

NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

PACIFIC GAS & ELECTRIC COMPANY

(Stanislaus Nuclear Project,

Unit No. 1)

Place - Bethesda, Maryland

Date - Tuesday, 15 May 1979

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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 In the matter of: :  
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 PACIFIC GAS & ELECTRIC COMPANY : Docket No. P-564A  
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 ( Stanislaus Nuclear Project, :  
 Unit No. 1) :  
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PACIFIC GAS & ELECTRIC COMPANY : Docket No. P-564A  
 ( Stanislaus Nuclear Project,  
 Unit No. 1)

Commission Hearing Room,  
 Fifth Floor, East-West Towers,  
 4350 East-West Highway,  
 Bethesda, Maryland.

Tuesday, 15, May 1979

Conference of Counsel in the above-entitled matter  
 was convened, pursuant to notice, at 9:00 a.m.

BEFORE:

MARSHALL E. MILLER, Esq., Chairman,  
 Atomic Safety and Licensing Board.

EDWARD LUTON, Esq., Member.

SEYMOUR WENNER, Esq., Member.

APPEARANCES:

On behalf of the Applicant:

WILLIAM H. ARMSTRONG, Esq., McCutchen, Doyle, Brown  
 and Enersen, Three Embarcadero Center, 28th Floor,  
 San Francisco, California

JACK FALLIN, Esq. and RICHARD MEISS, Esq., Legal  
 Staff, Pacific Gas & Electric Company, 31st Floor,  
 77 Beale Street, San Francisco, California.

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1 On behalf of the Department of Water Resources:

2 MICHAEL J. STRUMWASSER, Esq., Deputy Attorney  
3 General of California, 555 Capitol Mall,  
Suite 550, Sacramento, California

4 On behalf of the Cities of Anaheim and Riverside:

5 PETER MATT, Esq., Spiegel and McDiarmid,  
6 2600 Virginia Avenue, N.W., Washington, D.C.

7 On behalf of Northern California Power Agency:

8 ROBERT McDIARMID, Esq., and DANIEL I. DAVIDSON, Esq.,  
9 Spiegel and McDiarmid, 2600 Virginia Avenue, N.W.,  
Washington, D.C.

10 On behalf of the Regulatory Staff:

11 JACK R. GOLDBERG, Esq. and DAVID J. EVANS, Esq.,  
12 Office of Executive Legal Director,  
United States Nuclear Regulatory Commission,  
13 Washington, D.C.

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P R O C E E D I N G S

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2 CHAIRMAN MILLER: Ladies and gentlemen, we'll come  
3 to order.

4 Is this a prehearing conference or a conference  
5 with Counsel? Conference with Counsel, I think.

6 MR. DAVIDSON: Conference with Counsel.

7 CHAIRMAN MILLER: Thank you. That means we don't  
8 have to have a prehearing conference order, doesn't it? We  
9 will just enter the order as we go along.

10 Welcome to Washington, all of you Californians  
11 whom I usually see when I'm frantically running for the  
12 Courthouse out there. We have some spring weather for you  
13 today.

14 We have a number of motions or suggestions of one  
15 type or another, as well as the report we had asked Counsel  
16 to make concerning the progress, status, and productivity of  
17 discovery, and also the comment that you were all good enough  
18 to send us as to the adequacy or inadequacy of the proposed  
19 conditions negotiated between PG&E and the Department of  
20 Justice at some earlier period.

21 Does anyone have any particular desires as to the  
22 order in which the motions and matters of that type are taken  
23 up?

24 (No response.)

25 You are all very happy and non-committal this

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1 morning.

2 All right. What about the Staff's motion to compel  
3 discovery dated May 3rd, 1979? Would that be a good place  
4 to start?

5 MR. EVANS: That would be fine with us.

6 CHAIRMAN MILLER: Pardon me. Is there any response  
7 to that? I just seem to have a bare-- It isn't bare, but  
8 it's the Staff's motion to compel discovery. I don't seem to  
9 have any responses. Perhaps it was all done initially.

10 MR. ARMSTRONG: We did not have time to prepare a  
11 written response. Mr. Meiss is prepared to comment orally  
12 today.

13 CHAIRMAN MILLER: All right. Then we'll start off  
14 with the Staff.

15 MR. ARMSTRONG: I stand corrected, Mr. Chairman,  
16 in my earlier statement. Apparently Mr. Meiss had a written  
17 response prepared which was mailed yesterday. He has copies  
18 with him.

19 CHAIRMAN MILLER: It was mailed yesterday?

20 MR. ARMSTRONG: Yes. I suspect it might be more  
21 productive to have him summarize the observations here.

22 CHAIRMAN MILLER: Where did you mail it yesterday?  
23 California?

24 MR. MEISS: Yes. They were mailed in San Francisco,  
25 Mr. Chairman.

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1 CHAIRMAN MILLER: And you beat them out here.

2 MR. EVANS: Mr. Chairman, in light of the fact that  
3 we haven't had a chance to review PG&E's response to our  
4 motion to compel, we would request this be deferred until  
5 Thursday or later in the prehearing conference so that we will  
6 have a chance to read it over, and I think it will be more  
7 productive that way.

8 CHAIRMAN MILLER: It shouldn't take you that long  
9 to read this, would it?

10 MR. EVANS: We can be prepared this afternoon if  
11 that's....

12 MR. ARMSTRONG: Perhaps preliminarily Mr. Meiss  
13 could pass out the copies of what he has here.

14 CHAIRMAN MILLER: Yes, I think that would be very  
15 useful.

16 (Documents distributed.)

17 PG&E is disappointed that the Staff has spent so  
18 much effort in what seems to be an unnecessary exercise. Does  
19 this mean that you've come up with suggestions that will cut  
20 down the time of both the Staff and of the Board in consider-  
21 ing this matter?

22 MR. ARMSTRONG: That was my understanding,  
23 Mr. Chairman. Perhaps Mr. Meiss can comment at this time. It  
24 might shorten things up.

25 MR. MEISS: Mr. Chairman, in short, this response

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1 is in three parts. One is that we are willing to provide the  
2 requested information that the Staff has asked for. Ini-  
3 tially there appears to have been a misapprehension as to  
4 exactly what they wanted, and we thought we had answered  
5 precisely the question as it was asked.

6 The second one is that despite the Staff's attempts  
7 in constructing interrogatories, we are unable to provide the  
8 answer even in response to their motion to compel discovery.

9 The third type of response we have is in essence  
10 that we have given our answer, and that's all there is, and  
11 there is not much we can do about that.

12 CHAIRMAN MILLER: If I understand you correctly  
13 you say that complaint of the Staff boils down to three types:  
14 they don't believe the answer; they want different or addi-  
15 tional data; or that you misunderstood it but you're willing  
16 to provide the data that the Staff wants in two and three.  
17 And so therefore, all we have to consider I guess is -- what?  
18 The implications of number one?

19 MR. MEISS: I believe that's correct, Mr. Chairman.

20 CHAIRMAN MILLER: Well, this doesn't look like  
21 something that has to run over until Thursday. You're getting  
22 at least two-thirds numerically of what you asked for.

23 MR. EVANS: Recognizing that I haven't completely  
24 read it, if PG&E is willing to respond fully to our interro-  
25 gatories, then of course the Staff is satisfied.

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1 As I stated in our motion to compel, we are willing  
2 to work with PG&E to get the complete answers. We have filed  
3 the motion to compel because it is required under our rules  
4 of practice. If we have cleared up the misunderstanding  
5 between ourselves and PG&E through that motion to compel, then  
6 we're ready to work and get the complete answers.

7 CHAIRMAN MILLER: Let me make a suggestion. You  
8 are going to get a two hour and 15 minute recess for lunch  
9 today, from 12:00 to 2:15, or 12:15 to 2:30. We suggest at  
10 that time that you satisfy your gastronomic desires, you can  
11 read what you want to read, and you can digest both, and  
12 then we'll take it up this afternoon and I suspect at least  
13 much of the time we would consume this morning won't be  
14 necessary.

15 MR. EVANS: Fine.

16 CHAIRMAN MILLER: Now let us proceed. Do you have  
17 any desires as to the next order of business? Is there any-  
18 thing else you have been mailing lately that we haven't re-  
19 ceived? Messages in hollow oak trees or anything like that?

20 (No response.)

21 I guess not. All right. Then let's take up the  
22 letter of April 19th, 1979, to the Board from PG&E Counsel.  
23 It relates to the deposition of Mr. Robert H. Gerdes, a pre-  
24 vious motion, a motion for a protective order.

25 MR. DAVIDSON: Mr. Matt is unavoidably detained,

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1 your Honor. He will be here in a few minutes, and I believe  
2 he is the person most knowledgeable about Intervenors' side  
3 to this question.

4 CHAIRMAN MILLER: Of Mr. Gerdes? All right.

5 Let me inquire preliminarily, has anything happened  
6 that enters this move or cuts it down, or is it as it has been  
7 pending since the original motions and countermotions were  
8 filed? Nothing has happened? Well,--

9 MR. MC DIARMID: Yes, your Honor. One thing has  
10 happened. The deposition was originally scheduled for a  
11 period which provided a window during which Counsel were  
12 available, as a result of the scheduling in the FERC pro-  
13 ceeding. That proceeding is now scheduled to go to hearing  
14 on June 4th and, as a practical matter, Intervenors' Counsel  
15 will probably be tied up in that until it breaks, and it is  
16 not anticipated to break for quite a while.

17 CHAIRMAN MILLER: What does that mean? What are  
18 the implications of your announcement?

19 MR. MC DIARMID: It would be very difficult for  
20 me to schedule Mr. Gerdes' deposition.

21 CHAIRMAN MILLER: It will be difficult?

22 MR. MC DIARMID: Yes.

23 CHAIRMAN MILLER: Are you suggesting it has become  
24 moot then?

25 MR. MC DIARMID: No, your Honor.

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1 CHAIRMAN MILLER: When do you wish to take it?

2 MR. MC DIARMID: That will have to be worked out  
3 again with Counsel for PG&E, your Honor.

4 CHAIRMAN MILLER: Well, since there have been  
5 objections, I think you have chosen to have it determined by  
6 the Board. We are going to enter an order somehow or other.  
7 If you want to take it again you had better start letting us  
8 know before we get through here, when and where you want to  
9 take it, and we'll get the position of all parties and get  
10 the thing ruled on, once and for all.

11 MR. MC DIARMID: The objections were to a deposi-  
12 tion at a particular time in May which we thought had been  
13 agreed to.

14 CHAIRMAN MILLER: And a place, also, and as to  
15 who was going to pay what, and various other things, and what  
16 subjects were and were not to be gone into, and the documents  
17 involved. You had all sorts of problems. Maybe you weren't  
18 serious about them but--

19 MR. ARMSTRONG: If I might interject, Mr. Chairman  
20 I think some of the difficulties have been resolved. I  
21 think we retained, if you will, a philosophical difference  
22 as to how the discovery in the case might proceed. I think  
23 we can work out scheduling problems once we get these  
24 philosophical questions addressed and resolved by the Board.

25 CHAIRMAN MILLER: All right, fair enough.

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1 MR. ARMSTRONG: I might also add at this point,  
2 having heard Counsel for Intervenors' problems with respect  
3 to FERC, Mr. Gerdes' vacation plans and Mr. Doyle's pre-  
4 viously scheduled vacation plans would rule out the months of  
5 July and August for this period. But I think your FERC prob-  
6 lems may also block out that period, or much of it.

7 So before or after--

8 CHAIRMAN MILLER: We might be set for an evi-  
9 dentiary hearing before they finish the FERC thing, in which  
10 event we wouldn't have to worry about the deposition, just  
11 bring him in.

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1 MR. ARMSTRONG: That might be a simple resolution  
2 of the problem. Whether it's agreeable to our friends on  
3 the other side, I don't know.

4 MR. STRUMWASSER: I hope the Chairman is being  
5 facetious. That would only heighten our worry.

6 CHAIRMAN MILLER: All right. We'll take it up.  
7 So we have a second hold, in order to have your  
8 expert here and to resolve the philosophical questions; and  
9 then we'll see how it interrelates with what is or is not moot.

10 Okay, hold number two.

11 MR. ARMSTRONG: Your Honor, our -- quote --  
12 "expert" has arrived.

13 CHAIRMAN MILLER: As soon as he has caught his  
14 breath, we will proceed with hold number two.

15 MR. STRUMWASSER: Mr. Chairman, might I inquire  
16 whether the discussion of the Gerdes deposition is going to  
17 subsume the question of the use of depositions in general or  
18 the taking of depositions in general, because if so I think  
19 perhaps the material that Mr. Matt is preparing to present  
20 may emphasize issues that we would only get to later on, with  
21 respect to Mr. Gerdes in particular.

22 CHAIRMAN MILLER: They may encompass, as I under-  
23 stand it, what they call the philosophical differences, and I  
24 suppose this being the first depositional question or issue  
25 that we've had, it may well go beyond Mr. Gerdes himself. I

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would assume that, although I have no way of knowing.

2 MR. STRUMWASSER: I wonder if it would be possible  
3 for someone to outline the philosophical questions. I am  
4 prepared to take the first crack at it, or defer to Mr.  
5 Armstrong, at his pleasure.

6 CHAIRMAN MILLER: Let me take it in order.

7 First of all, we had a notice to take the  
8 deposition of Mr. Robert H. Gerdes. This notice was served --  
9 received by the Board, at any rate, March 28th, signed  
10 March 26th, 1979, by Mr. Matt. And it set forth the taking  
11 of the deposition of Mr. Gerdes, retired president and  
12 chairman of the Executive Committee of PG&E, et cetera, set  
13 up at the offices of Spiegel and McDiarmid, Washington, D.C.  
14 for all examination.

15 It set forth a number of areas upon which examina-  
16 tion was to be made, but not limited thereto, including the  
17 Pacific intertie, California Power Pool, and the like, six in  
18 number. The Deponent was requested to bring with him all  
19 documents in his custody or control which related in any manner  
20 to the subject areas, and to bring with him all documents  
21 shown to him since his retirement by PG&E, their consultants,  
22 and the like.

23 The next thing we knew, there was a motion for a  
24 protective order which was filed by PG&E counsel, going into  
25 a number of matters. We then had some responses and some

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1 letters. I think we did enter an order denying the motion to  
2 reschedule and suggested that we would pick up the matter of  
3 this and other depositions at this particular conference with  
4 counsel.

5 I think therefore that the first person we want  
6 to hear from would be the proponent of the motion for a  
7 protective order following the issuance of the notice of taking  
8 deposition and effectively a subpoena duces tecum for what  
9 appear to be a fairly large number and variety of documents.

10 MR. ARMSTRONG: Thank you, Mr. Chairman.

11 I believe that at least many of the specific  
12 requests in the motion for a protective order have been mooted  
13 or resolved one way or another, and so I will confine my  
14 remarks to what I believe are the remaining issues for deter-  
15 mination by the Board.

16 CHAIRMAN MILLER: Very well.

17 MR. ARMSTRONG: First I think a bit of background  
18 might be helpful in refreshing all of our recollections.

19 I think the Board will recall that at the last  
20 prehearing conference in January in San Francisco the Chairman  
21 made a suggestion that the parties should identify some  
22 particular issue in an attempt to depose witnesses knowledgeable  
23 about that issue for the purpose of focusing all our attention  
24 on what the disputed facts or issues with respect to that  
25 subject matter might be.

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1 After that, some efforts were made, conference  
2 telephone calls were held, and at that time the nexus, if you  
3 will, of those phone calls was the possibility of meshing  
4 the desire of at least some of the Intervenors to depose Mr.  
5 Gerdes with the Chairman's suggestion about a focused deposi-  
6 tion.

7 At that time we pointed out that we felt that the  
8 deposition of Mr. Gerdes would be at the other end of the  
9 spectrum from the suggestion made by the Board at the last  
10 prehearing conference, for the reason that Mr. Gerdes'  
11 knowledge transcended a great number of issues. And beyond  
12 that, his specific knowledge about particular topics was very  
13 limited, both because of his position in the company in the  
14 first instance, and because of the fact that he had been  
15 retired for several years in the second place.

16 So we didn't feel that that particular proposal  
17 met the criteria set forth by the Board, and we negotiated  
18 about that for some time without reaching any agreement.

19 I might add that I'm not entirely sure, indeed it  
20 is my belief and understanding that there was not significant  
21 amount of detailed agreement between the Staff and the  
22 Intervenors on various aspects of this either. So we  
23 eventually I think agreed to disagree as to the Chairman's  
24 suggestion regarding the deposition process.

25 The next thing we heard was Mr. Matt's suggestion

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1 on behalf of the Southern Cities that they wished to proceed  
2 with Mr. Gerdes' deposition independent of the Chairman's  
3 particular suggestion, just proceed as if it were an ordinary  
4 deposition under the rules.

5 At that point Mr. Matt and I had some telephone  
6 calls relating to timing of this deposition, and we ultimately  
7 concluded that the time which was selected was available, but  
8 we retained our differences of view as to the remaining  
9 procedures.

10 And that is what led to the motion for a protective  
11 order and the notice of deposition -- or the reverse order  
12 there.

13 In any event, I think the remaining issues, with  
14 that background, are these -- and I identified them in my  
15 letter to the Board of April 19.

16 I think the first question is particular to Mr.  
17 Gerdes, and that is whether his deposition should be commenced  
18 at a time in this litigation when the parties who propose to  
19 take the deposition are not prepared to complete it, and they  
20 know that. They know they have not completed the document  
21 discovery. We have all been advised that they're not even in  
22 a position -- or at least the last time we discussed the  
23 matter they were not in a position to respond to the conten-  
24 tion interrogatories served at the last prehearing conference.

25 So it is an agreed fact, if you will, that they

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1 have not concluded what I would describe as their basic  
2 discovery. And as I understand it, they want to begin Mr.  
3 Gerdes' deposition at this time and get as far as they can,  
4 and then retain the right to resume that deposition at a later  
5 time or times when they have reviewed more documents and found  
6 more things to ask questions about. And we feel, at least as  
7 to this witness, with the fact that he has been retired, he is  
8 not an active employee of the company in the same sense that  
9 others are, we're reluctant to ask Mr. Gerdes to come in for  
10 seriatim depositions over time.

11 We would like to take a point in time when they  
12 feel they are ready to begin and end the deposition in some  
13 sort of time frame, and go do it.

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1           The gentleman is almost 75 years old, and we feel  
2 that that is an additional factor to be taken into consideration  
3 in asking this particular witness to come in for several  
4 sessions of a deposition.

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5           We realize his deposition may be lengthy, but we  
6 would like it to be one which would be coherent as to time  
7 and get it over with, and that's the witness' desire too.

8           So that's the first issue, is whether we should have  
9 this deposition at this time with the procedure suggested by  
10 Intervenors.

11           The second question relates to the degree of notice  
12 which ought to be required. And I think on this issue this  
13 ought to apply to old depositions taken in this case.

14           At an early stage of this proceeding, there was an  
15 indication by the Board that there ought to be some definition  
16 of the area of questioning and the documents which would be  
17 the subject of questioning at a deposition.

18           The notice in this instance was very vague and  
19 broad as to the area of questioning and as to the documents  
20 which would be required or about which questions might be  
21 asked.

22           Again, we have a practical problem especially with  
23 Mr. Gerdes, and I think it would apply to anyone in his kind  
24 of situation. Preparing a witness with his breadth of involve-  
25 ment in the company's affairs both in time and in scope becomes

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1 a virtual impossibility. And I think whatever difficulties one  
2 has in coping with a witness who has been away from the active  
3 affairs of the company for as long as Mr. Gerdes has, that that's  
4 enhanced when the man has been involved in such a broad range  
5 of topics over his career, so we feel that there ought to be  
6 a greater specification of documents.

7 We all know that if you're going into a deposition,  
8 you're going to ask the witness some questions about documents,  
9 you've got to know in advance what documents you're going to use.  
10 And unless there is a theory of gamesmanship involved, it's  
11 only fair that the witness have an opportunity in advance to  
12 review the document, refresh his own recollection about what  
13 the context of the situation was.

14 I know, for example, that one of the areas that at  
15 least some of the Intervenors are most interested in relates to  
16 the history of the negotiations relating to the Pacific Northwest-  
17 Southwest intertie, all of which occurred in the early 1960's.  
18 And before, if you want to go back even further.

19 So we're asking a gentleman who's 75 years old to  
20 think now about events which transpired 15 to 20 years ago.  
21 We feel that some specificity would expedite the process.

22 The third issue is whether the Board should attend.  
23 The Board suggested at the last prehearing conference, in  
24 connection with the suggestion I adverted to earlier, that it  
25 would be inclined to want to attend some of these focused

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1 depositions.

2 We feel that the Board ought to attend this deposition  
3 of Mr. Gerdes. And in this instance, I'm now speaking to  
4 this particular deposition rather than, necessarily, to all of  
5 them that might be conducted because, again, of the special  
6 circumstances of this situation. I think also because, at  
7 least on the current schedule that is proposed, that this is  
8 the first one.

9 Again we would like to request that, in order to  
10 protect the witness from the problem that would be posed  
11 if the Board were not in attendance and able to resolve on the  
12 spot any quarrels over procedure or form of questions or whatnot,  
13 the Board's attendance would expedite the matter in that  
14 particular.

15 I think the other items as to which we had some  
16 problem at the time we filed the motion have been resolved.

17 I would say those are the particular items that relate  
18 to the deposition process. There's a fourth question which I

19 There's a fourth question which I did not mention  
20 in my letter but which I think we're going to have to get into  
21 at some point this week and it might as well be put on the  
22 table now and it's this: what should be the sequence of  
23 discovery?

24 Now PG&E has been producing documents, as you know,  
25 and tying up a tremendous volume of resources. Indeed, virtually

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1 all of the resources available to the company for this litigation  
2 are committed to that effort.

3 We, of course, have some discovery efforts that we  
4 would like to conduct. And at this point, one of the matters  
5 on our agenda is the question of when in the process should  
6 the member cities of NCPA be able to produce documents which  
7 we have sought for some time. And the way we're going to work  
8 that out is to have my law firm commit some resources to that  
9 effort so that PG&E's internal resources can remain committed  
10 to the task of producing its documents.

11 But we are somewhat annoyed, quite frankly, that we  
12 seem to be getting all of the requests with a normal amount of  
13 emphasis for timely response, and when we ask for some discovery  
14 on our part, the contention interrogatories or the discovery  
15 against the member cities of NCPA, we're put off. We would  
16 like to introduce some level of scheduling in this, so that  
17 there's an equitable and sensible procedure which we could  
18 follow.

19 We think that, particularly, if we focus on the  
20 question of the Gerdes deposition -- this relates back to my  
21 first question -- we're told on the one hand that the Inter-  
22 venors are not ready to answer contention interrogatories,  
23 and, on the other hand, that they are ready to proceed with  
24 what I should think would be a fairly complicated deposition.

25 CHAIRMAN MILLER: I believe the matter you're raising,

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1 namely the sequence of discovery and interrelationship, I  
2 think we had considered that to be under a separate category  
3 because we had motions both ways and we did want to get into --  
4 it will be gotten into, but I suggest you might hold your  
5 further discussion until we open up that subject generally,  
6 which we will place on the agenda and probably the next order  
7 of business after we take care of the deposition matter.

8 MR. ARMSTRONG: Let me just tie, then -- that whole  
9 subject, I think, does relate to my first issue or question,  
10 if you will, regarding the timing of Mr. Gerdes' deposition.

11 I say if the Intervenors feel that they can't answer  
12 the contention interrogatories, how on earth can they proceed  
13 with a deposition which ought to be one of the more difficult  
14 complicated depositions in the case?

15 CHAIRMAN MILLER: I see that I neglected to have  
16 the identification of counsel and parties, so Mr. Reporter,  
17 if I could proceed nunc pro tunc and ask for identification  
18 of counsel, parties and associates present here, starting  
19 with the Staff to my left, please.

20 MR. GOLDBERG: Jack R. Goldberg for the Staff. With  
21 me is my co-counsel David J. Evans. Mr. Benjamin H. Vogler  
22 is sorry he can't be here at this time, he's involved with  
23 other matters and hopes to make an appearance at this conference  
24 of counsel sometime later during the conference.

25 CHAIRMAN MILLER: Thank you.

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1 MR. MC DIARMID: Your Honor, Dan Davidson and myself,  
2 for NCPA, Robert McDiarmid of Spiegel and McDiarmid.

3 MR. MATT: On behalf of the Cities of Anaheim and  
4 Riverside, Peter Matt, Spiegel and McDiarmid.

5 MR. STRUMWASSER: Michael J. Strumwasser for Inter-  
6 venor, Department of Water Resources. With me is Brian Gross  
7 of the Department's Technical Staff.

8 MR. ARMSTRONG: William Armstrong from McCutchen,  
9 Doyle, Brown and Enersen for PG&E. With me from PG&E's legal  
10 staff Jack Fallin, Richard Meiss and also Sandra Schiazzo,  
11 one of our legal assistants.

12 CHAIRMAN MILLER: Thank you.

13 I think we'll take up now the matters raised by  
14 Mr. Armstrong regarding whether it's Mr. Gerdes' deposition and th  
15 questions that may be involved in, not only his deposition as a  
16 witness covering multiple areas and points, but also other  
17 and future depositions.

18 Let me say briefly that the suggestion that the Board  
19 made for the taking of certain discreet depositions was to seek  
20 to advance the progress of discovery and to learn on an  
21 experimental basis what role interrogatories with a handleable  
22 number of documents might take, but we're not suggesting this  
23 should be the procedure counsel should follow, they are  
24 expected to develop their own schedules, depositions and  
25 otherwise, nor in the consideration of the Gerdes deposition

agb7

1 or other depositions in the future does that enter in because  
2 you're not required to comply in any way with the Board's  
3 suggestions.

4 The development, or at least the evolution of the  
5 Gerdes deposition, of course, is significantly different from  
6 what the Board had in mind in view of the scope of the documents  
7 involved, the experience and the background of the witness and  
8 various other matters.

9 So we might as well separate it out because the  
10 Board doesn't really care whether you follow its suggestion or  
11 not, it was merely a suggestion and the same is true as to the  
12 Board's attendance. The Board and the individual members have  
13 plenty of business and we don't need to take the time to sit  
14 in on your depositions nor do we wish to intrude, we simply  
15 made a suggestion that, if it would be helpful, we'd try to  
16 arrange it.

17 We are neither insistent upon it nor even particularly  
18 desirous of participating in the deposition practice which,  
19 by analogy to the federal rules and under our own rules of  
20 procedure, is largely controlled and handled by counsel outside  
21 the presence of the Board and in your own power, so to speak.

22 Did you have something further?

23 MR. ARMSTRONG: Yes, I wanted to mention one other  
24 thing, Mr. Chairman, and I forgot it.

25 I know when anyone moves for a protective order in

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1 connection with a deposition, it is also viewed as a totally  
2 negative kind of an effort. We have a positive suggestion which  
3 I think might have some merit.

4 Mr. McDiarmid mentioned the FERC proceedings, and  
5 in those proceedings which address at least four specific  
6 contracts and areas, testimony has now been filed by the NCPA  
7 and by PG&E.

8 I think there might be some merit to the submission  
9 of that body of factual material to this Board because I would  
10 suspect that the parties -- I can say for PG&E, their position  
11 is not going to be different here and in FERC, and I would  
12 suspect the same is true of NCPA. As I say, I think there  
13 might be some merit to that, it would focus attention on those  
14 matters which have already been discovered to the point of  
15 hearing in that case.

16 And I'm well aware that DWR and NRC Staff are not  
17 parties over there, but they might find there would be some  
18 constructive use to that material and maybe could use that as  
19 a stepping off point to the focused issue approach which was  
20 suggested to the Board last time. If the parties and the  
21 Board find that a meritorious avenue to pursue, we'd be more  
22 than happy to work toward that end.

23 CHAIRMAN MILLER: All right. We'll ask the parties  
24 and counsel to address themselves to that point also in  
25 responding.

agb9

1 Who's next? I guess Mr. Strumwasser.

2 MR. STRUMWASSER: Thank you, Mr. Chairman.

3 At the outset, let me mention what DWR views as a key  
4 problem in our efforts to avail ourselves of the suggestion made  
5 by the Board at the last prehearing conference.

6 We see the inherent tension in two of the instructions  
7 that the Board gave. One was the suggestion that we depose  
8 a high-level official and, of course, this makes eminently  
9 good sense if we're trying to pin down what the contentions of  
10 the corporation are. The other that we select a single issue  
11 for, or a few discreet issues for the first deposition.

12 The tension is, if you pick a high-level official,  
13 you're going to get somebody who has his fingerprints all  
14 over all the issues. And if we limit each deposition to one  
15 or two issues, the poor fellow is going to be deposed more  
16 times than, you know, it's going to look like the World Series,  
17 we're going to be out to the seventh deposition before we know  
18 who has won the deposition.

19 It seems to us that, in general, that it's an  
20 irreconcilable dilemma. We think it is intolerable to ask  
21 anybody to subject themselves to multiple depositions, and we  
22 think that separating the issues out -- let me clarify that.  
23 Multiple depositions by which I mean one deposition on each  
24 issue for a man or woman who has been involved in virtually  
25 all the corporation's affairs.

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1                   And for that reason, we think that the limitation  
2 to a single issue is inherently unprofitable. But we do think  
3 that there is much to be gained from the proposal of the Board  
4 that we take some preliminary depositions in order to explore  
5 the possibility of shortening discovery. We still think that's  
6 a profitable way to proceed.

7                   We still think there is promise that we could  
8 shorten discovery, for example, just to give one facile example  
9 of how it might help us, we are prepared for all the defenses  
10 we can imagine PG&E propounding on each of the issues.

11                   We may learn from one or two of the depositions on  
12 a given issue that PG&E does not, in fact, contest some issue  
13 that we were prepared to have to prove, what its intentions  
14 were with respect to the transaction, what a contract does  
15 or does not provide for, learning that kind of information  
16 could very easily make it possible for us to prepare more quickly.

17                   However, we think that the selection of a high level  
18 official in general is probably not the most profitable way  
19 to proceed. For our purposes, DWR generally prefers the  
20 selection of someone at least one notch or two lower than  
21 Mr. Gerdes.

22                   It's a little difficult to be precise, but we would  
23 generally favor somebody in the nature of a department head  
24 who would probably be associated with a smaller number of issues  
25 and who would be more currently familiar with them. And I think

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1 that would permit a limitation of subject matter naturally  
2 that would satisfy PG&E.

3           However, I think that Mr. Gerdes is a good example  
4 of an exception to the rule that I just proposed, and Mr.  
5 Armstrong has stated quite eloquently what the reason for that  
6 is. He tells us that Mr. Gerdes is old, he has suggested the  
7 man is frail, those are reasons for taking the deposition early,  
8 not for skipping it.

9           He also suggested the man's memory may be flawed,  
10 and one can only extrapolate from that suggestion that each  
11 passing day more and more information oozes out. I don't know  
12 the extent to which Mr. Armstrong is underestimating Mr. Gerdes,  
13 but we think that all those things make is very sensible that  
14 we proceed with that deposition fairly quickly.

15           As to the question whether he is the proper man because  
16 his memory is flawed, the parties taking the deposition bear  
17 that risk. We knew that Mr. Gerdes was in his 70's, frankly,  
18 our reports were that the man is substantially more alert than  
19 Mr. Armstrong has intimated. But that's not really important,  
20 what is important is whatever information he has, we're out to  
21 get. And whatever information is no longer available in his  
22 head, we bear the risk that we're just not going to get questions  
23 answered, he knows how to tell us he doesn't remember something.

end1B

LC WRB/wbl 1 Let me hit a couple of the other issues that  
2 Mr. Armstrong addressed. One of them is the question of  
3 Board attendance.

4 We were perfectly amenable early on in these  
5 discussions that Mr. Armstrong alluded to, to having the  
6 Board attend. We thought it might be interesting and useful.

7 As our discussions proceeded we became very con-  
8 cerned about what the effect of the Board's attendance was  
9 going to be on the deposition. The phrase "mini-trial"  
10 began to be used. Mr. Gerdes was going to be the mini-trial  
11 for all of us to prove to the Board our case.

12 People were starting to talk about using documents  
13 and exhibits, and I don't think it's necessary for us to  
14 be explicit to the skilled attorneys sitting on this Board  
15 about what people had in mind in the way of preconditioning  
16 the Board about the trial of this case.

17 We think in light of perhaps the inevitable  
18 purposes to which people are going to put these depositions  
19 that the Board attendance has a very substantial risk of  
20 depriving the parties of an opportunity to fully prepare and  
21 use the pretrial discovery procedures prior to the presenta-  
22 tion of the case before the trier of fact. And, as a result,  
23 we would ask that the Board not attend any deposition unless  
24 there be some other arrangement that is made. In particular  
25 we would ask that the Board not attend the Gerdes deposition.

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fls wbl

1 Mr. Armstrong spoke of other problems -- the docu-  
2 ments, I'm sorry. I don't think that's a problem. As I  
3 understand it, there was and remains a stipulation among  
4 parties to the effect that we would exchange documents ahead  
5 of time that would be used at the deposition. I no longer  
6 recall the exact terms of the stipulation, how many days and  
7 so forth. But that provision remains fully satisfactory to  
8 us. We're happy to exchange documents ahead of the deposi-  
9 tion, and we expect PG&E would be willing to do the same.

10 There was the question of expenses. We would  
11 propose, at least with respect to deponents who are currently  
12 in the employ of a party or who are currently under contract  
13 with a party, that the expenses be borne by the party who  
14 is employing or contracting with that person. We will make  
15 our people available to PG&E or anybody else who wants to  
16 take a deposition at our expense. We expect that PG&E would  
17 do the same.

18 The only question remains one of whether there  
19 are special arrangements that need to be made where travel  
20 is encountered at the convenience of another party, and I  
21 think that can be handled on an ad hoc basis.

22 We think, by the way, this whole question of ex-  
23 penses is especially appropriate in the case of the Applicant's  
24 witnesses. The Applicant is required to undergo antitrust  
25 review by statute. The parties here, while they are helping

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1 themselves, are also in the business of helping the Commission  
2 discharge its duty. The Commission does not have the authority  
3 to award costs to a prevailing Intervenor so, unlike in a  
4 federal court, if we were able to establish our case as we  
5 expect we can, none of these costs of deposition would be  
6 awarded. So we think there is special inequity in asking  
7 Interveners to pay for the depositions of a PG&E employee or  
8 contractor.

9 In summary, we would propose that the deposition  
10 of Mr. Gerdes proceed perhaps some time in late June, at a  
11 place convenient to the parties, without the Board present  
12 and without prejudice to the parties' rights to take the  
13 deposition later if it is found necessary.

14 MR. ARMSTRONG: Mr. Chairman, I can cut at least  
15 the question of travel expenses short with perhaps two sen-  
16 tences. I think we have resolved the matter by the refer-  
17 ence to rules which make provisions for the payment of the  
18 statutory fees. As far as we're concerned, if we're talking  
19 about a PG&E witness being deposed in San Francisco, we're  
20 not going to charge the \$12 or whatever it is.

21 The only point we were making is, and I suspect  
22 that Mr. Strumwasser would state the same thing if any of  
23 his people were asked to come to Washington, he might want  
24 the plane fare, or whatever. And I think that has been the  
25 agreement, that if the witness has to travel across country,

eb3

1 we'll get reimbursed for those expenses. But at least PG&E  
2 is not asking for expenses if we're talking about depositions  
3 of San Francisco-based employees in San Francisco. It is  
4 only the cross-country travel that causes the problem. I  
5 thought we had worked that out.

6 MR. STRUENWASSER: As long as we're talking about  
7 travel for depositions and not for hearing, which is not  
8 presently before the Board, it's of no--

9 MR. ARMSTRONG: We'll worry about the hearing when  
10 we get there.

11 CHAIRMAN MILLER: I see no necessity then to pur-  
12 sue that subject further. Very well.

13 Who else wishes to be heard on this matter of  
14 depositions, whether of Mr. Gerdes or depositions in the  
15 future?

16 Mr. Matt?

17 MR. MATT: Mr. Chairman, there are two factual  
18 matters in laying out the background which I would like to  
19 address.

20 First of all, contrary to what Mr. Armstrong said,  
21 at least on behalf of the Southern Cities, in noticing the  
22 deposition of Mr. Gerdes, we fully intended to take that  
23 deposition pursuant, at least in our understanding, to the  
24 Board's direction. In other words, we were not seeking to  
25 take this under what might be considered the normal course

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eb4 1 of depositions but we were seeking to take Mr. Gerdes' depo-  
2 sition pursuant to the Board's instructions or suggestions  
3 at our last prehearing conference.

4 Second of all, I do not recall, as Mr. Strumwasser  
5 mentioned, an agreement we had reached on exchange of docu-  
6 ments. I don't think it may be a major problem but at least  
7 to the extent that I participated, I don't remember the agree-  
8 ment. I may be wrong.

9 MR. STRUMWASSER: I think it was a question that arose  
10 when we were preparing for the Goldhammer deposition.

11 CHAIRMAN MILLER: I think the Board has suggested  
12 to make depositions both meaningful and to prevent unnecessary  
13 motions being filed, that it would be well for Counsel in  
14 advance to confer as to the scope of the issues brought at  
15 any rate and as to documents that are expected to be used,  
16 either by the interrogator or subject to the duces tecum,  
17 whether formal or informal. We recommend the practice because  
18 it makes sense.

19 MR. MATT: I don't disagree with respect to the  
20 practice. It was just a question of putting before the  
21 Board my understanding as the proponent about what agreements  
22 had been made or not made.

23 Going more to the substance of the deposition of  
24 Mr. Gerdes, the Board's instructions were to have a deposi-  
25 tion which -- and as I understood the Board, it was to attempt

eb5  
1 to focus in on the issues and help begin to reduce -- poten-  
2 tially reduce the discovery which we're involved in.

3 It was the feeling, at least on my behalf for the  
4 Southern Cities, that we could begin focusing on these issues  
5 if we could get some of the people from PG&E, especially a  
6 witness like Mr. Gerdes who was involved in and had know-  
7 ledge of the events which had transpired, on which a large  
8 amount of the factual issues before this Board will be deve-  
9 loped -- that is, the intertie, the California Power Pool, the  
10 related agreements.

11 We felt that deposing Mr. Gerdes could be useful  
12 in helping to focus in on those issues, and his knowledge and  
13 the people involved, and where particular key documents or  
14 key people may be in the company.

15 In attempting to do this, I think the Board must  
16 recognize that it is very difficult in a case of this nature  
17 to focus on one issue. These issues are interrelated, at  
18 least again in my view and in my review of the discovery so  
19 far, you cannot talk about the Pacific intertie without  
20 looking at the California Power Pool, you cannot talk about  
21 the California Power Pool without looking at some of the  
22 various agreements and negotiations of other contracts con-  
23 current to that time period.

24 Similarly as to the six issues that I identified  
25 as areas which we had proposed to raise in this deposition;

eb6

1 they are interrelated and one, almost by the nature of the  
2 deposition process, will trip from one into the next and the  
3 blocking of-- To suggest we will only question on the Pacific  
4 intertie and nothing else would simply raise the specter of  
5 truly calling Mr. Gerdes back under a whole series of notices,  
6 again and again and again.

7 As Mr. Strumwasser said, it would be something  
8 like the World Series. I'm not even sure if at the seventh  
9 game we would know what was going on unless it was played into  
10 extra innings. Therefore, we feel the deposition of Mr. Gerdes,  
11 even if only noticed, is an appropriate way to approach the  
12 goals of the Board and our goals, the parties in this case.

13 Whether or not the Board attends is a question  
14 which I think the Board now realizes is somewhat of a dis-  
15 agreement among the parties. I have felt all along that  
16 the Board could properly attend such a deposition, that we  
17 could deal with the problem of whether or not it would turn  
18 into a mini-trial or not, that the Board there could provide  
19 immediate rulings when there are objections to certain ques-  
20 tions because Counsel felt they were going beyond the bounds  
21 for which the deposition was set or not. And really that would  
22 be a lot more efficient, and an economical use of time, rather  
23 than having a deposition and having a whole stack of objec-  
24 tions set up and then have to come back to the Board a month  
25 later and ask them to rule on them, and then call the witness

eb7 1 back again.

2 So it is my feeling on behalf of the Southern  
3 Cities that we would like the Board to attend a deposition  
4 of this nature, including Mr. Gerdes'.

5 We are prepared to begin the deposition of  
6 Mr. Gerdes. I disagree with the suggestion of Mr. Armstrong  
7 that you relate our preparedness on the question of deposing  
8 a PG&E witness such as Mr. Gerdes with whether or not we are  
9 prepared to answer 263 pages of contention interrogatories.  
10 In fact, the deposition of Mr. Gerdes will be useful in  
11 helping to frame the issues or helping to focus in on the  
12 issues.

13 We have done a significant review of the discovery  
14 documents which we received from PG&E. We are prepared to  
15 use those in an efficient manner, and could use those to  
16 assist us in this deposition.

17 I believe the other points that have been raised  
18 really go to the general question of deposition practice which  
19 will continue in this proceeding, and I'm not sure if the  
20 Board really wants -- how far the Board wants to go in this  
21 discussion.

22 But if I might just generally add that the deposi-  
23 tion process can be very useful, as with Mr. Gerdes, as long  
24 as we recognize that the issues in this case are interrelated.  
25 It is going to be very, very difficult to focus on just one

eb8

1 issue to the exclusion of others. And that is true I think  
2 whether we use Mr. Gerdes or a department head, unless the  
3 department head's responsibilities were so limited -- that  
4 is, he only worked on this one agreement, and that raises  
5 the question of whether or not the deposition of that person  
6 would really be useful in progressing us beyond the point of  
7 what we would get through the discovery we already have.

8 I think on the other issues that have been ad-  
9 dressed the Board has sort of indicated that they wish to  
10 wait because they seem to raise a greater question of dis-  
11 covery practice, and I think I will put off addressing those  
12 at this moment.

13 MR. DAVIDSON: Members of the Board, NCPA regards  
14 the early deposition -- and by "early" I mean as soon as our  
15 limited legal resources permit us to schedule them -- is  
16 essential. We have heard comments from Counsel for PG&E about  
17 his failing memory and the like. I don't have to underline  
18 them.

19 The thing I want to emphasize, and it's important  
20 to us at this stage, is we have documents involving  
21 Mr. Gerdes, too, in particular, which, if the facts contained  
22 therein are correct, I would submit conclusively establish  
23 massive antitrust violations, violations of Section 1 and  
24 Section 2 of the Sherman Act.

25 they involve conversations by Mr. Gerdes and it

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eb9 1 is very important to our preparation to find out what gloss  
2 Mr. Gerdes is going to put on them. One of those documents  
3 is contained as Attachment 4 to our comments on the ade-  
4 quacy of the Stanislaus commitments. It is a memorandum of  
5 a conversation between Mr. Gerdes and Charles F. Luce, the  
6 Administrator of Bonneville in '62. It is a memorandum of  
7 Mr. Luce and in it, the second paragraph involves the fact  
8 that --

9 MR. FALLIN: Your Honor-- Excuse me. I'm used  
10 to using that expression.

11 CHAIRMAN MILLER: It's all right. It isn't neces-  
12 sary; neither does it offend us.

13 (Laughter.)

14 MR. FALLIN: Again perhaps this is a little bit  
15 from my own background. It bothers me to see what appears  
16 to be an attempt to squeeze further into the consideration of  
17 this Board at this point Mr. Davidson's evidentiary efforts  
18 on particular documents. If his statement is that he has a  
19 document that he considers very important that he wants to  
20 take his deposition about, I think we can all take that into  
21 consideration.

22 However, if he wants to argue the meaning of or  
23 the evidentiary value of a particular document, I have a  
24 problem with that in pretrial or prehearing procedures. And  
25 I submit that that problem is not only imaginary. Even

eb10

1       though it is true that we do not have a jury and everybody  
2       is capable and everything else, I find that some control over  
3       that sort of thing is certainly helpful.

4               MR. WENNER: Why don't you wait until you're hurt?  
5       He hasn't said very much.

6               CHAIRMAN MILLER: Well, let me inquire: What's  
7       the attachment number of the document?

8               MR. DAVIDSON: Attachment Number 4.

9               CHAIRMAN MILLER: All right.

10              MR. DAVIDSON: And you'll find them, as I just  
11       discovered, by going through the yellow pages, each one of  
12       which represents behind it an attachment.

13              CHAIRMAN MILLER: All right. I have it now.

14              We appreciate the comments which have been made,  
15       Mr. Fallin, and we don't intend to get into the merits. On  
16       the other hand, this whole thing has got documents by the  
17       hundreds of thousands flying through the air, and I can assure  
18       you the Board isn't going to be unduly swayed by any particu-  
19       lar document or group of documents.

20              We do want to know what we're discussing generally.  
21       We're not about to try to dispose of the merits of the case  
22       in any particular form.

23              We assume, Mr. Davidson, that what you're doing  
24       is discussing this as simply being illustrative of an area  
25       of inquiry you wish to go into with a particular witness,

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1 But you're not going to go into any great detail or ask us  
2 to draw any conclusions therefrom.

3 MR. DAVIDSON: No, I'm only going to ask you to  
4 recognize the vital significance of establishing the facts  
5 of this conversation and seeing if Mr. Gerdes can put any  
6 gloss on it that takes away, in my view, the conclusive demon-  
7 stration in this document of PG&E's violation.

8 CHAIRMAN MILLER: You may be going a little far  
9 there because we're not interested in glosses or how conclu-  
10 sive these matters are, and that kind of thing. We're looking  
11 now simply at the taking of the depositions. We're looking  
12 at taking Mr. Gerdes' deposition.

13 We do not wish to become involved, and the Board  
14 was not aware that it had become involved in any kind of a  
15 mini-trial situation. We've got enough time, ammunition and  
16 able Counsel to hold a trial any time we are in a condition  
17 to do so. Therefore we're not interested in getting into any  
18 trial aspects now.

19 The question simply is the appropriateness and the  
20 right of Counsel to take the deposition, with whatever docu-  
21 ments may be indicated with some precision, of Mr. Gerdes,  
22 and insofar as it contains principles which may be applicable  
23 to future depositions when the Board is not in session, we will  
24 entertain some discussion beyond that.

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25 Now that's as far as we wish to go on deposition

eb12 1 practice.

2 I take it your discussion, your argument, is  
3 limited to those same parameters.

4 MR. DAVIDSON: It certainly is.

5 CHAIRMAN MILLER: Go right ahead.

6 MR. DAVIDSON: Do you want me to call your atten-  
7 tion to the really two or three specific sentences I would  
8 like to examine Mr. Gerdes on?

9 CHAIRMAN MILLER: I doubt it, because your  
10 examination is of Mr. Gerdes, not of the Board. The whole  
11 principle of deposition is for Counsel to go forward. It is  
12 your show, not our show.

13 MR. DAVIDSON: I would just like to illustrate  
14 why, for our reasons, it is critical to get Mr. Gerdes and  
15 nobody else.

16 CHAIRMAN MILLER: Well, why don't you just simply  
17 go ahead with the procedure that is set up by the rules of  
18 procedure for the taking of Mr. Gerdes' deposition? That's  
19 really all that we're inquiring into.

20 MR. DAVIDSON: I thought we had done that.

21 CHAIRMAN MILLER: Well, then, in that event your  
22 comment further is superrogation, isn't it?

23 MR. DAVIDSON: By "the procedure," do you mean  
24 a full deposition of Mr. Gerdes, taking weeks?

25 CHAIRMAN MILLER: Whatever is the pleasure of

es13 1 Counsel. We're not going to tell you how to run a deposition,  
2 and we're not going to run one for you.

3 MR. DAVIDSON: No, the question, your Honor, is  
4 this: Must we depose Mr. Gerdes on one specific occasion,  
5 or can we depose him on some points and then, as we learn  
6 more, assuming he is still available, depose him again?

7 CHAIRMAN MILLER: Well, we alluded to that generally  
8 in our last session, but I think the practice of this Board  
9 is not dissimilar from that of any other adjudicatory pro-  
10 ceeding whether it be administrative or judicial; namely, that  
11 you are expected to take the depositions and conclude them  
12 insofar as you are able with the knowledge, information or  
13 documents available to you. You should not try to be pre-  
14 mature and get a benefit from prematurity.

15 On the other hand, we know full well that you  
16 can't and shouldn't wait until the eve of trial and you're  
17 not going to be able to cover everything anyway. It gets  
18 down to the professional judgment of Counsel.

19 Once again, we do not encourage the practice of  
20 treating the witness like a yo-yo, especially a man who is  
21 75 years of age, familiar, undoubtedly, with a great many  
22 events in his lifetime. And his age and health, whether it  
23 is just normal for a man of that age or anything else, we  
24 don't want any witness to be subjected to undue strains or  
25 stresses. And that's what I mean. We don't want him on a

eb14

1 yo-yo where somebody is going to take him this week and a  
2 month later or six months later, somebody else is going to  
3 dance him around. This is not fair and we would issue an  
4 appropriate protective order.

5 Now since the witness in question that you're  
6 speaking of-- and you have a right to take his deposition.  
7 The fact that his age and state of health is whatever it is  
8 would certainly indicate that you would want to do it sooner  
9 rather than later.

10 However, we point out to you that you're going to  
11 be balancing also some of your felt needs and desires. By  
12 taking it earlier we expect you to cover as much as you  
13 reasonably can. We don't expect areas to be left open with  
14 the sure knowledge that you can bring him back just about  
15 any time that you want to, because you may not be able to.

16 We suggest that you sit down and decide, is this  
17 really the stage that you want to do it? If so, you produce  
18 the documents. Don't interfere with the document search by  
19 PG&E or whoever is the company that's responsible for the  
20 witness. We don't want to interrupt this production of  
21 documents which has certainly been taking a massive amount  
22 of time and money of you, ladies and gentlemen, and the Board,  
23 by your deposition practice.

24 Therefore, you have to make that judgment. Are  
25 there sufficient documents available or can you pretty well

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eb15

1 focus in on what you want to be produced? If they are not  
2 already produced, can you produce them yourselves to make a  
3 meaningful deposition? These are matters of judgment that  
4 you, as Counsel, will have to weigh.

5 We can only pass upon an extreme situation where  
6 a protective order is sought for a certain reason, and that's  
7 what we're exploring now. Mr. Armstrong is delineating them.  
8 Some have been suggested. We haven't yet heard from the  
9 Staff. By and large, Counsel bear their own professional  
10 responsibility in going ahead.

11 Within reason, we would permit further deposition  
12 but we, being cautioned at the outset of the situation here,  
13 we in turn caution you that you are not just going to be  
14 able to take one witness and conduct an inquiry which is un-  
15 fair or burdensome to him as a witness if not to any other  
16 parties.

17 These are judgmental matters. You have the know-  
18 ledge and information and can obtain it rather than the Board.  
19 But we're hearing from Mr. Armstrong; we're perfectly willing  
20 to hear from you and all other Counsel in that context, on  
21 Mr. Gerdes, what he knows, what documents you want him to  
22 bring, when you want to take his deposition, and the fact  
23 that he's not going to be subjected to harassment of any  
24 type, which I'm sure no one would wish to do now.

25 In that context, you may continue with your

1 argument.

2 MR. MC DIARMID: Your Honor, may I inquire, because  
3 it seems to me the groundrules may be in the process of shift-  
4 ing a little bit.

5 We had understood from the discussion at the last  
6 prehearing conference that it was the Board's suggestion,  
7 which we thought a good one, that the total pretrial pro-  
8 ceedings might be appreciably shortened by taking discrete  
9 depositions of particular people on rather limited aspects  
10 of the proceeding.

11 And within our understanding of the Board's direc-  
12 tions, we had joined with Southern Cities in the motion to  
13 depose Mr. Gerdes. For the reasons which Mr. Davidson has  
14 suggested and which Mr. Armstrong has suggested, there are  
15 very obvious reasons to attempt to record Mr. Gerdes'  
16 recollections at the earliest available date. And for  
17 reasons which Mr. Strumwasser has suggested, Mr. Gerdes was  
18 in fact privy to and involved quite deeply in quite a number  
19 of the issues that are here before this Board.

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1           Indeed, there are a comparatively small number  
2 of people within the PG&E organization who have what might  
3 be viewed as overview capabilities of the matters at issue  
4 here, and, like Mr. Gerdes, at least one of the other depart-  
5 ment heads is now to become a president of the company.

6           Within the scope of the Board's suggestion as  
7 to limited depositions, we have worked out among the inter-  
8 venors and staff a statement of what we hoped would be a  
9 limited area which would not overtax Mr. Gerdes and which  
10 we could probably conclude comparatively expeditiously; that  
11 is to say, it would not be a multi-week deposition.

12           I think as a mechanical matter that probably  
13 could go forward in a reasonably expeditious way. I explained  
14 to you earlier that there were some rather significant  
15 conflicting time pressures as a result of putting off of  
16 the deposition from early May. But the deposition as it was  
17 originally set probably could go forward and be concluded  
18 within a few days of time.

19           Now Mr. Armstrong suggested that he preferred  
20 the standard deposition practice where, as your Honor  
21 suggests, there is the requirement that you go forward at  
22 one time with everything that the witness might know within  
23 the scope of the case, or at least everything that you would  
24 be reasonably prepared to go forward with at that time, and  
25 only be able to call him back if there are reasons which

1 justify it.

2 In addition to his age and the infirmities which  
3 Mr. Armstrong suggests, which seem to us warrant deposing  
4 Mr. Gerdes on at least limited topics fairly early on in this  
5 proceeding rather than waiting for a year until discovery is  
6 complete, we are still of the view -- we, NCPA at least, are  
7 still of the view that the Board's suggestion in January as to  
8 a limited type of deposition would provide a basis for  
9 expediting the preliminary portions of this case.

10 That is to say since Mr. Gerdes was involved in  
11 policymaking on many of these topics, he probably would be  
12 able unquestionably to bind the company on -- well, I would hope  
13 the company would not argue, but I suppose they might -- I  
14 would think that Mr. Gerdes' deposition testimony would be  
15 tolerably dispositive on many of these issues and could perhaps  
16 cut short some of the discovery procedures which would otherwise  
17 have to be run through.

18 Now, I'm not quite sure where we stand. I think I  
19 have heard two different things, and I'm not sure that there  
20 has been a resolution.

21 There is the one thought that a preliminary deposition  
22 of this sort would still be appropriate. There is the other  
23 thought that, well, of course, counsel in an ordinary  
24 deposition would be expected to go forward with everything that  
25 they have to discuss with Mr. Gerdes.

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1                   And I guess my question is, are we still permitted  
2 to take a deposition of Mr. Gerdes of the sort suggested in  
3 January?

4                   CHAIRMAN MILLER: The reason you're hearing two  
5 different things is because you're talking about two different  
6 things. The suggestion the Board made was not meant to  
7 be imposed upon was of a character which you have reasonably  
8 well described.

9                   But that is not what the parties did. The parties,  
10 therefore, have now confronted the Board with a series of  
11 motions and issues which flow from, not the Board's suggestion  
12 as developed -- and it would take a fair amount of agreement  
13 among counsel to set it up.

14                   You have proceeded, rather, upon the standard depo-  
15 sition practice and rights both as conducted by this Board,  
16 this Commission, and the adjudicatory bodies in general.

17                   Now the response of the Board has been, therefore,  
18 since the context has changed, we're going by the rules  
19 governing the taking of depositions. We are seeking to analyze  
20 the prospective deposition of Mr. Gerdes and the documents  
21 that are to accompany it in one form or another under standard  
22 operating practice, and that is exactly what our rulings or  
23 our informational rulings have been.

24                   We can't reject or not pursue, at any rate, one type  
25 of suggestion and get ourselves into the procedural aspects of

1 a second kind and then wonder why they look different. They  
2 look different because they are different.

3 MR. MC DIARMID: Well, your Honor, I am very confused.  
4 All Intervenors and Staff thought we had notice of deposition  
5 within your Honor's suggestion in January.

6 CHAIRMAN MILLER: Let me bring to your attention, everybody  
7 didn't agree with you. For one thing, look at Page Two of  
8 your notice. At the discussion in January, someone asked a  
9 question about a certain witness. I think it was a gentleman  
10 who had signed a series of affidavits for PG&E which covered  
11 a broad spectrum. And I can recall --

12 MR. DAVIDSON: Mr. Kuder.

13 CHAIRMAN MILLER: And I can recall you saying you  
14 haven't had any experience in taking depositions of the kind  
15 we are suggesting. Why start with one where there are  
16 formidable difficulties? There's a truckload of documents,  
17 if nothing else, that are going to be involved. You are  
18 covering large, massive areas, why don't you start with somebody  
19 easier.

20 I can recall that discussion which, to me, is very  
21 close to the area you are now describing for us with Mr.  
22 Gerdes for substantially the same reason, start out to walk  
23 before you run.

24 If you want to get -- what we had suggested was to  
25 get a knowledgeable witness of high enough stature in the

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1 company to have a breadth of knowledge but to cover fairly  
2 discreet issues, not all and not the president or former  
3 president.

4 Now, when we made a suggestion, you came back with  
5 two which was then taken up by others as being different and  
6 it got substantially more different, as it evolved.

7 You're leaving the Board in between two concepts,  
8 and that's where we refuse to remain. We are, therefore, going  
9 to the traditional concept and we're pointing out that on Page  
10 Two where you list these six matters, it's perfectly accurate  
11 no doubt to say they're interrelated, but you are interrelating  
12 some very broad and very massive series of issues.

13 You then proceed to say that you want him to bring  
14 with him everything in his custody or control which relate  
15 in any manner to these six broad areas, and then you further  
16 require that all documents shown him since his retirement by  
17 attorneys of PG&E with the knowledge that the man is being used  
18 as a consultant and could be very extensively.

19 Now that in and of itself is wholly different from  
20 what the Board was suggesting. Having done so, you got into  
21 the easily to be anticipated problem of not being able to  
22 agree, because what we had suggested was more limited and more  
23 finite and required the cooperation of all counsel.

24 Having not gotten that, you now have the Board to  
25 where we're going to rule on the basis of standard normal

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1 practice tailored to the situation of witnesses, looking at  
2 protective orders, but we're not going to go further into  
3 matters that you chose not to take up. It's that simple.

4 Do you want a recess?

5 MR. STRUMWASSER: Please.

6 MR. MC DIARMID: Can I respond to that now?

7 CHAIRMAN MILLER: Do you want your shot before the  
8 recess? By electing now, you'll not get it later.

9 MR. MC DIARMID: All right, then, I would like to  
10 recess.

11 CHAIRMAN MILLER: All right. Ten minutes.

12 (Recess.)

13 CHAIRMAN MILLER: On the record.

14 Mr. McDiarmid, you may have the floor to make the  
15 surrebuttal that you wanted.

16 Let me just briefly, however, put into the picture  
17 the Board's thinking so you will all understand.

18 At our discussion in January, we had suggested the  
19 more focused type of matter that you're familiar with, the  
20 depositions. We had also said since you may feel it's early  
21 in the discovery stage that to encourage the experiment, at  
22 any rate, of the use of deposition practice, we would under-  
23 stand that discovery continuing, that there would be additional  
24 information counsel would have at a later date. Therefore, by  
25 taking an earlier deposition, they would not exhaust their

2277 051

1 opportunity to depose the witness without repeating things they  
2 had gone into but we were keeping the door open because of that  
3 consideration. Now that was under Approach A.

4 We're now under Approach B which is the normal  
5 deposition practice. Therefore, we will tailor to whatever  
6 the requirements are of a particular witness such as Mr. Gerdes  
7 as we're now exploring it.

8 But as the Board views it, normal deposition practice  
9 would indicate that counsel should made a good faith effort to  
10 cover the deposition of a particular witness when it is  
11 scheduled. You might have to vary this for reasons of health  
12 or whatnot, but essentially you make a good faith effort to  
13 cover what is available.

14 This doesn't mean that you're automatically fore-  
15 closed for the future, but neither does it mean that you're  
16 assured of a future opportunity either. The normal rule there  
17 is the showing of good cause, insuperable burden, but on the  
18 other hand, it does keep the pressure upon counsel to cover  
19 the deposition of the witness when they have the witness so far  
20 as he reasonably can.

21 Now, of course, there could be later developments,  
22 information, various other matters, and at all times there could  
23 be agreement among counsel. We don't even have to go into these  
24 rules, the Board doesn't have to rule when counsel agree  
25 among themselves, which we continue to encourage, which will

1 solve three-fourths of your problems.

2 But short of that, we're indicating to you how we view  
3 the normal practice, which would be to cover everything that  
4 you reasonably can, subject to whatever agreements you could  
5 make with counsel that, if at a future time there is a felt  
6 necessity of taking the deposition of a witness, make a showing  
7 of good cause which, if there is good cause, you can do.

8 Now if there isn't good cause, that's the risk you're  
9 taking. But again, that may be compensated for by the fact  
10 that you feel that this witness should be deposed now insofar  
11 as you reasonably can whatever the risks or the problems,  
12 if that's your choice, all right then, go ahead and do it --  
13 which I'm saying this is really the test, there's a safety  
14 valve, it is not anything automatic, it's a risk that you take.  
15 It's one you figure out for yourselves.

16 And as I say, all this now is in the absence of  
17 agreement among counsel, which can mold this whole thing and the  
18 Board won't even have to worry about it.

19 Now this is out present thinking on deposition practice  
20 and, as you can see, we are now discussing the application of  
21 our normal rules of procedure to the witnesses to be deposed.

22 Now, Mr. McDiarmid?

23 MR. MC DIARMID: Thank you, your Honor.

24 Perhaps I might outline for your Honor some of the  
25 considerations that went into the notice that was filed.

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1                   You're aware that there are four separate parties  
2 who are not necessarily on PG&E's side in this proceeding.

3                   CHAIRMAN MILLER: We have inferred as much.

4                   MR. MC DIARMID: And there are attorneys and repre-  
5 sentatives of each of these parties who are preparing their  
6 cases before this agency. Not all of the parties are in the  
7 same stage of preparation.

8                   NCPA, as you are aware, has some other litigation  
9 going with PG&E which involves some of the factual matters  
10 that will also be of relevance here. Mr. Armstrong alluded  
11 to the fact that there was quite a lot of testimony filed at  
12 the FERC by both sides. I believe that evidence is available  
13 to all the parties already.

14                   Now, after the January conference, the Intervenors  
15 and Staff discussed among themselves the scheme -- Scheme A,  
16 if you will, your Honor, that we understood the Board to  
17 have proposed, that there might be a means of taking what would  
18 not be a full-scale deposition, can't be a full-scale one time  
19 only deposition at this time, because nobody is completely  
20 prepared on what Mr. Gerdes would be expected to be conversant  
21 with simply because, well, we have received 152 reels of micro-  
22 film so far, that is apparently nowhere near complete.

23                   Now the parties discussed from the different per-  
24 spectives who might be called in a way that would advance the  
25 ball in this proceeding most expeditiously. We discussed the

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1 various personnel within PG&E that might be susceptible to a  
2 deposition of the sort involved in Scheme A, and we concluded,  
3 I think with some degree of unanimity, that there are really  
4 fairly few people within the PG&E organization that would have  
5 enough information simply as to what happened when and who said  
6 what within limited degrees and where the paperwork was likely  
7 to have left trails, if you will, the kind of preliminary things  
8 that we were discussing in January as a means of ascertaining  
9 ways of potentially shortening the fairly extensive documentary  
10 discovery in the proceeding.

11 We concluded there were fairly few people who would  
12 know that. There was Mr. Gerdes, there is Mr. Shakelford,  
13 who was the head of a department but is now either installed  
14 or about to become president, there are a couple of other  
15 people. But those would be about it that would have an overview  
16 in a way that would be useful in a way that we thought could  
17 potentially substantially shorten the discovery required.

18 We concluded that rather than attempt to call somebody  
19 who was now a high executive like Mr. Shakelford who, as I say,  
20 is about to become president if he is not already, which might  
21 be an imposition on the time of Mr. Shakelford which PG&E would  
22 argue was not warranted at this stage and also because of the  
23 fact that Mr. Gerdes is advancing in years, that it might be  
24 useful to try to proceed with Scheme A deposition for Mr.  
25 Gerdes.



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1 But we had honestly thought all four of the non-  
2 PG&E parties here that calling Mr. Gerdes for this kind of a  
3 scheme A, if you will, deposition would permit us to advance  
4 the ball meaningfully so far as the proceeding was concerned.  
5 Now we did have discussions with Mr. Armstrong, and Mr.  
6 Armstrong did retain his potential objection to the scope.  
7 But we thought we had worked out dates and documents to be  
8 produced, and we had put the proposed deposition off until  
9 the beginning of May because PG&E was busy preparing its  
10 file testimony and Docket E777, the FERC document -- there are  
11 four 7s in that, I may have misstated and said three -- which  
12 was due on May 1.

13 We had hoped that the parties and PG&E who would be  
14 involved in the deposition might not be the same parties or  
15 counsel involved in the preparation of that testimony, and  
16 therefore we could get Mr. Gerdes out of the way before NCPA  
17 and Southern Cities had to begin working on their responsive  
18 testimony which is due to be filed at the end of this month,  
19 and the hearing begins on June 4.

20 We had agreed to the beginning of May dates  
21 because we were under the impression that PG&E could make  
22 those dates. And we thought we could for a scheme A type  
23 deposition, and yet inasmuch as we could on our responsive  
24 evidence at FERC.

25 Now as Your Honor knows, there was an objection

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MPB/mpb2 1 that was raised. Many of the matters raised in the objection  
2 had -- if not before, have not been agreed to; they are non-  
3 issues. I think we are left with the question of the  
4 principles under which a deposition scheme A or a deposition  
5 scheme B would go forward.

6 Nobody is prepared. Nobody on our side is prepar-  
7 ed or could be prepared to take a final deposition of Mr.  
8 Gerdes at this time. If we were going to take a final deposi-  
9 tion of Mr. Gerdes at this time without something useful in  
10 the way of a scheme B deposition earlier, my suspicion is that  
11 it would be a fairly lengthy one because we have, as Your  
12 Honor knows, four parties with somewhat different points of  
13 view and somewhat different interests here.

14 We had hoped to be able to at least cut that final  
15 deposition somewhat short by taking a scheme A type deposition  
16 of Mr. Gerdes earlier which would at least be able to get  
17 some of his recollection out on the record now in light of  
18 his age and even more, in light of the representations that  
19 have been made this morning as to his age and health.

20 Quite honestly, we had thought we were complying  
21 as best we could with the suggestions which the Board had  
22 made in January. We continue to think that we have. I think  
23 there are -- well, there are other people as to whom a scheme  
24 A deposition could perhaps take place.

25 I would wager, I think most of us would, that

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MPB/mpb3 1 they would be likely to be much less useful in terms of  
2 expediting the proceeding or really avoiding future drawn out  
3 depositions.

4 I wonder, Your Honor, if in light of the representa-  
5 tions that have been made as to Mr. Gerdes and in light of the  
6 unfortunate example we had of Mr. Goldhammer, who died in  
7 mid-deposition, as it were, whether there wouldn't be automatic  
8 good cause for taking a deposition of Mr. Gerdes fairly early  
9 on to preserve as much of his testimony as might be accomplish-  
10 ed at this stage.

11 CHAIRMAN MILLER: Well, this is possible. We'll  
12 have to discuss it.

13 Let me inquire further so the Board can under-  
14 stand at least your position.

15 Suppose if a deposition, a partial deposition were  
16 taken for the reason alluded to; what would be the situation  
17 with regard to admissibility of that deposition or part of it  
18 in the event that Mr. Gerdes were not available at the time  
19 we have an evidentiary hearing?

20 I think now of other Intervenors, for example,  
21 who might have a different point of view from yours, that is  
22 if you took the deposition. I'm thinking also that PG&E  
23 might or might not refrain from expanding the deposition to  
24 have additional questions of a witness they thought that was  
25 either going to be available for hearing or for a subsequent

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mpb4

1 deposition.

2 In other words, if you have a partial fragmentary  
3 deposition, what about fairness and procedural due process  
4 as to its use in the event that that's all there is? What  
5 thought do you have on that?

6 MR. ARMSTRONG: Mr. Chairman, if I might just  
7 interject, I think there has been a misapprehension of my  
8 observations about Mr. Gerdes' age. While he is 75 years  
9 old, I have no evidence that he is suffering from any health  
10 problems. That wasn't my point.

11 My point was that he has been out of the company  
12 for several years, and I suppose any of us might look at a  
13 document we'd had to deal with 15 years ago and have to  
14 scratch our head a minute before we could recall it. The  
15 problem is made worse when you've got someone who has been  
16 retired and hasn't been dealing with the facts of the matter  
17 for quite a while. And it's that fact rather than some  
18 infirmity of health that I was referring to.

19 I mean, in Mr. Goldhammer's case we knew that he  
20 had terminal cancer at the time we began the deposition  
21 process. There is no evidence that I'm aware of as to  
22 Mr. Gerdes. He is 75 years old and that's all I know.  
23 Obviously he's not going to live forever; none of us is.  
24 But I didn't mean to suggest that there's a particular  
25 problem as to Mr. Gerdes' health.

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MPB/mpb5 1 CHAIRMAN MILLER: Yes, we understand you. In  
2 fact, I think that the Board said whatever infirmities there  
3 may be to be expected of a man 75 years of age. We did not  
4 infer there was anything further in the way of age, disability,  
5 health, or anything of the kind.

6 MR. ARMSTRONG: His health seems to have declined  
7 as we've gone around the table here.

8 (Laughter.)

9 CHAIRMAN MILLER: However, it remains for any  
10 witness -- he can be 55 or 35 -- whose deposition you would  
11 take in part, may not be available for various reasons when  
12 you get down to an evidentiary hearing, and you've got the  
13 question.

14 Of course, that is part of the reason too, to  
15 give everyone a fair opportunity to cross-examine or to go  
16 put on redirect; so the deposition can be used not only for  
17 discovery, but for information or testimony or any other  
18 valid or proper purpose when you get down to a disability.  
19 Therefore that's why we're, if not concerned, at least  
20 interested in seeing what are the ramifications of a truncated  
21 deposition for future use of any kind.

22 MR. ARMSTRONG: I think, Mr. Chairman, as far as  
23 PG&E is concerned, that would depend upon the fairness of the  
24 opportunity to cross-examine the witnesses under the circum-  
25 stances of the situation. And I think we had one type of

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MPB/mpb6 1 situation with Mr. Goldhammer. When we were going in we all  
2 knew he had a particular problem. He advised us, based on  
3 his doctor's advice and his own experience, that he had I  
4 think it was two hours that he felt he could go; and we did  
5 indeed go two hours.

6 I told everyone I'd go for 30 minutes, and that's  
7 how long I took. So those parameters I think are different  
8 than where you have a witness even who might be 75 years old,  
9 but there is no such anticipated health problem, I suspect  
10 there might be a desire to be somewhat more intensive in  
11 questioning in those circumstances.

12 But our problem in this instance, given the  
13 absence of any information or suggestion that Mr. Gerdes has  
14 any particular health problem, and given the fact that  
15 Intervenors and I guess Staff have a lot of work yet to do,  
16 according to their own indications, we feel that a deposition  
17 at this time would be premature.

18 CHAIRMAN MILLER: Well, what about the possibility  
19 that by holding off on that representation that the witness  
20 would not be available either for deposition purposes or for  
21 testimony and cross-examination?

22 MR. ARMSTRONG: In Mr. Gerdes' situation -- I  
23 mean, I want to be clear from the outset. We're not suggesting  
24 that his deposition should not be taken, period. It's a  
25 question of timing. And I think the risks that Mr. Gerdes is

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1 going to be unavailable are not substantially different from  
2 the risks to any other witness that we might have.

3 CHAIRMAN MILLER: Well, you can't overlook the  
4 fact that 75 is more than 50.

5 MR. ARMSTRONG: That's correct.

6 CHAIRMAN MILLER: We've got no evidence that there  
7 has been any acceleration in his longevity, but nor do we have  
8 any evidence to the contrary. So we're talking now in terms  
9 that we don't know when we're going to start an evidentiary  
10 hearing. The Board would be stupid not to recognize that at  
11 age 75, an insurance company would tell you what that means.

12 MR. ARMSTRONG: I think the principles that must  
13 be addressed here relate to the number of weeks or months  
14 that we're talking about. We've already been told that there  
15 is some period of time when we can't go forward anyhow because  
16 of commitments of counsel. So I'm not clear that the risks  
17 of Mr. Gerdes' demise are substantial if we're looking at the  
18 next six months or so.

19 And during that period I would hope counsel,  
20 having in mind all of these facts, would be able to do their  
21 preparation at least to a point where we could have a fair  
22 probability of getting at least most of the matters out of the  
23 way. And everyone would then have a fair opportunity for  
24 cross-examination so as not to hinge on admissibility of the  
25 deposition should Mr. Gerdes be unavailable at the time of the

MPB/mpb7

MPB/mpb8

1 hearing.

2 CHAIRMAN MILLER: When do you suggest that is  
3 likely to be, from your point of view?

4 MR. ARMSTRONG: I can't answer the question, Mr.  
5 Chairman. It depends on when Intervenors and Staff feel they  
6 are prepared to proceed with the deposition and have a  
7 reasonable sense that they can complete what they have to say.

8 And Mr. McDiarmid or Mr. Davidson, I can't  
9 remember which, indicated that they felt none of them is  
10 now prepared to take a final deposition of Mr. Gerdes. I  
11 think that's the crucial point.

12 As to when they will be prepared to --

13 CHAIRMAN MILLER: I don't know if the Board would  
14 require finality. No deposition has to be completed by itself  
15 at any time.

16 MR. ARMSTRONG: Within reasonable parameters. I  
17 think we're now at what would be described as a very pre-  
18 mature stage in the preparation of the Intervenors and Staff.  
19 I think that it's a rule of reason that we're advocating  
20 here, that the process be advanced to a point where we could  
21 have some assurance that they're ready to proceed.

22 Now, sure, something can always turn up. But at  
23 this point they know that there's going to be -- or they  
24 think that there's going to be a lot turn up, and we're  
25 concerned that this process seems to be stringing itself out

MPB/mpb9

1 unduly.

2 Now, I don't know, maybe by the end of December  
3 when we're ready to take Mr. Gerdes' deposition from the  
4 standpoint of everybody's schedules, they will also be ready  
5 from the standpoint of their own preparation, in which case  
6 that would be wonderful.

7 CHAIRMAN MILLER: I know we're out of order. We'll  
8 get back to you.

9 While we're discussing this, Mr. Armstrong, how-  
10 ever, let me inquire as to whether PG&E counsel intend to  
11 examine extensively Mr. Gerdes at the time the deposition is  
12 taken as noticed by the Intervenors?

13 MR. ARMSTRONG: To be quite candid with the Board,  
14 Mr. Gerdes has a very strong preference to be represented by  
15 Mr. Doyle, and so while I can't speak definitively on the  
16 subject --

17 CHAIRMAN MILLER: Mr. Doyle is a partner in your  
18 firm, is that right?

19 MR. ARMSTRONG: That's correct.

20 CHAIRMAN MILLER: And he would like him to do it?

21 MR. ARMSTRONG: As far as I know there is no plan  
22 to have any questioning of Mr. Gerdes by us. We anticipate  
23 he'll still be with us at the time of the hearing. But of  
24 course, that may change depending on the questions that will  
25 be asked by Intervenors and Staff.

MPB/mpb10

1 CHAIRMAN MILLER: I think you can expect that the  
2 questions to be asked will be extensive, based upon docu-  
3 ments, and will cover a very extensive overview of the con-  
4 duct complained of. Why we're inquiring -- In other words,  
5 of course the deposition can be used for any proper purpose,  
6 including preservation of purpose. Why we're inquiring, I  
7 guess we're checking your evaluation of the risk factor.

8 If you tell us right now it's just going to be  
9 discovery as far as you're concerned, you don't intend to ask  
10 any questions in chief, that might help us evaluate the time  
11 risk factor that we're now apparently confronted with.

12 On the other hand, you can tell us that in repre-  
13 senting your client you or Mr. Doyle or anybody else would  
14 consider it prudent to complete the record insofar as the  
15 witness is concerned and to give whatever explanations PG&E,  
16 the client, would like to have at the time the deposition was  
17 taken in recognition of all circumstances, and that would  
18 present the case in a little different factors.

19 Which do you represent to the Board, or are you  
20 able to?

21 MR. ARMSTRONG: I am able to represent at this  
22 time that we do not plan to ask any questions, you know,  
23 barring some clean up kinds of things that might come up.  
24 It's our anticipation, as I say, that Mr. Gerdes would be  
25 available. We don't have any reason to know, other than the

MPB/mpb11

1 fact that he's 75 years old, that he is not going to be with  
2 us.

3 Obviously the other thing we don't know is when  
4 the hearing is going to be. But bearing that all in mind,  
5 that is our present plan.

6 Let me say in addition, though, because I think  
7 it's pertinent to the discussions around the table here,  
8 that one of the reasons that we feel that we're not going  
9 to be asking any questions is quite candidly we've talked  
10 to the people in the company about the various positions  
11 and Mr. Gerdes is one whose recollection is not the best.  
12 And that's something that was true several years ago and  
13 today.

14 And what we have tried to do, without success,  
15 and I think it's understandable, is to suggest people to the  
16 Intervenors and Staff and to offer to suggest others as to  
17 whom we feel some information might be forthcoming.

18 Of course it always depends on what develops.  
19 But I don't want to leave the Board with the sense that it's  
20 been suggested that there is a really hot prospect here.  
21 If we thought it was all that informative, quite candidly  
22 we would have used him in the FERC proceeding and some of the  
23 testimony that's been filed. But we feel that others have  
24 a more detailed grasp at this point of the matters that were  
25 under examination at least in that form.

mpb12

1 CHAIRMAN MILLER: I see.

2 And there has been testimony prefiled, I take it,  
3 in FERC by both PG&E and the other parties?

4 MR. ARMSTRONG: By the other parties in the FERC  
5 proceeding, including NCPA and I think Southern Cities, but  
6 not BWR or NRC Staff.

7 MR FALLIN: Mr. Chairman, two small observations:

8 I think you accurately pointed out some differentia-  
9 tions in the words that were used here. When Mr. McDiarmid  
10 spoke of a "final deposition", I don't know that I've ever  
11 taken a "final deposition". I'm not sure many of us have.  
12 What we're talking about is a relatively full deposition.

13 And the essence of our position which we may be  
14 evolving in this group is that given the nature of this  
15 particular witness in trolling discovery as it goes forward  
16 it makes sense to have his deposition taken at the time when  
17 it's going to be a relatively full deposition, and substantially  
18 all of it is going to be accomplished, although it may not be  
19 final or ultimate to the extent that the latest subject  
20 matter I think is relevant too, that is with respect to the  
21 testimony that's now being filed in the FERC case.

22 To the extent that, as Mr. Matt put it, there was  
23 some element of attempting to define issues or positions with  
24 respect to most of the issues that were referenced in the  
25 notice of deposition, those issues have now been defined in

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1 perhaps the best of possible ways, by testimony that has now  
2 been filed on behalf of both parties, NCPA's first, PG&E's  
3 now has been filed, and their responding will soon be filed,  
4 all under oath, which now defines in pretty darn positive  
5 terms the parties' contentions and defenses with respect to  
6 very specific issues, with respect to a specific intertie,  
7 with respect to the California Power Pool, with respect to  
8 most of the issues with which we're going to be grappling  
9 here.

10 Now this leaves out DWR and Staff, who are not  
11 yet parties to that proceeding --

12 MR. STRUMWASSER: I'll object to the word "yet".

13 (Laughter.)

14 MR. FALLIN: I'm sorry, I'll accept that amenda-  
15 tion definitively.

16 But I think it's also true that to the extent  
17 that there was an impetus or there is an alleged impetus that  
18 working on this man in this manner is somehow necessary to  
19 find out all of these preliminary issues of who says what  
20 about these contracts, it's just no longer a fact. I think  
21 that in turn is a fact which can be taken into consideration  
22 here.

23 CHAIRMAN MILLER: All right.

24 Well, this is out of order a little bit.

25 MR. ARMSTRONG: Mr. Chairman, I have a few other

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1 remarks.

2 CHAIRMAN MILLER: I think you'd better wait now,  
3 because we haven't heard from Staff at all. And I'm not sure  
4 that we were through with DWR. I think we were.

5 You have completed yours, Mr. McDiarmid and Mr.  
6 Davidson?

7 MR. MC DIARMID: Well, Your Honor, you would ask  
8 about the question of admissibility --

9 CHAIRMAN MILLER: Yes.

10 MR. MC DIARMID: -- to which I had not yet responded.

11 I think the answer is that whatever Mr. Gerdes says  
12 he says under oath; to the extent that it's an admission  
13 against interest, it's an admission against interest and  
14 therefore admissible. To the extent that it may be some-  
15 thing else, there are various kinds of possibilities about  
16 what it might be. And I suppose we'd have to look at those  
17 at the time.

18 CHAIRMAN MILLER: Well, if this is going to be  
19 admissible only as an admission against interest, I wonder  
20 what really the extent of the admissibility would be.

21 At any rate, it's for discovery. So we won't get  
22 into admissibility.

23 All right.

24 Staff, I guess we haven't heard from you.

25 MR. GOLDBERG: Mr. Chairman, I'd like to begin by

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1 reiterating what the Staff's position has been thus far, and  
2 will continue to be for a while at least on depositions in  
3 this proceeding.

4 And that is that because we are in a substantially  
5 different posture from the Intervenors, who have lived with  
6 PG&E over the years and are parties to some of the contracts  
7 at issue here and are the subject of the alleged anticompeti-  
8 tive conduct of PG&E, we, like the Board, fairly recently  
9 came new to this situation and are trying to unravel the  
10 various allegations and the factual basis, if any, for them.

11 We have not been in a position to take any depori-  
12 tion under the so-called scheme B because we have not had a  
13 substantial amount or a large percentage of discovery,  
14 documentary discovery which we believe is necessary in order  
15 to take a meaningful deposition and take a deposition which  
16 will be fairly complete in and of itself. And therefore  
17 up until now we have resisted the notion of taking deposi-  
18 tions because we believe that the taking of depositions at  
19 this point, as far as we're concerned, would be premature.  
20 And it would inevitably lead to the situation where we had  
21 to come back and say "We now have a lot more information,  
22 we now believe we can conduct a much more meaningful examina-  
23 tion, and therefore we would like to take a deposition a  
24 second or a third time."

25 In order to avoid that, we felt it would be better

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1 for all concerned, considering the burdens on PG&E and PG&E's  
2 employees, and the Board and the Intervenors, to defer  
3 depositions until such time as we could take a much more  
4 complete deposition based on our documentary discovery.

5           However, at the last prehearing conference the  
6 Board came up with the suggestion to take some preliminary  
7 depositions with the hope that we could shorten the discovery  
8 phase of this proceeding. At that prehearing conference I  
9 once again reiterated our position that we felt that there  
10 was a substantial danger of multiple depositions unless we  
11 had a clear understanding from the Board and from all parties  
12 that if we proceed with any depositions at this time that the  
13 Staff and the Intervenors would not be precluded from taking  
14 the deposition of a deponent more than once based on the  
15 documentary discovery which the Intervenor and the Staff  
16 conducted from the time of the original deposition of the  
17 deponent.

18           It was my understanding that the Board in  
19 January recognized that and there made it very clear for  
20 the first time in this proceeding that we would not be  
21 precluded from taking multiple depositions, as long as it's  
22 not the type of thing where it's just cumulative and we just  
23 want a second shot at the witness. If in fact we've had more  
24 documentary discovery, we've learned a lot more about the  
25 situation from our document review, we then would not be

1 precluded from taking multiple depositions.

2 CHAIRMAN MILLER: I think that's a fair summary of  
3 the Board's position.

4 MR. GOLDBERG: That was the Staff's understanding,  
5 and I believe the Intervenors' understanding also. With that  
6 in mind we proceeded, as Mr. McDiarmid described, to nego-  
7 tiate in good faith in compliance with the Board's suggestions  
8 to take some of these preliminary depositions. And we had the  
9 hope, as did the Board, that it was a good suggestion and  
10 would lead to a shortening of the discovery phase of the  
11 proceeding.

12 Mr. McDiarmid described how our discussions  
13 evolved and how we finally concluded that Mr. Gerdes would  
14 be an appropriate first deposition. We were trying to  
15 satisfy the Board's suggestions and guidelines which had  
16 various -- and in some cases somewhat conflicting requirements.  
17 The Board did make the suggestion that we begin with a  
18 fairly high level official. The Board also said that we  
19 try to choose an issue or two and not start with the most  
20 difficult PG&E witness.

21 In trying to satisfy those guidelines, we did  
22 arrive at Mr. Gerdes. He is a high level official, and he  
23 is not the most difficult case. I think we all probably  
24 would agree that perhaps Mr. Kuder would be the most diffi-  
25 cult one to begin with. But by choosing Gerdes, then, we got

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MPB/mpbl8

1 away a little bit from the suggestion that we try to identify  
2 perhaps a single or two issues and attempt to stay as close  
3 to that particular requirement as possible. We did arrive  
4 at what we thought was something as close to it as possible  
5 while still enabling us to conduct a meaningful deposition  
6 on what are inevitably intertwined and related issues, as  
7 Mr. Matt described before.

8 So for those reasons we came up with the sugges-  
9 tion that we would begin by deposing Mr. Gerdes under the  
10 Board's so called procedure A guidelines. We thought we had  
11 pretty much agreement on most all the issues with PG&E and we  
12 noticed the deposition obviously believing that there weren't  
13 going to be any major problems associated with it.

14 We found subsequently that there were some major  
15 problems, on PG&E's side, and that was the subject, of course,  
16 of a motion of a protective order and motions to compel  
17 discovery.

18 But at any rate, I continue to believe that it's  
19 best to proceed with depositions as close to the terms that  
20 were suggested by the Board in January as possible. I think  
21 that's the only way the Staff believes that it can proceed  
22 at this time. And it certainly would like to proceed in that  
23 fashion.

24 I think we've all agreed that some of the  
25 problems that were perceived for some time are no longer

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1 problems, no longer issues. I don't think there's any issue  
2 concerning specification of documents. I think neither the  
3 Intervenors nor Staff objects to identifying, to whatever  
4 extent it can, the documents it would intend to use with  
5 Mr. Gerdes at his deposition and other depositions in this  
6 proceeding. And I think that PG&E is also cooperative in  
7 that regard in identifying the documents it intends to use.

8 The issue of whether or not the Board should  
9 attend has been perhaps the most serious area of disagree-  
10 ment among the parties. I think there are advantages and  
11 disadvantages associated with the attendance of the Board at  
12 any deposition, in particular the Gerdes deposition.

13 I do believe that if the Board attends, it will  
14 convert what might have been an ordinary discovery deposition  
15 where people are just honestly interested in learning some  
16 information and learning where things are and who should be  
17 the subject of further discovery, turn that type of deposi-  
18 tion into a mini-trial, where each party is very much con-  
19 cerned with making it look like their allegations are sub-  
20 stantiated by the facts or the defenses are substantiated by  
21 the facts, in looking as good as possible before the Board,  
22 especially if the Board had something in mind about these  
23 depositions which we're unaware of, about using them in some  
24 fashion with respect to issues that appear from time to time  
25 on the length of discovery and the amount of discovery and

1 what is necessary and so forth.

2 There is a lot of concern about just exactly what  
3 purpose would be served by the Board's attendance and how  
4 that would convert an ordinary deposition into a mini-trial.  
5 That's what I would call the major disadvantage that I could  
6 see with the Board attending.

7 On the other hand, I think we all recognize that  
8 because of positions that have been taken by the parties on  
9 virtually every facet of discovery so far, there is likely  
10 to be a lot of unforeseen objections and problems that arise  
11 with respect to particular questions, particular areas of  
12 inquiry, particular uses of particular documents. And we  
13 recognize that what very well could happen is that we could  
14 all travel, or a lot of us travel across country, whether  
15 it's here or in San Francisco, prepared to begin a deposition  
16 and find out that there are substantial problems that may or  
17 may not have been foreseen, and find out that we need the  
18 Board to resolve these and then travel back, and a series of  
19 motions again will be filed, and answers, and we'll have to  
20 wait for the Board to rule or the next prehearing conference,  
21 and we'll get those resolved only to resume the deposition  
22 and find that perhaps there are others.

23 And so in order to avoid that, I think the  
24 advantage of the Board attending would be to be available  
25 right there to make rulings and make sure that the deposition

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MPB/mpb21

1 gets underway in a reasonable fashion.

2 I think that if it's decided that the Board will  
3 not attend the deposition, then there ought to be some  
4 procedure available so that we can get some rulings from the  
5 Board which will avoid these repeated notices of depositions  
6 and resumptions which involve a lot of time, expense, and  
7 effort and inconvenience on the part of all the parties.

8 I don't think there is any longer any issue  
9 concerning the expenses to be borne by the parties on produc-  
10 ing deponents. I think we all pretty much agree that we can  
11 cooperate in making witnesses available in the location where  
12 they work or reside. When it comes to extraordinary expenses,  
13 however, I think again that we have pretty much reached  
14 agreement on that as far as the Staff's concerned. All we  
15 can do, but we certainly are willing to do, is comply with our  
16 rules and pay our share of the statutory fees that witnesses  
17 are entitled to. That's all we can do; we can't do anything  
18 more than that. We're precluded from doing any more than  
19 that. But we certainly have no objection to doing what our  
20 rules provide.

21 I don't think we have any further comments at  
22 this time.

23 CHAIRMAN MILLER: All right.

24 We go now to rebuttal or surrebuttal.

25 Were there matters that you had not had a chance to

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1 address, Mr. Armstrong?

2 MR. ARMSTRONG: I think a couple of points bear some  
3 review.

4 First of all, let me comment. A number of counsel  
5 for Intervenors and Staff referred to the Board's earlier  
6 suggestions, having what Mr. Strumwasser described as atten-  
7 tion between the suggestion for a single issue and a sugges-  
8 tion for a high level official. I don't have my transcript with  
9 me, but I believe a review of that will confirm my recollection  
10 that the phrase the Board chose was "an appropriate level  
11 official", indicating to me at least somebody who knew some-  
12 thing, whether that level in the corporate structure was high,  
13 low, or middle.

14 CHAIRMAN MILLER: I think we did use the term  
15 "appropriate". I do recall using the term "knowledgeable".

16 MR. ARMSTRONG: Yes.

17 CHAIRMAN MILLER: I think that's the context that  
18 at least the Board felt it was discussing; not necessarily  
19 the highest or the most difficult to retain. There may be  
20 matters that counsel among themselves had discussed to see  
21 what would be meaningful on the one hand and what would be  
22 knowledgeable from PG&E's point of view on the other.

23 MR. STRUMWASSER: I have a present recollection of  
24 the term either vice-president or president being used.

25 CHAIRMAN MILLER: Vice-president I think I used,

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MPB/mpb23

1 knowledgeable vice-president. I know I did at one point, at  
2 any rate, Mr. Strumwasser.

3 MR. ARMSTRONG: I think that at least we construed  
4 the phrase as somebody who knew enough to make the process  
5 worth the trouble of going into.

6 CHAIRMAN MILLER: Yes.

7 Let me say parenthetically we supposed there are  
8 probably 50 or 60 vice-presidents in an organization of that  
9 size. So we did mean high enough to have the knowledge and  
10 capacity to come forth. On the other hand, we do recognize  
11 that there are limitations of availability. And it's, again,  
12 a matter of judgment among counsel.

13 MR. ARMSTRONG: Yes. Well, in any event, Mr.  
14 Chairman, you earlier today alluded to the discussion  
15 regarding Mr. Kuder, and using him at the time as an  
16 example of somebody not to pick. Mr. Kuder, during the  
17 general time frame, was the general counsel of the company.  
18 And that is the reason everyone was -- in any event, I've  
19 got the titles wrong.

20 In any event, one thing is clear: And that is that  
21 Mr. Kuder during the relevant time period was subordinate  
22 to Mr. Gerdes. So instead of picking somebody we had used  
23 as an example of the worst case, they went and found one that  
24 was indeed worse than the worst case.

25 CHAIRMAN MILLER: Ingenuity of counsel knows no

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MPB/mpb24

1 bounds.

2 (Laughter.)

3 MR. ARMSTRONG: That's what I think precipitated  
4 this disagreement. And I come back, then, because I think  
5 the crux of our discussion is this conflict between what's  
6 now been characterized as scheme A and scheme B. We have  
7 to agree with the Board that what's being proposed here  
8 cannot by any stretch of the imagination be squeezed into the  
9 parameters which were delineated last time by the Board.

10 The statement of issues in the notice, as the  
11 Board has observed, is so broad as to preclude any character-  
12 ization of that as being a single issue. Indeed, the first  
13 three of the six items specified are all subsumed within the  
14 FERC proceedings, which have been mentioned already. And I  
15 think that the last three are subsumed to an extent within  
16 the FERC proceedings.

17 But beyond that, Mr. Chairman, it's clear to us --

18 MR. WENNER: Counsel, can I interrupt you?

19 When you say "subsumed within the FERC proceedings",  
20 you mean within the whole area of the FERC proceedings, or do  
21 you mean that they will be taken up in the near future in  
22 FERC?

23 MR. ARMSTRONG: I mean specifically this:

24 The FERC proceedings are concerning themselves with  
25 four contracts, and specifically the fairness and reasonableness

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mpb25 1 of those contracts considering antitrust questions which have  
2 been raised by NCPA and others in those proceedings. Among  
3 the four contracts are the Intertie Agreement, the California  
4 Power Pool Agreement, Contract 2948A -- now those are the first  
5 three items referred to in the notice of deposition here. The  
6 last three items are more generic in the notice of deposition.  
7 They referred to efforts of PG&E to obtain waiver of federal  
8 wheeling stipulations for transmission facilities between  
9 federally owned lands; that is a topic which I'm told came  
10 up in connection with the Pacific Intertie and Contract 2948A.

11 So to that extent they'd be involved in the FERC  
12 proceedings.

13 Similarly, number five in the notice of deposition  
14 talks about PG&E's contractual arrangements with other  
15 electrical utilities. And to the extent that that generic  
16 description would apply to the contracts involved in FERC,  
17 that would apply in the same observation with respect to  
18 item six, activities of PG&E concerning efforts of other  
19 electric utilities to obtain bulk power resources.

20 So that's what I meant by that reference.

21 MR. WENNER: Are these topics that are also  
22 included within the FERC proceeding, are they topics that  
23 are going to be taken up very soon within FERC? Not for the  
24 hearings to begin, but are these topics that are scheduled to  
25 begin?

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1 For example, if Mr. Gerdes is to be cross-examined  
2 -- let's make it very specific:

3 If Mr. Gerdes is about to be examined by FERC  
4 on one of those subjects that Mr. Davidson just brought up,  
5 well, then, is the deposition necessary? On the other hand,  
6 if that's something way down the line or has never been  
7 concluded, that's another situation.

8 Without wanting to go into FERC's proceedings,  
9 would there be a duplication? Are these subjects that are  
10 being raised with respect to depositions that would come up  
11 very soon in the FERC or not?

12 MR. ARMSTRONG: Mr. Gerdes has been identified,  
13 I am told, by the NCPA as a possible witness whom they would  
14 like to call. I'm told that there is that in a document,  
15 but that the verbal representation subsequent to the written  
16 document, that if they had nominated him at one point they  
17 have decided not to use him. But I think the matter currently  
18 stands that no one presently plans to call Mr. Gerdes in the  
19 FERC proceedings, although he was at one time put on a list  
20 somewhere.

21 CHAIRMAN MILLER: Is that correct, Mr. McDiarmid?

22 MR. MC DIARMID: As the matter now stands, Your  
23 Honor, I believe -- You'll have to trust my memory. What  
24 happened was that our original evidence was put on last  
25 October. Our original evidence in the FERC proceeding was

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1 put on last October. And for one reason or another there  
2 was what we interpreted as a directive that we list everybody  
3 else who might potentially be called possibly around the  
4 beginning of the year. And we listed everybody who might  
5 potentially be called as adverse witnesses.

6 The judge ruled that it was premature to list  
7 everybody that might possibly be called as an adverse witness  
8 and we'd have to make a showing at the time that adverse  
9 witnesses were called. Mr. Gerdes probably was on the list  
10 of anyone who might possibly be called.

11 There has been no subsequent list filed. The  
12 company filed their evidence on May 1, 2, 3, 4, it was the  
13 beginning of May. Mr. Gerdes was not a witness either for  
14 PG&E or for Southern California Edison in that proceeding.

15 Our rebuttal evidence is presently due on May 30th.  
16 We will today be filing an application for an extension of  
17 time to file that rebuttal evidence, although not an extension  
18 of time for the beginning of the proceeding. We do not  
19 presently intend to notice Mr. Gerdes as an adverse witness  
20 in that proceeding, although --

21 CHAIRMAN MILLER: Well, he is going to testify on  
22 behalf of anybody in any fashion in the FERC proceeding?

23 MR. MC DIARMID: Not at the moment.

24 MR. ARMSTRONG: It's not PG&E's intention.

25 CHAIRMAN MILLER: Well, so, then, the prefilled

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1 testimony does not include the testimony of Mr. Gerdes?

2 MR. ARMSTRONG: That's correct.

3 MR. MC DIARMID: That is right.

4 CHAIRMAN MILLER: Very well.

5 MR. ARMSTRONG: But I think, to get to the sub-  
6 stance of your questioning, the FERC proceeding is addressing  
7 these issues. Now what precisely the various parties have --  
8 what approach they've taken, what particulars they've gone  
9 into. I'm not familiar with. But I suggest that that's at  
10 least a starting point, now, as a reason for my suggestion  
11 that the testimony filed there might be instructive here.

12 But in any event, I think the difficulties that we  
13 have in this mingling of whether we're talking scheme A or  
14 scheme B present themselves in this list of issues. We can  
15 go down this list, and if we're talking about the Board's  
16 suggestion, we can look at item one, the formation of the  
17 Pacific Intertie including all related agreements and  
18 arrangements, negotiated at that time.

19 Well, Mr. Gerdes was not the one who was involved  
20 in the negotiation of the contracts. And if we're going to  
21 be talking about contracts and the meaning of specific terms  
22 in the contracts, the guy who was the chief executive of the  
23 company at the time is not the guy to talk to.

24 CHAIRMAN MILLER: Well, let's try to bring some  
25 order out of these generalities. Let us look at Mr. Gerdes.

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In what areas would it be reasonably believed by you or anyone else that he has knowledge and information that would be helpful in establishing a record for discovery or other purposes.

2

3

4

Let's see what Mr. Gerdes knows; compare it with the list -- or since that is somewhat limited, look at the six or seven

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6

items in the notice. Tell the Board whether or not any of

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those are areas in which you have substantial direct information.

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1 MR. ARMSTRONG: Well, bearing in mind that I'm not  
2 the one who's interrogating--

3 CHAIRMAN MILLER: So nobody knows?

4 MR. ARMSTRONG: -- it's my understanding that he has  
5 some knowledge or had some knowledge in an overview sense.  
6 I'm sure that he knew that there was a California Power Pool  
7 and I'm sure he had some idea as to what that all involved.

8 CHAIRMAN MILLER: That isn't what I asked you.

9 MR. ARMSTRONG: But as to detailed knowledge of any  
10 of these items, it's my information that Mr. Gerdes was in-  
11 volved in the negotiation of the concepts involved in the  
12 Pacific intertie.

13 CHAIRMAN MILLER: The intertie.

14 MR. ARMSTRONG: The concepts, as distinguished from  
15 contracts.

16 CHAIRMAN MILLER: All right, let's put down con-  
17 cepts there on one.

18 Now anything else?

19 MR. ARMSTRONG: I'm not aware of Mr. Gerdes -- or  
20 the extent of Mr. Gerdes' knowledge with respect to the  
21 California Power Pool, other than the most general overview  
22 kind of knowledge. And the same can be said of 2948-A, al-  
23 though I don't know--

24 If we could have a moment?

25 CHAIRMAN MILLER: Yes, confer with your colleague.

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1 We'd like that information.

2 (Pause.)

3 CHAIRMAN MILLER: All right, have you had a chance  
4 to confer?

5 MR. ARMSTRONG: Yes, Mr. Chairman.

6 CHAIRMAN MILLER: Very well.

7 MR. ARMSTRONG: It is our collective estimation  
8 that Mr. Gerdes was involved very little in the California  
9 Power Pool. That's a phrase that was used. That's an  
10 engineer's phrase.

11 Apparently he was involved in the negotiation, or  
12 at least the history of the events leading up to Contract  
13 2948-A. But again, I would say that his knowledge would be  
14 more general rather than more detailed about particular provi-  
15 sions although, you know, as to the specific intertie, there  
16 might well be provisions which were deemed critical at the  
17 time, and for that reason he got involved. But I can't tell  
18 you now what those provisions were.

19 As far as number four, the waiver of federal wheel-  
20 ing stipulations, I am told Mr. Gerdes has been involved in  
21 those efforts to one extent or another.

22 And as to five and six, I think the answer has to  
23 be Yes, depending upon which contracts or arrangements are  
24 being discussed, or which efforts to obtain bulk power re-  
25 sources are being discussed.

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MPB/eb3

1 CHAIRMAN MILLER: Well, as to the issues themselves,  
2 what witnesses do you suggest are both knowledgeable and in a  
3 position to convey information suitable for discovery with  
4 reference to Number One?

5 MR. ARMSTRONG: Mr. Chairman, you're putting me on  
6 a good spot, and I think perhaps I can answer the question  
7 in this way:

8 The company's notion as to which witnesses are  
9 knowledgeable is reflected in the testimony which it filed in  
10 the FERC. I personally was not associated with that effort,  
11 but there is at least a written record of what that is that  
12 is available at least to the NCP and Southern Cities, and I'm  
13 sure we can make it available to the others here if they haven't  
14 gotten it already.

15 CHAIRMAN MILLER: Will that encompass all six  
16 issues then set up?

17 MR. ARMSTRONG: Well, Numbers Four, Five and Six,  
18 as you can see, are generic, but to the extent that they re-  
19 late to the first three items, they would be involved in that  
20 testimony.

21 MR. STRUMWASSER: It should be clear that at least  
22 with respect to Items Five and Six, there are items assumed  
23 there that have nothing to do with the FERC proceeding.

24 MR. ARMSTRONG: That's right. That's why we're  
25 making that distinction.

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1 MR. STRUMWASSER: There are areas there in which  
2 we expect to have some examination.

3 CHAIRMAN MILLER: Yes. All right.

4 I think in order to wrap this up in a realistic  
5 way, if we can, the Board will rule. But we prefer, first of  
6 all, to have counsel endeavor among themselves to make agree-  
7 ments as they can, and we'll make the appropriate rulings.

8 MR. ARMSTRONG: Mr. Chairman, I just have two  
9 quick points by way of rebuttal.

10 Number one, Mr. McDiarmid suggested that we had  
11 worked out prior to the noticing of this deposition the  
12 question about documents. We worked out the question about  
13 documents, but it was after we got the notice. It's been  
14 worked out as of today. But actually I think it was my call  
15 with Mr. Goldberg after our motion for a protective order was  
16 received by Mr. Goldberg that I first learned that they were  
17 just talking about documents in Mr. Gerdes' personal control.

18 The second point is whether the Board should  
19 attend or not.

20 CHAIRMAN MILLER: The Board isn't going to attend.  
21 You can save your argument on that. We were simply making  
22 an offer. We in no way either wanted to intrude nor particularly  
23 desired to. We have other things in the scope of our duties.  
24 We'll be happy to leave counsel to their own devices. So  
25 don't look for us at that deposition.

MPB/mpb2

1 MR. ARMSTRONG: We wanted to retain our request  
2 for some representation for the purpose of resolving what  
3 we believe are inevitable disputes once we get into this  
4 deposition.

5 CHAIRMAN MILLER: That is the kind of arrangement  
6 which requires unanimity. Unanimity not being present, then  
7 it becomes moot.

8 MR. ARMSTRONG: Fine. I just wanted to make our  
9 position on that clear.

10 CHAIRMAN MILLER: Very well. We appreciate it.

11 It seems to us that there are two concepts, and  
12 we've all recognized concept A and concept B. If the  
13 parties wish themselves and in a mutually agreeable fashion  
14 proceed to set up or establish a procedure A as to Mr. Gerdes  
15 or any other witness, they're going to have to do it them-  
16 selves. They haven't done it so far. They'll be given an  
17 opportunity over the noon hour to consider whether or not  
18 they wish to set up under concept A Mr. Gerdes or anyone  
19 else. And if so, to agree on who the witness shall be and  
20 what limitation of subject matter shall be with the docu-  
21 ments to be produced on either side, what they shall consist  
22 of, and the relationship between an interim type of deposi-  
23 tion -- interim in the sense of either time or subject matter  
24 or whatever -- and availability of further deposition or  
25 depositions should also be discussed.

MPB/mpb3 1 If the parties mutually and unanimously wish to  
2 establish A, the procedure, think it through and advise the  
3 Board. If there is not unanimity then we don't want to be  
4 bothered, because if you're not going to agree then it won't  
5 work. It may be difficult to make it work even when you're  
6 unanimously disposed.

end Madelon  
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As far as B is concerned, proceeding in the normal fashion with as full a deposition as reasonably possible, but with the ability to take subsequent depositions for reasonable cause of some kind which need be established, it'll be under our normal rules if you want to do that, and if you want to discuss it, if you want to name witnesses, if you want to accomplish what is possible while you're all here in the Board's presence, we will make the time available for that purpose, if you don't or can't, then consider the matter closed. As far as ruling, we'll rule once we find out from the parties as to Plan A and Plan B or no plan. We'll make whatever rulings are necessary to establish the record. That's all it will amount to.

We do suggest further that insofar as there might be any disposition to consider Concept A, that on an issue basis, since there are at least six issues that are presented here, three, as you term them, generic, three relating to contracts, one other apparently the subject of some trial testimony and the like, counsel might wish to consider if they're going to go ahead with an attempt to set up or structure a Plan A what witness or witnesses might be considered in that scope on one or more of the issues that are thus set forth. But, again, that is dependent upon what counsel desire to do and can agree to do. Because, if not, we'll go into normal deposition practice, and we'll discuss that after you've had a chance

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1 to prepare.

2 MR. ARMSTRONG: Mr. Chairman, if I might add one  
3 comment: With respect to the Concept B, the full deposition  
4 under the normal rules, I think that the Board should bear in  
5 mind that if we are to proceed on that course it is necessarily  
6 going to divert some attorney resources of PG&E, and we've  
7 already had a problem which I'm sure we'll hear about sooner  
8 or later in getting to the privileged list which requires the  
9 attention of attorneys. And we've already had enough dis-  
10 tractions for other reasons from last time to this. Getting into  
11 the full blown deposition procedure will make that problem  
12 worse.

13 CHAIRMAN MILLER: We understand that these matters  
14 are interrelated. And we will, no doubt, be getting into such  
15 matters as continuation of discovery--

16 MR. McDIARMID: Your Honor,--

17 CHAIRMAN MILLER: --efforts, the privileged list  
18 and other matters that we have previously discussed that  
19 counsel will advise us concerning.

20 Is there anything else that counsel would like to  
21 say on this subject now before we pass on it?

22 Mr. McDiarmid?

23 MR. MC DIARMID: An inquiry, your Honor. We have  
24 previously been proceeding under an attempt to obtain unanimous  
25 agreement among the intervenors and staff so that there was

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1 no possibility of duplication inadvertently, in an effort to  
2 be guided by what we understood to be your instructions to try  
3 to avoid duplication of effort on the part of PG&E , or, for  
4 that matter, on the part of intervenors and staff.

5 If we are going to go the standard deposition route--  
6 I didn't bring along my copy of the Rules but I believe it  
7 permits--

8 CHAIRMAN MILLER: It permits consolidation of issues  
9 as well as parties, if that's what you're heading toward.

10 MR. MC DIARMID: No; I was wondering whether or not  
11 the instructions we thought we were operating under, that we  
12 all had to be agreed, at least in general, before a deposition  
13 was taken, were still operative.

14 CHAIRMAN MILLER: We would think that you would either  
15 be in basic agreement, although each of you has the right to  
16 ask question and the like, but you should be in basic agreement  
17 I think as to what you're going to go into, or else you should  
18 advise both opposing counsel and the Board.

19 We're assuming you are working out, as we had  
20 requested, where you reasonably could, and it's our observation  
21 that counsel have coordinated their efforts insofar as the  
22 intervenors are pursuing discovery and, presumably, depositions  
23 and the like.

24 Now we recognize that there are differences of  
25 view. We haven't suggested you could only have one spokesman

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1 or that individual counsel couldn't be free to address a wit-  
2 ness from different points of view. But if you're getting into  
3 any major fundamental areas I suppose fairness, at least,  
4 would indicate that all counsel should be advised and it  
5 should be brought to the Board's attention.

6 MR. McDIARMID: The problem with that, your Honor,  
7 is that you're potentially requiring that all depositions be  
8 put off until the very, very tail-end of the proceeding, of  
9 the pretrial proceeding.

10 CHAIRMAN MILLER: Not necessarily.

11 MR. McDIARMID: But, for example, I can postulate  
12 a possibility where Mr. Strumwasser, for example, might anti-  
13 cipate that it was important to take someone's deposition  
14 early on that he was particular interested in and whose testi-  
15 mony he felt some concern about perpetuating, whereas the other  
16 parties might not be prepared to take that person's deposition  
17 at the time. Or, conversely, NCPA might be prepared to take  
18 someone's testimony by deposition early on--

19 CHAIRMAN MILLER: Well any time you're perpetuating it  
20 certainly you wouldn't require everybody to agree. If any one  
21 or more parties feel the need to perpetuate somebody's testi-  
22 mony they certainly can do so by filing appropriate notice.

23 MR. STRUMWASSER: The problem I think Mr. McDiarmid  
24 is alluding to is that we agree that there's no need for  
25 agreement to take the first deposition. The problem that

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1 Mr. McDiarmid is alluding to, I think, is if I got a little  
2 concerned about Mr. Gerdes' health and took the deposition  
3 and my concern proved groundless and six months later he feels  
4 he's not ready to take a real deposition, would my having  
5 taken that first deposition have prejudiced his right to take  
6 a second. That's the problem. I'm not sure whether the Board  
7 wants to address that question today.

8 MR. ARMSTRONG: I could say that our view, of course,  
9 is that we're not going to permit or we're not going to agree  
10 to a carousel approach to this. We may be forced to.

11 But I think this is the kind of thing, for crying  
12 out loud, that we ought to be able to agree on, at least the  
13 sequence. I mean, if Mr. Strumwasser thinks that Gerdes is  
14 the key and McDiarmid thinks it's Joe Smith, maybe they can  
15 flip a coin and get together and at least establish a schedule  
16 and go to it. But it's unfair to the witness, any witness, to  
17 say Well gee, because of the vagueness of counsel --

18 CHAIRMAN MILLER: I think we're going to bring that up  
19 under sequence of discovery. Also, I alluded to the fact the  
20 Board can consolidate on issues as well as parties.

21 And if it got to a situation where there was some  
22 whipsawing going on because of multiple parties, we would look  
23 to the witness. We might well consolidate you on an issue if  
24 necessary.

25 We don't want to, we think you can work these things

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1 out among yourselves, but the Board reserves its powers. You  
2 can't expect a witness to be whipsawed, you wouldn't want it if  
3 it were your witness and vice versa. I think you can work these  
4 things out.

5 MR. STRUMWASSER: I suspect, Mr. Chairman, these are  
6 problems that are more easily and justly addressed in reality  
7 than they would be in general.

8 CHAIRMAN MILLER: If you had an exceptional circumstance  
9 the Board, of course, could depart from its usual rule also,  
10 but let's keep it to concrete factors.

11 And at the moment, we suggest you continue to confer  
12 among yourselves and establish your agreed-upon priorities,  
13 and we will be addressing that under what has been called the  
14 sequence of discovery, which has been requested to be placed  
15 upon our agenda, I think by Mr. Armstrong.

16 But this is a good time to start going into those  
17 matters, we're far enough along on the path of discovery to  
18 start establishing some schedules and sequences which are fair  
19 to all. And you may have differing points you want to bring up  
20 under that, too, it isn't just the one issue alluded to by  
21 Mr. Armstrong. We'll put that on our agenda perhaps for  
22 tomorrow or some convenient time.

23 MR. WENNER: Mr. Davidson, you mentioned there were  
24 two subjects that you were interested in and I thought that  
25 you thought that Mr. Gerdes was specifically knowledgeable

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1 about, you referred to one as Attachment Four, what was the  
2 other one?

3 MR. DAVIDSON: There were two conversations, I wanted  
4 to say, about which I wanted to inquire. One is contained in  
5 Attachment Four. The other is contained in the hand-written  
6 notes which comprise the last document of Attachment Six,  
7 particularly, the last page of those notes which bear the  
8 number at the bottom ZWA-51105.

9 CHAIRMAN MILLER: Are those sufficiently discrete  
10 matters that interrogation could be permitted as to those  
11 alone without substantial prejudice to any party reserving  
12 until a later date the full interrogation on discovery that  
13 has been requested by Mr. Armstrong? Or do they relate, is  
14 everything so interrelated that getting into those you're going  
15 to be going around the mulberry bush?

16 MR. DAVIDSON: I would think these two are quite  
17 discrete.

18 CHAIRMAN MILLER: Then we'll ask counsel to give that  
19 some thought before we come up with a final ruling on these  
20 matters which we have asked you to confer about over the noon  
21 hour.

22 MR. FALLIN: My quick reaction, again, not to take  
23 too long about it, is that in a case that involves whatever we're  
24 going to finally have, three million pages of documents,  
25 context is perhaps going to become to overarching issue for any

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1 of those things. And I don't see any one document, any one  
2 conversation going on without spreading beyond -- Well.....

3 CHAIRMAN MILLER: Well, we're inquiring whether the  
4 interrogation of a particular witness as to two particular  
5 documents or areas could be sufficiently discrete or limited  
6 to be approachable in that fashion or not.

7 MR. ARMSTRONG: I think if the questions Mr. Davidson  
8 is suggesting are along the lines of Did you have the conversa-  
9 tion reported in this memorandum, yes or no, then what Mr. Fallin  
10 is suggesting is that somebody is going to want to find out how  
11 they got to that meeting and what were the antecedents or  
12 what was the follow-up. I don't know, I think we had better  
13 think about that as to whether this is a long piece of yarn  
14 we're going to try to unravel or a short one.

15 CHAIRMAN MILLER: Give it some thought.

16 I think there are motions which have been filed by  
17 both PG&E, on the one hand, and by, well at least DWR, on the  
18 other. Those are the long, all-encompassing sets of interroga-  
19 tories which get into widespread and extensive issues of fact  
20 and mixed fact and the kind of thing that one would expect  
21 after discovery has been at least substantially completed and  
22 as one approaches an evidentiary hearing. They have been  
23 filed mutually, two sets.

24 Our disposition is to regard any effort at the present  
25 time to require responses as being premature. On the other hand,

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1 we are going to want to consider with counsel the whole question  
2 of sequence of discovery that has been put, its relationship  
3 to the document production that we'll be discussing tomorrow  
4 and the like.

5           So we won't attempt to go into those extensive motions,  
6 per se. We would regard, at the present time, each of them as  
7 being premature in the present state of the record. However,  
8 we don't want to let it pass without considering with counsel  
9 some possible scheduling, at least, some time relationship as  
10 to both of them because we think they're in the same category,  
11 really.

12           MR. STRUMWASSER: Mr. Chairman, our interrogatories  
13 we have divided into two parts, Part A and Part B. It seems to  
14 be the vogue in this proceeding now.

15           Part A corresponds quite closely to the interrogatories  
16 propounded by PG&E. Part B is somewhat different, and some of  
17 them are genuine contention interrogatories that are functionally  
18 similar to the party interrogatories. Some of them are market  
19 data interrogatories.

20           And in particular with respect to the market data  
21 interrogatories, they represent our effort to substitute the  
22 interrogatory process for the process that Mr. Goldberg had  
23 initiated some time ago of trying to get a joint stipulation  
24 on physical data.

25           What we have tried to do instead is to take the data

1 that we all had sought and we thought we could agree on, and which  
2 seemed not to be so agreeable after all after everything that  
3 had happened -- and what we had sought to do there was simply  
4 to get from PG&E what information it has, what contentions  
5 it has, we're collecting exactly the same information now for  
6 our own purposes, and to identify early on any potential  
7 conflicts so we can resolve data differences early.

8 We would suggest that Part B of our interrogatories  
9 ought not to be juxtaposed against the PG&E fourth set of  
10 interrogatories but, rather, that it proceed on its own. That  
11 is not, again, contention interrogatories based on analysis of  
12 the effort, that, rather, is discovery intended to either resolve  
13 specific issues that don't require the analysis of large volumes  
14 of documents or to identify what remaining factual issues are  
15 fit for discovery or whatever is necessary to resolve these  
16 factual questions.

17 CHAIRMAN MILLER: Well, we will consider that. We  
18 will consider also the contention that one party shouldn't be  
19 required to answer detailed interrogatories until the pre-  
20 cedent interrogatories it had filed had been answered, we'll  
21 get into some of those matters too.

22 We'll ask counsel mutually look through your long  
23 sets of interrogatories and mark those that you believe are  
24 not premature, such as the example Mr. Strumwasser has given  
25 and, Mr. Armstrong, you may have some on yours.

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1 Mark off those you feel honestly are susceptible of  
2 answer at this time in advancing it and not the kind of thing  
3 that would require either additional information or a response  
4 from the other parties. Mark those as you go along, that will  
5 be helpful to us when we get to it possibly this afternoon.

6 I think we're close enough now that we'll recess  
7 until 2:15. At that point, remember, the Staff is going to  
8 examine some matters, I believe, on its motion, Staff motion  
9 to compel. And whatever, we would suggest conferences among  
10 counsel on several things, some of which the Board might want  
11 to look at too, perhaps by giving a little longer lunch break  
12 we can review it.

13 Anything further?

14 (No response.)

15 (Whereupon, at 11:55 a.m., the hearing in the  
16 above-entitled matter was recessed, to reconvene at  
17 2:15 p.m., this same day.)  
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## AFTERNOON SESSION

(2:22 p.m.)

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3 CHAIRMAN MILLER: First of all, we'll take up all  
4 agreements, stipulations and other time-saving devices.

5 Mr. Strumwasser, I see you are gaining yourself and  
6 you are on your feet, do you want to lead off?

7 MR. STRUMWASSER: Sure thing.

8 Mr. Chairman, with respect to first the two sets of  
9 fourth interrogatories, at this point we are prepared to take  
10 the chair's suggestion that the entire body of both sets of  
11 interrogatories be treated as a single exchange which can be  
12 deferred. We think that the bulk of this material can be  
13 deferred.

14 There are specific areas in Part B of our answers  
15 to interrogatories that we're interested in. Mr. Fallin, Mr.  
16 Armstrong and I have been exploring the last half hour or so  
17 the possible substitution of a type A interrogatory for some  
18 of these questions. We have not yet achieved any conclusive  
19 resolution on that, and I think we'll probably pursue it later  
20 this afternoon after the meeting.

21 CHAIRMAN MILLER: All right.

22 I received over the noon hour DWR's response to the  
23 motion which goes to the Part A, Part B, I haven't had a chance  
24 to read that. I'm following now what your comments are.

25 I take it it would be profitable to have counsel

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1 explore further the possibility of the Part B responses and  
2 Part A, treating them on terms of equality, going forward  
3 mutually where possible and agreeing where it is not, unless  
4 you have a particular area that you require the Board to pass  
5 on.

6 MR. STRUMWASSER: I think that's right.

7 CHAIRMAN MILLER: Is that correct, counsel of PG&E?

8 MR. ARMSTRONG: That's correct we've had some  
9 discussions about substituting -- which was of the Type A  
10 deposition, the narrow deposition.

11 CHAIRMAN MILLER: B, I think, was set forth as  
12 being the --

13 MR. ARMSTRONG: We have two A's and two B's. Part A  
14 and Part B of the interrogatory set, I'm getting back to the  
15 deposition. Our discussions have focused on the possibility  
16 of a narrow, limited deposition to help clarify some of the --

17 CHAIRMAN MILLER: You're talking about depositions?

18 MR. ARMSTRONG: That's right.

19 CHAIRMAN MILLER: No wonder I wasn't focusing.

20 MR. ARMSTRONG: I'm sorry, I spoke too quickly.

21 CHAIRMAN MILLER: Let's finish up, first of all,  
22 since I have my mind set on A and B, the objections and the  
23 responses to the massive sets, could we finish that first?

24 MR. ARMSTRONG: That's what we're talking about.

25 MR. STRUMWASSER: There is a relationship.

1 MR. ARMSTRONG: The deposition we were discussing  
2 was a possible substitution for certain interrogatory answers.  
3 But we haven't really resolved anything on it.

4 CHAIRMAN MILLER: Well, do you want to report on  
5 that tomorrow?

6 MR. STRUMWASSER: Please. It's my understanding that,  
7 subject to whatever we can resolve, that the Board is prepared  
8 to take all the objections and motions to compel and everything  
9 under submission until such time as the answers would be more  
10 ripe?

11 CHAIRMAN MILLER: Yes, we're willing to do that. It  
12 does seem to be, at least many of them that we have examined,  
13 seem to be in that category whereas your response is quite  
14 correct, there are a group, however you wish to define them,  
15 which are susceptible of being responded to now on both sets.  
16 I take it you are now agreeing to do that.

17 MR. ARMSTRONG: Mr. Chairman, over the lunch hour,  
18 I did identify half a dozen or so questions which I thought,  
19 in our set of interrogatories, could probably be addressed  
20 early.

21 CHAIRMAN MILLER: Do you wish to take those up now  
22 or do you wish to take them up after you further confer?

23 MR. ARMSTRONG: Whatever. I don't want to leave the  
24 topic with the inference that we concur in the whole notion  
25 that the subject should be dropped entirely.

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1 CHAIRMAN MILLER: No, you're going to report on that  
2 tomorrow.

3 MR. ARMSTRONG: All right.

4 CHAIRMAN MILLER: You've got several aspects that  
5 you're discussing, and we understand none is completely  
6 resolved at the moment, some more than others, but you need  
7 more time but you're definitely going to report back tomorrow  
8 and we'll sort out those where you have been able to achieve  
9 some agreement, and where you haven't, we will either set up a  
10 mechanism or make a ruling.

11 MR. ARMSTRONG: Very good.

12 CHAIRMAN MILLER: I think the Staff was going to  
13 report to us after lunch, are you in a position now to do that?

14 MR. EVANS: Yes, Mr. Chairman.

15 Just before we reconvened, Mr. Meiss and I and  
16 Mr. Goldberg were discussing a motion to compel discovery and  
17 PG&E's response. I think we have agreed to talk about this  
18 some more between the parties and try to work these things  
19 out informally.

20 Basically, the answers that PG&E has given to our  
21 motion to compel show that while we are satisfied with some of the  
22 responses, in some of the responses we think PG&E still mis-  
23 understands what we're seeking. And some of the responses  
24 we think they understand but haven't answered. So there's a need  
25 to sit down and discuss this a bit more. We would like to

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1 do that perhaps today, if there is some time available.

2 And, after exchange of additional information from  
3 PG&E, if there still has not been a complete response, we would  
4 like -- I think we can agree that the Staff will have the  
5 ability to file another motion to compel for those things that  
6 we cannot agree upon.

7 CHAIRMAN MILLER: Well do you wish to do that, rather  
8 than to go ahead with your motion to compel, doesn't that set  
9 forth those as to which you are not in agreement?

10 MR. EVANS: That's true, Mr. Chairman, they've agreed  
11 to supply additional information in their response to our  
12 motion. Perhaps either talking today or some time during this  
13 prehearing conference, we could settle almost all issues.  
14 Those very few which remain, I think, would be appropriate for  
15 a motion to compel.

16 CHAIRMAN MILLER: All right. Well, we'd like to  
17 accomplish as much as we can. We suggest that you revamp,  
18 if necessary, your motion to compel discovery to encompass  
19 those matters which, after discussion, you're not able to agree  
20 upon and let the Board rule upon it. However, as you suggest,  
21 it may well be that either all or a great portion of it will  
22 be susceptible to agreement.

23 So that you'll report, when, tomorrow sometime?

24 MR. EVANS: We'd be prepared to -- I think Mr. Meiss  
25 has volunteered to supply some information. It's not until we've

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1 seen that information that we'll be able to evaluate whether  
2 it really responds to our motion to compel. We can report on  
3 the progress of our discussion, but we can't say definitively  
4 tomorrow whether we're going to be filing an additional motion  
5 to compel.

6 CHAIRMAN MILLER: Well, we'll have to leave that to  
7 you. But we point out, the more you stack up these motions  
8 to compel, withdraw them and revamp them and then file them  
9 again, the more you stack up either for the Board to have to  
10 worry about in-between -- and our trial schedules are getting  
11 pretty heavy -- or else you will wait for the next three or  
12 four month period until we get together, and neither one is  
13 conducive to advancing the cause.

14 Couldn't we find out what it is on particular  
15 interrogatories he's going to give you and whether or not  
16 that's going to be satisfactory? I believe if we got concrete,  
17 we might be able to resolve these things during the next few  
18 days.

19 MR. EVANS: This is at the pleasure of the Board.  
20 We're prepared to proceed arguing our motion to compel today.  
21 If PG&E is prepared, we can do that at the Board's pleasure.

22 CHAIRMAN MILLER: Is PG&E prepared?

23 MR. MEISS: Mr. Chairman, I believe that it may be  
24 premature to proceed further with the motion to compel, which  
25 I thought was the result of our dialogue with the Staff. The

1 results of the motion to compel thus far is that we have a  
2 clear understanding of what it is precisely the Staff wants.  
3 We've also made an agreement with -- in the form of this  
4 response to provide them yet additional information which they  
5 have not yet had an opportunity to inspect to see if it meets  
6 their needs. Now it may be as a result --

7 CHAIRMAN MILLER: Aren't we speaking in generalities?  
8 You're all giving me conversations which, when I try to pin  
9 it down, it's on the vague side, whereas I've got certain  
10 specific interrogatories. I've got Staff's motion to compel  
11 discovery in view of your responses -- I know that you've had  
12 some discussions. As a matter of fact, in your response, you  
13 indicate certain areas where you would supply the information,  
14 others where you pointed out that either the Staff didn't  
15 believe your answer or some other kind of lack of communication.

16 But can't we get concrete and get this disposed of?  
17 You have a lot of discovery ahead of you that we're going to  
18 be talking about.

19 MR. MEISS: That's right, Mr. Chairman, and I'm in  
20 full agreement with you and I think the Staff is as well.  
21 What we're suggesting to the Board is that it may be more  
22 economical of your time and of the hearing time, at least  
23 during this week, to review the material that is to be made  
24 available to the Staff and then if there should be something  
25 that we cannot resolve maybe in the next day or so, bring that

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1 to the attention of the Board so there is one focused item or  
2 two or three that requires a ruling on your part.

3 CHAIRMAN MILLER: All right, instead of holding it  
4 until Wednesday, we'll hold it until Thursday. Thursday morning  
5 let's have a report from both Staff and PG&E counsel. Let's  
6 find out just where you stand in a precise concrete way and  
7 when you can agree, tell us what you've got, and with respect  
8 to matters where you can't agree, tell us your differences  
9 and we'll rule on it and get it over with. Okay? Thursday,  
10 a.m.

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11 MR. EVANS: Mr. Chairman, just a point of clari-  
12 fication. Thursday we'd be prepared to, having abstractly  
13 discussed where we differ, resolve many of those things. But  
14 on those interrogatories which PG&E has agreed to supply us  
15 with additional information, we're still going to need per-  
16 mission of the Board to file a motion to compel.

17 CHAIRMAN MILLER: We won't keep you from filing a  
18 motion, but it seemed to me that right now you can find out  
19 what kind of information they're going to give you. It isn't  
20 that mysterious.

21 MR. EVANS: Some of this is very technical information.

22 CHAIRMAN MILLER: Technical or not, you've got  
23 technical people. I don't want to dance around and around and  
24 around, I think it is possible for you to say what it is your  
25 interrogatories should provide you as you see it. And I think

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1 you should be able to talk to PG&E's experts and see what they're  
2 going to give you and see if they match up or not. I don't  
3 think it is that difficult.

4 So let me hear from PG&E on that. Can we or can we not  
5 get together on the nature of the information to be supplied?

6 MR. ARMSTRONG: I think perhaps the best way to  
7 resolve this and alleviate Staff's concerns--I think they  
8 would like to be able to say they trust us implicitly but  
9 they're not quite prepared to go that far--maybe the best thing  
10 to do would be to have either deferral of this motion or, better  
11 yet, an order that will provide some additional information  
12 within, pick a time, 30 days or whatever, and then if they want  
13 to make a further motion to compel upon receipt of that  
14 additional information, they can make a new motion addressed to  
15 what concerns they may have.

16 CHAIRMAN MILLER: I think that's a good idea, so  
17 perhaps some language you can present to us when you discuss  
18 this which will indicate at least the understanding of counsel  
19 what is to be produced within what period of time. And we'll  
20 enter an order to that effect.

21 MR. WENNER: Can you tell me if load shedding and  
22 load dropping are the same? That seems to be, perhaps, one of  
23 the differences.

24 MR. FALLIN: I don't know if I can answer for  
25 everyone in the room or not. Shedding, I think -- well, it's

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1 almost the same kind of verbal analysis you might go through.  
2 Shedding seems to me to be a more programmed, planned, pre-  
3 arranged. Dropping can be programmed or pre-arranged, it can  
4 also be forced and catastrophic.

5 MR. STRUMWASSER: That's not in accordance with our  
6 understanding.

7 MR. ARMSTRONG: I think it's fair to say most  
8 engineers use load dropping to mean different things, one of  
9 which may, indeed, be load shedding. It just depends, as we  
10 understand it, on who you're talking to. I don't know that the  
11 term "load dropping" has a single definition that is co-terminous  
12 with the definition of load shedding.

13 MR. STRUMWASSER: For purposes of this proceeding,  
14 I think that the term "load dropping" has arisen in connection  
15 with DWR's claim that its ability to drop, literally physically  
16 drop its load, is a substitute for reserves of various kinds.

17 We have used the term "load shedding" entirely  
18 differently because, as we understand it, in the industry when  
19 one talks about load shedding, the principle method of load  
20 shedding is by varying the frequency, and that is virtually  
21 no impairment of service at all, whereas load dropping you are  
22 just giving up power.

23 MR. ARMSTRONG: I don't think there's a clear answer  
24 to the question. I also suspect that none of us lawyers really  
25 know.

1 CHAIRMAN MILLER: I would suspect that's true.

2 MR. STRUMWASSER: That could be a condition which  
3 isn't cured by the time we go to hearing.

4 MR. FALLIN: We all seem to be willing to talk about  
5 things we don't know anything about.

6 MR. STRUMWASSER: That's why we went to law school.

7 MR. WENNER: Well my question arose because I thought  
8 perhaps we were just talking about the same thing in different  
9 words.

10 MR. EVANS: Mr. Wenner, it's my understanding from  
11 our engineer, if it is correct, there is a fundamental difference  
12 between those two things. And again, this is my understanding  
13 from an engineer, that load shedding is an automatic process  
14 which involves underfrequency tripping of relays.

15 Now that sounds -- I'm really not sure what all that  
16 means, but the fundamental point is that it's automatic, whereas  
17 load dropping involves a manual shutting down of feeders off  
18 a distribution system. And there's a difference in the use  
19 of those two devices.

20 MR. STRUMWASSER: The key point is, I don't think  
21 either is more or less automatic than the other.

22 MR. EVANS: I disagree. I think the point I'm making  
23 is load dropping is manual, whereas load shedding is automatic.

24 MR. WENNER: I don't know if we should try to  
25 resolve this here, but before you try to get answers to either

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1 one of those, that perhaps we can disagree on what the terms  
2 mean.

3 MR. STRUMWASSER: I would like the record to be clear  
4 that DWR has consistently used that term to the contrary and,  
5 in particular, has used the phrase "automatic load dropping."

6 MR. EVANS: This is why we asked the interrogatory,  
7 to get these answers.

8 MR. WENNER: Could you tell them what you mean by  
9 load dropping at some point, so they could answer the question  
10 precisely?

11 MR. EVANS: Yes, sir.

12 MR. STRUMWASSER: We're not a party to those  
13 interrogatories.

14 MR. GOLDBERG: We can fix that.

15 (Laughter.)

16 CHAIRMAN MILLER: For information, where did we leave  
17 poor Mr. Cerdes?

18 MR. ARMSTRONG: The last time I heard, he was in  
19 San Francisco high and dry.

20 Mr. Chairman, we left this morning's discussion with  
21 the Board indicating that if the parties were not able to agree  
22 unanimously on the modification of the rules of procedure for  
23 deposition, they would be remitted to the rules, and the Board  
24 invited us to confer in an attempt to resolve some of these  
25 differences over the lunch hour. We didn't hear any suggestions

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1 other than the possible suggestion that we could address those  
2 two conversations recorded in the memorandum.

3 The only thought that I had about that was, if that's  
4 really what is on the top of their list and that's all, it  
5 doesn't make a whole lot of sense to have some group of people  
6 fly across the country to ask 10 minutes' worth of questions.  
7 And we could probably do that better by a written procedure,  
8 interrogatories or written deposition questions. I'm not sure  
9 that's provided in your NRC rules, but --

10 CHAIRMAN MILLER: Written interrogatories.

11 MR. ARMSTRONG: Some sort of written response would  
12 be more expeditious just to find out if Gerdes has a recollection  
13 of that conversation or those conversations.

14 CHAIRMAN MILLER: You have a strong suspicion that's  
15 not what they want, though?

16 MR. ARMSTRONG: I'm not sure what they want.

17 MR. DAVIDSON: I don't think I have to go into  
18 the reasons why attorneys prefer oral interrogatories.

19 MR. WENNER: You used both of those quotations in  
20 your memorandum on the comments on the adequacy of the Stanislaus  
21 commitment, and you there explain why you want them. It's in  
22 your memorandum.

23 MR. DAVIDSON: Yes.

24 MR. WENNER: Items Four and Six, Page Nine and --

25 MR. ARMSTRONG: I'm just not persuaded that even if

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we wanted to say we're going to have an oral deposition re-  
stricted to those two conversations that, after five minutes  
or ten minutes of thought, anybody would really be willing to  
restrict themselves to those two conversations.

MR. GOLDBERG: I don't think anybody has really  
suggested that. They were two examples of why we would want  
to take the deposition of Mr. Gerdes.

MR. ARMSTRONG: In short, I think the possibilities  
of a stipulated modification to the procedures under the rules  
is not in the cards here.

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1 MR. FALLIN: We might ask, or at least propose a  
2 question, whether there is any consensus among Intervenors as  
3 to when they're going to reach a position of being prepared to  
4 take what I characterized this morning as a reasonably full  
5 deposition. I don't know whether anybody has thought in terms  
6 of time for that or not.

7 MR. DAVIDSON: Without conferring with my colleagues,  
8 I would imagine that we will be able to take what you term a  
9 reasonably full deposition about the day the hearings begin.

10 MR. STRUMWASSER: I can say without fear of having  
11 to recant later that we will certainly be able to do it before  
12 the hearing goes on,

13 The problem is that-- The limiting factor in when  
14 we're ready to take the final deposition, so to speak, is the  
15 rate of PG&E document production. That's the source of the  
16 potential information that may require further investigation  
17 through the witness. So our preparedness to take the final  
18 deposition is going to be marked by how close to substantially  
19 complete the PG&E production is.

20 MR. ARMSTRONG: Well, if it might advance the think-  
21 ing on this I would simply say that the production from the  
22 executive offices, in particular of Mr. Gerdes' files, has  
23 been completed. I think Mr. Gerdes' files were completed some  
24 time ago, and I don't have the specific times in mind.

25 While there is always the possibility that something

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1 else might turn up, I think that body of documents is somewhere  
2 in the pipeline and available to Intervenors and Staff for  
3 their review.

4 Now how long it might take them to review it, I  
5 can't say.

6 CHAIRMAN MILLER: Which documents now are you talk-  
7 ing about?

8 MR. STRUMWASSER: Three or four thousand documents  
9 about that have been produced from Mr. Gerdes' own files.  
10 PG&E represents that Mr. Gerdes' files, those files which were  
11 designated as having been his to begin with, have been sub-  
12 stantially produced now, and we expect to have mastery of  
13 those documents within the next 30 days or so. That's not the  
14 problem.

15 The problem is we expect to find more documents  
16 related to Mr. Gerdes between now and the conclusion of pro-  
17 duction.

18 CHAIRMAN MILLER: The Board wishes to confer regard-  
19 ing the matter of the Gerdes' deposition and/or future ones  
20 if they're going to have the same principles; just so I under-  
21 stand, advise me whether or not my notes are correct.

22 The NRC Staff's motion to compel discovery which  
23 reflects now certain agreements and discussions, you are to  
24 report on that Thursday morning, and we will then enter what-  
25 ever order seems to be indicated. Is that correct?

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1 MR. EVANS: That's correct, Mr. Chairman.

2 CHAIRMAN MILLER: We regard that as a Thursday morn-  
3 ing report and you remember, in case we forget to bring it up  
4 as such.

5 MR. EVANS: We will.

6 CHAIRMAN MILLER: Number two are the mutual, lengthy  
7 interrogatories of DWR and PG&E, and responses thereto. The  
8 objections, the allegations of prematurity on some, contentions  
9 that others should be answered, Group A, Group B, as the DWR  
10 analysis refers to it, the studies and discussions thereto by  
11 PG&E are now to be further considered by Counsel and the sub-  
12 ject of a report as to what the Board could or should do, in  
13 whole or in part, to those mutual bundles of interrogatories  
14 Wednesday morning. Is that correct? Tomorrow morning?

15 MR. STRUMWASSER: Yes, sir.

16 MR. ARMSTRONG: That's our understanding.

17 CHAIRMAN MILLER: Are there any others that we have  
18 either deferred, deliberately and intentionally, or otherwise  
19 scheduled? I'm just trying to get our own thinking in order  
20 here before we take a short recess to confer on the Gerdes  
21 deposition.

22 MR. STRUMWASSER: Tidying up the Gerdes deposition,  
23 there is a recent filing by PG&E regarding our request for  
24 computer-stored information that does not require any present  
25 Board action.

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1 CHAIRMAN MILLER: You just want to note that for  
2 the record then, so that it will be reflected when we read  
3 the transcript? Why don't you briefly state what the status  
4 of that is?

5 MR. STRUMWASSER: We had propounded a set of docu-  
6 ment production requests addressed to computer-stored docu-  
7 ments. We have had discussions with PG&E, with Mr. Fallin  
8 and Mr. Meiss about them. And I guess about a week ago PG&E  
9 filed a lengthy response in which it indicated its willingness  
10 to produce certain documents under certain conditions.

11 I think the ball is now in our court. There are a  
12 few more programs I guess which have not yet been documented.  
13 Is that right?

14 MR. MEISS: I think you've gotten everything that  
15 the company has.

16 MR. STRUMWASSER: All right.

17 We are now in the process of reviewing those and  
18 there is a stipulation which we expect to be able to enter  
19 into without need to resort to the Board to an order limiting  
20 the use of those documents to protect PG&E's proprietary  
21 interests, and we expect that that will be presented to the  
22 Board, and we then expect to be asking PG&E to produce  
23 selected programs from that.

24 There is I think one outstanding request regarding  
25 the use of certain kinds of programs, but we are just not

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1 prepared today to discuss those.

2 CHAIRMAN MILLER: At least you're in essential  
3 agreement, and you are mutually producing and processing those.

4 MR. STRUMWASSER: That's right. And I might add  
5 we appreciate the cooperative attitude PG&E has shown.

6 CHAIRMAN MILLER: I'm sure you are.

7 Anything else that should be reflected in the record  
8 as a housekeeping matter, so that requests are either acted  
9 upon or resolved by the parties?

10 (No response.)

11 The Board will take a brief recess to discuss the  
12 Gerdes deposition.

13 Do you wish us to consider also other kinds of  
14 depositions?

15 MR. STRUMWASSER: I have not had a chance to ex-  
16 press our view on the Gerdes deposition.

17 CHAIRMAN MILLER: Go right ahead.

18 MR. STRUMWASSER: I wonder if I could just briefly.

19 We did not approach PG&E about the Gerdes deposition  
20 at the lunch hour because it was our perception, on the basis  
21 of our previous conversation, that PG&E was not anxious to  
22 proceed with that deposition if it could avoid it. And we  
23 had nothing to offer them that would make the proposition  
24 attractive to them.

25 But in our view there is still a real value to the

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1 kind of Type A deposition that the Chair had described before  
2 where we could proceed to ask questions to narrow anticipated  
3 defenses, to identify who the key witnesses are, to locate  
4 documents that are and are not important, and we think it is  
5 valuable that we keep these two, the Type A and the Type B,  
6 separate. We seek still to do that.

7 What has confounded our analysis here somewhat is  
8 that Mr. Gerdes we thought was, and I still think was a reason-  
9 able Type A person, given his--

10 CHAIRMAN MILLER: Let's be sure that we have the  
11 position of Counsel on the Gerdes deposition as to whether or  
12 not it is or could be a Type A. I'm not sure that we have  
13 that clearly. We understand the situation as to Type B, but  
14 we're not certain as to the positions of the parties on Gerdes  
15 as a potential Type A.

16 MR. STRUMWASSER: Okay. Our view is, and I think  
17 all the Intervenors and the Staff agree, we were only in-  
18 terested in Mr. Gerdes as a Type A at this stage of the pro-  
19 ceeding. We think that he was intimately involved in certain  
20 of these transactions; in others he was more tangentially  
21 involved but would have some information.

22 Although we did not want to foreclose ourselves  
23 from discussing those subjects, the deposition would be self-  
24 limiting by the fact that, for example, we know that his  
25 involvement in the Northwest intertie transaction was

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1 substantially more intimate than his involvement in the Power  
2 Pool Agreement. So we wouldn't ask the same kind of questions  
3 to the same extent.

4 But we thought he would still be a valuable person  
5 to have identify for us the people and documents that he thought  
6 were important in this round on these issues, and to the extent  
7 we could, to plumb the depths of his memory about what he  
8 remembered about the transactions.

9 In general, our view was that those kinds of ques-  
10 tions are best addressed to what I had referred to previously  
11 as the department head level people, and we have retained that  
12 view, but we think that Mr. Gerdes, first of all for some of  
13 these, he functioned very much like that during the early '60s  
14 and secondly, the problem arises that has led us to some of  
15 the confusion between Type A and Type B with respect to him,  
16 and that is that there exists a good reason to treat him -- to  
17 take a Type B deposition, and that is his advanced age.

18 Our problem with taking a Type B deposition of  
19 Mr. Gerdes or anybody at this point is that we are not afraid  
20 of anybody doubting our good faith in proceeding with a Type A  
21 deposition. We're not afraid in principle that there will  
22 be good cause to take a second deposition later.

23 Mr. Armstrong used the phrase "rule of reason," and  
24 I think that's a useful concept to identify here because we  
25 really do, before we take any Type B deposition, we do not

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1 want to get into a rule of reason analysis on whether we can  
2 take a further deposition. If we don't have a per se rule  
3 such as, for example, a per se rule allowing a second deposi-  
4 tion of a septuagenarian, then we don't want to get into it  
5 because we know that inevitably there is going to be dis-  
6 agreement between Mr. Armstrong and us.

7           When we get to the second deposition we are  
8 going to get questions about when did you get this document,  
9 when did you read this document. Well, I don't think you can  
10 ask him questions about that document then because you should  
11 have read it if you didn't read it. And we just don't want to  
12 get into that kind of a protracted, petty motion practice.  
13 That could just cause far more difficulty than it would be  
14 worth, and cost us much more time than it would save by taking  
15 an early deposition of this witness.

16           We think that because of Mr. Gerdes' status as a  
17 very senior man, and the actuarial problems that the Chairman  
18 alluded to, there may be reasons to take his deposition now  
19 that sort of create a spillover effect from the Type A depo-  
20 sition to a Type B, but we would like to take it under the  
21 Type A circumstances or not at all at this point.

22           That is to say we are just not prepared at this  
23 time to take our one and only deposition; we're not prepared  
24 to defend our efforts to take a second deposition through a  
25 rule of reason analysis in which we have to trace back the

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1 history of our preparation in this case.

2 So we would like to have the opportunity to take a  
3 Type A deposition of Mr. Gerdes. If we cannot have Mr. Gerdes,  
4 we would like to have the opportunity to take Type A deposi-  
5 tions of one or a small number of these department head level  
6 people about current topics that are clearly important to us.  
7 And we would like to do that without any prejudice to our  
8 right to take Type B depositions later on.

9 If I may also, just to allay any fears about the  
10 nature of our Type A depositions, as I envision the Type A  
11 deposition it would be something that any member of this Board  
12 or any of the attorneys here would recognize to be functionally  
13 different than a pretrial deposition or trial testimony.

14 I don't expect to use a lot of leading questions.  
15 I don't expect to try to, you know, handle him like a hostile  
16 witness. I really do expect to be asking questions in which  
17 we induce the witness to give us a narrative and then what  
18 was said and who said it, where was it written, who was in-  
19 volved; the kind of questions that you would take if you were  
20 sincerely trying to find out what the lay of the land is in  
21 that great mass of documents and bodies that represents PG&E.

22 MR. ARMSTRONG: If I might make a couple of obser-  
23 vations, I think it would be helpful.

24 It seems that the only feature of what the Board  
25 originally suggested that is now being called Type A, the only

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1 feature of that which Intervenors, or at least Mr. Strumwasser  
2 wants preserved is the feature which enables them to have what  
3 he has now called the per se rule entitling additional depo-  
4 sitions. And it is that feature to which we object.

5 As far as the rule of reason concept goes, our  
6 concern here is that we know that we have produced the docu-  
7 ments or the body of documents which are most likely to generate  
8 papers signed by or addressed to Mr. Gerdes.

9 Now as far as we're concerned, the only remaining  
10 justification or rationale for jumping in, if I might use that  
11 term, to a Type B Gerdes deposition is the assertion that his  
12 age makes it more likely that he won't be around later for a  
13 second session or a final one-session deposition. But if that's  
14 the thought then I suggest that we're not really talking about  
15 a discovery deposition, we're talking about a preservation of  
16 testimony deposition, a trial deposition, as some people use  
17 the phrase.

18 And if it is that kind of a deposition then I am  
19 constrained to suggest that the very reasons for having an  
20 early deposition with a right to, without question, take another  
21 shot later suggests also that the Board ought to come or they  
22 are not going to get an opportunity to observe this witness  
23 as a live witness either.

24 So you can't have it both ways, it seems to me. If  
25 your logic is pulling you in the direction of saying Yeah, gee,

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1 we had better ask whatever questions we've got in the top of  
2 our mind now because he isn't going to be around later, that  
3 logic I think supports our request that the Board, or at  
4 least a representative, attend.

5 If on the other hand the thought is this is just a  
6 discovery deposition and the fellow is going to be around  
7 later and we'll take a second session later, I suggest that  
8 there is no reason then to do this right now.

9 And I say this especially with the thought in mind  
10 that the executive office files have been produced and pre-  
11 sumably can be reviewed within some kind of a reasonable time  
12 frame. We're not talking about a delay of years. But that is  
13 all within their peculiar ability to control, like if they can  
14 review documents in 30 days, they can take this deposition in  
15 30 days. That's all we're really asking.

16 We will put him forward for deposition at any time  
17 but we would like to have some kind of a reasonable ground-  
18 rule. That's all we foresee.

19 MR. WENNER: What is your definition,  
20 Mr. Strumwasser, of Type A? What do you contemplate? These  
21 six things in the notice of deposition?

22 MR. STRUMWASSER: My impression of a Type A depo-  
23 sition is that it would not be substantially restricted as to  
24 scope because frankly, the deponent would need very little  
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1 protection. The whole purpose would be to identify what he  
2 does and does not know, and the extent to which he can help  
3 direct us to more precise discovery.

4 So, for example, if I were to make out that list,  
5 which I didn't, -- I contributed to the list but I didn't make  
6 the complete list -- I would have omitted the California Power  
7 Pool if I was going to try to be parsimonious about scope. But  
8 I think it is terribly useful; since you've got the man there,  
9 we ought to be able to ask him, since he was an officer of  
10 the corporation at the time when that agreement was entered  
11 into, what was your role, did you have anything to do with it,  
12 who were the main people involved in this, and whatever else  
13 you wanted to find out about it, and to what extent did it  
14 affect your operation of the corporation.

15 So I view it as going to the entire scope of this  
16 man's testimony, this man's experience with the corporation  
17 during this relevant period, and permitting us to identify what  
18 it is he knows, without wearing the man out, without being  
19 abusive or difficult with him, without trying to extract ad-  
20 missions from him, because frankly that's not what this wit-  
21 ness' deposition would be about.

22 This witness' deposition would be about finding out  
23 what are his representations as to the kinds of things, where  
24 the documents are, where the witnesses are, and what does he  
25 have to say about the defenses that we anticipate PG&E might

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1 propound.

2 MR. GOLDBERG: I think the Staff more or less agrees  
3 with Mr. Strumwasser. If we recall the context in which this  
4 whole suggestion arose, it was through the frustrations of all  
5 the parties and the Board in dealing with the mass of docu-  
6 mentary discovery. And the Board just said, "Look, there may  
7 be a way to cut through this, there may be a way to find out  
8 that you need a lot less documents if you just get some know-  
9 ledgeable corporate official and notice his deposition and  
10 start asking questions about where the important documents are,  
11 who are the important people."

12 That's exactly how the Staff views the Type A depo-  
13 sition. To the extent that it can be useful by pursuing that  
14 course, it would be foolish to narrow the scope down because  
15 we would like to be able to use this witness to narrow the  
16 amount of documents we have to go through on all the issues.

17 So we think that it is just a wise thing to follow  
18 the Board's suggestion with respect to all issues. And here  
19 we have one man who has a fairly great amount of knowledge  
20 about many of the issues in this case, and if we can just  
21 simply ask him, "Okay, where are the important documents, who  
22 are the key people we ought to talk to," we can maybe cut  
23 through this discovery a lot more quickly.

24 That's what we want to gain by deposition of  
25 Mr. Gerdes.

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1 MR. FALLIN: Mr. Chairman, --

2 CHAIRMAN MILLER: I think Mr. Matt comes next.

3 MR. MATT: If I might be of assistance, Mr. Chairman,  
4 to give you an idea -- and I'm in agreement with what the  
5 Staff said and what Mr. Strumwasser said -- I have the testi-  
6 mony that was filed by Mr. Kuder, who has been referred to  
7 before, in the FERC-7777 case. Throughout his testimony  
8 Mr. Kuder refers explicitly and implicitly to Mr. Gerdes, to  
9 letters Mr. Gerdes wrote, to meeting he went to, to actions he  
10 took.

11 In the type of Type A deposition that we're talking  
12 about, the thing would be to sit down with Mr. Gerdes and say,  
13 "Who did you go to these meetings with, what memos were written,  
14 who did you discuss it with," and be able to put together the  
15 path that was followed so we could then begin going through  
16 this mass of discovery and, rather than sort of -- and I don't  
17 -- floundering through it, looking for everything, he can help  
18 us organize or direct our search.

19 It may also help us to organize and direct our  
20 search as to the additional large amount of material which  
21 has not yet been produced by PG&E. I think that's the type of  
22 deposition we're talking about.

23 And I think again the testimony of Mr. Kuder makes  
24 clear just how involved Mr. Gerdes was directly in the Pacific  
25 intertie and implicitly, at least according to Mr. Kuder's

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1 testimony, in the California Power Pool since Mr. Gerdes, in  
2 many cases, spoke for the California companies before Congress,  
3 in meetings with various departments of the government in  
4 the building of the intertie, and spoke on behalf of the  
5 California companies, that is, the California Power Pool.

6 That's the way I would view a Type A deposition,  
7 and I think it would be useful.

8 CHAIRMAN MILLER: What kind of documents do you have  
9 in mind. If the gentleman was involved in as many activities  
10 over a period of time as you've indicated, do you really think  
11 it's likely he's going to remember who was present at this  
12 meeting, who was present at the other meeting, and that kind  
13 of thing? Aren't you going to have access to some notes,  
14 memoranda, minutes or whatever?

15 MR. MATT: There are two ways to answer that ques-  
16 tion. The first is we have assembled documents which either  
17 Mr. Gerdes has referred to -- he is the signatory, he is the  
18 receipient -- as a result of discovery. Again, and it happens  
19 to be a very good example, Mr. Kuder's testimony assembles a  
20 number of documents which he presents as exhibits which were  
21 signed by, sent by, or sent to Mr. Kuder -- to Mr. Gerdes,  
22 or meetings which Mr. Kuder attended as counsel for the company  
23 with Mr. Gerdes.

24 I think we can put together the various pieces of  
25 paper that --

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1 CHAIRMAN MILLER: Well, why doesn't that give you  
2 the discovery information which you feel is so necessary to  
3 take Mr. Gerdes now?

4 MR. MATT: Because here's a letter; we have no idea  
5 who he discussed the letter with, if anybody, what were the  
6 various considerations, what was the relationship of that letter  
7 to certain other events? We have the individual events but  
8 without being able to put them together.

9 CHAIRMAN MILLER: If I'm following you, it seems  
10 me that when you get right down to it, there are a number of  
11 documents, and necessarily so if there were this many trans-  
12 actions involved, which do either indicate his presence, or  
13 letters to or from him, and the like.

14 Now that gives you a substantial body of information  
15 for discovery purposes, probably more precisely than the  
16 gentleman could without having them shown to him, certainly  
17 as to his memory of the dates and the like.

18 What you're suggesting then, the reason that you  
19 want to take this so-called discovery or Type A deposition now  
20 is because you wish then to probe further to find out what his  
21 reasoning was here or why this-- It seems to me we're getting  
22 into matters beyond discovery, material which is already--  
23 Maybe I'm not following you.

24 MR. MATT: Mr. Chairman, I'm not trying to go  
25 through his thought processes as to why -- which would be a

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1 substantive deposition, Type B deposition, if you would. I'm  
2 afraid to categorize these like that, but I guess that's where  
3 we're going.

4 CHAIRMAN MILLER: You want more than what appears  
5 from the documentary record which you can derive now from  
6 Mr. Kuder, who is mentioned in a number of documents, some of  
7 which or many of which involve participation of the deponent.

8 MR. MATT: Not only-- Or from the documents we have  
9 already received in discovery which are attributed to Mr. Gerdes.

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10 MR. STRUMWASSER: Mr. Chairman, you need to be able  
11 to put them together.

12 CHAIRMAN MILLER: That's what I'm trying to find  
13 out, because we have conflicting desires here of the parties,  
14 and that's what we want to think about.

15 It is one thing to tell us what you want essen-  
16 tially is discovery, you want to see who to talk to and what  
17 to go to, but then if on the other hand you have a certain  
18 body of information which would satisfy part of the discovery  
19 requirements but you still want to do something else, it's  
20 the "something else" then that we've got to look at, too, and  
21 evaluate since you can't agree on the nature of the deposition  
22 of Mr. Gerdes at this time.

23 MR. STRUMWASSER: Mr. Chairman, I failed to mention  
24 about documents, and I had intended to.

25 My intention with respect to the deposition of a

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1 Type A person is that we would use almost no documents. The  
2 only documents I can conceive of us using in a Type A depo-  
3 sition would be the final contract, one of these major con-  
4 tracts that everybody sort of has around where you might ask  
5 him questions about specific clauses, how did this come about,  
6 why is it there; that kind of thing.

7 I would not propose to use documents for impeach-  
8 ment. I would not propose even to refresh recollections with  
9 documents at this point because of the -- because if you just  
10 eliminate the possibility of using a lot of documents you  
11 avoid a lot of the potential for slipping over into a Type B.

12 CHAIRMAN MILLER: That makes more sense, frankly.  
13 We're not now trying to pass judgment either way. The Board  
14 hasn't made up its collective mind. We're going to recess  
15 shortly. But you're telling us something different than  
16 Mr. Matt is telling us. They're both useful, but I see them  
17 as two different things.

18 MR. STRUMWASSER: That's right. And for our pur-  
19 poses, we would be happy to have the Board authorize the Type  
20 A deposition subject to just that kind of a position.

21 CHAIRMAN MILLER: Anything further that anyone  
22 wishes to say?

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MR. FALLIN: Yes, Mr. Chairman.

We began with Mr. Strumwasser and his description of what he would ask at a deposition and the matters he would inquire into. It inevitably evolved into what I think sounded to me, and I think would have sounded to any lawyer, like a conventional deposition, which is: You go down a list of things a guy is familiar with, ask him what he did, what he didn't do, what he wanted to do or what somebody else wanted to do. I don't know of any way of-- The reason that that kind of description falls out is because that's the kind of witness we're talking about.

I don't know any way that I could take-- I looked at the list of six items on the notice. I have a hard time figuring out what the other items would be, those are the items which are not going to be gone into under that description. When you get to Item A, which is "a contract," and then subsumed under Item A is all other agreements that relate in any way to that, to that contract. Basically we know enough, having discussed it all morning, what kind of an individual, what kind of a witness Mr. Gerdes is. And, I guess like blood types, you'd be prepared to give him a name, and he looks like Type B to me, just in terms of the kind of witness you're talking about.

Perhaps illustrative of that is Mr. Goldberg's point that, Gee, what we wanted to get to this witness for is

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1 to try and get to some things and be able to shape discovery  
2 and perhaps limit it.

3 Well, we're substantially past the point of any  
4 useful purpose for this witness. We've already produced  
5 from the thirty-third floor all the retired executive files,  
6 we're now finished with the current executive files. There's  
7 simply no way that his deposition is going to tell us a lot  
8 about what to do in terms of whether we need 4700 graphs  
9 from Electrical Engineering or not.

10 The next step, I guess, is Mr. Matt's position  
11 which seems to be kind of two things: one, he's got an FERC  
12 proceeding and wants to get into something here that  
13 would relate to that. --leading into his next statement,  
14 which is: he wants to conduct a Type B deposition. He wants  
15 to pull in all the documents they've got listed by author  
16 and addressee and everything else, and ask the man about  
17 them. To which Mr. Strumwasser's response was, whatever  
18 Mr. Matt would do with all the documents, he wouldn't have  
19 any documents of his.

20 I think there is no consensus other than what  
21 I would describe as the felt fact, that in dealing with  
22 this witness we're dealing with a witness who is going to  
23 be logically and sensibly taken as a broad gauge, fairly  
24 lengthy deposition process. And apparently Mr. Matt is the  
25 only one at this point who is willing to say he has

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1 accumulated the documents and gathered up in such a fashion  
2 that he's prepared to go ahead and take the deposition,  
3 and then, if it became necessary to do it later he'd have  
4 to -- he'd be willing to show why he didn't know about the  
5 facts.

6 MR. ARMSTRONG: Mr. Chairman, I'd like to add a  
7 sentence or two; and that is: I think you can get a  
8 flavor now for the problems we perceive in trying to give  
9 some reasonable protection to this witness.

10 The various parties for, I'm sure, reasons that  
11 are very good in themselves, have different perceptions  
12 about what they want to do with this witness initially. But  
13 they all, I think, with the possible exception of Mr. Matt --  
14 and I'm not even sure he would want to be excepted -- would  
15 like to have another opportunity at a later time to come  
16 back and do a second time whatever it is they didn't do the  
17 first time.

18 Well, it isn't fair to the witness to say,  
19 Listen, Mr. Gerdes, come in the first time and I'll tell  
20 you what: Mr. Strumwasser is going to ask you this kind of  
21 question about the Pacific Intertie, Mr. Matt is going to  
22 ask you a different kind of question, neither is going to  
23 ask the same question of the type that the other did, but  
24 they're each going to want to come back a second time and  
25 ask as to the same topic the question they didn't ask the

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first time.

You know, you just can't work that kind of thing out. If that's what they're going to do, they're going to end up having two depositions on the same subject with the same witness, and it just gets murky. And that's why were here.

And I would ask the Board, whatever the ruling is, can we have some clear guidance as to what it is we've got to do, because if they think they are really describing some limitations that are at all useful, I can't comprehend what they are. The only thing that I hear over there is they would like to take his deposition now, not be precluded from taking a deposition later of the same witness. I understand that that's what they want and I don't like it.

CHAIRMAN MILLER: I think Mr. Strumwasser said that he'd like to be able to take it now for reasons that he has described. But if it's going to get into a hassle on that, he ought to be able to take it when he's got more documents on discovery and he'd rather forego the earlier arrangement and have a full fair shot at the witness later, I think that was Mr. Strumwasser's position.

MR. STRUMWASSER: Exactly.

CHAIRMAN MILLER: I take it probably that's about the kind of thing the Board is going to have to look at.

Mr. Davidson.

MR. DAVIDSON: This is really an inquiry because I

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1 haven't done my research. It's been at least 10 years since I  
2 have defended a major anti-trust case in the courts.

3 But I remember companies which I represented, which  
4 were companies like General Motors, producing major witnesses  
5 every six months as discovery progressed. Where is this idea  
6 that --

7 CHAIRMAN MILLER: It's not unusual.

8 MR. DAVIDSON: -- in a massive anti-trust case, you  
9 only have one crack at a witness? That may be true for an  
10 automobile accident where you can just go through what the  
11 witness saw, but I mean, it makes a mockery of the idea that  
12 discovery can begin with depositions, they can come at the  
13 middle, the beginning or the end. Obviously, at the beginning  
14 you don't have documents, at the end, you have completed  
15 documents.

16 At least my decade-old recollection of the practice  
17 is a man like Mr. Gerdes can be deposed as a matter of right  
18 more than once, as long as it's clear there's no attempt at  
19 harassment or exhaustion or any improper effort. I don't think  
20 anyone is suggesting that anything improper is being tried here.

21 This whole discussion the last two hours, I think,  
22 has basically revolved around a single question: if Mr. Gerdes  
23 is deposed now, can he be deposed again later. And I think the  
24 answer in big cases is yes.

25 CHAIRMAN MILLER: The answer in big cases is yes.

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1 However, in most anti-trust cases, more than one deposition is  
2 given factual witnesses. However, usually most courts have  
3 ruled that you're not permitted just to have repetitive  
4 examinations in order to cover later matters that you could  
5 and should have covered in the earlier ones. In other words,  
6 counsel must make a good faith effort to examine with reasonable  
7 fullness at the time that he takes the first or second depo-  
8 sition. And the succeeding depositions are both shorter and  
9 more limited in scope than the first or first and second,  
10 I think is the way the courts around here tend to rule.

11 MR. ARMSTRONG: Mr. Chairman, we don't have any  
12 disagreement with that general proposition. The difficulty we  
13 get into, when we first started our conference telephone calls  
14 among counsel, is still the difficulties you have today,  
15 and that is that the Intervenors and Staff are not proceeding  
16 through the discovery process, that is, their own preparation,  
17 at the same pace or with the same approach.

18 And what we wanted to avoid was, just as an illustra-  
19 tion, Mr. Matt now has his testimony in FERC of Mr. Kuder.  
20 Mr. Strumwasser told us over lunch he doesn't have it yet, so  
21 now Mr. Matt can go in and work off the documents he's got and  
22 then six months later Mr. Strumwasser gets those documents and  
23 he wants to go back.

24 All we're asking is, even if we're going to have  
25 multiple sessions, let's at least decide what all of the

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1 questioners are supposed -- what homework they're supposed to  
2 have done before they walk in the door, so that Mr. Strumwasser  
3 hasn't done homework on Documents 1 through 1000 and Mr. Matt  
4 has read 1000 to 2000, and then you just get all jumbled up,  
5 that's our concern.

6 CHAIRMAN MILLER: Yes, I think that courts, in  
7 scheduling and certainly administrative agencies, do look to  
8 whether multiple parties and so forth -- do look at essential  
9 fairness, which is to say it's not just once and once only,  
10 but on the other hand, it isn't interminable, it isn't unfair,  
11 it's isn't unnecessary, prolonged and repetitious and where  
12 your multiple parties, you don't allow any whipsawing. So I  
13 don't think we are in any different view as far as the basic  
14 principles governing anti-trust.

15 MR. STRUMWASSER: I was going to suggest as the Board  
16 retired to deliberate this question, if the Board is inclined  
17 to authorize some form of Type A deposition that it outlined  
18 for us, the general characteristics of those deposition that  
19 it finds would be appropriate, and then give us the opportunity  
20 to present the Board with a written order in the morning to  
21 memorialize that.

22 Because our experience has been that, when a Board  
23 directive comes from the course of a multi-hour discussion,  
24 each of us seizes on different phrases, and the opportunity for  
25 confusion is there.

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CHAIRMAN MILLER: I think that's true.

MR. ARMSTRONG: A positive suggestion of, you know, what we'd like to see as a homework assignment, cutting it to the Gerdes deposition, is that the questioner at least represent that they have read the Gerdes files which have been produced and the executive files which have been produced.

And, if they can all say Yes we have done that, then we'll all be on the same wavelength and we'll know at least what was supposed to have been done, so that later on down the road if they say Gee we got into the Department of X, Y, Z and found this goldmine, there won't be any argument.

MR. STRUMWASSER: That's exactly what we're trying to avoid here. Our proposal instead was -- in fact, I expect before we take the depositions, the files with Mr. Gerdes three-letter code, whatever it is, that those would all be read.

But what we would now propose to do, and we would propose for a Type A deposition is that none of us would be bringing to the deposition Mr. Gerdes, our own copy of Mr. Gerdes files and start asking him the kinds of interrogative questions about Isn't it true that you really did X that would lead to the abuse that Mr. Armstrong is concerned about, and, correspondingly, we would then not have to make any kind of a showing about what the relationship was between a newly discovered document and an old discovered document and how much

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1 we did or didn't know so that we would have to then fight about  
2 the history of our own discovery process.

3 CHAIRMAN MILLER: How would you control Mr. Matt,  
4 then? How would you have the harmonious approach among you?

5 MR. STRUMWASSER: That's precisely why I had -- I,  
6 of course, would not propose to control Mr. Matt, but to give  
7 the Board and Mr. Gerdes the assurances necessary to allow us  
8 to proceed. That is why I would like to have a written order  
9 in which procedures such as the use of documents and the nature  
10 and the purpose of the depositions would be set out in writing.  
11 I'm sure Mr. Matt and everyone else would adhere to that.

12 MR. MATT: I agree with what Mr. Strumwasser is  
13 saying. I did intend--in my remarks, Mr. Chairman, I did not  
14 intend to suggest that because of the existence of these  
15 documents, the existence of this testimony, that then we're  
16 going to sit down at this point and ask Mr. Gerdes Why did you  
17 do this, why did you do that. That wasn't my intent.

18 My intent was only to show that there was a body which  
19 -- a Type A document, just a discovery deposition could be  
20 used to help us to begin narrowing in, focusing in our use of  
21 these documents for the rest of the proceedings.

22 I must object to Mr. Fallin's suggesting that I  
23 wanted to take the deposition for the use in another proceeding.  
24 I think Mr. McDiarmid said on behalf of NCPA and since, on  
25 behalf of Southern Cities, I'm in the same case, we are in a

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1 time bind, we can't do both at once.

2           There is no intent to use what I have in FERC, and  
3 I only used Mr. Kuder's testimony because I have a copy of it,  
4 I was reading it last night and it was a good example, and I  
5 don't intend to use one to cross over to the other nor am I  
6 prepared at this point to take a Type B deposition, I haven't  
7 gone through all the documents. I've gone through a body of  
8 them, people under my supervision have. I'm not prepared to  
9 make my one last deposition.

10           But again my only point in referring to this testimony  
11 was to suggest that there is a body of information and we could  
12 use a discovery-type deposition at that point. And I am in  
13 concurrence with what Mr. Strumwasser is really proposing.

14           MR. ARMSTRONG: Mr. Chairman, I think again the device  
15 is if you don't take the documents the first time, then you  
16 sit the witness down and say Now what did you do at this  
17 meeting and then six months later you say Now, I've got this  
18 document here. It's really foolish.

19           You know, if we're going to have to go to a deposition,  
20 let's try and delineate some topics, some homework, as I put it,  
21 and then just go to it, take the deposition. All this effort  
22 to try to involve some sort of limited procedure and hedge  
23 bets is failing because each one of these various lawyers has  
24 his own idea about how to go forward, and that's fine, but that  
25 disagreement should not impinge, and everybody agrees it shouldn't

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1 impinge on the witness. But I'm afraid it will unless they  
2 just get told Look, take your deposition but it will be assumed  
3 before you take your deposition that you have done this much  
4 homework and you'll be all ready to ask whatever questions you've  
5 got in those areas. If you want to come back later, you're going  
6 to have to go to a different subject matter.

7 And I think that's typically the way it's done where  
8 you have multiple depositions. Oh, of course, if somebody  
9 discovers something new about an old subject area, you go  
10 back into it. But you don't get this sort of thing that we're  
11 hearing today. This is really unworkable, I think.

12 MR. FALLIN: Mr. Chairman, several hours back now  
13 I think you made a comment that perhaps Type A was only going  
14 to work with coordination and agreement between counsel as to  
15 how it might be structured.

16 Listening to the kind of order that would have to be  
17 created made me think that that was an accurate definition.  
18 The order would say nobody could bring a document with him.  
19 Well, if I had an order that said I couldn't bring a document,  
20 the first thing I would do would be to sit down with my docu-  
21 ments and write my 36 or 37 pages of notes on what I was going  
22 to ask questions about and they would all be the subject matters  
23 in all the documents. So the order would then read not only  
24 can you not bring documents, but you're not allowed to consult  
25 with the documents for two months ahead of time.

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The reason I want to bring the documents, the reason I want to take the man's deposition is broad gauged discovery. And if it's going to take place that way, it should be under what, after all, the conventional rules with respect to taking depositions.

CHAIRMAN MILLER: Okay. We'll take a short recess.

(Recess.)

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1 CHAIRMAN MILLER: With reference to the question  
2 of Mr. Gerdes and other depositions, the Board has conferred.  
3 We appreciated the discussion by counsel, which has been most  
4 helpful. We have concluded that while there's no perfect  
5 solution, that the most appropriate way to handle this is  
6 for the Board to receive from the previous suggestion of a  
7 type A, or a type of deposition that was an effort, simply to  
8 advance the discovery to suggest modifications in the normal  
9 kind of deposition procedure for certain purposes. But as we  
10 saw it then and now, it required consent and cooperation of  
11 all counsel.

12 Since that's lacking, for whatever reason, there  
13 is no sense in trying to breathe life into a dead horse. So  
14 we therefore withdraw our suggestion previously made as to a  
15 type A or preliminary type of deposition. We will therefore  
16 be following the normal rules tailored to conform to the  
17 facts of each particular case which do govern the taking of  
18 deposition, and that's our own rules of practice, Part 2.

19 We have analogous rules which are reasonably  
20 applicable, the federal rules of procedure. In that context,  
21 notices to take depositions will be made as heretofore. The  
22 notice to take the deposition of Mr. Gerdes is before us.  
23 Unless it's subject to modification, it will be considered  
24 and construed as a type B deposition in the sense we're using  
25 the term, which is to say normal and usual deposition under

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1 our practice.

2 MR. STRUMWASSER: Mr. Chairman, as one of the  
3 parties who had joined in that notice, we would like to have  
4 the record clear that we are withdrawing from the notice.

5 CHAIRMAN MILLER: DWR then will be considered as  
6 withdrawing.

7 MR. MATT: Mr. Chairman, I think I can speak on  
8 behalf of -- definitely on behalf of NCPA and the Southern  
9 Cities, and I believe on behalf of Staff. If this is going  
10 to be treated as a type B deposition, then the notice will be  
11 withdrawn at this point on behalf of all parties.

12 CHAIRMAN MILLER: Very well.

13 Is that true for all counsel?

14 MR. GOLDBERG: Yes, sir, we're not prepared to  
15 proceed with a type B deposition.

16 (The Board conferring.)

17 CHAIRMAN MILLER: I will say simply that in order  
18 that we not be misunderstood as to what the Board considers  
19 to be the normal and usual deposition practice, the Board  
20 of the NRC and the federal rules of civil procedure, we do  
21 not mean to have said or implied that there can be only one  
22 deposition of a witness, especially an expert witness and a  
23 complicated set of facts.

24 However, we also caution counsel, as you're very  
25 well aware, that we do not expect subsequent depositions to be

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1       repetitious or go into matters that could have been covered  
2       the first time. There are general principles and counsel  
3       applies them all the time in the taking of depositions and  
4       objections thereto. And the more that you adhere to clean,  
5       full shots at a witness when you're taking it, and then have  
6       some reasonable approach for seeking to take additional --  
7       and this happens all the time -- fine.

8                 But insofar as either because of multiplicity of  
9       parties and counsel or because of efforts to needlessly or  
10      unduly take repetitious depositions, there will be a point  
11      where an appropriate motion for a protective order, the Board  
12      would consider it and probably would grant it if it seemed  
13      that the practice was getting out of hand. That's about as  
14      much as we can say.

15                But you're all experienced counsel. You've been  
16      through this before many times, especially in the so-called  
17      A case for a complex matter.

18                Are there any questions while we're discussing  
19      deposition practice? This would be something in the future  
20      and we may not have a chance to discuss it again. But we'd  
21      be glad to entertain any inquiries of counsel while we're  
22      on the subject.

23                I think we've probably said about as much as can  
24      be said. But if there are any questions, any requests for  
25      guidance, we'll be glad to consider them at this point.

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1 MR. ARMSTRONG: I had one small item that maybe  
2 I just didn't hear the later chapter on. But on the subject  
3 of notification about document usage, earlier there was some  
4 difference of recollection. I don't recall now if Mr. Matt  
5 had a chance again to speak to that point. But we have  
6 either an agreement or a direction that the notification  
7 of which documents a witness is going to be asked to speak  
8 to will be furnished in advance.

9 CHAIRMAN MILLER: I think the Board had mentioned  
10 it perhaps once or twice, but we'll state it again just to be  
11 clear.

12 We would expect and request counsel in advance of  
13 the taking of depositions of any witness where you're going  
14 to get into documents, which is probably the majority of  
15 witnesses at least on technical subject matters, we think  
16 that good practice would indicate in advance of taking of  
17 the depositions that counsel would confer among themselves  
18 to indicate what documents are to be used by the interrogator  
19 or interrogators and what documents they wish to have brought  
20 with the witness to the deposition or made available to him,  
21 both ways. The flow of what will be shown to him and of what  
22 he will be expected to either have with him or have readily  
23 accessible, so you don't have to defer deposition to get the  
24 documents.

25 And since you're all going to be taking depositions

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1 and having them taken, the Board requests that counsel  
2 exchange in advance the list of documents or description of  
3 documents, both ways. We think it will enhance your proce-  
4 dures.

5 MR. STRUMWASSER: Just so that we understand what  
6 we mean by a document to be used in a deposition, as I under-  
7 stand it that means a document that will be shown to the  
8 witness or marked for identification or both.

9 CHAIRMAN MILLER: Certainly both, or alluded to.  
10 Perhaps you wouldn't have it there, but you would say 'Don't  
11 you remember you wrote a letter in which you said so-and-so,  
12 and he would say yes', something like that, and then you go on.

13 Well, maybe technically he wouldn't need it, but  
14 just so that you show it to him, either marked as an exhibit  
15 or inquired about, or gets related to -- in terms of subject  
16 matter -- into your record. There's no mystery and no  
17 secrets then about the documents that are going to be referred  
18 to in depositions.

19 MR. STRUMWASSER: Well, the thing I'm confused  
20 about is the last phrase the Chairman used, "was alluded to".  
21 It goes to the comments that were made by PG&E counsel before,  
22 about how if you don't take the documents you still may use  
23 them to help pose questions and stuff.

24 When we get into this the document resources of  
25 my questions to a deponent -- I mean it's going to be impossible

MPB/mpb6

1 to enumerate with any certainty.

2 As long as you don't show them to him --

3 CHAIRMAN MILLER: For information, your background,  
4 you and your mental impression, one of those.

5 MR. STRUMWASSER: Okay.

6 CHAIRMAN MILLER: When it is the point of a  
7 particular question or interrogation, well, in fairness to  
8 the witness and to all other counsel we'd like you to  
9 identify them for the record, just so everybody knows what  
10 you're talking about. It's fairness, I guess, as well as  
11 explicitness for the record.

12 Mr. Davidson?

13 MR. DAVIDSON: I guess, as I've said, it's been  
14 ten years or so since I've been in a major antitrust case  
15 in the courts. But it's usually the procedure that's just  
16 been adopted deprives either party of any opportunity to ask  
17 a question of a witness about a document before the lawyer  
18 for that witness has been able to review that document with  
19 the witness and tell him what, in the lawyer's view, it would  
20 be nice to have that document interpreted as. And I always  
21 thought and always had had a right to directly show a witness  
22 this and say 'What does it mean?' without having to notify  
23 his lawyer a week in advance, and I was going to ask that  
24 question.

25 CHAIRMAN MILLER: Well, when you get right down to

MPB/mpb7

1 it, whether it's a week in advance or at the time, the  
2 established practice in court and elsewhere is before you  
3 show any witness who is represented by counsel in any fashion  
4 a document the first thing is 'Let me see it.'

5 MR. DAVIDSON: Yes.

6 CHAIRMAN MILLER: So then he sees it. So then  
7 he's got the same thing.

8 It's a question between a week, two days, or ten  
9 minutes.

10 MR. STRUMWASSER: There is a difference.

11 CHAIRMAN MILLER: All right. Let's hear from you  
12 then on how you want to handle it.

13 MR. STRUMWASSER: I mean, I'm afraid to go either  
14 way. I think that this Board would want to know whether a  
15 witness who was first shown a document before, saying what  
16 it had to say, asked for a 15 minute recess to confer with  
17 his lawyer, and that's valueable spent time.

18 CHAIRMAN MILLER: I wasn't suggesting that the  
19 witness would confer with the lawyer; I was saying any  
20 lawyer would say 'I want to see the document before the  
21 witness is interrogated about it.' And he has a right to do  
22 it.

23 MR. STRUMWASSER: But the missing step that Mr.  
24 Davidson was referring to is that the lawyer has no way to  
25 ventriloquize what the deponent is going to say if the lawyer

MPB/mpb8

1 only sees it for the first time at the deposition, and  
2 immediately before the question is asked.

3 CHAIRMAN MILLER: Assuming that he doesn't confer  
4 with the witness.

5 MR. STRUMWASSER: But any conference like that  
6 would be on the record.

7 CHAIRMAN MILLER: So I assume it would be indicated.

8 MR. STRUMWASSER: If the procedure that I've  
9 described, outlined, offends Mr. Davidson, I would be happy  
10 to go the other way, which is just that you make it available  
11 to counsel at the deposition prior to using it. But you don't  
12 give him five or 15 or eight number of days advanced notice  
13 what documents you're going to use.

14 CHAIRMAN MILLER: I think sometimes the way it's  
15 handled is whether it's in the nature of rebuttal documents,  
16 so-called or not. It is assumed when you take a deposition  
17 or when you interrogate at a trial, there are certain docu-  
18 ments that have always been marked as exhibits as a pretrial  
19 practice. However, there may be rebuttal documents which  
20 sometimes have not been produced, if it's not within the  
21 scope of produceability. There are some that come up for the  
22 first time at trial in rebuttal.

23 MR. FALLIN: Mr. Chairman, I think that -- you put  
24 your finger on what in today's practice pretty much moves that  
25 thing to trial. I have been in a case in the last -- what? --

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1 two and a half years where I haven't been required to call  
2 in or mark in advance --

3 CHAIRMAN MILLER: It's very unusual that they're  
4 not. It's very unusual because your pretrial practice, pre-  
5 trial examiners are in some circuits, and by the time you get  
6 through with your conferences prior to trial, the marking of  
7 exhibits and the rule that you can't offer an exhibit unless  
8 it's been shown to counsel in advance and made a part of your  
9 pretrial order in some jurisdictions, the opportunity for a  
10 surprise Perry Mason kind of document is rather remote in  
11 today's practice.

12 MR. STRUMWASSER: Not at deposition; only at trial.

13 CHAIRMAN MILLER: Well, yes, trial.

14 MR. STRUMWASSER: I thought Mr. Davidson wanted  
15 to preserve the opportunity to be Perry Mason at deposition.  
16 This perhaps is a theatrical potential, but it still is value-  
17 able.

18 MR. FALLIN: It's one of those great tit for tat  
19 jobs because then comes the great interrogatory question  
20 that deals with every subject matter that every witness knows,  
21 which is listed by numbers. We have kindly numbered all  
22 documents for you, all documents which you contend are related  
23 to Mr. X, relevant to issue Y, and so forth. And if you  
24 want to sit there and answer that one, it's all ready for  
25 you. And if all the data have to be changed for the names

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1 of the individuals --

2 MR. STRUMWASSER: At least we're consistent.  
3 We're not ready for the deposition or the interrogatories.

4 (The Board conferring.)

5 CHAIRMAN MILLER: All right.

6 I think the Board will follow the rule usually  
7 followed in court and in most administrative practice. When  
8 you're taking a deposition, engaging in discovery of that  
9 kind, if you wish, or if it appears reasonably likely that  
10 you're going to interrogate a witness concerning documents,  
11 directly or indirectly, as, say, rebuttal leads to, if you  
12 as an attorney know that there is a reasonable probability  
13 that such documents will be involved, we request that the  
14 witness and his counsel be notified in advance of what  
15 documents it is likely that he will be interrogated as to  
16 the subject matter or as to the document.

17 Now, as far as documents which are going to be  
18 used by the interrogator, we will not require their advanced  
19 production. We do require that any document prior to  
20 interrogating a witness must be shown to all counsel  
21 participating in the deposition and including any attorney  
22 who may be representing the witness if we have that situa-  
23 tion.

24 But in any event, if you're going to use a docu-  
25 ment and you don't want to do it in advance, you won't be

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1 required to, but you will be required to display it to all  
2 counsel participating in the deposition before interrogating  
3 the witness.

4 I think that's about as far as the Board needs  
5 to go at this time. I don't want to speculate what might  
6 happen, but I think those are the general rules of practice  
7 that we will follow.

8 Any comments?

9 MR. EVANS: Mr. Chairman, may I ask for a clari-  
10 fication?

11 CHAIRMAN MILLER: Yes.

12 MR. EVANS: I'm not sure what exactly the procedure  
13 will be. A document must be shown to all counsel, as I  
14 understand it.

15 CHAIRMAN MILLER: At the deposition, when it has  
16 not been previously -- well, it has to be shown so they know  
17 whether it's the same as one shown previously, yes. Now  
18 that's just customary practice.

19 If I want to ask a witness a question about a  
20 document, all courts and all administrative agencies that  
21 I'm familiar with, they will have to show it to counsel. If  
22 not, pass it around. That's time consuming, so you normally  
23 pass it around at the beginning of the day. But if you  
24 don't, then technically -- and it's been filed -- all counsel  
25 have the right to see a document that you're going to ask a

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1 witness a question about before you pose any questions.

2 MR. EVANS: And that is the only requirement  
3 that you've imposed on us.

4 CHAIRMAN MILLER: The document that you are using  
5 as the interrogator.

6 MR. EVANS: No.

7 CHAIRMAN MILLER: Or if the witness is going to  
8 be asked about matters where he's going to need documents  
9 or he may want to refresh his memory and the like. We're  
10 asking and directing you to advise in advance, other counsel,  
11 especially counsel for the party whose witness he may be,  
12 what documents you expect to have produced and within the  
13 file, and therefore to use at his deposition and make it  
14 more useful and not say 'Gee, I don't remember who was there,  
15 but there's a minute that says it' and so on. You're just  
16 helping yourself in that regard.

17 MR. EVANS: Thank you for clearing that up.

18 CHAIRMAN MILLER: Any questions?

19 MR. STRUMWASSER: That's fine with us.

20 CHAIRMAN MILLER: I think that's as far as we need  
21 to go at this time on deposition practice. We'll leave it  
22 at that point.

23 Now I believe that there are the two motions that  
24 we've asked to be reported on Wednesday and Thursday. So  
25 we'll move now to a matter that I'm sure we won't finish today.

MPB/mpbl3

1 We'll run probably until 4:30, 4:45, whatever is convenient  
2 for counsel. But we would like to get started on the reports  
3 on discovery which may take some time. So we might as well  
4 start it at this time. And we will be on it tomorrow for  
5 sure.

6 We have requested since the previous meeting that  
7 we had with you in January, we saw the commencement of the  
8 flow of documents that were being produced under somewhat  
9 elaborate procedures and in a massive search being made by  
10 PG&E with the employment and use of paralegals and the like,  
11 and a great procedure for copying them and the like and  
12 passing them over for examination and analysis.

13 We had a preliminary report from Staff at any rate.  
14 Mr. Goldberg had done some work on it and had some statistics.  
15 We therefore ask you at this meeting, four months later,  
16 when you would have had access to a substantial volume of  
17 produced documents to give us a report with some concreteness  
18 showing not only the number of documents but the nature of  
19 them, what the product was, really, so far as you could tell  
20 us, and to assist the Board in making an analysis of the  
21 utility, the effectiveness of the procedure that has been  
22 taken, about a year of effort, time, and money, on not an  
23 insubstantial basis. But it isn't quite that posture.

24 We'd also more or less indicated to counsel that  
25 we wanted to have an opportunity as a Board to evaluate the

MPB/mpbl4

1 cost effectiveness of this whole procedure.

2 You somewhat alarmed us when you spoke of two  
3 million documents or two more years, and things of that kind.  
4 And frankly, we'd like to think in terms of about half those  
5 figures if we must start projecting.

6 But at any rate, we do want to get a feel of what  
7 is being produced. We would like you now to start showing  
8 the Board why it is necessary to continue this process for  
9 whatever period of time and whatever documents and whatever  
10 costs there are. In other words, to justify it now for the  
11 Board.

12 Who wishes to start? We're not going to press you  
13 for time; we expect to be on it tomorrow. The subject  
14 involves a lot of factors, and we'd like to hear from all of  
15 you fairly and fully. Who would like to go first?

16 MR. STRUMWASSER: We can start if you'd like.

17 CHAIRMAN MILLER: Very well.

18 MR. STRUMWASSER: You would like our comments to  
19 be limited to discussion of the document production as  
20 opposed to the other parts of discovery, is that correct?

21 CHAIRMAN MILLER: Well, to document production,  
22 yes, because that's a discrete matter that has a lot of  
23 ramifications that you'll explain to us. But we don't mean  
24 really to exclude discovery; if there's something you think  
25 is related to it, don't hesitate.

MPB/mpbl5 1 MR. STRUMWASSER: There are other things that we  
2 are pursuing simultaneously.

3 CHAIRMAN MILLER: Then we'll start with the docu-  
4 ment production and then before you're through be sure and  
5 remind us of the other factors, Mr. Strumwasser.

6 MR. STRUMWASSER: Well, many of them have already  
7 been mentioned in the deposition discussions, interrogatories  
8 that are pending, some of which have been completed, and our  
9 own preparations for other cases. But the document produc-  
10 tion remains the area in which we are most -- it is certainly  
11 the most time consuming. It is certainly the area in which  
12 we are spending the largest proportion of our efforts and  
13 the most expenses.

14 I am sorry that I do not have with me today hard  
15 numbers about the numbers of documents produced or assimilated.  
16 We were just unable to pull those together before the pre-  
17 hearing conference.

18 Let me start by discussing the document production  
19 status as it is perceived from our end. There was a very  
20 high volume of production early in the year. And late last  
21 year, during a time when PG&E was producing from the departments  
22 which we were allowed to survey and do the green dotting of,  
23 that high volume suddenly came to a very substantial halt.

24 CHAIRMAN MILLER: Right about when?

25 MR. STRUMWASSER: I guess it was around January,

MPB/mpbl6

1 because that was when they left the green dotting departments  
2 and went to the executive, current executive offices. The  
3 process there was that they had no guidelines from the  
4 Intervenors and Staff that would enable them to eliminate  
5 any review and files. So they had to go through all of the  
6 files that could have contained documents and do their own  
7 screening pursuant to the categories in the original produc-  
8 tion request, as approved by the Board. And that has  
9 drastically reduced the volume of documents that have been  
10 produced.

11 It has increased the density of productive docu-  
12 ments, but it has slowed the whole process down considerably.

13 At the same time we did a survey of the warehouse  
14 files which we advised the Board of in January, the ones  
15 that had those tantalizing topics. And the result of that  
16 survey was to confirm that there were documents at the ware-  
17 house which had not been produced before and were relevant  
18 and significant to this proceeding.

19 We have sent a letter to PG&E in which we have  
20 enumerated the files, the boxes from the warehouse that we  
21 are interested in, and we were able to eliminate a vast  
22 majority of all the boxes that went over there.

23 CHAIRMAN MILLER: You were able to eliminate the  
24 vast majority of the warehouse documents?

25 MR. STRUMWASSER: The warehouse documents, that's

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1 right. But there are a substantial body of documents that  
2 require further analysis. And I guess Mr. Horne and Mr. Gross  
3 here spent several days at the warehouse, a not terribly  
4 hospitable environment, and they determined that it was  
5 necessary to require further production of certain documents.  
6 The letter has gone to PG&E and the parties have gotten copies.  
7 And as far as I know, no response was ever received. But we  
8 are prepared to go in and essentially replicate our green  
9 dotting process to complete that.

10 CHAIRMAN MILLER: Do you have any estimate of the  
11 number of documents that would be involved in the green  
12 dotting of the warehouse documents, approximately?

13 MR. STRUMWASSER: Our estimate is that there are  
14 300 boxes that need to be reviewed, and about 3000 pages per  
15 box. That's 900,000 documents that need to be reviewed by  
16 us in sort of the green dotting process. Of that we expect  
17 that a very small percentage will have to be produced.

18 We deal in boxes in this part of the discovery  
19 because PG&E's documents are filed in files, and the files  
20 are put in a box. So we have to retrieve them by box. But  
21 once they are retrieved by box, we may only have to go to one  
22 or two files in a box.

23 So we would have to sort of rough cut 900,000  
24 documents, and a small proportion of that would have to be  
25 produced by PG&E.

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I do have some subjective observations about the documents that have been produced. PG&E's production began more or less in the order in which we surveyed departments, and as a result, for example, we started surveying or green dotting in the retired executive files, and that's what our first production is from.

I think it's fair to say that our green dotting in those early departments was more liberal than it got to be later. All of the parties got a better feel for what it was we were looking for as we went on. So there is a fairly high proportion of the chaf to wheat ratio, it was very high in those early departments. We think it's gotten much better in the later production from siting and planning. And we think that the production yet to go will show an even higher proportion of productive documents.

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1 I might add we are continuing a pace in our document  
2 analysis -- at the last prehearing conferences, we reported to  
3 the Board that we had asked for authority to hire additional  
4 document analysts, a matter which in the wake of political  
5 developments in California required gubernatorial special dis-  
6 pensation. That special dispensation has been granted and  
7 at this very moment perhaps Mr. Horne is interviewing potential  
8 document analysts.

9 CHAIRMAN MILLER: Even now.

10 MR. STRUMWASSER: Even now.

11 (Laughter.)

12 CHAIRMAN MILLER: Good.

13 MR. STRUMWASSER: So we expect it will stimulate the  
14 economy of Southern California and be able to proceed even  
15 faster in our document analysis in the future.

16 I have little else to add in the way of subjective  
17 or objective observations. I'm happy to answer any questions  
18 the Board might have.

19 CHAIRMAN MILLER: Could you tell us what documents  
20 have been produced and examined by you, analyzed and deemed  
21 by you to be significant in terms of developing your proof  
22 either of liability or remedy, if I may use those two rough  
23 phrases.

24 MR. STRUMWASSER: What has been striking about the  
25 whole process is that it is very difficult to give a good

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1 categorical description of where you're finding productive  
2 documents. We have found documents -- we have found genuine  
3 smoking guns in the files relating to negotiation of the con-  
4 tracts that are at issue in this case, relating to their economic  
5 consequences, relating to the effects on PG&E.

6 But what is striking about the process by which this  
7 has occurred is obviously some of them were exactly where you  
8 would expect them, they were in files with entity titles for the  
9 other contracting party or files with the title of the other  
10 contracting party on it and it would have been the highest,  
11 one percent of the files -- would have designated to be limited  
12 to one percent.

13 But other of these documents have been found in  
14 obscure places which are not unrelated to the topic but certainly  
15 would not have been your first place to look. In fact, places  
16 where we looked, partly because of the fact that a relatively  
17 less promising file happened to be on the same microfilm roll  
18 as a high priority file, so we sent somebody that roll of micro-  
19 film first and told them While you're there also get this  
20 file. So our eclectic process has resulted in a productive  
21 analysis of some of these other files.

22 Many of these files we have been able to dispose of  
23 very quickly because we have felt that the green dotting  
24 process -- there's some dispute, I gather, now among the parties  
25 as to what the extent to which we were at liberty to look

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1 inside files when we were green dotting.

2 But in general, everybody was governed by the principle  
3 that we were going to try and make our decisions on the basis  
4 of file, older titles. And sure enough, some of the file  
5 folder titles that might have been productive turned out not  
6 to be and were quickly identified as such. I don't have any  
7 examples on hand, but some of them turned out to be just very  
8 humorous misunderstandings of what a file folder title is about.

9 But for the most part I think that the green dotting  
10 process, particularly as it proceeded in the second and third  
11 weeks of our -- the second and third-thirds of the green  
12 dotting was reasonably well targeted and has proven to be  
13 effective.

14 I'm reluctant to get very specific about which  
15 files we're looking at because I'm not crazy about letting our  
16 adversaries know the order in which we're damning documents,  
17 frankly.

18 I might add that in preparation for the on-again,  
19 off-again and now hopefully off Gerdes deposition, that we  
20 were able to examine all of the documents that -- that is to  
21 say, identify and rough examine the documents that Mr. Fallin  
22 and Mr. Armstrong described and those proved very fruitful.

23 And those documents were distributed and a whole  
24 lot of files. We were able to examine documents that were  
25 not just embowed in Mr. Gerdes private files, but we also

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1 found documents that had turned up from elsewhere in this  
2 request for production.

3 CHAIRMAN MILLER: Do you have an estimate of the  
4 approximate number of documents that have been produced and  
5 examined?

6 MR. STRUMWASSER: I do not. I would defer to Mr. Meiss  
7 and I would take any number he gave me because I don't have a  
8 good feel for it. But I can say this much, I think we have  
9 probably gotten in the neighborhood of 100,000 pages since  
10 the January prehearing conference.

11 I don't know, would you buy that, Mr. Meiss?

12 MR. MEISS: Actually by using the DWR numbering  
13 system, they copied as of May 4th 142,135 pages.

14 MR. STRUMWASSER: Correct to the first order of  
15 magnitude, anyway.

16 MR. MEISS: Which, Mr. Chairman, means that both  
17 NCPA and the Southern Cities have the same number of documents  
18 since, by agreement among the Intervenors but not including the  
19 Staff, copies of that microfilm was made available to NCPA  
20 and the Southern Cities.

21 CHAIRMAN MILLER: That's 142,000 pages, approximately,  
22 in total or since January?

23 MR. MEISS: This is since January. This is what  
24 DWR copied. We processed approximately 332,000 pages to come  
25 up with that.

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CHAIRMAN MILLER: Well I guess I didn't understand. Why did you process 300,000 and out of those pages come up with half of it?

MR. MEISS: As Mr. Strumwasser indicated, we are in the active executive files, which is one of those areas where the Intervenors and the Staff did not do green dotting. This is the area where we are examining the files and looking for documents that are called for under the document production order. And as a result, there's a substantially higher proportion of material that we're looking through that they might not have. Out of the abundance of caution to make sure that we look in all the nooks and crannies, we are going through a lot of paper.

CHAIRMAN MILLER: So you're producing 300,000 pages for their inspection and may request copying of 142, or how do you get that proportion?

MR. MEISS: I should defer to Mr. Gerdes deposition because he explained it a little bit better than I will. The way the system works is that we send people over to the files, they do essentially what amounts to green dotting; they ruffle through the files, if the stuff looks interesting as there may contain relevant material, the files are physically removed over to our shop. And then they are read, compared against the production order. The documents that are called for are made available for the states to copy,

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1 the documents that are not called for under the order are  
2 returned to the files. That's why there's a discrepancy.

3 CHAIRMAN MILLER: I still don't understand. Which  
4 is the 142,000 and which is the 300,000?

5 MR. MEISS: The 300,000 is the universe of documents  
6 actually removed from the files and brought to the Law  
7 Department for processing.

8 CHAIRMAN MILLER: By PG&E.

9 MR. MEISS: By PG&E. The 142,000 pages is the  
10 distillate, that is what's left after we have reviewed those  
11 raw files.

12 CHAIRMAN MILLER: Who distills the distillate?

13 MR. MEISS: That's our team of legal assistants  
14 and clerks.

15 CHAIRMAN MILLER: I see. So that it's still PG&E  
16 distillation.

17 MR. MEISS: That's correct.

18 CHAIRMAN MILLER: -- unaffected so far by any  
19 action by the Intervenor.

20 MR. MEISS: That is correct.

21 CHAIRMAN MILLER: Then what happens to the 142,000  
22 thus distilled, are they tendered to them or how do you  
23 handle that?

24 MR. MEISS: What we do is we place them in boxes,  
25 the boxes Mr. Strumwasser has referred to. They contain about

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1 2700 - as a box. We make the boxes available to our contractor  
2 and the state, who microfilms those documents.

3 CHAIRMAN MILLER: All of them?

4 MR. MEISS: All of them. And then it is that micro-  
5 film that the state takes as its copying right under the  
6 document production order, and then the paper copy is returned  
7 to the Law Department.

8 CHAIRMAN MILLER: And DWR has some arrangement with  
9 the other Intervenor, with the Staff, then, for your own  
10 use or for your reproduction?

11 MR. STRUMWASSER: Not the Staff anymore, they don't  
12 like our microfilm so they've got their own deal that our  
13 microfilm contractor prepares duplicate sets of the microfilm  
14 and sends copies to the other Intervenors and to us and the  
15 archives and others and so forth.

16 CHAIRMAN MILLER: I see.

17 Well, how many were thus produced, distilled by  
18 PG&E prior then to the January '79 date?

19 MR. MEISS: Unfortunately, I don't have that figure  
20 with me. But I believe it was in the neighborhood of 230,000  
21 pages.

22 MR. STRUMWASSER: No, more.

23 MR. MEISS: Was it more than that?

24 MR. STRUMWASSER: I think that by the end of last  
25 year we had all of the CID documents, all the CID update

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1 documents, the Helms Creek updates and some things that were  
2 tossed over the wall that we never really got out and found  
3 out what they were, and altogether they amounted to about  
4 400,000 pages.

5 CHAIRMAN MILLER: That's about my recollection from  
6 your previous --

7 MR. MEISS: Mr. Chairman, what I was referring with  
8 this, the so-called 425,000 which I did not count as the  
9 Stanislaus number, that's the CID documents we've referred to.  
10 What I was referring to are the so-called green dotted files  
11 that we've made available solely in response to the Board's  
12 production order. And I do believe that that's somewhere in  
13 the neighborhood of 230- to 310,000 pages. That's a pretty  
14 good sized number.

15 CHAIRMAN MILLER: That's prior to January and does  
16 not include the 142 since -- 142,000 sincethen?

17 MR. MEISS: No, it does not.

18 By my rough guess, I believe that the Intervenors  
19 have in their possession approximately 900,000 pages of PG&E  
20 documents.

21 CHAIRMAN MILLER: Now give me your new figure,  
22 900,000 pages, now what does that consist of?

23 MR. MEISS: That consists of the so-called 425,000  
24 CID documents, the approximately 300,000 pages that were  
25 produced up to the last prehearing conference and the 142,000

1 pages that were produced as of the 4th of May.

2 CHAIRMAN MILLER: I see.

3 MR. MEISS: And that comes to about 900,000 pages.

4 Now I should point out that the Staff has a substan-  
5 tially smaller proportion of that material. What the Staff  
6 has is the 425,000 pages which they got with an arrangement  
7 with the State, then they selected approximately a third of  
8 the green dotted files for production, so they've got about  
9 100,000 --

10 CHAIRMAN MILLER: Out of PG&E?

11 MR. MEISS: Out of the new PG&E production.

12 And in this last accounting, my estimate is we've  
13 shipped the Staff about 100,000 pages of documents. Now,  
14 under our arrangement with the Staff, what they do is they  
15 review those here in Bethesda and then the documents that they  
16 want to keep for their own litigation file, they maintain  
17 here in Bethesda and they send the balance back to us and then  
18 they pay only for the documents they keep.

19 MR. STRUMWASSER: By my count, it's closer to  
20 three-quarters of a million, but what's a couple hundred  
21 thousand pages among friends.

22 (Laughter.)

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23 CHAIRMAN MILLER: All right.

24 endC4

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1 CHAIRMAN MILLER: Well, we won't press you now,  
2 Mr. Strumwasser, but at some point we'd like to know out of  
3 900,000 or 42,000 or whatever, how many of those documents  
4 are actually significant in terms of either trial preparation  
5 or use at the hearing.

6 MR. STRUMWASSER: I hope to have by the next report  
7 a statistical estimate of roughly how many of these -- what  
8 the proportion of these is that's going to be likely exhibits  
9 and --

10 CHAIRMAN MILLER: Somehow could we get a handle  
11 on what is the residue after going through the status, what  
12 is the residue that is really of material significance to  
13 discovery, preparation, or use at trial.

14 MR. STRUMWASSER: Very good.

15 CHAIRMAN MILLER: Okay.

16 What's the convenience of counsel, by the way.  
17 You are our guests. When would you like to recess in the  
18 afternoon and when would you like to resume in the morning?

19 MR. STRUMWASSER: We're at the Board's pleasure.

20 If there is any chance that we could finish this  
21 before Thursday, that is by this Wednesday night, I would  
22 like to press ahead as long as the Board is willing.

23 MR. DAVIDSON: I would second that.

24 CHAIRMAN MILLER: We're certainly willing to. We  
25 have no interest in retaining you against your will.

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MR. STRUMWASSER: No reflection on the hospitality

....

CHAIRMAN MILLER: We'll make every effort, and I would say there's a reasonable chance. We've covered a lot today of a more or less miscellaneous nature. Now, as you know, we're getting primarily into the discovery. We're also going to get into discussions of the conditions, the license conditions, and their relationships to discovery.

MR. MATT: I suspect, Mr. Chairman, the longest part of this discussion will be on the license conditions. I don't perceive that the discussion of the discovery is going to be that prolonged. I don't think there is that much -- we've gotten the numbers basically between Mr. Strumwasser and Mr. Neiss as to what has been produced, and et cetera.

CHAIRMAN MILLER: We've gotten the numbers, but we have not gotten the description or feel of the documents. You've only tantalized us so far.

MR. MATT: Well, what I was saying is I don't think this discussion will be that long, and I think the major part of our discussion --

CHAIRMAN MILLER: Unless you're not going to tell us about it. That's what it comes down to.

MR. MATT: But I think the longest part will be, unless I am wrong, other than perhaps a few conferences among counsel which you asked to have reports on either tomorrow or

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1 Thursday --

2 CHAIRMAN MILLER: Well, we'll advance from  
3 Thursday the Staff's motion to compell discovery and those  
4 matters, we'll advance that to tomorrow. Already for tomorrow  
5 morning we have your report on the productive order and the  
6 like, DWR and PG&E. We'll advance those until tomorrow.

7 I think there's an excellent chance we would be  
8 able to finish Thursday afternoon.

9 MR. ARMSTRONG: If we set ourselves a schedule  
10 of attempting to resolve all of these discovery and miscellan-  
11 eous matters by the end of tomorrow morning or something,  
12 along those lines, so that we could commence our discussion  
13 of the commitments tomorrow afternoon, we might --

14 CHAIRMAN MILLER: Maybe even before that.

15 MR. MATT: That would be excellent.

16 I'm particularly concerned about allowing Mr.  
17 McDiarmid so he may be here as well for discussions which  
18 he would I think be useful in taking part in --

19 CHAIRMAN MILLER: Will he be here tomorrow?

20 MR. MATT: He will be if we tell him, I think.

21 MR. DAVIDSON: He will be here at whatever point  
22 you wish to take up discussion of the license conditions. On  
23 that topic his familiarity --

24 CHAIRMAN MILLER: I would say tomorrow afternoon.

25 MR. DAVIDSON: At 2:00, say, 1:00?

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CHAIRMAN MILLER: 1:30.

MR. DAVIDSON: 1:30, something in that neighborhood.

Thank you.

CHAIRMAN MILLER: What time would you like to start in the morning? 8:30, 9:00, 9:30?

MR. EVANS: Mr. Chairman, excuse me.

This impacts a little bit to the extent that PG&E and the Staff must get together at some point and do this informal discussing that we've agreed to. So if you are going to go ahead with the motion to compel tomorrow, we would prefer a little bit later starting so that we could get together before them.

CHAIRMAN MILLER: It doesn't matter to the Board. We're here; you are our guests. You know the work you have to do, you know you would like to finish by a certain time. So suit yourselves accordingly.

MR. DAVIDSON: Could we try to go on this afternoon?

CHAIRMAN MILLER: Yes. We're not cutting you off. We're trying to get some timing concensus.

MR. ARMSTRONG: Why don't we say, if we can, start tomorrow at 8:30?

MR. MATT: May I make a request, Your Honor? Due to babysitting problems and so on, if we could start around 9:00 tomorrow?

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1 MR. EVANS: I would concur with that.

2 CHAIRMAN MILLER: As I understand it, nine o'clock  
3 is when you people like to start. That isn't to say that at  
4 8:30 that the Staff and PG&E, for example, couldn't confer,  
5 or 8:15, or whatever time suits their pleasure.

6 And if there's anything else -- I guess there's  
7 another conference, isn't there? Yes, PG&E and DWR need to  
8 confer.

9 MR. STRUMWASSER: We're going to do that tonight.

10 CHAIRMAN MILLER: Okay. And in the morning get  
11 together with Staff. We'll start the session by nine o'clock,  
12 and by then hopefully you will have completed all your dis-  
13 cussions.

14 MR. ARMSTRONG: We'll get all of our homework done.

15 CHAIRMAN MILLER: Okay.

16 Who wants to go next on the discovery report?

17 Mr. Davidson?

18 MR. DAVIDSON: On this matter, I think I can speak  
19 for Southern Cities as well as NCPA. According to a report  
20 I received Friday from our file searches, as of May 11th we  
21 had received 152 reels of microfilm.

22 MR. STRUMWASSER: Now we have to give him another  
23 physical constant.

24 MR. MATT: That's absent the CID documents.

25 MR. DAVIDSON: Of those 152 reels, 37 reels have

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1 been read and indexed, 15 reels have been skimmed, no reels  
2 have not been read.

3 So we are pretty much keeping up to date in  
4 reviewing and indexing material at the pace that it comes in  
5 to us from PG&E through DWR.

6 CHAIRMAN MILLER: You don't have any way of trans-  
7 posing them from reels into pages, do you?

8 MR. STRUMWASSER: A reel is good for about 2500  
9 pages, Mr. Chairman.

10 CHAIRMAN MILLER: 2500 pages, okay.

11 How many pages?

12 MR. STRUMWASSER: 2500, sir.

13 MR. MATT: The numbers had best be consistent with  
14 DWRs numbers or we'll have a big problem here.

15 CHAIRMAN MILLER: Okay.

16 Now that's the total quantity, or that's the  
17 quantity since January?

18 MR. DAVIDSON: No, it is the green dotted file  
19 production, as I understand it. It does not include the CID  
20 documents which we've had in hard copy before.

21 CHAIRMAN MILLER: What about the executive files?

22 MR. DAVIDSON: It does include the executive files  
23 to the extent we have them.

24 CHAIRMAN MILLER: It does include them.

25 MR. DAVIDSON: Yes, sir.

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1 CHAIRMAN MILLER: They're not green dotted, are  
2 they?

3 MR. DAVIDSON: No, sir.

4 MR. STRUMWASSER: Mr. Chairman, that's just about  
5 400,000 documents, which is just about what Mr. Meiss said.  
6 The production since January of 1979 plus the 230,000 or so  
7 from before.

8 CHAIRMAN MILLER: Yes, there is a rough correla-  
9 tion there apparently. All right.

10 Well, what do they look like?

11 MR. DAVIDSON: Most of them are worthless. Some  
12 of them are smoking pistols.

13 We have attached as part of our comments on the  
14 Stanislaus commitments a number of representative documents,  
15 quotes of which appear in the first 12 or 13 pages of our  
16 text. I think there is a pretty conclusive case of antitrust  
17 liability right there, a pretty conclusive case of antitrust  
18 violation contained in the documents we've attached.

19 CHAIRMAN MILLER: To your analysis --

20 MR. DAVIDSON: Of the Stanislaus commitments.

21 CHAIRMAN MILLER: Well, which ones do you think  
22 are the smoking pistols in that regard?

23 MR. DAVIDSON: Well, I'll go back, because we've  
24 been there before. The two documents I referred to about  
25 Mr. Gerdes, and without looking at them I can summarize the

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1 thrust of them.

2 The first one is typewritten, and it might be  
3 better to look at that one. It's Attachment 4. The context  
4 of this is a discussion of the intertie between Mr. Gerdes  
5 and Mr. Luce, the administrator of Bonneville Power. SMUD  
6 at that point is supposing the California company's version  
7 of the intertie and coming out for an all-federal intertie.  
8 Gerdes of PG&E makes the point to Bonneville that -- and  
9 I'm reading from about the fourth line in that second  
10 paragraph, beginning with "He said..."

11 "He (Gerdes) said that if SMUD wished to  
12 plan alone with the federal intertie, Pacific  
13 Gas and Electric would probably terminate its  
14 contract with SMUD. He pointed out what he  
15 regarded as the advantages to SMUD of an inter-  
16 change arrangement with PG&E, emphasizing that  
17 SMUD was an all-hydro system and needed steam  
18 backup which only Pacific Gas & Electric was  
19 in a position to provide."

20 I say that as evidence of monopoly power and the  
21 use of monopoly power. SMUD needed it; it could only be  
22 provided by PG&E and PG&E would probably refuse to provide  
23 it if SMUD didn't bend to its wishes.

24 CHAIRMAN MILLER: Any more pisto. in this exhibit?

25 MR. DAVIDSON: No.

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1 CHAIRMAN MILLER: Now this document appears to bear  
2 a FERC number. What's the source? How did you come upon  
3 that?

4 MR. DAVIDSON: I noticed that this morning, and I  
5 think it must mean we attached it to something on March 1, '79.  
6 I do not know where it came from. I do not understand the  
7 material on top.

8 MR. STRUMWASSER: I can explain it.

9 It is Stanislaus production, and --

10 MR. ARMSTRONG: If I'm not mighty wrong, that  
11 document was something which we did not identify as something  
12 we had produced.

13 MR. STRUMWASSER: Oh, no, excuse me. I stand  
14 corrected. That's exactly right.

15 MR. ARMSTRONG: It's a memorandum by Mr. Luce.

16 MR. STRUMWASSER: Yes, it's a document which was  
17 retrieved by DWR; in preparation for this proceeding we went  
18 to the Northwest and reviewed some files at Bonneville. And  
19 that was a document which we pulled there.

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1 CHAIRMAN MILLER: That's the Bonneville files  
2 in Portland, Oregon?

3 MR. STRUMWASSER: That's right. It is not  
4 Stanislaus production.

5 CHAIRMAN MILLER: And it was obtained by you  
6 on behalf of DWR?

7 MR. STRUMWASSER: That's correct. That's the  
8 kind of thing I was talking about.

9 CHAIRMAN MILLER: Now what's next?

10 MR. DAVIDSON: A document which I have trouble  
11 describing where it comes in our file. It seems to be the  
12 document just before Attachment 7. There's Attachment 7,  
13 you go back, there's a yellow page, and then there's a  
14 handwritten document.

15 CHAIRMAN MILLER: We find, first of all,  
16 Attachment 7. Okay. And then--

17 MR. DAVIDSON: Go backward and you'll find  
18 after the yellow page a handwritten document.

19 CHAIRMAN MILLER: I go backwards to the yellow  
20 page?

21 MR. DAVIDSON: Yes.

22 CHAIRMAN MILLER: The next precedent yellow  
23 page?

24 MR. DAVIDSON: And there's a handwritten docu-  
25 ment. It bears the number at the bottom ZWA 51105.

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May I come up and see if yours--

CHAIRMAN MILLER: We have it, I think.

First of all tell us where it came from, when, and what is its significance.

MR. DAVIDSON: It has come from PG&E in discovery. I don't have any idea when.

MR. STRUMWASSER: It's a CID production document.

MR. MEISS: To be more precise, it was produced in the so-called Seven Party case in FERC to NCPA at its request.

CHAIRMAN MILLER: About when would that have been?

MR. MEISS: About 1974.

CHAIRMAN MILLER: All right. Go ahead.

MR. DAVIDSON: I would very much doubt that any CID document was produced to NCPA in 1974. When was it produced to the Department of Justice?

MR. MEISS: We had an arrangement with the Department of Justice, as you're well aware, that the documents produced to NCPA in the Seven Party case would also satisfy certain of the Department's requirements.

CHAIRMAN MILLER: Yes, I do seem to recall some description of that kind when we were discussing CID.

Well, unless there's a dispute as to whence it came and when, we'll go now to its significance as you under-

wb3

1 stand it.

2 MR. DAVIDSON: Well the significance-- Well,  
3 again, looking at the last page and I'll set the scene, it's  
4 a conversation between Mr. Warne of DWR, I believe he was  
5 the head of it.... Was he the head of it at the time?

6 MR. STRUMWASSER: He was the Director.

7 MR. DAVIDSON: --between Mr. Warne and Mr. Gerdes.  
8 And Mr. Warne asked, in the middle of that page as recorded  
9 here, "What would end cooperation of power companies?"  
10 This is the three, not just PG&E.

11 "MR. GERDES: One, sale of any power by  
12 state to others, other than Oroville.

13 "Two, purchase by state of any power from  
14 others."

15 It seems to me on its face Mr. Gerdes, on  
16 behalf of three companies, is threatening a boycott unless  
17 the state takes certain action.

18 It's a document of the very highest level,  
19 I think pretty clearly indicative.

20 CHAIRMAN MILLER: Do you have any more?

21 MR. DAVIDSON: I'm just glancing through the  
22 documents in our -- at the very beginning of our comments  
23 on the Stanislaus commitments.

24 A proposal by PG&E to permit SMUD -- Sacramento  
25 Municipal Utility District -- to integrate its Upper American

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1 River project, even though it would reduce the cost to SMUD  
2 of such power and assist SMUD in holding down its rate  
3 applicable to such sales. It's referred to on page 10.

4 CHAIRMAN MILLER: It says, "For example, the  
5 first document in Attachment 7 hereto shows a proposal by  
6 PG&E. That's at page 10 of the comments, and refers to the  
7 first document in Attachment 7 which is attached thereto,  
8 which we've had a portion of alluded to.

9 MR. DAVIDSON: I could go through a number of  
10 these, and these aren't necessarily--

11 CHAIRMAN MILLER: No, no; we're interested.  
12 What is the source of this first document,  
13 Attachment 7, which contains the matter which you've set  
14 forth in the transcript on page 10?

15 MR. DAVIDSON: Let me try to find it.

16 CHAIRMAN MILLER: It looks like a letter of  
17 December 4, 1967. Is that the one?

18 MR. DAVIDSON: I would think that that is a  
19 CID document.

20 CHAIRMAN MILLER: Is that's the one, Attachment 7,  
21 Stanislaus, March 2, 1979? --up at the top?

22 MR. DAVIDSON: I am having trouble with the  
23 attachments. I may be looking at the wrong one.

24 MR. ARMSTRONG: Might I suggest if the inquiry  
25 here is to identify smoking guns, then maybe Mr. Davidson is

wb5

1 doing well. But if the effort is to identify the events  
2 resulting from the Stanislaus production rather than the  
3 earlier production, we haven't seen one yet.

4 CHAIRMAN MILLER: We can count guns the same  
5 as you can.

6 MR. ARMSTRONG: I'm not going to get into how  
7 much smoke there is here.

8 CHAIRMAN MILLER: We're inquiring first of all  
9 the smoking guns as being the ones that he's most interested  
10 in, and finding the source of them. Now we can count the  
11 same as you can. And we'll be counting tomorrow. You'll  
12 have a chance to count, too. But let him do his counting  
13 now.

14 MR. ARMSTRONG: My point, Mr. Chairman, is,  
15 what we're describing, or what we're discussing now results  
16 from production made earlier, not from the production which  
17 we are spending so much time and money on now.

18 CHAIRMAN MILLER: I know that. After all, a gun  
19 is a gun. We don't want to intimidate anybody. You're  
20 looking at the primary document, and we'll have a picture  
21 by the time it's over.

22 MR. DAVIDSON: This document which I've now  
23 located bears on it the number on the right that I believe  
24 identifies it as a document the DWR has microfilmed.

25 CHAIRMAN MILLER: Which one, now, is this?

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1 MR. DAVIDSON: It's the one which has at the  
2 top, Attachment 7, Stanislaus, March 2, 1979. Pacific Gas  
3 & Electric letterhead.

4 CHAIRMAN MILLER: I have it. Can we identify  
5 the source of it while we're looking at it?

6 MR. MEISS: Mr. Chairman, this particular docu-  
7 ment was produced to NCPA in the so-called 7's case, which  
8 is a case that's set for hearing in June. The reason the  
9 State's number appears to the right margin about a third from  
10 the bottom is because by agreement with the State all of the  
11 documents in the 7's case are made available to them to  
12 film. So this document was produced probably in--

13 CHAIRMAN MILLER: So when was it produced, then?

14 MR. MEISS: In approximately 1975

15 CHAIRMAN MILLER: 1975. Produced by PG&E to  
16 NCPA--

17 MR. MEISS: In response to a discovery order in  
18 the case that's set for hearing this June.

19 CHAIRMAN MILLER: That's FERC 7777?

20 MR. MEISS: Phase 2; that's correct.

21 MR. STRUMWASSER: It was made available to us in  
22 the middle of last year, like July or August of last year.

23 CHAIRMAN MILLER: Now is this factually correct?  
24 We're just trying to get the facts at the moment.

25 Does anyone have any doubt as to the accuracy of

1 this representation?

2 MR. STRUMWASSER: We have no way of knowing when  
3 it was made available to NCPA. But I know that the copy  
4 Mr. Davidson is working from is a copy he got from us. So  
5 he got it after we got it the middle of last year.

6 CHAIRMAN MILLER: I understood you to say it was  
7 made available to NCPA in 1975.

8 MR. MEISS: That's correct, your Honor.

9 In the 7's case the NCPA sent a lawyer from his  
10 office to our offices in San Francisco, and that person  
11 reviewed documents in our office. He selected documents  
12 that he wished copied at NCPA's expense. We copied those  
13 documents and shipped them to NCPA here in Washington.

14 These documents apparently are documents that  
15 that lawyer did not select the first time through. But they  
16 were made available to NCPA at the time.

17 CHAIRMAN MILLER: How can you tell from the  
18 numbers on here when it was made available to anyone?

19 MR. MEISS: One reason is the-- how large the  
20 number is at the top of the page. This is 398,000. Another  
21 indication is the topic and the year. This document relates  
22 to SMUD, and the year is 1959. There was a call in the 7's  
23 order for all documents relating to negotiation of the  
24 existing SMUD contract and all predecessors of that contract  
25 regardless of the date of origin. So we produced documents

wbs

1 back to approximately 1947 with respect to our SMUD arrange-  
2 ments. ( ) that's why that document would be produced in  
3 the 7's case.

4 MR. STRUMWASSER: While we're on the subject  
5 of what you can tell through numbers, this would be as good  
6 a time as any to explain this to the Board.

7 There are for all of these documents two numbers  
8 on them; that is, for all documents produced by PG&E and  
9 copied by DWP. At the top you will see a three-letter  
10 followed by a variable length of numbers, PG&E number.

11 The PG&E number -- the three letters designate  
12 roughly whose files they came out of.

13 CHAIRMAN MILLER: ZMA, what does that indicate?

14 MR. STRUMWASSER: ZMA is some person or depart-  
15 ment, and I don't know offhand. But it would be like a  
16 specific person or a couple of people.

17 PG&E numbered all of its antitrust production  
18 serially from the number 1.

19 CHAIRMAN MILLER: IN this case?

20 MR. STRUMWASSER: No; in all cases. So that if  
21 there were 425,000 documents produced in the CID series,  
22 for example, then the CID documents would be roughly 1 through  
23 425,000. If Stanislaus came right after that, anything  
24 over 425,000 would follow.

25 There is a slight flaw in that because PG&E

wb9

1 numbered documents which they then withheld on account of  
2 privilege or for other reasons, so it's not an exact  
3 correspondence.

4 Generally speaking, the bigger the number the  
5 later the production.

6 On the righthand margin the Board will observe  
7 a different number, again three letters. This time there  
8 are going to be four or five numbers. That's the DWR  
9 number.

10 CHAIRMAN MILLER: In this case what is the number?  
11 Is it in the margin and running sideways?

12 MR. STRUMWASSER: That's right. That's the one.  
13 BCF 01370. Our BCF has no specific importance other than  
14 it is on a cartridge distributed to the parties that has the  
15 letters BCF on it, and you can locate it quickly.

16 We number serially from 1 up through however  
17 many documents are on that roll. So BCG, if it was the next  
18 roll, we would go back down to 1.

19 So in general the easiest way to tell a DWR  
20 number from a PG&E number is that there are only 2500  
21 documents in the entire production of all these cases from  
22 PG&E that have the number 1 through 2500. For DWR every  
23 microfilm roll will have a low number. So generally  
24 speaking anything that's below 2500 or 3000 means it's a  
25 DWR number as opposed to a PG&E number.

End 2E

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2f ebl 1 Also the DWR number will be a little more precise,  
2 a little clearer printing because it is on a later generation  
3 of the same document.

4 CHAIRMAN MILLER: Any other information that is  
5 enlightening to the Board in terms of tracing the origin of  
6 these documents?

cl 7 (No response.)

8 Okay. Have you covered the--

9 MR. DAVIDSON: These were not prepared to illus-  
10 trate current production. If the Board is interested what  
11 I can do is have sent up to me tomorrow documents which have  
12 been discovered, say in the last four weeks, and give examples  
13 of that.

14 CHAIRMAN MILLER: All right, or four months.

15 MR. DAVIDSON: I can do that, basically exclusively  
16 recent stuff.

17 For example, something that concerns us greatly,  
18 last night we saw documents for the first time indicating a  
19 concerted -- apparently a concerted effort by PG&E at least  
20 dating from January of '76 to cull documents from the files  
21 and prevent the insertion of damaging documents in their files.  
22 This may account if in fact there is a diminution of damaging  
23 material after January, 1976; this is the explanation for it.

24 And we do not know what was done, if anything,  
25 about culling documents that were already in the files at that

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1 date.

2 CHAIRMAN MILLER: You'll have that document to-  
3 morrow?

4 MR. DAVIDSON: I have it here. I have it hand-  
5 written and typed, and I'll give it to everybody here.

6 CHAIRMAN MILLER: Let's be sure that PG&E has it.

7 MR. DAVIDSON: Here it is typed.

8 This was given to us by a file search as at about  
9 6:00 p.m. last night. Do you want to see the actual....

10 This is the handwritten document from which the  
11 typed version was taken, which I hand you now.

12 (Distributing documents.)

13 CHAIRMAN MILLER: Do you have any more?

14 MR. DAVIDSON: I will get tomorrow some sampling of  
15 the more interesting documents that have been turned up in the  
16 last two months, in addition to the document, copies of which  
17 have been distributed.

18 CHAIRMAN MILLER: Very well.

19 All right, who wishes to go next on the report on  
20 discovery? The Staff?

21 MR. WENNER: Before you go on, can you give us your  
22 comment on the quality of the documents that have turned up?

23 MR. DAVIDSON: I think I get maybe three times a  
24 week covering memoranda and documents from the file searchers,  
25 and I would think it would be very rare that I don't get at

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eb3 1 least one document a week which I think is a very, very impor-  
2 tant document and which will be put in evidence at the appro-  
3 priate time.

4 It is a time-consuming, expensive process, but I'm  
5 still seeing enough return so I'm willing to advise my client  
6 to continue supporting it.

7 If this were merely a case of proving antitrust  
8 violation or actions inconsistent, I might well have enough to  
9 stop, but as I think the crux of this case may well turn out  
10 to be the appropriate conditions, I think it is important to  
11 demonstrate the extent of the violations. And therefore, I am  
12 continuing.

13 CHAIRMAN MILLER: The Staff.

14 MR. GOLDBERG: I think I can report on numbers of  
15 documents that have been produced by PG&E and sent to the  
16 Staff, and these numbers I think are consistent with the num-  
17 bers that have been given thus far today.

18 As at May 9, 1979, there were 519,743 green-dotted  
19 documents processed by PG&E. And by "green-dotted documents"  
20 I mean all documents other than CID documents. This would  
21 include the documents that we actually green-dotted in the  
22 files where we had access, and also include the documents that  
23 are being produced from the current executive offices.

24 Of that 519,743, 204,961 were shipped to the NRC  
25 Staff. That comes out to be 39.4 percent of all the documents

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1 produced by PG&E. All the green-dotted documents produced by  
2 PG&E and selected by the Staff have been now sent to the  
3 Staff.

4 I would like to point out that that 39.4 percent  
5 figure is probably a fair amount higher than we expect in the  
6 over-all process because from the current executive office  
7 files, there is no difference between the documents that the  
8 Intervenors are getting and that the Staff is getting because  
9 we were not granted access to those departments and so we are  
10 simply getting every document that PG&E determines is respon-  
11 sive to the document request.

12 With respect to all the other documents, the large  
13 of bulk of documents is PG&E's files to which we were granted  
14 access. We have selected I think a fairly -- well, a somewhat  
15 smaller percentage of documents than 39.4 percent.

16 At any rate, that figure is inflated to some ex-  
17 tent because of the large number of production recently of  
18 documents from files to which we were not granted access.

19 Of the 204,961 pages which were shipped to the  
20 Staff as of May 9th this year, we have actually processed  
21 86,449, or 42.2 percent of them.

22 Of the 86,449 that were processed by the Staff, we  
23 have retained 3,060, which is approximately 3.5 percent.

24 That's about 3.5 percent of the total number shipped to --  
25 That would be 3.5 percent of the number processed by the Staff.

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1 Now I also have a few figures on the production  
2 since January of '79. I don't know if the Board is interested  
3 in that also.

4 CHAIRMAN MILLER: Yes.

5 MR. GOLDBERG: All right. These figures thus far  
6 were the total production by PG&E up until May 9th, 1979,  
7 excluding the CID documents.

8 If we add the 519,743 green-dotted pages produced  
9 by PG&E to May 9th, and add to that the 425,000 CID documents,  
10 we get a little over 900,000 pages thus far in the proceeding  
11 including the CID documents. And I think that's consistent  
12 with the figures we heard before.

13 Since January 2nd, 1979, PG&E has processed,  
14 according to our calculations, 259,553 and of those, 92,805  
15 were sent to the NRC. And of that 92,805, we have processed  
16 23,519.

17 That's the extent of the data which I have on the  
18 numbers of documents produced and sent to Staff and processed  
19 by the Staff.

20 I think at the last prehearing conference I gave  
21 an indication of what we felt was the quality of the documents  
22 being produced, and that has not changed, I don't think, since  
23 January. It's substantially what Mr. Davidson has related to  
24 you and that is that it is virtually impossible to identify  
25 particular files or particular individuals or particular time

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1 periods where we're getting good documents, and the percentage  
2 of good documents is very small.

3 But it's a situation where as you proceed through  
4 these documents, every once in a while you get a couple of real  
5 good ones that are not falling into a pattern of coming from  
6 a particular department or particular individual, so we have  
7 not been able to determine a more speedy way of identifying  
8 these good documents in the large mass of documents that we  
9 are receiving.

10 On a percentage basis it's very small, but we don't  
11 know of any other way to get these good documents but to go  
12 through them all. It's an extremely burdensome task, and if  
13 there were any conceivable way of doing it other than the way  
14 we're doing it, we'd jump at the opportunity, but we haven't  
15 been able to identify one.

16 CHAIRMAN MILLER: Well, what about the quality or  
17 the relevance, let's say, of the documents you regard as good  
18 documents?

19 MR. GOLDBERG: Well, I don't have any specific  
20 examples with me. I don't know how to describe them other  
21 than to say that there are documents which are being discovered  
22 periodically which certainly support the allegations of anti-  
23 competitive conduct by PG&E. The problem the way I see it is  
24 to a large extent a number of these allegations are concerned  
25 with conduct which is not per se illegal but which might be

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1 illegal under the rule of reasoning.

2 And before a complete evaluation is made to deter-  
3 mine the illegality under the rule of reason, one must deter-  
4 mine what the intent was, what the purpose was, or what the  
5 anticompetitive effects were of the particular actions or res-  
6 trictions. That is what I see the bulk of discovery going to.

7 It is fairly easy to identify numerous restrictive  
8 provisions in many contracts, and numerous restrictive policies  
9 and practices of PG&E, but what requires a substantial amount  
10 of documentary discovery and a significant amount of serious  
11 analysis is the effect of these restrictions on competition,  
12 the purpose for which these practices and policies were pursued  
13 by PG&E, and that is not an easy task at all.

14 That I think is a description of where we are labor-  
15 ing with our effort and our analysis. It's a matter of taking  
16 little bits and pieces of information as we get them and trying  
17 to put them together to make a whole story. That is nowhere  
18 near complete. It might be described as being as complete  
19 as PG&E's production of documents is complete.

20 We're getting these things on a piecemeal basis.  
21 We've only gotten a small percentage of them, and whatever  
22 percentage of documents that are ultimately to be produced  
23 that we have at this time is, in one sense, the percentage of  
24 the story we have at hand. It's only a fraction right now.

25 CHAIRMAN MILLER: Are you telling us then that the

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1 quality of the documents which are being produced and analyzed  
2 by the Staff, insofar as it assists the Staff in analyzing  
3 the proof and preparing for evidentiary hearing, lies in the  
4 identification of anticompetitive intent and purpose?

5 MR. GOLDBERG: That's where we have the greatest  
6 need for purposes of -- in arriving at our position on a number  
7 of the allegations. That's what we need the documents for  
8 primarily, is to aid us in that analysis.

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9 CHAIRMAN MILLER: Is that what you're getting?

10 MR. GOLDBERG: We are getting documents which are  
11 assisting us and which bear on that. We certainly are not at  
12 the point of feeling that we have enough to complete our  
13 analysis and come to a conclusion. That's about all I can say.

14 CHAIRMAN MILLER: Is there any relationship between  
15 the number or quality of the documents which the Staff has  
16 obtained and any of the perceived insufficiencies of the  
17 license conditions, according to the Staff?

18 MR. GOLDBERG: Yes. I think that the documents  
19 we are seeing are confirming our belief that the PG&E com-  
20 mitments negotiated with the Department of Justice are inade-  
21 quate to correct the situation that exists.

22 CHAIRMAN MILLER: Can you tell us in what respect?  
23 Would you prefer to do that tomorrow when you've had a chance  
24 to consider the conditions which will be taken up tomorrow?

25 MR. GOLDBERG: Well, I certainly would prefer to

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1 do it tomorrow, but I don't know what I can add, other than  
2 what we put in our brief, as far as identifying the inade-  
3 quacy of the commitments and possible ways of correcting the  
4 deficiencies in the commitments.

5 CHAIRMAN MILLER: What we're asking you now is if  
6 there is any way you can correlate those perceived insuffi-  
7 ciencies with documents or other evidence that is the product  
8 of this massive discovery effort. I think you had better  
9 thing about that because what we're saying now is you've given  
10 us a description of the quality from your point of view of  
11 the documents, the percentages and the like.

12 Now we're asking you to go one step further and  
13 we'll be asking all Counsel to do this tomorrow: Correlate  
14 if you can the massive document search and production on the  
15 one hand with the felt needs of the parties from their differ-  
16 ing points of view and perceptions as to the inadequacies or  
17 insufficiencies of negotiated conditions which we are taking  
18 for the moment as being a given.

19 I think probably everybody is a little tired.  
20 We've had a full day. We are probably going to recess at about  
21 five until 5:00. I believe arrangements have been made for  
22 certain Counsel to meet in the morning at 8:30, or whatever  
23 they agreed upon.

24 We will commence the conference with Counsel at  
25 nine o'clock in the morning.

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1 MR. DAVIDSON: One topic which I hope we'll be  
2 discussing, one area that I think might yield a comparatively  
3 high number of relevant documents would be the documents with-  
4 held as privileged.

5 CHAIRMAN MILLER: Well, we'll be getting into that  
6 discussion tomorrow.

7 What is the status of document production with  
8 regard to privilege?

9 MR. FALLIN: I can speak to that. Do you want to  
10 wait until tomorrow or--

11 CHAIRMAN MILLER: Well, I would think you would  
12 want to do it all of a piece, wouldn't you?

13 MR. FALLIN: Well, I can highlight by saying that  
14 we have a major physical problem in getting the lawyers to  
15 the list at the same time they are responding to the other  
16 events that have been taking place in the case. And I want  
17 to talk to everybody concerned about not the numbers of lists  
18 we have involved in this case. It's not just the privileged  
19 list.

20 In addition to that, remember under the interroga-  
21 tories we have to prepare a list of every document contained  
22 in every file folder within certain decimal categories which  
23 isn't produced which, in our opinion, is not responsive.

24 And then there's another list beyond that and that's  
25 a list of all the -- the green-dotted which we kind of forgot

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1 about, all the unresponsive, sensitive documents.

2 What I would hope to suggest and discuss whether we  
3 can't reach some way of eliminating some of those lists so that  
4 we can get the front ones moved out more quickly.

5 CHAIRMAN MILLER: I think that's a reasonable re-  
6 quest. I will ask Counsel overnight to give that some thought,  
7 because we do have an enormous volume. Give some thought to  
8 the possibility of reducing the number of lists of documents,  
9 or the documents on some of the matters that have been alluded  
10 to that you may think of. It's a continuing effort of ours,  
11 too, so we'll put that on the agenda for tomorrow.

12 Anything else tonight?

13 (No response.)

14 All right, we will recess overnight, until nine  
15 o'clock in the morning.

16 (Whereupon, at 5:00 p.m., the conference with  
17 Counsel in the above-entitled matter was recessed  
18 to reconvene at 9:00 a.m. the following day.)

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