

NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD
PREHEARING CONFERENCE

In the Matter of:

PACIFIC GAS AND ELECTRIC CO. :
(Diablo Canyon Nuclear Power : DOCKET NOS. 50-275 OL
Plant, Units 1 and 2) : 50-323 OL

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
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7 In the Matter of: :
8 PACIFIC GAS AND ELECTRIC CO. : Docket Nos. 50-275 OL
9 (DIABLO CANYON NUCLEAR POWER : 50-323 OL
10 PLANT, UNITS 1 AND 2) :
11 - x

12 Room 550
13 4350 East West Highway
14 Bethesda, Md.
 Wednesday, December 16, 1981

15 The above-entitled matter came on for prehearing
16 conference, pursuant to notice, at 9:00 a.m., before:

17

18 SHELDON J. WOLFE, Chairman

19 GLENN O. BRIGHT, Administrative Law Judge

20 JUDGE KLINE, Administrative Law Judge

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1 APPEARANCES:

2 On behalf of the Applicant:

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8 On behalf of the Regulatory Staff:

9 WILLIAM OLMSTED, Esq.
10 Deputy Chief Hearing Counsel
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12 On behalf of Intervenor Governor Jerry Brown:

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16 On behalf of Joint Intervenors:

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PROCEEDINGS

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(9:00 a.m.)

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CHAIRMAN WOLFE: Good morning, ladies and
gentlemen.

5

MR. OLMSTED: Yes, Mr. Chairman. I'm William J.
Olmsted, Deputy Chief Hearing Counsel, appearing for the NRC
staff.

8

MR. LANPHER: Lawrence Coe Lanpher and Herbert H.
Brown, appearing for Governor Brown.

10

MR. NORTON: Bruce Norton and Philip Crane,
appearing for Applicant Pacific Gas & Electric.

12

MR. REYNOLDS: Joel Reynolds, appearing for Joint
Intervenors.

14

CHAIRMAN WOLFE: I have listed several things that
I think we should discuss this morning. The first one that
I have on the list is the Commission's order of December 8,
1981, CLI-81-33, regarding the Commission's holding that the
current regulations do not require considerations of impacts
on emergency planning of earthquakes which cause or which
occur in accidental radiological release.

21

Is anyone prepared to comment on that holding?

22

MR. OLMSTED: I think that we are prepared to
comment on it. I'm not sure what the appropriate order of
comment would be. If you would like, I would set forth --

25

CHAIRMAN WOLFE: Well, I would like to hear from

1 Intervenors principally, to make sure they know about that,
2 and the Board's position that we don't have jurisdiction
3 over that question in view of the holding of the
4 Commission.

5 MR. REYNOLDS: Mr. Chairman, I have seen a copy of
6 the order and it is our position that the order, having been
7 issued in the San Onofre proceeding, is not necessarily
8 applicable in this proceeding, for the principal reason that
9 PG&E's emergency plan itself lists as one of the initiating
10 conditions for an accident an earthquake involving breach of
11 containment and release of offsite radiation. That we
12 believe provides a basis for litigation of that issue in
13 this proceeding and the consequences which that would have
14 for implementation of emergency response procedures.

15 MR. BROWN: I think what Mr. Reynolds says is
16 sound. This is a question put into issue because,
17 obviously, the Applicant recognized that the serious
18 potential for an earthquake there had obvious implications
19 on emergency planning, and it sought to deal with this
20 properly. And one of the issues in the case is whether it
21 did. And it has done a considerable amount of work in that
22 direction now that we are all looking into.

23 Secondly, as the Board may know, some time ago,
24 maybe -- I think in excess of a month, surely, the Governor
25 filed a statement with the Commission stating that if the

1 Commission intends for its ruling in San Onofre to have any
2 impact on or to cover the Diablo Canyon proceeding, then the
3 Commission -- the Governor would appreciate having the
4 opportunity to comment on that.

5 And as is clear from the face of the Commission's
6 order, first, the Commission did not refer to Diablo Canyon
7 or other proceedings; and secondly, the Commission did not
8 provide us with the opportunity to comment, the necessary
9 inference being that the intention was not to govern this
10 proceeding.

11 CHAIRMAN WOLFE: Mr. Norton, do you have any
12 comment?

13 MR. NORTON: Well, Mr. Brown is partially right
14 when he says the Commission did not mention Diablo Canyon in
15 that decision. Rarely when you are deciding one case do you
16 discuss the facts and how that case applies to another
17 ongoing case. And just because Mr. Brown wrote a letter to
18 the Commission telling them what he wanted them to do and he
19 now states by their inaction that obviously they agree with
20 him, because they didn't do what he told them to do.

21 But I don't think the Commission responds to Mr.
22 Brown. I think they are sort of marching to their drummer,
23 so to speak.

24 The memorandum and orders are very clear, and it
25 clearly does apply to this case and any other cases. It

1 says, after consideration of this and related issues, the
2 Commission has decided that its current regulations do not
3 require consideration of the impacts on emergency planning
4 of earthquake. And the regulations aren't interpreted
5 differently for this case, we hope, and this decision
6 clearly does impact this proceeding.

7 CHAIRMAN WOLFE: Mr. Olmsted?

8 MR. OLMSTED: Yes, Mr. Chairman. I'm afraid that
9 I have to agree with the Board's initial impression as to
10 the effect of the memorandum and order. There is no basis
11 in law that I am aware of for ignoring the precedential
12 value of a decision in a particular proceeding insofar as
13 that decision is applicable to issues in other proceedings.

14 So I think that the San Onofre order clearly is
15 binding on the Board as Commission policy and regulatory
16 guidance.

17 As you know, the staff is a party which injected
18 this issue in the San Onofre proceeding and the Diablo
19 proceeding, with a letter to the utilities telling them that
20 we felt they should address earthquakes as natural phenomena
21 which was significant for the area in which those reactors
22 were located.

23 The Commission order on its face goes beyond the
24 issue referred to it by the Licensing Board in the San
25 Onofre proceeding, in that it not only rejects the

1 consideration of earthquakes beyond the SSE, which was the
2 staff position in that proceeding, but it also seemingly
3 rejects the consideration of earthquakes at all as being
4 beyond the regulatory requirements as they currently exist.
5 And the Commission arrives at that position by quoting the
6 statement of considerations accompanying the emergency
7 planning rule that interpretation of the rules would be
8 binding on all boards, wherever they are situated, because
9 it is based upon an interpretation of the rule that is
10 applicable to each individual board.

11 So from that standpoint I would agree with the
12 observation that the Chairman made. I think the order is
13 perhaps not as clear as it might be, but if you read the
14 concurring opinions and the dissenting opinions it is quite
15 clear that the Commission believed that it was excluding
16 earthquakes from consideration in individual licensing
17 proceedings such as this one, with the one exception, if you
18 read Commissioner Ahearne's concurring opinion, if you could
19 find a particular earthquake with a frequency of occurrence
20 at least annually, that might be permissible to include as
21 natural phenomena, though.

22 I think, since that's the only place you find
23 reference to even that much, probably the correct
24 interpretation of the order is that earthquakes are not to
25 be considered, because the Commission views, such as that

1 incorporated within the philosophy of the rule generally,
2 and that philosophy is the rule accounts for accidents and a
3 particular accident sequence or cause is unnecessary for
4 consideration.

5 CHAIRMAN WOLFE: Thank you.

6 Well, the Board has come to that conclusion, that
7 we will not consider the earthquake. So it is up to the
8 parties who disagree with that to take whatever steps they
9 can regarding an appeal from that ruling.

10 And it would seem to me there is sufficient time
11 between now and the hearing to do that. And even if there
12 weren't, the Commission could always order a hearing later
13 on if they disagree with our holding in the matter.

14 MR. BROWN: Judge Wolfe, I would like to just
15 point out one aspect of it that no one else has addressed,
16 that supports what I was saying. Let us take the simplest
17 case, at Diablo Canyon, of the primary evacuation route, and
18 on that route there is a bridge. Now, if there is an
19 earthquake and that bridge comes down, there would not be
20 the primary evacuation route and thus there would be a
21 substantial change in the emergency plan, and whether the
22 plan would function if there were a radiological release
23 after this bridge were destroyed becomes a central issue.

24 Secondly, there are other events that could
25 occur. I mean, during an earthquake other consequences

1 could occur which would substantially change the reality of
2 evacuation, for example, as compared with the plan on
3 paper. And that is why I think that, though the
4 Commission's concerns in San Onofre dealt with different
5 circumstances, with which I am not at all familiar, that
6 they wouldn't apply to the facts here, given the obvious
7 consideration that I just pointed out.

8 And there are a lot of additions that can be added
9 to that, and I wonder if the Board might reconsider its
10 tentative conclusion here in light of some of these things.

11 CHAIRMAN WOLFE: Well, we appreciate that
12 observation, but we had discussed that very example that you
13 have given and we still feel that we are bound by the
14 Commission's order. It is a question of jurisdiction and we
15 just don't have the jurisdiction to go around it.

16 The second item that I would like to discuss is
17 this question of the preliminary FEMA report. The staff
18 takes the position that the preliminary report is
19 sufficient, and Governor Brown takes the position that only
20 the final report can be used.

21 So I would like the parties to discuss that
22 situation, if they would. Do you want to start, Mr.
23 Olmsted?

24 MR. OLMS TED: Yes, Mr. Chairman. I think there is
25 also a request for directed certification from, I believe it

1 is, Joint Intervenors, pending on this issue.

2 CHAIRMAN WOLFE: Yes, that's right.

3 MR. OLMSTED: Which of course the staff will
4 oppose, because we don't think that the FEMA regulations and
5 the memorandum of understanding are of relevance to this
6 proceeding.

7 CHAIRMAN WOLFE: We will come to that question
8 after you discuss the support for your position here.

9 MR. OLMSTED: Essentially, I will refer the Board
10 first to the Commission's statement of considerations
11 accompanying the emergency planning rules, which was
12 published in the Federal Register on August 19, 1980. The
13 cite for that is 45 Fed Reg 55402. And in that discussion
14 you will find reference to the FEMA-NRC relationship, in
15 which the Commission states:

16 "On December 7, 1979, the President issued a
17 directive assigning FEMA lead agency responsibility for
18 offsite emergency preparedness around nuclear facilities.
19 The NRC and FEMA immediately initiated negotiations for a
20 memorandum of understanding that lays out the agencies'
21 roles and provides for a smooth transfer of
22 responsibilities.

23 "It is recognized that the memorandum of
24 understanding which became effective January 14th, 1980,
25 supersedes some aspects of previous agreements.

1 Specifically, the memorandum of understanding identifies
2 FEMA responsibilities with respect to emergency preparedness
3 as they relate to the NRC as the following:"

4 Paragraph number one: "To make findings and
5 determinations as to whether state and local emergency plans
6 are adequate."

7 There are some other paragraphs there, but I think
8 that is the relevant section of the statement of
9 considerations. So I think that the position articulated in
10 Joint Intervenors' filing requesting directed certification
11 is just wrong.

12 The Commission has specifically, by adopting our
13 emergency planning rules and referring to that memorandum of
14 understanding in its statement of considerations, made it
15 clear that it believes that that memorandum of understanding
16 binds the NRC. If you refer to that memorandum of
17 understanding, it clearly indicates in there the procedure
18 that will be followed for FEMA to provide NRC findings with
19 regard to NRC's duties under 50.47.

20 And the finding that they have been providing in
21 every case -- this isn't the first one -- has not been the
22 finding under their own regulations, the section 350
23 finding, but rather it has been a letter similar to the ones
24 that have been sent over in the case, the most recent one of
25 which I have served on the Board, which indicates the status

1 of emergency planning at a particular site with regard to
2 the planning standards in NUREG-0654, and therefore for
3 purposes of 50.47(a)(1), which requires this agency to give
4 a rebuttable presumption to a FEMA finding that is the FEMA
5 finding that we look to.

6 Now, there are some other issues that I don't
7 think I will get into right now as to what the effect of
8 that particular piece of paper is which we currently have
9 from FEMA, and the testimony that FEMA may give in the
10 proceedings that begin on January 19th. But I think the
11 first issue we have to address is, do we have to wait until
12 the FEMA regulatory finding is made.

13 The second observation I would make with regard to
14 that finding is that it is not even necessarily clear that
15 FEMA would ever issue that finding with regard to a
16 particular set of offsite plans because, if you read those
17 regulations, in order to initiate that process FEMA has to
18 be requested by the state in question to conduct that
19 review.

20 There is nothing that requires a particular state
21 to request that review. So you would find yourself, if you
22 interpreted our regulations to be requesting that finding,
23 in the anomalous situation of not ever being able to reach a
24 conclusion on emergency planning for a specific reactor in
25 states where the state itself did not request a FEMA

1 finding.

2 And I don't think that anybody reading the
3 statement of considerations accompanying our rule would
4 arrive at that conclusion, because if you look at that
5 statement you find that under 50.47(c) there are specific
6 provisions for the agency to make favorable findings as to
7 emergency planning where the state has not taken the actions
8 that are deemed necessary to implement emergency planning
9 with regards to nuclear facilities.

10 So the staff position is relatively
11 straightforward, and that is when we get a letter from FEMA
12 such as the ones that we have gotten in this proceeding,
13 which report their findings on the status of emergency
14 planning pursuant to the planning standards in NUREG-0654,
15 which correspond directly to the 50.54 findings, that that
16 is the finding from FEMA that we need for purposes of our
17 hearings.

18 Incidentally, I do have a case that I might refer
19 you to if you will give me just a second.

20 (Pause.)

21 This is Reynold Metals Company versus Donald
22 Rumsfeld, which can be found in 45 A.L.R. Fed., and it is
23 also 564 Fed. Second 663, decided by the Fourth Circuit on
24 October 14, 1977. Essentially what the case does is
25 interpret the law with regard to interagency memorandums of

1 understanding.

2 The conclusion of this case is that such
3 memorandums of understanding are interpretive rules, binding
4 on the agencies that promulgate them.

5 MR. LANPHER: Judge Wolfe, a couple of comments.
6 First, perhaps Mr. Olmsted could enlighten me a bit. You
7 started out, Judge Wolfe, by saying -- talking about a
8 preliminary FEMA finding. We haven't been served with a
9 finding. Has just one come out?

10 CHAIRMAN WOLFE: No.

11 MR. LANPHER: To my knowledge there is no FEMA
12 finding, preliminary or otherwise, at this point.

13 MR. OLMSTED: I did serve everybody with the
14 December 8, 1981. I served a copy of the November 17, 1981,
15 memorandum to Brian Grimes, which it was my understanding
16 from FEMA the Governor had even previous to my receiving it,
17 as a result of their discovery negotiations.

18 It confused me because it was called interim
19 findings, and I was told by our staff that they were in the
20 process of commenting to FEMA on those findings and that
21 they expected another document.

22 Later I was in touch with Jack Eldredge, who will
23 be the FEMA witness from the FEMA region involved, and
24 evidently FEMA has changed their internal process somewhat
25 and they are, instead of reviewing the regional findings, as

1 they have done in previous proceedings, and issuing a
2 separate headquarters document, merely forwarding to us the
3 regional findings as FEMA findings, unless they disagree
4 with them.

5 And it's my understanding that their position is
6 that these are the findings that we need for purposes of
7 this hearing. Now, that report does identify seven planning
8 standards for which it says there are deficiencies, and the
9 question of course becomes what the schedule is for the
10 corrective actions identified in that document and whether
11 those corrective actions can be accomplished on a time frame
12 consistent with this Board's activity.

13 But I view that as getting into the merits of that
14 particular finding. I think the first thing to do is to
15 discuss the nature of that document insofar as this Board's
16 ability to treat it under 50.47(a).

17 CHAIRMAN WOLFE: For want of a better word, I
18 would use the word "preliminary." I think in one of the
19 papers you submitted you used the word "preliminary," or the
20 word "interim" was also used at times. But I am referring
21 to the document that has now been discussed by the staff.

22 MR. LANPHER: Judge Wolfe, I just wanted to make
23 sure I knew exactly what they were referring to, because I
24 must say I am still confused, because I talked with a FEMA
25 attorney yesterday who stated that he thought that FEMA had

1 issued something last Friday in the nature of, I think he
2 used the word, preliminary finding. I hadn't seen that. I
3 had not been understanding that this memorandum to Mr.
4 Grimes that Mr. Olmsted did serve previously and which we
5 have a copy of was in the nature of a preliminary FEMA
6 finding. But let me go on.

7 CHAIRMAN WOLFE: Well, the Board hasn't seen
8 anything that was issued last Friday or in recent days.

9 MR. LANPHER: Let me comment on a number of other
10 matters. Perhaps in some other cases states would not ask
11 FEMA to make findings or final findings or whatever. That
12 certainly isn't the case here.

13 FEMA is conducting a regional meeting or a San
14 Luis Obispo County meeting tomorrow night, I believe, for
15 the purpose of getting public comments on the county and
16 state emergency response plans pursuant to its regulations.
17 And on the basis of those public comments it is intending to
18 come up with, for want of a better word, a final finding, I
19 understand in early January or mid-January, some time in
20 that time frame.

21 Clearly, they've been requested to do that by the
22 state. This isn't an instance where perhaps a state is
23 trying to block FEMA from exercising its responsibilities
24 under an executive order or something of that nature. From
25 a purely practical sense, it is clear that the reason that

1 FEMA holds these public meetings is that they get valuable
2 input. They get input, they get changes in the plan. They
3 come up with changes in their findings, their evaluations.

4 And it seems to me that this Board should hold the
5 proceeding in abeyance until we get that definitive set of
6 FEMA views, particularly since there is every indication
7 that we will have that FEMA statement in the relatively near
8 future. If it hadn't been for the budget problems in late
9 November, obviously, we probably would have it by now. That
10 was unavoidable, and the previous public meeting was
11 cancelled just on the eve of it.

12 But my understanding is that the meeting tomorrow
13 night will go off. In addition, the County of San Luis
14 Obispo is scheduled, I believe, preliminarily to vote on
15 adoption of its plan in early January. And then, along with
16 final FEMA findings, we will have a definitive set of plans
17 with which to go forward on.

18 My third comment is that this preliminary FEMA
19 finding -- this is simply from memory, but the November
20 document that Mr. Olmsted has referred to does not in any
21 way evaluate the state plan. And it's my understanding
22 under the regulations, 50.47, that FEMA finding goes not
23 only to the local or county plan or plans, but the state
24 plan.

25 And accordingly this preliminary finding to me is

1 just clearly on its face incomplete. It deals with the San
2 Luis Obispo County plan and not with the state plan, and in
3 addition doesn't even make reference to the necessary plan
4 from Santa Barbara County, which is in preparation, just
5 very preliminary stages of preparation, at this time.

6 But that is an emergency response plan that is
7 being prepared for the planning zones around Diablo Canyon
8 and will necessarily have to be integrated with the San Luis
9 Obispo County plan.

10 That's all I have to say at this point.

11 CHAIRMAN WOLFE: Can you respond to that, Mr.
12 Olmsted?

13 MR. OLMSTED: Well, I did attempt to clarify this
14 with FEMA to the extent that it was possible to do so,
15 because I thought that the document we submitted was
16 somewhat confusing in that regard. They pointed me to the
17 letter from the region to headquarters and which the
18 headquarters letter says they are adopting, which says:

19 "When the necessary corrective actions are
20 accomplished to the satisfaction of the FEMA region and the
21 county plan is completed and submitted to the state for
22 formal review, we believe with reasonable assurance that an
23 adequate level of emergency preparedness will exist in San
24 Luis Obispo County."

25 Their position as stated to us was that this was

1 the finding that we needed for purposes of proceeding with
2 our process of evaluation and reaching conclusions as to
3 50.47. They also pointed out, however, that there were some
4 deficiencies noted in there, and that in terms of the
5 corrective actions and the implementation of the corrective
6 actions that their position would be that these deficiencies
7 should be corrected before licensing.

8 The staff certainly agrees with that. That is one
9 of the reasons that I noticed at the same time that we would
10 be bringing Brian Grimes, because the issue to this Board at
11 that point would be, will those things be completed on a
12 time frame consistent with the Board's decisionmaking
13 process, and are the corrective actions capable of
14 implementation.

15 It is really quite similar to a number of
16 inspections that have to be done before licensing can go
17 forward, which are left to the inspectors in the region to
18 verify compliance with prior to licensing. And FEMA's
19 position seems to be that most of these corrective actions,
20 although they are to provide us with additional information
21 with regard to implementation, the timetables for these
22 corrective actions -- but their position seemingly is that
23 these corrective actions can be accomplished routinely.

24 (Pause.)

25 CHAIRMAN WOLFE: Well, as to that question, the

1 Board will take it under advisement, and in the memorandum
2 and order that we issue in connection with this conference
3 we will make a decision then on it.

4 But before we leave the topic, because I would
5 like to hear from Mr. Reynolds regarding certification of
6 the issue --

7 MR. REYNOLDS: We have requested certification for
8 the reasons explained in the request itself. But just let
9 me make a few comments here.

10 The request is based on our view that the public
11 hearing which is built into the FEMA process is a very
12 important and critical aspect of that process. It is not
13 simply for the function of informing the public what FEMA
14 has tentatively decided, but it is an opportunity for FEMA
15 to get input from the public which it can then incorporate
16 into its findings.

17 In other words, it is a very important aspect of
18 the deliberative process. Now, it is clearly relevant to
19 what Mr. Olmsted and what Mr. Lanpher have been discussing.

20 I just want to make one point about the memorandum
21 of understanding. To the extent that that provision which
22 Mr. Olmsted cites would have any purpose, it seems to me
23 that the purpose would be, if everything else with respect
24 to offsite preparedness had been finished and the only thing
25 that is holding up the licensing proceeding is this FEMA

1 finding, there might be some basis for using that provision
2 of the memorandum of understanding.

3 But in this case that clearly does not apply,
4 because the county plan itself is still in the process of
5 revision. It has not been finished. So clearly the FEMA
6 finding is not what is holding up this proceeding.

7 Once the county has finalized its plan, it seems
8 to me at that point if FEMA has still not issued its finding
9 then perhaps we would have a different situation. But to
10 rush ahead now, shortcircuiting the public hearing process,
11 essentially mooted out the role that that public hearing is
12 supposed to play, even though the county plan itself is not
13 finished, really would be an improper course to take, and it
14 is not consistent with the Commission's regulations.

15 MR. NORTON: Excuse me, Judge Wolfe.

16 CHAIRMAN WOLFE: Mr. Norton?

17 MR. NORTON: I'm a little puzzled by Mr. Reynolds'
18 argument and by Mr. Lanpher's argument. The public hearing
19 is not being cut out. The public hearing is occurring
20 tomorrow night, I believe, as Mr. Lanpher said. The input
21 is going to be made into the plan, the input is going to be
22 made to FEMA.

23 I don't understand, frankly, their position.

24 Nothing is being shortcuttered. Nothing is being eliminated.

25 Nothing is being avoided.

1 I believe the object of all of this is to have a
2 good plan. I think that is the ultimate goal, I would hope,
3 of all of these regulations. That is where the bottom line
4 is. And the question really is whether this Board should
5 have a hearing, if there is sufficient evidence.

6 Well, clearly, if FEMA has made a finding, whether
7 it be their final finding or their preliminary finding, if
8 they have made their findings, they have had their public
9 hearings, they have got all the input they're going to get,
10 and they are going to be there to testify to this Board as
11 to what their expert opinion is, as we will be in, as will
12 Joint Intervenors be in, this Board has what it needs to
13 arrive at a decision.

14 Frankly, I don't think it makes any difference,
15 really. The finding is nothing more than a presumption, and
16 I don't think it makes any difference whether you've got the
17 finding or not. When you have the evidence in front of you,
18 as you will have at the hearing, everything that is to be
19 done will be done by the time of the hearing in terms of
20 what you need to consider.

21 And I just don't understand Mr. Reynolds by saying
22 the public is being cut out. I just frankly don't
23 understand that at all.

24 MR. REYNOLDS: Perhaps I could explain it. If we
25 are proceeding here with what everyone is characterizing as

1 a preliminary finding, arrived at before the public hearing,
2 then it seems to me --

3 CHAIRMAN WOLFE Pardon me. When you say public
4 hearing, are you referring to the Board's hearing or to the
5 public hearing that is being held in the county?

6 MR. REYNOLDS: The public hearing that is being
7 held in the county by FEMA and is scheduled for tomorrow
8 night.

9 If we are proceeding here based upon a finding,
10 preliminary or otherwise, arrived at before that public
11 hearing, then obviously the input that might come out of
12 that hearing is something which we won't be dealing with at
13 all, and that is really our concern. We believe that the
14 public hearing process can result in changes to the FEMA
15 finding and I believe FEMA agrees with that too, and that is
16 why we are concerned, that we want to have that input and
17 that final FEMA finding for purposes of this proceeding, so
18 that we can rebut that finding at our hearing here.

19 MR. OLMSTED: Well, I guess I don't see where that
20 is going to affect our hearing at all. The FEMA witness
21 that is being provided for this proceeding and the attorney
22 who will be representing him are both there conducting that
23 public meeting in the vicinity of the Diablo Canyon plant
24 this week. And they will certainly be available to testify
25 as to what that did or did not have to do with the

1 evaluation that they have done to date.

2 And I don't think that any licensing process I
3 know has to wait until every agency does what it does before
4 it can go forward on the issues that it itself must decide.
5 And essentially what we are being urged to do by the state
6 and by Joint Intervenors is to wait entirely until every
7 last ministerial duty is done before this Board should
8 consider any issue relating to emergency planning or
9 consider any of the findings that FEMA has made to date.

10 And I don't think that is the law and I don't
11 think that is necessary and I don't think that is what is
12 contemplated under the memorandum of understanding. And I
13 don't think that is what other boards have been doing in our
14 proceedings.

15 And we have had other contested proceedings which
16 dealt with the status of events that was much less far along
17 in the process than this case is. We have had boards having
18 hearings on emergency planning and FEMA findings both prior
19 to and right after the exercises. And as a matter of fact,
20 a year or so ago we thought we would be in that situation
21 with this case.

22 So that in reality we are much further along than
23 most boards in this Commission have been at the time they
24 have begun hearings on emergency planning and taking FEMA
25 testimony as to the planning standards. So I just view the

1 motion as being completely dilatory and without any basis in
2 law or fact.

3 MR. LANPHER: Judge Wolfe, I think we're losing
4 sight of the most practical fact, and that is that we are
5 not in a situation where way down the road FEMA may change
6 its finding or come out with a final finding. We are in a
7 situation where we have already a dated FEMA document,
8 probably prepared in early November. It was sent out in
9 early November.

10 FEMA is conducting its hearing tomorrow. It is
11 going to have what will probably constitute its final
12 findings in a very short time or a relatively short time.
13 Every indication points to that. So from the very practical
14 point of view, I think this is what Mr. Reynolds was trying
15 to stress, that there is no need to rush into final
16 testimony and doing things on the basis of a preliminary
17 FEMA position when we're going to have a final FEMA position
18 very shortly.

19 This is not a situation where people are trying to
20 delay the proceeding. We have got a proceeding that is
21 close to a hearing and we have got a FEMA finding that is
22 almost imminent. So from a very practical point of view, I
23 think this Board can wait for that FEMA finding and allow
24 the filings which you yourself contemplated when your
25 original schedule was prepared to be made once that finding

1 comes out.

2 CHAIRMAN WOLFE: Well, I would assume that if
3 anything develops at the exercise tomorrow night, if that is
4 the time, that FEMA would immediately report it. I don't
5 think there is any doubt about that. Do you?

6 MR. LANPHER: Well, I don't think they're going to
7 immediately report something in the sense of reporting to
8 the Licensing Board. I think what they're going to do is
9 based upon the input that they receive tomorrow night and
10 any subsequent written comments. My understanding is
11 they're going to keep the record open for a few days after
12 tomorrow night's hearing for written comment, then they are
13 going to prepare their final findings.

14 And it is our position that those are the findings
15 that this Board should proceed to hearing on, and that those
16 should constitute the rebuttable presumption called for
17 under the NRC regulations in section 50.46.

18 MR. OLMSTED: Mr. Chairman, I have to correct
19 something here. The position of both Joint Intervenors and
20 the state has been that we ought to wait until FEMA's 350
21 filing. If you look on page 2 of the regional evaluation,
22 they state that it is not expected that the state will fully
23 exercise this plan in March 1982. The state plan is
24 tentatively scheduled for formal submission under the FEMA
25 rule process in July 1982.

1 So to the extent that we're talking about a formal
2 FEMA finding under FEMA's rules and regulations, we are
3 certainly not talking about having a final finding next
4 week. To the extent we are talking about something that
5 would bear on the findings that FEMA has provided us to
6 date, certainly if there is something unexpected that occurs
7 as a result of the public meetings, FEMA is fully aware of
8 what the status of this proceeding is and they file a report
9 with Congress monthly jointly with the NRC, and this Board
10 would be informed as soon as we had any such information.

11 And in any event, that whole process will be done
12 well in advance of the time scheduled for this hearing.

13 MR. NORTON: Excuse me, Your Honor. I would like
14 to add. Mr. Lanpher is seriously misleading this Board.
15 The final FEMA finding that Mr. Olmsted just referred to
16 cannot come out until the state plan is adopted by the
17 state. The state has to have the legislature approve the
18 plan before it is adopted, the state's plan is adopted. And
19 the state, oh, yes, from the documents we saw several weeks
20 ago there, has been told by the legislature that they can't
21 submit individual state plans for the region, the facility
22 and the state of California.

23 They have to submit it in one package, and they
24 are just starting on the SMUD, the Sacramento County plan.
25 They are just starting that. That is perhaps a couple of

1 years away.

2 So this final finding that Mr. Lanpher says is so
3 imminent may be years away, and that is precisely what they
4 are asking for in the request for directed certification,
5 not some further finding step, but the final is what they
6 have asked for in directed certification.

7 Now maybe they are changing their shoes at this
8 argument, but to say that that finding is imminent is very
9 misleading.

10 MR. LANPHER: I spoke -- I don't like being
11 characterized as attempting to mislead this Board. That was
12 not my intention.

13 I spoke with a FEMA attorney yesterday afternoon.
14 He was the one that indicated that the FEMA position on the
15 county plan would be finalized in early January. That was
16 his understanding. Now, whether that is a final final
17 finding, I'm not going to characterize it. But it is
18 something considerably more concrete than what we have been
19 provided thus far.

20 MR. BROWN: Judge Wolfe, I might add that just
21 looking at the schedule which the Board itself established
22 and promulgated for the parties in this case, it was
23 contemplated that what FEMA is going to do prospectively --
24 that is, some time after tomorrow -- would have been done on
25 the 6th of November, and that the parties had from that date

1 forward certain opportunities and responsibilities, and
2 there was a time frame for that.

3 And I don't understand why we are just not
4 focusing on that somewhat, and by focusing on that one sees
5 that the schedule that is being pressed upon all of us now
6 really is not in keeping with what had been the recent
7 judgment of the Board, following vigorous participation of
8 all of the parties, during the autumn of this year.

9 CHAIRMAN WOLFE: Any other comments?

10 MR. OLMSTED: I guess I would comment that the
11 purpose of the schedule was to make sure that people had the
12 relevant information that they needed in order to prepare
13 for the hearings. Aside from the fact that there is this
14 FEMA legislative type hearing going on this week, all of the
15 information upon which FEMA is relying has been made
16 available to the parties through the discovery process. The
17 parties have participated in reviewing all of those
18 documents. The Governor at least was represented at the
19 exercise.

20 And so it is not a matter that what we are
21 expecting to receive, if anything, from FEMA is going to be
22 significant new factual material such that it would cause a
23 disruption in the preparation for the parties' positions at
24 the hearing. I think everybody has sufficient information
25 in order to formulate whatever positions they want to

1 formulate with regard to compliance with 50.47, and that,
2 after all, was the real issue in setting the schedule that
3 we have.

4 MR. BROWN: I just don't think it is appropriate
5 for anyone to be crystal-ballng what is going to be in
6 FEMA's finding and what isn't. Mr. Reynolds pointed out the
7 reason FEMA has a procedure that embraces the opportunity
8 for public comment is because FEMA apparently takes it
9 seriously.

10 Now, this Commission and the Board in its own
11 discretion legitimately concluded that it was bound by a
12 jurisdictional finding of the Commission and couldn't look
13 into the earthquake matters. FEMA is an independent agency
14 and it has very heavy responsibilities with respect to the
15 consequences of earthquakes.

16 I have no conception, but what FEMA may decide
17 ought to be considered. I have no idea what will happen at
18 the meeting or what FEMA may decide to put in or not put
19 into its findings. But we do take very seriously, as the
20 Board knows, some of the aspects of planning that have now
21 been found by the Board to be outside jurisdiction because
22 of the Commission's ruling. And I would certainly think
23 that that is something that might be addressed in a FEMA
24 finding.

25 And if it isn't, I feel that under the very format

1 of the schedule that the Board established itself on
2 November 7th, that permitted matters to be put into issue
3 subsequently, depositions, discovery, and so on, that we
4 would have the appropriate opportunity to move in line with
5 those very principles.

6 So I really think that we are on a precipice here
7 of pushing ourselves into a situation which is going to be
8 difficult to get out of.

9 MR. REYNOLDS: I would just add one comment to
10 what Mr. Brown has said in response to Mr. Olmsted's
11 reference to all of the information that has come through
12 discovery. There has been a tremendous amount of paper
13 flying back and forth through the discovery process, and it
14 is certainly not an easy task to know what documents FEMA is
15 going to rely on and which ones it is not going to rely on.

16 So to say that we have all this information and
17 discovery and so we don't need to have something definite
18 from FEMA is, I think, certainly misleading, because it is
19 not an easy thing to basically crystal-ball, as Mr. Brown
20 has characterized it. So I think it is very important to
21 have something definite from FEMA.

22

23

24

25

1 CHAIRMAN WOLFE: Well, if there are no further
2 comments we will take this under consideration. And I might
3 say that if FEMA comes up with anything that is important
4 and relevant that changes in any way the position it took
5 earlier, we, of course, would consider that.

6 The next item that we have for discussion is the
7 joint intervenors' revised contention. Pardon me, before we
8 get to that, I guess that we should discuss the applicant's
9 motion to compel production of documents, and Governor
10 Brown's counsel's opposition to that.

11 MR. NORTON: Excuse me, Judge Wolfe, that was our
12 motion, and I do have something to add. As you know, we
13 were in depositions during the time that motion was filed.
14 We were in a ten-day period of depositions and we just
15 finished the day before yesterday. So another attorney
16 wrote the motion for me. I called and told him what the
17 facts were and he wrote the motion.

18 One of the things I am not sure that he put in is
19 that Governor Brown argues that well, gee, we listed all
20 these documents in a letter of October 23rd. I just want to
21 point out to this Board we never received that letter of
22 October 23rd that was, by messenger, to Mr. Olmsted. And no
23 copy was given to us. Mr. Olmstead responded to that
24 letter, and I yesterday got a copy of Mr. Olmsted's response
25 to that letter, which I had never seen before either. He

1 responded on November 3rd and I now have a copy of that
2 letter.

3 So this, quote "list" of documents was not
4 furnished to us. And more importantly, it did not include
5 all efforts; it is a partial listing, but I was personally
6 told by an employee that it does not include all the
7 documents that were pulled under the direction apparently of
8 Governor Brown, although it becomes quite unclear.

9 Apparently, the attorneys, Mr. Lanpher and Mr. Brown, did
10 not review those documents; someone else did and decided
11 they were privileged and pulled them.

12 Frankly, I am really upset by this, that the
13 people in this case will take it upon themselves to do that
14 sort of thing without filing any documents whatsoever. They
15 should file a motion for a protective order and say here are
16 a bunch of documents that we think should not be discovered
17 for whatever reason, privilege, attorney work product,
18 whatever. And that is perfectly normal.

19 But to go ahead and do this and never say anything
20 -- it was purely by accident that we discovered this, it was
21 purely by accident. There was a conversation with an
22 employee that we were sitting there going through documents
23 and I kept seeing a reference to a document that I couldn't
24 find, until I asked for that document. He said well, you
25 can't see that. And I said what do you mean I can't see it,

1 don't you have it? He said yes, well, I've got it but you
2 can't see it. Well, why can't I see it? Well, we were
3 instructed that you couldn't see it because it was
4 privileged. And I said who instructed you to do that?
5 Somebody from the Governor's office. And I said are there
6 other documents? Yes, there are.

7 And we never would have found out if I hadn't
8 asked. And I just think it is incredible, and I can't
9 believe this Board is going to let them get away with it.

10 CHAIRMAN WOLFE: Well, Mr. Lanpher, are you
11 prepared to respond to the applicant's motion to compel
12 production? Let me ask you if you are familiar with 10 CFR
13 2.730(h).

14 MR. LANPHER: I don't have it in front of me, sir.

15 CHAIRMAN WOLFE: Well, let me offer you a copy of
16 the notice in the Federal Register.

17 MR. LANPHER: Judge Wolfe, are you referring to
18 the recent revision of the regulations that calls for oral
19 responses?

20 CHAIRMAN WOLFE: Yes.

21 MR. LANPHER: Yes, I am familiar with that. I
22 didn't recognize it. And we are prepared to respond to this
23 motion at this time.

24 We have an affidavit which was telecopied
25 yesterday. I can give it to the parties. We will have the

1 original today. The fact is that the list of documents
2 which was provided in October is a complete list with the
3 exception of the so-called Caltrans documents which Mr.
4 Norton somehow has now come into possession of.

5 The Governor's office has spoken to Ms. Ann Flook
6 who is the person at OES that I believe Mr. Norton was
7 talking to and represented that there were many documents
8 that had been pulled. In fact, there were several OES
9 documents -- well, there was one other OES document; a
10 memorandum from Ms. Flook which is document number 4 on a
11 list, the index list, that has been previously provided to
12 Mr. Olmsted. So the list of documents which was provided is
13 complete except for the so-called Caltrans document which
14 Mr. Norton now has obtained.

15 So, to the extent that their motion asked for a
16 list, they have got the list. They may not like the list,
17 they may think that there are more documents. There are, in
18 fact, no more documents that have been withheld from
19 production.

20 I would like to add one further thing on this. We
21 are frankly concerned that when an assertion of privilege
22 has been made as to a particular document -- and Mr. Norton
23 certainly knew that the Caltrans document which he now has
24 in his possession and which, frankly, under your ruling,
25 Judge Wolfe, earlier this morning I guess, is not relevant

1 since you have ruled that earthquakes are not part of this
2 case; it dealt solely with earthquake matters, and perhaps
3 we will pursue that on appeal as you indicated, so it may
4 become relevant again.

5 But at any rate, we asserted a claim of privilege
6 as to that document. Mr. Brown and myself certainly did not
7 give it to Mr. Norton. I would frankly like to know how he
8 came to obtain a copy of that document, and I seriously must
9 question the propriety of having served that document on the
10 entire service list in view of the fact that a claim of
11 privilege had been made as to that document and not ruled
12 upon by this Board.

13 MR. NORTON: Well, I would love the opportunity to
14 respond to that one.

15 CHAIRMAN WOLFE: Just a moment. Was the document
16 referred to by that name in any list that you submitted?
17 How is it identified?

18 MR. LANPHER: That document was not on the October
19 23 list. The reason was that it was not prepared until
20 November, and it was not included on the list.

21 CHAIRMAN WOLFE: So it was never -- its privilege
22 was never indicated to the other parties?

23 MR. LANPHER: It was indicated to the other
24 parties at the time that PG&E was at OES doing document
25 discovery, and it was asserted by Mr. Brown in a letter

1 which he sent to the Board and served on the rest of the
2 parties. So I don't think there was any question but that
3 people knew we were asserting a claim of privilege, which
4 you all, of course, have not ruled on.

5 MR. NORTON: Judge, I find this amusing because,
6 first of all, we never got a copy of this list of so-called
7 privileged documents until long after the fact, a week or so
8 ago, when they responded to our motion to compel. It was
9 the first time we ever saw this so-called claim of
10 privilege, and that document is not on that list.

11 More importantly, they didn't claim privilege on
12 that document until they responded to our motion to compel,
13 and what is really funny about the whole thing, while I am
14 all upset about this document, when we got back to San
15 Francisco we found that the California Department of
16 Transportation had routinely mailed it out and it send it to
17 TERA Corporation. That is how I got a copy of it. Long
18 before this whole matter came up when we got back to San
19 Francisco from Sacramento, TERA Corporation already had the
20 document. It had been mailed out. Apparently the
21 originator of the document never knew it was privileged,
22 seeing as how he mailed it out.

23 And when one looks at the document, incidentally,
24 then this whole business about privilege becomes a real
25 joke. There is nothing privileged in that document. There

1 is absolutely no way any privilege attaches to that
2 document. A careful review of it, a cursory review or any
3 way you look at it, it is a report by a California state
4 agency, and to say that there is a privilege that attaches
5 to it -- and that is the problem with this list of October
6 23rd; are those other documents of the same category? I
7 mean, I don't know. It is just a list.

8 We definitely want to move, now that we have this
9 list, we want to move to see some of these documents. I
10 certainly want to see the notes that Ms. Ann Flock took
11 regarding a meeting of October 6 that she attended.

12 It says, "Summarizing trial preparation meeting of
13 October 5th, 1981, among witnesses and counsel regarding
14 possible testimony." I would like to know who was at that
15 meeting. Were they really witnesses? Ann Flock has never
16 been listed as a witness by the Governor; she was at that
17 meeting and she took notes. How is that privileged? We
18 would like the opportunity to argue that.

19 Of course, we don't have much information on this
20 sheet. Their duty was to file a motion for a protective
21 order, not to simply arbitrarily all by themselves pull a
22 bunch of documents and then after we find out about it,
23 start claiming privilege.

24 If you look at the procedures in our motion -- and
25 our motion to compel sets them forth -- they were required

1 to produce those documents. They are still required to
2 produce those documents. They have waived any privilege
3 that they now claim. They waived it under the rules and we
4 are entitled to see those documents.

5 MR. BROWN: Judge Wolfe, I would like to respond
6 to several parts of that, not the least of which is what I --

7 MR. NORTON: Excuse me, Your Honor, I don't think
8 double-teaming is fair in any proceeding. Mr. Lanpher
9 started this argument.

10 CHAIRMAN WOLFE: Well, we are having a conference
11 here, and it is not so unusual. Proceed.

12 MR. BROWN: Truly, with profound respect for this
13 institution, it is really time, after months and months of
14 the childish behavior of our colleague from PG&E, that I
15 just bring to the Board's attention that I think it is
16 offensive to have this kind of behavior and this kind of
17 innuendo come forth at this time.

18 CHAIRMAN WOLFE: I really am not interested in
19 that.

20 MR. BROWN: I simply wanted to express the
21 offensiveness which I feel because I am not accustomed to it.

22 CHAIRMAN WOLFE: Well, as a trial attorney, that
23 is one of the burdens of being a trial attorney. You have
24 to put up with people that you don't like, so you put up
25 with it.

1 MR. BROWN: I think I can go forward with that.

2 CHAIRMAN WOLFE: Let's not get into that.

3 MR. BROWN: Fine. The document was prepared as
4 stated in my letter to the Board a couple of weeks ago.
5 Literally at my request, a meeting in San Francisco was held
6 at my request and we would have proceeded at much greater
7 speed and prepared various other documents had it not been
8 for the death of George Young who had been retained to
9 assist us in preparation of an overall report with input
10 from Caltrans.

11 The memorandum, as I pointed out, from Mr. Rose
12 was done at my request. Sitting at the table, I asked him
13 to please summarize what had been stated so it would be
14 clear on the record. All the people who were present at the
15 meeting, incidentally, are listed on the Caltrans report
16 right at the top of it. And I believe Ms. Flock's name is
17 among the other names there, unless it was inadvertently
18 left off. Certainly, my name is on there and everything was
19 done specifically at my request. And it is just truly a
20 moot question now for us to be quibbling over it.

21 The statement has been made by us as counsel that
22 there are no other documents in addition to the earlier
23 list, except this Caltrans document, and this Caltrans
24 document, Mr. Rose has stated in an affidavit, is the only
25 other document. We are relying upon his affidavit,

1 certainly, and to the best of our knowledge that is the only
2 other document. And it is a closed and moot issue.

3 Mr. Lanpher's only point is why such a big deal is
4 being made out of the collateral dimensions of this. It is
5 a privileged matter that shouldn't be broadcast widely. It
6 has been broadcast widely. Everybody has it now, but it
7 shouldn't be used for purposes of the proceeding if we go
8 ahead with the emergency planning issue. But since this
9 Board has ruled we are not going ahead with it, it seems to
10 me the whole thing has just been eradicated.

11 CHAIRMAN WOLFE: We are not going ahead with the
12 earthquake issue.

13 MR. BROWN: I'm sorry, I mean the complicating
14 effects of an earthquake on emergency planning, and this is
15 not only much ado about nothing at this point, but it is
16 irrelevant and it adds somewhat of an odor to the proceeding
17 that is not necessary.

18 MR. OLMSTED: Mr. Chairman, there are a couple of
19 matters that I would like to comment on, and I don't want to
20 get involved in a dispute essentially between the applicant
21 and the Governor, but since this November letter from Mr.
22 Lanpher to me has become a matter of issue in the
23 proceeding, and because that letter did not indicate that it
24 had been distributed to anybody, I responded in kind. I did
25 not distribute my response to anybody for the simple reason

1 that Governor's counsel and I were having a dispute about
2 the proper procedure we would use.

3 But I think to make the record complete, I should
4 give the Board and the other parties a copy of the response
5 that I made to Mr. Lanpher's request, and as soon as I do
6 that I would like to make some comments about the use of the
7 privilege objection in discovery.

8 (Counsel handing documents to the Board and to the
9 parties.)

10 MR. OLMSTED: I would like to comment on the
11 privilege objection as a government lawyer who has long
12 since abandoned trying to make privilege objections as to
13 government documents. In the first place, the state, to the
14 extent that privilege objections are attempted toward the
15 entire state government, doesn't have much of a privilege
16 objection. If you look at the law, there simply -- they are
17 simply, -- as the federal government, the only employees as
18 to whom I can claim privilege are those who are
19 communicating confidences to me that are agency confidences
20 as opposed to employee confidences.

21 And there are very few people in the agency who
22 are entitled to do that, and the privilege only attaches to
23 the extent that that official requests that it attach. The
24 attorney does not have a privilege in and of himself. He has
25 no right to assert the privilege unless his client is

1 asserting the privilege. And in the terms of a governmental
2 client. that is really, in this case, Governor Brown himself
3 as opposed to any and every employee of the state government.

4 So it really takes you to the work product
5 privilege, and the question is what is the work product
6 privilege. And when you look at the law on work product
7 privilege, that, too, is a very limited privilege which can
8 be asserted, particularly with government agencies that are
9 generating documents in all areas of their expertise. For
10 instance, I could not assert a work product privilege with
11 regard to the Safety Evaluation Report. This Board wouldn't
12 put up with it for a moment, and yet, that is essentially
13 the testimonial document that the staff uses in its
14 licensing proceedings.

15 I can't even assert a privilege with regards to
16 drafts of those documents upon which I have commented
17 personally. And I think the standard is no less for the
18 Governor. Even if you assert a privilege, you are required,
19 under our discovery rules and under the federal rules and
20 most state rules with which I am familiar, to identify those
21 documents in response to the discovery request in a list,
22 note the privilege and be prepared to produce them to the
23 Board in camera for an independent determination as to
24 whether the privilege indeed attaches.

25 Now, those things were not done here, and I think

1 that it is common practice to do that. And so, the exchange
2 of letters which you have before you, and the telephone
3 conversations that I had with Mr. Lanpher occurred because
4 he and I basically disagreed as to what the law of privilege
5 is, and those are the comments I would have with regard to
6 that matter.

7 I basically do not believe that privilege attaches
8 to most of the documents here, particularly since it was not
9 asserted officially in response to the discovery request,
10 and the time in which such objections should have been
11 tendered.

12 MR. NORTON: Your Honor, since it's my motion, I
13 would like to respond to what Mr. Brown said, and Mr.
14 Lanpher.

15 The letter of October 23rd which attaches the
16 list, what Mr. Olmsted just laid out, is the procedure, and
17 the reasons that procedure exists is if an attorney has the
18 ability to unilaterally say well gee, that document is
19 privileged, so nobody can see it, I'm afraid we wouldn't get
20 much discovery done in this country. And the reason you
21 follow the procedure that Mr. Olmsted suggested I think is
22 best exhibited by the number one document on the list.

23 The first listed happens to be a document that
24 because we had never seen this privilege list of course we
25 had no idea that they were even claiming privilege and it

1 was in the OES files. Not only once but several places we
2 found the document that they are now claiming as
3 privileged. And we have copies of it. In fact, it is that
4 very document which led us to look for the Caltrans report
5 and which we attached to our motion to compel discovery.

6 If you look at that document and then you read
7 their description of that document, the two don't meet at
8 all. Their description of that document, "memorandum of
9 October 6th from Wade Rose" says that the document
10 summarizes trial preparation meeting among witnesses and
11 counsel re: possible testimony and in re opening
12 proceedings. It doesn't do that at all.

13 That document doesn't even come close to doing
14 that, and that is what bothers me about Mr. Brown and Mr.
15 Lanpher's unilateral actions in this matter. And that is
16 why we are entitled to see the rest of these documents.
17 They didn't properly put forth the privilege. They still
18 haven't; to this very day they haven't done that. They have
19 just unilaterally taken these documents, and we are entitled
20 to see them.

21 MR. LANPHER: Judge Wolfe, I don't want to belabor
22 this point. Mr. Olmsted is right on one thing; we should
23 have given the list earlier, and we apologize on that.

24 To assert, however, as Mr. Norton has just done,
25 that they never had any indication whatsoever that any

1 privilege had been asserted is not right. As Mr. Olmsted's
2 letter of November 3 says, when the documents were
3 delivered, we said here are all non-privileged documents.
4 When Mr. Olmsted queried me about that in a phone call, I
5 think maybe, or in an earlier letter -- I think it was a
6 phone call -- that is what prompted me to write him and
7 provide him the list which I had omitted before and I'm
8 sorry I did.

9 I am not going to argue about what the Caltrans
10 document was or was not; it speaks for itself. It was
11 prepared at the specific request of us, of counsel, to be
12 used in this litigation.

13 Now, the fact that it was -- that Mr. Norton has
14 indicated how he came to have a copy of it, obviously, PG&E
15 engaged in no improper activities. They have got it, and so
16 be it.

17 I just want to re-emphasize that given your ealier
18 ruling, the first four documents on this list all have to do
19 with earthquake emergency preparedness. They are obviously
20 irrelevant to this proceeding at this point, given your
21 ruling. If we get that reversed, maybe there will be
22 something different, but you have ruled.

23 All of the other documents, if you need a more
24 complete list, fine. I think they speak for themselves.
25 They were between attorneys and clients and all date from, I

1 guess most of them date from the spring. They really have
2 nothing to do with our current reopened proceeding on
3 emergency preparedness or the other issues.

4 CHAIRMAN WOLFE: Well, are you willing to submit
5 in camera the documents that you are still claiming
6 privilege for?

7 MR. LANPHER: Of course.

8 CHAIRMAN WOLFE: Perhaps you should do that. And
9 we will rule on that when we get out memorandum and order in
10 connection with this conference.

11 MR. LANPHER: I will submit those as soon as I am
12 able to, sir.

13 MR. NORTON: Judge Wolfe?

14 CHAIRMAN WOLFE: Yes.

15 MR. NORTON: We keep going around and around
16 instead of stopping, and I apologize for that. But Mr.
17 Lanpher said something new when he was talking about
18 relevancy. This is discovery, and to say that well gee,
19 that has to do with earthquakes so therefore it is no longer
20 now relevant, this is discovery, and we are entitled to see
21 documents which are relevant or which may lead to relevant
22 evidence, and we're entitled to see those documents.

23 MR. LANPHER: If you want to rule that earthquakes
24 are relevant, we would be delighted. I thought I heard you
25 earlier say that they are not relevant.

1 CHAIRMAN WOLFE: That is correct. We will move
2 on, then, to another item; namely, the joint intervenors'
3 revised contention, and I would ask Mr. Reynolds if you have
4 modified in any way the contention that you submitted
5 sometime ago, which I thought you were going to modify. Is
6 that correct?

7 MR. REYNOLDS: Have we modified the revised
8 contention?

9 CHAIRMAN WOLFE: In your joint intervenors'
10 revised contention on environmental qualifications of
11 safety-related electrical equipment, you set forth a
12 contention that covered two pages.

13 MR. REYNOLDS: Yes, that's right.

14 CHAIRMAN WOLFE: And I wondered if we shouldn't
15 have a more precise statement of your contention so that we
16 aren't faced with the impossible task of ruling upon the
17 relevancy of any matter that might be brought up in
18 connection with the material referred to in these two
19 pages. I don't think that a contention ought to run for two
20 pages.

21 MR. REYNOLDS: Well, we did speak about this in
22 one of the conference calls that we had with the Board, and
23 at that time, you expressed the opinion that you are not of
24 the school that it had to be an extensive contention to be
25 specific enough. And I stated at that time that that was

1 acceptable to me, and the reason that we had submitted this
2 two-page contention was to assure that it would be specific
3 enough. Because in the past we have been met with the
4 objection that our contentions were not sufficiently
5 specific.

6 I think you also said at that time that perhaps it
7 could be limited to the first two paragraphs and that is
8 acceptable to us, with the remainder of the discussion on
9 those two pages being merely more specific support for those
10 two paragraphs. Our principal concern in the contention is
11 stated in those two paragraphs.

12 I think one of the main points that I wanted to
13 make this morning is to respond simply to the view of both
14 the staff and PG&E that we have simply reiterated what was
15 in our original contention filed on, I guess it was June
16 30th, because we listed in the contention filed June 30th
17 numerous deficiencies or problems in the environmental
18 qualification which had been listed by PG&E in their
19 environmental qualification report.

20 We have listed a number of examples of
21 deficiencies in their program again in this revised
22 contention. That is not to disregard the Board's concern
23 that we focus on the staff SER supplement. It is our view
24 that PG&E's environmental qualification report and the
25 problems listed in there are virtually inseparable from a

1 contention regarding the staff's SER supplement. That is
2 why there is some overlap between the original contention
3 and the revised contention.

4 There is, however, a new matter in this revised
5 contention. It references SER Supplement 15; it takes issue
6 with the staff's conclusion that PG&E's environmental
7 qualification program is adequate and that compliance with
8 the Commission standards is assured.

9 Our view, our interpretation as stated in this
10 contention is that PG&E's environmental qualification
11 program is not adequate and that the staff's conclusion that
12 it is is not sufficiently justified and has insufficient
13 basis. That is our concern. Undoubtedly, it is an ongoing
14 issue; in other words, qualification will continue. We
15 don't dispute that at all. But at this point, we do contend
16 that PG&E has not adequately justified its conclusion that
17 it will comply with the Commission's environmental
18 qualification standards.

19 We also challenge the staff's conclusion that PG&E
20 has adequately justified its environmental qualification
21 program. We have, in support of that contention, not only
22 the matter on these two pages in the contention itself, but
23 also an affidavit in support of that contention by Greg
24 Minor who is a nuclear safety consultant for us.

25 He has specified in his affidavit particular

1 problems with the environmental qualification program based
2 on first, the June 10th environmental qualification report
3 from PG&E; and second, the September supplement to that
4 report I believe it was called Revision 1 to the EQR. And
5 also, the staff's SER Supplement 15.

6 So that is kind of a general summary of our
7 concerns in this contention, and if the Board is concerned
8 about the contention's length, we will certainly be happy to
9 accommodate that concern in whatever way we can. If it is
10 sufficient to limit it to the first two paragraphs, that is
11 certainly acceptable to us.

12 CHAIRMAN WOLFE: Mr. Norton?

13 MR. NORTON: Your Honor, I think Mr. Reynolds has
14 fairly stated that the first two paragraphs do indeed
15 encompass the next page and a half. They are broadly enough
16 stated to encompass the next page and a half, and one
17 certainly can litigate all of the issues that are contained
18 in the next page and a half, if the first two paragraphs are
19 admitted as a contention.

20 He also fairly stated that while what they
21 submitted didn't intend to be a rehash of contention 14 from
22 the clarified contentions of June 30th, that unfortunately
23 is what falls out. You take those first two paragraphs and
24 you litigate everything that was in contention 14 and more.

25 This Board I thought ordered very clearly as to

1 the contention that could be raised by the joint intervenors
2 after the SER Sup 15 came out. They just ignored that
3 direction from this Board and are basically asking this
4 Board once again to litigate contention 14 which this Board
5 had previously refused to litigate.

6 They don't change anything really; they just mixed
7 the words up a little bit and referenced a couple of
8 documents that came out after, but they don't change
9 anything at all. I think the Board should deny the
10 contention. They have certainly had the opportunity to put
11 forward the contention that was within the prescription of
12 this Board. They have had several opportunities. They had
13 the initial opportunity, I think you gave them another
14 opportunity in the phone conference when I think you
15 suggested that this contention was terribly long and complex
16 and involved, and I think you gave them the ability to do
17 that again this morning; to change their contention, and
18 they refused to do it. They want to litigate this whole
19 broad matter, and we think it should be denied because of
20 that.

21 CHAIRMAN WOLFE: Mr. Olmsted?

22 MR. OLMSTED: Yes, Mr. Chairman. I really don't
23 have much to add beyond what we filed in response to this
24 contention to begin with. I think for purposes of
25 discussion, if you will refer to our response, the part of

1 this contention that we pointed out as being new material is
2 on page 2, the dicussion of Reg Guide 1.97, Revision 2,
3 NUREG-0737, and then it does do what the Board indicated
4 they should do when the SER supplement came out. It alleges
5 an inadequacy in the SER on the ground that these matters
6 should have been evaluated by the staff in that Safety
7 Evaluation Report.

8 Now, in our response we tried to lay out what we
9 believe to be the misunderstanding with regard to Reg Guide
10 1.97, and in the sequence of events that would occur with
11 regard to the instrumentation and post-accident monitoring
12 equipment, and we also refer joint intervenors to PG&E's
13 October response on those matters, as required by their low
14 power license technical specifications.

15 And to date, joint intevenors have not done
16 anything about refining their contention in that area, and
17 therefore, we stand by the rejection we posited at the time
18 we responded.

19 CHAIRMAN WOLFE: Mr. Lanpher?

20 MR. LANPHER: Thank you, sir, just one short
21 comment. I think it is entirely inappropriate to even
22 consider rejection of a contention because it may be too
23 specific or too long or whatever. I think that joint
24 intervenors were trying to respond originally to the August
25 4 order of this Board which asked for more specificity and

1 basis. They have tried to make it quite clear what they
2 wish to litigate here, so that no one will be misled. And I
3 think they have accomplished that in this contention, so
4 everyone is on notice.

5 MR. OLMSTED: Incidentally, I hope no one
6 misunderstands the staff's position that we are not
7 objecting to the contention because we don't understand it.
8 I think the contention is quite specific. I think they have
9 set forth the basis for their contention. We are objecting
10 to it procedurally based upon the way in which it was filed.

11 And this time around, we object to it because it
12 doesn't meet the Board's order except for that area on page
13 2 which we feel was a misunderstanding of what the
14 supplement was designed to address in the first instance.
15 It is really not based upon new information in the
16 supplement. It is arguing the supplement should have
17 considered something which the staff position is that it is
18 being considered in another manner.

19 MR. REYNOLDS: I agree with Mr. Olmsted that
20 probably this is sufficiently discussed in the papers.
21 However, I do disagree with Mr. Norton's statement that we
22 have basically ignored the Board and refused to try to
23 accommodate your concern, because we certainly want to do
24 that and we have tried, since the August 4th order, to
25 revise the contention consistent with what we viewed to be

1 your intention there.

2 Also, I think I stated again this morning that we
3 would be certainly willing to limit it to the first two
4 paragraphs because I think that that does encompass our
5 concern. I also disagree with Mr. Olmsted's statement that
6 the contention fails to include any new information from the
7 SER Supplement. When the June 30th contention was filed,
8 the SER Sup had not been done; there was nothing in the
9 contention about the SER Sup.

10 After the supplement was filed, we revised the
11 contention. We, as I stated a short time ago, feel that the
12 staff has failed to adequately justify its conclusions and
13 we disagree with those conclusions, so there is that new
14 information from the supplement itself, and also from the
15 Revision 1 by PG&E to its environmental qualification report.

16 CHAIRMAN WOLFE: We will take a ten-minute break
17 at this time.

18 (A short recess was taken.)

19 CHAIRMAN WOLFE: The Board will take under
20 advisement this question of the joint intervenors'
21 contention, and will include in our memorandum and order our
22 determination regarding that contention.

23 Before we move on to other matters, Mr. Lanpher, I
24 would like to have from you all of the documents that you
25 are claiming privilege as to, and any other documents that

1 you have held out because of your determination as to
2 relevancy. I am referring to those documents that you say
3 are irrelevant because they are earthquake related.

4 MR. LANPHER: Very well.

5 CHAIRMAN WOLFE: We have a Pacific Gas & Electric
6 Company memorandum regarding the denial of discovery of
7 expert opinion. None of us has had a chance to read that,
8 but do you want to discuss it at this time?

9 MR. NORTON: Yes, Your Honor.

10 MR. OLMSTED: I don't believe we have a copy.

11 MR. NORTON: Yes, you do, Mr. Olmsted, I put it on
12 the corner of your desk. I think your elbow is on it.

13 MR. OLMSTED: All right.

14 MR. NORTON: I apologize for the lateness of this
15 filing, but obviously, it involves the depositions which we
16 have just completed, and I again did not prepare it because
17 I was in those depositions and had someone else prepare it.
18 And basically, it just sets forth the law regarding
19 discovery of expert opinion that is applicable in this
20 matter. And I am prepared today to discuss with the Board
21 what the problem is and what relief we are requesting from
22 the Board.

23 To date we have two depositions transcribed that
24 I have received; the deposition of Dr. Plovkin and the
25 deposition of Mr. Pallido, who are two experts being

1 called. I believe that it is two of three now experts being
2 called by the joint intervenors. Excuse me, that was four,
3 two of four. And these are, by way of example, the problem
4 but they are the only ones I have. The others haven't been
5 transcribed yet, and what I would like to do is refer the
6 Board -- I have brought three copies for the Board that I am
7 required to supply.

8 I would like to first turn to Dr. Plotkin's
9 deposition, page 13, and I will read from the deposition
10 because obviously, the other parties have not received their
11 transcripts yet. Page 13, starting at line 2, this is
12 myself examining Dr. Plotkin. "What is to be the subject
13 matter of your testimony in the upcoming proceedings?
14 Answer: I can't say at this time other than it will be
15 involved with the evacuation plan. Question: You've done
16 nothing to prepare for this deposition or for the upcoming
17 hearings? Answer: I've done very little. Question: Did
18 you read -- . Answer: We have just started. The work I
19 have done is very preliminary at the moment. Question:
20 What have you done? Answer: I have simply looked over the
21 Voorhees Phase 1 and Phase 2 documents, and the evacuation
22 time from the TEPA Corporation."

23 Then we go to page 22 and I asked, "Question: All
24 right, Dr. Plotkin, I take it then you told us everything
25 you know about San Luis Obispo emergency planning, is that

1 correct? Answer: I told you the conclusions that I have
2 come to at the moment, these are all preliminary and all the
3 work that I have done is preliminary at this time.

4 Question: And you have no other information to give us at
5 this deposition? Answer: No, sir."

6 And if you read the entire transcript you will
7 find that there basically is no information in there at all.

8 MR. OLMSTED: Excuse me, what page were you on?

9 MR. MORTON: The last quote was at page 21, lines
10 4 through 12. Now you go to Mr. Pallido's deposition, page
11 5, starting at line 10, he starts answering. Basically,
12 this is their agreement, quote, "that we would prepare
13 testimony for evacuation time estimates dealing specifically
14 with three documents by I believe it is January 9th and that
15 the hearing would begin somewhere around the 17th of the
16 same month. Question: Have you done that work? Answer:
17 No. Question: What three reports were you talking about
18 reviewing? Answer: There is two studies, a Phase 1 and a
19 Phase 2. Phase 2 deals with the five cities plan prepared
20 by Voorhees and Associates, and also, an evacuation related
21 to an earthquake study prepared by the TERA Corporation.

22 Question: Have you reviewed those studies? Answer: Only
23 in a brief manner at this point, which to me would mean that
24 I have spent between four and six hours reading briefly
25 through the material. Question: Have you formed an opinion

1 regarding the conclusion of those reports at this time?

2 Answer: No, certainly not. Question: Would you have the
3 ability to form opinions as to the correctness of the
4 approaches in those reports at this time, and by approach I
5 mean the analysis, methodology, date base, et cetera?

6 Answer: I am briefly aware of the methodology used,
7 however, I don't believe I am yet familiar enough with how
8 details were incorporated to determine whether or not the
9 methodology was properly implemented. So the answer is no."

10 Very frankly, Dr. Johnson is much the same. He
11 had some generalized theory which had nothing to do with the
12 review of any documents in this case, but just his
13 generalized theory based upon TMI, which he was able to
14 express to us. But as to its applicability to Diablo
15 Canyon, he had done no work along those lines.

16 Dr. Ericson again has -- for the purposes of his
17 deposition I felt that we were indeed able to get enough
18 information in his deposition to adequately prepare. We
19 understand where Dr. Ericson is coming from, so this
20 complaint does not go to Dr. Ericson.

21 As to the Governor's witnesses, -- incidentally,
22 Drs. Plotkin, Pallido and Johnson, they are not all
23 doctors. But those gentlemen all told us they were retained
24 in late October and that coincides with Mr. Reynolds's
25 document dated October 30th where he first identified these

1 witnesses.

2 MR. REYNOLDS: Excuse me, I think that is November
3 2nd.

4 MR. NORTON: November 30th is the date of your
5 document. It was mailed November 2nd. In any event, their
6 recollection is that indeed, that is when they were retained
7 and they all said well gee, we've been busy and we really
8 haven't had time to do the work yet. Apparently, they are
9 going to do all of this work during the time the intervenors
10 and Governor Brown have been arguing that nobody can do
11 anything; that is, over the Christmas vacation, because that
12 is really all there is left between now and the hearings, or
13 between now and the time the testimony is due.

14 As to Messrs. Minor, Hubbard and Bridenbaugh, I do
15 not have their transcripts of their depositions and so I am
16 not going to, at this point in time, try to tell the Board
17 what areas they have not yet done their work in and have no
18 opinions in what areas they did. I am sure we can get into
19 a screaming and shouting match about my memory, if I tried
20 to do that, but I will tell the Board that in many areas in
21 which they expect to testify, they haven't done any work
22 yet. They haven't got any opinions yet; it is just very
23 preliminary and very cursory. They don't really know
24 anything so they haven't done anything yet.

25 They have been onboard in this case forever, for

1 years. They have been consultants to the Governor, they
2 have been at every -- and prior to that, the joint
3 intervenors -- every hearing, meetings. They have worked
4 right along. There is no excuse of time in that case.

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1 The point is that the Joint Intervenors and the
2 Governor -- and I don't mean this to Messrs. Minor,
3 Bridenbaugh and Hubbard that they don't have anything,
4 because they do have some things that we were able to get
5 out in the deposition; but the problem is they have totally
6 thwarted the rules of discovery, the discovery process.
7 Basically what they've decided to do is do nothing until
8 after discovery closes, after the time for an answer to the
9 interrogatories is gone, after we have noticed their
10 depositions, and then do all of their work, form all of
11 their opinions and all of their conclusions. And we don't
12 get to know anything about until we have received their
13 testimony on January 11th.

14 If you read the rules of discovery, 26(b)(4) and
15 other applicable rules of discovery which are referenced in
16 this memorandum I have given you, that is not the proper
17 preparation for trial. We have done everything we can to
18 cooperate with their discovery request, but in this
19 proceeding they are claiming you don't comply with the
20 regulations basically. That is their bottom line. Your
21 emergency planning is inadequate.

22 Contentions 10 and 12 are similar kinds of
23 contentions in that they say you don't comply with the
24 regulations; you don't meet safety standards. It is very
25 difficult for us to prepare our case when we don't know why

1 they think that we don't comply.

2 For us to prepare our case we have got to know
3 where they are coming from. Now, with Dr. Erikson I know
4 where he's coming from, and I can prepare my case. I can
5 prepare my witnesses. I can prepare my testimony. Pallido
6 and Plotkin, I have no idea what he's talking about, where
7 they're going to come from. I have no idea how to prepare.

8 That is the whole purpose of discovery, so you
9 don't come to trial, or so you come to trial everybody
10 knowing what their positions are. In this case they have
11 totally thwarted that purpose from being accomplished.

12 The relief that I am requesting -- and this,
13 believe me, has been done successfully before in other
14 proceedings that I have been involved in -- is that these
15 witnesses be limited to the opinions they were able to
16 express in these depositions. They cannot now be allowed to
17 go out and look at all different documents and all different
18 information and come in with different opinions that we
19 don't know anything about. If they are allowed to do that,
20 you might as well throw out the discovery process, you might
21 as well not have it, because it can be absolutely thwarted
22 by the conduct that is going on here. That is our position.

23 CHAIRMAN WOLFE: Mr. Reynolds.

24 MR. REYNOLDS: I would like to respond.

25 First, we just got this. I haven't seen it before

1 which surprises me because we've been together literally for
2 the past ten days, so I'm not going to comment on that. But
3 this is very upsetting to me, I must say, for several
4 reasons.

5 First of all, the witnesses that he is referring
6 to were first contacted in late October. They have at no
7 previous time ever been involved in the Diablo Canyon case.
8 They have no background in this case. They agreed when I
9 retained them to prepare testimony at a hearing which was
10 scheduled for January 19th, and I told them that the date
11 for filing of testimony would be somewhere around January
12 9th. They have been operating under that assumption.

13 They will prepare their testimony for January
14 9th. They have just begun at the time these depositions
15 were taken, have just begun to do their preparation for that
16 testimony. When I spoke to them about giving testimony on
17 behalf of Joint Intervenors in this case they said yes, we
18 will do it for you. And I think it is important to
19 understand, too, that these witnesses have agreed to testify
20 with the knowledge that the intervenors in this case don't
21 really have any resources with which to pay them. They
22 agreed to do it with the understanding that they have other
23 commitments, and they would give -- they would do the job in
24 preparation for the testimony. I have no indication that
25 they are not going to do that.

1 They were listed as witnesses in early November.
2 I began to get them materials in November. I myself only
3 got a copy of the San Luis Obispo County plan in the first
4 week of December. I sent that to them at the earliest
5 opportunity obviously when they were deposed in the first
6 part of December. They had not had an opportunity to review
7 it and to form conclusions on it.

8 The documents which they had read, both Dr.
9 Plotkin and Mr. Pallido, they had read very quickly the
10 evacuation times assessment study, the TERA Corporation
11 evacuation time study, both of which involve very detailed
12 kinds of calculations and assumptions.

13 At the time of the deposition both were extremely
14 candid with Mr. Norton. They said we have only begun our
15 review. Based upon the limited review that we have had to
16 this point, we do not feel confident in making statements as
17 to any conclusions because we have only got a general idea.
18 Both Dr. Plotkin and Mr. Pallido did raise some concern
19 about the scenarios which were considered in those
20 documents, but it is quite another matter for them to come
21 in with very detailed kinds of things. The depositions were
22 not even discussed with respect to my witnesses in this case
23 until just before Thanksgiving, so there is that period in
24 November.

25 Somehow Mr. Norton is under the impression -- I

1 don't know where he gets the idea; he certainly hasn't given
2 me any basis for it -- that during the period of time they
3 were doing no work purposely to thwart his discovery. I
4 mean it is offensive to me for the simple reason that it
5 impugns the integrity of my witnesses, it impugns my
6 integrity who sponsors those witnesses, and he doesn't have
7 any basis for it.

8 I produced those witnesses. I did it. I
9 attempted to cooperate on very short notice without formal
10 procedures, setting up depositions for eight different
11 witnesses in three different cities. Dr. Plotkin and Mr.
12 Pallido came to San Francisco for the convenience of all
13 counsel to be deposed at PG&E's headquarters. They were
14 there. They could have been asked numerous questions about
15 their views on what should go into an evacuation time
16 assessment, what kind of methodology, what kind of
17 assumption. But when Mr. Norton found out that they had
18 only preliminarily reviewed the documents, he essentially
19 said well, do you have any opinions at all about Diablo
20 Canyon, and when Dr. Plotkin was unable really to focus on
21 what he was getting at, he said no, I really don't at this
22 point, he called off the deposition, he ended the deposition.

23 And now he comes up, he gives us this memorandum
24 on the date of this prehearing conference, and he represents
25 to this Board that there is some sort of intentional failure

1 to prepare or intentional subversion of the discovery
2 process which Mr. Pallido and Dr. Plotkin are perpetrating.

3 It is something which I obviously am upset about
4 it, and I apologize to the Board for it; but I have never
5 seen anything like this before. We are doing the very best
6 we can to put on a case, our case. Both Supervisor
7 Jorgenson and Supervisor Kupper were deposed in early
8 December. They have been involved in this case, and they
9 had fairly solid opinions about the subject matter that
10 they're going to testify about. Dr. Johnson was retained at
11 the same time as Dr. Plotkin and Mr. Pallido in this case.
12 He has done a little bit more work; in other words, he had
13 reviewed those two documents which I mentioned earlier and
14 had some opinions on it. He had also done a study with
15 respect to TMI. He was perfectly happy to talk about that.
16 So it is clear that he has opinions. He did the best that
17 he could.

18 Professor Erikson, he is the editor of the Yale
19 Review. He is a professor of sociology at Yale University.
20 He had read those same documents. He came in with very
21 definite ideas about those two documents. He has not read
22 the county plan because I only recently got him the plan.

23 We are not trying to subvert this process. We
24 have agreed to go through these depositions. When I spoke
25 to Mr. Norton in arranging them I said they have only begun

1 their review; they don't have much to say. He wanted to go
2 ahead with these depositions anyway.

3 Now, I would be perfectly happy to have scheduled
4 these depositions some time in January after my witnesses
5 have had an opportunity to really prepare their testimony.

6 Mr. Norton would have a perfect opportunity to get every bit
7 of information which they would have at their disposal.

8 Because of what I would consider to be an artificially tight
9 schedule, working toward a hearing on January 19 which Mr.
10 Norton has urged this Board to adopt, the only time possible
11 to schedule those depositions was early December.

12 It was a very difficult thing, I might say, to
13 arrange all of those depositions within that ten-day period,
14 but with some effort it was done, and all my witnesses
15 cooperated in getting there. They cooperated in answering
16 the questions to the very best of their ability. Their
17 integrity prevents them from going out on a limb with some
18 conclusion which they do not feel is adequately supported.
19 And yet, we come into this prehearing conference and all of
20 a sudden their failure to come up with conclusions is the
21 basis for impugning their integrity. I mean there is no
22 basis for that, and I would request the Board to deny this
23 motion.

24 Certainly, as I said, I can't respond to the
25 substance, but I see absolutely no basis for this; and I

1 feel that Mr. Norton is misleading the Board, and it is
2 something the Board should not sanction.

3 MR. NORTON: Excuse me, Judge Wolfe. I would like
4 to clarify the record.

5 I don't believe, and I guess I can only repeat
6 what I said previously when the transcript was out, but I am
7 in no way impugning the integrity of Mr. Reynolds or his
8 witnesses. I never said that they were intentionally
9 subverting any process. The bottom line is that they are
10 indeed avoiding discovery. Whether it's intentional or
11 unintentional I have no way of knowing. And I certainly am
12 not impugning the integrity of any of his witnesses.

13 CHAIRMAN WOLFE: All right. Let's move on then.

14 Does anyone else have any comments?

15 Mr. Lanpher.

16 MR. LANPHER: Like Mr. Reynolds, I just got this
17 document. I will respond just very preliminarily insofar as
18 my witnesses, Messrs. Bridenbaugh, Hubbard and Minor, are
19 involved.

20 From skimming this document it mentions Mr. Minor,
21 and now in oral argument Mr. Morton mentions Messrs.
22 Bridenbaugh and Hubbard. There is not a single citation in
23 here to where my witnesses or the Governor's witnesses
24 failed to present opinions. This is a bald allegation of
25 law. In fact, the witnesses came prepared. They provided

1 opinions. Perhaps Mr. Norton does not like their opinions.
2 These gentlemen are also terribly busy. They have done what
3 work they can.

4 Maybe Mr. Norton didn't intend to impugn their or
5 my integrity. I share with Mr. Reynolds a feeling of
6 resentment, because that was certainly the tone that came
7 out. These witnesses provided opinions. I just can't
8 comprehend that PG&E does not know where these witnesses are
9 coming from.

10 I think it is a totally baseless pleading. We
11 will respond to it in due course if the Board so orders.
12 However, to respond to a pleading that does not even cite
13 the deposition transcripts as to where our witnesses have
14 allegedly thwarted the discovery process is to require us to
15 respond just to allegations instead of facts. And
16 accordingly, I think this pleading is entirely improper.

17 CHAIRMAN WOLFE: I don't think it will be
18 necessary for you to respond in writing.

19 MR. LANPHER: Thank you.

20 MR. NORTON: Excuse me, Your Honor. We fully
21 understand and I thought I explained that we do not have the
22 transcripts.

23 CHAIRMAN WOLFE: Yes, you did.

24 MR. NORTON: And I don't expect to sit here and
25 argue about what Mr. Minor and Bridenbaugh and Hubbard could

1 offer opinions on or could not. I just simply relate to the
2 Board that there were definitely areas where they said we
3 haven't done anything there yet, and we intend to do it
4 between now and the time of the hearing. And it is that
5 problem that I am getting at, and when the transcripts come
6 out we can always argue about whether they said or didn't
7 say it, but a simple reading of the transcript will show
8 that.

9 And the problem, though, is as typified by these
10 two gentlemen where they have done nothing and they have no
11 opinions, and how do we prepare? And that is what I am
12 putting before the Board. And I really apologize if Mr.
13 Lanpher and Mr. Reynolds feel that I am impugning their
14 integrity or the witnesses' integrity because I'm not. I'm
15 simply explaining to the Board where we are and why it is a
16 problem for us, and asking for this Board to resolve the
17 matter by giving us some form of relief.

18 MR. LANPHER: Judge Wolfe, the idea of asking for
19 relief when you don't even have facts to put before the
20 Board is what bothers me most tremendously. If Mr. Norton
21 wants to wait until the deposition transcripts are available
22 to all people and then file a pleading with this Board and
23 ask for whatever relief, he certainly may. But to raise an
24 issue before this Board on the eve of this conference with
25 no prior preparation for anyone, no warning, and frankly, to

1 plant in the Board's mind that somehow these witnesses were
2 trying to thwart something with no facts to show us, at
3 least as to my witnesses, I just resent, I really do.

4 I think it is quite improper, and I would just
5 like to thank the Board for saying that we don't have to
6 respond at least to this pleading.

7 MR. OLMSTED: Mr. Chairman, I would like to
8 comment on this to this extent. I think what we're really
9 talking about here is an evidentiary matter, and in quickly
10 looking through this memorandum I did notice one Commission
11 case that was not cited that I think bears on the question,
12 and I would like to bring that to your attention. And that
13 is Boston Edison Company, Pilgrim Nuclear Generating
14 Station. It is a Licensing Board decision in 75-42 found in
15 2 NRC 159. And this case deals with an objection to
16 Applicants' discovery for information claimed to be in the
17 nature of expert testimony and opinion where the arguments
18 were similar concerning whether there was a right to the
19 discovery of expert opinion in advance of trial.

20 And I certainly think that nobody is really
21 arguing that there is not a right to discovery of expert
22 opinion. What is troublesome in this case is that the Joint
23 Intervenors and the Governor seem to be arguing that they
24 have a right to develop that opinion on the eve of trial.
25 And I think what the PG&E motion or memorandum is getting at

1 is that we won't have any discovery of that opinion.

2 What the response of the Joint Intervenors and the
3 Governor would be would be well, either take other
4 depositions in January, thus implicit in that rescheduling
5 the hearing for some other time; or go ahead and be
6 surprised by whatever opinions our experts subsequently
7 develop after discovery is closed. And I don't really think
8 that either course there is proper.

9 I think that as an evidentiary matter at the
10 hearings in January if these people attempt to testify in
11 two areas that they were not prepared to testify on during
12 their depositions that a motion to exclude such testimony at
13 that time would be proper.

14 MR. REYNOLDS: Could I just respond briefly to
15 that?

16 CHAIRMAN WOLFE: Yes.

17 MR. REYNOLDS: I can't see any basis whatsoever
18 for an exclusion of the testimony of Dr. Plotkin or Mr.
19 Pallido. As I explained, they got into the case only in
20 early November. They have other commitments themselves. I
21 have been getting the documents to them and am continuing to
22 do it. This is not a case where they have been studying
23 this subject, as no doubt the experts of the Staff and the
24 Applicant have, because they are involved in this case as a
25 matter of profession. These gentlemen have agreed to do it

1 and prepare the testimony and under a very short time frame.

2 I am perfectly willing, as I said, to permit any
3 kind of discovery of those witnesses, and we have done
4 everything possible to accommodate that concern. But
5 because the hearing is scheduled for January, our hands are
6 tied as to when those depositions can be held. December was
7 the only time they could be held, I said, not suggesting
8 that more depositions be taken, but if those depositions had
9 been scheduled for January, I think Mr. Norton and Mr.
10 Olmsted would have found substantially more information
11 coming out of Dr. Plotkin and Mr. Pallido, because there is
12 no question that they will have to prepare their testimony
13 by that time or they won't have testimony.

14 The cases that I gather they are referring to
15 certainly might apply to a situation where there is a
16 purposeful subversion of the process. By the very nature of
17 this case at the time they got into it, they are working on
18 a very short time frame. And we would love to have more
19 time; quite frankly we would love to have more time. We
20 just don't have it.

21 MR. NORTON: Excuse me, Judge Wolfe.

22 First of all, Mr. Reynolds' argument is something
23 we have no control over. He selected his witnesses. He
24 started them working when he started them, not us. And
25 again, everybody worries about the intent. I'm not saying

1 anything about anything intentionally. This is where we are
2 at.

3 The contentions are set forth in this Board's
4 order of August 4th, and we sent out interrogatories and we
5 started discovery long ago with interrogatories. It is not
6 the Applicant's fault or the Staff's fault that he didn't
7 get an expert witness until October 30th or November 2nd, or
8 that he didn't get this or that done. That is not something
9 that is our problem; that is Mr. Reynolds' problem.

10 And while one can sympathize, if one wants to, if
11 that is necessary, you can't allow -- there's an old saying,
12 you can't allow hard cases to make shipwrecks of the law.
13 We are entitled to our discovery. And Governor Brown
14 certainly doesn't have those arguments at all, because he
15 has had his experts aboard from day one.

16 And Mr. Lanpher was at those depositions, and I
17 know he will not contradict me when I tell you that in those
18 depositions they said we do not have an opinion on that
19 because we haven't done the work, and on more than one
20 occasion by each witness. And that is what we are concerned
21 about: how do we prepare our case? And they certainly
22 can't use this as a delaying device to delay the hearing and
23 say well, gee, we're sorry; let's delay the hearing three
24 months and then we'll let you have your discovery. That is
25 not the proper answer.

1 CHAIRMAN WOLFE: Very well. Let's move on.

2 MR. LANPHER: Judge Wolfe, I just want to
3 clarify. No response is required to this piece of paper, is
4 that correct?

5 CHAIRMAN WOLFE: That is correct.

6 MR. LANPHER: Thank you.

7 MR. NORTON: Your Honor, are you ruling on our
8 oral motion?

9 CHAIRMAN WOLFE: Not now. Your oral motion?

10 MR. NORTON: Yes. I was making a motion at this
11 proceeding to limit the testimony.

12 CHAIRMAN WOLFE: I will overrule that motion right
13 now.

14 MR. NORTON: I'm sorry. I hadn't finished making
15 the motion.

16 CHAIRMAN WOLFE: Well, I heard you before.

17 Do you have anything to add to it?

18 MR. NORTON: Well, I hadn't made it.

19 CHAIRMAN WOLFE: Well, you had made it earlier.
20 You had mentioned it earlier. Go ahead and make it if you
21 want to orally.

22 MR. NORTON: Yes. I would like to make the
23 record, Your Honor.

24 At this time we would move that the testimony of
25 the Joint Intervenors and Governor's expert witnesses be

1 limited to those opinions that they were able to express at
2 the time of their deposition or in their answers to
3 interrogatories that have been filed to date, and that they
4 not be allowed to come up with new opinions based upon facts
5 that we were unable to discover through the discovery
6 process. That is the essence of our motion.

7 CHAIRMAN WOLFE: We overrule that motion.

8 At this time I would like to ask if counsel has
9 any desire regarding the order in which we take up the
10 contentions that will be heard on January 19th? Do you want
11 to take up the emergency contention first, or do you want to
12 take up the other contentions?

13 We are asking this question in order that you can
14 alert your witnesses as early as possible when to be there.
15 If you don't have an idea now, we will -- you can make a
16 suggestion later, and we will attempt to order it the way
17 you wish, whatever is most convenient.

18 MR. REYNOLDS: Judge Wolfe, I think I would prefer
19 to do it later. I have to talk to my witnesses and will
20 determine what their preference will be in terms of being at
21 the hearing, so I would prefer to discuss that at a later
22 date.

23 CHAIRMAN WOLFE: Very well.

24 Earlier, Mr. Norton, at one of the earlier
25 hearings you submitted a motion asking for, in effect, a

1 change of venue, a change away from San Luis Obispo to, I
2 think you suggested Los Angeles or Chicago or Washington.

3 MR. NORTON: I don't believe I suggested Chicago.
4 I think it was Los Angeles.

5 CHAIRMAN WOLFE: I don't mean Chicago. I mean Los
6 Angeles, San Francisco or Washington. Strike that Chicago.
7 In effect, by setting the hearing on the 19th for San Luis
8 Bay Inn, we have acquiesced in part to moving the hearing.
9 We have the assurance of the sheriff that he can take care
10 of the situation there. We wonder if anyone has any
11 information as to the possibility of a disturbance at the
12 hearing?

13 MR. REYNOLDS: I certainly don't.

14 CHAIRMAN WOLFE: Do you, Mr. Norton?

15 MR. NORTON: No.

16 CHAIRMAN WOLFE: Well, there is a criminal
17 statute, 18 U.S. Code 1505 which provides in effect that
18 anyone who threatens by force or intimidation the hearing by
19 a department in carrying out the law that they are subject
20 to both a fine and imprisonment. And we are not going to
21 permit the interference at this hearing that we had at the
22 last one where people stood up and talked and others sang
23 and made a circus out of what I think is a very, very
24 serious matter. And I think the word ought to go out that
25 we are very serious about conducting the hearing in a very

1 orderly manner, and you might tell them about 18 USC 1505.

2 CHAIRMAN WOLFE: Does anyone have anything in
3 addition they wish to bring up?

4 MR. NORTON: Yes, Your Honor.

5 CHAIRMAN WOLFE: Mr. Norton..

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1 MR. NORTON: I have a couple of questions about
2 the hearing and the location of the hearing. I know Judge
3 Bright is familiar with the hearing facility, the San Luis
4 Bay Inn. I guess Dr. Bright and Mr. Crane and I are the
5 only ones left from the hearing at that location. The room
6 there is not much larger than the motel where we started the
7 last hearing, and you will recall, we were asked to then
8 move over to the auditorium.

9 Assuming that same matter comes up, we are
10 wondering what the Board will do. In other words, if 1000
11 people show up or 500 people show up, which that facility
12 certainly cannot hold, what can be expected to transpire?

13 JUDGE BRIGHT: Well, Mr. Norton, the first two
14 days, the 19th and 20th, the hearing will be held at the
15 Avila Beach Community Center, I think it is called, so this
16 should take care of the original peak, and then it should
17 tail off.

18 It turns out that we could not get the Bay View
19 Room for those two days, and the motel was understandably
20 reluctant to put us into the little room that is right
21 behind the Bay View Room, and besides that, they didn't want
22 people trampling their flowers. So the first two days will
23 be in the Municipal Building.

24 MR. NORTON: In Avila Beach?

25 JUDGE BRIGHT: Well, the proper name of it will be

1 in the order.

2 MR. NORTON: And my other question in that regard
3 is are there going to be limited appearances, because that
4 seriously affects how you schedule your witnesses. In the
5 past when we have had limited appearances it has lasted at
6 least one full day and generally two, and if we are going to
7 have them -- and we don't think it is necessary -- there
8 have been a number of limited appearances in this case and
9 it is generally basically the same people over and over.
10 But if the Board desires to have those limited appearances,
11 we would like to know about it for scheduling purposes.

12 CHAIRMAN WOLFE: The Board had determined that
13 there would be not be any limited appearances, but that
14 anyone who wished may submit a written statement. The Clerk
15 would receive it at the time of the hearing.

16 We feel that the limited appearances have been
17 completely adequate and it doesn't appear that any further
18 help could be received from that.

19 MR. NORTON: And I have one other minor matter,
20 and that deals with witnesses. I believe, Judge Wolfe, that
21 you had ruled that employees of the state of California were
22 the clients of Mr. Brown and Mr. Lanpher, in a telephone
23 ruling in deposition. That being the case, I presume we
24 will not need to request subpoenas from this Board to
25 require the attendance of some of those people as witnesses

1 at the hearing. There are a couple we would like to call,
2 and normally what we do is issue subpoenas and ask you to
3 issue the subpoenas to those people. But as they are they
4 are the clients in the case, we certainly don't need
5 subpoenas, and we would ask that the Board just enter an
6 order that these people appear at the hearing as witnesses.

7 CHAIRMAN WOLFE: I don't think that I ruled that
8 all employees of the state of California are clients of Mr.
9 Brown and Mr. Lanpher. However, I am sure that Messrs.
10 Brown and Lanpher will cooperate and see that the witnesses,
11 if you notify them immediately, are there. Is that true,
12 Mr. Lanpher?

13 MR. LANPHER: I think before I can say that
14 necessarily we will produce anyone that Mr. Norton wants, I
15 think that your suggestion that we confer with him and find
16 out if we have a disagreement is the proper one.

17 CHAIRMAN WOLFE: If you have a disagreement you
18 can call me and we will get out a subpoena.

19 MR. NORTON: Thank you.

20 MR. OLMSTED: Mr. Chairman, in that regard there
21 is somebody that I would like to make sure is going to be
22 available at that hearing from the state, and that is Mr.
23 Kearns.

24 MR. LANPHER: We are going to have to talk to Mr.
25 Kearns on this. I am not prepared right now -- I mean if we

1 do not want to produce him voluntarily, and my preliminary
2 thought is yes, we surely would, then as the Board has said,
3 it will issue a subpoena. But while I think PG&E listed him
4 as a potential witness in some set of interrogatory
5 responses, they listed a lot of people, so we really have
6 not focused on that at this point.

7 CHAIRMAN WOLFE: Well, I'm sure you have got to
8 confer with anybody that you say you will produce.

9 MR. LANPHER: That's right.

10 CHAIRMAN WOLFE: And you do that, and let Mr.
11 Olmsted know.

12 MR. REYNOLDS: Judge Wolfe, I have just one final
13 matter before we adjourn. We filed a motion to compel
14 answers to interrogatories against Pacific Gas & Electric on
15 November 6th, and there were three interrogatories that were
16 the subject of that motion. One which is of particular
17 concern we asked for a description and the current status of
18 the EPRI valve testing program, and we specified the number
19 of different categories of information that we were
20 concerned with.

21 Pacific Gas & Electric objected on the ground that
22 they did not believe that program was relevant to the
23 admitted contention 12 which the Commission has included in
24 this proceeding. I think one development is relevant to the
25 decision on the motion to compel and that is the December 11

1 decision of the Appeal Board in which they specifically
2 determined that it was their view that the valve testing was
3 an aspect of the contention. In other words, joint
4 intervenors' revised contentions 8 and 9, which relate to
5 valve classification design and qualification testing. The
6 Appeal Board took that to have been included in this
7 proceeding by the Commission.

8 Based upon that, it would seem to me that there is
9 now no basis whatsoever for PG&E's claim that the EPRI
10 testing results are irrelevant to that contention, and I
11 would request the Board at this time or perhaps in the order
12 which you will prepare following this conference, to direct
13 PG&E to respond to that interrogatory.

14 CHAIRMAN WOLFE: Mr. Norton, do you have a
15 position on that?

16 MR. NORTON: If you will give me just a moment?

17 CHAIRMAN WOLFE: Yes.

18 (Pause.)

19 MR. NORTON: We have no problem with supplying
20 that information as to the EPRI test program as to our
21 valves, but we don't want to be supplying information as to
22 the EPRI test program on any other valves they are testing,
23 because that is -- we are not required to go out and do that
24 work for the joint intervenors. We will supply the
25 information on our valves that are being tested in the EPRI

1 testing program without any problem, in light of the Appeal
2 Board's ruling.

3 MR. REYNOLDS: I would take issue with that to the
4 extent that PG&E has knowledge of other valves tested. If
5 that information is within their knowledge, it is clearly
6 relevant, we think, to the contention. Just because it is
7 maybe a different make we don't believe makes it irrelevant.

8 Now, he may believe that; we certainly disagree.

9 And the contention -- excuse me, the interrogatory itself is
10 not specifically limited only to PG&E's valves, and we would
11 like all of the information clearly that is within PG&E's
12 knowledge.

13 MR. NORTON: Well, the point being, Your Honor,
14 that we get information on our valves. I am not sure what
15 information other than hearsay type information we get about
16 other people's valves. And what I'm saying is we are not
17 required to go out and find out this information for Mr.
18 Reynolds. That is Mr. Reynolds' job. And if we have a
19 report from EPRI, for example, that lists all of the valves,
20 I mean, fine, we have no problem with that. I am simply
21 saying that we're not required to go out and undertake to
22 find out this information. We certainly have the
23 information on our valves.

24 MR. REYNOLDS: I am not attempting to tell Mr.
25 Norton what documents he has and what information he may

1 have. But I would like him to respond to the interrogatory
2 with all the information that he or his agents or
3 consultants have with respect to that EPRI program.

4 CHAIRMAN WOLFE: Can you do that?

5 MR. NORTON: We certainly can.

6 CHAIRMAN WOLFE: Very well.

7 MR. LANPHER: I have one item that I would like to
8 bring up, and that is that I understand in your memorandum
9 and order that you are contemplating subsequent to this
10 conference, that you are going to rule concerning the FEMA
11 finding, preliminary or otherwise. In that order I would
12 request that you set a timing similar to your earlier order
13 for filings pursuant to that FEMA order.

14 Before, we had a November 6th filing, or November
15 30th I guess, filing date for filings, if any, on the FEMA
16 findings, and this whole matter has been in flux, and we
17 just want to bring that to the Board's attention so it is
18 not inadvertently overlooked.

19 CHAIRMAN WOLFE: Very well, thank you.

20 MR. OLMSTED: Mr. Chairman, I really think that
21 that, however, is subsumed in the point that I wanted to
22 discuss with the Board. In a prehearing conference call
23 that we had with the Board some weeks ago I had indicated a
24 desire, now that there had been a lot more documents and a
25 lot more discovery between the parties, to consider whether

1 contention 1, which was admitted by the Board, on emergency
2 planning ought to be more specifically refined.

3 And the reason for that is that the contention, as
4 it presently reads, is that PG&E and the combined onsite,
5 state and local emergency response plans on preparedness do
6 not comply with 10 CFR 50.40(g), 50.47 and Revised Appendix
7 E, Part 50. Now had we been ab initio in a proceeding
8 starting today and that contention had been filed, and joint
9 intervenors and the Governor have pointed out many times
10 that the staff would have taken the position that that was
11 inadequateiy specific to enable the parties to know what
12 they had to defend against.

13 You have had a motion from PG&E which is really
14 directed to concerns about the specificity of that
15 contention because we have had discovery against
16 intervenors' witnesses who merely tell us, we don't have any
17 opinions as to how the plan is inadequate; it is just
18 inadequate.

19 So I think it is very difficult to comply with the
20 rest of the Board's schedule; namely, summary disposition
21 motions and the preparation of testimony. If the kind of
22 testimony the Board is going to get, from us at least, is
23 well the onsite plan is adequate and the FEMA findings are
24 in, and from PG&E, -- we think everything is honky-dorey,
25 and from the joint intervenors and state is, none cf it

1 works. I mean, you are going to have a hard time sorting
2 through evidence of that type.

3 And I would like to spend some time discussing
4 specific areas and planning standards that the parties want
5 to put in contention and testimony in the proceeding.

6 MR. REYNOLDS: I just want to point out that when
7 we filed our revised contention on emergency planning as the
8 basis for contention 1, we filed a four-page, very detailed
9 and specific contention setting forth our concerns and the
10 different areas that we felt we wanted to litigate in this
11 proceeding.

12 The Board, consistent with your view as to what
13 the proper contention is, reworded it into what is now
14 contention 1, and we are certainly prepared to go along with
15 that. I mean, I think that is probably the most efficient
16 way to go ahead with it, because if you start focusing on
17 what specific planning standards might apply for a
18 particular plan, -- PG&E's plan, okay, certain ones do --
19 which ones apply for the county plan? Well, it's not even
20 done yet so it's a little hard to tell which ones apply for
21 the state plan.

22 All of a sudden you've got a tremendous number of
23 conceivable objections at one point or another during the
24 hearing -- well, we stipulated that was out, we stipulated
25 that was out. And it seems to me to lead to the problem

1 that there could be just a tremendous amount of disagreement
2 and paper flying about & n^t around as to what is actually
3 included.

4 Now, as the Board has worded the contention, it
5 seems clear to me that what the obligation of an applicant
6 is is to address the Commission's planning standards set
7 forth in its regulation. I don't think that that is an
8 overly-burdenome responsibility and I think that it is a
9 very orderly way to go about it.

10 Now, if Mr. Norton and Mr. Olmsted would like to
11 have more time to prepare for summary disposition motions, I
12 don't have any objection to that. But I think that there
13 are certain implications, obvious implications for the
14 scheduling. It is my personal view that it is not going to
15 clarify thi to sit here and try to talk about which plan
16 is affected by which standards.

17 I would recommend to the Board that we go ahead,
18 based upon the language which you have devised for
19 contention 1.

20 MR. NORTON: Your Honor, I share both Mr.
21 Olmsted's and Mr. Reynolds' concern. This Board has put the
22 applicant in a very awkward position. You have a very
23 generalized, -- you know, you don't comply with the
24 regulations for emergency planning. You have ruled against
25 me when I have requested some relief because they won't tell

1 us what their opinions are and yet I have to move for
2 summary disposition and prepare testimony.

3 But that is where we are at, and I don't agree
4 with Mr. Olmsted. I don't see how, in the posture we are in
5 now, we can sit down and get rid of some of it. I mean, as
6 broad as it is, they don't have any opinions on a great deal
7 of it. And I don't mean exclusively. So I don't know. I
8 mean, I don't know what Mr. Pallido is going to come up with
9 between now and January 11th, and I don't think Mr. Reynolds
10 does.

11 So he can't sit here and agree that well, we're
12 not interested in that, we are interested in this, because
13 he doesn't even know what his witnesses think.

14 Which brings me to a point that Mr. Olmsted and I
15 discussed which is an interesting point, and that is
16 rebuttal testimony. If you recall at the last hearing,
17 everybody screamed bloody murder when I tried to put on a
18 rebuttal witness and it was for only a very, very limited
19 purpose that he was allowed to testify.

20 Now you are forcing me to go into a hearing where
21 I don't know what the other side is going to have to say at
22 all, and am I going to be allowed to put on rebuttal
23 witnesses? Because I am not going to know what they have
24 until I see their testimony on January 11th or 12th, and
25 mine is already going to be in.

1 CHAIRMAN WOLFE: If rebuttal testimony is
2 necessary on a proper showing, you will be allowed it.

3 MR. NORTON: But, Your Honor, the problem is with
4 that kind of a ruling that I am entitled to make a record,
5 and what you are doing is you are precluding me from knowing
6 what it is I have to make a record about until I get to the
7 hearing.

8 CHAIRMAN WOLFE: I don't agree with that at all.
9 You have to make a record to show that you are entitled to
10 this operating license. That is your burden.

11 MR. NORTON: That is correct. But I don't know
12 what the issues are.

13 CHAIRMAN WOLFE: And all of the other talk about
14 all the other things doesn't limit you at all. You have
15 that duty.

16 MR. NORTON: I agree with that, Your Honor, but I
17 don't know what the other side's position is.

18 CHAIRMAN WOLFE: Well, you are a lawyer, you have
19 to make an affirmative case.

20 MR. NORTON: That's correct. What I'm asking,
21 though, is am I going to be allowed --

22 CHAIRMAN WOLFE: I don't think that's an
23 impossible task.

24 MR. NORTON: No, the affirmative case isn't. It
25 is rebutting the others' position that is what I'm concerned

1 about.

2 CHAIRMAN WOLFE: Well, you just mentioned one
3 possibility; namely, rebuttal if you have to go to that.
4 You are a trial man, you ought to understand that you are
5 faced with some things that aren't too clear when you start
6 the trial.

7 MR. NORTON: I understand that, Your Honor, but I
8 am concerned about the Board's ruling about rebuttal
9 testimony at the last hearing. If I get that same ruling
10 again --

11 CHAIRMAN WOLFE: As I recall it, and I don't want
12 to rehash that, but I don't think that the rebuttal
13 testimony was necessary in the last case. I have nothing
14 against rebuttal testimony, if that's what you are saying,
15 if there is a need for it.

16 Anything further?

17 (No response.)

18 If not, we will adjourn --

19 MR. OLMSTED: I gather that means that you see no
20 need to specify the contention any further than it is now?

21 CHAIRMAN WOLFE: That is correct.

22 Then the hearing is adjourned and we will get out
23 the memorandum.

24 (Whereupon, at 11:35 a.m., the prehearing
25 conference was adjourned.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
Before the Atomic Safety and Licensing Board

in the matter of: Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power
Plant, Units 1 & 2)

Date of Proceeding: December 16, 1981

Docket Number: 50-275 OL & 50-323 OL

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

Ray Heer

Official Reporter (Typed)

Ray Heer
Official Reporter (Signature)