

COMMITTEE PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

DOCKET

08-CRI-1

DATE NOV 12 2008

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In the Matter of:)
) Docket No.
Complaint/Request for Investigation) 08-CRI-01
Regarding Energy Sense/MASCO)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

WEDNESDAY, NOVEMBER 12, 2008

9:35 A.M.

Reported by:
Peter Petty
Contract No. 150-07-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMISSIONERS PRESENT

Arthur Rosenfeld, Presiding Member

Jackalyne Pfannenstiel, Associate Member

ADVISORS, STAFF and CONSULTANTS PRESENT

David Hungerford, Advisor

Tim Tutt, Advisor

Dennis Beck, Senior Staff Counsel

Bill Pennington

Eurlyne Geiszler

ALSO PRESENT

Brett L. Dickerson, Attorney
Gianelli and Associates
on behalf of California Living and Energy
and DuctTesters

Bill Lilly, President
California Living and Energy
William Lilly and Associates, Inc.

Dave Hegarty
DuctTesters

Ivor E. Samson
Brett Crawford
Sonnenschein Nath and Rosenthal, LLP
on behalf of Energy Sense/MASCO

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P R O C E E D I N G S

9:35 a.m.

PRESIDING MEMBER ROSENFELD: This is the Energy Efficiency Committee prehearing conference on a complaint and request for investigation regarding Energy Sense/MASCO, docket number 08-CRI-01.

I'm Art Rosenfeld, the Presiding Member of the Energy Efficiency Committee. On my right is Commission Chairman Jackalyne Pfannenstiel, who is the Associate Member.

And apart from saying welcome, I think we're probably ready to have the staff tell us what's going on.

MR. BECK: I'm Dennis Beck; I'm Senior Staff Counsel with the Chief Counsel's Office. And with me today are --

MR. PENNINGTON: Bill Pennington.

MS. GEISZLER: Eurllyne Geiszler.

MR. BECK: And, if at this point the parties could state their appearances, please.

MR. LILLY: Bill Lilly, California Living and Energy.

MR. DICKERSON: Brett Dickerson, attorney.

1 MR. HEGARTY: Dave Hegarty.

2 MR. SAMSON: Ivor Samson, appearing on
3 behalf of Energy Sense and MASCO.

4 MR. CRAWFORD: Brett Crawford, appearing
5 on behalf of Energy Sense and MASCO.

6 PRESIDING MEMBER ROSENFELD: Good
7 morning, everybody.

8 MR. BECK: And one question I have
9 for --

10 PRESIDING MEMBER ROSENFELD: Dennis, is
11 your mike -- are you --

12 MR. BECK: Yes, it's on.

13 PRESIDING MEMBER ROSENFELD: -- it's on,
14 you just have to talk a little bit closer.

15 MR. BECK: Can you hear it?

16 PRESIDING MEMBER ROSENFELD: Yeah, now I
17 do.

18 MR. BECK: One question I have for Mr.
19 Dickerson is, Mr. Dickerson, are you going to be
20 representing both California Living and Energy and
21 DuctTesters?

22 MR. DICKERSON: That is correct, yes,
23 sir.

24 MR. BECK: Okay.

25 I would note that the CEC Staff and the

1 Commissioners are not -- the CEC is not a party to
2 this proceeding under the rules of Title 20. The
3 parties are the complainants which consist of
4 California Living and Energy and DuctTesters. And
5 the respondents which are MASCO and Energy Sense.

6 So the CEC Staff is not a party to the
7 proceeding.

8 The nature of this prehearing conference
9 is procedural, it's not substantive. We have a
10 hearing set for next month and we'll talk about
11 later in this prehearing conference.

12 So, at this point we will not be having
13 any testimony and accepting any exhibits or any
14 other evidence. It's merely to discuss issues in
15 preparation for the hearing for next month.

16 The first issue that we have on the
17 agenda is compliance with the Committee order,
18 the Committee order of October 2, 2008, which was
19 directed primarily to the respondents' request for
20 documents and information.

21 The Commission did receive response.
22 And at this point we'd open it up to the parties,
23 first the complainants and the respondents to
24 address their understanding of compliance with the
25 Committee order.

1 PRESIDING MEMBER ROSENFELD: I didn't
2 get all the names when you were going through and
3 introducing yourselves. And I forgot to introduce
4 my Advisor, Dave Hungerford.

5 So, for the first few minutes when
6 you -- also it will help the reporter, when you
7 talk, if you'd say who you are.

8 MR. DICKERSON: Okay, thank you. Brett
9 Dickerson, attorney for California Living and
10 Energy and DuctTesters.

11 I guess in regards to just the PODs, the
12 request for production of documents, it did seem
13 to be very comprehensive and are likely what we
14 would have expected be promulgated by anybody
15 who's trying to look to the issue of a conflict of
16 interest.

17 It did not appear that they were as
18 responsive and as comprehensive as they could have
19 been. There was an awful lot of information there
20 that I believe remains to be seen, and is going to
21 have to be produced prior to the ability to carry
22 out any manner of meaningful hearing in this
23 procedure.

24 Obviously the issue of shared employees,
25 shared officers, shared directors, commingling of

1 funds in the most innocuous -- using that term --
2 in the most innocuous of senses here. And the
3 manner in which work, in terms of both
4 construction and/or HERS testing is referred back
5 and forth is pivotal to this inquiry.

6 And many of the questions in the
7 documents that were demanded which would shed some
8 light on the extent to which MASCO and these
9 related entities are interconnected, and thereby
10 creating an illegal conflict of interest simply
11 have not been provided.

12 So, in the absence of those documents I
13 think we're going to be very precluded in our
14 ability to move forward with the hearing next
15 month.

16 But I think there's a lot that needs to
17 be seen. I don't know procedurally what the
18 subpoena powers are of this Board. I apologize
19 for that. Most importantly, I don't know what the
20 powers are to compel production, if the production
21 has not been deemed to be adequate, in terms of
22 Mr. Beck and/or the Commission. That's something
23 that we'll need to clarify here so that we can
24 follow the appropriate channels to get what we
25 need so that everybody can go forward from here

1 and make a fair decision for all concerned.

2 MR. BECK: In terms of the Commission's
3 ability to request --

4 PRESIDING MEMBER ROSENFELD: Dennis, I'm
5 sorry to nag at you, but can you talk a little
6 closer to the mike.

7 MR. BECK: Okay, sure. In terms of the
8 Commission's ability to request and receive
9 documents, we do have the general -- there is a
10 general authorization to request and receive any
11 documents that are necessary for the Commission to
12 carry out its duties. It's been interpreted very
13 broadly. So we would have the ability to do that.

14 What I'm thinking is that perhaps the
15 parties, and this goes also for the respondents,
16 could perhaps come up with a list of documents, or
17 proposed questions or proposed requests for
18 information. And submit those to the Commission.
19 And I think it would be by way of another
20 Committee order to the parties in question to
21 produce those documents and responses to those
22 questions.

23 MR. DICKERSON: Okay. Just anticipating
24 what may come down the line, obviously counsel at
25 the other table and everybody here recognizes that

1 discovery issues are fairly common. And
2 occasionally within the context of the civil
3 world, you know, motions need to be done to compel
4 production in the event that we haven't received
5 what the parties reasonably believe should have
6 been received.

7 What mechanism is available to us here
8 to compel that production absence of going outside
9 of this forum and possibly see -- is judicial
10 intervention something that is down the line? Or
11 do we generally try to keep it inhouse here? I
12 apologize if I'm asking very rudimentary questions
13 here, but I want to insure I understand the mix
14 between procedure within the context of a
15 Commission hearing and where we go in the event
16 that that's not going to be effective in securing
17 compliance with what I consider to be a very
18 comprehensive document demand that I think would
19 be adequate if we just had everything that was
20 there.

21 MR. BECK: Generally we do like to keep
22 things inhouse. This is an adjudicatory hearing
23 but it is not obviously formal civil litigation.

24 We do have the power to issue subpoenas,
25 as Mr. Samson knows, in his motion which we will

1 discuss later regarding Tom Hamilton's testimony.

2 So, we would just have to see how things
3 proceed. Whether or not there's compliance,
4 substantial compliance; and what remains to be
5 produced, whether or not some of that information
6 can be produced via testimony at a hearing.

7 So, it's difficult to anticipate exactly
8 what might be needed later on down the line.

9 MR. DICKERSON: Okay, our only concern
10 would be that when we're talking about seeing what
11 will happen down the line and possibly sort of
12 playing it by ear, to use the legal term, and what
13 that effect that has on our ability to
14 meaningfully carry out a hearing on the 12th of
15 next month. I think that could be pretty tight.

16 MR. BECK: That's possible. And we can,
17 the Chairman does have the authority to extend any
18 timeframes. In fact, that was done in this case
19 to have the hearing, the prehearing, set out
20 farther than the timeframe that was set out in the
21 regulations.

22 MR. DICKERSON: Okay.

23 MR. BECK: But again we're hoping that
24 everybody will be cooperative and comply with --
25 because what it will be is not just something that

1 is promulgated by the parties. This will be
2 something that will be submitted to the
3 Commission; and the Committee will issue a
4 Committee order requiring the submission of
5 documents or answers to any questions.

6 So, hopefully that will go some ways
7 towards gaining compliance quickly and within
8 enough time to have the hearing that's currently
9 set.

10 MR. DICKERSON: Well, because, again, I
11 haven't gone into this in any detail, but I think
12 we'd be willing to discuss any kind of a
13 reasonable extension or waiver of the time limits
14 in terms of statutes or rules or regulations
15 regarding getting these things done.

16 I would rather go more than the 90 days
17 and have something that's meaningful, rather than
18 to try to push something through that's
19 perfunctory and benefits no one at the end.

20 MR. BECK: True, but at this point we'd
21 like to keep it as set. If there is something
22 that does come up subsequently that we feel we
23 need to continue the hearing beyond that time,
24 then --

25 MR. DICKERSON: Well, I think I

1 mentioned I'll be in Las Vegas that day, so, on a
2 pre-planned trip.

3 PRESIDING MEMBER ROSENFELD: Sorry,
4 can't hear you. Can you talk a little closer to
5 the mike?

6 MR. DICKERSON: I'm sorry, yes. I think
7 I had mentioned to Mr. Beck that I would be in Las
8 Vegas on the 12th of December which could create,
9 potentially create a problem for me to attend.

10 MR. BECK: Scheduling is difficult, but,
11 of course, the schedule of the Commissioners
12 involved is a primary concern.

13 ASSOCIATE MEMBER PFANNENSTIEL: But I
14 understand -- excuse me, Dennis -- I think that
15 the hearing is scheduled for the 10th of December.

16 PRESIDING MEMBER ROSENFELD: Yeah, in my
17 notebook it's still the 10th.

18 MR. DICKERSON: The 10th, yeah. Still
19 in Vegas that day, too; that entire week.

20 ASSOCIATE MEMBER PFANNENSTIEL: -- the
21 day you're in Vegas.

22 PRESIDING MEMBER ROSENFELD: Not your
23 favorite day.

24 MR. DICKERSON: Yes, ma'am.

25 ASSOCIATE MEMBER PFANNENSTIEL: Let me

1 just put in here though, we really would like to
2 meet that schedule. I mean that's a schedule that
3 was derived where we believe we could get the
4 evidence, the information that we needed to put on
5 a hearing that day.

6 So we are still attempting to make that
7 schedule. And we will use whatever authority this
8 Commission has to get the information that's
9 necessary to do that.

10 MR. BECK: Mr. Samson.

11 MR. SAMSON: Yes, if I may respond.
12 Ivor Samson on behalf of the respondents.

13 We filed our responses to the
14 Committee's request for information at the end of
15 October in good faith to provide the information
16 that was requested. And I'm disappointed to hear
17 for the first time today that Mr. Dickerson finds
18 those responses, in some measure, unsatisfactory.

19 The normal procedure in a case like this
20 is where a party feels that discovery that has
21 been propounded and responded to is inadequate is
22 to set forth in some detail, in writing, what the
23 perceived inadequacies are in what we call a good
24 faith meet-and-confer effort so that the party
25 that propounded the information can say, gee, I

1 hadn't thought that they wanted this. Now that I
2 understand it, I can provide this, or I won't
3 provide that, whatever it may be. But it gives
4 the responding party an opportunity to know, with
5 clarity, what the deficiencies are, as opposed to
6 hearing just the general gripe that it wasn't
7 adequate.

8 So I would respectfully invite Mr.
9 Dickerson to do that. And if you let us know
10 where you feel that our responses weren't
11 adequate, then we will obviously take a look. And
12 if we didn't meet the mark, and what you request
13 is reasonable, then we'll certainly provide it.

14 Just one caveat, however. In our
15 responses you saw that we were willing to provide
16 certain contractual information, but subject to a
17 mutually agreeable confidentiality agreement. And
18 I haven't heard any requests or offer to comply
19 with such a confidentiality agreement.

20 What we have here is a situation, and
21 without attempting to get into substance because I
22 realize reasonable people can differ on this, on
23 the one hand we have a complaint that alleges that
24 the respondents are in violation of the conflict
25 of interest rules. On the other hand, from our

1 point of view, we have a competitor who is trying
2 to seek a competitive advantage and maybe drive my
3 client out of business. And maybe, you know,
4 depending on which part of the elephant one is
5 patting.

6 So, we're very concerned about making
7 confidential and proprietary information available
8 to a business competitor. A business competitor
9 that has put draft Energy Commission Staff reports
10 on the internet.

11 So, we're going to be guarded. I
12 certainly want to comply both with the letter and
13 the spirit of the Commission's order, but we need
14 to be careful to do it in a way which does not
15 create a competitive disadvantage for my client.

16 MR. BECK: This leads me to ask
17 questions to clarify. On page 4 of the response
18 of the respondents, that is where the
19 confidentiality, request for satisfactory
20 confidentiality agreement comes into play, or
21 where it's mentioned by the respondents.

22 To clarify, the information that you're
23 seeking to keep confidential is not from the
24 Energy Commission. Your concern is not that
25 Energy Commission Staff or the Commissioners would

1 see or have access to the information. Your
2 concern is that the complainants, as a business
3 competitor, would have information?

4 MR. SAMSON: That's correct. Correct.
5 The Commission, as the fact finder, obviously is
6 going to need to review certain, or may need to
7 review certain information we would consider
8 confidential and proprietary. I understand that
9 as part of the process. I would expect the
10 Commission to treat that information as
11 confidential.

12 I'm concerned with making that
13 information available to our competitor.

14 MR. BECK: And to the extent that if you
15 can do so, could you elaborate on what aspects of
16 those documents you feel are requiring
17 confidentiality.

18 MR. SAMSON: Certain business terms in
19 the contracts, themselves, may be considered
20 proprietary. And to the extent those documents
21 discuss business plans going forward, potential
22 business opportunities. And there may be more,
23 but those are the two things that I'm thinking of
24 off the top of my head.

25 MR. BECK: Since it appears to be an

1 issue between the complainants and the
2 respondents, as far as information, I don't know,
3 and I would encourage both parties to try and come
4 to some agreement as to what information can be
5 provided to the Commission.

6 Obviously anything that's provided to
7 the Commission at this point is subject to public
8 disclosure. So it would be -- and especially to
9 the parties. So it obviously would be shown to
10 the complainants.

11 But since the issue seems to be
12 disclosure of information to the complainants,
13 perhaps there is something that could be arranged
14 between the two parties that would allow the
15 Commission to have access to the documents under
16 some grant of confidentiality, or perhaps the
17 documents can be redacted to take out the
18 proprietary information.

19 And that the evidentiary value of those
20 documents to this proceeding would not be
21 compromised or mitigated in any way by the
22 redaction of those documents.

23 MR. SAMSON: All I can say is I'm
24 certainly willing to look at any way in which we
25 can supply the information that the Commission

1 needs to make its decision in a way that doesn't
2 compromise my clients' business interests.

3 And I think it's easy to talk about
4 things in a conceptual fashion. I think what we
5 really need to do is have Mr. Dickerson explain in
6 some detail, and again preferably in writing so
7 the client can see it and we can respond to it,
8 understand what his concerns are, where he feels
9 the information wasn't provided.

10 If, in fact, his point is valid and that
11 information wasn't provided, and we can do so, we
12 will.

13 MR. BECK: Do you have any response to
14 that, Mr. Dickerson?

15 MR. DICKERSON: Well, I guess my first
16 response is that I didn't promulgate the
17 discovery. The discovery was promulgated by the
18 Commission. Okay. And I guess what I need to
19 know is at what point in time has the baton
20 passed, or will it pass, pass to us to follow up
21 on inadequate discovery responses.

22 MR. BECK: Well, that's what the baton,
23 to some degree, is passing --

24 MR. DICKERSON: Um-hum.

25 MR. BECK: -- at this hearing --

1 MR. DICKERSON: Okay.

2 MR. BECK: -- has not passed completely.

3 The Commission still has the ability to request
4 documents, and to elicit testimony on the record
5 that it feels it needs to, to come to a decision
6 in this matter.

7 But, at this point, we are throwing open
8 the opportunity to the parties to submit requests
9 to the Commission, to the Committee, to ask the
10 Committee for a subsequent order regarding
11 additional documents and additional information.

12 MR. DICKERSON: Okay, because, you know,
13 obviously, Mr. Beck, I don't want to get in the
14 middle of your discovery, you know, start
15 communicating directly with him without you being
16 aware of it. And it would appear to me that the
17 appropriate procedure that we would follow is if I
18 do not believe that the discovery that I recently
19 received copies of is inadequate, I should
20 apparently probably serve Mr. Samson with whatever
21 notice I am providing to your request from you in
22 which I outline why I -- the concerns I have with
23 their responses to the Commission's discovery, so
24 you see it all at the same time, very much the
25 same way we would do a service to the court and a

1 service to the opposing party in the event that
2 there is a dispute regarding a discovery response.

3 MR. SAMSON: Although normally one gets
4 a meet-and-confer letter so that the responding
5 party has an opportunity to assess the merits of
6 the propounding party's claim.

7 MR. DICKERSON: Sure. I wouldn't have a
8 problem with doing any manner of the meet-and-
9 confer with you before we had to bring them
10 involved. But, again, --

11 MR. SAMSON: I think that makes --

12 MR. DICKERSON: That's okay, I just
13 didn't -- again, I did not promulgate the
14 discovery, okay.

15 MR. SAMSON: Right.

16 MR. DICKERSON: And consequently, if the
17 discovery was deemed in any way to be inadequate,
18 I perhaps naively assume that the followup would
19 be done by the Commission unilaterally, without a
20 request from us.

21 More than happy to do that if that's
22 what the procedure would be, because this is kind
23 of a learning experience for me today, too.

24 MR. BECK: It would be -- there may be
25 some concerns on the part of the Committee

1 regarding the adequacy of the information that was
2 provided. But because you are the party, your
3 clients are the parties, and that they have the
4 burden in this matter of proving that there is a
5 conflict of interest, then it is incumbent upon
6 the parties to request whatever documents or any
7 other evidence they believe is necessary to prove
8 that case. So, --

9 MR. DICKERSON: Okay, you've clarified
10 one point for me, and that was going to be my
11 question. Who assumes the responsibility of
12 meeting burdens of persuasion and burdens of proof
13 in this matter? Is it my clients here at this
14 table? Or does the Commission appoint a staff
15 attorney to take that, such as you would see with
16 EDD or the Department of Industrial Relations or
17 any of those?

18 MR. BECK: At this point it's your --
19 the burden of proof is on the complainants, as the
20 entity that indeed made the complaint. Our
21 regulations allow for CEC Staff or a party outside
22 of the Commission to file a complaint in this
23 manner. And this matter was filed by your
24 clients.

25 So the burden of proof would fall on

1 you. And as I said, at this point the Commission
2 is acting as a neutral fact finder.

3 And as this is an adjudicatory
4 proceeding, but yet not civil litigation, the
5 rules of evidence, of course, are different. They
6 can be found in our regulations, as well as some
7 of the other requirements, and rules and
8 procedure.

9 MR. DICKERSON: Have there been any
10 rules such as, you know, --

11 PRESIDING MEMBER ROSENFELD: I'm going
12 to ask you to keep your mouth a little closer to
13 the mike.

14 MR. DICKERSON: Okay, I'm sorry. Is
15 there any rules, regulations, et cetera, that have
16 been promulgated that cover the manner in which
17 these hearings are held that would be the
18 equivalent of the Code of Civil Procedure, so that
19 we would know what they would be before we get
20 started with it.

21 MR. BECK: Well, under the Code of Civil
22 Procedure, no. It's --

23 MR. DICKERSON: I mean a reasonable
24 facsimile that's used here.

25 MR. BECK: Well, they are in section

1 1230, et cetera, of Title 20.

2 MR. DICKERSON: Okay.

3 MR. BECK: That is the complaint/
4 request for investigation.

5 MR. DICKERSON: Okay, now --

6 MR. BECK: There are also section 1200,
7 et cetera, of Title 20.

8 MR. DICKERSON: Okay, I think --

9 MR. BECK: That contains the general
10 rules governing procedures by the Commission
11 including adjudicatory proceedings.

12 MR. DICKERSON: Okay, I think I've seen
13 those. Okay, thank you.

14 MR. BECK: Um-hum.

15 MR. DICKERSON: So I guess, if anything,
16 what we've come to the conclusion here, Mr.
17 Samson, is if need be we'll forward the equivalent
18 of a meet-and-confer to you that we can discuss.
19 And then if we can't resolve what we're talking
20 about at that point, I'll be contacting Mr. Beck
21 with whatever needs to be sent to him. And
22 hopefully he'll be able to maybe act as a mediator
23 or something to resolve whatever our discovery
24 matter, if that works for you.

25 MR. SAMSON: Yeah, that's perfectly

1 fair.

2 And I would just ask, since the clock is
3 ticking, if you could do it sooner rather than
4 later.

5 MR. DICKERSON: Probably not before I
6 leave today, but shortly thereafter.

7 MR. BECK: And obviously we do encourage
8 the parties to talk to one another to speed up and
9 enhance the compliance with -- and to prepare for
10 the hearing.

11 So what I'm contemplating is that the
12 parties will meet, discuss the matters, discuss
13 additional documents that may be needed by either
14 side. And if there is an agreement to produce
15 those documents, a voluntary agreement to produce
16 those documents, then you can go ahead and submit
17 that to the Commission, to the Committee, to the
18 docket saying we have agreed that these particular
19 documents will be produced --

20 MR. SAMSON: Stipulation in other words.

21 MR. BECK: Basically, in the way of a
22 stipulation. And if not, if there is still the
23 need to compel some documents by way of a
24 Committee order, then that should be stated. That
25 needs to be filed again to the docket by whichever

1 party feels that's necessary.

2 And then the Committee will issue an
3 order. We'll look at that and issue an order.

4 MR. SAMSON: Hopefully we won't, but if
5 Mr. Dickerson and I should get to that impasse,
6 and he files a request or motion to compel,
7 whatever it may be, whatever the nomenclature may
8 be, I would assume then that both parties would
9 have an opportunity to be heard on the substantive
10 merits of that request?

11 MR. BECK: Yes. Probably via writing,
12 though. We would probably not convene another
13 prehearing conference or hearing on that. It
14 would probably just be submitted --

15 MR. DICKERSON: Via briefs.

16 MR. BECK: -- briefs. But any order
17 would have to come through the Committee rather
18 than propounding discovery directly from one party
19 to the other. If there's -- obviously if the
20 parties again reach some sort of stipulation in
21 terms of production of the documents, then that's
22 probably preferable and also would enhance the
23 speed of getting the necessary documents to the
24 Commission, the Committee.

25 And there also may be additional --

1 after that is done there still may be some
2 additional documents from either side, or from any
3 of the other parties, that the Commission, or the
4 Committee, I should say, may need. And so the
5 Committee would obviously still reserve the right
6 to propound an additional request via Committee
7 order.

8 So, obviously the timeframe for this is
9 somewhat close, and I would encourage you
10 gentlemen to meet and confer on this as quickly as
11 possible; and to report to the Commission in
12 writing what the results are. So the Committee
13 could then do what it needs to do in terms of
14 either drafting a Committee order requiring the
15 production of documents that are in dispute. Or
16 again, seeing what additional documents that the
17 Committee might need to make decisions.

18 MR. SAMSON: And would you view that as
19 a joint status report? For example, Mr. Dickerson
20 and I say we've been able to agree on the
21 following items, but unable to agree on these
22 remaining items.

23 MR. BECK: Because it's less formal than
24 civil litigation, position is it need not have any
25 specific title or name. It could be stipulation,

1 or joint status report, however you want to term
2 it.

3 MR. SAMSON: But I guess my question,
4 whatever the terminology may be, would you expect
5 it to be in a joint status report submitted
6 jointly by the complainant and the respondent?

7 MR. BECK: I think that would probably
8 be -- one document is probably preferable if you
9 gentlemen, if the parties can agree on one single
10 document to be submitted.

11 MR. DICKERSON: That would just about
12 have to be an imperative if we're going to meet a
13 December 10th date, to be doing statements of
14 everything we did.

15 MR. SAMSON: And I mean, generally, you
16 know, with responsible counsel that's not an
17 issue. We all know what we agree on and what we
18 disagree on. And that's pretty straightforward.

19 MR. DICKERSON: It's like a scheduling
20 order in federal court. Essentially the same
21 thing. We say what we agree on and what we don't,
22 and that's it.

23 MR. BECK: And we did schedule the
24 hearing -- the hearing is obviously five weeks
25 from today's date. And the Committee did

1 anticipate, I think it's -- is it only four?

2 MR. DICKERSON: Four, 12th to the 10th,
3 28 days. Thirty days has November.

4 MR. BECK: Regardless. Whether it's
5 four or five weeks, we did pick those dates
6 thinking that those would be an appropriate amount
7 of time for any additional work to be done. And
8 we encourage the parties obviously to be as
9 diligent as possible.

10 MR. DICKERSON: I'll just say that's
11 going to be a tough, that's going to be a tough
12 nut for my folks to crack. Because really, again,
13 I'll confess to my own ignorance as to the
14 procedure. I do not anticipate, nor did my
15 clients, that the burden of proof and persuasion
16 would lie with them in this matter.

17 So really what we're finding ourselves
18 in is not necessarily bringing a complaint and
19 having it investigated. We're essentially in full
20 blown -- truncated, but full blown litigation
21 here.

22 MR. BECK: Well, not a full blown
23 litigation hearing. At this point the Committee
24 is anticipating this will take no more than a day.
25 And this is another thing that we will discuss.

1 Because the issues are, and we'll discuss the
2 issues a little bit later, the issue is a narrow
3 one of whether or not there is a conflict of
4 interest under the Commission's regulations.

5 There were, in various documents that
6 have been submitted, there were discussion of
7 other matters of a code of ethics, of some
8 questions about the workmanship that may be
9 involved. Those are, the Committee does not see
10 that as an issue in this hearing. It's
11 particularly whether or not there is a conflict.

12 Also it is anticipated that a number of
13 the issues about whether there is or is not a
14 conflict will be borne out by documentation and by
15 answers, both in requested documents, as well as
16 the answers to specific questions.

17 So, I'm not sure that the actual
18 testimony portion of the hearing would take very
19 long.

20 MR. SAMSON: I respectfully disagree,
21 Mr. Beck. Maybe when we get to that point we can
22 talk about it a little bit more.

23 MR. DICKERSON: What is the procedure
24 that we have for subpoenaing witnesses? Because I
25 think that may be where he's getting into some of

1 what he's talking about here, may require more
2 than just one or two people to get up and take the
3 stand and testify in this matter. Is it --

4 MR. BECK: Subpoenas are issued by the
5 Commission, or by the Committee in this case.

6 MR. DICKERSON: Based on input from us?

7 MR. BECK: Yes.

8 MR. DICKERSON: Okay.

9 MR. BECK: Yes. And hopefully that will
10 not be necessary. Hopefully, again, the counsel
11 can work together to agree on having witnesses
12 which we may as well go to that part of the agenda
13 that talks about Mr. Samson's application for a
14 subpoena for the videotaped deposition of Tom
15 Hamilton.

16 I have read the application and the
17 declaration and my understanding is that the
18 problem at this point is that Mr. Hamilton now
19 works for California Living and Energy, or at
20 least is retained by California Living and Energy.
21 Is that right?

22 MR. SAMSON: Well, to be clear, he was
23 the Executive Director of CHEERS for some period
24 of time. He left CHEERS, I believe it was early
25 2007, I'm not sure.

1 But for roughly the last year, being
2 approximate in those dates, but for roughly the
3 last year he's been employed by a consulting firm.
4 I think it's CTI or it's CIT --

5 SPEAKERS: ICI.

6 MR. SAMSON: Well, I have the letters
7 right, but in the wrong order. He's been employed
8 by a third-party consulting firm.

9 I have talked to Mr. Hamilton, as set
10 forth in my declaration, and asked if he would be
11 willing to appear on December 10th at the hearing
12 in this matter. And he said that he would,
13 subject to checking with his management. And that
14 was a discussion that I had with him I think the
15 end of September, whatever the dates are in my
16 declaration.

17 I called Mr. Hamilton, not having heard
18 back from him, I called him I think it was the
19 29th or 30th of October, to find out the status,
20 if he had talked to his management and gotten
21 permission to be able to come and testify.

22 And he said that within the last week,
23 within the last week from October 30th, the end of
24 October, his consulting firm had been retained by
25 California Living. And that therefore he felt

1 that there was a relationship conflict of interest
2 such that he couldn't voluntarily testify.

3 I explained to him that I simply wanted
4 him to talk about certain historical events,
5 primarily conversations that he had had with
6 officials of MASCO and Energy Sense, and with the
7 Energy Commission in 2006 regarding the
8 organization of Energy Sense, the structural
9 organization and compliance with the Energy
10 Commission's regulations.

11 I wasn't asking him to say anything
12 about California Living at all, just simply the
13 historical events in which he had been involved.
14 He said he understood; he was very gracious; but
15 he said he felt that he could not voluntarily come
16 up here.

17 And I told him that, you know, based on
18 that I had no desire to cause him any either
19 personal or professional inconvenience, but his
20 testimony is exceedingly important and therefore I
21 was going to seek a subpoena from this Commission,
22 hence the documents that have been filed.

23 MR. BECK: Mr. Dickerson, it appears
24 that -- well, first of all, is Mr. Hamilton
25 retained in some sense by California Living and

1 Energy?

2 MR. DICKERSON: My understanding is that
3 Mr. Hamilton's company is doing some work with
4 California Living and Energy. He is not an
5 employee of California Living and Energy.

6 MR. LILLY: There's no contracts.

7 PRESIDING MEMBER ROSENFELD: Sorry, just
8 didn't hear you. He is not?

9 MR. DICKERSON: He is not an employee of
10 California Living and Energy.

11 MR. SAMSON: It's like a third-party
12 consultant.

13 MR. DICKERSON: Yeah.

14 MR. BECK: Well, it seems that from what
15 Mr. Samson is saying is that Mr. Hamilton is
16 concerned that voluntarily coming and testifying
17 at the hearing would somehow run afoul of Mr.
18 Lilly's company.

19 And if that's not the case, then
20 something much easier than a subpoena would be for
21 Mr. Lilly to talk with Mr. Hamilton and say, tell
22 him that we have no problem with you coming and
23 testifying in this hearing. And, in fact, Mr.
24 Lilly may even wish to have Mr. Hamilton come and
25 testify.

1 MR. SAMSON: The only problem with that,
2 and I'm totally surmising at this point because I
3 don't know anything about Mr. Hamilton's company,
4 but perception is everything. And notwithstanding
5 the fact that Mr. Lilly may call Mr. Hamilton or
6 Mr. Hamilton's boss and say, I don't have a
7 problem with this, his company may still decide
8 that for reasons dealing with business
9 relationships, company policy, that they will only
10 allow him to testify in response to a properly
11 authorized subpoena.

12 And so at this point, given the initial
13 reservations that have been expressed, given the
14 fact that we don't know what actions Mr.
15 Hamilton's management may take regardless of Mr.
16 Lilly being very cooperative, I would prefer to
17 get the subpoena. That's the only way that we can
18 be assured of having Mr. Hamilton's testimony.

19 And then, quite frankly, it gives both
20 Mr. Hamilton and his company a cushion in that
21 down the road, whatever the outcome of this
22 proceeding may be, there's no awkwardness with
23 California Living and Hamilton and his company.
24 Mr. Hamilton is simply responding to a properly
25 authorized subpoena, telling the truth as he knows

1 it. He's not appearing here as a favor, if you
2 will, to one party or another. It protects the
3 impartiality of his testimony, if you will, to the
4 greatest degree possible.

5 MR. BECK: Mr. Dickerson, do you have
6 any response to that?

7 MR. DICKERSON: No. I understand
8 exactly where he's coming from. Anybody who's,
9 you know, done this stuff knows that that could be
10 a little bit of an issue. And the subpoena is
11 kind of the well,-they're-making-me document. So
12 it doesn't appear that you're coming in.

13 Again, whichever way you need to compel
14 to have him here, I can have Mr. Lilly have a
15 discussion with him. Obviously we're not -- I
16 think we've made clear we're not going out of our
17 way to try to stop him from coming in.

18 We don't have a problem with it. So,
19 whichever way works best, I'm certainly not going
20 to object to any subpoena that Mr. Samson may want
21 to have issued.

22 MR. BECK: What I would suggest, and
23 we're going to ask the parties to do, is to have
24 Mr. Lilly or Mr. Dickerson have whatever
25 discussions with Mr. Hamilton or Mr. Hamilton's

1 company.

2 MR. DICKERSON: He'll do it.

3 MR. BECK: And that you, again, at that
4 point you contact Mr. Hamilton and see if he is,
5 indeed, willing to come and testify. And you can
6 note that in the joint statement that you would be
7 submitting to the Committee.

8 If, at that point, you believed that a
9 subpoena was still necessary, then the Committee
10 would decide that and would issue one if we found
11 that it was necessary.

12 I do think that there is good cause for
13 having, I do think that his testimony, as you've
14 characterized it in your pleadings, are relevant.
15 So I think there would be good cause.

16 MR. SAMSON: Could I offer this as a
17 suggestion?

18 MR. BECK: Sure.

19 MR. SAMSON: Because I am concerned, and
20 I realize we're going to talk about scheduling
21 later, but nonetheless, where we are the
22 calendar's rapidly turning. And Mr. Hamilton's a
23 consultant. My impression is that, you know, he's
24 in his office one day a week, maybe, and traveling
25 around, doing a lot of stuff.

1 That the Committee issue a subpoena, but
2 not serve it. If Mr. Hamilton is agreeable and we
3 get a written commitment from his company that he
4 can and will appear, then the subpoena need not be
5 served. And he would agree to come based on --
6 I'm not sure who's Mr. Hegarty and who's Mr.
7 Lilly, I'm sorry -- based on, you know, the
8 request that's made that he voluntarily come.
9 That would be great.

10 But I am concerned that unless we get a
11 written commitment from his senior management
12 that, you know, company policies; we don't know
13 what his company policy is. Policies can change
14 at the last minute. One of their inhouse
15 attorneys said okay; a more senior attorney who
16 hadn't heard about it till the last minute says,
17 no, I don't think this is a good idea.

18 I think we need to have the assurance of
19 an issued subpoena. And absent a written
20 commitment from a senior-level person of their
21 company, I think we have to go forward with a
22 subpoena, is the only way of being assured. If we
23 get that written commitment then we won't serve
24 the subpoena.

25 MR. BECK: I'm going to ask the members

1 of the Committee if they have any input at this
2 point on this matter.

3 PRESIDING MEMBER ROSENFELD: Makes sense
4 to me to go ahead and issue it, but not serve.

5 ASSOCIATE MEMBER PFANNENSTIEL: My
6 feeling is why don't we see what's needed here. I
7 mean, it seems like we don't need to issue a
8 subpoena today. If you have the discussions with
9 Mr. Hamilton and others in his organization
10 tomorrow and discover that they're not
11 comfortable, we can always issue a subpoena.

12 But it just seems to me why go to that
13 level if we don't need to.

14 MR. SAMSON: I guess my response is
15 we're all here to maybe talk about the merits of
16 it. And I don't know how long it's going to take
17 to have discussions with Mr. Hamilton and whatever
18 management at his company is necessary. And then
19 how much longer it's going to take to get a
20 written commitment or not.

21 So we could be a couple weeks down the
22 road before we know for sure whether he will or
23 won't.

24 ASSOCIATE MEMBER PFANNENSTIEL: So your
25 point, counsel, on a subpoena is simply that it

1 would accelerate the decision on his part? I
2 guess I'm just not sure of the value of --

3 MR. SAMSON: If it's not served, no.
4 But if it is issued, then we wouldn't have to take
5 the time to come back to you and ask to have the
6 subpoena issued, we would have it in our pocket,
7 if you will. And then as soon as -- if we find
8 out that Mr. Hamilton cannot make a commitment,
9 then we could immediately then serve him.

10 MR. BECK: What we could do is have the
11 Committee rule that a subpoena would be issued for
12 Mr. Hamilton should his appearance not be able to
13 be secured otherwise. We could have that ruling
14 made today, but not necessarily draft up the
15 subpoena at this point, which wouldn't take very
16 long at all to do once we were notified that a
17 subpoena was going to be necessary.

18 MR. SAMSON: Again, the problem -- I
19 understand what you're saying. We just have to
20 come to a resolution, or Mr. Hamilton's
21 organization needs to come to a resolution on it
22 very quickly.

23 Because we can't compel Mr. Hamilton to
24 come, you know, 500 miles from Los Angeles to
25 Sacramento. It would have to be a videotaped

1 deposition in the Los Angeles area, and that takes
2 time to set up and notice.

3 MR. BECK: Well, my point is just
4 echoing what the Chairman said, is that the
5 subpoena is not going to be issued at this point
6 anyway. We agree that it's not going to be
7 issued.

8 We can make a determination here that
9 Mr. Hamilton's testimony is relevant, and that a
10 subpoena will be issued for him shall his
11 voluntary appearance not be secured.

12 And that the actual -- so, in a sense,
13 we are -- the Committee would be saying, yes, we
14 are going to issue a subpoena for him, so they
15 would be half a step less than actually having it
16 issued at this point and holding it. It's
17 functionally, I think, the same thing.

18 ASSOCIATE MEMBER PFANNENSTIEL: Mainly
19 you say if we need a subpoena we'd be glad to
20 issue one.

21 MR. SAMSON: Okay, that's fine. My --

22 PRESIDING MEMBER ROSENFELD: Promptly.

23 MR. SAMSON: I'm sorry, sir?

24 PRESIDING MEMBER ROSENFELD: And
25 promptly.

1 MR. SAMSON: Thank you. Could we
2 just -- I guess what I would like, assuming just
3 for the moment that we're still staying with the
4 December 10th hearing date. I realize that's open
5 to discussion, but just assuming that for the
6 moment. Could we have sort of a cut-off date that
7 unless we hear from Mr. Hamilton's organization by
8 X date, then the subpoena would issue?

9 MR. BECK: That's, toward the end of
10 this hearing I was going to broach the subject of
11 specific dates that we would like to have things,
12 which would include notification of whether or not
13 a subpoena will be necessary for Mr. Hamilton. As
14 well as an expectation of when we would get back,
15 get some sort of joint --

16 MR. SAMSON: That's fine.

17 MR. BECK: -- statement from the
18 parties.

19 MR. SAMSON: Okay, thank you.

20 PRESIDING MEMBER ROSENFELD: And I'm
21 going to welcome Tim Tutt, who's Chairman
22 Pfannenstiel's Senior Advisor. Glad to see you,
23 Tim.

24 (Pause.)

25 MR. BECK: Now I would like to talk

1 about the procedural issues for the hearing. As
2 we've already discussed, the hearing is set for
3 December 10th.

4 There has already been some discussion,
5 some concern that the sides will not be ready by
6 December 10th. As the Chairman has already
7 indicated, we hope that the amount of time that we
8 have -- it is set for December 10th, and we hope
9 that amount of time is sufficient to get the
10 information necessary, to secure whatever
11 witnesses.

12 If you have anything additional to say
13 on that matter, other than what's already been
14 discussed?

15 MR. DICKERSON: Other than I'm out of
16 the state all that week. Prepaid.

17 MR. BECK: I'm sorry, say again?

18 MR. DICKERSON: Prepaid. I'm out of the
19 state that week, so it's not readily cancelable.

20 MR. BECK: All right. Mr. Samson,
21 anything additional?

22 MR. SAMSON: Yeah, two comments. One I
23 would have to discuss with my client, but it's
24 normal, and I realize in a court setting one
25 always accommodates the court. In this setting I

1 guess we always accommodate the Commission.

2 But generally, between counsel, one
3 extends a professional courtesy to try and work
4 out with counsel dates that would work.

5 So subject to my client's approval,
6 which I don't, you know, just been raised for the
7 first time, obviously if it would work for the
8 Commission's schedule, we would endeavor to
9 accommodate Mr. Dickerson.

10 MR. DICKERSON: I appreciate that, thank
11 you.

12 MR. SAMSON: Again, that's between Mr.
13 Dickerson and myself, and I'm not speaking for the
14 Commission.

15 We would be prepared to go forward on
16 December 10th and had planned to do so. Part of
17 the problem is, you know, this is the first time
18 we've gotten together, other than reading I'm
19 going to call them allegations in the complaint.
20 And I realize Mr. Dickerson probably didn't draft
21 it.

22 We are kind of at a loss to know what
23 the nature of our case is, simply because the
24 complaint is kind of a shotgun, if you will.

25 And so without knowing what witnesses or

1 at least even if not names, the subject areas of
2 which the witnesses are going to testify on behalf
3 of the complainant, I have an obligation to my
4 client to present a case that responds to the
5 allegations.

6 And I anticipate right now calling seven
7 witnesses.

8 MR. BECK: I'm sorry, seven or --

9 MR. SAMSON: Seven.

10 MR. BECK: Seven.

11 MR. SAMSON: Seven. And as the
12 complainant with the duty of going forward, Mr.
13 Dickerson is going to call however many witnesses
14 he wants to. And I'm going to cross-examine them.

15 He's going to want to cross-examine my
16 witnesses, and I just simply don't see how it's
17 going to be done in a day.

18 MR. BECK: Mr. Dickerson, do you have
19 any comment?

20 MR. DICKERSON: I would concur with
21 that.

22 MR. BECK: How long do you think it
23 would take? If not a day, how long?

24 MR. SAMSON: Well, I can only speak for
25 my witnesses. I know I'm going to put on seven

1 witnesses, so I figure that's at least a day and a
2 half of direct testimony. I don't know how long
3 Mr. Dickerson is going to take to cross-examine
4 those witnesses. And I don't know how many
5 witnesses he's going to have and how long it's
6 going to take me to cross-examine them, because
7 neither of us has had the benefit of depositions
8 or discovery.

9 MR. BECK: Well, as I have stated, the
10 Committee does anticipate that it would not go
11 longer than a day. And the reason is that again
12 that the nature of the allegation, which is a
13 conflict of interest in the way that the companies
14 are doing their business. A lot of that can be
15 fleshed out and shown one way or another via some
16 of the documentation.

17 So, I encourage both sides to be
18 judicious in their use of -- in their calling of
19 witnesses.

20 The Committee will, during the hearing,
21 will probably not be shy about saying, if evidence
22 becomes duplicative, if it goes beyond the
23 boundaries that we've discussed, I don't think the
24 Committee would be shy about saying we've heard
25 this testimony, or this is already contained in

1 the documents that have already been submitted.

2 So, I would again encourage both sides
3 to be very judicious in planning testimony at the
4 hearing, considering that it seems to be a matter
5 that is documentary to a large degree.

6 MR. SAMSON: It is to a degree. But not
7 exclusively documentary. And that's why live
8 testimony is important. And I do understand and
9 am well aware of your admonition with regard to
10 not having cumulative testimony.

11 I know that this also is not going to
12 get into, you know, technical aspects of how
13 insulation is laid or not laid, or things like
14 that. We're focusing on corporate structure,
15 organization and finances. And I need to have a
16 number of witnesses to do that.

17 MR. BECK: Mr. Dickerson, at this point
18 do you have an idea of how many witnesses you will
19 be calling?

20 MR. DICKERSON: This is just the
21 roughest of estimations. I would expect I would
22 be calling, myself, between three and five.

23 ASSOCIATE MEMBER PFANNENSTIEL: Mr.
24 Beck.

25 MR. BECK: Yes.

1 ASSOCIATE MEMBER PFANNENSTIEL: We may
2 want to -- I don't think we'll be able to do it
3 here and now, but if we start looking at calendars
4 to find a couple days together, we're probably not
5 talking December then.

6 I just think people should understand
7 that if it is going to be more than a day, and
8 preferably, I think, from everybody's standpoint,
9 a couple days together, we are probably talking
10 after the first of the year. So people just need
11 to think about that when we try to finalize the
12 schedule.

13 MR. BECK: Yes. And unfortunately, the
14 date that was set, December 10th, was before I
15 think Mr. Dickerson was brought into the case,
16 that we did endeavor to find a date where
17 everybody was available, which was virtually
18 impossible.

19 PRESIDING MEMBER ROSENFELD: Tried, but
20 failed.

21 MR. BECK: We tried, but failed,
22 valiantly, but miserably to try and find something
23 where everybody fits it into their schedule.

24 Again, that is something that we should
25 probably address again. If there are, again, in

1 this joint statement that you would be -- the
2 parties would be submitting. One of the things
3 that would be discussed in there would be
4 potential dates.

5 And, of course, the availability of the
6 Committee Members is of primary concern. And that
7 if things need to be canceled, vacations need to
8 be truncated or other matters need to be
9 rescheduled, so be it. Of course, if counsel's
10 otherwise engaged in trial, but --

11 MR. SAMSON: Or gone to Vegas?

12 (Parties speaking simultaneously.)

13 MR. DICKERSON: Or going to Vegas.

14 MR. BECK: That's right.

15 MR. DICKERSON: Mr. Beck, would it be
16 possible for Mr. Samson and I -- forgive me if I'm
17 speaking on your behalf -- to see dates of
18 availability or non-availability for the
19 Commission after the first of the year so we would
20 have that information available to us when he and
21 I are trying to come up with dates?

22 MR. BECK: I think that that's possible,
23 we can do that.

24 MR. DICKERSON: Because we could spend a
25 lot of time coming up with a date, and then find

1 out that something else is going on.

2 PRESIDING MEMBER ROSENFELD: Didn't
3 work.

4 MR. BECK: Should also note that one of
5 the Chairman's Advisors, Tim Tutt, also came in
6 subsequent to us starting off. So he's here, as
7 well.

8 I've already discussed primarily what
9 the issues are that are going to be discussed.
10 They revolve around a conflict of interest, as
11 those are set forth in the regulations. As I
12 said, the Committee will definitely keep the scope
13 of the inquiry narrowed to that. I just want to
14 emphasize that to the parties.

15 In terms of specifics of how the hearing
16 would proceed, and the complaints would put on
17 their case, all their witnesses, submit any
18 additional documentation.

19 Witnesses would be subject to cross-
20 examination by the respondents. After the
21 complaints were done calling witnesses,
22 respondents would then be allowed to call
23 witnesses who would be subject to cross-
24 examination by the complainants. And also to
25 submit any additional documentation.

1 There would be some time for rebuttal,
2 but only rebuttal, not obviously to reemphasize
3 issues or matters of testimony that was already
4 presented.

5 MR. DICKERSON: I'm assuming we're under
6 a preponderance standard here?

7 MR. BECK: Yes.

8 MR. SAMSON: I'm sorry, I didn't hear
9 that.

10 MR. BECK: Preponderance is the
11 standard.

12 Now we get to the specifics of the
13 subsequent Committee order, or before that, the
14 joint statement by the parties. What we have
15 discussed here at this prehearing conference would
16 be, is a statement by the parties regarding
17 documents that are going to be in agreement, as to
18 those documents that are going to be produced.

19 Documents that one side or the other
20 believes are relevant and should be compelled to
21 be produced by the Committee, but have not been
22 able to get voluntary compliance to do so by the
23 other party.

24 I think a witness list by both parties,
25 at least a tentative witness list by both parties

1 to be contained in that statement.

2 Availability of the parties for a two-
3 to three-day hearing.

4 And are there any other issues? Also,
5 of course, the status of Mr. Hamilton, whether or
6 not he has agreed to come voluntarily to the
7 hearing, or whether the parties believe that a
8 subpoena is necessary.

9 Are there any other issues that counsel
10 believe should be addressed in the statement?

11 MR. SAMSON: May I ask that we go off
12 the record for a moment so I can consult with my
13 colleague?

14 MR. BECK: Sure.

15 (Off the record.)

16 MR. SAMSON: Mr. Beck, there's one other
17 thing that I think might be helpful, actually, to
18 both sides in the joint statement. As part of the
19 witness list, if we could have similar -- forget
20 the -- you know, federal court, state court
21 disclosures -- just sort of a one-paragraph
22 summary identifying who the witness is, and a one-
23 paragraph summary of their expected testimony.

24 MR. DICKERSON: Sort of like under
25 initial rule 26 disclosures?

1 MR. SAMSON: Yeah, I was trying to think
2 of the rule and I couldn't. Yes.

3 MR. DICKERSON: I don't have a problem
4 with doing that, that's fine.

5 MR. BECK: And that sounds good.

6 MR. SAMSON: You know, because there may
7 be motions by either party to preclude a witness
8 on the grounds that that testimony isn't relevant,
9 for example. And if we had at least a snapshot
10 peek at what the testimony is, it would help both
11 of us in our preparation for cross-examination,
12 which would make the hearing, itself, go more
13 efficiently.

14 MR. BECK: Okay. Any other matters that
15 you think need be included?

16 MR. DICKERSON: No, I think that will
17 cover it. We may talk in the interim and, you
18 know, maybe go through and see if there's anything
19 else that looks like it could be included.

20 MR. SAMSON: Yeah.

21 MR. DICKERSON: Maybe just pulling stuff
22 off that scheduling conference and see if there's
23 any headings there that would work, something like
24 that.

25 MR. SAMSON: Yeah. I'm presuming, you

1 know, additional items that we're in agreement on
2 and want to put in this information would be
3 acceptable.

4 MR. BECK: Would be acceptable to the
5 Committee?

6 MR. SAMSON: Yes.

7 MR. BECK: Well, I guess that would be
8 acceptable, but the Committee still reserves the
9 right to request additional items.

10 MR. SAMSON: Oh, of course. But I mean,
11 I'm just saying, if we come up with a scheme, for
12 example, on marking -- a cooperative scheme for
13 marking exhibits or something like that, that we
14 want to suggest. I'm looking at just sort of
15 housekeeping things that one normally puts in a
16 pretrial order.

17 MR. DICKERSON: Sure. If we're going to
18 get the thing done quickly, even in a day from two
19 days, we would probably need to have some type of
20 a stipulation as to the admissibility and the
21 foundation for certain --

22 MR. SAMSON: Yeah.

23 MR. DICKERSON: -- exhibits. If it's
24 going to be document intense the last thing the
25 Commission needs is for us to be going through and

1 laying foundation for every document that's going
2 to be put in front of them. That could go
3 forever.

4 MR. BECK: And the rules of evidence for
5 these hearings are set forth in section 1212 of
6 Title 20. And, of course, because it is in an
7 informal, but yet adjudicatory, proceeding, strict
8 compliance with the rules of evidence are not
9 necessary.

10 Now, we go into the timeframe for
11 getting that particular document. What do the
12 parties think is a reasonable timeframe for
13 submitting that document to the Committee?

14 MR. SAMSON: I think, if I may, the
15 first thing that needs to happen is that Mr.
16 Dickerson needs to send me a letter identifying
17 what he believes to be the deficiencies in our
18 responses to the Committee's order.

19 Then we need to look at that and then
20 Mr. Dickerson and I need to be able to talk and
21 say, you're right on this one, I disagree with you
22 on that one. So that we can identify what, if
23 any, additional documents are going to be
24 produced. And where we agree to disagree. And he
25 may or may not wish to make a motion to compel.

1 So it's going to take us a bit of time
2 for that process to occur in order to be able to
3 include that in the joint statement.

4 MR. BECK: So then by the end of the
5 week you're saying?

6 (Laughter.)

7 MR. BECK: We'd like to, at this point,
8 have a date in mind that we can expect something
9 by.

10 MR. DICKERSON: Can you tie the date to
11 whatever we decide on if we're going to move the
12 hearing date?

13 MR. BECK: I'm sorry?

14 MR. DICKERSON: In other words, we're
15 talking about the possibility, as I understand, of
16 moving the hearing date?

17 MR. BECK: Yes.

18 MR. DICKERSON: Can we tie the date at
19 which it will be due to a certain number of days
20 prior to the hearing date, whether that be the
21 10th or whether it's a new date?

22 MR. BECK: What I was thinking is that
23 there would be this -- the document, itself, would
24 have -- we wouldn't set the date for the new
25 hearing at this point, or prior to receiving that

1 document. I was anticipating that we would
2 receive that document and there would be the list
3 of available dates. And at that point we would
4 come up with a date, rather than setting a date
5 and then saying, so many weeks prior to this date.

6 MR. DICKERSON: Okay. Just so long as
7 the Commission will understand that if we have to
8 do it sooner rather than later many of the items
9 addressed may fall under the heading of coming
10 attractions, because he and I may not have decided
11 on everything, given the meet-and-confer nature,
12 some of what we're doing from the document
13 demands.

14 Do you concur with that ?

15 MR. SAMSON: I agree. That's fine. I
16 thought that would be sort of the first thing that
17 should be done.

18 MR. BECK: What realistically are we
19 thinking about? Two weeks? Three weeks?

20 MR. DICKERSON: Just from my own
21 experience, by the time you get in a meet-and-
22 confer, writing letters, discussing what's here,
23 because that is a fairly extensive document
24 demand, I'd be surprised to see if anything
25 prepared in sight of two and a half weeks. Just

1 to split a difference. That's pretty quick.

2 MR. SAMSON: If it takes you a week or
3 ten days to prepare your letter, --

4 MR. DICKERSON: Um-hum.

5 MR. SAMSON: -- I mean I'm sure you've
6 got other things on your calendar, too.

7 MR. DICKERSON: Yeah, um-hum.

8 MR. SAMSON: It's going to take me an
9 equal time to consult with my client and determine
10 our response. So, that's probably a fair
11 guesstimate.

12 MR. BECK: So if we did it three weeks
13 from today's date, which would be the 26th. It
14 would be the day before Thanksgiving, I believe.

15 MR. SAMSON: It would be the 3rd.

16 MR. BECK: That would be the 3rd?

17 MR. SAMSON: Three weeks from today
18 would be the 3rd of December.

19 MR. BECK: Is that sufficient,
20 Committee?

21 PRESIDING MEMBER ROSENFELD: Well, I'm
22 puzzled, Dennis, because Dickerson has said he
23 just can't make the 10th anyway. So, --

24 MR. BECK: I think at this point it
25 seems fairly clear that we're not going to make

1 the date of the 10th.

2 PRESIDING MEMBER ROSENFELD: That's
3 right.

4 MR. BECK: But still try to keep
5 everybody on a timeframe.

6 ASSOCIATE MEMBER PFANNENSTIEL: I think,
7 you know, from what people have said, I think a
8 three-week timeframe for providing this
9 information makes sense. We've already agreed
10 that to find a couple days together we're going to
11 be pushing this out much beyond what we had
12 expected or wanted.

13 But, if we're going to do it right and
14 get all this information it will take some time.

15 MR. DICKERSON: We can always do a
16 supplement, if necessary.

17 ASSOCIATE MEMBER PFANNENSTIEL: But
18 three weeks from today should get us the
19 information that we're asking for.

20 MR. SAMSON: The joint statement.

21 MR. DICKERSON: Um-hum.

22 MR. BECK: And at that point once we
23 receive that, once the Committee receives that and
24 reviews it, as I said, the Committee may decide to
25 sui sponte request, make additional requests of

1 any of the parties, as well as some of the
2 interested parties. As you know, we may request,
3 the Committee may request of CHEERS for documents
4 that they would then receive.

5 MR. SAMSON: And am I safe in assuming
6 that in that joint statement or separately, then,
7 that respondents would have the opportunity to
8 request discovery from the complainants?

9 MR. BECK: Well, hopefully there would
10 be able to be a joint statement regarding
11 documents to be submitted by both sides. So that
12 it wouldn't be something where you agree on a
13 group of documents from the respondents, and oh,
14 by the way, the respondents are requesting these
15 documents from the complainants, but we have no
16 agreement on that.

17 We'd like to see an agreement.
18 Agreement as to all of the documents that are to
19 be submitted. And if there are not, if there are
20 additional documents that you would have discussed
21 the submission of those additional documents and
22 had failed to come to an agreement. And that one
23 side or the other would be requesting the
24 Commission to compel the production of those
25 documents.

1 And also at that point we would take the
2 schedules of all the parties and try and come up
3 with a date. And in the Committee order, have the
4 new date or dates involved.

5 I don't know what the best way to get
6 the dates available to the Committee Members, too.
7 I suppose that the Committee Members can provide
8 me with available dates during the month of
9 January. And that I will take on the
10 responsibility of transmitting those to counsel
11 via email. I have both of your email addresses.

12 So you'll have those and you can play
13 with them as you will.

14 PRESIDING MEMBER ROSENFELD: To make
15 that clear, you will inform these two --

16 MR. BECK: Yes.

17 PRESIDING MEMBER ROSENFELD: --
18 attorneys of Chairman Pfannenstiel's and my two-
19 day, consecutive-day windows.

20 MR. BECK: Yes.

21 PRESIDING MEMBER ROSENFELD: And
22 meanwhile, they will also provide windows when
23 they can make two days consecutively. And you're
24 going to put it all together?

25 MR. BECK: Well, what I'm anticipating

1 is that prior to getting this joint statement from
2 counsel, that I will have provided them with --

3 PRESIDING MEMBER ROSENFELD: Yeah, okay,
4 that's as much as we can offer.

5 MR. BECK: -- availability, so then they
6 can say, these days are -- we've looked at our
7 calendars, as well as the availability of the
8 Committee Members, and these are the dates we're
9 requesting.

10 PRESIDING MEMBER ROSENFELD: Good.

11 MR. SAMSON: And if I could just throw
12 one slight complication into the mix. Just in
13 terms of dates, maybe we could go out even a
14 little into the first week in February or so. I'm
15 supposed to be leaving to go out of the country on
16 December 30th. And we're due to get back either
17 the 14th or 15th, I forget when. And that's
18 pretty much locked in cement.

19 And I will defer to the Committee's
20 calendar, but it will create great family problems
21 at home if I am not on the plane with my family
22 when we go out of the country.

23 PRESIDING MEMBER ROSENFELD: We can
24 provide January and February days.

25 MR. SAMSON: Thank you.

1 PRESIDING MEMBER ROSENFELD: I'm
2 sympathetic.

3 MR. SAMSON: Thank you. My wife will be
4 grateful.

5 ASSOCIATE MEMBER PFANNENSTIEL: I just
6 want to make sure, though, that the complainant in
7 this is okay with putting this off what will then
8 end up being a month to two months from where we
9 had originally thought it would be.

10 MR. DICKERSON: We're fine with that.

11 ASSOCIATE MEMBER PFANNENSTIEL: Thank
12 you.

13 MR. BECK: Is there anything, any other
14 issues that the parties want to address at this
15 point?

16 MR. DICKERSON: I think we've pretty
17 much covered it, at least from the complainants'
18 standpoint.

19 MR. BECK: Anything else, Mr. Samson?

20 MR. SAMSON: No. Give me just a moment
21 to go back through my notes and see, but I think
22 you've --

23 (Pause.)

24 MR. SAMSON: I would just have one
25 slight request, if we could change one date.

1 Rather than the joint statement being due on the
2 3rd, can we make it the next day, the 4th. I've
3 got depositions out of town the 1st, 2nd, and 3rd.
4 And it would make it a whole lot easier if I was
5 back in my office. So if we could just slip that
6 one day to the 4th.

7 MR. BECK: Yes, that's exactly, the 4th,
8 so it will be December 4th.

9 MR. SAMSON: Thank you.

10 MR. BECK: And, again, submit those to
11 the docket; submit that docket to the docket as
12 you have in the past.

13 MR. SAMSON: Yes.

14 MR. BECK: Is there anything else?

15 PRESIDING MEMBER ROSENFELD: No, I think
16 we got a lot cleared up today. Thanks to
17 everybody.

18 And Merry Christmas and Happy New Year.

19 MR. SAMSON: Thank you.

20 MR. DICKERSON: Same to you.

21 (Whereupon, at 10:51 a.m., the
22 Prehearing Conference was adjourned.)

23 --oOo--

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
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was thereafter transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
conference, nor in any way interested in outcome
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IN WITNESS WHEREOF, I have hereunto set
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