

RAS 3448

## Official Transcript of Proceedings

# NUCLEAR REGULATORY COMMISSION

Title: Duke Cogema Stone and Webster  
Savannah River Mixed Oxide Fuel Fabrication  
Facility; Reactor Renewal of License No. R-97

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

(9:00 a.m.)

1  
2  
3 CHAIRMAN MOORE: I am Judge Moore of the  
4 Nuclear Regulatory Commission's Atomic Safety and  
5 Licensing Board.

6 I've been assigned as Chairman of this  
7 Board to preside over the 10 CFR Part 2, Subpart L  
8 proceeding on the application of Duke Cogema Stone &  
9 Webster to construct a mixed oxide fuel fabrication  
10 facility on the Savannah River Reservation.

11 With me this morning on my left is Judge  
12 Kelber and on my right is Judge Lam. Judge -- Dr.  
13 Kelber is a nuclear physicist. Dr. Lam is a nuclear  
14 engineer. I unfortunately am just a lawyer.

15 The purpose of the session this morning is  
16 to hear oral argument on the questions of standing of  
17 the various petitioners and to hear argument on the  
18 admissibility of the petitioner's proffered  
19 contentions. From my previous order setting a  
20 schedule and order of presentation, each of you is  
21 aware of the large amount of territory that we must  
22 cover today and I intend to stick closely to that  
23 schedule.

24 I would remind the petitioners that the  
25 purpose of oral argument is to inform the Board -- we

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1 are the ones that must make the decision -- and to  
2 answer our questions. We are very familiar with all  
3 of the pleadings, I would remind the applicant and the  
4 staff of the same thing. You are here to answer our  
5 questions. We have read your pleadings and it would  
6 be greatly appreciated by the Board and indeed I will  
7 cut you off if you merely reciting what you've  
8 already given to us in writing.

9 We will start with brief arguments on  
10 standing this morning. And in that regard we will  
11 start with Mr. Moniak and the representative of  
12 Environmentalist Inc. If you will have a seat we will  
13 take a moment for you to introduce yourself to the  
14 court reporter and then we will begin.

15 MS. MINERD: Hi. I'm Leslie Miner and  
16 I'm here in place of Ruth who is ill. Can I give this  
17 piece of paper to you?

18 CHAIRMAN MOORE: I'm sorry I did not catch  
19 your name.

20 MS. MINERD: Leslie Miner.

21 CHAIRMAN MOORE: Could you spell that for  
22 the court reporter, please?

23 MS. MINERD: It's --

24 THE REPORTER: Is it L-E-S-L-I-E?

25 MS. MINERD: Right.

1 THE REPORTER: Last name?

2 MS. MINERD: M-I-N-E-R-D.

3 THE REPORTER: E-R-D? MinerD? Ms. MinerD  
4 when you speak please use that microphone or we'll  
5 never be able to hear you in here. Thank you.  
6 There's one on your table. Use it when you can. Oh,  
7 who do you represent Ms. MinerD?

8 MS. MINERD: Environmentalist Inc.

9 CHAIRMAN MOORE: Does the applicant and/or  
10 the staff have any objection to Ms. MinerD appearing  
11 this morning?

12 MR. HULL: No objection from the staff  
13 your honor.

14 MR. SILVERMAN: No objection from the  
15 applicant.

16 CHAIRMAN MOORE: We will proceed then  
17 according to the schedule.

18 JUDGE LAM: I'd like to add to Judge  
19 Moore's remark on the schedule. We have an extremely  
20 tight schedule today. This schedule should only be  
21 looked at as reflecting the need for efficiency in  
22 this proceeding. It should not diminish the  
23 significance of the issues before us. The  
24 intervenors' concern for public safety and protection  
25 of the environment of being taken very, very

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1 seriously.

2 CHAIRMAN MOORE: Mr. Moniak you may speak  
3 in place. Just please speak into the microphone.

4 MR. MONIAK: Okay, can you hear me?

5 CHAIRMAN MOORE: Well, please pull it  
6 closer to you.

7 MR. MONIAK: How's that?

8 CHAIRMAN MOORE: That's fine.

9 MR. MONIAK: My name is Don Moniak. I  
10 work for the Blue Ridge Environmental Defense League  
11 and I am representing the Blue Ridge Environmental  
12 Defense League and I'm also representing myself as an  
13 individual.

14 Toward the issue of standing, I have to  
15 say first of all, there is confusion as to myself  
16 representing myself as an individual and as a member  
17 of BREDL. And in the introduction -- no, actually in  
18 the filing of July 30th, stated that I'm willing to  
19 withdraw as an individual if BREDL is granted  
20 representational status based on my membership  
21 therein.

22 I also put myself down as an individual  
23 because we were not sure if one member willing to be  
24 represented was going to be enough. So there is some  
25 confusion there and I would just like to say that NRC

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1 staff has recognized that myself as an individual  
2 should have standing, so, therefore, as a member of  
3 BREDL, BREDL should have standing based on proximity.

4 CHAIRMAN MOORE: And contrary to what the  
5 staff says there's no reason why you can't both be in  
6 this proceeding.

7 MR. MONIAK: Okay. It sounds like a  
8 matter of confusion to the staff.

9 CHAIRMAN MOORE: If you have standing and  
10 that's established and if your organization  
11 demonstrating representational standing using you as  
12 a member or another member as, is demonstrated to have  
13 standing, you both filed the petition so there's, at  
14 least on its face, no reason why you can't both, if  
15 you want to stay in the proceeding, stay in the  
16 proceeding.

17 MR. MONIAK: Okay. Then I will. Standing  
18 injury and facts citing from Atomic Safety and  
19 Licensing Board LPB 956, Georgia Institute of  
20 Technology, living or working within a specified  
21 distance of a site with variations of distance  
22 depending upon the nature of the nuclear facility or  
23 activity or even passing by the entrance to a site  
24 twice a week for representation -- recreational  
25 purposes, is enough to presume injury in fact.

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1           Beyond that I want to discuss, within the  
2 time limit, the issue of the scope of the proceedings.  
3 And at issue is whether this scope of the proceedings  
4 is to be defined in narrow terms. Strictly looking at  
5 the MOX fuel fabrication facility or whether the  
6 issues of non-proliferation, Department of Energy's  
7 National Environmental Policy Act process,  
8 transportation and irradiation of plutonium MOX fuel,  
9 are within the scope of this.

10           I argue that, yes, it is within the scope  
11 and I just will refer you to the introduction to the  
12 contentions that were filed August 13th. In terms of  
13 non-proliferation, the entire basis for this project,  
14 the only purpose of need that is cited by the  
15 applicant, is a non-proliferation need. However, even  
16 the Department of Energy in its documentation wrote  
17 that there's no difference in the two approaches that  
18 were analyzed. Immobilization verses MOX on terms of  
19 non-proliferation impacts.

20           In either case, the purpose of plutonium  
21 disposition as it's currently structured is to convert  
22 highly concentrated plutonium to a form that is  
23 represented now as either attractiveness level B or C,  
24 according the Department of Energy safeguard rules, to  
25 category E, which is somewhat equivalent to a spent

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1 fuel standard. It is not to destroy the plutonium  
2 because there is no technology to do so that's  
3 developed at this time that can be implemented.

4 In light of the recent events, September  
5 11th, the risk of putting plutonium fuel into commerce  
6 definitely needs to be re-examined here.

7 CHAIRMAN MOORE: Stick to standing, Mr.  
8 Moniak.

9 MR. MONIAK: Okay. And that's our  
10 argument on standing.

11 CHAIRMAN MOORE: Mr. Moniak, your time on  
12 standing is up. Applicant.

13 MR. SILVERMAN: Thank you, Your Honor. My  
14 name is Don Silverman and I represent Duke Cogema  
15 Store & Webster, the applicant. We do not believe  
16 that Mr. Moniak has demonstrated standing.

17 CHAIRMAN MOORE: Well, I have a couple of  
18 questions in that regard and they're broader than just  
19 Mr. Moniak. Each and every one of these petitioners  
20 has made representations to the effect that their  
21 members either live or regularly travel routes on  
22 which the shipment of mixed oxide fuel is likely to be  
23 transported and you as well as the staff have in each  
24 and every case argued that that is an issue that is  
25 beyond the scope of the proceeding and cannot be a

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1 basis on which standing can be predicated. Is that  
2 correct?

3 MR. SILVERMAN: We have not argued that  
4 living near the facility is an issue outside the scope  
5 of proceeding.

6 CHAIRMAN MOORE: Well, traveling the  
7 routes or living in the direct proximity to that  
8 route.

9 MR. SILVERMAN: With respect to standing  
10 we've argued that they fail to meet one of the  
11 fundamental pleading standards for standing.

12 CHAIRMAN MOORE: Now, in your pleadings,  
13 I believe you state, and the staff certainly states,  
14 that the scope of this proceeding is delineated by the  
15 Commission's Notice of Hearing?

16 MR. SILVERMAN: Yes.

17 CHAIRMAN MOORE: And I have in front of me  
18 the Notice of Hearing and it states, in this regards  
19 contentions are expected to focus on the CAR, the  
20 December 2000 environmental report, and/or the January  
21 2001 quality assurance plan submitted by DCS.

22 MR. SILVERMAN: Yes.

23 CHAIRMAN MOORE: I have in front of me  
24 some selected pages. Would you pull out your  
25 environmental report, please?

1 Page 1-5 of your environmental report,  
2 Section 1.2.6 states, and I quote, "Because one  
3 mission reactor site was eliminated since the  
4 publication of the SPD EIS, the environmental impacts  
5 of MOX fuel transport to the mission reactors are re-  
6 evaluated in this ER."

7 Thereafter on Page 5-25 of your  
8 environmental report, Section 5-4, there's a heading  
9 noted, "Transportation," and under that Section 5.4.1,  
10 Section 5.4.2, 5.4.2.1, 5.4.2.2, 5.4.2.3, 1 through  
11 5.4.5, all discuss, in one way or another, the  
12 transportation of mixed oxide fuel. Then in appendix  
13 E of your environmental report entitled,  
14 "Transportation Risk Assessment", it goes in and has  
15 in one form or another -- it points out how risk  
16 analysis was done. And then Section E.5, entitled,  
17 "Representative Routes, Parameters and Assumptions",  
18 last sentence of that paragraph it says, "Because of  
19 the classified nature of SGT shipments, the actual  
20 routes used in shipment schedule will not be publicly  
21 available". In other words, it's classified.

22 In light of that, and your agreement that  
23 the Commission said the scope of this proceeding,  
24 among other things, includes the environmental report,  
25 how can you contend that the transport of mixed oxide

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1 fuel, which you had to supplement in your  
2 environmental report because of the change in  
3 facilities that are going to burn the mixed oxide  
4 fuel, are not within the scope of this proceeding?

5 MR. SILVERMAN: A couple of items in  
6 response, Your Honor. We do -- in fact you do  
7 correctly state that we have indicated that we did re-  
8 evaluate the impacts of the transport of fresh fuel  
9 from the facility and we may not have been as clear as  
10 we should have been in our pleadings, but we did  
11 indicate that that was re-evaluated in the  
12 environmental report anew --

13 CHAIRMAN MOORE: So, at least to the  
14 extent of your evaluation that's within the scope of  
15 this proceeding?

16 MR. SILVERMAN: Yes. That is a very --  
17 that is the one exception to our position that the  
18 environmental impacts of this fuel cycle are outside  
19 the scope and have been resolved by the Department of  
20 Energy.

21 CHAIRMAN MOORE: If -- for standing  
22 purposes and injury and injury in fact, a small  
23 unappreciated dose is sufficient harm for an injury,  
24 is it not?

25 MR. SILVERMAN: A small dose may be

1 considered sufficient to be injury in fact.

2 CHAIRMAN MOORE: Even if it's within  
3 regulatory requirements?

4 MR. SILVERMAN: That's correct.

5 CHAIRMAN MOORE: Does not your  
6 environmental report say that if -- you're going to  
7 get a dose, if you're on the highways next to the  
8 transport of these fuel transporter, are you not?

9 MR. SILVERMAN: I would imagine that there  
10 is some minimal exposure.

11 CHAIRMAN MOORE: And certainly if your  
12 stopped at the filling station where it's filling up,  
13 you're going to get the dose, are you not?

14 MR. SILVERMAN: I would presume some small  
15 dose.

16 CHAIRMAN MOORE: And the routes over which  
17 the fuel travels is not publicly available by your own  
18 admission in your environmental report. So how can an  
19 intervenor state with specificity the route that's  
20 going to be traveled? And you've already told me that  
21 a dose unintended or any dose, no matter how small or  
22 --

23 MR. SILVERMAN: No, I don't think any dose  
24 no matter how small. I don't think that's our  
25 position. I think that the cases do hold that a

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1 relatively small dose may be sufficient to show injury  
2 in fact. Our concern here is with respect to the  
3 causation element of standing. The intervenors have  
4 indicated that they live, in this case, about twenty  
5 miles away.

6 They've indicated certain -- the fact that  
7 they do travel on certain roads, but the Zion  
8 Commission decision and other similar decisions, and  
9 I can quote, give you the cite to that, hold that  
10 there has to be some demonstration by the intervenor  
11 of a plausible chain of causation. And we think that  
12 the intervenors' pleadings in this regard --

13 CHAIRMAN MOORE: Here, isn't the causation  
14 very plain. The fuel is being transported on roads  
15 over which they travel. That is something that's  
16 within the scope of your environmental report, hence  
17 it's within the scope of the proceedings. And by the  
18 transport of that fuel, if they happen to be on those  
19 roads because they're not published, they can't avoid  
20 the fuel shipments, they will be getting a small dose.  
21 Explain to me why that's not standing and why isn't  
22 that causation?

23 MR. SILVERMAN: Because I think there are  
24 other cases, and they are Licensing Board cases, that  
25 have held that, that is not sufficient for standing.

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1 CHAIRMAN MOORE: Doesn't each and every  
2 one of those cases deal with the transport of spent  
3 fuel? And isn't spent fuel covered in Table S4 or S5?

4 MR. SILVERMAN: No, I don't believe  
5 they're based upon that the determination that the  
6 intervenor lacks standing in those cases is based upon  
7 the Table S3 or S4 values. I don't believe that  
8 entered into the reasoning. I believe that they  
9 concluded that the intervenor had not shown adequate  
10 injury in fact and causation. And in this case,  
11 that's what we are arguing. Not that they haven't  
12 shown an injury in fact, but that, that causal link,  
13 based upon the allegations in their pleading, is  
14 insufficient. The staff has indicated --

15 CHAIRMAN MOORE: Now, would you be so kind  
16 as to enlighten me how one would show causation when  
17 it's classified as to what route this mixed oxide fuel  
18 will travel over?

19 MR. SILVERMAN: Well, we obviously cannot  
20 avoid the fact that those routes are confidential and  
21 -- at this time. However, the intervenors have relied  
22 on a number of different bases and what they're  
23 obligated to do is use whatever information is  
24 available to them in the construction authorization  
25 request to point out some linkage to the injury in

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1 fact. Some plausible way in which they could be  
2 affected, by reference to the information. It's not  
3 enough to say there is a facility here, I live this  
4 distance, and I may be affected. Now, obviously they  
5 do have a more difficult burden when we have --

6 CHAIRMAN MOORE: Excuse me, Mr. Silverman.  
7 They've said, I live here, I travel these roads, your  
8 fuel facility is here, you're going to send shipments  
9 of fuel over these roads, and I can't avoid them  
10 because we don't know where they're going to go.

11 MR. SILVERMAN: And again, I think the  
12 cases --

13 CHAIRMAN MOORE: And it's clear that from  
14 your own environmental report and they've said they  
15 will be injured by it, that a dose can be received.

16 MR. SILVERMAN: They say they travel on  
17 the roads and I believe these cases even stand for the  
18 proposition and they are Licensing Board cases, I  
19 acknowledge that, that just even living on it in a  
20 fixed location on those roads where trucks may travel  
21 by on a regular basis have not been held to be  
22 sufficient in these cases for standing.

23 CHAIRMAN MOORE: Those two cases, one was  
24 an accident case, was it not? That said they claimed  
25 there'd be an accident that they might be harmed by

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1 is. This doesn't have anything to do with an  
2 accident. They're just saying because of where they  
3 live and the roads they travel and because of where  
4 your facility's propose to be and where it's going to  
5 travel and because they can't avoid it because your  
6 route shipments are classified, they're likely to run  
7 into these shipments and hence be harmed. That's the  
8 sum and substance of their case. And you're really  
9 going to still contend that there is not causation in  
10 that instance?

11 MR. SILVERMAN: We believe the intervenors  
12 in this case haven't shown causation. May I just add  
13 that if, for example, you had an individual who lived  
14 a hundred miles away near the reactors, near the  
15 Catawba or the McGuire reactors, would have standing  
16 in this case under that theory because if there were--

17 CHAIRMAN MOORE: And they have claimed  
18 that they're going to be traveling on the roads over  
19 which your likely to be shipping the fuel.

20 MR. SILVERMAN: We think that extends this  
21 standing requirement principles too far in this case.

22 CHAIRMAN MOORE: And if they are standing  
23 at a stop light next to your truck and receiving a  
24 dose, that's not causation and injury in fact?

25 MR. SILVERMAN: No, I think that that

1 would result in hundreds or thousands of people being  
2 able to have standing in this case. Those trucks will  
3 be rolling on the highway, stopping at red lights,  
4 passing communities and if you argue that simply  
5 traveling on the roads is sufficient, then you really  
6 are arguing that an enormous number of people have the  
7 requisite standing in this proceeding and I don't  
8 think that's a reasonable result.

9 CHAIRMAN MOORE: Why?

10 MR. SILVERMAN: Because I think that the  
11 intention of the standing requirement is to identify  
12 individuals that have a real legitimate relation to  
13 the facility and have some reasonable, plausible  
14 likelihood of having some injury in fact.

15 CHAIRMAN MOORE: And receiving an unwanted  
16 dose doesn't qualify?

17 MR. SILVERMAN: Again, I think that just  
18 goes too far.

19 CHAIRMAN MOORE: Okay. Staff.

20 MR. HULL: This is John Hull, attorney for  
21 the staff. I would just add on the causation point.  
22 I don't believe there have been any petitioners  
23 identified, any members of any of the petitioner  
24 organizations identified, who live right by a road --  
25 I believe all the representations made were that the

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1 members lived some miles from certain roads, and even  
2 if we assume that any one particular road here will  
3 contain truck traffic involving fresh MCX fuel, unless  
4 a residence is located fairly close to one of those  
5 roads, I don't believe you could say that, merely  
6 because somebody lives three or four miles from such  
7 a road that that would be sufficient for standing.

8 CHAIRMAN MOORE: That deals very nicely  
9 with residence, Mr. Hull, but how about traveling on  
10 the roads and an unintended meeting with one of those  
11 vehicles?

12 MR. HULL: I think I agree with Mr.  
13 Silverman on that point. I do not believe that a mere  
14 traveling on roads -- that involves such an  
15 intermittent and uncertain potential exposure that I  
16 see that as being quite different than residence where  
17 somebody is -- can be presumed to be always in their  
18 house, for purposes of standing. But traveling on  
19 roads is much different.

20 CHAIRMAN MOORE: The problem with your  
21 argument Mr. Hull is you are the ones who classified  
22 the information that so nobody can tell where the  
23 transports are going to be and no one can avoid them.

24 MR. HULL: But as I said, even if we  
25 assume any one particular road will have MOX fuel

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1 traffic, were traveling on that road -- I mean, nobody  
2 is on a road continuously. It's not the same thing as  
3 living in your house.

4 CHAIRMAN MOORE: Well, how about the soul  
5 that is traveling down Interstate 20 parallel to your  
6 transport?

7 MR. HULL: I just think that this  
8 hypothetical individual is so speculative that you  
9 can't base your standing determinations on that.

10 CHAIRMAN MOORE: It only becomes non-  
11 speculative doesn't it, if there's a way to avoid it,  
12 because the information is not made public.

13 MR. HULL: The fact that the information's  
14 not public, it does add a complicating factor, but  
15 again, I have to go back to even if you assume that  
16 any one particular road will have such traffic, I  
17 think the causation argument still holds.

18 CHAIRMAN MOORE: Moving on to FI's  
19 standing.

20 MS. MINERD: About traveling on roads, I  
21 know all of these members personally and the ones  
22 living near the reactors, William Jacoy, Nancy Jacoy,  
23 Marian MinerD and Jess Riley, very regularly travel --  
24 I looked at the map and it's not too hard to figure  
25 out, there's not that many road choices you would have

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1 to go to those reactors and I know these people  
2 regularly travel those roads and there is a very  
3 serious problem in Charlotte with gridlock now. I  
4 don't know if any of y'all have tried driving in  
5 Charlotte, but elections have been won and lost over  
6 the traffic problem in Charlotte and it's turning into  
7 Atlanta. And I think that needs to be taken into  
8 consideration.

9 Also Edward Juisto; he travels regularly  
10 through Savannah River Site. He's in a rock and roll  
11 band that plays in Hilton Head. So he is constantly  
12 on the road from Augusta going to Hilton Head. Jess  
13 Riley also, he travels some. He is a farmer that  
14 grows crops that he sells around the state and he  
15 lives close to the site, within twenty miles.

16 CHAIRMAN MOORE: Applicant, do you have  
17 anything you'd like to respond?

18 MR. SILVERMAN: The only thing I'd like to  
19 add, just to reiterate if I may, is that we think the  
20 cases hold that merely living near a transportation  
21 route is not sufficient. What you're looking at here  
22 or traveling by is the likelihood that you could have  
23 an accident in a particular location at a particular  
24 time, as that particular individual is driving by that  
25 location. We think that's -- particularly given the

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1 design of these transportation casks approved by the  
2 NRC, it's a very incredible and speculative basis for  
3 granting standing.

4 CHAIRMAN MOORE: Staff?

5 MR. HULL: I don't have anything at this  
6 time.

7 CHAIRMAN MOORE: Okay let's move into the  
8 contentions. Start with Environmental Inc's.

9 MS. MINERD: Could we possibly start with  
10 BREDL? I have to get my thoughts together. I had a  
11 little trouble getting here and I just found out kind  
12 of late last night that I was going to be doing this  
13 for Ruth. She was trying to come but she's really not  
14 feeling well. Please.

15 MR. MONIAK: I'm willing to do that.

16 CHAIRMAN MOORE: Any objection staff,  
17 applicant?

18 MR. SILVERMAN: Applicant has no  
19 objection.

20 CHAIRMAN MOORE: We'll change the order.  
21 Mr. Moniak we'll start with your group 1A or group 1A  
22 through 1E. You have a total of ten minutes. And I  
23 would mention to all the parties you are free to use  
24 less than the time allocated.

25 MR. MONIAK: Both the staff and the

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1 applicant responded to 1A. The contention being that  
2 the applicant proposes to transfer radioactive waste  
3 to an unlicensed facility by stating that it is a  
4 clearly erroneous reading of the applicable NRC  
5 requirements because 10 CFR 20.2001 specifically  
6 provides that a licensee may dispose of licensed  
7 material to an authorized recipient and then they cite  
8 10 CFR 70.42 that authorizes the transfer of special  
9 nuclear material. That is an erroneous reading.

10 The NRC glossary of terms, radioactive  
11 waste is solid, liquid and gaseous materials, they're  
12 radioactive or become radioactive that may include  
13 special nuclear material. Special nuclear material is  
14 not radioactive waste.

15 So at cite 10 CFR 61.2, at this point in  
16 the definitions that waste means those low level  
17 radioactive wastes containing source special nuclear  
18 byproduct material etc. 10 CFR 20.1003, special  
19 nuclear material means plutonium, uranium 233,  
20 enriched and there's no mention of americium in this.  
21 The high alpha activity waste is americium dominated,  
22 which is not classified as special nuclear material,  
23 plus in its form it would not be considered special  
24 nuclear material.

25 This -- BREDL's contention did not involve

1 special nuclear materials. It involved radioactive  
2 waste that contains special nuclear materials that the  
3 Savannah River Site is not authorized to even treat at  
4 this point in time and will have to obtain  
5 authorization from the Department of Energy, that it's  
6 not authorized by the Nuclear Regulatory Commission  
7 and the transfer of waste to the Savannah River Site  
8 will entail some disposal of low level waste on site  
9 because that is Savannah River Site waste policy, as  
10 cited in the integrated system of Savannah River Site  
11 high level waste system plan.

12 That summarizes that, it is a very basic  
13 issue. They cannot transfer radioactive waste. It's  
14 not special nuclear material that is being contended  
15 here.

16 I'd like to address number 1D that the  
17 Department of Energy committed gross violations in the  
18 National Environmental Policy Act. The fact is, is  
19 that the applicant cited the Department of Energy's  
20 environmental analysis under NEPA to justify not  
21 analyzing the waste impacts. Therefore, they tiered  
22 under NEPA, which is allowed and encouraged and we  
23 encourage it, however, to tier under NEPA the document  
24 you are tiering to has to be adequate and sufficient.

25 The Department of Energy's analysis of the

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1 waste stream was, we argued, negligence to fraudulent.  
2 In January 2000 the official number for radioactive  
3 waste production generation was -- liquid radioactive  
4 waste, was 500 gallons per year at a MOX plant. In  
5 the environmental report it's 300,000 gallons a year  
6 when everything is added up, low level waste and alpha  
7 waste. That's 300,000 gallons a year of liquid  
8 radioactive waste that was not --

9 JUDGE KELBER: What was the 500?

10 MR. MONIAK: Five hundred gallons a year  
11 is what the Department of Energy --

12 JUDGE KELBER: What does that refer to,  
13 500 gallons a year of what?

14 MR. MONIAK: Liquid radioactive waste, low  
15 level waste about 130 gallons and transuranic liquid  
16 waste, actually it was 250 gallons, my mistake, it was  
17 500 liters. Between 100 and 500 gallons.

18 JUDGE KELBER: That's all right, I just  
19 wanted to know --

20 MR. MONIAK: So it's orders of magnitude  
21 greater. Department of Energy, in response to a  
22 letter from the Blue Ridge Environmental Defense  
23 League requesting a supplemental environmental impact  
24 statement which is required under NEPA when there are  
25 significant changes to the proposed project, stated

1 that they anticipate many changes to this project but  
2 they don't know when they're going to do a  
3 supplemental environmental impact statement.

4 All our other contentions within this  
5 we're going to just remain as is and just want to  
6 summarize, in terms of relief here, we feel it is  
7 incumbent upon the panel and the Nuclear Regulatory  
8 Commission as an independent body to refer this issue  
9 back to Congress and the Secretary of Energy because  
10 the decision to pursue this project was made based on  
11 fraudulent information. The information that they  
12 used came from the applicant. That will finish that.

13 Thank you.

14 CHAIRMAN MOORE: Applicant.

15 MR. SILVERMAN: Thank you, Judge Moore.  
16 With respect to contention 1A, Mr. Moniak referred to,  
17 that does allege that under NRC regulations, it's  
18 improper for DCS to transfer radioactive waste to DOE  
19 because DOE does not hold an NRC license. We continue  
20 to believe that's a impermissible challenge to the  
21 regulations and it's an incorrect reading of the  
22 regulations.

23 Part 20 clearly authorizes licensees to  
24 dispose of licensed material which includes source,  
25 special nuclear and byproduct material, by transfer to

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1 an authorized recipient. Parts 30, 40 and 70 covering  
2 byproduct source and special nuclear material, authorize  
3 the transfer of licensed material including waste, to  
4 the Department of Energy. The DOE is clearly exempt  
5 from NRC licensing and we believe this contention  
6 should be denied as clearly inconsistent with the  
7 regulations.

8 CHAIRMAN MOORE: You were citing 70,  
9 Section 70.42(b)(1)? I'm sorry 70.42(b)(1)?

10 MR. SILVERMAN: Yes. Among others.

11 CHAIRMAN MOORE: Well the trouble is  
12 there's a certain circularity here that is troubling  
13 and perhaps it's the fault of the regulation, which  
14 would certainly not be a new situation, but it says,  
15 "No licensee shall transfer special nuclear material  
16 except as authorized pursuant to this section." And  
17 then (b) says, "except as otherwise provided in his  
18 license." So they're authorized to receive it only if  
19 it's authorized by the NRC to give it to them in your  
20 license. Isn't that correct?

21 MR. SILVERMAN: No. Unless the NRC  
22 precludes the transfer to the Department of Energy,  
23 Your Honor, the Department of Energy is authorized to  
24 receive this material without an NRC license.

25 CHAIRMAN MOORE: It says "except as

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1 otherwise provided in his license." His would be DCS.  
2 In the DCS license and the NRC is issuing the license.  
3 So doesn't the NRC have to authorize your giving it to  
4 DOE?

5 MR. SILVERMAN: No, they do not, Your  
6 Honor, absolutely not. The regulations are clear on  
7 this point as far as we're concerned. Waste -- the  
8 possession and use of Atomic Energy Act material --

9 CHAIRMAN MOORE: Mr. Silverman, it may be  
10 clear to you but tell me what 70.42(b) says.

11 MR. SILVERMAN: I read it as, unless a  
12 license precludes the transfer of material to another  
13 entity, you may transfer special nuclear material to  
14 the Department, to an agency in an agreement state, et  
15 cetera. I'm not aware of any particular -- any NRC  
16 license that has had such a condition in it precluding  
17 it and I think that it's been well accepted and  
18 understood under the regulations that the Department  
19 of Energy does not need an NRC license to receive  
20 special nuclear material or source material or  
21 byproduct material.

22 CHAIRMAN MOORE: Not a separate license.  
23 Just your license here.

24 MR. SILVERMAN: I don't believe it's  
25 required to be authorized.

1 CHAIRMAN MOORE: Then what does "except as  
2 otherwise provided in his license" mean?

3 MR. SILVERMAN: Again, I think that saying  
4 you recognize that, that modifies a range of persons  
5 who may receive material. That means unless the NRC  
6 has prohibited receipt by one of these entities, then  
7 these regulations authorize the transfer of material  
8 to the Department of Energy and --

9 CHAIRMAN MOORE: Well does that not  
10 concede that this -- that the NRC has the authority  
11 not to allow you to transfer to DOE?

12 MR. SILVERMAN: They have the authority to  
13 impose a license condition to that effect as well as  
14 to any of the other --

15 CHAIRMAN MOORE: Tell me what says that  
16 DOE must accept the waste?

17 MR. SILVERMAN: There is nothing in the  
18 NRC regulations that requires that. But that's not --

19 CHAIRMAN MOORE: What do you offer us that  
20 -- is DOE going to accept the waste?

21 MR. SILVERMAN: Yes, DOE's indicated that  
22 they will accept the waste.

23 CHAIRMAN MOORE: And what is the basis for  
24 you telling us that?

25 MR. SILVERMAN: They've indicated that as

1 part of the overall program, surplus plutonium  
2 disposition program, that they will receive, for  
3 example, the liquid high alpha waste and other  
4 materials for disposition.

5 CHAIRMAN MOORE: And under your contract  
6 to design, construct and operate, that's the  
7 disposition contractually?

8 MR. SILVERMAN: I'd have to check that,  
9 Your Honor. As far as I'm concerned that point is not  
10 a significant point, however, the question is whether  
11 we are authorized under the NRC regulations to  
12 transfer material to the Department of Energy without  
13 the Department of Energy obtaining a license to  
14 receive that material and the regulations make it  
15 clear that -- and the Atomic Energy Act -- that they  
16 do not need a license.

17 CHAIRMAN MOORE: That's a given, but the  
18 NR, but 70.42, which you rely on, on its face, seems  
19 to say that the NRC does not have to give you  
20 permission to give it to the Department.

21 MR. SILVERMAN: That's what I'm saying,  
22 the NRC does not have to give us permission to give it  
23 to the Department, that's correct. And again, the  
24 contention is that it is illegal -- illegal -- for us  
25 to transfer this material to the Department of Energy

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1 without a license and that statement is incorrect as  
2 a matter of law under the regulations.

3 CHAIRMAN MOORE: Assuming that the NRC  
4 were to find that this is throwing gasoline on a  
5 forest fire, what would then happen to the waste?

6 MR. SILVERMAN: Could you elaborate what  
7 you mean by throwing gasoline on a forest fire?

8 CHAIRMAN MOORE: If there is as it's  
9 contended that a waste disposition program containing  
10 numerous storage tank facilities in various and sundry  
11 states of repair, some of which are unfortunately not  
12 particularly good state of repair apparently, and  
13 there is little if any, reserve capacity because of  
14 the various and sundry states of repair of these  
15 facilities.

16 That by adding more waste to that existing  
17 waste, which the petitioners all indicate is a problem  
18 and I believe that that's generally recognized that  
19 it's a exceedingly expensive problem that's going to  
20 have to be rectified, adding to it is adding arguably,  
21 putting gasoline on a forest fire.

22 MR. SILVERMAN: I understand what you're  
23 saying. Let me say first that we don't agree with the  
24 factual premises as to the lack of capacity to receive  
25 the material but that is a separate issue.

1           What we're talking about here is -- the  
2 whole question of whether the Department of Energy can  
3 safely manage this material once they receive it, is  
4 a separate matter in which is, we believe, beyond the  
5 scope of the proceeding and is certainly beyond the  
6 scope of this contention. The determination is, may  
7 the applicant possess the material and may the  
8 applicant, under the rules, transfer it to an  
9 authorized recipient? And the rules specify that they  
10 may. It's an entirely separate question and we think  
11 it's a question for the Department of Energy as to how  
12 they manage that material.

13           JUDGE LAM: Is it an option for the  
14 Department of Energy to refuse to accept the waste in  
15 the future? Do they have that option?

16           MR. SILVERMAN: I don't know, I'm not  
17 familiar with the details of the contracts, so that  
18 may limit their ability to accept the waste in the  
19 future. Now, if -- let's just say hypothetically that  
20 occurred. Then obviously if they can't accept it, or  
21 will not accept it, then -- which is highly  
22 speculative at this point -- then it will be up to the  
23 licensee to continue to safely manage that material  
24 and find an alternative route, but that's highly  
25 speculative at this point. There's no indication that

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1 that will occur and there's no contention that alleges  
2 that, Your Honor.

3 CHAIRMAN MOORE: One final question, Mr.  
4 Silverman.

5 MR. SILVERMAN: Sure.

6 CHAIRMAN MOORE: On page 23 of your  
7 response of September 12th.

8 MR. SILVERMAN: Bear with us just a  
9 second.

10 CHAIRMAN MOORE: Sure. From the bottom of  
11 22 over to 23, you indicate that Contention 1 for the  
12 alleged deficiency in the ER, that this portion of the  
13 contention is inadmissible because it does not raise  
14 a material issue of fact or of law within the scope of  
15 the proceedings.

16 I'm puzzled by your response because isn't  
17 the issue whether it has been done and then the  
18 question becomes has it been done? And your answer  
19 then is "At the time the ER was drafted because the  
20 facility and pipeline had not been designed by the DOE  
21 contractor, environmental impacts of this facility  
22 could not be evaluated," so it hasn't been done has  
23 it? And that's a deficiency that he's correctly  
24 pointed out?

25 MR. SILVERMAN: We did indicate that at

1 that time the environmental impacts with the aqueous  
2 waste pipeline had not been evaluated. We have since  
3 submitted a response to an RAI and I believe that the  
4 staff --

5 CHAIRMAN MOORE: Okay. We're back to the  
6 circular problem. If contentions are supposed to  
7 focus on the ER and the contention says that the ER  
8 hasn't done something, and then subsequent to your  
9 issuance of the ER you do something, is it your  
10 position that contentions must deal with what is done  
11 subsequently, but was not included in the ER?

12 MR. SILVERMAN: I understand. Obviously  
13 the intervenors can't take into account an RAI  
14 response that came in after they filed their  
15 submittal, but in fact -- so the contention can't take  
16 that into account if it's filed before that time.

17 But the fact remains that the RAI does in  
18 effect supplement the record and I think the Board has  
19 the ability to recognize that a contention may be  
20 rendered moot by a particular submittal, but let me  
21 also say that our position with respect to this issue  
22 is also that it's the Department of Energy that will  
23 be constructing the pipeline. That the issue here is  
24 the environmental impact and the safety of the  
25 construction and operation of the MOX fuel fab

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1 facility and so we have argued that it is outside the  
2 scope of the proceeding because that pipeline will be  
3 constructed and operated by the Department of Energy.  
4 Yes it is connected to the MOX facility --

5 CHAIRMAN MOORE: And it will carry the  
6 waste stream?

7 MR. SILVERMAN: Yes, it will.

8 CHAIRMAN MOORE: And the waste stream is  
9 created where?

10 MR. SILVERMAN: It's created from the MOX  
11 facility.

12 CHAIRMAN MOORE: And it's within the  
13 controlled area and it's certainly within the MOX  
14 facility site?

15 MR. SILVERMAN: It is within the  
16 controlled area and portions are within the MOX  
17 facility site.

18 CHAIRMAN MOORE: And it's under your  
19 control?

20 MR. SILVERMAN: No. It's under the  
21 Department of Energy's control. The transfer of the  
22 material to the Department of Energy occurs, I  
23 believe, when that material enters the pipeline.

24 CHAIRMAN MOORE: If it's beyond the scope  
25 of the proceeding, why is this in your ER?

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1 MR. SILVERMAN: The environmental report  
2 includes the impacts of a number of related actions  
3 that are related essentially to the overall fuel cycle  
4 and we have in most of those cases tiered from and  
5 simply incorporated -- not simply incorporated -- and  
6 incorporated analyses the department has performed --

7 CHAIRMAN MOORE: But that is not true for  
8 this one, is it?

9 MR. SILVERMAN: No, it is not.

10 CHAIRMAN MOORE: So why is that relevant  
11 to my question?

12 MR. SILVERMAN: Again, what's in the  
13 environmental report we believe that the --

14 CHAIRMAN MOORE: And well but, we started  
15 off on standing that the environmental report is  
16 within the scope of the proceeding.

17 MR. SILVERMAN: We did not discuss that  
18 issue in complete fashion, Your Honor. That is part  
19 of what the Board, excuse me, what the Commission  
20 said. We have a different view of the scope of the  
21 proceeding. Just because a piece of information is in  
22 the environmental report, or just because it is  
23 provided to the NRC in response to their standard  
24 review plan, in our view does not mean that it's  
25 necessarily within the scope of this particular

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1 proceeding on the construction authorization request.

2 CHAIRMAN MOORE: So Mr. Silverman, your  
3 argument seems to me to be that the Commission didn't  
4 mean what it said when it said contentions must focus  
5 on the environmental report.

6 MR. SILVERMAN: No, I think it did mean  
7 what it said, Your Honor, but we have to also consider  
8 on the environmental side what we believe is the  
9 fundamental decision is which, in the Clinch River  
10 case, which indicates that -- and this is not with  
11 respect to this particular issue, but our overall  
12 position is that issues and impacts that have fully  
13 been addressed by the Department of Energy in their  
14 programmatic statements are not within the scope of  
15 this proceeding. And though we do include reference  
16 to those in our environmental report, we incorporate  
17 them by reference.

18 CHAIRMAN MOORE: Okay. But let's go back  
19 to this particular problem. This is not addressed by  
20 DOE in its programmatic EIS and it's not addressed by  
21 you in the ER, yet you say this is beyond the scope of  
22 the proceeding.

23 MR. SILVERMAN: Yeah, we've argued that  
24 it's not a material issue of fact or law within the  
25 scope of the proceeding, Your Honor. That's correct.

1 CHAIRMAN MOORE: Anything else Mr.  
2 Silverman?

3 MR. SILVERMAN: No, sir.

4 CHAIRMAN MOORE: Staff?

5 MR. HULL: A couple of points, Your Honor.  
6 The staff does view the DCS July 12, 2001 letter, in  
7 which DCS submitted responses to the staff's  
8 environmental requests for additional information.  
9 The staff does view that July 12, 2001 DCS letter as  
10 supplementing the environmental report and that letter  
11 was made part of the record about a month before the  
12 contentions were filed, so we do view the DCS  
13 responses to the environmental RAIs as being properly  
14 subject to the contentions. In other words, the  
15 petitioners did have access to those responses a month  
16 before they --

17 CHAIRMAN MOORE: It's more than properly  
18 supplemented. Under your argument, it's mandatory  
19 then, is it not?

20 MR. HULL: Excuse me?

21 CHAIRMAN MOORE: You're essentially saying  
22 that it's mandatory that they include that material  
23 with -- they must have taken that material into  
24 account? It is as if it were in the ER.

25 MR. HULL: Yes, Your Honor.

1 CHAIRMAN MOORE: I have this horrible  
2 problem today, and you'll have to forgive me, of  
3 circularity. If an RAI is not indicative of any way,  
4 shape or form, as you contend, of the completeness of  
5 the ER, then how may the supplements from RAIs be  
6 required to be taken into account by petitioners?

7 MR. HULL: I think that the cases that the  
8 staff cited regarding RAIs --

9 CHAIRMAN MOORE: Before we get to the  
10 cases, let's get to logic.

11 MR. HULL: I'm trying to respond to your  
12 question, Your Honor. We're talking here about  
13 responses to RAIs, which I view as being different  
14 from the staff submitting RAIs. The response to the  
15 RAI --

16 CHAIRMAN MOORE: Mr. Hull, there can't be  
17 a response until there's an RAI, correct?

18 MR. HULL: Of course.

19 CHAIRMAN MOORE: Okay, so what makes the  
20 response different from the inquiry?

21 MR. HULL: The response to the RAI is  
22 additional information that's being submitted to the  
23 staff from DCS, which supplements the information in  
24 their environmental report.

25 CHAIRMAN MOORE: Indicating that the

1 environmental report was lacking in some regard,  
2 initially?

3 MR. HULL: That's correct, but then you  
4 get back to the fact that RAIs alone cannot form the  
5 basis for a contention.

6 CHAIRMAN MOORE: No, are you citing --  
7 referring to case law when you say that, because in  
8 your pleadings you say that, except if you'll read the  
9 cases, do they not say that the fact of an RAI alone  
10 cannot form the basis of a contention; isn't that  
11 correct?

12 MR. HULL: That's correct. A contention  
13 cannot be solely based on the fact that an RAI was  
14 issued.

15 CHAIRMAN MOORE: And isn't that  
16 considerably different?

17 MR. HULL: I'm sorry, different than what?

18 CHAIRMAN MOORE: Than a contention can't  
19 be based on an RAI?

20 MR. HULL: I'm sorry, I'm not following  
21 you, Your Honor.

22 The other point I wanted to raise is the  
23 staff reads 70.42(b) as -- let's say you have a  
24 situation where the staff determines after its  
25 environmental review that certain conditions need to

1 be added to a DCS license, which would adequately  
2 protect the surrounding environment in connection with  
3 waste being transported by the proposed pipeline. The  
4 staff could add conditions to the license that it  
5 issued which would address those environmental  
6 concerns, but unless the staff decided in issuing its  
7 license that such conditions were necessary, there  
8 would be no prohibition or restrictions on DCS being  
9 able to transfer that waste to the Department of  
10 Energy, under 70.42(b)(1).

11 CHAIRMAN MOORE: So it takes an  
12 affirmative act by the NRC to stop it? By putting a  
13 license condition in?

14 MR. HULL: If the staff put a license  
15 condition into the license, which -- well, put it this  
16 way, the staff would have the authority to put into  
17 the license conditions which would regulate the  
18 transfer of that waste.

19 CHAIRMAN MOORE: And what factors would  
20 lead to such a condition by the NRC?

21 MR. HULL: Well, the NRC is still  
22 evaluating the DCS application so I'm not in a  
23 position at this point to say what, if any, such  
24 restrictions will need to be put in.

25 CHAIRMAN MOORE: Okay. Anything else?

1           MR. HULL: One other thing. In the NRC's  
2           scoping report and for the record this is, the full  
3           title is, Scoping Summary Report, Mixed Oxide Fuel  
4           Fabrication Facility, Savannah River Site, document  
5           issued in August of 2001. The staff did recognize  
6           there the probable need for the Department of Energy  
7           to engage in certain infrastructure upgrades at the  
8           tank farm where this waste would be sent if the MOX  
9           facility is built and operated. So as it states here  
10          on page 20 of the scoping report under infrastructure,  
11          the RIS will address issues related to availability  
12          and adequacy of the infrastructure at the SRS, such as  
13          waste treatment and utility services to handle the  
14          needs of the proposed facility.

15                 That's all I have, Your Honor.

16           CHAIRMAN MOORE: Mr. Hull, do you agree  
17           with Mr. Silverman's analysis contained on pages 22,  
18           23 of his response?

19           MR. HULL: Give me a moment, Your Honor.  
20           At the top of page 23, the facts that he recites there  
21           seem to be accurate. I'm not sure that's what you're  
22           asking me though.

23           CHAIRMAN MOORE: The claim is that the ER  
24           didn't do X and X has not been done, and the reason X  
25           wasn't done was at the time the ER was drafted, they

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1 hadn't gotten around to it yet apparently.

2 MR. HULL: Apparently the DCE plans at  
3 that point, when the ER was filed, were very  
4 preliminary in terms of the details regarding this  
5 proposed pipeline.

6 CHAIRMAN MOORE: But your position is  
7 because there were subsequent answers to RAIs that  
8 that resolves the matter as far as contentions are  
9 concerned?

10 MR. HULL: Yes, Your Honor.

11 CHAIRMAN MOORE: Mr. Moniak.

12 JUDGE KELBER: I have a question. You  
13 mentioned the possibility of having to place  
14 conditions on the license and you posited certain  
15 actions by DCE. Suppose those actions don't happen,  
16 which could be because of other conditions or anything  
17 else. What do you do? The plant is ready to go and  
18 DCE hasn't done its work.

19 MR. HULL: In that eventuality, Your Honor,  
20 as I said before, I think the staff would have the  
21 authority to place conditions in the license --  
22 assuming the staff issued a license, the staff would  
23 have the authority to place any necessary conditions  
24 in that license which would adequately protect  
25 environmental values.

1 JUDGE KELBER: What would they do with the  
2 waste?

3 MR. HULL: Well I mean, we're sort of  
4 entering into speculation at this point.

5 JUDGE KELBER: Yes, we are. But it seems  
6 to me this is a go -- that DOE's action is a go or no  
7 go type of action. If they don't do it the project is  
8 no go.

9 MR. HULL: There are general policy  
10 questions that are in the realm of the Department of  
11 Energy and if they make certain policy decisions that  
12 could very well affect this proceeding. There's no  
13 question about that.

14 CHAIRMAN MOORE: Mr. Moniak.

15 MR. MONIAK: We're on number two. I have  
16 five minutes for this one, I believe; is that correct?

17 CHAIRMAN MOORE: I'm sorry?

18 MR. MONIAK: How many minutes on this one?

19 CHAIRMAN MOORE: Five minutes.

20 MR. MONIAK: Thank you. I wanted to  
21 confirm that.

22 CHAIRMAN MOORE: Oh, I'm sorry, Mr.  
23 Moniak. I can't read my own order, you have ten  
24 minutes.

25 MR. MONIAK: Yeah, I have to apologize, I

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1 don't have the order in front of me. I left -- one of  
2 the few things I left at the office.

3 CHAIRMAN MCCRE: I'll be your timekeeper.

4 MR. MONIAK: Thank you.

5 GLENN CARROLL: I have a copy.

6 MR. MONIAK: No, I have to be keeping  
7 track of this? Okay. 2A; Implementation of the  
8 National Environmental Policy Act, It's very clear  
9 that the National Environmental Policy Act was  
10 intended to create, encourage and allow for better  
11 decision-making by the government. Hang on.  
12 Implementation of NEPA procedures is encouraged at the  
13 earliest possible time.

14 There is no regulation on when scoping,  
15 public scoping, can begin. And there's a good reason  
16 for that. Because Congress has compelled agencies to  
17 seek the aid of all available expertise and formulate  
18 their own position early in the review process.  
19 That's under 455 F.2d at 420 2 ELR 220020. Sorry, I  
20 don't have the entire cite and it's cited within NEPA  
21 and the courts legal analysis of the National  
22 Environmental Policy Act.

23 I cited the Defense Nuclear Facility  
24 Safety Board because this is a massive project. This  
25 is not a small licensee. This is the largest project

1 the Department of Energy has undertaken in years. It  
2 was a good time for both agencies to put their  
3 ideological differences on who should be in charge  
4 aside and the Defense Nuclear Facility Safety Board is  
5 one of the best examples of regulatory oversight this  
6 country has. They understand weapons plutonium.

7 If it was not for the Defense Board and  
8 its constant prodding of the Department of Energy, the  
9 situation would be far worse today than what it is.  
10 In making sure that the Department of Energy  
11 stabilizes the plutonium that is unstable at this  
12 point, to make sure that it stores plutonium pits in  
13 an appropriate manner.

14 CHAIRMAN MOORE: How does that violate  
15 NEPA?

16 MR. MONTAK: Because NEPA says you must  
17 consult with experts, all available expertise. It  
18 violates the spirit of it and that's what I'm arguing.

19 Okay, there is a violation of NEPA under  
20 NRC regulations as well as others in that the NRC  
21 recognizes that in -- I can't cite the rule, but that  
22 fuel fabrication facilities require an environmental  
23 impact statement and this was in regulations at the  
24 time that the licensing was to begin. There were  
25 meetings occurring. By delaying the process, delaying

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1 the scoping process, it violated a NEPA intent of  
2 avoiding delay, avoiding conflict, and ensuring that  
3 planning efforts be coordinated. The standard review  
4 plan was being conducted and there was solicitation of  
5 opinion on that. At the same time there should have  
6 been -- it should have said we are going to include  
7 that in the scoping. It would have avoided conflict.

8 November 27, 2000, Commissioner McGaffigan  
9 stated that -- to the Department of Energy during a  
10 Commission meeting, we may well need an order at the  
11 start of this hearing to the board laying out our  
12 expectations on schedule and we did a Turkey Point  
13 order and as we have done in previous orders to give  
14 you a fighting chance to come somewhere closer to your  
15 schedule than you would like.

16 The public has been imposed with a tight  
17 schedule on this hearing process and on the  
18 environmental impact statement process that has not  
19 been imposed upon the agency. If the agency had  
20 pursued this earlier and the applicant, which is under  
21 contract to the Department of Energy to expedite this  
22 process, had pursued this, we would be a lot better  
23 off. That's all.

24 What I'm asking for in this sense for  
25 relief is that this be referred to the Commission as

1 a policy matter as well. For the NRC, if it was to  
2 take the same level of rigor in its approach to  
3 implementing NEPA, that it did to developing safety  
4 reports, we would all be better off for it. In terms  
5 of the collaboration between the NRC and the  
6 applicant, the fact remains both DCS and NRC argued  
7 that this was allowed -- is that the end of time? Is  
8 that somebody else's? Okay.

9 They argued that -- that just threw me off  
10 -- they argued that this is a standard part of the  
11 environmental review that the applicant can consult,  
12 but this was not a consultation, this was effectively  
13 functioned as a lobbying effort to overrule the  
14 opinions of the staff that were issued in May of 2000.  
15 The public did not have an opportunity to do this and  
16 NEPA scoping means that scoping does not allow -- does  
17 not mean that the industry and the applicant get to  
18 decide before the public even sees this as to what  
19 should be in the scope of this document. As a result,  
20 the irradiation of fuel in the reactors has been  
21 excluded in this process.

22 Integrated Safety Management, which the  
23 NRC is pioneer in, would mandate that this whole  
24 project be looked at as one. And by not looking at it  
25 as one, it's a regulatory burden upon the public.

1 There is no reason why the public should have to  
2 comment on thirty days on the scoping of the EIS while  
3 at the same time requesting a hearing.

4 Thank you.

5 CHAIRMAN MOORE: Mr. Moniak, all well and  
6 good but that's far beyond the scope of this Board's  
7 jurisdiction.

8 MR. MONIAK: Okay, that was my additional  
9 information that I wanted to provide.

10 CHAIRMAN MOORE: Applicant, do you have  
11 anything in response?

12 MR. SILVERMAN: Yes, Your Honor. Mr.  
13 Moniak began by discussing Contention 2A, the process  
14 that we followed and also I think he referred to  
15 Contention 2D, which suggest that we, excuse me 2C, in  
16 which he says that the staff began a de facto  
17 environmental review before a time schedule was  
18 published and also that there was collaboration that's  
19 somehow improper between DCS and the NRC staff and we  
20 believe those issues are wrong as a matter of law.  
21 The NRC -- first of all, with respect to the beginning  
22 and timing of this process, the NRC moved very  
23 promptly after they received our construction  
24 authorization request to issue a notice of intent to  
25 prepare an environmental statement. The proposal

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1 before the agency was the construction authorization  
2 request.

3 With respect to the notion that we've  
4 somehow improperly collaborated with the NRC staff,  
5 that is incorrect. 10 CFR Section 51.40 specifically  
6 encourages an applicant to quote, "confer with the NRC  
7 staff as early as possible before submitting its  
8 environmental report."

9 The intention of that is so the  
10 environmental report addresses as much as possible the  
11 concerns and issues that the staff wishes it to  
12 address. We did not engage in a lobbying effort and  
13 we did not decide the scope of this proceeding. There  
14 were -- excuse me, the scope of the environmental  
15 impact statement.

16 There were three at least, I believe there  
17 were three public meetings and an opportunity for  
18 written public comments on the scoping process. The  
19 NRC staff took that information into account. They  
20 took our comments into account and they in their  
21 scoping summary document established their statement  
22 as to the appropriate scope of the impact statement.  
23 So we don't believe that any of these contentions that  
24 Mr. Moniak has alleged in this regard should be  
25 admitted.

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1 I'd be happy to just enter the other  
2 contentions in this group if you would like us to.

3 CHAIRMAN MOORE: Staff?

4 MR. HULL: The staff would only supplement  
5 briefly what Mr. Silverman just said, that the  
6 proposal that the staff had to act on was the CAR, the  
7 Construction Authorization Request, that was submitted  
8 to the staff on February 28 of 2001 and the notice of  
9 intent was then published by the staff on March 7 of  
10 2001, so I think the staff acted very promptly.  
11 That's all.

12 CHAIRMAN MOORE: Mr. Moniak, your third  
13 group of contentions.

14 MR. MONIAK: Thank you. I'd like to just  
15 discuss conflict of interest.

16 CHAIRMAN MOORE: I'm sorry?

17 MR. MONIAK: Conflict of interest is what  
18 the contentions are. I'm not going to discuss 3A.  
19 I'm just going to leave that as is. Just pointing  
20 out, I think the issue should be referred to the  
21 Commission as a policy matter as stated in the  
22 Commission's order of June 12th, in which they wrote,  
23 "If rulings on the admissions of contentions or the  
24 admitted contentions themselves raise novel legal or  
25 policy questions, the presiding officer should readily

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1 refer or certify such rulings or questions to the  
2 Commission on an interlocutory basis."

3 3B. The Nuclear Regulatory Commission  
4 hired, as its NEPA contractor an organization with  
5 obvious conflicts of interest in this proceeding.  
6 Under the Atomic Energy Act, Section 170(a), Conflicts  
7 of Interest, relating to contracts and other  
8 arrangements, it states "The Commission by rule shall  
9 require any person proposing to enter into a contract  
10 agreement or other agreement whether by competitive  
11 bid or negotiation, to provide information regarding  
12 whether it has a conflict of interest with respect to  
13 being able to render an impartial technically sound or  
14 objective assistance and advice in light of other  
15 activities or relationships with other persons."

16 This is not a criticism of the Argonne  
17 National Laboratory as a basis of expertise. It's  
18 criticism that they have been hired to conduct the  
19 environmental review in an area in which they have a  
20 vested financial interest and even to the point that -  
21 - I'd like to submit today a patent held by Argonne  
22 National Laboratory for the method for  
23 plutonium/gallium separation by anodic dissolution of  
24 a solid plutonium/gallium alloy, a patent that has no  
25 relevance unless you want to make plutonium MOX fuel.

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1 And I'm going to finish it right there on that and on  
2 3C the issue of the --

3 JUDGE KELBER: Excuse me, before you go  
4 on.

5 MR. MONIAK: Yes.

6 JUDGE KELBER: I hold a patent generated  
7 when I was with Argonne many years ago on a method for  
8 control of reactors. Does that mean that Argonne  
9 can't support, through its technical expertise, the  
10 Commission on methods of controlling reactors?

11 MR. MONIAK: I believe that I'd have to  
12 see that particular one. What I believe is that  
13 Argonne has a role in providing expertise and  
14 consultation, but to be the contractor that conducts  
15 the environmental impact statement is inappropriate.  
16 Perceived conflict of interest means a lot. And  
17 there's many, many organizations out there capable of  
18 doing this work. And secondly, I do want to add that  
19 the Nuclear Regulatory Commission did say at the April  
20 18th hearing in Savannah, that they were going to find  
21 the information about this and provide it and that has  
22 never been done.

23 Regarding conflict of interest by the  
24 applicant, the Commission is required to analyze the  
25 purpose of need and whether this -- I'm going to pass

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1 on this. Thank you.

2 CHAIRMAN MOORE: Okay. Your time's  
3 expired. Applicant, any response?

4 MR. SILVERMAN: Thank you, yes.

5 With respect to the first contention that  
6 the NRC staff has a conflict of interest and as I read  
7 the contention shouldn't be licensing this facility  
8 for that reason. That in our view does not raise a  
9 novel legal or policy question here. Congress has  
10 directed that the NRC be the licensing authority for  
11 this facility and the assertion that they have a  
12 disqualifying conflict of interest is inappropriate  
13 and an impermissible challenge to the statute. They  
14 are the licensing authority.

15 Also it doesn't raise any issue within the  
16 scope of the proceeding. It does not raise any issue  
17 with respect to the adequacy of the design basis of  
18 structures, systems and components, principal SSCs,  
19 the quality assurance plan or the environmental  
20 report.

21 With respect to the allegation of a  
22 conflict of interest by the NRC contractor, we believe  
23 for the same reasons that that is beyond the scope of  
24 the proceeding.

25 And with respect to the alleged conflict

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1 of interest by DCS, we couldn't find any basis at all  
2 in the submittal by BREDL for that statement and  
3 furthermore whether true or not, has no bearing on  
4 DCS's qualifications to obtain a license in this case.  
5 We obviously have an interest in the overall success  
6 of the MOX program. That is not at all disqualifying  
7 from us being the applicant for the MOX facility fuel  
8 fabrication license.

9 That's all I have.

10 CHAIRMAN MOORE: Staff?

11 MR. HULL: I don't have anything at this  
12 time your honor.

13 CHAIRMAN MOORE: Mr. Moniak, you may start  
14 your fourth group of contentions. Ten minutes.

15 MR. MONIAK: Yes, on number four I just  
16 want to state that again, I'd like to see this  
17 referred to the Commission as a novel policy issue.  
18 And that's it.

19 CHAIRMAN MOORE: Applicant?

20 MR. SILVERMAN: As I stated before it's  
21 not a novel policy issue. It shouldn't be referred to  
22 the Commission.

23 CHAIRMAN MOORE: Staff?

24 MR. HULL: Nothing at this time.

25 CHAIRMAN MOORE: Mr. Moniak, your fifth

1 group of contentions, unresolved issues of authority  
2 of applicant to apply for and hold license.

3 MR. MONIAK: I would like to reduce this  
4 to a single contention after quite a bit of review.  
5 I had five contentions within this that actually more  
6 or less, functioned as relief perhaps, but I would  
7 just like to say the contention would be applicant's  
8 financial qualifications are insufficient.

9 The specific statement of the issue of law  
10 or fact to be raised or controverted is that Atomic  
11 Energy Act does authorize the issuance of licenses to  
12 persons applying for, who agree to make available  
13 technical information and data concerning activities  
14 under such licenses as the Commission may determine  
15 necessary. 10 CFR 70.23(a)(5), where the nature of  
16 the proposed activities is such as to require  
17 consideration by the Commission that the applicant  
18 appears to be financially qualified to engage in the  
19 proposed activities, in accordance with the  
20 regulations in this part.

21 There's a note in 10 CFR 70.22(a) that  
22 says "Where the nature of the proposed activities is  
23 such as to require consideration of the applicant's  
24 financial qualifications, to engage in the proposed  
25 activities in accordance with the regulations in this

1 chapter, the Commission may request the applicant to  
2 submit information." Financial assurance is also  
3 specified in 10 CFR 140.2, but I do acknowledge it  
4 says to possess and use plutonium and this is a  
5 construction request.

6 The financial qualifications are within  
7 the scope of the DCS application for authority to  
8 construct. It's in Chapter 2 of the Construction  
9 Authorization Request. And in the NUREG 1718 Standard  
10 Review Plan for the review of an application of a MOX  
11 facility, they stated that financial qualifications  
12 should be submitted.

13 Accordingly, DCS did submit information on  
14 financial qualifications in Chapter 2 and as a result,  
15 the NRC stated its intent to review the financial  
16 documents to determine whether the applicant appears  
17 financially qualified to engage in the proposed  
18 activities, as per 10 CFR 70.

19 I want to point out that much of the  
20 information I'm pointing out here was not available at  
21 the time of contentions, or it had just become  
22 available. It became available August 9th, August  
23 10th, when the Nuclear Control Institute released a  
24 report by the Department of Energy called Report to  
25 Congress on the Projected Life Cycle Cost of the U.S.

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1 and Russian Fissile Material Disposition Programs. In  
2 June this issue came up of financial assurance and  
3 during the June 16, 2001 telephone conference, Judge  
4 Moore, you asked how does financial information come  
5 into play?

6 Mr. Silverman stated, this is an unusual  
7 project as I think you're aware. This is a project  
8 where the entire funding is coming from the federal  
9 government through the Department of Energy. And our  
10 legal position is that the financial information  
11 associated with DCS, its parent financial resources  
12 and the like, is really not relevant.

13 Now some of that information has in fact  
14 been submitted because they have requested it, but  
15 we're not in a position to either concede that that is  
16 in fact relevant. And I have to admit, I was remiss  
17 in missing this until two months later, but the fact  
18 is, is financial qualifications are an issue here and  
19 they have not provided accurate information and  
20 there's no way of knowing, for us to know, because all  
21 the financial information is proprietary and I made  
22 the mistake a few months ago of stating that we didn't  
23 need the financial information, the proprietary  
24 information, because I believed that the Department of  
25 Energy was fully funding this.

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1           It turns out that they are not fully  
2 funding it. That the applicant has some financial  
3 risks here. They've only got about ten to eleven  
4 percent overhead. Their cost plus fixed fee. The  
5 fixed fee is only about ten or eleven percent. That's  
6 a proprietary figure, but that's an estimate I made  
7 based on the fact that when the contract was awarded  
8 in 1999 all reports were that it was a \$130 million  
9 contract.

10           However, according to the contract itself  
11 and the amendments, the performance cost of the  
12 contract, for this base contract, was a \$116 million,  
13 which leaves about 14 million for fixed fee, for the  
14 fixed fee, and that's since been amended, but and has  
15 only -- there's been about an \$8 million increase to  
16 125 million in the performance cost.

17           The estimated cost of disposition of  
18 plutonium as fuel in commercial nuclear reactors has  
19 risen about fifty percent since 1999 to about \$3  
20 billion. This was not identified in the applicant's  
21 submittal. The applicant stated that it does not  
22 anticipate major unforeseen cost overruns, or funding  
23 shortfalls. If such a funding shortfall were to  
24 occur, DCS would seek additional government funding.  
25 Applicant stated that in light of the MFS importance

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1 to the United States' obligation and Congressional  
2 support for this program, there is significant  
3 continuing federal government incentive to adequately  
4 fund the MFFF. This is in Part 2.

5 CHAIRMAN MOORE: Mr. Moniak, all your  
6 numbers aren't anywhere in your contention, are they?

7 MR. MONIAK: No, because I did not have  
8 that information at the time. I did not receive the  
9 information until August 15th from the Department of  
10 Energy.

11 CHAIRMAN MOORE: And the reason you didn't  
12 have the information was you made the decision not to  
13 pursue proprietary information?

14 MR. MONIAK: No. I didn't have the  
15 information regarding the estimate of cost by the  
16 Department of Energy and I also did not have the  
17 information regarding the actual performance cost of  
18 the contract at the time. That was withheld as  
19 proprietary inappropriately by the Department of  
20 Energy in response to a Freedom of Information Act  
21 request. I did not have that information. However,  
22 the basis of not looking at the financial information  
23 is that we were told that it was fully funded by the  
24 Department of Energy and it's not.

25 Thank you.

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1 CHAIRMAN MOORE: All right. Times up.  
2 Applicant?

3 MR. SILVERMAN: Thank you. The essence of  
4 these contentions, Your Honor, are the concerns about  
5 the financial qualifications of DCS either to  
6 construct or to operate the facility.

7 Our position with respect to financial  
8 qualifications for construction is that there is no  
9 requirement for such financial assurance in the  
10 regulations and such an issue is outside the scope of  
11 this particular proceeding. This is essentially a  
12 safety issue and on the safety side the scope of this  
13 proceeding is limited to whether the design bases of  
14 the principal SSCs are adequate to protect the public  
15 in the event of an accident or natural phenomenon.  
16 It's a limited set of safety findings that have to be  
17 made. The Commission's orders refer specifically to  
18 that in defining the scope of the proceeding and it's  
19 clear in the regulation. So to the extent there are  
20 contentions raising financial qualifications issues  
21 with respect to construction, they are outside the  
22 scope of the proceeding.

23 CHAIRMAN MOORE: They don't come in  
24 through the back door of the environmental report? If  
25 you're not financially qualified and you go and build

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1 a facility, there are environmental impacts from  
2 building the facility. Not operating, just building  
3 it, are there not?

4 MR. SILVERMAN: I don't think that's a  
5 required consideration under NEPA and furthermore  
6 that's not what any of the contentions allege so it  
7 would be a new issue. Furthermore, I should point out  
8 that there is information in our -- this is an  
9 important point -- information in our construction  
10 authorization request and there is a request for some  
11 of the information regarding financial qualifications  
12 in the standard review plan.

13 The standard review plan is a guidance  
14 document and in our view it has requested a number of  
15 pieces of information which the staff felt it wanted  
16 to have in order to make its decisions, but I think  
17 this Board has to focus on the regulation and on the  
18 Board order. And we supplied that information, let me  
19 say, because we obviously wanted to facilitate our  
20 application processing. But we believe there is  
21 information requested in the standard review plan that  
22 does go beyond the specific findings that this Board  
23 has to make and this agency has to make, in issuing  
24 the construction authorization request.

25 If -- to the extent these issues relate to

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1 financial qualifications for operation, our view is  
2 that that is a requirement of the regulations and that  
3 is an issue that can and should be raised at the  
4 possession and use license stage.

5 Finally, I am concerned and it may have  
6 been a misstatement on Mr. Moniak's part, but at one  
7 point he indicated in some of the numbers that he  
8 provided, that they were proprietary figures. And if  
9 that's in fact correct, I'm extremely concerned about  
10 that because he has not chosen to sign the proprietary  
11 affidavit and I would be concerned.

12 CHAIRMAN MCCRE: I'm sorry. What is your  
13 concern?

14 MR. SILVERMAN: I thought Mr. Moniak said,  
15 and I apologize if I misunderstood, but I believe he  
16 said at one point that some of the data that he  
17 provided was a quote proprietary figure.

18 CHAIRMAN MOORE: No, he doesn't have any  
19 of your proprietary information so anything he quotes  
20 --

21 MR. SILVERMAN: That's fine then.

22 MR. MONIAK: What I stated is that the  
23 Department of Energy inappropriately classified  
24 information in the contract as being proprietary that  
25 was not. As a result, until after the contentions

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1 were filed, I did not know what the performance cost  
2 was.

3 MR. SILVERMAN: That's fine.

4 CHAIRMAN MOORE: Staff?

5 MR. EULL: The staff has nothing to add to  
6 its written response to Contention 5.

7 CHAIRMAN MOORE: Mr. Moniak. Group six,  
8 compliance reporting.

9 MR. MONIAK: Yes, I'd just like to state  
10 that, the only thing I want to add is that, in the  
11 environmental report, which I had right here, just  
12 give me a second. The environmental report addresses,  
13 as it's supposed to, the issue of compliance. At no  
14 time does it discuss compliance of the applicant with  
15 any regulations. It discusses -- it spends a great  
16 deal of time discussing compliance of an unlicensed  
17 facility, the Savannah River Site, with the rules.  
18 And it raises the point of who is actually responsible  
19 under this process. But it is in the environmental  
20 report in -- it's in one of the appendices -- I can't  
21 cite it right now. And that's all I wanted to add to  
22 that. It was conducted and there's great confusion as  
23 to what they're actually supposed to provide for  
24 compliance, but they are not supposed to address the  
25 compliance of the Savannah River Site with the rules,

1 because the Savannah River Site has not applied for a  
2 license application and they are not going to be  
3 licensed or regulated by the NRC.

4 CHAIRMAN MOORE: Applicant?

5 MR. SILVERMAN: There are two components  
6 to this contention. One is that the environmental  
7 report didn't describe DCS's environmental safety and  
8 compliance record and the second is that we should  
9 have provided the environmental safety and health  
10 compliance record of the parent companies.

11 With respect to DCS's compliance record,  
12 we believe the intervenors are misunderstanding the  
13 regulation. 10 CFR 51.45(d) is the relevant  
14 regulation. It requires DCS to list the environmental  
15 permits and approvals that it will need for this  
16 particular project and to describe the status of  
17 compliance with those requirements. We have done  
18 that. I refer you to environmental report Chapter 7  
19 and Table 7-1, which lists those permits. We've  
20 included not only the permits the DCS is required to  
21 have, but that, I believe, I'd have to verify this,  
22 that Westinghouse -- the site permits that have to be  
23 obtained as well. The notion that DCS -- DCS is a  
24 relatively new company and this in fact its first  
25 project and in our view it makes no sense to demand

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1 that we provide a prior record of compliance that  
2 doesn't exist. And the regulation does not call for  
3 that. It does not call for us to submit compliance  
4 records associated with past projects.

5 Similarly with respect to the portion of  
6 the contention that alleges that should be providing  
7 the compliance records of the parent companies. We  
8 refer you again to the same regulation, 51.45(d),  
9 which calls for the applicant to describe the status  
10 of compliance with environmental requirements quote,  
11 "in connection with the proposed action". That  
12 clearly means that NRC is interested in again, the  
13 permits and compliance requirements related to this  
14 facility and there is no requirement for DCS to  
15 provide information about the technical qualifications  
16 or compliance records of its parent companies. DCS is  
17 the applicant in this case.

18 CHAIRMAN MOORE: Your time is up. Staff?

19 MR. HULL: The staff has nothing at this  
20 time.

21 CHAIRMAN MOORE: Mr. Moniak. Group seven  
22 contentions.

23 MR. MONIAK: The only thing I want to add  
24 to this, actually two things, one; transportation is  
25 addressed in here as an issue and to repeat what was

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1 said earlier, transportation is to be assessed in the  
2 scoping document here. However, we did not receive  
3 the scoping document in time for these contentions.  
4 And that is true. It was not issued until August 13th  
5 or 11th I think, and not available till the 12th or  
6 13th. We can't be analyzing something at the same  
7 time we're trying to get contentions done. And this  
8 was supposed to be done in mid July so it's placed a  
9 burden on our ability to submit contentions because we  
10 had to guess at what was going to be within the scope  
11 of the environmental impact statement.

12 And irradiation impacts are considered not  
13 within the scope of this project. However, it was  
14 within the scope -- the environmental report cites by  
15 tiering to the Department of Energy's surplus  
16 plutonium disposition environmental impact statement,  
17 the fact that an analysis was conducted then. So,  
18 therefore, by tiering to that document they're stating  
19 it is within the scope.

20 That's all I want to add.

21 JUDGE KELBER: Let me ask a question about  
22 the original contention as such. Given that light  
23 water reactor plants in the United States and many  
24 places in the world, burn fuel to 40,000 megawatt days  
25 per ton and therefore contain significant amounts of

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1 plutonium, why is fuel made from -- why is mixed oxide  
2 fuel in the sense of nuclear safety, a different issue  
3 than issues currently faced?

4 MR. MONIAK: A -- because the fuel that  
5 goes into light water reactors now contains no  
6 plutonium. It only contains it at the end so up to  
7 maybe one or maybe two percent, so most of the -- in  
8 most of the fuel cycle, most of the irradiation cycle,  
9 it's the uranium 235 that's driving the reaction.

10 JUDGE KELBER: But is there not  
11 significant amount of plutonium in a core that's been  
12 burnt for a while?

13 MR. MONIAK: Yes, there is. Quite a bit  
14 and that's a proliferation issue as well.

15 JUDGE KELBER: So you're talking quantity,  
16 not quality at this point; is that correct?

17 MR. MONIAK: Yeah, quantity five times  
18 more plutonium, well plutonium from the beginning of  
19 the process.

20 JUDGE KELBER: I understand that, but no  
21 reactor that's been in operation for a while has a  
22 completely clean, clean core. Are you discussing  
23 plutonium specifically or the amount of plutonium?

24 MR. MONIAK: It's the amount of plutonium,  
25 yes.

1 JUDGE KELBER: Thank you.

2 MR. MONIAK: Does that clarify?

3 CHAIRMAN MOORE: Mr. Moniak, the fuel will  
4 be burned if it all, in four reactors. If you're  
5 looking at those four reactors now, are you not  
6 looking at them generically? Whereas if it's looked  
7 at in the license amendment proceeding for each  
8 reactor, are you not looking at it specifically so  
9 that any characteristics of that specific facility  
10 would be fully taken into account?

11 MR. MONIAK: That's correct.

12 CHAIRMAN MOORE: So what you're really  
13 asking to do is to have it litigated five times  
14 instead of four times?

15 MR. MONIAK: No, actually I prefer to  
16 litigate it once.

17 CHAIRMAN MOORE: Well, if you litigate it  
18 here then would it be your position that it can't be  
19 litigated in the -- each of the reactor license  
20 amendment cases?

21 MR. MONIAK: I would argue that the  
22 license amendment case should be combined with this  
23 case. That's all. From a government efficiency  
24 standpoint and that way you all --

25 CHAIRMAN MOORE: Your appetite seems to be

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1 unbending.

2 (Laughter.)

3 MR. MONIAK: No, actually I see it as  
4 being less work in the long run.

5 CHAIRMAN MOORE: You answered my question.

6 MR. MONIAK: I do want to address the  
7 question though, it's plutonium 239 though in this  
8 instance and that's another issue. It's a very high  
9 content of plutonium 239. Ninety two to ninety four  
10 percent. Whereas the plutonium that is produced in  
11 reactors is -- it's called reactor grade plutonium,  
12 it's in the 60 to 70 percent range of 239 and as you  
13 know the delayed neutron -- I took nuclear power  
14 physics 236 last semester at Aiken Tech. and I  
15 couldn't -- I completely fumbled on the delayed  
16 neutron problem in the final. So I had to go back and  
17 read, if you do not factor in delayed neutrons, and  
18 even if you do for plutonium it's a much more  
19 difficult process.

20 CHAIRMAN MCCRE: Fine, Mr. Moniak, we have  
21 to stick to the issue that's in front of us.

22 MR. MONIAK: Yes, it's much more difficult  
23 to control the more 239 you have and that's well  
24 acknowledged because of delayed neutrons.

25 Thank you.

1 CHAIRMAN MOORE: Applicant?

2 MR. SILVERMAN: Yes just a moment, two  
3 aspects of the contention. One is that the use of MOX  
4 fuel in reactors is well within the scope of the  
5 proceeding in addition to the discussion we've just  
6 had. We would just like to point out that that's not  
7 a statement of any error or omission in the  
8 construction authorization request at all. It doesn't  
9 indicate any deficiency whatsoever.

10 The other aspect of this contention is  
11 that the SPD, the Surplus Plutonium Disposition  
12 program has been improperly segmented under NEPA and  
13 that in our view as a direct challenge to DOE's  
14 overall programmatic decisions in this regard and that  
15 should be outside the scope of the proceeding as well.

16 CHAIRMAN MOORE: Staff?

17 MR. HULL: Nothing at this time, Your  
18 Honor.

19 CHAIRMAN MOORE: Mr. Moniak, address your  
20 group eight contentions a through f please.

21 MR. MONIAK: How many minutes do I have on  
22 this, is it ten?

23 CHAIRMAN MOORE: Five.

24 MR. MONIAK: Five. Under c the applicant  
25 -- once again, the applicant tiers to the surplus

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1 plutonium disposition environmental impact statement  
2 throughout its environmental review, as the Nuclear  
3 Regulatory Commission will in its environmental impact  
4 statement, which is encouraged as long as it's based  
5 on accurate analysis in their review what it's being  
6 cited.

7 The environmental review and the  
8 construction authorization request define the  
9 feedstock for the MOX fuel facility as being plutonium  
10 oxide derived from the plutonium pit disassembly and  
11 conversion facility. That facility has been delayed.  
12 It is not being fully funded by the Department of  
13 Energy.

14 In addition, the immobilization facility  
15 which is cited within the environmental report as a --  
16 it's discussed -- has been suspended. There is  
17 approximately eight to ten tons of plutonium that  
18 three years ago, or even a year ago, the Department of  
19 Energy said was not suitable for use in plutonium fuel  
20 because of high impurities, low concentration and that  
21 kind of thing and there's discussion going on within  
22 the Department of Energy right now as to what to do  
23 with it. The feedstock -- the applicant failed to  
24 identify in the ER or the CAR, that the feedstock may  
25 not be from the plutonium pit disassembly conversion

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1 facility, and therefore may not be a homogenous feed.

2 8D, the plutonium fuel MOX option greatly  
3 increases a risk of plutonium theft diversion and  
4 reuse and the Department of Energy greatly under-  
5 estimated the risk of nuclear explosives being  
6 developed from reactor plutonium in its NEPA process.

7 I just want to add that reactor plutonium -- it's  
8 easier to make a nuclear explosive with reactor  
9 plutonium than it is with weapon grade plutonium. And  
10 this is fact, because you only need to master one  
11 technology, that being the explosive compression of  
12 the sphere, whereas with weapon grade plutonium you  
13 have to master three technologies. The explosive  
14 compression of the sphere, the simultaneous release of  
15 neutrons from an external source to drive the  
16 reaction, and there's a third one. This is  
17 acknowledge. Reactor plutonium is easier -- it's  
18 easier to make a weapon with reactor plutonium if you  
19 want to use that weapon in a short order -- it's more  
20 desirable to use weapon grade plutonium if you want a  
21 stockpile that's safe. But the amount of plutonium in  
22 reactor plutonium, the amount of plutonium 240, allows  
23 for the removal of neutron generators. It creates an  
24 unreliable weapon; one that say if you design it for  
25 a hundred kilotons, may only explode at ten kilotons,

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1 which is considered highly unreliable. A ten kiloton  
2 blast is pretty big.

3 As a result the only justification for  
4 this program, the only purpose of need, is non-  
5 proliferation and within that aspect the supposition  
6 that Russia will not proceed without us proceeding as  
7 well. Because of the lack of analysis in the ER and  
8 in the documents it tiers to, the real risk of  
9 proliferation as identified by Edward Teller, for  
10 example, who considers the tons and tons of plutonium  
11 within spent reactor grade fuel as being the greatest  
12 proliferation risk in the world, has not been  
13 considered.

14 Finally, SF, DOE's analysis failed to  
15 identify or greatly understated the real hazards of  
16 plutonium processing. The document I provided  
17 Plutonium the Last Five Years, I was citing, not from  
18 the PDF file, but from my WordPerfect copy, so I cited  
19 incorrect pages; however, the hazard of dissolving  
20 plutonium oxide that has been heat treated to above  
21 600 degrees Celsius, is not analyzed in the  
22 environmental report. They're going to be accepting  
23 plutonium oxide that is inherently more dangerous to  
24 dissolve during the polishing step because at its  
25 meeting at 3013, DOE stabilization standard, which

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1 mandates heat treatment to 950 degrees. This is in  
2 all the scientific literature and it was cited in this  
3 report. This is a major issue that is completely left  
4 out.

5 CHAIRMAN MOORE: Mr. Moniak, I have a  
6 problem with your contention 8 as pointed out by the  
7 applicant and I believe also the staff. In your  
8 submission, you cite repeatedly to, on page 71 of your  
9 submission, under facts and discussion, you cite  
10 repeatedly to pages of something entitled, "Plutonium  
11 in the Last Five Years", yet that is not, was not,  
12 submitted, I believe, with your filing.

13 MR. MONIAK: I did not submit a hard copy,  
14 I only submitted it electronically.

15 CHAIRMAN MOORE: I don't believe any of us  
16 received it.

17 MR. MONIAK: No, I submitted it  
18 electronically.

19 CHAIRMAN MOORE: And I don't think the  
20 applicant or the staff ever received it.

21 MR. MONIAK: They received it  
22 electronically as they indicated in their response  
23 that they --

24 CHAIRMAN MOORE: They did?

25 MR. MONIAK: Yes, they did.

1 CHAIRMAN MOORE: All right, but I don't  
2 believe at this point the Board has ever received it  
3 and I could be in error, but --

4 MR. MONIAK: I was told by somebody in  
5 your office that they had printed it up, because I had  
6 called and asked do I need to submit this entire  
7 thing, hard copy. There was some discussion over  
8 whether I had missed submitting some things.

9 CHAIRMAN MOORE: Did you submit it with  
10 the hard copy?

11 MR. MONIAK: No, I did not.

12 CHAIRMAN MOORE: And why didn't you do  
13 that?

14 MR. MONIAK: Because I ran out of time to  
15 make copies. Simple as that.

16 CHAIRMAN MOORE: But you say you did  
17 submit it to us electronically?

18 MR. MONIAK: Yes, I did submit it  
19 electronically and --

20 CHAIRMAN MOORE: Applicant, did you  
21 receive it, either hard copy or electronically?

22 MR. SILVERMAN: We believe that we did  
23 receive it along with the rest of the filing late  
24 after the midnight deadline.

25 CHAIRMAN MOORE: Staff, did you receive

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1 it?

2 MR. HULL: As I recall it was an  
3 attachment to the electronic, it was in PDF form. I  
4 didn't actually get a hard copy of it until several  
5 weeks later, but I do have it.

6 CHAIRMAN MOORE: Okay. You're finished?  
7 Do you have anything further?

8 MR. MONIAK: No.

9 CHAIRMAN MOORE: Applicant?

10 MR. SILVERMAN: First of all, I want to  
11 point out that this group of contentions, I'd like to  
12 direct the Board's attention just to the title. The  
13 title is "DOE NEPA Violations". All of the  
14 contentions in this group allege that the Department  
15 of Energy has violated the National Environmental  
16 Policy Act. We believe that that issue is beyond the  
17 scope of, not only this proceeding, but the NRC's  
18 authority. Mr. Moniak has referred to Contention 8C,  
19 which alleges that DOE has failed to issue a  
20 supplemental environmental impact statement to address  
21 major changes in the -- alleged major changes -- in  
22 the facility. Whether or not the DOE should have  
23 issued a supplemental environmental impact statement,  
24 as far as we are concerned, is clearly beyond the  
25 scope of the proceeding and it identifies no

1 deficiencies in our environmental report.

2 He refers to Contention 8D, which alleges  
3 that the MOX option greatly increases the risk of  
4 plutonium theft and that DOE has under-estimated the  
5 risks of developing nuclear explosives from reactor  
6 plutonium. That is clearly a challenge to the  
7 Department's surplus plutonium disposition program,  
8 identifying no deficiencies once again, in our  
9 environmental report.

10 And he referred to Contention 8F, which  
11 alleges that DOE has understated the hazards of  
12 plutonium. Again, we believe that's beyond the scope  
13 of the proceeding, pointing to no deficiencies in the  
14 environmental report. In addition he, I believe  
15 introduced new information in his oral presentation  
16 regarding the hazards of plutonium and the failure to  
17 analyze those hazards, which I don't believe were in  
18 his submittal. He also alleged that we have -- DCS  
19 has failed to identify that the plutonium disposition  
20 and conversion facility may not be the source of  
21 feedstock to the MOX facility. I don't believe that  
22 issue is identified anywhere in this group of  
23 contentions.

24 MR. MONIAK: That's correct. I confused  
25 it with Contention 10.

1 CHAIRMAN MOORE: Staff?

2 MR. HULL: Just one comment, Your Honor.  
3 Mr. Moniak, in his oral presentation today, did seem  
4 to be really focusing on nuclear non-proliferation  
5 issues and the staff still regards those as being  
6 outside the scope of this proceeding.

7 CHAIRMAN MOORE: Mr. Moniak, if you would  
8 please address your group nine -- Contention 9A and  
9 93.

10 MR. MONIAK: There we go -- is this okay?  
11 I'm not going to take it apart. This is a map of the  
12 Savannah River Site. This is the boundary that is  
13 called the controlled area by the applicants. At  
14 issue here is what the controlled area really is. I  
15 just wanted to show you this because I will keep the  
16 contentions as is.

17 CHAIRMAN MOORE: This is the Savannah  
18 River --

19 MR. MONIAK: This is the Savannah River  
20 plant, Savannah River Site, the whole thing. This is  
21 F area right here where they want to put the facility,  
22 the facility would be right there. Here is the  
23 Highway 125 running through here. Here's the railroad  
24 running right through here. Highway 125 just to the  
25 south of F area, three and a half miles. Is that

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1 better? Okay Highway 125 just to the south --

2 CHAIRMAN MOORE: Mr. Moniak we can see it  
3 if you would just lean it against your table.

4 MR. MONIAK: Sure. Highway 125 is right  
5 here, coming down, Highway 1 here, Highway 278 here,  
6 all within the control boundary. All heavily  
7 traveled. Also they are hurricane evacuation routes.  
8 Everybody coming from Hilton Head and Charleston and  
9 a few other places -- not Charleston, but they are  
10 hurricane evacuation routes. They're labeled as such.  
11 There's a commercial dump that's about right over  
12 here. All of these things are not identified in the  
13 environmental review. The assumption that the public  
14 is here is simply false. It's a very difficult  
15 question, but it is an omission. I just wanted for  
16 you to see the layout.

17 JUDGE KELBER: Excuse me. You say there's  
18 a dump somewhere south of area F?

19 MR. MONIAK: Yes, it's along Highway 125,  
20 I forget exactly, I think it's right here. It's --

21 JUDGE KELBER: That's used by whom?

22 MR. MONIAK: It's a consortium of  
23 counties. It's called -- it's called, it's cited in  
24 my --

25 JUDGE KELBER: That's all right, that's

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1 all I needed to know.

2 MR. MONIAK: It's a privately public run  
3 thing. But it's not run by the Savannah River Site.  
4 The people who go there and work there --

5 JUDGE KELBER: No, all I wanted to know is  
6 who runs it.

7 MR. MONIAK: Okay. Thank you.

8 CHAIRMAN MOORE: Did you have anything  
9 further, Mr. Moniak?

10 MR. MONIAK: No, that was it. That was  
11 the only additional information.

12 CHAIRMAN MOORE: Applicant?

13 MR. SILVERMAN: Mr. Moniak has identified  
14 in his presentation here that there are portions of  
15 the Savannah River Site which does correspond to the  
16 controlled area boundary for the MOX facility that do  
17 allow access to the members of the public. That's  
18 absolutely correct. There is also nothing improper  
19 about that at all and it's absolutely consistent with  
20 the regulations and I refer in particular to 10 CFR  
21 20.1301(b), which specifically states that a licensee  
22 may, quote, "permit members of the public to have  
23 access to controlled areas". This is an impermissible  
24 challenge to the regulations. In fact, this would not  
25 be the first time that the NRC has authorized a

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1 controlled area boundary to include not only areas  
2 where the public has access, but Department of Energy  
3 facilities not controlled by the licensee. And the  
4 example that comes to mind, although there may be  
5 others, are the gaseous diffusion plants, operated by  
6 the United States Enrichment Corporation on the  
7 Portsmouth and Paducah DOE reservations, in which the  
8 controlled area boundary does extend to the boundaries  
9 of the site reservation even though USEC, which is the  
10 certificate or license holder, only controls a small  
11 portion of the facility.

12 So the contention is wrong in our opinion  
13 as a matter of law.

14 JUDGE LAM: Mr. Silverman do you know how  
15 close the hurricane evacuation route is to the  
16 facility?

17 MR. SILVERMAN: I don't know that, but I  
18 could find that information out, if you would like.

19 MR. MONIAK: It's 3.5 miles is the closest  
20 point.

21 CHAIRMAN MOORE: Mr. Silverman, I'm  
22 puzzled by your argument that this is an attack on the  
23 regulations because in some circumstances an applicant  
24 may permit the public within a controlled area.

25 MR. SILVERMAN: The regulations authorize

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1 an applicant to -- the applicant is responsible for  
2 defining the controlled area boundary under Part 20  
3 and the regulations specifically allow a licensee to  
4 establish a controlled area that includes areas where  
5 the public may have access. The issue is the ability  
6 to limit access.

7 CHAIRMAN MOORE: And you indicate that you  
8 will be establishing a protocol with DOE and you state  
9 that DOE will integrate the MOX facility with existing  
10 SRS emergency preparedness and response plan in order  
11 to limit access to the MOX facility controlled area in  
12 the event of an emergency. Is that correct, on page  
13 41?

14 MR. SILVERMAN: Yes.

15 CHAIRMAN MOORE: Don't the regulations  
16 specifically require you to be able to control the  
17 control area and by keeping people out, for any  
18 reason, is that not the language of the regulation?

19 MR. SILVERMAN: That is the language of  
20 the regulation.

21 CHAIRMAN MOORE: Now if that's the case,  
22 will your protocol permit you to, for any reason, to  
23 stop the CSX Railroad from running trains through  
24 there?

25 MR. SILVERMAN: The protocol hasn't been

1 written yet so I can't tell you what's going to be in  
2 it precisely and I would like to verify that, that is  
3 what the regulations say even though I've indicated  
4 that --

5 CHAIRMAN MOORE: Let's go to the question  
6 that the protocol hasn't been written yet. At this  
7 stage, isn't it necessary for you to have that  
8 protocol?

9 MR. SILVERMAN: At this stage?

10 CHAIRMAN MOORE: Yes.

11 MR. SILVERMAN: No.

12 CHAIRMAN MOORE: Why not?

13 MR. SILVERMAN: That protocol's within the  
14 nature of -- that's our emergency planning  
15 arrangements and --

16 CHAIRMAN MOORE: Well, all well and good,  
17 but does that protocol determine whether you have  
18 properly defined the controlled area?

19 MR. SILVERMAN: That may be an issue  
20 that's ultimately litigable, again at the possession  
21 and use license stage. But this is not an issue that  
22 raises any issue with respect to the design basis of  
23 principal structures and systems, structure systems or  
24 components. For that reason as well, it's beyond the  
25 scope of this proceeding.

1                   Similarly, as I would point out again, the  
2 gaseous diffusion plant example, where the NRC has  
3 accepted an arrangement whereby there is an  
4 arrangement with the Department of Energy under which  
5 access is controlled to the site.

6                   CHAIRMAN MOORE: Well, I'm curious as to  
7 how you're going to comply with the regulation if  
8 there's a public highway, and indeed as I understand  
9 a public highway that is a hurricane evacuation route,  
10 and a CSX Railroad, a regulation that requires you to  
11 eliminate the public for any reason, not just in an  
12 emergency, that you have to have the authority to keep  
13 them out for any reason, how you're proposed protocol  
14 will meet the regulations and how you have properly  
15 controlled, defined the controlled area, if it doesn't  
16 give you that authority.

17                   MR. SILVERMAN: Well, first of all, Your  
18 Honor, the notion of the railroad and the hurricane  
19 route are new information that was raised here, I  
20 think, for the first time. It would be our intention  
21 to establish --

22                   CHAIRMAN MOORE: No, the railroad is  
23 stated in his -- reference to the railroad is in the  
24 pleadings.

25                   MR. SILVERMAN: I stand corrected. I

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1 don't recall -- didn't recall that. We would intend  
2 to have a protocol that provides controls equivalent  
3 to what the regulation provides. We do not have that  
4 at this point in time, but again I refer you to what  
5 I believe is the appropriate scope of this particular  
6 proceeding on the construction authorization request.

7 CHAIRMAN MOORE: Well when we get to  
8 GANE's contentions, we'll address that question, but  
9 I am having a lot of difficulty with your  
10 representation that your protocol will only limit  
11 access, will limit access, in the event of an  
12 emergency. And that on its face, does not to me,  
13 indicate that you're in compliance with the  
14 regulations that requires the definition of controlled  
15 area, which is 20.1003, I believe.

16 MR. SILVERMAN: That's correct.

17 CHAIRMAN MOORE: It defines controlled  
18 area as "means an area outside of a restricted area  
19 but inside the site boundary, access to which can be  
20 limited by the licensee for any reason." And although  
21 one reason may be in the event of an emergency, in the  
22 event of an emergency is far narrower than the  
23 definition contained in 20.1003. So, your response  
24 here that, that's what your protocol intends to do,  
25 leaves me with a series of questions on how that meets

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1 the regulations.

2 MR. SILVERMAN: Your Honor, again -- two  
3 points if I may, first of all, as I said, we believe  
4 the issue whether your interpretation is correct or  
5 not, is outside the scope of this proceeding.

6 Secondly, with respect to your  
7 interpretation, I would like the opportunity to confer  
8 with my client and see if I can get you some more  
9 information on this and since the issues going to come  
10 up in GANE --

11 CHAIRMAN MOORE: All right, well you'll  
12 have an opportunity with the GANE contentions.

13 MR. SILVERMAN: Yes. Thank you.

14 CHAIRMAN MOORE: In that regard, you might  
15 be prepared to answer whether DOE will give you the  
16 authority to halt the CSX railroad and to halt access  
17 to the dump and access to the state route. Because  
18 the wording of the regulations I just read to you  
19 requires you, the licensee, to have that authority.

20 MR. SILVERMAN: Well, on that score, Your  
21 Honor, I think that the regulation as interpreted by  
22 the agency in the past, allows an arrangement with the  
23 Department of Energy to provide that control. Let's  
24 assume that we have the requisite level of control, it  
25 does not have to be direct control by the licensee.

1 The gaseous diffusion plants are a good example of  
2 that, based upon my understanding of how that's  
3 established.

4 CHAIRMAN MOORE: We'll deal this  
5 afternoon, but you're going to have to deal with the  
6 language of the regulation, which on its face, appears  
7 to present an interpretation different than you're  
8 giving me now. Do you have anything else, Mr.  
9 Silverman?

10 MR. SILVERMAN: No.

11 CHAIRMAN MOORE: Staff?

12 MR. HULL: One moment, Your Honor.

13 (Brief pause.)

14 MR. HULL: Just one thing, Your Honor, and  
15 we probably will need to get into this further this  
16 afternoon but I just note that there also seems to be  
17 a provision in 70.61(f), which would be relevant to  
18 this question. So I'll be prepared to discuss that  
19 this afternoon if it comes up.

20 CHAIRMAN MOORE: We'd appreciate that.

21 Mr. Moniak your group ten, I'm sorry 10A  
22 through 10C.

23 MR. MONIAK: Yes. Okay I'd like to say  
24 first of all that -- could I go back to number 8  
25 because I confused the issue of heat treatment of the

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1 oxide, which is in 10 on page 75, number C. Let me  
2 just address that first. The issue of --

3 CHAIRMAN MOORE: Excuse me. 75 is group  
4 9, is it not?

5 MR. MONIAK: No, it's 10.

6 CHAIRMAN MOORE: You're correct. I  
7 apologize.

8 MR. MONIAK: The technical standard for  
9 long term stabilization storage of plutonium, 30.13  
10 standard, high firing, which is planned for the  
11 plutonium pit disassembly and conversion facility, so  
12 the oxide feed into the MOX plant is assumed to have  
13 been high fired.

14 I would like to give you a copy of the  
15 report Plutonium in the Last Five Years, as the last  
16 thing I do today. But in it, it documents the fact  
17 that treatment of oxide at temperatures greater than  
18 600 degrees, greatly, greatly complicates the aqueous  
19 processing of plutonium powder. And this is fact.  
20 This is Los Alamos -- Savannah River Site does not  
21 even have the capability right now, to treat the  
22 temperatures greater than 600 degrees and there's a  
23 good reason for that, because to treat at greater than  
24 600 degrees complicates things further down.

25 The fact is that by failing to mention

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1 this rather major variable, there's been a failure to  
2 analyze the impacts of high firing on the waste  
3 production. It could be, and I'm probably going to  
4 get in trouble for this, it could be that at the --  
5 putting all ideology aside, in order to improve safety  
6 and reduce waste, it could be that they don't want to  
7 meet the 30.13 standard for the oxide coming out a pit  
8 disassembly and conversion facility. It would make  
9 processing easier.

10 The assumption that power that's being  
11 produced to be passed directly on to the next  
12 facility, has to meet a long term storage standard for  
13 up to 50 years, is questionable. So this is a  
14 deficiency in that it was not analyzed. The impacts  
15 and the difference in impacts of treating high fired  
16 plutonium oxide versus plutonium oxide that has not  
17 been fired at temperatures greater than 600 degrees  
18 Celsius, is a necessity here, in terms of running the  
19 plant safely, staying within the design basis.

20 Secondly, there's been no analysis ever  
21 conducted by either the applicant or the Department of  
22 Energy comparing the alternatives of full  
23 immobilization to use of plutonium fuel and up 25 tons  
24 -- there's been none. It has never happened because  
25 there -- and specifically in that regard, the

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1 comparison in terms of the waste production and the  
2 size of the facility. Could I -- I would like to use  
3 these graphics here and I'm going to have to come  
4 closer to show you. Okay. The amount of plutonium  
5 that's been planned for this facility is 25.5 tons  
6 right now.

7 Of that, 21.5 to 24.5 has to come from the  
8 plutonium pit disassembly and conversion facility,  
9 which has been delayed. There's eight tons of  
10 material at various sites, some of it is not weapons  
11 grade, that was supposed to go into the immobilization  
12 stream. This is -- I did not address this in the  
13 contentions. It's an additional part. In terms of  
14 the feedstock, they are not planning this facility to  
15 handle non-weapon grade, even though fuel grade  
16 plutonium may be sent there, it's a very real  
17 possibility because it's part of the surplus.

18 The design basis for the facility is going  
19 to change again and again, and I provided -- here it  
20 is, facility size changes since 1999. This was a  
21 relatively small facility that has now almost tripled  
22 in size over a two year period. So what has been  
23 submitted so far, in terms of design and feedstock, is  
24 not final. The Department of Energy is notorious for  
25 changing its mind. The applicant is at the mercy of

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1 the Department of Energy's plutonium policies, which  
2 Shirley Jackson said it best three years ago. She  
3 said the ground that you walk on, on this program,  
4 moves every week, it shifts. Every time they came  
5 before them it was a different program. So you're  
6 being asked to license a moving target.

7 That's all I want to talk about there.  
8 And in terms of the crane issue, if you can give me  
9 just one minute, I have the reference here, I just  
10 have to find it.

11 (Brief pause.)

12 CHAIRMAN MOORE: Mr. Moniak, why don't we  
13 move on and you just give us that reference --

14 MR. MONIAK: In writing, yes, I just want  
15 to say --

16 CHAIRMAN MOORE: No, no, over the lunch  
17 break or something you can find it and then give it to  
18 us.

19 MR. MONIAK: Okay. Sure. I asked earlier  
20 if I could just address one thing that was in number  
21 8. Okay. The Department of Energy failed to identify  
22 the dual use nature of both the plutonium pit  
23 disassembly and conversion facility and the MOX fuel  
24 fabrication facility. This facility is not being  
25 proposed to be decommissioned, it's being proposed to

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1 be deactivated and turned back over to the Department  
2 of Energy.

3 The capacity that is being built here to  
4 purify plutonium, using liquid acid plutonium  
5 polishing module, can substitute the capacity at the  
6 Savannah River Site to purify it in the canyons now  
7 and this is stated in the canyon utilization study of  
8 March of this year in which they flat out say that  
9 purification capability at Savannah River Site that is  
10 essential for producing MOX quality oxide, will be --  
11 it's in the canyons now -- will be replaced by the MOX  
12 fuel fabrication facility. This exact same capability  
13 is lacking in the Department of Energy's weapons  
14 program.

15 Now whether or not it's going to be used  
16 or not is questionable, however, Savannah River Site  
17 was chosen to do plutonium pit production work outside  
18 of the NEPA process during this exact same process.  
19 In the U.S./Russian agreement that is cited over and  
20 over again in the environmental report, the CAR, and  
21 everything else, as the justification of need for this  
22 program.

23 It specifically states, and I can get the  
24 exact spot it says this, that the disposition  
25 facilities that the U.S. and Russia have agreed to

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1 build will only be used for that purpose. And so, if  
2 the purpose of need for this program is to meet the  
3 terms of the U.S./Russian agreement, then the question  
4 that has to be asked, will this facility meet the  
5 terms of that? And it appears that it will not.

6 Thank you.

7 CHAIRMAN MOORE: Applicant?

8 MR. SILVERMAN: There are a number of  
9 items in this contention that Mr. Moniak touched on.  
10 The first one is the part of the contention --

11 CHAIRMAN MOORE: I have one quick  
12 question. Let's go back to my notes here on  
13 Contention 9. Your assertion is that this is beyond  
14 the scope of the proceeding as to the controlled area.  
15 Is that a fair re-statement?

16 MR. SILVERMAN: That's part of our  
17 contention, yes.

18 CHAIRMAN MOORE: I looked in vain in your  
19 response or your answer to the contentions to  
20 Contention group 9 where you raised that.

21 MR. SILVERMAN: I'll have to check that,  
22 Your Honor, I thought we had made that point. Perhaps  
23 we had not made it explicitly.

24 CHAIRMAN MOORE: You just address the  
25 merits that you have properly defined them.

1 MR. SILVERMAN: We're checking that now.

2 CHAIRMAN MOORE: Okay. Go ahead.

3 MR. SILVERMAN: Can you refer me to the  
4 page of our pleading that you're looking at?

5 CHAIRMAN MOORE: Pages 40 and 41 is your  
6 response, and 42. Includes 9B, but it's 9A is what  
7 you're referring to.

8 MR. SILVERMAN: You're correct, we don't  
9 make that argument in the written submittal.

10 CHAIRMAN MOORE: Okay. Response to Mr.  
11 Moniak's group ten contentions.

12 MR. SILVERMAN: Yes, thank you.

13 The first issue he raised is with respect  
14 to the contention that the design is in conflict with  
15 the 30.13 storage standard and that aqueous polishing  
16 is more difficult with high fired plutonium. We don't  
17 think that alleges any safety issue. What he's  
18 alleging is a conflict, alleged conflict, with a  
19 Department of Energy standard, not with an NRC  
20 requirement. We don't think that raises any genuine  
21 issue of material fact. The 30.13 standard is in fact  
22 a requirement of the specification for the feedstock  
23 and we view that issue more as a -- if any issue is  
24 there at all, as a process issue, not a safety issue.

25 He then goes on and alleges that we did

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1 not -- that there has been no analysis of  
2 immobilization versus the fabrication of, I believe,  
3 25 and some odd tons of MOX fuel, but then he  
4 specifically stated that he did not address that issue  
5 in his contentions and we can't find it in this  
6 particular contention. So that's a new contention  
7 that he has failed to show good cause to raise in this  
8 proceeding.

9           The third issue he referred to is the  
10 assertion that the design basis will -- has changed,  
11 that the footprint has changed, over time, the  
12 facility has grown and that the design basis will  
13 inevitably change in the future. The fact that there  
14 have been previous changes in the footprint of the  
15 facility over time leading up to the submittal of our  
16 application, doesn't allege any deficiency in the  
17 application as it has been submitted. There is no  
18 inaccuracy in the application that has been  
19 identified.

20           And we don't believe that the general  
21 assertion that there may be future changes in the  
22 facility is sufficient and provides the requisite  
23 specificity to justify admission of a contention.  
24 Obviously the design of this facility is not yet  
25 complete and it's not required to be complete at this

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1 stage.

2 He then goes on and discusses -- refers to  
3 the alleged dual use nature of the MOX facility. That  
4 is not part of our application. We are requesting an  
5 authorization from the NRC to construct and ultimately  
6 operate a fuel fabrication facility -- that and  
7 nothing more. That's also, that's all I want to say  
8 on that point.

9 I think those are the substantive issues  
10 that he raised. I would ask though that if there are  
11 documents that are being presented to the Board in  
12 this proceeding that we make sure that everyone gets  
13 copies of those.

14 JUDGE KELBER: Let me say that I now  
15 recognize this document. We did get this in the  
16 electronic submission and we used it.

17 MR. SILVERMAN: Thank you. I'm also  
18 referring to the visual aids that are here today, if  
19 copies of those are being provided.

20 MR. HULL: Excuse me, Judge Kelber, just  
21 for purposes of having a clear record, if you could  
22 just identify what that submittal is for the court  
23 reporter.

24 JUDGE KELBER: It's called Blue Ridge  
25 Environmental Defense League Southern Anti-Plutonium

1 Campaign/Plutonium the Last Five Years, author Don  
2 Moniak, February 6, 2001.

3 CHAIRMAN MOORE: Mr. Hull, that's the  
4 document I raised that he referred to in the group 8  
5 contentions that I don't, I had not seen before.

6 MR. HULL: I was just concerned that Judge  
7 Kelber's reference to it wasn't clear enough for the  
8 record.

9 MR. MONIAK: The materials that I was  
10 showing here are not being submitted they were just  
11 visual aids for your understanding. I can't make a  
12 copy of this. It took me a month to get one. Can I  
13 address one thing?. In terms of plutonium fuel, MOX  
14 versus immobilization, I did address that in item H.

15 CHAIRMAN MOORE: No, Mr. Moniak, I'm  
16 dealing with Mr. Silverman's response at this time.  
17 Did you have anything further, Mr. Silverman?

18 MR. SILVERMAN: No, sir.

19 CHAIRMAN MOORE: Staff?

20 MR. HULL: Just one thing, Your Honor. I  
21 know we're not supposed to refer to the, to our  
22 filings, but this issue about the DOE 30.13 standard,  
23 I need to just make a reference. We do discuss this  
24 on Page 42 note 54 of our September 12, 2001 response  
25 and I'd urge you to look at that in considering this

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1 particular issue.

2 CHAIRMAN MOORE: I'm sorry, your page  
3 numbers were?

4 MR. HULL: This is footnote 54 on page 42.  
5 That's all I have.

6 CHAIRMAN MOORE: At this time we will take  
7 a very brief recess. It's now eleven, almost 11:20.  
8 We will reconvene precisely at 11:30 and we will take  
9 up Environmental Inc.'s contentions.

10 (A short recess was taken.)

11 CHAIRMAN MOORE: Ms. Miner, are you ready  
12 to proceed?

13 MS. MINER: Yes.

14 CHAIRMAN MOORE: I would remind you the  
15 Board would greatly appreciate it if you would address  
16 the arguments of the -- we have your contentions,  
17 we're familiar with them -- if you would address the  
18 arguments the applicants and staff have made in  
19 opposition to the admission of your contentions and  
20 why your contentions are admissible and meet the  
21 standard of 10 CFR 2.714(b)(2). If you would proceed  
22 starting with your contention A. Or if you wanted to  
23 treat them as a group we could do that, but if your  
24 going to treat each one individually then we've put a  
25 time limit on them and we'll just run through them

1       seriatim with responses.

2               MS. MINERD: Well, most of them I was just  
3 going to let stand as is and I was just going to  
4 address a couple of them.

5               CHAIRMAN MOORE: Okay, one moment since we  
6 took things out of order. I am out of order and it'll  
7 just take me a moment to --

8               MS. MINERD: That's fine.

9               (Brief pause.)

10              CHAIRMAN MOORE: Okay would you please  
11 proceed?

12              MS. MINERD: Okay, on Contention M, okay  
13 I don't have this year's Chamber of Commerce figures -  
14 - this talks about tourism, but tourism has been our  
15 number one industry in the past and it is one of our  
16 biggest industries in the state. Tourism is on the  
17 decline now, after September 11th, and we feel that  
18 those who would travel here for a vacation at  
19 somewhere like Hilton Head, might very well go  
20 elsewhere when they learn of the risks of plutonium  
21 fuel being transported and just about exclusively  
22 burned in South Carolina.

23              Charlotte is very close to South Carolina.  
24 The plutonium fuel factory has a potential to scare  
25 people out of and away from South Carolina. And this

1 would seriously affect the livelihoods of many South  
2 Carolina citizens, some of them being EI members.  
3 I've personally had people tell me, who are out of  
4 state USC students, when they have heard of this  
5 project, that they are seriously considering  
6 transferring to another school. My business is  
7 totally dependent on students in this state and USC  
8 does have a large out of state population.

9 And then I want to talk about, which is in  
10 the same contention, the conditions of attracting  
11 terrorists. John Goffman, who's one of the scientist  
12 credited with discovering plutonium --

13 CHAIRMAN MOORE: Ms. Miner, will you help  
14 me? What contention are you speaking to?

15 MS. MINERD: Oh. M.

16 CHAIRMAN MOORE: M. Still on M?

17 MS. MINERD: I'm still on M. He came to  
18 South Carolina in the early seventies for legislative  
19 hearings about hazardous waste in our state and he  
20 referred to SRS as a major threat to the East Coast.  
21 He gave the example of a plane crashing into the high  
22 level waste tanks at SRS and said that if the weather  
23 conditions were such, that you might have to evacuate  
24 the whole East Coast. The MOX polishing process will  
25 add -- I know it's under a million gallons -- I'm not

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1       sure of the number, but many gallons of liquid waste  
2       to what's already thirty something million gallons of  
3       liquid radioactive waste, which I know the DOE has had  
4       trouble figuring out what to do with this waste. I  
5       know they just spent \$500 million on the TIP program  
6       and things didn't seem to work.

7                 Anyway, I'm not sure who exactly -- DOE,  
8       NRC, or whoever is in charge on this one, especially  
9       in light of what has happened recently, more  
10       protection is going to be needed at SRS. And how is  
11       this cost going to be factored into this process? I  
12       imagine it's a taxpayer cost. Increased protection  
13       from terrorists from the fuel that's being transported  
14       on the roads is going to likely cause an increase in  
15       cost on this project and also increased protection  
16       from terrorists at the four Duke reactors will likely  
17       increase cost for Duke customers. EI members are Duke  
18       customers and they are taxpayers and they would be  
19       financially affected by these costs. I'm finished on  
20       that one.

21                CHAIRMAN MOORE: Anything on others?

22                MS. MINERD: Yes, yes.

23                CHAIRMAN MOORE: I apologize.

24                MS. MINERD: I'll keep going.

25                CHAIRMAN MOORE: Let's take them and have

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1 any response from the applicant?

2 MR. POLONSKY: Alex Polonsky for the  
3 applicant DCS. The contention as submitted was a  
4 contention limited to transport of fresh MOX fuel and  
5 the concerns about an intentional act against the  
6 transport of fresh MOX fuel. To the extent that  
7 representative of EI is now raising or broadening this  
8 contention to a tax on SRS or a tax on the Duke  
9 reactors, we see them as an amendment or a new  
10 contention in themselves and don't believe they are  
11 within the initial scope of the contention for  
12 finding. In addition, they are clearly outside the  
13 scope of this proceeding.

14 Any security precautions that might be  
15 needed based on last week's events, at SRS in general,  
16 are within the purview of DOE, not NRC and certainly  
17 don't need to be addressed by DCS in its safety or  
18 environmental report. Increased cost for those are  
19 similarly outside the scope of this proceeding.

20 That's all I have to add.

21 CHAIRMAN MOORE: Staff?

22 MR. HULL: Just briefly, Your Honor, the  
23 reference just now in the presentation to the four  
24 Duke reactors and EI members being Duke customers --  
25 those issues are clearly outside the scope of this

1 proceeding.

2 CHAIRMAN MOORE: Would you proceed please?

3 MS. MINERD: Okay. The next one is  
4 Contention R, which talks about identifying benefits  
5 and cost of fabricating MOX fuel over whatever else.  
6 I'm citing CEQ regulation 1500 Section 1500.2. A  
7 federal agency shall to the fullest extent possible,  
8 under Section E it says, use the NEPA process to  
9 identify and assess the reasonable alternatives to  
10 proposed actions that will avoid or minimize adverse  
11 effects of those actions upon the quality of the human  
12 environment, which I think also includes the  
13 pocketbook.

14 For example, there will be 450 MOX  
15 shipments across the state here in South Carolina  
16 which wouldn't happen if this plutonium was  
17 immobilized as opposed to turned into fuel. And also  
18 needs to be taken into account, what an immobilization  
19 facility would cost in terms of a, in comparison to  
20 the fuel fabrication facility.

21 CHAIRMAN MOORE: Applicant?

22 MR. POLONSKY: We don't think that this  
23 contention carefully reflects an accurate record or  
24 the record, an accurate reading of the record. It  
25 affects both the CAR and the ER. The CAR is not

1 required to have any cost/benefit analysis, economic  
2 or otherwise. The ER in Section 5 and Section 6  
3 discusses the benefits and costs of the MOX  
4 fabricating MOX fuel.

5 To the extent that the EI representative  
6 is now citing a CEQ regulation, which is more of a  
7 definitional nature of how the NEPA process should be  
8 used to decide reasonable alternatives, the CEQ  
9 regulations discuss implementation of NEPA in general,  
10 but this particular regulation does not incorporate a  
11 programmatic EIS. This assumes that an analysis is  
12 going to be done for the first time.

13 In this case, we have two prior DOE  
14 programmatic EIS's. The most recent, the SPD EIS,  
15 looked at reasonable alternatives and chose as the  
16 proposed action, which was then confirmed in the ROD  
17 issued by the DOE that a hybrid approach would occur.  
18 That hybrid approach has both fabrication and  
19 immobilization, so to the extent that CEQ regs were  
20 not adopted by DCS in the ER, to incorporate  
21 immobilization for example, they weren't required to.  
22 The SPD EIS covered that and did cover reasonable  
23 alternatives at that time. There's no need to discuss  
24 immobilization as a reasonable alternative in this  
25 case because it's going to happen in addition to MOX

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1 fabrication as discussed in the DOE's ROD.

2 That's all I have.

3 CHAIRMAN MOORE: Staff?

4 MR. HULL: Nothing on contention R, Your  
5 Honor.

6 CHAIRMAN MOORE: Ms. Minerd?

7 MS. MINERD: I'm finished.

8 CHAIRMAN MOORE: Well, then that concludes  
9 the questions or the Environmental Inc.'s contentions  
10 and those of BREDL and Mr. Moniak, leaving the GANE  
11 contentions. All right we'll make an inquiry as to  
12 the best way to proceed. It is now almost a quarter of  
13 eleven, I mean -- sorry, a quarter of twelve. It  
14 would be the Board's notion at this time that we might  
15 wish to go ahead and delve into the GANE contentions  
16 and deal with two or three of them and then break  
17 briefly for lunch and then return and deal with them  
18 and then have the motion to dismiss argued. Or would  
19 the parties prefer -- the participants prefer that we  
20 take a brief lunch break and come back right after  
21 lunch and start? Applicant, do you have a feeling  
22 what might be best for you?

23 MR. SILVERMAN: I think it would be fine  
24 to do a few of the contentions and then take a break.

25 CHAIRMAN MOORE: All right. Staff?

1 MR. HULL: I might just add or as a  
2 suggestion, could we maybe address the Motion to  
3 Dismiss now and then we could do all the contentions  
4 after lunch?

5 CHAIRMAN MOORE: I think we'd like to end  
6 with the Motion to Dismiss and address that because  
7 it's a number of issues that will have been touched  
8 upon already I think in dealing with the contentions.  
9 GANE?

10 MS. CARROLL: Well I did have a mindset  
11 that we would probably come after lunch but I'm  
12 prepared and nothings going to get me out of being  
13 nervous so I'll do whatever anybody else wants to do.

14 CHAIRMAN MOORE: If you don't mind, I  
15 think we'll go ahead and start then with your first  
16 contention.

17 MS. CARROLL: Okay. We have three minutes.  
18 However, we are addressing Contentions 1 and 2  
19 simultaneously so we believe we have six minutes.

20 CHAIRMAN MOORE: I'm having difficulty  
21 hearing you.

22 MS. CARROLL: Well, you're the first  
23 person to say that. Can you hear me now? Can you  
24 hear me now?

25 CHAIRMAN MOORE: Yes, thank you.

1 MS. CARROLL: We are going to address  
2 Contentions 1 and 2 simultaneously. Is this too loud?  
3 It sounds really loud.

4 CHAIRMAN MOORE: No, it's fine.

5 MS. CARROLL: Okay. So we are going to  
6 combine our three minutes for six minutes. The issues  
7 are similar. These Contentions 1 and 2 were supported  
8 by the expert opinion of Dr. Edwin S. Lyman.

9 The contentions are similar in nature and  
10 the responses by the staff and DCS are also similar,  
11 therefore we are discussing them together. The  
12 essence of this contention is that there is no  
13 indication in the CAR that DCS took into account --

14 CHAIRMAN MOORE: Ms. Carroll, let me  
15 interrupt you a moment. Just so that I can be clear  
16 for the rest of your presentation, would you be so  
17 kind as to identify now, and if not, shortly and in  
18 due course, the precise contentions by number that  
19 your two experts essentially had reviewed and attest  
20 to the accuracy of both the facts and support the  
21 opinion stated therein?

22 MS. CARROLL: You'd just like me to run  
23 through the list and tell you --

24 CHAIRMAN MOORE: Just by number. It would  
25 be helpful.

1 MS. CARROLL: Yeah. Contentions 1 and 2,  
2 Dr. Edwin S. Lyman. Contention 3, Peter Burkholder.  
3 Contention 5 and 8, Dr. Edwin S. Lyman. Contention 6  
4 was Dr. Lyman. Contention 7 is Dr. Lyman. So that's  
5 the contentions --

6 CHAIRMAN MOORE: So am I correct, 1, 3, 5,  
7 6, 7 and 8 are Dr. Lyman? Did I --

8 MS. CARROLL: One, two -- 3 is Burkholder.

9 CHAIRMAN MOORE: Ah, that's -- okay fine.

10 MS. CARROLL: Okay. And I don't have the  
11 list the way you do. I'll reiterate as I go through.

12 CHAIRMAN MOORE: Fine, thank you.

13 MS. CARROLL: Excuse me. I really am kind  
14 of starting more rapidly than I thought. I'm just  
15 surprised for doing it right this instant. Okay.

16 I think it would be helpful also to just  
17 sort of maybe lay out what these contentions are. So  
18 Contention 1 is lack of consideration of safeguards in  
19 facility design. Contention 2 is lack of  
20 consideration of physical protection in facility  
21 design. As I said, they are similar in nature and the  
22 responses from NRC and DCS were similar in nature so  
23 we're combining them. And they are both supported by  
24 the expert opinion of Dr. Edwin S. Lyman.

25 The essence of this contention is that

1 there is no indication in the CAR that DCS took into  
2 account materials control and accounting when it  
3 designed the MOX facility. This is poor engineering  
4 practice and may result in foreclosure of adequate  
5 safeguards measures during the operation of the plant,  
6 because the measures cannot be supported by the  
7 design.

8 With respect to the physical protection  
9 plan, DCS has taken credit for incorporating physical  
10 protection into the MOX facility design without  
11 providing a plan for physical protection.

12 These contentions illustrate one of the  
13 practical reasons for our Motion to Dismiss. GANE  
14 believes Contentions 1 and 2 provide a good  
15 illustration of why the NRC's approach of not  
16 requiring a complete license application at this stage  
17 is not only illegal, but handicaps its ability to  
18 judge the adequacy of the MOX facility design, to  
19 protect public health and safety.

20 DCS and the NRC staff argue that  
21 safeguards and physical protection information does  
22 not need to be submitted at the construction stage.  
23 This argument is addressed in our motion to dismiss.  
24 Even if the motion to dismiss is denied, Contentions  
25 1 and 2 should be admitted because they raise a

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1 genuine material dispute as to whether more  
2 information on safeguards and physical protection is  
3 needed in order to evaluate the MOX facility design.  
4 DCS argues that the design does not need to cover  
5 safeguards and physical protection considerations  
6 because NRC regulations only require the NRC to  
7 examine the adequacy of the design to protect against  
8 natural phenomena and the consequences of accidents.

9           According to DCS, loss of special nuclear  
10 material is not an accident or a natural phenomenon.  
11 We agree that loss of special nuclear material would  
12 not be a natural phenomenon, but we think that DCS is  
13 wrong to argue that it would not be an accident.

14           Since we couldn't find the definition of  
15 accident in Part 70 or even Part 50, we looked it up  
16 in the dictionary. The 1997 edition of Webster's  
17 College Dictionary gives the following primary  
18 definition, "1. an undesirable or unfortunate  
19 happening that occurs unintentionally and usually  
20 results in injury, damage or loss." Loss or theft of  
21 special nuclear material logically falls within the  
22 concept of an accident because it would be an  
23 undesirable event that was not intended by the  
24 licensee. Licensees have measures to thwart the loss  
25 or theft of special nuclear material. Failure of

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1 those measures would be accidental, not intentional.  
2 Thus, we think DCS's definition of what is an accident  
3 is too narrow.

4 The NRC staff argues that these  
5 contentions should be rejected because GANE has not  
6 identified the precise provisions in Parts 73 and 74  
7 of the regulations that DCS fails to comply with.  
8 This argument misses the point that GANE is  
9 challenging the adequacy of the DCS design to comply  
10 with 10 CFR -- Paragraph -- Section 70.23(b).

11 I'm finished.

12 CHAIRMAN MOORE: I have a couple of  
13 questions and I'm sure my colleagues have some as  
14 well. If you would be so kind to -- do you have the  
15 regulations or access to them?

16 MS. CARROLL: Yes, yes.

17 CHAIRMAN MOORE: 10 CFR 70.22(f) and 10  
18 CFR 70.20 through 23(b). I would like to know if GANE  
19 believes that Section 22(f) is broader than Section  
20 23(b)? And specifically as I read (f) it says, the  
21 plant shall contain in addition to other -- in part it  
22 says, each application for a license to possess and  
23 use special nuclear material in a plutonium processing  
24 and fuel fabrication plant shall contain, in addition  
25 to the other information required by this section, a

1 description of the plant site et cetera, et cetera, a  
2 description of the safety assessment of the design  
3 basis of the principal structure systems and  
4 components of the plant including provisions for  
5 protection against natural phenomenon and a  
6 description of the quality assurance program, et  
7 cetera. B, I'm sorry, 70.23(b) states in part -- it  
8 just refers to the principal structure systems and  
9 components, and it doesn't use the word including,  
10 which suggest to me examples non-exclusiveness. What  
11 is GANE's position?

12 And I apologize, it was a poorly worded  
13 question, but in a nutshell, Section 70.23(b)  
14 incorporates 70.22(f). It specifically says on the  
15 basis of information filed pursuant to 70.22(f). So  
16 it brings in the information from (f) into Section  
17 23(b). And so the reason for my question is, the  
18 applicant has repeatedly stated that only things that  
19 deal with the design basis of principal structure  
20 systems and components are within the scope of the  
21 proceeding. But if you look at the regulations one  
22 reading of those regulations is broader than that.

23 MS. CARROLL: We believe you are reading  
24 it correctly.

25 CHAIRMAN MOORE: What's GANE's view as to

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1 whether a material control, whether material control  
2 and accounting is a principal system or component of  
3 the facility? Is it?

4 MS. CURRAN: Excuse me, Judge Moore, I'm  
5 just wondering if some of these questions aren't  
6 appropriate to the Motion to Dismiss.

7 CHAIRMAN MOORE: Well they may be but,  
8 they're also equally appropriate for the contentions.  
9 Both 22, 70.22(f) and 70.23(b) use the terms, design  
10 basis of the principal system -- structure system and  
11 components of the plant, and I'm -- my question simply  
12 is whether the material control and accounting for the  
13 plant is a principal system or component. It's  
14 clearly not a structure. Well --

15 MS. CURRAN: May I answer the question?

16 CHAIRMAN MOORE: Certainly.

17 MS. CURRAN: Our contention was not  
18 intended to assert that a material control and  
19 accounting plan was a structure system or component.  
20 I suppose it could be a system. That's certainly a  
21 reasonable interpretation, but our contention goes  
22 further than that to say that without the information  
23 that is provided in a material control and accounting  
24 plan, it's impossible to evaluate whether the design  
25 is adequate to carry out the plan.

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1 CHAIRMAN MOORE: All well and good but  
2 don't you have to first determine whether, or one way  
3 to get there is to determine whether it's a system,  
4 structure or component?

5 MS. CURRAN: No. Because in Section  
6 70.23(b), it specifically references the information  
7 filed pursuant to 70.22(f), which is of course, all of  
8 the information required in a license application. To  
9 us, this regulation indicates that the Commission is  
10 taking a much broader -- is undertaking a broader  
11 review than has been set up in this particular  
12 proceeding, that the Commission is looking at the  
13 entire application in its fullness.

14 CHAIRMAN MOORE: I understand that and  
15 that goes to your motion this afternoon. Mine is  
16 simply just reading these regulations. That it would  
17 appear to me that unless I'm missing something, that  
18 a material control, that the plants material control  
19 and accounting is a system, structure or component.

20 MS. CURRAN: Arguably, it is a system.  
21 It's a system for accounting.

22 CHAIRMAN MOORE: My last question is, what  
23 is GANE's understanding of the standard review plan?  
24 Is it that it represents the staff's view of how an  
25 applicant may comply with the regulations so it is

1 essentially the staff's interpretation of the  
2 regulations?

3 MS. CURRAN: Yes.

4 CHAIRMAN MOORE: Applicant.

5 JUDGE LAM: Before we go to the Applicant,  
6 I have a question for GANE. The Applicant maintained  
7 that contention 1 should be heard during the  
8 possession and use application stage. What is GANE's  
9 view on that claim?

10 MS. CARROLL: Can you repeat the last part  
11 of that? I'm not sure I heard you correctly. They  
12 said that they support it?

13 JUDGE LAM: Contention 1, the Applicant's  
14 response. Contention 1 should be heard during the  
15 possession and use application stage if and when there  
16 is a hearing during that stage. I would like to hear  
17 from you what is your view on the applicant's claim.

18 MS. CARROLL: You know, I guess it's just  
19 inherent that our arguments on the motion to dismiss,  
20 that we have also brought out in our contentions that  
21 we think there's a serious safety gap in splitting up  
22 the construction and operating. This is fundamental  
23 to having a design that will operate safely, to design  
24 it now before you construct, because God forbid, you  
25 don't want to put a video camera behind a pipe where

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1 it can't see anything. I mean its just a real  
2 fundamental issue. So we appreciate the encouragement  
3 that we could, you know, review this at a later date,  
4 but now is the appropriate time. So we disagree with  
5 putting it off.

6 CHAIRMAN MOORE: Is it your view -- GANE's  
7 view that the physical protection system, the subject  
8 of your contention 2, which you're treating at the  
9 same time, also a principal system or component of the  
10 facility?

11 MS. CARROLL: You know, it's a system that  
12 has components that support it, but over arching it  
13 would be a system, but it has components that support  
14 the system and make it work right.

15 CHAIRMAN MOORE: Applicant.

16 MR. SILVERMAN: Thank you, Your Honor.  
17 Several points. First of all, with all due respect to  
18 Judge Lam, I hope that we didn't say -- and I don't  
19 think we said that the contention should be admitted  
20 in a proceeding that hasn't even been created yet. We  
21 have said that those sorts of issues, material control  
22 and accounting issues, are the types of issues that  
23 can be considered in a possession and use license  
24 application proceeding, but we're not saying that this  
25 contention should be admitted or is valid at this

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1 time.

2 JUDGE LAM: Thank you for the  
3 clarification.

4 MR. SILVERMAN: Thank you.

5 With respect to the concept of whether  
6 material control and accounting is an SSC, a principal  
7 SSC, I don't believe that's consistent with the  
8 standard understanding of structure system and  
9 component in the industry. I think that understanding  
10 is reflected in the staff's standard review plan,  
11 which does have a definition of principal, structure  
12 systems and components. If I may read that, it's very  
13 brief.

14 The definition is safety controls that are  
15 identified in the design basis as providing protection  
16 against the consequences of accidents or natural  
17 phenomenon. Designating a control as a principal SSC  
18 is effective synonymous with designating the control  
19 as an item relied on for safety. We think that these  
20 are structures, systems and components intended -- the  
21 design basis of which provide adequate protection to  
22 provide for the safety of the facility.

23 Our position on these two contentions,  
24 contention 1 and contention 2 is that they go beyond  
25 the scope of the findings that have to be made at this

1 time. They raise issues about plans and programs that  
2 are very important at the possession and use stage  
3 that are not within the scope of the determination to  
4 be made today, which is whether the design basis of  
5 principal SSC --

6 CHAIRMAN MOORE: Well let's look at the  
7 regulations. Does not 7023(b) capture the information  
8 required to be filed in 7022(f)?

9 MR. SILVERMAN: Yes.

10 CHAIRMAN MOORE: Have said that, what's  
11 the Applicant's understanding of what the standard  
12 review plan is? Does it reflect the staff's  
13 interpretation of the regulations and how you can meet  
14 those?

15 MR. SILVERMAN: I generally think a  
16 standard review plan is intended to reflect the  
17 staff's interpretation of the regulations and in an  
18 acceptable way of meeting the regulations.

19 CHAIRMAN MOORE: If that's the case,  
20 doesn't the staff's standard review plan, and didn't  
21 the staff's RAIs request additional information about  
22 your material control and accounting plans?

23 MR. SILVERMAN: They did. They requested  
24 information --

25 CHAIRMAN MOORE: Well let's start with the

1 first part.

2 MR. SILVERMAN: They did.

3 CHAIRMAN MOORE: Doesn't the standard --  
4 and didn't they do that on the basis of the standard  
5 review plan?

6 MR. SILVERMAN: The standard review plan  
7 requested information -- very limited information at  
8 this stage about material control and accountability,  
9 not a full MC&A plan.

10 CHAIRMAN MOORE: All right, I understand  
11 that. But certain basic information so they could  
12 draw certain basic conclusions.

13 MR. SILVERMAN: They did request that.

14 CHAIRMAN MOORE: So at this point then you  
15 would agree that the staff's reading of the  
16 regulations, right, wrong or indifferent, the staff's  
17 reading is that more information had to be provided  
18 than you set forth in your CAR on material control and  
19 accounting?

20 MR. SILVERMAN: No, I don't think so. I  
21 don't --

CHAIRMAN MOORE: All right, now  
22 tell me where my logic is wrong.

23 MR. SILVERMAN: Well the standard review  
24 plan --

25 CHAIRMAN MOORE: You agreed with me that

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1 the standard review plan represents the staff's view  
2 of interpretation of the regulations and how you can  
3 meet that interpretation. Now does the standard  
4 review plan state anything about material control and  
5 accounting?

6 MR. SILVERMAN: Yeah, it requests certain  
7 limited information which we provided.

8 CHAIRMAN MOORE: And did you provide that  
9 -- how did you provide that information?

10 MR. SILVERMAN: In the construction  
11 authorization request.

12 CHAIRMAN MOORE: All right. Now did you  
13 provide any additional information in response to an  
14 RAI about material control and accounting?

15 MR. SILVERMAN: I don't recollect that we  
16 did. It's possible that there is such an RAI.

17 CHAIRMAN MOORE: Well we'll be able to  
18 look at the RAIs to determine that. I can't lay my  
19 hands on the quote I was looking for.

20 Moving along, does 7022(f) make it clear  
21 that 7023(b) is not exclusive? That the information  
22 requested by -- in 23(b) is different from the  
23 information requested in 22(f)?

24 MR. SILVERMAN: I hope this answers your  
25 question. 7022(f) is intended to describe the

1 information to be provided in an application and  
2 7023(b) specifies that on the basis of that  
3 information the staff will make certain specific  
4 findings in either granting or denying the  
5 application.

6 CHAIRMAN MOORE: In your responses to  
7 GANE's contention -- and I think this would be  
8 applicable to both contentions 1 and 2 -- you indicate  
9 that DCS, the applicant, bears the risk if it's not  
10 able to construct subsequently a material control and  
11 accounting system and a physical security system that  
12 complies with the regulations.

13 MR. SILVERMAN: That's correct.

14 CHAIRMAN MOORE: I'm curious as to who  
15 bears that risk. You say DCS. Is it your risk or is  
16 it DOE's risk?

17 MR. SILVERMAN: Well DCS is the license  
18 applicant and to the extent that the application --

19 CHAIRMAN MOORE: Well let's get down to  
20 dollars. Who loses dollars?

21 MR. SILVERMAN: Oh, I would imagine that  
22 if the -- that there would be expenditures on the  
23 facility, but from the Department of Energy that would  
24 be lost if the facility were not licensed, but I don't  
25 think that's a material issue for the Licensing Board.

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1 CHAIRMAN MOORE: Who pays for the  
2 retrofit?

3 MR. SILVERMAN: I don't know whether there  
4 would be a retrofit, I don't know what the issue would  
5 be. This is all very speculative, I think, Your  
6 Honor.

7 CHAIRMAN MOORE: Well how --

8 MR. SILVERMAN: I don't understand why the  
9 financial risk of a facility -- any license  
10 applicant's facility, whether it's the financial risk  
11 of the application not being granted has anything to  
12 do with the licensing issues.

13 CHAIRMAN MOORE: Well you indicate in your  
14 response that DCS bears the risk. What did you mean  
15 by risk?

16 MR. SILVERMAN: We meant that if we are  
17 unable to demonstrate an adequate material control and  
18 accounting program and an adequate physical security  
19 program our license will not be granted.

20 CHAIRMAN MOORE: And then what happens?

21 MR. SILVERMAN: I imagine it's up to the  
22 Department of Energy to evaluate the situation. That  
23 doesn't mean that a modified license cannot be  
24 prepared. It doesn't --

25 CHAIRMAN MOORE: You've indicated that you

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1 are under contract to DOE to design, construct and  
2 operate the facility.

3 MR. SILVERMAN: Right.

4 CHAIRMAN MOORE: Does that contract deal  
5 with the risk?

6 CHAIRMAN MOORE: Oh, I imagine it does  
7 deal with financial issues.

8 CHAIRMAN MOORE: But you're not willing to  
9 share those with us?

10 MR. SILVERMAN: I don't know them  
11 personally. I'd have to review the contract.

12 CHAIRMAN MOORE: Well the reason we ask  
13 is, you say you share the risk, or you bear the risk,  
14 but the immediate question is, isn't it really DOE's  
15 risk?

16 MR. SILVERMAN: Your Honor, whether it is  
17 or is not, I think the cases clearly hold that it is  
18 not a litigable issue to allege that if an application  
19 is denied -- certain issues -- if we can't comply that  
20 the application will be denied, that's a standard risk  
21 that any applicant bears. Obviously in this case  
22 there's another component, the Department of Energy's  
23 funding the project. What that has to do with whether  
24 there's a significant safety issue here and whether  
25 the design basis are adequate is -- I don't really

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1 follow that.

2 CHAIRMAN MOORE: Well it goes back to the  
3 safety issue of what information is necessary at this  
4 point in the proceeding to determine whether you have  
5 complied with the regulations. That's the gist of the  
6 contentions that are in front of us on material  
7 control and accounting and physical security. And  
8 your answer essentially is that's an entire issue  
9 that's beyond the scope of the proceeding and can only  
10 be looked at later. When the regulations -- certainly  
11 when reading of the regulations suggests that  
12 information on material control and accounting and  
13 physical security must be provided at this stage of  
14 the proceeding.

15 MR. SILVERMAN: We don't read the  
16 regulations that way.

17 CHAIRMAN MOORE: Well assume for the  
18 moment that the regulations say that. How have you  
19 complied with them if they do say that?

20 MR. SILVERMAN: Well again, we don't  
21 believe they do say that, but if we -- but what we've  
22 done is provided the information -- the very limited  
23 information that the NRC staff has asked us to provide  
24 and recommended that we provide in a standard review  
25 plan. If I may, if we take ourselves back just for a

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1 minute. Before these 1971 amendments were made to  
2 address the need for a construction -- authorization  
3 of construction for a plutonium facility, we had this  
4 type of facility treated just like any other part 70,  
5 or any other, for that matter, materials license  
6 facility in the United States. That was after  
7 environmental reviews were complete. The applicant  
8 was free to construct the facility.

9 What it was requesting from the NRC --  
10 without any submittal to the NRC on the safety side.  
11 All that was required was a possession and use  
12 license. What happened in 1971 was the NRC said we  
13 want to impose some additional requirements for the --  
14 with respect to plutonium facilities.

15 And so they established a limited set of  
16 determinations that needed to be made using terms  
17 which I think are relatively well understood in the  
18 industry, design basis, principal SSCs, to define a  
19 limited area of inquiry that needs to be addressed and  
20 resolved before construction can be complete. We just  
21 do not believe that limited area of inquiry includes  
22 material and accountability issues, physical security  
23 issues, emergency planning issues, operator  
24 qualifications for example, another good example.

25 JUDGE LAM: Mr. Silverman --

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1 MR. SILVERMAN: Yes, sir.

2 JUDGE LAM: -- assuming your  
3 interpretation of the regulations are correct, so  
4 there is a clear communication between construction  
5 authorization requests and possession and use,  
6 assuming that be the case, how would you deal with the  
7 fundamental issue here, which is a safety issue  
8 related to possession and use and operation may have  
9 a relationship with how the facility is constructed,  
10 how do you decouple the two things?

11 MR. SILVERMAN: We don't decouple the two  
12 things, if I understand your question correctly, Judge  
13 Lam. We do -- a number of things have to happen. The  
14 staff has to determine that our design basis are  
15 adequate, so that the fundamental design of the plant  
16 is likely to produce a safe plant if built in  
17 accordance with that design.

18 And then the regulation says before we can  
19 begin to operate this facility, not only will we have  
20 to provide all that other safety information and all  
21 that other physical security and material control and  
22 emergency planning information, but we also will have  
23 to be subject to NRC inspection. The rule  
24 specifically says that the NRC will authorize us to  
25 operate once they've determined that the principal

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1 SSCs have been built in accordance with the design.  
2 I hope that answers your question.

3 JUDGE LAM: Yes, thank you.

4 CHAIRMAN MOORE: Mr. Silverman, if GANE is  
5 accurately quoted from the standard review plan --  
6 excuse me, Judge Kelber, go ahead while I try to find  
7 the quote.

8 JUDGE KELBER: The standard review plan,  
9 as you have stated, asks for a limited amount of  
10 material control and accounting information. What is  
11 the relationship of that information to the basic  
12 design of the plat?

13 MR. SILVERMAN: Well I'm not an engineer.  
14 I imagine there is some relationship.

15 JUDGE KELBER: Well it's a crucial  
16 question.

17 MR. SILVERMAN: I'm sorry?

18 JUDGE KELBER: Maybe we should be briefed  
19 by some expert because I can understand quite clearly  
20 that our physical features of the plat that are  
21 important to material control and accounting. For one  
22 thing, simply the design of piping systems and their  
23 ability to measure and possibly retrieve material from  
24 the pipes. Another has been mentioned by GANE. That  
25 is just the placement of video cameras. Typically in

1 modern construction, and increasingly so in the last  
2 several years and in the years to come, surveillance  
3 is provided for initially, not at the end. So I think  
4 we need to know whether information that is being  
5 provided on this system is pertinent to the design,  
6 and if it's not, what's missing. It's true there's a  
7 risk involved and it's not clear to whom the risk is  
8 involved. But part of our function in these hearings  
9 is to ensure that people don't go off the deep end  
10 without a safety net.

11 MR. SILVERMAN: If I may? If the position  
12 of the Board is that we're required to demonstrate  
13 material control and accountability -- address those  
14 issues at the design stage, you would be -- and before  
15 a possession -- a full possession and use license  
16 application is filed, I think you'll be imposing a  
17 requirement that has not been imposed on any other  
18 fuel cycle or materials license facility that I know  
19 of. Again, a facility like this, were it not for the  
20 1971 changes to the regulations, could simply be built  
21 after the environmental reviews were done. And  
22 whether the applicant would need to do is submit its  
23 material control and accounting plan with its  
24 application for possession and use. I also think to  
25 some degree we're really dealing with issues of cost

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1 here and not safety.

2 JUDGE KELBER: Well partly. But the  
3 question is, what information is pertinent now at this  
4 design stage to the implementation of material control  
5 and accounting system, because that certainly is a  
6 principal system. The question is, what information  
7 is sought now that is pertinent to the design? That's  
8 a, I think, a fairly straight forward question, and if  
9 you don't have experts here who can answer that,  
10 perhaps we could be briefed at a later date.

11 CHAIRMAN MCCRE: Mr. Silverman, I have in  
12 front of me an excerpt that I took from your CAR, page  
13 13-1. I guess it would be technically Section 13  
14 entitled safeguards and 13.1 is entitled physical  
15 security plan. It's a very brief paragraph, two  
16 sentences. The second sentence, and the only  
17 pertinent one, says DCS commits to provide a plan that  
18 meets the requirements of 10 CFR, Section 73.20,  
19 Section 73.45, Section 73.46 and 10 CFR Part 73,  
20 Appendix B, general criteria for security personnel;  
21 Appendix C, licensee safeguards contingency plans;  
22 Appendix G, reportable safeguards events and Appendix  
23 H, weapons qualifications criteria. That, I believe,  
24 is the sum total of what you have put forth on the  
25 physical plan. Is that incorrect?

1 MR. SILVERMAN: It is correct.

2 CHAIRMAN MCCRE: Now does the staff have  
3 to draw any conclusions, or under the regulations are  
4 any conclusions required at this stage as to physical  
5 security plan?

6 MR. SILVERMAN: We believe the answer to  
7 that is no, Your Honor.

8 CHAIRMAN MOORE: Then why is 13.1 in here  
9 at all?

10 MR. SILVERMAN: For a very good reason.  
11 As I said at the outset, the standard review plan is  
12 the staff's guide and their view, I believe, of what  
13 information they require and satisfactory level of  
14 information. We have provided this information to  
15 facilitate the application process, but we don't  
16 believe the regulation requires it.

17 CHAIRMAN MCCRE: So you disagree with the  
18 staff's interpretation that the regulations require  
19 it, which you've already told me is what the standard  
20 review plan is.

21 MR. SILVERMAN: Well we should hear from  
22 the staff on their view, but if that is their view, if  
23 that is their interpretation, then we would disagree  
24 with that.

25 CHAIRMAN MOORE: Assume for the moment

1 that the staff's interpretation is correct, did you  
2 provide any additional information about physical  
3 security and RAIs to the staff?

4 MR. SILVERMAN: We don't think so. It's  
5 possible that we did.

6 CHAIRMAN MOORE: Assume for the moment  
7 that the staff's interpretation is correct, how could  
8 anyone, reasonable or otherwise, draw any conclusion  
9 about physical security from what I just wrote to you  
10 that's in 13.1 of the CAR, other than the fact that  
11 there will be a physical security plan?

12 MR. SILVERMAN: Well I believe that the  
13 standard review plan calls for broad programmatic  
14 commitments. I may be paraphrasing it --

15 CHAIRMAN MOORE: Do you have the standard  
16 review thing here?

17 MR. SILVERMAN: Yes, portions of it.

18 CHAIRMAN MOORE: Can you pull up when it  
19 was -- with regard to the physical security plan -- or  
20 physical security that it calls for?

21 MR. SILVERMAN: I can read you the  
22 information that's called for under the construction  
23 approval for physical security, it's a paragraph.

24 CHAIRMAN MOORE: Okay, please do.

25 MR. SILVERMAN: "Although the applicant is

1 not expected to submit a physical protection plan for  
2 construction approval, the applicant should commit to  
3 developing and implementing a physical protection  
4 system that meets or exceeds the acceptance criteria  
5 in Section 13.1.4. If provided by the applicant, the  
6 primary reviewer should evaluate the proposed location  
7 and construction technique and materials of the  
8 buildings, protected vital material access and control  
9 access barriers, vehicle barriers, alarm stations,  
10 security search or control points and vaults to ensure  
11 that the commitments and program goals as described in  
12 Section 13.1.3 are appropriate for the physical  
13 protection at the design stage.'

14 That's the paragraph, and I would  
15 underscore the phrase "if provided by the applicant."

16 CHAIRMAN MOORE: But you've already said  
17 that that's the staff's -- agreed with me that that's  
18 the staff's view of its interpretation of what the  
19 regulations are.

20 MR. SILVERMAN: No, I really would like  
21 you to get that from the staff to be certain of that.

22 CHAIRMAN MOORE: We'll get there. And you  
23 disagree with that staff interpretation.

24 MR. SILVERMAN: Once again --

25 CHAIRMAN MOORE: Okay. Now assuming the

1 staff interpretation is correct, then have you met the  
2 regulation by Section 13.1 of the CAR?

3 MR. SILVERMAN: We believe we have.

4 CHAIRMAN MOORE: Assuming the staff's  
5 interpretation is correct.

6 MR. SILVERMAN: Yes, because the staff's  
7 interpretation is embodied in the SRP and we believe  
8 we met the --

9 CHAIRMAN MOORE: Let's go through all of  
10 the things that you just read to me and tell me where  
11 in the CAR I can find those dealing with materials,  
12 about halfway through.

13 MR. SILVERMAN: Well again, the first  
14 sentence says "The applicant should commit to  
15 developing and implementing a physical protection  
16 system that meets or exceeds" --

17 CHAIRMAN MOORE: I will state that the  
18 sentence I read to you says you're going to do that.

19 MR. SILVERMAN: Right. The very next  
20 sentence, which is the remainder of the provisions  
21 says "If provided by the applicant," and then it goes  
22 into a list of items that the primary reviewer --

23 CHAIRMAN MOORE: Let's go through those  
24 items. Have you done those?

25 MR. SILVERMAN: We have -- I presume we

1 have identified -- there are a number of items in  
2 there which we did not provide, Your Honor, we don't  
3 believe we're required and we don't believe that  
4 language required us to.

5 CHAIRMAN MOORE: Would it be fair to say  
6 once again with regard to material control and  
7 accounting, in the same way that we've just gone  
8 through this with physical security, that if you  
9 accept the staff's view of the regulation reflected in  
10 the staff's standard review plan, that there are also  
11 matters that you did not provide the information in  
12 your CAR on material control and accounting?

13 MR. SILVERMAN: Only items identified as  
14 voluntary, that the staff even in the standard review  
15 plan itself has not specified.

16 CHAIRMAN MOORE: Fine, Mr. Silverman.  
17 Once again, I will repeat to you, if you accept the  
18 staff's interpretation of the regulation, and we know  
19 you don't, but if you accept that interpretation, are  
20 there matters that you did not provide in the CAR  
21 concerning material control and accounting?

22 MR. SILVERMAN: There are no matters that  
23 the staff mandated that we provide -- I'm sorry, it's  
24 an important distinction. Yeah, there are items that  
25 we did not include --

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1 CHAIRMAN MOORE: Fine. My point is --

2 MR. SILVERMAN: -- which are in that, but  
3 they are voluntary.

4 CHAIRMAN MOORE: -- if you accept the  
5 staff's interpretation and I do not know if that  
6 interpretation is correct --

7 MR. SILVERMAN: I understand.

8 CHAIRMAN MOORE: -- and you disagree with  
9 that interpretation, that's a given. But if you  
10 accept their interpretation, that was simply my  
11 question.

12 MR. SILVERMAN: And let me say that if  
13 their interpretation is as you have posited it, if we  
14 look at that language, the way I read that language,  
15 it says that their interpretation is we must commit to  
16 the broad program goals but we may provide other  
17 information -- that's what it says. And we have  
18 provided the required information and some perhaps of  
19 the voluntary information that they don't apparently  
20 believe is necessary to meet the regulation, we have  
21 not provided.

22 CHAIRMAN MOORE: Fine. Do you have  
23 anything further?

24 MR. SILVERMAN: No, sir.

25 CHAIRMAN MOORE: Staff.

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1 MR. HULL: Your Honor, on Contention 1  
2 regarding the material control and accounting systems,  
3 I think you first have to look to the regulations in  
4 10 CFR Part 74 rather than the standard review plan.  
5 And the regulations in 10 CFR Part 74 contain no  
6 requirements specific to the design of MC&A systems.  
7 So regardless of whether the standard review plan is  
8 an interpretation of the regs by the staff or  
9 regardless of how you characterize the SRP, you have  
10 to look to the regulations themselves. And Part 74  
11 contains no requirement --

12 CHAIRMAN MOORE: Mr. Hull --

13 MR. HULL: -- and Part 74 was not even  
14 referenced in the notice.

15 CHAIRMAN MOORE: -- Mr. Hull, is the SRP  
16 the staff's interpretation of the regulation?

17 MR. HULL: I would not characterize it as  
18 the staff's interpretation.

19 CHAIRMAN MOORE: Of how an applicant can  
20 meet the regulation.

21 MR. HULL: The standard review plan sets  
22 forth one acceptable way in which an applicant can  
23 proceed. I would not characterize it though as the  
24 interpretation or an interpretation of the  
25 regulations. I certainly had no input into the

1 standard review plan, I don't know if anybody else in  
2 the Office of General Counsel did. But you first have  
3 to look to the regulations themselves. If the  
4 standard review plan is not consistent with the  
5 regulations, you can't go by what the standard review  
6 plan say, it very well may be some incorrect  
7 statements in there that are not consistent with the  
8 regulations.

9 JUDGE LAM: But what you're saying is the  
10 SRP reflects only one means of compliance, there may  
11 be others.

12 MR. HULL: That's correct.

13 CHAIRMAN MOORE: Mr. Hull, did the staff  
14 issue RAIs on the physical security plan with respect  
15 to the CAR and material control and accounting?

16 MR. HULL: I believe the staff did, Your  
17 Honor. I did not focus though on those RAIs in  
18 preparing my response to the contentions because the  
19 DCS responses to those RAIs on the construction  
20 authorization request were not submitted to the staff  
21 until after the contentions were filed. So I did not  
22 view it as being proper for me in responding to the  
23 contentions to rely on responses that were not  
24 available to the petitioners when they were filing  
25 their contentions.

1 CHAIRMAN MOORE: Why did the staff file  
2 those RAIs on the CAR if it's not appropriate until  
3 the operating phase of the staff's review?

4 MR. HULL: I have not discussed that with  
5 the staff, I can't answer that question.

6 CHAIRMAN MOORE: Well, would you like to  
7 venture a guess?

8 MR. HULL: I'm not going to guess at this  
9 point, but I'll confer with the project manager, Drew  
10 Persinko. Bear with me for a moment.

11 (Brief pause.)

12 CHAIRMAN MOORE: Is DCS' material control  
13 and accounting a principal system or component of the  
14 facility?

15 MR. HULL: I don't think it is a principal  
16 system, I think the word principal is the key word  
17 here, Your Honor. It's a system certainly, but I  
18 don't believe it's a principal system as the term is  
19 used in the regulations.

20 CHAIRMAN MOORE: Is the physical security  
21 system either a principal system or component?

22 MR. HULL: No, it's not. Both the MC&A  
23 issues -- I'm sorry -- material control and accounting  
24 issues and the physical security issues are dealt with  
25 -- will be dealt with later when DCS actually applies

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1 for authority to possess and use special nuclear  
2 material. And I think that's consistent with the  
3 regulation wording here we are focusing on in 10 CFR  
4 70.22. 70.22(a) states "Each application for a  
5 license," and then if you go to 70.22(f) it states  
6 "Each application for a license to possess and use  
7 special nuclear material in a plutonium processing and  
8 fuel fabrication plant," and then it goes on. I don't  
9 think we're there yet. Your Honor, we're just  
10 considering the construction authorization request.  
11 We are not yet -- we do not yet have before us an  
12 application for a Part 70 license, that's going to be  
13 submitted next year.

14 JUDGE KELBER: But our problem, Mr. Hull,  
15 as has been referred to earlier, is the circularity;  
16 that is to say 73(b)(12) (sic) whatever, incorporates  
17 the information in 70.22(f) and it seems as though the  
18 regulations want all the information all at once and  
19 they want it later as well.

20 MR. HULL: Your Honor, I agree with you.  
21 The regulations certainly could have been written in  
22 a more clear fashion. I would note that 70.22 was  
23 initially promulgated in 1956, whereas 70.23 was  
24 established in 1971 and I believe, as Mr. Silverman  
25 referenced, the 1971 action was taken specifically

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1 with regards to these plutonium fuel processing  
2 facilities. So I don't know how closely you can read  
3 70.22 and 70.23 together, although obviously I do  
4 recognize here that 70.23(b) does contain a reference  
5 back to 70.22(f).

6 CHAIRMAN MOORE: well, it's more than just  
7 a reference back, it says "On the basis of information  
8 filed pursuant to".

9 MR. HULL: But again when you go back to  
10 70.22(f), it talks about the application for the  
11 actual Part 70 license. We don't have such an  
12 application yet.

13 CHAIRMAN MOORE: How many applications  
14 have been filed to date?

15 MR. HULL: There's just been one  
16 application filed and that was for the construction  
17 authorization request.

18 CHAIRMAN MOORE: Is the CAR an  
19 application?

20 MR. HULL: It's a request for construction  
21 authority. I'm not sure if you can term it as an  
22 application, it's certainly not an application for a  
23 license. It's an application for construction  
24 authority.

25 CHAIRMAN MOORE: Do the regulations use

1 CAR, construction authorization request?

2 MR. HULL: I'm sorry, do the regulations?  
3 I don't believe there's any reference in the  
4 regulations to a construction authorization request.

5 CHAIRMAN MOORE: Where did you come up  
6 with that term?

7 MR. HULL: It's used -- obviously, Part  
8 50, when you're talking about nuclear power reactors,  
9 contains extensive provisions there about construction  
10 authority. Part 70 certainly lacks any of those  
11 specific requirements regarding construction  
12 authority. But I don't think there's anything in Part  
13 70, which prohibits the filing of a construction  
14 authorization request separate from the actual license  
15 application.

16 CHAIRMAN MOORE: Is there anything that  
17 permits it?

18 MR. HULL: I believe if you look at the  
19 way 70.23 is structured, 70.23 certainly permits it.

20 CHAIRMAN MOORE: Well, 70.23 uses the term  
21 use and possession, but nowhere do I find the term  
22 CAR.

23 MR. HULL: I agree there is no  
24 construction authorization request term in 70.23.

25 CHAIRMAN MOORE: So my question was do the

1 regulations permit it.

2 MR. HULL: Yes, they do. 70.23(a)(7) and  
3 70.23(b) are the regulations at issue here, as stated  
4 in the Notice which initiated this hearing.  
5 70.23(a)(7) deals with the environmental part of the  
6 staff's evaluation, 70.23(b) deals with the safety  
7 party.

8 CHAIRMAN MOORE: Okay, but couldn't that  
9 just as easily be done and mean with the application,  
10 and the application referring to one application for  
11 the whole ball of wax?

12 MR. HULL: If you look at 70.23(a)(7) and  
13 70.23(b), those are the regulations we're dealing with  
14 now. When the actual application for an operating  
15 license is filed next year, then 70.23(a)(8) kicks in.  
16 That's where the rules require the Commission to  
17 approve the as-built facility. So there's definitely  
18 a two-part process there reflected in those three  
19 provisions within 70.23.

20 JUDGE LAM: Mr. Hull, how does the staff  
21 fulfill its oversight and enforcement responsibility  
22 when we have a two-step licensing process here? Let  
23 me be more specific. If and when there are safety  
24 issues from the use and possession of material and  
25 from the operation of the facility, if there were

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1 safety issues coming out from the operation of the  
2 facility, and if they are related somehow back to how  
3 the facility is constructed --

4 MR. HULL: I think as Mr. Silverman  
5 referenced earlier today, DCS proceeds here at its own  
6 risk. If they go ahead and build this facility, that  
7 does not by any means signify that the staff is going  
8 to let them operate the facility. They chose to take  
9 this two-step approach and they proceed and their own  
10 risk.

11 JUDGE LAM: So the staff has the full  
12 authority to rectify things when you see deficiencies  
13 later on.

14 MR. HULL: Yes, and the expectation on the  
15 staff's part was that the second -- I shouldn't say  
16 the second -- the consideration of the application  
17 that DCS plans to file next year for a Part 70 license  
18 is going to involve many, many more issues than what  
19 we're dealing with now in this construction  
20 authorization request.

21 CHAIRMAN MOORE: Let's move on to  
22 Contention 3.

23 MR. SILVERMAN: Judge Moore, may I just  
24 add that we've confirmed that there is no RAI on  
25 material control and accountability or physical

1 security.

2 CHAIRMAN MOORE: Thank you.

3 MS. CARROLL: Your Honor, this has been a  
4 really, really deep discussion and I have just a  
5 couple of comments that have come up, if I may, before  
6 we move on.

7 CHAIRMAN MOORE: All right.

8 MS. CARROLL: I'll be brief.

9 CHAIRMAN MOORE: Obviously we're going to  
10 get back to this on the motion to dismiss.

11 MS. CARROLL: Yes, that occurs to us too.

12 I want to say this, this is not -- DCS has  
13 almost zero risk here and every time we use the term  
14 DCE, it means every taxpayer in this room and  
15 construction, as Judge Moore acknowledged, has an  
16 environmental impact. And to waste the taxpayers'  
17 money and to waste some of the natural area of South  
18 Carolina to build a facility that is so poorly  
19 engineered it will never operate is not only immoral,  
20 but it's a breach of your contract, because on page H-  
21 6 of your contract, it says that the technical  
22 direction and management surveillance shall not impose  
23 tasks or requirements upon the contractor, blah, blah.  
24 The technical direction, to be valid may not -- and I  
25 refer to Part 6 -- result in non-conformance with NRC

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1 license requirements. So it's very important and the  
2 DOE and the taxpayers and the nature of South Carolina  
3 take a huge risk if you don't address this issue now.

4 CHAIRMAN MOORE: Would you address GANE  
5 Contention 3, inadequate seismic design, please?

6 MS. CARROLL: I have two more comments.

7 We think that the definition of system is  
8 well covered in 74.59 paragraph (d) and (e). And so  
9 yes, the material control and accounting is a system.

10 CHAIRMAN MOORE: Ms. Carroll, when we set  
11 out the schedule, we did not allow for rebuttal.

12 MS. CARROLL: Oh, I'm sorry, I thought  
13 this would help.

14 CHAIRMAN MOORE: And so, will you address,  
15 as I've asked, Contention 3, please.

16 MS. CARROLL: Okay. Actually late last  
17 night when we talked to our seismologist, we have one  
18 little document we have to recover and thought we'd do  
19 it over lunch and so if I could leave that one and  
20 come back, go on to 4 and come back to 3. I need to  
21 get a page out of six inches of paper and I'm not  
22 prepared. I planned on doing that over lunch. So I  
23 would be prepared to go to Contention 4 and 5, if we  
24 could just come back to 3 after lunch. And it is  
25 quarter of one and I'm getting a little hypoglycemic

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1 here myself.

2 CHAIRMAN MOORE: Well, let's address  
3 Contention 4 quickly, please.

4 MS. CARROLL: Okay.

5 CHAIRMAN MOORE: And really, if you would  
6 just answer this question, the applicant and the staff  
7 have pointed out and there are legions of authority  
8 from the Commission and the old appeal boards, that  
9 what is at issue in a licensing proceeding -- any  
10 licensing proceeding -- is the application of the  
11 applicant. The staff's review is part of the overall  
12 licensing process but is not subject to litigation.  
13 Indeed, the staff need not even be a party to a  
14 proceeding, and this is an informal proceeding. The  
15 staff opted to be a party, but they did not need to be  
16 a party under the informal subpart L rules.

17 So isn't your contention in the teeth of  
18 all of the authority that the staff's review is not  
19 the subject of any license application litigation?

20 MS. CARROLL: We are aware of the  
21 arguments. It's hard sometimes for environmentalists  
22 to separate out the obvious safety hazards from what's  
23 legally allowable. I have a very brief statement  
24 prepared that won't take long to hear and so maybe if  
25 I just proceed with this, I'll be satisfied.

1 CHAIRMAN MOORE: If it addresses the  
2 staff's competence, isn't it irrelevant?

3 MS. CARROLL: You know, it goes to this  
4 fundamental problem that's really bogging us down  
5 today, which is this is an artificially segmented,  
6 truncated process and it is hampering everybody here  
7 every step of the way.

8 CHAIRMAN MOORE: Excuse me, Ms. Carroll --

9 MS. CARROLL: So that is the first  
10 fundamental mistake they made.

11 CHAIRMAN MOORE: -- even if this were one  
12 proceeding, there were one application, isn't the  
13 staff's review not part of the legitimate grist for  
14 the mill in litigation?

15 MS. CARROLL: We've raised the issue  
16 because we want the Board to take it into account when  
17 reviewing the contentions and it has a pervasive  
18 effect on this proceeding.

19 CHAIRMAN MOORE: All of which may be true,  
20 but the Board has no jurisdiction over either the  
21 staff's competence or their review of the license  
22 application.

23 MS. CARROLL: So you couldn't --

24 CHAIRMAN MOORE: That's why it's outside  
25 the scope of the proceeding.

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1 MS. CARROLL: So you couldn't pass the  
2 recommendation up that your participation in this  
3 proceeding has made it evident that further training  
4 would be required before the NRC embarked on this  
5 licensing proceeding or --

6 CHAIRMAN MOORE: The participants are free  
7 to seek Commission intervention in a proceeding, but  
8 this tribunal's authority is highly circumscribed and  
9 it is circumscribed in the way I have set forth.

10 So very frankly, your contention is  
11 clearly -- Contention Number 4 -- beyond the scope of  
12 the proceeding.

13 MS. CARROLL: Would you like to do 5  
14 before lunch or after lunch?

15 CHAIRMAN MOORE: It's now quarter of one -  
16 -

17 MS. CARROLL: We can pick up on 3 after  
18 lunch, that's a meaty one.

19 CHAIRMAN MOORE: Can everyone deal with 30  
20 minutes for lunch?

21 (No response.)

22 CHAIRMAN MOORE: Then we will reconvene at  
23 --

24 MS. CARROLL: Thirty minutes? Did I hear  
25 you correctly?

1 CHAIRMAN MOORE: Correct.

2 MS. CARROLL: That's not long enough.  
3 Ever if I was at home and I had a sandwich prepared,  
4 that just seems short -- I'm sorry. We have to drive  
5 somewhere, you know, and hopefully some place better  
6 than McDonald's.

7 CHAIRMAN MOORE: Forty-five minutes.  
8 We'll recess for 45 minutes for lunch and we'll  
9 reconvene precisely at 1:30.

10 (Whereupon, a luncheon recess was taken at  
11 12:45 p.m., the conference to resume at 1:30 p.m.)

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