

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

(1:30 p.m.)

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

MS. CARROLL: I apologize.

CHAIRMAN MOORE: Would you address Contention 5, please.

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

CHAIRMAN MOORE: Fine, go back to 3 then.

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

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

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

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 though, 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

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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

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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

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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, liquefaction  
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 MOX 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

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 MOORE: 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 Talwani 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 MOX 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?

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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.

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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.

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 DOE 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. CARROLL: 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. HULL: 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

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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 MOORE: 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 propogate 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 propogate 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.

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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 excepts 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

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

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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?

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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

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 hibrid  
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 KELBER: 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 dose  
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

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

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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.

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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

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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

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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 --

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 to 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 --

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

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

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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.

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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 MOORE: 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

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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

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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.

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

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

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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 19503 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

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

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?

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 MOORE: 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.

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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. POLONSKY: 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



1 --

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

3 MR. MONIAK: Yes.

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

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

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

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

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

14 MR. MONIAK: Okay.

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

17 MR. MONIAK: I will take that caution --

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

20 MR. MONIAK: Okay.

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

25 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

ASLBP 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.



William L. Warren  
Official Reporter  
Neal R. Gross & Co., Inc.

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