

PREHEARING CONFERENCE AND EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

DOCKET
06-AFC-10

DATE OCT 30 2007

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In the Matter of:)

Modification of Certification)
Starwood-Midway Energy Project)

Docket No.
06-AFC-10

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

TUESDAY, OCTOBER 30, 2007

2:13 P.M.

ORIGINAL

Reported by:
Peter Petty
Contract No. 170-07-001

COMMITTEE MEMBERS PRESENT

Jeffrey D. Byron, Presiding Member

John L. Geesman, Associate Member

HEARING OFFICER AND ADVISORS

Garret Shean, Hearing Officer

Gabriel Taylor, Advisor

STAFF AND CONSULTANTS PRESENT

Jared Babula, Staff Counsel

Che McFarlin, Project Manager

James Adams

Shahab Khoshmashrab

Steve Baker

APPLICANT

Allan J. Thompson, Attorney

Ron Watkins

Richard H. Weiss, Project Manager

Starwood Power-Midway, LLC

Starwood Energy Group

J.J. Fair, General Manager

CalPeak Power

Starwood Energy Group

Angela Leiba

URS Corporation

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P R O C E E D I N G S

2:13 p.m.

1
2
3 PRESIDING MEMBER BYRON: Good afternoon.
4 I'm Commissioner Jeff Byron, and we are here today
5 for a prehearing conference and possible
6 evidentiary hearing on the Starwood-Midway Energy
7 Project. And with me is Commissioner Geesman, our
8 Hearing Officer Garret Shean and my Advisor,
9 Gabriel Taylor.

10 I apologize that we're a few minutes
11 late getting started; seems there are a few other
12 issues that we had to get settled here today, as
13 well.

14 I will turn it over to our Hearing
15 Officer unless, Commissioner Geesman, do you want
16 to say anything to start?

17 ASSOCIATE MEMBER GEESMAN: No, thank
18 you.

19 HEARING OFFICER SHEAN: At this point
20 we'd like to have the parties identify themselves
21 and we'll begin with the applicant.

22 MR. THOMPSON: Thank you, Mr. Shean. My
23 name is Allan Thompson, representing the Starwood-
24 Midway Project. To my left is Ron Watkins and to
25 my right is Richard Weiss, both of whom represent

1 the project. In the first row of seats to my rear
2 is J.J. Fair from CalPeak, also representing the
3 project. And Angela Leiba of URS, environmental
4 consultant to the project.

5 HEARING OFFICER SHEAN: Staff.

6 MR. BABULA: Hello. My name is Jared
7 Babula; I'm Staff Counsel. Sitting next to me is
8 Che McFarlin, the Project Manager for the project.
9 And if staff does need to testify or come up
10 later, we'll introduce them at that time.

11 HEARING OFFICER SHEAN: Are there any
12 members of the public or people representing other
13 agencies in the audience? And is anyone on the
14 telephone yet? Apparently not.

15 All right. We have two documents, one
16 each from the staff and applicant, the prehearing
17 conference statements. And based upon the
18 information that's contained in those, we will
19 proceed in the following fashion.

20 There do not appear to be any contested
21 issues in any other issue than water resources,
22 that dealing with the water supply related to the
23 use of filter backwash water.

24 So what I propose to do is to move ahead
25 and take, under declaration, the applicant's

1 evidence, the FSA and the revised final
2 determination of compliance.

3 Then we'll discuss any changes to
4 conditions that were raised by the applicant and
5 about which the Committee may have some questions.

6 And lastly we'll go into a discussion of
7 water resources and the specifics of the matter
8 that appears to be in contest.

9 So, with that we'll go to you, the
10 applicant, Mr. Thompson. And you've basically
11 offered in your prehearing conference statement
12 the application for certification, supplemental
13 information in response to CEC's data adequacy,
14 responses to data requests, responses to data
15 requests air quality modeling files, responses to
16 data requests for follow-up questions, additional
17 information by Mr. Weiss dated April 20, data
18 response number 23 additional information, and
19 comments on the PSA.

20 Is there objection to admission of this
21 material into the record?

22 MR. BABULA: No objection.

23 HEARING OFFICER SHEAN: All right, then
24 it is admitted. Is that complete, other than the
25 water supply and materials, all the information

1 you would like in the record for the purposes of
2 the basis of the PMPD?

3 MR. THOMPSON: Yes, it does. As you
4 state, the only document that we wanted admitted
5 into evidence besides the ones you mentioned were
6 the October 9 water resource memo.

7 HEARING OFFICER SHEAN: All right.
8 We'll go to the staff. We have your staff's final
9 assessment. I believe it's the only document that
10 staff has to offer at this point, to serve as the
11 basis in the record for staff's testimony, is that
12 correct?

13 MR. BABULA: That is correct.

14 HEARING OFFICER SHEAN: All right. Is
15 there objection to admission of the staff's FSA?

16 MR. THOMPSON: None.

17 HEARING OFFICER SHEAN: All right, then
18 it is admitted.

19 On I think it was September 5th the San
20 Joaquin Valley Air Pollution Control District
21 submitted its revised final determination of
22 compliance. Is there objection to admitting into
23 the record the District's revised final
24 determination of compliance?

25 MR. THOMPSON: No.

1 MR. BABULA: No.

2 HEARING OFFICER SHEAN: All right. The
3 Committee has a couple of matters related to the
4 conditions that are proposed in the staff's FSA;
5 and the applicant has submitted several suggested
6 changes. And I'd like to go through, since they
7 basically reflect concerns of the Committee, some
8 of those.

9 So, if you could bring your traffic and
10 transportation person up, we could discuss that.

11 MR. ADAMS: Good afternoon.

12 HEARING OFFICER SHEAN: Hi. Why don't
13 you identify yourself for the record, please.

14 MR. ADAMS: James Adams, and I'm the
15 primary author of the traffic and transportation
16 analysis.

17 HEARING OFFICER SHEAN: All right, Mr.
18 Adams, let me just indicate that after reading the
19 FSA in detail on traffic and transportation it
20 occurred to me, based upon my experience, that
21 there was a matter that was not going to be
22 sufficiently covered based upon the conditions
23 that I saw in the FSA.

24 Specifically this relates to the safety
25 of school children either waiting for the school

1 bus, which picks children up essentially directly
2 in front of the project, as well as the safety of
3 the school children on the buses that proceed west
4 on West Panoche, I forget Avenue, Boulevard,
5 whatever it is, to west of I-5, and then return
6 the children to school in the Mendota Unified
7 School District.

8 This concern was heightened by the fact
9 that in the Panoche project it appears that they
10 are going to fundamentally overlap in time, given
11 that they are to be completed up and ready for
12 operation in the summer of '09.

13 In the Starwood FSA staff's testimony
14 indicates that they expect a ten-month
15 construction period beginning in the summer of
16 2008. And the Panoche project is a 14-month
17 schedule beginning in January of '08.

18 Everyone concedes that the typical
19 commute times for workers and delivery trucks is
20 going to be between 7:00 and 9:00 a.m. in the
21 morning; and departing between 4:00 and 6:00 p.m.

22 As I totaled up the number of average
23 construction workers and peak construction workers
24 for the projects, we're showing an average of 75
25 for the Starwood with a peak of 110 for

1 approximately three months; and for the Panoche
2 project 180 workers with a peak of 383.

3 Combined, that represents an average of
4 255 construction workers daily, and with a peak of
5 493, so almost 500.

6 In addition to that the combined total
7 of heavy trucks either delivering equipment or
8 materials is somewhere between 10 and 57. And
9 while that seems like a huge range, what we know
10 is there are going to be a substantial number of
11 truck deliveries.

12 The school bus for serving the Unified
13 School District of Mendota picks up somewhere
14 between 15 to 20 children, plus those in the five-
15 plex at 7:15 and drops them off at 3:45.

16 And I guess I'd notice one thing. There
17 was similar to a case that we've had in the past,
18 which was the SMUD Cosumnes case, where there was
19 going to be a similar issue of school buses
20 traveling along the worker commute routes, as well
21 as the truck delivery routes.

22 But there's no mention made in either
23 the Starwood or Panoche projects of valley ground
24 fog during a period essentially between mid-
25 November and the end of February, which will cover

1 some of the period that school is in session, and
2 would aggravate safety issues related to both the
3 children standing at their school bus stop, as
4 well as, if I understand correctly, the bus going
5 west on West Panoche to west of I-5 picking
6 children up, and then traveling eastbound in the
7 direction of the commuting traffic, the commuting
8 workers and trucks, until it passed the projects
9 and went on into the City of Mendota.

10 Have I captured, or is there anything
11 incorrect about what I characterized here?

12 MR. ADAMS: That's essentially it,
13 Commissioner -- Hearing Officer, yes.

14 HEARING OFFICER SHEAN: Okay. If that's
15 the case, then I think we need to have more
16 protection for school children under these
17 circumstances. Because it appears we have more
18 for the kit fox than these kids.

19 So I would like to refer both the
20 applicant and the staff to both the description of
21 the manner in which the Committee and Commission,
22 as it ultimately adopted the decision in the
23 Cosumnes Power Plant project dealt with this.
24 Which would be that there be some signage
25 indicating -- and I'll hand this out and you can

1 see it; it's on the Commission's website --
2 signage as shown on page 150, which is a large,
3 orangish sign depicting a school bus. And
4 advising drivers that they're in a school bus stop
5 area.

6 In addition to that, it would seem
7 appropriate that the conditions that are in the
8 SMUD case, that would be condition trans-5,
9 trans-8 and trans-10, be adopted, though modified
10 to some degree for this particular case.

11 Trans-5 requires the signage; trans-8
12 establishes a complaint process so that if it
13 appears that there are complaints from the parents
14 of children who are either standing at the bus
15 stop or noticing that there's either illegal
16 passing or dangerous passing on the roads by
17 construction workers, they can address it to the
18 Commission's compliance unit.

19 In addition, that there be worker safety
20 program in which workers for -- and since we have
21 half of the Panoche Committee here -- there would
22 be a worker safety program for both cases,
23 describing to construction workers the fact that
24 they are going to be in the presence of school bus
25 that's going to be either traveling coming on to

1 them, or in their direction. And that they need
2 to understand what the laws are with respect to
3 stopping when school buses stop, as well as just
4 general good driving habits, particularly in the
5 fog.

6 And the last item would be that there be
7 a protected pad at the school bus pickup area near
8 the project.

9 Now, I understand that there's a
10 possibility that if the residents of the five-plex
11 are moved out that that will no longer be a pickup
12 area for students.

13 MR. THOMPSON: If you got that from me,
14 Mr. Shean, I could have been wrong on that.

15 HEARING OFFICER SHEAN: Okay.

16 MR. THOMPSON: I actually checked with
17 someone who knew.

18 HEARING OFFICER SHEAN: Well, anyway, I
19 think what we're going to do is let me ask the
20 applicant, then if you will, to prepare something
21 that reflects what we just discussed and run it
22 through the staff and get it to the Committee.

23 And at this point, since the record does
24 not -- since neither the AFC nor the FSA mention
25 the word fog, I'm going to ask for a stipulation

1 from the parties that -- because we could get this
2 through official notice, but I think this is the
3 better way to do it -- that the project area,
4 including West Panoche Avenue, is subject to
5 valley ground fog essentially for half the month
6 of November, December, January and the month of --
7 let's see, half of November, December, January and
8 February. Can I get that stipulation from the
9 parties?

10 MR. THOMPSON: We so stipulate.

11 MR. BABULA: That's fine.

12 HEARING OFFICER SHEAN: All right. That
13 will take care of that.

14 I do have a question -- thank you, Mr.
15 Adams.

16 MR. ADAMS: You're welcome.

17 HEARING OFFICER SHEAN: All right, we
18 have a question with respect to noise. And that
19 goes to noise-4. Is the staff representative on
20 noise here?

21 MR. McFARLIN: Yes, he is.

22 HEARING OFFICER SHEAN: All right. I'm
23 trying to find this -- am I correct that in noise-
24 4 you have conditions with regard to initial noise
25 measurements, and -- well, first of all, you've

1 already accomplished them at locations ML-2 and
2 -3, which are what, 16 -- ML-2 being 1600 feet
3 from the project, and ML-3 being approximately
4 1300 feet from the project, right?

5 MR. KHOSHMAHRAB: Yes.

6 MR. BABULA: Would you like them to
7 introduce themselves, first?

8 HEARING OFFICER SHEAN: Oh, yes, I'm sorry.
9 Please go ahead and do that.

10 MR. KHOSHMAHRAB: Shahab Khoshmashrab,
11 co-author of noise and vibration.

12 MR. BAKER: Steve Baker.

13 HEARING OFFICER SHEAN: All right, I'm
14 not finding what I'm looking for. I thought I had
15 seen some retesting -- oh, here we go, I beg your
16 pardon.

17 Let's go to noise-5 and your first
18 dotted paragraph there that says: If the new
19 location is within one mile when the project first
20 achieves sustained output of 90 percent or
21 greater. That the project owner would conduct a
22 short-term noise survey at that new location.

23 And I guess my question is this: If I
24 am reading the FSA correctly, I understand that at
25 ML-2, the 1600 feet from the project, the staff

1 found that there would be compliance with the
2 applicable LORS because at that location you would
3 not hear the effect of the project, isn't that
4 correct? Page 4.6-12.

5 MR. KHOSHMAHRAB: ML-2, okay.

6 HEARING OFFICER SHEAN: Third full
7 paragraph. The predicted noise level at.

8 MR. KHOSHMAHRAB: Yes.

9 HEARING OFFICER SHEAN: Okay. So at
10 1600 feet it would comply with the LORS limit of
11 45 dba, that's for ML-2. And for ML-3, which we
12 know to be at 1300 feet, it would be a bump of 1
13 dba, which we generally consider to be inaudible,
14 is that correct?

15 (Pause.)

16 MR. KHOSHMAHRAB: So it's in compliance
17 with the LORS.

18 HEARING OFFICER SHEAN: Okay. My
19 question is your condition says if there's a new
20 location within a mile, which is almost 5300 feet,
21 why, if they're in compliance at 1300 or 1600
22 feet, you're going to measure out to 5280 feet?
23 Why is that not something closer to the distance
24 where you know it complies, which would be like
25 somewhere within 2500 feet or 2000 feet?

1 I mean you've got almost 3000 feet where
2 it doesn't seem possible that the project could be
3 heard.

4 (Pause.)

5 MR. KHOSHMAHRAB: I get your point.

6 HEARING OFFICER SHEAN: Okay. So if the
7 Committee were to change that to 2500 feet, you
8 wouldn't have any problem with that?

9 MR. BAKER: Perhaps a quarter of a mile
10 would make sense.

11 HEARING OFFICER SHEAN: Okay, quarter
12 mile.

13 MR. BAKER: That's 1320 feet.

14 HEARING OFFICER SHEAN: All right, we'll
15 do that. That's it. Thank you, gentlemen.

16 MR. THOMPSON: We will accept that
17 change.

18 HEARING OFFICER SHEAN: All right. I
19 figured. Okay.

20 The next change relates to two
21 conditions, one of them being AQ-SC-6; the other
22 being -- let me make sure I have it, I think it's
23 a noise condition -- yeah. And the noise
24 condition with regard to the removal of residents
25 from the five-plex.

1 And I guess the question that I have is,
2 I haven't yet seen -- in all my days, as they
3 would say, I haven't yet seen a condition that
4 says residents who are lawfully living at a house
5 have to be removed as a condition for compliance
6 with CEQA and the Commission's decision.

7 If I understand correctly, the applicant
8 has a previously-entered-into agreement with the
9 owner of that property that will result in the
10 termination of the tenancy of the residents based
11 upon the agreement, not based upon any specific
12 condition that we have here at the Commission.

13 And I notice the applicant has taken a
14 crack at rewording this. And I think what we want
15 to say is that rather than couch a condition
16 either in air quality or noise that requires the
17 removal of residents from their home in order to
18 not create an impact, that what the condition be
19 is that we want evidence that the applicant has
20 executed its agreement with the owner of that
21 property.

22 Do you understand the nature of that
23 difference? Okay.

24 The applicant's taken a crack at it.
25 Why don't we split the load and have the staff do

1 that. So that covers what I had in mind.

2 And the only other condition that you
3 had suggested changes on is the water condition,
4 so we're going to deal with that later. All
5 right.

6 So, is there any comment or question
7 about what we've done so far? Because we're now
8 ready to move into water. Okay, let's do that.

9 Well, here's what we've got in the
10 staff's prehearing conference statement; it's
11 characterizing the filing of October 19th by the
12 applicant of the alternative water supply analysis
13 that relates to the use of agricultural filter
14 backwash water as a modification to its original
15 AFC proposal. And that this newly proposed water
16 source would meet the, essentially evaluated as it
17 would have been evaluated if it had arisen earlier
18 in the case. Meaning discovery, an evaluation
19 period, and the preparation of a section of the
20 FSA to address it.

21 All that taking sufficient time that the
22 staff suggests that the earliest an evidentiary
23 hearing could be for it to have that material
24 prepared in that way would be ten weeks. Is that
25 essentially correct?

1 MR. BABULA: That's essentially correct.

2 HEARING OFFICER SHEAN: All right. The
3 applicant, in its prehearing conference statement,
4 disagrees with the staff; says that it had
5 submitted this proposal as part of its original
6 application, and has submitted a significant
7 amount of information that it had requested after
8 the preliminary staff assessment was published,
9 that this backwash water option be included in the
10 FSA.

11 And that to the extent it was included
12 in the FSA, let me just indicate by my reading it
13 was essentially that the staff had found that the
14 option was eliminated by virtue of its
15 noncompliance with state water policy as a low TDS
16 inland water. Is that a fair characterization of
17 your position?

18 MR. BABULA: That, at the time that was
19 what was put in the FSA. However, post-FSA they
20 provided a little bit more detail. And so at this
21 point we're really not able to fully articulate
22 whether or not staff's position is that it
23 violates water policy or doesn't. Because now
24 that they have elaborated on this water use, we
25 need to do the investigation to then determine all

1 aspects of it.

2 And so I don't want to say that we're
3 not going to agree to that water. It very well
4 may be that that water is suitable use. But at
5 this point in time, given that we're looking at a
6 two-mile pipeline, there's some sort of pond
7 changes that are happening on this Baker Ranch.
8 So there's stuff that's happening that we need to
9 address.

10 HEARING OFFICER SHEAN: Okay. Well,
11 let's just get into this. My reading of the FSA
12 would essentially be that other than the -- a
13 statement made in the FSA that the backwash water
14 would not have caused an impact to water supplies
15 and water quality, there was no essentially CEQA-
16 based analysis of backwash water in the FSA.

17 MR. BABULA: That's correct. The
18 analysis was up to what we were given at the time.
19 You have to know that what they were seeking
20 certification for was to use the upper aquifer.

21 And even though in their AFC they did
22 address two possible sources, the upper aquifer
23 was acceptable. There was no substantial impact,
24 staff found that there was no impacts. Therefore
25 there was no need to look for mitigation; there

1 was no need to look for alternatives as CEQA would
2 require.

3 And so the analysis ended. And they
4 specifically pointed out in their AFC that the
5 backwash was not a reliable source. But if it
6 were to become a reliable source during the
7 project process, they would then bring forward an
8 environmental assessment and bring that to our
9 attention.

10 So, with that in mind, we went forward
11 and said, okay, you have an acceptable water
12 source. Here it is; we've done the analysis; it's
13 done. You may have mentioned about some other
14 type of water source, but it's not reliable.

15 I mean they could have put in their
16 thing, we also might do cold fusion. But that's
17 not reliable. So, we're not going to give you any
18 of the details.

19 And so it wasn't until October 15th and
20 19th when they did finally come forward with that
21 full environmental assessment. So now staff is
22 looking at it.

23 And, of course, a lot of the groundwork
24 has been laid. We're not saying we need to start
25 the whole process over because there are a lot of

1 areas that this does not impact, and we're ready
2 to move forward. In fact, the upper aquifer
3 water, if that was the water they were going to
4 use, we're ready today.

5 So now they have a new source and we're
6 going to look at it. And we're certainly amenable
7 to working with them to work on the timeline. I
8 mean the ten weeks was sort of what, based on
9 staff's workload and what we foresaw, but
10 certainly that's not etched in stone, and we'll be
11 willing to work with the project applicant to get
12 a reasonable timeline to get this forward.

13 And certainly we're not saying that this
14 is a water use that's not going to be acceptable
15 right now. We started the process. We have some
16 data requests we want to do. We have staff here
17 to address particular issues, if need be, if the
18 Commission wants to get some rationale of what
19 they're looking for.

20 But, all in all, the original
21 application and what they are looking for
22 certification for was the upper aquifer, and that
23 was acceptable. And so that's what we moved
24 forward on. And even in discussions that was
25 always been, that's our water source. There might

1 be this other thing, but it's not reliable. And
2 so staff had to go with what we had in front of
3 us.

4 And as for their environmental analysis
5 that they provided, although it's helpful,
6 sections of Title 20, section 1742.5 and 1747,
7 1742 all require staff's independent analysis.
8 Staff shall review the information provided by the
9 applicant.

10 So, even though they have done their
11 analysis, we have to do ours. And that's the
12 bottomline, and that's what we're trying to do.

13 HEARING OFFICER SHEAN: I think for the
14 Committee's purposes, in terms of how we're going
15 to go forward, and when and under what conditions,
16 the real issues are: Is this a true project
17 modification which, on the one hand staff asserts
18 that it is. Or is this a dispute that has arisen
19 between the applicant and the staff after the
20 staff published its FSA, which is properly before
21 the Committee as part of an evidentiary hearing,
22 which could proceed on the basis of the evidence
23 in the record at that time.

24 So, Mr. Thompson.

25 MR. THOMPSON: Thank you. I guess it

1 should be no surprise that from our side of the
2 table we see the facts a little differently.

3 Number one, if you'll look at the AFC
4 there is a substantial amount of information on
5 this alternative, which we believe is superior.

6 We are prepared to put a witness on the
7 stand to talk about the timeline of how this
8 alternative got freed up and made more available.
9 Some initial determinations by Regional Water
10 Quality Control Board that staff's preferred
11 alternative would result in the creation of
12 hazardous waste, which made us all more inclined
13 than ever to convince Mr. Baker to come to an
14 agreement.

15 When we received the preliminary staff
16 analysis we were pretty surprised that the ag
17 backwash water, which we had touted as an
18 alternative all the way along, was not even
19 mentioned. Neither in the alternative section nor
20 in the water section.

21 And in our comments to the PSA we
22 requested that soil and water-4 be amended to show
23 that the ag backwash water should be considered an
24 alternative source of water for the project.

25 In the intervening period of time

1 between the PSA and the FSA staff did an amount of
2 work analyzing the ag backwash water and found
3 that it would not have any impacts on water
4 supply, and there would be no cumulative impacts.
5 But stopped short of any further analysis and
6 relied on, it seems to us, a legal opinion about
7 whether or not this source of water complies with
8 state LORS.

9 We have a very different view of whether
10 or not this water supply complies with LORS, and
11 we think it does. But I guess our bottomline is
12 that having relied on the legal opinion it is
13 almost disingenuous then to come in and say if we
14 lose on the legal opinion then you're going to now
15 look at this water as a source of water. We're
16 going to kill your project by taking it into
17 February or March. And that puts us in a very
18 difficult position.

19 We are prepared to go forward with
20 witnesses today to discuss how we got there. And
21 we would offer these witnesses for any questions
22 that staff has had. And, indeed, over the last
23 few weeks we have told staff that if there's any
24 questions they have about this ag backwash plan
25 that we'd be more than happy to answer any

1 questions.

2 Now, keep in mind that what we're
3 talking about here is a three-inch PVC pipe that
4 runs down two miles between rows of pomegranate
5 trees. An electric pump. And the owner of Baker
6 Farms is in the process of combining a number of
7 smaller ponds into one big pond, which makes this
8 feasible.

9 We have trouble believing that it takes
10 three months to get there. And if there is any
11 way that staff can clarify any of its concerns by
12 asking our witnesses questions this afternoon,
13 that's really where we would like to go.

14 HEARING OFFICER SHEAN: All right. I
15 think what happened after the Committee got both
16 the prehearing conference statements of the staff
17 and the applicant, it was to go back into the
18 record of the proceeding and to determine whether
19 or not, first of all, what was presented in the
20 original application. And then what happened
21 after that.

22 And to the extent that we have read that
23 in the AFC at page 1-3, it states that the Midway
24 site has three equally viable sources of supply
25 water. Number one, water from the well at the

1 adjacent CalPeak Panoche project. Two is
2 irrigation return flow water from the local
3 farming operation's agricultural backwash pond,
4 Baker Farming Company, LLC. Or three, water from
5 a deep well.

6 Further examination of the record in
7 this AFC indicates that for purposes of data
8 adequacy, that the data adequacy sheets that were
9 presented by the staff to the applicant for
10 supplemental information before the project was
11 deemed acceptable and adequate, the information
12 was adequate and the Commission should accept it,
13 did it contain any references to this backwash
14 water.

15 And after the acceptance of the AFC in
16 January of '07, none of the 67 data requests posed
17 by the staff to the applicant related to this
18 filter backwash water. And that by virtue of the
19 PSA there is -- I have been unable to find any
20 mention, either in the water section or the
21 alternative section or the project description
22 section, any reference to the backwash water that
23 would lead one to believe that it even existed at
24 the time of the preparation of the PSA.

25 What we do find is in early August there

1 are written comments by the applicant to the staff
2 requesting that this be included. They submitted
3 to you a draft change to I think it was water-4,
4 or soil and water-4, which indicated it wanted
5 this as a viable option if it did not choose to
6 use the degraded well water. And it did indicate
7 that additional environmental information would be
8 provided.

9 And then we get to October 10th about,
10 when the FSA comes out. And the FSA, pretty much
11 solely on legal grounds, eliminates because of the
12 low TDS of this water source, filter backwash
13 water as a viable option for the project.

14 There fundamentally is no -- and, let me
15 say, in between the PSA workshop and the FSA there
16 are no data requests related to this topic,
17 either.

18 So, I think a fair reading of the FSA is
19 that the staff put forth a one-pony show; and that
20 was, that as a matter of law, based upon the TDS
21 level of water, this was not and could not become
22 a viable water supply option.

23 Now, the applicant simply disagrees with
24 you, both as to the law and it has the facts that
25 it wants to present to make it a viable option.

1 The fact that the staff has not included any
2 information with respect tot he other CEQA-related
3 topics is fundamentally not the applicant's
4 choice, but the staff's choice.

5 And that the FSA, as you note in your
6 own introduction, is the final testimony of the
7 staff. And it seems to the Committee you're going
8 to need to ride that pony into the evidentiary
9 hearings. And if you want to put on some rebuttal
10 testimony to that that's been presented by the
11 applicant, you're entitled to do that.

12 But that does not constitute an
13 amendment to the original AFC. Because all of the
14 information, perhaps not all, but sufficient
15 information was in the AFC, and the time and
16 opportunity to ask discovery has passed. And
17 we're now at the evidentiary hearings.

18 So, I don't believe we can go forward
19 today because this rollover from prehearing
20 conference into evidentiary hearing is essentially
21 reserved to totally uncontested matters.

22 But the Committee has reserved a date of
23 November 19th for the conduct of a continued
24 evidentiary hearing which will address this issue.
25 And so we think that will give staff sufficient

1 opportunity, since you will have had basically
2 this document for a month by the time of the
3 hearing, to address the issues that are important
4 to the Committee.

5 First of all, let me indicate to the
6 staff that while we understand that under our
7 regulations staff is to conduct these
8 investigations and inquiries and analyses, that
9 fundamentally at this particular point of the
10 proceeding the record, which can be used to
11 support the Commission decision, only needs one
12 piece of information. If that happens to come
13 from the applicant, then the record is complete.

14 We do not need to have a study that
15 essentially would be duplicative of anything
16 presented by the applicant, and therefore, legally
17 cumulative. So, we do not need, in our eyes,
18 given where we are in the proceeding, the kind of
19 analysis that you have described.

20 So fundamentally what we would like the
21 staff to do is to address whether or not it
22 believes that, based upon the information you've
23 been provided, whether or not there is the
24 potential for a significant adverse environmental
25 impact. And whether or not the conditions that

1 are currently contained in the FSA are sufficient
2 to cover any potential and anticipatable, not
3 speculative, environmental impact, or whether
4 something needs to be added.

5 And if you have anything in addition to
6 those to points you want to provide us, of course
7 it's your option to do that, it's your testimony.

8 And I think what we have in mind is that
9 given the standard rules from the evidentiary
10 hearing, that you provide that to the applicant
11 ten days in advance of the hearing, in writing.

12 And given that the applicant has filed a
13 prehearing brief discussing the legal issue of
14 whether or not its project, which has no cooling,
15 as that has been traditionally used to describe
16 projects, it has no steam turbine, it has no
17 condenser, and it has no cooling tower, how it is
18 that the staff -- we would like a brief back from
19 you, so long as you maintain the position, how it
20 is that the staff believes that the State Water
21 Board Resolution 7558 and the Commission's policy
22 documents compel this project, without cooling as
23 that's been used in its traditional regulatory
24 application, how those policies apply, since they
25 expressly state that they are for cooling water.

1 If you don't want to maintain that
2 position into the evidentiary hearing then you
3 don't have to do it. But if you do, we'd like to
4 have a brief so that we can have, at that hearing
5 on the 19th, some further discussion of the issue.

6 MR. BABULA: When would that be due?

7 HEARING OFFICER SHEAN: Well, it's
8 nonevidentiary, so what would be acceptable to
9 you?

10 MR. THOMPSON: Tomorrow. No, just --

11 (Laughter.)

12 MR. THOMPSON: It would be helpful to
13 get it the 9th, that would give ten days. Is
14 that --

15 HEARING OFFICER SHEAN: Well, the --

16 MR. THOMPSON: I mean that's ten days,
17 ten days.

18 HEARING OFFICER SHEAN: -- 19th is the
19 date of the hearing.

20 MR. THOMPSON: Right.

21 HEARING OFFICER SHEAN: So testimony
22 filed by the 9th gives you ten days. All right.
23 So, I guess the 9th then. And let me indicate, if
24 you want to make arrangements for some other date
25 based upon your discussions with them, the

1 Committee is not locked into that. But that's
2 what the rule provides. And if, for some reason,
3 you are amenable to something less, that's going
4 to be between the two of you.

5 MR. BABULA: Are you eliminating any
6 potential for data requests, then? Are you saying
7 that what's now in the record's done? Or staff,
8 could they have additional information?

9 If you'd like, I have the water people
10 here that might be able to address just minimally
11 what the concern is. And I know the applicant
12 said that they have people available to answer
13 questions, so.

14 HEARING OFFICER SHEAN: Well, I think
15 what we're going to do is -- and the answer to
16 data requests is no. But, what you need to
17 understand, the reason the answer is no is they're
18 going to be relying upon what they've submitted.
19 If it's not sufficient, or it's not clear, or it
20 doesn't convince the Committee that this is a
21 viable option, they're done.

22 And the same sort of thing with you. If
23 you can convince the Committee that the policies
24 that relate to cooling water absolutely apply to
25 this, they're done because, as you've stated in

1 the FSA, if they don't comply there's no reason to
2 ask the environmental questions.

3 So, given that it's 3:00 I think the
4 Committee is willing to essentially flip this over
5 into some kind of a workshop format so that the
6 staff and the applicant can remain here and
7 discuss as much of this matter as you want.

8 There's an open phone line so that if
9 anybody is calling in to inquire what's going on
10 you should take them into account. And that will
11 afford you an opportunity to discuss this matter.

12 But as matters stand now, we're
13 continued for an evidentiary hearing to November
14 19th. Direct testimony for the staff would be due
15 on November 9th, as well as a brief arguing the
16 points related to the use of the application of
17 the cooling water water policy doctrines of the
18 state and the Commission to this facility that
19 does not use cooling in its traditional sense.

20 MR. THOMPSON: It does not sound like
21 you anticipate any further filings on behalf of
22 applicant, either testimony on the 9th or anything
23 else on the legal standard. And I think we're
24 fine with that. I think we're very happy with the
25 record and what we have submitted so far. With

1 the caveat that if we see something on the 9th
2 that we very much disagree with, would it be
3 permissible to the Committee to file something
4 within a couple days of the 9th?

5 HEARING OFFICER SHEAN: You could file
6 that. And traditionally what we've done is if
7 there is rebuttal based upon the evidence that's
8 filed within the ten days, we allow rebuttal and
9 surrebuttal to be oral.

10 MR. THOMPSON: Will do.

11 HEARING OFFICER SHEAN: So anticipate
12 that on both sides. That if there's a
13 disagreement at that point we will allow just
14 straight-up oral cross and oral direct and
15 redirect and so on and so on like that.

16 All right, is there anything further?

17 MR. THOMPSON: We were hoping that we
18 could submit all parts of the record except water
19 today, but we can't do that unless we go into
20 evidentiary hearings.

21 Part of the reason we wanted to do that
22 was to -- is to give as much assurance as we can
23 that we will have a decision in time to make
24 financing, allow for the 30-day rehearing period,
25 financing, and start construction before the

1 project disappears.

2 Those are still valid points that we'd
3 like to make, but I'm assuming that those are also
4 in the minds of the Commission and the Committee.
5 And that there's nothing that we need to do to
6 convince you that we need a decision in a fairly
7 short amount of time.

8 HEARING OFFICER SHEAN: Why don't you
9 just tell us what the factors are that, you know,
10 you consider significant. If I understand
11 correctly, the 12 months will be some time in
12 early January.

13 Now, you know, we've always had
14 difficulties getting through the holidays and
15 getting these, and so why don't you just tell us
16 what your --

17 MR. WEISS: You know, the way the
18 project stands with the --

19 HEARING OFFICER SHEAN: Would you just
20 introduce yourself for the record.

21 MR. WEISS: My name is Richard Weiss;
22 I'm the Project Manager for Starwood. The way the
23 project stands with our EPC contract to build out
24 to the PPA requirements with PG&E, we have to
25 release our contractor by March 1. And to release

1 our contractor we need funds available to
2 demonstrate we can pay his bill as he starts work.

3 To do that we need to close financing
4 sometime in February. We can't close financing
5 until 30 days after you'll give us your opinion
6 because there's an appeal period and I guess
7 there's some documentation period.

8 So it backs us up basically -- and you
9 get to the holiday period. It backs us basically
10 up to the end of the year.

11 And so we need a decision by the end of
12 the year so that you add 30 days, you're into
13 January, and you add a couple weeks for us to
14 close the project. We're closing in February; and
15 we kick off our contractor March 1.

16 Otherwise, we're exposed to delay
17 damages to the tune of \$17,000 a day to our
18 contractor. I mean, and one of the, you know,
19 schedule issues, you know, the staff proposed a
20 ten-week delay. A ten-week delay to this project
21 is worth \$1.1 million, and it would probably kill
22 it. It's not a big project; it's a, you know, 120
23 megawatt project; it's \$70 million. So a million
24 dollars is a very meaningful impact to us.

25 So, we've been -- and I've been

1 communicating with Che and Eileen and staff, you
2 know, we really need to get this done by year end.
3 And they, you know, up to this point I thought
4 we've had good cooperation. But just for the
5 Commissioners information, that's the schedule we
6 need to keep the project viable.

7 HEARING OFFICER SHEAN: All right.
8 Well, we understand that. I don't think there's
9 any Committee that doesn't, as soon as it gets the
10 record closed, you know, bust their hump to get
11 this done. And that'll be the case in this
12 proceeding, as well.

13 All right, if there's nothing further,
14 and if the staff and the applicant wish to, we'll
15 allow you to roll this over into a staff-sponsored
16 workshop so long as you keep the lines open. You
17 don't obviously have to have a reporter, given
18 what's going on. And this will allow you to have
19 an exchange of information which we hope will be
20 beneficial.

21 Otherwise, we will see you on the 19th
22 at 1:00. Thank you.

23 (Whereupon, at 3:01 p.m., the hearing
24 was adjourned, to reconvene Monday,
25 November 19, 2007.)

CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of November, 2007.



PETER PETTY