

RAS 4847

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

September 13, 2002 (11:12AM)

Title: Pacific Gas and Electric
Diablo Canyon ISFSI

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket Number: 72-26-ISFSI; ASLBP No. 02-801-01-ISFSI

Location: Shell Beach, California

Date: Tuesday, September 10, 2002

Work Order No.: NRC-523

Pages 1-238

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD
PREHEARING CONFERENCE

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In the Matter of :

PACIFIC GAS & ELECTRIC : Docket No. 72-26-ISFSI

: ASLBP No. 02-801-01-ISFSI

(Diablo Canyon ISFSI) :

-----x

Tuesday, September 10, 2002

The Cliffs Resort

2757 Shell Beach Road, Ballrooms

Shell Beach, California 93449

Before:

G. Paul Bollwerk, III, Esq., Chairman

Peter S. Lam, Ph.D.

Jerry R. Kline, Ph.D.

With: Susan R. Lin, Law Clerk

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1 PARTY REPRESENTATIVES PRESENT, continued:

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11 Beach Community John Wallace, General Manager

12 Services District: District Engineer

13

I-N-D-E-X

1		
2		
3	Welcome and introductions	8
4	Matter of Legal Standing of AVAC	23
5	Statement on behalf of Avila Beach	
6	Community Services District	68
7	Environmental Contentions	75
8	SLOMFP's submission of newspaper article . . .	82
9	Contentions of the County and Port	117
10	Environmental Issues	172
11	Transportation Issues	219
12	Adjournment	238
13		
14		

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

(9:32 o'clock a.m.)

JUDGE BOLLWERK: Good morning. Today we're here to conduct an Initial Prehearing Conference in the Pacific Gas and Electric Company proceeding.

In response to a Notice of Opportunity for Hearing published in the *Federal Register* on April 22nd, 2002, found in Volume 67 of the *Federal Register* at pages 19600 to 19602, various petitioners, including the San Luis Obispo Mothers for Peace, which is acting as a league -- a lead petitioner; Ms. Peg Pinard; the Avila Valley Advisory Council; the Cambria Legal Defense Fund; the Central Coast Peace and Environmental Council; the Environmental Center of San Luis Obispo; the Nuclear Age Peace Foundation; the San Luis Obispo Chapter of the Grandmothers for Peace International; the San Luis Obispo Cancer Action Now; the Santa Margarita Area Residents Together; the Santa Lucia Chapter of the Sierra Club; and the Ventura County Chapter of the Surf Rider Foundation have requested a hearing to challenge the December 21st, 2001 application of Pacific Gas and Electric Company under Part 72 of Title 10 of the Code of Federal Regulations for authority to construct and operate an independent spent fuels storage installation at its

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1 Diablo Canyon Power Plant.

2 In addition to these petitioners seeking
3 intervention -- intervening-party status, in
4 accordance with Section 2.714 of Title 10 of the Code
5 of Federal Regulations, four entities: San Luis
6 Obispo County, California; the Port San Luis Harbor
7 District; the California Energy Commission; and the
8 Diablo Canyon Independent Safety Committee have sought
9 permission to participate as interested-governmental
10 entities in accordance with Section 2.715(c) of Title
11 10.

12 As is our usual practice, we scheduled
13 this Prehearing Conference to provide these
14 participants with an opportunity to make oral
15 presentations on the contested matters that are now
16 before the Board as a result of their various filings
17 over the past several months.

18 These include: The matter of the legal
19 standing of the Avila Valley Advisory Council and
20 various other potential Section 2.714 petitioners; the
21 admissibility of these petitioners' eight proffered
22 contentions; the Section 2.715(c) participant status
23 of the Diablo Canyon Independent Safety Committee; and
24 the admissibility of the four issue statements
25 proffered by San Luis Obispo County and the Port San

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1 Luis Harbor District.

2 Before we begin hearing the parties'
3 presentations on these issue -- on these matters at
4 issue, I would like to introduce the Board members.

5 To my right is Judge -- is Dr. Jerry
6 Kline. Dr. Kline, an administrative scientist, is a
7 part-time Member of the Atomic Safety and Licensing
8 Board Panel.

9 To my left is Dr. Peter Lam. Judge Lam is
10 a nuclear engineer and a full-time Member of the
11 Panel.

12 My name is Paul Bollwerk. I'm an attorney
13 and I'm the Chairman of this Licensing Board.

14 At this point we'd like to have counsel
15 for the various participants identify themselves for
16 the record. Why don't we start with counsel for the
17 San Luis Obispo Mothers for Peace and the other
18 Section 2.714 petitioners; then counsel for the
19 entities seeking to participate as Section 2.715(c)
20 interested-governmental entities; then move to counsel
21 for applicant Pacific Gas and Electric; and, finally,
22 to the NRC staff counsel.

23 Ms. Curran.

24 MS. CURRAN: Good morning. My name is
25 Diane Curran. I'm an attorney with the firm of

1 Harmon, Curran, Spielberg and Eisenberg in Washington,
2 D.C. And I am here representing the San Luis Obispo
3 Mothers for Peace and 13 other petitioners in this
4 proceeding. I think you've already listed them.

5 JUDGE BOLLWERK: Did I get them all?

6 MS. CURRAN: It sounded to me like you
7 did.

8 JUDGE BOLLWERK: All right.

9 MS. CURRAN: I'd like to introduce Dr.
10 Gordon Thompson, who is on my right. Dr. Thompson
11 serves as one of our experts in this proceeding.

12 On my left is Peg Pinard, who is a
13 Supervisor of the San Luis Obispo County Board of
14 Supervisors.

15 Also present in the room are
16 representatives of the Mothers for Peace and various
17 other environmental and civic groups that have
18 petitioned with the Mothers for Peace in this case.

19 JUDGE BOLLWERK: All right. I think I
20 mispronounced your name. I apologize. It's Pinard
21 rather than Pinerd.

22 MS. PINARD: Thank you.

23 JUDGE BOLLWERK: Thank you.

24 All right. The Section 2.715(c)
25 participants, why don't we just start at this end of

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1 the table and move down that way.

2 (Speaker's brief comments not picked up by
3 the public address system.)

4 JUDGE BOLLWERK: There is an on-off switch
5 on these and you need to have them close. They are
6 very directional, so.

7 MR. WELLINGTON: Robert Wellington. I'm
8 legal counsel for the Diablo Canyon Independent Safety
9 Committee.

10 JUDGE BOLLWERK: Okay.

11 MS. HOUCK: Darcie Houck, Staff Counsel
12 for the California Energy Commission. And to my right
13 is Barbara Byron, our Nuclear Policy Advisor.

14 JUDGE BOLLWERK: All right.

15 MR. WAYLETT: Good morning. Tom Waylett,
16 Port San Luis Harbor District. And to my right is the
17 President of the Board of the Port San Luis Harbor
18 District, Carolyn Moffat. And seated behind me is
19 Britt Phillips, who is Vice President.

20 MR. TEMPLE: Bob Temple here on behalf of
21 the County of San Luis Obispo. To my right is Tim
22 McNulty, here from the County Counsel's Office. Also
23 present is Stacy Millich, also of the County Counsel's
24 Office.

25 JUDGE BOLLWERK: All right. Thank you.

1 Pacific Gas and Electric.

2 MR. REPKA: Yes. My name is David Repka
3 with the law firm of Winston and Strawn in Washington,
4 D.C., representing Pacific Gas and Electric Company.

5 On my left is Mr. Richard Locke with
6 Pacific Gas and Electric Company; he's attorney for
7 the company. And on my right is my colleague at
8 Winston and Strawn, Brooke Poole.

9 JUDGE BOLLWERK: All right. NRC staff.

10 MR. LEWIS: Your Honors, Stephen Lewis,
11 Counsel for NRC staff. On my left is Angela Coggins,
12 Co-Counsel for NRC staff. On my right is Randy Hall,
13 who is the current Project Manager for this review.

14 I'd like to introduce a few other people
15 from the NRC who are here, for the benefit of all the
16 parties and also for the public, so that they can know
17 who they are and ask them questions when we're off the
18 record.

19 Steven Baggett, who is a Technical
20 Assistant in the Spent Fuel Project Office and was
21 formerly Project Manager on this case.

22 Jose Cuadrado, who is in the Spent Fuel
23 Project Office and assisting the -- Randy and Steve
24 and others.

25 Girija Shukla, who is the Project Manager

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1 for the Diablo Canyon Plant in the Office of Nuclear
2 Reactor Regulation.

3 And somewhere, Roger Hannah -- please
4 stand up, Roger -- who is from the Office of Public
5 Affairs in Region 2, but filling in as the Public
6 Affairs Officer from Region 4.

7 I think that's covers everybody whom we
8 have with us.

9 JUDGE BOLLWERK: All right. Thank you
10 very much.

11 All right. At this point I'd like to let
12 you know, so that there's no misunderstanding, as we
13 stated in our Issuances of June 26 and August 2nd --
14 7th, rather, to August 7th, 2002, presentations to the
15 Board during this Prehearing Conference will be from
16 counsel for the participants that have just identified
17 themselves.

18 As is our usual practice, following the
19 Board's ruling on the standing and admissibility of
20 the contentions of the San Luis Obispo Mothers for
21 Peace and the other Section 2.714 petitioners and the
22 status of the Section 2.715(c) participants and the
23 admissibility of their issues, the Board will Issue a
24 Notice of Hearing that in accordance with 10 CFR
25 Section 2.715(a) will afford members of the public an

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1 opportunity to provide, as appropriate, oral
2 limited-appearance statements on the issues.

3 Further, in that or a subsequent notice
4 the Board will outline the times, places, and
5 conditions of participation relative to the
6 opportunity for oral limited-appearance statements.

7 As the Board noted in its August 7th, 2002
8 Issuance, however, in the interim any member of the
9 public may submit a written limited-appearance
10 statement providing his or her views regarding the
11 issues in this proceeding. Those written statements
12 may be sent at any time by regular mail to: The
13 Office of the Secretary, U.S. Nuclear Regulatory
14 Commission, Washington, D.C. 20555-001, to the
15 Attention of the Rulemakings and Adjudication Staff,
16 or it can be sent by email to hearingdocket@nrc.gov.
17 And I will repeat that.

18 By mail: Office of the Secretary, U.S.
19 Nuclear Regulatory Commission, Washington, D.C.
20 20555-001 to the Attention of the Rulemakings and
21 Adjudication Staff; or by email to [hearingdocket](mailto:hearingdocket@nrc.gov) --
22 all one word, h-e-r -- h-e-a-r-i-n-g-d-o-c-k-e-t -- at
23 [nrc.gov](mailto:hearingdocket@nrc.gov).

24 A copy of the statement should also be
25 served on me as the Chairman of this Atomic Safety and

1 Licensing Board by sending it by regular mail to my
2 attention at the: Atomic Safety and Licensing Board
3 Panel, Mail Stop T-3F23, U.S. Nuclear Regulatory
4 Commission, Washington, D.C. 20555-001 or by email to
5 gpb@nrc.gov.

6 And again my address is: The Atomic
7 Safety and Licensing Board Panel, Mail Stop T-3F23,
8 U.S. Nuclear Regulatory Commission, Washington, D.C.
9 20555-001. My email address: Gpb@nrc.gov.

10 As to the order of presentation by the
11 participants in this Prehearing Conference, most
12 recently in an order dated September 5th, 2002, we
13 outlined a schedule for presentation that affords an
14 opportunity for each of the participants to address
15 the various contested matters now before the Board.
16 The Board will intend to follow that schedule as
17 closely as possible in terms of the issues in the
18 allocated times for argument.

19 In that regard, we would request that
20 before starting on an issue for which a participant
21 has been afforded an opportunity for argument and for
22 a reply or rebuttal, counsel should indicate how much
23 of the total time allocation he or she wishes to
24 reserve for rebuttal.

25 For each issue we would also like to know

1 from counsel for the Section 2.715(c) participants
2 whether they have reached any agreement about a lead
3 Section 2.715(c) participant arrangement regarding a
4 particular issue and what that agreement, if any, is.

5 The Board will be providing counsel with
6 notice of the need to finish his or her presentation
7 toward the end of its allocated argument time.

8 Finally, at this juncture -- rather, at
9 some juncture, we would like to have a brief
10 discussion regarding some of the administrative
11 details involved in this proceeding, including the
12 application of the Hybrid Hearing Procedures in 10 CFR
13 Part 2, subpart (k).

14 And with respect to administrative
15 announcements I'd also make everyone aware of two
16 other things. I hope that by now everyone's turned
17 off their cell phone so that we aren't interrupted by
18 ringing cell phones.

19 Also be aware that you're welcome
20 obviously when you leave through these doors over here
21 to stay in this hall or to use the restrooms in the
22 back. If you try to go out onto the patio area, which
23 looks very inviting, you're then outside the security
24 zone that's been established and you'll have to go
25 back through security again to come into the room.

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1 So, again, if you confine yourselves to
2 the hall out here and the area behind us if you want
3 to stay within the security zone. If not, you'll have
4 to be rechecked as you come back into the room.

5 All right. All that being said, because
6 the burden rests with the Section 2.714 petitioners on
7 the issue of standing, in accordance with the
8 previously-issued schedule, we'll begin by letting
9 counsel for the San Luis Obispo Mothers for Peace and
10 the other Section 2.714 petitioners address the issue
11 of standing for these various participants.

12 MS. CURRAN: Judge Bollwerk, --

13 JUDGE BOLLWERK: Um-hum.

14 MS. CURRAN: -- before we begin on the
15 issue of standing, I wonder if I might raise a few
16 preliminary issues.

17 JUDGE BOLLWERK: All right.

18 MS. CURRAN: First, with respect to your
19 statement a moment ago that you expect that if
20 contentions are admitted in this case the Board will
21 be holding limited-appearance sessions, I just want to
22 communicate to you the concern of the petitioners who
23 are here today, the representatives of these
24 organizations, that they may not get that opportunity
25 if the contentions are denied.

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1 And they were especially upset that they
2 were not allowed to bring in signs here that would
3 silently express their views. I know I can understand
4 how that could be distracting to the Board, but I
5 would like to impress upon the Board the importance of
6 this issue to the community --

7 JUDGE BOLLWERK: Um-hum.

8 MS. CURRAN: -- and their desire to be
9 heard, regardless of what ultimately happens in terms
10 of the admissibility -- the ruling on admissibility of
11 contentions.

12 This is a licensing action that is going
13 to affect this community. And the community would
14 like an opportunity to be heard regarding the impacts
15 of this facility on the community and had thought that
16 at least they could hold up signs during the hearing
17 to express their views.

18 So I'd like to ask that the Board consider
19 whether some kind of session can be held regardless so
20 that the community can be heard.

21 JUDGE BOLLWERK: All right. We'll take
22 that under advisement, and I'll talk with the other
23 Board Members. As you well know, the other
24 proceedings that I've had with you, we've spent a lot
25 of time limited-participant sessions, and that's

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1 something we're certainly willing to do at the
2 appropriate time. So we'll consider that and we'll
3 get back with you, all right?

4 MS. CURRAN: 'Okay.

5 JUDGE BOLLWERK: Thank you.

6 MS. CURRAN: There's just one or two other
7 things that I don't want to take up my limited time on
8 --

9 JUDGE BOLLWERK: You're not. The clock
10 isn't running yet, but --

11 MS. CURRAN: One is I just want to
12 clarify, if it isn't already established, that
13 Lorraine Kitman, --

14 JUDGE BOLLWERK: Um-hum.

15 MS. CURRAN: -- who petitioned separately,
16 is now participating in this proceeding as a member of
17 the San Luis Obispo Mothers for Peace.

18 JUDGE BOLLWERK: All right.

19 MS. CURRAN: Also I think a concern was
20 raised by the staff in its response to Avila Valley
21 Advisory Council's amended petition to intervene, that
22 Avila -- AVAC had initially petitioned to represent
23 itself in the proceeding and is now being represented
24 by counsel, and raised a question as to whether that
25 was indeed the case, because it was simply my

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1 representation.

2 I asked Seamus Slattery, who is the Chair
3 of AVAC, if he would write a letter to the Board
4 clarifying that he wants --- that the AVAC wants to be
5 represented by counsel. And I have a copy of that
6 letter today to distribute, if that would be helpful
7 to the Board.

8 JUDGE BOLLWERK: All right. Let me ask
9 the staff, in light of that, if they still have an
10 objection, or I'm glad to take the letter for the
11 record if you think it's necessary.

12 MR. LEWIS: I'd like to have it in the
13 record.

14 JUDGE BOLLWERK: Okay. Why don't we go
15 ahead and have that then. How many copies do you
16 have? One?

17 MS. CURRAN: I have fifteen.

18 JUDGE BOLLWERK: Fifteen? Okay.

19 MS. CURRAN: Let's see.

20 (Copies of said letter distributed to
21 participants.)

22 JUDGE BOLLWERK: I don't know if
23 eventually you can get this electronically, but it
24 would probably be a good idea to submit it
25 electronically as well, if that's possible when you

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1 get back.

2 MS. CURRAN: I'll do that.

3 JUDGE BOLLWERK: All right.

4 MS. CURRAN: And then the last thing I'd
5 like to bring up is just to inform the Board and the
6 parties, since this was done Monday when many of the
7 parties may have been traveling, that yesterday the
8 petitioners in this case filed a petition with the
9 Commissioners of the NRC, asking the NRC Commissioners
10 to suspend this proceeding while it considers new
11 safety measures that would protect the Diablo Canyon
12 Nuclear complex, including the plant and the proposed
13 ISFSI, against the risk posed by acts of terrorism or
14 other acts of malice or insanity.

15 And I would like to clarify that that
16 petition was brought under the Atomic Energy Act and
17 does not have any effect on the contentions that the
18 petitioners have raised pursuant to NEPA in this
19 proceeding, which we believe the Board has
20 jurisdiction over, although the Board would not have
21 jurisdiction over major changes to safety regulations,
22 which is what we seek in that petition.

23 JUDGE BOLLWERK: Is it a rulemaking
24 petition, or a Section 2.206 petition, or however you
25 style that? You gave me a copy, and I didn't look at

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1 it.

2 MS. CURRAN: It is a petition for
3 compliance with the Commission's statutory obligations
4 to ensure that the issuance of a license poses no
5 undue risk to public health and safety or the common
6 defense and security.

7 JUDGE BOLLWERK: All right.

8 MS. CURRAN: It's neither an enforcement
9 petition nor a rulemaking petition.

10 JUDGE BOLLWERK: All right.

11 JUDGE LAM: Ms. Curran, this is a petition
12 dated yesterday?

13 MS. CURRAN: Yes. And I believe you have
14 both -- a copy.

15 JUDGE BOLLWERK: We have copies.

16 All right. Anything else?

17 MS. CURRAN: No.

18 JUDGE BOLLWERK: All right. Why don't we
19 then begin with the standing issues. The order that
20 we asked them to be argued was first the San Luis
21 Obispo Mothers for Peace argument, then the Diablo
22 Canyon Independent Safety Committee's argument. And
23 then we'll go from there down to the other
24 participants.

25 Does -- how much time for rebuttal or

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1 reply do you want to leave yourself?

2 MS. CURRAN: I think I have seven minutes.

3 JUDGE BOLLWERK: Right.

4 MS. CURRAN: And I'd like to reserve three
5 for rebuttal. I'm a little concerned that I may not
6 make it in seven minutes, because as -- and I -- I
7 really did not -- I didn't gauge the amount of time I
8 might need until yesterday, when I was reviewing all
9 the arguments. So I just want to let the Board know
10 that I'll certainly be as efficient as I can.

11 JUDGE BOLLWERK: Okay. And in terms of
12 the -- the Independent Safety Committee, how much time
13 would you all want to leave yourselves for rebuttal,
14 or reply, whatever you want to refer?

15 MR. WELLINGTON: We're anticipating 90
16 seconds saved for rebuttal.

17 JUDGE BOLLWERK: All right. That's a
18 minute and a half.

19 Okay. And do any of the other
20 interested-governmental participants, do you want to
21 use your time individually, or do you want to lump it
22 in some way or another? Did you talk about that at
23 all, or do you want to use it individually?

24 MR. WAYLETT: Use it individually, I
25 guess.

1 JUDGE BOLLWERK: Okay. All right.

2 All right then, Ms. Curran.

3 MS. CURRAN: Okay. I'd like to address
4 the objections made by PG&E to the standing of some of
5 the petitioner groups.

6 I know the NRC didn't -- said it did not
7 object to the standing of San Luis Obispo Mothers for
8 Peace or Supervisor Pinard, Peg Pinard, and wound up
9 not objecting to the standing of AVAC.

10 But it didn't say anything in particular
11 about the standing of the 11 other petitioners. So I
12 would assume it has no objection to their standing.

13 But PG&E did raise an objection to the
14 standing of some of the groups that -- whose members
15 reside in the area of the San Luis -- of the Diablo
16 Canyon Plant and also the standing of some of the
17 groups that -- whose members reside in the Santa
18 Barbara area. So I'd like to address those
19 separately.

20 JUDGE BOLLWERK: All right.

21 MS. CURRAN: Our -- we agree that there is
22 no presumption regarding the distance from an ISFSI,
23 that one needs to look at evidence of what could be
24 the environmental impacts, what would be the distance
25 that those impacts would occur.

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1 So what -- what the petitioners consulted
2 was the -- the Draft Environmental Impact Statement
3 for Yucca Mountain, which has a table in it indicating
4 that environmental impacts, health impacts in terms of
5 radiation doses will occur out to a 50-mile radius.
6 And that is what we relied on.

7 PG&E argues that we are trying to raise
8 some kind of a presumption. That is not the case.
9 PG&E does not contest this evidence that's in the
10 Yucca Mountain draft EIS. It simply says the impacts
11 are small. But as we point out in our Petition to
12 Intervene, even small impacts can be sufficient to
13 confer standing.

14 PG&E also argues that the petitioners have
15 not alleged a credible design-basis accident at the
16 ISFSI or a credible beyond-design basis accident at
17 the ISFSI that would cause such impacts.

18 But it seems to me that it is appropriate
19 to rely on a generic environmental impact statement
20 that looks at the impacts of the cask-candling
21 accident. This is the same kind of an accident that
22 could occur at the ISFSI and that this is sufficient
23 for purposes of conferring standing.

24 PG&E itself never provides a distance at
25 which it thinks that a beyond-design-basis accident at

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1 the ISFSI could do no harm.

2 PG&E cites a 1979 North Anna Spent Fuel
3 Pool Expansion case in which close proximity to the
4 plant was required. And I would submit that we have
5 provided evidence in the body of these contentions, in
6 particular I think it's Contention EC2, indicating
7 that there's new information about the risks of a
8 spent fuel pool accident, showing that the loss of
9 water from -- to the top of the fuel assemblies from
10 a spent fuel pool could lead to a fire that could
11 cause a catastrophic radiological release. And of
12 course such a release would cover a very large area.
13 We're talking about hundreds or thousands of square
14 miles.

15 So when looking at standing, when one is
16 looking at the circumstances of a particular facility,
17 we think it's appropriate to update information as to
18 what could be the environmental impacts of an
19 accident.

20 JUDGE BOLLWERK: They're using a distance
21 of approximately 17 miles. And I guess we've got 30
22 miles, 27 miles, within --

23 MS. CURRAN: Right.

24 JUDGE BOLLWERK: -- 20 miles, 75 miles, 35
25 miles. Do you have a distance that you're posing? I

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1 mean if you're --

2 MS. CURRAN: Well, if --

3 MS. MOFFAT: -- talking about as far as 75
4 miles?

5 MS. CURRAN: Well, it's the distance in
6 the Yucca Mountain Draft EIS, which is 50 miles. If
7 you look at that table in the Draft EIS, it indicates
8 that although they are low that one could expect to
9 see higher radiation doses out to 50 miles from Yucca
10 Mountain.

11 That's for a cask-candling accident, which
12 seems to me to be exactly the kind of thing that could
13 happen at the ISFSI, because the fuel has to be
14 transferred from the pools into the storage casks.

15 JUDGE LAM: So, Ms. Curran, you are
16 focusing on only 50 miles radius?

17 MS. CURRAN: Oh, --

18 JUDGE LAM: Earlier you mentioned hundreds
19 or thousands of square miles. That's a lot more than
20 50 --

21 MS. CURRAN: Well, I just wanted to
22 address the case that PG&E was relying on, the North
23 Anna case, saying -- their argument is basically if a
24 spent fuel pool accident couldn't have impacts beyond
25 a close proximity, then why would you expect a dry cask

1 facility to have impacts beyond that range. And I
2 just wanted to address -- raise a question as to
3 whether there's any longer a factual basis for that
4 North Anna decision.

5 JUDGE BOLLWERK: I know also that the
6 standing of AVAC has been contested basically because
7 --

8 MS. CURRAN: Yes.

9 JUDGE BOLLWERK: -- they have no --
10 they're an advisory body, not a --

11 MS. CURRAN: Yes.

12 JUDGE BOLLWERK: They have no, what do I
13 want to say, litigation authority, if that's the
14 proper term.

15 MS. CURRAN: Yeah. If you wouldn't mind,
16 I'd just like to finish with the other petitioners
17 first, --

18 JUDGE BOLLWERK: All right.

19 MS. CURRAN: -- because the other question
20 is whether the proximity to the transportation route
21 can confer standing.

22 There are a number of groups in Santa
23 Barbara --

24 JUDGE BOLLWERK: Right.

25 MS. CURRAN: -- who want to participate in

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1 this proceeding. They are asking for standing on the
2 basis of their proximity to potential transportation
3 routes. These transportation routes have been
4 reported by the Department of Energy. And I -- I'm
5 not exactly sure whether it was in the EIS or some
6 other DoE statement, but it was certainly reported in
7 the press in the Santa Barbara area. And that is what
8 led these petitioners to seek to join this case.

9 PG&E argues that this case doesn't involve
10 transportation impacts, and I think that's irrelevant
11 essentially.

12 The question, for purposes of standing, is
13 whether, if this permit were denied, it would
14 eliminate the impacts on which -- that these
15 petitioners seek to avoid.

16 So if the petition were denied, then these
17 petitioners wouldn't have to -- if the license
18 application were denied, these petitioners would never
19 have to worry about whether they would suffer
20 environmental or health impacts from transportation of
21 waste through their community. So that is the test
22 for standing, and I believe it's met here.

23 And I would like now to just briefly
24 address AVAC's standing.

25 JUDGE BOLLWERK: All right.

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1 MS. CURRAN: Originally AVAC filed a
2 petition on its own and PG&E -- PG&E objected that
3 AVAC hadn't shown any relationship between its purpose
4 and this proceeding. I believe that was the initial
5 objection.

6 AVAC refiled an amended petition. AVAC
7 submitted a set of bylaws showing that its purpose --
8 its purposes include intervening in judicial and
9 administrative proceedings for the purpose of
10 advocating for the interests of the community of the
11 Avila Valley.

12 In response to that amended petition, PG&E
13 raises a question about AVAC's authority to
14 participate in this proceeding. First I guess, first
15 of all to clarify, AVAC is an unincorporated
16 association and has, through its bylaws, given itself
17 the authority to participate in this proceeding.

18 But we did take a look at whether there's
19 any state law that governs this. And I'd like to
20 point the Licensing Board's attention to California
21 Code of Civil Procedures, Section 369.5(a), which
22 provides that an unincorpor- -- unincorporated
23 association, whether organized for profit or not, may
24 sue and be sued in the name it has assumed or by which
25 it is known. So there is a provision of the State

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1 Code that authorizes unincorporated associations to
2 sue or be sued.

3 JUDGE BOLLWERK: All right. Anything
4 else?

5 MS. CURRAN: No.

6 JUDGE BOLLWERK: All right. Now on behalf
7 of the Diablo Canyon Independent Safety Committee.

8 MR. WELLINGTON: I've provided a copy of
9 these to you for retention in the record --

10 THE REPORTER: You need to be at a
11 microphone.

12 MR. WELLINGTON: I've provided a copy of
13 these to you for inclusion in the record.

14 The Diablo Canyon Independent Safety
15 Committee on August 20 requested in writing to
16 participate in the instant matter as an interested
17 state agency in accordance with 10 CFR Section
18 2.715(c).

19 The several arguments, facts, and points
20 made and presented in the Safety Committee's written
21 request are incorporated by reference herein.

22 PG&E by its response to the Safety
23 Committee's request dated August 30 has stated its
24 opposition to the request.

25 Staff of the NRC has responded to the

1 Safety Committee's request by supporting it on the
2 basis that the Safety Committee by its very definition
3 is an interested state agency. The following
4 arguments are submitted pursuant to the Initial
5 Prehearing Conference schedule.

6 The question here is whether the Safety
7 Committee is an interested state agency whose
8 representatives should be afforded participation
9 status as provided in Section 2.715(c). That
10 regulation is short on definition. However, there are
11 several factors that support the Safety Committee's
12 status as an interested state agency.

13 To begin, the Safety Committee was
14 established as a result of a settlement agreement
15 entered into, among others, by the State of
16 California. Its actual creation was by means of a
17 decision of the California Public Utilities
18 Commission, an arm, an instrumentality of the State of
19 California.

20 Subsequent CPUC decisions have extended
21 the life of the Safety Committee on the basis the
22 public has a continuing interest in the plant safety.
23 The Safety Committee's very existence derives from and
24 through the State of California.

25 Each of its members is appointed by state

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1 officials. One by the governor, one by the attorney
2 general, and the third by the chairperson of the
3 California Energy Commission.

4 Despite PG&E's protest to the contrary,
5 the term "agency," as used in the regulation at issue
6 here, does not categorically require establishment
7 through a constitution, enabling statute, or
8 regulation.

9 That the Safety Committee certainly may be
10 a hybrid, not fitting nicely into PG&E's notion of
11 state agency, does not dispel the clear and compelling
12 certainty that the Committee was specifically created
13 by the State to perform a legitimate governmental
14 function. And that governmental function clearly is
15 on point with these current proceedings.

16 Citing the *Power of Authority of New York*
17 decision, NRC staff states its support for Safety
18 Committee participation. NRC staff is particularly
19 impressed, as was the committee -- commission and
20 power authority, with safety issues and the specific
21 interests of the prospective participant in assuring
22 the public that a nuclear facility will operate
23 without incident.

24 Here the Safety Committee has previously
25 stated its interest in the safe operation of the ISFSI

1 and has made the point that in doing so it is carrying
2 out its state-mandated responsibility to assure to
3 specific state agencies and to the interested public
4 the safety of operations at Diablo Canyon.

5 The Safety Committee is clearly not a
6 general-purpose-planning-advisory board of the sort
7 that was rejected as a hearing participant in the
8 decision cited by PG&E as *Yankee Rowe*.

9 Rather, the stated purposes and charges of
10 the Safety Committee put it directly at interest in
11 the ISFSI matter and where the integration of the
12 ISFSI -- that's hard for me to say -- into existing --
13 the integration of the ISFSI into the existing
14 facility systems as important questions concerning the
15 safety of operation at the plant.

16 The apparently unqualified rejection of
17 2.715(c) participants of advisory bodies, as mentioned
18 in *Yankee Rowe*, did not persuade NRC staff, nor does
19 it persuade us that the Safety Committee is not
20 qualified to represent the interests it is legally
21 bound to address at the direction of the State of
22 California.

23 Of paramount concern here is according
24 participant status to an agency created by the State
25 to assure and protect the safety of interests of

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1 citizens of that State.

2 And in that regard I would like to note
3 that it was in this very hearing, in this hearing
4 room, at the Safety Committee's last public hearings
5 in June of this year that six residents of San Luis
6 Obispo County appeared and requested that the Safety
7 Committee intervene in the instant proceedings.

8 Why PG&E is forwarding what amounts to a
9 very technical argument to keep the Safety Committee
10 out of the hearing mainstream is unclear. PG&E should
11 welcome the active participation of any agency that
12 will bring the experience and intellect regarding
13 atomic plant safety that the Safety Committee
14 possesses. We then request that you exercise your
15 considerable discretion to include us as participation
16 status.

17 Thank you.

18 JUDGE BOLLWERK: So I take it you're
19 basically distinguishing the Yankee case that was
20 cited as the difference between a general purpose
21 planning advisory committee and one that has a very
22 specific purpose, with respect to nuclear safety?

23 MR. WELLINGTON: Correct.

24 JUDGE BOLLWERK: All right.

25 All right. Does the California Energy

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1 Commission have anything they want to say on this
2 subject, on the standing of anyone?

3 MS. HOUCK: That we would support the
4 comments by the Diablo Canyon Independent Safety
5 Committee.

6 JUDGE BOLLWERK: All right.

7 Port San Luis Harbor District.

8 MR. WAYLETT: We would support the
9 inclusion of AVAC as to their standing and also the
10 Safety Committee.

11 JUDGE BOLLWERK: All right.

12 And San Luis Obispo County.

13 MR. TEMPLE: The County of San Luis Obispo
14 on August 20th sent you a letter, Judge Bollwerk.

15 JUDGE BOLLWERK: Right.

16 MR. TEMPLE: In that letter we urged that
17 this panel hold a full and open hearing on this
18 matter. In the letter we also asked that the NRC
19 provide all interested nonprofit organizations and
20 members of the public an opportunity to voice their
21 opinion regarding the ISFSI and related issues.

22 On that basis we have no objection to any
23 of the proposed intervenors who seek to participate
24 and ask that they be allowed to participate in this
25 and subsequent proceedings.

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1 JUDGE BOLLWERK: All right. Let me just
2 check one second.

3 Everything's all right over here?

4 THE REPORTER: (Nods.)

5 JUDGE BOLLWERK: Okay. All right.
6 Pacific Gas and Electric then.

7 MR. REPKA: Thank you, Judge Bollwerk.

8 I'll begin with the Section 2.714
9 petitioners. And that includes the Mothers for Peace,
10 nine other organizations, as well as Supervisor
11 Pinard, and the AVAC.

12 As you know from our filings, PG&E has no
13 objection to the participation in the proceeding of
14 the Mothers for Peace, the Santa Lucia Chapter of the
15 Sierra Club, or the San Luis Obispo Cancer Action Now
16 organization. PG&E does -- likewise PG&E has no
17 objection to the participation of Supervisor Pinard.

18 PG&E does have objections to the standing
19 of seven other organizations, as well as questions and
20 objections related to the participation of the AVAC.

21 With respect to the organizations that are
22 basing their standing on representational standing,
23 that is they seek standing here to represent the
24 interests of their members that live in a nearby area
25 and would be injured based on their nearby residence,

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1 our position is consistent with the NRC caselaw.

2 The caselaw of the NRC is that standing in
3 a license amendment or license proceeding related to
4 fuel storage is based upon close proximity. It's not
5 the 50-mile proximity presumption that applies for a
6 power reactor licensing proceeding. Many of the
7 groups here that would seek to participate are beyond
8 even the 50-mile proximity.

9 Ms. Curran's reference to the DoE EIS,
10 which alleges injuries at as much as 50 miles from --
11 from Yucca Mountain, has no applicability here.

12 With respect to the ISFSI, those accidents
13 which the NRC requires be analyzed are analyzed in the
14 application and show that there would be minimal doses
15 even at the site boundary, much less at 50 miles or
16 beyond.

17 With respect to assessing the standing of
18 the groups, we've chosen 17 miles, because that's the
19 number that's consistent with NRC caselaw.

20 We think that a reliance on the DoE EIS
21 would effectively establish a 50-mile presumption for
22 this case and others like it. That would not be
23 consistent with the past history of the NRC's
24 decisions with respect to fuel -- fuel storage
25 amendments.

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1 We don't view that as a technicality. We
2 view that as simply following the guidance that the
3 Commission has established for cases like this one.

4 The next category of the groups that would
5 participate base their standing, not on residence near
6 the facility, but on residence near speculative,
7 hypothetical transportation routes.

8 Quite simply, NRC precedent is again clear
9 that in a case such as this one, standing cannot be
10 based upon residence nearby a transportation route or
11 even an evacuation route.

12 Transportation is not an issue in this
13 proceeding. This proceeding relates to licensing a
14 storage facility. It has nothing to do with the
15 transportation offsite. And we'll talk about that in
16 conjunction with the contention related to offsite
17 transportation.

18 But, quite simply, the argument that if
19 this license is denied there will be no transportation
20 is simply not true. There is fuel stored onsite. It
21 will be transported regardless of whether or not there
22 is an ISFSI.

23 The specific routes chosen will be chosen
24 and subject to appropriate process at that time.
25 They're not at issue in this proceeding.

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1 With respect to -- I'll turn now to the
2 AVAC.

3 When AVAC first petitioned to intervene in
4 this proceeding they petitioned as a governmental
5 entity. PG&E argued, consistent again with NRC
6 caselaw, that an advisory committee is a
7 quasi-governmental body, not a governmental agency but
8 a quasi-governmental body that did not come within the
9 scope of the 2.715(c) provision for
10 interested-governmental entities.

11 At that point the AVAC amended their
12 bylaws and amended their petition to claim standing as
13 a private party.

14 Notwithstanding the amended bylaws, we
15 question the alleged status of AVAC as a private
16 organization. AVAC may be an unincorporated
17 association. However, it's still a creature of
18 California statute. It exists to be an advisory
19 committee for the San Luis Obispo County government.

20 We question whether there's legal basis
21 for the bylaws that establish it as a private entity
22 or claim to establish it as a private entity and claim
23 to give it the right to participate in a proceeding
24 such as this one.

25 San Luis Obispo County is here to

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1 represent the County and the County government. PG&E
2 has not objected to San Luis Obispo County's
3 participation here.

4 On the other hand, it's not at all clear
5 that AVAC is a private entity, as it claims to be now,
6 or that its intervention is within its authority.

7 AVAC has the burden of demonstrating its
8 standing. We don't believe that AVAC has met that
9 burden. AVAC is an advisory committee. It can't
10 claim that it's something different. It is what it
11 is. It takes funding, we understand, from the County
12 government. It functions under the auspices of the
13 County government. It therefore is a
14 quasi-governmental advisory board.

15 It's akin to an advisory committee of the
16 federal government under the Federal Advisory
17 Committee Act. An advisory committee may be -- may
18 have its existence independent of the government but,
19 because of its function, to advise the government,
20 it's subject to certain constraints and procedural
21 requirements that apply to an advisory committee.

22 The advisory committee cannot claim that
23 it's a private entity and therefore avoid being
24 brought within the government -- the scope of the
25 government requirements.

1 We believe in the end that there's
2 significant questions that AVAC -- regarding AVAC's
3 status, questions that AVAC needs to address through
4 the San Luis Obispo County government, and has not met
5 their burden to participate at this point as a private
6 entity or as a governmental entity.

7 With respect now to the Diablo Canyon
8 Independent Safety Committee.

9 JUDGE BOLLWERK: You're a little bit over,
10 but I gave Ms. Curran some additional time, so I'll
11 give you about two minutes to wrap up here quickly.

12 MR. REPKA: Okay. Quickly on the -- on
13 the Independent Safety Committee. PG&E welcomes the
14 participation of the Diablo Canyon Independent Safety
15 Committee in providing comments on the application, in
16 performing its normal oversight functions with respect
17 to the Power Plant.

18 However, the Diablo Canyon Independent
19 Safety Committee is not a governmental entity within
20 the definition of 2.715(c). It may have been created
21 as -- in a settlement as part of a governmental
22 process, but that does not make it a governmental
23 agency.

24 As we discussed in our filings, it's not
25 a creature of constitution, statutory, or regulatory

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1 requirements. And consistent with the Yankee Rowe
2 decisions, it does not -- it is not representative and
3 it has no attributes of government. It performs no
4 executive, legislative, or judicial functions.

5 Therefore we conclude that it's not within
6 the scope of 2.715(c). But, as I said, we continue to
7 welcome the input of the Independent Safety Committee.

8 JUDGE BOLLWERK: Do you see anything to
9 the distinction they've drawn between the
10 general-purpose-planning-advisory committee or a board
11 and one that has a very specific purpose and is
12 dealing directly with nuclear safety?

13 MR. REPKA: No. I see no basis in that
14 distinction. The point is it still performs no
15 governmental function and it's not there as a
16 representative entity.

17 JUDGE LAM: And, Mr. Repka, just exactly
18 what do you mean when you say you welcome the Safety
19 Committee's input, but you don't think they fit the
20 definition of a government agency?

21 MR. REPKA: This is a formal, legal
22 proceeding. And what we -- what we have objected to
23 is participation in the proceeding as an
24 interested-governmental entity.

25 However, the Independent Safety Committee

1 performs its ongoing responsibility to oversee
2 operations at the Diablo Canyon Power Plant. And we -
3 - we welcome them in continuing to perform that
4 function and providing whatever insights it wishes to
5 provide in that context.

6 JUDGE LAM: But not as a formal party in
7 this proceeding? That's correct, isn't it?

8 MR. REPKA: That's correct, Judge Lam.

9 JUDGE BOLLWERK: Ms. Curran cited a state
10 statutory Code provision, the Civil Procedure Code
11 Section 369.5(a). Do you have anything you want to
12 say about that?

13 MR. REPKA: Not at this time.

14 JUDGE BOLLWERK: All right. At this point
15 we'll turn to the NRC staff then. Thank you, sir.

16 MR. LEWIS: Mr. Chairman, Members of the
17 Board, the basic position of staff is already set
18 forth in our pleadings. We did not object to SLOMFP.
19 We did not object to the various other parties that
20 were under the initial umbrella of SLOMFP as valid
21 petitioners.

22 We were not basing our decision in any way
23 on proximity to transportation routes. We would not
24 consider that to be -- to confer standing but, rather,
25 on other representations about the location and nature

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1 of the constituency of those organizations.

2 Once AVAC indicated that it was
3 considering itself and had formulated itself as a
4 private organization, the staff also did not object to
5 that and would consider AVAC to be a valid petitioner
6 here.

7 In this regard I -- we did, of course,
8 file simultaneous pleadings with the applicant here.
9 And there are some things that have come in to the
10 staff's attention since then, which I would like to
11 comment on.

12 It seems to me that there are two
13 organizations I can think of right off the bat. AVAC
14 with respect to the County, and DCISC whom we have
15 also not opposed with respect to CEC, where there is
16 at least a question that we think needs to be
17 answered.

18 In both cases these organizations do have
19 an advisory capacity to their governmental
20 organization. For example, DCISC, one of their
21 responsibilities is to make recommendations to the
22 California Energy Commission.

23 Now the California Energy Commission
24 didn't say anything about this, but it raises in my
25 mind at least a question as to whether or not DCISC

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1 intends to be operating in this proceeding totally
2 independently or making recommendations to CEC.

3 If it is making recommendations to CEC in
4 this proceeding, then arguably that changes the
5 situation and it should be participating through CEC.

6 So for the staff's part, we would like to
7 have some clarification now that all the pleadings
8 have been filed on those points.

9 As far as the Yankee Rowe decision, we
10 think that the entity that was being addressed in the
11 Yankee Rowe decision was a regional planning
12 commission.

13 We think that is a very different kind of
14 organization from a -- from the Diablo Canyon
15 Independent Safety Committee, which is focused purely
16 on nuclear safety. So we think that the specific
17 versus the general purpose is an important thing.

18 We also are inclined to believe that the
19 independent, the word "independent" in their name may
20 be the answer to the question, which we still would
21 like to know the actual answer, but it may be the
22 question as to whether or not they are, in fact, here
23 as an advisor to the CEC.

24 I believe those are all the points that
25 staff needs to comment upon.

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1 JUDGE BOLLWERK: Do you -- do you have any
2 -- anything you want to say about the question of a
3 mileage range with respect to the ISFSIs in terms of
4 standing? Obviously the applicant has used 17 miles
5 based on some caselaw.

6 MR. LEWIS: Well, --

7 JUDGE BOLLWERK: And we have 20 miles, we
8 have 37 miles. We have -- you know there's a range of
9 75 miles, 27 miles, so.

10 MR. LEWIS: Well, the one comment that I
11 would make is that I don't believe that the DoE GEIS
12 for the Yucca Mountain Construction Authorization
13 Application is -- belongs in this proceeding.

14 I don't know exactly what it says and at
15 what page, but I don't think it can be relied upon as
16 an indication that supersedes the Commission's
17 determinations as to what is an appropriate distance.

18 I have been treating the North Anna, I
19 believe it is, decision of 17 miles as a rough -- as
20 a rough distance that would apply to ISFSI.

21 JUDGE LAM: So, Mr. Lewis, you're saying
22 there's no exact definition of what a close proximity
23 is?

24 MR. LEWIS: Well, there's certainly no
25 exact definition in the regulations, so all we have is

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1 NRC caselaw.

2 JUDGE LAM: And 17 miles is one of them?

3 MR. LEWIS: Yes.

4 JUDGE BOLLWERK: Questions?

5 JUDGE KLINE: Ms. Curran, I'd like to
6 clarify that, when you stated your radius of potential
7 injury, that it was based on a cask drop or a cask
8 incident and not a spent fuel pool fire; is that
9 correct?

10 MS. CURRAN: That's right. I -- I just
11 looked at the Draft EIS for Yucca Mountain because I
12 was just doing research on -- I was trying to meet the
13 Commission's test, which I think is a case-specific
14 test.

15 JUDGE KLINE: Okay.

16 MS. CURRAN: In each case one is supposed
17 to look at what could be the impacts or how far could
18 they go.

19 And, again, they have -- impacts have to
20 be fairly traceable, even if they're -- if they're not
21 large.

22 So I consulted the Draft EIS for Yucca
23 Mountain. And there's a table there that -- I believe
24 it talks about cask-candling accidents.

25 JUDGE KLINE: Right.

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1 MS. CURRAN: And again it says the
2 radiological effects could go out as far as 50 miles.
3 That seemed to me to be a very fair statement or a
4 fair basis for inferring that in this case people as
5 far as away as 50 miles could experience the effects
6 of an accident at this ISFSI.

7 JUDGE KLINE: All right. Is there some
8 reason why you did not rely on the PG&E documents?

9 MS. CURRAN: Yes. And I'm embarrassed to
10 --

11 (Laughter.)

12 MS. CURRAN: Oh, PG&E documents? Well, I
13 -- I did not --

14 JUDGE KLINE: The SER for example.

15 MS. CURRAN: The SER. Well, I -- I think
16 what the EIS is talking about is a beyond-design-basis
17 accident. And I think that S- -- the SAR was looking
18 at design-basis accidents. And I was familiar with
19 the EIS.

20 JUDGE KLINE: Okay.

21 MS. CURRAN: So it seemed to me to be --
22 there -- there was a government agency that had taken
23 a look at this and said accident effects could go out
24 to 50 miles. That seemed like a real reliable source
25 to me. And I haven't had -- heard anybody give a

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1 technical reason why this wasn't something reasonable
2 to rely on.

3 JUDGE KLINE: Okay. All right.

4 MS. CURRAN: Certainly we -- I mean we
5 know that also that these casks have to be handled in
6 the pool.

7 Somebody -- you just asked me: Are we
8 talking about a pool accident. Well, the casks have
9 to be handled in the pool. And a cask could fall into
10 the pool and displace water and crush the tubes or the
11 sleeves in which the fuel is housed. That could lead
12 to a spent fuel pool accident, which again would have
13 consequences for thousands of square miles.

14 But I was focusing on the cask-candling
15 accident in the -- in the EIS.

16 JUDGE KLINE: Thank you.

17 MS. CURRAN: And -- oh, was it my turn for
18 rebuttal yet or that was just a question?

19 JUDGE BOLLWERK: Since you're answering a
20 question, we're not going to count it. Now you're on
21 the -- now you're on the clock, so.

22 MS. CURRAN: Now I'm on the clock, okay.
23 Well, I answered that one.

24 It seems to me that PG&E is trying to
25 create a presumption of 17 miles here. And it also

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1 seems to me that that is what the Commission has said
2 is not the appropriate approach to this, that one
3 needs to look at every case and make a decision on
4 what's the -- what kinds of injuries are fairly
5 traceable to this action. So that is the standard
6 that we tried to meet. And we did not -- we were not
7 looking at presumptions.

8 In terms of the transportation, the
9 standing based on transportation, I believe counsel
10 for PG&E say that it's not true that if the -- if the
11 permit is denied that these risks or impacts will not
12 occur to the residents who are -- of Santa Barbara who
13 are near the transportation route.

14 Well, that's the not the case, because
15 this addit- -- it's true that other fuel that's at the
16 site may be transported through Santa Barbara, but
17 this amount of fuel will not be transported through
18 Santa Barbara.

19 And each additional shipment has --
20 carries with it its own radiation dose with the cask
21 that's being carried or the potential for an accident.

22 And I'd like to talk for a minute about
23 AVAC.

24 JUDGE BOLLWERK: Can I ask one question
25 before you do?

1 MS. CURRAN: Yeah.

2 JUDGE BOLLWERK: If this case were about
3 simply a spent fuel pool expansion, in other words,
4 reracking let's say, would your argument apply equally
5 in that instance?

6 In other words, all you're doing is
7 reracking the fuel so you can get more -- more rods in
8 the pool as opposed to taking them out and putting
9 them in an independent spent fuel storage
10 installation?

11 MS. CURRAN: Well, if this were a
12 reracking case, --

13 JUDGE BOLLWERK: Um-hum.

14 MS. CURRAN: -- then I believe that people
15 who reside hundreds or even thousands of miles away
16 might have standing in the case because of the
17 potential for a very serious accident in those pools.
18 So it would be different in the sense that people
19 would have standing at a much greater distance.

20 JUDGE BOLLWERK: What about in terms of
21 the transportation aspects that you've mentioned?

22 MS. CURRAN: Oh, the transportation
23 aspects? Well, yes, the transportation, in addition
24 to the tremendous distance that a radiological plume
25 could travel from a spent fuel pool, that -- this

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1 License Amendment is allowing PG&E to add additional
2 fuel to its inventory of spent fuel at the Diablo
3 Canyon site.

4 Right now PG&E has to stop in 2021 and
5 2025, can't generate any more spent fuel after that --
6 or 2006. I'm sorry. At this point PG&E has to stop
7 in 2006 because it has no more room for this fuel.

8 So the issuance of the license here or in
9 the case of a spent fuel pool amendment would allow
10 PG&E to put additional fuel in the pools and would
11 require PG&E to ship additional fuel away from the .
12 site at the end of the operating life of the plant.
13 So, yes, those transportation impacts would still
14 exist.

15 JUDGE BOLLWERK: All right. I'm sorry I
16 interrupted you. Go ahead.

17 MS. CURRAN: Okay. I'd just like to clear
18 up what seems to be some confusion about what AVAC is.

19 There's a law in California called the
20 Brown Act that governs the creation of -- by
21 governments of advisory bodies for purposes of
22 advising them, and there are certain rules.

23 If a government wants to create an
24 advisory body that's an offshoot of that governmental
25 entity, there's certain rules that have to be

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1 followed. That's not the case here.

2 This is not an official advisory body of
3 the San Luis Obispo Board -- County Commission. This
4 is a private organization.

5 For instance, AVAC does not have San Luis
6 Obispo County Board of Supervisors' delegated powers
7 and its membership does not included [sic] elected San
8 Luis Obispo County officials.

9 And if you look at the Brown Act in
10 California Government Code Section 54952, subsection
11 (c)(1), those are requirements for an official,
12 quasi-governmental entity.

13 AVAC is simply a citizens' organization
14 that was set up to express its views to the Board of
15 Supervisors. It does not get regular funding from the
16 Board of Supervisors. The Board of Supervisors does
17 not pay its costs.

18 There are -- I think some discretionary
19 money is given to AVAC to assist it, but this is not
20 an official offshoot of the Board of Commissioners.
21 And the Board of Commissioners does not supervise
22 AVAC. There's no supervisory role there.

23 So we're talking about an unincorporated
24 private association which is entitled -- is
25 independent of the County and is entitled to take

1 legal actions on its own.

2 JUDGE BOLLWERK: So you know the Brown Act
3 doesn't apply. The section that you talked about for
4 the -- that applies to unincorporated associations,
5 369.5(a), that does apply, that's different, correct?
6 That's not part of the Brown Act? It's a separate --

7 MS. CURRAN: Yeah. That other --

8 JUDGE BOLLWERK: Right. Right.

9 MS. CURRAN: -- procedural code.

10 JUDGE BOLLWERK: Right.

11 MS. CURRAN: And Supervisor Pinard just
12 mentioned to me that the Board specifically voted not
13 to make advisory group -- advisory groups
14 quasi-judicial. And they don't have any obligation to
15 fund this group, or anything like that.

16 JUDGE BOLLWERK: All right. Anything
17 else?

18 MS. CURRAN: And the -- in this particular
19 instance, AVAC is not making formal recommendations to
20 the Board of Supervisors.

21 JUDGE BOLLWERK: All right.

22 Mr. Wellington then.

23 Thank you.

24 MR. WELLINGTON: Yes. Thank you.

25 First let me address the question raised

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1 by your staff counsel with regard to whether the
2 Independent Safety Committee is appearing in this
3 action subsidiary to or in an advisory role to the
4 Energy Commission. It is not.

5 The -- as set up by -- and I've already
6 indicated, the Committee was created by a CPUC
7 decision, and it's appointed by the governor. Its
8 members are appointed by the governor, the attorney
9 general, and the -- and the chairperson of the CEC.

10 And when it does, it holds its
11 factfindings and public hearings three times a year
12 here. And it prepares and it has over the past 10
13 years prepared hundreds of recommendations and
14 comments with regard to the safety of operations of
15 the plant.

16 And it makes those recommendations
17 directly to PG&E with copies to the California Energy
18 Commission, the attorney general, governor, and the
19 PUC. So it operates, as indicated, independently of
20 making its own recommendations and not -- in this case
21 it's not a subsidiary to the participation of the CEC.

22 I would then secondly like to agree with
23 your staff counsel's interpretation of Yankee Rowe,
24 that it is clearly distinguishable from the position
25 that PG&E would like to have it take from that case.

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1 PG&E extrapolates from that decision and
2 actually comes up with a list of criteria for a
3 government agency that don't exist in that decision.

4 And I can assure you that the Diablo
5 Canyon Safety Committee, pursuant to California law,
6 is a state agency, an agency of the state and is a
7 governmental agency. It's appointed by state
8 officials.

9 It's open -- it's subject to the open
10 meeting laws for state agencies, that was just
11 referenced, the Brown Act or the Bagley-Keene Act.
12 The members file conflict-of-interest statements, like
13 all public officials, state and federal, do.

14 And, again, it's the position of the -- of
15 DCISC is clearly distinguishable from that of a
16 general, regional planning agency and, in fact, was
17 created specifically to oversee the safety of
18 operations at this plant, which is integral to what
19 you have before you in these proceedings.

20 Thank you.

21 JUDGE LAM: May I ask you what are some of
22 the most important safety recommendations the
23 Committee had made?

24 MR. WELLINGTON: You may. In fact, I --
25 I actually have come up with a list relative to the

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1 issue, but it didn't arise, because it was in the PG&E
2 papers, that had to do with: Well, you have an
3 oversight, but don't get involved; DCISC shouldn't get
4 involved with design and review. And these are
5 design-and-review issues over the years, that I've
6 just taken a quick look over past years.

7 We've made -- reviewed -- usually review
8 systems as a whole and how they integrate with the
9 safety of operations at the plant. But these are
10 specific construction and design matters that they've
11 reviewed: Fuel reliability; the reload fuel design,
12 having to do with the baffle-jetting question; low
13 level liquid and solid-rad waste handling system;
14 design of the steam generators, having to do with the
15 tube-support plates; the seismic retrofitting at the
16 plant that was done a number of years ago; a crackling
17 issue in the CVSC; and the design of the intake
18 structure.

19 So all of those, as well as -- I'd have to
20 say a couple years ago the Committee made some
21 substantial recommendations that were followed with
22 regard to the way PG&E handled its human resources
23 issues at the plant.

24 JUDGE LAM: Thank you.

25 JUDGE BOLLWERK: I just -- you are subject

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1 to the Brown Act then? That's come up and that's --
2 that is something that applies?

3 MR. WELLINGTON: The Brown Act applies to
4 state/local officials --

5 JUDGE BOLLWERK: All right.

6 MR. WELLINGTON: -- and the -- which would
7 be county and city. The equivalent for state agencies
8 is the Bagley-Keene Act.

9 JUDGE BOLLWERK: Okay.

10 MR. WELLINGTON: Also found in the
11 government Code.

12 JUDGE BOLLWERK: All right. And I don't
13 know if you want to answer this or counsel for the
14 California Energy Commission wants to answer, but what
15 is the relationship between the CEC and the CPUC, the
16 California Public Utility Commission?

17 MR. WELLINGTON: That's best answered by
18 the CEC.

19 JUDGE BOLLWERK: All right. Just for my
20 understanding. I'm just -- I see a lot of
21 commissions' names going around here.

22 MS. HOUCK: The California Energy
23 Commission sites power plants, power-generating
24 facilities in the state as well as it collects
25 research and data and analyzes issues related to

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1 energy.

2 Also one of our five commissioners has
3 served as the state liaison to the Nuclear Regulatory
4 Commission since 1983 and coordinates issues
5 concerning nuclear policy.

6 The California Public Utilities Commission
7 regulates public utilities within the state, and
8 including PG&E's operations related to distribution
9 and their generating facilities that they still
10 maintain after deregulation, which includes Diablo
11 Canyon.

12 JUDGE BOLLWERK: All right.

13 MR. WELLINGTON: If I could just dovetail
14 onto that, the -- by the way, the CPUC, in connection
15 with its proceedings of oversight over the Diablo
16 Canyon and PG&E, a couple of years ago when PG&E had
17 requested the dissolution of the Diablo Canyon
18 Independent Safety Committee, it was by a follow-on
19 order of the CPUC that indicated that the Committee
20 would continue until further order of the CPUC because
21 of its concern about the public -- public safety
22 concerns.

23 JUDGE BOLLWERK: All right. Any other
24 Board questions at this point?

25 Judge Kline.

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1 MR. LEWIS: Mr. Chairman, -- I'm sorry.

2 JUDGE KLINE: Go ahead.

3 MR. LEWIS: I didn't realize you were
4 going to speak. Please.

5 JUDGE KLINE: My question, I would like
6 the staff and the applicant to address them, both to
7 address.

8 And that is Ms. Curran's assertion that a
9 cask-candling accident in the vicinity of the spent
10 fuel pool creates the presumption that a spent fuel
11 fire is within the scope of -- within the proper scope
12 of this proceeding.

13 MR. REPKA: I'm happy to address that
14 first.

15 JUDGE KLINE: All right.

16 MR. REPKA: And our position is that it is
17 not within the scope of the proceeding, that this is
18 not a wet -- wet-storage application. The issue of
19 cask --

20 JUDGE KLINE: Well, she has asserted a
21 linkage. That is to say that there is a potential for
22 an ordinary cask-candling accident to interact with
23 the spent fuel pool. So we're --

24 MR. REPKA: Well, the cask-candling
25 accident is analyzed in connection with the Power

1 Plant license and has been addressed in the operating
2 licensing stage of the plan.

3 With respect to a cask candling in the --
4 with respect to the ISFSI, that's not related to the
5 spent fuel pool accident that's been previously
6 considered.

7 JUDGE KLINE: Okay. Staff.

8 MR. LEWIS: Judge Kline, I think my answer
9 is substantially the same. There was a separate
10 amendment which has not yet been granted but which was
11 noticed in the *Federal Register* having to do with
12 changes to the cask-transporting-and-handling system.

13 And that was an amendment to the Part 50
14 License. And that, I think, was where matters related
15 to a potential cask drop into the spent fuel pool
16 would have been a consideration. There was no
17 intervention in that proceeding.

18 I think that the ISFSI License Application
19 picks up further down the scheme of moving -- that
20 fuel has to come out of the pool obviously, but the
21 ISFSI Application picks up after what was covered by
22 that Part 50 Amendment.

23 JUDGE KLINE: Okay. Yeah, that's what I'm
24 trying to ascertain, is where the boundaries are
25 between our jurisdiction in this case versus what's

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1 included in the Part 50 license.

2 MR. REPKA: And Mr. Lewis is exactly
3 correct, that there was a separate application related
4 to cask candling in the -- in the fuel-handling
5 building.

6 JUDGE KLINE: Do you want to respond to
7 that?

8 MS. CURRAN: Yes, please.

9 I think the question is not what is the
10 legal scope of the proceeding, whether it includes
11 certain cask-candling issues. It has to do with what
12 would -- what could happen as a result of the granting
13 of this.

14 So if it could happen that a cask-candling
15 accident could occur, regardless of whether you have
16 the authority to make decisions about that, it's still
17 a standing issue.

18 JUDGE LAM: But isn't it true, Ms. Curran,
19 assuming the dry-cask-storage system is not built, the
20 scenario that you assert could still happen?

21 MS. CURRAN: Yeah, that's true. But it's
22 -- it's going to -- if the permit is issued, it's
23 going to increase the number of times that it could
24 happen, because there will be all that many more
25 incidents when fuel is going to be handled, put into

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1 these -- some into these casks. So it has a practical
2 effect on the number of opportunities there are for an
3 accident to occur.

4 JUDGE KLINE: But are you suggesting then
5 that we could -- the Board can step outside the
6 Initial Notice of Hearing or the Published Notice of
7 hearing for the Independent Spent Fuel Facility --

8 MS. CURRAN: Yes. And --

9 JUDGE KLINE: We can or --

10 MS. CURRAN: Well, I -- yes. And I'd like
11 to refer you to --

12 JUDGE KLINE: All right.

13 MS. CURRAN: -- a case.

14 JUDGE KLINE: All right.

15 MS. CURRAN: And I'm sorry that I don't
16 have the citation, but I remember being -- this was a
17 case that I was involved in. It's the MOX Facility
18 licensing case. And it was a standing issue -- no, it
19 wasn't. That one was there.

20 But the more important one was the one
21 Judge Bollwerk decided, and that was --

22 (Laughter.)

23 MS. CURRAN: -- Yankee --

24 JUDGE BOLLWERK: I may or may not remember
25 that one.

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1 (Laughter.)

2 MS. CURRAN: Yankee Rowe. And the
3 petitioners had a contention about impacts to workers
4 that was rejected, but the standing to raise the issue
5 of impacts to workers was not rejected because, if the
6 permit were denied, the impacts to workers would not
7 occur.

8 It was -- it was something that really
9 surprised me, because I had the same sort of
10 assumption that I think is at work here. If it's not
11 a legal subject of the proceeding, it can't be raised
12 as a practical matter.

13 And I also think in the MOX case it came
14 up too, because it was a question of whether people
15 who lived near the transportation routes, where the
16 plutonium was going into the plant, would have
17 standing. And this was just a couple of mo- -- or a
18 year ago, maybe.

19 The Licensing Board said that these
20 petitioners had standing because regardless of whether
21 or not the transportation issues were a subject of the
22 proceeding, if the -- if the permit were not issued,
23 these effects would never occur to these people. They
24 wouldn't be subject to this risk.

25 JUDGE LAM: Your recollection is

1 impeccable. I'm sitting on the MOX case.

2 MS. CURRAN: And I do remember that, too.

3 JUDGE BOLLWERK: All right. Anything else
4 from the Board?

5 All right. At this point it's about a
6 quarter to 11:00. We've been going over a little an
7 hour. Why don't we go ahead and take a break right
8 now, and then we'll move into the first contention.
9 Why don't we give, say, 10 minutes. We'll come back
10 at eleven o'clock and begin again. Thank you.

11 (Recess taken from 10:43 a.m. to 11:00
12 a.m.)

13 JUDGE BOLLWERK: If everyone could be
14 seated we'll come to order and -- come to order and
15 we'll begin again, please.

16 All right. Everyone needs to come to
17 order; we're going to start the proceeding again,
18 please.

19 Ms. Curran, you had a matter you wanted to
20 bring to the Board's attention. Ms. Curran.

21 Let's go back on the record, please.

22 Ms. Curran, please.

23 MS. CURRAN: Okay. I would like to --
24 first of all, if it would be possible, I would like to
25 correct a factual error that I made earlier, before

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1 the break. It's a very brief -- but I think it's very
2 important.

3 JUDGE BOLLWERK: All right. Go ahead.
4 I'm sorry.

5 MS. CURRAN: I think I said that the San
6 Luis Obispo Board of Supervisors specifically voted
7 not to make advisory groups quasi-judicial. What I
8 meant to say was the board voted not to make advisory
9 groups quasi-governmental.

10 JUDGE BOLLWERK: All right.

11 MS. CURRAN: And I would like to at this
12 point ask if the Board would entertain a statement
13 from John Wallace, who is with the Avila Beach
14 Community Services District.

15 Mr. Wallace came up to me during a break
16 and pointed out that he had sent a letter that was
17 addressed to the Commissioners in mid-August asking
18 for interested-government status. And it seems like
19 the letter never got to you, but I wonder if he could
20 have a chance to address the Board.

21 JUDGE BOLLWERK: All right.

22 MR. WALLACE: Thank you, gentlemen. My
23 name is John Wallace. I am the General Manager and
24 District Engineer for the Avila Beach Community
25 Services District.

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1 At our Community Services District Board
2 of Directors' meeting in Avila Beach last month, in
3 August, staff was directed to write a letter to the
4 Commission asking that the CSD, the Community Services
5 District, be included as an interested-party status in
6 these proceedings.

7 We did send a letter to the Commission on
8 August 14th, 2002, giving support for some of the
9 other intervenors in these proceedings and, again,
10 asking that, under Section 2.715, that Avila Beach
11 Community Services District be treated as a
12 governmental entity close to the plant -- we're
13 roughly five to six miles away from the plant -- and
14 that we be treated as an interested party in these
15 proceedings.

16 Because of the closeness of the community,
17 the only route in and out of the Diablo Canyon goes
18 through our district boundaries. And we do have
19 responsibilities for water, sewer, street lights, and
20 other infrastructure provisions for the town of Avila,
21 which again is the closest actual residential
22 community to the Diablo Canyon Nuclear Power Plant.

23 We haven't received a response to that
24 letter; don't know why. I think that we did send that
25 certified, but we haven't had a response back.

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1 We had earlier transmitted correspondence
2 to the Commission on two separate occasions, one in
3 April, one in May, asking about the evacuation routes
4 and the designation of those being official routes.
5 Again we've had no response to our letters.

6 We did meet with a representative from
7 Senator Feinstein's office and have provided them with
8 the documentation, as well as Senator Boxer's office,
9 about our desire to become an interested party in
10 these proceedings.

11 JUDGE BOLLWERK: Was this -- any other
12 parties have a recollection of this letter?

13 MR. LEWIS: We have not seen it. We noted
14 -- we noted that it was addressed: U.S. Nuclear
15 Regulatory Commission, Washington, D.C. 20555. And
16 we're fearful that it got caught up in the continuing
17 mail slow-downs.

18 JUDGE BOLLWERK: Right. One of the
19 problems we have is we sometimes don't see our mail
20 for weeks if not months, so --

21 MR. WALLACE: I understand.

22 JUDGE BOLLWERK: -- sending something to
23 us by mail is okay as long as you hopefully -- if you
24 want it looked at quickly, send it to us by email as
25 well.

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1 MR. WALLACE: Well, we did -- we did in
2 addition send that to your NRC Inspectors at Diablo
3 Canyon. We did have those gentlemen's names and we
4 did cc them directly to that, as well --

5 JUDGE BOLLWERK: Right.

6 MR. WALLACE: -- as Representative Capps
7 and --

8 JUDGE BOLLWERK: I should say in their
9 defense they're not part of this whole adjudicatory
10 process. So that sending it to them would not
11 necessarily get it to the proper person.

12 At this point what we can certainly do is
13 you may wish to resubmit that request to the Board
14 directly. And where -- there's a transcript being
15 made of the proceedings today. You can review that.
16 If there's something that you see that you want to
17 comment on, something specific, you could certainly do
18 that with respect to the proceeding today. But I will
19 also have to give the parties obviously an opportunity
20 to comment on your request.

21 I think at this point that might be the
22 best way to handle it, so that you can get the input
23 into the process that you want, but I also need to
24 have -- you know, I have a request here I haven't
25 seen, so.

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1 MR. WALLACE: Okay. I would conclude by
2 saying that PG&E was at our board meeting, and they
3 did concur in allowing us to become an interesting
4 party in this proceeding.

5 JUDGE BOLLWERK: Okay. All right. Would
6 that be acceptable to you? You can provide an
7 opportunity to review the transcript once it's been
8 put together and make a comment about anything that
9 you'd like to in terms of any of the issues that are
10 raised or any of the matters that are brought up here?

11 MR. WALLACE: That would be fine. Thank
12 you.

13 JUDGE BOLLWERK: Will that work?

14 MR. WALLACE: Yes.

15 JUDGE BOLLWERK: All right. Great. Thank
16 you.

17 MR. WALLACE: Thank you very much.

18 JUDGE BOLLWERK: I apologize. Although I
19 can't say where it went, but we'll certainly try to
20 find it. And actually if you could submit it again
21 directly to the Board, that might take care of the
22 problem in terms of where it's gone, so.

23 MR. WALLACE: We'll do that.

24 JUDGE BOLLWERK: All right. Thank you.

25 MR. WALLACE: I appreciate it.

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1 JUDGE BOLLWERK: Thank you.

2 MR. REPKA: Judge Bollwerk, may I be heard
3 for just a second?

4 JUDGE BOLLWERK: Sure.

5 MR. REPKA: We at PG&E also have not seen
6 the letter, but we would ask that any letter be served
7 not only on the Board but on the parties --

8 JUDGE BOLLWERK: All right.

9 MR. REPKA: -- in this proceeding,
10 including us.

11 JUDGE BOLLWERK: All right. There is --
12 the Board's Initial Prehearing Conference Order had a
13 direction about service of process. It's described in
14 detail about what needs to happen.

15 And I think any of the parties here could
16 probably provide you with a service list, which might
17 be -- Ms. Curran, in fact, could probably do that. If
18 she doesn't mind, that would be great, to make sure
19 that you get it to all the appropriate parties.

20 Again, I don't know what happened to it.
21 On behalf of the agency, I apologize. We could find
22 it at some point, but it's probably better for just to
23 send it directly to us at this point, okay?

24 MR. WALLACE: Thank you very much.

25 MR. REPKA: One other point, Judge

1 Bollwerk.

2 JUDGE BOLLWERK: Sure.

3 MR. REPKA: I was just going to say that
4 Mr. Wallace represented that PG&E had no objection.

5 JUDGE BOLLWERK: Um-hum.

6 MR. REPKA: I'm not aware of that. And I
7 would reserve our position until after we see the
8 letter.

9 JUDGE BOLLWERK: All right. Anything else
10 on that point?

11 Thank you very much.

12 MR. WALLACE: Thank you.

13 MR. LEWIS: All right. Judge Bollwerk?

14 JUDGE BOLLWERK: Um-hum.

15 MR. LEWIS: There is one, one item arising
16 out of this morning's interchange that I felt I should
17 clarify right now, both for the benefit of Mr.
18 Wellington from the Independent Safety Committee, but
19 for everyone.

20 He referred to counsel as "your," meaning
21 the Board's staff. We are not staff to the Board. As
22 you will find, if there is --

23 JUDGE BOLLWERK: Staff of the agency.

24 MR. LEWIS: Correct.

25 We're staff to the -- we're counsel to the

1 NRC staff and we are simply a party to the proceeding
2 like other parties here.

3 MR. WALLACE: Thank you.

4 JUDGE BOLLWERK: All right. Nothing else?

5 Why don't we go ahead and then move to the
6 first contention, which is San Luis Obispo Mothers for
7 Peace EC1, concerning failure to address destructive
8 acts of malice.

9 Ms. Curran, you have 30 minutes. How much
10 time for rebuttal or response do you want?

11 MS. CURRAN: I'd like to save 10 minutes.

12 JUDGE BOLLWERK: Okay. And with respect
13 to the contentions I would note that, you know, the
14 Board has read everything that the parties have put
15 into the record at this point.

16 So it's not necessary to go ahead and
17 repeat what you've already told us. I would just
18 focus on matters that you don't think would have been
19 addressed fully or something that's been raised by
20 another party that you haven't had an opportunity to
21 address up to this point.

22 Do the interested-governmental entities
23 wish to combine their time at all on a lead or does
24 everyone want their own five minutes, I think is what
25 we had allocated for everybody?

1 MR. McNULTY: We haven't made any
2 arrangements to combine our time so we'll be going
3 independently.

4 JUDGE BOLLWERK: Okay. Does that include
5 -- does that go for all the contentions or just for
6 this one?

7 MR. McNULTY: For all the contentions.

8 JUDGE BOLLWERK: For all the contentions.

9 MR. WAYLETT: Just for this one.

10 MR. TEMPLE: Just for this one.

11 We have made an arrangement regarding the
12 third segment.

13 JUDGE BOLLWERK: Okay. That's fine.
14 That's good. All right. I'm glad to know that. So
15 this one, everyone's on their own at this point. All
16 right.

17 All right. Ms. Curran, then we have your
18 argument, please.

19 MS. CURRAN: Okay. The first contention,
20 the first Environmental Contention addresses the
21 failure of the Environmental Report prepared by PG&E
22 to address consequences of acts of malice or insanity
23 against the ISFSI.

24 And I think the NRC staff pointed out that
25 this contention is similar to another contention in

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1 the PFS case that has been referred to the Commission.

2 And I think there are actually now four
3 cases pending before the Commission in which this type
4 of case -- this type of a contention is under
5 consideration.

6 I think, frankly, that that is where this
7 contention is likely to end up. But I would like to
8 try to persuade the Board to, when it refers this
9 contention, to first find that it's admissible and
10 then refer it.

11 JUDGE BOLLWERK: I suppose you're going to
12 tell us what's the difference between this case and
13 *Private Fuel Storage*.

14 MS. CURRAN: How did you guess?

15 JUDGE BOLLWERK: All right.

16 MS. CURRAN: I'm not sure that it's so
17 different, but we've all had the opportunity to look
18 at this issue in depth since the Commission took
19 review of it. And I myself participated in a briefing
20 of that issue. So I'd like to set forth some of the
21 reasons that I don't think you had before you in the
22 -- in the original filing of the contention.

23 I think the basic argument -- first of
24 all, the thing that needs to be gotten out of the way
25 right away is this is not a safety contention. And

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1 this is a contention under NEPA, which is an
2 independent statute.

3 And the obligations of NEPA are -- go
4 beyond what's required by the Atomic Act safety
5 requirements. And you can see that point discussed in
6 *Limerick Ecology Action versus NRC*, which is 869 F.2d
7 719. That's from the Third Circuit in 1989.

8 You can also see this point made in
9 *Citizens for Safe Power versus NRC*, 524 F.2d 1291 at
10 page 1299. That's from the D.C. Circuit in 1975.

11 So arguments that these kinds of security
12 issues are already covered by NRC safety regulations
13 are essentially irrelevant.

14 Now there's a question here as to whether
15 the policy that underlines -- underlies 10 CFR 50.13
16 should apply in this case. That's the regulation that
17 was established, I think it was in response to the
18 Cuban Missile Crisis, that says that nuclear power
19 plant licensees don't have to design their reactors in
20 order to anticipate an attack by an enemy of the
21 United States.

22 That policy has a number of underlying
23 considerations that I think really should be revisited
24 here, because we're in a different situation.

25 And I would like to direct your attention

1 to the 1994 Vehicle Bomb Rule that the Commissioners
2 passed in which the Commissioners establish new
3 requirements for vehicle barriers at nuclear plants.

4 This was in direct response to I think it
5 was the bombing of the World Trade Center and also an
6 incident in which an insane person drove a car inside
7 the Three Mile Island Nuclear Plant and made it all
8 the way into the interior of the facility.

9 And the Commission in that rulemaking
10 expressly addressed why that rule was not barred by
11 50.13. And I would submit to you that the policy
12 considerations that work there should also be at work
13 here.

14 And in that context the Commission was
15 passing a safety rule, so it was addressing how that
16 situation was different under a safety context in
17 making its safety regulations consistent.

18 This case is -- in this case you have even
19 more freedom because NEPA is a different statute. You
20 are not bound by the limitations of 50.13 in your
21 consideration of this case.

22 Well, another thing I also haven't
23 mentioned is 50.13 applies to nuclear power plants.
24 And this is an ISFSI. But I think what's important
25 here are the policy considerations.

1 If you look at 59 *Federal Register* at page
2 38893, the Commission discusses 50.13 at length and
3 explains how it's different.

4 They start out -- the Commissioners start
5 out by explaining that 50.13 was designed to exempt
6 licensees from having to establish measures that were
7 the appropriate responsibility of the military.

8 Then it went on to say, "The new rule or
9 this addition to the design-basis threat and added
10 performance requirements is in response to a
11 clearly-demonstrated, domestic capability for acts of
12 extreme violence directed at civilian structures. The
13 participation or sponsorship of a foreign state in the
14 use of an explosive-laden vehicle is not necessary.
15 The vehicle explosives and know-how are all readily
16 available in a purely domestic context. It is simply
17 not the case that a vehicle-bomb attack on a nuclear
18 power plant would almost certainly represent an attack
19 by an enemy of the United States within the meaning of
20 that phrase in Section 50.13."

21 All those considerations are equally
22 applicable here, we would submit.

23 And for the same reasons the -- I think it
24 was the Appeal Board's reasoning in the *Shoreham* case
25 in which it rejected a NEPA contention that tried to

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1 raise issues of sabotage, I think it was similar
2 considerations that were raised there where -- should
3 be revisited now because they're no longer -- they're
4 not current anymore.

5 And I'd also like to emphasize that NEPA
6 is a -- one of the unique things about NEPA is that
7 it's kind of a living statute, that it requires
8 agencies to look afresh at environmental -- at the
9 environmental impacts of their actions if new
10 information arises that will cause them to reconsider.

11 And that is expressed in the *Marsh* case,
12 in a Supreme Court case, and it's expressed in NRC
13 regulations. And here we do have new information
14 indicating that the previous policy conditions that
15 dictated the promulgation of 50.13 are no longer
16 valid.

17 PG&E makes an argument that we don't
18 provide a basis for our statement that nuclear power
19 plants are vulnerable and attractive terrorist
20 targets.

21 And I want to point out that at page 25 of
22 the contention we cite a statement by the NRC Chairman
23 that the design basis for reactor containments does
24 not include an aircraft attack.

25 Also at page 28 the contention discusses

1 the vulnerability of cask-design parameters, that it's
2 only designed to withstand the impact of a
3 tornado-driven auto, at 33 miles per hour. And we
4 argue that this is not sufficient, given the threat
5 that exists today.

6 In terms of the attractiveness of nuclear
7 power plants as targets, I would respectfully request
8 leave to amend the basis for this contention and
9 introduce an article by -- an A.P. newspaper article
10 that appeared in newspapers throughout the country
11 yesterday stating that, in fact, prior to the World
12 Trade Center and Pentagon attacks, Al Qaida was
13 explicitly considering attacks on nuclear power
14 plants.

15 I wonder if I might ask Dr. Thompson to
16 pass out copies of that article.

17 JUDGE BOLLWERK: All right.

18 (Copies of the article distributed to
19 participants.)

20 MS. CURRAN: I realize that newspaper
21 articles are not considered the best evidence that the
22 NRC would require. But, unfortunately, in this
23 situation I think it's the only evidence that we're
24 going to be able to get. So I would ask the Board to
25 consider it in light of that fact.

1 I would also think that at this point the
2 Licensing Board could take judicial notice of the
3 fundamentally attractive nature of nuclear facilities
4 to a saboteur or terrorist. They are essentially
5 potential nuclear weapons lying in wait. Why wouldn't
6 they be attractive to someone who really wanted to do
7 terrible harm?

8 Finally, PG&E argues that -- well, I guess
9 I should wait and see what we should do with this
10 article. Can -- is -- should I just wait for argument
11 in the rebuttal by others or --

12 JUDGE BOLLWERK: Well, at this point in
13 terms of the article, obviously the staff and anyone
14 else here, the applicant, will have an opportunity to
15 respond to whether we should -- we should accept it.
16 But do you want to say something further about the
17 article or --

18 MS. CURRAN: Well, just that in terms of
19 the timeliness of this information, this article
20 appeared in yesterday's newspaper. And apparently the
21 person who shared the information had it last June,
22 but waited until now to release it. But it's only
23 been released yesterday.

24 PG&E also argues that the petitioners'
25 concern regarding a terrorist threat or threat of acts

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1 of malice or insanity is not legitimate because it is
2 common to all plants.

3 I guess the argument is that if the NRC is
4 considering some kind of generic action with respect
5 to all plants, which apparently the NRC is, it's
6 undertaking a top-to -- top-to-bottom review of its
7 regulation, then the Licensing Board would have no
8 authority to admit a contention that raised a
9 challenge regarding those issues.

10 But, again, I think that argument mistakes
11 this for a safety contention. This is a NEPA
12 contention. And the law is very clear that if there
13 are foreseeable environmental impacts that arise from
14 a proposed federal action, the NRC cannot excuse
15 itself from considering those impacts by claiming that
16 it's a generic issue that will be considered at some
17 later point.

18 It's always acceptable to give generic
19 consideration to such impacts, but it is not
20 acceptable to defer such consideration to some later
21 generic study.

22 That's all I have for the moment.

23 JUDGE BOLLWERK: All right. Do you want
24 to use the rest of your time then for your rebuttal?

25 MS. CURRAN: Yes.

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1 JUDGE BOLLWERK: All right.

2 MS. CURRAN: Excuse me --

3 JUDGE BOLLWERK: I have about 10 minutes,
4 so you have -- that will give you about 20 minutes for
5 rebuttal then.

6 MS. CURRAN: Okay.

7 JUDGE BOLLWERK: All right.

8 Why don't we then move down the line here
9 for the interested-governmental entities.

10 The Independent Safety Committee.

11 MR. WELLINGTON: We take no position on
12 this issue.

13 JUDGE BOLLWERK: All right.

14 The California Energy Commission.

15 MS. HOUCK: At this time we have no
16 comments. We would note that the Mothers for Peace
17 did provide a copy of the brief they submitted, and we
18 have not had an opportunity to look at that as of yet.

19 JUDGE BOLLWERK: All right.

20 The Port San Luis Harbor District.

21 MR. WAYLETT: We would submit -- we would
22 support inclusion of this contention.

23 JUDGE BOLLWERK: All right. And the San
24 Luis Obispo County.

25 MR. TEMPLE: As made clear last September

1 11th, our infrastructure is subject to attacks of a
2 nature not once considered possible. That's no longer
3 the case.

4 The Board can take judicial notice of
5 substantially-changed circumstances. Several
6 newspaper articles, this one included, pointed out
7 that nuclear facilities on coastlines are vulnerable
8 to offshore attacks. This information is readily
9 available to the public as it is to the federal
10 government.

11 Subsequent to the *PFS* decision, the
12 possibility of offshore attack has been recognized by
13 Coast Guard in establishing a no-boat zone off the
14 coast of our facilities, nuclear facilities.

15 Because it was published in the *Federal*
16 *Register*, the Board can take official notice of this
17 new information. In doing so, the Board should also
18 consider that an ISFSI is not as robust as a power
19 plant. And so even if a power plant may be able to
20 withstand certain types of attacks, an ISFSI may be
21 vulnerable to those attacks.

22 In addition to threats from commandeered
23 aircraft, terrorists with shoulder-mounted weapons
24 have the potential to strike nuclear facilities,
25 including ISFSIs from a distance, with potentially

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1 devastating results.

2 At issue here is, given the change, in
3 understanding of risk associated with destructive acts
4 of malice, it is reasonable for the NRC to require a
5 prospective ISFSI licensee to evaluate those risks.

6 Because of our concerns for the health and
7 safety of our citizens, the County of San Luis Obispo
8 believes that the NRC would be derelict in its
9 responsibilities to ensure the common defense and
10 security if it did not require an Independent Spent
11 Fuel Storage Installation licensed applicant to
12 evaluate the risks associated with destructive acts of
13 malice.

14 The regulatory basis for such a decision
15 already exists within the environmental regulations in
16 Part 51, within the security regulations in Part 72,
17 and within the Atomic Energy Act itself.

18 Inclusion of terrorism-related impacts in
19 an environmental impact analysis, however, is not an
20 attack on the NRC's security regulations.

21 NEPA requires an agency to consider all
22 environmental impacts related to a proposal, including
23 impacts over which the agency has no jurisdiction.
24 This is an evaluation based on current and not past
25 understanding of those impacts.

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1 NEPA, however, only requires that an
2 agency consider such impacts not necessarily to take
3 any actions on them. Therefore even if the NRC
4 contends it has no jurisdiction over acts of
5 terrorism, just as it has no jurisdiction over thermal
6 discharges from nuclear power plants, the NRC must
7 consider the environmental impacts of acts of
8 terrorism just as it must consider the environmental
9 impacts arising from thermal discharges.

10 Since 9/11 our understanding of the
11 probability of a deliberate act of terrorism causing
12 damage to a nuclear facility which could result in
13 radioactive release has changed. As a result of our
14 collective recognition, this probability has changed
15 from something less than 10 to the minus sixth to
16 something greater.

17 The NRC should not be reactive, but should
18 require the licensed applicant to make a thorough
19 evaluation before approving this ISFSI application.

20 The County of San Luis Obispo asks on
21 behalf of its citizens that this Licensing Review take
22 into account these security issues to ensure that the
23 location selected is a reasonable-site alternative,
24 given the associated risks. The NRC should not grant
25 the ISFSI license until they have considered all

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1 relevant factors, including security issues.

2 JUDGE BOLLWERK: All right.

3 MR. TEMPLE: Thank you.

4 JUDGE BOLLWERK: Thank you, sir.

5 All right. Let me turn to Pacific Gas and
6 Electric then.

7 MR. REPKA: PG&E's position is that,
8 whether a safety contention or a NEPA contention, the
9 contention is inadmissible as a matter of law.

10 Like Ms. Curran, I have been involved in
11 briefing this very issue under NEPA to the Commission,
12 and see no reason to restate all those arguments here
13 today.

14 In fact, the -- this issue under NEPA has
15 already been addressed by several Licensing Boards in
16 both the Part 50 licensing context and the Part 72
17 licensing context.

18 It was specifically rejected in the *PFS*
19 case under Part 72. And we've had no basis provided
20 this morning for why this Board should reach any
21 different conclusion than has been reached in those
22 other cases, principally *PFS*.

23 The issue is currently subject to review
24 by the Commission. And I agree that that's where the
25 contention will probably end up, but there's no reason

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1 in which Board should admit the contention first.

2 Again, the issue has been briefed by
3 multiple parties. And there really isn't a whole lot
4 of reason to reiterate those arguments here today, but
5 I do want to respond to a few specific points.

6 First, Ms. Curran emphasizes that this is
7 not a safety contention, this is a NEPA contention.

8 However, she specifically states that the
9 NRC's regulations in 10 CFR 50.13 should be revisited
10 here. Obviously that cannot be done. That's not
11 within the jurisdiction of this Board.

12 In addition, to the extent that -- that
13 she would have the Commission revisit the policies
14 involved there as well as the policies of the
15 design-basis security threat, those are also beyond
16 the jurisdiction of the Licensing Board and not
17 subject matters for this proceeding.

18 Just last week Chairman Meserde wrote a
19 letter to the Office of Homeland Security discussing
20 what the NRC has been doing for the last year with
21 respect to security issues and outlined many of the
22 actions that have already been taken and that are
23 still to come.

24 PG&E of course will be bound by whatever
25 requirements the NRC imposes with respect to both the

1 Power Plant and the ISFSI, but that's not an issue
2 here today.

3 With respect to the issue of whether NEPA
4 requires an evaluation of the consequences of
5 terrorists' attacks, quite simply, that argument is
6 beyond the scope of NEPA.

7 First, NEPA does not require an analysis
8 of the consequences of acts of terror and war. NEPA
9 requires an analysis of the consequences and
10 alternatives related to the proposed project.

11 There is no direct causation between this
12 project and the scenarios that the Mothers for Peace
13 and others outline. The consequences of those
14 actions, terrible as they may be, quite simply, are
15 not the consequences of this licensing action. They
16 are the consequences of acts of terrorists or
17 postulated insane individuals.

18 It simply exceeds the scope of NEPA to
19 suggest that those consequences need to be evaluated
20 in an environmental impact statement.

21 NEPA is not a threat-assessment statute;
22 it is an environmental statute. NEPA does not force
23 an analysis of all the issues in its constraints that
24 are being addressed by the NRC elsewhere as a generic
25 security issue in consultation with the rest of the

1 federal government and the military.

2 The petitioners would expand NEPA far
3 beyond its intended scope and far beyond where any --
4 any judicial precedent would suggest that it should
5 go.

6 Particularly, cases suggest that NEPA is
7 bounded not only by ascent of -- by a concept of
8 causation but also by a rule of reason.

9 In the one case most directly applicable,
10 *Limerick Ecology Action*, the Court specifically held
11 that NEPA did not encompass the threat of sabotage and
12 acts of intentional malice, because those -- those
13 scenarios are not quantifiable and not predictable,
14 and therefore not subject to any kind of reasoned
15 environmental analysis. This situation is really no
16 different.

17 In the end licensees like many other
18 industrial activities in the United States, rely upon
19 the federal government and the military to protect
20 them against terrorist acts and acts of war. A
21 nuclear power plant is no different.

22 This is not to suggest that we're ignoring
23 those risks. It's simply suggests that under NEPA we
24 don't -- we are not required to perform an
25 environmental assessment of those actions.

1 At this point I really have nothing else
2 to add to what's already been submitted in the papers.
3 I think in sum I've heard nothing this morning that
4 suggests how this case is any different from *PFS*.

5 JUDGE BOLLWERK: All right. Staff then.

6 MR. LEWIS: Your Honors, I think that Ms.
7 Curran acknowledged already that -- that the
8 contention here really isn't any different than the
9 one rejected and then referred in *PFS*.

10 What I find from the discussion here today
11 is that NEPA is being used in a very loose way to try
12 to address what in reality is a very complicated
13 governmental responsibility question, which is
14 reflected in 50.13.

15 Although -- although Ms. Curran would ask
16 this Board to proceed to admit her contention, I think
17 that that would be inappropriate at this point.

18 I think the precise question on which she
19 urges you to give an answer is the question that the
20 Commission has taken to itself in the four combined
21 cases which it is -- now has under advisement.

22 There may well be something that will
23 result from those combined cases that will have an
24 impact on this proceeding, but that will have to be
25 seen.

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1 The other point that Mr. Repka made I
2 think is also a good one. It's -- the agency's
3 response to the new threat environment that we're in
4 is not embodied simply in what it is doing -- doing in
5 the adjudicatory context. It has also issued many
6 orders, including orders to nuclear power plants,
7 which would include Diablo Canyon.

8 The proposed ISFSI is to be within the
9 site of the Nuclear Power Plant, and there already are
10 orders for heightened security arrangements issued to
11 all of those.

12 Another point that was touched on in a
13 response by PG&E to this contention was the fact that
14 there is public knowledge of the fact that ISFSIs are
15 one of the categories of facilities that are going to
16 be addressed in a nonadjudicatory way by the
17 Commission, the Commission now having addressed
18 nuclear power plants, major fuel-cycle facilities, the
19 gaseous-diffusion plants, decommissioning reactors,
20 and the Honeywell Facility in Illinois which has
21 significant -- significant chemical as well as nuclear
22 issues related to it.

23 So I think that there's a lot happening
24 and -- but more to the point -- other people may not
25 agree with me that there's not a lot happening, but

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1 more to the point, the Commission has taken to itself
2 precisely the question that Ms. Curran would have this
3 Board decide on its own at this time in this context
4 by admitting this context.

5 JUDGE BOLLWERK: Let me just ask one,
6 Judge Kline, for -- the MOX case which you were on had
7 this issue in it, did it or did it not?

8 JUDGE LAM: Right.

9 JUDGE BOLLWERK: Was that a NEPA
10 contention or a -- do you remember?

11 JUDGE LAM: I think it was -- it was a
12 safety -- I think it was a safety contention. The
13 Licensing Board admitted the contention and referred
14 to the Commission, which would lead me to ask Mr.
15 Lewis the question: Does this issue rise to the level
16 of Commission referral, in your opinion?

17 MR. LEWIS: Well, it -- it could if it
18 were not for the fact that exactly the same issue has
19 either been referred or the Commission has directed
20 certification of the same question in a combined case
21 which involves one ISFSI, PFS; one fuel-pool
22 expansion, Millstone; one licensed renewal which is --
23 I think it's Catawba-McGuire; and the MOX -- and the
24 MOX Fuel Fabrication Facility.

25 It seems to me that that deliberation is

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1 going to encompass the question that's being raised to
2 you today.

3 JUDGE LAM: Now I thought -- I'm thinking
4 back, I'm thinking the MOX Licensing Board, I think it
5 was raised as a NEPA contention. I don't -- Ms.
6 Curran may remember better.

7 MS. CURRAN: Yes, it was a NEPA
8 contention.

9 JUDGE LAM: Yeah.

10 MS. CURRAN: And the Licensing Board
11 admitted it and then referred it to the Commission.

12 JUDGE LAM: Right. So I stand corrected.
13 It was not a safety contention. It was a NEPA one.

14 JUDGE KLINE: Ms. Curran, is there a
15 practical difference between the Board admitting it
16 and then certifying it versus just certifying it?

17 MS. CURRAN: Yes. It gives us a leg up.

18 (Laughter.)

19 MS. CURRAN: I do know that in every other
20 one of these cases the Licensing Board made a ruling
21 on the admissibility of the contention. I think the
22 MOX case was the only one in which the contention was
23 admitted. It may have been admitted in the Catawba-
24 McGuire case, I -- it wasn't.

25 MR. REPKA: It was not.

1 MS. CURRAN: So it seems the practice is
2 for the Licensing Board to ruling on the admissibility
3 of the contention, and I think --

4 JUDGE KLINE: Just saying that it would be
5 admissible if it was otherwise accepted by the
6 Commission; is that right? Not admitting it per se,
7 but...

8 MS. CURRAN: But saying that it's -- that
9 the --

10 JUDGE KLINE: That it would be admissible
11 if --

12 MS. CURRAN: Yes. That's what we would
13 like to see.

14 JUDGE KLINE: All right.

15 MS. CURRAN: We would like to see the
16 Licensing Board address the issue, because it seems to
17 me that in the first instance it's the Licensing
18 Board's prerogative and perhaps responsibility to rule
19 on the issues before it.

20 Mr. Lewis, I think, raises a question as
21 to whether this contention should be referred at all,
22 given that the other four contentions have -- were
23 referred all at once and they were briefed all at
24 once.

25 It seems to me that this case is a little

1 bit different from PFS in the sense that the proposed
2 ISFSI is on an existing Nuclear Power Plant site.
3 It's different from any -- they each have different
4 factual circumstances, so that perhaps referral is
5 appropriate.

6 But, in any event, we would -- we believe
7 it would be better for the Licensing Board to rule on
8 the admissibility of the contention and then deal
9 with, if there's any conflict that arises after that.

10 JUDGE KLINE: The staff some years ago
11 took the position on its NEPA statements that it
12 didn't have to -- that it didn't have to address
13 specifically beyond-design-basis accidents.

14 And I think some -- some caselaw was then
15 established that indeed that was wrong and that indeed
16 it was important in reactor licensing, for -- for
17 staff to specifically look at the environmental
18 consequences of design/beyond-design-basis incidents.

19 And I'm wondering now that since this is
20 a new -- a newly-arising issue if there isn't a
21 parallel kind of thought here, that -- that terrorist
22 incidents could conceivably create some sort of
23 design/beyond-design-basis incident and therefore
24 should be considered in an environmental impact
25 statement.

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1 MR. LEWIS: Judge Kline, you're correct
2 that there is caselaw that does say precisely what you
3 alluded to, which is that the staff cannot
4 automatically ignore beyond-design-basis accidents.

5 What -- what I was particularly
6 emphasizing here was that one cannot -- in the face of
7 what the Commission has done, I think the Commission
8 has asked the question in the consolidated proceeding
9 before it of what is the agency's responsibility under
10 NEPER -- NEPA to consider intentional, malevolent
11 acts. Well, that's -- that's the same question here.

12 JUDGE KLINE: Yeah.

13 MR. LEWIS: Ms. Curran and others, Mr.
14 Temple addressed this. They would have you take
15 judicial notice that these plants are -- are
16 particularly inviting facilities, and things of that
17 nature.

18 But my point is simply that I think 50.13
19 makes this a different and more difficult question,
20 because it goes to the fundamental question of
21 allocation of government responsibilities. This is a
22 major question, not just for the NRC but for the
23 entire government of the United States.

24 And because the Commission has framed this
25 as a question which they -- which they consider to be

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1 -- which they have posed under NEPA, I just assert
2 that we're going to hear something from them.

3 However, I have not -- I am in no way
4 urging the Board to defer ruling on the admissibility
5 of this contention. I think the other Boards ruled on
6 the admissibility of the contention. And it would be
7 our view that until the Commission changes its current
8 policy with respect to acts of terrorism, the
9 contention should be rejected.

10 MR. REPKA: May I respond to Judge Kline's
11 question?

12 JUDGE KLINE: I'd like to hear it.

13 MR. REPKA: You asked whether the caselaw
14 suggests that certain beyond-design-basis scenarios be
15 addressed under NEPA. And caselaw does suggest that
16 subject to a -- the rule, the NEPA Rule of Reason.
17 And so that means that not every scenario that
18 somebody could contemplate needs to be addressed on
19 NEPA -- under NEPA.

20 What we're arguing is that under the NEPA
21 Rule of Reason this particular beyond-design-basis
22 scenario is not one that's required to be addressed.
23 And there's at least three factors that go into that.

24 First is 50.13 which, as Mr. Lewis
25 suggests, does provide a fundamental allocation of

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1 responsibility. And I think that informs any Rule of
2 Reason under NEPA.

3 And that does apply here because this is
4 a co-located ISFSI, unlike the MOX Fabrication Plant
5 where the Licensing Board concluded that 50.13 didn't
6 apply at all because it was not a Part 50 licensed
7 facility.

8 The second factor is, is the causation
9 factor that I discussed earlier. And that certainly
10 goes to the question of whether this is a
11 design/beyond-design-basis event that must be
12 considered.

13 And the third is, is the policy inherent
14 in the *Limerick Ecology Action* case, which I mentioned
15 earlier, which is that these are fundamentally not
16 quantifiable, not predictable kinds of actions, and
17 that the *Limerick* case is a NEPA case.

18 JUDGE BOLLWERK: Anything else?

19 Before Ms. Curran then does her response,
20 let me just ask a question about this document that
21 she's proffered to the Board. Do either of the staff,
22 do you have any objections or thoughts about the
23 document?

24 MR. REPKA: For PG&E, we don't object to
25 this document being part of the contention. It -- it

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1 has no direct bearing on Diablo Canyon. And it's a
2 newspaper article of uncertain worth and origin, but
3 with those recognitions, if they want to append that
4 to their contention, we have no objection.

5 JUDGE BOLLWERK: All right. Anything from
6 the staff?

7 MR. LEWIS: I would say the same thing.
8 And what I would also say is that you -- by doing so,
9 the Board should in no way take judicial notice of any
10 -- of the accuracy of any facts stated in this
11 article.

12 JUDGE BOLLWERK: All right. Let me just
13 turn, any of the interested-government entities want
14 to say anything about the article one way or the
15 other?

16 MR. McNULTY: Well, it's the County's view
17 that you should take judicial notice of that article
18 as well as the others that Mr. Temple referred to. So
19 we'd like to see it admitted and considered.

20 MR. WAYLETT: The Port would also like to
21 see it admitted and considered.

22 JUDGE BOLLWERK: Well, I'm not going to
23 mark it as an exhibit as such, but we would append it
24 and make it part of the record in terms of what Ms.
25 Curran has already -- the exhibits that she has

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1 already submitted to the Board which are attached to
2 her original petition, the San Luis Obispo Mothers for
3 Peace contention, which are fairly lengthy in any
4 event. And we'd just make this another part of that,
5 but it would go into the record as such.

6 Anything from the California Energy
7 Commission?

8 MS. HOUCK: We would just also support
9 admitting the article.

10 JUDGE BOLLWERK: All right. Anything from
11 the Independent Safety Committee? No. All right.

12 All right. Ms. Curran, you have
13 approximately 20 minutes if you wish to use it all.

14 MS. CURRAN: Thank you.

15 I'd like to start by encouraging the Board
16 to read the briefs that were submitted by all the
17 parties in the four cases that are now pending before
18 the Commission, because I think a lot of the issues
19 that are raised here today are addressed in those
20 briefs.

21 They are in the MOX case; the Catawba
22 license renewal case -- Catawba-McGuire license
23 renewal case; the PFS case; and the Millstone case.

24 And also that the Licensing Board
25 carefully review the 1994 Vehicle Bomb Rule and its

1 proposed rule, because I think that rulemaking
2 establishes what is essentially a paradigm change in
3 the way the NRC has started to look at the potential
4 for acts of sabotage and terrorism.

5 The attacks of September 11th were by far
6 the most egregious events that have occurred so far.
7 But as we set forth in the contention, terrorists
8 attacks, acts of -- destructive acts of sabotage,
9 attacks by insane individuals have been going on for
10 the last 10 years and causing significant damage to
11 U.S. facilities and also within the U.S. homeland.

12 We had the bombing of the World Trade
13 Center in 1993. That was in the garage, but it was
14 still a terrorist-planned bomb. We had the bombing of
15 the Federal Building in Oklahoma. We had the bombing
16 of the *U.S.S. Cole*. We had the attempted bombing of
17 the Holland Tunnel. This has been going on for some
18 years now.

19 And the NRC has started taking the steps
20 to revisit this really new, evolving issue of what is
21 the domestic threat to our nuclear facilities.

22 I don't think that it is possible to
23 understate the importance of NEPA in this regard.
24 NEPA is an action-forcing statute. And, I think as
25 Mr. -- as Dr. Kline pointed out, years ago the NRC

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1 refused to consider the environmental impacts of
2 design-basis accidents because it was thought they
3 couldn't happen -- beyond-design-basis accidents
4 because it was thought they couldn't happen.

5 Then we had Three Mile Island, we had
6 Chernobyl, and the NRC was forced to say: We must
7 revisit this issue. Now it is a standard practice
8 that in environmental impact statements the NRC looks
9 at the impacts of beyond-design-basis accidents and
10 looks at alternatives that would mitigate them.

11 These may be measures that go beyond what
12 is required in the design, but it has advanced the
13 NRC's thinking about these things, and it has improved
14 the degree to which public health and the environment
15 are protected by this agency.

16 Maybe two weeks after the September 11th
17 attack on the World Trade Center and the Pentagon, I
18 went to a prehearing conference that Judge Lam
19 attended also. It was on the MOX case.

20 And one of the issues that came up was the
21 admissibility of a contention that the intervenor had
22 put in asserting that an environmental impact
23 statement must be prepared to consider the impacts of
24 a terrorist attack or acts of sabotage against the MOX
25 Plant.

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1 This contention, I must say, I helped with
2 it, the preparation of this contention, and I
3 considered it one of those rote things that one puts
4 in thinking this must be considered but there's very
5 little hope that it will happen.

6 Well, in the interim September 11th
7 happened. But it was really astounding to me that
8 when we were still reverberating from September 11th,
9 in the oral argument on the admissibility of this
10 contention, the counsel for the NRC staff argued that
11 acts of terrorism against the United -- facilities in
12 the United States are not foreseeable.

13 Well, that's what NEPA's for. NEPA forces
14 federal agencies to take another look when new
15 information comes up. And that's what we have
16 presented here to you, to say it is time to look
17 again.

18 I haven't heard anything here that alters
19 that very, very fundamental problem that the NRC has,
20 which is that for years it has refused to look at the
21 potential for acts of malice or insanity against its
22 nuclear facilities. And now we're in a situation
23 where it's very obvious it must be done. It's painful
24 to change. It is. But that is what NEPA forces the
25 government to do.

1 JUDGE KLINE: But the issue is now
2 squarely before the Commission, isn't it? Hasn't --
3 isn't that different than in the past situation? That
4 is to say that the prior resistance that you mention
5 appears to have been modified. That is to say the
6 Commission has taken review of these matters and --
7 and really the only issue being debated here --

8 (Crashing noise from the back of the
9 room.)

10 JUDGE KLINE: Ouch.

11 -- is who are the right decisionmakers.

12 You know, in a sense it appears to me that
13 the Commission has taken complete jurisdiction over
14 this matter.

15 MS. CURRAN: And I would submit to you
16 that in the first instance you are the right
17 decisionmakers because you have before you a NEPA
18 contention that's been submitted for a ruling by you
19 and that your ruling could assist the Commission in
20 its own determination that each layer of this agency
21 has its responsibilities to carry out and that in
22 doing so you will assist the Commission in making a
23 better decision.

24 JUDGE LAM: And, Ms. Curran, what type of
25 remedies do you have in mind?

1 MS. CURRAN: I'm sorry. I don't
2 understand the question. Remedies -- what we're
3 seeking from you today --

4 JUDGE LAM: That's right.

5 MS. CURRAN: -- is a decision to admit the
6 contention. And I would assume the decision would
7 also include a referral to the Commission because it
8 raises similar issues that are now under consideration
9 by the Commission. But the remedy today that we seek
10 is a ruling admitting the contention.

11 JUDGE LAM: Well, furthermore, what I
12 really meant was in order for a contention to be
13 admissible one of the elements for consideration is
14 what type of remedy are you seeking? Is it something
15 that we can -- we can impose?

16 MS. CURRAN: Yes. Well, in this case from
17 what I can tell from the Environmental Report, PG&E is
18 at least recommending that no environmental impact
19 statement be prepared on this project because it
20 considers the project to be covered by a generic
21 determination made in 1979 in NUREG 0575 that spent
22 fuel storage poses no significant environmental
23 impacts.

24 So what we would be ultimately seeking
25 here is a ruling that indeed this -- the construction

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1 and operation of this ISFSI would pose significant
2 environmental impacts in the sense of creating a
3 facility that would be vulnerable to acts of terrorism
4 or other acts of malice or insanity and that the
5 impact statement should look at both the consequences
6 of those accidents -- or not accidents -- those
7 deliberate acts and -- and measures are available for
8 mitigating them.

9 And this is another -- in terms of the
10 global nature of the relief, why this is so important
11 is that right now the Commission is doing a top-to-
12 bottom review of -- it says it's doing a review of its
13 security requirements. It is difficult for me to tell
14 whether that encompasses just perimeter security or
15 all measures that could be used to fortify nuclear
16 installations against a terrorist attack.

17 So it's not clear to me how that generic
18 review is going to come out. Certainly all we've seen
19 so far in terms of interim measures has been an order
20 -- several orders to nuclear licensees ordering them
21 to fortify the security at defense line.

22 But what -- NEPA would require something
23 more radical. It would require an assessment of all
24 reasonable alternatives, which we would submit would
25 include fortifying the facility against a terrorist

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1 attack so that if an airplane were to come into the --
2 in an area and crash into the facility, the facility
3 would be hardened to withstand such an impact, or
4 improved emergency planning so that if an attack were
5 successful that one would have a greater assurance
6 that people could be evacuated. That sort of thing.

7 And so once NEPA's in play there are
8 independent obligations that go beyond or apart from
9 whatever the NRC is doing in terms of advancing its
10 own safety regulations. NEPA tends to be a bit ahead
11 of NRC Safety Program, which is what was intended by
12 Congress.

13 I would like to also address an argument
14 that was made by Mr. Repka that there is no causation
15 here because the licensing of the ISFSI will not cause
16 a terrorist attack.

17 Well, that kind of reasoning is really
18 inconsistent with the way the NRC has approached
19 environmental impact statements in the past.

20 Usually the way the NRC looks at this, and
21 I think this is a sensible approach, is that if the
22 construction of a facility will make it vulnerable to
23 some exterior phenomena, that has to be considered.

24 For instance, an environmental impact
25 statement would look at the potential for a serious

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1 earthquake. And that wouldn't be ignored just because
2 the building of a facility wouldn't of itself cause
3 the earthquake, but the presence of the facility on
4 that site could create enormous consequences to the
5 members of the public around there that should be
6 mitigated by an adequate design. So I don't think
7 that is a valid legal argument.

8 I would also like to correct a
9 mischaracterization that Mr. Repka made of my
10 argument. I am not asking and these petitioners are
11 not asking the Licensing Board to reverse 10 CFR
12 50.13. We do not understand that to be your
13 obligation or your authority.

14 We are asking you to examine the policies
15 that underlie that rule and determine whether they are
16 appropriately applied in this NEPA context, which is
17 independent and apart from its safety obligations.

18 And I think if you look at the *Shoreham*
19 case in which this terrorism -- or sabotage contention
20 was rejected, you will see that sort of application,
21 where it wasn't that the Appeal Board applied 50.13,
22 it applied the reasoning underlying 50.13 to deny a
23 NEPA contention. That's what's appropriate here.

24 It is not necessary to reverse 10 CFR
25 50.13 to find that its underlying policies are no

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1 longer applicable in this NEPA context.

2 I think Mr. Lewis argued that the
3 petitioners are trying to use NEPA "in a very loose
4 way."

5 And I would -- I'd like to object to that
6 characterization because I think we're trying to use
7 NEPA in the vigorous way that it is intended to be
8 used and also in the way that is flexible. And that
9 is it is a cardinal characteristic of NEPA that it is
10 flexible and that it calls upon an agency to consider
11 new information.

12 What seems to us is going on here is that
13 PG&E and the staff are trying to encase NEPA in
14 cement. And NEPA does not submit to that. It is --
15 it is an action-forcing requirement that calls upon
16 the agency to look hard -- it's a hard-look standard
17 -- at new information and environmental impacts that
18 have previously been overlooked. That is the standard
19 that this Board has to comply with.

20 As far as questions of what is the
21 appropriate relationship between the military and the
22 NRC, it seems to me that at least at the outset the
23 NRC needs to address that in an environmental impact
24 statement, that we are demanding from the agency some
25 kind of an accounting for this licensing action before

1 it takes place.

2 If these questions haven't been resolved,
3 they need to be resolved before the plant is licensed.
4 There -- and then if the military, if it turns out
5 that the NRC and the military have -- have decided to
6 divide the responsibility in some way, that needs to
7 be discussed.

8 And the NRC has a responsibility for
9 addressing how the military is going to protect the
10 public from the risk, which only exists by virtue of
11 the facility being constructed and operated.

12 Finally, I think an argument's been made
13 that the Board should be guided by the *Limerick*
14 decision in which the Court agreed with the NRC that
15 the probability of a terrorist attack, or in that case
16 it was a sabotage event, could not be quantified or
17 predicted.

18 Well, I think the answer to that argument
19 lies in the 1994 Truck Bomb Rulemaking in which the
20 Commission basically said: We -- we've always taken
21 that position, but now we think that these kinds of
22 events are foreseeable; and we are going to take steps
23 to -- we may not be able to quantify the exact
24 likelihood that we [sic] will occur, but there's many
25 aspects of conditional probability that we can

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1 quantify, and we're going to start doing that and
2 we're going to take some action here.

3 So I would urge you to look at that
4 rulemaking for guidance on how the Commission has
5 changed. It's fundamentally changed its policy, its
6 previous policy of asserting that these types of
7 events cannot be predicted and therefore should not be
8 examined.

9 That concludes my rebuttal.

10 JUDGE BOLLWERK: All right. Any questions
11 from either of the Board Members?

12 All right. It's about noontime right now.
13 I think we're going to go ahead and take our luncheon
14 break at this point.

15 When we return we'll be hearing arguments
16 on two somewhat related issues, anyway, raised by the
17 San Luis Obispo County and also the Port of San Luis
18 Harbor District. One relating to alternative sites
19 and security plans and the other relating to emergency
20 response plan adequacy.

21 So we'll take those up when we return at
22 1:30. All right. We'll see everyone then.

23 Thank you very much.

24 (Luncheon recess taken from 12:00 to 1:31
25 p.m.)

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A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

(1:31 o'clock p.m.)

JUDGE BOLLWERK: We're here for the afternoon session for the Prehearing Conference for the Diablo Canyon Independent Spent Fuel Storage Facility proceeding.

A couple of administrative matters let me just mention before we move into the next group of contentions.

As I mentioned before, and there may be some new folks that are here this afternoon that weren't here in the morning, this morning. I'd appreciate if everyone would turn off their cell phone if they happen to have it on at this point. That makes the proceeding go much more smoothly if we don't have a number of phones going off.

Also be aware that if you leave, when you leave the area if you take a break or go outside, the area outside on the patio looks very inviting, but if you go out there you're outside the security zone. Then you're going to have to come around the building and come back in through the -- through the magnetometer that's being used out there.

The area down this hall and the back where there's the restrooms and the phones, that's all part

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1 of the security area. You can stay in there without
2 having to be re-examined. But if you go outside that,
3 then you'll have to come back in again. So, just so
4 you're aware of that. .

5 One of the things the Board Members
6 thought, the other Board Members thought I ought to
7 clarify something. They thought there might be some
8 uncertainty.

9 Initially or a little earlier we talked
10 about there had been a request or a statement by Ms.
11 Curran about two matters: Signs and limited-
12 appearance statements. And I think we indicated we --
13 we would confer some more about the limited-appearance
14 statements.

15 With respect to the signs, if I left any
16 ambiguity, there is an NRC policy set forth at 66
17 *Federal Register* 31719 and it's the *Federal Register*
18 for Tuesday, June 12th of 2001. I think before I had
19 said that it was, in a brief conversation we had, that
20 it was several years old. I guess it was newer than
21 I thought

22 It contains the following sentence:
23 "Signs, banners, posters, and displays will be
24 prohibited from all NRC adjudicatory proceedings,
25 Commission, and Atomic Safety and Licensing Board

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1 Panel hearings because they are disruptive to the
2 conduct of the adjudicatory process."

3 That's the Commission's policy and that
4 was the policy that we're following. And that's why
5 signs were not permitted. I just want to make that
6 clear.

7 All right. At this point if the parties
8 don't have anything, why don't we go ahead and move
9 into the next segment.

10 We have two contentions. One is the San
11 Luis Obispo County's EC. That's an Environmental
12 Contention: Alternative sites and security plans.
13 And also an Emergency Planning Contention by the Port
14 San Luis Harbor District.

15 And I think we have, in the way we set the
16 schedule out anyway, the County would be speaking
17 first.

18 And you have 15 minutes. Which portion of
19 that would like to save for rebuttal or response?

20 MR. TEMPLE: Just saving three minutes for
21 rebuttal or response.

22 JUDGE BOLLWERK: All right.

23 MR. WAYLETT: And also we did reach an
24 agreement ceding five minutes of our time to them.

25 JUDGE BOLLWERK: All right. So they have

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1 now 20 minutes, of which three they're going to use
2 for response?

3 MR. TEMPLE: Correct.

4 JUDGE BOLLWERK: Okay. All right. And
5 then in terms of the Harbor District, you have 15
6 minutes for a contention. Are you going to speak
7 separately to that? Are you basically giving them all
8 time to deal with both contentions, or how are you...

9 MR. WAYLETT: We're giving them -- my
10 understanding is that we've got a total of 15 minutes
11 --

12 JUDGE BOLLWERK: Okay.

13 MR. WAYLETT: -- and that we're giving
14 them five minutes of that, so we'd retain 10 minutes
15 --

16 JUDGE BOLLWERK: Okay.

17 MR. WAYLETT: -- and we'd -- we'd reserve
18 three for rebuttal.

19 JUDGE BOLLWERK: Three, okay. So just so
20 I'm straight, there was a total of 30 minutes between
21 the two of you that were allocated.

22 You're now taking -- the County's going to
23 take 20 minutes with three minutes of that for
24 rebuttal, which is 17 and three.

25 The Port -- the Port District is going to

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1 take 10 with three for rebuttal, all right?

2 MR. WAYLETT: Yes.

3 JUDGE BOLLWERK: Do I have that right?

4 MR. WAYLETT: (Nods head up and down.)

5 JUDGE BOLLWERK: Okay. All right. Very
6 good.

7 MR. TEMPLE: Before turning to the issue,
8 I'd like to take up a procedural matter as to exactly
9 how we are participating in this proceeding and the
10 standard under which we and the issues that we raise
11 are being judged.

12 It's unclear from the NRC staff's analysis
13 of the subject matter we've raised whether 2.714
14 governs participation under 2.715.

15 Specifically it's not clear from their
16 analysis whether 2.714 applies to the subject matter
17 we raise. And if we raise an issue that meets the
18 2.714 criteria, whether those issues become
19 contentions or whether to raise an issue at all, an
20 interested-governmental entity must meet the 2.714
21 criteria. If the staff's position is the latter, then
22 we respectfully disagree.

23 Certainly if the issues that we raise fit
24 all of the 2.714 criteria to be admitted as
25 contentions, we would ask that the Board treat them as

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1 such. However, that should not be the end of the
2 analysis for issues raised by interested-governmental
3 entities.

4 The stringent showings required under
5 2.714, they're more -- they're inconsistent with the
6 more informal participation that the Board should
7 expect from an interested-governmental entity that is
8 representing the interests of the citizens of a
9 county, state, local government.

10 Section 2.715 only allows participation
11 once a party has met the standing criteria, has raised
12 a contention that is then admitted into the
13 proceeding.

14 By adopting 2.715(c), the NRC recognized
15 that an interested governmental entity is not
16 equivalent to other private participants in the
17 proceeding, but they have unique contributions to make
18 in the hearing process because of the special roles
19 and responsibilities that they have with respect to
20 the public that holds them in office.

21 Accordingly, the burden on the parties to
22 raise an issue that then requires a hearing is not an
23 appropriate measure for evaluating the subject matter
24 under which an interested-governmental entity desires
25 to participate. Such a conclusion is also

1 inconsistent with the Commission's performance
2 objective of enhancing public confidence in its
3 processes.

4 We believe that the Commission should
5 allow governmental entities to raise issues that are
6 relevant to the licensing proceeding at hand. To the
7 extent that the County's issues differ from those
8 raised by other parties and that are admitted by the
9 Board, the Board should receive evidence and consider
10 the law and facts with respect to those issues and
11 evaluate the application to ensure it is adequate in
12 light of the issues that we're raising.

13 These issues should be considered by the
14 Board even if they don't qualify as contentions. As
15 an interested-governmental entity has its unique role
16 to protect the public health and safety of the people
17 here and the NRC has its role as well within its
18 jurisdictional area to protect that same interest, we
19 should share that interest in evaluating the ISFSI
20 application in protecting the public health and
21 safety.

22 Turning to the issue of alternative sites
23 and security plans, the County's reading of the ISFSI
24 Environmental Report has identified various
25 shortcomings that should be addressed if the ER and

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1 the License Application conform with the requirements
2 of 10 CFR 51.45.

3 Basically the Environmental Report in our
4 review lacks any details about alternatives sufficient
5 for the NRC to make a reasoned decision. It violates
6 the NRC's rules and fails to meet requirements of
7 NEPA.

8 Specifically the ER does not contain an
9 adequate discussion of the analysis of available
10 alternatives that would reduce potential environmental
11 impacts and it also does not include an adequate
12 analysis of the economic, technical, and other costs
13 and benefits of their proposed action alternatives.

14 The ER fails to adequately consider
15 alternative sites and related alternative security
16 plans, the focus of our issues.

17 Moreover, to the extent that the ER
18 purports to analyze the alternatives, it does not meet
19 the standards set by 51.45, as it doesn't give enough
20 detail to enable an objective observer to make a
21 reasoned decision or to reach a logical conclusion.

22 The quantitative data, when they start
23 looking at alternatives, is not enough for the
24 Commission to come in and perform an independent
25 evaluation, which is what is required by 51.45(c).

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1 With respect to alternative sites, the ER
2 is insufficient in our view because it fails to
3 adequately consider and analyze alternative sites and
4 security measures associated with those sites.

5 PG&E did not address in its Environmental
6 Report related issues -- relates issues such as
7 vulnerability to offshore attacks in selecting the
8 ISFSI location. In a post-September 11th world such
9 risks must be evaluated.

10 Failure to consider reasonable
11 alternatives not only violates NEPA but it is also
12 poses a potential health and safety risk to the
13 citizens of San Luis Obispo.

14 The Environmental Report is inadequate
15 because it fails to include the economic, technical,
16 and other benefits and costs of the proposed security
17 plan and alternative security plans. In addition,
18 it's inadequate in that it fails to quantify the
19 various factors considered with respect to the
20 security plan and its alternatives.

21 There's not enough information within the
22 plans for us as a County to understand what our role
23 is. PG&E did revise its emergency response plan as
24 part of its ISFSI Application.

25 We, as offsite responders, as the lead

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1 agency as an offsite responder, don't understand what
2 our role is supposed to be in supporting
3 implementation of the plan. And it raises particular
4 concerns because our people don't understand what the
5 consequences of various accidents that can arise from
6 an ISFSI being located at the facility are.

7 They can't evaluate the ER enough to tell
8 what those problems might be or to ensure that people
9 are trained to respond appropriately.

10 With respect to the Harbor District's
11 issue concerning the adequacy of the emergency
12 response plan, the County would like to address the
13 NRC's staff conclusion that it is not part of this
14 proceeding. PG&E, having chosen to amend its
15 emergency response plan to include the ISFSI, must now
16 live with that decision.

17 The revised emergency response plan is
18 subject to adjudication in this proceeding. The
19 comments from the NRC staff are incorrect with respect
20 to -- with this respect, as it was PG&E itself that
21 amended the emergency response plan and put it in
22 place.

23 For all of the above reasons, the County
24 asks the Atomic Safety and Licensing Board to consider
25 these issues as part of the ISFSI hearing.

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1 JUDGE BOLLWERK: All right. I just have
2 one question. If -- we have had in the past a number
3 of proceedings where, for instance, using private fuel
4 storage as an example, where a state has come into our
5 proceeding and intervened as a party. Obviously
6 standing is generally not a problem since the facility
7 is located in the state.

8 MR. TEMPLE: Right.

9 JUDGE BOLLWERK: What then is the
10 difference between a party that is a governmental
11 entity that comes in and asks to be a party and one
12 that asks to be an interested-governmental
13 participant?

14 MR. TEMPLE: Well, 2.715(c) provides that
15 -- and the subsequent caselaw -- provides that the
16 Board may then ask what the subject matter is that the
17 interested-governmental entity desires to participate
18 on with respect to the proceeding. Certainly the
19 Board should evaluate the relevance of the issues that
20 are provided.

21 But 2.714 creates a very high standard for
22 evaluating contentions. Those are what are being
23 proffered by potential parties that are being brought
24 forth as the party sort of opposed against the
25 licensee.

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1 We join the NRC in being another
2 governmental entity that has concerns about the
3 adequacy of the license, but we're not posing
4 ourselves against PG&E. '

5 We're raising subject matter which we
6 think it's essential for the Board to consider and
7 we're asking that it be given due consideration. But
8 we ask that it not be treated as contentions but that
9 it be appropriately treated if we're raising it.

10 JUDGE BOLLWERK: All right. Let me go to
11 a different -- I mean the Board is generally in the
12 process -- it is part of this process to consider
13 issues that are brought before it.

14 MR. TEMPLE: Right.

15 JUDGE BOLLWERK: But we don't create
16 evidence. We don't examine witnesses, although we may
17 ask questions of witnesses that have been called by
18 other parties. How do we take on that issue if
19 there's no one there that's quote-unquote sponsoring
20 it and supporting it and basically saying, you know,
21 this is our issue? I mean --

22 MR. TEMPLE: Certainly the interested-
23 governmental entity should be responsible for bringing
24 forth evidence, demonstrating that its relevant to the
25 proceedings, and demonstrating that there is some

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1 issue that the Board needs to deal with with respect
2 to the adequacy of the licensing action that it has
3 before it.

4 JUDGE BOLLWERK: Well, there is a
5 distinction between an interested-governmental entity
6 and a Section 2.714(c), or (a) participant, or
7 whatever under whatever, --

8 MR. TEMPLE: A 2.714 participant is --

9 JUDGE BOLLWERK: -- intervenor, if you
10 want to put it that way.

11 MR. TEMPLE: Right. Right. It has a
12 different standard, because those people are not
13 charged with representing the citizens in the location
14 where the facility is located in our case.

15 JUDGE BOLLWERK: All right. Any questions
16 --

17 JUDGE LAM: So are you saying that the
18 2.716 standard should be not only different than the
19 2.714 but it should be lower?

20 MR. TEMPLE: Absolutely. Absolutely. You
21 -- the Board should consider what we have to say with
22 respect to issues that impact the health and safety of
23 the public.

24 JUDGE BOLLWERK: I think you're on.

25 JUDGE KLINE: I am on.

1 Generally on a formal 2.714 contention,
2 the applicant carries a formal burden of proof. What
3 is your view regarding burden of proof on any issue
4 you bring forth under 2.715?

5 MR. TEMPLE: I would say that it is for --
6 at the end of the day it should be the applicant that
7 demonstrate -- should be able to demonstrate to the
8 Board that it has satisfied the applicable regulatory
9 requirement.

10 JUDGE KLINE: I'm just trying to see your
11 view of how we do this procedurally, because if he
12 carries the burden of proof then we would expect
13 expert testimony from the applicant on this matter.
14 And it isn't clear what your intentions are when you
15 say the Board should just consider something.

16 Is it your intention that you would
17 produce an expert witness that would tell us things
18 that we should consider or --

19 MR. TEMPLE: If it's an issue of law that
20 -- then we shouldn't have to come up with experts. We
21 should provide you with --

22 JUDGE KLINE: Oh, I understand if it's a
23 legal --

24 MR. TEMPLE: If it's an issue of fact,
25 then we should have to come up with experts to support

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1 the cont- -- or the issue that we're raising.

2 And the licensee, in turn, should be able
3 to demonstrate that it satisfied the requirements of
4 the application.

5 JUDGE BOLLWERK: All right. Judge Lam,
6 any other questions?

7 JUDGE KLINE: We'll let the licensee
8 respond to that.

9 JUDGE BOLLWERK: All right. We'll let
10 them deal with that. I'm sure they'll have something
11 to say about it.

12 All right. Then the -- the Harbor
13 District.

14 MR. WAYLETT: We would echo what the
15 County's had to say as far as the status of 2.715
16 participants. And, in fact, that was what we've
17 attempted to do with our filing.

18 We didn't view it as a -- as a strict
19 contention as much as it was our obligation to the
20 public that we serve to notify the Board of a
21 significant issue that we think should be considered
22 in this proceeding. And in our -- in our filing we
23 asked that the parties brief the issue.

24 What we have attempted to do is to notify
25 the Board that -- that it's our position that the

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1 events of the last year and the last -- and the years
2 before that, as well as changes in the demographics
3 and the physical attributes of the area, have led us
4 to have significant concerns regarding the adequacy of
5 the plan.

6 And that under these circumstances, given
7 the fact that PG&E did amend the plan and their
8 filing, that this should be a play here and it should
9 be considered.

10 JUDGE BOLLWERK: All right. Anything
11 else?

12 Do the Mothers for Peace have anything
13 they want to say on either of these issues?

14 MS. CURRAN: We're supportive of the
15 Commission -- of the County's --

16 THE REPORTER: I'm sorry. Come closer to
17 the mic.

18 MS. CURRAN: We support the admission of
19 the County's issues to the case.

20 JUDGE BOLLWERK: All right. The
21 California Energy Commission.

22 MS. HOUCK: We're also supportive of
23 admission to the contentions to the case.

24 JUDGE BOLLWERK: All right. And the
25 Independent Safety Committee.

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