

COMMITTEE HEARING OF ORAL ARGUMENTS
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for the) Docket No.
Calico Solar Project Amendment) 08-AFC-13C
_____)

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

WEDNESDAY JUNE 8, 2011

2:00 p.m.

Reported by:
Peter Petty
Contract No. 170-09-002

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Bart W. Brizzee (via telephone)
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Jeff Aardahl (via telephone)
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Patrick C. Jackson (via telephone)

Wayne W. Weierbach (via telephone)
Newberry Community Services District

Gloria D. Smith (via telephone)
Travis Ritchie (via telephone)
Sierra Club

ALSO PRESENT

Governmental Agencies

Becky Jones (via telephone)
California Department of Fish and Game

Members of the Public

I N D E X

	<u>Page</u>
Proceedings	1
Call to Order and Introductions	1
Opening Remarks by Hearing Officer Vaccaro	4
Sierra Club's Motion to Dismiss	5
Ms. Smith, Sierra Club	6
Ms. Foley Gannon, Applicant	11
Mr. Lamb, BNSF	14
Ms. Willis, CEC Staff	21
Ms. Gulesserian, CURE	25
Mr. Aardahl, Defenders of Wildlife	26
Mr. Ritchie, Sierra Club	27
Ms. Foley Gannon, Applicant	31
Mr. Lamb, BNSF	34
Ms. Burch, BNSF	36
Commissioner Questions of the Parties	40
The Commission's Role as Lead Agency with Respect to the Petition to Amend	59
Ms. Foley Gannon, Applicant	60
Ms. Burch, BNSF	62
Ms. Willis, CEC Staff	63
Ms. Gulesserian, CURE	64
Mr. Ritchie, Sierra Club	64
Ms. Jones, Dept. of Fish and Game	66
Baseline	66
Ms. Foley Gannon, Applicant	67
Ms. Burch, BNSF	68
Ms. Willis, CEC Staff	71
Ms. Gulesserian, CURE	73
Mr. Aardahl, Defenders of Wildlife	73
Opportunity for Public Comment	75
Closing Remarks	75
Adjournment	77
Reporter's Certificate	78
Transcriber's Certificate	78

1 Gannon, counsel to the applicant. And to my left is Sean
2 Gallagher from Calico Solar.

3 PRESIDING MEMBER DOUGLAS: Thank you. Staff.

4 MS. WILLIS: Good afternoon. My name is Kerry
5 Willis, senior staff counsel. With me is Steve Adams,
6 senior staff counsel, Terry O'Brien and Craig Hoffman.

7 PRESIDING MEMBER DOUGLAS: Thank you. Is Sierra
8 Club here?

9 MS. SMITH: Gloria Smith from Sierra Club.

10 MR. RITCHIE: And Travis Ritchie with Sierra Club.

11 PRESIDING MEMBER DOUGLAS: Thank you, thank you
12 for being on the phone. Is anybody here from California
13 Unions for Reliable Energy?

14 MS. GULESSERIAN: Yes, Tanya Gulesserian with CURE
15 is on the phone.

16 PRESIDING MEMBER DOUGLAS: Great, thank you. Is
17 anybody here from Basin and Range Watch?

18 MR. EMMERICH: Yes, hello, this is Kevin Emmerich
19 from Basin and Range Watch.

20 THE REPORTER: Could he speak up, I can't hear him
21 at all.

22 PRESIDING MEMBER DOUGLAS: Kevin Emmerich from
23 Basin and Range Watch. If you could when you speak if you
24 could speak up it would be helpful.

25 Is Patrick Jackson here or on the phone?

1 MR. JACKSON: This is Patrick Jackson.

2 PRESIDING MEMBER DOUGLAS: Thank you. Anybody
3 from the Newberry Community Services District?

4 MR. WEIERBACH: This is Wayne Weierbach from the
5 Newberry Community Services District.

6 PRESIDING MEMBER DOUGLAS: Thank you. Anybody
7 from the Society for the Conservation of Bighorn Sheep?

8 (No response).

9 PRESIDING MEMBER DOUGLAS: All right, we'll ask
10 again. Anybody from Defenders of Wildlife?

11 MR. AARDAHL: Yes, Jeff Aardahl.

12 PRESIDING MEMBER DOUGLAS: Great. I see BNSF in
13 the room; if you could introduce yourself.

14 MR. LAMB: Good afternoon. Steve Lamb and Cynthia
15 Burch from BNSF.

16 PRESIDING MEMBER DOUGLAS: Thank you. Anybody
17 from San Bernardino County?

18 MR. BRIZZEE: This is Bart Brizzee from the County
19 of San Bernardino.

20 PRESIDING MEMBER DOUGLAS: Thank you, glad to have
21 you with us.

22 Is there anybody here representing local, state or
23 federal agencies in person today?

24 (No response).

25 PRESIDING MEMBER DOUGLAS: Is there anybody here

1 on the phone representing local, state or federal agencies?

2 MS. JONES: Becky Jones, Department of Fish and
3 Game.

4 HEARING OFFICER VACCARO: I'm sorry, would you
5 please repeat your name again.

6 MS. JONES: Becky Jones.

7 HEARING OFFICER VACCARO: Thank you.

8 PRESIDING MEMBER DOUGLAS: Thank you. Anybody
9 else?

10 (No response).

11 PRESIDING MEMBER DOUGLAS: All right. With that I
12 will turn this over to our Hearing Advisor.

13 HEARING OFFICER VACCARO: I think most of you know
14 the reason that we are here today. We are really, you know,
15 here to cover two points of business, the first of which
16 will be Sierra Club's motion to dismiss; the next will be to
17 address the items that were specified just at the opening of
18 this proceeding by Commissioner Douglas.

19 I think what we would like to do is ensure that
20 all of the parties have an opportunity to speak today if
21 they wish to do so. However, briefs were only received from
22 about six parties. In all fairness what we will do is
23 initially hear from the arguments from those who filed
24 briefs. But before we get to the public comment portion the
25 other parties, and most of you are on the phone, will

1 certainly be given an opportunity to comment as well on the
2 topics that are raised today.

3 I think the first order of business though will be
4 Sierra Club's motion. Ms. Smith, what I wanted to find out
5 from you is whether or not Sierra Club will have an
6 objection at this time to CURE and BNSF offering argument as
7 we discuss the motion.

8 I might stand corrected in just a moment by any
9 number of you but my reading of the briefs indicated that
10 neither CURE nor BNSF directly invoked Sierra Club's motion,
11 either in opening papers or in the reply. Again, I might be
12 incorrect in that but that was my recollection and I also
13 did a search in the documents.

14 But since a lot of the positions raised by those
15 two parties seemed to sound somewhat enjoiner to your
16 motion do you have an objection to those parties arguing at
17 this time on your motion? If so then when we get to the
18 next issue of discussing the Committee's invitation for
19 briefing we can certainly hear from them at that time.

20 MS. SMITH: Sierra Club has no objection to how
21 the order goes with respect to our motion or if you have any
22 questions pertaining to jurisdiction. We just wanted to
23 speak on jurisdiction first so we are not -- we request no
24 certain formality or procedure on this.

25 HEARING OFFICER VACCARO: Okay, okay, fair enough.

1 So I think with that we will go ahead and hear first from
2 the Sierra Club and then in turn each of the parties can
3 speak. They will have an opportunity, each party is arguing
4 to respond. And at the end of the day Sierra Club will get
5 the final word with respect to their motion. So with that,
6 Ms. Smith, if you would go ahead and please speak to your
7 motion.

8 MS. SMITH: Thank you. Thank you, Commissioner
9 Douglas and Commissioner Weisenmiller and staff.

10 The immediate project before the Commission today
11 is a 275 megawatt photovoltaic generation system, which
12 constitutes Phase I of the project. And then a later phase
13 as we understand it would include an additional 288
14 megawatts of photovoltaic generation and then potentially
15 100 megawatts of solar thermal.

16 And as you have seen from the back and forth in
17 the briefs, there is plenty of evidence in the papers that
18 the solar thermal aspect of this project is not necessarily
19 commercially viable and somewhat speculative.

20 But setting aside the idea of whether or not the
21 solar thermal is speculative is a later and insignificant
22 component of this overall project. Again, the actual
23 project before the Commission is photovoltaic.

24 So from there our reading of the statute and all
25 the laws, the Commission must base its jurisdictional

1 decision on whether or not it can pass on this PV project on
2 provisions of the Warren-Alquist Act. And so taking a -- I
3 am going to do a step-wise analysis of the pertinent
4 provisions of the Warren-Alquist Act to show this Commission
5 does not have jurisdiction to process a PV application.

6 Starting with Warren-Alquist Section 25500. That
7 provision simply provides for the Commission's siting
8 authority for facilities.

9 And then when you turn to 25110, "facility" is
10 defined as thermal power plants over 50 megawatts.

11 Next is 25120. Thermal power plants are expressly
12 not photovoltaic generating units.

13 And then 25120 allows the Commission to site
14 appurtenant facilities, but the statute nor your regulations
15 define what an appurtenant facility is.

16 We turned to the Black's Law Dictionary. We
17 encourage you to look that term up in any dictionary of your
18 choice. But essentially the term is annexed , any facility
19 that is annexed to a more important thing. And, you know,
20 we contend here that the PV aspect of this certainly swamps
21 any solar -- sorry, any thermal at this time.

22 Finally, Section 25542 covers any facility --
23 okay, let me step back. 25542, for any facility that is not
24 defined as a facility under the Warren-Alquist Act the
25 Commission does not have exclusive jurisdiction to site that

1 facility.

2 So we have two provisions that expressly prohibit
3 the Commission from siting photovoltaic facilities. And it
4 is from our reading of the statute there are no other
5 provisions that contradict the above nor is there any case
6 law that is directly in contravention of these provisions.

7 A lot has been made of the 1984 PUC vs. CEC
8 decision. And there the court methodically worked through
9 the Warren-Alquist Act's Section 25107 and the statute's
10 legislative history to interpret the extent of the Energy
11 Commission's jurisdiction over transmission lines and that
12 did not turn out well for the Commission.

13 All the cases that we have found, and I think the
14 Attorney General's opinion also expressly limited, strictly
15 limited the Commission's exclusive jurisdiction to cite
16 energy facilities in the state of California. But again,
17 the jurisdictional question here can only be answered by
18 looking at the Warren-Alquist Act.

19 And if you read the other parties' briefs closely
20 they acknowledge that this project is a PV project, that the
21 Commission is not allowed to site PV projects, but then they
22 quickly pivot and turn to CEQA and construct these very
23 elaborate arguments why the Commission should assert
24 jurisdiction over this project based on CEQA.

25 But CEQA merely provides guidance on how the

1 Commission or any other agency might proceed once the
2 Commission resolves this jurisdictional threshold question
3 under the Warren-Alquist Act.

4 And finally I will just conclude by saying CEQA is
5 a process and not an enabling statute in this instance.

6 That is all I have.

7 HEARING OFFICER VACCARO: Okay, thank you. I
8 think the Committee is going to have some questions. I
9 think the idea is to wait for everyone to go ahead and make
10 their arguments. But right now if there was something that
11 was stated by Ms. Smith that either of you want to ask right
12 now?

13 PRESIDING MEMBER DOUGLAS: No.

14 HEARING OFFICER VACCARO: Okay. I think then
15 let's next hear from the applicant. I think it will
16 probably be both in reply to much of what Ms. Smith said but
17 after reading the briefs it sounds as though there might be
18 some other matters that you would like to cover on
19 jurisdiction.

20 So if we could just stick right now to the
21 jurisdictional issue. Lead agency is something that was
22 invoked in the Sierra Club's reply brief and is woven
23 throughout the jurisdiction issue as well. I think this is
24 an appropriate time to discuss that.

25 MR. FOLEY GANNON: Thank you. I'm sorry, do you

1 think it is an appropriate time to discuss the lead agency
2 question?

3 HEARING OFFICER VACCARO: The lead agency question
4 as well.

5 MR. FOLEY GANNON: Okay.

6 MS. SMITH: Wait, excuse me, this is Gloria
7 Smith. You know, I may have to object to that. We, I
8 believe, laid out a very cogent argument why the
9 jurisdiction question is front and center. Our motion and
10 our protest and our reply and everything that we have filed
11 go directly to the threshold question of jurisdiction and
12 the Warren-Alquist Act.

13 Lead agency is doing exactly what I counseled
14 against a moment ago. Getting bogged down in this unrelated
15 statute, which is CEQA. We need to stay with the Warren-
16 Alquist Act which does not speak to lead agency at this
17 time.

18 I respectfully request that we resolve this
19 jurisdictional question. Hear the oral argument, not
20 resolve it. Hear oral argument on that and then, you know,
21 potentially move on to, you know, what is essentially a Step
22 2 on how this process -- how this project will be processed
23 once the jurisdictional issue is resolved. Thank you.

24 HEARING OFFICER VACCARO: I think, Ms. Smith, it's
25 your motion. It's fine if we start with the jurisdictional

1 issue. I did understand your last comments in your opening
2 remarks to address some of the CEQA issue as well but at
3 this time it is certainly fine to have the parties solely
4 address jurisdiction. And after that is done we will move
5 forward with lead agency and baseline questions that the
6 Committee wanted addressed by the parties.

7 MS. SMITH: Thank you.

8 MR. FOLEY GANNON: Thank you. I would like to
9 first start by saying that Calico Solar is here before you
10 for consideration of this amendment. Not because we want to
11 be, as much as we have enjoyed spending time with the
12 Commission over the last couple of years, we are really here
13 because we have to be. And the reason we have to be is
14 because the amended project includes over 50 megawatts of
15 solar thermal power.

16 Under the Warren-Alquist Act, and we will just
17 stick with the Warren-Alquist Act for now, you, the
18 Commission, is the only agency with jurisdiction over that
19 part of the project. And because of that we need to be here
20 in front of you.

21 We are also coming to you because we are asking
22 for an amendment of a license which was issued by this
23 Commission. Again, there is no one else who can amend a
24 license that was issued by this Commission. So even if your
25 jurisdiction is exclusively over the solar thermal portion

1 of this project we need to come to you to have you consider
2 that.

3 And I would object first of all to Sierra Club's
4 assertion that everyone agrees that the project in front of
5 you is a 275 megawatt PV facility. We have not submitted an
6 application to anyone to construct a 275 megawatt PV
7 facility. We are seeking authorization to do a 663.5
8 megawatt solar project, 100.5 megawatts of which will be
9 solar thermal. Again, that is the basis of the jurisdiction
10 of this Commission and that is why we are here before you
11 today.

12 I would also like to take some umbrage with the
13 characterization of the case law which was relied on by
14 Sierra Club of saying that these cases that are cited, the
15 PUC case and the Attorney General's case, which they read as
16 saying that it is limiting somehow the Commission's
17 jurisdiction over energy generating facilities.

18 If you look at those issues that were resolved or
19 addressed in those cases, one she said was about
20 transmission lines and the other was -- the Attorney
21 General's was about the geothermal wells. Those are not
22 about your jurisdiction over a hybrid electro-generation
23 facility as is before you today.

24 I would submit that there is no case law that
25 addresses this question. And I would also submit that this

1 is a question that is not directly addressed by the Warren-
2 Alquist Act.

3 What Sierra Club and the other parties who object
4 to your jurisdiction are doing is first off I think making a
5 simple question complicated and then making a complicated
6 question simple. And we'll start with the first one, what I
7 see as a simple question.

8 Again, does the Commission have jurisdiction to
9 consider a project which includes 100.5 megawatts of solar
10 thermal generation? I think the Warren-Alquist Act is
11 absolutely clear on that. You are the only entity that
12 consider that. I think all the parties have agreed to it.
13 That if that is what is before you then clearly you are the
14 agency who has to consider that. It's a simple question.

15 The question that is more complicated is what is
16 your jurisdiction over a hybrid facility? The Sierra Club
17 and the other parties are submitting that that question is
18 directly answered by the Warren-Alquist Act. I would submit
19 that it is not.

20 When Sierra Club was just citing 25500 it says
21 that it was talking about your jurisdiction is limited to
22 facilities. If you look at that section it says that your
23 jurisdiction is limited to considering sites and facilities.

24 So you can't just go to the definition of facilities to see
25 what is the limit and the scope of your jurisdiction.

1 Again there is that word "site" and "site"
2 requires that there be a thermal power facility on the site
3 for it to be within your jurisdiction. But it does not say
4 anywhere that that is the only thing that can be on that
5 site to be within your jurisdiction.

6 Again, I don't think this is a question that was
7 contemplated by the Legislature when they enacted the
8 Warren-Alquist Act, that someone would be coming to you with
9 a hybrid facility like this. But I think it is something
10 that is consistent with the intent of the Warren-Alquist Act
11 and it is not precluded by any language of the statute.

12 And there is language in the statute which directs
13 you to interpret the ambit of your authority liberally and
14 to fulfill the policies of the Warren-Alquist Act, which is
15 to have an entity who is overseeing in a consistent manner
16 electrical generation facilities in the state. And we think
17 a broad interpretation of this, which allows you authority
18 over a hybrid facility such as you have before you today, is
19 consistent with that and again, it is not inconsistent with
20 any portion of the statute. Thank you.

21 HEARING OFFICER VACCARO: Thank you. Mr. Lamb or
22 Ms. Burch, we would like to hear from BNSF now.

23 MR. LAMB: Thank you, Hearing Officer Vaccaro.
24 First to be clear. We support and join in the Sierra Club's
25 motion. We think they made a very discrete and articulate

1 motion and we did not provide any further briefing on that.

2 Again, we join and support that motion and we believe that
3 it is a discrete motion.

4 The Committee asked for briefing regarding a
5 variety of subjects to which we responded. And if you want
6 me to address the jurisdiction issues now I will. I'm a
7 little confused about how we are doing the motion versus
8 what the Committee asked to be briefed.

9 HEARING OFFICER VACCARO: I think that's in part
10 why I asked the threshold question of Ms. Smith. My
11 understanding, and of course Ms. Smith will correct me if I
12 have it incorrect, is that we will hear the jurisdiction
13 issue now from everyone.

14 MR. LAMB: That's fine, that's fine, I just want
15 to be clear on that.

16 A couple of things that I wanted to start with.
17 First of all I find it interesting that counsel for Calico
18 Solar says, I think to quote, we have to be here, we need to
19 be here. I want to call your attention to 20 CCR 1936,
20 which is an implementing regulation from California Public
21 Resource Code Section 25541. That's a section which I am
22 sure the Committee is well aware that if a thermal power
23 plant is between 50 and 100 megawatts you have the
24 discretion to exempt it.

25 Now what would that mean in this case? If you

1 exempt it, as they are well aware, then it would be subject
2 to CEQA analysis, not Warren-Alquist analysis. Magically,
3 mystically, we have a project here that is 100.5 megawatts.
4 To suggest that that is a coincidence is just beyond
5 reason. It is calculated and it is purposeful.

6 And this goes to one of the major points that we
7 made in our brief. And that is quite simply that they knew
8 all along, from at least September/October of last year,
9 that they had no intention of, or capability of developing a
10 solar thermal power plant project utilizing SunCatchers.
11 They knew then. We cited the direct sworn testimony of Dan
12 O'Shea. He acknowledged that by September/October he knew
13 that.

14 Now I will tell you that when we addressed that we
15 believed that the staff would respond to that. Because we
16 would think that not only the Committee but the Commission
17 and the staff would be very, very concerned about what we
18 feel is a material misrepresentation that goes to the core
19 of what we are doing. There was no response from the staff,
20 which I find absolutely amazing.

21 So what we did, because we were compelled to do
22 that is we filed a complaint. It has been filed and
23 docketed today, to decertify this project. And that will be
24 set forth and that will be dealt with. But we have raised
25 this here and I think it should be addressed here.

1 Now one of the things that Calico Solar ha said in
2 response to this issue is, you know what, the viability of
3 the underlying project is not only not at issue, it is not
4 something that the Commission should consider. Really? I
5 mean, that's amazing to me. If you look at -- it's implicit
6 in the implementing statute and regulations that the project
7 has to be viable and it has to be feasible. I mean, what
8 they are suggesting is that they could ask for certification
9 of a project, fusion technology, lithium crystals that
10 generate more than 50 megawatts of thermal power plant
11 energy. Totally ridiculous.

12 And then when we look at reasonable alternatives
13 and mitigation measures, someone said how about SunCatchers.
14 They'd say no, that's not commercially viable, it's not
15 commercially available, we don't have to consider that.
16 But we don't have to worry about it in relation to the
17 underlying project.

18 So what are we talking about here? We are talking
19 about a project that could be certified by this Commission,
20 that could be implemented, could go into effect, and at the
21 end of the day, nothing. Nothing is ever built that has the
22 jurisdiction of this Commission. Nothing.

23 I mean, they are talking about putting in PV and
24 at best two years later doing solar thermal PV. Excuse me,
25 solar thermal SunCatchers for which this Commission would

1 have jurisdiction.

2 They talk about hybrids. Under their theory what
3 they could do is say, you know what, we've got a project,
4 here's a project. We are going to do 100.5 megawatts of
5 SunCatchers. Here is what we are going to do, Commission.
6 First of all initially we are going to put in 1,000 acres
7 worth of PV panels. Year 5 we are going to put in another
8 1,000 acres, Year 10 another 1,000 acres, Year 15 another
9 1,000 acres. Year 20 we are going to put in SunCatchers.
10 Do you have jurisdiction? You don't have jurisdiction.

11 You know, Ms. Smith pointed out 25542. That is
12 very clear in the California Public Resources Code. You
13 don't have jurisdiction. The entire project has to be
14 thermal powered. There is no such thing as authority for a
15 hybrid, to do a hybrid, it's nonsensical. It would totally
16 eviscerate the point of the implementing statute and
17 regulations.

18 And we will agree that this Commission has a
19 tremendous amount of authority and power. But it's
20 exclusive and it's limited. And I don't think anybody
21 disagrees that you don't have power and you don't have
22 jurisdiction over PV and that's what we are talking about
23 here.

24 Let's talk about this feasibility for a second.
25 They are saying that they are able to do it. And they don't

1 respond to the questions we asked. The questions we asked
2 is, what commitments do you have from Tessera Solar to show
3 this Commission that you can do this? What they say to you
4 is, oh, we have committed to Tessera Solar that we are going
5 to do it. That begs the question, that doesn't answer the
6 question.

7 They haven't responded to whether Tessera Solar or
8 Sterling Energy System or whatever it is can actually
9 produce and supply them. What we do have is we have a
10 letter that they submitted that says, it will be at least 24
11 months after we get funded. After we get funded. When are
12 we going to get funded? We don't know. It's totally
13 speculative. There is no reasonable belief that that
14 technology is viable or feasible today and it wasn't when
15 the project was certified.

16 Now everyone agrees that there is no jurisdiction
17 for PV technology. One of the things that counsel stated
18 was, we are dealing with not only a site but a facility. I
19 would like to read Section 25500. It says, quote: "the
20 exclusive power to certify all sites and related facilities
21 in the state, whether a new site and related facility or a
22 change or addition to an existing facility."

23 Okay, this is not a new site or a related
24 facility, they are not saying that. This is not a change or
25 an addition to an existing facility. Nothing has been

1 built. This is a change or addition to a site that has been
2 certified.

3 And yes, you have jurisdiction as long as it
4 fulfills the requirements of being a thermal power plant.
5 It's not; it's something more than that. I mean, think
6 about it. What if they said to you, hey look, here's the
7 project. We're going to have 100.5 megawatts of a thermal
8 power plant, we're going to have a hotel, we're going to
9 have a golf course, we're going to have an airport. And you
10 have exclusive jurisdiction over all that. That's
11 preposterous. The implementing statutes give this
12 Commission exclusive authority and jurisdiction but it's
13 limited and it doesn't include that.

14 Under the theory put forth by the staff and by
15 Calico, their theory is once you approve we got you, we
16 could do anything. In fact under their theory it doesn't
17 even need to be a thermal power plant now, they could just
18 put up a hotel.

19 What she said is, you are the only ones that have
20 the authority to amend the license. What she is not talking
21 about is what is the license for. A thermal power plant,
22 not a thermal power plant plus. So we think it is very
23 clear that there is no jurisdiction for this. Thank you.

24 HEARING OFFICER VACCARO: Okay, Ms. Willis, we'll
25 hear from staff.

1 MS. WILLIS: Thank you. Thank you. As stated in
2 our brief, staff disagrees with Sierra Club's motion to
3 dismiss. First of all it is very clear that the Energy
4 Commission has jurisdiction to preside over this entire
5 proceeding. The Calico amendment is just that, it is an
6 amendment, it is not a new PV project. It is also not a
7 golf course, an airport, a hotel or a residential
8 development. It is an electrical generation facility.

9 And we see that as part of, as part of the Energy
10 Commission's process of post-certification amendments and
11 changes under 1769 of the California Code of Regulations.
12 After the final decision is effective under Section 1720.4
13 the Applicant shall file with the Commission a petition for
14 any modification proposed as to the project design,
15 operation or performance requirements.

16 It also lays out the process for which if the
17 proposed amendment might have, in the staff's opinion,
18 potential for significant adverse impacts to the environment
19 that it goes before the full Commission. And that is
20 exactly what staff has asked, for a Committee to be assigned
21 for this proceeding because it is not a -- we don't believe
22 it is a minor amendment. We do believe it is a major
23 amendment and should rightfully be before the Commission.

24 Second of all, obviously I think all the parties
25 basically agree that the Energy Commission has the authority

1 to approve solar thermal and therefore it does have the
2 authority to approve and preside over the reduction of
3 capacity of the SunCatchers from 663.5 megawatts to 100.5.

4 Staff reviews the project as proposed in any case,
5 whether it's a gas, a natural gas project, or this
6 particular project. We look at what is proposed. We don't
7 speculate, we don't -- in the past there have been quite a
8 few projects that never received financing. We don't
9 speculate as to what is going to happen in the future, we
10 look at what is before us and we review that as is.

11 Staff does believe that this is not a new PV
12 project but it is a hybrid project. It is part -- it is
13 proposed to be part PV and part solar thermal. As stated in
14 our brief, there is really no clear statutory guidance on
15 how to resolve a jurisdictional issue when part of the
16 project is thermal and part of the project is non-thermal.

17 At this time I would like to invite Mr. O'Brien up
18 as someone who has been here quite a long time and has some
19 comments to make on the siting process.

20 MR. O'BRIEN: Commissioners, Hearing Officer
21 Vaccaro. I probably have been involved in over 90 percent
22 of the jurisdictional issues that have come before the
23 Commission since its founding and goes back, in terms of my
24 work, all the way back to 1985. Literally dozens of
25 projects have come before the Commission during that time an

1 there have been jurisdictional disputes.

2 We had a number of issues that came up in the
3 1980s when developers were trying to parse their project.
4 Specifically if you go back to the SWEPI project there were
5 three 20 megawatt turbines. And at that time the project
6 developer argued that that project was not jurisdictional
7 because basically each 20 megawatt turbine constituted a
8 separate project.

9 If you look at a solar project, the Luz Project at
10 Kramer Junction, a similar argument was made. There were
11 five 30 megawatt projects and the argument was that those
12 were all stand-alone projects and therefore the Commission
13 did not have jurisdiction because no project was over 50
14 megawatts.

15 In those instances the Commission took the
16 position that it was looking at one project, one power
17 plant. And I would argue that what we have today is a
18 situation while not directly analogous is somewhat similar
19 in terms of we have one project in front of us. And for the
20 Commission to find that it does not have jurisdiction it
21 seems to me the Commission has to say there are two
22 projects. Well we have one site. We have a hybrid project.

23 And the project, there is no argument that there is a
24 component, a thermal component that is over 50 megawatts.

25 So from my perspective given past Commission

1 decisions, and given really from a good government and an
2 engineering standpoint, what we have is one project. It
3 happens to use a thermal component and a PV component to
4 generate electricity.

5 Both those thermal components and the PV component
6 need other aspects of the electricity infrastructure of the
7 project in order to be able to deliver electricity to the
8 grid. There is a common transmission gen-tie line, there is
9 a common water system, there is a common control system. It
10 is in effect one power plant. And because this one power
11 plant is 50 megawatts or greater of thermal the Commission
12 has jurisdiction.

13 I believe it would be a mistake on the part of the
14 Commission to parse this project into two power plants. I
15 think that is inconsistent with the positions the Commission
16 has taken in the past when it has had jurisdictional issues
17 in front of it. And I believe that the circumstances of
18 this project are not so different, just because it is a
19 hybrid, that it would not lead at least me to the conclusion
20 that what we have is one power plant under the jurisdiction
21 of the Commission because there are over 50 megawatts of
22 that facility that are going to be thermally based.

23 HEARING OFFICER VACCARO: Thank you. Does that
24 conclude your presentation, Ms. Willis?

25 MS. WILLIS: Yes, thank you.

1 HEARING OFFICER VACCARO: Thank you both.

2 I think our other parties are on the telephone.

3 Ms. Gulesserian, are you still there?

4 MS. GULESSERIAN: I am.

5 HEARING OFFICER VACCARO: Okay. So why don't we
6 now hear from CURE on the jurisdictional issue.

7 MS. GULESSERIAN: Well, our position in our
8 reading of the statute is set forth in our brief; I have
9 nothing really new to add. We think it is clear that the
10 Commission has authority to approve reducing the capacity of
11 the SunCatcher solar thermal technology from 663.5 megawatts
12 to 100.5 megawatts.

13 We also think that the Commission does not have
14 authority to approve installing PV facilities. They are
15 ordinarily outside of the Commission's certification
16 jurisdiction. And you heard from all the parties regarding
17 the plain language establishing the exclusive jurisdiction
18 of the Commission. We think in general PV facilities are
19 generally outside of the Commission's jurisdiction.

20 There is little or no legislative history for
21 these provisions so we really don't have anything much more
22 to add regarding interpretation of the Warren-Alquist Act
23 and the regulations. So I have nothing further to add.

24 HEARING OFFICER VACCARO: Okay, thank you.

25 Mr. Aardahl, are you still on the line? Defenders of

1 Wildlife? Mr. Aardahl, are you still there?

2 MR. AARDAHL: I'm sorry, I'm here.

3 HEARING OFFICER VACCARO: Okay. It's your turn
4 now.

5 MR. AARDAHL: Okay.

6 HEARING OFFICER VACCARO: So if you would like to
7 speak on the jurisdictional issue on behalf of Defenders we
8 are happy to listen.

9 MR. AARDAHL: Okay, very good. Thank you for the
10 opportunity to speak today. Just briefly.

11 On June 3rd Defenders filed a brief on the Sierra
12 Club's motion to dismiss the petition for amendment of the
13 project. And basically in our filed response we argued that
14 the proposed modifications would potentially render the
15 project by definition primarily a non-thermal project based
16 on solar energy. And therefore we concluded that the
17 Commission would have no jurisdiction under the provisions
18 of the Warren-Alquist Act for that PV component of the
19 project, which would amount to about 85 percent of the
20 proposed generation or 563 megawatts.

21 As far as how to allocate jurisdiction over the PV
22 versus the solar thermal, that's another matter. But at
23 this time we argued in our brief that the 563 megawatt
24 modification would no longer fall under the jurisdiction of
25 the Commission. Thank you.

1 HEARING OFFICER VACCARO: Okay, thank you. I
2 think a number of things were said and I believe people
3 might want to make some responsive comments before we go to
4 the other parties. Ms. Smith, I'll start with you. You
5 will still get the final word but we are sort of midstream
6 right now. And if there is a response that you would like
7 to make, particularly comments in opposition to what you
8 have stated this is a good time to do that.

9 MR. RITCHIE: This is Travis Ritchie for Sierra
10 Club. I will be responding to some of the points that were
11 raised in the oral arguments.

12 I will start first with the applicant's statement
13 that they have to be here because there is a 50-plus
14 megawatt component which is solar thermal and for something
15 like that you have to go to the CEC.

16 The Sierra Club is not disputing that. The Sierra
17 Club doesn't dispute that to the extent that there is a
18 proposal for 100.5 megawatts of SunCatchers that the CEC is
19 the proper jurisdiction for that.

20 The problem is that is not what is before the
21 Commission at this time. The staff made it very clear that
22 they look at the project as proposed. And the petition to
23 amend has a proposed project that isn't just 100.5 megawatts
24 of solar thermal, it's predominately, 85 percent of it is
25 PV. And there is a point in the future where there may be

1 15 percent where it is solar thermal.

2 If the applicant wants to process this correctly
3 what they need to do is withdraw the request, the petition
4 to amend, and ask that the Commission dismiss the petition
5 to amend and then refile it as a reduction from the project
6 that is currently proposed to 100.5 megawatts.

7 And at that point the Commission can look and see
8 whether or not that project is commercially viable, that
9 SunCatcher project is commercially viable, and whether or
10 not it makes sense to certify that based on the area that is
11 necessary, the land use that is necessary for a 100.5
12 megawatt solar thermal project. But that is not what is
13 before the Commission right now. What is before the
14 Commission is this broader project with thousands of acres
15 that have nothing to do with solar thermal generation.

16 Now the other thing that the applicant addressed
17 was that this is a hybrid facility and that no one has ever
18 dealt with a hybrid facility and therefore we are in some
19 new realm that neither the Warren-Alquist Act nor case law
20 has contemplated.

21 Stating that this is a hybrid facility for
22 purposes of this is just an inappropriate way of framing
23 what this project is. It is not a hybrid facility. It is a
24 facility that has two different components and they are not
25 interdependent upon each other.

1 First of all it is not a hybrid facility because
2 100 percent of the facility will be photovoltaic in Phase I.

3 There is no plan whatsoever to begin construction on the
4 solar thermal aspects of this project. It is 100 percent PV
5 in Phase I. Even when we get to Phase II it is
6 predominately PV. Even then the majority of the power will
7 still be generated by PV modules, not by SunCatchers.

8 And as we discussed before, you know, there are
9 some issues on whether or not SunCatchers are speculative.
10 Even putting all that aside, we are not building any
11 SunCatchers for a long time and even then it is mostly PV.

12 And then staff said that this should be just a
13 single, a single project because it spits out electric
14 generation and therefore anything under it falls within the
15 umbrella as long as it meets that threshold level of 50
16 megawatts and solar thermal.

17 Well, the first problem with that is that for the
18 first several years of the plant it is not going to be under
19 that threshold because it is not going to be thermal. When
20 this thing starts producing electricity and when somebody --
21 right now there is no power purchase agreement so we don't
22 know who is going to be buying this power. But when
23 somebody starts to buy this power they are going to be
24 buying 100 percent PV power. And if the Commission approves
25 that they will have approved photovoltaic electric

1 generation, which is expressly excluded from its siting
2 authority in the Warren-Alquist Act.

3 And even if this thing is built as planned. Even
4 if several years down the line we have a final project that
5 looks exactly as the project that is proposed by the
6 applicant in the petition to amend. The two components, the
7 PV and solar thermal are not interdependent on each other;
8 they are completely separate. PV creates direct current and
9 it is a different type of electricity. And I couldn't begin
10 to tell you why but it is.

11 Whereas the solar thermal, the SunCatchers,
12 creates mechanical energy. It drives a piston and that
13 piston creates alternating current. It drives a piston and
14 that piston --

15 The only place where those two sources of power
16 meet is at the substation and there they are converted to
17 the type of power that can go onto the grid and they go onto
18 the grid. You do not need the SunCatchers to run the PV
19 plant and you do not need the PV facilities to run the
20 SunCatchers. They are completely interdependent of each
21 other.

22 Now there has been an argument that it is one
23 facility because they rely on common infrastructure. That
24 does not make it the same facility. As Mr. Lamb pointed
25 out, you could have a hotel or an airport or a golf course

1 that relies on the same roads and the same water system and
2 the same personnel as a thermal power plant stuck in a
3 corner of the site. But that doesn't mean that they are all
4 one facility and one plant. The same is true here, they are
5 completely different.

6 And we are not talking about something where this
7 is, you know, PV panels on top of an existing gas facility
8 or using the space on the site that isn't being used right
9 now. We are talking about thousands upon thousands of acres
10 that are going to be used for nothing but photovoltaic
11 generation. It is not a hybrid facility. It is a PV
12 facility and it may have a solar thermal component at some
13 point.

14 One minute while I review. I guess that's all
15 that I have to respond to what was said in oral arguments,
16 thank you.

17 HEARING OFFICER VACCARO: Thank you. Ms. Foley
18 Gannon.

19 MR. FOLEY GANNON: Thank you. First I would like
20 to concur with staff's discussion that there is not a
21 determination, we believe in the initial determination about
22 your jurisdiction about whether a project is speculative or
23 not speculative. But we would also like to just give a
24 little bit of a historic context to this project and why we
25 are before you today to address some of the comments that

1 have been made about the speculative nature of this project.

2 When this project was first proposed in 2008 it
3 was for an 850 megawatt solar thermal facility which would
4 rely exclusively on SunCatchers. Between 2008 when the
5 application was submitted and when it was brought before the
6 Commission in October of 2010 Calico Solar spent two years,
7 tens of millions of dollars in getting this project
8 approved. It did that because it believed it was going to
9 build this project.

10 Again, it spent time and money and considerable
11 effort. So to infer that there was something, that this was
12 somehow a bait and switch, that we were always intending to
13 switch this project to something else, is we think not
14 consistent with any fact before you. It is just simply not
15 true. So again, the project had been perceived -- proceeded
16 through the approval.

17 After the approval, as everyone, I'm sure, here is
18 aware there has been quite a bit of economic turbulence
19 through the end of 2009, 2010 that did affect the timing of
20 the development of the SunCatchers. And after the project
21 was sold the new project owner, the parent company, decided
22 to seek an amendment to the approval. And that is why we
23 are here before you today.

24 Again, the project includes 100 megawatts of solar
25 thermal. We think that answers the question of whether you

1 have any jurisdiction or not. There still remains a
2 question of whether you have siting authority over the PV.
3 But the basic question of, should you be the one who is
4 considering approving 100 megawatts of solar thermal, we
5 think the answer is absolutely, indisputable and clear.

6 To address the issue of whether this is one
7 project. We would suggest that it is appropriate for you to
8 look at earlier decisions by the Commission. As Mr. O'Brien
9 was discussing, what you have looked at when you have tried
10 to determine if a project was inappropriately piecemealed to
11 try to get under your jurisdiction limitation.

12 There's been things said saying that you should
13 look at, are they co-located? Here it's co-located, it's on
14 one site. Do they share infrastructure? Here the project
15 shares a common infrastructure. There is one water source,
16 there are shared roads, there's a shared substation, there
17 are shared transmission lines. There is a shared control
18 room.

19 It's true that PV doesn't need SunCatchers to
20 produce energy and SunCatchers don't need PV to produce
21 energy. But that is not what makes it one project. One
22 project is, again it's one site, it shares a common set of
23 infrastructure and it really makes sense for it all to be
24 looked at together.

25 If you determine that you only have jurisdiction

1 over the SunCatchers or the solar thermal component of the
2 project then you also do have authority over the related
3 facilities, which are the facilities that are necessary to
4 support the SunCatchers. And that will include things like
5 the water supply, the substation, the control room, the main
6 service complex, the roads. And so you would need to tease
7 out which one of these are related and which one of these
8 are not related to the solar thermal component.

9 Again, that is something that could be done. It
10 is going to be a complex process and we think it is
11 something that is not consistent with the legislative intent
12 that was creating one entity to review and approve all of
13 these types of projects but it is something that the
14 Commission could do.

15 Again, we think it's clear the Commission has
16 jurisdiction over the solar thermal component parts of this
17 project and the related facilities and we would ask you to
18 first off rule on that, why it's appropriate for it to be
19 here, and then we can consider further whether you should
20 also be taking jurisdiction over the other power generating
21 portions of the project. Thank you.

22 HEARING OFFICER VACCARO: Mr. Lamb, Ms. Burch?

23 MR. LAMB: Thank you, Hearing Officer Vaccaro. I
24 want to address a couple of points. The first is
25 Mr. O'Brien's one project. The problem with that analysis

1 is every single case that he referred to, the technology was
2 technology over which the Commission had jurisdiction, every
3 one. Here that is not the case. Again, what they are
4 suggesting is just because it deals with electrical
5 generation you have jurisdiction. But we know that
6 specifically in the Warren-Alquist Act PV is excluded,
7 specifically excluded.

8 So you have got this 4613 acre site. It has been
9 certified as all thermal power solar SunCatchers. We go to
10 100.5 megawatts, we put in a hotel, a golf course, an
11 airport. It's all the same project, we get to do it. It
12 doesn't make any sense.

13 Oh, it's not the same because it's not a hotel,
14 it's not an airport, it's not a golf course but it's
15 electrical generation, therefore you do. But you don't
16 because Warren-Alquist says you don't. That analysis and
17 that analogy fails.

18 Second, common infrastructure. That's a very
19 interesting argument because all of that common
20 infrastructure will be built, developed and put online in
21 Phase I with the PV. The main services complex, the
22 substation, the transmission lines and the water line will
23 all be built.

24 Under their theory you could do this. You could
25 say, look, I have a project, it's 10,000 acres, 2,000 PV,

1 2,000 PV, 2,000 PV, 2,000 PV, 2,000 SunCatchers. But those
2 2,000 acres of SunCatchers are going to be developed in
3 2225, that's when that's going to happen. Everything else
4 will go online earlier. But you know what, we need all that
5 infrastructure for those SunCatchers so that's all within
6 your jurisdictional purview.

7 That is an attempt to pervert the purpose of
8 implementing statute and regulations beyond comprehension.
9 And that's what they are trying to do here and it is simply
10 not appropriate. Thank you.

11 MS. BURCH: I would like to address one issue
12 raised by staff.

13 Having sat through many, many hearings last summer
14 where staff evaluated and made comments on and asked the
15 applicant to make changes to their project I definitely
16 would take exception to a representation that staff does not
17 go beyond the face of an application and make suggestions.

18 And I think there is an obvious suggestion here.
19 This is truly if, and I personally based on what I have
20 learned unfortunately over the last few weeks, believe there
21 are not going to be SunCatchers here. But if there were I
22 would suggest that it would be the tail wagging the dog.
23 And that if staff believes that there truly would be
24 SunCatchers here, suggest that the applicant take off .5 of
25 a megawatt and then decide to waive jurisdiction and

1 recommend that so that the true agencies with the true
2 interest and on the true technology have jurisdiction.

3 Thank you.

4 HEARING OFFICER VACCARO: Thank you. Ms. Willis.

5 MS. WILLIS: Thank you. To begin with I think
6 Ms. Burch just mischaracterized the statement. Staff does
7 make a lot of suggestions and we do ask for, in discovery,
8 many, many questions for data. And we do all that but we do
9 still review the project description, unless it is changed,
10 as it proposed. And that would be the same for this major
11 amendment. It doesn't mean we don't make suggestions but we
12 do actually -- after 12 years I can really attest that we do
13 review the project as proposed.

14 The first comment I would have would be in regard
15 to the Sierra Club's comment about, and it's repeated by
16 BNSF, about the 100 percent of PVs being built in Phase I.
17 Phasing of a project, to my knowledge, has never been
18 determinative of jurisdiction by the Energy Commission.
19 Projects are phased often in different phases and we have
20 never made any type of decision on whether we have
21 jurisdiction based solely on the phasing of the construction
22 of a project.

23 Second, as we stated and it has been stated and I
24 think it is agreed upon, there is much of the same
25 infrastructure that would be used by both the PV portion and

1 the solar thermal portion. Therefore if the Energy
2 Commission was only going to license or have jurisdiction
3 over the solar thermal portion it would also have
4 jurisdiction over the T-lines and water systems, the control
5 room, the substation and many of the access roads. So I
6 think that that portion is important to consider.

7 And it isn't -- and as we said, it's not a hotel,
8 it's not a golf course, they are both electricity generating
9 facilities. It's electricity going into the grid. I
10 imagine the end users of that are not concerned about which
11 side of the fence it came from but it is part of the same
12 parcel of that site. Thank you.

13 HEARING OFFICER VACCARO: Thank you.

14 Ms. Gulesserian, anything you would like to add?

15 MS. GULESSERIAN: I have nothing further to add
16 right now, thank you.

17 HEARING OFFICER VACCARO: Okay, thank you.

18 Mr. Aardahl, on behalf of Defenders anything you would like
19 to add?

20 MR. AARDAHL: Thank you. Nothing further at this
21 time.

22 HEARING OFFICER VACCARO: Thank you. So Ms. Smith
23 and Mr. Ritchie, as promised you get the final word on the
24 topic of jurisdiction. So if there is anything you would
25 like to add at this point please do so.

1 MS. SMITH: I think the ironic thing here is if
2 this were a casino or a hotel the Commission would have more
3 authority over this project than it currently does.

4 We tend to get a little balled up here because
5 they are two electric generating facilities but the majority
6 of it is expressly not in your jurisdiction, so that's the
7 problem. I honestly think that you would do better if this
8 was a golf course.

9 Agencies have to look to their implementing
10 statute in order to act and they cannot strain the language
11 in the implementing statute beyond where it can reasonably
12 go. And that's what the applicant and staff is asking the
13 Committee to do.

14 And frequently when courts are presented with
15 issues like this they appreciate and understand the problem
16 that they look right at the parties and say, this is not
17 something for us to solve, you need to go to your
18 legislature.

19 This may be a problem that the legislature has to
20 fix. But you cannot go beyond the reasonable interpretation
21 of the Warren-Alquist Act and start inventing all these
22 sorts of projects for which you have jurisdiction; it just
23 simply doesn't lie in the Warren-Alquist Act at this time.
24 And that's all that the Sierra Club has. And I'm sorry, I
25 am going to have to leave but Mr. Ritchie will stay.

1 HEARING OFFICER VACCARO: Thank you. I think at
2 this time we will go ahead and ask questions of the parties.

3 Each party of course can, if it is not directed
4 specifically to you, then it would be appropriate for each
5 party to have an opportunity to respond.

6 PRESIDING MEMBER DOUGLAS: This is Commissioner
7 Douglas; I have got a few questions for Sierra Club.

8 Mr. Ritchie, I think you said but I want to make
9 sure I heard you right. What do you think our obligation
10 would be if presented with a 100.5 megawatt amendment to a
11 solar thermal application that we have certified? So we
12 have certified a project, we have authorized a project and
13 now the applicant wants to reduce the size to 100.5
14 megawatts of solar thermal. What is our obligation with
15 regard to that amendment application?

16 MR. RITCHIE: Well, Commissioner, I think you are
17 correct in that, you know, the borders of the project as
18 they exist now would need to be changed. And so what the
19 Commission's obligation would be at that point would be to
20 reduce the borders to what are, you know, necessary to build
21 the project, the 100 megawatt project as it was proposed.
22 So I think immediately what that requires is dismissing the
23 petition to amend here because that is not what this
24 petition to amend asks for, it asks for this project that we
25 spent a lot of time discussing.

1 How the Commission members see that. You know, I
2 think you almost have to think about it as, because it is
3 such a radical change, as a new project, you know. So now
4 we are no longer doing a project that is going to be built
5 in the coming years. We are no longer looking at thousands
6 of acres that we were looking at. It's a pretty radical
7 change and I think it would have to come back as a new
8 project.

9 PRESIDING MEMBER DOUGLAS: All right, so
10 Mr. Ritchie, that's -- Mr. Ritchie, that's a comment towards
11 baseline and we are going to go to baseline but I want to
12 stay on jurisdiction for a couple more minutes here if you
13 don't mind. And you'll have a chance to speak on baseline.

14 So if we do as you suggest and we say, all right,
15 we are going to look within the four corners of the 100.5
16 megawatt project that the applicant is now proposing, what
17 do we do with the knowledge that actually there are, there's
18 a much larger project here because some of the roads and
19 some of the infrastructure is actually going to be used by a
20 larger photovoltaic project. And you can call it a hybrid
21 project or you can just call it two projects but we know
22 than the applicant is coming in with a larger plan than the
23 four corners of the 100.5 megawatt solar thermal project so
24 what do we do with that?

25 MR. RITCHIE: Well, there's a couple of things

1 there. First of all I think, I think the cleanest and most
2 proper way that the applicant could do would be to -- if
3 they are really going forward with what they are proposing
4 in this two phase process they don't need Commission
5 approval yet because they don't have SunCatchers yet.

6 So I think that what they should do is propose to
7 the appropriate state and federal agencies, you know, Phase
8 I of the facility, a PV facility. And something like a
9 programmatic EIR can deal with things like this. You know,
10 CEQA knows how to deal with these kind of step-wise
11 developments. They get into Phase I, they do Phase I. This
12 all falls under CEQA, under the scoping of CEQA.

13 Then when it comes to the time to get approval for
14 the 100 megawatt of solar thermal, when they are ready to
15 build that you see what exists on the ground. Is there
16 infrastructure that they can use? Is there infrastructure
17 from the PV facility that they built a few years earlier
18 that they can also use? Are there roads there, is there
19 water? And at that point then the Commission has something
20 to work off of. Then the Commission can look at what's out
21 there, what needs to be approved and how the project goes
22 forward.

23 Now is there a world where they could bring the
24 100 megawatt request first and try to parse out which road
25 goes to the solar thermal and which roads go to PV and which

1 facility -- which facility is there? You know, I think
2 under -- it gets messy. And I think under the answer to
3 that you could try and do something like that but it just
4 doesn't make sense here.

5 What makes sense here is to propose the facility
6 that they are going to build and then move on from there.
7 And if they need to consult with the Energy Commission CEQA
8 can do that. CEQA can work with multiple agencies
9 consulting together. But at this point right now the
10 SunCatcher portion, the 100 megawatt portion is not ready to
11 come before the CEC as it has been proposed.

12 PRESIDING MEMBER DOUGLAS: So is the basis that
13 you are saying it is not ready based on the timing in the
14 proposal or is it based on your concerns about the
15 technology?

16 MR. RITCHIE: I think it's both, you know. The
17 timing in the proposal is the issue that I discussed first
18 and then it just seemed so complicated to build -- you know,
19 if you have a road that is going to be used -- you know an
20 appurtenant road or some other thing that is used for the
21 SunCatcher facility but it is also going to be used for the
22 PV facility. I think practically it just makes sense to
23 deal with whatever is going to go in first. And then, you
24 know, once that is dealt with then you deal with what comes
25 up next.

1 And then also we have serious concerns about the
2 technology and whether or not that technology is
3 speculative. That I don't think though is the basis for the
4 decision. I think just as a practical matter you should
5 take those in step and, you know, they would be related
6 facilities and the infrastructure facilities. You know, if
7 they don't need to build them right now, if the SunCatchers
8 aren't ready to go in right now why should the Energy
9 Commission be approving them right now?

10 PRESIDING MEMBER DOUGLAS: Thank you. I am not
11 sure I agree with you that we should look at steps before we
12 look at the whole of what is proposed but I hear what you
13 are saying and I hear what you are saying about the timing.

14 Let me ask you one more question. If we were
15 unsure because other parties raised the question of the
16 viability of a technology what should we do with that
17 information? Is that something that should be the basis of
18 dismissing an AFC entirely and saying, come back when you
19 can prove your technology is ready or is that something that
20 we deal with when we look at reliability? Where do you see
21 that question actually fitting into this process?

22 MR. RITCHIE: Well I think it's an important fact.
23 I wouldn't presume to know how the Energy Commission would
24 want to deal with technologies like that that are in the
25 future, you know. I think there is some advantage to

1 looking at types of technologies that, you know, may be a
2 few years down the line. You know, that was the original
3 project, looking at this new technology.

4 But I think the issue here is the fact that this,
5 that the SunCatchers are speculative doesn't so much go to
6 whether or not the Commission should ultimately approve a
7 project that contains SunCatchers. It goes to whether or
8 not this project is a solar thermal project. And this
9 project is not a solar thermal project. And one piece of
10 evidence to that is that the only component that is solar
11 thermal is speculative, is down the line.

12 This wouldn't be an issue if, you know, if this
13 was an entire project and the Commission could kind of deal
14 with that. But what we are risking here is creating a
15 project that if the technology doesn't come through the
16 Commission will have exerted its extraordinary power over
17 something that it shouldn't exert power over. And that's
18 the problem.

19 PRESIDING MEMBER DOUGLAS: Thank you, Mr. Ritchie,
20 I think you have answered all my questions; I appreciate you
21 doing that.

22 I just have a few questions for BNSF. When
23 Mr. Lamb was initially speaking he raised the issue that the
24 applicant moved forward with the project that they then sold
25 to somebody else. And I just wondered if you could tell me

1 -- you know, there are actually many times that I have seen
2 applicants come in with an AFC that they either never intend
3 to build themselves or end up selling to another developer
4 so can you help me understand what is wrong with that.

5 MR. LAMB: Commissioner, what is problematic about
6 that is the knowledge then and now that the proposed
7 technology is not commercially available. What you said
8 was, a project they have no intention to build, a project
9 that they intend to sell. That doesn't mean the technology
10 is not available. Here we know the technology is not
11 available. It wasn't available then and they never said
12 anything to you.

13 And I would maintain that there is a duty, an
14 ongoing duty of candor to the Commission that was violated
15 there. That they should have said something. Hey, we know
16 they are not commercially available right now, and they
17 didn't. And they got certification and now they turn
18 around, they sell it, no problem.

19 But if you, if you put together the pieces here
20 what I am suggesting is there is a huge pink elephant in the
21 room and nobody wants to look at it. It is magically 100.5
22 megawatts. We know that that's the number under your
23 implementing regulation 1936 that gets you into mandatory
24 jurisdiction. Fifty to 100 you have discretion. The same
25 thing at 25541 of the Public Resources Code. That's a

1 coincidence? I think not.

2 They came to this Commission and they said, we
3 need an amendment because it is not commercially available
4 and viable. We want to do photovoltaic. They don't want to
5 do SunCatchers. They are giving you that number only as a
6 hook to maintain this jurisdiction and that's not
7 appropriate.

8 PRESIDING MEMBER DOUGLAS: So I'll just ask, I
9 think I know how you will answer this question. But if an
10 applicant comes in here with a proposal for a natural gas
11 plant and they are proposing a new, cutting-edge natural gas
12 turbine and down the road they realize that that turbine
13 just isn't going to work and so after approval they file for
14 an amendment and they want to change out the turbine do you
15 see something -- what is wrong with that?

16 MR. LAMB: There may be nothing wrong with that.
17 You've got to look at the -- it's a fact-specific inquiry,
18 Commissioner.

19 PRESIDING MEMBER DOUGLAS: All right.

20 MR. LAMB: Obviously. And in that specific
21 instance, if they believe all along that the turbines are
22 available and then they're not, that's not a problem. And
23 you may do another amendment for another turbine but you
24 can't do an amendment for PV.

25 PRESIDING MEMBER DOUGLAS: That was actually going

1 to be my last question. If the applicant had been coming in
2 here and proposing to instead of SunCatchers move forward
3 with another solar thermal technology, you know, obviously
4 that changes the jurisdictional debate but does that change
5 the fact that you filed a complaint and you're implying that
6 there may be something more to it. What is the difference
7 between changing to a different kind of natural gas turbine
8 and changing to a different kind of solar thermal technology
9 and changing to PV?

10 MR. LAMB: Jurisdiction.

11 PRESIDING MEMBER DOUGLAS: All right, just
12 jurisdiction.

13 MR. LAMB: Natural gas turbine, you've got
14 jurisdiction. Other parabolic mirrors, you've got
15 jurisdiction; PV you don't. It's that simple.

16 PRESIDING MEMBER DOUGLAS: So in your mind this is
17 about -- okay. I think that's all of my questions for now.
18 That's probably a good thing because people may want to
19 respond.

20 MR. LAMB: Thank you.

21 ASSOCIATE MEMBER WEISENMILLER: I have one
22 question which I think Terry may be able to respond to,
23 perhaps the attorney from CURE may be able to respond to,
24 perhaps not. My recollection is this Commission has
25 processed projects at the Richmond Cogen Refinery and there

1 was one that was built for the original cogen project in the
2 '80s.

3 And then there was a second one which was proposed
4 as an expansion of the cogen project plus an overall
5 refinery modernization that came in in the '90s that the
6 Commission was actually processing, ultimately Chevron
7 dropped the project when the cost got over the \$1.5 billion
8 or anyway multi-billion. But at least at that juncture it
9 was not just power plants but it was a power plant and a
10 refinery. Do you remember that, Terry?

11 MR. O'BRIEN: I do but I can't remember all the
12 specific details on that. I don't know if Roger Johnson who
13 normally has a better memory than I do can inform you on
14 that.

15 MR. JOHNSON: Commissioner, this is Roger Johnson.
16 You are correct in that situation where it was a small
17 power plant, an amendment that was brought back to -- it was
18 going to be an SPPE that became an AFC because of the
19 megawatt size. It was two generators associated with the
20 modernization of the facility and together they were greater
21 than 50 megawatts. But then that second generator was also
22 attached to the major modification and a new facilities and
23 so the Commission was going to do the CEQA work for the full
24 project. But only because of having the two generators.

25 ASSOCIATE MEMBER WEISENMILLER: Thank you.

1 HEARING OFFICER VACCARO: So before Chairman
2 Weisenmiller asked his question, Ms. Foley Gannon, it looked
3 like you were ready to push the red button. It seemed as if
4 you had some response that you would like to make to
5 Commissioner Douglas' questions so please go ahead.

6 MR. FOLEY GANNON: I am always ready to push the
7 red button.

8 I would like to respond first to Sierra Club's
9 response to your question about what they should do with the
10 100 megawatt facilities and their response that you should
11 just wait and see what happens.

12 I would suggest and we will probably talk about
13 this more when we are talking about CEQA that that is
14 directly contrary to CEQA, that's piecemealing. If you know
15 what you are planning for your project CEQA encourages
16 agencies to look at it early and to look at it holistically
17 so that you make sure that all environmental impacts are
18 studied and considered together.

19 And you have to remember that this project is
20 located on federal land. This project has a right-of-way
21 grant. There is a right-of-way amended application that has
22 been accepted by the BLM and is currently being processed.
23 That amendment application is to allow for 100.5 megawatts
24 of solar thermal.

25 So it is certainly a reasonably foreseeable

1 project that would have to be considered. In any event
2 under the CEQA document that someone would be doing. And
3 again we would submit that it would really be in a policy
4 way not a wise decision and we don't think it would be
5 consistent with CEQA.

6 We would also like to say that there has been
7 discussions of saying you might create a situation where you
8 approve a project that would never have been under your
9 jurisdiction in the event that solar thermal was never
10 installed.

11 We would say that is not I don't think unique to
12 this situation. Again, if you are approving a project which
13 is phased and the first phase has 40 megawatts, if the
14 second phase never happened then you would never have had
15 jurisdiction over the first phase if the second phase hadn't
16 been proposed.

17 So you look at, again, what is proposed by the
18 applicant and what is ultimately brought before the
19 Commission for approval. And I would submit when you are
20 considering jurisdiction at the outset you look at what is
21 proposed by the applicant. And again, we are proposing
22 100.5 megawatts of solar thermal facilities.

23 And then I would also say that there has been the
24 discussion of Section 25541 and saying that somehow doing
25 100.5 megawatts is trying to manipulate it. First off the

1 .5 is just because it comes in 1.5 megawatt groups and so it
2 happened to 100.5.

3 But also if you look at 25541 and you read what it
4 says, it says the Commission may exempt from this chapter
5 thermal power plants with a generating capacity of up to 100
6 megawatts in modifications if the Commission finds that no
7 substantial adverse impact on environmental or energy
8 resources will result from the construction or operation of
9 the proposed facility.

10 So what this really is, is a mitigated neg-dec or
11 a neg-dec provision. It is not saying you are somehow
12 getting out from under everything. It's saying you look at
13 it and you determine that there are no potentially
14 significant environmental impacts. And if you want to do
15 that for our project, that's great, we're good to go, thank
16 you.

17 HEARING OFFICER VACCARO: You're a mind reader. I
18 had a question about phasing that was raised actually by
19 Ms. Willis but the analogy that you gave I think is kind of
20 interesting and gets us there.

21 You were saying that if this was a two-phase
22 project, in order to get to the 50 megawatt threshold if
23 Phase I was 40 megawatts you would need the 10 megawatts of
24 the second phase. Granted. And I presume that you are
25 talking about thermal.

1 But what we seem to be hearing from some of the
2 other parties here is that we don't get there in Phase I of
3 this project. So how critical is that Phase I of your
4 analogy of 40 megawatts or are you just saying, as long as
5 you have at least 50 megawatts in some phase at some point
6 and it is something that everybody is contemplating at
7 Time-1, that's good enough.

8 But that seems to be the opposite of what some of
9 the other parties are arguing, which is that PV in Phase I
10 is in their view somewhat of a death knell. So maybe if you
11 could respond to that. I think we might want to hear from
12 some others on that as well.

13 MR. FOLEY GANNON: I was using the 40 megawatt in
14 Phase I just as an example. Say you had 100 megawatt
15 thermal power plant. Not solar but a thermal power plant.
16 And there was, you know, three phases for 120 megawatts so
17 40-40-40. And obviously if the project proponent came in
18 just with Phase I you wouldn't have jurisdiction over that.
19 You would never have jurisdiction over that.

20 So I was trying to use it as an analogy of saying
21 that you look at the entirety of the project to determine
22 whether you have jurisdiction or not. And the entirety of
23 this project, the entirety of this facility includes 100.5
24 megawatts of solar thermal power.

25 And to me the question of whether it's in Phase I

1 or Phase II, there is nothing in the Warren-Alquist Act or
2 your regulations, or I understand it the way that you
3 usually review an AFC, that would be looking at that
4 question to say, you know, what is going to be in Phase I to
5 determine whether we have jurisdiction or not.

6 PRESIDING MEMBER DOUGLAS: Right. I think the
7 question is, is there any difference between 40-40, for
8 example, with solar thermal versus a project that is 0-80
9 thermal because Phase I is photovoltaic and Phase II --
10 let's say it's 40 of photovoltaic and Phase II is 50 of
11 solar thermal. So is there any difference? Should the
12 phasing matter to us if Phase I is zero megawatts of solar
13 thermal versus say 20 and Phase II gets us over the
14 jurisdictional threshold?

15 MR. FOLEY GANNON: In my mind it doesn't; I think
16 it's an entire project. You have to look at the entirety of
17 the project and you make a determination on your
18 jurisdiction based on the entire project that is proposed.

19 HEARING OFFICER VACCARO: Thank you. Sometimes
20 doing the questions in tandem helps.

21 And I think we understand that that's Calico's
22 position but I am trying to make sure that I think we
23 clearly understand BNSF. Let's just assume that the solar
24 thermal component is not at issue and that it is really
25 going to happen, so that we put that aside. But the fact

1 that it is really going to happen in Phase II, not Phase I.

2 If that was a certainty do you still maintain the
3 position that you have been advancing today or do you still
4 say that there is something very unsettling and problematic
5 about the entire Phase I being photovoltaic?

6 MR. LAMB: Yes I do. Again, if Phase I is a golf
7 course, just because Phase II is thermal power doesn't mean
8 you have jurisdiction over Phase I. This is a myth that we
9 are creating. This is an independent -- this solar thermal
10 power plant that they are talking about is independent of
11 the photovoltaic; it is not integrated, it is not together.

12 The examples that Mr. O'Brien gave, with all
13 deference, are not applicable because you are talking about
14 substantially similar technology of which the Commission
15 always had jurisdiction and always will have jurisdiction,
16 it is only a matter of quantity.

17 Because if you rule otherwise, what the Commission
18 is saying is they are telling every developer out there,
19 okay boys and girls, just go out there and put in 55
20 megawatts of solar thermal power. It can be 20 years from
21 now, we can approve anything. That would completely
22 eviscerate the purpose of the implementing statute. This
23 implementing statute specifically excludes photovoltaic.
24 You can't put in what has been specifically excluded, you
25 just can't.

1 HEARING OFFICER VACCARO: Well let's assume that
2 that's true if in the first instance the application was
3 for, it was exactly as the amendment is being proposed. If
4 that was the AFC. But it's not the AFC. What we are
5 looking at right now is a petition to amend a project on a
6 site that has already received certification.

7 So I guess I am trying to reconcile us looking at
8 what we really have before us and not analogizing it to a
9 brand new project. Looking not only at the implementing
10 statutes but those that also give this Commission rulemaking
11 authority, authority that was exercised by adopting a post-
12 certification amendment process. And maybe tying the
13 statutes, the reg to what is actually before us, which is a
14 project that would still be on a site that was certified by
15 the Commission and directly relates to a project that was
16 approved by the Commission. I think maybe we can -- let's
17 talk about those dots a little bit.

18 MR. LAMB: I'd love to talk about that, Hearing
19 Officer Vaccaro, because the statute doesn't say anything
20 about a project. It talks about a facility, it talks about
21 a site, okay. What it says is, the exclusive power to
22 certify all sites in related facilities in the state, not
23 projects. Whether a new site and related facility or a
24 change or addition to an existing facility. You're talking
25 about a change or addition to a site, not to a facility. If

1 it's a facility it's been built. And in that case this is
2 what would happen, you would have exclusive jurisdiction if
3 it dealt with solar thermal power.

4 HEARING OFFICER VACCARO: Okay, let's shift over
5 to the reg. Because I think that is really what I was
6 trying to do is get you past the statute that everyone has
7 been focused on because we are looking at, I think, several
8 statutes and we are also looking at a regulation. And I
9 really haven't heard I think anyone give much discussion
10 today about the significance or the lack of significance of
11 the language in Regulation 1769. That's what I think I
12 would like to hear about because that is what this petition
13 to amend has come under, under the amendment authority that
14 the Commission has.

15 MR. LAMB: Okay, 1769 cannot provide more than
16 what 25500 allows. It can't; number one. Number two, I
17 don't see anything in 1769 that allows this Commission to do
18 what it has been asked to do. And an implementing
19 regulation cannot go beyond the four corners of the
20 implementing statute. And we know that the implementing
21 statute specifically excludes PV and it specifically says,
22 sites or facilities. It doesn't talk about projects.

23 HEARING OFFICER VACCARO: So then your position is
24 that the regulation is an idle act that has no effect?

25 MR. LAMB: No. What part of 1769 allows them to

1 do what they say they want to do? I haven't heard it.

2 HEARING OFFICER VACCARO: Staff or Calico, can you
3 address that?

4 MS. WILLIS: As I stated in our opening argument,
5 1769 does precisely address a modification to an existing
6 project. It says, after the final decision is effective,
7 under Section 1720.4 the applicant shall file with the
8 Commission a petition for any modification it proposes to
9 project design, operation or performance requirements. I
10 mean, it is addressing a project. It is not addressing just
11 the site but it is addressing the project.

12 I also wanted to add that -- one of my staff
13 reminded me that phasing can be various things. Phase I can
14 be just construction of roads or other facilities. It
15 doesn't necessarily have to be part of what we consider the
16 project as the generating facility. So that is one point to
17 make.

18 And also in regards to the 100.5 megawatt
19 discussion. Over the years applicants can and have filed
20 AFCs for projects between 50 and 100 megawatts. And as
21 Ms. Foley Gannon stated, the less than 100 megawatt
22 discussion is for small power plant exemptions, at which
23 point it is basically -- staff does an initial study and it
24 is basically a mitigated neg-dec.

25 Staff does not propose, does not intend, has no

1 characterization of this project being in that category. We
2 are looking at it as a full, complete, you know, subsequent
3 EIR-type of project.

4 PRESIDING MEMBER DOUGLAS: I guess I have to say
5 that I appreciate that the staff is not proposing the SPPE
6 process for this proposal.

7 HEARING OFFICER VACCARO: Your hand was moving.

8 MR. FOLEY GANNON: She actually said what I was
9 going to say so thank you.

10 HEARING OFFICER VACCARO: Okay. I think unless
11 the Committee has anything else that it wants to add with
12 respect to this jurisdiction discussion I think we have
13 exhausted the topic today in the briefing, the replies as
14 well as what has been said orally. Okay, thank you.

15 I think with that we'll move on to the next issue,
16 which is I think directly related which is, the Commission
17 in its role as lead agency with respect to the petition to
18 amend. So I think we'll go ahead.

19 We'll hear from the parties. I know that the
20 Sierra Club did not include this in its briefing.

21 Mr. Ritchie, are you still on the line?

22 MR. RITCHIE: I am, yes.

23 HEARING OFFICER VACCARO: Okay. So I think at
24 this point my focus is going to be initially on the people
25 who submitted briefs but that certainly wouldn't preclude

1 you later in the proceeding to address the issue should you
2 wish to speak to the lead agency topic. Because I believe
3 there is a footnote in Sierra Club's reply brief that
4 addresses, at least tangentially, the lead agency topic.

5 So I think we'll go ahead and start with the
6 applicant, Calico, if there is anything you would like to
7 add orally to what you have already briefed on the lead
8 agency topic.

9 MR. FOLEY GANNON: Thank you. We don't have much
10 to add. We are just summarizing that if the Commission has
11 jurisdiction over some or all of this amendment application
12 we think it is without question. It is required by your
13 regulations that you act as lead agency. So we think there
14 isn't actually very much to discuss in that point. Once the
15 jurisdiction is established you need to be lead agency.

16 And as a lead agency it is also completely clear
17 that you need to consider the whole of the project. So
18 irregardless of whether you have siting authority over the
19 PV or you don't you need to look at all the environmental
20 effects of the entire project.

21 It is very clear that CEQA, again, is geared at
22 having an early and thorough analysis so that an informed
23 decision is made by the first agency who is giving
24 discretionary approval of a project. In this case that
25 would be the Commission. And so you would need to look at

1 the whole of the project. Again that would be the PV, that
2 would be the related facilities, that's the roads, that's
3 everything.

4 Fortunately what was done before was also
5 considering the impact of the entire project on the entire
6 site. So you have a CEQA analysis that has been completed
7 for the project that was approved. As I am sure you are
8 well aware that was challenged in the Supreme Court and the
9 Supreme Court rejected that challenge. So that is a
10 complete and valid CEQA evaluation.

11 Because this is an amendment that needs to be your
12 starting point. That's your baseline. Again, CEQA is very
13 clear on this. What you look at are what are the
14 incremental changes between the project, the proposed
15 changes and the project that was approved. And you are
16 looking to see, are there any new impacts that weren't
17 looked at, associated with the previous approval.

18 And we would submit that there are no new types of
19 impacts that are associated with the amended project because
20 it is the same site, it is essentially the same footprint.
21 So the resources that would be impacted are all going to be
22 the same resources. You need to evaluate whether it is
23 going to be a different level of impact and whether there is
24 any new information or new circumstances. And again, we set
25 that forth in our brief, our consideration of those issues.

1 HEARING OFFICER VACCARO: You know, you just
2 segued into baseline.

3 MR. FOLEY GANNON: You wanted to go separately?

4 HEARING OFFICER VACCARO: Yes, I just wanted to
5 focus on lead agency. I'm thinking, is she going to get the
6 body language? I'm sorry, I hate to interrupt when you are
7 in the middle of an argument. But I think anything more to
8 be said on baseline should wait --

9 MR. FOLEY GANNON: Okay.

10 HEARING OFFICER VACCARO: -- until we make that
11 the front and center topic. Because there isn't uniformity
12 in viewpoint on the issue of lead agency and I think that is
13 one of those topics that we do need to have a robust
14 discussion on. So if there is more that you want to say on
15 lead agency please do, otherwise I think we should hear from
16 some of the other parties on that topic.

17 MR. FOLEY GANNON: Okay, that's all, thank you.

18 HEARING OFFICER VACCARO: Okay. BNSF, Mr. Lamb,
19 Ms. Burch, was there anything you wanted to add with respect
20 to lead agency?

21 MS. BURCH: We'll rest on our brief. We'll rest
22 on our brief.

23 HEARING OFFICER VACCARO: Okay, thank you. Staff?

24 MS. WILLIS: I don't think we have anything new to
25 add but just to reiterate that the Energy Commission should

1 serve as the lead agency regardless of whether or not the
2 Commission decides to exercise jurisdiction over the PV
3 portion.

4 As stated by Ms. Foley Gannon, that CEQA requires
5 us to look at the whole of the project. And staff has
6 looked and the Commission has looked at the whole entire
7 site and spent, you know, the better part of almost two
8 years on the original project at the exact site.

9 Staff has worked diligently with other agencies.
10 So it doesn't make a whole lot of sense to go out to another
11 agency when staff has included federal, state, local
12 agencies, including Department of Fish and Game, which I
13 think was the agency Sierra Club thought should be the lead
14 agency. Receiving, you know, input all along the way. And
15 nothing would change in that process, staff would continue
16 to do that on the amendment.

17 They produced a comprehensive analysis, its
18 potential environmental impacts and potential public health
19 and safety impacts. Many of the existing conditions may not
20 change depending on our analysis. We are not at that point
21 yet to make, to determine that.

22 But, you know, the Energy Commission still would
23 have jurisdiction over the solar thermal portion of it. It
24 doesn't make sense from a legal perspective or from
25 efficiency to have two different agencies reviewing

1 basically the same site, of which the Energy Commission and
2 staff have already spent and done an exhaustive review of.

3 So we believe just for good government purposes
4 that having a new agency, they would have to start from
5 scratch and that would cause potential delays in processing.

6 HEARING OFFICER VACCARO: Thank you.

7 Ms. Gulesserian, if you are still on the line, is
8 there anything that you wish to say on behalf of CURE?

9 MS. GULESSERIAN: Yes, we are still here and thank
10 you. I don't have anything to add beyond what is in our
11 brief. I think it is clear that the Commission must
12 actively be -- to do the CEQA analysis they can assert
13 jurisdiction over any part of this project.

14 HEARING OFFICER VACCARO: Okay, thank you.
15 Mr. Ritchie?

16 MR. RITCHIE: Yes. I'll say just a few quick
17 things. First of all I really want to reiterate, and we
18 said this earlier. That the determination of who is the
19 lead agency under CEQA is a secondary issue to jurisdiction
20 and it is something that is separate from the Warren-Alquist
21 Act. So I think we really have to look at it as a two step
22 process.

23 Now in our motion to dismiss we suggested who may
24 be the appropriate lead agency. That was a suggestion, we
25 are not taking a firm position there.

1 What I think is really important to understand
2 though is that these are two separate issues. CEQA and who
3 the lead agency is and whether or not a project is being
4 piecemealed or looked at as a whole of the project, that is
5 something that talks about the scope of the environmental
6 review, the scope of the EIR. That is something that is
7 very, very different than exerting the Commission's
8 exclusive permitting authority over the entirety of the
9 project.

10 And as an example staff pointed out in their reply
11 brief that Fish and Game had consulted on an incidental take
12 permit for this site but there is no Fish and Game permit.
13 Now with the original project that happened because the
14 Commission exerted its exclusive authority and that was in
15 lieu of a Fish and Game permit.

16 What we want to be very clear about is that the
17 jurisdictional issue has to address whether the Commission
18 can override all these other agencies. It is then a second
19 question of, if there is no jurisdiction who is the lead
20 agency and what is the scope of the EIR? That's something
21 that CEQA can deal with, that's something that CEQA deals
22 with all the time. But it is not, CEQA does not bestow upon
23 the Commission this exclusive jurisdiction authority that
24 overrides the authority of all other agencies. And that's
25 really what the Sierra Club is concerned about.

1 HEARING OFFICER VACCARO: Okay, thank you. I
2 think if Ms. Jones with Fish and Game, if you are still on
3 the line, is there any comment or thought that you might
4 have with respect to Sierra Club's recommendation that the
5 Department of Fish and Game act as the lead agency in this
6 matter?

7 MS. JONES: Well, as far as I know basically it's
8 determined through the Governor's Office. That we were
9 going to try and do all the permitting as, you know, make it
10 as efficient as possible for the project applicant. And
11 that would basically be beyond, beyond what we could I think
12 say much about.

13 HEARING OFFICER VACCARO: Okay, fair enough. It's
14 just that when we have people on the line and we can get
15 whatever their thoughts are it's helpful.

16 Unless there are any questions from the Committee
17 I think pretty much everyone has spoken who briefed on this.
18 The briefs were pretty clear. I think all the positions
19 are understood.

20 So I think with that, Ms. Foley Gannon, you got us
21 started on baseline. Why don't we continue the discussion
22 now I think on the environmental baseline issue. Because
23 again, the briefs were very specific and all of you are not
24 in agreement on the baseline issue as well. I think it is a
25 very important issue and hopefully we can have some fleshing

1 out orally of what people stated in the briefs.

2 MR. FOLEY GANNON: What I stated in the briefs and
3 what I stated a few moments ago, just reiterate. Our
4 position is, and we think it's clear under CEQA, when you
5 are considering an amendment you look at the incremental
6 changes.

7 And that is not the situation which is addressed
8 by the South Coast case which was discussed by BNSF of
9 saying you are considering a hypothetical situation, which
10 is if something is taken out. That situation was a new
11 project was involved and they were trying to base it on a
12 situation which was not an approved project.

13 Here there are specific regulations under CEQA in
14 the guidelines which speak to what do you do when you have
15 an amendment in front of you or you have a project change.
16 And that says that you look at three things.

17 You look at, are there any new impacts,
18 potentially significant impacts that were not previously
19 analyzed. Are there any new circumstances which can result
20 in new impacts that were not previously analyzed or more
21 severe impacts that were not analyzed. And is there any new
22 information that could result in new impacts or more severe
23 impacts than were previously analyzed. So that's the
24 universe of things that you look at under an amendment.

25 And again, in this case you have your

1 environmental document, which was completed by the
2 Commission and which was -- the request for review was
3 turned down by the Supreme Court. So that is a valid,
4 that's an unchallengeable document. So that's your
5 baseline, then from that you look at the incremental
6 changes.

7 And as we discussed in our brief, we believe that
8 there is some new information that is going to be developed
9 during this process. There were some studies that were
10 contemplated in the compliance part of the project which
11 will be before the Commission before the amendment is
12 considered. And we certainly think it is appropriate and
13 should be looked at by staff and by the Commission and
14 ensure that there are no new environmental impacts that are
15 revealed by that information. If there are they should be
16 studied and they should be mitigated. Thank you.

17 HEARING OFFICER VACCARO: Ms. Burch.

18 MS. BURCH: CEQA is triggered by a project.
19 Fundamental point. Number one. The project that was
20 considered was a SunCatcher project and the EIR that was
21 done was on a SunCatcher project. So our basic point number
22 one is that there is no first EIR on the photovoltaic
23 alternative that was rejected by both the BLM and the CEC.
24 Okay, that's the first really basic point. We don't have --
25 we just don't even match Ms. Foley Gannon's argument, we

1 start at different points.

2 Our second point is that even if -- not even if --
3 we have a pending lawsuit s I'm sure you all know regarding
4 this project in federal court.

5 (Telephone rings.)

6 MS. BURCH: And there are issues of major
7 significance to BNSF that we -- that not as many parties
8 were involved in so I understand why people haven't
9 addressed them. But glint and glare, hydrology,
10 sedimentation transport, access.

11 (Telephone conversation is heard over WebEx.)

12 HEARING OFFICER VACCARO: For those of you on the
13 telephone, we are hearing your side conversation. So it
14 would be helpful to us if -- just a reminder for those of
15 you on the phone lines. If you don't hear your mute button
16 we can hear your side conversations and background
17 conversations and we just heard part of one.

18 So if there is something else that you need to do
19 or a noise that you need to make we would appreciate if you
20 would hit your mute button. That way our proceedings can
21 continue without having to interrupt speakers. Thank you.
22 Ms. Burch, I apologize.

23 MS. BURCH: Not a problem. So it is a fiction
24 when you ask us about our questions, our concerns. It is a
25 fiction that there is a baseline to be studied from. And

1 that's just a fact, it's not even arguable. And I believe
2 staff is supporting the work that we need to have done in
3 whatever form it's done in. I believe if any project moves
4 forward here it needs to address those issues.

5 We were hoping to have a workshop. It was
6 mentioned at the last status conference that there would be
7 a workshop on one of the major issues within a week to ten
8 days and that hasn't happened. We hope that that will
9 happen. We will have to make a motion if it doesn't, I
10 suppose. We want to have a workshop on glint and glare. We
11 want to have these issues thoroughly evaluated.

12 That being said, it is a fiction that you can
13 analyze the incremental difference between an initial
14 assessment and this one. It never happened.

15 The other points are in my brief but those are
16 just two so important -- oh, I want to mention something
17 else. There is a difference between breaking a project up
18 and piecemealing it and having speculation on pieces of a
19 project, which is not permitted under CEQA. And I believe
20 at this point in time that the evidence on the record with
21 respect to SunCatchers is pure speculation.

22 And I would like to point out that in the prior
23 certification process, as you will read in the complaint we
24 filed today, they gave us specific dates and specific
25 amounts of megawatts and SunCatchers that were going to be

1 put into different phases. And they were to begin
2 immediately; in fact the original application said in 2010.

3 We are very concerned about there not being
4 speculation in this EIR. Thank you.

5 HEARING OFFICER VACCARO: Thank you. Ms. Willis.

6 MS. WILLIS: Thank you. As stated in our brief,
7 the staff intends to review the proposed amendment as part
8 of the subsequent EIR process stated.

9 I disagree with BNSF's characterization that there
10 was really no first EIR. There was a, you know,
11 considerable amount of environmental review of the entire
12 site, regardless of what technology was being used.

13 And in their briefs they discuss that it was an
14 alternative therefore this should be a new project. Well,
15 in other projects, for example, a water source might be
16 changed from maybe reclaimed water to dry cooling. We don't
17 consider a new project, we would consider an amendment and
18 review those environmental impacts as such. And we intend
19 to do that with this project.

20 And staff doesn't do a highly detailed analysis of
21 alternatives as they would do for an AFC or for an
22 amendment. We didn't --

23 We agree in part with the -- with Calico's
24 characterization but we have, as Ms. Burch has stated,
25 requiring glint and glare, hydrology impact studies done up

1 front for the amendment and we will be having workshops once
2 we start getting some information in so that we can have
3 those discussions. But there have been discussions among
4 the parties about the scope of the glint and glare studies
5 already so that has already taken place.

6 But we do intend to do a thorough environmental
7 review. Look at the incremental impacts. Look at any
8 impacts that were not reviewed the first time through. And
9 at this point in time we don't have all of the data or the
10 information that would complete discovery so we can't
11 actually say which areas that we would be looking at more
12 thoroughly than others but I do know from staff that some of
13 the conditions would remain the same or similarly.

14 And depending on jurisdiction of we the Commission
15 decided not to exercise jurisdiction over the PV portion
16 then the applicant would need to go and get the permits.

17 In our in lieu permitting certification process
18 all of the agencies contribute to the requirements of the
19 permit so it should be basically an administrative process
20 for them either way to get the permits or get them anew if
21 that's the case.

22 HEARING OFFICER VACCARO: Ms. Gulesserian, CURE
23 also submitted a brief on the baseline issue. Is there
24 anything you would like to add or a comment you would like
25 to make?

1 MS. GULESSERIAN: I don't have anything to add
2 beyond what we put in our briefs. But to summarize, we
3 believe that the Commission can restrict its review to the
4 incremental effects associated with the modification.

5 Section 21166 of CEQA Public Resources Code states
6 that when an EIR has been prepared for a project no
7 supplemental environmental review shall be required unless
8 one of these events occurs. And that is substantial changes
9 are proposed in the project. So we believe that the, you
10 know, the currently submitted petition to amend falls within
11 21166 in this case.

12 HEARING OFFICER VACCARO: Okay, thank you. Is
13 there any follow-up on baseline from any of the parties in
14 response to comments that were made by any of the other
15 parties? Because at this point the Committee doesn't have
16 any further questions but we would certainly like you to
17 have the opportunity to say now anything remaining on the
18 point. No?

19 MR. AARDAHL: Jeff Aardahl with Defenders.

20 Considering the proposed modifications and change
21 to the technology in a substantial way, the fact that both
22 the Commission and Bureau of Land Management did not analyze
23 or chose to not analyze one of the alternatives for the
24 formerly permitted project, namely the photovoltaic
25 technology on the grounds that it would result in greater

1 impacts. I would like for you to keep in mind as we go
2 through this process whether or not the environmental
3 baseline with regard to the alternatives to the project and
4 specifically to project locations is adequate.

5 HEARING OFFICER VACCARO: Okay, thank you.

6 Mr. Aardahl, you jumped out ahead of me but I'm glad that
7 you did because that puts us right at the next segment which
8 was we indicated to all of the other parties, even though
9 you did not submit a brief if there was a comment that you
10 wished to make on the topics there would be time to do so.
11 This is that time. We have just heard from Defenders.

12 I think we had several other intervenors on the
13 telephone so I am just going to briefly, you know, call your
14 name and if there is something that you would like to add
15 then this is the time to do that. So Mr. Emmerich, you were
16 on the line for Basin an Range Watch, are you still there?

17 (No response).

18 HEARING OFFICER VACCARO: Okay, I am not hearing
19 from Mr. Emmerich. Mr. Jackson, was there anything that you
20 wanted to add today based on the very specific issues that
21 were presented in today's proceeding?

22 MR. JACKSON: I have nothing to add.

23 HEARING OFFICER VACCARO: Thank you.

24 Mr. Weierbach on behalf of Newberry Community Services
25 District?

1 MR. WEIERBACH: I have nothing to add, thank you.

2 HEARING OFFICER VACCARO: Thank you. Mr. Burke or
3 Mr. Thomas, I don't know if you were able to join us on
4 behalf of the Society for the Conservation of Bighorn Sheep.

5 (No response).

6 HEARING OFFICER VACCARO: Not hearing them. And
7 Mr. Brizzee, I know that you were on the line. If you're
8 still there, if there is anything you would like to say on
9 behalf of the County of San Bernardino.

10 MR. BRIZZEE: No comments from the County, thank
11 you.

12 HEARING OFFICER VACCARO: Okay, thank you. I
13 think at this time then if there are any members of the
14 public who wish to speak this is your opportunity. I don't
15 see any here in the room. Anyone on the telephone who
16 wishes to speak as a member of the public?

17 (No response).

18 HEARING OFFICER VACCARO: I hear none. So I think
19 I just need for us to go off the record for just I think
20 maybe about a minute or two, please.

21 (Off the record at 4:05 p.m.)

22 (On the record at 4:07 p.m.)

23 HEARING OFFICER VACCARO: Okay, thank you for your
24 indulgence. We were really just working out a date because
25 I think what is important from everybody's perspective is

1 that you get an Order and that you get an Order in a very
2 short time frame that addresses these issues, including
3 issuing an Order on Sierra Club's motion. We plan to do
4 that all in one document and on or before July 1st the
5 Committee will issue an Order.

6 Ms. Foley Gannon is cringing but that's pretty
7 ambitious actually from my point of view. But on or before
8 July 1st we will have an order issued that addresses all of
9 these topics.

10 MR. FOLEY GANNON: I was cringing because I am
11 leaving for vacation that day and last summer you issued an
12 order on the day I was going to leave for vacation and I had
13 to cancel my vacation.

14 HEARING OFFICER VACCARO: Consider it light
15 reading on your trip.

16 (Laughter).

17 HEARING OFFICER VACCARO: So I think with that I
18 will turn it over to Commissioner Douglas.

19 PRESIDING MEMBER DOUGLAS: All right, I would like
20 to thank everybody who has participated in this hearing,
21 here in person or on the phone. It was very helpful to me
22 to hear everybody essentially argue and discuss and answer
23 questions on the points that were raised in the briefs so I
24 would like to thank everybody for that.

25 Unless Chairman Weisenmiller, he has any comments

1 -- do you have any comments? All right. So with that we
2 are adjourned.

3 (Whereupon, at 4:08 p.m. the
4 Committee Hearing was adjourned.)

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CERTIFICATE OF REPORTER

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

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 13th day of June, 2011.

PETER PETTY

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

RAMONA COTA

June 13, 2011