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MEETING
STATE OF CALIFORNIA
STATE LANDS COMMISSION

STATE CAPITOL
ROOM 444

SACRAMENTO, CALIFORNIA

ORIGINAL

WEDNESDAY, OCTOBER 26, 1983

10:00 A.M.

DELORES I. DALTON, C.S.R.
License No. 4691

MEMBERS PRESENT

1
2 Kenneth Cory, State Controller, Chairman

3 Leo T. McCarthy, Lieutenant Governor, Commissioner

4 Nancy Cardway, representing Michael Franchetti,
5 Director of Finance, Commissioner

STAFF PRESENT:

6
7 Claire Dedrick, Executive Officer

8 Robert Hight

9 W. M. Thompson

10 Don Everitts

11 Alan Scott

12 Judy Markell.

ALSO PRESENT:

13
14
15 Gregory Taylor, Assistant Attorney General

16 Rick Frank, Deputy Attorney General

17 Dennis Eagan, Deputy Attorney General

18 Alan Hager, Deputy Attorney General

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P R O C E E D I N G S

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3 CHAIRMAN CORY: We will call the meeting to order.

4 The first item is the confirmation of the
5 minutes of September 23th. Are there any corrections or
6 additions?

7 Without objection, the minutes will be confirmed
8 as presented.

9 The report of the Executive Officer.

10 EXECUTIVE OFFICER DEDRICK: Mr. Chairman, the
11 report is before you. If you would like me to read it, I
12 will.

13 CHAIRMAN CORY: Any questions on the Executive
14 Officer's report?

15 It not, we will accept it.

16 COMMISSIONER MCCARTHY: I remember it as a very
17 stimulating meeting.

18 (Laughter.)

19 CHAIRMAN CORY: The record will note that the
20 Attorney General -- the Lieutenant Governor -- I haven't
21 known you very long, Leo -- remembers that as a memorable
22 meeting.

23 We have accepted the Executive Officer's report.

24 The next item is the Consent Calendar. These
25 are items that will be taken up in a single motion. They

1 are printed in the calendar with the prefix C. Certain
2 items have already been removed, needing more work. The
3 first one is Item C2(E); C13, C17, and C18.

4 For those items remaining on the calendar, if
5 there is anyone --

6 COMMISSIONER ORLWAY: Excuse me. It is my
7 understanding that C18 has just been moved to the regular --

8 EXECUTIVE OFFICER DEDRICK: Since then, we have
9 taken it off the calendar.

10 There is one other item, C15, which should come
11 off. I'm sorry I forgot to tell you about that.

12 CHAIRMAN CORY: Okay. Let's make sure we've
13 got a clean shot at this.

14 The items that are off calendar and will not be
15 taken up today are Items C2(E), C13, C15, C17, and C18.

16 EXECUTIVE OFFICER DEDRICK: Correct.

17 CHAIRMAN CORY: If there is anyone in the audience
18 who has any disagreement with the proposed solution of
19 any of the other ones prefixed by the C, would they please
20 let us know.

21 Yes, sir.

22 MR. MANDELL: I would like to know why
23 C15 was removed from the Consent Calendar?

24 CHAIRMAN CORY: Would the staff respond as to why
25 C15 was removed.

1 EXECUTIVE OFFICER DEDRICK: Yes. A request for
2 time was received just before the meeting today, and
3 we normally honor those things unless there is time value
4 to some specific legal reason why we need to act. So just
5 out of courtesy to --

6 CHAIRMAN CORY: Who raised it?

7 EXECUTIVE OFFICER DEDRICK: Assemblyman Izenberg
8 requested that we hold off on this, through the Lieutenant
9 Governor's Office.

10 CHAIRMAN CORY: And the person who asked the
11 question. Are you the applicant?

12 MR. MANDELL: Yes, I am the applicant.

13 EXECUTIVE OFFICER DEDRICK: You should identify
14 yourself for the record, sir.

15 MR. MANDELL: This is Lighthouse Marina.

16 CHAIRMAN CORY: And you are?

17 MR. MANDELL: Dave Mandell, the office manager.
18 We expected a routine approval, and it is a
19 surprise to us that there is any problem.

20 CHAIRMAN CORY: I expected one too.

21 EXECUTIVE OFFICER DEDRICK: Well, we all did.

22 COMMISSIONER MCCARTHY: If I may, Mr. Chairman --
23 Mr. Mandell, we will try to identify what the problems
24 are on this, and then get a reset for you so you are
25 not prejudiced as to any undue time limit.

MR. MANDELL: That's fine.

CHAIRMAN CORY: Okay. Is there anybody else that has questions about the Consent Calendar?

Without objection, those items on the Consent Calendar are approved as presented.

The next item is, Item 20. The staff has some proposed amendments to the lease terms. These are dealing with the problem of the Air Force, and this is a negotiated settlement with the Air Force?

EXECUTIVE OFFICER DEDRICK: That is correct, Mr. Chairman. They have no effect on the substance of the lease or on the environmental conditions or anything else in the lease. It is merely a question of adopting the wording, which the Air Force is more comfortable with than the original wording.

In addition to that, they were transferred from the special operating conditions into the body of the lease where they more appropriately belong, but those are the only changes that have taken place.

CHAIRMAN CORY: Is there anybody that has any comments about these specific amendments from the audience? Questions from Commissioners?

Without objection, we will make those amendments and they are adopted.

Now, the next question before us is that we have

1 a problem with a written court opinion, from Superior
2 Court in Santa Barbara --

3 EXECUTIVE OFFICER DEDRICK: Mr. Chairman, I think
4 Mr. Hight perhaps should --

5 CHAIRMAN CORY: -- last evening.

6 EXECUTIVE OFFICER DEDRICK: -- last evening,
7 after 6:30.

8 CHAIRMAN CORY: Greg, do you want to comment?
9 Not comment? Should I comment? How should we get us to
10 where we are probably going to be?

11 MR. TAYLOR: I think the court has raised a
12 question with regard to whether or not the Coastal
13 Commission has jurisdiction. This Commission has not
14 agreed with the Coastal Commission's assertion of
15 jurisdiction in this issue. In light of that I think the
16 Commission wants to -- the Lands Commission wants to study
17 it and has directed to us to seek a clarification from
18 the court, I believe. In light of that, I think you are
19 going to consider whether or not the lease sale would be
20 rescheduled or not.

21 EXECUTIVE OFFICER DEDRICK: I would recommend that
22 the lease sale be rescheduled. I think we cannot at this
23 point determine what is the best course of action, and
24 the potential lessees have been -- really, I think, should
25 have the opportunity to sit back for awhile while we figure

1 out what happens next.

2 CHAIRMAN CORY: So our option from the staff is
3 to go ahead and not proceed, put over the pending lease sale
4 and authorize the attorneys to proceed with --

5 EXECUTIVE OFFICER DEDRICK: The proper legal
6 remedy, if that's all right with you.

7 MR. TAYLOR: Which, initially, would be to
8 seek reconsideration of the order.

9 CHAIRMAN CORY: Any problems with any of that?

10 COMMISSIONER McCARTHY: I would just like it
11 recorded, Mr. Chairman, that -- I, of course, have stated
12 my position in the past -- that I had no personal problem
13 with applying to the Coastal Commission for a permit in
14 every sense, so I would dissent from proceeding in the
15 courts on the action, but I understand there are two other
16 votes on this Commission that feel otherwise.

17 EXECUTIVE OFFICER DEDRICK: But, Governor,
18 you would approve putting the lease sale over?

19 COMMISSIONER McCARTHY: Yes, I have no problem
20 with that.

21 CHAIRMAN CORY: Okay, by unanimous consent, we
22 will put the lease sale over.

23 We probably should have a motion --

24 COMMISSIONER ORDWAY: I will move the continuance
25 with appropriate legal remedies.

1 CHAIRMAN CORY: I will second that.

2 All in favor say aye.

3 (Ayes.)

4 CHAIRMAN CORY: Opposed, nay.

5 That motion passes.

6 EXECUTIVE OFFICER DEDRICK: Do we have a motion
7 on the lease sale?

8 CHAIRMAN CORY: Yes, that was by unanimous
9 consent.

10 Item 20 is taken care of.

11 Next item, Item 21, Recommendation for revocation
12 of offer to lease on Commercial Lease at "O" Street Pier.
13 Staff?

14 EXECUTIVE OFFICER DEDRICK: Yes.

15 This has a long history, and to make it short,
16 in 1978, the Commission authorized staff to issue a lease,
17 given certain conditions of paying.

18 The conditions were never met by the applicant,
19 and it has been very close to five years. We would like
20 you to -- what is the present of rescision? -- revoke
21 that authority, since the lease has never been taken up by
22 the applicant and the conditions set by the Commission have
23 never been met in that five-year period.

24 Bob, did you have --

25 MR. HIGHT: No, that's fine.

1 EXECUTIVE OFFICER DEDRICK: We have staff here,
2 if you want more detail.

3 CHAIRMAN CORY: We have some people that want
4 to talk.

5 Mr. Harvey.

6 Is Mr. Harvey here?

7 Would you like to address the Commission on this
8 issue or not?

9 MR. HARVEY: I would.

10 CHAIRMAN CORY: Okay. Take your shot.

11 I would like the record -- this is Mr. Walter
12 Harvey, who is not the Walter Harvey who works for me.

13 (Laughter.)

14 MR. HARVEY: Everytime I come before this
15 Commission, you precede with saying that.

16 (Laughter.)

17 CHAIRMAN CORY: If somebody picks up the record,
18 I want them to understand, or not jump to the conclusion
19 that we are dealing with staff.

20 MR. HARVEY: Okay.

21 With regard to the lease that is under
22 consideration or option lease that is under consideration,
23 I would note that our documents will show that our option
24 runs through January 1st of 1984. Now, I don't really wish
25 to get into a full discussion of the entire ramifications,

1 but over the past years, under the direction of this
2 Commission, we have made very earnest attempt to deal with
3 the city and to deal both with the State Lands staff in
4 coming to a final agreement as to the terms of the lease
5 and also the terms of locating the restaurant at the "O"
6 Street Pier. During that time, we have met with many
7 obstacles, the last of which seems to be, or at least one
8 of the last which seems to be, the termination or the
9 request to rescind the lease agreement.

10 The only thing that I might say is that there is
11 a meeting scheduled with the Redevelopment Commission of
12 the City of Sacramento on November 14, at which time they
13 will take up this thing. This has been at the request of
14 Mr. Joe Serna on the Council and also at the request of
15 Mr. Sam Walton who is the chairman of that Commission.
16 They have made the request that it be on that Commission
17 agenda for the hearing on the one condition that we really
18 have not been able to meet, which was parking consideration.
19 We have a tentative agreement with the City of Sacramento.
20 We have the documents that support that.

21 We would wish that this Commission would not take
22 the final action to rescind what agreement we have with you
23 until such time as this has been heard by the Commission,
24 the Redevelopment Commission, and by the City Council.
25 And that is the only thing that I can request at this time.

1 CHAIRMAN CORY: Any questions from Commissioners?

2 We have a Mr. Leo Goto and Laura Salloway.

3 Do you wish to speak to the Commissioners?

4 MR. GOTO: For the record, I am Leo Goto,
5 Director of Community Development, and to my right is
6 Laura Salloway, agency counsel.

7 We would just like to say that the news regarding
8 the forthcoming meeting was news to us. That apparently
9 was from the top down, so so be it. We will be at that
10 time presenting what we believe to be the staff's position
11 in terms of going ahead with the RFP proceeding. So that
12 will all be brought out, apparently, at this November
13 meeting.

14 CHAIRPERSON CORY: Okay.

15 Yes, we will get to you.

16 MS. SALLOWAY: Yes, I would just like to respond
17 to the statement regarding the agreement on parking with
18 the city.

19 I have examined our records extensively, and I
20 see absolutely no evidence of any agreement with the
21 City of Sacramento or the Redevelopment Agency regarding
22 parking. At this time, there are considerable planning
23 problems regarding the use of parking for Mr. Harvey's
24 latest proposed project in such a way that he could
25 accommodate parking for his project without having an

1 adverse impact on the parking needs for the entire
2 development. No planning solution has ever been resolved.

3 I understand from our staff that some of the
4 area that he had originally proposed to use for parking
5 is now being used for another purpose, for historical
6 railroad purposes. So there hasn't ever been a resolution
7 of the parking issue, which, of course, was a condition
8 precedent to the lease.

9 In addition, the land use which is permitted
10 under this offer to lease is not the land use which
11 Mr. Harvey proposes to make at this time. Therefore, this
12 lease offer as it was drafted is really not appropos to the
13 project he is proposing now.

14 CHAIRMAN CORY: Could staff -- all of this, I
15 feel like I came in in the middle of a very bad movie.

16 (Laughter.)

17 EXECUTIVE OFFICER DEDRICK: Yes.

18 CHAIRMAN CORY: Could our staff please tell us
19 -- we have an offer to lease the property outstanding
20 to Mr. Harvey?

21 EXECUTIVE OFFICER DEDRICK: Yes.

22 It does not have a time limit on it, Mr. Chairman.

23 CHAIRMAN CORY: So that was our error to begin
24 with.

25 EXECUTIVE OFFICER DEDRICK: No, I don't believe it

1 was an error.

2 CHAIRMAN CORY: My instincts tell me you shouldn't
3 leave a lot of offers --

4 EXECUTIVE OFFICER DEDRICK: Oh, I get your point.
5 Good idea.

6 Actually, you set conditions which at that time
7 staff apparently thought Mr. Harvey could meet, or at least
8 intended to try to meet. Those conditions were never
9 met. We have apprised Mr. Harvey several times in the
10 years that have gone by that he was not in compliance
11 with those conditions.

12 CHAIRMAN CORY: So there is not an option?

13 EXECUTIVE OFFICER DEDRICK: That is correct.
14 There is no option.

15 MR. NIGHT: Correct, Mr. Chairman. He has a
16 lease which he has not executed, the terms of which he
17 has not complied with.

18 EXECUTIVE OFFICER DEDRICK: In addition to which,
19 the project for which he was granted the opportunity to
20 have a lease is not the project he is currently proposing.
21 And I should have told you earlier that staff is currently
22 reviewing an application from the Redevelopment Agency to
23 do a city plan covering the entire waterfront, including
24 this property, which is one of the reasons for the concern
25 of Mr. Goto.

CHAIRMAN CORY: Okay. It seems like we should go back to square one, since Mr. Harvey doesn't have anything.

EXECUTIVE OFFICER DEDRICK: Certainly, Mr. Harvey --

CHAIRMAN CORY: Mr. Harvey, am I misunderstanding the facts, from your side of the table?

MR. HARVEY: I believe that you are.

CHAIRMAN CORY: What do you think you have?

MR. HARVEY: I think we would have to go back to the original application. The only thing I can do at this point -- and this is out of a final attempt to deal with the city -- there has been a request that a full hearing be granted to this by the Redevelopment Agency, the chairman of that commission. Now, if the two people who are seated here wish to deny that, there's nothing I can do about them denying it, except, immediately, I will make some contacts with Mr. Walton since he is the one who assured me that this has been scheduled.

Now, I think the whole issue of whether or not there is parking --

CHAIRMAN CORY: Mr. Harvey, what I think I want to know is what do you think you have in the way of rights and obligations from us, because as the staff has explained it to us, we put an offer to enter into a lease if you met

1 certain conditions for a specific plan. The staff is
2 informing us that you are no longer interested in that
3 specific plan. You are pursuing a different specific
4 plan --

5 MR. HARVEY: That is not correct!

6 CHAIRMAN CORY: Okay. What is your side of the
7 argument?)

8 MR. HARVEY: The staff is suggesting that one
9 portion of the plan --

10 CHAIRMAN CORY: Why don't you come on up.

11 MR. BROWN: Mr. Chairman, my name is Curtis
12 Brown. I am Mr. Harvey's attorney, and I think maybe I
13 can add some light on this as well.

14 CHAIRMAN CORY: Okay. It is our understanding
15 from our staff that you do not have an option.

16 MR. BROWN: We feel that we have a commitment
17 to lease, based on Mr. Harvey's ability to satisfy
18 certain conditions which require cooperation from the
19 Redevelopment Agency. Ms. Salloway went through her
20 exhaustive analysis of this matter in response to a long
21 letter that I wrote to her documenting the fact that
22 Mr. Harvey feels he has met all of the conditions. I
23 had to give them this long letter because the Redevelopment
24 Agency couldn't find any of their documents.

25 We feel we have met the conditions. That is what

1 the purpose of the hearing is for before the Redevelopment
2 Agency. I don't think this Commission should be burdened
3 with hearing an argument and a whole series of arguments
4 which should be before the Redevelopment Agency, and all
5 we are asking that this matter, the status quo which
6 exists be preserved until after the Redevelopment Agency
7 hearing where Mr. Harvey can present his argument that he
8 has met the conditions that are needed prior to executing
9 the lease.

10 CHAIRMAN CORY: I'm looking to the Lands --

11 EXECUTIVE OFFICER DEDRICK: Our records really
12 indicate that Mr. Harvey has no preferential rights here,
13 Mr. Chairman, and that we have waited five years for
14 something to happen, have had repeated communications.
15 We are now sitting there with a piece of land that is
16 reaching the point where there is going to be an
17 organized development. The Redevelopment Agency will
18 decide on a plan, which we would have to agree with it for
19 that to happen. At that time, Mr. Harvey could reapply for
20 a lease without prejudice.

21 COMMISSIONER MCCARTHY: Mr. Chairman, what I
22 think I hear Ms. Dedrick saying is that, as in any other
23 number of cases where we have entered into a lease
24 arrangement with someone, that if they didn't exercise
25 their rights under that lease arrangement, after a certain

1 period of time, that we simply terminated the potential
2 advantages of that lease arrangement. I think that
3 operating principle is being suggested regardless of what
4 the Redevelopment Agency of Sacramento does one way or
5 the other.

6 EXECUTIVE OFFICER DEDRICK: That's correct.

7 COMMISSIONER McCARTHY: I think that is what
8 you are hearing. So we're really not trying to be in the
9 middle of the merits or the demerits of whatever plan the
10 Redevelopment Agency may want to shape. I quite agree with
11 you that that's something that we could be into up and down
12 the coast and throughout California and don't really want
13 to be. This is really a matter of whether or not the
14 lessee, in effect, has acted with some reasonable dispatch
15 to fulfill the opportunities and rights given under the
16 lease arrangement.

17 Staff has decided that Mr. Harvey has not and is
18 recommending to this Commission, as in dozens of other
19 cases, that we ought to terminate the lease arrangement.

20 EXECUTIVE OFFICER DEDRICK: Let me correct one
21 point.

22 You are correct on all points, but there is no
23 existing lease. He is a Lease applicant.

24 COMMISSIONER McCARTHY: Okay.

25 CHAIRMAN CORY: So what we are simply saying is

1 when the local people decide what's there, you get together
2 with them, come on in, and without prejudice, reapply,
3 and we will take a look at it.

4 MR. HARVEY: The only thing I might suggest is
5 that there has been a lease approved.

6 Now, what State Lands is saying that, because
7 they haven't signed it yet, because there was a condition
8 that we have been attempting to meet with the city, and
9 they would sign the lease after the approval, that is
10 probably a technicality that we will have to discuss
11 perhaps at a different time. What I am suggesting is,
12 if nothing else, that the cover letter that came, addressing
13 this issue, I believe, to the Commission -- at least the
14 copy that I got, received -- when the item came before
15 the Commission, stated that we would have until January
16 1984 to activate this lease agreement. Now, I have that
17 document, if no one else has that document. I guess
18 maybe I have got the only copy.

19 COMMISSIONER MCCARTHY: Is that correct?

20 CHAIRMAN CORY: Bob?

21 EXECUTIVE OFFICER DEDRICK: Our records do not
22 indicate that at any time during the discussions or during
23 the lease that a time limit was set. I also think it would
24 be very unlikely that a five-year time limit would have
25 been set on such a lease application. The fact is that the

1 authorization contains specific conditions. Staff could
2 not have executed a lease, legally, until those conditions
3 were met. Those conditions have never been met. Mr. Harvey
4 has not signed a lease. The state has not signed a lease.
5 There is not a lease in existence.

6 COMMISSIONER MCCARTHY: Is Mr. Harvey implying
7 that he somehow was given until January 1984 to fulfill
8 whatever conditions were required for this --

9 MR. HARVEY: Would the Commission like to see
10 the document?

11 CHAIRMAN CORY: Do you have it?

12 MR. HARVEY: Yes, I have it.

13 CHAIRMAN CORY: Let's look at it. I am
14 puzzled. What I have --

15 EXECUTIVE OFFICER DEDRICK: This one is news.

16 CHAIRMAN CORY: Has Mr. Harvey made his rental
17 payment that was due on June 1 '79?

18 EXECUTIVE OFFICER DEDRICK: No, he has not.

19 CHAIRMAN CORY: Has he made his payment that
20 was due on January 1, 1980?

21 EXECUTIVE OFFICER DEDRICK: No, he has not.

22 CHAIRMAN CORY: Has he made his third, fourth
23 and fifth rental payments that were due January 1, '81,
24 '82 and '83?

25 EXECUTIVE OFFICER DEDRICK: No, sir.

1 MR. HARVEY: No rental payment becomes due until
2 the effective date of the lease.

3 CHAIRMAN CORY: No? The authorized lease has
4 specific dates in it. It seems to me, if you go by the
5 time you're supposed to pay for something, it sort of
6 speaks to the fact that you should have signed it before.

7 EXECUTIVE OFFICER DEDRICK: Mr. Chairman,
8 Mr. Scott has just pointed out that there were two documents.
9 One is the lease that was authorized with the conditions you
10 have described, which had to be signed -- the conditions
11 had to be met and the lease had to be signed. There was
12 a proposed lease, given that the first lease went, for the
13 future, which may have a 1984 termination date on it.

14 MR. SCOTT: Beginning date. There was a proposed
15 beginning date of 1984. Neither of the lease has ever been
16 executed by either party. The only one that was ever
17 approved by the Commission or authorized for us to enter
18 into was the one with a beginning date of January 1, 1979.

19 EXECUTIVE OFFICER DEDRICK: And it is that
20 approval we would like you to revoke.

21 CHAIRMAN CORY: Mr. Harvey.

22 MR. HARVEY: If there are two leases before this
23 Commission --

24 CHAIRMAN CORY: No, there is only one.

25 EXECUTIVE OFFICER DEDRICK: There is not.

1 CHAIRMAN CORY: There is only one that I have
2 any record of.

3 MR. HARVEY: There is only one that I have a
4 record of, and it only has one number on it. Now if
5 there's another number of another lease that has come up
6 before this Commission, I would like to know about that.

7 EXECUTIVE OFFICER DEDRICK: It has not come
8 before the Commission, Mr. Harvey.

9 COMMISSIONER McCARTHY: Mr. Harvey, do you have
10 a document that in any way commits to you a January 1984
11 date to give you an opportunity to execute on the
12 conditions of the lease?

13 Do you have a document signed by this Commission
14 or the staff representing the Commission?

15 MR. HARVEY: Not signed. It comes out as a part
16 of the -- or came as a part of the lease document.

17 COMMISSIONER McCARTHY: So it was what was being
18 negotiated as a potential lease agreement?

19 MR. HARVEY: What was being recommended to the
20 Commission, I believe, for approval of time.

21 COMMISSIONER McCARTHY: This is a form of a
22 recommendation?

23 EXECUTIVE OFFICER DEDRICK: It was never brought
24 to the Commission because the precondition, meaning the
25 first -- the authorized lease was never met.

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CHAIRMAN CORY: Any questions of Commissioners?

COMMISSIONER ORDWAY: No.

COMMISSIONER MCCARTHY: No.

CHAIRMAN CORY: I'm prepared to --

COMMISSIONER ORDWAY: I will move the staff recommendation.

CHAIRMAN CORY: Motion to move the staff recommendation.

COMMISSIONER MCCARTHY: Second.

CHAIRMAN CORY: Second.

All those in favor, signify by saying aye.

(Ayes.)

CHAIRMAN CORY: Opposed.

We have revoked the offer.

Item 22, approval of modification of regulations of our code on general leasing.

Staff?

EXECUTIVE OFFICER DEDRICK: Sir.

What's the name of that statute? The Governor's statute AB 1111 requires that when you change regulations or your statutes change, that you go through the process with the new regulations, with hearings and so forth and submit it to the office of Administrative Law. There were some changes in the authority of the Commission last year, notably giving you discretion to decide -- rather than

1 making penalties mandatory on late payments, you now have
2 the discretion to decide whether or not it was the guy's
3 fault he was late. You recall we had problems with that
4 last year.

5 CHAIRMAN CORY: Okay.

6 EXECUTIVE OFFICER DEDRICK: And there are a
7 few other items. These new regulations are up for your
8 approval so we can proceed with the Office of Administrative
9 Law process.

10 CHAIRMAN CORY: We have a request to speak from
11 a John Zaines.

12 MR. ZAINES: Yes, Mr. Chairman.

13 CHAIRMAN CORY: Would you come up and identify
14 yourself for the record and tell us what you want to tell
15 us.

16 EXECUTIVE OFFICER DEDRICK: I should say -- excuse
17 me for just a moment, Mr. Zaines.

18 Mr. Chairman, hearings have already been held,
19 and you will see in your notes what the substantive effect
20 of that was.

21 MR. ZAINES: Good morning, Mr. Chairman. My
22 name is John Zaines. I'm an attorney with the law firm of
23 McCutchen, Black, Verleger & Shea. I'm here today on
24 behalf of the Western Oil and Gas Association.

25 Western Oil and Gas Association, or WOGA, as it

1 is called, is a trade association whose members conduct
2 much of the producing, refining, transportation and
3 marketing of petroleum and petroleum products in the Western
4 United States. WOGA's statement today concerns the
5 proposed conditions of the State Lands Commission's
6 regulations which deal particularly with what has come to
7 be known as throughput, that is assessing a charge for the
8 use of State lands based on the amount of commodity that
9 passes over those lands.

10 CHAIRMAN CORY: What is it that you don't like
11 about the change?

12 MR. ZAINES: If I may, Mr. Chairman, I would
13 like to outline briefly my statement today, and then go
14 into a little bit more detail on it.

15 Basically, the problem is that there is a lawsuit
16 pending. The lawsuit was filed --

17 CHAIRMAN CORY: Does the lawsuit relate to the
18 changes in the code or the existing code?

19 MR. ZAINES: It does, in effect, Mr. Chairman.
20 What the changes propose to do are to modify the
21 regulations that have been declared to be invalid as
22 unconstitutional. It defies reason to have changes in a
23 set of regulations, which have been invalidated, come
24 before this Commission at all.

25 In addition --

1 EXECUTIVE OFFICER DEDRICK: Excuse me. Could you
2 be a little bit more clear. I don't know what has been
3 declared to be unconstitutional.

4 MR. ZAINES: Certainly, I will.

5 The Chairman has asked me a question. I'm just
6 responding.

7 CHAIRMAN CORY: Go ahead with your thing and
8 let's get it done.

9 MR. ZAINES: Fine.

10 As the Commission is aware, WOGA is and has been
11 deeply concerned about the Commission's attempts over the
12 past seven years to amend those provisions of the
13 Administrative Code that deal with what I refer to as
14 throughout.

15 Back in 1976, when these regulations were
16 proposed, WOGA and several other interested parties
17 actively participated in the Commission's hearings and
18 urged that changing the regulations at that time was not
19 only unreasonable, but unconstitutional. The Commission
20 went ahead and approved the regulations. WOGA filed suit
21 here in federal court here in Sacramento on both federal
22 constitutional grounds and on state law grounds as well.

23 The state was successful in having the trial
24 more or less split so the state law issues would be
25 decided first by a state court. We went through that

1 process for many years, and the result was that the
2 state courts determined that there was no violation of
3 state law.

4 The lawsuit then came back to federal court
5 in Sacramento, as has been provided when it was split, and
6 the federal constitutional issues were specifically
7 addressed.

8 Federal court in Sacramento, a year or two ago,
9 ruled that the regulations were violative of the Federal
10 Constitution commerce clause, the import/export clause
11 and the duty and tonnage clause, and it invalidated them
12 based on that violation of the Constitution.

13 The state appealed that decision in the Ninth
14 Circuit Court of Appeals. That decision is pending
15 before the Ninth Circuit. No decision whatsoever has
16 been rendered by the Court of Appeals.

17 So what you have is a situation where these
18 regulations and the amendments today are proposed to
19 amend these basic regulations that were enacted in 1976.
20 Those regulations have been declared unconstitutional.
21 So why the Commission is going through this exercise I
22 guess is the threshold question, when you have regulations
23 whose validity is in serious doubt based on the existence
24 of only one decision concerning their validity and that
25 decision -- their constitutional validity -- that decision

1 saying they are invalid.

2 Now, second, Mr. Chairman, the Executive Officer
3 referred to AB 1111, codified in the Government Code
4 in Section 11340, et seq. AB 1111, among the criteria
5 it sets forth for enacting regulations in the state, are
6 that there be a necessity for regulations and/or amendments
7 to regulations and that those regulations be consistent
8 with the laws of the state as embodied in statutes and
9 decisions of courts relevant to those statutes.

10 We have here absolutely no necessity for any
11 amendments to these regulations when their fate -- at the
12 very least, their fate hasn't been decided. They may be
13 wiped out completely tomorrow by a decision of the Ninth
14 Circuit Court of Appeals. And you've got a district court
15 in Sacramento saying that they are indeed constitutionally
16 invalid. Clearly, you have an inconsistency with a
17 decision of the United States Federal Court.

18 Mr. Chairman, I have a more substantial statement
19 that goes into these issues that I have raised briefly now,
20 and I would be happy to delve into them in a little more
21 detail if the Commission so desires, or I would be happy
22 to just submit that statement to the Commission.

23 COMMISSIONER MCCARTHY: May I ask -- has the
24 Commission staff seen the full analysis of counsel for WOGA?

25 MR. HIGHT: Dennis Eagan, Deputy Attorney General,

1 can answer that question.

2 COMMISSIONER McCARTHY: May we hear the response
3 from the Deputy Attorney General?

4 MR. EAGAN: From what I've heard of Mr. Zaines'
5 remarks this morning, they track substantially the oral
6 presentation made on behalf of WOGA by Betty Jane Kirwan,
7 also an attorney with McCutchen, at the July 7th hearing,
8 and they also track the written submission which was
9 made by WOGA at that time. I haven't personally seen
10 the written presentation that Mr. Zaines referred to
11 here this morning. It sounds like something later
12 prepared.

13 Mr. Zaines, is that substantially in line with
14 what the remarks and presentation were earlier?

15 MR. ZAINES: It is, Mr. Eagan, and I think
16 probably the only significant addition is the discussion
17 of the significance of AB 1111 to the proposed amendments
18 today.

19 COMMISSIONER McCARTHY: What is the status of the
20 case before the federal court? Mr. Zaines has indicated
21 that WOGA has prevailed and that the federal district
22 court here in Sacramento has declared these regulations
23 constitutionally flawed. Is that your perception of it?

24 MR. EAGAN: I would like to cover two points
25 by way of response. One, to give the Commission an overview

1 of the litigation and the status report, and, secondly,
2 to make the point that that is essentially irrelevant
3 to what is before the Commission today, which is my
4 primary point. But in response to your first question,
5 approximately a year and a half ago, Judge Wilkins, the
6 federal district court judge here in Sacramento, did rule
7 in accordance with the contentions of WOGA in a lawsuit,
8 finding that those portions of Article 2 that pertain to
9 the volumetric leasing alternative are invalid under
10 certain cited provisions of the Federal Constitution.
11 The Commission appealed and maintained a stay of the
12 injunction that Judge Wilkins issued. What that means is,
13 pending our result out of the Ninth Circuit Court of
14 Appeals, the Commission can continue to collect and
15 negotiate new volumetric rentals. So whatever the result
16 of that is, Judge Wilkins' decision has no immediate
17 effect, and we are hopeful that the Ninth Circuit will
18 overrule his determination.

19 The case was argued last January, and we don't
20 yet have a decision.

21 The second point -- and really the more important
22 one for purposes of what is before the Commission today
23 is this. Even Judge Wilkins made no blanket ruling that
24 quote the regulations of the State Lands Commission are
25 unconstitutional. The lawsuit filed by WOGA is a very

1 focused one. It focuses on certain aspects of the
2 regulations, that is the volumetric leasing alternative.
3 That is merely one aspect of Article 2 which covers many
4 other things, and those other things, some of them, are
5 really the only subject of what is before the Commission
6 today in the way of proposed changes. There is nothing
7 whatsoever being proposed or changed regarding the
8 volumetric rentals, which is the source of this litigation.

9 COMMISSIONER MCCARTHY: Mr. Chairman, if I
10 may -- Mr. Eagan, is it your statement that the proposed
11 amendments to this general area of regulations pending
12 now before this Commission do not touch on the focused
13 point -- the issues that were before the federal district
14 court?

15 MR. EAGAN: Yes.

16 COMMISSIONER MCCARTHY: Thank you.

17 MR. ZAINES: Mr. McCarthy, might I respond to
18 Mr. Eagan's remarks?

19 COMMISSIONER MCCARTHY: Yes.

20 MR. ZAINES: Just so the record is absolutely
21 clear on what Judge Wilkins did when he stayed his
22 injunction. All he did was -- and I have a copy of his
23 order appended to my written statement that I will submit
24 today. What he did was he set up an escrow account so
25 that while this matter was being appealed, monies could be

1 put into that escrow account, and if WOGA prevails on the
2 appeal, the monies will be refunded. If they don't, the
3 monies will then go to the state. There is a distinction
4 to be made between staying the injunctive effect, staying
5 the ability of the state to collect these, and staying the
6 precedential effect of what the judge has decided. I
7 don't know if Mr. Eagan has led you to believe anything
8 else, but I want to be sure that that is clear for the
9 record.

10 COMMISSIONER McCARTHY: Thank you.

11 Mr. Zaines, of course, any statute or any
12 set of regulations promulgated and based upon a statute
13 which are found constitutionally flawed may be amended to
14 remove those flaws. So even if that were the issue
15 before us, I'm sure you're not suggesting to this
16 Commission that we could not try to address the flaws
17 now in the regulations. Are you suggesting that, as
18 the regulations would be amended, if this Commission
19 adopted the proposed amendments before us today, that they
20 still do not meet the requirements of AB 1111?

21 MR. ZAINES: Yes, and I believe I can provide
22 you with an example, Mr. McCarthy. Looking at Section 2003,
23 sub (2), sub (B), which is on page 4 of the strike-out
24 underlying format of the regulations -- actually, I think
25 you need to look at sub (A) and sub (B).

1 EXECUTIVE OFFICER DEDRICK: Excuse me, is that
2 page --

3 CHAIRMAN CORY: 104?

4 MR. ZAINES: I'm sorry, I'm looking at the notice
5 that appended to it, the underlying format. It is
6 Exhibit A in the notice of today's meeting.

7 EXECUTIVE OFFICER DEDRICK: Found it. Page 104?

8 MR. ZAINES: Yes.

9 You see that the change, going from (A) to (B),
10 is to strike out the "two cents per diameter inch per
11 lineal foot" and change that to an open-ended, "a rate
12 for diameter inch per lineal foot."

13 I believe, as I understand Section 2005 --
14 proposed 2005 -- which is later on on page 8, it will give
15 then the Commission the discretion to propose variable
16 rates per diameter inch per lineal foot. So what this
17 does is it goes right to the section of the regulations that
18 was declared invalid and it attempts to change them.

19 All I'm saying, Mr. McCarthy, is this is at
20 best premature, and it may be a total wasted effort to
21 go through this exercise. It is premature because there
22 hasn't been a final resolution as to whether you can have
23 this basic concept of charging on the basis of diameter
24 inch per lineal foot, and, if indeed the Ninth Circuit
25 affirms the district court and if the Supreme Court takes

1 it up and affirms as well, then you will have no regulations.

2 MR. EAGAN: May I be heard, just on the response
3 to that one?

4 I think it underlines the point I was trying to
5 make. There are a number of types of leasing formats
6 that the Commission uses. One, which is probably the
7 most time honored, is merely appraising the fee value
8 of the property to be leased, and then applying against
9 that to get a yearly rent a rate of return. Let's say
10 it is determined it is one percent. So if you had a
11 hundred thousand dollar piece of property, your yearly
12 rental on that would be \$9,000, under that approach.
13 That has been around a long time. That form of leasing is
14 not the subject of the litigation. In fact, it is a form
15 that is hardly endorsed in its challenge to the volumetric
16 rental regulations.

17 Let's go down to the next one. The diameter
18 inch per lineal foot means charging rent for pipelines.
19 Again, that is something that is not being challenged in
20 the lawsuit and has been around in terms of the
21 Commission practice for many, many years, prior to the
22 onset in 1976 of the volumetric rental alternative. That
23 says that you can look at the size and length of the
24 pipeline and charge rental based on that, regardless of
25 any consideration of what volume goes through it.

1 CHAIRMAN CORY: That's the only change that is
2 made. The volume remains constant, if you look at the
3 strikeout. The language of the volumetric is not altered.

4 EXECUTIVE OFFICER DEDRICK: That is correct.

5 CHAIRMAN CORY: That's why I'm really at a loss,
6 Mr. Zaines, as to what it is you're speaking of.

7 MR. ZAINES: Maybe I'm misunderstanding the
8 change that is proposed here, Mr. Chairman. Looking at
9 subsection 2 and subsections (A) and (B), it looks like
10 there is -- that is, as I understand it, the basis of the
11 volume being charged.

12 CHAIRMAN CORY: Wrong. (C) is the volumetric
13 charge.

14 MR. ZAINES: You are correct. You are
15 correct, Mr. Chairman.

16 CHAIRMAN CORY: And since you made that error,
17 I presume you will refund the money that you charged
18 WOGA for all of this.

19 (Laughter.)

20 MR. ZAINES: Mr. Chairman, I think though,
21 trying to recall the litigation as it has been proposed
22 to the Ninth Circuit and to the district court, I don't
23 believe that Mr. Eagan is correct in limiting it to just
24 strictly that one issue. I think what we have said in our
25 papers and what is being appealed now is the question of

1 whether you can set up the sort of charge that is not
 2 reasonably related to the value of the services being
 3 provided by the state. That is the test that the three
 4 commerce clause sections that I referred to earlier
 5 proposed.

6 And we said, as Mr. Eagan notes, "Sure. If
 7 you want to assess the percentage basis based on the value
 8 of the land, that's fine, but to look at other things such
 9 as the volume going through the diameter inch of a
 10 particular pipeline going through, those are not related
 11 to the value of services directly provided by the state."
 12 That is what the Constitution says has to be provided,
 13 and that I think is still in controversy here.

14 MR. EAGAN: I can only say that I disagree with
 15 the characterization of the scope of the lawsuit. It has
 16 from the inception been focused on the volumetric
 17 rental alternative.

18 CHAIRMAN CORY: I have yet to have anybody
 19 from the industry talk to me about anything other than
 20 volumetric.

21 MR. ZAINES: I think, Mr. Chairman this comes
 22 back to the questions Mr. McCarthy posed to me a little
 23 while ago, and I apologize for not answering it directly.

24 You asked if what is being proposed today
 25 if I still believe it is in contravention of AB 1111.

1 AB 1111 says that there has to be a demonstration of
2 necessity and there has to be a demonstration that there
3 is no conflict, i.e., that there is a consistency with
4 pending law. I think we have got an issue as to whether
5 what is proposed is, and I'm saying that this is premature
6 and that it may be, if the Ninth Circuit affirms and if
7 the decision of the court stands all the way up the line,
8 it may be absolutely unnecessary.

9 CHAIRMAN CORY: The changes that are being made,
10 as I understand it, do not relate to volumetric, and the
11 issue before the court at the Ninth Circuit is volumetric?

12 MR. ZAINES: Mr. Chairman, as I understand it,
13 the changes that are being made are part of the challenge
14 in that what is being challenged is a levy on companies
15 crossing state lands based upon other than the reasonable
16 value of the services provided to the state.

17 CHAIRMAN CORY: I think you are misstating the
18 issue before the court, even from your viewpoint. I don't
19 think it is services provided to the state. I think it
20 is services provided by the state.

21 MR. ZAINES: Excuse me. I misspoke, Mr. Chairman.
22 It is services provided by the state to the lessee. That
23 is what --

24 CHAIRMAN CORY: To my knowledge -- and I have
25 had various people from WOGA, various members of WOGA come

1 into my office. I have yet to hear any of them, in my
2 recollection, argue that the diameter inch per lineal
3 foot was not appropriate.

4 MR. ZAINES: Well, it may be, Mr. Chairman, that
5 in these discussions that you have had, it is just an
6 economical way of referring to really what the court issue
7 is, but I can tell you what the basis of the challenge is,
8 that the commerce clause cases say there must be a
9 reasonable relation between the value of the services
10 provided by the state and the --

11 CHAIRMAN CORY: Question, the bigger diameter the
12 pipe and the longer it is, the greater amount of land
13 is consumed by it? Would you question that just in terms
14 of basic logic?

15 MR. ZAINES: I wouldn't question that, no,
16 Mr. Chairman.

17 CHAIRMAN CORY: Isn't that in conformity with
18 your standards?

19 MR. ZAINES: No, not necessarily, Mr. Chairman.

20 CHAIRMAN CORY: How is it not? We are providing
21 land.

22 MR. ZAINES: Right. If there is an empty piece
23 of land that just happens to be lying there and it has
24 a certain value --

25 CHAIRMAN CORY: All land has to be someplace,