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NUCLEAR REGULATORY COMMISSION

Title: Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation

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

Location: San Luis Obispo, California

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PACIFIC GAS & ELECTRIC) Docket No. 72-26-ISFSI
) ASLBP No. 02-801-01-ISFSI
Diablo Canyon Power)
)
Plant Independent Spent)
)
Fuel Storage)
)
Installation)

Monday, May 19, 2003

ORAL ARGUMENTS by
PARTIES and INTERESTED GOVERNMENTAL ENTITIES
on the QUESTION of:
Whether a genuine and substantial issue of material
fact exists regarding the matters at issue in
Contention TC-2 such that an evidentiary hearing is
needed to resolve the disputes.

Held at the: Embassy Suites Hotel
San Luis Obispo Room
333 Madonna Road
San Luis Obispo, California 93405

Before U.S. NRC ASLB Administrative Judges:

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

(8:58 o'clock a.m.)

JUDGE BOLLWERK: Good morning. Previously in a December 2nd, 2002 ruling reported in Volume 56 of the Nuclear Regulatory Commission Issuances, beginning at page 413, this Licensing Board admitted intervening parties, interested governmental participants, and a contention or litigable issue into this adjudicatory proceeding concerning the application of Pacific Gas and Electric Company to construct and operate an independent spent fuel installation, or ISFSI, on its Diablo Canyon Power Plant site.

In that Decision, pursuant to Section 2.714 of Title 10 of the Code of Federal Regulations, we accorded party status to an individual, Peg Pinard, and several organizational petitioners, including the San Luis Obispo Mothers for Peace, which by consent is acting as a lead intervenor.

Also pursuant to Section 7- -- 2.715(c) of Title 10 of the Code of Federal Regulations, we admitted several interested governmental entities as participants in this proceeding, including San Luis Obispo County, California; the California Energy Commission; and the Avila Beach Community Services

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1 District.

2 Also the Board admitted for litigation the
3 2.714 intervenors' Technical Contention 2, also
4 referred to as TC-2, as it concerned the financial
5 qualifications of PG&E under Section 72.22 (e) of Title
6 10 of the Code of Federal Regulations to construct,
7 operate, and decommission its proposed ISFSI in light
8 of PG&E's pending request for Chapter 11 bankruptcy
9 reorganization.

10 Because the proceeding concerns the
11 expansion of spent fuel storage capacity at the Diablo
12 Canyon facility, under Part II, Subpart (k) of the
13 Commission's regulations, any of the parties to the
14 proceeding could request that special procedures set
15 forth in that subpart be utilized for this proceeding.
16 Both PG&E and the NRC staff made such a request.

17 As a result, after a period of discovery,
18 the parties and interested governmental participants,
19 which now includes the California Public Utilities
20 Commission as a result of its January 2003 request to
21 participate in the proceeding, filed pleadings and
22 supporting affidavits and exhibits addressing, among
23 other things, the question:

24 Whether a genuine and substantial issue of
25 material fact exists regarding the matters at issue in

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1 Contention TC-2 such that an evidentiary hearing is
2 needed to resolve the disputes.

3 We are here today in accordance with
4 Section 2.113 of the Commission's Procedural
5 Regulations to conduct an oral argument that will
6 afford the parties and interested governmental
7 participants an opportunity to address this question,
8 among others.

9 Before we begin this argument, let me take
10 a moment to identify the Board and the parties.
11 Sitting to my -- to my right is Judge Jerry Kline.
12 Judge Kline is an environmental scientist. To my left
13 is Dr. Peter Lam. Dr. Lam is a nuclear engineer. My
14 name is Paul Bollwerk. I'm an attorney and the
15 Chairman of this Licensing Board.

16 Let's have the representatives of the
17 parties and interested governmental entities introduce
18 themselves now. Let's start with counsel for the
19 Section 2.714 intervenors, then move on to counsel for
20 the Section 2.715(c) interested governmental entities,
21 then PG&E, and finally the NRC staff.

22 Ms. Curran.

23 MS. CURRAN: Good morning. My name is
24 Diane Curran.

25 [VIDEO TECHNICIAN]: Could you turn on

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1 your microphone, please?

2 JUDGE BOLLWERK: You need to pull the
3 switch toward the mic, toward the front.

4 MS. CURRAN: My name is Diane Curran. I
5 am here this morning representing the San Luis Obispo
6 Mothers for Peace, the Santa Lucia Chapter of the
7 Sierra Club, San Luis Obispo Cancer Action Now, Peg
8 Pinard, the Avila Valley Advisory Council, and the
9 Central Coast Peace and Environmental Council. And
10 with me at the counsel table is Rochelle Becker of the
11 San Luis Obispo Mothers for Peace.

12 JUDGE BOLLWERK: Good morning.

13 MS. CURRAN: Good morning.

14 JUDGE BOLLWERK: We can just go down the
15 line. That's fine.

16 MS. HOUCK: Good morning. My name is
17 Darcie Houck, and I'm here on behalf of the California
18 Energy Commission. And to my left is Barbara Byron,
19 our nuclear waste policy advisor.

20 JUDGE BOLLWERK: Good morning.

21 Just one second.

22 MR. CHASET: Good morning.

23 JUDGE BOLLWERK: Before you start, do you
24 want to get... We didn't the feedback taken care of
25 here.

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1 (Pause in the proceedings.)

2 JUDGE BOLLWERK: All right. Go ahead,
3 sir.

4 MR. CHASET: Good morning. I'm Laurence
5 G. Chaset, an attorney with the California Public
6 Utilities Commission.

7 JUDGE BOLLWERK: Good morning.

8 MR. MCNULTY: Good morning. I'm Timothy
9 McNulty. I'm a deputy county counsel with the County
10 of San Luis Obispo County.

11 MR. TEMPLE: I'm Robert Temple with the
12 Law Offices of Robert K. Temple, and I'm representing
13 the County of San Luis Obispo. And to my right is
14 Sheldon Trubatch, my of counsel.

15 JUDGE BOLLWERK: Good morning.

16 MR. TRUBATCH: Good morning.

17 MR. HELENIUS: Good morning. My name is
18 Christopher Helenius, and I'm the president of the
19 Avila Beach Community Service District, and with me is
20 my general manager John Wallace.

21 JUDGE BOLLWERK: Did you pull the switch
22 to the front up on the top. There you go, try again.
23 Thank you, sir.

24 MR. HELENIUS: You want me to try that
25 again?

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1 JUDGE BOLLWERK: If you would.

2 MR. HELENIUS: All right. Very good.

3 Good morning. My name is Christopher
4 Helenius. I'm the president of the board of directors
5 of the Avila Beach Community Services District. And
6 here with me this morning is our general manager, John
7 Wallace.

8 MR. WALLACE: Good morning.

9 JUDGE BOLLWERK: Good morning.

10 Pacific Gas and Electric Company.

11 MR. REPKA: Good morning, Judge Bollwerk.
12 My name is David Repka, and I'm an attorney for
13 Pacific Gas and Electric Company. And I'll introduce
14 the others here at counsel table with me.

15 On my right is my associate, Brooke Poole.
16 On my far left is Mr. Richard Locke, an attorney with
17 Pacific Gas and Electric Company. And in between Mr.
18 Locke and myself is Mr. Walter Campbell, who's the
19 director of business and financial planning for PG&E.
20 Mr. Campbell sponsored two affidavits filed in this
21 proceeding in PG&E's written filings.

22 One other individual I want to mention
23 among others who is here today, sitting in the first
24 row in the audience, is Mr. Robert Capus (phonetic),
25 who is the PG&E lead staff budget coordinator, who

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1 also filed an affidavit in this proceeding.

2 JUDGE BOLLWERK:

3 MR. REPKA: Mr. Capus may want to raise
4 his hand.

5 MR. CAPUS: (Raising hand.)

6 JUDGE BOLLWERK: All right. Thank you.

7 MR. LEWIS: Your Honors, I am Stephen
8 Lewis. And to my left is Angela Coggins. We are
9 co-counsel for the NRC staff. I'd like to introduce
10 the staff members who have come with us to this oral
11 argument. On my right is Mr. Michael Dusaniwskyj, who
12 prefers to be known as Michael so that lawyers don't
13 have difficulty with his name. And he is an economist
14 with the Nuclear Regulatory Commission staff.

15 On my far left is James Randall -- more
16 commonly known as Randy -- Hall, who is the senior
17 project manager in the spent fuel project office and
18 is the manager --

19 (Cell phone ringing.)

20 JUDGE BOLLWERK: Maybe this is the time
21 for me to make the announcement that I had on the next
22 page. Please, if you have a cell phone turn it off
23 right now, okay? And while you're in the room the
24 cell phones need to stay off.

25 Okay, go ahead.

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1 MR. LEWIS: I was kind of getting into the
2 tempo of that actually.

3 (Laughter.)

4 JUDGE BOLLWERK: It's a catchy tune, among
5 others. Go ahead.

6 MR. LEWIS: Where was I? Randy Hall is
7 the senior project manager and the spent fuel project
8 officer in the project office. And he is the assigned
9 project manager for this review.

10 JUDGE BOLLWERK: All right. Good morning.

11 In an April 16th, 2003 issuance we
12 established the order of presentation for this
13 argument and a three-hour time allocation for each of
14 the two sides, i.e. those supporting and opposing the
15 Contention TC-2 challenge to the PG&E application.

16 The San Luis Obispo Mothers for Peace and
17 the interested governmental participants, which are
18 one side, will go first; with Pacific Gas and Electric
19 and the NRC staff to respond, followed by reply
20 presentations by the San Luis Obispo Mothers for Peace
21 and the interested governmental entities.

22 In this regard, the San Luis Obispo
23 Mothers for Peace, the California Energy Commission,
24 and the other three interested governmental
25 participants: San Luis Obispo County, the California

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1 Public Utilities Commission, and the Avila Beach
2 Community Services District, which filed a joint
3 pleading, have allocated their three hours into
4 45-minute initial presentations and 15-minute replies,
5 while PG&E and the staff have allocated their time by
6 giving Pacific Gas and Electric two hours and the
7 staff one hour.

8 Also we've permitted the parties and
9 participants to cede time they do not use to other
10 parties or participants on their own side, on their
11 side.

12 And again let me just make a point now.
13 We're going to be moving into the argument. If you
14 have a cell phone, please turn it off. All right.

15 Finally, before we begin the argument, on
16 Thursday of last week we received a filing for the
17 four -- rather, from the four interested governmental
18 entities asking the Board to take official notice of
19 a May 14th, 2003 Washington Post article regarding the
20 financial condition of PG&E Wholesale Power Unit
21 National Energy Group.

22 In an order issued on Friday, we indicated
23 we'd allocate a brief period of time to the San Luis
24 Obispo Mothers for Peace, Pacific Gas and Electric
25 Company, and the NRC staff to reply orally to this

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1 motion or, if a party so chose, to file a written
2 response.

3 At this point let me just ask counsel for
4 each of those parties what they would like to do in
5 this regard.

6 Ms. Curran.

7 MS. CURRAN: We would just like to state
8 in general that we are supportive of the government
9 participants' motion. I don't have any argument to
10 make on it.

11 JUDGE BOLLWERK: All right. And you don't
12 wish to file anything further on it then?

13 MS. CURRAN: No.

14 JUDGE BOLLWERK: All right. Pacific Gas
15 and Electric Company.

16 MR. REPKA: Judge Bollwerk, we would like
17 to respond briefly today to the motion. And if the
18 Board, after hearing that argument, wants any
19 additional filing, we'd be happy to do that. But
20 we're willing to proceed this morning to respond.

21 JUDGE BOLLWERK: All right. Why don't we
22 just make that as part of your argument time then, if
23 nothing -- if there's no objection to that.

24 MR. REPKA: That's fine.

25 JUDGE BOLLWERK: All right. And the

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1 staff?

2 MR. LEWIS: Judge Bollwerk, the staff
3 wasn't -- I wasn't in the office on Friday. Ms.
4 Coggins just saw it very briefly.

5 JUDGE BOLLWERK: Um-hum.

6 MR. LEWIS: We are going to not -- we're
7 not prepared to address it today.

8 JUDGE BOLLWERK: All right. Then you want
9 to make a written filing on that?

10 MR. LEWIS: We would like to make a
11 written filing.

12 JUDGE BOLLWERK: Can you do that a week
13 from today? Would you need more time than that, or
14 can you do it -- what, tell me.

15 MR. LEWIS: No, a week, a week from today
16 is okay.

17 JUDGE BOLLWERK: All right.

18 MR. REPKA: I would point out that a week
19 from today I think is Memorial Day.

20 JUDGE BOLLWERK: Memorial Day, so it would
21 be a week from tomorrow then. You're right.

22 All right. With all that said, then let's
23 go ahead and begin the oral argument. And as among
24 the party intervenor and also the interested
25 governmental participants, who would like to go first?

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1 All right. Ms. Curran has raised her hand

2 --

3 MS. CURRAN: We'll go first.

4 JUDGE BOLLWERK: -- and volunteered, so.

5 MS. CURRAN: And I'll refer to my clients
6 as the intervenors rather than --

7 JUDGE BOLLWERK: All right.

8 MS. CURRAN: -- going through all their
9 names.

10 I'd also like to ask, I think my initial
11 presentation is going to be relatively brief, and I'd
12 like to ask more -- I think it'd be a better split of
13 the time for us to say half an hour for initial and
14 half an hour for reply, although I don't think we're
15 going to take that long.

16 JUDGE BOLLWERK: All right. Just let me
17 say, the Board has read all the pleadings, and
18 obviously we're familiar with them. You don't have to
19 necessarily repeat everything that's in them. Try to
20 stick to new information. And also we'll be flexible
21 with the time. I don't know that we're going to need
22 all the time that we've allocated, but we're here to
23 listen. And if we need to do that, we certainly will.
24 So.

25 MS. CURRAN: Okay. All right. With that

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1 in mind I am not going to repeat arguments that were
2 me need brief that the intervenors filed.

3 I would like to emphasize that the
4 intervenors are not seeking a hearing. We don't
5 believe that there is a material dispute here that
6 warrants a hearing. We think that procedurally and
7 substantively this case is in a posture that the
8 Licensing Board cannot make a positive finding that
9 PG&E satisfies the financial qualifications standard
10 in 10 CFR 72.22(e).

11 And I'd like to focus on the lack of an
12 NRC safety finding here that addresses the standard.
13 In order for PG&E to obtain this license, there needs
14 to be a set of safety findings by the NRC staff that
15 addresses PG&E's fulfillment of the regulations. And
16 here we're, of course, litigating whether PG&E has
17 fulfilled 72.22(e).

18 There is -- as yet the staff has not
19 issued a safety evaluation report for the Diablo
20 Canyon ISFSI. And so my understanding of NRC caselaw
21 is that the affidavits that the NRC staff have filed
22 in support of its brief can be used to represent the
23 staff's safety findings when a case comes to
24 litigation before the safety evaluation report is
25 issued.

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1 But if you look at the declaration that
2 the staff submitted in support of its brief, the
3 declaration does not fully address the financial
4 qualification standard. And, in particular, it does
5 not make a predictive finding with respect to the life
6 of the proposed facility.

7 All of the staff's findings are limited to
8 the nearterm and the staff literally uses the phrase,
9 "nearterm." And, of course, we're looking at a
10 license that will last for 20 years.

11 So in the absence of a staff safety
12 finding that actually addresses the standard, I don't
13 think that the Board has a basis to go forward with a
14 decision approving the issuance of this license.

15 Now, of course, there is a complicating
16 factor here that PG&E is in bankruptcy and expects and
17 -- or hopes not to be the licensee in some relatively
18 short period of time, but that does not excuse the
19 staff from making the required safety finding.

20 And in order to cope with or address the
21 uncertainty about the future that was created by the
22 bankruptcy filing, in our view what PG&E or the staff
23 needed to do was to seek some kind of waiver of the
24 regulation. If the staff didn't feel it could make
25 the appropriate safety finding, to address whether the

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1 regulation needed to be changed.

2 But the regulation is there, and it
3 requires a predictive finding for the entire term of
4 the license as to whether there will be sufficient
5 funds necessary to operate the facility safely.
6 That's 10 CFR 72.22(e)(2).

7 JUDGE BOLLWERK: Would you repeat that,
8 please, Ms. Curran?

9 MS. CURRAN: 10 CFR 72.22 Subsection
10 (e)(2).

11 I know I have been involved in proceedings
12 with at least one member of this Licensing Board
13 before where the issue has come up as to whether the
14 intervenor needs to show whether compliance with the
15 regulation matters. I remember that from the Yankee
16 Rowe decommissioning case. And I think Judge Lam and
17 Judge Bollwerk may have been on that panel.

18 And let me just say first that I think in
19 the case of this particular regulation, the rationale
20 for the regulation was set forth in the preamble to
21 the Financial Assurance Rule for ISFSIs and was
22 thought through by the Commission. And I do not think
23 the intervenors are legally required to show why it's
24 necessary to comply. That determination was made by
25 the Commission when the rule was promulgated.

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1 But, notwithstanding that, I think we have
2 tried to set out in our brief, suggest reasons why
3 failing to apply this standard fully could affect --
4 could leave PG&E in a situation without sufficient
5 funds. That there is a suggestion that if the
6 bankruptcy case results in a decision that PG&E can
7 create a new corporation and basically dissolve
8 itself, then the CPUC may not be willing to give PG&E
9 a return in the ratemaking process for the cost of the
10 ISFSI for which PG&E is seeking state compensation.

11 Now it's really difficult for us to
12 predict how that might unfold. But I think something
13 important to bear in mind is that we have been
14 precluded here from talking about the financial
15 qualifications of some new entity that might arise.

16 So it's procedurally difficult for us in
17 this proceeding to address how, how the events of this
18 bankruptcy may play out in the event that PG&E is no
19 longer an entity after the bankruptcy. But that would
20 be a subject of close examination in a waiver
21 proceeding, were PG&E to apply for a waiver and
22 attempt to show that satisfaction of the financial
23 qualification standard is not appropriate or necessary
24 in these circumstances.

25 So I think that is the procedural avenue

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1 that should be followed if -- in terms of showing why
2 it is or is not necessary to comply with the
3 regulation. I think there should be a proceeding in
4 which PG&E or the NRC staff shows and has the burden
5 of showing that compliance with this regulation is not
6 warranted or necessary in this case, and that would be
7 a waiver proceeding.

8 JUDGE BOLLWERK: Just so I understand,
9 you're talking about a waiver proceeding at this point
10 or a waiver proceeding after that bankruptcy transfer
11 takes place? I'm --

12 MS. CURRAN: Well, --

13 JUDGE BOLLWERK: I think I lost the bubble
14 on, the bubble --

15 MS. CURRAN: I think that's their choice.
16 I'm suggesting that this is the kind of proceeding
17 that would need to be carried out.

18 You may recall that we filed a motion to
19 stay this proceeding while the bankruptcy case
20 proceeded, and that motion was denied. So I don't
21 think it's our place to tell PG&E or the staff when to
22 seek such a waiver, but I think that is the procedural
23 tool that should be used to address the issue.

24 JUDGE BOLLWERK: Because their position at
25 least up to this point has been that a licensed

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1 transfer would take place and at that point you would
2 look at those provisions. But you're saying there
3 needs to be a waiver proceeding?

4 MS. CURRAN: Right. Because it -- here in
5 this proceeding you are tasked with determining
6 whether, in light of this contention, PG&E has
7 satisfied the financial assurance standard. And we
8 don't have a safety evaluation report, nor do we have
9 an NRC staff safety finding in the pleadings before
10 you that addresses the question of whether PG&E
11 complies with 70- -- 10 CFR Section 72.22(e)(2). You
12 don't have it.

13 So you -- you lack a legal basis for
14 finding on behalf of PG&E in this case, because of --
15 because of the absence of an NRC safety finding that
16 addresses the legal standard.

17 And I'm suggesting that the only way that
18 I can see for the Board to be able to make such -- to
19 make a safety finding would be -- I guess I don't see
20 how that can be done here. And I think the reason
21 that the staff only made its finding for the nearterm
22 is because the future is very uncertain.

23 JUDGE LAM: Now, Ms. Curran, if I take
24 your argument a step further, what you're saying is
25 because there's no compliance with 72.22(e)(2), this

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1 Board cannot find for PG&E? Can I take your argument
2 a step further and say that --

3 MS. CURRAN: Well, could I just -- should
4 I just add to what you just said, or clarify?

5 JUDGE LAM: Sure.

6 MS. CURRAN: What I'm saying is there is
7 no safety determination by the government, by the NRC
8 staff that that regulation has been satisfied. It's
9 not me sitting here telling you that the regulation
10 isn't satisfied. It's the fact that the NRC staff
11 officials, who are responsible for making the safety
12 finding, haven't made it.

13 JUDGE LAM: All right. With that
14 clarification, can I take your argument one step
15 further?

16 Because of that should this Board find
17 against PG&E? Would you go that far?

18 MS. CURRAN: I don't think you have a
19 choice.

20 JUDGE LAM: I see.

21 MR. LEWIS: Judge Bollwerk, may -- I
22 wanted to ask a point of order here as to how we can
23 proceed.

24 I know that this is not the taking of
25 testimony, and so we're not talking about objections.

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1 I did want to --

2 JUDGE BOLLWERK: This is also a legal
3 argument, but go ahead. All right.

4 MR. LEWIS: Well, I have never heard this
5 argument before. I'm hearing it for the first day --
6 time today. It's not in any papers that have been
7 filed by the intervenors. And my understanding of the
8 Subpart (k) process is that you are -- can only rely
9 upon written statements and summaries of facts and law
10 that had been provided to you.

11 So I'm -- I'm concerned that in the first
12 statement that you're hearing an argument which I've
13 never heard before is being made. And I -- I think
14 that is not proper in a Subpart (k) oral argument.

15 JUDGE BOLLWERK: Okay. Then your -- your
16 objection is noted.

17 MR. LEWIS: Thank you.

18 JUDGE BOLLWERK: All right.

19 MS. CURRAN: And could I just reply --

20 JUDGE BOLLWERK: Surely.

21 MS. CURRAN: -- and refer Mr. Lewis to
22 page 6 of the intervenors' April 28th, 2003 filing?

23 I'm finished with my presentation.

24 JUDGE BOLLWERK: All right. Do you want
25 to say anything about what you just...

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1 MS. CURRAN: Well, on page 6 our brief
2 says, "On its face, the scope of the staff's review is
3 inadequate to support the issuance of a license to
4 PG&E because the timeframe for consideration of
5 financial qualifications to sustain operating costs as
6 set forth in 10 CFR 72.20-" -- 70 -- I meant
7 "72.22(e)(2) covers the planned life of the ISFSI.
8 Therefore, as a matter of law, the NRC staff safety
9 review is inadequate to support the issuance of a
10 license to PG&E."

11 And in a footnote we explain that we don't
12 believe this is a mere disagreement with the staff.
13 This is -- we are pointing out a fundamental absence
14 of a safety finding in the staff's -- a safety finding
15 for the fullterm of the PG&E license in the staff's
16 affidavit.

17 JUDGE BOLLWERK: All right. Anything
18 further that you want to say in terms of your initial
19 argument then?

20 MS. CURRAN: No.

21 JUDGE BOLLWERK: All right. And, Mr.
22 Lewis, if you want to respond to that you can do so as
23 part of your argument. But let's let it lie at this
24 point in terms of what's been said.

25 All right. Let me then turn to the

1 interested governmental participants and see who
2 wishes to speak first.

3 MS. HOUCK: I will.

4 JUDGE BOLLWERK: Make sure you push it
5 toward the front. There we go.

6 MS. HOUCK: Okay. The California Energy
7 Commission has very brief comments, and we would like
8 to reserve approximately five minutes for rebuttal
9 comments.

10 JUDGE BOLLWERK: Okay.

11 MS. HOUCK: We agree with the intervenors
12 that we are not requesting an evidentiary hearing in
13 this matter. We believe the Board can decide the
14 issues based on the material presented and the
15 comments today.

16 The California Energy Commission is
17 concerned that what we have here is a proceeding where
18 the applicant, PG&E, a state-regulated entity, has
19 filed an application for the ISFSI representing that
20 it's going to rely financially on its access to
21 electric rates to fund the facility for its
22 construction, operation, and decommissioning. Yet at
23 the same time they're in a pending bankruptcy
24 proceeding asking to have Diablo Canyon Power Plant
25 and the proposed ISFSI divested to an entity that

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1 doesn't exist yet.

2 This seems inconsistent. And it concerns
3 the Energy Commission that it's really uncertain as to
4 who the actual applicant is here. The Energy
5 Commission believes that in order for this Board to
6 issue a license there needs to be some assurance that
7 PG&E, the state-regulated entity who is the applicant,
8 the current applicant for this proceeding, is actually
9 going to be the licensee that will follow through with
10 the information that's been provided in the
11 application.

12 And without that assurance we have serious
13 concerns that, as the intervenors indicated, that the
14 financial qualifications required for 10 CFR
15 72.22(e)(2) cannot be met and that an analysis of
16 those qualifications will fall through the, quote,
17 regulatory cracks here.

18 We do not see a finding that meets the
19 requirements of 10 CFR 72.22(e)(2), that the applicant
20 has the financial ability to safely operate the
21 facility for the life of the project.

22 And, again, we're expressing concern that
23 this issue needs to be addressed prior to a license
24 being issued and that we want some assurance that that
25 license that is issued for any ISFSI for Diablo Canyon

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1 is issued to the applicant, PG&E, the state-regulated
2 entity.

3 Thank you.

4 JUDGE BOLLWERK: All right.

5 MR. TEMPLE: Good morning. I'm speaking
6 right now on behalf of the interested governmental
7 participants, which include the County of San Luis
8 Obispo, the California Public Utilities Commission,
9 the Avila Beach Community Services District. But each
10 of those groups, the CPUC and the Avila Beach, will
11 have representatives speaking after I speak.

12 It is our contention and concern that the
13 Board lacks -- that PG&E has failed to demonstrate and
14 that the NRC staff has failed to show an analysis or
15 basis for a finding that PG&E is financially qualified
16 to construct, operate, or decommission an ISFSI.

17 The interested governmental participants
18 are not opposed to the construction of an independent
19 spent fuel storage facility. We are, however,
20 concerned that such a facility, if built and operated
21 by an underfunded licensee, could create an undue risk
22 for public health and safety.

23 The record that PG&E has presented appears
24 to us to show that bankruptcy raises serious questions
25 about its ability to meet its financial qualification

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1 requirements for an ISFSI.

2 Moreover, the lack of any meaningful staff
3 analysis of PG&E's claims beyond a sheer assertion
4 that the NRC knows financial qualifications when it
5 sees it, is -- does not address our concerns.

6 We're here today because we want an
7 evidentiary hearing to address our concerns. And, as
8 I will explain later, if the Board fails to hold a
9 hearing and resolve the issue in this proceeding and
10 issues an ISFSI license, that decision will be based
11 on a deficient application.

12 Accordingly, we believe that PG&E has not
13 demonstrated that it's financially qualified, as
14 defined by the NRC's requirements, but believe that at
15 a hearing in which PG&E's claims and the NRC's
16 analysis can be fully probed, may address our
17 concerns.

18 The scope of this proceeding is limited.
19 San Luis Obispo Mothers for Peace Contention TC-2,
20 which the Board has admitted, states that a contention
21 exists with respect to PG&E's failure to demonstrate
22 that it meets the NRC's ISFSI financial qualification
23 requirements. The admitted bases for this contention
24 include that PG&E is in -- bankrupt and enmeshed in a
25 contested bankruptcy proceeding with uncertain

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1 outcome. And PG&E has not addressed how its
2 bankruptcy might affect its financial qualifications
3 and its reliance on recourse to the ratemaking system.

4 The Board has ordered the scope of today's
5 proceeding and this contention to be limited. The
6 Board decided to admit TC-2 by stating that San Luis
7 Obispo Mothers for Peace has raised relevant and
8 material concerns regarding the impact of PG&E's
9 bankruptcy on its continuing ability to undertake the
10 new activity of constructing, operating, and
11 decommissioning ISFSI by reason of its access to
12 continued funding as a regulated entity.

13 The Board's language of "continuing and
14 continued" demonstrates that it clearly recognized the
15 need to address the impacts of bankruptcy over the
16 life of the ISFSI.

17 However, the Board chose to limit the
18 scope of the contention. It's not limited to the
19 pendency of the bankruptcy, but rather to PG&E's
20 ability to recover operating costs from the ratebase,
21 which is questionable due to its bankruptcy.

22 The Board, however, limited the contention
23 to exclude the discussion of financial qualifications
24 of any entities that may in the future construct or
25 operate the ISFSI. By so limiting the contention,

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1 however, it's virtually impossible to get a conclusion
2 that any entity could be financially qualified.

3 We're not focusing on what we predict in
4 the future, but we're having to assume that PG&E is a
5 CPUC rate-regulated utility in bankruptcy. In the
6 bankruptcy proceeding, PG&E maintains that their only
7 reorganization -- that only their reorganization plan
8 works.

9 Specifically, PG&E's counsel in the
10 bankruptcy proceeding, Steve Neale, stated in PG&E's
11 opening argument to the Bankruptcy Court, "That the
12 CPUC plan, which would have PG&E remain a CPUC
13 rate-regulated utility, will not work, would be
14 costly, delaying, deleterious, and an unsuccessful
15 detour on the important path to successful
16 reorganization of the debtor."

17 So in the bankruptcy proceeding PG&E
18 maintains it cannot survive if it remains a CPUC
19 rate-regulated utility. However, in this proceeding
20 it's asking that you find it financially qualified
21 because it is a CPUC rate-regulated utility.

22 Within the bounds of this proceeding, if
23 we were to look at PG&E as a rate-regulated utility in
24 bankruptcy, the Board does not have sufficient
25 information to conclude that PG&E has demonstrated

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1 that it can meet the requirements of Section 72.22 (e).

2 I'll discuss the undisputed facts and the
3 legal conclusions that can be drawn from those and
4 thereby demonstrate that PG&E has not provided the
5 information necessary to resolve the concerns that we
6 have about its financial qualifications.

7 What are the undisputed facts in this
8 proceeding? PG&E is in bankruptcy. Competing
9 reorganization plans are currently contested before
10 the Bankruptcy Court, so the final reorganization of
11 PG&E is uncertain.

12 The NRC staff has taken the position that
13 PG&E is financially qualified, so long as it remains
14 a CPUC-regulated utility. However, PG&E has stated in
15 the bankruptcy proceeding it cannot successfully exit
16 from bankruptcy as a utility regulated by CPUC.

17 PG&E proposes to rely on its status as a
18 regulated utility for the 20-year period of the ISFSI
19 license. However, PG&E offered no detailed accounting
20 of its ability to fund the ISFSI operation over its
21 proposed license life, 20 years.

22 PG&E's ISFSI application relies on
23 financial assumptions based on its reorganization
24 plan. However, PG&E's financial plans and bankruptcy
25 proceeding have been modified several times. PG&E

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1 Corporation is currently showing operating loss as a
2 result of the operation of its unregulated affiliates.

3 And while in bankruptcy, PG&E has failed
4 to at least make one full payment to the
5 Decommissioning Trust Fund because PG&E had, and I
6 quote, higher priorities for available cash.

7 The CPUC has testified that PG&E's access
8 to recovery of ISFSI costs through ratemaking is
9 uncertain because of bankruptcy.

10 Given these undisputed facts, can the
11 Board make the necessary predictive findings at this
12 point in the proceeding? These facts show that absent
13 a hearing, the Board cannot reasonably conclude to
14 sufficient certainty that PG&E is financially
15 qualified as to grant it a 20-year ISFSI license.

16 Clearly uncertainties remain, and PG&E's
17 status as a regulated utility, the outcome of the
18 bankruptcy proceeding, PG&E's access to ratemaking,
19 and PG&E's access to the Decommissioning Trust Fund
20 for purposes of decommissioning an ISFSI.
21 Collectively these uncertainties PG&E from supporting
22 the necessary predictive findings of financial
23 qualifications required under Section 72.22(e).

24 Moreover, the scope of this contention
25 makes it very difficult for PG&E to satisfy the

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1 Commission's requirements for financial
2 qualifications. PG&E's argument that financial
3 projections over 20 years are not required but
4 five-year projections are adequate is contrary to the
5 plain words of the Commission's requirements in
6 72.22(e).

7 Even if PG&E were correct, it cannot
8 predict, even for five years, to demonstrate financial
9 qualification, because this Board has precluded such
10 predictions as irrelevant.

11 During bankruptcy, PG&E's failure to
12 provide detailed bases to support its claims of
13 financial qualification, its need to modify its
14 financial assumption several times, its failure to
15 address uncertainties associated with its access to
16 the ratemaking system, and its failure to make at
17 least one Trust Fund payment collectively preclude a
18 financial -- a finding of financial qualifications
19 under Section 72.22 at this time.

20 What facts are in dispute in this
21 proceeding? First, insufficient information has been
22 presented by the NRC staff for the Board to make a
23 determination that PG&E is financially qualified.

24 The NRC supports -- the NRC staff supports
25 its conclusion with a series of conclusory statements.

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1 They fail to find any basis to support their
2 conclusions.

3 This cannot be cured today with any
4 testimony from NRC staff counsel. The NRC staff's
5 testimony is unclear to the -- on the extent to which
6 the NRC was forced to rely on irrelevant post-
7 reorganization information in PG&E's license
8 application, thus leaving unclear the extent to which
9 PG&E's relevant information is sufficient to support
10 the predictive findings that are required.

11 A need exists, therefore, for an
12 adjudicatory hearing on the issue of the extent to
13 which the NRC staff decision relies on irrelevant
14 information, because relevant information isn't
15 adequate to support the necessary findings.

16 Only a hearing can resolve this issue
17 because only the Board can compel the NRC staff to
18 testify regarding the adequacy of relevant
19 information. The NRC staff has been unwilling to
20 disclose information through voluntary discovery.

21 As I stated at the start, the failure to
22 hold a hearing and resolve this issue in this
23 proceeding will ensure that, contrary to NRC
24 regulations, the issue of PG&E's financial
25 qualifications to be an ISFSI licensee receives no

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1 further review by the NRC.

2 Second, PG&E relies on continued CPUC
3 regulation to claim that it is and will remain
4 financially qualified to construct and operate the
5 ISFSI, notwithstanding the absence of evidence needed
6 to show that it can both take on the new activity of
7 building an ISFSI and continue to safely operate that
8 for 20 years.

9 A need exists, therefore, for an
10 adjudicatory hearing on the issue of the source or
11 sources of PG&E's financial assurance to construct and
12 operate an ISFSI, which are clearly not yet in
13 evidence.

14 This issue is fundamental to the NRC's
15 decision regarding financial qualifications of this
16 licensed applicant and can only be resolved by an
17 adjudicatory hearing at which experts can provide
18 evidence on the means of demonstrating reasonable
19 assurance that it actually is financially capable of
20 constructing and operating and decommissioning an
21 ISFSI in resolving the uncertainties that we've
22 raised.

23 PG&E claims that because it now has tons
24 of money, it's financially qualified over the license
25 life of the ISFSI, but these do not hold water as we

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1 have to compare the money it has with the obligations
2 it has. Furthermore, we all know that many companies
3 that come out of bankruptcy do not survive.

4 Third, PG&E relies on continued CPUC
5 regulation to claim the Decommissioning Trust Fund
6 will contain enough money to decommission both the
7 Diablo Canyon Power Plant and the independent spent
8 fuel storage facility.

9 But the rate of accumulation by -- of
10 money in the Trust Fund is uncertain in the pace -- in
11 the face of possible removal of CPUC regulation as a
12 mechanism for ensuring sufficient contributions to the
13 fund. Mr. Chaset of the CPUC will have more to say
14 about this in a minute.

15 A need exists, therefore, for an
16 adjudicatory hearing on the issue of the adequacy of
17 the decommissioning funding. This issue is clearly a
18 critical issue to the NRC's decision regarding
19 financial qualifications and can only be resolved by
20 an adjudicatory hearing at which experts can provide
21 evidence on the means of demonstrating reasonable
22 assurance that sufficient funds will have been
23 accumulated and will be available in the face of
24 uncertainty resulting from the bankruptcy.

25 For these reasons, the interested

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1 governmental participants request that the Board hold
2 an adjudicatory hearing to hear evidence, compel frank
3 disclosure of necessary facts, and to obtain
4 information needed to make an informed decision about
5 the critical issue of PG&E's qualifications to become
6 an ISFSI licensee.

7 JUDGE BOLLWERK: Let me ask you a couple
8 of questions. The first one: Obviously anytime the
9 NRC -- one of the, I guess, cornerstones of NRC
10 financial assurance regulation is the question with
11 particular -- with regard to rate-regulated utilities
12 is the obvious assumption, I guess, that normally when
13 they make the appropriate showing, they're going to
14 receive the rates that they need to fund the
15 facilities. How is this particular case different
16 from that general assumption?

17 MR. TEMPLE: You have a rate-regulated
18 utility that ended up in bankruptcy. Right now -- and
19 this is the challenge of both this proceeding and
20 where PG&E currently is.

21 If you look at -- within the four corners
22 of this contention, we have to look at a PG&E in
23 bankruptcy. And that utility is in bankruptcy because
24 it was not able to recover the amount of money
25 necessary to pay for all of its obligations. That's

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1 not the usual paradigm for rate-regulated utilities.
2 This is an exception.

3 And we cannot have certainty until a plan
4 for reorganization has been adopted and there is an
5 exit from the bankruptcy proceeding.

6 JUDGE BOLLWERK: All right. The second
7 question. I guess you've had made some -- part of
8 your argument in the filings that you provided us was
9 a question, I guess, about the problems with the
10 notice of hearing that was issued, and the notice in
11 the proceeding, and the question of changes to the
12 application.

13 I mean the members of this particular
14 Board have also sat on the Private Fuel Storage case
15 where there's been, I think, 24 amendments to that
16 application. Obviously applicants come in all the
17 time and amend their application, to change it in one
18 way or another. How is this case different from that?

19 MR. TEMPLE: Our concern is not so much
20 with the application and the applicant. Our concern
21 is actually with what the Board has done and what
22 PG&E's evidence is in response to the Board's
23 contention.

24 And the Board has made a very narrow
25 contention out of this. And given the metes and

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1 bounds of that contention, it's very difficult for
2 PG&E to show that it, as a utility in bankruptcy,
3 satisfies 72.22(e).

4 JUDGE BOLLWERK: I mean the contention is
5 a challenge to that portion of the application. So I
6 guess I'm still having a problem understanding exactly
7 what -- I mean I think you're kind of -- kind of
8 flipping things here and saying the contention somehow
9 drives the application which, in fact, it doesn't.

10 MR. TEMPLE: No.

11 JUDGE BOLLWERK: The contention is
12 something that challenges the application.

13 MR. TEMPLE: Let me ask -- let me ask
14 Sheldon to take a shot.

15 JUDGE BOLLWERK: Do you want to say
16 something?

17 MR. TRUBATCH: Okay. The concern is that
18 the original application contained information about
19 the postbankruptcy situation as PG&E saw it. The NRC
20 staff apparently asked PG&E to file what it called a
21 supplemental information, which was a repackaging of
22 only some of the information in the application and
23 which focused on PG&E's current status as a regulated
24 -- as a CPUC-regulated licensee.

25 That, coupled with statements by the NRC

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1 staff in their deposition, leaves uncertain the extent
2 to which the NRC relied on any of this postbankruptcy
3 predictive discussion, which this Board has declared
4 is irrelevant.

5 JUDGE BOLLWERK: All right. Last
6 question. I guess you talked -- I guess there was
7 some concern about compliance with voluntary
8 discovery. Just, I'll make sure I didn't miss
9 anything. Was there ever a motion to compel of any
10 kind that was filed with respect to the discovery
11 request?

12 MR. TEMPLE: No. We actually made a
13 request during the depositions, and we got a reply
14 back that the NRC staff would look into our request to
15 provide documents related to the bases and the
16 background of their analysis for their decisionmaking,
17 but never got back to us.

18 JUDGE BOLLWERK: All right. Anything the
19 other Board Members have?

20 JUDGE LAM: Beyond what you are saying
21 today, would you be able to give us more concrete
22 examples regarding the staff's unwillingness or
23 inability to provide you with information?

24 MR. TRUBATCH: Board Member Lam, I would
25 suggest you read the transcript of the deposition of

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1 the staff's expert witness. On more than one occasion
2 he was asked to describe his thought process in going
3 from the information that PG&E provided to his
4 conclusion. And there was no thought process brought
5 forward, discussed, or described. It was simply, "I
6 know it when I see it; I'm the expert."

7 JUDGE LAM: I see.

8 JUDGE BOLLWERK: Any other questions?

9 Judge Kline?

10 JUDGE KLINE: (Shakes his head.)

11 JUDGE BOLLWERK: All right. Thank you,
12 sir.

13 MR. TEMPLE: Certainly.

14 Mr. Chaset.

15 MR. CHASET: Yes. I'm going to brief.

16 Like my colleague, Ms. Houck at the CEC,
17 the CPUC takes the position that in the abstract the
18 ISFSI is probably a useful and reasonable project.
19 And if PG&E was going to continue to be a regulated
20 utility -- or, change that. Let's say there had never
21 been a bankruptcy and PG&E was just going along
22 swimmingly as a regulated utility that owned Diablo
23 Canyon, the ISFSI is a project that could be and
24 probably would be paid for over time through rates
25 paid by PG&E's ratepayers.

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1 Unfortunately, the bankruptcy makes a
2 fundamental difference in terms of the financial
3 qualifications of PG&E to be able to fund this
4 project.

5 I'm going to just read a few sentences
6 from the testimony of Truman Burn, the CPUC staffer
7 who provided the testimony on behalf of the
8 governmental participants. And this is only going to
9 take a couple of minutes, and I ask you to bear with
10 me.

11 Mr. Burn says, "In my expert view, an
12 impact of the bankruptcy is that it creates
13 substantial uncertainty regarding the CPUC's
14 determination of whether construction costs for an
15 ISFSI have been incurred prudently and may be
16 recovered from rates. This uncertainty stems from the
17 possibility that a result of the bankruptcy could be
18 the transfer of ISFSI ownership to an entity no longer
19 regulated by the CPUC. Under these conditions the
20 CPUC could determine that moneys collected from
21 ratepayers should not be applied to a facility that
22 may no longer be used for the ratepayers' direct
23 benefit. Thus, I conclude that an impact of PG&E's
24 bankruptcy is substantial uncertainty in PG&E's
25 ability to demonstrate that it can fund construction

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1 of the ISFSI with moneys recovered from rates."

2 And Mr. Burn's testimony goes and talks --
3 he makes the same conclusion with regard to
4 construction money, with regard to operation funds,
5 and with regard to decommissioning costs. And I'm not
6 going to belabor you with further cites from the
7 testimony. I simply direct you to that and ask you to
8 consider it.

9 You know I would point out, PG&E is
10 taking, in our view, what are inconsistent positions
11 in, on the one hand, its licensed transfer proceeding
12 before your Commission and in this proceeding seeking
13 a permit for the ISFSI. PG&E cannot have it both
14 ways.

15 PG&E's kind of creating its own
16 uncertainty here with regard to the ISFSI financing.
17 In the license transfer proceeding that is still --
18 hasn't been closed, PG&E is saying that Diablo Canyon
19 should be transferred to a nonregulated entity that
20 will operate it as an exempt wholesale generator. If
21 that happens who's going to build, operate, or
22 decommission the ISFSI? Certainly not PG&E, the
23 CPUC-regulated utility.

24 In this proceeding, however, PG&E is
25 relying on PUC approval, on our approval through rates

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1 of the funding to build, operate, and ultimately to
2 decommission the ISFSI.

3 However, in the bankruptcy proceeding
4 PG&E's corporate position appears to be that this
5 regulatory structure that it is assuming, for purposes
6 of this ISFSI licensing, is neither desirable or
7 acceptable. Which is it?

8 If PG&E has its way in bankruptcy, it
9 won't have recourse to the ratepayer funding that it
10 is relying on to obtain a license from you for the
11 project that is before you.

12 I really cannot logically reconcile these
13 two positions that PG&E is taking. Given this
14 inability to achieve a necessary logical
15 reconciliation, how can there be, how can you find --
16 and I'm asking this as a rhetorical question -- how
17 can you possibly find that there is the financial
18 assurance with regard to the project that is before
19 you if PG&E obtains the very relief that it itself is
20 seeking from the Bankruptcy Court?

21 Because of this uncertainty that PG&E is
22 partly creating itself in this proceeding, I would
23 add, I think the most prudent thing for your Board to
24 do is to postpone taking any action on this license
25 application until the status of Diablo Canyon is

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1 resolved in the bankruptcy proceeding. That will
2 serve the interests of judicial economy in that you
3 won't have to go back and look at this thing again.

4 If Diablo Canyon remains a PG&E, part of
5 PG&E, the regulated utility, you can certainly move
6 forward and issue this license based on the financial
7 qualifications. It will probably be fairly easy for
8 you to make that judgment.

9 On the other hand, if PG&E gets its way in
10 Bankruptcy Court, you're back to square one. And we
11 don't know what kind of an entity we're even looking
12 at here if PG&E gains the relief that it is seeking
13 from Bankruptcy Court.

14 So I ask you to, you know, understand that
15 PG&E is in part the creator of its own uncertainty
16 here. And I would ask that you look logically at what
17 PG&E is asking for, on the one hand in this proceeding
18 and on the other hand in the license transfer
19 proceeding that is pending before your Commission.

20 Thank you.

21 JUDGE BOLLWERK: Just so I understand your
22 argument, --

23 MR. CHASET: Sure.

24 JUDGE BOLLWERK: There -- at the present
25 time there are really three situations that could

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1 exist. One, and you can clarify this or tell me I'm
2 wrong, however you -- there is the situation that
3 currently exists where the Bankruptcy Court has not
4 ruled, and that could go on. In theory it will not go
5 on indefinitely, but it could. I mean the judge in
6 theory will do something in it.

7 I take it the CPUC's position with respect
8 to that is that PG&E is still a rate-regulated utility
9 at this point and could come in under that situation
10 and ask for what they need?

11 MR. CHASET: Well, PG&E is still -- well,
12 Diablo Canyon is still part of the regulated utility
13 that is subject to PUC jurisdiction. And the PUC has
14 funded preliminary work on the ISFSI through rates in
15 the past. And then there is a rate case pending
16 before us. And in the rate case that's currently
17 pending, they are seeking some additional funds for
18 the ISFSI.

19 However, PG&E is in bankruptcy and is
20 asking to have Diablo Canyon transferred out from
21 under the aegis of PUC regulation. Once that -- once
22 -- once Diablo -- if PG&E gets its way -- and we're
23 fighting it. We want to keep Diablo under PG&E, --

24 JUDGE BOLLWERK: Right.

25 MR. CHASET: -- the utility. But if PG&E

1 were to prevail and Diablo were to be spun off from
2 the utility, there is no way in which the PUC is going
3 to be able to or likely would approve ratepayer
4 funding for the ISFSI.

5 So PG&E is asking, on the one hand, in
6 this proceeding, 'Well, we can rely on ratepayer
7 funding for the ISFSI.' And, you know, without the
8 bankruptcy, Diablo Canyon remaining a PG&E -- a PG&E,
9 the utility, a facility that's regulated by the PUC,
10 the funding for the ISFSI is a pretty straightforward
11 proposition. If it's going to benefit ratepayers and
12 be economically reasonable, it's normally the kind of
13 capital expenditure that would be approved, either --
14 either as a capital expenditure or as ongoing
15 operational costs that would be recovered through
16 rates.

17 But we are not talking about that
18 situation with PG&E's bankruptcy reorganization plan
19 request. They are asking for something very different
20 from that. So we're looking at this anomalous
21 situation where, on the one hand, PG&E is asking for
22 relief from PUC regulation, what it deems to be relief
23 from PUC regulation.

24 On the other hand, it's relying on that
25 regulation in this proceeding to get this project

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1 approved. I can't reconcile that anomaly in my head.

2 JUDGE BOLLWERK: Right. And I take it,
3 then, if the CPUC's position before the Bankruptcy
4 Court prevailed and it remained a regulated utility,
5 then in theory you would not have the problem that
6 you're having now?

7 MR. CHASET: I wouldn't be here today.

8 JUDGE BOLLWERK: All right. Thank you,
9 sir.

10 JUDGE LAM: Now can the anomalous
11 situation you just described be resolved this way:
12 Assuming PG&E is qualified to operate the facility as
13 a regulated utility, assuming that is the case. And
14 assuming a license is granted and within a short time
15 or a long time, it prevailed in the Bankruptcy Court,
16 therefore Diablo is no longer regulated. Could that
17 anomalous situation as you've described be resolved
18 this way, if that should happen, there will be a
19 transfer, a license-transfer proceeding?

20 MR. CHASET: Well, you know, --

21 JUDGE LAM: Could that resolve the
22 situation?

23 MR. CHASET: No. It doesn't because right
24 now, today, the anomaly exists. PG&E in bankruptcy
25 is, on the one hand, asking to have Diablo Canyon

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1 transferred out from under the protection of CPUC
2 regulation. The CPUC regulation would presumably
3 provide some financial certainty about the ISFSI, but
4 that's assuming that Diablo Canyon remains for the
5 foreseeable future PUC-regulated. Okay.

6 What PG&E is asking for is for Diablo
7 Canyon to be taken out from PUC regulation as soon as
8 it can get a discharge from bankruptcy. That could be
9 in the next few months. I mean there is a -- there is
10 not a reasonable foreseeability under this bankruptcy
11 that PG&E is currently in that Diablo Canyon will
12 remain subject to the protection of CPUC regulation.
13 And therefore there is this intrinsic anomaly in what
14 they're asking for.

15 JUDGE LAM: Oh, that I comprehend. But my
16 question is the risk is entirely taken up by PG&E.
17 They asked for a license. Under the scheme they're
18 being regulated. If a license is granted on that
19 basis, if that changed, then the license is in
20 jeopardy.

21 MR. CHASET: Right. But I don't think you
22 can make that assumption in light of what is currently
23 the reality of the bankruptcy proceeding.

24 MR. TRUBATCH: Mr. Chaset, would you cede
25 some time to me?

1 MR. CHASET: All right. I think Mr.
2 Trubatch wants to answer that.

3 MR. TRUBATCH: First of all, the
4 regulations require you to make the predictive finding
5 now for the full life of the ISFSI, not to make a
6 finding which then we all can foresee is likely or has
7 a high likelihood of needing to be fixed.

8 Second of all, there is nothing I can find
9 in NRC requirements that address the criteria for a
10 license transfer. Assuming you are to issue a license
11 and condition it properly, unless this Board is
12 willing to issue an order that sets out that any
13 license transfer proceeding will have to take into
14 account all the criteria in 72.22(e), so that the
15 successor licensee to this ISFSI will have its
16 financial qualifications examined to the same level
17 and the same criteria as they currently apply to this
18 applicant, you will not have -- you will have
19 something falling through the regulatory cracks.

20 JUDGE BOLLWERK: All right.

21 JUDGE LAM: All right. Thank you.

22 MR. CHASET: I'll adopt that.

23 JUDGE BOLLWERK: All right. Are you
24 finished, sir? Anything else?

25 MR. CHASET: Yes, that was it. Thank you

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1 very much.

2 JUDGE BOLLWERK: That was it? All right.

3 Any other questions from the Board
4 Members?

5 All right. Avila Beach then.

6 MR. HELENIUS: First, I'd like to thank
7 the Commission for granting the Avila Beach Community
8 Service District a seat at this table. You know that
9 we're geographically positioned in a rather unique
10 setting in that we are close -- we are the closest
11 community to the plant itself. And, further, we are
12 downwind from the prevailing wind direction, so that
13 there isn't another community within the County of San
14 Luis Obispo that is finding itself closer to the
15 facility.

16 Our board unanimously asked that I come
17 here this morning to speak on behalf of the community.
18 And I want you to know that the members of the
19 community that have attended our meetings on a monthly
20 basis have been without any dissent expressive of a
21 desire that we participate in this proceeding and we
22 express our concerns about the proposal.

23 I would observe -- or I would start by
24 observing that, while PG&E has done a marvelous job of
25 operating the plant from a public safety standpoint,

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1 our concerns about the future with respect to dry cask
2 storage are not focused on the safety of the casks
3 themselves.

4 We accept what we've heard from the
5 experts that as a general concept this plan would
6 work. We are, rather, concerned about PG&E's shaky
7 financial status in that it is in bankruptcy.

8 We are concerned that PG&E plans to seek
9 through this Commission a license for 20-year
10 extension of storage of nuclear waste at the facility
11 when originally the plant was licensed with the
12 concept that nuclear waste would not be stored at the
13 plant facility at all on a longterm basis. And here
14 we find them seeking a 20-year extension to do just
15 that and in the face of their obvious financial
16 difficulties.

17 We're concerned that not only -- we're
18 concerned not only from the standpoint that PG&E is in
19 bankruptcy, but we're also concerned because the
20 outcome of that bankruptcy proceeding is difficult if
21 not impossible to predict. We're concerned because
22 we're informed that PG&E has failed to fully fund its
23 obligations to the Decommissioning Fund.

24 We're concerned because we see PG&E --
25 PG&E taking the inconsistent positions, this factual

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1 paradox that Mr. Chaset -- if I --

2 MR. CHASET: Chaset:

3 MR. HELENIUS: -- Chaset, excuse me -- Mr.
4 Chaset just articulated is a very troubling concern
5 for the community and for our board.

6 We believe that when PG&E is taking such
7 an inconsistent position, depending upon the forum it
8 finds itself in and the request and objectives that
9 are being served, then this Commission needs to look
10 deeply behind what is going on here and satisfy itself
11 and hopefully satisfy members of our community that we
12 live in an area that not only is safe at present but
13 will remain safe into the future.

14 We think that the -- on the basis of all
15 the arguments that have been presented in writing to
16 you and the oral arguments that you've heard here this
17 morning, that the safest course would be for you to
18 revisit the issue about whether this proceeding should
19 even be moving forward until PG&E's bankruptcy is
20 resolved.

21 If you're unwilling to do that, then we
22 heartedly agree with all the other interested
23 governmental parties, that you hold an adjudicatory
24 hearing and you establish whether staff's
25 recommendations have any factual basis and you

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1 consider these issues with respect to PG&E's financial
2 ability to meet the requirements for this ISFSI
3 proposal over the full 20-year period.

4 And we would like to hear testimony from
5 your staff and others with respect to these issues.
6 Thank you.

7 JUDGE BOLLWERK: All right. Anything
8 further? The Board Members?

9 At this point let me see if there's any
10 further that any of the -- whether Ms. Curran or any
11 of the other interested governmental participants want
12 to say in terms of the initial presentations?

13 All right. Ms. Curran, you...

14 MS. CURRAN: Well, I think Judge Lam
15 raised the \$64,000 question which is: Is PG&E taking
16 the entire risk here. The set-up is, as I see it, as
17 it's been laid out, that we are going to talk about
18 PG&E's financial qualifications and that if and when
19 PG&E is no longer the entity that is applying for a
20 license, it's a new entity, GEN -- I think it's called
21 -- GEN will have to seek a license transfer for this
22 facility, for the ISFSI, and will have to demonstrate
23 its financial qualifications. So isn't -- isn't PG&E
24 assuming the risk. I think that's your question.

25 Am I right?

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1 JUDGE LAM: Yes indeed.

2 MS. CURRAN: Okay. Well, I think that is
3 a very important question and I -- I would like to --
4 I hope that the CPUC can address that later on,
5 because from what I can see just as a -- not an
6 economist reading the papers, it may be that at some
7 point in this proceeding, the CPUC, which is -- in
8 Truman Burn's declaration he says that at some point
9 the CPUC may decide not to give PG&E a return because
10 -- because of a Bankruptcy Court decision that PG&E is
11 not going to exist anymore, approving PG&E's plan.

12 And I think it's foreseeable that that
13 could happen at a point where PG&E has relied on that
14 -- on that return and then suddenly finds that it's
15 not available. And in that case the plant may already
16 be built and there may be insufficient funds to
17 operate it safely.

18 And I don't -- so I think that is a
19 possible problem, that it's not PG&E taking the whole
20 risk. I think there are scenarios that are
21 foreseeable where it's the members of the public who
22 assume the risk, because PG&E will not have sufficient
23 funds to operate the facility safely.

24 But the next point I want to make is that
25 I think the NRC safety regulations do not foresee a

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1 situation in which financial assurance is only
2 predicted for a very short time, not for the entire
3 life of the facility. I think if you're going to
4 proceed that way, and say, 'Well, PG&E will take the
5 risk later on if the license is' -- 'if PG&E's
6 reorganization plan is approved and PG&E seeks a
7 license transfer,' the regulations don't contemplate
8 that in this hearing PG&E's financial assurance is for
9 the next three years or four years are going to be
10 approved. The regulations require some predictive
11 finding about the life of the facility.

12 And -- and if it's the Board's wish to
13 proceed by saying, 'We're going to make a shortterm
14 prediction here. We're going to say for the brief
15 period while PG&E is in bankruptcy, it's fine. And
16 then we'll just wait and see what happens in the
17 outcome of the bankruptcy, to see if a new entity is
18 financially qualified,' that's not how the rules work.

19 So that I think the Board has to go
20 through a process of examining whether the rules
21 should be altered. And that's -- that's a different
22 kind of proceeding.

23 JUDGE BOLLWERK: Is that your waiver
24 argument?

25 MS. CURRAN: That's my waiver argument.

1 JUDGE BOLLWERK: All right. I'm sorry, I
2 didn't mean to cut you off. I was just make sure I
3 was understanding.

4 MS. CURRAN: Yeah. And in that case the
5 burden would be on PG&E to show why it's not necessary
6 to apply the rule the way it's written, and that's not
7 what's at issue in this particular proceeding. Okay.

8 JUDGE BOLLWERK: All right. Thank you.

9 Anything else anyone on the -- among the
10 interested governmental participants wants to say at
11 this point?

12 Mr. Trubatch is grabbing a microphone, I
13 see.

14 MR. TRUBATCH: No. I seem to have lost my
15 connection here.

16 JUDGE BOLLWERK: Oh, all right. We'll fix
17 that.

18 MR. TRUBATCH: I won't attribute that to
19 any nefarious any things.

20 Let me just add one minor addition to Ms.
21 Curran's statement, which I fully support, because the
22 rules are what the rules are.

23 If despite that the Board believes it can
24 issue a conditioned license, it's got to be sure that
25 whatever conditions are on a license are stopped at

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1 the point of irreversibility. So if I understand what
2 Board Member Lam was saying, you could have a license
3 condition regarding construction, but once you put a
4 spent fuel rod into those canisters, it's going to be
5 there for an awfully long time because even if we
6 believe Yucca Mountain comes to pass, it will take a
7 long time until PG&E fuel gets there. And so that to
8 me would be a point of irreversibility, as a practical
9 matter.

10 JUDGE BOLLWERK: All right. Anything
11 else, any of the intervenors or the governmental
12 participants want to say at this point in terms of
13 their initial presentation?

14 Go ahead, sir.

15 MR. CHASET: We do have rebuttal, I
16 believe.

17 JUDGE BOLLWERK: I'm sorry?

18 MR. CHASET: We do have rebuttal --

19 JUDGE BOLLWERK: Oh, absolutely. I just
20 want to make sure we've gotten your initial
21 presentations. I want to make sure that everybody got
22 a chance to say what they want to initially.

23 MR. CHASET: Thank you.

24 JUDGE BOLLWERK: All right. At this point
25 I think then it's about 10 after 10:00. Why don't we

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1 go ahead and take our -- take a break, about 15
2 minutes. And then we'll look to Pacific Gas and
3 Electric, I guess, for their response. Thank you.

4 (Recess taken from 10:10 a.m. to 10:29
5 a.m.)

6 JUDGE BOLLWERK: All right. We are back
7 from our break, and I think Judge Kline has a question
8 he'd like to ask the California Public Utilities
9 Commission representative.

10 JUDGE KLINE: Yeah. If I understood your
11 discussion, and correct me if I didn't, it is that
12 CPUC would be inclined to find this ISFSI proposal a
13 prudent expenditure provided that the Diablo Canyon
14 entity remained under your jurisdiction. That is to
15 say, there wasn't any transfer of license, but that if
16 -- that if it appeared there was going to be a
17 successor corporation, then it would lose your
18 approval. Is that -- is that the --

19 MR. CHASET: I -- that's not quite it.

20 JUDGE KLINE: Okay.

21 MR. CHASET: Close. We have been funding
22 preliminary -- there has been preliminary funding for
23 engineering and planning --

24 JUDGE KLINE: Yeah.

25 MR. CHASET: -- for the ISFSI that has

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1 been approved. And PG&E several -- several million a
2 year, and in the current rate case there are some
3 incremental dollars, 14,-, 15 million or so of
4 additional dollars per year that they're looking for.
5 And that that is an expense that, you know, all other
6 things being equal, appears to be prudent and
7 reasonable.

8 JUDGE KLINE: Okay.

9 MR. CHASET: The problem is that, you
10 know, we're looking at this bizarre anomaly of PG&E,
11 the utility, in bankruptcy, --

12 JUDGE KLINE: Yes.

13 MR. CHASET: -- and we don't know what the
14 outcome of that is. The outcome is going to be pretty
15 soon, but while PG&E is in bankruptcy there is in our
16 mind a substantial question as to the financial
17 qualifications of this entity to proceed with this
18 project, because depending on the outcome of the
19 bankruptcy either it will be reasonable and prudent
20 for ratepayers to fund this or it won't be, and we
21 can't say what that outcome is. Therefore, we cannot
22 make a finding as to reasonableness and prudence
23 without knowing the outcome of the bankruptcy.

24 JUDGE KLINE: What I understood, or part
25 of that concern was that if -- if the outcome of the

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1 bankruptcy is to create a new corporation not under
2 the jurisdiction of CPUC, that that's part of your
3 concern; that you would not be in a position to make
4 a determination --

5 MR. CHASET: Well, see, if -- if Diablo
6 Canyon becomes part of a nonregulated, you know,
7 exempt wholesale --

8 JUDGE KLINE: Yeah.

9 MR. CHASET: -- generator entity, we would
10 not be funding --

11 JUDGE KLINE: Yeah.

12 MR. CHASET: -- this project. And
13 ratepayers in California of PG&E wouldn't be funding
14 this project. So then there's a big question mark as
15 to who's going to fund it.

16 JUDGE KLINE: Well, --

17 MR. CHASET: And there's an even bigger
18 question mark about, you know, who's going to pay for
19 the decommissioning of it.

20 JUDGE KLINE: Well, this is getting close
21 to my question now, which is if -- suppose that it
22 does happen, that there is a successor organization to
23 operate Diablo Canyon which is not under CPUC
24 jurisdiction, what provision for rate regulation, so
25 let's say successor rate regulation, is there in

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1 California law?

2 MR. CHASET: Well, I can't --

3 JUDGE KLINE: If any.

4 MR. CHASET: I can't say that there is,
5 because --

6 JUDGE KLINE: Okay.

7 MR. CHASET: -- the ratepayers would not
8 be funding this project --

9 JUDGE KLINE: Okay.

10 MR. CHASET: -- if Diablo Canyon is spun
11 off to GEN.

12 JUDGE KLINE: But how would -- how would
13 GEN have its rates set or approved?

14 MR. CHASET: It -- that's unclear.

15 JUDGE KLINE: Oh, okay.

16 MR. CHASET: PG&E as part of its
17 bankruptcy has applied for approval at the Federal --

18 JUDGE KLINE: Well, --

19 MR. CHASET: -- Energy Regulatory
20 Commission of a 12-, I believe, -year purchase
21 agreement with regard to electricity from Diablo to
22 PG&E, the utility. That hasn't been approved. It's
23 unclear that that's a reasonable request, and that's
24 only for 12 years. I believe after that, you know,
25 it's sort of a big question mark of who they're going

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1 to sell their power to and at what price.

2 JUDGE KLINE: But is it possible that they
3 could just -- if they're not regulated by California
4 law, they would just set their own rates?

5 MR. CHASET: They could, and maybe nobody
6 buys.

7 JUDGE KLINE: Well, that -- okay.

8 MR. CHASET: And if nobody buys, how can
9 they fund this thing?

10 JUDGE KLINE: Well,...

11 MR. CHASET: How can they pay to
12 decommission it?

13 JUDGE LAM: Now Judge Kline's, one of the
14 questions is, if I may add to his question, that if
15 you don't regulate an entity, who does?

16 MR. CHASET: Well, the Federal Energy
17 Regulatory Commission presumably has some authority
18 over wholesale power rates, but if the rates are, you
19 know, -- but keep in mind, in a competitive market you
20 may be offering power for sale, but no one has to buy
21 it.

22 If you are a utility that's generating
23 electricity, your customers are going to be paying for
24 the power plants that you own through rates, but if
25 you're an unregulated exempt wholesale generator,

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1 unregulated by the state, you know the prices are
2 nominally regulated by FERC, but FERC, you know, can't
3 mandate any purchase-and-sale arrangements. They
4 merely say that you have the authorization to sell
5 power at market-based rates, whatever the market will
6 pay.

7 And assuming that this facility after 12
8 years gained the authority to sell power at market-
9 based rates from FERC, they would, you know, try to
10 sell power to whoever they could, presumably at the
11 cheapest possible price. And if people didn't like
12 the price and terms and conditions, they wouldn't have
13 to buy it.

14 JUDGE KLINE: On the question of
15 purchasing power on say just on an open market, is it
16 your view or are you asserting that the ISFSI adds
17 substantially to the marginal cost of power?

18 MR. CHASET: I'm assuming it would add
19 something to the marginal cost of power --

20 JUDGE KLINE: It would add something. I
21 mean is it enough to alter the market, do you think,
22 or...

23 MR. CHASET: I can't answer that.

24 JUDGE KLINE: Okay. Well, I would like to
25 hear the company develop this question too, when it's

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1 their turn.

2 JUDGE LAM: And also is it possible if the
3 rates are set by the market, PG&E may be able to set
4 the rates so attractive they will be flush with money?

5 MR. CHASET: Well, if their rates are so
6 attractive, their profit margin is going to be very
7 slim. And then there are some questions about, you
8 know, let's say they need to save 3- or 400 million to
9 decommission this plant. I mean how are they going to
10 do that and make money? I mean there are a lot of
11 unanswered questions that we'd have to speculate to
12 get answers to.

13 JUDGE BOLLWERK: All right. Any other
14 questions then?

15 JUDGE KLINE: No, nothing.

16 JUDGE BOLLWERK: We appreciate your
17 efforts to answer the Board's questions.

18 MR. CHASET: You're welcome.

19 JUDGE BOLLWERK: Thank you.

20 All right. At this point let me turn to
21 Pacific Gas and Electric Company for their response to
22 the initial arguments we've heard. And, just as a
23 scheduling matter, you have two hours. What do you
24 anticipate at this point?

25 MR. REPKA: Two things. Number one, over

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1 the last break Mr. Lewis asked if the NRC staff could
2 go first.

3 JUDGE BOLLWERK: Oh, all right. That's --

4

5 MR. REPKA: I agree with the Board's --

6 JUDGE BOLLWERK: That's fine.

7 MR. REPKA: -- accommodate -- to that
8 accommodation.

9 Number two is I don't expect to have two
10 hours.

11 JUDGE BOLLWERK: All right.

12 MR. REPKA: Probably something less than
13 an hour.

14 MR. CHASET: All right.

15 MR. REPKA: Before I turn it over to the
16 NRC staff, though, if it's convenient for the Board or
17 more efficient, I could try to respond to Judge
18 Kline's question now or we could wait.

19 JUDGE BOLLWERK: The staff was -- all
20 right. Why don't we go ahead and do that, and then
21 we'll turn to the staff and then come back to you. Go
22 ahead.

23 MR. REPKA: I think the question that
24 Judge Kline is asking is what would happen if PG&E and
25 the entity that was the successor to PG&E with respect

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1 to ownership and operation of Diablo Canyon were no
2 longer CPUC rate-regulated. I think that's really not
3 an uncertain question. And under the plan of
4 reorganization that PG&E has submitted to the
5 Bankruptcy Court, GEN would operate under a bilateral
6 power sales agreement with the reorganized PG&E, the
7 utility, under -- under this 12-year power sales
8 agreement that's subject to approval by the Federal
9 Energy Regulatory Commission, or FERC. So that that
10 much we know for sure.

11 All of the financial projections that are
12 the basis for the plan of reorganization in the
13 Bankruptcy Court in effect are the basis for the Part
14 50 license-transfer application that's pending before
15 the NRC, are based on that 12-year bilateral power
16 sales agreement that's subject to FERC jurisdiction.
17 Anything beyond that is really not on the table right
18 now and would be sheer speculation.

19 JUDGE BOLLWERK: All right. Let's turn to
20 the staff then.

21 MR. LEWIS: Your Honors, I --

22 JUDGE BOLLWERK: Let me just ask you, Mr.
23 Lewis. How long do you think approximately you're
24 going to take, just for...

25 MR. LEWIS: Well, maybe initially --

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1 well,...

2 JUDGE BOLLWERK: You'd reserve 60 minutes
3 out of the -- oh.

4 MR. LEWIS: It's going to be a half an
5 hour I think approximately, is my best guess.

6 JUDGE BOLLWERK: I'm not trying to limit
7 you. I just want to get a sense of where you're --

8 MR. LEWIS: Yeah, I understand.

9 JUDGE BOLLWERK: Okay.

10 MR. LEWIS: Your Honors, I'd like to --
11 I'd like to bring this whole question that we're
12 discussing this morning into the context in which the
13 NRC approached it and which we think is what the
14 regulations required us to do.

15 It's -- it's very interesting how in a
16 litigation proceeding of this type you get such
17 diametrically opposed interpretations of what the
18 regulations say. And what I'm specifically referring
19 to is that the opposing parties -- I'm going to call
20 them the opposing parties; that's the term I believe
21 the Board used in its -- in its order -- have
22 interpreted the NRC's regulation, in this case in
23 particular, 72.22(e), as specifically requiring a
24 finding of 20 years of reasonable assurance being able
25 to fund the construction and operation and

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1 decommissioning of the facility:

2 The regulation doesn't say that
3 specifically. I suppose that different attorneys
4 could have a different view as to whether or not that
5 inferentially is in there. However, the NRC staff
6 most emphatically thinks it is not.

7 The Atomic Energy Act provides for Section
8 182, for transfer of control of licenses. And each of
9 the regulatory parts essentially of the regulations
10 pick up on that and -- and provide specifics. A
11 transfer of control over the license has happened
12 myriad times, and the NRC has a process by which it
13 goes through to make that determination.

14 Now against that backdrop you -- no
15 regulation, no other regulation in the NRC's CFR Part
16 can be considered to require that the entity that we
17 are licensing in a particular proceeding is required
18 to remain that entity in perpetuity. And we don't
19 even have control over that. I mean that's just
20 business.

21 So I -- I would say that the -- the
22 opposing parties have basically set up an inference as
23 to what the regulations require and then have shot
24 down that inference.

25 What the NRC staff has done, and I think

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1 probably the most important document in this regard,
2 is the affidavit of Michael Dusaniwskyj, attached to
3 our original written summary filed with the Board.
4 Part 72 requires us to make a determination as to
5 whether or not the entity before us can satisfy
6 72.22(e). We made that determination.

7 It was also our position that we had no
8 recourse -- we would be acting improperly if we were
9 to be taking into consideration an entity that does
10 not then exist, does not now exist, and making some
11 findings or whatever they would be -- I don't think
12 you could even call them findings at that point -- but
13 about that entity. We had to deal with the entity
14 before us.

15 Our agency is an agency that puts an
16 important emphasis on moving as expeditiously as the
17 public interest warrants on applications. We had an
18 application before us.

19 Now that application is for a license for
20 an independent spent fuel storage installation. It
21 embraces all of the things required under Part 72, and
22 before we issue a license, we will have to make
23 findings on all of those matters covered by Part 72.

24 You know, one part of it is financial
25 qualifications and financial assurance for

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1 decommissioning. But, you know, we draw -- draw the
2 view, from what we've heard today, that the NRC is
3 somehow involved in at least an imprudent proceeding
4 or a meaningless proceeding, or perhaps even worse.
5 Just, you know, a totally improper proceeding. We
6 don't think that's the case.

7 We have an applicant before us. We don't
8 know what -- what its future course will be. We have
9 the California Public Utility Commission stating that
10 if its plan of reorganization in the Bankruptcy Court
11 prevails, it thinks everything will just be very --
12 very fine with respect to the review of this
13 application. It thinks it's a prudent -- prudent
14 endeavor. Presumably now it thinks it's a prudent
15 endeavor. And -- and then just simply points to --
16 excuse me -- to the bankruptcy as creating this
17 confusion as to how to proceed.

18 Okay. Now 72.22(e) requires specifically
19 that we make -- we find reasonable assurance that the
20 applicant either possesses the necessary funds or has
21 reasonable assurance of obtaining the necessary funds
22 or a combination of the two. And then it mentions the
23 construction costs, operating costs over the plan life
24 of the ISFSI and decommissioning costs.

25 Now the application that was originally

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1 submitted in December 21, 2001 contained the annual
2 report from the year 2000, which was the most recent
3 annual report by PG&E. And that provided us financial
4 information on the liquidity of Pacific Gas and
5 Electric Company. In particular, it gave us
6 information about revenues, the annual revenues,
7 amount available for distribution to shareholders.
8 Figures like that.

9 These -- these figures have more recently,
10 because that was a 2000 report, and you know things
11 have moved along very volatily since, but the -- the
12 most recent information on that was provided in the
13 affidavit of Walter Campbell, dated -- give me one
14 moment -- well, it's attached -- it's attached to the
15 Summary of Facts and Data -- Facts, Data and Argument
16 on which PG&E will rely, and that was April 11th,
17 2003.

18 And the more -- the more recent
19 information that Mr. Campbell provided was that PG&E
20 had capital expenditures of over \$1.5 billion,
21 operating revenues of over \$10 billion, earnings
22 available for common stock of over \$1.7 billion, for
23 the 12-month period ending December 31, 2002. So that
24 brings us up to a more recent set of figures that are
25 indicative of the kinds of resources that this entity

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1 possessed.

2 Now we have to say here, we have to
3 acknowledge here that the -- what PG&E can do with
4 those resources is significantly constrained by the
5 fact that it is before a bankruptcy judge. But we
6 have also attached in documents that we have provided
7 an approval of a contract for -- for services from
8 Holtech, H-o-l-t-e-c-h, Corporation, which is going to
9 provide the casks and the canisters for the ISFSI; and
10 that was approved by the -- by the bankruptcy judge.

11 The position that we understand PG&E has
12 taken in the bankruptcy proceeding is that the
13 construction and completion and availability of this
14 ISFSI is extremely important to the continued
15 operation, maybe essential to the continued operation
16 of this Power Plant. And I'm not a bankruptcy
17 practitioner, but I'm sure the judge would give that
18 significant consideration when that argument was made
19 before him as to whether or not it was an -- a
20 contract and an expenditure which he would approve.

21 JUDGE BOLLWERK: One of the parties -- one
22 of the interested -- I believe interested governmental
23 entities makes the point that obviously the bankruptcy
24 judge has to approve expenditures of cash. I guess
25 what you're saying is that doesn't bother you, that

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1 control by the bankruptcy judge over the possible
2 ability of PG&E to move forward with the ISFSI or how
3 it, in fact, is funded?

4 If for some reason the bankruptcy were to
5 proceed forward for some period of time indeterminate,
6 rather than being, you know, ruled on at some point.

7 MR. LEWIS: My -- from my understanding of
8 bankruptcy law, there is no reason to assume that a
9 debtor in possession in a voluntary reorganization
10 proceeding will be precluded by the bankruptcy judge
11 from making such expenditures and entering into such
12 contracts as the bankruptcy judge concludes are
13 necessary for its continued operation as a debtor in
14 possession.

15 JUDGE LAM: But if that were to be the
16 case, assuming the unlikely would happen, Mr. Lewis,
17 what recourse would the staff have? This is going
18 along with the scenario Ms. Curran is proposing.
19 Assuming the license is granted and then something
20 happened in the Bankruptcy Court, all money is frozen,
21 nothing will come this way or that way. Then what
22 would happen to the license and what action can the
23 NRC staff take if the facility is built, the storage
24 casks are sitting there, there's no money to operate
25 it? What can the staff do?

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1 MR. LEWIS: Well, I think -- I'm -- if the
2 scenario is that somehow we are still in a bankruptcy
3 proceeding in 2006, which is the projected date when
4 they would start to operate the ISFSI, I think the NRC
5 would be worried about a lot of safety matters at
6 Diablo Canyon. One of them would be the ISFSI.

7 The ISFSI is -- I'm going to check with
8 Randy and make sure I'm right -- it's basically a
9 passively-operating system. So -- so that as compared
10 to the reactor, which has many active systems, it
11 would probably fall into a slightly lesser category of
12 safety concern under that situation.

13 But certainly if -- if, you know, the
14 entity that is still the licensee were totally unable
15 to expend funds, NRC would be taking major enforcement
16 actions in the nature of orders and things of that
17 type.

18 So from the staff's point of view what we
19 had before us is we had before us statements of record
20 about substantial amounts of liquidity in Pacific Gas
21 and Electric Company. Then we had before us estimates
22 of the costs associated with the construction and
23 operation and decommissioning of the ISFSI.

24 I think the construction costs were on the
25 order of 63 million, the operating costs through 2040

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1 were on the order of, I'm going to say, and I'm going
2 by -- I'm not looking at a document right now,
3 somewhat less than 200 million. And -- and the
4 decommissioning costs were somewhere between 12.5
5 million and 13 something -- 13 point something
6 million.

7 You have heard argument, vehement argument
8 today and strongly-felt argument today that the NRC
9 staff made a purely subjective judgment about the
10 ability of this facility, this licensee to comply with
11 72.22. That is not the case.

12 These numbers are the type of
13 consideration that an economist at the NRC, such as
14 Mr. Dusaniwskyj, takes into account in -- in making a
15 judgment as to whether or not the applicant can
16 fulfill that regulation. He looked at -- he looked at
17 the numbers he had before him. He looked at the
18 projected costs of this facility and he made a
19 judgment that he saw no issue with respect to -- no
20 impediment for this entity before us to be able to
21 cover -- cover all the costs that are listed in
22 72.22(e).

23 Mr. Dusaniwskyj also wears, you know, many
24 other hats at the NRC, but one of them is that he also
25 reviewed the submittal in the license-transfer

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1 proceeding. And so he's certainly very familiar with
2 -- with the facts that were set forth there regarding
3 the successor entity that PG&E wanted the NRC to give
4 concurrence, to give our concurrence to the transfer.

5 But -- but collectively the staff in
6 discussion about what we had before us in this case
7 made a determination that we were dealing with the
8 current applicant. And frankly we saw no reason not
9 to proceed on that basis. I do not think it would
10 have been consistent with general Commission practice
11 for us to have said that, 'Well, this is, you know, a
12 meaningless proceeding,' and so we have proceeded on
13 the basis of the record that we had.

14 And I -- I would submit to you that on
15 those facts, the -- the numbers in fact demonstrated
16 a clear ability of the -- of PG&E to comply with the
17 regulations.

18 Now we -- we addressed also the fact that
19 also in the affidavit of Mr. Dusaniwskyj that we knew
20 that included in the current rate proceeding before
21 the CPUC were -- was a request for coverage in the
22 ratebase of moneys for the ISFSI and also we took note
23 of the fact that the bankruptcy judge had approved the
24 Holtech contract.

25 And what we were probing in addition to

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1 just looking at PG&E as though the bankruptcy didn't
2 exist, which of course I mean it would be impossible
3 and irresponsible, and we certainly wouldn't, you
4 know, refuse to take into account that the bankruptcy
5 proceeding was going on, but we -- but we looked at
6 these other venues where things are happening and we
7 believed that there still was a reasonable assurance
8 that the PG&E would be able to cover the costs
9 associated with 72.22(e).

10 It -- in this regard, I am not an expert
11 on California law and the only thing I would say in
12 response to some of the comments that Mr. Chaset has
13 made is that I would have to assume that as long as
14 PG&E is a rate-regulated entity with a request pending
15 before the CPUC, that the CPUC has to give the
16 requests before it due and careful consideration in
17 accordance with state law.

18 So I mean I don't know -- I don't know
19 what it means in that context and I'm not saying that
20 I know that what he -- that what Mr. Chaset said is
21 wrong, but I don't know what it means in that context
22 for a representative of the CPUC to say, 'Well, if
23 the' -- 'if the company is going to become a
24 nonregulated wholesaler, then we' -- you know, 'we
25 just wouldn't' -- 'we wouldn't put the rates' -- 'we

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1 wouldn't put this into the ratebase.'

2 Maybe it's as easy as he describes it. I
3 know that in other regulatory agencies whose rules
4 I've looked at, it doesn't strike me that it is that
5 easy.

6 That's our basic case. I mean we really
7 see it as a rather straightforward inquiry the staff
8 made with regard to a particular regulation and we
9 made our findings based on the record, which I think
10 provides ample support for our findings.

11 Now there has been mention here about the
12 transfer proceeding. The transfer proceeding really
13 is no longer an adjudicatory proceeding because the --
14 I'm talking now about the request to the Commission to
15 -- for the NRC to give its consent to the transfer of
16 the Part 50 license of Pacific Gas and Electric
17 Company to -- for Diablo Canyon, to two entities that
18 would be created by the reorganization proposal. All
19 of the parties that -- that did intervene in that
20 proceeding were either -- were either rejected as
21 intervenors, and now -- and now the Commission has
22 decided whatever other pending issues were there.

23 So that -- what that now is is an
24 application. It's an application for approval of a
25 transfer, which is still pending before the NRC.

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1 In response to something that Mr. Trubatch
2 said about, that he was unfamiliar anywhere in NRC
3 regulations, caselaw, et cetera of a requirement that
4 in a transfer proceeding the NRC make the same
5 findings about financial qualifications and assurance
6 that it would for an initial applicant. I would point
7 Mr. Trubatch and the other parties here to 72.50,
8 which is transfer of license, (b) (1). I will quote:
9 An application for transfer of a license must include
10 as much of the information provided -- excuse me --
11 the information described in 72.22.

12 And I'm going to skip on to what the part
13 is that I want to get at: And financial
14 qualifications of the proposed transfer -- transferee,
15 as would be required by those sections if the
16 applicant were for an initial license.

17 So there it is. I -- I...

18 JUDGE BOLLWERK: So I take it your
19 position is, as Mr. Trubatch described it, that there
20 is no regulatory gap?

21 MR. LEWIS: There is no regulatory gap.
22 Clearly not.

23 If you would give me moment, I just want
24 to switch to another part of this.

25 One of the -- one of the things that we

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1 have heard -- seen in the pleadings from the Energy
2 Commission and heard today is that -- that the NRC
3 staff has been derelict in its responsibilities
4 because we have presumed a particular outcome of the
5 bankruptcy proceeding.

6 And the corollary argument they make is
7 that we have refused to consider the potential outcome
8 which is that the CPU- -- the CPUC alternative plan of
9 reorganization is the one that prevails in the
10 bankruptcy proceeding. Well, the answer is we have
11 considered -- we have made no assumption as to what
12 will happen.

13 It is not -- I find it extremely strange
14 that because in the initial application there was a
15 full disclosure, what I would call a full disclosure
16 referenced to us of the fact that there was a
17 bankruptcy, which we knew about anyway being hopefully
18 reasonably-informed people, to say that that made the
19 information about the successor entities that PG&E
20 wanted to create a subject for a finding by the NRC in
21 this proceeding. It did not and it could not have.
22 The information was not provided to us.

23 There was not a type of record set before
24 us in this proceeding which would have enabled us to
25 make a finding about the proposed successor entities.

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1 And I -- you know, I would think that people dealing
2 with regulatory findings and administrative law would
3 -- would readily agree that, you know, the most
4 reasonable interpretation of what PG&E did there was
5 -- was that it was a full disclosure -- a full
6 disclosure made by PG&E.

7 In fact, I assume that the opposing
8 parties would be most unhappy if -- if the application
9 had come in with no such disclosure, but it came in
10 with a disclosure.

11 The -- may I pause for a moment? I want
12 to consult with my co-counsel for a moment.

13 JUDGE BOLLWERK: All right.

14 (Pause while NRC counsel confer off
15 record.)

16 MR. LEWIS: Your Honors, that completes
17 the staff's presentation on this at this time.

18 JUDGE BOLLWERK: All right. I have a
19 couple of questions that I'm going to -- I don't know
20 if any of the other members do.

21 What, if anything, would you like to say
22 about the -- I guess the arguments that have been made
23 by Pacific Gas and Electric regarding the need for a
24 five-year projection of costs or limited to a five-
25 year projection of costs under 50.33(f)(2) as opposed

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1 to 72.22(e) which talks about -- (e) (2) I guess talks
2 about operating costs over the lifetime of the
3 facility?

4 MR. LEWIS: Well, I think that what that
5 speaks to is the fact that when you have a new entity
6 you do -- the regulations do in fact require you to
7 make a specific projection. In fact, -- in fact, what
8 would -- what really drives that is that that is a
9 nonrate-regulated entity. And in lieu of the
10 presumption in Part 50 of financial qualifications of
11 a rate-regulated Part 50 applicant or a licensee, when
12 you're dealing with a nonrate-regulated licensee or
13 applicant, you need five years of projected revenues
14 and expenses.

15 So -- so I mean even in that situation it
16 seems to me that that is -- that is speaking to a
17 situation that we would have to face if we were
18 looking at a nonregulated entity. It's -- it's really
19 -- the findings of financial qualifications and
20 decommissioning in Part 72 are not as prescribed as
21 the Part 50 provisions. And I think many Members of
22 this Board are well aware of that point, that you --
23 we don't simply -- we can't apply all of the
24 prescriptive requirements of Part 50 to Part 72, but
25 nevertheless I think that with an entity that was

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1 nonregulated, we would take a hard look at their
2 projected revenues, costs, and all the considerations
3 that we felt were -- were covered under the financial
4 -- the reasonable assurance finding that we needed to
5 make.

6 I think what I quoted from 72.50 really
7 kind of -- well, from 72.50 as to having to make those
8 findings when there's a transfer, and if that transfer
9 is to a nonregulated entity, which is what it would be
10 in this case, then we would have to make a series of
11 findings. In that regard it probably -- this is
12 probably something the parties are aware of, but maybe
13 not. The transfer application that we're dealing with
14 now is for the Part 50 facility.

15 If -- if there is the culmination of a
16 transfer of the facility -- in this case I'm referring
17 to the ISFSI facility -- along with a Part 50 facility
18 to -- to these new entities envisioned by PG&E, and we
19 had already issued a license to PG&E, there would have
20 to be a transfer application made. And that would be
21 noticed.

22 JUDGE BOLLWERK: I guess what I'm having
23 trouble understanding is normally the Part 72
24 regulations are less prescriptive than Part 50
25 regulations, but Part 72 here talks about the

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1 operating costs over the lifetime of the facility,
2 which could be 20 years. And at least there's an
3 argument in the Private Fuels Storage case, at least
4 40 years. Where here all we're talking about, for a
5 nonrate-regulated utility, which is the -- I mean at
6 least as counsel for the California Public Utility
7 Commission has indicated, is a less -- seems to be
8 less clear in terms of their responsibility of the
9 rates, you have only five years.

10 I'm sort of trying to figure out why --
11 what the -- how -- this is actually less prescriptive
12 arguably than what's in part 72. I'm just -- can you
13 help me with understanding that?

14 MR. LEWIS: Yes. Let me -- let me try to
15 address that question, Your Honor. I mean we have
16 always assumed that -- that the reason that the other
17 parties have been referring to this 20-year, in this
18 case, timeframe is because of the -- the provision in
19 (e) -- 50 -- 72.22(e)(3), which talks about one of the
20 things that has to be demonstrated is that you either
21 have the money or will be able to get the money for
22 estimated decommissioning costs and necessary
23 financial arrangements to provide reasonable assurance
24 before licensing and that decommissioning will be
25 carried out after the removal of spent fuel and high

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1 level radioactive waste.

2 So -- and above that you have in (2):
3 Estimated operating costs over the planned life of the
4 ISFSI. The staff did, in fact, look at the current
5 applicant with a view to what its resources are. Even
6 -- even when we -- even when a regulation explicitly
7 says "reasonable assurance of having the funds over
8 the estimated operating life of a facility," it can
9 still only be a predictive finding.

10 In this proceeding the staff chose to
11 treat PG&E, as it currently exists, as the entity for
12 which we would look -- make our predictive finding as
13 to their ability to meet that. And -- and that is why
14 I pointed to the numbers that we had before us.
15 Admittedly -- admittedly this wording does put an
16 obligation on the staff to have a future focus to its
17 -- to its review. And I think that the finding that
18 we made took into account that future focus.

19 JUDGE BOLLWERK: All right. A question.
20 There has been some discussions about discovery that
21 was or wasn't turned over. Is there anything you want
22 to say about that?

23 MR. LEWIS: Yes. I think that what was
24 requested was whatever findings Mr. Dusaniwskyj had
25 made regarding the financial qualifications and

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1 decommissioning financial assurance of PG&E. And the
2 staff had not made any final findings as to that at
3 that time. And so therefore there were no documents
4 that constituted what we understood counsel for the
5 interested government parties to be asking for. So we
6 weren't withholding anything. What -- what we
7 provided was in our affidavit, in Mr. Dusaniwskyj's
8 affidavit.

9 JUDGE BOLLWERK: There were a couple of
10 questions that were raised, I guess, about different
11 matters dealing with decommissioning. One is a
12 question of the \$10 million payment that wasn't made.
13 Does the staff want to say anything further about that
14 in terms of that?

15 MR. LEWIS: Well, the -- the -- as far as
16 the funding of the ISFSI goes in terms of
17 decommissioning financial assurance, under our
18 regulations they're not in noncompliance with
19 anything. The requirement is that they show before
20 they get a license that they have -- either have the
21 funds or have reasonable assurance that the funds will
22 be there.

23 The fact that certain payments were missed
24 is not -- it may be indicative of problems that the
25 company has been having recently and certain business

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1 decisions that it has made recently, but it does not
2 indicate that it would -- that the licensee will not
3 have the ability to fund the activities described
4 under 70.22 before it is licensed.

5 JUDGE LAM: Now to go with -- Mr. Lewis,
6 to go with what you just said, when the staff examine
7 the licensee's financial qualifications, you look at
8 if the licensee has the money or the ability to get it
9 in the future.

10 Now it strikes me in this particular
11 proceeding the money involved relative to the
12 licensee's current assets is small. When I read the
13 licensee's pleading, I see the licensee is making the
14 claiming it has a current cash position at hand in
15 excess of \$3 billion.

16 The estimate that you quote in your
17 pleading, Mr. Lewis, is \$63 million of construction
18 costs, no more than \$180 million in operating costs
19 over a period of 36 years, and a decommissioning cost
20 of 13,- to \$14 million. If that is the case here, why
21 does not the NRC staff consider instead of the
22 licensee's ability to get it in the future, get the
23 money now, either by setting aside money in escrow or
24 by some sort of income-producing instrument with its
25 current cash at hand?

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1 Would that bypass all the dispute here
2 regarding what the Bankruptcy Court may or may not do?
3 Would that provide better assurance that indeed this
4 facility, if it meets other criteria for approval,
5 would be sufficiently funded?

6 MR. LEWIS: Well, I'm going to have to
7 make reference to Part 50 provisions in order to try
8 to address your question and then -- and then I will
9 point out something about Part 72.

10 The -- in our regulations, we -- first of
11 all, we do not rely obviously just on cash onhand. I
12 mean cash onhand is usually a relatively small amount
13 of the consideration of the value of the moneys that
14 can be made available, particularly where you have a
15 trust fund which is set up.

16 The NRC has never benchmarked, by which I
17 mean we have never said there is a particular curve on
18 which a licensee has to fall over the course of its
19 operating life in accumulating funds for
20 decommissioning. What it does have to do is it has to
21 continue to provide us reasonable assurance that it
22 will be able to pay for decommissioning. And now
23 we're talking about decommissioning of an entire Part
24 50 facility as well as a Part 72 facility at the time
25 of end of operation.

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1 And -- and so under our regulation it's
2 not a violation of anything in the NRC's regulations
3 that in a particular year a certain payment was not
4 made. Now there may be -- I just simply don't know
5 enough facts about -- you know, about what the
6 representations, written representations made to the
7 NRC on this point were to tell you anything more
8 specific about what the NRC would or would not do
9 regarding that \$10 million.

10 I do know that Mr. Dusaniwskyj is also the
11 person reviewing all of the decommissioning financial
12 assurance reports required to be submitted every two
13 years; and the most recent ones were submitted by
14 March 31st, 2003, including the decommissioning
15 submittal for the Part 50 facility, Diablo Canyon.

16 So we continue to look at those things.
17 If there were a significant shortfall in -- in
18 funding, that would be a matter of extreme concern to
19 the staff. Our regulations, since they do not
20 prescribe a specific schedule or curve for the build-
21 up of that fund, do not explicitly tell us what we
22 would do, so we would probably have to seek
23 consultation with our Commission.

24 JUDGE BOLLWERK: With respect to
25 decommissioning, there was also I guess a question

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1 raised about the role of the Bankruptcy Court in terms
2 of the transfer of interest of that, of the fund
3 without the California Public Utility Commission
4 approval. Is there anything further you can tell us
5 about that in terms of the staff's position?

6 MR. LEWIS: We know nothing specific about
7 the circumstances of the California Commission. We do
8 know that transfer of decommissioning funds has been
9 a pacing matter in many transfer approvals and has
10 entailed meeting requirements of a number of agencies,
11 such as FERC. The IRS has been very important in it.
12 And that's the sum of my knowledge on the subject.

13 JUDGE BOLLWERK: Now you mentioned the
14 IRS. And I want to -- I believe one of the reasons
15 that the applicant gave for the reason they hadn't
16 transferred the funds at this point was because of IRS
17 considerations. Is that something the staff takes
18 into account?

19 MR. LEWIS: Well, we are aware of the fact
20 that the IRS has to make certain rulings about -- yeah
21 -- about how taxes are going to be handled with
22 respect to these transfers. I mean that's obviously
23 a very sensitive subject. So there's a certain --
24 excuse me one moment.

25 (NRC staff and counsel confer off record.)

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1 MR. LEWIS: That's basically it, that --
2 that we know that the IRS has to make some approvals
3 and the taxation considerations are a major factor
4 here. And so that's what we took the licensee's
5 comments to be speaking to.

6 JUDGE BOLLWERK: All right. Anything
7 further from any of the Board Members?

8 All right. At this point then we would
9 turn to the applicant and Mr. Repka.

10 MR. REPKA: Thank you, Judge Bollwerk. I
11 have no desire here this morning to repeat all that's
12 in our written submissions. We're quite pleased with
13 our written submissions and believe they fully address
14 the issues in the case.

15 And what I want to do this morning is
16 focus on some of the issues that have been discussed
17 here this morning and answer any Board questions that
18 you may have. And with that, I don't expect us to
19 spend the full two hours, and probably something less
20 than an hour.

21 Let me -- let me start this morning by
22 doing something a little bit unusual. I'm going to
23 start by agreeing with something that Ms. Curran and
24 the Mothers for Peace said at the top of their
25 argument. They said that they were not asking for an

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1 evidentiary hearing and that there was no genuine and
2 substantial issue of fact in dispute that would
3 support that kind of evidentiary hearing, and we
4 certainly do agree with that.

5 Certainly the arguments that have been
6 made by all of the various parties in the written
7 filings and again this morning do not contain and do
8 not reflect a genuine and substantial dispute of fact
9 that would come anywhere near meeting the threshold
10 provided in Subpart (k) of the Commission's
11 regulations to support a further evidentiary hearing.

12 What we really have is a question of
13 whether or not the facts and evidence supports a
14 conclusion that PG&E, the electric utility applicant
15 in this case for a Part 72 license, has the financial
16 qualifications necessary to meet the requirements of
17 10 CFR Section 72.22(e). And it's on that point where
18 we diverge.

19 We think that we have included in our
20 filings, including testimony from qualified experts,
21 a substantial record that supports the conclusion that
22 the current applicant, PG&E, again the electric
23 utility, is financially qualified and meets all NRC
24 regulations that apply to Part 72 applicants and
25 licensees.

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1 Having said that, we heard this morning
2 from the Mothers for Peace that a new argument that
3 somehow a waiver would be required, I think that
4 argument seemed to be directed mostly at their feeling
5 that the staff had not made the sufficient finding to
6 date. We believe very strongly that no waiver is
7 required. There is -- that is a new argument,
8 obviously. But, in any event, we believe the record
9 supports the conclusion that PG&E is financially
10 qualified.

11 And I wanted to respond a little bit to
12 the idea that the argument that we've heard from the
13 Mothers for Peace, as well as I believe from the
14 governmental participants, that the staff has done an
15 inadequate review. The substantial Commission
16 precedent stands for the proposition, particularly in
17 the context of a safety review, which this is, that
18 it's the application that's the issue in the hearing
19 and not the quality or sufficiency of the staff's
20 review.

21 Particularly I'll cite a case involving
22 the curators of the University of Missouri. It's a
23 Commission Decision, CLI-95-1. It can be found at 41
24 NRC 71, pages 121 to 123. And it states, and I
25 believe I'm quoting here or if I'm not quoting I'm

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1 paraphrasing very closely: The adequacy of the staff
2 safety review is, in the final analysis, not
3 determinative of whether the application should be
4 approved. That's a 1995 Decision.

5 Similarly, there's a 1989 NRC Appeal Board
6 Decision involving Florida Power and Light and the
7 Saint Lucy Plant. It can be found at ALAB-921 30 NRC
8 177 at 185 to 186. That supports the same idea that
9 the staff's -- adequacy of the staff's review is not
10 the issue.

11 Finally I'll cite to the NRC's, the
12 Commission's 1989 Amendments to its Part 2 Hearing
13 Procedures, published at 54 *Federal Register* 33168,
14 specific -- and the specific cite at 33171. And it's
15 where it states, quote: The sole focus of a hearing
16 is whether the application satisfies NRC regulatory
17 requirements rather than the adequacy of NRC staff
18 performance.

19 So I think with that it's very clear that
20 the issue is whether or not PG&E has submitted
21 sufficient information to demonstrate that we meet 10
22 CFR 72.22(e). And, as I said, I believe that -- that
23 we have done that.

24 With that prelude I think it's necessary
25 first to talk a little bit about the scope of the

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1 issue in this case. Quite clearly, the applicant is
2 PG&E. The Licensing Board has focused Contention TC-2
3 on the financial qualifications of the current PG&E,
4 the electric utility.

5 We're not here today to focus on the
6 financial qualifications of successor entities,
7 including the proposed -- a proposed transfer to
8 Electric Generation, LLC that may or may not one day
9 result if the PG&E plan of confirmation -- plan of
10 reorganization is confirmed and if the NRC license
11 transfer of the Part 50 license is approved. That's
12 simply not the issue today.

13 The Energy Commission mentioned this
14 morning in their presentation that there is
15 uncertainty regarding who the applicant is. And that
16 quite clearly is not the case. There is no
17 uncertainty. The application is PG&E, and that's
18 clear from the application. It's clear from the
19 company's June 7th supplement to the application.
20 It's clear from all the filings that have been
21 submitted to date. And it's also clear from the
22 Board's own decision addressing the scope of
23 Contention TC-2.

24 Recognizing that the utility is the
25 applicant, I want to respond here briefly to the

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1 motion that the Board take official notice of a
2 Washington Post article last week regarding the
3 earnings report for PG&E National Energy Group, or
4 NEG. NEG is a wholly-owned subsidiary of the holding
5 company PG&E Corp.

6 PG&E NEG is a completely separate legal
7 entity, apart from PG&E, the electric utility. PG&E
8 NEG controls various generation assets, unregulated
9 generation assets, natural gas, transmission assets,
10 and some electric trading and marketing businesses.
11 And the financial performance of that entity and even
12 the potential, any potential restructuring of that
13 entity in Chapter 11 or otherwise simply is irrelevant
14 and immaterial to the issue before the Board in this
15 case.

16 There is -- as a separate legal entity,
17 there can be no argument that the financial condition
18 or liabilities of PG&E NEG can affect PG&E, the
19 electric utility. PG&E, the utility, has no assets
20 pledged to NEG. And certainly it would require no
21 expert in bankruptcy law to recognize that PG&E could
22 not transfer its assets, particularly in bankruptcy,
23 to another subsidiary.

24 So, therefore, we oppose the motion to
25 take official notice of the Washington Post article.

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1 Putting aside whether or not a newspaper article is
2 something that the Board could take official notice
3 of, in the first place, the fact is it's simply
4 irrelevant and immaterial to the issue in this case.

5 Unless the Board has further questions, I
6 don't propose to address that issue any further. And
7 given that Mr. Lewis has asked to respond, we would be
8 willing to put something in writing next week on that
9 topic.

10 In the Board's December Order admitting
11 the contention in this case, the Board quite clearly
12 stated that "The admitted contention concerns whether
13 or not there is an impact on PG&E during its pending
14 bankruptcy on its access to continued funding as a
15 regulated entity or through the credit markets and,
16 therefore, whether there was an effect on its
17 financial qualifications." We believe the evidence is
18 quite clear that access to credit markets is not an
19 issue pending the bankruptcy, number one.

20 And, number two, the pending bankruptcy
21 does not affect PG&E's current access to the
22 regulated-rate process. In fact, prior to the
23 bankruptcy Diablo Canyon operated under a settlement
24 agreement with the California Public Utilities
25 Commission dating from 1988 and amended several times

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1 since then, in which PG&E was not operating Diablo
2 Canyon on a cost-of-service ratemaking basis. Rates
3 were set under the settlement agreement at certain
4 price points or cost points that were intended to
5 incentivize plant performance. It was, however, not
6 cost-of-service rate regulation.

7 During the California energy crisis or
8 subsequent to the California energy crisis and the
9 financial difficulties that that created for PG&E, all
10 of PG&E's retained generation, including Diablo
11 Canyon, were returned to a traditional cost-of-service
12 rate regime, and that's where it resides today.

13 I think Mr. Chaset alluded to the fact
14 that there currently is a rate proceeding before the
15 CPUC. That's known as the 2003 General Rate Case, or
16 GRC. So there really is no question during the
17 bankruptcy whether or not there is access to the
18 ratemaking process.

19 All of the arguments I think that have
20 been made with respect to the Board's finding in this
21 case are variations of uncertainty arguments,
22 arguments that the future creates doubts about the
23 present. The fact of the matter is, though, that
24 issue and the financial qualifications of successor
25 entities are not before us today.

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1 The argument we seem to hear is that PG&E
2 today needs to address all of the various scenarios
3 that might unfold in the future, including transfers
4 of the Power Plant and the ISFSI to some successor
5 entity. That issue is not being ignored. It will not
6 be ignored. It's simply not before us here today.

7 As we said in our papers, the NRC's
8 regulatory process is extremely pervasive. It's
9 extremely rigorous. And it's also quite flexible, to
10 deal with issues when they ripen, when they mature,
11 and when they arise.

12 At this point we cannot license an entity
13 that hasn't been confirmed to become the owner of the
14 Power Plant and the ISFSI to be the initial licensee
15 for this particular facility. So obviously PG&E is
16 the current applicant, will be the initial licensee
17 unless and until developments in the bankruptcy case
18 change that, at which point the NRC's regulatory
19 process will assure that sufficient reviews are
20 performed, including of the financial qualifications
21 of that successor entity.

22 Mr. Lewis alluded to the regulations and
23 for license transfers for Part 72 licenses. They
24 certainly do apply. And with all due deference to Mr.
25 Trubatch, they do require financial qualifications

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1 review. And that simply is not before us yet today.

2 In the meantime there's a substantial
3 likelihood that PG&E will continue to operate Diablo
4 Canyon and the ISFSI for an indefinite period, pending
5 the bankruptcy and even possibly post-bankruptcy if
6 for some reason the PG&E plan of reorganization were
7 not confirmed by the Bankruptcy Court.

8 That's the hand that we're dealt today.
9 The NRC can deal with that hand and will assure
10 adequate financial qualifications. It will assure
11 continued safe operation of the ISFSI, just as the
12 Power Plant has continued to operate safely during the
13 pendency of the bankruptcy.

14 I think the governmental participants in
15 particular tend to whipsaw us on this argument about
16 who should be the licensee and what should happen
17 first. And they -- they like to argue that we're
18 somehow improperly taking credit for the post-
19 bankruptcy proceeding on the one hand, and on the
20 other hand that we're somehow ignoring the post-
21 bankruptcy situation. That strikes me sort of as a
22 "heads, we win; tails, you lose" kind of argument.
23 And it simply is not appropriate or compelling
24 argument.

25 The fact of the matter is we have

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1 referenced the Part 50 license transfer. We have
2 responded to the argument that the post-bankruptcy
3 situation is being ignored. And we've been very
4 clear, that in the Part 50 license transfer there are
5 financial projections for the operations of the Power
6 Plant that include the ISFSI, and those projections
7 show operating expenses, including expenses related to
8 the ISFSI, and projected revenues under the plan of
9 reorganization and its relating -- its inherent
10 bilateral power sales agreement. And those
11 projections show that in that post-bankruptcy
12 situation revenues would be more than sufficient to
13 offset the costs of operations at Diablo Canyon.

14 However, having said that, -- well, let me
15 first say that in the Part 50 license-transfer
16 context, where those projections are directly in issue
17 or were directly in issue, no party, including the
18 parties present in this room today, who participated
19 in that proceeding ever raised a substantive challenge
20 to those projections. Yes, they did raise arguments
21 that -- that constituted arguments against the plan of
22 reorganization, but those were not substantive
23 challenges to the projections.

24 So the fact of the matter is based on all
25 the assumptions inherent in the plan of reorganization

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1 there is in that context sufficient evidence to show
2 that the ISFSI can be funded and can be supported on
3 an ongoing basis.

4 Having said all of that, however, we are
5 not relying on that here today. PG&E, the electric
6 utility, is the applicant. And the fact of the matter
7 is PG&E, the electric utility, has access to -- to the
8 rate process and will continue to have access
9 literally unless and until that changes as a result of
10 the bankruptcy case.

11 Let me -- let me try to summarize a little
12 bit of what's in the various filings with respect to
13 the showing required by 10 CFR 72.22(e).

14 First, the regulation requires that we
15 provide estimates of construction costs, estimates of
16 operating costs over the plan life of the ISFSI, and
17 estimated decommissioning costs. We have done that in
18 the application. I think those numbers have been
19 repeated several times here this morning.

20 But, essentially, costs of construction in
21 the initial period, between now and 2025, would be on
22 the order of \$63 million.

23 Operating costs in the next period -- I'm
24 sorry. Operating costs including the storage cask
25 during that same period would be \$69 million.

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1 Operating costs for the second period, from 2026 to
2 2040, would be \$107 million.

3 And estimated decommissioning costs
4 related to the ISFSI, therefore not including
5 nonradiological decommissioning and not including
6 Power Plant decommissioning, would be \$12.5 million,
7 or \$13.9 million if you considered certain financial
8 contingencies.

9 All of those estimates in 2001 dollars.

10 The import of mentioning those numbers is
11 twofold. Number one, those numbers have never been
12 challenged substantively by any party to this
13 proceeding, so there really is no issue in dispute
14 with respect to the estimates.

15 And, number two, those numbers when
16 compared to the current financial condition of PG&E,
17 the applicant in the case, show that these numbers are
18 very, very small in terms of the overall operations of
19 Diablo Canyon and the overall assets and revenues of
20 the utility.

21 The governmental participants in their
22 filing wanted to dismiss this argument as, and I
23 quote, the blather about big numbers. Well, I find
24 that comment to be particularly disturbing and
25 disingenuous because ultimately that's what this case

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1 is about, is about the numbers. And it's the numbers
2 that show that PG&E is indeed financially qualified,
3 notwithstanding the bankruptcy situation.

4 PG&E is a solvent debtor in possession.
5 Following the California energy crisis of 2000, PG&E's
6 rates were -- PG&E's retained generation was returned
7 to the cost-of-service rate process. Prices of
8 electricity have since declined and other changes were
9 made with respect to the procurement of power.

10 So, in essence, PG&E is operating as a
11 solvent debtor in possession. The bankruptcy is not
12 about a current shortfall of revenues to cover
13 expenses. That's not the case. The financial
14 statements show that. It's really about a way of
15 restructuring the debt that was created in 2000 and
16 2001 when because of the flawed deregulation scheme,
17 the costs that were allowed to be recovered through
18 rates was far below the cost of electricity in the
19 market. So we really have a situation where the PG&E
20 bankruptcy filing is addressing past events. It
21 doesn't relate to the current situation.

22 As I mentioned earlier, there are costs
23 currently involved in the 2003 General Rate Case
24 before the California Public Utilities Commission. I
25 think they're, from what I understand in that case and

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1 from what I've heard this morning, there is no real
2 dispute that those costs represent improving costs and
3 that they would be disallowed in the proceeding.

4 The one issue that has presented itself
5 again this morning was a question raised by Mr. Burns,
6 the expert from the CPUC, who was affiliated with the
7 Office of Ratepayer Advocate, which is an arm of this
8 -- or an office within the CPUC, about not wanting to
9 commit to longterm support of Diablo Canyon in the
10 rate process if, in fact, it's ultimately going to be
11 transferred to a nonrate-regulated entity.

12 We understand that concern, but we also
13 understand that currently in the rate process there
14 have been no recommendations for adjustments to be
15 made based upon that argument. And, in fact, as Mr.
16 Campbell points out in his affidavit, that the way the
17 expenses are being treated from an accounting
18 perspective we believe represents a fair and accurate
19 accounting at this point.

20 And certainly if and when -- if the
21 eventuality arises that in some way -- if the plant
22 and the ISFSI will be transferred, then in that
23 scenario, if there's any adjustments to be made to the
24 rate process or any allocation, that is something that
25 certainly can be dealt with at an appropriate time if

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1 it's appropriate at all.

2 So, again, I think that that argument is
3 putting -- is getting ahead of the facts when -- and,
4 in fact, I think that in the current rate case there
5 has been no suggestion to make adjustments based upon
6 that argument.

7 I think the next question that's been
8 presented is one of purely a legal argument as to what
9 10 CFR 72.22(e) requires at this point. I think that
10 the Board had a question earlier for Mr. Lewis that
11 seemed to be getting at that.

12 The point we made in our filings was that
13 -- that 72.22(e) does not require a financial
14 projection for 20 years. Part 50, related to power
15 reactor licensees, requires that kind of projection
16 for a nonrate-regulated entity. In our case, for the
17 ISFSI, the applicant is a rate-regulated entity and
18 even -- even if the five-year requirement were to
19 apply, which this Board has already held in its
20 December decision that it doesn't, obviously five
21 years or something less than 20 years.

22 So what is the Commission after in
23 72.22(e)? There certainly can be no argument that it
24 is some sort of full projection for 20 years for a
25 rate-regulated entity. Nor can it be an argument that

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1 this predictive finding must address every conceivable
2 scenario that might -- might result over the next 20
3 years in terms of who the licensee might become.

4 Again, the NRC's regulatory process is
5 very rigorous and very pervasive. It can deal with
6 license transfers when and if they occur. There's no
7 reason to anticipate that now.

8 Also there's no requirement that the
9 entity that is the licensee always be a rate-regulated
10 entity. We've heard variations of the argument that
11 there's some uncertainty created by that fact alone
12 and that a nonrate-regulated entity couldn't possibly
13 be qualified to hold the ISFSI license. Well, again,
14 the issue's not before us. We don't have to decide
15 that today, but that argument is completely
16 inconsistent with the NRC's own policies and practices
17 in that the Commission has issued licenses and
18 transferred licenses to nonrate-regulated entities to
19 own and operate nuclear power plants.

20 The NRC in their 1996 Policy Statement
21 specifically recognized that the deregulation and
22 restructuring of electric utility industry was
23 creating that possibility.

24 And the upshot of that policy statement is
25 that the financial qualifications issues unique to

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1 nonrate-regulated entities will be addressed in
2 license transfers when that license -- when the
3 license transfer is proposed. So, again, we're not
4 here today to address that. We don't need to address
5 that today under the NRC's regulatory approach. And
6 it certainly can be addressed at an appropriate time.

7 But simply to argue that because this
8 scenario might -- might develop in the future, that
9 the Board and the Commission are precluded from making
10 a finding of financial qualifications today is simply
11 an untenable position.

12 I think the Commission is perfectly
13 capable of making decisions one at a time when they're
14 presented. In fact, that's the only logical way to do
15 it.

16 JUDGE BOLLWERK: But am I -- I guess I
17 still haven't gotten an answer to the question, what
18 I'm missing. Why this regulation, which deals with a
19 utility, is less prescriptive arguably than 72.22(e)
20 depending on how you -- I mean normally ISFSIs are
21 considered to have lower -- I guess a lower risk
22 involved to them, and the Commission has said that.
23 But yet we have the potential for 20 years here and
24 only five years for a nonrate-regulated utility.

25 Is there something about the projected

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1 costs I'm not understanding? There seems to be a
2 disconnect here in some way.

3 MR. REPKA: No. I'm not sure I completely
4 understand the Board's question because I don't think
5 the regulation is calling for a projection. I think
6 it simply is requiring an estimate of the costs over
7 the 20-year lifetime. And then what the regulation
8 then requires is that there be some reasonable
9 assurance that there will be a means to obtain
10 funding.

11 And the reasonable assurance in this case
12 is provided not by a formal financial projection for
13 the next 20 years, but by the fact that the applicant
14 is a rate-regulated entity. Under the terms of the
15 license that will be issued, PG&E, the electric
16 utility, will be the licensee. And if the license is
17 ever transferred, then the unique issues that are
18 raised by that scenario would be addressed.

19 But I don't think that this regulation is
20 requiring a 20-year projection. I'm not sure I'm
21 completely understanding the Board --

22 JUDGE BOLLWERK: Well, are you saying --
23 then I guess the 72.22(e) deals only with operating
24 costs which, by its terms, that's what it says,
25 whereas this projection is something other than that,

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1 it's something more pervasive, or am I again
2 misunderstanding?

3 MR. REPKA: Well, a formal projection
4 would be a formal projection not only of costs but
5 also of -- of revenues for the next however many years
6 that projection is good for.

7 And certainly what was submitted, for
8 example, in the Part 50 license transfer, because it
9 was a proposed transfer of a power plant license to an
10 unregulated -- unrate-regulated entity is a five-year
11 proforma projection of costs and revenues over that
12 period using all the assumptions, including the --
13 inherent in that plan, which would include the price
14 for electricity under the Bilateral Sales Agreement to
15 generate revenues.

16 So this regulation for the ISFSI,
17 72.22(e), is not requiring a revenue projection. It's
18 requiring reasonable assurance that a means will be
19 available to cover those costs. And the reasonable
20 assurance is: A, the rate process; and, B, as a
21 secondary matter, the financial wherewithal of the
22 company, which is documented in the -- most recently
23 in the annual report that's included with our filing.

24 JUDGE BOLLWERK: All right.

25 MR. REPKA: And just to put that into

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1 perspective, I think that, Judge Lam, you alluded to
2 some of those numbers earlier, but they are quite
3 large numbers and -- and are certainly part of the
4 reasonable -- reasonable assurance showing that's
5 required.

6 If you bear with me a minute, I will
7 highlight some of those numbers.

8 Okay. As reported in the annual report
9 that was included as an exhibit to the PG&E filing for
10 calendar year 2002, the operating revenues were over
11 \$10 billion. Operating income, which would be net of
12 expenses, would be -- were over \$3.9 billion. Income
13 available to common stock of almost \$1.8 billion.
14 Cash onhand of over \$3.3 billion. That number has
15 since increased in the -- based on the first quarter
16 10Q, I'll just add parenthetically. And total assets
17 of the company of over \$24.5 billion. And, again, the
18 company we're talking about is the electric utility.

19 With respect to access to the -- to credit
20 markets, I think we did explain fully in our filing
21 and in Mr. Campbell's affidavit that -- that these are
22 not being treated as capital expenditures and they're
23 not -- access to credit markets isn't being required
24 to obtain the funds to build and operate the ISFSI.
25 But it is worth noting that during the pendency of the

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1 bankruptcy last year for calendar year 2002, the
2 company did make over \$1.5 billion in capital
3 expenditures.

4 And the importance of that is that --
5 there are two points to be made about that. Number
6 one is not all capital expenditures need to be
7 approved by the Bankruptcy Court. Not all
8 expenditures of cash need to be approved by the
9 Bankruptcy Court. There are certain thresholds that
10 apply.

11 And so I think, Judge Lam, you alluded to
12 earlier the fact that what if the Bankruptcy Court
13 didn't approve a certain expenditure, well, that -- I
14 believe off the top of my head that there's a \$10
15 million threshold on that kind of approval.

16 But having said that, certainly the
17 Bankruptcy Court would approach any request for
18 capital expenditures from the standpoint of is this
19 necessary to preserve the asset, is this necessary to
20 preserve the source of revenue, which is in fact
21 essential to repaying creditors. So, therefore, it's
22 in the creditors' interest to keep the plant operating
23 and would be in the interests of -- and would be, in
24 all likelihood, they would approve reasonable and
25 prudent capital expenditures related to preserving the

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1 generating asset.

2 So -- so, again, we're talking some very
3 large numbers offset against some much, much smaller
4 numbers related to the proposed ISFSI.

5 JUDGE LAM: Now if I may interrupt you,
6 Mr. Repka, that was exactly the point why I asked the
7 staff the question about have they considered imposing
8 some sort of license condition on PG&E.

9 What you just said, the corporation have
10 a huge cashflow and cash onhand and other assets. The
11 number we're dealing with here in terms of
12 construction costs is less than two percent of the
13 cash you have onhand. The operating costs, I see, is
14 less than a quarter of a percent of the operating --
15 of your cash, right now what you have.

16 Now knowing what your strategy is, and the
17 Bankruptcy Court, to ask for a nonregulated entity,
18 which would necessitate a license-transfer proceeding.
19 That being the case, if the cost, in my view, is so
20 minuscule relative to your financial resources, why
21 not take care of the problem now by setting aside
22 money now that would take care of everything that you
23 need for this facility and bypass all the argument
24 here we heard today about uncertainty related to what
25 the Bankruptcy Court may or may not impose?

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1 MR. REPKA: I -- I think, number one, with
2 respect to the ongoing expenses associated with
3 construction and operation, that that wouldn't be
4 consistent with any NRC requirement to, in a sense,
5 prepay construction and operation costs. Those costs
6 are ongoing operating expenses that are being
7 recovered through the rate process. And so there
8 really is no reason to tie up that money in the front
9 end to address those kinds of expenses.

10 I think the second question would be with
11 respect to decommissioning funding, whether there is
12 some need to address the estimate of a \$12.5 million
13 decommissioning upfront. And I would have two
14 responses to that.

15 Well, first, it would be the company's
16 position that there's -- there's no interest in tying
17 up money in some sort of financial instrument for that
18 -- for that indefinite period of time.

19 What you have in the NRC's regulations is
20 a -- is a requirement that for an electric utility,
21 which the company is right now, that the external
22 sinking fund method is sufficient to provide the
23 reasonable assurance of funding, which is what the
24 decommissioning rules are all about, a reasonable
25 assurance of funding, and PG&E meets the requirements.

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1 And what you're proposing would go beyond NRC
2 requirements, and it's really not necessary given all
3 of the other information on the assets of the company,
4 et cetera.

5 Beyond that, however, if the scenario were
6 to actually unfold that the Bankruptcy Court were to
7 approve the PG&E plan of reorganization, the NRC were
8 to approve the Part 50 license transfer, and that plan
9 was going, got all of the other regulatory approvals
10 that were required, including from the Federal Energy
11 Regulatory Commission, and we were proceeding to
12 implementation, we would need to transfer the Part 72
13 ISFSI license.

14 At that point the external sinking fund
15 methodology for decommissioning funding assurance
16 would no longer be available under the NRC's
17 regulations to a nonelectric utility entity. At that
18 point your observation may have more -- have more
19 traction with the NRC. I frankly don't know what the
20 company's position would be or how it would go about
21 demonstrating decommissioning financial assurance at
22 that point other than to say that would be an issue to
23 be addressed and it absolutely would be addressed in
24 some appropriate fashion.

25 JUDGE BOLLWERK: Well, let me just take a

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1 variation on that. Mr. Trubatch suggested that
2 construction here not -- there be a license condition
3 in the case that construction will not -- can go
4 forward potentially if we were -- if this was to be
5 approved, but that no operation be -- be authorized
6 until there's some kind of financial assurance
7 determination relative to the -- whatever comes from
8 the Bankruptcy Court.

9 In other words, if it goes with the CPUC,
10 as they have suggested they want, then there would be
11 a financial assurance perhaps a finding, maybe not, if
12 there's no change in the license application -- in the
13 application. But if there is, the way that you want
14 to go, that the operation not be authorized until that
15 has been sorted out in terms of the license transfer.

16 MR. REPKA: Well, I think the first
17 response to that is that it's not necessary. The
18 applicant is the electric utility and the funding is
19 being provided.

20 I think it presumes a situation that if it
21 becomes a nonrate-regulated entity that one day
22 becomes the licensee, that somehow automatically it
23 will become underfunded and unsafe is a presumption
24 without any predicate whatsoever.

25 So -- so there's that problem with it.

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1 But number two is it may very well be that PG&E, the
2 electric utility, will continue to operate this ISFSI
3 for an indefinite period and the CPUC's plan of
4 reorganization might become -- might be approved by
5 the Bankruptcy Court, in which -- under which that
6 plan, PG&E would remain an electric utility.

7 So I'm -- I think that there's no reason
8 to presume one eventuality over the other, which in
9 effect that proposal would be doing. And number two
10 is I don't think there's a reason to presume that the
11 scenario of a nonrate-regulated entity would be
12 unsafe.

13 I think a third answer I would give to
14 that question too is that we are talking about storage
15 of spent fuel construction in the 2005 timeframe,
16 storage of spent fuel in the ISFSI beginning 2006, I
17 believe. It is very likely as a practical matter that
18 before any fuel is stored in the ISFSI, the bankruptcy
19 situation will, as a practical matter, have been
20 resolved.

21 But even -- even once -- I think the thing
22 that I'm trying to recollect what Mr. Trubatch's
23 scenario was, but it was something along the line of
24 a point of irreversibility once a single fuel assembly
25 --

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1 JUDGE BOLLWERK: Right.

2 MR. REPKA: -- is stored in the spent fuel
3 pool -- or is removed from the spent fuel pool and --

4 JUDGE BOLLWERK: Right.

5 MR. REPKA: -- put into a dry cask
6 storage. I think an important point to recognize is
7 that the funding involved in maintaining a dry -- a
8 dry cask on the ISFSI pad is fairly minimal. So again
9 we're presuming a problem that has no predicate.

10 Number two, from a safety perspective,
11 there's no basis to presume that that's an any less
12 safe scenario than if that spent fuel assembly were to
13 remain in the spent fuel pool today, which is where it
14 would have to be.

15 And, finally, I think again the fact of
16 the matter is the Power Plant is operating safely.
17 It's generating revenues based upon operations. And
18 preserving the asset requires some form of spent fuel
19 storage. So there's that very real argument for some
20 form of storage.

21 JUDGE BOLLWERK: What I think Mr.
22 Trubatch's point was, that why -- why do you want to
23 go ahead and essentially dirty up a cask when you
24 don't know what the situation is with this other
25 entity. The Commission hasn't, for whatever reason,

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1 because the bankruptcy isn't finished or because it
2 hasn't finished work on the license transfer, assuming
3 it were to go that way, it hasn't been reached --
4 hasn't reached that determination with -- in that
5 respect either.

6 MR. REPKA: Well, I think, number one, is
7 the hypothetical scenario that in all likelihood won't
8 actually arise because of the schedules involved here
9 in both the bankruptcy case and with respect to ISFSI
10 construction. And number two is -- is because that's
11 the schedule that we need in order to support
12 continued operations. It's safe. The proposal meets
13 all NRC regulations. And, you know, there's --
14 there's no basis for the premise that leaving it in
15 the spent fuel pool is better than putting it in a dry
16 cask storage.

17 And I think, finally, I just reiterate
18 again that with respect to any -- any transfer that
19 might ensue from the bankruptcy process, you're going
20 to go through, as Mr. Lewis pointed out, a full
21 financial qualifications review related to that
22 entity. And so -- so, therefore, you have that
23 assurance of financial qualifications at that point or
24 appropriate remedial actions will come out of that
25 review process, be it some sort of additional funding

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1 or some sort of additional whatever requirement the
2 NRC may view as necessary.

3 JUDGE BOLLWERK: All right. While you're
4 looking through your notes, just let me ask Mr. Lewis.

5 Do you have anything you want to say about
6 Mr. Trubatch's suggestion that there be a license
7 condition here that basically wouldn't permit
8 operation to go forward until there's been some
9 determination with regard to the bankruptcy and how
10 that's going to proceed; and then if there is a
11 license transfer then that would be resolved by the
12 Commission?

13 MR. LEWIS: My comment actually, it would
14 -- would be almost a repetition of what Mr. Repka
15 said. I -- I mean I think we're talking about a
16 passive -- a passive, more safe configuration. And I
17 don't think there's any reason for a presumption that
18 the financing could not be addressed under the NRC's
19 regulations and through whatever other means may be in
20 play at that time, bankruptcy proceeding or whatever
21 else. So I wouldn't have essentially anything to add
22 to what Mr. Repka said.

23 JUDGE BOLLWERK: All right. Mr. Repka,
24 let me turn back to you. Is there anything further
25 you want to do in terms of your response?

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1 MR. REPKA: Yes. The last thing I would
2 like to discuss is the -- the issue of the \$10 million
3 collected and not contributed to the Power Plant
4 Decommissioning Fund in 2000. Again that's been
5 addressed in our responsive filing, but I do want to
6 reiterate that response a bit.

7 That issue relates to the very unique
8 circumstances of the California energy crisis of 2000
9 and the cashflow issues that that created for PG&E.

10 As I said earlier, those issues have been
11 resolved since then. And I think that it's -- it's
12 somewhat -- I don't know what the right word is --
13 it's not appropriate to take those unique
14 circumstances and say that that's a basis to conclude
15 that that's going to happen again.

16 I think that that's -- there's simply no -
17 - no basis that we'll have the unique combination of
18 events before. In fact, the regulatory regime that
19 led to the cash crisis of 2000 has been addressed in
20 the nearterm and certainly would be resolved for the
21 longterm in the bankruptcy case with whatever
22 resolution comes out of that process.

23 So we have a very unique event that
24 doesn't stand for the proposition that this likely to
25 happen again in the future.

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1 Having said that, the next point to be
2 made is that -- and I think Mr. Lewis alluded to this
3 -- is that no point was the Power Plant
4 decommissioning fund ever underfunded.

5 The company reports on the status of the
6 decommissioning fund every two years as required by
7 NRC regulations. And while that report doesn't
8 address a \$10 million contribution not made, it does
9 report on the very -- on the value of the fund at a
10 given time. And the fund has always met NRC
11 regulations related to the Power Plant. And there's,
12 I don't think, been any suggestion otherwise.

13 In fact, in the Part 50 license transfer
14 application -- and I just use this as a illustration;
15 I'm not relying on this for PG&E's qualifications, but
16 as a demonstration of the point -- the showing needed
17 to be made that for a nonrate-regulated entity the
18 existing balance of the fund would be sufficient to
19 meet NRC requirements with no further contributions to
20 the fund for the life of the plan.

21 And that, that projection, which was based
22 on something significantly less than even a
23 two-percent real rate of return on the fund that NRC
24 regulations allowed, showed that with respect to NRC
25 radiological decommissioning the fund was more than

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1 adequate. So we -- we have a suggestion that somehow
2 inappropriate decisions were made. But, in fact,
3 funding was always at NRC-required levels.

4 Now the third thing I'll say is, is
5 there's a clear recognition by PG&E of the fact that
6 the \$10 million was recovered through the rate process
7 through -- with the expectation that it would be
8 applied to decommissioning funding. That's never been
9 lost.

10 In fact, PG&E goes through a
11 decommissioning funding proceeding every three years.
12 There's currently ongoing the 2002 triennial
13 decommissioning proceeding before the California
14 Public Utilities Commission related to decommissioning
15 funding.

16 The upshot of that case, which is still
17 pending, is that, based on the current values of the
18 fund, the contributions required through rates for
19 both the Power Plant decommissioning and the ISFSI
20 decommissioning are recalculated. And that process is
21 currently undergoing, as discussed in our filing,
22 based upon the latest contractor site-specific survey
23 and estimate of decommissioning costs.

24 But that case will assume the current
25 value of the fund without the \$10 million contribution

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1 and set what would be the appropriate rate and the
2 appropriate contribution for ISFSI decommissioning and
3 Power Plant decommissioning through the rate process.

4 So that process, again, provides the
5 reasonable assurance the mechanism for decommissioning
6 funding precisely as required by the NRC regulations.
7 The only issue, then, is what to do with the \$10
8 million that was collected and not -- not contributed
9 previously.

10 As we discussed, Internal Revenue Service
11 requirements don't allow the company to just deposit
12 that money at this point into the decommissioning
13 fund. So that was an issue that both the CPUC and the
14 company understood needed to be addressed in the
15 decommissioning proceeding. And, in fact, it has
16 been.

17 Mr. Campbell, in his supplemental
18 affidavit, alludes to the fact that there was a
19 proposal pending at the time to deal with that through
20 the rate process. That resolution has since become
21 final on May 8th of 2003.

22 And, as anticipated, it simply requires
23 that the \$10 million will be applied as an offset
24 against future revenue requirements related to
25 decommissioning.

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1 So in that manner the ratepayers will be
2 made whole. The decommissioning fund will get its
3 due, and the ratepayers will be made whole with
4 respect to the payment from the past -- the payments
5 made in the past.

6 I think that the significance of that not
7 only is that that issue is -- has been fully addressed
8 now through the rate process, it's also a -- a very
9 clear example of exactly how the rate process would
10 work to address this issue in the future.

11 Again, the applicant is the rate-regulated
12 PG&E. And to the extent that any contributions were
13 missed in the future, a presumption again without real
14 basis, but if that were to unfold, the rate process,
15 the state rate process, is a mechanism for resolving
16 those issues.

17 And so, therefore, this simply is not a
18 basis on which to conclude there's not financial
19 qualifications or not reasonable assurance of
20 decommissioning funding.

21 The last thing I was going to mention was
22 just to reiterate what the standards are under 10 CFR
23 Part 2 Subpart K for a formal evidentiary hearing.
24 That's, I think, fairly plainly set forth in our
25 filing. It's been addressed in some recent decisions

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1 in -- of the Commission in Subpart K proceedings in
2 the *Millstone* case and in the *Shearon Harris* case,
3 both related to -- approvals related to spent fuel
4 storage. And there's really no need to reiterate that
5 here today now, given at least Ms. Curran's agreement
6 that there is no genuine and substantial issue in
7 dispute that would meet that threshold.

8 So other than to say, again, that it's
9 extremely, extremely high standard to justify
10 evidentiary hearings and one that's not met here, this
11 issue really should be resolved based upon the
12 filings.

13 All right. Let me see if any of the Board
14 Members have any questions at this point.

15 Again, just, again, I think this is what
16 you've indicated. But at least as far as you're
17 concerned, then, there was never any NRC regulatory
18 violation related to the decommissioning funding, the
19 \$10 million?

20 MR. REPKA: That's correct.

21 JUDGE BOLLWERK: And then whatever,
22 whatever concerns arose because of the fact it was
23 ratepayer money and had to be settled with the
24 California Public Energy Commission -- excuse me --
25 the California Public Utilities Commission have been

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1 resolved. Is that your --

2 MR. REPKA: That's correct, based upon the
3 resolution approved by the CPUC on May 8th of 2003.

4 JUDGE BOLLWERK: Is there anything that
5 you want to say about the dialogue that we had with
6 the counsel for the California Public Energy
7 Commission [sic] regarding the possibility that this
8 bankruptcy will resolve, PG&E got its plan, this would
9 go off as a nonrate-regulated entity in terms of how
10 that would proceed with the funding process and how it
11 would be regulated?

12 MR. REPKA: And the funding for
13 construction and operation, or for decommissioning,
14 all of the --

15 JUDGE BOLLWERK: All of the above, yes.

16 MR. REPKA: Well, I think I've addressed
17 that in passing several times. I think that, again,
18 it is a -- it is an issue to be addressed through the
19 NRC licensing process in appropriate forums and in
20 appropriate ways.

21 Part of that is the Part 50 license
22 transfer application, which relates to the license for
23 the Power Plant and not the ISFSI obviously, because
24 there was no ISFSI license to transfer at the time.

25 But that filing shows, quite clearly,

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1 financial projections that include the ISFSI that
2 shows that at least the proposed entity that's part of
3 PG&E's plan of reorganization would be fully qualified
4 with respect to the ISFSI.

5 But we recognize that that issue is not
6 yet before the Board. And if and when that scenario
7 were to become at least more likely or more ripe, the
8 appropriate amendment to this application or, if the
9 license has already been issued, a transfer of the
10 Part 72 license is something that we would file.
11 There would be an NRC review. There'd be hearing
12 opportunity. And those issues would be addressed.

13 Apart from that, I'll just again repeat
14 what I said earlier. There certainly is no NRC
15 proscription of nonrate-regulated entities being
16 either Part 50 or Part 72 licensees. In fact, the
17 Commission's policy recognizes that both are entirely
18 possible.

19 The basis for financial qualifications
20 will certainly change, but there are certainly no --
21 no overall or overarching prohibition against a
22 nonrate-regulated entity being a NRC licensee.

23 JUDGE BOLLWERK: All right. Anything
24 further?

25 MR. REPKA: No.

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1 JUDGE BOLLWERK: Anything further from the
2 staff?

3 MR. LEWIS: No.

4 JUDGE BOLLWERK: All right. At this point
5 it's approximately 12:30. Let me turn to the
6 intervenors and the interested governmental
7 participants. I can offer you several options.

8 One would be to go to lunch and come back
9 and finish up your reply at that point.

10 A second one would be to take a short
11 break and to try to finish up, if we thought we could,
12 by 1:30. But if you need to call, like you need to
13 caucus, we can take a break and let you all talk among
14 yourselves about that and decide what -- this is kind
15 of your option, however you would best like to present
16 your cases.

17 If you want to try to finish up, we can do
18 that. If you want to take a lunch break, we can do
19 that.

20 MR. CHASET: Yeah, it would just be my
21 preference that we just take a short break to, you
22 know, have a drink of water and come back. I'm not
23 going to have but five or ten minutes. I don't know
24 about the rest of the parties. I mean I'm sure we
25 could --

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1 JUDGE BOLLWERK: We can even take a short
2 break to let you talk about that and come back and
3 tell us what you want to do, if that's...

4 MR. CHASET: All right. Let's do that.

5 JUDGE BOLLWERK: All right. Why don't we
6 take -- let's take a five-minute break. And when you
7 come back, let us know whether you prefer to take a
8 lunch break here or you want to try to finish up.

9 Just so you know, I would assume for lunch
10 we're going to need at least an hour to an hour and 15
11 minutes to get everybody back.

12 (Recess taken from 12:26 p.m. to 12:35
13 p.m.)

14 JUDGE BOLLWERK: All right. Before we
15 took the break, the question was on the table about
16 what was the preference, to go to lunch or to go ahead
17 and proceed. And what -- do you have a spokesperson?

18 MS. CURRAN: Yes, I'll be the
19 spokesperson.

20 JUDGE BOLLWERK: Okay.

21 MS. CURRAN: The intervenors and the
22 interested governments would like to take an hour for
23 lunch.

24 JUDGE BOLLWERK: Okay. An hour is enough,
25 then? You're -- all right. Well, it's now

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1 approximately 12:35. Why don't we say just to make --
2 why don't we say quarter to 2:00, just to make sure
3 everybody's had enough time. That's an hour and 10
4 minutes. But that should be acceptable?

5 MS. CURRAN: Okay. Thank you.

6 JUDGE BOLLWERK: All right. We'll take a
7 recess then to about quarter to 2:00.

8 (Luncheon recess taken from 12:39 p.m. to 1:52
9 p.m.)

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AFTERNOON SESSION

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(1:52 o'clock p.m.)

JUDGE BOLLWERK: All right. We're back after our lunch break and ready for the reply presentations by the intervenors and also the government participants. And my assumption is you want to go in roughly the same order as before?

MS. CURRAN: Yes.

JUDGE BOLLWERK: All right.

All right, Ms. Curran.

(Comments off the record regarding microphone adjustments.)

JUDGE BOLLWERK: All right.

MS. CURRAN: Okay. There's a couple of points I'd like to make.

First, in response to a comment that Mr. Repka made that seemed to imply that we're all in agreement, that there's no dispute of material fact, on that score the intervenors are not speaking for all the participants here.

And I think that the County and the CPUC have taken a different position with respect to disputed facts. And I'd just like to point that out. We each are presenting slightly different points of view.

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1 And we think there may be disputed facts
2 with respect to PG&E's financial qualifications during
3 the term of bankruptcy and perhaps afterwards.

4 But our position is that the Board doesn't
5 need to go that far or shouldn't go that far, because
6 at this point the record shows that there's been a
7 legally insufficient amount of evidence to show a
8 safety finding, an appropriate safety finding, either
9 by the NRC staff, or a finding that the Board could
10 make --

11 (Comments off the record re tape-recording
12 problems.)

13 JUDGE BOLLWERK: All right.

14 MS. CURRAN: Okay. Now it seems like my
15 mic is off again.

16 (Comments off the record again regarding
17 microphone adjustments.)

18 MS. CURRAN: All right.

19 JUDGE BOLLWERK: I guess we can't take any
20 more lunch breaks now. Everything was working before
21 we left. All right.

22 MS. CURRAN: At any rate, while there may
23 be disputes of material fact here, in our view the
24 failure of the NRC staff to address the issue of
25 financial qualifications for the entire license term

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1 and also the failure of PG&E to present evidence
2 showing financial qualifications for the entire
3 license term is essentially a show-stopper. I just
4 want to make that clear.

5 I'd like to address Judge Bollwerk's
6 question about the apparent anomaly between 10 CFR
7 50.33(f) and 10 CFR 72.22(e), that it appears at first
8 blush that 72.22(e) is stricter than 50.33 which, of
9 course, one would think that for a nuclear power plant
10 the rules would be more stringent.

11 And I can't say that I've read all the
12 cases that interpret 50.33(f), but just sitting here
13 reading both regulations it seems to me that it's
14 possible to read 50.33(f) as being stricter than
15 72.22, because both of these regulations contain
16 general language requiring a reasonable assurance
17 finding for the entire term of the license.

18 And 50.33 has basically two sentences in
19 a row. One sentence says that that finding, that
20 general finding, has to be made. And then directly
21 after that follows a sentence that says the estimate -
22 - the applicant must provide cost estimates for five
23 years and indicate the sources of funds to cover these
24 costs.

25 It seems to me that that's very specific

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1 about one piece of information that is needed to meet
2 the general standard. And I don't see in 72.22 the
3 equivalent requirement to indicate sources of funding,
4 as if very concrete information regarding sources of
5 funding has to be provided for at least five years
6 out.

7 It looks to me as though with 72.22(e),
8 it's more permissive in terms of how would an
9 applicant go about demonstrating this reasonable
10 assurance for the 20-year period.

11 JUDGE BOLLWERK: All right. Thank you.

12 MS. CURRAN: Another point that was made
13 with respect to how one would interpret this
14 requirement to make a reasonable assurance finding for
15 a 20-year license period as required by 10 CFR
16 72.22(e) that the applicant is not required to
17 forecast every conceivable scenario that might occur.

18 And I think that's a very reasonable
19 position to take, that we're not asking for prediction
20 of speculative events. But that is not at all what
21 we're dealing with here.

22 We're dealing with a situation where it is
23 the applicant itself which has set in motion a
24 scenario in which it does not wish to remain the
25 licensee. And, in fact, in a period that may be as

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1 short as six months to a year from now may not be the
2 licensee.

3 This is very realistic. It's not
4 speculation as to -- on every conceivable scenario
5 that might occur. This is dealing with a reality
6 that's very much before us.

7 I'd like to talk now about the
8 significance of the lack of an NRC safety finding.
9 And I believe I heard Mr. Lewis say at several points
10 that the NRC has made a safety finding here. And I'd
11 like to address two parts of this.

12 First, what is the requirement for the NRC
13 safety finding and then, second, assuming for prepares
14 of argument that the NRC doesn't have to make a safety
15 finding, what could be done here by the Licensing
16 Board based on the evidence that's before it.

17 If we look at the declaration or the
18 affidavit of Mr. Dusaniwskyj, -- I hope I've
19 pronounced it correctly --

20 MR. LEWIS: You did very well.

21 MS. CURRAN: Okay.

22 -- there are several key paragraphs.

23 The first one that I would refer you to is
24 paragraph 7 in which Mr. Dusaniwskyj says, among other
25 things: However, the information I have reviewed

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1 indicates to me that at this time PG&E continues to be
2 regulated by the California Public Utility Commission
3 in a manner similar to any other electric utility and
4 that there is a reasonable assurance that PG&E will
5 receive the rate relief necessary to support its
6 current and nearterm expenditures related to the
7 ISFSI.

8 Now Mr. Dusaniwskyj qualifies this -- if
9 you look at this sentence, he has several important
10 qualifiers. The first one is the phrase "at this
11 time." And the second is he describes the
12 expenditures as "current and nearerterm."

13 Now he does not describe anywhere what is
14 meant by "nearerterm," but I think it's reasonable to
15 infer that "nearerterm" means for the term that the
16 bankruptcy continues.

17 Also in paragraph 11, Mr. Dusaniwskyj
18 states, the very last sentence of that paragraph says:
19 However, based on my understanding of the bankruptcy
20 process if interim external financing were required,
21 that need would be addressed in the bankruptcy
22 proceeding.

23 Again, this is another statement of PG&E's
24 access to funding. His opinion addresses the interim
25 condition while PG&E is in bankruptcy.

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1 And then finally paragraph 13, which is
2 essentially his overall conclusion, states: I have
3 concluded, for the reasons set forth in this
4 affidavit, that PG&E has reasonable assurance that it
5 will be granted rate recovery adequate to enable it to
6 proceed with its nearterm ISFSI activities.

7 I just want to stop at that first
8 sentence. That first sentence is qualified. It only
9 relates to "nearterm activities."

10 In the second sentence he said -- he says:
11 I have also concluded that it is unlikely that PG&E
12 will have need for access to external credit for ISFSI
13 costs, but then a mechanism exists (the bankruptcy
14 proceeding) by which it can attain such interim credit
15 should that become necessary.

16 So, in other -- again, Mr. Dusaniwskyj
17 qualifies his conclusion by saying PG&E has access to
18 "interim credit," not longterm credit.

19 And his final sentence is: Consequently,
20 I do not find in Contention TC-2 information that
21 would prevent me from finding that PG&E has provided
22 reasonable assurance that it can fund the
23 construction, operation, and decommissioning of the
24 planned ISFSI facility.

25 Now this last sentence does not say: I

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1 have concluded that PG&E has or -- has a reasonable
2 prospect of obtaining the necessary funding for the
3 entire term of this license. He says: This
4 contention wouldn't prevent me from making that
5 finding.

6 In other words, he hasn't made it. He has
7 essentially made a safety finding that relates only to
8 the very brief term probably of PG&E's bankruptcy.
9 And this is on its face legally insufficient to
10 constitute the type of safety finding that is required
11 in 10 CFR 72.22(e).

12 And Mr. Repka cited several cases in which
13 the NRC has held that intervenors can't challenge the
14 adequacy of a safety finding. But I think that's very
15 distinct from the situation where you -- that you have
16 here in which the staff just hasn't made it. It
17 doesn't exist.

18 Now, in the alternative, assuming that the
19 Board could somehow substitute itself for the staff
20 and make the finding that's required here, I think if
21 you look at PG&E's affidavits, they're very similar.

22 PG&E represents its financial
23 qualifications as being sufficient for the term of the
24 bankruptcy, but that isn't what's required by the
25 regulation. The regulation requires a determination

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1 of financial assurance for the entire term of the
2 license.

3 Now that could be a predictive finding.
4 We are not arguing that PG&E has to nail down every
5 last dime it's going to get for the term of the
6 license, but there has to be a predictive finding and
7 there has to be some basis for it.

8 And PG&E doesn't try to make that
9 predictive finding, either. So I don't see what there
10 is in this record. And even if you could substitute
11 yourselves for the staff here and make the staff
12 safety finding, there isn't anything in the record on
13 which you could make a safety finding for the full
14 term of this ISFSI.

15 And I'd also like to make one clarifying
16 point. And that is I brought up the avenue of the
17 waiver proceeding this morning. And it's correct,
18 that wasn't in our brief. But I just suggested this
19 today as the only way I can see around what is an
20 essential legal infirmity here in this proceeding that
21 prevents a finding on behalf of PG&E. I don't think
22 it's essential to my case to offer an alternative that
23 could be taken to get out of the problem.

24 JUDGE BOLLWERK: Just trying to help.

25 MS. CURRAN: I always like to be helpful,

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1 yes.

2 Okay. The next thing I'd like to address
3 is what is -- what difference does it make whether the
4 Board applies this regulation as it's written. Should
5 the Board, should the Board insist that there has to
6 be a predictive finding that applies to the entire
7 term of this license?

8 Well, the first answer is: Yes, because
9 that's what the regulation requires. And the
10 Commission long ago made a determination that that was
11 important.

12 But supposing, for purposes of argument,
13 that we were allowed to look at it again today and
14 determine whether it's really worthwhile to do.

15 One of the things I think I heard Mr.
16 Repka say was that if PG&E's reorganization plan is
17 approved by the Bankruptcy Court and PG&E -- PG&E's
18 substitute, the new GEN Corporation, comes to the NRC
19 in a proceeding for the transfer of the ISFSI license,
20 I think I heard Mr. Repka say that under those
21 circumstances the external sinking fund that PG&E has
22 now for decommissioning funding would no longer be
23 available and that he does not know how
24 decommissioning funding would be addressed.

25 So we might have a situation in which the

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1 ISFSI is built; casks are loaded, which will now
2 require ultimately some decommissioning of this
3 facility. And we do not know how or whether this new
4 entity that PG&E proposes to create is going to
5 address the issue of decommissioning funding, which is
6 a very important element of this decommissioning -- of
7 this financial assurance rule.

8 And I think I also heard Mr. Repka say
9 that it may well be that PG&E continues to be the
10 entity that operates the Diablo Canyon Nuclear Plant
11 and that operates the ISFSI. But I think the point
12 that's important to recognize here is that PG&E itself
13 is working very hard to ensure that is not the
14 outcome.

15 PG&E is vigorously advocating the
16 dissolution of itself, of the creation of a situation
17 in which the die may have already been cast for this
18 ISFSI, but some new entity may walk in without the
19 wherewithal or a plan to pay for all of the costs that
20 are associated with it, including the costs of
21 decommissioning it.

22 I believe I also heard Mr. Repka say that
23 it is likely that the reorganization in the Bankruptcy
24 Court will have been resolved before fuel is loaded
25 into the casts. Well, if that's the case, then what

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1 is the hurry about making this decision before that
2 happens, before the uncertainty regarding the
3 bankruptcy proceeding is resolved?

4 (Pause in the proceeding.)

5 MS. CURRAN: I think that's all I have.

6 JUDGE BOLLWERK: If GEN were created,
7 wouldn't that sinking fund question have to be
8 addressed in the license transfer, though, in some way
9 or another?

10 MS. CURRAN: What if it couldn't be? What
11 if -- first of all, it seems to me there's a little
12 bit of a chicken-and-egg problem here. And that is
13 this.

14 The Bankruptcy Court, the Bankruptcy
15 Court's responsibilities don't include making sure
16 that the safety of the Diablo Canyon ISFSI is
17 adequately take care of, to my understanding. That's
18 not part of their mandate.

19 And so it's possible that this
20 reorganization will be approved in such a way that
21 PG&E is dissolved, but that doesn't necessarily leave
22 sufficient finances for a decommissioning fund. I
23 don't know whether that's true or not, but I think
24 it's possible.

25 So I don't think we can rely on a

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1 Bankruptcy Court to come up or to insist on a plan
2 that makes sure there's an adequate decommissioning
3 fund. And the chicken-and-egg question, in my mind
4 this question comes up if you look at the license
5 transfer case and this case and compare them.

6 In the license transfer case, it seems
7 that PG&E has gone to the NRC in its Part 50 context
8 to ask the NRC to approve the transfer of the Diablo
9 Canyon license to GEN so that it can present that to
10 the Bankruptcy Court and say: This is -- this
11 transfer is okay with the NRC because, of course, the
12 NRC has the authority to deny permission for a license
13 transfer. And the Bankruptcy Court would reasonably -
14 - could reasonably say: Why should we approve this
15 plan if this Agency hasn't also gone along with it?

16 But in this particular situation, there is
17 no ISFSI license yet, so PG&E is waiting till after
18 the bankruptcy, after a bankruptcy proceeding in which
19 it hopes to create a new entity to go to the NRC and
20 say: Is it okay with you if this new entity takes up
21 the license that PG&E was going to hold?

22 And in that situation it seems as though
23 it's kind of a foregone conclusion that the NRC has to
24 say yes, regardless of what's happened. It puts the
25 NRC in a bind because the Bankruptcy Court will have

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1 signed off on this reorganization plan to say: All
2 right, PG&E as an entity doesn't have to exist. The
3 license transfer for Part 50 will have been approved,
4 so these pieces that are kind of hanging over on the
5 ISFSI side will not get adequately addressed by
6 anyone.

7 JUDGE BOLLWERK: Do you mean as a result
8 of the bankruptcy that PG&E will no longer exist, or
9 will simply have a different status?

10 MS. CURRAN: Well, I'm assuming that --
11 assuming for purposes of argument that --

12 JUDGE BOLLWERK: It won't hold the -- it
13 currently won't hold the NRC operating license
14 anymore. I mean that's --

15 MS. CURRAN: Well, okay. As a result of
16 the bankruptcy -- supposing the Bankruptcy Court says
17 to PG&E: We approve your plan. PG&E still has to get
18 the NRC's permission to transfer the license to GEN.

19 JUDGE BOLLWERK: Um-hum.

20 MS. CURRAN: But then once the Bankruptcy
21 Court has approved this whole new plan in which the
22 Bankruptcy Court doesn't necessarily take an interest
23 in the safety of the ISFSI, what recourse does that
24 leave the NRC to put conditions on GEN's operation
25 when the Bankruptcy Court has already set something up

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1 that didn't take that into account at all?

2 It seems to me that that puts public
3 safety second to financial issues as they may get
4 worked out in the bankruptcy.

5 Am I making myself clear?

6 JUDGE BOLLWERK: Oh, yeah. I guess the
7 assumption you're working on is that the Bankruptcy
8 Court is going to do something which is going to leave
9 -- create a problem, at least in terms of the
10 decommissioning funding, that the NRC has no choice
11 but to transfer it to GEN because GEN's the only
12 entity that can hold it, that PG&E, given what the
13 Bankruptcy Court has said, no longer is an entity that
14 can hold the license in any way, shape, or form. It
15 just becomes inadequate as a receptacle for that
16 license. Is that --

17 MS. CURRAN: It seems to me that if GEN's
18 application is inadequate with respect to financial
19 assurance and if PG&E has already loaded fuel into
20 these casts, then it's possible that a liability will
21 have been created with respect to public safety that
22 can't be satisfied.

23 And that is why I think it's important in
24 this case to be faithful to the requirement of 10 CFR
25 72.22(e), that some predictive finding must be made

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1 with respect to the licensed term of the ISFSI, and
2 that means for 20 years out. There has to be some
3 reasonable basis for a forecast of how the costs of
4 this ISFSI are going to be covered for the entire
5 operating license term. And if that can't be done,
6 then the license has to be denied.

7 JUDGE BOLLWERK: All right. Any other?

8 MS. CURRAN: That's all I have.

9 JUDGE BOLLWERK: That's it. All right.

10 Why don't we move down the line then?

11 Let me just ask: Any questions from any
12 Board members? I'm sorry.

13 Okay. All right.

14 MS. HOUCK: Good afternoon. As stated
15 earlier this morning, the Energy Commission's concerns
16 go to the uncertainty, not of who the applicant in
17 this proceeding is, -- we understand the applicant is
18 PG&E -- but they go to who the eventual licensee will
19 be.

20 PG&E and the NRC staff have discussed the
21 situation as if the license proceeding and a potential
22 future transfer proceeding are mutually exclusive, yet
23 while this proceeding is going on PG&E is arguing in
24 another forum that they need to have Diablo Canyon and
25 the proposed ISFSI divested to an entity that doesn't

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1 yet currently exist.

2 And I think, as Mr. Chaset has said
3 earlier, it seems it bit disingenuous for PG&E to come
4 here and sort of ask to have it both ways, that in
5 this proceeding we're only supposed to consider PG&E
6 in its current form, which that includes being in
7 bankruptcy, but we're supposed to ignore the fact that
8 they're proposing in that bankruptcy to have this
9 facility owned and operated by an entity that doesn't
10 even exist yet.

11 When looking at the information that the
12 NRC staff has provided regarding what they considered
13 in determining whether PG&E met the qualifications set
14 forth in 10 CFR 72.22(e), they discussed looking at
15 PG&E in its current form.

16 Yet I'm not clear exactly what that form
17 is that they're discussing if they're not looking at
18 what the potential outcome in the bankruptcy
19 proceeding is, given the limited timeframes we're
20 talking about that a decision in the bankruptcy
21 proceeding could happen in six months to a year.

22 So does that mean NRC staff only
23 considered PG&E's financial qualifications for the
24 next six months to one year, which would be before the
25 facility would even be operated?

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1 And I think PG&E makes similar arguments
2 that we need to only look at PG&E, the state-regulated
3 entity, in its current form, yet there's this huge
4 uncertainty sitting out there regarding the outcome of
5 the bankruptcy proceeding that will likely be decided
6 before any spent fuel is put in this facility.

7 And it concerns the Energy Commission that
8 we do not know who that actual licensee will be, yet
9 we're sitting here making arguments as to how and in
10 what conditions this license should be issued under
11 when none of us in this room really know who the
12 actual licensee will be by the time it's constructed.
13 And that's very concerning to us because we believe
14 that this is a very unique situation.

15 PG&E's discussions in regard to the
16 license transfer and the fact that if it is
17 transferred to another entity that's not regulated are
18 discussing it in terms as if it were a typical license
19 transfer case where there was already a license
20 issued, already a facility existing, and then a new
21 entity came in that was an existing entity requesting
22 transfer where this Board and all the parties would be
23 able to look at both entities. And that's not the
24 case in this proceeding.

25 We don't know who that other entity may

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1 be, because it doesn't exist. This Board can't look
2 at the potential financial qualifications of this
3 entity. Yet PG&E is currently proposing to transfer
4 the facility in the bankruptcy proceeding, yet it
5 doesn't even have the license yet. And that's a very
6 unique situation that does not allow any of the
7 parties here to really consider the full impact of
8 what that decision may be.

9 The Energy Commission is not opposed to
10 the ISFSI. However, we do believe that it must be
11 granted to the state-regulated entity PG&E. And
12 that's not because a nonstate-regulated entity could
13 not construct, operate, or decommission that facility.
14 It's because PG&E, the state-regulated entity, is the
15 only entity that this Board has to consider.

16 And we need to have some assurance that
17 they will actually be that licensee. Otherwise, there
18 won't be an opportunity, once that facility exists, to
19 fully set forth arguments in regards to whether that
20 separate entity is actually viable to operate the
21 facility.

22 Thank you.

23 JUDGE BOLLWERK: Just so I -- but I take
24 it that GEN in some way, shape, or form is described
25 in the bankruptcy proceeding. And doesn't the

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1 Bankruptcy Court have to know what that entity is
2 going to look like?

3 MS. HOUCK: But as Ms. Curran pointed out,
4 the Bankruptcy Court is not considering the financial
5 qualifications, the financial qualifications of GEN in
6 regards to safety concerns. That would be what this
7 Board would do. And so we have concerns that it would
8 need to be looked at at this stage of the process,
9 where there's some -- it's reasonably foreseeable that
10 this license could be transferred.

11 We're not talking about something that is
12 a guess or that no one foresaw at the time of
13 licensing. PG&E has put it on the table that they
14 would, if they have their way, like to transfer this
15 license to another entity. Therefore, it creates
16 uncertainty.

17 JUDGE LAM: Do you have any specific
18 safety concerns in mind in that scenario?

19 MS. HOUCK: Well, the concern would be if
20 the facility were to be transferred to GEN at a point
21 where there were -- the facility was storing spent
22 fuel, and at that point if the facility was
23 transferred and there was not an adequate opportunity
24 to have sufficient safeguards placed on the license,
25 if GEN could not meet the cost obligations of that

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1 facility, it seems that the public would be taking the
2 risk of an ISFSI sitting there that's not adequately
3 maintained or operated and that those assurances
4 should be dealt with when it comes to everyone's
5 attention that that is a possibility, not trying to
6 separate the issues out and ignoring the fact that
7 there is a proposal out there in the bankruptcy
8 proceeding for something that does impact what this
9 Board does in its decision for the license.

10 JUDGE BOLLWERK: All right. Thank you.

11 Sir.

12 MR. CHASET: Good afternoon, Judge
13 Bollwerk and Judges.

14 Mr. Repka I believe stated and he would
15 have you believe that the applicant before you is
16 PG&E, meaning PG&E, the regulated utility. And in his
17 remarks Mr. Lewis made a point of talking about the
18 "entity before us" in this application.

19 Unfortunately, it's not as simple as to
20 say the entity before us is PG&E, the utility. The
21 entity before us is PG&E, a utility in bankruptcy,
22 which is a different entity altogether from the
23 standard utility that you deal with in NRC licensing
24 proceedings.

25 It has been brought to my attention that

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1 the NRC has never granted a license to an applicant in
2 bankruptcy. I think it would be a very poor precedent
3 to establish in this case. And I would urge you not
4 to do so.

5 The utility in bankruptcy is a
6 fundamentally different entity than the normal
7 garden-variety utility that you deal with when you are
8 issuing licenses. It's undergoing a metamorphosis.
9 It's an entity in a cocoon, if you will.
10 Unfortunately, we don't know what's going to emerge
11 out of that cocoon: A mayfly that could die in a day,
12 or an iron butterfly that will last for, you know,
13 many decades.

14 And, frankly, there's a fundamental
15 difference between the two. And I think it is very
16 problematic for this Commission to try to grasp with
17 the uncertain outcome of what's going to come out of
18 the cocoon when, in fact, we will know what that
19 outcome is fairly soon.

20 Once we know what that outcome is, you
21 will have before -- excuse me -- before you the
22 information which will lead you to believe that PG&E,
23 the utility to be regulated for the foreseeable future
24 by the California Public Utilities Commission, is an
25 entity that will have the financial ability to

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1 construct, operate, and decommission the ISFSI. That
2 is one possible outcome of the cocoon, one possible
3 entity that can emerge from the cocoon.

4 The other entity -- and if that's the
5 case, you probably have a record before you that would
6 allow you to grant the requested license, but you
7 can't do that until you know what the outcome is. And
8 I would urge you not to take action on this
9 application until you do know what that outcome is.
10 And that outcome's, hopefully, only a few months away.

11 Because the other entity that could emerge
12 from the cocoon is the mayfly. The mayfly flies
13 around, looks great, and then it's dead in a few days.

14 And the reason I say that is that the
15 company that is the proposed transferee of Diablo
16 Canyon has some fundamental problems that seriously
17 raise a question as to whether an ISFSI can be
18 properly operated -- constructed, operated, and
19 decommissioned. I'm using the three together.

20 Let's focus on operation. 72.22(e)
21 requires you to find that the applicant will have the
22 necessary funds available to cover the estimated
23 operating costs over the plan life of the ISFSI. Now
24 in this case that's 20 years, I understand. We're
25 talking about a 20-year plan life.

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1 Mr. Repka himself pointed out to you this
2 morning that under the power sale agreement that's
3 currently before FERC as part of PG&E's planned --
4 planned reorganization provides for a 12-year period
5 of sales of power from Diablo Canyon to PG&E at a
6 specified price.

7 After that Mr. Repka himself said: It's
8 highly speculative as to know what's going to happen.
9 Twelve years by my very simple mathematical abilities
10 is a lot fewer than 20. What happens then after 12
11 years? I really don't know. And I don't think you
12 can make a finding based on that record that PG&E has
13 -- not PG&E, excuse me; scratch that -- that GEN, the
14 entity that's the proposed transferee, would have the
15 necessary funds available to cover operating costs
16 after that 12th year is over. You just don't have the
17 facts in front of you to allow you to make that
18 finding.

19 More critically, more critically, you have
20 to make a finding that the applicant has the necessary
21 funds to cover estimated decommissioning costs.

22 Now it may be news to you but there is a
23 serious fundamental legal question that is being
24 addressed in the bankruptcy proceeding as to whether
25 or not PG&E has the ability to require the existing

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1 decommissioning trust fund to be transferred to GEN.
2 We have taken the position that they cannot make the
3 PUC transfer the beneficial interest in the trust from
4 PG&E, the utility, to this new entity.

5 We have filed documents in the bankruptcy
6 case that lead us to believe quite strongly that the
7 Bankruptcy Court does not have the jurisdiction to
8 mandate us to transfer the trust funds from PG&E to
9 GEN, the proposed transferee.

10 If that's the case and if the PG&E
11 reorganization plan is approved, it may be the case
12 that Diablo Canyon is spun off without a
13 decommissioning trust fund at all. If there's no
14 decommissioning trust fund, how could you possibly
15 make a finding that there are available funds for the
16 decommissioning of an ISFSI?

17 If zero dollars are transferred from the
18 existing trust funds to the new entity, you simply
19 cannot make that finding. Now PG&E would probably
20 tell you, well, you know, the Bankruptcy Court would
21 require the trust funds to be transferred.

22 We question whether the Bankruptcy Court
23 can do that. It's a matter of bankruptcy law and it's
24 a matter of contract law. These are matters that
25 raise a serious question in our minds as to the

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1 availability of any decommissioning trust funds for
2 the ISFSI.

3 Now another point here that was raised
4 relates to dollars. Now you heard Mr. Repka giving
5 you a large, large list of dollars that PG&E has
6 available, revenues, and income, and cash on hand. I
7 would simply note that those billions of dollars that
8 PG&E is sitting on, most of that money probably
9 belongs to the creditors. I mean, that's what the
10 bankruptcy is about.

11 So there are a lot of dollars that may
12 appear to be available for an ISFSI, but there are a
13 lot of dollars that are owed to creditors that PG&E is
14 sitting on.

15 One final point: Mr. Repka said in a
16 colloquy with Judge Bollwerk: There is no reason to
17 presume one eventuality, meaning the spinoff of Diablo
18 Canyon to GEN, over the other eventuality, meaning the
19 success of the CPUC and its bankruptcy reorganization
20 plan which would retain Diablo Canyon as part of the
21 utility.

22 I would simply note that there is certain
23 disingenuousness on the part of PG&E in terms of or in
24 light of what PG&E's asking for in the Bankruptcy
25 Court to say to you that there is no reason to presume

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1 one eventuality over the other.

2 PG&E really in its heart of hearts wants
3 you to presume one eventuality, which is that Diablo
4 Canyon is spun off to GEN, because that's what they're
5 asking for.

6 And yet if you really look at the
7 underlying circumstances, you do not have the ability
8 to make the findings that you need to with regard to
9 Diablo Canyon as spun off to GEN.

10 In fact, I think the facts simply don't
11 bear it up, and the law doesn't bear it up. And yet
12 PG&E is saying to you: Well, don't make that
13 assumption. Assume that the PUC is right and that
14 they're going to hold on to us.

15 I just -- the anomalousness of that is
16 just earthshattering to me. I can't -- I can't take
17 it with a straight face.

18 I think that the simple thing to do in
19 this case, the wise thing, the right thing for you to
20 do in this case is to simply hold off deciding this
21 matter until it's clear who is going to be the holder
22 of Diablo Canyon. If it's going to be the utility, I
23 think you have a very easy job. I think you have a
24 record that allows you to conclude this matter.

25 If it is not, however, you have to go

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1 back, and an entirely new set of documents has to be
2 reviewed and considered and subjected to possible
3 adjudication in this matter.

4 So I would urge you to wait. Thank you.

5 JUDGE BOLLWERK: Thank you.

6 All right. The County, then.

7 MR. TEMPLE: Certainly. I've got a couple
8 of quick remarks, and then I'll cede to Dr. Trubatch.

9 First of all, with regard to the material
10 that we requested the NRC staff to produce, and the
11 NRC staff failed to produce, pages 18 and 19 of Mr.
12 Dusaniwskyj's transcript of his deposition show the
13 documents that we asked for.

14 Those are documents related to the
15 analysis supporting the staff's conclusions regarding
16 PG&E's financial qualifications, not the conclusions.
17 And that's all that's been placed in the public record
18 are the conclusions.

19 With regard to the motion that the Board
20 take notice of recent financial performance, we note
21 that it demonstrates the loss of hundreds of millions
22 of dollars for a wholly-owned subsidiary of PG&E
23 Corporation.

24 The reason why we brought this to your
25 attention is during Mr. Campbell's deposition, we

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1 discussed some conditions that Standards and Poor's
2 proposed in a letter of February 19th of this year,
3 some 37 conditions that were attached to it, all which
4 must be met for investment grade rating to be received
5 from Standard and Poor's to the Pacific Gas and
6 Electric, the utility that would emerge from
7 bankruptcy.

8 One of those conditions includes an
9 infusion of cash from PG&E Corporation. The concern
10 obviously is if the parent corporation has other draws
11 on it, it would certainly limit what it would have
12 available to satisfy the Standard and Poor's
13 condition, and calls into question the viability of
14 the reorganization plan to some extent.

15 JUDGE BOLLWERK: All right. This
16 obviously is another draw, is your point, right?

17 MR. TEMPLE: That's correct.

18 JUDGE BOLLWERK: Okay.

19 MR. TRUBATCH: Let me go back to basics
20 for a second and remind us why we're here.

21 We have a contention before us that PG&E
22 has failed to demonstrate that it meets the financial
23 qualification requirements of 72.22(e). And the focus
24 of that contention has been narrowed by the Board to
25 be the impact of the bankruptcy on PG&E's access to

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1 continued funding as a regulated entity.

2 And the Board has also put a limit that we
3 are not to discuss postbankruptcy status of the
4 licensee, because that's all considered irrelevant to
5 this proceeding. And we also note Hornbook law that
6 the NRC is bound by its rules.

7 So under those circumstances I want to
8 make the following points:

9 First, I would hope that, consistent with
10 the Board's orders, that it will dismiss all
11 speculation about the post-bankruptcy details, because
12 we've heard a lot of that today. Some of us played by
13 the rules and did not engage in that.

14 Second, 72.22(e) should be applied as it's
15 written. It does not say: You need to make a cost
16 showing for 20 years. It says: You must show that
17 you have the necessary funds or reasonable assurance
18 of having those funds to cover the costs over the
19 operating life. So you must show that you have funds
20 for 20 years, not that what the costs are.

21 We've been wrestling also with why there
22 is a difference, apparent difference, between 72.22
23 and Part 50.

24 My first response to that would simply be:
25 Ask the Commission. It wrote those rules. It had

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1 whatever policy objectives it had in mind when it
2 established those rules. But beyond that, a plant can
3 be shut off if there is a change in its financial
4 qualification.

5 Once this ISFSI starts to be filled, there
6 is no practical way of unfilling it for many years.
7 And that certainly must have been one -- I would
8 speculate it's one of the motivations for these
9 differences, if there are such differences.

10 Third, PG&E has still not provided details
11 about the costs that must be covered by these large
12 amounts of cash it has on hand and income streams. As
13 Mr. Chaset pointed out, there are unresolved calls on
14 that money.

15 What we've heard here, though, is we've
16 heard lawyers talk about the costs and the funds. I
17 think what that illustrates is that it's time to let
18 economic experts talk about the money in detail, the
19 costs, the obligations, and let those experts be
20 subject to cross-examination in a adjudicatory
21 hearing. That's what would be appropriate to get at
22 the heart of this.

23 Regarding the 72.50(b), I just would like
24 to get some clarification. And let me posit the
25 following sequence: If the ISFSI license is issued

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1 and then the plant license is transferred, will the
2 ISFSI license transfer be noticed as a separate
3 license transfer, or will -- and, therefore, an
4 opportunity for hearing on that transfer -- or will it
5 be dragged along with the Part 50 license transfer?
6 That was the regulatory gap I was trying to explicate
7 earlier today.

8 Now regarding PG&E's demonstration of
9 financial qualification, the NRC staff has found that
10 the impact of PG&E's bankruptcy is that PG&E has only
11 demonstrated that it is financially qualified while it
12 is regulated by the CPUC. And let me -- sorry, I'll
13 take these off -- let me read from their response.

14 Likewise, in the deposition the staff
15 explained that its finding of reasonable assurance is
16 based upon current PG&E's organizational structure.
17 Additionally, staff also explained in both responses
18 to interrogatories and deposition testimony that it
19 considers this appropriate because if the
20 organizational structure of the ISFSI applicant or
21 licensee changes through the bankruptcy organization,
22 or for any other reason, a supplement to the current
23 application, a new application, or license transfer
24 request would be required depending on the timing of
25 such an occurrence.

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1 In any of these circumstances there would
2 be an attendant right to a hearing, whether in this
3 proceeding or some other proceeding.

4 We've heard several people say this, but
5 I'll say it again: This is not a case where we're
6 discussing a hypothetical change in the nature of the
7 applicant. PG&E's continued status is uncertain
8 because there's a bankruptcy proceeding.

9 The staff itself has said it can only make
10 the finding that's necessary so long as CPUC regulates
11 PG&E. The rules -- again, the rules are the rules.

12 And the rules do not provide for a phased
13 licensing, for making a 20-year finding in steps. And
14 that's -- since that's possible, since we can't
15 discount that, I would say that you can't make any
16 finding now because of that uncertainty.

17 Regarding the suggestion that a license
18 condition be imposed regarding operation, the issue is
19 uncertainty and the inability to undo the storage of
20 spent fuel, should the financial qualification
21 situation change. If the schedule is so hypothetical,
22 then such a license condition won't matter and it can
23 be imposed without impact.

24 However, if we do get to the point of
25 irreversibility, a license transfer proceeding becomes

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1 meaningless. We're stuck with an ISFSI with spent
2 fuel in it with no place to go.

3 Okay. Finally, let me just observe that
4 I find that the Board has constructed too small a box
5 for this proceeding. The Board has excluded all
6 information about the post-bankruptcy details. No one
7 expects the bankruptcy to last 20 years, I hope.

8 Yet the Board must make a finding
9 regarding PG&E's demonstration of financial
10 qualification over the life of the ISFSI. So you've
11 really cut yourself off from being able to explore the
12 full period. And leaving it to this, well, we can get
13 to this later in a subsequent proceeding, I don't see
14 that that's provided for in the rules.

15 May I switch now to the representative
16 from Avila Beach?

17 JUDGE BOLLWERK: Thank you.

18 MR. HELENIUS: Just briefly.

19 PG&E has argued that it is solvent and can
20 meet its burden under 10 CFR 72.22(e), yet it isn't
21 solvent. Anybody who's studied bankruptcy law or
22 practiced in the field of bankruptcy knows that there
23 are a number of definitions to what constitutes a
24 bankrupt.

25 One of them is inability to pay one's

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1 debts as they fall due. And PG&E has demonstrably had
2 that problem and that's what in large part has led to
3 its current bankruptcy filing.

4 It's told you here during this proceeding
5 this morning that it's a \$24.5 billion company. But
6 it's evidently unable to do what Judge Lam suggested
7 earlier here today, and that's pay what PG&E estimated
8 to be \$241 million into a separate fund that would
9 take care of the cost of construction, operation, and
10 decommissioning of the ISFSI facility.

11 So one has to ask the question then: Why
12 is that the case, because \$241 million measured
13 against \$24.5 billion is slightly less than one
14 percent of total assets.

15 You have to ask the question about the
16 financial condition of the company, and what it truly
17 is, is the answer that all those funds that it's
18 described here today are earmarked for other purposes,
19 such as one counsel suggested, earmarked for
20 creditors.

21 Finally, PG&E has utterly and completely
22 failed to address the interested governmental
23 participants' point that there's a logical
24 inconsistency in the position that it's taken before
25 the NRC. It's said that it can only emerge from

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1 bankruptcy if it's no longer a rate-regulated utility.
2 Yet it pins its hopes and, more importantly, it's
3 ability to provide the "reasonable assurance" that's
4 required in the way of funding to operate and
5 decommission the ISFSI facility on its being a
6 rate-based regulated electric company.

7 So with that said, as I mentioned this
8 morning, we would like to see you await the outcome of
9 the bankruptcy filing and see what happens upon
10 discharge before you proceed.

11 If you are unwilling to do that, we think
12 that you ought to hold an adjudicatory hearing and
13 take the evidence and make a decision based on the
14 facts as they are presented.

15 Thank you, gentlemen.

16 JUDGE BOLLWERK: Thank you very much. All
17 right. Let me just see if the Board Members have any
18 questions for anyone as we've been going through
19 these.

20 No. All right. At this point that
21 concludes, then, the oral argument before the Board.
22 I would like to thank all of you very much for your
23 presentations today. I think we've received a
24 treasure trove of information that we're going to have
25 to sift through now and make a decision about where we

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1 go next in terms of the request for an evidentiary
2 hearing, also the substantive merits on the
3 contention.

4 The case is now submitted to us for the
5 next step. And I, again, would like to thank all of
6 you for your presence today and for your efforts in
7 providing the information and the arguments that you
8 have to the Board. And if there's nothing else in
9 terms of anyone having scheduling or other questions,
10 then we stand adjourned. I thank you very much.

11 REPRESENTATIVES: Thank you.

12 (The hearing was concluded at 2:45 o'clock
13 p.m.)

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in the matter of:

Name of Proceeding: Diablo Canyon Power Plant
Independent Spent Fuel
Storage Installation
Docket Number: 72-26-ISFSI;
ASLBP No.:02-801-01-ISFSI
Location: San Luis Obispo, CA

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