

COMMITTEE CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification of)
the Los Esteros Critical Energy)
Facility, Phase 2)
(Los Esteros 2))
)
Presiding Member's Proposed)
Decision)
-----)

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03-AFC-02

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HEARING ROOM A
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WEDNESDAY, NOVEMBER 2, 2005

10:02 a.m.

Reported by:
Peter Petty
Contract No. 170-04-001

COMMITTEE MEMBERS PRESENT

Jackalyne Pfannenstiel, Presiding Member

Joseph Desmond, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Gary Fay, Hearing Officer

Timothy Tutt, Advisor

STAFF AND CONSULTANTS PRESENT

Robert Eller, Project Manager

Richard Ratliff, Senior Staff Counsel

APPLICANT

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Rick Tetzloff, Project Manager
Calpine Corporation

Barbara McBride
Calpine Corporation

Gary Rubenstein
Sierra Research

INTERVENOR

Robert Sarvey
Californians for Renewable Energy

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

2 10:02 a.m.

3 PRESIDING MEMBER PFANNENSTIEL: This is
4 the Commission Committee conference for Los
5 Esteros Critical Energy Facility Phase 2. I'm
6 Commissioner Jackie Pfannenstiel; I'm the
7 Presiding Member of this Committee. To my right
8 is Gary Fay, the Hearing Officer for the
9 proceeding. And to his right is Commissioner Joe
10 Desmond who is the other Member of the Los Esteros
11 Committee.

12 This is an opportunity to take comment
13 and discuss comments that have been received on
14 the Presiding Member's Proposed Decision in this
15 case.

16 So, with that, why don't I ask Mr. Fay
17 to continue.

18 HEARING OFFICER FAY: Thank you,
19 Commissioner. I'd just like to note that the
20 notice of availability for the Presiding Member's
21 Proposed Decision was sent out a month ago on
22 October 7th, and it noticed today's hearing.

23 I'd like to just briefly take
24 appearances. Mr. Wheatland.

25 MR. WHEATLAND: Yes, good morning. I'm

1 Gregg Wheatland, attorney for the applicant. With
2 me this morning is Rick Tetzloff, Gary Rubenstein
3 and Barbara McBride.

4 HEARING OFFICER FAY: Thank you. Mr.
5 Ratliff.

6 MR. RATLIFF: Dick Ratliff for staff.
7 With me is Bob Eller, the Project Manager.

8 HEARING OFFICER FAY: Thank you. What
9 we'd like to do is initially ask the parties --
10 oh, and let me ask, is there anybody here
11 representing CARE?

12 MR. SARVEY: Yeah, Bob Sarvey,
13 representing CARE.

14 HEARING OFFICER FAY: Bob, --

15 MR. SARVEY: Hi, Gary.

16 HEARING OFFICER FAY: -- there you are.
17 Thank you. So we have you, as well. Any other
18 parties present?

19 I'd like to go through the parties and
20 just get their reaction to the documents filed by
21 the other parties. I don't have any documents
22 filed by CARE, is that correct, Mr. Sarvey?

23 MR. SARVEY: No. We filed comments,
24 timely comments, seven pages.

25 HEARING OFFICER FAY: Okay, I did not

1 receive copies of those.

2 MR. SARVEY: They were docketed, they're
3 on the docket log.

4 HEARING OFFICER FAY: Really.

5 MR. SARVEY: Yeah. I haven't received
6 any --

7 HEARING OFFICER FAY: Do you have any
8 other copies of those?

9 MR. SARVEY: I only have one. I could
10 go make one quickly, if you'd like, or --

11 HEARING OFFICER FAY: Did the applicant
12 receive copies of that?

13 MR. WHEATLAND: Yes, we did.

14 HEARING OFFICER FAY: Okay.

15 MR. SARVEY: I haven't received any
16 copies of staff's comments, either.

17 HEARING OFFICER FAY: I'm sorry for that
18 confusion. So, copies or comments were filed by
19 each of the three parties. We'd like, in turn,
20 each party to comment on the written comments
21 filed by the other parties.

22 And then later we will ask the applicant
23 and staff to bring us up to date on the status of
24 discussions with the City of San Jose. And there
25 may be some other matters, as well.

1 So, Mr. Wheatland, could you give us
2 your views on the comments filed by the staff and
3 by CARE?

4 MR. WHEATLAND: Yes, thank you. Well,
5 first of all, I'd like to say that the applicant
6 strongly supports the Presiding Member's Proposed
7 Decision. The Committee's proposed decision, we
8 believe, accurately and fairly summarizes the
9 evidence in all of the subject areas.

10 We have, in our comments, suggested some
11 minor clarifications and corrections to the
12 decision. We don't believe that any of the
13 suggestions are substantive, and they are merely
14 intended to clarify and correct to be consistent
15 with the record and with the determinations that
16 were made during the course of the evidentiary
17 hearing.

18 We have also had a chance to review the
19 staff's comments, and we are in concurrence with
20 the staff comments, as well.

21 We did receive a copy of CARE's comments
22 on the Presiding Member's Proposed Decision. And
23 regarding those comments which focused primarily
24 on the air issue, I'd like to ask Mr. Rubenstein
25 to respond.

1 MR. RUBENSTEIN: Thank you, Mr.
2 Wheatland. CARE did discuss two air quality
3 comments; there was one incidental comment related
4 to the bicycle path, as well, which, I think, Mr.
5 Wheatland or Mr. Tetzloff will address in a
6 minute.

7 The comments raised regarding air
8 quality focused on two issues that the Committee
9 explicitly addressed, the CO emission limit for
10 the plant and the ammonia slip emission limit for
11 the plant.

12 None of the issues in CARE's -- none of
13 the arguments in CARE's comments raises any new
14 issues. The exact same argument were made by at
15 least one party, if not CARE, to the Bay Area Air
16 Quality Management District to consider these
17 issues.

18 Very briefly, with respect to CO, CARE
19 is suggesting that the CO limit for the project
20 should be 4 parts per million based on the
21 determination that was made for the Pico Power
22 Plant.

23 While we agree that the Pico Power Plant
24 is similar in design, we show the same concern as
25 the Bay Area District that there is not sufficient

1 data from this plant, which only started up this
2 past June, to confirm that this combination of
3 emission limits can, in fact, be met.

4 What we believe the District weighed in
5 its determination, and what we believe the
6 Committee should weigh, as well, is the fact that
7 rather than relying on engineering analysis for
8 this project, for Los Esteros, we actually tried
9 to meet 2 parts per million and 4 ppm CO level at
10 the same time, and found that in order to reduce
11 NOx levels to a level sufficient to enable an SCR
12 system to meet a 2 ppm NOx level.

13 That, in fact, drove the CO levels up to
14 where we could not consistently meet a 4 ppm CO
15 level. That was the basis for our position. The
16 Bay Area District concurred with that. The
17 Committee concurred with that in its Presiding
18 Member's Proposed Decision. And we believe that
19 that was the right judgment.

20 With respect to ammonia emissions, CARE
21 raises arguments that have been raised before.
22 The only new item that they mention is a report
23 prepared by the Bay Area Air Quality Management
24 District regarding a proposed particulate matter
25 implementation schedule.

1 To the extent that the Committee
2 believes this comment to be relevant, we ask that
3 you take official notice of the entire Bay Area
4 Air Quality Management District document that's
5 referenced.

6 If you go through that document you will
7 see that there are only four particulate control
8 measures that the Bay Area District indicated that
9 they would be adding to their program to address
10 the state law that's referenced.

11 Two of those control measures relate
12 to -- well, one relates to further reductions in
13 NOx and VOC emissions from internal combustion
14 engines. A second control measure relates to char
15 broilers. And the remaining two measures relate
16 to enhancing the effectiveness and efficiency of
17 the District's Spare-the-Air program, and Don't-
18 Light-Tonight programs focused on reducing wood
19 stove use on winter evenings.

20 None of the measures the Bay Area
21 District is pursuing would go towards reducing
22 ammonia emissions from SCR systems such as being
23 proposed here. Consequently, I think that the
24 report referenced by CARE actually works to
25 counter their argument.

1 The Bay Area District has been very
2 consistent in suggesting that they do not need to
3 control ammonia emissions from these types of
4 sources in order to further lower ambient PM10 or
5 PM2.5 levels.

6 So, once again, I believe that the
7 Committee's review of this issue, the Air
8 District's review of this issue is correct, and
9 urge that on this issue that the decision remain
10 as proposed.

11 HEARING OFFICER FAY: Mr. Rubenstein, a
12 followup question. You gave us a rough idea of
13 what kind of new data would cause this agency to
14 reconsider the approach to ammonia slip taken in
15 this case. That is, some new study of what type
16 would cause -- whether the District adopted it or
17 not -- might be a basis for this agency to
18 reexamine this issue in the future.

19 MR. RUBENSTEIN: I think the new data
20 would be essentially the same type of study that
21 the Bay Area District performed many years ago.
22 And that's the same type of study that all the
23 major air districts in California perform every
24 couple of years.

25 And that's what's called a chemical mass

1 balance analysis of the PM10, PM2.5 air quality
2 data in an attempt to link specific sources of
3 emissions and precursor pollutants to the PM10 and
4 PM2.5 levels that we actually breathe. There's
5 not a direct relationship. It's a fairly
6 complicated analysis which is why it's not done
7 very often.

8 That type of analysis, though, combined
9 with an analysis of relative concentrations of
10 ammonia -- sulfates and nitrates would enable an
11 assessment to be made or revised, as to whether
12 ammonia emissions need to be reduced or be
13 effective in reducing PM10 or PM2.5
14 concentrations.

15 So I think an updated study of that type
16 is one that I think the Commission would want to
17 look at before changing its position on this
18 issue.

19 HEARING OFFICER FAY: Okay. Thank you.
20 You say such a study is done by the Districts, and
21 it's every several years?

22 MR. RUBENSTEIN: That's correct.
23 Normally it's done in association with a PM10 or
24 PM2.5 planning exercise.

25 HEARING OFFICER FAY: Okay, thank you.

1 Mr. Wheatland, a question for you.

2 On page 3 of your comments regarding
3 worker safety, the last paragraph at the comment,
4 just above the title Com8, you say due to apparent
5 oversight the PMPD contains originally proposed
6 conditions 4 and 5, rather than the condition
7 agreed to by staff.

8 And in the transcript it discusses using
9 the corrected language of condition 3 in lieu of 3
10 and 4. And I just wonder if you could clarify
11 that confusion for us. And I'm referring to the
12 transcript of June 30th of this year, page 41.

13 MR. WHEATLAND: I believe that the
14 transcript reference may be incorrect. And I
15 think that the intent was to take that condition 3
16 as previously approved by the Commission and
17 substitute it for conditions 4 and 5 in the PMPD
18 that are identified as 4 and 5 in the PMPD. I'll
19 need to look here again just to confirm that, but
20 I believe --

21 HEARING OFFICER FAY: Okay, there's an
22 existing -- there are conditions 3, 4 and 5 in the
23 PSA. Are you saying that the agreed-upon
24 condition 3 should replace all three of those?

25 MR. WHEATLAND: Let me -- no. I believe

1 that -- let me look here just to be sure.

2 HEARING OFFICER FAY: Okay.

3 (Pause.)

4 MR. WHEATLAND: In the PSA the
5 conditions 3, 4 and 5, condition 3 would remain.

6 And conditions 4 and 5 would be deleted and
7 replaced by this other condition 3 that was
8 adopted by the Commission. So the number --

9 HEARING OFFICER FAY: Okay, which would
10 then --

11 MR. WHEATLAND: -- we'll have to change
12 the numbers --

13 HEARING OFFICER FAY: -- be condition 4.

14 MR. WHEATLAND: Yes.

15 HEARING OFFICER FAY: Okay, that
16 clarified, thank you. Thank you for that
17 clarification.

18 Okay, anything further then on comments
19 of the other parties from Calpine's perspective?

20 MR. WHEATLAND: Well, just on the issue
21 of the bike path. We've been advised that the
22 City of San Jose sent a letter to Commissioner
23 Pfannenstiel dated October 31, 2005 regarding the
24 highway 237 bikeway. Has the Committee received a
25 copy of that letter?

1 HEARING OFFICER FAY: No.

2 PRESIDING MEMBER PFANNENSTIEL: No.

3 MR. WHEATLAND: Well, what I'd suggest
4 we could do then would be to -- maybe with the
5 staff's assistance we could have some copies made
6 and then we could come back to the bikeway issue
7 once you have a copy of the City's letter.

8 HEARING OFFICER FAY: Okay. What was
9 the date of the letter, again?

10 MR. WHEATLAND: October 31, 2005.

11 PRESIDING MEMBER PFANNENSTIEL: Has the
12 staff seen that?

13 MR. WHEATLAND: And we just got it, so
14 if we can have copies made I think that'll --

15 HEARING OFFICER FAY: Okay, that --

16 MR. RATLIFF: We don't have it.

17 HEARING OFFICER FAY: Yeah, we -- you
18 have copies with you?

19 MR. WHEATLAND: We have one. Perhaps
20 the staff can help us.

21 HEARING OFFICER FAY: Can anybody on
22 staff help us make some copies of that so it could
23 be distributed, and we'll come back to that.
24 Thank you for calling our attention to that.

25 Okay, anything further, then, before we

1 move --

2 MR. WHEATLAND: No.

3 HEARING OFFICER FAY: -- to the staff?

4 MR. WHEATLAND: At this time there's
5 nothing further.

6 HEARING OFFICER FAY: All right.

7 Comments from the staff?

8 MR. RATLIFF: Staff is generally
9 supportive of the decision, and has offered very
10 brief comments on it that are mostly of an
11 editorial nature, corrections and changes.

12 The one area of exception, of course, is
13 in the area of -- under air quality, of ammonia
14 slip, where staff believes that an additional
15 condition should be adopted by the Commission.

16 Staff is not re-arguing that point today
17 because we believe we presented it very fully a
18 the evidentiary hearing. And the issue is
19 discussed fully in the decision.

20 So although that continues to be our
21 position, we are not re-arguing it to you today.
22 And did not intend to do so unless you ask us to
23 do so.

24 I also have handed to me an additional
25 change to the decision to the condition 1 under

1 land use, Land-1, which would add to the end of
2 that condition, the following phrase: 90 days
3 following the receipt of the request and forward a
4 copy of the transmittal letter to the CPM." That
5 supplements the applicant's proposed condition.

6 HEARING OFFICER FAY: And this is at the
7 end of the condition or the verification?

8 MR. RATLIFF: At the very end of the
9 condition -- oh, I'm sorry, the verification.

10 HEARING OFFICER FAY: At the end of the
11 verification, okay. And are you going to be
12 submitting that in writing?

13 MR. RATLIFF: We will, yes.

14 HEARING OFFICER FAY: I'm sorry that I
15 was diverted during your comment on the ammonia
16 slip. Did you say there was an additional
17 condition that you wanted regarding that?

18 MR. RATLIFF: No.

19 MR. WHEATLAND: And the addition to the
20 Land-1, the staff has reviewed with us. And the
21 applicant would agree to that revision.

22 HEARING OFFICER FAY: Okay.

23 Mr. Sarvey, any reaction to the staff's
24 recommendation?

25 MR. SARVEY: On Land-1?

1 HEARING OFFICER FAY: Um-hum.

2 MR. SARVEY: Nothing on Land-1, no.

3 HEARING OFFICER FAY: Okay. No problem.

4 All right. Anything further from the staff?

5 MR. RATLIFF: Only that we understand
6 that the City of San Jose has basically indicated
7 that it is not the agency which will be the
8 recipient of funds to repair the bike trail. And
9 I think that's the letter that's been referred to
10 by applicant this morning.

11 And that being the case, staff is in
12 agreement that the funds should be offered to
13 whichever agency is willing to repair the bike
14 trail.

15 HEARING OFFICER FAY: I guess the only
16 question that comes to mind is, is the applicant's
17 proposal of naming three agencies realistically
18 broad enough? Or does that cover the foreseeable
19 possibilities at this time?

20 MR. RATLIFF: We don't know of any other
21 possibilities in terms of local agencies who might
22 repair the bike trail.

23 HEARING OFFICER FAY: Okay. And do you
24 have any reactions to CARE's comments?

25 MR. RATLIFF: Well, I think we did react

1 to them. To the extent that CARE's comments are
2 in agreement with the staff position on ammonia
3 slip, again, we have, as I said earlier, we
4 continue to advocate that the Commission adopt a
5 limitation of ammonia slip. We just have not
6 chosen to re-argue it in our comments to you
7 today.

8 HEARING OFFICER FAY: Did you hear Mr.
9 Rubenstein's comment about -- answer to my
10 question about what kind of information or study
11 would be needed for the Commission to look at this
12 issue differently. And he said it would be a
13 comprehensive study that linked ammonia to
14 particulate formation.

15 Does staff have any -- staff obviously
16 has a different view of that, but thinking in the
17 future, for future cases in the Bay Area, frankly
18 I don't know what would change unless there was
19 new evidence from the point of view of the
20 Commission.

21 MR. RATLIFF: Yes. Given our inability
22 to persuade you on that point in this proceeding,
23 we would be very supportive of the Bay District
24 doing further studies and further analysis
25 regarding the presence of ammonia and nitrogen in

1 the Bay Area.

2 I mean we have reference to a ten-year-
3 old study which the District believes is
4 dispositive of the matter. But we would like to
5 see further study in this area. And we will be
6 talking with the Bay District to suggest that to
7 them.

8 HEARING OFFICER FAY: Okay, great.

9 Anything further then from the staff?

10 MR. RATLIFF: I'm sorry?

11 HEARING OFFICER FAY: Any further
12 comments from the staff on the comments filed by
13 the other parties?

14 MR. RATLIFF: No.

15 HEARING OFFICER FAY: All right. Mr.
16 Sarvey, for CARE?

17 MR. SARVEY: Yeah. Well, I'm happy to
18 hear that staff agrees with my comments on the
19 ammonia emissions. So there's two parties that
20 feel the same way in this proceeding.

21 And as far as applicant's position I'm
22 assuming, and I'd like to ask the applicant again,
23 are they asserting that the area is not as ammonia
24 rich and that's the reason there's no secondary
25 particulate issues. Is that the applicant's

1 position?

2 HEARING OFFICER FAY: Yeah, I think the
3 record is replete on that. But, Mr. Rubenstein
4 could answer your question briefly.

5 MR. RUBENSTEIN: Yes.

6 MR. SARVEY: Okay.

7 HEARING OFFICER FAY: Okay, yeah.

8 MR. SARVEY: Well, in my comments, which
9 I know the Committee hasn't had an opportunity to
10 review, but I did submit them timely, there is a
11 study in the record. And it's the biological
12 mitigation study.

13 And it clearly states that ammonia
14 concentrations do vary, even in the study area.
15 And it also says that ammonia concentrations are
16 anywhere from zero to, I believe it was 5 ppb. So
17 I think you have a study here already in the
18 record that you can rely on to limit the ammonia
19 slip.

20 The study that the PMPD cites as the
21 only relevant scientifically based study in the
22 record is not in the record. And that's the study
23 that the applicant keeps referring to and the Bay
24 Area keeps referring to that says that -- it's the
25 ten-year-old study that staff is a little bit

1 concerned about.

2 And it's not in the record. So I think
3 the PMPD needs to note, change that that the
4 relevant scientific study that they're relying on
5 in the record is not in the record. So, I think
6 that's an important distinction.

7 And then as far as the CO, I know,
8 again, the Committee has not had an opportunity to
9 see my comments, but we requested that the
10 Committee take judicial notice of the Pico Power
11 Plant decision. And there's no explanation
12 whether they have or they haven't.

13 But, the Pico Power Plant decision does
14 establish BACT as 4 ppm for CO. So I took the
15 liberty to do a public records request on the
16 conditions, the quarterly report for the Pico
17 Power Plant. It took me ten days and about \$55 to
18 accumulate this, but there's -- it pretty much is
19 something that the Committee could easily access
20 without the hoops that I had to jump through.

21 And, you know, I recommend the Committee
22 take a look at these results from the Silicon
23 Valley power plant, because they are the current
24 BACT for this type of facility. And I don't see
25 anyway that you could argue that they're not,

1 considering the Commission decision 02-AFC-3 that
2 requires a 4 ppm CO for this exact same
3 equipment. So I don't see how the PMPD
4 can make that statement.

5 The only other issue, of course, is the
6 bike path issue, and I don't know if you want to
7 talk about that now or if you want to put that off
8 till later.

9 HEARING OFFICER FAY: Well, we have the
10 letter from San Jose, the City of San Jose. So,
11 Mr. Wheatland, do you want to summarize what they
12 sent?

13 MR. WHEATLAND: Yes. By way of
14 background, more than a year ago the applicant
15 began discussions with the City of San Jose to
16 make arrangements for the repair of the bike path.

17 At that time both the applicant and the
18 City understood that the bikeway was intended to
19 be a permanent facility, and that it was located
20 within a City of San Jose right-of-way.

21 We went through the process of
22 negotiating a funding agreement with them. The
23 City sent out appraisers or estimators to
24 determine the cost of the repairs. And we
25 completed that process of determining the amount

1 that Calpine, or that the Los Esteros would fully
2 contribute to repair the bike path to its previous
3 condition.

4 But recently the City has determined
5 that it is not, in fact, located on a City right-
6 of-way. And in this letter the City is informing
7 the Commission, as it has informed Calpine
8 verbally that the City is not able to participate
9 in the repair or maintenance of the bikeway.

10 And the City has informed us that they
11 now believe that the bikeway is actually owned in
12 fee by the Water Pollution Control Plant, which is
13 a special district that is operated by several
14 different agencies.

15 And so they are directing us now at this
16 time to begin discussions with the Water Pollution
17 Control Plant, rather than the City of San Jose.

18 And I think that, in essence, summarizes
19 the letter.

20 HEARING OFFICER FAY: And what have you
21 done to follow up on that?

22 MR. WHEATLAND: Well, that was a bit
23 frustrating, I must admit, because in
24 determining -- in contacting the Water Pollution
25 Control Plant, we found that that plant is -- or

1 district is overseen by several cities, but the
2 administration of the operations on behalf of the
3 special district are undertaken by the City of San
4 Jose, itself.

5 So we've sort of come full circle in
6 finding that the City is not able to participate,
7 yet it seems still to play some role that we don't
8 yet fully understand with respect to the
9 administration of the plant.

10 So, it was because of this conundrum
11 that we are faced with, being ready and willing to
12 contribute funds to whoever will accept
13 responsibility for the facility, that we've
14 proposed a condition that would essentially give
15 those funds to whichever agency would step forward
16 and say, yes, they are responsible.

17 We've also, I must mention we've also
18 had conversations with Caltrans. But again,
19 Caltrans, with respect to the responsibility for
20 this bike path, is also very cloudy.

21 HEARING OFFICER FAY: Okay, thank you.
22 And the staff has looked this over and decided, I
23 mean with the slight addition that they made, that
24 that would address it as best we can at this time,
25 is that correct?

1 MR. RATLIFF: We don't know what else to
2 do. I mean we think Calpine has done what they
3 can by making the money available. Until some
4 agency, whether it's the City as the City, or the
5 City acting as the operator of the Water Pollution
6 Control Plant, is willing to accept the money and
7 use it to repair the bike trail we don't know what
8 else to do.

9 But we hope that we can continue to have
10 these discussions even after the termination of
11 this proceeding to try to get the City to do
12 something to repair the bike trail.

13 HEARING OFFICER FAY: Well, it would be
14 part of the compliance program. So that hopefully
15 the effort will be ongoing. And according to
16 their letter, the City of San Jose is interested
17 in having the bike path function.

18 PRESIDING MEMBER PFANNENSTIEL: Excuse
19 me, Gary. As I read the letter, though, they were
20 saying that the path that was damaged on the north
21 side was, in fact, not going to be repaired
22 because that was never intended to be the path
23 that was used. In fact, it was the path on the
24 south that they intended to be a permanent bike
25 trail, which is also closed, though I guess not

1 related to this.

2 And so I guess I wasn't sure, in just
3 skimming this letter in the minute I've had up
4 here, that the intention was ever to use the money
5 to fix the bike trail on the north side. Is that,
6 Mr. Wheatland, what you're reading the letter as?

7 MR. WHEATLAND: Well, until recently it
8 was the understanding that the bike path that was
9 adjacent to the plant was always intended -- was a
10 permanent facility and was intended to be
11 repaired.

12 It's only recently that the City has
13 informed us that they now understand that to be a
14 temporary facility, and that the permanent bike
15 path may, in fact, be built on the opposite side
16 of the freeway.

17 But it was just recently that they've
18 informed us of that. Our discussions with them
19 over the past year were based on the understanding
20 that it would be a permanent facility.

21 MR. TETZLOFF: If I could add something
22 to that. The way the proposed condition for Land-
23 1 that we proposed actually doesn't specify
24 whether it has to be the north side or the south
25 side. So, it can be used for either one.

1 MR. WHEATLAND: Yeah, that's a very good
2 point. We've intentionally drafted this condition
3 not to restrict the funds just to the north side.
4 So if the agencies, in fact, determine that a path
5 on the south side is more appropriate and wish to
6 direct the funds to that purpose, our condition
7 would permit that to happen.

8 PRESIDING MEMBER PFANNENSTIEL: Let me
9 ask Mr. Sarvey, do you have any suggestions on --
10 I think you brought this to our attention, and I
11 think been diligent in keeping us aware of this
12 issue. And I think you've heard what the
13 applicant has gone through, and you know, you
14 understand the conditions that we put on this.

15 Any suggestions on where to go?

16 MR. SARVEY: Well, I had a suggestion
17 previously, and that was to condition the
18 relicensing of this project on the repair of that
19 path. And I believe that Calpine's making an
20 effort, but I think motivation is lacking.

21 And somebody needs to step up and take
22 care of this. And, you know, we've been going
23 through a bureaucratic nightmare; we're getting
24 shuffled back and forth. You know, I don't know
25 the parties, but I mean, frustration is all we

1 have.

2 And, you know, I know the --

3 PRESIDING MEMBER PFANNENSTIEL: Well, we
4 have frustration. We also have some money that's
5 been put up. And so I guess we are seeking the
6 way through the bureaucratic maze on this.

7 All right, I guess there's no easy
8 answer. We'll have to keep working with the City.

9 MR. SARVEY: Well, my suggestion would
10 be maybe the Commission, themselves, should take
11 responsibility for this and get this done.
12 Because obviously Calpine doesn't have the pull in
13 San Jose, with Caltrans, whatever, but I'm sure
14 that the Commission would.

15 I mean the Commission has ultimately
16 authority over all the siting of these plants.
17 And if damage occurred during the siting of the
18 plant, the Commission is ultimately responsible.
19 And the Commission should take responsibility to
20 get the thing repaired in a timely manner.

21 Obviously this has been over three years
22 now. And I brought the Commission's attention to
23 this almost a year ago, so we're very
24 disappointed.

25 PRESIDING MEMBER PFANNENSTIEL: Thank

1 you.

2 HEARING OFFICER FAY: Okay. I'd like to
3 move now to the question of the zoning
4 inconsistency that was cited in the FSA, and that
5 the Committee used as a basis for not recommending
6 approval at this time due to a noncompliance in
7 LORS.

8 Can you bring us up to date, Mr.
9 Wheatland, and tell us what the plan is moving
10 into the future?

11 MR. WHEATLAND: I wish I could, but I'm
12 not really in a position to speak for the City of
13 San Jose. And I understand that they're not on
14 the phone call here today.

15 The applicant has submitted to the City
16 of San Jose an application for rezoning. That was
17 submitted earlier this summer. And if the City
18 had processed it in the normal course of business,
19 as they would other applications for rezoning, the
20 City would have, by this date, advised the
21 Commission with regard to their determination on
22 that issue. And the Commission could have acted
23 on that as part of its final decision.

24 But here has been a disagreement between
25 the City and the Commission, I believe, as to the

1 appropriate environmental documents to be used in
2 that process.

3 And so, as a result of that difference,
4 the application for rezoning has not moved
5 forward.

6 HEARING OFFICER FAY: Are you involved
7 in negotiations with the City, and do you have any
8 sense of timeline on this?

9 MR. RATLIFF: Mr. Fay, if I may, because
10 there is this nonconformity issue, the staff is
11 statutorily obliged to make efforts to see if it's
12 possible to conform local zoning with the project.

13 We will therefore meet with the City in
14 the near future to discuss what the best approach
15 for doing that would be.

16 And after we do so we'll report back to
17 the Commission what the results of those meetings
18 have been. We've had mainly correspondence-only
19 discussions in the past, and we're going to meet
20 face-to-face now and see if we can agree on an
21 approach.

22 The City has indicated a willingness to
23 conform the zoning. It's just a matter of how
24 it's to be done. We thought it was going to be
25 done prior to this meeting. We were told that at

1 evidentiary hearings it would be accomplished by
2 the end of, I believe by the end of August. And
3 yet, no action has been taken.

4 I think the City is considering what is
5 the best mechanism for conforming its zoning. So
6 we want to be involved in those discussions with
7 them. And we will report back to you after we've
8 had them.

9 I would expect that to be sometime in
10 late November.

11 HEARING OFFICER FAY: In November, --

12 MR. RATLIFF: Yes.

13 HEARING OFFICER FAY: -- did you say?

14 MR. RATLIFF: Yes.

15 HEARING OFFICER FAY: Okay. We're in
16 November now, so that would be within 30 days?

17 MR. RATLIFF: Yes.

18 HEARING OFFICER FAY: Okay. Mr. Sarvey.

19 MR. SARVEY: Yeah, I've been in contact
20 with the City several times, and they have some
21 concerns about the environmental review. And
22 there's some issues they don't feel have been
23 covered by the PMPD.

24 But I was told by the City authorities
25 that this would go before the Planning Commission

1 on either November 16th or December 7th.

2 PRESIDING MEMBER PFANNENSTIEL: I have
3 in front of me a letter that the City sent to
4 Eileen Ichien of the Chief Counsel's Office here
5 at the Energy Commission on September 12th. And
6 it said there that they anticipate that the
7 process would be completed, rezoning process I
8 assume they're referring to, would be completed
9 within 16 to 20 weeks, which would be January or
10 February of next year.

11 So is this later information? I'm
12 trying to put that -- I mean they agree that they
13 would use the PMPD presumably for this process.
14 And that they would finish it.

15 Is there later information than that
16 that says that it might happen next month or this
17 month?

18 MR. SARVEY: The information that I have
19 just in conversations with the City was they're
20 mostly concerned about nitrogen deposition. And
21 they don't feel it's been fully mitigated.

22 And as I said before, the City officials
23 said this is probably going to go before the
24 Planning Commission on the 16th of this month or
25 December 7th. That's as of about five days ago.

1 HEARING OFFICER FAY: Okay, the letter
2 the Commissioner cited is from the City Attorney's
3 Office. And who had you spoken with?

4 MR. SARVEY: Rich Buikema.

5 HEARING OFFICER FAY: In the Planning
6 Office?

7 MR. SARVEY: In the Planning Office.

8 HEARING OFFICER FAY: Okay. Well, there
9 may be a different understanding between the two
10 offices --

11 MR. SARVEY: Oh, yeah, absolutely. I'm
12 just relating what my conversation --

13 MR. RATLIFF: Well, what the City has
14 told us, as you see, is that they feel they cannot
15 proceed without their own environmental document.
16 So that is one of the things that we need to
17 discuss with them.

18 If that is the approach, it will take
19 certainly months for them to accomplish the
20 rezoning.

21 PRESIDING MEMBER PFANNENSTIEL: Mr.
22 Wheatland, if it turns out that the reference in
23 this letter is what guides the City, and therefore
24 it's January or February of 2006, how does the
25 applicant feel about that kind of delay?

1 MR. WHEATLAND: Well, while we, of
2 course, would like to have a license as soon as
3 possible, we also want to have a license that, you
4 know, that works out the differences between the
5 Commission and the City.

6 And so if that kind of process and that
7 timeframe is acceptable to the Commission and the
8 City, then it would be acceptable to the
9 applicant, as well.

10 PRESIDING MEMBER PFANNENSTIEL: It
11 doesn't delay your plans for breaking ground?

12 MR. WHEATLAND: No, it would not.

13 PRESIDING MEMBER PFANNENSTIEL: Do you
14 have a date for breaking ground?

15 MR. TETZLOFF: Not at this point. We're
16 still actively pursuing lining up a contract for
17 the phase 2, but we don't have one at this point.

18 PRESIDING MEMBER PFANNENSTIEL: So it
19 does not seem like pushing this for another
20 several months is in any way in your -- in the way
21 of your schedule, your anticipated schedule?

22 MR. TETZLOFF: No, it's not.

23 HEARING OFFICER FAY: I think in light
24 of this open-ended situation, rather than make any
25 call at this time that might harm any of the

1 parties or the relationships with San Jose, we'd
2 just like the staff and the applicant to submit a
3 report to the Committee every 30 days, you know,
4 docketed and proof to the parties.

5 It could be as brief as indicating no
6 change. But we just want to keep tabs on the
7 process. If you have a meeting with the City of
8 San Jose, please tell us that you did and what
9 came about. So that we can keep tabs on how this
10 is going.

11 Any other suggestions on how the
12 Committee might deal with this, under the
13 circumstances?

14 MR. RATLIFF: I guess we would only
15 offer that we think we need to have the
16 discussions first. From staff's point of view
17 it's important that whatever the City does, that
18 it issues its zoning approval consistent with the
19 Energy Commission's decision.

20 HEARING OFFICER FAY: Okay. Well, we'll
21 say, starting today, that every 30 days we want
22 something from the two parties on how this is
23 progressing. They can file it jointly if they
24 want, that's fine. I just want to have both
25 parties responsible.

1 The staff is following up on its charge
2 to meet and confer when there's a nonconformity.
3 But it's the applicant's proposal, so I think
4 that's the best way to leave it.

5 I don't think the Committee wants this
6 to be open-ended indefinitely, though, so we
7 certainly want the parties to move towards some
8 resolution on this. I assume the applicant wants
9 to do that if they ever want to build this
10 project.

11 (Pause.)

12 HEARING OFFICER FAY: Okay, I think we
13 have what we need from the parties. We appreciate
14 them for their filings. And, CARE, I apologize
15 that I was not able to get my hands on your filing
16 in a timely way. You obviously did file it
17 correctly. And we'll try to find out where the
18 breakdown was. But your comments will be taken
19 into account.

20 I anticipate that, while the Committee
21 will be waiting to hear from the parties on how we
22 resolve this, that ultimately, assuming there is a
23 resolution, there would be a revised PMPD because
24 it would change the bottomline recommendation.

25 And if the City does conform the zoning

1 to the project, then that's really the only hurdle
2 left for the Committee's recommendation. And then
3 a revised PMPD would recommend approval if that
4 change is made. And then it could go forward to
5 the Commission. But until that happens I think
6 we're sort of in abeyance.

7 Any further comments or questions?

8 MR. WHEATLAND: Yes, just to confirm
9 that with the exception of the issue of the zoning
10 conformity with the City of San Jose, am I correct
11 in understanding that the record of this
12 proceeding is closed with respect to all other
13 outstanding issues?

14 HEARING OFFICER FAY: There's a little
15 question about that, Mr. Wheatland. You filed a
16 letter from PG&E that is not in the record, except
17 for the administrative record in that you did file
18 it.

19 And you recommend that a finding be
20 changed on that basis. We can't base a finding if
21 it's not based on evidence in the record. So
22 there is that particular point. And, frankly, I
23 think the Committee can deal with that in another
24 manner; just remove the inconsistency and perhaps
25 discuss this matter in the text. It's not -- I

1 don't think it's critical. We do want to have the
2 information correct.

3 Other than that I don't see any reason.
4 But we are holding the record open for the land
5 use document from San Jose that would confirm the
6 language.

7 Mr. Ratliff, any reaction on the closing
8 of the record but for the land use question, the
9 zoning question?

10 MR. RATLIFF: I think the applicant
11 suggested that the Committee may want to take
12 official notice of the BAAQMD document concerning
13 ammonia, the presence of ammonia and nitrogen in
14 the Bay Area.

15 I don't know that that's necessary, but
16 if you do so, you would want to leave the record
17 open for that. And you would want to have that
18 document identified and provided to you. So,
19 apart from that, we have no other comments.

20 HEARING OFFICER FAY: And Mr. Sarvey has
21 asked again that we take notice of the Pico
22 decision.

23 Mr. Wheatland, can you provide the
24 Committee a copy of that study?

25 MR. WHEATLAND: Yes, we will. And we

1 have no objection to official notice of the Pico
2 decision because the Commission can always notice
3 its own decisions.

4 HEARING OFFICER FAY: Yeah, that is not
5 a matter in controversy. Don't think that if
6 there was some significance to not taking official
7 notice, that we respect our own decisions very
8 much.

9 Anything further, then?

10 Mr. Ratliff, anything further?

11 MR. RATLIFF: No.

12 HEARING OFFICER FAY: Okay. Mr.
13 Wheatland?

14 MR. WHEATLAND: No, thank you.

15 HEARING OFFICER FAY: Mr. Sarvey?

16 MR. SARVEY: Nothing further.

17 HEARING OFFICER FAY: Okay. I thank you
18 all for coming. I appreciate your efforts in
19 being here today and clarifying some of these
20 things for us.

21 And so within 30 days we will hear from
22 the staff and applicant on the continuing status.

23 Thank you. We're adjourned.

24 (Whereupon, at 10:48 a.m., the Committee
25 Conference was adjourned.)

CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of November, 2005.

PETER PETTY