

STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION
STATUS CONFERENCE

DOCKET	
11-AFC-04	
DATE	MAR 19 2012
RECD.	MAR 29 2012

IN THE MATTER OF:)
)
APPLICATION FOR)
CERTIFICATION FOR THE) DOCKET NO. 11-AFC-04
RIO MESA SOLAR)
ELECTRIC GENERATING)
FACILITY.)

CEC BUILDING
HEARING ROOM A
1516 9TH STREET
SACRAMENTO, CALIFORNIA

MONDAY, MARCH 19, 2012

2:05 P.M.

TIFFANY C. KRAFT, CSR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 12277

APPEARANCES

HEARING OFFICER

Kourtney Vaccaro

COMMITTEE MEMBERS

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Karen Douglas, Commissioner

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James Bartridge
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Jennifer Nelson
Eileen Allen

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Chris Davis, Siting Office Manager
Laura Murphy, Public Advisor's Office

APPLICANT

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Brian Biering, Esq., Ellison Schneider & Harris
Todd A. Stewart, PE, BrightSource Energy, Inc.
Danny Franck, BrightSource Energy, Inc.

INTERVENOR

Lisa Belenky, Center for Biological Diversity
Ileene Anderson, Center for Biological Diversity

CONSULTANTS

Heather Blair, Aspen Environmental Group
Scott White, Aspen Environmental Group

APPEARANCES

GOVERNMENT AGENCIES

BUREAU OF LAND MANAGEMENT

Cedric Perry

Kim Marsden

Larry Lapre

US FISH AND WILDLIFE SERVICE

Dr. Joel Pagel

Nisa Marks

Jenny Frasier, Palm Springs Office

CALIFORNIA DEPT. OF FISH AND GAME

Dr. Shankar Sharma

COUNTY OF RIVERSIDE

Phil Rosentrater

Tiffany North

SAN BERNARDINO COUNTY MUSEUM

Robert McKernan, Director

PROCEEDINGS

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COMMISSIONER PETERMAN: This is Commissioner Peterman. And we're going to start the Status Conference.

This is a Mandatory Status Conference by the assigned Committee, myself and Commissioner Douglas, to provide the parties, interested agencies, and the public an opportunity to discuss with the Committee a reasonable schedule of milestones for evaluating and deciding on the Application for Certification for the Rio Mesa project.

We'll start with some introductions. Again, I'm Commissioner Carla Peterman. To my right, I have our Hearing Officer Kourtney Vaccaro who will be conducting this Status Conference. To her right, we have Commissioner Karen Douglas. To Commissioner Douglas' right, we have her Advisors, Jennifer Nelson and Galen Lemei. To my left, I have my Advisor, Jim Bartridge. And to his left is Eileen Allen, the Commissioner's Technical Advisor for Facility Siting.

Also, we have the Public Advisor's Office. We have Laura Murphy I believe on behalf of the Public Advisor. If you can raise your hand in the back. Public Advisor can assist anyone with the public who's here now or on the line.

I now will have all the parties introduce themselves.

1 Applicant, would you begin?

2 MR. ELLISON: Thank you, Commissioner Peterman.

3 My name is Christopher Ellison from the Law Firm
4 of Ellison Schneider and Harris representing the
5 applicant.

6 MR. STEWART: My name is Todd Stewart, Project
7 Manager with BrightSource Energy.

8 MR. BIERING: Brian Biering with Ellison
9 Schneider and Harris. I'm also here on behalf of the
10 applicant.

11 COMMISSIONER PETERMAN: Great.

12 Staff, will you introduce yourself?

13 STAFF COUNSEL DE CARLO: Good afternoon. Lisa
14 DiCarlo, Energy Commission Staff Counsel.

15 To my left is Chris Davis, Siting Officer
16 Manager. We also have various staff in the audience who
17 we'll introduce if they're needed. And we have various
18 agencies on the phone to discuss the biological resource
19 issues.

20 COMMISSIONER PETERMAN: Thank you.

21 Is the intervenor from Center for Biological
22 Diversity present? I believe on the phone we have Lisa
23 Belenky. Do you want to identify yourself?

24 MS. BELENKY: Yes. This is Lisa Belenky with the
25 Center for Biological Diversity. And I believe I'll also

1 be joined by Ileene Anderson.

2 COMMISSIONER PETERMAN: Thank you.

3 Take a moment to ask anyone from local, State, or
4 federal agencies in person or on the phone to identify
5 themselves.

6 Is anyone from the Bureau of Land Management on
7 the line?

8 MR. PERRY: Yes. This is Cedric Perry, Project
9 Manager, BLM, California Desert District.

10 MS. MARSDEN: Kim Marsden, Natural Resources
11 Specialist.

12 MR. LAPRE: Larry Lapre, District Biologist, BLM.

13 COMMISSIONER PETERMAN: Thank you.

14 Anyone from US Fish and Wildlife Service?

15 DR. PAGEL: Dr. Joel Pagel and Erin Chandler at
16 Carlsbad.

17 MS. MARKS: Nisa Marks from Palm Springs Fish and
18 Wildlife Service.

19 MS. FRASIER: Hi. This is Jennifer Frasier also
20 from Palm Springs.

21 COMMISSIONER PETERMAN: Great. Thank you.

22 Anyone from the California Department of Fish and
23 Game?

24 DR. SHARMA: Dr. Shankar Sharma, CDFG.

25 COMMISSIONER PETERMAN: Thank you.

1 County of Riverside?

2 MR. ROSENTRATER: Phil Rosentrater, Riverside
3 County Deputy Director, EDA.

4 MS. NORTH: Tiffany North, Deputy County Counsel.

5 COMMISSIONER PETERMAN: Thank you. Are there any
6 other representatives from any State or local or federal
7 agencies? Please identify yourself now, if so inclined.

8 MR. MC KERNAN: Robert McKernan, Director, San
9 Bernardino County Museum.

10 COMMISSIONER PETERMAN: Thank you. All right.
11 If there's no one else on the line who would like to
12 identify themselves or in the room, I will now turn this
13 proceeding over to Hearing Officer Vaccaro.

14 HEARING OFFICER VACCARO: Thank you.

15 I think, first of all, we'll go over light
16 housekeeping. It pertains primarily to those of you on
17 the telephones. We have a really great system here which
18 allows us to hear signing, breathing, papers rustling,
19 side conversations, and the like. If you feel that you
20 need to make noise, we would appreciate if you would hit
21 the mute button. But please do not hit the hold button.
22 We'll probably end up hearing your music or whatever else
23 it is that your agency or telephone projects. If you get
24 too noisy and don't self-police, we may have to police
25 you. And that becomes a little challenging when you

1 decide you would like to speak. So you're on the honor
2 system for just trying to keep some of the background
3 noise at a low level.

4 I have to say, I'm just so pleasantly surprised.
5 I feel like a hostess who invited people to her party and
6 everybody showed up. This is absolutely amazing. We've
7 got, of course, the attorneys representing -- the parties
8 represented through attorneys, but I see a number of
9 technical people in the room. Clearly, we've got a number
10 of public agencies on the phone. Some of you we've tried
11 to get you to attend these status conferences in the past
12 and we haven't heard from you. So it is really I think
13 very encouraging to have this level of interest in what
14 are I think some very significant and important issues at
15 the threshold of evaluating this project.

16 So I'm going to bring those of you who aren't up
17 to speed back to February 1st, and then we'll fast forward
18 to today.

19 The Committee and I conducted an informational
20 hearing and site visit on February 1st. We received
21 written submissions prior to that time and listened to the
22 oral statements of the parties and members of the public
23 at the time as well.

24 What became readily apparent to everyone I think
25 even before that informational hearing and site visit was

1 commenced that day is that there are a number of issues at
2 play that will affect the schedule. What the Committee
3 said is let's not take hours today and learn about the
4 project and also learn about all of the different
5 scheduling issues. Let's hold the scheduling issues over
6 until the parties have had an opportunity to conduct at
7 least one or more workshops and for everyone to get a
8 handle on the issues. We'll have a status conference.

9 So here we are, mid March. I think those of you
10 might recall the Committee wanted to have a status
11 conference a bit sooner than mid March. But at the
12 request of the parties to give you some time to work
13 things out, here we are. You can rest assured that your
14 briefs have been read. Speaking just for myself alone, I
15 have read each brief probably three times for different
16 reasons. First is just a read through. Second time is
17 with a very critical eye. Third time is with a critical
18 eye and then on a comparative basis. I'm confident that
19 the Commissioners and their Advisors have read the papers
20 as well.

21 So I think with all of this interest and all of
22 these people, what I'm asking for you to do today, once
23 you get to the various issues, don't tell us what you've
24 told us unless it's important to underscore the point.
25 Make sure we understand what we really need to know so we

1 can set reasonable milestones to move this forward and
2 allow the Committee to have all of the information it
3 needs to resolve what appears to be a few areas of
4 dispute.

5 So I think with that, those of you who came
6 prepared today know that there was a Notice. And that
7 Notice for today's status conference identified the issues
8 for us to discuss. We're going to jump right in. Those
9 of you who have been through proceedings that I conduct,
10 the parties always -- always get to say what it is they
11 need to say. I will rush you along a little bit if you're
12 being redundant. But I like to do it round-robin fashion.
13 This is the order for each question we'll start with the
14 applicant. We'll move to staff. Then we'll hear from
15 Center for Biological Diversity.

16 I think we know that some of these issues will
17 take a bit more time than the other issues, but we will
18 not be here until 10:00 tonight. And I would submit to
19 you that I would like for us not to be here much past 5:00
20 o'clock if it even gets to that. So let's be efficient.
21 Let's hit the high points. But I think what's important
22 is we need to be thorough and understand what the issues
23 are.

24 So the first question that the Committee asked
25 the parties to brief -- and I think maybe it was the

1 applicant didn't like the way that I think I worded one of
2 these questions. Perhaps this is the one. Whether the
3 AFC -- actually it was the second question. The first
4 question is whether the AFC is data adequate in the
5 technical area of biological resources and cultural
6 resources.

7 So Mr. Ellison.

8 MR. ELLISON: Thank you, Ms. Vaccaro.

9 I will be, on this issue, very brief.

10 This question of data adequacy has been decided
11 by the full Commission and the staff in December. The
12 period of time for asking for reconsideration of that
13 decision has passed. And so this issue is resolved. And
14 I frankly don't think the Committee or even, for that
15 matter, potentially the Commission has the authority to
16 reverse that prior decision.

17 Having said that though, the Commission made the
18 correct decision. And the confusion here is simply this.
19 Center for Biological Diversity seems to believe that data
20 adequacy means that the Commission has all the information
21 it might require to make a final decision. That's not the
22 way the process works. Data adequacy means the provision
23 of Appendix B of the Commission's regulation for
24 acceptance of the initial application have been met. It
25 is followed by a discovery process that we are engaged in

1 now. No one, including the Center for Biological
2 Diversity, has pointed to any provision of Appendix B that
3 has not been met. And the reason for that is, as your
4 staff has found and as you have found, they have all been
5 met. So this application is data adequate.

6 I do have some sympathy for CBD's confusion about
7 why such massive additional information might be required
8 beyond an adequate application. And our position on that
9 is those requests are excessive. And we'll get to that
10 next.

11 HEARING OFFICER VACCARO: Thank you.

12 Ms. DiCarlo.

13 STAFF COUNSEL DE CARLO: Thank you, Ms. Vaccaro.

14 I concur with Mr. Ellison's statement, except for
15 the part where our requests are excessive with regards to
16 extra biological resources data. We outline in our brief
17 how we made the decision to declare or to recommend data
18 adequacy determination for this project based on the
19 regulations that we are required to comply with. We
20 explained why, perhaps, those regulations don't
21 necessarily encompass the full amount of information we
22 would need to ensure compliance with CEQA and conformance
23 with LORS. And so we're available to answer any questions
24 the Committee may have. But I feel we've adequately
25 explained our rationale. And I do concur with Mr. Ellison

1 that time for the review of data adequacy determination is
2 the 30 days subsequent to the Commission's determination
3 on that matter. And that has passed.

4 HEARING OFFICER VACCARO: Okay. Thank you.

5 Ms. Belenky.

6 MS. BELENKY: Thank you. I was on mute. Sorry.

7 It took a second.

8 Well, first, I just want to say that the
9 applicant does not speak for the Center for Biological
10 Diversity. And his characterization of our position is
11 inaccurate.

12 Secondly, I think on the question of data
13 adequacy, we are just starting to get some response to our
14 Public Records Act request. And going back and looking at
15 the transcript of the data adequacy hearing, it's quite
16 clear that staff was saying they could not possibly --
17 they did not believe they could meet a twelve-month
18 deadline with the amount of data at that point that they
19 had.

20 So to the degree that the applicant appears to
21 have been pressing very hard to say this must be approved
22 within a twelve-month period after the data adequacy
23 finding, this raises exactly the issue we are concerned
24 about.

25 It was clear from the few little amount of PRA

1 responses we've had so far that certainly staff -- some
2 staff at the Commission -- whether or not it's the staff
3 who are working on this project at the moment -- knew that
4 there was additional data that many -- that the other
5 agencies in the REAT group believe was necessary and that
6 data would take a longer time to compile going out and
7 doing the surveys in the appropriate seasons. And that,
8 therefore, to make a data adequacy determination in
9 December last year simply did not allow enough time to do
10 that, get the survey data, do the analysis, and finalize
11 any kind of decision within a year, within a twelve-month
12 period.

13 On the other hand, staff in their briefing has
14 raised a question that maybe the twelve-month period is
15 not really enforceable in any manner and that even if the
16 applicant does not agree to extend the time period that
17 they can simply -- the staff and the Commission -- the
18 Committee can simply move forward and take a longer time.
19 If that is the Commission's position, then perhaps it just
20 simply doesn't matter at this point.

21 But we do feel very strongly that the expert
22 agencies, including DFG and Fish and Wildlife understood
23 that additional information was needed and that that
24 should have been taken into account at that stage. And
25 from the transcript of the hearing, it does not appear

1 that it was actually discussed in any way.

2 HEARING OFFICER VACCARO: Okay. Thank you, Ms.
3 Belenky.

4 Ms. DiCarlo, putting you back on the hot seat a
5 little bit, Ms. Belenky said something I think that was
6 fairly interesting and needs some sort of response, which
7 is she was -- and Ms. Belenky, this is my paraphrase, so
8 I'm not going to get it exactly correct. You don't need
9 to tell me if I get it wrong. I'm already saying up front
10 it's probably not going to be exactly as you said it.

11 But the gist I took away is that the other
12 participants of REAT, not necessarily Energy Commission
13 staff, believe that this was information that was
14 necessary on the front end data adequacy stage, not
15 necessarily the recommendation that they would typically
16 make for data or requests throughout the process.

17 Is Ms. Belenky correct in that? Is that just
18 sort of a surmise? What do you have to say?

19 STAFF COUNSEL DE CARLO: I do not believe she's
20 correct in that. I don't think the other agencies would
21 ever necessarily tell us what we would need for data
22 adequacy. We do look to them to determine whether or not
23 they've met the basic regulatory requirements, if they
24 followed the protocols for the surveys they have
25 submitted. That would certainly be the case.

1 But I don't recall any discussion that had any of
2 the other REAT agencies informing the Energy Commission
3 staff they should declare this AFC inadequate or make such
4 a declaration.

5 HEARING OFFICER VACCARO: Okay. Thank you.

6 MS. BELENKY: Can I just clarify that is not what
7 I intended to say, if that's what you heard.

8 I think the point was that those agencies had
9 recommended additional surveys that meant that a
10 twelve-month period could not be met for this approval.

11 So this goes back to some of the issues we've
12 raised in our briefing, which is what to the Commission or
13 this Committee is the meaning of data adequacy at that
14 stage. I mean, you're saying you don't have to have all
15 of this information you need because you're going to go
16 into another process to obtain more information. But
17 there must be some sense in which the Committee feels that
18 it can meet the twelve-month deadline. Otherwise, that
19 statutory deadline becomes meaningless.

20 HEARING OFFICER VACCARO: That point came across
21 loud and clear. Thank you.

22 I think what we're going to do instead of just
23 hearing me make a recommendation to the Commissioners on
24 that issue is we're going to run through all of them.
25 When we've made our way through all of the issues, I will

1 make a recommendation. The Commissioners will either
2 agree or disagree. And then we'll end up doing what the
3 Commissioners direct of all of us.

4 So I think we've heard enough from the parties on
5 that particular topic. Let's go ahead to the one that I
6 think is why we have so many technical folks here in the
7 room, which is whether one additional year of bird and bat
8 surveys will be adequate as indicated by the December 16,
9 2011, REAT communication or if several years of additional
10 bird and bat surveys are required as indicated by the
11 January 31st, 2012, US FWS communication.

12 We'll start with you, Mr. Ellison.

13 MR. ELLISON: Thank you.

14 First of all, we do have technical people in the
15 room, including from as far as away as Israel. And one of
16 the things that I would emphasize to you is that this
17 question is fundamentally driven by factual questions. We
18 don't have a lot of legal disputes here. What we have are
19 factual disputes. Most fundamentally, factual disputes
20 about the risk of the facility. But also factual disputes
21 about the biology. There is a lot of frankly speculation
22 and sort of ambiguous implication, if you will, in the
23 briefs.

24 I want you to know that we are prepared to offer
25 witnesses to testify under oath to all the facts in the

1 brief that we gave you. And there are a lot of facts in
2 that brief which we think are critical.

3 Secondly, before going any further, let me say
4 this. Our very strong belief is that the surveys we have
5 already done are more than sufficient to meet all the
6 applicable legal standards to certainly meet, if in fact
7 exceed, the work that the Energy Commission has required
8 of other projects that it has licensed in the past.

9 But we have been talking to the various agencies,
10 the various REAT agencies, and we are prepared to do a
11 very substantial additional amount of work. And in a
12 moment, I will tell you exactly where I think we are with
13 respect to those discussions.

14 But by way of background, the BLM protocol, which
15 is what we started with here, the BLM protocol since we're
16 on BLM land because we were approved for this project and
17 was sent to the other agencies for comment as well as
18 before we did those surveys calls for about 400 hours
19 worth of survey work. We ended up doing and have already
20 done about 8,600 hours of survey work. And the amount of
21 work that we're now being asked to do would total about
22 25,000 plus hours of work. That's how far apart we are on
23 surveys.

24 What we have proposed to do as a compromise is
25 essentially another year -- close to another year's worth

1 of survey work. So we would be in the neighborhood of
2 16-, 17,000 hours of work against that original BLM
3 protocol of 400. So we are proposing to do a massive
4 amount of survey work on top of what has already been
5 done.

6 We've had some very good discussions with the
7 agencies. We think we are actually quite close. Before
8 we get into the discussions about who's right and who's
9 wrong about the need for these surveys, let me get to the
10 practical issues.

11 We think we are -- in fact, it has been
12 characterized to us by Fish and Wildlife Service that we
13 are 95 percent in agreement. We're down to a couple of
14 issues. Basically, those issues are as I understand it --
15 and I haven't been in all of these discussions. So if I
16 misspeak, I invite Todd and everyone else who's been
17 involved directly to correct me.

18 Basically, with respect to the surveys, where we
19 disagree is on doing -- putting carcasses out and doing
20 surveys for eagles with carcasses and doing some winter
21 surveys for birds generally. I want to be clear that our
22 concern about bridging that gap and doing those last two
23 pieces -- and believe me, I'm not going into everything we
24 agreed to do that beyond the 95 percent -- that's 5
25 percent -- is scheduled. If we can work out a schedule

1 that works, we would be prepared to do those last two
2 pieces.

3 But the concern is this: We need a final
4 decision from the Commission in the second quarter of
5 2013. And I won't go into all the details. But
6 basically, we need that to meet the online date in our
7 power sales agreements that we've already been awarded and
8 negotiated. And those are not easily subject to
9 amendments. A few years ago, they might have been. But
10 not now. So that is a life and death issue for the
11 project, is holding to that schedule.

12 So we are prepared to extend the twelve-month
13 statutory deadline. We can certainly have an interesting
14 conversation about that. But we are prepared to extend
15 that to meet the additional requirements if we can find a
16 way to still get to a final decision in the second quarter
17 of 2013. That's what we really need as a practical
18 matter.

19 And we think there may be some ways of doing that
20 by, for example, providing some of the information that
21 would come in in 2013 after the PSA but before the FSA.
22 Perhaps bifurcating the PSA based on issues, things of
23 that nature. And that's a discussion we haven't fully had
24 with staff, but we think might be productive.

25 With that background, if you wish, I can go on

1 and argue the issues about the surveys that we've already
2 done. It would essentially be what we've already said in
3 the brief. I will highlight just a couple of things and
4 then I would welcome any questions that you might have.

5 The first thing is what I already pointed out to
6 you. And you have a chart of the cost of the different
7 proposals on the table at the back of our brief, a bar
8 graph that shows the magnitude of some of the differences.

9 The second point I would make is you sometimes
10 hear, well, these projects require a lot more information
11 because they're so many more acres, the solar projects are
12 so large or the wind turbines, for example, are so large.
13 That's already incorporated in doing the protocols that
14 we've already done.

15 What's changing here is not what's being asked to
16 do. And, of course, if you're asked to do something
17 across 20 acres and you're asked to do the same thing
18 across thousands of acres, you do a lot more work in doing
19 the same thing for thousands of acres. We accept that.
20 We've already done that. That's why the application for
21 certification is 60,000 pages long.

22 What's being asked for here is qualitatively
23 different information, a kind of information that was not
24 required of other projects, regardless of size.

25 Secondly, there have been some comparisons to

1 other projects that have been licensed. In our brief,
2 we've sited some projects. And in particular, wind
3 projects which we're talking about have -- although I'm an
4 advocate for wind power, I will tell you they certainly
5 have an issue with respect to avian species.

6 But for example, you know, the West Wind Project
7 in Eastern Oregon, 2,000 acres, less than a hundred hours
8 of field observations for eagles permitted at that project
9 recently. The Mojave Wind Project, 38,000 acres, 500
10 hours of surveys. And even the wind projects sited by
11 staff as being a precedent for the amount of work we're
12 doing in the Chokeberry Wind Project, which is 222,000
13 acres, 1,002 megawatt wind turbine. It's a 2,000 megawatt
14 wind field in Wyoming, the equivalent power from a wind
15 project from Diablo Canyon. Our reading of the data for
16 that is that they did not require the same kind of
17 information that we're being asked to provide. In fact,
18 we think they were required to do a lot less. And we can
19 get into more detail than that. We know of no project,
20 frankly, that's being asked to do what we are being asked
21 to do.

22 The most important thing I would say is this:
23 The fundamental question about the impact to birds and
24 bats of this project is not whether there are birds and
25 bats out there and exactly what they are and where they

1 are and how high they fly, all those issues that we are
2 trying to resolve here. The fundamental question is what
3 is the risk of the facility to whatever species are out
4 there. We know there are some birds out there. We know
5 there are some bats out there. The question really is
6 what is the risk of the facility.

7 And we have had a remarkably small amount of
8 attention paid to that question in lieu of lots of issues
9 about frankly paying people to go out and stare at the sky
10 and count what they see, which incidentally I would point
11 out is not mitigation. It doesn't do anything other than
12 develop scientific information. It doesn't reduce the
13 impact in any way.

14 We think that the fundamental question, factual
15 question that you need to decide to go forward on this
16 question, is to look at what is the risk. And we set that
17 out in great detail in the brief. You'll hear perhaps
18 some people say that we don't know what the risk is.
19 That's not true. We actually have real world experience
20 with a very similar project in Israel. And we can talk
21 more about that. And we have flown somebody in from
22 Israel that you can ask questions of about that.

23 We have information also people will point to the
24 Solar I study, which is a specific study of avian impacts
25 of a solar facility of this type done many years ago.

1 Even that study, which is a project which is dramatically
2 more hazardous to birds than the Rio Mesa, will be
3 found -- the actual finding of that study was the impact
4 to birds was "minimal." Less than one percent of an
5 impact.

6 But that project was more hazardous than RMS in
7 several important ways. The most important one being it's
8 focused mirrors during standby operation on only four
9 points in the sky and created energy concentrations at
10 those four points that were many times higher than the
11 standby points for Rio Mesa will be. The Rio Mesa
12 mirrors, no two of them will be focused on the same point.
13 And you will have energy concentrations that are much
14 lower.

15 Similarly, the major impact in that study was
16 that there were impacts with the mirrors -- collision
17 impacts with the mirrors. That project, Solar I, had 126
18 acres of unnetted ponds right next to the mirrors. It
19 also was immediately adjacent to irrigated agricultural
20 land.

21 In the case of Rio Mesa, there will be no acres
22 of unnetted ponds. There will be four acres, compared to
23 126 of netted ponds. But no acres of unnetted ponds near
24 the site. And at least one mile buffer between the site
25 and any agricultural fields.

1 But the most important experience that I would
2 point you to is the actual real world experience at the
3 Israeli facility which is essentially the same technology
4 that we're talking about here. It has a somewhat lower
5 tower. It's smaller. It's only six megawatts. But it's
6 the same technology. The mirrors are the same, et cetera.
7 It's in a major flyway between Africa and Europe. And we
8 have experienced -- we have a witness who is the manager
9 of the facility come all the way from Israel who will
10 testify and they have -- they walk the site every day,
11 that they have seen zero, no bird mortality at that site.

12 Our brief includes a modeling of the heat
13 impacts, and I won't go into that. It includes a
14 calculation that shows that the collision risk from the
15 towers. And incidentally, in the Solar I study, they
16 found no collisions with the towers at that facility. The
17 collision risk with the towers at our facility if you look
18 at the air space occupied by the three towers at Rio Mesa,
19 it is the equivalence of three commercial scale wind
20 turbines. Now, we compared earlier to wind farms that had
21 as many as a thousand commercial scale wind turbines that
22 were asked to do far less than we are being asked to do.

23 Lastly, with respect to the site itself, you'll
24 see phrases like we are in the vicinity of the Colorado
25 River or we are in the vicinity of the Cibola Wildlife

1 Refuge. In fact, the main question that you should be
2 looking at, the main factual question with respect to that
3 is what are the birds that have been found on the site and
4 how do they compare to birds that are found at the river
5 or at the wildlife refuges. Because if we are "in the
6 vicinity" close enough to have the same kind of bird
7 populations, then yes, we're in the vicinity. But if the
8 bird populations are substantially different, then we're
9 not. And that work has been done. That question has been
10 answered.

11 The surveys that we've already done -- the birds
12 that have been found at Cibola found 287 species of birds,
13 including many waterfowl. At the RMS sites, the surveys
14 found 81 species of birds, dramatically less. And the
15 only siting of any waterfowl at all during the entire year
16 of surveys was one time 14 pelicans were sited flying over
17 the site. That's it. That was the only one.

18 So the site is not the same as the Cibola
19 Wildlife Refuge, which is several miles away. It is not
20 the same. It is in the desert. You've been there.
21 You've seen it. You know that.

22 I will stop now and invite questions. But let me
23 just say, A: To reiterate, I think we're actually quite
24 close to reaching an agreement. I'm sorry we weren't able
25 to completely close that prior to today. But we're still

1 interested in having discussions with the agencies to
2 close that last gap if we can do that consistent with our
3 schedule needs.

4 But having said that, we feel very strongly that
5 we have gone well beyond what both the applicable law and
6 the precedent of other projects would require us to do.

7 Thank you very much.

8 HEARING OFFICER VACCARO: Thank you. That was
9 actually a very succinct summary of what's in the briefs.
10 Thank you for not repeating all of it.

11 You did hit I think some of the important high
12 points of it, because those are the very things I think
13 we'd like to hear from staff on, as well as hopefully
14 we'll be able to hear from some of the other REAT agencies
15 on the phone to address some of those concerns.

16 Right now, we're going to keep this pretty much I
17 think at the representative level, meaning the attorneys.
18 Although if there are some technical people from Fish and
19 Game, Fish and Wildlife, or BLM on the line, if
20 Ms. DeCarlo can't facilitate the answers to those
21 questions on behalf of REAT, I think we might ask them
22 some questions. We may very well get to some testimony
23 from technical folks. But right now, I think we're going
24 to keep this at the representative level.

25 So Mr. Ellison, this goes to I guess Ellison

1 Advocacy. You have stated your client's position well in
2 the brief and today. But you used a phrase "life and
3 death." If your client doesn't get a decision by the
4 second are quarter of 2013 -- and those are pretty strong
5 words, because it doesn't really allow for much
6 flexibility on the part of the Committee and the
7 Commission. And while I and I'm sure the Commissioners
8 applaud all of the tremendous effort because I know it was
9 probably not easy to get down to five percent, which
10 really in real terms I think is probably bigger than what
11 we envision is five percent out of 100 percent, you're not
12 giving the Committee or the Commission much latitude if
13 you're saying truly your drop-dead is second quarter 2013
14 when we still have what seems to be quite a bit of
15 evidence we're going to have to get through on some of
16 these very important issues if the parties aren't able to
17 work it out themselves in terms of the schedule. So is
18 this rhetoric? Is this real? What happens? The clock
19 strikes midnight, what happens?

20 MR. ELLISON: It's not just rhetoric. The issue
21 is it's fundamentally driven by seasonal biology
22 requirements. When we get our permit in the fall, we have
23 to relocate desert tortoises on the site, for example. It
24 takes a couple of months at least to prepare to do that in
25 an ordinarily way. If we miss that fall window, it slips

1 at least six months before we can do it again. If we
2 suffer that six-month slip, we cannot build the project in
3 time to meet the power sales agreement deadline.

4 And again, I reiterate that deadline as far as
5 we're concerned is absolutely real. We cannot make any
6 assumption whatsoever that we can negotiate an extension
7 of that deadline in today's world. So when we say the
8 second quarter of 2013, that's what's driving it. And
9 it's not rhetoric at all.

10 I would also say, by the way, with respect to the
11 characterization that we're 95 percent there and has five
12 percent left, I was told that that's what one of the
13 agencies told us that we were 95 percent there. So it's
14 not my number. We believe it's someone else. We think
15 it's right though. We think we're awfully close.

16 But the difference to us is not -- it's not doing
17 the work. We're happy to do the work. It's just that if
18 everything slips until all of it is done, we don't meet
19 the schedule. And that, to us, is not a 95 percent issue.
20 It's life and death. So that's the problem.

21 So if we can find a way -- and we think if we had
22 some further discussions -- and it's possible. I can't
23 say anybody else would agree with it. But we think there
24 are ways of providing that information but holding to a
25 schedule that meets our needs.

1 HEARING OFFICER VACCARO: Thank you.

2 So Ms. DiCarlo, you're up. I notice that you
3 have a PowerPoint loaded and you'd like to do it, and
4 that's fine.

5 The cover page -- and I saw just this briefly
6 when you were doing the test -- said basically REAT
7 response. So does that mean that you are the
8 representative today for the most part for the REAT
9 agencies in addressing this question?

10 STAFF COUNSEL DE CARLO: Staff is representing
11 the REAT agencies agreed-upon responses to the counter
12 proposal contained in their brief. Heather Blair, our
13 staff biologist, is the one who's actually prepared to get
14 up and actually walk the Committee and the parties through
15 the agency's responses and perhaps counter-counter
16 proposal on certain items. And it's a very short
17 PowerPoint presentation. I think it would be helpful for
18 the parties to kind of understand and get in writing
19 basically where the agencies are in terms of the
20 applicant's counter proposal.

21 So we would beg the Committee's indulgence in
22 allowing us to walk you through that.

23 I have some other responses to statements Mr.
24 Ellison has made. But if you would like to get to the
25 nuts and bolts, we could do that in the PowerPoint first.

1 HEARING OFFICER VACCARO: Actually, while it's
2 still fresh in everyone's mind, why don't we address some
3 of the comments that were made by Mr. Ellison. I think
4 we'd all be curious to hear how staff responds because
5 just on the surface of it -- and this is why again I read
6 the brief several times. Each brief said something that I
7 thought was provocative, compelling, interesting, maybe
8 even persuasive. But then I get to the next one and I get
9 to the next one and then I think, wow, this is going to be
10 interesting to see how we can put all of this together,
11 because it doesn't seem as though we're all speaking just
12 different types of oranges. Sounds like we're speaking
13 apples, oranges and perhaps even bananas.

14 So I would like to hear I think first your
15 responses to Mr. Ellison, then do the presentation. Of
16 course, Mr. Ellison, after we get through everyone, you'll
17 get to respond as well.

18 STAFF COUNSEL DE CARLO: Wonderful. Thank you.

19 Let me first start by saying we are sympathetic
20 to the applicant's scheduling concerns, although we would
21 say scheduling is of their own making with regard to their
22 entering into the PPA. We are sympathetic and do
23 understand the need to get these projects moving.

24 However, at the end of the day, we need to ensure
25 that the decision and staff's recommendation is based on

1 substantial evidence in terms of whether or not the
2 project could result in significant impacts. And if so,
3 are they mitigable and have we identified the proper
4 mitigation.

5 So that's staff's main concern, that we have the
6 information we need in order to reach a solid
7 recommendation on the potential impacts to biological
8 resources.

9 HEARING OFFICER VACCARO: Can I pause just really
10 quickly before you go further?

11 I just want to make sure that we're all of the
12 same understanding. Staff is doing an analysis and it's
13 doing fact gathering. But ultimately, it is the Committee
14 and the Commission I think that makes the determination of
15 whether or not there is substantial evidence to support
16 the decision that it's making.

17 STAFF COUNSEL DE CARLO: Correct. And it would
18 just be does staff feel it has the information it needs to
19 make that recommendation to the Commission to the
20 Committee.

21 Mr. Ellison says we need to focus on the risks of
22 the facility. Nevermind what's out there, focus on the
23 risk. However, risk is one component and we have been
24 focusing on that.

25 We have several data requests of the applicant to

1 provide us more information of potential risks of the
2 facility, some of which they've objected to preliminary
3 indicating they'll try to get us the information we need.
4 But we're not ignoring that aspect. But in order to
5 determine risk, you have to know what's out there. You
6 need the environmental base line data in order to
7 determine what could be impacted. And that's what we're
8 talking about here, the base line data in order to make an
9 analysis of potential impacts based on the proposed
10 project.

11 Mr. Ellison references two projects that they've
12 sited to frequently to show why their proposed project
13 doesn't have potential risks that staff is concerned
14 about, Solar I and their facility in Israel, CEDC. Those
15 are orders of magnitudes smaller than the proposed Rio
16 Mesa. This is a very large project using a technology
17 that's very new. Mr. Ellison references certain data
18 "collected" at the CEDC facility in Israel. However, that
19 was done by employees. That wasn't a scientific review of
20 the impacts occurring on a day-to-day basis. So staff is
21 rightfully asking for more detailed information from a
22 scientific perspective.

23 One thing Mr. Ellison mentioned in his briefs
24 that I wanted to briefly address was this accusation that
25 staff in the REAT agencies are establishing a moving

1 target with our survey requests. And that is simply not
2 true. There were a couple of iterations of data that
3 we've been requesting. However, they follow logical
4 order.

5 US Fish and Wildlife Service asked for their
6 survey. They issued their survey recommendation in the
7 middle of June 2011. They had previous discussions in
8 spring regarding those survey recommendations. The June
9 27th was just I believe a written formalization of those.

10 The applicant sites to December 1st and December
11 2nd filings. We're not sure what those are. They could
12 just be a re-submittal of US Fish and Wildlife
13 recommendation. We're unaware of what those were. So
14 those weren't included in what we formally issued.

15 Then we followed up the June 27th recommendations
16 with a REAT group submittal on December 16th identifying
17 the explicit survey recommendation regarding migratory
18 birds, breeding birds and bats. And because the applicant
19 had several questions based on these survey data that we
20 re-issued, we requested data on January 31st
21 clarifications regarding eagle surveys. However, that was
22 just at the behest of the applicants who asked for more
23 information on what exactly we were asking for.

24 And then we followed this all up with our data
25 request, which is a formalization of all the information

1 that we had previously requested. So there really hasn't
2 been an erratic moving target here. We've just been
3 trying to systematically alert the applicant as early as
4 possible to what we identified as data needs in order to
5 ensure they got their people out in the field as soon as
6 possible to get the information collecting. So we
7 wouldn't delay the process any further.

8 And I believe I talked about the potential
9 hazards of the project and staff will go into more detail
10 about that. But there are several potential concerns with
11 this project, which is why it's so important to get the
12 underlying base line data to know what's out there that
13 could be potentially affected.

14 Possibilities are collision with towers. There
15 are three 760 foot towers out there. Especially at
16 nighttime, those may not be visible depending on the
17 lighting situation. There are birds who migrate at night.
18 That's a serious concern.

19 Potential collision with mirrors, another concern
20 which was obviously seen as a potential problem at the
21 Solar I facility. Although given the size of that
22 facility, the magnitude may be different than this one,
23 which is orders of magnitude different.

24 The impacts from the heat flux emanating from the
25 facility and the mirror standby points, that's information

1 we've asked to applicant to get us. We have engineers
2 assigned to help our biology staff understand kind of what
3 that means in the real world.

4 And there's also potential for blinding as birds
5 fly through these areas with light emanating. We don't
6 quite know the effect that could have. Could it be
7 blinding or even temporary visual impairment could be
8 potential problems. So those are the areas that we're
9 concerned about.

10 And so now I guess I'll just turn to staff.
11 Heather Blair will give our presentation on the REAT
12 agencies' response to the applicant's counter proposal.
13 And we'll also go into more detail about our concerns for
14 the project. And we also have Scott White here to follow
15 up with any questions the Committee might have.

16 HEARING OFFICER VACCARO: Just before we get
17 started with that and go ahead and go to the podium, I'm
18 not stopping you from doing that when you need to.

19 When you made reference to the applicant's
20 counter proposal, you're talking further back in time than
21 the counter proposal to the REAT -- December REAT
22 recommendation or are you talking about something else
23 now?

24 STAFF COUNSEL DE CARLO: This is their most
25 recent counter proposal. We've had different waves of

1 discussion about the various survey requirements. This
2 PowerPoint presentation is our response to their most
3 recent counter proposal in their reply brief. I believe
4 it was fully flushed out and hinted at in their opening
5 brief.

6 HEARING OFFICER VACCARO: Okay. Thank you.

7 MS. BLAIR: Good afternoon, Commissioners and
8 Advisors. Heather Blair, Aspen Environmental Group,
9 contractor to the California Energy Commission.

10 Staff put together this presentation -- yes.
11 Okay.

12 With items of concern to the REAT agencies
13 regarding the technology risks. And this really formed
14 the basis for our request for this additional survey
15 information. Lisa DiCarlo ran through a lot of it. I'll
16 run through it, try to summarize things, keep it brief,
17 keep it quick.

18 HEARING OFFICER VACCARO: But before you do --
19 again sorry -- I need to for the record be clear.

20 Typically, when you would speak to the
21 Commission, we would have you sworn in and you would be
22 giving testimony. Today, what you're giving is a
23 presentation. And at this point, we're not taking sworn
24 testimony from anyone because this part I don't believe is
25 in the nature of an evidentiary proceeding or an

1 evidentiary hearing. So I just want everyone to be clear.
2 We've got an agent of the REAT group giving a presentation
3 representing I guess the consensus at this point of the
4 REAT agencies. But I'm looking at you as being somewhat
5 on par with Ms. DiCarlo which is your being a spokesperson
6 at this point. But I'm not asking you to give sworn
7 testimony.

8 MS. BLAIR: Understood.

9 The Energy Commission is required to evaluate
10 this project under both CEQA and the California endangered
11 species act in partnership with our sister agency, the
12 California department of fish and game. Other partner
13 agencies include the BLM, which evaluate this project
14 pursuant to NEPA, as well as the United States Fish and
15 Wildlife Service, which must have an adequate base line to
16 potentially permit this project under the Bald and Golden
17 Eagle Protection Act, as well as evaluate it under the
18 Migratory Bird Treaty Act.

19 Given these responsibilities, the agencies will
20 consider several project factors in our impact analysis.
21 The first is the hazard that the technology poses. And
22 I'll go into that in subsequent slides. The project is in
23 a major migration corridor. It is in a branch to the
24 Pacific flyway. The project will result in extensive
25 habitat loss. And this habitat loss is of cumulative

1 concern in the Colorado River corridor given the other
2 energy projects that are proposed in the vicinity.

3 Next slide, please.

4 So several workshops have been conducted where
5 BrightSource explained their technology and the risks to
6 birds and bats. The REAT agencies agree that these
7 factors do, indeed, propose risks to birds. First being
8 the concentrated light and the energy flux near the tower
9 and the standby zones, which could result in injury or
10 mortality to the birds.

11 I think it's important to point out that although
12 BrightSource typically points at several comparative
13 projects to show that Rio Mesa is relatively benign, we do
14 not understand what the thresholds of the energy flux are
15 for injury to birds.

16 Also as Lisa mentioned, collisions with the
17 heliostat mirrors and towers is of concern as well as the
18 environmental setting. The project does support a diverse
19 assemblage of birds, specifically in the microphyll
20 woodlands on the project area. And more importantly, it
21 is surrounded to the east by national wildlife refuge,
22 irrigated agriculture, and extensive wetlands. And as I
23 said before, it is in a major migratory flyway.

24 So again, this slide is intended to sort of
25 mirror what staff has seen from BrightSource and the

1 agencies have seen from BrightSource several times, which
2 is a comparison of two other operational solar facilities
3 that employ similar technology. The first is the Solar I
4 facility in San Bernardino County and the CEDC facility in
5 Israel.

6 This slide presents these factors from the
7 agencies' point of view I would say. So regarding project
8 acreage, I'd like to point out that the Rio Mesa project
9 is much, much larger than the other two projects that are
10 used as a comparison for trying to say that Rio Mesa is
11 indeed benign.

12 With regard to the mirrors, the heliostats are,
13 indeed, smaller than those at Solar I, but the coverage of
14 the heliostats on the project area in terms of square feet
15 is again much, much larger. The two comparative power
16 tower projects have one power tower. The Rio Mesa one has
17 three towers, which are more than twice as tall. And
18 regarding adjacent land use and habitat, all three
19 projects provide habitat for birds and wildlife.

20 In regards to bird mortality, as Lisa mentioned,
21 the Solar I facility does have a peer reviewed and
22 published article documenting mortality on the Solar I
23 site. The CDEC project has no such scientific
24 information. And as we know for Rio Mesa, it's unknown at
25 this point what the risks are to birds.

1 Now I have a series of about three slides that go
2 into pretty exhaustive detail about where we are with our
3 agency determination after review of the applicant's
4 counter proposal. I'm not sure if you want to address
5 that at this point or we can hold it for later.

6 HEARING OFFICER VACCARO: Hi points. It seems
7 like you can tell us the bottom line for each of these.

8 I mean, I appreciate the level of work involved,
9 but I think we could be here for quite a while. And then
10 it starts to sound a little bit more like testimony than
11 just giving us the most critical pieces of information
12 that we need to move forward with the threshold question
13 of what are the milestones going to be for this project.

14 MS. BLAIR: Understood. And I would agree with
15 the applicant's characterization that we're 95 percent
16 there. I'll just run quickly through the differences in
17 the agency's determination of each of these survey
18 categories.

19 The first being for migratory birds. As the
20 applicant mentioned, they are not proposing to do winter
21 surveys. We are not in agreement there. We do think that
22 surveys are necessary between December 15th and January
23 31st. This is the peak winter use season, and it is
24 needed to understand the magnitude and abundance of bird
25 usage year round.

1 Similarly with regard to raptor migration, the
2 applicant is not proposing winter surveys. We again feel
3 they are necessary in this peak winter use season.

4 Golden eagle, the REAT agencies concur with the
5 applicant's proposal with a couple caveats. The first
6 being that the assumption should be put forth that any
7 nest, regardless of its condition, should be considered
8 potentially active. And this is in agreement with what
9 the applicant's consultant, Pete Bloom, had said during a
10 recent consultant meeting. And the service wanted to
11 emphasize this determination as a highly project specific,
12 that they may not make the same determination, especially
13 with regard to the need for early season surveys for other
14 projects.

15 With regard to GILA woodpeckers and breeding
16 birds, this was not mentioned by the applicant, but it is
17 one where we continue to have disagreement.

18 The applicant would like to do fewer surveys than
19 the REAT agencies think is necessary. The applicant would
20 like to do three. We state that eight are, in fact,
21 needed. And it's important to point out that the GILA
22 woodpecker surveys are also intended to encompass all
23 surveys for breeding birds. So at least eight are needed
24 to encompass both GILA woodpeckers and breeding birds.

25 The applicant is also proposing to survey of a

1 smaller area surrounding the project. They're putting
2 forth 500 feet. We originally wanted one mile. We'd like
3 to compromise at a quarter of a mile off site, which would
4 be in consideration of the GILA woodpeckers' home range
5 and also allow for an analysis of potential impacts to the
6 microphyll woodlands downstream of the project.

7 Another area under this topic is that the
8 applicant is proposing to assume presence of -- assume
9 occupation of GILA woodpeckers if they are detected during
10 the first two surveys for the species. But we need
11 absolute counts pursuant to the California Endangered
12 Species Act for our evaluation so that we can understand
13 how many individuals would be impacted or the number of
14 nesting pairs.

15 Also with regard to Elf Owl. Here's another
16 point of disagreement. The REAT agencies maintain that
17 they are needed. The applicant does not want to conduct
18 them, and we're looking for a determination from the
19 Committee here regarding this topic. We maintain that
20 they must be conducted to determine whether the species
21 occurs on site. And if it does, again, we need to have
22 absolute counts to determine the number of individuals
23 that could be impacted. This is based on the presence of
24 marginally suitable habitat on site and records of the
25 species occurring in similar habitats in Riverside County.

1 With regard to the last two, bat monitoring and
2 radar, happy to report that we are on the same page with
3 the applicant there.

4 Next slide.

5 And this just provides a summary of the agencies'
6 determinations.

7 HEARING OFFICER VACCARO: If we could just go
8 back to the slides that you were just discussing. And
9 again forgive me because I'm not a technical person. I'm
10 pretty much a lawyer and I think like a lawyer. So I need
11 just a little bit of education, because you used the
12 phrase "necessary" several times talking about everything
13 up until we got to I think the Elf Owl. And then you
14 started specifically talking about what CESA under CESA
15 you need absolute counts. But before that you were using
16 the very generic term of we believe is necessary. What
17 does necessary mean? Is it necessary for determining
18 whether there needs to be mitigation? Necessary for
19 fashioning the appropriate mitigation? I guess it's just
20 such an ambiguous term to me. Maybe it has technical
21 meaning. But I don't understand specifically when we've
22 got some difference of opinion over whether or not it's
23 necessary -- what are you meaning by that?

24 MS. BLAIR: By necessary, we mean that it is
25 necessary. It's -- required isn't the right word either,

1 I suppose.

2 But it is needed for us to establish an adequate
3 base line from which to evaluate impacts pursuant to CEQA.
4 It's also necessary needed from the agencies to be able to
5 conduct their evaluations regarding permit issuance under
6 their regulation.

7 So with regard to the absolute count, that's
8 another I guess a differentiator that more specific detail
9 would be needed in those cases because you're dealing with
10 the California Endangered Species Act.

11 HEARING OFFICER VACCARO: Okay. Thank you.

12 MS. BLAIR: Was that helpful?

13 HEARING OFFICER VACCARO: It helps me understand
14 how you're using this term, yes. Thank you

15 So because I had those questions on my mind, can
16 you get us to the last slide then after the charts here?
17 Because I think you were just starting to --

18 MS. BLAIR: This just presents a summary of the
19 table. These are the agency determinations for each of
20 the categories. Again, knowing that great progress has
21 been made, that we are close, there's just a few areas of
22 disagreement remaining.

23 HEARING OFFICER VACCARO: Is there anything at
24 all that would cause staff or the REAT agencies to shift
25 position? I mean, it seems as though you've been having

1 workshops and you're compromising on certain things. Are
2 these compromised areas or are these non-negotiables?
3 Just as we're hearing second quarter of 2013 is a
4 non-negotiable on the part of the applicant, I'm trying to
5 get a sense where are you? We hear you're at about a five
6 percent. Can that five percent be close to zero percent
7 or two percent? Or is this really an issue or a set of
8 issues that must be decided at the Committee level?

9 MS. BLAIR: Well, I think the Elf Owl is one that
10 needs to be decided at the Committee level. I'm looking
11 to the applicant to give me a sense of how they feel about
12 discussing things further.

13 And then with regard to the other items as far as
14 breeding birds, I see that as pretty minor. I mean, we're
15 talking about eight versus three all within the same time
16 frame essentially of the spring. I don't think that would
17 affect your schedule.

18 And then with regard to the need for winter
19 surveys, that I don't think pushes your schedule too far.
20 That would be concluding January -- the end of January,
21 2013. So I think the --

22 MR. WHITE: I wonder if I could add a couple of
23 words to that.

24 HEARING OFFICER VACCARO: And you are?

25 MR. WHITE: Scott White, Aspen Environmental

1 Group contracting biology staff to the Energy Commission.

2 What I just wanted to add is biology staff have
3 worked through these questions with the applicant in I
4 think three workshops now. And we've held multiple
5 meetings with the REAT agencies.

6 We've also been talking to Robert McKernan, who
7 is one of the authors of the study at the Solar I plant
8 and also an expert on birds in the desert. All of those
9 people are on the phone to answer questions if you're
10 interested.

11 But bottom line at this point, staff is to the
12 position where we sincerely believe this is data that's
13 needed to do an adequate CEQA and California Endangered
14 Species Act analysis of the projects potential impacts.

15 And the applicant has emphasized -- has
16 emphasized that while we know there are birds and bats
17 there, let's move on and figure out what the potential
18 hazards are. We want to emphasize we are working towards
19 understanding of potential hazards and look forward to
20 more workshops with the applicants on that question.

21 And yes, we do know there are birds and bats out
22 there. What we don't understand or have adequate data to
23 really support is how many and when and the species
24 diversity. And we've multiple times talked about the
25 major migration pathway and the wildlife refuges in the

1 area. And we continue to believe there is a serious
2 concern with many, many birds in this part of southern
3 California. And we need a solid base line to analyze that
4 potential impact for both endangered species and for more
5 common migratory species.

6 HEARING OFFICER VACCARO: Okay. So then correct
7 me if I'm wrong. But it sounds as though there's not much
8 room for further compromise on virtually all of these
9 areas, except for the one where you were noting the
10 difference between the three and the eight; is that
11 correct then, Ms. Blair?

12 MR. WHITE: That's not a spot for compromise. We
13 really do believe we need those eight field surveys for
14 both breeding birds during springtime and the State listed
15 endangered GILA woodpecker to quantify take under CESA and
16 to evaluate the abundance of birds on the site.

17 HEARING OFFICER VACCARO: Okay. So then one more
18 time, so then is there any room whatsoever for compromise
19 with respect to the items that were just presented in the
20 charts? Are they non-negotiables? I mean, I hate to put
21 you on the spot. But we could have so many more of these
22 status conferences where we talk but don't hit the point.

23 And if the point is they're non-negotiable is
24 second quarter 2013 and the REAT agencies' non-negotiables
25 are the items on the chart, I think that really helps

1 everybody understand the playing field. Because we
2 haven't had the benefits of being in the workshops or
3 really understanding it from the technical perspective
4 that you do. So these charts are so helpful.

5 MS. BLAIR: Right. I understand your question.
6 And I guess given the extent of the compromise on both
7 sides, we're kind of at a point where, yeah, this is sort
8 of the -- we thought we were at the minimum level before.
9 And I think we're really at the minimum level with what
10 we're asking for here. So I guess take a hard line, you
11 know, with your question, yeah, this is -- suppose there
12 isn't much room for compromise.

13 HEARING OFFICER VACCARO: And I appreciate that.
14 And perhaps sometimes folks aren't so used to me being
15 that direct. But I think sometimes to move it forward
16 it's necessary that we're all sort of understanding things
17 exactly the same way.

18 I have another question for the REAT group.
19 Ms. DiCarlo, I don't know if you're the one to answer it
20 or Ms. Blair. What happens hypothetically if you don't
21 get this information, the REAT, that it believes is so
22 essential? What does that mean for your ability to write
23 an environmental document?

24 MS. BLAIR: Well, I'm not a lawyer, but we would
25 have gaps in the analysis. And I would be concerned there

1 would be vulnerabilities in the defensibility of our
2 document.

3 HEARING OFFICER VACCARO: Defensibilities of the
4 document or defensibility of the ultimate decision?

5 MS. BLAIR: Of the decision.

6 HEARING OFFICER VACCARO: Ms. DiCarlo, I think
7 maybe you might want to weigh in on this.

8 STAFF COUNSEL DE CARLO: I would imagine it would
9 result in a staff recommendation where staff could not
10 reach a conclusion on the benignness of the project in
11 certain circumstances, that staff would not be able to
12 recommend that the project would not result in a
13 significant adverse impact because they lack the
14 information in certain areas on which to base that
15 conclusion.

16 HEARING OFFICER VACCARO: Okay. So just ensuring
17 I further understand. So staff could still put together
18 as much of a biological resources analysis as was possible
19 based on the known data, but this missing essential
20 data -- again, this is all hypothetical, just trying to
21 understand the import of all of this.

22 Staff would explain ensuring that it was doing
23 everything -- all the technical folks were truly being
24 represented fairly that here's what we don't have and
25 here's why we don't reach a conclusion, but here's the

1 recommendation we have because of that. Would we still
2 get a recommendation? Or would it just be a matter of
3 there's nothing that we can say about this because we did
4 not obtain or did not receive the essential data that was
5 required.

6 STAFF COUNSEL DE CARLO: I don't think you would
7 get a recommendation for project approval. I'm not sure
8 that staff would recommend project denial outright.

9 There is also the question of whether or not we
10 could fold in take permits without certain of the
11 information if they involved the CESA listed species.

12 HEARING OFFICER VACCARO: But that would be
13 articulated by staff basically saying here is the domino
14 effect or here's what's going to happen as a result of our
15 not having this information.

16 STAFF COUNSEL DE CARLO: Right. And we've issued
17 PSAs before in not necessarily biology but in other
18 technical areas where we haven't had all the information
19 we expected to get it by the FSA stage.

20 The slight difference here is that we're still
21 proposing a joint document with BLM. And they aren't able
22 to issue their draft document until they have all the
23 information they need in order to do the analysis because
24 they've done it in the past apparently with missing
25 information. They've had to re-circulate their DEIS. And

1 they've discovered it doesn't save any time. It actually
2 potentially creates more of a time sink than waiting for
3 the information.

4 So, whereas, in the past staff was willing to
5 issue a PSA with holes, we are probably less able to do so
6 here with that approach if we want to maintain our
7 cohesiveness and our joint approach with BLM, which we do
8 at this point.

9 HEARING OFFICER VACCARO: Thank you.

10 And I think that's why, speaking for myself, it's
11 very informative to have you representing the REAT agency
12 and where there is consensus, because I think there have
13 been both allegations -- and I think what we've seen in
14 the record where Fish and Wildlife Service has made
15 further recommendation beyond what was in the December
16 recommendations submitted by Pierre Martinez.

17 And that really gets to the other part of the
18 question. Was one year enough? I understand applicant is
19 saying one year additional is too much, but we're willing
20 to compromise to a large extent, except for on this part
21 where we disagree.

22 But that leaves hanging the question -- the
23 second part of my question, which is what about Fish and
24 Wildlife Service saying we understand that we agreed that
25 at least one more year would be necessary, but we think

1 it's really more than one more year.

2 And I didn't hear Mr. Ellison address that, but
3 we are going to get back to him. Staff addressed it in
4 the brief, and it sounded to me like that is a place where
5 staff is willing to have a point of departure with Fish
6 and Wildlife Service.

7 STAFF COUNSEL DE CARLO: Well, recognizing that
8 Fish and Wildlife Service is concerned with federal
9 statutory requirements, and while we are too, our permit
10 doesn't hinge on ensuring the completeness of those permit
11 requirements prior to issuing -- completing our review.
12 So we are committed to one year. The REAT agencies are
13 committed to one year.

14 I don't know -- Heather may have more information
15 about what subsequent to that Fish and Wildlife Service
16 may require of the applicant, if anything. But for our
17 needs, for staff needs to provide the Commission, the
18 Committee, with our recommendation, our analysis, we're
19 committing to doing it with the one-year surveys that we
20 identified.

21 HEARING OFFICER VACCARO: Okay. I think at this
22 point we've got Eileen Anderson on the line. I don't
23 know -- Lisa Belenky had been on the line. Center for
24 Biological Diversity, would you like to weigh in on this?

25 MS. BELENKY: Yes, we would. And I think I'm

1 going to have Eileen make a few comments as well.

2 But I just wanted to say on the issue that was
3 just being discussed a few minutes ago as far as what is
4 necessary, I think we very much concurred with what staff
5 appeared to be necessary, which is what is necessary for
6 the base line under CEQA and what is necessary for the
7 permitting under CESA may well be different things. And
8 that is something that needs to be very clearly defined.

9 This whole question of permitting in this case
10 and other -- that the Commission has the adequate data and
11 is following a procedure that at least matches
12 substantively the procedure that the expert agency would
13 have followed. It's very, very important for these issues
14 and particularly important to the Center.

15 I don't think there's any question that the
16 Commission can ask for additional data, and I don't
17 believe anyone has made that argument but they could not.
18 But it is the discretion of the agency, in this case, the
19 Commission. It is not up to the applicant to make that
20 decision.

21 And so again, the Center has in the past had some
22 problems with this whole idea that this was all a
23 negotiations. To some degree it may seem that way, but it
24 has to be ultimately the agency that is making a
25 discretionary determination about what data is needed.

1 And it cannot be simply a back-and-forth between the
2 applicant and the staff. That seems to us to be both
3 shutting out the rest of the public in understanding what
4 is going on and allowing a decision to be made not at the
5 level of the agency, or in this case the Commission.

6 So I'm going to turn it over to Eileen Anderson.

7 MS. ANDERSON: Yeah, I'm here. And I wanted to
8 bring up an additional issue that we've recently made a
9 data request on with regards to the desert kit fox and our
10 concerns there. And it's sort of being overlooked in
11 impacts to that species which is protected as a
12 fur-bearing mammal in California.

13 And our concerns stem from the fact that so many
14 kit foxes have been -- have died on the Genesis project
15 site. And so the notion of full disclosure of how many
16 kit foxes are on the project site and the application for
17 a take permit based on the number of kit foxes that could
18 be impacted is something that seems to be being overlooked
19 by both the staff and its applicant or at least
20 downplayed. It should be fair downplayed very much, which
21 for not having substantive requirements for how many dense
22 and the population -- an estimate of the population on the
23 site.

24 HEARING OFFICER VACCARO: Ms. Anderson, I'm aware
25 Center for Biological Diversity just propounded some data

1 requests. I have not looked at them. But I'm wondering,
2 do those data requests address some of these issues you're
3 now raising with respect to the kit fox?

4 MS. ANDERSON: They do. They ask for that
5 specific information.

6 HEARING OFFICER VACCARO: Okay. So that even
7 if -- as Ms. Belenky pointed out, even if applicant has a
8 point of view and even if staff with the REAT agencies
9 have a point of view that might even be simpatico, you're
10 absolutely right in pointing out that doesn't mean that
11 everyone is in agreement. And I suspect your data
12 responses are showing that you have some level of interest
13 and disagreement with what you've read and what you're
14 aware of to date; is that correct?

15 MS. ANDERSON: That's correct.

16 HEARING OFFICER VACCARO: Okay. We do have an
17 item to discuss kit foxes a little bit later. So I think
18 if I can find out.

19 Do you have anything else to add with respect to
20 the bird and bat surveys that have been at issue? And if
21 you'd like to restate some of your kit fox comments when
22 you get to that item, we'd be happy to hear from you.

23 MS. ANDERSON: Okay. I don't think I have
24 anything to add on the perspective of the bird and bat at
25 this time.

1 MS. BELENKY: This is Lisa Belenky.

2 I just wanted to add I think we're not going to
3 reiterate what the staff said, but we do very much agree
4 with staff on the point regarding the comparisons to other
5 projects, the two relatively smaller projects that have
6 already been built and operated. This is orders of
7 magnitude larger than that. And we disagree strongly with
8 the way the applicant has sort of framed the McCrary
9 study. But that I think is for another time, not at this
10 hearing today.

11 HEARING OFFICER VACCARO: Okay. Thank you.

12 I think at this point we've heard from the
13 parties on this topic. I told Mr. Ellison we'd hear from
14 him again. We've heard quite a bit from the REAT agencies
15 at this point. We have a sense for Center for Biological
16 Diversity's concerns. Perhaps you can respond to the
17 things that you believe merit particular response. I
18 don't think everything that's been said has to have a one
19 for one response.

20 MR. ELLISON: Thank you. And no, I'm certainly
21 not going to respond to everything, but I will respond to
22 what I think are a couple of key things.

23 First, we actually did -- and I would say to some
24 degree we think for the first time did hear some
25 compromise to the REAT agencies, at least if I understood

1 correctly. And this is partly clarification. The winter
2 surveys you're looking for would end on January 31st,
3 December 15th, and January 31st. That's six weeks.

4 MS. BLAIR: This is Heather Blair.

5 I noticed that typo. It is the 30th, not the
6 20th of January.

7 MR. ELLISON: Okay.

8 MS. BLAIR: I was kind of hurrying through that.

9 I wanted to say that we do concur with you
10 stopping on I think it was November 1st. Let me just
11 confirm. Yes, stopping November 1st pending our review of
12 the existing data that you will be providing regarding
13 bird use in the area. But we do need that six-week window
14 of peak bird use surveys in the winter.

15 MR. ELLISON: Okay. We appreciate the six weeks
16 and wanted to clarify that.

17 Secondly, let me ask -- start with a place where
18 I agree with Ms. Belenky. We completely agree that it is
19 the Committee that makes and ultimately the Commission
20 that makes the decision about schedule and makes the
21 decision about what information is required. We certainly
22 don't see ourselves making that decision or "negotiating,"
23 but we certainly have input like everybody else does as
24 you make that decision.

25 And in that regard, let me get to what I think is

1 the two fundamental questions. The first is I think the
2 one that Ms. Vaccaro so accurately asked about. What does
3 it mean to be necessary? The real question is how much
4 information is enough. There is no law that says you have
5 exactly this information -- or let me be more clear.
6 There is such a law. It is Appendix B on data adequacy.
7 We've long gone past that. We've met that a long time
8 ago. And there are some cases and there are certain
9 things that are specific things about information, but
10 generally speaking, what we're talking about here is a
11 judgment call, is a judgment by various experts and policy
12 makers balancing a set of interests about how much
13 information is enough to make a decision that's supported
14 by rationale substantial evidence. But at the same time
15 is not all the information that could possibly exist.
16 There are lots of cases out there, and we've sited some of
17 them to you that say that the Committee and the Commission
18 needs to balance not being burdensome, making a decision
19 within a reasonable time and all those other questions.

20 And with that, let me get to a specific example
21 of what I'm talking about when we see this disagreement
22 about how much is enough. It's -- for example, let's tack
23 the Elf Owl. If I said elephant, I misspoke. The
24 Elephant Owl is a whole other species.

25 My understanding is -- and our biologists tell us

1 there has not been a sighting of the Elf Owl in the lower
2 Colorado River in the last 20 years. We believe we're
3 being asked to look for something that isn't there and
4 that nobody has seen in 25 years, which involves proving
5 the negative, how much information, how hard do you have
6 to look for something that isn't there before you're
7 confident it's not there? Okay. A lot of this is related
8 to that sort of thing, proving the negative.

9 Some of the safety issues here are also related
10 to proving the negative. And that again is a question.
11 We think the information that you already have, which
12 includes this, would give you plenty of insight into
13 deciding whether there is going to be a significant impact
14 on this species that hasn't been seen there in 25 years.
15 REAT agencies disagree. Okay.

16 The second point I want to make has to do with
17 what I meant by the risk characterization. If you were to
18 decide, let's say hypothetically, that this facility poses
19 no unreasonable risk to whatever avian species are out
20 there, if hypothetically you made that judgment, then it
21 wouldn't matter what species were out there because
22 they're not at risk. That's fundamentally our position,
23 okay. We're not saying there is zero risk. There is some
24 collision risk. But the risks are quite understood.

25 And with respect to, for example, the heat risks

1 that we're talking about, for example, the solar flux
2 concentrate at CEDC at the Israel facility is higher than
3 it will be at Rio Mesa, despite the difference in the size
4 of the projects. All of those heat issues are absolutely
5 well understood. We've done modeling that's in our brief.
6 We have an expert flown here from Israel who's happy to
7 testify about it. The scale of facility on those kinds of
8 issues really makes no difference.

9 And as far as the scale of the facility with
10 respect to collision risk, that can be scaled up.
11 Collision risk is quite well understood. There are a
12 thousand wind machine -- wind projects that have looked at
13 collision risk with spinning blades, for heaven's sakes --
14 I mean, if we are using common sense here -- in some great
15 depth. This is not some new exotic risk that we don't
16 understand.

17 And the last thing I would say about the Solar I
18 study having been -- it's been suggested we've
19 mischaracterized it -- we've quoted it. The quote when
20 they said they found the risk is minimal, those aren't my
21 words. Those that's a quote from the Solar I study.
22 Okay. So these issues about how much information is
23 enough are very subjective.

24 If the question is can you survive a lawsuit and
25 the question will be is there substantial evidence in the

1 record to support the decision that you make. We've
2 submitted an application that's 60,000 pages long. We're
3 proposing now to supplement that with a year's worth of
4 additional survey data. Several thousand hours of
5 additional survey data. I'm more than happy to go in
6 front of any judge in California and argue that there's
7 substantial evidence in the record on these issues.

8 The last point I'd make is probably the most
9 important one, which is this. We are, we think, very
10 close with the REAT agencies on these issues. We do have
11 these remaining issues. As I've said earlier, our concern
12 is not money. In a couple of cases, it's issues of sort
13 of principle about looking for things that aren't there
14 and that sort of thing. But fundamentally it's about
15 schedule.

16 And if I've sounded as if I'm being
17 uncompromising in saying the second quarter of 2013, for
18 two points on that. First of all, that's not driven by
19 internal BrightSource considerations. That's driven by
20 issues that I have explained to you that are not within
21 our control.

22 And secondly, that's a very significant
23 compromise from the twelve-month schedule that we thought
24 we were entitled to by statute when we filed. And we are
25 making a significant compromise. We are reaching out, in

1 our view, quite significantly to the REAT agencies on
2 these issues.

3 And by the way, I should have mentioned that our
4 compromised proposal was developed in concert with -- we
5 went to the REAT agencies, including your staff, and said,
6 who's the James Audobon? Who's the person that you would
7 most trust on these avian issues? And the name that came
8 up was Dr. Pete Bloom over and over again. We've hired
9 Dr. Bloom to advise us on developing this compromise
10 proposal. And he's here and prepared to testify, if
11 necessary, on these issues.

12 And by the way, it's his birthday. We
13 particularly appreciate him coming in on his birthday to
14 advise on these questions.

15 So there is a lot behind this. And not just a
16 lot of technical expertise, but a lot of effort to reach
17 out and compromise on the part of my client.

18 And that leads me to the last thing. In terms of
19 bridging this last gap, the conversation that I would like
20 to have is a conversation about can we have a win-win.
21 Can we create a schedule that meets our needs and still
22 provides the information -- the last piece of information
23 that the REAT agencies need? There would have to be some
24 creativity involved in that. There would have to be some
25 changes in the normal course of business.

1 But I've seen the Commission do similar things in
2 the past. And I think there may be a conversation to be
3 had there that could ultimately result in a schedule we
4 can live with and still provide everything the agencies
5 are asking for.

6 HEARING OFFICER VACCARO: How does the cultural
7 resources issue fit into that, Mr. Ellison?

8 MR. BIERING: I can speak to the cultural issues.
9 This is Brian Biering on behalf of the applicant.

10 We were very concerned with the contention of the
11 staff brief that evaluation of cultural resources would
12 take 14 to 32 months. We believe that in light of our
13 existing efforts, which have been very substantial and
14 produce more than a 25,000 page record, the cost of the
15 applicant would be approximately \$2.5 million.

16 The applicant has followed the staff's advise and
17 BLM's decision regarding the existing surveys. And that
18 being said, going forward, we've identified through our
19 response and the data requests a number of areas where
20 some of the information that staff is requesting is
21 already part of the information and technical report.

22 And with respect to some of the archaeology
23 surveys they've requested, we believe we can provide them
24 much faster than the 14 to 32 months staff has estimated.
25 In our reply brief, we estimated that would take

1 approximately three to four months. And our cultural
2 resources specialist from URS is on the phone to answer
3 questions about that schedule, if the Committee has any
4 questions.

5 And finally on the paleontological issues, part
6 of what staff is requesting really requires we believe the
7 Committee to take a broader look at multiple subject
8 areas, soil and water, for example, biological issues,
9 because the technology that we employ doesn't have a
10 significant impact on those resource. We vibrate pylons
11 into the ground rather than trenching. And to trench and
12 do the level of excavations that staff is requesting
13 through their data requests will basically create
14 biological soil and water impacts that wouldn't otherwise
15 be there. And we are developing a plan to work with staff
16 to get them some of their information needs, but there's
17 very serious concern on our part that if we are required
18 to do the trenching that's called for in those data
19 requests, we'll need the Committee to look at the other
20 impacts to other resource areas.

21 So in sum, I think we can provide a lot of this
22 information and a schedule that won't impact the overall
23 schedule for the siting case and still meet a lot of what
24 staff is requesting for.

25 HEARING OFFICER VACCARO: I don't mean to sound

1 oppositional, because I think it is not a small thing or I
2 think done lightly, the level of compromise that the
3 applicant is willing to engage in to keep this moving
4 forward and to meet all of its business objectives. I
5 think what I'm not hearing -- and maybe it's me and maybe
6 it's because there have been a lot of words used, you're
7 looking for a certain schedule. Again, second quarter
8 2013 is what you've said.

9 We have a proposal that involves cultural
10 resources that has us out into 2015 based on staff's
11 schedule. And we'll hear from them. But even if we are
12 looking at just the biological resource, Mr. Ellison, you
13 said, look, we can give them what they want. We just need
14 to figure out the schedule. Are you really going to give
15 them everything that they say is necessary and it's just a
16 matter of working out the dates? Because then to me I
17 listen to that and say great, have another workshop and
18 get that figured out then. How you can get them what they
19 say is necessary and meet the schedule that you must have.
20 But I guess I'm really not seeing this quite yet.

21 MR. ELLISON: Let me be a little more specific.
22 And I apologize if perhaps I'm not being specific enough
23 before.

24 The kinds of ideas I'm talking about are ideas
25 like this. If the staff were willing to produce a PSA

1 based upon the information we've already offered and then
2 include the additional information, the five percent
3 that's in dispute in the final staff assessment, that's
4 one constructive idea that might help bridge the schedule
5 gap.

6 Another one that we think might be very helpful
7 is if staff or the Committee were willing to bifurcate the
8 PSA and FSA and deal with as many issues that are
9 unrelated to these data questions that we're talking about
10 now and get them done and isolate those issues that are
11 tied to this data. There are some other ideas that we
12 could throw around as well. Those are the kinds of ideas
13 I'm talking about.

14 If we have to essentially just put everything on
15 hold until January 30th until the last piece of biological
16 information comes in, we think there is no hope of meeting
17 the schedule.

18 And so it's that kind of conversation. We really
19 haven't had that exact conversation to this point because
20 we've been so far apart that it doesn't matter. But now
21 as close as we are, it brings into play some of these
22 other ideas that perhaps would allow us to bridge the gap.

23 Now, Mr. Biering is the person to address the
24 cultural issues, but I can tell you that a great deal of
25 the information that staff is asking for on a cultural and

1 paleontological issues is either information we've already
2 given them and we have to show them where it is in the
3 massive amount of information we've provided or it's
4 information we think we can provide in a much shorter time
5 than staff believes.

6 There is, however, some information -- and it's
7 particularly trenching. And Mr. Biering was talking about
8 on the paleontological side that we have not only
9 scheduling concerns with but even more fundamentally
10 concerns that is essentially a cure worse than the
11 disease. It's a data request that causes the project to
12 have very substantial impacts outside of paleontological
13 resource, biology, water, et cetera, that the project
14 would otherwise not have.

15 And we even had discussion apparently about from
16 paleontological staff about changing the way the pylons
17 are set in the ground that we believe would remove one of
18 the major environmental advantages of the BrightSource
19 technology, which is it does not disturb the site in the
20 same way that many, many other solar projects do. We
21 don't grade. We don't gravel. We don't do a lot of
22 trenching and drilling and all that sort of thing. We
23 just vibrate the posts into the existing environment. And
24 that's an advantage we'd like to preserve for the
25 biological issues that we're talking about here and for

1 the water issues that we're trying to preserve. As with
2 we try to balance all of these questions, we have those
3 concerns as well as the schedule concerns.

4 HEARING OFFICER VACCARO: Fair enough. So
5 Ms. DiCarlo, I guess there are a few topics, as Mr.
6 Ellison pointed out, that I guess are the ones that have
7 yet to be discussed with staff, a way of maybe
8 restructuring or changing a little bit of the way that
9 staff has traditionally prepared its reports perhaps and
10 using maybe a staggered approach or something else.

11 I mean, is staff open to further exploring ways
12 of obtaining what we've been told is necessary information
13 and re-evaluating the way in which it's put its
14 environmental reports out in the past?

15 STAFF COUNSEL DE CARLO: We'd certainly be open
16 to discussing options with the applicant. Unfortunately,
17 though as I mentioned before with our close coordination
18 with BLM and our attempt to do a joint document, we are
19 constrained with how flexible we can be with the PSA/draft
20 environmental impact statement.

21 As I mentioned before, there is the concern that
22 if we issue a partial DEIS, BLM would be required to
23 re-circulate that once further information was available.
24 So instead having of having a PSA/DEIS followed by an
25 FSA/FEIS, you'd have an PSA/DEIS. And then a

1 re-circulated PSA/DEIS and then an FSA/FEIS. So we would
2 want to avoid that because in the end that doesn't get us
3 any closer to the applicant's needed time line than we are
4 with our current proposal.

5 But we'd be open to discussing options. And
6 maybe we can further engage with BLM to see if there is
7 any possible flexibility with the issuance of that
8 document.

9 HEARING OFFICER VACCARO: Okay. Ms. Belenky or
10 Ms. Anderson, since you're a party and this is still a
11 question that's been on the table, is there anything that
12 you would like to add to the last topic we've been
13 discussing?

14 MS. BELENKY: Yes. This is Lisa Belenky.

15 First of all, I disagree with many things that
16 the applicant said. But as I said, this is not the time
17 or place to debate these questions. And I'm surprised
18 they keep trying to bring in and make this hearing an
19 evidentiary hearing. We'd be happy to have an evidentiary
20 hearing. This isn't it. So that is just as a first
21 matter.

22 Secondly, I think the Center is on record
23 repeatedly in many of these Commission proceedings as
24 opposing the whole idea of doing this staggered PSA or
25 doing partial information and rolling in new information

1 as the analysis proceeds. We don't believe that that's a
2 good way to do it. We think without the initial base line
3 data it's almost impossible to have a meaningful analysis
4 of impacts. And we would oppose that as we have opposed
5 it in the papers and in other proceedings.

6 And I think very much, you know, given that the
7 Commission is in a lessons learned procedure right now, we
8 hope that the Commission is learning from lessons from
9 what has happened on some of the other sites. And a lot
10 of what we have seen is that issues that are raised during
11 the process are ignored and then they come back to haunt
12 both the Commission and the applicant. And I think we
13 don't want to see that here. We've seen that with many
14 projects, and we really believe strongly that having a
15 full base line analysis coming in with the base line
16 information, first doing a full analysis of all of the
17 required issues is the way to proceed, not piecemealing,
18 not ignoring some of the impacts, not jumping forward by
19 assuming certain presence or absence and then jumping
20 forward to mitigation, that is not the correct way to
21 proceed with these very large projects that have
22 significant impacts.

23 HEARING OFFICER VACCARO: Thank you.

24 MS. ANDERSON: This is Eileen, and I don't have
25 anything to add.

1 HEARING OFFICER VACCARO: Thank you. I think
2 we've exhausted that second topic pretty well. So I think
3 we can go on to the third topic, which I think the
4 briefing addressed, but we do have someone from Riverside
5 County on the line. I believe Ms. North is on the line.

6 To the extent the County wanted to weigh in in
7 addition to the parties on this third item, let's see if
8 there is a little bit to discuss.

9 The issue was whether and how the pending
10 litigation challenging the legality of Riverside County's
11 solar facility development fees will affect Commission
12 evaluation of the project's compliance with the county's
13 land use, laws, ordinances, regulations, and standards.

14 Before any of you comment, please know we
15 understand that pending litigation isn't seen that
16 something is invalid. That part we got. I knew that when
17 I drafted the question.

18 Really, the heart of it I think is what Ms. North
19 got to and what staff got to, which is if we get to the
20 evidentiary hearings and this is invalidated and there was
21 no analysis of the existing land use LORS at the level
22 that is required, then there would be insufficient
23 evidence with respect to the project's compliance with the
24 existing LORS that seem to have some discretionary actions
25 that the Committee could take, but for the county's

1 interactions with the exclusive jurisdiction. That was
2 really the heart of the matter.

3 So why don't we -- if anyone has any more to say
4 on it, start with the applicant, staff, CBD. And then,
5 Ms. North, if there's anything you'd like to add.

6 MR. BIERING: This is Brian Biering on behalf of
7 the applicant.

8 As we noted in our brief, we're not a party to
9 the litigation. But I would like to note that the
10 Commission's process is adaptive and it's flexible to
11 account for these kinds of circumstances. We believe that
12 if we got to the point where the Riverside County
13 ordinance were to be invalidated that the Commission could
14 address the LORS issues without substantially effecting
15 the schedule.

16 HEARING OFFICER VACCARO: Okay. Ms. DeCarlo.

17 STAFF COUNSEL DE CARLO: We would just propose
18 from the outset analyzing both situations with the current
19 LORS in place, the ordinances, and in the alternative
20 acknowledging the potential, however remote it may be,
21 that the ordinances would be overturned, analyzing the
22 project as if the ordinances cannot exist. We believe
23 this is a safe approach. It shouldn't require too much
24 more staff time to do that, and it enables us to have a
25 decision that, regardless of what happens in the courts,

1 could stand.

2 HEARING OFFICER VACCARO: Thank you. Lisa
3 Belenky or Ileene Anderson.

4 MS. BELENKY: We take no position on this issue.

5 HEARING OFFICER VACCARO: Ms. North, if you're
6 still on the line.

7 MS. NORTH: Thank you.

8 I agree with Commission staff's approach of
9 evaluating it under the two different tracks: One if
10 solar program remains in place and one if it's not in
11 place.

12 HEARING OFFICER VACCARO: Okay. I think there's
13 probably not much more to be said on that particular
14 topic. It sounds as though the analysis will be brought
15 into the current work flow and that there's nothing this
16 would adversely effect or extend or impact the schedule in
17 the same way as the issues that we've previously been
18 discussing.

19 Okay. The next item was whether and how recent
20 adverse health impacts to kit foxes in the project
21 vicinity might effect the scope and time line of
22 Commission review of the AFC. We had a little
23 foreshadowing from Ileene Anderson on this issue. But I
24 think we would still like to hear from the parties as
25 well.

1 So Mr. Ellison, we'll start with you and work our
2 way around.

3 MR. BIERING: This is Brian Biering. I'll be
4 speaking to this issue on behalf of the applicant.

5 As we pointed out in our opening and our reply
6 brief, we believe that desert kit fox should be considered
7 in this proceeding. But it really needs to be placed in
8 the proper legal context, which is CEQA. The desert kit
9 fox is not protected by the Endangered Species Act or the
10 California Endangered Species Act. It's not a fully
11 protected species. And there's nothing in the natural
12 communities conservation planning process that requires
13 the DRECP to be completed before the Commission can issue
14 a decision on this.

15 We believe there's enough time in the siting case
16 to consider the impacts to desert kit fox. And one of the
17 things that we will endeavor to do is to learn lessons
18 from the other projects, including the Genesis project
19 that was sited by Center for Biological Diversity and
20 incorporate those into this licensing case as well. So we
21 think that we can do all that in the time frames that have
22 already been outlined and shouldn't have significant
23 impacts in the scoping schedule.

24 HEARING OFFICER VACCARO: Not putting you too
25 much on the spot or asking you to give away your position

1 quite yet, but I suspect you've been able to review the
2 data requests that have been issued by the Center for
3 Biological Diversity.

4 Do you find at this point that you've got major
5 disagreement with what it is they're requesting? Or at
6 this point do you think that that's something that's going
7 to keep moving forward positively? Or is that going to be
8 yet another decision tree for the Committee?

9 MR. BIERING: Yes, we have reviewed the data
10 requests from Center for Biological Diversity. And we are
11 currently in deliberations about how we're going to
12 respond and what exactly we'll say. But I think we can
13 provide them with the information they're looking for.

14 HEARING OFFICER VACCARO: Ms. DeCarlo.

15 STAFF COUNSEL DE CARLO: Staff agrees that we
16 don't believe that the issue with regard to potential
17 impacts to kit fox should effect the schedule. We are
18 reviewing the CBD's data request and will issue additional
19 data requests if we feel information is necessary.

20 We'll also be working closely with Fish and Game
21 to ensure that we've got the most up-to-date information
22 on potential impacts to kit fox resulting from studies
23 that are being done on Genesis, the information gathered
24 there. And we'll be coordinating with Fish and Game to
25 ensure that we identify the proper measures that are

1 necessary to protect the species and reduce or avoid
2 impacts as a result of this project. I have Scott White
3 here, our biological staff, if the Committee would like
4 more detail on this issue.

5 HEARING OFFICER VACCARO: I think at this time
6 I'm not sure that we have any questions. But I think we'd
7 like to hear a bit more from Center for Biological
8 Diversity if you'd like to supplement the comments made by
9 Ms. Anderson a few moments ago relating to desert kit fox.

10 MS. BELENKY: Yes.

11 HEARING OFFICER VACCARO: Excuse me one second
12 before you start.

13 One of the callers, you're having a side
14 conversation and we're hearing it. So all of you again if
15 you're having side conversations, please mute the phone.
16 I think I'll mute that caller.

17 So Ms. Belenky and Ms. Anderson, why don't you
18 speak. I'm going to leave the podium and try to mute that
19 caller. Please go ahead.

20 MS. BELENKY: Before Ms. Anderson goes back to
21 the specifics of the kit fox issue, I just wanted to say
22 that in some ways I think I wanted to respond to the reply
23 that the applicant provided.

24 One thing that the applicant says is that they
25 say take is not allowed without the proper fur-bearing

1 take permit. But in fact, there is no provision for such
2 a take permit. And the statute -- the regulation actually
3 says that may not be taken at any time. While this isn't
4 technically within the fully protected species statute, it
5 is very similar language.

6 And perhaps the applicant is right that it does
7 not fall within the NCCP exception and, therefore, no take
8 would be allowed at any time and there would be no
9 provisions for an exclusion to that.

10 So we feel like this is a very important
11 question, how kit fox is dealt with. This is a species
12 that is not only in itself important, but is a symbol and
13 an umbrella species for a lot of the habitat out there.
14 So I'll let Ms. Anderson speak to that.

15 MS. ANDERSON: I think I brought up a lot of the
16 issues when I talked about kit foxes previously. But
17 yeah, we see it as not only concern for this species but
18 also sort of an integral part of the ecological values of
19 this relatively undisturbed site. And so yet it's sort of
20 a process to evaluate how kit foxes are doing on the site.
21 Clearly, they need prey items. Clearly, there is no prey
22 items out there to support them. How much kit foxes are
23 supported is one of our questions in the data request that
24 we filed, including evaluation of their successful
25 reproduction, et cetera. I don't think I have anything

1 more to add at this point.

2 HEARING OFFICER VACCARO: Thank you.

3 That brings us basically sort of to the catch-all
4 question, which was any additional matters relating to
5 data adequacy or scheduling that are not identified in
6 this notice?

7 So I think right now what that allows you to do
8 without taking an inordinate amount of time, perhaps flag
9 for the Committee anything that you think is essential
10 really relating to scheduling, because that's the focus of
11 today's meeting. We're really trying to get a handle on
12 scheduling and scheduling milestones. So I'll give each
13 of the parties an opportunity to address those any of
14 those types of issues.

15 MR. ELLISON: Thank you. Just a couple of
16 things.

17 First of all, very quickly just in response on the kit fox
18 issue, I wanted to say that in the law there is a
19 distinction between take and incidental take. Endangered
20 Species Act refers to incidental take. The take that's
21 referred to with respect to the desert kit fox is I
22 believe commercial take, deliberate take, trapping, that
23 kind of thing, and not the incidental take that only
24 becomes prohibited when the species is listed. And that
25 creates a very substantial difference in the law.

1 Having said that, let me turn to the scheduling
2 issues. I reiterate that I think a productive
3 conversation can be had around the issuing that I spoke of
4 earlier about trying to devise a schedule that meets the
5 agency's needs as well as meets the applicant's needs.
6 There's nothing about that that's untoward. There's
7 nothing about that piecemealing issues or any of those
8 sorts of things. The Energy Commission process is replete
9 with opportunities for parties to comment even with the
10 procedures that I'm envisioning. There would be multiple
11 opportunities for any intervenor to comment on a complete
12 draft decision.

13 That being said, let me say this. If we can't
14 get there and the Committee is compelled to make a
15 decision on these issues without any agreement before it,
16 let me say two things about that. One of them is I think
17 it's very difficult for you to do that without even
18 hearing more than you've heard from the experts themselves
19 about why in our case we think the information that's
20 already been provided is sufficient and why in the case of
21 the REAT agencies it's not.

22 One of the main bases of our opinion that a lot
23 of the information we've provided already is sufficient is
24 that that level of information is being used now all
25 around the country to permit projects and it's been used

1 by this agency in the past many times to permit projects.
2 That's essentially a valid comparison if you're going to
3 assess whether something is really needed or not is has it
4 been needed before. And we can show you many examples of
5 projects and not just ARA projects that have been based on
6 much less information than we have already provided that
7 we propose to provide. So I think you might want to hear
8 from some of these experts themselves on this question,
9 whether just simply having to grapple with somebody says
10 it's necessary and somebody says it's not.

11 The other and last point I would make is this.
12 To the extent we cannot resolve these issues by agreement,
13 we would very much like to have a true evidentiary hearing
14 on the hazards of this facility, the heat risk, the
15 collision risk, the Solar I study, all of that kind of
16 thing because fundamental to all of these questions about
17 taking of species and all of those kinds of things is this
18 basic presumption that the REAT agencies are making that
19 this facility constitutes a unique or unknown hazard to
20 those species. And we believe that's just not the case.
21 And we would welcome that opportunity, an evidentiary
22 opportunity, to have you make a decision on that. Because
23 if you agree with us and make a decision that this
24 facility is not unique and hazardous, a lot of these
25 issues go away.

1 HEARING OFFICER VACCARO: I just want to pull the
2 thread of the last statement that you made, Mr. Ellison,
3 regarding the idea of an evidentiary hearing before we get
4 to the evidentiary hearings, because usually those would
5 come much later in time when all the environmental
6 documents are prepared. It sounds to me like you're
7 suggesting something much earlier in time, something akin
8 to a motion for summary judgment. But we don't really do
9 that here at the Energy Commission. But something along
10 those lines where you flush out the issues up front.

11 I'm wondering if this posture that everybody
12 seems to be taking with respect to the data responses and
13 requests and what's needed and what's not is the
14 resolution of those data response and request issues an
15 appropriate time. It seems to me that's the time where
16 we'll really better understand in the context of real
17 questions what those questions are about and what the
18 import is of providing the information or not with the
19 technical people there.

20 I mean, of course, if you don't end up having a
21 dispute over the discovery, that wouldn't come to us in
22 the first instance. And everything you're talking about
23 would be mute. But I suspect those issues are headed our
24 way. There's been some foreshadowing of that in the
25 party's briefs.

1 MR. ELLISON: When I propose an evidentiary
2 hearing, it is unusual in the Commission's context to do
3 that.

4 But I propose it because fundamentally -- and I'm
5 not proposing necessarily an evidentiary hearing that
6 closes the record on that issue and that you wouldn't
7 re-visit it later.

8 But fundamentally these questions about
9 scheduling, about the need for additional information are
10 factual questions. And the most fundamental factual
11 question you have in front of you is: Is this facility
12 uniquely dangerous such that we really need to take a much
13 deeper dive on what are the species that are going to be
14 affected by this dangerous facility than we would have
15 taken, for example, in the context of a major wind
16 facility located in Birds Landing?

17 So if you're going to decide a factual question,
18 if it's a predicate to making a procedural decision on
19 schedule, if it's a predicate to making a decision on
20 deciding data requests or anything else and it's so
21 fundamental that it actually -- in this case, you know,
22 what's unique about this disagreement we're having about
23 scheduling these issues is, you know, I reiterate what I
24 said earlier. It's life and death in that context.

25 Having a one-day evidentiary hearing and bringing

1 in real witnesses and putting them under oath and allowing
2 some cross-examination and allowing the Committee to
3 question the experts who really know this topic and making
4 a decision that may only be for the purpose of these are
5 the facts we're going to decide on the procedural question
6 on schedule or a decision on what information is
7 necessary, I think is the fairest and most judicious way
8 to handle that problem.

9 Having said that, I will also say that with
10 respect to the data requests, to preserve our rights, we
11 have filed objections to a number of data requests. But
12 we are endeavoring to answer many of the ones even that
13 we've objected to as best we can.

14 And fundamentally, I think the big ticket issues
15 are already before you. You've heard and we've been
16 working with the REAT agencies and with CBD for several
17 weeks now around these issues. It's pretty ripe. We may
18 still be able to close the gap. I hope that we can. But
19 I don't think a data request here or there is going to
20 change the fundamental questions that are now before you.

21 HEARING OFFICER VACCARO: Okay. And then I have
22 one follow-up question before we hear from Ms. DeCarlo.

23 I want to be clear that I'm understanding what
24 you're saying. From where I sit, I could make a
25 recommendation to the Commissioners right now that we

1 could produce a schedule with milestones based on
2 everything that we've heard and everything that's been
3 committed in writing. I could make that recommendation
4 comfortably. In fact, that is my leaning.

5 But that's not to say that I didn't hear and that
6 doesn't resonate with me that you're framing it as if
7 these substantive inform the procedural, then perhaps some
8 sort of evidentiary hearing would be worthwhile before the
9 schedule issues. And I think it's that "if" that I want
10 to understand. Are you putting that "if" out there
11 because you do believe that these substantive issues must
12 necessarily drive the procedural issue of putting forth
13 milestones? Or do you believe that the Committee is in a
14 position based on all that's been presented to do that and
15 move forward with the procedural issue now?

16 MR. ELLISON: Oh, I think it's well within the
17 Committee discretion to make a decision without the
18 evidentiary hearing I'm proposing. If you're satisfied
19 that you understand the facts well enough to go ahead and
20 make a decision, I wouldn't challenge that.

21 But what I'm saying is these are fundamentally
22 factual questions. They're in some cases technical
23 questions. And that an awful lot of what you've been
24 hearing is are these questions about proving the negative
25 or questions about we don't know what the risks are,

1 therefore we have to assume X, Y, Z. We can present you a
2 great deal of very credible technical information about
3 what risks to the facility are in terms of all the issues,
4 including, by the way, blindness, which we didn't address
5 in our brief but we certainly can.

6 And we think that when you compare the risks of
7 this facility to risks of other facilities that are being
8 permitted throughout California and throughout the nation
9 and at least as sensitive locations as this one on much
10 data, that you know the risks of this facility are if
11 anything, less.

12 But I'm not suggesting to you that I think that
13 the Committee is compelled to hold an evidentiary hearing
14 to decide this issue. No, you are not. This is a
15 procedural matter. You've decided these issues based upon
16 oral arguments and briefs many times in the past and you
17 are certainly well within your rights to do that again. I
18 simply want to offer you an alternative and make clear
19 that we do have witnesses that are anxious to testify on
20 these questions.

21 HEARING OFFICER VACCARO: Thank you.

22 Ms. DeCarlo, same topic for you. If there are
23 any issues, things that you think you want to underscore
24 or need to raise on the issue of scheduling. And then I'm
25 not going to repeat it because I won't say it the same way

1 the second time. But if you got the gist of the very last
2 exchange Mr. Ellison and I were having with respect to the
3 topic of whether or not it's necessary to deal with the
4 substantive issues in order to deal with the basic
5 fundamental issues of why we're here, which is getting out
6 of schedule with milestones.

7 STAFF COUNSEL DE CARLO: I'll address a couple of
8 items Mr. Ellison brought up and a couple others that we
9 haven't focused on today but I want to make sure the
10 Committee is aware of. We addressed them in our brief. I
11 wanted to highlight that because they do concern schedule.

12 The first thing regarding this issue about having
13 an evidentiary hearing on solely on the hazardous project,
14 you can't analyze biological impacts in a vacuum. You
15 can't say this is a benign project on its face, therefore
16 we don't know need to know how much is out there. How
17 many are out there. What are their habits that would
18 potentially bring them into interaction with a proposed
19 project. You have to analyze them simultaneously in this
20 concert. You can't address one without and ignore the
21 other.

22 So this idea of we can just evaluate the
23 potential impacts to the project and forget about the
24 species that it may be impacting I don't think is a viable
25 approach.

1 Yes, the heat flux issue is an unknown right now.
2 It will hopefully provide us more information so we can
3 get a feeling for whether or not that is a really
4 significant problem in this project. But the Commission
5 impact isn't an unknown. There are significant collision
6 hazards impacts at the Solar I facility. Maybe the
7 applicant characterizes that study saying that the results
8 were an insignificant overall impact. But this project is
9 orders of magnitude larger. And we're not as comforted by
10 the results of that survey in order to persuade us we
11 don't need additional information for this project.

12 Same with the CEC facility. It wasn't a
13 scientific evaluation of the impacts to birds, the
14 potential mortality. It was an employee, I would imagine
15 non-biologist employee, going out. Are there dead birds
16 on the ground? No. Okay. That's safe.

17 That's not necessarily the case. You don't know
18 if birds were impacted along the way. Maybe didn't drop
19 right then and there. Drop later. Could have predators
20 picking up the birds before they're being observed. So I
21 don't think reliance on those facilities coupled with a
22 vacuum look at this project is sufficient to satisfy our
23 needs for a full and valid evaluation under CEQA and CESA.

24 The applicant has asked the Committee to weigh in
25 on whether or not to require the Elf Owl survey, so I will

1 make one final pitch for that. Mr. White did a great job
2 at discussing that and Ms. Blair.

3 One, there is no scheduling impact with requiring
4 the Elf Owl surveys. It's a State Endangered Species
5 list. We're simply requiring them to go out for a couple
6 of nights to evaluate. It shouldn't have any impact on
7 the long-term concerns that the applicant has over
8 scheduling.

9 Two, absence of evidence isn't evidence of
10 absence. Just because there hasn't been any siting in the
11 areas for a while doesn't mean they're not out there.
12 They may be there and no one has been looking for them. A
13 survey at this point for endangered species is warranted.

14 Now let me go on to a couple of non-biological
15 resource issues. Cultural resource, I'm very pleased that
16 the applicant has committed to work with us and try to get
17 us the information we need. We're a little dubious they
18 can do it in such a short time frame. We do believe 14
19 minutes is a minimum amount of time it would require for
20 them to provide the information for us to evaluate it.
21 However, we're willing to talk to them about options and
22 have them walk us through again their application to try
23 to show us where they provided some of the information.

24 Let's see. LEDPA, that's something we haven't
25 discussed at all today. We identified it in our brief as

1 one of the other issues. There are a significant amount
2 of potentially jurisdictional waters on site over a
3 thousand acres. This triggers the need for Army Corps of
4 Engineers and U.S. EPA to do an alternatives analysis to
5 identify the least environmentally damaging practicable
6 alternative. This is a very lengthy analysis. Even more
7 lengthy probably than the NEPA analysis that would
8 normally be required, which is in and of itself much
9 lengthier than what we would do under CEQA.

10 We want to be in lock step with the agencies on
11 this one. They have the potential of identifying an
12 alternative that would be different than the proposed
13 project or different than an alternative we would
14 identify. And so if that were to happen, we could end up
15 certifying a project that ultimately wasn't the final
16 project in the eyes of the federal agencies. So it's
17 important in our eyes that we be involved in lock step on
18 this issue.

19 And there are potential scheduling implications.
20 We don't know what those would be at this time. We're
21 trying to work very closely with Army Corps and US EPA and
22 BLM to make sure we're involved in the analysis.

23 HEARING OFFICER VACCARO: Is that as good as it
24 gets right now? That's an interesting gray area, as is
25 the planning of development. I mean, it would be nice to

1 have a better sense. Because if as the Committee is
2 informed it is staff's goal to have a joint document with
3 BLM and to work in lock step with the various other
4 agencies, I think it becomes important for the Committee
5 to truly understand what it means to do so. I think we've
6 heard a bit about that in today's discussion on specific
7 technical areas.

8 But I mean, based on staff's most recent brief,
9 there hasn't been a change with respect to the plan of
10 development as far as we know. And is there anything you
11 can tell us about that? And is there more that you can
12 say about what it means to work in lock step on the LEDPA
13 analysis?

14 STAFF COUNSEL DE CARLO: Right. Well, the plan
15 of development, no recent information. We are having
16 weekly meetings with BLM. And the latest information they
17 may have a decision by the end of this month that they'll
18 let us know about. We are anxiously awaiting that.

19 In terms of working lock step, I mean, CEQA does
20 admonish agencies to the extent possible to issue joint
21 documents where both NEPA and CEQA apply. So that's our
22 goal. We believe it's in the interest of -- it allows for
23 easier public involvement doing so instead of having
24 separate documents floating around for the same project.
25 It's better for the analysis. We know we can work with

1 BLM and understand where they're coming from for their
2 analysis and try to maintain a consistency of analysis,
3 versus us going out ahead and then having BLM follow up
4 behind with maybe a different conclusion, different
5 determination. And it's better for the decision at the
6 end of the day. You end up with conditions of
7 certification that you know are going to be consistent
8 were the federal requirements. So we do prefer and would
9 recommend to the extent possible that we maintain a joint
10 approach for this project.

11 Now, I understand that circumstances may occur
12 that may no longer be possible or efficient or
13 practicable. But at least at this point staff is still
14 recommending we continue attempting a joint process.

15 I don't know if that answered your question.

16 So those are my comments about schedule, unless
17 anyone has comments.

18 HEARING OFFICER VACCARO: Thank you.

19 Ms. Belenky or Ms. Anderson?

20 MS. BELENKY: Thank you. I think in our papers
21 we raised the question of the technology, which we think
22 is the major issue here. The questions raised about the
23 bird impacts.

24 But I guess other than that, we mostly agree with
25 what the staff has said.

1 But one more thing did want to point out is that
2 the applicant was saying that other projects that may be
3 different or similar had different requirements, many of
4 those were probably approved by different agencies or
5 commissions. That is not the standard. The standards are
6 for the Commission to set here. And we believe a lot of
7 those projects that have been approved -- were approved
8 without appropriate environmental review.

9 So I think what we need to do here is focus on
10 what we know. I don't think having an evidentiary hearing
11 on risk in the abstract is going to really help at all at
12 this stage. Thank you.

13 MS. ANDERSON: I don't have anything to add.
14 This is Ileene.

15 HEARING OFFICER VACCARO: Thank you,
16 Ms. Anderson.

17 I think where we are now is we have heard a lot
18 from everyone and have read quite a bit as well -- I think
19 Ileene is going to have a question. But before we get
20 there, I think where we're going to head next since we
21 have various public agencies on the phone who really might
22 wish to shed some light on their perspective instead of
23 getting a sense or me giving a recommendation right now,
24 we'll go ahead and hear, open up the public comment. We
25 will hear from the public agencies, then hear from any

1 members of the public. I have a recommendation for the
2 Committee. And then we'll get our marching orders.

3 But before then, I think Ileene Anderson has a
4 question.

5 MS. ANDERSON: This is Ileene Anderson. I don't
6 have a question.

7 MS. ALLEN: Thank you. This is Ileene Allen.
8 Hello, Ileene Anderson.

9 This is a question for staff about water
10 resources. The project may have an impact on the Colorado
11 River aquifer, which has been a complicated multi-agency
12 topic involved in several other desert solar case. Does
13 staff anticipate the need to involve the US Bureau of
14 Reclamation or any other State or federal water agencies?

15 STAFF COUNSEL DE CARLO: We are looking into
16 that. We are coordinating with USBR I believe on the
17 analysis to make sure -- I'm sorry. It hasn't been a
18 focus of my attention lately because of the prominence of
19 the biological resource issues.

20 But I do know staff is actively investigating the
21 potential impacts of projects on water. And we are aware
22 of the USBR's involvement with the -- I forgot the name of
23 the term. But the threshold at which USBR determines
24 whether or not the project is using Colorado River water.
25 So we will -- if that is an issue, we are intending to

1 coordinate with the agencies.

2 I believe the applicant's proposal right now is
3 they are using MWD water and that it is not Colorado River
4 water. And if it actually is determined to be Colorado
5 River water, they have a mitigation plan to mitigate for
6 that.

7 So we are actively investigating that issue. But
8 I can't provide any further information on that right now.

9 MS. ALLEN: Well, if you do conclude there are
10 schedule implications for the interagency process, if you
11 could let the Committee know.

12 STAFF COUNSEL DE CARLO: Sure. We did ask all of
13 staff to let us know of anything that would effect
14 scheduling. And water staff did not identify that as a
15 potential scheduling problem. So I don't anticipate that
16 being a factor at this point. But we'll definitely inform
17 the Committee if that arises.

18 HEARING OFFICER VACCARO: Mr. Ellison, you pulled
19 your microphone close. So I suspect you'd like to respond
20 to in some fashion to Ms. Allen's questions as well.

21 MR. ELLISON: I would. Thank you.

22 Just to say that we have met with the
23 United States Bureau of Reclamation on this question and
24 we have a letter following this meeting from them saying
25 their issues have been addressed and they have no

1 concerns. So we think that issue will be fine.

2 HEARING OFFICER VACCARO: Thank you.

3 So I think we'll hear from public entities next
4 and then members of the public. Let's start with BLM. If
5 the representative from BLM has any comments or insider
6 input you'd like to provide at this time. Yes, if you'd
7 identify yourself, first name, last name, spell it and
8 then perhaps your position as well, that would be helpful
9 for the court reporter.

10 So starting with BLM, if we still have BLM on the
11 line.

12 MR. PERRY: You still have BLM. I'm sorry. My
13 name is Cedric Perry, but I have no comments at this time.

14 HEARING OFFICER VACCARO: Okay. And Mr. Perry,
15 would you spell your last name just to make sure we get
16 it. I'm taking it Cedric is C-e-d-r-i-c.

17 MR. PERRY: Correct.

18 HEARING OFFICER VACCARO: P-e-r-r-y?

19 MR. PERRY: Yes.

20 HEARING OFFICER VACCARO: Thank you.

21 US Fish and Wildlife Service?

22 MS. FRASER: Hi. Thank you. This is Jodi
23 Fraser. F-r-a-s-e-r.

24 A lot to digest and try to summarize quickly so
25 I'll try to be concise. I think -- you know, I don't have

1 a lot to add to Ms. DeCarlo and Ms. Blair and Mr. White's
2 summaries.

3 I did want to say, however, that the Fish and
4 Wildlife Service has been involved in this project since
5 early in 2011 and tried to provide pretty specific
6 guidance on protocols for our listed species, desert
7 tortoise as well as Golden Eagle and other trust resources
8 under the Migratory Bird Treaty Act.

9 Unfortunately, you know, we have been far apart
10 with the applicant on the what is "necessary." And so we
11 spent an inordinate amount of time trying to come to
12 agreement on what would be done.

13 And so I just wanted to emphasize that, you know,
14 we absolutely appreciate the information that BrightSource
15 has brought forward on the technology. We understand in
16 principle we're not physicists. So we understand
17 conceptually how the project technology will work.

18 What BrightSource cannot bring to us are
19 published papers about specific studies that have been
20 done on impacts to various species, wildlife, plants, you
21 know, the natural environment surrounding the project. So
22 this is where we're hung up. It is the risk. And that
23 has been our focus.

24 And you know, as has been said numerous times
25 today, comparing Rio Mesa to the Solar I and the CDEC and

1 the Spanish project, Torresol project, is difficult to do
2 because they're very different in scale more than
3 anything. And there was no monitoring protocol associated
4 with the CDEC project specifically. And so comparison of
5 data are difficult.

6 And again, absent a base line, how can you
7 compare data anyway? So we can take worst-case scenario.
8 I don't think that would bode well for BrightSource. And
9 it really is better to have site-specific information.
10 And the biggest issues that we're challenged with right
11 now is not just this project in and of itself, but its
12 regional context and the numerous projects that have been
13 permitted through the fast track process and the fact that
14 those projects when you compare the level of efforts for
15 surveys on those projects, we totally agree, the level of
16 effort for those project is more because we were
17 essentially under duress coming up with protocols because
18 we have not been faced with the scale and time frames on
19 these energy projects.

20 So the protocols that you received that
21 BrightSource received from the BLMs in 2009 I think
22 included six bullets of do X link transects for ten
23 minutes at a time. And I think in retrospect, that's what
24 we can flush out at the time. But we've had over a year
25 to come to grips with what we're dealing with. And

1 biology is a lot different than the technologies in the
2 sense that -- I guess you can compare it in the way that
3 when the engineers for a project go out and look at a
4 site, they see topography, solar insulation, you know,
5 other components that biologists don't necessarily see.
6 And so it is an apples and oranges kind of thing.

7 For us, we need to know what those species are,
8 the grounds that are going to be affected by the project
9 and how it may impact the surrounding area, especially in
10 the context of a rapidly implemented renewable energy
11 program that's impacting hundreds of thousands of acres in
12 this part of the world. So I think that's -- I'll stop
13 there.

14 HEARING OFFICER VACCARO: Well, thank you for
15 raising so many points, but doing it so clearly and
16 succinctly.

17 California Department of Fish and Game, is there
18 anyone still on the line?

19 MR. SHARMA: Yes. My name is Shankar. S, as in
20 Sam, h-a-n-k-a-r. And last name is Sharma. S, as in Sam,
21 h-a-r-m-a.

22 I, in fact, have a very similar -- similar --
23 (inaudible) been my colleague Ms. Fraser, Ms. Blair, and
24 Mr. White. I will -- (inaudible). For example, when we
25 are talking about the energy flux, obviously the

1 technology is impressive. And as my colleague --

2 (inaudible)

3 HEARING OFFICER VACCARO: Mr. Sharma, I'm going
4 to interrupt you for a moment. I'm not sure if you're
5 speaking on a hand set or cell phone or speaker phone but
6 you seem to be cutting in and out a bit. So we're having
7 some difficulty. We're getting most of your words and
8 then all of a sudden, silence. So if you are using a land
9 line, if you could ensure that you're speaking into the
10 headset. If you're using some sort of other technology,
11 it's beginning to be a little bit problematic for us to
12 hear you.

13 MR. SHARMA: I'm using the speaker from
14 (inaudible)

15 HEARING OFFICER VACCARO: How about if you not
16 use the speaker phone and just speak into the phone
17 regularly.

18 MR. SHARMA: Oh, actually I'm (inaudible) speaker
19 directly. (inaudible). Can call (inaudible) later.

20 HEARING OFFICER VACCARO: We'll move forward with
21 what we've gotten. And I do apologize. We may not catch
22 everything. So that might actually be a reason to be as
23 brief and succinct as you can possibly be.

24 MR. SHARMA: Okay. All of you who can hear me
25 right now, I'm talking into my computer speaker.

1 HEARING OFFICER VACCARO: Okay. That's much
2 better. So maybe if you just keep that distance. Again,
3 brevity and hitting the high points is always something
4 that we appreciate.

5 MR. SHARMA: Okay. My name is Dr. Shankar
6 Sharma. And I'm from the California Department of Fish
7 and Game.

8 COMMISSIONER PETERMAN: Dr. Sharma, this is
9 Commissioner Peterman. We heard everything you said up to
10 now. You can just continue. I heard you say you were in
11 agreement with your colleague, Ms. Fraser, and you can get
12 straight into your comments there.

13 MR. SHARMA: Oh, okay. So I will give two
14 specific examples.

15 For example, the energy exhibition of model
16 energy flux which we had seen in previous presentation by
17 the applicant and where it showed the radiator of energy
18 that's sufficient, now the things we need to be able to
19 (inaudible) request that if we could get input (inaudible)
20 model information. Now, bare in mind (inaudible) papers
21 that Ms. Fraser has (inaudible) so they are not able to
22 get because of proprietary reasons. So we are facing a
23 situation where -- we are facing a situation where to
24 simply -- (inaudible) which are being -- being able to
25 (inaudible).

1 The other point I will make, as you know, the
2 (inaudible) --

3 HEARING OFFICER VACCARO: Mr. Sharma, again I
4 greatly apologize for interrupting you. I usually don't
5 like to do this at all. But we are having such
6 difficulty.

7 Again, it's the technology. When we do hear you,
8 the volume is fine. We're able to understand. And then
9 all of a sudden, we have these technology glitches.

10 What I would ask of you -- and again, I mean no
11 disrespect by this. But we really are having trouble with
12 the technology. We would like your comment. We would
13 like to have the benefits of your full comment as you
14 intended to make it. If you would be willing to submit an
15 e-mail either directly to me, to the Committee or through
16 Ms. Blair so that we can read that and get it docketed, we
17 would greatly appreciate it.

18 But I think at this point, again with my
19 apologies, I'm going to terminate this particular comment
20 session and move onto the next commentor hoping that we
21 have better technological luck.

22 So I think with that, if anyone is still on the
23 line from the County of Riverside.

24 MS. NORTH: This is Tiffany North. I don't have
25 any additional comments right now. Thank you.

1 HEARING OFFICER VACCARO: Thank you.

2 MR. ROSENTRATER: This is Phil Rosentrater. I
3 have no additional comments.

4 HEARING OFFICER VACCARO: Okay. We had a -- I
5 think we had perhaps one other member of a public agency
6 or public organization on the line. But my notes aren't
7 helping me at the moment. So I think it was San
8 Bernardino County Museum.

9 MR. WHITE: I think you're talking about Bob
10 McKernan or Robert McKernan at the County Museum. I'm not
11 sure if he was on the phone still.

12 HEARING OFFICER VACCARO: Well, if he is, do you
13 have anything you'd like to add?

14 Okay, I'm not hearing anything. Any other public
15 entities on the line? I'm hearing none. Any members of
16 the public on the line who wish to make a comment at this
17 time?

18 I'm hearing none. But I will ask again. Any
19 members of the public who might wish to make a comment who
20 are on the telephone line?

21 Okay. I look around the room and I see mostly
22 people who are affiliated with a party, but I've made this
23 mistake before and I'm not going to do it again. Is there
24 any member of the public in the room before us who wishes
25 to make a public comment?

1 I see none. Okay. I think then today we have
2 heard from everyone, which gets us down I think to sort of
3 letting you all know at least where I'm headed and then
4 we'll find out from the two of them if they agree or
5 disagree and then we'll figure out where we're going.

6 I think the first issue is that of Center for
7 Biological -- raised by Center for Biological Diversity.
8 I think a number of intriguing points. I think that
9 ultimately though applicant and staff have it right. The
10 Commission is time barred. I mean, essentially, without
11 even getting to the merits, the Commission is time barred
12 even if the Committee were to ask it to reconsider. The
13 Commission is time barred from doing anything other than
14 leaving that determination as it stands.

15 That said, there were some interesting comments
16 made by Ms. Belenky today as well as in the briefing that
17 if CBD is so inclined, then I would invite you to follow
18 up on the alternative course that you proposed, which is
19 that you might ask the Commission to initiate some sort of
20 an investigation into the data adequacy process in terms
21 of what are the public disclosures that ought to be made
22 and when. How broad should it be during the course of the
23 data adequacy presentation and whether or not there's
24 something that might need to be changed within the data
25 adequacy regulations.

1 Again, I think that's the forum for those types
2 of issues and even to raise some concerns with things that
3 CBD believes happened in this proceeding. But my
4 recommendation is for the Committee to leave this as it
5 stands. The Commission made a data adequacy
6 recommendation and we continue to move forward. That's
7 the first item.

8 My second recommendation -- I think I already
9 gave this one away -- is I don't know if I was quite
10 decided before I came in this afternoon as to whether or
11 not I could make a recommendation that we move forward on
12 the papers. It depended on whether there was something
13 really different that came out that wasn't in the
14 briefings or already presented. I think the Committee can
15 set forth milestones, taking into consideration everything
16 that's been briefed and that's been set today.

17 And I would recommend that we not conduct a
18 pre-scheduling evidentiary proceeding, although I do see
19 one on the horizon. There are a number of issues, as Mr.
20 Ellison noted and as the REAT agencies noted, that need to
21 be addressed. But those issues, as Lisa Belenky correctly
22 points out, those are matters for the Committee and
23 ultimately for the Commission. What's really necessary?
24 What's needed? And I think those issues are going to be
25 put before the Committee and the Commission in fairly

1 short order.

2 So my recommendation is that we not have an
3 evidentiary proceeding first, that we move forward with
4 milestones and see what happens in the data request and
5 response process and any other motions that the parties
6 might submit.

7 COMMISSIONER DOUGLAS: I think Hearing Officer
8 Vaccaro, you're seeing Commissioner Peterman and I nod as
9 you say that. I think that's a reasonable way to proceed.

10 COMMISSIONER PETERMAN: I would agree. I think
11 that the briefing materials as well as the information
12 presented today as well as by the REAT agencies is
13 particularly useful for me in coming to that conclusion as
14 well.

15 HEARING OFFICER VACCARO: I think I would then
16 further propose within the next couple of weeks you can
17 expect to see proposed schedule and milestones issue from
18 the Committee.

19 With that, turn it over to Commissioner Peterman
20 to adjourn the status conference.

21 But again, like the hostess who had everybody
22 show up, those of you who came and didn't speak but
23 prepared to, it is really tremendous that we had so much
24 interest in today's proceeding and willing to speak. And
25 the agencies on the phone who typically don't attend or

1 appear at the status conference, I think what it does is
2 surface and even underscore that we have some very
3 significant issues to address as we move forward and that
4 everybody is fully engaged in doing so. I think that's
5 very commendable. And I appreciate this attendance and
6 the level of lawyering that went into presenting the
7 issues for this proceeding.

8 COMMISSIONER PETERMAN: Yes. Thanks in
9 particular for those who traveled near and far to be with
10 us. We greatly appreciate it. I expect we'll see many of
11 you during the evidentiary hearing. And greatly
12 appreciated the briefs. They were very valuable as well
13 as the information presented today. So if Commissioner
14 Douglas has nothing else to add, I will adjourn this
15 meeting. And you'll be hearing from us. Thank you.

16 (Whereupon the California Energy Commission
17 meeting adjourned at 4:35 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, TIFFANY C. KRAFT, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing hearing was reported in shorthand by me,
7 Tiffany C. Kraft, a Certified Shorthand Reporter of the
8 State of California, and thereafter transcribed into
9 typewriting.

10 I further certify that I am not of counsel or
11 attorney for any of the parties to said hearing nor in any
12 way interested in the outcome of said hearing.

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 26th day of March, 2012.

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