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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY & LICENSING BOARD

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In the Matter of: :
PACIFIC GAS & ELECTRIC COMPANY, :
(Stanislaus Nuclear Project, :
Unit 1) :
-----X

DOCKET NO. P-564-A

5th Floor Hearing Room
4350 East-West Towers
4350 East-West Highway
Bethesda, Maryland

Tuesday, May 5, 1981

Hearing in the above-entitled matter commenced at

10:00 a.m.,

8105070298

1 BEFORE:

2 Marshall Miller, Chairman
3 Sheldon Wolfe, Member
4 Seymour Wenner, Member

4 APPEARANCES:

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P R O C E E D I N G S

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9:30 a.m.

CHAIRMAN MILLER: Good morning, ladies and gentlemen. The conference for the counsel will come to order, please.

As you know, this conference is being held pursuant to a notice published in the Federal Register, Volume 46, Number 59, at page 9122. My name is Marshall Miller, I am the Chairman of this proceeding, and you have met my colleagues Mr. Seymour Wenner and Mr. Sheldon Wolfe.

I will ask counsel to identify themselves and their associates for the record, please.

MR. GOLDBERG: Jack Goldberg with the Nuclear Regulatory Commission staff. With me is Benjamin H. Vogler, Deputy Director of the Antitrust Division and Ann Hodgton.

MS. WEBER: I'm Susan Weber representing the California Department of Water Resources. Chet Horn, who represents the California Attorney General's Office will be right back.

MR. MATT: My name is Peter Matt, on behalf of the Southern Cities, Anaheim and Riverside.

MR. DAVIDSON: I am Daniel Davidson. I represent the Northern California Power Agency.

CHAIRMAN MILLER: Has everyone been identified?

MR. VOGLER: The applicant is not here yet this

1 morning.

2 CHAIRMAN MILLER: Has anybody seen anyone
3 representing the applicant in the last 24 hours?

4 MR. GOLDBERG: We were told they would be arriving
5 in town last night. If that's true they should be here soon.

6 (Pause.)

7 CHAIRMAN MILLER: Will the applicants' counsel
8 identify themselves for the record, please? Everyone else
9 has already done so.

10 MR. ARMSTRONG: William Armstrong representing the
11 applicant.

12 MR. FALLIN: Jack Fallin from Pacific Gas &
13 Electric Company, also representing the applicant. And Mr.
14 Rich Meiss who I think will be familiar to you.

15 CHAIRMAN MILLER: I believe everyone has now been
16 identified for the record. The matters that the Board has
17 knowledge of to be taken up are as follows:

18 First is the joint motion to suspend discovery, a
19 motion filed jointly by PG&E, the applicant, and by the
20 Staff and responded to by the other parties.

21 Second, there are, I think, three letters which
22 apparently have been exchanged between and among DWR or the
23 State of California Department of Water Resources and PG&E,
24 the Applicant, concerning the status of discovery based upon
25 certain letters which started in August of 1980.

1 And the subject of comment which we will take up,
2 number three, is NCPA's motion to compel production of
3 documents. Number four is NCPA's motion for a protective
4 order.

5 First of all, are those the matters and the issues
6 which counsel understand are before the Board for
7 consideration in this conference of counsel?

8 MR. DAVIDSON: The fourth item you noted, Your
9 Honor, NCPA's motion for protective order, in essence will
10 flow with your decision on the motion to suspend discovery.
11 PG&E has now indicated that if its motion is granted, they
12 do not wish to go forward with these depositions. And if
13 the motion is not granted, NCPA has no objection to going
14 forward with these depositions. So I think that item can
15 effectively be removed from your agenda.

16 CHAIRMAN MILLER: All right, we will remove the
17 motion for protective order heretofore filed by NCPA.

18 Now, are there other matters that are the subject
19 for formal motion or -- .

20 MR. FALLIN: Excuse me, Your Honor, as these
21 things go in terms of removal of issues and stipulations,
22 there's usually a little bit of conditioning involved.
23 Specifically, what we indicated was that with the order
24 granted with the suspension of discovery that was complete,
25 we would waive the argument with respect to the depositions

1 already noticed and in process.

2 Part of that is that the guillotine would drop, so
3 it would be hinged still if there was an argument that while
4 suspended, we wanted to go forward on the document
5 protection issue, that would be related to the deposition
6 question.

7 CHAIRMAN MILLER: Then what is your present
8 position?

9 MR. FALLIN: Basically, if the discovery is
10 suspended completely as of this moment, which means that we
11 do not go forward with the further document request of NCPA,
12 that being the situation we will not press to clear up the
13 depositions. The deposition request was designed to resolve
14 a -- how shall I put it, a discovery request that was in
15 being*, at the time the joint motion was filed. It seemed
16 to us since that had become an issue that we could affect
17 that issue by stating, well, in order to ease the
18 proposition, we will withdraw our request to close that out.

19 On the other hand, if we're going to close things
20 out on other items, we think that should be done also.

21 CHAIRMAN MILLER: And what is your present
22 position?

23 MR. FALLIN: If the joint motion is granted and
24 discovery is stopped, as it is today, the request to
25 complete those depositions is withdrawn.

1 CHAIRMAN MILLER: And if to the contrary?

2 MR. FALLIN: If there are variations on that, then
3 our position to taking those depositions will have to be
4 adjusted to meet those variations.

5 CHAIRMAN MILLER: By being adjusted, I'm not
6 entirely certain what you mean. In the event an adjustment
7 became necessary or matters that should be presented to the
8 Board?

9 MR. FALLIN: I think the simplest way to describe
10 it would be there are two decisions that would raise it:

11 One is we will simply act on the joint motion to
12 cease all discovery until a determination is made in the
13 PG&E Energy Commission litigation. A variation on that is
14 that we will act on the motion but we will resolve, at the
15 same time, discovery motions which are occurring at this
16 moment.

17 We would take the position that those depositions
18 which were noticed long in advance, originally, of the
19 determination which were prepared for, it appeared to us
20 logical to close those out.

21 Upon the filing of the joint motion NCPA made a
22 request for further documents. If those issues are to be
23 resolved as part of the -- I think you would say a
24 cleaning-up process or as the closing out -- then they
25 should be treated together.

1 CHAIRMAN MILLER: Your answer then is yes?

2 MR. FALLIN: I believe so.

3 (Laughter.)

4 CHAIRMAN MILLER: Thank you. We will restore Item
5 4 to the agenda. Are there any other matters that may arise
6 that should be noted in advance? Agenda items or
7 sub-items? Nothing on anyone's mind?

8 We will start off then with the joint motion by
9 Pacific Gas & Electric Company and the NRC Staff to suspend
10 discovery and motion activity. This joint motion was filed
11 February 13, 1981, which was an answer by the Department of
12 Water Resources filed March 11, 1981. A joint response was
13 also filed by Northern California Power Agency and the two
14 cities of Anaheim and Riverside to the joint motion filed
15 also on March 11, 1981.

16 On April 24, 1981, PG&E filed a document entitled
17 "Supplemental Memorandum in Support of Joint Motion." On
18 April 27, 1981, a response by the Department of Water
19 Resources to the so-called Supplemental Memorandum was filed
20 challenging the filing of additional papers by PG&E with
21 reference to the motion, but asking that the response be
22 considered if the Supplemental Memorandum were to be
23 considered.

24 I think those are the documents the Board has
25 received in regard to the joint motion together with the

1 attachments. There are two. Are there any other filings
2 that I haven't recited or listed?

3 MR. FALLIN: There is one item.

4 CHAIRMAN MILLER: What's that?

5 MR. FALLIN: Your Honor, the affidavit of Barton
6 W. Shackelford which was filed with the Commission by PG&E
7 pursuant to agreement with the Department of Water
8 Resources, which is a document -- .

9 CHAIRMAN MILLER: An affidavit of Barton W.
10 Shackelford?

11 MR. FALLIN: That's correct.

12 CHAIRMAN MILLER: That's dated, I believe -- at
13 least the copy I have bears the -- .

14 MR. FALLIN: It should be March 2, 1981.

15 CHAIRMAN MILLER: March 2, 1981 is the date it was
16 notarized, and that is the date of filing. Now, that
17 affidavit is to be considered with reference to the joint
18 motion?

19 MR. FALLIN: It's considered in both directions,
20 Your Honor. I think it's considered with the joint motion
21 and with DWR's response to it. It was filed as part of
22 their effort to get information from us, and it also sets
23 forth the specific dates of concern, the operational
24 estimate and the construction permit date.

25 CHAIRMAN MILLER: The affidavit just described by

1 counsel was apparently forwarded to the Board, to the
2 members of the Board, by a letter dated March 2, 1981, from
3 Mr. Fallin, and contains the affidavit of Mr. Barton W.
4 Shackelford, who then was the President and Chief Operating
5 Officer of PG&E. It does contain some discussion of the
6 plans and the statute, or one of the statutes, which appears
7 to be in question. So we take it, then, that was intended
8 to be part of the joint motion, or at least somehow to be a
9 document lodged for consideration by the Board in reviewing
10 that. Is that correct?

11 MR. FALLIN: That's correct.

12 CHAIRMAN MILLER: Is there anything else now to be
13 considered in this context?

14 MR. GOLDBERG: Mr. Chairman, only one minor
15 matter, and that is that pre-dating the joint motion was a
16 letter from the staff of January 28, notifying the Board of
17 its intent to file a joint motion.

18 CHAIRMAN MILLER: Yes, that's correct. I don't
19 have it in here but we do recall having received it. Is
20 there anything substantive in that we would need in addition
21 to your responses or filings?

22 MR. GOLDBERG: No, there was not.

23 CHAIRMAN MILLER: We will note for the record that
24 that letter and notice to the Board was received.

25 All right. I take it that the proponents of the

1 motion will desire to go first. Is that correct? And who
2 is the chief proponent?

3 MR. FALLIN: I think that having shared the honor
4 but having had the baton passed, I will start, Your Honor.

5 CHAIRMAN MILLER: Very well.

6 MR. FALLIN: The motion before the Board I have
7 characterized in writing as a common sense, practical issue,
8 and I believe that to be the case.

9 The issue involves the connection of this
10 litigation to the actual project. It brings to mind the
11 fact that at the end of these proceedings there must be a
12 creature of concrete, reinforcing bar, stainless steel, and
13 the rest of the things that go into a nuclear power plant.

14 The precise situation drawn and described by NRC
15 staff and PG&E in their joint motion is one that involves
16 two situations which operate to affect that plant and the
17 possibilities of its being constructed and the timing of its
18 construction. And those two elements operate independently
19 of the work we have done here, and the work that staff and
20 PG&E feel should be suspended for a time.

21 These two elements are the pending litigation
22 between Pacific Gas & Electric Company and the California
23 Energy Resources Conservation and Development Commission,
24 more commonly referred to as the California Energy
25 Commission, and the dates of the estimated need for the

1 Stanislaus Nuclear Project.

2 The first element of the litigation I think is set
3 out clearly in the papers on both sides. The array of
4 California State nuclear legislation is such that if it
5 remains intact it will prevent the construction of this
6 plant -- indeed, any plant -- in California. I can't say
7 forever because some of the things involved in the
8 legislation can be affected by technological change.

9 CHAIRMAN MILLER: What is the statute you're
10 referring to, the California statute?

11 MR. FALLIN: It's California Public Resources
12 Code, Section 25,000 et. seq. I've got a tighter cite to it
13 somewhere. I think it's referred to in the joint motion.

14 There are two segments to it. One is commonly
15 referred to as the Warren-Alquist Act, and the second
16 element is the amendments to that act.

17 CHAIRMAN MILLER: For the record, could you
18 clearly delineate which statutes are which and what they
19 refer to, and the scope of the statute as you understand it
20 or statutes if there are more than one, so we know what
21 we're talking about in the beginning? And after you have
22 done that, we would like to know the present status of each
23 if there be more than one, and that refers to all aspects,
24 both within the state of California and federal courts where
25 the act is pending. And we would like that, I think, first

1 of all so we can then follow your arguments.

2 MR. FALLIN: Yes, sir. The Act, which was known
3 as the -- and I wish to say to Mr. Horn I'm borrowing his
4 statutory citations from his response here -- it was 25,000
5 et seq of the California Public Resources Code, as I
6 mentioned. That statute is commonly referred to as the
7 Warren-Alquist State Energy Resources Conservation
8 Development Act, as amended in 1976 to add Sections 25524.1,
9 .2 and .3. And the combination is, I think, -- it's
10 sometimes called the California Nuclear Laws.

11 The thrust of the sections is to require a number
12 of events to occur before nuclear facilities will be
13 "authorized." The specific crunch point is to require a
14 demonstrated reprocessing and disposal technology.

15 CHAIRMAN MILLER: Which section refers to that?

16 MR. FALLIN: I believe it's 25524.2.

17 CHAIRMAN MILLER: Point two?

18 MR. FALLIN: Yes. And that was of the California
19 Public Resources Code. Our codes are separated by
20 descriptive name, and then are numbered within those codes.

21 CHAIRMAN MILLER: Well, let's just take it in
22 numerical order. Section 25524.1, what does that relate
23 to? This is the section, by the way, of the California
24 Public Resources Code?

25 MR. FALLIN: Yes. I believe that concerns the

1 reprocessing technology.

2 CHAIRMAN MILLER: What does it provide about
3 reprocessing?

4 MR. FALLIN: At that point, Your Honor, I would
5 have to pull it and consult it.

6 CHAIRMAN MILLER: All right, I'll give you an
7 opportunity to pull it and consult it. Now let's take the
8 next one, which is 25524.2. What does that relate to?

9 MR. FALLIN: Point two is the high level waste
10 disposal technology requirement.

11 CHAIRMAN MILLER: What is your understanding of
12 the substance of the requirement of .2, with reference to
13 high level waste management?

14 MR. FALLIN: It requires that the problem be
15 resolved before any plant can be licensed. As interpreted,
16 it would require not that it be estimated to be available or
17 that it be -- the projections be made concerning it, but
18 that it be in being prior to the licensing.

19 CHAIRMAN MILLER: That what be in being?

20 MR. FALLIN: A disposal methodology or a disposal
21 mechanism would be the better word.

22 CHAIRMAN MILLER: A disposal mechanism?

23 MR. FALLIN: Yes. In other words, if it is to be
24 the salt mines; that this facility be available. I should
25 say, as you can sense, that when we get to these sections I

1 have not had to work with them as such. The case with the
2 Energy Commission was not my litigation. So in preparing
3 these papers, I have summarized pieces and do not know those
4 terms well enough to be real confident when I start
5 describing them. We can supply those and can answer those
6 questions. That's why I'm not -- .

7 CHAIRMAN MILLER: My question is who, at this
8 moment, on behalf of the applicant PG&E is prepared to give
9 us with some particularity the nature of these three
10 sections plus the 14 others that were apparently involved;
11 what it is they purport to require and the status of the
12 litigations? Since you put that into controversy here,
13 we're interested in more than simply generalities or your
14 own explanation, and you've been candid enough to explain to
15 us that isn't your forte. Whose is it?

16 MR. FALLIN: I can move it backwards with a great
17 deal more decision.

18 CHAIRMAN MILLER: I'd like to move forwards, if
19 you don't mind. I would like to start with your
20 contention. Your contention is that because of the status
21 of certain litigation in which the federal court, or at
22 least the district court, has found at least certain
23 precisely-numbered statutes passed by the state of
24 California, however it was passed -- those are matters we
25 won't go into -- have been declared unconstitutional, as I

1 understand it, because of, among other things, the question
2 or problem of pre-emption of those areas by federal
3 authority.

4 Now, I understand further from the various matters
5 and documents filed both by yourself and others, that the
6 two district court decisions declaring not only these three
7 sections but apparently some other portions unconstitutional
8 are now pending upon appeal before the Ninth Circuit, is it?

9 MR. FALLIN: Yes.

10 CHAIRMAN MILLER: So we would like to know, since
11 this is one of the bases at least upon which the Board is
12 being asked now to suspend, whether temporarily or
13 otherwise, some very extensive and massive litigation which
14 has been underway for several years, as we're all familiar
15 with and we certainly have more than a passing interest in
16 some of the particular aspects of that litigation, whether
17 the projections, predictions or whatever you wish to call it
18 made by your client to bring this matter that has occupied
19 our time, attention and presumably a great deal of money for
20 some years to a screeching halt.

21 MR. ARMSTRONG: Mr. Chairman, perhaps I can be of
22 assistance on this point. I think we are all agreed; that
23 is, the parties, are all agreed that the factual history
24 which is recounted at pages 4 and 5 of the responsive brief
25 of the Department of Water Resources, to summarize the

1 statutes in California, require the California Energy
2 Commission to make certain findings as a predicate to their
3 authorization of any nuclear facility.

4 One of the required findings was the demonstrated
5 means for high level nuclear waste disposal, that Commission
6 has recounted at page 5 of the DWR brief.

7 MR. WOLFE: What's the date of that brief?

8 CHAIRMAN MILLER: March 11, 1981. It has our
9 stamp on it.

10 MR. WOLFE: Page five?

11 MR. ARMSTRONG: Yes. As they recount, the
12 Commission determined that the necessary findings regarding
13 that high level waste disposal requirement could not be
14 made, and I think the parties to the litigation agreed that
15 at least at the present time, those findings could not be
16 made under the statute. And I think it is that consensus
17 about the facts which has led to the litigation in the
18 federal courts regarding the constitutionality of that
19 provision as well, perhaps, as some others.

20 But as to the others, apparently the State
21 Commission was able to make the findings. So the impediment
22 which is of concern relates to the high level waste disposal
23 facility or technique which does not exist, and which the
24 Commission has found not to exist, and that is the state law
25 roadblock to any nuclear facility which has led, in turn, to

1 the federal litigation.

2 And I think the course of the litigation in the
3 federal courts has been recounted already.

4 CHAIRMAN MILLER: Then it's your understanding
5 that there is only one section then dealing with high level
6 waste management which is the subject of the inability of
7 PG&E to obtain the necessary permits from the cognizant
8 state authority?

9 MR. ARMSTRONG: Mr. Chairman, I believe the
10 litigation of the federal courts addresses as well the
11 constitutionality of the remaining provisions just on the
12 theory of whether the state has to the right to intrude on
13 the process given the federal interest and regulation of the
14 matter.

15 But I think it is the case at the present time the
16 only one of those particular provisions which, as a
17 practical matter, stands in the way -- constitutional
18 arguments aside -- is the one regarding high level waste
19 disposal.

20 CHAIRMAN MILLER: What happened to the
21 reprocessing?

22 MR. ARMSTRONG: The State Commission made the
23 findings that those provisions of the state statute were
24 met, but I believe the utilities and the Commission have a
25 dispute about whether, nonetheless, the state has the right

1 to get into that question at all. Even though the findings
2 were favorable I think there is an argument about the
3 constitutionality of the statute. But I don't think in a
4 practical or immediate sense that is the problem here.

5 The one that would stop the construction of a
6 nuclear facility right now is this high level waste problem.

7 CHAIRMAN MILLER: You may proceed.

8 MR. FALLIN: Having now to go to the part about
9 which I feel a great deal more confident, which is the
10 current status of that litigation. The case was acted upon,
11 our case was acted upon, in the district court. The
12 district court ruled favorably to PG&E. In other words,
13 they ruled that the acts -- and I believe it was all 16
14 sections that are of concern -- were, in fact, pre-empted by
15 the federal laws in the area.

16 A similar decision was made on parts of that same
17 legislation in a case that was not filed by PG&E. Those two
18 decisions -- in fact, I believe that the case, the Pacific
19 Legal Foundation case, was actually decided earlier than was
20 the PG&E decision. The two have been consolidated on appeal
21 in the Ninth Circuit. The briefs have been filed and the
22 case has been argued. The case has been submitted.

23 CHAIRMAN MILLER: Has it been argued?

24 MR. FALLIN: Yes, it has.

25 CHAIRMAN MILLER: When was it argued?

1 MR. FALLIN: I believe it was October of 1980.

2 CHAIRMAN MILLER: Someone from your firm was
3 represented? Or Mr. Armstrong's firm?

4 MR. ARMSTRONG: No, it wasn't, our firm.

5 MR. FALLIN: It was from Pacific Gas & Electric.

6 CHAIRMAN MILLER: They were consolidated, you
7 say? This separate action brought by the group of
8 non-utility plaintiffs, which was also for the judgment
9 declaring Public Resources Code 25524.1, declared
10 unconstitutional?

11 MR. FALLIN: Yes

12 CHAIRMAN MILLER: Do you have any information as
13 to the length of time, either in this or similar cases, that
14 would be required to expect in a broad sense at least a
15 decision by the Court of Appeals?

16 MR. FALLIN: Not at all, Your Honor. In their
17 response, the counsel for DRW essayed some estimates of time
18 from submittal to decision, and then made some estimates of
19 time for moving to the Supreme Court and potential
20 resolution of either the denial of the writ or acting upon
21 it, in arriving at a prospective date, a decision in June of
22 1982

23 CHAIRMAN MILLER: Pardon me, that was the Supreme
24 Court, wasn't it?

25 MR. FALLIN: Yes.

1 CHAIRMAN MILLER: Let's set aside the Supreme
2 Court, let's just now stick to your own circuit. This is
3 just a page later from the portion of the brief you've been
4 reciting to me as being an accurate statement of the issues
5 in the statute. On the next page it is treated, and they go
6 ahead and point out that the case is fully briefed, oral
7 arguments were heard and the case was submitted to the
8 circuit court on October 10, 1980.

9 They point out also that the Ninth Circuit has
10 issued a number of decisions in cases submitted at the same
11 time or a little later than the appeal, and that they at
12 least expect expeditious decision by the Ninth Circuit.

13 Now, do you accept, challenge or have anything to
14 say on this subject?

15 MR. FALLIN: No. I'm not sure that this
16 experience is duplicated with every circuit, but I suspect
17 it is. Descriptions of the time from submittal of the
18 decision are anecdotal; specifically, with respect to the
19 Ninth Circuit. I was in district court three weeks ago on a
20 settlement conference in one of my cases and listened to the
21 argument concerning whether or not another case should be
22 continued or not because it depended on the status of the
23 case currently before the Ninth Circuit for decision.

24 That case had been submitted for nearly two
25 years. I personally know of other cases with ranges not

1 that quite extreme, but over a year. I have no way of
2 knowing, nor does anyone, what the timing will be on this
3 particular case. One can always estimate and try and guess
4 what the factors are that make them move more quickly or
5 more slowly or more deliberately, I guess would be the
6 correct word. But I cannot supply an estimate that is
7 closer than from the shortest possible time to crank it out
8 to an extreme of possibly a year and a half to two years.

9 I believe those are the extremes. I was surprised
10 to hear in the description the period of two years. I will
11 say that the district court did not appear to be surprised
12 by that statement.

13 MR. ARMSTRONG: The experience of our office, Mr.
14 Chairman, has been that the time for submittal around this
15 present timeframe can run anywhere from six months to two
16 years, and in some cases longer. Everyone likes to know
17 what to expect, but the Ninth Circuit surprises us very
18 often. So it's just impossible to predict, in a given case;
19 at least, that's been our experience.

20 MR. FALLIN: I believe we can treat the two years
21 as an outside line. The estimates beyond that as to when
22 the issue will be finally disposed of again partake of each
23 attorney's feel for the time required to put together the
24 papers and move to the Supreme Court. It is the consensus
25 that whatever the result in the Ninth Circuit, an effort

1 will be made to take the case to the Supreme Court.

2 Now, the reasons why final disposition is
3 important I think relate to the enormous investment involved
4 in the plant. The company's position -- and I do not think
5 it is in any way extreme -- is that the project will not be
6 reactivated in the sense of putting it back into the
7 engineering status of moving forward until a final
8 disposition is had with respect to the statutes. That's a
9 decision that is based partially on the amount of money
10 concerned, and partially on what now has to be characterized
11 as a venture.

12 Given the general problems in the industry, given
13 this company's specific experience with its Diablo Canyon
14 Nuclear Project and given institutional factors peculiar to
15 the state of California, including the outspoken position of
16 the state's governor in opposition to further nuclear
17 construction, -- .

18 CHAIRMAN MILLER: What other nuclear plants, if
19 any, is PG&E either in the process of constructing or
20 applying for construction permits?

21 MR. FALLIN: Diablo Canyon is, for all intents and
22 purposes, completed, and I believe that's now true of both
23 Units 1 and 2. It awaits and awaits and awaits. Humboldt
24 Bay, which was -- I was going to say this company's pioneer
25 plant; that's not quite true because Vallecitos was also

1 initially a PG&E project. Humboldt Bay went down, I can't
2 even recall now it's been so far back, but because of its
3 initial suspension -- I think it may have been reloading c:
4 something -- it has been down for seismic investigations and
5 for attempted analysis of steps that might be necessary to
6 deal with the results of those investigations. At this time
7 there is no date for its reactivation.

8 The Sacramento Municipal Utility District has a
9 nuclear plant in operation, Rancho Seco. I hesitate for a
10 moment, because they may be in a down cycle right now; I
11 can't recall whether or not that is the case. There's a
12 project in Southern California, San Onofre, which is
13 operating.

14 Stanislaus, I believe, is the only project that
15 has -- the only nuclear project that has a name or a
16 location affixed to it in the company's planning, and we
17 have no plans for anything beyond that that has been
18 identified.

19 There is discussion in the papers of potential
20 arrangements to share in out-of-state facilities. I don't
21 believe that any of that material has come to anything like
22 fruition.

23 MR. WENNER: You don't believe -- what was that?

24 MR. FALLIN: Has come to anything like fruition.

25 CHAIRMAN MILLER: Fruition is what you said.

1 MR. FALLIN: It hasn't, to my knowledge, gone
2 beyond the completely speculative format. And I think
3 that's a summary of where nuclear in California is at the
4 moment.

5 CHAIRMAN MILLER: Do any of these other plants,
6 Diablo Canyon for example, have licenses similar to those
7 which were negotiated by PG&E and the Department of Justice
8 in this case regionally?

9 MR. FALLIN: These negotiated commitments had
10 included within them a term which looked towards the
11 possible non-operation of this project within a certain
12 timespan. I cannot recall now; I believe it was about a
13 year ago or two years ago we approached one of those
14 states. The mechanism outlined in the commitments, as I
15 recall it, was if we passed that date with no operation in
16 Stanislaus, that the agreement commitments could be a part
17 of the Diablo Canyon license.

18 There was some hesitation at the time because when
19 they were drafted it was anticipated that there surely would
20 be an operating license for those to be attached to.
21 Unfortunately, that was not the case.

22 However, we reached agreement with Justice and
23 with the staff, that we would implement the commitments by
24 making them a part of the existing construction permit
25 authorization for the Diablo Canyon plant.

1 The answer to your question is yes, there are
2 similar conditions. In fact, the conditions themselves do
3 exist today as conditions to the Diablo plant.

4 CHAIRMAN MILLER: Are any of those conditions
5 which exist today with reference to Diablo Canyon questioned
6 or challenged on antitrust ground by any of the parties to
7 this proceeding?

8 MR. FALLIN: Not in connection with Diablo Canyon.

9 CHAIRMAN MILLER: I am talking about this --
10 pardon me, do you pronounce it Stanislaus? Do you pronounce
11 the "s"?

12 MR. FALLIN: I do.

13 CHAIRMAN MILLER: Does everybody else in
14 California?

15 MR. FALLIN: But we have trouble with a number of
16 our names. I think it's Stanislaus County, which has always
17 been enough to let me call the river and the nuclear site
18 the same thing.

19 CHAIRMAN MILLER: What's the derivation of that?
20 Is that Russian?

21 MR. FALLIN: I do not know. A number of the names
22 are Indian/Spanish. That one certainly sounds Russian to me.

23 CHAIRMAN MILLER: I know the Russians were there
24 at one time.

25 MR. FALLIN: Well, one of our earliest projects

1 was conducted by Prince Poniotowski, but he was Polish.

2 CHAIRMAN MILLER: My inquiry is whether Stanislaus
3 -- in this proceeding, are there one or more of the
4 conditions which somehow or another have become attached to
5 Diablo Canyon's construction permit? If that be the status
6 of it, which are under challenge in this proceeding?

7 MR. FALLIN: Yes. In fact, almost automatically
8 we would not have this proceeding but for the fact that
9 intervenors have raised objections to the scope of those
10 conditions, and Justice accepted those.

11 CHAIRMAN MILLER: Has there been any discovery to
12 your knowledge which bears upon one or more of those
13 contested provisions in this proceeding which are similar to
14 those in Diablo Canyon, for example?

15 MR. FALLIN: I have to hesitate because the
16 descriptions of the discovery have to depend on the party
17 who is making it. I believe that, speaking for intervenors,
18 they would say that all of their discovery is, to some
19 degree or another, attached to all of their claims which
20 devolved down to an assertion that those conditions have
21 inadequacies contained in them.

22 CHAIRMAN MILLER: Well, in the course of our
23 discussions hitherto, there have been certain contentions in
24 that regard which have been of a fairly high order of
25 priority in DWR's position. We are not now talking about

1 the whole range of contentions; we are talking about two or
2 three or four different provisions, that it has been
3 contended or contained in the Diablo Canyon are other
4 provisions which inure to the disadvantage of DWR in this
5 proceeding. Isn't that correct?

6 MR. FALLIN: I think yes, they always have
7 emphasized sections of the commitments. The reason I have
8 to hesitate is the discovery base has been geared to broad
9 subject matter descriptions and chronological periods.
10 Although I will say -- no, that's not true. I was going to
11 say that the discovery products have been paragraphed; that
12 they are paragraphed to the discovery orders, not to the
13 commitments.

14 CHAIRMAN MILLER: Let me inquire further, then you
15 may resume your argument, whether there have been any
16 settlement discussions or negotiations between or among the
17 parties, particularly with reference to those conditions,
18 license conditions, which have been attacked in this
19 proceeding, and which may exist, and have the approval of
20 both PG&E and the Department of Justice in Diablo or others.

21 MR. FALLIN: The answer is yes, there have been
22 discussions.

23 CHAIRMAN MILLER: And what is the discussion?
24 What is the status of settlement negotiations leading
25 towards the narrowing, if not overcoming, of the objections

1 to particular license conditions proposed here and
2 apparently adopted in the other proceeding which could lead
3 to the settlement in whole or in part in this proceeding?

4 MR. FALLIN: They have not been successful in the
5 last such. They most recently had negotiations with the NRC
6 staff that went on for some period of time, and we exchanged
7 views and possibilities for change. Those negotiations did
8 not result in a resolution either generally or of any
9 specific items.

10 CHAIRMAN MILLER: I don't want to get into the
11 nature of them because the parties and counsel should be
12 free to negotiate without having the Board or anyone else
13 looking over their shoulder.

14 On the other hand, this is a matter of
15 considerable interest to the Board, the Appeal Board and the
16 public interest generally. We would therefore like to have
17 reports from you and other counsel on the status of
18 negotiations and, in a general way, we would like to know
19 how far apart you are, how many major and minor issues there
20 are. And we would like to have the feeling on this, as we
21 have had in other cases, some of which did eventuate in
22 settlements, to where we start to get a feel, because you're
23 asking for a very major thing, to bring this matter to a
24 halt with all the time and money expended.

25 We therefore expect and believe that all counsel

1 will act responsibly, and acting responsibly in part means
2 telling us very candidly, without going into negotiating
3 secrets, but I've found that those are sometimes a lot more
4 honored than the statement in actuality when I have seen
5 them later -- I'll let you use your judgment on that. . We
6 want to know where you stand and why you can't settle this.

7 MR. ARMSTRONG: Mr. Chairman, perhaps I should
8 respond.

9 CHAIRMAN MILLER: Whichever counsel have been
10 involved can speak to this.

11 MR. ARMSTRONG: Mr. Fallin has been in some of the
12 negotiations, but I have had the honor of being in all of
13 them with Mr. Vogel and Mr. Goldberg. The approach which we
14 took -- and I think it's the only one that has any current
15 value -- was to endeavor to work out with the staff some
16 kind of an approach which the staff could then take to the
17 intervenors to see if we could put a package together. And
18 in a sense, the difficulties on which those discussions
19 foundered I believe have to do with the pendency of the
20 other litigation and the concern, at least on the part of
21 PG&E, that any settlement which might be reached here which
22 would involve the intervenors would merely -- would not end
23 the problems for PG&E. They would still be in litigation
24 with the intervenors and other firms.

25 And therefore, there just would not seem to be the

1 advantage to it, especially given the differences in the
2 views between intervenors on some issues, and between staff
3 and intervenors on some other things that look like a
4 process that could end up being more complicated than
5 litigation was.

6 I think it was about at that point that the
7 settlement discussions, seeming very complicated, were
8 overtaken by the feeling that this whole proceeding might be
9 premature because of the delays and the need for the plant
10 and so on, which have led us to the motion being made here.
11 I think that's a capsule version of what has happened.

12 CHAIRMAN MILLER: Well, we will expect other
13 counsel to put a little flesh on the bare bones because we
14 are interested in getting particulars.

15 MR. ARMSTRONG: The particulars really have to do,
16 I think, with the concerns we had with -- well, let me give
17 another element of background which I think helps to explain
18 it.

19 The reason we approached staff -- or maybe they
20 approached us, I don't really remember how that began, but
21 in any event, PG&E had independent negotiations proceeding
22 -- this goes back two years -- with NCPA, and separately
23 with DWR on the business side to try and strike business
24 contracts with each of those two entities to address most if
25 not all of their concerns in a business sense.

1 We became concerned that should those negotiations
2 be successful on the business side, that would leave the NRC
3 staff in the dark and we still had a proceeding here. And
4 if we were resolving things with the intervenors, we would
5 still have to conclude matters with the NRC staff. So we
6 opened negotiations from that background and thought, let's
7 get everybody aboard.

8 Shortly after we began that process, NCPA
9 underwent a change of management. The negotiations with
10 them effectively collapsed, and I don't really know if there
11 are any ongoing negotiations with them in any event at the
12 present time.

13 But that situation kind of changed and made it
14 more unlikely that a disposition of this whole dispute, not
15 just in this forum but in the other forum, could be
16 achieved. And for that -- I think that was really kind of
17 the real world background; that negotiations with DWR I
18 think are continuing.

19 Every time I inquire of the negotiators I am told
20 that a deal is to be expected within 60 days. I don't know
21 where it stands at the moment. Apparently, they think
22 they're pretty close but they have felt that for sometime.

23 CHAIRMAN MILLER: Sixty days, did you say?

24 MR. ARMSTRONG: Yes, but I said that tongue in
25 cheek. I'm sure they are sincere, but I've been hearing

1 their estimates for better than a year. So, while they're
2 close, it seems that the narrowing of that final gap is
3 taking longer than all the parties had anticipated.

4 But from the PG&E standpoint it was the case that
5 -- you know, the settlement of one proceeding leaving the
6 other proceeding alive and well seems to have limited
7 value. And the hope had been at the outset that perhaps we
8 could wrap up the whole business, and about a year and a
9 half ago there was great optimism, at least at PG&E, that
10 they were on the verge of an agreement with NCPA, equally on
11 the verge of an agreement with DWR. If we could work out a
12 deal with NRC staff, everyone would be happy and we could
13 all proceed with doing business instead of litigating.

14 When that started to unravel, the incentives
15 disappeared, and it seemed that while we might strike a
16 bargain with staff, that would be just one small start on a
17 long road to disposing of things, especially given the
18 unraveling of the whole business with NCPA, and the
19 negotiations on that front and the pendency of the FERC
20 litigation with them.

21 So at the present time I would have to say that
22 the settlement process has come to a halt because of those
23 factors.

24 MR. FALLIN: The processing, to an unusual sense,
25 has not just ceased but has become, itself, a major issue.

1 The reasonableness of the negotiation effort was -- there is
2 a dispute as to who put it in issue. It has been PG&E's
3 position that for a number of years NCPA, by innuendo, at
4 least incidentally, repeated by DWR here when they raised
5 the "it's been five years since" kind of arguments, had
6 placed our good faith and bona fides in negotiating the
7 issue.

8 That perceived challenge was accepted before the
9 Federal Energy Regulatory Commission testimony has been
10 given in detail as to what those negotiations were, what the
11 issues were, what the proposals were, what the reasons were,
12 why they were not acted on at a given time, whether in fact
13 the delay is occasioned by PG&E or by NCPA. That has been
14 the firm sworn testimony before the FERC and has become an
15 issue for resolution there.

16 CHAIRMAN MILLER: What is the status of all the
17 FERC proceedings involving any or all of these parties?

18 MR. FALLIN: Everything we discussed about FERC I
19 think rightfully DWR has to put up its hand and say, we are
20 not in those.

21 CHAIRMAN MILLER: But you are?

22 MR. FALLIN: We certainly are.

23 CHAIRMAN MILLER: What's the status?

24 MR. FALLIN: One major case, Docket No. E7777,
25 Phase 2, is if everyone in the room crosses their fingers

1 about to conclude hearings this week after, I believe, about
2 two years in hearings. It is in that case that the evidence
3 relative to the negotiating process, the interconnection and
4 negotiating process, has been adduced.

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1 Another proceeding now bearing the name the
2 consolidated name of the Helms Project/Pit 3, 4, and 5
3 Project is about to commence, I think, May 12. In the
4 proceeding, about to commence, the Intervenors there, which
5 I believe include Santa Clara, as well as NCPA, are seeking
6 the imposition of license conditions on hydroelectric
7 projects and the arguments have centered around the
8 commitments that are in place here.

9 That is not any neat resolution of this case,
10 however, because there are major issues in that proceeding
11 as to authority to impose such conditions, et cetera. The
12 FERC is clearly not charged with administering the Atomic
13 Energy Act. The Federal Power Act, Part I, is not the Act
14 we are involved in here, so it is not a one-for-one
15 equation. However, that describes the parameters of that
16 case, which is to commence hearings in a week or so, and I
17 believe that is the status of those proceedings.

18 CHAIRMAN MILLER: Is it not possible that some of
19 the determinations, if they be only subissues in the FERC
20 proceedings, could have a salutary effect in resolving some
21 of the issues bound up in this proceeding?

22 MR. FALLIN: Almost all of them would have --
23 varying from procedural to substantive -- salutary effect,
24 depending on which way they flop. They will bright-line
25 jurisdictional questions, statutory issues. One of them,

1 most specifically the claims relative to the desire to have
2 a transmission concession in connection with a competitive
3 relicensing situation, which I guess you could describe as a
4 uniquely Federal Power Act issue, is raised expressly in the
5 Helms/Pit case.

6 And I should say there are also competitive
7 relicensing cases under way. The City of Santa Clara has
8 filed a competing application for PG&E's Mokelumne River
9 project. NCPA, in company with Southern Cities, has filed a
10 competing application for PG&E's Rock Creek-Cresta project.

11 I think that -- in other words, a decision with
12 respect to a given element might well be -- it was not
13 something that the Federal Power Act, Part I -- of what
14 should happen. They anticipated the relicensing be
15 conducted on a heads-up, each party competes basis, with no
16 cross-subsidization. And in looking at whatever elements
17 they look at, they say this is not a remedy that we are
18 going to give under the Act.

19 It could go the other way. That's the nature of
20 the issues presented in those proceedings.

21 CHAIRMAN MILLER: In the settlement negotiations
22 has there been any consideration given to the so-called
23 Waterford formula, wherein the parties, without conceding
24 liability in an anti-trust sense, but assuming arguendo that
25 there would be a situation where there should be access to

1 nuclear power, went into the kinds of conditions or
2 agreements or licensing agreements which could obviate some
3 or all of the contentions here?

4 MR. ARMSTRONG: Yes, consideration of that was
5 given. And I think there has been no dispute about the
6 access to nuclear.

7 We have had some trivial arguments about notice
8 provisions, but the arguments that are made here have to do
9 with other matters than access to the nuclear.

10 So, yes, some consideration was given to that, but
11 it was felt not to be a viable approach here.

12 CHAIRMAN MILLER: What are the issues which do not
13 involve access to nuclear facilities, whether generation or
14 transmission, which in the judgment of the parties at that
15 time rendered impossible negotiation?

16 MR. ARMSTRONG: I think the principal problems
17 which separated the parties related to access to
18 transmission facilities and, more specifically, the terms on
19 which that was to be done. Obviously, the existing
20 Stanislaus commitments or Diablo Canyon conditions as they
21 now are, provided for right of access to transmission
22 facilities.

23 The arguments, really, on behalf of the
24 intervenors and staff have been that those provisions do not
25 go far enough and those disputes remain the most

1 intransigent ones.

2 CHAIRMAN MILLER: Why could not those disputes, by
3 virtue of appropriate stipulations, be the subject of
4 inquiry in this proceeding, eliminating the massive
5 discovery and trial on the liability aspects?

6 MR. ARMSTRONG: Well, that idea has been explored
7 from time to time, as the Board may recall, and I think the
8 obstacle to it has been in essence the feeling on behalf of
9 Intervenors and perhaps also Staff that in order to make
10 their case, if you will, they need the broad-based discovery
11 for the reason, as I understand it, that they perceived at
12 least some elements of a Section 2 Sherman Act kind of
13 proceeding in which they are going to have to establish
14 something that looks like monopolization.

15 However, that might be construed under the gloss
16 of the Atomic Energy Act provisions. So they need, as I
17 understand the argument, this broad-based discovery in order
18 to help them establish this notion of monopolization in sort
19 of an institutional kind of problem, rather than looking at
20 a specific instance of a combination or something of that
21 sort.

22 MR. FALLIN: I should say, Your Honor, there are
23 factors within the negotiation or within the subject matters
24 that make any easy resolution highly unlikely.
25 Specifically, two of these supposedly major denominated

1 problems with the commitments implicate our customers in a
2 major way-- specifically, the subject of relicensing of
3 hydroelectric plants. The nature of a hydroelectric plant
4 is that it generates electricity without fuel. Fuel costs
5 are passed through to our consumers. Ergo, the fuel cost
6 savings in a hydroelectric plant runs not to PG&E; it runs
7 to our customers.

8 We can take one example, the Mokelumne River
9 Project, for which the City of Santa Clara has filed a
10 competing application. If the project is taken out of the
11 PG&E system, our customers immediately experience about a
12 \$35 million per year, every year, increase in their rates.

13 That is not reflective of the full value lost in
14 terms of fuel, which runs something in excess of \$50 million
15 per year, every year. It is not a situation in which we
16 feel free to negotiate away or, to put it another way, to
17 negotiate advantages into the other side in that relicensing
18 situation.

19 The intertie problem raises a similar, very hard
20 problem, because municipalities have been successful in the
21 past in imposing various preference provisions in federal
22 project usage laws. There is a distinct possibility that
23 opening up a non-specific access provision to the intertie
24 would, through the operation of those preference provisions,
25 deny our customers all access to otherwise available

1 hydroelectric power flowing from the Pacific Northwest.

2 I raise these issues because they are a part of
3 the picture and they are not things that are easily resolved.

4 MR. WENNER: Could you spell out that problem a
5 little more?

6 MR. FALLIN: With the intertie?

7 Again, I know in enormous detail the ins and outs
8 of the relicensing problem. The intertie, because it has
9 been massively litigated in that 7777 litigation on the
10 general parameters, perhaps Rich may know more details.

11 MR. ARMSTRONG: I can speak to that.

12 Just to explain the situation, the difficulty is
13 this. Much of the available surplus hydro in the Northwest
14 is public power. The concern which people had at the
15 beginning of discussions about the construction of the
16 intertie, a concern which they still have, is what happens
17 if California preference agencies have an open pipeline to
18 the Northwest and there are two aspects of the concern.

19 If that pipeline or the transmission line, to
20 avoid the metaphor -- the transmission line is freely open
21 to the public agencies, the concern from PG&E is that they
22 will effectively be shut out because of the preference
23 provisions, and that the public agencies in California would
24 acquire and use all of the available surplus public power in
25 the Northwest.

1 From the position of the Northwest, there was, and
2 I think may still be, a concern that to the extent
3 California public agencies become dependent or
4 semi-dependent upon this power, it will become practically
5 difficult or impossible to shut it off at a future time,
6 when the agencies in the Northwest would otherwise need that
7 power for their own purposes.

8 That, at least, was the historical reason for this
9 rather complex construction of contract provisions, which
10 gave to the California public agencies only a pro rata share
11 of that public power cost advantage via their purchases
12 through either the Bureau of Reclamation or through PG&E.
13 And, as we mentioned earlier, the fuel cost advantages are
14 passed along to customers.

15 So the guts of the argument, again -- and this is
16 where it impacts settlement negotiations -- the real thrust
17 of this is who is going to derive what share of those cost
18 benefits.

19 The same thing can be true in the argument over
20 the re captured hydro or either of these other hydro issues.
21 On the Intervenor's side, of course, they wish to capture as
22 much of those benefits as they can for their customers.
23 PG&E's interest is to keep those interests which they have
24 for their customers and, from the company standpoint, if you
25 just looked at it as a straight commercial transaction and

1 said we have 100 units here to be allocated out and will
2 settle the Stanislaus proceeding by some cut -- 50-50 or
3 20-80 or whatever -- that's fine, except if you've still got
4 another proceeding going on. You're still probably going to
5 have to have some more chips available for that proceeding.

6 CHAIRMAN MILLER: Some more what?

7 MR. ARMSTRONG: Chips.

8 CHAIRMAN MILLER: Poker chips?

9 MR. ARMSTRONG: Poker chips, party chips, whatever.

10 (Laughter.)

11 MR. ARMSTRONG: But this was the concern, if you
12 could resolve the whole thing as to one issue and say all
13 right, this is going to be the delineation of the sharing of
14 those benefits once and for all. But if it isn't, no. But
15 this is not once and for all; this is this week's allocation
16 and next week we are going to be back at you for some more.

17 The calculation gets a little more difficult. So
18 I think it's in this context that the settlement negotiation
19 was occurring. And, as I said earlier, about a
20 year-and-a-half or two years ago the thought was things were
21 all coming together. And then it all fell apart, if you
22 will.

23 MR. FALLIN: Yes, I closed on the intertie.
24 Curiously enough, if the public power interests of this
25 world had not been so successful in securing special

1 interest legislation with respect to taxpayer-funded federal
2 projects they would have no trouble getting the access
3 desired across the intertie.

4 But having been so wonderfully successful in
5 creating that trap they are not inclined, especially because
6 of the problems we are looking at. We are looking at
7 competition between consumer groups in those remaining
8 issues. They are issues of interrelationship having to do
9 with the commitments as to reserve sharing, calculations as
10 to equipment usages that I would characterize as commercial
11 concerns -- the nits and picks of who gets \$5 here or \$6
12 there.

13 They do implicate the organizations separately,
14 but those major sticking points run directly to the consumer
15 groups.

16 MR. WENNER: What are the major interties? Do
17 they go throughout the states?

18 MR. FALLIN: When we talk about the intertie we
19 are describing a specific main transmission line. It's a
20 500 kV line; actually it's a double line, I think, for
21 nearly all of its distance, that begins in the Pacific
22 Northwest, runs through northern California into southern
23 California. It's an alternating current line. There is
24 also a direct current line which runs, I believe, through
25 Nevada, bypassing northern California and then is

1 interconnected into the southern California system.

2 The 500 kV for a portion of its length is -- the
3 ownerships vary. There is a portion owned by the Bureau of
4 Major Reclamation, a major portion owned by PG&E, portions
5 owned by Southern California Edison, and portions in the
6 Northwest owned and constructed by companies up there. And
7 it is the avenue by which, in situations where surplus power
8 appears in the Pacific Northwest, it can be moved into
9 California. It will also carry flow in the other direction.

10 CHAIRMAN MILLER: Hasn't there been a sharp
11 diminution in the amount of surplus hydropower from the
12 Pacific Northwest with Bonneville trying to get nuclear?

13 MR. FALLIN: That is the case. All of these
14 disputes are being played against an ever-changing energy
15 situation.

16 CHAIRMAN MILLER: And they are diminishing in the
17 case of hydro in the Northwest?

18 MR. FALLIN: Yes, understanding that in the future
19 the flows from the Northwest may be radically altered, so
20 that, in fact, the so-called surplus comes and is costed
21 from a nuclear plant, a coal plant, or whatever.

22 And that is a picture which none of us can affect,
23 or all of us can affect, but I guess the world is evolving a
24 number of these situations.

25 It also is making an easy resolution of this

1 hydro-electric issue increasingly impossible, because the
2 consequences to our consumers mount on a scale that is
3 fueled by oil cost, not even conventional inflation.

4 MR. ARMSTRONG: I think I should add, so the Board
5 is aware or perhaps reminded of, the fact that one advantage
6 in this Northwest-Southwest intertie is the different peaks
7 that the two regions have so traditionally.

8 As I understand it, most of the arrangements have
9 not been for the outright sale of power but rather it's been
10 an exchange peak-for-peak.

11 MR. WENNER: Excess seasonal exchange?

12 MR. ARMSTRONG: Yes.

13 MR. WENNER: Hasn't that been contrasted sharply
14 in the last year, especially?

15 MR. ARMSTRONG: I think it depends on the rainfall
16 in any given year. But while the volume of power available,
17 relatively speaking, has declined in terms of units of
18 energy, its relative value in dollar cost compared to the
19 alternative cost of generation is significantly increased.

20 So I understand there is now discussion about --
21 as there has been over the years -- about the construction
22 of another line. So how that is all resolved, the future
23 will have to tell us. But there is a continuing interest in
24 this whole subject and I have to assume that the reason is
25 that although there may be growth -- the obviously is growth

1 in the Northwest in terms of energy demand -- the peaks will
2 still be sufficiently different that the exchanges of energy
3 can occur.

4 CHAIRMAN MILLER: What's the reason for the
5 difference in the peaks? What does that arise out of?

6 MR. ARMSTRONG: In general terms, the Northwest
7 uses its energy in the wintertime for heating and California
8 tends to peak in the summertime with air conditioning.

9 MR. FALLIN: It is not a variation in the way you
10 usually think of it in the way of loads. There is also a
11 variation in generation. As I recall it, the Northwest
12 hydro begins peaking earlier than California's. Now because
13 you are going down on the map that doesn't strike everybody
14 right at the point, but our primary sources are snow pack,
15 not water as such.

16 And in general our runoff begins later than it
17 does in the Northwest. So there is a point in there where
18 there will be spilling, were they not able to deal off power
19 when we can use it. That, as the Chairman has said, is
20 obviously changing, because as folks fill up the Northwest
21 they absorb more and more of whatever is available.

22 On the note of changing conditions perhaps I can
23 return to the motion.

24 CHAIRMAN MILLER: How have things changed since
25 October of 1978, when PG&E filed suit with regard to the

1 Warner-Alquist Act? There certainly PG&E was uncertain.
2 They didn't have a favorable judgment or two favorable
3 judgments in hand. Why in October in '78 did not PG&E file
4 a motion to suspend, as against row, when you have one or
5 more favorable judgments in the District Court?

6 This is what the joint motion swings on insofar as
7 PG&E is concerned. So question, why not earlier than now
8 filing this motion?

9 MR. FALLIN: The answer to that -- and I have
10 thought about that -- is related to the subject we have just
11 been discussing. That is the changing of circumstances
12 around the prospective reality of this project.

13 In the year since Mr. Shackelford testified in
14 that litigation the respective need for the Stanislaus
15 nuclear project has advanced four years. He testified in
16 late -- late 1979 and early 1980 -- as to a need for the
17 project that began in 1983, as I recall.

18 That need, because of a number of I guess you
19 could call them good things in terms of the diminishing rate
20 at which electricity is demanded in California, the extent
21 to which conservation has been successful, and the basic
22 requirements kicked out by our system's needs has now moved
23 to 19 -- it is now 1997 that it is called for becoming
24 operational. I think I said 1983. I meant 1993. In other
25 words, the need for this project is now located sixteen

1 years from this date.

2 Your question, was that four years the triggering
3 mechanism that brought us here today? It was a part of it.
4 A part of what goes on -- and at this point NCPA has claimed
5 this is all somehow politically motivated -- that the
6 parties raced in here -- the staff and PG&E -- because one
7 party won the election and the other didn't.

8 That, I can say, is specifically not the case.
9 Mr. Goldberg, I can distinctly recall his discussing with me
10 way last summer at the occasion of one of these -- you know,
11 we had this business about whether PG&E was hiding documents
12 and we took depositions of a number of employees. Mr.
13 Goldberg asked me at that time, is this really making
14 sense? Is this a situation that should go on? And at the
15 time I said, Jack, it's getting to the point where it's
16 really beginning not to, and that was the perception I had
17 then, well before anybody knew who was going to walk into
18 the White House in November.

19 When the notion came up in January between the NRC
20 and PG&E to take a hard look at this, that taking a hard
21 look came into a situation in which (a) we knew damn well we
22 weren't going to build anything until we had a final
23 resolution of this litigation. We also knew that the need
24 for the project had now moved to 1997.

25 In the context of this case that means that the

1 anticipated harm to Intervenor from the project, which is
2 the only justification for us being here -- that is the
3 project in being -- will go to create or maintain conditions
4 inconsistent with the anti-trust laws. They cannot
5 experience that problem until a date that is nearly two
6 decades in the future.

7 MR. WOLFE: Yes, but all I'm saying is that this
8 is not mentioned or even averted to in your joint motion for
9 suspension. You didn't really bring that up until your
10 supplemental memorandum of April 24 and again during oral
11 argument today.

12 MR. FALLIN: Basically, the decision to come here
13 was the combination of the circumstances. Now it may be and
14 will be that there a time six months earlier when I could
15 have or should have gone through the hard-look process and
16 initiated it myself rather than having to wait until the
17 discussions began in January, as they did.

18 However, I would say that stating that it would
19 have been -- it might have been good to have ceased doing
20 these things and spending this money somewhat earlier is
21 certainly no reason for arguing that this money and doing
22 these things should now be done. And that is basically what
23 we come to.

24 The issue posed -- frankly, what we are asking for
25 in terms of screeching halts is a limited step. And I think

1 that is important to bear in mind.

2 CHAIRMAN MILLER: This is an interim proposal now
3 we are being confronted with? You are going to modify your
4 motion?

5 MR. FALLIN: No, the proposal is in terms of
6 performing discovery between the parties, is a halt. It is
7 a halt, however, that is designed to be so structured in the
8 order so as to preserve the fruits of all of the discovery
9 that has passed to date, with the exception of anything that
10 would be supervised by the Board in terms of adjusting how
11 many tons of that material has to be kept or moved around.
12 And that runs only to the point of final disposition of this
13 Energy Commission case.

14 Now much of the argumentation seems to be based on
15 the assumption that the District Court will be upheld on
16 appeal. Now that is a very much to be desired result. I
17 clearly can't speak for all the other parties in the room,
18 and certainly not for the State of California.

19 If the decision is adverse, if the District Court
20 is reversed at either level, then there will be no going
21 forward. There will be no need for those tons accumulated,
22 and it would have been a complete gesture to have preceding
23 them all.

24 That is the perception, and it is a practical
25 perception, that generated this joint motion. The request

1 that this be considered, however, must then be arranged
2 against the actual proposals having to do with the project
3 itself, and there are two dates which are of significance.

4 One of them is the date I have mentioned, which is
5 the planning parameter which shows the usefulness of a major
6 block of capacity that is not denominated Stanislaus, but is
7 appropriately sized for it in 1997, and the estimation which
8 PG&E has indicated it is willing to stand by here to meet
9 that date. The construction permit would be required some
10 eight years earlier, which is 1989.

11 The first date is of significance only to PG&E,
12 its shareholders and its customers. Should it take us past
13 eight years, should the decision that those acts are not
14 valid, should the project reactivated at that date, and the
15 litigation here commenced, should it somehow take us beyond
16 1989 to resolve it, I suppose PG&E runs the risk that its
17 construction permit could be delayed. That is our problem.

18 The Intervenors' problem, which is a problem which
19 must be based upon the operating of that plant, creating or
20 maintaining a situation, will not begin before 1997 and it
21 is in that factual context that the motion is placed before
22 you.

23 Now it's easy, I suppose -- the notion is it's
24 easy to say PG&E, you accept the risk, so forth and so on,
25 but we must evaluate the situation. I have to say that I do

1 not -- even if it takes, what, two, three years to get the
2 final disposition -- I do not believe that it would be
3 necessary to take five years in which to resolve this
4 litigation. If it does take somewhat more than five years,
5 then we have brought that problem on our own head. And I
6 think that characterizes the basis on which this joint
7 motion is brought.

8 The questions really are, is it reasonable; is it
9 unreasonable? The perception that the staff and FG&E joined
10 on was that it did not make sense in societal terms or in
11 terms of the interest of the participants here to go on
12 expending very, very large sums of money against a
13 possibility until it was determined that the project would
14 go forward in view of the timeframe that all of this was
15 being laid against.

16 There are two perceptions that are involved in
17 that analysis. One of them is the point raised by DWR,
18 citing two statements that Mr. Mielke made on behalf of the
19 company in the Energy Commission litigation, where he said
20 the expenditures for this kind of litigation are relatively
21 modest arranged against the final cost of a nuclear
22 project. That comes as no news to any of us. The enormous
23 capital investment involved in these projects is no
24 mystery. A very, very substantial litigation cost compared
25 to that can be made to appear quite small. A substantial

1 litigation cost incurred for no good reason is wrong, apart
2 from any relative standard.

3 There is an element that I think, in response to
4 the question about what is come together to occasion this
5 motion now, and that is the fact that this company, my
6 company, is now financially stressed, significantly so,
7 extremely cash-short. No amount, no substantial expenditure
8 for litigation or whatever can be treated as insignificant
9 or immaterial or just part of going along with that
10 examination at this point.

11 DWR and NCPA have raised the point that, golly, we
12 have lawyers who are familiar with the case, but he'll wait
13 a year or two and if the disposition goes one way and if we
14 go forward they will have to come back to the case. Two
15 points on that. That is what we are all in business doing
16 every day. Across the number of things which I carry, I
17 have many of them which I come back to at six-month to a
18 year intervals. If it happens, it is something that we are
19 all involved in accommodating.

20 This case, this litigation, this expenditure does
21 not exist as an employment opportunity for any of us. That
22 is not a reason for continuing.

23 MR. WOLFE: Mr. Fallin, let me interrupt. One or
24 more of the Intervenors indicated that they do wish to go
25 forward, lest recollections fade and witnesses die. I note

1 that in your supplemental memorandum you referred to Federal
2 Civil Procedure 27. In citing it you state that the rule
3 provides for perpetuation in testimony, apparently testimony
4 that is being taken or has been taken before FERC. Would
5 you explain how that would work in this proceeding to
6 preserve testimony before us, and particularly where, I take
7 it, DWR is not a party to FERC, or in the FERC litigation.

8 MR. FALLIN: The mechanism of depositions was
9 resorted to in one instance in this case with a Mr.
10 Goldhammer. Intervenors did not ask all the questions they
11 sought to, as I recall that deposition. It is a mechanism
12 we have used before.

13 Your direct question as to transcripts and
14 testimony in the FERC, whether that would be sufficient for
15 DWR's purposes, or whether in view of the eminent demise of
16 some individual or individuals, they would want to resort to
17 a deposition format. I think that would be a decision for
18 them to make.

19 In other words, the transcripts are there,
20 recorded and available and under oath, and I think the order
21 is susceptible of the adjustment --- the proposed order --
22 to provide that in instances where it does appear that
23 someone is in peril, more peril than all of us are at any
24 given moment, that his testimony can be preserved.

25 I believe that would be an action that would be

1 consistent with the spirit in which this joint motion is
2 offered. It is not intended to protect someone who is about
3 to expire from giving his testimony. And I can say for PG&E
4 that would be a reasonable adjustment to the proposed order.

5 On the other hand, I would also point out that
6 there is a kernel of information contained in that line of
7 argumentation, and that is what the decision will be in this
8 case must be what will be the impact of this project on the
9 situation as it exists when the project becomes operational.

10 There is the fact that it goes beyond just a
11 question of will we get out of the way in time for the
12 construction permit. It's what relevance or how much of the
13 situation, as it exists today -- or, more pointedly, as it
14 existed thirty years in the past when these individuals were
15 supposedly involved in it -- will in fact be determinative
16 sixteen years in the future, weighed against a situation
17 that all of us can sit here and see changing right now.

18 I'm not saying that would be an argument that
19 would be employable to say the testimony of a given witness
20 should not be preserved, but I do think that is a factor
21 that weighs on the question of whether it makes sense to
22 suspend the discovery operation between these parties until
23 we have a final disposition.

24 A point I would also make in terms of that order,
25 that order affects only the passage of materials between the

1 parties. If, in fact, DWR is convinced that the Act will be
2 declared unconstitutional, the case will go forward. It can
3 occupy itself doing other things it describes in its moving
4 papers, accumulating the materials it has not accumulated
5 yet, working the materials up into the form that it wants to
6 do, keeping its people employed on some schedule that
7 enables them to do anything. No part of this order reaches
8 anybody's internal organizations.

9 I think you can gather from the gist of my
10 comments that I do not anticipate doing those internal
11 operations during this period. Now maybe, again, we are
12 taking some risk that they would be free to go ahead and
13 march forward with this organization. The financial
14 situation which we are facing now is one that the company
15 cannot ignore, I cannot ignore. And that informs our being
16 here today.

17 I think that that concludes my presentation of the
18 situation.

19 CHAIRMAN MILLER: Very well. We will take about a
20 ten-minute recess.

21 (A brief recess was taken.)

22 CHAIRMAN MILLER: All right, we will proceed.
23 Staff?

24 MR. GOLDBERG: Mr. Chairman, and members of the
25 Board, I would like to rest on the PG&E statement of the

1 facts and just add to that the perspective of the staff in
2 bringing with PG&E this joint motion for suspension of
3 discovery.

4 In early to mid-January of 1981 a decision was
5 made at the highest levels of the staff in PG&E to move this
6 licensing Board to suspend discovery in this proceeding.
7 Immediately after that decision was made, the staff notified
8 the parties of the intent of PG&E and the staff to move for
9 a suspension of discovery. We followed that notice to the
10 parties up with a letter to the Board informing the Board of
11 our intent to move for a suspension of discovery. The joint
12 motion then followed shortly after our letter to the Board.

13 This case has, from the very beginning, involved a
14 substantial amount of time, money, effort and manpower on
15 the part of the staff and, as the Board, I am sure, knows,
16 all parties to this proceeding. There have been some events
17 which have strained substantially the existing resources of
18 the staff. The Commission, in responding to Congress, has
19 directed the staff to reorganize itself and concentrate its
20 efforts on near-term operating licenses and near-term
21 construction permits.

22 A substantial part of the staff is on a directed
23 overtime schedule to meet expedited schedules for issuing
24 near-term OLs and near-term CPs. Many of our personnel who
25 were heretofore available in assisting in litigation such as

1 the Stanislaus proceeding are of a temporary nature. I am
2 talking about paralegals and clerks who assisted us in our
3 litigation effort. Those personnel, in response to
4 direction from the Commission, have not been rehired. We
5 have had to let them go, and they are no longer available to
6 the staff.

7 The staff fully recognizes all its statutory
8 responsibilities and at this time is making a serious effort
9 to prioritize those statutory responsibilities and determine
10 which ones must be met immediately and which ones should be
11 assigned the limited resources that we have so as to
12 eventually meet of our statutory responsibilities.

13 I would like to emphasize that there are two
14 independent elements which form the basis of the joint
15 motion. They were mentioned by PG&E to be the pending
16 litigation that is before the Ninth Circuit on the
17 constitutional challenge to the California nuclear laws and
18 also the currently-projected date when PG&E believes it will
19 need Stanislaus to operate.

20 Those two bases are somewhat independent. Most of
21 the focus has been on the litigation that is currently
22 before the Ninth Circuit. But even if that litigation were
23 decided today and even if that litigation were not pursued
24 any further with an outcome favorable to the construction of
25 nuclear plants in California, we still have the independent

1 reason that PG&E, for reasons of conservation and what else,
2 at this time does not need the Stanislaus nuclear unit until
3 1997 at the earliest, with the construction permit needed in
4 1989 at the earliest.

5 In view of these facts, we believe that the public
6 interest strongly dictates that we devote the limited
7 manpower and resources that we have at the staff level to
8 the immediately-pressing responsibilities that the staff
9 has. The Stanislaus case is no longer an
10 immediately-pressing responsibility. It is one which can be
11 fully met after deferral, as we request in the joint motion.

12 The situation in 1997, when this plant presently
13 is scheduled for operation, and even in 1989, which at
14 present is the earliest date on which a construction permit
15 would be needed, might be far different than it is today.
16 We have heard about negotiations among the parties --
17 negotiations between PG&E and DWR -- which at all reported
18 times are fairly close to resolution. There have been over
19 the years negotiations between PG&E and NCPA. There have
20 been negotiations in connection with this proceeding between
21 PG&E and the staff. It may very well be that in 1997 or in
22 1989 settlement among some or all of the parties might have
23 mooted many of the issues which the parties are now eager to
24 proceed with in discovery.

25 Even if we do resume this case at a future date

1 because not all issues are resolved, the discovery that
2 might be required at that point might be far different than
3 what the parties claim is required now..

4 Just in the last year we have heard there has been
5 a four-year slippage in the projected date for Stanislaus.
6 Who knows what further slippage there might be in another
7 year. Maybe we will have another four years or six years.
8 It's merely speculative at this point as to when Stanislaus
9 is going to be needed. But all we know is PG&E is stating
10 for sure it's not until 1997 at the earliest.

11 There is no compelling reason, as far as we are
12 concerned, why we must proceed at this point, with their
13 severely strained resources, to continue discovery for a
14 plant which may never be built. And if it is built it is
15 going to be operating in 1997 at the earliest.

16 I would like to also point out the recent decision
17 by the Appeal Board in the Perkins case strongly supports --
18 it's a memorandum dated March 20, 1981, and I apologize that
19 I have not made this available to any of the other parties,
20 and if they are not familiar with it, we can make copies
21 available to them at the next break.

22 The Appeal Board in the Perkins case stated, and I
23 would like to quote, because it is directly pertinent to the
24 motion to suspend discovery, "There is a clear public
25 interest to be served in ensuring that the time and effort

1 of Commission officials and employees, including the members
2 of its adjudicatory panels, is well spent. If anything,
3 this is more apparent today than ever before. We can
4 officially notice the concern of the Commission regarding,
5 most particularly, the progress of licensing action on those
6 nuclear plants which are either fully built or near
7 completion. This concern has prompted a fresh and more
8 intensified look into the matter of allocation of personnel
9 resources."

10 Denial of the joint motion will only force the
11 staff and the Applicant and the Intervenors to engage in
12 further substantial monetary and personnel expenditures on
13 mere speculation.

14 CHAIRMAN MILLER: Mere speculation?

15 MR. GOLDBERG: Yes.

16 CHAIRMAN MILLER: How is that consistent with some
17 of the views that if they had more personnel that they would
18 be issued? You yourself said considerable time and effort
19 -- why now has the picture changed for the staff from that
20 which you pointed out, namely resources. Is there any other
21 reason?

22 MR. GOLDBERG: Well, there certainly have been
23 changes which stress our available resources now beyond
24 those stresses that we have normally experienced in the
25 past. But from the staff's perspective there has been a

1 change with the intent of the Applicant. Our action in
2 moving for this suspension of discovery is based directly on
3 the changed intentions of the company with respect to
4 Stanislaus.

5 CHAIRMAN MILLER: We asked you some years ago,
6 since they hadn't even filed the application and this was
7 all in the future if it was necessary to go to this
8 expense. At that time staff said they thought it was in the
9 public interest and that was some years ago.

10 MR. GOLDBERG: The statute provides for a
11 three-year advance submission of anti-trust information
12 before the rest of the construction permit follows. There
13 is nothing unusual at all about the submission of PG&E's
14 antitrust information. . Even up to three years before
15 they might come with the rest of their construction permit
16 application.

17 CHAIRMAN MILLER: We don't suggest it was
18 unusual. We suggest that the Department of Justice at that
19 time was satisfied with the conditions negotiated and that
20 the staff, maybe not enthusiastically but, rather,
21 ordinarily, went along with the position taken by some of
22 these Intervenorers that there were significant
23 anti-competitive questions that were then involved, that
24 there were other plants involved which were not within our
25 jurisdiction or consideration, such as PG&E's interest in

1 Diablo Canyon and so forth, that there was a situation
2 there. You spent considerable money. I think the staff put
3 a lot of this on computers, didn't they, so the expenditures
4 to date have been substantial by everyone, including the NRC
5 staff.

6 And it's true, and we certainly recognize the
7 Commission's actions and the Appeal Board's statements.
8 However, as I point out, this is an anti-trust matter.
9 You're not tying up technical staff, I don't believe, as you
10 are in a CP or an OL proceeding. Or perhaps the major
11 thrust, not total, but the major thrust of the observations
12 of the Appeal Board and the Commission might be brought to
13 bear, but this is an anti-trust matter, and the expenditures
14 and so forth, while substantial, are a little bit different
15 category.

16 I do understand the staff's anti-trust
17 capabilities probably are cut down in terms of personnel and
18 supporting, perhaps even attorneys. I don't know the
19 situation, but I've heard that.

20 However, the question is, if there are more
21 substantial significant anti-competitive questions which are
22 the antecedents in the activities of a large utility in the
23 State of California over a period of time, if Intervenor
24 are not individuals who are coming in underfunded and
25 unrepresented by counsel and the like but appear to be at

1 least adequately funded and certainly, as well anybody by
2 the Assistant Attorney General involved here, as well as
3 private firms representing the City, it seems it is a little
4 bit different from the usual Intervenor situation, or even
5 allocation of resources which, nonetheless, we recognize as
6 a matter of concern to the staff and Commission.

7 So if you would look at the anti-trust aspect of
8 this rather than just the overall view of the funding and
9 resources capabilities of the staff today, would you, please?

10 MR. GOLDBERG: What you say is certainly true,
11 that from the beginning of this case we have had substantial
12 problems because of Stanislaus commitments which were agreed
13 to by PG&E and the Department of Justice, and we have
14 perceived this from the beginning of this case to the best
15 of our ability. We still have the same concerns.

16 The question we are dealing with now is what is
17 the time frame that is necessary to deal with those
18 concerns? Up until very recently we believed that the time
19 frame was such that it was necessary for us to continue
20 pursuing this because PG&E had the option at any point in
21 filing the construction permit and we have been continually
22 trying to get from PG&E its best estimate as to when that
23 filing would take place. It was only fairly recently that
24 there was somewhat of a change in the position of PG&E about
25 its intent to file the remainder of its application in the

1 not-too-distant future.

2 It was only in January of this year when we had
3 any information which we felt justified in acting upon which
4 told us that there was no likelihood of PG&E's filing the
5 remainder of its application in the near future.

6 Notwithstanding our concerns about the merits of
7 the anti-trust problems that are at issue in this
8 proceeding, we feel that it is most inappropriate to
9 continue pursuing them at this time, when we have very
10 substantial statutory responsibilities elsewhere that is
11 demanding upon our legal staff as well as our technical
12 staff.

13 CHAIRMAN MILLER: Do you have any objections to
14 the Intervenor represented by counsel pursuing that, which
15 the staff feels perhaps because of economic and resource
16 constraints they'd have to fall back?

17 MR. GOLDBERG: Well, if I understand your
18 question, you are suggesting that some of the parties
19 proceed and others not.

20 CHAIRMAN MILLER: Well, I'm referring to what you
21 probably read. I think it was put in the earthy terms, if
22 it's too hot for you, get out of the kitchen, said one of
23 the Intervenor. I think it was the State of California,
24 DWR. They said we want to proceed. We understand the
25 staff's plight, but come with us if you can, but if not,

1 stand aside, but don't hold everything up because of your
2 resource problem.

3 I think that's enough of what was stated in one of
4 the papers.

5 MR. GOLDBERG: We have a statutory responsibility
6 in terms of anti-trust, and we have no intention of shirking
7 that responsibility. If there is a proceeding which is
8 ongoing, then we will fulfill our statutory responsibility
9 to the best of our ability.

10 CHAIRMAN MILLER: I understand that. My question
11 was simply with your limited capability, as you have
12 described, is there any good reason, public interest or
13 otherwise, why the matter could not proceed, if for other
14 reasons it should be deemed equitable to permit it to
15 proceed with discovery in whatever phases are now relevant,
16 with the labor and expense perhaps being borne by the
17 Intervenor's agents, I don't know just what, of the State of
18 California, but which have indicated some concern,
19 demonstrated some capacity so to do. Would that in any way
20 prejudice the staff or the staff's performance of its own
21 functions?

22 MR. GOLDBERG: Well, I think it might very well
23 prejudice us. It would perhaps prevent us from preparing an
24 adequate case and presenting that case to the Board, with
25 the perspective that the staff has, which is quite different

1 from any of the Intervenors, who naturally are protecting
2 their own competitive interest. From the point of view of
3 the staff, we are looking at not the interest of any
4 particular Intervenors or particular parties but competition
5 as a whole.

6 If discovery went forth without the staff there's
7 a good likelihood that we would not be able to present to
8 the Board an adequate record on the state of competition as
9 a whole.

10 CHAIRMAN MILLER: I don't quite follow that. It's
11 conceded that each party looks at it in terms of its own
12 interest, the Applicant naturally on the one hand and the
13 Intervenors on the other. But the fact that competitors
14 come in and raise anti-competitive issues under the
15 anti-trust laws would not seem, per se, to mean that the
16 staff wouldn't get competition -- which is what the courts
17 are charged with the responsibility of doing -- that the
18 staff would be put to any real disadvantage. At least I'm
19 not following any prejudice that would result.

20 The fact that somebody's competitors raise some
21 questions of monopolization, for instance, I don't know
22 qualitatively how it would be much different from what the
23 staff would do, except maybe they would do a better and more
24 thorough job. But short of that, would you be prejudiced?

25 MR. GOLDBERG: I'm not suggesting we would

1 necessarily do a better job. I am suggesting there may very
2 well be issues which ought to be addressed which particular
3 Intervenor, for their own reasons, think ought not to be
4 addressed.

5 CHAIRMAN MILLER: They seem to be addressing
6 everything under the sun, as I read the Contentions. But if
7 there is anything the staff would like to interject that the
8 Intervenor haven't, I'm sure the record could be rectified
9 in that regard.

10 But I'm still trying to find out really how it
11 would harm the staff's presentation. For example, we asked,
12 and I think you gentlemen did supply one time, respects in
13 which you considered that the agreed contentions by the
14 Department of Justice and PG&E were not adequate for the
15 situation here in this area, for whatever reason.

16 I think the staff has very definite reviews. I
17 don't recall them being too sharply divergent from at least
18 some of those of the Intervenor. These were almost
19 institutional questions, weren't they, in part? The staff's
20 point of view historically and in other anti-trust cases in
21 the context in which NRC examines them, which is limited, of
22 course, but within the licensing concept, the license
23 conditions are an important part of the staff's expertise,
24 aren't they?

25 MR. GOLDBERG: Yes, they are.

1 CHAIRMAN MILLER: Wouldn't it be helpful in this
2 case to have those matters considered by the Board if they
3 were to be anything short of determination of the proceeding?

4 MR. GOLDBERG: Most certainly.

5 CHAIRMAN MILLER: Okay. You may proceed.

6 MR. GOLDBERG: I have nothing further to add.

7 (Board conferring.)

8 CHAIRMAN MILLER: All right. We will proceed now
9 to hear from the counsel for Intervenors. Who wishes to go
10 first?

11 MR. HORN: Mr. Chairman, my name is Chet Horn from
12 the California Department of Justice, speaking on behalf of
13 the Intervenor, Department of Water Resources.

14 It might be helpful to begin our opposition to the
15 joint motion by adding a little bit of perspective which I
16 think has not been addressed today and perhaps comment on
17 some new perspective which has been added by previous
18 remarks this morning.

19 The foundation of this motion in particular, as it
20 has been argued by PG&E, appears to be that it is the only
21 entity in this room with an interest in the construction
22 permit date or the operation date of the Stanislaus plant.
23 That is decidedly not the case.

24 Each of the Intervenors is here in part because
25 they have expressed an interest in both of those matters and

1 indeed have, at least in the case of my client, indicated an
2 interest to the extent of its willingness to expend in
3 excess of half a million dollars a year in this litigation.
4 That interest is in seeing this plant go forward and having
5 the opportunity to participate in it under license
6 conditions that we feel acceptable whenever that plant comes
7 on line.

8 You have heard a lot about changes in the
9 projected need date for Stanislaus, and I could address a
10 great deal on the arguments, much of which I think we
11 treated in our papers. I only point out that Mr.
12 Shackelford, in his deposition and his affidavit, and the
13 company, in its briefs in the energy litigation in the
14 District Court of California, have repeatedly stated that
15 the lead time for their decision is 12 to 14 years prior to
16 the operation date.

17 Yet if we grant the 1997 -- even if we concede
18 that 1997 is now the projected operation date for the
19 Stanislaus plant, subtracting fourteen years from that, you
20 need a decision by this company to go forward in 1983. Even
21 if you are down to 12 years, you need that decision by
22 1985. I think it's prudent, and my client thinks it's
23 essential, that that decision be granted on the need for
24 anti-trust review and understanding of what the conditions
25 under which this plant will go forward will look like. We

1 cannot do that if we suspend this proceeding indefinitely
2 today.

3 The second point that was raised this morning is
4 the position of the staff, and I think the Board has
5 pinpointed the difficulty with the joint motion in that
6 respect. We understand the staff's funding and staffing
7 problems and are perfectly willing to go forward without
8 them. In fact, we hope to.

9 We do not think that they have made a case for any
10 prejudiced staff interest if we do go forward with or
11 without them. The only suggestion of prejudice that I
12 have heard insofar as the staff is concerned is the
13 potential that they will not be able to participate in
14 presentation of its views adequately if it does not
15 participate in the ongoing discovery.

16 Now I would suggest that given the breadth of the
17 discovery orders which have been entered so far and which
18 are currently in effect, and given the fact that you have
19 three intervening groups who are and will have access to all
20 of that discovery and will go forward if allowed to with
21 whatever additional discovery we think is necessary to
22 adequately explore these issues, we are not likely to throw
23 that away.

24 And the staff feels at some point, if we get this
25 case to hearing and it wishes to present its views, we can

1 make that information available to them and probably in a
2 fashion which would be a much more efficient review of that
3 information than any capability they have right now.

4 In short, their position does not suggest a reason
5 for suspending discovery. It may suggest a reason for the
6 staff to play down its role in this case.

7 With that, I would like to turn to the joint
8 motion itself. Perhaps the most conspicuous absence of any
9 of the supporting papers is a statutory or regulatory
10 foundation for this motion. Nowhere has PG&E or the staff
11 cited any authority which would permit this Board, absent a
12 dismissal, from retrenching from its decision in 1977, and
13 that decision of the Appeal Board followed the appeal from
14 that decision, which says that the statutory mechanism
15 having been started by PG&E in this case must go forward.

16 Intervenors' complaints are on file. We have
17 stated a case. The summary disposition motion of PG&E to
18 two different attacks to this Commission. Both of those
19 bodies that have considered it have said we must go forward.

20 Given that, one would think that there must be
21 some basis for withdrawing or changing the mind of this
22 Commission in that regard. None has been cited, and there
23 is a very good reason for that. There is none. There is
24 nothing in the Atomic Energy Act which permits this
25 Commission, once it has begun this process, to stop, absent

1 a withdrawal unequivocally of the Applicant from going
2 forward in this case. PG&E has not said it is unequivocally
3 abandoning the plans for Stanislaus, and it could not make
4 such a claim.

5 Given that, they must look then to the regulations
6 of this Commission and see if there is something there which
7 would permit this Board to grant the motion which has been
8 requested. We reviewed those regulations and we only see
9 one possibility and it is section 2.740, provisions relating
10 to the Board's ability to control the timing of discovery.
11 There are two provisions which have possible relevance to
12 this decision.

13 The first is subdivision (c), which permits the
14 Board to enter any necessary protective orders to prevent
15 burden harassment on the part of any party. That regulation
16 requires a specific showing of undue burden or harassment
17 and requires, then, a showing of connecting that burden to a
18 particular protective order request. That provision on its
19 face is not granted on convenience of the parties, which is,
20 so far as I have heard today, all that's involved here.

21 So far as the convenience of the parties is
22 concerned, there is a regulation in subdivision (d) of 2.740
23 which does talk about convenience to the parties and
24 specifically prohibits this Board from using convenience of
25 the parties to delay the prosecution of the proceeding.

1 That specific prohibition falls in line with a
2 much broader mandate to this Board found in section 2.718 of
3 this Commission's regulation, which defines the authority of
4 the presiding officer, which in this case is this licensing
5 board. That regulation mandates this Board to issue orders
6 which see to it that there will be no undue delay in the
7 carrying out of this Commission's statutory anti-trust
8 functions.

9 None of these matters have been addressed by the
10 staff nor by PG&E. We think there is a reason for that.
11 Had they been addressed specifically, this motion could not
12 have been made in good conscience.

13 Turning from the question of the
14 statutory-regulatory foundation, we must then get to the
15 factual foundation, which is the underpinning of this
16 motion. In that regard, I think the Board has heard this
17 morning argument of a second reason which was not, as
18 pointed out by Member Wolfe -- was not made a part of the
19 original moving papers, and that is delay in the scheduled
20 operation date for Stanislaus. I will address that.

21 I would like to turn back to the original reason
22 which was the foundation for this motion, which is the
23 pending litigation concerning the constitutionality of
24 certain of California's public resources code provisions.
25 The one fact which is abundantly clear, if you review all

1 the papers which have been filed in connection with this
2 motion, is that there is not one changed circumstance
3 concerning those bills or that litigation which would
4 justify this motion.

5 The bills which are the subject of attack in that
6 litigation were enacted in 1976 prior to the date that this
7 proceeding even began. They became effective in January of
8 1977, prior to the time that PG&E filed its summary
9 disposition motion. That motion did not raise the so-called
10 obstacle to going forward with Stanislaus as a reason for
11 terminating the proceeding at that time, and we think
12 rightly so.

13 The energy litigation which challenges the public
14 resources code provisions regarding nuclear plant siting
15 cannot provide a permanent obstacle, at least in its current
16 status, to this Commission or, indeed, to the California
17 Energy Commission from siting the Stanislaus plant. I don't
18 believe I have heard PG&E say that it would. I thought Mr.
19 Armstrong came close this morning, but I don't think that he
20 said exactly that. I think there's a reason for that. The
21 status of those bills, even if they are returned to
22 operational effect upon reversal of the Court's judgment --
23 if that's what happens -- will pose no necessary obstacle to
24 the siting and licensing of the Stanislaus plant.

25 PG&E has consistently maintained the position in

1 the energy litigation and elsewhere that the facts today and
2 indeed at the time of the regional 1978 determination by the
3 Energy Commission in California concerning the waste
4 disposal problem, PG&E has always maintained that the
5 technology exists or would exist by the time Stanislaus
6 becomes operational.

7 MR. WOLFE: What is your position on that?

8 MR. HORN: I have two hats here, so I'll first put
9 on the Attorney General's hat. And that is that the
10 Attorney General has no position concerning the factual
11 ability of the Energy Commission from making the necessary
12 finding regarding waste disposal. I think that DWR would
13 agree that if the plant -- I'm sorry, if we proceed that by
14 the time Stanislaus becomes operational the necessary
15 findings will be able to be made by the Energy Commission.

16 So far as constitutionality of litigation is
17 concerned, I have not discussed with DWR whether it even has
18 a view. The Office of the Attorney General has issued a
19 formal opinion agreeing with the outcome of the District
20 Court judgment declaring those provisions of the Public
21 Resources Code unconstitutional.

22 CHAIRMAN MILLER: It preceded, did it not, the
23 determination of either of the Federal District Courts, as I
24 recall? Did the Attorney General's opinion precede the
25 determination by either of the Federal District Courts?

1 MR. HORN: That is correct, Mr. Chairman.

2 MR. WENNER: You referred to the word "bills" a
3 moment ago. What did you mean by that?

4 MR. HORN: Well, the legislation which is the
5 subject of the litigation in the District Court is a fairly
6 complex regulatory scheme which was the subject of two
7 different --

8 MR. WENNER: Are these California statutes?

9 MR. HORN: That's right. The first was enacted --

10 MR. WENNER: I understand.

11 MR. HORN: All right.

12 The point here is that I don't believe that PG&E
13 has said, nor could it say, even if it loses -- that is, the
14 District Court judgment is reversed -- that it will
15 unequivocally abandon plans for the Stanislaus plant. And
16 perhaps it's an inquiry which this Board ought to direct to
17 PG&E, because I think it is an extremely important question,
18 especially in view of Mr. Goldberg's reference to the
19 three-year anti-trust review regulations of this Commission,
20 found in Part 50 of the Commission's regulations.

21 The question of whether we will go forward with
22 Stanislaus is a question which will ultimately hinge on a
23 great number of factors, and it is my view that the pending
24 energy litigation is only one small kernel in that pod. The
25 economics of nuclear power, the vicissitudes and the

1 political winds in the Congress and the state legislatures
2 of California and each of the other fifty states, are all
3 matters which at any given time can affect the views of
4 utility company management on whether they should undertake
5 the necessary investment to go forward with an operating
6 license application or construction permit application.

7 That commitment on the part of this company, so
8 far as I have heard, with respect to this plant is still
9 here. Mr. Mielke and Mr. Shackelford have not, in their
10 affidavits or in their testimony in the energy litigation,
11 declared their unwillingness to go forward, nor do I believe
12 that they said that if they lose that litigation they will
13 abandon plans for Stanislaus.

14 That being the case, I don't think this Commission
15 has the power to stop this proceeding. I think it must go
16 forward to a determination of the merits on the case.

17 More importantly, there are good reasons why you
18 should go forward. Until there is something like an
19 unequivocal abandoning of Stanislaus by the company here the
20 procedures which this Commission faces are long and complex
21 and the discovery history in this case suggests that if we
22 do go forward a number of years yet remain of work in this
23 case. I think it is not insignificant to look back on where
24 we have been in discovery in this case and where we are
25 today and what's left to be done.

1 CHAIRMAN MILLER: We would like to have a status
2 report on discovery. I forgot to mention to counsel, so
3 this would be a good time for them all to be thinking about
4 it. But since you are discussing the subject, we would like
5 to know what has been accomplished. It's been some time
6 since we'd had the monthly status reports or since we had
7 our last status report on discovery, so we would appreciate
8 your covering it, and we will ask other counsel to have it
9 in mind.

10 You may proceed.

11 MR. HORN: I am prepared, Mr. Miller, to give you
12 a brief status report on our progress in discovery. I would
13 like to take that up as a separate matter, unless you'd like
14 to hear that now.

15 CHAIRMAN MILLER: No, that's all right. We are
16 going to recess about ten till one or so for an hour and
17 fifteen minutes for lunch, if that helps any of you with
18 your plans.

19 MR. HORN: Now, going back to where we are today
20 and what remains to be done, we have to remember that the
21 discovery orders which operate today have been the subject
22 of a great deal of controversy before this Board. That
23 controversy has been decided and orders have been entered
24 and the scope of discovery necessary to determine the issues
25 which are in controversy by order of this Board has been

1 decided. We can retrench from that if good reasons to do so
2 are suggested. None have been in connection with this
3 motion.

4 As a result of that, the estimates about the
5 discovery burden which remains to be accomplished in this
6 case become highly pertinent to the question of when we will
7 be done with the anti-trust review which is required by
8 Section 105(c) of the Atomic Energy Act. To date, PG&E has
9 produced somewhere in the neighborhood of a million and a
10 half pages of numbered documents in response to this Board's
11 order. Estimates are that it has anywhere from one and a
12 half to two times that much left. It has taken
13 approximately 115 weeks -- excuse me, approximately 95
14 weeks, or almost two years, to get to where we are today in
15 document production.

16 If PG&E maintains its estimated case which led to
17 Board Exhibit 1 after the last pre-hearing conference of
18 5,000 pages per day of document production, we will not
19 finish production of even PG&E's documents for two more
20 years. If PG&E maintains its actual production rate of the
21 last 95 weeks, we will not finish document production for
22 four more years, until 1985, at the current level.

23 That discovery burden is indeed large and that's
24 because this is a complex case. Our ability to review that
25 discovery has so far been unhindered by the production

1 rates. We have, under our system of review, two different
2 levels of analysis that we put all discovery material
3 through. And we have, with respect to the first level of
4 analysis, maintained pace with PG&E. Almost ninety percent
5 of every document which has been produced has been put
6 through our first level analysis. Almost half of those
7 documents have been put through the second level of analysis
8 and fully ten percent identified as potential exhibits in
9 this case. In short, we are able to keep up with PG&E
10 production rate as it has been to date in our analysis.

11 At the same time we have managed to produce to
12 PG&E from DWR's file approximately 25 percent of all the
13 documents which we think will be produced by the Department
14 in response to their discovery request to us.

15 CHAIRMAN MILLER: What was that percent?

16 MR. HORN: Approximately 25 percent to date.

17 That production began in earnest only in October
18 of last year because of the length of time which was taken
19 to negotiate the stipulation procedures which would be used
20 and also because of some intervening production which
21 occurred in response to subpoenas served on us by Southern
22 California Edison Company in connection with some FERC
23 proceedings. All that material, by the way, has been made
24 available to PG&E and is available to any of the parties in
25 this case.

1 In short, there is a lot of work to be done here.
2 That work is going to take a lot of time. If we begin a
3 deposition program in earnest which has as its foundation
4 the information available from document production the net
5 deposition program will not begin for a number of years.

6 Now we are prepared to notice the depositions of
7 certain persons immediately if necessary in cases where
8 health or age suggest that we should forego complete
9 document production and we are in fact planning on doing
10 that. We do not think it is a sensible procedure for this
11 Board to suggest that we begin in earnest a large-scale
12 deposition program until document production has been
13 completed.

14 We are certainly willing to reconsider that view.
15 It has been my practice that deposition programs which do
16 not account for all document production which is going to
17 take place usually result in two deposition programs. And
18 it doesn't strike me as a particularly sensible procedure,
19 but I am more than willing to undertake it if the Board
20 finds it appropriate.

21 Given these facts as we see them, it seems to us
22 relatively clear that this review process will go on for
23 some time. This is going to be an exceedingly complex
24 anti-trust hearing, because the issues are large and we are,
25 after all, dealing with the largest public utility in this

1 nation. If we receive a conclusion at the Board level of
2 this proceeding by 1985 or by 1986 or 1987, a final review
3 of whatever the outcome is, whatever the licensing
4 conditions, if any, which are imposed, will not occur until
5 the Appeals process is complete, and I would not want to
6 hesitate to speculate on what that amount of time could
7 take.

8 But it seems to me clear that given the level of
9 work which remains to be done in this case that that timing
10 will run square on to the 1989 date which PG&E now estimates
11 is its needed date for its construction permit. It will run
12 well beyond the 14-year planning period which PG&E's
13 president testifies that he needs.

14 Given that fact, I cannot see any factual
15 foundation or even any good reason for suspending discovery
16 or any other motion work in this case. If we do seriously
17 entertain a suspension of discovery and all motion work in
18 this case, I think the Board has to understand what the
19 risks that will pose to the Intervenor's are, or to the staff
20 and to this Board in terms of the ability of the Intervenor's
21 to prove their case, to have necessary access to the
22 discovery information which will provide the foundation for
23 its trial efforts.

24 We have heard the suggestion that Rule 27 of the
25 Federal Rules gives us everything we need. I have to laugh

1 at that suggestion a little bit. We've had some experience
2 with Rule 27 in the District Courts in California and they
3 have some very interesting nexus tests that they use, and I
4 don't think we can meet them here.

5 The Federal District Courts will not use Rule 27
6 of the Federal Civil Rules of Procedure without a showing
7 that that testimony is being preserved for litigation which
8 is likely to come before those courts. They are not in the
9 habit of preserving testimony for other commissions.

10 This Board, I suppose, could adopt a version of
11 Rule 27, and perhaps it has by suggesting that the Federal
12 Rules of Civil Procedure will serve as analogs for this
13 litigation. The impact of that, should it be ordered by
14 this Board as suggested by Mr. Fallin, would be to moot this
15 motion as far as I am concerned.

16 The only sensible way to preserve testimony under
17 Rule 27 is to bring those witnesses before a court reporter
18 along with the documents about which that witness will
19 testify. If that's what we are going to do, I would point
20 out that it is probably a much more orderly process to
21 continue the current document production and let us take the
22 depositions based on a preliminary review of the documents
23 which we think are important for that witness to testify
24 about, as opposed to having him bring all his documents with
25 him and do that review in the context of a deposition, a

1 decidedly distasteful prospect from my point of view and
2 certainly from any witness's point of view, to would be
3 brought before this Commission's deposition process.

4 If we entertain this motion, the suggestion has
5 been made that our ability to maintain our litigation staffs
6 will be unhindered because we can do our own work. And I
7 suppose that's true. We can continue being prepared for and
8 producing all of our documents to PG&E and we can continue
9 reviewing the documents which they have produced to us.

10 As I have indicated, though, our ability to
11 maintain pace with PG&E has so far worked pretty well. I
12 think we could complete our review of the documents produced
13 by PG&E in some reasonably short period of time. I wouldn't
14 want to hazard a specific guess, but certainly a year or so
15 and I think we will be done.

16 If I understand this motion, it is one which seeks
17 for an indefinite suspension, which I cannot see, ending the
18 motion, as granted until sometime in late 1982, if our most
19 optimistic estimates are right. It would certainly extend
20 into 1983 if the Supreme Court does not decide a certiorari
21 next term.

22 And we will be, at the end of that period, only
23 being faced with the question, is PG&E going forward with
24 Stanislaus. I think that the suggestion that they will stop
25 is a suggestion which will be carefully reconsidered by

1 PG&E's management, if and when they are faced with a
2 decision on the merits in that energy litigation. I am not
3 sure how they will come out when they are faced with that
4 question, if they are faced with it.

5 I think it's important this Board understand they
6 may not be faced with that decision. There may be no
7 judgment on the merits in the energy litigation. It may
8 well be that the Ninth Circuit decides, and the Supreme
9 Court refuses to review, the question of PG&E standing.
10 That is one of the issues which has been raised in the
11 energy litigation and we don't know what the outcome of that
12 decision will be.

13 If the decision of the Ninth Circuit is based on
14 standing grounds and not on the merits of the
15 constitutionality of the statutes, again, PG&E's management
16 will be faced with a question of do we go forward with the
17 Stanislaus claim? And again I have not heard today and I
18 don't think we will hear what the management decision will
19 be, if faced with that choice. I think it's a decision
20 management will face at the time they are faced with it, and
21 they will make whatever review is necessary.

22 CHAIRMAN MILLER: I think we will suspend at this
23 time for lunch and return at 2:00, please.

24 (Whereupon, at 12:50 o'clock p.m., the hearing was
25 recessed, to reconvene at 2:00 o'clock p.m., the same day.)

AFTERNOON SESSION

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2:10 p.m.

CHAIRMAN MILLER: Let the record show that the session, when we recessed for lunch, very clearly was stated to resume at 2:00. It's now ten minutes after 2:00 and we're going to resume.

Gentlemen, you're going to have to be more prompt. This morning I understand you might have gotten lost or something, but when we said we'd resume at 2:00 after lunch, we met 2:00, so if necessary you'll have to leave* somebody behind, if your appetites are such that you can't accomplish it in the allotted time, since we're all talking about the limitation of resources and husbanding all of our money and time, it also pertains to the time .

MR. FALLIN: We apologize, Your Honor.

CHAIRMAN MILLER: It's accepted. I think there's a question here that one of the Board members has for you.

MR. WENNER: This is addressed to all counsel. When we were in San Francisco at the conference in January 1979, there was some discussion about the effect of the Stanislaus commitments, if there were to be any imposed in this proceeding, upon other nuclear plants of PG&E. There was some thought that suppose Stanislaus isn't built eventually. I have a transcript here.

Can you people, during some recess, or if you

1 happen to have the citations available -- I would like the
2 citation of that colloquy.

3 CHAIRMAN MILLER: If counsel can assist in
4 locating the reference to the transcript -- that was at the
5 last San Francisco meeting, was it not?

6 MR. WENNER: Yes.

7 MR. FALLIN: I think that was the
8 inter-relationship between Stanislaus and Diablo and the
9 conditions in both.

10 CHAIRMAN MILLER: Yes, very probably that was it.
11 If anybody could come up with this citation where that's
12 located, we would appreciate it.

13 MR. FALLIN: If we could borrow your transcript we
14 could try and do that right now while we're going on.

15 CHAIRMAN MILLER: Thank you.

16 Mr. Horn, you may resume your argument.

17 MR HORN: Thank you, Mr. Miller. I think in the
18 interest of shortening this colloquy somewhat, I am going to
19 limit my remaining remarks to two of the principal reasons I
20 think remain to be discussed about why this Board ought not
21 grant PG&E's and the staff's joint motion.

22 The first is what I would call the equitable
23 reason that I think this Commission will well understand,
24 and that is that PG&E ought not be allowed to be rewarded
25 for its conduct in discovery in this case. I'm sure we will

1 get to it at some point later on in the agenda, but the fact
2 is that PG&E has violated an order of this Board and this
3 Board's regulations and it has failed to produce documents
4 without informing this Board and the parties for a period of
5 almost five months. .

6 CHAIRMAN MILLER: What's the connection, Mr.
7 Horn? What's at issue here?

8 MR HORN: I think the connection is twofold. It
9 seems to us that the motion, at least insofar as it is
10 proffered by the company, bears a serious danger of
11 involving this Board in a manipulation of this Commission's
12 procedures to satisfy the particular goals of the applicant
13 here. This company has resisted, from the beginning, as you
14 well know, any effort at serious antitrust review in this
15 case.

16 It attempted to take these proceedings by storm in
17 January of 1977 with a summary disposition motion which
18 ultimately had to be ruled on by an Appeals Board of this
19 Commission. The purpose of which was to cease antitrust
20 review. It has argued over and over again that goings on in
21 other proceedings before other commissions pose a reason why
22 this Commission need not engage in extensive antitrust
23 review. And now it comes before this Board and says that
24 the vagaries of the political life of nuclear power in this
25 country and in particular, in California, suggest yet

1 another reason why we should not have an antitrust review,
2 or at least why that review should be suspended indefinitely.

3 That continuous effort seems to us to require this
4 Board to say to the company, you started this process,
5 . u're going forward with it and now let's get busy.

6 The ceasing of the production of documents, while
7 it has not as of yet interrupted our ability to prepare our
8 antitrust case surely will get to that point soon enough.
9 The pipeline has been shut down, as far as we know. It was
10 shut down some six months.

11 I don't know how many documents PG&E has yet to
12 turn over to us. I do know, as I explained earlier, that we
13 are maintaining pace in our review of that material, and
14 unless the pipeline is reopened our review effort will
15 cease. When the last of those documents currently in the
16 pipeline flow to us, that I think is the most practical
17 significance for their cessation.

18 Which brings me to the second and last point I
19 would like to discuss. The Board asked and there was some
20 discussion this morning about the possibilities of
21 settlement. Mr. Fallin made the, what I think was a rather
22 remarkable assertion for the first time in this case, that
23 there were at least two issues in which there appears to be
24 no prospective settlement from PG&E's point of view; that
25 is, the relicensing of hydro facilities provisions of the

1 Stanislaus commitments and the issue surrounding the
2 intertie. That's a lot like saying especially with respect
3 to the intertie that there will be no settlement in this
4 case.

5 As this Board knows, the intertie transmission
6 issues form, in a large part, the core of the transmission
7 access issues which will be tried. It has always been a
8 major concern of DWR, the other intervenors and the staff.
9 They were told that because of potential impact of
10 resolution of those issues on PG&E's customers, it is
11 unlikely -- indeed, I believe the expression used by Mr.
12 Fallin was practically impossible -- that there will be any
13 settlement of that issue.

14 Now, the staff told the Board this morning that
15 one of the reasons why it felt this motion is inappropriate
16 at this time was that under the new scheduling requirements
17 for the operation of the plant, it raises the possibility
18 that settlement may indeed change things between now and
19 1997 or '89 or '85, whenever it is.

20 I think in light of Mr. Fallin's remarks with
21 respect to at least two issues that it's unlikely there will
22 be any settlement. It seems to clear that this hearing will
23 have to go forward, at least on those, because we've now
24 been told there will be no settlement by the company on
25 those issues.

1 Secondly, I think the Board should understand and
2 is rightly concerned that the prospects of settlement in
3 this case in large part are impacted by the ability of the
4 parties to make settlement a worthwhile effort to pursue.
5 It's the same in every other case. If we now suspend
6 progress in this case, if we stop all discovery, we reduce
7 the burden on the company and reduce progress towards
8 resolution of hard, difficult issues like the two which Mr.
9 Fallin says he will not settle; reduce progress towards
10 resolution of any other antitrust issue which this Board has
11 determined must be tried in this case. There will be no
12 settlement in this case or it will be a settlement which is
13 a command for the intervenors to capitulate on those issues
14 and nothing more.

15 The fact is that if this Board wants to maintain a
16 realistic prospect of a reasonable settlement of the
17 antitrust disputes which are raised in this proceeding, it
18 must keep this hearing progressing towards a hearing and
19 a resolution of those disputes. Anything else and we're not
20 going to have a settlement here.

21 On the prospects of settlement, I think it is fair
22 to say that Mr. Armstrong accurately reported at least with
23 respect to DWR that there were ongoing discussions of a
24 business nature which may resolve a number of issues
25 relating to the business relationship between my client and

1 the company.

2 It is my understanding that those talks have
3 achieved substantial progress; that, however, they are going
4 at an exceedingly slow pace. Again, if we suspend this case
5 there is little or no prospect and little reason for PG&E to
6 increase the pace of those discussions.

7 Now, it's not clear to me at this point that those
8 discussions alone will resolve all the issues between DWR
9 and PG&E. It's clear to me that they will resolve a large
10 number of them, and once the business relationships are
11 developed for the posed 1983 relationship between the
12 company and DWR, we will be in a much better position to
13 understand where we are in terms of narrowing the focus of
14 any needed relief from this Commission.

15 But the key point that I have to urge on this
16 Board is that like any other case, settlement will flow when
17 both sides realize what the risks are in terms of going to a
18 hearing and facing the prospect of relief; in this case, the
19 imposition of license conditions on the construction
20 permit. If we stop now for an indefinite period, it seems
21 to me we remove whatever incentives this Board has to create
22 on its own, and granting of this joint motion would do just
23 that and, I think, seriously hinder any settlement prospects
24 that the parties have for the resolution of these issues.

25 And I think with that I will conclude my remarks

1 unless the Board wishes a report or has any questions.

2 MR. WENNER: Let me ask you one question. Suppose
3 Stanislaus were never to be built and you raised the
4 question whether PG&E would or would not make a declaration
5 about its intention regarding Stanislaus. Suppose
6 Stanislaus were not to be built and they decided down the
7 line. What would be the effect of the decision of this
8 Commission?

9 MR HORN: That is, if we take this phase of the
10 licensing proceeding to hearing?

11 MR. WENNER: In decision.

12 MR HORN: In decision and subsequent to that the
13 company states its complete withdrawal of the Stanislaus
14 plans, and so the proceeding is dismissed with prejudice
15 against PG&E. I think it probably raises some very hard
16 questions about the collateral estoppel effect of any
17 findings of fact this Board would render in its decision.

18 I would have to say candidly that I cannot believe
19 that it would result in a judgment which would be res
20 judicata against the company or any other party, because
21 it's not clear to me that the judgment in that event -- it's
22 not clear to me that there would be a judgment in any event
23 if we simply put a stop to the proceeding altogether.

24 MR. WENNER: Assume it went to hearing, to a
25 decision.

1 MR HORN: I am assuming that. What I am saying to
2 you is it's not clear to me what the res judicata
3 implications of the Board's decision would be. It's also
4 not clear, although I think it's possible, that there would
5 be some collateral estoppel impacts that the Board's
6 findings of fact might have.

7 Certainly, at a minimum those findings would have
8 a salutary effect on whatever other forum would then be
9 turned to by DWR to seek resolution if it has any trust
10 disputes with the company. I find it difficult to believe
11 that if, because of abandoning of the plant, we then are
12 forced to seek another forum, that that forum will ignore
13 the lengthy record, the lengthy consideration and the
14 findings of a Board like yourselves.

15 The extent of the impact that that other forum
16 gives to this Board's findings is unclear, but I think it
17 would certainly have, if nothing else, an instructive
18 benefit for whatever forum would have to consider these
19 antitrust questions.

20 MR. WENNER: In the hypothetical case I've given
21 you, what would be the effect of a decision of these
22 Commission upon Diablo Canyon from other nuclear plants of
23 the respective conditions?

24 MR HORN: With respect to its impact on Diablo
25 Canyon, it is my understanding that absent agreement with

1 PG&E, the Board would not have the power to impose any
2 changes in the license conditions on the Diablo license. It
3 would certainly use this Board's finding as an effort to
4 persuade the company that they should amend that license,
5 but I think any amendments to that license, as a practical
6 matter, would have to come in the context of an enforcement
7 proceeding presumably initiated by this staff in connection
8 with the Diablo license.

9 It might be that the findings of this Board would
10 have a very instructive impact on the staff's consideration
11 of whether an enforcement proceeding in Diablo is
12 appropriate, seeking for amendment of that license with
13 respect to the potential impact on other nuclear power
14 plants.

15 I believe you have heard Mr. Fallin describe to
16 you this morning the only other PG&E nuclear power plant
17 which exists is Humboldt, and I think the same things that
18 were just now said about Diablo are true there as well.

19 In terms of the prospective PG&E seeking certain
20 occasion of additional new plants at some point in the
21 future, again, I think the findings and the judgment of a
22 duly-constituted hearing board would be extremely
23 instructive and perhaps have some collateral estoppel value
24 to whatever board would hear that application should the
25 antitrust issues be raised in that review process.

1 Certainly, any new application by PG&E to build a
2 plant in addition to Stanislaus would have to be subject to
3 antitrust reviews of Section 105(c). I find it difficult
4 to believe that Department of Justice, despite our concerns
5 over its review in this case, would ignore the antitrust
6 findings of the duly-constituted board of this Commission in
7 its antitrust review of that future license application.

8 Again, I don't feel like I could speak to what
9 would be a binding judgment without doing research. I think
10 that's a very difficult decision at best. But certainly it
11 would have, in some way or another, some, I think, salutary
12 benefit in connection with any other application which PG&E
13 might bring before this Commission.

14 MR. WENNER: Suppose Stanislaus were built; what
15 would be the effect of conditions included by this
16 Commission in this case on other PG&E nuclear plants?

17 MR HORN: I think if this plant is built and the
18 Board conducts its antitrust review, and that leads to the
19 imposition of license conditions of any sort, whether the
20 Board adopts the Stanislaus conditions or amends them or
21 whatever, those license conditions then become binding in
22 the sense that they operate like an injunctive decree of
23 this Commission against the company.

24 That injunctive decree is enforceable by the
25 Commission staff and it may be enforceable by parties like

1 DWR or the other intervenors in this case. Certainly, we
2 would have the opportunity to bring to the attention of the
3 Commission staff any violations of those license conditions
4 that we felt were involved. And our rights, should the
5 staff disagree with us about violations or not, is not clear
6 to me.

7 But I think with whatever enforcement mechanisms
8 there are, the decree would operate like an injunction
9 against the company. Therefore, the need for license
10 conditions with respect to any other plants which the
11 company has might well be -- might be unnecessary. It would
12 depend on the view that the Antitrust Division, Commission
13 staff and intervenors like ourselves take on PG&E's conduct
14 in its compliance with whatever license conditions would be
15 imposed as a result of this case.

16 That is to say, we might feel, or the Justice
17 Department might feel that even with license conditions
18 there might still be areas of concern. And it's hard for me
19 to say right now what the impact of these license conditions
20 would be in that event.

21 MR. WENNER: Are there any agreements or
22 understandings that were entered into in this proceeding
23 about the effect of decisions in this case with respect to
24 licensing conditions and their effect upon other nuclear
25 plants of PG&E?

1 MR HORN: None that I know of with the exception
2 of the agreement between the Department of Justice and PG&E,
3 which has already resulted in the Stanislaus commitments
4 being attached to the Diablo license conditions. I don't
5 know of any other agreement but there may well be one; I'm
6 not privy to it if there is.

7 MR. WENNER: I'm going to direct the same
8 questions to the other parties as we go along. I believe
9 there was colloquy about this in San Francisco. Thank you
10 very much.

11 MR. DAVIDSON: May it please the Tribunal, my name
12 is Daniel Davidson, I represent the Northern California
13 Power Agency.

14 As I have listened to the argument this morning, I
15 noticed at least one very significant point suggested in the
16 briefs, both of NCPA and of DWR that has been sloughed off.

17 PG&E, within the last six months, sought a share
18 of the Palo Verde nuclear unit. We are told by counsel that
19 nothing much came of it, but they have not at all addressed
20 the prospect of PG&E over, say, the next decade, seeking a
21 share of an out-of-California nuclear plant. They have
22 sought it, on information and belief -- and I don't intend
23 to testify -- within the last six months. They are
24 capacity-short. And this is certainly something that I think
25 has to be addressed on their claim that essentially they

1 will not have a nuclear plant until at the earliest 1997.

2 I don't think they know it, I don't think they can
3 preclude it. Let's take the 1997 or was it 1998 date --
4 1997. My notes show that it was bruited around so much this
5 morning. What do we know about it?

6 We know that a PG&E official has signed an
7 affidavit saying it's the earliest they could meet it. What
8 is it based on? Has there been cross examination? What has
9 caused the change from the previous position and what has
10 happened since the date of that affidavit? For example,
11 again, on information and belief, since that date was put
12 forward, PG&E has virtually cancelled its plans to build the
13 Montezuma Coal Plant, approximately 1000 megawatts in
14 California.

15 It has given up on its plans to buy a share of the
16 Harry Allen Warner, Warner Valley Project out of state,
17 probably about 400 megawatts. Where does PG&E now intend to
18 get the thousands of megawatts of baseload units it will
19 require before the mid-1990's?

20 Now, it's not as if any plan is written in
21 concrete. I have a document submitted to the California
22 Energy Commission which shows a chart that seems to be dated
23 August 12, 1980. That shows nuclear coming on in 1995, so
24 two and a half months slipped to two years. Because by
25 December we're told that it was 1997. What caused the

1 slip? Might it go back four years or ten years the other
2 direction because of the failure of other plans? We don't
3 know anything about PG&E's plans for Stanislaus except a few
4 comments of counsel who must admit they are not prepared to
5 really stand examination on the subject.

6 In any event, for a decision as momentous as the
7 one that PG&E asks today, I think a lot more is required
8 before this tribunal can accept that naked assertion.

9 Now, there's something I don't understand. It
10 must be readily apparent that the PG&E motion as filed is
11 pro forma. What they say occupies about a page. All they
12 say is there is uncertainty as to whether or not the
13 California nuclear legislation is constitutional or not, and
14 therefore, we can't go ahead. There's nothing else. The
15 rest has all come subsequent to their petition, which as I
16 say is pro forma.

17 That may be explained by what staff said today,
18 that the joint motion was arranged on the highest level of
19 the NRC staff and PG&E. Fortunately, I believe the highest
20 level does not include the tribunal. All you have before
21 you on your motion is this statement, as I say, and I repeat
22 it because I don't think it should be ignored or even
23 forgotten; that there is the California nuclear legislation.

24 What is not said is that there was this California
25 nuclear legislation before the petitions to intervene were

1 filed. What has happened subsequently? PG&E has been
2 successful before two district courts. It's hard to see how
3 that affords any basis for suspension of this proceeding.

4 Chairman Miller has indicated how much effort,
5 time, struggle, strife -- I'm now using my own words -- has
6 gone into getting this far, and to be told that it will be
7 terminated after the expenditure of millions of dollars
8 because PG&E suddenly decides that a pre-existing condition,
9 a condition that existed before this litigation began,
10 should suddenly be put forward as a grounds for, in essence,
11 terminating this hearing.

12 That was what was in the PG&E petition and all
13 that's in the PG&E petition. Then, in the document they
14 filed -- .

15 MR. WENNER: In the petition? What do you mean,
16 in the joint motion?

17 MR. DAVIDSON: In the joint motion. In the
18 document PG&E filed alone improperly under the Commission
19 rules --.

20 MR. WENNER: What document are you now referring
21 to? The supplementary petition?

22 MR. DAVIDSON: Yes.

23 MR. WENNER: That's the one of April 24?

24 MR. DAVIDSON: I believe so. The second reason is
25 added to the first, and that is, PG&E may not need it, or as

1 asserted, will not need Stanislaus until 1997, and won't
2 need therefore a construction permit until about 1989. As I
3 say, we have nothing here other than a bald assertion.

4 It still gets interesting because PG&E improperly
5 this morning, or certainly incompletely, quoted the
6 statements made under oath and under examination in the
7 district court proceedings where Mr. Mielke, a lawyer, the
8 Chairman of the Board of PG&E and his chief executive
9 officer said PG&E does not require the expenditure of
10 antitrust review so great that we don't want it to go
11 ahead. This is the type of thing we want to get out of the
12 way. He said it twice. It's quoted in DWR's brief. PG&E
13 said it's become more expensive. Expenses mean more to us.

14 The chairman of their board knew the expenses; he
15 also knew this was the kind of thing he wanted to get out of
16 the way. Now I suggest you cannot tell one thing to a
17 district court to try to avoid a suggestion that you have no
18 right to review, or no standing for review, and then come to
19 this tribunal and suggest the opposite.

20 Mr. Mielke has spoken, and I think if PG&E has
21 changed its position, this tribunal is entitled to an
22 explanation by Mr. Mielke as to what has happened since he
23 testified at the district court deposition.

24 MR. FALLIN: Could you give me the quote, just to
25 interject? I'd like to hear the language so I can respond.

1 MR. DAVIDSON: There are two quotes. I'm quoting
2 from the citation at page 12 of DRW's answer to the joint
3 petition, and I will read it to help everybody because I
4 think it is significant. This is Mr. Mielke.

5 CHAIRMAN MILLER: Does it start on page 11?

6 MR. DAVIDSON: Yes, it starts at the bottom of
7 page 11. The first two paragraphs on page 12, and also the
8 next indented paragraph on page 12, and Mr. Mielke is quite
9 clear.

10 MR. WOLFE: What was the date of that deposition,
11 please?

12 MR HORN: I don't have the date with me at the
13 moment. It's in my hotel room. I'll be glad to supply it.

14 CHAIRMAN MILLER: But that is an exhibit to your
15 response.

16 MR HORN: I don't think that one from the
17 deposition is attached. There's an affidavit.

18 CHAIRMAN MILLER: All right, will you supply that,
19 please?

20 MR. FALLIN: I think, Your Honor, it may help.
21 There are some dates in the attached -- in fact, the
22 affidavit is probably dated. The affidavit is dated
23 September 1979. The deposition was taken later perhaps.

24 CHAIRMAN MILLER: Well, lest there be any
25 question, here's a copy of the depositions.

1 MR HORN: I do, Your Honor.

2 CHAIRMAN MILLER: Will you supply it to the Board,
3 please?

4 MR HORN: Yes, sir.

5 CHAIRMAN MILLER: That's the full depositions? Is
6 there any testimony or depositions other than these referred
7 to? We would like to have the complete record of them
8 insofar as you can furnish them.

9 MR HORN: Your Honor, may I have made copies made
10 so I can leave them with the Board?

11 CHAIRMAN MILLER: Or you can furnish them later if
12 you wish.

13 MR HORN: I can try to arrange it. I just don't
14 know about the availability of a copying service this
15 evening.

16 CHAIRMAN MILLER: You can supply it when you
17 return to your office. By the way, if there are any other
18 matters similar to this, any depositions of any of the
19 parties, the Board wants to have full information, so if you
20 suggest any for the record now and supply them later, we'd
21 be happy to have the record reflect the documents.

22 You may proceed.

23 MR. DAVIDSON: Inquiry was made this morning about
24 problems with the Stanislaus conditions which are now
25 attached to PG&E's Diablo Canyon construction license.

1 First, as we have stated in our responsive paper now and
2 before, we believe at least one provision in those license
3 conditions is illegal under the precedents of this agency.

4 CHAIRMAN MILLER: Which one is that?

5 MR. DAVIDSON: The one that provides for what we
6 call the exit veto, that PG&E does not have to transmit
7 anything out of its service area or Northern California if
8 it or someone else wants to make a higher bid. As we show,
9 this seems to me the same provision that was held illegal in
10 the Cleveland Illuminating case, Davis-Besse.

11 CHAIRMAN MILLER: Which page of your response
12 refers to that? I know I've read it. Do you have it handy?

13 MR. DAVIDSON: It's about page 11. It begins
14 really at the bottom of page 10 at the NCPA and Southern
15 Cities response. I mention that because it seems to me that
16 provision is a peculiar problem.

17 Judge Wenner asked, what happens under various
18 conditions with Stanislaus going ahead or not going ahead,
19 and what I'm saying is that right now the NRC is left with
20 an illegal provision in one of its licenses, and that is the
21 problem that I think must be resolved. I don't see how it
22 can accept a provision in its license that is illegal under
23 its precedents.

24 CHAIRMAN MILLER: I will say we're going to want
25 that matter briefed as well as perhaps some other things, so

1 you might make notes now. We're going to have all parties
2 brief their propositions and any others that are similarly
3 related to it.

4 MR. DAVIDSON: All right, sir. It might also be
5 interesting to inform the tribunal rather briefly of how we
6 have learned PG&E interprets the Stanislaus commitments.

7 We have had examination at the Federal Energy
8 Regulatory Commission and it has become quite clear, for
9 example, PG&E is required to transmit in the wheeling area
10 under the Stanislaus commitments. One would think that is a
11 quite straightforward obligation.

12 It turns out not only is it not straightforward;
13 it is almost totally illusory as PG&E interprets those
14 conditions. PG&E's position is as follows, and this can be
15 documented from the record at FERC:

16 "To agree to wheel from an NCPA resource, we must
17 have an interconnection agreement. To have an
18 interconnection agreement we must agree on the level of
19 reserves, terms, conditions, rights, et cetera. When and
20 only when full agreement is reached on reserve levels,
21 payment, the whole ball of wax, albeit on transmission or
22 full-fledged interconnection agreement, then and only then
23 will PG&E submit it to FERC for review."

24 And I should add, by the way, NCPA must agree and
25 sign it. PG&E will not make a unilateral submission unless

1 NCPA agrees to every rate, term and condition put forward by
2 PG&E. PG&E will not even file with FERC, and if FERC
3 changes a jot of the agreement, PG&E has no obligation to
4 provide any service.

5 PG&E will stall through the negotiation process
6 again. This, according to PG&E, is the meaning of the
7 Stanislaus commitments. I suggest that PG&E's position
8 violates the commitments and clearly, it is a totally
9 unreasonable position by an entity which I think we can say,
10 without examining the record in detail, is a position of
11 monopoly power in Northern California.

12 I suspect the tribunal may have had a little
13 difficulty following PG&E's discussion this morning of hydro
14 relicensing. Let me try to explain what I think is meant by
15 it.

16 PG&E, under the Stanislaus commitments, is not
17 obligated to wheel, to transmit, from a recaptured hydro
18 plant; a recaptured hydro plant being a plant which PG&E has
19 had for 50 years, and then which FERC, in exercising its
20 congressional duty, determines in a relicensing proceeding
21 should go to somebody else. PG&E's position is -- and there
22 was an interesting term they used this morning; I don't know
23 the transcript but I think I noted it down -- they don't
24 want to negotiate their advantage away.

25 By their advantages, they mean precisely this;

1 they don't want anyone to be able to go to FERC seeking to
2 recapture a hydro license and say that the other entity has
3 transmission. PG&E will use its control over transmission
4 to try to impede FERC in carrying out its statutory duty of
5 choosing between two licensees. They will not acknowledge
6 that their transmission system is available if another
7 entity succeeds in recapturing it.

8 Now, this is very interesting. Mr. Shackelford,
9 who is the Chief Operating Officer, was examined at FERC and
10 he was asked -- in fact, given many opportunities because
11 the presiding judge there couldn't quite understand his
12 position -- why PG&E agreed to transmit from any facility
13 NCPA might in the future build in Northern California but
14 not for a recaptured hydro plant. What was the difference?

15 Well, he couldn't articulate any difference except
16 it might help FERC determine the license should go to
17 somebody other than PG&E. I submit that this is another
18 example of the intolerable conditions admitted under the
19 license conditions, and that PG&E should not be given more
20 time to engage in these tactics. I think we are grown
21 people here; I think we all know the expense of carrying
22 this proceeding to fruition is not very much for PG&E.

23 As Mr. Mielke indicated, this is the largest
24 utility in the United States. I know I heard PG&E saying
25 this morning that suddenly they're under a great financial

1 pinch. It might be interesting to find out which attorneys
2 in this room traveled from California first class and which
3 did not.

4 CHAIRMAN MILLER: I think we will -- .

5 MR. FALLIN: I can say that one real quick; nobody
6 did. I want that on the record.

7 CHAIRMAN MILLER: I'm going to strike both of
8 those and direct counsel to cease. I don't want to get into
9 personalities. We don't care about it either way.

10 MR. DAVIDSON: Excuse me, Your Honor- I did not
11 mean it as a personal comment. I just do not accept the
12 statement of counsel that PG&E's financial stringency is so
13 great.

14 CHAIRMAN MILLER: You may address financial
15 stringency; you may have discovery on it, but we don't want
16 you to get into ad hominem arguments. Proceed now.

17 MR. WENNER: When would the condition that might
18 be imposed if this case were to go forward take effect,
19 assuming that a decision were reached? When would such
20 conditions, if such conditions were to be imposed in this
21 case if it went forward, when could they take effect?

22 MR. DAVIDSON: I believe, Your Honor, and I'm not
23 certain, I really would like a chance to correct what I'm
24 about to say if it needs correcting -- certainly no later
25 than the issuance of a construction license. That was

1 something that I think was glossed over this morning. We
2 were told the end of this proceeding there was supposed to
3 be a plant in being. The end of this proceeding is a
4 condition to attach to a construction license, and a
5 construction license precedes construction.

6 MR. WENNER: Suppose they were to get a
7 construction permit and then didn't exercise it? Would
8 these conditions be effective? I address this question to
9 all counsel.

10 MR. DAVIDSON: Unless they actually announced the
11 permit, I believe they would be effective. In other words,
12 I don't think it's the active construction but the active
13 accepting of the construction permit. DWR was keeping up
14 with the PG&E discovery. NCPA has more than kept up with
15 the PG&E discovery.

16 We have assimilated what we have received. PG&E's
17 unwarranted cessation of production since September of last
18 year has prejudiced NCPA. We are waiting for discovery. We
19 have assimilated all that we have received, and the
20 connection I think is this. I do not think a party should
21 be able to, with impunity, ignore an order imposed by this
22 Board and then come before the Board in what is, at best, an
23 inequitable motion asking this Board to think kindly of it
24 and do something for it.

25 PG&E's actions have resulted, if we go forward, in

1 something like six months of delay in production of
2 documents without any attempt at an excuse. Actually, there
3 has been an attempt, but you have the correspondence between
4 DWR and PG&E before you. You can question the parties. But
5 I think that after reading that correspondence the answer is
6 very clear.

7 PG&E unilaterally stopped producing without
8 excuse, and I think that is something that must be attended
9 to by this Board.

10 MR. WOLFE: Stopped producing in September of
11 1980? Is that what you're saying?

12 MR. DAVIDSON: Yes, sir.

13 MR. WOLFE: While you're on the subject, why
14 didn't you address their letter of August 19, 1980 where
15 they asked certain questions about how you wished to proceed
16 with discovery? Why didn't you respond to that letter?

17 MR. DAVIDSON: At this point, I do not recall, I
18 have not searched the files. I have read the exchanges
19 between DWR and PG&E and I think it is quite clear that PG&E
20 unilaterally stopped. They never called to ask -- .

21 MR. WOLFE: That letter was also addressed to you,
22 was it not, sir?

23 MR. DAVIDSON: I'm sure it was.

24 MR. WOLFE: And you don't recall having received
25 it?

1 MR. DAVIDSON: Sir, I was at trial five days a
2 week during that period. I do not recall having received it.

3 MR. WOLFE: Do you have it in your possession
4 now? I mean now do you know about the letter? Do you have
5 it?

6 CHAIRMAN MILLER: Is there any question that it
7 was received by you or your office?

8 MR. DAVIDSON: I'm not raising that question. I
9 don't know it for a fact but I think if we hadn't received
10 it I would know it.

11 MR. WENNER: DWR, when did you raise that question?

12 MR HORN: Pardon, sir?

13 MR. WENNER: When did you begin to raise the
14 matter of cessation of delivery?

15 MR HORN: We began to raise the matter when we
16 learned of it for the first time with the filing of the
17 joint motion. There was a reference in a footnote which I
18 think appeared on the first page of that joint motion paper
19 which suggested, for the first time to us, that cessation of
20 production had occurred.

21 We then called -- I believe we talked to Mr.
22 Fallin and then later we called Mr. Meiss in February of
23 this year to discuss the matter. I would like to respond to
24 Mr. Wolfe's inquiry about the August letter from PG&E if I
25 may.

1 We have investigated by contacting all the parties
2 to the extent that we can what the circumstances concerning
3 that August letter are. It seems to us that it is clear
4 that everyone to whom that letter was addressed with the
5 exception of Mr. Stormwasser, in fact, received a copy of
6 that letter near the time it was sent.

7 We have talked to each of the parties who received
8 it and frankly cannot come up with an explanation of why it
9 was not responded to. I can say this. The labor of
10 responding to those sorts of matters was undertaken by our
11 office in this proceeding at that time. The letter was
12 clearly received by me.

13 As I say, it is not clear that Mr. Stormwasser
14 received a copy. We had no copy in his files, nor does the
15 secretary show anything on her docket sheets about receipt
16 of that letter.

17 At the time the letter came to me, I was in the
18 process and had been working almost exclusively on another
19 matter, and Mr. Stormwasser was handling most of the
20 contacts regarding discovery in connection with this
21 litigation.

22 We reviewed our telephone notes and all of our
23 memo correspondence concerning discovery about that time and
24 simply cannot explain why we did not respond. We don't even
25 have notes which does indicate whether we discussed the

1 matter with the staff or the intervenors. So the frank
2 answer to why we did not respond to that August letter is
3 that we just don't know.

4 I think that the Board should keep in perspective
5 here that the question of whether responded to or not is, in
6 our view, anyway, one of very limited relevance to the
7 question of the justification for PG&E's cessation of
8 production.

9 Now, we've discussed in the correspondence the
10 large number of contacts which had occurred between our
11 office and PG&E and the other parties and PG&E since that
12 August letter. If that was the reason for their cessation,
13 surely a party who is about to disregard a Board order in a
14 stipulation that it had signed should call up and say,
15 quote, "We are about to stop unless you guys do something."
16 This is really a serious problem for us.

17 As we pointed out, the foundation for the August
18 letter itself was simply incorrect. We had given the
19 information which is required, which is asked for in that
20 August 1978 letter -- I'm sorry, August 1980 letter, almost
21 two years before in July of 1978 in the reorganization which
22 occurred and which PG&E told us about by way of
23 supplementary interrogatory response to the first set of
24 interrogatories in this case, identifying the reorganization
25 down to the department level and no further, so far as we

1 can tell by review of our records.

2 Consequently, there is nothing in any of the
3 supplementary responses which would have enabled us to give
4 PG&E any additional information which was not already
5 provided to it in the July 1978 letter from Mr. Stormwasser
6 to Mr. Houlihan.

7 So, I don't know what we can conclude from our
8 failure to respond to that letter. It was clearly an
9 oversight and one I don't intend to defend here because I
10 don't think it's defensible. We should have responded,
11 certainly. We are not able to explain by a review of our
12 records what happened and why it was not responded to.

13 I don't think our failure to respond excuses PG&E
14 from its failure to indicate to people clearly that it was
15 stopping all production as a result of that letter. The
16 August 28th letter, after all, only dealt with production by
17 PG&E from private office files which raise a particular
18 procedural problem because of the impact of the second set
19 of interrogatories from the intervenors and the staff to
20 PG&E in this case.

21 The procedure requires that as a result of those
22 interrogatories we identify particular persons for which
23 special searches will be conducted in the private files of
24 PG&E personnel. The central file production, which was also
25 ceased in August of 1980 or September of 1980 I should say,

1 was not impacted by failure to respond to that August letter
2 one whit, and yet, PG&E stopped production from those files
3 as well.

4 MR. WENNER: Did you notice that they were no
5 longer sending monthly reports or no longer sending you
6 monthly -- .

7 MR HORN: Pardon me?

8 MR. WENNER: Had you noticed between September and
9 January that you were no longer receiving documents?

10 MR HORN: It's not that we were not receiving
11 documents; we have been receiving them continuously since
12 then. The documents they were producing were not in the
13 pipeline. We could not have known until we were at the
14 footnote in that memo that in January of this year that
15 production had stopped.

16 MR. WENNER: Thank you.

17 CHAIRMAN MILLER: Mr. Davidson, I think you had
18 the ball.

19 MR. DAVIDSON: I think I'm substantially at the
20 end. I guess we will discuss later where we are on
21 producing documents, or do you want a short report now?

22 CHAIRMAN MILLER: Tell us now.

23 MR. DAVIDSON: We have approximately three boxes
24 of documents to go and we will ship them out in the next few
25 days, and at that point, except for documents which we have

1 claimed or are claiming privilege, we will have completed
2 the discovery requested by PG&E.

3 CHAIRMAN MILLER: Tell us about how many files or
4 documents may have been involved.

5 MR. DAVIDSON: Now I can get that information.

6 CHAIRMAN MILLER: Approximately; you don't have to
7 be too precise if you can approximate it.

8 MR. DAVIDSON: I'd say it's big, but that's no
9 help, but I really don't know.

10 CHAIRMAN MILLER: Bigger than a breadbasket? Okay.

11 MR. DAVIDSON: Bigger than a room, I would suspect.

12 CHAIRMAN MILLER: Okay. Do you have any reports
13 now on the status of discovery; whether of your own or that
14 of any other party?

15 MR. DAVIDSON: Well, we are still working on the
16 claims of privilege and other than that, as I say, I think
17 we are virtually finished. In a few weeks we will have
18 produced everything required of us. And at a later point we
19 will be discussing future scheduling. It is rather
20 appalling to look forward and think where we would be if the
21 case continued at the current rate of documentary production.

22 Mr. Horn went through it. At the current rate, we
23 have four more years of documentary production ahead of us
24 before deposition, discovery and before hearing. Perhaps
25 NCPA, as a result of its litigation at FERC, is in a better

1 position than most, but we would hope some way could be
2 found to start a hearing, say, around January or before.

3 CHAIRMAN MILLER: You want to start a hearing in
4 January even though you have four more years of discovery?

5 MR. DAVIDSON: No, I mean speaking for NCPA, we've
6 reached the stage where we want to go to trial now.

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1 CHAIRMAN MILLER: Have you located those
2 transcript references?

3 MR. FALLIN: I believe so, Mr. Chairman.

4 CHAIRMAN MILLER: I don't want to interrupt you
5 until you have had the opportunity to find them.

6 MR. DAVIDSON: Unless the panel has further
7 questions, I have concluded.

8 CHAIRMAN MILLER: You have alluded to, I think,
9 what you termed a pro forma motion and documents in support
10 thereof. Is that correct?

11 MR. DAVIDSON: Yes, sir.

12 CHAIRMAN MILLER: You have discussed various
13 factual data, opinions and statements of witnesses,
14 including Mr. Shackelford and others. Do you have any plans
15 to take depositions or otherwise develop a record on this
16 point that you deem as significant as you term it?

17 MR. DAVIDSON: It would seem to me that the people
18 -- the parties seeking termination of discovery, which is, I
19 think, in large part termination of the case at least for a
20 number of years -- bear a strong burden of proof which they
21 haven't carried.

22 I think before this tribunal can properly act, if
23 it is inclined to grant the motion, it must have the facts
24 determined. And I suggest respectfully that if the panel
25 reaches a conclusion and if the facts alleged by PG&E are

1 correct to entertain its motion, then an evidentiary hearing
2 should be set.

3 My own view is that the facts alleged are not
4 sufficient, but that in any event they are certainly not
5 established. I don't think the panel has been given a
6 reason why this proceeding should be terminated for a number
7 of years. The first reason given was because PG&E has won
8 two District Court cases in the interim. I don't think that
9 much time need be spent on that reason.

10 The second reason is because they will not need
11 Stanislaus until 1997, but as we have seen there is no
12 statement that another nuclear plant will not be needed,
13 that a nuclear plant will not be constructed out of state.
14 There is no attempt to show how the many changes in PG&E's
15 resource program have advanced or impeded the construction
16 schedule for Stanislaus. There are just far too many loose
17 ends to even approximately PG&E's carrying the burden of
18 proof. And yet I think the burden of proof must be on PG&E
19 at this point.

20 Even as Mr. Horn has demonstrated, taking the 1997
21 date as correct, extrapolating on the current pace of
22 discovery, taking the 14 years lead-time PG&E says it needs,
23 we would still be lucky to conclude this anti-trust case in
24 time to give PG&E the lead-time it says it needs. No matter
25 how we look at it, I think PG&E's motion must fail. But I

1 am saying if the tribunal is inclined to grant it, I think
2 then and only then it should require evidentiary support.

3 CHAIRMAN MILLER: I wasn't aware we have done any
4 bifurcating of this motion, if you've got a record that you
5 want to have, so far we've got a lot of suggestions of '
6 counsel. We've got a lot of statements. We've got a lot of
7 arguments, with precious little in the way of actual
8 predicate in this record. If anybody wants to do anything,
9 we are not inclined to determine a matter potentially this
10 significant on a case that's been going on for about four
11 years and I myself am not going to take the word of any
12 lawyer for it.

13 I don't mean to disparage the profession. If you
14 want a record, let's make a record. This is not a record.
15 We enjoyed your arguments, and we see the points of view,
16 and I think you as experienced counsel now see the
17 evidentiary record, that better be developed if you want the
18 Board to make a meaningful decision. We would also like to
19 have some of these points briefed that you have raised or
20 you have heard your opponents raise.

21 So this has been a delightful introductory
22 preliminary. I suggest you now start putting in some time
23 and energy on the main battle. We would like to have a full
24 evidentiary record. Four years is too much to toss out the
25 record. And yet, on the other hand, important questions

1 have been raised by counsel representing the Applicant and
2 staff.

3 Now we would like to have the foundation
4 improved. In the past we have heard you tell how it is
5 going to take years and years to get the documents, which it
6 has, and we said that you can take a few depositions as we
7 go along, and maybe you've done some, but I'd like to see
8 these questions addressed to some of the witnesses who have
9 the information testifying under oath by deposition.

10 I love all of you ladies and gentlemen counsel
11 here, but I'm not going to take your word on developing a
12 record that is this significant. We are not going to go off
13 on rhetoric or argument alone.

14 MR. HOEN: Mr. Chairman, then, I would like to
15 make a comment, if I might.

16 DWR noticed the depositions of both Mr. Mielke and
17 Mr. Shackelford and we also served a fifth set of
18 interrogatories on PG&E in an effort to develop a factual
19 foundation which this Board would have before it. The
20 notices of deposition were withdrawn at the request of PG&E
21 in lieu of the filing of the Shackelford affidavit, which is
22 attached to our responsive papers, which says that the
23 information testified to by Mr. Shackelford during the
24 course of the Energy Commission litigation in California is
25 still true today, with the exception of rescheduling of

1 Stanislaus in PG&E's resource plan.

2 At PG&E's request we did not get -- I think, Jack,
3 you correct me, if it was at your request -- I should say
4 the Mielke affidavit which we had sought was not filed
5 because we had thought that Mr. Shackelford's affidavit
6 covered most of the points. I now notice, upon review, it's
7 not clear that Mr. Shackelford ever testified about the cost
8 and the relative cost of proceeding with this anti-trust
9 review. So I am not sure that particular issue, at least
10 from the evidentiary standpoint, is adequate.

11 MR. FALLIN: Yes. I think, Chairman Miller, the
12 inference that, first of all, there is something wrong with
13 the motion because it did not cover 40 pages I won't
14 address. I think if the question is direct and can be
15 stated that way, it really should be.

16 With respect to the question of developing the
17 facts which were important for the proceeding, those facts
18 had to do with the processing of the Energy Commission case
19 and had to do with the planning for the project. DWR did
20 direct to us a fifth set of interrogatories, did notice the
21 depositions of Mr. Shackelford and Mr. Mielke. I discussed
22 with them their situation. He reported to me -- in fact, I
23 called him from Washington when I received word that
24 depositions had been noticed for four days hence. And we
25 met when I got back and he said that in the meantime he had

1 acquired the records of testimony given in the Energy
2 Commission case which dealt with the status of that
3 proceeding and the status of the plan. And then said there
4 is enough in this volume of material, providing that we can
5 get it updated and incorporated.

6 So the result of this effort by DWR, and I have to
7 say in PG&E, to cooperate and develop that element, the
8 Shackelford declaration was submitted, which does
9 incorporate all of the sworn testimony he gave in the Energy
10 Commission saying that all of that had remained
11 substantially correct with the obvious fact that some facts
12 had changed, and the fact that it changed was the need for
13 the plant and gave the dates for the plant.

14 With respect to the interrogatories, we answered
15 them before their due date in order to provide that material
16 before we came here. So when Mr. Davidson says that somehow
17 we arrived at this point with no one having any idea what
18 was going on, (a) that's not correct; (b) it fails to read
19 the efforts that both DWR and PG&E made to develop the
20 information in time for this proceeding. The proceeding was
21 also put over in order to accomplish both of those events.

22 MR. WENNER: When you say this proceeding --

23 MR. FALLIN: The time for responding to the motion
24 was extended by PG&E to allow for supplying to DWR of the
25 interrogatory answers and the declaration on the current

1 status of the project plans.

2 MR. GOLDBERG: Mr. Chairman, I would like to
3 affirm what Mr. Fallin has just said. NCFR is the only one
4 I hear arguing that there is not a sufficient record for the
5 Board to decide the joint motion.

6 There was, as I understand it, an agreement
7 reached between DWR and PG&E that the Shackelford affidavit
8 was sufficient in lieu of further depositions of Mr.
9 Shackelford and Mr. Mielke. And on the basis of that
10 affidavit and the answers to the fifth set of
11 interrogatories, as far as the staff is concerned, the facts
12 were developed and established sufficient to warrant motion
13 to suspend discovery.

14 I don't think there is a need for any further
15 evidentiary basis in order for the Board to rule on the
16 motion.

17 MR. WENNER: What affidavit are you talking about?

18 MR. GOLDBERG: The affidavit that was filed March
19 2 by PG&E, the affidavit of Mr. Barton Shackelford.

20 CHAIRMAN MILLER: Look at page two of that
21 affidavit. In the course of that litigation, referring to
22 the preceding litigation prescribed in paragraph four, he
23 offered a sworn affidavit in September of '79, deposition
24 testimony October '79, trial testimony January of '80,
25 concerning PG&E's plans for the Stanislaus plant.

1 We reviewed those, and so forth, and it was
2 accurate when given and remains generally true today.
3 However, the resource plans have undergone some changes
4 since I testified, and there I identify certain engineering
5 baseloads and so forth. That's far from being a factual
6 affidavit, counsel. If this is going to be an affidavit to
7 establish something, I would like to know what it
8 establishes.

9 It shows he testified three different times by
10 deposition or otherwise, but he doesn't attach a thing. DWR
11 had attached part of it, but it didn't attach Mielke, so I
12 don't know what is attached, what isn't, and I don't know
13 whether that refers to all three portions of his testimony
14 or not. Maybe you know. Deposition and trial testimony --

15 MR. ARMSTRONG: It might simplify the matter, Mr.
16 Chairman. I think the only facts which bear on the
17 questions that are involved in this motion relate to the
18 timing when the plant would be required to come on line and,
19 of course, inferentially from when construction would have
20 to begin. I think the affidavit stands on its own.

21 In the latter part of paragraph six I think is
22 for the benefit of DWR that the reference to the earlier
23 testimony was given. But I think Mr. Shackelford in his
24 affidavit stated his position with the company and also
25 states that as of December 1980 the plans are as stated

1 therein. And I think that evidence is sufficient upon which
2 to base a finding.

3 If NCPA has some suggestion that that is an error
4 they had nearly ten months to do something about correcting
5 it or putting in contrary evidence. But the matter has to
6 be inherently believable. It's PG&E's goose, after all,
7 that's on the line, and if they are making a mistake about
8 all of this they are going to suffer the consequences.

9 CHAIRMAN MILLER: What consequences would they
10 suffer? In four years we have had considerable expenditure,
11 time and effort on at least some of the proposed conditions
12 which are acceptable to your company and to the Department
13 of Justice were not acceptable to some Intervenors, and I
14 think the staff, although I don't recall precisely the
15 staff's position on some of these matters, but nonetheless
16 laid on the back burner.

17 That's a rather strong demand. I don't say it is
18 or is not justified. We're not trying to prejudge one way
19 or the other, but it sure isn't something that we are taking
20 lightly.

21 MR. ARMSTRONG: I think that's an accurate
22 assessment. The point I was making is limited to the notion
23 that the fact which is being disputed by NCPA was when PG&E
24 now plans to need this facility. And I think the
25 evidentiary support for the 1997 and 1989 dates is

1 sufficiently set forth in this affidavit.

2 CHAIRMAN MILLER: I'm afraid I wouldn't agree with
3 you. It's full of conclusions. It doesn't give a basis for
4 it. It doesn't tell what his predictions or estimates are
5 for various points in time -- a little matter of ten years
6 go, four years ago, yesterday, or tomorrow.

7 In other words, if that's really a matter of
8 significance in support of the moving party, it sure had
9 better be nailed down a little more definitely, in terms of
10 somebody's saying, yes, I testified three or four times and
11 here's what I think now generally.

12 MR. ARMSTRONG: I don't think he says anything
13 about this is what he thinks generally. He says as of
14 December 1980 the plant will not be needed until 1997.

15 CHAIRMAN MILLER: Well, sure, he's got the
16 conclusion and there he put the date, no doubt about that.
17 But he says the testimony he gave on three different
18 occasions -- and I'm still not sure about those three --
19 sworn affidavit of '79, deposition testimony of October '79,
20 and trial testimony in January '80. I'm not at all sure
21 that's attached anywhere. I am talking about the rest of
22 what he says, that testimony was accurate when given. It
23 would certainly be perjury if it weren't.

24 So he is not telling me a great deal. And I
25 related the facts and circumstances I related then remain

1 generally true today. I just think that this affidavit is
2 very soft. It doesn't address itself to the hard facts.
3 It's not evidentiary and if these matters are of
4 significance as is now being urged by one of the
5 intervenors, I think it behooves everybody to make a decent
6 record, or if it's immaterial, tell us so, and we will go
7 ahead to what is material.

8 MR. MATT: Mr. Chairman, my name is Peter Matt and
9 I'm here on behalf of Anaheim/Riverside. It has been
10 traditional in these proceedings; these two cities seem to
11 be a thorn in everyone's side and people wish we weren't
12 here, but we are.

13 We have some very definite positions on the issues
14 which have been raised by this motion. We are directly
15 affected and I would like to address those.

16 CHAIRMAN MILLER: You will be permitted to do so.
17 Aren't you from the same firm as Mr. Davidson's firm?

18 MR. MATT: Yes, I am.

19 CHAIRMAN MILLER: We looked over at you and we
20 think you've been heard from and you are quite correct that
21 you have put on a different cap. You represent two
22 different clients and you are entitled to be heard. We
23 apologize. We overlooked you, but we do point out you are
24 from the same firm and you are sitting side by side, and
25 there is some perhaps not altogether valid reason why we

1 didn't call upon you, but we sure apologize for it and call
2 upon you now.

3 MR. MATT: Thank you. I think from now on I will
4 put a barrier between myself and Mr. Davidson.

5 CHAIRMAN MILLER: Not too high.

6 (Laughter.)

7 MR. MATT: First of all, Mr. Steven Nichols, also
8 of our firm, appears on behalf of Anaheim/Riverside and I
9 neglected to do so this morning.

10 I would like to really address the point that you
11 have just been discussing with counsel.

12 Mr. Chairman and members of the Board, it is my
13 belief that even if we take as given the fact that the
14 Stanislaus nuclear plant will not be needed until 1997,
15 given that fact without any further investigation does not
16 justify the request by PG&E and staff that this proceeding
17 be delayed indefinitely.

18 In fact, if anything, that date, which is 16 years
19 from now, is exactly the same time frame which this Board
20 and PG&E faced in 1976 when this proceeding began, because
21 at that time we were told that the unit was to be on-line in
22 1991, 16 years after the beginning of these proceedings. If
23 that is true, then why was PG&E of the view that it needed a
24 16-year lead period in 1976, yet five years later is
25 prepared to tell this Board it no longer needs that time

1 frame in order to construct and have in operation a nuclear
2 plant. I suggest that is not a real reason. I think it is
3 a make-weight argument.

4 I think their second argument concerning
5 litigation is a make-weight argument. As Mr Wolfe
6 indicated, what is the difference in the litigation as
7 between now and October of 1978? In fact, when we go back,
8 what is the difference between October of 1976 and today
9 with respect to that litigation? If anything, PG&E has a
10 clearer picture today of what intentional risk it has
11 vis-a-vis California law concerning the construction of a
12 nuclear plant. It now has a District Court -- two District
13 Court decisions saying the California law is
14 unconstitutional and, therefore, cannot bar the building of
15 the Stanislaus nuclear unit.

16 If PG&E really viewed that as a risk to what Mr.
17 Fallin referred to as a venture, why did they not try to
18 resolve that risk before engaging these parties and this
19 Board in this proceeding? They could have, in 1976, said to
20 the Board and these parties, let us not go forward with an
21 anti-trust review at this time because we don't know where
22 this litigation on this California law is going to lead us.
23 And it may be that we are doing it all for naught. They
24 never said that to us. I suggest, Your Honor, that that
25 argument is then a make-weight argument.

1 The only argument made that rings true in this
2 entire motion is the plight of the NRC staff, faced as it is
3 with budget cuts, which, as we all know, is the situation
4 the entire government faces. And I believe that PG&E has
5 piggy-backed on the NRC staff's plight to its own advantage.

6 I suggest, Your Honors, the DWR has said that the
7 citizens of Anaheim/Riverside, while we want to see staff
8 participate, we recognize their role -- do not believe this
9 proceeding should be held up due to governmental budget
10 cuts, due to the position the staff finds itself in. I
11 believe the public interest is not served by delaying a
12 proceeding in which public agencies in California have
13 expended considerable sums of money, because a Washington
14 staff finds itself handicapped by matters which are not in
15 their control.

16 We are prepared to go forward. I believe that the
17 public interest, the overall public interest, including the
18 people of the State of California who are most directly
19 affected by this plant, can be best served by moving forward
20 with the anti-trust review of PG&E with respect to this
21 plant.

22 CHAIRMAN MILLER: Shall we hear from anybody else?

23 MR. MATT: I'm not complete. You've asked a
24 number of questions that need to be answered.

25 CHAIRMAN MILLER: I'm sorry. I thought you were

1 finished.

2 MR. MATT: First of all, Mr. Wenner has asked a
3 number of questions about the effect of the license
4 conditions if the Stanislaus plant is not constructed. If
5 this proceeding is held, if we apply the existing license
6 conditions to other PG&E plants, I would remind this Board
7 that under those license conditions and Anaheim-Riverside
8 obtained no rights, obtained no services for PG&E, obtained
9 no benefits whatsoever.

10 Mr. Armstrong today indicated that the question of
11 participation in the plant was no longer an issue. Unless
12 PG&E has changed its position, the cities of Anaheim and
13 Riverside, which have requested the opportunity to
14 participate in that plan, has not been granted. We have not
15 been granted an opportunity to participate in the Stanislaus
16 plan.

17 MR. WENNER: In what?

18 MR. MATT: The Stanislaus nuclear plant. I might
19 add, to recognize what we are talking about, the cities of
20 Anaheim/Riverside have a combined peak load of 700
21 megawatts. They have invested \$1.7 billion in the San
22 Onofre plant, the Intermountain project, and other
23 projects. We are not sitting here waiving some mythical
24 chance of participation. We are real cities with real
25 dollars with real concerns about getting low cost power

1 supply, and we are pursuing aggressively the opportunities
2 to obtain that power supply.

3 We are being denied access through the PG&E system
4 to the Pacific Northwest, one of the issues in this
5 proceeding. We are being denied access by the licensing
6 conditions as drafted to the opportunity to deal on a
7 reasonable and economic basis with other municipal systems
8 in the PG&E control areas, such as the Sacramento utility
9 district, the members of NCPA and the Department of Water
10 Resources. We have a real axe to grind. And this case
11 presents us with an opportunity, a forum, in which we can
12 have determined what our rights are.

13 MR. WENNER: Explain the difference between your
14 situation vis-a-vis the original Stanislaus commitments with
15 respect to DWR and yourself.

16 MR. MATT: With respect to DWR and ourself, under
17 those commitments PG&E's commitments run to what is
18 described as entities generating or distribution systems
19 within the PG&E control area. We are located east of Los
20 Angeles. We are in the control area of Southern California
21 Edison Company. Those license conditions do not obligate
22 PG&E to provide any service whatsoever to any system outside
23 their control area.

24 Thus, if we request PG&E to provide us
25 transmission service over their network there is nowhere in

1 those conditions that obligate PG&E to provide that
2 service. If we seek to purchase power with an entity within
3 the PG&E service center, such as a member of NCPA, they have
4 an exit veto. We cannot even participate or compete with
5 PG&E to obtain power from a system within its control area.
6 We would lose coverage of its exit veto.

7 MR. WENNER: That means they won't wheel for you?

8 MR. MATT: That means they won't wheel for us.

9 That means if an entity within PG&E has power to sell and we
10 offer to buy it, if they determine it is in their interest
11 to buy it, all they have to do is, as I read it, offer the
12 same price and buy it itself.

13 MR. WENNER: You are not within their service area
14 as it were?

15 MR. MATT: No, we are not. We are in the service
16 area of Southern California Edison.

17 CHAIRMAN MILLER: Have you raised those objections
18 in licensing conditions and filings you have previously made?

19 MR. MATT: Yes.

20 CHAIRMAN MILLER: Could you identify them
21 offhand? I have seen them. I just can't recall them.

22 MR. MATT: I would have to go back to our initial
23 pleadings. They are in our motion for summary dismissal and
24 our comments in response to your and Mr. Wenner's meetings
25 in San Francisco and the transcript.

1 CHAIRMAN MILLER: Thank you. I do recall it.
2 Would you remember what the staff position was with regard
3 to those same alleged deficiencies as you set them forth of
4 the proposed Stanislaus conditions?

5 MR. MATT: I believe because we raised the issue
6 of what obligations the utility has to entities outside its
7 control area the staff has not, as I understand it, taken a
8 position one way or the other on that matter. You might
9 check with Mr. Goldberg.

10 CHAIRMAN MILLER: Yes. We will ask staff to
11 verify that.

12 By the way, while I am asking, anybody -- DWR, Mr.
13 Davidson, do you recall the position taken by the staff with
14 regard to the alleged deficiency in the proposed Stanislaus
15 conditions?

16 MR. DAVIDSON: Yes. I was trying to whisper to
17 Mr. Matt. I don't have any recollection vis-a-vis the
18 southern cities. I think it's a fair summary to say
19 vis-a-vis NCPA and DWR they generally supported the
20 deficiencies we alleged in the Stanislaus conditions. But
21 they are the best source of that, at least short of a
22 transcript and the record.

23 CHAIRMAN MILLER: We will ask the staff to verify
24 it, but I wanted to get your recollection on it. You may do
25 it either now or subsequent because we are going to ask for

1 briefs.

2 Mr. Goldberg, if you have a memory, fine.

3 MR. GOLDBERG: Mr. Davidson is generally correct.
4 We submitted a detailed brief to the Board as did the other
5 parties on the inadequacy of the Stanislaus commitments and
6 we attached to that brief suggested changes that might be
7 appropriate to remedy those deficiencies.

8 And in that brief we did generally agree with the
9 inadequacies that concern NCPA and DWR. I believe we stated
10 at that time that we did not have a position on the
11 inadequacies as they pertained to this.

12 CHAIRMAN MILLER: Yes, I believe I vaguely recall
13 that now. I recall the parties did furnish that information
14 and it was done with care, as I recall.

15 MR. WENNER: You said inadequacies with respect to
16 --

17 MR. GOLDBERG: The southern cities of Anaheim and
18 Riverside.

19 MR. MATT: There were other inadequacies, as we
20 discussed. For example, as was raised by Mr. Davidson, I
21 believe by Mr. Horn, one of the provisions in those license
22 conditions is that PG&E is not required to wheel power from
23 a recaptured hydro project. Anaheim/Riverside, along with
24 its sister cities in southern California, along with members
25 of the Northern California Power Agency, have failed to

1 recapture PG&E's license on what is called the Rock
2 Creek-Cresta, what we refer to as the Feather River project
3 for which they currently hold the license.

4 Were those license conditions to remain or attach
5 to another project we would be blocked in our attempts to
6 obtain them -- to obtain that license unless FERC takes
7 action to void that license condition.

8 MR. WENNER: Counsel for the staff, I wonder if
9 you could address the question that I addressed to Mr.
10 Davidson' before about the effects of conditions that might
11 be imposed in PG&E if this proceeding were to go to its full
12 fruition, a phrase that's been used today -- whether (a)
13 assuming that Stanislaus is built.

14 MR. GOLDBERG: If Stanislaus is built, whatever
15 conditions were decided by this Board to be appropriate
16 would be attached at the time of the issuance of the
17 construction permit, not before, not after, but at precisely
18 that time. They would not be affected before issuance of
19 the construction permit, but they would be affected
20 immediately upon the decision of this licensing board.

21 I would like to correct Mr. Davidson in his
22 suggestion that we would have to wait until the Board action
23 before there would be any effectiveness of the license Board
24 conditions. That's not correct. They would be effective
25 upon determination by this Board as to what was appropriate.

1 MR. WENNER: Whether or not they accepted the
2 permit?

3 MR. GOLDBERG: No, no. I mean assuming that the
4 CP was actually issued to the company and they accepted it.
5 If subsequently they abandon their intention to build and
6 operate the plant and officially withdrew from the project,
7 with approval of this Commission, those conditions would no
8 longer be effective. As long as there is an outstanding
9 construction permit, however, regardless of what PG&E's
10 intentions might be, those would be effective license
11 conditions.

12 If PG&E decided not to build Stanislaus and in
13 fact did not build Stanislaus, but we nevertheless had an
14 initial decision from this Board on anti-trust issues, then
15 there would be no direct legal effect that would attach to
16 those conditions because the conditions would not and could
17 not be effective until they were attached to a construction
18 permit.

19 So if some time subsequent to initial decision on
20 anti-trust issues, but prior to actual issuance of the
21 construction permit, the company changed their mind and
22 withdrew, the net initial decision would have generated
23 license conditions which could not attach to any license and
24 would not, in and of themselves, be enforceable by this
25 Commission.

1 Certainly the parties would, based on that, as has
2 been suggested by Mr. Horn, have an opportunity to seek an
3 enforcement action or an amendment to a license, but it is
4 an independent proceeding that would have to be initiated
5 before anything other than what is already attached to
6 Diablo Canyon would be effective with respect to PG&E.

7 MR. WENNER: Diablo Canyon, I gather, had no
8 conditions originally attached to it?

9 MR. GOLDBERG: Diablo Canyon is a 104(b) license,
10 which means it was grandfathered. There could be no
11 anti-trust review.

12 The only reason why we have anti-trust conditions
13 on Diablo Canyon is because of the agreement between PG&E
14 and the Department of Justice to have the Stanislaus
15 commitments attached to Diablo Canyon in the event that
16 PG&E either withdrew its application for a construction
17 permit for Stanislaus or one was not issued by around April
18 of '79, I believe, several years, two or three years ago.

19 By virtue of that agreement, and essentially the
20 company's willingness to have those commitments attached to
21 Diablo Canyon, the staff did issue an amendment to the
22 Diablo Canyon construction permit attaching those
23 commitments verbatim as anti-trust license conditions.

24 MR. MATT: There is a provision where, if a party
25 can establish changed conditions to show that subsequent to

1 the issuance of a license, conditions changed which
2 warranted a new anti-trust review, and, if so, prove
3 anti-trust license conditions, then such a proceeding could
4 be held and I believe could be held even with respect to
5 Diablo.

6 MR. GOLDBERG: No, that's not correct.

7 The significant changes in connection with an OL
8 proceeding for grandfathered plants under section 103 of the
9 Act, and so they will review based on significant changes
10 not available for Diablo Canyon.

11 MR. MATT: I thought it was based on the
12 attachment of the licenses.

13 Mr. Chairman, there were two other areas that you
14 inquired on and one was settlement negotiations. I believe
15 in January of '77 there was a joint settlement discussion
16 amongst all the parties. Anaheim/Riverside is interested in
17 pursuing this. We were subsequently told by PG&E that they
18 were not interested in pursuing settlement negotiations with
19 the cities. There has been no discussion since that point.
20 So the discussion PG&E has been having with NCPA, DWR and
21 the staff does not address our issues.

22 A second point you have requested is a report on
23 discovery. Anaheim/Riverside completed its response to
24 discovery request to PG&E a year and a half ago. We
25 produced some 120,000 documents. I am quite concerned.

1 This proceeding is delayed and when you resume this
2 proceeding in 1984 or '85 we will be hit by brand new
3 discovery requests, because so much time has gone by.

4 I don't want to be put in that position. We
5 completed our discovery in time. In fact, we were urged by
6 PG&E to complete it quickly so they could use it in another
7 proceeding and now we are told, oh, let's let this
8 proceeding stay for a while. I don't want to be faced with
9 double discovery burdens because of PG&E's problems. I
10 don't think that is at all equitable.

11 I think that addresses the concerns and the
12 questions of the Board and the positions that
13 Anaheim/Riverside takes with respect to this motion.

14 CHAIRMAN MILLER: Are you through now?

15 MR. MATT: Yes.

16 CHAIRMAN MILLER: I misjudged you before, but you
17 have now concluded your argument?

18 MR. MATT: Yes, I have.

19 CHAIRMAN MILLER: I think everyone has had an
20 opportunity initially. I don't want to overlook you.

21 MR. DAVIDSON: I was just going to say, if you
22 want, I didn't give a negotiation report.

23 CHAIRMAN MILLER: Okay. Good. Let's have the
24 record complete.

25 MR. DAVIDSON: There have been negotiations going

1 on, indeed have been negotiations on for over a decade
2 between PG&E and NCPA over an interconnection agreement. I
3 do not think the parties are very far apart. However, that
4 does not solve -- the negotiations currently going on would
5 not solve major issues in this case.

6 CHAIRMAN MILLER: Why?

7 MR. DAVIDSON: As PG&E indicated to you this
8 morning, they regard certain issues as essentially
9 nonnegotiable. They will not commit themselves to wheel
10 from recaptured hydro. They will not give a preference
11 entity any firm access to intertie transmission.

12 MR. WENNER: Repeat that.

13 MR. DAVIDSON: They will not give any preference
14 entity firm access to intertie transmission. I explained it
15 to you this morning.

16 To use their phrase, if access were "freely open",
17 the phrase used this morning, preference entities might get
18 all the preference power in the Northwest. The last
19 statement is an exaggeration. We are not seeking all the
20 intertie capacity PG&E has. We would be satisfied with a
21 rather small percentage of PG&E's firm intertie capacity.

22 But in any event, the company's position in this
23 is not negotiable.

24 MR. WENNER: Will you explain one thing to me?

25 MR. DAVIDSON: I'll try.

1 MR. WENNER: With respect to this intertie and the
2 reference and its relationship to the preference --
3 preferred cities, these cities, for example, and preferred
4 entities -- is that preference such that at any point they
5 come in and say where in this category of preferred
6 customers there is something up for grabs, we get it ahead
7 of you?

8 MR. DAVIDSON: Yes, for a short answer.

9 MR. WENNER: They cannot resist that?

10 MR. ARMSTRONG: That's correct, assuming it would
11 be open transmission.

12 MR. DAVIDSON: We're talking about federal power,
13 Bonneville power. We're not talking about power of
14 nonfederal entities in the Northwest.

15 CHAIRMAN MILLER: The preference is federal.

16 MR. DAVIDSON: When Bonneville was selling power
17 to California, the preference entities come ahead of
18 nonpreference entities providing preference entities of the
19 position taken.

20 Now if you assume a situation where there is 100
21 megawatts of preference power available to sell in
22 California and 100 megawatts of transmission capacity
23 enjoyed by PG&E, if, say, the preference entities had ten
24 megawatts of transmission capacity, they would get ten
25 percent of the total energy for sale in California.

1 MR. WENNER: They would get 100 percent or 100 of
2 those units, and if it came to leaving out the intertie
3 program they can grab everything?

4 MR. DAVIDSON: Yes, sir.

5 MR. WENNER: You can always beat PG&E on the sale
6 of it.

7 MR. DAVIDSON: On a straight sale, yes. If it's a
8 seasonal exchange, of course, we would have to be able to
9 satisfy Bonneville's conditions, but in a straight sale,
10 yes, we would come ahead of PG&E.

11 MR. FALLIN: If you are done, I could start
12 responding to some of the things --

13 MR. WENNER: I just wanted to get the situation
14 clear.

15 MR. FALLIN: It might be easiest in going back
16 over some of the points I picked that one up.

17 MR. GOLDBERG: Excuse me. Before we get to
18 responses, perhaps I should give the staff status of
19 discovery report and then we could go into everyone's
20 responses for what everyone else will say.

21 CHAIRMAN MILLER: I would just like to know the
22 staff position, if you can state it on the record on the two
23 so-called non-negotiable issues.

24 MR. FALLIN: One of my responses is going to be to
25 talk to correct that, to refine what has been, in m, is,

1 earlier characterized.

2 MR. GOLDBERG: With respect to PG&E's document
3 production, we have received from PG&E to date approximately
4 725,000 pages of documents and of that 725,000 pages we have
5 reviewed 250,000 pages.

6 Beyond review, we have in detail indexed fully
7 1,300 documents. Now that's documents, not pages. Some of
8 the documents are a couple of hundred pages long; others are
9 just one page long.

10 With respect to CID documents, as distinguished
11 from the so-called green-dotted production, we have received
12 425,000 additional pages and have reviewed all 425,000 pages
13 of those pages, and in detail indexed 800 documents of the
14 425,000 pages, for a total of 1,150,000 pages received from
15 PG&E, 675,000 pages reviewed, giving rise to a total of
16 2,100 documents completely indexed and digested.

17 Also, because of special procedures that were
18 agreed to by PG&E and the staff, these totals, as far as
19 green-dotted documents received, should be substantially
20 less than what the other parties are receiving. We made
21 special efforts to make an initial cut when we went through
22 PG&E's files to reduce the number of documents that would
23 actually have to be copied and produced to us.

24 So in effect we made our first cut in the file
25 system itself and these totals represent the result of that

1 first cut. The other parties chose to take all the
2 documents which were green-dotted in the files and their
3 best estimate is that we are receiving about one-third of
4 what the other parties are entitled to.

5 CHAIRMAN MILLER: I recall you did some screening
6 initially which cut down the number of documents that the
7 staff actually thought needed to be reduced.

8 MR. GOLDBERG: That's correct.

9 CHAIRMAN MILLER: Anything further?

10 MR. GOLDBERG: That's the substance of our report
11 on the status of discovery. I do have responses to a number
12 of items that have been mentioned, which I will follow after
13 PG&E has had the opportunity to respond.

14 CHAIRMAN MILLER: Let me inquire of counsel, would
15 you prefer to try to finish all subject tonight -- this
16 afternoon? Or would you prefer to come back tomorrow
17 morning?

18 MR. FALLIN: The further we can get the better, I
19 think. That's not a complete answer to your question.

20 CHAIRMAN MILLER: No, but we're amenable. The
21 Board can go late.

22 MR. HORN: If the Chairman is inclined to attempt
23 to consider all items on the agenda this evening, I would be
24 delighted to stay here until midnight if we have to.

25 CHAIRMAN MILLER: Well, not until midnight. We're

1 not that interested.

2 (Laughter.)

3 MR. WENNER: You prefer to get out of town?

4 MR. HORN: It's not that so much as pleading
5 matters on the agenda.

6 CHAIRMAN MILLER: Well, we could run, say, another
7 hour, or we could recess in an hour and ten minutes, if we
8 were going to come back in the morning. So we are just
9 really saying we are inquiring generally how much more do
10 you wish to say on this? There are some matters we haven't
11 touched upon. It well may be that they are ancillary to the
12 main matter anyhow.

13 If you wish to try to finish in about an hour,
14 fine. We would be happy to do it. If, on the other hand,
15 there are matters that you wish to think about and sleep on,
16 and documents that you might present tomorrow, we are going
17 to come back tomorrow morning anyhow. We will recess within
18 the next hour or at any time convenient, so you chose. We
19 are at your disposal for another hour.

20 MR. FALLIN: I think since we could complete the
21 round of responding to what has been presented upon the
22 joint motion we can move perhaps just to the discovery
23 summary also today, leaving the other issues for tomorrow.

24 Obviously, I want to respond, so I am pushing for
25 a little more time. I would rather do that now, but I

1 think, although we may have heard some comments to the
2 contrary, the Board would seem to have the authority to
3 adjourn when it wishes to.

4 CHAIRMAN MILLER: Well, we appreciate your
5 deference.

6 (Laughter.)

7 CHAIRMAN MILLER: We do wish to accommodate
8 counsel. We do realize that most of you are from out of
9 town.

10 (Board conferring.)

11 CHAIRMAN MILLER: The Board tends to feel that if
12 we could accomplish all matters, which is to say both the
13 responses, whatever may be engendered thereby, and some of
14 these motions that have impact -- if we can't do it within
15 an hour, by 5:00, then we would prefer to recess shortly or
16 comfortably. If we are going to come back anyhow, we would
17 rather do it that way than trying to push. So that's about
18 the way it is, I guess.

19 Why don't you take five minutes and discuss it
20 among yourselves? You probably know a lot better than the
21 Board does how much time it will take, whether you have
22 other things to present or not.

23 MR. FALLIN: Your Honor, part of the reason I
24 raised the point is that I have to be -- although Mr.
25 Armstrong and Mr. Meiss are going to be here, I have to be

1 elsewhere in the city tomorrow, not that my words are all
2 that essential or important, but there are some of these
3 things that, were it to wait until tomorrow morning, I might
4 forget to come back on. But we'll think about it.

5 (A brief recess was taken.)

6 CHAIRMAN MILLER: Well, have you ladies and
7 gentlemen had a chance to confer among yourselves?

8 MR. FALLIN: I think we would like to try to put
9 it to bed, if we can, and I would try to not take more than
10 fifteen or twenty minutes, or fifteen minutes to respond to
11 some of the points that were raised.

12 I am trying to recall some of these issues that
13 were pointed out. A quick one for the southern cities, they
14 raised I'll call it a third element of contention on the
15 commitments, the provision relative to an option in PG&E to
16 match offers coming in from out of the area. Of all of the
17 points, this is -- I think it's characterized as the least,
18 in any practical significance, and the one that was most
19 likely not to have had a major problem simply because of the
20 way the provision operates.

21 There are no restrictions on how many times a
22 party goes from one to another, and if you have ever sold
23 anything, you know, it's a situation where if you chose to
24 go the route in question, if you go first outside or if you
25 come to PG&E -- go outside, get an offer, come to PG&E, PG&E

1 matches it, the condition places no restriction on your
2 ability to go back again to the other person and ask him can
3 you come back again and come higher and come back again and
4 come back again. That's one way of working it.

5 If you go the other way, the way the provision is
6 written, if you go to PG&E first and get an offer and you go
7 to the outside party and get a higher one, the condition has
8 been satisfied. My feeling about that provision has always
9 been that it was -- if you were inclined to try -- certainly
10 if you were inclined to make an economic arrangement, it was
11 not any significant impediment. In fact, it almost acted as
12 a floor in terms of a market when you were coming back to
13 someone in the area.

14 I would also point out this someone in the area
15 includes NCPA and the other entities within that northern
16 California service area. So those entities would have
17 whatever option right there is involved in that.

18 MR. WENNER: When you say high or low, I'm not
19 clear. Do you make your prices higher?

20 MR. FALLIN: The option says that if an area
21 entity, which would be PG&E and CPA, one of the individual
22 northern California cities, will take that amount at the
23 same price as someone outside, it will stay inside. That's
24 all it says. It does not say anything about how many times
25 you go back and forth between participants asking what will

1 happen.

2 MR. WENNER: Does this also include if you could
3 use the power yourself?

4 MR. FALLIN: I'm not sure that I follow that.

5 Yes, yes, that's right. It's not a mechanism
6 where we could match it and then go and market it outside
7 somewhere ourselves.

8 With respect to what I said earlier in terms of
9 negotiations, the Chairman asked us, without going into
10 details, to characterize the status of those negotiations so
11 as to give a flavor of what the prospects were. I have not
12 said and will not say that anything is non-negotiable.

13 I pointed out the practical problems inherent
14 specifically in the hydro-electric recapturing case, which
15 raises such significant rate possibilities in order to point
16 out just how problematical negotiations on that particular
17 element are. I have not excluded that, but it is a factor
18 in it. And the same is true of the intertie.

19 There are variations of the way the intertie can
20 be dealt with, and that is not excluding the possibilities
21 in negotiations with respect to it. I would say in the
22 context of what we have in front of us now, both of those
23 events must change in terms of a plant that will not be
24 operational until the late 1990s. Whatever else may be
25 true, we know that the power supply situation as it exists

1 today will not exist then, and certainly the situation that
2 existed ten, twenty years ago when many of these documents
3 were created will not exist.

4 In terms of the hydro-electric situation, that
5 issue is one that has been raised before the FERC. I'm
6 sorry that over the years PG&E has done such unseemly things
7 as make motions for summary judgment and pointed out there
8 other proceedings, but I think there are practical elements
9 in the whole situation which should be considered in making
10 a decision on what, after all --

11 MR. WENNER: You don't have to apologize for
12 making a motion for summary judgment.

13 MR. FALLIN: Going back to a major concern that
14 was expressed by DWR and then repeated by the other parties,
15 that is that PG&E -- the uncertainty involved in the Energy
16 Commission decision is not a real uncertainty. That is,
17 PG&E has not told us for sure what will happen if those
18 state acts are upheld.

19 That I can clear up right now. Our position is if
20 those acts are upheld Stanislaus will not be built.

21 CHAIRMAN MILLER: What if the reverse is true?

22 MR. FALLIN: If the position we have taken, and
23 this is part of why the affidavit is constructed this way.
24 The testimony given by Mr. Shackelford with respect to the
25 pre-emption litigation did state that were those Acts to be

1 taken out of the way, we would proceed. That was
2 incorporated and was included.

3 CHAIRMAN MILLER: Is that still true today?

4 MR. FALLIN: So far as I know, and so far as the
5 position we are willing to take today, that is the case.

6 CHAIRMAN MILLER: The answer is yes?

7 MR. FALLIN: Yes.

8 I should say too, in terms of that affidavit, it
9 was part of our agreement and understanding that because of
10 the way it was constructed that DWR could and would be
11 incorporating parts of that prior testimony in terms of
12 their response to our motion. That's why it was presented
13 that way.

14 MR. WENNER: What way? I don't follow you.

15 MR. FALLIN: That's why this affidavit was
16 prepared to explicitly refer to that earlier testimony, so
17 they could accomplish the purpose in getting those things
18 into evidence.

19 MR. WENNER: This matter is settled, then, in
20 answer to the Chairman's question. You have answered if the
21 California law says and is upheld that you cannot build it.
22 You won't build it.

23 If the California no longer is declared
24 unconstitutional and you can build it, you intend to build
25 it. And that's your representation?

1 MR. FALLIN: That's correct.

2 The changes are the same changes that have moved
3 the project forward today. If our planning parameters
4 change and it moves farther out, it will do so. And that's
5 the context in which we come here today.

6 MR. WENNER: By farther out you mean to 1999?

7 MR. FALLIN: Yes, that's correct. Past that.

8 MR. ARMSTRONG: What he meant is that if future
9 planning decisions require a further deferral, then that
10 might occur --

11 CHAIRMAN MILLER: Or if they require acceleration
12 that might occur also. They might make studies from time to
13 time and adjust the predictions.

14 MR. FALLIN: The position on which we are asking
15 for consideration on our motion here today is one where we
16 have no present indication of the need for that facility
17 before an operational date of 1997, and we are specifically
18 accepting whatever delay problems might arise from our
19 measured back date of requiring a construction permit by
20 1987 -- 1989, excuse me.

21 MR. WENNER: It would be a construction permit by
22 1989?

23 MR. FALLIN: Again, that allows for eight years to
24 construct the plant from point of issuance to the final.

25 In the testimony referred to earlier, in the

1 deposition testimony I believe it was a six-year estimate.
2 We have given eight years to move in that figure.

3 Reference was made -- those are the only dates of
4 significance that I am aware of.

5 I think that's -- as I go back through the list,
6 I'm trying to recall some of the other issues that have been
7 raised with respect to the time of the plant and perhaps
8 uncertainties involved in it. I think there have been
9 questions asked about how this comes about. I think I tried
10 to answer them initially. It's the combination of the
11 specific problem of the Energy Commission situation being
12 one in which, if those Acts are upheld, the project will not
13 go forward, coupled with an ever-increasing financial
14 problem that the company faces, coupled with a planning
15 horizon that has moved the plant well out into the future,
16 so that the completion of this review is no longer in any
17 sense in the critical path for that planned project, so far
18 as we are concerned. And that is the basis on which this
19 proposal is made.

20 Again, I think it is important to stress that
21 there is no proposal that anybody be barred from -- I'll put
22 it another way. The proposal is simply that the case be
23 preserved until a point that is not unlimited, that is
24 definable. As soon as that decision is made, if the direct
25 requires it, we must come back immediately, advise the Board

1 of precisely what our scheduling and timing requirements
2 are, and resume the process.

3 I'm not sure whether the Board wishes to hear more
4 on the issue of the document discovery and production issue
5 that's been displayed in the letters. Specifically, the
6 situation was one where we left and I think legitimately so,
7 looking at the documents, the last status conference with
8 the clear understanding that the Intervenors were going to
9 do their best to shave, trim and modify their request as
10 they reached the lower priority areas in document
11 production.

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1 Part of that proposal was the notion that we would
2 identify as we await instructions before going on. There
3 were significant problems displayed between the Intervenor
4 as to what kind of priorities might be appropriate for one
5 or the other, and that was the essence of the letter that
6 Mr. Meiss delivered to all of the Intervenor asking for
7 them to give us the signals as to which step was to be done
8 next.

9 In trying to recall, I think it was in the
10 mid-fall, I talked with him and learned that we had not yet
11 had a reply. And the question came up --

12 CHAIRMAN MILLER: Let me cut this short. We're
13 not happy with the state of the record. We think that
14 everybody could have been a little bit more precise and the
15 Board certainly expected all of the parties to advise the
16 Board if for any reason there was a significant suspension
17 of the production of documents.

18 Now there was. We're not going to try to hang
19 anybody and say who stuck John or the rest of it. We are
20 not pleased with the way it came about, but we understand
21 human nature. You are lawyers and these matters do occur.
22 We trust it will not occur in the future if the future holds
23 discovery or production of documents or matters of that
24 kind, and we would tell every counsel and every lawyer here
25 and now there is a not-insubstantial interruption of what

1 the Board understands to be an ongoing plan when we relieved
2 you of the necessity of every thirty days giving us a status
3 report on production of documents.

4 We certainly would have expected to hear long
5 before May or April or whatnot in 1981 that there had been a
6 suspension of the production of them for any reason and that
7 what was ongoing was in the pipeline. I think we need say
8 no more about it because we expect that it will not occur in
9 the future, and it doesn't advance us any to try to assign
10 blame, because that really isn't our function. We are not
11 pleased with it.

12 We're telling all of you of the situation where
13 the Board had assumed you were producing the documents that
14 were somewhere near the rate estimated. We had confidence
15 that if it were not so you would tell us. It was not so,
16 and you didn't tell us, but we are willing to drop that
17 matter there.

18 Proceed.

19 MR. FALLIN: The basic proposition is that given
20 the facts of the situation and those are facts whose changes
21 and whose message is not something that's been manipulated
22 or is manipulatable by any of us. We think this a measured,
23 sensible step to take. I do not think it makes sense to be
24 incurring expenses that approach and perhaps exceed a
25 million dollars a year pursuing a proposition that is

1 problemmatical until the Energy Commission litigation is
2 resolved.

3 And at best, we will -- the determinations that
4 will have to be made will have to be played out against
5 conditions that will exist more than a decade in the future,
6 given the number of financial, engineering, litigation steps
7 that we can now see in process and know must be accomplished
8 before that end.

9 That's really the only intention involved in
10 requesting this step. I think the Commission has authority
11 to do what is sensible with respect to the scheduling and
12 discovery in this case.

13 CHAIRMAN MILLER: Staff?

14 MR. GOLDBERG: I would like to briefly address a
15 number of issue that have been raised.

16 First of all, with respect to DWR's argument that
17 the Board does not have authority to suspend discovery in
18 this case, I think DWR is entirely wrong on that matter.
19 First of all, it is important to understand that we are not
20 talking about a dismissal of this proceeding, whether it is
21 with or without prejudice. We are talking about a
22 procedural ruling by the Board on a discovery schedule, and
23 we are asking for a temporary suspension of that discovery
24 schedule for now, only until we get a further report from
25 PG&E on its intents after there is a ruling on the Federal

1 court litigation.

2 Second 2.718 of the Commission's rules of practice
3 clearly gives the Board the authority to make the type of
4 procedural ruling that is requested here. The "no undue
5 delay" admonition which was mentioned by Mr. Horn is not no
6 undue delay in intervenors' or any parties' piling up as
7 many documents as they can get.

8 The "no undue delay" language of 2.718 refers to
9 not relying unduly the issuance of any construction permit
10 or operating license. There is no good reason to have a
11 pile of documents if there is not going to be a hearing,
12 which follow from that, which will give rise to license
13 conditions which will attach to a construction permit for a
14 real nuclear power plant.

15 A lot has been said about the enormous amount of
16 time, money and effort which has already been spent on this
17 case and the staff certainly agrees that all parties have
18 borne substantial expenses and manpower drains, but that is
19 not reason to continue those substantial expenditures and
20 substantial allocation of resources when it is now clear
21 that the future of the plant is extremely uncertain.

22 The only thing that is clear now is that the plant
23 is not needed until at least 1997. That means that we can
24 defer discovery while we, from the staff's point of view,
25 address more immediate responsibilities which we must

1 address with the resources that we have.

2 Mr. Wenner asked did the staff address the two
3 issues which were mentioned and the commitments which might
4 be an obstacle to settlement, namely the no wheeling from
5 recaptured hydro provision and the limitation on wheeling
6 over the intertie.

7 We, the staff, recognize and have described in our
8 submission to the Board on the inadequacies of the
9 commitments the potential anti-trust problems with such
10 license conditions. We have been preparing to address
11 those, if and when there is a hearing. They have been the
12 subject of negotiation between the staff and PG&E, as well
13 as earlier in the proceeding among all parties.

14 And without characterizing positions of the
15 parties taken during settlement negotiations, I would just
16 say that the statements made today by PG&E may not, in our
17 opinion, preclude the potential settlement of this case. We
18 have made every effort and as long as there is a proceeding
19 we will continue to make every effort to settle the case.

20 What was said today does not present an insoluble
21 problem as far as the staff is concerned. We have always
22 taken the view that we will look at a settlement package as
23 a whole. There are lots and lots of particular anti-trust
24 issues. We have various positions on each one of those
25 issues. It is going to be give on some and take on others.

1 We would evaluate any settlement proposal as a whole, and
2 don't view the statements today by PG&E as an insurmountable
3 obstacle to settlement.

4 Once again, I would refer all the parties to the
5 Appeal Board's decision in the Perkins case, which I think
6 is instructive for the purpose of recognizing what this
7 Appeal Board has itself recognized in connection with the
8 situation that the staff finds itself in today. And, once
9 again, I would like to quote now from page nine of that
10 decision.

11 CHAIRMAN MILLER: What was the citation on that?

12 MR. GOLDBERG: It's a March 20, 1981, memorandum
13 by the Appeals Board, and it is to date unpublished.

14 CHAIRMAN MILLER: Does it have an ALAB number,
15 civil opinion number, any number?

16 MR. GOLDBERG: It does not. I will make it
17 available to all the parties tomorrow and send a copy to the
18 Board.

19 It states on page nine, "We perforce will have to
20 concentrate our attention on those proceedings which involve
21 reactors which are either in existence or proposed to be
22 built on a definite schedule. Appeals in proceedings and
23 construction permit applications for reactors which have
24 been indefinitely deferred and may well never be built at
25 all will have to take a back seat."

1 CHAIRMAN MILLER: Does that include the sources
2 they are talking about?

3 MR. GOLDBERG: As I said earlier, they were
4 talking about the resources of the Commission and the
5 Commission's employees and the Commission's adjudicatory
6 panels.

7 CHAIRMAN MILLER: They were talking also of the
8 Appeal Board resources.

9 MR. GOLDBERG: Yes. Specifically, the issue
10 concerned whether or not the Appeal Board would hear an
11 appeal in connection with the construction permit proceeding
12 which the applicant did not, before this Commission or
13 anywhere else, state its intention of withdrawing. But
14 because the Appeal Board had learned from the Wall Street
15 Journal that the applicant was considering abandoning
16 another nuclear plant, a different nuclear plant --

17 CHAIRMAN MILLER: Is this Duke Power?

18 MR. GOLDBERG: Yes. The Appeal Board thought that
19 that may have some significance with respect to their
20 intentions on Perkins.

21 CHAIRMAN MILLER: Was it Cherokee?

22 MR. GOLDBERG: I believe it was.

23 CHAIRMAN MILLER: Now you realize this is an
24 anti-trust case where the Appeal Board does not sua sponte
25 review. In fact, they review reluctantly and only when

1 pressed by parties on a series of appealable errors. And
2 there is somewhat distinguishable in our practice on the
3 Commission and Appeal Board from constructions and OL
4 matters.

5 MR. GOLDBERG: Well, I understand that about the
6 sua sponte review, but otherwise I think the rules of
7 practice are equally applicable to anti-trust proceedings as
8 well as health, safety and environmental proceedings.

9 CHAIRMAN MILLER: Are you sure of that now?

10 MR. GOLDBERG: Yes, I believe so.

11 CHAIRMAN MILLER: Matters of pleading, for
12 example, are significantly different, I believe, in
13 anti-trust than they are in practice of the other type of
14 proceedings, as the staff has pointed out from time to time.

15 In other words, there are significant
16 differences. And anti-trust is not the favored child, I
17 suppose, of the Commission. It doesn't really seek out that
18 kind of jurisdiction. They are not reaching out for it.
19 The Appeal Board has long since announced they are not going
20 to give sua sponte reviews, so it's on a little bit
21 different track, wouldn't you say, Mr. Goldberg?

22 MR. GOLDBERG: I would say that indicates neither
23 the Commission nor the Appeal Board will prefer to have the
24 staff resources devoted to an anti-trust case involving a
25 plant which may never be built rather than addressing the

1 immediate CP and OL applications that are before us in
2 adjudicatory proceedings which the staff's legal resources
3 are needed for immediately.

4 CHAIRMAN MILLER: What other anti-trust cases is
5 the staff having to devote their meager resources to which
6 would take priority over this one?

7 MR. GOLDBERG: Which would take a priority to this
8 one?

9 CHAIRMAN MILLER: Over this one. What anti-trust
10 proceedings should be the subject of a higher priority of
11 the staff's use of resources that this anti-trust
12 proceeding? Are you saying all anti-trust proceedings are
13 stepchildren? I'm not quite following you.

14 MR. GOLDBERG: I don't think there is one which is
15 a higher priority. I don't think because of variant
16 circumstances there are any that have a high priority at
17 this point. Most of the major cases have been substantially
18 completely settled and this is the most significant one
19 remaining where there is not a major or complete settlement.

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1 MR. FALLIN: Mr. Chairman, we didn't give a
2 summary of the discovery pages.

3 CHAIRMAN MILLER: Are you through, Mr. Goldberg?

4 MR. GOLDBERG: Yes.

5 MR. WENNER: Excuse me, Mr. Fallin.

6 MR. FALLIN: No, I interrupted.

7 MR. WENNER: I have a question. Well, if you have
8 just a temporary interruption I'll wait.

9 CHAIRMAN MILLER: Mr. Fallin never has a temporary
10 interruption. Answer the question.

11 (Laughter.)

12 MR. FALLIN: I think I almost made my 15 minutes.

13 CHAIRMAN MILLER: You came very close, you had 21,
14 I wrote it down.

15 (Laughter.)

16 MR. WENNER: Mr. Goldberg, from your vantagepoint
17 of having participated in some negotiations of this
18 proceeding, what's your reaction to the answer that was made
19 to your argument about settlement? Your argument this
20 morning was if we wait and wait and we suspend everything,
21 there will be lots of waiting done and they'll have lots of
22 time to negotiate, and this would encourage a settlement.

23 The answer that was given to that was if we defer
24 all proceedings and suspend all proceedings there will be no
25 pressure on anybody to settle. Therefore, it will never get

1 settled.

2 MR. GOLDBERG: I don't agree with that. We've
3 heard a number of times today the phrase "business
4 negotiations", those negotiations that are taking place with
5 DWR between DWR and PG&E, and those that have over the year;
6 taken place within NCPA are not specifically associated with
7 particular pieces of litigation. They are negotiations with
8 respect to interconnection agreements and bulk power supply
9 agreements.

10 And those, by necessity, will have to continue
11 whether or not this proceeding is here. As a matter of
12 fact, as I understand it, there were actually some explicit
13 conditions on some of those negotiations that they were not
14 directly tied to any litigation and would not, even if they
15 reach agreement, necessarily dispose of the litigation.

16 So I think that whether we have a suspension of
17 discovery or not, there will -- and there is incentive for
18 further business negotiations among the parties and
19 California.

20 MR. WENNER: I think my question was a little
21 different from the one you answered. I'm just asking about
22 the pressure to settle as against lots of time to settle.
23 Which do you think will be more likely to lead to a
24 settlement? That is, as you get to the courthouse and get
25 to trial, there's a certain incentive or pressure to

1 settle. Is that an answer to your argument that if we give
2 them until 1980, something or other, settlements somehow
3 arise? And given time, the evolutionary process is such
4 that they'll be settled?

5 MR. GOLDBERG: The normal pressure to settle --
6 well, I think it cuts both ways. Oftentimes, there is a
7 great incentive to settle just before or even at the
8 beginning of the trial when you have thoroughly prepared the
9 case and you might be somewhat uneasy about the outcome.

10 On the other hand, I know of a natural reluctance
11 to settle in other circumstances where you feel you have
12 fully prepared your case and you feel confident that you're
13 going to win. But those considerations are really, I think,
14 somewhat different in this proceeding because we may not
15 have a hearing. I don't know what incentive there is on the
16 part of PG&E to settle this case, when they may never ever
17 have to settle this case.

18 If, in fact, they don't proceed with their
19 construction of Stanislaus, there will be absolutely no
20 incentive on their part to settle. And of the issues that
21 have been raised here when you're talking about disposing of
22 this piece of litigation as part of that incentive.

23 If, on the other hand, there is going to be a
24 Stanislaus, we know now that the earliest we can expect its
25 operation is 1997, and I think we have seen that over the

1 years there have been changes. There are settlement
2 negotiations going on in a business context. A lot of what
3 is required for the proceeding now may be far different when
4 we have to proceed with discovery in this case to be on
5 schedule with their intention for Stanislaus.

6 And I think it is a possibility that a good deal
7 of the discovery which we believe is now necessary will not
8 be necessary.

9 CHAIRMAN MILLER: Why do you say that, Mr.
10 Goldberg? You've said it several times. The staff
11 originally was alleging what came perilously close to a
12 charge of monopolization under Section 2 in this case. Now,
13 that didn't start yesterday and didn't presumably end
14 tomorrow if it were true. Now why, all of a sudden, do we
15 have a monopolization allegation with a lot of
16 ramifications? Suddenly, everything is going to be
17 different.

18 MR. GOLDBERG: Right now that's correct. There is
19 a monopolization charge against the company and that
20 requires looking at whether or not there's been a willful
21 acquisition or maintenance of monopoly power. That
22 necessarily requires extensive discovery into the history of
23 the company; how it got to where it is in the marketplace
24 today.

25 CHAIRMAN MILLER: In the present and the future

1 and other plants, nuclear or not, it's an ongoing creature,
2 isn't it, if there is truly monopolization underway being
3 practiced?

4 MR. GOLDBERG: That's right. But what I'm
5 suggesting is that if between now and 1989 when they're
6 going to get their construction permit at the earliest,
7 there are settlements among some of the parties which
8 substantially narrow the issues, the antitrust problems
9 which remain.

10 It may be that monopolization is not one of the
11 issues that remain.

12 CHAIRMAN MILLER: Do you really believe that,
13 having given us the studies -- and you made some excellent
14 studies here of the monopolization aspects, the staff is
15 certainly interested in, if not convinced of --and now
16 because there's a different point of view and the limited
17 resources and so forth, are you seriously telling us that
18 that monopolization if it took place was just something that
19 might have passed? It's not going to change in the next
20 five years? It's going to be different? This is a great
21 leap forward in logic on the part of the staff, Mr. Goldberg.

22 It does puzzle me a bit. I'm talking about
23 monopolization, which is a serious, heavy allegation with
24 many, many ramifications for a large private utility in
25 place in the state of California, and the staff has worked

1 very hard on this case, as have the others. And I didn't
2 recall until we came into this recent aspect of whether the
3 staff has got resources and they should put them to work on
4 the CF rather than on some little antitrust kind of case.

5 I didn't have the feeling and belief that the
6 staff is taking the view that this was just a trivial
7 matter. I felt when the allegations were made and that when
8 discovery went away, I thought when the staff when to the
9 considerable expense, time and effort that I know the staff
10 did, as well as all other counsel, that you were taking a
11 serious anti-competitive view of a monopolization case, and
12 that isn't just a light charge or "boys will be boys."

13 Now, have you changed your view?

14 MR. GOLDBERG: No, we have not changed our view.
15 We have always viewed the monopolization charge as well as
16 the other anti-competitive allegations against PG&E
17 extremely seriously, and we have not changed our position on
18 the merits of those antitrust issues today.

19 CHAIRMAN MILLER: And you think something great
20 and strange and a waving of the wand by the tooth fairy is
21 going to change this whole situation you've been describing
22 to us now, from 1981 up to whenever you want to project the
23 possibility of construction application? And if so, what do
24 you base that on?

25 MR. GOLDBERG: I don't know what's going to happen.

1 CHAIRMAN MILLER: You're just speculating about
2 what might; you've got an ongoing monopolization case that
3 you would adduce proof on?

4 MR. GOLDBERG: We are suggesting that all the
5 fruits of discovery be preserved.

6 CHAIRMAN MILLER: I know what you're suggesting
7 about the fruits of discovery. I also know if you do
8 nothing for two, three, four or five years in the posture
9 this case is in, you're talking about a new lawsuit, if
10 there'd be a new lawsuit in '89 or '90 or what. We might as
11 well face the facts of life. Let's not disabuse ourselves
12 of the idea that by calling something a temporary suspension
13 and putting in so many obstacles that have to be leaped over
14 that we aren't really changing the essential nature of this
15 proceeding.

16 Maybe that's justified; that's why I'm trying to
17 get some hard facts, some hard evidence and some hard
18 reasoning. But I don't think that I want fairy tales, and I
19 think I'm starting to get fairy tales.

20 MR. GOLDBERG: Well, the act reads in terms of the
21 Commission making a finding as to whether or not the
22 issuance of the license would create or maintain the
23 situation.

24 CHAIRMAN MILLER: The activities under the
25 license; activities would create or maintain, and you've got

1 to maintain a situation that started some years ago that's
2 ongoing. You told me of it till yesterday and I don't know
3 what you're projecting for the future, but don't you think
4 that maintenance is an element that should be looked at?
5 Unless you're prepared to say we should just stop this
6 proceeding; it isn't justified?

7 MR. GOLDBERG: Absolutely, but now we don't even
8 know when we're talking about issuing the license.

9 CHAIRMAN MILLER: Well, what do we know about
10 monopolization? Let's look at the monopolization you have
11 charged. Let's not project other illusory goals, what some
12 president says or whatever the motives are. Let's look at
13 the monopolization the staff has alleged. Was that based on
14 something the staff felt was substantial? I don't think you
15 should prejudge; I think you should always maintain a
16 certain independence, but nevertheless, I was finding the
17 staff's presentation through the last three years -- you
18 were alleging entities in some documents at least which had
19 a significant substantial bearing on an allegation of
20 ongoing, past, preceding and future projected
21 monopolization. Is that unfair?

22 MR. GOLDBERG: Well, let me correct you a little
23 bit.

24 CHAIRMAN MILLER: Go ahead.

25 MR. GOLDBERG: We have not made the allegation of

1 monopolization. The position of the staff was that we have
2 petitions to intervene by other parties, and their position
3 in those petitions was that if the allegations are true,
4 there's a serious antitrust problem which warrants an
5 antitrust proceeding.

6 There's valid intervention on the basis of the
7 petition and the Commission ought to hold a hearing to
8 examine the allegations to see whether or not they're true;
9 and if true, what are appropriate license conditions.

10 As we proceeded through discovery, we began
11 analyzing the evidence and we did report to the Board that
12 we were finding evidence which substantiated most if not all
13 of the charges that have been made.

14 CHAIRMAN MILLER: I remember you telling us that.

15 MR. GOLDBERG: Yes.

16 CHAIRMAN MILLER: I believed you.

17 (Laughter.)

18 MR. GOLDBERG: Well, you should have.

19 CHAIRMAN MILLER: Now, are you taking it away from
20 me?

21 MR. GOLDBERG: I'm not taking it away.

22 CHAIRMAN MILLER: Go ahead.

23 MR. GOLDBERG: We are perhaps by various
24 estimates, a third, a half, maybe three-quarters, depending
25 on the individual parties and their estimates, through

1 discovery. We have, on a continuing basis evaluated each
2 one of the issues in the proceeding and what our position is
3 going to be on those issues. We would continue to do so if
4 this proceeding continued.

5 But it just seems to me that it's a tremendous
6 potential waste of time, money and effort to proceed now
7 when there is absolutely no reason to proceed now. When
8 under the best estimate of the company, it's 1989 at the
9 earliest that they need a construction permit, and by
10 suspending discovery temporarily we are losing nothing and
11 possibly saving a further additional waste of time, money
12 and effort which we cannot afford at this time.

13 CHAIRMAN MILLER: You're talking about the staff's
14 time and effort? There are some segments of the state of
15 California say they'll put forth the effort, spend the money
16 and do it, so it isn't a case where you've got intervenors
17 who don't have the competence and money to proceed.

18 Secondly, you state very eloquently that there is
19 no possibility, and yet, when I read these affidavits I see
20 people testifying with the gloss one way when they're into a
21 lawsuit, and this is understandable on the part of
22 witnesses. I don't impugn their honesty. But nonetheless,
23 the statements are a little more qualified now when there's
24 a serious substantial delay sought than they were when the
25 court was being asked to rule upon the unconstitutional

1 aspects.

2 Now, this is human nature. But what I'm saying is
3 why is the staff suddenly saying my goodness, there's no
4 possibility? Did you take depositions? Did you probe in
5 depth, trying to find out what the differences were and the
6 nuances of those three sworn statements of the one witness?
7 Have you done any of that?

8 MR. GOLDBERG: We have an affidavit of the
9 president of the company.

10 CHAIRMAN MILLER: I read that affidavit. What he
11 said was generally -- what he said was these things are
12 generally true, and unless things change, it will be true in
13 the future. If that's what this staff is basing on to give
14 me this eloquent statement that there's no possibility, then
15 I suggest you might want to re-examine the factual basis for
16 it. If you're content to rest on it, okay.

17 MR. GOLDBERG: I would suggest that the affidavit
18 is quite specific on the dates of 1989 -- .

19 CHAIRMAN MILLER: It glibly sets the date. Those
20 are conclusory matters. You know the difference between a
21 conclusion and a factual data base. Step by step, it
22 verified subject to cross examination even, and then you
23 know what you have. I am merely asking the staff, have they
24 just simply taken that affidavit which I read, too, and is
25 that the extent on the basis of which the staff says there

1 is no possibility to act and so forth?

2 MR. GOLDBERG: That affidavit, along with their
3 inability to see whether there is a need to address these
4 pressing issues at this time -- .

5 CHAIRMAN MILLER: Isn't the staff interested in
6 whether or not there was monopolization, as charged and
7 partially supported by massive discovery? Isn't the staff
8 interested in continuing to see, so long as there is a
9 proceeding, whether or not those are significant matters
10 that should be explored? Doesn't the staff have that much
11 interest?

12 MR. GOLDBERG: Of course we have the interest but
13 we think it's necessary now to address them at the
14 appropriate time, and now is not the appropriate time.

15 CHAIRMAN MILLER: Four years ago it was?

16 MR. GOLDBERG: That's correct.

17 CHAIRMAN MILLER: Four years ago it was going to
18 take 8 or 10 or 12 years anyway to bring something on line,
19 but it didn't disturb the staff then. Why does it disturb
20 the staff now, that you're projecting into the year and
21 saying my goodness, this is a waste of time?

22 MR. GOLDBERG: It didn't disturb the staff then
23 because to the best of our knowledge there was the intent by
24 PG&E to proceed in an expeditious fashion with this
25 construction permit application.

1 CHAIRMAN MILLER: Was that statute pending? That
2 statute didn't happen yesterday.

3 MR. GOLDBERG: That's right, and as far as PG&E
4 was concerned, at least as far as we knew, that was not an
5 impediment. And now they're saying that that is an
6 impediment. And that regardless of that, it's going to be
7 1997 at the earliest.

8 CHAIRMAN MILLER: They say because they won two
9 lawsuits in federal courts that sustained in the one case
10 where they were a party, sustained their objection to the
11 constitutionality, they won that. The same position was
12 taken by another federal court having won. And all of a
13 sudden, they say oh my goodness, look at this terrible
14 situation we're in, and the staff says yes, terrible. Are
15 you really serious in urging that position?

16 MR. GOLDBERG: Well, when an applicant says we
17 intend to build a plant; here's our antitrust information,
18 we take the applicant's word that they wouldn't be supplying
19 us the information or go through a useless gesture. And
20 when they say now they're not going to build it until 1997
21 at the earliest as far as operation, and they give an
22 affidavit of the president of the company so stating, we
23 have accepted that on its face and have based our motion on
24 that. And I think that was legitimate.

25 CHAIRMAN MILLER: I think that's a fair statement

1 of the staff's position.

2 MR. ARMSTRONG: Mr. Chairman, I think in fairness
3 to the staff -- .

4 CHAIRMAN MILLER: Are you going to defend the
5 staff now? That's all right.

6 (Laughter.)

7 MR. ARMSTRONG: Once in a while I think it just
8 has to be observed that the staff and indeed, I think
9 anyone, taking a step back looking back at that affidavit,
10 if the company comes in with Stanislaus and says listen, we
11 aren't going to need that plant until 1997, and then the
12 response is what do you mean, you're kidding, let's cross
13 examine. I'll tell you this. The same individual who wrote
14 that affidavit would dearly love to be believed when he says
15 he'd like the application for the Diablo plant to be
16 approved forthwith.

17 It seems when we're talking Diablo, let's wait on
18 that one. But Stanislaus, let's hurry that one up.

19 CHAIRMAN MILLER: I can believe anything you tell
20 me about Diablo Canyon.

21 MR. WENNER: Can you explain one final thing to
22 me? Suppose one of the cities said look, we want 100% of
23 all the Bonneville power that's available, would they have a
24 preference for getting it? A preference sufficient so that
25 if they could get it, they could get the whole blessed works

1 so PG&E would get nothing?

2 MR. DAVIDSON: Well, they cannot resell it.

3 MR. WFNNER: I know that.

4 MR. DAVIDSON: Well, you'd have to assume a city
5 of sufficient size to buy whatever is available. If it is
6 available and it is the only preference entity, yes.

7 CHAIRMAN MILLER: The Board would like to receive
8 briefs from the parties covering some of the matters that
9 have been raised today. You need not reiterate what you set
10 forth in your moving papers and your responses. You may
11 refer to them if you wish. We've read them and will reread
12 them again. However, there have been certain matters raised
13 today that require, in the judgment of the Board, some
14 clarification and some citation of authority if possible.

15 We would like to give about 30 days and ask for
16 simultaneous submission unless you feel this poses an unfair
17 burden. What's your reaction?

18 MR HORN: Thirty days is fine, and I like the idea
19 of simultaneous submissions.

20 CHAIRMAN MILLER: Pardon me, I didn't hear you?

21 MR HORN: The 30 days is fine, and I like the idea
22 of simultaneous submission.

23 CHAIRMAN MILLER: What is 30 days from today?

24 MR. ARMSTRONG: June 4th, Mr. Chairman.

25 CHAIRMAN MILLER: June 4th did you say?

1 MR. ARMSTRONG: That's a Thursday.

2 CHAIRMAN MILLER: The 5th is Friday?

3 MR. ARMSTRONG: Right.

4 CHAIRMAN MILLER: All right, let's have
5 simultaneous filing of briefs in response to various
6 arguments that have been raised today or the various points,
7 but no repetition of those things which have been filed.
8 Simultaneously on the 5th of June, Friday.

9 Mr. Wenner suggests you try to make that a
10 self-contained document, reasonably terse where you can ,
11 but then attaching the documentation, for example, so we
12 don't have to chase through three or four or five documents.

13 Anything else?

14 MR HORN: So I understand what it is we are
15 briefing, a little earlier a number of questions were
16 raised, and specifically you asked for a briefing concerning
17 the hydroelectric provisions of the Stanislaus commitment,
18 and a number of issues like that with respect to the
19 commitment. I am perfectly prepared and I think understand
20 the Board to be saying what you really want now is a
21 re-briefing on the motion, and you want a record created in
22 connection with that brief which develops all facts which
23 the Board has indicated it thinks is now lacking.

24 CHAIRMAN MILLER: A refined briefing and taking
25 into consideration the discussions and arguments that each

1 of you has made and the Board has asked questions about.
2 No, it will be a refinement. We don't ask you to repeat
3 what you have done.

4 MR. FALLIN: Mr. Chairman, because this is an
5 ongoing process and it's a question that was raised with
6 respect to these ongoing settlements, the notion was posited
7 that it is necessary to keep PG&E expending this money in
8 order to impel negotiations to go forward. This litigation
9 has never, to my knowledge, had any inter-relationship with
10 negotiations taking place with DWR.

11 I may have spoken to the people involved, but
12 never involving this litigation. The ongoing character of
13 these expenses will not be a factor in telling us to do
14 something that we should not be doing in terms of those
15 negotiations. The existence of this litigation has not been
16 a factor forcing us to either enter into them or to carry
17 them forward. That will continue to be the case.

18 CHAIRMAN MILLER: All right. I think unless there
19 is something further we will adjourn. Judge Wenner would
20 like to have a short bench conference with counsel.
21 Anything further? We're about to adjourn.

22 MR. ARMSTRONG: On the briefing schedule, Mr.
23 Chairman, do you want to allow any provision for responsive
24 submittals? Based on past practice, I suspect everybody -- .

25 CHAIRMAN MILLER: It was our thought initially,

1 but we've pretty well kicked around many of these things in
2 argument today, and we would allow the 30 days. Now, if
3 counsel feels strongly that they want another ten days or
4 something to file simultaneously, we don't think it's
5 necessary but we'll defer to you.

6 MR. ARMSTRONG: The Board is probably right.

7 CHAIRMAN MILLER: All right. Is ten days enough?
8 All right, we will give an additional ten days following the
9 day that the briefs are due, June 5; an additional ten days
10 of the nearest business day thereto.

11 MR. ARMSTRONG: June 15th is a Monday.

12 CHAIRMAN MILLER: June 15th, then, for
13 simultaneous replies and responses to the filing of any or
14 all of the other parties. Okay, we stand adjourned. Thank
15 you very much.

16 (Whereupon, at 4:55 p.m., the conference was
17 adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
Atomic Safety & Licensing Board

In the matter of: Pacific Gas & Electric Co (Stanislaus Nuclear Project,
Unit 1)

Date of Proceeding: May 5, 1981

Docket Number: P-564-A

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

ANN RILEY

Official Reporter (Typed)



Official Reporter (Signature)