

## DOCKETED

<b>Docket Number:</b>	97-AFC-01C
<b>Project Title:</b>	High Desert Power Plant
<b>TN #:</b>	210800
<b>Document Title:</b>	Transcript of 03/15/2016 Prehearing Conference
<b>Description:</b>	N/A
<b>Filer:</b>	Cody Goldthrite
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Committee
<b>Submission Date:</b>	3/22/2016 8:10:50 AM
<b>Docketed Date:</b>	3/22/2016

## CALIFORNIA ENERGY COMMISSION

## STAFF WORKSHOP

In the Matter of: ) Docket No. 97-AFC-01C  
 )  
 HIGH DESERT POWER PLANT ) Prehearing Conference  
Report (2016 \*\*\*\*) )

California Energy Commission  
 High Desert Power Plant  
 Committee  
 Prehearing Conference

CALIFORNIA ENERGY COMMISSION

HEARING ROOM B, 1516 NINTH STREET

CHARLES IMBRECHT HEARING ROOM

SACRAMENTO, CALIFORNIA

TUESDAY, MARCH 15, 2016

1:00 P.M.

Reported By: Peter Petty

## APPEARANCES:

## COMMITTEE:

Karen Douglas, Commissioner, Presiding Member

Janea A. Scott, Commissioner, Associate Member

## HEARING OFFICER:

Susan Cochran, Hearing Officer:

## ADVISERS:

Jennifer Nelson, Adviser to Commissioner Douglas

Le-Quyen Nguyen, Adviser to Commissioner Douglas

Rhetta DeMesa, Adviser to Commissioner Scott

Courtney Smith, Adviser to Commissioner Scott

## STAFF:

Elena M. Miller, Senior Staff Counsel

Joseph Douglas, Compliance Manager

Matt Layton

Paul Kramer

## PETITIONER:

Bradley K. Heisey, Tenaska Capital Management and  
High Desert Power Plant, LLC,

Jeff Harris, Esq., Ellison Schneider & Harris

Samantha Pottenger, Esq., Ellison, Schneider & Harris

Peter Kiel, Esq., Ellison, Schneider & Harris

## APPEARANCES (contd):

## INTERVENORS:

California Department of Fish and Wildlife

Nancee Murray, Senior Staff Counsel

Kit Custis, Retired Annuitant, Hydrogeologist

Alisa Ellsworth, a plant manager and Biologist with CDFW

## ALSO PRESENT:

Steve Ashton, City of Victorville

I N D E X

	<u>Page</u>
1. Call to Order: Introductions	5
2. Report from Petitioner, Staff and Intervenor(s) regarding their readiness for the upcoming Evidentiary Hearing, proposed testimony and witnesses; Committee discussions with the parties about the order of topics, use of informal and formal procedures, and other matters in preparation for the Hearing; Request for Interim Relief.	7
--	
3. Public Comment	65
4. Closed Session	72
Committee Closed Session consideration of the following Item: Prehearing Conference Agenda	79
Concluded	79
Court Reporter's Certification	80
Transcriber's Certification	81

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

2 MARCH 15, 2016

9:33 a.m.

3 COMMISSIONER DOUGLAS: All right. Well, then,  
4 welcome everybody. This is the Prehearing Conference and  
5 Evidentiary Hearing, but we aren't really taking evidence.

6 HEARING OFFICER COCHRAN: That was the way it was  
7 noticed.

8 COMMISSIONER DOUGLAS: All right. This was  
9 noticed as a Prehearing Conference and Evidentiary Hearing  
10 for the petition to modify the High Desert Project, and  
11 I'll start by introducing the Committee. I'm Karen  
12 Douglas. I'm the presiding member of the Committee, and to  
13 the left of the Hearing Officer is the Associate Member,  
14 Janea Scott.

15 Hearing Officer to my immediate left is Susan  
16 Cochran, and my advisers, Jennifer Nelson and Le-Quyen  
17 Nguyen, are to my right. Commissioner Scott's advisers,  
18 Courtney Smith and Rhetta DeMesa, are to Commissioner  
19 Scott's left.

20 Oh, thank you. And so I'll introduce Laura  
21 Murphy. Are you right here in the back of the room holding  
22 the cards, from the Public Adviser's Office. Are we doing  
23 that or is someone else doing that?

24 (Pause)

25 COMMISSIONER DOUGLAS: Very good. So with that,

1 let me ask the parties to introduce themselves, starting  
2 with the Petitioner.

3 MR. HARRIS: Good morning. I'm Jeff Harris, and  
4 I'm with Ellison, Schneider and Harris, here on behalf of  
5 the Petitioner. To my left is Brad Heisey, with High  
6 Desert, and we have some of the folks on the phone, as  
7 well. Behind me are my colleagues, Samantha Pottenger and  
8 Peter Kiel, as well.

9 COMMISSIONER DOUGLAS: Good.

10 MR. KIEL: Good morning.

11 COMMISSIONER DOUGLAS: Thank you very much.  
12 Staff.

13 MS. MILLER: Good morning. Elena Miller, on  
14 behalf of Chief Counsel's Office, representing Staff for  
15 the California Energy Commission.

16 MR. DOUGLAS: Joseph Douglas, the plant's project  
17 manager.

18 COMMISSIONER DOUGLAS: Thank you. And  
19 Intervenor, California Department of Fish and Wildlife.

20 MS. MURRAY: Hello. My name's Nancee Murray,  
21 Staff Counsel for California Department of Fish and  
22 Wildlife. This is Kit Custis, retired annuitant,  
23 hydrogeologist, and Alisa Ellsworth, a plant manager and  
24 biologist, is on the phone.

25 COMMISSIONER DOUGLAS: Great. Well, thank you

1 for being here today. Let's see. With that, do we have  
2 present or on the phone any elected officials or  
3 representatives of any state, county or local jurisdictions  
4 who have not spoken so far? In the room, anybody? All  
5 right. On the phone.

6 MR. ASHTON: Ms. Cochran. Yes. Prehearing  
7 Conference (indiscernible 16:06:37).

8 COMMISSIONER DOUGLAS: All right. On the phone,  
9 if there's anyone representing a state, federal or local  
10 government agency, elected official or a Native American  
11 tribe, please speak up. Doesn't sound like it.

12 MR. ASHTON: Probably won't hear it much longer.

13 COMMISSIONER DOUGLAS: Don't --

14 MR. ASHTON: Going to take over. Steve Ashton,  
15 with the City of Victorville, water supply manager.

16 COMMISSIONER DOUGLAS: Excellent. Thank you.  
17 Anyone else on the phone from state or local or federal  
18 jurisdiction or tribal? Very good. All right. So with  
19 that, I will turn this over to the Hearing Officer.

20 HEARING OFFICER COCHRAN: Thank you very much.  
21 I'm not (indiscernible 16:07:18) my mic. So one of the  
22 things I want to warn you about for those of you who are in  
23 Sacramento, the red light needs to be on in order for your  
24 voice to go out over the system. And the system is set up  
25 in such a way that there are only four live mics at any one



1 time.

2           So if there are already four lit and you turn  
3 yours off, then the first one who was on gets booted off.  
4 So if you get booted off, just know that you need to make  
5 sure your red light is on, and if you boot someone else  
6 off, that's the way the system works.

7           For those of you who are on the telephone, if you  
8 could mute yourselves, so that way if there's a point in  
9 time when you wish to speak you can unmute yourself,  
10 because if we have to mute you and then try to figure out  
11 who wants to speak it makes it really difficult for us.

12           But if there's staticy [sic] stuff going on now,  
13 as well as some other noises. So if you could mute  
14 yourself that'll be greatly appreciated. And with that,  
15 let's -- I'll start by talking about why we're here today  
16 and how that happened. The Committee noticed today's  
17 Prehearing Conference in the Notice of Postponed Prehearing  
18 Conference and Evidentiary Hearing, Revised Committee  
19 Schedule and Further Orders issued on February 19, 2016.

20           Last Friday, March 11, 2016, I docketed a  
21 memorandum indicating that there would be no Evidentiary  
22 Hearing today, and instead, we would focus on the  
23 Prehearing Conference of the proceedings. As explained in  
24 the February 19 notice that scheduled this Prehearing  
25 Conference, the basic purpose of the Prehearing Conference

1 is to assess the party's readiness for the hearings, to  
2 clarify areas of agreement or dispute, to identify  
3 witnesses and exhibits, to determine areas where the  
4 parties desire to cross-examine the other parties'  
5 witnesses and to discuss associated procedural matters.

6           Because of the accelerated review of this case,  
7 formal intervention was not required. Instead, in order to  
8 exercise the rights afforded to Intervenors in Energy  
9 Commission proceedings an interested person was required to  
10 file proposed evidence and testimony by a deadline set  
11 forth in the February 19 notice and orders.

12           In addition, any potential Intervenor and the  
13 existing parties were required to file Prehearing  
14 Conference statements with exhibit lists no later than  
15 March 8, 2016. The California Department of Fish and  
16 Wildlife completed the steps necessary to exercise its  
17 rights afforded to Intervenors.

18           No other individuals or entities filed evidence  
19 or testimony within the time frame set forth in the  
20 February 19 notice and orders to become formal Intervenors.  
21 We also received timely Prehearing statements by Staff and  
22 the Petitioner and we thank you for that.

23           An exhibit list of all exhibits has been created  
24 based on the Prehearing Conference statements that were  
25 received and you can prepare your own exhibit list using

1 that function on the electronic docket. If you have any  
2 questions about that after the Prehearing Conference, I'll  
3 be happy to show you how to use that functionality.

4 So I want to talk today -- now, we're going to  
5 move onto the procedure for today. Today's agenda is  
6 divided into five parts. First, we will discuss matters  
7 contained in the Prehearing Conference statement and other  
8 issues raised by the parties and the Committee.

9 Next, we'll discuss the exhibit lists. Then  
10 we'll discuss the witness list, and finally, we will  
11 provide an opportunity for public comment. Ms. Murphy,  
12 from the Public Adviser's Office, has blue cards. So if  
13 there are public members present who wish to speak, please  
14 fill out a blue card so that we can make sure to get your  
15 comments at the end of this proceeding.

16 So let's turn now to some of the issues that were  
17 raised in the Prehearing Conference statements. And the  
18 first thing that I want to discuss is the hearing format.  
19 As explained in the Notice of Prehearing Conference and  
20 Evidentiary Hearing, the Committee may proceed either by  
21 way of an informal hearing format in which the Committee  
22 will call all witnesses to testify as a panel on whatever  
23 the topic may be, or the Committee has the opportunity to  
24 choose a more formal format in which attorneys call  
25 witnesses and ask them questions.

1           So that everyone is clear, I want to review the  
2 hearing process. Testimony offered by the parties, whether  
3 by declaration or in person, must be under oath. Each  
4 party has the right to present witnesses, introduce  
5 exhibits and to rebut evidence of another party.

6           The Technical Rules of Evidence do not apply for  
7 the lawyers playing along, but may be relied upon as  
8 guidance. However, any relevant, noncumulative evidence  
9 may be admitted if it is the sort of evidence upon which  
10 responsible persons are accustomed to rely in the conduct  
11 of serious affairs.

12           Questions of relevance will be decided by the  
13 Committee. Hearsay evidence may be used to supplement or  
14 explain other evidence, but shall not be sufficient in  
15 itself to support a finding. The Committee may take  
16 official notice of matters within the Energy Commission's  
17 field of competence, and of any fact that may be judicially  
18 noticed by California courts, as set forth in the Evidence  
19 Code.

20           The Committee may ask questions of any witness at  
21 any time. Witnesses should speak only one at a time for  
22 the benefit of the court reporter. The Committee may  
23 establish limits as needed on the number of questions a  
24 party may ask and the amount of time the line of  
25 questioning may consume.

1           The party with the burden of proof may provide  
2 final rebuttal testimony if the Committee deems it  
3 necessary. The Committee may curtail testimony or  
4 examination of a witness if it becomes cumulative,  
5 argumentative or in any other way unproductive.

6           The question before us today is the Petitioner,  
7 in its Prehearing Conference Statement, asked that the  
8 Committee use the formal hearing process, citing due  
9 process concerns. I would like to hear from all of the  
10 parties on whether a formal or informal process should be  
11 used when we reach the evidentiary hearing in this matter.  
12 And I will start with the Petitioner, Mr. Harris.

13           MR. HARRIS: Good morning. Thank you for that.  
14 Appreciate the opportunity to have this discussion with  
15 y'all. We filed the petition. We have a proposal before  
16 you, and as to that petition we bear the burden of proof.  
17 We feel very strongly that we need the opportunity to  
18 create a prima facie case, to use the legal term.

19           We need to make our case to you. In order to do  
20 that we believe that we need the opportunity to provide you  
21 with some structure that basically gives you an overview of  
22 our petition and our requests, and answers the questions  
23 that we think need to be answered by the Committee.

24           To meet that burden we feel very strongly that we  
25 require at a minimum the opportunity to present direct

1 testimony. We think that's the threshold issue, and the  
2 most important issue to us on this entire matter is the  
3 ability to have direct, to start with our case, let you  
4 know what our petition has asked for, and we'll get to this  
5 in a minute, because there's a lot of noise, actually, now  
6 from the microphones, but a lot of noise in this  
7 proceeding.

8           But we think we can very much focus you on the  
9 issues that matter in our petition. And so having an  
10 opportunity for direct testimony, and a nice opportunity  
11 for direct testimony is very important to us. We don't  
12 object to other parties having similar opportunities about  
13 their direct testimony.

14           We did put our objection into the record, because  
15 the Government Code requires us to do that. We need to  
16 preserve that. So even though I shave my head, I'm not  
17 always confrontational without a good reason. So I'm  
18 preserving that option for us.

19           We're very amendable to a hybrid process that  
20 would allow us to have our direct testimony, to put on that  
21 affirmative case, make our witnesses available for the  
22 cross-examination and then follow that with a panel, either  
23 a panel, you know, an informal panel discussion from the  
24 Commissioners, which I think is preferable, or a panel of  
25 all witnesses at the end, if we want to use that format,

1 which I think sometimes leads to a situation that will  
2 allow this and the most aggressive people are heard.

3           So my preference for a vehicle would be for our  
4 witnesses. So I think that process not only protects our  
5 due process right, but it very much I think shortens the  
6 process, as well, because the Committee will know what we  
7 think is important.

8           I think it's sometimes hard, my personal  
9 experience watching these without direct testimony, is that  
10 the Committee has questions, and you start down that route  
11 and we forget to talk about the affirmative case.

12           And so that would be our request, that we have an  
13 opportunity for opening testimony and then we can switch to  
14 an informal thereafter, and I think that's most protective  
15 of our due process rights in a victimless petition  
16 (phonetic).

17           HEARING OFFICER COCHRAN: Thank you, Mr. Harris.  
18 Ms. Miller.

19           MS. MILLER: Staff do not oppose anything that  
20 Mr. Harris has stated. We have stated in our Prehearing  
21 Conference Statement that we would like to make our  
22 witnesses available, staff available by panel, which would  
23 be more the informal process, but I think that the hybrid  
24 approach that's proposed by the Petitioner in their  
25 Prehearing Conference Statement is something that we could

1 certainly work with.

2 HEARING OFFICER COCHRAN: Okay. Thank you. Ms.  
3 Murray.

4 MS. MURRAY: I think that we're fine with the  
5 hybrid approach. We would like to just have Mr. Custis  
6 here as a witness. We feel like Ms. Ellsworth, who is  
7 based out of Bishop, her testimony or answers were not  
8 controversial. So we would like some direction on if you  
9 need her in the room.

10 She's on the phone today. So we would like the  
11 opportunity to first have our direct, and then we're fine  
12 with a cross-examination by panel, but we would like some  
13 clarification from the other parties who are on the  
14 Commission on whether or not you would desire to have their  
15 biological resources testify -- evidence or testimony from  
16 Ms. Ellsworth in person.

17 HEARING OFFICER COCHRAN: So that, then, leads me  
18 back to another round of questions with the parties about  
19 Ms. Ellsworth and is her testimony in controversy and are  
20 there other options, potentially having her available by  
21 telephone so she doesn't have to travel. What are the  
22 parties' thoughts on that?

23 MR. HARRIS: As with this witness, we have no  
24 objection having her testify telephonically. I do feel  
25 that as to the majority of the witnesses I think it's



1 important to have them in the room. We can't see who  
2 they're consulting with or if they're consulting.

3 The nonverbals are very important. So as a  
4 general rule we think the Commission ought not take  
5 telephonic testimony. But I've been to Bishop and you  
6 can't get there from here. So I understand the constraint  
7 and the burden that places, so we would not object.

8 MS. MURRAY: Thank you.

9 HEARING OFFICER COCHRAN: Staff.

10 MS. MILLER: The question I think that Ms. Murray  
11 raised that I'd like to address is whether there's any  
12 controversy, and I will refer to staff's rebuttal to Fish  
13 and Wildlife's testimony. The only issue or question that  
14 we raised was with regard to the responses prepared by  
15 their witness to 1(a) and 1(b) and whether or not those  
16 were in agreement with, or not, with the testimony prepared  
17 by Mr. Custis.

18 But I don't think that that represents enough  
19 controversy to require her to be in the room, but that's my  
20 complete answer to the question.

21 HEARING OFFICER COCHRAN: Okay. So at a minimum  
22 I think what is likely to happen is Ms. Ellsworth will be  
23 able to testify telephonically, and then we'll discuss that  
24 further. I'm assuming that when we finish today there will  
25 be yet another order from the Committee sort of talking

1 about how we see the hearing proceeding, including  
2 responding to some of these questions about formal, versus  
3 inform, hybrid, as well as the direction to the witnesses.

4           So the next question is, one of the issues in  
5 this proceeding is the standard against which to review the  
6 request to use groundwater for cooling purposes. One  
7 potential standard that would apply to the proceeding  
8 through our LORS analysis is that contained in the 2003  
9 Integrated Energy Policy Report, what we call the IEPR, and  
10 State Water Resources Control Board Resolution, which  
11 essentially says that, fresh, inland waters should be used  
12 for cooling only if other sources or other methods of  
13 cooling would be environmentally undesirable or  
14 economically unsound.

15           The Applicant has argued that this standard does  
16 not apply. Now, is that an issue that we think we can  
17 resolve today? Is that something that the parties would  
18 like to provide briefing on? How can we best bring this to  
19 a head and potentially resolve this issue? Mr. Harris?

20           MR. HARRIS: Thank you. I appreciate the  
21 opportunity to address this question. We're very glad to  
22 be here before you today, because we feel like this is the  
23 first opportunity for us to present our petition. There is  
24 before you -- two things that are before you--there are  
25 before you two things.

1           Our position, which is requesting the ability to  
2 use groundwater as another source of water to add supply  
3 diversity to our project. We anticipate in most years  
4 won't even use that groundwater or use very little and  
5 you've place reasonable limits on the groundwater.

6           That's our proposal to drought proof this  
7 facility. It's backed up by the first condition. That  
8 includes reference to a specific, objective standard, which  
9 is the chloride standard, and also a loading waters.

10 That's what's before you from our perspective, and that we  
11 think we could finish today if the Committee was hearing  
12 just our petition.

13           There is also before you what I'm going to refer  
14 to as a substitute issue. That's Staff's proposal. It's  
15 Staff's proposal to direct us to use 100 percent of  
16 recycled water. That is not our petition. That is not our  
17 proposal. That, though, is the subject of your question  
18 about the IEPR.

19           If you rule, and we're going to ask you to do  
20 this, if you rule that the Staff's substitute proposal is a  
21 problem before this Committee, then you need to address  
22 this IEPR question. Then you need to address the issue of  
23 a closed session on our economic feasibility, because that  
24 IEPR standard, not the Applicant, but that IEPR standard  
25 brings into play a whole series of economic issues that

1 have competitive issues that we're going to have to hear in  
2 private session.

3 We can avoid that private session if you listen  
4 to our petition and give us a ruling on that itself. I  
5 think as a threshold matter we're going to ask the  
6 Committee very clearly to decide whether the Staff's  
7 substitute petition is even properly before us.

8 If you decide that that standard is, or that that  
9 substitute petition will be heard, either properly before  
10 you or out of an abundance of caution we want to hear it,  
11 as well as our petition, then we will -- we'd defend the  
12 position that that 2003 IEPR standard does not apply to the  
13 2001 certified project.

14 I think on the face of the IEPR, 2003 talks about  
15 certification of projects. Doesn't talk about projects  
16 that are already certified. While there's a very strong  
17 legal standard about retroactive application of a new law,  
18 I mean, it's just a practical concern that we have about  
19 the issues related to converting a facility that was  
20 certified and prohibited from using recycled water to now  
21 convert that facility to 100 percent recycled water, as has  
22 been suggested by Staff.

23 And again, that's the Staff's proposal. It's not  
24 ours. So that standard is very much at play. I think its  
25 legal applicability is an issue that the Committee should

1 consider ruling on as it relates to this case. It's very  
2 clear to us that it does not apply retroactively, that  
3 general administrative law principles of being able to rely  
4 on your petition, vested rights apply.

5           So it's very much an important issue and if the  
6 Department determines that we have, you know, one day of  
7 hearings, or you know, five days' worth of hearings, so  
8 that issue I think needs to be decided by this Committee.  
9 And if you need further briefing on that issue to decide  
10 it, we're willing to do that, but it's very important that  
11 that issue be decided today. Get decided. You could have  
12 more than today. I mean, you're going to need more than  
13 today to decide it.

14           (Laughter)

15           HEARING OFFICER COCHRAN: Thank you. I certainly  
16 need more than today. Ms. Miller.

17           MS. MILLER: In response to Mr. Harris'  
18 statements, it is for the Committee to consider Staff's  
19 position, and the way he's explained it is Staff's position  
20 relies on this 2003 IEPR, which is policy, in addition to  
21 laws. And so Staff had prepared ample testimony explaining  
22 the position and the policy, as well as legal basis, for  
23 that position.

24           We are not prepared today to say that any of what  
25 we've provided in testimony should be taken out. And so if

1 that means that we're on a path to have to brief the issue,  
2 then I agree with what Mr. Harris has stated, and that is  
3 that Staff are willing to prepare a brief on that issue.

4 And Mr. Harris has sort of set forth a potential  
5 path in terms of if the Committee is going to consider  
6 Staff's testimony, then the Committee needs to determine  
7 whether the 2003 IEPR applies, and if the Committee  
8 determines that the 2003 IEPR applies, that there ought to  
9 be a closed session.

10 And I would like to acknowledge to the Committee  
11 that that is certainly something that Mr. Harris and his  
12 client can request of the Committee and Staff would not  
13 oppose that.

14 HEARING OFFICER COCHRAN: Okay. Ms. Murray, do  
15 you have an opinion?

16 MS. MURRAY: We do not.

17 HEARING OFFICER COCHRAN: Thank you. Backing up  
18 a little bit, so let's talk a little bit about the timing,  
19 then, on the resolution of this issue. I know that you  
20 said today, but I don't think you actually meant today.  
21 What time do you think this decision needs to be made, Mr.  
22 Harris?

23 MR. HARRIS: I think as matter of law it's an  
24 easy decision, and can be made relatively quickly. I think  
25 you -- I've offered to brief it further if you'd like us

1 to. I'm not sure you need us to do that, but it seems to  
2 be foundational.

3 I mean, the reason we're not going forward today  
4 is because we're hearing issues and the Staff's substitute  
5 proposal, potentially. And that to me shapes the entire  
6 path forward. It's going to shape our affirmative case.  
7 It's going to shape our ability to be prepared for the  
8 Staff's affirmative case.

9 And so I think the Committee needs to take  
10 whatever time it needs to decide the issue. The out for  
11 you, to be direct, like I tend to be, is to decide to hear  
12 the evidence and not decide whether it applies or not. I  
13 don't know that you necessarily have to reach a final  
14 decision or whether the application of that particular  
15 Staff standard or not -- I do think though that if you  
16 decide to hear the staff's substitute proposal, we ought to  
17 have a very clear demarcation in the hearing where we put  
18 on our affirmative case, talk about our petition, break and  
19 come back to hear the Staff's.

20 HEARING OFFICER COCHRAN: Ms. Miller.

21 MS. MILLER: Staff has made recommendations in  
22 the testimony provided to the Committee thus far, and if  
23 I'm going to agree with Mr. Harris on one more point, I  
24 think that it is this, that the testimony provided explains  
25 the reliance or the examination of the state water policy

1 by Staff as a piece of the analysis done by Staff to get  
2 them to where they've gotten to now, which is the  
3 recommendation that is before the Committee in the  
4 testimony provided.

5 If the Committee wants us to brief, we will  
6 certainly do so, but I -- let me just make it one more  
7 point clear. I agree that I don't know that we need to  
8 brief this issue. I believe that the testimony is  
9 sufficient.

10 HEARING OFFICER COCHRAN: So neither one of you  
11 are in -- are either of you anticipating that the Committee  
12 will make a decision on this issue before we conduct the  
13 Evidentiary Hearing?

14 MR. HARRIS: I'm anticipating that you're going  
15 to address the issue we raised, which is our proposal and  
16 Staff's substitute proposal, and whether you'll hear that  
17 substitute proposal. Yeah, I think we are anticipating  
18 you'll decide that question procedurally, whether you'll  
19 hear just our petition or whether you'll hear petition and  
20 the Staff's proposal, and the order you'll hear those  
21 things. I would expect that an order would kind of lay  
22 that out for us.

23 HEARING OFFICER COCHRAN: Okay. Anything else on  
24 this issue? Let's move on, then, to the confidential  
25 information that we've talked about. If the Committee must



1 decide whether to use groundwater -- the use of groundwater  
2 is economically unsound, what process or procedure should  
3 we use to review that?

4 And I'm looking for very specific measures, how  
5 we think this needs to happen and what additional questions  
6 or information may be necessary.

7 (Pause)

8 HEARING OFFICER COCHRAN: Sorry about that.  
9 Anyone who wants to speak?

10 MR. HARRIS: Thank you. Well, again, this issue  
11 will be joined if the Committee decides to hear the Staff's  
12 substitute proposal. If we decide that IEPR dictates that  
13 the project talk about its individual economic feasibility,  
14 that is extremely sensitive and confidential market  
15 information that could potentially cause severe harm to the  
16 project.

17 And just to kind of simplify that concept, the  
18 type of information that we'd be presenting will allow both  
19 a competitor and a counter-party to a power purchase  
20 agreement, potentially reverse engineer a new way into our  
21 economics and figure out where the line of paint is vague.

22 So that information which the IEPR I think calls  
23 for, to use that standard, that information has to be  
24 confidential. So I am unaware of whether the Commission in  
25 approving this standard that requires confidential

1 information thought about its processes.

2 I've looked through your regulations and they are  
3 ultimately silent on this issue. But I think common sense  
4 would dictate at least a few actions. Number one, I think  
5 that first in the room would have to be the parties and the  
6 Commission, decision-making Commission, obviously, and  
7 Commission Staff, and nobody unaffiliated with a party, to  
8 use a double negative. I think everybody in the room would  
9 have to be affiliated with a party.

10 Secondly, we would be having to shut down the  
11 WebEx, because there's no security potential there. Third,  
12 I think Mr. Petty would be probably doing a separate  
13 transcript, confidential transcript for that portion of the  
14 hearing.

15 I think the participants in that hearing, to the  
16 extent we can insure confidentiality, would have to sign  
17 some sort of confidentiality agreement to not take that  
18 information from the room and to not use it in the analysis  
19 and to not use it for any purposes other than what the  
20 Commission needs that information to be used for.

21 The basic idea would be to allow only the  
22 decision-makers to be in the room and then to hear from the  
23 folks who know the financial standing of the High Desert  
24 Power Project, and High Desert, LLC. So that I think is  
25 the type of -- those are the kind of the minimum safeguards

1 I can think of right now.

2 I think confidentiality agreements, I would throw  
3 that back to the General Counsel to figure out how that  
4 works with state employees. I don't know. I've never had  
5 to do that. So she's not in the room, but hey,  
6 congratulations on figuring that one out, so. Thank you.

7 Sorry. The smarter person of our duo is helping  
8 with this. I think that's kind of what I've come up with  
9 so far in thinking about this issue.

10 HEARING OFFICER COCHRAN: Does Staff have  
11 anything? So the Applicant has already submitted certain  
12 information that has been received under seal and it is  
13 docketed as a confidential document. I don't know who has  
14 reviewed that on the Staff side. I have not reviewed it.  
15 I don't think anyone on the Committee has either.

16 So the question is, is that information  
17 sufficient? Is there additional information that will be  
18 necessary, and what do you think about the procedural  
19 safeguards that Mr. Harris has outlined in his remarks?

20 MS. MILLER: Okay. I'll try and address each one  
21 of those separately. Yes, confidential financial  
22 information was docketed, and deemed confidential and that  
23 evidence was put on the docket. I have reviewed the  
24 documents. My team of witnesses have reviewed them and we  
25 have some in-house staff from the Energy Commission that

1 are not currently on our witness list that have also  
2 reviewed the information from an economic standpoint.

3           We have stated in our testimony that we were not  
4 able to make conclusions, based upon the information  
5 provided. But as you can tell from Petitioner, they have  
6 been very cautious in what has been shared with us. I  
7 don't know if, once we figure it out, if it were possible  
8 to do a closed session, such as Mr. Harris has proposed, if  
9 more information can be provided.

10           But I can say that more information should be  
11 provided if we're to reach some sort of a determination of  
12 whether it's economical or not for this particular project  
13 owner. With that -- let me --

14           HEARING OFFICER COCHRAN: Okay.

15           MS. MILLER: -- because there's one other thing  
16 that I needed to address, and that is the challenges, the  
17 legal challenges, the silence in our regulations. I have  
18 also read and tried to figure this out and knock this out.  
19 We have been thinking about this for at least a couple of  
20 months now, I think two months at least, and I have  
21 communicated to the Petitioner what I want you to hear now,  
22 and that is that the burden is on the Petitioner, if they  
23 want this closed session, to request it.

24           And it will present us, as he's indicated, with  
25 some challenges on some uncharted territory, which is of

1 interest to the Commission because it will be difficult to  
2 map out. But we have thought about this quite a bit. We  
3 didn't know that we would get to this point today.

4 Mr. Harris, actually, the day that the Prehearing  
5 Conference Statement was filed by Petitioner, that's the  
6 first document that was docketed by the Petitioner,  
7 indicating that they may need a closed session. But we  
8 have been thinking about this for some time.

9 HEARING OFFICER COCHRAN: Well, and I think that  
10 the lack of regulation has been foremost in my mind, but I  
11 am aware of analog provisions in CEQA when you're dealing  
12 with cultural resources and keeping specific, particularly  
13 Native American, resources confidential so that they're not  
14 then subject to inappropriate action by those who may get  
15 that information incorrectly.

16 So there are some standards that we could draw on  
17 in the absence of our own regs talking about it. You  
18 indicated, Ms. Miller, that there was more information that  
19 you that you thought would be necessary. Have you or staff  
20 come up with a data request or some other discovery  
21 mechanism to get the information that you think that you  
22 might need that's in addition to that already supplied by  
23 the Applicant?

24 MS. MILLER: We have not written or drafted a  
25 data request.

1 HEARING OFFICER COCHRAN: How long do you think  
2 such a data request might take to formulate?

3 MS. MILLER: Oh, we could certainly do so in a  
4 matter of a couple of days, the challenge being the  
5 confidential circumstances.

6 MR. HARRIS: If I could speak for this issue, but  
7 I don't want to interrupt you, though.

8 MS. MILLER: Go ahead.

9 MR. HARRIS: Okay. Thank you. You know, the  
10 concept of burden has been going around a couple times  
11 here, and I guess I want to reiterate that the burden is on  
12 the Staff for their substitute proposal to convince the  
13 Committee, number one, that you even hear it, and then  
14 number two, to convince the Committee that the IEPR  
15 standard applies.

16 But those are two threshold burdens that the  
17 Staff bears, okay? And I'm kind of picking on Elena's  
18 words a little bit, and I apologize for that. She did talk  
19 about, though, in terms of proving economic feasibility  
20 that we bear the burden of providing information on that  
21 question and I accept that.

22 I think that we do, to the extent the Committee  
23 rules that they want to hear the Staff substitute, and to  
24 the extent the Committee hears that they think they want to  
25 hear about the IEPR, you don't necessarily have to rule on

1 its applicability.

2 But to the extent you think Staff carries their  
3 burden on those two issues, we are more than prepared to  
4 carry the burden of providing the information on economic  
5 feasibility. We are also prepared to stand on the  
6 information we provided the Staff in January in our  
7 confidential hearing.

8 We think that's enough information to make the  
9 case. We are hesitant to put additional economic  
10 information out there because of the risk associated with  
11 it, but we will withstand the burden of the Committee  
12 looking at us, notwithstanding -- without a data request,  
13 without any more information, looking at us and saying,  
14 what you provided is not enough, because I felt that that  
15 January presentation to Staff was convincing.

16 I'm convinced that I'm willing to stand on that  
17 and brief on that. So I don't think you need additional  
18 information on the economic feasibility if you choose to  
19 hear that issue.

20 HEARING OFFICER COCHRAN: I would like to talk a  
21 little more about that, Mr. Harris, because that seems to  
22 be a recurring theme here. And while I understand that the  
23 Petition states what the Petition states, in determining  
24 whether to act on the modification, there has to be some  
25 type of environmental review of the impacts associated with

1 changing from state water project water and 1,000 acre feet  
2 per year of reclaimed water to also then being able to use  
3 up to 3,000 acre feet per year of groundwater.

4 That is part of that environmental analysis,  
5 whether we would have followed a CEQA analysis or the  
6 regulatory process that we use in citing cases, we do have  
7 to consider alternatives and the Staff has presented an  
8 alternative that may be the environmentally superior  
9 alternative.

10 And so, really, isn't it then incumbent upon the  
11 Applicant to give us the information we need on that?

12 MR. HARRIS: I'm going to give you a direct  
13 answer and say no. 1748 of your regulations, and it's sub,  
14 help me out, Sam, is it C or D. D, all right. E, "The  
15 proponent of any additional condition, modification or  
16 other provision relating to the manner in which a proposed  
17 facility should be designed, cited or operated in order to  
18 protect the environmental quality, insure public health and  
19 safety, shall have the burden of making a reasonable  
20 showing that the need for and feasibility for the  
21 condition, modification or provision."

22 And so you're citing regulations which we always  
23 say apply by analogy in a compliance case. 1748 very  
24 clearly put the burden on a party who's proposing an  
25 alternative to carry that burden. I don't believe that the



1 Staff's substitute proposal falls within the gamut of a  
2 CEQA alternative.

3           They're not looking at a potential significant  
4 affect in providing an alternative to mitigate potentially  
5 significant affects. This proposal involves no new  
6 infrastructure. There's not a single well drilled.  
7 There's not a single pipeline put in place.

8           There's not a change in anything in the physical  
9 environment in our proposal. Staff's proposal is  
10 undefined. Do something to be able to use 100 percent  
11 recycled water, figure out what that is, come back to us  
12 and do a petition to figure out how to do that.

13           Our proposal isn't even a project under CEQA,  
14 given the lack of change and physical changes in the  
15 environment. There's nothing new on the ground. All the  
16 infrastructure exists. To the extent that you're concerned  
17 about potential environmental impacts, this is an  
18 adjudicated basin.

19           The Mojave Water Agency is the water master for  
20 this basin. They have been the water master since the  
21 '90s. They are the model for California Sustainable  
22 Groundwater Act. They are exempt from California's new  
23 landmark Groundwater Act precisely because their model that  
24 the State of California wants for the entire state.

25           You have a water master whose job it is to

1 protect the environment, and to speculate on a potential  
2 environmental impact associated with water use in an  
3 adjudicated basin, and again, I'm not good at subtle, that  
4 literally requires you to assume that the Mojave water  
5 master does not do their job, that they fail in some way to  
6 protect the environment, which doesn't speak well for  
7 California's Groundwater Sustainability Act, because it's  
8 based upon the same model.

9           So I don't think you have a project alternative.  
10 I don't think you have a project under CEQA. I think you  
11 have to assume failure by the Mojave Water Agency to find a  
12 significant affect. And then finally, I guess I would  
13 point out paragraph 25 of the Executive Order that's  
14 currently before the Commission, which we're going to get  
15 to when we talk about interim relief, that Executive Order,  
16 among other things, exempts from CEQA -- I'm going to get  
17 the language so I don't screw this up.

18           "The Energy Commission shall expedite the  
19 processing of all applications or petitions for amendment,"  
20 which is our petition, "the power plant certifications  
21 issued by the Commission for the purpose of securing  
22 alternative water supplies necessary for continued  
23 operation of the power plant."

24           That is precisely what our petition does. We are  
25 trying to secure alternative water supplies necessary for

1 continued operation, and that's paragraph 25 of Executive  
2 Order B-2915. Paragraph 26 expressly exempts from CEQA  
3 actions taken by paragraph 25.

4 And so I don't think we need that Executive Order  
5 exemption, because it's not a project under CEQA, but even  
6 if it is, you have that exemption to move forward, as well.  
7 So you know, one of the things that has been suggested by  
8 the Staff's proposed alternative is that there's some kind  
9 of data gap here, that we don't know what your potential  
10 water use might to do this basin, and that's incorrect.

11 We have the GSI report. We refer to it as the  
12 GSI report. It's attached to our opening testimony and  
13 it's also incorporated into the record. That is a  
14 substantive analysis of the environmental impacts,  
15 potential environmental impacts of the water use with this  
16 project.

17 And so there's not even a data gap here. And  
18 what that document shows is that under some conditions, dry  
19 years and extreme drought, that in three years out of 10  
20 there won't be enough of recycled water alone to meet the  
21 needs of this project.

22 So we've got a supply problem. We need 4,000  
23 acre feet kind of as a design criteria. And that report,  
24 which is in the record and Staff doesn't agree with the  
25 report, but it's there and it's evidence, shows that there

1 isn't enough water in enough years.

2           Why does that report show there's not enough  
3 water in all years? Because it assumes that the  
4 obligations of the basin are met with the MOU between the  
5 Fish and Wildlife Department -- I'll never get your name  
6 right now that you've changed it -- California Department  
7 of Fish and Wildlife, DW, and VVWRA.

8           So in those three out of 10 years where there's  
9 not enough supply of recycled water, the reason there's not  
10 enough supply is because of the set-aside pursuant to the  
11 MOU. So there's not even a data gap here. And so the  
12 excuse, the frustration we have with not moving forward  
13 with this, everything you need to decide our petition is in  
14 front of you, and the confusion and the chaos is all around  
15 the Staff's substitute proposal. That was probably the  
16 longest answer that they have --

17           MS. MILLER: Yeah. I would like to comment that  
18 Mr. Harris went on a stream of consciousness from  
19 confidential financial information to substantive argument  
20 about water and water supplies for this proceeding, and so  
21 I would like to acknowledge that we thought we were talking  
22 about confidentiality and confidential information, but I  
23 heard a whole lot of argument in there, and I don't think  
24 that that's why we're here today.

25           I want to go back to an earlier point where we

1 were talking about data requests and confidential  
2 information. I want to punctuate for the Committee that if  
3 the Staff were to put together data requests on this issue  
4 of financial -- confidential, financial information, the  
5 data requests themselves would need to be confidential.  
6 And I don't know, frankly, that we've ever done that in a  
7 proceeding.

8 HEARING OFFICER COCHRAN: Well, and to be fair to  
9 Mr. Harris, I did open the door because I specifically  
10 asked him the question about the burden and the  
11 alternatives analysis. So I think he was responding, at  
12 least in part, to the question I posed to him.

13 And so if you have -- I'm not sure how much  
14 substance we want to get into today. So what I would ask  
15 is that we just let his comments lie for now and we'll pick  
16 them up probably at the Evidentiary Hearing to discuss more  
17 fully, rather than -- unless you can very briefly, and I  
18 mean very briefly, if there's something that you wanted to  
19 respond to, either you or Ms. Murray, either one.

20 MS. MILLER: There is one thing.

21 HEARING OFFICER COCHRAN: Okay.

22 MS. MILLER: And then I will let everything else  
23 lie until the Evidentiary Hearing. Mr. Harris has unfairly  
24 characterized Staff's testimony as they didn't find data  
25 gaps. And I want to call to the Committee's attention that

1 the petition and the testimony that's been provided in  
2 support of the petition has specifically argued for checks  
3 and balances.

4 And what Staff have said in rebuttal and in their  
5 own testimony is if the petition is going to ask for checks  
6 and balances in support of their petition for a loading  
7 order that we do actually need to have checks and balances.  
8 So they have articulated the term checks and balances, but  
9 they haven't provided Staff with anything particular to how  
10 that would look.

11 And so if there are gaps it's in their argument,  
12 in their petition and in their testimony, because they have  
13 to offer that this petition provides checks and balances.  
14 Staff have not found that in any of their testimony, and  
15 with that I will stop.

16 MR. HARRIS: Can I tell you where they are?

17 HEARING OFFICER COCHRAN: Perhaps that a  
18 discussion for --

19 MS. MILLER: This is a Prehearing Conference.

20 MR. HARRIS: Yeah.

21 HEARING OFFICER COCHRAN: -- conference  
22 statement, Mr. Harris, or the Prehearing Conference.

23 MR. HARRIS: I know it, but the Committee's here  
24 and it's not ex parte. So I thought they might want to  
25 actually know the substance a little bit.

1 MS. MILLER: I will defer to the Committee on  
2 that.

3 HEARING OFFICER COCHRAN: Well, then, perhaps an  
4 offline discussion would be better. Ms. Murray, do you  
5 have anything that you wanted to offer on this question?

6 MS. MURRAY: Just briefly, that we do believe  
7 there is a data gap and that is in the environmental  
8 analysis, and we're hoping to discuss that at some point.

9 HEARING OFFICER COCHRAN: Okay.

10 MR. HARRIS: Can I ask for clarification, though?  
11 Is that data gap with our proposal or with the Staff's  
12 substitute proposal?

13 MS. MURRAY: Both.

14 HEARING OFFICER COCHRAN: Okay. Well, that was  
15 exciting. So let's now talk -- I think you've given the  
16 Committee a lot to think about and that's part of what we  
17 were here today to do, too. So when we get to Evidentiary  
18 Hearings we'll all know, hopefully, what we're going to be  
19 talking about.

20 And one of the things I think we need to talk  
21 about is participation of the Mojave Water Agency, the City  
22 of Victorville and the Victor Valley Water Information  
23 Authority. And I know that we have a representative on the  
24 phone. Is she still with us? Do I have -- do I still have  
25 you from the Victor Valley -- well, the City of

1 Victorville?

2 (Loud noise)

3 MR. ASHTON: This is Steve Ashton, with the City  
4 of Victorville.

5 HEARING OFFICER COCHRAN: Thank you so much. I  
6 know that we received a letter from the Mojave Water  
7 Agency. I'm not aware that they're online today. Did they  
8 call in after we sort of did roll call? Okay. I'm going  
9 to guess no. And I'm sorry. Could you spell your last  
10 name for me, please?

11 MR. ASHTON: Yeah. It's A-s-h-t-o-n.

12 HEARING OFFICER COCHRAN: Okay. Do you see the  
13 City of Victorville as playing a role or in helping the  
14 Committee in any way? And I'm going to also ask the  
15 parties to address that. What participation do we need  
16 from those other entities and how do we best secure it?  
17 And I'll ask you first, Mr. Ashton.

18 (No response.)

19 HEARING OFFICER COCHRAN: Okay. Apparently, I'm  
20 -- -- so Staff, Petitioner, does anyone want to weigh in on  
21 the question about the participation by any of the  
22 Victorville, Victor Valley, Mojave Water Agency?

23 MS. MURRAY: We have an opinion on that.

24 HEARING OFFICER COCHRAN: Excellent.

25 MS. MURRAY: The Department did see the March 8<sup>th</sup>



1 letter from the Mojave Water Agency, and the Mojave Water  
2 Agency wears two hats. And so we're interested in the hat  
3 the Mojave Water Agency wears as water master. And as  
4 water master, Mojave Water Agency's uniquely positioned to  
5 know the inflow and outflow, the pumping, what is going on  
6 in the basin.

7 This power plant is located in the Alto Subarea,  
8 as well as they know about the other subareas in the Mojave  
9 River Adjudication. And we do feel that they have been at  
10 this business of monitoring the basin since the early '90s,  
11 and certainly, since the 1996 judgment was entered.

12 And we believe that they are the ones who can  
13 perform the water balance that would be needed for the  
14 environmental analysis to determine whether or not  
15 reclaimed water, reused water is available for High Desert  
16 Power Plant, and in what amount, so as to be consistent  
17 with the judgment, which has in this lower narrows  
18 transition area a requirement that a maximum depth, the low  
19 ground be 10 feet.

20 So the water master should or could be  
21 commissioned to do a water balance report. They did one in  
22 2003 that Mr. Custis heavily relied on in his testimony,  
23 and we feel like an update to that reflecting the 13 years  
24 that has happened, not only since our MOU, but since their  
25 last significant water balance analysis was done, would be

1 the most helpful evidence and piece of the data that's  
2 missing to help inform what environmental affect there  
3 might be for either continuing the use of reused water or  
4 accelerating or increase the use of reclaimed water.

5 And that does need to be tied to the judgment  
6 that this power plant sits in and knew about when they  
7 cited it, that there is obligations in the judgment,  
8 Exhibit H, to the riparian area that, while it's not the  
9 water master's job to protect the environment, it's only  
10 their job to comply with the judgment.

11 And so we feel that having the water master do  
12 the analysis on the water balance, address Exhibit H, give  
13 that information to the parties, give us some -- all --  
14 it's an independent third party. I mean, we could try  
15 this, but we're not neutral, and they are.

16 They do not protect the environment. That's not  
17 their job. And so they would be neutral. I believe  
18 they're neutral. We would then be able to see that,  
19 comment on it and then we would be ready for an Evidentiary  
20 Hearing.

21 HEARING OFFICER COCHRAN: So obviously -- pardon  
22 me. Obviously, Fish and Wildlife had prior experience with  
23 them in 2003 when they prepared this report. How long did  
24 it take? What were the cost factors involved? Do you know  
25 any of that?

1 MS. MURRAY: We were surprised by the report. We  
2 think it's very thorough. It's well done. We didn't ask  
3 them to do that. We were still, even yesterday, trying to  
4 figure out what was the trigger for that 2003 report.

5 HEARING OFFICER COCHRAN: Okay.

6 MS. MURRAY: So we don't.

7 HEARING OFFICER COCHRAN: And the letter that you  
8 referenced, for those playing along at home, is in the  
9 docket at TN210667. And one of the comments it makes in  
10 there is that it would require action by that board in  
11 order to have them undertake any of this.

12 And so I'm just wondering, I'm trying to figure  
13 out how to speed the plow, if you will, if we're going to  
14 go down that particular path, and in particular, the time  
15 it would take for that to happen. And I don't know who can  
16 answer my question.

17 MS. MILLER: The March 8<sup>th</sup> letter, which we,  
18 Staff, will be adding to our exhibit list, it's not on  
19 there yet, it does, as you were saying, as you've  
20 acknowledged on the last side of the -- it's the last  
21 paragraph, acknowledged that it would require the  
22 expenditure of public funds.

23 The letter was the result of Staff working with  
24 MWA, which we continue to do for the entire period of time,  
25 analyzing this petition and asking questions of MWA to

1 inform our Staff in preparation for what we thought would  
2 be today the Evidentiary Hearing.

3           And in return we received this letter. We don't  
4 know, to answer your question, how long it would take. We  
5 don't know how much it would cost. Nobody has asked us  
6 those questions. MWA has not asked Staff for any money or  
7 commitment of money.

8           That's not where the conversation has gone. The  
9 conversation has specifically been to inform Staff about  
10 how the water mater does the job of the water master, to  
11 keep balance in the basin. And let me just -- and I know,  
12 Mr. Harris, you're reaching -- but let me say one more  
13 thing. VVWRA, Victor Valley Water Reclamation, is also a  
14 significant stakeholder in this, has a role in it.

15           Staff have also worked a great deal, I believe,  
16 with their staff, as well. They have an interest in this  
17 that is unique, being that they sell the water. But we  
18 have asked them to participate. We've also asked MWA to  
19 participate and we received a letter from MWA, a couple of  
20 other letters, but this most recent March 8<sup>th</sup> letter, and we  
21 have not received anything on letterhead from VVWRA, but  
22 there have been conversations.

23           MS. MURRAY: This is a busy time of year for the  
24 water masters, so they're meeting monthly.

25           MR. HARRIS: If I could. The water master serves

1 the Court. There is an adjudication here. And again, as I  
2 said, it's the model California's adopted for the  
3 Sustainable Groundwater Act. You've heard people say, we  
4 don't know how much this is going to cost. We don't know  
5 how long this is going to take.

6 And the reason you hear those things is because  
7 no other water user in this basin would be subjected to  
8 what has been proposed. No other water user in this basin  
9 would be required to do the kind of study that's been  
10 suggested. No other water user in this basin would be  
11 required to do the type of analysis that's been requested.

12 This analysis is not necessary for you to do to  
13 approve our proposal. This analysis relates to the Staff's  
14 substitute, not our proposal, and we will stand on our GSI  
15 report as to potential water availability. And we think  
16 that the Commission ought to assume certain things, and  
17 that's sometimes dangerous, but not in this case.

18 You ought to assume that people are going to live  
19 up to their legal obligations. You ought to assume that  
20 the MOU will be satisfied, and which we did in our GSI  
21 report. And you ought to also assume that the VVWRA will  
22 look to their side of that agreement.

23 So I understand the sensitivity in this area.  
24 It's beautiful. I've been there. I'm glad that the  
25 Department is not neutral. I'm glad someone's looking

1 after that resource. These issues are not implicated by  
2 our petition, and this is not a general, statewide form to  
3 resolve statewide policy issues.

4 This is in a specific adjudicatory proceeding  
5 dealing with the request before you from this Applicant,  
6 and to turn this process into a multi-year process, it's  
7 going to take you six months to get the contractors on  
8 board to do some of the stuff that they want people to  
9 perform. It is not your process and it's not what this  
10 process ought to be used for.

11 MS. MURRAY: I respectfully disagree with Mr.  
12 Harris and what I disagree with is that their analysis in  
13 their opening testimony, as our testimony indicated, did  
14 not fully evaluate the VVWRA, CDFW MOU. It made some  
15 assumptions about our MOU that are not accurate, and but  
16 were instead reflected in our MOU, or our testimony.

17 And that is a lot of the reason why we're at the  
18 table, is that both the Staff and the Applicant  
19 misunderstood the MOU that we have with VVWRA, and to the  
20 benefit of -- well, misunderstood it and did the analysis  
21 based on an incorrect understanding of the MOU.

22 MR. HARRIS: First, I have to disagree, of  
23 course. But of those issues go to the weight of the  
24 evidence. None of them go to the applicability of those  
25 questions through our petition. And the Committee could

1 decide, if the Department prevails in their view, that we  
2 screwed up and we misunderstood their agreement.

3 I don't think we did, but that's a weight of the  
4 evidence issue. That's not a threshold question that  
5 requires a two or three-year-long process or study. I'd  
6 just moved the process along, I realized. But anyway, it  
7 is a weight of the evidence question and one that this  
8 Committee can decide, and it's another issue where we're  
9 willing to stand on our record. We have a very robust  
10 record that we are willing for the Committee to make the  
11 decision on.

12 HEARING OFFICER COCHRAN: Okay. Thank you very  
13 much for that. Again, more food for thought for the  
14 Committee.

15 MR. HARRIS: Oh, I guess I'd offer one more  
16 thing. We are willing to sit down with the Department, go  
17 through that MOU and type them up a stipulation about what  
18 it means, and if we're unable to do that, that's fine. But  
19 I want to put that out there as we're willing to sit down  
20 with the Department and talk about that MOU, because we  
21 don't believe we misunderstood it.

22 HEARING OFFICER COCHRAN: And I know that in  
23 Staff's Prehearing Conference Statement they had talked  
24 about the potential of having a workshop, and it seems to  
25 me that that may be something to pursue at a workshop.

1 That's exactly what workshops are supposed to do.

2           And so Ms. Miller, I would turn to you and say,  
3 have you scheduled that workshop? Do you have a date in  
4 mind if -- for that? Where are we?

5           MS. MILLER: No workshop has been scheduled.  
6 We've not talked to the parties. We wanted to see how  
7 today went and we were in a swift preparation of getting  
8 ready for what we thought would be the hearing. So we made  
9 that recommendation, honestly, thinking that there could be  
10 some value added, that we might be able to reach some  
11 resolution. I think that our greatest challenge has been  
12 the schedule, trying to get everything done so quickly.

13           And as we've been swiftly moving forward more  
14 issues popped up, unexpected ones, and yet, you will also  
15 note that in our Prehearing Conference Statement we  
16 stressed that those local water agencies, we only have City  
17 of Victorville on the phone today.

18           And we appreciate that, I want to acknowledge.  
19 Thank you, Mr. Ashton, for being there, but we really need  
20 VVWRA to better inform the conversation. We have  
21 correspondence from MWA. That may be what we received, but  
22 if they could be on the line for such a workshop that would  
23 be great.

24           We've asked, the Staff have asked and we've  
25 gotten as far as you've seen us get in terms of what I've



1 said today, and also on the record. And so I will tie a  
2 bow on this and say simply that we could get to a certain  
3 place with Petitioner and with the Fish and Wildlife  
4 representatives in a workshop and resolve perhaps some of  
5 these issues that are merely issues because of the timing.  
6 But I do believe that there are significant issues that we  
7 could not resolve without those other organizations  
8 involved.

9 HEARING OFFICER COCHRAN: Would there be -- I'm  
10 sorry. Would there be any value in potentially having that  
11 workshop down in Victorville to make sure that it then  
12 doesn't become an issue of those folks being able to  
13 travel? I'm just throwing that out. I don't expect an  
14 answer or anything today. Mr. Ashton, are you still on the  
15 line?

16 MR. ASHTON: Yes, I'm here. I think that would  
17 help a lot, because there could be more people representing  
18 the city. They'd just be like four policy setters here,  
19 and not just me. I'm from (indiscernible 17:06:46)  
20 operations.

21 HEARING OFFICER COCHRAN: Okay. So I think that  
22 gives you some idea on a going forward basis. And so we've  
23 edged around this. So I'm going to come back to a more  
24 substantive question, but because it is so foremost in  
25 everyone's mind, let's do talk about future scheduling in

1 this matter.

2 I am not anticipating, Mr. Harris, that this is  
3 going to be a multi-year process. That's not my intention.  
4 I don't always get my way, but I don't think that the  
5 Committee is looking at that either. And one of the things  
6 I wanted to talk about was exactly what our deadline is.

7 I know that there has been discussion about a  
8 September 30, 2016 date, and I think that's largely  
9 predicated on the last Order that the Commission gave where  
10 it allowed use of groundwater for two waters, and that that  
11 expires on September 30<sup>th</sup> this year.

12 So you know, I know you'd like a decision today.  
13 That's probably not going to happen. Okay. It's not going  
14 to happen. But you know, what deadline are we looking at  
15 and can we schedule some future dates in this matter so  
16 that we do know and have some certainty for the witnesses,  
17 especially those who are going to be traveling?

18 MR. HARRIS: Okay. Well, let me explain the  
19 urgency. We first went to the Commission in September of  
20 last year asking for this Committee to be appointed,  
21 precisely because we are running up against a deadline that  
22 is in the existing conditions of certification.

23 And then those really relate to our ability to  
24 use groundwater in the interim. The last Order allowed us  
25 to use groundwater for water -- and I'm just going refer to

1 the water year, since it's easier for me, water years '15  
2 and '16, two water years, 2014-15, '15-'16.

3 But in any event, the water year's the same as a  
4 federal fiscal year. Ends on September 30<sup>th</sup>. So we are six  
5 months away from the operative language in the petition  
6 prohibiting us from using that water supply. We are here a  
7 year in advance, and now we're six months away, and I think  
8 we're months away.

9 I'm glad to be here. We're not committed to a  
10 multi-year process, but we're months away from a further  
11 decision. The reason that's important to us is that we  
12 have to be able to go out into the market and look for  
13 alternative water supplies, and not day ahead kind of  
14 thing. It's a longer term kind of thing.

15 So we are already, as I said, we have six months  
16 left in our current ability to use that what was considered  
17 to be an interim supply. That is one of two sort of major  
18 issues with not having a decision today. My deadline would  
19 have been February, to be honest. And even then that was  
20 pressing things.

21 The second issue is that if you've seen the  
22 Sacramento River recently, it's been a decent water year in  
23 California. Still to be determined where it ends up, but  
24 it's been a good water year. One of our primary supplies,  
25 and one of the diverse set of supplies we've asked for

1 State Water Project water, we have an allocation of around  
2 2,000 acre feet for this calendar year that we can use for  
3 this water year.

4 That may be increased when the Department and the  
5 feds look at the water situation and decide where things  
6 are going to go. So we have a limited ability to use this  
7 year's second supply, the State Water Project water. That  
8 supply was very good for us until it got real wet,  
9 ironically.

10 When it was sort of wet that water quality was  
11 great and we'd be able to use a lot of that. When we got  
12 really wet, the California Aqueduct is an open ditch, and  
13 things run into it and the water quality has degraded  
14 severely with the rains recently.

15 So that water went from being very usable to not  
16 very usable in the time that we got more water. So that  
17 second supply we're concerned about being able to use, and  
18 part of the relief that we've asked for in this petition  
19 was the ability to percolate groundwater.

20 There are a number of conditions, and I've got  
21 conditions in front of me from our petitions, that relate  
22 to the percolation of groundwater. And so if we start  
23 looking at interim relief, the ability to use that supply  
24 if it is available to us, the State Water Project supply  
25 that's available to us, then the use of percolation is a

1 very big issue for us, as well.

2           And so we're already past the deadline, and if we  
3 could talk about those issues and talk about the ability to  
4 maybe get some interim relief, I think it's going to be a  
5 fairly long process, apparently, we'd like relief.

6           HEARING OFFICER COCHRAN: When you talk about  
7 percolating groundwater, I know that there are provisions  
8 in the existing conditions relating to banking groundwater.  
9 Is this something different than that?

10           MR. HARRIS: Yes. The existing conditions allow  
11 us to inject groundwater. Direct injection it's called.  
12 And so that water comes into our system. We clean it up to  
13 basically drinking water standards for shorthand, and then  
14 physically force it into the ground. It's injected into  
15 the ground. There are some important things about that  
16 current injection process.

17           Number one, we have to have water, right, got to  
18 have a supply, and it's only State Water Project water. Of  
19 our four supplies, only State Water Project water can be  
20 cleaned up and injected. That water has to be available.  
21 It has to be of sufficient quality.

22           We've talked about this in our petition. So the  
23 water we'd received lately was not really water we could  
24 inject well, because of some of the first constituents in  
25 that water. And the third sort of big issue for us on that

1 is that the project has to be running for us to be able to  
2 inject groundwater.

3           And in simplest terms, the injection process  
4 requires heat, and the heat comes from the operation of the  
5 power plant. And so if we've got 10 acre feet of State  
6 Water Project available to us and we're not running, we  
7 can't inject any of that.

8           Percolation is a much different issue.  
9 Percolation would allow us to put water into the ground the  
10 way that Mojave does this now, through spreading  
11 percolation. That percolation cleans up the water quite a  
12 bit, makes it higher quality water.

13           And it's not dependent upon us running and it's  
14 not really dependent upon the water quality to the same  
15 extent. The ground is a really wonderful filtration  
16 system, better than your Britta, for dealing with  
17 constituents in that water.

18           So percolation both in the short run with this  
19 water year we have now and in the long run where things  
20 that we really feel are important, you know, the Staff has  
21 taken issue a little bit with the percolation, in that they  
22 would like that to be our sole means of building our  
23 groundwater bank.

24           We'd like it to be one of several means to build  
25 the groundwater bank, but I think people are generally in

1 agreement with that. And what we've asked for in our  
2 petition, getting back to our petition, is the ability to  
3 go out and talk to the players down there to get the  
4 agreements that are already in place probably modified to  
5 allow us to do the percolation.

6           So that's a pretty straightforward authority.  
7 We're not asking you to review the percolation. We're not  
8 asking you to review the final analysis, because one  
9 doesn't need to be done for this process. Basically,  
10 enabling us to go out and talk to the folks who would be  
11 responsible for this so that we can do the percolation.

12           We have to make changes to the condition  
13 language, because it refers to banking, and injection,  
14 which we currently do, as synonymous. So we have to  
15 distinguish between banking and, you know, through  
16 injection and banking through percolation.

17           That's why there's so many conditions that are  
18 felt about -- that is I think a central part of our  
19 petition, and it's also one of our urgencies. We've got  
20 the back end pressure of losing the State Water Project  
21 supply -- or the groundwater supply, and the front end  
22 pressure of not being able to use the water allocated to us  
23 now.

24           With percolation it's not like we can take the  
25 entire 3,000, you know, 2,000, whatever we get on the last

1 day of the water year and, you know, floods somewhere.  
2 It's a very -- it's a slower process. It's fast with  
3 injection, but it has to be spread out over time. So  
4 that's where it is.

5 HEARING OFFICER COCHRAN: And you said that would  
6 require modifications in some contracts. Are those with  
7 both the City of Victorville and the MWA out of some water  
8 master open groundwater basin?

9 MR. HARRIS: I'll let someone smarter than me on  
10 that issue answer this question. So go ahead, Brad.

11 HEARING OFFICER COCHRAN: And if you could  
12 identify yourself for the record, please.

13 MR. HEISEY: Sure. My name's Bradley Heisey, and  
14 with Tenaska Capital Management, but also served as an  
15 officer for the High Desert Power Project. So I'm here  
16 representing the ownership of the High Desert Power  
17 Project. Just to answer from a clarity perspective, we use  
18 a collection of agreements, and we have a number of  
19 promotional arrangements.

20 But the primary arrangement for actual storing of  
21 the water in the Alto Sub-basin is a contract between the  
22 Mojave Water Agency and the City of Victorville or  
23 Victorville Water District. Any water that we direct for  
24 injection into the well field that we have access to,  
25 again, that's the City of Victorville's oil field, is



1 earmarked and tagged as High Desert's water.

2           So there's a subaccounting that goes on with  
3 regard to that particular storage activity. And for all  
4 intents and purposes that State Water Project water that we  
5 have directed for direct injection, and in this case now  
6 that we would direct through percolation would be tagged as  
7 High Desert's water.

8           But we are not the party for that water storage  
9 contract. And so there is some cooperation and some  
10 necessity for those two counter-parties to be agreeable to  
11 modifications or changes to those agreements. And that's I  
12 think what we have relayed in here, is to try to get the  
13 authority to go start that process and see if we can get  
14 those parties to engage with regard to modifications or  
15 changes to agreements that we're not a direct party to.

16           HEARING OFFICER COCHRAN: Okay. Thank you very  
17 much.

18           MS. MILLER: Can I say one other thing, that --  
19 for the Committee to be aware of, that in Staff's analysis  
20 we aren't far off from what Mr. Harris has described in  
21 regard to this percolation proposal. Specifically, Staff  
22 would allow the project owner to bank State Water Project  
23 water in the Mojave River Basin through MWA, which as you  
24 heard, they have a relationship with MWA that exists via  
25 percolation costs through the Mojave River Basin.

1           So I want to highlight for you, because there's  
2 obviously a lot of distraction as to the differences  
3 between us, but on this we're not far. And the Staff's  
4 proposal included what they currently do, which is the pre-  
5 treatment of the water that they -- then they bank the  
6 direct injection that he spoke of.

7           Staff proposal to move toward recycled water is  
8 dependent upon that the equipment that they currently use  
9 to pre-treat be modified to adapt to using water cycled  
10 water at the facility. So that's the basis for that  
11 recommendation. But Staff and Petitioner agree on this  
12 percolation.

13           MR. HARRIS: Yeah, I think that's right. I think  
14 we're very close on the whole concept of percolation. I  
15 think everybody thinks that's the best way to take care of  
16 the basin, import the water and help with the groundwater.  
17 To the extent we have disagreements, I think it's about  
18 that question of repurposing, which we've testified, our --  
19 you slipped in some substance on how you want to -- we have  
20 testimony that would suggest that repurposing is not  
21 feasible.

22           But and we'd like this to be one of several  
23 options for us to build that with, not the option. And  
24 that's I guess the other difference I would draw. But I  
25 think with the law, I think we're all saying the same

1 thing, that the basin would be benefitted from drip  
2 percolation and we will be supplying the money that would  
3 allow this to happen.

4 I mean, without our ability to do this there's  
5 probably no funds to go out and find this water through  
6 percolation. And I got into substance again. I'm sorry.  
7 It happens.

8 HEARING OFFICER COCHRAN: Sorry about that.  
9 We're talking up here about timing. I would assume that  
10 today we're not ready to pull out our calendars and start  
11 saying, How does March 3<sup>rd</sup> look or May 3<sup>rd</sup> or anything like  
12 that. March 3<sup>rd</sup>, not of next year. Sorry. May 3<sup>rd</sup>. I  
13 didn't mean to cause Mr. Harris to have a stroke here in -  
14 - during our conference.

15 (Laughter)

16 MR. HARRIS: It's a nervous tic. Before we leave  
17 this percolation issue.

18 HEARING OFFICER COCHRAN: Yes.

19 MR. HARRIS: We have pulled out of our proposal  
20 all of the conditions that would have to be affected to  
21 fill out a percolation agreement for -- and these are  
22 directly out of Exhibit 1000, and I'll just provide those  
23 to the folks. You can just handle that one.

24 And again, this is nothing new. This is out of  
25 our Exhibit 1000, pages 31 to 33. These are the conditions

1 that we've asked to be amended to allow percolation to go  
2 forward. I won't ask you to study them today, but I want  
3 to make a very specific request that the Committee consider  
4 in their interim order either adopting these conditions or  
5 asking the Executive Director, who has authority under the  
6 Executive Order, to adopt these percolation conditions.

7 I want to make that specific request that we get  
8 that authority so that we can go out and start having these  
9 discussions with people about percolation. So I know Staff  
10 will want to respond to that. That would be our request on  
11 the percolation issue.

12 MS. MILLER: Staff would like Mr. Harris to  
13 please explain what he's just proposed. I heard you say  
14 that you would like the Committee to go to the Executive  
15 Director to request the Executive Director to exercise the  
16 Executive Order signed by Governor Brown for the drought.

17 But it sounded like you were saying just for  
18 purposes of Soil and Water 4, and the proposal that you've  
19 handed out in the room today but that we could find in the  
20 record as your Exhibit 1000. Did I hear you correctly?

21 MR. HARRIS: You got most of it, and it's said --  
22 the letter (indiscernible 17:22:37) actually got it. But  
23 more than the Soil and Water 4, there are only five  
24 conditions that are in this handout that we just gave  
25 y'all. Some of them just change the word "banks" to

1 "injected," for example.

2 But yes, I would make the request that the  
3 Committee, either on its own or through the Executive  
4 Order, ask the Executive Director to issue a letter that  
5 approves these condition modifications. And we could take  
6 these issues off the table for the hearing that way, as  
7 well. And I think that's well within the Executive  
8 Director's authority under that provision, and I think it's  
9 within the Committee's authority, as well.

10 MS. MILLER: Can I ask a question of Mr. Harris?

11 HEARING OFFICER COCHRAN: Please. It might be  
12 the question I was going to ask.

13 MS. MILLER: Mr. Harris, this is the first I've  
14 heard you request that the Executive Director exercise  
15 authority granted by this Executive Order, but I was at a  
16 couple of business meetings that you attended, a series of  
17 I believe two months where you requested a Committee to be  
18 assigned.

19 And then eventually, a Committee was assigned,  
20 which is the Committee before us today. So why am I  
21 hearing as a Prehearing Conference that you want the  
22 Executive Director to exercise authority under this  
23 Executive Order?

24 MR. HARRIS: You're not hearing that for the  
25 first time. I need to find my petition, so give me a

1 minute, please.

2 HEARING OFFICER COCHRAN: Okay. Let's try to  
3 stick to my understanding is that you're asking the  
4 Committee, Mr. Harris, for some interim relief, and the  
5 interim relief looks a lot like the proposed conditions  
6 that you've handed out to us that are part of Exhibit 1000.  
7 Is that correct?

8 MR. HARRIS: Yes.

9 HEARING OFFICER COCHRAN: Okay. And whether the  
10 Executive Director has authority to adopt these as under  
11 the Governor's Executive Order, or whether the Committee  
12 does, that is part of its inherent power and control in  
13 these proceedings, your position is, is that you need all  
14 of these changes that are outlined. Ms. Murray, do you  
15 have a copy of what Mr. Harris handed out?

16 MS. MURRAY: I do.

17 HEARING OFFICER COCHRAN: Okay. That you need  
18 all of the changes reflected in Soil and Water 4, Soil and  
19 Water 5, Soil and Water 6, Soil and Water 12 and Soil and  
20 Water 13. Is that correct?

21 MR. HARRIS: Yeah. Those all relate to  
22 percolation, so yes.

23 HEARING OFFICER COCHRAN: Okay. And turning  
24 first to Staff, have you looked at these conditions and  
25 would there be any modifications that you would make to

1 these conditions if the Committee were going to be granting  
2 interim authority or interim relief, I should say.

3 MS. MILLER: I apologize. I was talking to my  
4 client.

5 HEARING OFFICER COCHRAN: That's okay.

6 MS. MILLER: Could you please restate, please?

7 HEARING OFFICER COCHRAN: I'm just wondering if  
8 there are any proposed Staff modifications to the changes  
9 reflected in 4, 5, 6, 12 and 13 from Exhibit 1000. You  
10 said you were close, and I wanted to know how close.

11 MS. MILLER: Well, I don't have proposed  
12 modifications for you.

13 HEARING OFFICER COCHRAN: Okay.

14 MS. MILLER: But I know that Staff have talked to  
15 MWA and you've heard us talk about how -- well, let me just  
16 tie these two things together. We've talked about  
17 percolation and now we've been presented with this new  
18 request, but it impacts -- if this were to occur by some  
19 authority of the Energy Commission, the impact would be on  
20 MWA.

21 MWA's not participating. They're not a party.  
22 They've provided comments. So it's important that MWA have  
23 some opportunity to speak to what's been proposed. And  
24 this is in the record. Again, I -- acknowledging what Mr.  
25 Harris has stated, what has been handed out to us today is

1 not new. It is in their exhibits, but I am deficient in  
2 that I don't know where MWA would be on these.

3 HEARING OFFICER COCHRAN: Let's take the  
4 Executive Order part off the table for right now, and just  
5 assume that the Committee is looking at this as interim  
6 relief to make sure that the plant continues to operate  
7 pending hearing from the CAISO, who I believe are also on  
8 the phone, as an interim relief measure only.

9 First of all, would that alleviate your concerns,  
10 Mr. Harris, that you've talked about based on the September  
11 30, we'll call it a deadline. I know there's some dispute  
12 about that. Would that alleviate some of the Petitioner's  
13 concerns on the availability of water to keep the plant  
14 running?

15 MR. HARRIS: The granting of our ability to  
16 percolate water, granting my request, basically, it  
17 definitely would alleviate some of our concerns. We would  
18 be on that right away.

19 HEARING OFFICER COCHRAN: Okay.

20 MR. HARRIS: We would be under pressure to try to  
21 use the allocation we're getting in this year from State  
22 Water Project water. So we'd have every incentive to move  
23 forward quickly. And that would be very helpful.

24 HEARING OFFICER COCHRAN: Okay. And Staff,  
25 recognizing that this would be an interim relief only,



1 would not preclude further discussion of this, what would  
2 Staff's position be about granting interim relief?

3 MS. MILLER: Very quickly, I've had a second to  
4 talk to my client and there are concerns, real concerns  
5 that if the Committee were to act and provide what we're  
6 talking about as temporary relief, the first thing that  
7 Staff have made a recommendation, and such a temporary  
8 relief would be placing judgment or decision on Staff's  
9 recommendation that's been presented.

10 But also, we're -- aside from not having MWA at  
11 the table, we're really concerned about where this water's  
12 going to come from. It's unknown to us. So these seem  
13 like valid, real issues that would preclude some sort of a  
14 swift decision by the Committee to grant some relief to the  
15 Petitioner as requested.

16 And I unfortunately don't have a more elaborate  
17 comment to provide you, but I think I've expressed concern.

18 HEARING OFFICER COCHRAN: And I appreciate that,  
19 and that's part of the issue here where we're sort of  
20 improvising as we go along in these matters, and new ideas  
21 pop up and we try to address them. Ms. Murray, have you  
22 had a chance to look at this?

23 We do want to hear from you, because obviously,  
24 you are the steward of the environment before us today, and  
25 I hate to put all of that burden on you, but.

1 MS. MURRAY: We've had a brief chance to look at  
2 it and at this point as an interim order we have no  
3 objection to it and feel that maybe it would give us some  
4 breathing room to fill the data gap that we see is  
5 currently existing in the record.

6 HEARING OFFICER COCHRAN: Okay. Thank you very  
7 much. Does anybody else wish to be heard on this issue,  
8 and I believe, Commissioner Douglas, did you want to say  
9 something?

10 COMMISSIONER DOUGLAS: Well, would anyone else  
11 like to speak up on this issue?

12 HEARING OFFICER COCHRAN: All eyes turn to Mr.  
13 Harris.

14 MR. HARRIS: Yeah, sorry. I'm not as good a  
15 multi-tasker as I thought I was. Yeah, you know, what  
16 we're asking for is the authority to go out and have these  
17 discussions, and if we're successful in those discussions  
18 to be able to use percolation.

19 So that's one of the tools we want to have in our  
20 toolbox, if you will. Doesn't forego the possibility that  
21 we don't reach an agreement and doesn't, you know, doesn't  
22 insure that we will reach an agreement. This gives us that  
23 authority to go out and have the ability to have access to  
24 this additional ability to build our bank.

25 And that's really at the end of the day what

1 we're asking to do, is building that groundwater bank.  
2 There's a limit in the current conditions of how much water  
3 has to stay in that bank, and given the issues that have  
4 precluded us from banking more water, this would be an  
5 ability to really deal with that issue.

6           So again, I guess I won't suggest that we're not  
7 pre-deciding that percolation will happen. We're just  
8 asking for the authority to go out and get the agreements  
9 on this.

10           HEARING OFFICER COCHRAN: And do the conditions  
11 need to be modified for you to have that or?

12           MR. HARRIS: I think if we're successful, and we  
13 intend to be, yes.

14           HEARING OFFICER COCHRAN: Okay. So what you're  
15 hoping is that by making these changes the Commission will  
16 have signaled that changes to the agreement are  
17 appropriate, and that therefore your negotiating partners  
18 in these agreements will provide you with -- they'll have  
19 greater incentive to listen to what you're saying.

20           MR. HARRIS: If I could speak English, I would  
21 have said it that way, yes.

22           HEARING OFFICER COCHRAN: I don't know that I  
23 speak English, but I speak lawyer, so. Did you want more  
24 time to look at the conditions? I think they're online?

25           MS. MILLER: Well, I -- yes.

1 HEARING OFFICER COCHRAN: I'm trying to figure  
2 out who -- where we are. There's a lot of balls in the  
3 air.

4 MS. MILLER: Well, I think on the issue of timing  
5 I was actually curious to know how long Mr. Harris thinks  
6 that it will take to go out and make those agreements or to  
7 work on those agreements, because I think we got to this  
8 place in the conversation talking about timing. So I'm  
9 curious how long do you think it would take?

10 MR. HARRIS: It has to be done quickly, and let  
11 me explain why, because as I said, we can't take all the  
12 water at the end of the water year, and the water year ends  
13 on the 30<sup>th</sup>. So we're going to have to get the agreements  
14 in place in advance of September 30<sup>th</sup> and work backwards  
15 from there. So we'll have every incentive to have an  
16 answer on this within weeks, not months, maybe weeks. You  
17 want a range, eight to 10 weeks.

18 MS. MILLER: Okay. Thank you. And in response  
19 to the question that was asked, I would like a little time.  
20 I'm one head in a team of heads.

21 HEARING OFFICER COCHRAN: Right.

22 MS. MILLER: And I'm probably the most deficient  
23 head to be answering this question for you.

24 HEARING OFFICER COCHRAN: That's fine. I  
25 appreciate it.

1 MS. MILLER: There are others behind me with far  
2 more to offer.

3 MR. HARRIS: Since we're in the hard set  
4 (phonetic) fix, as well, the other issue that we talked  
5 about was the possible extension of our ability to use the  
6 groundwater past the next six months. So the current  
7 condition limits the water use, groundwater use through the  
8 end of this water year. That's a different supply of water  
9 and it'll give us some additional certainty.

10 And so we had suggested that the Committee allow  
11 us to use that source in the interim, more than just the  
12 next six months. I would think at least two more water  
13 years should be sufficient to allow us to get to all these  
14 processes and allow us to contract far enough ahead to be  
15 able to use that water.

16 So I'd be looking to -- the mandate that's in the  
17 current condition is -- what's that current condition.  
18 It's one month. Soil and Water 1 has an end date, the last  
19 end date is September 30<sup>th</sup> of 2016. I think we need to  
20 change the date on that to September 30<sup>th</sup>, 2018. So that's  
21 a pretty straightforward change to allow for two more years  
22 of interim relief on the groundwater.

23 COMMISSIONER DOUGLAS: So it seems like there are  
24 -- let me see if Staff wants to speak to this.

25 MS. MILLER: Yeah. Staff are not inclined to

1 recommend another extension of two years of groundwater,  
2 but we have had a sister agency join this conversation in  
3 just the last two weeks. I think it's important that they  
4 speak to the issue. But to restate, Staff are not inclined  
5 to recommend an extension of two more years.

6 MS. MURRAY: And we have some questions, just is  
7 that buy -- you're buying it from the City of Victorville,  
8 the groundwater?

9 MR. HARRIS: Yes.

10 MS. MURRAY: So we would just need to look at  
11 that a little bit more. The first one, this one where it's  
12 the State Water Project being brought in, we're fully  
13 supportive of. We'd have to just take a look at your --

14 MR. HARRIS: I'm sorry. On the percolation  
15 you're fully supportive of that proposal?

16 MS. MURRAY: The interim.

17 MR. HARRIS: Yeah, the interim.

18 MS. MURRAY: For the interim, right, bringing  
19 State Water Project in and having the option to inject or  
20 percolate. We like the idea of you bringing State Water  
21 Project in.

22 MR. HARRIS: I'd love for them to hear that.  
23 We're getting there. Thank you.

24 (Pause)

25 HEARING OFFICER COCHRAN: Okay. Sorry about

1 that. We took a brief break. So you recall that the  
2 Committee had asked a series of questions. One of the  
3 questions that the Committee had asked was critical needs  
4 met by the High Desert Power Plant, in specific, is it for  
5 reliability or bridge (phonetic) support or anything like  
6 that.

7 And my understanding was that an invitation had  
8 been issued to the California Independent System Operator  
9 to join us today. Is anyone from CAISO here today, either  
10 in the room or on the phone? California ISO, going once,  
11 going twice, fair warning.

12 MS. MILLER: Ms. Cochran.

13 HEARING OFFICER COCHRAN: Yes.

14 MS. MILLER: There is nobody on the phone. We  
15 asked.

16 HEARING OFFICER COCHRAN: Okay.

17 MS. MILLER: But we were told that they could not  
18 attend today.

19 HEARING OFFICER COCHRAN: Okay.

20 MS. MILLER: But Staff had reached out to them  
21 and they are looking into their side of what CAISO does.

22 HEARING OFFICER COCHRAN: Okay. Fair enough.

23 MS. MILLER: They're examining the petition, is  
24 my understanding.

25 HEARING OFFICER COCHRAN: Okay. Because I think

1 that that is also a question that the Committee continues  
2 to have. And we appreciate everyone who provided us  
3 answers to our random thought questions that we put out.  
4 At this point I think where we are is we would like to hear  
5 public comments from anyone in the room or anyone online  
6 who would like to speak to us.

7           And then we're going to go into closed session.  
8 So turning first to anyone on the phone who'd like to make  
9 a public comment. Anyone at all? Okay. Is there anyone  
10 in the room who would like to make a public comment? You  
11 can go ahead and mute them all again; thank you. Anyone in  
12 the room? Oh, Ms. Willis, who is acting as the public  
13 adviser, is shaking her head, no blue cards. Mr. Harris,  
14 your mic is on. Did you want to say something?

15           MR. HARRIS: Yeah. I'm again, not being subtle.  
16 I wanted to make sure you heard the part of the Fish and  
17 Wildlife's position on the percolation issue.

18           HEARING OFFICER COCHRAN: I believe I did. I  
19 think that --

20           MS. MURRAY: We do not object to your Exhibit  
21 1000 change, potential change to Soil and Water 4, 5 --

22           HEARING OFFICER COCHRAN: Six, 12, 13.

23           MS. MURRAY: -- 6, 12, 13.

24           HEARING OFFICER COCHRAN: Thank you, though, for  
25 that. And so at this point we will be going to closed



1 session under the Government Code. I would ask that the  
2 parties remain here. I will come back. Someone will come  
3 back down and tell you what's going on. So we will be in  
4 recess. Thank you.

5 ***Closed Session 11:36 a.m. until 2:30 p.m.***

6 COMMISSIONER SCOTT: Hello, everyone. This is  
7 Commissioner Janea Scott, and I just want to welcome  
8 everyone back. It is 2:30. So we're going to go back on  
9 the record and we'll turn the hearing over to Susan  
10 Cochran.

11 HEARING OFFICER COCHRAN: Thank you so much. And  
12 I am going to report out of Closed Session some of the  
13 discussion and decision that the Committee has had. A  
14 formal Written Notice and Order will follow. So if you  
15 don't take down or can't take down everything I say as I  
16 blitz though this, please accept my apologies. The first  
17 order of business is that we are going to set this for a  
18 further Status Conference, and the date that we're looking  
19 at right now is April 20 from 2:00 p.m. to 5:00 p.m. And I  
20 wanted to check with counsel to see if that was available  
21 on anyone's calendar, if that presents some difficulties.

22 And the purpose of the Status Conference will be  
23 to discuss the schedule, including the timing of a future  
24 Evidentiary Hearing and the scope of that hearing.  
25 Wednesday, April 20<sup>th</sup>, 2:00 to 5:00. Any --

1                   COMMISSIONER SCOTT: And just a Status  
2 Conference, no witnesses?

3                   HEARING OFFICER COCHRAN: No witnesses, just a  
4 Status Conference.

5                   MS. MILLER: Staff are available on the 20<sup>th</sup>.

6                   HEARING OFFICER COCHRAN: Okay.

7                   MS. MILLER: All the whole team comprising Staff  
8 are available on that day. So kudos for picking a day that  
9 everybody's available. Thank you.

10                  HEARING OFFICER COCHRAN: Okay. In order to help  
11 streamline the discussion that day the Committee is going  
12 to direct that Staff schedule a workshop as soon as  
13 possible, preferably in Victorville, and the issues that  
14 the Committee believes need to be discussed at that Staff  
15 workshop include, but are not limited to, options for  
16 interim relief, including conditions 4, 5, 6, 12 and 13, as  
17 presented by the Petitioner today, and as well as the  
18 discussion of continued use of groundwater as set forth in  
19 the 2014 ruling, the process for determining financial  
20 feasibility of the use of something other than groundwater,  
21 and including especially the process that you would like to  
22 see if there's a discussion on nondisclosure agreements,  
23 anything like that. Any stipulations come out from that,  
24 that would be helpful.

25                  Again, there was a discussion today about a

1 stipulation regarding the Memorandum of Understanding  
2 between California Department of Fish and Wildlife and the  
3 Victor Valley Water Reclamation Authority. And so any  
4 discussion you could have about that would be helpful.

5 Further pursuit of a water balance calculation  
6 from the Mojave Water Authority, who is the water master  
7 under the judgment, and finally, better figures for the  
8 actual water demand and usage by the plant, so that in  
9 crafting interim relief and in ruling on the petition the  
10 Committee has a better understanding of how much water is  
11 truly needed, based on historical production by the plant,  
12 and use.

13 In addition, the Committee will be asking for  
14 points and authorities from the lawyers in the case, and  
15 specifically, Petitioner and Staff, but to the extent that  
16 the Fish and Wildlife would like to weigh in, we are happy  
17 to hear from you, as well, on the following questions.

18 First, the applicability of the 2003 IEPR. There  
19 was discussion today regarding vested rights and assorted  
20 other topics, and whether there are other laws in effect at  
21 the time of approval if the IEPR does not apply, in  
22 analyzing the petition, as well as in analyzing any of the  
23 alternatives that Staff may have proposed.

24 Second today, Petitioner argued that CEQA does  
25 not apply, that this is not a project under CEQA. We would

1 like legal briefing, and when we say legal briefing, that's  
2 not a chance to reargue the facts that you may have  
3 presented in various declarations.

4 This is purely legal discussion, argument,  
5 research that the Committee is looking for. We would also  
6 like further information on the burden of proof. Is  
7 Staff's analysis on the feasibility study presented by the  
8 Petitioner an alternatives analysis under CEQA, or is it an  
9 alternative condition being proposed by Staff under newly  
10 renumbered Section 1745 of the Energy Commission's  
11 regulations.

12 And finally, as it relates to interim relief, how  
13 can the plant be operated if no action is taken? What are  
14 the Committee's options to grant, including the potential  
15 applicability of the Governor's Executive Order, whether it  
16 would require full Commission action to modify the  
17 conditions, or any other options that the Committee has  
18 available to it in crafting interim relief.

19 And I believe that's all. Are there any  
20 questions, comments, protests? Oh, the briefing. Opening  
21 briefs will be due in two weeks, and reply briefs will be  
22 due one week after that. Opening briefs will be due in two  
23 weeks, and reply briefs will be due one week after the  
24 opening briefs, from the notice.

25 MR. HARRIS: From the notice.

1 HEARING OFFICER COCHRAN: Which should be out  
2 this week. Thought that might be an important part. Okay.  
3 Any questions? Ms. Miller.

4 MS. MILLER: Just, I was scribbling very quickly.  
5 I'm sure everybody in this room was. So just requesting  
6 that the notice identify specifically what it is you're  
7 seeking in our briefs. That would be most appreciated.

8 HEARING OFFICER COCHRAN: The notice will include  
9 the topics that were just outlined.

10 MS. MILLER: Absolutely. Thank you.

11 HEARING OFFICER COCHRAN: Anything else? Mr.  
12 Harris.

13 MR. HARRIS: Just one note. I think you're  
14 talking about actual water use, figuring out that thing. I  
15 think looking backwards is a start, but it's not the  
16 entirety of it. I think part of what we're going to have  
17 to analyze here is -- are the assumptions you make going  
18 forward. I'm going to try to figure out the --

19 HEARING OFFICER COCHRAN: I think it's the Quins  
20 (phonetic).

21 MR. HARRIS: Think it's the what?

22 MS. MILLER: Very good.

23 HEARING OFFICER COCHRAN: There. Thank you. No  
24 more scratching.

25 MR. HARRIS: Okay. Is that any better?

1 HEARING OFFICER COCHRAN: Much.

2 MR. HARRIS: Yeah. Here we go. All right.  
3 There we go. Let's try it again. In terms of -- yeah, I  
4 know, always causing trouble. Thanks, Sam. In terms of  
5 the workshop, I think trying to figure out how much water  
6 is actually needed, I think a historic look-back is only  
7 half of the picture.

8 You're also going to have to make assumptions  
9 about going forward, projections going forward, and that's  
10 going to be assumptions about a lot of different variables.  
11 It's, you know, water quantity available by type, and water  
12 quality available by four types.

13 It's going to be assumptions about the operations  
14 of the project. So that's a capacity factor and  
15 assumptions about the weather, for example, because the  
16 biggest factor affecting cooling load is the ambient  
17 temperature. So I think capacity is a good indicator.

18 Actually, I think our responses to some of the  
19 Committee questions talk about the capacity indicator and  
20 we can go through that if you want, but also take into  
21 account the fundamental issue of projections about forward  
22 operations, of cooling water conditions, of forward ambient  
23 conditions and that kind of thing, so.

24 HEARING OFFICER COCHRAN: Okay. And in case it  
25 wasn't clear, we would like the workshop to happen before

1 the Status Conference, if at all possible. There's a  
2 little over a month between today and the Status  
3 Conference, and you have three weeks of briefing in there.

4 So I know that there is some time to provide that  
5 notice and to get everything together, but that would be  
6 the Committee's preference.

7 MS. MILLER: So just to run through this for my  
8 sake, because I'm slow. I'm looking at the April Calendar.  
9 Today we are in March. Today is March 15<sup>th</sup>, and the  
10 Committee is asking -- somewhere in the next couple of days  
11 we'll get a notice from the Committee, and that in two  
12 weeks let's assume the notice comes out the 18<sup>th</sup>, assuming  
13 for hypothetical purposes only, that briefs would be due  
14 April 1<sup>st</sup>, the Committee's asking that we have a workshop  
15 before April 20<sup>th</sup>, which would put us at having a workshop  
16 after the briefs are done, which would hypothetically be  
17 sometime the week of April 4<sup>th</sup> to April 11<sup>th</sup>, and then we go  
18 into hearing or Status Conference, excuse me, on the 20<sup>th</sup>.

19 HEARING OFFICER COCHRAN: That's correct. And  
20 it's possible that you could start working on getting the  
21 workshop scheduled, even in advance of the order that's  
22 coming out. I think the order will be more helpful  
23 relative to the briefing, as opposed to the scheduling of  
24 the Staff workshop. So anything else from anyone else? If  
25 not, we're adjourned. Thank you all very much.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Whereupon at 3:11 p.m., the hearing was adjourned.)

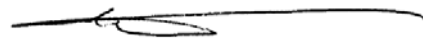


**REPORTER'S CERTIFICATE**

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 18th day of March, 2016.

---

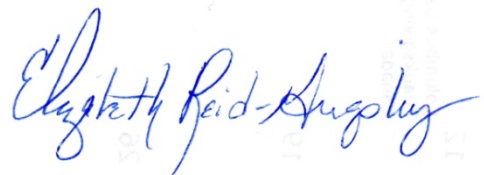
PETER PETTY  
CER\*\*D-493  
Notary Public

**TRANSCRIBER'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 transcribed by me, a certified transcriber 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 18th day of March, 2016.



---

Elizabeth Reid-Grigsby  
Certified Transcriber  
AAERT No. CET\*\*D-145