

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS
Oral Argument

May 7, 2009
Jefferson City, Missouri
Volume 2

Rob Lee,)
)
Petitioner,)
)
v.) Case No. WC-2009-0277
)
Missouri American)
Water Company,)
)
Respondent.)

DANIEL R.E. JORDAN, Presiding
Regulatory Law Judge

REPORTED BY:

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1 P R O C E E D I N G S

2 JUDGE JORDAN: I am calling oral
3 argument in Case No. WC-2009-0277, and the argument
4 that I am calling for is on the pending motion to
5 compel compliance with discovery. I'm Daniel Jordan,
6 regulatory law judge for the Missouri Public Service
7 Commission, and I will now ask for entries of
8 appearance. We'll begin with the movant which is
9 Mr. Rob Lee. Would you give your name to the court
10 reporter and spell it for her.

11 MR. LEE: I am Rob Lee, present and on
12 the phone today.

13 JUDGE JORDAN: And that's L double E?

14 THE WITNESS: L-e-e.

15 JUDGE JORDAN: Very good. Okay. And
16 for Missouri American Water Company?

17 MR. NOCE: Matt Noce with the Hepler
18 Broom Law Firm. And Noce is N-o-c-e.

19 JUDGE JORDAN: And for Staff?

20 MR. RITCHIE: Sam Ritchie, attorney for
21 Staff of the Public Service Commission.

22 JUDGE JORDAN: And I don't see anyone
23 from the Office of Public Counsel here in the room.
24 Is there any such representative on the line?

25 (NO RESPONSE.)

1 JUDGE JORDAN: I don't hear one, so
2 we'll go ahead and get started hearing argument on
3 the motion to compel. And we're only going to talk
4 about the motion to compel this morning. There are a
5 number of other motions outstanding, but we have
6 given notice only as to the motion to compel
7 discovery. So that's what we're going to confine our
8 discussions to this morning.

9 I will be hearing arguments. The burden
10 of proof in sustaining an objection to discovery is
11 on the objecting party, so that would mean Missouri
12 American Water Company. I do -- I will not be ruling
13 from the bench today. I will take the arguments,
14 we'll discuss these issues, but I will not issue an
15 order right here and now. I will issue a written
16 order later. Any questions about our procedure from
17 anyone?

18 (NO RESPONSE.)

19 JUDGE JORDAN: I don't hear any, so
20 let's start talking about this discovery. I have
21 before me Mr. Lee's motion to compel, and this
22 relates to discovery that Mr. Lee served on
23 March 23rd, 2009. I have also Respondent's response
24 to Complainant's -- Complainant's motion to compel
25 and request for oral argument. I've granted the

1 motion for oral argument and I have Respondent's
2 objections to Complainant's data requests, so let's
3 begin there.

4 Mr. Noce, you object to Mr. Lee's data
5 requests, you object to his discovery, but I see that
6 in certain cases you have produced what you believe
7 he has asked for.

8 MR. NOCE: Correct, your Honor. Real
9 quick, I guess just going through them, we've already
10 produced all of our repair records for the last 19
11 years to Mr. Lee's counsel in the -- in the civil --
12 I'm sorry -- in the civil lawsuit that's pending, so
13 Mr. Lee should have access to those records. I'm
14 sorry?

15 MR. LEE: This is not the civil lawsuit.

16 MR. NOCE: Well, Mr. Lee, we provided
17 this -- this information to you. These records have
18 all been produced with regards to No. 1. You know, I
19 mean, I guess we can produce them again. We just --
20 we're trying to avoid these expenses, your Honor. As
21 you can tell, there's a lot going on in this case,
22 you know, something seems to be filed every day.

23 And if we're going to have to produce
24 records in two separate actions to Mr. Lee, I think
25 it's just redundant -- you know, I think it's

1 excessive and just designed to harass us almost at
2 this point, your Honor.

3 JUDGE JORDAN: Well, let me ask you
4 this. I know that you objected to all or almost all
5 of the data requests as burdensome, unduly
6 burdensome. Is that what you're saying is that
7 you've made the information available in one case so
8 that ought to be good enough; is that correct?

9 MR. NOCE: Correct. We provided this to
10 him so all he needs to do is go and talk to his
11 attorney about obtaining these records.

12 JUDGE JORDAN: Now, it's true that the
13 civil action is unrelated except for common facts to
14 the action before this Commission. Do you -- do you
15 agree with that, Mr. Noce?

16 MR. NOCE: Well, your Honor, we had
17 taken the position that we believe that they are
18 related in that the issues are similar and should
19 have a res judicata. In fact, we've raised that at
20 both -- an affirmative defense in this case --

21 JUDGE JORDAN: Uh-huh.

22 MR. NOCE: -- as well as we filed a
23 motion to dismiss in the -- in the civil action that
24 was denied. So while -- I mean, I guess that's -- to
25 answer your question, I think we believe -- we've

1 taken the position that they are related. However,
2 both courts have disagreed with us or at least at
3 this point.

4 JUDGE JORDAN: Okay. You're referring
5 to the relation as to the effect that one action in a
6 judgment or decision in it has to the other, is that
7 what you're saying?

8 MR. NOCE: We believe it to be one cause
9 of action, correct.

10 JUDGE JORDAN: Right. Okay. And --
11 and -- and both tribunals have disagreed with that.
12 Nevertheless, I understand your argument to be that
13 everything being sought in this action has been
14 produced in that action. Are you asking basically
15 that the production in the civil action meet the
16 requirements of the administrative action's
17 discovery, is that -- is that what you're saying?

18 MR. NOCE: I guess, yes, your Honor. I
19 think we're trying to ask to avoid any undue expense,
20 yeah. We're asking that, you know, our discovery
21 responses in -- in the civil action be incorporated.

22 JUDGE JORDAN: Okay. So you would -- if
23 something came up at the hearing and -- and -- and
24 Mr. Lee said, well, this is the document that was
25 produced to me in discovery in the civil action, then

1 you would have no objection to it not having been
2 produced in the administrative action?

3 MR. NOCE: Correct.

4 JUDGE JORDAN: Okay. Mr. Lee, do you
5 have a problem with any of that so far?

6 MR. LEE: I do. We don't know that the
7 documents are exactly the same. I am doing this on
8 my own without an attorney. They may have added
9 documents, and this just causes chaos and confusion
10 and it's just one more way to burden this case that
11 I'm working on by myself to make it nearly impossible
12 for me to handle by myself.

13 JUDGE JORDAN: Well, let me ask you
14 this, Mr. Lee.

15 MR. LEE: One more thing if I could.

16 JUDGE JORDAN: Okay. Go ahead.

17 MR. LEE: If they've already been
18 produced, surely they're not burdensome or cumbersome
19 to copy them and send them again. That should be a
20 ten-minute job.

21 JUDGE JORDAN: Well, Mr. Noce can
22 address that, I think.

23 MR. NOCE: Well -- well, I mean, if
24 Mr. -- Mr. Lee's aware of this. I mean, it's --
25 there are -- several documents have been produced.

1 I'm not exactly sure of the page count, however, I
2 know that it does take up, you know, file folders
3 worth of records, and we -- we're trying to avoid
4 having to produce these, you know, multiple times.

5 JUDGE JORDAN: Okay. In other words, it
6 sounds like here's where we're at: Mr. Lee, Mr. Noce
7 is saying that they have produced everything you've
8 asked for once. They --

9 MR. LEE: I've not --

10 JUDGE JORDAN: -- they are -- if you're
11 asking the same questions, then the answer is going
12 to be the same.

13 MR. LEE: I don't know that all these
14 questions are the same.

15 MR. NOCE: Well, I mean, I guess if we
16 want to go point by point, we -- we have produced all
17 of our repair records for the last 19 years within a
18 quarter-mile radius of Mr. Lee's home to his attorney
19 in the civil lawsuit.

20 JUDGE JORDAN: And --

21 MR. NOCE: And -- and as the Court is
22 aware, we have a duty to supplement that which we
23 will do in accordance with Missouri discovery rules
24 in that lawsuit, and we'll be sure to produce copies
25 to Mr. Lee's attorney.

1 JUDGE JORDAN: And that's item No. 1.

2 MR. NOCE: Correct.

3 JUDGE JORDAN: Okay. So you're saying
4 that item No. 1, repair records for the last 19 years
5 within a quarter-mile radius of -- here's the
6 address: 11119 Carl Street -- that Missouri American
7 Water Company has produced those in the civil action;
8 is that correct?

9 MR. NOCE: Yes, sir -- yes, your Honor.

10 JUDGE JORDAN: Okay. Let's move to item
11 No. 2, what testing methods used to locate leaking
12 water mains.

13 MR. NOCE: Your Honor, in regards to
14 this discovery request, Mr. Lee was present during
15 the deposition of Derrick Lynam (phonetic spelling)
16 in the civil lawsuit. This issue was covered in
17 detail during that deposition.

18 Mr. Lynam was questioned by Mr. Lee's
19 attorney with regards to our testing methods, with
20 regards to the accuracy of those tests with how or
21 why we do them, when we do them. All those questions
22 were asked and all that information is set forth in
23 Mr. Lynam's deposition transcript and which Mr. Lee
24 should -- again should have access to through his
25 attorney and that we don't feel that -- you know,

1 that's not a simple question to answer.

2 JUDGE JORDAN: Okay.

3 MR. NOCE: I think it was covered in
4 detail, like I said, in Mr. Lynam's deposition.

5 JUDGE JORDAN: And did you say Mr. Lee
6 was present for that deposition?

7 MR. NOCE: Yes, he was.

8 JUDGE JORDAN: Okay. Mr. Lee?

9 MR. LEE: Again, we are trying to
10 comingle the two cases in the -- it's a clear
11 maneuver to make this cumbersome and impossible for
12 me. I have not hired an attorney for this matter. I
13 may have been present at that -- in that situation.
14 I have health problems which also entail memory
15 issues. If I was present there, I don't remember
16 most of it anyway.

17 JUDGE JORDAN: Well, Mr. Noce, can you
18 tell us whether a transcript was produced for that
19 deposition?

20 MR. NOCE: I know I have a transcript.
21 I assume -- Mr. Lee's attorney was the attorney who
22 took the deposition. I assume he has the original
23 and Mr. -- which would be available to Mr. Lee.

24 JUDGE JORDAN: Okay. So not only was
25 Mr. -- was Mr. Lee present, but also counsel for the

1 civil action was present?

2 MR. NOCE: Correct, he was the one
3 taking the deposition.

4 MR. LEE: Again, everything is go hire
5 an attorney, and I am doing this pro se.

6 JUDGE JORDAN: Okay. Let's move on to
7 item No. 3, the degree of accuracy of each test. It
8 looks like your objection is the same as to No. 2,
9 Mr. Noce?

10 MR. NOCE: Correct.

11 JUDGE JORDAN: All right. Anything
12 further on that, Mr. Lee?

13 MR. LEE: I don't see the problem in
14 producing that one either.

15 MR. NOCE: Again, all that information's
16 contained in the -- in the deposition transcript.

17 JUDGE JORDAN: All right. Let's move on
18 to item No. 4, how often are these tests performed.
19 That looks like the same objection as to item No. 3,
20 am I correct, Mr. Noce?

21 MR. NOCE: Yes, and if I could expound
22 on that, Judge?

23 JUDGE JORDAN: Please.

24 MR. NOCE: We are -- Mr. Lee's aware
25 that we were out at the property on Friday -- last

1 Friday, and I've agreed and I've informed Mr. Lee
2 which I will do as soon as I get them, we're
3 getting -- we'll be getting reports for all tests
4 that we did at the locations that Mr. Lee is claiming
5 in this -- in this case where leaks exist. And we --
6 we did our ultrasonic test that he's talking about in
7 these discovery requests and we've agreed that we
8 will produce those once those are available to me.

9 JUDGE JORDAN: So --

10 MR. NOCE: Which I expect to be in the
11 next day or so.

12 JUDGE JORDAN: Okay. So for this item,
13 you're -- you're going to supplement what's been
14 produced -- what -- your response to this item?

15 MR. NOCE: Correct. Well, I'm not sure
16 if it's directly responsive to No. 4.

17 JUDGE JORDAN: Uh-huh.

18 MR. NOCE: However, we have agreed to
19 produce that.

20 JUDGE JORDAN: Okay.

21 MR. NOCE: And we will -- we will do
22 that just for the Court's, you know -- just to make
23 that aware to the Court. And we -- we -- we told
24 Mr. Lee that on Friday when we were at his property,
25 so...

1 JUDGE JORDAN: Okay. So that response
2 may address not only No. 4 but certain other of these
3 items?

4 MR. NOCE: Correct, correct.

5 JUDGE JORDAN: Mr. Lee, would you like
6 to add anything to that?

7 MR. LEE: No. I agree that they said
8 they will produce the document.

9 THE COURT REPORTER: Mr. Lee, could you
10 please speak up?

11 JUDGE JORDAN: Mr. Lee, our reporter
12 can't hear you very well. Can you speak up a little
13 louder?

14 MR. LEE: Sure.

15 JUDGE JORDAN: Thank you.

16 MR. LEE: I agree that they said they
17 would produce the documents. The good result of
18 their presence here was we found one more leak on
19 Aspen Woods here, looks like, which was repaired a
20 day or two ago.

21 MR. NOCE: Well, not to get -- without
22 getting too far into the substantive argument, the
23 report that we produced, and it's my understanding
24 that the report will show that there was actually --
25 we did do further investigation to determine whether

1 or not there was, in fact, a leak, and that the
2 further investigation -- again, without having to see
3 the report, but my understanding is that that
4 revealed that there was no leak at that location
5 where we were doing our testing. However, again, all
6 of that -- all of that information will be provided.

7 JUDGE JORDAN: Okay. Let's move to the
8 next item, then. And the next item is No. 5, the
9 number of feet of water pipe maintained by Missouri
10 American in this quarter-mile area. Now, that
11 objection's a little bit different. Do you want to
12 speak to that, Mr. Noce?

13 MR. NOCE: I'm not sure if I see the
14 relevance of that, Judge. I'm not sure if that
15 information's readily available to us either without
16 having to go through several years' worth of
17 documents to go back and to determine -- to make this
18 determination.

19 If Mr. Lee can set forth a reason why
20 this is either discoverable or relevant in this
21 matter or could lead to the discovery of admissible
22 evidence, we'd be -- you know, I -- I'm willing to
23 hear that, but I -- you know, at first glance, I
24 don't see any -- any reason why this should be
25 admissible or discoverable.

1 JUDGE JORDAN: Mr. Lee?

2 MR. LEE: I believe it's a very
3 important part of this picture, how many feet of pipe
4 are in this system and compared to how many feet are
5 tested on a regular basis. You know, that shows a
6 picture, and I believe what's going to emerge from
7 this all is, we buried a water system in this
8 neighborhood 70 years ago and we have not even tested
9 it in 70 years. Or if we have tested it, we test it
10 when they -- when a resident tells us water is
11 geysing out of the ground. It's very, very relevant.
12 It's a very big part of the picture of what's going
13 on here.

14 JUDGE JORDAN: And that leads us to item
15 No. 6 which is the number of feet of these pipes that
16 have been tested with the ultrasonic type of test.
17 Mr. Noce, I understand your response to this
18 discovery may be a little different now.

19 MR. NOCE: Well, your Honor, correct.
20 Like I said, I think in the -- in the civil action
21 we've also produced to Mr. Lee records where we've
22 gone out and performed tests, and that -- that has
23 come back negative as to leaks. And again, we're --
24 we're going to be producing records from last Friday
25 that will show similar results.

1 We've provided all records that we have
2 in our possession with regards to the tests we've
3 done where no water's -- where no leaks have been
4 found. Again, Mr. Lee has all the reports for leaks
5 in the area as well, or at least his attorney does.

6 Now, for us to have to break that down
7 into feet, I'm not sure we can do that. The reports
8 that we've provided will say what section of the
9 pipes we're testing. I don't think our people go out
10 there and actually measure -- take measurements of
11 what, you know, the length or distance that they're
12 actually testing for.

13 What they can do is they can hook up
14 with this ultrasonic at one point and then go down
15 the pipe. You go down the main, you know, past the
16 area where Mr. Lee is claiming that there are leaks,
17 and then, you know, run an ultrasonic test between
18 those two areas. They don't necessarily take a
19 measurement of those areas, but they do record in the
20 reports where the two -- where the -- what portion of
21 the main was tested.

22 And Mr. Lee, again, has had -- or his
23 attorney has been provided with that information and
24 we will be providing additional information, like I
25 said, in the next day or so.

1 JUDGE JORDAN: Okay. Then let's move on
2 to item No. 7, "All test records that can
3 substantiate Missouri American Water Company findings
4 that the water leaking from the ground in my
5 neighborhood is not coming from these pipes." Your
6 objection, Mr. Noce, is overly broad and vague, or at
7 least that's the grounds for your objection. Your
8 objection is not overly broad and vague necessarily,
9 but that is the -- the grounds for your objection.
10 Do you want to -- do you want to tell me a little
11 more about that, please?

12 MR. NOCE: Well, Judge, I'm just not
13 exactly sure what all he's -- he's asking for.
14 Again, we've -- we've provided him all -- we provided
15 his counsel with our water sample results that have
16 been taken. And again, I think that's been requested
17 in the civil lawsuit, that's all been provided.
18 Again, as I said -- I've stated that our -- our
19 ultrasonic test results, our correlated results
20 that -- that have been taken in the area when we
21 receive reports of leaks, those have all been turned
22 over and we'll continue to turn those over.

23 I'm not exactly sure what all he's
24 talking about with -- with regards to all test
25 records that can substantiate our findings. I mean,

1 we've been out there on several occasions. Some of
2 these documents, I'm not sure if records have been --
3 you know, have necessarily been created every time we
4 go out there, but I'm not -- I'm not exactly sure
5 what he's asking for, I guess, is...

6 JUDGE JORDAN: Okay. Mr. Lee, anything
7 to say about that item of discovery?

8 MR. LEE: Yeah. Missouri American Water
9 has been 100 percent sure from the very first time I
10 complained about this water that it's not their
11 water. I want to know where did they -- how did they
12 come up with that? Did they pull a rabbit -- a
13 rabbit out of the hat, you know, did they have a
14 dream last night? What tests, actual tests have been
15 performed that can assure me 100 percent that this
16 water is not coming from the water main?

17 The water sample test that they do is
18 strictly a tap water test for water coming out of a
19 tap. It has no adjustments or allotments, the way I
20 understand, for water seeping several thousand feet
21 through the earth, microbial and mineral -- minerals
22 being added to it through the earth. They come down
23 and take a sample of the water and there's no
24 chlorine in it and they say it's not our water.

25 When the DNR was out here, there was a

1 leaky valve right up the road here at Bellefontaine
2 and 270. Water was running right out of that water
3 system running a thousand feet or so on top of the
4 blacktop. And at the bottom of the hill when the DNR
5 tested it, that water had 10 percent of the chlorine
6 that had left that system with minutes ago on top of
7 the hill. And that was running above ground with no
8 soil to interfere with the readings.

9 Now we come to my neighborhood, the
10 water runs several thousand or several hundred feet
11 through the soil and gets contaminated, but they take
12 a sample out of the basement and they say it's not
13 our water. I think we're doing the wrong tests to
14 determine that.

15 JUDGE JORDAN: Okay. Let's move on to
16 item No. 8, the number of gallons unaccounted for in
17 this water system. Would you like speak to your
18 objection, Mr. Noce?

19 MR. NOCE: Yes, Judge. Like we talked
20 about I think at the preconference hearing, we
21 explained to Mr. Lee that this number that we -- that
22 we keep on a yearly basis is for the system as a
23 whole. We -- we're -- we do not have the capability
24 to break this down by region much less by Mr. Lee's
25 neighborhood to account for what water not -- what's

1 called nonrevenue water, water that we -- we -- that
2 leaves our system that ends up not being billed.

3 I believe Mr. Bush stated it at the --
4 that that information is provided to the PSC on an
5 annual basis and that the percentage is an acceptable
6 level in the -- under our -- the industry, Missouri
7 American's annual, you know, state -- or typical
8 annual unaccounted, nonrevenue water amount is within
9 the industry standards.

10 However, that information with regards
11 to this particular case is irrelevant because, again,
12 it's not focused on Mr. Lee's neighborhood and
13 there's no way that we can make such -- that type of
14 a reading with regards to this particular
15 neighborhood.

16 JUDGE JORDAN: Mr. Lee?

17 MR. LEE: I believe it was Mr. Bush
18 provided a number and percent. Was it 10 or 15
19 percent the day that we talked? I'm asking for that
20 number, that percentage to be converted to the total
21 number of gallons. That is one other -- one other
22 fact about this water system of how much water is
23 being lost in it.

24 I've calculated just in the -- estimated
25 here just in the few leaks in my neighborhood for

1 this to be about 21 million gallons a year that's
2 running out of the ground. I've converted that into
3 dollars to be about \$4.8 million worth of water
4 leaving this system. If the number of gallons is
5 enormous like I think it is, and I have one small
6 percent of that in my neighborhood, now, that again
7 paints a picture and shows the integrity of this
8 water system. And we don't -- it seems like Missouri
9 American doesn't want to let any information out that
10 shows the integrity of the water system.

11 MR. NOCE: Again, I mean, Mr. Lee, just
12 in response, I -- there's -- there's -- there are no
13 tests that we do that -- with regard to your
14 neighborhood in particular. Any number that we're
15 going to provide you is going to be on the system --
16 the system as a whole, and therefore it's not
17 relevant to this case.

18 MR. LEE: This neighborhood is part of
19 that system, Matt.

20 MR. NOCE: But any number -- any
21 information -- the information we have does not
22 pertain directly to that -- your neighborhood. We
23 don't have any readings for that, for your
24 neighborhood in particular.

25 JUDGE JORDAN: Okay. I think we

1 understand -- if I -- I think I understand what's
2 going on with that item, that is, Mr. Lee has -- has
3 taken the numbers for the system as a whole and done
4 an estimate of what he thinks is going on in his
5 portion of it. Am I correct, Mr. Lee?

6 MR. LEE: No, not exactly, Mr. Jordan.

7 JUDGE JORDAN: Okay.

8 MR. LEE: I have just estimated in the
9 several areas near my home where the water's running
10 out of the ground and done an estimate on that.

11 JUDGE JORDAN: Oh, okay.

12 MR. LEE: Not the whole entire
13 neighborhood. I imagine there's other places where
14 it's as bad or worse that I don't know about.

15 JUDGE JORDAN: Okay.

16 MR. LEE: In fact, I know two places
17 right up the street where there's twice as much water
18 running out of the ground than there is right here.

19 JUDGE JORDAN: Okay. Well, that is the
20 last of the discovery items. Staff is here. Does
21 Staff have anything to say on this motion to compel?

22 MR. RITCHIE: No, we don't. That's it.

23 JUDGE JORDAN: Okay. Well, what I'd
24 like to do while my ruling is -- is pending is
25 encourage the parties to continue to work on these

1 items. Mr. Noce has said he's got some more
2 information to send to Mr. Lee. I'll be working on
3 an order with the Commission to resolve this
4 discovery dispute, and anything that gets resolved or
5 happens in the meantime, I'd be grateful if the
6 parties would notify the Commission so that I can
7 adjust my order accordingly.

8 If the part -- if the parties can work
9 something out on this discovery, it's probably
10 something better than the Commission can order them
11 to do. That's my experience. So I'll encourage the
12 parties to continue to work at resolving this
13 discovery dispute if they can. If they can't, well,
14 an order will be forthcoming.

15 Is there anything else from any of the
16 parties before we end this oral argument and go off
17 the record and hang up the phone? Anything from
18 staff?

19 MR. RITCHIE: No, Judge.

20 JUDGE JORDAN: Anything from Missouri
21 American?

22 MR. NOCE: Nothing, Judge.

23 JUDGE JORDAN: Anything from Mr. Lee?

24 MR. LEE: I would just like to say
25 there's been such a denial of this information or

1 refusal to let it out, and then we put the fact that
2 I filed a complaint with the Public Service
3 Commission and filed a motion to dismiss in the other
4 case. It seems like if Missouri American Water had
5 their way, I would have no information, I would have
6 no civil suit, I would have no complaint with the
7 Public Service Commission, I would have nothing but a
8 leaky basement and water running out of the ground.
9 And I'm saying when are we gonna stop this dog and
10 pony show and get the problem solved?

11 JUDGE JORDAN: Okay. Thank you,
12 Mr. Lee. And that will conclude the oral argument on
13 this motion. Thank you all for your attention and
14 for your participation, and good morning to you.

15 MR. NOCE: Okay. Great. Thanks, Judge.

16 JUDGE JORDAN: You're quite welcome.
17 We're off the record.

18 (WHEREUPON, the recorded portion of the
19 oral argument was concluded.)
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