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Title: Diablo Canyon Nuclear Plant
Oral Arguments

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Docket Number: 50-275-LR and 50-323-LR

ASLBP Number: 10-890-01-LR-BD01

Location: San Luis Obispo, California

Date: Wednesday, May 26, 2010

Work Order No.: NRC-258

Pages 1-370

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) Docket Nos.
) 50-275-LR and
PACIFIC GAS & ELECTRIC COMPANY) 50-323-LR
(Diablo Canyon Nuclear Power) ASLBP No.
Plant, Units 1 and 2) 10-890-01-LR-BD01

County Government Center
San Luis Obispo County Board Chambers
1055 Monterey Street
San Luis Obispo, California

Wednesday, May 26, 2010
8:30 a.m.

BEFORE ADMINISTRATIVE JUDGES:

ALEX S. KARLIN, CHAIRMAN
NICHOLAS G. TRIKOUROS
DR. PAUL B. ABRAMSON

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For Petitioner San Luis Obispo Mothers for Peace:

DIANE CURRAN, ESQ.

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

(8:30 a.m.)

1
2
3 JUDGE KARLIN: Good morning. I'd like to
4 call this meeting of the Atomic Safety and Licensing
5 Board to order and go on the record with the reporter.
6 I'd like to welcome the parties and the members of the
7 public. We are here to conduct an oral argument in
8 the matter of Pacific Gas & Electric Company, an
9 application for a license renewal for its Diablo
10 Canyon nuclear reactors.

11 This is a challenge to PG&E's application
12 by the San Luis Obispo Mothers for Peace.

13 The docket number in this case, for the
14 record, is 50-275-LR and 50-325-LR. Those -- "LR"
15 means license renewal. And there are two reactors, so
16 there are two numbers. The ASLBP number is 10-890-01-
17 LR-BD01.

18 And this oral argument is being conducted
19 today pursuant to an order that we issued -- this
20 Board issued on May 5th. Today's date, for the
21 record, is May 26, 2010 and the location of our
22 proceeding here today for the record is the San Luis
23 Obispo County Board of Supervisors Chambers Room in
24 the City of San Luis Obispo, California.

25 First, I'd like to introduce the members

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1 of this Board To my left is Nicholas Trikouros. He
2 has a B.S. and M.S. in engineering, a Ph.D. equivalent
3 at Polytech University. Judge Trikouros has over 30
4 years of experience in the nuclear industry. He's
5 held senior positions with DNP Nuclear Corporation and
6 his areas of expertise include nuclear plant design,
7 basis and licensing, reactor systems, emergency
8 operating procedures, and accident analysis, and
9 probabilistic risk assessment. He was one of the
10 early responders to the Three Mile Island Unit 2
11 accident and provided on-site technical support and
12 consultation in responding and controlling that
13 incident. He's also served as an adjunct professor at
14 Rutgers and he is one of our -- the Atomic Safety and
15 Licensing Board technical or scientific judges.

16 To my right is Dr. Paul Abramson. He has
17 a Ph.D. in physics and a J.D. in law, juris doctorate
18 in law, so he's a double-hitter, as it were. He
19 served with the ASLBP's Special Associate Chief Judge,
20 legal and technical, for five years, and now he is
21 working -- his experience includes the head of the
22 LWR.

23 JUDGE ABRAMSON: Light Water Reactor --
24 there we go -- system safety analysis in Argonne
25 National Labs. Later, he was a partner at several

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1 major law firms specializing in power project
2 development and construction and finance.

3 My name is Alex Karlin. I'm a lawyer with
4 about 30 years of experience in law and about six
5 years additional experience as being one of the judges
6 on this Board, and I will serve as the chairman of
7 this particular Board.

8 I'd also like to introduce the members of
9 our staff who are helping us out here today. To my
10 right is Ms. Wen Bu. She is a lawyer and is the law
11 clerk who helps us with legal issues in this matter.
12 She's the law clerk to the Board.

13 Ms. Ashley Prange over there with her hand
14 up is our administrative assistant and so she's
15 helping out with many of the logistical matters here
16 today.

17 Mr. Victor Drix is the Office of Public
18 Affairs from the NRC and for media, if any media
19 people are here, they might want to talk with him or
20 he can try to answer some of your questions.

21 And Mr. Michael Rodriguez is our security
22 officer and I'm not sure whether he's here today or --
23 here at the moment or not -- okay. He's outside.

24 The second order of business is we'd like
25 to thank -- I'd like to thank the San Luis Obispo

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1 County Board of Supervisors for making this excellent
2 facility available to us. It is our policy, it's our
3 -- we try to hold these arguments and these oral
4 arguments in the vicinity of the facility that's being
5 applied for, the license is being applied for. One of
6 the interesting aspects of this case is that all of
7 the lawyers in this case, both the lawyer for San Luis
8 Obispo, the lawyer for PG&E, and the lawyer for the
9 NRC Staff are all located in Washington, DC. And we
10 have a hearing room not much different from this which
11 is 20 feet from my office but, rather than having the
12 hearing there, for the convenience of the lawyers and
13 the judges we're having it here because this is the
14 community that's being -- will be affected and we
15 thought that this is where we need to have this. So
16 we thank Frank Mecham, who's the Chairman of the San
17 Luis Obispo Board of Supervisors and his staff for
18 making this facility available to us. In particular,
19 Ms. Joyce Neal and Ms. Vicky Shelby have been very
20 helpful in working with Ashley Prange and myself and
21 all of us in setting this up.

22 We welcome the public interest in this
23 proceeding and we're glad to see a number of people
24 here today. Also, through the help of the Board of
25 Supervisors, we are having this proceeding webcast.

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1 We have our own webcasting facilities in Washington,
2 but these are excellent webcasting operations here, so
3 happily we're able to do that for the -- with the
4 community, too.

5 At this point, I'd ask the parties to
6 identify themselves and introduce themselves and any
7 of their clients who may be with them. We'll start
8 with Ms. Curran, San Luis Obispo Mothers for Peace.
9 Ms. Curran.

10 MS. CURRAN: Do I stand up?

11 JUDGE KARLIN: Yes, please. I think that
12 would be good.

13 MS. CURRAN: Good morning. I'm Diane
14 Curran. I represent San Luis Obispo Mothers for Peace
15 and with me today are several members of the board of
16 directors -- Jill Zamek, Elizabeth Aptelberg, June
17 Cochran, and Jane Swanson.

18 JUDGE KARLIN: All right. Thank you.
19 Welcome. Pacific Gas & Electric, Mr. Repka?

20 MR. REPKA: Yes. Good morning.

21 JUDGE KARLIN: Good morning.

22 MR. REPKA: David Repka for Pacific Gas &
23 Electric Company and with me today are my colleague,
24 Tyson Smith. Tyson and I will be splitting the
25 argument on the various issues this afternoon. Also

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1 with us are Ms. Post from our legal department, Terry
2 Grebel, who is the project manager.

3 JUDGE KARLIN: Okay.

4 THE REPORTER: I'm having a hard time.

5 JUDGE KARLIN: Right.

6 THE REPORTER: If they can come up to the
7 podium.

8 JUDGE KARLIN: Okay.

9 JUDGE ABRAMSON: Do you want that repeated
10 or --

11 JUDGE KARLIN: Have you got that or do we
12 need to repeat it? All right. Let's repeat it if we
13 may. I'm sorry for that but we're going to use --
14 this is the podium that's active?

15 THE REPORTER: I believe this one.

16 JUDGE KARLIN: The one near you?

17 THE REPORTER: Yes.

18 JUDGE KARLIN: Okay. We're going to use
19 one podium today and I guess that's the one that has
20 the mikes on.

21 Ms. Curran.

22 MS. CURRAN: Okay. Good morning.

23 JUDGE KARLIN: Good morning.

24 JUDGE ABRAMSON: Can you hear that
25 adequately?

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1 THE REPORTER: That's better. Thank you.

2 MS. CURRAN: My name is Diane Curran. I
3 represent the San Luis Obispo Mothers for Peace and
4 with me this morning are several members of the board
5 of directors for the Mothers for Peace -- Jill Zamek,
6 Elizabeth Aptelberg and June Cochran, Jane Swanson is
7 out in the hall, and other members of the organization
8 are also in the audience. And we also very much
9 appreciate your having a webcast of this proceeding
10 because there's a number of members of the group and
11 other people in the community that can't come this
12 morning and can only watch it that way.

13 Thank you.

14 JUDGE KARLIN: Thank you. Welcome. Mr.
15 Repka, for PG&E.

16 MR. REPKA: Yes. Thank you again. David
17 Repka for Pacific Gas & Electric Company and with me
18 are Mr. Tyson Smith, my colleague, who will be
19 splitting argument with me today on the various
20 issues. Also Ms. Jennifer Post, in-house counsel for
21 Pacific Gas & Electric and, among others, with us
22 today Terry Grebel, who is the PG&E project manager
23 for the License Renewal Project.

24 JUDGE KARLIN: Thank you, Mr. Repka.
25 Welcome. NRC Staff, please.

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1 MS. UTTAL: Good morning, Judges. Susan
2 Uttal from the Office of General Counsel representing
3 the NRC Staff. With me today is Lloyd Subin from the
4 Office of General Counsel, Max Smith, Catherine
5 Kanatas, all of the Office of General Counsel. The
6 three of them will be splitting the argument today.
7 Also I have Staff members Kimberly Green, Drew
8 Stuyvenberg, and Tina Ghosh representing Staff.

9 JUDGE KARLIN: Great. Welcome. Thank
10 you, Ms. Uttal.

11 Okay. Couple of housekeeping and
12 administrative matters. We're going to -- cell
13 phones, please turn your cell phones off or to mute.
14 If you have a conversation, please take it out in the
15 hall.

16 Media, if there are any members of the
17 media present, we welcome you and glad you are here.
18 It's an excellent way to better inform the community
19 of what we're trying to do here today. And pursuant
20 to our published rules, copies of which are on the
21 table out there outside of the hearing room, only
22 ambient lighting should be used if any photography is
23 being taken and the photographer should stay in the
24 back of the room. It doesn't look like that's going
25 to be an issue here.

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1 We're having a transcript made of this
2 proceeding. Our court reporter is over here and there
3 will be a written full transcript and that will be
4 available on NRC's web page promptly in a couple of
5 weeks I think. It's posted up there on the Agency
6 Adams System they call it.

7 In terms of -- for the benefit of the
8 public, I think the lawyers all know this, but perhaps
9 we ought to cover -- I try to cover three points of
10 introduction. First is the role of this Board;
11 second, a bit of the history of this application and
12 this process; and, third, the purpose of today's
13 proceeding. And so, with that, I'll go into the
14 nature and role.

15 First point is the nature of this Board.
16 What is an Atomic Safety and Licensing Board? There
17 is a handout, a little brochure in the back table
18 outside of the hearing room that has a little bit of
19 information that might be helpful to you about the
20 function of these Atomic Safety and Licensing Boards.
21 We call ourselves "the Board" or "a Board."

22 Federal law charges the Nuclear Regulatory
23 Commission with regulating nuclear facilities. And
24 the NRC is headed by five Commissioners who are
25 appointed by the President and confirmed by the

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1 Senate. The five Commissioners on the one hand have
2 a large regulatory staff who review applications, who
3 draft and develop regulations that the Commission
4 might want to adopt, and they do a huge amount of the
5 work and most of the work with regard to any given
6 application for a renewal or an upgrade or for a new
7 facility.

8 So there's the NRC Commissioners and then
9 there's the NRC Staff and then there's this Board, the
10 Atomic Safety and Licensing Board. And our role is
11 quite different. We are an independent and separate
12 entity from both the Board and the Staff -- I'm sorry
13 -- the Commission and the Staff. We have no
14 allegiance to the Staff. We're not allowed to
15 communicate with the Staff, the NRC Staff, on any
16 issue associated with this case or any other
17 substantive issue. This is what's called ex parte
18 communication which is prohibited, and so we're not
19 allowed to have any communications except what we hear
20 here today and what they file on the public record in
21 the pleadings of this case, which is open for anyone
22 to see.

23 This same rule applies to the Applicant as
24 well. We have no communications with Pacific Gas &
25 Electric. They can't communicate with us, and any

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1 communications that do occur have to be on the record
2 either today in oral -- in a public proceeding or in
3 a written document that's filed for all to see.

4 In the same way, this Board is not allowed
5 to have any communications with any of the
6 Commissioners, the five Commissioners, about this
7 case. They don't come down the hall and tell us what
8 they think we should rule. We don't ask them what
9 they would like us to do. They can't even do
10 performance reviews on us. We -- they can't give us
11 bonuses. They can't cut our salary. They can't fire
12 us. They really can't do anything. This is an
13 attempt -- and I think it works reasonably well -- to
14 give us some independence and to allow us to rule the
15 way we see fit, call them the way we see them. And if
16 somebody doesn't like what we've ruled, either the NRC
17 Staff or the applicant or the intervenor, they can
18 appeal it to the Commission and the Commission will
19 look at it and they can reverse us or they can affirm
20 us, and we do our best and hopefully it's the right
21 thing. But if somebody doesn't like it, they can
22 appeal.

23 And I think it's good to point out that
24 we're kind of like a federal court. You know, you
25 have three branches of government in the Federal

1 Government. You've got the Executive, the
2 Legislative, and the Judicial, and we are a quasi-
3 judicial entity and that's why the Board, the Atomic
4 Safety and Licensing Board, we call ourselves a quasi-
5 judicial. We're -- we function as judges, and often
6 we have our proceedings in courtrooms and courthouses
7 and we follow many of the same procedures that you
8 would see across the street in a county courthouse
9 here. And so that's -- I think it's important for the
10 community to understand that because I know there have
11 been other meetings in this community that the NRC
12 Staff has conducted with the Applicant and other
13 public participation, and this is a little different
14 animal, I think, and this Board is established by a
15 statute -- there's a federal statute, part of the
16 Atomic Energy Act -- that sets up the Atomic Safety
17 and Licensing Boards. And it's somewhat unique in the
18 sense that we're not just -- I don't want to say
19 "just" because I'm a lawyer, but we have not just
20 lawyers; we have technical expertise, people with high
21 degrees of scientific expertise and technical
22 expertise in the industry to bring to bear on some of
23 the questions that the parties raise to us.

24 Second, a brief history of this
25 proceeding. The record we have reflects that in

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1 November of 2009, PG&E submitted a renewal application
2 to the NRC Staff, and in January of 2010, this year,
3 the Staff published a notice in the *Federal Register*
4 giving the public the opportunity to file a petition
5 to challenge the license renewal. It's kind of a 60-
6 day speak now or forever hold your peace type of a
7 notice in the *Federal Register*. And, in response to
8 that, on March 22nd, the San Luis Obispo Mothers for
9 Peace filed a petition and a request for a hearing
10 with five contentions, and you'll hear more about that
11 -- contentions -- and they also requested the waiver
12 of two regulations associated with a couple of
13 contentions. So there's a waiver request and five
14 contentions. And that's kind of what we're here to
15 talk about and ask questions about today.

16 Since that time, Pacific Gas & Electric
17 has filed an answer responding to those contentions
18 and the Staff has done the same. The NRC Staff
19 likewise has done the same.

20 PG&E argues that none of the contentions
21 should be allowed in and that this request for hearing
22 should be denied entirely. The Staff takes the
23 position that a part of one of the contentions may be
24 admissible but the other four and a half, I guess you
25 would say, are not. So we're going to ask questions

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1 about that. The Petitioners have filed a reply in
2 April. And in April, this Board was created. The
3 Commission issued an order establishing these three
4 individuals that you see here today as the Board.
5 There are quite a number of judges on the Atomic
6 Safety and Licensing Board, and we were appointed to
7 handle this case.

8 So after reading all of the pleadings, and
9 they were pretty large, and the waiver request, we had
10 some questions. We've decided we think would be
11 helpful to ask some questions of the lawyers for the
12 parties about what they've filed so we can better
13 decide this part of the proceeding.

14 Okay. Third, the purpose of today's
15 proceeding. The Board has to decide today or -- well,
16 we'll decide. I'm not sure whether we'll issue our
17 ruling today. I kind of don't think we'll issue the
18 ruling today, but --

19 JUDGE ABRAMSON: We won't decide today.

20 JUDGE KARLIN: We won't decide today. But
21 we will listen, and the purpose of this is to help us
22 to decide whether the request for hearing should be
23 granted. In order to get a request for hearing
24 granted, among other things, the Petitioner, San Luis
25 Obispo Mothers for Peace, needs to propound an

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1 admissible contention and those are sort of terms of
2 art under the NRC regulations and CFR 2.309(f), and
3 that provides criteria for what constitutes an
4 admissible contention.

5 And the criteria include things like,
6 well, the contention has to be within the scope of the
7 license renewal. It has to be relevant and within the
8 scope of the license renewal. It has to include a
9 brief explanation of the basis for the contention. It
10 has to include a concise -- "concise statement" of the
11 alleged facts or expert opinions which support the
12 petition or the contention. So those are the kind of
13 things we're going to ask questions about perhaps
14 today and try to understand whether those contentions
15 meet those criteria.

16 PG&E says the contentions meet none of
17 those -- don't meet those criteria, and of course
18 Mothers for Peace say that they do.

19 So they filed extensive briefs on this,
20 pro and con. We've read them all and we have these
21 questions.

22 After today, we will issue a written
23 decision where we'll decide whether the five
24 contentions and the two waiver requests meet the
25 criteria and whether any admissible contention has

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1 been propounded. The decision will be issued. It
2 will probably be in July. It might be late June, but
3 I'm thinking July is more likely.

4 Okay. Now, our decision can go one of two
5 ways. If we say, Yes, they have propounded an
6 admissible contention, then what we do is we grant the
7 request for a hearing. Today is not the hearing. The
8 hearing would come later. The hearing becomes more
9 like a trial where witnesses come in, they testify,
10 and we take exhibits and testimony and we decide like
11 a trial, like --

12 The other option is for us to say, No,
13 they haven't propounded any admissible contentions
14 and, if we rule that way, then that's the end of the
15 case unless the San Luis Obispo Mothers for Peace want
16 to file an appeal to the Commission, which they can
17 do, and then they can take it further on up the chain
18 to the federal courts as well if they don't like the
19 Commission's ruling.

20 So we're not here to have the evidentiary
21 trial. We're just here to have the lawyers argue the
22 admissibility of the contentions.

23 At this point, are there any additions,
24 Judge Abramson?

25 JUDGE ABRAMSON: You knew I'd have

1 something to say.

2 JUDGE KARLIN: Good. Yeah.

3 JUDGE ABRAMSON: Judge Karlin did a nice
4 job of explaining what this is all about, but I think
5 there are a couple of facts that warrant some
6 clarification or some expansion.

7 First of all, for those -- and I'm sure
8 the lawyers here all know this -- but for those of you
9 who are not familiar with Atomic Safety and Licensing
10 Boards, we're a creation of the Atomic Energy Act.
11 We're a unique entity in the United States and maybe
12 worldwide. The -- Congress, when they required the
13 creation of Atomic Safety and Licensing Boards,
14 mandated that each board will be made up of one person
15 who's skilled in the conduct of administrative
16 proceedings, which the Commission's interpreted
17 generally to mean a lawyer, and two persons who are
18 scientists and, in fact, Congress said it expects
19 those scientists will be persons -- I can't quote this
20 exactly -- but persons of national standing and
21 caliber in nuclear science. You won't see another
22 board like this or another court like this anywhere in
23 the world I believe. And medical tribunals, for
24 example, don't get to this level.

25 What -- and the other thing that that

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1 means is that each of us, the lawyers and the
2 scientists, must vote on every decision, every issue
3 on every decision. That means the scientists have to
4 understand the legal issues and the lawyers have to
5 understand the scientific issues. So we're quite
6 unique.

7 We act very much like a federal trial
8 court. We take the evidence. We make the decision.
9 Our decision is appealed to the Commission. The
10 Commission may decide to review all the facts and have
11 basically their own hearing which they would call a
12 hearing de novo, or the Commission may just look at
13 whether our ruling should be overturned or upheld and
14 not dig into the facts in detail.

15 From there, an appeal goes to the federal
16 courts of appeal. So the net effect is that within
17 the Commission, we're like a trial court. And as
18 Judge Karlin said, we are independent of the
19 Commission. We don't take any marching orders. They
20 can't interfere with what we do.

21 He's not quite right that they can't fire
22 us. But I don't know of any instance where they have.
23 What we do have within the panel -- and the panel has
24 a lot of judges who are assigned to the panel and for
25 each time we have a case, three judges are selected

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1 for the panel in order to try to establish a board
2 that has -- meets the criteria and has the technical
3 expertise to handle the issues that may come up as
4 well as the legal expertise.

5 Within the panel, scientific judges have
6 five-year appointments. Legal judges have lifetime
7 appointments. So there's that distinction. It was
8 enacted by the Commission some years ago, and the
9 rationale, frankly, eludes me but it's there.

10 JUDGE KARLIN: All right. Thank you.

11 JUDGE ABRAMSON: Thank you.

12 JUDGE KARLIN: That's good. Okay.
13 Format. Before we start, we're going to talk a little
14 bit about format and logistics. This proceeding today
15 will break down into three parts. First, we've -- and
16 we've got this order that we issued on May 4th that
17 lays some of this out. Copies of that should be out
18 on the table outside for interested members of the
19 public. The lawyers already have this -- three parts.

20 First, an opening statement from each of
21 the parties, ten minutes. The Mothers of Peace
22 members will go first. PG&E will go second. And the
23 Staff will go third. Up to ten minutes. And if you
24 don't need to take ten minutes, that's great. You
25 know, it is up to ten minutes.

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1 Second, we're going to go to each of the
2 contentions, those five contentions as I say, and talk
3 about or ask questions about each of them in turn.
4 There's one technical contention. That's called --
5 well, denominated technical -- TC-1, Technical
6 Contention 1, and then there's four environmental
7 contentions and so they are EC-1 to EC-4, total of
8 five, and we're going to take each of them in turn.
9 We had originally allocated or we have allocated in
10 our order a certain amount of time for each of those
11 contentions, and it was 30 minutes for the Petitioner,
12 San Luis Obispo Mothers for Peace; 20 minutes for
13 Pacific Gas & Electric; and ten minutes for the Staff.

14 Now, that time frame, that total of an
15 hour on most of the contentions -- the waivers were a
16 little different -- the purpose of this is not to have
17 the lawyers give speeches -- and they know this. They
18 know how this works -- it's for us to ask questions.
19 And so the 30 minutes or the 20 minutes is really not
20 so much a limit on them as it's a limit on --
21 tentative limit on us. I mean, if one of us have a
22 burning question, we're not going to cut ourselves off
23 at 20 minutes or whatever it is. We realized upon
24 looking at this thing that actually that's probably
25 not going to work very perfectly. We may have in some

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1 contentions more questions for the Applicant than 20
2 minutes and we may have less questions of the Mothers
3 for Peace than 30 minutes, and so I think we're going
4 to dispense with the formal time frames and restricted
5 time frames and just simply ask such questions as we
6 think are important until such time as we are done
7 asking questions and then we'll, you know, move on to
8 the next party or the next contention in that way. So
9 please bear with us. I think the first one perhaps
10 may take more than a total hour. Some of the others
11 may take a bit less after we've gotten up to speed on
12 some of the issues. So we'll have -- but I think we
13 still are going to do the process where the sequence
14 will be on any given contention the Mothers for Peace
15 will go first, the -- because they have essentially
16 the burden of establishing that these contentions are
17 admissible, so they get the shot to go first.

18 Pacific Gas & Electric will then respond
19 with their thoughts as to why these contentions are
20 not admissible. And then the Staff will get a chance
21 to also lay out their legal points.

22 And then we will have San Luis Obispo
23 Mothers for Peace have the opportunity to have a bit
24 of rebuttal at the end because they have the burden on
25 this thing and that's the way we established it

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1 before. And so we'll let them have one last shot to
2 ask -- ask them -- again, we're going to be asking the
3 questions, but some of them may be questions that are
4 related to what transpired earlier.

5 And then at the end -- that's the second
6 part, the contentions. First, the opening statements.
7 Second, contentions 1, 2, 3, 4, 5. And then the third
8 major element will be a closing statement or argument
9 of five minutes from each of the parties.

10 JUDGE ABRAMSON: Up to.

11 JUDGE KARLIN: Up to. Up to. And, again,
12 this is not for speeches. This is for us to ask
13 questions.

14 Let's see here. Ms. Bu will help us keep
15 time with regard to the opening statements, those that
16 are time limited, and she will give you a two-minute
17 warning on that. So if you get to that point, she'll
18 let us all know.

19 And as to logistics, I apologize we don't
20 have three counsel tables here which is sort of our
21 normal way of doing it. So what we need to do is ask
22 each of the lawyers who are going to argue on a
23 particular contention to go to the podium on my left,
24 I guess it is, and speak from there and we'll go in
25 turn. Speak clearly so that, you know, obviously we

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1 can hear you but the members of the public can also
2 hear you. I think the acoustics in here are very good
3 and they have microphones, that sort of thing.

4 We intend to finish today. We will go
5 until we get finished. We have -- the Board of
6 Supervisors has gratefully given us as much time as we
7 need -- six o'clock -- five o'clock, six o'clock,
8 seven o'clock. I really don't think we're going to
9 need that much time, but we don't have this facility
10 tomorrow and we want to do as much as we can and get
11 it done today.

12 With that, I'd like to ask if the parties
13 have any questions or clarifications that are needed.
14 Ms. Curran -- and I'm sorry to ask you, but I think --
15 do you have any questions or further points?

16 MS. CURRAN: No.

17 JUDGE KARLIN: No. She indicates no for
18 the record. Mr. Repka?

19 MR. REPKA: No.

20 JUDGE KARLIN: Okay. And Mr. Repka says
21 no for the questions. And, lastly, Ms. Uttal?

22 MS. UTTAL: No.

23 JUDGE KARLIN: No. All right. Great.
24 Then we will start with the opening statements.

25 Ms. Curran, ten minutes, please.

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1 JUDGE ABRAMSON: Or less.

2 JUDGE KARLIN: Or less.

3 OPENING STATEMENT ON BEHALF OF THE PETITIONERS

4 MS. CURRAN: Thank you for the opportunity
5 to make an opening statement to give the public a
6 general idea of the concerns that the San Luis Obispo
7 Mothers for Peace seeks to have addressed in this
8 proceeding for the relicensing of the Diablo Canyon
9 Nuclear Plant.

10 And thank you all for coming.

11 San Luis Obispo Mothers for Peace has
12 served as a community-based watchdog over the Diablo
13 Canyon Nuclear Plant since 1973 when the group
14 intervened in the original operating license case for
15 the plant. At that time, the Mothers for Peace had
16 two primary concerns about the safety and
17 environmental risks posed by the operation of the
18 Diablo Canyon plant -- first, that the plant was
19 located dangerously close to a major and active
20 earthquake fault, the Hosgri Fault; and, second, that
21 the plant was vulnerable to sabotage.

22 The NRC completely refused to consider the
23 Mothers for Peace's concerns regarding sabotage. And
24 after hearings that lasted over ten years, the NRC
25 finally rejected the Mothers for Peace's concerns

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1 about earthquake risks and allowed Diablo Canyon to
2 operate.

3 While the Mothers for Peace's concerns
4 were rejected by the NRC, they did not go away. In
5 fact, they have been exacerbated in recent years.
6 Today, not only is the safety of Diablo Canyon
7 threatened by the Hosgri Fault, but a new fault has
8 been discovered that is even closer to the plant, the
9 Shoreline Fault. PG&E has only made a preliminary
10 study of the fault. It won't get the results of a
11 more complete study that is now being done in
12 collaboration with the United States Geologic Service
13 until 2013. Even though the operating license for
14 Unit 1 doesn't expire until 2024, which is more than
15 ten years after 2013, PG&E wants to go -- the NRC to
16 go ahead and make a license renewal decision now,
17 before the earthquake study results are in.

18 The Mothers for Peace have asked for a
19 hearing in order to make sure that before the NRC
20 signs off on the adequacy of PG&E's renewed license to
21 protect the environment, it is fully informed about
22 the risks to the environment posed by an earthquake
23 and the measures that should be taken to avoid or
24 mitigate the risks.

25 Other developments are that on two

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1 occasions, in 2001 and 2009, the NRC made an
2 announcement about earthquake risks that has profound
3 implications for renewal of the Diablo Canyon Nuclear
4 Power Plant license. The NRC announced that although
5 it generally has confidence that the environmental
6 risks of an earthquake-induced spent fuel pool
7 accident is small, it has no basis for making such a
8 generalization with respect to any nuclear power plant
9 west of the Mississippi River. In other words, the
10 NRC has no current basis for saying that storage of
11 spent fuel in the Diablo Canyon fuel pools during a
12 20- or perhaps 40-year license renewal term is safe
13 for the environment.

14 Given that the Diablo Canyon pool is now
15 filled to capacity with radioactive helium and will
16 remain so during any license renewal term, an
17 earthquake-caused severe accident in the spent fuel
18 pool could cause the release of a large quantity of
19 radioactive helium into the air with potentially
20 catastrophic consequences for a large area of
21 California and beyond.

22 Another development that has occurred
23 since the original operating license case for Diablo
24 Canyon is the September 11th attacks on the World
25 Trade Center and the Pentagon. These attacks

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1 graphically and tragically demonstrated that high-
2 profile targets like nuclear power plants are
3 vulnerable to attack by sub-national groups who have
4 the capacity and the intent to do enormous damage.
5 Yet neither the environmental report prepared by PG&E
6 nor the generic environmental study prepared by the
7 NRC for license renewals addresses the environmental
8 impacts of an attack on the Diablo Canyon spent fuel
9 pool or any other spent fuel pool.

10 With respect to attacks the reactor
11 itself, although the NRC's generic environmental
12 impact statement addresses the impacts of attacks on
13 reactors, it does not identify any mitigative measures
14 that would avoid or reduce the impacts of such
15 attacks.

16 Finally, over the past several years,
17 inspection reports issued by the NRC technical staff
18 have shown that PG&E has a chronic pattern of failing
19 to properly address and correct safety problems at the
20 Diablo Canyon plant in a timely and adequate way, yet
21 PG&E plans to use the same problem-plagued
22 organization to manage aging safety equipment during
23 a license renewal term.

24 In this hearing, the Mothers for Peace
25 seeks to force PG&E to take steps to ensure that the

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1 problems which plague its current operation do not
2 cause it to overload and fail to correct future safety
3 problems with aging and corroding equipment.

4 In requesting a hearing on this consent,
5 Mothers for Peace asks this licensing board to enforce
6 two major federal statutes for protection of public
7 health and the environment -- the Atomic Energy Act
8 and the National Environmental Policy Act, also known
9 as NEPA.

10 The Atomic Energy Acts forbids the NRC
11 from renewing PG&E's license if it would pose an
12 unacceptable level of risk to public health and
13 safety. The licensing board should apply the act to
14 prohibit PG&E from relying for the management of aging
15 and corroding safety on an organization that has
16 demonstrated it has difficulty managing even the
17 ordinary sorts of safety problems that arise in the
18 current license term.

19 Mothers for Peace also asks the licensing
20 board to apply NEPA by refusing to permit the
21 relicensing of Diablo Canyon until the environmental
22 impacts of severe earthquakes on the reactor and the
23 spent fuel pools has been adequately studied. And
24 until measures have been identified to avoid or
25 mitigate those impacts, NEPA requires the NRC to

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1 consider the potential effects of relicensing Diablo
2 Canyon in advance of relicensing the plant, not after
3 it's done.

4 NEPA also requires the NRC to fully
5 consider the environmental impacts of attacks on the
6 Diablo Canyon Nuclear Plant before relicensing it.
7 That means examining the impact of an attack on the
8 spent fuel pools, which has not been analyzed in any
9 previous environmental document. It also means that
10 although the NRC has analyzed the impacts of an attack
11 on the reactor itself, it must now analyze and --
12 identify and analyze the cost-effectiveness of
13 specific measures that could be taken to avoid or
14 mitigate the consequences of an attack on the reactor.

15 Most of the issues raised by Mothers for
16 Peace in this case relate to a class of accidents that
17 are called severe accidents. These are accidents with
18 relatively low likelihood that are nevertheless
19 reasonably foreseeable, and we learned this from the
20 Three Mile Island accident and the accident at the
21 Chernobyl Nuclear Plant in Russia. Therefore, the law
22 requires that even though these severe accidents don't
23 fall into the category of the ordinary course of
24 events, they must be taken into account.

25 But the law is only as good as the

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1 agencies that enforce it. The entire country is now
2 witnessing the horrific consequences of the Minerals
3 Management Service's failure to make a rigorous
4 analysis of the potential for severe accidents and the
5 means to be avoiding --

6 MS. BU: Two minutes.

7 MS. CURRAN: -- or mitigating them before
8 permitting BP to conduct deep ocean oil drilling in
9 the Gulf of Mexico. The Gulf oil spill is a
10 cautionary tale for any large and dangerously
11 federally-licensed operation, the failure to enforce
12 environmental laws can have devastating effects for
13 generations to come.

14 Mothers for Peace calls upon this
15 licensing board to fully enforce the law in this case
16 by requiring that the Agency's decision about
17 relicensing the Diablo Canyon Nuclear Power Plant must
18 await crucial information about the risk of a severe
19 earthquake, that it must be supported by an adequate
20 study of the impacts of an attack on the spent fuel
21 pool, and that it must identify cost-effective
22 measures to avoid or mitigate an attack on either the
23 fuel pools or the reactor.

24 Thank you very much.

25 JUDGE KARLIN: Thank you. Mr. Repka.

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1 OPENING STATEMENT ON BEHALF OF THE APPLICANT

2 MR. REPKA: Thank you. Pacific Gas &
3 Electric Company has filed an application for renewal
4 of the operating licenses for Diablo Canyon Units 1
5 and 2 on a schedule that is fully consistent with the
6 NRC's regulations as well as with the practice of
7 other plants in the nuclear industry and the NRC's
8 review of those applications.

9 Quite simply, the timing of the
10 application is not an issue before the licensing
11 board. What is at issue is whether or not PG&E's
12 application meets the requirements of 10 CFR Part 54
13 and whether PG&E has provided sufficient information
14 to support the NRC's environmental review required
15 under 10 CFR Part 51.

16 The Mothers for Peace have submitted five
17 proposed contentions, all of which fundamentally
18 challenge the scope of what must be addressed for
19 license renewal. The proposed contentions raise
20 matters of current management performance, issues
21 related to the seismic design of the plant that are
22 subject to ongoing regulatory review, and issues of
23 spent fuel storage and terrorist attacks that have
24 been previously addressed in the NRC's generic
25 environmental impact statement, referred to as the

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1 guide for license renewal.

2 In promulgating its license renewal
3 regulations, the Commission was very clear in its
4 intentions related to the particular focus of a
5 license renewal review.

6 In both the 1991 and 1995 NRC rulemakings,
7 the Commission referred to its fundamental principles
8 of license renewal. The Commission's first principle
9 is that license renewal is focused on age-related
10 degradation unique to a period of extended operation.
11 Neither the licensing basis of the plant nor the full
12 scope of regulatory issues is a matter for review in
13 this forum. Does this mean that new issues regarding
14 operating performance and the adequacy of the design
15 are ignored by the NRC? No. Of course it does not.

16 The Commission went on to say that the
17 current regulatory processes will assure that the
18 current licensing basis will maintain adequate
19 protection of health and safety. This includes
20 regulatory inspection and oversight processes as well
21 as other regulatory processes related to the review of
22 new information that will determine when and if
23 licensing basis changes are needed or performance
24 improvements are required.

25 So, for example, new seismic information

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1 is actively considered today. The Mothers for Peace
2 raised issues related to the seismicity and the
3 Shoreline Fault near Diablo Canyon. This is a good
4 example of how the process works. Seismicity is an
5 issue that PG&E continues to investigate proactively,
6 as required by its current license. The Shoreline
7 Fault is an issue that was identified by the USGS
8 through PG&E-funded research. The issue was reported
9 to the NRC.

10 To date, no information has been
11 identified to suggest that the plant is not safe.

12 The Mothers for Peace base their license
13 renewal contention on the current regulatory
14 correspondence. They add no expertise to the
15 discussion. The contention ignores the regulatory
16 process that is working precisely as the Commission
17 intends.

18 The Shoreline Fault is not a license
19 renewal issue. It is an issue that cannot and does
20 not wait for license renewal. It is being addressed
21 today.

22 In promulgating the license renewal rules,
23 the Commission announced a "second and equally
24 important principle of license renewal." That is,
25 that the licensing basis will be maintained in the

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1 future renewal period just as it is today. Compliance
2 with the licensing basis and implementation of aging
3 management programs now and in the future will be
4 subject to NRC inspection, oversight, and enforcement
5 programs.

6 The Mothers for Peace today raise a number
7 of current-day relatively minor inspection enforcement
8 matters and they leap to the conclusion that PG&E will
9 not be able to implement aging management programs.
10 But the matters they raise will be and are being
11 addressed through the current regulatory processes.
12 Aging management programs in the future will be
13 subject to oversight. These are not license renewal
14 issues.

15 The logic of the contentions also
16 represents a huge leap. None of the current issues
17 cited by the Mothers for Peace is even remotely
18 indicative of the overall operation and management of
19 Diablo Canyon, much less indicative of how PG&E will
20 implement aging management programs in the future.

21 Historically, Diablo Canyon has been an
22 excellent performing plant, with a record of
23 reliability and safety. The current plant performance
24 is measured by, among other indicators, the NRC's
25 ongoing reactor oversight process. All current ROP

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1 assessment inputs for the plants are green and the
2 plant is in the licensee response column of the NRC's
3 action matrix. In this context, the Mothers for Peace
4 claims about operational performance are simply
5 unfounded, in addition to being outside the scope of
6 license renewal.

7 Finally, in other contentions, the Mothers
8 for Peace address generic issues that have been
9 evaluated for all plants in the NRC's generic
10 environmental impact statement. Mothers for Peace
11 recognize that they need a waiver to address those
12 issues again in this forum, but a waiver is not
13 warranted. On issues of spent fuel storage and
14 terrorist attack, there is nothing unique about Diablo
15 Canyon that justifies a waiver.

16 Ms. Curran said this morning that the NRC
17 has no basis for its conclusion that its assessments
18 apply to plants west -- in the western United States.
19 This is simply incorrect.

20 We will address the specific issues
21 further in our discussions today of each contention
22 and we welcome the opportunity to address your
23 questions. But in the final analysis, license renewal
24 for Diablo Canyon will serve the electricity customers
25 of California very well. It will be consistent with

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1 NRC's requirements and will assure that the plant
2 continues to operate as a vital component of the
3 state's electricity supply and that is essential to
4 meeting the state's goals for greenhouse gas emission
5 reductions.

6 Thank you.

7 JUDGE KARLIN: Thank you, Mr. Repka. Ms.
8 Uttal. Mr. Smith.

9 MR. M. SMITH: Yes, Your Honor.

10 JUDGE KARLIN: Yes. Thank you.

11 OPENING STATEMENT ON BEHALF OF THE NRC STAFF

12 MR. M. SMITH: Good morning, Judge Karlin,
13 Judge Abramson, Judge Trikouros. I'm Maxwell Smith on
14 behalf of the NRC Staff this morning.

15 As discussed in our pleadings, the NRC
16 Staff supports the Mothers for Peace's request for
17 hearing, but on a limited basis. To grant a request
18 for hearing, the Board must find that Mothers for
19 Peace has established standing and it's proffered at
20 least one admissible contention. The Staff believes
21 that part of one contention, Environmental Contention
22 1, is admissible, where the remainder of Environmental
23 Contention 1 and the balance of the contentions are
24 not.

25 Before I discuss the Staff's -- outline

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1 the Staff's stance on each contention, I'd like to
2 give a little bit of background on the process before
3 us. When it promulgated a license renewal regulation,
4 Commission had founded its rule on two findings.
5 First, the Commission found that with the exception of
6 age-related degradation unique to license renewal, the
7 existing regulatory process was adequate to ensure the
8 safe operation of the plant during the period of
9 extended operation.

10 Second, the Commission found that if that
11 regulatory process were modified to account for the
12 age-related degradation unique to license renewal,
13 then the regulatory process would suffice to ensure
14 safe operation during the period of extended
15 operation.

16 Thus, the Commission limited the scope of
17 license renewal to issues that are related to
18 modifications of the licensing process to account for
19 age-related degradation. Now, this conclusion is
20 embodied in 54.29(a), which I'll paraphrase, that
21 states the Commission will grant the license renewal
22 application if it finds that actions have been
23 identified and steps will be taken with respect to
24 managing the effect of age-related degradation or
25 updating time limited aging analyses such that there's

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1 a reasonable assurance the plant will continue to
2 operate with its licensing basis and during the period
3 of extended operation, which is to say it will operate
4 safely.

5 Thus, the focus of the Staff's review on
6 the license renewal application, as well as any
7 administrative proceedings on the application, are
8 limited to the aging management programs and time
9 limited aging analyses proffered by the Applicant.

10 As a corollary, the Commission promulgated
11 another rule, 54.30, which states that if the license
12 renewal review uncovers current issues of
13 noncompliance at the plant, then the Applicant has an
14 obligation to address those ongoing compliance issues
15 now. And the Applicant's efforts to address those
16 issues are outside of the scope of the license renewal
17 review pursuant to 10 CFR 54.30(e).

18 The Commission also must conduct an
19 environmental review, as mentioned earlier, under the
20 National Environmental Policy Act to assess the
21 environmental impacts of operation during the period
22 of extended operation.

23 The Commission has determined that many of
24 those environmental impacts will be the same across a
25 -- all the plants or a wide spectrum of them. Thus,

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1 in 1996, the Commission prepared a generic
2 environmental impact statement, or a GEIS, which
3 analyzed issues applicable to all plants and made
4 conclusions on them, so-called Category 1 issues, and
5 also identified issues that need to be resolved on a
6 price-specific basis, so-called Category 2 issues.

7 The GEIS's determinations are incorporated
8 into the regulations and may not be challenged during
9 the license renewal proceedings absent a waiver by the
10 Commission. The Commission set a high standard to
11 waive a rule. To waive a rule, the Commission
12 requires a proponent of waiver to demonstrate that the
13 application of the rule will not serve the purposes
14 for which the Commission promulgated the rule in light
15 of special circumstances unforeseen by the Commission
16 that are unique to the facility and the proponent of
17 the waiver must also demonstrate that application of
18 the rule to the case would prohibit the Commission
19 from considering a significant issue.

20 As discussed in our brief, in a nutshell,
21 the Staff supports and opposes parts of Environmental
22 Contention 1 or EC-1. EC-1 asserts that the Applicant
23 should have accounted for the impact of the Shoreline
24 Fault in the probabilistic risk assessment that
25 undermines its severe accident mitigation alternative

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1 analyses.

2 Staff agrees that the Applicant has not
3 demonstrated how the probabilistic risk assessment or
4 a PRA accounts for the Shoreline Fault, but the Staff
5 disagrees that a fully updated PRA is necessary to
6 satisfy the Agency's NEPA obligations. Rather, a
7 conservatively modified PRA that overstated the
8 dangers and risks posed by the Shoreline Fault would
9 be adequate for the severe accident mitigation
10 alternative analyses or SAMA analyses required by
11 NEPA.

12 Second, Technical Contention 1, alleges
13 that, in light of ongoing compliance issues at the
14 Diablo Canyon plant, the Applicant will not
15 effectively manage the impacts of aging during the
16 period of extended operation. However, as already
17 discussed, ongoing compliance issues are outside of
18 the scope of the Commission's regulations. This is
19 license renewal review pursuant to the Regulation
20 54.30(b).

21 The next Environmental Contentions 2 and
22 3 are grouped together because they both challenge the
23 environmental impacts of the spent fuel pool during
24 the period of extended operation. Those impacts were
25 considered generically by the Commission in the 1996

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1 GEIS and, therefore, cannot be challenged on a license
2 renewal proceeding absent a waiver of the rule.

3 The Mothers for Peace asserts that the
4 proposed draft provision to the 1996 GEIS undermines
5 the justifications for that rule. The Mothers for
6 Peace have not pointed to any new analysis or any new
7 information contained in that update that tend to
8 demonstrate that the conclusions in the original GEIS
9 are faulty or otherwise unsafe nor don't adequately
10 assess the impacts of a continued operation.

11 Therefore, the Mothers for Peace have not
12 carried their burden to demonstrate why the rule
13 should be waived in this case.

14 Last, Environmental Contention 4 addresses
15 the Applicant's SAMA analyses do not adequately
16 account for the impact of terrorist attacks. But the
17 Commission's already considered and rejected a very
18 similar contention in the *Oyster Creek* proceeding. In
19 that case, the Commission found that price-specific
20 SAMA analyses, combined with the generic analysis of
21 terrorist attacks, in the 1996 GEIS adequately
22 satisfied the Agency's NEPA obligations. Like this
23 case, the Applicant relies on the 1996 GEIS as well as
24 price-specific SAMA analyses and, therefore, this
25 Commission is foreclosed by -- contention is

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1 foreclosed by Commission precedent.

2 I'd like to just close with a few other
3 comments about the ongoing process. However the Board
4 rules today, the Staff will continue to do a thorough
5 safety and environmental review of the Applicant's
6 application and also the public's opportunity to
7 participate in this proceeding will not end with the
8 Board's ruling; rather, just with respect to the
9 environmental review required by NEPA, the public will
10 have more opportunities to participate through
11 comments in the scoping process and on the draft
12 environmental impact statement.

13 Thank you.

14 JUDGE KARLIN: Thank you, Mr. Smith.
15 Okay. That was helpful. We finished the opening
16 statements and now we will proceed to Technical
17 Contention Number 1.

18 Ms. Curran will address or respond to
19 questions that we have and we can talk about TC-1.
20 We'll call it TC-1. I might mention -- I think we
21 were going to say this earlier -- we ask a lot of
22 questions up here sometimes. And we're trying to
23 probe for logic and thinking and the rationale being
24 presented. It doesn't necessarily mean we have a
25 ruling one way or the other in mind. Sometimes we may

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1 be supportive of a proposition and a need to have the
2 counsel or the advocate give us better help or better
3 explanation, so all I'm saying is try not to read too
4 much into our questions as to where we're going with
5 all of this. I know it's almost inevitable for you to
6 try to do that. But it doesn't really inform you very
7 much where we're going.

8 So, with that, Ms. Curran, we are focusing
9 on Technical Contention Number 1. Could you -- and I
10 might mention to the parties if you've got your CFRs
11 with you, it's sometimes a good idea to have it with
12 you at the podium because I tend to -- all I know is
13 what's written in the regulations and so I read the
14 regs. and ask questions. That's sometimes the way I
15 think.

16 Could you restate Contention TC-1 for us,
17 Ms. Curran?

18 MS. CURRAN: Sure. Before I do, I'd just
19 like to make sure that I reserve ten minutes for
20 rebuttal.

21 JUDGE KARLIN: Right.

22 MS. CURRAN: I understood what you were
23 saying before, but just to make sure that I -- however
24 much time we take, I'd --

25 JUDGE KARLIN: Well, we recognize you have

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1 -- we will give you a chance for rebuttal.

2 MS. CURRAN: Yes.

3 JUDGE KARLIN: Which may or may not be ten
4 minutes.

5 MS. CURRAN: Right.

6 JUDGE KARLIN: That's sort of function-
7 driven by our questions more than anything else.

8 MS. CURRAN: Okay.

9 JUDGE KARLIN: Understood.

10 MS. CURRAN: All right. The contention is
11 the Applicant, PG&E, has failed to satisfy 10 CFR
12 Section 54.29's requirement to demonstrate a
13 reasonable assurance that it can and will "manage the
14 effects of aging" on equipment that is subject to the
15 license renewal rule; i.e., safety equipment without
16 moving parts. In particular, PG&E has failed to show
17 how it will address and rectify an ongoing pattern of
18 management failures with respect to the operation and
19 maintenance of safety equipment.

20 JUDGE KARLIN: Okay. I have a couple of
21 questions. We read the Staff's brief and PG&E's brief
22 and they articulate I think properly that, you know,
23 the Commission, in setting up the license renewal
24 regulations, have said that, Well, we're not supposed
25 to get into current licensing basis issues, whether or

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1 not the facility is currently in -- you know, doing
2 the right thing or that sort of matter.

3 And on page 20 I guess of the Staff's
4 brief, I see them say, "The Commission crafted its
5 license renewal role around a carefully-constructed
6 dichotomy between issues related to aging and current
7 compliance issues." I'm paraphrasing a little bit.
8 And then they go on to say, "TC-1 proposes to
9 eviscerate that distinction. If the Board accepts the
10 basic premise of TC-1, the current operating issues
11 are relevant to the license renewal review because
12 these issues reflect on the Applicant's ability to
13 implement the terms of its AMPs, then any operating
14 issue regarding Diablo Canyon would be admissible."

15 Could you respond to that? I mean, is
16 what -- how do you distinguish between now the problem
17 with current licensing and your -- isn't that what
18 you're raising?

19 MS. CURRAN: Right. Well, first of all,
20 the word "management" or "manage" appears in two
21 different places in the regulation.

22 JUDGE KARLIN: Four different places.

23 MS. CURRAN: Oh, okay. I saw two this
24 morning, 54.21 and 54.29, so clearly the word "manage"
25 has to mean something. And in our view, the way the

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1 Staff and PG&E read the Regulation, it doesn't mean
2 anything. Because if you have a program, then that's
3 all you need to do is put in the program and
4 there's -- no party can raise a question about whether
5 -- whether the Applicant can actually manage the aging
6 equipment.

7 And in my reading of the revised license
8 renewal rules, which I think was in 1996, the
9 Commission basically narrowed the rule saying, Well,
10 the class of equipment that we're going to focus on is
11 narrower -- it maybe doesn't get the same kind of
12 measures for maintenance that other things do, that
13 it's perhaps harder to evaluate whether it's having
14 problems with aging or corrosion, etc. and we're going
15 to focus on that.

16 But I don't read the Regulation as
17 excluding any concern about whether those extra
18 measures that are needed to manage aging equipment,
19 whether the licensee has an adequate organization for
20 actually carrying out those extra measures. I don't
21 read the rules -- I don't read the preamble to that
22 rule as excluding that question.

23 So, yes, it does seem -- in answer to your
24 question that the Commission did not want to -- an
25 intervenor to be able to raise general questions about

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1 can you manage this aging equipment. But where
2 there's a pattern in the past of inadequate
3 management, where -- and this is what we've found in
4 these inspection reports was they called it this --
5 NRC inspectors called it an adverse trend, repeated
6 failure to be able to identify problems and solve them
7 in a timely way.

8 And it seemed reasonable to us to ask,
9 Well, if this licensee is having a lot of trouble
10 dealing with the ordinary current licensing basis type
11 of problems, then what will happen in the license
12 renewal term where the problems are more challenging?

13 JUDGE KARLIN: So if I understand, your
14 point is not whether or not the Diablo Canyon facility
15 is currently in compliance, but that the allegation
16 you make that they are allegedly not able to manage
17 current compliance erodes their ability to show that
18 they will be able to manage aging in the future?

19 MS. CURRAN: Yes.

20 JUDGE KARLIN: Okay.

21 JUDGE ABRAMSON: Alex, let me -- let me
22 just pick this up for a second.

23 JUDGE KARLIN: Sure.

24 JUDGE ABRAMSON: Ms. Curran, do I
25 understand your contention to focus on the management

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1 aspect, not on anything else? Your concern here is
2 that they don't have the ability to manage this?
3 You're not concerned about the detail. Your focus is
4 on their management? Is that correct?

5 MS. CURRAN: Right. Right. And one of
6 the arguments is, well, management doesn't age.
7 Right? So if management doesn't age, then -- well,
8 some of us managers age -- the organization doesn't
9 age, so it's outside the scope. I think that reading
10 of the Regulation would just basically leave the term
11 out of the Regulation because --

12 JUDGE ABRAMSON: I understand.

13 MS. CURRAN: Yeah.

14 JUDGE TRIKOUROS: I'm looking for a formal
15 connection that doesn't require as much interpretation
16 of the word "manage" in the Regulation as some people
17 might. So if I think of the Reactor Oversight Program
18 and its interrelationship with the programs in the
19 plant -- and I'm going to talk more about programs in
20 the plant in a bit -- but I would look at the License
21 Renewal Program as being a program -- think of it as
22 a circle that the plant has to deal with. I think of
23 the Reactor Oversight Program as a circle that the NRC
24 has to deal with. I'm looking for an overlap between
25 those two.

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1 We're hearing from the Staff and the
2 Applicant that there is no overlap. But when I look
3 at the GALL Report, there are ten elements that are
4 identified in that report. And a number of them --
5 for example, Programmatic Element Number 7 is
6 corrective action, which is a -- sort of an overlap
7 program, if you will. It's sort of a management idea.
8 In fact, it is specifically a program at the plant
9 called the Corrective Action Program.

10 Programmatic Element -- or Element 10 is
11 operating experience, where they're looking for the
12 implementation of operating experience within License
13 Renewal Program.

14 Number 9 is administrative controls. So
15 there are management elements in the license renewal
16 that overlap, if you will, with the Reactor Oversight
17 Program.

18 Do you see that as a formal connection or
19 do you still -- do you really believe that the
20 reliance should be on the definition of the word
21 "manage" within the Regulation?

22 I'm looking for help in understanding if
23 there's a formal overlap that isn't covered?

24 (Pause.)

25 MS. CURRAN: I was just hoping that I

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1 could find a quote. So, for instance, in the *Turkey*
2 *Point* case, which is CLR-01-17, the Commission talks
3 about its concern -- it's on page eight -- that "Left
4 unmitigated, the effect of aging can overstretch
5 equipment, unacceptably reduce safety margins, and
6 lead to the loss of required plant functions,
7 including the capability to shut down the reactor and
8 maintain it in a shutdown condition."

9 So the Commission was expressing concern
10 that if -- if these peculiar effects of aging, which
11 is the focus of the license renewal rule, if they're
12 not properly attended to, that this could lead to an
13 accident or some other unacceptable condition.

14 So then the question is: If in the
15 current license term there is activity that provides
16 evidence that some safety function related to aging
17 that's -- you know, corrosion or something like that,
18 may be left unmitigated, is that the proper subject of
19 a contention? And we would say the Commission's
20 language allows that issue to be admitted.

21 Is that helpful, Judge Trikouros?

22 JUDGE TRIKOUROS: Yes. It is helpful.
23 But, again, I'm still looking for that formal
24 understanding of whether there's reactor oversight
25 built into the License Renewal Program, and I'm going

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1 to be asking the same question to each of the other
2 parties as well, so you might have a chance to comment
3 on it later, but I just see the GALL Report as being
4 the overlap connection.

5 MS. CURRAN: Well, you know, over and over
6 if you look at the *Turkey Point* case, if you look at
7 the preamble to the 1996 rule, the Commission keeps
8 stressing that while there's a lot of things that
9 happen in the license renewal term that are just like
10 everything that happens in the current term, there's
11 other things that are different because equipment
12 ages.

13 And when they give examples of the
14 distinctions -- the Commissioners give examples of the
15 distinctions that they make -- they always give
16 examples of programs that don't involve aging
17 equipment.

18 For instance, in CFR -- where they're
19 trying to give an example of how -- well, the current
20 licensing basis isn't relevant to the license renewal
21 term, they always give an example of something like,
22 Oh, there are ways not related, like emergency
23 planning. Emergency planning doesn't age. So, you
24 know, that's a really clear one --

25 JUDGE ABRAMSON: Let me pick this up

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1 again, Ms. Curran, just for a second. So your focus
2 is on the management aspect. So we -- do you accept
3 the idea that they -- that the program might -- the
4 program would be adequate but that you're concerned
5 about how they implement the program --

6 MS. CURRAN: Yes.

7 JUDGE ABRAMSON: -- or follow up the
8 program?

9 MS. CURRAN: Yes.

10 JUDGE ABRAMSON: And if that's the case,
11 then how would you distinguish your proposed
12 contention/admission from the line of cases that says
13 where you challenge management, it's a bad actor kind
14 of claim and you have to show a link between the
15 current management and the individuals in current
16 management and individuals who are going to be
17 carrying out this management of this aging management
18 program in the future during a license renewal term?
19 Do you think that that needs to be distinguished or do
20 you just not -- haven't thought about it?

21 MS. CURRAN: Well, I -- we weren't
22 contemplating challenging the behavior of individuals
23 because it seems -- well, the -- we distinguish
24 between the program, which is a written thing, like
25 this is instructions for how you do it, and the

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1 execution. Where a company has repeated problems with
2 the execution, perhaps that's a problem with the
3 program. I'm not sure what it is. At this point, we
4 see the pattern. Perhaps it's a problem with the
5 description of the program or some instruction in the
6 program that's overlooked. Perhaps it's a problem
7 with training. Perhaps -- I don't know what causes
8 this. It just keeps repeating itself. And that is --
9 that is the question. If it's repeating itself now
10 under these circumstances, will it not repeat itself
11 under more -- under the greater duress of the license
12 renewal term?

13 JUDGE KARLIN: Maybe I can follow up on
14 that a little bit. I mean, as I understand your point
15 -- I'm going to ask the same question of PG&E and the
16 Staff -- the aging -- the Regulations never mention
17 the word "aging management program." The Regulations
18 never mention the word "aging management plan." The
19 Regulations just simply say that they have to
20 demonstrate -- "demonstrate that the effects of aging
21 will be adequately managed." Okay, will be adequately
22 managed, that the company will adequately manage
23 aging.

24 Now, the question is: If I submit a
25 perfect plan to you, a perfect piece of paper that

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1 meets everything that people should do and slap it on
2 the table and say that -- I have thus demonstrated I
3 will adequately manage this issue, is that sufficient?
4 Is a piece of paper sufficient, or is there more to
5 it? I think I hear you saying a piece of paper needs
6 to be right, but you also have to convince the NRC
7 that indeed you will implement that and your
8 management will implement that competently and
9 properly. Is that your point?

10 MS. CURRAN: It's actually just a little
11 bit different because, for instance, if this were an
12 initial operating license case and PG&E was applying
13 for a license for the first time, it wouldn't be
14 possible to raise this contention.

15 JUDGE KARLIN: Right. I understand.

16 MS. CURRAN: Given the written plan and
17 say, This is my plan and that's probably all anybody
18 could do with it is say, We're going to review this
19 plan for what else have we got?

20 And here in this particular case, because
21 this is a renewal of the license that's been in effect
22 for some years, we have evidence that there are
23 problems with the implementation of an existing plan
24 for maintaining existing equipment.

25 JUDGE KARLIN: Right.

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1 MS. CURRAN: That -- and that it is the
2 same organization, nothing different about the
3 organization that's going to be applied to this next
4 set of problems which is different.

5 JUDGE KARLIN: Okay.

6 JUDGE TRIKOUROS: Those inspection reports
7 that you chose -- chose them well -- but maybe not for
8 the reasons that you originally -- that you were
9 thinking. But they bring out a concern that I'd like
10 to get resolved here, which is the -- and how that
11 concern has to be dealt with in terms of license
12 renewal.

13 If you -- if you think of all the programs
14 in the plant -- and I said I was going to talk more
15 about programs and now I'm going to -- but if you
16 think of all the programs in the plant as a series of,
17 you know, vertical processes, then the design basis
18 implementation that the plant has to do or that -- and
19 I differentiate that from the current licensing basis
20 where I would say the design basis is a subset of the
21 current licensing basis -- the design basis
22 implementation is a horizontal process that cuts
23 across all of those vertical programs.

24 Very common in the nuclear industry for
25 the vertical programs to be done exceptionally well.

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1 What is not common is the horizontal program of how
2 the design basis interrelates to all of those.

3 Now, looking at those inspection reports,
4 it's very clear that the problem appears to be in this
5 design basis implementation, this horizontal program.

6 JUDGE ABRAMSON: Clear to you.

7 JUDGE TRIKOUROS: Well, yeah. It appears
8 to me. Now, the -- I was reading through the annual
9 assessment letter -- this is the 2010 -- this is the
10 2009 assessment written in March of 2010 -- and it
11 talks about how well the plant actually performs.

12 JUDGE KARLIN: Could you identify --
13 that's a letter from --

14 JUDGE TRIKOUROS: This is a Marc 3rd, 2010
15 letter --

16 JUDGE KARLIN: Letter from --

17 JUDGE TRIKOUROS: -- letter from John T.
18 Conway --

19 JUDGE KARLIN: That's to John T. --

20 JUDGE TRIKOUROS: To John T. Conway -- I'm
21 sorry -- from --

22 JUDGE KARLIN: The NRC.

23 JUDGE TRIKOUROS: Yeah, from Dwight
24 Chamberlain.

25 JUDGE KARLIN: Of the NRC.

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1 JUDGE TRIKOUROS: Of the NRC.

2 MS. CURRAN: If I -- and you're referring
3 to a letter that's not mentioned in the contention;
4 right?

5 JUDGE TRIKOUROS: Yeah. That's right.

6 MS. CURRAN: Okay.

7 JUDGE TRIKOUROS: And -- but it is the
8 annual assessment letter and it relates to the
9 inspection reports that we're talking about.

10 And it refers to cross-cutting problems.
11 So the problems that you identified in the inspection
12 reports do seem to come out in the annual assessment
13 as well and they're referred to -- it's referred to as
14 a cross-cutting problem.

15 So I guess the question that I have is why
16 is that not then covered under the Reactor Oversight
17 Program, the normal Reactor Oversight Program? They
18 recognize the problem. They've known about it for two
19 years. They've identified findings along those lines.
20 Why would that be something that should be considered
21 within the license renewal?

22 MS. CURRAN: Why should it be not
23 considered in licensing -- why isn't it just part of
24 the --

25 JUDGE TRIKOUROS: Right.

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1 MS. CURRAN: -- current licensing basis;
2 is that what you're asking?

3 JUDGE TRIKOUROS: Right. And let's assume
4 that this problem continues into next year and the
5 year after, possibly all the way through to the day
6 that the plant would actually operate under the
7 license renewal. Why would that not be part of the
8 Reactor Oversight Program, the normal Reactor
9 Oversight Program that -- that looks at all of these
10 different things?

11 MS. CURRAN: Well, this problem they have
12 is applicable to things in the current licensing
13 basis. We don't dispute that. But then the question
14 is if the Commission says over and over again in its
15 decisions and the preamble to the license renewal
16 rule, We're really concerned here about programs for
17 managing the effects of aging; right? That's what
18 they say. It's different. It's different partly
19 because these -- sometimes these things are hard to
20 find, the problems are hard to find, they're hidden,
21 it's in passive equipment, you know, deep in the
22 plumbing and the pipes. So here we've got an
23 organization that has trouble finding these and
24 resolving problems that are easier to find.

25 So then the -- our reasoning is, if

1 they've got trouble with the easier things, then we're
2 concerned they're not going to be able to manage the
3 harder things that have to do with aging management
4 and it doesn't matter what your program looks like on
5 paper if the inspectors are saying, We see an adverse
6 trend. This keeps happening to you. Why? That's
7 what we're pointing out.

8 And we -- certainly this is applicable in
9 the current licensing basis. We're not disputing
10 that. But we're saying it has unique and different
11 importance for the license renewal term because if
12 these kind of problems come up in the context of the
13 additional demands of a license renewal program, then
14 that's going to create a safety problem.

15 JUDGE TRIKOUROS: The problem I'm having
16 is -- that I'd like to understand further and, again,
17 we're going to be debating this with the other parties
18 as well -- is that the plant could have a perfect
19 operating history up until 2024 when the license
20 renewal period begins. And in 2030, this problem
21 could arise and has to be dealt with under the Reactor
22 Oversight Program. Why is that different in the
23 period before 2024?

24 Go ahead.

25 MS. CURRAN: It's very different from the

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1 Mothers for Peace's perspective in the sense that once
2 the license renewal permit is issued, then any concern
3 that the Mothers for Peace or anyone else may have
4 with the operation of the plant under the license
5 renewal term becomes an enforcement matter in which
6 resolution of that concern is a purely discretionary
7 matter.

8 Now, while you are reviewing this
9 application, PG&E has the burden of proving that it
10 satisfies the license renewal regulations. And so we
11 can come to you, the licensing board, and say, We ask
12 that you force PG&E to address this issue before you
13 will approve the issuance of a permit, so it's a legal
14 difference in terms of what's required.

15 JUDGE KARLIN: Okay.

16 JUDGE TRIKOUROS: I'm not finished but we
17 could end it and pursue this later.

18 JUDGE KARLIN: I think that might be
19 useful. You'll have another shot at it or, you know,
20 another opportunity when we get to rebuttal. Perhaps
21 we should turn to Mr. Repka and PG&E for the moment.

22 MS. CURRAN: Okay.

23 JUDGE KARLIN: And ask some of these
24 questions of them. Mr. Repka.

25 MR. REPKA: Okay. Thank you.

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1 JUDGE KARLIN: Good. I would like to
2 start with a question about the inspection reports.
3 The Petitioner uses -- references three inspection
4 reports that are referred to as IRRs. These are
5 inspections that have been done by the NRC of the
6 Diablo Canyon facility. They seem relatively
7 thorough. These are normal I think inspections that
8 are done and I would like to refer to the February 6,
9 2009 IRR-0805 and it covers the year 2008 or part of
10 the year 2008.

11 As the Petitioners point out, on page 24
12 there's an adverse -- "adverse trend in problem
13 evaluation." "This adverse trend began during the
14 fourth quarter of 2007 and continued to the fourth
15 quarter of 2008. Examples include ..." and then they
16 go down and list I think it's like 13 violations --
17 and that's their word, not mine -- the NRC Staff's
18 word that PG&E Diablo Canyon was in violation.

19 They then recite a number of other
20 violations.

21 The other two reports, the IRR-0903 2009
22 inspection, they list 13 violations and again find an
23 adverse trend.

24 Same thing for the third report.

25 Doesn't this -- does this raise an issue

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1 with the -- if the company is not able to manage
2 current compliance, does this erode our confidence and
3 reasonable assurance that the company will be able to
4 manage aging?

5 MR. REPKA: No.

6 JUDGE KARLIN: Okay. And please explain.

7 MR. REPKA: The inspection findings
8 obviously are what they are. They are being addressed
9 consistent with the process. I think it's important
10 to recognize that all of the findings are rolled up
11 into various -- the three reports that are relied upon
12 by the Mothers for Peace into a series of five, six,
13 four I think it is between the three inspection
14 reports. It's not the large number that you're
15 quoting. But all of the rollup findings that are
16 actually cited as violations are treated as either
17 green findings or severity level 4 violations, all of
18 which are relatively minor matters, and all are
19 treated as non-cited violations.

20 And beyond what that says about the
21 overall significance of it, the important thing is to
22 be treated as a non-cited violation implies that there
23 are corrective actions that are underway. And I think
24 that that as a factual matter, that's an important
25 element. That's not the only element, but certainly

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1 from a license renewal standpoint, the point is that
2 these are issues being addressed today by today's
3 regulatory process and it doesn't follow that in 2024
4 or 2026, whatever the beginning of the period of
5 extended operation is, that these violations, these
6 adverse trends, these whatever they are will continue
7 to exist because, in fact, they won't.

8 JUDGE KARLIN: Well, let me ask my
9 question that I asked of Ms. Curran. Let's say that
10 PG&E plops a perfect piece of paper on the table and
11 says, That's our aging management program. Is it
12 outside the scope of this proceeding or any contention
13 to ask whether or not the company has demonstrated it
14 will adequately implement or manage that program, or
15 we just look at the piece of paper?

16 MR. REPKA: Yes. I think it is outside
17 the scope to address --

18 JUDGE KARLIN: Then we just look at the
19 piece of paper?

20 MR. REPKA: You look at -- the finding for
21 license renewal is focused upon the scope of equipment
22 subject to aging management review, the results of the
23 aging management review, the aging management programs
24 that are in place, and the focus is to determine
25 whether all the equipment that's in scope has been

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1 addressed.

2 JUDGE KARLIN: Well, let me ask, if I may.
3 That's the topic of the management; i.e., you're
4 managing aging. But the question is with the adequacy
5 of the management. The adequacy of the management is
6 irrelevant to the adequacy of an aging management
7 program?

8 MR. REPKA: The implementation of those
9 programs down the road is beyond the scope of license
10 renewal. And to the extent that the Mothers for Peace
11 and you're looking at 10 CFR 54.29 and 54.21 which
12 talk about the standards for issuance of a renewed
13 license.

14 I think it's also important to look at 10
15 CFR 54.30, which is matters not subject to a renewal
16 review and, in particular, it talks about the review
17 is required to show that there are -- if there were
18 some finding that there's not reasonable assurance
19 during the current licensing term, the license
20 activities will be conducted in accordance with the
21 CLB. 54.30(b) then states that, "The licensee's
22 compliance with the obligation under paragraph (a) to
23 take measures under its current license is not within
24 the scope of the license renewal review."

25 JUDGE KARLIN: Now, let me ask you about

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1 that because I think that is an issue. Compliance of
2 54.30(b), "The licensee's compliance with the current
3 licensing basis to take measures under its current
4 license is not within the scope." And I agree.
5 Obviously that's a reg. We follow that. That doesn't
6 seem to be what they're saying. They are not arguing
7 about whether or not the company is in compliance with
8 the current licensing basis or raising that as a
9 contention. Their contention is the alleged failure
10 of the company to be in compliance with the current
11 licensing basis undermines its ability to demonstrate
12 that it will adequately manage in the future another
13 topic; i.e., aging.

14 MR. REPKA: But that argument
15 fundamentally is premised on a current day issue which
16 is precisely of the kind contemplated by 54.30(a).

17 JUDGE KARLIN: But let me then ask about
18 this GALL which is the Generic Aging Lessons Learned
19 Report, NUREG 1801, Volume 1, Rev. 1, September 2005.
20 As Judge Trikouros has pointed out, this is a -- this
21 is a document that the Staff attempts to give its
22 analysis of lessons learned with regard to management
23 of aging and on page two of that document, ten program
24 elements in each aging management program. There are
25 ten program elements that must be there. Number

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1 seven, corrective actions. Number eight, confirmation
2 process. Number nine, administrative controls. And
3 on number ten, operating experience.

4 Doesn't the alleged noncompliance towards
5 the current operating experience provide some indicia
6 that supports their allegation that if you can't
7 manage the current licensing basis, you haven't
8 demonstrated you're going to be able to manage aging?

9 MR. REPKA: I think, again, that doesn't
10 follow. I think that all of those programs are
11 important programs that are part of operation of the
12 plant today and in the future will always be
13 important. I can't deny that. But implementation
14 today, just as is implementation in the future, is an
15 issue for the reactor oversight process and other
16 regulatory processes.

17 I think if you try to draw a inference
18 based upon an issue today, number one, it wouldn't be
19 an accurate inference because corrective actions will
20 necessarily be mandated by the existing oversight
21 process so there's no -- should be no inference that
22 it will continue to exist into the future. And --

23 JUDGE KARLIN: Well, let me ask on that.
24 Doesn't the three inspection reports in a row, each of
25 which indicate an adverse trend, provide some indicia

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1 that the corrective actions aren't working?

2 MR. REPKA: That is -- would be true for
3 today and that's an issue for current --

4 JUDGE KARLIN: And isn't today all we have
5 to go on as to whether you've adequately demonstrated
6 what you're going to do in the future is proper?

7 MR. REPKA: Well, again, the focus of
8 license renewal is not on the implementation of the
9 program in the future. The regulatory process
10 provides a process to assure that the current
11 licensing basis, which includes the Corrective Action
12 Program, the Operating Experience Review Program, that
13 those will be implemented in the future. That's the
14 second principle of license renewal, that the reactor
15 oversight processes and the other regulatory processes
16 address those.

17 So, again, the focus for license renewal
18 is on the scope of equipment, the scope of the aging
19 management review, the scope of the program itself,
20 and none of these inspection reports say anything
21 about that. Nothing in the contentions say anything
22 about that.

23 JUDGE KARLIN: Let me ask this. Then on
24 page 13 of your brief, if you would turn to that --

25 MR. REPKA: You need to bear with me for

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1 a second.

2 JUDGE KARLIN: Page 13 -- I'm sorry --
3 your answer.

4 MR. REPKA: Okay. I'm there.

5 JUDGE KARLIN: The first full paragraph,
6 I guess it's the second sentence, you state,
7 "Unsupported speculation that PG&E will contravene the
8 NRC rules at some point in the future is not an
9 adequate basis for a contention."

10 I find that real surprising. "Unsupported
11 speculation will contravene at some point in the
12 future." Don't the three inspection reports indicate
13 that PG&E is contravening the rules in the current
14 last three years in a row?

15 MR. REPKA: I don't --

16 JUDGE KARLIN: Don't you think that
17 provides us some basis to look to the future and say,
18 Well, if you've currently been in violation of the
19 three years, you know, having a problem, that's some
20 indicia that you might have a problem in the future
21 with this other topic; i.e., aging.

22 MR. REPKA: No, because the current
23 regulatory process provides the means to assure that
24 appropriate corrective actions are taken.

25 JUDGE KARLIN: No, but I want to ask you:

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1 Do you really believe that it's unsupported
2 speculation that you will contravene in the future
3 when there's three inspection reports in a row that
4 you are contravening it in the present?

5 MR. REPKA: Yes, I do believe that.

6 JUDGE KARLIN: That's unsupported? Okay.

7 MR. REPKA: Because there is a process in
8 place to assure that corrective actions are taken.

9 JUDGE KARLIN: That's not the issue,
10 whether there's a process to take corrective action.
11 The issue is whether the company is, at least by the
12 NRC staff, said to be in violation numerous times,
13 right now.

14 MR. REPKA: Well, I think that it's
15 unsupported because you're making a leap into the
16 future and assuming that it will continue to exist
17 through the current operating license term as well as
18 into the future, into the extended operating license
19 term, and that's simply unsupported.

20 And that's precisely why implementation is
21 beyond the scope of this review because how can we
22 have a hearing today about what might exist in 2024 or
23 2030 or 2036?

24 JUDGE KARLIN: But isn't a person's past
25 performance the best indicator we can have as to what

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1 their future performance is going to be?

2 MR. REPKA: Well, the past is --

3 JUDGE KARLIN: I mean, that's one of the
4 main --

5 MR. REPKA: -- never an indicator of
6 future results. I mean, I can accept that as a
7 premise. And I think that that's why we have ongoing
8 regulatory processes.

9 The licensing review and the inspection
10 and oversight functions are two very different
11 creatures of the regulatory process, and so we're
12 focused here on the licensing review which is
13 necessarily focused on the programs, the scope, the
14 sufficiency, and adequacy of the programs. And I
15 think there's, you know, a substantial number of
16 Commission cases that support that that we cite in our
17 brief talking about issues related to the quality
18 assurance and issues related to human performance, and
19 the Commissions and its boards have ruled that those
20 are outside the scope of license renewal for the very
21 same reason -- that the regulatory process assures
22 that those issues are addressed today.

23 JUDGE KARLIN: But doesn't the GALL itself
24 talk about corrective actions as being part of aging
25 management and confirmation -- this is the guidance

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1 that the Staff has issued.

2 MR. REPKA: Yes.

3 JUDGE KARLIN: Now, I'm not saying we have
4 to follow it.

5 MR. REPKA: Yes.

6 JUDGE KARLIN: But --

7 MR. REPKA: No. I think there's many
8 programs in a nuclear power plant that exist today and
9 will continue to exist into the future and they're,
10 therefore, important to the period of renewed
11 operation. That doesn't bring them within the scope
12 of a hearing based upon current performance.

13 Yes, those programs will exist and will be
14 relied upon in the future, no doubt about it. But the
15 oversight of that process is not the focus of a
16 license renewal licensing review. That's the focus of
17 inspection and enforcement.

18 JUDGE TRIKOUROS: So you don't see any
19 overlap at all with respect to these various program
20 elements that we were talking about earlier in the
21 GALL Report -- the corrective action requirements, the
22 operating experience, the administrative controls, and
23 confirmation process. These are all dealing with the
24 things we're talking about here and they're
25 specifically required as part of the license renewal

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1 process.

2 JUDGE ABRAMSON: As part of the plant.

3 MR. REPKA: Those programs are part of the
4 plant. I don't deny that. Those are important
5 programs that have to be implemented. The NRC will
6 monitor the implementation and the process will be --
7 to the extent there's adverse trends, they'll be self-
8 correcting. But, again, not an issue for the license
9 renewal review. And I think that's precisely what the
10 Commission's general principles are all about and
11 precisely what 10 CFR 54.30 is all about.

12 So corrective actions to address those
13 kind of today problems will be -- are not within the
14 scope of license renewal.

15 JUDGE ABRAMSON: Judge Trikouros, let me
16 ask you because I don't have that document in front of
17 me that you have. You're reading from the GALL
18 Report?

19 JUDGE TRIKOUROS: Right.

20 JUDGE ABRAMSON: Are those elements you're
21 listing, are they listed in the GALL Report as
22 elements of a plan?

23 JUDGE TRIKOUROS: Aging management.

24 JUDGE ABRAMSON: If I understand -- okay.
25 So if I understand it correctly, those are elements of

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1 the aging management plan. What's being challenged
2 here, Mr. Repka, unless I misunderstand it, is in
3 order for the Agency to have reasonable assurances
4 that the plan itself will be adequately implemented,
5 there has to be some indicia that the Applicant will
6 implement its perfect plan even if the plan addresses
7 all these things.

8 Would you just spend a second -- you said,
9 for example, there's a line of cases addressing
10 personnel actions, personnel -- and I assume what you
11 meant by that is the activities of individuals. What
12 seems to me is being challenged here is whether or not
13 the individuals who are charged with actual
14 implementation of this plan will do so or whether or
15 not there's a commitment of the Applicant, whether or
16 not the commitment of the Applicant to implement this
17 plan is sufficient to give the Agency adequate
18 assurances. That seems to you to be what the
19 challenge is?

20 MR. REPKA: Well, I think that is what the
21 challenge is and --

22 JUDGE ABRAMSON: Is there a line of cases
23 that addresses such assertions?

24 MR. REPKA: Well, I think the case we cite
25 related to implementation of the quality assurance

1 program would be an example of that. If I could find
2 the citation.

3 JUDGE KARLIN: Is that the *Oyster Creek*,
4 the Licensing Board decision?

5 MR. REPKA: I believe so.

6 JUDGE KARLIN: Do you have any Commission
7 decision on that?

8 MR. REPKA: I don't believe so but there
9 is a Commission decision in *Dominion on Millstone* that
10 talks about operational issues are addressed by
11 ongoing oversight review and enforcement. That is a
12 Commission decision. I put corrective action program
13 into the operational issue. It's not unique to the
14 period of extended operation.

15 JUDGE ABRAMSON: How would you -- is there
16 a proper analogy here between this assertion and the
17 line of cases that addresses -- that amounts to bad
18 actor? This management's demonstrated we can't do it
19 and the requirements, I believe in the Commission line
20 of cases, says unless you show it through the
21 individuals, that doesn't get you there.

22 MR. REPKA: Yeah. The line of cases
23 you're referring to -- and I think it's correct to
24 bring it up -- is in a technical qualifications review
25 for initial licensing and for license amendments and

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1 other things, the issue of character and competence
2 have come up, and it's not just character. It's also
3 competence. And those issues, the standard I think is
4 very, very high as to when it would be an issue
5 litigable in a licensing proceeding; in other words,
6 the Commission has said things along the lines of, You
7 can't presume that the licensee won't meet the
8 Regulations. It won't meet its license and technical
9 specifications.

10 JUDGE KARLIN: Well, let me ask on that.
11 I mean, isn't that what I was just talking about? You
12 can't presume that the licensee will violate, the
13 applicant will violate. But we don't have to presume
14 that here. Doesn't the three IRRs show that Applicant
15 is currently in violation? We don't have to presume
16 that.

17 MR. REPKA: Again, the process assures
18 that corrective actions are taken and --

19 JUDGE KARLIN: Well, that's not the issue.
20 It's not an issue of whether it's going to be
21 corrected; the issue is we're not presuming they're
22 going to be in violation because they're alleging you
23 are in violation.

24 MR. REPKA: You are presuming because
25 you're presuming a future conduct. The current

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1 conduct is addressed today. You're making an
2 inference and drawing a presumption that that will --
3 it's essentially some different conduct will occur in
4 the future that's similar to what's happening today,
5 and that is a presumption.

6 JUDGE ABRAMSON: Mr. Repka, in the line of
7 cases we were discussing a minute ago before Judge
8 Karlin wanted to follow up, and I want to pick this
9 up, --

10 JUDGE KARLIN: Sure.

11 JUDGE ABRAMSON: -- those lines of cases,
12 if I recall correctly -- and I think I was involved in
13 a couple of them -- those lines of cases essentially
14 assert here's an action that the applicant did wrong
15 and here's another incident that demonstrates the
16 applicant did wrong. And the assertion by the parties
17 trying to raise the question was because they did
18 those things wrong, they'll do it wrong in the future.
19 And as I recall the Commission rulings and the Board
20 rulings, they were to get to that point, that's a
21 character -- that's a character attack. You've got to
22 show me that it's the individuals.

23 Am I recalling those incorrectly?

24 MR. REPKA: Yes. The -- an example I can
25 bring up based on my own experience was a case in the

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1 late -- mid to late 1990s at Millstone related to a
2 spent fuel storage and the contention was precisely
3 that, that the licensee had violated NRC requirements;
4 in fact, had pled guilty to some criminal violations
5 related to EPA requirements as well as NRC
6 requirements, fairly -- conduct much more egregious
7 than what we're talking about here today. And the
8 contention was that the applicant wouldn't be able to
9 implement its administrative controls, wouldn't be
10 able to implement its programs in the future, and the
11 Commission rejected that as a contention..

12 JUDGE ABRAMSON: Cause?

13 MR. REPKA: And I think that -- excuse me?

14 JUDGE ABRAMSON: Cause? Why was it --

15 MR. REPKA: Because, (a), you can't make
16 a presumption about future conduct based upon past
17 conduct and, number two, without some more specific
18 egregious conduct by specific individuals as you say
19 may have been part of it -- I don't remember the
20 details -- but -- but that's the point.

21 But I think even -- you don't even need to
22 reach that line of cases here because in license
23 renewal, the Commission's clear it's not looking at
24 the full scope of operational issues like it might be
25 looking at in initial licensing. And I don't -- if

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1 you were to have a hearing on this issue, the hearing
2 would be about -- presumably about these present day
3 issues and whether sufficient corrective actions are
4 being taken and how this might affect the conduct of
5 the company in the future. I don't understand how you
6 could square that kind of hearing with 10 CFR 50.30(b)
7 which says that those kinds of issues for which
8 corrective actions are required today are beyond the
9 scope of license renewal.

10 JUDGE KARLIN: Let me follow up on that
11 and then Judge Trikouros I think has a few questions,
12 too, and we're not done. But I think there is a line
13 of cases where -- and I believe under the statute
14 would you agree in certain circumstances the
15 competency of the applicant is a statutory criterion
16 for getting a license?

17 MR. REPKA: I think that is -- there is a
18 line of cases and there is a requirement for initial
19 licensing.

20 JUDGE KARLIN: Yes.

21 MR. REPKA: That's not a requirement for
22 license renewal.

23 JUDGE KARLIN: Right. And this is not the
24 situation, as I understand it here, which is I think
25 it's a switch of the burden of proof or persuasion

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1 perhaps. This is not a -- you I believe as the
2 Applicant, you have to demonstrate that you will
3 adequately manage the effects of aging during the
4 period of extended operation, so that is your burden
5 and you must show a reasonable assurance that you will
6 do so.

7 And as I understand it, that -- in this
8 case, there's an allegation -- I mean, not to get to
9 the merits of whether that's valid or not -- that
10 based on the inspection reports, which they allege
11 show you were not adequately managing or PG&E is not
12 adequately managing current compliance, that this
13 raises a question about whether the company will
14 adequately manage aging.

15 And I understand there are corrective
16 actions to deal with current compliance, but, again,
17 I think -- isn't the burden on the Applicant to
18 demonstrate you will adequately manage aging in the
19 period of extended operation?

20 MR. REPKA: Yes.

21 JUDGE KARLIN: And do you do that simply
22 by plopping a piece of paper on the table and saying,
23 Here's our demonstration? Or is there any
24 implementation component of that?

25 MR. REPKA: Well, (a), it's more than

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1 plopping a piece of paper on a table. It's an
2 exhaustive review of the plant, the equipment, the
3 aging mechanisms, the aging management programs, and
4 that's what's presented for license renewal and that's
5 what's in the scope of review.

6 The future implementation of the aging
7 management programs, many of which would call for
8 inspections and surveillances far into the future, the
9 implementation of that is the subject of ongoing
10 regulatory oversight inspection processes and it's not
11 part of the licensing review.

12 JUDGE KARLIN: Now, I agree with I think
13 what Judge Abramson was raising a question here. Now,
14 if an intervenor comes in and says, Look, we found one
15 alleged violation of this company over the last 20
16 years and, therefore, we have grave doubts about their
17 ability to manage aging in the future, that's one
18 thing. On the other hand, if the Petitioner comes in
19 and says, There's a pattern of serious noncompliance
20 and, therefore, they have a problem with aging
21 management in the future, is there a line that can
22 distinguish between -- you know, without getting into
23 the merits of the contention, of course, when such a
24 contention might be admissible and it might not?

25 MR. REPKA: I think if the contention is

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1 no more than we have a history -- of the contention
2 asserted, a history of current violations or current
3 regulatory issues, I don't think there's a line. I
4 don't think that's in scope. And I think that, you
5 know, even if there were a line, I think a number of
6 green findings and severity level 4 non-cited
7 violations doesn't cross that line.

8 JUDGE KARLIN: Right. Now, the Staff says
9 -- and I'm going to ask them this question, and this
10 is a little preview for the Staff -- is that on page
11 22, given the quantity and magnitude of these
12 inspection findings, they are not of the type of
13 violations that can cause the NRC to be unable to find
14 reasonable assurance of 54.29. Given the type and
15 quantity, these are not the type -- isn't that the
16 merits? How do we know whether the type and -- you
17 say, well, these are green findings. These are white
18 findings. These are purple findings. I don't know
19 what findings they are. But how do we distinguish
20 between an admissible contention and a non-admissible
21 contention without getting to the merits?

22 MR. REPKA: Okay. I think our arguments
23 are twofold. Number one, it's a scope argument which
24 is an admissibility argument, and I would -- to the
25 extent that Staff is suggesting that there is some

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1 type or some kind that would cause a problem, no, I
2 disagree. So it's a scope argument.

3 But to the extent that the Staff's
4 argument is the same as the argument I just made, that
5 these findings aren't sufficient to raise that -- a
6 genuine dispute on that point, that's a basis
7 argument. That's a question of whether or not
8 there's --

9 JUDGE KARLIN: Well, wait a second. What
10 is basis? 2.309(f)(1)(ii) says adequate basis -- says
11 provide a brief explanation of the basis. You're not
12 talking about that, are you?

13 MR. REPKA: Well, a basis that satisfies
14 the ultimate standard for admissibility which is that
15 there has to be a showing of genuine dispute on a
16 material issue of fact.

17 JUDGE KARLIN: So you're talking about
18 (vi), genuine dispute?

19 MR. REPKA: Yes.

20 JUDGE KARLIN: Because the word "basis"
21 only appears in (ii) and that's not what you're
22 talking about.

23 MR. REPKA: Right. Genuine dispute.

24 JUDGE KARLIN: "Provide sufficient
25 information there's a genuine dispute on a material

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1 issue."

2 MR. REPKA: Correct.

3 JUDGE KARLIN: Okay.

4 MR. REPKA: (A) It's not sufficient and,
5 (b), it's not a material issue.

6 JUDGE KARLIN: So you're focusing on
7 materiality, not sufficiency.

8 MR. REPKA: That would be the scope
9 argument. Yes.

10 JUDGE KARLIN: Okay.

11 MR. REPKA: But sufficiency --

12 JUDGE KARLIN: I think I understand.

13 MR. REPKA: -- is a separate argument.

14 JUDGE TRIKOUROS: The inspection reports
15 deal with 2008 and 2009. Is there any indication that
16 the trend is continuing in 2010?

17 MR. REPKA: I don't have that information.
18 I know that there are -- is regulatory dialogue going
19 on and specific corrective actions are being taken,
20 but as to current metrics, I can't answer that
21 question.

22 JUDGE TRIKOUROS: You don't know of any
23 inspection findings that would -- that would indicate
24 the trend is continuing?

25 MR. REPKA: I don't know would be the

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1 correct reservation. I can't say that there aren't
2 any.

3 JUDGE TRIKOUROS: The -- this design basis
4 question, I'd like to explore that with you if I
5 could.

6 MR. REPKA: Okay.

7 JUDGE KARLIN: The findings indicate --
8 the assessments of Diablo Canyon indicate that you run
9 your programs well. However, there's a trend that
10 indicates that you do not understand -- either you do
11 not understand design basis properly or you did not
12 understand how to implement the design basis when
13 something comes up with respect to some piece of
14 equipment or something such as an analysis in the
15 design basis.

16 A case in point was a steam generator tube
17 rupture where the operator action which was
18 licensed -- the plant license of 12 minutes operator
19 actions was then reduced to 5.24 minutes which is
20 amazing. Talk about operator action down to 24/100s
21 of a minute and -- which is required to be reported to
22 the NRC was not reported to the NRC. It could have
23 been 300 milliseconds for all I know. It just simply
24 wasn't -- was just done and not reported as it should
25 have been.

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1 That's indicative of something that is
2 perhaps more difficult to fix, perhaps. I'm asking
3 you if given the GALL requirements and given the
4 nature of these inspection findings, that you still
5 see no overlap whatsoever?

6 MR. REPKA: No. I don't think I ever said
7 there was no overlap. I think all of these programs
8 undercut everything at the plant and relate to
9 everything, including license renewal, so I've never
10 said that there's no overlap. But what I have said is
11 that implementation of those programs is not a license
12 renewal licensing issue.

13 The trend related to design and licensing
14 basis that you point out is certainly something that
15 PG&E management is very aware of, that NRC staff has
16 made very clear to PG&E where the NRC is on that
17 issue, and certainly actions are being taken or are
18 being planned and discussed with the regulator, and
19 that's the regulatory oversight process where that
20 issue is resolved. Again, it's not an issue that's
21 unique to license renewal. It's not an issue unique
22 to age-related degradation. It simply isn't within
23 the scope of the very specific license renewal review
24 required by 10 CFR Part 54.

25 JUDGE TRIKOUROS: So the egregiousness of

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1 a problem would still be -- make it -- would still be
2 independent of the license renewal process. Your
3 argument is that eventually you'd be shut down by the
4 Nuclear Regulatory Commission if things got bad?

5 MR. REPKA: Correct. Correct. And, you
6 know, if the presumption is the corrective actions
7 aren't sufficient or insufficient to assure safe
8 operations today, that action has to be taken today.
9 And so, you know, that's precisely our point, is
10 that --

11 JUDGE TRIKOUROS: And the aging management
12 plan has to specify what corrective actions are going
13 to be taken in these cases; right? I mean --

14 MR. REPKA: For these particular
15 violations, yes.

16 JUDGE TRIKOUROS: Right. Well, when you
17 have a -- when your plan addresses aging of a specific
18 component, you're going to address not just how you're
19 going to examine it but what you're going to do to
20 correct the problem. That's the plan; right?

21 MR. REPKA: Yes. And corrective action
22 programs have measures to assure that the
23 effectiveness of the corrective actions are assessed
24 in the future. So it's an ongoing process every day.

25 JUDGE KARLIN: May I ask a question? On

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1 page 11, if you would turn to page 11 of your brief,
2 please, --

3 MR. REPKA: Certainly.

4 JUDGE KARLIN: -- which is your answer.

5 MR. REPKA: Okay.

6 JUDGE KARLIN: I don't know why I refer to
7 it as your brief. You give us a quote out of the 1991
8 Regulation -- *Federal Register*, actually -- and
9 happily you continue what I think is the key part of
10 it in your footnote, Footnote 5 I guess -- Footnote 4.
11 But let me -- this is what troubles me. I think this
12 is a key point. There's a general statement that, you
13 know, current licensing basis issues are not part of
14 an aging management program, but then it goes on to
15 say in the *Federal Register*, "Allegations that the
16 implementation of a licensee's proposed actions to
17 address aging related to degradation has or will cause
18 noncompliance with the current licensing basis during
19 the period of extended operation or that the failure
20 of the licensee to address age-related degradation in
21 a particular area has or will cause noncompliance
22 would be valid subjects for contentions."

23 Isn't that exactly what they're alleging
24 here? -- that the implementation is the problem and
25 that the doubts about the implementation are raised by

1 the -- what they allege current noncompliances that
2 show a management problem?

3 MR. REPKA: I think the allegations and
4 doubts addressed in that statement are more specific
5 than what we have here. They're more specific to
6 aging management programs, aging management plans
7 saying, Here's the plan we have. Oh, you're relying
8 upon a plan related to this equipment that operating
9 experience shows hasn't worked in the past to address
10 the age-related degradation. And that might be a
11 legitimate issue.

12 But I think that it's -- this is referring
13 to something more specific than what we're talking
14 about here, which is broad performance issues and
15 implementation of broad plans and programs in the
16 future.

17 JUDGE TRIKOUROS: Looking at page ten of
18 your -- of your answer, you make a statement that
19 you're referring to the inspection reports that the
20 Petitioners have cited and you say -- you say, "But
21 such modifications and design control failures do not
22 implicate age-related degradation. Instead, such
23 modifications implicate the current licensing basis
24 which, as discussed above, is outside the scope of the
25 license renewal review."

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1 But in fact, the entire structure of the
2 aging management program is to preserve the current
3 licensing basis in the 20-year extension period. So
4 I don't understand how -- I don't understand that
5 statement.

6 MR. REPKA: Well, I think the statement is
7 that the violations involve changes that were made
8 perhaps without a 50.59 review or an adequate 50.59
9 review related to the current licensing basis. So
10 what we're talking about there is that these are --
11 these are violations related to the current licensing
12 basis of the plant, changes, design -- configuration
13 management not being adequately maintained, for
14 example, nothing specific to an aging mechanism, the
15 scope of equipment subject to an aging management
16 program, nothing specific to aging.

17 And I think that's the point we're trying
18 to make and the distinction we're trying to make.
19 Again, it's a broad reference to CLB maintenance, but
20 CLB maintenance is something that's monitored by
21 ongoing oversight today as well as in the future.

22 And that's precisely the Commission's
23 second principle of license renewal where the
24 regulatory oversight programs and processes will
25 assure in the future that the CLB is maintained.

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1 JUDGE TRIKOUROS: But, in fact, aging --
2 aging monitoring is not something you're doing today,
3 so obviously anything that happens today couldn't be
4 associated with aging in the sense that it's not
5 something that you need to do.

6 MR. REPKA: I don't think that's really
7 true. I think what you -- in monitoring the plant
8 every day, you're looking at equipment performance and
9 reliability, you're conducting preventive maintenance
10 and corrective maintenance, you're monitoring and
11 trending through the corrective action programs how
12 equipment is performing. All of that is exactly
13 what's rolled up into the aging management reviews.

14 JUDGE TRIKOUROS: Right, but you have no
15 aging management program per se today and you're
16 having some problems with implementing the things
17 you're talking about right now.

18 MR. REPKA: Again, I don't think that's
19 necessarily true. I think many of the aging
20 management programs being relied upon are programs
21 that exist today for equipment and will be continued
22 in the future. Others will be enhanced and others
23 will be new programs. But there are aging management
24 programs today and additional programs in the future,
25 recognizing of course that license renewal is focused

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1 on a very specific set of long list structure systems
2 and components that are passive and are not monitored
3 by current day surveillance programs.

4 But plant performance and plant equipment
5 is addressed today.

6 JUDGE TRIKOUROS: But there is a
7 distinction I think between what you do today and what
8 you will do when the AMP is implemented. There will
9 be a level -- there will be a higher level associated
10 with aging than -- today it's maintenance really and
11 prevention of failures, not per se aging.

12 JUDGE KARLIN: I'm going to suggest that
13 we complete the questioning of Mr. Repka and PG&E at
14 this moment and then take a break because we've been
15 going basically two hours at this point. And as I
16 intimated and I guess we haven't followed our own time
17 limits -- I'm sorry -- but I think this has been
18 helpful. So do we have any more questions of Mr.
19 Repka at this point?

20 No? Okay. Mr. Repka, thank you.

21 MR. REPKA: Thank you.

22 JUDGE KARLIN: We're going to take -- it
23 is -- I have it as about 10:30. We will take a ten-
24 minute break and try to reconvene crisply at 10:40.
25 This proceeding now stands adjourned.

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1 (Recess from 10:28 a.m., until 10:42 a.m.)

2 JUDGE ABRAMSON: Our law clerk wouldn't
3 say it, so I will. Let's rock and roll. All right.
4 Please be seated. Somebody get Ms. Curran away from
5 an interview so she can start.

6 JUDGE KARLIN: Actually, we have the
7 Staff. I think the Staff are up. So the licensing --
8 Atomic Safety and Licensing Board has now reconvened
9 and we are on the record.

10 Staff, would you please come up to the
11 podium.

12 MR. M. SMITH: Yes, Your Honor.

13 JUDGE KARLIN: Mr. Smith.

14 MR. M. SMITH: Judge Karlin.

15 JUDGE KARLIN: Yes. Thank you.

16 MR. M. SMITH: Judge Trikouros.

17 JUDGE KARLIN: Okay. You've heard a
18 number of the questions we asked. Let me ask you. On
19 page 22 of your brief, --

20 MR. M. SMITH: Yes, sir.

21 JUDGE KARLIN: -- you -- I will quote it
22 again. "Given the quantity and magnitude of these
23 inspection findings, they are not the type of
24 violations that can cause the NRC to be unable to find
25 a reasonable assurance."

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1 Isn't that the merits?

2 MR. M. SMITH: Yes, Your Honor. In that
3 section of our brief, we're arguing the alternative.
4 In the first part, we argue that the Commission was
5 outside of the scope. But in this portion, we're
6 arguing that even if it were within the scope of
7 license renewal, the types of violations that have
8 been alleged are simply not the types of violations
9 that can cause the Staff to be -- or the NRC to be
10 unable to find a reasonable assurance, which is the --
11 as the parties just pointed out, the touchstone for
12 license renewal, 54.29(a). We point out that in the
13 Staff's Reactor Oversight Program, the types of
14 violations that can cause the Staff to be unable to
15 find reasonable assurance are --

16 JUDGE KARLIN: Wait a second. Wait a
17 second.

18 MR. M. SMITH: Yes, Your Honor.

19 JUDGE KARLIN: In the Staff's Reactor
20 Oversight Program, the types of violations that will
21 be unable to provide the Staff to find reasonable
22 assurance of what? The Reactor Oversight Program
23 doesn't deal with aging management, does it?

24 MR. M. SMITH: No. It does not.

25 JUDGE KARLIN: Okay. So --

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1 MR. M. SMITH: But --

2 JUDGE KARLIN: Well reasonable assurance
3 that the aging management program demonstrates that
4 the aging management program will be adequate. Okay.
5 But go ahead.

6 MR. M. SMITH: Right.

7 JUDGE KARLIN: So you're talking about --

8 MR. M. SMITH: Our argument is that the
9 aging management program is adequate if it adequately
10 describes how the Applicant will manage the effects of
11 aging during the period of extended operations.

12 JUDGE KARLIN: Well, let me ask you this:
13 Are you saying that the aging management program is
14 adequate if it has a piece of paper that says
15 everything that needs to be said?

16 MR. M. SMITH: Yes.

17 JUDGE KARLIN: And that's all it takes?

18 MR. M. SMITH: That's our argument, Your
19 Honor, and I believe the Commission has held that in
20 the *Oyster Creek, Pilgrim, and Vermont, Yankee, and*
21 *Indian Point* --

22 JUDGE KARLIN: What about the 1991 *Federal*
23 *Register* that I was quoting that comes out of their
24 brief that says implementation is an issue as well?
25 Let's go to that.

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1 MR. M. SMITH: Yes, Your Honor.

2 JUDGE KARLIN: Don't you agree that
3 implementation of the program is relevant, not just
4 the adequacy of the piece of paper?

5 MR. M. SMITH: The -- the allegation reads
6 that, "Allegations of the implementation of a
7 licensee's proposed actions to address age-related
8 degradation has or will cause noncompliance to the
9 plant's current licensing basis during the period of
10 extended operation or that the failure of licensee to
11 address age-related degradation in a particular area
12 has or will cause such noncompliance during the period
13 of extended operations would be subject for a
14 contention."

15 JUDGE KARLIN: Would be valid subjects for
16 a contention. Yes.

17 MR. M. SMITH: Yes. That's correct.

18 JUDGE KARLIN: So scope-wise, isn't it
19 saying it would be within the scope?

20 MR. M. SMITH: We believe the focus of
21 this -- the proposed action is again based on the
22 proposed plan and not an actual implementation or
23 actual compliance with the terms of the aging
24 management program.

25 JUDGE KARLIN: Well, isn't that what the

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1 contention is? They're saying that the proposed aging
2 management plan, a piece of paper, there are some
3 doubts about it because we are concerned that they
4 will not -- we allege that they will not adequately
5 implement that, they will not adequately manage. And
6 the basis for their allegation that the concern that
7 they will not adequately manage aging is that they
8 allege they're not adequately managing what they're
9 doing now. Isn't that exactly what the quote says is
10 within the scope of an aging management contention?

11 MR. M. SMITH: I believe that the focus of
12 the quote is on implementation of the licensee's
13 proposed action.

14 JUDGE KARLIN: Right.

15 MR. M. SMITH: So I believe that the focus
16 is on the --

17 JUDGE KARLIN: I thought that's what I
18 just said.

19 MR. M. SMITH: -- adequacy of the aging
20 management program itself, not on the implementation
21 of the licensee's actions. I think the use of the
22 word "proposed" in that sentence is very significant.
23 It demonstrates what the Commission is talking about
24 is not the actual implementation but the --

25 JUDGE KARLIN: Well, let me ask -- it has

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1 to be proposed, does it not, because it's in the
2 future. It's -- it can't be -- they can't demonstrate
3 they're doing it now because it's not now. Proposed
4 is an inevitable adjunct because the aging management
5 program doesn't go in effect until the renewal is
6 granted.

7 Question? I'm using the word "proposed"
8 is inevitable because an aging management program is
9 inevitably in the future.

10 MR. M. SMITH: Right. But if the
11 Commission had intended for this review to also
12 include an analysis of whether or not the Applicant is
13 likely to do or capable of implementing the aging
14 management program in the future, then the
15 implementation of the licensee's actions --

16 JUDGE KARLIN: Well, let's --

17 MR. M. SMITH: -- would cause
18 noncompliance.

19 JUDGE KARLIN: Let's go back -- let's go
20 back to page 22 where I started with. You posit that
21 it is within the scope and now you're then focusing on
22 an alternative argument that, given the quantity and
23 magnitude of these inspection findings, they are not
24 the type that can cause that's unable to find
25 reasonable assurance.

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1 What type could? They've alleged a
2 pattern of non- -- inability to manage things and a
3 pattern of not -- what would be the line that would
4 say the types that are the type that could cause us to
5 find -- admit a contention? Is there a line --

6 MR. M. SMITH: I don't think it's
7 reflected on a line of reasonable assurance, Your
8 Honor, and --

9 JUDGE KARLIN: But isn't that the merits?
10 That's the merits. I'm talking about the
11 admissibility of the contention?

12 MR. M. SMITH: Well, it is the merits of
13 the contention. The admissibility has to show, you
14 know, it could or -- could go to the merits and that's
15 our -- the reasonable assurance standard is a very
16 high one and the -- the Commission has been unable to
17 find reasonable assurance in the past, having very,
18 very significant violations and --

19 JUDGE KARLIN: Well, the reasonable
20 assurance standard is a high one and, therefore, the
21 Applicant's burden of showing reasonable assurance,
22 demonstrating reasonable assurance is a high burden.
23 Is that what you're saying?

24 MR. M. SMITH: Well, for -- well, negating
25 it is a high burden as well.

1 JUDGE ABRAMSON: Can I pick this up for a
2 second, Judge Karlin?

3 JUDGE KARLIN: Sure. Sure.

4 JUDGE ABRAMSON: Let me -- is this
5 microphone on? Yes? You can hear me all right?
6 Okay. Let me pick this up for a second, Counselor.
7 Your statement to the effect that these are not the
8 types or kind of violations that could lead the Agency
9 to not be able to find reasonable assurance, is
10 that --

11 MR. M. SMITH: Type and quantity, Your
12 Honor.

13 JUDGE ABRAMSON: Okay, type and quantity.
14 Now, could lead or could result in to me is a critical
15 element of your statement; that is, these -- these
16 violations are insufficient to -- to form the basis
17 for an NRC finding that there's not reasonable
18 assurances -- these violations in and of themselves or
19 these violations are insufficient to form the basis,
20 and the implication of that -- is that correct?

21 MR. M. SMITH: That's my understanding.

22 JUDGE ABRAMSON: And if that's the case,
23 then the logical extension of that is there could not
24 be a finding based on those -- based on those
25 violations, there could not be a finding of lack of

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1 reasonable assurances and, therefore, there is no
2 basis made up -- there's no basis from those
3 violations?

4 MR. M. SMITH: I agree, and --

5 JUDGE ABRAMSON: That's the substance of
6 your argument? In other words, it's not going to the
7 merits at all. It's that those violations themselves
8 are insufficient to form a basis. There may be some
9 violations that would be sufficient to form a basis.
10 Those are insufficient. And that's not a merits
11 question. It's an argument that the way the NRC
12 evaluates violations, those themselves could not and,
13 therefore, are insufficient to form the basis for an
14 admissible contention?

15 MR. M. SMITH: I agree.

16 JUDGE ABRAMSON: I'm just trying to
17 understand your argument. I'm not making a statement
18 that I believe that or not. I'm trying to understand
19 your argument.

20 MR. M. SMITH: I agree that's a
21 description of my argument.

22 JUDGE KARLIN: On page 18 of your answer,
23 you quote from the *Federal Register* at 64.960. That's
24 the same citation we had before. And in quotes --
25 your brief says, "The NRC's decision should normally

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1 be limited to whether actions have been identified and
2 have been or will be taken to address age-related
3 degradation unique to license renewal."

4 What do we do if the word "normally" be
5 limited? "The NRC's decision normally -- should
6 normally be limited." So I guess there are times when
7 it won't be limited that way.

8 And, in fact, the next sentence -- which
9 is the one we talk about -- is where contentions can
10 be admitted in certain circumstances.

11 MR. M. SMITH: I believe that the
12 statement when read in its entirety -- I'm going to
13 need a minute, Your Honor.

14 (Pause.)

15 JUDGE KARLIN: It's out of the December
16 13th, 1991 *Federal Register*, 56 Fed. Reg. 64.960 I
17 think it is as you cited -- yeah, 64.960.

18 It says, quote -- I'll read the *Federal*
19 *Register*. "Noncompliances are generally
20 independent ..." -- oh, that's a little bit different
21 -- "independent in a causal sense of a renewal of
22 decision. For example, failure to comply with
23 cessation blackouts are not caused by the impending
24 operations. However, allegations that the ..." --
25 well, that's a different -- I'm sorry.

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1 MR. M. SMITH: Are you reading --

2 JUDGE KARLIN: What I'm focusing on is
3 what does it mean when it says, "The NRC's
4 decision" -- as to whether or not aging -- the
5 Petitioner has demonstrated it will adequately manage
6 aging during the period of extended operation -- it
7 says, "The NRC's decision should normally be limited
8 to whether actions have been identified that will be
9 taken to address age-related ..." so there's something
10 else.

11 MR. M. SMITH: Yeah. Obviously.

12 JUDGE KARLIN: What does "normally" mean?

13 (Pause.)

14 Let me just -- let's clarify.

15 MR. M. SMITH: No. If I can --

16 JUDGE KARLIN: Doesn't "normally" mean
17 just what it says? -- that there may be some
18 exceptions?

19 MR. M. SMITH: Yes. I -- I am not
20 entirely familiar with all the statements --

21 JUDGE KARLIN: Well, --

22 MR. M. SMITH: -- but I believe that
23 during the 1991 statement of consideration, the
24 Commission recognized the possibility there could be
25 some other issues during the license renewal

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1 proceeding that wouldn't be unique to -- or focused on
2 age-related degradation.

3 JUDGE KARLIN: All right. We'll move on.

4 MR. M. SMITH: But I think the word
5 "normally" is mentioned. I was hoping there would be
6 a statement in that paragraph that specified that, but
7 I can't see one right now.

8 JUDGE KARLIN: Well, okay. We'll move on.

9 MR. M. SMITH: I'd be happy to get back to
10 Your Honor and address that later today.

11 JUDGE KARLIN: That's all right. It was
12 your quote, so --

13 MR. M. SMITH: Yes.

14 JUDGE KARLIN: -- I'm just asking about
15 it. We'll move on.

16 JUDGE TRIKOUROS: I have a question.

17 JUDGE KARLIN: Go ahead.

18 MR. M. SMITH: I think that's what the
19 meaning of the word "normally" is but --

20 JUDGE KARLIN: All right. Let's go on.

21 JUDGE TRIKOUROS: Your answer at pages 16
22 through 17, you say, "An applicant for license renewal
23 may reference the GALL Report."

24 MR. M. SMITH: Yes.

25 JUDGE TRIKOUROS: And you go on to say,

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1 "For each aging management program, the application
2 gives a brief description of the licensee's operating
3 experience in implementing that program."

4 So implementation seems to be part of this
5 equation.

6 MR. M. SMITH: Your Honor, that's a
7 quotation from the Commission in the *Oyster Creek* case
8 I mentioned earlier.

9 JUDGE TRIKOUROS: Right. Right. Well,
10 no. The part where you say you may reference the GALL
11 Report is your words. I think the latter part was the
12 quote from the other case.

13 MR. M. SMITH: I believe in that instance,
14 the Commission was discussing the situation where an
15 applicant has submitted a AMP that is not consistent
16 with the GALL Report. And it has to address the ten
17 elements mentioned in the GALL Report. I believe that
18 there is clarification of those ten elements in the
19 standard review plan, NUREG 1800, which describes
20 those ten elements as well as Element 7, the
21 corrective action program, and Element 10, operating
22 experience.

23 Reading that description of those
24 elements, I think that it seems clear that the
25 elements are intended to address the adequacy of the

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1 aging management plan itself, not whether the
2 applicant will actually take corrective actions to
3 address noncompliance with the aging management
4 program but, rather, whether the aging management
5 program contains elements to govern those corrective
6 actions and to then address them through
7 administrative controls and confirmatory processes,
8 element eight.

9 JUDGE ABRAMSON: Let's pick that one up.
10 When the Staff's reviewing -- and now I want you to
11 speak as an attorney and keep it to your filings
12 before us, if you can, which I know is difficult given
13 this line of questioning we've been going down -- when
14 the Staff's reviewing the aging management programs
15 and the application, the Staff -- does the Staff focus
16 on the programs, does the Staff think about at all how
17 the Applicant might manage it other than to the extent
18 it's described in the program? Does the Staff
19 consider whether the Applicant's management will
20 implement it? Or does the Staff focus on what's in
21 the program itself and what's in the license
22 application?

23 MR. M. SMITH: The Staff focuses on what's
24 in the license application and the program itself and
25 whether or not that program will get implemented

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1 adequately and ensure the safe operation of the plant.

2 JUDGE KARLIN: On page 16 of your answer,
3 -- this is a question that's come up for PG&E as well
4 -- you state in the middle of the page, "The
5 Commission's general policy is not assuming that
6 licensees will violate NRC regulations."

7 And certainly -- and that's certainly
8 true. I mean, not assuming will violate NRC
9 regulations. Don't the three inspection reports for
10 the last three years say by the NRC Staff that the
11 company is violating the NRC regulations? Don't they
12 use the word "violation" numerous times?

13 MR. M. SMITH: Yes. The inspection
14 reports do use the word "violation" numerous times.

15 JUDGE KARLIN: So we don't need to assume
16 that the licensee will violate NRC regulations because
17 the NRC Staff has already said it is violating NRC
18 regulations.

19 MR. M. SMITH: This portion of the brief
20 doesn't deal with the inspection reports, Judge
21 Karlin.

22 JUDGE KARLIN: I understand.

23 MR. M. SMITH: This section of the brief
24 is discussing the Commission's general policy
25 determinations.

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1 JUDGE KARLIN: I said as a general policy.

2 MR. M. SMITH: And how it structured the
3 scope of license renewals.

4 JUDGE KARLIN: But if we have -- but if we
5 have contravailing evidence, you're not going to
6 assume they're going to violate. But if you have
7 concrete evidence; i.e., three inspection reports from
8 the Staff that they are in violation and there's an
9 adverse trend, is the assumption rebutted?

10 MR. M. SMITH: Well, in this case I'm
11 arguing that the Commission has made the generic
12 determination that the focus of the license renewal
13 review should be on the adequacy of the aging
14 management plans. And as a general matter, I'm saying
15 that this comports with the Commission's determination
16 in the *Oyster Creek* case.

17 I don't believe the Commission explicitly
18 considered this instance in this statement of
19 consideration where the -- well, actually I think the
20 Commission did actually consider the instance where
21 licensees would not be in compliance with their
22 current licensing basis and the Commission, in their
23 statement of consideration, explicitly say that it
24 cannot conclude with perfect certainty -- I'm
25 obviously paraphrasing it -- all licensees will at all

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1 times comply with their current licensing basis. Yet,
2 nonetheless, the Commission went on to promulgate a
3 rule that permitted license renewal based on -- so I
4 think the Commission envisioned that situation, Judge
5 Karlin.

6 JUDGE KARLIN: I think I'm troubled and
7 trying to understand current -- certainly perfection
8 is not required, you know, by a facility and there
9 might be a noncompliance or an issue or a violation
10 that would occur, and that shouldn't open the
11 floodgates to contentions that, Well, they can't
12 manage their company right so they can't manage their
13 aging management program.

14 But, by the same token, there are other
15 situations which are the other side of the line, at
16 least an admissible contention, and a contention might
17 be admitted without getting to the merits.

18 MR. M. SMITH: My response to you, I think
19 the Commission has drawn the line at the place where
20 the actual implementation of aging management programs
21 is not part of the scope of --

22 JUDGE KARLIN: Well, I understand.

23 MR. M. SMITH: But if you want me to go
24 past that line, I think a good second place to draw
25 the line would be at reasonable assurance and to look

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1 at are these types of -- are these violations -- are
2 these the types of violations that could cause the NRC
3 to be unable to find the reasonable assurance that the
4 plant would operate safely.

5 JUDGE KARLIN: Right.

6 MR. M. SMITH: And under the Staff's
7 procedures, thereby issue a shutdown order.

8 JUDGE KARLIN: Oh, I -- you're saying the
9 only thing that could merit a contention being
10 admitted here is the -- would be a shutdown order?

11 MR. M. SMITH: I mean, it would have --

12 JUDGE KARLIN: Noncompliance would warrant
13 a shutdown order?

14 MR. M. SMITH: I mean --

15 JUDGE KARLIN: That's pretty extreme,
16 isn't it?

17 MR. M. SMITH: I believe that that's --

18 JUDGE KARLIN: Is there some support for
19 that? There has to be a shutdown order before we can
20 admit a contention?

21 MR. M. SMITH: There's support from 54.29
22 that says the Commission has to find reasonable
23 assurance. And the Mothers for Peace have argued that
24 these violations are the types that can cause the NRC
25 to be unable to find that reasonable assurance that

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1 the plant will implement its aging management programs
2 and thereby comply with its licensing basis during the
3 period of extended operations. And that finding of
4 being unable to operate -- reasonable assurance -- I
5 mean, unable to operate is the type of thing that you
6 would need to find at that level.

7 JUDGE ABRAMSON: Counselor, let me ask
8 you: In essence here, what we have is a commitment
9 from the Applicant. They've got this plan. They have
10 reviewed the plan. If you deal with that plan, if you
11 live up to your commitments and properly implement
12 that plan, that's fine.

13 At what point is a contention challenging
14 a commitment admissible? Because basically you're
15 saying if they make -- if they're making a commitment
16 to do this -- right? --

17 MR. M. SMITH: Yes, Your Honor.

18 JUDGE KARLIN: -- and what would be the
19 conditions under which a challenge to a commitment
20 itself would be admissible or inadmissible?

21 MR. M. SMITH: I think those situations
22 would be when the challenge focused on the elements of
23 the aging management program and how those elements
24 did not guarantee the safe operation of the plant
25 during the periods of extended operation.

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1 JUDGE ABRAMSON: Okay. But let's go back.
2 So I understand. But the elements of the plan aren't
3 at issue here.

4 MR. M. SMITH: Okay.

5 JUDGE ABRAMSON: I mean, --

6 MR. M. SMITH: Right.

7 JUDGE ABRAMSON: -- of course you're
8 saying Mothers for Peace are arguing, Yeah, your
9 commitment's no good. When would that kind of a
10 contention be admissible? What are the conditions for
11 which or under which a challenge to a commitment of a
12 licensee is admissible?

13 MR. M. SMITH: In the manner that Mothers
14 for Peace have crafted it where it's a challenge --

15 JUDGE ABRAMSON: Yeah. We made the
16 commitment. The Applicant's making a commitment.
17 When is a commitment challengeable?

18 MR. M. SMITH: Well, our response would be
19 that that's not the type of challenge that would be
20 admissible in the scope of license renewal.

21 JUDGE ABRAMSON: I mean, there are lines
22 of cases that address a commitment of an applicant.
23 I've seen them. But -- are you familiar with those?
24 And maybe Ms. Uttal's familiar with those lines of
25 cases.

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1 MS. UTTAL: I'm not familiar.

2 JUDGE ABRAMSON: Okay.

3 MR. M. SMITH: No, Your Honor.

4 JUDGE ABRAMSON: Okay. But, to me, that's
5 the substance of this challenge. Would you agree, Ms.
6 Curran, that the substance of this challenge is that
7 the commitment's no good?

8 JUDGE KARLIN: Why don't we wait for
9 her --

10 JUDGE ABRAMSON: Well, --

11 JUDGE KARLIN: Let's wait for her to get
12 up. It's -- re-ask the question. We'll wait till she
13 -- so anything further for Mr. Smith?

14 JUDGE TRIKOUROS: Let me explore the GALL
15 Report one more time.

16 MR. M. SMITH: Yes, Your Honor.

17 JUDGE TRIKOUROS: The -- it's very clear
18 to me the disparate problems with implementing
19 programs at the plant don't fall under the category of
20 a -- of something that would apply to license renewal.
21 I don't have any big problem with that.

22 But the purpose of license renewal -- the
23 whole licensing purpose is to assure the current
24 licensing basis is maintained for 20 more years.
25 That's sort of the goal of it. And if the plant in

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1 question is having a problem understanding their
2 current licensing basis and implementing design --
3 implementing decisions associated with the design
4 basis of the plant, and they're having this problem
5 now for at least two years and I suspect possibly
6 longer -- I don't know -- but -- and we don't know if
7 it's extending into 2010 yet.

8 Do you not see that as different from
9 disparate problems in reactor management, operations
10 management that do not in any way relate to the
11 licensing -- the aging management program?

12 MR. M. SMITH: With respect to the scope
13 of license renewal, I do not. The focus of license
14 renewal was on the adequacy of the aging management
15 plan. The licensee's ability to implement corrective
16 actions to identify, analyze, and evaluate problems is
17 a part of the licensee's ongoing obligations to comply
18 with their current licensing basis. And if the public
19 has concerns regarding the licensee's ability to
20 implement or to obtain those requirements, then the
21 remedy is always to file a suit to evict Petitioner.

22 JUDGE TRIKOUROS: If there was a problem
23 with maintaining some piece of equipment and there was
24 a finding and then there was a corrective action, and
25 that corrective action was not implemented, and then

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1 it happened again and it happened again and it
2 happened again and it went on over a two-year period
3 at various times, would that be not different than if
4 it happened once and it was corrected?

5 In other words, is the degree an issue
6 here and the nature of this finding which is a cross-
7 cutting issue and that has been going on for
8 approximately two years now without any correction?

9 MR. M. SMITH: Well, with respect to the
10 scope of license renewal, I do not believe that it is
11 as we believe that the compliance is outside of the
12 scope of license renewal and whether it happens once
13 or ten times, the obligation is on the licensee to
14 address that now during the current term of operation
15 and the NRC Staff should be inspecting and identifying
16 those issues and read the inspection reports in the
17 cases the Staff has.

18 If we move on and say this is part of the
19 scope of license renewal, then I think that to the
20 extent I believe that reasonable assurance leads to a
21 level of an admissible intention of challenging the
22 Applicant's ability or likelihood to implement the
23 aging management plan, then frequency could matter in
24 that instance.

25 JUDGE TRIKOUROS: Even if it impacts the

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1 program -- the administrative program elements of the
2 GALL Report?

3 MR. M. SMITH: I believe the
4 administrative elements of the GALL Report focused on
5 whether or not the AMP itself contained, you know, a
6 plan for corrective actions, if it contained a plan
7 for administrative controls, not whether or not --

8 JUDGE ABRAMSON: And the Staff would
9 review that plan and not accept it unless the Staff
10 viewed that that plan could implement those things; is
11 that correct?

12 MR. M. SMITH: That's correct, Your Honor.

13 JUDGE KARLIN: Any further questions? All
14 right. Thank you, Mr. Smith.

15 MR. M. SMITH: Thank you, Judge Karlin.

16 JUDGE KARLIN: Ms. Curran, I think we had
17 a few questions for you. Then we'll move to
18 Contention EC-1.

19 MS. CURRAN: I also have a couple points
20 I'd like to make at this time.

21 JUDGE KARLIN: Well, we'll see. We'll
22 see. Again, you may get to make your points in light
23 of the questions. I would like you to then give us
24 your thoughts on the 1991 *Federal Register* quote that
25 I keep harping on which is quoted by the PG&E in their

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1 brief at page 11, Footnote 4 I guess it is, and where
2 they say, "Allegations relating to the implementation
3 of these actions has or will cause noncompliance would
4 be valid subjects for a contention."

5 Isn't that your point, that this is the
6 type of contention you're raising here?

7 MS. CURRAN: Yes.

8 JUDGE KARLIN: All right.

9 MS. CURRAN: And just to follow up on
10 that, I guess to make one of my points, which is that
11 in 54.21(d), the Regulation refers to -- and this is
12 the Regulation that specifies what are the
13 requirements for a license renewal application -- it
14 uses the words "program" and "activities," so I think
15 the word "activities" is a broader word than just
16 programs that would encompass, you know, how are you
17 going to do this.

18 JUDGE KARLIN: Okay.

19 MS. CURRAN: Not just what's your paper
20 plan.

21 JUDGE ABRAMSON: Well, Ms. Curran, can I
22 follow up your further explanation? Earlier, I asked
23 you whether your challenge was essentially to whether
24 they would properly implement it, whether they would
25 manage it.

1 MS. CURRAN: Uh-huh.

2 JUDGE ABRAMSON: Is my earlier question or
3 statement of the challenge that I made that what
4 you're effectively challenging is even if the plan is
5 perfect, you're challenging whether they will live up
6 to their commitment to implement that plan; is that
7 correct?

8 MS. CURRAN: Yes, and I think that it's
9 possible -- these inspection reports raise the
10 question why does this keep happening, and I think --
11 I'm not an expert in this field at all, but I could
12 imagine that one of the answers is there's something
13 wrong with your program. One of the answers might be
14 you lack an adequate safety culture. But another
15 answer could be there's something missing from your
16 program. Maybe it's training. I don't know. I
17 really don't -- I don't know what the diagnosis would
18 be for the cause of this, but it seems to me that what
19 we need in order to gain admission of this contention
20 is the evidence that there is something wrong that has
21 to be addressed such that it raises a question about
22 whether the program will be implemented
23 satisfactorily.

24 JUDGE ABRAMSON: But there -- the minute
25 when you start talking about something wrong with the

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1 program, to me you take it back to the adequacy of the
2 aging management program as opposed to the challenge
3 to whether they will adequately implement or properly
4 implement that program.

5 And I thought I understood you to be
6 challenging their -- whether they will effectively
7 implement.

8 MS. CURRAN: Well, the word is -- the word
9 is "manage."

10 JUDGE ABRAMSON: Right.

11 MS. CURRAN: And that -- no, that's the
12 word in the Regulation.

13 JUDGE ABRAMSON: Yes.

14 MS. CURRAN: So that I think that's the
15 word you have to come back to and that there are
16 several ingredients that go into whether you do a good
17 job of managing something, and one would be you've got
18 the right instructions, you've got a good set of
19 instructions, and one would be you've got an
20 organization that can carry it out, that has a
21 commitment, adequate commitment. I just -- I don't
22 want to -- I don't want to cut the contention short
23 because the contention focuses on the word "manage."

24 JUDGE ABRAMSON: But you're not -- right.
25 But I understand your focus is on the word "manage"

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1 and as opposed to challenging any specific element of
2 a plan.

3 MS. CURRAN: That's right. We are not
4 contesting any element -- any specific element. We
5 are contesting the management of aging.

6 JUDGE ABRAMSON: And if there were
7 something in the plan that described -- and I haven't
8 read the plan -- if there were something in the plan
9 that described how they would implement; i.e., what
10 management would do under various circumstances,
11 that's not what's being challenged here because you
12 haven't addressed any element of the plan.

13 MS. CURRAN: No. But I can imagine now it
14 could be relevant in someone's testimony to say, Well,
15 perhaps one reason why this --

16 JUDGE ABRAMSON: Yeah, but we're not going
17 there.

18 MS. CURRAN: Yeah. In terms of the
19 admissibility of the contention, no. We are not
20 challenging any element of the program.

21 JUDGE TRIKOUROS: And you've heard the
22 Applicant and the Staff indicate that the -- and they
23 provided supporting basis that all of this should be
24 covered by the Reactor Oversight Program and you
25 disagree with that based on your interpretation of

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1 what the word "manage" means in the Regulation; is
2 that correct?

3 MS. CURRAN: Right. And I would like to
4 refer the Board to the preamble to the Revised License
5 Renewable -- which actually was 1995. I think I said
6 1996 before. Because I think it has a useful quote
7 and a helpful quote. This is *60 Federal Register*.
8 The first page is 22461. The date is May 8th, 1995
9 and the page I'm reading from is page 22464. It says,
10 "The objective of a license renewal review is to
11 determine whether the detrimental effects of aging,
12 which could adversely affect the functionality of
13 system, structures, and components that the Commission
14 determines require review for the period of extended
15 operation are adequately managed. The license renewal
16 review is intended to identify any additional actions
17 that will be needed to maintain the functionality of
18 the system, structures, and components in the period
19 of extended operations."

20 So our contention is essentially there are
21 some additional actions that need to be taken here to
22 ensure that the aging management program for this
23 plant is adequately managed and it's effective.

24 JUDGE ABRAMSON: Additional actions
25 outside what's specified in the aging management plan

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1 that's being reviewed by the Staff?

2 MS. CURRAN: Yes.

3 JUDGE ABRAMSON: So are you asserting
4 there are omissions from the plan?

5 MS. CURRAN: That could -- at this point,
6 you know, we don't have an expert at this point to
7 diagnose here's the reason for the problem and it
8 doesn't -- what I've seen in the inspection reports,
9 it just keeps happening. Nobody said why. So I don't
10 know if we can get to that yet.

11 JUDGE TRIKOUROS: One could interpret what
12 you just read to be really components of the aging
13 management program entirely, not separate actions, not
14 separate activities. That's I think how the Applicant
15 and the Staff interpret such things.

16 But you're saying this is not part of the
17 aging management program as written and described in
18 the license application but is -- this is a separate
19 activity?

20 JUDGE ABRAMSON: Well, it sounds to me
21 like a generalized assertion that there's something
22 missing and we don't know what -- we can't identify it
23 and that the evidence that there's something missing
24 is by these three inspection reports.

25 MS. CURRAN: There's something missing

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1 from what's been offered. The PG&E has the burden of
2 proof here, has the burden of proving that it can and
3 will adequately manage aging during the license
4 renewal term.

5 We have presented evidence that, yes,
6 something is missing, whether -- and we are not at the
7 stage yet of diagnosing the problem in detail, but
8 something is missing such that PG&E doesn't have a
9 basis to come in right now and say, No problem. We
10 can manage this just fine. As a matter of fact, what
11 PG&E has is a history of difficulty identifying and
12 resolving problems with this operation which, when
13 presented with the more difficult problems posed by
14 license renewal of, you know, the problems of
15 monitoring and correcting aging equipment, may put the
16 safety of the plant in jeopardy.

17 JUDGE ABRAMSON: And what sorts of
18 evidence or testimony do you think would be presented
19 at any hearing on the merits of this question? In
20 other words, where would we go? What would we be
21 focusing on were we to have a hearing on the merits of
22 this particular challenge?

23 MS. CURRAN: I would think that PG&E as
24 the party with the burden would have some burden of
25 showing that it is -- it is going to include some

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1 measures for managing age-related degradation that
2 would correct the problems that it's been having that
3 would make sure that the problems did not follow PG&E
4 into the license renewal term with these new issues,
5 and that the intervenors would critique that.

6 JUDGE KARLIN: May I bring us back to the
7 contention, is that I think it's stated -- quoted,
8 "The Applicant, PG&E, has failed to satisfy 10 CFR
9 54.29's requirement to demonstrate a reasonable
10 assurance that it can and will manage the effects of
11 aging, etc. In particular, they have failed to show
12 how it will address and rectify an ongoing pattern of
13 management."

14 I'm not sure I see this as a contention of
15 -- you're certainly not identifying any part of the
16 piece of paper --

17 MS. CURRAN: Right.

18 JUDGE KARLIN: -- the plan and say,
19 There's something -- that's wrong. That's a wrong --
20 page 32(e) is wrong. Nor are you saying there's
21 something omitted from the piece of paper. I think
22 what you seem to be saying is that given the current
23 ongoing pattern of management failures with respect to
24 the current operations, there is a failure to satisfy
25 the need to demonstrate that the management will

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1 implement the piece of paper.

2 MS. CURRAN: Uh-huh.

3 JUDGE TRIKOUROS: I don't see a contention
4 of omission so much as a contention of implementation
5 or management. I think "management" is a correct
6 word. "Manage" is the key word and I don't see how
7 you take "management" out of an aging management
8 program.

9 I just think it's relevant somehow and the
10 Staff and the Applicant seem to be saying -- and you
11 can comment on this -- that the management refers to
12 what's written in the aging management program and
13 approved by the Nuclear Regulatory Commission. The
14 implementation or any problem with implementation,
15 such as the findings that you've identified, are
16 covered under existing interfaces between the Nuclear
17 Regulatory Commission and the Applicant; namely,
18 Reactor Oversight Program and others.

19 That's their position. What would you say
20 about that?

21 MS. CURRAN: I would say that that
22 position would leave the word "management" out of the
23 Regulation. And that's just not consistent with basic
24 principles of regulatory interpretation.

25 JUDGE KARLIN: Any more questions? All

1 right. I think we've covered enough. Do you have one
2 final point?

3 MS. CURRAN: I have one more thing, which
4 is that I am not familiar with the doctrine that you
5 were talking about, Judge Abramson, of the bad actor's
6 doctrine. As I think about how it might apply, it's
7 hard for me to see how it would apply in this case
8 just because the inspection reports don't describe
9 this as an issue that has to do with individuals.
10 They describe it as an organizational problem. But I
11 guess what I would like to ask is that if the Board
12 thinks that the bad actor doctrine could be applied
13 here to deny the contention, we'd just like a chance
14 to brief the question.

15 JUDGE KARLIN: All right. Thank you.
16 We're now going to turn to Environmental Contention
17 Number 1. Do you want to gather the correct
18 materials, Ms. Curran?

19 MS. CURRAN: Yes.

20 JUDGE KARLIN: I know your backup --

21 (Pause.)

22 Are you ready, Ms. Curran

23 MS. CURRAN: Yes.

24 JUDGE KARLIN: Okay. Could you state the
25 contention for the record, please, read it?

1 MS. CURRAN: Yes. Contention EC-1 states,
2 "PG&E's severe accident mitigation alternatives, SAMA,
3 in other words, analysis fails to satisfy 40 CFR 6 and
4 1502.22 because it is not based on complete
5 information that is necessary for an understanding of
6 seismic risks to the Diablo Canyon Nuclear Power
7 Plant. And because PG&E has failed to acknowledge the
8 absence of the information or demonstrated that the
9 information is too costly to obtain, as a result of
10 PG&E's failure to use complete information, the SAMA
11 analysis does not satisfy the requirements of the
12 National Environmental Policy Act, or NEPA, for
13 consideration of alternatives."

14 And then we cite a case and NRC
15 Implementing Regulation 10 CFR 51.53(c)(3)(ii)(L).

16 JUDGE ABRAMSON: Now, is it more specific
17 than that or is it just this general contention? Do
18 you have a particular reason that you believe that the
19 SAMA analysis -- some particular things that the SAMA
20 analysis fails to consider?

21 MS. CURRAN: We don't have a particular
22 SAMA in mind.

23 JUDGE ABRAMSON: I'm not thinking about
24 the SAMA. I'm thinking about the things that are not
25 adequately -- are not fully considered. Are you

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1 saying -- you're generally they haven't considered.

2 MS. CURRAN: Well, what is not considered
3 is the result of the study that PG&E and the United
4 States Geological Survey now have underway which
5 includes the Shoreline Fault and the general seismic
6 activity in the region and the probabilistic risk
7 assessment which will put all that into a risk
8 assessment context.

9 JUDGE ABRAMSON: Okay. So if I correctly
10 hear that, you're not making a generalized assertion
11 with no specifics. You're saying -- and let me come
12 at it in another way. If they were to provide SAMA
13 analysis and PRA analysis that did consider those --
14 the Shoreline Fault and its effects, would that -- is
15 that your only concern here, or are you trying to say
16 something much broader that I don't understand?

17 MS. CURRAN: The concern is that the --
18 the SAMA analysis for the Diablo Canyon plant does not
19 include a probabilistic analysis of the risks posed by
20 the Shoreline Fault.

21 JUDGE ABRAMSON: It doesn't incorporate
22 the risks posed by Shoreline Fault; right? A PRA
23 would include lots of things. That particular one is
24 excluded?

25 MS. CURRAN: Right, and -- and also that

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1 to the -- this is actually -- it's not asking for just
2 anything. It's asking for a probabilistic assessment
3 of that risk as opposed to -- PG&E now has in its
4 possession a deterministic analysis of the Shoreline
5 Fault, and we're saying that isn't enough because the
6 standard of reasonableness that the NRC has
7 established is PRA.

8 JUDGE ABRAMSON: Okay. But that's focused
9 on Shoreline Fault and the effects of Shoreline Fault.

10 MS. CURRAN: Yes.

11 JUDGE ABRAMSON: Thank you.

12 JUDGE KARLIN: I have a question about --
13 you're citing, of course, the CEQ Regulation 40 CFR
14 1502 about incomplete or unavailable information. And
15 the NRC takes the position it's not bound by those
16 regulations. It generally, you know, looks at them
17 and uses them as guidance or whatever. We can --
18 we're not going to argue about that at the moment.
19 But is -- when doing -- in meeting that Reg., is the
20 Agency simply required to gather up such information
21 that exists at the moment and put them into a pile and
22 then evaluate them, or is there ever an obligation to
23 conduct additional investigation or to generate
24 additional studies before the EIS is completed?
25 Because that's what it seems like you're suggesting is

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1 that, well, you know, based on extant information, you
2 know, maybe they've covered everything. But they're
3 right now working on something very important and
4 we -- and that ought to be in there, too. That needs
5 to be in there, too.

6 MS. CURRAN: Yeah. I -- as I recall, I
7 don't think that the Agency can be forced to go out
8 and do some new study that it didn't already plan to
9 do. But I think this is a very different situation
10 where the study's been planned since 2008. So --

11 JUDGE KARLIN: What study? You say "the"
12 study. What study?

13 MS. CURRAN: The study -- the CRADA study.

14 JUDGE KARLIN: Yes. There's a CRADA.
15 There's a --

16 MS. CURRAN: Right.

17 JUDGE KARLIN: That's with USGS and PG&E
18 and they're doing some studies and there's this long
19 term -- what is it called? -- LT --

20 MS. CURRAN: Yes, LTS --

21 JUDGE KARLIN: Seismic program that
22 they've been doing for years and years.

23 MS. CURRAN: Right.

24 JUDGE KARLIN: All right. So are -- and
25 their answer is, Well, there's always new data coming

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1 in.

2 MS. CURRAN: Right.

3 JUDGE KARLIN: We can't stop everything
4 and say, Well, tomorrow there may be some new data.

5 MS. CURRAN: Right.

6 JUDGE KARLIN: Because, well, you know,
7 there's always new data.

8 MS. CURRAN: And the case law says you've
9 got to be able to draw the line somewhere.

10 JUDGE KARLIN: Right. Right.

11 MS. CURRAN: It can't go on and on
12 forever. So what we're saying is look at all the
13 circumstances of this case. Okay. First of all, this
14 license doesn't expire till 2024. That's Unit 2.
15 Unit 2, 2025. So we're 14 years out right now; okay?
16 And most license renewal applications don't take more
17 than five or six years to process. So this is the --
18 PG&E has enough time to do this a couple of times
19 before the license expires. Okay. That's number one.

20 Number two, the earthquake -- Diablo
21 Canyon is an active earthquake zone. We already know
22 about the Hosgri Fault and a new fault has been
23 identified. This is a very serious risk. And it's
24 something that the NRC and PG&E try to predict what's
25 going to happen, but one would want to have the best

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1 available information before relicensing a plant for
2 another 20 years or perhaps 40 years. So if we know
3 that a study which, by the way, the last time it was
4 done was 1988, okay, so it's a little out of date now.
5 So we're going to have another study that's going to
6 be -- we know it's going to be finished around 2013.
7 The CEQ Regulations require -- and this is just a
8 matter of reasonableness. This is not -- this is not
9 some far-out regulation that everybody would say, Oh,
10 that's crazy. They say get the best available
11 information. And if you know there's some information
12 out there and you can't get it 'cause it costs too
13 much money or you have to wait too long to get it, you
14 need to -- you need to discuss that.

15 You know, this information -- knowing what
16 is the seismic risks to this plant is probably the
17 most important environmental issue facing the NRC with
18 respect to renewing the Diablo Canyon license.
19 There's -- I don't know of any other plant that is
20 sitting next to a known active major earthquake fault,
21 and now a new one has been discovered. It would be
22 irresponsible for the Agency or PG&E to rush into
23 license renewal if there's plenty of time left between
24 now and the expiration of the Unit 1 and 2 licenses to
25 wait and get that information and put it into a PRA

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1 and look at what are the alternatives for avoiding or
2 mitigating those risks.

3 And of course the alternatives always
4 include not renewing the license. They include a
5 whole range of things, but they include the no action
6 alternative and everything else that is -- that can be
7 evaluated to be cost effective.

8 JUDGE KARLIN: Well, let me ask. The
9 Staff in its contention has said that they have -- and
10 I'm looking at their brief on page 28 -- they have no
11 objection to admission of a limited part of Proposed
12 Contention EC-2 -- EC-1, I'm sorry -- and they go on
13 to say, well, but it simply should be -- "Staff
14 opposes the admission of the remainder of the
15 contention specifically requiring further study of the
16 fault and broader regional studies to be included in
17 the analysis of the environmental reports."

18 Is this just a contention of omission that
19 can be satisfied with the criteria that the Staff lays
20 out in page 29 of their brief? Would you accept their
21 position that it should be admitted partially but not
22 entirely?

23 MS. CURRAN: Well, I think the difference
24 between the Staff's view of this and the Mothers for
25 Peace's view is the Staff -- and I heard it in the

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1 Staff's opening statement this morning -- is the Staff
2 thinks a license renewal decision can be made with
3 something less than a probabilistic risk assessment.
4 I think I heard overly conservative PRA or something
5 that would --

6 JUDGE KARLIN: Yes.

7 MS. CURRAN: And --

8 JUDGE KARLIN: And you disagree with that,
9 I take it?

10 MS. CURRAN: That's the first time I've
11 actually heard that was this morning, but --

12 JUDGE KARLIN: Well, no. I think that's
13 not correct. I think they say that in their brief,
14 that they think, you know, you don't need to do a
15 probabilistic risk assessment. They say on page 29,
16 "The Staff believes that as to the discussion of the
17 Shoreline Fault, the following has been omitted from
18 the environmental report: One, the potential impacts
19 of the Shoreline Fault; two, the revised CDF
20 estimates; three, the Applicant's search for any
21 equipment, structures not previously identified."

22 They go on to say they don't think you
23 have to wait for a probabilistic risk assessment.

24 MS. CURRAN: Right.

25 JUDGE KARLIN: And I take it you disagree

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1 with that and that probabilistic risk assessment is
2 the normal approach you say.

3 MS. CURRAN: Yeah, and I think what I
4 heard this morning -- and this was what I heard for
5 the first time -- but in the brief, what I think the
6 Staff was saying was, We've got this deterministic
7 assessment. Let's -- you can -- we won't object to
8 the admission of a contention that says you've got to
9 say something about the Shoreline Fault, and maybe
10 it's just incorporating that.

11 But what we are saying is that that
12 deterministic analysis has -- that type of analysis
13 has been ruled inadequate for a SAMA analysis by the
14 Commission or by the -- I think it was the Licensing
15 Board in the *Pilgrim* case said -- and maybe it was the
16 Commission that said PRAs are standard ways of doing
17 SAMA analyses.

18 So what we are saying is that there is
19 time to do a PRA here. There's enough time to do it
20 and it needs to be done. And what I heard this
21 morning was we could do some kind of a modified PRA.
22 Maybe it wouldn't take quite as long. I think it
23 would probably take longer than just adopting the
24 deterministic analysis. And I guess we'd have to see
25 what it looked like.

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1 JUDGE ABRAMSON: That's exactly where I
2 want to go with this. What I heard Staff saying and
3 what I hear from Judge Karlin's reading of their
4 answer is that what they would support admission of is
5 a contention saying that core damage frequency, CDF,
6 is inadequately -- is inadequate because it doesn't
7 consider the Shoreline Fault.

8 Now, what would happen is, as I understand
9 it, and putting on my techie hat for a moment, you
10 would revise the core damage frequency elements of a
11 PRA so that you included the damage -- the effects of
12 the Shoreline Fault which would increase the core
13 damage frequency and would increase it over the
14 spectrum of events that are considered in a PRA in
15 some way and that Staff is saying that could be done
16 in a conservative way so that it would incorporate all
17 -- it would more than incorporate the effects of the
18 Shoreline Fault.

19 Now, having done the core damage frequency
20 modification, you would then revise the PRA. So if
21 the core damage -- and, by the way, the only thing
22 that, as I understand it, the only thing that the
23 Shoreline Fault would change is the core damage
24 frequency for various events.

25 Having -- and, Nick, you can correct me if

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1 I've got this wrong because you're more familiar with
2 these than I am -- having changed the core damage
3 frequency so that it adequately incorporates the
4 effects -- or conservatively incorporates the effects
5 of the Shoreline Fault, redo the PRA, and see whether
6 that makes other SAMAs effective.

7 That I think is what I hear the Staff
8 saying they would admit. And so rather than wait for
9 a full-blown environmental impact statement or
10 whatever USGS is doing on Shoreline Fault, if in fact
11 there is information that would enable the revision of
12 core damage frequency so that it adequately
13 encompassed effects of the Shoreline Fault, you could
14 redo the PRA. Would that get you where you need to
15 be?

16 MS. CURRAN: I don't think so.

17 JUDGE ABRAMSON: And why?

18 MS. CURRAN: And the reason is that if one
19 looks at the RIL letter that we cited, the main
20 document where the NRC describes the whole history of
21 this process and what's going to happen now, in that
22 document it is clear that the analysis that's been
23 done so far is preliminary in nature and that PG&E
24 right now is gathering additional data about the fault
25 that would better inform the analysis.

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1 And I didn't bring the notebook with me,
2 but on pages ten and 11 of this RIL letter, there was
3 kind of a summing up paragraph. I am going to get it.

4 JUDGE ABRAMSON: Why don't you grab it.
5 Yeah.

6 (Pause.)

7 MS. CURRAN: And this -- you know, I am
8 not a seismologist. I'm a lawyer; okay? And part of
9 -- part of what NEPA is about is a member of the
10 public is supposed to be able to read the publicly
11 available documents and get some idea are the relevant
12 concerns being addressed here.

13 So I read these words with not the -- I do
14 not have a Ph.D. in anything to do with earthquakes,
15 but I have the ability to read the plain language of
16 these Government reports. So here are -- starting at
17 the bottom of page ten --

18 JUDGE KARLIN: Of -- please --

19 MS. CURRAN: It is IRL -- what is it? --
20 09- -- hold on a minute.

21 JUDGE KARLIN: IRL 09-001.

22 MS. CURRAN: Right. That's this letter.

23 JUDGE KARLIN: Okay. Page ten.

24 MS. CURRAN: Bottom of page ten. "The
25 CRADA Program is expected to provide significant new

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1 information regarding the larger tectonic picture of
2 the area. The NRC's Staff initial assessment was
3 deterministic, consistent with the design basis of the
4 facility. Currently, probabilistic methods are
5 available to more accurately characterize the hazard
6 of the region surrounding the site. Further, regional
7 moment balancings could also more accurately
8 characterize the regional hazard both independently
9 and as part of a probabilistic hazard assessment. As
10 more information becomes available, such as the slip
11 rate of the potential Shoreline Fault or any
12 additional information about the Hosgri Fault, the NRC
13 Staff expects to evaluate the regional seismic hazard
14 and to form a probabilistic study when the available
15 data is sufficient."

16 So here is the NRC saying, We need this
17 data in order to do a probabilistic assessment. We
18 need to -- we need to wait till we get it. And what
19 we're saying in this contention is that PG&E hasn't
20 given a reason not to wait for this important
21 information.

22 We -- another thing I just wanted to
23 mention -- we attached a letter from the California
24 Public Utilities Commission to our contention which I
25 think was -- the purpose of that letter was

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1 misinterpreted by PG&E and the Staff. Our purpose in
2 attaching that letter was to say, If PG&E thinks that
3 it needs to get its license renewal decision in order
4 so that the availability of energy from Diablo Canyon
5 can be planned ahead of time, it's been told by the
6 PUC, We're not ready to put you into the rate base
7 until we know that this is a reliable source of
8 electricity, that an earthquake won't knock you out.
9 So that excuse is gone.

10 We don't have the excuse that it's going
11 to take forever to get a license renewal permit
12 because it just doesn't take -- it doesn't take ten
13 years or 14 years to get one.

14 JUDGE KARLIN: Question here. As I see --
15 you've been characterized I think by the Staff or the
16 Applicant as asking that this Board somehow suspend
17 the proceeding until the probabilistic risk assessment
18 is completed whenever this is going to be completed --
19 2013 I think is the year I've heard bandied about,
20 asking us to suspend the proceedings.

21 I didn't see that in your petition -- you
22 filed a contention which is, as I understand it, that
23 the ER is inadequate because it doesn't have certain
24 elements to it dealing with the Shoreline Fault. If
25 that contention is admitted, we would -- you would

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1 litigate that issue as to whether it's adequate or not
2 adequate and we would just go along and have the
3 merits decision on whether it's adequate or not
4 adequate and we wouldn't suspend anything as far as I
5 can tell.

6 Is that correct? You're just willing for
7 us to go straight ahead on that contention: Would it
8 be adequate or inadequate -- is it inadequate for them
9 not to have that in their ER? I'm not trying to be a
10 trick question. I just -- I don't see you asking for
11 a suspension. I see you saying that what they've
12 submitted is not adequate.

13 MS. CURRAN: And if -- knowing this
14 information is out there being developed, that if they
15 want -- if PG&E wants to go ahead and get a license
16 renewal decision, it has to justify omitting that
17 information.

18 JUDGE KARLIN: Right. And if they don't
19 justify it, then the Board might rule against them and
20 deny their renewal.

21 MS. CURRAN: Right.

22 JUDGE KARLIN: And they can apply again
23 later when they got the PRA.

24 MS. CURRAN: And in terms of trying the --
25 we haven't made a motion to suspend the proceeding but

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1 we have I believe cited in the history of the
2 Regulation of 40 CFR 1502.22, they do talk about time
3 as being one of the elements that is relevant and cost
4 -- it's too expensive to get the information, it would
5 take too long to get it, so that's something they need
6 to address.

7 Just saying, We haven't finished it yet
8 isn't enough, especially where the -- it's all
9 circumstantial, and the standard for NEPA is a
10 reasonableness standard.

11 JUDGE KARLIN: But their answer is always,
12 Well, wait a second. There's always going to be new
13 data. This is a long-term seismic program. We've
14 been doing this for decades. We're going to keep on
15 doing it for decades. You can't call it -- stop and
16 say, Until this long-term program is finished, you
17 can't issue a license renewal because a long-term
18 program will never be finished.

19 MS. CURRAN: And so the contention is
20 basically saying under the case law, there's a
21 question, a legal question, legal and factual
22 question, where do you draw the line.

23 JUDGE KARLIN: Right.

24 MS. CURRAN: And we're saying PG&E has not
25 drawn the line in the right place.

1 JUDGE ABRAMSON: And you mentioned earlier
2 that *Pilgrim* case and so that will bring me to PLR 10-
3 11 in which the majority of the Board, of which I was
4 a part, was reversed by the Commission and something
5 was remanded to us regarding a SAMA NEPA analysis and
6 the Board -- and the Commission said some very
7 specific things in that remand about what is and what
8 is not to be dealt with. In particular, they talked
9 about it's not a research program.

10 Is that what you're referring to or not
11 when you mentioned *Pilgrim*?

12 MS. CURRAN: No. I'm referring to -- I
13 believe there was a contention which criticized the
14 SAMA analysis because the argument was that the
15 probabilistic analysis didn't adequately or correctly
16 describe the risk and it should have been a
17 deterministic analysis. And that issue was rejected
18 on the basis that -- the ruling was PRA is the way we
19 do SAMA analysis. That is our standard practice. And
20 in that case, that was the position that the NRC Staff
21 took and said, PRA is the standard way we do SAMA
22 analyses which differs from the position that the
23 Staff took in its brief in this particular case.

24 JUDGE KARLIN: Do we have any more
25 questions for Ms. Curran at the moment? No. Okay.

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1 Thank you, Ms. Curran.

2 PG&E and Mr. Repka or Mr. Smith. Mr.
3 Repka, may I ask -- the research information letter
4 09-001 talks about the preliminary deterministic
5 analysis that have been done with regard to the
6 Shoreline Fault. Can you summarize for us what is the
7 status of the current work that's being done by PG&E
8 and the USGS? As I understand it from the petition,
9 there is something that's due in 2010. There's
10 something that's due 2012. And that the probabilistic
11 risk assessment are three-dimensional. I'm not sure
12 whether they're the same or different as 2013.

13 Could you -- what's currently on the books
14 being worked on by PG&E with regard to seismic issues
15 around this plant, please?

16 MR. REPKA: Okay. I'll try to walk
17 through the timeline and if I say something that's
18 incorrect, they're going to tell me from back here.

19 JUDGE KARLIN: Okay.

20 JUDGE ABRAMSON: Before we go down this
21 path, let me just note that a lot of the information
22 we're getting here is not in the record. It's not
23 part of the pleadings. And we have to be very careful
24 what we do and don't consider from this, particularly
25 factual information that has nothing to do with the

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1 pleadings.

2 JUDGE KARLIN: Well, I think that the
3 Petitioner has alleged certain things about a study
4 due 2010, 2012, and 2013, and that is in the record
5 and I'd like that to be addressed if you have a
6 response or that's incorrect in some way.

7 MR. REPKA: Okay. So the issue of the
8 Shoreline Fault was first identified by the USGS under
9 the CRADA with PG&E and the NRC was notified of the
10 issue in November 2008, so that's the first thing.
11 That's based upon the USGS work to look at the area of
12 seismicity that was known, the offshore area of
13 seismicity, and they relocated some of the historic
14 faults based upon their revised methodology, and that
15 showed a refocusing of some of that seismic activity
16 into this area that is now referred to as the
17 Shoreline Fault.

18 The -- PG&E presented some data back in
19 that time frame based upon that work and some other
20 work. The NRC did an independent assessment in April
21 2009 where they did a -- they looked independently at
22 the -- based upon an 84th percentile deterministic
23 seismic case, which is the licensing base of seismic
24 case and agreed with PG&E that this fault activity was
25 bounded by the design basis Hosgri.

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1 PG&E also embarked on some additional
2 work, some field work, including high resolution sea
3 floor mapping of the area offshore from Diablo Canyon,
4 some work related to looking at magnetic information
5 and observation of the offshore region by helicopter.

6 JUDGE KARLIN: Okay.

7 MR. REPKA: And the point of all of that
8 is a data set went online in December of 2009-January
9 2010. That's what's discussed in some of this
10 information that's being referred to.

11 JUDGE KARLIN: Okay. Well, let me focus
12 this down a little more. The Petitioner at page 11
13 refers to January 2010 memo to the NRC regarding
14 Diablo Canyon, summary of January 5th, 2010 meeting
15 regarding the Shoreline Fault. And in -- on the
16 second page, it says, "PG&E stated Shoreline Fault
17 studies were accelerated and the current schedule is
18 to have the Shoreline Fault study completed by the end
19 of 2010."

20 What's that?

21 MR. REPKA: What's that -- that's the work
22 that has been done to date. The data set has already
23 been published. It's been presented to the NRC.

24 JUDGE KARLIN: Right.

25 MR. REPKA: It's online, and the full

1 report that completes all the analysis of that data
2 will be completed by December 2010.

3 JUDGE KARLIN: So there's some report that
4 PG&E is going to issue by December 2010 covering the
5 Shoreline Fault study; right?

6 MR. REPKA: Correct, and --

7 JUDGE KARLIN: Now, the next sentence
8 says, "The rest of the tectonic modeling for the
9 Central California region is due to be completed in
10 2012."

11 What's that?

12 MR. REPKA: There have been some proposals
13 to do some additional work.

14 JUDGE KARLIN: And you are in fact doing
15 them, as I understand this letter says.

16 MR. REPKA: Well, the proposals for the
17 work that have been done relate to some offshore sea
18 bed monitoring as well as some 3-D seismic studies
19 which are based on -- a lot of the data generated to
20 date is all from land-based sonar stations to the
21 east.

22 JUDGE KARLIN: Right. Right. Land-based.

23 MR. REPKA: Would look at it from some
24 stations that don't presently exist west of the site.
25 So those studies, the offshore sea bed monitoring and

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1 the so-called 3-D studies, are currently the subject
2 of an application PG&E may have before the CPUC for
3 funding and --

4 JUDGE KARLIN: No, no, no. Let me just
5 ask. Because then there's this next sentence
6 that's -- there's some study that's due to be
7 complete, this memo says, in 2012. And then the next
8 sentence talks about "Barbara Byron from the
9 California Energy Commission asked if three-
10 dimensional imaging studies as recommended by CEC are
11 going to be performed. PG&E stated it is looking into
12 funding for this project and, if funded, would extend
13 the Central California study to 2013."

14 So is -- so the three-dimensional imaging
15 -- so that's a different element to the studies,
16 three-dimensional?

17 MR. REPKA: The 3-D refers specifically to
18 the sonar stations to the west.

19 JUDGE KARLIN: Oh, okay. So the 3-D is
20 the same. And are any of those probabilistic risk
21 assessments?

22 MR. REPKA: All of those are data-
23 gathering efforts --

24 JUDGE KARLIN: Oh, okay.

25 MR. REPKA: -- that are used in both

1 deterministic and probabilistic assessments. So
2 the -- and I think all of this illustrates exactly how
3 this issue is being addressed today as part of an
4 ongoing regulatory process the LTSPU alluded to is
5 actually required by this very unique Diablo Canyon
6 license condition and will go on throughout the
7 operating life of the plant.

8 So all of those studies are continuing or
9 at least PG&E is seeking funding for the additional
10 work. But what we have before us right now is what
11 was presented in January. It's reported in the
12 document that the Mothers for Peace are relying upon.
13 And certainly what that shows is that from a current
14 licensing basis perspective, everything we know is
15 that it's bounded by the design basis earthquake on
16 the Hosgri. So all of the statements we've heard this
17 morning about this is a terrible, horrible risk are
18 based upon nothing. It's -- all of the information to
19 date shows that we are bounded by the current
20 licensing basis.

21 So that brings us to the question of the
22 SAMA. Is this -- if this contention is about the
23 current licensing basis of the plant, it's clearly out
24 of scope of license renewal. It's not --

25 JUDGE KARLIN: Now, wait a second. Let me

1 ask you about that. I have a problem with that
2 proposition. You sort of -- let's look at *Turkey*
3 *Point*, the Commission's decision, COI 01-17. And on
4 page 13, it says -- 54 NRC 3 at page 13 -- I will
5 quote: "The Commission's AEA review under Part 54
6 does not compromise or limit NEPA." Going down
7 further, "Two inquiries are analytical separate. One,
8 Part 54, examines radiological health and safety while
9 the other, Part 51, examines environmental health
10 effects of all kinds. Our aging-based safety review
11 does not in any sense restrict NEPA or drastically
12 narrow the scope of NEPA."

13 As I read that -- and I think other
14 sources would support -- the NEPA review is not
15 restricted to current licensing basis. It applies to
16 any environmental impacts that might be associated
17 with continuing the operation of a facility for
18 another 20 years.

19 MR. REPKA: Correct.

20 JUDGE KARLIN: So why do you keep saying
21 that this NEPA contention must be restricted to the
22 current licensing basis or not --

23 MR. REPKA: I actually didn't say that.
24 I said if the contention was about the current
25 licensing basis, it would be precluded.

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1 JUDGE KARLIN: Why does the current
2 licensing basis got anything to do with it?

3 MR. REPKA: Well, if the contention is
4 about NEPA --

5 JUDGE KARLIN: Right.

6 MR. REPKA: -- the NRC and the generic
7 environmental impact statement has already looked at
8 both design basis and severe accident risk, which
9 includes seismic risk.

10 JUDGE KARLIN: Oh, that -- you're talking
11 about the GEIS?

12 MR. REPKA: The GEIS.

13 JUDGE KARLIN: Okay. Well, that's a
14 different issue.

15 MR. REPKA: Correct. I understand that.
16 And the -- and has concluded that both are Category 1
17 issues with small environmental impacts. So that
18 portion of NEPA is already satisfied. So the one
19 remaining NEPA obligation is the so-called SAMA
20 analysis that's required by 51.53 sub whatever it is.

21 So to the extent this contention is
22 focused on SAMA, that's -- that's potentially in
23 scope. But the problem with the contention as it
24 relates to SAMA is it's not based on anything. It
25 doesn't satisfy the case law and the requirements for

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1 a sufficient SAMA contention.

2 JUDGE ABRAMSON: Okay. Let's go down that
3 for a second, Mr. Repka, because as I see this, this
4 is purely a SAMA -- purely a question of is NEPA
5 satisfied in respect to the license renewal and the
6 only issue that NEPA -- that regards NEPA in the
7 license renewal is the Commission's edict that if you
8 didn't do SAMA when you got your first license, you've
9 got to do it at license renewal. So you've got to do
10 SAMA analysis and -- so let's take that as our
11 starting point.

12 MR. REPKA: Right, and I agree with that
13 starting point.

14 JUDGE ABRAMSON: There's an assertion that
15 the SAMA analysis that's been done -- that the ER is
16 insufficient but the only way it can be insufficient,
17 because it's ultimately the Staff's obligation to do
18 an EIS. The only way the ER can be insufficient is if
19 there was an omission or an insufficiency in the SAMA
20 analysis, and the assertion here is that the SAMA
21 analysis doesn't -- if I heard this correctly --
22 doesn't incorporate the potential effect of the
23 Shoreline Fault.

24 Right? And I think I heard the Staff --
25 or read the Staff to be saying, We think that the ER

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1 needs to be modified to address the effects of the
2 Shoreline Fault. Whether or not that means redoing --
3 whether or not that means there's an omission -- it
4 seems to me the Staff would be saying there's an
5 omission because the ER doesn't address the effect.
6 It doesn't mean they're not encompassed by the
7 analysis that's already been done. It just means it
8 didn't address it. It might be sufficient to just
9 say, These analyses incorporate the effects because.
10 But that's my impression.

11 Am I off-base on that?

12 MR. REPKA: No. I think that's my
13 impression of what the Staff is asking for in their
14 brief as well. But we don't have a request for
15 additional information from the Staff, so I can't say
16 for sure that I know what the Staff is seeking. I
17 think the important thing, though, is the RAI process
18 will go on.

19 JUDGE ABRAMSON: Right.

20 MR. REPKA: That's the important part of
21 the licensing review. And we do know from well-
22 established case law that an RAI, which presumably
23 this will be, is alone not sufficient for a
24 contention. The intervenor, the Petitioner, has the
25 burden to identify something specific themselves based

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1 upon some expertise.

2 And that's particularly true with respect
3 to a SAMA contention, and we've cited some of those
4 decisions in our brief that say with respect to the
5 SAMA contention, the Petitioner has to show some
6 specific deficiency, how it could relate to some
7 specific mitigation alternative, how that -- the
8 averted risk benefit would change and how that
9 mitigation alternative might be -- might now be
10 justified, whereas it's not in the SAMA analysis of
11 record.

12 We have none of that. And I think, you
13 know, one case that sticks out in my mind as I read it
14 is an *Indian Point* decision that's 68 NRC 43. It's a
15 Licensing Board decision, but it's on admissibility of
16 a SAMA contention and it's New York State 14 and 15 in
17 particular. But I was fairly struck by how the
18 Licensing Board rejected that contention for precisely
19 the reason that the contention was purely speculation
20 that we have -- there's no information on this
21 particular seismic risk -- and it was a seismic
22 contention -- but nothing more to show how that would
23 alter the SAMA evaluation of record.

24 So that's why when we wrote -- you know,
25 I think that's the standard and that's where the

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1 contentions fail. When we wrote --

2 JUDGE KARLIN: Well, let me ask you on
3 that question, if I may. We look at page 14 and 15 of
4 your brief, and I think at 15 you talk about the
5 Indian Point -- and I had a question about that. On
6 14, you start the paragraph on page 14 with, "At its
7 most basic, the contention is an impermissible
8 challenge to the CLB."

9 And I don't think it's a challenge to the
10 CLB. It's a challenge to the adequacy of an ER. And
11 as I think --

12 MR. REPKA: If it --

13 JUDGE KARLIN: Is it a challenge to the
14 CLB?

15 MR. REPKA: Everything I've heard this
16 morning says no.

17 JUDGE KARLIN: No.

18 MR. REPKA: And that's --

19 JUDGE KARLIN: Well, that's what you just
20 said it is.

21 MR. REPKA: So, you know, certainly no
22 contention could be admitted that says that it's a
23 challenge to the CLB. If it's a challenge to the SAMA
24 evaluation --

25 JUDGE KARLIN: No, no, but let me ask you.

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1 "At its most basic, the contention is an impermissible
2 challenge to the CLB." Do you think this
3 environmental contention challenging the adequacy of
4 the ER is a challenge to the CLB?

5 MR. REPKA: To the extent that the
6 contention -- even some of the rhetoric this morning
7 has been directed at the issue of seismic risk being
8 very important to the safe operation of Diablo Canyon.
9 That would be a challenge to the CLB. And that's
10 being addressed today.

11 JUDGE KARLIN: But that's not what the
12 contention -- the adequacy -- it's a NEPA issue.

13 MR. REPKA: I --

14 JUDGE KARLIN: It's not a safety issue.

15 MR. REPKA: I can only respond to some of
16 the rhetoric in the contention and in the --

17 JUDGE KARLIN: So let's go to the *Indian*
18 *Point* quote on page 15. You're talking about, for
19 example, *Indian Point* proceeding LBP decision, and I
20 will read in the middle: "The Board rejected the
21 proposed contention in part because the Petitioner
22 failed to explain why the most recent information was
23 sufficiently different from earlier data." So it
24 wasn't a matter that it was outside of the scope. It
25 was just simply that they didn't explain why their

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1 information was different.

2 Is that a qualitative difference as
3 opposed to simply a scope difference?

4 MR. REPKA: No. It's a qualitative and
5 quantitative difference to the outcome of the SAMA
6 evaluation. So if we're focused on a SAMA evaluation,
7 the contention doesn't even engage the SAMA evaluation
8 as presented in the environmental report. There's --
9 it acts as if it doesn't exist. And, in fact, there's
10 a fairly detailed SAMA evaluation based upon a
11 probabilistic assessment of the seismic risks, at
12 Diablo Canyon. It looks at specific -- very specific
13 seismic mitigation alternatives and concludes, based
14 on the PRA, that none of those are cost-justified and,
15 in fact, none of those are cost-justified by a very
16 wide margin.

17 JUDGE ABRAMSON: Mr. Repka, if we take
18 Mothers for Peace' assertion to be that nothing in the
19 ER says anything about -- about Shoreline Fault and,
20 therefore, it's an omission I think is what the --
21 what I hear the Staff to be saying, that -- is that
22 not an admissible contention?

23 MR. REPKA: No. I don't think that alone
24 is sufficient. I think it has to say -- it has to be
25 something again material to the outcome. The Mothers

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1 for Peace talk about this EC Regulation 40 CFR 15.022
2 as well as a couple of cases but, just to address
3 that, that regulation talks about incomplete and
4 unavailable information needs to be addressed if it's
5 relevant to reasonably foreseeable significant adverse
6 impacts.

7 Well, everything we know based upon the
8 evaluations to date are this is not going to lead
9 to --

10 JUDGE ABRAMSON: But did the ER address
11 that?

12 MR. REPKA: It certainly addressed the
13 profile -- the long-term seismic program -- seismic
14 profiles of plants. We know that the Hosgri bounds
15 the Shoreline Fault.

16 JUDGE ABRAMSON: I'm sorry. Does the ER
17 say that the Hosgri -- the date that's used in that
18 ERA bounds inclusion of anything from the Shoreline
19 Fault? Does the ER say that?

20 MR. REPKA: The ER doesn't say that but it
21 includes an uncertainty evaluation, a sensitivity
22 evaluation to address --

23 JUDGE ABRAMSON: Oh, I don't doubt -- I
24 don't even think it's relevant whether or not it says
25 those sorts of things. If it were a contention of

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1 omission that the ER doesn't address the Shoreline
2 Fault, that seems to me to be in and of itself -- you
3 don't know if it's material if you didn't address it.

4 Now, it may be immaterial if addressed.
5 But it sounds to me like it's asserted that it wasn't
6 even addressed.

7 MR. REPKA: I think that's -- would be
8 inconsistent with the Commission's line of cases on
9 SAMAs that says you need to do more than plead Issue
10 X was not addressed. You have to show is there some
11 particular mitigation alternative that would be
12 impacted if you considered X. You have to show -- I
13 think the words in the cases were "some reasonable
14 notion" of what are the costs impact of that, what are
15 the averted risk benefit of that, and we have none of
16 that.

17 JUDGE ABRAMSON: Well, unfortunately, I'm
18 not sure that I can agree with your assessment of the
19 Commission line of cases given what happened in CLR
20 10-11 where the majority of the Board reached a
21 conclusion that something was unnecessary vis-a-vis
22 SAMA analysis because it was bounded by other stuff,
23 and the Commission came back and said, Do it, but
24 maybe I'm misreading 10-11. I'd appreciate your input
25 on that.

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1 MR. REPKA: Well, I think that goes to the
2 point that in that decision, the Commission was also
3 very clear that a SAMA evaluation isn't a science
4 project. It's not a research project.

5 JUDGE ABRAMSON: Absolutely.

6 MR. REPKA: It's not trying to capture,
7 you know, future results that may come in. We have
8 the best available information. The SAMA evaluation
9 included in the environmental report was based upon
10 the seismic profiles based on the long-term seismic
11 program data which is the best available bounding
12 information, applied an uncertainty, and we feel like
13 that evaluation does precisely what -- I mean, the
14 Mothers for Peace cite as a NEPA standard *Colorado*
15 *Environmental Coalition v. Dombeck*, and that says that
16 the standard for an environmental analysis is that it
17 must constitute a reasonable good-faith presentation
18 on the best information available under the
19 circumstances. And I think that's precisely what the
20 SAMA evaluation is. And, in fact, the court in that
21 case actually upheld the Forest Service's analysis.

22 So on the facts of that standard, we think
23 we're very much like that case.

24 JUDGE KARLIN: Let me ask on that. Aren't
25 you at the merits? All we're talking about now is

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1 whether this contention is admissible, not whether
2 they're right.

3 MR. REPKA: No. It's --

4 JUDGE KARLIN: How do we distinguish --

5 MR. REPKA: It's a question of whether
6 there's sufficient basis to generate a genuine dispute
7 on a material issue.

8 JUDGE KARLIN: And they've presented the
9 research information letter, the discovery of the
10 Shoreline Fault, the fact that PG&E and USGS and
11 perhaps even NRC are actively investigating and have
12 reallocated resources to go after this Shoreline Fault
13 issue quite actively it seems like as being the
14 supporting information to show that this is something
15 that's relevant and might be -- might be relevant at
16 least to get a contention in.

17 MR. REPKA: But simply said, there's an
18 ongoing issue between the NRC and PG&E. Therefore,
19 there's a contention.

20 JUDGE KARLIN: No, no. They didn't say
21 that.

22 MR. REPKA: They've offered -- well, I
23 think that's how I would characterize it, and they've
24 offered no independent expertise.

25 JUDGE KARLIN: Well, wait a second.

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1 MR. REPKA: They've offered no --

2 JUDGE KARLIN: Is there any -- wait a
3 second. Is there any requirement in any reg. or any
4 case that they provide an expert opinion?

5 MR. REPKA: There is requirement for
6 support.

7 JUDGE KARLIN: All right. And is there
8 any requirement that they provide an expert opinion?

9 MR. REPKA: Not specifically.

10 JUDGE KARLIN: Is there any requirement
11 that they provide a substantive affidavit?

12 MR. REPKA: No, but they have --

13 JUDGE KARLIN: Okay.

14 MR. REPKA: -- to demonstrate the
15 existence of a genuine dispute.

16 JUDGE KARLIN: Yes. Yes.

17 MR. REPKA: And that's --

18 JUDGE KARLIN: Sufficient information to
19 support a genuine dispute. But there's nothing
20 requiring an expert opinion and there's nothing
21 requiring substantive affidavits, so I think that
22 portion of your brief just troubles me because that
23 just simply is a strawman.

24 JUDGE ABRAMSON: But let's come back to
25 what I see as a pretty fundamental and straightforward

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1 issue to deal with, which is I think what I hear you
2 saying, Mr. Repka, is that PG&E's convinced that the
3 data that you have bound whatever would be allocated
4 from those local seismic profiles to the Shoreline
5 Fault and that, therefore, the PRA that's been done
6 encompasses the effects of the Shoreline Fault but
7 that the ER says nothing about the Shoreline Fault.
8 Is that an accurate characterization essentially?

9 MR. REPKA: The ER says nothing about the
10 Shoreline Fault. The PRA that's in the ER with the
11 sensitivity analysis to address uncertainty would
12 bound a SAMA evaluation that would include the
13 Shoreline Fault probabilistic profile.

14 JUDGE ABRAMSON: So --

15 MR. REPKA: As mentioned earlier, that the
16 Staff's question seems to be what about the
17 probability and what would be the contribution to the
18 core damage frequency and, you know, all of that is
19 not specifically addressed, but the fact is it -- our
20 position is that we think at the end of the day the
21 SAMA evaluation would lead to exactly the same
22 results, given the uncertainty in the probabilistic
23 analysis and the wide margin on the actual seismic
24 mitigational --

25 JUDGE ABRAMSON: And that to the next

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1 effective SAMA. The cost gap for the --

2 MR. REPKA: Correct. When I refer to the
3 margins, the cost versus risk benefit.

4 JUDGE ABRAMSON: Okay. So it would -- if
5 we were to admit a contention of omission, it would be
6 relatively straightforward for PG&E to provide a
7 supplement to the ER or a minor amendment to the ER
8 which addressed this question and then -- and then it
9 would be a question of whether the contention was moot
10 or not.

11 MR. REPKA: Yeah. Without trivializing
12 the words --

13 JUDGE ABRAMSON: I don't mean to
14 trivialize it.

15 MR. REPKA: -- it would go into the
16 analysis. The act of supplementing whether it be
17 responding to an NRC Staff RAI and putting it into a
18 record, yes, that would be a straightforward task. I
19 have no doubt about that.

20 JUDGE ABRAMSON: Okay. So let's come back
21 then to what I hear your argument for why we should
22 not follow the Staff's suggestion that there be a
23 narrower admitted contention that says the ER is
24 insufficient because it doesn't deal with the
25 Shoreline Fault, and that is -- your argument would be

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1 the requirement for any contention's admissible
2 ability is that it must demonstrate genuine issue --
3 a material -- a genuine material issue of disagreement
4 with the application.

5 MR. REPKA: Related to the SAMA
6 evaluation.

7 JUDGE ABRAMSON: Right, related to the
8 SAMA evaluation. And that because it is a general
9 assertion of omission to consider this, without any
10 indicia that if it had been considered, it would be
11 material; i.e., it might make the next SAMA cost
12 effective, it should be not admitted? Is that -- am
13 I hearing that right?

14 MR. REPKA: Correct. If the NEPA standard
15 is, as the Mothers for Peace asserts, whether it's
16 necessary to make a reasoned choice among feasible
17 alternatives, then it has to have some basis to say
18 that and we don't think there is that basis to show
19 that it's going to make a difference in terms of
20 choosing mitigation alternatives.

21 JUDGE ABRAMSON: And recent cases at both
22 the Board and at the Commission level addressing SAMAs
23 would support that view? Can you give me a cite?
24 Because the one on *Platwith* (ph) doesn't make me feel
25 that way.

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1 MR. REPKA: I think those are the cases we
2 cited in our brief. If you could bear with me a
3 second. And I mentioned *Indian Point*, which is a
4 Licensing Board decision, and I think that decision is
5 actually on all fours.

6 I apologize. My papers are out of order
7 right now.

8 JUDGE KARLIN: Join the boat.

9 MR. REPKA: Correct. Commission decision
10 in *McGuire/Catawba* license renewal, COI 02-17, that we
11 characterize as saying that -- in fact, if the
12 petitioner in that case proposed an additional
13 mitigation alternative needed to be considered, and
14 the Commission said there had to be some notion, some
15 basis to conclude that that alternative was credible,
16 that it could possibly be cost effective and so,
17 therefore, there wasn't a sufficient basis to admit a
18 contention on a SAMA. So I think that case was --
19 that case, the petitioner even offered more because
20 they identified a specific alternative, a mitigation
21 alternative.

22 Here, we have no mitigation alternative.
23 We just have a -- a seismic concern.

24 And the other case is LBP 08-13. That's
25 *Indian Point* we cite in our brief as a Licensing Board

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1 decision.

2 JUDGE TRIKOUROS: That deterministic
3 analysis, if I remember correctly in the research
4 information document, picked 84th percentile, I think,
5 didn't it, the one standard deviation?

6 MR. REPKA: It did. And I believe that's
7 a licensing basis case, a design basis case.

8 JUDGE TRIKOUROS: Yes. The difference
9 between that -- and I understand why they picked that,
10 but the difference between that and a probabilistic
11 analysis would be that there -- that in probabilistic
12 space, there's a 16 percent chance that the earthquake
13 would actually be greater than the current licensing
14 basis?

15 MR. REPKA: Right. Well, the
16 probabilistic case in the -- I want to say that SAMA
17 is still based on an 84th percentile, but the
18 sensitivity is on a 95 -- 95th percentile
19 probabilistic analysis.

20 JUDGE KARLIN: Okay. I think that's all
21 the questions we have, Mr. Repka. Thank you.

22 We'll now ask Staff. We are now at 12:20.
23 Perhaps we can focus on the Staff and have a short
24 rebuttal or opportunity to ask Ms. Curran some
25 questions and break at that point for a bit of a late

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1 lunch.

2 Mr. Subin.

3 MR. SUBIN: Yes.

4 JUDGE KARLIN: You're going to present --

5 MR. SUBIN: Right.

6 JUDGE KARLIN: -- answer questions on
7 this. Okay. Good. Let me get my notes together, if
8 I may. Let me go to your answer at page 28. This is
9 I believe where you talk about that you don't object
10 to admission of part of this contention.

11 MR. SUBIN: That's correct.

12 JUDGE KARLIN: "Staff has no objection to
13 admission of a limited part of Proposed Contention EC-
14 1." And then you propose on page 29, "The Staff
15 believes as to the discussion of the Shoreline Fault
16 the following has been omitted from the environmental
17 report." One, two, three -- you list some things.

18 And aren't you getting to the merits? It
19 seems to me that the contention is that SAMA is
20 inadequate.

21 MR. SUBIN: Correct.

22 JUDGE KARLIN: And one of the bases --
23 perhaps the basis -- I don't like that word, but the
24 support for that is, Well, they need to do a
25 probabilistic risk assessment. They haven't done

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1 that. And that's really key and that's important and
2 that's standard or that's required or whatever. But
3 a PRA is what needs to be done. And that's their
4 contention.

5 And you say, Oh, no, no, no. A PRA
6 doesn't need to be done. Something less than that
7 will be sufficient. Now, aren't you arguing about --
8 they're arguing it's inadequate and they give you a
9 reason why they think it's inadequate -- give us a
10 reason why they think it's inadequate and you say,
11 Well, that may be right that it's inadequate but it's
12 inadequate in a different way and if they just fill in
13 these three -- one, two, threes, everything will be
14 fine.

15 MR. SUBIN: Because this is a contention
16 of omission, we felt --

17 JUDGE KARLIN: Well, no, no, no. Is it a
18 contention of omission? It's an inadequacy, that the
19 PRA is inadequate --

20 MR. SUBIN: It's inadequate in that we
21 don't know whether they considered it or not.

22 JUDGE KARLIN: Yeah. Okay.

23 MR. SUBIN: It may appear that they
24 haven't considered it, but we need to know these
25 things --

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1 JUDGE KARLIN: Right.

2 MR. SUBIN: -- to even know if there was
3 an omission or not. We don't know if there's an
4 omission and these are the things that would have to
5 be considered.

6 JUDGE KARLIN: Right.

7 MR. SUBIN: And that was just part of the
8 explanation.

9 JUDGE KARLIN: Well, those are the things
10 you think need to be considered.

11 MR. SUBIN: Right.

12 JUDGE KARLIN: And it may -- it doesn't
13 seem like what they think needs to be considered.

14 MR. SUBIN: When you say "they" --

15 JUDGE KARLIN: "They," the San Luis Obispo
16 Mothers for Peace.

17 MR. SUBIN: Mothers for Peace. Correct.

18 JUDGE KARLIN: And so if we admitted a
19 narrowed contention and the Applicant filled in those
20 three blanks, one, two, three, isn't that just --
21 wouldn't the San Luis Obispo Mothers for Peace simply
22 come and say, Well, it's inadequate.

23 MR. SUBIN: Well, they're saying it's
24 inadequate because they think we need a whole new --

25 JUDGE KARLIN: Need a PRA.

1 MR. SUBIN: -- a new PRA. There already
2 is a PRA in --

3 JUDGE KARLIN: Well, no, no, a new PRA, a
4 PRA that deals with -- has there been a PRA that deals
5 with the Shoreline Fault?

6 MR. SUBIN: There's a SAMA analysis that
7 deals with it.

8 JUDGE KARLIN: Okay.

9 MR. SUBIN: And --

10 JUDGE KARLIN: Has there been a
11 probabilistic risk assessment on the Shoreline Fault?
12 That's what I'm asking.

13 MR. SUBIN: No. We haven't seen one. The
14 SAMA analysis. Right.

15 JUDGE KARLIN: Right. Well, look at
16 research information letter 09-001, the first page.
17 I'm looking at this and there's an attachment by the
18 Petitioner at page nine or referenced by the
19 Petitioner at page nine and it's preliminary
20 deterministic analysis, and the word "preliminary"
21 appears seven times on the first page. Who did that?
22 Who wrote this?

23 MR. SUBIN: That was written by one of our
24 staff members.

25 JUDGE KARLIN: Okay. So the NRC Staff

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1 wrote this.

2 MR. SUBIN: Correct.

3 JUDGE KARLIN: And --

4 MR. SUBIN: I don't believe her name is on
5 it. I'm not -- it should be Annie Cameron (ph). Is
6 it on -- I think she's the point of contact at the end
7 or something.

8 JUDGE KARLIN: I don't see any name on
9 this document.

10 MR. SUBIN: Okay. But that's done by the
11 Staff.

12 JUDGE KARLIN: Okay.

13 MR. SUBIN: Yes.

14 JUDGE KARLIN: And page -- it says -- the
15 conclusion -- I'll read it -- "This preliminary
16 assessment indicates that the best estimate 84th
17 percentile deterministic seismic loading levels
18 predicted for a maximum magnitude earthquake on the
19 potential Shoreline Fault are slightly below those
20 levels for which the plant was previously analyzed in
21 Diablo Canyon Long-Term Seismic Program."

22 All right. So it's slightly below?

23 MR. SUBIN: Right. That's what it states.

24 JUDGE KARLIN: Do you have that document
25 in front of you?

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1 MR. SUBIN: Not in front of me right now.

2 JUDGE KARLIN: Okay. On Figure 10 --
3 perhaps you could get it. Do you have it? -- yes.
4 Right. Figure 10 --

5 MR. SUBIN: What page is that on?

6 JUDGE KARLIN: -- of that RIL.

7 MR. SUBIN: Yes. What page did you say
8 that was on?

9 JUDGE KARLIN: It doesn't have a page.
10 It's Figure 10.

11 JUDGE TRIKOUROS: Figures are in the back.

12 MR. SUBIN: Right.

13 JUDGE KARLIN: It's page 22 -- I'm sorry.
14 There is a page.

15 MR. SUBIN: Yes.

16 JUDGE KARLIN: Now, it shows what is the
17 LTPS spectrum. That's the Long-Term Seismic Program
18 Amount?

19 MR. SUBIN: Correct.

20 JUDGE KARLIN: All right. It says it's
21 slightly below those levels for which the plant was
22 previously analyzed in the Long-Term Seismic Program.
23 So we see the solid black line depicting the LTPS
24 spectrum. Then we have four studies that are averaged
25 on the right-hand column as to various deterministic

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1 ground motions and look at the Chiou and Youngs study
2 of '08. Does that study -- slightly higher than the
3 Long-Term Seismic Program?

4 Do you see the piece of --

5 MR. SUBIN: I see that the curve goes up,
6 but I couldn't tell you. I'm not an expert.

7 JUDGE KARLIN: It looks to me that that
8 piece is higher.

9 JUDGE ABRAMSON: I think that's a very
10 technical question.

11 JUDGE KARLIN: Well, --

12 JUDGE ABRAMSON: I don't think we --

13 JUDGE KARLIN: -- I think it's quite plain
14 that it is higher. The only question is what's done
15 in the deterministic study is that they've averaged
16 the four studies that are being -- Abrahamson and Siva,
17 Campbell and Bozorgonia, Chiou and Youngs, and Boore
18 and Atkinson. There are four studies and I read the
19 full report and it says that the average is what
20 you've come up with.

21 JUDGE ABRAMSON: Judge Karlin, first of
22 all, that's a spectral analysis and the effect of
23 earthquakes at different frequencies have different
24 effects. So the fact that it has a higher impact at
25 one particular frequency does not mean the overall

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1 effect is higher. So I think it's a very complicated
2 technical question which we shouldn't try to interpret
3 here.

4 JUDGE KARLIN: All right. I appreciate
5 that remark, but I think what I'm trying to ask is
6 when you say "slightly below" those levels, it is very
7 slightly before and, in fact, one study shows it's
8 higher, slightly above.

9 JUDGE ABRAMSON: It doesn't show that.

10 JUDGE KARLIN: Yes, it does.

11 JUDGE ABRAMSON: Okay.

12 JUDGE KARLIN: Now, is that the basis upon
13 which the Staff makes the statement that the Hosgri
14 study is bounding of the Shoreline Fault?

15 MR. SUBIN: I'm not sure. I couldn't tell
16 you.

17 JUDGE KARLIN: Is that what you say in
18 your brief?

19 MR. SUBIN: Let me ask Staff.

20 JUDGE KARLIN: All right.

21 (Pause.)

22 MR. SUBIN: The only way I can answer is
23 that this is a deterministic analysis that the Staff
24 uses for operating --

25 JUDGE ABRAMSON: Counselor, let me --

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1 JUDGE KARLIN: No, no. I want him to
2 answer the question.

3 JUDGE ABRAMSON: I don't think he's
4 capable of answering the question. Let me get to that
5 point. Are you an attorney?

6 MR. SUBIN: Yes.

7 JUDGE ABRAMSON: Are you a scientist?

8 MR. SUBIN: I have no --

9 JUDGE ABRAMSON: Do you know anything
10 about this particular technical topic?

11 MR. SUBIN: No.

12 JUDGE ABRAMSON: And, therefore, are you
13 competent to answer a question about how the Staff
14 reads a particular technical result?

15 MR. SUBIN: No.

16 JUDGE ABRAMSON: Thank you.

17 MR. SUBIN: Not without --

18 JUDGE KARLIN: All right. Well, let me
19 ask this question as an attorney, Mr. Subin. Let's
20 return to page 32 of your brief.

21 MR. SUBIN: Yes.

22 JUDGE KARLIN: Petitioner -- it's at the
23 bottom of the page. "Petitioner cites from the RIL
24 09-001 the meeting summary discussing the fault and
25 the Staff's determination that the updated information

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1 has not changed the conclusion that the Hosgri Fault
2 is bounding."

3 I'm just asking whether this RIL is a
4 basis of the Staff's determination that the Hosgri
5 Fault is bounding? You said that in your brief and
6 I'm just asking if that was a basis --

7 MR. SUBIN: We're really citing what the
8 Petitioner said at that point in time.

9 JUDGE KARLIN: Right. Right. But isn't
10 that what you say in your letter, in your letter of
11 April 8th -- I'm sorry -- the Staff does say that it's
12 bounding, do they not?

13 MR. SUBIN: The Staff says -- the Staff --
14 under the operation of the plant, they have to make
15 sure that it meets its licensing basis. It's not done
16 for license renewal. It's a separate division. It
17 has nothing to do with this hearing as far as we
18 understand, and, yes, they made that statement and I
19 can only -- I cannot interpret it any further than
20 they said it's bounding for purposes of safe
21 operation, that they don't have to shut the plant
22 down.

23 JUDGE KARLIN: Right. Right.

24 MR. SUBIN: That's the only thing I can
25 speak to.

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1 JUDGE KARLIN: Right.

2 MR. SUBIN: Is that that's what that's
3 done for and that's -- that's what they're speaking
4 to.

5 JUDGE KARLIN: Right.

6 MR. SUBIN: Now, they may have to do
7 additional studies and those studies may find out
8 other information, but --

9 JUDGE KARLIN: Right. But are they doing
10 additional studies?

11 MR. SUBIN: My understanding is yes.

12 JUDGE KARLIN: And what --

13 MR. SUBIN: It's that data program and I
14 think it's referred to in the RIL.

15 JUDGE KARLIN: So the Staff -- has the
16 Staff asked the Applicant to do a probabilistic risk
17 assessment of the Shoreline Fault as it might affect
18 this?

19 MR. SUBIN: Not as it might affect the
20 license renewal application. They may have asked them
21 under the program.

22 JUDGE KARLIN: Okay. Okay.

23 JUDGE TRIKOUROS: I have a question.

24 JUDGE KARLIN: Yeah. Go ahead.

25 MR. SUBIN: I stand corrected. I don't

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1 believe that we have -- they've -- PG&E have agreed to
2 do it with I guess USGS.

3 JUDGE KARLIN: So you didn't -- the Staff
4 did not --

5 MR. SUBIN: We requested their doing it
6 and --

7 JUDGE KARLIN: But they are doing a
8 probabilistic risk assessment?

9 MR. SUBIN: That's our understanding.

10 JUDGE KARLIN: Is your understanding?

11 MR. SUBIN: That's correct.

12 JUDGE KARLIN: And "they" being the
13 Applicant and --

14 MR. SUBIN: The Applicant and USGS.

15 JUDGE KARLIN: -- USGS.

16 MR. SUBIN: Correct. Under LTSP Program
17 they've agreed.

18 JUDGE KARLIN: Okay. Thank you.

19 MR. SUBIN: And I think we have it in the
20 brief, so --

21 JUDGE KARLIN: I'm sorry?

22 JUDGE TRIKOUROS: Now, you list the three
23 items that you think are -- were omitted from the
24 environmental report. On -- this is page 29 of your
25 answer.

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1 MR. SUBIN: Correct.

2 JUDGE TRIKOUROS: And the first one refers
3 to the impact of the Shoreline Fault on the seismic
4 core damage frequency and off-site consequences. It's
5 an "and." Right?

6 MR. SUBIN: Right.

7 JUDGE TRIKOUROS: Which implies then what?
8 Does it imply then -- the off-site consequences is --
9 are determined, as I understand them, from a Level 3
10 PRA, from the Level 3 of a PRA. And in order to do
11 that, you need to have -- use the seismic information
12 that would be necessary to do that. That information
13 will not be available for some time.

14 All right. So you're suggesting that the
15 -- that the Applicant come up with some CDF that you
16 would consider conservative and somehow convert that
17 to a --

18 MR. SUBIN: I think we explain that later
19 on, that we said it can do a sensitivity analysis, so
20 they don't need all the information. They just need
21 preliminary information to do that and I think we
22 explained that in our brief.

23 JUDGE ABRAMSON: Counselor, I understand
24 there's some relatively new data that allocates
25 seismicity to this newly discovered Shoreline Fault?

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1 This is a January data that we were hearing about
2 earlier. Did the Staff discuss with you while you
3 were determining that this may be a contention of
4 omission how the data on seismicity might be
5 reallocated to permit an assessment of core damage
6 frequently? And, frankly, core damage frequency is a
7 result -- is computed, as I understand it, as a result
8 of the entire seismicity at the site. It doesn't
9 matter what the source is. It's a function of what
10 the seismicity is at the site.

11 JUDGE TRIKOUROS: It's really where I'm
12 going with this.

13 JUDGE ABRAMSON: Yes.

14 JUDGE TRIKOUROS: Is that you're saying
15 you don't need a PRA in your answer but, in fact, the
16 things that you're saying are omitted and need to be
17 provided I don't understand how you get there without
18 doing a PRA. So I'm sort of -- I feel like we're
19 chasing our tail here and I'm not --

20 MR. SUBIN: Well, it would have to be used
21 in accordance with what they've done already on the
22 Hosgri Fault.

23 JUDGE TRIKOUROS: Well, I'm assuming that
24 the PRA for the plant -- and I haven't studied the PRA
25 for Diablo Canyon, the existing PRA -- but I'm

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1 assuming they used a seismic hazard -- seismic hazard
2 curve that was appropriate for the site.

3 MR. SUBIN: Right.

4 JUDGE TRIKOUROS: That seismic hazard
5 curve is now possibly not appropriate for the site,
6 and I would imagine that that would have to be
7 utilized in order to do a PRA that would include Level
8 3 that would include consequences.

9 JUDGE ABRAMSON: Well, Nick, isn't this a
10 SAMA question? Aren't the SAMA computations -- and
11 let me ask you and maybe the Applicant. SAMA
12 computations for this case are going to be done with
13 MACTS-2?

14 MR. REPKA: That's correct.

15 JUDGE ABRAMSON: Okay. MACTS-2 starts
16 from an assumption of release as a function of core
17 damage frequency; right? Core damage frequency is
18 computed from -- this is why you have technical judges
19 -- core damage frequency is computed from the
20 seismicity. The seismicity is a function of what --
21 the seismic activity at the site. They have data on
22 the seismic activity at the site. They've now
23 discovered a new fault. That means the seismic
24 activity at the site is not -- doesn't mean the
25 seismic activity at the site is different. It means

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1 it's now allocable some to the new fault and some to
2 the fault they were working from. So you're not going
3 to do a PRA assuming just the source of core damage
4 frequency from the Shoreline Fault. You're going to
5 do a PRA for the site which assumes -- which uses the
6 seismic activity of the site. Is that not correct?

7 JUDGE TRIKOUROS: That's correct. So it
8 isn't clear to me, in other words, what you're saying
9 here regarding the -- what has to be provided to cure
10 the omission.

11 JUDGE ABRAMSON: Yeah. That's right.

12 JUDGE TRIKOUROS: And but you do go on to
13 say that you don't need a PRA.

14 MR. SUBIN: Right.

15 JUDGE TRIKOUROS: And I can find that for
16 you somewhere here.

17 JUDGE ABRAMSON: But the fact is you can't
18 do the SAMA analysis without using MACTS which is
19 essentially a PRA.

20 JUDGE TRIKOUROS: Right. Exactly. You
21 say "because precise quantification using state-of-
22 the-art PRA methods is not needed to complete the SAMA
23 analysis." Well, in order to do the end consequence
24 as part of your omission, you need -- you do need
25 to --

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1 MR. SUBIN: Many plants have missing
2 information from their seismic profile.

3 JUDGE TRIKOUROS: Just one moment.

4 JUDGE KARLIN: Are we in the merits?

5 JUDGE ABRAMSON: No. We're not. We're
6 trying to understand what the needs are. We're trying
7 to understand what is being proposed by the Staff.

8 (Pause.)

9 MR. REPKA: Judge Karlin, --

10 THE REPORTER: I can't pick that up.

11 JUDGE KARLIN: All right. That doesn't
12 need to be in the record.

13 THE REPORTER: Thank you.

14 (Pause.)

15 MR. SUBIN: Okay.

16 JUDGE KARLIN: Yes, Mr. Subin.

17 MR. SUBIN: Okay. There's a PRA in
18 existence that they will have to update and use this
19 information as we've explained before. SAMA is based
20 on only the available information. We don't ask the
21 Applicant, you know, to do new -- you know, a new
22 study for SAMA, you know, the SAMA analysis, so if
23 they have a bounding analysis already, all we're going
24 to ask them for is that new information to see if it's
25 still bounded.

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1 Now, if it's not bounded, other things
2 will happen, and I think we've also alluded to that.
3 There's also different levels of rigor that we do when
4 we do the analysis. It doesn't have to be state-of-
5 the-art. I think we've also cited that in our brief.
6 And I don't know if that answers your question but --

7 JUDGE TRIKOUROS: So you have said that
8 they would have to update their existing PRA?

9 MR. SUBIN: Right.

10 JUDGE TRIKOUROS: Then that's the answer.

11 JUDGE ABRAMSON: That would be the form of
12 the omission you're suggesting, Counselor?

13 JUDGE KARLIN: Only one party can -- one
14 lawyer argue at a time.

15 MS. UTTAL: All right.

16 JUDGE KARLIN: Not going to allow double-
17 teaming.

18 MR. SUBIN: When I said that they have to
19 update it, they don't necessarily have to have a new
20 PRA and I thought that was understood.

21 JUDGE KARLIN: Okay.

22 MR. SUBIN: They don't need a new PRA.
23 They just need to adjust it as we've said --

24 JUDGE KARLIN: Okay.

25 MR. SUBIN: -- by doing a conservative

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1 analysis.

2 JUDGE KARLIN: Okay.

3 MR. SUBIN: I thought I was clear, but my
4 colleague said I wasn't as clear --

5 JUDGE KARLIN: I just have a couple more
6 questions and then maybe we can have lunch after we've
7 had a little bit of rebuttal and Mr. Repka has made
8 his point, but when does the Staff -- I look at the
9 Staff's web page of May 20th, 2010 -- and I know this
10 is not in the record -- but it may be judicial notice
11 -- when does -- the Staff says it's going to issue a
12 draft supplemental environmental impact statement on
13 October 15th of this year and then a final SEIS on
14 August 12th of 2011. Has -- is that a valid time
15 frame?

16 MR. SUBIN: Those are dates that -- it
17 doesn't mean that that's going to be the exact dates.

18 JUDGE KARLIN: I understand it's not exact
19 dates, but I'm trying to put into perspective whether
20 the Staff currently thinks --

21 MR. SUBIN: My staff tells me at this
22 point in time it looks like the dates that we're going
23 to have everything out by.

24 JUDGE KARLIN: So those dates still stand.

25 MR. SUBIN: Right.

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1 JUDGE KARLIN: I'm trying to put this in
2 perspective of what other studies are being conducted
3 and whether they'll come in within the time frame of
4 this regulatory proceeding or not.

5 Okay. And let me ask on page 33 of your
6 brief -- and I think the Petitioner -- I mean, the
7 Applicant raises the same question -- is you say,
8 "While there will always be more data that could be
9 gathered, agencies must have some discretion to draw
10 the line and move forward with decisionmaking."

11 Is the Petitioner asking this Board to
12 draw the line? Who draws the line? -- the Staff or
13 this Board as to whether or not this additional study
14 needs to be done or not.

15 MR. SUBIN: In terms of deciding what
16 study needs to be done, it's Staff that decides.

17 JUDGE KARLIN: But if you have a
18 contention admitted, it's us that decide that.

19 MR. SUBIN: That would be for you to
20 decide.

21 JUDGE KARLIN: Yeah.

22 MR. SUBIN: But I don't know --

23 JUDGE KARLIN: That's what we do. We
24 decide whether we decide.

25 MR. SUBIN: And if you read the case, it

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1 specifically -- we're the decisionmakers in this case.

2 JUDGE KARLIN: The Agency is.

3 MR. SUBIN: The Agency is.

4 JUDGE KARLIN: And we are part of the
5 Agency.

6 MR. SUBIN: And that's --

7 JUDGE KARLIN: For better or for worse.

8 Okay. That's all.

9 JUDGE ABRAMSON: I just want to come back
10 one more time to what seems to me to be a fundamental
11 question here. I understand what the Petitioners are
12 arguing. I want to understand more precisely what the
13 Staff thinks should be admitted here. Is the Staff
14 suggesting that this is a contention of omission
15 because the ER does not address -- does not address
16 the Shoreline Fault and it needs to say something
17 about it, or what is the Staff's view of what is
18 omitted here?

19 MR. SUBIN: Well, I think we summed it up
20 in the way we drafted the contention. What we're
21 looking for is something from them that basically
22 tells us that they considered it. We don't know
23 whether they have or not, as to whether it's in
24 consideration, and that's why we drafted the
25 contention.

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1 JUDGE KARLIN: Okay. Thank you, Mr.
2 Subin. Why don't we give Mr. Repka one point. There
3 you go. And you can't testify and you can't have any
4 evidence.

5 JUDGE ABRAMSON: You'd better respond to
6 your question, Buster.

7 JUDGE KARLIN: Now I'm going to get it.

8 MR. REPKA: I am a lawyer, not a
9 psychologist. That's my --

10 JUDGE KARLIN: All right.

11 MR. REPKA: There were some questions,
12 Judge Karlin, about Figure 10 from RIL 09-001.

13 JUDGE KARLIN: Right.

14 MR. REPKA: And the point of clarification
15 I would like to make is that shows -- figure shows the
16 LTSP response spectrum. The LTSP response spectrum is
17 not the design basis response spectrum for Diablo
18 Canyon. The Hosgri spectrum is the design basis
19 response spectrum, at least at most frequency ranges.
20 And the relationship between the two can be seen in
21 Figure 14 in the same report.

22 But the LTSP spectrum was well bounded by
23 the Hosgri, and we did include a little bit of a
24 primer on the design basis, the unique design basis
25 for Diablo Canyon in Footnote 6 of our brief.

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1 JUDGE KARLIN: All right.

2 JUDGE TRIKOUROS: And the PRA I'm assuming
3 utilized the Hosgri seismic response spectrum?

4 MR. REPKA: Correct.

5 JUDGE TRIKOUROS: The existing PRA.

6 MR. REPKA: I believe that's correct. If
7 it's not, I'll come back and let you know.

8 JUDGE KARLIN: If we let you. Okay. Ms.
9 Curran.

10 (Pause.)

11 Well, Ms. Curran, we're trying to think
12 whether we have any specific questions for you in
13 rebuttal. Let me just look at my notes. I certainly
14 would ask -- you've seen the response to the Staff.
15 Do you have any comments on the three items that they
16 indicate there?

17 MS. CURRAN: Well, just one overall
18 comment, which is that what's sauce for the goose
19 should be sauce for the gander. In the *Pilgrim* case,
20 an intervenor came in and criticized the SAMA analysis
21 because they said this PRA here doesn't give us an
22 accurate picture of what the risks are of a -- I can't
23 remember what kind of a severe accident it was. And
24 the Commissioners said, PRA is our standard way of
25 doing things. And what I'm hearing here is we've got

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1 some ways we can fudge this because nobody wants to
2 wait until we get all the information and finish and
3 do a good job of this. And I just think that is -- it
4 boils down that, and that is the heart of our
5 contention, that what Staff is saying is, Give us some
6 information. We've got this preliminary study out
7 there. We can use something from that. We have some
8 data that we -- you know, we have in hand. You can
9 use that and put it into the PRA that you've got.

10 But we also have this letter that's cited
11 in our contention where the Staff says, We are waiting
12 to get the results of a regional study that includes
13 the Hosgri Fault, that includes the Shoreline Fault,
14 and we're going to take that and we're going to put
15 that into a revised PRA. The last one we did was
16 1988. And now we have one coming up in just a few
17 years. And what is being proposed at this license
18 renewal proceeding is let's do whatever we can do
19 without waiting, do the best we can with what we have,
20 and not wait to do the job we said we were -- started
21 out to do because that would take too long and we'd
22 like to get this decision over with before we get the
23 information. I just -- I think that is the heart of
24 our contention and that's the issue that we'd like to
25 get admitted.

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1 JUDGE KARLIN: Any questions? All right.
2 Thank you, Ms. Curran. All right. We're going to
3 take a break now. I have it as 12:45. We will take
4 a one-hour lunch break --

5 JUDGE ABRAMSON: One hour?

6 JUDGE KARLIN: -- and reconvene at --

7 JUDGE ABRAMSON: Twenty minutes.

8 JUDGE KARLIN: Twenty minutes?

9 JUDGE ABRAMSON: Thirty minutes.

10 JUDGE KARLIN: Well, we'll give you an
11 hour. One forty-five we will reconvene and talk about
12 contention EC-2. Thank you. We are adjourned.

13 (Whereupon, at 12:45 p.m., the proceedings
14 recessed for lunch, to resume at 1:45 p.m. this same
15 day.)

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AFTERNOON SESSION

--oOo--

1
2
3 JUDGE KARLIN: Please be seated. The
4 Atomic Safety and Licensing Board will now go back on
5 the record. And I believe we are now at Contention --
6 Environmental Contention Number 2.

7 Let me get my materials organized and we
8 will begin. Ms. Curran, yes.

9 MS. CURRAN: Should I start by reading the
10 contention again?

11 JUDGE KARLIN: Yeah. That would be good.
12 Yes, please. What is the contention?

13 MS. CURRAN: Okay. The contention reads,
14 "PG&E's environmental report is inadequate to satisfy
15 NEPA because it does not address the airborne
16 environmental impacts of a reasonably foreseeable
17 spectrum of spent fuel pool accidents, including
18 accidents caused by earthquakes."

19 And this is one of the contentions that's
20 supported by a waiver petition.

21 JUDGE KARLIN: So on this contention, as
22 I understand it, the Mothers for Peace concede that a
23 waiver is necessary in order for this contention to be
24 within the scope?

25 MS. CURRAN: That's right because there's

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1 a regulation that forbids consideration of the impacts
2 of storage during the license renewal term.

3 JUDGE KARLIN: Right. And so I think we
4 thought it might be best to focus on the waiver issues
5 as sort of a threshold before this contention, so I
6 think we're going to try to focus our questions on
7 that.

8 You're seeking a waiver from Appendix B to
9 Part 51 of the NRC Regs., among other things; right?
10 And Appendix B to Part 51 is based on the 1996 generic
11 environmental impact statement, GEIS; right?

12 MS. CURRAN: Yes.

13 JUDGE KARLIN: Final. Your petition talks
14 a lot about the 2009 draft GEIS and the Applicant and
15 the Staff say, Well, that's not the basis for the
16 Regs. So what if the draft GEIS is defective or has
17 a problem? That's not relevant to whether or not this
18 Appendix B should be a waiver from Appendix B.

19 How do you respond to that?

20 MS. CURRAN: Well, the '96 GEIS was
21 supposed to be updated ten years later. I don't know
22 where it was. The Commission said they originally
23 planned to update the GES for license renewal every
24 ten years. And of course they didn't get around to
25 renewing it or to updating it until this draft revised

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1 GEIS in 2009 but they did, you know, just a few years
2 afterwards got around to revising it.

3 And if you compare those two environmental
4 impact statements, the '96 GEIS and the 2009 draft
5 revised GEIS, their analyses of the potential for
6 spent fuel pool fire are completely different. The
7 words that the '96 GEIS uses about potential for a
8 pool fire -- and this is on pages 6-72 and 6-75R --
9 "Even under the worst probable cause of a loss of
10 spent fuel pool coolant (a severe seismic-generated
11 accident causing a catastrophic failure of the pool),
12 the likelihood of a fuel-platting fire is highly
13 remote."

14 Now, if you look at the draft revised
15 GEIS, a lot has happened since 1996. We had NUREG
16 1738 where the NRC Staff admitted for the first time
17 that if spent fuel in a pool is uncovered, it can
18 burn. We also had the NAS report that followed up on
19 that. And then we got security orders by the
20 Commission telling every licensee they needed to
21 modify their spent fuel pools in order to avoid a
22 catastrophic fire.

23 It's become an issue. It's something the
24 Commission learned, changed its view. Now, they may
25 have reached the ultimate conclusion that the risks of

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1 a pool fire are low, but the reasons are different
2 now. It's -- the reasons have shifted to -- have
3 shifted from a catastrophic pool fire is inconceivable
4 to, well, it's possible but it's not as likely as we
5 may have thought and we have taken some mitigative
6 measures to keep the probability down.

7 In addition to that, in the draft revised
8 EIS, the NRC said, We cannot generalize about spent
9 fuel pools west of the Mississippi River. So that
10 leaves Diablo Canyon without a viable environmental
11 analysis of the impacts of an earthquake on the spent
12 fuel pools.

13 JUDGE KARLIN: Well, let me ask on that.
14 I mean -- the issue of whether or not the draft GEIS
15 of 2009 is valid or invalid or correct or incorrect is
16 not before us. I don't think you're trying to -- but
17 your question is whether that constitutes new and
18 significant information under *Marsh v. Oregon* that
19 would warrant revisiting the 1996 GEIS.

20 MS. CURRAN: Yes.

21 JUDGE KARLIN: Is that right?

22 MS. CURRAN: That's a good way to put it.
23 In other words, this -- this is equivalent to a draft
24 -- a draft EIS for Diablo Canyon because this -- the
25 purpose of a generic EIS is to make in generic terms

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1 an environmental finding that can be applied to all
2 nuclear plants.

3 And environmental impact statements aren't
4 cast in stone. They're very different from safety
5 regulations where the agency promulgates a regulation,
6 that regulation is good for all time and even new
7 information isn't going to automatically undermine
8 that the way an EIS constantly has to be opened to new
9 and significant information. If the licensing
10 decision hasn't been made yet, if there's new
11 information, it has to -- the decision has to be
12 informed by the new information.

13 And here we have the NRC itself presenting
14 new information in the form of basically a draft GEIS
15 in support of future prospective licensing decisions
16 saying the basis for our findings about spent fuel
17 pools has changed.

18 JUDGE KARLIN: Does the fact that it's a
19 draft GEIS question whether they're presenting new
20 information? I mean, a final EIS will say, Oh, no,
21 we're wrong. It does cover western United States
22 sites.

23 MS. CURRAN: Well, if they say that in the
24 end, then maybe the contention is withdrawn. But
25 right now, the Commission has -- right now, it's like

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1 a draft EIS for this licensing decision. What the
2 Commission is saying is things have changed for
3 prospective decisions. Just as in any case, you know,
4 the draft EIS is put out before the licensing
5 decision. This is like a draft EIS for the Diablo
6 Canyon licensing case.

7 JUDGE ABRAMSON: Have they said when they
8 would take comment on it?

9 MS. CURRAN: They already took comment.
10 The comments have been filed in -- in 2009. So
11 Mothers for Peace commented on the draft GEIS, and so
12 we would expect that the licensing decision for Diablo
13 Canyon would not be made until the issues raised in
14 that draft GEIS had been resolved because they affect
15 Diablo Canyon.

16 JUDGE TRIKOUROS: Let me get a
17 clarification from you. The -- the references to
18 NUREG 1738, which is not a draft document -- it's a
19 final-issued NUREG, number one.

20 MS. CURRAN: It's a final --

21 JUDGE TRIKOUROS: Number two, isn't the
22 exception or the exclusion for western nuclear power
23 plants, specifically Diablo Canyon, limited to seismic
24 event frequency?

25 MS. CURRAN: Yes. But when you do a PRA

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1 for, say, spent fuel pool accidents, I believe you
2 need to integrate the earthquake into the other
3 causative factors and put it all together. You don't
4 do a separate one for just earthquakes. You put 'em
5 together.

6 JUDGE TRIKOUROS: I don't understand what
7 you mean by "put them together."

8 MS. CURRAN: Well, there's, you know, cask
9 drop earthquake, there's -- in the EIS, there's a list
10 of various precursor events.

11 JUDGE TRIKOUROS: Right.

12 MS. CURRAN: And they're integrated
13 into -- there's, you know, probability figures given
14 putting all those together and that's why the -- we
15 put it in terms of it's not just a separate EIS for
16 earthquakes. It's -- if you're going to look at
17 what's the potential for severe accident in the Diablo
18 Canyon spent fuel pool, you put all the causative
19 factors together.

20 JUDGE TRIKOUROS: The -- yes. Yes, but
21 the -- it seems to me there are two basic event
22 categories. There are boil-down events and drain-down
23 events. The boil-down events are not in question,
24 things such as loss of off-site power, that sort of
25 thing. The drain-down events, which include such

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1 things as cask drop, are also not in question other
2 than one category of drain-down events which is
3 seismic-initiated events. So my understanding is that
4 the only thing that you could -- the only conclusion
5 you could draw from NUREG 1738 is that the seismic
6 event frequency should be determined on a plant-
7 specific basis.

8 MS. CURRAN: Well, and that's the reason
9 for the waiver petition.

10 JUDGE TRIKOUROS: I understand, but the
11 waiver seems -- and I'll quote you the words -- but
12 it's broader. It seems to indicate that a complete
13 reanalysis of the -- all environmental impacts should
14 be done. So let me ask it as a question. Is that
15 what you're talking about with respect to your waiver?
16 -- just the seismic event frequency portion?

17 MS. CURRAN: Well, I think -- well,
18 there's two different contentions. That's maybe part
19 of the problem is that the waiver petition is
20 addressed to two different contentions and one has to
21 do with the impacts of an attack on the fuel pool --
22 and we would expect all those things to be integrated
23 together into a single analysis.

24 I think that's --

25 JUDGE TRIKOUROS: Okay. Well, the --

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1 MS. CURRAN: I don't think you take them
2 piecemeal. I think you look at the whole.

3 JUDGE TRIKOUROS: I don't -- I guess I
4 don't see the -- let's limit ourselves to EC-2 right
5 now.

6 MS. CURRAN: Okay.

7 JUDGE TRIKOUROS: The -- is your petition
8 for waiver focused on the seismic event frequency
9 issue?

10 JUDGE ABRAMSON: Only.

11 JUDGE TRIKOUROS: Only?

12 MS. CURRAN: For EC-2?

13 JUDGE TRIKOUROS: Yeah.

14 MS. CURRAN: Yes.

15 JUDGE TRIKOUROS: Okay. It's not clear in
16 reading the waiver, but that is the limitation?

17 MS. CURRAN: It's really focused on
18 what -- that disclaimer in their draft revised EIS
19 saying basically the NRC is not going to generalize
20 about the risks of an earthquake at California nuclear
21 plants, so it would be seismic.

22 JUDGE TRIKOUROS: Okay.

23 JUDGE KARLIN: If I may. On the waiver
24 itself --

25 MS. CURRAN: Excuse me. I'm just going to

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1 get my --

2 (Pause.)

3 JUDGE KARLIN: The waiver request you
4 filed, 2.338, you know, the Regulation talks about
5 they have to show that there's some special
6 circumstances such that the application of the
7 regulation would not serve the purposes for which the
8 rule or regulation was adopted. In your declaration,
9 you talk about what you think the purpose of the
10 regulation was and you say, "The purpose of the
11 regulation is to codify and apply a generic
12 determination made in 1996 license renewal GEIS that
13 spent fuel may be stored in reactor sites without
14 imposing significant additions to environmental risk."

15 Is there any regulation -- where is that
16 written? Is there -- in the Reg., in the preamble to
17 the Reg., in the statement of consideration; is there
18 something that tells us what the purpose -- you know,
19 any quote that I can quote what the purpose -- because
20 I think there may be a nuance there but I'm not sure.

21 MS. CURRAN: Well, I guess I would just
22 refer back to the text of the EIS itself which says
23 we've looked in general at the issue of spent fuel
24 storage impacts on a general basis. I think I read
25 you the quote saying that basically spent fuel pool

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1 fires aren't credible. So that if you -- if the NRC
2 can make that finding for every nuclear plant in each
3 case, then it makes sense to make a generic finding in
4 Appendix B to Part 51. I'm not sure I know of
5 anything more specific than that.

6 JUDGE KARLIN: Well, on page 28 -- and
7 I'll ask this -- I think it's -- no, 24 of the PG&E's
8 answer, they talk about the purpose -- well, this is
9 a key factor in whether a waiver can be granted and,
10 you know, the type of purpose doesn't -- would not
11 serve the purposes for which the rule or regulation
12 was adopted.

13 And, here, the Applicant cites you and
14 says, "The Petitioners assert that the purpose of Part
15 51, Appendix B, is 'to codify and apply a generic
16 determination made in 1996,'" just as you said. "We
17 agree," they say. And then they go on, "Application
18 of the rule here would serve the purpose for which the
19 rule was adopted by precluding site-specific
20 consideration."

21 Now, is the purpose of the rule -- here's
22 what I'm grappling with. On the one hand, I see you
23 saying that the purpose of the rule is for the NRC to
24 handle generic issues generically. And as I
25 understand, the Applicant is saying the purpose of the

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1 rule is to preclude site-specific analysis. And I
2 think that's a slightly different purpose.

3 MS. CURRAN: But there's got to be a
4 reason for -- you can't just arbitrarily preclude --

5 JUDGE KARLIN: A reason for precluding
6 site-specific analysis.

7 MS. CURRAN: Yeah. Every nuclear plant is
8 supposed to have an environmental impact statement
9 when there's a licensing decision and it's legitimate
10 for the NRC to look across the board and say, Well,
11 are there some of these determinations that we don't
12 have to make every single time?

13 JUDGE KARLIN: Yeah.

14 MS. CURRAN: We can make 'em one time and
15 then we -- you know, that's tiering. That's
16 legitimate. But if you can't -- if you can't make a
17 generalization, how can you have the rule? The
18 purpose of the rule is to apply a generic
19 determination. It doesn't have its own -- it's not
20 self-justifying.

21 JUDGE KARLIN: Right.

22 MS. CURRAN: This is all about
23 administering NEPA. And under NEPA, the NRC has to be
24 able to say when it makes a licensing decision, We
25 looked at all the significant environmental impacts

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1 and we made a determination as to their significance.
2 And it's okay to say some of these impacts are the
3 same for all plants.

4 But you can't just write that out of --
5 you can't say, Well, we never have to look at this
6 because we have a rule that says we don't.

7 JUDGE KARLIN: Okay.

8 JUDGE TRIKOUROS: Well, the -- right now,
9 SAMA analyses are not done for spent fuel pools. The
10 basis for that is that the risk has been determined to
11 be low. And that is predicated on the 1996 GEIS.
12 Now, along comes NUREG 1738 and the revised draft GEIS
13 which analyzed spent fuel pool accidents, I believe,
14 and came up with the same conclusion except that it
15 excluded plants like Diablo Canyon from the seismic
16 perspective.

17 So why wouldn't a reanalysis of the risk
18 for Diablo Canyon end it? In other words, what's
19 compelling that says, Now we must do SAMA analysis for
20 spent fuel pools?

21 MS. CURRAN: Well, I suppose the first
22 step would be to look at the risk. You'd have to do
23 the analysis. And then if the impacts were
24 significant, then you would get to the SAMA analysis.

25 JUDGE TRIKOUROS: Right.

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1 MS. CURRAN: So that's --

2 JUDGE KARLIN: Does a SAMA analysis
3 include -- SAMA, severe accident mitigation analysis -
4 - I'm sorry -- severe accident mitigation alternatives
5 analysis, SAMA analysis -- does a SAMA analysis -- I
6 think I hear you asserting somewhere in your pleadings
7 that a SAMA analysis, not just -- doesn't just cover
8 mitigation but avoidance, that the SAMA analysis
9 addresses how the accident -- severe accident might be
10 avoided. Is that correct? I'm going to ask the same
11 question of Staff and Applicant.

12 MS. CURRAN: Well, yeah, I think --

13 JUDGE KARLIN: Or is it just mitigation?

14 MS. CURRAN: I think that under standard
15 NEPA case law, that -- when an agency considers
16 alternatives, that if the no action alternative is
17 cost effective, it has to be examined and it's
18 possible that in most cases that's not true, but if
19 the no action alternative meets the criteria, it
20 should be examined.

21 JUDGE KARLIN: Well, I'm just thinking --
22 I hear a lot of it saying, Well, the risk is no worse
23 whether -- the initiator makes no difference. If
24 there's a spent fuel pool meltdown, there's a spent
25 fuel pool meltdown and the consequences -- the damage

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1 is the same, so the mitigation is the same.

2 But if you're talking about avoidance of
3 a spent fuel pool meltdown, it might be the avoidance
4 of an earthquake would be different than avoidance of
5 a terrorist attack.

6 JUDGE ABRAMSON: Yeah. But that's not the
7 way SAMA analysis works.

8 JUDGE KARLIN: So is there -- that's what
9 I'm asking.

10 JUDGE ABRAMSON: That's not the way it
11 works.

12 JUDGE KARLIN: Well, that's what I'm
13 asking.

14 MS. CURRAN: Well --

15 JUDGE KARLIN: Is there an avoidance or
16 prevention element either in NEPA or in a SAMA
17 analysis? Avoidance or prevention as opposed to
18 simply, Yeah, it happened. Now we're going to
19 mitigate it.

20 MS. CURRAN: Yes. I think so because the
21 -- I believe the analysis weighs the probability of
22 the accident and then the costs of the impacts of the
23 accident and then one looks at -- integrates those and
24 looks at what are the costs of measures that would
25 avoid or mitigate them.

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1 JUDGE KARLIN: Avoid or mitigate.

2 MS. CURRAN: So you do that comparison.
3 It's a weighting of costs and benefits.

4 JUDGE KARLIN: Okay.

5 MS. CURRAN: So if the benefits of not
6 acting are greater than the benefits of acting, then
7 that has to be discussed. Then it doesn't have to be
8 implemented. It just has to be discussed.

9 JUDGE KARLIN: All right. Well, now if we
10 now jump to the waiver -- and this is the problem we
11 have here -- that we have EC-2 and the waiver and
12 EC-3 and the waiver and we need to sort of iterate
13 back and forth, I think. But if we jump to your
14 waiver, page four -- I'm sorry -- this is your waiver
15 brief, the -- that brief that you filed, it indicates
16 that -- well, "In addition, the draft revised license
17 renewal GEIS relies on mitigation measures that are
18 site-specific. That's further undermining the
19 regulation's purpose of generalizing about the impacts
20 of spent fuel storage."

21 And so you're trying to imply there I
22 think that Diablo Canyon was unique in the application
23 of site-specific measures or aren't you?

24 MS. CURRAN: Each operating reactor -- and
25 I'm basing this on reading the draft revised GEIS --

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1 each operating reactor got enforcement orders from the
2 NRC. It was security-related saying do these things
3 to reduce the effects of an attack on your spent fuel
4 pool, and those were secret orders so we don't know
5 what was in them, but my understanding was that each
6 plant received a separate order and that each plant
7 was analyzed separately so, again, we don't know what
8 was in the orders but it's reasonable to presume that
9 if every plant got a separate order and the NRC claims
10 -- I think they actually claim in the draft revised
11 GEIS to have looked at the specific site
12 characteristics -- then that's -- that indicates that
13 this is no longer a generic topic. This has become a
14 site-specific topic.

15 JUDGE KARLIN: Well, is that true? I
16 mean, the -- I think that a lot of generic
17 determinations that the NRC makes are based on a
18 series of site-specific analyses which they then --
19 they look at the results of all of those analyses and
20 reach generic determinations.

21 JUDGE ABRAMSON: I think the implication
22 that Ms. Curran's making here is that they don't know
23 what orders were given to each plant and they may very
24 well differ; therefore, they may be site-specific and
25 we don't know.

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1 JUDGE TRIKOUROS: But all of this is
2 safeguards information that is not -- hasn't been
3 released.

4 JUDGE KARLIN: And isn't this Contention
5 EC-3 anyway?

6 JUDGE ABRAMSON: That's 3 she's talking
7 about.

8 JUDGE KARLIN: Which is terrorist --

9 MS. CURRAN: Yeah.

10 JUDGE KARLIN: You're talking about 3.
11 Okay. The -- in terms of the waiver, the Applicant,
12 Pacific Gas, and the Staff, they focused on *Millstone*
13 and we asked you to brief *Millstone*. But there is the
14 regulatory provision, 2.38(b), and then *Millstone*
15 comes in.

16 Do you see -- how have you addressed the
17 *Millstone* factors or are they essentially the same as
18 the regulatory?

19 MS. CURRAN: Well, we tried to address
20 them in our brief.

21 JUDGE KARLIN: You never mentioned
22 *Millstone* in your initial pleading and, you know, your
23 waiver requests, so I'm thinking, well, you know --

24 MS. CURRAN: It didn't seem terribly
25 different to me. It seemed to be -- the basic

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1 elements of the standard are in *Millstone* kind of --
2 they're parsed. But in my view, we did address all
3 the elements of *Millstone* in our waiver petition and
4 in our brief we reiterate that basically.

5 JUDGE KARLIN: Well, let's talk about the
6 four factors in *Millstone*. One, strict application
7 would not serve the purpose for which the rule was
8 adopted. I think you addressed that.

9 Two, special circumstances, that you've
10 alleged some sort of special circumstances.

11 Three, that the situation at Diablo Canyon
12 is somehow unique.

13 And, four, significant problems that a
14 waiver is needed to reach a significant safety
15 problem.

16 Now, I assume you agree with the Staff
17 that *Millstone* can't be correct when you're dealing
18 with an environmental contention and it has to be an
19 environmental problem, not a safety.

20 MS. CURRAN: Right, and we address that in
21 our brief.

22 JUDGE KARLIN: Right.

23 MS. CURRAN: And the regulation itself
24 doesn't limit itself to safety issues.

25 JUDGE KARLIN: Right. Right. Okay.

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1 JUDGE TRIKOUROS: Now, the term
2 "environmental impacts" is used throughout your
3 pleadings. What do you mean when you say
4 "environmental impacts"?

5 MS. CURRAN: The impacts of a catastrophic
6 fire in a fuel pool. Significant release of cesium,
7 airborne release of cesium, contamination -- land
8 contamination, human illness, relocation of the
9 population, the kinds of things that happened in the
10 aftermath of the Chernobyl accident.

11 JUDGE TRIKOUROS: So when you say
12 "environmental impacts," you mean consequences of an
13 accident?

14 MS. CURRAN: Yes.

15 JUDGE TRIKOUROS: You don't mean the risk
16 of an accident? You don't mean the person rem per
17 year. You mean the person rem, so to speak?

18 JUDGE ABRAMSON: She's after the SAMA
19 analysis which to me means looking at the cost
20 benefit, I think. Am I --

21 MS. CURRAN: Yeah.

22 JUDGE TRIKOUROS: But the --

23 MS. CURRAN: But risk comes into it,
24 doesn't it?

25 JUDGE ABRAMSON: Yes.

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1 JUDGE TRIKOUROS: Well, it --

2 MS. CURRAN: The probability comes into it
3 and that is the -- the classic way that the NRC
4 evaluates that is to weigh the -- is to look at the
5 risk and then to measure -- to measure the consequence
6 in terms of the probability so it's all weighted.

7 JUDGE TRIKOUROS: Well, I think we need to
8 straighten that out and -- for example, if
9 environmental impacts is environmental consequences,
10 then that means a reanalysis of the -- the whole -- a
11 reanalysis of the MACTS-2 portion of it. Let me say
12 it that way. The -- if environmental impacts refers
13 to a risk-weighted result or a probability-weighted
14 result, which would be then risk, then one would not
15 have to reanalyze the consequences if the issue were
16 simply a seismic event frequency. One would simply
17 reevaluate the seismic event frequency, take the
18 existing consequence analyses right out of the NUREG,
19 for example, and multiply it now by the new CDF and
20 get a different risk number.

21 So it means a lot how you define
22 environmental impacts. And from what I've seen in the
23 pleadings, not just yours actually, those numbers --
24 those terms are used interchangeably in confusing ways
25 and -- at least for me.

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1 MS. CURRAN: Well, it seems to me that
2 there's two things that one looks at. And they have
3 to be looked at separately to some degree. One is the
4 probability and one is what consequences could result
5 from this type of accident. And because in the spent
6 fuel pool the inventory of the pool is dominated by
7 cesium, the consequences of early release are somewhat
8 different than if the core melts. So that has to be
9 taken into account and separately addressed, you know,
10 this is what happens when there's a large release of
11 cesium.

12 JUDGE TRIKOUROS: But I don't think that's
13 -- let me just pursue it one second.

14 JUDGE KARLIN: Okay.

15 JUDGE TRIKOUROS: I don't think that's the
16 case, as I understand it. When the analysis is done
17 of a spent fuel pool accident associated with a
18 seismic event, they don't do a detailed structural
19 analysis to try and understand where the pool might
20 break and how much water might get out or any of that.
21 They simply take all the water out of the pool
22 instantly. It's gone.

23 And that's true of whether it's a big
24 seismic event or a small seismic event. So the
25 consequence is the same. What's different is the

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1 frequency of that event occurring which then informs
2 the consequences, so to speak. Risk informs the
3 consequence. That's my understanding and so that's --
4 and it's important I think to this whole thing.

5 MS. CURRAN: Judge Trikouros, I just want
6 to clarify one thing. My understanding is that one of
7 the things that was learned in NUREG 1738 is that
8 complete loss of water from the pool is not the most
9 serious kind of accident that you could have in a fuel
10 pool because if you lose all the water at once, it
11 isn't as serious an event as if you lose part of the
12 water and the cooling effect is lost.

13 JUDGE TRIKOUROS: Right.

14 MS. CURRAN: So I think it's probably more
15 -- originally that was the kind of analysis that was
16 done. Take all the water out and then what happens?
17 And that was one of the reasons why the answer kept
18 coming out no problem. But if you start to consider
19 what happens when you lose the cooling effect of the
20 water or air in the fuel assemblies, that's when the
21 serious problems occur.

22 JUDGE TRIKOUROS: Well, I agree with that
23 but I don't think that's what was done. I believe
24 that -- and this is something I'd like to get
25 straightened out -- but I believe seismic event

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1 occurs, the water drains, the fuel -- spent fuel pool
2 zirconium fire occurs. Those -- in that order.

3 JUDGE ABRAMSON: But in any event, Judge
4 Trikouros, isn't what's done in the SAMA analysis is
5 there's an assumption of a certain amount of release
6 and the frequency of that suggested by the -- in this
7 case the seismic frequency distribution function.

8 JUDGE TRIKOUROS: But there is no SAMA.

9 JUDGE ABRAMSON: But what they're after
10 here is essentially a SAMA analysis to see whether you
11 should mitigate --

12 JUDGE TRIKOUROS: Right.

13 JUDGE ABRAMSON: -- whether you should
14 mitigate these kinds of events.

15 JUDGE TRIKOUROS: Right.

16 JUDGE ABRAMSON: That's what they're
17 after.

18 JUDGE TRIKOUROS: And it's clear that the
19 consequences are untenable. So what it really boils
20 down to, so to speak, is the frequency.

21 JUDGE ABRAMSON: Right.

22 JUDGE TRIKOUROS: And that's the
23 conclusion that's really reached in these documents,
24 is here are the consequences. They're not very good.
25 But, look, the probability is such that we're not

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1 worrying about it.

2 JUDGE ABRAMSON: It's remote and
3 speculative, as NEPA would put it.

4 JUDGE TRIKOUROS: That's really where this
5 boils down to. Now, the -- your petition is saying,
6 Look, you don't know the frequency of this because you
7 don't know what the seismic event is. That may drive
8 the whole thing, put us in a whole different plane of
9 frequency, and where it does become a serious issue.
10 But we'd have to determine that.

11 MS. CURRAN: Right.

12 JUDGE TRIKOUROS: That's really where
13 you're coming from.

14 MS. CURRAN: That's what the draft revised
15 EIS seems to be calling for. It's saying the
16 generalizations that are made in NUREG 1738 cannot be
17 applied to Diablo Canyon. So then where does that
18 leave us?

19 JUDGE TRIKOUROS: With respect to the
20 seismic event frequency.

21 MS. CURRAN: Right.

22 JUDGE TRIKOUROS: I think you need to
23 always qualify it that way.

24 MS. CURRAN: Okay.

25 JUDGE TRIKOUROS: Because the consequences

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1 are treated -- are discussed as generic. They are not
2 site-specific. They are discussed --

3 MS. CURRAN: And the consequences as
4 discussed in a draft revised EIS are also probability-
5 weighted as far as -- that's my reading of the EIS so
6 that's, you know, something where they considered a
7 probability in looking at the consequences.

8 JUDGE TRIKOUROS: Right. When they
9 determined the risk, that's right. That's correct.

10 JUDGE ABRAMSON: I'd like to return just
11 for a moment, Ms. Curran, to the issue of the impact
12 of the fact that this is only a draft. Mothers for
13 Peace did comment on the draft, so your input is now
14 in front of the Commission. And I'd like to have you
15 explain to me if this were draft anything else, it
16 would -- if it were simply an RAI, for example, it
17 would not be the basis for a contention and wouldn't
18 come in.

19 Why in this instance when Mothers for
20 Peace has commented to the Commission, when the draft
21 is not a final Commission document -- it's one that
22 was put out for comment -- should we consider the
23 content of the draft to be significant new information
24 that's sufficient to pass the threshold for this
25 waiver?

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1 MS. CURRAN: The reason is that the draft
2 presents the NRC technical staff's most recent
3 thinking on the risk of pool fires related to
4 earthquakes. That is the NRC -- the NRC saw fit to
5 publish this in a draft revision to an environmental
6 impact statement, which the law requires the NRC to
7 revisit when it has new information that could change
8 the outcome of its study.

9 JUDGE ABRAMSON: And the basis for your
10 argument really relies on the statements by the Staff
11 that this is not applicable for seismic events west of
12 the Mississippi. Am I hearing that correct?

13 MS. CURRAN: That's right.

14 JUDGE ABRAMSON: So this really revolves
15 around that one sentence?

16 MS. CURRAN: Yes.

17 JUDGE ABRAMSON: Or that one concept.
18 Okay.

19 MS. CURRAN: Yes. And we rely for the law
20 on 10 CFR 51.92 which obliges the NRC to revise an
21 environmental impact statement when it has new
22 information, which it has done in this case by issuing
23 the draft EIS. At this point, in our view, we have
24 put the issue into play. It could be that when all is
25 said and done, the NRC comes out with a final EIS --

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1 GEIS which in our view has to be done before Diablo
2 Canyon's relicense that says, Oh, we made a mistake.
3 We really -- we dreamed all this that has been going
4 on for the last ten years and we want to go back to
5 NUREG 1353 when we said spent fuel pools pose no risk
6 at all.

7 But I really don't think that's going to
8 happen and, right now, what we have is the NRC --
9 we're seeing the evolution of the NRC's thinking about
10 an extremely important environmental issue. It's
11 changed over time. We people learn things. People
12 change their thinking. And when it comes to
13 environmental risk, that's what the law requires the
14 Agency to take that new thinking into account, present
15 it to the public, and say, This is how our views have
16 changed. What do you think? And before that next
17 licensing decision, which is -- you know, the GEIS is
18 supposed to support the Diablo Canyon licensing
19 decision -- before that decision --

20 JUDGE ABRAMSON: Yeah. I understand that.

21 MS. CURRAN: Okay.

22 JUDGE ABRAMSON: I understand all that.

23 Thank you.

24 JUDGE KARLIN: Any more questions?

25 JUDGE TRIKOUROS: Just a clarification.

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1 I don't think west of the Mississippi. I think the --
2 it says --

3 JUDGE ABRAMSON: I'm only quoting what she
4 said.

5 MS. CURRAN: Well, I may have generalized
6 wrong, but --

7 JUDGE TRIKOUROS: Okay. Because I don't
8 think Arizona plants -- whenever they specifically
9 mention plants, they mention Diablo Canyon, San
10 Onofre, and one other plant in Washington state I
11 think, but I just want to make sure.

12 MS. CURRAN: Okay.

13 JUDGE TRIKOUROS: But they do specifically
14 mention Diablo Canyon.

15 MS. CURRAN: They do.

16 JUDGE KARLIN: Thank you, Ms. Curran.

17 MS. CURRAN: Thank you.

18 JUDGE KARLIN: Mr. Smith. Okay. Mr.
19 Tyson Smith speaking for --

20 JUDGE ABRAMSON: Goes to Washington.

21 JUDGE KARLIN: -- Pacific Gas & Electric.
22 Mr. Smith, I would like to ask you to turn to page 23
23 of your answer. And we're focusing -- I'm going to
24 focus on the waiver issue.

25 MR. T. SMITH: Okay.

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1 JUDGE KARLIN: And I think the -- your
2 brief talks about item number two, "A waiver from the
3 NRC regulations is not warranted." Okay?

4 MR. T. SMITH: Uh-huh.

5 JUDGE KARLIN: And you talk about the four
6 elements of *Millstone* and that sort of thing about
7 whether or not the waiver is warranted. And I see
8 your brief going into that in some depth, and it's
9 useful to us. But I think -- does it seem to me -- it
10 seems to me that maybe that you've asked the wrong
11 question or you're asking us to focus on the wrong
12 question. Because they've asked for a waiver. And in
13 a waiver, as I understand, they don't have to show
14 that the waiver is warranted. They just have to show
15 to us that they have a prima facie case that the
16 waiver is warranted.

17 Could you talk about that? Your brief
18 never mentions what I think is the issue we have to
19 decide, is whether or not they've made a prima facie
20 case, not whether the waiver is warranted in
21 substance.

22 MR. T. SMITH: Well, no. We didn't
23 actually focus on whether they had made the prima
24 facie case, but I think the point we're raising here
25 is they have not made the prima facie case. They

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1 haven't demonstrated that the application rule
2 wouldn't serve the purpose here. They haven't made
3 any demonstration that there are special circumstances
4 that were not considered in the GEIS. In fact, the
5 very circumstances they're focusing on, severe
6 seismic-generated catastrophic loss of the spent fuel
7 pool, was specifically addressed in the GEIS.

8 JUDGE KARLIN: Well, let me go -- I mean,
9 you know, prima facie case, we all think we know what
10 that means and we've all used it as lawyers many
11 times, but I had to go back to the books and look.
12 And *Black's Law Dictionary* defines prima facie case as
13 "sufficient to establish a fact or raise a presumption
14 unless disproved or rebutted."

15 Now, I see your answer as primarily a
16 rebuttal.

17 MR. T. SMITH: And that would --

18 JUDGE KARLIN: But that's what we are not
19 to consider in whether there's a prima facie case.
20 What we need to say is have they raised an
21 inference -- have they raised sufficient that absent
22 any answer from you, it would be a prima facie case
23 requiring an answer from you.

24 MR. T. SMITH: And they have not done
25 that.

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1 JUDGE KARLIN: And how have they not done
2 that?

3 MR. T. SMITH: Well, they have not --
4 actually, they've not made a prima facie case for any
5 of the four waiver standards, for instance.

6 JUDGE KARLIN: Well, they say that Diablo
7 Canyon in the earthquake situation is unique, do they
8 not? That, you know, there's been a lot of studies
9 done on Diablo Canyon. It's excluded by all the GEISS
10 and so it's special and it's unique.

11 MR. T. SMITH: But they haven't addressed
12 the fact that the GEIS itself, the one that's
13 applicable to 1996 GEIS, does not limit its
14 conclusions in any way to plants outside of the
15 central or eastern United States.

16 JUDGE KARLIN: I think that's -- I have
17 some difficulty with that, but we'll let it ride
18 because I just -- I'm very troubled by -- a prima
19 facie case is one where we don't -- you could simply
20 demur. They file their petition and you simply say,
21 I demur. We need to say nothing. They have not
22 established even enough to shift the burden to us to
23 even respond in any substantive way.

24 Instead, you've responded in a substantive
25 way to all the elements.

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1 MR. T. SMITH: And I think we did that
2 because the response shows that there is no -- there
3 is no basis for a waiver. We address each of those
4 factors and demonstrate --

5 JUDGE KARLIN: But that's not the
6 question.

7 MR. T. SMITH: The reason we responded is
8 because we think it's important to get on the record
9 our view of the bases that they're asserting for the
10 waiver, and so that's why we've included it.

11 JUDGE KARLIN: Okay. And you -- here,
12 they're asserting that there is new and significant
13 information subsequent to the 1996 GEIS, and let's
14 just put this in a context I understand it. Before an
15 agency makes a decision on something that
16 significantly affects the environment, it has to do an
17 environmental impact statement under NEPA.

18 This Agency in 1996 did a generic
19 environmental impact statement. It is now 14 years
20 later, 2010. Now they're being asked to make a
21 decision on whether to issue this license or not. As
22 I understand, the Petitioners are saying, Well, in
23 that intervening 14 years, some new and significant
24 information has come forward; i.e., the 2009 draft
25 GEIS and the 1738 NUREG and, therefore -- so is this

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1 not new and significant information that ought to be
2 considered before this 2010 decision is made?

3 MR. T. SMITH: Well, there's two questions
4 embedded in that. If we're just talking about the
5 purpose of a waiver, whether or not there's new and
6 significant information doesn't change the fact that
7 spent fuel storage is a Category 1 issue that can't be
8 litigated in an individual proceeding.

9 JUDGE KARLIN: Well, that's why they're
10 asking for a waiver.

11 MR. T. SMITH: Right. But whether or not
12 you need to have a waiver to admit a contention is
13 different than whether you satisfy NEPA by considering
14 new and significant information. Certainly in the
15 GEIS, the existence of 1738, the draft GEIS is
16 addressed. Other petitions for rulemaking have been
17 filed by two states, raising a very issue of whether
18 1738 is new and significant information --

19 JUDGE KARLIN: Now, you're talking
20 about -- you're talking about the New York case?

21 MR. T. SMITH: I'm talking -- right there
22 I was talking about --

23 JUDGE KARLIN: The rulemaking --

24 MR. T. SMITH: -- the denial of the
25 petition for rulemaking that was ultimately upheld in

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1 *New York v. NRC.*

2 JUDGE KARLIN: But in that case, those
3 were -- it was rulemaking and I think --

4 MR. T. SMITH: It was a petition for
5 rulemaking filed by the State of California --

6 JUDGE KARLIN: Yes.

7 MR. T. SMITH: -- and the State of
8 Massachusetts, and they were requesting that in light
9 of NUREG 1738 that the Commission change their
10 designation of spent fuel pool accidents and spent
11 fuel storage from Category 1 to a Category 2.

12 JUDGE KARLIN: Right. And I'm looking at
13 I think the decision that you cited, among others, is
14 *New York v. NRC*, Second Circuit, decided December 21,
15 2009 and it was a petition for rulemaking filed by the
16 State of New York and the Commonwealth of
17 Massachusetts and the State of Vermont and whatever,
18 and --

19 JUDGE ABRAMSON: Was State of California
20 in that list?

21 JUDGE KARLIN: No. I don't believe the
22 State of California --

23 MR. T. SMITH: California did not pursue
24 the appellate court litigation.

25 JUDGE KARLIN: Yeah.

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1 MR. T. SMITH: But the denial of the
2 petition for rulemaking that was appealed was filed by
3 the State of California.

4 JUDGE KARLIN: And in that on page 554,
5 589 F.3d 554, the Court says, "An agency decision to
6 deny a rulemaking petition" -- which is not what this
7 is -- "is subject to judicial review, but that review
8 is extremely limited and highly deferential," and they
9 go on to say, "The standard has been said to be so
10 high as to akin to non-reviewability."

11 MR. T. SMITH: And that's correct.

12 JUDGE KARLIN: So the basis of their
13 decision was deference to the agency?

14 MR. T. SMITH: And that is not why I was
15 not citing *New York v. NRC*. I was citing the NRC's
16 denial of the petition for rulemaking, which is at 73
17 Fed.Reg. 46204.

18 JUDGE KARLIN: Well --

19 MR. T. SMITH: And if I may quote there,
20 the NRC says that, "NUREG 1738 did not attempt to
21 specifically address a number of issues and actions
22 that would substantially reduce the likelihood of a
23 zirconium fire, potentially rendering the frequency
24 estimate to be remote and speculative."

25 JUDGE KARLIN: Well, my point -- if I may

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1 continue on this particular case -- is that the
2 judicial review in question is acknowledged to be
3 extremely limited and highly deferential. I think the
4 difference is here that we are part of the Agency. We
5 are a part of the -- we don't have the extremely
6 limited and highly deferential viewpoint on that. In
7 fact, we have two highly competent experts in
8 technical arenas --

9 JUDGE ABRAMSON: Not deferential either.

10 JUDGE KARLIN: -- and so I think, you
11 know, there's a different standard, and the denial of
12 a rulemake petition under that standard is not
13 particularly relevant to what we need to do here
14 today.

15 MR. T. SMITH: I would agree.

16 JUDGE ABRAMSON: That's -- can I --

17 JUDGE KARLIN: And we do have the specific
18 exclusion of Diablo Canyon and we do have that
19 combined with the Shoreline Fault. The Shoreline
20 Fault didn't exist at the time of the statement made
21 in NUREG 1738. I believe that was maybe 2002 time
22 frame.

23 MR. T. SMITH: There's a couple of things
24 that I think where -- when we focus exclusively on
25 NUREG 1738, I think we're missing the bigger picture,

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1 which is that the NRC in the draft GEIS and its
2 original GEIS has relied on much more than that.
3 They've relied on a series of studies beginning in the
4 late 1970s, all of which have uniformly concluded that
5 the risk of a spent fuel pool fire is uniformly and
6 consistently low. NUREG 1738 doesn't change that. In
7 fact, it doesn't say anything about the seismic
8 setting at Diablo Canyon or the seismic risk at Diablo
9 Canyon. It says in fact we don't apply to Diablo
10 Canyon.

11 The Commission, in its denial of the
12 petition for rulemaking most recently, said that it
13 has looked at mitigation alternatives for all plants
14 and has concluded that the risk is low. It made no
15 exclusion or exception for Diablo Canyon.

16 JUDGE ABRAMSON: Would you just take a
17 minute, Mr. Smith, and refresh my memory about this --
18 this petition by the State of California for
19 rulemaking. What were they asking for and what
20 explicitly -- and did it relate to an assertion that
21 things have changed in terms of information for Diablo
22 Canyon and did -- did the Commission itself rule on
23 that request?

24 MR. T. SMITH: The request was not
25 specifically focused on Diablo Canyon. It was a

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1 petition for rulemaking requesting that the Agency
2 change its categorization in the GEIS from a Category
3 1, which means it can't be litigated, to a Category 2
4 issue for spent fuel pool risks.

5 JUDGE ABRAMSON: And it was filed by the
6 State of California?

7 MR. T. SMITH: Correct, and the State of
8 Massachusetts.

9 JUDGE ABRAMSON: Okay.

10 MR. T. SMITH: And the NRC addressed that
11 in its denial of petition for rulemaking.

12 JUDGE ABRAMSON: And when was that?

13 MR. T. SMITH: This -- it was denied in
14 August of 2008.

15 JUDGE ABRAMSON: Okay.

16 MR. T. SMITH: And in there, the NRC goes
17 to great lengths to discuss the effects of NUREG 1738
18 and it explains that there are a series of
19 conservatisms in NUREG 1738 that additional studies
20 subsequent to 1738 have shown that NUREG 1738 is
21 extremely conservative and --

22 JUDGE TRIKOUROS: Extremely conservative
23 how? With respect to the consequences of a spent fuel
24 zirconium fire or with respect to the frequency of its
25 occurrence?

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1 MR. T. SMITH: Frequency of its
2 occurrence.

3 JUDGE TRIKOUROS: Okay.

4 MR. T. SMITH: The Commission has said
5 that NUREG 1738 didn't account for operator actions,
6 didn't account for further analysis of heat transfer
7 mechanisms --

8 JUDGE TRIKOUROS: Okay.

9 MR. T. SMITH: -- or mitigation
10 alternatives in place since 9/11.

11 JUDGE TRIKOUROS: And all of that works
12 fine except for seismic events. Seismic events --
13 now, I'm not commenting on site-specific measures,
14 mitigation measures that are not known to the general
15 public. I'm not commenting on that. I'm commenting
16 on what -- what is before us. And what's before us is
17 that if I asked you to tell me what the frequency of
18 a seismic event at Diablo Canyon is right now, I don't
19 think you could tell me.

20 MR. T. SMITH: No. I can't tell you. And
21 the Commission doesn't require me to be able to tell
22 you. They say qualitatively the risk of a spent fuel
23 pool accident, including from severe seismic-generated
24 events, is uniformly low at all plants without
25 exception.

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1 JUDGE TRIKOUROS: But they exclude Diablo
2 Canyon --

3 MR. T. SMITH: They do not exclude --

4 JUDGE TRIKOUROS: -- from --

5 MR. T. SMITH: -- Diablo Canyon from that
6 conclusion. NUREG 1738 was designed to allow
7 relaxation of regulatory requirements at
8 decommissioned plants. It was designed for a specific
9 purpose.

10 JUDGE TRIKOUROS: It is true in their
11 general conclusion they don't exclude anybody. I
12 agree with that.

13 JUDGE ABRAMSON: In --

14 JUDGE TRIKOUROS: What we make of that is
15 another --

16 JUDGE ABRAMSON: Judge Trikouros, are you
17 talking about this denial of rulemaking when you say
18 in their general conclusion they didn't exclude --

19 JUDGE TRIKOUROS: In the general
20 conclusions of NUREG 1738 --

21 JUDGE ABRAMSON: But I'm much more
22 interested in this denial of rulemaking because it's
23 the State of California who requested it, which
24 impliedly would bring into play plants in California.
25 And if the denial -- and I want to look more closely

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1 at this denial, but what you're telling me, Mr. Smith,
2 is that in that denial, the Commission said it's
3 generally true across the board for all plants.

4 MR. T. SMITH: Correct.

5 JUDGE ABRAMSON: If they remain Category
6 1 events.

7 MR. T. SMITH: That's exactly what they
8 said.

9 JUDGE KARLIN: Well, let me ask, if I may,
10 on page E-33 of the 2009 draft GEIS -- do you have
11 that E-33?

12 MR. T. SMITH: I do.

13 JUDGE KARLIN: That was cited I think by
14 the Petitioners. There's where they have the excludes
15 Diablo Canyon, that -- "Since issuance of the 1996
16 GEIS, additional analysis of the risk from spent fuel
17 pool accidents has been performed and documented. The
18 key document in this regard is NUREG 1738."

19 Then they go on to talk about airborne
20 pathways which, as I understand it, is the gist of
21 this contention, and says, "The initiating events
22 included in this analysis are listed below: Seismic
23 (for central and eastern United States sites).
24 Footnote: Excludes Diablo Canyon, San Onofre, and
25 WNP-2."

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1 So aren't they saying in the most recent
2 statement that, Look, Diablo Canyon is not covered by
3 this analysis?

4 MR. T. SMITH: No. That's not what
5 they're saying.

6 JUDGE KARLIN: Is excluded.

7 MR. T. SMITH: No. If you look on page E-
8 35, the --

9 JUDGE KARLIN: Okay.

10 MR. T. SMITH: -- Commission begins and
11 they say, "Since NUREG 1738 and subsequent to the
12 attacks of 9/11, significant additional analyses have
13 been performed, includes a Sandia analysis."

14 JUDGE KARLIN: Wait a second. I'm on
15 E-35?

16 MR. T. SMITH: I'm on the bottom paragraph
17 of E-35.

18 JUDGE KARLIN: Okay. "Since issuance of
19 NUREG ..." -- I'm with you.

20 MR. T. SMITH: Is very low. And then you
21 go later on to the last of the section, I guess it's
22 E3.7.1.

23 JUDGE KARLIN: Well, that's terrorist
24 attack. We're not talking about terrorist attack.
25 We're talking about earthquakes.

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1 MR. T. SMITH: "The NRC says based on a
2 more rigorous accident progression analysis, recent
3 mitigation enhancements" -- which would apply no
4 matter the initiating event -- "and NRC site
5 evaluations in every spent fuel pool in the country,
6 the risk of a spent fuel pool zirc. fire initiation is
7 expected to be less than reported in NUREG 1738."

8 There's no exception. It says it's less
9 than 1738, including based on an examination at all
10 plants.

11 JUDGE KARLIN: But didn't they just say in
12 that footnote that they excluded Diablo Canyon? How
13 can they say that if they excluded --

14 MR. T. SMITH: They say NUREG 1738 didn't
15 include Diablo Canyon or didn't they conclude that,
16 nevertheless, for all plants, "We conclude that the
17 risk is low."

18 JUDGE KARLIN: And what is the basis for
19 that?

20 MR. T. SMITH: The NRC's basis is the
21 Sandia studies, which perform more realistic analyses,
22 the mitigation measures that have been required since
23 9/11 to maintain or restore spent fuel cooling in the
24 event of an accident, that have been confirmed.

25 JUDGE KARLIN: And the NRC site

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1 evaluations of every SPC. Now, are we bound by that?
2 That's a Staff draft. Is this Board bound by that?

3 MR. T. SMITH: No. If anything, you're
4 bound by the existing GEIS which says that spent fuel
5 pool is a Category 1 issue and, to the extent the
6 Petitioners are asking for a SAMA analysis, --

7 JUDGE KARLIN: But they're asking for a
8 waiver. They're asking for a waiver. So we know that
9 if they don't get a waiver, they don't get this
10 contention in.

11 MR. T. SMITH: Right.

12 JUDGE KARLIN: So that's the issue.

13 MR. T. SMITH: But that conclusion in the
14 GEIS makes no exception. Period.

15 JUDGE KARLIN: Beg pardon?

16 MR. T. SMITH: The conclusion that's in
17 the GEIS and the studies that were available at the
18 time of the GEIS make no exceptions for Diablo Canyon.

19 JUDGE KARLIN: And was the Shoreline Fault
20 new information since this occurred?

21 MR. T. SMITH: Yes. But as I mentioned
22 earlier, new and significant information will be
23 addressed in the NRC's NEPA evaluations or the
24 supplemental environmental impact statement.

25 JUDGE KARLIN: Well, that's the issue

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1 here, whether it will be addressed in the NEPA
2 evaluation for this site.

3 MR. T. SMITH: It was addressed in our
4 environmental report. We specifically addressed the
5 Shoreline Fault. It's mentioned. It's discussed as
6 new and significant information.

7 JUDGE KARLIN: It's mentioned but I think
8 even the Staff believes that your discussion was
9 inadequate in its suggesting we had met that
10 contention, is it not?

11 MR. T. SMITH: I think there you're
12 focusing on the SAMA analysis which is one part of the
13 ER, but the ER itself in its discussion of new and
14 significant information does discuss the Shoreline
15 Fault.

16 JUDGE KARLIN: All right.

17 MR. T. SMITH: It mentions it, describes
18 what's known about it at that time.

19 JUDGE KARLIN: Where is that stated in
20 your brief?

21 MR. T. SMITH: It's not stated in our
22 brief, I don't believe.

23 JUDGE KARLIN: Well, it seems to be
24 relevant. Okay.

25 JUDGE ABRAMSON: But it's in the ER

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1 nonetheless which is in the record --

2 MR. T. SMITH: It's in the ER.

3 Absolutely.

4 JUDGE ABRAMSON: -- and we can look at it.

5 MR. T. SMITH: We've been focusing on the
6 SAMA analysis and, as we discuss, it's not
7 specifically mentioned in there but the existence of
8 it is highlighted in the environmental report.

9 JUDGE ABRAMSON: Was any of this new and
10 significant information available at the time of the
11 NRC's decision on rulemaking we were -- on the
12 petition for rulemaking from the State of California?

13 MR. T. SMITH: No, it was not. The
14 existence of the Shoreline Fault was not known at that
15 time.

16 JUDGE KARLIN: On page 24 of your brief,
17 here's the purpose question that I asked Ms. Curran
18 and -- you seem to -- what is the purpose of the --
19 you say, "The application of the rule here would serve
20 the purpose" -- I'm quoting -- "The application of the
21 rule here would serve the purposes for which the rule
22 was adopted by precluding site-specific consideration
23 of storage issues."

24 Was that the purpose of the rule, to --

25 MR. T. SMITH: The purpose --

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1 JUDGE KARLIN: -- preclude site-specific
2 consideration?

3 MR. T. SMITH: That's perhaps an
4 oversimplification. Actually, what the Commission
5 said was, We're implementing the GEIS to improve the
6 efficiency of the licensing process for license
7 renewal. And they do that by evaluating for certain
8 issues where the NRC can assign a single significance
9 category and has evaluated mitigation measures and
10 have determined that no additional site-specific
11 mitigation measures would reduce its significance,
12 they can reach a generic conclusion and doesn't need
13 to be litigated in individual licensing proceedings.

14 JUDGE KARLIN: So the purpose is to -- is
15 to make the process more efficient by handling generic
16 matters generically?

17 MR. T. SMITH: Yes. Correct.

18 JUDGE KARLIN: Not to exclude site-
19 specific consideration where otherwise warranted.

20 MR. T. SMITH: Certainly where otherwise
21 warranted. Absolutely.

22 JUDGE KARLIN: All right.

23 JUDGE TRIKOUROS: But we're in a difficult
24 position here. We -- we need to make a judgment on
25 this and we need to make a judgment that balances

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1 site-specific mitigation measures implemented post-
2 9/11 that were there to deal with terrorism, I assume
3 -- that we don't know -- and we want to balance that
4 against a seismic event frequency, which we don't
5 know. So I've got two things I don't know and I'm
6 trying to balance them against each other.

7 MR. T. SMITH: I don't think you need to
8 balance those at all. The Commission has already
9 spoken clearly on this issue and it says that all
10 spent fuel pools, the risk of a zirconium fire from a
11 spent fuel accident is low, qualitatively across the
12 board. There doesn't need to be a quantification of
13 the seismic risk and --

14 JUDGE TRIKOUROS: Well, but there still is
15 -- there still remains the issue of the exclusion in
16 NUREG 1738.

17 MR. T. SMITH: The draft GEIS does not
18 exclude Diablo Canyon.

19 JUDGE TRIKOUROS: But --

20 MR. T. SMITH: And it mentions 1738.

21 JUDGE TRIKOUROS: What doesn't exclude --
22 say that again.

23 MR. T. SMITH: The draft GEIS does not
24 exclude Diablo Canyon from its conclusions that the
25 risk of a spent fuel pool fire are low at all plants.

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1 So certainly NUREG 1738 is just one piece of the many
2 documents that the NRC has looked at over the year.
3 They're basing their determination on all of those
4 documents, not just 1738. So maybe you can't apply
5 1738 directly to Diablo Canyon, but you can apply the
6 NRC's broader conclusions.

7 Just because the seismic hazard is
8 different in Diablo Canyon, Diablo Canyon also has a
9 higher seismic design basis. So you can't draw any
10 conclusions about that from NUREG 1738. It has no
11 applicability here.

12 JUDGE TRIKOUROS: Okay. It has no
13 applicability here because of that one statement in
14 the conclusion in the draft GEIS?

15 MR. T. SMITH: Not just the one statement.
16 It's the series of studies, including the GEIS in
17 1996, the Sandia study, the NRC's evaluation in the
18 denial for petition for rulemaking, the orders they've
19 issued, which culminate in the conclusion -- in the
20 draft GEIS which confirms the 1996 GEIS and says that
21 the results of the 1996 GEIS are bounding for all
22 plants.

23 JUDGE ABRAMSON: Mr. Smith, let me ask you
24 -- I appreciate that argument and that makes -- that
25 has a certain merit to it. But let me ask you another

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1 question, related question. And perhaps it's not
2 something that you know. Are you -- do you know
3 whether or not the seismic frequency spectrum has been
4 changed as a result of the discovery of the Shoreline
5 Fault or whether the site-specific seismic frequency
6 spectrum stays the same and it's just a question of
7 allocation between the faults in the area?

8 MR. T. SMITH: I believe an effort is
9 underway to evaluate that very question. I think
10 that's part of what will be completed in December of
11 this year or late 2010.

12 JUDGE ABRAMSON: I see.

13 MR. T. SMITH: I want to step back for a
14 second and say we're talking about the waiver. We're
15 really talking about two things here. They're asking
16 for sort of a double waiver. It's not just a waiver
17 from the consideration of spent fuel accident risks.
18 They're also asking for a SAMA analysis. SAMA is a
19 severe accident mitigation alternative. It only
20 applies to reactor accidents, not to spent fuel pool
21 accidents. So they're really asking you to do two
22 things -- waive the generic consideration of the risk
23 and, two, affirmatively require PG&E to do something
24 different than anyone else has ever had to do for
25 license renewal.

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1 JUDGE KARLIN: Well, I don't see that in
2 the contention. The contention is PG&E's ER is
3 inadequate to satisfy NEPA because it does not address
4 airborne environmental impacts of a reasonably
5 foreseeable spectrum of spent fuel accidents including
6 accidents caused by earthquakes. They didn't mention
7 the word SAMA at all.

8 MR. T. SMITH: The Contention EC-2 in
9 bold, it says, "Failure of the SAMA analysis to
10 address the environmental impacts of spent fuel pool
11 accidents."

12 JUDGE KARLIN: All right.

13 JUDGE TRIKOUROS: Good point.

14 JUDGE ABRAMSON: Yeah. I mean, and if I
15 back-door this, the whole reason for this is -- the
16 reason there's anything going on at this license
17 renewal stage is because the Commission said, If you
18 have not yet done a SAMA analysis for your plant, on
19 license renewal you've got to do it.

20 JUDGE KARLIN: But that's only if you
21 don't get a waiver. If you get a waiver, as they're
22 asking for -- SAMA is a limiting factor with regard to
23 the normal license renewal because it is required as
24 a Category 2.

25 MR. T. SMITH: The basis --

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1 JUDGE TRIKOUROS: Let's be clear. There's
2 no SAMA required for spent fuel pools.

3 JUDGE ABRAMSON: That's right.

4 JUDGE TRIKOUROS: Period.

5 JUDGE ABRAMSON: That's right. Severe
6 accident, not --

7 JUDGE KARLIN: Well, I guess -- if I may,
8 mean, I guess the SAMA analysis in the reg. says -- if
9 I -- let's go back to the reg. As I understand it,
10 51.53(c)(2)(ii)(L) says, "If the Staff has not
11 previously confirmed a severe accident mitigational
12 alternatives for the plant, then the ER needs to
13 include a consideration of the alternatives to
14 mitigate severe accidents that must be provided."

15 Right?

16 MR. T. SMITH: That's correct.

17 JUDGE ABRAMSON: But now you have to go to
18 the definition of severe accidents, Judge Karlin.

19 JUDGE KARLIN: No, no. I think what we're
20 talking about is -- they're asking for a waiver of
21 another provision which says, "The ER need not discuss
22 any aspect of the storage of spent fuel for the
23 facility within the scope of the generic determination
24 in 51.23."

25 So they're asking for a waiver of that, a

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1 different -- so the ER does need to -- you do point
2 out, I think, that they seem to be asking for a waiver
3 of 51.23 as well as 51.53; is that right?

4 MR. T. SMITH: We did point that out.

5 JUDGE KARLIN: Yeah. And I see that. But
6 I don't see -- you know, and I see that you point out
7 properly that they use the word SAMA, but I'm not sure
8 how that comports.

9 MR. T. SMITH: This -- I can address this
10 easily.

11 JUDGE KARLIN: Okay.

12 MR. T. SMITH: Two points: One, severe
13 accident only applies to reactors. So there's no such
14 thing as a SAMA for a spent fuel pool. The definition
15 of severe accident is inapplicable. Two, the purpose
16 of the SAMA requirement is NEPA's --

17 JUDGE KARLIN: Now, wait a second. Where
18 is that written?

19 JUDGE ABRAMSON: Definition of severe
20 accident. You look up SAMA.

21 JUDGE KARLIN: Find it. Show me the reg.

22 MR. T. SMITH: Sure. And I'm not sure I
23 can point you to a specific reg. I can point you to
24 a Commission decision saying that.

25 JUDGE KARLIN: Okay.

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1 MR. T. SMITH: Would you like that?

2 JUDGE KARLIN: Yes.

3 JUDGE TRIKOUROS: By the way, just because
4 there's a requirement, there's no requirement to do a
5 SAMA for a spent fuel pool, --

6 MR. T. SMITH: Correct.

7 JUDGE TRIKOUROS: -- doesn't mean that a
8 spent fuel pool accident isn't severe.

9 MR. T. SMITH: Correct. I guess I would
10 add -- the Commission said this in COI 01-17 at 54 NRC
11 21 at the bottom of the page.

12 JUDGE KARLIN: Which one is that?

13 MR. T. SMITH: It's the *Turkey Point*
14 license renewal decision.

15 JUDGE KARLIN: Okay. I actually have that
16 one and I just -- COI 01-17. What page?

17 MR. T. SMITH: Twenty-one.

18 JUDGE KARLIN: Twenty-one.

19 MR. T. SMITH: And it's at the bottom.

20 JUDGE KARLIN: I'm with you.

21 MR. T. SMITH: The last paragraph that
22 bleeds over onto 22, four lines up.

23 JUDGE KARLIN: Mr. Oncavage?

24 MR. T. SMITH: Yes. That paragraph
25 essentially begins, "And, in any event, Part 51's

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1 reference to SAMAs applies only to nuclear reactor
2 accidents not spent fuel pool storage accidents."

3 And I would augment that with what Judge
4 Abramson was saying earlier, which is that the purpose
5 of NEPA -- I'm sorry -- the purpose of the SAMA
6 analysis is to comply with NEPA's requirement that you
7 look at alternatives. And the reason you have to do
8 SAMAs --

9 JUDGE KARLIN: And you're saying that's
10 the holding of this case, this sort of reference here?
11 I mean, why would it make any difference if there's a
12 severe accident under NEPA that you need to look at,
13 isn't NEPA NEPA?

14 MR. T. SMITH: Yeah, and that was just
15 what I was getting to. NEPA requires you to evaluate
16 alternatives. That's the genesis of the requirement
17 for a severe accident mitigation alternative.

18 JUDGE KARLIN: Right. Right.

19 MR. T. SMITH: The reason you have to look
20 at it in because some plants haven't previously
21 considered those alternatives.

22 JUDGE KARLIN: Right. Right.

23 MR. T. SMITH: At Diablo Canyon, when the
24 spent fuel pool was specifically approved in a license
25 amendment in 1987, the NRC looked at severe accidents

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1 in connection with that license amendment and
2 concluded that the spent fuel pool did not have a
3 significant impact on the environment. So this issue
4 has already specifically been addressed for Diablo
5 Canyon.

6 JUDGE KARLIN: Did you cover that in your
7 brief?

8 MR. T. SMITH: I did. We did.

9 JUDGE KARLIN: Where? No. I'm surprised.
10 Maybe I wasn't paying attention and I read it three
11 times. I kind of lost track.

12 MR. T. SMITH: I believe it's cited in a
13 footnote.

14 JUDGE KARLIN: A footnote.

15 JUDGE ABRAMSON: That will teach you to
16 read footnotes.

17 JUDGE KARLIN: That will teach me.

18 (Pause.)

19 MR. T. SMITH: It's -- looks like it's at
20 the top of page 29.

21 JUDGE KARLIN: All right.

22 MR. T. SMITH: I'm seeing it's in the
23 paragraph that talks about the significant safety or
24 the significant environmental issue.

25 JUDGE KARLIN: Okay.

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1 MR. T. SMITH: It says that, "The NRC has
2 previously considered the risks associated with spent
3 fuel storage, including severe accidents, in
4 connection with the re-rack in" -- that's the current
5 design of the Diablo Canyon spent fuel pool.

6 JUDGE KARLIN: Nineteen ninety-six. And
7 this is the *New York v. NRC* case that I was just
8 reading?

9 MR. T. SMITH: Further down on page 29.

10 JUDGE KARLIN: Yeah. I mean, the -- "The
11 Commission previously denied a petition for
12 rulemaking." Is that what you're referring to?

13 MR. T. SMITH: I'm actually -- no, on the
14 top of --

15 JUDGE KARLIN: Okay.

16 MR. T. SMITH: -- top of page 29, --

17 JUDGE KARLIN: Twenty-nine.

18 MR. T. SMITH: -- it says the letter from
19 C. Trammell, NRC, to PG&E, the supplement to the SER
20 and EA for Diablo Canyon re-rack.

21 JUDGE KARLIN: Yes.

22 MR. T. SMITH: That's the NRC's approval
23 of the current design for the Diablo Canyon spent fuel
24 pool.

25 JUDGE KARLIN: Okay.

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1 MR. T. SMITH: And there the NRC concluded
2 that there were no significant radiological or non-
3 radiological impacts. They addressed specifically the
4 performance of the spent fuel pools during a
5 postulated Hosgri earthquake.

6 And if you look back on page 28, in
7 addition I note there that, "The NRC's considered
8 severe accidents at the spent fuel pool."

9 JUDGE KARLIN: Okay.

10 MR. T. SMITH: So this issue's already
11 been addressed which means NEPA has already been
12 satisfied for the current licensing basis.

13 JUDGE TRIKOUROS: Right. That decision,
14 of course, was based on seismic information that's
15 different than exists today.

16 JUDGE ABRAMSON: We don't know.

17 JUDGE KARLIN: Well, --

18 MR. T. SMITH: That's fair.

19 JUDGE KARLIN: Okay.

20 MR. T. SMITH: The difference is whether
21 it's new and significant, and you can address new and
22 significant information through the NEPA process
23 without a waiver and the Commission -- there's no need
24 for a waiver here when the Commission -- the NRC Staff
25 will address it through the supplemental environmental

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1 impact statement process. Obviously, the Mothers for
2 Peace have also addressed the issue through the GEIS
3 notice and comment process. So there are multiple
4 ways to satisfy NEPA here that are short of allowing
5 a full adjudicatory hearing on this issue.

6 JUDGE KARLIN: Well, doesn't that presume
7 the merits which is they're wrong? All we're looking
8 at now is whether a waiver -- a prima facie case for
9 a waiver has been made and a contention should be
10 admitted. I mean, you're getting to the merits of
11 whether the contention is right and saying, The Staff
12 will take care of that. Trust us. Don't worry about
13 it.

14 MR. T. SMITH: I'm getting to the process
15 behind which you satisfy NEPA.

16 JUDGE KARLIN: Right.

17 MR. T. SMITH: And I'm saying is you don't
18 -- it is more than one way to satisfy NEPA. You don't
19 have to have a hearing. That's the point.

20 JUDGE KARLIN: You don't have to.

21 MR. T. SMITH: No.

22 JUDGE KARLIN: But the question for us is
23 is it prohibited?

24 MR. T. SMITH: I believe it is prohibited
25 by the Commission.

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1 JUDGE KARLIN: Okay.

2 MR. T. SMITH: I feel comfortable saying
3 you're familiar with that conclusion.

4 JUDGE ABRAMSON: Absent a waiver it's
5 prohibited.

6 MR. T. SMITH: Absent a waiver. Correct.

7 JUDGE KARLIN: Well, we know that. Any
8 more questions for Mr. Smith? Thank you, Mr. Smith.

9 MR. T. SMITH: Thank you.

10 JUDGE KARLIN: Okay. I guess the Staff.

11 (Pause.)

12 Mr. Smith, Mr. Maxwell Smith.

13 MR. M. SMITH: Yes, Judge Karlin.

14 JUDGE KARLIN: Yes. All right. Maybe I
15 could ask you that question about purpose. And in one
16 of the purposes of the criteria for the waiver is that
17 the application of the Regulation would not serve the
18 purposes for which the Regulation was adopted. Are
19 there any citations you have or law you can give us as
20 to, you know, a clear statement of the purpose of
21 Appendix B and 1996 GEIS?

22 MR. M. SMITH: Not beyond what's already
23 been stated by the Applicant and the Mothers for
24 Peace. We do agree that the Applicant perhaps stated
25 that test too narrowly in their brief and that it must

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1 really be a two-part analysis, a generic determination
2 as well as one that's still correct, the assessment of
3 the environmental impact is properly stated.

4 JUDGE KARLIN: And what is your -- I mean,
5 I'm troubled by the failure of the -- what I see --
6 the concern -- the failure of the Applicant to address
7 what constitutes a prima facie case. Now, you in your
8 brief have talked about prima facie case.

9 MR. M. SMITH: That's correct, Your Honor.

10 JUDGE KARLIN: But isn't that a different
11 and lower threshold than the merits of whether a
12 waiver is warranted or not?

13 MR. M. SMITH: Certainly. That's in
14 *Black's Law Dictionary*.

15 JUDGE KARLIN: Yeah. Is there a unique --
16 is the law regarding prima facie case unique in the
17 Commission? Does the Commission see that any
18 differently than, you know, sort of the normal prima
19 facie?

20 MR. M. SMITH: I think it's reasonable to
21 read prima facie -- the term prima facie case in this
22 instance as the way it's normally read in legal
23 documents.

24 JUDGE KARLIN: I'm sorry. Could you
25 repeat that?

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1 MR. M. SMITH: I think it's reasonable to
2 interpret the word "prima facie" in this statute in
3 the way that -- or this regulation, excuse me -- in
4 the way that it's used in other legal instances and
5 situations.

6 JUDGE KARLIN: Okay. And so is it --
7 would it be reasonable to characterize it as able to
8 withstand a demurrer?

9 MR. M. SMITH: Yes.

10 JUDGE KARLIN: Yes?

11 MR. M. SMITH: I believe that it is. I
12 think that the major problem the Mothers for Peace's
13 petition for waiver has is that it suffers from a
14 logical error, in my opinion.

15 JUDGE KARLIN: And what is that?

16 MR. M. SMITH: The error is that, as we've
17 talked about in the draft revised GEIS, which they
18 rely on primarily for their statement that --

19 JUDGE KARLIN: Oh, could you speak more
20 into the mike?

21 MR. M. SMITH: Am I not loud enough?

22 JUDGE KARLIN: I think so. Just try to
23 speak up a little bit more.

24 MR. M. SMITH: Okay. I'll move in here.

25 JUDGE KARLIN: Thank you.

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1 MR. M. SMITH: The major problem I see
2 with the Mothers for Peace's petition for waiver is
3 that, as we've discussed, it rests on the analysis in
4 the draft revised GEIS which also relies on NUREG
5 17338 which explicitly exempts Diablo Canyon from its
6 discussion of the seismic analysis. So, at the most,
7 it can't really tell us anything about the adequacy of
8 the environmental impact analysis for Diablo Canyon
9 one way or the other. It doesn't show us that it's
10 inadequate. It doesn't show us that it's more
11 adequate. You know, they draw on other studies, too,
12 that tend to indicate that it's -- the analysis in the
13 1996 GEIS is probably more conservative but, at the
14 bottom, it doesn't tend to undermine it really in any
15 way. Nineteen ninety-six GEIS stands on its own.

16 JUDGE KARLIN: It stands on its own --
17 certainly we're not here I don't think to litigate
18 whether or not the 2009 draft GEIS, for example, is
19 adequate or inadequate or has got some omission in it
20 or doesn't have an omission in it. I think I hear
21 them saying it introduces new information which is --
22 they would allege is new and significant enough that,
23 you know, this needs to be considered in -- before the
24 license is reissued in Diablo Canyon.

25 MR. M. SMITH: I think the most you can

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1 say about the new information is that it doesn't apply
2 to Diablo Canyon. I don't think you can say that it
3 tends to undermine the 1996 GEIS's conclusions with
4 respect to Diablo Canyon.

5 JUDGE KARLIN: Well -- okay. They say --
6 the 2009 says it excludes Diablo Canyon.

7 MR. M. SMITH: Right. It says that --
8 well, it was only a small portion of that analysis.

9 JUDGE KARLIN: Right.

10 MR. M. SMITH: As the Applicant pointed
11 out, just with respect -- and Judge Trikouros asked,
12 too, with respect to seismic issues.

13 JUDGE KARLIN: And so you're suggesting
14 that's sort of a neutral point, is that, well, all
15 that does is say it excludes Diablo Canyon. It
16 doesn't cut one way or the other.

17 MR. M. SMITH: Right.

18 JUDGE ABRAMSON: And, therefore, you
19 believe that leaves the old GEIS in place standing on
20 its own.

21 MR. M. SMITH: Right, as it is today.

22 JUDGE ABRAMSON: As it affects -- yes.

23 JUDGE KARLIN: I understand that.

24 JUDGE ABRAMSON: Let me ask you --

25 JUDGE KARLIN: Let me finish one more

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1 thing.

2 JUDGE ABRAMSON: Go ahead.

3 JUDGE KARLIN: Which is but what about the
4 Shoreline Fault? I mean, that certainly is some sort
5 of new information.

6 MR. M. SMITH: Right.

7 JUDGE KARLIN: That it does -- I mean, to
8 me, it just seems like, Well, they've discovered a
9 brand new earthquake fault 600 meters off of the --
10 off from the plant, that's sort of new and might be
11 something we want to take into consideration.

12 MR. M. SMITH: I thought about the
13 Shoreline Fault a great deal when I was applying the
14 *Dominion Millstone* test to this case.

15 JUDGE KARLIN: Right.

16 MR. M. SMITH: And I think there's two
17 points about it. First, the Mothers for Peace didn't
18 really bring up the Shoreline Fault in their arguments
19 with respect to the second factor, and the other point
20 is that the proponent for waiver must demonstrate that
21 all four parts of the *Millstone* waiver test are met.
22 And while the Shoreline Fault --

23 JUDGE KARLIN: No. No. They don't need
24 to show that it's been met.

25 MR. M. SMITH: Well --

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1 JUDGE KARLIN: They need to show a prima
2 facie case.

3 MR. M. SMITH: Excuse me, Your Honor.
4 They need to show a prima facie case.

5 JUDGE KARLIN: All right.

6 MR. M. SMITH: And in this instance, the
7 Shoreline Fault might well satisfy element two to
8 demonstrate a prima facie case but it wouldn't
9 necessarily demonstrate element one nor elements three
10 or four.

11 JUDGE KARLIN: But let's -- it might show
12 element two, which is special circumstances; right?

13 MR. M. SMITH: Right.

14 JUDGE KARLIN: And it might show --

15 MR. M. SMITH: Unforeseen by the
16 Commission.

17 JUDGE KARLIN: -- element three which is
18 unique --

19 MR. M. SMITH: Perhaps element three, I
20 believe -- right.

21 JUDGE KARLIN: There's one that's special
22 circumstances and one that's unique, and those two --
23 you know, well --

24 MR. M. SMITH: I'm sorry, Judge Karlin.
25 I got elements two and three mixed up.

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1 JUDGE KARLIN: Yeah.

2 MR. M. SMITH: Element three is unique,
3 and I think the Shoreline Fault could well satisfy the
4 unique element of the waiver test, but it might not
5 satisfy one or four and arguably wouldn't satisfy two
6 in that the Commission seems to have foreseen --

7 JUDGE KARLIN: Well, four is whether it's
8 significant.

9 MR. M. SMITH: -- seismic --

10 JUDGE KARLIN: Four is whether it's
11 significant. Right?

12 MR. M. SMITH: Right, four is the
13 significance factor.

14 JUDGE KARLIN: And one is -- what's the --
15 -- what's the initial --

16 JUDGE TRIKOUROS: The purpose, the
17 purpose.

18 MR. M. SMITH: Purpose of the rule.

19 JUDGE KARLIN: And if the purpose of the
20 rule is to treat generic things generically and site-
21 specific things site-specifically, well, is it site-
22 specific?

23 MR. M. SMITH: I think that's too narrow
24 of a formulation of the purpose of the rule
25 incorporated in the 1996 GEIS. I think the purpose is

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1 to treat generic things generically but only to the
2 extent that results in a correct determination of the
3 environmental impacts of that issue.

4 If, you know, the test was just let's
5 treat generic things generically, then arguably you
6 can never waive any element of the 1996 GEIS because
7 they're always treating things generically.

8 JUDGE KARLIN: But they're saying this is
9 not a generic thing.

10 MR. M. SMITH: That -- I mean, the test
11 has to go farther than that.

12 JUDGE KARLIN: They're saying this is not
13 a generic thing because it's special, because it's
14 unique, because it's a new fault. I don't know.

15 JUDGE ABRAMSON: What about the conclusion
16 that the other Mr. Smith was referring to by the
17 Commission that these events are low for every plant
18 in the country?

19 MR. M. SMITH: Right. The Commission has
20 made that determination on several instances like in
21 Diablo Canyon as mentioned.

22 JUDGE ABRAMSON: And this was -- this was
23 a determination made after 1738; right? In a ruling -
24 - I've forgotten the specific ruling you were speaking
25 to, but there was a ruling where -- to which the

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1 Applicant's counsel referred wherein one section it
2 talked about 1738 and later they said, But this type
3 of event is low for all plants.

4 MR. M. SMITH: I believe that's the denial
5 of petition for rulemaking.

6 JUDGE ABRAMSON: Is that correct?

7 MR. T. SMITH: Yeah, and it's also in the
8 GEIS, the draft GEIS.

9 MR. M. SMITH: So --

10 JUDGE ABRAMSON: It's in the draft GEIS,
11 too.

12 MR. M. SMITH: I'll summarize, both the
13 draft revised GEIS and the denial of the petition for
14 rulemaking filed by New York State, Massachusetts,
15 and --

16 JUDGE ABRAMSON: The Commission makes that
17 determination.

18 MR. M. SMITH: -- the State of California.
19 Yes. The Commission's made that determination in
20 those documents as well.

21 JUDGE ABRAMSON: And would you -- and so
22 in the draft GEIS, if they make that determination,
23 how would you read that together with the comment that
24 one specific piece doesn't apply to Diablo Canyon? If
25 they're both in a draft GEIS; right?

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1 MR. M. SMITH: Right. They are. And I
2 think the Commission is relying on the other factors
3 discussed by the Applicant -- the fact that NUREG
4 17338 was focused on a plant in decommissioning, there
5 would be less chance for operator actions to avert the
6 impacts of the loss of water in the spent fuel pool --

7 JUDGE ABRAMSON: So would you conclude --

8 MR. M. SMITH: -- and other circumstances.

9 JUDGE ABRAMSON: Would you conclude that
10 taken together, those two statements advise that the
11 draft GEIS says this spent fuel pool events remain a
12 low probability event, a low consequence event -- I've
13 forgotten which way it's cast -- for all plants and,
14 therefore, for Diablo Canyon, even though they've
15 excluded Diablo Canyon for the one piece?

16 MR. M. SMITH: That is a conclusion the
17 draft revised GEIS reaches.

18 JUDGE ABRAMSON: To me, that's the end of
19 the story.

20 JUDGE TRIKOUROS: Let me put this all
21 together for myself because it's getting a bit
22 confusing. We have a 1996 GEIS that basically says,
23 We're fine with respect to spent fuel pool. The
24 likelihood of any consequences occurring are -- is
25 low. Therefore, the risk is acceptable.

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1 We -- and, therefore, we don't need to do
2 a SAMA for spent fuel pools.

3 JUDGE ABRAMSON: Well, that's where we --

4 JUDGE TRIKOUROS: That's 1996.

5 MR. M. SMITH: I might add another note to
6 that, Your Honor. In the draft revised GEIS, they
7 also point out that one of the reasons why the
8 Commission determined with respect to accidents that
9 spent fuel pools that the environmental impacts would
10 be low was that they would be bounded by the impacts
11 of a reactor accident.

12 JUDGE TRIKOUROS: Well, I'm not ready to
13 go there. Let me progress in --

14 MR. M. SMITH: Okay.

15 JUDGE TRIKOUROS: -- time here. Starting
16 with 1996 GEIS, then we move to the -- to this -- to
17 these Sandia studies that have been discussed by Mr.
18 Smith earlier which my understanding is that they
19 showed that even if you uncover fuel, it isn't
20 necessarily true that it will go to zirconium fire
21 stage.

22 MR. M. SMITH: Right.

23 JUDGE TRIKOUROS: Then subsequent to that
24 or all of that occurring around the same time is the
25 2001 event in which site-specific mitigation measures

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1 were required which are unknown, that there are
2 some -- they're alluded to but we don't know
3 specifically what they are.

4 Then we have this draft revised GEIS --

5 JUDGE ABRAMSON: I think you have the
6 rulemaking before that, petition for rulemaking;
7 right? -- before the draft GEIS?

8 JUDGE TRIKOUROS: The rulemaking came
9 before that ~~or~~ the request for --

10 MR. M. SMITH: I believe the rulemaking --
11 the denial for petition for rulemaking came before --

12 JUDGE TRIKOUROS: Came before.

13 MR. M. SMITH: -- the revisions to the
14 1996 GEIS.

15 JUDGE TRIKOUROS: All right. Fine. So
16 we'll throw that in there.

17 MR. M. SMITH: Right.

18 JUDGE TRIKOUROS: Now we have the draft
19 revised GEIS that reevaluates this using the
20 information from NUREG 1738 and concludes based on the
21 analyses that it performed, that 1738 performed, and
22 the Sandia work and the site-specific mitigation
23 measures, looking at that together, the Commission
24 believes that all plants in the United States have a
25 low risk of spent fuel pool accidents and,

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1 therefore, --

2 JUDGE ABRAMSON: Remain in Category 1.

3 JUDGE TRIKOUROS: -- yeah, and therefore
4 you don't need to do a SAMA analysis. But in that
5 1738 document, we do have an issue regarding the
6 seismic -- the conclusions that that study reached
7 regarding seismic were not applicable to Diablo
8 Canyon. But we're led to the conclusion that the
9 Commission knew that when they reached their
10 conclusion in the -- at the end of the revised draft
11 GEIS.

12 JUDGE KARLIN: So what's your question?

13 JUDGE TRIKOUROS: But, however, now we
14 have the Shoreline Fault.

15 MR. M. SMITH: That's correct.

16 JUDGE ABRAMSON: Which was -- which was --
17 was not that present when they did the draft GEIS?
18 Isn't that part of what's -- what drove this question?

19 MR. M. SMITH: May I consult with
20 technical staff for a moment?

21 JUDGE ABRAMSON: Yes.

22 (Pause.)

23 JUDGE KARLIN: If I may ask this question.
24 As I understand it, the Shoreline Fault was discovered
25 in November of 2008; correct?

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1 MR. M. SMITH: That's right.

2 JUDGE KARLIN: The draft GEIS 2009 was
3 issued on July 31st, 2009; correct?

4 MR. M. SMITH: Right.

5 JUDGE KARLIN: Approximately seven months,
6 eight months later, so the question really is does the
7 draft GEIS cite and cover the Shoreline Fault at the
8 Diablo Canyon facility?

9 MR. M. SMITH: Right, although of course
10 it takes a long time to develop a document like the
11 draft revised GEIS.

12 JUDGE KARLIN: Yeah. But that's the
13 question. Does the draft GEIS incorporate the fact
14 that there's a new Shoreline Fault that was discovered
15 eight months earlier? I suspect not. That's what I'm
16 asking.

17 JUDGE TRIKOUROS: But we do know that
18 it's --

19 JUDGE KARLIN: No, no. Let him ask --
20 answer. Does the answer --

21 MR. M. SMITH: No. It does not.

22 JUDGE KARLIN: It does not.

23 JUDGE TRIKOUROS: It doesn't.

24 JUDGE KARLIN: Okay.

25 JUDGE TRIKOUROS: I was going to say it

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1 simply isn't referenced so, therefore, we'd have to
2 assume it's not.

3 JUDGE KARLIN: All right.

4 MR. M. SMITH: To be honest, the draft
5 revised GEIS specifically cites NUREG 1738 which
6 exempts Diablo from a seismic analysis, so --

7 JUDGE TRIKOUROS: And these things were
8 happening in parallel. It would be hard to believe
9 that it was --

10 MR. M. SMITH: That's correct.

11 JUDGE TRIKOUROS: And then we have -- the
12 final point is that an unmitigated spent fuel pool
13 severe accident has consequences which are
14 unacceptable. That statement I think is still true.
15 I don't think it's -- the Sandia studies and the site-
16 specific mitigation are in fact mitigation factors,
17 not consequence factors and so, therefore, they go
18 towards the frequency of a severe accident, not
19 towards the consequence of a severe accident. Right?

20 MR. M. SMITH: Correct.

21 JUDGE TRIKOUROS: Okay. Is that it in a
22 nutshell? Did we leave anything out?

23 MR. M. SMITH: I think that's a good
24 timeline, Your Honor.

25 JUDGE KARLIN: Do you have any more

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1 questions for Mr. Maxwell Smith? No. Thank you, Mr.
2 Smith.

3 MR. M. SMITH: Thank you, Your Honor.

4 JUDGE KARLIN: Ms. Curran. Okay, Ms.
5 Curran. I'm not sure whether we have any questions.
6 Let's ask you -- let me ask you just to focus on the
7 prima facie case issue. All you have to do is make a
8 prima facie case for the waiver as far as I understand
9 it under 2.335(d). And if we decide you have a prima
10 facie case, we kick it up to the Commission to decide
11 whether you really do get a waiver. And if we decide
12 you don't, you're out.

13 So what -- what do you need to show in
14 order to just make a prima facie case?

15 JUDGE ABRAMSON: And how have you shown
16 it.

17 JUDGE KARLIN: And how have you shown it?
18 Prima facie case for a waiver, not the merits of the
19 waiver, just the prima facie case on the waiver.

20 MS. CURRAN: I -- to me, this just seems
21 like a show-stopper, like a prima facie -- it's in --
22 it's in the Government document, the Government. It's
23 not like we had to hire an expert to tell you this.
24 We relied on the Government document that says the
25 principal study we're relying on doesn't include

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1 earthquakes for Diablo Canyon.

2 JUDGE KARLIN: But isn't that sort of a
3 neutral point? It doesn't say it's good. It doesn't
4 say it's bad. It just says it doesn't cover it.

5 MS. CURRAN: We didn't analyze it.
6 Period. And if you look at the --

7 JUDGE KARLIN: But that's 2009.

8 JUDGE TRIKOUROS: But you heard the --

9 MS. CURRAN: Well, that's the most recent
10 thinking.

11 JUDGE TRIKOUROS: But you heard the
12 Applicant's comment that the conclusions -- while in
13 the body of the document it clearly indicates that
14 exclusion, in the final conclusion not of NUREG 1738
15 but of the draft revised GEIS, it doesn't exclude
16 Diablo Canyon in its statement.

17 MS. CURRAN: It does, actually. Can I
18 read it to you?

19 JUDGE TRIKOUROS: Sure.

20 MS. CURRAN: Because it's important to
21 read the words.

22 JUDGE KARLIN: Please.

23 MS. CURRAN: Okay. I'm reading from page
24 E-36.

25 JUDGE KARLIN: E-36?

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1 MS. CURRAN: Yes.

2 JUDGE KARLIN: All right. Hang on.

3 MS. CURRAN: In the middle of the second
4 full paragraph that starts "Furthermore ..." It says,
5 "Based on a more rigorous accident progression
6 analyses, the recent mitigation enhancements and NRC
7 site evaluations of every SFP in the United States,
8 the risk of an SFP zirconium fire initiation is
9 expected to be less than reported in NUREG 1738 and
10 previous studies."

11 Well, they say "NRC site evaluations of
12 every spent fuel pool," but they just finished saying
13 that they can't talk about -- they have nothing to say
14 about the Diablo Canyon site. So what they're saying
15 here is -- they're making a generalization about every
16 place else. Because if they had done a site-specific
17 seismic analysis at Diablo Canyon, they would have
18 said so. But this is -- this is about every place
19 else.

20 So, in other words, they're saying, We can
21 make generalizations about everything but Diablo
22 Canyon. If the NRC technical staff had done a site-
23 specific seismic analysis for Diablo Canyon, that
24 footnote wouldn't be in there or it would be
25 annotated.

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1 JUDGE KARLIN: Well, they also talk about
2 the key document is 1738.

3 MS. CURRAN: Right.

4 JUDGE KARLIN: They say that somewhere.

5 MS. CURRAN: It's key.

6 JUDGE KARLIN: And I looked at 1738 a bit
7 and you cited it a bit and it has -- it is rife with
8 statements that it doesn't cover the western United
9 States, it doesn't cover Diablo Canyon. It must say
10 that about half a dozen times.

11 MS. CURRAN: Right.

12 JUDGE KARLIN: How does that play into
13 this?

14 MS. CURRAN: Well, another thing that I
15 want to point out is in the environmental report, and
16 this is mentioned in our reply at page nine, PG&E says
17 that seismic, along with fire, are the dominant risks
18 for Diablo Canyon. So seismic is the dominant risk
19 and fire is probably related to seismic so that
20 they're saying for the dominant risk factor here, that
21 PG&E admits is the most important risk factor at
22 Diablo Canyon, the only technical study that the NRC
23 can cite that has to do with seismic analysis of spent
24 fuel pools -- there's no other technical study cited
25 in here -- they can't reach any conclusion about

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1 Diablo Canyon. And you yourselves mentioned the
2 Shoreline Fault. You know, recent information shows
3 they're still turning up problems. That's why the
4 authors of 1738 said what they said because this plant
5 happens to be located in a major earthquake zone.

6 So there isn't any -- there isn't anything
7 in this draft revised EIS or in the '96 EIS that
8 addresses that or overcomes it.

9 JUDGE TRIKOUROS: The overall conclusion
10 is on page E-37, and it provides no exclusions. If
11 plants like Diablo Canyon or San Onofre or Washington
12 Nuclear Power were not applicable in that conclusion,
13 do you think it was an oversight that they didn't
14 include them? I'm trying to understand why in the
15 overall conclusion, which is really looking at the
16 bigger picture, including Sandia, looking at site-
17 specific mitigation, all of that, that they reached
18 that conclusion.

19 MS. CURRAN: Well, for one thing, the
20 context of the conclusion that I just read to you and
21 that is in that paragraph, that's the last paragraph
22 before Section E.3.7.2, that whole discussion is in
23 the context of terrorist attacks.

24 JUDGE TRIKOUROS: Right.

25 MS. CURRAN: So I think probably that was

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1 the main point -- and this is not the Commission.
2 This is the NRC Staff -- that their main point was, We
3 dealt with how you could intentionally cause a pool
4 fire and we reduced the risk to an acceptable level.
5 That doesn't -- there isn't anything in this language
6 -- no study that's cited, nothing -- to indicate the
7 NRC, after reading what it says in 1738, went and
8 said, Okay, let's do an analysis and see if we can get
9 enough information to make a generalization. It isn't
10 there.

11 JUDGE TRIKOUROS: Right.

12 JUDGE ABRAMSON: So what new information
13 is here when the final conclusion says in this report
14 that we're seeing, this draft GEIS that's being cited
15 as the new information, what new information is there
16 when the final conclusion says we're back where we
17 were for all plants in the United States? Or am I
18 missing something?

19 MS. CURRAN: Well, yeah. I think you are
20 missing something, which is that we're not back where
21 we were. We're not back where we were at all. We
22 have come quite a long way from the 1996 GEIS in which
23 the NRC technical staff, relying to a significant
24 extent on studies of low density pool storage, said,
25 Spent fuel pool fires are not credible. Just won't

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1 happen. Don't have to worry about it.

2 Then NUREG 1738 came out. The Staff
3 admitted for the first time -- I was personally
4 involved in a case where during that case it came out
5 that the NUREG 1738, my -- our expert witness was the
6 witness who said fuel can burn if it's uncovered. And
7 in their pleading, the NRC Staff basically said our
8 expert doesn't know what he's talking about. Who
9 would say a thing like that? It's ridiculous.

10 And then the Staff came out and said, We
11 have concluded that, yes, if the fuel is uncovered, it
12 will burn. And then thereafter, the NRC began to
13 study ways to mitigate that effect and that was when
14 we got all the, you know, the Sandia studies and the
15 orders in the individual cases. But that conclusion,
16 that if fuel is uncovered it can burn, that's really
17 different than what is in the '96 EIS and, therefore,
18 we can't go back to that place where you basically say
19 it's not a credible event.

20 Basically, where the NRC now is saying,
21 It's credible but if you mitigate it, if you look at
22 some of these factors that are security-related
23 information, it's not as bad as originally thought in
24 1738.

25 JUDGE ABRAMSON: Sorry. I'm not making

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1 myself clear. What Judge Trikouros is referring to,
2 as was the Staff and the Applicant, is a conclusion on
3 E-37 --

4 MS. CURRAN: It's page E-36, isn't it? Or
5 am I missing something on E-37?

6 JUDGE ABRAMSON: Weren't you reading from
7 E-37?

8 JUDGE TRIKOUROS: Well, no. I paraphrased
9 from the conclusion. The conclusion on page E-37 does
10 not provide any exclusions. That's all.

11 JUDGE ABRAMSON: On page E-37, not E-36
12 that you were reading from --

13 JUDGE TRIKOUROS: Right, E-37.

14 MS. CURRAN: Okay.

15 JUDGE TRIKOUROS: That's the overall
16 conclusion in paragraph -- it's Section E.3.7.3, and
17 it doesn't provide any exclusions. Now, and I'm
18 asking how one would interpret that.

19 MS. CURRAN: I would interpret this as not
20 covering the seismic risk because there is no
21 documented study, nothing, that contradicts the
22 statement in NUREG 1738. That is the only statement
23 that the NRC points to about seismic risk and it says,
24 We cannot generalize about Diablo Canyon. And we have
25 the environmental report saying fire and seismic are

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1 the dominant severe accident risks.

2 JUDGE TRIKOUROS: It is certainly
3 confusing from -- at least from my point of view that
4 one could know that Sandia studies and site mitigation
5 measures overcompensate or compensate for the seismic
6 which they say they don't know.

7 So certainly that is confusing. I'll
8 grant you that. I'm not sure how they reached that
9 conclusion. They don't explain that in here. And we
10 would -- we would add to this that the Shoreline Fault
11 is not considered in this conclusion. And of course
12 this is only a draft. I don't know if that will be
13 fixed later. But -- so certainly we can say that.

14 MS. CURRAN: Yes.

15 JUDGE TRIKOUROS: Is there more?

16 MS. CURRAN: I really think that the --
17 aside from the Shoreline Fault, the most important
18 factor here is that there is one -- only one study
19 that is referenced in this draft revised EIS that
20 talks about seismic risks to the fuel pools in
21 California, including Diablo Canyon, and that's NUREG
22 1738. And absent some documented study that shows,
23 Well, the NRC now has looked at the seismic risk and
24 it's acceptable, then I think what you're left with is
25 that the generalization has a footnote to it which is

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1 that footnote you see on page E-35, that the
2 generalization and the conclusion still is footnoted
3 with that exception for Diablo Canyon.

4 JUDGE KARLIN: Page 33, I believe.

5 MS. CURRAN: I'm sorry. Page 33.

6 JUDGE TRIKOUROS: Oh, 33.

7 JUDGE KARLIN: Page 33. Any more
8 questions? You okay?

9 JUDGE TRIKOUROS: Yeah. That's fine.

10 JUDGE KARLIN: All right. I think --
11 thank you, Ms. Curran. We'll take a break for ten
12 minutes. I just realized there's a clock back there,
13 so we can -- we can keep track here. Let's see. What
14 does that say?

15 JUDGE ABRAMSON: Three twenty-two.

16 JUDGE KARLIN: Three twenty-two. So can
17 we reconvene at 3:33? I mean, we really want to be --
18 I'm sorry. We've been taking a lot of time with these
19 questions. It's helpful to us. But now I think we've
20 got to crank it up a little bit or be here very late.
21 So we'll take a break until 3:33. Please be back in
22 here. We are adjourned.

23 (Recess from 3:22 p.m., until 3:33 p.m.)

24 JUDGE KARLIN: Please be seated. Thank
25 you. The Atomic Safety and Licensing Board will now

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1 reconvene. It is 3:33, and thank you for being
2 prompt. I know it's a long day and everyone's got to
3 take a bit of a break. But we've got two more
4 contentions to do and I think these may go a little
5 more quickly because we've covered a lot of ground.

6 So, Ms. Curran, we are now in Contention
7 EC-3. If you could tell us what that contention is
8 all about or at least give us a read -- read the
9 contention to us.

10 MS. CURRAN: Okay. EC-3, "The
11 environmental report fails to satisfy NEPA because it
12 does not evaluate the environmental impacts of an
13 attack on the Diablo Canyon spent fuel pool during the
14 operating license renewal term." And this contention
15 is also supported by the waiver petition.

16 JUDGE KARLIN: Right. So you -- you
17 acknowledge, I believe, in your pleadings that in
18 order to get this -- you need a waiver in order for
19 this contention to be admitted?

20 MS. CURRAN: Yes.

21 JUDGE KARLIN: And so you're pursuing a
22 waiver. What's the difference between this contention
23 and EC-2? One of them deals with -- is it only the
24 accident, the initiator's different? One's a --

25 MS. CURRAN: Yes.

1 JUDGE KARLIN: One's a earthquake. One's
2 a terrorist attack. That's the only -- key
3 difference?

4 MS. CURRAN: Yes.

5 JUDGE KARLIN: And --

6 MS. CURRAN: But they share something in
7 common which is that they have -- the draft revised
8 GEIS in each case indicates there are site-specific
9 factors that contributed to the -- to the NRC's
10 analysis. In the case of EC-3, what we're -- what
11 we're after is to get a better understanding of what
12 was the site-specific analysis for Diablo Canyon which
13 is discussed in a draft revised GEIS as -- in that
14 sentence that I read on page E-36. It says, We've
15 looked at every site. We've imposed mitigation
16 measures at every site. We'd like to know what that
17 is and we'd like the environmental report to discuss
18 it and we'd like to be able to see it, comment on it.

19 JUDGE ABRAMSON: Would you like terrorists
20 to have access to it? You don't want that in the
21 public eye, do you?

22 MS. CURRAN: Well, to the extent the
23 information can be publicly disclosed, yes. But, if
24 not, then when we get to -- we haven't even seen what
25 the documents are, so the first step would be give us

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1 the reference documents, disclose them to the extent
2 they can be disclosed under the FOIA, and then we
3 would consider whether to ask for further access to
4 the information.

5 JUDGE KARLIN: But with regard to the
6 draft -- 2009 draft GEIS, we're referring to page E-36
7 and E-33 -- now, I look at E-33 and there it says,
8 "The initiating events included in the analysis are
9 listed below." First one, "Seismic for central and
10 eastern United States sites." The quote goes on to
11 say "excludes Diablo Canyon."

12 So with regard to seismic, I see 2009
13 draft GEIS explicitly excluding Diablo and marking it
14 out as, well, we didn't cover that. I don't see any
15 such exclusion for terrorist attacks for Diablo or
16 something like that. Why is -- does -- so I'm
17 troubled by that. I mean, I see something unique
18 about Diablo with regard to seismic acknowledged here
19 or at least excluded. But I don't see that with
20 regard to anything special about Diablo and
21 terrorists.

22 JUDGE TRIKOUROS: On page 21 of your
23 petition, you specifically say "the potentially
24 significant environmental impacts of spent fuel pool
25 accidents that is not considered in the 1996 license

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1 renewal GEIS." What are they? As Judge Karlin says,
2 they're not seismic-related. What are we talking
3 about? What are these significant impacts that we're
4 talking about that are --

5 MS. CURRAN: The impacts of a successful
6 attack would be a release of the inventory of the
7 spent fuel pools to the environmental and the airborne
8 release. Is that what you're asking?

9 JUDGE TRIKOUROS: Well, the terrorist
10 attacks are not -- terrorist attacks are not -- are
11 they -- let me ask: Are they explicitly considered in
12 the new information? I mean, is there something new
13 that I'm missing here?

14 MS. CURRAN: Yes. In the draft revised
15 GEIS, the NRC Staff claims to have considered the
16 impacts of attacks on spent fuel pools. That's one of
17 the things that's discussed.

18 JUDGE TRIKOUROS: And where is that?

19 MS. CURRAN: Page E-35 and E-36, I
20 believe. It's right after the discussion of NUREG
21 1738.

22 JUDGE TRIKOUROS: Right. NUREG --
23 exactly. NUREG 1738 considered terrorist attacks.

24 MS. CURRAN: Well, no. I'm talking about
25 the draft revised GEIS.

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1 JUDGE KARLIN: I think you're referring to
2 page --

3 MS. CURRAN: I'm sorry.

4 JUDGE KARLIN: -- EC- -- no, E-4 of the
5 July 2009 -- the accident risk and impact assessment,
6 and E-6 there is a discussion of the San Luis Obispo
7 Mothers for Peace decision and they talk about
8 contamination in land and weight and the Commission
9 essentially concludes that, "In respect to the
10 decision of the Ninth Circuit, the NRC will prepare an
11 analysis of the environmental impacts of a terrorist
12 attack for licensing actions at facilities within
13 geographic boundaries of the Ninth Circuit," which is
14 California. Is that what you're talking about as
15 having some special terrorist thing?

16 MS. CURRAN: Well, I -- I'm sorry. You
17 were reading from E-6?

18 JUDGE KARLIN: I believe it's page E-6, E-
19 7, and then E-8 is just before -- if you have that in
20 front of you.

21 MS. CURRAN: Yeah, and my understanding
22 was that the NRC said, We will do this. And then if
23 you flip over to page E-34, --

24 JUDGE KARLIN: All right. I'm on it.

25 MS. CURRAN: -- starting -- actually

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1 starts on E-35 --

2 JUDGE KARLIN: E-35

3 MS. CURRAN: -- I would say.

4 JUDGE TRIKOUROS: Well, there's a
5 discussion on E-35.

6 MS. CURRAN: What?

7 JUDGE TRIKOUROS: There's a discussion on
8 E-35 starting on line 16, I believe.

9 MS. CURRAN: Yeah, and this is what I was
10 assuming was the NRC's -- considers that it's
11 fulfilling the court's mandate by providing this
12 discussion of the likelihood of consequences of an
13 attack on the spent fuel pools and it says, "Because
14 we've taken these mitigative measures, it's not a
15 significant risk. So where -- in the mitigative
16 measures that were employed and the site-specific
17 analyses that are referred to on page E-36, they are
18 described as site-specific and the generic EIS doesn't
19 give the name of every separate nuclear plant. They
20 just say, We did site-specific analyses. And what
21 we're saying is, Well, one of your site-specific
22 analyses was for Diablo Canyon and, therefore, we
23 don't -- we think we are entitled to see what you did
24 in this -- in the context of this licensing case, that
25 you -- the NRC needs to disclose to the neighbors of

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1 the Diablo Nuclear Plant what was the site-specific
2 analysis that was done and, again, to the extent
3 possible under the Freedom of Information Act which
4 would mean identifying the analyses that were
5 performed, identifying whatever orders there were, and
6 disclosing as much as is consistent with the FOIA.

7 That -- we're asking for a waiver for the
8 purpose of getting that information and participating
9 in that decisionmaking process because the information
10 isn't given in a generic rulemaking and it's site-
11 specific. It's appropriate to do it in a site-
12 specific way because that's how the analysis was done.

13 JUDGE TRIKOUROS: Well, let's separate
14 this into two parts. There are site-specific
15 mitigation measures and there are the Sandia studies
16 of a more realistic consideration of spent fuel pool
17 cooling under scenarios that might lead to water --
18 loss of coolant.

19 Which are you referring to here?

20 MS. CURRAN: Well, you know, honestly I
21 don't know exactly what was done because it's
22 described only in very general terms here. So, for
23 instance, you have a sentence here, "Based on the more
24 rigorous accident progression analyses," which I think
25 that might refer to the Sandia studies --

1 JUDGE TRIKOUROS: Right.

2 MS. CURRAN: -- "the recent mitigation
3 enhancements," which I think probably means to plant-
4 specific orders" --

5 JUDGE TRIKOUROS: Right.

6 MS. CURRAN: -- "and NRC site evaluations
7 of every SFP in the United States" -- I don't know
8 what that is because there's no reference for that --
9 "the risk of an SFP zirconium fire initiation is
10 expected to be less than reported in NUREG 1738."

11 So we are -- and this is made in the
12 context of post-September 11th, so our -- we infer
13 that is in response to the threat of an attack,
14 whatever measures that were taken, and we're saying
15 this seems to be a very site-specific analysis, to a
16 significant degree, and, therefore, we ask for a
17 waiver so that the issues can be addressed in the
18 context of this individual licensing case.

19 JUDGE TRIKOUROS: The -- well, first of
20 all, I doubt very much if Sandia analyzed spent fuel
21 pool cooling scenarios for every reactor in the United
22 States, so likely they did it on a generic basis.
23 They picked likely a representative plant in each of
24 the groupings and probably did that. I don't know for
25 sure what they did.

1 But with respect to the -- with respect to
2 site-specific mitigation measures -- and we mentioned
3 this earlier -- everything they did, they did to come
4 up with generic conclusions. They weren't trying to
5 be -- they weren't trying to reach conclusions that
6 were specific to each plant in the United States.
7 From all indications, they just wanted to reach
8 generic conclusions in this document.

9 So how would it help you to get all that
10 information? I mean, what would --

11 MS. CURRAN: It would help --

12 JUDGE TRIKOUROS: What would be the end?

13 MS. CURRAN: -- to evaluate whether the
14 impacts of an attack have been reduced to an
15 acceptable level, to an insignificant level.

16 JUDGE ABRAMSON: Ms. Curran, can we walk
17 through the legal request here so I understand. I
18 think we're getting distracted by wanting the FOIA
19 information which you don't make a request of us for.
20 Let's go through what it is precisely that you're
21 asking.

22 You made a contention that the ER's
23 insufficient because it didn't properly consider the
24 risk of spent fuel pool accidents at this plant.

25 JUDGE TRIKOUROS: From terrorist attacks.

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1 JUDGE ABRAMSON: From terrorist attacks.

2 All right. Is that correct?

3 MS. CURRAN: Yes.

4 JUDGE ABRAMSON: Okay. And in order to be
5 able to get that contention admitted, you need a
6 waiver of a specific Commission regulation or rule
7 that says they're out of the scope of license renewal.
8 Right?

9 MS. CURRAN: That's right.

10 JUDGE ABRAMSON: So what we're addressing
11 first is the question of the waiver, and the waiver
12 rests on the premise that there's new and significant
13 information in the draft EIS; is that correct? -- the
14 new draft GEIS?

15 MS. CURRAN: Yes.

16 JUDGE ABRAMSON: Okay. So that's where
17 we're going. If we were to grant the waiver, then you
18 would have to pursue receiving this information so you
19 could pursue your contention; right?

20 MS. CURRAN: Right.

21 JUDGE ABRAMSON: So we should be focusing
22 now on the waiver, I think.

23 MS. CURRAN: Okay. And the new and
24 significant information --

25 JUDGE ABRAMSON: Right.

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1 MS. CURRAN: -- is information showing
2 that the -- the NRC (a) considers the impacts to be,
3 first of all, significant, significant enough to
4 warrant mitigation measures and, two, that the
5 analysis of the significance of the impacts and the
6 mitigation measures are, according to the draft
7 revised EIS, to some extent site-specific.

8 JUDGE ABRAMSON: Yes.

9 MS. CURRAN: And that is why the generic
10 EIS is inadequate to do the job, but we need a site-
11 specific analysis.

12 JUDGE ABRAMSON: So the draft GEIS
13 concludes that spent fuel pool accidents caused by
14 terrorist attacks are low enough frequency that they
15 need not be dealt with, low enough risk, I guess, that
16 they need not be dealt with. And what you're saying
17 is the new --

18 JUDGE KARLIN: Wait a second. Do you want
19 an answer from her?

20 JUDGE ABRAMSON: Yes. She -- is that
21 correct?

22 MS. CURRAN: Yes.

23 JUDGE KARLIN: Okay. She nodded but --

24 JUDGE ABRAMSON: You're right. Thank you.
25 And your assertion is that that conclusion, which is

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1 in the draft GEIS, rests upon information that's in
2 the draft GEIS and that's the new and significant
3 information and you don't know what that new and
4 significant information is and you need a waiver so
5 you can find -- a waiver of the reg. that says spent
6 fuel pool accidents caused by terrorist attacks are
7 outside the scope, you need a waiver of that so you
8 can find out how the Commission concluded that these
9 remain low-risk events?

10 MS. CURRAN: That's right because the
11 information appears to be site-specific.

12 JUDGE ABRAMSON: Yeah. Okay. I
13 understand.

14 JUDGE TRIKOUROS: But do you see a
15 uniqueness in Diablo Canyon here?

16 MS. CURRAN: Well, every --

17 JUDGE TRIKOUROS: Everything you just said
18 I think can be said for every plant in the United
19 States.

20 JUDGE ABRAMSON: Yeah, but we don't
21 know --

22 MS. CURRAN: Every plant was dealt with in
23 a unique way, yes. So if we were neighbors of a
24 different nuclear plant, we would say the same thing.
25 Each plant was treated as a unique entity for purposes

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1 of the NRC's analysis.

2 JUDGE ABRAMSON: We --

3 JUDGE KARLIN: Well, isn't that a problem,
4 though?

5 JUDGE TRIKOUROS: I don't know --

6 JUDGE KARLIN: Because a waiver, you have
7 to ostensibly at least -- one of the *Millstone* factors
8 is you have to show there's something unique about
9 this plant and I thought you were talking -- spent
10 some time talking about the agricultural, you know,
11 land and the -- California's agriculture is three
12 times -- average is three times higher than the
13 nation's and that sort of thing.

14 MS. CURRAN: Well, that's one of the
15 factors that's unique but it's not the only one, that
16 if the Commission says, We looked at each plant
17 separately, that is a way of saying each plant is
18 unique.

19 JUDGE KARLIN: Well, no, no. I'm not so
20 sure that that's logically true. I mean, isn't that
21 just basic inductive reasoning; that is, in order to
22 reach a general conclusion, you take a whole bunch of
23 data points and look at each one of them individually
24 and then you reach some generic conclusion that, We've
25 looked at all of these and they're all the same with

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1 regard to X.

2 MS. CURRAN: Well --

3 JUDGE KARLIN: That's how you reach a
4 general -- a generic conclusion.

5 MS. CURRAN: It might be --

6 JUDGE KARLIN: You look at individuals.

7 MS. CURRAN: For instance, say in NUREG
8 1150, the severe accident report, there's
9 representative nuclear plants.

10 JUDGE KARLIN: Representative. I see.
11 Okay.

12 MS. CURRAN: Analyzed and then
13 generalizations are made. But here it says, "The NRC
14 did site evaluations of every SFP --

15 JUDGE KARLIN: Right.

16 MS. CURRAN: -- in the United States."
17 That to us indicates something different, not we took
18 a representative sampling but every single one we felt
19 warranted -- this is a very important --

20 JUDGE KARLIN: Isn't that better than a
21 representative sample? That's a hundred percent
22 sampling and that's exactly the sentence that Mr.
23 Tyson Smith was quoting as proving his case with
24 Contention EC-2 which is, Well, look, they've already
25 concluded that there's no problemo.

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1 MS. CURRAN: But, to me, it seems like the
2 NRC is having it both ways. It's saying to the
3 public, We take this so seriously -- we take this very
4 seriously. That's a good thing. The NRC takes spent
5 fuel pool risk very seriously and, therefore, it has
6 done a separate analysis of every single spent fuel
7 pool in the country. Terrific.

8 But if you're going to do that, you can't
9 claim it's generic. If you're going to say to people,
10 We're protecting you because we looked at your nuclear
11 plant, you know, to the neighbors at Diablo Canyon,
12 We're looking at Diablo Canyon but we're not going to
13 tell you what we did because it's generic. That's --
14 you can't have it both ways.

15 JUDGE KARLIN: Okay.

16 JUDGE TRIKOUROS: I'm still confused. Are
17 you referring to the Sandia work or are you referring
18 to the other?

19 MS. CURRAN: I'm referring to the NRC --
20 there's no documentation of what this is, but in this
21 draft revised EIS, it says, "The NRC did site
22 evaluations of every SFP in the United States."

23 JUDGE ABRAMSON: That's her -- that's the
24 assertion. Let's --

25 JUDGE TRIKOUROS: Okay.

1 JUDGE KARLIN: Let me -- okay. I think --
2 may I jump to another -- in terms of the unique -- the
3 land contamination issue, you talk about the
4 photoagricultural area that the plant is located in,
5 help me with -- and I'm not sure I understand. There
6 is a COI 08-26; right? This is a Pacific Gas &
7 Electric Diablo Canyon ISFSI, independent spent fuel
8 storage installation decision, of October 23, 2008.
9 And there, the Commission talks about the assertion in
10 the context of the spent fuel -- I'm sorry -- the
11 spent fuel installation, not the pool, that you had
12 alleged. I think you represented the Mothers for
13 Peace in that case. That was, you know, an important
14 agricultural area, and the Commission seems to reject
15 that concept and say, quote on page 520, 68 NRC 509,
16 page 520, "PG&E lists several additional
17 characteristics at Diablo Canyon site." Skip. "First
18 of all, the power plant site is large and is located
19 in a sparsely populated region so the number of
20 exposed individuals would be small. The costs of
21 evacuation or relocation would be small. Moreover,
22 PG&E also owns and controls a large area of land
23 surrounding the site. Relatively little of this land
24 is productive and the nearest dairy is 12 miles away,
25 so any costs associated with protective actions for

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1 ingestion pathways would be minimal."

2 Now, the Commission cited that seemingly
3 with approval and ruled against you with Commission
4 Chairman Jaczko, now dissenting.

5 Have you appealed that decision? What's
6 the status of that decision?

7 MS. CURRAN: Yes. We have but on a
8 different issue. But I think --

9 JUDGE KARLIN: And has it been decided?

10 MS. CURRAN: -- I can explain that -- I
11 guess I'd like to address your question about the
12 consequences of the accident. The scenario that was
13 analyzed by the NRC in that particular case was one in
14 which say an airplane was flown into a cask or a truck
15 bomb set off in which you would have -- the cask would
16 be opened up but there would be some minor --
17 relatively minor escape --

18 JUDGE KARLIN: Okay.

19 MS. CURRAN: -- of radioactive material.
20 What we were positing in that case, which was
21 rejected, but which we're also positing in this
22 particular hearing request, is if fuel catches fire,
23 it's very different -- very, very different situation.
24 The cesium is basically atomized, goes high into the
25 atmosphere, and goes all over the place a la

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1 Chernobyl. That kind of thing is what we're talking
2 about. It would have very far-reaching consequences.

3 The kind of accident that was evaluated in
4 that case, one of our criticisms of the decision was
5 we didn't think it was a credible -- it wasn't
6 something that would have been attempted because it
7 would have very little effect.

8 JUDGE KARLIN: But -- okay. So the
9 distinction between that case is it was a spent fuel
10 cask which would not be -- is different from a spent
11 fuel pool where there would be a lot of fuel lots
12 presumably close together or something like that.

13 MS. CURRAN: It's really the difference
14 between impact to a cask and a fire.

15 JUDGE KARLIN: Yeah. Right.

16 MS. CURRAN: A fire in any spent fuel
17 assembly would have significant off-site effects.

18 JUDGE KARLIN: And is -- what's the status
19 of this case? -- COI- -- is it on appeal?

20 MS. CURRAN: It is on appeal in the Ninth
21 Circuit. Yes.

22 JUDGE KARLIN: And has it been briefed?

23 MS. CURRAN: Yes. It's been briefed.

24 JUDGE KARLIN: Argued?

25 MS. CURRAN: And we are awaiting an order

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1 -- we don't know whether we'll have an oral argument
2 or a decision.

3 JUDGE KARLIN: Okay. All right. Thank
4 you.

5 JUDGE TRIKOUROS: What do you say about
6 the argument that's made that there's really no
7 difference whether the failures are human sabotage-
8 related or just random failures or common mode
9 failures or whatever might cause a core melt? You're
10 really talking about the same thing.

11 MS. CURRAN: Well, you might be talking
12 about the same thing in terms of the consequences if
13 the release were to happen. But we presume that the
14 mitigative measures would be related to the way the
15 release could be caused. So, for instance, if you
16 were trying to mitigate an attack on a spent fuel
17 pool, you might try to protect the pool from an
18 attack. That would be a way to mitigate the pool
19 fire. Whereas if you were trying to protect it from
20 something falling in it, then you do something
21 different.

22 JUDGE TRIKOUROS: Are we -- I think we're
23 -- I think I'm getting the impression we're talking
24 apples and oranges. The site-specific mitigation
25 measures were spent-fuel-pool-related; right? This

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1 contention is reactor-related. Am I missing
2 something? There's nothing --

3 MS. CURRAN: This contention is pool-
4 related.

5 JUDGE KARLIN: This is pool. This is
6 pool.

7 JUDGE ABRAMSON: This is spent fuel pool.

8 MS. CURRAN: Number four is reactor-
9 related.

10 JUDGE KARLIN: Four is reactor.

11 JUDGE TRIKOUROS: Yeah.

12 JUDGE KARLIN: We're on three.

13 JUDGE ABRAMSON: We're still on three,
14 Nick.

15 JUDGE TRIKOUROS: Oh, I'm sorry.

16 MS. CURRAN: It's okay. I'm really
17 getting tired.

18 JUDGE TRIKOUROS: Yeah. It's been a long
19 day.

20 JUDGE ABRAMSON: Let's get it over with.
21 Move to four.

22 JUDGE KARLIN: I'm not tired. We're ready
23 to go five more hours.

24 JUDGE ABRAMSON: Let's hear it. Got any
25 questions for anybody else on this?

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1 JUDGE KARLIN: Any more questions for Ms.
2 Curran at the moment? We will have an opportunity to
3 ask her again.

4 AUDIENCE MEMBER: Excuse me. Could you
5 speak into the microphones. We can't hear the panel
6 very well. Could you use the microphones.

7 JUDGE KARLIN: All right. We will try to
8 do that. I'm sorry.

9 AUDIENCE MEMBER: Thank you. This morning
10 it was clear. Now it's not. Thank you.

11 JUDGE KARLIN: Okay. Sorry about that.
12 We will -- we'll all try to do a little bit better.

13 JUDGE TRIKOUROS: Are they on?

14 JUDGE KARLIN: We now have two sets of
15 mikes because, well, the court reporter needs a
16 separate mike.

17 JUDGE TRIKOUROS: Are these on? Do we
18 know they're on?

19 JUDGE KARLIN: I believe that they are on.
20 Yes.

21 JUDGE TRIKOUROS: Is that better? Testing
22 1, 2, 3.

23 JUDGE KARLIN: The light shows that it is
24 on. Just --

25 AUDIENCE MEMBER: Judge Trikouros, you are

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1 the one I cannot hear.

2 JUDGE ABRAMSON: Is your yellow light on?
3 His light's --

4 JUDGE TRIKOUROS: Can you hear me if I
5 speak into this like that?

6 JUDGE KARLIN: Your light shows to be on.
7 Press that button, that yellow button. Maybe we can
8 turn the volume up a little bit without getting too
9 much --

10 JUDGE TRIKOUROS: Is that better?

11 AUDIENCE MEMBER: That's good. Thank you.

12 JUDGE TRIKOUROS: Somehow I think I shut
13 off --

14 AUDIENCE MEMBER: Thank you.

15 JUDGE TRIKOUROS: Thank you.

16 JUDGE KARLIN: All right. Mr. Tyson
17 Smith.

18 MR. T. SMITH: Yes.

19 JUDGE KARLIN: Yes. In your reply -- I
20 have a question and I don't think I have too many for
21 you, but the reply at page 15 says that the 1996 GEIS
22 considered only sabotage against reactors but not
23 considered attacks on spent fuel pools. But it
24 says -- and I think I've got a quote here -- "Both the
25 means of attack and the alternatives for avoiding or

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1 mitigating attacks would be different for a reactor
2 than for a spent fuel pool and, thus, the
3 environmental analysis of those impacts would be
4 different." I'm sorry. That's what the reply says.

5 MR. T. SMITH: Right.

6 JUDGE KARLIN: That's what San Luis Obispo
7 is saying, that "the means of attack and the
8 alternatives for avoiding the attack would be
9 different for a reactor than for a pool and, thus, the
10 analysis of those impacts would be different."

11 How do you respond to that?

12 MR. T. SMITH: Well, the 1996 GEIS did
13 include the risks of a terrorist attack on the spent
14 fuel pools.

15 JUDGE KARLIN: Sabotage.

16 MR. T. SMITH: Sabotage.

17 JUDGE KARLIN: It covered sabotage. I
18 understand. Okay.

19 MR. T. SMITH: Correct. I think that's an
20 incorrect statement.

21 JUDGE KARLIN: Well, but let me ask the
22 other question then. Does -- when you're looking at
23 a -- the means of attack and the alternatives for
24 avoiding an attack, would the alternatives for
25 avoiding an attack on a spent fuel pool be different

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1 than avoiding an attack on say an ISFSI or a reactor?

2 MR. T. SMITH: Potentially.

3 JUDGE KARLIN: Potentially.

4 MR. T. SMITH: There's a range of
5 responses that could be taken to avoid or mitigate the
6 consequences of an attack, depending on the form of
7 the attack, the difference if it's individual
8 personnel on the ground versus some sort of aircraft.

9 JUDGE KARLIN: Right. And I'm not sure
10 whether this is a SAMA contention necessarily, but do
11 you -- they seem to be saying that when you're doing
12 a SAMA analysis, severe accident mitigation
13 alternatives analysis, that you don't just look at
14 mitigation but you look at methods for avoiding the
15 severe accident as well.

16 Do you agree that avoidance and prevention
17 is a part of a SAMA analysis?

18 MR. T. SMITH: Yes, I do, but this is not
19 a SAMA analysis.

20 JUDGE KARLIN: Okay.

21 MR. T. SMITH: Again, this is -- we're
22 talking about the spent fuel pool --

23 JUDGE KARLIN: Right.

24 MR. T. SMITH: -- rather than a severe
25 accident.

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1 JUDGE KARLIN: Some of the contentions are
2 SAMA analysis.

3 MR. T. SMITH: Right.

4 JUDGE KARLIN: I don't --

5 MR. T. SMITH: This one I don't believe is
6 characterized -- I would not characterize this as a
7 SAMA contention.

8 JUDGE KARLIN: Okay.

9 MR. T. SMITH: With respect to mitigation
10 alternatives, however, the Commission has broadly
11 required that all plants across the country implement
12 mitigation measures to maintain or restore spent fuel
13 cooling in the event of a terrorist attack. Those
14 have been required for all plants. It's been
15 confirmed at all plants by an NRC review and
16 inspection. And that was the basis for the generic
17 conclusion.

18 JUDGE KARLIN: You're talking about the
19 orders?

20 MR. T. SMITH: I'm talking about the
21 orders which were subsequently embodied in a
22 rulemaking on which the public, including the Mothers
23 for Peace, of course, had a chance to comment.

24 JUDGE KARLIN: Okay.

25 JUDGE TRIKOUROS: That and the Sandia

1 analyses.

2 MR. T. SMITH: The Sandia analysis is also
3 part of the Commission's conclusions in the revised
4 GEIS or draft GEIS.

5 And you asked about -- just briefly, I
6 want to clarify the status of COI 08-26.

7 JUDGE KARLIN: Yes.

8 MR. T. SMITH: That case did involve an
9 appeal that's currently, as Ms. Curran mentioned,
10 before the Ninth Circuit, but as I understand it, they
11 didn't appeal that aspect of the Commission's
12 decision, which was Contention 2. They've appealed it
13 on process grounds, the type of hearing that they were
14 given, and their access to documents and not on the
15 basis of that conclusion that you were citing.

16 JUDGE KARLIN: I mean, that -- there was
17 a dissent filed by Commissioner Jaczko, then
18 Commissioner, now Chairman Jaczko, saying he disagreed
19 with the conclusion that the land contamination might
20 not be a problem it seemed like. And they didn't
21 appeal that? That's not in the --

22 MR. T. SMITH: Correct.

23 JUDGE KARLIN: -- review? So -- okay.
24 And -- okay. Go ahead.

25 JUDGE TRIKOUROS: Those analyses we're

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1 talking about, the site-specific measures and the
2 Sandia work, none of that was referenced in the draft
3 GEIS. Is that typical that -- well --

4 MR. T. SMITH: I believe it was referenced
5 in the draft GEIS, the Sandia study, on -- I believe
6 we were looking at it earlier on page -- must be --

7 JUDGE TRIKOUROS: Do you see a reference
8 to the Sandia study?

9 JUDGE KARLIN: I don't remember.

10 MR. T. SMITH: -- E-35. "Subsequent to
11 the terrorist attacks, additional -- significant
12 additional analyses have been performed to support the
13 view that the risk of a successful terrorist attack;
14 i.e., one that results in a zirconium fire, is very
15 low."

16 The Commission in their denial of the
17 petition for rulemaking that I was discussing earlier
18 also specifically addressed --

19 JUDGE KARLIN: Oh, the very next sentence,
20 they do say, "These analyses were conducted and said
21 by Sandia." So you see that at the bottom of page
22 E-35?

23 JUDGE TRIKOUROS: Yeah, but there's no --
24 I mean, they mention the analyses --

25 JUDGE ABRAMSON: There's no reference to

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1 a particular report.

2 JUDGE TRIKOUROS: There's no reference to
3 any document or anything like that.

4 MR. T. SMITH: No. There is no reference
5 to a particular document.

6 JUDGE KARLIN: Okay. Ms. Curran has I
7 think acknowledged -- said that Contention EC-2 and
8 EC-3, the only difference really seems to be the
9 initiator. One's a seismic event and one's a
10 terrorist attack. Do you agree that that seems to be
11 the --

12 MR. T. SMITH: I would agree. Yes.

13 JUDGE KARLIN: -- they're analogous in
14 that way? And she indicates that -- well, I -- that
15 there's information -- the new and significant
16 information not only with regard to seismic issues as
17 in EC-2 but with regard to terrorist attack issues for
18 EC-3 and finds that that's in the 19- -- I'm sorry --
19 2009 GEIS. Do you agree with that?

20 MR. T. SMITH: I don't agree that there's
21 any new and significant information. She was focusing
22 on the fact that there were apparently some site-
23 specific reviews performed, and I agree entirely with
24 Your Honor that of course there's no way you can make
25 a generic conclusion without a basis and you generate

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1 a basis by looking at individual plants. And, here,
2 the NRC has done that and they've concluded that
3 across the board the risk of a zirconium fire from a
4 terrorist attack is low.

5 JUDGE KARLIN: Is the Ninth Circuit's
6 decision new and significant information?

7 MR. T. SMITH: It is not. And the
8 Commission has subsequently addressed that in the
9 context of license renewal and they distinguished it
10 clearly on the grounds that in an ISFSI proceeding,
11 they made no statements about the likelihood or the
12 impacts of an attack but they have addressed it in the
13 GEIS for license renewal.

14 JUDGE KARLIN: So you're talking about the
15 *New York v.* -- the New York case in the Second
16 Circuit?

17 MR. T. SMITH: I think --

18 JUDGE KARLIN: In the *Oyster Creek* case?

19 MR. T. SMITH: It would be the *New Jersey*
20 *Department of Environmental Protection* in the Third
21 Circuit. But I'm more specifically talking about the
22 Commission's *Oyster Creek* decision where they
23 addressed the differences between the *Mothers for*
24 *Peace* Ninth Circuit decision and they said the
25 difference is for -- in the GEIS, we've specifically

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1 addressed the risks and the consequences of a
2 terrorist attack.

3 JUDGE KARLIN: And by that, they mean the
4 1996 GEIS talks about sabotage.

5 MR. T. SMITH: And that's -- correct. And
6 they've confirmed that decision as recently as 2008 in
7 their denial of the petition for rulemaking which I
8 was mentioning earlier which also addressed new
9 information regarding terrorist attacks and the
10 Commission reconfirmed their conclusions in the GEIS
11 that the --

12 JUDGE KARLIN: Yeah. I see the Third
13 Circuit and the Second Circuit's decisions as highly
14 deferential to the Agency. And you don't think that
15 the 9/11 attacks are any new and significant
16 information with regard to the approaches for
17 terrorist attacks?

18 Isn't it correct that the 1996 sabotage
19 analysis in the GEIS really just dealt with people
20 rolling up with a big truck or attacking on the ground
21 and no one thought about an airplane smashing into a
22 facility?

23 MR. T. SMITH: I can't say what went on --
24 what was the thinking behind that aspect of the
25 decision. Certainly as the Commission has indicated

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1 in other places, that the -- a terrorist-initiated
2 event is not that different than other severe
3 internally-initiated accidents. So it seems that the
4 conclusions would apply equally, but I can't say what
5 they were thinking at the time.

6 JUDGE KARLIN: Okay. Any questions?
7 Okay. Thank you, Mr. Smith.

8 MR. T. SMITH: Thank you.

9 JUDGE KARLIN: Staff. Mr. Subin. Let's
10 see if we have any questions for you.

11 JUDGE TRIKOUROS: I may have one.

12 MR. SUBIN: As long as I don't need a
13 doctorate to answer it.

14 JUDGE KARLIN: On your -- in your answer
15 on page 41 -- and I think this is not that troublesome
16 but I think I want to just ask this one thing.

17 MR. SUBIN: You're referring to the
18 answer, not the answer to the waiver?

19 JUDGE KARLIN: I'm sorry. Your answer, I
20 think, on --

21 MR. SUBIN: Right. Okay. Forty-one.

22 JUDGE KARLIN: -- on page 41.

23 MR. SUBIN: Just to clarify.

24 JUDGE KARLIN: You say -- let's all try to
25 speak up. I'm sorry. I think we're being remiss.

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1 Page 41, "Without any basis, San Luis Obispo Mothers
2 for Peace have presumed that the NRC did indeed rely
3 on site-specific measures for evaluation of the
4 impacts of attacks on the DCNPP spent fuel pool and
5 appropriate mitigation measures."

6 Without any basis, they have presumed that
7 they relied on site-specific. Now, isn't she citing
8 to us this page out of 2009 that says, Look, you know,
9 it says we have done a site-specific analysis of every
10 site in the United States?

11 MR. SUBIN: Correct. As the Judges --
12 more than one have said --

13 JUDGE KARLIN: So is there some basis for
14 that?

15 MR. SUBIN: -- that's how you get the
16 generic finding.

17 JUDGE KARLIN: But didn't -- when you say
18 it's without any basis, you're presuming they did a
19 site-specific analysis.

20 MR. SUBIN: Right, and, therefore, the
21 site-specific just -- therefore, this needs to be
22 site-specific. This is done -- but this is done as a
23 Category 1, not a Category 2.

24 JUDGE KARLIN: I'm sorry. Speak up,
25 please.

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1 MR. SUBIN: It's not -- it's not a
2 Category 2. I thought that's what she was -- we think
3 that's what she was referring to.

4 JUDGE KARLIN: Okay. I mean -- all right.
5 Any other questions?

6 JUDGE ABRAMSON: Nope.

7 JUDGE TRIKOUROS: No. I don't think so.

8 JUDGE KARLIN: All right.

9 MR. SUBIN: Okay.

10 JUDGE KARLIN: Mr. Subin, you get off
11 easy. We're getting tired. We're all getting tired.
12 I appreciate patience.

13 Well, we do have a -- do we have any
14 additional questions for Ms. Curran at this point?

15 JUDGE ABRAMSON: No.

16 MS. CURRAN: I need to make a correction.

17 JUDGE KARLIN: All right. Please. If you
18 can make it brief.

19 MS. CURRAN: And then I'll just stay up
20 here.

21 JUDGE KARLIN: Okay, because we've got the
22 next contention coming.

23 JUDGE ABRAMSON: Got your books for the
24 next one?

25 MS. CURRAN: Mr. Tyson Smith described the

1 contents of our brief to the Ninth Circuit and I'd
2 just like to correct the misimpression that all we
3 raised in the Ninth Circuit were issues related to
4 process. We challenged the substantive decision in
5 the Commission's case which relates to what are the
6 consequences of an attack on the dry storage facility
7 at Diablo Canyon. That's very much in play.

8 JUDGE KARLIN: All right. And I suppose
9 that it's all on the record somewhere in the Ninth
10 Circuit what the briefs say.

11 MS. CURRAN: Yes.

12 JUDGE KARLIN: If we find that to be a key
13 element, we may take administrative notice of what's
14 in those briefs or at least that point and only that
15 point.

16 Okay. With that, we will move to the
17 final contention, EC-4, which --

18 JUDGE TRIKOUROS: I was --

19 JUDGE KARLIN: Okay. Well, why don't you
20 start, Judge Trikouros? Let me get organized.

21 JUDGE TRIKOUROS: No.

22 JUDGE ABRAMSON: Why don't we let her read
23 it while we're waiting.

24 JUDGE KARLIN: Yeah. Why don't you read
25 it and --

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1 MS. CURRAN: Okay. The contention reads,
2 "The environmental report fails to satisfy the
3 National Environmental Policy Act because it does not
4 discuss the cost-effectiveness of measures to mitigate
5 the environmental impacts of an attack on the Diablo
6 Canyon reactor during the license renewal term."

7 JUDGE ABRAMSON: Attack meaning terrorist
8 attack?

9 MS. CURRAN: Yes.

10 JUDGE KARLIN: All right.

11 JUDGE ABRAMSON: And you don't need a
12 waiver for that or you do?

13 MS. CURRAN: We don't believe we do.

14 JUDGE KARLIN: Yeah. Why is that? Why
15 don't you need a waiver for that? The Applicant says,
16 Oh, the waiver is necessary here. Isn't that covered
17 by the appendix whatever?

18 MS. CURRAN: Well, --

19 JUDGE KARLIN: Or generic --

20 MS. CURRAN: -- no, I don't think so. It
21 -- this falls under the regulation -- I think it is 10
22 CFR 51.53(c)(3)(ii)(L), which requires the
23 consideration of SAMAs for reactor accidents. And
24 we're saying what is an accident but an uncontrolled
25 release of radioactivity from a nuclear plant and the

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1 cause could include negligence or act of God or
2 someone doing harm to the plant. It's an
3 unintentional catastrophic release of radioactive
4 material. And as a result of the Ninth Circuit's
5 decision in *San Luis Obispo Mothers for Peace v. NRC*
6 in 2006, the impacts of -- if the impacts of terrorist
7 attacks on nuclear facilities now must be included in
8 an EIS, then so should SAMAs. In other words,
9 measures to mitigate or avoid those -- the impacts of
10 those attacks.

11 And we don't think that a waiver is
12 necessary to reach that issue.

13 JUDGE ABRAMSON: So read me the contention
14 again, please.

15 MS. CURRAN: "The environmental report
16 fails to satisfy the National Environmental Policy Act
17 because it does not discuss the cost-effectiveness of
18 measures to mitigate the environmental impacts of an
19 attack on the Diablo Canyon reactor during the license
20 renewal term."

21 JUDGE ABRAMSON: Okay. So your
22 proposition here is that the ER -- that the SAMA
23 analysis needs to include terrorist attacks because --

24 MS. CURRAN: That's right.

25 JUDGE ABRAMSON: -- of the Ninth Circuit's

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1 decision?

2 MS. CURRAN: That's right.

3 JUDGE KARLIN: Okay. So it's a SAMA
4 contention.

5 JUDGE TRIKOUROS: But it doesn't mention
6 SAMA in the --

7 JUDGE ABRAMSON: Well, it does.

8 JUDGE KARLIN: It says "mitigate," but it
9 doesn't say SAMA.

10 JUDGE ABRAMSON: It says mitigation, so
11 that takes you to SAMA.

12 JUDGE KARLIN: Okay.

13 JUDGE TRIKOUROS: I have a question.

14 JUDGE KARLIN: Yeah.

15 JUDGE TRIKOUROS: You reference Table
16 F.5-3.

17 JUDGE KARLIN: Closer to the mike.

18 JUDGE TRIKOUROS: Oh, I'm sorry. It says,
19 "Table F.5-3 analyzes 25 SAMAs, each of which is
20 specifically tailored to an internal event. For each
21 SAMA, the table gives a detailed description of how it
22 works to mitigate the effect of the event. Thus, the
23 SAMA analysis takes into account the characteristics
24 of the specific internal events."

25 MS. CURRAN: Uh-huh.

1 JUDGE TRIKOUROS: I looked at that table
2 and I couldn't relate it to a specific event. Maybe
3 you could help me with that. But --

4 JUDGE ABRAMSON: But the point she's
5 making, Nick, is that it doesn't address externally-
6 initiated events like terrorist --

7 JUDGE TRIKOUROS: It doesn't address --
8 from what I can see, it doesn't address any of that.
9 It doesn't -- it's not specific to events that I could
10 see.

11 (Pause.)

12 MS. CURRAN: I'm not a nuclear engineer.

13 JUDGE TRIKOUROS: Yeah.

14 MS. CURRAN: But it looked to me as though
15 these -- there's really a lot of detail in these SAMAs
16 that seems to relate to this is how the accident is
17 happening and this is how we would put a wrench in to
18 keep it from going further, basically.

19 JUDGE TRIKOUROS: Yeah.

20 MS. CURRAN: And so I -- what I was trying
21 to get at was with an attack, the same way that you
22 would look at -- how could we for each stage of this
23 thing, this progression, how could we keep it from
24 getting worse from the consequences being severe. You
25 would do the same thing for an attack. You might

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1 strengthen the containment. You might put more guards
2 at the door. You know, there's a number of things
3 that you might do to prevent -- to mitigate the
4 likelihood of the attack or to keep the attack from
5 progressing as far as it might go otherwise, and that
6 -- so, in other words, to say that we've already
7 looked at SAMAs doesn't really answer the question
8 about what are the SAMAs for an attack.

9 JUDGE TRIKOUROS: I mean, there is no
10 attack scenario -- there is no specific attack
11 scenario that you've identified in your contention
12 with a demonstration that, Well, look at this
13 scenario. This attack scenario would not be covered
14 by one of these 25 SAMAs. There was nothing like
15 that. It was just the statement that, you know, this
16 is -- these SAMAs are event-specific and don't apply
17 to terrorist attacks. I mean, clearly one could
18 devise terrorist attacks for which these SAMAs would
19 be extremely helpful. So help me with that. Where
20 were you --

21 MS. CURRAN: Well, the burden in our view
22 is on PG&E in the first instance to identify the
23 credible attack scenarios and then evaluate SAMAs for
24 them. That is not within the ability or the
25 responsibility of the Mothers for Peace. That -- this

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1 hasn't been done at all is our complaint, that -- that
2 PG&E needs to take the first step to do it.

3 It would be one thing if they tried it and
4 they left something out, but they haven't even -- they
5 haven't even gotten over the threshold to do it at
6 all.

7 JUDGE TRIKOUROS: Well, one could spend 20
8 years doing that also in the sense that how many --
9 where do you stop? How many -- you know, how would
10 one do it I guess is certainly a question that comes
11 up.

12 MS. CURRAN: Well, but if you're asking
13 the question that is so open-ended that who could
14 possibly do this, that issue was resolved in the Ninth
15 Circuit decision where basically the court said to the
16 NRC, NRC, you make a lot of representations to the
17 public that you're capable of analyzing what are
18 credible scenarios and preventing them, and the
19 only -- the only context in which you will do that is
20 in a NEPA context and we're telling you you have to do
21 it in that context, too. So the NRC has shown itself
22 to be capable of identifying credible scenarios and
23 figuring out how to mitigate them or prevent them, and
24 we're saying, You need to do that in a NEPA context.

25 JUDGE TRIKOUROS: It's a lot easier for a

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1 spent fuel pool I think.

2 JUDGE ABRAMSON: Yeah. I'm sure you
3 realize the extent of the exercise that you're
4 suggesting, that they -- that the Applicant needs to
5 go through and dream up all possible attack scenarios
6 and then consider what the releases might be and try
7 to figure out what mitigation measures might be
8 associated with them and then do a SAMA analysis for
9 those. It is an enormous task. I don't -- I'll have
10 to think very carefully about whether that falls --
11 whether the concept of the Ninth Circuit ruling
12 extends to this, and I'm sure the Staff and the
13 Applicant have thought about it a lot. It is an
14 enormous task.

15 MS. CURRAN: Well, if I could just respond
16 to this, to your concern for a moment. These are all
17 things that the NRC and all nuclear plant licensees do
18 in the context of security, which is hidden from the
19 public. And so the question that was addressed in the
20 Ninth Circuit decision was: Is there an element of
21 that that is covered by NEPA such that the Agency and
22 the Applicant also need to be accountable to the
23 public for these things that they do anyway but which
24 are done in secret so that the public has a way of
25 having an influence on the process of advocating for

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1 greater security because these security measures have
2 a profound effect on environmental protection.

3 That is the -- it's not that these things
4 aren't done. It's just that they are not done in
5 public. They're not done with the kind of
6 accountability that NEPA would give for agency
7 decisionmaking.

8 JUDGE ABRAMSON: I don't believe that
9 that's an accurate statement, although I must say I
10 don't have detailed information on what the Staff does
11 on this. But I think to say -- to -- yet you're
12 implying that the Staff and Applicants have analyzed
13 potential consequences of these -- of terrorist
14 attacks, of a wide variety of scenarios of terrorist
15 attacks, and extended those to a SAMA-type analysis is
16 inaccurate and you're asking that it be done. I don't
17 -- I'll -- we'll have to think about that.

18 JUDGE KARLIN: Well, let me ask this: As
19 I understand it, in the -- there's safety side, which
20 is Atomic Energy Act, and there's a NEPA side,
21 environmental impact statement, environmental -- ERs,
22 and on the safety side, part of the San Luis Obispo
23 Mothers for Peace Ninth Circuit decision, I thought
24 the argument you made was, Well, look, we're not
25 asking for an infinite number of different scenarios

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1 of attack but we are arguing that the Commission
2 already has postulated several scenarios of attack,
3 not necessarily known to us, but that they do -- known
4 to you -- but that they do this in the safety context
5 and why can't they just do it in the environmental
6 context as well.

7 And I saw that was part of your argument.

8 Now, however, I think that the -- there's
9 a statement made by the Staff on page 47 of their
10 brief and they talk about the Ninth Circuit decision
11 -- the Applicant I think does the same thing -- and
12 says, Well, no, no. Wait a second. The Ninth Circuit
13 -- "The Ninth Circuit's holding is limited by the
14 facts before it. In the Ninth Circuit case, the NRC
15 categorically argued that NEPA did not require the
16 Agency to prepare an assessment of terrorist threats
17 as part of its NEPA analysis." Citation is there.
18 And goes on, "This proceeding, like the *Oyster Creek*
19 proceeding, is different in that the environmental
20 analysis at issue rests on a discussion of terrorism
21 contained in the GEIS, not a categorical determination
22 that terrorist attacks are outside of the scope."

23 So they're saying -- they're
24 distinguishing the Ninth Circuit, Oh, this is
25 different because Ninth Circuit San Luis Obispo was,

1 No, NRC. You cannot just categorically say we're not
2 going to do this. Here, they say, Well, we're not
3 arguing that. We're arguing that in fact we did do it
4 back in 1996 and so this is a different case and Ninth
5 Circuit doesn't apply.

6 Your analysis and response? How -- is
7 that -- that seems like a reasonable discussion of the
8 case.

9 MS. CURRAN: We are not in this contention
10 disputing that in 1996 -- it might have been a little
11 bit later. I think it might have been in a
12 supplemental '96 EIS --

13 JUDGE KARLIN: Okay.

14 MS. CURRAN: -- that the NRC looked at the
15 impacts of an attack on a nuclear plant. But the
16 heart of a NEPA analysis is the analysis of
17 alternatives. That's --

18 JUDGE KARLIN: Right.

19 MS. CURRAN: The analysis of impacts is
20 very important, but really the heart of it is looking
21 at the cost-effectiveness of measures to avoid or
22 mitigate the impacts and they never got that far. And
23 what we're saying here is, You need to take the next
24 step. It just didn't happen yet. And now is the time
25 we're asking for it.

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1 JUDGE KARLIN: Okay. Now, with regard to
2 alternatives, they hammer on this *Duke Energy/McGuire*
3 case. I have it here in front of me. I'm not sure
4 whether I have the cite to it. July 23, 2002. It's
5 cited numerous times in their brief. And here, the
6 Commission, among other things, seemed to reject a
7 SAMA contention and they said on page 11, "We find
8 that the Petitioner's minimal information in support
9 of their contention was inadequate. For any severe
10 accident concern, there are likely to be numerous
11 conceivable SAMAs and, thus, it will always be
12 possible to come up with some type of mitigation that
13 has not been addressed by the licensee. In the end,
14 whether a SAMA alternative is worthy of more detailed
15 analysis in an environmental report or SEIS hinges
16 upon whether it may be cost-beneficial."

17 And then they talk about -- close quote.
18 And then they talk about, you know, the Petitioner
19 needs -- because there's any number of theoretically
20 possible SAMAs may be conceived, the Petitioner has to
21 give some showing of sort of a -- why this alternative
22 that you're suggesting might be more beneficial.

23 I mean, have you done that? I mean, I
24 don't see where you've helped us to even address that
25 issue?

1 MS. CURRAN: I would say the *McGuire* case
2 is distinguishable because that case involved SAMAs
3 for accidents -- accidentally-caused accidents where
4 the NRC and the applicant were already in the process
5 of looking at SAMAs. They had a list of SAMAs. The
6 intervenors came in and said, You didn't look at this
7 other SAMA that we would have liked you to address.

8 JUDGE KARLIN: Okay.

9 MS. CURRAN: Here, it's an entire field
10 that's been neglected, just not addressed at all. So
11 it's legitimate in our view to say this has been
12 completely omitted. And so someone -- the Applicant
13 needs to take the first step and look at these
14 alternatives.

15 JUDGE KARLIN: Okay.

16 JUDGE TRIKOUROS: Both the Applicant and
17 the Staff indicate that it's -- the burden is on
18 the -- on you, the Petitioner. The Applicant's
19 answer, page 41, and the Staff's answer, page 48. And
20 there's a certain logic here that I may be missing.

21 Let's assume that one could come up
22 with -- and I think it's absolutely true that one
23 could come up with one thousand terrorist scenarios
24 which would be in fact covered by the SAMAs that are
25 in that table that I referenced, one thousand of them,

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1 and I believe that's absolutely true.

2 It wouldn't cover the 999,000 perhaps.
3 But it would certainly cover one thousand, just as a
4 hypothetical. That is where it makes sense for the
5 burden to be on the Petitioner because the Applicant
6 could come up with all these scenarios. Then we would
7 just be incremented to where we are today with one
8 thousand under our belt and then looking for the
9 thousandth and one scenario. And I don't see where we
10 would be any different.

11 MS. CURRAN: Well, there could be a
12 thousand accident scenarios, too. There could be a
13 thousand of a lot of things. But the issue here is
14 that there isn't one that's analyzed -- we might -- if
15 we saw that PG&E had actually looked at this issue and
16 analyzed alternatives, we very well might say, Okay,
17 they did it. This is -- NEPA is action force and we
18 are trying to get PG&E and the NRC Staff to take NEPA
19 -- to fulfill their responsibility under NEPA to do
20 that job. If they did it, we might -- if we wanted to
21 come in and criticize a SAMA analysis that had been
22 done, we might say, Here's a very credible scenario
23 that you overlooked. But there isn't any because it
24 just hasn't been done. It's been totally overlooked.

25 And it seems to me to be very legitimate

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1 to say, This is an area where you, the Applicant, need
2 to take the first step and to take it. Period. And
3 if later we don't think you've done a good enough job,
4 we will criticize it and we will give you the details
5 about what you left out. But nothing's been done.

6 JUDGE ABRAMSON: Ms. Curran, correct me if
7 I'm remembering this wrong because it's been a while
8 since I read it, but I thought that the Commission in
9 response to the Ninth Circuit's ruling said something
10 to the effect that, We rely on other Government
11 agencies to mitigate these events, the DoD and other
12 agencies charged with dealing with terrorists.

13 And that that was an accepted approach in
14 the Ninth Circuit. Am I incorrect in recollecting
15 that?

16 MS. CURRAN: I honestly do not remember
17 that.

18 JUDGE ABRAMSON: Well, I'll ask the
19 question of Applicant's counsel. I think that was the
20 answer.

21 JUDGE KARLIN: I think if I remember, the
22 Commission says that's an argument that was made in
23 the Third Circuit, in the Second Circuit, and perhaps
24 even in this circuit. It sounds like it was not
25 accepted in the Ninth Circuit.

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1 JUDGE ABRAMSON: I think it was accepted
2 in the Ninth Circuit.

3 JUDGE KARLIN: But it was -- well, the
4 Ninth -- but it was -- it was accepted in the Third
5 and Second. But we'll find out. I mean, that's a
6 question for law.

7 Any other questions of Ms. Curran at this
8 point?

9 JUDGE TRIKOUROS: Just one clarification.

10 JUDGE KARLIN: Yes.

11 JUDGE TRIKOUROS: We don't know what the
12 Applicant was thinking in the creation of that table
13 necessarily. They may have documented -- documented
14 it in some detail. I can -- it just isn't clear to me
15 that one has -- that one when doing SAMAs has to be
16 mechanistic; in other words, one could say, you know,
17 this is happening for some reason. How would I deal
18 with that? Here's how I would deal with that. Which
19 then would encompass some number of terrorist attacks
20 and also certain design basis or beyond design basis
21 considerations.

22 So you're saying no one's thought of that
23 or no one's -- it isn't entirely clear to me that
24 there hasn't been that type of thinking. The design
25 basis events are constrained by single failure

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1 requirements, that sort of thing. That does not get
2 you to core melts. One has to postulate a series of
3 failures in order to get to the core melt. Those
4 failures could occur in any number of ways. Certainly
5 terrorist attack is one way, a terrorist scenario.

6 But -- so when you said it hasn't been
7 thought about, it's not clear to me that it hasn't.
8 I don't know.

9 MS. CURRAN: Well, let's just put -- it's
10 not stated that it's been thought about and, two,
11 members of the public who are concerned about the
12 environmental risks of the plant, there's very few
13 neighbors of a nuclear plant who are capable of
14 second-guessing whether PG&E thought about attacks
15 when they were listing SAMAs. It seems to me that
16 it's very important for PG&E to say to the public, We
17 took this into account and our list of SAMAs includes
18 that consideration, and that -- you know, that is part
19 of the assurance that NEPA has been complied with, the
20 issue has been covered, and that, you know, to a
21 certain extent one has to be able to rely on the
22 Applicant and the Agency to do the necessary analyses.
23 And it's -- it goes a long way towards satisfying the
24 law if they can say, We did it.

25 JUDGE TRIKOUROS: But isn't there a rule

1 of reason applied?

2 MS. CURRAN: Yeah, and the rule of reason
3 in NEPA very much includes being very clear with the
4 public about what was done and not asking the public
5 to second-guess whether an important issue was
6 covered.

7 JUDGE ABRAMSON: I think that's precisely
8 what was before the Ninth Circuit and I want to get on
9 and hear what the Applicant's counsel has to say about
10 that.

11 JUDGE KARLIN: All right. Thank you, Ms.
12 Curran.

13 JUDGE TRIKOUROS: Thank you.

14 JUDGE KARLIN: PG&E, please. Mr. Repka.

15 MR. REPKA: I'm back.

16 JUDGE KARLIN: You're back. Is that a
17 line from Arnold Schwarzenegger?

18 MR. REPKA: The Governor.

19 JUDGE ABRAMSON: He's not -- it's not that
20 he'll be back. He's back.

21 JUDGE KARLIN: I'll be back.

22 MR. REPKA: Right.

23 JUDGE KARLIN: I did the "no problemo"
24 one.

25 JUDGE ABRAMSON: Mr. Repka, what can you

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1 help me to refresh my memory about what went on in the
2 Ninth Circuit between the Commission and the -- and
3 the NRC?

4 MR. REPKA: A number of different things,
5 and so let me try to sort those out because I think --
6 the one I believe you're thinking of is the *Public*
7 *Citizen v. NRC* case.

8 JUDGE ABRAMSON: That's New Jersey.

9 MR. REPKA: No. It was in the Ninth
10 Circuit.

11 JUDGE KARLIN: No, no.

12 MR. REPKA: It was a challenge to the
13 NRC's design basis threat rulemaking. And that design
14 basis threat rulemaking specifically excluded the
15 issue of aircraft attacks as well as other kinds of --
16 other kinds of issues. And the issue you're thinking
17 of in that case I believe is -- was the
18 Commission's -- part of the logic for that decision
19 was that there are those things that would prevent the
20 occurrence, prevent the terrorist attack, that could
21 conceivably be done but those were in the domain of
22 the Federal Government and would involve things like
23 active weaponry and other kinds of things,
24 interdiction of terrorists, intelligence, and many
25 other things that are in fact done as a matter of

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1 fact.

2 One of the arguments in that case, in
3 which the Ninth Circuit did uphold the NRC's
4 rulemaking, was that somehow the rulemaking ran afoul
5 of the Mothers for Peace Ninth Circuit case and the
6 Ninth Circuit in *Public Citizen* rejected that argument
7 in that context.

8 So I believe that's the decision you're
9 thinking of when you're talking about those actions
10 that are external to the company.

11 JUDGE KARLIN: And may I ask -- that's in
12 the design basis threat safety side of the NRC
13 responsibilities?

14 MR. REPKA: Indeed it was. It was a
15 challenge to the safety --

16 JUDGE KARLIN: Okay.

17 MR. REPKA: -- requirement but did include
18 a challenge that the rule was -- contravened NEPA as
19 well under the Ninth Circuit decision.

20 And I think that, Judge Trikouros, to your
21 point about specific SAMAs that are in the SAMA
22 evaluation, you know, obviously we don't consider
23 those things that we can't do for terrorism and the
24 kinds of things that may be -- would have been
25 addressed by the *Public Citizen* case, I'm not an

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1 expert in this but I look at the F-6 table I believe
2 it was in the SAMA evaluation table, F.6-1, and I do
3 agree that many of the specific SAMAs that were
4 considered are independent of the initiator. If you
5 add a redundant actuation system to some piece of
6 equipment, you add an extra valve or indicator or a
7 diverse component to do this, that could help in many
8 scenarios. I can't -- I haven't made a correlation to
9 terrorist scenarios, but certainly if there's
10 additional equipment that will survive or could be
11 used to mitigate, that would apply.

12 And I think that that -- that goes to --
13 really the fundamental point here, though, is that the
14 contention is a SAMA contention. We know now from the
15 reply brief especially that it's all about SAMAs.
16 This issue of terrorist attacks in the context of
17 license renewal has been addressed in the '96 GEIS.
18 It's been addressed in the draft revision as well
19 which basically reaffirms the conclusion of the '96
20 GEIS.

21 But in the *Oyster Creek* license renewal
22 case, the Commission specifically addressed the issue
23 of terrorism again in the license renewal context.
24 And the contention was a SAMA contention. And
25 essentially -- and I'm looking at COI 07-08, which was

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1 a Commission decision, obviously, in February of 2007,
2 but it was -- contention was, as characterized by the
3 Commission, "Under NEPA, in New Jersey's view, the NRC
4 Staff's environmental analysis ought to have included
5 a more elaborate examination of severe accident
6 mitigation alternatives at Oyster Creek." And the
7 Commission went on to reject that contention on the
8 basis that the 1996 GEIS on sabotage events was
9 sufficient to satisfy NEPA for the -- in the license
10 renewal context.

11 Which takes me back to the Ninth Circuit
12 and the Mothers for Peace Ninth Circuit case on NEPA
13 and terrorism, and I think in general the Mothers for
14 Peace tend to overstate the significance of that case.
15 I mean, it certainly said that the NRC as a matter of
16 law cannot categorically exclude the terrorism issue.
17 That's a decision the Commission continues to disagree
18 with quite clearly. And the Third Circuit itself
19 disagreed with the Ninth Circuit on that decision.

20 But it did not say anything about anything
21 other than ISFSIs. It didn't say anything about
22 license renewal. It didn't say anything about SAMA
23 evaluations or mitigation alternatives. It didn't say
24 anything about how the NRC should address NEPA in the
25 context of -- should address terrorism in the context

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1 of NEPA, and it also didn't even say that the NRC
2 needed to consider consequences of terrorist attacks.
3 It said that the NRC just needed to look at it and
4 determine whether or not those events were remote and
5 speculative. And, in fact, if you look at the 1996
6 GEIS, part of the NRC's analysis there is that these
7 events are remote and speculative, they can't be
8 quantified, and went on to characterize the
9 consequences as well.

10 The NRC took a similar approach in its
11 environmental assessment supplement for the ISFSI and
12 said that these are low likelihood events and decided
13 that the consequences were, in any event, consistent
14 with reactor accidents and they quantified the
15 consequences in ways I can't remember. But I think
16 the other thing that's important to remember in that
17 case is that the Mothers for Peace today are talking
18 about scenarios and addressing multiple scenarios.
19 After the remand from the Ninth Circuit, there were a
20 number of contentions proposed for hearing, some of
21 which were specific scenarios. And the Commission in
22 ruling -- and this was a Commission decision -- in
23 ruling on the admissibility of contentions, one of the
24 things that I think they made very clear was they had
25 no interest in engaging in site-specific hearings on

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1 terrorist scenarios to meet NEPA or otherwise and
2 rejected those contentions.

3 So the context is slightly different from
4 where we are right now, but I think that argument that
5 somehow the SAMA analysis needs to address those
6 scenarios specifically would inexorably lead to site-
7 specific litigation of scenarios which is precisely
8 what the Commission said in the ISFSI context that
9 they don't want to do.

10 JUDGE KARLIN: Well, let me ask this: If
11 the Commission decided -- if this Board decided and
12 the Commission affirmed that it would be appropriate
13 to look at some SAMA analysis with regard to terrorist
14 attacks, do you think the Ninth Circuit would reverse
15 us, or would they defer to the expert agency as well?

16 I mean, what I'm suggesting is a wide
17 range of reasonableness that this Commission and this
18 Board may have and that the Ninth Circuit is only
19 going to reverse us if we go outside of those ranges.
20 We may be at one end of the range with regard to one
21 Commission and we may be at another end of the range
22 with regard to another Commission.

23 MR. REPKA: I've been around long enough
24 not to speculate as to what the Ninth Circuit will
25 decide on anything, but --

1 JUDGE KARLIN: Or the Commission.

2 MR. REPKA: Right. But --

3 JUDGE ABRAMSON: Mr. Repka, --

4 MR. REPKA: -- as far as the Commission,
5 I know how they would rule on this because they did --
6 they addressed the SAMA issue in *Oyster Creek*.

7 JUDGE KARLIN: But they also addressed it
8 in the *San Luis Obispo* case, as you just cited, and
9 Jaczko dissented from both of them.

10 MR. REPKA: And Commissioner Jaczko's
11 dissent was focused as much on the process issue and
12 the access to documents, which actually leads me to
13 another point I'd like to make about that.

14 JUDGE KARLIN: And the land contamination
15 issue.

16 MR. REPKA: More the process and the
17 documents that were released to allow further
18 litigation of the land contamination issue.

19 JUDGE KARLIN: Yes.

20 MR. REPKA: But I think on the document
21 point, the Ninth Circuit *Mothers for Peace* decision
22 talked specifically about access to documents and they
23 cited the *Weinberger* case, *Hawaii v. Weinberger*
24 Supreme Court decision, and it was very clear in that
25 decision that under a NEPA analysis, the Government is

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1 under no obligation to release any information related
2 to security information.

3 So I think that that's -- that was very
4 much in the mind of the Ninth Circuit when they issued
5 that decision.

6 JUDGE KARLIN: Well, the Ninth Circuit did
7 also say when they issued their decision in the *San*
8 *Luis Obispo Mothers for Peace* was that the Agency is
9 free to fashion various ways to deal with security
10 issues and that -- but they can't simply dismiss the
11 entire NEPA process and say, Because it's so
12 sensitive, we just won't do it.

13 MR. REPKA: Correct. And looking at the
14 *Weinberger* case itself, what the court decided there
15 was that the -- I believe it was a naval base issue
16 and that the Navy could do the analysis and never make
17 the results public and that would satisfy NEPA.

18 JUDGE KARLIN: Well, the part of -- if I
19 remember that case, the *Weinberger* case was whether or
20 -- the issue was -- wasn't that the one where the
21 issue was whether or not the Navy was indeed storing
22 nuclear weapons at a particular facility --

23 MR. REPKA: It was storage of nuclear
24 weapons.

25 JUDGE KARLIN: -- and if they announced

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1 they're going to do a NEPA analysis of the storage of
2 nuclear weapons, the cat would be out of the bag and
3 they would reveal that they indeed were storing it
4 there. So there was a fundamental problem.

5 MR. REPKA: Right. Security information.

6 JUDGE KARLIN: Whereas, here, there's no
7 such question. There is spent nuclear fuel in those
8 pools. There is a reactor over there. And no one's
9 hiding that fact.

10 MR. REPKA: Well, certainly the analysis
11 could lead you to a -- to deal with safeguards
12 information and the level of protection and the
13 consequences, and I think those are all equally of
14 concern to the Commission --

15 JUDGE KARLIN: Yes.

16 MR. REPKA: -- and they've made that very
17 clear.

18 JUDGE TRIKOUROS: Now, with respect to
19 SAMA, there's a frequency aspect to it that -- with
20 respect to terrorism, I'm having trouble understanding
21 how one might implement that even in a simplistic way.
22 I would have to determine a modification cost
23 associated with terrorist attack or attacks and, to do
24 that, I would look at the consequences which are
25 really the same as the consequences that have already

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1 been analyzed, likely not different, but the
2 probability or -- I guess in this particular case it
3 would be probability of a terrorist attack would have
4 to be factored in in order to determine if one could
5 cost-beneficially make the modification.

6 Do you have any comment on that? I was
7 going to ask the Petitioner to address that later,
8 too, perhaps.

9 MR. REPKA: Yes. I think that's the
10 fundamental problem that the Commission has always
11 been concerned about, argued to the Ninth Circuit and
12 to the Third Circuit, as to why a NEPA analysis from
13 a risk perspective or otherwise of the terrorist issue
14 makes no sense, because you have no ability to
15 quantify the probability aspect of the -- of the risk
16 assessment. And I think that that argument applies
17 even more to a SAMA evaluation as it's performed
18 typically. It's a very quantitative analysis and, in
19 order to make the cost benefit of -- the
20 implementation cost versus the averted risk benefit,
21 if you can't quantify the probability, you can't do
22 that in a quantitative way other than assuming the
23 probability of the terrorist attack, one, and then
24 looking at the consequences. But that obviously is
25 distorting the risk argument, the risk analysis.

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1 JUDGE ABRAMSON: Mr. Repka, did I
2 understand you correctly that it really became clear
3 to you as counsel for the Applicant only after seeing
4 the reply that this was really a contention asserting
5 that SAMA analysis needed to be performed in
6 connection with terrorist attacks?

7 MR. REPKA: Oh, I think -- I can't
8 remember right now what the words of the original
9 contention were, but certainly the reply reinforced
10 that this is really a SAMA issue; it wasn't looking at
11 anything more in terms of the terrorist analysis than
12 the SAMAs, but --

13 JUDGE ABRAMSON: Was that -- was the issue
14 -- was the law regarding the cases we've talked about,
15 the law regarding performing SAMA analysis for
16 terrorist attacks, addressed thoroughly in your
17 answer?

18 MR. REPKA: I believe it was.

19 JUDGE ABRAMSON: Okay.

20 MR. REPKA: I believe we speak to the
21 *Oyster Creek* case and -- you know, the one thing I
22 would add to that, if we didn't cite it, would be the
23 Commission's decision in *Oyster Creek* because it does
24 specifically relate to a SAMA contention.

25 JUDGE ABRAMSON: Did you address the

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1 design basis threat cases also on -- I don't recall.

2 MR. REPKA: I don't believe we did address
3 that. I raised that in answer to your questions.

4 JUDGE ABRAMSON: Yeah.

5 JUDGE KARLIN: Okay. Any more questions
6 of Mr. Repka? Thank you, Mr. Repka.

7 Staff. Is it --

8 MS. KANATAS: Good afternoon, Your Honors.

9 JUDGE KARLIN: Is it Ms. Kanos?

10 MS. KANATAS: It's Ms. Kanatas.

11 JUDGE KARLIN: Kanatas. Okay.

12 MS. KANATAS: Yes, sir.

13 JUDGE KARLIN: Ms. Kanatas. All right.
14 Boy, you get the last of the day, huh?

15 MS. KANATAS: I do.

16 JUDGE KARLIN: Good. Contention EC-4.
17 I'm not sure how many questions we have. Let me just
18 look at my notes for a moment. I do have one
19 question. I think -- they talk about the waiver. I
20 believe -- was it your brief or the Applicant's that
21 teed this issue -- they didn't ask for a waiver here.

22 MS. KANATAS: Correct.

23 JUDGE KARLIN: And their answer was, Well,
24 because it was a SAMA. Do you think a waiver is
25 needed or not, or do you accept her explanation?

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1 MS. KANATAS: The Staff does not join
2 PG&E's argument that a waiver is needed for this
3 because the GEIS concluded that terrorist attacks are
4 bounded by severe accidents which are a Category 2
5 issue that need to be addressed on a site-specific
6 basis. In the environmental report as well as in the
7 supplemental environmental impact statement, as *Turkey*
8 *Point* points out, typically Category 2 issues are
9 within scope of license renewal.

10 JUDGE KARLIN: Right.

11 MS. KANATAS: And so for that reason, we
12 did not join --

13 JUDGE KARLIN: Okay. You did not argue
14 that they did need it.

15 MS. KANATAS: We did not argue that a
16 waiver was needed.

17 JUDGE KARLIN: Whereas the Applicant did.

18 MS. KANATAS: Correct.

19 JUDGE KARLIN: Yeah. Okay. Any
20 questions?

21 JUDGE ABRAMSON: So is it the Staff's
22 position or view then that no specific terrorist act
23 initiators need to be considered in a SAMA analysis
24 because the results -- because they would be -- they
25 would be incorporated or they would be -- their

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1 effects would be incorporated in the existing SAMA
2 analysis?

3 MS. KANATAS: Correct. We believe that
4 the *Oyster Creek* Commission decision indicated that
5 the SAMA analysis in the Applicant's environmental
6 report, which did address severe accident mitigation
7 alternatives, as well as the Staff's supplement, that
8 that was a sufficient environmental review of NEPA
9 terrorism issue.

10 JUDGE ABRAMSON: And was it in *Oyster*
11 *Creek* addressed by reference to the GEIS also?

12 MS. KANATAS: Yes, it was. Both the GEIS
13 generically and the SEIS specifically analyzed the
14 severe accident mitigation alternatives which were
15 found to bound the terrorist attacks. And the same is
16 true in this case. PG&E submitted an environmental
17 report which provided a SAMA analysis for severe
18 accidents. The Staff plans to publish their draft
19 supplement in October, which will be publicly
20 available so that the Mothers for Peace and other
21 interested members of the public can comment and
22 participate in that process which does fulfill the
23 twin aims of NEPA of the Agency and the Staff
24 reviewing and analyzing the significant environmental
25 impacts and then allowing the public to be involved

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1 and provide input.

2 JUDGE KARLIN: And if the Mothers for
3 Peace believe that the draft SEIS is inadequate, they
4 can file new contentions at that time.

5 MS. KANATAS: You're correct. Under
6 2309(f)(2) is the regulation that you are referencing,
7 and absolutely if there is --

8 JUDGE KARLIN: Right.

9 MS. KANATAS: -- new or different
10 information or analysis -- I'm paraphrasing -- but at
11 that time, yes.

12 JUDGE KARLIN: Now, in -- oh, go ahead.

13 JUDGE ABRAMSON: But the Staff's view at
14 this point of the ER is that there need be no specific
15 additional consideration of terrorist act initiated
16 accidents because the reference to the GEIS is
17 sufficient when taken in combination with the
18 Commission's view that the consequences are bounded by
19 -- or are -- I really don't think "bounded" is the
20 right word -- encompassed by the existing severe
21 accident SAMA analysis?

22 MS. KANATAS: Correct. Because the GEIS
23 addressed the issue of the terrorism analysis and, as
24 PG&E has submitted environmental report with an
25 analysis of SAMA for severe accidents, and then the

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1 NRC Staff will be able to provide their own evaluation
2 to determine if that analysis is adequate, yes, the
3 Staff does not believe that a terrorist-specific SAMA
4 analysis was -- is required under the precedent of
5 *Oyster Creek*.

6 JUDGE ABRAMSON: So the ER satisfies the
7 regulatory requirement in your mind that the -- that
8 the Applicant provide an ER that is sufficient to aid
9 the Staff in preparation of its in this case
10 supplemental EIS? Which is the only regulatory
11 requirement on the Applicant for an ER.

12 MS. KANATAS: Correct. We do believe
13 that's the case.

14 JUDGE ABRAMSON: Okay.

15 JUDGE KARLIN: Now, let me ask: Isn't
16 that the merits?

17 JUDGE ABRAMSON: Mo.

18 MS. KANATAS: That -- well, the --

19 JUDGE KARLIN: We're dealing with just the
20 admissibility.

21 MS. KANATAS: Right. Well, the *Oyster*
22 *Creek* decision, the actual holding, said that the
23 contention, which did go to whether or not -- as Mr.
24 Tyson Smith indicated, that NRC should have included
25 a more elaborate examination of SAMAs, including an

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1 inquiry into consequences of potential aircraft attack
2 on the reactor, and the Commission rejected this
3 argument based on the GEIS and SEIS analysis of the
4 terrorism analysis and then went on to say that there
5 was no adequate basis for that contention. So that
6 feeds into the 2309 --

7 JUDGE KARLIN: So isn't the adequacy of a
8 basis more contention-specific in one -- the identical
9 contention in one case may have -- the Petitioner may
10 provide an adequate basis and in another contention --
11 proceeding they may not provide an adequate basis. So
12 the identical contention might be admissible in one
13 case and not admissible in the other if in one case an
14 adequate basis was provided and in another case it was
15 not.

16 MS. KANATAS: I believe that is true. But
17 as has been pointed out, Mothers -- Mothers for Peace
18 have not met the 2309 requirements as their claim that
19 the SAMAs in the environmental report are inadequate.
20 It rests on speculation and assertion with no factual
21 or expert opinion as to how or why terrorist attacks
22 would be different from severe accidents.

23 JUDGE KARLIN: Okay.

24 MS. KANATAS: No ballpark relative costs
25 and benefit.

1 JUDGE KARLIN: Well, let me ask on that.

2 MS. KANATAS: Yes.

3 JUDGE KARLIN: Much has been made of this
4 *McGuire* decision. It's 56 NRC 1, the *Duke Energy*
5 decision. And it's called the *McGuire Nuclear Station*
6 *and Catawba*. And on page 12, they talk about, "Any
7 number of possible SAMAs may be theoretically
8 conceivable" and that the Petitioners need to have
9 some ballpark figure or some sort of indication of --
10 for the cost benefit of the SAMA.

11 MS. KANATAS: Uh-huh. I don't have the
12 case in front of me, but I -- yes, I --

13 JUDGE KARLIN: Okay. And I see the
14 Applicant arguing that and I think the Staff argued
15 that. Now, why didn't you argue that with regard to
16 Environmental Contention Number 1? Environmental
17 Contention Number 1 was, you know, a SAMA contention,
18 if I got it right, about the -- they didn't deal with
19 the Shoreline Fault. And I don't know whether anybody
20 argued or you argued, Well, you didn't give some
21 plausible cost estimates of why this would make a
22 difference.

23 Is there a discrepancy between -- did you
24 argue cost -- that the *McGuire* case in in the context
25 of Contention Number EC-1? And, if not, why are you

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1 arguing it here?

2 MS. KANATAS: I need a minute to consult
3 as I did not --

4 JUDGE KARLIN: Sure.

5 MS. KANATAS: -- work on EC-1. Thank you.

6 (Pause.)

7 MS. KANATAS: Thank you. Thank you for
8 the indulgence for more time.

9 JUDGE KARLIN: Okay.

10 MS. KANATAS: It was not argued -- it was
11 not avoided in the argument because of some
12 distinguishing characteristic. It was, rather, that
13 EC-1 focused on alternate grounds for why the
14 contention was inadmissible. And here, just in a SAMA
15 context here, we looked to *Indian Point* and *McGuire* to
16 just say that all that there was in EC-4 was the mere
17 assertion that specific terrorist attacks needed to be
18 done and that was all that was said.

19 So --

20 JUDGE KARLIN: As I understand, Ms. Curran
21 was saying, Well, a whole category of severe
22 accidents, you know, have not been considered; i.e.,
23 terrorist attacks. Not -- we're not nitpicking
24 specific issues. It's just a whole category was
25 excluded and that's why we think it needs to be

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1 included.

2 MS. KANATAS: The way I understand Ms.
3 Curran's argument, and certainly she can correct me,
4 is that she felt the SAMA analysis was inadequate
5 because while severe accidents were looked at, it
6 didn't look at specific terrorist SAMA analysis.

7 JUDGE KARLIN: Right. A category of --

8 MS. KANATAS: Right, within severe
9 accidents.

10 JUDGE KARLIN: Okay. Well, I don't think
11 I need to pursue that point. Anything else? No. All
12 right. Thank you.

13 MS. KANATAS: Thank you.

14 JUDGE KARLIN: Ms. Curran -- okay. We
15 might have one or two more questions.

16 JUDGE TRIKOUROS: I signaled you that I
17 wanted to ask you that question. The value of a SAMA
18 is, in large part, associated with the quantification
19 of the event scenario. And the inability to quantify
20 a terrorist scenario would really make the SAMA that
21 you're -- the SAMA analysis that you're interested in
22 having done not practical in the sense that one
23 wouldn't know what to do with it. Because the SAMA
24 does require the quantification in order to determine
25 if a modification should or shouldn't be made.

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1 MS. CURRAN: Well, are not -- I guess what
2 I would just point out is that in the course of
3 deciding what security improvements to improve -- to
4 impose, to the extent -- to the extent that security
5 improvements go beyond adequate protection standards,
6 the NRC looks at cost and there -- I just think that
7 the NRC does look at cost and so there must be a way
8 to do it. And if there isn't, then say so. If there
9 isn't, say so.

10 If that's the reason, then -- if there's
11 no way to -- and here's an agency -- and I'm
12 representing a group of neighbors, right? This is
13 very -- NEPA is so common sensical and simple in a way
14 -- it's just the Government saying to the public, We
15 are taking your concerns about protection of the
16 environment into account. If the agency or if PG&E
17 can't figure out how to do this, then say so. Put it
18 out there. Let's talk about it. But don't tell us,
19 We can't do it. We've got to keep it secret. We're
20 not discussing it with you. You know, all the reasons
21 that -- the only people who don't get included on
22 these really important issues are the members of the
23 public who are affected by it. Part of the purpose of
24 NEPA is to get these issues out on the table so they
25 can be discussed.

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1 JUDGE ABRAMSON: Ms. Curran, let me speak
2 to this. This has been a topic I spent a fair amount
3 of time thinking about. And as you know, when you do
4 SAMA analysis, you start with an initiator and you
5 calculate the -- you start with the probability of
6 that initiator and you then take the initiator, you
7 figure out what the consequences are, and you work
8 your way through until you get environmental
9 consequences. So you take the initiator -- but to
10 start with, you have to have the probability.

11 Now, if we -- if we as a group in this
12 room think about how to calculate the probability of
13 a particular type of terrorist attack, what would you
14 do? If you're going to calculate the probability of
15 somebody being in a particular auto accident, you'd go
16 get the data; right? You'd figure out how many
17 accidents there were on that highway per year and
18 you'd work your way backward and calculate a
19 probability.

20 If we were to use that kind of objective
21 normal approach to calculating a terrorist attack, the
22 probability of any particular terrorist attack would
23 come out so small because there are virtually none.
24 We'd have to speculate on how frequently it would
25 occur. And we had one terrorist attack on the Twin

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1 Towers. We have -- I'm not sure if we have any
2 terrorist attacks on nuclear power plants in the U.S.

3 When we -- if we try to calculate the
4 probability of the event, the number would not be
5 calculable other than by speculation. There's no data
6 on which to base a number. So I think, if I recall
7 correctly, at one point when the NRC Staff was trying
8 to address this for the Ninth Circuit, they said
9 they're remote and speculative. You'll recall that's
10 a phrase from NEPA. If it's remote and speculative,
11 you don't have to deal with it.

12 I think if we were objectively to try to
13 figure out the probabilities of a terrorist attack at
14 all, or let alone the probability of specific types of
15 terrorist attacks so that we could then calculate the
16 kind of release from a core, we'd be very hard-pressed
17 to come up with a number greater than some
18 infinitesimal number.

19 So this to me is the issue that underlies
20 these problems. And while I'm sympathetic to
21 everybody's concern about terrorist attacks -- and,
22 believe me, I live in New York City. I was in the
23 city the day that that attack happened. I had
24 acquaintances that died as a result of that. I'm
25 sympathetic, empathetic to the issue. But if I as a

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1 scientist try to calculate this, I think I can't do
2 anything other than come up with a number that's so
3 small that it has to be remote and speculative under
4 NEPA criteria. And that's why I think Judge Trikouros
5 is raising the question how would you do it. I think
6 it's not how would you do the calculation to figure
7 out the cost. It's how would you get the number to
8 begin with of the probability of that event. That's
9 the one that gives me heartburn.

10 MS. CURRAN: Judge Abramson, I would just
11 refer you back to the Ninth Circuit decision in which
12 I think the court basically said to the NRC that -- it
13 looked at all the contexts in which the NRC publicly
14 represented that it was capable of doing just that.
15 IT was capable of making decisions about which types
16 of threats should be protected against and it -- you
17 know, it was reassuring the public, We can do this.
18 We're doing this all the time.

19 And yet in the context of NEPA, it was
20 saying, We can't do this. There was an internal
21 inconsistency. That I think was the bedrock of the
22 Ninth Circuit's decision.

23 JUDGE ABRAMSON: Yeah.

24 MS. CURRAN: And I'm not saying it's easy
25 to do. But I think what the Ninth Circuit was saying

1 is -- to the NRC is, If you're telling us that you
2 can't come up with a way to analyze this because it's
3 impossible, we're telling you that's contradicted by
4 your own statements, your own actions in many
5 contexts. And so we give it back to you to figure
6 out.

7 JUDGE ABRAMSON: And I read that into the
8 Ninth Circuit decision and, as you know, I'm an
9 adjudicator. I wasn't part of the team that wrote the
10 NRC's brief for that, but it seems to me as a
11 scientist that any number I would come up with for a
12 probability of one of those events would be ten to the
13 minus nine or ten to the minus ten. It would be
14 really infinitesimal because there's just simply no
15 events on which to base it. And you could look at
16 other kinds of attacks, domestic terrorist attacks in
17 the U.S. And if you picked a facility and tried to
18 calculate the probability of that event, you'd come up
19 based on the data with something tiny as compared with
20 if you tried to calculate aircraft crashes, and I was
21 involved with private fuel storage where we had a
22 mechanism for calculating the probability of an
23 aircraft crash into the site and, from there, we could
24 work forward to calculate consequences.

25 Here, the normal mechanisms for

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1 calculating it would lead you to a number that's so
2 small you would have to conclude it's remote and
3 speculative. Why the Staff didn't -- Staff and
4 counsel didn't argue that before the Ninth Circuit
5 effectively, I can't speak to.

6 JUDGE KARLIN: Let me jump in. I think
7 the Ninth Circuit decision, the Staff did argue
8 exactly those points; that is, that the -- we can't --
9 we don't have to do a NEPA analysis of the terrorist
10 attack here categorically because it's remote and
11 speculative and, oh, by the way, we can't quantify,
12 there's no way we could quantify anything. And the
13 Ninth Circuit flatly said, No, we don't accept that
14 it's remote and speculative because you've got all
15 these other safety programs that deal with terrorist
16 attacks. And, oh, by the way, just because it's not
17 quantifiable what the probability is doesn't mean you
18 don't have to cover it under NEPA qualitatively.

19 And I think that's -- if we all re-read
20 the Ninth Circuit's decision, I think it flat out
21 rejected the remote and speculative.

22 JUDGE ABRAMSON: No. You have to read the
23 briefs to get there, Judge Karlin, and I've read them.

24 JUDGE KARLIN: Well, the decision itself
25 says, We reject the argument that it's remote and

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1 speculative. The decision itself rejects the idea
2 that just because you can't quantify what the
3 probability is, you don't have to deal with it under
4 NEPA.

5 JUDGE ABRAMSON: And that's right. And
6 you can quantify it. You come up with an
7 infinitesimal number.

8 MS. CURRAN: If the analysis of
9 alternatives is indeed one of the most important steps
10 to be taken in an environmental impact statement, then
11 our view is that it's incumbent on the agency to find
12 a way to do that. And if they can't do it by
13 attaching a probability number to a risk, then perhaps
14 it's a different -- a qualitative analysis similar to,
15 say, the truck bomb rule which was one where -- this
16 was in 1994 -- where the NRC said, We can't quantify
17 this but we can look at some indicators that this is
18 something we've got to protect against, and they
19 promulgated a rule. That's the kind of analysis that
20 could be done.

21 JUDGE ABRAMSON: It may well be that the
22 Commission would entertain the possibility of trying
23 to develop a rule for how to deal with these things.
24 But what I'm saying is if I as a scientist try to
25 calculate the probability -- I can calculate the

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1 probability, Alex. I disagree with anybody who argued
2 to the Ninth Circuit that you can't calculate the
3 probability. I can calculate it. I take the hard
4 data and I calculate a number and the number I come up
5 with is ten to the minus ten, ten to the minus 12.
6 It's the frequency of occurrence of those events and
7 it's infinitesimal and, therefore, remote and
8 speculative.

9 And that wasn't adequately argued. But I
10 can calculate that number and, starting from that
11 number, I would get to the conclusion that it's remote
12 and speculative and, therefore, you don't have to deal
13 with it under NEPA. But that argument was not
14 adequately made before the Ninth Circuit.

15 JUDGE KARLIN: Well, it was made but it
16 may not be adequately because they lost.

17 JUDGE ABRAMSON: Not adequate. They just
18 asserted it. They never made it.

19 JUDGE TRIKOUROS: Let me point out to you
20 that if one were looking where to get bang for the
21 buck, so to speak, if I look at the number of severe
22 accidents that were -- that occurred in the world, I
23 would find that they occurred almost exclusively
24 because of operator error. So I have real severe
25 accidents that have occurred because of operator

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1 error, not sabotage, simply mistakes.

2 And if -- and that's real data. These are
3 actual severe accidents. So where would one put their
4 money, you would argue, in the human performance area.
5 Much more so probabilistically than in a terrorist
6 attack. So, I mean, just as another way to look at
7 this.

8 JUDGE KARLIN: Thank you. Do we have any
9 more questions for Ms. Curran?

10 MS. CURRAN: If we take until ten o'clock,
11 we might be able to solve this.

12 JUDGE KARLIN: I think we'll go on
13 discussing this later, but thank you, Ms. Curran. I
14 think that's all that we have on this.

15 So I think we've reached the point where
16 we will then entertain the closing arguments. Five
17 minutes. It's been a long day and, Ms. Curran, you're
18 back up in the hot box. Five minutes. Ms. Bu will
19 try to keep time, a one-minute warning.

20 CLOSING STATEMENT ON BEHALF OF THE PETITIONERS

21 MS. CURRAN: Well, I would only like to
22 stress that this is a very important juncture for the
23 Diablo Canyon Nuclear Plant. It is the first time
24 since the plant received an operating license that
25 environmental issues are to be looked at

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1 comprehensively. There's been, as I was saying in my
2 opening statement, a number of very important
3 developments in the world, the terrorist attacks of
4 September 11th, with respect to the Commission's
5 understanding of the behavior of spent fuel pools,
6 owner accident conditions, with respect to what's been
7 learned about the earthquake risks and what is still
8 being learned about the earthquake risks in this area.

9 And, once again, I would put before this
10 Board the cautionary tale of the BP oil spill in which
11 the regulators cooperated with BP in basically a rush
12 to judgment to issue permits where the technology for
13 mining the oil was way ahead of the technology for
14 dealing with the effects of a serious accident, where
15 it wasn't taken seriously. It wasn't taken seriously
16 the potential for something very, very serious to
17 occur.

18 But you have the opportunity to do that.
19 And the Mothers for Peace are relying on you to take
20 into very serious considerations the issues that we
21 have raised and we believe that NEPA requires the
22 ventilation of these issues that we have raised today.

23 And I thank you very much for your
24 consideration of our views. Thank you.

25 JUDGE KARLIN: Thank you, Ms. Curran.

1 PG&E. Mr. Repka.

2 CLOSING STATEMENT ON BEHALF OF THE APPLICANT

3 MR. REPKA: Thank you. It's late and I'll
4 be brief. I just want to touch on three points. Much
5 has been made today about three issues -- terrorist
6 attacks, spent fuel pool risks, and seismic risks.
7 With respect to terrorist attacks, the issue has been
8 addressed in the GEIS on a generic basis and there's
9 been absolutely nothing presented in any contention
10 that would provide a basis to say that there's
11 anything unique or different about Diablo Canyon with
12 respect to terrorist attacks, nothing that would make
13 the site particularly risky or different from any
14 other site in the United States.

15 Second, with respect to the issue of spent
16 fuel pool risks, there's been some discussion of the
17 draft revision to the GEIS, and I just want to refer
18 to one page of the draft revision of the GEIS that
19 perhaps has been missed in the discussions earlier
20 today and that's page 3-50. In the draft, the NRC
21 writes that, "Nuclear power plants are constructed
22 according to seismic specifications in 10 CFR Part 50,
23 Appendix S. Their spent fuel pools are designed with
24 reinforced concrete, allowing them to remain operable
25 through the largest earthquake that has occurred or is

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1 expected to occur in the area." It goes on to say,
2 "Two California plants, Diablo Canyon and San Onofre,
3 are in locations with peak acceleration of 25 to 30
4 percent of gravity," which they're saying is larger
5 than other locations. But then goes on to say, "These
6 plants have been designed to safely withstand the
7 seismic effects associated with earthquakes with
8 epicenters at various locations and at various depths,
9 magnitudes, and ground accelerations."

10 The point here is --

11 JUDGE KARLIN: May I ask: What document
12 was that?

13 MR. REPKA: This is draft revision 1 to
14 NUREG 1437.

15 JUDGE KARLIN: Okay.

16 MR. REPKA: Page 3-50.

17 JUDGE KARLIN: So that's the 2009 draft
18 GEIS?

19 MR. REPKA: Correct.

20 JUDGE KARLIN: Page?

21 MR. REPKA: 3-50.

22 JUDGE KARLIN: Thank you. Just for the
23 record.

24 MR. REPKA: The point is that with respect
25 to the spent fuel pool or any other structure system

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1 or component at the plant, the seismic hazard at
2 Diablo Canyon may be greater than other locations in
3 the United States, but the plant is designed precisely
4 for that. So, therefore, the seismic risk is not
5 greater than at other plants in the United States.

6 And then the final point I would like to
7 make is with respect to the seismic issue and the
8 issue of the Shoreline Fault. Obviously, PG&E is
9 continuing its evaluations of that. There has been
10 substantial data presented by the company to the NRC
11 that has been characterized as preliminary, but I can
12 represent for the experts in PG&E that all
13 expectations by the end of the year, when the final
14 report on this first -- this current analysis is
15 completed, that in fact it will show that the -- that
16 the assessments of the Shoreline Fault today are
17 actually conservative.

18 And with respect to the -- because
19 uncertainties will have been eliminated and
20 conservatisms removed and, therefore, show that in
21 fact the Shoreline Fault is well-bounded by the
22 existing design basis. In fact, the only item offered
23 for any contention on seismic or otherwise related to
24 the Shoreline Fault is this research information
25 letter 09-001 which is actually an independent NRC

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1 Staff assessment of the current state of the inquiry
2 into the Shoreline Fault. And the conclusion of that
3 very document that's being relied upon is that, "The
4 results of the preliminary assessment indicate that
5 the best estimate of 84th percentile deterministic
6 seismic loading levels predicted for a maximum
7 magnitude earthquake on the Shoreline Fault are below
8 those for which the plant was previously analyzed in
9 the Diablo Canyon Long-Term Seismic Program for all
10 frequencies of interest."

11 . So that's the conclusion and that's what's
12 being relied upon and I think that that provides no
13 basis for concerns with respect to the current state
14 of the seismic design of the plant.

15 Thank you.

16 JUDGE KARLIN: Thank you, Mr. Repka. NRC
17 Staff, Mr. Smith.

18 CLOSING STATEMENT ON BEHALF OF THE NRC STAFF

19 MR. M. SMITH: Thank you, Judge Karlin.
20 Just a few thoughts to close with. With regard to
21 Technical Contention 1, Staff has taken the position
22 that the focus of license renewal is on the
23 application. But managing effects of aging does not
24 end with the submittal of the aging management program
25 and the license renewal review. Rather, the terms of

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1 the AMP are incorporated into the current licensing
2 basis and subject to the NRC's oversight during the
3 period of extended operation.

4 And, finally, I'd like to clear up a
5 couple points on Environmental Contention 1 on our
6 position on that. The *Pilgrim* decision states that
7 probabilistic risk assessment is one way to adequately
8 manage -- to adequately perform a SAMA analysis but
9 not the only way. In fact, most licensees add to
10 their PRA to account for weaknesses in the analysis,
11 particularly to account for missing info regarding
12 seismic or fire issues, the benefit multiplier. All
13 we're asking for in this case is the Applicant do a
14 similar analysis by showing the benefit multiplier in
15 this case is adequate to address the Shoreline Fault
16 or take the three steps identified in our pleadings to
17 also account for the Shoreline Fault.

18 Thank you.

19 JUDGE KARLIN: Thank you. Thank you, Mr.
20 Smith.

21 MS. CURRAN: May I have one moment?

22 JUDGE KARLIN: No. No. I don't think so.
23 We're completed at this point and I think everyone's
24 had their shot and it's been a long day.

25 MS. CURRAN: Mr. Repka discussed part of

1 the revised EIS that --

2 JUDGE KARLIN: You --

3 MS. CURRAN: -- was not discussed at all
4 and I would just -- it will take me two -- a minute to
5 address. It seems very unfair to me.

6 JUDGE KARLIN: Go ahead, Ms. Curran.
7 Please go to the podium. Nothing you've said thus far
8 has been recorded. We'll give you two minutes. Go
9 ahead, Ms. Curran.

10 MS. CURRAN: I just wanted to address the
11 part of the draft revised EIS that Mr. Repka referred
12 to at page 3-50. That was not discussed in any of the
13 arguments --

14 JUDGE ABRAMSON: Go ahead. Tell us what
15 you want to say about it.

16 MS. CURRAN: -- earlier.

17 JUDGE ABRAMSON: Please.

18 MS. CURRAN: The first sentence from the
19 paragraph that he cites says, "Nuclear power plants
20 are constructed according to seismic specifications in
21 10 CFR Part 50, Appendix S." He's talking about
22 design basis accidents. This is -- what we are
23 talking about in our contentions is severe accidents,
24 so I just want to make that distinction.

25 Thank you.

1 JUDGE KARLIN: All right. Thank you.
2 Thank you. All right. We've had a long day.
3 Everyone has been very patient in responding to our
4 questions, sometimes clear, sometimes unclear. We've
5 tried to ask them -- I think we've gotten some answers
6 that helped me think through these contentions.

7 Where do we go from here? This Board will
8 adjourn the meeting here today and then we will
9 convene internally and discuss our assessment, hash it
10 out, go through each contention, and reach our best
11 decision as we can as to whether the contentions are
12 admissible, whether they're within the scope and all
13 the other issues that have been raised here today.
14 And then, having reached that decision internally in
15 terms of what we think the answers are, we will write
16 a decision which will be made available to the public
17 trying to go through with care, reasonable care, each
18 of the points being made and what our thoughts are and
19 what our ultimate decision is.

20 So that's going to take us a little while.
21 It will probably be early July or July sometime I
22 think when we issue this ruling. And the ruling will,
23 as I said at the beginning of the day, be focused on
24 whether the contentions are admissible and whether the
25 waivers -- they have made a prima facie case on the

1 waivers. And if we think that the intervenor Mothers
2 for Peace have filed an admissible contention or a
3 waiver, then we will so rule and we will then grant
4 the request for a hearing. And a hearing will be
5 conducted later, a trial, an actual evidentiary trial
6 where witnesses testify as to the facts, experts for
7 the most part.

8 If we deny the request for the hearing and
9 find that none of the contentions are admissible and
10 none of the waivers have made a prima facie case, we
11 will issue a ruling to that effect and that will be
12 the end of this proceeding unless somebody appeals it.
13 In either case, somebody can appeal our decision so --
14 and often they do. No hard feelings there. We're not
15 -- we don't always rule correctly but we're going to
16 do our best and we're going to issue our decisions in
17 -- as promptly as we can and we expect that to be in
18 July.

19 Again, appreciate all of the hard work
20 that the lawyers have put into this and the parties
21 have put into this. We appreciate that the public has
22 been here and has sat through a lot of this. It's
23 very hard to follow, I think, and we also I guess
24 finally would like to thank again the San Luis Obispo
25 County Board of Supervisors for making this facility

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1 available. It's been I think quite useful for us and
2 I hope that if this happens again, we may be able to
3 use their facilities in the future.

4 With that, we stand adjourned.

5 (Whereupon, at 5:23 p.m., the proceedings
6 were adjourned.)

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CERTIFICATE

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

Name of Proceeding: Oral Arguments

Docket Number: 50-275-LR and 50-323-LR

ASLBP Number: 10-890-01-LR-BD01

Location: San Luis Obispo, California

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


Michael Williamson
Official Reporter
Neal R. Gross & Co., Inc.

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