

RAS 4402

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Private Fuel Storage, LLC

Docket Number: 72-22-ISFSI; ASLBP No. 97-732-02-ISFSI

Location: Salt Lake City, Utah

Date: Thursday, April 25, 2002

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UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

In the Matter of:)
 PRIVATE FUEL STORAGE, LLC,) Docket No. 72-22
 (Independent Spent Fuel) ASLBP No.
 Storage Installation) 97-732-02-ISFSI
)

U. S. Nuclear Regulatory Commission
 Salt Lake City Sheraton, Wasatch Room
 Salt Lake City, Utah 84114

On April 25, 2002 the above-entitled matter came
 on for hearing, pursuant to notice, before:

MICHAEL C. FARRAR, CHAIRMAN
 Administrative Judge
 U. S. Nuclear Regulatory Commission

DR. JERRY R. KLINE
 Administrative Judge
 Atomic Safety & Licensing Board Panel

DR. PETER S. LAM
 Administrative Judge
 Atomic Safety & Licensing Board Panel

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1 Thursday, April 25, 2002

1:04 p.m.

2
3 P R O C E E D I N G S
4

5 JUDGE FARRAR: It's just after 1:00 here
6 in the Sheraton in Salt Lake City. We're going --
7 the three Board members are here. We're about to
8 have an oral argument on the in limine motions on
9 the seismic proceeding.

10 We have with us from the State Denise
11 Chancellor and Connie Nakahara. We have by phone
12 Paul Gaukler -- you're there, Paul?

13 MR. GAUKLER: Yes, I am.

14 JUDGE FARRAR: Mr. Turk, you're there?

15 MR. TURK: Yes, Your Honor. I have
16 someone else with me here.

17 JUDGE FARRAR: Who's that?

18 MR. TURK: I have Martin O'Neill.

19 JUDGE FARRAR: Okay. Is he a lawyer
20 or --

21 MR. O'NEILL: Lawyer.

22 JUDGE FARRAR: Okay. Mr. Turk, could
23 you say hello to the court reporter and say what a
24 good job she's doing so she'll get to know your
25 voice?

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1 MR. TURK: Ma'am reporter, as far as I'm
2 concerned, whenever you're tired, you're welcome to
3 come home.

4 MR. GAUKLER: Your Honor, Paul Gaukler
5 here, and I have Mat Travieso-Diaz here.

6 JUDGE FARRAR: Okay. And that was
7 enough for her to get a sense of your voice.

8 MR. GAUKLER: And Mr. Travieso-Diaz and
9 I will be sharing the argument. We'll be dividing
10 it up depending upon the particular motion.

11 JUDGE FARRAR: Okay.

12 MR. TRAVIESO-DIAZ: Good afternoon to
13 you all.

14 JUDGE FARRAR: Okay. How are you doing?

15 MR. TRAVIESO-DIAZ: Fine. How are you?

16 JUDGE FARRAR: Fine, thanks.

17 MR. TURK: Your Honor, Charles Miller
18 has joined us in Washington with the Staff.

19 JUDGE FARRAR: Okay, fine. Glad to have
20 him.

21 And we have here also from the State, in
22 the audience, Fred Nelson, from the Staff,
23 Catherine Marco and Bob Weisman and the
24 ever-present Mark, from the company, Jay Silberg
25 and John Donnell.

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1 So I think we're ready to get started.
2 What I'd like to do first is, given that we've all
3 been traveling and communications not always being
4 perfect, go over with you what we have in terms of
5 documents to make sure we have everything that you
6 have. We've read everything in our possession, but
7 there may be something not in our possession.

8 Then in terms of the argument, we'd like
9 to take them -- we've got something like eight
10 motions here, eight or ten motions. If you go ten
11 minutes each, you're up to an hour and a half, to
12 two hours. So we've read your papers. When we get
13 to the arguments, who's ever the proponent of the
14 motion may get two or three minutes just to state
15 the high points. We will interject with questions
16 and then give each side a response to it and back
17 and forth until we're in a position we think we can
18 rule on the motion.

19 The earlier ones may take longer
20 because, as we get to the later ones, some of the
21 same principles that helped us resolve the early
22 ones will govern the later ones also.

23 So let me go through with you what we
24 think we have here. We have three separate motions
25 from the Applicant, one to strike the testimony of

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1 Dr. Khan, one to strike portions of the testimony
2 of Dr. Ostadan and one to strike portions of the
3 testimony of Dr. Resnikoff. We have a State of
4 Utah response to all three, a unified response, and
5 we have no response from the Staff on that one.

6 Is that correct?

7 MR. TURK: Your Honor, we've responded
8 to the motion to strike testimony from
9 Dr. Resnikoff.

10 JUDGE FARRAR: Okay. I don't have that,
11 but Dr. Lam has it so I'll share with --

12 MR. TURK: We had that faxed over to the
13 hotel and hand delivered to Your Honors on Tuesday
14 morning. We sent over two papers at that time.

15 JUDGE FARRAR: Oh, okay. I have -- what
16 we have in that fax, Mr. Turk, is page 2 of your
17 letter to Ms. Chancellor, and I did not have the
18 motion. Ms. Marco is now giving your response, so
19 I'm all set on that.

20 MS. CHANCELLOR: We don't have that.
21 Sherwin, we don't have that one.

22 MR. TURK: Which one?

23 MS. CHANCELLOR: Your response to PFS's
24 motion.

25 Oh, thank you very much. I just got an

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1 extra.

2 MR. TURK: It should have been e-mailed
3 to you the night before.

4 MS. CHANCELLOR: It's okay. I've --

5 JUDGE FARRAR: There's no -- I don't
6 doubt anyone sent stuff. The only question is
7 whether we, in fact, got it.

8 MR. TURK: Okay. I know that I e-mailed
9 it on Monday night, and because Your Honors had
10 asked to have a hard copy delivered on Tuesday, I
11 faxed it to the hotel and instructed them to
12 deliver it to each of the three judges and
13 Ms. Marco.

14 JUDGE FARRAR: I think what happened is
15 I got part of that fax but not all. But that's why
16 we're going through this housekeeping. No harm
17 done. All right.

18 JUDGE LAM: Mr. Turk, I saw that your
19 fax was sent at 3:50 a.m. on Tuesday morning.

20 MS. CHANCELLOR: Oh, that's why I don't
21 have it.

22 JUDGE LAM: Good job.

23 MR. TURK: I must say I sent the fax
24 myself to you.

25 JUDGE FARRAR: Next from the Staff I

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1 have a motion to exclude exhibits and portions of
2 Dr. Resnikoff's testimony. I have a State response
3 to that, and I have an Applicant response in
4 support of that Staff motion.

5 Is that correct?

6 MR. GAUKLER: That's correct from our
7 perspective, Your Honor.

8 JUDGE FARRAR: Okay. From the State we
9 have a motion to strike Applicant's prefiled direct
10 testimony in its entirety, and then that same
11 motion covers other matters, including two sets of
12 witnesses, Tseng and Soler and Trudeau and Wissa.
13 I have an Applicant's response to that, and I do
14 not have a Staff response to that.

15 Is that correct?

16 MR. GAUKLER: We did not respond,
17 Your Honor.

18 JUDGE FARRAR: Okay. Fine.

19 Then I have another State motion to
20 exclude Staff testimony, three sets of -- portions
21 of three sets, Luk and Guttman, Waters and then
22 three people, Stamatakos, McCann and Chen. I have
23 a Staff response to that and an Applicant response
24 to that.

25 Is that correct?

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1 MR. GAUKLER: I believe so, Your Honor.

2 JUDGE FARRAR: Okay. All right. Then
3 with -- let us take just a moment here to make sure
4 we have everything we need in front of us.

5 All right. Let's start with the State's
6 motion that deals with the testimony in its
7 entirety -- the Applicant's testimony in its
8 entirety, and the Tseng and Soler and Trudeau and
9 Wissa testimony.

10 And, Ms. Chancellor, if you could make
11 your points briefly, and we will be interjecting
12 with questions we have.

13 MS. CHANCELLOR: Yes, Your Honor.

14 We really don't have much to add from
15 our -- from the motion that we filed.

16 With respect to PFS being inexcusably
17 late, we'd just like to make the point that PFS
18 chose to structure its testimony certainly. They
19 refer to Tseng and Soler's testimony as being 97
20 pages long. It's 97 pages long because two of
21 Holtec's analyses are actually written into the
22 testimony. So if PFS chose to structure its
23 testimony that way, then it should have taken that
24 into account when it filed its testimony.

25 We have read the Applicant's response,

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1 and if -- if it is the Applicant's position that
2 they will state on the record that they did not
3 look at our testimony at all, did not respond to
4 it, either the testimony or the key determinations,
5 then I believe that while we may be disadvantaged a
6 little bit with having typos and all sorts of
7 things in our testimony, we won't push that one.

8 JUDGE FARRAR: Mr. Gaukler, you did make
9 a representation in your brief to that effect, but
10 would you be willing to state here as an officer of
11 the -- of the Board that, in fact, your delay was
12 as you indicated, the usual delay in editing and
13 the final side checks and so forth?

14 MR. GAUKLER: That's exactly right,
15 Your Honor.

16 THE COURT: Okay. Well, let --

17 MR. GAUKLER: There was just a lot of
18 work that everybody had to do. Regrettably we did
19 not meet the deadline as did the Staff or the
20 State, but we were obviously better than them. And
21 we sought no litigation advantage and received no
22 litigation advantage from having received the
23 State's testimony before having filed ours.

24 MR. TRAVIESO-DIAZ: And, Mr. Chairman,
25 this is Mat Travieso-Diaz. Since I also worked

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1 with Mr. Gaukler in putting the testimony together,
2 I would like to join making that representation.
3 The last thing on our minds at that point in time,
4 in the early morning or late evening, was the time
5 to look up anybody else's filing.

6 JUDGE FARRAR: Based on those
7 representations, those are the kind of
8 representations that, if any party to the
9 proceeding that's appearing in front of us makes,
10 we would accept at face value. We have no
11 indication or no reason not to do that. So on that
12 basis, we will deny the State's motion, which, in
13 effect, they have conceded we could deny, at least
14 as far as it goes to the lateness of the -- of the
15 entire thing.

16 Ms. Chancellor, in your motion you asked
17 that if we didn't strike it, we might grant such
18 other remedy as would be appropriate. Is there
19 anything at this point you think you need that
20 would be responsive to that?

21 MS. CHANCELLOR: Nothing that I can ask
22 for, Your Honor.

23 JUDGE FARRAR: I don't know what that
24 means, and I won't ask.

25 Go ahead with the rest of your motion

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1 then.

2 MS. CHANCELLOR: The Part B of our
3 motion deals with the TBA pad flexibility analysis
4 that Tseng and Soler rely on in their testimony.
5 Just prior to coming over here this afternoon, we
6 received some information from Mr. Gaukler with
7 respect to the pad analysis. But we -- my
8 understanding is that it's only a part of that
9 analysis, and we haven't had a chance to review it.
10 And, in any event, I believe we would need the
11 entire analysis.

12 MR. GAUKLER: I would think that we've
13 given you the analysis that's relevant to the
14 incorporation of flexibility into the Holtec model.
15 That's what we reflected we would get from TBA as
16 quickly as we could if TBA was willing to release
17 that and make that available. I believe with that
18 information, together with your general knowledge
19 of the Holtec methodology, that you would -- should
20 have all the information that you need in that
21 respect.

22 I would note also you had a chance to
23 depose Mr. -- Dr. Tseng and Dr. Soler thoroughly on
24 the TBA analysis, and you would also have a chance
25 to do that in cross-examination.

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1 MS. CHANCELLOR: If I could respond?

2 But what we wouldn't have the chance to
3 do is to evaluate what parts of the TBA analysis
4 were relevant. We'd have to rely on the judgment
5 of Dr. Tseng and Soler for information that they
6 would -- to make the determination of what they
7 thought was relevant for pad flexibility.

8 MR. GAUKLER: We've given you the
9 formula --

10 MS. CHANCELLOR: Wait, wait, wait. I
11 haven't finished.

12 MR. GAUKLER: -- for the pad flexibility
13 that was incorporated in to the model.

14 THE REPORTER: I'm sorry. You're going
15 to have to start again.

16 MR. GAUKLER: We've given you the
17 formula for the pad flexibility that was
18 incorporated into the model. Why don't you take a
19 look at that and get back to me, and if you need
20 more, we'll talk about them.

21 MS. CHANCELLOR: This is information
22 that we have asked for going back to the
23 depositions, and to get it today and then say,
24 Well, ask for more if this is not enough, really is
25 just a disadvantage, considering that we'll have to

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1 cross-examine Tseng and Soler probably on Tuesday
2 or Wednesday.

3 MR. GAUKLER: You didn't ask for it at
4 the deposition. We took it upon ourselves, even
5 before we've received your motion to compel, to try
6 to obtain authorization of TBA to receive it -- to
7 obtain it. We did that the week after -- or the
8 end of that week we filed the testimony, and we've
9 been in the process of trying to get authorization
10 from them. With people being out of the office or
11 sick or things like that, it's taken longer than we
12 had hoped. And I was able to talk to a TBA
13 attorney and get his okay while he was at a hearing
14 this week, which he graciously took time out of to
15 monitor and shepherd this through TBA for us.

16 MS. CHANCELLOR: I'm going to let
17 Ms. Nakahara respond because she was in the
18 depositions and I'm not -- I don't know exactly
19 what occurred.

20 MS. NAKAHARA: If I could clarify, in
21 the November depositions of Dr. Tseng and
22 Dr. Soler, I asked for copies of all cask stability
23 analysis that Dr. Tseng and Dr. Soler conducted,
24 and we were told -- I was told that they were not
25 available because they were proprietary documents.

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1 MR. GAUKLER: That is true. Ms.
2 Nakahara did ask for that in the November
3 deposition. We got back to her and told her that
4 they were proprietary to the individual utilities
5 and Holtec and that we'd have to get permission
6 from the individual utilities, we could do that. I
7 believe we left it at that point in time that they
8 would get back to us further if they wanted to
9 pursue it --

10 MS. NAKAHARA: Then we must have had a
11 misunderstanding because it was my understanding
12 that you were not going to provide those documents.

13 MR. GAUKLER: Okay, okay. That could
14 be. I don't remember exactly what that was at that
15 point in time. But certainly when we decided to
16 rely upon this document, we've taken steps to try
17 to obtain it and provide it to the State.

18 JUDGE FARRAR: Is there a compromise
19 remedy here? In other words, we seem to be on the
20 right track, but the State now has very little time
21 to prepare. Is there any way to take these
22 witnesses later or --

23 MR. GAUKLER: It would be difficult, I
24 think, to take them later. Conceivably we could
25 allow questioning on this part of it later, I

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1 guess. That might be one possibility. But I think
2 the State would agree with me it makes sense to
3 keep them where they're at. They're our second set
4 of witnesses. We have -- and they'll be -- I'm
5 sure they're going to have a lot of questions. It
6 will be a major part of the State's, you know, the
7 State's cross-examination.

8 MS. CHANCELLOR: What we would suggest,
9 Your Honor, is that Mr. Gaukler continue to see if
10 he can get the entire document, that we will go
11 forward as we are now and we'll renew our objection
12 later on during the hearing if it comes to that.

13 JUDGE FARRAR: All right.

14 MS. CHANCELLOR: It seems like we were
15 at an impasse.

16 JUDGE FARRAR: Okay. Then on that
17 basis, we will deny the motion at this time without
18 prejudice to its being renewed.

19 MS. CHANCELLOR: Do you need to confer?

20 JUDGE FARRAR: Let me go off the record,
21 a procedural matter here.

22 (A discussion was held off the record.)

23 JUDGE FARRAR: Back on the record.

24 The last part of your motion deals with
25 the Trudeau and Wissa testimony.

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1 MS. CHANCELLOR: That's correct. If you
2 look at Exhibit 3 to the State's motion, this is
3 the test data that AGECE supplied to PFS or Stone &
4 Webster, and it includes sulfates, a count taken at
5 a depth of 2 to 4 feet with 13,800 ppm sulfate.
6 And to reproduce the testimony and exclude this
7 portion of the report that the -- that the
8 geotechnical firm submitted we believe is
9 misleading. And even though the testimony does
10 state that they did exclude sulfate tests taken at
11 2 to 4 feet, there's not a bright line between
12 where the eolian silt ends and the Bonneville clays
13 begin, and in order to make soil cement, there's no
14 guarantee that you're not going to get some
15 Bonneville clay in with the soil cement. You know,
16 two scoops of topsoil, a little bit of soil cement,
17 sprinkle in some water, and then you've got soil
18 cement. So you really don't know what you've got
19 going into the recipe.

20 JUDGE FARRAR: And, Ms. Chancellor, the
21 exhibit --

22 MS. CHANCELLOR: It's Exhibit 3.

23 JUDGE FARRAR: Yeah. It notes that it
24 excludes the tests but doesn't show the amount of
25 the sulfates found. Does it show the depth -- in

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1 the note reflecting the exclusion, does it show the
2 depth?

3 MS. CHANCELLOR: I believe it does say 2
4 to 4 feet and that they were higher.

5 JUDGE FARRAR: Okay.

6 MR. GAUKLER: I think, Your Honor,
7 briefly, that the testimony is not misleading. We
8 quite clearly state that it's 0 to 2 feet, that we
9 believe the stuff below 2 feet's not applicable,
10 and we note that the stuff had higher test results.
11 If the State wants to pass a different view, that's
12 something they can pursue in cross-examination or
13 rebuttal, but it's not an issue for -- in terms of
14 a motion to strike for being unreliable.

15 JUDGE FARRAR: Okay. I think,
16 Mr. Gaukler, I -- we prefer the practice where, if
17 you're going to exclude something, you be as
18 forthcoming as possible about what's being
19 excluded, and it might have been better, for future
20 reference, to make sure that you give all the
21 information about the excluded material so that
22 the -- whoever you're dealing with has full notice.
23 But having said that, I think we're at a stage now
24 where the State is not disadvantaged by -- by
25 moving ahead. They have the information, and they

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1 can use it to cross-examine the witnesses. So we
2 will deny their motion on that count.

3 Okay. Let's continue with the State's
4 motion versus the Staff dealing with one, two,
5 three separate -- three separate pieces of Staff
6 testimony on generally -- on the same general
7 grounds for each one.

8 Go ahead.

9 MS. CHANCELLOR: I'd like to start with
10 the Waters testimony. Mr. Turk from NRC has sent
11 us documents, and I believe that there is
12 sufficient information in those documents such that
13 we can go forward. However, I would like a
14 representation from Mr. Turk that if we do need
15 additional documents that he will do his best to
16 expedite getting them to us and because we withdraw
17 our motion that he won't drag his heels in getting
18 us what we want.

19 JUDGE FARRAR: Mr. Turk?

20 MR. TURK: Your Honor, we've been very
21 cooperative with the State, I believe. We sent
22 off, I believe on April 17th, approximately 11 sets
23 of documents to her.

24 I sent additional documents to you
25 today, by the way, Denise. There were some

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1 electronic files that I just received from Mr.
2 Waters. I just sent you those too. And, yes, we
3 will give you whatever you need as quickly as we
4 can, assuming there's no privilege that we would
5 assert.

6 MS. CHANCELLOR: Okay. Appreciate that.
7 We won't go forward with that motion.

8 JUDGE FARRAR: All right. Then that
9 motion is withdrawn.

10 Thank you, Mr. Turk, for that
11 representation.

12 MR. TURK: Thank you, Your Honor.

13 MS. CHANCELLOR: The Luk/Guttman
14 testimony is a different matter. The Luk report is
15 not part of the Staff's normal regulatory
16 documents. The Staff took a position on the cask
17 tipover analysis and the SER in December of '99 and
18 the final SER in September of 2001 and in the
19 seismic supplement to the SER in December of 2001.
20 We received some e-mails from Mr. Turk, I believe
21 it was -- is today the 25th? We received them
22 today. And it appears that there has been
23 correspondence between the Staff and Dr. Luk going
24 back to May of 2001 with respect to details about
25 PFS's cask stability analysis, time histories from

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1 Geomatrix, soil layers, et cetera, And these
2 documents have just been turned over to us.

3 The --

4 JUDGE FARRAR: Now, Ms. Chancellor, this
5 is the testimony that I've seen in correspondence
6 between Mr. Turk and you with a whole lot of
7 additional documents in the last ten days?

8 MS. CHANCELLOR: In the last -- that's
9 correct, Your Honor, after we filed the motion.

10 JUDGE FARRAR: Okay.

11 MS. CHANCELLOR: To the extent that the
12 Staff argues that they made Dr. Luk available, I
13 think if you look at the schedule that we were on
14 during March, it made it totally infeasible for the
15 State to conduct a deposition in the last two weeks
16 when we were getting ready to file prefiled
17 testimony.

18 The offer that the Staff made was that
19 we could go to D.C. this week on Thursday and
20 depose Dr. Luk.

21 The Staff is the entity that has got
22 this report finalized -- actually, the day -- the
23 day that they filed testimony -- well, actually,
24 Sunday, March 31st, and we didn't actually receive
25 a copy of Revision 1 of the report until April 2.

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1 It isn't -- even with the documents that
2 Mr. Turk has sent us, computer files, raw data, we
3 can't be expected to go to an Excel spreadsheet and
4 figure out what part of Holtec's cell matches up
5 with Dr. Luk's cell. We need to sit down and be
6 able to ask Dr. Luk questions of how he conducted
7 his analysis, what parameters he used and also to
8 get some background information on Dr. Luk, whether
9 he -- how many stability reports he has conducted.

10 I don't want to belabor the point.
11 Suffice it to say is that I don't believe it would
12 be fair for us to -- to be at the stage of
13 cross-examination and to be asking questions that
14 we don't know the answer to. To be -- to be at
15 that stage, eliciting information is just not fair
16 on us.

17 JUDGE FARRAR: Thank you,
18 Ms. Chancellor.

19 Mr. Turk, any thoughts there?

20 MR. TURK: Yes, thank you. By the way,
21 Mr. Jack Guttman has just joined us, and Mr. --
22 Dr. Mehendra Shah has also walked into the room
23 now.

24 JUDGE FARRAR: All right.

25 MR. TURK: Your Honors, the Luk report

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1 and the Guttman/Luk testimony is a very important
2 piece of the evidence that the Staff is putting
3 before you.

4 As you will probably -- as you probably
5 know from having read the testimony and the report,
6 Dr. Luk conducted confirmatory analysis in which he
7 input, through very sophisticated computer modeling
8 and analyses, the 2,000-year earthquake at the PFS
9 site, including soil structure interaction, which,
10 by the way, you'll see, as we talk about Dr. Khan's
11 report, that's something that he omitted from his
12 study.

13 Dr. Luk input the 2,000-year earthquake
14 parameters. He did a separate set of studies for
15 10,000-year parameters and again a second set of
16 studies for the 1972 San Fernando earthquake
17 Pacoima Dam record, which, by the way, contains
18 accelerations that roughly resemble the
19 accelerations predicted for the 2,000-year
20 earthquake at the PFS site.

21 The analysis that Dr. Luk conducted was
22 begun some time ago, back in mid -- mid-2001, not
23 because the PFS proceeding had any issue in it
24 related to that -- that question, because at that
25 time there was no issue in the PFS proceeding

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1 related to this matter. He did it because the NRC
2 Staff, Office of Nuclear Regulatory Research, was
3 conducting a generic evaluation of cask response to
4 seismic events. And, by the way, among the other
5 studies that Dr. Luk has conducted are studies
6 related to the San Onofre Nuclear Power Plant
7 ISFSI, the Hatch Nuclear Power Plant ISFSI and some
8 other studies I'm not -- I don't recall offhand
9 what they are.

10 The work is significant. It's important
11 for that work to be reflected in the record of this
12 proceeding. The work relates to Part D of
13 Contention Utah L/QQ which was only admitted at the
14 end of 2001. It was only as the State continued to
15 try to raise this issue that the Staff began to
16 think, well, maybe this is something that we should
17 work on for use in this proceeding. And, in fact,
18 after the Board admitted the contention, we
19 expedited our attempts to complete the studies.

20 That work was completed in early 2002 on
21 a staged base. First the work concerning the
22 2,000-year earthquake was completed, and then the
23 other work was completed, running into March.
24 Dr. Luk had to go off to Korea for a previously
25 scheduled trip. When he came back, he did two

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1 additional computer runs related to the 10,000-year
2 and the 1971 San Fernando earthquake using a
3 coefficient of friction which was maximized at .80
4 in order to determine the extent of cask tipover
5 that might be expected.

6 So there has been no attempt to delay
7 the completion of that report or the introduction
8 of that report in this proceeding. In fact, we
9 have tried to give the State up-to-the-minute
10 information about the report.

11 For example, in February we sent out a
12 summary of the conclusions that Dr. Luk had reached
13 with respect to his first set of computer runs
14 while he was still writing up the report. We
15 wanted to get out as quickly as possible a summary
16 so the State could see what the Staff was working
17 on and what conclusions it would present.

18 On March 8th we sent out what we
19 believed at that time to be the final report.
20 Dr. Luk went off to Korea, and then we discovered
21 that there were these additional runs that still
22 had to be done, which we asked Dr. Luk to do
23 immediately upon his return on March 20th.

24 There has been no deliberate delay. The
25 issue was raised late and was admitted even later

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1 by the Board, so we've been scrambling to try to
2 get the issue addressed. The result is the Staff
3 has done what I consider to be an outstanding piece
4 of research. It is a piece that the Commission
5 should have before it when they decide what is the
6 seismic hazards presented at the PFS site. I don't
7 think there's any way that the Board could exclude
8 that evidence and come out with a decision that the
9 Staff could support as we go forward to Commission
10 review.

11 Now, in terms of documentation, as I
12 mentioned, we've been trying to get documents to
13 the State as quickly as possible. The first task
14 was to get the report finished. And we did, and we
15 got that out. I was working pretty hard, as well
16 as I'm sure all counsel were working the weekend
17 before our seismic testimony was due. That report
18 was finished on March 31st, the day before
19 testimony was due. We did send it out then with
20 our testimony. We transmitted it on the night of
21 April 1. I believe it went out of here at roughly
22 2:00 a.m. in the morning an April 2nd. The State
23 may not have received it electronically until the
24 next day, but it was packaged and mailed out of
25 here on the night between April 1 and April 2 and

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1 e-mailed on the date of April 2nd. So we've done
2 our best to get them that document as quickly as
3 possible.

4 Subsequently, we've been transmitting to
5 the State a whole series of documents that sets
6 forth the input and the output that were developed
7 and utilized in Dr. Luk's report. We've been doing
8 that with various pieces of correspondence. As
9 Your Honors know, I've faxed to you and I've
10 e-mailed a whole set of copies of correspondence
11 between myself and the State relating to Dr. Luk's
12 documentation and the possibility of scheduling a
13 deposition. We've been willing even to schedule
14 his deposition. We're not trying to hold back.
15 Unfortunately, the time has been very short, and we
16 were unable to reach a convenient accommodation
17 with the State because it would involve
18 cross-country travel no matter who -- no matter who
19 travels, someone's going to have to travel
20 cross-country for that deposition, and there just
21 hasn't been time to do that in the few days
22 remaining before the hearing.

23 JUDGE FARRAR: Mr. Turk, I'll give
24 Mr. Chancellor an opportunity in a minute to
25 respond to your assertion that the Staff has been

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1 moving as quickly as possible, but assuming for the
2 moment that what -- you know, that she were to
3 accept everything you just said as showing proper
4 or even extraordinary diligence on the part of the
5 Staff, we're still faced with the situation where
6 the State has now had handed to it what you
7 describe as, you know, a very important piece of
8 work, a lot of supporting documents. They've been
9 as busy as everybody else. What's the solution
10 that gives them a fair opportunity to assimilate
11 all that material, talk to their experts and
12 prepare for the hearing? In other words, even if
13 everything you say is true and well put, what -- do
14 you have a suggestion for how we make sure they
15 have a fair opportunity to respond?

16 MR. TURK: Well, I'd like to hear what
17 the State considers they would need. So far the
18 only thing they've said is that it's unfair for
19 this testimony to be admitted and they need to have
20 time to ask questions before going to hearing, but
21 I haven't heard a solution proposed.

22 JUDGE FARRAR: And before I ask
23 Ms. Chancellor to respond, Mr. Gaukler, do you have
24 anything you wanted to add on this?

25 MR. GAUKLER: Mr. Travieso-Diaz is

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1 addressing this matter.

2 MR. TRAVIESO-DIAZ: Mr. Chairman, we
3 don't have anything to add because much of how it
4 transpired has been between the Staff and the State
5 and we don't have facts that we could add to what
6 has been said.

7 I would mention, however, that it does
8 seem that all the remedy the State seems to want to
9 have is really to talk to Mr. Luk -- Mr. Luk before
10 the hearing as opposed to asking him the same
11 questions at the hearing. And I don't see, given
12 that that is what they want, if the deposition
13 cannot be arranged before the hearing, how we can
14 avoid having to have the questions that she was
15 going to ask before the hearing be asked at the
16 hearing.

17 JUDGE FARRAR: Maybe this is a time to
18 interject into this proceeding the notion -- I
19 think, Ms. Chancellor, you sent us an e-mail on
20 behalf of everybody that people have realized that
21 seismic will not be done in two weeks. We've been,
22 of course, talking about that schedule. We didn't
23 make that original schedule. Our thoughts this
24 morning, the Board, was that schedule seemed off by
25 about half, that everything has taken twice as long

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1 as scheduled. So I think that means what we're
2 looking at is a break in the hearing after the
3 sixth week and a resumption, and we'll talk later
4 with the parties about orchestrating that. But it
5 seems that there would be some kind of a break
6 before resumption of seismic later.

7 Does that provide us fortuitously the
8 solution to this issue, that we would have Dr. Luk
9 later or this whole piece of work later and the
10 State could use the -- the break in the hearing to
11 do the preparation?

12 Ms. Chancellor, is that --

13 MS. CHANCELLOR: The schedule,
14 Your Honor, is a nightmare --

15 MR. TURK: I have a proposal to make
16 with respect to scheduling a deposition if Your
17 Honors are convinced that that's something they'd
18 like to do.

19 JUDGE FARRAR: We'll come back to that
20 in a minute. Ms. Chancellor was in the middle of
21 something.

22 MS. CHANCELLOR: I -- I believe that we
23 have the witnesses lined up for Section D of the
24 contention and to defer Dr. Luk would just throw
25 that off --

1 JUDGE FARRAR: Have them lined up for --

2 MS. CHANCELLOR: Lined up to testify at
3 the beginning of -- on April the 29th, on Monday.
4 So we will start with Section D witnesses, and
5 Section D witnesses, start with Youngs and Tseng,
6 Tseng and Soler, then Trudeau --

7 JUDGE FARRAR: The 29th?

8 MS. CHANCELLOR: Yes.

9 JUDGE FARRAR: Doesn't the company go
10 first?

11 MS. CHANCELLOR: Right. That's what I'm
12 saying. We've got -- we've got PFS's witnesses.
13 They have four witnesses on D. Then we have the
14 Staff's witnesses, and Dr. Luk is the second
15 witness for the Staff on D.

16 JUDGE FARRAR: Let me interrupt. The
17 parties have agreed to break -- to break the
18 hearing down by --

19 MS. CHANCELLOR: Oh, we didn't tell you
20 that?

21 JUDGE FARRAR: No. Now, we told you,
22 you know, to arrange it however you thought best.

23 So you're going to go by subsection of
24 the contention --

25 MS. CHANCELLOR: That's right.

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1 JUDGE FARRAR: -- as opposed to all of
2 the Applicant --

3 MS. CHANCELLOR: Right. What we thought
4 we would do is do Section D and then C and then E.
5 So it's the last --

6 MR. GAUKLER: So something we've been
7 working on for the past two months, at least the
8 past month.

9 MR. SILBERG: But the Board didn't have
10 a need to know.

11 MR. GAUKLER: And we have all these
12 witnesses for Section D lined up that first week.
13 We have the witnesses for Section C lined up the
14 second week. Initially we had thought we'd get
15 done with D the first week on Friday, then in
16 between D and C --

17 JUDGE FARRAR: Mr. Gaukler, let me
18 interrupt. Back up on -- since this is the first
19 we've heard of it -- and we're not offended. We
20 said we'd come out here whatever--

21 MR. GAUKLER: I thought we had sent the
22 e-mail to Your Honors, the parties had, and --

23 JUDGE FARRAR: It's possible, but, you
24 know, we've been on the road or things -- okay. So
25 the parties' plan is to start on April 29th,

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1 next --

2 MS. CHANCELLOR: On Monday.

3 JUDGE FARRAR: -- Monday --

4 MR. GAUKLER: Um-hum.

5 JUDGE FARRAR: -- with Part D?

6 MR. GAUKLER: With Part D.

7 JUDGE FARRAR: And which witnesses are
8 those?

9 MR. GAUKLER: The first witnesses would
10 be Robert Youngs and Dr. Wen Tseng.

11 JUDGE FARRAR: Right.

12 MR. GAUKLER: That would then be
13 followed by Dr. Tseng and Dr. Soler.

14 JUDGE FARRAR: Right.

15 MR. GAUKLER: That would then be
16 followed by Mr. Paul Trudeau.

17 JUDGE FARRAR: And these are all on D?

18 MR. GAUKLER: On D.

19 JUDGE FARRAR: All right.

20 MR. GAUKLER: And that would then be
21 followed by Dr. Bruce Ebbeson.

22 JUDGE FARRAR: Okay. And then the Staff
23 would have whom on D?

24 MR. TURK: We have two panels,
25 Your Honor. The first would be a panel of Daniel

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1 Pomerenius --

2 JUDGE FARRAR: Right.

3 MR. TURK: -- Goodluck Ofoegbu.

4 THE COURT: Okay. They would be your
5 first one, and then who?

6 MR. TURK: And then Dr. Luk would be our
7 second panel by himself -- I'm sorry, with Jack
8 Guttman.

9 JUDGE FARRAR: Right.

10 And the State?

11 MS. CHANCELLOR: The State would have
12 Barry Solomon, who's doing background, Dr. Bartlett
13 and Dr. Ostadan, and then as another panel,
14 Dr. Ostadan and Dr. Khan.

15 JUDGE FARRAR: Oh, Ms. Chancellor, you
16 once sent a cover letter with your testimony. Did
17 it omit one of the panels? You listed seven, and
18 you really have eight or something?

19 MS. CHANCELLOR: One, two, three, four,
20 five, six, seven, eight.

21 JUDGE FARRAR: Yes. There was a cover

22 --

23 MR. CHANCELLOR: Oh, did I?

24 JUDGE FARRAR: -- letter that I think
25 only listed seven, but there was testimony from

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1 eight. You have eight?

2 MS. CHANCELLOR: That's because we were
3 trying to file on time, Your Honor.

4 Yes, we have eight.

5 JUDGE FARRAR: Okay. Because I have
6 Dr. Bartlett on several panels. So we have
7 Solomon --

8 MS. CHANCELLOR: Solomon and then
9 Bartlett and Ostadan --

10 JUDGE FARRAR: Right.

11 MS. CHANCELLOR: -- and then Ostadan and
12 Khan.

13 JUDGE FARRAR: All right. So those
14 would be your three.

15 As long as we're on this, why don't we
16 -- Mr. Gaukler, next you had all agreed on what
17 part?

18 MR. GAUKLER: Right, initially we had
19 agreed on Section E. Now we think it's unlikely
20 we'll get done with D in time to allow E to be
21 heard between D and C. We have agreed on Section
22 C, that no matter what, we will heard the people on
23 soil cement on Wednesday, March 8th -- May, excuse
24 me. Then --

25 JUDGE FARRAR: Wait, wait, wait. Go

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1 slowly here. So on Wednesday, May 8th --

2 MR. GAUKLER: We would hear the people
3 on soil cement because that's the schedule where
4 both the State's witnesses and the Applicant's
5 witnesses are available. And that would be -- you
6 would have the testimony of Dr. Bartlett and
7 Dr. Mitchell for the State. You would have --

8 JUDGE FARRAR: Wait. Go slowly here.
9 Who would you have?

10 MR. GAUKLER: We would have Mr. Paul
11 Trudeau and Dr. Anwar Wissa.

12 JUDGE FARRAR: That panel?

13 MR. GAUKLER: Yes.

14 JUDGE FARRAR: Right, okay.

15 MR. GAUKLER: As it pertains to soil
16 cement, um-hum.

17 JUDGE FARRAR: Okay. And that's all you
18 would have?

19 MR. GAUKLER: On soil cement, yes.

20 JUDGE FARRAR: On C. Okay.

21 The Staff would have whom on C?

22 MR. TURK: We'd have Dr. Ofoegbu
23 appearing by himself.

24 JUDGE FARRAR: By himself, right.

25 And the State?

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1 MS. CHANCELLOR: The State would have
2 Dr. Bartlett by himself and then Dr. Bartlett and
3 Dr. Mitchell.

4 MR. GAUKLER: Dr. Bartlett by himself
5 will be just on the soils issue, I understand,
6 right, Ms. Chancellor?

7 MS. CHANCELLOR: I think a better way of
8 saying it is Dr. Bartlett and Dr. Mitchell will be
9 testifying together on soil cement, and
10 Dr. Bartlett will be doing the rest of C.

11 MR. GAUKLER: And that's the same thing
12 with respect to Dr. Wissa and Paul Trudeau.
13 They'll be testifying together with respect to soil
14 cement, and then Mr. Trudeau will be testifying
15 with respect to the other parts of C.

16 JUDGE FARRAR: All right. And then --
17 okay. So that is -- would be during the fifth
18 week. And have the parties decided for the sixth
19 week if they -- sixth and last week here whether
20 they want to finish aircraft or do seismic?

21 MS. CHANCELLOR: That's the week of May
22 13, right?

23 JUDGE FARRAR: The week of May 13th,
24 which is our so-called spillover week.

25 MR. GAUKLER: I think the parties would

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1 like to finish aircraft crashes. There is a
2 potential, given limitation of witnesses, that it
3 may not be possible. But right now we have the
4 following scheduling constraints --

5 MR. TURK: Paul, may I interject one?

6 JUDGE FARRAR: Go ahead.

7 MR. TURK: Your Honor, this is Sherwin
8 Turk. I'd like to ask that we hold off that
9 question temporarily. I think the three principal
10 parties need to talk a little more among
11 themselves.

12 JUDGE FARRAR: So there's no decision
13 yet for sure on the week of the spillover week?

14 MR. TURK: Not as far as the Staff is
15 concerned, Your Honor.

16 JUDGE FARRAR: Okay. Then we will not
17 pursue that now.

18 MR. TURK: We have some witness
19 scheduling conflicts that I've just e-mailed to the
20 State and PFS, and I think we need to consider all
21 of that information before we go forward with that
22 week.

23 JUDGE FARRAR: Okay. Then eventually
24 we'll get to Part E of the contention, and,
25 Mr. Gaukler, that involves which witnesses?

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1 MR. GAUKLER: For PFS, our primary
2 witness will be Dr. Allin Cornell, and then on
3 radiation dose consequences we would have
4 Dr. Everett Redmond, Dr. Alan Soler and Dr. Tseng.
5 We do have some testimony in Dr. Tseng and Dr
6 Soler, other testimony on E, but my sense right now
7 is that that would be heard in the context of D,
8 and so we would not be putting them back on in that
9 context in E.

10 JUDGE FARRAR: And Staff has who on E?

11 MR. TURK: We have two panels,
12 Your Honor. First we have Stamatakos, Dr. McCann
13 and Dr. Chen testifying as one panel.

14 JUDGE FARRAR: Um-hum, right.

15 MR. TURK: And then we have Michael
16 Waters on those consequences.

17 JUDGE FARRAR: Right.

18 And the State has whom?

19 MS. CHANCELLOR: Dr. Arabasz by himself
20 and as a panel, Dr. Bartlett and Dr. Ostadan and by
21 himself, Dr. Resnikoff.

22 JUDGE FARRAR: What happened, Mr.
23 Gaukler, to Donald Lewis? Did I miss him?

24 MR. GAUKLER: Oh, excuse me. That's
25 right. He's on E also. I apologize.

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1 MS. CHANCELLOR: I'd just like to
2 mention, Your Honor, that we have unavailability of
3 a key witness, Dr. Bartlett, for the week of the
4 13th, so I'm not sure that we will be able to go
5 forward with L/QQ on the week of the 13th.

6 JUDGE FARRAR: All right. This
7 information is helpful to us. Let's get back to
8 the question that triggered it, how the State will
9 get a fair opportunity to prepare on the Luk
10 report. From what you've told me and given the
11 efforts you've made to arrange witnesses, there
12 does not appear to be an easy solution. One
13 solution, of course, would be the State makes its
14 best effort and would have the opportunity at the
15 end to say we need to bring this fellow back later
16 to pursue it more.

17 MS. CHANCELLOR: I have a suggestion.

18 JUDGE FARRAR: Okay.

19 MS. CHANCELLOR: If Mr. Turk can get
20 Dr. Luk in here on Sunday, we could take his
21 deposition on Sunday.

22 MR. TURK: Which Sunday, April 28th?

23 MS. CHANCELLOR: The one coming up,
24 Sherwin.

25 MR. TURK: I have what I think is an

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1 even better solution, Saturday, May 4th. Why don't
2 we let everybody else have a day off from the
3 hearings and do the deposition then?

4 MS. CHANCELLOR: But that would be after
5 his testimony. That really wouldn't help us.

6 MR. TURK: I wouldn't expect it will be
7 after his testimony, not the way things have been
8 going.

9 JUDGE FARRAR: Before we get to the
10 Staff --

11 MS. CHANCELLOR: Five witnesses before
12 Dr. Luk.

13 JUDGE FARRAR: We have four sets of
14 Applicant witnesses. Would Dr. Luk be your first
15 panel, Mr. Turk, or second?

16 MR. TURK: Second.

17 JUDGE FARRAR: So we have five sets of
18 witnesses.

19 MR. TURK: And if worse comes to worse,
20 if you reach the day that you've finished all the
21 other panels, we can start the deposition then and
22 give everyone a day off from hearing. But I really
23 don't think that will happen until Saturday.

24 JUDGE FARRAR: Well, we've been sitting
25 here, we've gone through two and a half issues so

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1 far, and the notion -- you've got 21 panels or
2 witnesses, and we're thinking, of course, subject
3 to what you all decide, that the -- given what's
4 happened so far that the possibility of doing two a
5 day for ten days is impossible and that if we could
6 do one a day for four weeks we would cover them.
7 At that rate, we would -- that Saturday, May 4th,
8 or Sunday, May 5th, whichever you all pick, would
9 seem to work. We'll referee the Saturday versus
10 Sunday if you need us, but so far you all have been
11 very good at arranging things yourself.

12 MS. CHANCELLOR: Every hearing has been
13 longer than we anticipated, so maybe Mr. Turk is
14 right. We'll take him up on his Saturday, the 4th
15 of May, offer.

16 JUDGE FARRAR: Okay. Then your --

17 MS. CHANCELLOR: I don't know what
18 happens if we -- if we --

19 MR. GAUKLER: Well, if we get to him
20 earlier, just do what Mr. Turk suggests, maybe just
21 have a day off and have the deposition on that day
22 and then have the hearing on Saturday.

23 MS. CHANCELLOR: Okay. All right.

24 JUDGE FARRAR: All right. Then to that
25 extent, Ms. Chancellor, your motion, which was well

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1 taken and well put, but so were the responses, your
2 motion is denied, but we've taken these steps to
3 provide the remedy that you need.

4 MS. CHANCELLOR: And we assume that
5 Mr. Turk will do like he did with Dr. Waters and be
6 responsive to our requests if we need additional
7 documentation.

8 JUDGE FARRAR: I know he's about to say
9 that.

10 MS. CHANCELLOR: Thank you.

11 MR. TURK: What I'm about to say,
12 Your Honor, is that we've given them all the
13 documents that we've identified so far. And
14 they'll see, even in the last day -- I think
15 yesterday I transmitted more documents to them.
16 Because if there are documents that are identified
17 during the deposition that they need and we haven't
18 turned them over, we'll get those as well.

19 JUDGE FARRAR: We appreciate that,
20 Mr. Turk.

21 Ms. Chancellor, you had another part of
22 this motion --

23 MS. CHANCELLOR: Right, Your Honor.

24 JUDGE FARRAR: -- which dealt with three
25 witnesses.

1 MS. CHANCELLOR: Yes, Stamatakos McCann,
2 and Chen.

3 First is the hearsay upon hearsay, maybe
4 even upon hearsay reliance on a person from DOE.
5 And in the Staff's response, they state that the
6 State could get in touch with Dr. Chandar, but
7 that's not the point. I notice that in the Staff's
8 response they don't mention whether any of these
9 witnesses were involved in that conversation with
10 Dr. Chandar, who they got that information from.
11 So I think that while the -- while NRC proceedings
12 do allow hearsay, this hearsay is so unreliable and
13 it is on an issue that -- as to why DOE changed
14 Standard 1020, that it's not a minor point. And so
15 I think that the response to answer 20 as it
16 relates to that hearsay statement should be struck.

17 JUDGE FARRAR: Mr. Turk?

18 MR. TURK: Thank you, Your Honor.

19 Dr. Harish Chandar is identified in the
20 Staff testimony as the person responsible for
21 coordinating DOE's revision of its Standard 1020-94
22 which resulted in the issuance of
23 DOE-STD-1020-2002.

24 Now, I think I should call to Your
25 Honor's attention a very significant piece of

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1 information. The State of Utah Exhibit 126 is a
2 memorandum from Richard Black who, coincidentally,
3 used to work at OGC at the NRC. It's a memorandum
4 to him and others in the DEO providing
5 Dr. Chandar's telephone number and indicating that
6 anybody who has comments could reach him at
7 telephone. And it also gives his e-mail address.
8 So Dr. Chandar's authority is not in dispute. The
9 State itself has produced that memorandum.

10 JUDGE FARRAR: Mr. Turk, what's the date
11 of that e-mail?

12 MR. TURK: That's an e-mail dated August
13 22, 2001. It's Utah Proposed Exhibit 126.

14 The State is aware of Dr. Chandar's
15 telephone number. They could call him to question
16 him to see whether the Staff, in fact, had a
17 communication with him, who was involved in the
18 communication and what was said. So there is a
19 great deal of reliability. The Staff has
20 identified the key person with whom they spoke.

21 In addition, the State is able to
22 cross-examine the Staff's witnesses to get the
23 information as to who was involved in the
24 conversation, and I can volunteer to you right now
25 that Dr. Stamatakos was one of the people involved

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1 in that conversation, along with others.

2 JUDGE FARRAR: So you would have on the
3 stand one of the people who actually had the
4 conversation, not a person to whom the conversation
5 was relayed?

6 MR. TURK: That's correct. And we'll
7 have in the audience another person with whom that
8 conversation was held in case we need any further
9 questioning. So there is no unreliability, and the
10 State has a full opportunity to test the veracity
11 and reliability of the Staff's representation of
12 that communication.

13 JUDGE FARRAR: Are Dr. -- and forgive me
14 for not having all these right at my fingertips.
15 Are Dr. Chandar's statement or report going to be
16 in front of us.

17 MR. TURK: The report is the 1020-2002.
18 Portions of that report I believe have been moved
19 -- or will be processed as evidence, but I'd have
20 to ask the other parties to help me there with
21 respect to exactly what exhibit number it is.

22 JUDGE FARRAR: So we would have his
23 report, and then we would have on the stand a Staff
24 person who talked to him and can -- so while they
25 can't verify his report, they can tell us why they

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1 drew information from it and so forth.

2 MR. TURK: Yes. The report itself,
3 Your Honor, is about an inch thick, single sided,
4 so on the order of, I would say, 300 pages, 250 or
5 300 pages. The State it is -- Denise, can you tell
6 me, is there -- do you recall offhand what exhibit
7 number that is?

8 MS. CHANCELLOR: We have the draft DOE
9 Standard 2001, but we just have an excerpt, and
10 that's Exhibit 126.

11 But the DOE-STD-1020 is not a report
12 that this Mr. Chandar put out. It's a thick report
13 that has been -- that was being changed from '94 to
14 2002 as to the return period. DOE-STD-1020 used a
15 2,000-year, and now it's using a 2,500-year return
16 period earthquake for certain DOE facilities. And
17 the question is why did DOE make that change in
18 Standard 1020. And the Staff relies on
19 DOE-STD-1020 as part of its rationale for granting
20 the Staff -- for granting the Staff -- for granting
21 PFS the exemption request. And so there's a lot of
22 questions revolving around DOE-Standard-1020.

23 MR. TURK: We will have the report with
24 us, Your Honor, we can introduce it into evidence
25 if the parties or the Board wish to, or perhaps we

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1 would just introduce Appendix C. There are some
2 pages of Appendix C that have been proffered. I
3 forget who did it and what exhibit number it is.
4 But we can take that entire appendix and proffer it
5 into evidence.

6 In essence, there's a table there that
7 speaks to what return period should be utilized for
8 various performance category facilities. DOE
9 structures its table by listing four different
10 performance categories. PC, for performance
11 category, 3 is the one most akin to a spent fuel
12 storage installation, and that's the one for which
13 the return period in this document has been revised
14 from a 2,000-year return period to a 2500-year
15 return period.

16 The communication that the Staff had
17 with Dr. Chandar involved asking the reasons for
18 DOE's change in that return period, and they were
19 informed by Dr. Chandar that because DOE uses USGS
20 national earthquake hazard maps, they wanted to use
21 the same return period that's specified in those
22 maps, which was 2500 year. It wasn't because they
23 thought 2500 years was more significant than 2000
24 years, but it was a consistency issue.

25 Now, I'm paraphrasing the testimony, and

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1 the witnesses will be able to explain better than
2 me just what Dr. Chandar told them. But that's one
3 of the things the Staff witnesses talk about in
4 terms of the relevance of the 1020 standard. And
5 as I said, the communication is testable, the
6 document itself can be introduced and the State can
7 talk to Dr. Chandar and get whatever information
8 they want from him directly.

9 JUDGE FARRAR: Looking to the end of the
10 case, is the Chandar -- I mean I have no problem
11 with hearsay coming in, as we've ruled earlier in
12 the case, but will you be using the DOE report to
13 kind of -- to go to the ultimate question in this
14 case, the legitimacy of the exemption? In other
15 words -- or is there something else that would --
16 would, you know, get to that ultimate question?

17 MR. TURK: It is a reference point.
18 It's not the ultimate test, but it was a reference
19 point used by the Staff when they issued the SER.
20 And they indicated that the Staff would approve the
21 exemption request in part because it was consistent
22 with that DOE standard by analogy.

23 JUDGE FARRAR: But you'll have someone
24 on the stand who will be supporting the wisdom of
25 drawing that analogy?

1 MR. TURK: Yes.

2 MR. GAUKLER: And, also, we'll have
3 Dr. Allin Cornell on the stand who will talk
4 generally about the DOE-1020 standard and
5 particularly make the point that even though the
6 return period earthquake change changed for PC-3
7 categories, the performance objective remained the
8 same.

9 JUDGE FARRAR: Ms. Chancellor, with that
10 background what are your thoughts?

11 MS. CHANCELLOR: Your Honor, the Staff
12 relies on DOE-STD-1020-94 which has a 2000-year
13 return period earthquake, and I believe that
14 conversation that is relayed to what this
15 Dr. Chandar said goes to whether the standard
16 should be at least 2500 years. What we are asking
17 for is essentially two sentences to be deleted from
18 the Staff's testimony. We won't require all of the
19 Question 27 to be struck, just the statement that
20 the Staff had the conversation with --

21 JUDGE FARRAR: Wait, hold on. Let us --

22 MS. CHANCELLOR: Page 31 of the Staff's
23 testimony.

24 JUDGE FARRAR: Of?

25 MS. CHANCELLOR: Of Stamatakos, Chen and

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1 Khan.

2 JUDGE FARRAR: Page which?

3 MS. CHANCELLOR: 31, at the bottom of
4 the page.

5 JUDGE FARRAR: Okay. And you would
6 delete which portions?

7 MS. CHANCELLOR: Starting with, The
8 Staff has discussed this development --

9 JUDGE FARRAR: Right.

10 MS. CHANCELLOR: -- through the end of
11 that paragraph, down to USGS NEHRP maps.

12 JUDGE FARRAR: So you delete the entire
13 sentence on 32 or just through maps ?

14 MS. CHANCELLOR: Through maps.

15 JUDGE FARRAR: Let us take a look at
16 this for a moment.

17 MS. CHANCELLOR: Do you want us to --

18 JUDGE FARRAR: Yes.

19 (The Panel confers off the record.)

20 MR. TURK: I'm sorry, Denise. Did you
21 say to the end of the paragraph or to the end of
22 the answer?

23 JUDGE FARRAR: She said -- she's now
24 removed herself from Board's -- nearness to the
25 Board's deliberations, but what she said was

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1 through the word "maps" on page 32.

2 Oh, Denise? Ms. Chancellor?

3 MS. CHANCELLOR: Um-hum.

4 JUDGE FARRAR: There's maps in the
5 middle of the sentence and maps at the end of the
6 sentence.

7 MS. CHANCELLOR: It's the end of the
8 paragraph, so we are deleting one, two, three,
9 four, five, six lines of the Staff's testimony.

10 JUDGE FARRAR: I'm sorry. I misstated
11 that. Thank you, Mr. Turk for that clarification.
12 We'll take a minute here.

13 MR. TURK: Your Honor?

14 JUDGE FARRAR: Yes.

15 MR. TURK: I would like to respond also,
16 Your Honor.

17 MR. TRAVIESO-DIAZ: So would I.

18 MR. GAUKLER: I have a point to make
19 too, Your Honor, real quick. Dr. Allin Cornell
20 makes the same statement, that a minor change has
21 been made to the PC-3 category to make the use of
22 PC-3 category's structures and components of the
23 USGS National Probabilist Seismic Hazard Maps. So
24 he basically refers in his testimony to the same
25 facts.

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1 MS. CHANCELLOR: But Dr. Cornell doesn't
2 have the imprimatur of speaking for DOE.

3 MR. TURK: May I address
4 Ms. Chancellor's motion, Your Honor? This is
5 Sherwin Turk.

6 JUDGE FARRAR: Before you do that, give
7 us a minute just --

8 MR. TURK: Okay.

9 JUDGE FARRAR: -- for the Board to look
10 at these two sentences and talk about them. Then
11 we'll hear your --

12 MR. TURK: Okay. I think you should
13 look at the beginning of the answer as well and see
14 how those sentences tie in to the beginning of that
15 answer.

16 JUDGE FARRAR: Okay.

17 (The Panel confers off the record.)

18 JUDGE FARRAR: All right. The Board has
19 conferred, and before we make any ruling, whose
20 turn was it to speak?

21 MR. TURK: Sherwin Turk, Your Honor.

22 JUDGE FARRAR: Okay.

23 MR. TURK: I wanted to make one final
24 point here. What the State is essentially asking
25 Your Honors to do is to keep in the record the fact

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1 that DOE has moved to a 2500-year return period but
2 to ignore, to exclude any statement of the reasons
3 for DOE doing that. That's improper. The State
4 can't have it both ways. If they want to introduce
5 evidence that the DOE standard currently is a
6 2500-year return period, then we should be able to
7 explain our understanding, having spoken with the
8 official which the state itself acknowledges to be
9 the official in charge of making the change, what
10 the reasons were, and explain to the Staff, for
11 doing it. To do otherwise would be to have an
12 incomplete record which would improperly suggest
13 that there is some scientific or technical basis
14 for moving from 4×10^{-4} -- I'm sorry, from $5 \times$
15 10^{-4} to 4×10^{-4} , which is, as you know from
16 mathematics, in any event, a very small change.
17 It's a 20-percent change.

18 But it would be improper simply to leave
19 in the record what the current standard is without
20 us explaining what DOE told us was the reason
21 behind it.

22 And, incidentally, the State couched its
23 motion in terms of reliability. There is no
24 question of reliability here. As I've mentioned
25 before, this is the DOE official responsible for

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1 making the change. It's not an unnamed person.
2 It's a person that we named, a person who is the
3 responsible official at DOE, whose number is in the
4 State's possession. They can call him or e-mail
5 him or contact him. And if they have evidence
6 that's contrary to what the Staff presented, let
7 them introduce it.

8 MR. TRAVIESO-DIAZ: Mr. Chairman, I'd
9 like to make one point that hasn't been made
10 before.

11 JUDGE FARRAR: Yes, sir.

12 MR. TRAVIESO-DIAZ: Okay. This portion
13 of the motion is clearly premature. We are having
14 the NRC panel testify and have the reliability of
15 that communication probed by State's counsel and by
16 the Board. There is no way to determine how
17 reliable or unreliable the testimony is. That kind
18 of belong in the abstract. We have a
19 representation by the Staff that the people who
20 were in the communication are going to be available
21 to be questioned. Why don't we wait until then?

22 JUDGE FARRAR: Thank you for that
23 thought.

24 Ms. Chancellor, you can respond to both
25 of those.

1 MS. CHANCELLOR: My concern, Your Honor,
2 is that it suggests that this has the -- that this
3 is the DOE's official position. There's no
4 document. There's nothing that suggests that this
5 is DOE's official position. If the Staff wants to
6 testify that -- that it was undertaken because of
7 this, that's one thing. But to say that it is
8 based on Dr. Chandar of DOE, that that is the
9 reason why this change was made, I think that --
10 that is misrepresenting -- misrepresenting the
11 official position of DOE. If they can find
12 something that says this is DOE's official position
13 as to why we made this change, fine, but this is
14 just a hearsay statement.

15 JUDGE FARRAR: Okay. I think on this
16 the point just made by the Applicant is one that
17 we've followed in the past. When in doubt on
18 matters like this, leave the material in. You can,
19 Ms. Chancellor, raise these points through
20 cross-examination, and then there's always the
21 opportunity after that, depending on what you
22 establish, to renew your motion. So we will -- we
23 will deny that motion.

24 I believe that takes care of the State's
25 motion -- motions.

1 Let's keep going. We've set some
2 principles here which we'll try to follow.

3 Mr. Gaukler, let's take up your motions
4 with the -- hold on. Let me switch gears here.

5 Mr. Gaukler, we have three of your
6 motions.

7 MR. GAUKLER: That's correct,
8 Your Honor.

9 JUDGE FARRAR: Let's leave the Resnikoff
10 one till last, take up the one dealing with
11 Dr. Khan where you want -- where you're dealing
12 with the State's testimony.

13 MR. GAUKLER: Yes. I will address
14 Dr. Khan, with respect to Dr. Khan.
15 Mr. Travieso-Diaz will address the one with respect
16 to Mr. Ostadan.

17 With respect to Dr. Khan, I think we've
18 set forth the facts very simply in our motion. The
19 State's own witnesses, Dr. Ostadan, calls a
20 nonlinear --

21 (A discussion was held off the record.)

22 MR. GAUKLER: -- said that a nonlinear
23 analysis of a freestanding object is a very complex
24 analysis, unusual analysis. We have Dr. Khan
25 essentially acknowledging in his deposition that

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1 this is the first time he's undertaken this type of
2 analysis, as a practical matter. He does refer to
3 having done a review of Holtec's analysis with
4 respect to freestanding fuel racks at Diablo
5 Canyon, and the State suggests that that qualifies
6 him as an expert and suggests that we're using a
7 double standard in that we refer to Dr. Tseng's and
8 Dr. Soler's extensive experience with respect to
9 analyzing freestanding fuel racks.

10 The point is, though, when we questioned
11 Dr. Khan more closely, he acknowledged that he was
12 not focusing on the sliding issue, he was focusing
13 on the structural strength in that analysis.

14 The other analysis was just a
15 hypothetical box, no real component.

16 With respect to contact stiffnesses,
17 which is one of the main parameters he takes issue
18 with Dr. Tseng's and Dr. Soler's analysis, he
19 acknowledged that this is the first time that he
20 had ever developed a contact stiffness for
21 analyzing a freestanding moving object such as the
22 casks.

23 The State essentially tries to attack
24 the back door of Dr. Tseng's and Dr. Soler's
25 expertise, thus claiming expertise for Dr. Khan.

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1 Number one, that's not the subject of this motion.
2 Number two, Dr. Tseng and Dr. Soler have extensive
3 experience going back 15 years in many types of
4 nonlinear analysis of freestanding objects
5 involving both casks and freestanding fuel racks
6 under various types of conditions.

7 The state references in its opposition
8 that, based on his professional judgment, Dr. Khan
9 has questioned the small movements shown by the
10 Holtec analysis, and my point is he doesn't have
11 any professional experience on which to base such a
12 question. And, therefore, we do not believe that
13 he has the knowledge, skill or experience to be an
14 expert in this area.

15 JUDGE FARRAR: Mr. Turk, you did not --
16 is this one you did not file anything on? Correct?

17 MR. TURK: That's correct.

18 JUDGE FARRAR: All right. Then,
19 Ms. Chancellor, your response?

20 MS. CHANCELLOR: Ms. Nakahara is going
21 to give the response, Your Honor.

22 JUDGE FARRAR: Okay.

23 MS. NAKAHARA: I'd like to clarify a
24 point that Mr. Gaukler made. Dr. Khan did evaluate
25 the Holtec analysis for free -- for a freestanding

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1 spent fuel rack. However, he also independently
2 modeled a freestanding spent fuel rack for the same
3 facility, Diablo Canyon.

4 Mr. Gaukler contradicts himself. He
5 makes the point that freestanding fuel racks --
6 analysis of the freestanding fuel racks is not
7 relevant in the case of Dr. Khan, but, on the other
8 hand, his witnesses rely on years and years of
9 analyzing freestanding fuel racks. I would like to
10 point out, as we did in our motion, that Dr. Khan
11 has over 22 years of experience conducting seismic
12 analysis of structures. He also has 22 years of
13 experience in performing nonlinear analysis. And
14 although he does not have 22 years of experience in
15 modeling freestanding objects in nonlinear
16 analysis, I would suggest that you don't exclude
17 his 22 years of seismic analysis and nonlinear
18 analysis experience because he hasn't had an
19 opportunity to do freestanding objects.

20 And he has done -- I mean the box
21 analysis that he did model is not irrelevant
22 because it wasn't a specific structure. It still
23 revolves around the same principles.

24 MR. GAUKLER: I'd like to add two brief
25 rejoinder points, if I could, Your Honor.

1 THE WITNESS: Yes. Go ahead.

2 MR. GAUKLER: First of all, I thought I
3 was very clear when I asked Dr. Khan the nature of
4 his experience that he had with respect to the
5 freestanding analysis as it applied to spent fuel
6 racks and that my understanding is as he stated it
7 on page 68 of his deposition which I've attached,
8 which he mentions there that he evaluated the
9 freestanding spent fuel racks and that he didn't
10 focus on sliding.

11 And in that I was very clear that I
12 wanted to identify each and every time he had
13 looked at something -- analyzed something that was
14 freestanding, and I went over specifically the two
15 circumstances I had understood him to say earlier
16 in the deposition. He agreed with those and didn't
17 add anything else.

18 Second, with respect to nonlinear
19 analysis, Dr. Khan indicated he's done a lot of
20 testing with respect to nonlinear situations, but
21 he has not done a nonlinear analysis. That was his
22 testimony, I believe, on page 66 of his deposition.

23 Those two points of rejoinder -- I would
24 again make my main point, that he doesn't have the
25 experience, skill or knowledge to testify in this

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1 area.

2 MS. NAKAHARA: Just to paraphrase what
3 Judge Farrar said establishing principles in this
4 proceeding, I believe on your last decision you --
5 and I'm paraphrasing, when in doubt, let it in.

6 JUDGE FARRAR: What a low below to cite
7 us back at ourself.

8 Can we go off?

9 (The Panel confers off the record.)

10 JUDGE FARRAR: The Board has consulted,
11 and my two colleagues believe strongly in the
12 transferability of professional knowledge, that
13 people are not limited to precisely the work
14 they've done before and that any challenge to that
15 is a matter of cross-examination, so -- for which
16 the groundwork has already been laid at the
17 deposition, and we will continue that at the trial.
18 So this motion of the Applicant will be denied.

19 JUDGE LAM: Let me add to Judge Farrar's
20 comment on disqualifying an expert in these
21 proceedings. In this particular proceeding, as
22 well as all the proceedings that I have been
23 familiar with, unless there is a glaring deficiency
24 regarding an expert's qualification, such as
25 somebody proffering a butcher as a brain surgeon,

1 the Board is inclined to assign appropriate weight
2 to the expert's testimony commensurate with his
3 expertise. And, furthermore, the party always has
4 the remedy in cross-examination to impeach the
5 witness's qualification.

6 So for -- I hope these comments will set
7 the appropriate background for everybody to
8 consider.

9 JUDGE FARRAR: Let me add to that that
10 at the trial what we're looking for is what does
11 the witness say, how strong are the witness's
12 reasons for saying that, what contradictory things
13 may the witness have said before. So it's not, I
14 think, for the parties in going forward at the
15 hearing, it's -- the credence that we give any
16 witness depends on how strong the underlying
17 reasons are and what basis in the witness's
18 background, experience, education, whatever,
19 support that.

20 And those are things that we would
21 encourage you all to challenge on cross-examination
22 so at the end of the case we know exactly what
23 weight, if any, to give to any particular witness.

24 We've been going an hour and a half, and
25 I think we have, if my checklist is right, only two

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1 matters left. We have the Applicant's motion with
2 respect to the Ostadan -- a portion of the Ostadan
3 testimony, and we have the Applicant and the
4 Staff's motions with respect to Resnikoff.

5 Is that correct?

6 MR. GAUKLER: You've captured the
7 Applicant's remaining motions, yes, Your Honor.

8 JUDGE FARRAR: Okay. Then let's take up
9 the Ostadan matter next.

10 MR. TRAVIESO-DIAZ: Thank you,
11 Mr. Chairman.

12 This is a very narrow motion. It
13 doesn't go to Dr. Ostadan's qualifications. It
14 deals, however, with a point or an issue that we
15 think is extremely important and timely, which is
16 what is the scope of this contention that we're
17 going to be hearing about over the next two or
18 three or whatever number of weeks.

19 On December 26 when the Board denied the
20 various motions that were pending and allowed
21 Contention L and Contention QQ to be admitted and
22 litigated, it asked the parties in their work to
23 come up with a single document that comprised all
24 the claims that were part of those two contentions
25 so that we could proceed in an orderly fashion to a

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1 hearing.

2 The parties have done that, in fact, to
3 spend three or four days of various attorneys' work
4 leading to the submittal to the Board January 16 of
5 this year. And as we understand the Board's
6 reaction, it was one of gratitude to the parties
7 for having worked hard and come up with a road map,
8 a framework under which we were going to litigate.

9 Applicants have understood from that
10 point forward, is that that contention -- which
11 just to express the terms of it is six single
12 spaced pages of claims -- is the universe that
13 we're going to be addressing. And, of course, as
14 the Applicants, having the burden of proof, every
15 one of the issues that have been raised in that
16 contention is very important to us, needs to be
17 studied and needs to be -- testimony needs to be
18 filed, whether it's 97 pages or 50 pages or
19 whatever.

20 So we have been working under the
21 assumption that that was the playing field, having
22 been clearly defined, clearly limited. It was a
23 big playing field, many claims, and we, in fact,
24 have been working very hard to address all of
25 those.

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1 And that is I think is the most
2 important basic point that we need to decide as a
3 preliminary matter before going to the merits. It
4 is is the expression of Contention L/QQ that
5 appears in the document that was filed with the
6 Board, that is an attachment to this motion with
7 Dr. Ostadan, is that the universe?

8 The State doesn't seem to believe that's
9 the case. If you look at their response just
10 before footnote 12, the state says that it is not
11 bound -- doesn't feel it is bound by what is
12 contained on that text. We -- we respectfully
13 argue that that cannot be. It's not fair to the
14 Applicant to have to be -- submit itself to what in
15 Texas was called die of an ambush, to have claims
16 be raised at the last minute or during the hearing
17 or whenever a State witness feels like it is
18 something new to say that it's important.

19 We are perfectly happy to prepare
20 whatever testimony it takes to address the
21 contentions, but we need to know what those
22 contentions are. We need to know them sufficiently
23 in advance of the hearing so we can do justice to
24 them. We have the burden of proof, so we need to
25 know what is our task to defend against.

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1 Now, going to the actual issue, very
2 narrow issue that I have before you, it is an
3 indication as to why this point that I just made is
4 so important.

5 JUDGE FARRAR: Let me interrupt for just
6 a second and make sure I understand your argument
7 so far. I don't know if I've heard you say one
8 thing or two things. I know you've said this is
9 outside the scope of the redrawn contention that
10 you all put together. Are you also saying or is it
11 part of the same point that this comes too late?
12 In other words, if it were within the scope of that
13 redrawn contention, you're not saying that you
14 learned about this too late in terms of deposition,
15 or are you saying that?

16 MR. TRAVIESO-DIAZ: I'm saying both.
17 I'm saying that it is -- as a matter of orderly
18 procedural fairness to the Applicant -- well, to
19 the parties, once we agreed on what the issues
20 were, those should be issues that we'll be
21 litigating, and we don't have any other right to
22 expand it. That's my first point.

23 My second point is -- and I was going to
24 get to this --- this particular issue has not
25 surfaced on four-plus years that these contentions

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1 have been with us, yet they have had five filings
2 describing the contention. Mr. Ostadan himself,
3 who made the claim in this March 8th deposition for
4 the first time, has filed six different filings,
5 declarations and testimony. He has also given
6 three depositions.

7 Never ever has this claim been mentioned
8 before. In fact, at the -- at the testimony --
9 when he gave the testimony in the deposition, I
10 inquired of the State counsel as to whether she
11 could point out for me where this had come up
12 before. And she said she would look into it. I
13 have repeatedly asked her, Well, where did he say
14 this? I have looked at every piece of paper, every
15 word that has been said. This claim has never been
16 offered before.

17 Moreover, moreover, I did undertake to
18 look at if any way this claim could be construed as
19 being something that has been raised before, and he
20 hasn't.

21 And let me just explain very briefly to
22 you what the subject is. Subsection D(1)(g) of the
23 testimony essentially says -- and that is on all
24 claim. I mean it has been going for sometime --
25 you have casks, storage casks sitting on concrete

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1 pads. In an earthquake, those pads may slide. The
2 pads are separated by a soil cement layer. One pad
3 could, in moving, induce forces on the soil cement
4 which in turn will have an action on another pad.
5 That is D(1)(g) says, when the pads slide, one can
6 act on the other.

7 At his deposition Dr. Ostadan confirmed
8 that this is what he was saying. Well, he said
9 more. He said even if the casks don't slide, they
10 are vibrating in place at a frequency which is
11 similar for all of them, and just by the fact that
12 they are vibrating, they are going to introduce
13 forces on the other.

14 Now, not only is it an argument that is
15 different in kind and is different because it's not
16 a challenge to the analysis that the Applicant has
17 done, but it also calls for different expertise to
18 talk about what the resonant frequency of the pad
19 is and how it resonates and what effect that has as
20 opposed to what physical force a pad exerts on the
21 other.

22 So we're being disadvantaged because it
23 is a claim, we don't know the contours of the
24 claim. It has never been presented before, and the
25 State, not even in the answer to this motion, has

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1 pointed to where this claim has ever been raised.
2 So I believe it's a totally new claim, a claim that
3 was not within the scope of the contention that was
4 framed by the parties by agreement and accepted by
5 the Board, and to allow that claim to be litigated
6 will be both unfair to the parties, particularly to
7 the Applicant, and it will be against the orderly
8 process of this -- of this hearing, which is
9 already pretty long as it's going to be.

10 JUDGE FARRAR: All right. Thank you.

11 Mr. Turk, you have no position on this;
12 is that correct?

13 MR. TURK: We have a position. We
14 haven't filed one in writing, Your Honor, but we do
15 have a position.

16 JUDGE FARRAR: Then let me --
17 Ms. Chancellor, do you object to the Staff, since
18 they did not file anything in writing, saying
19 something orally?

20 MS. CHANCELLOR: If it's brief, I won't
21 raise a formal objection, but I reserve the right
22 to.

23 JUDGE FARRAR: Mr. Turk, why don't you
24 speak to it, then.

25 MR. TURK: I'll speak to it briefly,

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1 Your Honor.

2 I agree with PFS counsel. This issue of
3 frequency in vibrations has not been raised in the
4 contention itself. The issue of pad interaction
5 was raised only in the context of how would motion
6 of one pad against the other pad cause it to slide
7 or what additional stress would it put on that
8 other pad in terms of sliding or possible cask
9 tipover. I imagine if you -- if you say, okay, if
10 the pads don't slide, maybe that increases force
11 for tipover. But frequency of vibration was never
12 raised as an issue.

13 There is an important distinction to
14 draw between the identification of issues and the
15 identification of evidence that makes an issue --
16 or an outcome of an issue more or less probable.
17 This is not evidence that goes to the issue of
18 would one pad acting on the other pad cause
19 additional sliding or cause tipover. This is a
20 different issue. So you can't introduce this
21 simply by saying this is more evidence on the
22 original issue. Instead, it is an entirely new
23 issue which the state could have raised in 1997,
24 because PFS's plan from the beginning was to place
25 pads a certain number of feet apart from each

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1 other. And the issue of whether there would be
2 vibrations or frequencies of one pad acting on the
3 other could have been raised back in 1997. It was
4 never identified until now.

5 JUDGE FARRAR: All right, Mr. Turk.

6 Ms. Chancellor, that's essentially an
7 endorsement of the position of the Applicant.

8 MR. TURK: Yes, Your Honor.

9 JUDGE FARRAR: I guess the first
10 question for you is can you point us to something
11 in the contention that can fairly be taken as
12 embracing this?

13 MS. CHANCELLOR: I think, first of all,
14 I would like to say that there are two different
15 types of pad-to-pad interaction, and Mr.
16 Travieso-Diaz does correctly describe one type of
17 pad-to-pad interaction.

18 The type of pad-to-pad interaction that
19 Dr. Ostadan is referring to is the amplitude of
20 pads vibrating at natural frequencies and what
21 effect that vibration of the pads are going to have
22 on the pad that is under analysis. Dr. Ostadan has
23 talked about the natural frequency of the pads in a
24 number of his depositions. It's is true that it
25 wasn't until his deposition on March 8th that he

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1 spelled out with specificity the amplitude of
2 pad-to-pad interaction.

3 But as Mr. Travieso-Diaz mentioned, it
4 is true we have had five filings.

5 I am very well aware of that, Mr.
6 Travieso-Diaz.

7 And we have put as much as information
8 as we could into those five filings. To say that
9 we should be expected to put every single thing
10 into those filings is, I think, unreasonable. The
11 State is well aware of what it's like to be
12 disadvantaged, as is the case, for example, with
13 the Luk report.

14 With respect to where this appears, I
15 can't site anything other than what is sited in the
16 motion, and that is the motion for summary
17 disposition of Utah L -- let me see -- that's not
18 the right one. We certainly raised it in
19 discovery. I believe we raised it in -- oh, here
20 it is -- Footnote No. 9.

21 JUDGE FARRAR: Footnote 9 in --

22 MS. CHANCELLOR: In our motion, on page
23 6, we state that --

24 JUDGE FARRAR: Motion for?

25 MS. CHANCELLOR: Oh, I beg your pardon.

1 Our response to PFS's motion.

2 JUDGE FARRAR: Oh, okay.

3 MS. CHANCELLOR: I beg your pardon.

4 MR. TURK: What date is that document,
5 Denise?

6 MS. CHANCELLOR: April 22.

7 JUDGE FARRAR: The response to the PFS
8 motion.

9 And you're saying page 9?

10 MS. CHANCELLOR: That's right. And it
11 says -- it describes the basis of the -- oh, page
12 6, page 6. It describes the basis of the
13 contention, and then it states, While it has been
14 shown that the effect of soil structure interaction
15 is important in the seismic response of a cask pad
16 cement-treated soil, PFS has ignored the effects of
17 pad-to-pad interaction to pads spaced only 5 feet
18 apart in the longitudinal direction.

19 And this was when we filed Contention QQ
20 in May of 2001. And I don't think that the State
21 should be unreasonably disadvantaged because this
22 contention was -- it took so long for the Board to
23 make a decision on whether this contention should
24 be admitted or not.

25 The State was -- was quite prepared to

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1 have whatever time was needed for discovery. We
2 have advised PFS of Dr. Ostadan's concerns.
3 Dr. Ostadan went into detail in his deposition as
4 to what the scope of his concern was.

5 In previous depositions, especially with
6 original Utah L, the main -- the main point of
7 those depositions was to try and box the State into
8 as narrow a box as it could with respect to the
9 original geotechnical contention. So to say that
10 at the end of the day the State should not be able
11 to put forward evidence on a very important safety
12 issue is -- is, I believe, treating us differently
13 than the way in which you have treated the Staff,
14 for example, in allowing the Luk report to come in.
15 I think in this instance the Board should follow
16 its principle of if in doubt, let it in.

17 MR. TRAVIESO-DIAZ: Mr. Chairman, if I
18 could answer, I have a few points I want to make.

19 JUDGE FARRAR: No. Let me say something
20 first. Then you can speak.

21 Ms. Chancellor, if I can paraphrase what
22 you just said, it sounds to me like your argument
23 is stronger on the point that the Applicant has had
24 notice of this, perhaps more notice than you had on
25 other issues, but your argument is weaker on the

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1 point was this fairly embraced by the contention.
2 In other words, it's not -- they might have notice
3 that they could go ahead, but they're saying this
4 is not part of the case. We're advised about it,
5 but we don't think it's part of the case.

6 Mr. Travieso-Diaz, go ahead with what
7 you were going to say.

8 MR. TRAVIESO-DIAZ: Okay. I have --
9 first, as to whether this is a different issue, I
10 would direct you to a transcript of the position of
11 Dr. Ostadan which is attached to the motion.. At
12 page 201 Dr. Ostadan --

13 JUDGE FARRAR: Wait, wait, wait. Wait,
14 wait, wait. It may have been attached to the
15 motion at one point, but let's make sure that we --
16 we have your motion. We have the attachment which
17 is the present state of the contention. And
18 somewhere here I thought we had those.

19 Yes. It got separated somewhere. This
20 is Dr. Ostadan's deposition?

21 MR. TRAVIESO-DIAZ: Yes, the excerpt.

22 JUDGE FARRAR: And what page?

23 MR. TRAVIESO-DIAZ: 201.

24 JUDGE FARRAR: Okay.

25 MR. TRAVIESO-DIAZ: On that page

1 Dr. Ostadan clearly agrees that this particular
2 issue, claim, concern, is entirely different from
3 the one that is expressed in D(1)(g). With D(1)(g)
4 dealing -- as I explained before, well, what
5 happens when two pads slide and what do they do to
6 each other?

7 And he said, This has nothing to do with
8 sliding. He says, even if the pad sticks, without
9 moving, vibrating, that vibration would affect
10 those. It's an entirely different claim, and
11 there's no question that it's different.

12 Now, Mrs. Chancellor, said there could
13 be 50 different types of pad-to-pad interaction.
14 Yes, there could be. But there's only one that has
15 been singled out in the contention as it was framed
16 in May of 1991 (sic). And, by the way, I have it
17 in front of me, and nowhere there does it say
18 anything about vibrating pads. The word "vibrating
19 pads," I defy her to ever find those words
20 anywhere, in any filing, in anyone's testimony.

21 If it is such an important seismic
22 issue, how come it took them to March 8, 2002 for a
23 witness to identify? I just don't think that this
24 has ever been raised, and I think also that it is
25 clearly outside the scope of the immediate

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1 contention.

2 As to the point as to, hey, we are being
3 prejudiced by all this that is happening, you have
4 earlier noticed that all the people have all the
5 issues. First, I think that's irrelevant to this
6 particular issue. But more importantly, we are
7 being disadvantaged. As far as direct testimony of
8 our witnesses, we sent it. Don't say now this is
9 an issue, because it's not part of the contention.

10 THE REPORTER: Mr. Travieso-Diaz, could
11 you slow down just a tad, please?

12 MR. TRAVIESO-DIAZ: I am sorry. I tend
13 to get carried away.

14 THE REPORTER: That's okay.

15 MR. TRAVIESO-DIAZ: Our witnesses have
16 not addressed this issue in their direct testimony.
17 I don't think they're prepared to address it on
18 cross-examination either at this point. We have
19 three days before the hearing. This is
20 considerably -- could be a fairly significant
21 technical issue to investigate. I'm not saying
22 it's meritorious. I think that just to put it to
23 bed it may take a considerable amount of work. I
24 think it's elementally unfair, particularly given
25 that the ground rules on the playing field was

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1 defined in general, to expect three days before the
2 hearing our witnesses to have to address it. It's
3 a completely new claim. This is a totally new
4 contention. That's my point.

5 JUDGE FARRAR: Mr. Turk, let me ask you
6 a question. And without knowing anything one way
7 or the other about this, suppose we were to hold
8 that this was outside the scope of the contention
9 and could not be considered at this hearing, but
10 someone in Rockville thought this was a very
11 important -- this raised a very important safety
12 matter. Is this something that people like the
13 people gathered with you would look at at this
14 stage or are we the last resort here?

15 MR. TURK: Let me say first that the
16 people who were gathered with me left after you
17 ruled on the motion to strike Staff testimony.

18 JUDGE FARRAR: All right. Well, people
19 like them.

20 MR. TURK: But that said, if it was a
21 significant issue and the State asked us to
22 investigate it, we would look at it, I guess cross
23 the threshold to decide if we think there's any
24 reason why we need to look at it. And if we agreed
25 there was a safety issue that had to be

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1 investigated, we would.

2 I would join in Mr. Travieso-Diaz's
3 comment. Not only does the Applicant not address
4 this in their testimony, neither does the Staff,
5 and for good reason. We address all the issues
6 that were raised in the contention. We didn't
7 address this because it was not raised in the
8 contention.

9 The SER addressed a lot of the issues,
10 probably all of the issues that the state raised,
11 for good reason. The state raised them, we
12 addressed them in the SER and we closed them. This
13 was on issues they had raised. The SER does not
14 address this issue.

15 Now, is there merit in it? I don't know
16 the answer to that. But if there is, then the
17 Staff could still at this time investigate it on
18 its own, regardless of whether or not you admit it
19 as an issue at this time. But if you do admit it
20 as an issue, then we probably have to go back and
21 spend months of analysis trying to decide is this
22 something that we are concerned about or not, and
23 what's the outcome. But it certainly has not been
24 identified yet, and therefore, it was not addressed
25 in our SER issues until this time.

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1 MS. CHANCELLOR: May I comment,
2 Your Honor?

3 JUDGE FARRAR: Yes.

4 MS. CHANCELLOR: There are a number of
5 issues in the SER that the Staff doesn't address,
6 especially cask sliding, pad flexibility,
7 pad-to-pad interaction. I don't believe that it is
8 any remedy for the State to rely on the Staff with
9 respect to geotechnical issues. We have the --

10 MR. TURK: I have to disagree with --

11 MS. CHANCELLOR: Let me finish, Sherwin.

12 MR. TURK: I'm sorry. You said we
13 didn't address it. We did address it.

14 JUDGE FARRAR: Let her finish. You've
15 just been reprimanded, not by me but by her.

16 MS. CHANCELLOR: That to say that it is
17 a remedy for the State to rely on the Staff for an
18 issue that has not been admitted into this hearing,
19 it has been our experience that the Staff only
20 addresses those issues that the State raises in its
21 contentions.

22 Second, the reason the State has brought
23 up many issues in Utah QQ was because ground
24 motions at the PFS site increased by 35 percent and
25 that some issues that weren't as important prior to

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1 that then became important.

2 Third, PFS was on notice on March the
3 8th as to Dr. Ostadan's concerns.

4 And, fourth, the Board has recognized
5 that an intervenor may put flesh on the bones of
6 its contention, and I believe that that's what we
7 were doing when Dr. Ostadan testified under oath on
8 March 8th that his -- on March 8th, and that was
9 the first time that Dr. Ostadan had been deposed on
10 Utah QQ. His other deposition was with respect to
11 the old geotechnical contention.

12 MR. TRAVIESO-DIAZ: If I could make two
13 comments, Mr. Chairman, very briefly?

14 JUDGE FARRAR: Yes, but Mr. Turk had
15 something, a clarification or correction he wanted
16 to make. Let him go first.

17 MR. TURK: I've asked somebody to go get
18 the consolidated SER. I don't have it in front of
19 me.

20 But, in fact, throughout Chapters 4 and
21 5 there's a discussion of structures, including the
22 concrete pads. There's a discussion of pad-to-pad
23 interaction. There's a discussion of sliding, of
24 cask tipover. All of the issues that are raised in
25 Contention L/QQ are addressed in the SER. Not this

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1 one.

2 If the State felt this was an important
3 point, then the way the Commission has set up its
4 regulations, it requires the filing of a late
5 contention, and the State could explain why it did
6 not raise the issue until March of 2002. But the
7 Commission's rules of practice are very strict, and
8 they say that if you have an issue that you want to
9 raise, file it as a contention and meet the
10 timeliness requirement, not -- not identify it in a
11 deposition and say, Here's another matter we think
12 you should look at.

13 MR. TRAVIESO-DIAZ: May I make my two
14 points, Mr. Chairman?

15 MR. FARRAR: Yes, go ahead.

16 MR. TRAVIESO-DIAZ: First, I think it's
17 a complete bogus argument to say that the
18 intervenor always has the right to put flesh on his
19 contention. This is not flesh, this is a new body.
20 This is a new contention. He's not trying to
21 explain what has already been raised. In fact, the
22 purpose of the deposition was to try and understand
23 what -- you know, the flesh of the contention that
24 existed, not to come up with something entirely
25 new.

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1 Second, I think that the Commission case
2 law is very clear that the Board and the parties
3 are bound by the express terms and boundaries of
4 the contentions. I don't think it is possible,
5 acceptable, permissible or a good precedent to
6 allow a party in discovery, in the middle of
7 deposition, to raise a completely new issue or
8 modify or amend a contention that way. I think
9 it's against the rule of practice, it's against --
10 and it's very much against good management of this
11 case.

12 JUDGE FARRAR: With respect to the flesh
13 on the bones, Ms. Chancellor, there's a little
14 problem there. I think when we wrote that, we were
15 talking about a contention that comes in and
16 everybody starts discovery, and the contention
17 grows and gets fleshed out.

18 But we had here a very unusual
19 development that much of the way down that road we
20 said, Okay, get together and narrow that back so we
21 know exactly where we're headed, and that was done
22 fairly recently in terms of the calendar. Of
23 course, you have had a lot of discovery since then,
24 so I guess there was some room for it to expand a
25 little, but I think much less room than you would

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1 ordinarily have where the contention is at the very
2 beginning of the case, nobody knows anything, the
3 Applicant files some amendments, the Staff puts out
4 some documents, things are going along and things
5 are growing.

6 But here we did have the specific
7 writing by the parties of a contention that was
8 supposed to capture everything to that point, so
9 I'm having a little trouble.

10 Let me do this: While you think about
11 your answer to that, why don't we take a -- we've
12 been going almost two hours. We're close to the
13 end. Why don't we take a ten-minute break.
14 Everyone can take a break. And the Board will
15 consult a little bit, and we'll come back in ten
16 minutes.

17 (A recess was taken.)

18 JUDGE FARRAR: Mr. Gaukler and Mr.
19 Traviosa-Diaz, are you still there?

20 MR. TRAVIESO-DIAZ: Yes.

21 JUDGE FARRAR: We are back and we have
22 changed reporters.

23 MR. TRAVIESO-DIAZ: Sorry we wore her
24 out.

25 JUDGE FARRAR: And Mr. Turk is still

1 there and the State is here and Mr. Silberg is
2 still with us. Ms. Chancellor, at the back of this
3 or somewhere in the unified contention I thought
4 you reserved -- did you reserve the right somewhere
5 not to be bound by this? Where do I remember
6 reading that?

7 MS. CHANCELLOR: I don't know, Your
8 Honor. But I'm sure it was in there.

9 JUDGE FARRAR: My colleague said that
10 at some point in one of these documents there was
11 some reservation of rights?

12 MR. GAUKLER: I remember something with
13 respect to the stipulation that we had on Parts A
14 and B of the contention that was filed at the end
15 of January, first part of February.

16 JUDGE FARRAR: I think you are right,
17 Mr. Gaukler. We were reading all the documents
18 this morning.

19 MR. GAUKLER: And that was with respect
20 to Part B of the contention which talked about the
21 deterministic earthquake.

22 JUDGE FARRAR: Right.

23 MR. GAUKLER: And the proper
24 determination of the motions under the
25 deterministic earthquake.

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1 JUDGE FARRAR: That's all right, Mr.
2 Gaukler. That's all I need. I was thinking it was
3 at the back of the contention itself. It's not.
4 In light of that, my colleague, Dr. Lam, wants to
5 ask Ms. Chancellor some questions about the
6 contention itself.

7 JUDGE LAM: Ms. Chancellor, would you be
8 able to go to the Unified Consolidated Contention
9 Utah L and Utah QQ and point to any language in
10 there that would encompass Dr. Ostodan's theory of
11 harmonic oscillation. Would you be able to find,
12 within the Unified Consolidated statement in there,
13 any references or any statement that we could
14 interpret as including what Dr. Ostodan is saying
15 today?

16 MS. CHANCELLOR: Your Honor, just the
17 basic statement at the beginning of the contention
18 as well as D-1(g), the Applicant has failed to
19 analyze for potential pad to pad interaction.

20 JUDGE LAM: D-1(g). One could perhaps
21 construct a theory here that the language in the
22 Unified Consolidated statement is broad and general
23 enough, and you have also provided sufficient
24 notice as of March 8 of 2002 in Dr. Ostodan's
25 deposition, to notify the Applicant and the Staff

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1 of your concern? Is that the theory that you'd
2 like to have us consider?

3 MS. CHANCELLOR: Yes, I believe so. I
4 think what the State was trying to do was to be as
5 cooperative as possible in trying to put down the
6 concerns in the Unified Contention. But it wasn't
7 our understanding that, because we were being
8 cooperative and doing this prior to discovery, that
9 we would be bound by the absolute language of this
10 Unified Contention.

11 JUDGE LAM: Now, then, perhaps you can
12 also explain to me in your April 22nd response to
13 PFS's Motion to Strike on Page A, the last sentence
14 of the first paragraph, you stated, "By agreeing to
15 the document, the State did not consider itself to
16 be circumscribed solely to the wording of the
17 restatement in prosecuting of its Contention."
18 Would you elaborate on that?

19 MS. CHANCELLOR: Yes, Your Honor. If
20 this Contention had been able to take its normal
21 course, PFS would have been advised as to the
22 experts' opinions or evidentiary material that
23 would support the general statement. Because we
24 were on an expedited schedule in this regard, the
25 first time that we notified PFS of the specifics

1 with respect to the amplitude pad to pad
2 interaction was in the March deposition.

3 I mean, I think you have to put this
4 into context. Dr. Ostodan has what, 200 pages in
5 his deposition? He has a laundry list of concerns
6 with PFS's seismic hazard analysis. For him to go
7 down --

8 JUDGE FARRAR: When did he get that?

9 MS. CHANCELLOR: Get what?

10 JUDGE FARRAR: Their seismic hazard
11 analysis.

12 MS. CHANCELLOR: I mean, just in
13 general. The seismic design, the way in which they
14 --

15 JUDGE FARRAR: But that was not
16 something new, in other words, that he got in
17 Discovery?

18 MS. CHANCELLOR: Your Honor, we have
19 been getting something new at various stages
20 because PFS keeps on changing its calculations. It
21 went to soil cement as a design element after we
22 found out that there was an influence in ground
23 motion. So we have had this moving target.

24 JUDGE FARRAR: That I understand. And
25 our rulings have been fairly liberal in that

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1 respect when the company does something new or you
2 discover something new from them. But the trouble
3 I'm having is this is a new theory your guy came up
4 with. In other words, this is not --

5 MS. CHANCELLOR: It's a different
6 theory.

7 JUDGE FARRAR: A different theory. In
8 other words, he didn't say, "Here is a new piece of
9 paper from the company. Wow. Now I have this new
10 thought." It seems to me his own thinking evolved,
11 and that's different from the company filing a new
12 application or filing a new approach or in
13 Discovery of their witnesses you learning something
14 you didn't know before.

15 MS. CHANCELLOR: I'm not sure whether it
16 was his thinking that evolved or whether it was our
17 ability to get down on paper what our expert's
18 thinking was. I mean, this is a highly technical
19 area. And we have struggled, believe me, we have
20 struggled to get this on paper.

21 MR. TRAVIESO-DIAZ: Mr. Chairman, at an
22 appropriate time can I make a comment?

23 JUDGE FARRAR: Hold on a minute until
24 Dr. Lam finishes.

25 JUDGE LAM: Ms. Chancellor, it appears

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1 to me by the statement I just read you on Page A,
2 it seems to me that you somewhat agree to the
3 allegation that it would be stretching a little bit
4 to interpret the Consolidated Unified statement as
5 inclusive of Dr. Ostodan's different theory.

6 MS. CHANCELLOR: That's correct, Your
7 Honor. But I think it is a stretch that you can
8 make.

9 JUDGE LAM: Okay. And also, would you
10 further give us a little bit more elaboration as to
11 what you are saying, saying in May 15 of 2001 State
12 of Utah's Request for Admission to late filed
13 Contention QQ. You refer to this is perhaps the
14 first time you serve notice that you were concerned
15 about pad to pad interaction. Could you elaborate
16 a little more on that? Because I do not have that
17 request in front of me. I'm referring to Page 6,
18 the last paragraph and the last sentence. Page 6
19 of your response to PFS's Motion to Strike, dated
20 April 22.

21 MS. CHANCELLOR: Right. I'm just trying
22 to find it in QQ.

23 MR. SILBERG: Judge Lam, I could
24 probably retrieve that document in about five
25 minutes, if you wish it.

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1 MS. CHANCELLOR: I have it here, thank
2 you.

3 JUDGE LAM: Okay.

4 MS. CHANCELLOR: It states, "While it
5 has been shown that the effect," on Page 10 of Utah
6 QQ, "while it has been shown that the effect of
7 Soler structure interaction is important in the
8 seismic response of the cask pad cement-treated
9 soil, PFS has ignored the effect of pad-to-pad
10 interaction for pads spaced only five feet apart in
11 the longitudinal direction." And that is what we
12 brought up in May when we submitted the original
13 Utah QQ.

14 JUDGE LAM: Now, at that time when you
15 make that submission, did you have Dr. Ostodan's
16 theory in mind when you make reference to
17 pad-to-pad interaction? Did you have that specific
18 theory in mind?

19 MS. CHANCELLOR: Your Honor, I don't
20 know -- I don't think I can answer that. I mean, I
21 have to work with the experts and translate the
22 technical language into a legal document. And I
23 can't say what Dr. Ostodan had in mind in May of
24 2001. That is something you would have to ask him
25 on the stand. I mean, I just don't have the

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1 ability to do that.

2 JUDGE LAM: So if Dr. Ostodan, in fact,
3 had that in mind, then all the parties would have
4 sufficient notice.

5 MS. CHANCELLOR: That's correct.

6 JUDGE LAM: Would that be true?

7 MS. CHANCELLOR: That's correct.

8 JUDGE LAM: Thank you, Ms. Chancellor.

9 JUDGE FARRAR: Let me ask, Counsel, on
10 the telephone to address the discussions that have
11 just been had.

12 MR. TRAVIESO-DIAZ: If I may address the
13 last point first, since we have it fresh in our
14 minds. What Ms. Chancellor didn't read you is the
15 next sentence to the one that she read you on that
16 page of the Contention. It says --

17 MS. CHANCELLOR: I can read it, if you
18 want.

19 MR. TRAVIESO-DIAZ: Would you, please?

20 MS. CHANCELLOR: Yes, I will. "In the
21 stability analysis, the passive resistance of one
22 pad will act as a pushing force on the next pad.
23 This interaction has been totally ignored and the
24 evaluation thus seriously violating the conclusion
25 of the stability of the pads."

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1 MR. TRAVIESO-DIAZ: Okay. Exactly.
2 That entire sentence with reference to Dr.
3 Ostodan's declaration, Paragraph 14. In fact that
4 is what D-1(g) says, the contention that we had
5 with us, when the pads slide they may strike each
6 other and that interaction has not been considered
7 in the analysis. That is a legitimate contention
8 and one that we have known from the beginning.

9 Let me just make one more point, which
10 is Ms. Chancellor referred to how the analysis by
11 PFS has changed, moving target. The reality is
12 from the very beginning, since 1997, PFS intended
13 to have 500 pads sitting next to each other. That
14 has never changed then or now. If the pads are
15 vibrating now, they were vibrating in 1997. This
16 issue could have very easily been identified when
17 the first Contention, Utah L, was filed. It has
18 nothing to do with QQ. But even assuming it could
19 have been raised in QQ, they have plenty of
20 opportunity. And I think what Dr. Ostodan had in
21 mind is what he said in Paragraph 14 of his
22 declaration and what Ms. Chancellor quoted directly
23 here: "In the stability analysis, the passive
24 resistance for one pad would act as a pushing force
25 on the next pad." That's what the Contention was

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1 and is.

2 MR. SILBERG: Mat, could I add one point
3 to your comment?

4 MS. CHANCELLOR: Are we having tag team
5 here?

6 JUDGE FARRAR: On limited basis.

7 MR. SILBERG: The only point I wish to
8 add is what Dr. Ostodan had in mind at the time the
9 Contention was submitted is irrelevant. What is
10 relevant is what is on the papers that were
11 submitted to this Board and what this Board ruled
12 upon in deciding on whether to admit QQ.

13 MS. CHANCELLOR: I would like to respond
14 with respect to what issues the State could have
15 raised. The State, at the time that it filed the
16 original QQ, was looking at all of PFS's seismic
17 analysis. Once PFS went out and did a new
18 investigation and discovered that the ground
19 motions had increased significantly, then that
20 brought to the fore additional concerns that may
21 not have been as much a concern when the ground
22 motions were at .5 something "g", and now they are
23 up to .7g, and they are actually at 1.3g if you are
24 at a 10,000 year return period earthquake. And
25 Dr. Ostodan is on record of saying, "Some of those

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1 issues would not be a concern to me if PFS had an
2 adequate margin of safety in its design." Because
3 PFS's design is unconventional and everything has
4 to work exactly as PFS intends it, then Dr. Ostodan
5 has raised several issues that are of concern to
6 him. And so I think to say that we could have
7 raised this issue earlier is really not the issue.
8 The issue is the ground motions increased 35
9 percent. We filed a Contention. I believe you can
10 find that this is within the scope of that
11 Contention.

12 JUDGE FARRAR: And when did that
13 knowledge about the ground motions increasing
14 happen, roughly?

15 MS. CHANCELLOR: Thirty days prior to
16 May 16, or maybe a few days prior to that.

17 JUDGE FARRAR: Of 2001?

18 MS. CHANCELLOR: Of 2001. We had been
19 burned so many times that we know that we have to
20 file a contention within 30 days of when we get
21 notified. So I'm pretty comfortable in saying
22 that.

23 JUDGE FARRAR: We have heard beeps on
24 the phone. Mr. Gaukler, you are still there?

25 MR. GAUKLER: Yes.

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1 JUDGE FARRAR: Mr. Turk, are you still
2 there?

3 MR. TURK: Yes, Your Honor.

4 JUDGE FARRAR: We'd like to rule today
5 on this. Assuming we granted the Applicant's
6 motion, Mr. Turk, you had mentioned the late-filed
7 contention process. How, in your mind, would that
8 work in terms of timing with the hearing, the long
9 awaited hearing, now taking place? How would you
10 envision the filing of such a motion, the response
11 to such a motion, and our action on such a motion,
12 and it being part of this hearing or not part of
13 this hearing?

14 MR. TURK: Your Honor, I would respond
15 by saying the State has known of this issue since
16 March 8. They could have filed a motion at that
17 time to admit this as a new issue.

18 JUDGE FARRAR: Let me interrupt you
19 there. The new information that would trigger that
20 would be the new or the different theory adopted by
21 their witness? Is that --

22 MR. TURK: Yes. And the argument
23 against it, of course, would be that they could
24 have filed it even before then. But they would
25 still have to face the problem that they didn't

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1 file it in March and here we are a month and a half
2 later when they would first be filing.

3 JUDGE FARRAR: Suppose the new
4 information was they thought this was part of the
5 contention and today we ruled that it is not, under
6 this hypothesis?

7 MR. TURK: They could make that argument
8 to you. We, of course, would oppose it, as I hear
9 PFS would as well. But if they want to do it, they
10 have the right to do it. They can file at any time
11 and we would have to respond. And whatever our
12 other obligations are in the hearing, we have
13 unfortunately been faced with the task of filing to
14 other matters during the course of our hearing
15 preparations and during the hearing, and we would
16 have to respond to this one as well. Perhaps we
17 would have to juggle a response date by a day or
18 two in order to make sure someone was available to
19 write the paper. But if they file it, we will
20 respond.

21 JUDGE FARRAR: Mr. Travieso-Diaz, let
22 me ask you, in line with that, and feel free to
23 consult with your colleagues, both here and
24 there --

25 MR. TRAVIESO-DIAZ: I'm sorry. What is

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1 the question?

2 JUDGE FARRAR: I'm trying to pose it.
3 If you were to look into the future and say the
4 Board -- you don't know if we would grant or deny
5 this motion. If you looked into the future and
6 said, "There's a danger the Board would grant this
7 motion," would you want that action to be taken
8 immediately so that you could have it part of this
9 hearing or would you want it to be deferred, and if
10 it is granted it would be heard later and if it is
11 denied you win?

12 MR. SILBERG: I'm sorry. Which motion
13 are we talking about? The motion to strike or some
14 other hypothetical?

15 JUDGE FARRAR: No. Assuming we granted
16 the Applicant's motion to strike. But -- wait.
17 Let me finish. But Mr. Turk has suggested that the
18 State could then file, say they want to bring this
19 contention in late filed. That has a possible
20 disadvantage to the company in that if that process
21 took a long time and it were granted, you are
22 looking at a hearing sometime down the road which
23 is, I take it, not in the company's interest. It's
24 also not in the company's interest, necessarily, to
25 be forced quickly into a hearing. And I'm asking

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1 for you all to address that. And we view this as a
2 serious matter. We want it resolved promptly. And
3 Mr. Turk raised the question of the late-filed
4 contention and we don't want -- now we have to face
5 how that would tie in with a hearing. And we want
6 to make sure we get as much information about what
7 all the parties think about that right now rather
8 than sometime later.

9 MR. SILBERG: Mat, let me address that
10 for the Applicant.

11 MR. TRAVIESO-DIAZ: All right.

12 MR. SILBERG: There are two separate
13 questions on the table, and I think each have to be
14 looked at separately. One is there's a motion to
15 strike. What's the right answer from the law and
16 the facts as presented. I think the answer to that
17 is clear. Whether or not the State wishes to file
18 a late-filed contention on this or any other matter
19 I think is a totally separate matter. The State is
20 always free to file that. We are always free to
21 respond to that. Frankly, if that motion were
22 filed today and if it were granted, which I think
23 based on what I have heard would be the incorrect
24 result, we would immediately go to the Commission
25 because that would be a ruling that would

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1 significantly affect the outcome and the
2 proceedings that this case is under. And I think
3 we would have a very good shot at getting the
4 Commission to quickly review it.

5 But I don't think we would ever get that
6 far. Because if the State chose to look at it, I
7 think we would be looking at exactly the same
8 issues that we looked at now. This was something
9 that could have been filed certainly last March,
10 May, whatever. And the fact that Dr. Ostodan
11 didn't get around to fleshing out his analysis, I
12 don't think is at all dispositive of whether the
13 issue was there. I think that correctly Mat has
14 stated that the issue was there in 1997. And
15 therefore, I think the Board has to rule on the
16 questions before it. And it ought to rule promptly
17 on the questions, whatever they are, both these
18 motions and any future motions. And I hope the
19 board would do that.

20 JUDGE FARRAR: Mr. Turk, do you have
21 anything to say at this point?

22 MR. TURK: I heard Mr. Silberg's
23 argument and I agree with it fully, Your Honor.

24 JUDGE FARRAR: Ms. Chancellor?

25 MS. CHANCELLOR: Yes, Your Honor. I

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1 think that it would be -- we believe it would
2 create an unlevel playing field for you to deny
3 this motion when at every step of the way the
4 Applicant is allowed to change its position. It
5 develops new calculations, as does the Staff,
6 presents new evidence. And in this respect, I
7 believe that we are being penalized for being
8 cooperative. And what I suggest is that you rule
9 in our favor and allow the Applicant and the Staff
10 to supplement their testimony.

11 MR. TURK: May I address that point,
12 Your Honor?

13 JUDGE FARRAR: Yes.

14 MR. TURK: What is to keep the State
15 from raising a new issue in cross-examination and
16 saying, "You have a chance now to go out and get
17 rebuttal testimony." It's not a sliding target.
18 Whatever the casks may do on the pad, we are not
19 obliged to keep sliding every time the State slips
20 in a new issue. They have an obligation on the
21 Commission's rules of practice to file their issues
22 in contention. Let them do that if they want to.
23 That's the only proper way for them to raise a new
24 issue.

25 MR. TRAVIESO-DIAZ: Also, Mr. Chairman,

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1 the solution that State counsel suggests is not
2 necessarily either fair or workable for us. Since
3 we haven't looked at that issue, I don't know how
4 long it would take to prepare supplementary
5 testimony to look into it. The other issues have
6 been with us for over a year, some of them four
7 years. We know what they are, we have been able to
8 prepare. We have a hearing that starts on Monday.
9 When are we going to do that? How long is it going
10 to take? It would be totally unfair to put us in
11 that position at this point.

12 JUDGE FARRAR: I think we are fully
13 informed. Let us consult, then we will make a
14 ruling. Then we will take up the Resnikoff
15 testimony and we will do that fairly quickly,
16 bearing in mind my colleague's view that expertise
17 is generally transferable. And then we will take
18 up some scheduling matters.

19 (Discussion off the record.)

20 JUDGE FARRAR: Mr. Turk, Mr. Gaukler,
21 are you still on there?

22 MR. GAUKLER: Yes, we are.

23 MR. TURK: Yes, Your Honor.

24 JUDGE FARRAR: This is obviously a
25 difficult and important issue. We are going to

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1 grant the Applicant's motion to exclude this and we
2 are going to State our reasons here at some length.

3 The state of this case is different
4 because of the Unified Contention. We wrote an
5 opinion in December which had a lot of principles
6 in this about how contentions grow with Discovery
7 and what happens in the first 30 days shouldn't set
8 the rules for the entire rest of the case,
9 particularly Ms. Chancellor, as you said, the
10 Applicant and the Staff filing new documents and
11 new analyses. And I think our decision said you
12 are entitled to the same sort of treatment they
13 get. When something new grows through discovery or
14 through new information you gain, you are entitled
15 to be treated the same and to change your
16 contention.

17 Here, however, as we see it, the
18 contention was narrowed. There was more Discovery
19 but, as we understand it, this different theory was
20 not triggered by any Discovery you did of the
21 Applicant. It was not discovered by any new
22 analyses the Applicant did. It was not triggered
23 by anything new that the Staff did. It's an
24 evolution in the thinking of your experts and
25 therefore is outside the ordinary growth of the

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1 contention.

2 In some instances, on motions like this
3 where we are in doubt, we say, "All right. Let the
4 evidence come in. The other side can
5 cross-examine. If their points are so well taken
6 that this person is not an expert or whatever, they
7 will prevail on cross-examination." We feel bound
8 here, however, that this is a broad, different
9 theory in a complex case. And to say to the
10 company and the Staff, "Okay, show up next week or
11 the week after and start cross-examining and you
12 can make the same points you have made in this
13 motion," would not be fair to them. So while this
14 is a difficult and important issue, we feel that
15 the Applicant is entitled to have its motion
16 granted, and that's our ruling. That leaves us
17 only --

18 JUDGE LAM: Before you go any further,
19 Judge Farrar, let me remind the State that I'm sure
20 the State is aware of the process for 2206
21 petitions and also late-filed contentions.

22 MS. CHANCELLOR: Yes, we are.

23 JUDGE FARRAR: That leaves us only the
24 Staff's and Applicant's motions dealing with the
25 Resnikoff testimony. I would ask -- well, there's

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1 two aspects of that: One, the general expertise
2 question, and second, the nonaccident dose
3 calculations.

4 Let's deal with the expertise question
5 first. Mr. Turk, Mr. Gaukler, in light of what we
6 have said about my colleagues' belief in the
7 transferability of knowledge and expertise, within
8 reason, of course, do you have anything you'd like
9 to add to what you have said in your motion to
10 exclude portions of Dr. Resnikoff's testimony?

11 MR. TURK: Which of us would you like to
12 speak first, Your Honor?

13 JUDGE FARRAR: You have seized the
14 floor. Go ahead.

15 MR. TURK: I was yielding the floor.

16 JUDGE FARRAR: All right. Your choice,
17 Mr. Turk.

18 MR. TURK: Well, we will need a minute
19 first, Your Honor. If PFS would like to go
20 forward, that is all right with us.

21 JUDGE FARRAR: Go ahead, Mr. Gaukler.

22 MR. GAUKLER: I don't have anything to
23 add to what we have stated in our motion, Your
24 Honor. Our paper filed in support of the Staff's
25 motion. Again, I think we have gone through and

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1 shown that we don't believe that Dr. Resnikoff has
2 any experience in many of the topics in which he
3 supposedly testifies such as doing the analysis of
4 the strength of the canisters or the analysis of
5 cracks in the concrete or something like that in
6 which he indicated he has never done any type of
7 analysis in his professional career. And also,
8 when I asked him in terms of how would you go about
9 doing it, he said, "I don't have the slightest
10 idea." And I think there's just numerous
11 references like that throughout the deposition that
12 we have attached to our response supporting the
13 Staff's motion that I think shows that Dr.
14 Resnikoff does not have expertise. And I think
15 it's more like the butcher passing for the brain
16 surgeon on some of those matters that he tries to
17 testify to.

18 JUDGE FARRAR: Mr. Turk?

19 MR. TURK: I'm always going to remember
20 the butcher and the brain surgeon. There are a few
21 things that stick in your mind.

22 Your Honor, at one point during this
23 hearing, you very wisely noted that the Staff comes
24 into these proceedings with armies of people behind
25 it. And we do that for a reason. We have experts

1 either employed by the NRC or under contract to NRC
2 in a long laundry list of specific disciplines. We
3 have civil engineers, we have health physicists,
4 mechanical engineers, nuclear engineers,
5 meteorologists. We have a range of disciplines in
6 which we look for people who are specifically
7 skilled in order to be able to develop sound
8 opinions. We use those people in writing our
9 safety evaluation reports, our environmental impact
10 statements. If we don't have the necessary
11 expertise, we go out and get it. We don't take a
12 civil engineer and ask him to become a health
13 physicist. We don't ask a health physicist to
14 become a civil engineer.

15 The licensing board itself is comprised
16 of three people with specific expertise, including
17 a lawyer, an engineer, and a health physicist.
18 There's a good reason for that. Dr. Resnikoff
19 attempts, in his testimony, to do all things. He
20 attempts to be an engineer and a health physicist
21 as well as, I suppose going back to his original
22 training, a physicist skilled in particle physics.
23 Nothing in his resume qualifies him to give
24 engineering opinions. I think we have made that
25 case in our paper.

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1 Even though Dr. Resnikoff is willing to
2 take on the role of making his opinions known to
3 you, there is no reason why his opinion should be
4 more valuable to you than my opinion, trained as I
5 am in political science. The only question that
6 you should look at in examining his testimony is
7 does this witness have the expertise necessary to
8 frame the opinion that he gives you? And I think
9 our motion, as well as PFS's motion, makes the case
10 that he does not have the necessary expertise to do
11 that.

12 I don't want to go on beyond what we
13 have in our motion. I think we have laid it out
14 fairly well. I would point, however, to Footnote 4
15 in our motion, in which we indicate why the State
16 indicated they were bringing Dr. Resnikoff. In
17 their responses to Discovery they said they are
18 bringing him in order to calculate doses. But when
19 they presented his testimony, they presented him
20 with all sorts of engineering without showing any
21 expertise or showing why his opinion is any more
22 valuable than my opinion. And I don't mean to
23 disparage him any more than I would disparage
24 myself, but we are not trained in the areas that
25 Dr. Resnikoff seeks to give you opinions.

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1 JUDGE FARRAR: All right. Ms.
2 Chancellor, we don't need to hear from you. We
3 have heard these arguments. We think this is a
4 matter for cross-examination if, in fact, his
5 expertise is lacking to support the opinions that
6 he will give in the trial. And that's a matter
7 that you all can explore with him on
8 cross-examination. And that will go to the weight
9 or even to the possible later exclusion of his
10 testimony. But we think that is something for
11 cross-examination and we will deny the motions to
12 that extent.

13 Ms. Chancellor, there's another part of
14 the motion, however, that goes to the dose
15 calculations which the Applicant says is not -- the
16 dose calculation and ordinary circumstances which
17 the Applicant says is not part of this case. Do
18 you have a defense of that?

19 MS. CHANCELLOR: Yes, I do, Your Honor.
20 I believe this is squarely within Section E of the
21 Unified Contention. This is not a design basis
22 accident analysis. It is -- the PFS's burden in
23 this case is to show that it can meet the
24 regulations for a seismic exemption. Those
25 regulations will require that there be no health or

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1 safety consequences and that it is in the public
2 interest. So in this case, I believe that you
3 don't necessarily have to look at the dose
4 consequences of a beyond-design basis accident in
5 order to determine whether PFS should get the
6 exemptions or not. Is it in the public interest.

7 Furthermore, the original rule-making
8 plan did make a distinction between a 10,000 year
9 return period earthquake and a 1,000 year return
10 period earthquake. There were policy reasons why
11 the NRC said, "If you are at a 1,000 year return
12 period and you can show that you meet operating
13 dose limits, then you can have a 1,000 year return
14 period. Other- wise, it is 10,000 years." You
15 have either one or the other.

16 What we are saying is that PFS should
17 have to design its facility to a 10,000 year return
18 period earthquake or something less. But something
19 significantly more than a 2,000 year return period
20 earthquake. So the basis of our seismic exemptions
21 part of the contention states that PFS has not
22 designed its facility to insure that there will be
23 adequate protection against exceeding 72.104(a)
24 dose limits, and that's because it's an exemption
25 from existing promulgated regulations, and not

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1 simply a design basis accident analysis.

2 JUDGE FARRAR: Mr. Gaukler, who is
3 going to address that for you?

4 MR. GAUKLER: I will be addressing that.
5 First of all, the whole issue is in the context of
6 assuming the rule-making plan relied upon by the
7 State is the appropriate standard here, is the
8 consequences of a failed safety component of
9 structure and a seismic condition. And that's how
10 they phrased the issues themselves back when they
11 initially sought to admit the contention. If you
12 look at their November, 2000 contention, they refer
13 back to their, on Page 6, they refer back to their
14 January, 2000 contention stating the basis or the
15 reason for what turned out to be Bases 1 and 2 of
16 the contention. If we go back to the January, 2000
17 contention, January 26, 2000, on Page 9 they
18 specifically say that the entire basis for allowing
19 a graded approach to seismic design rests on the
20 projected radiological consequences of a failed
21 SSC. So what they are talking about is standards
22 that they perceive should be applied to a failed
23 SSC which, by definition, is either a design-basis
24 accident or a beyond-design basis accident.

25 JUDGE FARRAR: Mr. Gaukler, let me

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1 interrupt for a minute here. Leave aside for a
2 moment the question of whether this fits within the
3 Contention. Isn't there another question here?
4 This is a calculation that's relevant and perhaps
5 collateral to but relevant to the Contention even
6 though the Contention deals with, you know, a
7 post-seismic condition. Is this a calculation that
8 is needed in order to, as background, in order to
9 understand what you are doing with the seismic,
10 post- seismic calculation?

11 MR. GAUKLER: In this respect, Your
12 Honor, they at one point challenged the normal dose
13 calculation in the late filed Contention.

14 JUDGE FARRAR: Never mind what they
15 challenged. In other words, is this something that
16 we need when we get to writing a decision on the
17 post- seismic situation? Do we need this
18 information to build that decision?

19 MR. GAUKLER: It's our position that you
20 do not need that information because we believe
21 that the appropriate dose consequences to look at
22 is that for the accident dose which is set forth in
23 72.106(b) and not 72.104; that the dose
24 consequences that the State refers to was pegged
25 upon this rule-making plan which both the Licensing

1 Board and the Commission said that we are not bound
2 to follow and which has since or is since no longer
3 the preferred alternative to the proposed
4 rule-making plan.

5 JUDGE FARRAR: Even if we are not bound
6 to follow it and something new has been added,
7 isn't something like that -- in other words, you
8 are looking at a plan now, but isn't it always or
9 isn't it frequently relevant how and why and what
10 the reasons were you changed from a previous plan?
11 If it was relevant to the previous one, why is it
12 not relevant now?

13 MR. GAUKLER: The point we are making,
14 Your Honor, I think is -- the challenge, it is
15 really going to a challenge to the way we calculate
16 the normal dose rate. It's saying that we have
17 operations the improper dose limit, and we do not
18 think that is part of this Contention.

19 JUDGE FARRAR: Let me ask --

20 MR. GAUKLER: In the sense that they can
21 bring it in under by saying you have to look at,
22 for instance, under a particular regulation they
23 might argue it in that sense you might look at it.
24 But the way the testimony is phrased, it's a direct
25 challenge to our normal dose calculation.

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1 JUDGE FARRAR: And you are saying
2 that's a calculation that we don't need to be
3 bothered with to decide this issue, or to decide
4 the issue in the contention that the State is, in
5 fact, presented?

6 MR. GAUKLER: The dose limit that the
7 State said is applicable is the 25 millirem limit
8 of 72.104. That's the limit of issue of whether or
9 not that dose limit is applicable.

10 JUDGE FARRAR: Mr. Turk, you didn't
11 file anything on this?

12 MR. TURK: I think we did, Your Honor.

13 JUDGE FARRAR: This is the one that you
14 filed and I didn't have it at the beginning?

15 MR. TURK: Yes, I believe so.

16 JUDGE FARRAR: All right. Then go
17 ahead and address this.

18 MR. TURK: We filed a short paper, Your
19 Honor. About a five-page paper.

20 JUDGE FARRAR: Go ahead.

21 MR. TURK: In asking whether the
22 testimony is relevant, we have to look at relevant
23 to what? Relevant to what determination before the
24 Board? We have made the point in our paper that a
25 design basis seismic event is exactly that; it's

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1 design basis. The proper standard to determine or
2 to look at is the 72.106(b) standard which is what
3 applies to the design basis event. The only
4 relevance that we see of 72.104(a) is in the
5 State's claim that PFS doesn't make it under the
6 old proposed rule-making approach, the two-tiered
7 system. And we think that's irrelevant, number
8 one, because that approach is no longer even
9 proposed. It was never in effect. And by the way,
10 I would point out the State is wrong. In their
11 paper they claim that the 72.104(a) standard was in
12 effect or that the proposed rule-making under the
13 original 98.126 was in effect at some point. It
14 was never in effect.

15 JUDGE FARRAR: If it wasn't in effect
16 or never adopted, is it nonetheless --

17 MR. TURK: It was simply a proposal.

18 JUDGE FARRAR: Yes. But sometimes --
19 in other words, there was something in one of these
20 motions about someone's earlier version of a paper.
21 And to me even though the person now has a new
22 version of the paper it is fair so ask, "Wait. You
23 said something else in your first draft. What led
24 you to change your mind?" Is there anything of
25 that nature in here where even though this wasn't

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1 adopted or it never was in effect, there's
2 something instructive in it that might be useful as
3 we look at the plan that is in effect or is
4 adopted?

5 MR. TURK: I suppose as a historical
6 reference point.

7 JUDGE FARRAR: Not so much historical,
8 but there may be some good substantive content in
9 there that we would say, "Well, this looks like a
10 good theory. Explain why you abandoned it." And
11 I'm just speaking hypothetically here.

12 MR. TURK: Well, it's not an issue in
13 the case before you because it's a generic
14 rule-making approach. And the Commission itself
15 has indicated to the Staff and to the public to go
16 with the single- tiered system. That's in the
17 revised rule-making approach. So I don't see that
18 there's any decision you could make to which the
19 72.104(a) issue is relevant at this point.

20 JUDGE FARRAR: Let me ask Ms.
21 Chancellor to address, then, that point and what
22 Mr. Gaukler said.

23 MS. CHANCELLOR: Your Honor, I come back
24 to the point that this is not your standard design
25 basis accident. It is a seismic, it is an

1 exemption from existing regulations.

2 With respect to the Commission's
3 endorsement of another rule-making plan, what the
4 Commission has said is that it has asked for
5 comments on what the return period should be for
6 purposes of a probabilistic seismic hazard analysis
7 ranging from a 2,000 year return period earthquake
8 to a 10,000 year return period earthquake. And it
9 has directed the Staff to conduct additional
10 analysis.

11 With respect to whether our Contention
12 relates to the safety of SSCs, if we are bound by
13 the language of the Unified Contention for Part D,
14 we should be bound by it for Part E, also. It is
15 squarely within Part E that the Contention states
16 that PFS has failed to show its facility design
17 will provide adequate protection against exceeding
18 the Section 72.104(a) dose limits. We can argue in
19 the hearing and in our findings and conclusions the
20 relevance of 72.104(a).

21 JUDGE FARRAR: Give us a minute here.

22 MR. GAUKLER: Your Honor, I'd just like
23 to make two points.

24 JUDGE FARRAR: Go ahead.

25 MR. GAUKLER: With respect to the

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1 language of the bases for the Contention that we
2 just took over from Utah L Part B, the language was
3 there and put them in the Unified Contention. So
4 the source of the language for the basis for Utah L
5 Part B was the Licensing Board itself. And if you
6 look at the Licensing Board decision, January 31,
7 2001, with respect to Part B of the Contention it
8 specifically says that that was related back to the
9 State's claim in Part A which goes back to the
10 rule-making approach which had that two-tier method
11 at that point in time.

12 And the second, and under that two-tier
13 method the relevance of 72.104 was, would your
14 failed SSC exceed the dose limits of 72.104? And
15 that was the issue and the context in which the
16 Board admitted the Contention. And here they are
17 trying to go back and say, "We allowed normal dose,
18 or the normal dose rate is wrong based upon the way
19 we calculated it." And that is just not part of
20 this Contention.

21 JUDGE FARRAR: All right. I think we
22 have the matter understood. Give us a minute.

23 (Discussion off the record.)

24 JUDGE FARRAR: We are going to deny the
25 motion to exclude this. The matter is reflected in

1 the Unified Contention and we think is sufficiently
2 tied in to the issue to warrant going ahead subject
3 to cross-examination. I think that concludes
4 the --

5 MR. TURK: Your Honor, we do have some
6 additional matters in the Staff's motion. As to
7 Dr. Resnikoff, there are exhibits that we had moved
8 to exclude.

9 JUDGE FARRAR: Which is?

10 MR. TURK: In our April 15 motion in
11 limine, which was directed --

12 JUDGE FARRAR: I have it here.

13 MR. TURK: The first set of documents
14 are existing that are repetitious, it says the
15 Staff will be introducing those documents in
16 complete form.

17 JUDGE FARRAR: The other day we had an
18 issue where all three parties introduced an exhibit
19 and nobody cared. Why is this important? I mean,
20 it struck me that was strange practice at the time,
21 but it happened and nobody -- I don't know what the
22 offense is. I mean, I would be inclined to dismiss
23 this or deny this part of the motion as kind of
24 inconsequential.

25 MR. TURK: I would agree it is not a

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1 matter of great consequence, Your Honor.

2 JUDGE FARRAR: Okay. Then let's deny
3 it on that basis.

4 MR. TURK: And then there are some
5 documents that we moved to exclude on the grounds
6 that they lacked the proper sponsoring witness.
7 And also the Diablo Canyon application we moved to
8 exclude as being irrelevant.

9 JUDGE FARRAR: I think those are
10 matters that when those are -- let's hear the
11 arguments on those when they are proffered and
12 offered at the hearing. So we will deny the motion
13 as to those matters. Not to say there may not be
14 some merit in one or more of them, but I think
15 those are better taken up in the context of the
16 hearing.

17 MR. TURK: So just denied without
18 prejudice at this time?

19 JUDGE FARRAR: Exactly.

20 MR. TURK: Thank you, Your Honor.

21 JUDGE FARRAR: Does that take care of
22 everything there? Then let's talk about
23 scheduling.

24 I think we are set to continue hydrology
25 tomorrow from 9:00 to 1:00 in the State Capitol.

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1 We had also talked late last night about continuing
2 on Saturday. The Board has consulted today and
3 when we first started this session two hours ago,
4 three hours ago, Mr. Gaukler, you made a
5 representation about that late filing. And I said
6 that on representations like that I would take your
7 word and every lawyer's word at face value. The
8 Board thinks there's one thing that experience now
9 teaches we can never take lawyers' representations
10 at face value, and that's whether we ought to go
11 ahead when they are tired.

12 To us on the Board, this is a search for
13 truth. I'm not denigrating the lawyers' interest
14 in truth. But they are also or have been engaged
15 for five years in a strenuous adversary contest.
16 And one of the things about beating your adversary
17 is never concede that you are tired. And so I
18 think that we have learned not to take anyone's
19 representation that they are not tired. The last
20 half hour last night was painful in a number of
21 respects for everybody. And our notion is that we
22 should not have the hearing on Saturday.

23 We do a lot of work behind the scenes,
24 after hours, but I think it is, you know, nothing
25 compared to the work the lawyers do behind the

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1 scenes with their clients preparing. And we have
2 done it twice now and it hasn't been particularly
3 effective either time. So unless someone on the
4 phone or here tells me there's a serious witness
5 problem on Saturday, we would eliminate that.

6 Now, there was a gentleman from the
7 Staff who said he could not be here on Monday
8 and --

9 MR. SILBERG: Mr. Chairman, if you are
10 suggesting we continue with Utah O on Monday, I
11 simply don't know who is available. I would have
12 to go downstairs and talk to the witnesses and see
13 what their schedule is.

14 JUDGE FARRAR: And the Staff witness
15 indicated he was not available Monday. I'm
16 willing, when we have to overcome things like that,
17 to do things by telephone. We did it with a couple
18 of aviators that way. It's not a good way to do
19 things. But the question I had is if we don't
20 finish hydrology tomorrow, the parties are planning
21 to do seismic Monday. In other words, we don't or
22 you don't want to put off seismic to finish
23 hydrology; is that correct?

24 MS. NAKAHARA: I'd be happy to put it
25 off.

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1 MR. SILBERG: I defer to folks on the
2 phone.

3 MR. GAUKLER: It's taken a long time to
4 arrange our witnesses for D and we have had them
5 all arranged, and it's probably the biggest session
6 of the three sessions is the seismic. And I know
7 I'm going to lose some witnesses come next week on
8 D. So my desire would be to go forward with
9 Section D of the seismic contention on Monday.

10 JUDGE FARRAR: And as of now, is this
11 true for all the parties? You have witnesses and
12 lawyers for seismic on Monday. That's how you have
13 approached the process? Mr. Turk, is that right?

14 MR. TURK: That's true for us, as well.
15 That has been Mr. Gaukler speaking but yes, we had
16 people flying in on Sunday to be there for the
17 hearing on Monday.

18 JUDGE FARRAR: Then we will get as far
19 as we can by one o'clock tomorrow, Friday, on
20 hydrology and then we will quit hydrology at that
21 point.

22 MR. SILBERG: If the concern is that we
23 are tired and I know tomorrow night is likely to be
24 a late night, why can't we do Saturday afternoon?
25 I hate to let this issue just go to the back of the

1 line. I would really like to try to finish these
2 things up. I suspect our people are all here. I
3 don't know what Mr. Ostler's schedule or Mr.
4 Nelson's schedule is, but we can certainly find
5 that out in short order. And I really want to get
6 as much done as we can. I just really don't like
7 the idea of continuing to push these issues off and
8 not closing them out.

9 JUDGE FARRAR: Okay. We may be in
10 Tooele late Friday but we could certainly be
11 available Saturday afternoon. But who is --

12 MR. SILBERG: It's a totally different
13 cast of characters.

14 JUDGE FARRAR: Except for you.

15 MR. SILBERG: No.

16 JUDGE FARRAR: You're not doing seismic?

17 MR. SILBERG: I'm a butcher.

18 MS. CHANCELLOR: A different body.

19 MR. SILBERG: I may be here.

20 JUDGE FARRAR: Mr. Turk, who is doing
21 seismic with you?

22 MR. TURK: I am, along with Marsh
23 O'Neill.

24 MS. CHANCELLOR: Same Board.

25 JUDGE FARRAR: That's right. We are

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1 alright.

2 MR. TURK: I'd like to note a comment,
3 also, Your Honor. I think it was very ambitious
4 and commendable to try to set all these hearings
5 back to back but I know after a few weeks the Board
6 especially is going to be exhausted.

7 JUDGE FARRAR: Well, we are going to
8 get to that point in a minute. All right. We will
9 do Saturday afternoon, but we don't have space
10 here.

11 Trish, we have no space here. Someone
12 is taking over. That's why we didn't have space --

13 MR. SILBERG: I thought we were going to
14 do Saturday at the State Capitol.

15 JUDGE FARRAR: Connie said that --

16 MS. NAKAHARA: I left a message and she
17 hasn't returned it. Let me step out while you
18 continue.

19 JUDGE FARRAR: While we are dealing
20 with that issue, there's another issue. We will do
21 seismic for two weeks and we will be at your, at
22 whatever the lawyers work out on this spillover
23 week; whether that's another seismic week, whether
24 that's aircraft, or whether that's, if we don't
25 finish hydrology, hydrology.

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1 We then have the question, Ms.
2 Chancellor, you sent us a letter saying the parties
3 now have realized we are not getting seismic done
4 in two weeks. It seems to me four weeks is or
5 would be a minimum. Our extra hearing week, our
6 sixth week ends on May 17. Assuming we need two,
7 three, or four more weeks of hearings, when do the
8 parties want to do that? And let me say we could
9 use a break.

10 And number two, it was the day I first
11 met you by video conference and suggested we have a
12 hearing, one week of hearing in D.C. and you made a
13 very strong pitch on behalf of the citizens of the
14 State of Utah that we have the hearing out here,
15 which we acceded to. During the two weeks of
16 hearing we have had this far, at most points in the
17 hearing there have been no people in the audience
18 not connected with the case. There have been a few
19 wander in and out. There were a lot who came to
20 the limited appearances. I urged them repeatedly,
21 "I hear what you are saying. Come to the hearing,"
22 and a couple of them showed up. The Board's
23 thought, subject to your argument, is that the
24 continuation of these hearings would be in our
25 lovely hearing room in NRC headquarters in

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1 Rockville.

2 MS. CHANCELLOR: We would strongly
3 object. We are going to have to take a file
4 cabinet full of documents if we go back there. We
5 have to get witnesses back to the East Coast. I
6 think it is typical that NRC hearings are held
7 where the facility is located. And we think that
8 we would be unduly prejudiced if we had to haul
9 everything and spend weeks in Washington, D.C. All
10 our files are here. We shouldn't have the burden
11 of travelling away from where the facility is
12 located.

13 JUDGE FARRAR: I guess without asking
14 the other parties to speak, if you look at the
15 balance, what motivated our thinking is if you look
16 at the balance of convenience of the lawyers, the
17 witnesses, it tilts very heavily toward an East
18 Coast orientation. Everyone who has been here, we
19 will be here for six weeks. Different lawyers and
20 Staff members will be here one to five weeks, and
21 they have had to haul their files. Your point is a
22 valid one but it applies to everyone else.

23 The only people involved in the whole
24 thing from beginning to end are the Board members,
25 and at some point our ability to function properly

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1 is a problem. In terms of the -- I understand your
2 problem about moving things, but that is shared by
3 everybody.

4 In terms of the citizens of Utah, if
5 there were some who decided, having missed these
6 six weeks, they want to see the rest, we do have
7 video facilities and you can rent things, a room,
8 out here and we will beam the signal out. But to
9 ask us to be here for whatever the number is, nine
10 to ten weeks, I think we are trying to spread the
11 burden here equitably. And I think that even if we
12 had that back here, we still would have tilted it
13 to here.

14 MS. CHANCELLOR: I think we are going to
15 have problems with witness availability. Some of
16 our witnesses are here. And I think it is unfair
17 to ask the witnesses who are here in the state to
18 travel back to D.C. We have Dr. Arabaz and
19 Dr. Bartlett. I mean, you are going to do what you
20 are going to do.

21 JUDGE FARRAR: No. Some people accuse
22 us of that, but we try to listen.

23 MR. SILBERG: It is also the witnesses
24 for the other parties who are travelling here and
25 have been travelling here. It's a decision that

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1 has always been phrased as the hearings are held in
2 locations for the convenience of the Board and the
3 parties. And certainly most hearings start off in
4 the location nearest the site. We are not that
5 close to the site here. However, there have been
6 many hearings which have taken place in Washington;
7 parties have had to travel to Washington to
8 participate in those hearings. It is not or we are
9 not dealing here with a private relatively unfunded
10 intervenor organization. We are dealing with the
11 State of Utah. It is simply not a question that
12 the burden should only fall on the Staff, the
13 Board, and the Applicant.

14 MS. CHANCELLOR: I would just like to
15 add it is PFS that wants to locate in Utah. I
16 think that to say that it is an unconvenience for
17 PFS to have hearings in Utah when it wants to put
18 its facility here, a centralized facility, that
19 that argument doesn't wash. It's convenient to
20 dump their fuel here but it is not convenient for
21 them to have hearings here. I just don't think
22 that is fair.

23 MR. TURK: Your Honor, if I may just add
24 a small voice into this discussion. This is
25 Sherwin Turk.

1 JUDGE FARRAR: Go ahead.

2 MR. TURK: I think the Board has been
3 exemplary in travelling out to Utah and being
4 willing to stay out there for week after week after
5 week. But there is a limit to human endurance.
6 I'm looking at travelling back to Utah not after
7 really a week off, I can tell you I have been busy,
8 but I have appreciated not having to be away from
9 home continuously as the Board has been. So I
10 think if we are talking about only a few extra
11 weeks of hearing when five or six weeks have
12 already taken place in Utah, I think that is a
13 small burden on the State, comparatively.

14 MR. SILBERG: And we have spent several
15 weeks out here two years ago at hearings. This is
16 not our first venture out to the State.

17 MS. CHANCELLOR: I think we would have
18 structured the schedule a lot differently had we
19 known that some of the hearings were going to be
20 held in Rockville. We would not necessarily have
21 chosen to go back to Rockville for seismic
22 contentions, if that's the contentions that you
23 want to hear.

24 JUDGE FARRAR: Well, we will hear any
25 contentions any time. In other words, up until a

1 few days ago we hoped we could finish with the
2 sixth spillover week. When your letter came in, we
3 had been or we knew at that point, I think everyone
4 knew at that point that we were going to go over.
5 We didn't know at that time exactly how you would,
6 as came out today, we didn't know exactly how you
7 had structured things in terms of which seismic
8 issues were going forward. But . . .

9 MS. CHANCELLOR: I'd like to add maybe
10 the public hasn't shown up but we have had press
11 coverage. If the hearings are in D.C., we won't
12 get any press coverage back there.

13 JUDGE FARRAR: Well, that's a matter
14 for the editors of the newspapers. If they think
15 this is important enough, they should send their
16 reporters.

17 MR. SILBERG: Or they can send a
18 stringer, as many papers do when stories are in
19 Washington.

20 JUDGE FARRAR: Or we will beam the
21 thing. I assume the reporters have made everyone's
22 acquaintance. They have your or they know how to
23 contact people. We can beam the proceeding back
24 here and they can watch it from wherever that
25 studio is. We will be willing to hear more from

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1 you on this. But I wanted, at the earliest moment
2 that we had begun thinking about this, to let you
3 all know about it.

4 What about dates? Assume we finish here
5 on May 17, how soon would we resume either here or
6 in D.C.? Have you all talked about that?

7 MR. GAUKLER: We had talked about it,
8 but it was in the context where we assumed that
9 everything would be done except Section E of Utah
10 L/QQ. We have not talked about it beyond that
11 context.

12 JUDGE FARRAR: I take it you had not
13 been or you were going to give yourselves a couple
14 of weeks off?

15 MR. GAUKLER: The week that we had come
16 up tentatively, it wasn't completely good for
17 everybody, was the latter part of the week of June
18 3rd, I think. Starting June 4th. Well, it depends
19 on where we were. In D.C. we would probably have
20 to start June 4th and in Utah we would probably
21 have to start June 5th.

22 MS. CHANCELLOR: We'd like to rethink
23 the week of the 13th. I'm not sure that we are
24 going to agree that that should be reserved for
25 aircraft crashes.

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1 JUDGE FARRAR: The company's witnesses
2 are D.C. area people?

3 MR. SILBERG: For aircraft?

4 JUDGE FARRAR: Yeah.

5 MR. SILBERG: No. I think one is in
6 Florida and two are in the D.C. area.

7 MS. CHANCELLOR: I'm just saying
8 everything is up for grabs now.

9 MR. SILBERG: Is that right, Paul?

10 MR. GAUKLER: Yes. In terms of aircraft
11 crash witnesses, one in D.C., one in Virginia,
12 Charlottesville, which is the same as D.C., and one
13 is in Florida.

14 JUDGE FARRAR: Why don't we leave it
15 this way: We will hear, just as you said, the
16 seismic hearing and we said we will take it in
17 whatever order you want. We will hear whatever you
18 want, whatever you all agree on the week of May 13.
19 We will give everyone two weeks off, unless I hear
20 any objection. Totally apart from whether it is
21 Utah or D.C., we would take the weeks of May 20 and
22 May 27th, which is Memorial Day. We would take
23 those two weeks off. And we would resume June 3rd
24 or whenever after June 3rd. You all decide. And
25 we will leave open the question of where that will

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1 be. No, we can't leave that open. You need to
2 plan your witnesses.

3 MR. SILBERG: The two weeks that you
4 want to take off are the weeks starting --

5 JUDGE FARRAR: Monday, May 20. So we
6 finish Friday the 17th, we would take off the week
7 of May 20th and the week of May 27th, which is the
8 week which begins with Memorial Day. And we would
9 be available at your pleasure the week starting
10 June 3. Any weeks after that. The earlier we know
11 about that, the better, because I have another
12 hearing that I need or another proceeding that I
13 need to schedule sometime in that period where I
14 would need a day and a half.

15 JUDGE LAM: And I have three other
16 proceedings.

17 JUDGE FARRAR: If we decide to have
18 more time off than the two weeks, that's fine. But
19 we will be ready after those two weeks.

20 MR. SILBERG: My suggestion, Mr.
21 Chairman, would be for the parties to try to work
22 amongst themselves and let's just set a date. I
23 would arbitrarily say, since I'm not involved in
24 the negotiations, next Thursday to report back to
25 the Board --

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1 MS. CHANCELLOR: We will be in hearings
2 all week. We won't have time to deal with
3 scheduling.

4 MR. SILBERG: You'll have to deal with
5 the schedule. You can't allow it to slip until
6 after the hearing is over.

7 MS. CHANCELLOR: Jay, we have been
8 working at an expedited pace. I think this is
9 totally unfair.

10 MR. SILBERG: It's a hearing.

11 MS. CHANCELLOR: It's not a hearing.
12 It's a marathon.

13 MR. SILBERG: Some hearings and some
14 trials are marathons, and it's the same for all the
15 parties. But I think the parties need to be able
16 to get back to the Board. If they can't reach an
17 agreement, then I think the Board needs to do what
18 it does in those cases and make a decision.

19 MR. TURK: May I make a request, also,
20 in this record in terms of whether it is a marathon
21 or not? I think it has been quite a marathon and I
22 would like to ask that unless there's a specific
23 objective that can be gained by continuing into
24 evening session such as the panel is almost
25 finished and if we spend an extra hour we can

1 relieve them, I would ask that we break at 5:30 or
2 6:00 each night rather than do the late night
3 sessions.

4 JUDGE FARRAR: We had talked about
5 that. I had intended to mention it. We, meaning
6 the Board, had talked about that. And we are or
7 that was our conclusion. We would go from 9:00 to
8 5:00. If there's something that can be wrapped up
9 by 5:30, we might go a few minutes later. But
10 unless there's some extraordinary witness
11 situation, that we basically would be on a 9:00 to
12 5:00 schedule. Everyone I have talked to among my
13 colleagues back home has said that when you are in
14 a case this long, that's the way you have to do it
15 or no one can survive.

16 MR. TURK: I appreciate that, Your
17 Honor. And we all need to prepare for the next
18 day, so I appreciate that.

19 JUDGE LAM: And this would apply to the
20 next three weeks. Discipline, gentlemen; 9:00 to
21 5:00.

22 JUDGE FARRAR: Barring some extra-
23 ordinary reason, we have tried to push with the
24 hope that by pushing harder we could finish faster,
25 and it doesn't work.

1 MR. SILBERG: Let me make two
2 suggestions. One is just -- I haven't discussed
3 this with anybody on my own side. But there may
4 come a time when time, perhaps "limits" is too
5 strong a point, but time guidance on
6 cross-examination may be appropriate. It has been
7 done in other cases. It certainly is the case in
8 trials. We have had extraordinarily lengthy
9 cross-examination of Applicant and Staff witness
10 panels to date.

11 JUDGE FARRAR: Wait. Let me interrupt
12 you.

13 MR. SILBERG: Only because those are the
14 only ones who have been on the witness stand.

15 JUDGE FARRAR: Let me interrupt you.
16 Without naming names, blaming anybody, talking
17 about particular lawyers or particular witness
18 panels, go ahead and I will let you finish.

19 MR. SILBERG: It was only because those
20 are the witnesses, largely, who have been on the
21 witness stand.

22 JUDGE FARRAR: I will hear the point,
23 but as a general point and not with respect to --

24 MR. SILBERG: The general point is there
25 may come a time that some of the parties, or all of

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1 the parties, may wish to suggest there be limits,
2 criteria, guidance on time for cross-examination.

3 The second point, which is totally
4 unrelated to that, is that our hearing, our overall
5 hearing schedule also involved schedules for
6 proposed findings. And we were going to have those
7 or that schedule run from the completion of the
8 hearings, as I recall. There will be some issues
9 that are completed well before others that will
10 involve different parties, different lawyers.
11 There won't be, necessarily, any overlap between
12 the people who may be stuck on seismic or stuck on
13 aircraft and other people. And I think I'm going
14 to, at some point, ask that we set the proposed
15 findings schedules for those issues that are done
16 based on when those issues are done, and not wait
17 or apply the convoy system to this hearing.
18 Otherwise, I think the overall schedule will suffer
19 extremely harmfully.

20 JUDGE FARRAR: We would entertain such
21 a suggestion at the appropriate point, but subject
22 to not giving double duty to any lawyers.

23 MR. SILBERG: Absolutely.

24 JUDGE FARRAR: In other words, if you
25 are in a hearing on Issue X you are not going to be

1 writing findings on Issue A that was concluded.

2 MR. SILBERG: Absolutely. And I
3 included that point, or I meant to if I didn't in
4 my remark.

5 JUDGE FARRAR: We would entertain that
6 kind of proposal even though the people whose
7 interest is harmed by that is the Board.

8 MS. CHANCELLOR: With respect to time
9 limits, it's difficult to put time limits on how
10 the witnesses are going to answer. While you may
11 limit the time for cross, you can't control how the
12 witnesses --

13 MR. SILBERG: And there's always leeway
14 when the witnesses are being very verbose and
15 eating into your time. Certainly those are taken
16 into consideration.

17 JUDGE FARRAR: You all -- I have said
18 many times how well you all have cooperated. I
19 have tried to extend that to the hearing process.
20 But there are times when, in order to shorten the
21 marathon, I will be more willing to say to a
22 witness, "That's not the kind of answer we want."
23 In fact, I said one last night. "That question
24 could have been answered yes or no. Give us a yes
25 or no. And then explain if you want to. Listen to

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1 the question. Give us a short answer." I'm
2 willing to do that.

3 I'm willing to, where cross-examination
4 bogs down, be more ready to tell people, "We are
5 spinning wheels here." Without saying whether and
6 when that has happened before, in order to shorten
7 the marathon I'd be willing to do that and treat
8 everybody, you know, that plays by the same rules.
9 I know there are times a lawyer is really spinning
10 wheels and you say, "Fine. You have a half hour.
11 Use it however you want." That's a dramatic
12 approach to take and I don't want to do that
13 because this hearing has been a long time being
14 created and I want everyone, when it is over, to
15 feel that they had a fair chance to be heard. But
16 at some point in the marathon, you have to say to
17 everybody, "We are going to move things more
18 quickly."

19 Speaking of moving things more quickly.
20 I'm being given the signal that the extended phone
21 call has two minutes to go. So unless somebody has
22 something urgent to take up, we will see you from
23 9:00 to 1:00 in the State Capitol.

24 MR. TURK: Your Honor, I have a small
25 point to make in reference to your last estimate

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1 about limiting cross-examination.

2 JUDGE FARRAR: Yes.

3 MR. TURK: The rest of us are not privy
4 to what other parties submit to you in cross-
5 examination plans. But when a party hands you a
6 plan, if you find items that you think are beyond
7 the scope or might involve too much spinning of
8 wheels or are small points, I would be willing to
9 be bound by a determination by you that I'm limited
10 to a certain amount of time and I have to wrap up
11 whichever points I think are most important.

12 JUDGE FARRAR: That's a good
13 suggestion. But the problem has not been that they
14 are outside the scope of what they filed. It's
15 that sometimes there have been cross-examinations
16 that may not be going anywhere fast. They are on
17 point, but they are not going. I don't know that
18 that has happened but it's one thing we can try to
19 be more rigorous about.

20 MR. TURK: And I'm not suggesting that
21 you be punitive with anyone about it.

22 JUDGE FARRAR: No. It's not punitive.
23 It's just that when everyone in the room knows we
24 are not getting anywhere, let's say, "We are not
25 getting anywhere."

1 MR. TURK: I appreciate that.

2 JUDGE FARRAR: And I'm not saying that
3 has happened. But --

4 MR. TURK: There was one time when I
5 indicated I was going to ask one question or a few
6 questions and it went over and I recall the way you
7 looked at me after that happened.

8 JUDGE FARRAR: Well, I will use that
9 look more frequently with more people. On that
10 semi-humorous note, let's adjourn the conference.
11 Thank you all for your time. We will see you
12 tomorrow.

13
14 (The proceeding was concluded
15 for the day at 4:30 p.m.)
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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

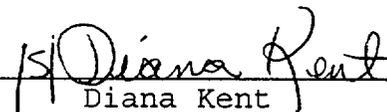
Name of Proceeding: Private Fuel Storage, LLC

Docket Number: Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

Location: Salt Lake City, Utah

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Diana Kent

Official Reporter

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