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NATIONAL ENERGY BOARD

OFFICE NATIONAL DE L'ÉNERGIE

Order No. GH-R-1-91

Ordonnance N^{o} GH-R-1-91

Canadian Petroleum Association

an application to the National Energy Board dated 29 May 1991 and subsequently amended on 27 November 1991 by the Canadian Petroleum Association requesting the Board to review its GH-5-88 decision to issue gas export Licences GL-99 and GL-111 to Alberta a

Hearing held at
Audience tenue à

Calgary, Alberta

25 February 1992
25 février 1992

Volume 2

Canada

I

ORDER NO. GH-R-1-91
ORDONNANCE No GH-R-1-91

IN THE MATTER OF the National Energy Board Act, and the Regulations thereunder;

AND IN THE MATTER OF an application to the National Energy Board dated 29 May 1991 and subsequently amended on 27 November 1991 by the Canadian Petroleum Association requesting the Board to review its GH-5-88 decision to issue gas export Licences GL-99 and GL-111 to Alberta and Southern Gas Co. Ltd., filed with the Board under File No. 7200-A004-12;

- - -

RELATIVE A la Loi sur l'Office national de l'energie et a ses reglements d'application; et

RELATIVE A une demande de l'Association petroliere canadienne a l'Office National de l'energie en date du 29 mai 1991 et amendee le 27 novembre 1991

concernant la modification des licences
d'exportation GL-99, GL-111 et de certains aspects
de la decision rendue suite a l'ordonnance GH-5-88.

- - -

Hearing held at Calgary, Alberta, on Tuesday,
February 25, 1992

Audience tenues a Calgary, Alberta, le mardi
25 fevrier 1992

PANEL:

R. Priddle	Chairman/President
J.-G. Fredette	Member/Membre
A. B. Gilmour	Member/Membre

A P P E A R A N C E S

C O M P A R U T I O N S

C. K. Yates	Canadian Petroleum Association
L. L. Manning	Independent Petroleum Association of Canada
M. A. Putnam, Q.C.) K. F. Miller)	Alberta and Southern Gas Co. Ltd.
D. G. Hart, Q.C.	Alberta Natural Gas Company Ltd.
P. H. Davies	Alberta Energy Company Ltd.
M. J. Black	Amerada Hess Canada Ltd.
C. H. Hughes	American Natural Gas Corporation
S. G. Trueman	Amoco Canada Petroleum Company Limited
T. G. Kane	ANR Pipeline Company

D. C. Edie	Brymore Energy Ltd.
J. D. Brett	Centra Gas Manitoba Inc.
R. B. Brander	Centra Gas Ontario Inc.
R. A. Pashelka	Chevron Canada REsources
G. Walsh	Czar Resources Ltd.
P. M. McKenzie	Esso Resources Canada
G. R. Walsh	G. R. Walsh and Associates Ltd.
J. S. Bulger	Gaz Metropolitain, inc.
M. M. Moseley	IGI Resources, Inc.
B. A. Woods	Mobil Oil Canada
L. E. Smith) T. M. Sutliff)	Northwest Pipeline Corporation
L. E. Smith) J. F. Walsh)	San Diego Gas and Electric Company

A P P E A R A N C E S

C O M P A R U T I O N S

L. E. Smith	The Northeast Group - Joint Inverventi-on of Alberta Northeast Gas, Limited, Boundary Gas, Inc., Ocean State Power, Ocean State Power II, Masspower, Selkirk Cogen Partners, L.P., Selkirk Cogen Partners II, L.P.
C. Havers	NOVA Corporation of Alberta
A. S. Hollingworth) K. J. Warren) T. N. Cotter) M. E. Lipson)	Pacific Gas and Electric Company
J.B.D. Malone, Q.C.	Pacific Gas Transmissions Company
W. M. Smith	Pacific Interstate Transmissions Company
F. F. Foran	Pan-Alberta Gas Ltd.

R. H. Mackie	PanCanadian Petroleum Limited
R. B. Hillary	Poco Petroleums Ltd.
M. D. Grant	ProGas Limited
J. T. Horte	SaskOil & Gas Corporation
J. M. Dunn	Shell Canada Limited
L. Keough	Southern California Edison Company
A. Walsh	Summit Resources Limited
D. Wharton	Suncor Inc.
N. D. D. Patterson	TransCanada PipeLines Limited
M. J. Samuel	Western Gas Marketing Limited
C. Dehart	Williams Gas Marketing Company
W. M. Moreland	Alberta Petroleum Marketing Commission

IV

A P P E A R A N C E S

C O M P A R U T I O N S

J. T. Brett	California Public Utilities Commission
M. Tremblay) J. Robitaille)	Procureur general du Quebec
G. R. Walsh	Minister of Energy for Ontario
J. L. Fingarson) P. Jarman)	Ministry of Energy, Mines and Petroleum Resources, British Columbia/Ministry of the Attorney General, British Columbia
J. Morel) R. Graw)	Board Counsel

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EXHIBITS/PIECES JUSTIFICATIVES

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Calgary, Alberta
Tuesday, 25 February, 1992
Le mardi 25 fevrier 1992

--- Upon commencing at 8:30 a.m./A l'ouverture de l'audience a 8h 30

THE CHAIRMAN: Good day, everyone. Bonjour et tous.

May we start with the preliminaries; and may I ask whether anyone has any objection to Westar Mining being granted late intervenor status?

MR. DEHART: My name is Chuck Dehart, and I am with Williams Gas Marketing.

I would request that we be granted status to monitor this proceeding, with the option to make final arguments, if appropriate.

THE CHAIRMAN: You were called yesterday, sir, and you were not here.

MR. DEHART: Yes, sir, that is correct. I was not here; I was en route.

THE CHAIRMAN: Does anyone have objection to Williams Gas Marketing being granted status to monitor the proceeding and make argument?

--- (No response/Pas de reponse)

THE CHAIRMAN: Thank you.

There seems to be no objection to Westar Mining, Mr. Morel.

MR. MOREL: Perhaps we could mark, Mr. Chairman, the late intervention in the "C" series. I

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believe it would Exhibit C-65-1.

THE CLERK: That will be Exhibit No. C-65-1.

--- EXHIBIT NO. C-65-1:

Intervention of Westar Mining.

THE CHAIRMAN: Thank you.

Mr. Putnam, I wonder if you have any news about Mr. McMorland's availability.

MR. PUTNAM: Thank you, Mr. Chairman.

Mr. McMorland was informed of yesterday of your remarks expressing dissatisfaction with his limited availability for this hearing, and he has asked me to convey two or three comments in response this morning.

Firstly, he is disappointed that you may have the impression that he has not given this hearing sufficient priority. In fact, he has many demands on his time, as you will appreciate, some of which must be accorded similar importance to this hearing.

You should also be informed that two days of meetings scheduled for this week were in fact scheduled prior to the scheduling of this hearing.

Secondly, he wishes to point out that the Company is proposing to present four senior witnesses, in addition to himself. The Company is producing its Senior Vice-President, its Vice-President of Gas Supply and

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Operations, and its Manager of Sales and Marketing. In those circumstances, Mr. McMorland had assumed that a couple of days of his attendance might be sufficient.

He did not know, of course, until last week that the argument concerning the production of California witnesses was going to take up part of this week, and that has further compressed his available time to testify.

Having said all of that, I can report this morning that Mr. McMorland, last evening and this morning, is in the process of extricating himself from his other commitments. He now hopes to be available until the end of this week.

Despite that, I would suggest that we still try and retain the A&S Panel in first position in the batting order, though I am open to your directions in that regard, sir.

---(A short pause/Courte pause)

THE CHAIRMAN: Thank you, Mr. Putnam.

That is good news. We will leave A&S first in the order of presenting witness panels.

Mr. Yates, do you have anything about Rule 26?

MR. YATES: Yes, Mr. Chairman.

What I will provide to you is a series of pages which have been excerpted from the annotation

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materials in respect to Title 28, which you will recall is the title which includes Section 1782 relating to

assistance to foreign and international tribunals, and to litigants before such tribunals.

The heading in the front of this package is "Scope of Rules "One Form of Action". Rule 1 indicates that the rules govern the procedure in the United States district courts in all suits of a civil nature.

Then I am also providing to you page 763, which includes a note to Section 1782, which specifically says that these matters are covered by the Federal Rules of Civil Procedure, Rules 26 to 32.

The rule which I was referring to specifically yesterday was actually Rule 30(6), which allows for subpoenas to be given to government agencies. And in my submission, the CPUC is, by its own assertions, a government agency -- it certainly purports to be that through its letter -- and therefore the Rules apply.

So what I will provide you with is copies of the document which I was just discussing.

THE CHAIRMAN: Thank you, Mr. Yates.

Are there any other preliminaries?

--- (No response/Pas de reponse)

THE CHAIRMAN: If not, I will ask counsel to come forward and speak to Mr. Yates' motions.

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CPA Motions
(Manning)

I would like to hear first from those in support of Mr. Yates.

Mr. Manning, please.

CPA MOTION FOR SUBPOENA, APPOINTMENT OF COMMISSIONER, AND ISSUANCE OF LETTERS ROGATORY IN RESPECT OF PGT/PG&E AND CPUC; AND MOTION TO STRIKE CPUC LETTER OF COMMENT FROM THE RECORD:

MR. MANNING: Good morning, Mr. Chairman, Board Members.

As indicated in the letter which IPAC has sent to all interested parties in this proceeding, dated February 13th, IPAC fully supports the motion of the CPA to obtain such orders and directions from this Board as may be necessary in order to obtain the evidence of the witnesses of both Pacific Gas Transmission Company and Pacific Gas and Electric Company.

There is one exception to our support of the CPA motion, and that deals with the manner in which we feel it is appropriate to consider the CPUC Letter of Comment. I will get to that later on in my submissions.

In IPAC's submission, the evidence of the

witnesses of PG&E and PGT is both appropriate and necessary for the following reasons:

Firstly, given that Alberta and Southern, the holder of the export licences issued under GH-5-88, is a

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(Manning)

wholly-owned subsidiary of PG&E, the corporate affiliation between these two companies and, for that matter, the corporate affiliation between Pacific Gas Transmission Company, a wholly-owned subsidiary of Pacific Gas and Electric, would suggest that in order to obtain the most full and complete record relating to the position of A&S, and the impact the CPUC decisions might have on the Board's findings of fact and its decision in GH-5-88, the parties best able to provide this evidence are in fact those that own and control A&S; that is, PG&E, and PG&E's wholly-owned subsidiary, Pacific Gas Transmission, the transporter of the A&S gas supply to Northern California.

In IPAC's view, the Board must hear the best evidence available regarding the chain of contractual arrangements underpinning the A&S export licences.

Given that the chain of contractual arrangements involves both PG&E and PGT, it follows that the Board must here directly from these parties in order to obtain the best and most complete record possible.

Secondly, and perhaps even more importantly, it is appropriate for PG&E and PGT to be present and present their views to the Board.

As the Board is fully aware, any decision made by it should be made after consideration of the most complete record available and after hearing the submissions

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(Manning)

and evidence of all parties who are likely to be affected by any order that the Board may make in this proceeding.

As it is not unreasonable to expect, this proceeding may or will result in an order or orders that, in some way, either directly or indirectly, affect PG&E and PGT, either by way of their legal rights, their commercial interests, or in their pocket.

This being the case, it is clear that both of these parties are necessary and proper to this proceeding.

The PG&E corporate family, which consists of PG&E as the parent and PGT, A&S and ANG as its siblings, is and has been the sponsor of the Alberta-California Pipeline Project which was put together in the 1950s and resulted in the construction of the PG&E pipeline and related upstream and downstream facilities, which have enabled Canadian gas

to flow through to the PG&E market in California since 1960.

Each of these family entities was created to play a role in the Alberta-California Pipeline Project. Each of the members of this family played a role which was carried out at the direction of its parent, with the view to benefitting PG&E and PG&E's consumers by obtaining a secure long-term supply of Canadian gas.

It would appear that the role of A&S in the Alberta-California Project has been, and continues to be,

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(Manning)

restricted to aggregating gas supply and obtaining and keeping current the required Canadian regulatory approvals.

If one considers that the purpose of the Alberta-California Project was singular -- that being the construction of a pipeline in order to access and secure long-term Canadian gas supplies -- then it is reasonable to expect that any policies of the CPUC which might impact on PG&E, the corporate parent, would have an impact on the corporate subsidiaries which were created to carry out the singular purpose of the Alberta-California Pipeline Project.

In IPAC's view, it is noteworthy that A&S did not participate in the CPUC Capacity Brokering proceeding. Apparently, A&S relied on PG&E to put forth the position of the Alberta-California Pipeline Project before the CPUC. This being the case, A&S is less equipped to provide the Board with useful information relating to the issues in the CPUC proceeding.

In this regard, it is noteworthy that A&S, in its Response to IPAC Information Request No. 6, has confirmed that this is the case, and has noted that A&S has not made any representations in any proceeding before the CPUC or before the FERC over the last two years. A&S stated in its response that, and I quote:

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CPA Motions
(Manning)

"...PG&E and PGT have performed similar roles" -- that is, keeping abreast of regulatory and government affairs and making representations to the appropriate authorities in the United States -- "within their respective regulatory jurisdictions..." This involved making appropriate representations to U.S. authorities on matters affecting the Alberta-California Pipeline Project.

As PG&E is the party who participated in these proceedings and represented the interests of the Pipeline Project, it is best equipped to provide this Board with a complete understanding of the dynamics related to the CPUC's policies.

Also noteworthy, in IPAC's view, is the fact that two of the five witnesses which the CPA has requested attend and give evidence in this proceeding -- namely, Mr. McLeod, Executive Vice-President of PG&E, and Mr. Gibson, Vice-President of Gas Supply of PG&E -- are both Directors of A&S.

Of equal importance, in IPAC's view, is the fact that the PG&E witnesses appeared during the course of the GH-5-88 proceeding and made representations upon which the Board presumably relied in issuing the export licence to say A&S.

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CPA Motions
(Manning)

These representations have been more fully described and outlined in the CPA Application and in Mr. Yates' able presentation to this Board with respect to the present motion.

The PG&E witnesses earlier supported the issuance of the export licences to A&S, and provided comfort, in the sense of reassuring the Board that the contracts underpinning the export licences would be adhered to and that the forecast requirements were one of the driving factors causing A&S and its corporate parent to seek and obtain further export licences from this Board in order to meet what was the then-forecast supply requirements.

Having heard the PG&E witnesses then, it is only appropriate to hear them now, so that all parties are given an opportunity to examine them with respect to their past position and with respect to the present changed circumstance.

It is for these reasons, as well as those cited by the CPA, that IPAC supports the CPA motion in this regard.

If the PG&E and PGT witnesses do not appear and participate in this proceeding, then the Board would not have before it all parties which would be necessary and appropriate in order to obtain a complete record; and

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CPA Motions
(Manning)

perhaps even more importantly, the Board would not have

before it several of the parties who may well be affected by the Board's order in this proceeding.

Insofar as PG&E and PGT are directly involved in the contractual arrangements relating to the gas supply underpinning the GH-5-88 export licences, for these parties not to participate would be tantamount to withholding of information as PG&E, its end-use consumers, and PGT obtain the benefits associated with the corporate family's undertaking as it relates to the Alberta-California Pipeline Project.

In IPAC's view, if these parties obtain the benefit, let them come and speak to the matters at issue in this proceeding, which clearly relate to the benefits they have obtained over the years under the various contractual arrangements underpinning the export licences.

The commonly accepted test which is applied by the Courts in determining whether a party is necessary or proper to a proceeding, and whether that party should be added to that proceeding, is well stated in the case of Re Starr.

Mr. Chairman, copies of this case have been distributed to counsel in the room who are going to be dealing with this motion.

This case is one which involved a judicial review and it is often cited as authority for the tests which the courts utilize in determining whether it is appropriate to add a party to a proceeding.

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CPA Motions
(Manning)

The test can be stated as questions to be posted by a court or tribunal, and there are three of them, as follows:

1. Do to the parties seeking to be added have a "considerable commercial interest in the results of the proceeding"?

2. Are the persons who are sought to be added to the proceeding those whose rights are directly or substantially affected by the result of the proceeding?

3. Is the person sought to be added in some way going to be affected in his legal rights or his pocket as a result of the proceeding?

This case stands for the proposition that if the answer to any of these questions is "Yes", then that party is both necessary and proper to the proceeding and should be added in order to enable the court to effectively and completely determine and adjudicate upon the matters at

issue.

The point here is that all parties who may be directly concerned in the outcome of the proceeding should be part of it.

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CPA Motions
(Manning)

In IPAC's submission, when the Board poses these questions in determining whether PG&E and PGT should be parties to this proceeding, it will be clear that the answers to these questions will be "Yes".

Both PGT and PG&E are parties who either are or may likely be directly affected by the outcome of the Board's decision in this case. Both are parties who have legal rights which either will or may be affected by the Board's decision here.

Further, it is clear that both PG&E and PGT's pockets will be affected.

It is beyond doubt that these parties have a substantial commercial interest in any decision which might be taken by the Board which would impact upon the gas supply arrangements of the A&S producer pool, the conditioning of short-term export orders, or the potential amendment to ANG tariffs.

IPAC submits that the Board has clear jurisdiction to compel the evidence of PG&E and PGT as provided under Section 11 of the National Energy Board Act, which Mr. Yates touched on yesterday and which, as you are aware, provides that the Board is vested with the powers of a superior court of record.

Under the Board's Rules of Practice and Procedure, it sits and holds hearings, it has all the

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(Manning)

powers to summon and compel the attendance of witnesses, to administer oaths to witnesses, to compel the production and inspection of documents, to enter upon and inspect property, and to enforce its decisions and orders.

The Board can, and in IPAC's submission should, compel PG&E and PGT's witnesses to give their evidence in this proceeding.

The Canada Evidence Act, which applies to NEB proceedings and other matters over which Parliament has jurisdiction, provides, in Section 5, and I quote:

"No witness shall be excused from answering any question on the ground that the answer to the question may tend to incriminate him or may tend to establish his liability to a

civil proceeding at the instance of the Crown or any person."

In IPAC's view, this provision of the Canada Evidence Act, together with Section 11 of the National Energy Board Act, puts beyond doubt the Board's jurisdiction and power to compel the attendance of these witnesses for the purpose of taking the best evidence possible.

One last point should be made with respect to this aspect of the CPA motion.

In IPAC's submission, all one has to do here 0157 CPA Motions (Manning)

is to refer to the Hearing Order in this proceeding. In it the Board stated that it found, in deciding to issue the GH-5-88 export licences, that the Northern California market was a proven and highly dependable market and likely to remain so over the term of the licences; and that the proposed exports would provide net benefits to Canada.

The Board also found that are now new facts and changed circumstance which warrant this review.

In finding that the proposed exports were of net benefit to Canada, the Board must also have found that the exports were in the public interest.

If new facts and changed circumstance warrant a review of the export licence, then it follows that these new facts and changed circumstance, as determined to exist by the Board, pose a potential threat to the net benefit of Canada and to the public interest.

With this in mind, the Board framed the issues in the Hearing Order, and these issues include among them Issue 1, which deals with the effect of regulatory action taken by the State of California and the consequences of the California actions on the Board's findings and decision in GH-5-88.

As noted earlier in my submission, PG&E represented the interests of the Alberta-California Pipeline Project at the CPUC Capacity Brokering 0158 CPA Motions (Manning)

proceedings. A&S did not participate.

In IPAC's submission, for this reason, PG&E is not only the best witness on this issue, but the only witness who can speak to the issue on the part of the Pipeline Project and the PG&E coporate family. This is because PG&E represented the interests of the Pipeline Project before the CPUC.

Similarly, PGT is, in IPAC's submission, the best witness, and perhaps the only witness, that can speak to Issue (f) of the Hearing Order; that is, the issue which deals with whether amendments to the ANG tariff are required to address the matter of access to the pipeline capacity for long-term contractual arrangements.

The Board will want to consider the impact of such amendments and, in particular, the impact it might have on the interconnecting PGT pipeline.

In IPAC's view, PGT's evidence in this regard is crucial.

CPUC Letter of Comment

I am going to turn now to IPAC's comments on the CPUC Letter of Comment. As I noted earlier, this is one area in which IPAC differs from the CPA.

In IPAC's view, the appropriate method of dealing with the CPUC Letter of Comment is simply to strike it from the record.

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CPA Motions
(Manning)

IPAC believes that because the CPUC is a regulatory body, it is inappropriate to take steps to compel the CPUC to present witnesses in this proceeding and provide evidence in order to speak to the matters contained in the Letter of Comment.

Now, should the CPUC wish to participate in this proceeding, all it need do is intervene. It can then choose whether it is prepared to present evidence, cross-examine, and submit argument. This choice is up to the CPUC.

In IPAC's view, the CPUC should not be accorded any special privileges beyond what are extended to any other party with respect to making statements before this Board in the form of a Letter of Comment, or otherwise.

IPAC has been advised that the CPUC President, Mr. Stan Hulett, appeared -- apparently voluntarily -- in a proceeding sometime around 1985, and that would be the FERC Mojavi Pipeline proceeding. President Hulett apparently presented evidence and was cross-examined on it.

This is simply an example of the fact that the CPUC can, when it decides to do so, present witnesses to speak to evidence. The point is: If it did it then, it can do it now.

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CPA Motions
(Manning)

The CPUC Letter of Comment is some 15 pages in length and attaches an appendix of an additional 95 pages. In IPAC's view, the CPUC Letter of Comment goes far beyond what is considered appropriate for a letter of comment.

The document makes what are, in IPAC's view, inflammatory and accusatory statements relating to anti-competitive actions, unilateral regulatory intervention, potentially adverse long-lasting ramifications to the perception of the continued California access to long-term secure Canadian gas supplies.

Further, the CPUC filing makes unsupported statements regarding the Canada-U.S. Free Trade Agreement, the authority of the CPUC and how it relates to other jurisdictions, and the principle of sanctity of contract and its foundation in law and business practices.

These statements are apparently designed by the CPUC to have some impact on this proceeding. If the CPUC wishes to impact this proceeding, it should, like all other parties, present a witness so that the CPUC's view can be subjected to cross-examination.

Ample precedent exists for the Board to refuse to accept the Letter of Comment, and Mr. Yates touched on these precedents yesterday.

In IPAC's view, the decision in the GH-5-89

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CPA Motions
(Manning)

Hearing is determinative of this issue. And as you will recall, in GH-5-89 the Saskatchewan Government, through the Department of Energy and Mines, sought to introduce a Letter of Comment which purported to make some submissions with respect to an issue which was critical to the GH-5-89 proceeding, and that was toll methodology.

The Board considered the matter and the submissions of parties with respect to whether that Letter of Comment should be allowed to stand, and the Board decided to exercise its discretion and declined to accept the Letter of Comment "because it raised questions both of fact and opinion which could legitimately be challenged and because we know" -- as the Board then said -- "that at least one party wished to challenge the Saskatchewan Government by way of cross-examination".

It is clear that the CPUC Letter of Comment raises both questions of fact and opinion which can legitimately be challenged. The CPA has indicated it wishes to challenge those statements; so would IPAC; and so

may other parties to this proceeding.

Therefore, to allow the Letter of Comment to be received into the record of this proceeding without a CPUC witness speaking to the substance of what is contained in the Letter, and being cross-examined on it, would amount to a denial of natural justice.

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CPA Motions
(Manning)

In IPAC's view, therefore, the letter must be refused by the Board.

Mr. Chairman, that concludes my submissions on the CPA motion.

I have something in the way of a procedural musing that I would like to raise for consideration.

After all parties have been heard with respect to this motion, the Board will have to rule on whether it is prepared to take such steps as may be necessary in order to obtain the witnesses of PG&E and PGT.

Assuming that the evidence of these witnesses is found by the Board to be necessary and appropriate, then it is reasonable to expect that the prospect of a delay in this proceeding would present itself.

This delay would presumably come about by reason of the Board affording a reasonable time for PG&E and PGT witnesses to prepare their evidence, file it, circulate it to Interested Parties, and thereafter have Interested Parties be afforded an opportunity to present Information Requests in relation to the evidence, and to allow all parties who might be interested in cross-examining these witnesses a reasonable time to prepare, so as to avoid what otherwise might be an unproductive series of cross-examinations from occurring.

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CPA Motions
(Manning)

I just speak to this now so that it is raised for the Board's consideration.

That concludes my submissions.

Thank you.

MR. GILMOUR: Mr. Manning, I had a question with respect to the Re Starr case, which I do not have a copy of.

You mentioned three questions. I assumed that the three questions applied to a party who wished to be admitted as a party to the case.

I wonder if they apply equally to a party who would be sought to be compelled to become a party to the case.

MR. MANNING: Yes. In my view, sir, they do.

You are correct; in that case, a party came and sought to be added. But it often occurs that someone seeks to invite another party to the "party", as Mr. Yates characterized it yesterday.

I think what should be central for this Board's consideration is whether, if you pose those questions, the answers are "Yes".

In IPAC's view, they are.

Next, if the answers to those questions are "Yes", then I think you should go further and consider

whether, if you make an order or decision which in some way affects or impacts PG&E or PGT, will they be bound by it.

From my understanding of the law, if they are not parties to the proceeding, they will not be bound by your order or decision, so that they are, in that sense, appropriate parties to have before you in this proceeding.

MR. GILMOUR: Surely if they judged that they were going to be affected in their rights, or their "pockets", which is the third question in the Re Starr case, they would be here.

MR. MANNING: Sir, I think they are here. I think they are just reluctantly coming forth.

As I remember the correspondence that Mr. Yates referred to yesterday, they are interested and they support the proceedings as completely as they may be able to in the circumstances.

They have some difficulties because of other legal actions which are under way, and I think you will have to deal with that in considering and deciding the matter.

MR. GILMOUR: Thank you for that clarification, Mr. Manning.

THE CHAIRMAN: Thank you, Mr. Manning.

Mr. Edie, please.

MR. EDIE: Thank you, Mr. Chairman. Good morning, Mr. Chairman, Members of the Panel.

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CPA Motions
(Edie)

Mr. Chairman, my submissions this morning on behalf of Brymore Energy Ltd. -- which I will refer to as "Brymore" -- address only the first of the CPA's two motions.

Brymore takes no position with respect to the striking from the record of the materials filed by the California Public Utilities Commission.

First, Brymore has intervened in this proceeding based upon the grave concerns it has about the very nature of the CPA's Application for Review of Board Order GH-5-88 and of the consequences of this type of review, both to the instant case and to future proceedings before this Board.

In its oral motion, the CPA seeks to convince this Board that it should issue subpoenas against certain officers of Pacific Gas Transmission Company and Pacific Gas and Electric Company, to appoint a Commissioner, and to direct letters rogatory to the District Court for the Northern District of California.

Mr. Yates has gone to considerable time and effort, both in earlier correspondence and yesterday, to convince you that the evidence of these individuals is crucial to the development of a complete record in this proceeding.

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CPA Motions
(Edie)

With respect, the issue is much more fundamental than that.

I would like to address the characterization of the CPA's position in this proceeding. The CPA has taken great pains, in responding to assertions from PG&E, in distancing the CPA from those of its individual members who actually have contracts with Alberta and Southern.

I would like to quote Mr. Yates' letter of February 11, 1992, which is Exhibit B-11, at page 6. I quote:

> "First, the CPA is not a party to any of the Alberta court actions and therefore has no interest whatsoever in any form of pretrial discovery.
>
> Second, the CPA has no contracts with any of A&S, ANG, PGT or PG&E, (and) cannot by definition be involved in commercial

negotiations..."

Mr. Chairman, that second point is very important. Mr. Yates felt it sufficiently important to repeat during his oral argument yesterday.

The CPA is not a party to any of the contracts in question; yet it seeks redress from this Board.

On the one hand, it holds up its hands and

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CPA Motions
(Edie)

says: "Do not look at us. We are not involved in those particular contract disputes."

On the other hand, it seeks to have this Board issue orders which would effectively put great stress on those very contractual negotiations.

The CPA is a third party -- a "stranger" -- seeking to have this Board exercise its jurisdiction to review one of its earlier decisions. One could even go so far as to question the CPA's locus standi for bringing its application. However, Brymore does not feel it necessary to go that far at this time.

The next issue, sir, is: Who caused this hearing?

Mr. Yates suggested that if the Board had initiated this hearing on its own motion -- which it clearly has the power to do -- then the Board would need to issue subpoenas to have all relevant persons, in his words, "come to the party". Mr. Yates specifically means PG&E and PGT witnesses.

That may be true, but it is simply not the case in this particular proceeding. This is the CPA's Application and the addition of additional issues into which the Board has seen fit to inquire does not change that basic premise.

We do not believe we would be here without

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(Edie)

the CPA's original Application, and nothing the CPA can now say, after its own initiation, can alter that particular fact.

Mr. Chairman, Brymore sees three fundamental flaws with the process that is before you.

The first flaw relates to all proceedings

initiated by third parties, which is exemplified by the oral arguments today. Third parties do not have all the facts. That was made abundantly clear by Mr. Yates loquacious references to the evidence of PG&E and PGT.

Further, despite Mr. Yates' protestations to the contrary, and without attributing any base motives to the CPA in bringing this particular action, third parties may well have their own agendas, if not nefarious purposes.

Mr. Yates has asserted that natural justice implies that this Board must force or at least attempt to force witnesses residing in a foreign jurisdiction to provide evidence to this proceeding.

With respect to my friend, he is stretching the concept of natural justice. This proceeding is, in certain respects, akin to a preliminary inquiry in a criminal proceeding.

Leaving aside the CPA status to make the complaint for the moment, in a criminal proceeding, at a

preliminary inquiry, the Crown "must establish that there is evidence upon which a Judge or jury, at trial, could find the Defendant guilty". If such evidence exists, the case proceeds to trial.

Here, it is the CPA which must assert that there is sufficient evidence of new facts and changed circumstances since 1988 upon which this Board could proceed to a review of the GH-5-88 Decision.

If such evidence exists, a review would then be undertaken. Nevertheless, once the criminal matter proceeds to trial, the onus remains on the crown to prove its case based upon evidence it adduces.

Mr. Chairman, Brymore submits that at least procedurally this current proceeding is directly analogous to that criminal proceeding. The Board has found that the CPA has passed the first threshhold and has ordered the review of Decision GH-5-88.

However, meeting the threshold to cause the review to be conducted does not equal proving the case that the original decision ought to be overturned or amended. That onus remains with the CPA.

In bringing this particular motion, the CPA seeks to shift that onus to the Defendants, who are, in this particular case, A&S, ANG, PGT and PG&E, to prove their innocence.

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Again, with respect, that constitutes an unfair burden upon those parties which the rules of natural justice, repeatedly invoked by Mr. Yates, would not impose.

Mr. Chairman, this Board has quite rightly characterized the CPA as the Applicant in this particular proceeding, and that characterization appears in the letter that you sent to Mr. Yates dated February 5, 1992, which has been filed as Exhibit A-13. Therefore, in this particular instance, as I indicated, the onus remains on the CPA to prove its case.

By granting this motion, this Board would allow the CPA to shift that onus to A&S and its affiliated corporations. This Board ought not to do that, Mr. Chairman.

In its letter to Mr. Yates of February 5, the NEB reiterated its policy which it has followed to date with respect to the impact this proceeding could have on A&S and ANG.

That policy is to let the participants make their own cases and adduce the evidence they wish to adduce, in the clear and certain knowledge that failure to adduce relevant evidence may have an adverse impact upon the ultimate outcome of the proceeding from that particular participant's perspective.

The CPA would have you rule against the

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application of that policy to reviews of prior decisions of.

Brymore believes this to be a distinction without a difference. We submit that there is no difference, in principle, between an application and a review of a previous decision. Brymore therefore submits that this policy which has been implemented by the Board in the past is a fair and reasonable policy and ought to be followed in this particular case.

Mr. Chairman, I turn to the "thin edge of the wedge". Much has been made, in written materials, by the CPA of that "thin edge of the wedge of regulatory interference". Yet, that is what the CPA seeks in this Application: further regulatory interference in the marketplace.

Let me speak for a moment about the thin edge of another wedge.

If this Board grants the CPA motion and

allows the CPA to pursue its fishing expedition against PGT and PG&E, the wedge will have been driven into the certainty of all currently-outstanding export licences and any future export licence applications, and the ability of applicants to rely thereon.

Any third party, without direct involvement or interest in the transactions which underpin the licence,

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(Edie)

would be encouraged by the result of this proceeding to bring Application for Review of any export licence, alleging changed circumstances or new facts.

Mr. Chairman, in each and every case, there will of course be changed circumstances and new facts. That simply occurs by the passage of time and the flow of commerce and regulatory activities.

Such a third party could then go on a witch hunt, seeking to have this Board require the holder of the licence to justify why its licence should not be altered or even taken away.

This Board has not allowed such kangaroo court procedures in the past and, with respect, we submit ought not to now or in the future.

To allow the CPA's motion would be to fundamentally change the current practice of a prospective hearing for an export licence based upon a snapshot of -- again, Mr. Yates's terms -- the "best evidence available" at the time of the original application.

The CPA's approach would supplant that with a continuous frame-by-frame requirement on the part of the applicant to prove that its project was, is and ever shall be in the Canadian public interest.

Mr. Chairman, I submit that would be a bad movie indeed. The tentative title might be "Apocolypse

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(Edie)

Then".

Further confusion arises when one considers the issue of the framework of this particular review. Is this review to reapply the tests applicable at the time of the original hearing? If so, is it a full rehearing? Or is it a trial de novo, requiring all of the elements -- including, for instance, a cost/benefit analysis -- which were required at that time?

If so, we acknowledge that Mr. Yates' arguments that the market evidence of PG&E is relevant.

However, it is also conceivable that this Board would conduct its review in light of the current export licence procedures and tests.

If that is to be the case, it is clear from the GHW-1-91 written proceeding that this Board is at least directionally continuing its course toward less intervention in the marketplace and less regulation.

If the Market Based Procedure is ultimately modified by the Board's Decision in GHW-1-91 to exclude the requirement that evidence be provided to allow an assessment of whether export sales are likely to be durable over their term and load factor considerations, then Brymore submits that the evidence sought by the CPA from PG&E and PGT is no longer relevant to that review, and the CPA's motion would fail on that particular ground.

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(Edie)

Mr. Chairman, Brymore is confused by the combinations and permutations arising from the issue of the applicable test and the scope of this review.

What is clear is that this is an application for increased regulation by the self-styled champion of deregulation.

Mr. Chairman, the second fundamental flaw relates, again, to the process that we find ourselves in.

The normal process with respect to an export licence is for the export contract to be renegotiated, if in fact that is going to take place.

At that time, once renegotiation has been completed, the parties bring the new contract or the amended contract before the Board. Then the Board, with that amended contract before it, determines whether in fact to call a review of the original hearing or a new hearing on the basis of the changed facts.

Here we have the cart before the horse: no renegotiated contract.

No wonder the CPA is floundering around looking for evidence.

The third fundamental flaw, Mr. Chairman: The CPA sought this review, then expressed surprise that those parties who have a direct interest in the licences which were issued pursuant to Decision GH-5-88 did not wish

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(Edie)

to participate by giving evidence.

With respect, Mr. Chairman, the reason is obvious -- and Mr. Gilmour picked that up in questioning of Mr. Manning.

The CPA does not seek any order of this Board as a result of this review to have either or both of Licences GL-99 or GL-111 revoked or amended. Rather, they want them strengthened.

In those circumstances, there is no reason for PGT or PG&E to appear. Contrary to IPAC's submissions, the CPA's Application, if granted, would not negatively affect either PGT or PG&E. Rather, it would result in a net benefit to them, by boosting load factors under contracts entered into by their affiliates.

Why appear if there is no negative impact?

In fact, Mr. Chairman, in this case the CPA has asked this Board to shut the tap on all other competitors' shipments of gas into Northern California.

With respect, Mr. Chairman, this is like the boy who flags down the patrol car in the street. When asked why, Johnnie explains: "Some puke just hijacked Joe's produce truck."

When asked for a description of the thief and the truck, Johnnie says: "But I don't want you to focus on that. What I really want you to do is go arrest Sam."

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(Edie)

When asked why, Johnnie replies: "Because Sam might sell produce to the same stores Joe was."

I submit that the officer of the law might be puzzled by this scenario, Mr. Chairman; so should you.

Brymore certainly sees no connection between the A&S contractual dispute and the short-term orders to export natural gas.

With respect, Mr. Chairman, the effect of the Interim Order which has been issued in this case not only stops Sam from selling fresh produce to the stores to which Joe was selling, say in Airdrie, but to all other stores accessible from the entire No. 2 Highway.

Mr. Chairman, this is a contract dispute, notwithstanding CPA's attempt to expand this hearing into a national crisis. We already have enough of those.

The underlying circumstances leading to this hearing relate to a contract dispute involving a group of private parties, of which the CPA is not even a member.

Brymore does not believe that this Board should impose further regulation in an effort to resolve a contract dispute.

However, if action is required, Brymore submits that the only appropriate action by this Board must relate specifically to Licences GL-99 and GL-111.

Mr. Chairman, we have heard much from both

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Mr. Yates and from Mr. Manning on the "best evidence available".

They both indicated that the best evidence available to this Board was to come from PG&E and PGT. However, in listening to their argument, I jotted down that much of what they want relates to the policy of the CPUC.

That puzzles,me, Mr. Chairman. With respect, the best evidence as to the policies of the CPUC comes, not from PG&E and PGT, but from the CPUC.

In that regard, we submit that Mr. Yates' motion is misdirected.

Finally, Mr. Chairman, I would like to address the effect of the NEB intervention.

Although it has expressed its reluctance to be forced to bring this Application, what the CPA, in essence, seeks is further regulation of the natural gas industry. This pits our regulators against their regulators. This is simple brinksmanship, and ultimately will benefit no one, least of all the Canadian producing natural gas industry.

This Board already has evidence before it from Alberta Natural Gas Corporation as to that corporation's concerns over increased Canadian regulatory risk.

Brymore endorses those concerns and commends

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(Edie)

that this Board listen carefully and consider the consequences of stepping back into the regulation business.

Mr. Chairman, the Canadian public interest is indeed in jeopardy from applications such as this one.

Unless there are any questions, Mr. Chairman, those are all of my submissions on this issue.

THE CHAIRMAN: Mr. Yates...?

MR. YATES: Mr. Chairman, I was only going to comment that if that was "support", it raises the concept of the "Italian Army" to new heights.

THE CHAIRMAN: Mr. Yates, that was my mistake. I had assumed that people would be coming forward first who supported you, and I ought to have recognized from his written submission that Mr. Edie was not going to do that.

Let me ask then: Are there others who wish to support Mr. Yates' motion?

Mr. Fingarson, please.

MR. FINGARSON: Mr. Chairman, the Province of British Columbia does wish to support Mr. Yates and say a few words. I, too, was surprised by Mr. Edie's "support".

The Province agrees with Mr. Yates that it is essential that the Board have before it all of the facts which bear on the issues to be decided in this review and

inquiry, and it is important that it is both a review and inquiry.

It appears to us -- and we again agree with the CPA submission -- that the critical evidence as to the California market, and the effect that the CPUC actions have had on that market since the GH-5-88 Decision, would be best explained by those persons who originally testified as to the same matters, the PGT and PG&E officers and employees who Mr. Yates seeks to compel to testify.

In coming to our position on this matter, we asked ourselves one question: Whether there would be any doubt that if these people were available in the City of Calgary today, the Board would require them to come and testify at these proceedings.

Our answer to that is simple: It appears obvious to us that the Board, in that case, would issue subpoenas and would require what we view as the best evidence. The persons would be compelled to forthwith appear before this hearing and be available for cross-examination.

There is no doubt in the minds of the Province of British Columbia that the evidence is relevant to the issues. It is the best evidence available. It will not be second-hand; it will not be excerpts from transcripts in other proceedings. It would be the "real

stuff", the stuff upon which you need to base your decision.

We agree with Mr. Yates that in a proceeding of this nature -- a review and inquiry -- it is up to the Board and not the parties to determine what evidence should be before it.

In fact, in our view, the Board has a duty to ensure that it makes its decision on the best evidence available and to arrange the procedure so as to ensure that result.

We also think it is significant that the relief being requested by Mr. Yates and by CPA is against two parties who have voluntarily chosen to intervene and be represented by counsel. We think this is somewhat different from the Board exercising what are, admittedly, its very broad powers to require evidence from parties who had not been in that position; from strangers to a proceeding.

I think this is important with respect to some of the questions asked by Mr. Gilmour and the example brought up by Mr. Manning.

We are dealing with people here who are already parties; they have intervened.

The issue is one of jurisdiction of the Board and whether it can compel people who are within Canada to

appear before it and should do that, or whether it can extend that jurisdiction, through letters rogatory, into the U.S. and ask the help of the court to compel that type of evidence.

So we have two people who are already parties. Should they be compelled to give evidence or not?

If it is relevant, and if it is the best evidence, the answer, in my mind, is clear: You must do it.

We also agree with the CPA submission as to how to compel the evidence. The fact that the persons in question are outside Canada is, in our view, basically irrelevant.

The Board has the power and it should, through the proper use of that power, request the assistance of the courts of Northern California to obtain

the relevant evidence. That would be so only if subpoenas were issued and these parties refused to appear in these proceedings voluntarily, having received the subpoena.

We agree it would be appropriate for Mr. Priddle to be the Commissioner in such case, and that all intervenors in such case should have the right to cross-examine when that evidence is taken, if it is taken in Northern California.

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(Fingarson)

I should add one caveat to these remarks, and that is: The Province's position on this matter should not be taken to support any suggestion that the Board ought to exercise its powers to compel evidence from members of another regulatory commission.

You may or may not have those powers. Mr. Yates spoke as though they were there. We have not fully researched that question.

Assuming that you do, we do not think it would be an appropriate exercise of that power to compel or attempt to compel that type of evidence from another jurisdiction.

That brings me to Mr. Yates' second Application, with regard to striking out the Letter of Comment from the CPUC.

The Province agrees that the letter is basically comprised of evidence; that it goes far beyond what one might term an "ordinary Letter of Comment".

We feel that the letter, as drafted, is an abuse of the Letter of Comment procedure which has been established by this Board. It goes beyond the basic intent of that procedure.

It attempts to do precisely what the earlier CPUC letter claimed that no one but the California Public Utilities Commission, acting together, after a vote, could

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(Fingarson)

do.

We, therefore, feel and submit to you that the letter ought to be struck from the record. We agree with the IPAC submission on this. In view of our earlier point to you that it is not appropriate for this Board to attempt to compel evidence from a member of another regulatory tribunal, if the letter is beyond a real Letter of Comment, then all that is left for you to do, in our view, is to strike it from the record.

If it is left on the record, it should be given little or no weight. In fact, we will argue that it be given no weight.

Mr. Chairman, Members of the Board, that comprises our submission on these matters.

If you have no questions, I will retire.

THE CHAIRMAN: Thank you, Mr. Fingarson.

The Board has no questions.

MR. FINGARSON: Thank you.

THE CHAIRMAN: Ms. Moreland, please.

MS. MORELAND: Thank you, Mr. Chairman.

On behalf of the APMC, sir, I would like to make a very brief submission in respect to one aspect of the motion brought on behalf of the CPA, and that relates to the treatment of the Letter of Comment filed by the California Public Utilities Commission.

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(Moreland)

The APMC submits that this Board should strike the CPUC Letter of Comment from the record if the CPUC is not prepared to provide a witness to speak to it.

It seems fairly evident from the comments in the CPUC's letter of 27 January, which is Exhibit D-1-3, that it is not prepared to voluntarily appear in these proceedings and provide a witness to speak to the comments provided in the letter.

Sir, the APMC submits that you have two bases for exercising your discretion in striking the letter from the record.

The first of those bases is that the letter raises matters of fact and opinion which can legitimately be challenged, and in fact CPA and IPAC have indicated an intention or a desire to challenge those, should they remain on the record.

Sir, that is the test that this Board adopted in the GH-5-89 proceedings, and you have heard about that both from counsel for CPA and for IPAC.

The second basis upon which this letter can and ought to be removed from the record is that were you to permit this letter with the untested and, in our

submission, very wide-ranging statements to remain on the record, it would confer an unwarranted benefit or advantage on the California Public Utilities Commission, inasmuch as

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(Moreland)

it will not be required to provide a witness to speak to these statements like every other party in this proceeding who has chosen to participate through adducing evidence and the provision of a witness so that that evidence can be properly tested.

In our submission, sir, that is, and would be, a denial of natural justice to other parties to this proceeding, and I think that that is a test that this Board adopted in the RH-1-88 proceedings.

On both of those tests, sir, the APMC submits that the CPUC Letter of Comment fails and, accordingly, should be removed from the record.

Sir, subject to any questions on that very brief submission, that is all that I have to say.

THE CHAIRMAN: Thank you, Ms. Moreland.

The Board has no questions.

I take it those are all the counsel who wish to speak in support of Mr. Yates' motion.

Is there anyone in the Order of Appearances ahead of Brymore who wishes to speak in opposition to the CPA?

--- (No Response/Pas de reponse)

THE CHAIRMAN: It is your turn, then, Mr. Hollingworth.

MR. HOLLINGWORTH: Thank you, sir. I would

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(Hollingworth)

like to have a minute or two to get set up. I do not know if you would like to take a short adjournment. It should not take that long.

THE CHAIRMAN: We will just stay here, Mr. Hollingworth, thank you.

--- (A short pause/Courte pause)

MR. HOLLINGWORTH: Mr. Chairman, later in the argument I do plan to refer to cases, many of which Mr. Yates has in his book of precedents.

In order to conserve paper, we have not reproduced those again, but we have, and are distributing to you, copies of precedents upon which we will rely.

--- (A short pause/Courte pause)

MR. HOLLINGWORTH: Mr. Chairman, Mr. Gilmour, Mr. Fredette: This is the CPA's second attempt to secure the relief of having PG&E and PGT provide evidence and witnesses at this hearing, so really I suppose it is an appeal from the Board's earlier exercise of its discretion which was expressed in its letters of January 23, which are Exhibits A-2, A-3, A-4 and A-5.

The first attempt, sir, was initiated by the January 15 letter from Milner Fenerty, acting as counsel for the CPA.

This was, bear in mind, Mr. Chairman, before the due date for filing testimony of February 3rd.

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(Hollingworth)

Nevertheless, the CPA sought immediate confirmation of the participation of A&S, ANG, PGT, PG&E, and the CPUC. And it also sought a certain order of procedure.

At the time of this letter, all but the CPUC had registered as intervenors.

The Board replied, as I stated, on January 23rd in a series of letters. It requested the evidence of A&S and ANG, and it has it.

It advised the CPUC of its rights and the status of Letters of Comment. The CPUC apparently took that into consideration and concluded it could not appear.

It also advised the CPA that the decision of PG&E and PGT whether to file evidence and to provide witnesses was up to them and was a matter for those parties to decide by February 3rd, all in accordance with the directions on Procedure, Exhibit A-1.

And it noted that PG&E and PGT, and I quote, "are outside the territorial jurisdiction of the Board".

In its letters to A&S and ANG, the Board used identical language in the last paragraph, where it stated this:

"With a view to providing the Board with the best possible evidence, ANG (or A&S) will, if necessary in its judgment, produce witnesses from affiliated companies. These affiliated

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(Hollingworth)

companies may also wish to assist and support ANG or (A&S in) the presentation of its evidence by participating in the hearing."

The Board well knows, of course, that PG&E and PGT are affiliated with ANG and A&S.

I think what is significant, Mr. Chairman, is that the Board left the decision to participate -- which I suggest to you can mean several things -- up to PG&E and PGT. It left the type of case to lead to the judgment of A&S and ANG.

This is entirely consistent with normal Board practice, with normal court practice, and with normal practice before other tribunals. A party leads the case that it feels is appropriate.

If I understand Mr. Yates correctly, he concedes that his request to have PG&E and PGT appear stems solely from the fact that the Board called, in effect, its own inquiry. On the basis of the relief sought by the CPA, no evidence by PG&E or PGT is required.

Sometimes it is a little difficult, Mr. Chairman, to tell exactly what relief exactly Mr. Yates is seeking. He made the point yesterday of saying that CPA was not seeking rescission, or revocation, or even limiting, as I understand it, of Licences GL-99 and GL-111.

It is a good thing that he made that statement because, listening to him, I was under some misapprehension for a while that maybe that is what he was after.

He has sought relief that is enumerated in his Application and his amendment. And I repeat, sir, that nothing the CPA is seeking requires the testimony or evidence of PG&E.

In effect, Mr. Yates has to lean on the Board issues as his reason for advancing the motion that he spoke to at considerable length yesterday.

Only by asserting that -- and it is by his guess that A&S and others cannot address the Board's issues -- can Mr. Yates find any reason for his motion. He is telling the Board what it needs for its inquiry.

The Board has made its decision, but he does not like it. He is really saying: You, Board, are not capable of doing this without this evidence -- and, no doubt, his spirited cross-examination.

The January 23rd letters did not satisfy the CPA. On January 30th, it forwarded a letter saying it would not live with the Board's disposition; that it would seek to compel testimony from PG&E and PGT if they refused to appear.

It concluded with another attempt to alter

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the procedure that the Board had laid down.

As you well know, PG&E and PGT have subsequently declined to produce witnesses, and they have cited reasons.

A&S and ANG, on the other hand, duly filed testimony and they are here; they are ready to present it. They also answered Information Requests.

PG&E wants to reiterate, Mr. Chairman, its reasons for not filing testimony and producing witnesses. Then it will describe the practical and legal reasons as to why it should not.

But at all times, Mr. Chairman and Board Members, in considering why PG&E should not call evidence, the Board should balance those reasons against the reasons why PG&E has concluded that it will not call evidence.

PG&E's letter of February 3 sets out the reasons, and that is Exhibit C-39-3. It sets out several reasons for not appearing, and they are all as valid now as they were when the letter was written. They are on page 2, Mr. Chairman, of that letter, as you are looking at it. I think they bear repetition. I will read them.

"PG&E has been named, along with A&S, as a party defendant in three actions brought in the Court of Queen's Bench in Alberta by several Alberta gas producers. These

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plaintiffs (Amoco Canada, Shell Canada and Chevron Canada) are all members of the CPA.

In addition, each one has registered as an intervenor in these proceedings. Shell and Chevron have also named PGT as a co-defendant. The Plaintiffs' claims exceed $400 million. Briefly, they allege that A&S wrongfully breached its contracts with the plaintiffs; that A&S is the alter ego of PG&E so that PG&E is responsible for A&S' debts; that PG&E induced A&S to commit the alleged breaches of contract; and that PG&E otherwise wrongfully interfered with the contractual relationship between A&S and its producers."

The second reason:

"PG&E and A&S currently are engaged in confidential commercial negotiations with A&S producers to restructure PG&E's gas supply arrangements from Alberta and British

Columbia. This process is being undertaken in conjunction with a facilitator appointed by Alberta Petroleum Marketing Commission pursuant to the Natural Gas Marketing Act of Alberta."

And thirdly: "PG&E is the subject of a

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(Hollingworth)

formal review now being conducted by the California Public Utilities Commission...into the reasonableness of PG&Es Canadian gas purchases for the years 1988 through 1990.

In this case, certain parties, including the Commission's own Division of Ratepayer Advocates, are recommending that the Commission disallow hundreds of millions of dollars for alleged overpayments for Canadian gas by PG&E."

And Mr. Yates had the figure right yesterday; it is around $390 million (U.S.) that is supposed to come out of the pockets of the shareholders of PG&E. It is an enormous claim and one that the company treats with tremendous seriousness, as well it should.

Notwithstanding the scorn that is heaped on these reasons by my friend, PG&E regards them as very relevant and the risks as very real. PG&E was acting on the Directions of Procedure, coupled with the January 23 letters from the Board, when it decided not to attend.

It could merely have stated its intention not to appear. It could have even just not filed evidence, Mr. Chairman. That is the usual procedure. But it did not do that.

Clearly, the Board left it up to PG&E as to

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(Hollingworth)

what it wished to do. PG&E is not just snubbing this Board. It has been sued by three prominent members in good standing, of the Canadian Petroleum Association. Other actions may be pending -- and they may come from CPA members, or they may come from members of other organizations, or members of no organization.

Mr. Yates tut-tuts that CPA is not involved in the suits, or the contracts, or the restructuring.

Talk about ludicrous positions, Mr. Chairman.

The CPA is a trade organization. It is a lobby group and it is dedicated to looking after the best interests of its members, and especially the producer members. It reaches positions by votes of its members.

Don't believe for a minute that it is acting here without direction from those constituent members.

This can be demonstrated I think, Mr. Chairman, with two examples. The first is contained in Mr. Yates' lengthy letter of February 11, 1992, which is Exhibit B-11. I would ask you to turn to that, Mr. Chairman, and particularly page 6.

I refer you, Mr. Chairman, to a sentence that starts about two-thirds of the way down the page. It reads, and I quote:

"Second, the CPA has no contracts with any of

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A&S, ANG, PGT or PG&E, cannot by definition be involved in commercial negotiations, and has no interest whatsoever in forcing disclosure of `confidential and sensitive commercial negotiation strategies and results'. The Association is interested in having the Board uphold existing contracts which have already been determined to have been entered into in the public interest of this country."

Right away, looking at the two sentences, it is fairly obvious that there is a bit of a contradiction between the two. In two sentences, Mr. Yates tries to segregate restructuring from the contracts that the CPA is interested in having this Board uphold.

Mr. Chairman, it is these very contracts which are the subject of restructuring. The parties have recognized that there is a need to restructure because of events which have taken place, largely at the direction of the CPUC. They have entered into commercial renegotiations. Those are under way now. And what it affects, obviously, is existing contracts; and there will be new contracts that flow from those discussions.

The second example that I want to turn you to, Mr. Chairman, is found in the CPA Evidence, which is

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Exhibit B-9,and particularly Tab 7 of that material, which is the Application for Rehearing of the Canadian Petroleum Association of the CPUC Capacity Brokering Division.

Mr. Chairman, before I turn you to the specific page, I just want to read a representative example

of the kinds of stuff that is being alleged in the Court of Queen's Bench of Alberta. I am going to read to you paragraph 4 of the Statement of Claim of Amoco Canada Petroleum Company Ltd. and Amoco Canada Resources Ltd. as Plaintiffs against Alberta and Southern Gas Co. Ltd. and the Pacific Gas and Electric Company.

Here is what Paragraph 4 says:
"The Defendant A&S has and is engaged in the acquisition of natural gas under contract for ultimate consumption by the customers of the Defendants PG&E. The Plaintiffs say that all relevant activities of the Defendant A&S were under and at the direction of the Defendant PG&E or, alternatively, that the Defendant A&S was the agent and alter ego of the Defendant PG&E."
That is not unlike the summary I read to you a little earlier of what these Statements of Claim are about.

Reverting back to the Application for

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Rehearing, Mr. Chairman, I turn you to page 20. You will see a Subheading B which says: "The CPUC Errs In Ignoring The Nature Of The Relationship Between PG&E And Its Affiliates."
Let's read a little of this:
"The factual circumstances of the relationship between PG&E and A&S demonstrate that PG&E must be held responsible for the Canadian gas purchase contracts entered into by its wholly-owned subsidiary, A&S."
Doesn't this have a familiar ring to it?

"California law establishes that the "corporate veil" may be disregarded for purposes of holding one corporation liable for the obligations incurred by another where there exists "such a `unity of interest and ownership {between corporate entities} that the separate personalities {of these corporations} no longer exist,' and where inequity would result `if the acts are treated as those of the {acting} corporation alone'."
And it goes on from there, Mr. Chairman.

Can my friend seriously stand there and say that the CPA has no interest in some of the matters that

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are before the Courts?

It is just inconceivable that he could stand there and say that. It is factious in the extreme.

It is not just the CPA which concerns PG&E in this regard, Mr. Chairman. Look at the IPAC Information Request to Alberta and Southern. There are several questions in that which have a direct bearing on the court actions.

I am not going to enumerate those now, Mr. Chairman; I will leave it to you to have a look at.

Although Mr. Yates' letter of February 11 is the main argument of the CPA, it falls far short of providing details of any consequence. Indeed, considering its length, it is a remarkable shortcoming.

Since the issuance of a subpoena or letters rogatory is discretionary -- which even Mr. Yates concedes -- it is incumbent upon the CPA to say what it wants.

Really we were provided with details of any consequence only yesterday, in the course of Mr. Yates' presentation. Before that, I think the best clue was in the letter of January 30th that Mr. Yates also wrote to this Board, which requested a description of the events which have transpired since the GH-5-88 Decision, as well as the policies, objectives and decisions of those companies that affect Canadian gas sales to California.

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There are two elements to that: One is events that have transpired in California.

And you, Mr. Chairman, dealt with that squarely yesterday in your inquiry to Mr. Yates. You said: Well, isn't a lot of this on the public record? Isn't a lot of this CPUC Decisions? -- or in effect that is what you said.

Yes, that is exactly what it is. But Mr. Yates did not deal with that.

He is usually very thorough in dealing with questions, and I thought he side-stepped that one rather neatly. He did not answer you. But, yes, it is CPUC Decisions and CPUC proceedings that we are dealing with here.

And do you know who has been at those proceedings on an almost non-stop basis, Mr. Chairman?--The CPA. IPAC has been there a lot, and a group called the "Canadian Producer Group"--which I believe, except for one member, is entirely constituted of CPA members.

So it is not exactly as if they are ignorant

of what has been going on down in California.

As to the policies, objectives and decisions, that is all very interesting. But the question is: Is this evidence necessary or can it be obtained somewhere else?

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The fact of the matter is that there is no magic that PG&E is regulated by the CPUC and it has to do what its regulator directs.

It has resisted many CPUC actions, up to and including filing a Request for Rehearing on the Capacity Brokering decision.

However, the effects in the California market and the changed circumstances and facts that flow from that, flow from the CPUC Decisions. PG&E cannot speak to those with any more authority than the CPA, which attended the hearings. In some respects, it is speculation as to what may happen. We are still dealing in the future in a lot of this material.

Certainly the case with capacity brokering is one which may be undone by actions of the FERC in its mega-NOPR -- which you well know, sir, is not yet decided.

Most critically, the CPA does not know if this evidence will not be presented, particularly by A&S.

Exhausting himself in a blizzard of mail to the Board, Mr. Yates has apparently overlooked the possibility of asking Information Requests of Alberta and Southern.

He may still ask questions in cross-examination. A&S might not know, but it might know. If it does not know, it might have to go off and seek

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information. That is common before this Board.

And remember, you have to balance this against the severe prejudice to PG&E that it will suffer in the other actions if it is forced to appear here and be cross-examined by Mr. Yates and his friends.

Another thing you pinpointed yesterday, Mr. Chairman, was raised by Mr. Yates first on page 5 of his February 11 letter, which is Exhibit B-11. Just before the heading "PG&E and PGT Reasons for Refusing to Cooperate",

he deals with his concern about the criticism of the record and ignoring it.

Well, you asked yesterday: Who is he concerned about?

In my submission to you, Mr. Chairman, the concern is solely with respect to the CPUC. I think we have to ask whether Mr. Yates is not trying to get a decision here which will impress the CPUC; whether that is not the real agenda. Or maybe the real agenda is in the courts, or at the bargaining table.

These are questions, sir, valid questions that must be asked.

I found that passage in this letter of February 11 very interesting:

"Any decision based on such a record could subsequently be criticized or, at worst,

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ignored by affected parties."

What does that mean if it does not mean the CPUC?

There are a few other points that I want to make in response to Mr. Yates before I get into the legal questions, Mr. Chairman.

One of the parties that he wants to come here is Mr. McLeod. He says to you: Oh, well, Mr. McLeod appeared at the CPUC, and it was after the Amoco suit was filed, so what is the big deal?

Yes. But he left out a little.

Mr. McLeod did appear at the CPUC after the Amoco suit was filed. It was at an en banc hearing of the California Public Utilities Commission. Mr. McLeod there gave unsworn testimony, in the form of a speech really, before the full Commission, and he was not subject to cross-examination by any parties; he was subject to a few questions by the Board, and that was that.

For him to imply that Mr. McLeod had cheerfully shown up at the CPUC and submitted himself to the kind of appearance that Mr. Yates is asking he undergo here, is an unfair comparison.

Mr. Yates says: Well, PG&E was very willing to speak to the CPUC on the reasonableness case. The implication being: Well, why wouldn't it come here?

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Even using the "Yates scale of hyperbole", Mr. Chairman, this is outrageous. It is testifying to his regulator. PG&E is testifying to its regulator, and it has to do that or it loses $390 million. CPA does not want to be here. Well, PG&E does not want to be at the Reasonableness Case and be at risk for such vast sums.

I just could not believe that statement could be made.

Mr. Yates also refers to the considerable filings that PG&E has made in its Reasonableness filings. Yes, it has made considerable filings. Of course it would; it is trying to defend itself against losing $390 million.

I ask you to recall and remember, Mr. Chairman, several things about that testimony. First of all, it has not been sworn; it will not be presented, as I understand it, until April or later; it is subject to revision before that time; and it was prepared for a different tribunal, with different rules, from a different perspective.

Lastly -- and this is a point that Mr. Edie made rather well I thought -- The CPA is proposing unprecedented action in seeking to compel testimony of both PG&E and the CPUC. Consider the consternation here if producer representatives or Board Staff or Members were ordered to testify at a CPUC proceeding. The possible

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consequences of what Mr. Yates is seeking from you are simply enormous.

I want to move to the legal considerations before I come back to some of these points, Mr. Chairman.

I have some remarks by way of general effect. I want to deal with the subpoena and the letters rogatory on the assumption that the Board has jurisdiction to do it, which is what Mr. Yates has been asserting to you. But it is just an assumption, and I want to come back to the question of jurisdiction after a little time.

With respect to the subpoena, sir, I do not have very much to say. Mr. Yates says that they have been issued by this Board, and he received that advice from Board Counsel.

My advice is that, to the best of Board Counsel's recollection, any subpoena ever issued by this Board was to a party that really wanted to appear, but had to have a subpoena served on it in order to show to his or her employer, or something of that nature.

As I understand it, we are not talking about

the NEB having ever served a subpoena on an unwilling subject. Let's be clear on that.

The second thing, of course, is that the subpoena is clearly for use within Canada.

I notice that Mr. Fingarson said: Oh, the

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Board ought to go ahead and issue subpoenas.

I do not know whether he thought that the Board ought to then fly down to San Francisco and serve them, but that would be the most outragous invasion of the sovereignty of the United States that I could imagine, and it is probably why the Board's Rules clearly state that subpoenas are to be used within Canada.

Even Mr. Yates concedes that.

And be it recalled that all five of the parties Mr. Yates would like to have here, one of whom is of course with PGT, are residents of California.

So it is probably safe to say that the issuance of a subpoena would be a nugatory action on the part of the Board and essentially a waste of time.

But if this Board even considers issuing subpoenas, we would agree with Mr. Yates that it is a discretionary act. And the discretion should be against the issuance, because there is no valid reason for the PG&E Executives presence here, which has been shown, especially when balanced against the prejudice which I have spoken to. PG&E could suffer, and suffer substantially, by the appearance of these witnesses and their exposure to cross-examination by some of the parties here.

Dealing with commission evidence, which I think is the main point, sir, the first thing to recall --

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and again, I agree with Mr. Yates on this -- is that it is a discretionary act. It is to be dealt with according to the particular circumstances of each case.

Mr. Yates relied, as do I, on the Ehrmann and Ehrmann case, which is Tab 10 of his book. It is a decision of the English Court of Appeal late in the last century.

Essentially it says that evidence which is desired to be obtained abroad must be really necessary for the purposes of justice. It is not enough to say that it may be of some use on a collateral matter.

And this is really the law in Canada. It has been followed here in several cases. I do not intend to go into those, because most of them mention the Ehrmann case.

So the Board must ask itself, in exercising this discretion, whether it is necessary to obtain the proposed evidence; and whether the evidence cannot be secured, except by the intervention of the courts of California, or the federal courts in California, whichever Mr. Yates goes to.

I am thinking, of course, of the testimony which Alberta and Southern will be presenting to you, and the CPA itself will be presenting to you, and IPAC will be presenting to you. This Board simply does not know yet whether it has to have this testimony of PG&E that Mr.

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Yates' asserts that it does.

It is not enough that the proposed evidence is merely corroborative or incidentally useful. To make that determination, the Board must be apprised of the particulars of the proposed evidence. The CPA must establish that the evidence is in the exclusive knowledge of PG&E and that it cannot be made available any other way.

In my submission, Mr. Chairman, Mr. Yates has failed, on a massive scale, in making that point.

Look at the February 11 Application. It fails to particularize, in any sufficient or adequate manner, what evidence CPA proposes adducing from PG&E that is not otherwise available.

Unless the evidence is identified, the Application is groundless. At best, it is premature, until it is known what evidence is available from the parties who are full participants in this hearing already.

One thing that Mr. Yates did early on was name the witnesses that he wanted here.

I thought to myself when I first saw this, not being schooled in commission evidence matters at that time, it was pretty outragous. I had never heard of a Board proceeding where another party named the witnesses that it wanted Intervenor 'X' to show up with.

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Then as I looked into letters for commission evidence -- that is, letters rogatory -- I realized that indeed this is customary; you do name the witnesses. There

is something else that you name too: you set out the list of questions that you want to be answered by the witnesses.

Has that been done? Absolutely not.

Or in the alternative, the requesting tribunal -- and that is you -- should particularize, in sufficient detail, the nature of the controversy and the subject matter about which the witnesses are to be examined so that the executing authority -- that would be the Court in California -- can frame its own questions.

Support for that, Mr. Chairman, can be found under Tab 5 of the precedents which I gave to you, and that is part of a text by Jean Gabriel Castel entitled "Canadian Conflict of Laws".

Professor Castell has been teaching for many, many years at Osgoode Hall. I say "many years" because he taught me, Mr. Chairman, and that was a long time ago.

I said earlier that I wanted to talk about the powers of this Board in matters of jurisdiction, Mr. Chairman, and I want to turn to those now.

On the question of whether to issue a subpoena or commission evidence, you have to consider one

thing: Mr. Yates says repeatedly that the NEB is a superior court of record.

With all due respect, Mr. Chairman, the NEB is not a superior court of record.

It is a court of record, and that is plainly stated in Section 11(1). It has, by virtue of Section 11(3), all such powers, rights and privileges as are vested in a superior court of record with respect to certain matters only, Mr. Chairman; and these include the attendance, swearing, and examination of witnesses.

That precise wording, sir, was adopted by Mr. Justice Cattanach in another case that Mr. Yates and I both took to, and that is at Tab 4 of his materials. He referred you, in part, to that yesterday and I thought that it was appropriate that he do so.

He turned you to page 524 of the decision at Tab 4 of his precedents and he read to you the passage which says that "the fact that the statute designates the Board "a court of record" does not constitute the Board a

court of law or justice in the legal sense of that term", and then he goes on.

I want to speak to that for a moment.

First of all, Mr. Justice Cattanach's remarks were obiter dicta -- which is to say that they were not the basis for the decision.

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That aside, I think I need to go on and say that the Board is a court of record by virtue of its act. It does not have any inherent jurisdiction. That is to be compared to what we call Section 96 Courts under the Constitution Act of 1867.

Mr. Yates referred you to the Keystone case in the Manitoba Court of Queen's Bench. The Keystone case is Tab 8 of his materials. The Manitoba Court of Queen's Bench is a court of inherent jurisdiction; the Alberta Court of Queen's Bench is a court of inherent jurisdiction.

The National Energy Board is not; nor is the Federal Court of Canada.

This Board derives its powers from its Act and its Regulations, and so does the Federal Court of Canada. This distinction becomes very important as the argument progresses.

The Board's Regulations or Rules of Practice and Procedure are a bit complex, Mr. Chairman -- and you will recall that I talked about this a few weeks ago in a conference that we were both at.

As usual in this hearing, the Board has directed the use of the Draft Rules of Practice and Procedure dated the 21st of April of 1987. They are Draft Rules because they have yet to be passed by Cabinet by way

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of an Order in Council.

There are still extant Rules of Practice and procedure which are contained in the Consolidated Regulations of Canada in 1978. They have been amended several times by subsequent orders.

Those, sir, are found under Tab 1 of the materials which I have supplied to you for your reference. I will be coming back to them in a moment.

Those regulations, sir, have not been repealed. I found it interesting, when I was researching

this, that a well-known text on matters concerning the National Energy Board -- and that is Canadian Energy Law Service by Alastair Lucas and now Madam Justice Constance D. Hunt -- still include both sets of rules of practice and procedure.

The Draft Rules qualify as a regulation under the Statutory Instruments Act of Canada, which is found in Statutes of Canada, 1970, 1971, 1972, as Chapters 38, as amended.

That Act, in Section 9, says that no regulation comes into force until it has been registered with the Privy Council Office.

That has not happened. We checked on it very recently.

Nor do the Draft Rules fall within an

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exempted class of regulation.

Consequently, sir, the Draft Rules of Practice and Procedure have no force in law.

Mr. Yates cites the Draft Rules as granting the power to have a Commissioner take evidence out of the jurisdiction. He does that in several places. One place is on page 11 of his February 11th letter.

He then relies on Section 36(3) of the Board's Draft Rules, and that says:

"The Board may at any time order that...

(c) any witness be examined before a Commissioner or other person authorized to administer oaths appointed by the Board for that purpose."

Of course, he is suggesting, sir, that you be appointed for that purpose.

I think, sir, the wording of that section has to strike you as being fairly general. But from this, Mr. Yates derives specific powers to take commission evidence.

I would like you to compare that, sir, to the Rules of Court of several provinces. Those are found under Tabs 11, 12 and 13 of the materials which have been put in front of you.

Tab 11 is British Columbia. And look at the detail that it goes into. It sets it all out for you as to

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how you are supposed to do it. It goes on for a couple of pages; it sets out the forms.

Go to Ontario, under Tab 12. There is the heading of the rule, "Where person to be examined resides outside Ontario." It goes on at some length; it provides the forms, Mr. Yates has thoughtfully done for you, sir. But, significantly, the Rules of Practice and Procedure do not provide it.

Alberta is a little more economical in its language, but nevertheless, in Rule 270, which is under Tab 13, it deals with this matter. It deals specifically with taking evidence within or without the jurisdiction.

Compare all that wording to Section 36(3).

I think it is pretty reasonable to assume that Section 36(3) is really only directed at situations where a witness is simply unable to come before you -- to get testimony from a hospital bed or something like that, where it is thoroughly inconvenient. They are coming to give you fairly minor testimony from a great distance and it is inconvenient, sir. Something of that nature.

To boot-strap Section 36(3) into providing you with the necessary wherewithal to issue letters rogatory for taking commission evidence in the State of California is a fair leap indeed.

Interestingly, sir -- and I come back to this

point now -- the original Rules of Practice and Procedure, if you like, the 1978 rules, do cover the attendance of witnesses, and they do it in Section 18.

I will read that rule, because not everybody has this book. It reads:

"The production and inspection of documents and the attendance and examination of witnesses in proceedings before the Board upon an application shall be enforced in the same manner as in the Federal Court of Canada."

So the Board is thus confined, in my submission, sir, to the jurisdiction possessed by the Federal Court of Canada in requiring attendance and examination of witnesses. This is a critical point.

The Board may be clothed by its Act with the powers of a superior court of record in terms of compelling the attendance of witnesses, but it has, by Section 18 of the 1978 Rules -- which are not contradicted by the Draft Rules, even if they have validity. And they say: We are restricting ourselves to the rules that the Federal Court

of Canada has imposed upon itself, and we are imposing those upon ourself.

The Federal Court is governed by the language of the Federal Court Act which is found in the Revised

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Statutes of Canada, 1985, as Chapter F-7, as Amended.

This Act is completely determinative of the scope of the Court's -- and therefore the Board's -- jurisdiction. That is because this is not a court of inherent jurisdiction, nor is the Federal Court.

Even if you assume that the Draft Rules, and Section 36(3)(c) in particular, are valid, the rule is general and vague.

Secondly, it does not supersede or repeal the earlier legislation -- that is, Section 18 -- except where there is an inconsistency such that the two legislative enactments cannot stand together.

There is very recent authority for that proposition, sir, and that is found in a case that I am sure the Board is well familiar with, and that is the Friends of the Oldman River Society and Canada, under the Minister of Transport. That is found at Tab 4 of the materials that I have presented to you.

Nothing in the 1987 Draft Rules is inconsistent with Section 18 of the 1978 Rules, Mr. Chairman. Therefore, Section 18 is valid and the Board is bound by it, and therefore it is bound by the Federal Court Rules in taking commission evidence. So you have to look at the Federal Court Rules, and Rule 477 is the relevant one. It is found under Tab 2 of the materials which I have

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presented to you.

Not dissimilar to the provincial rules that I referred you to, it goes into some length as to how this is going to be done, and quite unlike the rules of the Board, draft or otherwise.

I do not want to read Rule 477 because it is so long, but it is silent on the jurisdiction of the Federal Court to issue letters rogatory to give effect to commissions conducted outside of this country.

That is incomplete contra-distinction to, say, Rule 290 of the Alberta Rules of Court, which makes explicit reference to letters of request being issued by the Court of Queen's Bench.

Indeed, the jurisdiction of the Federal Court to issue letters rogatory remains undecided. Authority for that proposition can be found in a case Mr. Yates thoughtfully presented, which is Tab 11 of his materials Xerox of Canada Limited and IBM Canada Limited.

A look at that case shows you the considerable doubt. In that case, Xerox questioned the jurisdiction of the Federal Court to issue letters rogatory, and ultimately the Court cast doubt on its ability to do so.

It is my submission, Mr. Chairman, that Rule 477 merely constitutes the necessary domestic law to give

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effect to the international civil procedure conventions governinig the taking of evidence on a reciprocal basis between Canada and the States concerned in civil and commercial matters.

Interestingly, Canada is not a signatory to any such bilateral convention with the United States. It is with many countries in Europe; not with the United States.

Authority for that proposition can be found in Professor Castel's text, at page 123, which, as I said earlier, is Tab 5 of our materials.

Further, Canada is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The date of that Convention is March 18, 1970.

In the absence of a civil procedure convention, the court must rely on any inherent jurisdiction it may possess to issue letters rogatory.

Authority for that can be found in the Keystone Fisheries case that is in Mr. Yates' materials and in Wigmore on Evidence which is in Mr. Yates' materials.

However, the Federal Court is without any inherent jurisdiction, as I have described to you. The language of the Federal Court Act, as I have said, is completely determinative of the scope of the Court's

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jurisdiction. Authority for that can be found in Roberts v. Canada, which is Tab 6 of the materials which I have

presented to you.

Nor, in my submission, sir, can the CPA argue that the issuance of letters rogatory is purely a matter of procedure over which the Federal Court may have inherent jurisdiction. The issuance of letters rogatory is a matter of substantive public international law grounded on international comity.

Mr. Yates talked to you about that yesterday.

The Court of Appeal in Ontario dealt with this matter in Re McCarthy and Menin and the United States Securities and Exchange Commission -- interestingly, a regulatory agency. And that case, sir, is found at Tab 7 of our materials.

The court observed, with respect to a court's discretion to execute on foreign letters rogatory as follows:

> "The legislation--" (which is the Ontario Evidence Act and the Canada Evidence Act) --"is designed to provide as a matter of international courtesy or comity for the taking of evidence of persons within the jurisdiction of our courts in aid of foreign courts and inherent I think in the idea of international courtesy or comity is a mutuality of purpose and of powers. Letters rogatory emanating either in this Court or received in this country from a foreign Court generally contain the expression by the Applicant `We shall be ready and willing to render the like assistance to you when requested'."

That is found at page 161 of that Decision, Mr. Chairman. I apologize for not mentioning that earlier. That passage starts about a third of the way down the page.

In deciding the question of the Board's jurisdiction to issue letters rogatory under the auspices of the Federal Court Rules, it is noteworthy that the Board and the Federal Court have no power to reciprocate and execute on foreign letters rogatory, thus lacking the requisite mutuality of power ordinarily required in international law.

Again, I refer you to the Xerox and IBM case and also to the Canada Evidence Act, Sections 43, 44, 46, and 47. And that is found, sir, under Tab 8 of the material that has been presented to you.

Given all these circumstances, sir, it is my

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submission that the weight of authority indicates that the Board is without jurisdiction to order a rogatory commission.

Dealing with the matter of foreign law further, Mr. Chairman, it is incumbent upon the Applicant, CPA in this case, to demonstrate to the Board's satisfaction that there is a reasonable probability that an order for a rogatory commission would be effective under the laws of California.

The authority for that is again the Xerox and IBM case and also the Textron Canada case -- and I will not even describe the name of the Defendants there. Both of those cases are found in Mr. Yates' material, Tabs 11 and 12.

The efficacy of letters rogatory emanating from the Board will depend upon the law of the United States. A party alleging foreign law bears the burden of proof on a balance of probabilities, to establish the content and meaning of the foreign law.

Mr. J.G. McLeod said that in Conflict of Laws, which is a text that is reproduced at Tab 9 of the materials that I have presented to you, and cases are cited therein by McLeod.

The traditional method of proving laws of foreign countries is expert evidence. Gold and Reinblatt,

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a Supreme Court of Canada case from 1929.

We do not have that reproduced but I think it is fairly trite.

In the present case, CPA has offered no evidence whatever as to whether a court in California will execute on letters rogatory issued by the Board.

That is in contra-distinction, for instance, to the Xerox case, which is well worth reading, Mr. Chairman, because there was substantial Affidavit evidence from both sides in that case as to whether or not this would occur.

Canadian courts will not take judicial notice of foreign law unless they are authorized to do so by statute. The Canada Evidence Act, Sections 17 and 18, deals with that, and it is found under Tab 10 of the materials that we have presented.

That Evidence Act, sir, applies to all proceedings with respect to which the Federal Government has jurisdiction and circumscribes what foreign laws a court may take judicial notice of.

Section 17:
"Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any

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province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the Constitution Act, 1867."
And section 18:
"Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded."
In other words, Mr. Chairman, the Board cannot take judicial notice of laws in the United States. Merely citing 28 U.S. Code 1782, the way Mr. Yates has done, does not constitute evidence of the applicable laws of California.

It is submitted that the CPA has failed to establish a reasonable probability that the court in California will give effect to letters rogatory from the Board.

Where is his Affidavit that shows this material? It is not here, and it should be. And he has failed to demonstrate to you, sir, that there is this reasonable probability.

The NEB proceedings will unquestionably be delayed if PG&E is compelled to litigate the question of

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the effectiveness of foreign letters rogatory within the State of California.

Given the substantial doubt as to the effectiveness of letters rogatory emanating from this Board, sir, it is submitted that the Board should exercise its discretion not to order a commission, particularly pending the giving of evidence by other parties to this proceeding, as I have said to you now several times.

Just by way of summing up, PG&E says that it will be prejudiced if it is required to testify and submit

to cross-examination. I believe that I have set out to you ample reasons why this is the case. I have shown you the nexus between CPA and its constituent members. And it is not just a concern that is restricted to the CPA. There may be others in this room who are waiting with a Statement of Claim.

There are other possible sources of the information which has been sought, as far as we know what that information is. And it has not been particularized. The Board should exercise its discretion not to grant subpoenas or letters rogatory to take commission evidence.

This is particularly the case since the law is far from being as simple and straightforward as Mr. Yates would have us believe.

Before I conclude and sit down, I want to

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deal quickly with the case brought up by my friend Mr. Manning, which I only saw this morning for the first time.

He there refers to a rule of practice from Ontario. It is equivalent, I am told, as is found in Rule 38 of the Alberta Rules of Court.

But let's not forget that we deal with the Federal Court's rules in this area, and Mr. Manning has failed to show that there is an equivalent rule in the Federal Court Rules of Practice.

I do not know whether there is or not; but I think it is incumbent on Mr. Manning to say whether there is or not.

I think you, Mr. Gilmour, made an effective point with Mr. Manning, questioning the fact that does not this usually relate to a party that wants to be admitted. That was certainly the case in the Starr matter.

It is interesting to read a passage that is found towards the end of that decision. I believe Mr. Manning gave it to you. It is on page 46 of the Starr decision, in the penultimate paragraph about a third of the way down. Mr. Justice Grange says there:

> "I also believe that it is clear from the cases that even when the applicant satisfies that condition it is entirely discretionary in the Court whether he will be allowed to

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> intervene or not, and the Court may always decline the application where it considers that the interest of the applicant is already

adequately represented."

I suggest to you, Mr. Chairman and Members, that that is a decision that you have made. You made it in your series of letters when you said that A&S could provide evidence, ANG could provide evidence, and they could determine whether or not to get it from their affiliates. That is what they have done. Notwithstanding this long appeal that we have heard from Mr. Yates yesterday of your original decision of January 23rd, it is PG&E's submission that the January 23rd decisions were entirely correct and appropriate and should be allowed to stand.

Subject to any questions you have, those are my remarks.

THE CHAIRMAN: Thank you, Mr. Hollingworth.

The Board has no questions.

THE CHAIRMAN: Are there other parties who wish to speak in opposition? Mr. Malone...?

MR. MALONE: Yes, I do. I will be 20 minutes. Perhaps it would be a good time to break.

THE CHAIRMAN: Let's do that, then. Thank you, Mr. Malone. We will take our morning break.

--- (A Short Recess/Pause)

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(Malone)

--- Upon resuming/A la reprise

THE CHAIRMAN: Good morning, Mr. Malone.

Would you proceed, please.

MR. MALONE: Mr. Chairman and Members of the Board, Mr. Hollingworth has clearly presented his arguments, arguments which militate against the issue of subpoenas or letters rogatory.

In the interests of time, PGT will adopt those arguments and supplement his submissions with certain additional information.

In our letter to this Board dated February 3, which has already been exhibited as Exhibit C-40-2, we pointed out that PGT, PG&E and A&S are named Defendants in two separate lawsuits instituted by Shell Canada and Chevron.

I propose to exhibit both Statements of Claim at this time to afford the Board an opportunity to view the breadth of the allegations.

Copies have been circulated to Board Staff, to the Board, Mr. Yates and others. There are extra copies at the back of the room.

Did you want to assign numbers to those now, sir, or should I just move on?

THE CHAIRMAN: Let's mark them, Mr. Malone, please.

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THE CLERK: The Statement of Claim will be Exhibit C-40-4.

MR. MALONE: I believe that is the Shell one, sir.

THE CLERK: Yes, that is correct.

--- EXHIBIT NO. C-40-4:
Statement of Claim of Shell Canada Limited in Shell Canada Limited and Alberta and Southern Gas Co. Ltd., Pacific Gas Transmission Company and Pacific Gas Electric Company, instituted in the Court of Queen's Bench of Alberta A&S, PGT and PG&E.

THE CLERK: Chevron Canada Resources will be Exhibit C-40-5.

--- EXHIBIT NO. C-40-5:
Statement of Claim of Chevron Canada Resources in Chevron Canada Resources and Alberta and Southern Gas Co. Ltd., Pacific Gas Transmission Company and Pacific Gas and Electric Company, instituted in the Court of Queen's Bench of Alberta.

MR. MALONE: Gentlemen, the Plaintiffs allege, among other things, that A&S, PG&E and PGT are inseparable legal entities, so that PGT and PG&E are responsible for the debts of A&S.

Let me read Paragraph 18 of the Shell document:

"In the alternative, the obligations of the Defendant A&S pursuant to the agreements are also the obligations of the Defendant PGT and the Defendant PG&E, or one of them, as the

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principals and guiding hand of the Defendant A&S and accordingly the Defendant PGT and the Defendant PG&E are liable for the Plaintiff's losses as herein alleged."

Chevron, in its document, at Paragraphs 16

and 17 states:

"At all material times hereto the overall responsibility for the activities of A&S rested with PG&E and/or PGT, such that PG&E and/or PGT exercised complete domination and control over the day to day operations of A&S. In the alternative, PG&E and/or PGT exercised immediate domination and control over A&S in regard to the events giving rise to the breach of the Gas Purchase Contracts.

17. In the further alternative, the Plaintiff states that PG&E and/or PGT utilized A&S as their agent, or alter ego, for the express purpose of obtaining gas supplies to serve PG&E's end users in the State of California."

These Plaintiffs further allege that PGT and PG&E induced A&S to commit contract breaches.

These Plaintiffs also allege that PGT and PG&E wrongfully interfered with the contractual relationships between A&S and its producers.

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Shell, at Paragraphs 20 and 21, alleges as follows:

"The Defendant PG&E and the Defendant PGT have, together or separately, conspired with the Defendant A&S to circumvent the minimum volume obligations of the agreements by arbitrarily reducing the volume of natural gas taken from A&S, replacing that natural gas with natural gas purchased on more favourable terms from an entity or entities holding interruptible transportation rights on the PGT system; or by causing A&S to contract for discretionary volumes, all thereby knowingly and intentionally causing injury or loss to the Plaintiff when the Defendant A&S failed to purchase its required minimum volumes of natural gas from the Plaintiff.

21. By the actions and conduct set out in paragraph 20, the Defendants PG&E and PGT wrongfully interfered with the economic relations between the Plaintiff and the Defendant A&S, causing injury and loss to the Plaintiff."

Finally, Chevron in its Statement of Claim

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recites:

"Further, and in the alternative, the Plaintiff states that the PG&E and/or PGT are

liable to the Plaintiff for the damages they suffered by reason of A&S breaching the Gas Purchase Contracts because they, individually or together, induced or conspired to cause A&S to breach the contracts. In particular, at all material times, PG&E and/or PGT had knowledge of the existence of the Gas Purchase Contracts, and by their actions, directly or indirectly, caused A&S to breach the Gas Purchase Contracts with the result that the Plaintiff suffered damages as set out in paragraphs 13 and 21 herein."

The Plaintiff Chevron claims $253 million jointly from the Defendants. Shell claims some $51 million -- a total of $284 million in the two actions.

As is self-evident, the heart of these court cases go to the very matters that CPA seeks to investigate: the level of takes under the licences and under the contracts; the reasons therefor; and the prospects for the future.

These allegations will be fully argued in the courts once counsel have had an opportunity to review and

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inspect the thousands of documents that are relevant to the issues raised, and when both sides have prepared their witnesses and completed Examinations for Discovery.

That process will take several years and will involve the right to object to improper Discovery questions, with recourse to the courts which can rule as to their propriety.

This Board takes the position that it is not bound by the principles of evidence applicable to court proceedings. This presents a problem to PG&E and PGT. Objections to questions available in civil cases are not available here. Accordingly, evidence under oath before this Board may be used in a subsequent civil proceeding in Alberta. There is no "use immunity" recognized under Canadian law.

The concerns of PGT and PG&E are not fanciful; they are real.

We ask: What are the reasons for the questions to be asked by intervenors and who is really interested in the answers?

Mr. Yates and the CPA say they are not a stalking horse for anyone. But they do not speak for everyone at this hearing. There are in excess of 50 intervenors in this proceeding. Three have already sued PG&E -- Amoco, Shell and Chevron. Two have included PGT --

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Shell and Chevron. Unknown others may have suits pending.

Who knows what questions lurk in the hearts of counsel and what are their motives.

We note, for example, that Mr. Manning, counsel for IPAC in this proceeding, is also counsel to Chevron in its lawsuit against PGT and PG&E. Let me repeat that. Mr. Manning, counsel for IPAC in this proceeding, is also counsel to Chevron on its lawsuit against PGT and PG&E.

IPAC wants you to issue subpoenas. A review of the IPAC Information Request to A&S in this proceeding illustrates the double-barreled nature of IPAC's questions, as they probe their relationships between A&S, PGT and PG&E -- matters not really relevant to this licence review process, but relevant to the allegations in the Shell and Chevron Statements of Claim which I read to you just a moment ago.

Mr. Hollingworth has asked that you look at those questions of IPAC, and I simply leave it in that same way.

It is therefore obvious that any prudent Defendant would not voluntarily offer evidence in these proceedings, not without safeguards to ensure that cross-examination avoids the issues material to the lawsuits, or that safeguards exist to protect against

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probing questions relative to sensitive commercial negotiations.

It would be the height of madness to volunteer evidence in such circumstances.

There may be other producers who have intervened here today and who are contemplating litigation. It is impossible for PGT and PG&E to know.

Furthermore, at this point in time, it is not at all clear that the record at the end of cross-examination will be deficient in any way. That will be up to this Board to decide.

The idle speculation of the CPA at this early stage of the proceedings that there will be deficiencies, even before hearing from A&S and ANG Panels, is premature and, frankly, "silly", to use Mr. Yates' word.

We have heard that the Board has in the past

issued subpoenas in cases where a witness is willing to attend, but suffers from some impediment.

In this case, PGT and PG&E are unwilling to come, but for good and sufficient reason.

Both have a long history of cooperation with regulatory authorities on both sides of the border. Only the extraordinary circumstances present today make it impossible to voluntarily offer their complete cooperation, as they did initially in GH-5-88.

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Based on the foregoing, we say it would be unjust to issue subpoenas in this case, as the concerns of both entities are legitimate and the evidence sought may be available from A&S and other sources.

The fight between the CPA and the CPUC has become personal and bitter. That was very evident yesterday. However, cooler heads must prevail.

My client is caught in the middle of an international dispute that is not of its making -- a dispute that will not be settled by political brinksmanship, but only by commercial negotiations.

We say that the CPA has failed to demonstrate on any burden of proof that the interests of the Canadian public would suffer in the absence of witnesses from PGT and PG&E.

We say their motion is founded only on speculation and is premature.

In all of the circumstances, we submit that you should exercise your discretion by refusing the CPA motion.

Those are my submissions and I will help you with questions, if there are any.

THE CHAIRMAN: The Board has no questions, Mr. Malone.

Thank you.

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Are there other counsel who wish to speak in opposition to Mr. Yates' motions?

Mr. Tom Brett.

MR. BRETT (CPUC): Good morning, Mr. Chairman,

Panel.

Mr. Chairman, I was retained last week by the California Public Utilities Commission to advise them with respect to certain aspects of their activities that impact on Canadian matters. Included among my responsibilities is the responsibility to attend and monitor these hearings.

As you know, the CPUC is not a party to this proceeding. It has not intervened, but it has filed a Letter of Comment dated February 11, 1992.

The Canadian Petroleum Association, through Mr. Yates' second motion, which he presented yesterday, seeks to deny the CPUC the right to use the Letter of Comment method in this instance or, in the alternative, to have you make us a party to the proceeding and compel the CPUC to testify, even though we are not now a party.

These steps, I submit, adversely affect my client's substantive rights and, in all fairness, the CPUC should have the right to reply to this motion. The CPUC would like to reply to Mr. Yates' second motion.

Unfortunately, Mr. Chairman, the CPUC did not obtain a copy of this motion, which is dated last Thursday,

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February 20th, until sometime late on Friday, February 21st. I did not personally obtain a copy of the motion until about 7:00 p.m. Friday evening.

We have not yet had the opportunity to study this motion and to review the cases referred to in it.

We would like some time to do that prior to making a submission. We would be prepared to make a submission as early as Friday of this week; our preference would be Monday of next week.

THE CHAIRMAN: Mr. Brett, Monday and Friday are a long way off sort of in terms of what one had had in mind for this hearing process.

Is there any possibility at all that you could be briefed and have considered the motion and the various arguments made around it by tomorrow morning?

MR. BRETT (CPUC): Mr. Chairman, my understanding is that the individual most directly involved in preparing the material related to the Letter of Comment from the CPUC, Mr. Edward O'Neill, their Assistant General Counsel, is not available until sometime later tomorrow. He is literally in communicato.

I would prefer to be able to speak to him prior to making comments.

| Subject to consultation with the Chief
| General Counsel of the CPUC, Mr. Pete Arth, if you tell me
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| that the only time you can hear it is tomorrow, then we
| would endeavour to make a submission tomorrow.
|
| In the circumstances, I would prefer to have
| a somewhat further delay, even if it could be until
| Thursday.
|
| THE CHAIRMAN: Mr. Yates...?
|
| MR. YATES: Mr. Chairman, I have a little
| bit of a problem with the suggestion made by Mr. Brett.
|
| Firstly, we are not dealing with two motions
| here, we are dealing with one motion, which has two aspects
| to it.
|
| I made some representations to you yesterday
| about the similarities of the two aspects and the
| differences. The fact is, the same relief is sought, at
| least in the alternative, in the motion relating to the
| CPUC as is sought in the motion relating to PGT and PG&E.
|
| Therefore, I, in replying to the comments of
| my friends who oppose those motions, would be entitled to
| reply to whatever Mr. Brett may say in respect to the
| aspect of the motion relating to the CPUC.
|
| I do not have any problem with his making
| representations in respect to the motion, notwithstanding
| that a party, by Letter of Comment, is not an intervenor.
|
| I do have a problem with replying to anybody
| prior to the submissions of my friend, Mr. Brett.
| 0237
| The February 20th letter was in fact faxed
| from my office to the CPUC last Thursday, on the date of
| the letter, notwithstanding the fact that they seem to send
| things to me with 17-cent stamps on them. I thought it was
| appropriate that they get notice immediately on the
| amendment of the motion which affected them.
|
| It seems to me that that gives them more than
| ample time to prepare for making comments by tomorrow
| morning.
|
| I would resist extending the time for
| comments by CPUC beyond tomorrow. If you do extend the
| comments beyond tomorrow, then I would submit that my right
| to reply to all of the parties who have made submissions
| against whatever aspects of the motion of the CPA would
| follow Mr. Brett's submissions.
| --- (A short pause/Courte pause)
| THE CHAIRMAN: Do any other counsel wish to
| speak to the matter raised by Mr. Brett and commented on by

Mr. Yates?
--- (No response/Pas de reponse)
THE CHAIRMAN: Mr. Brett, our strong preference would be for you to get briefed and be ready to go at 8:30 a.m. tomorrow morning.

MR. BRETT (CPUC): Thank you, Mr. Chairman. We will endeavour to do that.

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THE CHAIRMAN: And similarly, Mr. Yates, we would hope that you could be ready to reply to the arguments made about your motion as soon as possible after Mr. Brett has finished.

MR. YATES: I will certainly do that, Mr. Chairman.

I was going to say that I was not in an position to reply, particularly to my friend Mr. Hollingworth, today. Part of the "blizzard of paper" that he received from me included the arguments which I made to you yesterday.

While he was kind enough to provide me with the cases that he was going to refer to, I did not have any indication as to what his argument was going to be today, so I would need to review the transcript, particularly in respect to the rather labyrinthine of legal arguments that have been made, and I would be prepared to respond tomorrow.

If I might make a procedural suggestion, Mr. Chairman. We started this proceeding with my expressing some concern about proceeding with the cross-examination of Mr. McMorland prior to your making your decision in respect of the motion because the nature of the cross-examination would vary somewhat, depending upon what your decision is in respect to the motion.

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Balanced against that is the desire of the Canadian Petroleum Association to move through this proceeding as expeditiously as possible. We are also seeking to accomodate Mr. McMorland's schedule, to the extent possible.

What I would suggest, taking all of those into account, is that we proceed with Mr. Brett's comments tomorrow; that I would reply to not only his, but the counsel for other parties' submissions after that; and that I would be prepared, immediately following that reply, to proceed to cross-examine Mr. McMorland.

THE CHAIRMAN: Mr. Yates, that is very helpful to the Board.

The way we would like to proceed then would be to hear Mr. Brett first thing tomorrow morning, followed

by Mr. Yates' reply. And Mr. Putnam, the Board would appreciate it if you could have your witness panel ready to go almost immediately after Mr. Yates has finished.

That is, of course, without prejudice to when the Board's ruling might be given or what its ruling might be on Mr. Yates' motion.

MR. PUTNAM: It is perhaps premature, and maybe a little presumptuous, but could I also add to the discussion about procedure, Mr. Chairman.

We were discussing that during the break with

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some of my colleagues.

Mr. Yates stated yesterday, and he reiterated it this morning, that his approach to this proceeding, and particularly his cross-examination of witnesses, will largely be governed and determined by his knowledge of whether or not the California witnesses may be required to provide evidence, and that that difference could, as I think he put it yesterday, mean the difference between a cross-examination of hours or a cross-examination of some days.

I suppose that is more or less true for everyone participating in this hearing.

That being so, it occurs to us that perhaps the Board should consider some temporary adjournment of this hearing until (a) a decision has been made about the California witnesses' attendance or testifying; and should the Board decide that it is going to grant all or part of Mr. Yates' application in that respect, a further determination would then have to be made as to when and how those witnesses' evidence will be obtained and the time required to do that.

It also occurs to me that a limited delay in these proceedings might also afford the Board an opportunity to consider the progress apparently being made by the intergovernmental negotiations and to determine

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whether, as you suggested in your Opening Statement yesterday, some revision to the issues that have been outlined might be appropriate.

I make those suggestions now only because I thought it would be useful for us all to be thinking about that between now and the completion of the arguments relative to the California witnesses. We can speak to it again tomorrow if you like.

Subject to those comments, we will have our panel ready to go tomorrow.

--- (A short pause/Courte pause)

THE CHAIRMAN: Mr. Hart...?

MR. HART: The longer you consulted, Mr. Chairman, the more futile I felt standing here.

--- (Laughter/Rires)

Let me just very briefly align myself with the submission made by Mr. Putnam. The ANG witnesses, as well, are hanging in the balance. Certainly there is a very substantive overhang of this entire proceeding. Many issues turn on whether or not the CPA application will be granted, in whole or in part.

In light of the other considerations, the ongoing negotiations, we would strongly urge the Board to give favourable consideration to the proposal put to you by Mr. Putnam on behalf of A&S.

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THE CHAIRMAN: Thank you, Mr. Hart.

Mr. Manning...?

MR. MANNING: Mr. Chairman, I have a few comments that I would like to make that deal both with the proposal made by Mr. Putnam and with some of the remarks made by Mr. Malone on behalf of PGT in his earlier submissions to you.

IPAC, of course, intends on cross-examining A&S and is in much the same position as the CPA: the scope of its cross-examination is going to be largely determined by whether witnesses from PG&E and PGT appear.

In that sense, we do not think Mr. Putnam's suggestion for an adjournment of proceedings is unreasonable.

However, we have one caveat, and that is that if proceedings are adjourned, all parties, and in particular IPAC, may suffer from the availability of their witnesses.

As matters now stand, during the week of March 4th the witnesses who are intended to sponsor IPAC's evidence will not be available for that week.

I just thought I should raise that for the Board's consideration.

I want to deal briefly with some of Mr. Malone's remarks, because I think it is appropriate.

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He, in his submission, I believe tried to leave the suggestion, by referring to the fact that I am acting for Chevron and IPAC, that there might be some

impropriety.

In doing this, he made reference to the fact that some of IPAC's Information Requests to A&S seemed to be related to matters in issue in the lawsuits.

That may or may not be the case, sir.

I can tell you that IPAC has prepared its evidence in this proceeding, and IPAC has prepared its Information Requests in this proceeding. There has been no collusion of any sort, in the sense that might be suggested by Mr. Malone.

The other thing that I think would be of interest to the Board is: Just as Mr. Malone has advised the Board that my firm is representing both Chevron in the civil action and IPAC in this proceeding, Mr. Malone's firm represents both PGT in the civil action and in this proceeding; and Mr. Hollingworth's firm represents both PG&E in the civil proceedings and in this proceeding.

So to the extent that that causes a concern, it is a concern for all or none of us.

That concludes my comments. Thank you, sir.

THE CHAIRMAN: Mr. Yates...?

MR. YATES: Mr. Chairman, I was wondering
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how Mr. Putnam's "musings" got elevated into a proposal that some people think he is making.

Is it your intention to consider submissions, at some point, on the advisability of adjourning the proceedings; and if so, at what point would you intend to consider such submissions?

THE CHAIRMAN: We would certainly consider such submissions at that point in time where they were raised substantively.

All that the Board Members know about the Intergovernmental-CPUC negotiations is what we have read in newspapers.

However, one notes that Alberta, through the APMC, and British Columbia are represented in the proceeding, and I presume that if there was a development that was likely materially to affect the way we carry on, we would hear from those people.

So we are ready for that when it arises.

MR. YATES: Fine, Mr. Chairman. I just did not think that Mr. Putnam had actually put a proposal

to you. I was a little surprised that Mr. Hart was purporting to support it.

I should say that the CPA's position is contrary to any suggestion of an adjournment. It has taken us a long time to get this far. The CPA will do what it

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can to facilitate the expeditious conduct to completion of the evidentiary part of this proceeding.

THE CHAIRMAN: Thank you, Mr. Yates.

I had heard and read Mr. Putnam and Mr. Hart as being in the category of musings, rather than something substantively being brought before the Board.

I will just repeat that tomorrow morning we would like to start with Mr. Brett; and then -- with a short pause if necessary -- with your reply to the argument on your motion; and then, again totally without prejudice to what might be the Board's ruling or when that ruling might be given on your motion, we would like the A&S Panel to be ready.

Like Mr. Manning, I am impressed with the argument about witness availability, and I think that the panel and people who intend to cross-examine it ought to be prepared for something extensive rather than brief; it ought to be with a view of making the very best use of these witnesses.

Unless there are any matters that parties would like to raise, I think ---
Yes, Mr. Hollingworth.

MR. HOLLINGWORTH: It is fairly mechanical, Mr. Chairman.

My friend Mr. Malone has put in evidence as

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exhibits the Statements of Claim by Shell and Chevron. I would think that to make the record complete, it would be appropriate to have the Amoco suit, in which of course PGT is not named as a party Defendant. If you think that that is appropriate, sir, I will make the requisite copies and make that filing tommorow.

THE CHAIRMAN: That will make it complete. Thank you for offering to do that. We will accept that.

MR. HOLLINGWORTH: I will look at the transcript to see if I can derive anything logical out of Mr. Manning's musings about my acting for PG&E in two different forums.

THE CHAIRMAN: Mr. Manning...?

MR. MANNING: I just wanted to correct my earlier advice.

I indicated to the Board that the IPAC witnesses would not be available March 4th. It is actually March 13th. I had the date wrong.

The other thing I would like to advise you of, sir, is: to the extent that you have indicated we should be prepared to conduct what is a thorough cross-examination of the A&S witnesses, I understand Mr. McMorland is going to be available for the balance of this week but not after that. Of course, IPAC wants to examine the A&S Panel with him present, so that may involve some

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timing considerations on our part as to when we conduct our cross-examination. We want to do it with him present.

THE CHAIRMAN: Thank you, Mr. Manning. I should have said that.

As I indicated yesterday, the Board would be prepared to sit longer hours this week, perhaps even starting tomorrow afternoon.

Mr. Hillary...?

MR. HILLARY: Mr. Chairman and Members of the Panel, I am not sure, at this point, based on what has taken place in the last 20 minutes, whether this constitutes a motion, or a suggestion on procedures, or a musing, or quite where it fits. We seem to be either in the shifting sands of time when it comes to how this proceeding should progress or quick sand, either one of which keeps us moving.

What I would like to state though -- and I thought at the time we were working through the procedures that this would be perhaps something that no other party had suggested on procedures, but it is certainly a position that Poco would like to bring forward in this proceeding, and that is a matter dealing with timing and dealing with the issues in the broader context of what is going on outside of this hearing room, and specifically with the energy consultative mechanism.

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Let me start by stating that Poco is both an A&S producer and an interruptible shipper on ANG, selling gas into the Pacific Northwest and California. Poco has also been a strong supporter of the de-control process and a less-regulated market for natural gas.

In that context then, Poco remains very concerned with the actions of the CPUC in attempting to interfere in the term of the A&S contracts and their markets and, to that extent, I think it is fair to say that we can directionally support the concerns that have been

expressed by the CPA that have ultimately led to this particular proceeding.

Poco is also concerned, though, that any responsive action by this Board -- and I couch that as anything that may come out of this proceeding -- may amount to a degree of re-regulation of the gas industry, and that, in itself, may have some far wider consequences for our international gas trade in the United States.

While Poco was opposed to the introduction of any interim measures, as can be seen by our original submissions, it also recognizes and submits that these interim measures that the Board has put in place as of the 4th of February are an effective responsive block to the displacement of A&S firm service sales and that nothing further needs to be done at this time by this Board,

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because it does respond, and effectively respond, to the actions of the CPUC thus far ---

THE CHAIRMAN: Mr. Hillary, the Board may have a problem with the angle that you are taking.

Your motion, or musings, or suggestions on procedure, does it have a bearing on how we would be moving over the next couple of days?

MR. HILLARY: It certainly does.

THE CHAIRMAN: I see. Very well.

MR. HILLARY: What we are concerned about here is the fact that the negotiations under the energy consultative mechanism have been going on now for approximately two months, and it is our understanding that the parties themselves in those negotiations are getting much closer to a satisfactory resolution through the process of negotiation.

That being the case, I think we can also say that the Board's actions of February 4, in bringing in the interim measures, have helped that process, because it has focussed the attention of the parties to the point where it looks like substantial progress is imminent.

I would say that Poco also takes comfort from Mr. Yates' statement yesterday -- which I think is rather telling here -- and in that he defined what the CPA was seeking to achieve in this proceeding. That is something

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that I think that Poco can state right here that we agree to.

What I am referring to is a comment, which in

the transcript is in Volume 1, page 106, starting at line 14, where he said:

"And recognize what the CPA is seeking in this proceeding: The CPA is saying to this Board that you should maintain conditions on the short-term orders that maintain the validity of your GH-5-88 Decision for a sufficient time to allow the individual parties to make their deals. That is what the essence is: Maintain the GH-5-88 Decision until restructuring is complete."

For the Board to do as the CPA is now requesting, we fear not only puts this Board into the unenviable position of being perceived as perhaps over-zealous or aggressive, but it will, in all likelihood, perhaps also prejudice the negotiation process, which appears, by all accounts, to be moving very successfully towards conclusion.

Therefore, Poco is concerned that the consideration and issuance of subpoenas to third-party witnesses and then, thereafter, seeking their enforcement in the United States is not only an unprecedented step for

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this Board to take, but it will almost certainly sour the entire atmosphere of international gas trade between our two countries.

We should never forget that the United States is, and will remain, our best export customer for natural gas.

It is in that broader context that I give you these remarks.

That has nothing to do with the comment on the legality of the Board's right to compel these witnesses. We have heard enough conflicting positions on that in the last couple of days.

Our issue is really one of concern for timing in this process.

Therefore, we respectfully submit that perhaps the appropriate course of action for the Board to take at this point is to leave the interim measures in place, as they are right now, because they are effective; then adjourn this full hearing on an indefinite basis while the process of negotiation is going on, giving it time to work, rather than perhaps prejudicing its outcome further by any action that might be taken here.

If the negotiations are successful, this hearing, and ultimately even the interim measures, may prove to be unnecessary.

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If the negotiations fail, then that, we

submit, will be the appropriate time to reconvene and consider the remedies that would best fit the circumstances as they are at that time.

Thank you.

--- (A short pause/Courte pause)

THE CHAIRMAN: Mr. Hillary, while you latterally characterized what you had to say as a "recommendation", it sounded more like a motion that we adjourn on the grounds, I suppose, that proceeding to examination of witnesses would prejudice the Intergovernmental-CPUC discussions and negotiations.

Is that a fair capsule of what you are after?

MR. HILLARY: That is probably fairly close to a fair capsulization. I hesitate to consider it to be a motion in the context of the motion that had to be dealt with with respect to the CPA application for subpoenas and letters rogatory.

It did have a very clear interconnection and bearing on the timing aspect of their motion, as opposed to what I would consider a stand-alone motion.

--- (A short pause/Courte pause)

THE CHAIRMAN: Mr. Hillary, we feel that we cannot deal with it as a motion.

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We already have one motion on the table.

We have not had notice of your motion, so we will regard it simply as a recommendation. We will not ask parties to comment on it.

We will bear in mind what you have to say as we proceed.

MR. HILLARY: Thank you very much, Mr. Chairman.

THE CHAIRMAN: Thank you, Mr. Hillary.

We will not plan to change the approach to tomorrow's activities that I outlined.

Mr. Yates...?

MR. YATES: Mr. Chairman, I have one matter of clarification in respect to the cross-examination tomorrow.

The Board has gone to some lengths to continue to consider CPA as the applicant in this proceeding.

In your Opening Remarks yesterday, though,

you indicated that cross-examination would be in accordance with the Order of Appearance. The normal practice of this Board, though, is that the applicant cross-examines last.

Perhaps it is my force of habit of cross-examining first that I was not thinking about that.

Having said that, I am happy to go first,

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recognizing that virtually no one else is suggesting they are going to have cross-examination.

Perhaps I can propose that as a way of facilitating the continuation of the hearing, but I would not like to give up the applicant's right to go last if somebody comes along after me and tries to do some backfilling.

THE CHAIRMAN: You are asking if you can go first provided that ---

MR. YATES: Mr. Chairman, I am expressing the realization that under the Board's normal procedure, as an applicant, I would go last.

I have already volunteered to proceed with the cross-examination of A&S tomorrow. I am prepared to continue to do that ahead of other parties. But I am expressing some concern about what may happen in the cross-examination after I have completed.

Perhaps we can leave it that I will say I might be back to you later in that event.

THE CHAIRMAN: We will accept your offer. We will have you go up first, Mr. Yates, and we will see what then happens.

MR. YATES: Thank you.

THE CHAIRMAN: Thank you.

If there are no other matters that we should

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deal with, we will adjourn now until 8:30 a.m. tomorrow morning.

Thank you.

--- Adjournment/Ajournment