

RAS 4484

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Private Fuel Storage, LLC
Oral Argument

Docket Number: 72-22-ISFSI; ASLBP No. 97-732-02-ISFSI

Location: Salt Lake City, Utah

Date: Friday, May 10, 2002

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Work Order No.: NRC-281

Pages 1-124

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SECY-02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:)	
PRIVATE FUEL STORAGE, LLC,)	
(Independent Spent Fuel)	Docket No. 72-22
Storage Installation))	ASLBP No.
)	97-732-02-ISFSI
)	

On May 10, 2002 the above-entitled matter came on for hearing, pursuant to notice, before:

MICHAEL C. FARRAR, CHAIRMAN
Administrative Judge
U. S. Nuclear Regulatory Commission

DR. JERRY R. KLINE
Administrative Judge
Atomic Safety & Licensing Board Panel

DR. PETER S. LAM
Administrative Judge
Atomic Safety & Licensing Board Panel

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1 Friday, May 10, 2002

9:00 a.m.

2
3 P R O C E E D I N G S

4
5 JUDGE FARRAR: Good morning everyone.

6 We are here to hear oral argument on the State of
7 Utah's request to file a new contention denominated
8 Utah SS challenging certain aspects of the revised
9 Cost Benefits balance contained in the Staff's
10 Final Environmental Impact Statement. We are doing
11 this in somewhat unusual fashion; we have the
12 lawyer for the State of Utah here, and the lawyer
13 for the Applicant, PFS, and the NRC staff by
14 telephone from the D.C. area. If you -- let me
15 have you introduce yourselves and your colleagues
16 first. Mr. Stewart?

17 MR. STEWART: Monte Stewart, Special
18 Assistant Attorney General, state of Utah,
19 representing the state of Utah. Denise Chancellor
20 is also here, and we expect Connie Nakahara here
21 momentarily.

22 JUDGE FARRAR: For the Company?

23 MR. SILBERG: This is Jay Silberg at
24 Shaw Pittman, here at Shaw Pittman. Sitting in on
25 this end are Doug Rosinski and Doug Hamer of our

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1 office, and I believe sitting in with you at Utah
2 is Matt Diaz and Blake Nielsen.

3 JUDGE FARRAR: Yes. And I saw Mr.
4 Gaukler at one point, although he is not here now.
5 Mr. Weisman?

6 MR. WEISMAN: Robert Weisman, counsel
7 for the NRC staff. And with me here in Washington
8 are Michael Waters and Charlotte Abrams from the
9 Office of Nuclear Material Safety and Safeguard.
10 And I believe that Sherwin Turk was going to be in
11 the room in Utah.

12 JUDGE FARRAR: I believe we see him. He
13 is, in fact, here in his usual spot. For the
14 benefit of everyone on the telephone, we do have
15 several local news reporters here and several
16 members of the public. And, in fact, one of the
17 reporters is recording the audio here, just so
18 everyone is informed.

19 For those of you who are more familiar
20 with trials than with oral arguments, you may be
21 surprised. The trials are for the benefit of the
22 parties where the lawyers put on their witnesses
23 and we listen and occasionally ask questions and
24 the lawyers do the cross-examining.

25 Oral arguments, as all the lawyers know,

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1 are a very different thing. We have received
2 written briefs from the parties so we know what the
3 issues are. It's not illegal for us to even have
4 begun to think about how we might decide the case.
5 What you will hear, though, is -- as I said, oral
6 argument is for our benefit so you will hear us
7 frequently interrupt the lawyers.

8 It will be a rapid-fire sort of thing.
9 For the benefit of the reporters, the court
10 reporters, we all need to remember that she can
11 only take down one of us at once, although we tend
12 to get excited and talk over each other. But you
13 will see much more activism on the part of the
14 Board because this is for our benefit to answer
15 questions that we have.

16 If you are trying to analyze the case
17 when we ask the lawyers a question, you can assume
18 that their answer represents their position. It's
19 a dangerous business to assume, from our question,
20 that you can tell what we are thinking. We
21 sometimes ask a question because we think that's a
22 good theory and want to see if it is. We sometimes
23 ask a question because it's a bad theory and we
24 want to see if the lawyer agrees. So be careful
25 drawing any conclusions from the questions we ask.

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1 As usual, I'm accompanied by my
2 well-experienced colleagues, Dr. Kline,
3 environmental scientist, and Dr. Lam, nuclear
4 engineer. They have been at this business long
5 enough that they have picked up some of the tricks
6 of the trade of the lawyers and so you may hear
7 them ask some perceptive legal questions, as well.

8 Ordinarily in a proceeding like this,
9 the moving party, the State, would start. But we
10 would like to depart from that. There are a couple
11 of questions we have that we would like to ask the
12 Applicant and Staff at the very beginning just to
13 set the background so the State knows, as it begins
14 its argument, exactly what we are up against.

15 The first question, you might think,
16 "How could this Board have been involved in this
17 case and ask this question? Don't we know the
18 answer for it?" Obviously the reason we are asking
19 it is to make sure we understand clearly what the
20 parties' positions are on it. With that in mind,
21 Mr. Silberg, this being a NEPA case, one of the
22 issues, of course, is what's the benefit of this
23 project? Some of the debate today will be about
24 the economic analysis but we would like your view,
25 before Mr. Stewart starts, why is your company

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1 building this project? Why does your company want
2 to build this project?

3 MR. SILBERG: There are a number of
4 reasons, and the benefit of the project is not only
5 the benefit for the company, but also for its
6 members, member utilities, and for the other
7 participants in the project, specifically the Skull
8 Valley Band. From the standpoint of PFS and its
9 members, the interim storage facility provides an
10 option for utilities to send spent fuel away from
11 their sites under a variety of circumstances.
12 Those circumstances include the inability to obtain
13 additional spent fuel storage capacity at their
14 existing reactor sites because of physical
15 limitations, because of legal restrictions, because
16 of economic benefit for centralized storage.

17 The benefits also to the utilities and
18 PFS, particularly to the utilities, include the
19 ability to decommission their existing reactor
20 sites by being able to ship off the spent fuel that
21 is currently stored there when a reactor is
22 permanently shut down. Absent a place to send the
23 spent fuel, a utility would be unable to completely
24 decommission its site because there would be no
25 other location currently to send spent fuel.

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1 The Yucca Mountain project, as I think
2 everybody knows, which passed a significant mile-
3 stone on Wednesday with a vote from the House of
4 Representatives to override the Nevada veto, is not
5 scheduled to be available until 2010 at the
6 earliest. And therefore, there are no other
7 available interim storage sites. A utility which
8 wished to shut down a reactor and decommission that
9 site would have to maintain on-site spent fuel in
10 either pool storage or cask storage and would be
11 unable to completely decommission that site, make
12 it available for other purposes, close out its
13 nuclear operations, et cetera.

14 But there are also economic benefits to
15 be had from this facility both for the company in
16 terms of profits it may accrue, also benefits to
17 those companies that would participate in the
18 project, supplying goods and services. I think, as
19 the evidence at an earlier stage of the process
20 shows, the total system cost of this project could
21 approach \$3 billion, which is a lot of goods and
22 services, a lot of tax revenues, a lot of benefits
23 payments.

24 From the standpoint of Skull Valley
25 Band, I don't believe that they are represented

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1 here today but I think it is fair to say the Skull
2 Valley Band looks to this project as a source of
3 revenue, as a source of jobs for its members at the
4 reservation.

5 From the standpoint of Tooele County,
6 they would receive significant economic benefits
7 from this project. From the standpoint of the
8 State of Utah, they, too, would receive significant
9 economic benefits from the project, although it
10 appears they are not interested in those right now.
11 There are jobs to be had for both members of the
12 Band and others. So there are a very wide variety
13 of economic and other benefits that this project
14 would entail both to PFS, to its members, and to
15 the Band and the county, to the State, and to lots
16 of other folks.

17 JUDGE FARRAR: Let me ask an even more
18 pointed question. In terms of the economic effect
19 on your client, suppose Yucca Mountain is built on
20 time or ahead of schedule, suppose you don't get
21 the level of business you expect so that at the end
22 of the project your client has lost money. From a
23 NEPA standpoint - and I ask this question so the
24 State will, when it begins its argument, fully
25 understand your position - from a NEPA standpoint,

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1 how significant is it that your company could lose
2 or this could be a money-loser for this company?

3 MR. SILBERG: From a NEPA standpoint I
4 would say it's not significant at all. Economic
5 benefits are only one part of the Cost Benefit
6 Analysis. And there is no substantive requirement
7 that there be a net positive economic benefit from
8 a project.

9 JUDGE FARRAR: Let me --

10 MR. SILBERG: This or any other project.

11 JUDGE FARRAR: I think that's a
12 sufficient answer to set the stage. Thank you.
13 And again for the members of the public, that's his
14 position. It's not necessarily anybody else's.
15 But that sets the stage for the argument.

16 Mr. Weisman, one of the issues here is
17 whether the State timely filed its contention. And
18 again, for the benefit of the observers, they filed
19 within the requisite time limit after the Final
20 Environmental Impact Statement was filed, but there
21 was a requirement, or there may be a requirement
22 that they should have filed much earlier when they
23 first could have learned about this contention.

24 Mr. Weisman, let me ask you kind of a
25 hypothetical system question.

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1 MR. WEISMAN: Yes, your Honor.

2 JUDGE FARRAR: The Staff puts out a
3 lengthy Draft Environmental Impact Statement, and
4 suppose a party looks at that and says, "Boy,
5 there's a lot wrong with that." A party files a
6 hundred-page document with a hundred arguments
7 saying, you know, "Staff is all wet. This was a
8 lousy statement."

9 MR. WEISMAN: Yes, your Honor.

10 JUDGE FARRAR: As I read yours and the
11 Applicant's paper, you would have that party,
12 whether it's the State of Utah or an individual
13 citizen, also have to file a hundred contentions at
14 that point fully documented under the very strict
15 Commission rules, or later on if the Staff responds
16 and deals with 99 of those hundred and the
17 prospective intervenor says, "Aha, they didn't deal
18 with the other one," and then files a contention,
19 you would say they are too late unless they had
20 filed all hundred in the middle of the proceeding.
21 Do I correctly understand the Staff's position?

22 MR. WEISMAN: Your Honor, I think that
23 the Staff's position is the cases establish an
24 iron-clad obligation on the part of an intervenor
25 to timely file its contentions as soon as it has

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1 information available to allow it to do so. The
2 purpose of that is to make sure that the Applicant
3 and the Staff are on notice as to what the
4 Intervenor wishes to litigate at the earliest
5 possible opportunity.

6 JUDGE FARRAR: Let me interrupt there
7 for a second. What would you have the licensing
8 board do at that time; rule on all hundred
9 contentions?

10 MR. WEISMAN: I think, your Honor, that
11 if the Intervenor believes that there is a
12 significant issue, the Intervenor is under an
13 obligation to file a contention. And I would
14 believe that if the Intervenor thought a hundred
15 issues were significant enough to file contentions
16 on, then the Board would have to rule on whether
17 those contentions were admissible. Somewhat like
18 what we did at the initiation, at the outset of
19 this proceeding.

20 JUDGE FARRAR: Even if it later proves
21 that we spent a lot of effort in writing 99
22 opinions, that the Staff later, you know, proves
23 moot because the Staff dealt with those 99 issues
24 in the Final Environmental Impact Statement?

25 MR. WEISMAN: Yes, I believe that

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1 that's -- I believe that that's the case, your
2 Honor. The Intervenor, if the Intervenor is filing
3 comments, the Staff may have a good reason for not
4 dealing with the comments the way the Intervenor
5 would prefer that it come out. In that case, the
6 Intervenor would still be interested in litigating
7 that contention.

8 JUDGE FARRAR: Let me ask you this
9 question, then: Would we -- suppose we admitted
10 the hundred contentions. Would we go to hearing on
11 them at that point?

12 MR. WEISMAN: We might go to hearing.
13 We might dispose of certain contentions through
14 summary disposition.

15 JUDGE FARRAR: Wait a minute. If we set
16 hearing on a hundred issues, wouldn't the Staff
17 say, "Wait a minute. We don't go to hearing until
18 we put the Final Environmental Impact Statement
19 out."

20 MR. WEISMAN: Yes, I believe that the
21 Commission's regulations provide that we would not
22 go to hearing until the FEIS is issued. I think
23 that is correct.

24 JUDGE FARRAR: Okay. One last question.
25 This Part 8 of the Final Environmental Impact

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1 Statement, the economic analysis, kind of the
2 break-even look. At whose instance was that
3 section created? Is that something you would
4 typically do or was that done for a reason peculiar
5 to this case?

6 DR. WEISMAN: I'm not aware of any
7 reason peculiar to this case why a break-even
8 analysis was added.

9 JUDGE FARRAR: Was it in the draft?

10 MR. WEISMAN: It was not in the draft.
11 And I believe that it was added in response to a
12 comment from the State.

13 JUDGE FARRAR: Okay. Go ahead.

14 MR. WEISMAN: The Staff typically would
15 select several different scenarios to analyze which
16 might or might not include a break-even analysis,
17 depending on the facts of the case. So I can't say
18 typically whether there would be one or not.

19 JUDGE FARRAR: Okay. I thank Mr.
20 Silberg, Mr. Weisman, thank you for helping us make
21 sure we understand the background of this. With
22 that, we will -- I'm sorry, Judge Lam has a
23 question.

24 JUDGE LAM: Mr. Weisman, let me follow
25 up on Judge Farrar's question.

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1 MR. WEISMAN: Yes, Judge Lam.

2 JUDGE LAM: In your February response to
3 the State's late-filed contention, you had sort of
4 argued that the State should not expect that the
5 Draft Environmental Impact Statement would not be
6 revised so that the contention should have filed
7 then. Now, one can also argue the State should
8 have expected the draft report to be revised. I
9 mean, it seems to me the Staff, by arguing that
10 way, the Staff seems to want it both ways. First,
11 the Staff is free to revise the draft report in
12 whichever way or form it sees fit so that the final
13 statement would accommodate anybody's concern. And
14 on the other hand, you are sort of expecting the
15 Intervenor to file contentions based on the draft
16 report and not the final report. Can you elaborate
17 a little bit more on that rationale?

18 MR. WEISMAN: Perhaps, Judge Lam, this
19 is somewhat akin to at the initiation of a case, if
20 the Environmental Report contains certain
21 information it might generate many contentions.
22 But the Intervenor should expect that the Staff
23 would draft its initial or its Draft EIS based on
24 the Environmental Report. Whether or not the Staff
25 does that -- in fact, the Staff is free to conduct

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1 its own independent analysis and come to its own
2 conclusions.

3 Similarly, when responding to comments
4 on a Draft Environmental Impact Statement, the
5 Staff is going to perform its own analysis and is
6 free to arrive at conclusions that may agree with
7 the comments or may not agree with the comments.
8 So it's not -- it's not an appropriate position for
9 an Intervenor to assume that the Staff is going to
10 address its comments to the Intervenor's
11 satisfaction in the Final Environmental Impact
12 Statement. Does that answer your question?

13 JUDGE LAM: Yes, indeed. But my thought
14 is this: In applying the basic principle of
15 fairness, isn't it fair for any Intervenor to only
16 litigate the final environmental impact report?

17 MR. WEISMAN: Well, I believe, your
18 Honor, that the Commission's rules require that the
19 Intervenor raise the issue at the earliest
20 opportunity. And if there is an issue in the Draft
21 Environmental Impact Statement or the Environmental
22 Report, for that matter, the Intervenor is under an
23 obligation to raise the issue at that matter. If
24 you wait until the Final Environmental Impact
25 Statement is issued to litigate all environmental

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1 issues, that would backload the proceedings and
2 could result in substantial delay to resolution of
3 the Staff's review of the application. So I think
4 that there is an obligation to litigate those
5 things, litigate those contentions as early as
6 possible.

7 MR. SILBERG: Judge Lam, if I might add
8 a comment to that?

9 JUDGE LAM: Please do.

10 MR. SILBERG: The NRC regulations at
11 2.714 (B) (2) (iii) specifically say that on issues
12 arising under the National Environmental Policy
13 Act, "The Petitioner shall file contentions based
14 on the Applicant's Environmental Report. The
15 Petitioner can amend those contentions or file new
16 contentions if there is data or conclusions in the
17 NRC Draft or Final EIS, Environmental Assessment or
18 supplement that differs significantly from the data
19 or conclusions in the Applicant's document."

20 The clear rule established by the
21 Commission many years ago is that on NEPA issues,
22 the initial contentions and any contentions have to
23 be based on the documents that are available at the
24 time; in this case first the Environmental Report,
25 then supplements to the Environmental Report, and

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1 then the DEIS, and then the FEIS.

2 There are certainly cases, and there
3 have been cases as you know in this case, where
4 contentions were filed based on the Environmental
5 Report that claim that Issue X had not been
6 adequately analyzed. And when that adequate
7 analysis or that analysis was then prepared,
8 summary disposition was granted on those
9 contentions based on the analysis that showed up,
10 for instance, in the DEIS. And it is certainly
11 appropriate for the Board to deal with the issues
12 presented to them at the time. It is certainly
13 required for the parties to present their
14 contentions at the earliest practicable time and
15 for the Board to rule on them.

16 Now, in the NEPA context, you can't go
17 to hearing until the FEIS is issued, under the
18 existing Commission rules. And therefore,
19 ultimately what you are litigating on NEPA issues
20 is the FEIS. But that does not say that the
21 Commission's regulations that require prior or
22 early filing of contentions and the Commission case
23 law, which clearly requires that, is at all
24 inconsistent with the FEIS as being what is
25 ultimately tested.

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1 JUDGE LAM: Thank you, Mr. Silberg.

2 JUDGE FARRAR: I thank the parties. I
3 think with that background, we can revert to the
4 normal oral argument format where each party will
5 have twenty minutes to make its case. That twenty
6 minutes will be interrupted by Board questions, as
7 is customary.

8 Before we get to that, just want the
9 record to reflect we have been joined by Diane
10 Nielsen, the governor's environmental director.
11 Dr. Nielsen, delighted to have you here.

12 DR. NIELSEN: Thank you, your Honor.

13 JUDGE FARRAR: Mr. Stewart, you have
14 heard Staff and the Applicant state their position
15 on some fundamental matters. With that, please
16 begin your argument.

17 MR. STEWART: Thank you. With your
18 leave, I will address first the issues, the
19 questions that you put to Mr. Weisman regarding
20 timeliness and then move on to the issue of
21 economic benefits, quantified and qualitative
22 benefits which I believe go to the issue you
23 focused on in your order which was, "So what? Is
24 there any relief to be given Utah?" So with your
25 leave, I will proceed in that order.

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1 JUDGE FARRAR: Please do so.

2 Hold on. Just a minute. The audience
3 is indicating they can't hear. Would you see if
4 you can get a microphone, Will?

5 MR. WEISMAN: Your Honor, this is Mr.
6 Weisman. And we can hear you and we were able to
7 hear Judge Lam, but it was difficult.

8 JUDGE FARRAR: To hear Judge Lam and me?

9 MR. WEISMAN: Yes.

10 JUDGE FARRAR: Let's go off the record.

11 (Discussion off the record.)

12 JUDGE FARRAR: Let's go ahead and try
13 this. If somebody can't hear in the audience, put
14 up your hand; and on the other end of the phone
15 line, let us know. Go ahead, Mr. Stewart.

16 MR. STEWART: Thank you. Regarding
17 timeliness, I think that the logical first step is
18 to make clear what you, in your order, indicated
19 was not clear to you and that is the history of the
20 Cost Benefit Analysis in this proceeding. We
21 believe that Mr. Weisman's errata sheet helped, to
22 a certain extent, to clarify that. And in our
23 effort to help, we would like to hand to the Board
24 various revisions of the key chapter, Chapter 7 of
25 the Applicant's Environmental Report.

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1 MR. SILBERG: I guess I have a problem
2 with handing stuff out that we are not able to get.

3 JUDGE FARRAR: Somehow I anticipated
4 that you would say that.

5 MR. STEWART: This is all stuff
6 referenced in Mr. Weisman's errata. With one small
7 exception, this is taken from your own client's
8 documents. And I can describe each in order and
9 point out the significance in a way that I think
10 will be clear to all, including those who do not or
11 are not able to have immediately a copy in front of
12 them.

13 JUDGE FARRAR: Hold on. Mr. Silberg,
14 Mr. Weisman, I take it from what we have been
15 handed, these are nothing but copies of portions of
16 the documents that you all produced. But if Mr.
17 Stewart would be careful in referring to each one
18 of them to make sure there's a complete
19 identification so that those who are not in the
20 room can find them, and if you want to ask your
21 co-counsel who are here to confer with you, if we
22 need to we can even have a recess and they can call
23 you on a cell phone or something.

24 MR. SILBERG: We have a lot of documents
25 scattered around our office here, so I just don't

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1 know what it is that Monte has distributed.

2 MR. WEISMAN: And your Honor, we, too,
3 although I have brought several relevant documents
4 with me here in our conference room, I may not have
5 them readily available, whatever it is that he is
6 going to refer to.

7 JUDGE FARRAR: Okay.

8 MR. STEWART: It's not a big deal, as I
9 think you will see in short order.

10 JUDGE FARRAR: Let's keep going and see
11 how far we get. And if there's a problem we will
12 address it.

13 MR. TURK: May I ask a question? Mr.
14 Stewart was able to pass a copy to the Applicant's
15 counsel here in the room. I don't know if he has
16 an extra copy for me.

17 JUDGE FARRAR: I'm sorry. I didn't know
18 there would be Staff here.

19 JUDGE FARRAR: Take mine.

20 MR. TURK: That's all right.

21 JUDGE FARRAR: We can share up here.

22 Go ahead, Mr. Stewart. We will see how
23 far we get with this.

24 MR. STEWART: I'm going to state first
25 the purposes for the documents and then identify

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1 the documents. The purpose of the documents is to
2 confirm what Mr. Weisman revealed in his errata,
3 and that is that with respect to the Cost Benefit
4 Analysis, the Applicant's Environmental Report has
5 been a moving target. But most significantly, the
6 Applicant's Cost Benefit Analysis in its
7 Environmental Report from the initial filing of the
8 Environmental Report, Revision Zero, in 1997 until
9 March of 2001, nine months after the filing of the
10 Draft EIS, contains a Cost Benefit Analysis done on
11 a 20-year duration, a pure 20-year duration
12 applicable to both receipt and storage. I think
13 that's important. And hence, the provision of
14 these documents.

15 The first document is Chapter 7 from
16 Revision Zero or the original. And you will see on
17 that a table 7.3-1 where the 20-year operating time
18 period is specified with its reflection of
19 significantly reduced alleged net project benefit.
20 The very next document is from Revision 1. It's
21 the same table, 7.3-1, slight revision upward
22 figures. Then the next document is Chapter 7 from
23 Revision 6. And Mr. Weisman's errata referred to
24 an Appendix 7 B at 1. I'm going to make a guess
25 that he was referring again to table 7.3-1 because

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1 that table is still present in the E.R. as of
2 Revision 6 which, by the way, was December of '99.

3 MR. SILBERG: Monte, could you refer,
4 tell me what the last couple of documents you were
5 referring to were?

6 MR. STEWART: All of these are your
7 client's original E.R. and then the revisions
8 relative to Chapter 7.

9 MR. SILBERG: I have Rev. 0, Table 7.3.1
10 and Rev. 1, 7.3-1. What was the next one?

11 MR. STEWART: Number three, Revision 6,
12 and this is the entire Chapter 7, and we are
13 directing attention to Table 7.3-1. And I think
14 the important part regarding this document is it's
15 changed to show different repository opening dates
16 because that has an impact on cost benefit. Have
17 you found that? It is before -- it's actually
18 right after Page 7.3-2 in the third document of the
19 packet.

20 MR. SILBERG: I don't have that one
21 here, but go ahead.

22 MR. STEWART: As Mr. Weisman correctly
23 noted --

24 MR. SILBERG: Could we just note the
25 date of that Rev. 6? I believe that's --

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1 MR. STEWART: December 16, 1999.

2 MR. SILBERG: Okay.

3 MR. STEWART: As Mr. Weisman correctly
4 noted, the 20-year analysis continued with Revision
5 6. That is not evident from any express language
6 in the document, but it is certainly evident when
7 you compare it with, for example, the same table as
8 it appeared in Revision 1, because the smaller
9 alleged net project benefits puts it into the
10 20-year category, not the 40-year category.

11 MR. SILBERG: I don't have that
12 document. Could you tell me where in Mr.
13 Weisman's --

14 MR. STEWART: Yes. It is where he
15 referred to the extraneous, I think that was his
16 word, the extraneous table.

17 MR. WEISMAN: I'm afraid, I think, Mr.
18 Stewart, that you are referring to a different
19 table. You are talking about Table 7.3-1? Is that
20 right?

21 MR. STEWART: You made reference to 7 B
22 at Page 1.

23 MR. WEISMAN: That's correct.

24 MR. STEWART: But our review of that
25 document does not reflect an analysis on the

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1 20-year basis.

2 MR. WEISMAN: Not in Revision 6.

3 MR. STEWART: Correct.

4 MR. WEISMAN: Correct.

5 MR. STEWART: But 7.3-1 definitely is a
6 continuation of the Cost Benefit Analysis on the
7 20-year basis.

8 MR. WEISMAN: Okay. But I did not make
9 that representation in my errata.

10 MR. STEWART: Correct. As I stated
11 earlier. And the reason we looked carefully at
12 Revision 6, we were trying to understand what you
13 were getting at in your errata. And that's Page 1
14 of the errata, to answer Mr. Silberg's question.
15 Mr. Weisman said, and in our view correctly but for
16 the citation, "The 20-year analysis was deleted
17 with E.R. Revision 6 although one extraneous
18 reference to a 20-year license duration remained."

19 Well, the point is, it did remain. And
20 from the filing of the Environmental Report until
21 nine months after the filing of the Draft EIS, the
22 Environmental Report contained a Cost Benefit
23 Analysis, the numbers of which we do not agree, we
24 do not accept, but the basis of which was right. A
25 20-year operating period to match the federal

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1 action being requested, issuance of a 20-year
2 license for both receipt, storage, and disposal.
3 That's the purpose of this packet.

4 The last document in the packet, by the
5 way, is Revision 13, the March, 2001, the March 30,
6 2001 revision where, for the first time, the
7 Applicant in its E.R. abandons the proper basis for
8 the Cost Benefit Analysis, which is the twenty year
9 period. And, of course, it is our position that
10 the 40-year stuff appearing in the E.R., going
11 clear back to the original application, was simply
12 legally irrelevant stuff. I mean, you could have
13 put in a few pages of Garfield cartoons and it
14 would have had the same effect. It wasn't relevant
15 and we didn't need to respond to it because it is
16 clear we are talking about major federal action
17 being issuance of a 20-year license, and that's the
18 proper basis for the Cost Benefit Analysis which
19 the Applicant's own E.R. did for four years.

20 JUDGE FARRAR: Let me make sure I
21 understand your position. What is the State's
22 position now on what the proper analysis should
23 consist of?

24 MR. STEWART: The proper analysis is
25 simply this: To do a Cost Benefit Analysis, that

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1 must be an analysis of the costs and benefits of
2 the federal action being requested.

3 JUDGE FARRAR: So you would --

4 MR. STEWART: Issuance of a 20-year
5 license.

6 JUDGE FARRAR: Okay. Let me ask a
7 couple of questions about that. First, ordinarily
8 the Commission has rules that say only consider the
9 license that's being asked for. If you are asking
10 for a reactor license for 40 years, don't consider
11 that they might later ask for a further license and
12 they might later switch the fuel. I understand
13 that rule. The problem I have with this, based on
14 our appreciation of the evidence so far and the way
15 the Applicant proposes to run this, is even if the
16 Commission had an iron-clad rule contrary to the
17 argument you just had that said from the very
18 beginning consider only, in any analysis, consider
19 only storage for twenty years because that's all
20 the license did --

21 MR. STEWART: Twenty-two.

22 JUDGE FARRAR: Twenty-two. One
23 understanding you could gather of the evidence thus
24 far is it's going to take twenty years to fill up
25 this facility with 4000 casks. And even if the

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1 Commission issued an order at the end of year
2 twenty and said, "Okay, that's the end of your
3 license. This was a bad deal. Shut the place
4 down," it would take twenty years, the same twenty
5 years to remove the 4000 casks. So that's the
6 problem or a problem we are struggling with. How
7 do you mesh what we think we have been told are
8 realities of the situation with a Commission rule
9 or policy or impact statement that says, "Gee, we
10 are only going to consider twenty years." This is
11 a different case or it seems it might be a
12 different case that at the end of twenty years the
13 stuff is still there. How do you address that in
14 terms of where or how the analysis should be done?

15 MR. STEWART: Pretty simple. Number
16 one, we acknowledge the problem you are faced with.
17 Number two, let me tell you our view. And I think
18 it is a clear and well-founded view as to why you
19 have that problem. You have that problem because
20 what you are dealing with is an outlaw MRS. Now,
21 I'm not here to argue what the Commission itself
22 will be deciding soon. But the simple fact is, the
23 simple reality, and it's one that the Applicant has
24 acknowledged and that Utah has certainly
25 acknowledged, is this is nothing more or less than

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1 an MRS. It is certainly different than what
2 Congress authorized --

3 MR. SILBERG: Monte, I lost you. You
4 said it was neither more or less of an MRS?

5 MR. STEWART: Your project is nothing
6 more or less than an MRS.

7 JUDGE FARRAR: For the benefit of the
8 public, you should tell them --

9 MR. STEWART: And MRS is Monitored
10 Retrievable Storage, a solution to nuclear waste
11 storage that Congress authorized in initially 1982
12 but specifically its 1987 amendments to the Nuclear
13 Waste Policy Act. The reason Utah calls it an
14 outlaw MRS, of course, is because Congress made
15 clear that only the Federal Government would
16 operate an MRS.

17 Now, where am I going with this?
18 Simple. Commission regulations recognize that when
19 you have an MRS, you need a 40-year license period.
20 The very same regulation that limits an ISFSI
21 license to twenty years expressly allows for an MRS
22 license for forty years. And that makes sense,
23 given the nature of an MRS. So yes, you have a
24 problem, and the source of the problem is that the
25 Applicant has come forward with something

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1 completely outside this nation's integrated nuclear
2 waste management storage system.

3 JUDGE FARRAR: Let me ask, does that
4 argument, and again for the members of the public,
5 that argument is not something within our
6 jurisdiction. That is a matter pending possibly in
7 the United States District Court and in front of
8 the Commission. So while Mr. Stewart makes that
9 argument here, it is not something that -- it is
10 background to his case. It is not something we can
11 deal with.

12 Mr. Stewart, does that argument explain
13 the section of the Commission's environmental
14 regulations, Section 51.61 which says no discussion
15 of the environmental impact of the storage of spent
16 fuel at an ISFSI beyond the term of the license is
17 required in an Environmental Report? Is that
18 because in your view that regulation envisioned an
19 on-reactor-site storage facility and so, since the
20 Commission has said that's largely without
21 environmental consequences, that was what they had
22 in mind in that rule?

23 MR. SILBERG: Excuse me, Mr. Chairman.
24 I missed your citation.

25 JUDGE FARRAR: Part 51.61.

1 MR. SILBERG: Thank you. That's what I
2 thought.

3 MR. STEWART: And more specifically
4 51.97 A.

5 JUDGE FARRAR: Because we have been
6 struggling with how you reconcile those statements
7 which could be read as saying we shouldn't be
8 looking at environmental impact at all with the
9 notion of this particular facility. So I take it
10 that would be your explanation of why that rule
11 could give us some causes of confusion in our
12 minds?

13 MR. STEWART: Exactly right. And I
14 would be the last person to have ever guessed that
15 the NRC's Waste Confidence Decision would be a
16 friend of the State of Utah. But thanks to the
17 citations provided in the order relative to this
18 oral argument, we then carefully looked at, as you
19 requested, the various Waste Confidence Decision
20 regulations. And 51.97 A says that the Commission
21 will address environmental impacts of spent fuel
22 storage for the term of the license or amendment
23 applied for. The license applied for? Twenty
24 years, by NRC regulars. So an environmental
25 impacts is, I submit, a term of art. And it

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1 certainly implicates the whole range of
2 considerations that a federal decision-maker looks
3 at, including Cost Benefit Analysis and
4 consideration of both quantitative and qualitative
5 costs and benefits.

6 JUDGE FARRAR: All right. With this
7 background, let's turn the focus, then, to how does
8 all this affect the timeliness of your contention?

9 MR. STEWART: Okay.

10 JUDGE FARRAR: And then the major issue
11 we asked everyone to focus on, even if your
12 contention is timely --

13 MR. STEWART: So what?

14 JUDGE FARRAR: Thank you. I was trying
15 to state it artfully, but you said it better. So
16 what? In other words, even if you were right, is
17 there any relief we can grant? And if there's no
18 relief we can grant, then the contention doesn't
19 get admitted because it would be a vain act and a
20 waste of everyone's time. So if you could focus
21 everything we have said in the past 45 minutes
22 here, both by other counsel and yourself, on those
23 two questions.

24 JUDGE LAM: And also, Mr. Stewart, also
25 perhaps you can focus on how does the FEIS fail to

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1 comply with 51.91? Where in 51.91 do you see a
2 violation?

3 MR. STEWART: Okay. Thank you. Then I
4 will jump right to that. First, this is a case of
5 first impression for the NRC. Mr. Weisman made
6 reference to NRC cases applying the NRC's late
7 filing regulations. That's fine and dandy. None
8 of those cases, not one of those cases addresses
9 the intersection of the late filing regulars on one
10 hand and the operation of the NEPA process on the
11 other hand.

12 Now, the NEPA process again is a term of
13 art. In fact, that phrase is defined in the
14 binding regulations of the Council on Environmental
15 Quality. And it encompasses the process that you
16 know so well. The NEPA process has been in its
17 life of what, 30 years now, wonderfully successful.
18 It's been really quite an effective bit of
19 legislation because there was some genius in it.
20 The basic idea was we are going to do a process
21 where everybody gets to look at the environmental
22 decision and have their say on it. And it's our
23 faith as Americans who like open, robust discussion
24 and debate, it is our faith that that process will
25 lead to an accurate, fair, Final EIS, and that the

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1 federal decision-maker will then be able to make
2 its decision, its important environmental decision
3 on such a valid accurate basis. Okay?

4 Now, the problem with the NRC and --
5 excuse me. The Staff and PFS's position, and your
6 hypothetical went to it, is that a party to an NRC
7 adjudicatory proceeding must assume going into the
8 NEPA process, must assume that the NEPA process
9 will fail. And that is not the philosophy nor the
10 experience of NEPA. The experience is it will
11 succeed. And, indeed, in this very instance the
12 NEPA process halfway succeeded.

13 JUDGE FARRAR: Let me ask a question
14 building on that. Mr. Weisman, I think correctly,
15 cited some regulations and perhaps some cases about
16 when you need to file contentions. On the other
17 hand, we have a number of directives from the
18 commissioners about the efficient management of our
19 proceedings and use of resources. In trying to
20 reconcile those two, I do have a problem with
21 Intervenor, guarding against the possibility that
22 the NEPA process will not work, filing a hundred
23 contentions and licensing boards writing a hundred
24 decisions and then sitting around and finding out
25 that 98 percent of that work by the Intervenor and

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1 by the people who oppose the Intervenor and by the
2 Board was wasted. And maybe rather than ask you I
3 will ask Mr. Weisman, when it's his turn, to
4 reconcile that.

5 Let me ask you, though, you correctly
6 stated one aspect of NEPA. Those of us who have
7 the misfortune to be old enough to have been around
8 at the time when NEPA was passed remember a
9 different purpose. That was the era when Federal
10 Government in the development mode, and I think the
11 classic was the Department of Transportation, made
12 business decisions without any reference --
13 business and development decisions, state highway
14 departments building highways with federal
15 approval, without regard to environment. So NEPA
16 said, "While you are making these business
17 decisions, please take into account the
18 environment."

19 Here, we are almost doing the reverse.
20 You are asking us, "Here is a decision and look
21 more carefully at the economics." And so to me
22 this, a little bit, runs the risk of turning NEPA
23 on its head. Here is something that has been
24 looked at from an environmental standpoint and you
25 are saying, "Don't reject it on environmental

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1 standpoint. Reject it on an economic standpoint."
2 And that's kind of a flipping NEPA, or is it?

3 MR. STEWART: I submit it isn't. But
4 first I think we need to accept a reality about
5 this project that has been stated by PFS itself.
6 The reality of this project is this project is a
7 no-go project if it's a 20-year project only. And
8 I would refer the Commission or, excuse me, the
9 Board to Mr. Parkyn's testimony on June 21 of the
10 year 2000, particularly beginning at Pages 2129
11 through 2131.

12 MS. CHANCELLOR: Your Honor, if I may.
13 I think we need to note that that testimony was
14 given in a closed hearing. I don't know how you
15 want to deal with it.

16 JUDGE FARRAR: Give us a second.

17 MR. STEWART: I'm not going to read it.

18 JUDGE FARRAR: Just tell us very
19 generally what its subject was and we will go look
20 at it at the right time.

21 MR. STEWART: It's a pretty clear
22 statement that Mr. Parkyn --

23 JUDGE FARRAR: Mr. Silberg, do you have
24 an objection?

25 MR. SILBERG: Yes, I do. A, I don't

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1 have it in front of me and, B, I have no idea what
2 is proprietary or what is not proprietary. And it
3 may be that Mr. Stewart may have already disclosed
4 proprietary information.

5 JUDGE FARRAR: Well, he hasn't said
6 anything. My problem is --

7 MR. SILBERG: Well, he characterized
8 testimony which was given and I don't know what the
9 testimony is.

10 JUDGE FARRAR: Well, so far he hasn't
11 characterized it yet. My problem is I was not the
12 chairman of that board.

13 MR. SILBERG: He did characterize it by
14 saying that PFS has already said X. And that
15 statement may or may not be proprietary. I don't
16 know. That's one of the problems of having stuff
17 come out that wasn't in the original pleadings that
18 we didn't have an opportunity to look at and see
19 what was going on.

20 MR. WEISMAN: Your Honor, if I might
21 add, I was also not involved with those hearings
22 and I am not at all familiar with that testimony or
23 what went on there. And I also do not have the
24 testimony before me.

25 JUDGE FARRAR: Well, this goes back to

1 the question I asked of Mr. Silberg at the very
2 beginning, what the purpose of this is. I have
3 been operating under the assumption that even if
4 you build it and they don't come, even if it's only
5 a 20-year project --

6 MR. SILBERG: We have a license
7 condition that requires us to have a certain level
8 of contract commitments before we can begin
9 construction. So we may build it and they won't
10 come, but we will have contracts. And that was all
11 hashed out during the financial qualifications
12 hearing.

13 JUDGE FARRAR: Okay. And I guess my
14 thought had been even if it didn't rake money for
15 you in twenty years, and even if Yucca Mountain
16 were built at the earliest possible time from
17 now --

18 MR. SILBERG: We should all be so
19 blessed.

20 JUDGE FARRAR: That this is like me
21 buying a life insurance policy: If I don't die at
22 the end of the year, I'm not necessarily unhappy
23 that I didn't collect.

24 MR. SILBERG: Exactly. I was going to
25 use that exact analogy. That this is, as we said,

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1 insurance. And people buy insurance all the time,
2 and we feel good if we don't have a car wreck that
3 year or if our house doesn't burn down.

4 JUDGE FARRAR: Let me ask Mr. Stewart,
5 then, Mr. Stewart, on this notion I'd have more
6 trouble -- and again, for members of the public,
7 when I say what I'm thinking, that isn't
8 necessarily what I'll be thinking five minutes from
9 now, what I'm thinking when I ask the question.
10 I'd have more trouble with the Applicant's position
11 if they were taking part of a national forest or
12 part of BLM wilderness land to do this. Then I
13 would say, "Wait a minute. Before you can take
14 this land you've got to show a real purpose is
15 served because you have a huge environmental impact
16 depriving the public of this forest," and so forth.

17 In this case you have the unique
18 situation where the Goshute Indians have said,
19 "Take our reservation. We would love you to have
20 it." And for purposes of this argument, the
21 environmental justice issue does not come into
22 play. Whatever is going on among the tribe, the
23 Applicant at this point has permission of the tribe
24 to use their reservation. So you are not -- in
25 other words, to me that's a business decision the

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1 tribe makes. It's a different situation from BLM
2 land or national forest land. And so to me it
3 seems the Applicant is in a stronger position to
4 say, "We've got a deal with the Skull Valley Band.
5 They think this is worthwhile. They may be right
6 or wrong but they think it is worthwhile. It is
7 nothing the public needs to be concerned about. We
8 are building this as an insurance policy. That's
9 all we have to show under NEPA. We don't have to
10 show we are going to make money. We don't have to
11 show it's a great business decision." How do you
12 deal with that argument?

13 MR. STEWART: If you do not correct the
14 Cost Benefit Analysis in the FEIS, the Court of
15 Appeals is going to reverse the issuance of a
16 license. Hughes River Watershed versus Glickman,
17 81 F. 3rd 437. I have copies for you. That's
18 Fourth Circuit, 1996.

19 JUDGE FARRAR: Okay.

20 MR. SILBERG: I'm sorry. These
21 decisions are to establish what principle?

22 MR. STEWART: That if you don't correct
23 the Cost Benefit Analysis mistake clearly inhering
24 in the FEIS, that the Court of Appeals is going to
25 reverse the issuance of a license.

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1 MR. SILBERG: Okay.

2 MR. STEWART: Next is -- this is a Tenth
3 Circuit Case, which Tenth Circuit may well be the
4 court of appeals we are dealing with. Johnston
5 versus Davis, 698 F. 2nd at 1088. Now, what's the
6 principle? I always make a mistake when I hand
7 people something; they start reading and stop
8 listening. But the principle is pretty clear and
9 I'm going to start by agreeing with Mr. Silberg on
10 a number of issues.

11 Number one, the Cost Benefit Analysis,
12 even if it shows substantial negative benefits, or
13 excuse me, substantially negative on the cost
14 benefit ratio, does not mandate that the federal
15 decision-maker go one way or the other. Nothing in
16 the FEIS mandates that the federal decision-maker
17 go one way or the other. But this country is so
18 committed to federal decisions affecting the
19 environment being based on valid and accurate data,
20 that when one component of the equation, the
21 equation being what everything in the FEIS throws
22 out, is wrong and materially wrong, then it's going
23 to get sent back for that to be corrected and for
24 the federal decision-maker to look at it again.

25 JUDGE FARRAR: If it is relevant to the

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1 decision at hand.

2 MR. STEWART: And this is clearly
3 relevant to the decision at hand. And I'm going to
4 agree with Mr. Silberg; it is right out of the
5 second section of NEPA that the federal decision-
6 maker must consider not only quantitative data but
7 also qualitative considerations. But that does not
8 say that he is to consider only qualitative
9 considerations and ignore the quantitative
10 considerations.

11 JUDGE FARRAR: Okay. But what is the
12 quantitative harm to the country if Mr. Silberg's
13 clients lose a million dollars on this deal? In
14 other words, what I think he is saying, and some
15 will agree and some will not, is that it is a
16 benefit to the nation to protect the generating
17 capacity of nuclear plants around the country who
18 are getting or might run into a bottleneck because
19 of no spent fuel storage. Now, some will say
20 that's true and some will say it is not true. Some
21 will say that is a valuable benefit to the society
22 and others will say it isn't. But if he is right
23 and the Staff has endorsed his view thus far, if he
24 is right that that's a benefit, then why do we care
25 whether his client makes or loses money on the

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1 deal?

2 MR. STEWART: For a very simple reason.
3 It matters very much to this country and it matters
4 very, very much to we children of the Great Basin
5 when, a few years down the line, this shell
6 Delaware limited liability company known as PFS
7 goes bankrupt.

8 JUDGE FARRAR: Now, that's an excellent
9 point.

10 MR. STEWART: And then you have this
11 environmental outrage sitting out there and their
12 answer is, "Oh, well. The people who sent us the
13 casks, it will then be their responsibility even if
14 we go under." What kind of a mess is that? Do you
15 want bankruptcy court jurisdiction in such a matter
16 with up to 40,000 MTUs sitting out in the open?

17 JUDGE FARRAR: And that's an excellent
18 point. But isn't that concern dealt within the --

19 MR. STEWART: Financial assurance?

20 JUDGE FARRAR: -- financial assurance
21 issue that was heard in this closed session a
22 couple years ago which is, you know, ready for a
23 decision by the other board? As I viewed that, all
24 the questions you just raised are taken up there.
25 If, in fact, you all prevail, and I have not looked

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1 at that transcript myself, if you all prevailed
2 there and showed that this corporation does not
3 have the wherewithal, that this could end up as an
4 orphan site, then you win on that safety ground on
5 the point you just argued. But if the company
6 prevails on that and says, "No, this is a
7 legitimate corporation, this won't be an orphan
8 site," then doesn't that knock out both your safety
9 argument and your environmental argument?

10 MR. STEWART: No. Because NEPA requires
11 an assessment of environmental impacts. Your own
12 regulations require the assessment of environmental
13 impacts. To understand accurately those
14 environmental impacts, you must understand
15 accurately the financial status of the private
16 actor. And then there's a further answer, too.
17 NRC is not the only decision-maker involved in this
18 process. You spoke about the Goshutes and their
19 decision. That's Indian Trust land. The Secretary
20 of the Interior, Gayle Norton, is another federal
21 decision-maker in this matter. And it certainly
22 must matter to her whether she has accurate or
23 bogus information on the cost benefit analysis, the
24 cost benefit ratio of this proposed project.

25 JUDGE FARRAR: Wait a minute. There's

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1 no suggestion, I have never heard any suggestion
2 that the Skull Valley Band would not get -- in
3 other words, if I were Gayle Norton, I would say, I
4 have a trust responsibility over the Skull Valley
5 Band. They are getting their money out of this.
6 And putting aside the environmental justice issue
7 about who in the tribe gets it, which is totally
8 irrelevant for these purposes, if the tribe --

9 MR. SILBERG: Could I interrupt on a
10 totally unrelated matter? I believe you indicated
11 this conference was going to go until 12:30. I
12 remember in prior conferences we ran into telephone
13 lines potentially going dead, and I just wanted to
14 make sure that we get our chance to talk.

15 JUDGE FARRAR: Our law clerk, among his
16 other duties, has called the operator and we are
17 now up to three hours, which I hope we won't use.
18 But we have made that arrangement. But thank you,
19 because there was an occasion where we did run out
20 of time on a previous matter.

21 I was saying if the --

22 MR. STEWART: Won't they still get paid?

23 JUDGE FARRAR: All Gayle Norton has to
24 worry about is the Band getting paid.

25 MR. STEWART: The Band's entitlement

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1 rests with its lease with this private actor, which
2 may well be in bankruptcy. The problem with
3 contracting with people who go into bankruptcy is
4 you don't get the benefit of the deal you cut with
5 them.

6 JUDGE FARRAR: And they have some number
7 or their income might run out and they would have
8 some number of casks on their reservation.

9 MR. STEWART: Who is to say that after
10 bankruptcy court has searched jurisdiction, that
11 they are going to get paid anything? Why wouldn't
12 the bankruptcy court, in fairness to all creditors,
13 void that along with other contracts?

14 JUDGE FARRAR: Let me make this
15 suggestion. I won't say your twenty minutes are
16 up, which they are, but let's quickly get to where
17 we are on the late file. I take it, from what you
18 have said, enough things have changed, this whole
19 issue is murky enough you filed comments on the
20 DEIS, you acted within the right time after the
21 FEIS which had a new departure, and so you are
22 timely.

23 MR. STEWART: Exactly. When the issue
24 arises nine months after the filing of the DEIS,
25 and not that many months before the issuance of the

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1 FEIS, to say that we had to file a contention then
2 when we were entitled to assume that the NEPA
3 process would succeed, I mean both fairness and
4 efficiency dictate that in these circumstances we
5 have amply demonstrated good cause.

6 JUDGE FARRAR: If we disagreed with you
7 on good cause or thought maybe you had partially
8 met your burden on good cause, we are supposed to
9 look at four other factors, two of which under our
10 decisions are paramount. One is whether you could
11 be expected to contribute significantly to the
12 proceeding. And the other parties are welcome to
13 argue against that. But I think based on your
14 participation in the last financial hearing and
15 your participation on seismic and aircraft
16 accidents here, parties can argue against you on
17 that but they would have an uphill climb.

18 The other issue is whether it would
19 delay the proceeding. Looking at the fact that all
20 the lawyers in the case misrepresented to us how
21 easy this case would be to try, and so we are not
22 going to finish in the six weeks we planned but are
23 going to take, I would guess now we are talking the
24 end of June with the additional session here in
25 early June and additional sessions in DC, if we

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1 finish the hearing the end of June, and the parties
2 got the time they had previously requested to file
3 their proposed findings and their replies and we
4 got our usual 60 days, we are looking at a mid-
5 November decision on the whole case. If we --
6 suppose we announced a week from now, mid-May, that
7 this contention was in, I can dream up a schedule
8 that would have -- and since it deals with
9 financial, I'd be happy to refer the contention to
10 the other board rather than take it on myself --

11 JUDGE LAM: The other board consists of
12 Judge Kline and me. Thanks a lot.

13 MR. SILBERG: Judge Farrar, Judge
14 Bollwerk just called me on another line and he
15 disagrees with that remark.

16 JUDGE FARRAR: Uh-huh. I could
17 construct a scenario where, if Judge Bollwerk and
18 my colleagues on that board, held your feet to the
19 fire, had a one-month Discovery period, another
20 month to file testimony, a week-long hearing a
21 month later, short time for proposals and replies,
22 and the Board shortened its time, you could have a
23 mid-November decision on that issue, also. I guess
24 my question for the State would be if we found that
25 your timeliness argument had something to commend

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1 it but not enough, or wasn't a hundred percent your
2 way, say it was 60/40 your way, then it would be a
3 key issue whether this would delay the proceeding,
4 would you be willing to operate under an --

5 MR. STEWART: Expedited --

6 JUDGE FARRAR: -- extremely expedited
7 schedule? And while Mr. Silberg is threatening me
8 with Judge Bollwerk, don't give too much of Ms.
9 Chancellor's time away without checking with her
10 because she is involved in some other matters.

11 MR. STEWART: I will stay with SS, and
12 my time is more flexible. And yes, we would
13 definitely expedite it. And let me say that,
14 speaking as someone with little expertise in things
15 mathematical, I can understand Dr. Sheehan's
16 affidavit. I can understand the issues. I sense
17 that there's a computer program in existence -
18 proprietary, no doubt - where with the tweaking of
19 some of the variables you can get the right answer
20 to this Cost Benefit Analysis. So I think it is
21 something that lends itself to expedited treatment.
22 It will not unduly delay the proceeding, and
23 whatever schedule you can dream up, it will be
24 years shorter than a schedule that involves a Court
25 of Appeals reversal.

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1 JUDGE FARRAR: Let me ask this: Then if
2 you are right on that, it really comes down to what
3 you call the so-what question. Suppose we went
4 through all that and we found that there was
5 something wrong with this analysis, whether the
6 company was going to make a profit or whether we
7 were threatened with a possible bankruptcy -- well,
8 no. That's the financial qualifications. It's
9 been characterized as the break-even analysis.
10 Whether this is a better proposal than nuclear
11 reactors around the country continuing to do what
12 they are doing with all the geographic and
13 political problems that may involve. And suppose
14 we came up with slightly different numbers. Mr.
15 Silberg is still going to pound his drum and say
16 this is an insurance policy to protect the
17 generation of electricity in America. And so even
18 if we had a week-long hearing and said, "You're
19 right, the Applicant's figures either endorsed by
20 the Staff, or the Staff's separate calculations are
21 off by ten percent. They made these mistakes.
22 They were wrong. They are off by ten percent." I
23 guess I have to throw back at you your "so what"
24 question.

25 MR. STEWART: Okay. And I'm glad you

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1 did. PFS, in its filing with this Board on Page
2 11, was irresponsible in its characterization of
3 Dr. Sheehan's affidavit and I quote PFS's words.
4 "A slight reduction in magnitude of the benefits
5 would have no impact on the NRC Staff's overall
6 conclusion of a potential for net positive benefit.
7 Indeed, the State's own expert found that even
8 applying all the purportedly correct assumptions,
9 each FEIS analysis still shows a positive net
10 benefit from PFSF operation."

11 I direct your attention -- and there's
12 no citation to any paragraph of that declaration.
13 But I direct your attention to Page 8 of
14 Dr. Sheehan's affidavit. First, Paragraph 27.
15 Right two-thirds of the way down Paragraph 27 of
16 the affidavit. "Some or all of those figures would
17 be substantially negative."

18 MR. SILBERG: Read the whole sentence.

19 MR. STEWART: Well, I can direct their
20 attention to the whole paragraph.

21 JUDGE FARRAR: Hold on a minute. We
22 will read the whole paragraph here.

23 MR. SILBERG: Please do. Because the
24 first sentence of that paragraph is the one that we
25 have in mind. Plus Table 8 in Dr. Sheehan's

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1 attachment.

2 MR. STEWART: And if I could finish my
3 thought now. Directing your attention to 30. This
4 goes to the break-even analysis. And I'm glad you
5 raised the break-even analysis because I think the
6 focus simply on the financial viability of this
7 Delaware limited liability company is much too
8 narrow. I mean, we are trying to quantify benefits
9 to the industry and Staff has taken this break-even
10 approach.

11 Paragraph 30 of the Sheehan, Dr. Sheehan
12 affidavit, for a 2015 repository date, the maximum
13 through-put is 9073, 42 percent short of the break-
14 even figure. And then it goes on to say it is 14
15 percent short for a 2010 repository opening, which
16 of course is not a realistic possibility. So there
17 is a sound basis -- the State has provided a sound
18 basis for saying we are not talking about a slight
19 change in the outcomes of this analysis. We are
20 talking about a substantial and material change
21 that puts us into negative territory, that puts us
22 on the wrong side of the break-even point.

23 JUDGE FARRAR: Suppose I'm a reactor
24 operator on the East Coast, and I run the numbers
25 and I say, "If I can get my local authorities to

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1 allow me to expand my spent fuel pool or to have
2 on-site storage, yeah, I can do that cheaper than
3 contracting with Mr. Silberg's client. But my
4 local authority is not necessarily on my side and
5 they haven't liked us for a long time. And, yeah,
6 it is going to cost twice as much, but it's worth
7 it to me to know that I have a place to send the
8 spent fuel because then I can continue, I know I
9 can continue to operate." Everyone likes to bash
10 the local electric utility until a storm comes or a
11 tornado, or in this case if I'm a utility CEO and I
12 don't plan properly and all the sudden I don't have
13 enough generating capacity, there's no excuse in
14 the world that is going to satisfy the public. So
15 if one of these people says, "I can do it here for
16 half the price, but I'm not sure I'll get to do it
17 so I'm going to sign up with Mr. Silberg because
18 now I know I can continue to operate and generate
19 electricity," or even if the break-even figures are
20 way off, why is there not a fall-back argument that
21 says since we are not taking park lands, we are not
22 taking forests, why can't they do this?

23 MR. STEWART: There's something that
24 troubles me about the PFS position and the Staff
25 position, too, and it seems to me that their

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1 position fundamentally has, as its premise, that no
2 matter what the data, no matter what the facts, the
3 federal decision-maker, at least the NRC federal
4 decision-maker, is still going to issue this
5 license. If they know something we don't know,
6 great, get it out on the table. But until then we
7 are entitled to participate in good faith in the
8 NEPA process. The NEPA process says that federal
9 decision-maker is not going to be constricted in
10 his decision by the FEIS if the FEIS is accurate.

11 JUDGE FARRAR: I guess I have a
12 different question. Not is it accurate, but is it
13 relevant? One of the questions I asked at the very
14 beginning was at whose instance was this break-even
15 analysis in there? Because I think if I were Mr.
16 Silberg, I could argue not that an error in this
17 violates the integrity of the NEPA process, but
18 that this kind of analysis is irrelevant to the
19 process; that here is a proposal and you analyze it
20 from an environmental standpoint under NEPA, but
21 you don't have to analyze it from a financial
22 standpoint under NEPA, at bottom. That is the
23 trouble I'm having with the case going back to the
24 origination of NEPA being, "Here is this federal
25 juggernaut that is always doing projects without

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1 ever considering environmental aspects." We never
2 said, "Hey, that road costs too much." We said,
3 "We would love to have that road," until people
4 finally rose up. And the first one was, my office,
5 the Department of Justice handled it, Overland Park
6 in Memphis, where the road was going to go right
7 through the city park. And they said, "No. The
8 juggernaut has to be stopped for environmental
9 reasons." And you are saying to stop it because
10 the economic analysis is wrong. And that's why I
11 dare ask the question, is the economic analysis
12 irrelevant under NEPA?

13 MR. STEWART: No. And I'm sorry I'm so
14 slow getting to the right answer, but I'm there
15 now. Here is the right answer. The federal
16 decision-maker is going to be looking at, indeed is
17 mandated to look at the no-action alternative.
18 Okay? CEQ regulations mandate that the no-action
19 go into the FEIS. Those are binding. This FEIS
20 makes reference to a no-action alternative. That
21 no-action alternative, a reasonable federal
22 decision-maker may conclude in light of everything
23 is the best approach. And looking at correct data,
24 showing that on a Cost Benefit Analysis we are
25 substantially into negative territory, we are

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1 substantially short of the break-even point, could
2 certainly sway the federal decision-maker, the
3 impartial, unbiased not pre-judged decision-maker
4 to say, "No-action alternative is best. Therefore,
5 my decision is no-action. Therefore, no license."

6 JUDGE FARRAR: Let us do this: If any
7 of you have ever been to a Supreme Court argument
8 in Washington, when Mr. Stewart's twenty minutes
9 were up, even in mid-sentence Chief Justice
10 Renquist would have said, "Your time is up." I
11 think we can now fairly say your twenty minutes is
12 up. For the benefit of the court reporter and
13 everyone else, let's do something highly unusual in
14 oral arguments. Let's take a short break. For you
15 all on the other end of the phone, if you don't
16 mind, I have 28 after. Let's resume at 25 of.
17 Just a quick seven minute break to give everybody a
18 chance to --

19 MR. SILBERG: Should we just, I guess,
20 hold on?

21 JUDGE FARRAR: Yes. Just hold on. And
22 we have the phone actually for three hours from
23 whenever we started. And which of you -- I guess
24 under our usual rules, Mr. Silberg, you would go
25 next and then the Staff?

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1 MR. SILBERG: That's fine with me.

2 MR. WEISMAN: Fine with me.

3 JUDGE FARRAR: Hang on a minute.

4 MR. SILBERG: We have used up an hour
5 and a half of the three hours.

6 MR. WEISMAN: Thank you for the break,
7 your Honor.

8 JUDGE FARRAR: I wonder whether the law
9 clerk shouldn't get more time. I don't know how
10 long it will run.

11 JUDGE FARRAR: Let's wait and see. In
12 many of the arguments, the questions we ask the
13 first side kind of set the stage for the others to
14 go, and you may not need as much time. But we
15 will -- let's wait half an hour or so and see how
16 it is going and get another hour if we need it.

17 MR. SILBERG: Fine.

18 MR. STEWART: My only time constraint is
19 that I am participating as a prosecutor in a three
20 o'clock child rape case hearing in central Utah, so
21 I ought not leave any later than 12:30.

22 JUDGE FARRAR: We'll be fine.

23 (Discussion off the record.)

24 JUDGE FARRAR: We are ready to resume
25 the argument again. For the benefit of the members

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1 of the public here, if you now hear the Board ask
2 exactly the opposite questions of these people that
3 they asked other people, you might think, "Can't
4 they make up their minds?" But that's the purpose
5 of oral arguments is to help us make up our minds.

6 Mr. Silberg, we will give you the same
7 twenty minutes we gave Mr. Stewart. Go ahead.

8 MR. SILBERG: Thank you. Let me first
9 respond to a number of points raised in the earlier
10 discussion, and I'll work my way backwards and then
11 I will address the issues in perhaps a little more
12 organized fashion. First, the no-action
13 alternative that Mr. Stewart raised that the NRC
14 federal decision-makers look at it, they have
15 looked at it. There was a context on the no-action
16 alternative. That was Contention Utah Z. That was
17 dismissed by the Licensing Board granting us
18 summary disposition on August 1, 2001. On the
19 break-even analysis, there is no requirement in
20 NEPA for a break-even analysis requested by the
21 State of Utah in their comments. The NRC requested
22 that we perform one. We did. We submitted that to
23 the NRC. The NRC took that and included that in
24 their Final Environmental Impact Statement.

25 JUDGE FARRAR: Mr. Silberg, on that Utah

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1 Z, do you happen to recall the other board's
2 reasons for granting that motion?

3 MR. SILBERG: Have the decision in front
4 of me but I would have to go back and read it,
5 frankly. I can't remember the specifics of it.

6 JUDGE FARRAR: That's all right. We
7 will take a look at it afterwards.

8 MR. SILBERG: Obviously they found there
9 were no genuine issues of material fact on that
10 issue. With respect to the rhetoric of the NRC
11 issuing a license no matter what, I think the Board
12 will recognize that that is rhetoric and no more.
13 The State is entitled to participate in the NEPA
14 process. But that participation is subject to the
15 rules established by this Commission. And the CEQ
16 regulations do not say anything about hearings
17 before the NRC. And indeed the CEQ regulations, as
18 I recall, while they are used by the NRC, are not
19 binding on the NRC because the NRC is an
20 independent agency and not subject to direction
21 from the Council on Environmental Quality.

22 With respect to --

23 JUDGE FARRAR: Mr. Silberg, as I recall,
24 though, there's nothing in the CEQ regs that would
25 necessarily help the State here.

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1 MR. SILBERG: That's correct.

2 JUDGE FARRAR: So I'm surprised that you
3 would not want to rely on them.

4 MR. SILBERG: Well, I don't think that
5 we need to, frankly. And since I haven't had time
6 to go back in detail through the CEQ regs, I wasn't
7 planning to make that a cornerstone of this
8 response. But I think you are correct.

9 The "so what" issue and whether we made
10 an outrageous statement on Page 11 of our motion, I
11 think if the Board reads Paragraph 27 and if the
12 Board looks at Table MFS-8, the Board will see that
13 Dr. Sheehan came up with positives of reduced net
14 benefits. Now, he can then say that other changes
15 would reduce those values perhaps substantially
16 negative, and that probably is true. On the other
17 hand, changes in the other direction would increase
18 them substantially. But his numbers, as shown in
19 Table 8, suggest even under his re-analysis that
20 there is a positive benefit.

21 JUDGE FARRAR: Mr. Silberg, how do you
22 reconcile for us the Commission's regulations,
23 which say don't go beyond the term of the license,
24 with the notion that once you get the 4000 casks in
25 place they are of necessity going to be there far

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1 beyond the terms of the license?

2 MR. SILBERG: That's an interesting and
3 an important question. There are two points.
4 First of all, the provisions that you have referred
5 to, 51.97(a), and 51.61, refer to environmental
6 impacts. It's my belief that the cost numbers are
7 not environmental impacts. And when or if you
8 track back through the waste confidence proceeding
9 to the Baltimore Gas and Electric decision, you
10 will see that they distinguish between
11 environmental impacts and economic. So I don't
12 think the fact that where the Commission says you
13 only look at environmental impacts for the term of
14 the license is the governing factor.

15 The more interesting analysis, however,
16 is something that we did not explore because it
17 didn't appear to be relevant to the discussion
18 until we looked at the Board's questions, and when
19 we heard the description or the discussion by Mr.
20 Stewart. But the difference between the expiration
21 of the license and the termination of the license
22 is a very important distinction. When you look at
23 the analysis, the brief filed by the State and the
24 analysis by Dr. Sheehan, they come up with the idea
25 that all spent fuel presumably has to leave the

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1 site within 20 years plus some other period of time
2 which they say is two years, sounds about right to
3 them. That, I think, is inconsistent with NRC
4 regulations and certainly inconsistent with the
5 Final Environmental Impact Statement. And it is
6 flat out wrong.

7 The NRC has a provision which deals with
8 expiration and termination of licenses. That
9 regulation, 72.54, says a number of things. One,
10 it includes the timely renewal doctrine, which I
11 suspect everyone is familiar with. I suspect
12 members of the Board are, as well. That provision
13 says a license does not expire at the end of its
14 term if an application has been filed at an
15 appropriate time, which is defined in these
16 regulations, I think, as two years. Under the
17 Administrative Procedure Act it's 30 days, but the
18 NRC has changed that. Does not expire until the
19 Commission has acted on that. So there is no
20 automatic twenty years and the earth opens up and
21 there's then a great chasm.

22 But more important than that, the same
23 regulation, 72.54, Section C, says that each
24 specific license, and these are Part 72 licenses
25 like the one we are seeking, continues in effect

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1 beyond the expiration date if necessary with
2 respect to the possession of license material until
3 the Commission notifies the licensee in writing
4 that the license has terminated. During this time
5 the licensee shall limit actions involving spent
6 fuel or other license material to those related to
7 decommissioning. It also provides, if one looks
8 back at the history of this regulation, the NRC
9 estimates that that period of time could be, one
10 estimate is 62 months. That's a Federal Register
11 cite, which I can give you if I hunt around here a
12 little bit. It was the final rule adopting 72.54.
13 So the two years is a bogus number, frankly.

14 JUDGE FARRAR: Okay. But then what is
15 the right number? Do we stop at twenty? Do we
16 add --

17 MR. SILBERG: The rule is that NRC would
18 not allow and the license would not allow
19 additional shipments of spent fuel onto the site
20 after the 20 years, the expiration of the license,
21 whether that is on day 365 of year 20, or whenever
22 the timely renewal doctrine should say so.

23 JUDGE FARRAR: But then, given all this,
24 when should or what period should the Staff have
25 used for a break-even analysis?

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1 MR. SILBERG: I think the Staff is
2 entitled, since this is NEPA, to use a reasonable
3 period for a break-even analysis.

4 JUDGE FARRAR: Now, I could read some of
5 the other testimony in the case, given the pace at
6 which you're delivering casks -- I think it was
7 four casks a week on one train.

8 MR. SILBERG: Right.

9 JUDGE FARRAR: For 1000 weeks, twenty
10 years. It would take you just as long to remove
11 them.

12 MR. SILBERG: Yes, it might. It could
13 be speeded up somewhat. And it also may depend on
14 the "take" rate at the receiving facilities. But
15 the analyses that we provided the Staff we believe
16 are reasonable analyses.

17 JUDGE FARRAR: When you said "receiving
18 facility", that means Yucca Mountain or somewhere
19 else?

20 MR. SILBERG: Correct. And it could be
21 Yucca Mountain, we hope, or another facility. But
22 in any event, NEPA is subject, as I think we would
23 all agree, to a rule of reason. And the
24 reasonableness governs not only the environmental
25 analysis but the economic analysis, as well. And

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1 we have provided to the Staff what we believe is a
2 reasonable off-loading schedule.

3 There is no requirement in NRC
4 regulations, and the State has pointed to none,
5 that require that the facility be off-loaded in
6 year 22. In fact, the logic of their position
7 would require that it be emptied by year 20, which
8 clearly is not the law. It is clearly not what the
9 regulations contemplate. It is clearly not what
10 the Environmental Impact Statement contemplates.

11 JUDGE FARRAR: Let me ask you, suppose
12 the Staff had not done a break-even analysis in the
13 FEIS. Would you argue that that FEIS was
14 nonetheless complete?

15 MR. SILBERG: Clearly. I don't think I
16 have ever seen a requirement in NEPA cases, and I
17 have read many of them, probably most of the Court
18 of Appeals cases under NEPA, I have never seen an
19 interpretation which requires a break-even
20 analysis. The Cost Benefit Analysis itself is not
21 even part of NEPA. One reads the words of NEPA in
22 vain to find any mention of something called cost
23 benefit. It was invented in the Calvert Cliffs
24 decision by Judge Kelly Wright where they took the
25 word "consider" and spun that into a Cost Benefit

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1 Analysis. And I know that because I was involved
2 in that case.

3 JUDGE FARRAR: But that was -- but
4 whether or not Judge Wright had a legitimate reason
5 for doing that, that's part of the NEPA
6 jurisprudence at this point, wouldn't you say?

7 MR. SILBERG: Correct. But there is
8 nothing in that case which requires a break-even
9 analysis.

10 JUDGE FARRAR: I guess I have always
11 thought of it as, "Here is the proposal," whatever
12 it is. It has certain environmental impacts. It
13 is taking park land, it is going to have certain
14 air emissions, certain water pollutants. And then
15 you say, "Okay. Those are environmental impacts.
16 What are we getting for that? We are getting a
17 road. We are getting a nuclear reactor. We are
18 getting something that brings some benefit to the
19 people."

20 MR. SILBERG: Right. And I agree with
21 Mr. Stewart where he said that we do need to
22 consider both qualitative and quantitative. And I
23 think it is also correct that, subject to the rule
24 of reason, the information in the FEIS ought to be
25 pretty damn good. Not perfect. There is no

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1 requirement and the cases are very specific that
2 one is not to fly-speck an Environmental Impact
3 Statement. But it ought to be a reasonable
4 portrayal of what the facts are and what the
5 analysis is. Now, let me --

6 JUDGE FARRAR: Let me ask another
7 question on a similar thought. We could take the
8 position we don't care, or not we don't care but
9 NEPA doesn't care whether your company makes a
10 little money or loses a little money on this. But
11 Mr. Stewart says if you lose a lot of money, you
12 disappear, we have bankruptcy, we have a problem,
13 and there's some environmental impact from having
14 orphaned casks sitting in Skull Valley with no one
15 tending to them. So while we may not care or NEPA
16 may not care if your company makes or loses a
17 little, does NEPA care if your company loses a lot?

18 MR. SILBERG: And I think the answer to
19 that is the NRC has a separate process for looking
20 at financial qualifications. We have gone through
21 that process with the NRC Staff. We have been able
22 to satisfy the NRC Staff. We have had a lengthy
23 hearing on that issue. We hope that a decision
24 will be issued which will determine that we are
25 financially qualified. Once that determination has

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1 been made, one need not go back and make some
2 assumptions that are contrary to the findings of
3 the NRC in order to comply with NEPA. That is
4 simply not what NEPA requires. That is the kind of
5 speculative analysis which the Supreme Court, on
6 several occasions, has said we ought not to be
7 doing. NEPA, again, is a rule of reason. We could
8 also postulate that a meteor would strike Skull
9 Valley. We need not postulate every conceivable
10 event, and I think having gone through NRC
11 financial qualifications assessment, NEPA does not
12 revisit that, does not revisit that issue.

13 JUDGE FARRAR: If I didn't know the law
14 at all, I would tend to agree with what you just
15 said. But it has always been a little bit of a
16 puzzlement to me that the NRC does an extensive
17 safety review of any proposal, but then even if
18 those -- and correct me if I'm misstating the
19 jurisprudence. Even if all those safety issues are
20 resolved in the company's favor and against the
21 interests of the Intervenors, there's still a NEPA
22 review done of the lingering possibility that there
23 will be an environmental impact from something
24 beyond a design-basis accident. One, is this the
25 jurisprudence? And two, why doesn't that apply to

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1 the safety issue of financial qualifications? Even
2 if you win on your financial qualifications issue
3 as a safety matter, NEPA requires a look at the
4 lingering, if I can call it that, lingering
5 possibility that something may go wrong financially
6 and there will be these orphan casks.

7 MR. SILBERG: Well, in the NRC
8 jurisprudence, one does look at SAMAs, Severe
9 Accident Mitigation Alternatives. And you look at
10 is there anything out there that would mitigate a
11 beyond design-basis accident. And the NRC
12 financial qualifications analysis we think, in
13 essence, does that; determines that, you know, that
14 is not a likely occurrence. I think there is a
15 substantial body of belief that the NRC has gone
16 above and beyond what is referred by NEPA in doing
17 its SAMA analysis. And there have been, I think
18 there is currently a rule-making petition pending
19 on exactly -- but I think where the same issue has
20 been determined on the safety side, one did not
21 review it on the NEPA side. And I think that is
22 true for other aspects.

23 Also, when you start to get into the
24 alternatives, what is an alternative mechanism?
25 And then you get into the obviously superior

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1 jurisprudence and there's certainly no showing that
2 there is any. And I think the record on the
3 financial qualifications hearing does deal with
4 exactly these issues. And one does not need to
5 revisit the same issue in two different locations.
6 That was not -- I don't think that was ever the
7 intent of NEPA. NEPA is an environmental
8 assessment process and is not meant to duplicate
9 everything that one does everywhere else under your
10 substantive --

11 JUDGE LAM: Mr. Silberg, you don't think
12 NEPA affords the Intervenor the second bite of the
13 apple on the issue of financial qualifications?

14 MR. SILBERG: Absolutely not. And I
15 think if they were to have that bite of the apple,
16 then they should have tried to raise it in
17 accordance with the NRC process. Now, I think one
18 of the problems I have with Mr. Stewart's analysis
19 is that it kind of ignores the fact that while
20 there may be other agencies, and it was referring
21 to the fact that the Secretary of the Interior may
22 have some obligations, and that no doubt is true,
23 but this agency, this board is not here to validate
24 or invalidate the actions of some other agency.
25 Each agency has to meet its own procedures. And

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1 what we are here today debating is compliance with
2 the NRC procedures.

3 JUDGE FARRAR: Mr. Silberg --

4 MR. SILBERG: So the fact that the State
5 has had these opportunities, a continuing
6 opportunity since 1997, to file contentions on this
7 and other issues, I think at this point to say,
8 "Well, now we have to go back and redo it again in
9 the NEPA context," I think is probably not a
10 correct reading.

11 JUDGE FARRAR: Mr. Silberg, let's focus
12 for a moment on the timeliness issue. As you know,
13 I had the luxury of Judge Bollwerk turning the case
14 over to me so I came out here to try, with my
15 colleagues, to try four issues. I didn't have to
16 spend three years resolving admissibility of tens
17 of contentions and similar numbers of summary
18 disposition motions. As I understand the
19 regulations, you could file an Environmental Report
20 and the State has to file its contentions.

21 MR. SILBERG: Correct.

22 JUDGE FARRAR: And we could resolve a
23 hundred of them. And then the Staff does a Draft
24 Environmental Impact Statement, which may take care
25 of a hundred of the problems or 98 of the problems

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1 that the State had with your Environmental Report,
2 but now there's a hundred new issues in the Draft
3 Environmental Impact Statement. So they file a
4 hundred more and we labor and put out a whole bunch
5 more opinions. And by the time the FEIS comes out,
6 now they have exhausted their administrative
7 remedies and they are timely but they have also
8 fully exhausted the Board, which has been doing
9 nothing else for three years but dealing with 98
10 times three, close to 300 moot contentions. Why
11 would the Commission concern about how we manage
12 proceedings, how we get our work done in a timely
13 fashion, how we get the hearings, get decisions
14 done, why should we be spending our time like that
15 in almost -- well, I will not use an adverb because
16 I'll probably use the wrong one. So why would we
17 do that?

18 MR. SILBERG: Well, I think, Judge
19 Farrar, you will recall the history of how this
20 process developed. There was a time when
21 Intervenors would wait until or try to wait until
22 the last minute to raise contentions. And they
23 would argue at the beginning of the process, "We
24 can't file contentions now because the Staff hasn't
25 done its review and therefore we are entitled to

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1 wait until the Safety Evaluation Report, Final
2 Environmental Impact Statement comes out and then
3 we will tell you what our issues are." The
4 Commission made a policy determination in the early
5 1970s and made it very clear, and that clarity is
6 reflected in NRC regulations, that Intervenors
7 raise their contentions at the earliest possible
8 time because otherwise the process will never reach
9 conclusion.

10 JUDGE FARRAR: Can they accomplish that
11 in effect by filing with you on the one hand or
12 with the Staff before they do the DEIS, the Staff
13 after they do the DEIS, a well thought-out set of
14 problems they have, maybe not as precisely or as
15 thorough as the rigorous contentions rule would
16 require, but showing a good faith effort to grasp
17 the issues, showing some thoughtfulness in proposed
18 remedies, and thereby putting everybody on notice,
19 the company, the Staff, and eventually the Board,
20 that these are serious matters that the Intervenor
21 intends to pursue if they are not resolved to their
22 satisfaction? Why is that not a much more
23 efficient approach for carrying out the purposes
24 that the Commission had in mind with that 1970s
25 policy?

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1 MR. SILBERG: Well, one could argue that
2 it is, and one could argue that it isn't. I
3 believe it isn't. The short answer is that's not
4 what the regulations call for. The longer answer
5 is because typically the kinds of issues that
6 people raise, and they will raise it based on
7 Environmental Report, on a safety evaluation
8 report, on some newspaper article, whatever, are
9 the same issues that they will still have three
10 years later into the process.

11 The NRC recognized that Discovery takes
12 a long time; that formulation of testimony, hiring
13 experts takes a long time. And if you waited until
14 the final Staff document came out, these hearings
15 would take even longer than they already do. And
16 so the Commission made a very conscious policy
17 determination saying, "Raise your contentions as
18 soon as you can." And the Commission has been
19 quite consistent in insisting that that be done.
20 It's done it several times recently in the context
21 of license renewal cases.

22 But the rules are clear. One has to put
23 one's contention out on the table. And I think
24 historically the issues that are raised on
25 environmental reports, if people are concerned with

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1 them, they are still issues that they are concerned
2 with when the FEIS has come out. Not much happens
3 to put the issues at rest in the minds of the folks
4 who were seeking to fight these projects. And the
5 Commission studies this. There were a lot of
6 people who paid a lot of attention to how to make
7 these licensing hearings work better. And that was
8 the Commission's determination. We may want to
9 second-guess that now, but that is really not
10 appropriate.

11 The rule is that as documents show up,
12 Intervenor has an obligation, an iron-clad
13 obligation as the Commission said in the Ocone
14 decision, to look for materials on which to base
15 its contentions. And if they don't do that, then
16 they have allowed time to slip and they lose their
17 opportunity. In this case, and let's talk about
18 the facts in this case.

19 JUDGE FARRAR: I was just going to ask
20 you to do that.

21 MR. SILBERG: This contention is based
22 on three new assumptions. That's the words in the
23 contention. These are new assumptions which
24 appeared for the first time in the FEIS, if one
25 believes what the State has said. The truth is

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1 they are not new assumptions. Putting aside the
2 question of whether it was Revision 0 or Revision 6
3 or Revision 13, even if it -- the last one that
4 Mr. Stewart was talking about that came out in
5 March of '01, that is still more than a year ago.
6 The truth is these analyses that we are talking
7 about were published in November of 2000.

8 They are very specific in how they deal
9 with the 20-year term, with the break-even
10 analysis, and with the start date. Those letters
11 to the NRC Staff - and Mr. Diaz has copies of some
12 of the excerpts there which, if you want to look at
13 it you can - are very clear that the exact
14 questions which are now being posed by the State
15 were discussed, because that was the basis on which
16 the FEIS cost benefit was published. This
17 information was available to the State more than a
18 year and a half from now, almost a year and a half
19 from the date that they filed their contentions.

20 It is very clear that they cannot sit by
21 on their hands and wait for those documents to
22 gather dust and then, when another document comes
23 out which incorporates that, to say, "Oh, I've got
24 a new issue." That is not what the law is. That
25 is not what this Commission has allowed. The rules

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1 and the Commission's decisions are crystal clear.

2 Now, if one looks at those documents -
3 and there's a letter from Private Fuel Storage to
4 the NRC dated November 15, 2000, another one dated
5 November 22, 2000, another one dated November 28,
6 2000 - all of these are responding to the NRC's
7 requests for additional information which, in turn,
8 were based on the comments that the State of Utah
9 filed in September of 2000. This information was
10 provided to the State, including all the electronic
11 files on computer disks. The State has had it.
12 And now they turn up when the FEIS comes out and
13 now we are going to have a contention based on new
14 information. The fact is, there's no way on earth
15 that this is new information. None of it is new
16 information.

17 JUDGE FARRAR: So what you are saying
18 is --

19 MR. SILBERG: To say there's good cause
20 for coming in with this stuff at this late date,
21 this late date being February when they filed, is
22 just turning history on its head. There is no
23 possible justification for their waiting until the
24 same analysis appears in the FEIS, when they could
25 have filed contentions, you know, well over a year

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1 earlier. So on the timeliness issue -- and I think
2 that is such a strong case that I really shouldn't
3 need to spend any more time on the matter at all.
4 But I will address --

5 JUDGE FARRAR: Well, suppose we, rather
6 than saying you were a hundred percent right or the
7 State was a hundred percent right, that it's a
8 close case, one or the other, would you on the
9 other factors you challenge the notion, would you
10 say we could not make a finding that they would
11 make a valuable contribution?

12 MR. SILBERG: Well, I think on those
13 factors I will rest on my belief with the exception
14 of the one matter that you discussed with Mr.
15 Stewart, and that is the delay cost. I frankly do
16 not believe that we could get to a decision on this
17 issue by mid-November. No matter what people say
18 about expedited schedules, and not in any way
19 questioning the sincerity of those statements, the
20 history of this proceeding does not lend any
21 comfort to the idea that you could get through this
22 issue if one were to issue an order tomorrow
23 saying, "Let's go to hearing."

24 And I was going to leave this for the
25 end but I feel strongly enough about this issue, as

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1 I have mentioned to the Board before, that while I
2 think this is as clear a case as I have ever seen
3 for a late-filed contention, and I will get to the
4 merits of the contention in a minute, if the Board
5 were to come out the other way, I would ask that
6 you immediately certify that question to the
7 Commission because I believe that adding a
8 contention of this type at this point in the
9 proceeding would affect the basic structure of this
10 proceeding in a pervasive and unusual and adverse
11 way.

12 JUDGE FARRAR: Let me ask you in terms
13 of lawyers, the lawyers who are appearing out here
14 in Salt Lake City are going to be busy between now
15 and mid-September. The only way you could - and I
16 understand your argument that you couldn't get this
17 other issue done by mid-November - but clearly the
18 only way you would have a chance would be to have
19 different lawyers, entirely different lawyers on
20 the issue. And Mr. Stewart has said he would do
21 that for the State. I take it you and the Staff
22 would also have to do the same thing.

23 MR. SILBERG: Well, we, at Shaw Pittman,
24 believe in cloning. We would figure out a way to
25 Staff that case and push it as hard as we can. But

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1 frankly, as I said, the history of this proceeding
2 gives me no comfort that you could get to a
3 decision by that time.

4 JUDGE FARRAR: Let me insist on an
5 answer on the other question, because we would have
6 to face it if we got to it. Where are we on
7 whether the State could be expected to make a
8 valuable contribution to this issue?

9 MR. SILBERG: Frankly, I think if one
10 looks -- my own view, having sat through the
11 financial qualifications hearing, do I think the
12 State made a valuable contribution? I'd probably
13 have to say no. Does Dr. Sheehan have credentials?
14 Yes. But I think credentials don't get me very
15 far. This is kind of the reverse of Judge Lam's
16 transferability of training. Dr. Sheehan has not
17 presented any new information. He has taken other
18 people's information and made some adjustments to
19 it. And as I pointed out, none of them show that
20 we go negative. So frankly, no. That's not a
21 centerpiece of our argument, but if you force me to
22 say would they make a valuable contribution, no, I
23 don't think so.

24 JUDGE FARRAR: Then I take it in summary
25 your position today, as I think was foretold by

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1 your brief, is you think that this is an
2 inexcusably late filing, given the prior
3 opportunities and given the wording of the
4 Commission's regulations. And two, on the merits
5 of whether there's anything we can do, you would
6 adopt the "so what" argument?

7 MR. SILBERG: Well, it --

8 JUDGE FARRAR: Not in those terms, but
9 as a catch phrase for all the things you said about
10 why this --

11 MR. SILBERG: I don't think this is
12 anything to -- well, frankly, as I started to
13 explain, I think that the 20-year plus two year
14 argument is not a correct reading of the NRC law.
15 And once that falls, I believe the rest of their
16 analysis falls, as well; except for perhaps the
17 start date because that isn't tied to twenty years.

18 But the start date, aside from the fact
19 that they have known for a long time that 2003
20 didn't match up once the schedule that called for a
21 decision in September of 2002 was published, and
22 that is published in September of 2001. So there's
23 no reason why that issue couldn't have been raised
24 earlier. But I think that the general idea that
25 every time there's a schedule change we have a new

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1 contention, I think gets into the fly specking
2 issue.

3 JUDGE FARRAR: But you did, I think you
4 said that on the break-even analysis, under NEPA
5 that's not necessary?

6 MR. SILBERG: That a break-even analysis
7 is not required under NEPA. I believe that is
8 correct. However, having done one, I think the
9 numbers in the FEIS, the numbers that we presented
10 are about right.

11 JUDGE FARRAR: But here is the problem I
12 have with that: I hate to get the Board in the
13 business of reviewing, either in detail or
14 globally, an analysis that is not necessary under
15 NEPA.

16 MR. SILBERG: I think you don't have to,
17 because you can find this whole issue to be
18 untimely and then the issue goes away. I think if
19 you do need to look at it, you need to look at
20 whether the twenty plus two years has any bearing
21 on anything, and I think if you look at the NRC
22 regulations, you will see that it doesn't. But
23 there's no logic in their idea that somehow you get
24 twenty years plus "some small period of time" which
25 they then come up with two years, the basis of

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1 which is never presented. And there isn't any
2 basis for that number.

3 JUDGE FARRAR: Mr. Silberg, let me
4 interrupt you for a second. The court reporter is
5 running out of tape. Let's give her a moment to
6 change that and if you could be thinking of a wrap-
7 up argument, then we will go to Mr. Weisman.

8 (Discussion off the record.)

9 JUDGE FARRAR: Let me ask you to wrap up
10 in a couple of minutes.

11 MR. SILBERG: I'll try.

12 MR. STEWART: And my rebuttal, I can
13 make short and to the point.

14 MR. SILBERG: I think if one looks at
15 the Final Environmental Impact Statement, you will
16 see quite clearly that it does not support the idea
17 of this twenty plus two years. I think if you look
18 at 72.46(c) you will see that it doesn't support
19 the unloading within two years after twenty years.
20 If you look at the legislative history of 72.54 and
21 that regulation itself, you will see that it
22 doesn't support twenty years plus two years. There
23 simply is no basis for this forced unloading. And
24 once that falls away, none of Dr. Sheehan's
25 analyses and therefore none of the State's

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1 arguments have any merit because they are all based
2 on a principle which has no validity.

3 The NRC rules have always provided that
4 at the end of a license, the date of a license,
5 that one did not magically remove every piece of
6 radioactivity from the site. Including spent fuel.
7 And the licenses which have expired or are about to
8 expire for nuclear power plants bear that in mind.
9 The NRC regulations clearly contemplate that people
10 have the time necessary to remove that radioactive
11 material, remove that spent fuel. And in this
12 case, while we would not be receiving any
13 additional fuel, we would be in the decommissioning
14 mode of removing radioactivity from the site. The
15 assumptions that are the basis for this contention
16 simply are at odds with Commission regulations and
17 Commission policy.

18 JUDGE FARRAR: All right. Thank you,
19 Mr. Silberg. Mr. Weisman? You will also have 20
20 minutes. Wait. Mr. Stewart has a question here.

21 MR. STEWART: I wonder if it might be
22 more efficient for me to do my brief rebuttal to
23 Mr. Silberg's comments and then do my rebuttal to
24 Mr. Weisman's comments after his, rather than
25 lumping them together beginning 30 minutes from

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1 now.

2 JUDGE FARRAR: Yes. Ordinarily we
3 wouldn't do that but Mr. Stewart has a time
4 commitment here. So Mr. Weisman, if you will wait
5 your turn.

6 MR. WEISMAN: I think, your Honor, that
7 it would be appropriate for the Staff to present
8 its arguments and that way Mr. Stewart would only
9 have to answer once. We may make some similar
10 arguments to what the Applicant has made, and he
11 would not have to repeat his answer.

12 JUDGE FARRAR: Okay. Well, let me do
13 that. We will follow that which is the more
14 regular course. But at some point I may interrupt
15 you and let Mr. Stewart do as much rebuttal as he
16 can, given his time constraints.

17 MR. WEISMAN: So long as the Staff gets
18 to put before you the arguments that the Staff has,
19 we will be happy with that.

20 JUDGE FARRAR: Okay. Let me start then
21 by asking you to put forth an argument you didn't
22 have which was there is some surprise on the
23 Board's part that you only address the timeliness
24 issue and not the admissibility issue. Can you
25 tell me what is going on and if the Staff at this

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1 point has a position on that?

2 MR. WEISMAN: Well, your Honor, I think
3 we set forth our position in the brief which is
4 simply that we don't object to the basis
5 requirements.

6 JUDGE FARRAR: I thought now your brief
7 said you had no position.

8 MR. WEISMAN: Well, right. In the brief
9 I believe that we said that we had no position on
10 the basis requirements, on whether or not they were
11 satisfied. I might amplify that --

12 JUDGE FARRAR: Before you amplify it, I
13 have to say I have never seen a Staff brief on a
14 contention going to a Staff document that doesn't
15 take a position on the merits of the admissibility
16 of a contention.

17 MR. WEISMAN: Well, your Honor, I think
18 at this point the Staff would have to say that on
19 its face there appears to be a basis to the State's
20 contention; but to go further, there is certainly
21 something to the Applicant's argument, particularly
22 with respect to the start date, that there isn't
23 any relief that could be granted. With respect to
24 the start date, I would just start by saying the
25 Staff is entitled to rely on the information it had

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1 at the time it prepared the analysis. That was the
2 information we had. We don't have to constantly
3 update the analysis. And I think --

4 JUDGE FARRAR: Mr. Weisman, let me
5 interrupt you. I guess I didn't make myself clear.

6 MR. WEISMAN: Yes, your Honor.

7 JUDGE FARRAR: When you have an oral
8 argument, usually a party states its position
9 before the oral argument and we explore that
10 position at the argument. I haven't heard yet why
11 the Staff took no position in its brief on this
12 question and why it is now thinking it has the
13 opportunity to argue the case on that point.

14 MR. WEISMAN: Well, I'm sorry, your
15 Honor. I thought that your order had directed us
16 to be prepared to respond to the Applicant's
17 argument with respect to what relief could be
18 granted.

19 JUDGE FARRAR: Okay.

20 MR. WEISMAN: Maybe I can cut this short
21 a little bit and see the bottom line. The Staff's
22 bottom line with respect to the relief that could
23 be granted is the Board can modify an EIS based on
24 the record that is before it. It can take whatever
25 other action it deems appropriate with respect to a

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1 contention that's been proven. Perhaps I don't
2 understand the Applicant's argument in that
3 respect. But it seems to us that you could, in
4 fact, grant some relief if this contention were
5 proven.

6 JUDGE FARRAR: Okay. Here is what I
7 think I just heard you say. We could put these
8 people through this unmerciful drill that would
9 lead to a decision in mid-November or we could say
10 that break-even analysis or something else in there
11 is wrong by a factor of five percent and we amend
12 the EIS. And I don't think the State would then
13 say we had given them any relief.

14 The question is the issue the State is
15 raising is this project doesn't make sense. They
16 would hope to push this contention and get a
17 decision when the Board is saying under NEPA this
18 project doesn't make sense. If they got a decision
19 that said the break-even analysis was off by \$5 or
20 \$500, that is not relief. Why would we go through
21 this process to reach that result?

22 I mean, this is -- Mr. Stewart wasn't
23 unwilling to say it's the "so what" question. We
24 are not going to go through a hearing if the answer
25 is, "So what?" What could be accomplished by this

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1 hearing and what kind of -- I mean, Mr. Silberg's
2 point is you don't let this contention in because
3 there's no substantive relief you can grant.

4 Now, we talked about earthquakes the
5 other day and we talked about hydrology. And there
6 is substantive relief. It may not lead to the end
7 of the project, or the death knell of the project,
8 but you can say you have to add on this additional
9 water pollution piece of equipment or you have to
10 do more seismological questioning. That's relief.
11 It's not what they want, but it is substantive
12 relief. Here, I haven't heard you talk about any
13 substantive relief we could grant.

14 MR. WEISMAN: If I understood Mr.
15 Stewart's argument correctly, he was stating that
16 the Cost Benefit Analysis presented to the
17 decision-maker needed to be an accurate analysis.
18 That if it were presented to a court of appeals and
19 it were incorrect, then the decision makers'
20 ultimate decision could possibly be overturned. So
21 in that respect, the Board can grant relief by
22 simply correcting, if the Board believes there's an
23 error in the Cost Benefit Analysis. And saying
24 that, the Staff certainly believes that the Cost
25 Benefit Analysis is correct and we can defend it.

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1 JUDGE FARRAR: Even if you believe it is
2 correct, where are you on Mr. Silberg's argument
3 that it's unnecessary, or at least the break-even
4 analysis is unnecessary?

5 MR. WEISMAN: Your Honor, it's an
6 interesting question. Mr. Stewart raised the issue
7 about other federal decision-makers. And I will
8 point out to the Board that none of the other three
9 federal agencies that have joined in this FEIS have
10 joined in the Cost Benefit Analysis. They do not
11 believe that it is necessary under NEPA, and --

12 JUDGE FARRAR: Is that reflected in the
13 document?

14 MR. WEISMAN: It is reflected in the
15 document, your Honor. This Cost Benefit Analysis
16 is something that the NRC performed. It's a matter
17 of practice, and that's why the NRC or that's why
18 the Staff included it.

19 JUDGE FARRAR: I don't mean the Cost
20 Benefit Analysis of the overall project; here is
21 why you are doing the project and here is the
22 environmental impacts. I'm talking about the
23 specific analysis of the Applicant's finances. The
24 Staff believes that's necessary under the --

25 MR. WEISMAN: Well, the Cost Benefit

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1 Analysis in Chapter 8 of the FEIS is not an
2 analysis of the Applicant's finances.

3 JUDGE FARRAR: Right.

4 MR. WEISMAN: It is an analysis of the
5 overall cost, financial cost, and benefits to
6 society as a project. Certainly the Applicant
7 would not incur any cost from individual reactor
8 licenses having to store spent fuel at their sites.
9 And what the Cost Benefit Analysis does is compare
10 the cost of storage at reactor sites with the cost
11 that would be incurred if a license were granted
12 and the PFS facility built. So it's not an
13 analysis of the Applicant's financial flows. It's
14 not an analysis of the Applicant's financial
15 ability. Financial assurance has been litigated
16 elsewhere, as we have mentioned before. Does that
17 answer your question?

18 JUDGE FARRAR: Begins to. But . . .

19 MR. WEISMAN: If we look in the CEQ
20 regs --

21 JUDGE FARRAR: Let me ask you a
22 question.

23 MR. WEISMAN: Yes, your Honor.

24 JUDGE FARRAR: From my favorite world of
25 golf. The PGA tour has a program called the First

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1 Tee program where they try to bring golf to inner-
2 city kids not only to teach them golf but more
3 important to teach them the values that golf
4 teaches; sportsmanship, dedication, practice.
5 Honesty.

6 MR. WEISMAN: Yes, your Honor.

7 JUDGE FARRAR: Suppose Tiger Woods says,
8 "I want to do this in Utah and this is such a great
9 idea I'm going to ask the Department of Agriculture
10 to turn over some national forest land to me to do
11 this. And I'm not going to charge these kids
12 anything. I'm going to give back and I'm going to
13 put all my own money into this. This is going to
14 be the biggest drain on my pocketbook that there's
15 ever been." Should the Department of Agriculture
16 look at how much it is costing Tiger Woods to do
17 that, or do they just say, "We are giving up some
18 national forest land. That's a cost. And the
19 benefit is we are providing or we are going to
20 provide these benefits to inner-city kids and it is
21 totally irrelevant whether it costs Tiger Woods a
22 million dollars a year or ten million a year."

23 That's where I get to on this break-even
24 analysis. If Tiger Woods wants to do that, why
25 can't he do that? If Mr. Silberg's clients want to

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1 bring the fuel here, and again they have to deal
2 with this Department of Agriculture with the
3 environmental impacts of that move, but why do we
4 care what it is costing them and why could we care
5 what it is costing Tiger Woods?

6 MR. WEISMAN: I can't answer for the
7 Bureau of Land Management or the Bureau of Indian
8 Affairs, since the golf course is proposed on the
9 Indian reservation --

10 JUDGE FARRAR: I'm using the analogy why
11 would we care what it is costing Tiger Woods? All
12 we would say is, Here is this national forest which
13 is now gone for this mini-golf course. But here is
14 a benefit for the inner-city kids in Salt Lake
15 City," or wherever you are. Why would we care what
16 it costs Tiger Woods?

17 MR. WEISMAN: I think to answer your
18 hypothetical, the NRC would probably not care. The
19 idea is that in licensing, of course, is if the
20 Applicant satisfies the NRC's safety regulations
21 and safety requirements, then the Applicant would
22 be entitled to a license. And if not, they are not
23 entitled to a license. In doing environmental
24 analysis, the Staff attempts to provide a complete
25 picture to the Commission as to what are the

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1 consequences of building a facility. So the Staff
2 here has included a Cost Benefit Analysis as just
3 one more piece in the picture to show the
4 Commission the consequences.

5 JUDGE FARRAR: Okay. I guess I don't
6 understand why it is a consequence that a federal
7 agency should worry about whether Mr. Silberg's
8 client makes or loses money on this deal. We
9 should care about the concept --

10 MR. WEISMAN: Whether the Applicant
11 makes or loses money is not relevant to our
12 licensing decision.

13 JUDGE FARRAR: Okay. How about whether
14 this is a better business deal for the electric
15 utility industry to move the spent fuel here or to
16 wrestle with it on the existing sites? While the
17 public may care about the environmental
18 consequences of those two alternatives, why does
19 the federal agency care about the impact of that as
20 a matter of a business judgment by Mr. Silberg's
21 clients in the electric utility industry?

22 MR. WEISMAN: Your Honor, it's the
23 Staff's attempt to quantify the costs and benefits,
24 the societal costs and benefits of the action. We
25 recognize that we can't capture all costs and

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1 benefits, we can't quantify them all. But the
2 Staff can quantify some of the economic costs and
3 benefits to society. And that's what we have
4 attempted to do to present to the Commission.

5 JUDGE LAM: But what about, Mr. Weisman,
6 what about Mr. Stewart's theory that this
7 environmental assessment is utterly wrong,
8 therefore the Applicant would lose a great deal of
9 money, therefore the Applicant would ultimately go
10 out of business and then grievously harms the
11 environment?

12 MR. WEISMAN: Your Honor, the Staff
13 Environmental Impact Statement relies on the Staff
14 Safety Evaluation for certain input assumptions.
15 One of those assumptions is that the Applicant is
16 financially qualified to manage or take care of the
17 facility. That issue has been litigated in this
18 proceeding whether or not the Applicant has
19 provided appropriate financial assurance.

20 JUDGE LAM: As a safety matter.

21 MR. WEISMAN: It's a safety matter. We
22 don't revisit that -- I'm sorry, your Honor?

23 JUDGE LAM: I thought Mr. Stewart's
24 theory is this is now an environmental matter.

25 MR. WEISMAN: We have -- your Honor, Mr.

1 Stewart's theory may be that it is an environmental
2 matter but it is not raised in this Cost Benefit
3 Analysis and it is not raised -- to the extent that
4 that issue was raised, it was raised as a safety
5 contention. This Cost Benefit Analysis does not
6 implicate whether or not the Applicant is going to
7 make money or not make money, whether they are
8 going to go bankrupt or not go bankrupt. If the
9 societal cost benefit is negative, that is no
10 indication that the Applicant is not financially
11 qualified to manage this facility. Their financial
12 qualification does not have anything to do with the
13 Cost Benefit Analysis in Chapter 8 of the FEIS.

14 MR. TURK: Is it possible that --
15 someone put a microphone in front of me, and
16 there's an on switch. Is it possible I supplement
17 Mr. Weisman's comments?

18 MR. STEWART: I thought the rule was
19 contrary to tag team.

20 MR. TURK: I appreciate that, but he and
21 I are on different locations and we cannot consult
22 as the question is asked. I'm unable to give Mr.
23 Weisman my input to his answer to the question
24 unless I do it formally here.

25 JUDGE FARRAR: I'd feel better about

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1 this request if the Staff had favored us with a
2 position on this issue when the original brief was
3 filed.

4 MR. TURK: I can respond to that, also.

5 JUDGE FARRAR: Go ahead.

6 MR. TURK: With respect to your last
7 point, I believe that when we filed our response to
8 the contention initially, we felt it was adequate
9 to address timeliness without having to address the
10 issue of merits because we thought it was a clear
11 case.

12 JUDGE FARRAR: Let me make a suggestion
13 for the future: Any time you are appearing in
14 front of me, address both.

15 MR. TURK: We will try to do that, your
16 Honor. And I apologize if that left you with some
17 lack of input that you felt we should have provided
18 to you at the time.

19 With respect to Judge Lam's question, if
20 the financial assurance safety hearings had
21 concluded that the Applicant lacked financial
22 qualifications or it could go bankrupt because, for
23 example, we did not have a license condition that
24 assured that an adequate amount of money would be
25 coming into it in order to safeguard the

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1 construction or provide for a safe construction
2 operational facility, two things would have
3 happened. One, we would have told you we want the
4 license to be denied and you wouldn't need to get
5 to the environmental question; or two, the
6 Intervenor could come in and say this Applicant
7 hasn't shown they could not go bankrupt. That is a
8 potential environmental effect that needs to be
9 considered in the EIS, and I would have said yes,
10 that's true.

11 JUDGE FARRAR: So you can revisit safety
12 issues under an environmental, under NEPA?

13 MR. TURK: You wouldn't revisit the
14 issue, but you would take the conclusion from
15 safety hearings and say, "This Applicant could go
16 bankrupt and leave all those sitting out there in
17 the desert," and then look at the environmental
18 consequence of that in the EIS.

19 JUDGE FARRAR: How about the lingering
20 theory that I think shows up in safety issues; that
21 the Applicant wins on the safety issue but the
22 Staff still visits, under NEPA, the lingering
23 probability that there could be an accident with
24 dire environmental consequences?

25 MR. TURK: The same thing would exist

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1 with respect to all safety issues. We evaluate the
2 safety of the facility and I think if we look at a
3 nuclear power plant, which has many more safety
4 considerations involved, we don't go to the EIS and
5 say, "Let's consider all the speculative scenarios
6 we can come up with because they might say we are
7 wrong in our safety conclusions."

8 JUDGE FARRAR: But there's no NEPA issue
9 that occasionally surfaces in the cases about kind
10 of this residual concern, or am I misstating the
11 jurisprudence?

12 MR. TURK: There is a consideration of
13 credible accidents in the EIS.

14 JUDGE FARRAR: Right.

15 MR. TURK: And what are the effects of
16 accidents that are deemed to be credible.

17 JUDGE FARRAR: Okay. Mr. Weisman, why
18 don't you address the timeliness issue. Let's take
19 it backwards. If we thought this was a close case
20 on the excuse for the belatedness, can we assume
21 the State would make a valuable contribution?

22 MR. WEISMAN: Your Honor, I believe that
23 we said in our brief that we thought that the State
24 would make some contribution to the proceeding, but
25 that we didn't think that it would be so great as

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1 to weigh heavily in the State's favor on that
2 factor.

3 JUDGE FARRAR: How about the delay of
4 the proceeding; could we do this energetic schedule
5 I laid out and conclude or lead to a decision by
6 mid-November, the same time as this Board is
7 anticipating getting out its decisions on the other
8 issues?

9 MR. WEISMAN: Your Honor, the Staff's
10 position on that is that financial analysis is very
11 complicated. It depends on a fairly large number
12 of assumptions that vary with respect to their
13 certainty, and there would be a great deal to
14 explore in Discovery and in preparing testimony and
15 then for the Board to consider in making its
16 decision. The Staff position is that all of those
17 things would take a significant amount of time.

18 JUDGE FARRAR: And we are not looking at
19 a two-day hearing?

20 MR. WEISMAN: We are not looking at a
21 two-day hearing, your Honor.

22 JUDGE FARRAR: What kind of hearing are
23 we looking at?

24 MR. WEISMAN: My estimate would be more
25 on the order of a week to ten days.

1 JUDGE FARRAR: Good. Then I will apply
2 the rule we have learned in Salt Lake City, that
3 that means two weeks to twenty days.

4 MR. WEISMAN: I think you would be safe
5 in cutting it off at two weeks.

6 JUDGE FARRAR: Then what the Staff
7 position really comes down to gets back to the
8 point Mr. Silberg and I were discussing; that the
9 Commission rules - whatever I might think about how
10 you run a proceeding efficiently - Commission rules
11 say the State, like every other Intervenor, has to
12 file a whole lot of contentions at every
13 environmental stage of the proceeding in order to
14 preserve its right at the end of those three steps
15 to come up with the one or two contentions that are
16 left.

17 MR. WEISMAN: And, in fact, that's what
18 was done in this proceeding. The State filed many
19 environmental contentions. Other Intervenors filed
20 environmental contentions. Many were not admitted.
21 Other contentions were admitted but have been
22 dismissed on summary disposition. And I think that
23 if you examine the Staff's EIS, the FEIS deals with
24 many of those issues in a way that they would
25 adequately deal with the Intervenor's original

1 concern.

2 JUDGE FARRAR: So I shouldn't let my
3 having recently returned to the Commission, I
4 shouldn't let my superficial look at the system be
5 unduly influential.

6 MR. WEISMAN: In some respects, your
7 Honor, the system works that way. It's open for
8 public participation. And it may not be as
9 efficient as might be done in an ideal world. But
10 it gets the job done. And it accomplishes many
11 different competing goals.

12 JUDGE FARRAR: Okay. Then that leaves
13 only the question assuming we apply that system
14 rigorously, the State says, "Yes, but here's some
15 new things. So even though we didn't file a
16 contention earlier, we filed within a proper time
17 period after learning what was really going on
18 here." How do you respond to that?

19 MR. WEISMAN: Well, I turn to Revision 6
20 that Mr. Stewart identified, Table 7.3-1. Mr.
21 Stewart claims that the numbers in that table
22 derive from a 20-year analysis. However, if you
23 look at Page 7.3-1, the page number identifying the
24 costs, in Revision 6 the numbers, the cost numbers
25 in that table all come from or are recited on that

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1 page. And that page speaks about the facility and
2 its operation over its projected 40-year operating
3 life. Those are 40-year numbers. There is nothing
4 in E.R. Revision 6 that refers to a 20-year
5 analysis. In E.R. Revisions 7 and 8 there is an
6 item in a table that refers to a 20-year scenario
7 but there is no analysis whatsoever of any 20-year
8 scenario in Revisions 7 and 8.

9 The FEIS, the DEIS, I'm sorry, you
10 relied on the analysis set forth in Revision 8 of
11 the E.R., and the 2000 ERI report. When the State
12 got a copy, when they received a copy of the 2000
13 ERI report in September of 2000, after the issuance
14 of the DEIS, the State identified this 20-year
15 versus 40-year issue in its comments. It's quite
16 clear that the State was aware of those issues at
17 that time. And if the State thought it was so
18 significant, the State should have submitted a late
19 filed contention then.

20 JUDGE FARRAR: Okay. I think I
21 understand this argument. In view of that, let me
22 go on to something else in view of the need to give
23 Mr. Stewart time for rebuttal.

24 Section 51.61 of the Regs, and the
25 related ones, how do I reconcile what it says there

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1 with looking at the fuel being on the site after
2 twenty years and then with Mr. Stewart's argument
3 that the Commission, I think he called it an outlaw
4 facility. I take it your response on the outlaw
5 facility argument to me would be that's a matter
6 for the United States District Court and/or the
7 Commission, and that our Board need not be
8 concerned about it?

9 MR. WEISMAN: I believe you are correct,
10 your Honor.

11 JUDGE FARRAR: Okay. But then looking
12 at the last language in 51.61, was that drawn up
13 without having in mind the type of facility and the
14 type of issue we are dealing with here? Because in
15 a sense, if I read that literally, and I think one
16 other section literally, it says there's no
17 environmental impact from these so why did the
18 Staff do an Environmental Impact Statement at all?

19 MR. WEISMAN: Your Honor, I think that I
20 would back up just a little bit and say that -- I'd
21 start with the elementary proposition that when a
22 Commission issues a license, the activities
23 authorized in that license can be performed by the
24 licensee until the minute that that license
25 expires. So if the NRC were to issue a 20-year

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1 license to PFS, it would authorize receipt of spent
2 fuel until the very last minute of that 20-year
3 license. And the licensee is entitled to do that.

4 What follows, of course, is the
5 decommissioning. And the decommissioning
6 regulations for an ISFSI are in 72.54. Clearly if
7 a license were issued, PFS would have to submit a
8 decommissioning plan two years before expiration of
9 the license if it did not seek or if it weren't in
10 timely renewal.

11 JUDGE FARRAR: But what do I do under
12 51 --

13 MR. WEISMAN: I guess what I'm trying to
14 get to is that 72.54 authorizes a licensee to
15 possess material past the expiration of a license
16 until the facility is decommissioned and license is
17 terminated.

18 JUDGE FARRAR: Okay. But if physically
19 this Board concludes that you can't remove the 4000
20 casks, what do we do in light of what 51.23(b)
21 says, and 51.61 says? In other words, it's one
22 thing -- you know, I never had any problem with the
23 Commission's rule that says in reactor licensing
24 cases you can assume there will be a Yucca Mountain
25 in the future. Don't worry about it. That's fine.

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1 That's valid. But here, if I read the rule, which
2 admittedly was written a long time ago and the
3 Commission undoubtedly didn't have this
4 circumstance in mind, the rule says disregard
5 something even though you know physically it is an
6 absolutely definite thing that's going to happen.

7 MR. WEISMAN: I think, your Honor, and I
8 hesitate to tread into the merits of this
9 contention, but I think that the Staff has provided
10 an analysis that recognizes the possibility of fuel
11 remaining on the site during decommissioning. We
12 also recognize that there isn't any requirement to
13 perform any analysis beyond the term of the
14 license.

15 JUDGE FARRAR: That's a great
16 hypothetical or great theory that we all agree
17 with, except -- we can say don't assume the reactor
18 will get a license after 40 years. That will be a
19 decision made by other people at that time. But I
20 have difficulty saying don't assume there will be
21 any fuel on the site after 20 years when, at the
22 end of the 20th year, the 7300th day or whatever it
23 is, there will be 4000 casks there.

24 MR. WEISMAN: And if that license is
25 granted, the Applicant is certainly entitled to

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1 have fuel there on that or at the end of the 20th
2 year.

3 JUDGE FARRAR: Okay. I think we have
4 gone as far as we can here. Mr. Stewart, in view
5 of the time, it's ten to 12:00 and I know you
6 mentioned either on or off the record you have an
7 important prosecutorial matter that we would not
8 want to interfere with, and it's some distance from
9 here. So why don't you start your rebuttal.

10 MR. STEWART: Thank you. And I'm going
11 to focus first, your Honor, and I think relatively
12 briefly but I believe quite helpfully on a concept
13 that Mr. Silberg brought forward, and that he kept
14 going back to and that he kept identifying as
15 extraordinarily important. And that's his
16 reference to the timely renewal doctrine as
17 codified or at least put into the regulations at
18 72.54. There was a fundamental miss in his
19 argument which I believe Mr. Weisman adopted. But
20 him raising the argument is extraordinarily
21 valuable for this Board for two reasons.

22 First, it's valuable because in the
23 course of his argument I think it became clear that
24 the essence of PFS's position and argument is that
25 this is really a 40-year project and that,

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1 therefore, the major federal action that is being
2 considered here is a 40-year defacto license. If
3 that is so, and if he is right, as he kept arguing,
4 then there's nothing wrong with the FEIS as it now
5 stands.

6 The problem, however, is that he is
7 doing, or excuse me, PFS, the Applicant, now joined
8 by Staff, is doing violence to NRC law as follows:
9 First of all, in this case, the case of this PFS
10 facility, proposed facility, the sole purpose of
11 the facility is storage. This is not a reactor
12 site where the primary purpose is generation of
13 electrical power, da, da, da, and the handling of
14 the waste is tangential to that. The sole purpose
15 of this site is storage. In that context, it is
16 absolutely reasonable for everyone to say that the
17 shipment to the site and the removal of the spent
18 nuclear fuel from the site must be timed to fit the
19 actual term of the license. That's just
20 reasonable. And that's the only approach you can
21 take and make meaningful the NRC regulation saying
22 for this kind of a project, an ISFSI, you are going
23 to grant a 20 year license. Because if you accept
24 Mr. Silberg's approach, you are doing violence to
25 the 20-year license concept and you have, in

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1 effect, erased the distinction that is right there
2 in black and white in the NRC regulation that says
3 ISFSI, 20 years; MRS, 40 years.

4 Where else does it do violence to NRC
5 law? In the waste confidence regulations. There
6 is a way to reconcile those regulations that the
7 Commission will address environmental impacts of
8 spent fuel storage only for the term of the license
9 applied for. And that's twenty years. There is a
10 way to reconcile what is going on here with that
11 NRC law. And that is to say for this facility,
12 since its sole purpose is storage, it is absolutely
13 reasonable to include in the timing of the facility
14 both the receipt and the removal, and fit that
15 within the license term. If you do that, you have
16 done justice to the 20-year license provision. If
17 you do that you have done justice to the waste
18 confidence regulations that limit environmental
19 concerns to the time of the license itself.

20 JUDGE FARRAR: So what you are saying,
21 if I understand you correctly, is the license would
22 be issued with the condition that says you may
23 receive fuel, spent fuel, for as long as you want
24 as long as you have it all off site in twenty
25 years.

1 MR. STEWART: Yes. Exactly right. And
2 that's why this is a no-go project if you abide by
3 NRC law. Now --

4 JUDGE FARRAR: Two problems with that.
5 One, I take it we would have to admit -- in other
6 words we have no basis in the record now to -- you
7 know, assuming at the end of the case here the
8 State were to lose on all the pending issues and we
9 were to say Staff can issue the license, we would
10 have no basis now to say, "But it would have to
11 have the fuel removed in twenty years." We could
12 only do that after we had some kind of hearing, I
13 think.

14 MR. STEWART: Well, I like to live in
15 the real world. And the real world is what
16 everybody in this room, I think, knows and that is
17 this deal isn't going to go ahead if the stuff has
18 to go in and come out within twenty years because
19 of the break-even analysis, because of the business
20 considerations involved.

21 JUDGE FARRAR: Well, wait. Suppose Mr.
22 Silberg's clients were faced with the condition you
23 just described. Might they not still say, "Okay,
24 we are going to lose money on the deal but it is
25 still worth it to the electric utility industry and

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1 the consumers of electricity in America to do this
2 because this is our insurance policy against
3 reactor shut down."

4 MR. STEWART: They cannot satisfy
5 licensing condition one. They cannot. And
6 Dr. Sheehan's affidavit establishes that. Under a
7 correct application of the 20-year license concept,
8 they can't satisfy license condition one. It's
9 just a matter of --

10 JUDGE FARRAR: What's license condition
11 one?

12 MR. STEWART: It places a minimum that
13 they must satisfy in terms of through-put and
14 storage. They can't satisfy it. It is in the
15 affidavit.

16 JUDGE FARRAR: Is that a condition
17 that -- where did that condition come from? I mean
18 is that -- you are proposing it as your condition?

19 MR. STEWART: No. It is already in
20 existence. And Mr. Silberg referred to it in his
21 argument.

22 JUDGE FARRAR: Go ahead, Mr. Silberg.

23 MR. SILBERG: That is the condition
24 associated with the financial qualifications
25 analysis to assure there is adequate money to fund

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1 the construction of the project.

2 JUDGE FARRAR: Okay. Thank you.

3 MR. SILBERG: If I could, you said --

4 MR. STEWART: If I may continue with my
5 rebuttal.

6 MR. SILBERG: You stated that this is
7 stated in Dr. Sheehan's affidavit that they can't
8 meet the license condition?

9 MR. STEWART: Yes.

10 MR. SILBERG: I don't want to interrupt
11 your --

12 JUDGE FARRAR: We can find that later,
13 if need be. Go ahead, Mr. Stewart.

14 MR. STEWART: I refer to Paragraph 32
15 which is only a conclusion and it is a conclusion
16 of paragraphs or of earlier analysis. "These very
17 much lower maximum lower through-put levels will
18 also run afoul of license condition LC 17-1,
19 certainly for 2015 repository levels and probably
20 for the 2010 scenarios, as well. So the reality is
21 you apply NRC law in a straightforward fashion,
22 this deal dies. It is a no-go.

23 Now, let me go to timeliness in that
24 connection. And if I get a little exercised,
25 excuse me. You understand my background is not NRC

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1 procedure. I come from courts that expressly state
2 their primary objective is to achieve substantial
3 justice on the merit, and here I am sensing that
4 procedural matters loom a bit larger.

5 I direct your attention to our
6 Contention SS Exhibit 2.

7 JUDGE FARRAR: Mr. Stewart, my first job
8 in life was a law clerk to a federal judge to whom
9 the principles you just spoke were the paramount
10 value in American jurisprudence. So go ahead.

11 MR. STEWART: Thank you. I direct your
12 attention to Exhibit 2 of our contention.

13 MR. SILBERG: What is Exhibit 2? I
14 don't have that.

15 MR. STEWART: It is Denise Chancellor's
16 October 4 cover letter to the State of Utah's
17 September 27, 2000 comments on the DEIS.

18 MR. SILBERG: I didn't have a number on
19 it.

20 MR. STEWART: I'm sorry. In any event,
21 I point that out to give you this time line. You
22 must understand, and we stand by our position
23 regarding Table 7.3-1 in Revision 6. The DEIS came
24 out in June of 2000. In timely fashion by
25 September, October, Utah had submitted its comments

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1 to the DEIS. And the essence of the comment was,
2 wait a second, when you're analyzing the costs and
3 the benefits, as you must understand NRC regs, of
4 this project, you've got to do it on a 20-year
5 basis. That means stuff in, stuff there, and stuff
6 out. You can't do it on the 40-year basis that you
7 are proposing here. That's the essence of what we
8 said. We said that six months before the Applicant
9 finally amended its E.R. to finally withdraw
10 totally and completely its information about a
11 20-year analysis.

12 We then relied on the NEPA process for
13 Staff to see the sensibility of our comment and to
14 respond accordingly. Staff responded halfway. The
15 NEPA process here, Utah contends, was half
16 successful. Because they said, "Hey, you are
17 right. We have to analyze this solely as a 20-year
18 license with respect to receipt." But you know
19 what, and without saying so expressly, they went on
20 to adopt Mr. Silberg's position of, "Yeah, but we
21 can string this out for 40 years with respect to
22 the actual storage." Hence, when that half
23 correction/half failure came to life in the FEIS,
24 Utah timely filed its contention and said, "You
25 have to make this right."

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1 And now that brings me to another
2 important point. Mr. Silberg kept saying NEPA
3 doesn't require a break-even analysis. NEPA
4 doesn't require a quantified dollars and cents cost
5 benefits analysis. I'm not going to argue that
6 here, other than to say we don't accept that. But
7 I'm going to argue something that I think is
8 irrefutable. And that is simply that PFS itself
9 thought that such kinds of analyses were necessary
10 and helpful in the NEPA process and Staff thought
11 these kinds of analyses were necessary and helpful
12 in the NEPA process. That's why they are in the
13 DEIS and that's why they are in the FEIS. And the
14 point is with them being in there because they are
15 necessary and helpful, they have to be right.

16 Mr. Silberg said that the FEIS has to be
17 pretty damn good. What we have presented on a
18 solid basis with Dr. Sheehan's affidavit is that
19 that analysis is pretty damn bad. And the federal
20 decision-maker must, under NEPA, have an FEIS that
21 has it right. And that means an analysis that
22 shows what we are confident it will show; that when
23 you talk about the proper understanding of the 20-
24 year license term, that this project makes no sense
25 in whole bunches of ways; not just narrowly focused

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1 on PFS's bank statement but on the value of it to
2 the industry, the larger societal issues. And
3 certainly it will demonstrate that there's no way
4 they can satisfy Licensing Condition 17-1.

5 JUDGE FARRAR: Then if I understand your
6 position, you would have us find that your
7 contention was timely or had good cause for the
8 late filing; two, that you would contribute to the
9 proceeding; three, we could get on a rush schedule
10 and get this done by mid-November; and four, you
11 would limit that hearing on that contention to a
12 NEPA analysis of a 20-year project in and out in
13 twenty years, and do the NEPA analysis on the in
14 and out in twenty years?

15 MR. STEWART: Absolutely. And if this
16 Board doesn't want to make the ultimate ruling of
17 law, it darn well ought to have both alternatives
18 in the FEIS.

19 JUDGE FARRAR: In and out in twenty
20 and --

21 MR. STEWART: And what's in there now.

22 JUDGE FARRAR: In twenty and not
23 necessarily out until forty. Do a hearing on both
24 of those.

25 MR. STEWART: The other one is already

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1 done. There's the analysis. We haven't said this
2 is bad analysis for forty years. We have just said
3 it is bad to do a 40-year analysis. And that's why
4 Mr. Silberg's argument about --

5 JUDGE FARRAR: So you wouldn't spend any
6 time on the 40-year analysis. We wouldn't be fine-
7 tuning that.

8 MR. STEWART: Exactly.

9 JUDGE FARRAR: And that's the insurance,
10 in your mind, to the irrelevancy argument of why
11 fine-tune a 40-year argument which is not going to
12 yield a different result. You are saying leave the
13 40-year analysis there, but look at a 20-year and
14 that might lead to a different result under NEPA.

15 MR. STEWART: Yes. We haven't
16 challenged -- and that's why what Mr. Silberg's
17 colleague passed out here, all of this information
18 that came out after Utah filed its comments to the
19 DEIS, all of this stuff is simply stuff saying,
20 "Our 40-year analysis is correct." That's not the
21 point. The point is you shouldn't be doing a
22 40-year analysis. You have to be doing a 20-year
23 in and out analysis. And you aren't doing it.

24 JUDGE FARRAR: Let me do this, Mr.
25 Stewart --

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1 MR. STEWART: And they did not abandon
2 that approach until Revision 13, after we had
3 already hammered the issue.

4 JUDGE FARRAR: Let me see if my
5 colleagues have any questions to ask any of the
6 lawyers. And then Mr. Silberg, Mr. Weisman, Mr.
7 Stewart has to leave the room. I will give you
8 each one minute to say anything, even though you
9 are not entitled to any time, I will give you each
10 one minute to say anything you think needs to be
11 said.

12 MR. STEWART: Thank you for your time.

13 JUDGE FARRAR: Mr. Silberg?

14 MR. SILBERG: First, Mr. Stewart says
15 that we have to have an absolute twenty years in
16 twenty years out. If that's true, then his
17 contention should be thrown out because that is not
18 what his contention asks for. His contention says
19 twenty years plus two years, which is, as I said,
20 has no regulatory basis because it is twenty years
21 and then time for decommissioning. And if he looks
22 at the material we submitted in the November 28
23 letter, I don't know whether all the schedules are
24 attached, but not all of those are 40-year
25 schedules. Some are as short as 29-year schedules.

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1 The idea that we have a 40-year facility is bogus.
2 I looked at the testimony by Mr. Parkyn. It
3 doesn't say that. And frankly, I'm surprised that
4 Mr. Stewart, without looking at the testimony,
5 would make statements as to what that testimony
6 says.

7 MR. STEWART: For the record, sir, I
8 have read the testimony four times in the last few
9 days.

10 MR. SILBERG: You said you didn't have
11 it and you hadn't read it.

12 JUDGE FARRAR: We will be the arbiters
13 of that. Go ahead, Mr. Silberg. I will give you
14 one more point to make.

15 MR. SILBERG: With respect to
16 substantial justice and procedural compliance,
17 obviously we need to have both. We need to meet
18 the NRC regulations and do what underlies them, and
19 that's what we are doing. And we did these
20 analyses because the NRC Staff asked for them.
21 They asked for them because they were answering the
22 comments raised by the statute of Utah. Whether it
23 is required or not is a different matter.

24 JUDGE FARRAR: Okay. Thank you. Mr.
25 Weisman, I'll give you a minute.

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1 MR. WEISMAN: This is very simple, your
2 Honor. The State would like to include the period
3 of decommissioning in the license term. That's
4 what the State is asking. The State would like to
5 have a 10-year license term for receipt and a
6 10-year period for decommissioning. That is not
7 what is at issue here. What is at issue is a 20-
8 year license followed by decommissioning, as
9 provided in NRC regulations. So in that respect,
10 the State is simply wrong.

11 JUDGE FARRAR: Okay.

12 MR. WEISMAN: As to whether or not
13 Revision 6 has a 20-year analysis in it, I will
14 leave it to the Board to simply look at the text of
15 Revision 6 and you see whether you think the State
16 is right or we are right.

17 JUDGE FARRAR: Okay. Mr. Weisman, thank
18 you. We need to get Mr. Stewart out of here. I
19 have both a thank you and an apology to Counsel.
20 The thank you is obviously for the marvelously good
21 and well-focused arguments presented here today,
22 which will be enormously helpful to the Board in
23 reaching its decision. The apology is I have been
24 blaming you all for telling me how long hearings
25 will take and you being off by a factor of two. I

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1 said this would take 90 minutes and it took three
2 hours, so I'm as bad as you are. But thank you.
3 We will attempt to have an oral decision by next
4 Friday.

5 MR. SILBERG: Mr. Chairman, thank you.
6 And I would at least restate my request on the
7 decision or if that decision calls for a hearing
8 that it be immediately certified to the Commission.

9 JUDGE FARRAR: We will consider doing
10 that, as we always do with any decision that has
11 immediate large consequences. Mr. Turk?

12 MR. TURK: Your Honor, a question you
13 raised, an interesting question about the Tiger
14 Woods golf course example and whether that would
15 have to be evaluated with respect to the costs and
16 benefits to Mr. Woods. Would your Honor believe it
17 would be valuable to have the parties file any
18 written briefing of that issue?

19 JUDGE FARRAR: No.

20 MR. STEWART: Am I being asked to
21 stipulate that PFS is an altruistic eleemosynary
22 institution rather than a profit-driven entity?

23 JUDGE FARRAR: No.

24 MR. TURK: That's not my point.

25 JUDGE FARRAR: No. You are being asked

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1 to attend to important business you said you had on
2 behalf of the citizens of Utah, and we appreciate
3 the importance of that work you do.

4 MR. SILBERG: I'm sorry. I didn't
5 understand what --

6 JUDGE FARRAR: Mr. Stewart can leave.

7 Mr. Turk asked if we needed additional
8 briefs on the Tiger Woods analogy, and the answer
9 is no.

10 MR. TURK: And with respect to whether
11 or not an EIS must include a discussion of the type
12 that is at issue here as it relates to the Tiger
13 Woods -- I'm only asking if you would find
14 something like that to be valuable. I'm not
15 looking to take more briefing responsibility if you
16 don't need it.

17 JUDGE FARRAR: If the parties would like
18 to file --

19 MR. WEISMAN: I lost you, I didn't hear
20 what you said.

21 JUDGE FARRAR: I started to say
22 something but I don't have the votes to impose it
23 so the answer is no.

24 MR. SILBERG: Good.

25 MR. WEISMAN: Thank you, your Honor.

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1 MR. STEWART: Relative to the Tiger
2 Woods analogy, I propose a golf tournament to
3 settle everything.

4 JUDGE FARRAR: Thank you. We are
5 adjourned.

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8 (The proceeding was concluded
9 for the day at 12:10 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:

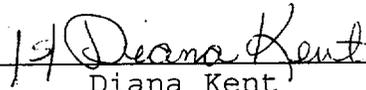
Name of Proceeding: Private Fuel Storage, LLC

Docket Number: Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

Location: Salt Lake City, Utah

were held as herein appears, and that this is the
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