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NUCLEAR REGULATORY COMMISSION

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Pre-hearing Conference

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Location: (telephone conference)

Date: Wednesday, August 24, 2005

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL
PRE-HEARING CONFERENCE CALL

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IN THE MATTER OF:	
U.S. Army (Jefferson Proving	Docket No.
Ground Site)	40-8838-MLA-2
(Independent Spent Fuel	
Storage Installation)	
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Wednesday, August 24, 2005
Teleconference

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:
JUDGE ALAN ROSENTHAL Presiding Officer
DR. PAUL B. ABRAMSON Special Assistant

1 APPEARANCES:

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P R O C E E D I N G S

9:58 A.M.

1
2
3 MR. KOPP: This is Frederick T. Kopp with
4 the Rock Island Arsenal Legal Department. I am the
5 counsel for the Army.

6 JUDGE ROSENTHAL: Thank you very much, Mr.
7 Kopp. And we'll now -- Save The Valley?

8 MR. MULLETT: Your Honor, this is Michael
9 E. Mullett, counsel for Save The Valley.

10 JUDGE ROSENTHAL: Thank you, Mr. Mullett.
11 And now for the NRC Staff?

12 MR. SMITH: This is Tyson Smith for the
13 NRC Staff.

14 JUDGE ROSENTHAL: Thank you. As was
15 indicated in the order that I issued last week, this
16 conference is being recorded.

17 Now the motion before us asserts us that
18 the proceeding is moot because directed to a withdrawn
19 application of the Army for a five-year renewable
20 possession-only license with respect to the
21 accumulated DU munitions on the site.

22 In substitution of its quest for such a
23 license, the Army has advanced what instead has been
24 characterized as a proposal for an alternative
25 decommissioning schedule for the decommissioning of

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1 the JPG site.

2 As explained in a July 19, 2005 letter
3 appended to the motion, the Army is putting forth a
4 plan and strategy, site characterization, to be
5 conducted within five years of approval and
6 commencement of plan execution.

7 At the end of the five-year period, the
8 Army will present to the NRC the license termination
9 plan that would propose termination under restricted
10 release conditions.

11 This motion is supported by the NRC Staff
12 and opposed by the Intervenor, Save The Valley.

13 Under normal circumstances, given the
14 withdrawal of the application that has undergirded the
15 proceeding, a dismissal on grounds of mootness would
16 be a virtually automatic matter. The circumstances of
17 this case, however, far from normal, and hence, this
18 conference.

19 The extended or tortured background of
20 this proceeding chronicled in some detail in LBP 0509
21 issued last March 31 and that background presumably
22 being fully familiar to those participating today, it
23 does not appear to be any necessity to rehearse it in
24 detail at this point.

25 Suffice it to note that it is has now been

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1 over a decade. The Army ceased the accuracy testing
2 of the munitions on the JPG site and more than five
3 years since in late 1999 filed what apparently was its
4 first license amendment application addressed to the
5 decommissioning of the site.

6 The time in March 2000, I granted Save The
7 Valley's hearing request pertaining to the
8 decommissioning plan that was the subject of that
9 application. This has transpired.

10 In June 2001, the Army filed a new plan,
11 nominating as its final decommissioning license
12 termination plan. Amended in 2003, the Army withdrew
13 that plan and put before the Staff yet another and
14 radically different proposal. That it be granted the
15 five-year renewable possession-only license that now
16 is no longer being sought.

17 That proposal put Save The Valley to the
18 effort and expense of filing a new hearing request.
19 IN short, for more than five years now, this
20 Intervenor has been treated to a series of shifts of
21 position on the part of the Army with the apparent
22 indulgence of the Staff that have left us no closer to
23 an ultimate determination regarding site
24 decommissioning than on the day the munitions testing
25 ended in 1994 some 11 years ago.

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1 Yet, not only has that Intervenor already
2 been required to file and to have granted two hearing
3 requests in this matter, but now the Army and Staff
4 would have it that a third request was mandated and
5 that presented under completely different and more
6 stringent procedural rules.

7 All this, because the Army and Staff
8 apparently have been unable to agree on a satisfactory
9 decommissioning process. In that connection, the
10 revised decommissioning plan had been scrapped for the
11 reasons that the Army declined on asserted safety
12 grounds to conduct certain additional site sampling
13 modeling that the Staff insisted be performed to
14 assist its evaluation of that plan.

15 In the totality of these circumstances,
16 Judge Abramson and I have some doubt regarding whether
17 requiring Save The Valley to file yet a third hearing
18 request with respect to the future of the JPG's site
19 is either reasonable or necessary to satisfy the
20 dictates of the Commission's rules. Hence, this
21 conference.

22 We will now call upon counsel for the Army
23 to respond to the foregoing observations, following
24 which we will hear from Staff counsel and then permit
25 Intervenor's counsel to respond and that will be dealt

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1 with some questions.

2 Mr. Kopp, would you like to respond?

3 MR. KOPP: Let me first say that the
4 Army's concern throughout these proceedings has been
5 one of safety, as you've indicated, and the safety
6 doesn't relate so much to the depleted uranium, but it
7 relates to the unexploded ordnance that is at the site
8 of the depleted uranium.

9 As we have gone along, we have not made
10 these new plans, submitted these new applications in
11 a vacuum. It's been part of extensive discussions and
12 some guidance from the NCR Staff, some suggestions
13 that might hopefully resolve this matter.

14 The current application that we have made
15 is based on the fact that -- I take that back. In
16 2003, late 2003, early 2004, the Army Environmental
17 Center did studies on various bases and proving
18 grounds including the Jefferson Proving Ground and the
19 Army is now convinced that although it is not safe, by
20 any means, it is possible to supply more data to the
21 NRC and the Save The Valley people because we think we
22 can get in there, into the Jefferson Proving Ground
23 and with the unexploded ordnance experts being on site
24 and present while we are finding places to sink
25 further wells and so forth, we think that we have

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1 minimized the risk to personnel that's doing that.

2 Given that situation, we are of the mind
3 that we would like to give this matter to closure.
4 The prior application, the one that we've just now
5 abandoned was based on the fact that we didn't think
6 we could get in there and do that kind of testing and
7 we were basically trying to maintain the status quo in
8 a way that was safe for the people of the area and
9 safe for the people that would be doing the testing.

10 That has resulted in the shift in our
11 plan. Our new plan now is to do much more extensive
12 testing, field sampling and to bring this matter to
13 closure with a restricted release to the Army.

14 The Army is also of the opinion that we're
15 never going to be able to have this property out of
16 our possession, that we're always going to have to
17 maintain it in some form of restricted holding because
18 not so much because of the depleted uranium again, but
19 because of the unexploded ordinance.

20 So that's what brings us to this matter
21 today. There is a significant difference in the new
22 application as opposed to the old application. I
23 myself would characterize it as about 180 degree
24 turnaround in the sense that, as I say, we
25 contemplated with a five-year renewable license,

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1 minimum testing and monitoring and maintenance of the
2 status quo, hoping that technology would catch up with
3 the situation and allow us to do something further in
4 the future.

5 And as I understand it, this was a
6 possible suggestion that the NRC had been
7 contemplating not only for our site, but for a number
8 of sites that were in the safe situation that could
9 never really be released for an unlimited termination
10 or unrestricted termination, rather. And that's what
11 prompted the change that went into the five-year
12 renewable license. But now, as I say, we have come to
13 the conclusion based on the Army Environmental
14 Center's studies and the fact that last April in a
15 meeting with the NRC Staff, we finally came to the
16 conclusion that our five-year renewable plan just was
17 not going to fly, that we did need to do significantly
18 more testing and the question was could it be done
19 safely which the Army has concluded that well, it
20 can't be done safely, but it can be done with a
21 minimalization of the danger involved. And that's why
22 we are submitting the new plan.

23 Now as to whether it arises through the
24 merit of a completely new plan or is a continuation of
25 the old plan, as I say, I think there's substantial

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1 differences in what we are planning to do, but
2 ultimately, the characterization is something that the
3 NRC has the prerogative to make. They determine that
4 it was such a departure from our prior application
5 that a new publication had to be made and people given
6 an opportunity to request a hearing on these new
7 matters and that's why we're here today.

8 Additionally, it was -- well, let me
9 rephrase that. The NRC notified us as well as the
10 other participants in these proceedings in June that
11 it was considering this application that we had made
12 to have superseded our prior application and that they
13 were no longer going to consider that application and
14 at that point in time they were basically inviting us
15 to go ahead and dismiss that, since it was no longer
16 going to be a matter of contention between us and the
17 NRC or between us and Save The Valley.

18 And so at that point, we did that, moved
19 for dismissal of this action and withdrew our
20 application. It's my understanding that the
21 application is withdrawn while these proceedings still
22 remain. They remain for an application which is
23 basically no longer in discussion or in consideration.

24 JUDGE ROSENTHAL: Let me interrupt you,
25 just for a moment, Mr. Kopp.

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1 Do I understand that from what you have
2 just told us that the difference between the proposal
3 that has now been withdrawn and the proposal that is
4 currently on the table is that under the prior
5 proposal there was no significant testing that was
6 called for, whereas under this proposal during the
7 course of the next five years you're going to be doing
8 some testing that I take it it's your hope will
9 produce a viable decommissioning plan?

10 Is that really what it comes down to, is
11 you weren't going to test under the five-year
12 possession-only license because you thought it was too
13 dangerous, but under this proposal, even though there
14 are dangers, you're willing to assume them and it is
15 testing is the difference? Is that a fair summary of
16 it? If not, please let me know what else is involved.

17 MR. KOPP: I believe that's correct, Your
18 Honor.

19 The specifics are that we are now willing
20 or hopefully able to submit more site-specific data
21 than we were able to before. There was some testing
22 under the old application, but under that old
23 application we were trying to rely on the data that we
24 had been gathering during the operational phase,
25 during the actual testing of the projectiles and so

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1 forth.

2 JUDGE ROSENTHAL: Am I correct in my
3 recollection that the reason that you withdrew the
4 revised decommissioning plan, I think that was in
5 2003, and substituted the POLA request was that the
6 Staff was calling upon you to do some testing which
7 you weren't prepared to do because of the perceived
8 dangers involved?

9 MR. KOPP: I believe that's correct, Your
10 Honor.

11 JUDGE ROSENTHAL: Now we've gone full
12 circle, haven't we?

13 You withdrew the plan in 2003 because it
14 was -- the site sampling was not deemed possible and
15 now you're going to conduct those tests that the Staff
16 had previously requested?

17 MR. KOPP: That's essentially correct.
18 The only difference between then and now is that based
19 on the Army Environmental Center's study, we feel that
20 it can be done more safely than we had originally
21 thought.

22 JUDGE ABRAMSON: This is Judge Abramson.
23 Let me jump into the fray here. And perhaps this
24 question is best directed at the Staff counsel. What
25 was the Army's original license with the NRC? What

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1 was the nature of that license?

2 MR. SMITH: It was a testing license, a
3 part 40 possession of source material license for
4 testing.

5 JUDGE ABRAMSON: The purpose -- it was a
6 material possession license to perform testing.

7 MR. SMITH: Correct.

8 JUDGE ABRAMSON: And the testing was of
9 these weapons, but the possession relates to the
10 depleted uranium that's the casing on the shells. Is
11 that right?

12 MR. SMITH: I guess -- I'm not sure this
13 is actual casing material, but yes, the depleted
14 uranium that was part of the ordnance that was used
15 in the testing.

16 JUDGE ABRAMSON: Yes, it's not the shell
17 casing, sorry, it's the projectile casing.

18 Now, what happened to that license? Does
19 it still exist?

20 MR. SMITH: Yes, it does still exist.

21 JUDGE ABRAMSON: So, they're still
22 operating under the original license?

23 MR. SMITH: Well, I'm not sure they're
24 operating now. I guess under 4042(c), specific
25 licenses continue in effect beyond the expiration

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1 date, and I believe their license has expired. But
2 the license continues until the Commission notifies
3 them that the license has been terminated.

4 JUDGE ABRAMSON: Why did the license
5 expire? Did it have a definitive term on it?

6 MR. SMITH: I believe it expired sometime
7 in the mid-90's, pre-1995.

8 JUDGE ABRAMSON: Actually expired, but it
9 has procedurally continued because the Commission
10 hasn't told them that it's expired?

11 MR. SMITH: Correct. And, during that
12 time period, their actions are limited to actions
13 related to decommissioning and to controlling entry
14 and access to the site. It's now a possession-only
15 license.

16 JUDGE ABRAMSON: It is de facto a
17 possession-only license because of the expiration of
18 their license to do testing and it continued, it
19 turned into a possession-only license because the
20 Commission hadn't told them they were done?

21 MR. SMITH: Correct. Because they haven't
22 done decommissioning.

23 JUDGE ABRAMSON: All right. So the whole
24 process since the termination of the testing has been
25 to get some sort of decommissioning plan in place and

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1 acted on.

2 MR. SMITH: Yes. One that the Staff finds
3 acceptable.

4 JUDGE ABRAMSON: All right. Now I have a
5 question for you on this front. And let me go back to
6 counsel for the Army. What precautions does the Army
7 currently take to limit access to this site. Is it
8 fenced and guarded and etcetera, or what's the nature
9 of the limitation on access?

10 MR. KOPP: It's within an installation
11 which is now fenced and guarded, yes.

12 JUDGE ABRAMSON: Now, back to the Staff.
13 When a power reactor ceases operation and makes an
14 election now to change its license to go into
15 decommissioning, the power reactor owner, licensee, is
16 entitled to elect various phases of decommissioning,
17 one of which is called Safe Store. Are you guys
18 familiar with that?

19 MR. SMITH: A little bit, yes, Your Honor.

20 JUDGE ABRAMSON: And Safe Store, as I
21 understand it, what the licensee does is he fences it
22 and he limits access to it and he guards it while he
23 waits for the radiation to decay to a point where he's
24 willing to actively undertake decommissioning.

25 MR. SMITH: Correct. And there's also

1 some environmental monitoring that takes place during
2 that time.

3 JUDGE ABRAMSON: And is it, does the staff
4 look at what's been going on at the JPG-zation of
5 testing as substantially the same? Have they
6 implemented precautions that are, what are implemented
7 for Safe Store?

8 MR. SMITH: I guess there's sort of a
9 different philosophy. There's not really active decay
10 of radioactive materials or anything taking place
11 here. It's more trying to achieve decommissioning
12 safely and where we're trying to figure out and
13 characterize the site and where we're trying to
14 resolve those issues.

15 JUDGE ABRAMSON: I'm sorry. I'm not
16 asking about what you're trying to do. I'm asking
17 about the precautions that are taken to limit access.
18 Are they similar?

19 MR. SMITH: Yes, oh, the precautions to
20 limit access, yes.

21 JUDGE ABRAMSON: So, if I were to look at
22 this -- if we as a Board were to look at this site,
23 and what's going on in this facility, we could
24 certainly take the view that they started out with a
25 license. The license continues. They're trying to

1 figure out how they're going to decommission. They've
2 got it fenced and guarded while they're trying to
3 figure that out. In that sense it's very similar to
4 what would happen at a power reactor, under its
5 original license?

6 MR. SMITH: Yes.

7 JUDGE ABRAMSON: And, in fact, the Army is
8 still operating under its original license.

9 MR. SMITH: Well, they have a possession-
10 only license. They're not operating. But, yes.

11 JUDGE ABRAMSON: They're, what --

12 MR. SMITH: They still maintain that
13 license.

14 JUDGE ABRAMSON: What's going on is under
15 the original license?

16 MR. SMITH: Correct.

17 JUDGE ABRAMSON: And, now given that
18 what's going on is under the original license, help me
19 understand why there needs to be a notice of a new
20 proceeding.

21 MR. SMITH: Well, the notice of the new
22 proceeding is really not so much geared towards this
23 proceeding as much as the notice of alternate schedule
24 request is to give notice to other members of the
25 public, because of the change in what the Army is

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1 proposing to do. They possession-only license
2 amendment request, the subject of this proceeding,
3 would have delayed decommission indefinitely. It's a
4 renewable possession-only license. It was just going
5 to sort of keep, maintain the status quo. Whereas the
6 alternate schedule request that's the subject of the
7 June Notice and Opportunity of Hearing, leads to
8 decommissioning. It increases environmental
9 monitoring. It has a field-sampling plan. It also
10 has a health and safety plan to address the dangers
11 associated with the unexploded ordnance. And, from
12 the Staff's perspective, our obligation is offered to
13 the public at large, and to inform them of the kind of
14 activities that we are reviewing and considering
15 allowing the Army to perform --

16 JUDGE ABRAMSON: That's very commendable,
17 Mr. Smith, but that doesn't address my concern, which
18 is why this Intervenor is being required for a third
19 time to file a hearing request. Every time apparently
20 there's a change in what the Army is proposing, this
21 Intervenor is being put to an additional obligation.

22 Now, it's fair enough to say, okay, you
23 want to provide an opportunity for other people if
24 hypothetically there are any in that area. So far,
25 nobody seems to have expressed an interest in this

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1 matter other than Save the Valley, but let's assume
2 that there are other people and I commend the Staff
3 for its concern about those people. What I do not
4 understand is the Staff's seeming total lack of
5 appreciation for the additional burdens that are being
6 placed upon this Intervenor every time there is a
7 change in the decision on the part of the Army as to
8 the way it wants to go.

9 Now, I have to assume, for example, that
10 the Army another year from now might decide that, for
11 one reason or another, the plan now on the table
12 doesn't in the vernacular, cut the mustard. And they
13 may come up with a different proposal. And the Staff,
14 I suppose, would say, well, gee, here's another
15 proposal. Maybe there's some hypothetical people out
16 in the Indiana wilderness that are interested in this
17 new proposal, so we have to put out a new notice and
18 guess what, Save the Valley has to now file yet
19 another application, or rather, hearing request.

20 Now, it seems to me that somewhere along
21 the line some consideration has to be given to the
22 impact that this continued change of plans has upon
23 this Intervenor. And so far, the Staff's attitude
24 seems to be, well, that's too bad, the Intervenor just
25 has to deal with these various changes.

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1 MR. KOPP: Well, and in fact, Judge
2 Abramson, in fact, it seems to me as if this is all
3 the same proceeding. We started out with a license.
4 The license changed its parameters from one of testing
5 to one of holding and figuring out how to
6 decommission. And I'm at a loss to see why these
7 intervenors, having once been admitted to the
8 proceeding on what's going to happen with this
9 license, need to do anything more. They're in and
10 they should stay in, it seems to me. Perhaps the
11 staff can help me understand why that shouldn't be the
12 case.

13 MR. SMITH: Well, I guess the case is this
14 is an amendment request, a voluntary amendment
15 request, filed by the Army as opposed to a proceeding
16 involving the license itself. And I think it's
17 important to remember here that Safe the Valley is in
18 the same position for practical purposes as if they
19 prevailed on the merits of these various proceedings.
20 They've gotten a new request, or a new amendment
21 request from the Army. They're moving towards
22 decommissioning. They're doing increase site
23 characterization. And those are all things that Save
24 the Valley had requested and had raised as areas of
25 concern. And those are actions that we've taken into

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1 consideration, that the Army has, you know, attempted
2 to address voluntarily. So I find, I don't see the
3 same prejudice to Save the Valley. I'm seeing them,
4 you know, having success, but not on the merits as
5 granted by the Board, but by, through voluntary
6 actions of the Army.

7 JUDGE ROSENTHAL: I would say, Mr. Smith,
8 that if I were Save the Valley, I wouldn't regard my
9 having obtained much success when, 11 years after this
10 operation ceased, there is still no determination as
11 to what is going to be the bottom line in terms of
12 site decommissioning. If you think this is a large
13 success, I certainly wouldn't view it that way if I
14 were in the position of Save the Valley.

15 And, again, it doesn't seem to me that
16 your response meets Judge Abramson's question, which
17 is, isn't this all one ball of wax?

18 MR. SMITH: And the answer is no, because
19 this proceeding was based on a specific license
20 amendment request filed by the Army and that license
21 amendment request no longer exists. It's been
22 withdrawn voluntarily by the Army. That's their
23 prerogative. And they filed a new different request,
24 and that's the subject of a separate notice and
25 opportunity of hearing.

1 JUDGE ROSENTHAL: And that's form placed
2 totally over substance, it seems to me.

3 MR. SMITH: I would actually regard it
4 quite differently. I mean, the substance of the
5 current proposal is to move toward decommissioning,
6 whereas the possession-only license would delay
7 decommissioning indefinitely. I mean, the activities
8 that are contemplated for the next five years, there
9 are activities contemplated for the next five years,
10 whereas under the possession-only license, there
11 wouldn't have been.

12 JUDGE ROSENTHAL: Now let's say that a
13 year from now, the Army, viewing this proposal,
14 decides it doesn't fly or the staff reaches that
15 conclusion on its technical review. I take it that
16 the staff has not completed its technical review of
17 this proposal. Its just accepted it administratively.
18 Is that correct?

19 MR. SMITH: The alternate schedule
20 request, that's correct.

21 JUDGE ROSENTHAL: So, let's assume either
22 that the Army chooses to withdraw it because it has
23 some problems, or the staff, on its technical review,
24 says to the Army, no, this doesn't fly, come up with
25 something else. And the Army then does that. I take

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1 it then, under your analysis, that Save the Valley
2 would be required to file yet another hearing request.

3 MR. SMITH: Well, again, I think it would
4 depend on how different the two requests were. I
5 mean, the, something that is a supplementation or the
6 logical outgrowth of a particular proposal might not
7 require renoticing, but --

8 JUDGE ROSENTHAL: But it's up to the, I
9 take it though that who decides whether it's
10 sufficiently different is going to be the Staff. And
11 I suppose that the significance of differences might
12 be in the eye of the beholder, so that as long as the
13 Staff thinks that this is a sufficient difference and
14 therefore the Staff issues another notice of
15 opportunity to hearing under your analysis, Save The
16 Valley then has the obligation to file yet another
17 hearing request.

18 It seems to me that -- I've been in and
19 out of this Commission and its predecessor for well
20 over 30 years. I've never encountered anything like
21 this before and it seems to me, if I may say so, Mr.
22 Smith, that there is a decided -- and one might even
23 characterize it as careless, indifference to the
24 burdens that are being placed upon this Intervenor and
25 this Intervenor has counsel. I'm sure that Mr.

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1 Mullett charges for his service and this is a
2 continuing financial obligation being imposed, all of
3 this because the Army for one reason or another -- and
4 I'm not criticizing it, has changed the Staff on which
5 it's --

6 JUDGE ABRAMSON: Let me ask another
7 question, perhaps a little more focused. When I've
8 been involved in hearings where there was an
9 application and had originally been noted, generally
10 the approach has been that the Staff issues a bunch of
11 requests for information and those lead to the
12 submittal of additional information they sometimes
13 lead to amendments to the application.

14 Why is this change which I assume was in
15 response to conference with the Staff and requests for
16 additional information from the Staff. why is this
17 change so great that it warrants an entirely new
18 proceeding rather than viewed as amendments that arise
19 in response?

20 MR. SMITH: Right, so in certain let's say
21 reactor licensing proceedings and there's RAIs and the
22 Applicant or the licensee will submit responses and
23 what we always say in those instances is that the
24 response dated such and such was a supplement, did not
25 change the nature or scope of the requested action.

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1 And what we have here is something that
2 really changes the nature and scope of the action,
3 again, where there were going to be no activities for
4 an indefinite period of time versus now we're actively
5 moving towards decommissioning. There's a field
6 sampling plan. There's additional monitoring.
7 There's a host of different activities that are taking
8 place. It's completely different in both nature and
9 in scope. And that's something that the Staff cannot
10 treat as being the same as what was previously put
11 forward.

12 JUDGE ABRAMSON: Mr. Smith, does this then
13 look more like what was originally intended in the
14 licensing proceeding, it was terminated in whatever it
15 was, '03.

16 MR. SMITH: No, it doesn't, because now
17 they're proposing to do all this additional field
18 sampling and they have the health and safety plan to
19 go in and it's rusty, unexploded ordnance, whereas I
20 believe the previous decommissioning plan was a
21 decommissioning plan, whereas this is an alternate
22 schedule request. We're going to collect more
23 information. Then we're going to have better site
24 characterization and be able to decommission properly.

25 JUDGE ABRAMSON: And in the meantime, this

1 site is fenced and guarded as if it were in the same
2 fashion in which a power reactor would be fenced and
3 guarded during safe storage period?

4 MR. SMITH: More or less. I mean some of
5 the security requirements aren't exactly the same, but
6 --

7 JUDGE ABRAMSON: I might assume the
8 security requirements are greater because it's a
9 military reservation. Is that accurate?

10 MR. SMITH: I would not be the best person
11 to speak to that. Perhaps Mr. Kopp could speak to
12 that.

13 JUDGE ABRAMSON: Well, perhaps you and the
14 Applicant can discuss this and file something with us
15 to let us know whether --

16 MR. SMITH: As I understand it, it's
17 inside the base. It's fenced and protected and I mean
18 that's an obligation of them holding the license.

19 JUDGE ABRAMSON: But my question is that
20 greater than or at least equal to what would be
21 required under Safe Store for a power reactor and I
22 think maybe you and the Applicant should discuss that
23 and just file something with us in a week or so.

24 MR. SMITH: Okay. I think it's like
25 comparing apples to oranges, but we'd be happy to

1 provide some comparison, I guess.

2 JUDGE ABRAMSON: What we want to know is
3 the level of security, that's not apples and oranges.

4 MR. SMITH: Okay.

5 JUDGE ROSENTHAL: Mr. Mullett, you've been
6 standing patiently by. What do you have to say with
7 regard to what we've heard from Mr. Kopp and Mr.
8 Smith?

9 MR. MULLETT: Thank you very much, Your
10 Honor.

11 We'd make several points, I think.
12 First, we think that what's happening here is
13 characteristic or symptomatic of what's happening with
14 the larger proceeding with regard to sort of turning
15 the NRC's rules and purposes on their head. And in
16 particular, and I think some of the questions that
17 you've asked yourself, Your Honor, the extent to which
18 this theoretical opportunity for a request for a
19 hearing for an abstract group or individual out there
20 in the Indiana public has been converted into an
21 obligation and in particular a recurring obligation on
22 Save The Valley party. And so I think that's a very
23 critical difference, critical distinction here that we
24 think again is symptomatic of what's happened with the
25 larger proceeding.

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1 JUDGE ROSENTHAL: What do you say to
2 Mr. Smith's assertion that you've guys have, in fact,
3 won part of the battle because under the prior
4 proposal there was nothing at all going to be done,
5 whereas under the current proposal there's all kinds
6 of sampling and other endeavors looking to the
7 decommissioning of the facility. So Mr. Smith would
8 have it that not only is this a substantially
9 different proposal, but one that inures significantly
10 to the benefit of your client.

11 MR. MULLETT: Well, Your Honor, there are
12 two aspects to that. First, we wouldn't argue
13 tremendously with the logical outgrowth analogy that
14 the Staff suggested. I guess the only conclusion that
15 we can draw here is that what the Staff would say is
16 that it's an illogical outgrowth when an application
17 gets modified and changed in a way suggested by Save
18 The Valley and apparently recommended by the Staff.

19 What both the Staff and the Army are
20 ignoring here is that the immediately preceding
21 request from September 2003 on which you granted a
22 hearing in January of 2004 was also a 40.42 G2 request
23 as far as an alternate schedule is concerned. You
24 know, we went through this sequence where we had a DP
25 and then because they changed it to an LTP, we had to

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1 request another hearing.

2 When we got a hearing on the LTP and it
3 became clear that the kinds of concerns that Save The
4 Valley was raising were the kinds of concerns that the
5 Staff felt and, of course the technical review were
6 going to have to be addressed, particularly as far as
7 site characterization was concerned, then you know,
8 the Army decided well, we really don't want to
9 decommission at this point. Then we want to get
10 ourselves an alternate schedule so we don't have to
11 decommission with the alleged reason being these
12 safety concerns.

13 So we basically come in and say hey, as a
14 matter of law, you guys have got a problem here. You
15 just can't have any indefinite alternate schedule and
16 you're still going to have an obligation with respect
17 to site characterization because you're going to have
18 to demonstrate that postponing decommissioning
19 indefinitely isn't a risk to the public health and
20 safety.

21 Now this whole thing with regard to site
22 characterization and the deficiencies of site
23 characterization, those have been going on from the
24 beginning. And certainly, we are, I guess, you know,
25 gratified is not the right word in terms of sighing

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1 and saying finally, finally, the Army has at least in
2 theory agreed that additional site characterization is
3 both necessary and feasible which from our standpoint
4 has been manifest and true from day one. But when we
5 look at the plan as we said in our comments that we
6 filed, we don't really see what the Army filed yet as
7 a real plan. It's sort of at best an outline of a
8 plan or a plan of a plan or a hope of a plan or
9 something like that.

10 As you pointed out earlier, none of this
11 activity is yet on-going. None of this activity is
12 yet occurring as far as site characterization is
13 concerned and it's all subject to funding. So you
14 basically have got a situation where the Army is
15 saying well, if we can get agreement on this, then we
16 can go back and maybe we can get funding for it and if
17 we can get funding for it, then maybe we'll go ahead
18 and do it and when we get to that point we'll give you
19 some detail as to what we're actually going to do and
20 when we're going to do it and how we're going to
21 integrate our health and safety plan with our field
22 sampling plan.

23 And if all that works out the way we would
24 hope, then you know, five years after we start, our
25 plan would be to file a restricted LTP request. But

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1 if something happens in the interim and we can't get
2 funding or something else changes, then you know,
3 obviously we might have to change course again.

4 So we would agree with you, you know. We
5 just really haven't made any substantial progress. We
6 do appear to have at least the recognition in theory
7 at this point on the Army's part that additional site
8 characterization is going to be necessary for them to
9 be able to do anything further here, but we really
10 don't see a definitive, acceptable plan for that yet.

11 As far as the situation that we've got, it
12 seems to us that one of the things that changes the
13 plan is that the Army puts a target out there. If
14 Save The Valley hits it with a hearing request, then
15 it gets moved. So we have to hit it again. And in
16 this particular instance, as we would see it, this
17 situation has been compounded because of the presiding
18 officer's entry bringing this matter to the attention
19 of the Commission.

20 JUDGE ROSENTHAL: In that connection
21 before you go any further, I would like the views of
22 the parties starting with Mr. Kopp on whether it would
23 be prudent to hold this matter in abeyance to see what
24 the Commission does with respect to the responses that
25 it has now received.

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1 MR. KOPP: Your Honor, I --

2 MR. MULLETT: He's got to wait for us.

3 MR. KOPP: Your Honor, this is Mr. Kopp.

4 I guess my response to that would be the issue about
5 whether to hold this in abeyance would be to what
6 purpose. The Commission now has whatever issues it
7 has in front of it as does this proceeding have
8 whatever issues it has in front of us, but the
9 underlying application which is before the Commission
10 or which was before the Commission and before you and
11 these proceedings is now withdrawn and so --

12 JUDGE ROSENTHAL: Well, let me suggest
13 that the possible reason for doing that would be that
14 the Commission was responding to a memorandum that I
15 issued at the end of March in which I expressed
16 considerable concern which regard to the way in which
17 Save The Valley was being treated in this matter.

18 Now the Commission was responding to that
19 concern. I don't know what the Commission is going to
20 have to say once it has digested the responses it has
21 received. But at least it still has before us, before
22 it my concern and this concern, I must say, is I think
23 I've probably already made clear this morning, has not
24 at all been abated by this most recent development.

25 But your view, I take it is, that there's

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1 no reason to wait for the Commission?

2 MR. KOPP: There's no reason, I think, to
3 wait for the Commission insofar as the dismiss is
4 concerned. The Commission is going to do what it's
5 going to do, but I don't think that these proceedings
6 need to be held in abeyance because there is no
7 application. The Commission can't order us to proceed
8 expeditious with a consideration of the application
9 that's been withdrawn --

10 JUDGE ROSENTHAL: But the Commission could
11 decide that notwithstanding this development, that the
12 existing proceeding is enough, is sufficient to
13 envelope the new proposal. And that's, at least a
14 possibility, is it not?

15 MR. KOPP: I don't know how we get to
16 there from here because as I understand it that
17 particular issue is not before the Commission.

18 JUDGE ROSENTHAL: The Commission has
19 before it whatever it wishes to decide. It has this
20 entire matter of this proceeding, its posture, the
21 course that this proceeding has taken are all things
22 that the Commission has before it and the Commission,
23 I don't see any reason myself why the Commission is so
24 disposed, would not say that the existing proceeding
25 encompasses the new proposal.

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1 JUDGE ROSENTHAL: I agree.

2 MR. MULLETT: Let me pick this -- Judge
3 Abramson, let me pick this up again for a second. I
4 want to make absolutely sure I understand the
5 circumstances. I'm relatively new to this.

6 When the Army ceased testing of weapons
7 and its licensed automatically, as I gather, at that
8 point, changed form to a possession license with a
9 requirement that they proceed with decommissioning,
10 when was or what was the nature of the first action by
11 the Army to deal with the Staff's requirement for
12 decommissioning? Was there a decommissioning plan of
13 any sort submitted before the 1983 action, I mean 2003
14 action?

15 JUDGE ROSENTHAL: No, no, no. It was a
16 decommissioning plan in the end of 1999.

17 MR. KOPP: Right.

18 MR. MULLETT: So there was a
19 decommissioning plan in 1999 and did Save The Valley
20 intervene at that point?

21 MR. KOPP: Yes. And that -- what happened
22 to that action? Was that dismissed? Terminated?
23 What happened to that action?

24 MR. MULLETT: My understanding, this is
25 Mike Mullett, we basically went from DP to LTP and in

1 terms of having a situation that arose that was
2 somewhat analogous to this, we had a conference call
3 and so on and the hearing, the second hearing that we
4 got on the LTP, that proceeding was dismissed, but at
5 the point in time that the Army did then file a
6 decommissioning plan of some type, then we essentially
7 had the opportunity to revise that hearing on request,
8 on the basis that we had twice filed hearing requests,
9 twice established that we had standing, that we had
10 legitimate areas of concern with respect to
11 decommissioning, so presumably at some future point
12 there would be a decommissioning effort, so we would
13 have the opportunity to do that.

14 And the justification for doing that at
15 that time was that there wasn't presently a
16 decommissioning plan, that what we had now was an
17 alternate schedule. So then we filed the hearing
18 request on the alternate schedule and to the area, the
19 concern that we raised in that hearing request
20 referred that you can't do it indefinitely as a matter
21 of law and that even if you're asking for an alternate
22 schedule with an indefinite postponement, you're going
23 to have to demonstrate through site characterization
24 at that particular plan, that particular proposal is
25 consistent with public health and safety.

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1 So that's how we got where we are here.
2 Save The Valley for a hearing and a proceeding on the
3 original decommissioning plan. When it became clear
4 from the technical review that the Staff shared some
5 of Save The Valley's concerns and had some of its own,
6 the Army said oops, we're going to change the plan.
7 They came up with a license termination plan. We came
8 back and had concerns again, primarily associated with
9 the adequacy of site characterization, the
10 availability of site specific data, problems of that
11 nature. We got into technical review.

12 It became clear that was the case and
13 there was going to have to be site characterization to
14 go forward with the LTP, so the Army changed again and
15 basically said well, what we really want is an
16 alternate schedule. We want an alternate schedule
17 with an indefinite postponement and then we came back
18 in and said what we said and we got the hearing then
19 and frankly --

20 JUDGE ROSENTHAL: Let me interrupt for a
21 moment, Mr. Mullett. Am I correct in my recollection
22 that when it moved from the first decommissioning plan
23 to the second decommissioning plan the so-called LTP,
24 that I did not require you to file a new hearing
25 request and indeed, if I recall correctly, the Staff

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1 did not file a new notice of opportunity for hearing
2 on the revised decommissioning plan.

3 Am I right about that?

4 MR. MULLETT: I'd have to go back and see
5 for sure. My recollection was that we didn't have to
6 make a showing with respect to standing, but we did
7 end up submitting new areas of concern.

8 JUDGE ROSENTHAL: It was not a -- let me
9 get to Mr. Smith who I assume is familiar with the
10 background of this.

11 First, there's the decommissioning plan
12 filed in 1999 and Save The Valley files a hearing
13 request which I granted. Then at some subsequent
14 point the Army decides to substitute an entirely new
15 plan which it denominated the final decommissioning
16 license termination plan.

17 Now at that point, here's a new plan to
18 which indeed differs considerably apparently from the
19 prior one because the Staff found it technically
20 deficient. Did the staff at that juncture say okay,
21 not only is the previous plan no longer before us, but
22 now that there's this new plan in order to make
23 certain that everybody has the opportunity to
24 challenge it, we're going to issue a new Federal
25 Register notice of opportunity for hearing.

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1 Did it do that?

2 MR. SMITH: We're going to look into that
3 right this second.

4 JUDGE ROSENTHAL: I think the answer
5 you're going to find is no.

6 And if the answer is no, why in this
7 circumstance is there a requirement that --

8 MR. SMITH: I think there's a difference
9 between this and we're looking in steps. We had the
10 decommissioning plan. They withdrew that. Then they
11 filed the long term, indefinitely renewable
12 possession-only license --

13 JUDGE ROSENTHAL: No, no --

14 MR. SMITH: And then there's the current
15 one.

16 JUDGE ROSENTHAL: No, no, go back.

17 MR. SMITH: I know. You're going back to
18 --

19 JUDGE ROSENTHAL: I'm talking not about
20 the withdrawal of the LTP and the substitution of the
21 possession-only license. What I'm talking about is
22 previous to that time.

23 And specifically, in June 2001 --

24 MR. SMITH: Right. The difference between
25 that and the 1999 one was presumably more iterative

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1 and clarification in nature, rather than being a scope
2 of activities that are fundamentally different.

3 JUDGE ROSENTHAL: That's scarcely is going
4 to fly, Mr. Smith, because the first plan, the one
5 that was filed in 1999 was accepted by the Staff for
6 technical review.

7 The LTP was rejected by the Staff for
8 technical review until a number of changes were made
9 in it.

10 Now I don't understand how you can tell me
11 that this was simply a "no, nevermind" between a plan
12 that the Staff found acceptable for technical review
13 and a subsequent plan which the Staff found not
14 acceptable.

15 MR. SMITH: Well, if you're asking for
16 additional information, if certain information is
17 lacking, the activities that may be proposed may be
18 the same, but the information, the basis for taking
19 those activities may be lacking.

20 I hate to speculate on those sort of
21 differences because what we're really looking at here
22 is the difference between the possession-only license
23 amendment that was filed in '02 and withdrawn earlier
24 this summer, and the alternate schedule request from
25 May of this year and the differences between those two

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1 are fundamentally different activities that lead to
2 totally different, short term and long term outcomes
3 for the proving ground and the treatment of the
4 uranium there.

5 JUDGE ROSENTHAL: We understand the
6 procedural differences, Mr. Smith. You don't need to
7 educate us on that.

8 Let me just ask the real essential
9 question here. What's been going on since the '90s is
10 an effort to figure out how to decommission this site.
11 Save The Valley got permission to intervene. There
12 have been a lot of perturbations and iterations and
13 changes in what is being proposed and considered by
14 the Applicant and the Staff to get to decommissioning,
15 but in the end isn't it all the same process, try to
16 figure out how you're going to decommission and
17 decommission, and if that's the case, while Save The
18 Valley might feel the need to and wish to file
19 additional proposed contentions with regard to new
20 filings by the Army, why on earth should they be
21 required to start up -- to be viewed as starting a new
22 proceeding?

23 MR. SMITH: Because these are specific
24 amendment requests filed by the Army and the
25 jurisdiction for particular proceeding is limited to

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1 that given to the Board by the Commission related to
2 a specific amendment request.

3 JUDGE ROSENTHAL: So if there's a change
4 a year from now with the Staff were to regard as
5 significant, whether anybody else would regard it as
6 significant or not, as long as the Staff would regard
7 it as a significant change, then we start all over
8 again. That's the Staff's position. And then in two
9 or three years from now, there's yet another change in
10 the proposal. Staff says that's significant. We
11 start all over again.

12 MR. SMITH: And as you pointed out
13 earlier, the Commission certainly could step in and
14 may have something to add to this, unrelated to this
15 proceeding as well.

16 JUDGE ROSENTHAL: Okay, now let me just --
17 I think we've probably gotten the positions of all of
18 the parties, but let me ask you, Mr. Smith, do you
19 agree with the Army that there's no reason to hold
20 this in abeyance until we hear from the Commission on
21 a matter that the Commission sought filings from the
22 parties?

23 MR. SMITH: I do, Judge. The Commission
24 seemed to indicate in its order from a couple of days
25 ago that they expected prompt action on this and I

1 anticipate that they will, if they want to do
2 something, they will do it after --

3 JUDGE ROSENTHAL: All that they said, I
4 think in that order was that they expected a ruling.
5 The ruling can just as easily be we're going to wait
6 for Commission action. It could either be the grant
7 or the denial of the motion. They said a ruling. And
8 isn't a possible ruling deferral?

9 MR. SMITH: Certainly.

10 JUDGE ROSENTHAL: Do you have anything
11 further?

12 JUDGE ABRAMSON: No.

13 JUDGE ROSENTHAL: Do any of the counsel
14 have anything they wanted to add?

15 MR. MULLETT: Your Honor, this is Mike
16 Mullett. The only other thing that I would add and
17 this certainly is a consideration for you, one that we
18 just raised, as far as the referral to the Commission,
19 the referral to the Commission arose out of this
20 proceeding and from a jurisdictional standpoint and
21 again, you're the judgment here, not me, but certainly
22 in other proceedings you have a referral of a matter
23 to the Commission in terms of dismissing that
24 proceeding while the Commission is considering the
25 referral. That, to me, almost seems like then that

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1 the Army and the Staff are asking the presiding
2 officer to, in effect, step on the toes of the
3 Commission after the presiding officer invited the
4 Commission to get involved.

5 But again, I hesitate to say that I think
6 everybody there in Washington is in a better position
7 to judge than we are out here in Indiana, but
8 certainly just from us hicks out here in the sticks,
9 you know, that's the kind of the way it would look to
10 us.

11 JUDGE ROSENTHAL: Thank you, Mr. Mullett.
12 Anything further?

13 MR. KOPP: Is that just a I'm just a poor
14 country lawyer story?

15 MR. SMITH: This is Tyson Smith of the
16 Staff. I have a question. Is there anything -- or
17 what do we owe the Board coming away from this
18 conversation?

19 JUDGE ABRAMSON: Yes. You owe us -- you
20 are to consult with the Applicant and provide us a
21 brief, two pages, discussion of the similarity of the
22 safeguards and security measures at the JPG as
23 compared to those that would be required of a licensee
24 of a power reactor in Safe Store mode.

25 All we want to know is are they

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1 essentially comparable or are those at JPG greater?
2 We're trying to get a handle on access.

3 MR. SMITH: And without discussing any
4 safeguards information?

5 JUDGE ABRAMSON: That's correct.

6 MR. SMITH: So it's necessarily going to
7 be a fairly high level generic comparison?

8 JUDGE ABRAMSON: That's correct.

9 JUDGE ROSENTHAL: And let's request that
10 by close of business next Tuesday.

11 JUDGE ABRAMSON: Yes, this should not be
12 a difficult job.

13 MR. MULLETT: Your Honor, may I comment
14 just briefly on that general question?

15 JUDGE ROSENTHAL: Yes.

16 MR. MULLETT: We would differ with the
17 characterization that's been offered in a couple of
18 respects.

19 First, the key aspect, the activity that
20 was going to be ongoing with respect to 40.42G, they
21 had an environmental radiation monitoring plan
22 proposed that was definitely going to involve some
23 drilling, some fixing of wells, some continued
24 collection of data, so you were not going to have a no
25 activity situation.

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1 Secondly, in terms of security situation,
2 I sure hope that security situation at Jefferson
3 Proving Ground, the access situation at Jefferson
4 Proving Ground is different than it would be at a
5 nuclear reactor in safestore.

6 I would hope that the Staff would come
7 back and say it is apples and oranges. I would really
8 hope that because that would raise some larger
9 concerns because certainly the whole issue of
10 trespassers, for example, hunters and others, that
11 certainly has been an issue with regard to the whole
12 question here of exposure scenarios and what not.
13 It's not to say the Army is not doing their job within
14 the context here, that's not what I'm saying. But I
15 would sure hope that we would not be in a situation
16 where we're analogizing the security situation here to
17 one of Safe Store nuclear reactor.

18 JUDGE ROSENTHAL: Mr. Kopp, what I want to
19 know is is the access to the JPG more difficult than
20 access to a reactor in safe store?

21 MR. KOPP: I will check on that and we'll
22 get you the answer to the request.

23 Your Honor, I do have one comment on the
24 issue of the necessity of refileing a notice and so
25 forth.

1 It seems to me from what Mr. Smith has
2 said and from the history that's demonstrated here,
3 that the need for refileing, the need for republication
4 has actually been triggered by the end result rather
5 than the processes to reach that result.

6 When the Army shifted from the
7 decommissioning license to a possession-only
8 indefinite license, there was a republication. Now
9 we're going back to a decommissioning plan and there's
10 a republication and I think that that's probably what
11 is the basis of the Staff's distinction, not the test,
12 because certainly, if we were in a situation where we
13 had planned decommissioning from the first, the
14 addition of several new tests wouldn't constitute a
15 whole new plan, but on the other hand, the end result
16 certainly is different here than it was when we
17 intended to lead the property in status quo.

18 MR. MULLETT: Could I reply to that
19 briefly?

20 JUDGE ROSENTHAL: Yes, go ahead.

21 MR. MULLETT: In our view, frankly, what
22 the Army has filed here is nothing other than what it
23 would have refiled in response to the on-going
24 technical review in this proceeding. It was certainly
25 what we were anticipating, what we were expecting and

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1 we don't see how there's anything other than a logical
2 outgrowth of the technical review in the current
3 proceeding, Your Honor.

4 JUDGE ROSENTHAL: Thank you. Okay, I
5 think we've heard from you all --

6 MR. KOPP: If I could just add one other
7 thing you had not mentioned. You're probably aware of
8 this, but the Commission on Monday entered an order
9 with respect to our request for a continuance as far
10 as the filing of an new order.

11 JUDGE ROSENTHAL: I am aware of that
12 order.

13 MR. KOPP: Okay.

14 JUDGE ROSENTHAL: Thank you, gentlemen.
15 And at this point the conference is terminated.

16 (Whereupon, at 11:01 a.m., the conference
17 was terminated.)

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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: U.S. Army Jefferson

Proving Ground Site

Pre-Hearing Conference

Docket Number: 40-8838-MLA-2

Location: teleconference

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



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