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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

ORAL ARGUMENT

In the Matter of:

PRIVATE FUEL STORAGE L.L.C. Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage
Installation)

Thursday, May 29, 2003

ASLBP Hearing Room, T3-B45

Two White Flint North

11545 Rockville Pike

Rockville, Maryland

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

MICHAEL C. FARRAR Chairman

PETER S. LAM Administrative Judge

JERRY R. KLINE Administrative Judge

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

9:32 a.m.

CHAIRMAN FARRAR: Good morning, everyone. Welcome back. I'd say our lives have been empty since we haven't spent every day with you for three months like we did last year but that wouldn't be the truth, so I won't say it. In any event, welcome. This is the Private Fuel Storage double header today. First, an oral argument on the Applicant's motion for reconsideration and then a pre-hearing conference on the so-called consequences question.

There have been two developments I'm sure you're all aware of this week. First, that the Board chaired by Judge Bollwerk issued three decisions in the financial qualifications area, and the Commission yesterday issued a decision concerning their not reviewing at this time our probability decision from March 10 and giving us instructions on how to proceed with the consequences hearing.

With that introduction, could we have counsel introduce themselves? Mr. Silberg?

MR. SILBERG: Yes. Good morning, Judge. I'm Jay Silberg from the law firm of Shaw Pittman. With me here today from Shaw Pittman also are Paul Gaukler and Sean Barnett. We are representing the

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1 Applicant, Private Fuel Storage.

2 CHAIRMAN FARRAR: Mr. Turk?

3 MR. TURK: Good morning, Your Honors. I'm
4 Sherwin Turk with the Office of General Counsel for
5 the NRC staff. With me to my far right is Catherine
6 Marco, another attorney with OGC, and to my immediate
7 right is Mr. Mark Delligatti, Project Manager for the
8 NRC staff for the PFS project.

9 CHAIRMAN FARRAR: Okay. Since you've
10 introduced Mr. Delligatti, Mr. Silberg, are there any
11 of your people you'd like to tell us are here?

12 MR. SILBERG: Yes. In the back of the
13 room, we have Mr. Max DeLong. Mr. DeLong is a -- Dr.
14 DeLong is a board member of PFS and is Executive
15 Engineer with Exel Energy. And also John Donelle,
16 Stone & Webster, who is the Project Director of PFS.

17 CHAIRMAN FARRAR: Okay. Thank you. In
18 our order of -- I'm sorry. Mr. Soper, Ms. Chancellor.

19 MR. SOPER: I'm sure that wasn't
20 subliminal.

21 (Laughter.)

22 MR. SOPER: Good morning to the Panel.
23 Jim Soper and Denise Chancellor for the State of Utah,
24 both from the Utah Attorney General's Office.

25 CHAIRMAN FARRAR: Good to see you again.

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1 MS. CHANCELLOR: And we have nobody here
2 for this.

3 CHAIRMAN FARRAR: Okay. And we do
4 appreciate it. We'd offer you the opportunity to
5 participate by videoconference, and we certainly
6 appreciate that you declined that opportunity and are
7 showing up in person, and we appreciate that.

8 MR. SOPER: But we'd like to mention that
9 we have Connie Nakahara on the telephone who has been
10 tested and she's listening. I'm not sure if she
11 intends to say anything.

12 CHAIRMAN FARRAR: If you want her to say
13 something -- I mean we try in oral arguments not to
14 have more than one participant, but if it comes to
15 something she knows about, feel free to call on her.
16 Otherwise, anyone who's dialed in I'd like to make
17 sure that they mute their phones and put a sign on
18 their door so their boss doesn't come in yelling at
19 them and we hear all about it in the middle of the
20 hearing.

21 In terms of logistics, you all know about
22 the security situation. Anyone who's not, I guess, an
23 NRC employee has to be escorted even to the restrooms.
24 I would ask if there are any staff people here not
25 participating if they see somebody needing some help

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1 and there's no escort available if they would help
2 with that.

3 Our order of April 29 set the time limits
4 for the oral argument. Applicant will have 45 minutes
5 to open, staff will have 20 minutes, State will have
6 an hour and ten minutes, and the Applicant will have
7 15 minutes to close. That would get us to 12:15. The
8 mission on time today is finishing the afternoon
9 session by three o'clock so the State counsel can
10 catch their plane back home and not to have to spend
11 another night here. Are there any preliminary matters
12 before we start the argument?

13 MR. SILBERG: Just one, Mr. Chairman. I
14 would note that it is likely that we will be
15 discussing at some point during this morning's oral
16 argument proprietary information. I think the parties
17 are generally aware of what information is likely to
18 be proprietary, and when we get to that point we will
19 try to announce that and would ask that those persons
20 who are not directly connected with any of the parties
21 be escorted out and we close the hearing at that
22 point.

23 CHAIRMAN FARRAR: Is there another way to
24 do that which would be -- I've been thinking of
25 questions that I can do by reference to something in

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1 your briefs or by asking a general question and you'll
2 know what we mean. I mean the danger to me is not you
3 all but us blurting out something. I hate to have
4 people leave if it's not necessary.

5 MR. SILBERG: Yes. I think it will be
6 very difficult to discuss the financial aspects of the
7 Motion to Reconsider, which is one of the collateral
8 issues that the Board raised in its Item 3 without
9 mentioning certain topics which are considered to be
10 proprietary. That will be towards the end of the
11 argument, and perhaps we can avoid having people
12 coming in and out, but I think it probably not
13 feasible to do it by code words.

14 CHAIRMAN FARRAR: Well, the problem is you
15 may think it's coming at the end of the argument, but
16 we may think it's coming earlier. Just by the very
17 nature of oral argument and for the benefit of those
18 who've been to evidentiary hearings rather than oral
19 arguments, evidentiary hearings the parties pretty
20 much put on their case and we ask a few questions.
21 Oral argument is not for the benefit of the parties,
22 it's for our benefit to make sure we understand the
23 issues. So you'll hear a lot of constant
24 interruptions from us, that's not being rude. That's
25 the way oral arguments are. We're trying to make sure

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1 we understand the case and we're in position to make
2 a decision.

3 Mr. Silberg, let's do this: First off, if
4 any of us begin to blurt out something that sounds
5 dangerous to you, don't be polite, jump up and say it.

6 MR. SILBERG: We'll be polite but we will
7 jump up.

8 CHAIRMAN FARRAR: Yes, jump up and say,
9 "Hold it," and that's fine. We don't usually proceed
10 that way, but, certainly, please do that. But let's
11 see how it goes bearing your concern in mind. Any
12 other preliminary matters? All right. Mr. Silberg,
13 you're going to conduct the argument?

14 MR. SILBERG: Would you like us to use the
15 --

16 CHAIRMAN FARRAR: We put it there if you
17 want to. What's your preference?

18 MR. SILBERG: I'd just as soon sit.

19 CHAIRMAN FARRAR: Sit, okay.

20 MR. SILBERG: But I'd be happy to stand if
21 the Board would like.

22 CHAIRMAN FARRAR: That's fine. Mr. Turk,
23 Mr. Soper, is that all with you not to use the podium?

24 MR. SOPER: That's fine. Whatever the
25 Board would prefer.

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1 CHAIRMAN FARRAR: Yes.

2 MS. CHANCELLOR: Just to alert the Board,
3 Mr. Soper and I will be doing part of the argument
4 each. Mr. Soper will take the first part that relates
5 directly to Q, and I'll be doing the collateral issues
6 if that's acceptable.

7 CHAIRMAN FARRAR: Okay.

8 MR. SILBERG: I was going to mention that
9 when I started to speak that we would also divide up
10 the argument, except ours is in three parts like Gaul.

11 CHAIRMAN FARRAR: Okay. All right. Then
12 why don't we get started, Mr. Silberg.

13 MR. SILBERG: Thank you.

14 CHAIRMAN FARRAR: Hold on one second. All
15 right. Go ahead, Mr. Silberg.

16 MR. SILBERG: Thank you. As I mentioned,
17 we would, with the Board's indulgence, like to divide
18 up our oral argument. I will address the procedural
19 issue, Question 1, of the Board's April 4 Memorandum
20 and Order. Mr. Gaukler will discuss the evidentiary
21 issues, which is Question 2, and Mr. Gaukler and Mr.
22 Barnett will discuss the Board's Question 3.

23 Let me start out by summarizing the
24 proposed license condition, which we asked the Board
25 to adopt in our Motion for Reconsideration. That

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1 condition would limit the number of casks at the site
2 to a maximum of 336 arrayed within the cask storage
3 area in a particular shape specified in that
4 condition. The staff slightly revised that in their
5 answer to our Motion for Reconsideration, but it's
6 basically an order limiting both the number of casks
7 and the size of the area in which they would be
8 stored.

9 CHAIRMAN FARRAR: Two questions, Mr.
10 Silberg. Did you ever ask us to do that during the
11 course of the hearing?

12 MR. SILBERG: I will address- that as my
13 first issue.

14 CHAIRMAN FARRAR: Okay.

15 MR. SILBERG: As an overview, we believe
16 that the uncontradicted evidence from the existing
17 record establishes that a cask limit of that type
18 within that area will meet the Board's and the
19 Commission's ten to the minus six criteria for the
20 probability of an aircraft crash.

21 Now, as I said, I'm going to address the
22 first question, the procedural issue. That question
23 had two parts. First, does the record reflect a
24 previous request or suggestion that the Board could
25 have or should have ruled that the proposed license

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1 condition be adopted, and, second, the second part of
2 the first question, if not, does the current request
3 meet the criteria for a Motion for Reconsideration?
4 There should also be a third question, which I'll also
5 address, and that is even if the request doesn't meet
6 the criteria for reconsideration, should it still have
7 been granted.

8 With respect to the first part of Question
9 1, the question that you just asked, Judge Farrar,
10 there was no explicit request for the Board to adopt
11 this license condition. With respect to the second
12 part of the first question, was there a suggestion
13 that the Board could have or should have ruled, we
14 believe that read fairly the record contains at least
15 a suggestion that such a condition be adopted. And at
16 this point, if I could ask my colleagues, we have
17 excerpted the record materials which are reflected in
18 our brief which we believe demonstrate that there was
19 this, as the Board said, suggestion. These are
20 excerpts from documents already in the record, and we
21 will also give the Board copies of the excerpts.

22 And there are a number of places in the
23 record where we believe if read fairly that there is
24 this, as you said, suggestion, and as soon as Mr.
25 Barnett distributes those -- I have previously given

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1 copies of these to the parties. If one goes back to
2 the aircraft crash report --

3 CHAIRMAN FARRAR: Let me interrupt you,
4 Mr. Silberg. We've read your brief, I understand that
5 you did have these references to the fact the facility
6 wouldn't be filled up. My problem is this: When we
7 wrote our decision and tried to lay out the future
8 course of the proceeding, we talked about the Air
9 Force changing the flyway, the width of flyway. We
10 talked about the number of flights changing. I think
11 I'm speaking for the three of us, it never crossed our
12 mind to license a smaller facility. Now, were we
13 being particularly obtuse in missing that? I know
14 you'll be polite answering that.

15 MR. SILBERG: Politely, I would suggest
16 that the Board could have from the material in the
17 record divined that that would be another option that
18 the Board had.

19 CHAIRMAN FARRAR: Now, you never said to
20 us, "Give us the full license, but if we lose on the
21 formula, give us whatever license you can give us by
22 jiggering the numbers one way or the other."

23 MR. SILBERG: Well, frankly, we think that
24 that's inherent in any request. If, for instance, you
25 are suing for damages and you're asking the judge or

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1 jury to give you \$10,000 worth of damage and you only
2 prove \$5,000, you would expect not to get zero but to
3 get the amount you proved.

4 CHAIRMAN FARRAR: Yes. But if you were
5 seeking a license for a 1,200 megawatt reactor and we
6 gave you a 300 megawatt, someone upstairs would hear
7 about that.

8 MR. SILBERG: That might be, and in fact
9 that has occurred. There are many cases where the
10 utility for one reason or another either asks for or
11 accepts a low power or restricted power license until
12 other matters are established.

13 CHAIRMAN FARRAR: I didn't say restricted,
14 I meant not you can build your facility but only run
15 it at 300 megawatts, I mean a decision that says you
16 may build a 300-megawatt reactor.

17 MR. SILBERG: Well, a 300-megawatt reactor
18 is a different reactor, it is not the same hardware,
19 it is not the same containment, it is not the same
20 fuel. In our case, we are, in essence, building a
21 different size reactor, because all you're doing is
22 adding casks. It's as if the -- an analog here would
23 be if one were building modular reactors and you would
24 ask for a license for ten 100-megawatt reactors and
25 you only got a license for three. In our situation,

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1 that would be the equivalent when you get a lower
2 power license on an operating reactor you can't have
3 a 300-megawatt reactor, you have 1000-megawatt reactor
4 that operates at 300 megawatts. And in fact that is
5 what the Commission and the staff have done on
6 numerous occasions in the past when there were issues
7 that were outstanding.

8 And this does not turn on whether or not
9 there are regulations which authorize low power
10 licenses. There are now those regulations in 10 CFR
11 Part 50. But prior to the promulgation of those
12 regulations in June 1972, the Commission was still
13 issuing low power licenses and not just for start-up
14 purposes. There were times in the early 1970s where
15 there were issues with ECCS design or fuel design, and
16 the Commission limited the size -- the ability of a
17 plant to operate to 20 percent power. and that was
18 the basis on which the Licensing Board granted the
19 license.

20 Now, that could have been a permanent
21 license if the technical issues were not resolved. In
22 fact, the technical issues were subsequently resolved.
23 But the Appeal Board and the Commission, nonetheless,
24 granted 20 percent licenses, notwithstanding the
25 absence of any specific regulatory basis that said you

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1 can issue a low power license. And we're dealing with
2 the same situation here. We think the record and the
3 excerpts that we have in the brief fully suggest to
4 the Board that by reducing the number of casks it
5 could have brought down the probability to the ten to
6 the minus six criteria.

7 JUDGE LAM: Now, Mr. Silberg, would you
8 clarify for me your strategy here. To me, that
9 suggestion often by itself has very little meaning.
10 The license application failed with a size of 4,000
11 casks. Now, it may or may not be successful at a
12 reduced size. Now, that suggestion in the record --

13 MR. SILBERG: I'm sorry, you said it may
14 or may not be successful at the reduced size?

15 JUDGE LAM: Right, right. I mean that is
16 to be determined at this argument. Now, to me, why
17 don't you just go ahead and demonstrate it will be
18 successful at 336 casks instead of going back to the
19 record to discover if there is a suggestion or not?

20 MR. SILBERG: Well, we have made that
21 demonstration. Our motion demonstrates based on
22 uncontested evidence in the record that we meet the
23 ten to the minus six criterion for the smaller sized
24 facility. So we have made that demonstration. That's
25 laid out in our motion. Mr. Gaukler will address

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1 that, and we can address the specifics of any of the
2 particular inputs that we used in that calculation.
3 It is a ministerial mathematical calculation based on
4 evidence in the record to demonstrate that with an
5 affected area based on 336 casks we meet the ten to
6 the minus six criterion. We have made that
7 demonstration.

8 JUDGE LAM: Right. That being the case,
9 then why do you care if the Board should have been
10 aware of a reduced size cask in the record or not?

11 MR. SILBERG: That was a question that the
12 Board raised. I'm addressing Question 1 from your
13 order of April 4 where you asked whether there was a
14 request or a suggestion in the record. That's the
15 only reason that I'm raising that. We framed this as
16 a Motion for Reconsideration. It was an appropriate
17 format, and I can go through the various criteria that
18 make a Motion for Reconsideration appropriate.

19 CHAIRMAN FARRAR: Why don't you go ahead
20 and do that?

21 MR. SILBERG: Okay. However, even if we
22 change the label and call it something else, a Motion
23 to Impose a License Condition, we should still do what
24 you said which is look at the record and see what the
25 outcome is.

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1 Now, the criteria for a Motion for
2 Reconsideration, which is the second part of this
3 question, has been expressed in a variety of different
4 ways. Some are what should be in a Motion for
5 Reconsideration, some are what should not be in a
6 Motion for Reconsideration. For instance, in the
7 Central Electric case Commission decision, CLI-8126,
8 and these are all decisions that are cited in the
9 various parties' briefs, it talks about a reevaluation
10 of the order in light of elaboration of or refinement
11 of arguments previously advanced. Well, we think that
12 the change in the affected area, which is part of the
13 equation that we used, is certainly an elaboration or
14 a refinement of the basic argument, which is we ought
15 to -- we think we established that we meet the
16 probability for a full-sized facility.

17 In the PFS case, in the Licensing Board's
18 decision, LBP-0031, the Board referred to whether the
19 order overlooked critical factual information. We
20 think in this case that the Board did overlook
21 critical factual information, which is the information
22 in the record that demonstrates that a smaller-sized
23 facility with a smaller affected area would meet the
24 criteria.

25 CHAIRMAN FARRAR: Did we overlook critical

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1 factual information or did you never ask us to do
2 this? And the reason I ask this question is I've only
3 been on the Board for the last year and a half. The
4 Board, chaired by Judge Bollwerk, did all the laboring
5 work before then. But it seems to me the history of
6 this case is a history of the Applicant saying the
7 State didn't follow the rules to the letter and so
8 their contention ought to be thrown out or a summary
9 disposition ought to be granted because they didn't
10 file an affidavit or they were three days late or
11 something like that. Now, you're coming in on a
12 Motion for Reconsideration with what seems to me is
13 asking for something you didn't ask for before, and
14 every time the State tried to shift the contention
15 from what they filed, they learned something and
16 they'd file something different, you were the first
17 guy in the door saying, "Don't let them do it, they
18 filed their contention, they're stuck with it." You
19 filed an application, why aren't you stuck with it?

20 MR. SILBERG: Well, the question is
21 whether this is an appropriate Motion for
22 Reconsideration, and for it to be an appropriate
23 Motion for Reconsideration we do not have to have
24 asked a precise question of the Board. That's why you
25 file reconsideration, I believe. Are we stuck with

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1 the application? Had the Board done what we believe
2 as we have said in our petitions for appeal, yes, we
3 would have been stuck with the application. However,
4 because a smaller-sized facility is necessarily
5 encompassed within the larger-sized facility, it's the
6 same as the damage case analogy that I posited before.
7 Are we stuck with a request for \$10,000 in damage when
8 our proof establishes \$5,000? Do we get nothing or do
9 we get \$5,000? It seems to me that's the analogy that
10 the Board ought be looking at.

11 CHAIRMAN FARRAR: Or murder and
12 manslaughter.

13 MR. SILBERG: That's correct. I mean if
14 a defendant is convicted of murder and you fail to
15 establish capital punishment, does that mean he goes
16 free? I don't think so. I mean there are lesser
17 included penalties in the criminal world, there are
18 lesser included verdicts in the civil world, and there
19 are lesser included licenses in the administrative
20 world.

21 CHAIRMAN FARRAR: I don't quarrel with you
22 as a general philosophical matter, but that's not how
23 we've treated the State, and when I was on the Appeal
24 Board years ago and when I've been here I had one
25 maxim: Everybody gets treated the same. I don't care

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1 what the rules are as long as they're applied to
2 everybody, and that's not how they've been treated.
3 Or that's my impression that that's not how they've
4 been treated.

5 MR. SILBERG: Well, let me call the
6 Board's attention to a decision in which you were a
7 party in the Seabrook case in which I believe the
8 Appeal Board did exactly that. In ALAB-442, and
9 these, again, are discussed in the briefs, based on
10 litigation of a contention on the population of the
11 low population zone, the Appeal Board determined that
12 the appropriate radius for the low population zone was
13 1.25 miles instead of 1.5 miles as the application
14 said. Did the Appeal Board dismiss the application?
15 No. What it said is, "We're adopting 1.25 miles as
16 the radius for the LPZ," and because the application
17 demonstrated, as our does, that the reactor in that
18 case met the criteria for a 1.25 mile radius LPZ, they
19 went ahead, they didn't throw the application out.

20 And I think we're dealing with the
21 situation here. You have the lesser included, if you
22 will, size of the facility. You don't dismiss the
23 application. And I don't think it's the same to say,
24 "Well, we held the intervenors to the letter of the
25 law, and we should hold you to the letter of the law."

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1 I think you are holding us to the letter of the law.
2 I don't think we are getting a special break because
3 we are asking for what we established. I think we are
4 getting what we are entitled to if the facts prove
5 what we believe they have established.

6 Now, I'll be happy to go through some of
7 the other criteria for a Motion for Reconsideration,
8 but, as I said, I think we meet the criteria:
9 overlooked critical factual information, existing
10 information that was overlooked, refining or pointing
11 out a factual misapprehension. And then there's the
12 negative: It shouldn't be an entirely new thesis, and
13 the State has pointed out that language, correctly so.
14 We don't believe that this is a, quote, "entirely new
15 thesis." We think that the smaller-size facility
16 based on a smaller affected area is well within the
17 scope of the application and as we demonstrated in the
18 excerpts in the record is something which was before
19 the Board when the decision was written and remains
20 before the Board.

21 So we think it's perfectly appropriate in
22 this circumstance, whether you call this a Motion for
23 Reconsideration or a Motion to Supplement the Record
24 or a Motion to Add a License Condition, at that point
25 you're in a semantics world. The Board should do the

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1 right thing, and if they disagree with the label we've
2 put on our motion, then we ought to apply the right
3 label. And the Board has done that.

4 CHAIRMAN FARRAR: Well, I'm not sure,
5 though, the Motion to Supplement the Record -- or that
6 it meets the criteria for a Motion to Supplement the
7 Record or a Motion to Reopen the Record.

8 MR. SILBERG: Well, I don't think there is
9 any need to supplement the record or reopen the
10 record. We believe that everything that's needed is
11 in the record, and Mr. Gaukler will talk about that.
12 And the staff in fact said everything that's needed is
13 in the record.

14 CHAIRMAN FARRAR: Yes. Your lawyer said
15 it and their lawyer said it, and my familiarity with
16 practice here is we don't go by what lawyers say, we
17 go by what experts say. And I have a little trouble
18 with the notion that you can walk in with a brief and
19 say, "We have looked at this and there's no safety
20 ramifications, there's no environmental ramifications,
21 there are no financial ramifications," and we're
22 taking that on your say so and the staff counsel say
23 so as opposed to some sort of formal document from the
24 staff scientists and engineers or from your client's
25 people.

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1 MR. SILBERG: That's what the record is
2 that we have established. There is an enormous record
3 that's already been admitted into evidence in this
4 case, and we cite to that record at every point. One
5 does not need to introduce an affidavit to put into
6 the record information that is already in the record.

7 CHAIRMAN FARRAR: Not to put into the
8 record but to say that someone has analyzed the record
9 and has in fact concluded that all the safety issues
10 that were resolved in your favor can still be resolved
11 in your favor, that this in fact has no -- does not
12 affect the findings either by the staff in its review
13 or us in our decisions that none of those safety
14 issues are resurrected. The evidence on which you
15 would base that decision or that conclusion or that
16 opinion might be in the record, but why shouldn't that
17 opinion be formally brought to us?

18 MR. SILBERG: Well, I think the opinion,
19 the ultimate opinion is that of this Board, and the
20 reason that Congress established Atomic Safety and
21 Licensing Boards with technical members and legal
22 members is so that they could take the evidence and
23 evaluate the evidence. All this evidence has been
24 already evaluated. The State had an opportunity to
25 point out technical issues which may have been raised

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1 by the smaller-sized facility. They did raise some,
2 we responded to those in our reply, I think
3 convincingly, and absent some other demonstration that
4 there are open issues we think the record speaks for
5 itself, and we think that this Board is more than
6 qualified to take the evidence of record and to
7 determine whether in fact we have established what we
8 need to establish.

9 CHAIRMAN FARRAR: So should we review all
10 the evidence in the case and all the summary
11 disposition motions and come to our conclusion that
12 reading over all those safety and environmental and
13 financial issues, yes, there's no nothing here, none
14 of those are affected?

15 MR. SILBERG: If the Board believes based
16 on what we have demonstrated that there are issues, I
17 think the appropriate thing would be for the Board to
18 ask where those are dealt with.

19 CHAIRMAN FARRAR: I don't know if there
20 are those issues, because I haven't gone back and
21 reread the 50 or 100 decisions disposing of safety
22 issues to see whether something jumps out at me.

23 MR. SILBERG: Well, that's one of the
24 reasons we have an adversarial process. If there are
25 such issues, at least at the initial level, it's up to

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1 the other parties to point them out. The State has
2 pointed out some, we have responded to them. The
3 staff has said there are none. If the Board in its --

4 CHAIRMAN FARRAR: Mr. Turk said there are
5 none.

6 MR. SILBERG: And Mr. Turk is speaking for
7 the staff.

8 CHAIRMAN FARRAR: Usually when he speaks
9 for the staff he has some staff scientists and
10 engineers who've provided him something in writing
11 where they go on record as saying what their opinion
12 is and then he presents it to us.

13 MR. SILBERG: That information is already
14 in the record, Your Honor. I think you have to ask
15 Mr. Turk whether he speaks for the staff and what his
16 basis is, but I believe that if we say there are no
17 issues and we have a record that supports that and we
18 have a technically qualified and legally qualified
19 Board which can evaluate that level of proof -- it's
20 no different when we litigated the seismic issue. How
21 does the Board know that we covered all the basis?
22 Well, we have testimony by the State and testimony by
23 the staff, and then the Board takes the record and it
24 determines whether there is anything left out. And I
25 think we're in the same position. We have a motion

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1 that we filed, a response by the State and the staff
2 that points out certain issues or determines there are
3 non-issues, and this Board needs to make a decision.

4 CHAIRMAN FARRAR: Okay.

5 MR. SILBERG: I think the only other issue
6 that I'd like to cover is whether the Board can impose
7 the condition without a license -- an amendment to the
8 license application, which is something that the State
9 has argued. We find nothing in the regulations, we
10 find nothing in any NRC case law which says that such
11 an amendment to the application is required. And,
12 certainly, if one looks to the analogy of the low
13 power license or the partial power licenses which were
14 granted, no such amendments were required in those
15 cases either. So I think there's no basis for that
16 requirement.

17 I think I've covered all the issues that
18 I wanted to cover with respect to the Board's first
19 question. I'm certainly happy to answer any other
20 questions. If not --

21 CHAIRMAN FARRAR: Let me ask you this:
22 Suppose we thought your motion failed but that it
23 would go too far to insist on the full formality of
24 the license amendment -- amendment to the application?
25 What's the middle ground procedure that would fulfill

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1 the spirit of how we try to do things here without
2 getting you into the full formality of an amendment to
3 the application and without signing off on the very
4 little formality that's contained in your motion?

5 MR. SILBERG: I guess one could ask the
6 staff to submit an affidavit putting under a technical
7 signature what staff counsel has represented as the
8 staff's position, that all the issues are in fact
9 covered by the existing record.

10 CHAIRMAN FARRAR: Shouldn't we get the
11 same thing from you?

12 MR. SILBERG: We'd be happy to do that.
13 We think that a statement that we have made as
14 statement of counsel does that, but if you wanted that
15 from our technical people, I suspect we could turn
16 around inside of 24 hours and get that out, get that
17 affidavit to you. Might even have it by this
18 afternoon if you wanted.

19 CHAIRMAN FARRAR: You said, Mr. Silberg,
20 that concluded your part. Mr. Gaukler, you were going
21 to cover what?

22 MR. GAUKLER: I'm going to cover the
23 second question of the Board and the first part of the
24 collateral issues, the financial assurance. And Mr.
25 Barnett will cover the NEPA issues.

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1 I'd like to hand out some stuff which I
2 may refer to in the argument, and these are all
3 excerpts from the record.

4 MR. TURK: Your Honor, may I ask whether
5 perhaps a slight modification of our procedure might
6 be appropriate?

7 CHAIRMAN FARRAR: What's that, Mr. Turk?

8 MR. TURK: Because there is a concern that
9 there may be some discussion of financial information
10 which PFS wishes to keep out of the public eye, if it
11 would help Your Honors in addressing the issues,
12 perhaps we could all -- all parties could speak to
13 what Mr. Silberg just addressed, which is part one of
14 the Board's questions; that is, whether the Motion for
15 Reconsideration is well-founded and should be granted
16 before we move to -- at least before we move to
17 financial matters.

18 MR. GAUKLER: The other option is to just
19 put financial matters at the end, Your Honor.

20 MR. SILBERG: Well, but that would just be
21 the end of ours. I like your suggestion.

22 MR. TURK: At the end of -- we wouldn't
23 address it. Just everybody address all of the other
24 issues except financial and have everybody address
25 those at once at the end. Just another possibility,

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1 Your Honor.

2 CHAIRMAN FARRAR: Mr. Silberg, you have no
3 objection in what Mr. Turk recommended? Ms.
4 Chancellor and Mr. Soper?

5 MR. SOPER: The suggestion is just to
6 address whether or not the motion is well taken?

7 CHAIRMAN FARRAR: Yes. The procedural --

8 MR. SOPER: I mean that would be fine.

9 MS. CHANCELLOR: There may be some back
10 and forth between Mr. Soper and myself because we
11 structured our presentation based on the order that
12 the Board presented us with, and so --

13 CHAIRMAN FARRAR: Well, why don't we do
14 this: Mr. Gaukler, you said you were not going to
15 cover financial?

16 MR. GAUKLER: I am going to cover
17 financial, but I was proposing that we just do that at
18 the end, everybody address that at the end separately.
19 In other words, I address the second question of the
20 Board, which is do we need to have any further
21 evidence with respect to the calculation of the
22 affected area --

23 CHAIRMAN FARRAR: Why don't you go ahead
24 with that?

25 MR. GAUKLER: Mr. Barnett addressed the

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1 NEPA --

2 CHAIRMAN FARRAR: Let's hold financial to
3 the end.

4 MR. GAUKLER: Very good.

5 CHAIRMAN FARRAR: Yes. Go ahead.

6 MR. GAUKLER: Very good.

7 CHAIRMAN FARRAR: And your senior partner
8 has used a good bit of your time, so keep your eye on
9 the clock.

10 MR. GAUKLER: I will keep my eye on the
11 clock. I believe this is fairly straightforward, Your
12 Honor. We believe that all the inputs necessary to
13 show that a smaller-sized facility would meet the one
14 times ten to the minus six standard are in the record.
15 We set that forth in our brief. We used the same four
16 factor formula the Board used with respect to aircraft
17 crash hazards and the same formula the Board used with
18 respect to ordnance hazards, and we showed that the
19 inputs for each one of those factors in that affected
20 area, for the affected area are set forth in the
21 record.

22 And I've given you, for example, the
23 excerpts from -- the first handout is the excerpts
24 from the aircraft crash report which shows the
25 affected area formula that shows the inputs that we

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1 used for the F-16 calculations, specifically the
2 wingspan of 32.7 and the other inputs for the F-16.

3 CHAIRMAN FARRAR: And those are the same
4 inputs that you used on the first go-around.

5 MR. GAUKLER: Same inputs we used on the
6 first go-around.

7 CHAIRMAN FARRAR: Now, for the first go-
8 around, that was, if I recall, the one part of the
9 case that was not contested.

10 MR. GAUKLER: That was not contested.

11 CHAIRMAN FARRAR: We all argued mightily
12 about the other three factors.

13 MR. GAUKLER: You're right, Your Honor.

14 CHAIRMAN FARRAR: Everybody had a
15 different opinion, but in terms of the area we're
16 talking -- we're talking about starting out with the
17 affected area, but start with the basic area. That's
18 a given.

19 MR. GAUKLER: Right.

20 CHAIRMAN FARRAR: You have your grid and
21 you don't have to know much math to figure out what
22 the area is. Then you say you use the same factors to
23 turn that area into an affected area --

24 MR. GAUKLER: Right.

25 CHAIRMAN FARRAR: -- in terms of a target

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1 for a plane.

2 MR. GAUKLER: And in fact the State
3 adopted our affected area for the F-16 crash. In the
4 materials I've given you, I've given you the excerpts
5 from Dr. Resnikoff's testimony where he explicitly
6 adopts the same area we do. And, in fact, I've given
7 you the excerpts from his declaration opposing a
8 Motion for Summary Disposition where he actually goes
9 through and does the calculation in detail. We didn't
10 have that cited in our brief but I saw that, and he
11 uses the wingspan, et cetera. So I think everybody
12 used the same methodology and agreed upon it.

13 We think the State's arguments with
14 respect to the affected area are misplaced. Their
15 claim that we should use a generic wingspan is wrong
16 because we have the F-16 specific wingspan and in fact
17 they used it themselves. With respect to the issue
18 they raise of the overlap of the Canister Transfer
19 Building and the area of the cask storage affected
20 area, we treated them separately. We calculated the
21 affected area for the Canister Transfer Building and
22 for the cask storage area and added them together and
23 ignored any potential overlap such that our
24 calculations would be the conservative approach to the
25 Panel.

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1 CHAIRMAN FARRAR: Is what you're saying,
2 in effect, that if your motion allows us to get to the
3 merits, the area question is the simplest of all
4 these? In other words, if I'm concerned, how do I
5 know that some other safety issue isn't resurrected?
6 That's one area, that's one problem. But this
7 calculation of the affected area, you're saying, is a
8 slam dunk.

9 MR. GAUKLER: Slam dunk. It's a
10 calculation the Board can do under the authority that
11 the State itself cited in its finding. That's our
12 position on that, Your Honor.

13 CHAIRMAN FARRAR: Okay. The next matter
14 you were --

15 MR. GAUKLER: I was going to address
16 financial assurance next, but that's left at the end.
17 I was going to address the -- just the general point
18 of the collateral issue in terms of the process, but
19 I think you've already discussed that with Mr.
20 Silberg. We believe that the process -- referenced
21 the process in your April 29 order has to focus on
22 that, the process for resolving the collateral issues.
23 And we believe that the evidence is in the record and
24 that there's sufficient evidence in the record that
25 the Board can make its conclusion with respect that

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1 we've asked them to make and that the process for that
2 is the process of a motion, the response to the motion
3 and this oral argument. I think you've addressed that
4 further with Mr. Silberg.

5 CHAIRMAN FARRAR: Would it be unfair of me
6 to say you tried to put the whole burden on the State
7 here. You came in and as counsel you said, "Hey,
8 everything's all right." Let's leave out financial
9 for a moment. "Hey, everything's all right for safety
10 and environment. No issues are resurrected." Staff
11 says, "Hey, everything's all right." Now, the State,
12 having had nothing put in front of it, should have
13 then come in and said, wait a minute, even though
14 you've just had this very short statement, now they
15 have to go to the drawing board -- they have to go
16 through the entire record and -- are they supposed to
17 file a -- what were they supposed to do?

18 MR. GAUKLER: I think it's really self-
19 explanatory, it's very logical that there's no safety
20 impact. First of all, the Canister Transfer Building
21 is --

22 CHAIRMAN FARRAR: Well, let's assume I
23 think that.

24 MR. GAUKLER: Okay.

25 CHAIRMAN FARRAR: Without binding me to

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1 that, let's assume I think that, yes, that makes sense
2 when you think about it. How do I know that? We're
3 not supposed to write about what we think. How do I
4 know that's the case without your experts and the
5 staff's experts coming to us and saying, "That is in
6 fact the case. We have laboriously gone through that
7 record and we can assure you" and give five or six
8 examples or something? In other words, it's not that
9 what you're saying defies common sense or seems far
10 out, it's just that I don't see that it's in front of
11 us.

12 MR. GAUKLER: You're kind of asking us to
13 prove the negative in a sense, okay, and I think --

14 CHAIRMAN FARRAR: But Mr. Silberg wanted
15 us to prove the negative. He says we're so talented
16 up here we can go through the entire record and prove
17 that negative.

18 MR. GAUKLER: Well, my thinking is, Your
19 Honor, that we have the Canister Transfer Building,
20 for example. There's nothing that changed with the
21 Canister Transfer Building, nothing that's changed
22 with how it operates. Nothing whatsoever has changed
23 with the Canister Transfer Building. The only thing
24 that may change we may have fewer operations in the
25 Canister Transfer Building. That's the only thing

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1 that would be changed, because you'd be -- assuming
2 that you only had 336 casks, you'd be going through
3 fewer transfer operations both ways with respect to
4 the cask storage area. Nothing's changed with respect
5 to the construction of the cask storage area,
6 nothing's changed with respect to the layout of the
7 pads. The only thing you're doing is you're having
8 fewer pads.

9 And, basically, you're just stopping
10 operations earlier than what you would otherwise. And
11 even assuming we had a license for a 4,000 cask
12 facility, there's nothing that says we have to store
13 4,000 casks there. It may turn out that we've only
14 got contracts for 336 and it only went up to 336
15 casks, and we may have just stopped there just because
16 that's all the market had for us to store.

17 CHAIRMAN FARRAR: Are you saying that if
18 you had gotten a license for 4,000 and for whatever
19 reason had quit short of that and the State came in
20 and said, "We want an order to show cause, you didn't
21 put enough casks there," that's a loser?

22 MR. GAUKLER: Yes. There's nothing that
23 says we have to put 4,000 casks there. There's been
24 a lot of testimony in the financial qualifications
25 testimony where --

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1 CHAIRMAN FARRAR: Leave out financial and
2 think of a more safety environment.

3 MR. GAUKLER: There's just been testimony
4 that we never reached 4,000 casks. We did a lot of
5 cost/benefit scenarios under different storage
6 assumptions in terms of how many casks would be there.
7 So if you had a range of casks that you looked at in
8 terms of evaluating the application, 4,000 was the
9 maximum, but there was never anything that requires
10 you to have 4,000. There's a license to operate up to
11 4,000, that's not a sentence that you must have 4,000.

12 JUDGE KLINE: Mr. Gaukler, would you
13 clarify the nature of the license that you now seek?
14 If we were to be persuaded and you were to receive a
15 license for 336 casks, would that satisfy you? Would
16 you take your license and go home and not seek any
17 further regulatory action?

18 MR. GAUKLER: No. No. We're here, we
19 want the full-sized facility. That's how come we've
20 gone on with the consequences hearing, Your Honor,
21 suggested and appealed your decision with respect to
22 the hazard probability both at the same time. So
23 we're taking every avenue that we can to achieve the
24 full-sized facility, and we see this as an interim
25 step to achieving the full-sized facility.

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1 JUDGE KLINE: So if yo were to be
2 successful in your argument on this issue, this would
3 not obviate the need to go forward on the consequences
4 issue.

5 MR. GAUKLER: No, it would not.

6 JUDGE KLINE: Okay. Okay. Now, in the
7 past, in reactor licensing, the NRC did issues things
8 like limited work authorizations and limited capacity
9 licenses under some form of presumption that a full
10 capacity license would later issue, except with a
11 disclaimer often expressed as applicant's risk, which
12 never came to fruition, I don't think, in reactor
13 licensing.

14 MR. GAUKLER: I think Shoreham did come to
15 fruition in that sense.

16 JUDGE KLINE: Yes, in Shoreham it did. I
17 had many of my best years on Shoreham.

18 (Laughter.)

19 JUDGE KLINE: It ruined me. So that the
20 license you now seek is really in the nature of a
21 limited work authorization.

22 MR. GAUKLER: Limited work authorization.

23 JUDGE KLINE: Permission to go and build
24 pending a future favorable decision.

25 MR. GAUKLER: Or an interim low power

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1 operation license, as Mr. Barnett will talk about.

2 JUDGE KLINE: Okay.

3 MR. GAUKLER: Exactly right.

4 JUDGE KLINE: Is there authority in NRC
5 regulations to do a thing like that in a cask
6 application?

7 MR. GAUKLER: The Board and I think the --
8 both the Board and the Commission has the inherent
9 authority to put a condition on the license, and
10 that's what we're asking for here. So I think there
11 is authority for this. And the same way, I believe,
12 they granted low power licenses before there were
13 regulations in effect.

14 CHAIRMAN FARRAR: But it's a condition on
15 a license that you haven't yet earned.

16 MR. GAUKLER: In that sense, it's the same
17 way with respect to a low power license. We have not
18 -- when you get a low power license to operate up to
19 whatever, I think it's five percent power, you have
20 not yet earned the license to operate at full power.
21 And Mr. Barnett will talk about that, but there are
22 some uncertainties and issues that have to be resolved
23 before you get to your full power license. So the
24 analogy we think is exactly on point. We've earned
25 336, we're seeking 4,000, and we believe we're going

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1 to obtain 4,000, and that's exactly analogous to what
2 Judge Kline was referring to.

3 JUDGE LAM: And, Mr. Gaukler, would you
4 please clarify for me, assuming you get to 336, what
5 is your strategy to go to 4,000 again?

6 MR. GAUKLER: Well, the strategy for going
7 to 4,000 is we're going to show that there are no
8 significant consequences from impact. As Your Honor
9 knows, we have also appealed to the Commission the
10 hazard decision on the probability. So there are two
11 scenarios under which you may again be successful.

12 MR. GAUKLER: Yes, that's correct.

13 CHAIRMAN FARRAR: And just like the
14 limited work authorization you're not allowed at any
15 time to say, "Gee, we've put all this money into the
16 336. That gives us some entitlement to the larger one
17 or some of this money will go down the drain."

18 MR. GAUKLER: That's at our risk.

19 CHAIRMAN FARRAR: Right, that's at your
20 risk. Okay. Mr. Barnett, you've got about five
21 minutes left and you're going to address?

22 MR. BARNETT: I'm going to address the
23 environmental question, Your Honor, whether further
24 environmental assessment is required to impose a
25 license condition. And we believe that no further

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1 assessment is required. At the outset, the
2 environmental impacts of a small facility with a
3 license condition imposed would be bounded and
4 described by the environmental impact statement that's
5 already been prepared by the NRC staff. If we got the
6 license condition, we would merely be building fewer
7 pads and storing fewer casks at the site, which would
8 reduce the environmental impacts below those
9 documented in the EIS and discussed in the record.

10 CHAIRMAN FARRAR: Isn't the real issue the
11 NEPA balance?

12 MR. BARNETT: Yes, it is. Yes, it is.
13 And I might say also at the outset as well that as a
14 practical matter the license condition might actually
15 never operate on PFS, because we are litigating the
16 consequences issue, and the Commission has, through
17 its order yesterday has set forth a schedule for an
18 expedited proceeding. So if we finish that by the end
19 of the year, then we'll have the consequences issue
20 resolved before the facility would ever operate,
21 because it's going to take 18 months or more to build
22 the PFSF, so in that case the consequences issue would
23 be resolved. And if we were successful, we would have
24 a full capacity license, and the license condition
25 would never really limit the number of casks at the

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1 site.

2 CHAIRMAN FARRAR: Let me ask you not about
3 the NEPA balance but about the level of environmental
4 impact. Now, again, without prejudging that matter
5 that doesn't seem like a particularly controversial
6 statement that there's not going to be any greater
7 impact because you're building fewer casks. Are you,
8 in effect, asking us since you haven't filed any
9 affidavits to kind of take judicial notice of that?
10 Is that why this procedure is so informal that you're
11 asking us to say safety and environmental issues,
12 small site, judicial notice, no problem?

13 MR. BARNETT: Your Honor, you could think
14 of it that way. We think that under NRC case law that
15 because of the analogy with low power testing that
16 that would support us in that in the case of reactor
17 operations that low power testing environmental
18 impacts are subsumed within the environmental impact
19 statement prepared for the full power operations.

20 CHAIRMAN FARRAR: Okay. Let's talk about
21 the NEPA balance.

22 MR. BARNETT: Under the NEPA balance, we
23 think that the case law on low power testing, which
24 held that the full operation, full power environmental
25 impact statement, bounded and described those impacts

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1 is --

2 CHAIRMAN FARRAR: I have no problem with
3 the absolute -- no. I may have no problem with the
4 absolute level of the environmental impacts, but on
5 the balance, whatever the level of environmental
6 impacts if you're creating less benefit from the NEPA
7 balances, here's your environmental cost but whatever
8 they are they're offset by these benefits that approve
9 from whatever the project is, if you're creating fewer
10 benefits, why is that not an issue that the balance
11 has to be redone?

12 MR. BARNETT: It's not an issue because
13 the license condition would only be an interim step in
14 the life of the facility.

15 CHAIRMAN FARRAR: We don't know that.

16 MR. BARNETT: That's true. The Commission
17 didn't know that in Shoreham either, that there were
18 uncertainties related to emergency planning and two
19 outstanding safety conditions --

20 CHAIRMAN FARRAR: But wait a minute. If
21 you're saying that consequences is a slam dunk, I can
22 save the Board six months of intense work that the
23 Commission yesterday told us to engage in.

24 MR. BARNETT: We're not saying that it's
25 a slam dunk, it's an issue that has to be resolved,

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1 but in Shoreham there were also issues that had to be
2 resolved as well, and it was not guaranteed that the
3 applicant would resolve them successfully.

4 CHAIRMAN FARRAR: Right. But here you
5 could end up with a 336-cask facility. You could lose
6 on consequences, the Commission could refuse to
7 reverse this on the March 10 decision, and you'd have
8 a 336-cask facility, and the question would be do the
9 benefits of that outweigh the environmental costs.

10 MR. BARNETT: That's true, we could end up
11 that way, but the same way a reactor license applicant
12 could end up with a reactor that's only licensed for
13 low power testing, because they would fail to meet the
14 requirements for full power operation. And we think
15 --

16 JUDGE LAM: But the question, Mr. Barnett,
17 have you looked at the balance assuming the 336 casks
18 is going to be permanent?

19 MR. BARNETT: We have not looked at the
20 balance specifically. I would say that the benefit --
21 one benefit of imposing a license condition and
22 allowing us to go forward under it would be the time
23 that would be saved in bringing the facility to full-
24 scale operations. And that was something that was
25 pointed out by the Commission in its latter Shoreham

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1 decision. I think it's CLI-85-12, if I recall, but
2 that's in our brief.

3 CHAIRMAN FARRAR: Or is there also an
4 answer that the environmental impacts are so minimal
5 you don't have to worry about a balance? Is that part
6 of your position or not?

7 MR. BARNETT: The environmental impacts
8 are very small, yes. I think that's spelled out in
9 the EIS. And the benefits of 336 casks might be
10 greater than what one might think strictly from the
11 proportionality of 336 compared to 4,000. There are
12 some PFS potential customers or PFS members who need
13 to move fuel from their sites, for example, reactors
14 that may be forced to shut down or reactors that are
15 shut down and want to get the fuel off the site so
16 they can decommission. And that would be a greater
17 need than merely a reactor who is saying, "Well, do I
18 store at my site or do I store at PFS?" We think that
19 would be an added benefit as well.

20 CHAIRMAN FARRAR: So if you use the 336 to
21 give priority to the plants that are in trouble in
22 terms of space --

23 MR. BARNETT: That would be an added
24 benefit beyond what the 336 would suggest.

25 CHAIRMAN FARRAR: Okay. All right. I

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1 think we have your position on that. Let's hold
2 financial.

3 MS. CHANCELLOR: Your Honor, may I ask how
4 much time does PFS have remaining?

5 CHAIRMAN FARRAR: None. One minute. No,
6 none. But we'll get through this somehow.

7 JUDGE LAM: Now, I do have a question to
8 both Mr. Silberg and his colleagues. I kept hearing
9 that for a smaller-sized facility everything is --
10 it's in the record. I assume what I'm hearing is
11 this. There's nothing in the record talking about a
12 336-cask facility. I'm assuming you are talking about
13 in order to arrive at the probability estimate for the
14 336-cask facility, all the input parameters, all the
15 calculations, all the methodology are in the record.
16 Is that a correct assumption?

17 MR. BARNETT: Yes, sir.

18 MR. SILBERG: That's right.

19 CHAIRMAN FARRAR: Mr. Turk? It's the
20 Board's intention to go through this without a break.
21 If that causes anybody a problem, put up your hand and
22 let us know. Mr. Turk?

23 MR. TURK: Thank you, Your Honor. Before
24 I begin, I'd like to introduce some other people in
25 the audience, which may help Your Honors understand

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1 some of the statements I make later in my argument.
2 First, I would note that Mr. Lawrence Chandler is with
3 us today. He is Associate General Counsel for
4 Hearings, Enforcement and Administration. Also in the
5 audience are two of the staff's experts who appeared
6 before Your Honors in the evidentiary hearing, and I
7 would ask them to stand when I mention their names.
8 First with respect to aircraft crash issues, Dr.
9 Kazermirias Campe is with us. And with respect to
10 financial assurance matters, Dr. Alex McKeigney is
11 with us. And Your Honors will understand why I
12 introduced them as I make some of my statements during
13 my argument.

14 The first issue I'd like to address is
15 whether or not the Motion for Reconsideration is well-
16 founded. As Your Honors know, in our response to the
17 PFS Motion for Reconsideration, we stated our view
18 that we did not believe that reconsideration was the
19 proper form of request to come before you, because we
20 did not see that Your Honors were remiss for not
21 having identified a 336-cask facility as being
22 something that should be licensed at this time. We
23 did not see that request explicitly made by PFS before
24 they filed their Motion for Reconsideration, and we,
25 like you, did not anticipate that that would be a

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1 request whereby PFS specifically came to you and said,
2 "Please limit us to a 336-cask facility and award us
3 a license to that extent while other matters remain
4 pending in litigation." So for that reason, we oppose
5 the Motion for Reconsideration.

6 At the same time, we identified our view
7 that forms should not be elevated above substance, and
8 while reconsideration may not have been the proper
9 form for their motion to have been filed under, they
10 could have labeled it a Motion to Supplement. In
11 fact, they could have labeled it a Motion for
12 Clarification whereby they came to you and said, "If
13 you don't find that an affected area for 4,000 casks
14 would meet the probability threshold, then please
15 clarify what level would meet the threshold." That
16 would have been a motion that they could have
17 presented to you and they could have received that
18 clarification. But we think that the mere fact that
19 they labeled a Motion for Reconsideration should not
20 be fatal to their request.

21 CHAIRMAN FARRAR: But a Motion to
22 Supplement -- again, we're looking for the right -- we
23 want to get to the merits of the motion, but, again,
24 my concern is you've got to have a procedure that
25 makes sense. I wouldn't see either possible to view

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1 this type of request as not fitting the criteria for
2 a Motion to Supplement or a Motion for Clarification.
3 I mean that's -- or you didn't say Motion to Reopen.

4 MR. TURK: I did not say Motion to Reopen.
5 It would not meet a Motion to Reopen standard because
6 if nothing else a Motion to Reopen requires
7 affidavits, and there were none filed before you. But
8 it would have met whatever criteria exists for a
9 Motion to Supplement or for Clarification because
10 there is no requirement that an affidavit be filed.
11 All they would have to show you is that there was some
12 ground for their motion based on the evidence before
13 you. And I believe that they have done that, because
14 the record is complete with respect to the affected
15 area calculation.

16 CHAIRMAN FARRAR: Is that what Motions to
17 Supplement the Record are usually used for?

18 MR. TURK: A Motion to Supplement here, if
19 it had been filed, would have been to present to you
20 the request for a license condition that would allow
21 them to operate up to 336 casks.

22 CHAIRMAN FARRAR: Why isn't that a Motion
23 to Reopen which has certain formal criteria that have
24 to follow? And, again, this is not semantics, this is
25 not elevating form over substance, this is how do you

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1 follow the rules in a way that's fair to everybody so
2 we can get to the merits of this request? And I just
3 see in comparison to what the State had to go through
4 to bring its new claims or revised claims in front of
5 the Board this is a short circuit kind of practice.

6 MR. TURK: The standard for a Motion to
7 Reopen, as I recall it, I don't have the regulation
8 before me, under 10 CFR 2.734, I believe, they would
9 have to show that there is some significant new
10 information that would cause a material aspect of your
11 decision to require change. Here there is no
12 significant new information because the information is
13 already before you. All there is is a proposed
14 condition that would say, "Please allow us to go as
15 far as we are authorized or we would be authorized to
16 go under the existing standard and the existing
17 evidence.

18 CHAIRMAN FARRAR: Isn't there some new
19 information in that if we don't take judicial notice
20 of what may be obvious to everyone in the room that
21 there are no safety or environmental ramifications,
22 that takes some new information? Somebody's got to
23 look through that record and say, "No problem here.
24 We the staff technical people, we the Applicant's
25 technical people put ourselves on the line, and you

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1 can be assured there's nothing here."

2 MR. TURK: If they had identified
3 something that was significantly different, then that
4 would require reopening, but where they are saying the
5 opposite is true that there is nothing significantly
6 new, the record is complete.

7 CHAIRMAN FARRAR: Mr. Silberg is saying
8 that.

9 MR. TURK: Yes. In our view, they're
10 correct.

11 CHAIRMAN FARRAR: But we don't make
12 nuclear licensing decisions based on what counsel
13 says.

14 MR. TURK: If this was a Motion to Reopen,
15 you would be required to look for affidavits, but
16 unless it's a Motion to Reopen there is no strict
17 requirement for affidavits.

18 CHAIRMAN FARRAR: Suppose -- let me ask
19 you the same question I asked Mr. Silberg. Suppose we
20 thought the motion that's filed before us fails,
21 whatever it's called, and suppose we said, "Well, we
22 don't have to go so far as making a file and amendment
23 to the application." What's the compromise that
24 follows the spirit of the regulations but gets things
25 in front of us in the proper form?

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1 MR. TURK: I think the suggestion that we
2 made would accomplish that, and that would be to treat
3 it on its substance rather than the form of the motion
4 and look to determine whether or not the motion is
5 well supported in the sense that the evidence is in
6 the record already, does not need supplementation of
7 the record.

8 CHAIRMAN FARRAR: But I don't have -- you
9 can take the view that we don't have any substance in
10 front of us. We have counsel's representations with
11 no backup. As the Commission pointed out, we've been
12 six years on this case, and we've put a lot of -- a
13 lot of Board members have put a lot of effort into
14 resolving a lot of issues and the Applicant lost.
15 Now, they have a chance to prove consequences, that
16 there will be no consequences and they might win, but
17 after six years when they come up losing, all of a
18 sudden there's a little motion in front of us that
19 they want us to grant and say, "Oh, gee, you won after
20 all" with no technical input whatsoever. There's
21 nothing technical in front of us, and even though Mr.
22 Silberg says we're great and we can review the entire
23 record ourselves, that's not our job.

24 MR. TURK: It is the job of counsel when
25 presented with a motion such as PFS submitted before

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1 you to find any reason that they would not support the
2 motion or would oppose the motion. Speaking for the
3 staff, we evaluated the motion, in fact we turned to
4 our staff experts and we asked them, "Do you agree
5 that there's no financial impact, do you agree there's
6 no safety impact?" We don't have in the room are
7 environmental reviewers, but we asked the same
8 question of our environmental reviewers. In fact, we
9 consulted with approximately a dozen of the staff's
10 experts to make sure that we could support the
11 Applicant's motion or if we were going to oppose it to
12 have a sound basis for opposing.

13 CHAIRMAN FARRAR: Mr. Turk, I --

14 MR. TURK: So I come to you as counsel,
15 and I represent that we have done that. We have not
16 filed affidavits --

17 CHAIRMAN FARRAR: Right. I don't doubt
18 your word that you did that, but the way we usually do
19 things is when the staff comes to a technical
20 conclusion like that, the technical people prepare
21 some sort of document and they say it.

22 MR. TURK: That's correct. And the
23 Applicant --

24 CHAIRMAN FARRAR: And that's not just form
25 over substance. They are the people, not counsel, who

1 make decisions for the staff.

2 MR. TURK: If the Applicant had filed
3 affidavits, we would have come in with our own
4 affidavits, but we did not see that it was our burden
5 to make the case for the Applicant with affidavits
6 where the Applicant itself did not do so.

7 CHAIRMAN FARRAR: Do you think that the
8 Applicant -- that the better part of discretion here
9 would be for us to insist that the Applicant come up
10 with a different sort of document, a different sort of
11 motion, a different sort of amendment to the
12 application and have affidavits with it that your
13 people could then take a look at, and they could go on
14 record as supporting or -- they, the technical people,
15 could go on record as supporting it or not supporting
16 it? Would that be the better practice than have us,
17 in effect, taking judicial notice or accepting
18 counsel's representations and say, "Okay. Gee, here's
19 this little motion and go ahead company, it's okay."

20 MR. TURK: We believe that either practice
21 would be acceptable, but if the Board is more
22 comfortable by relying on affidavits rather than
23 reaching for a decision based on counsel's
24 representations, we wouldn't have any problem with
25 that course of action.

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1 JUDGE LAM: Now, Mr. Turk, the affidavit
2 would serve perhaps a useful purpose. I just heard
3 that you indicated you had consulted with the staff's
4 technical experts on if there are any safety
5 implications for the reduced-size facility. My
6 thought on this have you asked your experts if there
7 are any unintended consequences in terms of safety?
8 I know the Applicants have made a demonstration, but
9 they determined that the reduced facility would meet
10 the aircraft risk probability because of the
11 associated size reduction. When you asked your expert
12 did your questions focused only the aircraft risk?
13 Did you venture outside of this arena?

14 MR. TURK: Yes, we did, but we did not
15 pull each reviewer who participated in drafting the
16 SER. That would have required going to a very large
17 team of people on many issues that did not appear to
18 be affected by merely changing the size of the
19 facility. But we did consult with Mr. Delligatti
20 who's here with me, and I asked him that same
21 question: Apart from aircraft issues, are there any
22 safety impacts that you could foresee that would
23 require further consideration of?

24 CHAIRMAN FARRAR: Well, suppose you filed
25 an affidavit to that effect from Mr. Delligatti or

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1 your team or so forth, you know, filed some sort of
2 document. How long does the State get to contest
3 that? You just said there were a whole lot of issues
4 and you didn't ask about them because it's pretty
5 obvious. How long would they get to respond to
6 something like that?

7 MR. TURK: Well, in the normal course of
8 things, I would think that the Applicant would have to
9 come in with its motion supported by affidavits. All
10 parties would then have the ten days permitted by 10
11 CFR 2.730 to respond to the motion. Or if they need
12 additional time, they could request additional time.
13 And we and the State would then be in the same boat of
14 having to complete our review or our questioning of
15 our witnesses and come back with our affidavits within
16 the time allowed by the Board.

17 CHAIRMAN FARRAR: Okay.

18 MR. TURK: With respect to the license
19 condition that PFS has proposed, as Your Honors know,
20 in our response to their motion, we evaluated their
21 proposed license condition and revised it. I believe
22 in our paper we stated that the license condition
23 should be made more specific to identify the
24 configuration on which casks could be arranged on the
25 storage pads.

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1 CHAIRMAN FARRAR: Okay.

2 MR. TURK: And with that alteration, we
3 have accepted the concept of this limited condition
4 pending completion of all other aircraft crash
5 litigation.

6 CHAIRMAN FARRAR: And you agree that the
7 area and affected area questions are simply
8 mathematical exercises based on existing record?

9 MR. TURK: Yes, we do. We think the
10 record is complete. We also believe, as we pointed
11 out in our response to the motion, that the State had
12 a full opportunity to contest the affected area
13 calculation, and they had reason to do so. As Your
14 Honors know, they contested every other aspect of the
15 NUREG-0800 formula presentation which PFS made; that
16 is, they contested the width of the airway, the number
17 of accidents historically, the number of aircraft.
18 The one item that they chose not to contest, although
19 they could have and had reason to, was the affected
20 area. Speaking for the staff, we looked at what PFS
21 gave us with respect to affected area, and we were
22 satisfied. We accepted that without revision.

23 I'd like to turn to the environmental
24 issue, if I may. Judge Farrar, you asked the question
25 of PFS as to whether it's correct that there's a

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1 possibility that the license, the full license may
2 never be granted. That possibility does exist, the
3 same as it exists with respect to a low power license
4 being issued for a facility that's still in litigation
5 over its emergency preparedness. It's possible for
6 those cases, as it happened in Shoreham for some time,
7 that the full power license may be delayed or in fact
8 it may be never granted. That possibility exists, but
9 in the Shoreham case, both the Commission and the
10 Court of Appeals found that there was no reason to
11 supplement the environmental impact statement to
12 consider only low power operations, considering
13 particularly --

14 CHAIRMAN FARRAR: Did they say there was
15 no reason to supplement it to look at the individual
16 impacts or did that holding go so far as to say you
17 didn't have to redo the balance?

18 MR. TURK: They went to the balance as
19 well as impacts. If Your Honors recall, in the
20 Commission's first decision in Shoreham, which it was
21 CLI-84-9, the Commission looked only at impacts. In
22 the Commission's second decision in 1985, they also
23 included a cost/benefit analysis, which looked at
24 impacts. It also found that the cost/benefit balance
25 did not have to be redone to consider low power. And

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1 the Court of Appeals found in considering the
2 governor's and county's request for a stay of low
3 power that they had not demonstrated substantial
4 likelihood of success on the merits, that a full power
5 license may never be issued and therefore a
6 supplementation of the EIS was required to consider
7 cost/benefits.

8 CHAIRMAN FARRAR: But that reactor was
9 already built, was it not?

10 MR. TURK: Yes, it was.

11 CHAIRMAN FARRAR: All right. Isn't there
12 a difference between redoing a NEPA balance when
13 something has not been built and your balance may be
14 altered as opposed to redoing a NEPA balance where all
15 the environmental impact has already been created? In
16 other words, whether you move forward, there's going
17 to be no -- your cost, environmental costs, whatever
18 they are, have already been incurred, and so the
19 balance becomes a most frivolous exercise.

20 MR. TURK: That was not explicitly
21 considered by the Commission or the Court, but the
22 answer to that question is there is no substantial
23 difference, because even though for the construction
24 of a nuclear plant, the impacts of construction would
25 already have occurred. The benefits would not have

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1 been realized at all. The only benefits that you
2 would ever realize upon issuance of the low power
3 license is the amelioration of the applicant's
4 understanding of what problems may exist in the plant
5 that need to be corrected. That is, they wouldn't
6 have electricity generated, they wouldn't have that
7 large benefit. They would simply know do they have to
8 fix their plant somehow before they would be able to
9 commence operation.

10 CHAIRMAN FARRAR: I guess my question is
11 a different one. In the NEPA balance you're saying
12 should we incur the cost? Are the benefits worth
13 incurring the costs? If the plant's already built,
14 you've incurred the cost, so there's nothing you can
15 avoid when you -- if you just do the low power
16 license.

17 MR. TURK: I think the analogy you have to
18 draw is to the EIS that's done at the construction
19 permit stage. In reactor licensing, as you know,
20 there's a two-step process. When a construction
21 permit is granted, an EIS had been prepared that
22 considers the potential benefits of operation. That
23 may never occur. There may never be an operating
24 license granted. In fact, the application for an
25 operating license had not yet been received when the

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1 construction permit comes in and is evaluated.

2 So the EIS at the construction permit
3 stage considers impacts and the potential that you'll
4 receive benefits. That's the same thing that you have
5 here where you issue a less than full capacity
6 license. It may be that in a future a full capacity
7 license is not authorized, but you're in no worse
8 situation than you are when you're granting a
9 construction permit and you yet have to determine
10 whether or not an OL could ever be granted.

11 CHAIRMAN FARRAR: Mr. Turk, in the
12 interest of time, I think we understand your position,
13 and if you'll hold off on -- did you have anything
14 else before financial?

15 MR. TURK: And I would just make one last
16 point on environmental. I agree with PFS that the
17 impacts are bounded by what's in the EIS. And,
18 further, the benefits are described in the EIS. And
19 for the Commission's purposes and for the Licensing
20 Board's purposes, you have before you a statement of
21 what the benefits of full issuance of a license would
22 be, and it's not difficult to understand that if you
23 scale down, those benefits would be reduced. You may
24 not have a quantitative presentation made to you, but
25 the information is before you upon which you can make

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1 a reasoned judgment as to the cost and benefits.

2 CHAIRMAN FARRAR: But PFS says they would
3 not necessarily be reduced pro rata because you would
4 offer the 336 to the companies that need them the most
5 whose power would be interrupted if they didn't have
6 them. So the benefits would be reduced, but you agree
7 it would be necessarily pro rata.

8 MR. TURK: We would agree with that, and
9 we wouldn't ask you -- we would not ask you to make a
10 quantitative assessment that simply scaled down in a
11 linear sense the benefits from 4,000 casks to 336.
12 But, qualitatively, you would have the information
13 before you upon which to make a reasoned judgment.

14 CHAIRMAN FARRAR: All right. Then we'll
15 hold your financial presentation. And, Ms.
16 Chancellor, they also have no time left.

17 MS. CHANCELLOR: Thank you, Your Honor.

18 CHAIRMAN FARRAR: Who's going to start?

19 MR. SOPER: I will, Your Honor.

20 CHAIRMAN FARRAR: Okay. Mr. Soper?

21 MR. SOPER: Thank you. Let me bring us
22 back to why we're here, if I might. We're here on
23 Applicant's Motion for Reconsideration. This is not
24 a Motion to Reopen the record, this is not a Motion
25 for Summary Disposition on some new or amended

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1 application, it's not any of the motions that Mr. Turk
2 mentioned. I can't even remember the ones he
3 mentioned here for the first time today We're here
4 for a Motion for Reconsideration.

5 The motion itself states what PFS is
6 claiming. It says, "The Applicant requests
7 reconsideration of the March 10 decision on the
8 grounds that based on the record before the Court --
9 or the Board, the Board could and should have ruled
10 that the facility be licensed subject to a condition."
11 That's the claim we're here on.

12 The motion itself sets forth the legal
13 grounds. In filing a Motion for Reconsideration, the
14 movement must identify errors or deficiencies in the
15 Presiding Officer's determination, citing an earlier
16 decision in this very case by the Commission. They
17 did, however, leave out the part that when they quoted
18 that new matters are improper, although they
19 acknowledged today that that is in fact part of that
20 standard.

21 There's no confusion here. This is not
22 some other motion that's mistakenly mistitled a Motion
23 for Reconsideration. It's a Motion for
24 Reconsideration. They even say today that they
25 believe it's a Motion for Reconsideration. Now, the

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1 fact that the staff says it's poorly founded, which we
2 agree, or that it's something else, doesn't make it
3 another motion. And as the Board's pointed out, Your
4 Honor mentioned the fact that when the State files a
5 motion it receives strict scrutiny with every
6 regulation in timeliness and denied for any
7 irregularity in that respect. And I'm not making a
8 criticism, I'm just noting that the Board has been
9 very fair in treating all parties the same, and so
10 when the Applicant makes a motion like this that
11 somehow is just kind of a fuzzy gray thing, let's
12 somehow get here and talk about stuff, it ought to
13 treat that sort of motion the same way as if the State
14 had made it.

15 CHAIRMAN FARRAR: And you would then
16 object if we issued a decision saying the Motion for
17 Reconsideration is denied, but treating it as some
18 other motion it's granted.

19 MR. SOPER: Yes, we would. There's no
20 other motion before the Court, Your Honor. The State
21 was served with a Motion for Reconsideration. It's
22 filed a response to a Motion for Reconsideration.
23 It's come here today prepared to argue a Motion for
24 Reconsideration. We have not reviewed six years of
25 proceedings, I'm frankly surprised if the staff has

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1 done that either, to be commended in fact if they
2 have, but we're here on a Motion for Reconsideration.
3 Why should we be prepared to argue something else?

4 This is also not a brainstorming session.
5 It's not here on a way to figure out how can we give
6 PFS a license after we've had a license to construct,
7 let us not forget, a 4,000 cask facility. They're
8 here asking that they be allowed to construct a 4,000-
9 cask facility. Now, this is not a brainstorming
10 session as to how we can grant them such a license
11 when they have just been denied a license to construct
12 a 4,000-cask facility after two years of proceedings
13 and a lengthy trial and lengthy detailed finding
14 showing that they don't qualify for a 4,000-cask
15 facility to be constructed.

16 The Board made the request in its earlier
17 order that we ask the question -- or answer the
18 question, has PFS made a previous request to construct
19 a 336-cask facility, which I think is another way of
20 asking the legal standard is this a new matter, and I
21 think everyone in this room knows that they have not.

22 The number 336 was back calculated from
23 the probability found by the Board. No party proposed
24 that probability, it wasn't submitted as a proposed
25 finding by anyone. It was an entirely new

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1 determination of probability made by the Board for the
2 very first time on March 10. So no one could in fact
3 have used that probability to back calculate, come up
4 with a number, 336, before March 10, 2002; it's
5 impossible.

6 CHAIRMAN FARRAR: Mr. Silberg is
7 suggesting we should have done it. Once we came up
8 with our probability number, we should have said,
9 "Well, they don't get what they're asking for, but
10 we'll give them this." Should we have been that
11 astute?

12 MR. SOPER: So the request then was not --
13 was to give a license for anything. In other words,
14 the request was no matter what the result if we're
15 denied a license, give us a license for something,
16 change the application, because that's what it is. I
17 mean the Board might have thought let's shorten the
18 casks, let's move the facility.

19 CHAIRMAN FARRAR: You've anticipated my
20 question. I can see that it would be -- require a
21 license amendment if say on seismic they said, "Well,
22 let's not do them with concrete and steel, not bolted
23 down, let's do them out of fiberglass and we'll bolt
24 them down. That's clearly a different new proposal.
25 But what about this lesser included offense or the

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1 damages analogy? You ask for one thing and you're
2 automatically asking for everything else that may be
3 included in that. How do you respond to that?

4 MR. SOPER: Why would the Board even
5 suspect that PFS would want a license for only eight
6 percent of what it applied for? Three-thirty-six is
7 not based on some engineering criteria, not designed
8 to fill some need, management decision. Let's build
9 a 336-cask facility. In fact, there's no intention --
10 they have no intention of building and owning and
11 operating a 336-cask facility, and Mr. Barnett said
12 so. This condition may not even come to fruition.
13 And the Board would not suspect that this men had any
14 financial goals. It means eight percent of what they
15 ask for.

16 I noticed in the Board's order, and the
17 Board has not ruled on this, this is not a
18 reconsideration of anything the Board ruled on. The
19 Board ruled the application envisions as many as 4,000
20 casks, each nearly 20 feet high, 11 feet in diameter,
21 made of concrete and steel, resting on 500 concrete
22 pads, arrayed on 99 acres in the reservation of the
23 Skull Valley Band of Goshute Indians. That's from the
24 Board's order, Page 7. And they footnote that
25 sentence. The Band would derive substantial income

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1 from making its reservation available to the Applicant
2 for the facility. Now, clearly, they didn't expect
3 that the Band's going to make all that money on eight
4 percent of what they proposed.

5 I mean this notion that the Board somehow
6 should have divined that after a miserable complete
7 failure of this application, we're talking 92 percent
8 of this application is rejected as far as the number
9 of casks, why would they -- and this is not, "Well,
10 they barely missed it. We could give them one for 90
11 percent or 50 percent or 40 percent." It's eight
12 percent. Why would you even think they had any
13 desire. It's a totally different matter. It would
14 serve a different economic purpose, not to mention the
15 fact that all the clad rule issues are not balanced
16 and the viability of it financially figured out. It's
17 ridiculous to think the Board would have divined this
18 on its own.

19 JUDGE LAM: So, Mr. Soper, you're saying
20 the Board could not have and should not have approved
21 a 336-cask facility?

22 MR. SOPER: It's clear it was never
23 requested before, Your Honor, and there is no reason
24 for the Board to think that. If the Board thought
25 that a license should be granted no matter what, why

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1 didn't it suggest shortening the casks, burying the
2 casks with the top even with the ground, moving the
3 facility to a different part of the Reservation?
4 Well, you say, "Well, we don't know if that's within
5 the terms of the lease." Well, do you know if 336
6 casks is in the terms of the lease?

7 CHAIRMAN FARRAR: I seem to remember
8 asking a question during seismic that said we only
9 rule on what's in front of us, not on -- if the
10 proposal passes muster, that's fine. We don't say a
11 different proposal would pass better muster or we
12 don't look -- usually don't look for some substitute
13 proposal. What about Mr. Silberg's example about the
14 Seabrook LPZ? What is the difference between that?
15 Is the difference that when you were setting the LPZ
16 it was inherent in that that you picked the right
17 number, not necessarily the number the company was
18 urging?

19 MR. SOPER: Is this the low-power reactor?

20 CHAIRMAN FARRAR: No. This is the low
21 population zone where you had to decide -- bring it
22 back to me, Mr. Silberg. You had to decide the area
23 that could be evacuated.

24 MR. SILBERG: Yes. The low population
25 zone is the area immediately surrounding the plant,

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1 and it's related to doses under certain maximum
2 accident conditions. It's also related to the
3 distance from the nearest population center. The
4 contention dealt with where is the nearest population
5 center. Based on the Appeal Board's determination as
6 to where that was located, which was a different
7 location than the Licensing Board and the Applicant,
8 the maximum size of the LPZ had to be reduced.

9 MS. CHANCELLOR: I can respond to that,
10 Your Honor.

11 CHAIRMAN FARRAR: Go ahead, Ms.
12 Chancellor.

13 MS. CHANCELLOR: In Seabrook, the Board
14 acted on a sua sponte authority. This was in 1977.
15 And since then there has been regulation on it that
16 limits the Board's sua sponte authority. In addition
17 --

18 CHAIRMAN FARRAR: Did we raise the whole
19 issue sua sponte or just the change in the --

20 MS. CHANCELLOR: Just the change from 1.5
21 to 1.2 miles. And that the Board also found that
22 there were no radiation consequences. And here
23 there's a difference, we haven't had a hearing on
24 consequences. So I think Seabrook is distinguishable.

25 CHAIRMAN FARRAR: Go ahead, Mr. Soper.

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1 MR. SOPER: By the way, the staff
2 addresses this directly and just simply says this has
3 not been raised before, and this does not qualify for
4 a Motion for Reconsideration. And I think that's
5 clear. The big question -- here's the big question.

6 CHAIRMAN FARRAR: And what you said
7 earlier is essentially an argument that our job is to
8 rule on the motion in front of us, not to reshape it.

9 MR. SOPER: Well, yes, two things. Number
10 one, it becomes advisory. You have no idea if an
11 applicant wants a facility 50 percent as big as it
12 applied for. In fact, the assumption is had they
13 wanted such a size facility they would ask for it and
14 have based it on a management decision. But what
15 about eight percent? It's ridiculous to think that
16 you'd have any reason to think that their facility
17 basically does not qualify, let's give them a license.
18 What about one percent? What if it only took one
19 cask? Would you give them a license for that? Why
20 would you?

21 It's advisory, and any judicial body in my
22 experience does not issue advisory opinions. You
23 might as well say, "Here's a number of things you
24 could do." Now, the Board did say that. You might
25 get some agreement with the Air Force. Number two,

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1 you might want to prove the casks represent no health
2 consequences or the Board mentioned you might want to
3 redesign your casks.

4 And they said there should have been a
5 third option, you could give us a condition. Well,
6 you can give limitless options, but notice none of
7 those were rulings on the merits on those things. The
8 Board didn't say, "Now, if the Air Force changes its
9 flight path, we will give you a license right here and
10 now conditioned on you bring us an agreement." Well,
11 what are the terms of the agreement, how is it worded?
12 I mean those issues still have to be addressed on the
13 merits. This is not a third option in the analogy
14 that they try to present.

15 But there's even a bigger question.
16 Didn't mean to interrupt, Your Honor. You about to
17 ready to -- the big question is this. Let's say the
18 issue of a 336-cask facility was before the Board,
19 which it was not, but for argument let's just say that
20 this matter was presented for decision to the Board in
21 this decision. And let's further assume that there
22 was evidence on probability that said anything greater
23 than 336 casks will cause the probability to exceed
24 ten to the minus six. Let's say that those two
25 things are in place. In that case, why would the

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1 Board grant a license to construct a facility that
2 contained more than 336 casks? Why would the Board
3 say, "Okay, the facts are here, they're clear. Three
4 hundred and thirty-six casks pass muster, 337 does
5 not. Let's issue an order allowing them to construct
6 a 4,000-cask facility. Why would you do that? I'm
7 not asking for an answer, it's rhetorical, but the
8 answer is there's no reason. Now, why would PFS want
9 such a thing? Why would they want to spend money to
10 construct a 4,000-cask facility on 99 acres knowing
11 that they can only use 336?

12 JUDGE LAM: Mr. Soper, I asked Mr. Silberg
13 that question, or Mr. Gaukler that question - under
14 what scenario would they prevail, going from 336 cask
15 to 4,000. They proffered two scenarios. One is they
16 win on consequences, and two, they win on Commission
17 appeal. Would that satisfy you on that question?

18 MR. SOPER: I think that's exactly right.
19 It doesn't satisfy me, but you're exactly right, Your
20 Honor. PFS' reply says, "PFS is proposing a condition
21 that would limit the number of casks at the site,
22 which could be lifted upon a showing that an aircraft
23 crash would have no significant consequences." The
24 Staff responds saying, "In addition, the proposed
25 license conditions should be modified to specify that

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1 the restriction to 336 casks shall expire upon the
2 conclusion of all aircraft crash litigation in this
3 proceeding, in a manner that allows the storage of a
4 larger number of casks at the facility, as reflected
5 in the PFS application, 4,000 casks."

6 Now they both presume that the Board is
7 ultimately going to give PFS a license for 4,000
8 casks. It's a slam dunk. They presume it, which
9 makes a sham out of any more proceedings in this case.
10 They want the Board -- this is outrageous. They want
11 the Board to join in this presumption that yes, we'll
12 let you build the 4,000 casks today, because you're
13 going to win anyway. They want the Board to say that,
14 which is outrageous.

15 Now they may have that optimistic outlook,
16 but there's no other reason. Three hundred and
17 thirty-six casks is a ruse. That number means
18 nothing. The calculation of the number, this is all
19 a ruse. There's one object here today. Let us build
20 a 4,000 cask facility. Let us build it today. These
21 pesky hearings are slowing us down. It doesn't matter
22 if the condition is for one cask, 10 casks, it just
23 doesn't matter. They would be here with the same
24 request, let us build 4,000 casks today. Then after
25 we've spent million of dollars and it's there, then

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1 the Board can rule well, now that you've let us build
2 this and spend millions of dollars, can we use it?

3 CHAIRMAN FARRAR: Let me make sure I
4 understand what you're saying. Are you saying they'll
5 build the infrastructure that would support 4,000
6 casks, but as I understand it, if we were to rule in
7 their favor, they would be limited to putting 336
8 casks on there, and you've been suggesting 4,000. Are
9 you saying if we issue -- suppose we granted their
10 motion. Okay? You've got a license which includes a
11 condition that -- you've got a license that says you
12 may build for 336. Are you saying that what they're
13 really asking for is a license for 4,000, which is
14 temporarily limited to 336?

15 MR. SOPER: They want a license to build
16 what's showing in their aircraft report, which is a
17 facility that holds 4,000 casks. Now they may say
18 well, gee, we won't pour the pads yet for the rest of
19 them.

20 CHAIRMAN FARRAR: Let me interrupt you and
21 ask Mr. Silberg a factual question here. When you
22 said -- when you filed this motion and ask for a
23 license condition, my first reaction was a condition
24 to what license? You don't have a license. Are you
25 saying you want, in effect, a license for 336 casks,

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1 or are you saying you want a license for 4,000, which
2 is temporarily -- which has a condition on it you can
3 only build 336 now?

4 MR. SILBERG: I think it's the latter.
5 And whether it's a proposed condition, it's no
6 different than the license conditions that have been
7 "proposed" on financial qualifications. We have a
8 whole raft of license conditions. You don't need a
9 license issued in order for there to be license
10 conditions being discussed. And if the license is
11 issued, to be imposed.

12 CHAIRMAN FARRAR: Suppose we ruled in y
13 our favor today.

14 MR. SILBERG: Right.

15 CHAIRMAN FARRAR: And said okay, you win.
16 Would the staff then issue you a license for the
17 original proposed 4,000, which would happen to contain
18 a condition saying you can only do 336 until something
19 else happens, or would they issue you a license for a
20 336 cask facility?

21 MR. SILBERG: Perhaps you need to ask the
22 staff, but my understanding is the way this has
23 occurred in the reactor world is that the license
24 that's issued typically for a low power or a reduced
25 power operation, has the full power limit embedded in

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1 the license, subject to a licensed condition that says
2 thou shalt not operate above X megawatts or X percent
3 of power.

4 CHAIRMAN FARRAR: So Mr. Soper's
5 description of what he thought was happening here is
6 correct.

7 MR. SILBERG: The license would be limited
8 to 336 casks.

9 CHAIRMAN FARRAR: But the license would be
10 for the 4,000, limited to 336.

11 MR. SILBERG: That's correct. And the
12 construction would be, you know, as we have described,
13 which would be in a phased method anyway. We would
14 not plan -- we never plan to construct the entire
15 facility all at once.

16 CHAIRMAN FARRAR: Mr. Turk, do you agree
17 that's how to issue the license?

18 MR. TURK: Yes.

19 CHAIRMAN FARRAR: So it would be for the
20 4,000 limited to 336.

21 MR. TURK: Yes. And may I elaborate for
22 one moment?

23 CHAIRMAN FARRAR: Yeah.

24 MR. TURK: All issues, other than the
25 aircraft crash issue, and I guess the rail spur

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1 decision that we're still waiting for from the Board,
2 has been decided already with respect to a 4,000 cask
3 facility. We looked at things like quality assurance,
4 emergency preparedness.

5 CHAIRMAN FARRAR: Well, no, no, no.
6 You're going beyond my --

7 MR. TURK: No, no. I'm just explaining
8 why you could issue, or why the Staff could issue a
9 license for 4,000 with the 336 limitation. And in a
10 nutshell, all issues have been considered for the
11 4,000 cask facility and found in favor of PFS, either
12 by the Staff with respect to non-contested issues, or
13 by the Board on contested issues.

14 CHAIRMAN FARRAR: I got it.

15 MR. TURK: And I would add one thing. At
16 some point, I'd like a chance to respond to Mr.
17 Soper's assertion that we're asking the Board to join
18 a presumption that -- or that this is a ruse that, in
19 fact, they're going to be getting a license for 4,000.
20 We're asking to join in that assumption. We don't
21 assume it, and we're not asking the Board to assume
22 it.

23 CHAIRMAN FARRAR: Okay. Go ahead, Mr.
24 Soper. I wanted to make sure the premise you're
25 making your argument on was correct.

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1 MR. SOPER: Okay.

2 CHAIRMAN FARRAR: And, in fact, it appears
3 to have been correct.

4 MR. SOPER: I can just say that no
5 appearance of logic would have any other result than
6 if the Board were to grant the construction license
7 for a 4,000 cask facility, and allow it to be
8 constructed, and the cost of that incurred, then it
9 certainly would be logical for someone to assume and
10 ask gee, I wonder what the Board will do as far as
11 letting them use it. And this is not a criticism of
12 the Board, this is a criticism of asking the Board to
13 be put in that position.

14 CHAIRMAN FARRAR: So you don't accept the
15 philosophy that we can say some costs are at the
16 applicant's risk, and that does not effect any future
17 decision.

18 MR. SOPER: Well, no. This is not like -
19 and Ms. Chancellor will discuss this because she has
20 this part - but this is not like low power reactor
21 where you've already approved a reactor construction
22 license for the full size of everything. The site has
23 been fully approved by them, so this is a red herring
24 to say well, let's look at the operation aspect of it.

25 The other thing is, this kind of decision

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1 could have been made way back at summary disposition.
2 They could just as easily be claiming today that the
3 Board erred back in summary disposition when it said
4 well, there are more issues here. I mean, they could
5 determine then that one or two casks could meet the
6 probability standard.

7 We're going to have a new law in licensing
8 now, which means that application gets filed,
9 applicant demonstrates it can safely store 1 percent
10 or one cask, give us the construction permit for the
11 whole thing. We'll have it all done by the time the
12 hearings are held, and we can look out the window and
13 actually see it. Then the notion is -- I mean, the
14 notion of impartiality and prejudgment is so clear in
15 that sort of scenario, that I just can't imagine the
16 Board considering it seriously.

17 CHAIRMAN FARRAR: If you were the
18 applicant, what would you have filed here? Or if you
19 were making the rules, and everyone was being treated
20 by the same rules, what motion should they have filed?

21 MR. SOPER: Well, the Applicant has
22 pursued its application. We've had a lengthy trial on
23 this issue, and they lost. The focus here is not how
24 do we coddle the Applicant to further them in their
25 proceeding. They picked to put a storage facility by

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1 this country's largest bombing range, and the natural
2 consequences of that can't be hidden, and they came
3 out in the trial. Now I don't know what they ought to
4 do about that. They picked a poor location, and it
5 doesn't work very well.

6 CHAIRMAN FARRAR: Now one to this point,
7 Mr. Soper, has ever accused me of coddling the
8 Applicants.

9 MR. SOPER: No, I --

10 CHAIRMAN FARRAR: No, I know. No. But
11 there is a culture and practice in the Commission that
12 the company loses on any application. They're always
13 free to come back and amend it. In other words, if it
14 fails -- you know, in litigation if it fails, the case
15 is over. You won, they lost.

16 MR. SOPER: Oh, yes. I see what you're
17 saying.

18 CHAIRMAN FARRAR: The practice here is
19 okay, the company lost. They can walk in the next day
20 and file a new application that's only slightly
21 different from the old one, and there's no prejudice.
22 So when I say what should they have filed, it was not
23 we're trying to help them. It's they always, as I
24 understand it, have an almost unlimited right to come
25 back with a slight --

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1 MR. SOPER: I'm sorry, Your Honor. And I
2 understand what you're saying now, and I think -- and
3 I do -- there's no question about that. I was
4 thinking when you said that that it was like Mr. Turk
5 was trying to think of a motion they could file to
6 make this all go away.

7 I think what you said is exactly right.
8 They can propose something else. They can change
9 whatever offending features of the facility that they
10 want, but this can't be a moving target. We get here
11 and discuss a bunch of things they could do to get a
12 license today. They need to put their new target down
13 on paper, if it's a 336 cask facility, they need to
14 put that down so we can address whether or not the --
15 I mean, we can't value all the ramifications of a
16 facility off the top of our head.

17 CHAIRMAN FARRAR: Let me ask the question
18 a different way. Here's what I'd like to avoid.
19 Suppose we say to the Applicant today, or whenever we
20 say it, for the reasons the State says this motion
21 fails, but it's without prejudice to you coming back
22 with something else. It seems to me, particularly
23 given the tenure of the last part of the Commission's
24 order yesterday, which we certainly intend to follow.
25 We don't want Mr. Silberg coming back with some other

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1 motion, and we say oh, sorry, you guessed wrong again.
2 You know, but without prejudice. Try again. And some
3 day you may get it right, and we'll get to the merits
4 of your motion.

5 It seems to me it would be good if we, on
6 the assumption that this motion fails, an assumption
7 which I'm just positing for purposes of this argument,
8 that someone would say to them, but if you come back
9 with the following kind of motion, that will let us
10 get to the merits of that motion.

11 MR. SOPER: Well, I believe it's like the
12 Board ordered in its March 10th order. It's like the
13 Air Force. It's like the consequences. If the
14 Applicant chooses to rehabilitate its application and
15 bring these matters before the Board, then they'll be
16 ruled on. This is like the Applicant itself points
17 out, just another alternative, just like consequences
18 and agreement from the Air Force, a different
19 facility.

20 CHAIRMAN FARRAR: But wouldn't the system
21 be well-served if we were to deny this motion, if we
22 were to say one, it's without prejudice, and here's
23 how we think this type of motion should be presented
24 in order to get to the merits. And if you present it
25 that way, we'll entertain it. Or is that, in fact,

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1 the Board, in your words coddling the Applicant, and
2 serving as counsel for them?

3 MR. SOPER: Well, I don't think we need to
4 make new procedures or new rules. I think when --

5 CHAIRMAN FARRAR: Okay. What is the
6 procedure they should have followed?

7 MR. SOPER: I think they probably should
8 have amended their application to whatever -- I mean,
9 this requires an amendment that addresses financial
10 assurance, is this now financially viable? I don't
11 know. This has to be a new amendment, just like any
12 applicant that wants to change their application to
13 the Commission, ought to change whatever parts of the
14 application are effected. If it's the SAR, then the
15 SAR ought to reflect differently.

16 CHAIRMAN FARRAR: Okay. Suppose they file
17 this amendment to the application, what are the next
18 steps?

19 MR. SOPER: Well, I imagine they would ask
20 for summary disposition.

21 CHAIRMAN FARRAR: They file the amendment.
22 Then the Staff have to do its thing, and notice it for
23 a further hearing?

24 MR. SOPER: Well --

25 CHAIRMAN FARRAR: In other words, here's

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1 my problem. If this were a totally new proposal where
2 you couldn't make an argument that it was subsumed in
3 the earlier proposal; again, the fiberglass casks that
4 are bolted down, to use a maybe silly example. There
5 would be a procedure you'd go through. Staff would
6 review it. You'd get notice for hearing. You'd file
7 your contentions. But this, at least to some extent,
8 we've had a lot of -- you know, we've had no
9 procedures on -- we've had no hearing on fiberglass
10 casks bolted down, but we have had a hearing on what
11 the site would look like, what the probability -- how
12 you do the probability calculation. So is there some
13 procedure, as you just suggested, that would, in
14 effect, honor the spirit of the rules, honor your
15 right to be treated fairly, but would not require
16 needless machinations, that someone would say why are
17 you forcing them to go through all that?

18 MR. SOPER: Well, the only aspect of this
19 facility that is addressed by this request is the
20 probability. Now that may seem like that could be a
21 matter that there's not too much to talk about. How
22 do we resolve the balance underneath without an
23 investigation? It's clearly way different. How do we
24 resolve the financial viability? And I don't know if
25 decommissioning -- I don't even know the range of

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1 topics that are affected by this, but this is a vastly
2 different application, unless -- it's vastly different
3 unless we take the presumption that this is just an
4 early start on construction for the 4,000 casks. The
5 336 means nothing. The license condition means
6 nothing. This is just a procedure to get them on
7 their way, and we'll just pass it through, assuming
8 that everything will end up the way that the rest of
9 the application was presented.

10 CHAIRMAN FARRAR: Suppose we did what
11 we've done frequently in this proceeding and said we
12 don't like this motion for reconsideration. We buy
13 your argument that it's not our job to reshape it into
14 something because you're not prepared to meeting that
15 something. But we ask the three parties to sit
16 together to get down -- to sit down, and to come up
17 with some other procedure where in fairly rapid
18 fashion, we could get this in front of us on the
19 merits. Something short of a formal license -- formal
20 application amendment, and all the steps that follow.
21 Is that something you're willing to participate in
22 with the other parties?

23 MR. SOPER: Could I pass the answer to Ms.
24 Chancellor, because it's kind of into her area?

25 MS. CHANCELLOR: Your Honor, I think first

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1 of all, we need to understand what the ISFSI licensing
2 process is. As you recognized in the seismic
3 decision, the Commission said it's a one-step process.
4 A construction and operating license are issued at the
5 same time. Unlike nuclear power plant licensing,
6 where you have a construction license, and then you
7 have an operating license.

8 In the preamble to Part 80 of the original
9 rule, the Commission said that you need considerable
10 detail in the SAR sufficient to support a finding
11 under 72.40. One of the requirements under 72.40 is
12 to -- for the Commission to approve the site
13 suitability. In fact the Commission must evaluate
14 proposed sites with the design basis external events
15 for which adequate protection cannot be provided
16 through ISFSI design, and should be deemed unsuitable
17 for the location of the ISFSI.

18 The Board has said that the PFS site
19 doesn't meet the siting evaluation factors. What this
20 Board is asking us to do is to negotiate with the
21 Applicant to give them a construction license. That
22 is not what ISFSI licensing is all about.

23 CHAIRMAN FARRAR: Not negotiate with the
24 Applicant to give them a license to negotiate with
25 them on how you're going to put the merits of this

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1 issue in front of us.

2 MS. CHANCELLOR: Your Honor, PFS had the
3 opportunity throughout the six years of putting the
4 336 cask facility in front of you. It has chosen not
5 to do so. At the Eleventh Hour when the State
6 eventually prevails on an issue, now you're saying go
7 back and renegotiate procedures so that we can
8 expedite this, so that the Applicant can get a
9 construction license. That is not what ISFSI
10 licensing is all about.

11 CHAIRMAN FARRAR: Yesterday morning I
12 would have agreed with you, but the Commission's order
13 granted deals only with the consequences issue. But
14 it does say we specifically authorize the Board to use
15 whatever procedural devices it deems necessary to
16 reach a timely decision, assuming that the Commission
17 intended that, not that -- and they say in here they
18 want this case wrapped up. So to the extent that I'm
19 suggesting a procedure that's out of the ordinary, it
20 seems to me the complaint is not - - would not be to
21 us, but to the Commission.

22 MS. CHANCELLOR: A procedure out of the
23 ordinary cannot be an illegal procedure. PFS is
24 asking for a license condition on a 4,000 cask
25 license. The regulation prior to the Commission

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1 issuing a construction and operating permit to PFS
2 make a site suitability finding. They cannot make a
3 site suitability finding until they do the consequence
4 analysis, so the expedited procedures, we believe,
5 would be an illegal end-run around existing
6 regulations.

7 CHAIRMAN FARRAR: Wait. No. We could do
8 a site suitability based just on probability. In
9 other words --

10 MS. CHANCELLOR: Limited to --

11 CHAIRMAN FARRAR: But limited to --

12 MS. CHANCELLOR: Limited to a smaller size
13 that may be less than 336.

14 CHAIRMAN FARRAR: Right. In other words,
15 it --

16 MS. CHANCELLOR: But in essence, you're
17 giving them a construction license, and that's not
18 what this proceeding is all about. You don't get a
19 separate construction license, and then get an
20 operating license; which is, in essence, what you're
21 doing, if you allow any sort of procedures that we
22 arrive at.

23 CHAIRMAN FARRAR: I thought the
24 construction license would be - - suppose it's for one
25 cask? The construction license would be build all

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1 your infrastructure. You have permission to build all
2 your infrastructure, and you may put one cask on
3 there. In other words, the site is suitable if the
4 number of casks are small enough, because then the
5 probability is small enough.

6 MS. CHANCELLOR: That changes the
7 calculus. Once PFS has one cask out there, I know
8 it's at the Applicant's risk, but there are a number
9 of cases where the Applicant has come in and cried
10 economic waste. We need to generate revenue so that
11 we can make this a viable facility.

12 CHAIRMAN FARRAR: Are those nuclear
13 regulatory cases, or --

14 MS. CHANCELLOR: I believe in some of the
15 nuclear power plant cases, but I don't have them in
16 front of me.

17 CHAIRMAN FARRAR: So you aren't buying the
18 notion that we can close our eyes to the -- in other
19 words we say to the Applicant, this is at your risk,
20 and you're saying that in practice, that doesn't work.

21 MS. CHANCELLOR: That's correct.

22 JUDGE LAM: Ms. Chancellor, am I hearing
23 what you're saying? You don't have any problem with
24 the Commission order yesterday about expedite
25 procedural matters on the consequence hearing.

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1 MS. CHANCELLOR: Well, I --

2 JUDGE LAM: But you do have it here on the
3 336 cask facility, or am I just hearing you wrong?

4 MS. CHANCELLOR: Well, we always have
5 problems with expedited procedures, because we like to
6 have a life, Your Honor. But the Commission -- I
7 think that's something that we will probably talk
8 about in the scheduling portion of the presentation
9 today, but PFS -- the most expeditious way of dealing
10 with this is to go forward with the consequence
11 analysis.

12 The notion that PFS can get a smaller
13 license, and that it is analogous to a low power
14 license is totally off-base. Low power license, we
15 quote from Diablo. "Low power testing is a normal,
16 necessary, and expected step in the life of every
17 nuclear plant. This is true whether testing is
18 planned under the authorization of a separate fuel
19 loading and low power testing license, or scheduled as
20 the first step towards operation under the authority
21 of a full power license." So with a low power
22 license, a full capacity construction permit has
23 already been issued. In this case, PFS owns 4,000.
24 Site suitability has already been determined in low
25 power. PFS is being deemed unsafe for 4,000 casks.

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1 In particular, the license for low power
2 is authorized by Section 192 of the Atomic Energy Act,
3 by Regulations 50.57 and 50.47. And I might add, most
4 of the cases dealing with low power involve whether
5 the Applicant has off-site emergency planning
6 capability, but the regulations only require the
7 Applicant to have on-site emergency planning. That's
8 what all those low power cases are about.

9 So with the nuclear power plant license,
10 low power reactor is a normal and necessary step.
11 Whereas, PFS' motion is not a necessary step. They
12 don't need this for start-up. They need this for
13 construction, and that's not part of the ISFSI
14 process. And there's the regulations on point that
15 state that low power is not an alternative to full
16 power. And that the no action alternative has already
17 been determined at the construction stage.

18 Here we've got no analysis of the no
19 action alternative. What is the benefit of 336 casks
20 versus the no action alternative? The purpose of a
21 low power license is the opportunity to test equipment
22 that can't otherwise be tested, which could take
23 months, or weeks to correct the problems.

24 PFS wants to get a license now so that it
25 can market and construct its facility. There's

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1 nothing that says that the 336 casks is bounded by the
2 environmental impact statement, using the low power
3 analogy. And there's no such thing as an interim step
4 to full capacity for ISFSI licensing, as PFS says.

5 PFS says that it wants a license condition
6 to mitigate safety consequences. Well, another way of
7 looking at this is you can say PFS is coming to the
8 nuisance - 7,000 F-16 flights, transit, Skull Valley.
9 It's next to a bombing range. Why would this Board
10 issue a license to PFS for 4,000 casks, not knowing
11 what the consequences are of locating there?

12 PFS hasn't come to you and asked for a 336
13 cask license. It's come to you asking for a 4,000
14 cask license, with an illegal license condition to
15 limit it to 336 casks.

16 CHAIRMAN FARRAR: Would your position be
17 different if, in fact, they were asking for a 336 cask
18 license?

19 MS. CHANCELLOR: We would have a different
20 argument. The argument would be that the -- in order
21 to achieve one-step licensing, the Commission expects
22 a certain amount of detail in the application and the
23 SAR. It relies on the Staff to evaluate the technical
24 merits of what the Applicant has put before it. And
25 in this case, in fact, the Commission has said that

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1 the anchor-point of NRC's initial review process to
2 protect public health and safety from potential risk
3 of an ISFSI is NRC's Staff technical review of the
4 license application.

5 I think that the Board should summarily
6 dismiss PFS' motion, that the -- to say that PFS
7 should get something smaller without proving the
8 safety consequences --

9 CHAIRMAN FARRAR: How do they do that?

10 MS. CHANCELLOR: I beg your pardon?

11 CHAIRMAN FARRAR: How do they do that?

12 MS. CHANCELLOR: They litigate what we
13 have on expedited schedule, as the Commission says,
14 for the consequences.

15 CHAIRMAN FARRAR: How do they get a 336
16 license?

17 MS. CHANCELLOR: They can't. Well, they
18 could file an application with the Staff. The Staff
19 could review it. It would probably take more time
20 than litigating the consequences.

21 I'd like -- if the Board has no other
22 questions, I'd like to turn to NEPA.

23 CHAIRMAN FARRAR: Go ahead.

24 MS. CHANCELLOR: NRC regulations require
25 both the environmental report and the environmental

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1 impact statement to include consideration of economic
2 technical and other benefits and costs of the proposed
3 action and alternatives.

4 CHAIRMAN FARRAR: Do you concede that the
5 environmental impacts of the small -- environmental
6 impacts, not the environmental balance, the
7 environmental impacts of the smaller site are
8 necessarily smaller, or necessarily not larger?

9 MS. CHANCELLOR: If you're talking about
10 consumption of natural resources, air quality, water
11 resources, those types of things, then yes, there
12 isn't any difference. But NEPA implicitly requires
13 that the proposed facility exhibit some benefits to
14 justify its construction. And that consideration of
15 alternatives, including the no action, is the linchpin
16 of environmental analysis.

17 CHAIRMAN FARRAR: So the raw costs are no
18 worse, but the balance and the need could be
19 different. Is that what you're saying?

20 MS. CHANCELLOR: Not could be, are very
21 different.

22 I'd like to address some of the points
23 that the Board brought up when it ruled on Utah SS.

24 CHAIRMAN FARRAR: Wait a minute. What
25 about the 20/40 deal last May 10th through 17th?

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1 MS. CHANCELLOR: Right. There the Board
2 said that it saw the benefit as sort of an insurance
3 policy against the creation of a permanent facility.
4 That is nowhere to be found in the environmental
5 impact statement.

6 PFS relies for need on -- that it is an
7 interim facility for its members and non-members to
8 ensure one, that nuclear power plants do not cease
9 operating before their license term because it lacked
10 spent fuel storage space. Two, that permanently shut
11 down reactors could decommission sooner. And three,
12 it's an economic alternative to at reactor storage.

13 CHAIRMAN FARRAR: Let me get this
14 straight. So you're going back to the arguments the
15 Applicant made last May 10th, I think it was, and we
16 tended in our oral ruling a week later to side with
17 the Applicant on what the benefits were, as opposed to
18 what the Staff said the benefits were, if I recall
19 correctly. And now you're saying okay, take what the
20 Applicant said then, and use those as the benefits,
21 and those benefits are undercut or diminished with the
22 smaller site. Is that your argument?

23 MS. CHANCELLOR: No. What I'm saying is
24 that the benefits as elaborated and documented in the
25 final environmental impact statement are -- this is

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1 what the Applicant proposed to the Staff. What I was
2 trying to contrast was that this insurance policy
3 against Yucca never opening is nowhere to be found and
4 documented in the EIS. So they have three bases for
5 needs, for the need for the facility, and they
6 elaborate on these.

7 CHAIRMAN FARRAR: Yeah, but if I recall,
8 we -- I thought in that oral ruling, we tended to
9 reject the Staff's statement of what the benefits
10 were, and we're free to do that. And that amends the
11 environment -- that then amends the Agency's
12 environment impact statement. And we tended to adopt
13 in its place what the company said the benefits were.

14 MS. CHANCELLOR: Well, the company has
15 proposed to the NRC Staff what is in the environmental
16 impact statement, and the Staff has documented, and
17 PFS has elaborated on that here today. They talk
18 about physical and operational constraints at nuclear
19 power plants. Well, the only political constraint are
20 some state laws in Minnesota. And just recently, the
21 Minnesota legislature lifted the ban on storage at
22 Prairie Island. Prairie Island now can store -- so in
23 terms of PFS' members' needs, the situation has
24 changed.

25 The Minnesota legislature is allowing

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1 Prairie Island to store fuel through the end of its
2 operating term, and is allow the Public Service
3 Commission to determine if they need more storage
4 space, if they operate -- if they renew their license
5 application.

6 La Crosse, the company that Mr. Parkyn is
7 associated with, they have filed an ISFSI application
8 with the NRC to pursue on-site storage.

9 CHAIRMAN FARRAR: Does your argument prove
10 too much? If all these things develop, then Mr.
11 Silberg and his clients won't build this facility.

12 MS. CHANCELLOR: It doesn't prove too
13 much. What it proves is that FEIS does not discuss
14 the need for, and the benefits of a 336 or some lesser
15 facility. The Staff only analyzed throughput of about
16 19,000 MTUs for the cost benefit analysis, and it
17 found that 10,000 MTUs was -- the no action
18 alternative benefit was more than a 10,000 MTU
19 facility.

20 PFS argues that shutdown reactors could
21 decommission sooner. However, there's a new rule that
22 the NRC has promulgated just last month allowing for
23 partial release of sites. So the need for this 336
24 cask facility certainly doesn't meet the PFS' claimed
25 economies of scale that is throughout their

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1 application.

2 CHAIRMAN FARRAR: And that's a NEPA issue,
3 not a business judgment issue.

4 MS. CHANCELLOR: Yes, because NEPA
5 implicitly requires that the proposed action exhibit
6 some benefits to justify licensing it.

7 CHAIRMAN FARRAR: Okay. But if the
8 environmental costs are in the scheme of things
9 relatively minimal, then you need fewer benefits to
10 justify incurring them. So you were about to talk
11 about environmental issues. What are the -- that's --
12 never mind that question.

13 MS. CHANCELLOR: But I think, Your Honor,
14 as we stated in our response to the motion, PFS has
15 admitted that something much larger than 336 casks is
16 not economically viable. Why would the NRC issue a
17 license to a company where it's not economically
18 viable to construct?

19 There must be some justification to allow
20 a company to diminish the environmental quality of the
21 area. They are consuming resources. They are adding
22 to air quality degradation. There are lots of
23 environmental costs that you may allow for a 40,000
24 cask facility that did exhibit benefits of real need,
25 and that there was -- that the no action alternative

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1 may not be able to balance out.

2 But if you're talking about an 8 percent
3 smaller -- a facility 8 percent of the size of what
4 they are requesting, we're dealing with a different
5 animal. This is not "bounded" by the FEIS. There are
6 no regulations on point that say that you don't have
7 to consider the no action alternative when you -- like
8 there is for the low power testing, where you've
9 already done that, and where low power is -- by
10 regulation, the Commission has made that generic
11 finding, that you don't have to do a NEPA analysis
12 with respect to low power. There's no equivalent
13 regulation here with respect to PFS' mini facility.

14 One of the main purposes of the FEIS is to
15 allow those who haven't been involved in the
16 proceeding to understand and consider the factors
17 involved. And where an FEIS departs markedly from the
18 position espoused or reflected in the FEIS, you need
19 to supplement it.

20 CHAIRMAN FARRAR: Let me interrupt, Ms.
21 Chancellor. Your side has a good bit of time left,
22 but the company has rebuttal time, and we haven't yet
23 gotten to financial. Can we agree that this
24 afternoon's session, which is set from 1:15 to 3, need
25 not be as long, in light of the Commission's order of

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1 yesterday. In other words, I anticipated we were
2 going to have a tennis match debating which party was
3 right about how long -- what the end date of that
4 proceeding should be. We now have the end date, so
5 the discussion will be more how do we get to that end
6 date, rather than -- so we could shorten that.

7 MS. CHANCELLOR: I could wrap up --

8 CHAIRMAN FARRAR: And I know you'll tell
9 me you don't like the Commission order for what it
10 does to your capabilities, but the Commission order is
11 its order, and we're going to follow it.

12 MS. CHANCELLOR: Your Honor, we're about
13 done with our presentation on the issues here.

14 CHAIRMAN FARRAR: Okay.

15 MS. CHANCELLOR: I'd just like to say that
16 this is a motion for reconsideration. We can't be
17 expected to comb the record to figure out all the
18 collateral effects that may occur because of this 336
19 cask license condition. And that PFS is asking for a
20 capacity of 4,000 casks. They say they're going to
21 start at zero.

22 CHAIRMAN FARRAR: Okay. You can't comb
23 the record on this motion, but suppose, again assuming
24 we were to deny this motion, the Applicant and the
25 Staff came up with some documentation of their

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1 position in the form of an application amendment or
2 whatever, and presume that all their experts said
3 we've combed the record, and there's nothing here.
4 There's no problem here. You would then have to comb
5 the record. You may not want to do it in response to
6 this motion. You may not have to do it in response to
7 this motion, but at some point you're going to have to
8 do that. If they come up -- assuming this is not the
9 right motion. If they come up with the right
10 procedure, you're going to have to have your people
11 comb the record, or are you?

12 MS. CHANCELLOR: Well, I think what you're
13 doing, Your Honor, is licensing by motion practice.
14 And that if that's what you choose to do, of course we
15 will do it.

16 CHAIRMAN FARRAR: Assume it's not a --
17 assume we say it's not a motion practice. You've got
18 to do a formal license amendment. And they come up
19 with the right little reports that say nothing going
20 on here. We've checked it out. Then you've got to
21 get your experts to respond. Right?

22 MS. CHANCELLOR: That's correct. We'd
23 have file a contention or who knows what. And then
24 there's the question of how much effort you can expect
25 us to put into consequences, while at the same time,

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1 by combing the record to figure out what the effect of
2 a 336 cask license is. I think that would be grossly
3 unfair for you to burden us --

4 CHAIRMAN FARRAR: The Commission -- okay.
5 The Commission said yesterday they don't want to put
6 you to the effort of briefing probability while you're
7 doing consequences.

8 MS. CHANCELLOR: Correct.

9 CHAIRMAN FARRAR: And you saying we should
10 also read into that, they would prefer that all our
11 energies be put on consequences, and not on a 336 cask
12 amended application?

13 MS. CHANCELLOR: That seems to come
14 through loud and clear on the Commission's order, as
15 far as the way we read it.

16 JUDGE LAM: Is that also your preference?

17 MS. CHANCELLOR: Yes, it is. We don't
18 think that the 336 cask license has been presented.
19 And if it's PFS' intent to expedite this, it's at
20 their own risk. If they want to go back and present
21 a license application for 336 casks, and get a
22 construction and operating permit for a capacity of
23 336 casks, describe where those casks will be located,
24 describe the NEPA effects.

25 CHAIRMAN FARRAR: Let me interrupt here.

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1 Mr. Silberg, if it came to that, what's your
2 preference - if we decided we can honor the
3 Commission's order to move fast on consequences, and
4 couldn't deal with your 336 -- we couldn't do both at
5 once, or are you suggesting we can do both at once?

6 MR. SILBERG: I'm suggesting not only you
7 can, but I think you must. And I think, if I read the
8 Commission's order, I don't see anything in there
9 which suggests anything about doing away with a motion
10 for reconsideration. They clearly recognize that
11 there is one. If they intended to say that should be
12 put aside, as well, I think they would have said that.
13 I don't want to psychoanalyze what goes on inside the
14 meeting rooms.

15 CHAIRMAN FARRAR: Careful.

16 MR. SILBERG: But, you know -- no, I think
17 you need to do both. I think you have to do both. I
18 think, you know, the State of Utah has the resources
19 to do both. And I think -- you know, the governor has
20 said many times that he will use all the resources to
21 deal with this proposal, and so I, frankly, don't feel
22 a lot of sympathy. We've all had to work very hard in
23 this case over long periods of time.

24 I think this is a fairly straightforward
25 issue, frankly. I don't think that there is the need

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1 for another application. I think Commission case law
2 clearly --

3 CHAIRMAN FARRAR: You're going --

4 MR. SILBERG: Yeah.

5 CHAIRMAN FARRAR: That's too much.

6 MR. SILBERG: But if I have to make a
7 choice, I'll have to consult with the client. I'm not
8 prepared to do that right now.

9 CHAIRMAN FARRAR: Okay. Mr. Turk.

10 MR. TURK: We see nothing in the
11 Commission's order that addresses the need to abandon
12 the Motion for Reconsideration, or for --

13 CHAIRMAN FARRAR: And I'm not suggesting
14 there's anything in there. What I'm suggesting is
15 they made very clear that we're to do -- consequences
16 is to be done. And what I'm saying is, if there is a
17 -- if it turns out, and there may not be a conflict,
18 but if there's a conflict between doing the 336 cask
19 proposal and doing the consequences hearing, you're
20 saying we'll find the energy to do both?

21 MR. TURK: Yes. And we don't see a need
22 to amend the application in order to submit the PFS
23 proposal. I think it's -- if you deny the Motion for
24 Reconsideration, PFS is free to file whatever motion
25 they deem appropriate. Maybe they may want to amend

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1 the application. Maybe they'd find a different way to
2 do it, but I wouldn't assume that necessarily there
3 would be a lengthy review involved.

4 CHAIRMAN FARRAR: And where the Commission
5 yesterday talks about us using whatever procedural
6 devices we need on the consequences, you don't see as
7 part of that that out of this hearing today, if we
8 deny their motion, should come some suggestion as a
9 procedural device of how to get this issue raised
10 properly. That's their job, not our's.

11 MR. TURK: It's PFS' job really to decide
12 what they want to do next, if you deny their motion.

13 CHAIRMAN FARRAR: Ms. Chancellor, are you
14 about wrapped up?

15 MS. CHANCELLOR: Yes, we're done, Your
16 Honor.

17 CHAIRMAN FARRAR: Okay. So now let's get
18 into finance.

19 MR. SILBERG: Can I do some rebuttal to
20 this? I think we're entitled to it.

21 CHAIRMAN FARRAR: I've shortened their
22 time.

23 MR. SILBERG: WE'll be short.

24 CHAIRMAN FARRAR: Keep it real short
25 because they didn't get all their allotted time, and

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1 you've already had all your allotted time.

2 MS. CHANCELLOR: Could we reserve any time
3 we have for rebuttal?

4 CHAIRMAN FARRAR: Yeah.

5 MR. SILBERG: Well, I don't think the
6 Board's order contemplated --

7 CHAIRMAN FARRAR: I can take of myself,
8 Mr. Silberg. Thank you. Go ahead.

9 MR. SILBERG: Okay. Thank you.

10 First, I'd note a number of things. In
11 terms of some cost, and the fact that this is a sham,
12 and notwithstanding anything that once we build one
13 cask, this is an inevitable train. I think the
14 Shoreham decision shows that that isn't the case. The
15 Supreme Court clearly ruled in the PRDC case a long,
16 long time ago that some costs on safety issues are not
17 to be considered. And I think the rhetoric heard from
18 the State is simply inconsistent with that.

19 The Shoreham case did involve things other
20 than emergency plans. They involved Marked II
21 containment, pass and mechanical valve failure, and
22 other issues. The Commission has issued low power
23 licenses without benefit of statutes and regulations.
24 I referred to those. I think if you go back through
25 history you'll find them.

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1 They talked about need to put a new target
2 down on paper. We've done that. They said they can't
3 evaluate the proposal off the top of their heads.
4 They've had since March 31 to do that, and we've seen
5 nothing. On substance, I think they have had an
6 opportunity to address the substance motion. The
7 State quoted the Board's order referring to the
8 application envisioning as many as 4,000 casks. Well,
9 as many as certainly includes the lesser included 336.

10 The statement that Seabrook sua sponte is
11 wrong. Seabrook did involve sua sponte outside steam
12 generator issues, not on demographics. This is not an
13 advisory opinion, contrary to what they said we have
14 asked for. We will use it if we get it. We are not
15 asking to build a 4,000 cask facility today. That's
16 simply the rhetoric.

17 If the Board decides that the motion is
18 not properly titled, I think the Commission in its PFS
19 decision specifically retitle the motion and treat it
20 the appropriate way. If the Board thinks that more
21 evidentiary --

22 CHAIRMAN FARRAR: Which decision was that?

23 MR. SILBERG: We cited it in our case.
24 It's CLI-00-21 at page 264, where they treated a
25 second petition to intervene by William Peterson as a

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1 Motion for Reconsideration, and I think also a Motion
2 to Hold in Abeyance.

3 If the Board believes that there is
4 evidentiary support, my suggestion - and I think
5 that's not necessary. I think that's incorrect, but
6 if the Board disagrees, then I think what the Board
7 ought to do is promptly issue an order telling all the
8 parties to promptly put in affidavits. We know what
9 our position is. We've said it. We know what the
10 Staff's position is. They've said it. You don't know
11 what the State's position is. We ought to provide
12 simultaneous affidavits from our experts saying what
13 are the safety issues for the 336 cask facility? What
14 are the environmental issues for the 336 cask
15 facility? You address that. You put that before the
16 Board. The Board can make a decision. If the EIS --

17 CHAIRMAN FARRAR: Let me ask what those
18 affidavits would look like?

19 MR. SILBERG: Well, we could --

20 CHAIRMAN FARRAR: Yeah. And would we get
21 a one-liner from you saying our guys have looked at
22 everything, and there's nothing here?

23 MR. SILBERG: I think that's probably what
24 we would say.

25 CHAIRMAN FARRAR: That's useless to us.

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1 MR. SILBERG: Well, that's why I think
2 asking us to prove a negative -- we have said what we
3 think the consequences are. We think there are no
4 unreviewed different safety consequences. We think
5 all the environmental consequences set forth in the
6 EIS are bounded.

7 CHAIRMAN FARRAR: And there would be no
8 supporting -- there would be no analysis supporting
9 that conclusory affidavit.

10 MR. SILBERG: Well, I don't know what kind
11 of analysis you have to prove the negative. And what
12 we're saying is nothing is happening. We can go
13 through and repeat the entire safety evaluation, and
14 annotate on each page, this the same, this is the
15 same, this is -- because that's what you're asking us
16 to do.

17 We have done that analysis. The Staff ha
18 said that they have done that analysis. We can say
19 chapter by chapter, verse by verse, that there are no
20 changes in each of these items. Or we can say in the
21 one line that says we've reviewed the SER. There
22 aren't any changes for a small facility.

23 JUDGE LAM: Well, it's not exactly that,
24 Mr. Silberg. I don't think you are asked to prove the
25 negative, which is impossible. The thought process

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1 here is we have safety ramifications for a 4,000 cask
2 facility. If and when the size of number of casks are
3 reduced, are there any unintended safety consequences?
4 The analogy is, I'm building an aircraft carrier of
5 certain size. All of a sudden I'm reducing it. Would
6 I see any unintended safety consequences? That is the
7 focus of our question here. It's not like, you know,
8 prove that you don't have -- proving a negative is
9 impossible.

10 MR. SILBERG: Well, how do we say that
11 there are -- we believe there are no unintended
12 consequences. We have thought this through with our
13 technical experts, and we can't think of any.

14 JUDGE LAM: Well, then --

15 MR. SILBERG: How do we establish that,
16 other than saying we are unaware of any unintended
17 consequences?

18 JUDGE LAM: Well, there are rational and
19 analysis -- there are methods out there to do that.
20 It's not necessarily a cursory review. Perhaps, an
21 in-depth evaluation. I mean, if you wanted to go down
22 that path. I'm not saying we are going down that
23 path, but how do we analyze a smaller aircraft is
24 necessarily safer than a larger aircraft? How are you
25 going to analyze a smaller car is necessarily safer

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1 than the larger car?

2 MR. SILBERG: Well, we're not talking
3 about a smaller car, we're talking about fewer cars on
4 a highway.

5 JUDGE LAM: If that's the case, then the
6 rationale could be laid out.

7 MR. SILBERG: Well, I don't think that is
8 the rationale. To get to 4,000 casks, we have to put
9 336 casks on the site. So by definition, we have
10 looked at the entire loading of the facility, and
11 whether it's one cask which is analyzed, or 4,000
12 casks which is analyzed, somewhere in-between the 336
13 casks, that's also looked at. If there were some
14 different safety issue, the Staff would have been
15 required to deal with that in the SER. They would
16 have been required to say when we get to 336 casks,
17 we're going to have a new issue that comes up, because
18 we aren't going to be at 336 casks if we get to 4,000
19 casks. So you have to have already assumed and
20 evaluated the fact that there is no -- there are no
21 new safety issues.

22 I simply don't know what kind of analysis
23 you can posit other than we have thought about it. We
24 can't come up with anything else. And I think what
25 you've heard us say, what you've heard the Staff say

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1 is, that's it. The State has said there are no -- you
2 know, the environmental impacts are no greater if
3 there's an argument that's on the cost benefit. And
4 I think that's dealt with because we have shown what
5 types of benefits this facility will produce. Not
6 4,000 casks, there'll be a smaller number of casks.
7 There'll be, you know, fewer casks moved from a
8 reactor to the site, but there are still benefits.
9 And the cost benefit analysis does not, you know -- it
10 is not a mathematical requirement that you actually
11 even have a positive cost benefit under NEPA law. I
12 think we would clearly have that here. But as a
13 matter of law, you don't need that.

14 I, frankly, don't know what we would put
15 into the record other than the fact that we have
16 reviewed, and we find no impacts. We find no
17 unintended consequences. The State has issues. In
18 fact, they raised several in their reply to our
19 motion, and we dealt with those. We showed that those
20 were just not relevant. They were not credible. They
21 were wrong.

22 If the Board wants to give them yet
23 another opportunity to do that, to file an affidavit,
24 let them do that, but let's do it quickly. Let's move
25 ahead. This motion is not - I hate to say rocket

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1 science - but this is a fairly straightforward
2 mathematical analysis of the record. The rest of it,
3 you know, is logic. You're there. You've gone
4 through the analysis already.

5 JUDGE LAM: But how do you address Mr.
6 Soper's concern by granting a license for 4,000 casks
7 with a license condition of 336 casks, it comes across
8 as the Board is assuming ultimately you will prevail.

9 MR. SILBERG: Well, that's wrong. The
10 Board does not presume we would prevail, any more than
11 when a licensee gets a low power or a reduced power
12 license, or a shorter term license. You remember that
13 in the early days of the NRC, you didn't get 40 year
14 licenses. You got a provisional operating license
15 that was good for, I believe, 18 months. There was no
16 assumption that you would continue. In the PRDC case,
17 the Supreme Court said you don't take some costs --
18 you assume nothing.

19 JUDGE LAM: So you are perfectly prepared,
20 if the license for 4,000 casks with a license
21 condition of 336 casks is granted, but you ultimately
22 --

23 MR. SILBERG: We open on 336 casks, unless
24 we demonstrate that that condition should be released.

25 JUDGE LAM: Right.

1 MR. SILBERG: Simple as that.

2 JUDGE LAM: So ultimately, you are
3 prepared to live with 336 casks for the lifetime of
4 the facility.

5 MR. SILBERG: Absolutely. We may not
6 build the facility in that case. We may stop -- you
7 know, we may pull the plug. But right now, we want to
8 go ahead because, you know, we think in our heart of
9 hearts we will ultimately prevail on the 4,000. And
10 by getting the 336, it allows us to significantly
11 reduce the time which we're ready to go. We can start
12 construction. We can be there, and not sit back and
13 wait another year. And if we're limited to 336,
14 that's a business decision. The Commission has said
15 that business decisions are left to the Applicant.

16 CHAIRMAN FARRAR: Let us --
17 notwithstanding who gets hurt by it, let's cut this
18 off here, and let's get to financial.

19 MR. SILBERG: Can we take a short break?
20 We have to clear the room.

21 CHAIRMAN FARRAR: No, I'd like to try --
22 okay. If we do -- if we cleared the room, who gets to
23 stay? Only your people get to stay. All the State
24 people get to stay, I mean, all the Staff people get
25 to stay.

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1 MR. TURK: Yes. I think we only have two
2 members of the Staff here. I mean maybe others I
3 don't recognize, but I'll check with them, and we
4 would ask those to stay who are involved in financial
5 matters, or who may have interest in what you say.

6 CHAIRMAN FARRAR: Why don't we try it
7 without clearing the room, Mr. Silberg. You refer us,
8 when you're arguing, refer us to something on a page
9 in your brief, and we'll know what you're -- you know,
10 if you talk in code you can say the concept outlined
11 halfway through such and such a page is what we're
12 talking about now, and we'll argue it that way.

13 MR. SILBERG: Mr. Gaukler is going to lead
14 the charge on this.

15 CHAIRMAN FARRAR: Okay.

16 MR. SILBERG: If we're not taking a break,
17 I will ask permission to take a break.

18 CHAIRMAN FARRAR: Yeah. To save time,
19 anyone who is going -- would someone on the Staff
20 who's badged go with anybody who has to go, even if
21 you're not -- even if you're only here as a spectator,
22 just so we can do this quickly, rather than slowly.
23 And the rest of us will just stay here.

24 (Pause.)

25 CHAIRMAN FARRAR: All right. We're back

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1 after a short break. Mr. Silberg.

2 MR. SILBERG: I think Mr. Gaukler --

3 CHAIRMAN FARRAR: Mr. Gaukler.

4 MR. SILBERG: Yes.

5 MR. GAUKLER: I intend to keep this
6 relatively short, because the points we want to make,
7 I think, are relatively simple --

8 CHAIRMAN FARRAR: Right.

9 MR. GAUKLER: -- and straightforward. The
10 basic points, Your Honor, are that there are licensing
11 conditions in place that ensure the financial
12 assurance as far as the NRC is concerned, regardless
13 of the size of the facility. And we've committed to
14 meet those license conditions, and we would meet them
15 for a 336 cask facility.

16 With respect to the first license
17 condition, we've said that we would have sufficient
18 funds, whether it be by equity, revenue or debt, that
19 is fully committed to construct a facility with the
20 initial capacity as specified to the NRC, and we all
21 know what that is. And we will have those committed
22 funds if we go forward with a 336 cask facility. We
23 have to have the same committed funds as you would
24 otherwise, and the Board has already identified --
25 Judge Bollwerk's Board has identified the cost of such

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1 a facility. And we would have to have those funds
2 committed -- whether we would use them or not, we
3 would have to have committed funding available. And
4 so basically, it comes down to if we have a customer
5 whose need is great enough for us to go forward, and
6 wants to commit the funds, that that would provide us
7 the funds to go forward.

8 CHAIRMAN FARRAR: Okay. Mr. Gaukler, I'm
9 at a little disadvantage here, of course, since I was
10 not involved in the financial qualifications issue.
11 But is your position -- can I restate it as simply as
12 this; that the 336 customers --

13 MR. GAUKLER: Casks.

14 CHAIRMAN FARRAR: -- or casks, the
15 customers who want those may learn that they have to
16 pay more than they thought they were going to pay. In
17 other words, they thought there were going to be 336
18 out of 4,000 or out of some other number.

19 MR. GAUKLER: Right.

20 CHAIRMAN FARRAR: And so they said ah-hah,
21 that's going to cost us X dollars.

22 MR. GAUKLER: Right.

23 CHAIRMAN FARRAR: Now you show up and say
24 it's going to cost you many more than X dollars,
25 because we only have a 336, and we've got to raise all

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1 this money just to -- now one of two things. Is your
2 position this simple? One of two things will happen,
3 they'll say hey, we're in. We really need these
4 casks. We'll pay anything for this space, in which
5 case you've raised your money. Or they'll say hey,
6 that's not the deal we thought you were talking to us
7 about. We're not going to -- we're out. We don't
8 want to do this, in which case the answer is there's
9 no facility.

10 MR. GAUKLER: That's exactly right, Your
11 Honor.

12 CHAIRMAN FARRAR: So all these 400 pages
13 that my colleagues and Judge Bollwerk have put out, it
14 comes down for purposes of today, your position is
15 that simple; we either get the money, or we won't.

16 MR. GAUKLER: That's right.

17 CHAIRMAN FARRAR: People will either pay
18 the surcharge or surtax, or whatever, or they won't.
19 If they pay it --

20 MR. GAUKLER: Right.

21 CHAIRMAN FARRAR: -- we've got our money.
22 If they don't --

23 MR. GAUKLER: Basically, that's right,
24 Your Honor. In terms of construction, we have the
25 option for some equity, as well as customer debt or

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1 revenue, but that's the bottom line, Your Honor.

2 JUDGE LAM: Now, Mr. Gaukler, I presume
3 you have read the three decision we issued this week
4 on financial qualification.

5 MR. GAUKLER: I have focused on two on
6 Utah E, and not necessarily Utah F.

7 JUDGE LAM: And are you well aware, in
8 each and every one of them there's a footnote saying
9 the decision was based on the 4,000 cask facility
10 application?

11 MR. GAUKLER: Yes. I understand that,
12 Your Honor.

13 JUDGE LAM: Have you gone back and
14 reviewed if you have 336 casks, each and every one of
15 the arguments that were presented in these decisions
16 would come out in your favor?

17 MR. GAUKLER: Yes, it would. The dollars
18 would be lower - okay - in terms of estimated
19 operating costs, but yes, it would. But in terms of
20 the nature of the contracts as a license condition, as
21 those decisions reflect, another license condition
22 requires us to have enough funds to cover whatever
23 those estimated costs are.

24 CHAIRMAN FARRAR: So my initial reaction
25 when I got your motion that this was going to be --

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1 that the merits of the motion would turn on financial,
2 you're really saying that's a non-issue.

3 MR. GAUKLER: That's right, Your Honor.

4 CHAIRMAN FARRAR: And whether or not the
5 State likes that this would be your third funding
6 scheme - and I don't use that pejoratively - this
7 would be your third approach to funding, that doesn't
8 matter. In other words, you've got to raise a certain
9 amount of money.

10 MR. GAUKLER: Got to raise the money to
11 meet the conditions. We would still use the same
12 agreements that we submitted to the Board - okay - in
13 terms of the basic agreements. But we would have to
14 raise the funds, and basically there would be whatever
15 surcharge, whatever else would be necessary to raise
16 those funds.

17 CHAIRMAN FARRAR: IF you fail --

18 MR. GAUKLER: If we wanted to go ahead.
19 If we did not come forward with the funds to meet
20 those conditions, we could not go ahead.

21 CHAIRMAN FARRAR: That the license
22 self-destructs.

23 MR. GAUKLER: Right. And nothing.

24 CHAIRMAN FARRAR: I mean, it falls in the
25 -- I mean, the condition comes into play, and you

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1 can't go ahead.

2 MR. GAUKLER: That's correct.

3 CHAIRMAN FARRAR: Okay. In the interest
4 of time, I'll let you come back. But let me -- Mr.
5 Turk, do you share that view?

6 MS. MARCO: Your Honor --

7 CHAIRMAN FARRAR: Oh, Ms. Marco.

8 MS. MARCO: Yes, we do share --

9 MR. TURK: I yield.

10 MS. MARCO: We do share the view that the
11 license conditions established by the Commission in
12 its August 1st, 2000 order can be met through the
13 reduced-size facility. There is one thing I heard
14 that I would like to point out, and I think it was
15 made by the Applicant, that they would have a less
16 cost for operation as been stated in the order.

17 However, I believe that the costs as
18 articulated in Paragraph 4.79 of the order would still
19 have to be met, and if they choose -- if the customers
20 choose to do that, then it would be fine.

21 CHAIRMAN FARRAR: But you agree, the case
22 is basically a simple -- in other words, you don't
23 care how much more a particular customer has to come
24 up. If the customer -- if it's in the customer's
25 interest to do it --

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1 MS. MARCO: If they choose to do it --

2 CHAIRMAN FARRAR: -- they'll pay the
3 extra. And if they don't --

4 MS. MARCO: They walk away. Correct.

5 CHAIRMAN FARRAR: Right. Okay.

6 MR. TURK: We should point out one thing
7 also, Your Honor. The license conditions are geared
8 to two different events. One is construction, one is
9 operation.

10 CHAIRMAN FARRAR: Mr. Turk, back in Salt
11 Lake didn't I have to say when you yield to somebody
12 else, you're yielded.

13 MR. TURK: I yield again.

14 CHAIRMAN FARRAR: Thank you. Ms.
15 Chancellor, is this your's or Mr. Soper's?

16 MS. CHANCELLOR: It's mine, Your Honor.

17 CHAIRMAN FARRAR: Is the case as simple as
18 I just stated it?

19 MS. CHANCELLOR: No, I don't think it is,
20 Your Honor, because I don't think that you can
21 comprehend the ramifications not having sat through
22 weeks of hearing testimony, written findings,
23 evaluatables findings, and reply findings. And there
24 was a reason that the Board's decisions were as long
25 as they were.

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1 I believe that in this instance, that PFS
2 and the Staff are writing reasonable assurance that
3 the applicant will have funding for the construction
4 and operating life of the -- for the operating life of
5 the facility. They're writing reasonable assurance
6 out of the regulations.

7 License conditions came about in a case
8 call Claiborne. And in Claiborne, the Commission
9 allowed the license conditions to go forward, provided
10 that the Applicant had a definite financial plan.
11 They had 30 percent equity funding. Here we've got a
12 license applicant of dubious financial qualifications.
13 The Commission in CLI-OO-13, the Financial Assurance
14 Decision, said that it would not grant a license to an
15 applicant of dubious financial qualifications.

16 CHAIRMAN FARRAR: Well, wait a minute.
17 Whether or not you and I would share that view, the
18 Board has just put out three decisions that rejects
19 that view, and I'm not about to sit here and say well,
20 they were wrong. You know, you may not like those
21 three decisions, but right now those are the -- don't
22 we have to follow those?

23 MS. CHANCELLOR: Those three decisions
24 relate to a 40,000 MTU facility.

25 CHAIRMAN FARRAR: Okay.

1 MS. CHANCELLOR: And it relates to the
2 amount of dollars per kilogram of Uranium that each
3 person will pay to fund construction. And if you
4 multiply that dollar amount in the model service
5 agreement with the number of casks under license
6 condition one, you have enough funds to fund
7 construction, based on -- I don't know if I can say
8 this -- can I just ask the applicant?

9 MR. GAUKLER: I'd rather not get into that
10 on the record.

11 MR. SILBERG: I think the answer to this
12 is simple, straightforward, and unfortunately,
13 proprietary.

14 MR. GAUKLER: But the answer, I think, is
15 still my answer; is that we have surcharges beyond --

16 MS. CHANCELLOR: I didn't relinquish my
17 time for them to argue that point. I just wanted to
18 know if I could discuss a proprietary matter.

19 CHAIRMAN FARRAR: Let's see Counsel at the
20 bench. And, Ms. Court Reporter, let's go off the
21 record. And would you move away, please.

22 (Whereupon, the proceedings in the
23 above-entitled matter went off the record at 12:18
24 p.m. and resumed at 12:24 p.m.)

25 CHAIRMAN FARRAR: Okay. We're back on the

1 record after having a bench conference to decide how
2 we're going to continue to argue financial
3 qualifications without clearing the room. And I think
4 we have arrived at a way to do that.

5 So please continue, Ms. Chancellor,
6 addressing what seems to be the crux of this matter,
7 without -- argue it in general without getting into
8 the details.

9 MS. CHANCELLOR: In the hearings on
10 Utah E, we had three versions of the model service
11 agreement, which is the agreement by which PFS will --

12 CHAIRMAN FARRAR: Right, I know what it
13 is.

14 MS. CHANCELLOR: Okay. So now PFS is
15 saying that they don't need to change the terms of
16 that agreement. Well, if they don't need to change
17 the terms of that agreement, they can't fund --

18 CHAIRMAN FARRAR: I thought they were
19 saying they would change the prices or the --

20 MS. CHANCELLOR: Dollar amounts?

21 CHAIRMAN FARRAR: -- dollar amounts.

22 MS. CHANCELLOR: If they change the dollar
23 amounts, they're changing the agreement.

24 CHAIRMAN FARRAR: Mr. Gaukler, are you
25 planning on changing the dollar amounts?

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1 MR. GAUKLER: Well, our understanding is
2 that we have -- we can provide financial conditions
3 with respect to, number one, equity, revenue, or debt.
4 The model service agreement right now, by its terms,
5 provides a certain amount of money -- would provide a
6 certain amount of money for a 336-cask facility.

7 To the extent that would be insufficient,
8 we can explore other means to provide that money per
9 the license condition. Per the license condition, we
10 go to equity, revenue, or debt. And as part of that
11 we could get additional commitments from our customers
12 as necessary -- funding commitments -- that would meet
13 the license condition beyond the model service
14 agreement, that would give us the sufficient funding
15 to meet the license condition. That's --

16 CHAIRMAN FARRAR: So you'd have a
17 different model service agreement for the 336-cask
18 facility than the 4,000?

19 MR. GAUKLER: Not necessarily. You may
20 just have additional commitments from your customers
21 for funding, or you could fund it -- you just could
22 increase the price under the model service agreement.
23 There's different ways you could do it.

24 All I'm saying is we have to meet the
25 condition there, and the condition is not limited to

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1 the model service agreement --

2 CHAIRMAN FARRAR: Go ahead, Mr. Turk.

3 MR. GAUKLER: -- specifically.

4 CHAIRMAN FARRAR: Mr. Turk, you wanted to
5 say something?

6 MR. TURK: Just that the license condition
7 establishes how much money they have to come up with
8 before they can commence construction. That amount is
9 fixed.

10 CHAIRMAN FARRAR: And that's all you care
11 about.

12 MR. TURK: That's right. Well, we'll
13 verify that they meet that.

14 CHAIRMAN FARRAR: Right. But that's the
15 staff's -- that's what the staff is looking for.

16 MR. TURK: Yes.

17 CHAIRMAN FARRAR: You don't care where
18 that money came from. They either have it or they
19 don't.

20 MR. TURK: Nor does the Commission,
21 because their license condition specifically
22 authorizes -- it doesn't say, "You must provide it by
23 revenues." It says, "You can provide it by one of
24 three sources."

25 CHAIRMAN FARRAR: How do you agree that,

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1 Ms. Chancellor?

2 MS. CHANCELLOR: PFS has no revenue. It
3 doesn't make a product. It cannot generate any
4 revenue for -- during the construction phase. It
5 probably can't generate much revenue during operations
6 stage, because it's going to be so loaded down with
7 debt. It's also --

8 CHAIRMAN FARRAR: Are you talking about,
9 generally, the 4,000-cask facility?

10 MS. CHANCELLOR: No, the -- I'm limiting
11 this to the 336-cask.

12 CHAIRMAN FARRAR: Okay. But isn't the
13 point if you're right, if they can't raise -- in other
14 words, if you are correct that they cannot raise that
15 money because this thing really doesn't make any sense
16 to their customers or to the bankers or wherever this
17 money is coming from --

18 MS. CHANCELLOR: No, there's another
19 option.

20 CHAIRMAN FARRAR: Then you're right, and
21 you win.

22 MS. CHANCELLOR: No.

23 CHAIRMAN FARRAR: Okay.

24 MS. CHANCELLOR: I'd like to quote
25 something you wrote in Seabrook.

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1 CHAIRMAN FARRAR: Oh.

2 (Laughter.)

3 I notice that Mr. Silberg quoted Seabrook.
4 He did not quote my dissent saying the company was not
5 financially qualified.

6 MS. CHANCELLOR: You got it. "If safety
7 means anything, it means that there is a need to avoid
8 a situation in which financial pressures on the
9 applicant become so pervasive as to influence the
10 manner in which a plant is constructed."

11 CHAIRMAN FARRAR: Boy, I knew what I was
12 talking about then, didn't I?

13 MS. CHANCELLOR: You sure did. "The
14 struggle to obtain funds becomes too difficult. Even
15 the most safety-conscious utility company might
16 succumb and -- in the efforts to reduce cost and
17 cutting corners in constructing the plant."

18 You go on to talk about the financially-
19 strapped company may go ahead with construction and do
20 less testing. Who knows what this also meant?
21 Testing programs are going to be like, for example,
22 where there are no license conditions as to what they
23 have to do I might add --

24 CHAIRMAN FARRAR: Unfortunately, Ms.
25 Chancellor, while I remember those words very well, I

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1 also remember that the Commission did not adopt my
2 line of reasoning.

3 (Laughter.)

4 Although the company did go bankrupt, but
5 the Commission said I -- that was not the right test.

6 MS. CHANCELLOR: But in Seabrook there was
7 not a license condition as there is in this case, and
8 the license conditions are premised that the applicant
9 will be able to raise sufficient funds.

10 The NRC license is not a license to go out
11 and try and raise enough money to fund construction.
12 There has to be reasonable assurance. When NRC gets
13 out of its regulatory role, when something goes awry,
14 such as in the Atlas mill tailings case in Utah, we
15 had a bankrupt company, NRC was paralyzed by inaction
16 in order to deal with that situation. The state filed
17 a natural resource damage claim, and about six months
18 later the NRC acted.

19 CHAIRMAN FARRAR: Okay. But they say
20 they're going to have a sinking fund. Can we talk
21 about that?

22 MS. CHANCELLOR: That deals with
23 decommissioning. We are talking about --

24 MR. GAUKLER: He's talking about
25 construction right now.

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1 CHAIRMAN FARRAR: Yes. But you were
2 worried about abandoning the site.

3 MS. CHANCELLOR: Well, as we know, the NRC
4 rules assume that the fuel has left the site. That's
5 not necessarily the case if you're going to have a
6 bankrupt company.

7 MR. GAUKLER: First of all, Your Honor, we
8 are focusing on construction. The costs for
9 construction of the facility have been specified in
10 the Board's order. Those are the costs that we would
11 have to provide funding. So not -- it's not a matter
12 of cutting costs. The Board has already found our
13 costs to be reasonable.

14 And what we have to show is we have
15 funding to cover those costs. And if we don't show
16 that funding, we don't go forward. And that funding
17 can be from different sources. It can be the model
18 service agreement, it can be additional commitments
19 from customers, it can be additional loans guaranteed
20 from banks by customers.

21 So there's different sources that can make
22 up that funding, but we have to show the amount of
23 funding to cover costs, which the Board has already
24 found to be reasonable for that specified facility.
25 And if we don't come up with that funding, we cannot

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1 go forward.

2 MS. CHANCELLOR: I'd like to direct the
3 Board's attention to page 10 of our response, in which
4 there's an admission by the applicant as to what is
5 the minimum size feasible facility, economically
6 feasible.

7 CHAIRMAN FARRAR: Right.

8 MS. CHANCELLOR: And now they're saying
9 that something considerably less than that may be
10 economically feasible. Otherwise, why would you grant
11 them a license if there's an admission on the record
12 that something that is --

13 CHAIRMAN FARRAR: But as I understood it,
14 that was economically feasible under the funding
15 structure in existence at the time. They now have to
16 change that funding structure to bring in more money,
17 and either they'll succeed or they'll fail.

18 MR. GAUKLER: And if we don't succeed, it
19 means it's not economically feasible.

20 CHAIRMAN FARRAR: Now, could --

21 MS. CHANCELLOR: Well, then, why is the
22 license condition a proprietary number? Why are we
23 tiptoeing around this initial license capacity if it
24 has no competitive advantage to PFS?

25 CHAIRMAN FARRAR: Let's not argue that.

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1 Let's go off the record a minute.

2 (Whereupon, the proceedings in the
3 foregoing matter went off the record at
4 12:32 p.m. and went back on the record at
5 12:34 p.m.)

6 CHAIRMAN FARRAR: Judge Lam has one
7 question for Mr. Gaukler.

8 JUDGE LAM: Mr. Gaukler, I understand you
9 are saying there are other means for you to obtain
10 money for construction from these service agreements,
11 one of which is loan, the other one is equity. Now,
12 if you were to go down the path of obtaining more
13 money as a loan, would that adversely impact on your
14 financial qualification?

15 MR. GAUKLER: We already have the
16 provisions of the model service agreement, which would
17 provide a certain amount base, okay, which I don't
18 think comes above the percentages that have been
19 quoted other places.

20 And the most likely way we would get
21 additional funding would be from a customer who needed
22 to go forward to provide us the additional funding in
23 that respect. And so it would be like a surcharge
24 from a customer, and basically -- and so it would just
25 be additional funding.

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1 It would be a surcharge from a customer
2 who needed to go forward, particularly needed the
3 facility to go forward and was willing to fund any
4 additional costs that would be necessary. So it would
5 be very similar to the other charges that are set
6 forth in the model service agreement.

7 JUDGE LAM: Well, to me, there's a big
8 difference between equity contribution and the loan.
9 If you borrow money, you are financially exposed. If
10 somebody is willing to give you money as equity, he
11 takes on that risk. So it's a big difference.

12 You are not financially exposed to
13 somebody who gives you money as equity. But a loan,
14 you need to service it.

15 MR. GAUKLER: A loan, we need to service
16 it, but then you have the other provisions of the
17 model service agreement which come into play to
18 service that loan. And we can't talk about those
19 specifically, but they would service the loan.

20 JUDGE LAM: I see. Okay.

21 CHAIRMAN FARRAR: What time is your
22 airplane?

23 MS. CHANCELLOR: 6:00. But it took us two
24 hours to get out here, coming from the airport, so we
25 want to allow plenty of time.

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1 CHAIRMAN FARRAR: The flight -- okay. The
2 flight is at 6:00. You've got to be there by, what,
3 4:30?

4 MS. CHANCELLOR: I don't think we can go
5 later than 3:00, Your Honor.

6 CHAIRMAN FARRAR: Okay. Then, we're 20
7 minutes late. We'll save some time this afternoon.
8 I've got 12:36. Let's come back at 1:40. We'll start
9 the prehearing conference, but before we start that we
10 may have a ruling on today's motion, which we would
11 announce orally. So don't be later than --

12 MS. CHANCELLOR: I'd just like to make one
13 final point on financial assurance, which I didn't
14 mention but which is in our document, and which the
15 Commission was concerned about in remanding the issue
16 back to Judge Bollwerk to develop a carefully-worded
17 model service agreement. That is staff review of
18 license conditions post-license -- whether they'll
19 have to engage in ministerial or adjudicative type
20 action.

21 CHAIRMAN FARRAR: Right. I saw that.

22 All right. Then, we'll be back at 1:40,
23 and we may have a ruling at that point.

24 (Whereupon, at 12:37 p.m., the
25 proceedings in the foregoing matter went

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1 off the record for a lunch break.)

2 CHAIRMAN FARRAR: It's 1:40, and I see
3 that everyone who needs to be here is here. We had
4 indicated we might be prepared to make a ruling on
5 today's motion at this time, and we are prepared to do
6 so.

7 We are going to deny the motion on
8 procedural, not substantive, grounds and without
9 prejudice to the company moving forward in whatever
10 fashion it deems appropriate to bring the merits of
11 its motion before us correctly.

12 We think these reasons will be brief. We
13 think the motion doesn't meet the standards for
14 reconsideration. In all our deliberations on the
15 aircraft issue, none of us ever raised -- ever even
16 considered the notion of licensing a smaller facility,
17 and the fact that we never once thought of it
18 indicates to us that it was not something fairly
19 presented in the sense of being able to ask for
20 reconsideration.

21 In reaching that decision, we are
22 influenced heavily by the fact that throughout this
23 proceeding the state has been held to a high standard
24 in filing contentions and in trying to change them and
25 present different things. And we think it would be

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1 inherently unfair and partial not to hold the company
2 to the same types of standards that the state has been
3 held to over the entire course of this proceeding.

4 In saying this, we express no -- again,
5 express no opinion on the merits. We talked this
6 morning about the merits. They may be easy to
7 resolve; they may not be. But we don't consider them
8 in front of us, notwithstanding the notion that the
9 336 casks may be subsumed in 4,000, but that was never
10 brought to us as something to make a decision on.

11 Had it been, we might have been able to
12 structure the evidence and questions differently to be
13 able to resolve the merits of the issues that still
14 are in front of us.

15 We think it's not our role either to comb
16 the record on the records and things that aren't
17 fairly presented, nor is it our role to suggest to the
18 company what the next steps it should take would be.
19 We leave that to them as quickly or on whatever
20 timetable they seek, or whatever timetable they think
21 appropriate. We might suggest that whatever new they
22 file they might suggest a timetable for staff action
23 and state action.

24 We would expect anything that's filed by
25 the company, by the staff, or by the state in this

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1 regard to be very specific in nature, so that we can
2 get to the merits with as little ado as possible.

3 One reason for issuing this ruling today,
4 rather than write a written opinion, is we have yet
5 one issue to decide on the rail line environmental
6 issue, and I think it would be better use of our time
7 to work on that rather than put out an opinion on this
8 matter. And since this ruling goes against the
9 company, it's better for them to have it -- while they
10 may not like it, it's better for them to have it
11 sooner rather than later. So that's why we're issuing
12 an oral ruling with only this bare minimum of reasons
13 now.

14 Any questions about what this portends?

15 MR. SILBERG: Yes. Let me -- I appreciate
16 the Board has given us the ruling promptly. I think
17 that is very helpful. What I do have a problem with
18 is the Board's decision not to include any suggestions
19 as to what is the appropriate timetable.

20 There is often an expression in the
21 nuclear regulatory business where the applicants
22 present something to the NRC, and the NRC says no, and
23 there's no guidance given. It's the "bring me a rock"
24 syndrome. Now, bring me another rock.

25 And, frankly, I think after what we've

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1 been through it would be very helpful for us -- and in
2 the long term save a lot of time and aggravation on
3 all parties -- if the Board were to suggest what the
4 rock ought to look like.

5 We suggested something early on, although
6 I respectfully disagree that it's not proper -- that
7 motion for reconsideration is not proper. But we
8 suggested the possibility of filing affidavits to put
9 the merits on the record. If that's not appropriate,
10 I think the Board owes it to the parties to indicate
11 what is appropriate and not put us into the "bring me
12 a rock" syndrome.

13 CHAIRMAN FARRAR: In not making a
14 suggestion, we were motivated by the fact that that
15 is, in fact, part of the Commission culture, not to
16 tell you. But if you want us to do that, let me
17 consult with my colleagues.

18 MR. SILBERG: And if you want to do that,
19 you know, tomorrow or by a very short order, that's
20 fine. Or if you want to give it to us now, that's
21 fine, too. We need to know, so we can make a decision
22 as to whether it's worth proceeding or not.

23 CHAIRMAN FARRAR: Everything we're doing
24 we're doing right now.

25 MR. SILBERG: Great.

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1 CHAIRMAN FARRAR: And I forgot to say that
2 in not treating your motion as something else, we were
3 influenced by the state's argument that they came here
4 prepared to meet a particular motion. And so that was
5 the indication there.

6 (Judges confer.)

7 CHAIRMAN FARRAR: Mr. Silberg, your
8 request is a fair one. I think all we can say,
9 however, is that, clearly, an amendment to the
10 application would be acceptable. I don't know -- but
11 we don't know what less than that might be acceptable.

12 I'll tell you what we're looking for.
13 We're looking for something that addresses the area
14 question and addresses the ramification question. You
15 know, what's the new effective area on which there has
16 been a full record developed?

17 And so you just have to address that. You
18 have to address the ramification issue. Does this
19 amendment resurrect any safety, environmental, or
20 financial questions? I understand your position of
21 approving a negative. I think we would find
22 unacceptable a one-liner that says, "The company's
23 experts have looked at everything, and it's all fine."
24 That's no good.

25 Something -- but we're not going to tell

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1 you what more than that is fine. You may want to
2 consult with the staff, unless the staff wants to say
3 now -- in other words, both of you claim that you've
4 already done this work.

5 So it shouldn't take a long time -- Mr.
6 Silberg, I know we can count on you not to take a long
7 time, because it's in your interest not to take a long
8 time. But I think the staff should also, if this work
9 has been done, doesn't need the usual amount of time
10 it might spend on a major league license amendment.

11 MR. TURK: If I may address it for a
12 moment.

13 CHAIRMAN FARRAR: Yes.

14 MR. TURK: Your Honors, I agree with you
15 that you do not have to advise PFS in terms of what it
16 should do in order to advance its proposal. I think
17 PFS is capable of looking at the arguments we've made
18 today and decide for itself what they think is the
19 best course.

20 But I would note that in our response to
21 the motion for reconsideration we laid out
22 approximately a four-page discussion of our review.
23 And we stated specifically, if you look at page 6 of
24 our response, we state that the staff has reviewed its
25 SER, its EIS, and the financial assurance conditions

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1 that the Commission and the Board have before them.

2 And based on that review, it's our
3 conclusion that there is no effect. And then, we went
4 through each of the different areas. That portion of
5 our response to the motion for consideration was
6 developed with the assistance of staff experts. Our
7 affidavit, if that is what we had to file, would be
8 pretty much that four-page section, perhaps amplified
9 a bit.

10 But that's if we have to file affidavits.
11 But it's not clear because we don't know what PFS
12 wants to do, whether that's the course they're going
13 to follow, or if they're going to do a license
14 amendment, or what.

15 CHAIRMAN FARRAR: When you file a regular
16 license amendment before there's a hearing, does that
17 have affidavits with it? You have a safety analysis,
18 right?

19 MR. TURK: The application has to be
20 submitted -- any amendment to the application has to
21 be submitted under oath or affirmation. It wouldn't
22 be an affidavit that sets out expert opinion on the
23 consequences which they --

24 CHAIRMAN FARRAR: Somebody says this is
25 the real deal, our people did this, and so forth.

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1 MR. TURK: Yes.

2 CHAIRMAN FARRAR: And what does the staff
3 issue?

4 MR. TURK: We do our evaluation, either in
5 the SER or in the EIS. That's not done under
6 affidavit, but we are under duties as federal
7 employees to state the truth. And when we issue a
8 staff document, it's based upon a determination that
9 that is the staff position.

10 CHAIRMAN FARRAR: Mr. Silberg, how long do
11 you think it will take you to file whatever it is
12 you're going to file?

13 MR. SILBERG: I don't know, because I'm
14 still not sure what the parameters are. One of the
15 issues is if we file an application, if we're looking
16 at new contentions, if that's the process this Board
17 believes we have to go through, and if we're going to
18 have an argument with the state as to whether that's
19 what we should do, as they've said, we'll never get
20 this thing resolved --

21 CHAIRMAN FARRAR: Okay.

22 MR. SILBERG: -- on a schedule that's
23 going to help us.

24 CHAIRMAN FARRAR: I understand your
25 position. But how long is it going to take you to

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1 file something?

2 MR. SILBERG: I'd have to consult with my
3 clients.

4 CHAIRMAN FARRAR: And the reason I'm
5 asking is we're going to expect the state to be
6 working starting now, not starting when you file your
7 thing. So how long --

8 MR. SILBERG: I'm going to have to consult
9 with my clients, and, you know, we have to determine
10 whether or not we're going to do this, whether it's
11 worth the --

12 CHAIRMAN FARRAR: Let's assume you'll do
13 it in 10 days. Mr. Turk, how long -- just for
14 purposes of where I'm going with the calendar. Mr.
15 Turk, if you get their document -- how long after you
16 get their document, whatever it is, will you need to
17 redo and represent what you claim you have already
18 done?

19 MR. TURK: If we don't have to do more
20 than we've done already, certainly within a week.

21 CHAIRMAN FARRAR: Okay.

22 MR. TURK: Depending on what we see from
23 PFS.

24 CHAIRMAN FARRAR: Mr. Soper, if you turn
25 your people loose now, trying to come up with the

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1 things that are really important to you, how long,
2 starting now, would you need? In other words, Mr.
3 Silberg was right this morning that they filed a
4 motion on March 31st.

5 So what they're trying to do has been out
6 there, so I would -- what I think we can do, since
7 what we're doing is looking at contentions that have
8 already been ruled on -- let me ask if everyone is
9 agreeable to this. We will -- you will all agree that
10 the state need not file formal contentions, which
11 would lead to us ruling on them, and so forth, but
12 will file some sort of statement that here are the
13 issues where they think the issue is resurrected, and
14 here is why.

15 And then you'll be free to -- and everyone
16 is going to have some affidavits backing that up.
17 Then you all will be free to move for summary
18 disposition, or whatever. I don't want to have a
19 lengthy argument on contentions. I want to know what
20 the state's issues are.

21 And, Mr. Soper, don't give me 100 issues.
22 In other words, I know at the beginning of the case,
23 you know, you had a lot of issues. What we want here
24 is the things that are genuinely resurrected -- you
25 know, that you believe have genuinely been

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1 resurrected.

2 And if you give us 100 and say they're all
3 resurrected, and I find one that really is frivolous,
4 then I'll say, well, all 100 are frivolous. In other
5 words, don't throw any frivolous ones in there.

6 MR. SOPER: I'm disappointed that you
7 would suggest that I would do such a thing, Your
8 Honor.

9 (Laughter.)

10 But could I ask, if we're supposed to be
11 looking at this now, are we training our people to
12 focus on an application that has a new footprint
13 design for 336 casks?

14 CHAIRMAN FARRAR: Right. In other words,
15 the 336-cask footprint that was described in the
16 motion for reconsideration, that's the target.

17 MR. SOPER: Well, I would call that a
18 4,000-cask footprint that will only hold 336 casks.

19 CHAIRMAN FARRAR: No, no. They describe
20 the geometry of the 336. I don't think they said
21 exactly where it would be, other than it would be far
22 enough from the Canister Transfer Building that you --

23 MR. SOPER: I'm not sure they're even
24 agreeing with that as you described it. I'm
25 wondering, is this a fence that surrounds a 10-acre

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1 tract of land now designed only to hold 336 casks? Or
2 is this a fence that surrounds a 99-acre tract of land
3 capable of 500 pads, but we're only going to use some
4 little corner of it? Those are two different
5 facilities.

6 MR. SILBERG: The casks will only be on
7 the part of the site -- of the size described in our
8 application.

9 MR. SOPER: So it will be the full -- it
10 will be this thing.

11 CHAIRMAN FARRAR: Right. It will be the
12 full site, the full infrastructure, and somewhere in
13 there where the 500 pads would be would be 42 pads.

14 MR. SOPER: This will be an amendment to
15 build this very same thing that they've always
16 proposed and only store a few casks in it.

17 CHAIRMAN FARRAR: Right, 42 pads.

18 MR. SOPER: On one --

19 CHAIRMAN FARRAR: In one --

20 MR. SOPER: -- confined area.

21 CHAIRMAN FARRAR: -- contiguous, nearly-
22 square area.

23 MS. CHANCELLOR: And it makes a lot of
24 difference for our analysis whether the Commission --
25 whether PFS is going to request the Commission to

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1 issue a 40,000-MTU capacity license, limited to 336
2 casks. Or are they going to ask the Commission to
3 license a 3,360-MTU facility only, and later they
4 would change that capacity. That changes the
5 calculus.

6 CHAIRMAN FARRAR: It seems to me this is
7 -- they have pending an application for 4,000. Isn't
8 this in the nature of another -- an application for
9 336? I was never comfortable with your license
10 amendment, that it's a 4,000-cask license limited to
11 336. Maybe I'm mistaken.

12 MR. SOPER: Well, it seems to me like
13 we're going down the same -- we're seeking a license
14 they don't really want as a ruse to build a 4,000-
15 cask --

16 CHAIRMAN FARRAR: That can be part of your
17 argument. All I'm trying to do is get the merits in
18 front of us.

19 MS. CHANCELLOR: We don't know what PFS is
20 going to come up, whether they still -- whether
21 they're still going to insist on the 4,000 capacity
22 cask license limited to 336, where they define the
23 area, where they describe the collateral effects of a
24 336-cask license condition.

25 MR. SOPER: We'll just have to wait to see

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1 that, Your Honor. But all we're suggesting is --

2 CHAIRMAN FARRAR: No, no, no. You may
3 have to wait to see exactly what emerges, but you
4 don't have to wait to see to have your experts looking
5 at this to say, "Hey, what, if anything" -- and the
6 answer may be nothing -- "what, if anything, is
7 resurrected -- what of the safety issues are
8 resurrected by this?"

9 Your experts can start conceptualizing
10 that without waiting to see precisely what it is that
11 they file.

12 MS. CHANCELLOR: If I may add, Your Honor,
13 we have just recently received the financial assurance
14 decision after waiting three years for that. We have
15 to petition within 15 days to the Commission on
16 financial assurance. Our experts that we have on
17 financial assurance will be focused on the petition to
18 the Commission. I think it's an unfair burden to look
19 at a hypothetical effect of what PFS may come back
20 with.

21 CHAIRMAN FARRAR: But the safety -- but
22 the area issue, the geometry issue, the resurrecting
23 of safety issues, and the resurrecting of
24 environmental issues, are things that different
25 experts can be waiting on -- could be working on.

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1 And maybe we'll let you file a two-step
2 thing -- file those at a certain point, and then you
3 can have some extra time on financial. But we've got
4 to move this along, because we don't want to be
5 spending a lot of procedural time on this that needs
6 to be devoted to the consequences hearing.

7 So I'm sympathetic with your concern about
8 your financial experts now have a job to do. That's
9 exactly what was in the Commission's decision
10 yesterday. They didn't want to bother you all
11 litigating probability while the same people would be
12 doing consequences. So your point is certainly well
13 taken.

14 But the safety and environmental and
15 target area issues are something that somebody else
16 can be working on. Just -- all I'm saying is turn
17 your experts loose.

18 MS. CHANCELLOR: Not knowing whether PFS
19 is going to come back with anything.

20 CHAIRMAN FARRAR: Of course they're going
21 to come back -- well --

22 MS. CHANCELLOR: Well, Mr. Silberg said he
23 has to consult with his client.

24 CHAIRMAN FARRAR: Mr. Silberg, why don't
25 you inform the Board and counsel for the parties as

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1 soon as you make that decision.

2 MR. SILBERG: We will do so. And,
3 hopefully, it will be in a matter of days. I'm out of
4 town tomorrow.

5 CHAIRMAN FARRAR: All right. But if you
6 -- you file that, and we'll start the clock.

7 MR. SILBERG: Okay.

8 CHAIRMAN FARRAR: I would think, given the
9 time -- from the time you get -- you file that notice,
10 and given the -- and tell us at that time how long you
11 think you will need to file whatever it is you're
12 going to file, staff has indicated how long it'll take
13 them.

14 I would think, Ms. Chancellor, that if the
15 state had 30 days from the time Mr. Silberg sends his
16 notice, that would be enough for all your experts
17 except the financial people. What's its petition
18 time, 45 days? I'm sorry. 15 days?

19 MS. CHANCELLOR: As it turns out, Judge
20 Bollwerk's decision to petition the Commission is due
21 the same day as the seismic petition. He didn't allow
22 five days for mailing, so they're both due on the same
23 day. But we may try and get an extension on that.

24 But our experts on -- I don't know whether
25 there will be any seismic consequences. I don't think

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1 so. But certainly our financial people will be very
2 busy, and so will the attorneys involved.

3 CHAIRMAN FARRAR: I'm not talking about
4 your time. I'm saying get the experts, give them your
5 instructions and get them turned loose reviewing the
6 record.

7 MS. CHANCELLOR: Commencing when Mr.
8 Silberg lets us know whether they're going to pursue
9 this issue.

10 CHAIRMAN FARRAR: I'll give you all another
11 option. Once Mr. Silberg decides, if you want to lay
12 out an agreed upon procedure for doing this, fine.
13 But what I'm saying is that, either by our order or an
14 agreed upon procedure, I want the states' experts
15 working now, not waiting until after they get the
16 staff document. Now, unless you -

17 MS. CHANCELLOR: Even if PFS doesn't file
18 anything, you want us to start now.

19 CHAIRMAN FARRAR: No, no, no. After they
20 tell you that they're going to file.

21 MS. CHANCELLOR: Okay.

22 CHAIRMAN FARRAR: Not today. When Mr.
23 Silberg says, "In a week or whatever, okay, it's a go,
24 we're going to refile this thing and it's going to
25 look like this." Get your experts working before he

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1 files it and before the staff files it.

2 MS. CHANCELLOR: Okay, I understand.

3 CHAIRMAN FARRAR: I know you'll have to
4 reshape what they do, depending on what his people say
5 and what the staff people say, but the experts can be
6 reviewing the record.

7 MS. CHANCELLOR: So, if you give us 30 days
8 from Mr. Silberg's notice, what if they file it three
9 weeks later? Then we have a week to refine our
10 position?

11 CHAIRMAN FARRAR: Thirty days from his
12 notice or two weeks from the staff filing, whichever
13 is later. Is somebody writing this down?

14 MS. CHANCELLOR: From the staff filing?

15 CHAIRMAN FARRAR: Right, 30 days from his
16 filing or two weeks from the staff filing, whichever
17 is later. What we're trying to do is bring the merits
18 of this matter in front of us in a proper fashion in
19 the quickest way possible.

20 The Commission did not address this
21 particular matter, but it's clear from their decision
22 that they want us to move along. We are intent on
23 being fair, but there's no reason to take more time
24 than a particular matter warrants. Different matters
25 warrant different times. Is everybody clear? Ms.

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1 Chancellor.

2 MS. CHANCELLOR: Yes, I'm clear, Your Honor.

3 CHAIRMAN FARRAR: Mr. Sober and Mr. Turk.

4 MR. SOPER: I take it Mr. Silberg's notice
5 would include the nature of the amendment.

6 CHAIRMAN FARRAR: That he is going forward
7 and the nature of the document.

8 MR. SOPER: And if it's going to be to
9 pursue a 4,000 cask with 336 somewhere in it.

10 CHAIRMAN FARRAR: Right. The more you
11 tell Mr. Silberg the less we quarrel about later.
12 That ends our ruling on motion for reconsideration and
13 its aftermath. We will now switch gears and move into
14 the Pre-Hearing Conference on the consequences issue.
15 We're off the record.

16 (Whereupon, the above-entitled matter
17 concluded at 2:09 p.m.)

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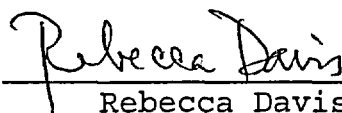
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Docket Number: 72-22-ISFSI

Location: Rockville, MD

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Rebecca Davis
Official Reporter
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