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NUCLEAR REGULATORY COMMISSION

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Docket Number: 70-3098; ASLBP No.: 07-856-02-MLA-BD01

Location: Rockville, Maryland

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Secy 02

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY AND LICENSING BOARD

4
5 IN THE MATTER OF: ||
6 SHAW AREVA MOX SERVICES || Docket No. 70-3098
7 LICENSE APPLICATION FOR || ASLBP No.
8 POSSESSION AND USE OF || 07-856-02-MLA-BD01
9 BYPRODUCT, SOURCE AND ||
10 SPECIAL NUCLEAR MATERIALS ||
11 FOR THE MIXED OXIDE FUEL ||
12 FABRICATION FACILITY ||
13

14 Room T3B45
15 11545 Rockville Pike
16 Rockville, Maryland

17
18 Tuesday, January 8, 2008

19 1:30 p.m.

20 BEFORE:

21 MICHAEL C. FARRAR, Administrative Judge

22 NICHOLAS G. TRIKOUROS, Administrative Judge

23 LAWRENCE G. MCDADE, Administrative Judge
24
25

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P R O C E E D I N G S

1:34 P.M.

1
2
3 ADMIN. JUDGE FARRAR: Good afternoon.
4 We're here in the Shaw AREVA MOX Services case
5 pursuant to the Board's decision of October 31st and
6 our orders of November 21st and December 4th to hear
7 our second oral argument.

8 My name is Mike Farrar. I'm the chairman
9 of this Board. With me are my brother Judges, Larry
10 McDade on my right, and Nick Trikouros on my left. We
11 also have here our law clerks Marcia Carpentier and
12 Zach Kahn.

13 Ms. Olson, are you there?

14 MS. OLSON: Yes, I am.

15 ADMIN. JUDGE FARRAR: Okay, thank you.
16 For the other people, people for the Petitioners?

17 MS. CARROLL: Glenn Carroll with Nuclear
18 Watch South.

19 ADMIN. JUDGE FARRAR: All right.

20 MR. ZELLER: I'm Lou Zeller with Blue
21 Ridge Environmental Defense League.

22 ADMIN. JUDGE FARRAR: Okay, and that's Dr.
23 Lyman with you?

24 DR. LYMAN: Edwin Lyman, Union of
25 Concerned Scientists.

1 ADMIN. JUDGE FARRAR: Okay, glad to have
2 you all here with us.

3 For the Applicant?

4 MR. SILVERMAN: Don Silverman for the Shaw
5 AREVA MOX Services from Morgan, Lewis & Bockius.

6 MR. ZABIELSKI: Vince Zabielski, also from
7 Morgan, Lewis.

8 ADMIN. JUDGE FARRAR: All right, thank
9 you.

10 And for the staff?

11 MR. MARTIN: Jody Martin from the NRC
12 Staff, Office of General Counsel.

13 MS. JONES: Andrea Jones from the NRC
14 Staff, Office of the General Counsel.

15 ADMIN. JUDGE FARRAR: Okay.

16 MR. TIKTINSKY: And Dave Tiktinsky from
17 the Office of Nuclear Material Safety and Safeguards..

18 ADMIN. JUDGE FARRAR: Okay, and there was
19 a Ms. Simon who filed a notice of appearance.

20 MS. JONES: Yes, Ms. Simon will be
21 participating today.

22 ADMIN. JUDGE FARRAR: Fine, thank you.

23 One of our orders had set a schedule where
24 we were going to hear ten minutes of argument on each
25 side on the admissability of the new contention,

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1 contention six. And then we were going to go into 30
2 minutes aside on the recommendation of our decision of
3 October 31st. And we've set out a number of questions
4 that you -- we wanted you to be able to address in
5 that. And that last question to the extent that it's
6 comprehensible deals with -- I knew what I meant when
7 I said it, but I'm not sure I said it as well as we
8 could have, that deals -- the best way to look at that
9 as case management going forward, how do we set the
10 ground rules for the case moving forward. So it may,
11 in essence, become a three-part argument.

12 Ms. Olson, you're hearing us all right?

13 MS. OLSON: I'm hearing you fine.

14 ADMIN. JUDGE FARRAR: Okay. Ms. Carroll,
15 Mr. Zeller, who is arguing contention six?

16 MR. ZELLER: Yes.

17 ADMIN. JUDGE FARRAR: Okay, can you come
18 to the podium.

19 ORAL ARGUMENT OF LOUIS A. ZELLER

20 BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE

21 MR. ZELLER: Thank you, Mr. Chairman,
22 Judge Trikouros and Judge McDade. My name is Lou
23 Zeller and I'm with the Blue Ridge Environmental
24 Defense League here today argue the admissability of
25 contention six, our late-filed contention which was

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1 filed on October 5th regarding the need to supplement
2 the environmental impact statement for the proposed
3 plutonium fuel factory.

4 I believe the question before the Board
5 today is what genuine and material dispute exists to
6 support the admission of contention six. We believe
7 that contention six should be admitted. We agree at
8 the outset with the Board that it is appropriate, in
9 its words to admit contentions three and four and also
10 we believe it is appropriate for the Board to hold the
11 proceedings in abeyance pending the completion of the
12 safety evaluation review by the Nuclear Regulatory
13 Commission staff.

14 As you know, federal rules for late-filed
15 contentions direct the presiding officer to evaluate
16 them using factors specified in 10 CFR 2714. The ASLB
17 --

18 ADMIN. JUDGE FARRAR: Why do you concede
19 that it's late filed when in fact your claim as you
20 filed it within 30 days of a particular event
21 happening --

22 MR. ZELLER: I guess it was termed a late-
23 filed contention because it was not filed with the
24 original contentions.

25 ADMIN. JUDGE FARRAR: Okay. But you're

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1 not conceding that you were late in the ordinary sense
2 of the word?

3 MR. ZELLER: Yes, sir. The Board has
4 proposed four alternatives: one, to reject the
5 contentions; deferral to a later time; reject the
6 contentions, but to continue the proceeding; and also
7 to reject the contentions, but add a licensing
8 condition. We specifically address these four
9 alternatives in our November 19th brief.

10 Let me just touch on some of the high
11 points in regards to the admissability and the need
12 for a supplemental environmental impact statement.
13 The SER is a key document in the licensing process, of
14 course. Federal regulations and the Commission case
15 decisions direct that the NRC staff complete
16 environmental reviews before construction begins. Our
17 examples which we can provide from Commission rulings
18 in 2003 on the plutonium fuel construction
19 authorization from CLI-0303, 57 NRC 245 which state
20 that for any reaction requiring an environmental
21 impact statement, construction activities are
22 discouraged until the staff has completed an
23 environmental review. Construction activities prior
24 to completion are discouraged. Construction
25 activities are discouraged until the staff has

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1 completed an environmental review and so forth.

2 ADMIN. JUDGE FARRAR: But the Applicant
3 says here nothing has happened. All of what you say
4 might be true, but nothing has happened. There's a
5 lot of suggestions and things might happen.

6 MR. ZELLER: Right.

7 ADMIN. JUDGE FARRAR: But they're saying
8 nothing has happened.

9 MR. ZELLER: Well, if it is nothing has
10 happened yet --

11 ADMIN. JUDGE FARRAR: I'll have some
12 questions for them about that because on the one hand
13 your opponents seem to be saying you're premature, but
14 on the other hand, they seem to be saying you're
15 untimely, so we'll get to that in a minute, but on the
16 merits, they're saying nothing has happened. They
17 don't add the parenthetical they should have added
18 which is so come back later, but let's assume they had
19 added that. Why shouldn't you have come back later?

20 MR. ZELLER: Right. Well, the
21 uncertainty, I believe of the proposed action is
22 insufficient to dismiss contention six, regardless of
23 any technical uncertainty surrounding this proposed
24 action, the DOE found it necessary, nevertheless, to
25 devote considerable resources to issuing the September

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1 5th amended record of decision.

2 ADMIN. JUDGE FARRAR: Is that the key? Is
3 that they key point? One, that's the thing that gets
4 you timely, assuming 30 days is the normal time limit
5 in the absence of anything else. That gets you
6 timely, and are you saying that's a significant --
7 that up to then it might have been speculative, but
8 when DOE does a new record of decision, that means
9 something tangible is brewing and that therefore that
10 by itself reopens environmental issues? What exactly
11 are you saying?

12 MR. ZELLER: I don't want to speculate on
13 any other particular issues, but we know that on
14 September 5th, the amended record of decision was
15 submitted and that the Board itself has stated that
16 the existence of technical uncertainty with regard to
17 your proffered contentions three and four, does not
18 undercut the basis of support for such contentions
19 which otherwise have demonstrated to have merit.

20 ADMIN. JUDGE McDADE: Mr. Zeller, at this
21 point in time, there's an application before the
22 Nuclear Regulatory Commission. If that application is
23 granted in its current form, it will allow the
24 Applicant as a contractor for the Department of Energy
25 to undertake certain actions with regard to certain

1 quantities of and certain kinds of plutonium. As I
2 understand your contention six, based on actions
3 recently taken by the Department of Energy that you
4 believe that there is a significant possibility, if
5 not probability, that at some point in the future, the
6 Department of Energy will seek to send additional
7 quantities and additional kinds of plutonium to this
8 facility for processing and that the environmental
9 impact of that has not been addressed adequately,
10 hasn't been addressed at all at this point in time.

11 Starting with that premise, assume the
12 Department of Energy wished to do exactly what you
13 believe they intend to do, they would not be able to
14 do it, under the current license as proposed, would
15 they? Would they not have to come back, would not
16 they have to go to their contractor, their contractor
17 submit a license amendment and the Nuclear Regulatory
18 Commission review that amendment and at that point in
19 time make a determination as to whether or not a
20 supplemental environmental impact statement would be
21 necessary and wouldn't at that point in time in the
22 event that happens your contention be ripe. But at
23 this point in time it's too speculative. It's
24 something that may or may not happen, but it's not
25 something that could happen under the terms of the

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1 license as proposed by Shaw, as submitted by Shaw, and
2 as currently reviewed by the NRC.

3 MR. ZELLER: There's nothing speculative
4 about this action.

5 ADMIN. JUDGE McDADE: Am I incorrect that
6 if the Department of Energy wanted to do what you
7 believe they want to do, that they would not be able
8 to do it under the license as proposed?

9 MR. ZELLER: There is a need to modify the
10 plutonium fuel factory under the current plan
11 envisioned already. Some of that information is
12 present in the scenarios painted in the documents that
13 we submitted on October 5th, some of the technical
14 memoranda, some of the information which is posted to
15 our website.

16 ADMIN. JUDGE McDADE: But at this point in
17 time --

18 MR. ZELLER: But there's a need for, for
19 the through put at the plutonium fuel factory to be --
20 to need a modification of the fuel factory would need
21 to be done in order to carry out its full mission of
22 34 metric tons. There is from five to nine metric
23 tons of material under the present regime that cannot
24 be processed in the facility as currently proposed.

25 ADMIN. JUDGE TRIKOUROS: Mr. Zeller --

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1 MR. ZELLER: In addition --

2 ADMIN. JUDGE TRIKOUROS: This is new. The
3 amended record of decision where you agreed deals
4 exclusively with storage, not with a -- as the
5 Applicant and the staff are saying, not with a
6 decision that's been made to process additional
7 plutonium?

8 MR. ZELLER: It has to do with the
9 processing of additional plutonium:

10 ADMIN. JUDGE McDADE: But at this point in
11 time, what the Department of Energy has proposed to do
12 is to store additional plutonium, additional form of
13 plutonium, and additional quantities of plutonium at
14 the site and you then speculate from that if they're
15 going to send it there, they're not sending it there
16 for no purpose, that ultimately what they would want
17 to do with it is to process it at this facility and
18 the logic of that is clear.

19 My question that I don't feel that I've
20 gotten an answer from, as I understand the position of
21 the staff and the Applicant, they're saying that the
22 contention at this point is speculative, that under
23 the current license application and what the NRC staff
24 has reviewed, that if the Department of Energy wanted
25 to do what you believe they ultimately will want to

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1 do, that there would have to be an amendment to the
2 license application submitted, that once that happens
3 we then have something tangible to review. We can
4 make a determination if what is in that license
5 application is sufficient for the purposes intended
6 and then make a determination as to whether or not the
7 subsequent environmental review and safety review by
8 the NRC staff is adequate, meets the NEPA requirements
9 for environment, meets the Atomic Energy Act
10 Requirements for Safety, but then we have something
11 real, something that we can get our hands around and
12 something that we can litigate.

13 At this point in time, we do not know if
14 such an application will be submitted or exactly what
15 the form of that application will be so that any
16 litigation is going to be speculative. Now, what is
17 wrong with that argument? Why should we not accept
18 that and simply defer if and when an application and
19 amendment is submitted, you would then have an
20 opportunity to file a contention based on the exact
21 language of the proposed amendment, and after seeing
22 what action, if any, the NRC Staff takes in response
23 to that, which may be at that point totally
24 satisfactory to the Petitioners or if it is not
25 satisfactory, you would be able to point out the

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1 specific deficiencies, which we would then be able to
2 review.

3 What's wrong with that approach?

4 MR. ZELLER: Well, neither the MOX
5 services nor the NRC Staff have argued that the
6 information that we have proffered is not new and
7 significant and has no bearing on the environmental
8 impacts.

9 ADMIN. JUDGE FARRAR: But I think what
10 Judge McDade is getting at is not whether you're right
11 on the merits.

12 MR. ZELLER: Right.

13 ADMIN. JUDGE FARRAR: But I think you
14 answered in a roundabout way his question a couple of
15 minutes ago when he said wouldn't they have to file a
16 license application amendment to do what you fear. I
17 think you said yes, they would. So what we're asking
18 is if they have to file a license application
19 amendment, in other words, they can't do, you have a
20 contention that says we fear X.

21 MR. ZELLER: Yes.

22 ADMIN. JUDGE FARRAR: What I think you
23 said is, and what Judge McDade is getting at, is they
24 can't do X without amending their application. So X
25 isn't going to happen unless they show up with a

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1 license application amendment. When that happens, why
2 is that not the time for you to come in here and say
3 aha, we knew it, here they are. We don't like what
4 they're planning to do.

5 MR. ZELLER: I understand and we, I have
6 to say at the outset that we have followed the rules
7 and the regulations so far for submitting this
8 contention. So in the words of the Board's decision
9 in the past, the chimerical and other, I guess,
10 pejoratives, paradoxical entered into the discussion
11 about whether this is something that is speculative or
12 not.

13 We contend, actually, that this is not
14 speculative and this is our opportunity under the
15 rules to participate in this process. If there is
16 uncertainty, then our reply is that the proceedings
17 after the admission of the contention, should be held
18 in abeyance because we agree there is a certain amount
19 of decisions to be made down the road. That is plain.

20 You would say that until the Applicant has
21 decided on the final design for the proposed plant, in
22 answer to your question, until the Applicant has made
23 the changes in the construction authorization request
24 and the license application, and the Applicant has
25 substantially completed construction which they have

1 not, at this time, and the NRC staff has completed its
2 safety review that the proceedings should be held
3 abeyance. For efficiency's sake and for other
4 reasons, we feel that is the solution which the Board
5 should recommend.

6 ADMIN. JUDGE FARRAR: Okay, specifically
7 with regard to contention six though, just explain to
8 me what you believe the NRC staff should have done at
9 this point that they have not done. Not what the
10 Department of Energy has done, but what, if anything,
11 should the NRC have done at this point that they
12 haven't done?

13 MR. ZELLER: Well, in answer to that, in
14 our October 5th filing, some of the materials which I
15 assume that staff has read, as you all certainly have,
16 regarding the plan for alternative disposition of
17 defense plutonium and defense plutonium materials that
18 were destined for the canceled plutonium
19 immobilization plant. I would direct them to page 21,
20 which outlines pits, clean metal, and clean oxide,
21 25.6 metric tons; future declaratories of 4.4 metric
22 tons; other metal oxide, less than 4 metric tons.

23 So there are some other metal oxides.
24 There are some impure forms of plutonium which are
25 presently destined under the plan. Some of this

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1 material, under the current terms, cannot be processed
2 without modifying the plant. That's what I would say.

3 ADMIN. JUDGE TRIKOUROS: I'd like to get
4 a clarification on this. Let me say it this way. In
5 the absence of the amended ROD, are you claiming that
6 the plant would require modification from its current
7 license, from the current license application?

8 MR. ZELLER: Correct.

9 ADMIN. JUDGE TRIKOUROS: Now why didn't
10 you say that in any of your contentions?

11 MR. ZELLER: Well, I don't have an answer
12 for that. But the information, nevertheless, is in
13 the documentation which we did provide. This is a
14 further demonstration that the plutonium fuel factory,
15 the notice, which was issued for this hearing, was
16 issued prematurely and that that failure should not
17 destine the contention to be likewise claimed to be
18 premature or otherwise speculative.

19 ADMIN. JUDGE FARRAR: But supposed we said
20 to you, okay, we understand why you're confused about
21 when you need to come in under these rules and under
22 this particular circumstance of the case and we'll
23 talk to the other parties about that. But if we said
24 to you in a decision that's a nice contention you
25 brought in here, it may some day be something that we

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1 need to deal with, but right now it's premature, so
2 thank you for sending this to us, we're going to
3 reject it now, but without prejudice to your coming
4 back if this eventuality materializes and you'll be
5 timely under the rules if you come back then. Except
6 for the fact that you need one live contention to keep
7 the proceeding going, if that were not an issue, you
8 wouldn't feel bad if we said nice try, too early, come
9 back when it's time, that's not a loss for you, is it?

10 MR. ZELLER: Well, this --

11 ADMIN. JUDGE FARRAR: I got a note here,
12 can you get the microphone a little closer to your
13 mouth. Some people are having trouble hearing.

14 MR. ZELLER: Certainly. I would say that
15 the regulations and previous Commission decisions on
16 this type of facility would seem to allow the Board a
17 high level of procedural latitude. So we are asking
18 the Board now to take this opportunity. We believe
19 that there is a basis for it.

20 ADMIN. JUDGE FARRAR: But assuming we
21 decline that invitation and said thank you for the
22 invitation, but we don't want to do that now, but this
23 could be a nice contention, come back later, there's
24 no harm to your organization from us doing that, is
25 there?

1 MR. ZELLER: Then I would want to know
2 when is later.

3 ADMIN. JUDGE FARRAR: Okay.

4 MR. ZELLER: Because we argued some of
5 these points three, four years ago during the
6 construction authorization request, and basically the
7 Board punted and so we are here to pick up the pieces.

8 ADMIN. JUDGE FARRAR: And given the
9 uncertainty about how these rules sometimes work, I
10 wouldn't blame, I certainly don't blame you for coming
11 in saying we want to be doubly sure we're not late.

12 I think we understand your position and as
13 usual, we've gone over the time on this.

14 Ms. Carroll?

15 ADMIN. JUDGE McDADE: If I could just very
16 briefly, and again, I just want to focus on one thing,
17 that --

18 MS. OLSON: Who is speaking, please?

19 ADMIN. JUDGE FARRAR: It's Judge McDade.

20 MS. OLSON: Thank you.

21 ADMIN. JUDGE McDADE: Who was that, who
22 was just speaking?

23 ADMIN. JUDGE FARRAR: Ms. Olson.

24 ADMIN. JUDGE McDADE: Ms. Olson, please do
25 not speak.

1 MS. OLSON: I'm sorry.

2 ADMIN. JUDGE McDADE: You're listening.
3 There are representatives here for you.

4 MS. OLSON: I'm sorry.

5 ADMIN. JUDGE McDADE: That -- Mr. Zeller,
6 the question that I had and that I still don't feel
7 that I've got an answer to and I want to make sure I
8 understand your position, you believe the Department
9 of Energy has certain intentions, but at this point
10 the Applicant here, Shaw, has not filed a license
11 amendment.

12 Given the fact that they have not filed a
13 license amendment, what if anything do you think the
14 NRC staff should do at this point in time that they,
15 the NRC staff, haven't done?

16 MR. ZELLER: Once again, some of the
17 material under the current terms cannot be processed.
18 That's why I pointed to the technical documents we
19 submitted on October 5th.

20 ADMIN. JUDGE McDADE: I understand that
21 and I understand what you've written.

22 MR. ZELLER: Right.

23 ADMIN. JUDGE McDADE: But what I'm saying
24 is is as I understand what you're saying, that the
25 environmental review, the environmental impact

1 statement done by the NRC is inadequate because it
2 doesn't address certain possibilities. But what I'm
3 asking, at least on the face of it, those
4 possibilities are outside the scope of the current
5 license application. So what basis would the NRC
6 staff have for conducting a broader environmental
7 impact review and preparing a broader environmental
8 impact statement unless and until they get a
9 supplement, they get an application, that they then
10 have something that they can actually look at and make
11 a determination as to what the environmental impact
12 would be of what is proposed.

13 At this point in time, given the
14 speculative nature of it, wouldn't any further
15 environmental review by the NRC staff on its face be
16 deficient because they wouldn't know exactly what was
17 going to happen and therefore would have no concrete
18 way of assessing the environmental impact of that
19 speculative event?

20 MR. ZELLER: The filing of the notice by
21 the NRC staff may have been premature. I can claim no
22 responsibility for that and if there is some remedy
23 that the Board would offer there, then I don't know
24 what that might be.

25 ADMIN. JUDGE McDADE: But that's a larger

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1 question.

2 MR. ZELLER: Certainly.

3 ADMIN. JUDGE McDADE: However we end up
4 resolving that question, this proceeding is a little
5 bit sua generis because we had this extra early notice
6 of application. How do we work through the case? I
7 don't know that that affects what you're saying right
8 now. You have a contention --

9 MR. ZELLER: With all due respect, my next
10 sentence was to say that this is a technical argument
11 you're asking me in terms of the throughput or in
12 terms of the existing facility and its need to be
13 modified. I would like to request that we have --
14 rather than have going through around our elbow to
15 speak, that we have Dr. Lyman to address the technical
16 point with regard to the need to modify the
17 environmental impact statement based on the new
18 information.

19 ADMIN. JUDGE McDADE: Again, we're --

20 MR. ZELLER: And the record of decision.

21 MS. CARROLL: I'm not sure --

22 ADMIN. JUDGE McDADE: Two ships crossing
23 here, Mr. Zeller, and again, my question is this. I
24 understand what it is that the Department of Energy
25 has done and what their document is and what your

1 basis for filing the contention, and what you believe
2 is the necessary consequence, and the probable
3 consequence. But at this point in time, right now,
4 not what should have happened in the past, but right
5 now, given the fact that you have that amended record
6 of decision by the Department of Energy, what
7 specifically are you saying in response to that that
8 the NRC staff should have done that they have not yet
9 done?

10 MR. ZELLER: What should they do now that
11 they should not have done?

12 ADMIN. JUDGE McDADE: What should they do
13 now --

14 MR. ZELLER: What should they do now --

15 ADMIN. JUDGE McDADE: That they have not
16 done.

17 MR. ZELLER: That they have not done?

18 ADMIN. JUDGE McDADE: Yes.

19 MR. ZELLER: They should agree that
20 contention six should be admitted period.

21 ADMIN. JUDGE FARRAR: He didn't mean what
22 should their lawyers do. But what should the staff
23 management do with the fact that they now have a new
24 document in their hands from DOE? What steps should
25 they take as the nation's regulators say aha, we have

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1 to do something with this or we don't -- what should
2 they be doing with that document? Not what are the
3 underlying merits of that document, what should they
4 be doing in terms of how they should process that?

5 ADMIN. JUDGE TRIKOUROS: Mr. Zeller, for
6 example, should they have issued a supplement to the
7 environmental impact statement?

8 MR. ZELLER: Yes.

9 ADMIN. JUDGE TRIKOUROS: Was that a yes?

10 MR. ZELLER: That is absolutely correct.

11 ADMIN. JUDGE TRIKOUROS: Now why would
12 they do that if they haven't firmly decided to process
13 this additional plutonium in this facility?

14 MR. ZELLER: Why would they do that if
15 they have not firmly decided?

16 ADMIN. JUDGE TRIKOUROS: If they have
17 decided finally to process this plutonium, this
18 additional plutonium in this facility, why should they
19 issue a supplement to the environmental impact
20 statement?

21 (Pause.)

22 MR. ZELLER: There is a lot of work to be
23 done before a final safety evaluation report may be
24 done. The environmental impact statement is
25 insufficient. The safety environmental review, the

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1 safety evaluation cannot be done at this point because
2 this is a moving target.

3 What we have before us today is the first
4 indication of that moving target. Until either the
5 Department of Energy, the NRC staff or the licensing
6 process grapples with this ever-changing chimera, to
7 use your own terms, of a facility, then we feel that
8 we should -- that our contention through no fault of
9 our own is admissible. We do feel that that process
10 would allow further exploration of some of these
11 detailed arguments which have to do with throughput
12 and which have to do with the safety evaluation and
13 all of the matters here; but that at this point, we
14 still must ask for an abeyance of this matter until
15 those four conditions that I laid out at the beginning
16 are fulfilled as regards the environmental review,
17 that's in regard to the environmental impact and
18 instruction authorization request, the license
19 amendment and actual construction of this facility.

20 ADMIN. JUDGE FARRAR: Mr. Zeller, I think
21 we understand your position and we've gone, as is my
22 custom way beyond the ten minutes, so we'll allow --

23 MR. ZELLER: I appreciate the time.

24 ADMIN. JUDGE FARRAR: We'll allow you a
25 minute or two on rebuttal if need be, and Ms. Olson,

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1 let me apologize to you. I forgot that you were not
2 with us in Augusta and this is your first appearance.

3 MS. OLSON: I apologize, sir.

4 ADMIN. JUDGE FARRAR: No, no, no. What we
5 do since everybody is here, we usually don't announce
6 our names when it's one of the Judges, but the only
7 people talking are the Judges and the person at the
8 podium, unless we depart from that. So what you might
9 -- and we only allow one person to argue per side. So
10 what you might want to do is wait until a break like
11 right now when Mr. Zeller is finished, and then you
12 can put up your hand which won't be helpful, so I
13 guess you would have to say something and say you want
14 to say something, but I probably wouldn't let you
15 because we have one, it's not a tag team. It's one
16 representative per side per argument, but if you had
17 something you needed to add, why don't you go ahead.

18 MS. OLSON: Sir, I apologize. I trust my
19 colleagues to carry the argument. I simply did not
20 understand that speakers were not going to identify
21 themselves. I will do myself to follow and read the
22 transcript later.

23 ADMIN. JUDGE FARRAR: Okay, we do that on
24 conference call, where everyone is on a conference
25 call, we usually do that, but when we're having an

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1 argument where it's three Judges peppering the poor
2 people at the podium with questions, we usually don't
3 pause. But thank you. You're doing just fine.

4 Who is going next, the Applicant or the
5 staff?

6 MR. ZELLER: Thank you.

7 MR. SILVERMAN: Applicant.

8 ADMIN. JUDGE FARRAR: Ms. Carroll, you had
9 a problem?

10 MS. CARROLL: Yes. First of all, I
11 apologize, but there is probably a protocol here and
12 I think it's pretty formal. And I don't know how to
13 get the word to Lou if he's not saying all that we had
14 planned to say.

15 ADMIN. JUDGE FARRAR: The way to do it is
16 while we're badgering the next two participants here,
17 you and he can be working up something to say on
18 rebuttal.

19 MS. CARROLL: We get rebuttal. All right.

20 ADMIN. JUDGE FARRAR: But it's got to be
21 short and snappy.

22 Who is going next?

23 MR. SILVERMAN: The Applicant, Your Honor.

24 ADMIN. JUDGE FARRAR: Go ahead, Mr.
25 Silverman.

1 ORAL ARGUMENT OF DONALD SILVERMAN, ESQ.

2 ON BEHALF OF THE APPLICANT

3 MR. SILVERMAN: Thank you. Good
4 afternoon. Don Silverman with Morgan, Lewis
5 representing Shaw AREVA MOX Services.

6 I do want to specifically address some
7 points associated with our specific position on this
8 contention, but I think before I do that I'd like to
9 respond and clarify a few things that came up in the
10 prior discussion and in particular some questions of
11 Judge McDade, and some things that Mr. Zeller said.

12 Number one, it is our position that there
13 are no modifications required to this facility to
14 process the material that this facility was originally
15 planned, designed and is being constructed to process
16 which is about 33 or 34 metric tons. There is no
17 basis at this point to conclude any modifications are
18 necessary.

19 ADMIN. JUDGE FARRAR: That covers what --
20 if DOE makes the change that their record of decision
21 says they're thinking -- were you talking about that
22 situation?

23 ADMIN. JUDGE TRIKOUROS: It sounds like
24 you're addressing the question that was asked about
25 whether the facility, as currently designed to process

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1 the current plutonium storage requires modification.

2 MR. SILVERMAN: Yes.

3 ADMIN. JUDGE TRIKOUROS: You're saying it
4 does not.

5 MR. SILVERMAN: It does not.

6 ADMIN. JUDGE FARRAR: Okay, but then let's
7 jump right to the next question. If DOE does what the
8 Petitioners are concerned they would do, would you
9 then have to file a license --

10 MR. SILVERMAN: And that was the second
11 point I wanted to make sure the record was very clear
12 on. That completely depends upon the nature of the
13 mature, the type of the material and we don't know the
14 answer to that question right now. It is not
15 necessarily the case that a license amendment need be
16 filed. We need to make that clear. There is a change
17 process that the regulations call for. It's the 77.72
18 change process. It is a portion of the regulations
19 that allow an Applicant to evaluate a potential change
20 in the MOX facility and make a determination about
21 whether they may make that change without prior
22 approval, but they have to identify it for the staff
23 and the staff becomes aware of it and reviews it after
24 the fact, or the result of that process may be a
25 conclusion that there may need to be an amendment.

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1 So I wanted to make sure Judge McDade was
2 not misled in that regard.

3 ADMIN. JUDGE FARRAR: Let's stick with
4 that. Okay, so you come to this conclusion. You say
5 okay, we're going to do something different, but it's
6 no big deal. We'll just notify the staff that we
7 decided to make this change and that's going to be it.

8 MR. SILVERMAN: Subject to staff review.

9 ADMIN. JUDGE FARRAR: But assume they say
10 yes, God bless you, that's great, that's just a minor
11 change, would the Petitioners get notice that you were
12 doing that or how would they learn that you were doing
13 that?

14 MR. SILVERMAN: If I understand correctly,
15 I believe the changes that are that the Applicant
16 concludes they may make without prior approval must be
17 provided to the NRC staff within -- January of each
18 year. It's a public document. When that became
19 available, if the Intervenors or Petitioners at that
20 time felt that that was the basis for some sort of a
21 contention, they'd have the opportunity.

22 ADMIN. JUDGE FARRAR: So is that the
23 answer to their concern? They're in here early
24 because they don't want to be late. You're saying
25 it's too early. If we either file a license

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1 application amendment --

2 MR. SILVERMAN: Amendment.

3 ADMIN. JUDGE FARRAR: Or a change deal
4 with the staff, they will learn about it. If they
5 don't like what that change is, they may be wrong on
6 the merits or right on the merits, but if they don't
7 like that change, they could come in here -- that
8 would be a timely occasion for them to file a
9 contention.

10 MR. SILVERMAN: I don't want to speak to
11 the merits of whether it would be -- it may be timely
12 depending upon when they file it.

13 ADMIN. JUDGE FARRAR: Let's say as part of
14 going forward we pick a number and we'll talk about
15 that later, 30, 45, 60 days. Suppose we said 60 days
16 is going to be the presumptive timeliness. If they
17 came in within 60 days of getting that change or
18 learning about that change order, you could argue they
19 have no basis for their contention, but you couldn't
20 argue that they were untimely?

21 MR. SILVERMAN: I'm not sure about that,
22 Your Honor. I'm not prepared to say that 60 days
23 would be timely or untimely.

24 ADMIN. JUDGE FARRAR: How many of these
25 proceedings have you been at? I won't ask how long

1 you've been doing this, because I don't like when
2 people cite my 1973 decisions, so I won't ask you --

3 MR. SILVERMAN: Quite a number.

4 ADMIN. JUDGE FARRAR: How many of these
5 have you been at?

6 MR. SILVERMAN: Quite a number. I'm not
7 sure, Your Honor.

8 ADMIN. JUDGE FARRAR: Every Board you've
9 been in front of I'm sure has at some point said new
10 and amended contentions can come in within 30 days.
11 In other words, they set a --

12 MR. SILVERMAN: Thirty days is often a
13 standard that is found acceptable and we have
14 recognized that --

15 ADMIN. JUDGE FARRAR: Let's use 30 instead
16 of 60. So if we issue a case management order that
17 says going forward it's going to be 30 days and they
18 file something within 30 days of a change, one of
19 these change notices on January 1st, are you telling
20 me you would concede that that -- not that it was a
21 good contention, maybe it doesn't have a basis, maybe
22 it's outside the scope, whatever. Are you telling me
23 you would or would not concede that that's timely?

24 MR. SILVERMAN: I would say if there was
25 new information that became available.

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1 ADMIN. JUDGE FARRAR: The change order is
2 the new information.

3 MR. SILVERMAN: Right, exactly. I'm
4 agreeing with that.

5 ADMIN. JUDGE FARRAR: Why is this so hard?

6 MR. SILVERMAN: I don't think it is hard,
7 Your Honor.

8 ADMIN. JUDGE FARRAR: You're making it
9 hard.

10 MR. SILVERMAN: Okay, I'll try not to.

11 ADMIN. JUDGE McDADE: Maybe, and it
12 doesn't seem that hard to me, I just want to make sure
13 I understand the procedure and I thought that we had
14 gone through this procedure in some detail when we
15 were back down in Augusta. And we talked about the
16 70.72 change procedure as sort of the mechanism that's
17 there. And as I understood it from what you said at
18 Augusta and consistent with what you said here today,
19 the first issue is is there a change?

20 MR. SILVERMAN: Right.

21 ADMIN. JUDGE McDADE: In the first
22 instance, the Applicant makes a decision as to whether
23 or not that change is significant. Whether it's
24 significant, whether it's material or not, they notify
25 the NRC staff about it. It may be a significant

1 change which is going to require prior approval from
2 the NRC staff and it may be a minor change that does
3 not require under the regulations approval from the
4 NRC staff.

5 MR. SILVERMAN: Yes.

6 ADMIN. JUDGE McDADE: In any event, as of
7 on an annual basis, the Applicant has to notify the
8 staff of any changes, any changes. The staff then has
9 an opportunity if they disagree with the Applicant, if
10 the Applicant says this is not material, it does not
11 require prior approval, the staff has an opportunity
12 to review that and take exception with the Applicant
13 if they choose.

14 MR. SILVERMAN: Yes.

15 ADMIN. JUDGE McDADE: And say we disagree.
16 We want you to justify this and they could require you
17 to submit an application supplement.

18 MR. SILVERMAN: Amendment application.

19 ADMIN. JUDGE McDADE: To modify the
20 procedure.

21 MR. SILVERMAN: Yes.

22 ADMIN. JUDGE McDADE: But at this point in
23 time, as I understand the argument of the Applicant is
24 we are getting way ahead of ourselves. We don't know
25 what, if anything else Department of Energy is going

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1 to ask us to do. Once we see what, if anything they
2 ask us to do, we the Applicant, have to make an
3 initial decision as to whether or not that requires
4 changes in our procedures or practices under 70.72.
5 If we determine initially that those are material, we
6 submit an amendment to the NRC. If we
7 -- and once that happens, now there is an Agency
8 action. The Agency action is the review of those
9 amendments and that requires as an Agency action for
10 the NRC to supplement its environmental impact
11 statement. They have to determine whether or not
12 those changes will have a significant impact on the
13 environment.

14 MR. SILVERMAN: Correct.

15 ADMIN. JUDGE FARRAR: That if in the
16 alternative you don't, you, the Applicant, does not
17 believe it's a significant change, the NRC has an
18 opportunity to review that and to call you on it and
19 say no, we think it is, we think you need to submit an
20 application.

21 In the alternative, if neither you nor the
22 NRC believes that it's significant, then nonetheless,
23 the Petitioners would have an opportunity to challenge
24 that. The submission, on an annual basis on January
25 of each year, is a public document. They would have

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1 an opportunity to review that to say that the decision
2 made by the Applicant is erroneous under the
3 regulation. The decision then by the NRC staff to
4 accept that is erroneous and they would then have an
5 opportunity to challenge that just as they could
6 challenge any other Agency action that was
7 inconsistent with the regulations. But at this point
8 in time, asking us to pile one hypothesis on top of
9 another hypothesis, what is DOE going to ask, what
10 changes, if any, would that require? What
11 environmental impact would that have that there's just
12 no way to intelligently do that at this point in time?

13 Am I --

14 MR. SILVERMAN: I'm with you 100 percent,
15 Your Honor.

16 ADMIN. JUDGE McDADE: Is that the
17 procedure that the Applicant believes that would be
18 followed?

19 MR. SILVERMAN: Yes.

20 ADMIN. JUDGE McDADE: And what would be
21 the mechanism for challenge in the event that the
22 Petitioners believe that a change was necessary, the
23 Applicant did not believe that it was material. The
24 NRC staff concurred in that. At that point in time,
25 how would the Petitioners challenge that?

1 MR. SILVERMAN: The Petitioners would
2 either file a new contention. If we had a proceeding
3 that was on-going. If we did not have a proceeding
4 that was on-going, they could file a petition to
5 intervene. And third, they have the 22.06 procedure.

6 ADMIN. JUDGE FARRAR: On the first two,
7 would those be timely?

8 MR. SILVERMAN: Your Honor, I don't want
9 to be coy with you. If, in fact, yes -- let me say
10 this. If, in fact, that information that's in that
11 annual report -- if the first notice of that was the
12 70.72 report made public and within 30 days the
13 Intervenors came in and raised that as an issue, I
14 think it's very likely we would conclude that that was
15 timely. It's very difficult for us to argue that it
16 was not.

17 ADMIN. JUDGE FARRAR: And let me finish,
18 you wouldn't say wait a minute, back in 2007, there
19 was a record of decision that should have tipped you
20 off that this long convoluted procedure was going to
21 take --

22 MR. SILVERMAN: Certainly not this record
23 of decision because this record of decision is
24 completely irrelevant to what we're talking about
25 here. It's an amended record decision on storage and

1 storage has nothing to do with the issue that's at
2 hand here.

3 ADMIN. JUDGE FARRAR: Let me make sure you
4 understand where we stand right at this moment. When
5 Mr. Zeller sat down, I was prepared to write a
6 decision that said thank you for submitting this
7 contention. It may be good. It may be bad, but it's
8 early. So we're going to send you home, but come back
9 at a future time, when it's ripe, and you'll -- you'll
10 have your fair shot then.

11 I'm concerned that you're not willing to
12 say to us they will have a fair shot then. If you
13 won't say to us they'll have a fair shot then, then
14 we're not throwing them out now.

15 MR. SILVERMAN: I am willing to say that
16 under the circumstances where there is new
17 information, where there is a change because where we
18 are today -- so I am willing to say that.

19 ADMIN. JUDGE FARRAR: No, you're saying
20 nothing is final until you all decide to file this
21 change order or not change order. Up until then it's
22 all speculative.

23 So either you're making that
24 representation to us today or you're not. If you're
25 representing to us that up until then it's

1 speculative, then they come back within 30 days after
2 that change order. If you're saying oh, well maybe
3 they should be reading other documents, then they've
4 got to be back in here every week for the next seven
5 years with a new contention.

6 MR. SILVERMAN: I'm not saying that, Your
7 Honor, absolutely not.

8 We need, first of all, the Department to
9 make a decision on a matter it has not made a decision
10 on, number one. And number two, we need a
11 determination whether there is a change. Whether it's
12 pre-approved or by way of amendment. You need both of
13 those conditions.

14 If those conditions happen, then there is
15 new information and they have an opportunity to come
16 in through the procedures of the Agency and file an
17 request for new contention of petition. But where we
18 are today is we have none.

19 ADMIN. JUDGE TRIKOUROS: You had said
20 earlier if a proceeding was still open, what do you
21 mean by that? Do you mean that you have not been
22 issued the license yet?

23 MR. SILVERMAN: No, I mean that there's --
24 I believe there's a distinction in the procedures as
25 to whether this Hearing Board is still empaneled and

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1 the parties to my left are Intervenors or not.

2 ADMIN. JUDGE TRIKOUROS: So if all
3 contentions were dismissed right now --

4 MR. SILVERMAN: Yes --

5 ADMIN. JUDGE TRIKOUROS: Then the
6 proceeding would be closed as far as you're concerned?

7 MR. SILVERMAN: Yes.

8 ADMIN. JUDGE TRIKOUROS: And the
9 opportunity then for intervention is very limited --

10 MR. SILVERMAN: Well, 2.309 petition to
11 intervene would come into play, but I believe that
12 they would have to meet the standards of the late-
13 filed standards which we've been talking about.

14 ADMIN. JUDGE FARRAR: But in that
15 circumstance, let's say there's another petitioner out
16 there that's not been concerned about your facility
17 until now. These people have no live contention and
18 this changed process happens and somebody says oh wait
19 a minute, that's a big difference. We want to come in
20 now. Would they have good cause for late filing?

21 MR. SILVERMAN: They would have to meet
22 the same standards for petitions for late filing.

23 ADMIN. JUDGE FARRAR: They can't come in
24 before then, according to your argument, because it's
25 all speculative until then.

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1 MR. SILVERMAN: Your Honor, I'm not sure
2 about that. It's a different -- it's a speculative.
3 It's a hypothetical Intervenor that isn't here before
4 us today. It's not the issue before the Board and I'm
5 not sure I'm prepared to tell you --

6 ADMIN. JUDGE FARRAR: Here's our problem.
7 What we do to people in front of us -- one of the
8 primary things that it tells us in whatever the
9 section of the regulation is is we have to run a fair
10 and impartial proceeding. And one of the things we do
11 is we try to make sure that people don't get thrown
12 out if they have, on prematurity grounds, if they have
13 no recourse later. You can't have it both ways.

14 MR. SILVERMAN: And I'm advised that --

15 ADMIN. JUDGE FARRAR: So when I ask you
16 hypothetical, it's not because I have the hypothetical
17 in mind. I have in mind the people who are in front
18 of us and what we need to do to be sure they, and
19 other people like them are treated fairly.

20 MR. SILVERMAN: And I believe that I've
21 indicated that the Petitioner to my left does have a
22 procedural mechanism available to them and would be
23 given a fair opportunity to raise new issues.

24 You've postulated that some third party
25 that's not even here today that might come in years

1 from now and I'm not prepared to say that -- first of
2 all, I don't think that's an issue before the Board,
3 frankly.

4 The issue before the Board is the
5 admissability of these contentions.

6 ADMIN. JUDGE FARRAR: That question -- the
7 infamous question five --

8 MR. SILVERMAN: Correct.

9 ADMIN. JUDGE FARRAR: -- to put it in the
10 last order kind of gets to that. That's what we're
11 getting at.

12 MR. SILVERMAN: Yes.

13 ADMIN. JUDGE FARRAR: What happens in the
14 future, because what happens in the future defines us
15 may help define for us what's fair in the present.

16 MR. SILVERMAN: Well, as I said, we're
17 prepared to speak to that at the time you'd like to
18 speak to that.

19 As I said, it's a petition to intervene
20 pursuant to 2.309 and this third party who we don't
21 know who it is at this point would have to meet the
22 appropriate standards.

23 ADMIN. JUDGE McDADE: Let me just again,
24 I'm asking a question to clarify something in my own
25 mind and to make sure that I understand it. In the

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1 event there's an open proceeding, that there's still
2 an open contention before this particular Board, we're
3 already discussed the procedure that they would file
4 a late-filed contention, explain what the new
5 information was, and we would then review the
6 contention at that point in time, that in the event
7 there is not an open proceeding before this Board, all
8 contentions are resolved, the Board signs off on it,
9 and we move on. There comes a point in time where
10 they, a Petitioner, any Petitioner, a citizen,
11 somebody believes that there is something going on
12 that is outside the scope of the license, that the
13 licensee has made an initial determination that this
14 is not material. It does not require an amendment and
15 filed a notice under 70.72, that they've identified it
16 to the NRC. The NRC staff has looked at it and said
17 no, we don't believe this requires an amendment
18 either. There's no open proceeding.

19 At that point in time, as I understood it,
20 what you were saying is that anybody who had an
21 objection to that would be able to file a petition
22 with the Commission to say that the Commission's staff
23 action was inadequate. It is inconsistent with the
24 Commission's regulation, 70.72. And that would then
25 go to the Commission. If the Commission accepted that

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1 position, they would direct the staff action
2 appropriately. If the Commission disagreed with that,
3 there would then be review in the Court of Appeals.
4 There would be a final Agency action. The Commission
5 would have rejected the petition and whether or not
6 the Commission acted appropriated in rejecting it
7 would be subject to judicial review.

8 Is that the procedure as the Applicant
9 sees it or is there a different procedure that could
10 be --

11 MR. SILVERMAN: No, I agree with that
12 procedure, Your Honor.

13 ADMIN. JUDGE McDADE: Is it your position
14 that anything more is required?

15 MR. SILVERMAN: No, Your Honor.

16 ADMIN. JUDGE McDADE: But that's the due
17 process procedure that is set out on how this thing
18 could be challenged?

19 MR. SILVERMAN: Yes.

20 ADMIN. JUDGE McDADE: And in the
21 alternative, if the Applicant felt that there were
22 modifications necessary that were material,
23 significant, it would file a petition, an amended
24 application which would then kick through this whole
25 procedure again. It would require additional review

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1 of the amendment by the NRC staff, including perhaps
2 a supplemental environmental impact statement, a
3 safety evaluation report, which would then be subject
4 to review by subsequent board?

5 MR. SILVERMAN: It would create an
6 opportunity for a Petitioner to file a new petition,
7 yes. And if admitted, there would be a hearing on
8 that subject.

9 ADMIN. JUDGE McDADE: I just wanted to
10 make sure I understood what your position was.

11 Thank you.

12 ADMIN. JUDGE FARRAR: Mr. Silverman,
13 you've used 20 minutes of a -- or rather, we've used
14 20 minutes of the 5 minutes allotted to you.

15 MR. SILVERMAN: May I take one more minute
16 just to cover a few points?

17 ADMIN. JUDGE FARRAR: Yes.

18 MR. SILVERMAN: The bottom line for us on
19 this contention is it is speculative. It is based
20 upon changes that the Department of Energy has not
21 even decided whether to make -- and we believe there
22 is a considerable amount of case law, both NRC case
23 law and Federal Court case law that supports the
24 position that the issue is unripe and should not be
25 admitted.

1 ADMIN. JUDGE FARRAR: Okay, thank you.

2 MR. SILVERMAN: Thank you.

3 ADMIN. JUDGE FARRAR: For the staff?

4 MR. MARTIN: Jody Martin for the staff.

5 ORAL ARGUMENT OF JODY MARTIN

6 ON BEHALF OF THE NUCLEAR REGULATORY COMMISSION STAFF

7 MR. MARTIN: The staff's position is
8 similar to the point that Mr. Silverman just made,
9 that this contention at this time is unripe.

10 ADMIN. JUDGE FARRAR: Suppose we agreed
11 with you. And this whole change deal happened that
12 Mr. Silverman and we were talking about. And at the
13 end of that the Petitioner said we don't like the way
14 you handled that. Here's our contention. Would that
15 be timely?

16 MR. MARTIN: If it was within whatever the
17 time the Board set aside, if it was within 30 days and
18 it really was new information, yes. That that was the
19 first time they heard of it, then yes.

20 ADMIN. JUDGE FARRAR: Well, no, no. See
21 that's not the throw-away line that you tried to make
22 it. Because we have a history of these cases where
23 they wait until something happens and you say oh,
24 there were documents three years ago that kind of
25 hinted at that. You should have been in here three

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1 years ago. But when they come in three years earlier,
2 you say it's speculative, nothing has happened yet.
3 So I want to know unvarnished, if they come in after
4 -- you having stood here today and said it's
5 premature, when will it and I thought we were on a
6 simple path to resolution of this case. It's
7 premature now. But it won't be premature the day of
8 the change or whatever, other major notice comes out.
9 You're saying that maybe that would be too late,
10 because there would have been some intervening
11 document.

12 MR. MARTIN: No, I'm saying once they know
13 that the changes are made, 30 days would be timely.

14 ADMIN. JUDGE FARRAR: But I'm told these
15 are only published once a year.

16 MR. MARTIN: Right, so that's when they
17 find out once a year.

18 ADMIN. JUDGE FARRAR: Or you could take it
19 upon yourself, if you wanted to speed the process, to
20 say we usually only publish this once a year, but here
21 it is July and we want you to know that we have done
22 X and Y.

23 MR. MARTIN: Correct, for instance if the
24 change, if the licensee determines that the change
25 requires a license amendment under 70.72, it's

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1 probable they would find out before the year-end
2 notice.

3 ADMIN. JUDGE FARRAR: Right.

4 MR. MARTIN: And then they would have 30
5 days from that point that they found out.

6 ADMIN. JUDGE FARRAR: Right, but it is not
7 going to be some hidden document that no one would
8 have paid attention to.

9 MR. MARTIN: Correct. I will, I do have
10 to clear up the record a little bit though. Not every
11 70.72 change is public. Some of them are official use
12 only depending on what the change is.

13 ADMIN. JUDGE FARRAR: I assume something
14 like this.

15 MR. MARTIN: I don't want to speculate,
16 but this seems like something that would not be
17 official use only.

18 ADMIN. JUDGE FARRAR: Well, then how about
19 this? How about you make us a commitment now that
20 however this happens, whether license amendment, a
21 change, some other way you send them a notice that
22 says remember that oral argument on January 8, 2007 or
23 2008. It's not premature anymore because this just
24 happened. Make us a commitment do that?

25 MR. MARTIN: I'm not sure if I can make

1 it. I'm not sure if I'm allowed to make a commitment
2 to do that.

3 ADMIN. JUDGE FARRAR: See, I keep giving
4 you ways to win the case and you keep turning me down.
5 I don't get it.

6 ADMIN. JUDGE McDADE: Mr. Martin is saying
7 that might happen three years from now, five years
8 from now --

9 MR. MARTIN: And I'll also say that --

10 ADMIN. JUDGE McDADE: And he may not be
11 employed by the NRC staff at that point in time and
12 whatever commitments he make, the other people who
13 were there at that point in time may feel bound by it
14 or not.

15 MR. MARTIN: That's true. And also, I
16 would also like to note that this change currently is
17 going through DOE NEPA process. The reason this came
18 to light was because it is being considered for a
19 draft environmental impact statement for DOE.

20 ADMIN. JUDGE McDADE: And at this point,
21 we don't know what change.

22 MR. MARTIN: Correct.

23 ADMIN. JUDGE McDADE: At this point, what
24 change, if any? And are you saying it depends what
25 the change is, whether or not it would be official use

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1 only or whether it would be public, but it is
2 difficult to make a commitment not knowing what
3 change, if any, is coming down the road.

4 MR. MARTIN: That's correct. And the
5 second point I was just making was that presumably
6 they can keep up the DOE NEPA process. They can make
7 comments in the draft environmental impact statement
8 that is due out by DOE and the presumably they'll see
9 when DOE comes out with the final environmental impact
10 statement what they are recommending.

11 ADMIN. JUDGE FARRAR: And where do they go
12 and assume they don't like that outcome. Where do
13 they go?

14 MR. MARTIN: The outcome as far as DOE's
15 decision or as far as --

16 ADMIN. JUDGE FARRAR: Yes. Can they ask
17 for hearing in front of the DOE, like we can give them
18 opportunities for hearings here?

19 MR. MARTIN: I'm not sure that they can
20 ask for a hearing. I'm not sure of DOE's internal
21 procedure.

22 ADMIN. JUDGE FARRAR: I think the answer
23 is no.

24 MR. MARTIN: No --

25 ADMIN. JUDGE FARRAR: So they will file a

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1 comment with DOE, DOE will say we've got a lot of
2 comments, thank you, here is what we're doing.

3 MR. MARTIN: Well, DOE would follow the
4 NEPA procedures.

5 ADMIN. JUDGE FARRAR: What can they do
6 then? When DOE finishes that, does that then come
7 over to you all?

8 MR. MARTIN: I was basically using that as
9 a point to highlight that they would be aware that
10 DOE's made a decision whether or not they have to or
11 when they're near the decision of whether or not they
12 have to make any changes to the facility and that
13 should highlight them.

14 ADMIN. JUDGE FARRAR: Could they then file
15 a contention with us?

16 MR. MARTIN: Only when DOE made the
17 decision that they were going to.

18 ADMIN. JUDGE FARRAR: Right. DOE says
19 here is FEIS or supplemental FEIS.

20 MR. MARTIN: And the time to file would be
21 when DOE either makes their change or they could pay
22 attention and at the end of the year, if this is one
23 of the changes that come up in the year end cover
24 letter, then they would be able to file at that time.
25 So that's when the new information would be ripe.

1 ADMIN. JUDGE TRIKOUROS: Mr. Martin, the
2 70.72 process, analogous to the 50.59 process?

3 MR. MARTIN: Correct.

4 ADMIN. JUDGE TRIKOUROS: Makes a lot of
5 sense to me when a plant is already licensed and
6 operating. It has a practical consideration that I
7 think have a lot of merit.

8 But when a plant is under construction and
9 not yet licensed, you're saying that the 70.72 process
10 applies even then?

11 MR. MARTIN: Not necessarily then. They
12 could still -- we could still ask RAIs during the
13 process.

14 ADMIN. JUDGE TRIKOUROS: You may want to
15 confer -- I really want to know the answer to this, so
16 you may want to confer.

17 (Pause.)

18 MR. MARTIN: Sorry for the break. 70.72
19 does not apply until they are a licensee. There's an
20 analogous design change process that they are
21 following right now to evaluate any changes to the
22 current application, but there's no requirement for
23 them to follow 70.72 at this time.

24 ADMIN. JUDGE TRIKOUROS: What is that
25 design change process? Can you quote, cite something

1 for us? Is it something that's written down somewhere
2 or not?

3 MR. MARTIN: I'm not sure if it's written
4 down somewhere, but we have to -- but still the staff,
5 where we can approve the final application, review the
6 application to make sure the application meets all the
7 requirements to part 70.

8 So while -- at the end of the day, there
9 are changes that still have to meet all the
10 requirements in part 70.

11 ADMIN. JUDGE TRIKOUROS: So we can throw
12 out 70.72 as an item right now.

13 MR. MARTIN: Until the license is issued.

14 ADMIN. JUDGE TRIKOUROS: Until the license
15 is issued.

16 MR. MARTIN: Right.

17 ADMIN. JUDGE TRIKOUROS: That's fine. So
18 now that's a different world than we've been
19 discussing. Judge McDade gave a summary of 70.72, but
20 it doesn't apply here.

21 ADMIN. JUDGE FARRAR: Let me interject.
22 Without interrupting your train of thought, if
23 everything went swimmingly for the Applicant, and
24 there were no Petitioners, when would this license be
25 issued?

1 MR. MARTIN: The SER is currently
2 scheduled --

3 ADMIN. JUDGE FARRAR: No. When would the
4 license be issued?

5 MR. MARTIN: Shortly after the SER which
6 is scheduled December 2010.

7 ADMIN. JUDGE FARRAR: Four years before
8 construction is finished?

9 MR. MARTIN: Correct.

10 ADMIN. JUDGE TRIKOUROS: So everything
11 we've been talking about now, I see it as no longer
12 applicable. The 70.72 process doesn't apply. Mr.
13 Silverman got up and talked about the 70.72 process.
14 So I am confused. If we terminate the proceeding,
15 then from my understanding, the only option available
16 to the Petitioners is the normal 309 process and what
17 is it, the 206 process, right?

18 MR. MARTIN: Correct.

19 ADMIN. JUDGE TRIKOUROS: Anybody else
20 could go and petition the Commissioners for some
21 assistance.

22 MR. MARTIN: Correct, if we terminate the
23 proceeding, yes.

24 ADMIN. JUDGE TRIKOUROS: Okay. These
25 RAIs, you issue RAIs as a normal of your review of

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1 this application.

2 MR. MARTIN: Correct.

3 ADMIN. JUDGE TRIKOUROS: Are RAIs an
4 opportunity for intervention, additional intervention
5 if the proceeding is open and also the question is
6 what about if the proceeding is closed?

7 MR. MARTIN: If there is new information
8 contained in RAI, while this proceeding is still open,
9 then the Petitioners, if there's new information,
10 could file a new contention under 2309(f)(2).

11 ADMIN. JUDGE TRIKOUROS: Do they have to?
12 Because why would they say gee, the staff is on top of
13 this issue. Here's an RAI from the staff,
14 interesting, but presumably the Applicant will answer
15 it and deal with it and change the design or change
16 the construction.

17 Are you saying if they don't come in with
18 an RAI, then later, six months later when they don't
19 like the solution you and the Applicant have worked
20 out, and they come in with a contention, you say oh,
21 sorry, you should have been in within 30 days of the
22 RAI. Again, we're going to have them in here day in,
23 and day out until the year 2014 filing new
24 contentions. Is that how to run a fair and efficient
25 proceeding?

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1 MR. MARTIN: Well, if the -- basically, I
2 think if there is no new information of the RAI, they
3 would have to file timely after the new information in
4 the RAI.

5 ADMIN. JUDGE FARRAR: Even though you're
6 just asking a question?

7 MR. MARTIN: Or the response to the RAI
8 would -- the new information would be contained.

9 ADMIN. JUDGE FARRAR: And you wouldn't say
10 that's speculative because we haven't resolved it yet.

11 MR. MARTIN: Well, it depends. It depends
12 what the answer to the RAI was.

13 ADMIN. JUDGE FARRAR: Do you see why
14 intervenors have trouble? I mean I hate to say this,
15 but the word, the phrase has been roaming around my
16 mind in the last three minutes. Shell game. There's
17 no way for an intervenor to sit there and -- if they
18 had the three of us, the whole Licensing Board Panel
19 advising them, they'd have no idea when they have to
20 come in, when it's premature and when it's untimely.
21 They'd have no way of knowing because none of you will
22 give them a straight answer on when they have to come
23 in and we don't want to sit here until the year 2014
24 with endless contentions coming at us and your saying
25 they're premature and/or untimely which we'll get to

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1 in a minute on your brief.

2 MR. MARTIN: Judge Farrar, I think once
3 they find -- once there is new information that they
4 are making a change, any new information that changes
5 --

6 ADMIN. JUDGE FARRAR: No, a lot of your
7 RAIs say hey, wait a minute. Our inspector was out of
8 your place and we didn't like what we see, or you sent
9 us a drawing. There's something wrong with it.
10 What's going on here, obviously, or a better phrase
11 than that. But that's a lot of your RAIs -- what do
12 they do when they see that?

13 MR. MARTIN: Those, there's probably
14 nothing to file a new contention on.

15 ADMIN. JUDGE FARRAR: But you use -- see,
16 and maybe you didn't even realize it, you used the
17 word probably. And you say probably. That means
18 later when they come in, you'll say ah, it was an RAI.

19 MR. MARTIN: I'm saying probably because
20 I'm sure -- once -- I still believe that once there is
21 firm information that they have decided to make any
22 change, that's the new information they have in 30
23 days. We will not argue the timeliness.

24 ADMIN. JUDGE FARRAR: If there's a change,
25 but a lot of RAIs, I've seen, and I'm thinking of PFS,

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1 you all sent a million RAIs saying we don't accept
2 your calculations. We don't think you've looked at
3 this closely enough. What about this? What about
4 that?

5 They weren't trying to change anything.
6 The Private Fuel Storage wasn't trying to change
7 anything. They were trying to satisfy the staff's
8 legitimate inquiries about the adequacy about what
9 they were doing.

10 MR. MARTIN: One moment.

11 ADMIN. JUDGE FARRAR: Go ahead. That's
12 all right.

13 (Pause.)

14 MR. MARTIN: We just wanted to point out
15 it would probably be the response of the RAI that
16 would trigger any new information.

17 ADMIN. JUDGE FARRAR: Okay. Let me tell
18 you what concerns me.

19 MR. MARTIN: Okay.

20 ADMIN. JUDGE FARRAR: We have a lot of
21 cases coming down the pike.

22 MR. MARTIN: Right.

23 ADMIN. JUDGE FARRAR: Somebody in this
24 Agency, and if it is not us, maybe we will ask the
25 Commissioners to do it, has to make it clear when

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1 people are timely and when they're premature because
2 otherwise to protect themselves, they have to sit at
3 their kitchen table, maybe they have offices, they sit
4 at their kitchen table and say aha, what happened
5 today that I have to file a contention in 30 days just
6 to protect myself because I think I could probably
7 wait a year, but if I do, there was something that
8 happened today that they're going to throw back in my
9 face so I better file this contention.

10 And we will come in here every week and we
11 will have oral arguments and we will waste your time
12 and their time and the Applicant's time. The law firm
13 will get rich, but that's the way of the world. But
14 we can't be doing this and knowing you, Mr. Silverman,
15 I don't say this as an attack on your personal
16 character, but you won't give me a straight answer,
17 because maybe you can't give me a straight answer.

18 Well, if you don't understand the system
19 and we don't understand it, how are they supposed to
20 understand it? That was a rhetorical question.

21 MR. MARTIN: I was thinking of a response.
22 Thank you.

23 ADMIN. JUDGE FARRAR: Let's get to your
24 brief, starting on page five.

25 ADMIN. JUDGE McDADE: Actually, I want to

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1 clarify something just before we get there. At this
2 point in time, we have an open hearing. That at some
3 point in time, one would anticipate that the hearing
4 would be closed and the open contentions are resolved.
5 That will all happen prior to the time that the
6 license is issued, that at this point in time the
7 procedure for adding contentions would be the 2.309
8 procedure, that once we have a closed hearing, a
9 closed proceeding, it would then move forward to a
10 license. A license would be granted. If a license
11 were granted and then changes were to be made, then
12 the 70.72 procedure would kick in. That may well be
13 given the history here, a period, a significant
14 period, before the plant is actually open and
15 operating. Given the estimated time intervals, the
16 final safety evaluation report would issue.

17 After that, the license would issued and
18 then the 70.72. So 70.72 could be applicable in this
19 case. It isn't applicable right now. Right now the
20 procedure would be under 2.309(f)(2). But at a later
21 point in time, the 70.72 might be applicable. Is that
22 accurate?

23 MR. MARTIN: Yes, that's accurate, yes.

24 ADMIN. JUDGE McDADE: And with regard to
25 when something is timely or not, you've been, you

1 know, reluctant to give an answer. Am I correct that
2 you are reluctant to give the answer because it is
3 going to depend on what that information is and it's
4 sort of difficult to speculate at this point every bit
5 of information that could be down over the next
6 several years until this plant either is abandoned or
7 opened, one or the other?

8 MR. MARTIN: Yes, that's correct.

9 ADMIN. JUDGE McDADE: But in any event, it
10 is your position that it would not be the question by
11 the Agency staff that would be the trigger. It would
12 be the question by the Agency staff coupled with the
13 response and whether or not the Agency staff viewed
14 that response as adequate if a punitive intervener
15 believed that the response was inadequate to the
16 question. At that point in time, they would have an
17 opportunity to file and again, depending where we are
18 in the procedure, if it is prior to the granting of
19 the license, if we have an open proceeding, they would
20 file under 2.309.

21 At a later point in time, if information
22 came to their attention, it might be under a different
23 regulatory procedure. Is that correct?

24 MR. MARTIN: That is correct.

25 ADMIN. JUDGE TRIKOUROS: So Mr. Zeller

1 indicates that the facility as currently documented in
2 the license application requires modification
3 independently of any record of decisions, amended
4 record of decision.

5 You're saying, or Mr. Silverman has said
6 that is not true, that is not the case. We go down
7 the road a little bit and we find out that, in fact,
8 the facility does require modification and the
9 Applicant then jumps into this undefined design change
10 process, which you did not explain what it is and the
11 Applicant is somehow supposed to, or the Intervenor or
12 the Petitioners is somehow supposed to be plugged into
13 this.

14 This is the dilemma. I was simply trying
15 to be fair here. If they're right, then they ought to
16 be heard and we ought to deal with it.

17 MR. MARTIN: Let me take one more --

18 (Pause.)

19 Excuse me, Judge Trikouros. The answer I
20 have is that the design change process is an internal
21 MOX Services process. They do send us annual updates
22 on that as well, at least the cover letter of all
23 those changes is public so there is at least some
24 recognition there is some public information on what
25 changes have taken place.

1 ADMIN. JUDGE FARRAR: The cover letter is
2 public. As soon as you see a cover letter, I'm
3 sitting in Ms. Carroll's kitchen and I see a cover
4 letter, I say, gee, that's interesting. I wonder what
5 is behind that. Can she get it?

6 MR. MARTIN: It depends on what the change
7 is. Some of the changes are OUO. Some of the changes
8 --

9 ADMIN. JUDGE TRIKOUROS: But somewhere
10 along the line there will be a change to the license
11 application. If I think of the license application as
12 some sort of a FSAR, somewhere along the line that has
13 to be changed before you approve it. I mean, that
14 only makes sense.

15 MR. MARTIN: Correct.

16 ADMIN. JUDGE TRIKOUROS: You're not just
17 going to simply approve something that's 80 percent
18 correct and 20 percent is floating around in some
19 design change process. That doesn't make sense. So
20 it has to be, somewhere along the line there has to be
21 a modification to the license application that
22 describes this plant. At that point, certainly the
23 Petitioners would see that. They might come in and
24 say okay, I told you so a year and half ago that this
25 had to be changed and here it is, I see it changed.

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1 MR. MARTIN: Right.

2 ADMIN. JUDGE TRIKOUROS: And they file a
3 contention. You turn around and say wait a minute,
4 that change took place a year and a half ago. You're
5 way out of line in terms of timing.

6 MR. MARTIN: I don't think we would do
7 that. Because the information that the change, once
8 the change is public, that's the first time that they
9 would get notice that there has been a change made and
10 then they would have at least within the 30 days to
11 file a new contention based on that. Because under
12 the ripeness doctrine we've been talking about, it's
13 not going to be ripe for review until there actually
14 has been some sort of change made to the application.

15 ADMIN. JUDGE McDADE: Let me ask a
16 question here just for my own edification. One
17 anticipates and particularly what we've been told
18 there's going to be an awful lot of activity before
19 the Board over the next several years. Certainly, one
20 of the issues raised by Judge Farrar is sort of the
21 concept of both the Applicant and from my standpoint
22 more importantly the Board sort of be nickled and
23 dined to death where people are filing additional
24 contentions under 2.309(f) on a weekly basis, a
25 monthly basis and we get to be very chummy because

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1 we're meeting with each other, just sort of set aside
2 every other Monday to sort of meet and go over the new
3 contentions.

4 Is there anything in the regulations that
5 you can point me to that would preclude as a case
6 management tool are simply saying that -- and assume,
7 this is on the assumption we have an open proceeding
8 that we have a viable contention that we admit of
9 saying that this application is not going to be
10 approved until after the safety evaluation report
11 comes out. It's going to come out at this point
12 anticipated in December of 2010. I'm just simply
13 saying that for a case management standpoint to tell
14 these Petitioners and all Petitioners, hold your
15 contentions. We don't want to take them up every
16 other week. Hold your contentions, file all your
17 contentions within 60 days after the safety evaluation
18 report comes out and we will take them all up at that
19 point in time. That way we're not going to be doing
20 it piecemeal. We're not going to be doing it
21 speculative. We're going to have the entire body
22 before us, see how all of the contentions fit together
23 and we can then proceed in an orderly way instead of
24 doing it in this disorderly way.

25 And is there anything in the regulations

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1 that you can point me to that from our standpoint of
2 a case management tool that we do it that way? We
3 simply tell them, hold your contentions until 60 days
4 after the safety evaluation report comes out, file
5 them then, and then we move forward. What precludes
6 us from doing that?

7 MR. MARTIN: I don't think anything
8 precludes you from doing that.

9 ADMIN. JUDGE McDADE: Mr. Silverman, are
10 you aware of anything in the regulations that would
11 preclude us that from the standpoint of case
12 management of doing it that say?

13 MR. SILVERMAN: Your Honor, I don't think
14 the Board has the authority to do that in all honesty.

15 ADMIN. JUDGE FARRAR: Where, where does it
16 say we can't --

17 MR. SILVERMAN: I don't believe there's
18 anything that authorizes that in the regulations.
19 Your authority is to rule on contentions as --

20 ADMIN. JUDGE FARRAR: No, we understand
21 that, but assuming we have an open proceeding. We
22 have a proceeding where there is a viable contention
23 that -- and we now move forward.

24 The question then is from the standpoint
25 of simply of case management instead of doing this

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1. thing on a piecemeal basis of recognizing that first
2. of all we have the potential over a significant period
3. of time for contention after contention coming in
4. under 2.309 up through the time that the license
5. application, assuming the license application is
6. granted of our saying that it doesn't make any sense
7. for us to be dealing with these piecemeal. Everyone
8. coming, coming, coming that may be consistent, may be
9. inconsistent, may supplement each other.

10. Many of the things that may be raised in
11. a contention today are going to be resolved under
12. their own weight, long before we get to the time that
13. the safety evaluation report is submitted for our
14. saying we're going to be involved in Yucca Mountain.
15. We're going to involved in COLs. We're going to be
16. involved in a hundred other things that we simply
17. don't have the time to come and meet with you every
18. other week to look as the construction of this
19. complicated matter goes on between now and 2014 or
20. certainly 2011 when the safety evaluation report comes
21. out and in doing it on a piecemeal basis. So we say
22. to these Petitioners and we say to everybody else,
23. hold your contention. We're doing this as a case
24. management tool. Hold your contentions. We're not
25. going to address them now. File them with -- we don't

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1 want to see them. Sixty days after the safety
2 evaluation report comes out, submit them. At that
3 point in time we are going to sit down and we are
4 going to resolve them instead of the Applicant
5 responding on a weekly basis, you're filing hundreds
6 of petitions with us in response to various
7 contentions. You hold it to the end. You file one
8 omnibus document. The staff has an opportunity at the
9 same time to file an omnibus document discussing all
10 of those contentions and then we have either say
11 there's nothing to be heard. There's no basis for a
12 hearing or in the alternative we have one hearing at
13 that point in time and resolve everything. And
14 nothing is speculative. We know exactly what's going
15 to happen, that all of the plans have coalesced, the
16 plant, the construction has moved forward. You all,
17 your client knows what changes it's generally going to
18 have to make because it's pretty far down the road in
19 construction. The staff is going to have an
20 opportunity to determine whether or not those changes
21 are material in a context, not looking at them on one
22 by one, but get to look at the whole thing and say
23 yes, this is not material. This is okay. Why isn't
24 that the most efficient way and what in the
25 regulations again from a case management standpoint

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1 precludes the Board from taking that approach?

2 MR. SILVERMAN: Your Honor, you are asking
3 a question that we haven't given a great deal of
4 thought to in preparation for this hearing and we
5 certainly haven't researched in any great detail, so
6 I guess I shouldn't be too certain about my answer.

7 I believe, however, that what the rules --
8 and I understand the concern the Board has with the
9 case load that the Boards are facing going forward.
10 But that does create a situation where let's just
11 posit the notion that my client, the Applicant, three
12 months from now submits a license amendment
13 application and the Petitioners have full notice of
14 that. They're concerned about it. They have complete
15 notice of it. That case management tool allows them
16 to postpone the litigation of that issue for
17 potentially years which I don't think is --

18 ADMIN. JUDGE FARRAR: It doesn't allow
19 them. It requires them.

20 MR. SILVERMAN: Require them to do that,
21 and I don't think that's consistent with certain of
22 the Commission's policy of disposing of these issues
23 as efficiently as possible. I think we'd have to look
24 into the issue a little more closely.

25 I wouldn't have a problem in an open

1 proceeding with a Board saying after the SER is
2 issued, Petitioners, you be deemed to be timely if you
3 filed a contention or contentions based upon the SER
4 within some period of time.

5 ADMIN. JUDGE FARRAR: That is the classic
6 rubber sandwich because they'll say it is based on the
7 SER and you will say, as you have done, you and your
8 colleagues at the bar have done, you will say oh, they
9 knew about that before the SER. It was in a document
10 two years ago.

11 MR. SILVERMAN: If it was, then they had
12 an obligation and they were noticed and they had that
13 notice.

14 ADMIN. JUDGE FARRAR: That's what Judge
15 McDade says we don't want to come in here every week
16 and have this prematurely, untimely argument, week
17 after week after week about a facility the
18 construction has just started on.

19 MR. SILVERMAN: I appreciate that.

20 ADMIN. JUDGE FARRAR: Okay, when you're
21 doing your research, you'll look at 2.319, I'm sure.
22 Make sure you cover the parts about our duty to hold
23 a fair and impartial hearing. Take appropriate action
24 to control the pre-hearing and hearing process, to
25 maintain order, to simplify things, to set reasonable

1 schedules, but basically, fair and impartial.

2 MR. SILVERMAN: I understand.

3 ADMIN. JUDGE FARRAR: You're familiar, of
4 course, with the doctrine of exhaustion of
5 administrative remedies and you're familiar with the
6 quip that administrative remedies exhausted people and
7 that's what we're talking about here.

8 ADMIN. JUDGE McDADE: And Mr. Silverman,
9 if you could, and also Mr. Martin and also to the
10 Applicants. Our having, and my having, raised this
11 issue and raised this question and what we're trying
12 to accomplish on one, both a case management
13 standpoint of how do we simplify this and recognizing
14 what I think you were saying, Mr. Silverman, is for
15 example, if your client six months from now comes to
16 the belief that you need to file an amendment, you do
17 file the amendment. You don't want to spend another
18 three years building the facility consistent with that
19 amendment only to be told three years down the road
20 yet, no. You can't do that and you have to again say
21 well, we didn't want to simply sit here for three
22 years until after the safety evaluation report came
23 down and now you're asking us to go back and we've
24 constructed the facility consistent with this.

25 It is either going to be impossible to go

1 back or extremely expensive to go back. So
2 recognizing that as a legitimate interest of the
3 Applicant, if you all can come up with a way to parse
4 this through, to use some language where perhaps again
5 the Board exercising its authority for case management
6 chooses to consolidate what it can but perhaps at the
7 same period of time be able and in order to articulate
8 certain exceptions to that, that would allow the
9 resolution of specific matters such as the one I just
10 described from the standpoint of the Applicant, if you
11 don't want to get too far out on the plank before you
12 find out whether or not there is water in the pool.

13 You know, and how do we address that? And
14 whether there is any specific language and an order
15 that we could craft that would address both of those
16 concerns adequately and I address that both to the
17 Applicant, Mr. Silverman, Mr. Martin, to the staff,
18 and also if the Petitioners can offer us any
19 assistance in that in how an order could be drafted
20 that would meet those concerns.

21 MR. SILVERMAN: Your Honor, at your
22 request, we will of course provide our views on all
23 those issues. Let me just say at least in closing for
24 me on this issue unless you have anything further for
25 us, that there are two different issues that we're

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1 talking about here. One is the omission of a
2 particular contention. Is it ripe or is it not ripe.
3 And our view is this is not ripe and the Board ought
4 to rule on that.

5 The other issue that we've been spending
6 a great deal of time on is I think, with all due
7 respect, the Board's concern about the processes and
8 procedures that are in place in the regulation and I
9 think that is a different inquiry.

10 ADMIN. JUDGE FARRAR: That's the case
11 management inquiry. But it also deals with, and I
12 said this before, before we throw a contention out
13 because it is premature, we need to know that there is
14 a process, a fair process later that lets them come
15 back. You'll never talk me out that, Mr. Silverman.

16 While you're doing that, let me ask you a
17 question. And Mr. Silverman, as long as you have the
18 floor, 70.23(a)(8).

19 MR. SILVERMAN: Yes.

20 ADMIN. JUDGE FARRAR: You're supposed to
21 put in this operating license application, I think,
22 that you've constructed the principle parts of the
23 building in accordance with your design. How did your
24 application deal with that when you hadn't turned over
25 a shovel of dirt?

1 MR. SILVERMAN: That is not required to be
2 in the application. The application, what the
3 regulation says is an application will be approved --

4 ADMIN. JUDGE FARRAR: Okay, so when are
5 you going to tell the staff that you have complied
6 with 70.23(a)(8)?

7 MR. SILVERMAN: The way 70.23(a)(8) works,
8 Your Honor, is we cannot get our license to possess
9 and use radioactive material until the staff has come
10 out and done a series of inspections and verified in
11 public inspection reports that we have constructed the
12 principal structure systems and components in
13 accordance with our application. That's an inspection
14 process that they must make once we, towards the end
15 of construction.

16 ADMIN. JUDGE FARRAR: But at some point,
17 you tell them hey, we're ready.

18 MR. SILVERMAN: Absolutely.

19 ADMIN. JUDGE FARRAR: Okay.

20 MR. SILVERMAN: That does not need to be
21 in our application. And --

22 ADMIN. JUDGE FARRAR: Suppose at the
23 beginning of this case, the Intervenors had said we'd
24 like to file a contention of omission. Our contention
25 is you haven't constructed your facility in accordance

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1 with the design. Our basis is we went out to the site
2 and nothing had happened.

3 Is that a valid contention?

4 MR. SILVERMAN: No, Your Honor. it's not.
5 It's completely speculative. It has no basis
6 whatsoever. And it's totally premature.

7 ADMIN. JUDGE FARRAR: Okay, we mentioned,
8 and we're getting into the second part of the
9 argument, but as long as we're here, let's do it. You
10 can sit down for a second, Mr. Martin.

11 We mentioned contention of omission in our
12 decision October 31st.

13 MR. SILVERMAN: Yes.

14 ADMIN. JUDGE FARRAR: We invited
15 reconsideration. Neither you nor the staff addressed
16 the simple, plain doctrine the Commission has
17 established of contention of omission. I can't
18 imagine a better contention of omission than one that
19 says to get your license you have to have completed
20 construction and you've omitted to do that.

21 Now, that comes in as a contention of
22 omission. And then when you complete construction
23 you'd say okay, that's moot. But why would that not
24 be a valid contention? How can it be speculative?
25 It's true?

1 And let me make sure you and I have the
2 word speculative the same way. When you say to them
3 about the particular contention that we've just been
4 talking about, when you say that's speculative, you're
5 saying wait a minute, DOE hasn't decided to do that.

6 MR. SILVERMAN: Right.

7 ADMIN. JUDGE FARRAR: We have a plan and
8 you're saying we're going to change our plan. My
9 contention of omission is not speculative. You had a
10 plan and you haven't followed your plan.

11 Why is that not a valid contention of
12 omission? It may not take them a long way, but it's
13 -- you're trying to get an operating license before
14 you've turned over a shovel of dirt.

15 MR. SILVERMAN: If I'm not answering your
16 question, please let me know, and I'll try to address
17 it; but, to me, we're talking about apples and oranges
18 here. Contention of Omission is a concept that
19 doesn't really come up until, and doesn't really have
20 any relevance until you have a Contention omitted, and
21 then there is a question about -- admitted, excuse me.
22 Then there is a question about how it is addressed,
23 resolved, or otherwise mooted. You're not there.

24 ADMIN. JUDGE FARRAR: I didn't make myself
25 clear.

1 MR. SILVERMAN: Okay.

2 ADMIN. JUDGE FARRAR: March 14th the
3 notice comes out, March 14th, 2007. May 14th in comes
4 one contention. You have not constructed the facility
5 in accordance with the plans. Is that an admissible
6 contention?

7 MR. SILVERMAN: It is not an admissible
8 contention.

9 ADMIN. JUDGE FARRAR: Why, what's it
10 lacking?

11 MR. SILVERMAN: A requirement to have
12 demonstrated at that phase of the process that we have
13 constructed in accordance with the application. It's
14 almost illogical, in a sense. Once the construction
15 is underway, once there is construction, if, in fact,
16 we have failed to construct in accordance with the
17 application, that's a legitimate contention.

18 ADMIN. JUDGE FARRAR: And how do they --
19 see, here's how the Contention of Omission would
20 work. They say you haven't constructed it. As you
21 finish construction, you could come to us, and suppose
22 we admit that contention? As they finish
23 construction, you could come to us and say we built
24 the foundation in accordance with the plans. Please
25 dismiss that portion of their contention as moot.

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1 We'd say fine, moot.

2 Now this is a situation where you control
3 all the documents, you control all the information,
4 and we're saying to them this is going to be a seven-
5 year construction process. For seven years you've got
6 to scurry around and try to find documents in a timely
7 fashion, and God help you if you don't, because the
8 people will be in here saying you're out.

9 MR. SILVERMAN: Your Honor, a valid
10 Contention of Omission is a contention that alleges
11 that the Applicant has failed to do something that
12 they have a legal obligation to do. And at the point
13 in time that they have filed their license
14 application, and have not even begun construction,
15 there's nothing they failed to do that's inconsistent
16 with -- that violates, that the regulations require.

17 ADMIN. JUDGE FARRAR: Okay. This is a
18 special proceeding, because it's the only proceeding
19 I've ever been aware of where the equivalent of an
20 operating license application is filed before
21 construction has begun. You're aware of cases where
22 that's happened?

23 MR. SILVERMAN: Yes, Your Honor. And I'm
24 only so old here, but my understanding is that the
25 Board has referenced Reactor Operating License cases.

1 ADMIN. JUDGE FARRAR: Those were never
2 filed before construction started. In fact, our
3 problem there was the operating license applications
4 came in so late, the Boards were -- construction was
5 almost done.

6 MR. SILVERMAN: Many were filed well
7 before, I believe well before construction was
8 completed.

9 ADMIN. JUDGE FARRAR: Completed, not
10 before it started. That's the peculiarity about this
11 case, and that is what may motivate one or more of us
12 to say to the Commission, this proceeding is a mess
13 and it needs some direction, just like you gave it
14 some direction five years ago with a special order
15 saying here's how this proceeding is going to be
16 conducted.

17 MR. SILVERMAN: Well, I think that goes to
18 the timing of the Notice of Opportunity --

19 ADMIN. JUDGE FARRAR: No, not the timing.
20 It deals -- well, let me ask you this, did you have to
21 file this application when you did? Could you have
22 waited five years?

23 MR. SILVERMAN: We could have waited, yes.

24 ADMIN. JUDGE FARRAR: There was no rule
25 from the staff that said if you don't get this in,

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1 it's too late. You could file it whenever you want.

2 MR. SILVERMAN: There was no legal
3 requirement to file when we filed.

4 ADMIN. JUDGE FARRAR: Once you filed it,
5 was there a requirement that the staff -- was there an
6 internal requirement that the staff process it?

7 MR. SILVERMAN: Yes, after concluding that
8 it's docketable.

9 ADMIN. JUDGE FARRAR: And it's docketable,
10 even though you hadn't started construction.

11 MR. SILVERMAN: Absolutely. That's not
12 part of the application. Again, that's an inspection
13 function that comes at the end of the process.

14 ADMIN. JUDGE FARRAR: Remember, at the
15 beginning of this case, which I was not involved in,
16 the Commission issued an order that said this is an
17 unusual proceeding. Here's how we're going to do it.
18 Environment is going to come in the first phase. It's
19 not coming in the second phase. Why is this
20 proceeding not so peculiar, that we need to recommend
21 to the Commission that they ought to issue another
22 order, which we may not have -- you may tell us that
23 we don't have a case management authority to do, but
24 they certainly have the authority to do it, issue an
25 order that says straighten out this mess.

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1 MR. SILVERMAN: My view, Your Honor, is
2 it's not peculiar at all, because it is very typical
3 and common for a Notice of Opportunity for Hearing to
4 be presented and published in the Federal Register
5 shortly after the docketing of any application. And
6 that's reactor operating licenses, and any other
7 application. It's very common in Materials space, and
8 in --

9 ADMIN. JUDGE FARRAR: It's not common to
10 have the application filed this early.

11 MR. SILVERMAN: I haven't researched
12 exactly when each OL application comes in.

13 ADMIN. JUDGE FARRAR: Okay. When you send
14 us the information Judge McDade asked for, send us any
15 case you're aware of, not talking about the new COLs,
16 or the ESPs, I'm talking about a case preceding those
17 where the equivalent of an operating license
18 application was filed before construction started.

19 ADMIN. JUDGE McDADE: Let me address this
20 question or seriatim, first to Mr. Silverman, and then
21 to Mr. Martin. Is this case, and I realize we're
22 talking about different portions of the regulations,
23 but just sort of theoretically, any different than say
24 for a nuclear power plant COL, where you have a
25 combined construction and operating license. I mean,

1 here you submit an application. This is how we're
2 going to build the proposed facility. At some later
3 point in time pursuant to 70.23(8), the NRC Staff
4 comes out and effectively puts imprimatur on that says
5 you've gotten far enough along with the principal
6 structures, it has been done consistent with the
7 application, and we're giving you the okay. And at
8 that point, the NRC is saying we'll grant your license
9 application. Is this sort of theoretically consistent
10 with a reactor COL application?

11 MR. SILVERMAN: I believe it is. I'm not
12 the world's leading expert on the Part 52 regulations,
13 but I think it's quite similar.

14 ADMIN. JUDGE McDADE: Mr. Martin, is that
15 analogy apt in this fast view, or is there a
16 significant difference this and that?

17 MR. MARTIN: First, let me just clear up,
18 the 70.23(a)(8) is a process that we used, I think for
19 -- similar to what -- what will happen is we will
20 issue the license before they make the 70.23(a)(8)
21 finding, but there will be conditions on the license,
22 basic conditions that no possession or use can occur
23 until after license conditions have been --

24 ADMIN. JUDGE FARRAR: What's the hurry?

25 MR. MARTIN: Excuse me?

1 ADMIN. JUDGE FARRAR: What's the hurry?

2 MR. MARTIN: Because -- I'm not sure what
3 the hurry is. I know that it's schedule-based. I'm
4 not sure what the exact hurry is. I just know the way
5 the process works, there's an operational readiness
6 review at the end. During the operational readiness
7 review, the staff has to make the final findings that
8 all the provisions of 70.23(a)(8) have been met, or
9 all the requirements of 70.23(a)(8) have been met.
10 When they make those findings, then the license
11 petitions will fall out.

12 ADMIN. JUDGE FARRAR: It says,
13 "Application for a license will be approved when
14 construction has been completed." How can you issue -
15 -

16 MR. MARTIN: It's a conditional approval,
17 based on final findings that its met all the --
18 because, otherwise, if you look at the schedule,
19 we're issued a license in 2010, but construction will
20 not be done for several more years.

21 ADMIN. JUDGE FARRAR: Are you as concerned
22 about the petitioners sitting at their kitchen table
23 for seven years trying to keep up with this flow of
24 paperwork, as you are about the applicant?

25 MR. MARTIN: Currently, we're just

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1 concerned about following the Commission's
2 regulations. And that's the way you have to follow
3 them.

4 ADMIN. JUDGE TRIKOUROS: Well, that just
5 means that you're following the procedures that are in
6 the COL Part 52, where the license is issued in
7 advance, and ITAACS are issued to assure that it was
8 built in accordance with the license that was
9 approved. I mean, inherently, I don't see a major
10 problem with that, as long as the process is complete.
11 So you would say that it is more analogous to the COL
12 process.

13 MR. MARTIN: Correct, it is more
14 analogous. I think the most analogous, when we were
15 discussing it, to be more similar to the other Part 70
16 cases, the USEC or LES, where there's a single
17 hearing. Here, the hearing was split, but the
18 Commission said -- when the two-step process was
19 originally challenged up to the Commission, the
20 Commission noted in a footnote that the applicant
21 could have come in with a single application, and we
22 could have done this in a single process.

23 In this case, what drove the two-step
24 process was the application coming in in two different
25 steps, so for us, that shows that the Commission is

1 comfortable with having this hearing before --

2 ADMIN. JUDGE FARRAR: Wait, we're going to
3 get to that. Well, there you go, you raised it.
4 Let's look at your brief. No, let's finish --

5 MR. MARTIN: Okay.

6 ADMIN. JUDGE FARRAR: Let's try to finish
7 this contention, but please remind me if I forget to
8 badger you about this point, remind me that I owe you
9 one. Okay? Later. And you're the gentleman who
10 issued the notice, whose name the Notice of
11 Opportunity for Hearing went out over?

12 MR. TIKTINSKY: That's the contact person,
13 yes.

14 ADMIN. JUDGE FARRAR: Okay. Good. Then
15 you remind me, also, in case I forget.

16 Mr. Martin, why don't you come back, and
17 let's talk about your brief on this contention.

18 ADMIN. JUDGE TRIKOUROS: By the way, while
19 you're walking up to the podium, I will point out that
20 the COL process does allow an opportunity for
21 intervention at the time of ITAAC completion. And I
22 don't think that's the case here.

23 MR. MARTIN: Correct. That is a
24 distinction between the two processes.

25 ADMIN. JUDGE TRIKOUROS: Okay.

1 ADMIN. JUDGE FARRAR: Mr. Martin, pages 5-
2 10, I guess, of your -- no, 5-11 of your brief. Part
3 One, you do a remarkable job of saying that this
4 contention is premature, without using the word
5 "premature", which was a good thing, because in pages
6 9 and 10, Part Two, you do a remarkable job of showing
7 how it's untimely. Which is it, is it both premature
8 and untimely? And where I'm headed is, can we do this
9 to these people?

10 I quoted Commissioner Merrifield several
11 times, former Commissioner Merrifield several times in
12 the prior decision, because he said how important it
13 was to deal fairly with the people. So first tell me
14 how it could be both premature and untimely.

15 MR. MARTIN: And I apologize for the
16 confusion that obviously created. I think the issue
17 in the first part of the pleading we were mainly going
18 for is that we don't believe that this issue is ripe
19 for review.

20 ADMIN. JUDGE FARRAR: Fine. Okay.

21 MR. MARTIN: Okay.

22 ADMIN. JUDGE FARRAR: I'll give you that.

23 MR. MARTIN: However, the second part
24 we're saying if you accept this really is an issue,
25 this issue should have been brought up earlier,

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1 because if you accept that this -- we didn't feel in
2 any part of the issue --

3 ADMIN. JUDGE FARRAR: If anyone from the
4 English-speaking world, any other legal system were in
5 this room, they'd run out screaming hearing you say
6 that. You all have created this system that you don't
7 think has to be consistent with the Common Law, the
8 Principles of Fairness, or the Constitution of the
9 United States. And you think it's fine to get up here
10 with these comments.

11 ADMIN. JUDGE McDADE: Was that a question?

12 ADMIN. JUDGE FARRAR: No. That was my
13 view, half-baked though it may be, but we get these
14 briefs that have these arguments that have nothing to
15 do with what any of us have studied in law school.

16 ADMIN. JUDGE McDADE: Mr. Martin, as I
17 read the brief, I understood it that, one, it's the
18 position of the NRC staff that this is premature.

19 MR. MARTIN: Correct.

20 ADMIN. JUDGE McDADE: But, secondly, if we
21 were to view that it was not premature, there is no
22 recent event that has triggered this particular --

23 MR. MARTIN: Correct. For instance, I
24 mean, if we use the hypothetical and we said that this
25 issue is a real issue, that it's ripe, and we can

1 review it, if we accepted that -- if you ignore the
2 first part of my brief, or the first part of our
3 brief, and we accept this is an issue, then we still
4 have the timeliness arguments that we have to meet.

5 ADMIN. JUDGE FARRAR: And you don't --

6 ADMIN. JUDGE McDADE: If it's an issue,
7 when did it arise?

8 MR. MARTIN: Correct.

9 ADMIN. JUDGE McDADE: You're saying it
10 isn't an issue.

11 MR. MARTIN: Correct, that's the first
12 point.

13 ADMIN. JUDGE McDADE: But then the
14 question is, if it we viewed it as an issue, when did
15 it arise? And you're saying that we cannot point to
16 any event that has occurred that triggered the --

17 MR. MARTIN: Correct, that --

18 ADMIN. JUDGE McDADE: -- of this
19 particular issue.

20 ADMIN. JUDGE FARRAR: Not the record of
21 decision 30 days before their petition. That wasn't
22 the, like signal event, different -- see, because what
23 I see you all doing is you point to some paragraph in
24 some letter two years ago, and you say ah-hah, there
25 it was. Now they're saying we waited, and here's a

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1 record of decision by the Department of Energy.
2 That's a big event. Why wasn't that the significant
3 event? You're saying you can find some stuff earlier.

4 MR. MARTIN: Well, I wasn't saying just
5 any stuff. I'm saying that they cited was from
6 earlier. The other two issues they cited, the one
7 that said that DOE was considering making changes, and
8 the study that was cited to say, to show that DOE
9 would have to make a change to the MOX facility. Both
10 of those pieces of information, the latest one, the
11 one that showed that they were thinking about using
12 different materials, was from March 28th.

13 ADMIN. JUDGE FARRAR: But then on whatever
14 date the ROD was, that DOE said ah-hah, now here's a
15 decision by DOE. I don't care what else they referred
16 to, that was the decision. Up to then -- now it may
17 still be premature. You may still win on that
18 argument, but up to then, they're saying that was the
19 thing that triggered it.

20 MR. MARTIN: Right. I mean, our argument
21 --

22 ADMIN. JUDGE FARRAR: And you're saying,
23 no, no, you can find some stuff in earlier documents
24 that they should have been alert.

25 MR. MARTIN: What was in the record of

1 decision was not anything different than what was in
2 the notice that they were going to prepare a
3 supplemental Environmental Impact Statement, which was
4 published March 28th, and which they cited.

5 ADMIN. JUDGE FARRAR: Okay. Suppose these
6 people had a lot of money, and two years ago they'd
7 hired you and me to advise them on this. When would
8 we have told them to file this petition? They're
9 saying okay, now we don't want to waste money on this.
10 We've got limited resources. We're going to the
11 neighborhoods collecting money. When are we going to
12 file this thing? Would we tell them don't worry about
13 it, you can wait two or three more years? Do we tell
14 them worry about it, or do we tell them what I've
15 taken away from here this afternoon; we have no idea?

16 MR. MARTIN: My belief is that we would
17 tell them that when DOE makes a change, or announces
18 that they're actually going to make a change, or
19 submits something to the NRC that they're going to
20 make a change, then 30 days of that time period --

21 ADMIN. JUDGE FARRAR: And that hasn't
22 happened yet.

23 MR. MARTIN: Correct.

24 ADMIN. JUDGE FARRAR: So their petition is
25 premature.

1 MR. MARTIN: Right.

2 ADMIN. JUDGE FARRAR: This contention is
3 premature.

4 MR. MARTIN: Right.

5 ADMIN. JUDGE TRIKOUROS: If the proceeding
6 is open.

7 MR. MARTIN: Yes.

8 ADMIN. JUDGE TRIKOUROS: If the proceeding
9 is not open, the 30 days is meaningless. Right?

10 MR. MARTIN: Well, do you -- license is
11 not issued yet, then you can still use 2.309(c) for an
12 untimely petition, instead of 30 -- you could call it
13 still a motion for concern, so the 30 days would still
14 be important, because for a late filing.

15 ADMIN. JUDGE FARRAR: Why is it untimely?
16 Do the regulations define timely and untimely?

17 MR. MARTIN: I don't believe they do.

18 ADMIN. JUDGE FARRAR: Right. You're
19 right, they don't define them. So why would you call
20 that untimely, when they act as fast as they humanly
21 can?

22 MR. MARTIN: Just using the word, and
23 2.309(c) says untimely petitions.

24 ADMIN. JUDGE FARRAR: But it doesn't say
25 when that is.

1 MR. MARTIN: Correct.

2 ADMIN. JUDGE FARRAR: Okay.

3 MR. MARTIN: Any more questions on the
4 late file contention?

5 ADMIN. JUDGE FARRAR: No. This was
6 supposed to be a 20-minute argument, and it's been an
7 hour and 45 minutes, but we've gotten a little into
8 some other issues.

9 Mr. Zeller, I promised you a minute of
10 rebuttal, but you're not required to use it.

11 MR. ZELLER: Thank you.

12 MS. CARROLL: Can we confer?

13 ADMIN. JUDGE FARRAR: You certainly may.
14 I mean, we don't want to hear why this is a bad
15 proposal by DOE. You've heard what we're interested
16 in. We're interested in the legitimacy of our
17 processes here, so if you want to tell us something
18 about that, you're welcome to tell us, but don't tell
19 us why this is a bad idea by DOE.

20 (Attorneys confer.)

21 ADMIN. JUDGE TRIKOUROS: Mr. Silverman,
22 while they're conferring, this design change process
23 that was alluded to, do you understand it?

24 MR. SILVERMAN: I know a little bit about
25 it. There is an internal design change process,

1 there's procedures for making design changes, and
2 there are procedures - and I'll be corrected if I'm
3 wrong here in a second - which would indicate that if
4 there is a change that necessitates a modification to
5 the application before it's approved, that we would
6 have to submit a change to the license application.
7 And it would be public, unless it's classified
8 information, or some other kind of protected
9 information. It precedes the 70.72 change process.
10 It's very similar to it.

11 ADMIN. JUDGE TRIKOUROS: So it's the
12 license application form of 70.72, and it's documented
13 -- is it documented anywhere? I mean, is this
14 something that I could go and read?

15 MR. SILVERMAN: Bear with me one second.
16 The process is documented in an internal procedure,
17 and we have to absolutely double check, but I think it
18 would be available. At this point, I don't believe
19 it's -- there would be any reason to protect it in
20 some way.

21 ADMIN. JUDGE TRIKOUROS: So it's an NRC
22 staff internal procedure.

23 MR. SILVERMAN: Oh, no, no. It's an
24 applicant procedure. It's an applicant procedure.

25 ADMIN. JUDGE TRIKOUROS: Oh, it's your

1 procedure.

2 MR. SILVERMAN: Absolutely. Our design
3 change process.

4 ADMIN. JUDGE TRIKOUROS: So the only way
5 the staff would know about it is if you submitted it
6 to the staff.

7 MR. SILVERMAN: Or if they came and
8 reviewed it.

9 ADMIN. JUDGE TRIKOUROS: So there must be
10 a document that was submitted to the staff.

11 MR. SILVERMAN: The staff doesn't review
12 and approve all procedures. There are many procedures
13 --

14 ADMIN. JUDGE TRIKOUROS: Then you're
15 operating under a set of procedures, which the staff
16 does not have access to.

17 MR. SILVERMAN: The staff does have
18 access. Bear with me one second. My understanding is
19 our procedure has been discussed with the staff in
20 some public meetings, but we have not submitted it to
21 the staff for review, and they haven't come to see it,
22 but it has been discussed in public meetings.

23 ADMIN. JUDGE TRIKOUROS: So it's only
24 documented as a minutes of some public meetings.

25 MR. SILVERMAN: Yes. We're obligated to

1 construct a facility in accordance with the
2 application. We are not obligated to have any
3 particular type of procedure to make sure we do that.
4 We do, in fact, have a procedure to make sure that we
5 do that, and if there is a change in the design that
6 warrants a change in the application, as it's
7 submitted, we have an obligation to make sure the
8 staff is aware of that, and we've done that.

9 ADMIN. JUDGE TRIKOUROS: I empathize,
10 because this is not the third MOX fuel fabrication
11 facility that we built, it's the first, and it may be
12 the last for a long time, so I can empathize. But it
13 is -- I think you need to empathize with what we're
14 going through in terms of understanding the process,
15 so that we can make decisions that make sense.

16 ADMIN. JUDGE FARRAR: Is there anybody
17 from the applicant or DOE in the room?

18 MR. SILVERMAN: We have some
19 representatives of both entities here.

20 ADMIN. JUDGE FARRAR: In case I forget at
21 the end, I want to assure them that our concern about
22 the legitimacy of the NRC's processes has nothing to
23 do with the merits of their application. If and when
24 that comes to hearing in front of us, we will attempt
25 to treat them as fairly as we're attempting to treat

1 the petitioners in terms of procedural rights. They
2 will get the same procedural and substantive right, so
3 this does not reflect that we harbor any animus toward
4 them. They just happen to be in the midst of a
5 proceeding that raises a lot of questions about how we
6 do business.

7 MR. SILVERMAN: We're certain of that,
8 Your Honor, without you having said that. Thank you.

9 ADMIN. JUDGE FARRAR: Do the petitioners
10 have something they wanted to add?

11 MR. ZELLER: Yes, Judge Farrar, briefly.
12 I've learned a lot in the last hour or so, and on top
13 of chimerical, I think I would pile exasperation seems
14 to be something which would apply here. We are
15 attempting with our remedy that we offered at the very
16 beginning of my testimony today to offer a process, a
17 way out, if you will, which is efficient, which is
18 respectful of both the public's right to intervene,
19 and of this Board's decision making process.

20 None of the alternatives that are
21 proffered are comparable to the extent, to the change
22 -- no comparable alternatives have been offered here.
23 The change process, which has been outlined here, is
24 murky, and is practicably useless to us.

25 The NRC did fail to evaluate significant

1 environmental impacts to process, which were based on
2 the processing of additional, significant additions,
3 perhaps 33 percent of impure Plutonium into this
4 facility, and so I rest my case.

5 ADMIN. JUDGE FARRAR: Okay. Thank you.
6 Ms. Olson, we usually have just one, as I said, one
7 party, one representative address each issue, but was
8 there anything you wanted to add?

9 MS. OLSON: Thank you. Yes. I would like
10 to add that I believe that the current changes in NRC
11 licensing privilege the applicant, and I very much
12 appreciate the Board's desire to address the reality-
13 base of the public's participation. And so thank you
14 very much for asking the questions, and I hope that
15 you will continue to recognize that in order for there
16 to be a - I'm just going to put some slang in here -
17 garbage in/garbage out. We want to see a process
18 that's not garbage.

19 ADMIN. JUDGE FARRAR: Okay. Well, don't
20 go away, because we have the second half of this yet
21 to do. But I would say in response to your comment,
22 when I finished being a law clerk 40 years ago, and my
23 colleagues have all heard this, the judge said to me,
24 "Never forgive, people can stand to lose, but they
25 can't stand not to be treated fairly."

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1 MS. OLSON: Thank you.

2 ADMIN. JUDGE FARRAR: And some of that is
3 evident here. Please don't tell my colleague, Judge
4 Rosenthal, that it took me an hour and 55 minutes to
5 do 20 minutes of argument. He'll never forgive me.
6 Let's take a --

7 MS. CARROLL: Excuse me. Do I get to say
8 anything?

9 ADMIN. JUDGE FARRAR: No, because you all
10 were supposed to split --

11 MS. CARROLL: Well, this is rough to
12 respond doing a collaborative law suit, and it's
13 awkward. And I don't always feel that --

14 ADMIN. JUDGE FARRAR: Wait, didn't we do
15 that?

16 MS. CARROLL: -- certain points were
17 represented. And I can be super quick, but there are
18 some things --

19 ADMIN. JUDGE FARRAR: Wait. We did this
20 in Augusta, and we told you -- we said that on each
21 issue only one person gets to speak.

22 MS. CARROLL: Well, if that's not working,
23 then what do we do? Then do we just set up two
24 interventions?

25 ADMIN. JUDGE FARRAR: No, because we

1 wouldn't -- go ahead.

2 MS. CARROLL: I mean, it's an interesting
3 experience, and it's the first one. I want to make a
4 complete record. Give me 45 seconds.

5 ADMIN. JUDGE FARRAR: Oh, absolutely.

6 MS. CARROLL: I want to point out that
7 Contention Six is supported by an expert witness.
8 It's supported by CLI-02-07 that states that
9 "significant new information will reopen the EIS." We
10 met the threshold for Contention Six to be accepted.
11 It's new information, it's significant information.
12 A supplemental EIS needs to be done. We followed the
13 rules of the NRC. We brought it up timely. We have
14 no problem waiting until DOE, and Shaw AREVA, and NRC
15 have it together for us to litigate it. It's a
16 potentially significant fraction of throughput to the
17 thing, and we sent you a document and a footnote here.
18 We haven't raised this issue yet, but our expert says
19 that this is not actually new Plutonium, and it hasn't
20 been analyzed. So, you see, it's really not all that
21 speculative. We don't really have to wait. Am I
22 right?

23 MR. SILVERMAN: Your Honor, if it's new
24 information that they haven't raised, I object it
25 being raised. And this is not an evidentiary

1 proceeding.

2 MS. CARROLL: Well, it's kind of not.
3 It's in there, we just hadn't pointed this point out,
4 and I thought this was the time to at least bring it
5 to your attention.

6 DR. LYMAN: To clarify the technical
7 aspects, I think it's important that we understand, if
8 I could have just 30 seconds to explain. Because I
9 always feel that it's best to make sure --

10 ADMIN. JUDGE FARRAR: Dr. Lyman, hold on.
11 Mr. Silverman, you're indicating you want to object to
12 this.

13 MR. SILVERMAN: I do. It's not an
14 evidentiary proceeding, Your Honor. This is an
15 argument for the lawyers and the representatives of
16 the parties, and Dr. Lyman hasn't been sworn. We
17 haven't had opportunities for discovery, there's no
18 admitted contention. I think it's inappropriate at
19 this stage, so I would object to him speaking.

20 ADMIN. JUDGE FARRAR: Did you ever see *My*
21 *Cousin Vinnie*?

22 MR. SILVERMAN: Bits and pieces.

23 ADMIN. JUDGE FARRAR: That's a very cogent
24 argument, one of the best you ever made. Overruled.
25 Go ahead.

1 DR. LYMAN: Thank you. I'd just like to
2 clarify. In the document, one of the documents we
3 submitted, which was the DOE plan. And this is the
4 document, by the way, that triggered the contention.
5 It was an attachment to the amended record of
6 decision. It's dated September 2007, and as we said
7 in our contention, this is the first time that there
8 was any indication DOE had considered modifying the
9 MOX plant to be able to deal with some of the non-pit
10 Plutonium.

11 In this document, on page 21, there's a
12 bar chart which makes it clear that some of the
13 material that's part of the 33 or 34 tons that was
14 originally the design-basis for this plan, and is part
15 of this proceeding, some of that material cannot be
16 processed without the modification that DOE is
17 referring to here, and that's clear from the bar
18 chart. And so, therefore, this isn't speculative at
19 all, but it's simply, it's a matter of information
20 that the applicant has failed to provide in the
21 context of this proceeding, that they do not have 34
22 metric tons of weapons-grade Plutonium, which is pure
23 enough to be operated in the plant according to the
24 design-basis. And so that's the only point I'd like
25 to make, and this is clear from the bar chart on page

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1 21. Thank you.

2 ADMIN. JUDGE FARRAR: Okay. Thank you.
3 It's 3:30. Let's take a 10-minute break. We'll be
4 back promptly at 3:40, and we will turn to the
5 reconsideration, half hour a side, reconsideration of
6 our decision, but many of the things dealing with case
7 management and so forth we've already touched on, so
8 that may be mercifully shorter than it would have
9 been. Thank you.

10 (Whereupon, the proceedings went off the
11 record at 3:36:07 p.m., and went back on the record at
12 3:47:06 p.m.)

13 ADMIN. JUDGE FARRAR: All right. We're
14 back on the record. Applicant, staff, who is going to
15 go first on this one?

16 MR. SILVERMAN: The applicant.

17 ADMIN. JUDGE FARRAR: Okay. This is on
18 the reconsideration of our prior decision.

19 MR. SILVERMAN: Your Honor, I'm not sure
20 what procedure you have in mind, but I would
21 recommend, and this is probably what you have in
22 mind, that we do one of your -- I think there are five
23 issues. We do one issue, and all the parties address
24 it?

25 ADMIN. JUDGE FARRAR: Yes, if you want to,

1 or you can weave them together, however. I suppose --

2

3 MR. SILVERMAN: We might have a clearer
4 record if we do it that way, but anyway you'd like.

5 ADMIN. JUDGE FARRAR: Yes, go ahead.

6 ADMIN. JUDGE McDADE: That's fine, yes.

7 MR. SILVERMAN: Okay. Well, my
8 understanding is that -- what I'll do is, I'll address
9 very briefly the first question that the Board has
10 asked. I'm really largely on this one going to defer
11 to the staff, because it really refers to the staff.

12 ADMIN. JUDGE FARRAR: The question there
13 is, they made a representation in their brief that I
14 didn't see what the support was for, so if you want to
15 try to defend it, you're welcome to, or you could skip
16 it.

17 MR. SILVERMAN: Well, maybe you should
18 take this one first. I'm not entirely sure what the
19 representation is.

20 ADMIN. JUDGE FARRAR: Okay.

21 MS. JONES: Good afternoon. I'm Andrea
22 Jones.

23 ADMIN. JUDGE FARRAR: Ms. Jones, I think
24 we were talking about your November 9th brief. On
25 page 3, you talk -- it was the issue as to whether

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1 there would be another Notice of Hearing, and you were
2 referring to the fact that a dual hearing is allowed.
3 And then you said, "The Commission's decision to allow
4 for hearing on the operation of this facility well
5 before construction is completed demonstrates their
6 comfort with conducting proceedings in this fashion."
7 Now let me ask you a couple of questions first.

8 MS. JONES: Yes.

9 ADMIN. JUDGE FARRAR: The March 14th
10 notice was put out by this gentleman over here. Did
11 any of you go to the concurrence sheet to tell me, so
12 you can tell us how high up the ladder -- I'm not
13 questioning whether he was authorized, whether there
14 were delegations down.

15 MS. JONES: Understood.

16 ADMIN. JUDGE FARRAR: But how high up the
17 ladder did he get approval; namely, did the
18 Commissioners approve this Notice of Hearing at this
19 time, or did it just go out, I think the used the word
20 as a "staff functionary" kind of thing?

21 MS. JONES: Unfortunately, I don't really
22 have an answer for that, because I really didn't check
23 the concurrence sheet to see how far up it went.

24 ADMIN. JUDGE FARRAR: I did. It didn't go
25 anywhere.

1 MS. JONES: Okay.

2 ADMIN. JUDGE FARRAR: So can we agree that
3 the Commissioners never saw this notice, and have --
4 institutionally had no idea what's in it?

5 MS. JONES: I think it would be very
6 difficult for me to agree to that, because I don't
7 know what --

8 ADMIN. JUDGE FARRAR: Okay.

9 MS. JONES: -- the Commission could have,
10 or could not have seen.

11 ADMIN. JUDGE FARRAR: Okay. Then we did
12 get a concession from Mr. Silverman that he could have
13 filed this application much later than he did. He
14 filed it when he did. You all processed it. Once you
15 said it was eligible for docketing, or whatever the
16 magic words are, then you put out a notice.

17 MS. JONES: That's correct.

18 ADMIN. JUDGE FARRAR: So here we are. But
19 the Commission institutionally had nothing to do with
20 that. So when you say, "The Commission's decision to
21 allow this demonstrates the Commission's comfort",
22 that's kind of a stretch.

23 MS. JONES: Okay. I -- I'm sorry, go
24 ahead.

25 ADMIN. JUDGE FARRAR: Or is that kind of

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1 a stretch?

2 MS. JONES: I think what we were trying to
3 explain was the process of dual hearings. We weren't,
4 necessarily, seeking to address the timing, or the
5 Commission's intent with regard to timing, since based
6 on my research and reading, I was not able to find
7 anything that explicitly addresses that issue. So
8 this particular statement was made purely for the
9 purposes of demonstrating that the Commission had
10 previously decided that bifurcating these proceedings
11 was appropriate.

12 ADMIN. JUDGE FARRAR: Okay. But they --
13 then there's no representation in there that the
14 Commission thinks it's a really great idea to do
15 operating license hearings before construction starts.
16 They may when it comes to them, agree with that or not
17 agree, but right now, we don't want to start by saying
18 they think that's neat.

19 MS. JONES: I can't -- I honestly cannot
20 say in this particular proceeding.

21 ADMIN. JUDGE FARRAR: Okay. Thank you.
22 Mr. Silverman, the next question deals with
23 70.23(a)(8), and you've almost kind of addressed that.
24 Is there anything else you want to --

25 MR. SILVERMAN: I would. In this context,

1 I haven't addressed, I think, the critical point.

2 ADMIN. JUDGE FARRAR: Go ahead.

3 MR. SILVERMAN: The critical point is that
4 now we're talking about Contentions Three and Four.
5 We're not talking about Contention Six. This is
6 reconsideration of --

7 ADMIN. JUDGE FARRAR: Right. This is
8 reconsideration.

9 MR. SILVERMAN: Yes. And Contentions
10 Three and Four relate to the waste solidification
11 building, both environmental and safety issues
12 associated with that. 70.23(a)(8) relates exclusively
13 to whether Shaw AREVA MOX Services has constructed a
14 MOX facility in accordance with the application. It
15 has nothing to do with the waste solidification
16 building.

17 ADMIN. JUDGE FARRAR: Okay. We talked
18 about the waste solidification building in our
19 decision, but we also talked a lot about the
20 commitment the staff put on you about what you're
21 supposed to do inside your own facility, so let's
22 leave out the waste solidification building, and let's
23 focus on that.

24 MR. SILVERMAN: Sure. I believe that's
25 the set point issue you're referring to?

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1 ADMIN. JUDGE FARRAR: Right. Now
2 70.23(a)(8), again, I'm sitting at the kitchen table
3 hired by the interveners, and they say I want to file
4 a contention on 70.23(a)(8). You told me before they
5 couldn't file the grand Contention of Omission. What
6 contention can they possibly file?

7 MR. SILVERMAN: Today?

8 ADMIN. JUDGE FARRAR: No, no, May 14th.
9 What contention could they have possibly filed, other
10 than this set point deal.

11 MR. SILVERMAN: Which they didn't file.
12 They didn't file any issue on the set point issue.

13 ADMIN. JUDGE FARRAR: Well, we said they
14 did. They filed something that referred to what the
15 ACRS said, and we tracked that down and found out --
16 that led us to what the staff said. The staff put a
17 requirement on you that you didn't -- have not
18 complied with, as far as we can find out, and that's
19 what led us to the Contention of Omission.

20 MR. SILVERMAN: Your Honor, they did quote
21 the ACRS. You are correct, and that does -- that
22 phrase, that section from the ACRS language does talk
23 about the language in the SER that talks about us
24 having set points established in the LA. That is not,
25 in our view, what they contended. It happens to be in

1 the -- it's discussed, it's quoted, but that is not
2 their contention. Their contention is we have no
3 concrete plan to build the WSB.

4 ADMIN. JUDGE FARRAR: Well, don't Boards
5 traditionally, even in a lot of these proceedings,
6 don't Boards traditionally at the first pre-hearing
7 conference collapse, re-frame, merge different
8 contentions and come out with an order saying
9 Contentions Nine and Ten are admitted, re-framed by
10 the Board, as follows?

11 MR. SILVERMAN: That does happen, and I
12 don't believe that an appropriate re-framing of these
13 contentions would include the set point issue, because
14 I just don't believe it's reasonably encompassed
15 within the issues they raised in the contentions.

16 ADMIN. JUDGE TRIKOUROS: I disagree.
17 Although the words "alarms" and "set points" weren't
18 used, I'll quote you from their basis of Four, not the
19 part that refers to Three, but the part that's just
20 Four. It says, "There is also no indication in the
21 ISA Summary that MOX Services will conduct operations
22 at the MOX Plutonium facility in a way that assures
23 there is always sufficient waste storage capacity to
24 bring the facility to a safe configuration in the
25 event that waste receipt is interrupted."

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1 I could easily translate that to alarms
2 and set points, and actually many others, so --

3 MR. SILVERMAN: Fair comment, Your Honor.
4 It's a close issue, yes.

5 ADMIN. JUDGE FARRAR: We may want to come
6 back to that, but let's get back to my question.

7 MR. SILVERMAN: Sure.

8 ADMIN. JUDGE FARRAR: Given that you
9 hadn't turned over a spade of earth on May 14th, what
10 contention could they have filed -- if you were
11 advising them, went over to the other side, you're
12 advising them, what can they file that's not
13 premature?

14 MR. SILVERMAN: Based upon 70.23(a)(8)?

15 ADMIN. JUDGE FARRAR: No, based on
16 anything.

17 MR. SILVERMAN: They could file any
18 contention they wish that indicated that the
19 application was deficient in some fashion, either by
20 omission, or error.

21 ADMIN. JUDGE McDADE: I think what Judge
22 Farrar is getting at is something more than just the
23 application itself. The application says we are going
24 to build a plant in the following way.

25 MR. SILVERMAN: Right.

1 ADMIN. JUDGE McDADE: And assume for the
2 sake of argument that if, in fact, the plant were
3 built that way, it would be appropriate to be
4 approved. It would be appropriate to be licensed.
5 Part of the approval process, and the language of the
6 regulation in the 70.23(a)(8) has to do with the
7 license will not be issued unless the Commission is
8 satisfied that the applicant has demonstrated that the
9 principal buildings have been built in conformance.

10 MR. SILVERMAN: Yes.

11 ADMIN. JUDGE McDADE: So would it be a
12 possible contention, as I understand what Judge Farrar
13 is asking, for a petitioner to say at this point in
14 time the applicant has not demonstrated that the
15 facilities, the principal portions of the facility
16 have been made in accordance with its application.
17 Therefore, the application under the regulation cannot
18 be approved, that a Contention of Omission is, there
19 needs to be that proof. We filed the contention now
20 that at that later point in time, when the staff would
21 be doing its review under 70.23(a)(8), we then have an
22 opportunity to determine, and to litigate if we
23 believe it has not been the case, that the applicant
24 has demonstrated that, because the staff can't approve
25 it unless the applicant has demonstrated that. So we

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1 are filing a Contention of Omission now that at a
2 later point in time either precludes the granting of
3 the license, or requires that the applicant
4 effectively cure that Contention of Omission by
5 demonstrating, as is required under (a) (8).

6 MR. SILVERMAN: If I may use a
7 hypothetical as an example to try to at least explain
8 my view of that. If an intervener, if a petitioner
9 filed a contention that said there was a failure to
10 submit a material control plan, or emergency plan,
11 something like that, omitted from the application, and
12 the regulations did not require that plan to be
13 submitted with the application, one would argue it is
14 a Contention of Omission, but I would argue that it is
15 contrary to the regulations, and would be
16 inadmissible. And I think the same thing applies
17 here. There is no regulatory requirement upon filing
18 of the application to have demonstrated that we have
19 constructed in accordance with the regulations; and,
20 therefore, I think it would be inadmissible.

21 ADMIN. JUDGE FARRAR: Okay. Then when --
22 then you're back in our conundrum that every week,
23 even though they can't get on the site to watch, they
24 have to come back and say you didn't do the foundation
25 right, you didn't do -- now three weeks later you

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1 didn't do the electrical right. I don't know the
2 innards of your facility, but they then need to come
3 back every day, every week, every month and tell us
4 something is wrong with construction. And if they
5 don't, they're too late.

6 MR. SILVERMAN: I think once they have
7 notice of an issue, they have an obligation to raise
8 it in a timely manner.

9 ADMIN. JUDGE McDADE: But the question --
10 and, again, what we're trying to get at is, is there
11 a way through the filing of a Contention of Omission
12 that a putative petitioner can shift that burden to
13 the applicant? Again, not that the application itself
14 is deficient, not saying that at the time the
15 application was submitted there was anything that
16 should have been in there, that wasn't in there, but
17 saying, instead, that under the regulation, the
18 Commission cannot grant the license unless and until
19 it determines that the plant construction of the
20 principal structures, systems, and components approved
21 pursuant to Paragraph B of this section has been
22 completed in accordance with the application. For
23 them to say that there is no basis in the record at
24 this point in time for the Commission to make that
25 finding, so it's effectively saying a Contention of

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1 Omission; and, therefore, to keep open that issue that
2 they would be able to litigate at a later point in
3 time once the construction is completed, once the
4 Commission is at the point of doing its certification
5 effectively, its review, putting its imprimatur on
6 under 70.23(a)(8), at that point, they get to say now
7 let's see what has been cured and what hasn't. Let's
8 see what it is that the staff is making that
9 determination based on, and/or any deficiencies. Is
10 that a way that a potential petitioner can keep this
11 issue available for hearing?

12 I think what Judge Farrar's concern is,
13 under the way that you have posited it, if the
14 application is done correctly, then there's no viable
15 way for a petitioner to challenge the actual
16 construction, that they have to rely only on the
17 staff. Is there a way that they could do more through
18 a Contention of Omission? And if not, why not?

19 MR. SILVERMAN: Again, if at some point in
20 the process of construction - I hope I'm answering
21 your question - they believe that we have failed to
22 meet that regulation, they may file a new contention,
23 or a new petition. At this point in time, I do not
24 think it would be -- I think there is no genuine issue
25 of material fact or law at this point in time when

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1 there is no legal obligation to have even begun
2 construction, so I do not believe at this point in
3 time, or upon the filing, May 14th, that there would
4 have been an opportunity to raise a legitimate issue
5 about whether we have, in fact, constructed through a
6 Contention of Omission.

7 ADMIN. JUDGE McDADE: We're all - and,
8 again, I just want to make it clear - the premise is,
9 at this point in time, there is no indication
10 whatsoever that the applicant has done anything wrong,
11 or anything deficient. That they have, the applicant
12 has done exactly what it is supposed to have done,
13 that it has submitted an application, the application

14 --

15 mR. SILVERMAN: Yes.

16 ADMIN. JUDGE McDADE: -- is perfect.
17 There is no defect in the application itself. But a
18 putative intervener says we're concerned not just that
19 the application is good, not just that the plan is
20 good, but this is a construction and operating
21 license. What we want to do is to preserve our right
22 to litigate that, to inquire at a hearing whether not
23 just the plan, but the application has been done
24 correctly, that the regulation says that the staff,
25 that the Commission can't approve the application

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1 until they have determined that you all have
2 demonstrated that you have done it in accordance with
3 this.

4 MR. SILVERMAN: I understand.

5 ADMIN. JUDGE McDADE: And what they're
6 saying is, and the hypothetical posited is, is there
7 a way that a putative intervener can say by filing a
8 Contention of Omission we want to preserve our right
9 to challenge.

10 MR. SILVERMAN: I understand.

11 ADMIN. JUDGE McDADE: We're not going to
12 be there in the plant every day. We're not going to
13 be -- the staff can be there. They're not going to be
14 there every day either, but they're going to come in
15 periodically. They're going to do a review before the
16 staff -- before you all get nuclear materials,
17 radioactive materials to start process. We're not
18 going to have that kind of access.

19 MR. SILVERMAN: I understand.

20 ADMIN. JUDGE McDADE: What we want to do
21 is to preserve our right at the end, and the question
22 is, would a Contention of Omission say that you all
23 haven't demonstrated that the plant has been produced
24 in accordance with the application, would that
25 preserve their right to challenge at the end? And if

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1 not, why not?

2 MR. SILVERMAN: Again, Your Honor, I
3 believe I understand your question, and I think what
4 I said before is my response to that. I don't think
5 a Contention of Omission is a valid mechanism for
6 doing that either as of the filing date of the
7 application, or today.

8 ADMIN. JUDGE FARRAR: Now you don't object
9 to the Contention of Omission Doctrine, as such, since
10 the Commission invented it.

11 MR. SILVERMAN: Well, no, I think --
12 absolutely not. I believe I know what a Contention
13 of Omission was, and I don't believe what you are
14 positing is a legitimate Contention of Omission, is
15 what I'm saying.

16 ADMIN. JUDGE FARRAR: Okay.

17 MR. SILVERMAN: No question there is such
18 a thing, absolutely. And I subscribe to the
19 Commission's --

20 ADMIN. JUDGE FARRAR: Judge McDade's
21 hypothetical, and I go back to the entire Common Law,
22 Constitutional Law, there's a doctrine throughout most
23 of the law that the person in control of information
24 has the burden of action. If we're in a financial
25 case, and the company hides the Chief Financial

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1 Officer, we have a presumption that if he had
2 testified, it would have been against the company.
3 There's a whole lot of doctrines about the person in
4 control has to take the action, may not have the
5 ultimate burden of proof, but has to take the action.
6 Under Judge McDade's hypothetical, this puts the
7 burden back on you, instead of them wondering what's
8 happening on your site, you're the only people who
9 know what's happening on your site. So once a week
10 you say to the staff, we finished the foundation, we
11 finished this, we think we finished that. They get
12 notice of that, and they can challenge it; otherwise,
13 they're rummaging around in the dark trying to say
14 gee, we wonder how that foundation? They're always
15 early, or they're always late. That's what Judge
16 McDade's Contention of Omission says, you haven't done
17 this.

18 MR. SILVERMAN: I understand.

19 ADMIN. JUDGE FARRAR: So keep us posted as
20 you do those things, and we'll keep you posted about
21 whether want to file a contention.

22 MR. SILVERMAN: And there are many
23 mechanisms for keeping the petitioners posted,
24 inspection reports as the process is going forward of
25 construction, and other public documents, meetings

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1 and the like. I just believe that what you are
2 positing is, in my view, with all due respect, a
3 misinterpretation of the Contention of Omission
4 Doctrine, as I understand it.

5 ADMIN. JUDGE FARRAR: Okay. Then you're
6 in favor of the system that these people show up every
7 day, every week on our doorstep with a contention.

8 MR. SILVERMAN: My obligation is to --
9 it's not a question of whether I'm in favor of it.
10 It's to follow the regulations, and the procedures
11 that the Commission has established for hearings.

12 ADMIN. JUDGE FARRAR: Oh, we -- you're
13 going to give us a memo on that, because Judge McDade
14 suggested one procedure we could follow is say we're
15 not going to do that, because that's unfair and
16 inefficient, and we're going to wait until 60 days
17 after the SER. So unless you can tell us that that's
18 prevented by the regulations, we might come to the
19 conclusion that that would be a sensible way to
20 proceed.

21 MR. SILVERMAN: I understand.

22 ADMIN. JUDGE FARRAR: So I'm giving you a
23 chance now to give me an alternative. If you don't
24 want us to do that, and we don't want them to show up
25 every day, and every week for the next seven years,

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1 how do we handle it?

2 MR. SILVERMAN: I do not have an
3 alternative to the procedures that I believe are in
4 place at this time.

5 ADMIN. JUDGE FARRAR: Okay. Here's what
6 I want you all to think about, and we'll decide this
7 in an hour. Maybe the three parties should sit down
8 and try to decide what that alternative means would
9 be. Now let me say a word to the staff, I'm deadly
10 serious about this. I suggested this in Millstone
11 once. I said we can't get to the decision in this
12 case for a month, so if you all want to, why don't you
13 take a couple of weeks and decide, and try to settle
14 it. The staff went up to the Commission and said that
15 I had deferred the case, and directed you to settle
16 it. I'm not deferring this case. We're going to turn
17 to it, and we're going to decide it.

18 I'm saying you all have -- we're going to
19 give you the opportunity. You don't have to take it.
20 If you say we don't want to settle, Mr. Silverman
21 doesn't want to settle, Ms. Carroll, you can say you
22 don't want to settle. This is not mandatory. I'm
23 saying it might make sense in light of the answer Mr.
24 Silverman just gave, for the three parties to say yes,
25 that doesn't make sense.

1 Mr. Silverman, I know you don't like 60
2 days after the SER. You don't have to justify not
3 liking that. I know you don't like that. You know we
4 don't like, and the petitioners probably don't like
5 coming in every week. Give us something else within
6 the rules, or ask us to say, if it's not within the
7 rules, ask us to take your suggestion and send it to
8 the Commission, and ask them if - just like they
9 issued a special order to start this proceeding many
10 years ago, that they might not issue a special order
11 now saying gee, this is an unusual proceeding. Here's
12 the way we think it should be run. If you don't, if
13 any of you chooses not to do that, that's fine, but
14 don't tell the Commission that I ordered you to
15 settle. Don't tell them that I said we were going to
16 defer the case pending settlement. This is an
17 opportunity for you to take to try to come up with
18 something.

19 Now that's my idea. I'll confer with my
20 colleagues at the end and see if we really want to do
21 that. But, please, have that in mind.

22 ADMIN. JUDGE McDADE: Okay. If I could,
23 sort of going back, I had addressed this question with
24 Mr. Silverman. Mr. Martin, or Ms. Jones, if I could
25 address it to you, and sort of also a two-part

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1 question is, first of all, sort of hypothetically,
2 would it be possible for a petitioner to preserve the
3 issue? And what in the regulations prevents that of
4 saying a Contention of Omission, the petitioner
5 hasn't, in fact, couldn't at this point demonstrate
6 that the plant has been manufactured in accordance
7 with the plan. It's just too early, but we want to be
8 able to preserve the right to litigate under --
9 whether or not 70.23(a)(8) has been complied with,
10 and we're going to do that by terms of a Contention of
11 Omission. That's the first question is, what in the
12 regulations precludes that, if any? And then,
13 secondly, assuming -- well, secondly, however you
14 answer that question is, does it matter because could
15 we, in any way, say that what the petitioners in this
16 case have done could be viewed as that kind of a
17 Contention of Omission, or is it well, maybe
18 hypothetically that could be the case, but it doesn't
19 matter here, because that kind of petition is not
20 filed, that kind of contention isn't before the Board?
21 So it's sort of a two-part question, and whichever --
22 Mr. Martin, Ms. Jones, whoever?

23 MR. MARTIN: Sure. I think the problem
24 with that approach is the Contention of Omission
25 Doctrine, as originally spelled out, 2.309(f)(1)(vi)

1 essentially says that a petitioner believes that the
2 application fails to contain information on a relevant
3 matter, as required by law." And it's hard in this
4 case to see how an application would contain the
5 finding needed in 70.23(a)(8).

6 ADMIN. JUDGE FARRAR: What's that
7 regulation?

8 MR. MARTIN: 2.309(f)(1)(vi). That's just
9 the Contention Admissibility standards.

10 ADMIN. JUDGE FARRAR: Yes, but the --
11 we're talking about Contention of Omission as the
12 Commission enunciated it.

13 MR. MARTIN: Right. And I think that they
14 ---- that's the basis of how they enunciated it. And
15 they must point out some legal requirement, they must
16 show that something was omitted from the application,
17 that the applicant had a legal responsibility to
18 include in the application.

19 ADMIN. JUDGE FARRAR: I must be crazy. It
20 says in here --

21 ADMIN. JUDGE McDADE: Well, it will take
22 us a long time to --

23 ADMIN. JUDGE FARRAR: Well, let's not have
24 a sanity hearing. But even though Mr. Silverman says
25 he doesn't need to have it in the application --

1 MR. MARTIN: Right.

2 ADMIN. JUDGE FARRAR: -- the central issue
3 in front of the staff over the next seven years is,
4 did they build it the way they said.

5 MR. MARTIN: Right.

6 ADMIN. JUDGE FARRAR: And you've just told
7 me that's not a legal obligation to be in the
8 application.

9 MR. MARTIN: No.

10 ADMIN. JUDGE FARRAR: And I say so what?

11 MR. MARTIN: Okay. The distinction I'm
12 trying to make here is 70.23(a)(8) is a finding that
13 the staff must make that it was built --

14 ADMIN. JUDGE FARRAR: But it goes to the
15 whole reason they have an application, that 100 of you
16 people will be employed reviewing it.

17 MR. MARTIN: So if there's any information
18 that we would need to make that finding that was not
19 included in the application, that was supposed to be
20 in the application, that would be a good Contention of
21 Omission, to say they -- they need to show something
22 that was supposed to be in the application, but they
23 were not included in the application.

24 ADMIN. JUDGE McDADE: What if my
25 contention is that the staff hasn't done an

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1 Environmental Impact Statement, the staff's
2 Environmental Impact Statement is what the hay, we
3 don't care. Now that's the Environmental Impact
4 Statement. We couldn't be bothered. We don't think
5 that anything to do with nuclear could have an impact
6 on the environment. So I say well, gee, I'd really
7 like to litigate that. It seems to me that there's an
8 inadequate Environmental Impact Statement. But what's
9 --

10 MR. MARTIN: Well, then, yes, that would
11 be a Contention of Omission, because you would say we
12 have an obligation under NEPA, you could cite NEPA
13 that the staff didn't provide, didn't do their NEPA
14 duties as they were supposed to.

15 ADMIN. JUDGE McDADE: Right. And here
16 we're saying that the Commission can't -- until the
17 Commission determines that the plant has been made in
18 accordance with the plan, it can't grant the
19 application. So what we're saying is, the record is
20 deficient, the Commission cannot properly make that
21 decision, because initially a Contention of Omission,
22 there's no facts before the Commission on which you
23 could make that decision. But now we get to the point
24 immediately before the application is to be granted,
25 that the license is to be issued, and I want to still

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1 say, you know, the information is inadequate. I filed
2 a Contention of Omission back on day one, a long time
3 ago, and by doing that, I've now shifted the burden to
4 the staff and the applicant to demonstrate that this
5 has been -- this requirement has been met, that the
6 Contention of Omission, that the omission has been
7 cured. So rather than me having to be there as a
8 petitioner every day going through, looking at what
9 has been done, where I really don't have access, I
10 really don't have resources, that I have to wait until
11 the end of the process, that now that the staff is
12 getting ready to puts its imprimatur, the Commission
13 is getting ready to grant the license, I want to be
14 able at that point to challenge whether or not the
15 record is sufficient for the Commission to make that
16 determination. But I wanted to preserve it with a
17 Contention of Omission up front. There is not
18 sufficient evidence in the record at this point on
19 which the staff could make that determination.
20 Everybody agrees that that would be the case. You
21 have to wait and see what happens.

22 So my question is, why could that
23 Contention of Omission not be done in order to sort of
24 preserve the issue from the standpoint of a putative
25 petitioner? Where in the regulation is that

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1 precluded? And then my next question is, are we just
2 simply -- is this a hypothetical, how many angels on
3 the head of a pin, because there's nothing in the
4 petition that these petitioners have put forward that
5 could be stretched to be that kind of a Contention of
6 Omission?

7 MR. MARTIN: The answer to the first half
8 of the question, I mean, I kind of have to go back to
9 my last answer, is that yes, we can't make that
10 finding yet. But it's the staff's position that for
11 a true Contention of Omission, they must show us what
12 information is not in the application that the
13 applicant was required to put in the application.

14 ADMIN. JUDGE McDADE: When I raised the
15 hypothesis about the totally deficient Environmental
16 Impact Statement, that the staff, for whatever reason,
17 just sort of blew off its obligation under NEPA. That
18 would be a viable contention.

19 MR. MARTIN: Because you would have NEPA,
20 and you would say staff, under NEPA, you are required
21 to look at these alternatives, or you're required to
22 do this analysis. You did not do this analysis.

23 ADMIN. JUDGE McDADE: Right. And here,
24 under 7.23(a)(8), the staff is required to make this
25 determination. And the staff needs to have a basis in

1 fact for making that determination. How is it
2 theoretically different? Ms. Jones?

3 MS. JONES: Yes. I think it appears that
4 under 70.23(a)(8), I think according to the staff's
5 interpretation of that, this particular facility - and
6 correct me if I'm wrong, but I think that you are --
7 what you're saying is the Contention of Omission
8 flows from the petitioner's contention that the waste
9 solidification building has not been built?

10 ADMIN. JUDGE FARRAR: No, we're talking
11 general.

12 MS. JONES: In general.

13 ADMIN. JUDGE FARRAR: We're going to get
14 to the specifics of this contention. We're talking
15 about -- the first question before we get to the
16 specifics of this one, how can they file any
17 contention?

18 MS. JONES: How would they file any
19 contention?

20 ADMIN. JUDGE FARRAR: Any contention now.
21 I'm sorry, back on May 14th, since construction didn't
22 start, August 1st, until August 1st. Maybe the answer
23 is, and Mr. Martin cited Section 6, which starts, you
24 have to provide sufficient information to show that a
25 genuine dispute exists. Well, a genuine dispute does

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1 exist.

2 MS. JONES: That's correct.

3 ADMIN. JUDGE FARRAR: It hasn't been
4 constructed.

5 MS. JONES: Right.

6 ADMIN. JUDGE FARRAR: Then it says the
7 information must include references to particular
8 portions of the application. That's nice language,
9 because that's how it usually works, but sometimes
10 these regulations are written with particular
11 situations in mind.

12 MS. JONES: I understand.

13 ADMIN. JUDGE FARRAR: And what we have
14 here, and Mr. Silverman is going to tell me if there's
15 ever been an application filed for an operating
16 license before construction started, we have a
17 situation where the person who wrote the regulation
18 wasn't anticipating this situation. And you all seem
19 to think that doesn't matter, just apply the
20 regulation the way it's written, but it's not written
21 for that situation. What are we supposed to do? So
22 you're saying -- so this language, the Contention of
23 Omission can only deal with the application, that's
24 great when you're dealing with an --

25 MS. JONES: But that's just as we

1 understand it.

2 ADMIN. JUDGE TRIKOUROS: I'm not a big fan
3 of asking you to construct contentions for people,
4 frankly, but I thought I heard a contention that was
5 not filed; specifically, that the license application
6 was incorrect in that the facility as designed cannot
7 process the waste, as available. And, yet, that
8 contention was not filed. And there's an answer to
9 the question that Judge Farrar just asked, what kind
10 of a contention could have been filed? Well, there it
11 is. You just mentioned it; and, yet, you didn't file
12 that contention.

13 MS. CARROLL: For clarification, we were
14 referring to the Plutonium, and the rod in Contention
15 Six. I believe that's what you're referring to, and
16 we pointed out at page 21 of the supplement where
17 that's actually Plutonium that's actually been in the
18 program, and hasn't been analyzed. And you're right,
19 that point was not specifically made in our
20 contention. And I apologize if I'm out of order.

21 ADMIN. JUDGE FARRAR: No, no, you're fine.

22 ADMIN. JUDGE TRIKOUROS: So it's clear
23 that any problems that you would have had with the
24 license application could have been identified and
25 filed in a timely manner. In some cases they were,

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1 and others, apparently, they weren't. And I
2 understand the timing available to you is not
3 extremely long for a 2,000-page document that's rather
4 detailed. But I think the question --

5 MS. CARROLL: Pardon me, You're looking
6 at me. Am I up?

7 ADMIN. JUDGE FARRAR: No.

8 MS. CARROLL: Okay. But I'm paying
9 attention. I just wasn't sure how this --

10 ADMIN. JUDGE TRIKOUROS: What we're trying
11 to understand is where we go from here.

12 ADMIN. JUDGE FARRAR: Let's focus on this
13 Contention Four. Leave out Three for a minute, let's
14 take Four, where the staff, and let's say under Four
15 we're going to exercise what Boards have done from the
16 beginning of time. They're going to take the
17 contention, and they're going to see what it means,
18 and they're going to reshape it, and say Contention
19 such and such is admitted as a Contention of Omission,
20 and it states the following.

21 The staff told - and this question is
22 addressed to the staff, and, Mr. Silverman, you can
23 answer it after them. The staff said to the applicant
24 your application must include the following. The ACRS
25 said yes, that's a good idea. And the application

1 doesn't include the following, and the interveners say
2 you didn't do that. Why is that not plain and simple,
3 forgive everything we've said this afternoon, why is
4 that not a valid Contention of Omission? You told
5 them last proceeding it to be in there, and it isn't.

6 MS. JONES: Well, I think there's two ways
7 to answer. And I understand --

8 ADMIN. JUDGE FARRAR: Would one of them be
9 yes, it's valid?

10 MS. JONES: Well, I understand the
11 question that you're asking, and there's several
12 responses to that. One, I would say that the staff is
13 currently ---- they are currently reviewing the
14 application, and they are currently looking at that
15 issue.

16 ADMIN. JUDGE FARRAR: Oh, that's fine.
17 Look at it all you want.

18 MS. JONES: Right.

19 ADMIN. JUDGE FARRAR: But until you look
20 at it, why is that not a valid Contention of Omission?
21 First off, is it in the application? Judge Trikourous
22 didn't find it. Is it in there, that statement we
23 quoted that said the staff said your application must
24 have the following in it? Is it in there?

25 MS. JONES: To my knowledge, it is not in

1 there.

2 ADMIN. JUDGE FARRAR: Okay. If it's not
3 in Judge Trikouros' knowledge, and the gentleman with
4 you, and your knowledge, let's go forward. It's not
5 in there. Why is that not a valid Contention of
6 Omission? Now remember Contention of Omission, it
7 sits there. You and your friends go over the
8 application and say hey, Mr. Applicant, put this in
9 there, then you all come in and say please dismiss the
10 Contention of Omission because now it's in there.
11 We'll say, petitioners, do you agree it's in there?
12 Yes. Do you like it? No, we think it's inadequate.
13 Fine, you have 30 days to challenge it on its merits.
14 That's how the Commission says this thing works. So
15 if it's not in there, and if that's the way the
16 process plays out, why is that not a valid Contention
17 of Omission, so that you would stand up here and say
18 this contention as re-framed by the Board should come
19 in, for now.

20 MS. JONES: I understand. And I think the
21 best answer I have for that is, from our standpoint in
22 looking at the contentions, when we go back and look
23 at Contention Four, we saw that in Contention Four
24 that the petitioners specifically mentioned that
25 Contention Four was based on Contention Three. And I

1 think that's probably where I think where everyone is
2 getting hung up. I think we, from our standpoint,
3 Judge - and I completely understand where you're
4 coming from, but I think from our standpoint, in
5 looking at that language, we thought that what they
6 meant was extended on-site storage needed to be
7 examined in the application, because we believe that
8 the waste solidification building will not be built.

9 ADMIN. JUDGE FARRAR: As you read
10 Contention Three --

11 MS. JONES: That's how we read it.

12 ADMIN. JUDGE FARRAR: -- which was very
13 long.

14 MS. JONES: Exactly.

15 ADMIN. JUDGE FARRAR: It's incorporated by
16 reference, and you said they must mean the same thing.
17 Not an improper approach you've taken.

18 MS. JONES: Thank you.

19 ADMIN. JUDGE FARRAR: Now that you looked
20 at the contention again --

21 MS. JONES: Yes.

22 ADMIN. JUDGE FARRAR: Forget the waste
23 solidification building.

24 MS. JONES: Okay.

25 ADMIN. JUDGE FARRAR: And look at the

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1 contention as a contention that says whatever happens
2 with DOE, they truck it to Texas, if they want to
3 truck it to Texas, and they don't, they want to build
4 a WSB, and they don't, something happens, and we get
5 backed up on our site, the site that the NRC is
6 licensing, that's the contention, the protection is
7 not in there for when the backup occurs, for whatever
8 reason, in the non-licensable parts, is that a valid
9 Contention of Omission?

10 MS. JONES: I would say that if you
11 exclude the language regarding Contention Three, then
12 if you look at the language independently, then I
13 would say that could potentially be a valid
14 contention, but I could only say that, I'd have to
15 consult with the PM, excuse me, the Project Manager,
16 to determine whether or not it would actually be a
17 requirement, that they actually look at extended on-
18 site storage. I'm going to --

19 ADMIN. JUDGE FARRAR: I don't care what
20 they look at storage. What you told them, you, the
21 staff, told the applicant you have to have this stuff
22 in there to make sure you don't have an overflow on
23 site.

24 MS. JONES: I understand.

25 ADMIN. JUDGE FARRAR: For whatever reason.

1 You told them that. If that's how we read their
2 contention, and there's a way -- and I know how you
3 got misled by reading Contention Three first. If
4 that's the contention, they didn't put in their
5 application something you told them to put in there,
6 and, in fact, the ACRS said is a big deal, why -- is
7 that a valid contention? Because if that's a valid
8 contention, then our life is much easier going
9 forward.

10 MS. JONES: I understand.

11 ADMIN. JUDGE FARRAR: Are you going to
12 tell me that now, or are you going to tell me that -
13 when are you going to tell me that?

14 MS. JONES: Well, I'd have to go back to
15 my previous answer. I'd have to qualify it by saying
16 assuming we ignore their sentence, or their particular
17 statement that Contention Three is not --

18 ADMIN. JUDGE FARRAR: I'm not talking
19 about Three.

20 MS. JONES: I'm sorry?

21 ADMIN. JUDGE FARRAR: I'm not talking
22 about Three.

23 MS. JONES: I know, and I just have to
24 qualify my statement --

25 ADMIN. JUDGE FARRAR: Suppose we threw out

1 ----- didn't you all have a foot -- excuse me, Ms.
2 Carroll, Mr. Zeller, didn't you all have a footnote in
3 your reconsideration brief that said everything you
4 want to cover in Three is really covered by Four?

5 MS. CARROLL: I would have to look at it,
6 if you want to take the time to do that?

7 ADMIN. JUDGE FARRAR: No, it's there.

8 MS. CARROLL: But that sounds right.

9 ADMIN. JUDGE McDADE: Well, if you could
10 be looking at that. And I know Mr. Silverman has been
11 sitting there very anxious.

12 ADMIN. JUDGE FARRAR: Let me finish this.
13 Suppose we did this, we don't care what happen -- all
14 we care is what happens on site. We don't care what
15 DOE does off-site, as long as it doesn't cause a
16 backup on site. So we'll throw out, we'll reconsider
17 our decision and we'll throw out Contention Three.
18 We'll re-frame Contention Four to say it deals with
19 having proper set points and calculations, and so
20 forth, to prevent an overflow. And you told them to
21 do it, and they didn't. Is that a valid Contention of
22 Omission?

23 MS. JONES: I'm sorry. If you don't mind,
24 I'd like to confer with the Project Manager.

25 ADMIN. JUDGE FARRAR: You certainly may.

1 MS. CARROLL: Your Honor, you were
2 referring to not our original petition, but our reply
3 to the responses?

4 ADMIN. JUDGE FARRAR: Yes.

5 MS. CARROLL: And what page did you say
6 that footnote was on?

7 ADMIN. JUDGE FARRAR: Yes, it's Footnote
8 Two beginning on page 5. Kind of implicit there is,
9 yes, you'd like Three and Four in, but if Four comes
10 in, you can make all the arguments you want to make.

11 MS. CARROLL: That what it says.

12 ADMIN. JUDGE FARRAR: Thank you. All
13 right. How are we doing over on the staff side?
14 You'll get your turn, Mr. Silverman. I know this is
15 making you nervous.

16 MS. JONES: No, I would have to say based
17 on the restatement of the contention, I'd have to
18 disagree with the Board, because it appears that the
19 Board is restating it.

20 ADMIN. JUDGE FARRAR: Boards do that all
21 the time.

22 MS. JONES: I understand. It appeared to
23 me in looking at Contention Four that they were pretty
24 clear about what exactly they were contesting with
25 regard to the application.

1 ADMIN. JUDGE FARRAR: You know why I --

2 ADMIN. JUDGE TRIKOUROS: I read the words
3 out loud. I read the words out loud, and they were
4 very consistent with the contention as we were
5 discussing it.

6 ADMIN. JUDGE FARRAR: I empathize with
7 you, because that's how I read it the first time. It
8 says we adopt Three, so I read it in context of Three.
9 Forget Three.

10 MS. JONES: I understand.

11 ADMIN. JUDGE FARRAR: Read Four. Read
12 Four, just Four, and forget the incorporation by
13 reference. Just read Four, and, particularly, the
14 last sentence, the last two things, citing the ACRS
15 report, and the last sentence. So the restated
16 contention would be, we don't know that there will
17 always be sufficient waste storage capacity because
18 the applicant did not include, as the staff directed
19 them to, stuff about set points, blah, blah, blah.

20 (Attorneys confer.)

21 MR. SILVERMAN: I know we're all
22 caucusing. Would it be helpful just for a formal
23 five-minute break?

24 MS. JONES: I would appreciate that, as
25 well, Judge.

1 ADMIN. JUDGE FARRAR: Sure. Okay. It's
2 4:31, let's come back at 4:40.

3 MS. JONES: Thank you.

4 ADMIN. JUDGE FARRAR: Ms. Olson, don't
5 hang up, because I'm advised we're so over our time on
6 the conference deal that if you hang up, you won't be
7 able to call back in.

8 MS. OLSON: Okay. Thank you.

9 ADMIN. JUDGE FARRAR: Okay.

10 (Whereupon, the proceedings went off the
11 record at 4:36:31 p.m., and went back on the record at
12 4:46:59 p.m.)

13 ADMIN. JUDGE FARRAR: All right. We're
14 back on the record. The staff was going to consult
15 about the reframed contention.

16 MS. JONES: We've consulted, and I think
17 that the way for me to respond to that is to say that,
18 and I don't see any other way for me to respond, other
19 than to say that assuming we do take out the
20 Contention 3 reference, assuming we accept that the
21 SER and the language that is being cited in the SER is
22 an absolute requirement, assuming all of that, then it
23 would be a contention of omission and it would be
24 admissible. But that's assuming all of those items.

25 ADMIN. JUDGE TRIKOUROS: That's assuming

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1 what? I'm sorry.

2 MS. JONES: That's assuming all of the
3 items that I just spelled out.

4 ADMIN. JUDGE FARRAR: It might not -- Your
5 concern that that language doesn't exist in the SER?

6 MS. JONES: No, I'm concerned that it's
7 not exactly. When the language was placed in the SER,
8 I'm concerned that it wasn't exactly a requirement
9 that we were basically telling that Applicant to
10 address it, but telling them exactly how to address it
11 is sort of another issue and because we're currently,
12 we're still looking at the license application, it
13 makes it very difficult I think at this point for us
14 to make that commitment.

15 ADMIN. JUDGE FARRAR: But you can see here
16 that they have to address this matter somehow.

17 MS. JONES: I'm told by the staff that
18 it's not necessarily in the license application that
19 they have to address it.

20 ADMIN. JUDGE FARRAR: Well, your document
21 said to them, "Put it in the license application."

22 MS. JONES: I understand.

23 ADMIN. JUDGE FARRAR: Since your document
24 said it, why is it not a valid contention of omission
25 to say that they didn't do it? Now if you want to

1 come back later and say, "Please dismiss the
2 contention of omission because we shouldn't have said
3 it" or they've dealt with it another way, that's the
4 next thing.

5 MS. JONES: I'm sorry, Judge.

6 (Pause.)

7 MS. JONES: Okay. Sorry about that,
8 Judge. Thank you very much for being so patient.

9 As I understand it, the particular, the
10 regulation or, shall I say, the language, correct
11 myself, the language in the SER that references the
12 set points as I understand it, what the staff -- There
13 is, of course, as you know a lot of information that
14 we request from the Applicant which could also show up
15 in ISA summaries as you already know. But as I
16 understand it, the items that the staff would actually
17 require or actually contained in the instruction
18 authorization approval --

19 ADMIN. JUDGE FARRAR: You know you thanked
20 me for my patience. But someday the United States
21 Court of Appeals is not going to be as patient with
22 you all.

23 MS. JONES: I understand.

24 ADMIN. JUDGE FARRAR: You can't keep
25 behaving like this in a system that ultimately is

1 governed by the Constitution and laws of the United
2 States. You know, our powers may be limited, but
3 somebody is going to say this is a shell game. I
4 thought I was asking you the most simple concession
5 that you could possibly be. Thank you. I understand
6 what you're said.

7 Mr. Silverman.

8 MR. SILVERMAN: One simple point, I hope,
9 simple point. As I read the --

10 ADMIN. JUDGE FARRAR: You concede this is
11 -- As reframed as we've suggested it, do you concede
12 this is a valid contention of omission?

13 MR. SILVERMAN: I was going to speak to it
14 as it was stated by the Intervenors.

15 ADMIN. JUDGE FARRAR: No, no.

16 MR. SILVERMAN: Would you reframe it for
17 me then one more time?

18 ADMIN. JUDGE FARRAR: We'll reframe it so
19 let's read it. It's on one page. Read it and forget
20 for the moment the first part that incorporates
21 everything about the Waste Solidification Building.
22 Just read it as to what they say about the ACRS letter
23 and you have to run the place in a way that says
24 there's sufficient waste storage capacity which led us
25 to the SER which says by the staff then, here's how we

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1 want you to do that. Here's how you must do it in
2 your application. Is that a valid contention of
3 omission?

4 MR. SILVERMAN: Please bear with me. I
5 believe it is a contention of omission. You said a
6 valid contention of omission. Yes, it is in my
7 personal view a contention of omission and what I'd
8 like to make clear for the record is that it is not
9 the basis that the Applicant was arguing that the
10 contention is inadmissible. Other bases were the
11 bases we argued, not that.

12 ADMIN. JUDGE FARRAR: Right. In other
13 words, we all read their petition. Understandably,
14 they went on and on in part three and they
15 incorporated it by reference in part four. So we read
16 number four against that background. That's how your
17 brief -- I think what you just said that's how you
18 wrote your brief.

19 MR. SILVERMAN: Our brief then argued on
20 a number of bases that it was not right, speculative,
21 premature, no genuine issue of material fact and those
22 were the reasons we challenged, not whether or not it
23 was a contention of omission.

24 ADMIN. JUDGE FARRAR: But now if we
25 reframed as boards sometimes do, would it now be a

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1 valid contention of omission?

2 MR. SILVERMAN: Do you mean admissible or
3 a contention of omission?

4 ADMIN. JUDGE FARRAR: Admissible.

5 MR. SILVERMAN: I would want to see the
6 contention in writing and brief that, Your Honor.

7 ADMIN. JUDGE FARRAR: Let me ask you. We
8 talked before about how many of these proceedings
9 you've been in. Have you ever taken the position that
10 a single contention submitted by a petitioner was
11 admissible? The reason I ask is I checked the PFS
12 case in which I was blessed with the second part of
13 it. There were something like 127 contentions, one of
14 which we had 65 days of hearing and on which the
15 applicant lost on the first go-round.

16 MR. SILVERMAN: I wasn't counsel in that
17 case, of course.

18 ADMIN. JUDGE FARRAR: I understand that.
19 That contention on which the applicant lost was
20 objected to as not admissible. So there is some
21 credit -- We're getting to some credibility stuff
22 here. So I want to know in all the cases you've ever
23 handled did you ever say "That petitioner's contention
24 is admissible"?

25 MR. SILVERMAN: I do not recall having

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1 ever concluded that.

2 ADMIN. JUDGE McDADE: But in this
3 particular instances, all that you're saying is before
4 commit your client to a particular position you would
5 like to read the contention and have an opportunity to
6 brief it, to think about it.

7 MR. SILVERMAN: That's exactly right.
8 I've expressed my view on the contention of omission
9 issue as reframed. But as to the admissibility of the
10 contention, I mean that's a more complicated issue and
11 I think if that is an issue, we would want to be able
12 to address it.

13 ADMIN. JUDGE FARRAR: Why is it
14 complicated when the staff told you it had to be in
15 your application?

16 MR. SILVERMAN: Your Honor, there are a
17 number of criteria for determining the admissibility
18 of a contention and if we're being asked to decide and
19 make a judgment about whether a contention is
20 admissible or not we think it's appropriate to be able
21 to see it in writing and respond in writing and have
22 a chance to think about it.

23 ADMIN. JUDGE FARRAR: You've been doing
24 this for five months.

25 MR. SILVERMAN: This is reframed

1 contention, Your Honor, we're hearing for the first
2 time.

3 ADMIN. JUDGE FARRAR: You're right.

4 MR. SILVERMAN: I'm happy to respond to
5 the contention as written.

6 ADMIN. JUDGE FARRAR: Okay. The way it's
7 written is just if you leave out -- if we don't get
8 misled by the reference to Part 3 what's written has
9 been in front of us for six months.

10 MR. SILVERMAN: And we've expressed our
11 opinion on that and we've never said it's not a
12 contention of omission, but we have said it's
13 inadmissible for the reasons stated.

14 ADMIN. JUDGE FARRAR: Okay. We said it
15 was a contention of omission and your brief didn't
16 address whether it was a contention. We said it's a
17 contention of omission and asked for reconsideration.
18 Your brief didn't mention the words "contention of
19 omission."

20 MR. SILVERMAN: Right. We had a rationale
21 for that, for not addressing that question.

22 ADMIN. JUDGE FARRAR: Can I hear it?

23 MR. SILVERMAN: Sure. We believe as I
24 stated before that a contention of omission doctrine
25 is not really even relevant at this point. It's a

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1 doctrine upon which you decide how a contention may be
2 mooted or disposed of after admission. It is a
3 relevant consideration for whether it's admissible.

4 ADMIN. JUDGE FARRAR: No. Right. It
5 doesn't establish that it's admissible.

6 MR. SILVERMAN: Correct.

7 ADMIN. JUDGE FARRAR: But it helps you in
8 thinking about to say this is a contention of
9 omission. So they might have to come up with less
10 information. In other words, if they say you built
11 your foundation wrong, they'd better have a lot of
12 stuff. If they say you forgot to build your
13 foundation, they don't need a lot of stuff.

14 ADMIN. JUDGE McDADE: But with regard to
15 --

16 ADMIN. JUDGE FARRAR: You nodded.

17 MR. SILVERMAN: I think I agree with that.

18 ADMIN. JUDGE FARRAR: Okay.

19 ADMIN. JUDGE McDADE: But with regard to
20 this particular issue, if the Board were to refine the
21 contention and get that to the staff and to the
22 Applicant and to the Petitioner by the end of this
23 week, would it be realistic to get a reply in writing
24 by the end of the following week, Mr. Silverman, from
25 your client's standpoint?

1 MR. SILVERMAN: On the question of whether
2 the reframe contention is admissible?

3 ADMIN. JUDGE McDADE: Yes.

4 MR. SILVERMAN: I think given my personal
5 schedule I'd like to ask probably for just a little
6 bit more time, perhaps the following Monday or
7 something like that.

8 ADMIN. JUDGE McDADE: From the standpoint
9 of the staff?

10 MS. JONES: We are sort of running into a
11 scheduling problem as well. I am scheduled to be in
12 Nebraska before Judge Young in the Crow Butte case.

13 ADMIN. JUDGE FARRAR: Let me ask you a
14 question as long as you brought that up.

15 MS. JONES: Okay.

16 ADMIN. JUDGE FARRAR: Are floods that
17 affect staff lawyers much more significant than fires
18 that affect Petitioners?

19 MS. JONES: That's an interesting
20 question.

21 ADMIN. JUDGE FARRAR: Thank you.

22 MS. JONES: I'm so sorry, but --

23 ADMIN. JUDGE FARRAR: If you missed that
24 --

25 MS. JONES: And, Judge, there's another

1 reason. I don't want to seem to be disrespectful that
2 I'm speaking without really fully explaining. But I
3 believe there is a deadline for the Petitioners in
4 that particular case that's coming up and that is the
5 reason why we have some filings that we're expecting
6 and that is the reason why.

7 ADMIN. JUDGE FARRAR: Okay. We had once
8 promised a decision in this case by January when we
9 ran into all the confusion, certainly legitimate
10 reasons back in December and we promised a decision by
11 January 31st. I think with some pressing judicial
12 and administrative things facing various of us we're
13 not going to make that. So we have no problem
14 refraining the contention quickly, sending it to you
15 and giving all of you as much time within reason as
16 you need given your other responsibilities.

17 This is a major step because it would be
18 if once a contention is in then we have a proceeding.
19 So we want to make sure we get it right.

20 MS. JONES: Right.

21 ADMIN. JUDGE FARRAR: So we would have no
22 problem giving you some time. But I think --

23 ADMIN. JUDGE McDADE: The question is how
24 much. Mr. Silverman indicated if we got the brief
25 formulated contention in by Friday that 10 days would

1 be sufficient for the Applicant to get a response and
2 the question without debating what your other issues
3 are is 10 days enough. If not, is 12 days enough?
4 How many days or do you want to get back to us
5 tomorrow on that?

6 MS. JONES: Yes, I'll get back to you. I
7 am -- I should also clarify something. The deadlines,
8 because I don't want to mislead the Board, the
9 deadlines in the other case were, the deadline just
10 came to me, is set for January 11. However, the judge
11 also said to them that if you can get your filings to
12 staff counsel before then and I'm just not really sure
13 what we're going to expect from that. So I just want
14 to be clear on that.

15 ADMIN. JUDGE FARRAR: On this matter, are
16 there not more than one staff lawyer? In other words,
17 this in my mind is not a big deal.

18 MS. JONES: Okay.

19 ADMIN. JUDGE FARRAR: This is a reframed
20 contention that's going to say they didn't do what you
21 told them to do.

22 MS. JONES: Okay.

23 ADMIN. JUDGE McDADE: Can we say 10 days,
24 that following Monday, and then if you believe you're
25 going to need more time just file a motion for the

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1 extension of time?

2 ADMIN. JUDGE FARRAR: Right.

3 ADMIN. JUDGE McDADE: Once you get back to
4 your office.

5 ADMIN. JUDGE FARRAR: The 21st is a
6 holiday. We could do the 22nd. We could do the 23rd.
7 Here's what I'd like. I'd like -- Well, let's think
8 what the Petitioner, we're asking you to say this is
9 a valid reframed, admissible reframed contention. You
10 all may say, "Thanks, Board, but we don't like your
11 reframed contention. We want to move forward with
12 something else."

13 So why don't we do this? We'll send the
14 contention reframed. Petitioners tell us by the 18th
15 if that contention were admitted, could you live with
16 that. In other words, does that let you present the
17 things you want to present and remembering what you're
18 heard here today, the fact that there might be some
19 other things you'd like to present.

20 MS. CARROLL: I know. That's what I'm
21 running through my mind because I think this has come
22 around. I think this has come around exactly where we
23 wanted it to be which was to admit it. Now if there
24 was a question about the process, how you would
25 proceed when there's absolutely no information, how

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1 can we litigate it.

2 ADMIN. JUDGE FARRAR: No. Right now, this

3 --

4 MS. CARROLL: If you want to reframe our
5 contention and make it admissible, how could we turn
6 that down? Am I right? It's kind of exciting.

7 ADMIN. JUDGE FARRAR: Okay.

8 MS. CARROLL: Nobody would want to talk
9 about how we're going to deal with it.

10 ADMIN. JUDGE FARRAR: And you might lose
11 contention 3. In other words, what we are going to
12 say --

13 MS. CARROLL: No, we do have something to
14 say about reopening the EIS and we're sorry if people
15 misunderstood us and thought that we actually thought
16 the NRC license WSB because we know better. We know
17 that perfectly and we may have gotten a little flowery
18 with giving you enough history to hope to make a
19 strong impression on you of why we're watching the
20 waste and why we're terrified of going forward to
21 process 50,000 tons of plutonium without a waste plan.
22 I do have some other things obviously to respond to
23 you that went on today besides this.

24 ADMIN. JUDGE FARRAR: But how about if we
25 got the contention out by --

1 MS. CARROLL: Yes, we think we need a
2 supplement EIS and I think we actually have an
3 argument for that. But if we want to clear up
4 confusion about whether --

5 ADMIN. JUDGE FARRAR: That deals with our
6 -- There's a third part of this which is the case
7 management, you know, how are we going to go forward.

8 MS. CARROLL: And it's really hard to go
9 forward without any detail whatsoever about the waste
10 plan.

11 ADMIN. JUDGE FARRAR: No. Here's what we
12 may have at least two, maybe three, votes for going
13 forward with. Suppose Contention 3 on reconsideration
14 were out. Contention 6 was out as premature without
15 prejudice to "coming back" whatever "coming back"
16 means which we'll define. Contention 4 as restated is
17 in.

18 Then we have a proceeding. Then I ask you
19 all to sit down and say you don't want to come in
20 every day with a contention. Mr. Silverman, you don't
21 want to wait sixty days after the SER and I understand
22 why you don't want that. How do we come up with an
23 agreed procedure for moving forward? One example
24 might be, yes, it's sixty days after the SER unless
25 the Applicant says, "We've just reached a major step."

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1 We notify the Board and the parties that here's a
2 major step. And the Petitioners, we want this thing
3 put to bed now. So we'd like the Board to say this is
4 a major step and Petitioners get 45 days or however
5 many days.

6 We come up with some set, agreed-upon case
7 management order that's either within the regulations
8 and within our power or is not within the regulations
9 and not within our power which we would send to the
10 Commission and say, "We agree with the parties. This
11 would be a sensible way to run the future of this
12 proceeding." The Commission may say, "Nothing doing."
13 That's fine. I'm happy if we say to them, "This
14 proceeding is causing us a lot of trouble, threatens
15 to be a lot of waste. Here's how we and the parties
16 think we could do it, probably not authorized unless
17 you authorize it." I'm happy to send them that. So
18 that's what we're envisioning the way we might go with
19 this.

20 MS. CARROLL: Okay. Now I want to add
21 something and then I need one moment of conference
22 here.

23 If you admit this contention and there's
24 nothing to chew the fat on, so this SER concept you
25 have, which I've heard it stated today much more

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1 broadly than it is --

2 ADMIN. JUDGE FARRAR: Right.

3 MS. CARROLL: But you're just taking this
4 one contention and saying that's when --

5 ADMIN. JUDGE FARRAR: Right now -- No, no.

6 MS. CARROLL: -- it would be right for
7 consideration.

8 ADMIN. JUDGE FARRAR: No, no. This one
9 contention is ripe -- This one contention is admitted
10 now. Now since it's --

11 MS. CARROLL: What's to talk about? They
12 have nothing to look at.

13 ADMIN. JUDGE FARRAR: No, no. That's the
14 --

15 MR. SILVERMAN: It's fine. We don't need
16 to talk anymore.

17 MS. CARROLL: And we wait until after the
18 SER.

19 MR. SILVERMAN: So go on.

20 ADMIN. JUDGE FARRAR: No. Let me finish.

21 MS. CARROLL: I misunderstood then.

22 ADMIN. JUDGE FARRAR: Here's how a
23 contention of omission works. You say, "Mr.
24 Applicant, you forgot to do something." We let in the
25 contention. A day, a week, a month, a year, six years

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1 later --

2 MS. CARROLL: Whenever.

3 ADMIN. JUDGE FARRAR: They -- And it just
4 sits there. We don't go to hearing because they
5 didn't do it yet. Two years later, take a number.
6 They do what they were supposed to do. Staff says,
7 "Good. Nice going." They then come to us and say,
8 "Let's please dismiss that contention. It's now
9 moot." We say to you, "Do you agree that they've now
10 done it?" Presumably, you say, "Yes." "Do you like
11 what they've done?" You say, "No." "File an amended
12 contention within 60 days challenging what they've
13 done." That's how that works.

14 When we talked about the SER that was
15 Judge McDade's suggestion that instead of having you
16 show up every day on new contentions about everything
17 else we'd say, "We don't want any contentions. We
18 have all these other cases coming. Wait until 60 days
19 after the SER." You'd like that. Mr. Silverman
20 doesn't like that. "Fine. Come up with a
21 compromise."

22 MS. CARROLL: Okay. So now, I understand
23 you and maybe the reason you said SER is like that's
24 when the boom comes down and if they haven't ponied up
25 a waste plan everybody knows about that.

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1 ADMIN. JUDGE FARRAR: It has nothing to do
2 with the --

3 MS. CARROLL: I thought you said the SER,
4 but let's not get hung up on that point.

5 ADMIN. JUDGE FARRAR: No. The SER plus 60
6 days has to do with every other imaginable contention
7 you could come up with.

8 MS. CARROLL: Okay. Now here's the point
9 I'd like to make is if you've accepted our contention
10 and we have nothing to talk about until whenever they
11 do what they forgot to do, we have a case.

12 ADMIN. JUDGE FARRAR: Right.

13 MS. CARROLL: And if some new information
14 comes up, we can put it in.

15 ADMIN. JUDGE FARRAR: No, no.

16 MS. CARROLL: I mean we need to discuss
17 that then. We're not rolling over on that one yet
18 because you know what? I mean, see my time hasn't
19 come up yet and I have a few notes and a few little
20 things in 30 minutes.

21 ADMIN. JUDGE FARRAR: But I need you to
22 hear me out.

23 MS. CARROLL: This -- Okay.

24 ADMIN. JUDGE FARRAR: By saying you can't
25 come in until 60 days after the SER that sounds like

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1 that's unfavorable to you. It's really favorable
2 because you don't have to worry about 60 -- between
3 now and then, you don't have to be filing stuff afraid
4 you've missed the deadline. You get to come in all at
5 once at the end.

6 Now Mr. Silverman is not going to like
7 that because then he gets hit with this barrage of
8 things at the end. So he's going to come up, if this
9 settlement takes place, and say, "Well, that's okay
10 generally, but we want these other specific time
11 lines." For certain things, you're going to come in
12 in June. And other things, you're going to come in in
13 December.

14 And now maybe this will fail. Maybe you
15 all won't talk to each other. No one will agree and
16 fine. Then we will write an order and we will write
17 what we write in any event because this is so
18 convoluted. The Commission can always review what we
19 want, but our intent is to say to the Commission,
20 "Please help us here. We're doing the best we can,
21 but you need to take charge of this proceeding that's
22 going for seven more years."

23 MS. CARROLL: But here's my instant
24 feedback on that concept and we aren't in here because
25 of our appetite for the game. We're in here because

1 of the deep-seeded concern about an ill-conceived plan
2 that we oppose out of hand. Now we're in a process
3 and it's so egregiously thin and it's going on since
4 1994 and it's already costed close to \$2 billion.
5 These are concerns.

6 We go to Congress. We go to DOE. We go
7 to the people and try and get them to understand about
8 this. If we wait four, five -- You know we have a
9 little thing here where Tiktinsky was addressing the
10 Committee on Waste and it's like if we have a hearing
11 that's in 2011. This thing goes on and on and on. If
12 we wait, all of these billions of dollars, all this
13 missed opportunity on a correct approach to plutonium,
14 all this investment and infrastructure that's wrong
15 because we waited to raise these issues and I mean
16 there's plenty more wrong than what we're able to
17 muster. Okay?

18 ADMIN. JUDGE FARRAR: Two -- Let me
19 respond.

20 MS. CARROLL: But the little bit -- I mean
21 I don't know where we're getting into my piece.

22 ADMIN. JUDGE FARRAR: Let me tell you.

23 MS. CARROLL: I thought maybe we were here
24 for the piece of it.

25 ADMIN. JUDGE FARRAR: No. Let me give an

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1 instant response to that. Number one, this may be the
2 best way politically and militarily and all that way
3 to dispose of surplus plutonium or it may not. No one
4 is asking us our opinion on that and if you ask us our
5 opinion on that, we have no opinion.

6 MS. CARROLL: Understood.

7 ADMIN. JUDGE FARRAR: That's Congress and
8 the Department of Energy and our elected officials.
9 So no matter how strongly you feel about that, we're
10 sorry. We can't listen to you.

11 MS. CARROLL: Okay, but here's --

12 ADMIN. JUDGE FARRAR: Wait a minute. We
13 assume the project goes forward. These people get
14 their funding and we have to decide based on your
15 contentions is it safe and can it go forward. Even if
16 it's the worst idea America ever thought of, if it's
17 safe, they can do it. You have to fight that
18 somewhere else.

19 If you think though that your fight on
20 that is put at a disadvantage by you not coming in
21 here every day with contentions, then tell Mr.
22 Silverman you don't like our idea. He'll say, "Good.
23 I don't like their idea." And we won't have it
24 settled. That's your choice, strategically, resource-
25 wise, how you want to proceed. That's your choice.

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1 So don't settle. Don't reach a settlement agreement
2 on anything that you don't want to live with.

3 If there's a settlement agreement that
4 makes sense, we will think about it. We're probably
5 have another prehearing conference where we'll all sit
6 around the table and work up the details and we'll
7 adopt it and send it to the Commission. If there's no
8 settlement agreement, we will issue a case management
9 order and we'll send that to the Commission. So this
10 your chance to say, not today, this is your chance to
11 sit down and make this settlement fit with your
12 strategy which I understand but which I can't -- We're
13 not going to say, "DOE, this is stupid, overly
14 expensive project." And we're not going to say it's
15 good or it's bad. That's not our job.

16 MS. CARROLL: Well, it was sloppy of me to
17 confuse you with that, but I wanted to make a point,
18 first of all, to try and say that we have brought our
19 concerns in what we brought before you. Now I need to
20 -- First of all, I still have my 30 minutes. Right?

21 There's a lot to respond to here. There's
22 a lot that's been said and I think that --

23 ADMIN. JUDGE FARRAR: Sometimes --

24 MS. CARROLL: -- we're all here. You're
25 here. You said it. We have 30 minutes.

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1 ADMIN. JUDGE FARRAR: Right but --

2 MS. CARROLL: Okay, but --

3 ADMIN. JUDGE FARRAR: Wait. Let me say
4 something. I've been in a lot of arguments in my life
5 and sometimes people say, "I don't need to say
6 anything to the judge because kind of what they've
7 said takes care of my concerns." We'll give you your
8 30 minutes.

9 MS. CARROLL: Well, I mean, this is one
10 contention and I really appreciate, God Almighty, I
11 appreciate how seriously you're taking this
12 contention. But now here's a little history.

13 ADMIN. JUDGE FARRAR: Okay.

14 MS. CARROLL: You know this well. In
15 2001, DCS came in and said, "Oh, well, we're going to
16 pipe it over and put it in the tanks." And we made
17 the case that the tanks were on a closure program.
18 They were overburdened. They couldn't deal with the
19 waste that was in there and we got a waste
20 solidification building out of it. Now we would love
21 to critique that.

22 My point is by keeping abreast of the
23 process there are wrong turns being made every day and
24 if we wait until 2011 and go "Oh my God, we got off
25 track on January 9, 2008 and they just took right

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1 turns when they should have taken left for seven
2 years."

3 ADMIN. JUDGE FARRAR: Well wait --

4 MS. CARROLL: "And we're so hopelessly
5 lost, we can't get there from there and we're out of
6 money."

7 ADMIN. JUDGE FARRAR: Wait.

8 MS. CARROLL: So now we're going to
9 process --

10 ADMIN. JUDGE FARRAR: Wait a minute. If
11 you get your 30 minutes, we get to interrupt you to
12 the same extent we interrupted them on their 30
13 minutes.

14 MS. CARROLL: I kind of anticipated that.

15 ADMIN. JUDGE FARRAR: You're no better
16 than -- You're not worse than them, but you're not
17 better than them.

18 As I understand the waste solidification
19 building, here's our role and we disagreed with some
20 of how the applicant presented it in Augusta. Right,
21 we have no licensing authority. We, the Commission,
22 has no licensing authority over the waste transfer
23 building, but there is a requirement somewhere in here
24 that they have to have in place before they get a
25 license some system for getting the waste off the

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1 licensed site and to somewhere else.

2 Now I think all that the NRC cares about
3 is that there be some system for moving it somewhere
4 else and that there be a system that if it doesn't get
5 moved offsite or gets clogged up we shut down before
6 the tanks are three-quarters full or whatever. If you
7 don't like what they're doing offsite, that's not --
8 All we care is they are getting it offsite. They may
9 get it offsite in a brilliant manner or a stupid
10 manner, but that's their problem. All we care about
11 is it's not on our licensed site. So that's an
12 argument you have to take to Congress and DOE.

13 Mr. Silverman and Ms. Jones, did I state
14 that roughly correctly?

15 MS. JONES: Yes.

16 ADMIN. JUDGE FARRAR: Did I state that
17 roughly correctly for what our role is versus --

18 MR. SILVERMAN: Yes, Your Honor.

19 ADMIN. JUDGE FARRAR: Okay. So whatever
20 you think about their plans offsite, we only care
21 about how those plans back up into this facility. As
22 you argue it, you can talk about the waste
23 solidification building being a bad idea, but we can't
24 do anything about that.

25 MS. CARROLL: I'm sorry that keeps

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1 confusing you.

2 ADMIN. JUDGE FARRAR: Yes.

3 MS. CARROLL: Because what we want to do
4 is stated clearly. I really appreciate your doing a
5 better job than I can to clear up Contention 4 and I
6 don't want to spend our time on that.

7 What I want to say right this instant is
8 that in CLI02-7 which I believe you referred to
9 without naming today and we want to get this on the
10 record and when I have my speech-making time, I'll
11 bring up some other aspects of it. On page 212 in
12 background and, of course, our whole basis of our
13 contention which also seemed to be somewhat missed by
14 the Commission as I reread this today was that closing
15 the EIS before even receiving an operating license we
16 did not think satisfied the requirement under NEPA and
17 they went into many other details that I didn't
18 remember being central to our point.

19 It says, "The hearing notice also
20 specified that the NRC would consider operation at the
21 MOX facility later when the agency would decide
22 whether construction"... Oh wait. I'm reading the
23 wrong part. That was the part about where it kind of
24 looks like we maybe should not have docketed that
25 operating license because construction hadn't started.

1 On the waste, they're promising us that
2 we can reopen the EIS and let me find that cite. "And
3 that's what we're after with Contention 3 is the
4 supplemental EIS." It's kind of confusing to me
5 because I really thought you had accepted those
6 contentions and it's interesting that you invited us
7 to come back and go at again, a point I missed while
8 we focused on finding precedence for holding
9 proceedings in abeyance that we thought totally
10 covered you for accepting the contentions you accepted
11 and holding them in abeyance.

12 ADMIN. JUDGE FARRAR: I admit what we did
13 was unorthodox. We let the contentions in. We said,
14 Here are some other ways to proceed, but this is
15 unorthodox and novel and so we invite reconsideration.
16 That's unusual."

17 MS. CARROLL: Well, we were a little slow
18 on the uptake and it's -- Here we go. It's 211.
19 "NEPA EIS Supplement, NRC Responsibilities, Rules and
20 Procedures, Late Filed contentions." "A genuinely new
21 environmental information emerges," which I think a
22 waste solidification building for 10,000 gallons of
23 high Alpha waste a year would qualify if we ever get
24 to see what that plan is, if it emerges "during
25 subsequent phases of the proceeding," where we are,

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1 "our rules provide for the possibility of supplements
2 to the EIS and for late filed hearing contentions."

3 ADMIN. JUDGE FARRAR: I think the staff
4 though would say that they don't care what happens
5 next, that they don't think this agency should care
6 about what happens next door. Is that right?

7 MS. CARROLL: And that's why we want you
8 to protect us.

9 MS. JONES: No, I don't think that's
10 exactly accurate, not for the EIS.

11 ADMIN. JUDGE FARRAR: So for the EIS you
12 do care what happens next door because --

13 MS. JONES: It's a connected action on the
14 people.

15 ADMIN. JUDGE FARRAR: Right.

16 MS. JONES: So that's why we analyzed it.

17 ADMIN. JUDGE FARRAR: Okay. Fine. Thank
18 you.

19 So am I right that it's a --

20 MR. SILVERMAN: I was just going to point
21 out that the EIS is published by the NRC and has an
22 entire session on the impacts of the WSB.

23 ADMIN. JUDGE FARRAR: Okay.

24 MR. SILVERMAN: It's not new information.

25 MS. CARROLL: It has two pages.

1 MR. SILVERMAN: There's a full appendix on
2 it as I recall. I could be wrong.

3 ADMIN. JUDGE FARRAR: Okay. The point is
4 everyone in the room seems to view it as a connected
5 action. So what happens next door could trigger some
6 additional EIS review.

7 MS. CARROLL: The EIS was supposed to
8 cover all impacts of a facility. It's supposed to
9 cover alternatives, blah-bitty-blah. So we think this
10 comes under all impacts of the facility and the high
11 alpha waste has an impact and because we haven't seen
12 plans of how they're going to treat it we don't have
13 a realistic view of what the impacts could be.
14 There's nothing to analyze yet.

15 ADMIN. JUDGE FARRAR: We weren't the board
16 the first time. So we didn't, at least, I didn't look
17 at the environmental impact statement. It did cover
18 the WSB just said?

19 MS. JONES: Yes, it did.

20 MS. CARROLL: In two pages. I don't think
21 it quite made two pages. I did not bring it up with
22 me from Atlanta. There isn't a plan. So what
23 validity does the analysis have? That's our point
24 whether we made it or not and the flowery language was
25 to show a history of living with DOE operating at

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1 Savannah River site doing major projects without waste
2 plans.

3 So here we are. We don't have a waste
4 plan. We have a promise. We have, I suppose, a valid
5 reason why we don't have a waste plan. We have a
6 board who gets it. We've brought out the ACRS to show
7 you that other people besides little people that work
8 in their art studio, not their kitchen tables, it's in
9 a bedroom in my house, so you're not far off, that the
10 ACRS has concerns. It's a big deal. You have all of
11 that.

12 And what apparently we didn't say well
13 enough was protect us. We've lived with this. We've
14 lived with DOE not having waste plans. You've
15 accepted our contentions. We'll wait. You know, if
16 we can't shut this down, if we can't send the
17 application back, we'll wait until it's complete. But
18 we want our right to a hearing.

19 ADMIN. JUDGE FARRAR: But that's what
20 letting this contention would do.

21 MS. CARROLL: And I do get that.

22 ADMIN. JUDGE FARRAR: Eventually.

23 MS. CARROLL: But I want to reopen the
24 EIS. So I'm not rolling over on that and we're not
25 making any decisions today. We're all clear on that.

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1 ADMIN. JUDGE FARRAR: If you want to
2 reopen the EIS, then that's another contention yet to
3 be filed.

4 MS. CARROLL: No, that's Contention 3.

5 ADMIN. JUDGE FARRAR: Well --

6 MS. CARROLL: I mean that's the --

7 ADMIN. JUDGE FARRAR: I think you'll find
8 if you read our opinion closely that we kind of lump
9 the two together and in retrospect that may or may not
10 have been the best thing we did.

11 But speaking of that, before I forget and
12 what you want to do, you said maybe you were slow on
13 the uptake. I thought when we got your February 19th
14 response to our order that that was one of the finer
15 pieces of writing I've seen by petitioners and
16 certainly by petitioners who are not lawyers and it
17 would have done justice to some lawyers. So as far as
18 we're concerned, if that's going to be the caliber of
19 the work you bring here, we welcome your participation
20 and think you'll make a contribution. I meant to say
21 that at the beginning but we got disorganized here.

22 ADMIN. JUDGE McDADE: But at this point in
23 time, aren't we just simply -- An issue has been
24 raised whether or not Contention 4 could be
25 reformulated by the Board, for the Board to commit

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1 their reformulation to writing, for the Board to give
2 that reformulation as a draft to the parties by the
3 close of this week, to ask the parties then to comment
4 on that whether or not (1) the reformulation is
5 something, given the nature of the original
6 contention, within the capacity, authority, of the
7 Board to do, (2) if it is within the authority of the
8 Board to do whether or not that reformulated
9 contention would be admissible for the NRC staff and
10 for the Applicant to do that, for the Petitioners to
11 comment of whether or not you have any objection to
12 the reformulated contention as drafted, any
13 suggestions that you would have to reformulate it
14 differently.

15 We've already briefed with regard to all
16 of the other contentions. We don't need to go into
17 all of that again and revisit it.

18 The other issue had to do with case
19 management. We had raised the issue before with
20 regard to case management and what to do as far as the
21 timeliness of contentions. We had talked about the
22 possibility of directing potential petitioners to hold
23 their contentions until perhaps 60 days after the
24 safety evaluation report is issued. Mr. Silverman
25 raised a problem with that specifically that that

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1 would then require the Applicant to perhaps move ahead
2 with great uncertainty that could perhaps cause
3 significant problems and the question is whether or
4 not that could be addressed and asking the parties to
5 comment on any suggestions they had to (1) whether or
6 not it was within our capacity to simply as a case
7 management tool to tell Petitioners to hold off, if
8 not, why not with regard to contentions and (2) then
9 to suggest any other, for example, like saying an
10 exception to that for any petition if there was going
11 to be an amendment to the application that that would
12 be a triggering event that would be a recognition on
13 the part of the Applicant that this was a matter of
14 significance where they were asking for a modification
15 in the application, an amendment to the application,
16 so perhaps an exception that a contention that
17 challenged a proposed amendment would have be filed
18 within 60 days after the amendment was filed or (3)
19 such other suggestions as the parties might have to
20 make that such a case management order workable and
21 fair to the staff, to the Applicant and to punitive
22 Intervenors.

23 Those were the things that I thought we
24 had on the table and we're requesting additional
25 briefing on. Are there other matters?

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1 MS. CARROLL: I need to confer with my
2 colleagues if I could just have a minute.

3 ADMIN. JUDGE FARRAR: Ms. Olson, are you
4 still there?

5 ADMIN. JUDGE McDADE: The phone company
6 may have taken action without approval.

7 ADMIN. JUDGE FARRAR: Mack, her phone
8 number should be on some -- Mack? Her phone number
9 should be on some certificate of service or something.

10 MS. CARROLL: I believe I have it.

11 (Off the record comment.)

12 ADMIN. JUDGE FARRAR: But we have a notice
13 that -- I got a note that after 4:45 p.m. she can't
14 dial back. So tell her she'll have to read the
15 transcript.

16 PARTICIPANT: We could call her.

17 MS. CARROLL: Do you need Mary Olson's
18 number?

19 ADMIN. JUDGE FARRAR: Yes.

20 MS. CARROLL: I don't have it. Never
21 mind. Sorry.

22 ADMIN. JUDGE FARRAR: That's all right.

23 MS. CARROLL: She's in Florida and it
24 might be her cell phone. That might be harder to
25 track down.

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1 (Pause.)

2 MS. CARROLL: I'm sorry. I've been
3 needing to confer for a long time. So our conference
4 didn't exactly hook up with what you were saying,
5 Judge McDade. So it's not a follow-on and I think --
6 we're all clear we're not deciding anything today.
7 You're wanting to make sure that we're clear on what
8 you're putting on the table. You're not asking us on
9 the spot to say, "Yes. We'll give you -- We'll throw
10 away everything. Give us a free formulated contention
11 for -- by Friday." You're not asking us to decide
12 this on the spot.

13 ADMIN. JUDGE McDADE: We're not asking you
14 to decide anything. What we're saying is we're
15 looking for additional information before we decide
16 and what we're trying to do is just to lay out what
17 additional information, what additional input, from
18 the parties we want before we decide.

19 ADMIN. JUDGE FARRAR: You could, for
20 example, get our reformulated contention and say,
21 "That's not what we want to argue. We don't support
22 that contention." We don't want to see that. That
23 doesn't mean you get what you want. It means we go
24 back and have to decide the case that's in front of
25 us.

1 MR. SILVERMAN: I have a procedural
2 suggestion I think maybe the parties would agree with.
3 I know I feel a need and a recommendation. The need
4 is it would be very helpful to me and I suspect all
5 the parties if the Board would be willing to just put
6 in a very short order exactly the questions you'd like
7 us to answer and then I would like to suggest if
8 you're willing to do that that I believe that we can
9 confer among ourselves, all three parties, and we can
10 probably come back to you, I believe, with an agreed
11 upon schedule for answering your questions. And as
12 far as I'm concerned, we could all answer at the same
13 time each question.

14 ADMIN. JUDGE FARRAR: Right. Well, the
15 only question --

16 (Off the record discussion.)

17 ADMIN. JUDGE FARRAR: I think it may be
18 even simpler than that. But let's state it right now.
19 Friday we send everybody a reframed contention.
20 Intervenors, you look at it for a week and just let us
21 know are you happy if we went forward with that
22 contention. Now I'm not asking you to answer.

23 MS. CARROLL: I've got something busting
24 to say something.

25 ADMIN. JUDGE FARRAR: Listen for a minute.

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1 You say, "We don't want to move forward in that
2 proceeding with this contention." Okay. Then that
3 would be bring the proceeding to a halt and we would
4 just write an opinion. But if you say, "Okay. If the
5 Board will admit that contention, we're willing to go
6 forward with that contention," then these two parties
7 would then have a week or whatever to say, "That's an
8 admissible contention" or not and, of course, we're
9 hoping they'd say that's admissible because that seems
10 to be where we're headed.

11 But if they say it's not admissible, then
12 we're the same as you. We'll write a decision. Maybe
13 it's admissible. Maybe it's not. They made some
14 arguments why it's not. So we'll write a decision.

15 Then on the assumption that there's going
16 to be one admissible contention and we have a live
17 proceeding, we want the three parties to get together
18 and say what would we recommend for a case management
19 order that's something in between the chaos that we're
20 in now and Judge McDade's idea that we don't want to
21 see a contention until 60 days after the SER.

22 Now each of you have your different
23 strategic reasons for wanting something closer to one
24 end or the other of that. You may reach agreement.
25 You may not reach agreement. The pressure on you is

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1 we're going to issue a case management order. If it's
2 not one you agree on, the three of you don't agree on
3 it, the three of us will agree on it and we'll issue
4 something. That may be better or worse than you think
5 you're going to get otherwise and then we move
6 forward. No, we don't move forward. Then we write a
7 decision that says to the Commission, "We've agonized
8 over this. Here's what we think is right, but if you
9 have a better idea, let us know because we want to run
10 this proceeding for seven years a way that makes
11 sense, that's fair to everybody and efficient use of
12 everyone's resources."

13 Now you want to just say something.

14 MS. CARROLL: Well, I haven't been very
15 impressed with anything I've heard from our opposing
16 parties today and you haven't even heard from me and
17 maybe I have an idea.

18 ADMIN. JUDGE FARRAR: Great. Let's hear
19 it.

20 MS. CARROLL: You know maybe there's
21 something in my 30 minutes that will have another
22 little angle here.

23 ADMIN. JUDGE FARRAR: They probably
24 weren't impressed with anything we said.

25 MS. CARROLL: I haven't said all that

1 much.

2 ADMIN. JUDGE FARRAR: No. They weren't
3 impressed with us. But go ahead.

4 MS. CARROLL: And then --

5 ADMIN. JUDGE FARRAR: How much time?

6 MS. CARROLL: I'm missing my flight. So
7 I just want you to know I'm doing this without
8 personal sacrifice.

9 ADMIN. JUDGE FARRAR: Okay. Then go
10 ahead.

11 ADMIN. JUDGE McDADE: And also it's not
12 just 30 minutes to talk about anything.

13 MS. CARROLL: I know.

14 ADMIN. JUDGE McDADE: It's 30 minutes to
15 talk about a specific issue, the issues that were
16 addressed the order setting up the hearing.

17 MS. CARROLL: That's right. I mean, I did
18 my level best to comply. What I'm prepared to talk
19 about is what you suggested was what we were supposed
20 to talk about.

21 ADMIN. JUDGE FARRAR: That's what I'm
22 saying. Your brief was elegantly worded and it dealt
23 with the issues we raised on reconsideration. Your
24 feelings about the wisdom for the United States of
25 America about this proposal are interesting. But

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1 there's no sense giving them to us because we have not
2 been given any role.

3 Now sometimes our role is expanded or
4 contracted a bit, but we have no role in how the
5 United States and the Soviet Union should deal with
6 this problem.

7 MS. CARROLL: But my context for that was
8 where we started out opposed to the project in the
9 course of the way the proceeding went which we thought
10 was kind of rigged in the CAR, construction
11 authorization request.

12 I want to point out we saved our tanks
13 which would have been a dismissal idea and by running
14 the process as it went, you know, as it was laid out,
15 we maybe if we can ever see the details have a better
16 idea for the waste. This is one of our realities in
17 doing these interventions is we may not stop the
18 project we're opposed to, but we may improve it and
19 that is why my gut reaction and I think it is
20 appropriate to respond for instance to your process
21 idea, Judge McDade, about holding everything off, a
22 lot of harm could happen, a whole lot of harm. A
23 whole lot of waste could happen.

24 So I can't imagine. It's hard for me to
25 imagine as a scenario where we go that --

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1 ADMIN. JUDGE McDADE: A whole lot of
2 waste? What waste?

3 MS. CARROLL: A waste of taxpayer money,
4 an investment in a structure that's wrong and
5 operating plans that are wrong and that have been
6 hardwired into the building and cannot be remedied.
7 These are just off the top of my head. Those are the
8 unacceptable ramifications of waiting until maybe it's
9 2009 or maybe it's 2010 or maybe it's 2011 and maybe
10 we're up to \$5 billion and maybe the door isn't wide
11 enough to get the equipment in. I'm just -- it's not
12 conceivable to me that we would accept that.

13 ADMIN. JUDGE McDADE: The alternative you
14 understand would be that 60 days after something
15 happens they will say you were out of time, that you
16 will learn of something and they will say you were out
17 of time within which to file the contention. It may
18 well be a valid contention. It may well be
19 significant. But you didn't file it within a
20 sufficient period of time that had you been following
21 all of the documents that came out of this procedure
22 on a daily basis, on an hourly basis, you would have
23 been aware of this particular fact and you weren't.
24 You didn't file a contention within the period of
25 time. You're out of time.

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1 That's what I was suggesting as a
2 procedure that would prevent us from having to look at
3 everything piecemeal, to look at everything out of
4 context, to look at every specific item that happens
5 under a microscope rather than looking at the macro
6 approach to the whole thing, that the concerns that it
7 would be for us for wasting our time, for wasting the
8 time of the Applicant, the staff and the Petitioners.
9 And what I'm looking for is any help in how we could
10 draft a case management order that would address the
11 concerns of one allowing a timely consideration of
12 issues, of issues when the consideration is going to
13 be most efficient, for example, say if there's an
14 amendment to the application to have a period of time
15 after that then which to challenge that amendment but
16 at the same period of time to do this thing
17 efficiently, that it's not going to take all of our
18 time and likewise, it's not going to take all of the
19 staff's time, the Applicant's time and your time to
20 come in on a piecemeal basis day after day, week after
21 week, for you to follow this thing on a real time kind
22 of situation and for us to be involved on a real time
23 situation.

24 So again, I don't need the answers to that
25 right now. What we've done is invited the staff, the

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1 Applicant and you all to think about that and to make
2 suggestions to us on (1) limits on our authority and
3 then (2) if any, in crafting this case management
4 order and then, in addition, the limits on our
5 authority just from a practical standpoint, what makes
6 sense. How can we do this most efficiently meeting
7 the legitimate concerns of all the entities involved.
8 That's where we are.

9 We don't need all of those answers right
10 now. We don't need you to just kind of speculate on
11 it. If you have something to address that now that
12 you'd like to that could help us perhaps define the
13 issue, refine the issue, that would be very helpful.

14 MS. CARROLL: At the beginning of your
15 statement, I think I want to check and see if I
16 understood you correctly, you were also suggesting the
17 benefit to us would be if an agreement was reached on
18 your plan that at the time of the SER we would have 60
19 days to file contentions on that and they could not
20 argue that they were nontimely and that would be the
21 benefit to us if we accepted your idea and if all the
22 parties accepted the idea and that's the decision you
23 write and that's what the Commission allows you to do.

24 But I'm just kind of holding back on some
25 stuff because of the 30 minutes and the kind of

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1 prepared to address what you suggested today was about
2 and is that time now? I mean because --

3 ADMIN. JUDGE FARRAR: Yes.

4 MS. CARROLL: -- that's kind of an
5 important piece of it.

6 ADMIN. JUDGE FARRAR: You're welcome to
7 say what you want, but if you notice, these other
8 people when they had their 30 minutes they maybe got
9 a minute and then they got ten minutes of questions
10 and then they got another minute and then -- In other
11 words, they don't -- The reason we have oral argument
12 is not for you all to make speeches, but for us to get
13 answers.

14 In other words, we have your briefs. We
15 don't have to have oral argument. So we have oral
16 argument because as you've seen we have a lot of
17 questions, some of them good, some of the bad. When
18 these lawyers got up here, they knew they weren't
19 going to make a speech for 30 minutes. They knew they
20 would have to bob and weave and get their points in in
21 between questions.

22 You don't have 30 minutes left to make a
23 speech. But if you want to bring some points to our -
24 - Because that's not why we have oral argument. We
25 have your briefs. We have oral arguments so our

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1 questions can be answered. Sometimes lawyers who
2 argue cases when the judge says we don't need to hear
3 from you, the lawyers says, "Good" because that means
4 they don't have any questions for me and they
5 understand my position and sometimes when the judge
6 says, "I'll hear from the other party" and says, "I
7 don't need to hear from you" that's not cutting off
8 your rights. That's saying we understand your
9 position. We have trouble with theirs. We want to
10 question them.

11 This is not the time -- So as you decide
12 what you want to do, say, in the next ten minutes,
13 bear that in mind. You've heard where we're headed
14 and we read your footnote that said much of what you
15 can get in Contention 4, everything you really wanted
16 to in Contention 3. You heard us say Contention 6,
17 they're probably right. It's premature, but we're not
18 going to throw it out as premature without preserving
19 your rights to come in later and they can't say that
20 later it's too late.

21 MS. CARROLL: But later is --

22 ADMIN. JUDGE FARRAR: No. We don't know
23 when. That we don't know when later is.

24 MS. CARROLL: Whenever they decide it.

25 ADMIN. JUDGE FARRAR: Right. And then we

1 said, "Okay. In acting on these six contentions,
2 we've looked in the future and we don't like what we
3 see because it's not fair or efficient for anybody.
4 So we have to struggle and do a case management
5 order." And that's what the infamous question five
6 that we sent you was kind of how does this proceeding
7 play out going forward and on that, we've said, "Talk
8 to each other."

9 So far, you've kind of won all the round
10 maybe. You never know. We may go back and change our
11 minds and write some different decision. But right
12 now, it's looking pretty good for you.

13 MS. CARROLL: Excuse me. I think my
14 colleague has been trying to get my attention.

15 ADMIN. JUDGE FARRAR: Okay.

16 (Pause.)

17 MS. CARROLL: So are you saying even
18 though I came all the way to D.C. and prepared to make
19 a little case I'm going to have an opportunity to do
20 it in writing and I don't have to be here now?

21 ADMIN. JUDGE FARRAR: No. You've had --
22 You've spoken many -- In other words, over the last
23 hour, you've --

24 MS. CARROLL: I know, but it's been
25 random. I have no idea what in here I haven't

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1 captured.

2 ADMIN. JUDGE FARRAR: But that's what they
3 did. They came up here ready to talk for 30 minutes
4 and they wished they had gotten a chance but they
5 didn't because we were all over them. So that was
6 kind of random. We jumped into a second issue before
7 we finished the first issue. The whole thing, that's
8 how oral arguments go.

9 Now when I've said you've done pretty well
10 so far, those two parties walked in here today saying,
11 "Hey. The Board said they're reconsider. We may get
12 to get this case terminated." They're probably not
13 thinking that now. They may yet get that, but they're
14 probably not thinking that right now.

15 MS. CARROLL: But we're not hearing a
16 process that's recognizable. I'm not hearing a
17 process that's recognizable to me.

18 ADMIN. JUDGE FARRAR: Okay. Why don't we
19 --

20 MS. CARROLL: There's something that's
21 like it's some -- I mean, you -- Can we take five
22 minutes and assess where we are and then wrap it up
23 quickly somehow or another?

24 ADMIN. JUDGE FARRAR: Sure. Yes.

25 MS. CARROLL: But at least clear think,

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1 focus on it a minute.

2 ADMIN. JUDGE FARRAR: Right.

3 MS. CARROLL: We know you want to get out
4 of here.

5 ADMIN. JUDGE FARRAR: No. We're here.
6 Believe it or not, we enjoy this part of our jobs. Go
7 ahead. We'll kind of -- Off the record.

8 (Whereupon, at 5:48 p.m., the above-
9 entitled matter recessed and reconvened at 5:59 p.m.)

10 ADMIN. JUDGE FARRAR: We're back on the
11 record. All the parties are here. Ms. Carroll, the
12 ball is in your court.

13 MS. CARROLL: Thank you. I think the time
14 will be well worth it because my colleagues talked me
15 down from my big speech.

16 First of all, we have a question and would
17 like to clarify what the license amendments to the
18 application are that you referred to several times.

19 ADMIN. JUDGE FARRAR: Those were just
20 hypothetical, generic like Judge McDade was saying.
21 One approach might be that you'd wait to file all your
22 contentions except if there were certain major things
23 that happened along the way that were clearly
24 identified and he used as an example license
25 amendments. But that would be something for you all

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1 to work out in your settlement discussions if you
2 choose to engage in them.

3 DR. LYMAN: I'm sorry.

4 ADMIN. JUDGE FARRAR: Go ahead, Dr. Lyman.

5 DR. LYMAN: Just a follow-up, but my
6 understanding is there is nothing in the regulations
7 about a formal license amendment process to the
8 application. Isn't that what we heard before?

9 ADMIN. JUDGE FARRAR: Amendments to the
10 license, in other words, we don't know how this
11 process between the Applicant and the staff works.
12 They know. You know probably more about it than we
13 do. We only decide cases that come in front of us.
14 So you all would sit down with them and say, "How is
15 the process going to work? When are significant" --
16 in other words, the SER is a significant event that
17 brings everything together. There may be other
18 significant events that you all will define that say,
19 "Okay. Here is a significant event and so we'll have
20 60 days after that."

21 DR. LYMAN: So you would propose --

22 ADMIN. JUDGE FARRAR: Judge McDade was
23 using license amendment as a generic term to describe
24 something major happening. We didn't mean --

25 DR. LYMAN: But there would have be

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1 mechanisms so if that happened we would be notified.

2 ADMIN. JUDGE FARRAR: Right. In other
3 words --

4 DR. LYMAN: But such a mechanism doesn't
5 exist now. As we heard, it's a licensing process.

6 ADMIN. JUDGE FARRAR: No, you would create
7 it and say to us and here's how I envision it working.
8 You all agree that at some certain stages those would
9 be these big stages. The way I envision it is the
10 Applicant would notify you all. The Applicant and
11 staff, however they do it, would notify you and the
12 Board a big thing has just happened. We would like
13 this to trigger a sixty day period and we would say,
14 "Fine. As to the events wrapped up in this big
15 development you now have 60 days."

16 DR. LYMAN: Right. But it would be their
17 judgment whether or not something was significant
18 enough to rise to that.

19 ADMIN. JUDGE FARRAR: No. You would
20 define that in advance.

21 DR. LYMAN: Okay.

22 ADMIN. JUDGE FARRAR: In other words, you
23 and they would say what are those kind of things going
24 to be and they submit it to us and we could say, "No,
25 that's not that kind of event." In other words, this

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1 is not -- this is us managing the case. It's not --
2 It's something different than is affirmatively stated
3 in the regulations.

4 DR. LYMAN: I understand.

5 ADMIN. JUDGE TRIKOUROS: But let me point
6 out. This isn't a carte blanche to just file a
7 million pieces of paper. This has to be new and
8 significant information that has significant meaning
9 to this case. This isn't just an arbitrary situation.

10 ADMIN. JUDGE FARRAR: If they make a big
11 change in plans.

12 DR. LYMAN: As you much know, the use of
13 the word "significant" in NRC regulations is often a
14 very controversial concept.

15 ADMIN. JUDGE FARRAR: You all are going to
16 define this. Forget, throw out, the regulations. You
17 all are going to define how you think this proceeding
18 should go ahead, what you would like. They aren't
19 controlling this process. I know they usually control
20 this process between the two of them. They're not
21 controlling this process. This is our process now.

22 ADMIN. JUDGE TRIKOUROS: Also there's no
23 requirement for them to keep you apprised of
24 everything that goes on. This is something that they
25 would agree to or not. But there is no formal

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1 requirement for this.

2 DR. LYMAN: Right. That was my point from
3 the beginning. We'd be creating a requirement.

4 ADMIN. JUDGE FARRAR: Right. In other
5 words, this would be points where the Applicant wants
6 to say we have to get this thing behind us. The only
7 way they're going to do that is notify you to say,
8 "Hey, it's time to get this behind us. You get our
9 agreement to it." So this is not -- This time it's in
10 their interest to give you information.

11 ADMIN. JUDGE McDADE: Is there anything
12 further that you hadn't put in your briefs that you
13 would like to bring to our attention before we move
14 on?

15 MS. CARROLL: That was my question.

16 (Off the record discussion.)

17 MS. CARROLL: I started with this question
18 and my comment having listened to this dialogue is
19 that the scenario that instantly leaps to my mind is
20 what's the mechanism when we go, "Hey, something
21 significant happened and you didn't trigger it."

22 ADMIN. JUDGE FARRAR: Then you have 60
23 days from after the SER.

24 MS. CARROLL: In the --

25 ADMIN. JUDGE McDADE: -- case management

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1 order at this point in time. What we're doing is
2 suggesting that you can make suggestions to us as to
3 how a case management order could be addressed. At
4 this point in time, we haven't made any decisions.
5 We're not going to commit ourselves. We're going to
6 hear from the staff. We're going to hear from the
7 Applicant. We're going to hear from you. And then
8 we're going to make a decision.

9 So if you have any suggestions that you
10 could make orally now, great. Do it. We're also
11 giving you an opportunity if there's something that
12 you don't think of today that you want to bring to our
13 attention in writing to set up a period of time within
14 which you can do that as well.

15 MS. CARROLL: Okay. So here it goes.
16 Sorry.

17 ADMIN. JUDGE FARRAR: And maybe we haven't
18 made this -- I'm assuming Mr. Silverman doesn't like
19 the 60 days after the SER. So if he wants to get
20 something done faster, he's going to tell you. If he
21 neglects to tell you, you still have 60 days from the
22 SER. That's your worst position if you get what I
23 think you want is not to have to be in here every day.

24 ADMIN. JUDGE TRIKOUROS: We haven't issued
25 any rule --

1 ADMIN. JUDGE FARRAR: Right.

2 ADMIN. JUDGE TRIKOUROS: Now understand.
3 We haven't issued any rulings yet. It is not clear
4 that necessarily all the judges on this Board agreed
5 with that. I want to make that clear right now that
6 this is just --

7 ADMIN. JUDGE FARRAR: But we're saying to
8 you all having heard what each of us has said can you
9 reach an agreement on what you'd like our case
10 management order to be.

11 MS. CARROLL: I wouldn't imagine we could.

12 ADMIN. JUDGE FARRAR: Okay. Fine.

13 MS. CARROLL: I'll be honest with you and
14 I appreciate --

15 ADMIN. JUDGE FARRAR: Then fine. Report
16 that back to us. Report that back. They may feel
17 that way. The settlement discussion may last three
18 minutes. Fine.

19 MS. CARROLL: But I appreciate --

20 ADMIN. JUDGE FARRAR: You all have
21 something at stake. You all have something to lose by
22 not settling and that's sometimes the best way to get
23 settlement. Nobody wants to settle. The other guy is
24 wrong, but sometimes you get in the room and you talk
25 about it. But go ahead.

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1 MS. CARROLL: Well, I definitely think
2 dialogue is a good thing.

3 ADMIN. JUDGE FARRAR: Right. But now we
4 answered your first question. Go ahead to where you
5 were next.

6 MS. CARROLL: I appreciate hearing from
7 Judge Trikouros because you have been speaking about
8 this a lot with language that sounds very much like
9 you have an idea that you're pretty invested in and
10 it's making me pretty uncomfortable.

11 But this is the speech. It's very short
12 and they convinced me to say less than what I wanted
13 to say because I was really hoping to persuade you to
14 my point of view. But they believe it can be done in
15 fewer words. And here it goes.

16 This is our position. You accepted
17 Contentions 3 and 4. We believe you were correct in
18 doing that and we believe you can hold it up. It
19 could be held in abeyance. We gave you precedence we
20 believe that will hold up and you can manage the case
21 that way.

22 Three and four are both valid. They go to
23 different points. The EIS and the SER capture
24 different issues and so accepting one would leave
25 blanks that we feel are vitally important to the

1 safety and health of our people.

2 I've misspoken when I said reopen the EIS
3 and what I should have said, what would have been
4 correct and accurate would have been a supplemental
5 EIS and I apologize for the confusion. And I actually
6 -- I guess it might be the time to acknowledge having
7 heard it today that there was confusion in the wording
8 of those contentions and it would be regrettable if
9 this serious issues was unable to be sustained because
10 of a wrong word somewhere.

11 In the past, I've had an ASLBs, subparts
12 of contentions and such to work around --

13 ADMIN. JUDGE FARRAR: You don't have to
14 apologize. You didn't word it wrongly. We, several
15 of us, read it wrongly and had to go back and look at
16 it and realized that there were different points being
17 made. So you filed what you filed. It was fine.

18 MS. CARROLL: Now one of the reasons why
19 I'm saying less now is because we believe that we have
20 an opportunity to write it and that would be more
21 deliberate and a more agreeable process for everybody
22 involved. So I hope I'm not making the wrong decision
23 to pull back.

24 ADMIN. JUDGE FARRAR: You would be able to
25 write what?

1 MS. CARROLL: Some of the things I'm not
2 saying that's there's a brief where we can put it out
3 deliberately and thoughtfully and with some research.

4 ADMIN. JUDGE FARRAR: If as part of this
5 discussion of how we move forward with the case
6 management order, you're welcome to file anything you
7 want with us at any time that states your position
8 insofar as it -- in other words, we have your position
9 insofar as Contentions 3 and 4. If you want to file
10 something about the case, how this case should be
11 managed going forward, you're welcome to file that at
12 any point. In other words --

13 MS. CARROLL: I'm surprised. I would have
14 thought we would have had to get permission to put
15 more words on this.

16 ADMIN. JUDGE FARRAR: Believe it or not,
17 we're the judges and we just gave you permission.

18 MS. CARROLL: Okay. I mean because you
19 know you've raised some really -- You've really been
20 taking this outside of the box and the impulse to do
21 that, I really appreciate a lot because I sense that
22 you're trying to do something to make the MOX plant
23 better, you're doing something to preserve our rights
24 and yet my sense is that we want to go forward with
25 the plan. We think that's the greatest good. We

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1 don't think you have the power to send a prematurely
2 filed application back. So if we're stuck with this
3 application, we want these contentions then. That's
4 our current position and I don't think we've changed
5 that.

6 And I did have a little bit to say to try
7 and convince you to keep them.

8 ADMIN. JUDGE FARRAR: Remember the whole
9 purpose of this case management order is to define how
10 and under what circumstances you will bring future
11 contentions in. You've put six contentions in front
12 of us. Some were rejected. Some are being
13 reconsidered, whatever. We've talked about reframing
14 one and it going forward.

15 So now you have a live proceeding. Now
16 you can bring in new contentions under the rules when
17 they're timely filed and we're going to have a case
18 management order that's going to define what does that
19 mean.

20 MS. CARROLL: Okay.

21 ADMIN. JUDGE FARRAR: So all the other
22 contentions that go to the safety of this plant that
23 you want to file you're going to be able to file under
24 the case management order.

25 MS. CARROLL: So, for instance,

1 hypothetical case, we finally see a waste
2 solidification building plan. We have it. It's
3 evidence and we go "Well, it's obvious we need a
4 supplemental EIS." Once we see it, it will help us
5 make our point that the EIS must be supplemented.
6 We'll have the EIS to compare. We can compare the EIS
7 to it.

8 ADMIN. JUDGE FARRAR: That is and maybe
9 you all want to define this, but that because of the
10 way the Commission set up this proceeding at the
11 beginning environmental issue are done except for
12 certain circumstances and the way you resurrect them
13 you may have to go to the staff or -- I forget how all
14 that works, but that's like a bad -- That's not your
15 best hypothetical. Your best hypothetical is you find
16 out that something, that they changed the design of
17 the plant so it might overflow in midstream.

18 MS. CARROLL: The reason I brought that up
19 is because you just said again that you were thinking
20 of sacrificing Contention 3 and it's our NEPA
21 contention on the waste and it's different than the
22 safety contention.

23 ADMIN. JUDGE FARRAR: Yes, but because
24 it's a NEPA contention that's precisely why it may not
25 be legitimate.

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1 MS. CARROLL: Okay. I'm going to defy my
2 colleagues and say a little bit more. But you did
3 just bring me to the point about the -- And this is
4 what I'm prepared to say. We've put in six
5 contentions since May. We do not have the resources
6 to flood you with contentions. So it seems to me the
7 issue is and has been and this is how we had
8 understood it and this is what we had talked to is
9 that there is nothing to litigate than what? Well, it
10 certainly isn't overloading you with work.

11 We cited the cases including recent cases
12 where cases have been held in abeyance for up to two
13 years even and that's kind of what we were hearing
14 that we were going to get waste solidification
15 building in two years and that had been an issue.

16 ADMIN. JUDGE FARRAR: Let's talk about
17 this contention of omission, number four, as reframed.
18 That would come in and we haven't talked about it, but
19 I assume that would sit there. It would in effect be
20 in abeyance because it's a contention of omission
21 until they cure it. They can't get a license and
22 sooner or later they'll come in and cure it and you'll
23 say, "We don't like the cure." We'll say, "Fine.
24 Give us an amended contention and we'll litigate
25 that." That's how it works.

1 So that contention at least for a time is
2 going nowhere. You've brought it in. It's working
3 there and it stays there forever until the Applicant
4 and staff do something. Meanwhile, I mean at some
5 point you'll need to file I assume some -- I'm
6 assuming they're going to deal with that issue at some
7 point.

8 MS. CARROLL: Well, if not, I hope you'll
9 bust them.

10 ADMIN. JUDGE FARRAR: They'll be busted
11 themselves or by the staff. Right, we'll deal with
12 it. But as this project moves forward, we were
13 assuming that you were going to want to file
14 additional contentions.

15 MS. CARROLL: If we had a live contention
16 and it was in abeyance, we envisioned that that would
17 mean if an issue came along that we would have the
18 resources to bring to you that that would create a
19 framework of a live proceeding where a late filed
20 contention could be proffered and we could have our
21 timeliness arguments and all that stuff and you know
22 we think it was done and we appreciate your comments
23 to this effect. We've done well.

24 ADMIN. JUDGE FARRAR: Now you know you're
25 going to lose many of those timeliness arguments

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1 because they're going to dredge. No matter how timely
2 you think you are based on a recent document they're
3 going to dredge out something and say here's a
4 document from six months ago and you're going to lose.

5 MS. CARROLL: I've been holding my piece
6 because I heard you on it today. You know, I heard
7 you really explain things, all of you, what's been
8 going on.

9 ADMIN. JUDGE FARRAR: I suggest you got to
10 know when you've won and now I think what you've just
11 said is going to lead Mr. Silverman and the staff
12 lawyers to say, "Why should we agree with a case
13 management order because you want to proceed in this
14 other fashion" and they'll be happy to proceed in that
15 other fashion because they'll bludgeon you with
16 documents that you had somehow in your constructive
17 possession even though you didn't read them. There
18 are thousands of pages of documents and they could
19 always pull one out that says, "We sent you this three
20 months ago. You should have acted then."

21 We don't think that's the way the business
22 of the United States Government ought to be done. But
23 unless we put in the case management order, that's how
24 it's going to be done.

25 MS. CARROLL: Going back to the question

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1 of a supplemental EIS, I would refer you once again to
2 the CIL02-7 which you've indicated your familiarity
3 with and -- Excuse me.

4 (Pause.)

5 MS. CARROLL: We've talked about its --
6 I'm saying it again because to me this is really
7 strong that we can have a supplemental EIS. It says
8 so on page 211. Excuse me. Yes. And for filing late
9 filed contentions. So it's a hearing right as a
10 procedural right. We've been -- It's been reiterated
11 in that order

12 ADMIN. JUDGE FARRAR: You can always ask
13 for supplemental EIS and the staff may or may not tell
14 you that they don't think the circumstances warrant it
15 and we'll argue that out here and you can file late
16 filed contentions and they may say, "That's a late
17 filed contention" or more likely they'll say as
18 they've said most of the time that "Too bad. It's too
19 late because here's a document you had six months
20 ago." They said that about this record of decision
21 that I would have thought, "Gee, that's the triggering
22 document. You've sprung into action within a month."
23 And they all whipped out some things. "You should
24 have known about that three months ago" and I badgered
25 Mr. Martin about that for saying it was premature and

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1 untimely at the same time.

2 MS. CARROLL: But we think you have the
3 power. I mean, I thought it was kind of interesting
4 --

5 ADMIN. JUDGE FARRAR: That's why we're
6 talking --

7 MS. CARROLL: My take on that was that you
8 were offering them, you were inviting them, to say
9 something you hadn't heard or hadn't thought of. I
10 didn't think that happened today.

11 ADMIN. JUDGE FARRAR: No.

12 MS. CARROLL: I thought you had the power
13 to say, "It's too timely. We accept it. When you
14 have some info, we'll litigate it."

15 ADMIN. JUDGE FARRAR: What I was saying to
16 them was I think your position is kind of flimsy.

17 MS. CARROLL: I didn't think they did
18 anything to strengthen it my own self.

19 ADMIN. JUDGE FARRAR: And when they don't
20 strengthen it, then I can say, "Good." If I want to
21 write an opinion against them, now I gave them a
22 chance to respond and they didn't. So now I'm on
23 sounder ground going ahead. They responded in some
24 ways. They didn't respond in others. That's the way
25 the system works.

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1 MS. CARROLL: And we have some experience
2 with the system and we came in with our eyes open and
3 the reason I gave you the litany of approaches is
4 because we don't dare put all of our resources and
5 hopes in this process which you called looked like a
6 shell game. We think it looks a lot like a shell game
7 too and yet you got off the tanks and that's the
8 payoff. That's --

9 ADMIN. JUDGE FARRAR: And we're committee
10 --

11 MS. CARROLL: -- go for some stuff.

12 ADMIN. JUDGE FARRAR: And we're committed
13 to making it as fair a game as there can be because we
14 want everybody in this room to be treated the same.

15 MS. CARROLL: And it's amazing and we're
16 appreciative of it and I just want to say that we
17 don't have to decide today or anything. But today is
18 a good time to get some things out and everybody's
19 ears at that same time and we signed up for this
20 process and we think we can use it and we don't have
21 to come up with a case management, that we have
22 accepted contentions, that the law provides for us to
23 wait until they're litigable.

24 ADMIN. JUDGE FARRAR: Here's what's going
25 to happen if you don't come up with some kind of case

1 management order. Let's say we finish this
2 proceeding. You have a valid reframed Contention
3 Number 4. Sooner or later, Mr. Silverman's people are
4 going to send to the staff and to you what they
5 omitted to send before and it's going to say here's
6 how we're going to deal with avoiding tanks getting
7 too full and the staff will look at it and the staff
8 will argue with them a little bit and eventually
9 they'll answer all the staff questions and eventually
10 the staff will say, "Okay. You've taken care of all
11 our concerns" because the staff will keep badgering
12 them until they do take care of the concerns.

13 Now Mr. Silverman could come to us and
14 say, "The staff is badgering us too much. We want a
15 hearing." Applicants don't do that. They'd rather
16 give the staff what they want. So eventually, the
17 staff and it's not a corrupt process says, "You've met
18 it." Then they're going to say to us, "Please dismiss
19 Contention Number 4 because we've cured the omission."

20 And at that point, you're going to have --
21 you will get X number of days to either say they
22 haven't cured it which you won't be able to say
23 because they have submitted something and what you'll
24 have to say is I don't like the cure.

25 MS. CARROLL: Exactly.

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1 ADMIN. JUDGE FARRAR: And you're going to
2 have to litigate then.

3 MS. CARROLL: Exactly. We're up for it.
4 That's what we're waiting for. That's our beef. If
5 I'd have been in there, we would have gone for
6 criticizing it. But it was omitted which was easy.

7 ADMIN. JUDGE FARRAR: But what I suggest -

8 -

9 MS. CARROLL: Because I went immediately
10 to look it up as my highest interest over there and we
11 got some traction with it before. Oh my God, it's not
12 there. I can do this.

13 ADMIN. JUDGE FARRAR: Okay, but what's
14 going to happen is I can't predict the future. But
15 when they finish curing this omission, it's going to
16 be a hard thing for you to challenge.

17 MS. CARROLL: We're up for it.

18 ADMIN. JUDGE FARRAR: Good.

19 MS. CARROLL: I mean, that's what I want
20 to say. Thank you for giving me an airing.

21 Now we think that this might be a good
22 time to share something that we thought we'd save for
23 a brief and I'm sorry Mr. Tiktinsky had to leave
24 before we bandied his name about some more. But he
25 was at a meeting. It was a MOX meeting and the talk

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1 is the staff is saving all their RAIs until the end.

2 MR. SILVERMAN: Your Honor, does this have
3 anything to do with the contentions and the issues
4 before the Board? I'm going to object to this.

5 MS. CARROLL: It's a bad way to proceed
6 with the MOX factory and that's why we have to --

7 MR. SILVERMAN: This is brand new.

8 MS. CARROLL: -- say on an ongoing basis
9 because it's not going well and I'm hoping this ASLB
10 process which I do not think will be too burdensome to
11 you. I mean I'm sorry. You know there's this nuclear
12 renaissance going on. It's going to burden the NRC.
13 It is. Terrible. I'm sorry for it.

14 ADMIN. JUDGE McDADE: Let me interrupt for
15 a second. At this point, there was an objection made
16 to the arguments by Mr. Silverman. The objection was
17 as I understood it this isn't just sort of free formed
18 discussion. It's directed to the issues. There's an
19 objection. Let us get together and rule on the
20 objection.

21 MS. CARROLL: I'm sorry.

22 MR. SILVERMAN: Thank you.

23 (Off the record discussion.)

24 ADMIN. JUDGE FARRAR: Ms. Carroll, my
25 thought was you all came a long way to be heard here

1 and that we wanted to hear what you have to say.

2 MS. CARROLL: Um --

3 ADMIN. JUDGE FARRAR: I'm going to mix
4 with something. Mr. Silverman has now objected on
5 essentially the ground that I can be liberal in
6 letting you say what you want to say, but at some
7 point it's going so far afield that we're outside the
8 purpose of why we're here.

9 MS. CARROLL: But it's relevant.

10 ADMIN. JUDGE FARRAR: No. What he's
11 saying is it's not relevant and while I would like to
12 sit here and hear what you have to say, it needs to be
13 tied into the issues that are in front of us today and
14 so we need to focus on that. So why don't you take
15 five minutes and finish up with what's relevant to the
16 issues in front of us today.

17 MS. CARROLL: Can't you let me make an
18 effort to prove its relevance and then strike it from
19 the record or whatever? Isn't that what an objection
20 does is it removes it from your consideration?

21 ADMIN. JUDGE FARRAR: Here's the thing.
22 In oral arguments, there aren't objections. They're
23 not permitted. I mean, that's not how we proceed.
24 But it's a sign of how far afield we've gotten that
25 Mr. Silverman would make an objection that's usually

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1 not in order. So we need -- In other words, we don't
2 care what Mr. Tiktinsky does about his job. We don't
3 care when they send their RAIs. All we care about is
4 running a fair proceeding where you're not exhausted
5 by the process and not deprived of a fair opportunity
6 to present contentions when the time arises.

7 MS. CARROLL: Okay.

8 ADMIN. JUDGE FARRAR: So why don't you
9 take five minutes. You've had as much freewheeling
10 speaking time as the others did. Most of them would
11 rather they had the less time to listen to our
12 questions than they did. So why don't you take five
13 minutes and we'll wrap up.

14 (Pause.)

15 MS. CARROLL: Okay. What he made me aware
16 of is that there is going to be a case management
17 discussion. I can maybe say some things that you'll
18 have in your mind while you're writing it. But we're
19 going to go through that process. That is a decision
20 you have taken.

21 Again, let's see, we did want to -- I do
22 want to say this. I think this is right. We think
23 that Contention 6 is acceptable and the alternative
24 that was articulated here today does not give us the
25 same rights and we would like to see that accepted and

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1 go forward and think it's similar. I mean, again we
2 have an expert witness and this amendment is coming
3 and we'll file a late filed contention I guess.

4 I guess I can express a reluctance to get
5 into a situation where we would not be able to file
6 contentions on certain glaring aspects of the MOX
7 plant. But I think you can see in the history we've
8 tracked certain things and they're showing up here
9 again and we think that should be a compelling point
10 that we're this far down the road and these things
11 haven't been dealt with and this is why it's very
12 important to us to have the hearing rights and the
13 panel of judges.

14 We think it's the most highly protective
15 process of public health and good. This process, we
16 understand that it's rigorous. That's part of the
17 reason why we haven't peppered you with contentions.
18 It's just like, you know, you send ping pong balls and
19 if you send too many, you're fielding all of them and
20 we know this by experience and so we're picking
21 carefully.

22 And in the five questions that you gave us
23 we again on one refer you to CIL02-7. And then on
24 point number five, the only acceptable of those
25 options was numeral 1(i)(1).

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1 And I think -- Do you think that's it, Ed?
2 Lou? We rest our case. Thank you.

3 ADMIN. JUDGE FARRAR: Okay. Thank you.
4 We've lose Ms. Olson a long time ago.

5 MS. CARROLL: Her cell phone battery could
6 have died. She's in Florida.

7 ADMIN. JUDGE FARRAR: Whatever. It's not
8 her fault. I'm just stating the facts for the record.
9 Mr. Silverman, Ms. Jones, anything to add?

10 MS. JONES: I just wanted to maybe get
11 some clarity on whether or not the Board intends to
12 put its reformulated contention in writing so that we
13 could respond or --

14 ADMIN. JUDGE FARRAR: Yes.

15 MS. JONES: I'm not quite sure. I don't
16 know if that issue was resolved.

17 ADMIN. JUDGE FARRAR: We intended that
18 from the beginning.

19 MS. JONES: Okay.

20 ADMIN. JUDGE FARRAR: We would rewrite it,
21 send it to them by the end of the week, give them X
22 days to say whether they buy into it, then give you
23 all a different number of days because you each have
24 a short term problem. We would give you a different
25 number of days to tell us whether that's an admissible

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1 contention and we'll put this in the order sending the
2 contention to them and then we would say, "We'd like
3 you all to use some other period around that same time
4 to spend ten days in settlement and maybe it's ten
5 days, maybe it will be ten minutes, maybe it will be
6 ten seconds, in settlement discussions to see if you
7 can come up with a case management framework within
8 our existing authority or outside our existing
9 authority."

10 We could bless and send to the Commission.
11 The other we could say we don't have the authority,
12 but we'll send it to the Commission and ask them to
13 install it.

14 MR. SILVERMAN: I understand that, Your
15 Honor. There were some other issues and questions
16 that came up earlier in the proceeding and it's not
17 clear to me whether they are still on the table or
18 not, action items for us to respond to. If they are,
19 I'd surely really appreciate them in an order so we
20 all have clarity.

21 ADMIN. JUDGE FARRAR: Okay. That may be
22 in a subsequent order because we can't do that until
23 we see the transcript and I don't know if we have it
24 on one day or whatever.

25 MR. SILVERMAN: That would be fine.

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1 ADMIN. JUDGE FARRAR: But I think you each
2 had agreed to do certain things.

3 MS. JONES: Yes.

4 ADMIN. JUDGE FARRAR: So we'll dig those
5 out.

6 MR. SILVERMAN: And put them in an order.

7 ADMIN. JUDGE FARRAR: And put them in the
8 order.

9 MR. SILVERMAN: Thank you very much.

10 MS. JONES: Thank you.

11 ADMIN. JUDGE FARRAR: Okay. Gee, it was
12 only five hours for a two hour hearing. Judge
13 Rosenthal will since he feels responsible for me
14 having mentored me for 40 years will be very upset
15 with me. So please don't tell him.

16 (Laughter.)

17 ADMIN. JUDGE FARRAR: Thank you all for
18 coming. We'd stay and come down in the well and spend
19 some time with you but we all have places to go. So
20 let's do it anyhow. This case is submitted. Off the
21 record.

22 (Whereupon, at 6:35 p.m., the above-
23 entitled matter was concluded.)

24

25

CERTIFICATE

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

Name of Proceeding: Shaw Areva MOX Services
Application

Docket Number: 70-3098;
ASLBP No. 07-856-02-MLA-BD01

Location: Rockville, Maryland

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.


Katherine Sykora
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