

1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (1:30 p.m.)

3 CHAIRMAN MOORE: Ms. Carroll, you need a
4 new watch.

5 MS. CARROLL: I apologize.

6 CHAIRMAN MOORE: Would you address
7 Contention 5, please.

8 MS. CARROLL: Well, would you prefer that
9 or would you like to go back to 3 and then continue?
10 I'm prepared to --

11 CHAIRMAN MOORE: Fine, go back to 3 then.

12 MS. CARROLL: Contention 3 deals with
13 inadequate seismic design. We have 12 minutes and
14 I'll try to take less to make up for the lateness.
15 This contention is supported by the expert opinion of
16 Peter Burkholder.

17 The NRC staff does not oppose the
18 admission of this contention, which challenges the
19 adequacy of DCS' seismic analysis. DCS opposes the
20 contention on a number of grounds.

21 First, DCS argues that the scenario
22 addressed in the CAR is bounding because it was an
23 earthquake of magnitude 6.9 at Charleston, which
24 occurred less than 100 miles from SRS.

25 GANE's response to that is this argument

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1 misses the point of our argument. The Talwani study
2 shows that the region of seismicity may be larger than
3 originally thought, based on the Charleston earthquake.
4 Also, that the frequency of earthquakes may be higher.

5 The second point of DCS' argument disputed
6 GANE's assertion that it is impossible to evaluate the
7 accuracy of Section 1.3.6.2 of the CAR because of lack
8 of references and because it references Westinghouse
9 SRS documents that are not publicly available. But
10 DCS does not show that the references are either
11 complete or accessible. In fact, GANE's expert, Peter
12 Burkholder, called Westinghouse this week. Catherine
13 Whitker of the Records Office confirmed that Report
14 Number 2000-0454 is not publicly available. This is
15 one of the reports cited in the CAR.

16 DCS then argues that even if GANE is
17 correct that the information is not available, GANE
18 has not shown that it is material information. But as
19 GANE states in the contention, this data is used by
20 DCS to describe site geology for purposes of
21 evaluating the relationship between geologic structure
22 and seismic sources within the general site region.
23 This assertion by DCS establishes the materiality of
24 the data.

25 Third, DCS takes issue with an assertion

1 by GANE that the USGS has identified a larger
2 magnitude for a seismic event on August 2, 1974 than
3 was reported in the CAR. USGS reports a magnitude of
4 4.9, whereas the CAR reports a magnitude of 4.3. DCS
5 argues that there are different methods for
6 calculating the magnitude of a seismic event and that
7 the magnitude of an event can vary, depending upon the
8 method selected.

9 The problem with this is that DCS has not
10 provided any references or other information to allow
11 an independent reviewer to evaluate how it came up
12 with the 4.3 figure or whether the estimate is
13 reliable.

14 GANE contention also faults the CAR for
15 failing to include 10 other seismic events listed by
16 USGS that have occurred since 1974 within 200 miles of
17 the SRS and that have a magnitude greater than 3.0.
18 DCS says that three are actually included in the CAR.
19 DCS also says that four occurred after the 1993 cutoff
20 date for Table 1.3.6-1. GANE questions why a cutoff
21 date that was eight years ago. Finally, DCS says that
22 the remaining three events range in magnitude from 3.0
23 to 3.7 and add nothing of any significance to the CAR
24 table. But we wonder why are they left out? The
25 accumulation of errors raise significant questions

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1 about DCS' methodology.

2 Number 4, DCS also takes issue with GANE's
3 assertion that although the CAR cites several site
4 response studies within the SRS regarding the shaking
5 of earth during an earthquake, there is not an
6 indication that DCS has performed a quantitative site
7 response study for the MOX facility. DCS refers to
8 CAR Section 1.3.5.2 and Figure 1.3.5-22 for
9 exploration borings and cone penetrometer tests that
10 were taken in 2000 to define site-specific subsurface
11 conditions at the MOX facility site.

12 According to DCS at page 24 of their
13 response, "The exploration borings and CPT holes
14 indicate that subsurface conditions encountered at the
15 MFFF site are consistent with all previous
16 investigations performed at SRS in F area and near the
17 site."

18 If one looks at page 29 of the
19 geotechnical study that the NRC staff put on MOX
20 website September 5, the statement appears to be
21 false. Location of the building on the MOX facility
22 site has been changed precisely because geologic
23 conditions are not uniform. I'm quoting from page 29
24 of the geotechnical report. "The original exploration
25 program consisted of 13 exploration borings and 37 CPT

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1 soundings. The CPT program was extended to 63
2 soundings after thick soft zones were encountered in
3 the eastern portion of the MFFF site at the original
4 building location."

5 And I would point you to a diagram that --

6 CHAIRMAN MOORE: Excuse me, Ms. Carroll,
7 would you give me the full name of that document you
8 just quoted from? You gave us the page number.

9 MS. CARROLL: Yes, sir, I apologize. MOX
10 Fuel Fabrication Facility Site Geotechnical Report and
11 it has a series of numbers. Would you like them?

12 CHAIRMAN MOORE: Please.

13 MS. CARROLL: DCS01-WRS-DS-NTE-G-00005-C.

14 CHAIRMAN MOORE: And whose document is
15 that?

16 MS. CARROLL: It is DCS' document and I
17 believe is in response to an RAI.

18 I refer you -- and I'll finish reading the
19 quote, but there's a map that's included in the CAR
20 and it's Figure 1.3.5-22, and this shows the location
21 of the bore holes and CPTs that I'm reading about from
22 DCS' geotechnical report.

23 "The critical structures" -- okay, so I
24 just said that they had 13 borings, 37 soundings, it
25 was extended to 63 soundings after thick soft zones

1 were encountered in the eastern portion -- I like to
2 call it the MFFF site, at the original building
3 locations. "The critical structures had to be
4 relocated to avoid thick soft zones. The original
5 soil boring locations were also adjusted to provide
6 coverage of the present MOX and EDG building location
7 and remained at a total of 13. Five dialotometer test
8 holes, DMT holes were performed at representative
9 locations near CPT soundings and exploration borings,
10 to evaluate in situ stress conditions and to collect
11 in situ data for correlation with the CPT, exploration
12 boring and laboratory test results."

13 5. GANE also asserts in this condition
14 that the probabilistic seismic hazard assessment is
15 incomplete. DCS incorrectly asserts that this
16 contention is based only on an RAI from the staff.
17 The contention is based on our expert's agreement with
18 the reasoning provided in the RAI, which you can see
19 on page 17 of our contentions. GANE concurs with the
20 need for clarification -- I'm quoting -- on all points
21 mentioned in the RAI, end quote.

22 Our expert, Peter Burkholder, agrees with
23 the reasons for requesting additional information that
24 are provided in the RAI at pages 439. Some of the
25 vital issues that are requested in there -- some of

1 them are so technical, I don't even know what part to
2 spout to you, but they also deal with ground motion
3 modeling, slope instability hazards, liquification
4 susceptibility, liquefaction -- excuse me --
5 liquefaction susceptibility, soft zones -- and my
6 personal favorite -- a request for a copy of a
7 Westinghouse SRC report.

8 Number 6. The contention -- this is DCS'
9 response to GANE -- the contention asserts that DCS
10 has not complied with NRC staff guidance that a site-
11 specific spectrum of seismic events should be
12 developed. DCS argues that the standard review plan
13 is not binding. GANE agrees that the staff guidance
14 documents are not binding, but they do represent
15 guidance for complying with the regulations.

16 If the applicant doesn't comply with NRC
17 guidance, it must provide some alternative and
18 equivalent means of complying with NRC regulations.
19 Here, the fact that seismic conditions appear to vary
20 within the space of a few hundred feet on the MOX site
21 is an especially compelling reason to do a site-
22 specific spectrum of seismic events.

23 CHAIRMAN MOORE: Ms. Carroll, your time is
24 up.

25 MS. CARROLL: And I'm finished.

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1 CHAIRMAN MOORE: I have a couple of
2 questions.

3 MS. CARROLL: Yes.

4 CHAIRMAN MOORE: How do you respond to the
5 applicant's argument that even if GANE's assertions
6 set forth in Contention 3 are accepted as true, none
7 of these matters demonstrate that the design basis of
8 the MCX fuel facility is erroneous?

9 MS. CARROLL: The Talwani study that we
10 submitted supports our contention that the scenario
11 that DCS analyzed is probably not the bounding
12 incident that needs to be adhered to.

13 CHAIRMAN MOORE: So on page 22 of its
14 answer, DCS addresses that and my question is, is DCS
15 correct on page 22 that the events in the Talwani and
16 Schaeffer study are bounded by the events considered
17 in the CAR.

18 So then it's your position that their
19 statement that they are so bounded is incorrect.

20 MS. CARROLL: It's too dated. There's
21 ample relevant information out that needs to be
22 applied to the design. Talwani shows that the
23 scenarios they looked at are not necessarily bounding.

24 CHAIRMAN MOORE: And on page 23 of their
25 answer to your Contention 3, they say much the same

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1 thing, they say "The value cited by GANE is bounded by
2 the magnitude of the Charleston earthquake as provided
3 in Table 1.3.6-1 of the CAR."

4 MS. CARROLL: But they're relying on data
5 that's dated back to 1974 and we have a study by the
6 authority in the U.S. -- we called to ask for experts
7 and all roads lead to this Talwani guy who is up there
8 in Columbia, South Carolina. He is the authority on
9 seismology and particularly for this zone and he is
10 saying there have been bigger earthquakes, more
11 frequently. And in fact, this liquefaction thing
12 tends to erase the geologic record and that is part of
13 why it's so difficult.

14 But this is abundant, it's a prominent
15 study. Our guy in Colorado went right to it. He had
16 never heard of -- well, he had heard of Talwani and it
17 was just a confirmation, but he is a prominent,
18 prominent man. His study is out there, it's been out
19 there for awhile -- well, it's been out there since
20 April, so I'll concede that maybe they didn't know
21 about this, but it's time to get on board with it.

22 The question that Talwani raises is that
23 the size of the region affected by the Charleston
24 earthquake is greater than was thought.

25 JUDGE KELBER: Well, I'm trying to narrow

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1 the issues, if I can, and I'm not sure how that
2 particular claim enters in, but let me ask you, from
3 an engineering point of view, what I'm interested in
4 is the ground acceleration, the frequency and from a
5 probabilistic point of view, the return frequency.
6 Now which of these are at issue? There are three
7 parameters there, which of these are at issue, in your
8 view?

9 MS. CARROLL: Well, although I was going
10 to answer that, my lawyer tells me I can't and I
11 believe her.

12 JUDGE KELBER: Okay.

13 MS. CARROLL: I don't have the expertise.

14 JUDGE KELBER: I would really have hoped
15 that we would be able to narrow the issues as much as
16 possible here.

17 MS. CARROLL: We would be happy to provide
18 an answer when we consult with our expert.

19 As you're probably aware, the staff and
20 DCS spent a day and a half just two days ago going
21 over some of this and would you like to see the six
22 inch geotechnical document that DCS just submitted?
23 It's obviously an open-ended issue and, Judge, I could
24 make this process work and be clear and we could be
25 sitting here without this open-ended issue -- well,

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1 we'll talk about the motion to dismiss later.

2 CHAIRMAN MOORE: Well, on page 26,
3 following up Judge Kelber's question, again the
4 applicant asserts that even if your allegations
5 regarding return interval are accepted, you have
6 provided no basis for questioning either the design
7 earthquake or that return interval, because your
8 assertions are all bounded by the applicant's
9 earthquake analysis. You just say that this is a
10 disagreement among experts so that there is a fight
11 here.

12 MS. CARROLL: There's a fight.

13 CHAIRMAN MOORE: Okay. Applicant.

14 MR. SILVERMAN: Thank you.

15 I'd like to just make a couple of general
16 points and then I'm going to pause for a minute to
17 consult with my client and certainly if you have
18 questions, we can answer those.

19 Just to briefly reiterate, what we're
20 asking the Board to do is to recognize that there are
21 -- the fact that there may be disparities in
22 individual data points and in particular aspects of
23 the seismic analysis doesn't necessarily mean there's
24 a genuine issue of material fact and does not
25 necessarily mean that they call into question the

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1 design bases. So one of the things we would ask the
2 Board to do is look very carefully at the contention
3 and look at each part of the contention as a separate
4 issue and make its decisions accordingly.

5 CHAIRMAN MOORE: Mr. Silverman, help me
6 out, on page 21 of your response, you speak of a --
7 under number 1, a magnitude 7 earthquake at Charleston
8 with a 600-year recurrence interval -- you identify
9 that as one of GANE's points. And then on the next
10 page you say, "The CAR addresses an earthquake of
11 magnitude 6.9 at Charleston" --

12 MR. SILVERMAN: Right.

13 CHAIRMAN MOORE: -- "which occurred less
14 than 100 miles from the Savannah River Site." And
15 then you go on to say in the next sentence that the
16 magnitude 7 event at Charleston is bounded, if I'm
17 reading this correctly, by the events that you
18 consider. How does a magnitude 6.9 earthquake bound
19 a 7 earthquake at the same location?

20 MR. SILVERMAN: I'll admit that we weren't
21 as clear as we should have been here, Your Honor. In
22 two ways, it does. My understand -- and I'm not a
23 seismic expert -- is that there are different scales
24 used for determining the magnitude of an earthquake.
25 The scale we used came up with a value of 6.9 and that

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1 is -- for those of you who may understand the term --
2 the body wave magnitude. The scale that I understand
3 was used by Talwani and Schaeffer is called the moment
4 magnitude methodology. My understanding is that if
5 you apply that methodology, our 6.9 earthquake is in
6 fact a 7.3 earthquake. That's number one.

7 Number two, when we talk about the
8 earthquake occurring at Charleston, what we're talking
9 about is not in the City of Charleston but at the
10 closest point of the Charleston seismic zone, which is
11 a geographic area close to the facility, so it's
12 actually, as I understand it, about 75 miles away from
13 the facility. So that's actually closer than the City
14 of Charleston. Also, my understanding is that we have
15 in fact designed the facility and the intent is to
16 design it to withstand an event of that magnitude.

17 With respect to the second portion of the
18 contention where we talk about the August 2, 1974
19 event, and we have two different magnitudes alleged,
20 again, we believe that the 4.9 magnitude value is
21 bounded by the Charleston earthquake with the 6.9 and
22 we have identified that in the CAR table. So we don't
23 think that part of the contention raises a material
24 issue.

25 With respect to the 10 events that we were

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1 alleged to have omitted -- and in this regard, GANE
2 says that there is an accumulation of errors, there
3 really isn't an accumulation of errors. There are
4 three of those events that are in fact right there in
5 the table. There are four of them that did occur
6 after the 1993 cutoff date of the table, and that's
7 why they were not included. And with respect to both
8 those events that were not included and the three
9 remaining events that GANE cites, they all have
10 magnitudes in a range which are encompassed by the
11 data that we have presented. There are 250 events in
12 that table and I wouldn't be surprised at all that
13 some individuals could find some events that we did
14 not include.

15 We ask you to consider what impact that
16 has on the seismic design basis.

17 CHAIRMAN MCCRE: On page 22, in response
18 to GANE's assertion that you did not essentially
19 provide references to any of the studies and/or --
20 must have been the studies that -- that you didn't
21 provide references for your statements and/or
22 conclusions. You indicate on page 22 that Section
23 1.3.8 provides other references for seismic
24 information in the CAR.

25 My question is simply is all of the

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1 information set forth in the CAR referenced?

2 MR. SILVERMAN: In the entire CAR?

3 CHAIRMAN MOORE: With regard to seismic.
4 And the reason I ask that is they claim that it is not
5 and give a laundry list of all the things that have
6 not been referenced, they give examples. And you
7 don't answer each one of those but you merely point
8 out that Section 1.3 provides other references. And
9 I just want to know is their laundry list correct.

10 MR. SILVERMAN: I'm sorry, this is a list
11 of statements where they allege we have not provided
12 references?

13 CHAIRMAN MOORE: Their contention on page
14 15.

15 MR. SILVERMAN: What does the paragraph
16 begin with? We may have different page numbering.

17 CHAIRMAN MOORE: Starting with "DCS
18 claims" --

19 MR. SILVERMAN: Yeah, okay.

20 CHAIRMAN MOORE: -- "to evaluate the
21 relationship between geologic structure and seismic
22 sources within the general site region."

23 MR. SILVERMAN: Uh-huh.

24 CHAIRMAN MOORE: And they say two
25 sentences later "For those figures that do indicate

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1 the source of the information, no citation to a
2 reference document is provided in the list of
3 references, and they cite Section 1.3.8. See for
4 instance figures," and they give a bunch of them.

5 MR. SILVERMAN: So they're pointing out
6 areas where allegedly we have provided --

7 CHAIRMAN MOORE: Well, the problem is
8 their concern as expressed in the contention is
9 clearly that they can't independently verify what
10 you've done because you haven't provided them a road
11 map that can be followed --

12 MR. SILVERMAN: I understand.

13 CHAIRMAN MOORE: -- to provide independent
14 verification.

15 (Brief pause.)

16 MR. SILVERMAN: There are -- it appears
17 there are statements that are not referenced to any
18 particular published work -- some references where the
19 intervenors would not have access to the references.
20 Let me just say and I'll be happy to respond to any
21 other questions you have, that let's go back and look
22 at what the contention is. The contention isn't there
23 an omission or error or safety issue. The contention
24 is they couldn't verify our information. And that is
25 not an admissible contention, in our view.

1 CHAIRMAN MOORE: Well, if the applicant
2 can't follow your road map, how can the staff follow
3 your road map to ensure you're correct?

4 MR. SILVERMAN: Well, the staff, if they
5 need additional references have asked for them and we
6 have since provided them. My point is only --

7 CHAIRMAN MOORE: So doesn't that
8 definitionally say that your road map is not able to -
9 - does not demonstrate that your analysis is accurate?

10 MR. SILVERMAN: There is no requirement to
11 have a reference for every statement in the CAR. I
12 don't know the specific statements we're dealing with,
13 but there's certainly no requirement that every
14 factual statement or technical analysis have a
15 published work as a referenced basis. And even if
16 there were, the point is that that is not a statement
17 of any deficiency in the design bases of the principal
18 SSCs. It's not even a statement of really any error
19 or omission. It's not a valid contention.

20 CHAIRMAN MOORE: Well, I guess I'm stuck
21 on circularity again.

22 JUDGE KELBER: Let me ask, what in your
23 view is actually being challenged -- I like to think
24 in engineering terms -- as an engineer, I'm worried
25 about them. Frequency I have to deal with, the

1 amplitude I have to deal with and how often, I have to
2 deal with.

3 Which of those are being challenged?

4 MR. SILVERMAN: Well, I think in reference
5 to the Taiwani and Schaeffer study, it appears there's
6 an assertion about frequency. I'm not an engineer, so
7 I don't know that there's any challenge here to
8 amplitude. There does appear to be a challenge to the
9 return interval.

10 JUDGE KELBER: The return frequency.

11 MR. SILVERMAN: They say return interval,
12 perhaps that's the same.

13 Again, in this particular portion, and I
14 really would urge the Board as they review this
15 contention, once again to break it down and look at
16 the individual bases. The simple allegation is that
17 there is a lack of references, that references are not
18 publicly available and that they could not verify our
19 analysis.

20 CHAIRMAN MOORE: The whole thrust of the
21 contention is that because you have not provided
22 sufficient information, it's impossible to determine
23 whether your analysis is correct. And then they break
24 that down into A, B, C of why they can't independently
25 verify, all shooting to the fact that the CAR is --

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1 the CAR's seismic analysis is insufficient. And I
2 don't understand if the information to determine the
3 sufficiency is not present on the face of the CAR why
4 that's not a valid contention.

5 MR. SILVERMAN: Well, we believe -- I
6 think we believe the information is there in the CAR
7 and there's ample technical information to formulate
8 reasonable contentions and to identify specific
9 alleged errors or omission in the analysis. But to
10 say that gee, we couldn't do that because we don't
11 have all the references is a different matter.

12 CHAIRMAN MOORE: Let me give you another
13 example.

14 MR. SILVERMAN: Sure.

15 CHAIRMAN MOORE: On page 25 of your
16 response, you state in your paragraph number 5, item
17 number 5, probabilistic seismic hazardous assessment,
18 "GANE states that the probabilistic seismic hazard for
19 the MOX facility is incomplete. GANE's only basis for
20 this claim is a reference to an RAI issued by the
21 staff."

22 If you look at 16 and 17 of their
23 contention, under the heading at the bottom of page
24 16, Site Response, isn't that whole first paragraph
25 not a basis for the claim and isn't the reference to

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1 the RAI just additional support?

2 MR. SILVERMAN: Bear with me one minute
3 while I read that paragraph again.

4 (Brief pause.)

5 MR. SILVERMAN: What that paragraph says
6 to me is essentially -- we've obviously abbreviated
7 our description of what the contention is, but the
8 notion is -- what we said is that the contention is
9 that the PSHA is incomplete, and this paragraph
10 indicates that the reason it's incomplete is that it
11 does not indicate that a quantitative site response
12 study for the MCX facility site has been done and that
13 we haven't established -- the potential for intense
14 shaking or soil liquefaction at the site has not been
15 established. We -- our response is that this is (1)
16 based upon the RAI and (2) we say as described in
17 answers to RAIs, detailed site investigations were
18 performed.

19 My point is that our response doesn't just
20 rise or fall on the statement that this is based upon
21 an RAI, we also explain that their statement is
22 incorrect and the analysis has been performed. So I
23 don't think we're mischaracterizing their position.

24 CHAIRMAN MOORE: Where in the CAR can I
25 find that analysis?

1 MR. SILVERMAN: Without spending a lot
2 more time on this, Your Honor, there is a section
3 1.3.6 which is seismology, and I am advised that in
4 that section, we do discuss the probabilistic seismic
5 hazard analysis. It's a pretty long section, I think,
6 and I haven't focused on the specific language.
7 Perhaps we can get you a better answer before the
8 session is over.

9 CHAIRMAN MOORE: Well, we'll have to take
10 a look at that in our further study of all of this.

11 Do you have anything further?

12 MR. SILVERMAN: I may.

13 (Brief pause.)

14 MR. SILVERMAN: I guess the only other
15 point I would add is that GANE has made reference to
16 the geotechnical report that was submitted in August
17 to the NRC. That is something that I don't believe
18 was identified in the contention, so it would be an
19 additional basis, but it's my understanding that if
20 you review that report, it does in fact confirm that
21 the SRS site information is applicable to the specific
22 MOX facility site. The situation is -- the subsurface
23 conditions are comparable.

24 CHAIRMAN MOORE: I'm sorry, I don't think
25 I understood you.

1 MR. SILVERMAN: The geotech report that
2 was submitted, which GANE alludes to --

3 CHAIRMAN MOORE: Correct.

4 MR. SILVERMAN: -- for the first time I
5 think here today, does in fact confirm that the SRS
6 site data is applicable to the MOX facility site and
7 we just wanted to make that point.

8 CHAIRMAN MOORE: If I understood what Ms.
9 Carroll was stating about that report, it indicates
10 that the location identified in the CAR is no longer
11 the subject of the location -- the actual physical
12 location of the facility?

13 MS. CARROLL: I didn't make that clear.
14 The map that's in the CAR does show the current
15 location, proposed location, but the geotechnical
16 report reveals that they moved it, which had not been
17 known before, and we think that the data that caused
18 them to move it is actually completely inconsistent
19 with their statements that there's a uniform
20 seismology.

21 CHAIRMAN MOORE: Okay.

22 MR. SILVERMAN: So the point is the
23 geotech report does analyze our site today.

24 CHAIRMAN MOORE: Mr. Hull, does staff
25 concede the applicability -- I'm sorry -- the

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1 admissibility of GANE Contention 3? I just can't
2 remember if it had a qualification.

3 MR. HULL: No, Your Honor, we had no
4 qualifications on number 3.

5 CHAIRMAN MOORE: Do you have anything
6 you'd like to add?

7 MR. HULL: No, staff has nothing to add at
8 this time.

9 CHAIRMAN MOORE: Okay.

10 JUDGE KELBER: There is nothing -- I'm
11 trying to narrow the issues here because seismic
12 issues tend to get very unwieldy. Is there any
13 particular aspect of this that is of greater concern
14 than any other?

15 MR. HULL: Right now, the staff is
16 reviewing the geotechnical report and I believe I made
17 reference in my September 12 filing to the fact that
18 the staff was going to be having meetings in Aiken
19 which occurred just this week, on Wednesday and
20 Thursday. The geotechnical report was discussed in
21 those meetings, it's still under evaluation, so at
22 this point, I'm not in a position to say whether one
23 technical issue might be more important than another.

24 CHAIRMAN MOORE: Ms. Carroll, Contention
25 5.

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1 MS. CARROLL: Your Honor, I'd like to
2 point out very briefly, and this isn't rebuttal, but
3 this just might be helpful. Don Moniak attended the
4 meeting yesterday morning and thought it was
5 significant to point out, and we agree, that the
6 development of SRS seismic criteria is still an
7 objective that has not been met, and more
8 specifically, site-specific probabilistic seismic
9 hazard assessment is still in process and isn't
10 expected to be completed until December or January.

11 CHAIRMAN MOORE: Fine. Would you address
12 Contention 5?

13 MS. CARROLL: Yes, sir.

14 CHAIRMAN MOORE: And you'll be addressing
15 Contention 8 with 5.

16 MS. CARROLL: That is correct.

17 Contention 5 and Contention 8 deal with
18 incorrect designation of controlled area and
19 Contention 8 impacts minimized through incorrect
20 designation of controlled area. We have ten minutes.

21 These contentions are supported by the
22 expert of Dr. Edwin S. Lyman.

23 Well, we have the map. Everybody's gotten
24 to see the map of Savannah River Site. Let's put it
25 where we can -- great. So what we understand is that

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1 one area is defined by the boundary of Savannah River
2 Site and within that -- which is a 300 square mile
3 area. Within that, we have a 45 acre area which is
4 proposed for the MOX facility, which will have a fence
5 around it. DCS puts the boundary of the controlled
6 area at the SRS boundary site and we disagree that and
7 think it should be at the MOX facility boundary site.
8 We say that as a legal matter, the boundary of the
9 controlled area must be at the edge of the area that
10 DCS controls; that is, the edge of the restricted area
11 which contains the MOX factory. The DCS' illegal
12 designation of controlled area boundary is significant
13 for three important reasons:

14 1. People who work in other areas of
15 Savannah River Site should not be exposed to higher
16 doses than allowable doses for members of the public,
17 unless they get paid by DCS to do so.

18 2. If the boundary of the controlled area
19 is closer to the plant, then DCS must have more
20 rigorous means of keeping doses within regulatory
21 limits, than if the boundary of the controlled area is
22 further from the plant, because radiation levels will
23 be measured at the boundary of the controlled area.

24 And I'm going to go ahead and say this
25 editorial comment that this smacks of dilution is the

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1 solution to pollution.

2 3. The third reason that this is illegal
3 is described in 10 CFR 70.61(b) and (c) and would
4 result in stricter security.

5 DCS argues that it will have a protocol
6 with DCE that limits site access in the event of an
7 emergency. GANE's response to that is we haven't seen
8 this protocol, so we don't know if DCS has the
9 authority to limit access to the entire Savannah River
10 Site and we really appreciate Don's discussion this
11 morning of the many activities that the public may
12 partake upon on the Savannah River Site.

13 It seems doubtful that DOE would give DCS
14 that much authority. It would also be difficult to
15 carry out as a practical matter due to the sheer size
16 of Savannah River Site at 300 square miles. How will
17 DCS physically control access? Are they going to post
18 employees at every ingress and egress point on the
19 Savannah River Site? And are they going to stop every
20 car that comes on and every train? It's an awesome
21 responsibility for a subcontractor.

22 DCS argues that its approach of including
23 DOE facilities within the site and boundaries was
24 sanctioned by NRC in promulgating amendments to Part
25 70 in 2000. Our response is that it is not clear from

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1 the rulemaking document cited by DCS that that is the
2 case. The portion of the statement of consideration
3 cited by DCS relates to comments about doses to
4 "collocated workers," that is workers at nearby DOE
5 facilities who may have occasion to go onto the MOX
6 facility site in the course of their jobs.

7 In responding to the comments, the
8 Commission emphasized that the licensee must establish
9 the controlled area over which it has authority to
10 exclude personnel or property. This gets back to the
11 unanswered question of how DCS could have control over
12 the entire Savannah River Site.

13 Also, DCS has conceded that it now intends
14 to treat non-DCS workers in the controlled area as
15 members of the public during normal operation. If DCS
16 accepts the principle for normal operation, then it
17 should also accept it for accidents.

18 I have a couple more comments.

19 In response to DCS' contention that this
20 issue is outside the scope of the proceeding, GANE
21 contents that it affects the design, where is the
22 fence for the controlled area. What design features
23 are necessary to minimize accident doses to a person
24 at the boundary of the controlled area? The answer to
25 that question depends a lot on whether the distance to

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1 the boundary is measured in feet or in miles.

2 CHAIRMAN MOORE: Anything further?

3 MS. CARROLL: No.

4 CHAIRMAN MOORE: Applicant?

5 MR. SILVERMAN: One of the assertions that
6 GANE makes is that Savannah River Site workers should
7 not be exposed to higher doses than members of the
8 public unless they're paid by DCS. And we don't agree
9 with that at all. There's obviously no requirement
10 for such. What there is is a requirement that
11 collocated workers, Savannah River Site workers, may,
12 for accident purposes, accident analysis purposes, be
13 analyzed against the performance objectives applicable
14 to workers rather than the performance objectives
15 applicable to members of the public, so long as they
16 are properly trained in accordance with 10 CFR Part
17 19. We have committed to do that and that is
18 consistent with the regulations.

19 CHAIRMAN MOORE: I asked you several
20 questions this morning when this subject came up with
21 Mr. Moniak.

22 MR. SILVERMAN: Yes.

23 CHAIRMAN MOORE: And I was wondering -- if
24 I remember correctly, you didn't have an answer but
25 you were going to see if you could get one.

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1 MR. SILVERMAN: Yeah, I have some
2 information for you, Your Honor.

3 My understanding, first of all, is that
4 one of the issues that you asked about is the language
5 in the regulation that says the licensee has the
6 ability to control access for any reason.

7 CHAIRMAN MOORE: Uh-huh.

8 MR. SILVERMAN: We appreciate that
9 language is in the regulation, we think that has to be
10 read in the context of Part 20, the rationale for Part
11 20 and the context of the rationale for having a
12 controlled area boundary designated. Part 20 is a
13 radiation protection regulation and that language has
14 to be construed in the context of that regulation. The
15 primary purpose of the controlled area boundary, as we
16 understand it, is to establish a location at which one
17 calculates doses, radiological doses, to a member of
18 the public.

19 And so we think that it is -- even though
20 the language says "for any reason," we think that it
21 is reason and appropriate under the regulation to
22 conclude that so long as that ability exists to limit
23 access to the area in the event of emergency or other
24 radiological incident, that that meets the regulation.

25 CHAIRMAN MOORE: So the plain meaning rule

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1 of interpreting regulations, construing regulations,
2 is inapplicable to the definition of controlled area?

3 MR. SILVERMAN: We don't understand why it
4 would be relevant or important at all for the
5 applicant to be able to control access entirely at its
6 own whim, unrelated to radiological health and safety
7 considerations, simply because it seems like a nice
8 idea to do it.

9 We also understand that DOE has the
10 ability in its emergency plan --

11 CHAIRMAN MOORE: Well, assume for the
12 moment that we're stuck with the regulation. Aren't
13 the answers either comply or get the regulation
14 changed?

15 MR. SILVERMAN: We have to comply or get
16 the regulation changed, that's correct, or get an
17 exemption from the regulation.

18 CHAIRMAN MOORE: Or seek an exemption from
19 the regulation.

20 MR. SILVERMAN: Right.

21 CHAIRMAN MOORE: Have you sought such an
22 exemption?

23 MR. SILVERMAN: No, because we didn't
24 believe one was necessary.

25 CHAIRMAN MOORE: Well, under my view of

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1 the case from the CADC, where much like this, it had
2 to do with using simulators and I'm sorry, I can't
3 remember the precise language of the regulation but
4 the gist of it was something to the effect that you
5 either could or you couldn't use a simulator for some
6 purpose and even though it was very clear, it wasn't
7 convenient to read it that way and so the agency read
8 it in the convenient way and the Court of Appeals
9 indicated that that was not appropriate conduct on the
10 part of an agency, that it must follow its regulations
11 or change them.

12 So I'm troubled here because unless you
13 produce a protocol that DOE gives you the authority to
14 do this, I can't see how you could comply.

15 MR. SILVERMAN: Well again, we think that
16 we are developing a protocol, we think it will be
17 appropriate and provide the necessary responsibilities
18 and functions. It's an issue that is unrelated to the
19 design basis of the principal SSE, so if it's an issue
20 at all, it is an issue --

21 CHAIRMAN MOORE: Okay, but --

22 MR. SILVERMAN: -- at the possession and
23 use stage.

24 CHAIRMAN MOORE: -- Ms. Carroll just
25 directly addressed that. How is she wrong?

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1 MR. SILVERMAN: I don't recollect how she
2 addressed that, Your Honor.

3 MS. CARRCLL: Where is the fence? Excuse
4 me, I'm sorry.

5 CHAIRMAN MOORE: That the controlled area
6 deals, as you readily concede, with doses and how you
7 design a facility to ensure that the doses that are
8 received under all the various scenarios are different
9 if you measure it in feet than they are with miles.
10 I think that's a fair paraphrase of what she just
11 said. How do you respond that that makes it a design
12 issue?

13 MR. SILVERMAN: There are design issues
14 that are not appropriate for this proceeding. This is
15 an issue about the design bases, the fundamental
16 design parameters of the facility. We have in the CAR
17 specifically identified exactly which items we believe
18 are principal structures, systems and components.
19 there's a list.

20 And for each of those we've specified here
21 are the design bases we used. There's nothing in this
22 contention that says your selection was wrong or you
23 left something out or your design bases are
24 inadequate. That information is there in the CAR to
25 be addressed.

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1 CHAIRMAN MOORE: But you addressed each
2 and every one of those using this controlled area.
3 Now assume you can't use this controlled area, how do
4 those change?

5 MR. SILVERMAN: I don't know the answer to
6 that.

7 CHAIRMAN MOORE: Well, that's what their
8 contention -- that's what's behind this very
9 contention, that's what this contention is all about -
10 - you've used the wrong control area.

11 MR. SILVERMAN: Well, again, we believe
12 that this type of arrangement that we contemplate is
13 both -- was both contemplated by the rule changes in
14 the year 2000 and has been applied in other
15 situations.

16 JUDGE LAM: Mr. Silverman, would you
17 elaborate on that? I'm thinking about that -- you're
18 referring to the gaseous diffusion plant.

19 MR. SILVERMAN: Yes.

20 JUDGE LAM: Would you elaborate on how
21 that facility is compared to this current design?

22 MR. SILVERMAN: Yes, based upon my
23 understanding, which I think is accurate, the gaseous
24 diffusion plants are large Department of Energy
25 reservations operated by the Department of Energy,

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1 virtually the whole facility. Within the site region,
2 within the overall site is a gaseous diffusion --
3 operating gaseous diffusion plant operated by, in
4 effect, an NRC licensee. They hold certificates --
5 that's the United States Enrichment Corporation --
6 doesn't hold a license, it holds a certificate of
7 compliance.

8 That facility is regulated by the NRC.
9 The rest of the Portsmouth and Paducah reservation is
10 not. We have a situation where the MOX facility will
11 be regulated by the NRC, the rest of the Savannah
12 River Site reservation will not be.

13 CHAIRMAN MOORE: I think you'll find, Mr.
14 Silverman, that not only is it just the site, the
15 actual physical plant itself, portions of it, are
16 regulated by DOE and portions of it are not.

17 MR. SILVERMAN: That's absolutely right.

18 CHAIRMAN MOORE: Within side the walls.

19 MR. SILVERMAN: That's right. They even--

20 CHAIRMAN MOORE: Doesn't that make it a
21 considerably different situation?

22 MR. SILVERMAN: I don't see how that does
23 in this case. The controlled area boundary in that
24 case is at the boundary of the Paducah and Portsmouth
25 sites, just like we're proposing to do here. That is

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1 where the public dose is calculated.

2 CHAIRMAN MOORE: Well, if you live in a
3 duplex, which is essentially the situation at the
4 gaseous diffusion plants because part of the plant is
5 DOE and part of the plant is United States Enrichment
6 Corporation, how do you differentiate the common area,
7 essentially, in that situation? I would suggest to
8 you it's impossible.

9 MR. SILVERMAN: Well, I don't know the
10 answer to that in that case. They have obviously
11 addressed those issues, those plants are operating and
12 they're operating under NRC oversight and to the best
13 of my knowledge, they're operating safely.

14 CHAIRMAN MOORE: But that, in no way,
15 shape or form, even indicates that this issue has ever
16 even been addressed in that facility, does it? The
17 fact that it exists doesn't mean that it was
18 addressed.

19 MR. SILVERMAN: No, the certificate
20 applications for those facilities specify where the
21 controlled area boundary is and I think do indicate
22 that there are arrangements with the Department of
23 Energy to exert control over those facilities in the
24 event of an emergency.

25 CHAIRMAN MOORE: Okay. Anything else?

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1 MR. SILVERMAN: No, nothing else.

2 CHAIRMAN MOORE: Staff.

3 MR. HULL: Your Honor, the staff continues
4 to come to the position that -- I mean, there's no
5 question that the definition of controlled area states
6 what it states, but GANE has not -- in proffering this
7 contention, GANE has not identified any evidence which
8 supports its position that the DCS assumption about
9 the appropriate controlled area boundary adversely
10 affects the adequacy of its physical security measures
11 and that as a result the design basis of the MOX
12 facility does not adequately support approval of
13 construction. They provide no evidence to support
14 that assertion, so the staff continues to view this as
15 an inadmissible contention.

16 GANE is obligated to provide some evidence
17 which merits further inquiry and if you compare this
18 contention to Contention 3, you'll -- the staff urges
19 that you should find that Contention 5 is not
20 adequate. They really rely only on the fact that the
21 staff has issued requests for additional information
22 to DCS on this topic, but they don't provide any other
23 independent evidence that there's a problem.

24 CHAIRMAN MOORE: Well, if the applicant
25 has applied a wrong definition, isn't that, in and of

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1 itself, indicative that the analysis is highly
2 questionable?

3 MR. HULL: I don't think it's been
4 established that they apply wrong definition.

5 CHAIRMAN MOORE: Well, assume for the
6 moment that you have to comply with the definition
7 contained in 10 CFR Section 20.1003, controlled area.
8 And assume for the moment that they cannot comply with
9 the "for any reason" provision of that definition.

10 Now if you accept that as the definition
11 of controlled area in the regulations and that it has
12 been inappropriately applied by the applicant, then
13 doesn't that, on its face, raise the question as to
14 the propriety of their analysis?

15 MR. HULL: Well, but it hasn't been
16 established that the either DOE or DCS would not have
17 the authority to limit access to that area for any
18 reason.

19 CHAIRMAN MOORE: Well, it has to be the
20 licensee, Mr. Hull.

21 MR. HULL: Excuse me?

22 CHAIRMAN MOORE: The regulation says
23 licensee.

24 MR. HULL: And it's my understanding that
25 there is some agreement or protocol that's trying to

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1 be worked out between DOE and DCS on this point.

2 CHAIRMAN MOORE: And I believe it's
3 accurate that Mr. Silverman has not been willing to
4 indicate that DOE will cede the authority for them at
5 any time for any reason to exclude persons from the
6 entire controlled area, including State Route 25 and
7 the CSX Railroad.

8 MR. HULL: But I still don't see any
9 evidence of how this affects the adequacy of the
10 proposed physical security measures.

11 CHAIRMAN MOORE: Fine.

12 MR. HULL: And how it would adversely
13 affect the design basis of the MOX facility. I don't
14 see any evidence submitted by GANE which goes to those
15 questions.

16 CHAIRMAN MOORE: Okay, fine.

17 MR. SILVERMAN: May I clarify --

18 JUDGE KELBER: Let me ask one question.
19 Suppose I take a very simple illustration that I have
20 a plant which emits some stray radiation and I measure
21 the dose received by a member of the public at 100
22 yards and 1000 yards. Clearly it's going to be
23 different. If I designed the plant to make the dose
24 fall within Part 20 limits at 1000 yards, it is very
25 likely to exceed that by a considerable measure at 100

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1 yards; is that not correct?

2 MR. HULL: Let me make sure I understand.
3 You're saying that let's say they put a fence 1000
4 yards away versus a fence 100 yards away and would
5 there be differences between those two scenarios?

6 JUDGE KELBER: Yes, in the design of the
7 plant, if I designed it for 1000 yards and then I find
8 that I have to work at 100 yards, don't I have to do
9 something to meet Part 20? I meet Part 20 at 1000, I
10 don't meet it at 100.

11 MR. HULL: Just a moment, Your Honor.

12 (Brief pause.)

13 MR. SILVERMAN: Your Honor, could I
14 attempt to answer the question while the staff is
15 discussing it?

16 MR. HULL: Your Honor, I'm going to have
17 the project manager, Drew Persinko, address your
18 question.

19 MR. PERSINKO: My name is Drew Persinko,
20 I'm the project manager -- NRC's project manager on
21 MOX. Responding to the Board, it's conceivable that
22 if you do change the boundary of where the public dose
23 starts, that that could affect your design. You might
24 have to change some of the principal SSEs -- you could
25 conceivably. But that assumes that the establishment

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1 of the controlled area boundary is incorrect at the
2 outset, which I don't know that's been established
3 yet.

4 JUDGE KELBER: Thank you.

5 MR. SILVERMAN: May I elaborate?

6 CHAIRMAN MOORE: Mr. Hull, one final
7 thing, look at page 20 of the contention, and it cites
8 apparently one of your RAIs.

9 MR. HULL: You're talking about the final
10 paragraph on page 20, Your Honor?

11 CHAIRMAN MOORE: Correct, over onto page
12 21. And if the staff agrees with the applicant's
13 interpretation of 10 CFR 21003, and you bring up
14 70.61(f). If you agree with that, then why did the
15 staff issue this RAI that is cited here stating a
16 different interpretation of the rule?

17 MR. HULL: Well, again, Your Honor, I have
18 to go back to the fact that an admissible contention
19 cannot be based solely on the fact that an RAI was
20 issued and I don't see any other evidence that GANE
21 has given us which supports this contention.

22 CHAIRMAN MOORE: Well, I would suggest
23 that looking at the contention, that they have applied
24 the wrong definition and haven't met the definition in
25 the regulation, but you don't find that sufficient?

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1 MR. FULL: I don't see any evidence of how
2 it affects, adversely affects, health and safety
3 interests.

4 CHAIRMAN MOORE: Ms. Carroll, GANE
5 Contention 6, please.

6 MS. CARROLL: We have eight minutes. The
7 contention that's being referred to is inadequate
8 safety analysis and our expert opinion for this
9 contention is provided by Dr. Edwin S. Lyman. This
10 contention challenges the adequacy of DCS' safety
11 analysis. It is supported by the expert declaration
12 of Dr. Edwin Lyman.

13 The NRC staff does not approve -- by the
14 way, Dr. Lyman was planning to come today and declined
15 because of the events last week. There were family
16 pressures not to fly. The NRC staff does not oppose
17 the contention with the exception of language relating
18 to the boundary of the controlled area. DCS first
19 criticizes GANE's reliance on an RAI as "insufficient"
20 by itself to support the contention, but GANE's
21 discussion of the RAI reflects the fact that GANE's
22 expert agrees with the RAI. The contention also gives
23 the reasons for his agreement.

24 DCS also claims that GANE does not provide
25 sufficient detail in support of its argument that the

1 CAR does not analyze a boundary case with respect to
2 the source term for a fire involving the plutonium
3 oxide buffer storage unit. The the contrary, at page
4 23 and 24, GANE gives specific examples of its reason
5 for questioning the accuracy and the conservatism at
6 DCS' analysis.

7 DCS also argues that GANE has not
8 adequately supported its challenge to DCS' assumption
9 that two banks of hepa filters will continue to
10 operate in an accident. DCS says that it does not
11 rely on hepa filters to comply with requirements of 10
12 CFR 70.61, but it does admit that hepa filters are
13 relied on for defense in-depth which is required by 10
14 CFR 70.64(b). DCS also claims that hepa filters will
15 have an efficiency of 99.95 percent and that it was
16 conservative in assuming that they would be only 99
17 percent effective.

18 This argument ignores the report in RAI
19 cited on page 25 of GANE's contentions, indicating
20 that hepa filter performance is uncertain and might be
21 nil.

22 The following is an additional quote from
23 the abstract of the Bergman DOE report that is cited
24 at note 19 on page 26 of GANE's contentions: "The
25 deterioration of the filter efficiency depends on the

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1 exposure parameters. In severe exposure conditions,
2 the filters would be structurally damaged and have a
3 residual efficiency of zero percent."

4 Finally, DCS claims --

5 JUDGE KELBER: Excuse me. Where did that
6 quote come from?

7 MS. CARROLL: It's from -- I'm sorry --
8 it's from a report that's cited, the Bergman DOE
9 report --

10 JUDGE KELBER: Thank you.

11 MS. CARROLL: -- that's cited at note 19.

12 JUDGE KELBER: At footnote 19, thank you.

13 MS. CARROLL: Finally, DCS claims that
14 GANE has not raised a viable dispute with DCS over
15 whether DCS' instrumentation and control system
16 satisfies the defense in-depth principle. According
17 to DCS, there is redundancy within the instrumentation
18 and control system, but the system lacks one feature
19 necessary to defense in-depth -- a balance between
20 prevention and mitigation. Given -- and I shouldn't
21 say one because I'm not sure that it's limited to
22 that. Given that mitigation by hepa filters is
23 uncertain, DCS' MOX factory design lacks a mitigation
24 feature.

25 And I'm finished.

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1 CHAIRMAN MCCRE: Applicant.

2 MR. SILVERMAN: Yeah, there are three
3 components to this contention, three elements. The
4 first is the allegation that we didn't analyze the
5 bounding case for a fire in the plutonium oxide buffer
6 storage unit. Essentially the allegation is that more
7 justification is required for our position and that
8 our assumptions should be further examined. That is
9 language from the GANE contention.

10 Essentially also, they appear to call into
11 question the assumptions we've made about the fraction
12 of plutonium that could become airborne and
13 respirable. We took those values that we selected for
14 those factors from the NRC staff's own accident
15 analysis guidelines.

16 In fact, we took the most conservative
17 airborne fraction assumption and also the most
18 conservative assumptions regarding the portion of the
19 plutonium that could become respirable from three
20 different studies, and even with those very
21 conservative values, the result of our accident
22 analysis shows that we are well, well below the
23 regulatory requirements which is performance
24 objectives in the event of an accident both for doses
25 to members of the public and to workers. So we don't

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1 think that raises a material issue.

2 With respect to the centering furnace, the
3 hydrogen explosion in the centering furnace, GANE
4 alleges that we provided inadequate analysis and
5 challenges our hepa filter efficiency. We in fact
6 analyzed in the CAR an explosion event in the aqueous
7 polishing process as well as in the centering furnace,
8 and the aqueous polishing process explosion event that
9 was considered had a larger source terms and bounds
10 the centering furnace event. We don't describe the
11 centering furnace explosion in detail because it's not
12 the bounding case, the bounding case is the aqueous
13 polishing process explosion.

14 Finally, with respect to our -- GANE's
15 concerns about --

16 JUDGE KELBER: Excuse me. Aqueous
17 polishing process explosion, that's a hydrogen
18 explosion?

19 MR. SILVERMAN: Apparently it could be any
20 kind of explosion including a hydrogen explosion.

21 JUDGE KELBER: But one doesn't know what
22 size explosion it is, does one? It can be anything.

23 MR. SILVERMAN: It's a deterministic
24 accident based upon the largest -- all of the material
25 in the largest tank in a cell -- and a cell is a

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1 segmented portion of the facility that's segmented
2 from the rest of the facility. It's all the tanks in
3 the cell and the cell is protected from the rest of
4 the facility.

5 JUDGE KELBER: But the cell is in effect
6 not in line in that process, it's in a separate
7 process?

8 MR. SILVERMAN: This is Gary Kaplan from
9 DCS.

10 MR. KAPLAN: All -- the AP process is
11 contained in many cells which are segmented from each
12 other and the bounding explosion involves all of the
13 material within one of those cells.

14 JUDGE KELBER: In one cell.

15 MR. KAPLAN: That's correct. There's more
16 material involved than that, more radiological
17 material involved than that, in the centering furnace.

18 JUDGE LAM: And in the bounding analysis,
19 the hepa filter does not suffer any structural damage,
20 is that correct?

21 MR. KAPLAN: For -- the safety strategy
22 for explosions is to prevent them. Basically 10 CFR
23 70.61 we're going to prevent all the explosions in the
24 facility. As defense in-depth, we will show that the
25 hepa filters survive the explosion, provide mitigation

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1 if that explosion were to occur.

2 JUDGE KELBER: Wait a minute, wait a
3 minute. If the explosion were to occur, you maintain
4 the hepa filters will maintain most of their
5 capability?

6 MR. KAPLAN: Yes, we'll demonstrate that,
7 that's correct.

8 JUDGE KELBER: You intend to demonstrate
9 that?

10 MR. KAPLAN: Yes, but to meet 70.61, we're
11 going to demonstrate that the explosions are
12 prevented, they're made highly unlikely.

13 JUDGE LAM: May I ask you, how could that
14 be feasible? We're dealing with a great deal of
15 distance from the site of the explosion to where the
16 hepa filters are located?

17 MR. KAPLAN: Right. It's distance and
18 these are relatively small tanks, relatively small
19 explosions, that's correct.

20 JUDGE LAM: So the source terms are small
21 and the distance is great.

22 MR. KAPLAN: That's correct.

23 JUDGE KELBER: I'm familiar with some of
24 these plants since I gave a talk at the Second
25 International Conference on Plutonium way back on a

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1 pilot plant. And the explosion, if one should occur,
2 would propagate down what is essentially a long pipe.
3 Where is the attenuation?

4 MR. KAPLAN: Well, there will be features
5 as necessary to protect the hepa filters, if
6 necessary.

7 JUDGE KELBER: Ah-ha! These features are
8 described somewhere?

9 MR. KAPLAN: They will be described in the
10 ISA, correct.

11 JUDGE KELBER: In the what?

12 MR. KAPLAN: In the license application.

13 MR. SILVERMAN: In the integrated safety
14 analysis.

15 JUDGE KELBER: Features which are being
16 designed now and are necessary to protect the hepa
17 filters, but they are not a part of the CAR?

18 MR. KAPLAN: At the current time, the
19 design, basically the piping system, is very small and
20 we think the analysis will show that the explosion
21 won't propagate down where we'll need any additional
22 features.

23 JUDGE KELBER: Wait a minute. The shock
24 wave is going to go down this tube and it's not going
25 to need any additional features, it's going to

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1 attenuate naturally to a few inches of water? I
2 somehow doubt that.

3 MR. SILVERMAN: Again, what we're talking
4 about here is providing at this stage of the process
5 the design bases, not the detailed design.

6 JUDGE KELBER: Well, but the design basis
7 certainly has to include some feature to deal with
8 hydrogen explosions and such other explosions as you
9 may want. And we're being told that some magical
10 feature which attenuates a shock wave passing through
11 a long tube is going to be introduced. It's surely
12 vital when you have hepa filters which are unsupported
13 by anything other than their will to live.

14 MR. SAINT LOUIS: I'm Tom Saint Louis with
15 DCS.

16 The network of piping that connects to the
17 hepa filters starts out small at the source of the
18 explosion, but expands because it serves many parts of
19 the facility. So that will attenuate the shock wave.
20 In addition, there are features inside the filter
21 housings that are described in the CAR that protect
22 the filters.

23 JUDGE KELBER: I read those features and
24 they're pretty standard.

25 MR. SAINT LOUIS: Yes.

1 JUDGE KELBER: And I agree with them, of
2 course, but that's beside the point. Are there
3 calculations to support this assertion that the shock
4 wave will be so attenuated down to a few inches of
5 water pressure?

6 MR. SAINT LOUIS: The calculations are
7 being performed and will be submitted in the ISA.

8 MR. SILVERMAN: Which will be part of the
9 license application.

10 JUDGE KELBER: I wish I had their
11 confidence. Regardless of the fact that you decide
12 that the hydrogen explosion would not be bounding --
13 and I'm not sure why -- you feel that you do not have
14 to adhere to any of the OSHA regulations regarding the
15 use of safety devices or the NASA standard for
16 hydrogen and hydrogen systems? I don't see any
17 reference -- there's also an ASME standard. I didn't
18 see any reference to any of these standards in the
19 CAR.

20 MR. SILVERMAN: Well, if there are OSHA
21 requirements that apply, Your Honor, we will obviously
22 have to adhere to them and would intend to adhere to
23 them, but they're not part of the construction
24 authorization request and they're not issues to the
25 NRC.

1 JUDGE KELBER: Well, certainly ASME
2 standards and NASA standards are.

3 MR. SILVERMAN: Well, ASME standards may
4 be selected and used as part of the design basis and
5 we have committed to certain ASME standards.

6 JUDGE KELBER: But not the ones dealing
7 with hydrogen.

8 MR. SILVERMAN: I'm not sure about that,
9 we could check on that.

10 MR. SAINT LOUIS: We are following both
11 the Compressed Gas Association and the NFPA standards
12 for hydrogen distribution and storage on the site.

13 JUDGE KELBER: What is the target
14 reliability for the ISC system that's going to prevent
15 these explosions? When you say prevent, you really
16 mean you have a target reliability.

17 MR. SILVERMAN: Judge Kelber, we'd like a
18 couple of minutes to answer that and pick it up after
19 we take an afternoon break.

20 JUDGE KELBER: Sure.

21 MR. SILVERMAN: Thank you.

22 CHAIRMAN MOORE: So that I can understand
23 some of what was just done between you and Dr. Kelber,
24 are the cells dependent or independent of one another?

25 MR. SAINT LOUIS: The cells are connected

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1 with an exhaust ventilation system, so they're
2 structurally separate from each other.

3 CHAIRMAN MOORE: But they are connected
4 through a ventilation system?

5 MR. SAINT LOUIS: That's correct.

6 CHAIRMAN MOORE: Okay. Are there any
7 other connections?

8 MR. SAINT LOUIS: There's process piping
9 that passes material from one operation to the next
10 operation.

11 CHAIRMAN MOORE: And these are sequential?

12 MR. SAINT LOUIS: That's correct.

13 CHAIRMAN MOORE: And all of the process
14 piping and all of the ventilation system follows the
15 sequence of the cells?

16 MR. SAINT LOUIS: That's correct.

17 JUDGE KELBER: I do have one final
18 question. People speak of bounding accidents here, do
19 you mean the highest consequence or the highest risk
20 to individuals? And I guess I sort of ask that of
21 GANE as well.

22 MR. KAPLAN: What's proposed there is the
23 bounding consequence analysis.

24 JUDGE KELBER: Pardon?

25 MR. KAPLAN: Bounding consequences.

1 JUDGE KELBER: Thank you.

2 MR. KAPLAN: Assuming the event occurs,
3 So it would also be the highest risk.

4 CHAIRMAN MOORE: Mr. Silverman, did you
5 have anything further?

6 MR. SILVERMAN: No, sir.

7 CHAIRMAN MOORE: Mr. Hull.

8 MR. HULL: Staff has nothing at this time.

9 JUDGE KELBER: Mr. Hull, in replying to
10 the contention, you wrote in part, "For example, GANE
11 contends that a hydrogen explosion in the centering
12 furnace of the proposed MOX facility is not adequately
13 analyzed in the CAR and that a previous safety study,
14 excerpts of which are attached to GANE's contentions as
15 Exhibit 6, of MOX fuel fabrication plants identify
16 this scenario as one of the common risk contributors."

17 In the scoping summary report you
18 distributed on August 28, I find no mention of
19 hydrogen explosions. Do you believe the scope of the
20 EIS will be extended to include the effects of such
21 explosions?

22 MR. HULL: Haven't considered that
23 question, Your Honor, but if we in reviewing the EPRI
24 interim report that is referenced in footnote 23 on
25 that page that you were just reading from -- and just

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1 for the record, this is the staff's September 12, 2001
2 response to the contentions -- it's certainly possible
3 that if we reviewed that report and conclude that it
4 does need to be discussed in the EIS, we'll discuss it
5 in the EIS.

6 JUDGE KELBER: Thank you.

7 MS. CARROLL: I'm a little bothered by
8 their willingness to discuss this outside of the
9 public.

10 CHAIRMAN MOORE: I'm sorry, I --

11 MS. CARROLL: I'm a little bothered by the
12 applicant and the NRC staff's willingness to discuss
13 various and sundry issues, as long as the public is
14 not involved.

15 CHAIRMAN MOORE: That's not directly
16 relevant to what we have in front of us today.

17 If you would address, Ms. Carroll, your
18 Contention 7.

19 MS. CARROLL: Contention 7, GANE contends
20 that the ER is inadequate to address the environmental
21 impacts of using MOX fuel in the Catawba and McGuire
22 reactors. We have five minutes. We rely on Dr. Edwin
23 S. Lyman's expert opinion for this contention.

24 This contention challenges the failure of
25 the ER to address the environmental impacts of

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1 irradiating MOX fuel in the McGuire and Catawba
2 reactors. It is supported by the expert declaration
3 of Dr. Edwin Lyman.

4 As the contention sets forth, there is
5 significant new information not considered in DOE's
6 SPB EIS that the likelihood and consequences of an
7 accident at a reactor that burns MOX fuel is
8 substantially greater than previously thought. This
9 has an indirect impact that must be considered in the
10 ER and the EIS.

11 DCS and NRC both argue that this
12 contention is not admissible because it was not
13 embraced in the Notice of Opportunity for a Hearing.
14 But the Notice stated that the issues to be heard
15 include whether the action called for under NEPA is
16 issuance of the license. We cannot imagine how it
17 could be irrelevant to that determination to inquire
18 whether the product that is being licensed can be used
19 safely. That question cannot be answered adequately
20 by reference to DOE's generic EIS because DOE did not
21 address the additional risks of burning MOX in ice
22 condenser containments.

23 That's all I've got.

24 CHAIRMAN MOORE: Applicant.

25 MR. POLONSKY: Everything I've heard today

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1 on this contention is the same that we read in the
2 written contention and we have the same response.
3 It's outside the scope of the proceeding. It deals
4 with the Catawba reactors and specific technical
5 information regarding those reactors. It doesn't have
6 anything to do directly with the MOX facility license.

7 CHAIRMAN MOORE: In -- and I can't lay my
8 hands on it -- your CAR -- I'm sorry, in the
9 environmental report -- in Section 5.6.4, last
10 sentence, you state "Safety and environmental impacts
11 of design basis and beyond design basis accidents will
12 be analyzed by the mission reactor licensee as part of
13 the 10 CFR Part 50 reactor license amendment process."

14 What's your basis for stating that?

15 MR. POLONSKY: Our basis is that in order
16 for -- we assume that in order for Duke to accept MOX
17 fuel for irradiation in their reactors which are
18 licensed under Part 50, that they will likely undergo
19 a separate licensing proceeding to amend their
20 licenses to irradiate that fuel.

21 CHAIRMAN MOORE: Well, we know that much.
22 But as part of any either environmental assessment
23 and/or an environmental impact statement, that's where
24 this would come in in part?

25 MR. POLONSKY: I'm not sure I understand

1 your question, Judge.

2 CHAIRMAN MOORE: Well, what we're reading
3 from is from your environmental report.

4 MR. POLONSKY: Yes.

5 CHAIRMAN MOORE: So I'm assuming that if -
6 - clearly there will have to be safety analysis done,
7 but in addition, the consequences of design basis and
8 beyond design basis accidents would be done as part of
9 the -- under NEPA -- for the target reactors or the
10 reactors that are going to burn the fuel.

11 MR. POLONSKY: I hope this answers your
12 question. What NEPA would require is any significant
13 change to the facility that was not incorporated in
14 their initial NEPA analysis, assuming those plants
15 were, you know, authorized to operate after 1970.

16 CHAIRMAN MOORE: And you seem to indicate
17 that there would be such.

18 MR. POLONSKY: We assume so, but --

19 CHAIRMAN MOORE: Staff.

20 MR. HULL: Yeah, the -- well, I'll be
21 happy to answer any questions, I don't have anything
22 to state at this point.

23 CHAIRMAN MOORE: Do you agree with the
24 statement I read from the applicant's environmental
25 report, Section 5.6.4, the last sentence?

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1 MR. HULL: I'm sorry, Your Honor, you'll
2 need to repeat it. I was looking at something else
3 while you were --

4 CHAIRMAN MOORE: "Safety and environmental
5 impacts of design basis and beyond design basis
6 accidents will be analyzed by the mission reactor
7 licensee as part of the 10 CFR Part 50 reactor license
8 amendment process."

9 MR. HULL: Yes, that's correct.

10 CHAIRMAN MOORE: So if this contention
11 were submitted at the appropriate time and by an
12 appropriate petitioner, would it be admissible in a
13 reactor amendment licensing proceeding on one of these
14 four mission reactors?

15 MR. HULL: Well, you know, assuming the
16 requirements of the contention rule were met and the
17 contention was specific enough.

18 CHAIRMAN MOORE: But the subject is one
19 that clearly will be open during the mission reactor
20 amendment process?

21 MR. HULL: Yes, it'll be considered as
22 part of the staff's NEPA review. And I think as you
23 stated earlier today, Judge Moore, it will probably be
24 more beneficial to do the specific analyses at the
25 four reactors at that time, if and when it becomes

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1 necessary rather than do some sort of generic
2 environmental analysis right now.

3 CHAIRMAN MOORE: Okay, we're going to take
4 a brief -- and I mean brief -- five minute recess.
5 It's now 3:09. We will be back in session at 3:14.

6 (A short recess was taken.)

7 CHAIRMAN MOORE: Ms. Carroll.

8 MS. CARROLL: Yes, sir.

9 CHAIRMAN MOORE: Contention 9.

10 MS. CARROLL: Contention 9, we're styling
11 as inadequate cost comparison, and we have three
12 minutes.

13 This contention challenges the failure of
14 the environmental report to consider the economic
15 costs of the MOX facility. The NRC staff does not
16 oppose admission of the contention.

17 DCS argues that 10 CFR 51.45(c) does not
18 require -- putting emphasis on the word require --
19 economic analysis because the regulation uses the word
20 "should" instead of "must," but "should" is not a
21 command that can be ignored like "may." "Should"
22 means you ought to do it unless you have a good reason
23 not to. And DCS has not provided a reason.

24 DCS also argues that GANE cannot ask for
25 a discussion of costs because the DOE generic EIS

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1 already made a decision that the costs are acceptable.
2 That decision was based on information that has become
3 outdated. The DOE EIS cannot be frozen in time, the
4 government has to keep updating its environmental
5 analysis as the decision-making process progresses and
6 becomes more specific.

7 The decision to license the MOX facility
8 must be based on accurate information about its costs.
9 Even if the NRC cannot revisit the balance of MOX
10 production versus the immobilization that was struck
11 in the generic EIS, -- I'm having trouble reading my
12 notes, excuse me -- the heart of the cost/benefit
13 analysis required here is located on the base of
14 plutonium disposition. Whether or not to dispose of
15 plutonium and then weighing out immobilization versus
16 MOX as the proposed disposition paths under this NEPA
17 process.

18 The public deserves this analysis. We
19 have these new reports showing phenomenally escalated
20 costs, almost 50 percent more than they were two years
21 ago, to produce MOX. So that even if the NRC can't
22 revisit the immobilization versus MOX production
23 question, they do have authority to see that this
24 information is gathered and available to the public,
25 so the public knows what it's getting into.

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1 So, the ER must discuss the economic costs
2 associated with the choice. This type of disclosure to
3 decision-makers and the public is one of the most
4 important and valuable features of NEPA.

5 Thank you.

6 CHAIRMAN MOORE: Applicant.

7 MR. POLONSKY: I hope I'm not
8 mischaracterizing what Ms. Carroll said, but I thought
9 I heard that she said that there has not been a
10 violation of an NRC regulation and that the regulation
11 says "should" and that we were supposed to have
12 provided a rationale for why we did not put in
13 something that a regulation says -- uses the word
14 "should" but in fact, we don't view that as a
15 violation of the regulation on its face, and if you
16 look at the plain meaning, it says "should" and we are
17 not required to do so, and we did not.

18 CHAIRMAN MOORE: Turn to the last sentence
19 of Section 51.45, please -- 51.45(c), last sentence.
20 What verb does it use?

21 MR. POLONSKY: Should contain.

22 CHAIRMAN MOORE: Now would you contend
23 that your environmental report does not need to
24 contain data sufficient to aid the Commission in
25 development of an independent analysis?

1 MR. POLONSKY: No.

2 CHAIRMAN MOORE: Okay. So what that
3 means, in effect, is that the -- I assume that even
4 though "should" in some circumstances can be read as
5 non-mandatory language, in other circumstances, it can
6 be read as mandatory in the same sense as "shall" or
7 "must."

8 MR. POLONSKY: But even this sentence,
9 Judge Moore, if there was a deficiency in the ER,
10 additional information would have needed to be
11 provided for it to have been accepted and used by the
12 NRC. We are not aware of a reason for the NRC to seek
13 economic information.

14 CHAIRMAN MOORE: Well, one of the problems
15 with your interpretation, as I see it, is in the
16 sentence that you're relying on as saying "should" and
17 hence not being mandatory, the preposition "also" was
18 used. And what does the word "also" mean in that
19 context, if it is permissive, as you contend?

20 MR. POLONSKY: I will accept your
21 definition for the following discussions, if I can
22 move ahead and give an example of why I think that
23 even though the word "should" doesn't require us to,
24 that there are reasons why an economic cost/benefit
25 analysis is not necessary in all situations, and if

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1 the word "should" is used, it may indicate that there
2 are circumstances where an economic cost benefit
3 analysis is not required. Such a situation would be
4 where a programmatic EIS has already been conducted or
5 where, in this case, the DOE's record of decision,
6 which incorporated two specific and detailed cost
7 analyses, already made the decision that the costs
8 were acceptable.

9 Now they proffer that new financial
10 information has been released in, from what I
11 understand, a draft report that was recently issued.
12 But the question is whether NEPA requires an economic
13 cost/benefit analysis. And to the extent that they
14 state -- that GANE states that DOE must update its
15 analysis, that is on the onus of DOE to conduct.

16 And NEPA, for example, within a
17 supplemental EIS scope, would only require that if
18 that were a material or significant change that the
19 DOE decided was a definition of material or
20 significant. There's been no indication that the type
21 of cost changes are material or significant and
22 there's no indication that the underlying need for
23 this program, which is the U.S./Russia agreement,
24 would be changed in any way by an increase in costs.

25 In addition, this is not an economic cost

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1 comparison of the MOX facility in a vacuum. It's in
2 comparison to MOX versus immobilization and the
3 decision of whether to pursue a hybrid or a single MOX
4 fabrication or a single immobilization is a DOE policy
5 decision that was made by DOE, supported by the
6 U.S./Russian agreement, which requires a hybrid
7 approach of both immobilization and MOX fabrication.
8 And that decision -- that policy decision -- is DOE's
9 and we believe outside the scope of this proceeding.

10 So even if the word "should" does require
11 it under normal circumstances, we believe the
12 circumstances of this case provide an exception.

13 JUDGE KEEBER: Strictly from the point of
14 view of English grammar, should and shall are
15 indistinguishable in this case. After all, we don't
16 have a command that you should not commit adultery,
17 but we could have.

18 CHAIRMAN MOORE: Staff, do you have
19 anything?

20 MR. HULL: No, Your Honor.

21 CHAIRMAN MOORE: Ms. Carroll, Contention
22 Number 10.

23 MS. CARROLL: Contention Number 10,
24 inadequate discussion of transportation impacts.

25 Comments were made by -- these comments

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1 were made by a respected entity with substantial
2 expertise. They relate to inadequacies of DOE's
3 generic EIS to address environmental impacts of
4 transportation of plutonium through Georgia to the MOX
5 facility. These comments were not addressed or
6 resolved in the final generic EIS, they are not
7 addressed or resolved in the environmental report.

8 All the new analysis that has been
9 referred to in DCS's argument, and I don't recall if
10 NRC referred to them, they were for transport of newly
11 manufactured fuel to the reactors. Our concern is
12 with plutonium coming through the state of Georgia
13 from the western states to the facility.

14 It's okay for the government to do tiered
15 EISs, but if NRC and DCS are going to rely on a DOE
16 EIS, it has to be adequate to address the general case
17 -- sorry, can't read the writing here -- but if the
18 NRC and DCS are going to rely on a DOE EIS, it has to
19 be adequate to address the general case and it also
20 has to be adequate to embrace the specifics of the
21 individual case.

22 GANE's contention shows that DCS'
23 environmental report and the generic EIS are
24 inadequate to address transportation impacts. It is
25 important to note that NRC and DCS to not identify

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1 passages in the generic EIS where the state of
2 Georgia's comments were addressed or resolved. And it
3 was the state of Georgia's comments on the record that
4 provided most of the basis of our contention -- the
5 material basis of our contention.

6 Thank you.

7 CHAIRMAN MOORE: Applicant.

8 MR. POLONSKY: The contention is basically
9 a regurgitation of State of Georgia comments on the
10 draft SPD EIS. There were, I believe, hundreds of
11 comments submitted by different people on the SPD
12 draft EIS, which as part of the NEPA process were
13 considered and either rejected or incorporated as
14 appropriate, as any NEPA process would be, into the
15 final SPD EIS.

16 The fact that GANE believes that the State
17 of Georgia's comments should have been incorporated
18 and believes that they were not incorporated by DOE
19 into the SPD EIS has little or no bearing on the
20 adequacy of the ER. It would merely be stating that
21 they had commented themselves on the SPD EIS and their
22 own comments had not been incorporated into the final.
23 We believe this contention is outside the scope of
24 this proceeding and would also like to point out that
25 the contention itself is specific to plutonium

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1 transport into SRS, the Savannah River Site, not to
2 the MOX facility for, at least as is currently
3 proposed, we believe the shipments are going to APDCF,
4 the PDCF will, as its name implies, disassemble the
5 pits. That material will then be fed to the MOX
6 facility itself and DOE will have jurisdiction and
7 control and will actually conduct that transportation.

8 CHAIRMAN MOORE: Staff.

9 JUDGE LAM: Before you do that, do we know
10 if the State of Georgia's comments have been resolved
11 to the satisfaction to the State of Georgia?

12 MR. POLONSKY: I do not know.

13 CHAIRMAN MOORE: Staff.

14 MR. HULL: I don't have anything to add to
15 the staff's response, Your Honor.

16 CHAIRMAN MOORE: Ms. Carroll.

17 MS. CARROLL: Yes, sir.

18 CHAIRMAN MOORE: GANE Contention 11.

19 MS. CARROLL: Contention 11, we have five
20 minutes -- oh, wait -- oh, I see, item 9 is Contention
21 10, that threw me off a little bit -- item 10 is
22 Contention 11. Okay, we have five minutes.

23 The contention is that the environmental
24 report fails to address the waste stream from aqueous
25 polishing. Relevance of Cogema's experience -- I'm

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1 sorry, we're in a different mode. We had fuller
2 answers worked out and as we got deeper into the
3 contention, we got a little sketchier here. Okay.

4 DCS and NRC, I believe, also challenge
5 GANE's assertion that Cogema's experience -- the
6 Cogema experience with MOX manufacture is relevant to
7 this proceeding. However, the environmental report
8 acknowledges that the same process used in French
9 plants is intended to be used in the U.S. plant so the
10 experience is indeed relevant.

11 NEPA requires a hard look -- this is in
12 quotes -- at environmental impacts. It is not
13 reasonable to propose a known and potentially
14 hazardous process and not discuss what is known about
15 it. We have a really huge problem at Savannah River
16 Site and it's been acknowledged for the last 20 years
17 and it's called the Tank Closure Program. We have the
18 highest curie inventory in the nation -- and you saw
19 how watery it is. You couldn't even see through the
20 fog this morning hardly when you were coming here.
21 Look at the map, it's just covered with creeks and
22 stuff, it's a really watery area.

23 Okay, in the press of war, we built this
24 vast facility here. We have been dealing with
25 plutonium and tritium at the Savannah River Site and

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1 as such, we have now 35 million gallons of high level
2 liquid waste in 50-year old tanks sitting above the
3 largest freshwater recharge aquifer in North America.
4 And this is a problem. It's acknowledged and we're
5 trying to deal with it.

6 We've had a failure of a fundamental
7 process, an interim process, that was supposed to get
8 that liquid ready to go into a glassification factory.
9 The glassification technology is pretty darned good
10 but we're missing a step. We wasted nearly 20 years
11 on it. Last year, we abandoned it, we have nothing --
12 right now, we have nothing. Meanwhile, we've got one
13 tank we've managed to empty but last year, two tanks
14 sprang leaks. So the inventory has been lowered below
15 the leaks and put in the empty tank.

16 Now this tank closure program is really
17 important to a lot of pps, it took a lot of pressure
18 to get instituted, it is an ongoing program.

19 The MOX process and the aqueous process
20 which they came to late in the game, they said they
21 were going to do a dry process, they can't do it --
22 counter-productive isn't a strong enough word. It
23 counteracts any efforts in the tank closure program.

24 Be that as it may, I want to make sure you
25 understand this problem and I know that you do because

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1 you mentioned it first thing this morning. Right now,
2 the current plan is, well, you know, they've got a
3 waste management -- this is what DCS said -- they've
4 got a waste management program. Yeah, they're kind of
5 stalled out right now, but we aren't going to produce
6 any waste until 2007, so surely they'll have it
7 together by then. I mean, we're talking about DOE and
8 I don't want to insult anybody, but they start and
9 abandon stuff all the time and it isn't reasonable to
10 assume that by 2007, they're going to be going.

11 CHAIRMAN MOORE: Ms. Carroll --

12 MS. CARROLL: So it's not smart to count--

13 CHAIRMAN MOORE: -- your time is up, five
14 minutes has expired.

15 MS. CARROLL: I just have one more
16 thought. And haven't I been light on the other ones?

17 CHAIRMAN MOORE: Pardon?

18 MS. CARROLL: I have one more thought and
19 I have really been --

20 CHAIRMAN MOORE: Please just give me your
21 thought, please.

22 MS. CARROLL: Okay. In Contention 1,
23 there is a reference to scrap generation and a
24 reference in Contention 1 to the Melox plant in France
25 and how they have dealt with an unanticipated amount

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1 of scrap which has amounted to eight percent and which
2 is jamming up the system. It's sitting around undealt
3 with but the deal is it's going to go through a
4 similar process, an aqueous processing, it's going to
5 produce a waste stream and this is not dealt with.

6 CHAIRMAN MOORE: Applicant.

7 MR. POLONSKY: The contention as stated
8 says that we failed -- quote-unquote, failed -- to
9 address aqueous polishing waste stream. On its face,
10 it's a misreading of the ER. We clearly reference in
11 Section 5.2.12, the transfer of high alpha liquid
12 waste to SRS and we don't think the contention raises
13 a material fact when it states that we failed to
14 address the waste stream.

15 On the issue about Cogema, the allegation
16 is that GANE can't verify Cogema's performance in
17 facilities in France and that that info should have
18 been made available to the public. The requirement in
19 2.714 under NEPA is to identify -- base those
20 contentions on the ER -- a deficiency in the ER, the
21 case law says, or an omission.

22 This does not identify a deficiency in the
23 ER simply because that information is not made
24 available to the public. In addition, DCS is not
25 relying on any Cogema operating parameters for its

1 design and there's no requirement to incorporate
2 information from other facilities. The fact that the
3 facility is going to be of a type that is similar
4 doesn't require them to incorporate specific operating
5 parameters from that facility.

6 Finally, DCS --

7 CHAIRMAN MOORE: Outside the Melox plant,
8 are there any other plants that are using any process
9 that you're copying?

10 MR. POLONSKY: Outside of Cogema's
11 facilities?

12 CHAIRMAN MOORE: Outside the Melox plant,
13 yeah.

14 MR. POLONSKY: Outside of Melox, I don't
15 know, but -- it's all Cogema facilities.

16 CHAIRMAN MOORE: Okay, one of your -- the
17 process which you're using, I take it, is derived from
18 --

19 MR. POLONSKY: A number of different
20 Cogema facilities.

21 CHAIRMAN MOORE: And I just did a little -
22 - I'm very curious as to why those similar processes
23 are not -- need not be looked at as part of the hard
24 look under NEPA, because that is the experience.

25 MR. POLONSKY: DCS --

1 CHAIRMAN MOORE: You're not doing this in
2 a vacuum.

3 MR. POLONSKY: DCS is the applicant.

4 CHAIRMAN MOORE: Correct.

5 MR. POLONSKY: Not any of its --

6 CHAIRMAN MOORE: I understand that.

7 MR. POLONSKY: -- consortium companies.

8 CHAIRMAN MOORE: But --

9 MR. POLONSKY: The designs are not the
10 same.

11 CHAIRMAN MOORE: Are they similar? Does
12 not your environmental report, Section 3.2, indicate
13 that they are?

14 MR. POLONSKY: It mentions -- yes, but
15 that does not impact anything about the hard look
16 analysis under NEPA. The hard look analysis under
17 NEPA is whether or not specific aspects of the
18 environment have been analyzed. If, for example,
19 archaeological impacts were not analyzed, that would
20 be a deficiency in hard look. But there is no
21 requirement and no case law that I'm aware of under
22 NEPA that requires an environmental impact statement--

23 CHAIRMAN MOORE: But the impacts that have
24 been created by the similar processes in other
25 facilities, are they not relevant to this inquiry?

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1 MR. SILVERMAN: Your Honor, it's also my
2 understanding, just for example, if we take your
3 argument to a little bit more of extreme, that the
4 aqueous polishing process that we use is very similar
5 to a process called Purex that's used around the
6 country in government facilities. And I don't think
7 there's a requirement that we evaluate the impacts and
8 effluents, for example, from unrelated government
9 facilities.

10 CHAIRMAN MOORE: Just assume for the
11 moment, and I have no idea whether this assumption has
12 any basis, but assume for the basis of answering the
13 question that there are very significant environmental
14 impacts flowing from those processes. You would not
15 need to look at those same impacts here? You could
16 just ignore them, even though your process is similar?

17 MR. POLONSKY: As long as the
18 environmental report takes into account what the
19 environmental impacts are expected to be, reasonably
20 expected or reasonably foreseeable impacts, that's
21 what NEPA requires. And we have done so and there's
22 no indication here of how we haven't done that. And
23 as the Commission has been very clear about, a
24 contention is not a platform for a fishing expedition
25 in discovery.

1 We're very aware that the petitioners
2 would like to see information about Cogema's
3 operations and facilities, or at least we've heard
4 that from Mr. Moniak, that he would like to see
5 information about Cogema. But Cogema is not the
6 applicant here and we don't believe this contention
7 proposes anything other than a deficiency in the ER
8 which factually is incorrect.

9 They say we failed to do it, we did do it
10 and there is no deficiency in the ER, which is
11 something they were required to do under 2.714.

12 JUDGE LAM: That point is well taken.
13 However, why didn't you take advantage of the benefit
14 of experience on similar facility elsewhere?

15 MR. POLONSKY: All of the environmental
16 impacts that are expected from this process, whether
17 it's taken from the Purex process or whether it's
18 taken from a Cogema in general process or whether it's
19 a low level waste generation process that's taken from
20 any commercial process throughout the country is
21 incorporated in the environmental report as a
22 potential environmental impact in Section 5 and how
23 the affected environment -- how the environment will
24 be affected by operations.

25 Specifically, there are different

1 capacities, the grades of the material are different,
2 there are going to be two separate facilities from
3 which we have extracted technology and waste
4 processing, the regimes are not identical and there is
5 no, again, requirement for us to do that.

6 Judge Lam, you may be right, there may
7 have been -- it may have been nice to have
8 incorporated that for the benefit of the doubt, but
9 that's not the basis of a valid contention.

10 JUDGE LAM: Thank you.

11 CHAIRMAN MOORE: Staff.

12 MR. HULL: I would add, Your Honor, that
13 you've got a whole different set of laws and
14 regulations that are applicable in France. Now I have
15 no idea what the details of any French laws or
16 regulations that are out there that apply to these
17 French facilities, but you know, it would be very
18 difficult to make any reasonable comparison for NEPA
19 purposes when -- I mean, for instance, let's say
20 you've got a waste stream, a liquid waste stream,
21 that's flowing into a river in France that runs by one
22 of these facilities.

23 Well, you have a -- since you have an
24 entirely different set of regulations and rules in
25 this country, I mean who is to say that that same

1 waste stream would be prohibited under law in this
2 country.

3 And the other thing that I just need to
4 add is that you have to look at the specific
5 contention here, Contention 11 provides no evidence of
6 what these alleged problems in Europe are. It would
7 be just gross speculation to assume that there are
8 some problems. It was up to GANE to identify such
9 problems, and they did not. They have the burden on
10 submitting a valid contention and this is a very bare
11 bones contention that leaves the parties guessing as
12 to well, you know, what are these problems in Europe
13 that they reference.

14 So the staff would continue to maintain
15 that Contention 11 is not admissible.

16 CHAIRMAN MOORE: Contention 12, please.
17 Ms. Carroll, if you would address that.

18 MS. CARROLL: Contention 12 deals with
19 malvolent acts, terrorism and insider sabotage. We
20 have five minutes.

21 The question posed by Contention 12 is
22 whether the environmental report must address
23 consequences of terrorism and insider sabotage. The
24 NRC staff and DCS argued on the day after what
25 happened in New York and Washington that this isn't

1 required under NEPA.

2 We believe this is an irrational position.
3 As discussed in the contention, there are examples all
4 around us of terrorism and insider sabotage. If there
5 was a doubt whether these threats must be considered,
6 it was eliminated by the events of last week. GANE
7 requests leave to amend the factual basis for this
8 contention. We're asking the Licensing Board to take
9 official notice of the terrorist attacks on the World
10 Trade Center and the Pentagon last week.

11 To continue to ignore this issue is not
12 only irrational, but it's immoral.

13 CHAIRMAN MOORE: Applicant.

14 MR. POLONSKY: We are acutely aware of
15 last week's events and as required by regulations, DCS
16 will be submitting security and safeguards plans with
17 its license application. These plans will address
18 threats, thefts and radiological sabotage. However,
19 the case law on NEPA does not require an assessment of
20 intentional acts in an environmental review and
21 therefore, the ER itself is not deficient and that's
22 why we believe --

23 CHAIRMAN MOORE: Do you disagree with the
24 staff's analysis that the rule of reason applies here?

25 MR. POLONSKY: I'm sorry?

1 CHAIRMAN MOORE: Do you disagree with the
2 staff's analysis that under NEPA the rule of reason
3 applies?

4 MR. POLONSKY: To the extent that this is
5 echoing the basis of why NEPA does not require an
6 environmental analysis of intentional acts, yes.

7 CHAIRMAN MOORE: Well, my question goes to
8 under the applicable NEPA case law, do you agree with
9 the staff's position that the rule of reason is the
10 test that is applied, that you only address reasonably
11 foreseeable events?

12 MR. POLONSKY: Yes, I was just going to
13 echo those key words -- yes, reasonably foreseeable.

14 CHAIRMAN MOORE: Sadly, here at 3:47 on
15 September 21, 2001, are you still going to contend
16 it's not reasonably foreseeable that these kinds of
17 catastrophic events can occur?

18 MR. POLONSKY: There is a difference
19 between the statement you've made, Judge Moore -- can
20 occur, reasonably foreseeable and whether or not they
21 are reasonably foreseeable and can occur at this
22 facility.

23 If we were about to license a 200 story
24 tower building in Chicago, I might agree that it might
25 be reasonably foreseeable under NEPA to make an

1 analysis of intentional threats on that licensing
2 proposed action. However, there is no indication,
3 based on last week's events or for that matter a
4 change in NEPA case law after the other domestic act
5 of terrorism in this country --

6 CHAIRMAN MOORE: On September 10, was
7 there any indication that any such event was
8 reasonably foreseeable?

9 MR. POLONSKY: I'm not sure of your
10 question, Your Honor.

11 CHAIRMAN MOORE: On September 10, would
12 you agree that it would have been remote and
13 speculative under NEPA to contend the events that
14 occurred would occur?

15 MR. POLONSKY: Under NEPA, yes, but that
16 doesn't stop the applicant --

17 CHAIRMAN MOORE: So you didn't need to
18 look at the consequences.

19 MR. POLONSKY: Under NEPA, but those
20 sabotage and terrorist events are incorporated in
21 safety and security plans.

22 CHAIRMAN MOORE: Okay, how? Because each
23 one of your analyses as I read your ER and CAR say
24 that your hepa filters will remain intact and working.

25 MR. POLONSKY: I'm not sure I'm following

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1 your analogy.

2 JUDGE KELBER: Let me put it this way --
3 unfortunately it's terribly easy to imagine that an
4 attack that would remove the hepa filters from service
5 as well as doing other collateral damage and at the
6 present time that has become far less remote and
7 speculative than it was last September 10. Now do you
8 still intend to state that your publication of plans
9 which are essentially aimed at keeping the hepa
10 filters working under your various accident scenarios
11 is sufficient to account for the environmental impact
12 of these acts?

13 MR. POLONSKY: The regulations require us
14 to submit security and safeguard plants that will meet
15 threats, thefts and radiological sabotage. Now
16 whether or not the definition of a threat, theft or
17 radiological sabotage changes as a result of events of
18 last week, that has no -- we believe it has no change
19 to the environmental NEPA responsibility.

20 And again, I would point out, for example,
21 the attack on the Edward R. Murrah Building in
22 Oklahoma City, a devastating domestic terrorist act
23 unforeseeable prior. But it did not change NEPA case
24 law. It may change the way agencies protect their
25 facilities against threats and sabotage, but it

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1 doesn't effect the NEPA analysis.

2 CHAIRMAN MOORE: If one is applying the
3 rule of reason and you only look at reasonably
4 foreseeable events, and those that are reasonably
5 foreseeable, you must then analyze to consequences of
6 such events because they are no longer remote and
7 speculative. Then why isn't this contention
8 admissible, because under the rule of reason one can
9 reasonably conclude it is no longer remote and
10 speculative, it is foreseeable, and the consequences
11 of such an act have not been -- the environmental
12 consequences of such an act have not been analyzed in
13 the environmental report?

14 MR. POLONSKY: Because it's DCS' position
15 that the rule of reason is for a specific facility and
16 there's no indication that it's any more reasonably
17 foreseeable that a MOX facility would be the target of
18 terrorism than prior to September 11th than today, or
19 any other nuclear facility for that matter. I mean
20 there have been other incidents --

21 CHAIRMAN MOORE: Excuse me.

22 MR. POLONSKY: Yeah.

23 CHAIRMAN MOORE: I could be mistaken but --
24 - and the staff can certainly correct the record --
25 but are not all facilities today on a high state --

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1 the highest level of security alert?

2 MR. POLONSKY: If you say so.

3 CHAIRMAN MOORE: If so, why is that?

4 MR. POLONSKY: Because there is a threat
5 to -- there's a threat to domestic terrorism. There's
6 a threat of domestic terrorism.

7 CHAIRMAN MOORE: Well if it's not --

8 MR. POLONSKY: But there's no change --
9 there's no corresponding change to any of the
10 regulations.

11 CHAIRMAN MOORE: The rule of reason is not
12 a regulation. It's supposed to be a rule of reason,
13 and reason, in light of circumstances, often is
14 changed. And if environmental consequences are not
15 looked at because they were previously viewed as being
16 only consequences of remote and speculative actions
17 and changes occur that they're no longer remote and
18 speculative, why does not that same rule of reason
19 require under NEPA that they're looked at?

20 MR. POLONSKY: I agree with the principal.
21 I just believe that there are other incidents that
22 have happened in this country that in the past should
23 have, if this rule applies, this rule of reason, that
24 would have changed NEPA case law, and they did not.
25 And so, I take from that and analogize and say if they

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1 didn't change NEPA case law -- again, just the
2 environmental review, then --CHAIRMAN MOORE: Was the
3 issue ever raised? And please tell me where and when.

4 MR. POLONSKY: Any licensing proceeding
5 that would have occurred after the Edward R. Murrah
6 Building, for example, would be an example. Any
7 licensing that would have happened after a plane -- a
8 propeller plane flew into the Empire State Building I
9 believe 40 or 50 years ago. There's historical
10 evidence for these things, and we can agree to
11 disagree on the application of your rule of reason.

12 CHAIRMAN MOORE: No, it's not my rule of
13 reason. I would like that the be very clear

14 JUDGE LAM: For your information, the
15 Commission has spoken on how one may assess what is
16 the meaning of remote and speculative.

17 CHAIRMAN MOORE: Staff.

18 MR. HULL: Your Honor, the staff -- if the
19 Board has any questions of the staff on this
20 contention, Mr. Fernandez will respond.

21 CHAIRMAN MOORE: You, Mr. Fernandez, say
22 the rule of reason is the applicable principle that
23 should be applied, that only reasonable -- reasonably
24 foreseeable events; hence, those that are non-remote
25 and speculative need be analyzed under NEPA --

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1 MR. FERNANDEZ: That's correct.

2 CHAIRMAN MOORE: -- and the consequences
3 of such events?

4 MR. FERNANDEZ: That's correct.

5 CHAIRMAN MOORE: Is it the staff's
6 position today, September 21, 2001, that the events
7 postulated in contention 13, filed a month before the
8 events of September 11th are still remote and
9 speculative and don't fall within a common sense
10 application of the rule of reason?

11 MR. FERNANDEZ: That's correct, and let me
12 explain why. I think we need to look at the text of
13 the contention. The text of the contention really
14 doesn't raise any of the issues that we've been
15 discussing so far. The text of the contention talks
16 about what the Department of Energy does in their SPD
17 EIS, something that is clearly beyond the scope of
18 this proceeding. Then they go on to challenge what
19 DCS does with regard to their environmental report and
20 what they regard as many credible scenarios.

21 Your Honor, September 11th -- the events
22 in September -- on September 11th are relevant, and
23 the Commission is considering how to address those in
24 regards to its -- to the safeguards to all the
25 facilities that licenses there; however, as the

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1 applicant stated, this does not change the nature of
2 Part 51 and what it requires.

3 The requirements on the Part 51, as guided
4 by the rule of reason that you said with regards to
5 NEPA, don't mandate that we consider terrorism acts,
6 because terrorism acts are by their nature
7 unforeseeable and are by their nature intentionally
8 performed in the devious manner -- a manner that can
9 be easily predictable.

10 That's why we don't do, for example,
11 probabilistic risk assessment for terrorism, because
12 it's not easy to predict who, what, when, where and
13 how. You can remedy these things. All you can do is
14 have good intelligence and try to prevent and minimize
15 the effects --

16 CHAIRMAN MOORE: The contention very
17 clearly says that you need to analyze the
18 environmental consequences of essentially something
19 that's equivalent to a severe accident.

20 MR. FERNANDEZ: And -- and I mean we --
21 and the staff's position is that the applicant has
22 submitted information as to what the -- for example,
23 off-site releases from the maximum credible accident
24 and the --

25 CHAIRMAN MOORE: And each one of those

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1 accidents that has been analyzed in the CAR, as well
2 as the -- for the ER --

3 MR. FERNANDEZ: Right.

4 CHAIRMAN MOORE: -- postulate that the
5 filters of the facility remain intact and working and
6 contain the accident.

7 MR. FERNANDEZ: Correct.

8 CHAIRMAN MOORE: Now the contention says
9 that it's no longer remote and speculative that such
10 accidents can occur.

11 MR. FERNANDEZ: Well I think you're
12 talking about two different things.

13 CHAIRMAN MOORE: And if one occurred that
14 -- it would not be bounded by the bounding conditions
15 that the applicant has analyzed and it needs to be
16 looked at under NEPA as --

17 MR. FERNANDEZ: I think you may be
18 reformulating the contentions because as I read it, it
19 doesn't talk about the hepa filters, it just talks
20 about terrorists attacks and how they're not analyzed,
21 and our understanding is that they are analyzed.
22 They're bounded by the maximum --

23 CHAIRMAN MOORE: Fine. Tell me how if
24 events like occurred on September 11th were to occur
25 at this facility, how they would be bounded by that

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1 accident analysis in the ER and the CAR.

2 MR. FERNANDEZ: Well, Your Honor, I think
3 this is also another part where the rule of reason
4 would need to apply. The reason why is, we need to
5 ask ourselves, these are -- there's a comparable
6 situation with nuclear power plants. This is not the
7 first time that an airplane crashing into licensee
8 facilities has been considered. This is not a novel
9 issue.

10 Other licensing boards and appellate
11 boards have faced the same issue. In the Shoreham
12 case, for example, and in Turkey Point they have
13 considered these issues. And in those cases we've
14 considered that we don't expect private individuals
15 and these companies have to carry the burden of
16 defending the nation. That burden is left to the
17 government. The government has the responsibility of
18 protecting Americans from attacks from terrorists.

19 CHAIRMAN MOORE: Excuse me. This has
20 nothing to do with burden. This has to do with an
21 analysis under NEPA that if this horrible event
22 happened, what would the consequences be. It doesn't
23 say they have to protect against it, pay the freight
24 for protecting against it, or any other such thing,
25 merely what are the environmental consequences and can

1 those environmental consequences be mitigated.

2 MR. FERNANDEZ: I think you're correct in
3 that assessment. The problem is that it's not
4 reasonable to foresee the postulations made by the --
5 by GANE in this case. I mean if from now -- I guess
6 the Board would have to take the position that from
7 now in every licensing action, we need to consider a
8 large aircraft crashing into our facilities. If that
9 is the position that the Board is willing to take from
10 now on, then I guess this staff has nothing else to
11 say.

12 JUDGE KELBER: Have there been licensing
13 proceedings in which the possibility of aircraft
14 crashes of various types have been considered?

15 MR. FERNANDEZ: Yes, Your Honor.

16 JUDGE KELBER: Where it was appropriate,
17 where it was foreseeable?

18 MR. FERNANDEZ: Yes, Your Honor. If there
19 -- for example --

20 CHAIRMAN MOORE: Now why were those
21 considered?

22 MR. FERNANDEZ: If I remember correctly --

23 JUDGE KELBER: Let me help you out. TMI
24 1 and 2 --

25 MR. FERNANDEZ: Yeah, TMI.

1 JUDGE KELBER: Turkey Point and --

2 MR. FERNANDEZ: I think TMI is a good
3 example because of the proximity to the aircraft paths
4 with regard to LaGuardia and JFK. And in that case,
5 it was reasonable for sale because it was so close to
6 where these planes were flying that they needed to
7 consider what the impacts would be, and a factual
8 determination as part of its safety analysis. The
9 Board looked at those facts, but not as far as NEPA.
10 Never has a board required of an applicant to look at
11 these types of scenarios with regards to its NEPA
12 obligations.

13 CHAIRMAN MOORE: But in all of the
14 instances that you've just referenced, the bounding
15 accident already considered what -- the same
16 consequences of the airplane crash. With a reactor,
17 you would lose containment. Well here there is no
18 containment.

19 JUDGE KELBER: Not at Turkey Point.

20 CHAIRMAN MOORE: Pardon?

21 JUDGE KELBER: Not at Turkey Point.

22 MR. FERNANDEZ: It depended on the
23 hearing. You're right with regards to one of the
24 hearings. The other hearing did not consider --

25 CHAIRMAN MOORE: So I'm just having

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1 trouble saying that it's already being considered and
2 never under NEPA. Well it never needed to be because
3 it was already a bounded accident. What's being
4 postulated here by malevolent acts of terrorism are
5 something that go beyond what up to this point was the
6 bounding accident that the HEPA filters stay intact
7 and function.

8 MR. FERNANDEZ: I think you're correct
9 with regard to everything you've said so far. The
10 only thing is, I don't see that represented in the
11 contention filed by GANE. As the Board has currently
12 explained it, that's a different argument. That's not
13 what's before us right now, I don't think. I don't
14 think that's what GANE argued of their contention. I
15 mean, I don't see anything with regards to that in the
16 text of their contention.

17 CHAIRMAN MOORE: Ms. Carroll, your last
18 contention, contention 13.

19 MS. CARROLL: Contention 13 contends that
20 the environmental report lacks probability
21 calculations and we have five minutes. This
22 contention is based on a requirement and NRC
23 regulations that to the extent practical NEPA analysis
24 must quantify the factors -- I'm sorry, must quantify
25 the factors considered. DCS concedes that it hasn't

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1 fully quantified environmental impacts of accidents.
2 DCS argues that it isn't practical to do a fully
3 quantitative analysis because uncertainties are too
4 great.

5 This argument establishes the existence of
6 a material factual dispute between the parties. On
7 the one hand, GANE has demonstrated that probabilistic
8 risk assessment is a commonly used tool and is looked
9 to by the NRC commissioners as a valid way to measure
10 environmental impacts.

11 On the other hand, DCS argues that in this
12 case quantitative analysis is not sufficiently
13 reliable to be useful; thus, DCS offers a kind of
14 hybrid analysis that can combines quantitative and
15 qualitative analysis. In GANE's view this is the
16 worst of both worlds, in which qualitative analysis is
17 used to mask the significance of quantitative
18 uncertainties. GANE has raised an admissible issue as
19 to whether the environmental impacts of accident risks
20 at the MOX facility are quantifiable. The contention
21 should be admitted.

22 Thank you.

23 CHAIRMAN MOORE: Applicant, one moment.
24 Backing up to the previous contention. Staff, the
25 middle sentence of the contention says lack of

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1 analysis of monovalent act scenario leads to failure
2 of design safeguards. That is precisely the point I
3 was making, that's it beyond the accidents they viewed
4 or design -- within design safeguards.

5 MR. FERNANDEZ: Can you -- can you tell me
6 which sentence that is, Your Honor?

7 CHAIRMAN MOORE: That's the contention,
8 the 12th line.

9 MR. FERNANDEZ: Well, Your Honor, I
10 believe that that last -- the line that you're reading
11 from -- I mean, again, the applicant was clear in that
12 now is not the appropriate time to challenge the
13 safeguards design and the emergency plans that the
14 licensee needs to submit during the operations,
15 special nuclear material used in possession license
16 stage of the proceeding. Now we're dealing about what
17 the contents of the ERR and what the required contents
18 of that ER should be and these are not that.

19 CHAIRMAN MOORE: Where are the -- such
20 consequences from an environmental standpoint going to
21 be looked at in the next stage -- in the possession
22 and use?

23 MR. FERNANDEZ: The environmental impact
24 statement is being drafted by the staff currently to
25 address both stages, construction and use -- I mean

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1 construction and operation.

2 CHAIRMAN MCCRE: And it's going to include
3 such matters?

4 MR. FERNANDEZ: It would more than likely
5 include them. If it doesn't to the satisfaction of
6 the staff, it will be supplemented at a later date if
7 it receives new and significant information from the
8 applicant with regards to those matters. And at that
9 point, the public would have the opportunity to
10 participate through the scoping process once again.

11 CHAIRMAN MOORE: But why isn't it
12 appropriate for a contention to say the environmental
13 report is faulty for not including such -- the same
14 matters you say are going to be looked at in the EIS.

15 MR. FERNANDEZ: Well as I understand it,
16 what you're asking is whether they're required to
17 submit something to analyze impacts of -- that would
18 look out -- something like what happened on September
19 11th, is that correct?

20 CHAIRMAN MERRY: Well in your terms,
21 beyond design basis -- currently design basis
22 accidents.

23 MR. FERNANDEZ: And it is the position of
24 the staff that NEPA does not currently require that.

25 CHAIRMAN MOORE: Applicant.

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1 MR. SILVERMAN: We're on contention 13.
2 I'll be brief, Your Honor. GANE argues that Part 51
3 regulations require that the environmental report
4 quantify the probability of accidents and that we
5 failed to explain why it's not practical to do that.
6 Again, as GANE has correctly stated, the regulation
7 states that generally that environmental impact should
8 be quantified to the fullest extent practicable. We
9 have, in fact, in Section 5.5 of the Environmental
10 Report an accident analysis discussion, which does
11 include upper bound probabilities for some accidents
12 and does include and discuss other accidents in a
13 qualitative manner. There's nothing inappropriate
14 about that. It's consistent with the regulation and
15 the contention should be rejected in our view.

16 CHAIRMAN MOORE: Staff.

17 MR. HULL: Yeah, I'll supplement Mr.
18 Silverman's remarks in that respect. Section 5.5 in
19 Appendix F of the Environmental Report total over 25
20 pages of material and it was GANE's responsibility --
21 rather than just making some blanket assertion about
22 the Environmental Report not being adequate, it was
23 GANE's responsibility to indicate or specify what
24 portions of the Environmental Report are inadequate.
25 Contention cannot be admissible when it just makes

1 blanket statements like this without giving the
2 parties any specifics as to what are the issues that
3 GANE seeks to litigate.

4 In addition to that, GANE did not identify
5 any specific accident scenarios, and their citations
6 to NRC case law are not relevant. I won't go into
7 that because that's fully explained in the staff's
8 response. Thank you.

9 JUDGE KELBER: If I want to evaluate a
10 safety assessment sometime in the future, I'm faced
11 with the assertion that an explosion in an aqueous
12 processing cell is -- poses -- I believe it's probably
13 greater consequences than an explosion in a centering
14 furnace. But how am I to judge without a good
15 probabilistic analysis which poses the greater risk?

16 MR. HULL: Well, Your Honor, focusing on
17 contention 13, that was my point. They don't specify
18 what accident analysis are we supposed to be talking
19 about.

20 JUDGE KELBER: Well there are many
21 accidents. Do they have to do an analysis all on
22 their own --

23 MR. HULL: In submitting contentions, Your
24 Honor, they're required to specify, in this regard,
25 what is the accident analysis that was not adequately

1 evaluated. They can't just make broad statements like
2 they do here in contention 13. They have to give the
3 parties specific information to put the parties on
4 notice as to what issues they seek to litigate, and
5 contention 13 does not do that.

6 JUDGE KELBER: Do you think we'll ever
7 have a PRA for this plant? Does the staff intend to
8 make one?

9 MR. HULL: One moment, Your Honor.

10 (Brief pause.)

11 MR. HULL: I'm advised that the staff does
12 not intend to do a probabilistic risk assessment here.

13 JUDGE KELBER: Oh, God help us all.

14 CHAIRMAN MOORE: We'll turn now to the
15 GANE motion to dismiss. You have 15 minutes.

16 MS. CURRAN: I would like to take ten
17 minutes and reserve five for rebuttal.

18 CHAIRMAN MOORE: We'll consider -- feel
19 free to take all of your time and we'll consider
20 whether rebuttal is necessary at the end. But I would
21 request that you move the graphic from in front of you
22 --

23 MS. CURRAN: Okay.

24 CHAIRMAN MOORE: -- so that I can throw
25 things directly at you.

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1 MR. HULL: Your Honor, I hate to
2 interrupt. Mr. Persinko wanted to add a statement
3 regarding the previous contention-13 discussion.

4 MR. PERSINKO: I just want to say that the
5 staff intends to incorporate risk concepts in risk but
6 does not intend to do a complete rigorous
7 probabilistic risk assessment as one would normally
8 think with false reason of entries.

9 MR. SILVERMAN: Your Honor, if --

10 JUDGE KELBER: Don't go to Las Vegas.

11 MR. SILVERMAN: Your Honor, if I may
12 briefly? In light of the fact that GANE has been
13 given the opportunity to file the motion, we filed a
14 response and they had an additional pleading admitted
15 and we did not have the opportunity to respond. We
16 would object to a rebuttal argument in this case.

17 CHAIRMAN MOORE: Okay. Well let's take it
18 and see where it leads and whether rebuttal and
19 surrebuttal might be necessary. Please proceed.

20 MS. CURRAN: I'm mindful that the Board
21 has instructed us all that it has read the pleadings
22 and that we shouldn't repeat what's on paper. So what
23 I would like to focus on today is an argument made by
24 DCS that there's no specific provision of the Atomic
25 Energy Act that prohibits system two-step process

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1 established by the NRC and that the AEA does not
2 require the submittal and NRC review of a license
3 application or any other information prior to
4 commencement of construction of a plutonium fuel
5 fabrication facility. The applicant cited the Power
6 Reactor Development case and its response to the
7 contentions. I went back and looked at that and found
8 that it's helpful in looking at this motion to
9 dismiss.

10 What's happened it seems in this
11 proceeding is that the NRC staff has created kind of
12 a hybrid proceeding that takes a little bit from Part
13 70 and takes a little bit from Part 50 and creates a
14 separate construction permit application which they
15 call the CAR, which is less complete than an operation
16 license application, much less complete. And separates
17 the review process into very distinct steps that are
18 separated not only in the sense that there's two
19 actions, but separated in time, which required
20 distinctly different amounts of information to be
21 submitted. This is something that is -- I find no
22 authorization for in the statute. There is a real
23 difference between the statutory provisions for two-
24 step licensing of nuclear power plants and the one-
25 step licensing of other kinds of facilities.

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1 If one looks at the Power Reactor
2 Development case, that case discusses how there is in
3 Section 182 -- 182 of the Act, which is 42 USC
4 2232(a), the Congress sets out a standard for the
5 issuance of an operating license. And in Section 185,
6 which is 42 USC 2235, there's a separate standard set
7 out for the issuance of the construction permit. The
8 question -- the Power Reactor Development case, which
9 is 367 US 346, the year was 1961 -- was whether the
10 standard at the construction permit stage is different
11 than the standard would be at the operating license
12 stage, whether it's a lesser standard. The Supreme
13 Court answered that question in the affirmative and
14 said that the construction permit is kind of a
15 provisional thing and that later on when an operating
16 license is issued, then the Commission will make the
17 compete safety findings that are required for
18 operation under the Act.

19 There's a case where Congress has set up
20 a statutory process for dividing the licensing of a
21 nuclear facility into two parts. The Supreme Court
22 talked about the rationale for allowing this lesser
23 safety finding in the construction permit stage and
24 the tension that existed between wanting to encourage
25 licensees to go through construction by guaranteeing

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1 that a favorable safety finding would be made at
2 operation, and on the other hand wanting to be able to
3 make that safety finding at the operating stage
4 independently. The court resolved that tension in
5 favor of the lesser finding at the construction permit
6 stage, but guaranteeing that there would be a
7 stringent safety finding at the operating license
8 stage.

9 That two-step process does not apply to a
10 plutonium processing facility. It's not a production
11 and utilization facility as the Commission has defined
12 those facilities in its regulations. So there's
13 essentially no statutory authority for such a two-step
14 license and review process. I think we have gone over
15 the fact that in the regulations themselves there also
16 is no two-step process for the submittal of a
17 construction permit application for a plutonium
18 processing plant. There is a separate step for
19 consideration of whether construction should be
20 allowed to go ahead, but it's very clear from the rule
21 making history that the Commission did not contemplate
22 making that determination until it had received a
23 complete license application and even had completed
24 its safety and environmental review. And, of course,
25 exactly the opposite is being planned here.

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1 Another issue that I just wanted to bring
2 to your attention here, and I'm sure you're aware of
3 is, there have been many, many examples raised here
4 today of the practical effect that has on the ability
5 of this agency to make adequate findings regarding the
6 design of this facility and whether it's going to be
7 adequate in the long run to support the operation of
8 the facility. I think there's been many instances
9 today where the Licensing Board was frustrated in its
10 attempts to determine what information had been
11 submitted, or was considered necessary. I think
12 that's no accident, because, in fact, the NRC has no
13 regulations that separately set out in detail what
14 would be required for a construction permit versus an
15 operating license.

16 In fact, this is -- something has been
17 flipped here, that a regulation that was initially
18 intended to make the review of plutonium processing
19 plants more stringent by adding the requirement that
20 the design of the facility be included in the body of
21 the license application has been twisted in the sense
22 to allow an incomplete construction permit application
23 that doesn't allow a comprehensive review of what the
24 facility is going to do. The result is -- the effect
25 is exactly the opposite of what the Commission

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1 intended when it promulgated these regulations.

2 I really -- I feel that we've been
3 thorough in our attempt to respond to the arguments
4 made by DCS and the staff, and if you have any
5 questions about our arguments, we would be really glad
6 to respond.

7 JUDGE KELBER: You mentioned rule making
8 history and similar considerations. Do you have any
9 specific references that could help us?

10 MS. CURRAN: Yes. They are cited in our
11 motion to dismiss. Let me give you the page number.
12 I believe it's on page 16 of our motion to dismiss.
13 This -- the rule making in 1971, I believe, was made
14 immediately effective. There was concern expressed in
15 the rule making itself for the special hazards posed
16 by plutonium processing facilities. If you look in
17 the Notice of Rulemaking, it says we are dispensing
18 with the period that usually is given before the rule
19 goes into effect and making this immediately
20 effective. It's an unusual action for the Commission
21 to take.

22 JUDGE KELBER: If we -- if one were to
23 adopt your view as to the nature of the licensing
24 process here, would that make this 70. -- what is it,
25 22(f) and 23(b)12 consistent?

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1 MS. CURRAN: I'm sorry, 70.23(b)?

2 JUDGE KELBER: Yeah. The key words -- we
3 discussed this earlier today. It says the Commission
4 will approve construction on the basis of information
5 filed pursuant to the 70.22(f).

6 MS. CURRAN: Right. In other words, the
7 entire application must be submitted before the
8 Commission makes that determination on the adequacy of
9 the design. In fact, the regulations require that a
10 completed license application must be submitted at
11 least nine months before commencement of construction.
12 Under the schedule proposed by the staff here, which
13 is attached as an exhibit to our motion, that isn't
14 even possible here. And I think -- as you've heard a
15 little bit today, the terminology is a little loose.
16 This is an application but it's not being called an
17 application for a license. It's being called an
18 application for something else, or a permit, an
19 authorization request. There's no such animal in the
20 NRC regulations.

21 CHAIRMAN MOORE: But their position --
22 they being the staff and the applicant, since it's not
23 prohibited, it's permitted.

24 MS. CURRAN: From the perspective --

25 CHAIRMAN MOORE: How do you respond to

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1 that?

2 MS. CURRAN: That's not a valid argument.
3 The NRC -- for one thing, we started out with the
4 question of how an application gets docketed for a
5 hearing, and there's only one kind of application that
6 can be docketed for a hearing under Part 70 and that
7 is the application for a license. From the
8 perspective of a citizen intervenor, the idea that the
9 NRC staff could simply make up a category of
10 application and call a public hearing on it, which is
11 what's happened here, is an extraordinary waste of
12 citizen intervenor's time, not to mention an
13 incredibly confusing experience for the citizen
14 intervenor who looks to the regulations to try to
15 figure out what is going on. What do I as an
16 intervenor have to evaluate in order to assess the
17 adequacy of this application? And when you go through
18 the application -- the regulations and look to see
19 what kind of an application am I looking at here, the
20 regulations don't help you.

21 In comparison, if this were a construction
22 permit proceeding for a nuclear power plant, one could
23 go to Section -- Part 50 and see specific requirements
24 for the contents of a construction permit application
25 and compare those requirements to the contents of the

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1 application. There's no such thing here. There's
2 only what the staff arbitrarily announces to us it
3 considers relevant. And that is not responsible
4 agency process. It prejudices the ability of any
5 member of the public to understand and participate in
6 the decision making process. Also, it's clear to us,
7 especially from what's been said today, results in a
8 decision making process that does not -- is not
9 rigorous with respect to protecting public health and
10 safety.

11 JUDGE LAM: Well along that line, Ms.
12 Curran, after listening to what the staff has said and
13 what the applicant has said today, which were the
14 staff would not hesitate to exercise its oversight
15 responsibility to impose requirements if and when
16 necessary after the facility is constructed, and the
17 applicant was willing and able to bear that risk.
18 Would that mitigate some of the concern about the
19 protection of public health and safety?

20 MS. CURRAN: Well in the real world, if
21 you have built a facility and spent a lot of money on
22 it, and after you have finished it, you find that you
23 create your plans for carrying out the operation, the
24 activities that are going to go on in this building,
25 and you find that there's some very expensive changes

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1 that you really ought to make to make it safe, in the
2 real world one thinks twice about tearing down a
3 building that one has finished. Certainly I would
4 think DOE would think twice about tearing down a
5 building at the taxpayers expense, which is when DCS
6 says it's going to bear the cost, it's passing the
7 cost on. It's not the stockholders who are paying,
8 it's mostly the taxpayers who are paying. So this is
9 -- it's also common sense that when you're going to
10 build something, a building that would house a
11 potentially dangerous activity, to plan for what's --
12 to plan for a relationship between the physical design
13 of the facility and what's going to take place there.
14 And if the NRC wanted to have a separate process for
15 review of construction and operation that is similar
16 to a nuclear power plant, first it needs authorization
17 in the statute for that. And second, it needs -- it
18 needs some kind of regulations to support such a
19 process.

20 We've heard a lot of confusing statements
21 here today about how much material -- how much
22 information is to be required, for instance, with
23 respect to material control and accounting in order to
24 support the design of the facility. The original
25 intent of these regulations was to set up a rigorous

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1 process where the design of the facility would be
2 added to the operational requirements, and instead,
3 they've been -- they've been divorced.

4 CHAIRMAN MOORE: Ms. Curran, I believe
5 that in the Commission's referral order they indicated
6 it was to be a two-part process. Unfortunately I
7 can't put my finger on that to find where that
8 appears.

9 MS. CURRAN: I recognize that. We are not
10 arguing to you that there's no ambiguity here. We
11 came to the Licensing Board in the first instance
12 because it was not clear to us that the Commission was
13 aware of the problems that we --

14 CHAIRMAN MOORE: But can't the Commission
15 change the rules by order, and haven't they done that
16 in this case?

17 MR. CURRAN: I don't -- I don't believe
18 that the Commission can make -- first of all, if the
19 Commission is going to make changes to a regulation --
20 to a set of regulations, it needs to do so knowingly
21 at the very least. It's not clear to me at all that
22 the Commission understood that the two-step licensing
23 process that is normal for a nuclear power plant does
24 not necessarily apply in a Part 70 licensing case. So
25 at the very least, if the rules are going to be

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1 changed, then that has to be acknowledged and
2 explained. In our view, when the agency promulgates
3 regulations for the consistency of its decision making
4 process, it should abide by those regulations unless
5 it goes through an orderly process for changing them,
6 and that has not happened here. What we've got is de
7 facto licensing based on whatever the circumstances
8 happen to be and without regard to the regulations.

9 CHAIRMAN MOORE: Applicant.

10 MR. SILVERMAN: Thank you. I would like
11 to first respond to a couple of Ms. Curran's points.
12 The first point she makes is, she alludes to the
13 Atomic Energy Act and the provisions which specify
14 that you must have a construction permit approved and
15 an operating license approved for a reactor. Congress
16 did set up that specific statutory scheme for
17 reactors. Her position is because they did not send
18 up a similar specific statutory scheme for MOX fuel
19 fabrication facilities; therefore, the agency is
20 without power to establish such a procedure. We don't
21 agree with that. There is no provision in the Atomic
22 Energy Act that prohibits this procedure. The only
23 thing the Atomic Energy Act requires for a facility
24 like this is that we not possess special nuclear
25 material without a license. As a result of that, the

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1 staff is free and the Commission is free to establish
2 appropriate licensing procedures just so long as it
3 assures that no special nuclear material is possessed
4 without a license. Section 161 of the Atomic Energy
5 Act gives very broad powers in establishing licensing
6 procedures.

7 CHAIRMAN MOORE: Well -- but wait a
8 minute. Are the provisions of Part 70 substantive
9 regulations or procedural regulations?

10 MR. SILVERMAN: They contain both
11 procedural and substantive requirements.

12 CHAIRMAN MOORE: Well is it generally
13 acknowledged that Part 2 contains the procedural
14 regulations?

15 MR. SILVERMAN: Generally for hearings and
16 enforcement --

17 CHAIRMAN MOORE: And what is required in
18 an application? Would it be your contention that that
19 is a procedural rule, not a substantive rule?

20 MR. SILVERMAN: I'm not sure I would make
21 the distinction one way or the other, but I believe
22 Part 70 speaks to that, what's required for various
23 types of applications.

24 CHAIRMAN MOORE: May the Commission change
25 by rule -- I'm sorry, by order substantive rules?

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1 MR. SILVERMAN: I don't believe they're
2 changing the rules. What they're doing is
3 establishing additional procedures not called by the -
4 - not specifically required by the statute.

5 CHAIRMAN MOORE: Well forget the statute.
6 How about the regulations?

7 MR. SILVERMAN: If you're referring to the
8 Part 70 regulations --

9 CHAIRMAN MOORE: Yes.

10 MR. SILVERMAN: -- 7022(f) and 23 that we
11 discussed earlier --

12 CHAIRMAN MOORE: Yes.

13 MR. SILVERMAN: -- we have stated our
14 position on that. We believe that those regulations
15 authorize this procedure, that the Commission
16 recognized that. CHAIRMAN MOORE: Where did they
17 recognize it? I'm having trouble putting my finger on
18 that.

19 MR. SILVERMAN: Well the referral order
20 clearly discusses the fact that there'll be a separate
21 construction authorization request. It discusses the
22 fact that the issues were to be admitted as
23 contentions must relate -- and this is page 7 under
24 Commission guidance -- to whether the principal
25 structure systems and components and the quality

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1 assurance program together provide reasonable
2 assurance. And they add in the finding about NEPA.

3 I also believe in the April 18th -- if
4 you'll bear with me just one second.

5 MR. FERNANDEZ: Your Honor, if I may?

6 CHAIRMAN MOORE: No.

7 MR. SILVERMAN: Let me finish. The very
8 first paragraph in the summary of the April 18th
9 Notice of Acceptance for Docketing and Notice of
10 Opportunity for Hearing says the NRC has accepted to
11 construction authorization request, CAR, for
12 docketing.

13 CHAIRMAN MOORE: Is that -- is that a
14 staff notice or a Commission notice?

15 MR. SILVERMAN: This is signed by the
16 secretary of the Commission.

17

18 CHAIRMAN MOORE: All right.

19 MR. SILVERMAN: I believe there are other
20 places in here where this recognizes that there will
21 be a construction authorization request and that that
22 is separate from the license application to come
23 later.

24 CHAIRMAN MOORE: Which goes back -- the
25 Atomic Energy Act clearly permits the Commission to

1 act in two ways, by order and by rule.

2 MR. SILVERMAN: Yes.

3 CHAIRMAN MOORE: Then the notice of
4 docketing would be in order, so that --

5 MR. SILVERMAN: I think effectively it is,
6 but we rely on both that and on the regulations.

7 CHAIRMAN MOORE: I'm having some trouble
8 putting this in context because if the regulations are
9 read in a fashion as suggested by the petitioners,
10 then that would seem to be contradictory of Commission
11 -- at least implied, if not explicit statements of the
12 Commission. But if they are not in -- if the
13 Commission has not done this by order, then it can
14 only do this by a rule change. So the question then
15 becomes, in these documents in which they've done it,
16 does a notice amount to an order by the Commission
17 changing the substantive rules?

18 MR. SILVERMAN: Again, I do -- I do think
19 in essence -- and would probably want to research the
20 point -- that this notice is in effect an order of the
21 Commission, but it's not a change. It is a
22 clarification of the scope of this proceeding. We
23 think this regulation calls for certain specific
24 findings to be made and it is appropriate and
25 reasonable under the regulation for the applicant to

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1 submit the information necessary for the staff to make
2 those findings. And it is illogical for the applicant
3 to be required to submit information that is beyond
4 the scope of those findings at this stage and is
5 redundant in many ways.

6 CHAIRMAN MOORE: Your interpretation is in
7 the teeth of 7023(b), which incorporates 7023(f). I
8 mean that is the crux of the matter. You're
9 essentially asking us to read the provision of 7023(b)
10 that says information on the basis of information
11 filed pursuant to Section 7022(f) out of the
12 regulations. I would agree with you, if it didn't say
13 that, that your argument is highly persuasive.

14 MR. SILVERMAN: We don't think it says
15 that. Let me see if I can explain, put these
16 regulations in context. I'm going to borrow a
17 statement from Mr. Hull, I believe, who said that
18 Section 7022(f) was adopted in the 1950s. So we have
19 a -- if you look at that regulation, it talks about an
20 application -- the information that an application has
21 to contain. At that time, I don't think anyone
22 contemplated or specifically considered a separate
23 construction authorization request. I'm sorry, not F.
24 7022 -- I apologize -- was adopted in the 1950s in
25 general. F was added later.

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1 When F was added, it says, in addition to
2 all this other information that we've already asked
3 for from an applicant, we want certain additional
4 specific information. That is, a description of the
5 plant site, a description of the design basis of
6 principal SSCs, et cetera. That's the additional
7 kernel of information that was added and required.

8 We now go to the regulation in 7023 where
9 it says the Commission will approve construction of
10 the principal SSCs based upon -- on the basis of
11 information filed pursuant to 7022(f) when it's
12 determined that the design basis of the principal SSCs
13 in the QA program are adequate. We think what they're
14 referring to there is that additional information
15 related to the design basis of principal SSCs that was
16 added as an additional requirement to strengthen the
17 regulations, and that it does not intend to require
18 the submittal of a large amount of additional
19 information that would not normally be submitted at
20 this stage.

21 It's also the logical result in the
22 following sense. We're talking about highly -- if you
23 applied the interpretation of the intervenors, you're
24 going to be submitting general design information on
25 the plant. At the same time, you're going to have to

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1 submit detailed design information of the plant of the
2 type you would have to submit at the possession and
3 use license stage. There's a redundancy and an
4 illogic there that doesn't hold for us. There would
5 be no reason to ask for the general information at
6 this time if the Commission contemplated all of the
7 detailed specific information at this time. What the
8 staff and the Commission have done here is read some
9 regulations that are admittedly not as clear as they
10 should be, but they have read them in a reasonable
11 way, in a logical way, in a way that's authorized by
12 the statute and in a way that ensures that the staff
13 gets the requisite information they need.

14 Ms. Curran also says -- and they've made
15 this comment in their --

16 CHAIRMAN MOORE: Okay, accept your
17 interpretation, how do you respond to Mr. Curran's
18 argument that you will be the -- the staff will be
19 doing an EIS before they ever see a safety analysis.
20 Now in every other instance where you have a two-part
21 licensing proceeding, you have -- at a CP for a
22 reactor, for example, the EIS, as does the CP license
23 application, has all of the detailed design.

24 MR. SILVERMAN: No.

25 CHAIRMAN MOORE: Certainly the vast, vast

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1 majority of the detailed design material in it. So
2 they're done on parallel tracks. Indeed, in a recent
3 case in which several members of this Board sat in
4 Turkey Point, the staff's answer to a charge that you
5 must complete the safety analysis before you do the IS
6 is no, no, no, they can be done in parallel because
7 when they're done in parallel, you necessarily in
8 doing your NEPA analysis are using and incorporating
9 the analysis from the safety side -- from the safety
10 track. Here, Ms. Curran points out that what's going
11 to happen is, the EIS will be done two years before
12 the safety analysis, and all of the things that you've
13 told us today that will be done later, will be done
14 later, will be done later, that go to whether or not
15 your accident analysis are going to be properly
16 assessed and are correct, will not be looked at until
17 two years after the environmental impact statement is
18 issued. That seems to me to strike a discordant note,
19 and not, as you would contend, bring an illogic to the
20 regulations, rather Ms. Curran's interpretation of
21 these regulations would clearly avoid that situation
22 and fit in the traditional mold of having the EIS and
23 the safety analysis done on parallel tracks, not
24 perpendicular tracks, one done two years in front of
25 the -- I'm sorry, the NEPA analysis, and EIS done two

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1 years in advance of the safety analysis.

2 MR. SILVERMAN: First of all, what we have
3 here is a parallel track and that is consistent with
4 other NRC procedures. We have the SER being prepared
5 at the same time the environmental impact statement is
6 being prepared by the staff and parallel tracks.
7 Furthermore, we pointed out two examples where this
8 type of procedure is specifically authorized by the
9 regulations. We've referred to the Part 52 relief
10 site permit application procedure. That's a procedure
11 where an application can apply for an early site
12 permit for a nuclear power plant. Before they have
13 filed a construction permit, before they have filed a
14 combined license, and in order to --

15 CHAIRMAN MOORE: What does the NEPA --
16 what NEPA requirements attach at that point and what
17 does the NEPA analysis include at that point?

18 MR. SILVERMAN: I will quote the
19 regulation -- well a portion of the regulation. A
20 full environmental review will be prepared covering,
21 quote, the environmental effects of construction and
22 operation, unquote. That's constructed, even though
23 a construction permit hasn't even been filed or a
24 combined license application hasn't been filed. There
25 is an environmental review of construction and

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1 operation in that procedure. That's in the
2 regulations in Part 52.

3 In part 50, we have the limited work
4 authorization procedure where an LWA may be issued
5 after an environmental impact statement is issued on
6 the construction permit, but before the SCR under
7 construction permit is issued. If an applicant had to
8 wait, even for that SCR to come out before it could
9 proceed to work there wouldn't be any reason to get
10 the LWA in the first place. There are at least two
11 provisions in the regulations where this very
12 procedure is called for. It is not necessary under
13 NEPA to have the entire safety analysis and all of the
14 safety considerations and a final application prepared
15 in order to do an adequate environmental impact
16 statement.

17 JUDGE KELBER: The thing that bothers me
18 is one of the first things I learned when coming on
19 the panel. The Commission follows the Humpty Dumpty
20 rule. Our rules and regulations say what they mean
21 and mean what they say. It's otherwise known as the
22 plain speaking rule. Ms. Curran's interpretation
23 seems to satisfy that point of view. If you follow
24 her interpretation the rules mean what they say and
25 say what they mean. You're offering a perfectly

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1 reasonable interpretation by analogy, but it doesn't
2 mean the Humpty Dumpty rule. You're putting us in a
3 great dilemma that way. We're faced with two rational
4 interpretations. One which meets the plain speaking
5 rule, but which is not analogous to procedures worked
6 with power plants -- nuclear power plants. You're
7 saying this is something analogous to what's done with
8 nuclear power plants in their early site permits and
9 limited work authorizations, and we should follow that
10 interpretation. How do we choose -- put yourself in
11 a neutral position. How does one choose? On what
12 basis is there to make a choice?

13 MR. SILVERMAN: Judge Kelber, I think my
14 response to that is that the Commission is aware of,
15 and has sanctioned the procedure and the
16 interpretation that we proffered.

17 JUDGE KELBER: In other words, you're
18 saying the Commission said do it. Okay.

19 CHAIRMAN MOORE: Do you have anything
20 else?

21 MR. SILVERMAN: Well I just want to
22 respond real briefly to one of the arguments that the
23 intervenors have made because I think it's very
24 misleading, and then I will close my remarks.

25 They continually say that our

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1 interpretation weakens rather than strengthens the
2 safety regime. That's absolutely false. What we've
3 done here is what -- what the Commission has done is
4 added an another entire level of review here. Most
5 special nuclear material licensees once again simply
6 have to file a possession and use license application.
7 What they've done here is establish a requirement that
8 we come forward with a discussion of the general
9 design basis of this plant so that they can make a
10 finding that if we built it in accordance with those
11 basic parameters there will be reasonable assurance of
12 safety. And we can't build until those findings are
13 made. That is added on. That's the strengthening of
14 the regulations.

15 We have no other comments on this at this
16 time.

17 CHAIRMAN MOORE: The trouble with that
18 argument though is, it's almost a nonsecular because
19 the information that you supply is so skeletal that
20 once you get the -- something that I can find no -- I
21 don't know what you will get when you -- from your
22 CAR. I guess you'll get an authorization. You won't
23 get a license, as I understand it. But it's very
24 skeletal and you get that authorization, then you
25 provide all of the detailed information during

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1 possession and use. And yet, because you've got this
2 authorization on the basis of skeletal information, it
3 is now locked in, because you did all that you said
4 you were going to do, even if subsequently with the
5 detailed information, it proves that perhaps that
6 wasn't prudent. But you have met the authorization of
7 this -- what you were saying, this benefit of a two-
8 step process. And so, I think that it's a two-edged
9 sword that you're pointing out. It has great
10 advantages to you, whether it has great advantages for
11 safety, I don't know.

12 MR. SILVERMAN: Well, I believe it does.
13 I really -- I would have to object to the
14 characterization of the CAR as skeletal. I mean this
15 is three volumes of documentation here with very
16 specific commitments to codes and standards that are
17 to be applied to design basis events, to descriptions
18 of how we do our accident analysis and the results of
19 those accidents analysis. There is a lot of
20 information in there. It is by definition three
21 volumes more than one would get for any other special
22 --

23 CHAIRMAN MOORE: Now what happens once you
24 get whatever comes out of this process, an
25 authorization, whether it's a license, whatever we're

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1 calling it? You then are entitled -- having fulfilled
2 that requirement, you then are entitled to the
3 possession and use license, are you not?

4 MR. SILVERMAN: No, not at all. We're
5 entitled to begin --

6 CHAIRMAN MOORE: If you build it the way
7 you say you were going to build it in your initial
8 license, aren't you then entitled --

9 MR. SILVERMAN: No, that's only part of
10 the calculation. Obviously the staff has to verify
11 that we built it in accordance with the commitments
12 that we've made.

13 CHAIRMAN MOORE: Okay, assume you do that.

14 MR. SILVERMAN: In addition to that, the
15 staff has to obviously approve all of the other
16 commitments, obligations and specifications that we
17 provide in our license application, which is going to
18 be, I understand, considerably more detailed in many
19 facets, including containing a large number of
20 programs like material control and accountability, et
21 cetera, that we haven't provided at this point in
22 time. Plus an integrated safety analysis, which has
23 to be provided under the new NRC regulations, and a
24 demonstration that, you know, certain events are
25 highly unlikely or certain events are unlikely based

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1 upon our application. There's a lot more to be done
2 here. It's not just okay, you built it in accordance
3 with those design basis.

4 CHAIRMAN MOORE: Then we what, supplement
5 the IS if necessary?

6 MR. SILVERMAN: If there's substantial
7 significant new information, then the NRC has an
8 obligation to examine that information and make a
9 determination whether they need to supplement it. If
10 there's significant changes to the design of the
11 facility that the NRC believes warrants a supplement
12 they're obligated to do that.

13 CHAIRMAN MOORE: Where does the backfit
14 rule fit in?

15 MR. SILVERMAN: There is a backfit rule.
16 It's a new rule in 10 CFR Part 70. I'm not sure I
17 understand your question, but it does give the staff -
18 - that's interesting. It's a good point. It does
19 give the staff the ability to make determinations that
20 backfits are required with certain determinations,
21 and, you know, without a cost benefit analysis if it's
22 necessary -- if the backfit is necessary to meet --

23 CHAIRMAN MOORE: Doesn't the backfit rule
24 require a cost benefit analysis?

25 MR. SILVERMAN: No. The way the backfit

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1 rule works in both the Part 50 regime and the Part 70
2 regime is if the staff determines that there's a
3 change that's required in order to meet the adequate
4 protection standard. There is no cost benefit
5 analysis. It is imposed upon the licensee. If the
6 staff -- I can cite you to the regulation using the
7 language. If the staff believes it's simply a safety
8 improvement and it's not necessary to meet adequate
9 protection standard, but would be a safety
10 improvement, then there is a cost benefit analysis
11 done.

12 JUDGE LAM: So in this case the backfit
13 rule may or may not apply?

14 MR. SILVERMAN: There is a backfit rule --
15 no, it applies in the sense that it gives the staff
16 the ability to say regardless of the requirements that
17 we have imposed before, in order to protect public
18 safety, we must impose a new requirement, and they may
19 do that --

20 JUDGE LAM: The backfit rule would apply
21 and cost benefit analysis may or may not be required?

22 MR. SILVERMAN: Yes.

23 CHAIRMAN MOORE: But under Ms. Curran's
24 reading of these regulations, if this were done as a
25 one-step process, the backfit rule would never come

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1 into play.

2 MR. SILVERMAN: I'm not sure about that.

3 CHAIRMAN MOORE: Well how would it come
4 into play?

5 MR. SILVERMAN: I think that any time,
6 even an operating plant, the staff can impose a
7 backfit.

8 CHAIRMAN MOORE: No, they just wouldn't
9 give you the license until you did what they wanted
10 you to do. You could contest that, but it would not
11 be anything to do with the requirements of the
12 backfit.

13 MR. SILVERMAN: Perhaps.

14 CHAIRMAN MOORE: Staff, do you have
15 anything to add?

16 MR. FERNANDEZ: Yes, Your Honor.

17 CHAIRMAN MOORE: Okay.

18 MR. FERNANDEZ: The first thing we would
19 like to add -- the first think we would like to
20 address is that even though Ms. Curran's argument is
21 an attractive one, it's just one of two arguments
22 before you that are reasonable. We believe the more
23 reasonable, and in fact, the one endorsed by the
24 Commission is the one advanced by the applicant and
25 the staff.

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1 I would like to address some things raised
2 by the Board and Ms. Curran in her presentation.
3 First, I would like to begin with what Judge Kelber
4 said with regards to putting the Board in a difficult
5 position. The Board is in no difficult position at
6 all. I believe that the orders issued by the
7 Commission are clear, that this is a two-step
8 licensing proceeding, there's no question about what
9 the Commission's expectations are of how this
10 Commission should -- of how this proceeding should
11 proceed. And if there's any question as to what the
12 Commission meant, then the Commission itself should
13 answer that question and not to Board.

14 Second, I would like to address something
15 that Judge Moore addressed with regards to what
16 applicant will get at the end of this process.
17 Something that I don't think anybody has mentioned yet
18 is the Administrative Procedures Act. The APA defines
19 what a license is with regards to what administrative
20 agencies do. In it's definition of licenses, there's
21 permits and authorizations. It's a very broad
22 definition. So reading the APA in conjunction with
23 the Atomic Energy Act, as the Atomic Energy Act
24 commands, they would have a license from the
25 Commission at the end of this proceeding.

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1 With regards to the Commission notice, I
2 think, Judge Moore, you were looking for where in the
3 Commission notice the Commission specified as far as
4 the bifurcated proceeding. If you go to page 19,995,
5 the second column. If you have a copy from the
6 Federal Register, it will be bolded where it says
7 Federal Register. And there it reads, the results of
8 the NRC's reviews of the DCS filings will be
9 documented in a safety evaluation report and an
10 environmental impact statement. As stated in the
11 March 7, 2001 Federal Register notice, in the summer
12 of 2002 DCS plans to submit a request for authority to
13 operate the MOX facility, and that request would be
14 the subject of the separate notice of opportunity for
15 hearing. That is volume 66 of the Federal Register.
16 We would like to point out that ordinarily these
17 notice of acceptance for docketing are filed by the
18 staff. In this case, it was the secretary of the
19 Commission that issued the notice.

20 We would also like to address the
21 statements that GANE made with regards to the Atomic
22 Energy Act. The Atomic Energy Act is very specific
23 with regards to nuclear power plants, and that is
24 correct. However, as the Seagal case recognized in
25 the D.C. circuit, it also is very unlike any other act

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1 in the authority of delegates to the agency, which it
2 created. In this case, the Commission. It gave the
3 Commission powers unlike other agencies have in
4 determining the way it would issue licenses and it
5 would organize itself. So we believe that relying on
6 the Atomic Energy Act -- we have the discretion of
7 setting up and establishing the practices as we deem
8 necessary to license facilities that are not
9 specifically set out in the Atomic Energy Act.

10 Also another comment raised by Ms. Curran
11 with regards to the immediate effectiveness of the
12 rule when it was promulgated. I don't think the Board
13 should read anything into making the rule immediately
14 effective when it was published. We need to remember
15 that at the time there were several people -- several
16 industry groups that were interested in engaging in
17 this type of facility. So it's obvious that the
18 Commission would issue a rule immediately because the
19 interest was there. So they wanted to make sure that
20 if anybody came in, they came in under the particular
21 rule that they wanted to promulgate. It doesn't
22 specifically reflect that they were any particular
23 inordinate concerns with regards to the safety of
24 these facilities that they allude to.

25 Now I would like to go into the merits of

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1 the motion, if you don't have any questions.

2 (No response.)

3 MR. FERNANDEZ: First, as we mentioned, we
4 contend that the Board lacks authority to review the
5 motion. As we argued before, the authority of the
6 Board and the scope of this proceeding is clearly
7 delineated and the notice of hearing and in the
8 referral order. We believe if there are any issues
9 that the Board deems that deal with this particular
10 issue it should be referred to the Commission.

11 Second, even though GANE offhandedly
12 discards the argument that because it's not
13 specifically prohibited, we shouldn't be authorized to
14 engage in this activity. We believe that it's a
15 strong argument. I mean the -- we'll be the first to
16 admit that Part 70, when you read it in its totality,
17 at some point it doesn't seem to really make sense.
18 It has been something that the staff has dealt with,
19 the applicant has dealt with it and we understand when
20 GANE says it's difficult to deal with the regulations,
21 we know what they mean. These are the regulations
22 that we have and these are the regulations that we
23 need to deal with.

24 We believe that you can read everything
25 that's in the regulations to support a bifurcated

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1 licensing approach. There's nothing that prohibited
2 it and it establishes clearly as a standard for
3 approving construction and a standard for approving
4 operations. True, in --

5 CHAIRMAN MOORE: Don't get carried away
6 with you advocacy now. You used the word clearly.
7 Now this morning we were told they're ambiguous. So
8 you guys have got to get together over there.

9 MR. FERNANDEZ: Well, Your Honor, I would
10 point to 723(b) and it does set out what we need to
11 look at. I know you're going to refer me back to
12 7222(f) and I'm about to address that. But 7023(b)
13 does set out what the Commission needs to look at when
14 it's approving construction.

15 7022(f) is a roadblock. We recognize that
16 it seems to say you need to provide all the
17 information up front. We would -- I agree with the
18 applicant that when this was amended that the
19 Commission intended for those particular requirements
20 to apply solely for the purpose of special nuclear
21 materials used in possessed licenses. And that is not
22 what we're litigating today. I mean, the fact that
23 the DCS -- go ahead.

24 JUDGE KELBER: You believe something is
25 the Commission's intent?

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1 MR. FERNANDEZ: Yes, Your Honor.

2 JUDGE KELBER: And what is the basis of
3 that belief?

4 MR. FERNANDEZ: Well, Your Honor, there is
5 -- unlike GANE, I don't believe that the statements of
6 considerations for the rule are that clear. I believe
7 that just reading the regulations on their face, in
8 tandem, the whole of Part 70, you come out with the
9 Commission's intent of having two separate
10 considerations of operations and licensing. In fact,
11 why would they have two separate standards for
12 considering construction and operations? Well because
13 you would consider them separately. They didn't
14 clearly outline there was going to be a separate
15 licensing proceeding, and we are all wrestling with
16 that issue. But it is clear that they established two
17 separate standards for the two separate issues.

18 JUDGE KELBER: What's clear? Where are
19 the two separate standards?

20 MR. FERNANDEZ: Your Honor, if you go to
21 723(b), it says the Commission will approve
22 construction of et cetera. Once they have analyzed
23 what it says there, then if you go to A-8, it says
24 when the proposed activity is operation of the
25 facility, as would happen in the second part of the

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1 hearing process, then you have the delineated
2 requirements of what they need to approve.

3 I mean it's even clear that if they came
4 in with just one application, we may even had to have
5 had a second hearing after that to make sure that they
6 had constructed the facility to the specifications
7 that they had set out in their one license
8 application. So when faced with both of these
9 regulatory interpretations, we would urge the Board to
10 go with the interpretation that the staff has done and
11 that the Commission has approved.

12 Now moving on to some of the other
13 arguments raised by GANE regarding Part 51, the NEPA
14 requirements and the staff. Your Honor, the NEPA
15 requirements and the staff are basically that. They
16 are requirements that come from the National
17 Environmental Policy Act. Those obligations are
18 separate from the obligations that the agency has with
19 the Atomic Energy Act. Basically we're talking about
20 two documents that are drafted in response to two
21 obligations that the agency has. What GANE is trying
22 to say is that oh, when NEPA was drafted, it basically
23 reinforced or enhanced the Atomic Energy Act to
24 require that you draft a safety evaluation report with
25 the environmental impact statement, and that is not

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1 correct.

2 We all know through the NEPA case law that
3 NEPA is a procedural statute, that it has no
4 substantive requirements on the agencies that are
5 implementing that statute, and that when the agency
6 meets the hard look requirement, and it publishes
7 sufficient EIS, it has met its obligations on the
8 National Environmental Policy Act. We would argue
9 that the Board should not allow GANE to piggyback on
10 the Atomic Energy Act to increase the responsibilities
11 that the NRC has under NEPA.

12 Lastly, we would like to address -- since
13 I think we're running out of time and we want to be
14 fair to all the other parties -- the point regarding
15 the unavailability of the hearing file. The
16 regulations are clear that the hearing file should be
17 produced when a hearing is established. That has not
18 happened yet. We believe it may be premature to
19 address that issue.

20 Even in fact if a hearing were found -- if
21 we found that the petitioners can become parties to a
22 hearing, if there is a hearing, the hearing file only
23 contains the documents that are available at that
24 point, and the rules specifically provide for the
25 staff to supplement the hearing file as new documents

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1 become available and do not require that any
2 particular documents are available at a particular
3 time.

4 If you don't have any questions, the staff
5 will rest.

6 JUDGE LAM: I have a question for you, Mr.
7 Fernandez.

8 MR. FERNANDEZ: Yes, Your Honor.

9 JUDGE LAM: Do you think in the
10 Commission's referral order to us it gave implicit
11 approval to this two-step licensing process, or did it
12 give explicit approval?

13 MR. FERNANDEZ: Your Honor, I think that
14 the Board in it's referral order -- hold on a second.
15 I believe they explicitly adopt the statements that
16 they made with regards to the notice of hearing,
17 particularly in pages 7 through 8. They ask -- they
18 direct the presiding officer -- officer to issue an
19 initial decision specifically, quote, on the CAR
20 within approximately two years.

21 The decision is not on whether DCS should
22 have a special nuclear materials license, the decision
23 is on the CAR, basically the construction
24 authorization, the construction portion of this
25 proceeding. Right now, I cannot -- and also on page

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1 8, it also delineates the hearing's goal as issuance
2 of an initial decision on the CAR. So it's clear the
3 Commission is aware that there's a two-part proceeding
4 and that it wants to Board to merely stick to the
5 issues raised by the CAR in this proceeding and not
6 issues with regards to the bifurcation of the process.

7 JUDGE LAM: If that being the case, if
8 your interpretation is correct, do you think it would
9 be better for the Commission to decide this motion by
10 GANE?

11 MR. FERNANDEZ: I don't know if it would
12 be better or worse. I know it would be appropriate
13 for the Commission to be the one to decide the issue.

14 JUDGE KELBER: You used the fact that they
15 requested an initial decision, but there have been a
16 number of cases -- complex cases in which there have
17 been initial decisions given. They don't -- the ones
18 I'm thinking of do not have about private fuel storage
19 is the case in point. Do not have a bifurcated
20 proceeding.

21 MR. FERNANDEZ: I didn't mean to over
22 emphasize the portion that referred to it being an
23 initial decision. I'm sorry.

24 CHAIRMAN MOORE: Did it ever occur to the
25 staff in looking at this problem in advance, if it was

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1 looked at at all, to use the procedure and get a
2 binding interpretation from the general counsel on
3 what this regulation means, and if you didn't consider
4 it, why didn't you consider it?

5 MR. FERNANDEZ: As far as I -- my own
6 personal knowledge is concerned, I'm not aware that
7 the staff formally requested an opinion on an
8 interpretation of the Part 70 requirements from the
9 general --

10 CHAIRMAN MOORE: Before you embarked on
11 this incredibly ambitious approach, why was that not
12 considered when your co-counsel has indicated the
13 regulations are in ambiguous and not clear?

14 MR. FERNANDEZ: Again, Your Honor, I don't
15 know. I've only been with the agency for a year. I
16 think those decisions were made prior to my arrival.

17 CHAIRMAN MOORE: Well unlike you, I've
18 been here a long time and I've never seen that
19 approach used, and yet I've seen the staff run into a
20 lot of walls in the years I've been here with this
21 very reason, and I just cannot fathom why when this
22 procedure is available, before you embark on something
23 that is inevitably going to cause this kind of a
24 problem, you do not get at the earliest stages such an
25 interpretation.

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1 And I would hope -- I don't expect, but I
2 would hope that that message will get through, because
3 I frankly find that it is beyond the pale in this day
4 and age that we should be having to wrestle with a
5 problem like this when before you ever embarked on
6 this path it should have been resolved definitively.

7 There being nothing further, the Board
8 will take all of these matters under consideration.

9 MR. MONIAK: Your Honor.

10 CHAIRMAN MOORE: Yes, Mr. Moniak.

11 MR. MONIAK: I was wondering if I could
12 have 30 seconds to offer a comment on the motion. We
13 never submitted any written comments.

14 CHAIRMAN MOORE: I recognize that. The
15 Board -- what I would like to do though is to hear
16 from you on -- this morning we left open a couple of
17 matters and you were going to enlighten us on where --
18 and you'll have to forgive me for forgetting precisely
19 what we were dealing with can be found.

20 MR. MONIAK: It was the crane -- the crane
21 issue that was cited in number 10.

22 CHAIRMAN MOORE: That's GANE contention
23 10?

24 MR. MONIAK: Yes. Would you like me to do
25 that first?

1 CHAIRMAN MOORE: Yes.

2 MR. MONIAK: Okay.

3 MS. CARROLL: Did hear him right? He said
4 GANE's contention 10. This is yours.

5 CHAIRMAN MOORE: I'm sorry. Ten, yeah.

6 MR. MONIAK: Heavy lift cranes, I have a
7 copy of this.

8 CHAIRMAN MOORE: You can do this --

9 MR. MONIAK: Yes, I know I can do this
10 sitting down, but it's been a long day. I think
11 better on my feet.

12 Contention 10 regarding heavy lift cranes.
13 I want to cite the citation. It's Section 1110 of the
14 Construction Authorization Request, page 11.101. The
15 heavy lift crane -- it states the heavy lift cranes
16 that handle critical loads must retain their load
17 during normal operation design basis accidents and
18 design basis natural phenomenon events. The paragraph
19 above it says heavy lift cranes in the MOX facility
20 designed to safely and reliably hoist critical or non-
21 critical loads that weigh in excess of 1,800 pounds --

22 CHAIRMAN MOORE: Is that an exhibit to
23 your contentions?

24 MR. MONIAK: Well it's in the CAR.

25 CHAIRMAN MOORE: Okay.

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1 MR. MONIAK: I just didn't have this in
2 front of me.

3 CHAIRMAN MOORE: Fine.

4 MR. MONIAK: Critical loads are defined as
5 those --

6 CHAIRMAN MOORE: It's in the CAR and we'll
7 be able --

8 MR. MONIAK: Oh, okay, okay.

9 CHAIRMAN MOORE: I just wanted the
10 citation.

11 MR. MONIAK: Yes.

12 CHAIRMAN MOORE: Now what's the second
13 matter you have?

14 MR. MONIAK: Under -- on the second page
15 of this it just says there are no principal SSCs
16 associated with the system, in spite of the fact that
17 --

18 JUDGE KELBER: Are you still talking about
19 the crane?

20 MR. MONIAK: The crane, yes.

21 JUDGE KELBER: No, we'll read that
22 ourselves. You gave us the reference and that's fine.

23 MR. MONIAK: Okay, great.

24 The other issue I wanted to address, it
25 was not really in our contentions, is relating to the

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1 contract. There was a when earlier about what was in
2 it. I have it here --

3 CHAIRMAN MOORE: It wasn't submitted as an
4 exhibit to any of --

5 MR. MONIAK: No.

6 CHAIRMAN MOORE: Then it is not before us
7 for consideration as part of the contention.

8 MR. MONIAK: Okay.

9 CHAIRMAN MOORE: So that --

10 MR. MONIAK: I was wondering if I could
11 have 30 seconds to address this?

12 CHAIRMAN MOORE: No.

13 MR. MONIAK: Okay, thanks.

14 CHAIRMAN MOORE: Now we have a couple of
15 housekeeping matters. Ms. Carroll, you have one.

16 MS. CARROLL: Well something kind of weird
17 happened last week. I came back from being out of
18 town and I had an order from DCS or whatever, their
19 response to our contention, and a PDF file. I sent
20 the PDF file to Diane and it was so big her computer
21 couldn't open it and I asked for a copy of it in Word
22 and they said no, we're not going to serve in Word
23 anymore. It just seems petty and weird to me. The
24 PDF files are bigger and harder to open. I actually
25 haven't done the work to look at your order. I

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1 thought you specified Word Perfect.

2 CHAIRMAN MCCRE: In a word, you're being
3 served by electronic mail with PDF files as opposed to
4 something --

5 MS. CARROLL: A word processing document.

6 CHAIRMAN MOORE: Word or Word Perfect that
7 you were previously getting, is that correct?

8 MS. CARROLL: That's true.

9 CHAIRMAN MOORE: By whom?

10 MS. CARROLL: By the applicant.

11 CHAIRMAN MOORE: Applicant, is that the
12 case, and if so, why can't you use Word or something
13 else that they can handle?

14 MR. POLONSKY: That is the case. We have
15 decided and initially had made a decision to file by
16 PDF files. The order requires electronic filing.
17 GANE clearly can open it themselves as she's
18 indicated.

19 CHAIRMAN MOORE: Do you have the
20 capability of sending it in Word or Word Perfect?

21 MR. POLONSKY: We do, but for security
22 reasons we discontinued that practice of filing.

23 MS. CARROLL: These are public documents.

24 CHAIRMAN MOORE: Ms. Carroll, I've heard
25 your argument.

1 Are you filing things PDF with us?

2 MR. POLONSKY: Yes, we are now, and we had
3 in the beginning. There was a lapse. I can explain
4 if it will make more sense. A PDF file is in essence
5 an image of the document.

6 CHAIRMAN MOORE: I recognize that.

7 MR. POLONSKY: A Word document has many
8 hidden characteristics that can be tweaked from the
9 background of a document and there are various
10 functions that we don't want anyone to be able to
11 identify that could be identified if the document were
12 accessible via Word or Word Perfect. So we're no
13 longer serving documents in Word or Word Perfect. We
14 would be happy to fax it or -- I mean clearly Glenn
15 Carroll is capable of printing it herself and faxing
16 it to her legal counsel. We have, we think, met our
17 obligation to file it electronically and in a timely
18 manner and GANE has indicated they can access that
19 document.

20 CHAIRMAN MOORE: And you're treating
21 everyone the same way?

22 MR. POLONSKY: Yes, everyone is being
23 served identically except for EI, of course.

24 CHAIRMAN MOORE: Well since there'll be no
25 more filings necessary until the Board has spoken on

1 the matters before us, there's nothing in that regard
2 that needs to be decided today.

3 Are there any other housekeeping matters?

4 MS. CARROLL: I'd like to point out one
5 thing in case it's not obvious to you. A PDF file,
6 you cannot copy and paste any of the words. Anything
7 you want to recite you'll have to retype. So I would
8 say that's our main objection, besides it being large,
9 and I'll have to have another computer, you know.

10 CHAIRMAN MOORE: We need not decide that
11 at this moment.

12 MR. FOLONSKY: That's not a factual
13 statement either. You can cut and paste.

14 MR. MONIAK: It depends. Actually it
15 depends on how it was --

16 CHAIRMAN MOORE: Hearing no other matters
17 to be brought before us --

18 MR. MONIAK: I have one point that I would
19 like to make regarding timeliness. We were like two
20 or three hours late in submitting our contentions. I
21 didn't anticipate anybody would be waiting on the
22 other end at two in the morning timing us. I want to
23 point out that we never --

24 CHAIRMAN MOORE: Mr. Moniak --

25 MR. MONIAK: -- received copies of the DCS

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CHAIRMAN MOORE: -- there's an old adage--

MR. MONIAK: Yes.

CHAIRMAN MOORE: -- that if you haven't stepped in a bear trap, don't go looking for it.

MR. MONIAK: Okay. I want to point out though that DCS has not provided --

CHAIRMAN MOORE: Excuse me. The applicant did not raise the issue and object to your filing.

MR. MONIAK: Okay, you're right. I'll pass.

CHAIRMAN MOORE: So they have essentially waived their objection for this round.

MR. MONIAK: Okay.

CHAIRMAN MOORE: I would caution you in the future --

MR. MONIAK: I will take that caution --

CHAIRMAN MOORE: -- that they may no longer be willing to do that.

MR. MONIAK: Okay.

MR. SILVERMAN: I would just like in response to a question by Judge Kelber regarding target reliability for INC systems refer you to an RAI answer, if I may.

JUDGE KELBER: Sure.

1 MR. SILVERMAN: CAR RAI number 39.

2 CHAIRMAN MOORE: There being no other
3 matters before us at this time, we'll take all of this
4 under advisement in determining the standing and the
5 admissibility of the contentions. Once the Board
6 rules there will be an immediate telephone conference
7 to deal with discovery and lay down the procedures for
8 doing that. If there's nothing further, we're
9 adjourned.

10 (Whereupon, the above matter was concluded
11 at 5:23 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Duke Cogema Stone & Webster
Docket Number: 70-3098-ML
ASLEP Number: 01-790-01-ML
Location: North Augusta, Georgia

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



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