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

Location: Rockville, Maryland

Date: Wednesday, April 9, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

HEARING

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In the Matter of: :
SHAW AREVA MOX SERVICES : Docket No.
Mixed Oxide Fuel : 70-3098-MLA
Fabrication Facility : ASLBP No.
(License Application for : 70-856-02-MLA-BD01
Possession and Use of :
Byproduct, Source and :
Special Nuclear Materials) :

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Nuclear Regulatory Commission
Hearing Room T-3 B45
11545 Rockville Pike
Rockville, Maryland

Wednesday, April 9, 2008

BEFORE:

MICHAEL C. FARRAR Chairman
LAWRENCE C. McDADE Administrative Judge
NICHOLAS G. TRIKOUROS Administrative Judge

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P-R-O-C-E-E-D-I-N-G-S

(1:00 p.m.)

1
2
3 CHAIRMAN FARRAR: Good afternoon,
4 everyone. We're here, once again, in the -- 1:00 on
5 Wednesday, April 9th, for another oral argument in the
6 MOX proceeding.

7 I'm Mike Farrar. I'm the Chairman of the
8 Board. With me are my brother judges, Nick Trikouros
9 and Larry McDade.

10 This is in effect a follow-on to the oral
11 argument we had on January 8th, which itself was a
12 follow-on to our October 31st decision finding that
13 Petitioners had standing, and at least tentatively
14 admitting two of their contentions, Number 3 and
15 Number 4.

16 We had a number of issues before us then.
17 We ended up reshaping Contention 4 and asking the
18 parties for their views on it. We also asked for
19 their views on case management order.

20 We had briefs and pleadings on those
21 questions and a multitude -- maybe I think something
22 like 15 briefs on those and related questions since
23 then. So we're here today to deal with all of those
24 matters.

25 First, we're going to try to take final

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1 action on the shape and admissibility of Contention 4,
2 address new Contention 7, address the request for
3 suspension of construction, or stay of the
4 construction authorization, and deal with the case
5 management order question.

6 Our goal is to write -- after this is to
7 write a decision that deals with all of the pending
8 matters, and then we'll know for certain if the case
9 is moving forward and under what ground rules.

10 With that background, could I ask the
11 parties to introduce themselves? For the Applicant?

12 MR. SILVERMAN: I'm Don Silverman. I'm
13 with Morgan Lewis, and we represent the Applicant, MOX
14 -- Shaw Areva MOX Services.

15 MR. ZABIELSKI: I'm Vince Zabielski, also
16 with Morgan Lewis.

17 CHAIRMAN FARRAR: Okay. And for the
18 Staff?

19 MS. JONES: I'm Andrea Jones from OGC.

20 MS. SIMON: I'm Marcia Simon from OGC.

21 MS. MARCO: Catherine Marco, OGC.

22 CHAIRMAN FARRAR: Okay. Ms. Marco, we're
23 delighted you filed your appearance. Ms. Marco and I
24 go way back to the PFS proceeding six years ago when
25 she was a young lawyer and I was a younger Judge.

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1 (Laughter.)

2 And I'm not surprised that you've risen to
3 the position you have. We're happy to have you with
4 us.

5 For the Intervenor?

6 MS. CURRAN: Good afternoon. I'm Diane
7 Curran, here representing the Intervenors, Nuclear
8 Watch South, Blue Ridge Environmental Defense League,
9 and Nuclear Information and Resource Service.

10 With me at the counsel table are our
11 expert, Dr. Edwin Lyman of the Union of Concerned
12 Scientists, and Glenn Carroll of Nuclear Watch South.

13 And I believe on a telephone connection we
14 have Lou Zeller representing BREDL, and Mary Olson
15 representing NIRS.

16 CHAIRMAN FARRAR: Mr. Zeller, you're
17 there?

18 MR. ZELLER: I am, Judge Farrar. Thank
19 you. This is Lou Zeller.

20 CHAIRMAN FARRAR: And you can hear all
21 right?

22 MR. ZELLER: I can hear very well. Thank
23 you for adding this link.

24 CHAIRMAN FARRAR: Okay. And Ms. Olson?
25 I think we were told she was not calling in.

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1 MS. CURRAN: Oh, okay.

2 CHAIRMAN FARRAR: Ms. Curran, we are also
3 delighted to have you here. Your clients have done an
4 admirable job over the months in trying to represent
5 themselves, but this is a very complicated case, and
6 we're delighted to have someone as accomplished as
7 yourself in it.

8 Mr. Silverman, don't feel bad that I've
9 complimented them. We're happy to have you --

10 MR. SILVERMAN: I'll try not to take it
11 personally. Thank you.

12 (Laughter.)

13 CHAIRMAN FARRAR: -- still with us, but
14 now it's kind of a fair fight.

15 Mr. Zeller, we're happy to have you on as
16 an observer. If you have a mute button to cut down on
17 background noise that might affect our recording, we'd
18 like you to use that. But otherwise, just try to keep
19 the noise to a minimum. And since you have counsel,
20 both you and Ms. Carroll and Dr. Lyman are welcome to
21 be here and to talk to counsel, but not to address the
22 Board.

23 MR. ZELLER: Of course. Thank you.

24 CHAIRMAN FARRAR: Okay. I want to, before
25 we start, compliment the parties on some very lengthy

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1 and well-done and thoughtful pleadings and other
2 documents, which should allow us to move more quickly
3 this argument than we have at earlier ones.

4 I also want to thank you for, when we
5 asked you questions that you thought were off the
6 charts, you answered the questions and then told us
7 politely that we shouldn't do anything with the
8 answers, and that, of course, is fine.

9 And while we'll get to this later, Ms.
10 Marco, Ms. Jones, the Board appreciates your pleading
11 of the other night on the change of approach. There
12 is always the -- those of us who have been in the
13 government know the old saying, "The government wins
14 when justice is done," and it's in the finest
15 traditions of government lawyers to make sure that the
16 right thing is done, not necessarily that their client
17 sticks with a position that's not meritorious.

18 Let's move -- are there any preliminary
19 matters we should deal with?

20 (No response.)

21 Okay. Then, let's move -- what we've done
22 in our schedule was talk about having, first,
23 something in the nature of a prehearing conference,
24 which will be kind of a just round-robin as though
25 we're all sitting around the table trying to deal with

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1 Contention 4 and the reshaping of it.

2 And we -- so let's start with that. Mr.
3 Silverman, you asked for -- you had two kind of major
4 legal issues that you thought needed to be dealt with,
5 and four matters of clarification. If we agree with
6 all of those, then -- don't get your hopes up yet. If
7 we agree with all of those, you would then concede
8 that's an admissible contention?

9 MR. SILVERMAN: We would, Your Honor.

10 CHAIRMAN FARRAR: Okay. Then, let's --
11 let me ask some questions, and feel free to, you know
12 -- anybody chime in if they think they need to.

13 On the liquid high-alpha waste, limiting
14 it to that rather than to all wastes, Ms. Curran, I
15 believe you said that's acceptable. -- their
16 restriction that they want to put on is acceptable to
17 you.

18 MS. CURRAN: Yes.

19 CHAIRMAN FARRAR: Okay. Staff would have
20 no problem with that, I assume.

21 MS. JONES: I think our problem is a
22 little bit larger than the -- maybe the wording of the
23 contention.

24 CHAIRMAN FARRAR: I'm just talking about
25 that one point.

1 MS. JONES: Okay. Oh.

2 CHAIRMAN FARRAR: We were -- we wrote it
3 as though it dealt with all waste.

4 MS. JONES: It pertained to liquid --

5 CHAIRMAN FARRAR: The Applicant points to
6 the petition saying it's liquid high-alpha waste.

7 MS. JONES: Yes, that's fine.

8 CHAIRMAN FARRAR: That's fine with you?

9 MS. JONES: Yes.

10 CHAIRMAN FARRAR: Okay. Can I assume from
11 the Staff that if this contention is limited to liquid
12 high-alpha waste that the Staff, in the exercise of
13 its ordinary regulatory duties that it would be doing,
14 whether or not we existed or had any jurisdiction,
15 would deal with the rest of the waste on the same --
16 in other words, if this contention doesn't reach the
17 rest of the waste, would the Staff address it in the
18 ordinary course of its regulatory responsibilities?

19 MS. JONES: Okay. I guess I'm not really
20 -- I'm not really understanding.

21 CHAIRMAN FARRAR: Okay. We had said the
22 contention deals with all of the various --

23 MS. JONES: Right.

24 CHAIRMAN FARRAR: -- possibly problematic
25 waste streams. Mr. Silverman says, "Well, the

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1 contention only dealt with liquid high-alpha waste."
2 But the contention raises a -- kind of a generic kind
3 of problem. We may have a hearing, or not, here only
4 on liquid high-alpha waste, but all of these other
5 waste streams could also result in the same kind of
6 problem.

7 If we limit the contention the way Mr.
8 Silverman wants us to, what assurance do we have that
9 the Staff, over the next several years, will make
10 sure, without our oversight -- just in doing the job
11 it is commissioned to do by the laws and regulations
12 -- would deal with that issue for the other waste
13 streams?

14 MS. JONES: Oh, yes. Yes, certainly we
15 would --

16 CHAIRMAN FARRAR: Okay. So the public
17 interest -- the public interest doesn't depend only on
18 us having a broad contention. We can have a narrow
19 contention, and you'll carry the ball the rest of the
20 way.

21 MS. JONES: Oh, yes. That's correct.

22 CHAIRMAN FARRAR: Okay. Thank you.

23 Second point -- let's hold the second one,
24 because that's a little more complicated. That's the
25 second point about whether the problems would -- that

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1 the contention deals with arise only on the DOE side
2 of the fence or would also include what's happening in
3 the MOX facility. Let's come back to that.

4 The first clarification Mr. Silverman
5 wanted was we had said you'd have to take certain
6 measures as though those were the exclusive ones. Mr.
7 Silverman, you wanted an addition to the language,
8 something like "and other appropriate measures," so
9 the first two were not limiting.

10 Ms. Curran, is that all right with you?

11 MS. CURRAN: I'm not sure I follow where
12 you are.

13 CHAIRMAN FARRAR: Mr. Silverman, would you
14 go -- would you go over --

15 MR. SILVERMAN: Yes, I would.

16 CHAIRMAN FARRAR: -- the document -- Ms.
17 Curran about that.

18 No, no, no. Do it on the record.

19 MR. SILVERMAN: I can do that. Thank you,
20 Your Honor. The contention, as reformulated by the
21 Board -- let me find the exact language, bear with me
22 a second -- early in the contention says -- well, let
23 me just read from the beginning.

24 "The license application and ISA summary
25 for the proposed MOX facility are inadequate, because

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1 they do not address safety and public health risks
2 posed by an inability to transfer waste from the
3 facility, resulting in the need to forego receipt of
4 radioactive materials or to safely shut down the
5 facility."

6 And we suggested that there may possibly
7 be other alternatives, and we suggested that that
8 language be changed to, "Which might result in the
9 need to forego receipt of radioactive materials,
10 safely shut down the facility, or take other
11 appropriate measures." And it's my understanding that
12 in Petitioner's February 19th pleading they agreed
13 that that was an acceptable change.

14 MS. CURRAN: Chat's correct. I just lost
15 my place in --

16 CHAIRMAN FARRAR: That's okay. There are
17 a lot of documents to track through here.

18 Is that change all right with the staff?

19 MS. JONES: Yes, that's okay.

20 CHAIRMAN FARRAR: Thank you, Ms. Jones.

21 The next one was we had worded the
22 contention as though the old SER imposed requirements,
23 and, Mr. Silverman, you wanted them to state
24 expectations. And before we deal with that, we had
25 raised a question with the Staff, what is the status

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1 of the SER? And let me explain where that question
2 comes from.

3 We understand that the only things that
4 impose formal restrictions on an applicant are the
5 statute, the regulations, license conditions, and so
6 forth. But all that says is the SER is not self-
7 executing.

8 At least -- I can't speak for my
9 colleagues -- but my impression through the years is
10 when the Staff puts something in an SER that's the
11 rule. Now, it may not be self-executing, but my
12 impression had always been if it's in the SER it later
13 gets incorporated somehow somewhere, maybe in a
14 license condition.

15 The Applicant may later amend the safety
16 -- the SAR, which becomes part of the licensing basis,
17 but there is a point in your briefs where you make it
18 sound like, "Well, we wrote the SER, but that's no big
19 deal." I take it that's not what you meant?

20 MS. JONES: No, that's not what we meant.

21 CHAIRMAN FARRAR: Okay. Tell me -- so
22 tell me what we're going to do with this -- what
23 appeared to be a pretty strong -- in other words, the
24 Staff has to pass on the application, the former
25 application. They said, "Well, we can only pass on

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1 this if this happens." Why isn't that kind of the law
2 of the case?

3 MS. JONES: Well, I guess our view is, in
4 looking at the nature of what an SER is, it really is
5 just comprised of the Staff's findings and their basis
6 for decision, particularly in this case with regard to
7 the construction authorization request.

8 And so any statements about what would
9 happen somewhere down the line, I -- and it's an
10 interesting legal question, and it raises what I think
11 is interesting policy questions as well. But
12 something that would happen somewhere down the line,
13 I don't think that the Staff would be bound to it,
14 because the Applicant could always change their mind
15 somewhere down the line as to how they're going to
16 handle their waste.

17 And so they're not -- until that license
18 application comes in, it is what it is. And so the --

19 CHAIRMAN FARRAR: Well, but what if the
20 Applicant doesn't change its -- in other words, I take
21 it that's the Staff saying, "We can't approve this
22 unless X." Now, if the facts change, right, something
23 else can happen.

24 MS. JONES: Right.

25 CHAIRMAN FARRAR: But if the facts don't

1 change, it seems to me that the public would not be
2 well served if the Staff says, "We can only approve
3 something under these conditions," and then later
4 says, "Oh, well, don't worry about it."

5 MS. JONES: Well, I think what's really
6 important here is when the Staff made those
7 statements, they were making it with regard to -- and
8 this goes back to 70.23(b), when they were looking a
9 design bases. And as I understand it, when you're
10 looking at -- looking at design bases is not the same
11 as looking at design. So they were looking at the
12 representations that were made to them at that
13 particular moment.

14 And so in using it to make their decision,
15 I think that it was appropriate to do. But to say
16 that it's now a requirement, without the -- without
17 there being some sort of a regulation requiring that
18 the information be placed in a license application, I
19 don't know that that's the same thing.

20 To say that the Applicant needed to comply
21 with what was in the SER, I don't know that that is
22 the same as saying that they are actually having to
23 require -- excuse me, comply with the requirement that
24 it be placed in the license application.

25 JUDGE McDADE: But what happens then?

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1 Something is in the safety evaluation report. What
2 then? If the Applicant doesn't have to comply with
3 that, then what's the point of having it in the SER?

4 MS. JONES: Well, I don't think that it's
5 so much that the Applicant doesn't have to comply with
6 that specific portion of the SER. What they do have
7 to follow through with is how they're going to handle
8 their waste. So the primary concern at that point,
9 when the construction authorization request and the
10 construction authorization was approved, was, as I
11 understand it, the primary concern was: how are you
12 going to handle your waste?

13 And so that information was provided, and
14 so the staff thought that that was sufficient, and so
15 they decided that it was okay to go ahead with
16 construction authorization. So I -- again, I think
17 that --

18 JUDGE McDADE: Now, isn't that now part of
19 the licensing basis?

20 MS. JONES: Is it part of the licensing
21 basis?

22 JUDGE McDADE: Yes.

23 MS. JONES: I don't know the answer to
24 that question. I think what's going to be in the SER
25 for the license is really what's going to be the bases

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1 for whether or not this facility gets a license to use
2 and possess -- or to possess and use.

3 JUDGE TRIKOUROS: Well, there's no doubt
4 in my mind that the Staff, in reviewing the license
5 application, would have to deal with the -- what I
6 would consider an open item in the CAR SER. They
7 clearly said that there was a deficiency, and they
8 said that we understand -- we expect that this
9 deficiency is going to be cleared up in the license
10 application.

11 From my reading of the license
12 application, it wasn't. But that's something that the
13 Staff has to deal with, because it is an open item as
14 far as I'm concerned.

15 Now, in this process, unlike ESP COL
16 processes where an ESP SER would say there is a COL
17 action item that has to be dealt with in the next
18 phase, they don't seem to do that here. And I think
19 it's a deficiency that they don't do that here, but,
20 nonetheless, they're not required to here.

21 So, but it's very clear to me that if
22 their -- if this problem isn't dealt with at the
23 license application phase, then the license cannot be
24 issued. It has to be dealt with.

25 JUDGE McDADE: But the question here is

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1 just how this fits into the draft contention that's
2 currently before us, which talks about specifically
3 that the NRC Staff required that actual setpoints
4 would be provided in the license application.

5 The proposal, as I understand it, is to
6 change that language to state that the NRC Staff
7 stated its expectations that actual setpoints would be
8 provided in the license application. As I understand
9 it, that's the proposed language from the Applicant,
10 correct?

11 MR. SILVERMAN: Yes.

12 JUDGE McDADE: Okay. And from my
13 standpoint, what is the problem with that, if any,
14 from the Staff's standpoint, to have that as part of
15 the contention? And what that does, as I understand
16 it, is it -- it states an expectation at this point
17 that actual setpoints would be provided in the license
18 application.

19 But it allows the Applicant, if it chose,
20 to submit something else. If down the road you feel
21 that something other than actual setpoints would be
22 more appropriate, you would be able to address this
23 deficiency noted in the original SER in a different
24 manner, which the Staff would then have the ability to
25 review. Is that a correct understanding?

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1 MR. SILVERMAN: That's essentially right,
2 Judge McDade. I just want to point out that it's not
3 -- that we're not quibbling with the need for
4 controls, for setpoints, for appropriate measures to
5 be sure that we have the safe storage of material in
6 the event that the WSB is not available.

7 It's just that we would anticipate,
8 frankly, that those would more likely appear in
9 internal documents, such as a procedure, a program.
10 They wouldn't necessarily and don't necessarily need
11 to be in the license at all -- or any perhaps in the
12 license application itself.

13 The only part of the required language
14 we're quibbling with is that this information is
15 required to be in the LA.

16 CHAIRMAN FARRAR: So you're conceding the
17 problem needs to be dealt with. It's required that
18 the problem be dealt with, but how -- through whatever
19 mechanism you all agree on later.

20 MR. SILVERMAN: Well, I hesitate to use
21 the word "problem," but I would say that we agree that
22 there needs to be adequate controls to ensure safe
23 storage of the waste in the event that the WSB is not
24 available.

25 JUDGE McDADE: Okay. But then, the way I

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1 misunderstood your position, the issue wasn't that
2 there would be a different solution other than
3 providing actual setpoints. What your distinction was
4 is that those setpoints would not necessarily have to
5 appear in the license application. They could, but in
6 the Applicant's position they don't need to appear in
7 the license application. They need to exist, they
8 need to be documented, but they need not be in the
9 license application itself.

10 MR. SILVERMAN: That is correct. And they
11 will exist, and they will be documented.

12 JUDGE McDADE: Okay. Is that -- does that
13 satisfy the concerns of the Petitioners?

14 MS. CURRAN: Well, I have to break my
15 concerns into two parts. In a regulatory basis, it's
16 very disturbing, because the language of this SER
17 seems very plain that the Staff said, "We're going to
18 issue construction authorization based on this
19 condition." And if you look back at CLI 0207, the
20 Commission's decision in 2002 where they rejected
21 Gain's motion to -- Gain requested them not to
22 bifurcate the proceeding. The Commission said, "In
23 short, the regulations contemplate two approvals --
24 approval of construction under 10 CFR Section
25 70.23(a)(7)(b) -- (a)(7), and (b) approval of

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1 operation, 10 CFR 70.23(a)(8)."

2 So it seems to me this was a licensing
3 action, the approval of construction. The NRC Staff
4 said, "We're saying okay to construction," but very
5 explicitly put a condition on it. And now, it's being
6 characterized as a mere expectation.

7 So I think that's -- from the standpoint
8 of, well, what is happening here that the SER is being
9 rewritten in the course of this proceeding? We
10 wouldn't agree to that.

11 JUDGE McDADE: Okay. Well, I read it the
12 same way that you did initially. But the way Mr.
13 Silverman explained it to me seems to make more sense,
14 which is it isn't just an expectation, it's a
15 requirement. It will happen. The question is: where
16 will it be documented? And the position is not that
17 in the original SER there was a requirement that it be
18 documented in the license application. There was only
19 a requirement that it be documented.

20 And Mr. Silverman says, "At this point in
21 time, it may or may not be documented in the license
22 application." It seems to appear that they are
23 leaning -- that it would not be documented in the
24 license application, but that as a requirement of the
25 SER it would be documented, that these setpoints would

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1 be documented. It's just where that documentation
2 would occur.

3 Now, as long as it occurs, doesn't that
4 meet the requirements set out in the original SER?

5 MS. CURRAN: No.

6 JUDGE McDADE: Why not?

7 MS. CURRAN: Because the words of the SER
8 say, "Actual setpoints would be defined by DCS," which
9 is the predecessor to SHAM, "as part of any license
10 application." That is an important phrase to the
11 Intervenors, because if it isn't put into the license
12 application, it is probably going to go someplace
13 where the Intervenors don't see it and can't make any
14 comment on it or raise any issue about it in the
15 hearing.

16 So it appears to me that one of the things
17 that the Staff is saying here is this is a material
18 element of this license application that needs to be
19 in it. We want it to be delivered. We wanted to
20 review it. We want to review it. And, implicitly,
21 then it becomes the subject of the hearing -- could be
22 the subject of a hearing request.

23 JUDGE TRIKOUROS: Let me help you a little
24 bit with this. Setpoints, in and of themselves, are
25 meaningless. Setpoints only have meaning in the

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1 context of an overall set of procedures that are
2 developed in order to accommodate this problem.

3 Those procedures are not going to be in
4 the license application. So if you had some setpoints
5 sitting in a license application, for me it would have
6 no meaning whatsoever. I would want to look at those
7 procedures. I would want to understand what they're
8 doing and how those license -- those setpoints were
9 developed in the context of the operations of that
10 facility.

11 So I think maybe you are perhaps reading
12 more into the importance of having a natural setpoint
13 sitting in a license application. I think there's a
14 bigger issue here, which I think, if I were reviewing
15 this, I would be looking at a lot more than just some
16 setpoints. And I think it's critical that this be
17 documented in the ISA.

18 Now, I think that's another deletion that
19 the Applicant wanted to -- that was added in here.

20 But I just wanted to make sure you
21 understood that having some setpoints in a license
22 application gives you nothing to review fundamentally.

23 MS. CURRAN: Give me a moment.

24 MS. JONES: Judge, there is one more thing
25 I'd like to add. The Petitioners were making

1 references to the SER and stating that the setpoint
2 language created some sort of a condition, and that's
3 not exactly accurate. There is no such condition in
4 the construction authorization. And if there were to
5 be a condition, it would have been in the construction
6 authorization. So I just wanted to clear that up.

7 CHAIRMAN FARRAR: But that just gets us
8 back to our original question. Maybe "shocked" is too
9 strong a word, but I have always thought when you all
10 put something in the SER, that's the end of it, unless
11 the Applicant wants to make an appeal or something.
12 If it's in the SER, it's a done deal. You say
13 something has to be done, it's going to be done.

14 Now, it may not be -- it may have to be
15 incorporated somewhere else to have the force of law,
16 but we never suspected it could disappear.

17 MS. JONES: No. And I'm not saying that.
18 that's not what I'm arguing. I mean, it is something
19 that's going to have to -- it is something that they
20 will have to deal with. But I was just merely making
21 the -- just merely clarifying, because the Petitioners
22 were speaking about the SER as if it has created a
23 condition, and I just wanted to make it clear.

24 I understand where you're coming from. I
25 do. And I understand what the language says. I see

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1 it. But it's the fact that it's in the SER, which is
2 not -- it's just a document of bases and
3 recommendations.

4 JUDGE McDADE: Okay. Well, Ms. Jones,
5 with regard to the contention, if the end of that
6 second paragraph of the redrafted Contention 4 were
7 redrafted to say, "In which the NRC Staff required
8 that actual setpoints would be documented," period, is
9 that something that would be problematic from the
10 standpoint of the Staff? And, if so, why?

11 MS. JONES: Can you state that again?

12 JUDGE McDADE: That the end of that second
13 paragraph of the draft contention would be -- would
14 state, "In which the NRC Staff required that actual
15 setpoints would be documented."

16 MS. JONES: I guess I still have a problem
17 with the required language.

18 MR. SILVERMAN: Can I perhaps help?

19 CHAIRMAN FARRAR: Yes. Go ahead.

20 MR. SILVERMAN: Try to help?

21 CHAIRMAN FARRAR: Mr. Silverman? Yes.

22 MR. SILVERMAN: We fully expect to
23 document the measures that we will be taking to
24 address the safe storage of this waste in the event of
25 an interruption with the WSB. It may not necessarily

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1 be in the LA. It will be documented. And, indeed, if
2 this contention is admitted, I strongly suspect we're
3 going to have to describe our controls and the
4 measures we're taking, and the contention will be
5 addressed in the context of this contention.

6 CHAIRMAN FARRAR: And does that take care
7 of Ms. Curran's problem that this would get done in
8 some document that gets buried and they never get a
9 look at it?

10 MR. SILVERMAN: If this contention is
11 admitted, as I suspect it will be, you will -- we will
12 be providing that explanation.

13 CHAIRMAN FARRAR: Does that take care, Ms.
14 Curran, of your problem?

15 MS. CURRAN: I'm afraid it doesn't.

16 CHAIRMAN FARRAR: That's not the answer we
17 wanted.

18 (Laughter.)

19 MS. CURRAN: Well, just to back up a
20 little bit here, the first sentence in that paragraph,
21 in the SER, at page 11-48, says, "The Staff notes that
22 an explicit inventory limit on waste is not specified
23 in the revised CAR," which implies that they
24 considered that to be basic design information that
25 they would have expected to see, and that was necessary.

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1 And then, they go on to discuss the
2 current design and that the Applicant indicated that
3 the facility will shut down before exceeding the
4 liquid waste storage capacity. "The Staff interprets
5 this to mean active waste generating operations would
6 be curtailed at some setpoint before the tankage is
7 completely full, until the potential backlog of waste
8 at the facility is clear."

9 Then, the last sentence says, "Actual
10 setpoints would be defined by DCS as part of any
11 license application it may later submit. The Staff
12 finds this approach acceptable for construction
13 authorization."

14 So what we have is the Staff identifying
15 a deficiency in the CAR and saying, "We have come up
16 with a way that we can let you go ahead with
17 construction, but you must take Step X, which is to
18 include these setpoints as part of your license
19 application."

20 Now, as a technical matter, Judge
21 Trikouros was saying just putting the setpoints in the
22 license application might not be enough. Well, maybe
23 it's not, but that is at least the minimum of what is
24 being required here. And it doesn't say, "Sometime
25 later down the road, please give us information." It

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1 said, "Put it in the license application."

2 So what we're trying to engage in this
3 contention is a violation of a licensing requirement.
4 So to me, to say it's an expectation or that it will
5 appear somewhere at some time, is inconsistent with
6 what is in this document.

7 CHAIRMAN FARRAR: License applications,
8 like I guess all applications, get amended many times
9 through the years. I think in PFS there were 20
10 formal license amendments.

11 MR. SILVERMAN: What we're trying to do --

12 CHAIRMAN FARRAR: But wouldn't it be --
13 isn't your concern taken care of -- Mr. Silverman
14 isn't saying this isn't going to get done. He's
15 saying it may not be in the license application, but
16 it will be somewhere, and so when your -- if your
17 contention comes in, wouldn't -- one of the approaches
18 we could take is we'll just wait until that document
19 shows up somewhere, and then you can decide if you
20 want to challenge it as insufficient to accomplish the
21 underlying purpose the Staff had in mind when it wrote
22 the SER.

23 MS. CURRAN: Well, yes, if the contention
24 is admitted, and we are -- we have an opportunity to
25 address that information when it comes in, I do have

1 a question here as to how we would get notice. If it
2 is not --

3 CHAIRMAN FARRAR: Well, if the contention
4 is admitted, I think the rule we figured out long ago
5 is -- when the Appeal Board was alive and kicking, was
6 any -- if there's a contention pending, the Staff and
7 Applicant are under an obligation to notify the Board
8 and the parties when anything significant happens
9 outside the hearing that could affect something in the
10 hearing. Is that still the rule, Ms. Marco?

11 MS. CURRAN: That's correct.

12 CHAIRMAN FARRAR: Yes. That's the rule as
13 is the mandatory disclosure requirements, as is the
14 fact that we would have to present either dispositive
15 motions that would address this issue or evidence in
16 the form of testimony, and the fundamental problem I
17 have with Ms. Curran's argument is she is equating the
18 SER with an NRC binding legal requirement, which it
19 simply is not.

20 JUDGE McDADE: And as I understand it,
21 what we're trying to accomplish here -- and through
22 the contention -- is that these setpoints be
23 identified, that they be documented. As Judge
24 Trikouros pointed out, that simply documenting them in
25 the application itself may be meaningless, that based

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1 on his experience he questioned whether documenting it
2 in some other form -- for example, in the ISA -- would
3 be more appropriate, but that the bottom line is that
4 there was a deficiency identified in the CAR.

5 And the contention, as I understand it, is
6 that that deficiency needs to be remedied. And the
7 proposal for the contention is to not -- based on the
8 objection posed by the Applicant, not include the
9 language in hoc verba that it be in the license
10 application, but that it be documented, and, not to
11 belabor this, just if it is documented as described,
12 and if the contention is -- specifically addresses
13 that, is there any requirement that -- of the
14 Petitioner that is not met by that language that you
15 would like to bring to our attention before we move
16 on?

17 MS. CURRAN: Excuse me for one moment.

18 (Pause.)

19 We are willing to accept the change in the
20 language, with the understanding that, as you
21 previously stated, we are entitled to notice when that
22 information is provided, so that we can evaluate it
23 and see whether we need to amend the contention.

24 JUDGE McDADE: Okay. Thank you.

25 On another matter, I --

1 CHAIRMAN FARRAR: Is that a deal, Ms.
2 Jones?

3 MS. JONES: That a notice --

4 CHAIRMAN FARRAR: Notice -- she doesn't
5 mean Federal Register notice. Meaning notice --

6 MS. CURRAN: A notification.

7 CHAIRMAN FARRAR: Notification.

8 MS. JONES: Notification. Oh, yes. Yes.

9 CHAIRMAN FARRAR: Yes.

10 MS. MARCO: If there is a live contention,
11 and there is something material and relevant to that
12 contention.

13 CHAIRMAN FARRAR: Yes. Okay. Mr.
14 Silverman, that's all right with you?

15 MR. SILVERMAN: I agree with that rule.

16 CHAIRMAN FARRAR: Okay, good. Good.

17 JUDGE McDADE: If I could ask a question
18 also with regard to the second paragraph of the
19 revised contention, and a request for change language
20 by the Applicant. The revised contention uses the
21 language about waste transfer, and the Applicant has
22 proposed that the word "transfer" be changed to
23 "receipt."

24 And, Mr. Silverman, if you could explain
25 to me, from the Applicant's standpoint, what the

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1 distinction is there, if it reads "receipt" as opposed
2 to "transfer."

3 MR. SILVERMAN: I can. Let me just make
4 sure I find exactly the part of --

5 JUDGE McDADE: The third line of the
6 second paragraph.

7 MR. SILVERMAN: I have it in one
8 paragraph.

9 JUDGE McDADE: It also appears again --
10 that same concept appears again in the third
11 paragraph. Talks about receipt versus transfer.

12 MR. SILVERMAN: Yes. I'm not pinpointing
13 the exact language, but the point we are trying to
14 make there, Your Honor, is the one that the Board has
15 decided to skip over temporarily, and that is that we
16 believe that the contention, as written, and when you
17 look at the basis for the contention, you come to --
18 we come to the conclusion that it is intended to
19 address the problem of the unavailability of the WSB
20 to receive waste, and that we need to have in place
21 appropriate measures to ensure that if we have to
22 store high-alpha waste for a period of time, because
23 it cannot be received, then we have those appropriate
24 measures.

25 It was not intended to address some

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1 internal problem within the MOX facility, which would
2 prevent us from -- and maybe it's a little bit
3 semantic -- but transfer. There is nothing in the
4 contention that talks about any breakdown of systems
5 in the MOX facility, any failure of procedures that
6 would preclude us from safely storing the waste.

7 The basis statement focuses on unplanned
8 interruptions in the WSB, so this whole issue of
9 receipt is trying to -- is trying to address that
10 second point, which we had deferred, that I can
11 elaborate on.

12 JUDGE TRIKOUROS: Even the quote to the --
13 the reference to the ACRS letter, which was a more
14 general concern, that they incorporated in their
15 contention, referred to more generic unplanned
16 interruption.

17 MR. SILVERMAN: I think that that actually
18 is very clear evidence of the point I'm trying to
19 make. The exact language from Chairman Wallis' letter
20 is -- I'll read the operative phrases. They refer --
21 MF3, MOX Facility, will return waste to the Department
22 of Energy. "The facility to receive this waste has
23 not been designed" -- that's the WSB -- "nor have the
24 waste acceptance criteria been established."

25 They talk about the possibility of

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1 unplanned interruptions in waste receipt by the
2 Department of Energy, and they use that in several
3 other places. To me, this is very clear that the
4 concern on the part of Chairman Wallis was the WSB
5 wasn't -- isn't built yet. And what if it's not
6 ready, or what if there's an interruption in its
7 availability? We need to have provisions to address
8 that.

9 So I think --

10 JUDGE TRIKOUROS: Does the Intervenor have
11 any comments on that?

12 CHAIRMAN FARRAR: And then, as you're
13 giving us your comments, Contention 4 incorporated the
14 basis for Contention 3. But Contention 3 spends an
15 awful lot of time talking about the WSB, which would
16 reinforce the point Mr. Silverman made.

17 MS. CURRAN: Well, to look at the
18 statement, the contention statement in Contention 4,
19 it says the license -- this is our original statement.
20 "The license application for the proposed plutonium
21 fuel facility is inadequate because it does not
22 address safety and public health risks posed by
23 indefinite storage of liquid high-alpha waste at the
24 site, or contain measures for the safe storage of that
25 waste."

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1 CHAIRMAN FARRAR: You're invoking the rule
2 that we litigate contentions, not bases?

3 MS. CURRAN: Well --

4 CHAIRMAN FARRAR: I mean --

5 MS. CURRAN: -- starting -- I think you
6 start with the contention. And the fact -- the
7 contention relates to the implications of the
8 unavailability of the WSB. But that -- you know, that
9 includes what is happening within the facility.

10 CHAIRMAN FARRAR: I would tend to agree
11 with you that if all we had in front of us was that
12 three-line statement of the contention, we could read
13 it more broadly. But the basis statement for Number 4
14 is relatively brief, basically incorporates the
15 statement under 3, and that seems to have an almost,
16 or perhaps an exclusive focus, on the problem caused
17 by the absence of something on the DOE side of the
18 fence.

19 MS. CURRAN: Well, the statement that we
20 quote from the ACRS in our basis of Contention 4 is
21 there is no -- also no indication in the ISA summary
22 that MOX services will "conduct operations at the MOX
23 plutonium facility in a way that assures there is
24 always sufficient waste storage capacity to bring the
25 facility to a safe configuration in the event that

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1 waste receipt is interrupted."

2 CHAIRMAN FARRAR: But doesn't waste
3 receipt -- isn't there a strong implication there that
4 that's waste receipt by DOE, not waste mismanagement
5 on the site?

6 JUDGE TRIKOUROS: Let me chime in here.
7 Mr. Silverman --

8 CHAIRMAN FARRAR: Wait. Let me finish.

9 JUDGE TRIKOUROS: But I think I could --

10 CHAIRMAN FARRAR: Okay.

11 JUDGE TRIKOUROS: -- address this. Waste
12 receipt by DOE would not occur if: a) DOE didn't want
13 it, B) DOE could not accept it, c) something happened
14 in the facility to prevent the waste from going to the
15 DOE. I mean, one could view it that way.

16 The word "receipt" in this context can be
17 looked at broader than just that DOE -- something is
18 wrong with the DOE. No waste solidification building
19 on it, no -- couldn't one interrupt it that way?

20 MR. SILVERMAN: That would be an
21 interpretation, if you just look at -- were
22 interpreting that one word. I agree with you.

23 We do rely on it. We think the more
24 logical interpretation is the one I've set forth, but
25 it is bolstered by a number of things. The basis

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1 statement, which really refers to the Graham Wallis
2 letter, which talks almost exclusively about the
3 unavailability of the WSB.

4 Contention 3, which is, as Judge Farrar --
5 we agree with Judge Farrar. When you read
6 Contention 3, which is a basis for Contention 4, it
7 repeatedly refers to concerns about availability of
8 the WSB.

9 And, fourth, to the best of my knowledge,
10 there is nothing in any of the Petitioner's pleadings
11 that points to any kind of a problem going on inside
12 the MOX facility that would preclude waste transfer or
13 receipt. It's silent on that subject.

14 JUDGE TRIKOUROS: Well, from my point of
15 view, whether or not the DOE is the source of the
16 problem or not, I would think the procedures, the
17 setpoints, the alarms, would all be the same.

18 So it doesn't much alter the progression
19 of events that we have to go through in dealing with
20 this contention. Do you see a difference that I'm
21 missing perhaps?

22 MR. SILVERMAN: The difference I see, Your
23 Honor, is in the evidence that we would need to put
24 on. If this were more broadly construed, we would
25 probably have to present to you the range of potential

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1 events, circumstances, and problems that could occur
2 inside the MOX facility that could result in the
3 inability to transfer or receive the waste.

4 We do not believe we have to do that. We
5 do not believe that is part of the contention. We
6 will, once again, have to show that we have adequate
7 controls and measures and setpoints to ensure that if
8 there is a problem on the outside we can address it.
9 But we don't have to address every potential scenario
10 that might occur inside the MOX facility, which is
11 where we would have to be if this were more broadly
12 read.

13 (Pause.)

14 MS. CURRAN: Would it be helpful if I
15 added something here?

16 CHAIRMAN FARRAR: Yes, go ahead.

17 MS. CURRAN: The question of whether the
18 waste solidification building is built, or whether it
19 has waste acceptance criteria, isn't the only
20 question. The question is also whether the waste will
21 meet criteria for sending it to the waste
22 solidification building.

23 In other words, the overall plan for
24 disposing of this waste includes not just the question
25 of whether the waste solidification building exists,

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1 but whether there are measures in place at the plant
2 to make sure that the waste can be transferred.

3 So that's why we think it's a bigger
4 question than just --

5 CHAIRMAN FARRAR: Mr. Silverman is about
6 to say, "I agree with you. You could have written a
7 contention that said that." But you -- he is going to
8 say you didn't -- that's not what the contention said.

9 MR. SILVERMAN: I wouldn't have said it
10 better than Judge Farrar.

11 (Laughter.)

12 CHAIRMAN FARRAR: Well, we've been around
13 each other long enough that everybody -- only the
14 Court Reporter doesn't know what each of us is going
15 to say.

16 JUDGE TRIKOUROS: Did the ACRS letter
17 reference waste acceptance criteria? I think the
18 answer is yes, it did.

19 MS. CURRAN: Yes. Yes.

20 JUDGE TRIKOUROS: And the reference was
21 made to the ACRS letter, specifically the ACRS letter
22 did mention waste acceptance criteria.

23 MS. CURRAN: Yes.

24 JUDGE TRIKOUROS: Let me make one
25 suggestion. There is a -- instead of the words "waste

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1 receipt by DOE," what if we used "waste transfer to
2 DOE"? Would that be -- would that cause you problems?

3 MR. SILVERMAN: I can live with the words
4 "waste transfer." I prefer "waste receipt," but the
5 fundamental principle I think is the one that I feel
6 very strongly about. And that is that this contention
7 is not focused on, and the basis does not discuss or
8 support the notion of having to address, in response
9 to this contention, scenarios and events that occur
10 inside the MOX facility.

11 JUDGE TRIKOUROS: Does the Intervenor
12 agree with that?

13 MS. CURRAN: It's implicit that without
14 knowing what the waste solidification building is, we
15 don't know what the waste acceptance criteria are. So
16 we don't know if the MOX facility will be in a
17 position to meet the criteria. So it's a -- and I
18 think the language of Contention 4, as we originally
19 phrased it, embraces that, and the ACRS letter
20 embraces that, which we rely on.

21 JUDGE TRIKOUROS: The word "transfer" in
22 this context would mean anything associated with
23 taking the waste that's in those holdup tanks and
24 moving it to the DOE facility. It could be anything.
25 It could be a problem with waste acceptance criteria.

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1 It could be a problem with the waste solidification
2 building being inoperable for a time. It could be
3 anything associated with that movement, that transfer.

4 It would not include valve failures inside
5 of the plant, tanks rupturing, any number of ISA --
6 integrated safety analysis -- related items, which in
7 fact are covered in the integrated safety analysis.

8 It would only involve that transfer, which
9 means from the holdup tank to the DOE facility. But
10 it would be broad in the sense that it could be -- it
11 could be a problem with the piping that they use to
12 transfer the waste. It could be waste acceptance
13 criteria, any number of things. But we would limit it
14 to that movement from the holdup tank to the DOE.

15 MS. CURRAN: That's acceptable to us.

16 JUDGE TRIKOUROS: And that's what the word
17 "transfer to DOE" would mean. And we would have to
18 make that very clear in our ruling, that that's what
19 it means.

20 MR. SILVERMAN: Your Honor, that, in our
21 view, goes beyond the scope of the contention and the
22 basis that was set forth for it.

23 CHAIRMAN FARRAR: I think we've gotten as
24 much out of this as we can. Let's move on.

25 Before we leave the question of the SER,

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1 Ms. Jones, the Staff had an objection that we mention
2 the SER in the reshaped contention. The contention,
3 as written by the Petitioners, had a reference to the
4 ACRS letter, which by its title, if I recall, dealt
5 with the SER. Why is that not sufficient to reference
6 the SER in the rewritten contention? And if it's not
7 sufficient, who cares? Because once the contention is
8 in, we are going to be talking about the SER anyhow.
9 Is this not a big deal that you'd like to tell us
10 forget what you said or --

11 MS. JONES: Well, I think the brief -- you
12 have to excuse me. I'm suffering with allergies,
13 so --

14 CHAIRMAN FARRAR: Okay.

15 MS. JONES: -- if you can just bear with
16 me. Excuse me.

17 CHAIRMAN FARRAR: Those allergies are not
18 to the Board.

19 (Laughter.)

20 Are they?

21 MS. JONES: No. They're to other things.

22 (Laughter.)

23 No, I think -- I'll just -- basically just
24 restate what we said in our brief, and we just felt
25 that in recasting the contention in this way, because

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1 the Petitioners did not originally cite that, because
2 it wasn't a document that they originally relied on,
3 we felt that that didn't hold true to the principles
4 under 2.309.

5 CHAIRMAN FARRAR: Okay.

6 MS. JONES: And so we felt that it went a
7 little bit further than perhaps it should have,
8 according to the policies of the Commission.

9 CHAIRMAN FARRAR: Okay. Let's get back to
10 the last couple of clarifications the Applicant
11 wanted. I think one of them was we had said, "Given
12 such and such," and the Applicant wants to change
13 "given" to "possible," just to make sure that we're
14 talking -- make sure we're talking about a
15 hypothetical as opposed to something that was
16 presumed.

17 Ms. Curran, would that change be all right
18 with you?

19 MS. CURRAN: Where exactly is that?

20 JUDGE McDADE: Third paragraph, second
21 line. It talks about waste aging within the facility,
22 given protracted onsite storage --

23 MS. CURRAN: Oh, in the event of --

24 JUDGE McDADE: Yes.

25 CHAIRMAN FARRAR: Yes.

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1 JUDGE McDADE: Changing that to --

2 MS. CURRAN: We wouldn't object to that.

3 CHAIRMAN FARRAR: All right. Ms. Jones,
4 I think -- I think we meant the "given" in the sense
5 Mr. Silverman would like it clarified.

6 MS. JONES: I don't think we had any
7 particular opinion on that.

8 CHAIRMAN FARRAR: And the last thing was,
9 Mr. Silverman, at some point in the redrafted
10 contention, we were insisting on some procedures, and
11 he wanted them described more as -- described as
12 analyses -- in other words, that they'd have to -- so
13 what line was that in?

14 JUDGE McDADE: It's the next-to-the-last
15 sentence in paragraph 3. "This would entail including
16 in the ISA summary." As drafted, it said "procedures
17 for the identification/mitigation of," and the
18 proposal from the Applicant is to change that "it
19 would entail including in the ISA summary analysis of
20 hazards posed by the aging."

21 CHAIRMAN FARRAR: Ms. Curran, would that
22 -- does that change proposed by the Applicant cause
23 any trouble?

24 MS. CURRAN: We had suggested some
25 alternative wording in our response to Contention 4,

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1 which is dated February 19th, which of course we would
2 prefer.

3 CHAIRMAN FARRAR: All right. Read it.

4 MS. CURRAN: On page 4, we recommended the
5 sentence be reworded to state, "This would entail
6 including in the ISA summary analyses of the potential
7 for unplanned interruptions in waste receipt by the
8 Department of Energy, and in the license application
9 procedures for the identification and mitigation of
10 any hazards posed by aging waste over short,
11 intermediate, and long duration timeframes."

12 We reworded the contention this way,
13 because in our view the ACRS was concerned about both
14 analyses and procedures.

15 CHAIRMAN FARRAR: Mr. Silverman, is that
16 all right with you?

17 MR. SILVERMAN: Could I hear the -- I
18 apologize, Ms. Curran.

19 MS. CURRAN: Do you want me to read it
20 again?

21 MR. SILVERMAN: Yes. Would you mind,
22 particularly the first part of it, a little more
23 slowly.

24 MS. CURRAN: Okay. The sentence reads,
25 "This would entail including, in the ISA summary,

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1 analyses of the potential for unplanned interruptions
2 in waste receipt by the Department of Energy; and in
3 the license application, procedures for the
4 identification and mitigation of any hazards posed by
5 aging waste over short, intermediate, and long
6 duration timeframes."

7 MR. SILVERMAN: Would you bear with me
8 just a second?

9 CHAIRMAN FARRAR: Go ahead.

10 (Pause.)

11 MR. SILVERMAN: Your Honor, I think the
12 only small adjustment we would make to that is that
13 the procedures portion, as it is written now, says the
14 procedures would be in the license application. And
15 we're fine with the procedure language but not in the
16 license application, because that's not where you find
17 procedures typically. With that, we would be I think
18 fine with that language.

19 JUDGE TRIKOUROS: Right. And that's in
20 accord with the conversation we just had that
21 procedures are not usually in license applications.
22 And I would be uncomfortable having the statement that
23 procedures would be in a license application.

24 MR. SILVERMAN: So to be clear, the
25 analyses would be in the ISA, and the procedures would

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1. be provided, but not in the LA.

2. CHAIRMAN FARRAR: Ms. Hones, any thoughts
3. on that?

4. MS. JONES: No, that is correct. The
5. procedures are not in the license application.

6. MS. CURRAN: Once again, would we get
7. notice of the existence of the procedures, so that we
8. could request them?

9. JUDGE TRIKOUROS: As part of this
10. proceeding, if this contention is admitted, the
11. litigation of this contention would involve the whole
12. story, not just the setpoints, it would be the whole
13. story, which is much more than just the setpoints. It
14. would include the calculation, for example, of how the
15. setpoints were determined. It would include
16. procedures. It would include alarms, alarm setpoints,
17. alarm response procedures.

18. You know, how would you handle this
19. situation in this particular plant? That's really
20. what the contention is about. So, and you would, of
21. course, as a party to the contention, get to see all
22. of that.

23. MS. CURRAN: Okay.

24. CHAIRMAN FARRAR: Thank you. I think that
25. wraps up all the questions we had about redrafting the

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1 contention.

2 Mr. Silverman, if the contention is
3 admitted and it's -- well, let me just get right to
4 the question. Were you planning to appeal to the
5 Commission the grant of standing to these Petitioners?

6 MR. SILVERMAN: No, Your Honor.

7 CHAIRMAN FARRAR: Okay. All right. Thank
8 you.

9 Thank you all for that discussion in the
10 nature of a prehearing conference. We'll go back to
11 the drawing board and take everyone's thoughts into
12 account, and see what we come up with.

13 We'll now move into the more formal oral
14 argument part of the session for which the first item
15 under our schedule is to address the new Contention 7,
16 in which we ask the Applicant and Staff to go first.
17 That argument I think can be foreshortened because of
18 the change of approach notice filed by the Staff the
19 other evening.

20 But, Mr. Silverman, why don't you go ahead
21 from the podium, please, on Contention 7.

22 MR. SILVERMAN: Thank you, Your Honor.
23 Our position on Contention 7 is that it is not
24 admissible. We have a number of bases for that. The
25 first is that the fundamental premise for having filed

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1 the contention in the first place was the concern --
2 this is explicit in the Petitioner's pleadings --
3 concern with the Staff's position that it may issue a
4 license with a condition regarding the completion of
5 the PSSCs in compliance with 70.23(a)(8).

6 They've made that very clear -- that that
7 was the rationale for filing when they did. They even
8 said they previously felt they would have the
9 opportunity to challenge this at a later date. The
10 Staff has now clarified that they will not issue the
11 license until the completion determination has been
12 made. There will be no such condition. And,
13 therefore, that fundamental basis for this contention
14 at this time in our view is moot.

15 CHAIRMAN FARRAR: So you're saying that to
16 the extent that it was a strategic -- a placeholder,
17 that the Intervenors had to file strategically because
18 of where they thought the staff was going, that's not
19 necessary.

20 MR. SILVERMAN: That was I think their
21 view, and that's correct.

22 CHAIRMAN FARRAR: Okay. Now, walk us
23 through, under the new staff position, what's going to
24 happen. You'll keep building the facility over the
25 years. I think you represented, either in a brief or

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1 at the last argument, at no time would you send a
2 letter to the Staff saying, "Hey, we've finished all
3 of the things you need under (a)(8). . . Would you please
4 come out and look at our documents, look at the
5 facility, and verify that?" That you don't make a
6 formal -- you don't make a formal request for them to
7 make that finding.

8 MR. SILVERMAN: That is my understanding.
9 The process, as I understand it, is that there are
10 ongoing inspections of the facility, which are going
11 on as we speak. There is a resident there who
12 provides quarterly reports that are on ADAMS, and he
13 is inspecting this facility against the applicable
14 standards, including whether the PSSCs are being built
15 in accordance with the application -- as we speak.

16 That process will continue. It will
17 generate a whole host of public documents, inspection
18 reports. I'm sure there will be many meetings with
19 the staff on the subject that will be public, and
20 other types of information that will be available that
21 will be -- that would enable the Petitioners to have
22 some sense of how construction is going and to be on
23 notice, if there's an issue that they believe warrants
24 a contention, a late-filed contention, that we don't
25 meet the requirements.

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1 CHAIRMAN FARRAR: Now --

2 JUDGE McDADE: These are publicly-
3 available documents?

4 MR. SILVERMAN: Yes, sir.

5 CHAIRMAN FARRAR: Okay. Now --

6 MR. SILVERMAN: I can't promise you every
7 single inspection report and all of the language of
8 each is, but yes. And I think so far the quarterly
9 reports have all been public.

10 CHAIRMAN FARRAR: Okay. Then, so that
11 goes on, and you don't ask the Staff to make the
12 (a)(8) determination. So then, let me go back to --
13 let me ask Ms. Jones something here that would help us
14 with the facts. At some point, the Staff gets
15 together and says, "Okay. These people -- in our
16 judgment, these people have done what they said they
17 were going to do. We can now make an (a)(8)
18 determination. "

19 What's the runup to that? In other words,
20 who would know that that's coming?

21 MS. JONES: Well, the process, as we
22 envision, is to do exactly what Mr. Silverman
23 described. And that is, you know, this process is
24 ongoing through inspections, and all of these
25 documents are publicly available. And so the runup --

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1 CHAIRMAN FARRAR: And if at any point --
2 okay. So if at any point Ms. Curran gets one of those
3 and says, "Wait a minute." The Staff said -- the
4 Applicant said, "Here is what we did." The Staff
5 looked at it and said that's okay, and she doesn't
6 think it's okay, she could file a contention then?

7 MS. JONES: Yes, under the rules.

8 CHAIRMAN FARRAR: So that's a suggestion
9 that she doesn't wait until you make the ultimate
10 (a) (8) finding --

11 MS. JONES: That's correct.

12 CHAIRMAN FARRAR: -- at the end, and then
13 say, "Oh, wait a minute. You can't make that finding.
14 A whole lot of bad stuff happened." She'll know the
15 "bad stuff" happening as --

16 MS. JONES: As the process --

17 CHAIRMAN FARRAR: -- as we go along.

18 MS. JONES: That's correct.

19 CHAIRMAN FARRAR: So in that sense -- let
20 me ask one more question. Suppose you make the (a) (8)
21 determination. Okay? Everything is fine. They did
22 what they said. And you say, "And, by the way, here's
23 your license"? Do you say that contemporaneously, or
24 is that just one of the things that you've put in --
25 you know, you check that box off and sometime down the

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1 road they get their license?

2 MS. JONES: It's sometime down the road.
3 It all depends on how these -- how it all progresses
4 and how it evolves. We're not going to issue the
5 license before we make a determination. And that
6 could be -- it all depends on where we are four years
7 from now. We can definitely assure everyone that we
8 will not issue that license until we've made that
9 determination on those PSSCs.

10 JUDGE TRIKOUROS: This hearing
11 announcement indicates that your findings would have
12 to be documented in a safety evaluation report. So
13 would you make the final (a)(8) finding in a
14 supplement to the SER?

15 MS. JONES: We have not really gotten to
16 the point of determining exactly in what document this
17 finding will be made, mostly because we're not at that
18 point yet.

19 JUDGE TRIKOUROS: Okay. Well, this is --
20 these findings will be documented in the safety
21 evaluation report.

22 MS. JONES: I understand.

23 JUDGE TRIKOUROS: It's on this record.

24 MS. JONES: Yes. And I don't have any
25 concrete answers, other than to say, "When we make

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1 that -- when that time comes, everyone will know about
2 it, because it will be in a publicly-available
3 document." But in the meantime, they can challenge
4 and raise issues along the way.

5 CHAIRMAN FARRAR: So the (a)(8)
6 determination, even though it looks like this when you
7 read the reg, it looks like, ah ha, all of a sudden
8 one day there is going to be that determination,
9 that's really an ongoing determination --

10 MS. JONES: That's an ongoing process.

11 CHAIRMAN FARRAR: -- over the years. What
12 they've done so far is okay.

13 MS. JONES: Yes.

14 CHAIRMAN FARRAR: Three months later, it's
15 still okay.

16 MS. JONES: That's correct.

17 CHAIRMAN FARRAR: If it's not okay in your
18 mind, you'll tell them. You say it is okay, and Ms.
19 Curran doesn't agree, she files a contention.

20 JUDGE TRIKOUROS: Now, the construction
21 inspection program is a formal document, and it's
22 available for review I think.

23 MS. JONES: Yes.

24 JUDGE McDADE: Mr. Silverman, you
25 indicated you thought Contention 7 was inadmissible

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1 for several reasons, the first of which is the change
2 in the Staff position renders it moot. What are the
3 other reasons?

4 MR. SILVERMAN: The other two reasons,
5 Your Honor, are that -- are, one, that we don't view
6 it as raising a genuine issue of law or fact. There
7 is no genuine issue of fact. They haven't -- the
8 Petitioners have not identified any single particular
9 construction deficiency.

10 CHAIRMAN FARRAR: Wait a minute. There is
11 a -- they're not saying there's an issue of fact.
12 They are saying there is a fact, which you have
13 conceded, this facility has not been built in
14 accordance with the specs, because it hasn't been
15 built.

16 So the facts -- as I understand their
17 argument, the facts are undisputed.

18 MR. SILVERMAN: Yes.

19 CHAIRMAN FARRAR: They've got a pure
20 question of law here. You didn't do what (a)(8) --
21 you have not, to this point, done what (a)(8) says, so
22 you can't get a license.

23 MR. SILVERMAN: And I was getting to that.
24 We don't believe there is a factual issue of law
25 either. We agree that before -- that particularly

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1 based upon the statements of the Staff that until we
2 have made those -- completed those PSSCs we will not
3 get our license. There is no inadequacy in the
4 license application at this point in time.

5 And this is, as I said, an anticipatory --
6 what I refer to as an anticipatory placeholder
7 contention. The burden -- the Petitioners will have
8 access to information. When they find information
9 that they believe calls into question our compliance
10 with that rule, they may file a contention and
11 demonstrate compliance with the standards based upon
12 that specific information. Right now, they have no
13 such information whatsoever.

14 CHAIRMAN FARRAR: But you're addressing
15 their contention now against the backdrop of the
16 revised Staff -- in other words, what you're saying
17 is, given where the Staff is now, the contention has
18 this failing, that if we agree -- we could agree with
19 you on that point, without necessarily agreeing that
20 you were right under the old Staff position. Is that
21 correct?

22 MR. SILVERMAN: You could do that, yes.

23 CHAIRMAN FARRAR: In other words, if the
24 old Staff position, at least in my mind, made this
25 contention the only legitimate -- you know, a

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1 legitimate approach for challenging what was going to
2 happen; what you're now saying is the way it was just
3 described to us in the last few minutes, there is
4 nothing to the contention -- is premature from --

5 MR. SILVERMAN: Yes.

6 CHAIRMAN FARRAR: -- under the description
7 we just got.

8 MR. SILVERMAN: We believe it is premature
9 under the prior circumstances as well.

10 CHAIRMAN FARRAR: Yes. But we could argue
11 -- you and I could stay here and argue that for a long
12 time.

13 PARTICIPANT: But there would be no point.

14 (Laughter.)

15 MR. SILVERMAN: Yes. And then, if I may,
16 the final argument is the notion of the contention
17 being late filed, and the question of good cause in
18 the other standards. And Petitioner's basis for good
19 cause was the prior Staff position, once again.

20 CHAIRMAN FARRAR: Okay. Rather than have
21 -- we had allotted a lot of time for this argument
22 because of the prior Staff position, let's depart from
23 -- given what you've said and they've said, let's kind
24 of depart from the order we had talked about, and let
25 me just ask -- you can sit down, Mr. Silverman, but if

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1 we -- you know, if you need more time -- but, Ms.
2 Curran, let me ask you, given this new way of looking
3 at things, why isn't it -- what I thought you were
4 looking for was a chance to challenge this
5 determination that you were afraid was going to be
6 made early in the dark of night. You wanted to be
7 able to challenge that on the undisputed facts that
8 this thing hasn't been accomplished yet.

9 But now, under the new Staff explanation,
10 why can't we throw out this contention, preserving
11 your rights to come in whether you feel like it, as
12 these quarterly or whatever reports come in, and say
13 that they are not doing construction properly?

14 MS. CURRAN: Well, a couple of reasons.
15 First of all, we are dealing with this prematurely
16 issued hearing notice. And the whole way that NRC
17 rules are set up is that, unless you do -- the earlier
18 you do contentions, the better off you are. And it is
19 true that it didn't -- we didn't think about this as
20 an issue until we heard the Staff say what it said.

21 In spite of that, although that has
22 changed, it still is the case that it puts us at a
23 disadvantage to wait for things to happen. It is true
24 right now -- right now, it's true -- and it's not moot
25 -- it's true that this application doesn't meet --

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1 satisfy the regulations, because construction has not
2 been done in accordance with the approved design
3 bases.

4 CHAIRMAN FARRAR: Right. But to me at
5 least you've preserved that point by filing this
6 contention. The Staff -- the license can't be granted
7 until (a) (8) is complied with. This license was filed
8 -- this is a way of looking at it. This license was
9 filed -- and I know we -- I've used the word
10 "prematurely." License application was filed
11 prematurely. That may be the wrong word in a legal
12 sense. It was filed -- they filed it, but a lot of
13 things about it were not ripe for contentions or for
14 hearings, because construction hadn't moved very far.

15 Recognizing all of that, and recognizing
16 that you want to preserve your right to challenge
17 construction, bad things about construction, as they
18 go along, why aren't we now in the position that you
19 are free to do that? Clearly, under any reading of
20 the Commission's good cause filings -- timeliness and
21 untimeliness -- if you get a quarterly report that you
22 say, "Here are some -- it has -- reflects construction
23 problems," a contention filed then is going to be
24 timely.

25 MS. CURRAN: Well, that all depends on

1 whether Contention 4 survives, or how long it
2 survives. If Contention 4 is dismissed, this case is
3 over. And we are in a position of trying to reopen
4 the record, meeting that standard, and also submitting
5 at that point late-filed contentions.

6 So as long as we are --

7 CHAIRMAN FARRAR: It would be -- in other
8 words, suppose Contention 4 came in, we resolve it
9 somehow. I mean, I assume if Contention 4 comes in,
10 the Applicant is going to get cracking and they're
11 going to deal with the things on Contention 4. They
12 are going to say, "Here is our system," move for
13 summary disposition, and we'll either grant it or --
14 we'll either grant it or have a hearing.

15 And then, you could still -- you're right.
16 You could be looking at a number of years of
17 construction ahead of you with no live proceeding. If
18 that's the case, isn't the procedure you then go to --
19 we don't exist anymore, you go to SECY and you say,
20 "We'd like to file a renewed intervention petition.
21 We have good cause for doing it, because the Board
22 said so many years ago, that, you know, we should be
23 able to come back."

24 You file your contentions, and presumably
25 you get in because no one can say you should have

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1 filed earlier, if you're attacking construction that
2 has just been completed and analyzed.

3 MS. CURRAN: Well, it seems to us that
4 since this hearing notice has been issued, the Atomic
5 Energy Act hearing process has been triggered on this
6 application. We don't consider it to be equivalent
7 protection of our hearing rights to have to, after
8 this proceeding has closed -- if that should happen --
9 to have to go in and ask the Commission to reopen a
10 case in -- which was originally opened at the
11 Commission's instigation, giving us full rights to
12 participate in this licensing proceeding.

13 And what I'd like to suggest is that the
14 contention, which is a valid contention, it's
15 admissible, should be admitted, and that the Board
16 could hold it in abeyance --

17 CHAIRMAN FARRAR: So it becomes --

18 MS. CURRAN: -- pending --

19 CHAIRMAN FARRAR: -- it becomes the grand
20 contention of omission that just sits there. It's not
21 ripe for hearing, and it just sits there until you --
22 either you're totally happy with construction, and
23 then it disappears, or until you decide to activate
24 some specific contention to replace the grand
25 contention of omission.

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1 MS. CURRAN: Yes. And I would think that
2 what would make sense from an efficiency standpoint
3 would be to wait until the Staff issues whatever
4 documents -- I assume it has got to issue some kind of
5 a finding of compliance with 70.23(a)(8), whether it
6 does that as a supplement to the SER or something
7 else.

8 It's typical in NRC hearings that no
9 hearing goes forward until the Staff's findings have
10 been made. At that point, we would clarify what
11 issues that we thought were still outstanding and
12 present testimony, and the Board could rule.

13 CHAIRMAN FARRAR: You'd rather that than
14 get an opinion from us now that this contention is
15 rejected because you -- we fully expect, based on what
16 has been said in the briefs and said here today, that
17 your rights would be fully protected later? In other
18 words, you'd rather have a live contention in front of
19 us rather than trust the Commission to honor an
20 opinion we were to write about your future rights?

21 MS. CURRAN: Yes. And it's no reflection
22 on you, Judge Farrar.

23 (Laughter.)

24 We just wouldn't consider ourselves to be
25 adequately protected after this case is over. There

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1 is a real difference between being able to respond to
2 a hearing notice and having all of the rights that go
3 with that, and then having to, after this case is
4 over, the public isn't entitled to anything.

5 The public can try to figure out what it
6 wants to by going on ADAMS and, you know, looking
7 through publicly-available documents. But I can tell
8 you it's much more difficult than when you are in a
9 noticed hearing, you've got a notice of here's the
10 licensing documents that you have to deal with, here's
11 your obligations, here's your rights. It becomes a
12 much more discretionary and unpredictable kind of a
13 process.

14 And it also seems to us that while you do
15 have discretion to decide on the issue of lateness,
16 that I don't think you have discretion to deny a
17 contention that asserts uncontested facts and a
18 material issue of law. I think the contention has to
19 be admitted on these facts.

20 Now, there is a dispute among the parties
21 as to -- on the lateness issue, on the good cause
22 criteria, because --

23 CHAIRMAN FARRAR: Let's not worry about --
24 do you mean the -- until Staff counsel said that here,
25 you didn't know this was a problem.

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1 MS. CURRAN: That's right.

2 CHAIRMAN FARRAR: Nobody --

3 MS. CURRAN: We could have raised this at
4 the --

5 CHAIRMAN FARRAR: Nobody knew it was a
6 problem; don't worry about that.

7 MS. CURRAN: But I would think that is the
8 only basis on which you could reject the contention.

9 CHAIRMAN FARRAR: When I said "don't worry
10 about it," let's -- we can come back to that. Let's
11 stick with the guts of what we're doing here.

12 Mr. Silverman and Ms. Jones, it seems Ms.
13 Curran has stated the issue squarely. I think you're
14 in agreement that she should have a chance to
15 challenge things at the right time. It seems to me
16 you need now to convince us that the way for that
17 challenge to occur is by rejecting this contention,
18 but by preserving her rights later, because if you
19 don't convince us that those rights are real, then
20 that tends to push us into the position where we have
21 to say, "Well, if her rights are going to be
22 protected, then admitting this contention is a way to
23 do it."

24 So, Mr. Silverman --

25 JUDGE TRIKOUROS: But before you do that,

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1 I have a question of Ms. Curran. Why wouldn't every
2 intervenor on every case issue a contention exactly
3 like this one? And then, no cases would ever get
4 closed, and they would be open for the entire duration
5 of every proceeding that this agency deals with. Why
6 is this different?

7 MS. CURRAN: Well --

8 JUDGE TRIKOUROS: Why should you be given
9 special consideration?

10 MS. CURRAN: Well, I've never been in a
11 case before, Judge Trikouros, where there was the
12 separate question of whether a facility has been built
13 according to a design.

14 JUDGE TRIKOUROS: I think every proceeding
15 we have, whether it be COL proceedings or even in the
16 old Part 50 world, it's always that issue -- has the
17 facility been constructed in accordance with its
18 design basis?

19 MS. CURRAN: Well, it's true -- the last
20 operating license case I was involved in -- and this
21 only applies to nuclear powerplants, to initial
22 licensing -- was the Seabrook case many years ago.
23 And since then, any other kind of facility, for most
24 materials licenses, other kind of licenses, there is
25 only the issuance of the operating license.

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1 The Commission has no say over the
2 construction. This is an unusual facility here,
3 because it's more like a nuclear powerplant. So I
4 think this is -- and my understanding, going back in
5 history to look at these old cases, was that the
6 operating license application wasn't docketed, and the
7 hearing notice wasn't issued until construction was
8 somewhere -- you know, had proceeded to a certain
9 extent.

10 But here, it's -- a lot of things in this
11 case are happening backwards or in the wrong order.
12 This is one of them that the -- the hearing notice is
13 issued -- was issued before construction had even
14 begun. And yet imposing on the public this iron-clad
15 obligation to identify issues at the earliest possible
16 juncture -- now, whether we think that's a good idea,
17 that's our obligation under the regulations.

18 And I've been penalized for not doing that
19 enough times, so it's very -- it's a visceral feeling
20 one has.

21 JUDGE McDADE: Okay. But taking this kind
22 of in order, at least the order that I understood the
23 Applicant to suggest, is first of all -- has to do
24 with the timeliness of the contention.

25 That it appeared initially that the

1 contention was timely, because it was based on an
2 articulation by the Staff of a position that they
3 could satisfy the 70.23(a)(8) requirement in a license
4 condition, and that that was a new articulation, and
5 that was what the contention was based on as far as
6 timeliness, that that is no longer operative because
7 the Staff has withdrawn that position. So, first of
8 all, it is not timely.

9 Second, that it doesn't identify anything
10 in the license application itself that is deficient.
11 So, therefore, it doesn't -- at this point -- state a
12 genuine issue of fact or law that could go forward to
13 litigation.

14 And then, third, with regard to the real
15 issue, which is: will the facility be built in
16 accordance with the appropriate plans, that it is too
17 early to cast the contention based on that, that you
18 would be getting access through ADAMS to these
19 quarterly reports during the period of time that the
20 facility is under construction, all of which will be
21 prior to the time that the Staff makes its 70.23(a)(8)
22 determination.

23 And if at any time, upon review of these
24 quarterly construction reports, you identify a
25 deficiency, at that point in time a contention would

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1 be ripe.

2 Now, if -- have I correctly understood the
3 Applicant's position?

4 MR. SILVERMAN: Essentially, yes, Your
5 Honor. Yes.

6 JUDGE McDADE: Okay. When you say
7 "essentially," how did what I just articulate differ?

8 MR. SILVERMAN: I don't think I would.

9 JUDGE McDADE: Okay. Taking it one by
10 one, first of all, with the timeliness of the
11 contention, given the fact that the Staff has
12 withdrawn its position, has stated that we do not
13 intend to handle the compliance with 70.23(a)(8) as a
14 license condition, why does that not render the
15 condition -- this contention late?

16 MS. CURRAN: Well, the criteria that the
17 Board has to apply are a set of criteria that have to
18 be balanced. And it's true that -- that this
19 particular element of good cause seems to have been
20 mooted by the Staff's change in position.

21 But I think the Board has to balance all
22 of the other factors, too. And one of them is the
23 intervenor's right to a hearing, which we do have a
24 right to a hearing on the issue of whether the plant
25 has been built in accordance with the approved

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1 elements of the design.

2 One is, will we contribute to the
3 development of a sound record? We have expert help.
4 We are evaluating the application with expert help.
5 We have counsel that is experienced. We are able to
6 do that.

7 And I think that the Board should also
8 consider the fact that this is another example of
9 being late and being early at the same time. That
10 arguments have been made that the contention is late,
11 but arguments have been also made today that the
12 contention is early. And --

13 JUDGE McDADE: But with regard to this, I
14 mean, the only change in circumstance from when the
15 original license application was submitted was an
16 articulation by the Staff as to how they were going to
17 handle the 70.23(a)(8) requirement. The Staff
18 articulated how it would handle it, and then withdrew
19 that.

20 So doesn't that have no effect on our
21 decision as to the admissibility of that contention at
22 this time? And, if not, why not?

23 MS. CURRAN: Well, the -- I guess there's
24 two separate questions. One is: is the contention
25 admissible, just taking the simple words of the

1 standard and applying it? I think, as Judge Farrar
2 said, the facts are uncontested.

3 The fact is that this application doesn't
4 address whether the 70.23(a)(8) has been met, and so
5 that as a matter of law if we file -- if the
6 contention were admitted and we filed a summary
7 judgment motion tomorrow, we should prevail. There's
8 a separate question about --

9 CHAIRMAN FARRAR: But that's a contention
10 you should have filed -- you could have filed last
11 May, because assuming the Staff hadn't done this
12 flipflop, we're back where we -- right now, we're back
13 where we were last May. People would look at (a)(8)
14 and say, "Well, that hasn't happened yet. I'll file
15 a contention when -- as those things happen.

16 In other words, to the extent you -- so in
17 that --

18 MS. CURRAN: And what caused us to --

19 CHAIRMAN FARRAR: Right.

20 MS. CURRAN: -- to realize that this was
21 a significant problem was the Staff's change in
22 position, which, by the way, I think could change
23 again. We don't know. That's certainly the Staff's
24 position today.

25 CHAIRMAN FARRAR: But wait, wait, wait.

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1 I think the First Circuit just yesterday talked about
2 holding the Commission to litigating positions that it
3 takes. I think we could assure you that if this
4 contention is dismissed, it's on the understanding
5 that here is how it's going to be -- the system will
6 play out, and any representation that any lawyer makes
7 on behalf of a client in a proceeding is certainly
8 binding for at least that case.

9 So I don't -- you know, they may change
10 their position, but if they change their position that
11 would resurrect in you or create in you new rights to
12 say, "Wait a minute. That's something we weren't
13 expecting." So it seems to me they are -- they are
14 bound by that, to that extent.

15 JUDGE McDADE: But at this point in time,
16 I mean, given that -- but the next step is, in this
17 contention, there is nothing that is specifically
18 pointed to in the license application itself that is
19 deficient. And then, moving on to the next question
20 of, is there an ability for you to receive an
21 appropriate hearing, if you identify any deficiency
22 that would ordinarily be handled through 70.23(a)(8).

23 And, as articulated here today, the
24 procedure would be upon review of the quarterly
25 construction reports that would be available through

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1 ADAMS, that if you noted a deficiency up to the time
2 that the Staff would ultimately make its (a)(8)
3 determination, that you would have the ability at that
4 point in time, because it would be new information, it
5 would be information that would only become available
6 with the issuance of the quarterly report, to file a
7 contention based on the information in that quarterly
8 report identifying a deficiency in the manner of
9 construction, and at that point in time we would
10 actually have something to have a hearing about, to
11 determine whether or not the construction did or did
12 not meet the applicable criteria.

13 So if that procedure were being -- first
14 of all, is there any reason to believe that procedure
15 wouldn't be followed, wouldn't have to be followed?
16 And, secondly, if it was, wouldn't that not only give
17 you a right to a hearing, but a much more focused
18 right to a hearing when we would be able to look at
19 specific allegations of deficiencies that we would
20 then be able to have the parties litigate?

21 MS. CURRAN: Judge McDade, all of that
22 might be true if this -- if this proceeding were
23 continued. If this -- if this proceeding goes on for
24 the next I think I heard Staff counsel say four years,
25 another four years, in order for us to have the

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1 guaranteed right to raise those issues, two things
2 have to happen.

3 One is that this proceeding has to be
4 going on, because if this proceeding ends, then
5 basically the non-discretionary aspect of this whole
6 thing will have ended before we are able to completely
7 fully challenge any deficiencies in the application.

8 As I said before, it would not be
9 acceptable to us -- we wouldn't consider it to satisfy
10 our rights under the Atomic Energy Act if we had to
11 ask the Commission to reopen this case after this
12 hearing is closed, in order to address issues of
13 compliance with 70.28(a)(8).

14 And that gets back to your first question,
15 isn't it -- I think you asked, isn't it true that you
16 don't really have any dispute here because the
17 application doesn't talk about construction, since it
18 hasn't happened?

19 JUDGE McDADE: What I questioned is
20 whether or not in the contention there is any specific
21 allegation of a -- in Contention 7, whether there is
22 any specific allegation of a deficiency in the license
23 application itself.

24 MS. CURRAN: Well, yes, there is. The
25 specific allegation is that -- is that there is no

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1 information that addresses compliance with
2 70.28(a)(8). That is the specific allegation.

3 But I think your question is -- well, this
4 plant is going to be built, and don't you want to have
5 -- raise concerns in a more specific way. Yes. I
6 mean, we think that that would certainly be an
7 appropriate way to do it. But the way to manage this
8 case so that it can be done properly is to admit the
9 contention and then let the Staff try to moot the
10 contention by sending us these reports, and also
11 giving us access to the information that we need to
12 evaluate whether construction is complete.

13 For instance, we need to confirm whether
14 there will be quarterly reports if the -- if the
15 construction inspections relate to safeguards issues
16 or official use only information. There has been a
17 problem here that some information just doesn't get
18 into the public domain because of that.

19 JUDGE McDADE: Okay. Ms. Curran, let me,
20 based on something you just said, pose a question to
21 Mr. Silverman. You indicated that there is no
22 deficiency in the license application. Based on what
23 Ms. Curran just indicated, this is not a construction
24 license. This is an operating license.

25 And given the fact that it's an operating

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1 license, as articulated by Ms. Curran within the scope
2 of this contention, is that in order to get a license
3 application -- an operating license approved, there
4 should be information in the license application
5 indicating compliance with 70.23(a)(8), that that --
6 since it's an operating as opposed to a construction
7 license, should be a necessary part of the
8 application, so that this is, as I understood, just
9 articulated a contention of omission.

10 That information isn't there yet, and,
11 admittedly, it couldn't be there yet at this point in
12 the proceeding. But that, nevertheless, that is a
13 deficiency in the license application, and that,
14 therefore, the contention -- as a contention of
15 omission -- should be omitted, and then it would be
16 cured by the Applicant at such time as the
17 construction were substantially completed and could
18 demonstrate in its application compliance with (a)(8).

19 What is the deficiency, if any, in that
20 argument?

21 MR. SILVERMAN: The deficiency in that
22 argument, Your Honor, is there is no requirement in
23 the regulations, and there is no information, to the
24 best of my knowledge, in the standard review plan that
25 interprets the regulations, that indicates any need

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1 for the license application itself to discuss the
2 status of construction, and whether or not we are
3 meeting the requirements of 70.23(a)(8).

4 That is an inspection function, and it is
5 going on now. It will continue to go on. There will
6 be public information. It is not just quarterly
7 reports. There are going to be, I'm sure, all sorts
8 of inspections. If problems arise, there will be
9 reports that -- perhaps mandatory reports that have to
10 be filed by the Applicant. This is not part -- a
11 requirement for the license application. It's a
12 requirement to be verified by the technical staff as
13 construction proceeds.

14 CHAIRMAN FARRAR: But the notice of
15 hearing is a notice of hearing on the grant of an
16 operating license.

17 MR. SILVERMAN: Of a license to possess
18 and use radioactive material. Yes, sir.

19 CHAIRMAN FARRAR: So leave out license
20 application for purposes of this discussion. They're
21 coming in and saying, "We object to the grant of an
22 operating license," because one of the things you have
23 to demonstrate -- or that has to be accomplished is
24 the facility has to be built in accordance with the
25 plans.

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1 So not only do we want to -- do we say we
2 have a contention, it's not just a placeholder, we
3 move for summary disposition on that contention, on
4 the undisputed facts and the law, and that their
5 contention would be -- they would win on their
6 contention, and we would issue a decision that says,
7 "You can't have an operating license."

8 This notice says you are trying to get an
9 operating license. They could try to get a ruling
10 from us that says, "You can't have an operating
11 license." You have not -- (a)(8) has not been met.

12 Now, obviously, that's without prejudice
13 -- you coming back later and saying, "Hey, how about
14 now?" But now the burden is on you to come back and
15 resurrect the application rather than on them to keep
16 tracking all of this information that may or may not
17 be readily available. So we kind of have three
18 possibilities here.

19 The one that you think is -- contention is
20 out, you've got plenty of rights later, come back.
21 The middle ground is, contention is in, it's a
22 placeholder, we'll get to it as things evolve. The
23 approach I know you don't like is, contention in,
24 summarily granted, you lose, no operating license,
25 without prejudice to come back at the right time.

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1 MR. SILVERMAN: There is --

2 CHAIRMAN FARRAR: What's wrong with that
3 analysis?

4 MR. SILVERMAN: Well, I guess I'd ask a
5 question. Are you asking me to comment on option 2 or
6 3 or --

7 JUDGE TRIKOUROS: All of them.

8 CHAIRMAN FARRAR: We've commented on one
9 -- I want you to comment on the one you really don't
10 like. But if you were going to be a strict
11 constructionist and just go by the law, and you can
12 have a contention that's pure law, this contention in
13 the sense I described it -- not saying we would do
14 that -- but has some winning points about it.

15 (a) (8) -- you're looking for an operating
16 license. The notice said you can challenge the
17 operating license, and they're saying you can't have
18 an operating license, you haven't met (a) (8), end of
19 case, case closed, you lose.

20 MR. SILVERMAN: And the point is we are,
21 of course, not required today to meet (a) (8).

22 CHAIRMAN FARRAR: Yes. But the notice
23 says you can challenge the operating license. And
24 they are saying right now you can't have an operating
25 license. That's the thrust of their contention -- you

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1 -- right now you can't have an operating license.

2 MR. SILVERMAN: And our response -- I hope
3 I'm being responsive, Your Honor, is this contention
4 simply doesn't raise a genuine issue of material fact
5 or law that can be litigated now.

6 CHAIRMAN FARRAR: Yes, it can be
7 litigated. You lose. It can be litigated, and you
8 lose because there is no facility there that would
9 allow a finding under (a)(8). There is no facility.
10 That's -- it's not -- it isn't --

11 MR. SILVERMAN: In my view, we wouldn't
12 lose, because the point would be that the regulations
13 don't require us to demonstrate compliance with (a)(8)
14 now.

15 CHAIRMAN FARRAR: To get an operating --

16 MR. SILVERMAN: Yes, but we're not nearly
17 there yet.

18 CHAIRMAN FARRAR: But the notice is out
19 there. The notice that says to them, "Show up now" --

20 MR. SILVERMAN: Right.

21 CHAIRMAN FARRAR: -- because these people
22 are trying to get an operating license, that notice is
23 there now.

24 MR. SILVERMAN: And I believe under the
25 case law it is incumbent upon the Petitioners to

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1 identify a specific problem that can be litigated.
2 They are asking us to hold this in abeyance because
3 there is nothing to litigate.

4 CHAIRMAN FARRAR: No, no, no, no. I --
5 we're going beyond that. We're not asking you to hold
6 it in abeyance. They're saying it's a pure issue of
7 law. You keep saying, you know, there is no issue,
8 but there is an issue. And there is undisputed facts.
9 The facility has to be built, and it hasn't been. You
10 lose.

11 MS. MARCO: Your Honor, if I may.

12 CHAIRMAN FARRAR: Yes. Go ahead.

13 MS. MARCO: I believe that the hearing
14 notice as it is, with all of these types of
15 applications, specifies where the application can be
16 found and does indicate that that would be what the
17 subject of the hearing would be.

18 CHAIRMAN FARRAR: The subject is the?

19 MS. MARCO: The overall issue of the --

20 CHAIRMAN FARRAR: The subject is the
21 application, not the grant of a license.

22 MS. MARCO: It's based on the application
23 that has been filed, and there is usually an
24 indication of where that can be located.

25 CHAIRMAN FARRAR: But so under that

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1 approach, you would say that the --

2 MS. MARCO: That the regulation --

3 CHAIRMAN FARRAR: -- that the third option
4 that I just hypothesized does not come into play, this
5 business of -- you're saying that the notice is really
6 a notice that says you are now free to challenge the
7 license application. It's not --

8 MS. MARCO: That's how I understand it.

9 JUDGE McDADE: If I could before, I just
10 have a quick question back for Ms. Curran based on the
11 argument given by Mr. Silverman. What Mr. Silverman
12 has said is that under the regulation, under the Part
13 7 regulations, they are not required at this point to
14 demonstrate compliance with (a) (8) and, as a practical
15 matter, it would be impossible at this point for them
16 to do that. So the regulation doesn't require it. It
17 makes sense that the regulation doesn't require it
18 because it would be impossible.

19 Now aren't you, in effect, suggesting and
20 they have suggested a mechanism by which your client
21 would be able to get a hearing on the issue, a full
22 hearing, that what you're, as I understand their
23 argument, effectively attempting to do is to rewrite
24 the regulations and perhaps the Commission should have
25 already done that and make them more consistent with

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1 the ITAAC requirements in the Nuclear Reactor
2 provisions. But the Commission hasn't rewritten the
3 regulation. It is what it is right now and there is
4 no requirement at this point as part of a license
5 application that they demonstrate compliance with the
6 (a)(8) or that they've satisfied sufficient
7 requirements from which the NRC staff can make the
8 findings that it needs to make under 70.23(a)(8).

9 Where in the regulations would we look in
10 order to impose that requirement on the Applicant at
11 this point in time?

12 MS. CURRAN: Well, I have not reviewed the
13 regulations to see if they say that the Applicant has
14 to address the construction issue in the license
15 application. So I can't verify one way or the other
16 whether that's true.

17 But I do know that in the hearing notice
18 the NRC says it "will review the license application
19 for compliance with applicable sections of regulations
20 and Title X of the Code of Federal Regulations." So
21 I know that the hearing notice says that the issue
22 here is whether this Applicant complies with the
23 regulation.

24 Now I also know that 10 CFR 2.309 says
25 that contentions are supposed to be based on the

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1 application and if you took Mr. Silverman's argument
2 all the way it might be that we're never entitled to
3 address this issue because if it isn't mentioned in
4 the application and that's the only thing we can base
5 our contentions on, then, well, too bad.

6 But I think that would run afoul of
7 various cases like Union of Concerned Scientists v.
8 NRC, 735(f)(2)(d), 14 something, 1482 or something
9 like that where the Commission had an issue that it
10 declared was necessary to a licensing decision and the
11 court said to the NRC, "You cannot exclude that issue
12 from the scope of a hearing. You have to let the
13 public litigate it."

14 JUDGE McDADE: But doesn't the staff seem
15 to be conceding that in this particular instant? On
16 the face of it, 70.23(a)(8) is a requirement on the
17 staff. The staff has to make certain determinations.
18 Admittedly, the Applicant has to supply the
19 information from which the staff can make those
20 determinations.

21 But the regulation itself is addressed to
22 the staff and a procedure has been outlined here today
23 as to how the hearing requirements as the Court of
24 Appeals recognized and Union of Concerned Scientists
25 case that there has to be a provision so that a

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1 punitive intervenor would have the right to challenge
2 the decisions and determine what in here whether or
3 not there is a fact in the record, a sufficient basis,
4 on which the staff could make the requirements under
5 70.23(a)(8) and if you determine that there was not,
6 you would be able to challenge that and you would be
7 able to challenge it along the way as construction
8 proceeded and the idea being that the time to
9 challenge is not after the Applicant has gone several
10 billion dollars down the wrong road. But rather at
11 each phase of construction if there was an
12 identifiable defect at that point would be the time to
13 challenge it and at that point in time would be a
14 timely point where we would be able to properly have
15 enough facts before us that the parties would be able
16 to litigate their differences and we would be able to
17 make an adjudication on that. Why does that not
18 satisfy the requirements of Union of Concerned
19 Scientists?

20 MS. CURRAN: Well, first of all, I just
21 want to express my disagreement with your
22 interpretation of 70.23(a)(8). Although the staff or
23 the NRC is required to determine that construction has
24 been completed in accordance with the approved
25 application, I think the obligation is on the

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1 Applicant to build a plant safely and that the staff
2 is merely verifying that the Applicant has done its
3 job. So --

4 CHAIRMAN FARRAR: Let me interrupt you
5 there because that was the point that I was going to
6 come to. I want to get clarification. There's an old
7 doctrine that we don't review staff determinations.
8 The applicant comes in with some seismic stuff and the
9 staff says, "Your seismic stuff is all right." The
10 intervenors can't say the staff person was unqualified
11 and so forth. In other words, the question is always
12 what did the applicant put forward.

13 Even though this regulation is worded in
14 a staff-oriented fashion, is the question three years
15 from now is the challenge to what the Applicant has
16 done in construction or is it the challenge to the
17 staff determination about that construction? What's
18 the staff say on that?

19 MS. JONES: I don't think it's the staff's
20 determination that can be challenged.

21 CHAIRMAN FARRAR: In other words -- Okay.
22 So as soon as the Applicant goes off the track, files
23 the quarterly report that reveals something, that's
24 challengeable even though the reg doesn't say the
25 applicant will do that.

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1 MS. JONES: Right.

2 CHAIRMAN FARRAR: Implicit in (a)(8) is
3 you all are just passing them what the Applicant did
4 and what's at issue is what the Applicant is doing.

5 MS. JONES: Right.

6 CHAIRMAN FARRAR: Mr. Silverman, do you
7 agree with that?

8 MR. SILVERMAN: Absolutely.

9 CHAIRMAN FARRAR: Okay.

10 MS. CURRAN: Judge McDade, I just want to
11 respond to the second part of your question. We don't
12 have a problem with the basic -- In terms of case
13 management, we don't have a problem with the concept
14 of dealing with construction issues as they come up,
15 say, if they were dealt with each time one of these
16 construction reports is submitted.

17 The problem here is how to do that in a
18 way that protects the Intervenor's hearing rights and
19 it is not going to protect our hearing rights if this
20 proceeding ends before construction is completed,
21 before all those reports come in and we are left in
22 the position of knocking on the NRC's door to try to
23 get the hearing to which we were entitled to in the
24 first place.

25 So if the Board can come up with a way to

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1 maintain our hearing rights on this application, then
2 we think that would be an appropriate way to manage
3 the case as long as we can get notice of the
4 information, as long as no burden of proof shifts to
5 us and as long as the Board protects us effectively on
6 the issue of timeliness on which we are always going
7 to be vulnerable under the regulations.

8 JUDGE TRIKOUROS: Ms. Curran.

9 MS. CURRAN: You know, assuming we comply
10 with your requirements.

11 JUDGE TRIKOUROS: Ms. Curran, the concern
12 that I have with respect to Contention 7 is that, in
13 fact, in admitting Contention 7 we would be preserving
14 your hearing rights but providing you an infinite
15 hearing right. You would have -- Under that under
16 that acceptance, you would be able to challenge every
17 calculation on every important safety aspect of this
18 plant.

19 You could request thousands and thousands
20 of calculations as I understand this. You could
21 request so much material that it would be
22 obstructionary. You would have an infinite hearing
23 right and we are not here to provide you with an
24 infinite hearing right. We are here to be fair to all
25 sides.

1 So clearly in my view (a)(8) involves a
2 determination of finding on literally thousands and
3 thousands of items, basically everything that's IROFS,
4 I guess, in the terminology of Part 70. So clearly
5 that would be not wise.

6 Now your request about having your hearing
7 right preserved is a valid request and we hear it and,
8 you know, we'll take it up. But what I'm saying is
9 that, at least, in my view, Contention 7 gives you an
10 infinite hearing right which I don't think is what you
11 would expect really.

12 MS. CURRAN: Could I respond?

13 JUDGE TRIKOUROS: Sure.

14 MS. CURRAN: First of all, the subject of
15 the (a)(8) determination is the PSSC. So it isn't
16 every IROF. It's narrower than that.

17 JUDGE TRIKOUROS: Well, it's every
18 primarily system, structure and component in the
19 plant.

20 MS. CURRAN: Right. But I also think the
21 concern you're expressing it's true in any case, in
22 any licensing case. These applications are large and
23 theoretically any party that comes into one could
24 raise many, many issues. But as a practical matter,
25 most intervenor groups don't have the kind of

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1 resources and these Intervenors want to ensure the
2 safety of this facility, that it is going to be built
3 in a way and operate in a way that protects the
4 environment and making sure that no license is issued
5 unless those conditions are met.

6 It seems to us that we have the right to
7 make sure that our concerns are addressed and we're
8 acting here in good faith.

9 JUDGE TRIKOUROS: You are and I think you
10 can see that where you did find something that was
11 important to safety and an omission, a clear omission,
12 that this Board was right there on that.

13 MS. CURRAN: Yes, we appreciate that.

14 JUDGE TRIKOUROS: The other concern that
15 I have with respect to Contention 7 is that it, in
16 essence, says that the only time to submit a license
17 application is at the end of the construction term.
18 Is that -- Am I misinterpreting that?

19 MS. CURRAN: Well, in --

20 JUDGE TRIKOUROS: That's the only time
21 that you could meet 723 (a)(8).

22 MS. CURRAN: Well, in the past, it's my
23 understanding that construction was at least -- had
24 gone for some distance in the 1970s. When the first
25 generation of plants was licensed that just because of

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1 this two-step licensing process that the NRC has --

2 (Off the record discussion.)

3 MS. CURRAN: There hasn't been a licensing
4 case for a plutonium processing facility that I know
5 of other than this one and the Commission decided that
6 construction according to an approved design of these
7 PSSCs was important because of the significant safety
8 issues involved. And so then it's necessary to set up
9 the proceeding in a way that makes sense and part of
10 making it make sense is to offer the public an
11 opportunity to participate in a meaningful way.
12 That's what we're trying to ensure.

13 JUDGE TRIKOUROS: Right, but as Judge
14 Farrar had indicated earlier, you do have that
15 opportunity in a hundred different ways even if this
16 proceeding were closed today. Any design changes to
17 the facility that end up being a record -- changes to
18 the record of decision. I'm not sure about RAIs but
19 possibly the review of RAIs, they come out subsequent
20 to that. You know, there is any number of
21 opportunities that you might have. If you see new and
22 significant information that you could request that
23 this hearing or this case be reopened.

24 What you're saying is, if I hear you
25 correctly, that's difficult. That's much more

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1 difficult than having a case that's already open
2 throughout the entire five years. That's how I heard
3 what you said.

4 MS. CURRAN: Yes. I said that and it's
5 also discretionary. It wouldn't be our right.

6 MR. SILVERMAN: Your Honor, if I may. I
7 have just a brief statement. I agree with your
8 characterization. It is the rules, however. There
9 are procedures and they are in the rules and I think
10 what I'm hearing Ms. Curran say she doesn't really
11 like the rules.

12 CHAIRMAN FARRAR: Mr. Silverman, let me
13 ask you. Getting back to the representatives of when
14 we first started this issue. The Applicant files
15 quarterly reports. No. How does the Applicant tell
16 the staff how construction is going?

17 MR. SILVERMAN: I'm going to ask to see
18 one of my technical people can add to this, but we
19 have an NRC resident inspector onsite. That resident
20 inspector is out there on a daily basis monitoring
21 construction activities. He issues a quarterly
22 inspection report.

23 CHAIRMAN FARRAR: He issues a report?

24 MR. SILVERMAN: Yes.

25 CHAIRMAN FARRAR: Not the Applicant?

1 MR. SILVERMAN: That's correct. That
2 report is generally available in ADAMS and my
3 understanding is so far, I don't know how many reports
4 there have been so far.

5 Do you have any idea, Paul? About five so
6 far and that all have been placed on ADAMS.

7 CHAIRMAN FARRAR: And he issues those to
8 whom?

9 MR. SILVERMAN: To the Applicant, but
10 they're -- it's like a typical inspection report that
11 you would find, that you can find on ADAMS from
12 publicly available --

13 JUDGE TRIKOUROS: The problem I have with
14 that, I looked on ADAMS, it doesn't jump out at you at
15 all I can tell you. If you know what you're looking
16 for, if you put in quarterly inspection MOX facility,
17 you'll probably find it.

18 But if you're looking at ADAMS to see
19 what's out there that you could review, it isn't so
20 easy. Perhaps there's a docket number associated with
21 it that you could do it that way.

22 MS. JONES: Judge, as I understand it from
23 the staff, there is a MOX website site.

24 JUDGE TRIKOUROS: There is a what? I'm
25 sorry.

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1 MS. JONES: It's part of the NRC public
2 access system.

3 (Off the record comments.)

4 JUDGE TRIKOUROS: But tell me, Ms. Jones,
5 this inspection report, the inspector's report, who
6 does that go to within the staff and for what purpose?
7 In other words, does the inspector have the last word?
8 "I've looked at this, everything is going great," and
9 Inspector he or she details why he thinks it's going
10 great. Is that the end of it for the staff or does
11 that go here to Headquarters or the region and
12 somebody looks at the inspector report and makes an
13 official management decision that everything is okay
14 or not.

15 MS. JONES: If you give me a second, I
16 will consult with the staff.

17 JUDGE TRIKOUROS: Okay.

18 (Off the record discussion.)

19 MS. JONES: Okay. Let me just clarify
20 something I said earlier. I believe I, according to
21 the staff, sort of misnamed. On the NRC website there
22 is actually a MOX page, a MOX webpage, as opposed to
23 a separate website. So I think I maybe explained it
24 in a way that was not exactly accurate.

25 According to the staff to answer your

1 question, these inspection reports, they're generated
2 by the resident inspector and basically it's the
3 typical, what you see, observations, issues that he
4 may have located. Violations it would contain. There
5 would be even open items perhaps and if some of those
6 items were closed then there are indications of how
7 they were closed. Those are included.

8 From there the report would go to the
9 branch chief for Region II who is over the MOX project
10 and, from that point, it also gets distributed to the
11 project manager and all of those relevant, significant
12 people here at Headquarters and, if there are some
13 additional issues that need to be addressed in those
14 reports, then to the extent that they take care of
15 them here at Headquarters, then they will tend to
16 those issues.

17 But as I understand it from the staff, it
18 is mostly a regionally generated document. But those
19 documents do make their way here. They are reviewed
20 and any issues that come the people here at
21 Headquarters will tend to them.

22 CHAIRMAN FARRAR: So let me see if I can
23 paraphrase it correctly. The inspector is kind of
24 finding the facts, reaching tentative conclusions, but
25 a number of more senior people look at it and say,

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1 "Okay, if those are the facts. You said there's not
2 a problem here. But we do have a problem here. We'd
3 better get on this." Is this kind of what I'm
4 thinking or they may say everything is fine?

5 MS. JONES: Judge, as I understand it, the
6 staff here at Headquarters works in collaboration with
7 the staff in the regional office and the inspector.
8 And so to that extent if there are any issues, they
9 try to work them out through there and back and forth.
10 They also tell me that in certain cases if they need
11 to send someone down with a special technical
12 expertise from Headquarters, they will that person
13 down to participate in an inspection in at the
14 facility.

15 CHAIRMAN FARRAR: Okay.

16 JUDGE TRIKOUROS: Let me just --

17 CHAIRMAN FARRAR: Wait. I have to finish
18 this.

19 JUDGE TRIKOUROS: Go ahead.

20 CHAIRMAN FARRAR: So that process goes on
21 and at some point the inspector finds out, "Gee, that
22 report I wrote X days ago, the region headquarters,
23 everyone agrees I was right." How long does it take
24 for that, in other words, all that staff review
25 process you were just describing?

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1 Now there might be open items. Somebody
2 here may say, "Here's a real problem," and it may not
3 get resolved for a year. They go to the Applicant and
4 they say, "You're going to have to back fit. You're
5 going to do this, that or the other." But, I mean,
6 how long does it take for that regional and
7 Headquarters process to reach a decision that there
8 either is a problem or there is no problem on any
9 given report? Just give me a ball park number. I
10 mean, is it a day? A week? A month? A year?

11 (Off the record discussion.)

12 CHAIRMAN FARRAR: I didn't think these
13 questions were brain teasers. I thought this kind of
14 a ready answer.

15 MS. JONES: These are very particular
16 procedures. I want to make sure I get it --

17 CHAIRMAN FARRAR: I mean, don't tell me
18 every case is different. I mean, standard practice.
19 How long does it take this to bubble up and get
20 blessed or not blessed as the case may be?

21 MS. JONES: Well, I guess obviously
22 general answer is that it all depends on the issue.

23 CHAIRMAN FARRAR: Right.

24 MS. JONES: But, of course, the other
25 information that I was trying to get for you is that

1 the reports are issued -- The inspector has to issue
2 the report. He has 30 days at the end of the quarter
3 to do that.

4 CHAIRMAN FARRAR: Right.

5 MS. JONES: So, of course, whatever issues
6 are contained within that report, then obviously it
7 depends.

8 CHAIRMAN FARRAR: But I want to know how
9 long after the inspector says, "Here's my report. It
10 covers the period X to Y."

11 MS. JONES: Right.

12 CHAIRMAN FARRAR: How long before that
13 bubbles through and the powers that be have said good
14 report, bad report, problems, no problems?

15 MS. JONES: I think that's really
16 difficult to say.

17 CHAIRMAN FARRAR: I have to have an answer
18 because if you tell me you don't know, you're not
19 going to like the next thing I'm going to say.

20 MS. JONES: Okay.

21 CHAIRMAN FARRAR: Well, the next thing I'm
22 going to say is -- No. Go ahead.

23 MS. JONES: I'd love to hear what you're
24 going to say.

25 (Laughter.)

1 CHAIRMAN FARRAR: No.

2 MS. JONES: Perhaps I can prepare a
3 response to what you're saying.

4 CHAIRMAN FARRAR: No. I need an answer.
5 That's a fair question and we need an answer. How
6 long does that take? I'm not saying the darn cases
7 that take two years to resolve.

8 MS. JONES: Right. Well, obviously, it's
9 not going to take a year or --

10 CHAIRMAN FARRAR: Well, how long? I want
11 to know. Is that a two month process? How long a
12 process is it?

13 (Off the record discussion.)

14 MS. JONES: Yes, it's very difficult to
15 say, Judge.

16 CHAIRMAN FARRAR: Okay. Then tell me how
17 if you don't know how long it takes all of your
18 people, however many resources you put into this, you
19 don't know how long it takes them to decide whether
20 based on what the inspector's report says, there's a
21 problem or not, how are we going to tell Ms. Curran
22 how long she has after she gets that report to file a
23 contention with us?

24 (Off the record discussion.)

25 MS. JONES: Well, I don't think you're

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1 going to like my response.

2 (Laughter.)

3 CHAIRMAN FARRAR: You don't like my
4 questions. I don't like your responses.

5 MS. JONES: But it's just very difficult
6 to nail down the amount of time it would take to
7 resolve these issues. But if the concern is about the
8 Petitioners and their ability to file something,
9 obviously that opportunity is there.

10 CHAIRMAN FARRAR: No, no. They have one
11 person, two people.

12 MS. JONES: Right.

13 CHAIRMAN FARRAR: We talked about the
14 kitchen table, but it wasn't the kitchen table. It
15 was the dining room table at the last argument. You
16 have five, 10, 20, 50 people who are paid a lot of
17 money to be experts in this full time. If it takes
18 you a long, long time to figure out what's going on
19 there, I want to know how much time we should give
20 them to figure out with their limited resources when
21 they can come in with a contention and they say, "Aha.
22 I looked at the inspector's" because here's how these
23 cases work out. Mr. Silverman and his colleagues, not
24 critical of you, say, "They had this report. They
25 should have come in in 30 days."

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1 You're telling me, I think you're telling
2 me, the staff can't do it in 30 days. So how can you
3 tell us that a fair time to give them to come in so
4 they are considered timely is 30 days.

5 Ms. Marco, aren't you glad you showed up
6 today.

7 MS. MARCO: Basically, when they provide
8 their late filed contention, it will be composed of
9 whatever they deem to be necessary to raise their
10 contention, whatever they found fault with, any
11 materials that were out there.

12 At that point, the staff would look or the
13 Applicant would look to see whether that was a
14 reasonable amount of time to establish and to arrive
15 at level of detail necessary to support what they
16 filed.

17 CHAIRMAN FARRAR: But what I'm saying is -
18 -

19 MS. MARCO: It wouldn't be known.

20 CHAIRMAN FARRAR: Suppose they get the
21 inspector report the day it's issued. They look at it
22 and they say, "Wow, this is complicated. We're going
23 to have to spend some time looking at it." Shouldn't
24 they get at least as much time as you get to look at
25 it before you make your managerial decisions? How can

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1 we give them less?

2 Mr. Silverman, you had your hand up. Can
3 you help us or do you want to keep away from this as
4 far as you can?

5 MR. SILVERMAN: I don't want to keep away
6 from it. Before that time has passed, I will weigh in
7 beforehand.

8 CHAIRMAN FARRAR: Okay.

9 MS. MARCO: For the purpose of entering a
10 contention, a valid contention, in the proceeding
11 which is a wholly separate purpose and for the staff
12 to make their safety claim per case, that's something
13 we would be able to tell by looking at what they've
14 filed whether they were able to come up with that in
15 time.

16 CHAIRMAN FARRAR: No, no. I'm not worried
17 about what you do with their contention.

18 MS. MARCO: But then, okay, you're talking
19 about fairness of equating --

20 CHAIRMAN FARRAR: I'm saying -- Right, I'm
21 going to say to them, "Okay. We're throwing out
22 contention." Suppose I say to them, "We're throwing
23 out Contention 7. But as long as this proceeding is
24 alive, you have X days from any one of those
25 inspection reports to come in with a new

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1 particularized contention with a basis." I'm trying
2 to figure out what that time should be.

3 MS. MARCO: I'm not so certain it can be
4 handled in a cutoff date like that because some may
5 require little time, some more.

6 CHAIRMAN FARRAR: Okay. Good point. But
7 many boards have said as a rule of thumb, I think
8 Judge Bollwerk did it in PFS, for new stuff, 30 days
9 is the norm. Now you can argue we needed more, blah,
10 blah, blah. But most boards try to set a norm. So
11 what's the norm?

12 MS. MARCO: I think I've heard the norm
13 being articulated as 30 days in fact.

14 CHAIRMAN FARRAR: Right, but I've never
15 heard that norm articulated against a background here
16 where you can't tell me how long it takes -- I have
17 another thing then.

18 MS. MARCO: It's perfectly so.

19 CHAIRMAN FARRAR: How about this? How
20 about instead of 30 days from the inspection report
21 it's 30 days from whenever you all revise the
22 inspection report or take action based on the
23 inspection report? If they don't like what you do,
24 that's the time they challenge.

25 MS. MARCO: I'm afraid, Your Honor, that

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1 the information that this inspection report was based
2 on would already be before them at the first round
3 that it was provided to the public.

4 CHAIRMAN FARRAR: That's what the staff
5 always says. They say here's the staff RAI.
6 Intervenors come in after an RAI and the applicant
7 always says, "Wait a minute."

8 MS. MARCO: There was information --

9 CHAIRMAN FARRAR: There was information a
10 long time ago on which the staff based its RAI. You
11 can't load onto the RAI. You're right. So if you're
12 not allow that, we're struggling here for how much
13 time they get.

14 JUDGE TRIKOUROS: Well, let me understand
15 something. You're running an engineering organization
16 at the NRC in essence. A construction inspection
17 report comes in. I'm assuming and you can answer yes
18 or no to this that you don't jump on that construction
19 inspection report, do the review immediately and then
20 issue it. You put it in some sort of a queue because
21 you may be working on 50 other things at the time and
22 it might take you two months or it might take you a
23 month or it might take you three months. It might
24 take you a day depending on how many other things are
25 in the queue and how complicated the issue is.

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1 So I can understand why you're not saying
2 a week, a month, a year. But do I have that
3 characterized correctly?

4 MS. MARCO: Yes.

5 JUDGE TRIKOUROS: If there's a problem,
6 you will issue a revised construction inspection
7 report and the Intervenors would have an opportunity
8 to see the revised construction inspection report
9 which would then be new and significant information to
10 them at any time that it comes down. Right?

11 MS. MARCO: Well, it depends what the late
12 filed contention is based on. If it's based on
13 information that was previously known regardless of
14 how many revised inspection reports there are, then
15 that would be something that should be accounted for
16 at that time.

17 MR. SILVERMAN: Your Honor, may I?

18 CHAIRMAN FARRAR: Yes.

19 MR. SILVERMAN: Briefly. In many of the
20 cases that I'm familiar with, a general rule of thumb
21 has been 30 days from the availability of the
22 information. I think that's a good starting point.
23 That is not to say that that is a rule that is in cast
24 and stone and that it applies in every contention in
25 every case.

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1 The regulation is for a late filed
2 contention after the initial submission of contentions
3 there's among other things the amended or new
4 contention has been submitted in a timely fashion
5 based upon the availability of the subsequent
6 information. I submit to you that that would be up to
7 you to decide what is reasonable and fair, taking into
8 account the cases that have gone before, the
9 complexity of the information, etc.

10 Petitioners/Intervenors, if they're
11 intervenors at that point, may very well know what to
12 call to your attention the complexity of that
13 information. We may want to call to your attention
14 the lack thereof and it's a decision for you to make.

15 CHAIRMAN FARRAR: So kind of
16 presumptively, 30 days is okay. If you think you
17 needed more, you have to justify it.

18 MR. SILVERMAN: I would be comfortable
19 with that.

20 CHAIRMAN FARRAR: Yes. Good point, Mr.
21 Silverman.

22 JUDGE TRIKOUROS: Does the construction
23 inspection program specify how long you have?

24 (Off the record discussion.)

25 CHAIRMAN FARRAR: Go ahead, Ms. Curran.

1 MS. CURRAN: Should I wait for them?

2 MS. MARCO: We're gathering information.

3 JUDGE TRIKOUROS: Im sorry.

4 MS. MARCO: We're getting the information.

5 JUDGE TRIKOUROS: Yes, that's fine. Just
6 on the side, the construction inspection program
7 should be available to you.

8 CHAIRMAN FARRAR: Let's do this. We've
9 been at this two hours and 20 minutes. Let's take a -
10 -

11 MS. CURRAN: Could I just --

12 CHAIRMAN FARRAR: Yes, go ahead.

13 MS. CURRAN: -- respond because I'm going
14 to forget? Two things, okay. While this proceeding
15 is still pending, if a construction inspection report
16 comes in, then it seems to me the way to approach it
17 that makes the most sense is if Contention 7 is
18 admitted, has been admitted, then the staff would say,
19 "Your contention has been mooted in this respect by
20 this information. What do you say?" And then we
21 would have a period of maybe 30 days to say yes or no,
22 it's been mooted. But that it wouldn't be -- It would
23 be more appropriate to put the burden on the staff of
24 saying this issue is now resolved because it wasn't
25 resolved before.

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1 But let me just add one more thing which
2 is one of our really important concerns here is what
3 would happen if this proceeding had ended and we were
4 still in the process of awaiting these construction
5 inspection reports. First of all, we have no right to
6 receipt of those reports. We would have to get on
7 ADAMS every day or every week and see if one had come
8 up.

9 Then if we see one, what if the
10 construction inspection report relies on official use
11 only information or safeguards information and we want
12 to see it. Well, since we're not a participant in any
13 ongoing proceeding, we have no right to ask for that
14 information and so we may not have any access to
15 information for purposes of amending our contention or
16 responding to a suggestion that -- Well, I guess they
17 wouldn't be saying the contention is moot because we
18 would just be in the position of asking for a hearing
19 based on information that we would have to hope that
20 we saw in a timely way and if it relied, if the
21 inspection report relied, on nonpublic information, we
22 have to base it on only the public information because
23 we wouldn't have any right to get it.

24 If we were in this proceeding and the
25 proceeding were ongoing, then we have a right to say

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1 we need a protective order to look at this and tell
2 you whether we think this satisfies our concern. Only
3 if the proceeding is ongoing would we have that kind
4 of a right.

5 JUDGE TRIKOUROS: But is that true because
6 I have that as an open issue on my list? Only if it's
7 an open proceeding do you have access to nonpublic
8 available information. Is that true?

9 MS. JONES: I don't know the answer to
10 that question. I know that there are new procedures
11 that have just come out with regard to classified
12 information. But I know that those procedures don't
13 apply retroactively. I don't have an answer to that
14 question, but I can get one.

15 JUDGE TRIKOUROS: The license application
16 you reviewed, was it 700 pages long or 2,000 pages
17 long?

18 MS. CURRAN: It was 700 or --

19 JUDGE TRIKOUROS: Seven hundred.

20 MS. CURRAN: But, Judge Trikouros, in
21 response to your question, I've been involved in
22 proceedings before where I have asked to see
23 proprietary documents and the counsel for the licensee
24 told me wait until the proceeding has started and then
25 we will enter a proprietary agreement and we'll get a

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1 protective order from the judge because the licensee
2 wants a protective order from a judge. There's also -
3 - If you're dealing with safeguards information,
4 there's a requirement to show a need to know and
5 generally the need to know is related to I have an
6 issue and a hearing that I want to pursue.

7 JUDGE TRIKOUROS: This is mostly
8 safeguards information.

9 MR. SILVERMAN: I was just going to say we
10 had a protective order in the construction
11 authorization case signed out by the board if my
12 recollection serves me before any contention was even
13 admitted. The Intervenors/Petitioners could have
14 asked for one. When they do ask for one, I'm sure the
15 board will take it under consideration.

16 They have the right to do that. They
17 haven't done it yet. Safeguards information has
18 special legal protections. We have to follow whatever
19 the requirements are associated with those.

20 MS. CURRAN: But I think I just heard Mr.
21 Silverman say "the board issued a protective order."
22 If there is no board, if this case is ended and there
23 is no board, then there are issues --

24 MR. SILVERMAN: That's right.

25 MS. CURRAN: Then who issues the

1 protective order?

2 MR. SILVERMAN: There is no protective
3 order. The fallacy in all this is that the
4 Intervenors/Petitioners seem to believe that they are
5 in the shoes of the staff. They have two completely
6 different functions. They are not a surrogate for the
7 staff. The staff has to review this application
8 across the board and make a determination that we meet
9 all the requirements and all the regulations in the
10 statute and then in the regulations.

11 It's the Petitioner's right, Intervenor's
12 right, to raise contentions as they come up within the
13 bounds of the Part 2 regulations. There are standard
14 to be applied. Sometimes it's late intervention
15 standards. In some instances, it might be motion to
16 reopen standards. But those are the standards in the
17 regulations. They do not have unbridled right to
18 access the information, proprietary, safeguards or
19 otherwise or if they're not a party to the case.

20 CHAIRMAN FARRAR: Let's do this. Let's
21 take a longer than usual break. We'll come back and
22 we'll ask each of you to summarize in a minute or two
23 where you think we are on Contention 7 and then we'll
24 deal with the last two items on the agenda which
25 should go a lot faster.

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1 It's 3:27 after now. Let's -- Eighteen
2 minutes. We'll come back at 3:45 p.m. Off the
3 record.

4 (Whereupon, at 3:28 p.m., the above-
5 entitled matter recessed and reconvened at 3:46 p.m.)

6 CHAIRMAN FARRAR: Okay. We're back on the
7 record at 3:45 p.m. I forgot at the beginning to take
8 note of the presence of our law clerks, Marcia
9 Carpenter and Zach Kahn. They are working on this
10 case as a break from Indian Point which is even more
11 controversial than this one is. They work on any
12 number of cases. We're glad to have them here helping
13 us.

14 All right. Let's wrap up No. 7. Ms.
15 Curran, anything you want to add or summarize? Maybe
16 tell us just what you think we ought to do.

17 MS. JONES: Excuse me. Judge.

18 CHAIRMAN FARRAR: Yes.

19 MS. JONES: If I may interpret, there are
20 a couple of items that we would like to clear up
21 because we don't want to leave the Board and everyone
22 here with a misimpression.

23 CHAIRMAN FARRAR: Okay. Go ahead.

24 MS. JONES: Regarding the questions you're
25 asking.

1 We just wanted to clarify that the
2 quarterly reports that come out that the resident
3 inspector inspects issues 30 days after the quarter
4 ends, once that report is issued that pretty much it.
5 That report does not get revised. If there are any
6 open items on that report, as I understand it, there
7 will be additional reports that will come out later
8 that indicates how those open items were closed and it
9 makes specific reference to that specific open item
10 from the quarterly report that was originally issued.
11 So I just wanted to make sure that everyone understood
12 that. And all of these, of course, are posted on the
13 website.

14 Also, too, there are also additional
15 inspection reports, not just the quarterly reports.
16 There are sometimes special inspections that have to
17 occur. So I don't want to leave everyone with
18 impression that it's just the quarterly report. There
19 are sometimes special inspections that are conducted
20 and those reports are also -- They're also posted on
21 the website as well.

22 So all inspection reports that are related
23 MOX can be found on the website. So I wanted to make
24 sure that I clear that up for everyone.

25 CHAIRMAN FARRAR: Okay. And -- Go ahead.

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1 JUDGE McDADE: If you could, is there a
2 list that you could direct us to that identifies that
3 documentation on which the staff relies in order to
4 make its 70.23(a)(8) determination so that anybody
5 would be able to then look at that list and know that
6 they have reviewed all of the appropriate
7 documentation?

8 MS. JONES: I'm going to see if I can get
9 this right. There is no specific list. In the
10 inspection report, there isn't exactly a section that
11 says 70.23(a)(8). What there are are just various
12 items, various observations, of the inspector of
13 construction and design. So there's not -- There
14 isn't any specific list as far as I know that tells
15 you specifically what's, if I'm answering your
16 questions, that will go into an inspection report on
17 what to look for.

18 JUDGE McDADE: No. What I'm asking is in
19 addition to. You've identified the quarterly
20 inspection reports and you've also indicated that in
21 addition to those there are --

22 MS. JONES: Other documents.

23 JUDGE McDADE: -- also special inspection
24 reports. What I'm asking is is there a list somewhere
25 that you could direct the Board to that would identify

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1 those documents, that documentation, that the staff
2 would rely on ultimately in making their 70.23(a)(8)
3 determination so that somebody could then know what
4 the universe is. In other words, an issue may well be
5 did the staff have adequate information in front of it
6 on which to make that determination. So the question
7 then is what is the universe of information. How does
8 one know what that universe of information the staff
9 has in front of it is?

10 MS. JONES: I think the best was to answer
11 that is we really won't know until we actually make
12 the finding and I think once the "finding" once it's
13 actually made, then there would be a list of
14 documents, a list provided for what the staff used in
15 making that determination. But in terms of the
16 process as it goes along, there isn't any specific
17 list.

18 JUDGE McDADE: There is no guidance
19 document to the staff on what to look at and how to
20 conduct that evaluation.

21 (Off the record discussion.)

22 JUDGE McDADE: I mean, it seems like
23 there's a NUREG for how to get to the candy machine.

24 MS. JONES: Right. As I understand it
25 from the staff, there are, in the construction

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1 inspection procedures, procedures laid out for what
2 you would look at.

3 JUDGE McDADE: And is that listed in a
4 specific group of NUREGs?

5 MS. JONES: I'm checking.

6 (Off the record discussion.)

7 JUDGE McDADE: Perhaps rather than
8 delaying it right now, if you could perhaps just send
9 answer to that question.

10 MS. JONES: Like to just send a letter.

11 JUDGE McDADE: In writing and just with
12 service to the various parties.

13 MS. JONES: Okay. Would you like for me
14 to send that through email or any -- Just email it to?

15 JUDGE McDADE: Email would be fine as long
16 as it's served on all of the parties.

17 MS. JONES: Everyone, okay.

18 JUDGE McDADE: And it would just indicate,
19 you know, what we've just talked about.

20 MS. JONES: Okay.

21 JUDGE TRIKOUROS: I have one problem that
22 I heard earlier from Ms. Curran and I'm trying to
23 wrestle with it a little bit. A lot of the material
24 in this project is safeguards information, rightly so.
25 If you go by the application, it's 700 to 2,000, so

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1 roughly two-third is safeguards information.

2 When and if we close this proceeding, I'll
3 say when we close the proceeding, Ms. Curran is
4 indicating that she has no access then to this
5 information and I guess if you're just someone in the
6 general public asking to see safeguards information,
7 it's not that easy to get it.

8 Do you have any -- Is this the first time
9 this ever came up? It's hard to imagine that it is.

10 MS. JONES: I can imagine that it hasn't
11 and I don't have a clear answer.

12 JUDGE TRIKOUROS: Okay. I think that's a
13 very important one to get an answer to because I think
14 they're really sort of stuck here and I certainly I
15 don't see an out. I don't think this NRC would be too
16 keen to just issue this documentation very easily to
17 anybody.

18 MS. JONES: But I would like to just
19 clarify one thing. As I understand it, there is no
20 safeguards information for this facility. It's on the
21 OUO classified.

22 JUDGE TRIKOUROS: Well, the documents I
23 saw say safeguards.

24 MS. JONES: Is that right?

25 JUDGE TRIKOUROS: Yes.

1 MS. JONES: Okay.

2 JUDGE TRIKOUROS: But whatever it is, I
3 don't think it's public.

4 MS. JONES: It's not public.

5 JUDGE TRIKOUROS: There's a lot of
6 material on this project that's not publicly
7 available.

8 MS. JONES: That's correct.

9 JUDGE TRIKOUROS: Given the nature of this
10 thing.

11 CHAIRMAN FARRAR: As long as we're
12 clarifying things, let me say that my insistence on
13 getting an answer from you harkens back to my time in
14 the private sector when the CEO asked you a question
15 for budget or timing purposes. There had to be an
16 answer and you could qualify the answer and so forth.
17 So if I seem to be pursuing you overly vigorously,
18 it's because I have been pursued overly vigorously
19 myself in the past.

20 Ms. Curran, do you want to tell us a quick
21 summary here or you're not compelled to.

22 MS. CURRAN: A quick summary.

23 CHAIRMAN FARRAR: Yes.

24 MS. CURRAN: We think Contention 7 is
25 admissible. The best way to ensure that the hearing

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1 covered by the Notice of Hearing remains open long
2 enough to consider all the construction related issues
3 that are going to come up in the next four years is to
4 admit the contention and allow it to be litigated.
5 There's -- And that could be by the staff filing these
6 construction inspection reports arguing that it's
7 mooted the contention in some respect and then we
8 would respond.

9 Another alternative would be to admit the
10 contention. We file a summary disposition motion.
11 The application is denied. The case is closed. And
12 the NRC comes back with a new hearing notice somewhere
13 down the road that's at a more timely moment. So that
14 is our position.

15 CHAIRMAN FARRAR: All right. Mr.
16 Silverman, you already told us how to deal with the 30
17 day, the timing issue that I had talked about. That,
18 of course, would be on the assumption that the
19 contention was dismissed. Do you want to summarize
20 other points for us?

21 MR. SILVERMAN: Yes, I will briefly, Your
22 Honor.

23 On the notion that the application would
24 be denied at this point in time is just, as far as I'm
25 concerned, completely inconsistent with the

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1 regulations because the notion that we have to
2 demonstrate that compliance now is at odds with all
3 the regulations.

4 The other major points I wanted to make
5 very briefly is (1) we believe it is an inadmissible
6 contention as we've said and what underscores that, a
7 point I haven't made, is the following. If this
8 contention is admitted as is, we have an obligation to
9 provide mandatory disclosures and we have to provide
10 documents that are relevant to the contention.

11 I have to tell you. I have no idea what
12 documents I would provide in response to this
13 contention as it's presently written. Would I have to
14 provide every single construction record that exists?
15 Contrast this with Contention 4 where we have an issue
16 having to do with waste tanks, their ability to store
17 that waste for a particular period of time. We have
18 a general understanding I think of the kinds of
19 documents we would need to make available to the
20 Intervenors.

21 Here it is wide open. There is no
22 identification of a deficiency and no identification
23 of a PSSC that has been or isn't being built in
24 accordance with 70.23(a)(8) and it's therefore
25 admissible.

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1 We think that --

2 CHAIRMAN FARRAR: If you would. Putting
3 the shoe on the other foot. If you were Ms. Curran,
4 suppose we dismiss the contention. How would she do
5 her search since you don't know what documents are
6 relevant to the contention? If she wants to pursue
7 this in good faith, what document kind of search
8 should she be engaged in for the next five years since
9 she knows --

10 MR. SILVERMAN: She should look at
11 inspection reports that are filed associated with the
12 construction of the facility. She can view or attend
13 public meetings that are held between the Applicant
14 and the NRC staff. She can review reports that may be
15 filed from time to time that are mandatory reports
16 perhaps due to some sort of a problem. There are
17 reporting requirements in Part 70 and in other
18 provisions of the regulations. She would do what any
19 other intervenor has done in any other case that I'm
20 familiar with.

21 The concerns that I think the Petitioners
22 have are with the NRC procedures that are available to
23 them to raise these issues. The fact that they have
24 concerned with those procedures is not a basis to
25 admit an inadmissible contention and that procedures

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1 have been established by the Commission with, in my
2 view, due regard for fairness and equity and
3 timeliness of proceedings.

4 Those are my concluding remarks.

5 CHAIRMAN FARRAR: Were those procedures
6 established with an eye toward notices or license
7 applications and resulting notices of hearing that
8 would come this early in the process and again I don't
9 want to use the word "premature." You're entitled to
10 have filed, you're entitled to have put out the
11 notice. But do the regulations that she's
12 complaining, that you say, she doesn't like the
13 system, was the system designed and drafted with this
14 kind of situation in mind and, if not, what, if
15 anything, should we do about it?

16 MR. SILVERMAN: I believe the system was
17 designed with this kind of situation in mind and I
18 honestly do not view this as different in any
19 significant way from most of the old CPOL cases. In
20 one of our briefs we cited to you some very, very
21 lengthy periods of time between the time a request for
22 an operating license was filed many, many years, 12,
23 17 years, 18 years, as I recall, before a construction
24 authorization was issued. Not any different than what
25 we have here.

1 CHAIRMAN FARRAR: And that concluded what
2 you had to say, Mr. Silverman.

3 MR. SILVERMAN: Yes, sir.

4 CHAIRMAN FARRAR: Okay. Ms. Jones.

5 MS. JONES: Basically, our position has
6 been that the contention is inadmissible and I'm not
7 going to go through a recitation. I think Mr.
8 Silverman basically brought up a lot of points that we
9 brought up as well in our brief and that is that
10 there's really no factual basis for it.

11 They haven't really identified any
12 deficiencies with the license application. The PSSCs
13 are being constructed. The construction inspection
14 program, there is the information available to them.
15 They can access to make their own determinations as to
16 whether or not there is compliance.

17 So I don't see -- Based on what they've
18 stated in their petition, I don't see how their late
19 filed contention can be admissible under those
20 circumstances.

21 CHAIRMAN FARRAR: Okay. Thank you, Ms.
22 Jones.

23 Mr. Silverman, I can't remember if I asked
24 you this earlier. The staff change of approach, do
25 you have any -- I'm not going to ask you whether you

1 like it or not. But do you have any quarrel with it?

2 MR. SILVERMAN: We do not.

3 MS. CURRAN: Judge Farrar.

4 CHAIRMAN FARRAR: Yes, madam.

5 MS. CURRAN: I hadn't heard Mr.
6 Silverman's argument before about his argument that if
7 the Contention 7 were admitted that it would open a
8 limitless discovery and I would just like a chance to
9 respond to that.

10 CHAIRMAN FARRAR: Okay.

11 MS. CURRAN: I've never seen a case where
12 a contention, admission was denied because of some
13 concern that had to do with discovery. I don't
14 understand that to be part of the criteria for judging
15 admissibility.

16 But be that as it may, it seems to me that
17 after he made that argument, Mr. Silverman listed the
18 kinds of documents that one would expect to be
19 produced. So I don't think it's a limitless array of
20 documents. And it seems to me that management of
21 discovery is something that can be done by the Board.

22 CHAIRMAN FARRAR: I think what he was
23 saying was to the extent that a contention isn't
24 narrowly focused I think he was arguing that the fact
25 discovery in his mind would run awry is an indication

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1 that a contention has to be more narrowly focused than
2 this.

3 MR. SILVERMAN: That it doesn't point out
4 a concrete issue to be litigate.

5 CHAIRMAN FARRAR: And, of course, now
6 there's nothing more concrete you could have said at
7 this point. So that's the tension here but I --

8 MS. CURRAN: It probably could be very
9 simple. I mean, there's probably nothing to produce
10 right now anyway.

11 CHAIRMAN FARRAR: Okay. Well, I think we
12 have what we need here.

13 Let's turn to the request that
14 construction be halted. We've read the briefs and
15 don't have a whole lot of, unlike our situation with
16 the others, questions. So I think we can do this in
17 a lot less time than the schedule allows.

18 Ms. Curran, if you want to come -- Well,
19 stay there if you want.

20 MS. CURRAN: I would prefer to.

21 CHAIRMAN FARRAR: Okay. And we've read
22 your briefs you don't have to recite what's in there.
23 You may want to give us a synopsis of the reasons why
24 you think we should rule in your favor or address
25 anything that they had in their. Is this the issue of

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1 where you wanted to a reply?

2 MS. JONES: Yes, it is.

3 MS. CURRAN: I think it is.

4 CHAIRMAN FARRAR: So we gave you the --

5 MS. JONES: Yes.

6 CHAIRMAN FARRAR: Okay. So if you want to
7 address anything that they said in their last two
8 briefs or the single brief that each of them filed.
9 Go ahead. Whatever you want to do. What I'm saying
10 is we don't need the --

11 MS. CURRAN: Yes. I just don't have a lot
12 to add what we already said except to say that the
13 aspects in which the design -- remains incomplete are
14 significant in our view. They have to do with
15 disposal, a very important issue, they have to do with
16 safety of the operation and they have to do with
17 security and these are all fundamental elements of the
18 design and we would call them PSSCs.

19 (Technical issues with the microphone.)

20 MS. CURRAN: The DOE has a history of
21 building facilities before they've finished --

22 CHAIRMAN FARRAR: But your oppositions
23 said that those were issues for the previous stage and
24 they may be, as I understand their arguments, good
25 issues but those should have been brought up at the

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1 previous board level.

2 MS. CURRAN: Well, that board is disbanded
3 and these issues that we raise have come since or were
4 not resolved there and it seems to me there's an
5 overarching question of how this whole licensing of
6 this facility should be managed that --

7 CHAIRMAN FARRAR: As I recall from reading
8 that original board's decisions there were some points
9 where that board didn't resolve, didn't address,
10 issues because it believed they would be addressed at
11 this phase and I'm not trusting my recollection too
12 well on that. But do any of the things that you're
13 bringing before us now fit into that category where
14 that board said, "Well, we're not going to deal with
15 those. That will be the role of the next board"
16 because that would kind of give us some authority if
17 they fit into that category.

18 MS. CURRAN: Well, I do remember that with
19 respect to the environmental impacts of the waste
20 solidification building the board said new information
21 may arise later and if you see new information come up
22 you can raise it later which we've done in this case.

23 But there are, as expressed in Contention
24 4, safety issues that go along with that. There are
25 issues regarding the processing, the safety of

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1 processing of material, that arise from the fact that
2 DOE is now contemplating expanding the scope of the
3 material that will be processed at the plant. If that
4 happens, that's likely to require design changes that
5 will affect the safety of the plant that we will
6 require in the safety analysis and it seems to us to
7 be important because the Commission recognized many
8 years ago in the mid '70s that these kinds of
9 facilities are particularly hazardous and given those
10 hazards, if it is true as it appears that the demands
11 on this facility and therefore the design of this
12 facility may change in the next several years that it
13 would be wise to wait to build the facility until it's
14 more certain what the design is going to be.

15 CHAIRMAN FARRAR: I think though your
16 opponents say even if they were to concede the
17 validity of that position as a matter of public policy
18 they would say we have no jurisdiction to address that
19 question.

20 MS. CURRAN: And that is why we asked you
21 to refer the question to the Commission.

22 CHAIRMAN FARRAR: Couldn't you just go to
23 the Commission yourself?

24 MS. CURRAN: I believe there's a
25 regulation that requires us to start with the

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1 licensing board and I don't know exactly what number
2 it is, but I'm fairly certain of it.

3 CHAIRMAN FARRAR: Okay. I think that's
4 the -- I mean that's a primary thrust of their
5 argument is to put everything else aside, we just lack
6 jurisdiction.

7 MS. CURRAN: If you were to rule we don't
8 have the authority to deal with us, we suggest you go
9 to the Commission, that would not be a problem for us.
10 But we did think we were obliged to start with you and
11 we also think it would be helpful to have your
12 endorsement of our request.

13 CHAIRMAN FARRAR: Anything else, Ms.
14 Curran?

15 MS. CURRAN: No.

16 CHAIRMAN FARRAR: Okay. Thank you.

17 Mr. Silverman.

18 MR. SILVERMAN: Your Honor, I'll be brief
19 unless you have specific questions. The original
20 hearing notice in the construction authorization
21 proceeding that was issued by the Commission
22 specifically said that to approve construction NRC
23 would need to make certain findings that the design
24 bases, the principle SSCs, were adequate to address
25 accidents and natural hazards, etc.

1 There was a proceeding to do that. A
2 decision was made. That is that this is essentially
3 a challenge to that decision. We agree the Board does
4 not have jurisdiction.

5 CHAIRMAN FARRAR: These contentions would
6 -- I'm not asking you to concede they would have been
7 admissible, but they would have been able to be
8 entertained at that.

9 MR. SILVERMAN: Yes.

10 CHAIRMAN FARRAR: It would have been fair
11 to present them to that board.

12 MR. SILVERMAN: Yes, and frankly some of
13 the issues they raised were before. At this point in
14 time, if the Petitioners believe that we have somehow
15 failed to meet our obligations under the construction
16 authorization request, then their remedy is the 2206
17 Petition. It's a request for enforcement action.
18 It's not a request that this Board refer the matter.

19 With respect to both the referral and the
20 issue of a stay, they've made no effort to demonstrate
21 the standards are met for a referral and with respect
22 to if you consider this to be essentially a request
23 for a stay, they have made no effort to demonstrate
24 compliance with those standards.

25 CHAIRMAN FARRAR: With the standard 4

1 factors.

2 MR. SILVERMAN: Yes. So our view of this
3 is that this is completely inappropriate. It's the
4 second bite of the apple. It is an effort to reopen
5 what was decided in the prior proceeding by a prior
6 licensing board and if they think we're violating our
7 terms and requirements and conditions they should go
8 and file a 2206 petition.

9 CHAIRMAN FARRAR: Or if they filed with
10 the Commission. I mean, they're free to do that.
11 Correct?

12 MR. SILVERMAN: I'm not sure. I'd have to
13 think about the procedural aspects of that. I imagine
14 they could file for the Commission to reconsider in
15 some fashion. I would have to research that. The
16 decision has already been made.

17 CHAIRMAN FARRAR: Okay. Anything else?

18 MR. SILVERMAN: No, Your Honor.

19 CHAIRMAN FARRAR: Okay. Thank you, Mr.
20 Silverman.

21 Ms. Jones.

22 MS. JONES: That's basically our position
23 as well. We think that these issues have already been
24 decided. They were decided during the construction
25 authorization process.

1 PSSCs in terms of the arguments they're
2 making about design completion, that's not really
3 required in the regulations. What the Applicant was
4 required to do was to meet design bases and, of
5 course, the Commission made that decision and issued
6 a construction authorization. So I think that their
7 motion, excuse me, their request to suspend is without
8 a basis.

9 CHAIRMAN FARRAR: And how about us with or
10 without comment sending it on to the Commission?

11 MS. JONES: As I understand it and I have
12 not looked at all of the rules and criteria for making
13 referrals, but as I understand it, those require
14 extraordinary circumstances and I don't know that this
15 would qualify given the fact that this is a decision
16 that was previously made and they haven't really
17 presented any even really regulatory requirement that
18 these design issues be resolved now, that design be
19 complete and be complete of PSSCs now. So I don't --
20 I'm not familiar enough with those referral
21 regulations, but I would think that they would have to
22 do more than just say, "We think that the design
23 should be complete" without pointing to some
24 regulatory requirement.

25 CHAIRMAN FARRAR: I suppose --

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1 MS. JONES: Or even demonstrating
2 irreparable harm under the motion to stay criteria
3 which I think would be the applicable criteria here.

4 CHAIRMAN FARRAR: I suppose if we don't
5 have jurisdiction to consider something we probably
6 don't have jurisdiction to refer it. I don't know.

7 Anything else, Ms. Jones?

8 MS. JONES: No, I think that's it.

9 CHAIRMAN FARRAR: All right. Then we'll
10 take that part of the case, the stay request or
11 suspension request, under submission along with the
12 issues on Contention 4, Contention 7 and anything else
13 left over from the January oral argument. I think we
14 had Contention 6 and we were going to revisit
15 Contention 3 also and so forth.

16 That leaves us only the case management
17 order. Someone whose name escaped suggested some
18 bizarre approaches to case management if I could
19 remember who that was I reported to the authority, but
20 none of the three of you seem to like the idea.

21 Ms. Jones, do you think we should just --
22 This is not the time for a case management order.
23 It's let the case proceed, percolate, along.

24 MS. JONES: I think that my position is
25 that the Board obviously can make that determination.

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1 If the Board wants to create a case management order,
2 then certainly, as I understand it, it's within your
3 authority to do so. But I don't think that at this
4 time that it's really warranted. I think that if we
5 should see somewhere down the line that we are running
6 into a situation where we're getting a lot of filings
7 which is I think what you originally envisioned the
8 last time we were here in January, then I think that
9 at that time I think it would be more appropriate
10 because then we'd have a better idea of what may lie
11 ahead. But I think at this point it's highly
12 speculative. But it's the Board's discretion.

13 CHAIRMAN FARRAR: Mr. Silverman, I seem to
14 recall that was your brief that you did a very polite
15 and thorough job of saying that was one of the worst
16 ideas you ever ran into.

17 (Laughter.)

18 CHAIRMAN FARRAR: So I commend you.

19 MR. SILVERMAN: And then you had some
20 support from the Petitioners on that one.

21 (Laughter.)

22 CHAIRMAN FARRAR: I commend you for the
23 way you wrote that. No, it was very well written and,
24 Ms. Curran, your people don't see a need for it and I
25 think that was one of those instances where there's

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1 nothing wrong with asking questions and raising ideas
2 and if they don't make any sense, people tell us and
3 people told us that.

4 And, in fact, you all have kind of a
5 coincidence of positions that neither side wants to
6 let anything drag along. If there's a contention to
7 be brought, it should be brought now rather than
8 later. That benefits the Applicant. That's benefit
9 the Intervenors.

10 MS. CURRAN: Judge Farrar.

11 CHAIRMAN FARRAR: Yes, madam.

12 MS. CURRAN: When we first responded to
13 that, the only contentions on the table, I think, were
14 three and four and possibly six and now we have seven.
15 And I would just add to that that if the Board does
16 admit Contention 7, then it may be appropriate to take
17 some measures to --

18 CHAIRMAN FARRAR: You say if we did admit
19 seven?

20 MS. CURRAN: Yes.

21 CHAIRMAN FARRAR: Okay.

22 MS. CURRAN: Some measures to govern the
23 litigation of Contention 7. Since it is a bit
24 unusual, we will concede.

25 CHAIRMAN FARRAR: Okay. So if seven comes

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1 in, we would have to say, "Okay. Seven is in, but it
2 is a peculiar bird. So here is how we want the" -- I
3 think then we would ask rather than say how to do it.
4 That might be a point which we would ask for your
5 suggestions. "Okay, now that seven is in" or with the
6 objection of two of the parties, "how would we proceed
7 further?" That's a good point, but I think we would
8 not try to do that all at once.

9 Well, there's nothing else. We thank you
10 for your excellent on all, as I mentioned at the
11 beginning, on all the pleadings and your very
12 responsive answers to our questions, some of which you
13 may have thought were good questions. Some were bad.
14 But you all did a good job of addressing them. So we
15 will take the case under submission and I said at the
16 beginning attempt to write a decision that says
17 exactly where we are on this and gives us a roadmap
18 for going ahead or not as the case may be.

19 So the case is submitted. Thank you. Off
20 the record.

21 (Whereupon, at 4:18 p.m., the above-
22 entitled matter was concluded.)
23
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

Oral Argument

Docket Number: 70-3098-MLA

Location: Rockville, Maryland

were held as herein appears, and that this is the
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