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

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In the Matter of)	
Northern States Power)	
Co. (Formerly Nuclear)	Docket Nos. 50-282-LR and
Management Company,)	50-306-LR
LLC.))	ASLBP No. 08-871-01-LR
)	October 29, 2008
(Prairie Island Nuclear)	
Generating Plant, Units)	
1 and 2))	"INTERIM DRAFT TRANSCRIPT"
)	

HASTINGS, MINNESOTA

BEFORE:
WILLIAM J. FROEHLICH, Chairman
DR. GARY S. ARNOLD
DR. THOMAS J. HIRONS

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

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3 >> JUDGE FROEHLICH: Good morning. We'll
4 come to order. My name is William Froehlich, Chairman
5 of the Atomic Safety and Licensing Board, which has
6 been designated to hear this matter and decide the
7 issues in the Application of Northern States Power
8 Co., originally filed as Nuclear Management Company,
9 petition to renew their facility operating license on
10 No. DPR-42 and DPR-60, for an additional period of 20
11 years.

12 This matter has been docketed by the U.S.
13 Nuclear Regulatory Commission as Docket Nos. 50-282-LR
14 and 50-306-LR.

15 The LR stands for License Renewal, and the
16 first docket refers to the Prairie Island Unit 1 and
17 the second docket Prairie Island Unit 2.

18 Today's proceedings is publicly noticed by
19 the ASLBP order issued on October 16, 2008. That
20 order was published in the Federal Register on
21 October 22nd, 73 Federal Register 63032, and the order
22 lays out in general terms what we will be discussing

1 here today and the types of questions we would like to
2 have answered at this oral argument.

3 For the record, today's date is Wednesday
4 October, 29th, 2008, and it's 9:04 a.m., in Courtroom
5 2-E at the Dakota County Judicial Center in Hastings,
6 Minnesota.

7 First, I'd like to introduce the Atomic
8 Safety and Licensing Board. On my right is Judge Gary
9 Arnold. Judge Arnold has a Ph.D. in nuclear
10 engineering, with over 25 years experience in the
11 nuclear field. This includes operational experience
12 in the Navy, as well as 20 years at the Knolls Atomic
13 Power Laboratory.

14 To my right is Judge Thomas Hirons. Judge
15 Hirons has a Ph.D. in nuclear engineering from North
16 Carolina State University and has worked for the Los
17 Alamos National Laboratory for 32 years.

18 Before going to Los Alamos, Judge Hirons was
19 an assistant professor of mechanical and nuclear
20 engineering at the University of Notre Dame.

21 As I mentioned earlier, my name is William
22 Froehlich. I've been designated Chairman of this

1 Atomic Safety and Licensing Board. I'm a lawyer by
2 training, with 32 years of federal administrative and
3 regulatory law experience. And because I'm a lawyer
4 and one of the judges here, I serve as chair on
5 procedural issues.

6 I'd also like to introduce a few other
7 people from the Atomic Safety and Licensing Board
8 panel.

9 To my far left is our law clerk, an
10 attorney, Matthew Rottman. We have two administrative
11 and logistical support members with us, Ms. Patricia
12 Harich over in the corner, and Joe Deucher, who runs
13 the computer equipment and audiovisual equipment.

14 Mr. Deucher has been working with the Dakota
15 County court officials to web stream today's
16 proceedings.

17 If you have any comments about the web
18 streaming or that portion of this proceeding, you can
19 send them to webstreammaster.resource@nrc.gov. This
20 will all be up on the web page as well.

21 Before we begin, I'd like to thank the folks
22 from the Dakota County Judicial Center who made it

1 possible for us to use their facilities and for their
2 help in coordinating all matters relating to this oral
3 argument.

4 Commander Blair Anderson, Chief Deputy Dave
5 Bellows, and especially Cary Nygaard from the Dakota
6 County Facilities Office.

7 Our court reporters today are Ms. Lorraine
8 Carter and Ms. Denise Phipps. Denise Phipps is
9 starting first, and Lorraine will kick in at the
10 appropriate time.

11 There will be an electronic transcript made
12 of our argument today, and it will be posted on the
13 NRC website shortly.

14 At this point, perhaps, I could ask the
15 parties to introduce themselves. I'd like for lead
16 counsel to introduce themselves, state your name and
17 your client, introduce any counsel who may be
18 participating with you in the argument today.

19 Could we start please with the Petitioner.

20 >> MR. MAHOWALD: Good morning. My name is
21 Philip Mahowald. I'm general counsel for the Prairie
22 Island Indian Community. I'm here today on behalf of

1 the Prairie Island Indian Community. With me at the
2 table is Mr. Christopher Grimes, who is a nuclear
3 engineer consultant, retained by the Community to
4 assist us in this matter. I'd also like to recognize
5 Tribal Council President, Ron Johnson, who is sitting
6 in the audience today.

7 >> JUDGE FROEHLICH: For the Applicant,
8 please.

9 >> MR. LEWIS: Good morning. My name is
10 David Lewis with the law firm of Pillsbury, Winthrop,
11 Shaw, Pittman, representing the Northern States Power.
12 And also sitting at the table is Allison Crane from my
13 office.

14 >> JUDGE FROEHLICH: For NCC Staff.

15 >> MS. MIZUNO: For the NRC staff, Office of
16 General Counsel, Beth Mizuno. And with me today is
17 David Roth, also with the Office of General Counsel,
18 and Marcia Simon with the Office of General Counsel.

19 We are accompanied today with Richard
20 Plasse, Nathan Goodman and James Davis. They are with
21 the NRC Division of License Renewal.

22 >> JUDGE FROEHLICH: Now just a few words

1 about housekeeping and introductory material before we
2 start, housekeeping matters. Please turn off your
3 cell phones, set them on vibrate. And if you have any
4 conversations on the cell phone or otherwise, please
5 take them out in the hall.

6 The media is welcome. We are electronically
7 connected, but there may be people from the media
8 here. The NRC Office of Public Information, Ms. Prema
9 Chandrathil is here.

10 If you have any questions or need an
11 additional information about the proceedings, about
12 what is happening today or what will happen along the
13 license renewal process, feel free to speak with
14 Prema.

15 Members of the public are free to observe
16 the proceedings today and all NRC hearings, but only
17 counsel for the parties would be allowed to speak
18 today, because it is on their filed pleadings that the
19 Board has questions.

20 For the benefit of the public or any media,
21 I thought it might be useful to spend just a few
22 minutes to explain the role of the Atomic Safety and

1 Licensing Board, a brief history of the proceeding and
2 the purpose of today's argument.

3 In essence, the Atomic Energy Act, is a law
4 passed by Congress. It created the Nuclear Regulatory
5 Commission. There are five members on the Commission.
6 They're appointed by the President, confirmed by the
7 Senate. And the commissioners have a large regulatory
8 staff working for them. And they're represented today
9 by the NRC staff at the table there.

10 The Board up here is a separate entity,
11 whose role is very different. The Atomic Safety and
12 Licensing Board judges are appointed basically for
13 life, not part of Staff, not part of the
14 commissioners. Our responsibility is solely to hear
15 the cases that are brought before us by the parties
16 and to rule on any legal or factual issues that come
17 as a result of that.

18 The only communications we can receive about
19 the case come from the filed pleadings or in open
20 session like this. We don't sit and talk with the
21 commissioners or with Staff or any of the parties.
22 Our decision has to be based solely on what comes into

1 the record or what we hear in open court.

2 The commissioners are ultimately an
3 appellate body. And for those who are unhappy with
4 the decisions made by the Board, they can appeal to
5 the Commission in the first instance and to the courts
6 if they're still dissatisfied.

7 So the important point I think I'd like to
8 make is, when we talk about the NRC here, we're really
9 talking about three different entities, the
10 commissioners back in Washington, the Staff
11 represented here, and the ASLBP, the board hearing the
12 case.

13 The proceedings we're discussing today
14 discuss, deals with the application dated April 11th,
15 2008, filed by Northern States Power Co. to renew its
16 operating license for the Prairie Island Nuclear
17 Generating Plant.

18 The current license expires on August 9th,
19 2013. And Northern States -- for Unit 1. And
20 Northern States seeks to renew that for 20 years. The
21 Unit 2 license expires October 29, 2014, and Northern
22 Seeks seeks to extend that for 20 years to October 29,

1 2034.

2 On May 6, 2008, the NRC published a Notice
3 of Receipt of the license renewal application. On
4 June 17th, the NRC published a Notice for Acceptance
5 of Docketing, and provided an opportunity for hearing
6 on the issue.

7 On August 18th, Prairie Island Indian
8 Community filed a timely petition to intervene in this
9 matter.

10 On September 3rd, the Atomic Safety and
11 Licensing Board was established to rule on the
12 Petition for Leave to Intervene and all hearing
13 requests and to preside over any hearings that may be
14 held in this matter.

15 The Board will decide whether the Prairie
16 Island Indian Community request for hearing should be
17 granted. We will decide whether or not the Prairie
18 Island Indian Community has filed what's known as
19 admissible contentions.

20 The NRC has a regulation that we're all
21 bound to apply. It's found at 10 CFR 2.309(f)(1), and
22 that includes six criteria that every contention

1 that's admitted must meet. We'll go through each
2 contention that was filed and see whether it meets
3 those six criteria.

4 The criteria include a number of different
5 things. For example, provide a specific statement or
6 law or fact to be raised or controverted. A brief
7 explanation of the basis for the contention. The
8 Petitioner must show that the contention is within the
9 scope of the proceeding, and is material to the
10 findings of the NRC must ultimately make in this
11 matter.

12 Finally, the Petitioner must provide a
13 concise statement of the alleged facts or expert
14 opinions which support the Petitioner's position on
15 the issue and which the Petitioner intends to rely on
16 at hearing, together with references to specific
17 sources or documents on which the Petitioner intends
18 to rely.

19 They also have to show that there's a
20 genuine dispute of material fact; and, as part of
21 that, whether there's anything missing from the
22 application that was filed by the Applicant.

1 So today we'll be talking and probing the
2 Petitioner about each of the contentions and trying to
3 figure out whether they meet those six criteria I just
4 outlined. If they meet the six criteria, we'll rule
5 that the contention is admissible. If they don't,
6 we're obligated to rule that they're not admissible.

7 After we hear oral argument today we'll go
8 back and issue a written decision or ruling. We
9 probably won't be able to rule from the bench on the
10 contentions today because some of them are quite
11 complicated, and we want to be able to absorb all that
12 we hear from you today.

13 At this point I'd like to ask my two
14 colleagues if there's anything they'd like to raise at
15 this point if they have any comments.

16 >> JUDGE HIRONS: No.

17 >> JUDGE ARNOLD: No.

18 >> JUDGE FROEHLICH: Today's argument will
19 begin with an opening statement of up to 15 minutes in
20 length from each party. The Petitioner will go first.

21 Each one will get 15 minutes to give an
22 uninterrupted opening statement for us, and then we'll

1 turn to review the admissibility of each individual
2 contention.

3 Just for our planning purposes, we've
4 allocated about 30 minutes per contention, although we
5 may shift that time around as some contentions may
6 take longer to dispose of or to rule on than others.

7 So that there will be some contentions for
8 which we don't have any contentions, on those
9 contentions we'll allow the parties to make a
10 statement if they wish explaining or amplifying their
11 position.

12 I guess I should also mention at this point
13 that this is not an opportunity to bring in new
14 evidence or new arguments. What we are working from
15 is the pleadings that have already been filed and
16 answering questions that arise from those pleadings.

17 Our law clerk, Matthew Rottman, will keep
18 time on this. And he has a one-minute warning card.
19 He'll hold that up. I'd ask when you see that card,
20 you finish up your sentence and end your presentation.
21 We'll try to keep this on schedule.

22 Does anyone here, any of the parties have

1 any questions or concerns about the procedures I've
2 outlined? Hearing none, let's begin. I'd like please
3 an opening statement from the Petitioner, Mr.
4 Mahowald.

5 >> MR. MAHOWALD: Would the Board prefer
6 that we stand?

7 >> JUDGE FROEHLICH: If you're comfortable
8 in your chair, please remain at the chair. I would
9 say speak directly into the microphone because it's
10 being web streamed, and for the benefit of the court
11 reporter.

12 I should also note for the parties that the
13 mics are live all the time. So if you are conferring
14 amongst yourselves, hold down the button, the bulb
15 will go dim, and it will be muted and then not
16 broadcast.

17 >> MR. MAHOWALD: Thank you, Your Honor.
18 The Prairie Island Indian Community petitions to
19 intervene asserting several contentions to ensure that
20 NSP's License Renewal Application for the Prairie
21 Island Nuclear Generating Plant conforms to the NRC
22 Safety and Environmental Regulations and other

1 applicable law.

2 The Community is concerned that the renewal
3 of the PINGP license may result in a detrimental
4 effect to the health and safety of the Community
5 members and also cause an adverse impact on the
6 environment.

7 The Community's contentions represent a
8 focused set of concerns within the scope of license
9 renewal. We've identified specific sources and facts
10 on matters material to the decision of whether to
11 grant NSP's application to relicense Units 1 and 2.

12 As a general matter, the Community asserts
13 contentions of omission. In other words, the
14 Community contends that certain portions of NSP's
15 License Renewal Application and Environmental Report
16 fail to satisfy the requirements of applicable
17 regulations, namely 10 CFR Parts 51 and 54, as we
18 cited in our Petition to Intervene.

19 It is not the Community's role to fill in
20 the holes and omissions of the License Renewal
21 Application or the Environmental Report. That is the
22 Applicant's responsibility.

1 The Community believes that each of its
2 contentions state a viable, admissible factually
3 supported contention.

4 Five of our contentions are based on
5 deficiencies in NSP's environmental report. NSP has
6 failed to adequately disclose information required
7 under 10 CFR Part 51. The ER fails to include
8 information sufficient to make an accurate assessment
9 of whether any historic or archeological properties
10 will be affected by the proposed license renewals.

11 The Environmental Report Severe Accident
12 Mitigation Analysis underestimates the cost of a
13 severe accident.

14 The Environmental Report fails to include
15 complete and adequate information and analysis on
16 endangered and threatened species.

17 The Environmental Report fails to consider
18 the disparate impact of higher than average cancer
19 rates and other adverse health impacts on the Prairie
20 Island Indian Community.

21 The Environmental Report contains a
22 seriously flawed Environmental Justice Analysis, that

1 does not adequately assess the impacts of the PINGP on
2 the Prairie Island Indian Community.

3 The five remaining contentions address the
4 deficiencies in NSP's License Renewal Application.
5 NSP has failed to adequately address issues required
6 by 10 CFR Part 54.

7 In particular, the License Renewal
8 Application does not include an adequate plan to
9 monitor and manage the effects of aging for
10 containment codings.

11 The License Renewal Application does not
12 include an adequate plan to monitor and manage the
13 effects of aging due to embrittlement of the reactor
14 pressure vessel and the associated internals.

15 The License Renewal Application program
16 commitment to do whatever the NRC tells them to do
17 does not demonstrate the effectiveness of an aging
18 management program for managing primary stress
19 corrosion cracking from nickel alloy components.

20 Four, the License Renewal Application does
21 not include an adequate plan to provide inspection and
22 monitoring for corrosion or leaks in all buried

1 systems, structures and components, that may convey or
2 contain radioactively contaminated water or other
3 fluids and/or may be important for the plant safety.

4 And, finally, the License Renewal
5 Application does not include an adequate program for
6 managing flow accelerated corrosion.

7 The Community has endeavored to work with
8 NSP to address the Community's concerns, and even
9 offered to review NSP's Environmental Report before it
10 was filed to ensure the Community's interests were
11 adequately disclosed and protected. NSP declined.

12 After NSP filed its License Renewal
13 Application, the community again sought to work with
14 NSP on these issues in order to avoid, if possible,
15 having to file a petition to intervene. Those efforts
16 were not fruitful and the Community made the decision
17 to file its petition to intervene which was approved
18 by motion of the tribal council.

19 While I'm sure we'll address each of these
20 specific contentions in more detail as we go through
21 the day, there are a few that I'd like to address
22 briefly now in slightly more detail.

1 First, the protection of burial mounds and
2 other areas of cultural, historic or spiritual
3 significance is of vital importance to the Community.

4 The staff meeting nearly one year ago, the
5 Community raised concerns about burial mounds after
6 reviewing the 106 Group's map that showed that the
7 location of the cooling towers overlap with a known
8 burial mound group.

9 For months, the Community sought an
10 explanation from NSP. But it wasn't until the
11 Archeological Environmental Site Audit that NSP's
12 representatives announced that six burial mounds were
13 indeed destroyed during the construction of the
14 cooling towers.

15 We also learned, during that site visit,
16 that two previously unknown sites, a burial mound site
17 and an artifacts gather, were discovered during the
18 construction of the discharge channel in the 1980s.

19 This history raises more questions than
20 answers. It's clear that there hasn't been adequate
21 disclosure of these very important and critical sites.

22 The environmental report fails to include

1 information sufficient to make an accurate assessment
2 of whether any historic or archeological properties
3 will be affected by the proposed license renewals.

4 The Community is also concerned about the
5 health and safety of its youngest most vulnerable
6 members, since children are more susceptible to
7 ionizing radiation than adults. Particularly for
8 children, there is no safe level of exposure to
9 radiation.

10 The German KiKK study, which we cited in our
11 Petition to Intervene, was published in December 2007
12 and reported an increased risk of cancer in children
13 living 5 kilometers, approximately 3.1 miles, or
14 closer to a nuclear power plant compared to those who
15 lived further away.

16 This was even though the emissions from
17 those plants during the normal operations were low.

18 The Ulm Physician's Initiative issued a
19 warning on January, in January of 2008 following up on
20 the KiKK study, and said, pointing out that the
21 children living near German nuclear power plants have
22 a 60 percent increased risk of cancer and 121 percent

1 increased rate of Leukemia. These are truly alarming
2 findings.

3 The Ulm Physician's Initiative pointed out
4 the need to critically re-examine previous assumptions
5 about radiation risk and emissions exposure limits and
6 called for improved monitoring of emissions.

7 And just last month, the Swiss government
8 announced a nationwide study to again examine the
9 question of whether residents close to a nuclear power
10 plant is associated with an increased risk of
11 childhood cancer, in particular leukemia. That is
12 what's referred to as the CANUPIS study. This study
13 will also influence other factors including
14 electromagnetic fields.

15 The Community believes that a study
16 following the model of KiKK and CANUPIS should be
17 conducted in the vicinity of the Prairie Island
18 Nuclear Generating Plant, using the latest and best
19 available technologies, including genetic epidemiology
20 and genomic profiling differential diagnostics before
21 that plant is relicensed for an additional 20 years.

22 This study would also include a detailed

1 monitoring of all radionuclide emissions, including
2 the release of tritium and other radioactive
3 contaminants into the air, Mississippi River/Sturgeon
4 Lake, including both the water and sediments, as well
5 as in the groundwater.

6 Because a large portion of the Community's
7 reservation is within a one-mile radius of the plant,
8 nearly all of the communities lands are within a
9 three-mile radius of the plant, the Community is
10 effectively at a source term for potential exposure to
11 these radiological contaminants.

12 In addition to the NRC's public health and
13 safety mandate, the Community status as a tribal
14 nation, federally recognized Indian tribe, also
15 implicates the Federal Government's trust
16 responsibilities, which we believe requires a
17 comprehensive study before the plan is relicensed for
18 an additional 20 years.

19 Finally, the Community is deeply concerned
20 about the general lack of attention given to the
21 Community in the Environmental Report. The
22 Environmental Report minimizes the presence of the

1 tribe, the tribal population, tribal resources and
2 landholdings, home sites, community demographics,
3 including population growth and the tourist population
4 relating to the Community's gaming enterprise, hotel
5 and marina operations.

6 We believe that this demonstrates,
7 unfortunately, the same lack of regard and respect for
8 the Community and its members that occurred 40 years
9 ago when the plant was first cited for and constructed
10 on Prairie Island.

11 With respect to the Motion to Strike, the
12 Community believes that it has complied in all
13 respects with the necessary pleadings and that the
14 Motion to Strike should be denied in all respects.

15 We believe that each of the arguments raised
16 in our reply were appropriate and amplifications of
17 the facts raised in our initial pleading, and we will
18 deal with that obviously in more detail as we go into
19 it this afternoon.

20 At this point I would just reserve any
21 remaining time for rebuttal.

22 >> JUDGE FROEHLICH: Thank you.

1 On behalf of the Applicant, please.

2 >> MR. LEWIS: Thank you. Good morning.

3 The issue before the Board is whether the
4 Indian Community's contentions meet the NRC's
5 threshold pleading requirements, which Judge Froehlich
6 correctly described and outlined.

7 Those threshold requirements were
8 established by the Commission to make sure that the
9 NRC's hearing processes is only invoked when it
10 deserves to be invoked, because the Commission
11 recognized that the hearing process has costs. It has
12 a cost in time. It has a cost in diverting resources
13 of the Staff, of the Applicant, and it has a
14 significant monetary cost.

15 Just, in time frame, a hearing can extend
16 the licensure proceeding by a year on the nominal
17 schedule and potentially more.

18 And on the economic cost, hearings typically
19 cost hundreds of thousands of dollars and can run into
20 millions. So it is a burdensome process. That does
21 not mean it's not legitimate and warranted. It simply
22 means that, before it is invoked, there needs to be a

1 demonstration that there is a material genuine dispute
2 that deserves to invoke the process.

3 And that is why the Commission has
4 established these threshold requirements. Among the
5 requirements is the requirement that the proponent of
6 a contention provide sufficient information to show
7 that there's a genuine material dispute.

8 I view that as the overarching requirement:
9 Have they provided sufficient information to show
10 there really is substance there, something that
11 deserves it to be litigated.

12 A second requirement, I think it's
13 peripheral, is that they have to provide facts or
14 expert opinion, together with documents and
15 references, with sources and references that support
16 those assertions. And, again, the intent of the
17 Commission is to make sure there's real substance
18 before the hearing process is invoked.

19 We have submitted our answer and maintain
20 that the Indian Community, with all due respect, has
21 not met these threshold requirements.

22 In particular, in general, their contentions

1 have allegations but they don't have the sort of
2 support that shows that in fact there is indeed
3 something behind them. In some cases there's simply
4 no support provided for claims that really are expert
5 opinion. And in other cases, they're references to
6 documents from other pleadings without a real
7 demonstration that those apply to our proceeding and
8 somehow demonstrated a dispute with our application.

9 Since the Indian Community focused initially
10 on the archeological contention, Contention 1, let me
11 use that as an example.

12 The Indian Community, in its petition, I
13 believe page 10, referred to the desecration of
14 resources during construction and referred to the
15 excavation of a burial mound or burial mounds in the
16 vicinity of the cooling towers.

17 And I believe I heard my colleague again
18 reference the destruction of that burial mound. It's
19 easy to make an assertion like that. But the reason
20 for requiring support is to show that in fact there's
21 more than just allegations.

22 And, in fact, there is not support for that

1 characterization. The facts are these: That Northern
2 States Power hired a prominent archeologist, Eldon
3 Johnson, who in fact was the State of Minnesota's
4 first state archeologist to survey the site prior to
5 construction.

6 The group of mounds that was in the vicinity
7 of the cooling towers were already known, and they
8 were examined specifically by Dr. Johnson before there
9 was any construction activity to determine whether it
10 was appropriate to conduct that construction in that
11 area.

12 Four of these mounds -- there was a group of
13 six mounds. Four of these mounds essentially had been
14 leveled by decades of farming and plowing. Two of the
15 mounds were larger and appeared to remain intact.

16 And so those two mounds were excavated to
17 determine whether they were sources that needed to be
18 protected. When Dr. Johnson excavated those mounds,
19 they found no remains. They found no mortuary
20 artifacts. They found no indications at all of
21 burials.

22 Currently, those mounds have an official

1 designation in the Office of State Archeologist of
2 Minnesota, and they are designated as earthworks, not
3 burial mounds.

4 Prior to the excavation, the mounds were
5 perceived as possible burial mounds. But before the
6 work was done on the construction of the cooling
7 towers, there was a specific survey, a specific
8 examination of the site. And, in fact, the two mounds
9 that remain intact were declared sterile, which was a
10 term indicating that they had no archeological
11 significance.

12 Let me just talk about the broader
13 suggestion that I think the Indian Community is
14 suggesting that because there was this, let me use
15 their term, desecration of resources, construction
16 that now Northern States Power can't be trusted and
17 they'd like to address that broader claim, too.

18 Because the facts are, again, these: That
19 Northern States Power, over 50 years, has taken
20 extraordinary measures, far more than I've seen any
21 other licensee, to identify and protect resources.

22 In connection with the site investigation,

1 the site selection process, in 1960, a decade before
2 the plant was even built, they hired Dr. Johnson, who
3 came out and surveyed the site and determined that the
4 main plant area was clear of important resources and
5 was an appropriate place to build a site. They
6 retained Dr. Johnson again in '67 and '68 to come out
7 and specifically look at the construction area, which
8 he did.

9 And, again, he found that there were no
10 significant archeological resources in the main plant
11 construction area. He did find -- and I think it was
12 already known, but there was an Indian village, the
13 Barton site, at the far south end of the site.

14 He established a set-off distance in which
15 no construction could occur. And Northern States
16 Power later helped fund his investigations which led
17 to the site being put on the National Historic
18 Register and preserved. And that has never been
19 affected by plant construction activities.

20 Northern States Power again retained
21 Dr. Johnson in 1980 because they needed to make
22 significant modifications to their discharge system.

1 So they brought Dr. Johnson back in, and this was a
2 significant construction activity. And they surveyed
3 again before they did this additional activity. They
4 did find two areas.

5 I believe the Indian Community raised this
6 issue the first time in their reply, and we don't
7 think it was necessary. Probably brought up in the
8 contention. But because they didn't raise it, and
9 just recently in this argument I believe I heard the
10 Indian Community refer to this as one of these areas
11 as a discovery of a burial mound. Both of these areas
12 that were discovered in 1980 are classified as
13 artifact-scattered areas.

14 I know of no basis for the assertion that
15 one of these was a burial mound. Again, it's very
16 easy to make the assertion, but the threshold
17 requirement is that to show cold, hard facts what is
18 being claimed is in fact the case and is something
19 deserving.

20 The Indian Community infers some of these
21 discoveries back, at least that the original surveys
22 were no good. I think that the appropriate inference

1 is that Northern States Power knows when it needs to
2 do additional surveys and does them. And when these
3 two artifacts-scattered areas were examined, they then
4 adjusted the project to minimize the impact on these
5 artifact-scattered areas.

6 So rather than showing any sort of
7 insensitivity, in fact, it shows remarkable efforts to
8 make sure that, when we do additional construction
9 activities, we know what we're affecting and we
10 minimize that effect.

11 And there have been other surveys at Prairie
12 Island in addition to these. I think at one point the
13 Indian Community had argued again, I think in a reply,
14 that with respect to the Steam Generator Replacement
15 Project that will occur five years hence, that maybe
16 there's been no surveys in that area.

17 But I think that simply ignores the original
18 1960 and 1967 surveys of Dr. Johnson, which
19 specifically looked at the main plant construction
20 area. And the Steam Generator Replacement Project
21 will occur in that area, in areas where in fact the
22 original Steam Generator Replacement Project had

1 occurred several years ago occurred, next to a parking
2 lot in an area that's very, very disturbed.

3 And I did, by the way, bring some
4 photographs. I don't intend to use them in the
5 argument. But at any point you want to get a sense of
6 what is it that we're talking about in these areas, I
7 have them behind me. I can show you.

8 Let me also address the concern that was
9 raised in this argument that somehow we've not been
10 sufficiently responsive to the Indian Community's
11 concerns or have not reached out to them.

12 I think that that's an unfortunate
13 perception by the Indian Community. I don't want to
14 impugn them, but I think that, again, Northern States
15 Power has made considerable efforts to reach out to
16 them, to address their concerns.

17 We did provide the 106 Group report to them
18 before we filed the License Renewal Application. We
19 met with them. We fielded a bunch of questions for
20 them, not only on the archeological resource but on
21 other contentions.

22 When they raised requests for additional

1 information related to the 106 Group, we went out and
2 commissioned a further study which we've now given
3 them in draft.

4 We've made quite extraordinary efforts to
5 reach out to the community and be responsive to their
6 concerns. And we're continuing to do that. We're
7 continuing to, notwithstanding the fact that we're now
8 in this litigation mode, we're still willing and in
9 fact scheduled to meet with the Indian Community to
10 try to resolve some of these concerns. It's very much
11 our intention to try and be good neighbors.

12 One thing I do want to point out, though,
13 about the discussions that occurred before the License
14 Renewal Application, while we were trying to respond
15 to their concern about the License Renewal
16 Application, there was also a request by the Indian
17 Community that we consider reopening a prior monetary
18 settlement. And so it wasn't just responding to the
19 contentions. As these things, it was a more
20 complicated issue than just addressing their
21 environmental concerns and assertions and
22 archeological resources.

1 I guess, in sum, I think that some of the
2 characterizations by the Community are unfortunate,
3 because I think that the real record and demonstration
4 over many, many years is that Northern States Power
5 has been a very, very good neighbor and a very, very
6 good environmental steward.

7 For that reason, I ask you, when you look at
8 the contentions, please don't accept assertions and
9 allegations at face value. The threshold requirement
10 is there to look further and say where is the real
11 support, is there something that really stands behind
12 the allegations? Because they're easy to make. But
13 they shouldn't necessarily attribute them to the
14 hearing process.

15 Let me just very briefly talk about the
16 Motion to Strike. We've argued it at some length.
17 I'm not going to repeat it. But there is a number of
18 reasons why allowing new arguments to be raised after
19 initial contention is inappropriate, the Commission
20 Report says it guts their rules, makes them sort of
21 meaningless if you can come in later and just recast
22 the contention and come in with new bases.

1 From my perspective, too, though, it's a
2 matter of fundamental fairness. It really denies the
3 Applicant and the NRC staff the opportunity to provide
4 a reason, written reasoned response to the
5 allegations.

6 I'll give you two examples -- I think I can
7 do it in one minute. In the tribe, in their
8 application, indicates we've never provided a 316-B
9 Report. They argue that should have been provided.

10 The rules actually don't require us to
11 provide that. But if that had been raised in the
12 contention, we could have pointed out that that was in
13 fact made available to the Staff through the
14 environmental audit and the fact since has been
15 submitted on the docket.

16 The Indian Community has made references to
17 tritium. Again, there are REMP Reports out there that
18 have the results of tritium, including measurements in
19 the Indian Community wells. And the levels of tritium
20 measured in there are, in one well, I believe it was
21 below detectable limits, of 19 picocuries per liter
22 and in one it was around 16 picocuries per liter. And

1 the REMP Report established that is consistent with
2 the level of tritium measured in rain water. These
3 were in shallow wells.

4 In fact, there was also a USGS report that was
5 done for the Indian Community, not for us, which
6 simply concluded the levels of tritium observed were
7 consistent with atmospheric levels.

8 And with that I'll wrap it. I guess I don't
9 have time for rebuttal, so I hope I don't need it.

10 >> JUDGE FROEHLICH: Thank you. NRC staff,
11 please.

12 >> MS. MIZUNO: Beth Mizuno for the NRC
13 staff. As Judge Froehlich and the counsel for
14 Northern States has discussed, many of the bases for
15 admission of contentions or bases for finding
16 contentions inadmissible. I won't go into those.

17 However, I'd like to expand on one of those
18 ideas. The NRC staff is here to give its views on the
19 issues raised in the contentions, both on the safety
20 and engineering side and also in the environmental
21 area.

22 In some instances, our position is a purely

1 legal one. And one of those legal issues that has to
2 do with contention admissibility that has been touched
3 on is whether a contention is within the scope of this
4 proceeding. And it is that, that I'd like to discuss a
5 little more fully.

6 It's our job at the NRC to regulate
7 operations at nuclear power plants so that those
8 operations are conducted in such a way as not to be
9 inimical to the public health and safety. And we look
10 at the conduct of those operations on a day-to-day
11 basis, currently every day.

12 But we also look at the conduct of those
13 operations over the period of extended operation for
14 license renewal, for the additional 20 years that
15 we're talking about here in this proceeding.

16 Now, Prairie Island, like all plants, is
17 subject to NRC regulation and must adhere to its
18 Current Licensing Basis. We also call it the CLB, the
19 Current Licensing Basis.

20 And it must adhere to this basis during its
21 day-to-day operations. Because current operations are
22 already addressed, they're being addressed by ongoing

1 regulatory programs and through the Current Licensing
2 Basis.

3 The Commission has determined by rule that
4 the license renewal proceeding does not need to
5 revisit these current operating issues. Thus, current
6 operating issues are outside of the scope of this
7 license renewal proceeding.

8 What needs to be addressed -- what needs to
9 be addressed in this proceeding is what is it that
10 needs to be done in order to ensure that over time, as
11 the plant ages, it will continue to operate in
12 accordance with its Current Licensing Basis and, thus,
13 in a way that is consistent with public health and
14 safety.

15 Examples of these kinds of current operating
16 issues that will be going on in the period of extended
17 operations -- give you a couple of examples.

18 Emergency planning and security. Those are
19 issues that are covered by current operating
20 requirements. And those issues will be issues,
21 they're issues today, they will be issues 20 years
22 from now, during the period of extended operations.

1 Where an issue is addressed by current ongoing
2 regulatory programs, those issues are outside of the
3 scope of a license renewal proceeding.

4 There's a similar idea with respect to
5 environmental issues. There, the Commission is
6 required to examine the impact on the environment that
7 would flow from its approval of the License Renewal
8 Application. And some of these environmental effects
9 are going to be the same for all plants. We call those
10 generic effects.

11 And those are, as we've dealt with them in a
12 regulatory fashion, those are Category 1 effects.
13 Each Category 1 effect is generic to all plants. All
14 plants share them. And in each instance the effect is
15 at the same level. It is either a small, moderate or
16 high effect, but it is always that same effect all the
17 way across the board for all plants.

18 These Category 1 effects are addressed by
19 regulation. And they are addressed by the NRC in its
20 Generic Environmental Impact Statement.

21 We call that the GEIS, the G-E-I-S. The
22 Commission has analyzed the mitigation of Category

1 lissues and has determined that no further mitigation
2 of Category 1 adverse impacts will likely be
3 sufficiently beneficial to warrant implementation.

4 In contrast, Category 2 effects are effects
5 that are specific to each plant. Category 2 effects
6 -- with respect to Category 2 effects, we're talking
7 about environmental impacts that are specific in this
8 case to Prairie Island.

9 Those will be addressed separately by the
10 Staff when it prepares its supplement to the GEIS. We
11 call that the Supplemental Environmental Impact
12 Statement, or SEIS, S-E-I-S. The environmental issues
13 that are covered by the GEIS are outside the scope of
14 this proceeding, because they have already been
15 addressed.

16 Now, regarding the individual contentions,
17 we appreciate the list of questions that the Board has
18 provided the parties in advance of this proceeding.
19 They have been very helpful.

20 I will be addressing some of them. My
21 colleagues, Mr. Roth and Ms. Simon, will be addressing
22 others. As Mr. Roth filed the Staff's response to the

1 Motion to Strike, he will be addressing that. And
2 any time that he or I have not used, we'd like to
3 reserve for rebuttal.

4 Mr. Roth.

5 >> MR. ROTH: David Roth for the Staff.
6 Just briefly, we'd like to reiterate our limited
7 support for the motion to strike that was filed by the
8 Applicants.

9 As we put in our October 9th filing, the
10 majority of the new information provided and/or
11 applied, with Mr. Grimes' declaration included,
12 constitutes new arguments and new contentions.
13 Efforts to support items, the efforts to support
14 should have been present in the original petition, not
15 in the reply.

16 As counsel for the Applicant has said,
17 admissions already discussed these, the two cases are
18 Palisades and Louisiana Enrichment Services, as we
19 cited in our written pleadings. These put down
20 Commission standards that your reply has to be
21 narrowly focused, can't introduce new arguments and
22 new issues.

1 In this case that's exactly what the
2 majority of the reply has done; therefore, we continue
3 to support the motion to strike.

4 >> JUDGE FROEHLICH: Thank you. The
5 Petitioner, do you wish to use any of your rebuttal
6 time that you had reserved?

7 >> MR. MAHOWALD: Yes, thank you, Your
8 Honor.

9 Seems to me we have quintessential fact
10 disputes here. We do take some issue with respect to
11 the criticism of our late, our reply arguments
12 relating to the archeological issues because that
13 information which we discussed wasn't made available
14 to us until the site audit visit on August 21st.

15 The deadline for petition to intervene was
16 August 18th. The other thing -- so that information
17 came to light, it was presented to us afterwards.

18 Now, I would encourage the Board to take a
19 look at whatever photographs Mr. Lewis has because
20 one of the things that you're going to see is that the
21 106 Group's Cultural Resource Assessment Map that was
22 circulated to the Community in September, or in

1 November of 2008, excuse me, includes an area where
2 -- that is outside of what is defined as the historically
3 disturbed area.

4 However, you'll see that the subsequent map
5 which was generated in January of 2008, miraculously
6 includes that area now within that historically
7 disturbed area. And those photographs will actually
8 show, you can compare those to the photographs that
9 are in the License Renewal Application where the
10 undisclosed area which had been a grassy area is now a
11 parking lot.

12 So we are anxious to find out more about
13 that and what protocols and procedures were followed
14 in paving that area and grading that area which was a
15 previously undisturbed area.

16 Again, that ties right back to, again, some
17 information that was disclosed to us during the site
18 audit visit where workers from the plant went out near
19 the Burst Lake burial mound site and dug a hole to
20 conduct acoustic testing for a proposed firing range.

21 Again, the admission right there in front of
22 the NRC staff and everybody else who was in attendance

1 was nothing was done to scope. Nothing was done to
2 find out where we were digging. It was just somebody
3 coming out with another person to dig in the ground
4 and do some tests.

5 So, again, we have some serious concerns
6 about what's going on. I do want to also add that
7 with respect to the 316-B report, we had requested
8 that, and NSP did agree to make it available to us
9 during the site audit visit.

10 However, the NRC told us that that was
11 beyond the scope of our cooperative agency so we were
12 not allowed to see it. And to the best of my
13 knowledge that report is still not available on the
14 ADAMS site.

15 The other point that I would like to point
16 out is, while the 106 Group, the group retained by the
17 Applicant, describes those burial mounds at GD-59 as a
18 possible burial site, not earthen works.

19 So, again, when it comes right down to it,
20 the Community has stated viable contentions, has
21 articulated a factual basis to support those
22 contentions. And if we have anything right now, it's a

1 fact dispute that should be left for the hearings
2 stage.

3 At this point in time we are not required to
4 prove our case. We are simply required to show that
5 there are facts to support our contentions, that there
6 is a dispute of material fact, and that the further
7 inquiry is necessary.

8 And we cited to a long line of cases in our
9 reply brief to support that fact. Again, also
10 supporting the fact that a reply is permitted to
11 legitimately amplify the factual arguments that were
12 made in the original petition.

13 That is exactly what we did. We also
14 welcome the inquiry with respect to tritium, because there
15 certainly is publicly available information. But from
16 the Community's perspective that information is
17 woefully lacking and doesn't allow the Community to do
18 what it needs to do to evaluate the release of
19 radioactive contaminants, including tritium.

20 Take, for example, the 2006 REMP Report.
21 There is a well that's monitored monthly on site.
22 It's Well P-10. That included tritium levels from 400

1 some odd picocurie up to almost 37, almost nearly 3800
2 picocurie per liter for the year 2006 on a monthly
3 basis.

4 NSP also disclosed that during August of
5 2006 there was an unusual release of approximately 168
6 gallons of water with a concentration of over 19,000
7 picocurie per liter. But, curiously, when you go to
8 the REMP Report and the final chart for 2006, it's
9 called the Complete Data Report. Well P-10 is
10 supposed to include 12 months of data.

11 However, if you look at that chart, the
12 chart excludes the months of February, March, May,
13 June and August.

14 So it's not enough to simply say that
15 there's publicly available information out there. As
16 we'll get into in further detail, hopefully later on
17 today and hopefully in the hearing process, there's a
18 legitimate concern about the information that's being
19 released and its potential impact on the Community.

20 Thank you.

21 >> JUDGE FROEHLICH: I'm informed that the
22 Applicant has no time remaining, although the Staff

1 does.

2 Do you care to respond?

3 >> MS. MIZUNO: Yes, Judge Froehlich. On
4 the issue of the Motion to Strike and the concept that
5 the rules on motions to strike is based on, that that
6 concept is, as counsel have noted, is the idea of
7 fundamental fairness.

8 Where an issue is raised outside of the
9 petition, the Staff does not have an opportunity to
10 respond in writing. And we are at a fundamental
11 fairness disadvantage.

12 And this morning I believe I heard a new
13 contention with respect to Contention 4, which is the
14 contention on radiological impacts.

15 And that new piece that I believe I heard
16 this morning was a request by the Prairie Island
17 Indian Community that additional studies be conducted
18 for the Prairie Island plant site. That is not, from
19 my view of the pleadings so far, included in anything
20 that has been filed in writing by the PIIC -- is not
21 in the Prairie Island Indian Community's Petition for
22 Intervention and Request for Hearing. Therefore, the

1 Staff has not had an opportunity to address that
2 issue. And this, we believe, is an example of the
3 kind of fairness issue that the rules were designed to
4 preclude.

5 I'm done, Your Honor.

6 >> JUDGE FROEHLICH: In the notice of this
7 oral argument today, the Board had identified 12
8 issues that we'll cover in the course of the day.
9 Some will go fairly quickly. Some, I think, we have
10 more questions on.

11 The first one was the matter of, I think,
12 more procedural than substance. And my question was
13 for the Staff, whether there's still a challenge to
14 the right of counsel for the Community to appear today
15 and represent that community.

16 Staff.

17 >> MS. MIZUNO: Your Honor, Beth Mizuno on
18 behalf of the Staff. The answer to your question is,
19 yes, the Staff believes still there is a question with
20 respect to standing. And I'd like to make it clear at
21 the outset that there is no intention on the Staff's
22 part to suggest that Mr. Mahowald's integrity is at

1 question here. It is not.

2 We hold him in the highest regard
3 professionally. Our issue is not with respect to what
4 he said. It is with respect to who said it. Mr.
5 Mahowald, with all due respect, is general counsel for
6 the tribe. But according to our reading of the
7 tribe's constitution and bylaws, he is not a member of
8 the tribal council. He's not presented himself as a
9 member of the tribal council, and the constitution and
10 bylaws do not authorize him to act on behalf of the
11 tribe.

12 And, accordingly, under our reading of the
13 constitution and bylaws, it needs to be a member of
14 the tribal council to authorize the tribe's
15 participation in this hearing. And I understand that
16 it can be viewed as a procedural issue.

17 However, standing is critical to these
18 petitions for intervention. And for that reason we
19 raised this issue. The way this has come about and
20 the way the pleadings are structured is identical to
21 the way the issue arose in the 1995/1996 proceeding
22 with respect to Prairie Island's Independent Spent

1 Fuel Storage Installation. We call that the ISFSI,
2 I-S-F-S-I, the ISFSI. And in that instance, assistant
3 general counsel for the tribe filed on behalf of the
4 tribe. It is no different here.

5 And because we cannot waive standing,
6 because standing has to be demonstrated with the
7 Petition for Intervention, we believe we have a
8 problem here with respect to standing.

9 >> JUDGE FROEHLICH: I'd like to address
10 your problem, counsel. As I understand it, counsel
11 for the Indian tribe is a member of the Bar of South
12 Dakota as well as the Bar of Mississippi. I'm sorry,
13 Minnesota; is that correct?

14 >> MR. MAHOWALD: Correct, Your Honor.

15 >> JUDGE FROEHLICH: As a member of the bar,
16 he purports to represent the Indian tribe. Is there
17 anything in the Commission's rules that requires
18 anything more than an attorney's assertion that he
19 represents the client that sits with him?

20 >> MS. MIZUNO: No, Your Honor, the rules do
21 not specifically address that.

22 >> JUDGE FROEHLICH: And you don't challenge

1 the right of Mr. Lewis to represent the Applicant?

2 >> MS. MIZUNO: That is correct, Your Honor.

3 We do not.

4 >> JUDGE FROEHLICH: So the only basis for
5 the challenge here is that the tribal counsel --

6 >> MS. MIZUNO: You mean --

7 >> JUDGE FROEHLICH: That tribal counsel
8 wouldn't have standing to represent the tribe, or the
9 Community, I'm sorry?

10 >> MS. MIZUNO: I believe the issue is with
11 respect to some demonstration by a member of the tribe
12 that states we authorize this person to act for us.

13 With respect to the role of the Office of
14 General Counsel, we are authorized to speak on behalf
15 of the Agency. With respect to the Applicant, the
16 Applicant filed its License Renewal Application and
17 did that. With respect to the Indian Point questions
18 on standing, those were organizational and
19 representational standing, and affidavits were filed
20 on behalf of the intervenors in that instance to
21 establish representational standing.

22 What we have here is not representational

1 standing. The Prairie Island Indian Community has
2 sought organizational standing. And it is our belief,
3 as the prior ISFSI board obviously felt, under those
4 circumstances it is appropriate to ask the tribe to
5 authorize the representation by counsel.

6 >> JUDGE FROEHLICH: And the reply of the
7 Community dated September 19th, the footnote and the
8 attached declaration, did not allay your concerns?

9 >> MS. MIZUNO: No, sir, it did not. The
10 Prairie Island Indian Community, the footnote that
11 Your Honor is referring to distinguished this case
12 from the prior ISFSI case on the grounds that the
13 prior ISFSI case had been brought by private counsel,
14 not by general counsel associated with the tribe, and
15 therefore that was why the request was made by the
16 Board.

17 But when we pulled up the original petition,
18 and we have given the ADAMS number, the accession
19 number for the document retrieval system, when we
20 pulled that document up by that number, we discovered
21 that, indeed, the original filing had not been filed
22 by general counsel for the tribe but, rather, by

1 outside counsel.

2 And that is another issue that we have with
3 respect to the representation.

4 >> JUDGE FROEHLICH: Do you care to be
5 heard, counsel?

6 >> MR. MAHOWALD: I believe I understand the
7 NRC's concerns with respect to that. My thinking was
8 that my declaration dated September 19th, 2008, would
9 have addressed that concern, because I note in
10 paragraph 2 of that declaration: "On July 16, 2008,
11 the Prairie Island Indian Community Tribal Council
12 approved a motion authorizing general counsel Philip
13 R. Mahowald to prepare and file a Petition to
14 Intervene and request an adjudicatory hearing in the
15 United States Nuclear Regulatory Commission's Atomic
16 Safety and Licensing Board on Nuclear Management
17 Company, LLC's application for renewal of its license
18 to operate Units 1 and 2 of the Prairie Island Nuclear
19 Generating Plant.

20 Again, I'm here as a member of the bar.
21 Also, I guess, I would also add that I'm admitted to
22 the bar of the Prairie Island Indian Community Tribal

1 Court and representing on behalf of my client and my
2 employer.

3 But if the Board sees fit to have any
4 further submission over and above the declaration,
5 including some statement, perhaps, from the tribal
6 council president who is here in attendance, or some
7 sort of affidavit, we'd be happy to do whatever the
8 Board would request of us to put this issue to bed.

9 >> JUDGE FROEHLICH: Is there anything you
10 care to add, counsel for Staff?

11 >> MS. MIZUNO: With respect to curing the
12 issue?

13 >> JUDGE FROEHLICH: What is it that you
14 would like from the Community?

15 >> MS. MIZUNO: It's not what we would like.
16 We find ourselves caught between the Agency's stated
17 interest in involving other governmental entities,
18 such as the Prairie Island Community. We find
19 ourselves in conflict between that interest and our
20 regulations requiring demonstration of standing, our
21 procedural regulations.

22 And in the Entergy license transfer case,

1 the decision from the Commission came down within this
2 last month.

3 Let me give you the cite: It's CLI-08-19.
4 In the Commission's decision, in the Entergy license
5 transfer proceeding, they found that standing had not
6 been met; that the requirements for standing were
7 submitted in an untimely fashion by way of affidavit
8 that was late.

9 And in that case the Commission stated that
10 the authorization that was filed with the reply, i.e.,
11 it was not filed with the petition, was not an
12 appropriate basis for demonstrating standing and
13 denied standing in that case.

14 So we feel that this is an issue that still
15 needs to be resolved. And we put it before you, Your
16 Honors.

17 >> JUDGE FROEHLICH: I would like to resolve
18 this issue in sort of a threshold issue for us all.
19 I'm not quite sure what it is that needs to be done
20 from the perspective of the community.

21 >> MR. MAHOWALD: Your Honor, I guess I'm
22 particularly troubled by the last comments there with

1 reference to a case where the claim then is that the
2 standing coming later or the proof of standing coming
3 later is defective.

4 And I guess I'm not clear that the NRC is
5 seeking to strike and exclude the Community's
6 participation on standing contention, on a standing
7 basis here, or perhaps I misunderstood the
8 significance of the case that she was reading from.

9 >> JUDGE FROEHLICH: Counsel, for the
10 standing of the Community or standing of the
11 representative of the Community?

12 >> MS. MIZUNO: It would be the standing of
13 the Prairie Island Indian Community, Your Honor. And
14 in the Entergy license transfer case, the standing
15 of -- it was one of the labor unions that had sought
16 intervention, that standing was denied.

17 And with respect to that, the standing was
18 denied because of an untimely showing of the basis for
19 standing.

20 >> JUDGE FROEHLICH: Just for the record,
21 the Applicant does not contest the standing of the
22 Community in this case; is that correct, sir?

1 >> MR. LEWIS: Our position is, yes, they do
2 have standing. They're immediately north of us, and
3 we accept their general counsel's assertion that he's
4 their duly authorized representative.

5 >> JUDGE FROEHLICH: I'd like to move
6 forward and address the file contentions of the
7 Community. The first contention being the one that
8 dealt with historical and archeological resources.

9 In our notice of October 16th, we wanted to
10 ask of the Petitioner, the Community, what is lacking
11 from the Applicant's Environmental Report and any
12 citations or support for your belief that items or
13 depth is missing from what has been done.

14 >> MR. MAHOWALD: Thank you, Your Honor. We
15 believe what the Environmental Report is lacking is a
16 clear explanation of the extent to archeological
17 impact and controls that have been established to
18 prevent such impacts in the future.

19 We believe, again, as we stated generally in
20 our introductory statement, that this particular
21 contention is well supported and we have outlined
22 sufficient facts in our petition to intervene.

1 The terms of the legal authority for the
2 contention, we note that 10 CFR 51.53(c)(3)(2)(k)
3 requires an environmental, an archeological assessment
4 by the Applicant. And that according to the NRC
5 Standard Review Plan, NUREG 1555, Supplemental 1, on
6 page 3.36-3, the purpose of such an assessment is to
7 ensure that such resources, historic or archeological,
8 are not as adversely affected by proposed activity
9 related to refurbishment.

10 Furthermore, Regulatory Guide 4.2,
11 Supplement 1, has detailed instructions for the
12 Applicant on the assessment of historical and
13 archeological resources.

14 Now, we believe that the Applicant's
15 Environmental Report is deficient because the
16 information in the Environmental Report is based upon
17 a literary review of cultural resources at the site.
18 And that would be the 106 Group report.

19 This literature relied on review work that
20 was done in the 1960s. As we noted in our reply, in
21 our arguments again today, we find that the findings
22 of that 1960 survey are inadequate because it seems

1 to -- again, we can get into this down the road --
2 seems to me that Dr. Johnson's focus was with the
3 Bartron village site as opposed to the areas where the
4 plant was going to be constructed.

5 But, again, the information that was also
6 revealed during the site audit visit after we filed
7 our petition to intervene also raised some questions
8 with regard to the effectiveness and the sufficiency
9 of those disclosures.

10 Now, we also note that, again, the point
11 raised in the opening argument that there's a
12 discrepancy in the draft report and the draft cultural
13 resources map that was prepared by the 106 Group, an
14 area that was designated as historically disturbed and
15 then was later amended to include this parking lot
16 area.

17 But where it fits in specifically with
18 respect to the License Renewal Application is we are
19 still waiting for an explanation.

20 And it's not clear to us, from viewing the
21 Environmental Report, where the temporary structures
22 and other activities that will be related to the Steam

1 Generated Replacement Project will be occurring.

2 And so I guess from our perspective it's a
3 straightforward contention of omission. We're simply
4 trying to figure out where these activities will
5 occur. And from our perspective, since we were not
6 there, we were not on site, it's not simply sufficient
7 to say that it will be in the same place where the
8 previous Steam Generated Replacement Project occurred.

9 Because as we understand it, there will be
10 temporary structures built, warehouses and things like
11 that. We assume that there will be electricity,
12 plumbing utilities provided, things of that nature.

13 So we're simply looking for an accurate and
14 complete disclosure of where that's going to take
15 place. Now, the other thing that we have mentioned in
16 our petition is that the 106 Group report stated no
17 construction activities were planned during the
18 renewal period.

19 That fact in and of itself seems
20 inconsistent with the Applicant's admission that there
21 will be construction activities related to the Steam
22 Generator Replacement Project.

1 And so I'm -- again, we're trying to make
2 sure that there is a full and complete disclosure and
3 assessment of the archeological and other sites of
4 significance.

5 >> JUDGE FROEHLICH: I note, counsel, as
6 part of the application in Appendix E, the
7 Environmental Report, there's a letter from the
8 Applicant to the State Historic Preservation Officer.
9 And it says that there's a number of consultations and
10 meetings held, I guess, at or around February 2008,
11 where the Community gave to the Applicant their
12 concerns regarding environmental issues and that you
13 had requested a copy of the Cultural Resource
14 Assessment.

15 In that -- I guess in that letter, which is
16 not part of the application, were these type of
17 concerns outlined that you just mentioned?

18 >> MR. MAHOWALD: Yes, Your Honor.

19 >> JUDGE FROEHLICH: Have you received any
20 response from the Applicant to that letter of
21 February 7th?

22 >> MR. MAHOWALD: As Mr. Lewis reported, the

1 Community and NSP are currently engaged in
2 discussions, and we actually do have a meeting
3 scheduled for Monday to go over the preliminary
4 findings of a Amy Hillenbrandt, who was retained by
5 NSP to do some work over the summer to inventory and
6 categorize some of the historical records.

7 Ms. Hillenbrandt led the site audit,
8 environmental archeological site audit, on
9 August 21st, 2008. And it is an ongoing effort.

10 And I would also note that, I believe it was
11 by letter dated October 6th or October 7th of just
12 this month, Mr. Mike Wadley did send along the
13 procedures that are currently in place and I think
14 have been in place for archeological issues as well as
15 excavation issues.

16 I believe those, again, have been in place
17 since 2006. So it's an ongoing effort.

18 >> JUDGE FROEHLICH: And is it your position
19 that the 106 report that suggests that further field
20 assessment is necessary, is that where the Community
21 is going? Is that what they're after?

22 >> MR. MAHOWALD: Yes, Your Honor. And we

1 believe that that view is corroborated and supported
2 by the finding in 1980 of a previously unknown, which
3 I guess it was our understanding based on the site
4 audit was a burial mound group and an archeological
5 scatter. Mr. Lewis disagrees with that.

6 But if I could, I wanted to just address one
7 particular concern that he addressed there. Now,
8 there's this unfortunate perception that if burial
9 mounds are somehow impacted in any way, whether it's
10 through agricultural purposes or erosion, that the
11 reduction of the burial mound somehow makes it any
12 less significant.

13 Well, if you were going to take a bulldozer
14 over a known cemetery and removed all the headstones
15 and other grave markers, that wouldn't change the
16 sacred status of that land because there would still
17 be bodies buried underneath and a place of reverence
18 and respect out of the folks who have been buried
19 there.

20 So there are some sensitivities here that,
21 unfortunately, in the past, may not have been duly
22 regarded. And we also understand, too, that

1 sensitivities have changed over the years and that
2 this is not 1960. This is not 1968. It's 2008.

3 But it doesn't change the fact that there
4 are still some problems that still, unfortunately,
5 seem to occur.

6 And, again, to the extent that NSP moves to
7 strike those portions of our reply, obviously where we
8 talked about the information that we learned after we
9 filed our Petition to Intervene, we would respectfully
10 like to add that to the record. But I guess, more
11 fundamentally, when it comes to whether we've stated
12 an admissible contention, our threshold pleading, our
13 initial petition, in our view, states the requisite
14 information needed to have an admissible contention of
15 omission.

16 We've noted the requirements for an
17 archeological assessment. We've also highlighted in
18 our original petition the specific facts that cause us
19 to question the, I guess, the safety, if you will, and
20 the thoroughness of their archeological monitoring
21 program. That's still an ongoing problem. It's still
22 an ongoing conversation.

1 And, again, I'm optimistic that we can
2 hopefully achieve some resolution. But the fact that
3 as recently as last year two workers went out to a
4 known burial mound area and simply dug a hole in the
5 ground to conduct some acoustic testing, leads us to
6 believe that there are still some problems with their
7 protocols and procedures.

8 And, again, we think all of those facts
9 state viable and admissible contention to get this
10 matter, I guess, explored in further detail down the
11 road.

12 >> JUDGE FROEHLICH: Mr. Lewis.

13 >> MR. LEWIS: Thank you. Let me just try
14 and refocus the Board's attention to what was the main
15 thrust of the original contention, was that the
16 application didn't identify where the steam generator
17 projects would occur. That was the allegation.

18 Our response was that the Indian Community
19 simply haven't addressed the information that was in
20 the application; that the application, in fact,
21 indicated that the area would be northwest of the
22 turbine building and it would be in a disturbed area.

1 And so that is still the main issue. They
2 simply did not challenge what was in the application,
3 in the original contention, and the good case law is
4 that if you don't, your contention doesn't demonstrate
5 a genuine material dispute.

6 Now, the argument has now morphed into,
7 well, maybe we don't have enough information; maybe we
8 can't trust you. When you say it's in a disturbed
9 areas, maybe we think you're not telling us the truth.
10 But generally that is not a good contention, unless
11 there's a darned good basis for impugning the
12 integrity of an applicant and the veracity of its
13 statements.

14 The 106 Group report was characterized as a
15 literature assessment, and that's indeed correct. But
16 that doesn't make it deficient. The reason it was a
17 literature assessment is because there was many
18 decades of prior surveys and data and knowledge. And
19 so the purpose was not to go out and resurvey the
20 site. The purpose was to collect in one place and
21 document the very extensive knowledge of the site.

22 And so the fact that it was a literary

1 assessment in our estimation is immaterial.

2 >> JUDGE FROEHLICH: Mr. Lewis, is it
3 correct that the 106 Group study, not only did they
4 did not conduct any new surveys, they looked at the
5 literature that existed, but there's no specific
6 analyzation of future projects or of contemplated
7 events that are going to occur on the site?

8 >> MR. LEWIS: The Indian Community is
9 correct, they were not aware of the Steam Generator
10 Replacement Project. But they were not asked to
11 analyze whether that would have an effect.

12 What they were doing is documenting the
13 surveys -- they were charged with identifying what
14 areas have been identified as being sufficiently known
15 to lack archeological resources, that they've been
16 characterized as disturbed, and there's no need for a
17 further assessment and what areas should be identified
18 as undisturbed so that we knew, if we did work outside
19 specific bounds, that we should indeed go back and do
20 further surveys. And that was the purpose of the
21 assessment.

22 >> JUDGE FROEHLICH: Could you address for

1 me the steam generator replacements, that project's
2 relationship to the License Renewal Application; is it
3 in, is it part of? Is it something completely
4 separate?

5 >> MR. LEWIS: It is an activity that will
6 occur before the license is renewed, but we're
7 planning on doing, I believe it's 2012, I think is the
8 date. If I'm wrong, I'm wrong by a year. But it's
9 close to there. We would only do it, obviously, if
10 we're going to get license renewal. We'd make no
11 point to do a steam generator replacement in 2012 and
12 shut down the plant in 2014. There's a causal
13 relationship.

14 And for that reason we characterized it as a
15 refurbishment activity, because we saw a causal
16 relationship to the pure extended operation and put it
17 in the Environmental Report for that purpose.

18 >> JUDGE FROEHLICH: I ask you that because
19 the contention as originally framed spoke to whether
20 an historic or archeological property would be
21 affected by the proposed license renewal. And I
22 wanted to know specifically how the steam generator

1 replacement fit in with that portion of the way the
2 contention was originally framed.

3 >> MR. LEWIS: When you go back to the NRC
4 rules, they require you look at the impacts of
5 refurbishment activities and license renewal
6 construction activities on archeological resources.
7 We identified that as, in essence, a refurbishment
8 activity that was paving the way for license renewal.

9 >> JUDGE ARNOLD: I do have questions.
10 First one for the Petitioner. And this is common
11 among a number of your contentions in that you claim
12 that the information provided on the license renewal
13 is insufficient.

14 And after reading over 10 CFR, Chapter 51,
15 on the Environmental Report, it is quite specific as
16 what has to be addressed. But it seems to leave in
17 the air as to what is considered sufficient in
18 addressing just about any issue it talks about.

19 So I would like to hear from you how you
20 determine whether something is described sufficiently
21 or not in the license application and what in the
22 federal regulation supports your interpretation.

1 >> MR. MAHOWALD: Would you like me to
2 confine my comments to this contention right here
3 right now?

4 >> JUDGE ARNOLD: Well, I'm really looking
5 for more of a general philosophy of how you would look
6 at any issue and say that's just not enough to
7 completely define the position on it.

8 >> MR. MAHOWALD: For example, on this
9 particular contention that the assessment of
10 archeological issues, from the Applicant's
11 perspective, it was adequate for them to say that the
12 construction activities in association with the Steam
13 Generator Replacement Project would be approximately
14 100 yards northwest of the turbine building.

15 Now, where we run into difficulty with that
16 is, actually, when we were looking at that and relying
17 upon the 106 Group map that was the cultural resources
18 assessment results that was provided to us in, I
19 believe it was during our staff meeting in November of
20 2007, that particular map shows an area northwest of
21 the turbine building that is outside the boundaries of
22 the historically disturbed areas.

1 So when the Applicant tells us that all of
2 those activities will be taking place on historically
3 disturbed areas, that there's nothing to worry about,
4 that's where we have our questions.

5 Now, it wasn't actually -- and I will
6 confess here -- that it wasn't actually until we were
7 looking further into this that we realized that the
8 final Cultural Resources Assessment Map of the 106
9 Group which is dated, I believe, January 2nd, 2008, so
10 several months later, actually now includes this area
11 within the historically disturbed boundaries.

12 And, again, it raised questions for us,
13 because we're trying to ascertain if they are doing
14 enough to identify potential sacred sites, potential
15 burial mounds, because, as the 106 Group reports, that
16 area is replete with sites of historical and
17 archeological significance.

18 And so, again, there's just a whole series
19 of events based on the ongoing relationship with the
20 parties. Which, again, I think are facts that are
21 sufficiently set forth in our Petition to Intervene,
22 as well as legitimately amplified in our reply that

1 express our concerns that we don't have all of the
2 answers we need to make sure that those sites of
3 historical, archeological and cultural significance
4 aren't impacted during the relicensing period.

5 And that would be specific to, as we
6 indicated in our Petition to Intervene, not only the
7 Steam Generator Replacement Project, but also the
8 expansion of the ISFSI site. Because they are going
9 to be proposing to expand that to hold up to 98 casks
10 for dry cask storage.

11 I'm not sure if that answers your question,
12 Your Honor.

13 >> JUDGE ARNOLD: Let me see if this is the
14 answer I'm getting. First off, the Environmental
15 Report is not written so that you can assure that
16 cultural resources are protected or anything. They
17 are written so that the NRC staff can come out with an
18 Environmental Impact Statement that fully addresses
19 all of the issues.

20 What you're saying is: If the information
21 provided causes you to have doubts, then you would
22 infer that the NRC would reasonably also have doubts

1 and not be able to come up with an Environmental
2 Impact Statement that fully fulfilled the requirements
3 of NEPA; is that...

4 >> MR. MAHOWALD: That's correct, Your
5 Honor. Our concern about -- I realize it's a somewhat
6 nebulous term. The adequacy of the disclosure. And
7 we hope that by flagging these issues through our
8 Petition to Intervene, that that will alert the NRC
9 staff to explore those issues in further detail.

10 And I would have to say that based on the --
11 I participated. I was fortunate enough to be able to
12 go to the site audit. And the NRC staff who
13 participated, they were very knowledgeable, very
14 conscientious, and actually asking probing questions
15 and wanting to look further into all of these details.
16 So I do hope -- and, again, I guess we won't know, but
17 I do hope that the NRC will address these issues in
18 further detail in their Environmental Impact
19 Statement.

20 But the trouble that we have as an outside
21 participant is the rules and the procedures say that
22 we've got a petition to intervene right now. And so

1 we are simply trying to assert and protect the
2 interests of the community, and the only way we can
3 under the time frames that are allowed by the rules of
4 this Board and of this Commission.

5 So it is, it's an environmental disclosure.
6 And we're asking for more.

7 >> JUDGE FROEHLICH: Can I interrupt? Could
8 I hear from the Staff whether the information is of
9 the quantity -- quality in the EI that's sufficient
10 for you to meet your responsibilities under NEPA?
11 Because their argument really impacts on your work.

12 >> MS. MIZUNO: Understood, Your Honor. The
13 answer to the question is actually no. But that's
14 because not -- the NRC Staff's work in this area is
15 not relying solely on the Applicant's Environmental
16 Report as has been discussed. There was an
17 environmental site audit. And currently the NRC
18 environmental staff is working on its evaluation of
19 the issue of impacts on archeological and historical
20 assets or sites.

21 One of the things that, rather, the basis
22 for the Staff's objection to admissibility of this

1 contention goes to basis and failure to raise a
2 material, genuine material dispute.

3 When you look at actually what the Prairie
4 Island Indian Community has before it is its belief,
5 as its basis for the admission of this contention, it
6 is largely speculative based on what has transpired in
7 the past. There is no evidence, no documentary
8 evidence, no expert evidence, nothing solid that says
9 this assessment by the Applicant is deficient.

10 The area has been described, and we
11 understand where it is. We understand that it is in a
12 previously disturbed area. And we believe that given
13 that description, and in light of any contravening
14 supporting document or affidavit, that that is
15 sufficient for purposes of the regulatory requirement
16 for the Environmental Report that the Applicant has to
17 submit.

18 >> JUDGE ARNOLD: I want to change my
19 original question just to be more applicable to the
20 Applicant here. When you're developing an
21 Environmental Report, certainly you don't put in every
22 bit of information that you may have about a topic or

1 it would just be voluminous.

2 So you put in information that you consider
3 sufficient to fulfill the requirements of 10 CFR 51.
4 How do you go about deciding what is sufficient to go
5 in the license application?

6 >> MR. LEWIS: As a general matter of
7 environmental law, the CEQ regulations indicate that
8 NEPA documents should be written concisely and should
9 avoid needless detail. That's in 40 CFR 1500.21(b).
10 And, in addition, they provide that the discussion
11 should focus on the most significant issues. Where
12 you have less significant issues, you should discuss
13 those only briefly.

14 So the general proposition is that you
15 discuss an issue in the level of detail that's
16 commensurate with its level of significance.

17 Here, what the Northern States Power tried
18 to do is provide the explanation of why we did not
19 believe we would have an impact on archeological
20 resources.

21 They indicated that there was this
22 refurbishment activity. It was in the main area of

1 the plant. It was an area that was disturbed, and
2 therefore it was an area that would not be expected to
3 effect archeological resources.

4 But, in addition, we indicated that we are
5 indeed putting in place a procedure that we'll provide
6 further protection just in case there is something
7 unexpected that's discovered.

8 And that procedure is one that requires, if
9 there's any discovery of archeological resources, to
10 immediately halt the work and to consult with an
11 archeologist and to consult with the state.

12 So we have a belt-and-suspenders approach,
13 which we thought was more than sufficient to document
14 our assessment why there wouldn't be an impact. And
15 having done that under the NEPA guidelines, our
16 response would necessarily focus on that and needless
17 details.

18 We did not put in the 106 Group report as a
19 full provision because it simply does identify where
20 some burial mounds are, and it's generally
21 inappropriate to put those types of materials on the
22 public docket. You don't want to encourage amateur

1 archeologists from going out and disturbing sites. I
2 do not know whether the Board has a copy of these;
3 and, if they like, I can provide them, but we need to
4 make sure they're not put on ADAMS.

5 >> JUDGE FROEHLICH: I don't think we need a
6 copy, but the Staff obviously has a copy of the
7 Cultural Resource Assessment, the 2008 report, the
8 Staff has that?

9 >> MR. LEWIS: Yes, they do, yes.

10 >> JUDGE ARNOLD: One other short question.
11 Previously disturbed area. I've got a general idea
12 what that means, but when you disturb an area, is that
13 pretty much a guarantee that there's nothing left of
14 historical or archeological interest, or...

15 >> MR. LEWIS: We can't go that far.

16 Archeological resources can be buried at depths,
17 depends on how great the area of disturbance was.

18 The area of the main plant was built was an
19 area that was cultivated for like maybe a century, a
20 long, long time, very heavily disturbed before the
21 plant was constructed. And portions of the plant, of
22 course, in an area of the power block, excavation down

1 to the bedrock and there's indeed nothing.

2 In this general plant area, initially
3 Dr. Johnson did a survey and indicated that there was
4 no visible indication of cultural significance. He
5 came back before construction in '67 and dug a series
6 of trenches.

7 And my understanding is there's a criticism
8 that maybe today you wouldn't do that. But things
9 have changed since the '60s and that's how they did it
10 at the time. And they found no indication. But, no,
11 we can't guarantee that perhaps there's something in
12 some location that's buried at a depth that just
13 wasn't spotted.

14 >> JUDGE ARNOLD: So it would be a fair
15 statement that in the previously disturbed area, where
16 refurbishment activities will take place, there's some
17 potential for resources, and you're depending upon
18 your environmental coordinator to protect them, if
19 they exist.

20 >> MR. LEWIS: That's fair.

21 >> JUDGE HIRONS: Is the footprint for the
22 temporary structures and equipment pretty exactly

1 defined? Or can you look up ahead toward it?

2 >> MR. LEWIS: I can show you the photograph
3 of where we believe the structures will go, and
4 there's some structures that already exist because
5 they were used. The decontamination facility that was
6 used for the first project still exists and would be
7 the intent to use it again. There were also two large
8 well houses that were used. I think the intent would
9 be to use those again.

10 The demands of the facilities would be
11 temporary office facilities for quite a considerable
12 workforce, 700, 600, something like that, good-sized
13 workforce, and lay-down areas. But there is an area
14 that was used for this purpose in the prior project.

15 The project, though, has not been engineered
16 yet. There's fundamental issues like how do you get
17 the steam generators in the containment.

18 Can you use the hatch, or do you have to
19 open up a greater hole in the side of containment, and
20 obviously those issues will dictate what resources you
21 need on the site and how many workers, what sort of
22 lay-down areas, how many workers and what support.

1 And until you get to that level of engineering, we
2 really can't engineer the project and say, yes, we're
3 going to have these five trailers in this area. But
4 what we have committed is that we will use the
5 disturbed area and apply this procedure.

6 >> JUDGE HIRONS: But you are saying with
7 some confidence that this will all be done in
8 disturbed areas?

9 >> MR. LEWIS: That's what the environmental
10 report covers, yes.

11 >> JUDGE FROEHLICH: Wonder if this would be
12 a convenient time to take a 10-minute break for the
13 morning. Why don't we stand in recess for 10 minutes
14 and we'll resume at quarter of 11:00. We'll take up
15 Contention 2 then.

16 (Recess taken)

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2 >> JUDGE ARNOLD: If I can take up Contention 2 that dealt
3 with the second analysis. Now, this Contention
4 desires that methodology from the site restoration
5 study be used for calculating the costs of
6 decontaminating any sites that are affected by some
7 sort of accident at the plant.

8 My question for applicant currently, the
9 MACCS 2 code seems to be the standard methodology for
10 doing that calculation. Is it possible to incorporate
11 the methodology of the site restoration study into the
12 MACCS 2 code without doing major code updating and
13 upgrading without digging into the code?

14 >> MR. LEWIS: I'm not sure. I know my impression is
15 that it is a different methodology that the MACCS 2 code
16 takes specific data that's derived from the census and
17 different sources through a program called Set Pop
18 and uses those values and assign values to properly in different
sectors
19 and then evaluates the impact of contamination decontamination
20 those areas.

21 The site restoration study that was done for the
22 disperses of that looking at a much smaller area. My

1 recollection is the study referring to an area of less
2 than ten miles; the MACCS code is out to 50-miles and
3 my risk again of the methodology and the site
4 restoration study is basically going and looking at
5 individual bussinesses and surveying the area and
6 putting in unique values as opposed to the MACCS 2
7 approach which is because it is going out to 50-miles
8 is very much using average values in radio sectors
9 and different spacial elements. I think it would be very hard
10 to incorporate that. I have not asked specifically.

11 >> JUDGE ARNOLD: A question for the Petitioner: Was part of
your concern

12 here that the specific value of the Indian community's property was
not
13 reflected in the cost estimates involved in the SAMA
14 analysis?

15 >> MR. MAHOWALD: That's correct, Your Honor.

16 >> JUDGE ARNOLD: that would be because the general
charaterization of the area around the plant is

17 different from the characterization of the casino and other
facilities?

18

19 >> MR. MAHOWALD: Correct, Your Honor. I guess I think the
20 explanation would be that whereas oftentimes the
21 analysis of a rural area, the Prarie Island Reservation
22 doesn't fit those demographics in any way given the

1 large volume of visitors that come on and the high
2 volume of traffic. That's one aspect to it. But with
3 respect to the site restoration study, we do believe
4 that the report can be used to develop different
5 inputs to be used in the MACCS 2 code which would take
6 into account and provide a better analysis than is
7 currently employed?

8 >> JUDGE ARNOLD: So you do believe that what
9 you desire to have done is capable or MACCS 2 code is
10 capable of doing that?

11 >> MR. MAHOWALD: Correct.

12 >> JUDGE FROEHLICH: Is it your position that
13 it would reveal more specific results as used by the
14 Applicant?

15 >> MR. MAHOWALD: Correct.

16 >> JUDGE FROEHLICH: Then I guess that raises the question to
the Applicant, what sorts of site

17 specific inputs were used in the use of the MACCS code
18 to address concern that it was not site specific
19 enough from the petitioner's perspective?

20 >> MR. LEWIS: Perhaps I should try to explain the
21 MACCS 2 modeling interpretation but the MACCS 2 model five
22 mile from five to ten miles and then, at ten mile

1 increments out to 50-miles. And what it does is it
2 assigns a percentage of farm and non-farm property in each of the
3 specialists which is derived from and assigns a value
4 typically -- (technical issue with captions)

8 And it basically contains the contamination
9 under a whole range of meteorological conditions to
10 each spatial element and has a number of runs, and you
11 can take different percentages. But for SAMA analysis, you
12 use the mean value, figure out whether something is
13 cost beneficial and is appropriate. It then looks at,
14 okay, here's the level of contamination in each
15 spatial element, what do we need to remediate that
16 level of contamination, and it is based on the EPA's
17 protective action guidelines.

18 >> JUDGE FROEHLICH: Could I interrupt you,
19 counsel? Please stay in place. We're having difficulties with the
closed
20 captioning.

21

22 (Short interruption)

1
the 3 >> JUDGE FROEHLICH: Could you have the reporter read back
4 last line that you have so that will refresh your
5 recollection?
6 (Reporter read back the last sentence as
7 follows:
8 (And the last line was what do we need to
9 remediate that level of contamination and it's based
10 on the EPA protection action guidelines?)
11 >> JUDGE FROEHLICH: Mr. Lewis?
12 >> MR. LEWIS: That's what we are talking about here,
13 there is criteria that's derived from the EP. And in
14 our model is 3 Rimp by persons on table S property I
15 think EPA is over 50 years. The EPA is five gram
16 standard part of the action guidelines that assumed
17 that two labs could be incurred in the emergency and
18 intermediate phase and this 3 Rimp allocated to the
19 long term phase and so you try to demonstrate what
20 would it take to make property -- make that 3 rim
21 standard. The code first looks at decontamination,
22 model scenarios, decontamination factor of 3 and 1 of

1 15. There are different costs that it says with that
2 level of decontamination, can you get down to a 3 rim
3 standard. If you can't with decontamination, then, it
4 looks at interdiction up to 30 years and determines
5 with a decontamination plus interdiction, you get down
6 to the 3 Rimp and if you can't, then, the property is
7 condemned and the value of the property is lost.
8 If you can have the standard, it does cost benefit
9 analysis. If the cost of decontamination and
10 interdiction, exceed the value of the property and the
11 property would also be condemned. And if it is cost
12 beneficial, it looks after decontamination costs, the
13 interdiction comes, the loss determined on the
14 property and the depreciation of the property that was
15 there and the fact that it is designed to take into
16 account the economic loss of that property being out
17 of service.

18 Again, what it is doing, it is looking at the
19 economic impact over the 50-mile area though it is
20 using -- again, the Set Top Model applies the value of
21 the property the subject property in each of these
22 spacial elements.

1 If you in fact came in and said well, the
2 Indian community is more valuable and should have a
3 higher percentage, that actually wouldn't work with
4 the code because what you're doing then is looking at
5 these values. And so presumably, there are properties
6 that have a higher value and properties that probably
7 have a lower property with a lower value by simply
8 increasing the value. If I can even do that, it would
9 not necessarily be an accurate result. I could do
10 that sensitivity analysis and could put it at a higher
11 value for nonfarm property in that spacial element and
12 see what the difference was. But it wouldn't
13 necessarily give me any valid determination of whether
14 it's cost beneficial and that defeats the whole -- --
15 the purpose is not to look at the impact.

16 The NRC already looked at that in the GIS and
17 said they are small for all appliances, that was a
18 generic determination. But the NRC said, they are
19 small, we still should look at mitigation and be site
20 specific. So what this is trying to do is determine
21 is there a cost beneficial that needs to be looked at
22 and therefore, the purpose really is not to say what

1 is the specific impact on the Indian community; the
2 purpose is to say when I look at the consequences of
3 an accident over a 50-mile range and I look at the
4 possible production and accompanying risk, as a
5 consequence of that accident over a 50 mile radius, is
6 some SAMA cost beneficial?

7 JUDGE HIRONS: I have a question for the
8 petitioner. Very early you referenced the Indian
9 Point similar type of scenario there. And I wondered
10 to what extent did you use the data or whatever in the
11 Indian Point contention to carry through to this
12 contention; things like the magnitude of the source
13 term because I believe the Indian point reactors are
14 about twice the power level. So I guess the question
15 is: Did you take these kinds of things into account
16 in your thinking in posing the contention?

17 >> MR. MAHOWALD: Only insofar as it referred
18 to the Sandia Study, as a source of contamination and
19 information decontamination. I think the crux of the
20 contention is that the Sandia Study provides different
21 assumptions about potential clean up costs and that
22 contention was admitted in the Indian Point case for

1 that reason among others. We think that the different
2 assumptions that the Sandia Study brings, a potential
3 cleanup cost of the Prairie Indian land cleanup is
4 more appropriate here.

5 >> JUDGE FROEHLICH: But in the Sandia
6 studying the Indian Point case, I don't believe that
7 in that case, they studied the stigma effects on the
8 tourist industry; is that correct? There is nothing
9 in the Indian Point case that goes to stigma effects?

10 >> MR. MAHOWALD: That's correct. I think
11 with respect to that particular piece of the
12 contention, it's -- we wanted to highlight the
13 uniqueness of the Prairie Island community because the
14 land that the Prairie Island community has is land
15 that is held in the trust by the Federal Government.
16 It's not like the community can simply relocate out of
17 the area. That is the land that was set aside as
18 reservation for the community. And that has all sorts
19 of legal implications to relocate. You have to go
20 through a deed of trust process, things like that. If
21 you want to relocate your gaming enterprise, you go
22 through another set of regulations. So I guess that

1 is somewhat separate but that was one of the issues
2 that we are trying to touch on there.

3 >> JUDGE FROEHLICH: Mr. Lewis?

4 >> MR. LEWIS: One of the factors in the
5 decision of Indian Point that was the code they put
6 were known to intervenors. I wanted to point out that
7 in our Jordan States Power Environment Report at page
8 F.3-3, we in fact provide the MACCS economic
9 parameters that were used in the model including the
10 decontamination costs that were used in the modeling
11 with the different levels of decontamination. They
12 are specified in the application. The Indian
13 community never looked at those and never explained
14 why they were inappropriate. The Environmental Report
15 also gives the basis for those factors.

16 The factors were derived from NRC values that
17 were used in the 1990 reactor safety study. The NRC
18 in NUREG 4551 reactor safety study was NUREG 1150 I
19 believe. But we took those decontamination costs again at
20 two factors, the value that was criticized d in their
21 site restoration study, they were both actual
22 decontamination factors and we escalated those to

1 current dollars for the decontamination values. And I
2 would submit that again back to the original point
3 that the contention is a general dispute, I think it was
4 incumbent upon the Indian community to if they wanted
5 to raise this issue, to get an expert to challenge the
6 inappropriateness about factors in the application and
7 not rely on just general suspicions.

8 >> MS. MIZUNO: Yes, Your Honor. The question
9 that the staff -- sorry, that the Board posed to us asked about our
views to
10 the applicant of the MACCS 2 code. And we believe
11 that the MACCS 2 code is applicable to the situation
12 and we would say that we don't view the petitioner as
13 arguing the MACCS code as inapplicable. What they are
14 arguing about is specifically one set of inputs to the
15 MACCS 2 code and I think the Board recognized that is
16 with the question with respect to what damage it would
17 do to the code if certain Sandia Report items were
18 imported, could it be done without doing damage to the
19 code. Could the code still run, could it still work? One of the
things that I
20 think needs to be highlighted about the MACCS 2 code
21 and the decontamination costs and how those factor in
22 with each other is this idea and it is that

1 decontamination costs are just one of the inputs to
2 the MACCS 2 code. There are a lot of other inputs and
3 of course, depending on how the inputs are
4 manipulated, you can change the result. Put another
5 way, specifically, for the MACCS 2 code, depending on
6 the change to your inputs, a severe accident
7 mitigation alternative that was not cost beneficial
8 may become potentially cost beneficial because what
9 the SAMA analysis, the SAMA analysis, it doesn't stop
10 at decontamination costs. That's just one of the
11 inputs. The point of the SAMA analysis is to identify
12 mitigation alternatives that are cost-effective.
13 And decontamination costs are just a part of the
14 calculation that goes into identifying cost-effective
15 mitigation alternatives. It's not the end result. And the
16 problem here with this contention is that it focuses
17 on that intermediate stage and doesn't focus on the
18 end result. There is no assertion in the contention
19 that changing this specific input will result in
20 additional mitigation alternatives becoming
21 cost-effective. That isn't alleged. And in the
22 reply, the Prairie Island Indian community in its

1 reply, not in its petition but in its reply, the
2 Indian community stated it is reasonable to assume
3 that a change in the input will change the end result.
4 And it is the NRC staff's position that an assumption
5 is not appropriate here for purposes of establishing
6 admissible contention. We need support, not
7 assumptions.

8 >> JUDGE FROEHLICH: With Contention 3, this
9 deals with the analysis in the Environmental Report on
10 the dangers and threats of species. The Commission
11 allege it is not in compliance with the regulations.
12 I have a very, very technical question of the
13 Petitioner. On the last line in page 13 of your
14 Reply, it states that the NRC staff pointed out in its
15 Answer that northern states assessment on the impact
16 of mussels are inadequate. Can you focus me on that,
17 where that is?

 MR. MAHOWALD: Page 13, I didn't hear the reply.

18 >> JUDGE FROEHLICH: Well, I believe if I read this, it
states

19 the NRC staff pointed out in its Answer that northern
20 state assessment on mussels is inadequate. Where is
21 that in the staff's Answer?

22 >> Mr. ROTH: Your Honors, if I may, David Roth for the
staff. I believe keeping in mind what

1 the intention of counsel was, was to write that the
2 staff has pointed out there was information with ER
3 and they were continuing to disagree with the adequate
4 information rather than identifying what staff stated
5 was inadequate. I believe that's how that sentence
6 is supposed to be looking at that myself going back.

7 >> JUDGE FROEHLICH: Thank you. I think that
8 that clarifies my question. I guess in your analysis,
9 the Higgins-Eye Pearly mussel is an endangered species and we
10 are required to assess the impact. The Applicant
11 states -- that they have studied the demographics.
12 What is staff's position on the assessment relating to
13 that mussel?

14 >> JUDGE ARNOLD: Before we -- let's treat
15 this as a pearly eye issue and then avian species issue so
16 that we don't get too confused about what we are
17 talking about.

18 >> MR. ROTH: Staff of course has not
19 published our Environmental Impact Statement or the supplement to any
envirnmental impact statement. so it's
20 clear that the final analysis, what we are saying is
21 that the decision is not being made by this. However,
22 the staff did accept the application for review. They

1 did not reject it. And to date, there aren't any
2 RAIs, request for additional information specific to
3 the contents of the endangered species assessment of
4 the Pearly Act. That translates to staff accepted the
5 analysis that was there.

6 >> JUDGE ARNOLD: A quick yes or no; are you
7 satisfied with the Applicant's discussion of Pearly
8 Eye such that you can do the -- the NRC can do its job
9 on the EIS?

10 >> MR. ROTH: Yes, the staff is.

11 >> JUDGE FROEHLICH: I guess that throws it back to
12 the petitioner. What more can be done regarding the
13 Pearly Eye mussel?

14 >> MR. MAHOWALD: Well, I think where we point
15 out what we believe is the deficiency in the ER is
16 the reference to the Higgins-Eye concludes with
17 the statement that it is conceivable that some larva
18 enzyme will be carried downstream into the power plant's
19 screening house, and there is really no effort made to
20 quantify exactly what that would be.

21 And furthermore, in Section 4.7, the ER
22 concludes by stating that renewal of the PINGP license

1 is not expected to jeopardize the continued assistance
2 of any threatened or endangered species or result in
3 the destruction of adverse modification of any critical
4 habitat because the current operational practice would
5 not be affected by license renewal. And NRC concludes
6 that impact threatened by species from license renewal
7 will be small and would not award mitigation.
8 And we believe that is more of a conclusionary
9 statement that does not accurately and sufficiently
10 assess the impact of the proposed action on this
11 endangered species. And I guess the --

12 >> JUDGE FROEHLICH: What is the support for
13 that belief?

14 >> MR. MAHOWALD: Well, I guess the belief is
15 that we don't know based on what's contained in the
16 Environmental Report what the basis of the Applicant's
17 statement is. And so we are left wanting to know
18 more; how did the Applicant reach that conclusion and
19 how did the Applicant come to quantify the
20 significance of its own conclusion that some larva
21 will be carried downstream into the power plant intake
22 screening house. How do they know that? How do they

1 expect to measure that? How do they expect to monitor
2 to monitor the intake and things like that?

3 So I guess that's what we are trying to point
4 out is from our perspective, we simply don't
5 understand the basis for the applicant's statements.

6 >> JUDGE FROEHLICH. Based on his statements,
7 the 316 demonstration on the subject --

8 >> MR. LEWIS: No sir. The argument is the
9 same problem as its original contention did. In our
10 our
11 conclusions, looking at the conclusion statements and
12 saying it was conclusionary, most conclusions are but
13 they are ignoring that the meat of our analysis in Section
14 4.7 in which we cite on pages 23 and 24 of our
15 analysis where we looked at the life cycle of the
16 Higgins. This is a mussel that basically raises its larva
17 by allowing it to parasitically attach to the gills of the fish.
18 It has a lure and the fish are lured in by a portion
19 of its mantle hook or something and comes in closely nd
20 releases, attaches to the gills of the fish and then
21 are raised that way and eventually the gill may drop
22 off of it. We consulted with the Minnesota Department

1 of Natural Resources before submitting the
2 Environmental Report and obtained this information and
3 so we are making this discussion carefully that any
4 larva who do not attach immediately are basically
5 nonviable and if they don't have a stream, they are
6 not going to explain why there is to have an effect
7 because they are not going to attach to a fish and they are not
8 going to survive.

9 So we put that in our report to expressly
10 explain why there is no effect and it wasn't done
11 lightly. I want to avoid the word "consultation" because consultation
12 with an endangered species is a term that applies specifically to
13 action that occur between NRC and the Fish and
14 Wildlife Service. But we did our own communications
15 and tried to make sure we understand why the Minnesota
16 Department of Natural Resources put it where they were
17 and they had determined yes, this was a good place
18 whoever survived and we don't think it will be in
19 effect. And we documented that in the ER. And that
20 portion wasn't challenged in the contention and it
21 isn't challenged today. It simply ignored it as it
22 creates a dispute with their application.

1 >> JUDGE FROEHLICH. Does staff want to be
2 heard?

3 >> MR. ROTH: Nothing further, Your Honor.

4 >> JUDGE HIRONS: Let's switch now to the
5 mortality and the issue with the transmission lines.
6 And I guess the Petitioner, I have two questions:
7 This is stated to be a Category One issue based on the
8 generic environmental impact statement. So, was there
9 any thought of directly requesting a waiver of that
10 ruling in order to make the case that you have? And
11 secondly, on page 15 of the Prairie Island Indian
12 Community Reply where avian mortality is discussed and
13 also the process of counting dead birds, and a
14 statement is made that the applicant has made no
15 operational changes to minimize this. And I wonder
16 what you had in mind with what you were referring to
17 as operational changes?

18 >> MR. MAHOWALD: With respect to that as a
19 Category 1 issue, I believe that we cite to the fact
20 that Prairie Island was singled out on a site specific
21 basis and it experienced some avian mortality issues
22 that had high rates of avian mortality that of course

1 ties into our original contention discussing it as a
2 significant fly away for various birds. With respect
3 to the question as to our concerns, I guess we point
4 out there that where it says that the ER discloses
5 that and this is again on page 15 of our Reply quoting
6 the 3-13 that where Prairie have been observed at
7 PINGP were long associated transmission lines since
8 1978 but systematic searches or formal solution
9 studies have not been conducted. And so, I guess we
10 are left with the interpretation I guess of that as
11 saying how do we know -- how can we ascertain avian
12 mortality when we are no longer looking for it, no
13 longer trying to measure it?

14 That raises a question in our perspective
15 and an issue of deficiency in the ER.

16 >> JUDGE HIRONS: That does not really
17 answer the question that you allude to operational
18 changes. Am I missing something?

19 >> MR. MAHOWALD: Perhaps I misunderstood your
20 question.

21 >> JUDGE HIRONS: If I can read from the
22 response of the community: Did the applicant make

1 operational changes in the nuclear PINGP to reduce
2 avian mortality, or did it just stop looking for dead
3 birds? Is that sort of something you were just
4 throwing out there, which is true?

5 >> MR. MAHOWALD: That is our concern because
6 there is the reference to -- again, the portion that I
7 just pointed which talks about the finding since 1978
8 but also adds that systematic searches for formal
9 avian studies have not been conducted. So I guess the
10 question is, did they change their procedures for
11 monitoring because -- can you say that there is no
12 longer any impact when you're not actually looking to
13 find out --

14 >> MR. HIRONS: I understand what you're
15 saying about that. I guess maybe I'm missing
16 something. I'm still focused on you alluding to
17 operational changes. Is the change not counting
18 birds?

19 >> MR. MAHOWALD: Yes, I believe that would be
20 it.

21 >> JUDGE HIRONS: Okay.

22 >> JUDGE FROEHLICH: I'd like to ask staff,

1 the bird study done for a period '73 to '78, does that
2 study now, 30 years old sufficient to meet the
3 requirements of the Endangered Species Act or NEPA now
4 that we have a Category 2 question here?

5 >> MR. ROTH: If it is Category 2, it has to
6 be analyzed and endangered species Category 2 and the
7 applicant does have discussions of endangered avians.

8 >> JUDGE FROEHLICH: As I understand the
9 study of the endangered species, the study of the
10 avian species, was a study done between 1973 and 1978.
11 The petitioner saying there has not been any
12 subsequent study and if there is an endangered species
13 involved, is it necessary to have a more recent study?

14 >> MR. ROTH: I do not believe there has been
15 any endangered species identified to have a more
16 recent study.

17 >> JUDGE FROEHLICH: We have to back up and
18 see if there is something here in a Category One issue
19 or Category 2 issue -- I guess the petitioner, comes
20 forward with what endangered species are you referring
21 to get us into a Category 2 analysis?

22 >> MR. MAHOWALD: I guess we're back to that

1 problem of how do we identify the birds that are being
2 studied? So that's -- we're having difficulty with
3 the Environmental Report because there's not a
4 disclosure of the birds that are experiencing the
5 avian mortality. I guess with respect to whether this
6 is a Category 1 versus a Category 2 issue, again, I
7 guess we think it is site specific but if we need to
8 request a waiver, we can pursue it that way. I guess
9 that is another option to move forward.

10 >> JUDGE FROEHLICH: Did the first study 1973
11 to '78 reveal any threatened or endangered species?

12 >> MR. LEWIS: The description of the study
13 in the Environmental Impact Study identifies the birds
14 that were found in the study and none of them were
15 threatened or endangered in addition to our
16 environmental report. We list the endangered species
17 that are recognized to be present at the plant or in
18 the vicinity of the transmission lines associated with
19 the plant and this was after discussing it with the
20 state and federal agencies.

21 We acknowledged and we have not identified
22 the threatened or endangered species along the

1 transmission lines. The point that hasn't been
2 responsive to these calls, these transmission lines
3 will operate with the plant though they're not and
4 therefore, there is in fact no causal connection
5 between license renewal and the impact of these
6 transmission lines regardless of whether the plant is
7 operating or not.

8 >> JUDGE FROEHLICH: So the transmission
9 lines that we're referring to, not the transmission
10 line would be from the plant to the grid? I'll
11 withdraw that.

12 This deals with the environmental report and
13 the consideration on the cancer rates on the --
14 occasions of the minority community. I guess I would
15 ask what is the plant specific new information which
16 requires Category One issue to be examined for Prairie
17 Island?

18 >> MR. MAHOWALD: Where we view it as a plant
19 specific issue is with respect to the finding of the
20 KiKK Study of where there was a higher incidence of
21 childhood cancer with radiation of power plants, of
22 the Prairie Island Indian community located within

1 that 3-mile radius. So that is one of the issues that
2 we raised. We also believe that the cancer studies
3 that are being performed and reported on now do create
4 new and significant information, qualify as new
5 significant information because we had the KiKK study
6 followed up by the initiative and again, we made
7 reference to it today because it occurred after we
8 filed our petition and the Swiss Government also
9 following up with the Newman Study. We believe that
10 again, this is new and significant information and we
11 want a closer examination of the potential threat to
12 children.

13 >> JUDGE FROEHLICH: Applicant, a little bit
14 more with respect -- I'm assuming that this is a
15 Category One issue and not site specific?

16 >> MR. LEWIS: I do object to the references
17 that initiative and the Swiss study. There is no
18 basis for a new contention that should be properly,
19 argument and cite brand new information. It does not
20 provide a meaningful response. But it doesn't make
21 any difference in this instance whether it is a
22 Category One issue and the Commission grants the

1 waiver.

2 The grounds for granting the waiver is that
3 the petitioner has to submit -- has to make a prima
4 fascia showing and has to be supported by affidavits.
5 That's certainly not been done. If the Board under
6 the rule of 2.335 I believe, it then refers the
7 petition to the Commission for a ruling and the Board
8 ins there is not a prima fascia showing and the Board
9 denies it, none of the table S procedures has been
10 followed. Beyond that, the Commission has indicated
11 that a waiver to allow litigation -- NRC proceeding
12 must be based on the showing of particular to that
13 plant. What I heard is the suggestion that new
14 studies suggest there is high risk to children,
15 population is close to a plant. That is not specific.
16 The community resides where whatever plant has people
17 that live near the plant, and has children who live
18 near a specific plant, they are simply saying NRC,
19 risk estimators are generically wrong or inappropriate
20 and if that's the case, Commission case law indicating
21 that a rulemaking petition is the appropriate course,
22 not a petition of waiver in this proceeding. Finally,

1 we did take a look at the studies reported and didn't
2 see in fact any discussion of real information on the
3 risk casualty.

4 They never looked at what was the dose people
5 received and therefore, they never attempted to raise
6 or analyze any sort of dose response relationship. So
7 there certainly is no demonstration that the NRC's
8 generic risk estimator based on the model is wrong.

9 >> JUDGE FROEHLICH: Petitioner, you wanted
10 to respond?

11 >> MR. MAHOWALD: I wanted to point out that
12 we did make reference to both Kikk study position
13 initiative in our original petition and that was also
14 made reference to Exhibit E of my declaration 2008. I
15 do agree that the reference to the issue is coming up
16 late in that study that was announced in late
17 September in this case.

18 >> JUDGE FROEHLICH: Referring to a plant
19 specific argument Category 1 to Category 2, where is
20 that in the petition?

21 >> MR. MAHOWALD: Again, we articulate in our
22 reply, we indicated that it's our view that we don't

1 have sufficient data to determine the disclosure and
2 release another radiological companion to actually
3 perform the baseline that would be necessary to create
4 that site specific claim.

5 >> JUDGE FROEHLICH: Does staff wish to be
6 heard?

7 >> MS. MIZUNO: Yes, Your Honor. Our
8 objection to the admissibility of this contention is
9 based on the lack of support and lack of a basis. And
10 nothing we have heard moves us from that position.
11 That's all I have.

12 >> JUDGE FROEHLICH. Thank you. Let's move
13 on to Contention 5 dealing with the Environmental
14 Justice Report. It's alleged in the 5th Contention
15 that the environmental analysis does not adequately
16 assess the impact of the Prairie minority community.

17 >> JUDGE ARNOLD: I have only one question
18 and I will ask this of both Petitioner and Staff.
19 Where in the code of federal regulations or any other
20 legal requirements document is the licensee required
21 to perform an environmental justice review or provide
22 any information per the Commission's environmental

1 justice review? Start with Petitioner.

2 >> MR. MAHOWALD. We would point to
3 Regulatory Guide 4.2.1 which says the staff expects
4 the applicant to provide information on the
5 environmental justice issue. So we think that is the
6 regulatory authority for that.

7 >> JUDGE ARNOLD: That is Reg guide --

8 >> MR. MAHOWALD: Correct --

9 >> JUDGE ARNOLD -- that which you state is
10 followed by a specific list which request demographic
11 information. So is there anything to suggest that
12 there's any review involved?

13 >> MR. MAHOWALD: It appeared from I guess
14 our reading of the environmental report that there was
15 actually no effort made to address any environmental
16 justice issues.

17 >> JUDGE ARNOLD: Staff, I'm looking for a
18 requirement to do anything having to do with the
19 environmental justice review.

20 >> MS. SIMON: Your Honor, Marcia Simon for
21 Staff. The answer to your question is there is no
22 requirement in the code of federal regulations or any

1 other legal requirement that the applicant do a
2 review.

3 >> JUDGE ARNOLD: Okay, thank you. One more
4 question for Petitioner -- and I think the demographic
5 information that was provided seemed to follow very
6 specifically, the guidance that was in that reg guide
7 but in following that guidance, very specifically, it
8 seemed to average out the Indian community so that
9 they never appeared. Is that part of your contention
10 as well?

11 >> MR. MAHOWALD: That is a concern because
12 it goes far beyond the immediate boundaries of the
13 Prairie Island community. I believe it is a 50-mile
14 radius as opposed to again, we're talking about a
15 4-mile radius would be all of the land owned and in
16 trust by the community at this time.

17 >> JUDGE ARNOLD: Thank you. Do you have
18 anything to say on this at all?

19 >> MS. SIMONS: If you look at the
20 environmental report on that, they analyzed over 2,000
21 within a 50-mile radius and I'm not sure of what -- I
22 think that they are distinct areas within that 50-mile

1 radius. So presumably, the area immediately around
2 the plant including the PC were contained in that.

3 >> MR. LEWIS: May I address that to clarity?

4 The two blocks that actually falls within two
5 different block groups and so we did follow the NRC
6 methodology that reg guide tells us to provide the
7 demographic information that the NRC use and we
8 followed the NRC methodology. The Indian community
9 has 250 members. And the block group is a bigger
10 area, that's actually two blocks population is split
11 and when you look at the criteria for whether there is
12 a minority population under the NRC guidance which
13 is -- does percentage exceed the average by 20
14 percentage points or was it more than 50 percent of
15 the area, just because there is a small population
16 does not meet that criteria. But because of that on
17 the map, we identified a minority population where in
18 addition to showing the block groups that had minority
19 populations who specifically identified the Indian
20 community, their tribal lands able to identify them
21 notwithstanding the fact that they actually meet the
22 numerical test in the NRC guidance.

1 >> JUDGE FROEHLICH: So then, to follow-up
2 your answer with the Petitioner, Mr. Lews, that the
3 Indian community was contained in the study of two
4 blocks, population and some additional alert or some
5 kind of additional markings made that the Indian
6 community was addressed within that portion of it -- I
7 guess I will ask Petitioner, what more do you want
8 them to do? Do you want them to break down the blocks
9 smaller sections beyond what the reg guide states? Or
10 what is it that they didn't do -- that's not to put
11 them out of compliance with regulatory guidance -- to
12 suggest they do?

13 >> MR. MAHOWALD: I guess this also relates to
14 the previous contention that we discussed where we do
15 believe that there is a disproportionate impact on the
16 tribal community being in close proximity to the power
17 plant followed up there. In terms of what they would
18 have to do, we -- I guess -- let me consult and see if
19 I can get you a more specific answer.

20 I think what we are looking for is now that
21 there is an identification of the minority community,
22 there needs to be a better specification of what the

1 impacts actually are, so as to fulfill the
2 environmental justice requirements.

3 >> JUDGE FROEHLICH: But that's not part of
4 the reg guide or any regulation or requirement; is
5 that correct?

6 >> MR. MAHOWALD: Well, again, we understand
7 that in terms of the NRC's requirement, it's implied
8 in there that there needs to be some sort of handling
9 in addressing the environmental issues. But, it's a
10 fairly complicated analysis.

11 >> MS. SIMON: Your Honor, may I?

12 >> JUDGE FROEHLICH: Please respond.

13 >> MS. SIMON: The Reg guide is a guidance
14 and it clearly states that the staff, there is a
15 environmental justice review. It does not mention the
16 word "applicant." And that is part of its obligation,
17 so, there are two elements to the review, the
18 identification of the minority population which was
19 done through -- pursuant to NRC guidance by the
20 applicant, environmental report and there is the
21 identification of possible disproportionate impact. I
22 would also like to mention that there is a memorandum

1 of understanding between the tribe and the NRC and
2 under that environmental justice is one area in which
3 the staff is actively pursuing to work with the tribe
4 on that. So even regardless of whether the applicant
5 information, the NRC's independent review requires
6 NEPA will involve the Prairie Island.

7 >> MR. MAHOWALD: One follow-up. Again, we
8 do recognize that the community does have a role of
9 cooperating agency and environmental justice does fall
10 within the scope of that relationship. But I guess
11 the question that we would come back to is that we
12 understand that the NRC has to perform this function
13 but how can it perform this function without requiring
14 information from the applicant reg guide provides that
15 the supplemental environmental impact statement will
16 be based on information provided in the ER,
17 environmental report developed during the site
18 specific scoping process. The tribe can contribute to
19 that through the cooperating agency but it does seem
20 to me that the need to have the applicant address this
21 is at least implied in that REG guide.

22 >> JUDGE FROEHLICH: Any response from

1 Applicant or staff?

2 >> MR. LEWIS: Only that staff does perform,
3 independent analysis and found the requirement under
4 NEPA to do its own hard look and look at information
5 and data from sources as public meetings. It gets
6 information and consults with other agencies so the
7 environmental report.

8 >> JUDGE FROEHLICH: Staff has the
9 opportunity to send out additional information and
10 petition has an obligation to pass along whatever
11 studies it would have to the staff, used by staff in
12 preparing the statement.

13 >> MS. SIMON: That's correct, Your Honor and
14 the applicant said that the staff actually will do its
15 own -- it will actually look into these issues
16 independently and so, even if the theory the applicant
17 provided no information, staff would still have to do
18 it.

19 >> JUDGE FROEHLICH: Just procedural, when the
20 environmental report comes out and it contains a
21 section on environmental justice, if at that point,
22 the petitioner believes that the environmental

1 analysis conducted by staff is logged insufficient,
2 there would be an opportunity for them to file a new
3 contention?

4 >> MS. SIMON: Yes, I agree to the
5 supplemental EIS report yes, that's true, they can
6 file that.

7 >> JUDGE FROEHLICH: Thank you. Is there
8 anything else any one wants to say on Contention 5
9 before I go to Contention 6?

10 Contention 6 deals with monitoring and
11 managing the effects of agent that contains sodium and
12 integrity is directly related to plant safety and
13 emergency core cooling systems.

14 >> JUDGE ARNOLD: I have one question and
15 it's relevant for Contentions 6, 7 and 8 and I want to
16 go down the line from Petitioner all the way to Staff
17 asking this. If an agent management issue has been
18 identified prior to the relicensing process, and has
19 been adequately addressed in the current license
20 basis, does it need to be addressed in the license
21 renewal process other than by referencing the plan
22 existing under the current licensing basis?

1 >> MR. MAHOWALD: First, yes, we do believe
2 so because if you look at the part 54 states that the
3 second and equally important principle of license
4 renewal hold that the plant specific licensing basis
5 must be maintained during the renewal term in the same
6 manner and to the same extent as during the original
7 licensing term. This principle would be accomplished
8 in part by degradation management specific structures
9 and components that are important to license renewal
10 of the previous rule, 60 F R 22464. So the second
11 principle of license renewal that AP management plan,
12 the current licensing term should be maintained during
13 the renewal for those components within the scope of
14 license renewal as defined by part 54.4.

15 >> JUDGE ARNOLD: Thank you. Applicant?

16 >> MR. LEWIS: Let me be sure I understand
17 the question. Are you asking whether if an issue is
18 addressed is outside the -- necessarily outside the
19 scope of license renewal?

20 >> JUDGE ARNOLD: I think that's correct. I'm
21 asking if it's been identified as an agent management
22 program and satisfactorily addressed during the

1 current licensing period. When you come to
2 re-licensing, is it treated -- can it be treated as an
3 issue that's already been solved and referred back to
4 that solution. Or, are you starting from ground zero
5 in the relicensing process and go through and define
6 the whole agent management program there?

7 >> MR. LEWIS: I understand now. As a matter
8 of law, it is not excluded from the scope of license.
9 It can still be on the table. The Commission when it
10 promulgated its license, renewal did recognize that
11 there were certain programs that are part of the core
12 licensing basis and managing agent and credited some
13 of those programs in the rule, in particular credited
14 the maintenance rule and the fire protection rule for
15 active components. But it declined to go further at
16 the time indicated in the rulemaking that if in the
17 future, it decide to credit additional programs and
18 take an outside scope, it could do that by further
19 rulemaking. What the NRC staff did do however and
20 consistent with the recognition that already indeed
21 effective agent management programs all in place is it
22 tries to inventory those programs and capture them.

1 That was the whole purpose of the report was to
2 identify those existing agent management programs and
3 effective programs at that time, and Ms. Grimes will
4 remember.

5 So the purpose there was to try to figure out
6 between part of the current licensing basis because
7 that's what we look at and that's the whole purpose,
8 does not mean outside scope is beyond challenge and so
9 I would submit just the fact that we have something
10 addressed by the COB, that does not take it outside of
11 your purview.

12 >> MS. SIMON: If the agent is identified in
13 the current licensing term, obviously, there is still
14 going to be an agent issue so there does need to be an
15 agent management program for it. However, as
16 applicant counsel has noted, the purpose develops to
17 look at a number of agent management programs to try
18 to streamline the process to see if they can
19 generically, be acceptable. And I would like to point
20 the Board to recent decisions which was issued by the
21 Commission about 3 weeks ago, the caption is kind of
22 long in the oyster creek and the CLI23. In that

1 decision, Commission discusses and endorses the entire
2 process of which if an applicant states that it's
3 agent management will be consistent with the law,
4 then, it does not have to separately demonstrate the
5 adequacy. That alone will demonstrate the adequacy of
6 the agent management program. So, as long as the
7 applicant is using a program that will be consistent
8 with this law or that if it is that with enhancement
9 will be consistent, that gives reasonable assurance
10 that agent will be adequately handled during that
11 period.

12 >> JUDGE ARNOLD: Okay, similar to the
13 generic question, now, paint chips. We've known
14 about those for years, coding issues, issues with
15 coding. We have known about strainers clogging for
16 years and years. So I guess I'd like to find out and
17 probably in the paperwork but is that covered under
18 the Gall Report methodology for handling agent of
19 coding? I'll start with the applicant?

20 >> MR. LEWIS: I believe the Gall Report does
21 have an agent management program that the applicant
22 could adopt through managed agent of coding. In our

1 case, we are not relying on totally coming to protect
2 the components inside the containment and so the issue
3 is simply to debrief that issue on the strainer. And
4 our position was simply that we were not trying to
5 maintain the coding so that they don't fail. Instead,
6 we had analysis that said let them fail, I shouldn't
7 say that, the analysis says yes, if the qualified
8 coding fails in the area of impact, if the non-
9 qualified and degrading coding failed outside the
10 coding impact, our strainers won't be blocked and our
11 emergency core pooling system will still work. So
12 rather than having a program that is making sure
13 coding doesn't fail, we have analysis that says
14 equipment will still perform its function. And for
15 that reason, it just didn't fall within the definition
16 of the scope.

17 >> JUDGE ARNOLD: Your analysis basically
18 says if no more than this amount of coding fails and
19 it seem to be a generous amount, then, your strainers
20 are fine. And do you then do anything that says and
21 we know that we will not have more coding failure than
22 this because....

1 >> MR. LEWIS: Yes, we have a special program
2 which keep a lot of the graded codings in order to
3 constantly validate the assumption that's in our
4 generic letter 2004-02 analysis.

5 >> JUDGE ARNOLD: Petitioner, any comment on
6 that?

7 >> MR. MAHOWALD: I think that the concern
8 that we have with respect to that and I will have to
9 consult with respect to the letter that was just
10 referenced, but I think the concern that we had was
11 the applicant's assumption of fail in that if it's
12 not -- that the assumption can be incorrect if you're
13 not taking into account an adequate amount of
14 management program. I guess I would liken it to if
15 you take a power wash to a newly painted home, and you
16 apply that to the jetstream to the siding, you're
17 going to get a dispersal that's more likely going to
18 be a smaller amount with smaller size particles.
19 However, if you take that same power washer to a home
20 that has aging peeling paint, you're very likely to
21 get a larger pieces of paint that could clog. And
22 so, our concern is that perhaps the assumption would

1 lead to an incorrect finding that at all times you can
2 have smaller particles that won't be clogged in some
3 strainer.

4 >> JUDGE ARNOLD: So if I can ask Petitioner
5 on the conclusion reached that there will not be an
6 effect and I believe you mentioned the assumption in
7 the calculation is that all the programs are --
8 suddenly come off -- that was a worst case
9 scenario.

10 >> MR. LEWIS: There's this other business of
11 the worst case break that all coding are assumed to
12 come up and become debris and then, there is the
13 entire rest of it, the worst case pipe break all
14 unqualified coding are assumed to come up from spray
15 and chemical and become debris and are degraded
16 dequalified coding seem to fail and become debris.

17 >> JUDGE HIRONS: So are you saying that your
18 conclusion is that you disagree with the results of
19 that analysis, that it would not affect the operation
20 of the assumption?

21 MR. MAHOWALD: About whether there is an
22 adequate monitor management program because even with

1 those assumptions, unless you have an adequate monitor
2 management program, you still run the risk you will
3 have larger particles that could still clog the
4 containment.

5 >> JUDGE HIRONS: So that's the principle
6 thrust of your contention?

7 >> MR. MAHOWALD: Correct.

8 >> MS. MIZUNO: Yes, Your Honor, Beth Mizuno
9 for the NRC staff. Our focus would go back to the
10 original question which was with respect to what age
11 if there is a current program to manage agent fact; is
12 that sufficient? And we would point the Board to the
13 Commission's decision in the Turkey Point case decided
14 in which this Commission stated some agent related
15 issues are adequately dealt with by regulatory process
16 and may not be subject to further review during the
17 license renewal proceeding. That's what we think
18 controls in this instance, as far as the aging of the
19 containment. What we understand the applicant is
20 talking about in what the Board recognized as the
21 worst case scenario is an event driven event. It's
22 not an aging event. It's an accident. It's an event

1 and that's -- that is different in our view from a
2 purely aging related degradation. That's all.

3 >> JUDGE FROEHLICH: We're at the noon hour.
4 -- did you want to be heard?

5 >> MR. MAHOWALD: Just one very quick
6 response to the staff's comment. We don't believe
7 this Turkey Point Decision is an appropriate decision.
8 We do not think that coding at issue here are
9 analogous to the emergency planning that was
10 discussed in the Turkey Point Decision, ongoing
11 regulatory programs, excuse me.

12 >> JUDGE FROEHLICH: I note we're at the noon
13 hour. I propose we adjourn until 1:00 p.m. and resume
14 and take up Contention 7 and contentions that follow
15 after that. We will stand in recess.

16 >> JUDGE FROEHLICH: So we resume 1:15. Have
17 a leisurely lunch.

18 (Whereupon, Court recessed for lunch)

19

20

21

22

1 >> JUDGE FROEHLICH: We'll be back on the
2 record. This afternoon we'll begin with Contention 7,
3 the monitor and managing of aging duty to
4 embrittlement, reactor vessels and associated
5 materials. Contention 7.

6 Our closed captioning is trailing us. We'll
7 wait a moment.

8 >> JUDGE ARNOLD: What I read here looks to
9 me more like three contentions that are very similar.
10 One is inadequate accounting for embrittlement on the
11 reactor vessel, inadequate accounting for
12 embrittlement on associated internals, and then within
13 the body of the contention, something that's basically
14 saying that the vessel surveillance program is
15 inadequate.

16 My questions mostly concerned, at least for
17 Petitioner, with the treatment of embrittlement on the
18 vessel internals, in that I picked out, within the
19 containment, a chain of events.

20 One that embrittlement was inadequately
21 accounted for in the vessel analysis, or in the
22 analysis of the internals, that in a shock, if the

1 internals are embrittled, they could fail and then,
2 finally, that the failure of the internals could lead
3 to a core configuration that could not be cooled.

4 And what I was really looking for is what
5 are the facts in the original contention that supports
6 that chain of logic.

7 >> MR. MAHOWALD: What we cited to you and
8 what we listed in our original petition, to work
9 through that chain of logic, I'll first deal with link
10 one, which I guess we would describe as from Dr.
11 Lahey's, citing paragraph 10 of Dr. Richard Lahey,
12 Jr.'s, declaration in the Indian Point decision,
13 paragraph 10, where it says: "When neutrons, barred
14 metals in the core which occurs during nuclear
15 fission, those metals can become embrittled, that
16 would be your first link one. That's at page 28 of
17 our petition.

18 The next link is also on page 28 of our
19 original petition, where Dr. Lahey describes at
20 paragraph 15 how embrittlement RPVs and RPV internal
21 structures and components would respond to the highly
22 transient severe decompression shock loads associated

1 with the design basis accident, dba loss-of-coolant
2 accident, LOCA, that would be link two. Again at page
3 28 of our petition.

4 The third link that you were looking for is
5 described beginning at the top of page 29 of our
6 petition. Again quoting Dr. Lahey, and making
7 reference to paragraph 15 of his declaration, "That
8 experiments have demonstrated that when metals fail in
9 a nuclear power plant, particularly the metals that
10 are in the RPV and the internals closest to the core,
11 e.g., those located in the beltline region, the core
12 may not be able to maintain a coolable geometry and it
13 may melt."

14 So I want to note that that comes from our
15 original petition. But I also want to make the
16 statement and the argument that all of those are
17 purely factual statements as well. And I'm not sure
18 if the Applicant or the NRC staff is going to disagree
19 with the truthfulness of those; but, again, from our
20 perspective, in terms of stating a factually specific
21 contention, we would cite to the declaration of
22 Dr. Lahey that was submitted in the Indian Point

1 decision, but we would also say that his observations
2 are stand-alone facts that can be utilized to state a
3 valid and admissible contention.

4 >> JUDGE ARNOLD: Okay. Applicant, do you
5 have anything to say on that?

6 >> MR. LEWIS: I would, with all due respect
7 to my colleague, disagree. This is a purely factual
8 issue. This is a highly technical matter of expert
9 opinion on whether there are severe decompression
10 shock loads that would occur that would affect the
11 internals, the internals without pressurized
12 components.

13 The Pressurized Thermal Shock Rule, which
14 applies to the vessel itself, was based on studies
15 that indicated that for embrittlement to be a concern
16 for the carbon steel vessel, there needed to be both a
17 pressure shock and a thermal shock. And thermal shock
18 alone was insufficient.

19 I guess I've never seen any basis to
20 indicate that with respect to internals inside the
21 reactor, which aren't pressurized and therefore don't,
22 as far as I know, are not subject to any sort of rapid

1 depressurization stress, that there are those kind of
2 stresses that could, coupled with thermal stress,
3 cause a failure.

4 I'm also not sure and see nothing in
5 Dr. Lahey's original declaration that really explains
6 what these stresses are, what the thermal stresses are
7 and how quickly these components would be subject to
8 cool-down. And it's very, very much a matter of
9 expert opinion and simply no basis for it.

10 This is not an analysis that was part of the
11 original licensing basis of a plant. And I think if
12 one is positing a brand new phenomena that needs to be
13 managed, there needs to be more than simply saying
14 embrittlement may occur, which, of course, is
15 obviously the case.

16 The question is: Is it significant? How
17 does it apply to the materials of the internals which
18 are not carbon steel, they're typically stainless
19 steel. And they're different. There's a lot here
20 that's not answered.

21 And as far as whether there's sufficient
22 technical opinion basis to demonstrate a genuine

1 material issue, our position is it's just not shown.

2 >> JUDGE ARNOLD: My second question is also
3 for you. Could you describe the vessel surveillance
4 program, including the number of capsules, how often
5 they're removed? Are they destructively tested? And
6 how it's expected to last through an extended 20 years
7 of life.

8 >> MR. LEWIS: Okay. Each vessel had six
9 capsules originally. And in each vessel, four
10 capsules have already been removed and tested.
11 Therefore, each vessel has two left. So four in
12 total. Two left.

13 That is, as we pointed out, our answer
14 stated in the USAR, Updated Safety Analysis Report,
15 for the plant and therefore it's on the docket and
16 available and should have been addressed.

17 How the capsules will be tested on a
18 going-forward basis is answered and addressed directly
19 in the Reactor Vessel Surveillance Program described
20 in the GALL report, which we've referenced and
21 adopted.

22 And it states that if an applicant has a

1 surveillance program that consists of capsules with
2 projected fluence of less than the projected 60-year
3 fluence, at the end of the 40 years at least one
4 capsule is to remain in the reactor vessel and tested
5 during the period of extended operation.

6 I'm reading from the GALL report, which is
7 NUREG 1801. And this is in Section Roman Numeral
8 XI.31. So that's the program we've committed
9 basically to test one more sample that has at least
10 the end of 60-year life level of radiation, which
11 means that we would have one additional spare beyond
12 that.

13 There's also a requirement in one of the
14 standards that you can't leave a capsule in beyond
15 twice the end-of-life fluence. So if at some point it
16 looked like one of the spare capsules was nearing
17 twice the end-of-life fluence we'd also have to move
18 that, we would preserve it for further testing.

19 Right now our estimation is the prior four
20 capsules on each vessel that have been tested had less
21 than the 60-year fluence, or 60-year fluence
22 corresponds to 54 effective full power years in our

1 case.

2 >> JUDGE ARNOLD: When you say "the 60-year
3 fluence," is that that there's an average fluence and
4 these capsules are in a location of higher peak
5 fluence?

6 >> MR. LEWIS: I'm not exactly sure how you
7 calculate the fluence. I'd have to -- I'm told their
8 location where they lead the fluence of the vessel.
9 And there's a procedure and program for how you
10 calculate the fluence and ensure that it's
11 representative. In fact, conservative for the vessel
12 materials. I don't know the details of that program.
13 As I said, the four that we've tested so far had less
14 than the 54 full-power years, so we do need to test
15 under the GALL program one more capsule for each
16 vessel.

17 Right now we've done preliminary
18 calculations. And the capsules there right now exceed
19 the 54 full-power years now.

20 And so our current expectation is that we'll
21 remove and test them in 2011 and 2012. And just one
22 capsule for each unit. And we'll have one later on

1 that we could use but would not need to meet the GALL
2 program. At that point we would have tested specimens
3 from each vessel with the end-of-life fluence and
4 condition.

5 >> JUDGE ARNOLD: And the capsules that you
6 will be removing in the near future, they have a
7 fluence that is characteristic of closer to the
8 60-year fluence; is that --

9 >> MR. LEWIS: Right now the preliminary
10 calculations are all the remaining capsules in there
11 have already exceeded 54 effective full-power years.
12 So they're already representative of end-of-life
13 conditions. So they just need to be removed and
14 tested, and we'll have data on end-of-life conditions.
15 I think you asked are they destructively tested.

16 And my understanding, I've never actually
17 seen a Charpy test, but I understand there's a Charpy
18 test, a great big hammer that swings down and breaks
19 them. But I do understand that capsules can sometimes
20 be saved and reconstituted and used and that's also
21 beyond me on how they do it. But there would be some
22 program.

1 You asked a question about the program
2 enhancements. The program enhancements are described
3 completely in our License Renewal Application in the
4 appendix that describes this program. It's simply
5 that. When you remove a capsule, even after we test
6 it, we will then preserve the specimens if we ever
7 need them again. And the enhancement is no more than
8 that.

9 >> JUDGE ARNOLD: At the moment do you have
10 some analysis of any type of shock events for vessel
11 internals?

12 >> MR. LEWIS: We have two analyses for
13 reactor vessel internals. Not that I'm aware of,
14 Judge Arnold.

15 >> JUDGE ARNOLD: Petitioner, do you have
16 anything to add?

17 >> MR. MAHOWALD: No.

18 >> JUDGE HIRONS: I wanted to ask you, you
19 mentioned four of the six have been removed and then
20 the fifth one would be around 2012 or '13, roughly.

21 >> MR. LEWIS: '11 or '12, yes.

22 >> JUDGE HIRONS: '11 or '12. And then the

1 final one would be left until the end of the license
2 renewal period or --

3 >> MR. LEWIS: Unless at some point it would
4 appear that it would exceed twice the end-of-life
5 fluence, in which case it would have to be removed and
6 preserved. You would not eradiate more than twice the
7 end-of-life --

8 >> JUDGE HIRONS: You would determine that
9 how?

10 >> MR. LEWIS: You keep track of the fluence
11 under the program and calculate it. I don't know how
12 it's calculated, but it's calculated regularly.

13 >> JUDGE HIRONS: Okay. Thank you.

14 >> JUDGE FROEHLICH: Beyond the surveillance
15 plan that you just described, are there any proposed
16 enhancements or additions to that program?

17 >> MR. LEWIS: The only two program
18 enhancements are the enhancements that are
19 specifically described on page B-69 of our Aging
20 Management Program. They are a requirement to ensure
21 all withdrawn and tested surveillance capsules not
22 discarded as of August 11th, 2000, are placed in

1 storage for possible reconstitution and use, and a
2 requirement that in the event spare capsules were
3 drawn, the untested are placed in storage and
4 maintained for future inspection. They're both simply
5 enhancements to make sure that we don't discard
6 specimens either after they were tested or in the
7 event they were withdrawn.

8 >> JUDGE FROEHLICH: Thank you. Anything
9 else?

10 >> JUDGE ARNOLD: I'm satisfied.

11 >> JUDGE HIRONS: Thank you.

12 >> JUDGE FROEHLICH: Let's move, please, to
13 Contention 8, dealing with primary stress corrosion
14 and cracking for nickel alloy components.

15 The Board in its notice of this argument had
16 asked that the Petitioner address where the stress
17 corrosion cracking issue is addressed as part of the
18 Current Licensing Basis. And the parties are prepared
19 to address the generic question, which we have touched
20 on a little bit already this morning.

21 If an issue is subject to an Aging
22 Management Plan during the licensing period, is it

1 required to be addressed as part of the relicensing?

2 We'll start with Petitioner.

3 >> MR. MAHOWALD: First off, stress
4 corrosion cracking is part of the CLB, and we're not
5 challenging the CLB.

6 But as we indicated earlier, yes, it is also
7 part of the Aging Management Program. And we cited
8 for that proposition Part 54, which states in the
9 statements of consideration for Part 54, that the
10 second and equally important principle of license
11 renewal holds that the plan specific licensing basis
12 must be maintained during the renewal term in the same
13 manner and to the same extent as during the original
14 licensing term.

15 Its principle would be accomplished in part
16 through a program of age-related degradation
17 management for systems, structures and components that
18 are important to the license renewal as defined in the
19 previous rule.

20 The second principle of license renewal that
21 Aging Management Plans and the current license term
22 should be maintained during the renewal term for those

1 systems, structures and components that are within the
2 scope of license renewal as defined by Part 54.4.

3 So that is our answer to that question. And
4 I'm trying to think if there was a further question.

5 >> JUDGE FROEHLICH: Go ahead.

6 >> JUDGE ARNOLD: As Judge Froehlich
7 mentioned, this was the second or third contention
8 that really had to do with an aging management issue
9 identified prior to the relicensing process.

10 And I understand the Petitioner's position
11 on this. Once again, in light of it being an aging
12 management item that was identified prior to the
13 relicensing process, it has already been addressed.
14 And is there some reason that that addressing of this
15 issue means that you don't have to have a complete
16 description of an aging management system within the
17 application?

18 >> MR. LEWIS: What we did in our
19 application -- again, on pressurized stress corrosion
20 cracking, there's an upper head issue and a lower head
21 issue. The upper head issue is, there's no
22 uncertainty involved. It's very specific. The

1 requirements are not being put in the regulations.
2 And so the only place I think that is challenged by
3 the intervenors is with respect to how we're managing
4 pressurized water stress corrosion cracking of the
5 instrument tubes in the lower vessel penetrations.

6 And you're correct, that issue has been
7 looked at by the NRC. The issue here really is it's
8 one that's still evolving. I mean, it's one where
9 there's still research going on. The original NRC
10 concern was with the upper head, because this was a
11 phenomena that was associated with high temperatures,
12 and initially it was thought there probably wasn't an
13 effect with the lower penetrations but people went out
14 and looked and they found, I think, cracking in one of
15 the reactors.

16 So the NRC expanded its concern and issued a
17 generic letter and said we need to look at it further;
18 in the interim we want everybody to do full metal
19 inspections. That's what we have. That's what's on
20 the CLB.

21 The GALL report addresses it exactly the way
22 we've addressed it in the application. In fact, what

1 we committed to in our application is what the GALL
2 report requires.

3 The GALL report, and this is NUREG 1801,
4 pages Roman Numeral IV.A2-4, A2-5, A2-7, different
5 places, say, for nickel alloy.

6 "For nickel alloy, comply with applicable
7 NRC orders and provide a commitment in the FSAR
8 supplement to submit plant-specific AMP to implement
9 applicable Bulletins and Generic Letters and
10 staff-accepted industry guidelines."

11 So what the GALL report tells applicants to
12 do is do exactly what we've done, credit the Generic
13 Letters and Bulletins and guidance that's out there
14 that's handling this issue in the interim and also
15 commit that while in the long-term the NRC has
16 finished the research and decided what else they want
17 us to do, we'll do them.

18 And so we've dutifully said exactly what the
19 NRC guidance asks us to say. I would suggest that
20 this is analogous to the way the NRC used to treat
21 what was known as generic safety issues and unresolved
22 safety issues.

1 Those were issues that were in and around
2 when the plants were initially licensed and the
3 Commission had to grapple how do we do initially
4 licensing when there's an unresolved issue, an issue
5 they categorized as unresolved.

6 It was addressed in a series of cases. Gulf
7 State Utilities, River Bend is probably the leading
8 case, ALAB-444, 5 NRC 760.

9 In essence what it says is the fact there's
10 an emerging issue when the NRC is doing research out
11 there is not an impediment to licensing. If somebody
12 wants to raise it, they can; but they really need to
13 explain why the NRC's interim solution is not good
14 enough. Just say what is some issue that's still
15 being subject to research is not enough to make an
16 admissible contention, show that there's a specific
17 risk for a plant and what the NRC is telling licensees
18 to do in the interim is not good enough.

19 Our whole basic response is here the NRC
20 issued a Generic Letter. They said do full metal
21 inspections. We're doing full metal inspections. Why
22 is it that what we're doing is not adequate to manage

1 this aging phenomena until the NRC finishes its
2 research, amends the ASME code and tells us to do
3 more.

4 >> JUDGE FROEHLICH: Care to respond?

5 >> MR. MAHOWALD: As we indicated in our
6 original petition, we do believe that the License
7 Renewal Application program commitment to do whatever
8 the NRC tells us to do does not demonstrate the
9 effectiveness of an Aging Management Program. We
10 believe that the License Renewal Application violates
11 10 CFR Section 54.21(a)(3) because it does not address
12 all 10 elements of an effective Aging Management
13 Program for the aging effects on nickel alloy
14 components and wells. So we stand by that original
15 contention.

16 >> JUDGE FROEHLICH: Staff wish to be heard.

17 >> MS. SIMON: Marcia Simon for the Staff.
18 With regard to the original contention, the asserted
19 violation of 54.21(a)(3) and not addressing the 10
20 elements, the 10 elements are in the standard review
21 plan, which is NUREG 1800. I believe they're in
22 Appendix A.

1 And 10 CFR 54.21(a)(3) does not require an
2 applicant to address those elements. It requires an
3 applicant to demonstrate the adequacy of the Aging
4 Management Program for the period of extended
5 operation.

6 And as I mentioned before lunch, this can be
7 done by a commitment, by stating that the Aging
8 Management Program is consistent with the GALL or
9 that, if enhancements are being proposed, that the
10 enhancements will be consistent with the GALL.

11 >> JUDGE FROEHLICH: Anything else?

12 >> JUDGE ARNOLD: No.

13 >> JUDGE HIRONS: Well, you actually
14 answered my question before I asked it. But you
15 quoted from what was in your response that you don't
16 have to answer all of the 10 elements, but you have to
17 have an effective Aging Management Program, and I was
18 going to ask you to expand on that a little, which I
19 think you just did.

20 >> MS. SIMON: I'll just add that if the
21 Applicant's Aging Management Program that they propose
22 was not consistent with the GALL, that is when they

1 would have to address the 10 elements. So as long as
2 they -- if they can state it's going to be consistent.
3 And the NRC staff does an audit to make sure that
4 there really are, that is consistent.

5 >> JUDGE HIRONS: Thank you.

6 >> JUDGE FROEHLICH: Moving now to
7 Contention 9. And this deals with piping systems,
8 buried systems that may convey or contain
9 radioactively contaminated water or other fluids
10 relating to plant safety.

11 I guess I'll start with the Petitioner and
12 ask specifically what piping systems this contention
13 has in mind. And after you name them, what
14 safety-related function those systems play.

15 >> MR. MAHOWALD: Your Honor, where we start
16 out with is the problem with the contention, or the
17 problem, excuse me, with the License Renewal
18 Application is we just don't know what piping systems
19 there are.

20 Because with respect to Section 3.2.2.9 of
21 the application, it states that -- well, we have
22 from -- it says "for steel, with or without coating or

1 wrapping, piping, piping components and piping
2 elements buried in soil, Section 3.2.2.9 of the
3 application states that the PINGP does not have any
4 steel, with or without coating or wrapping, piping,
5 piping components or piping elements buried in soil in
6 NUREG 1801 Chapter 5 Roman Numeral V systems.
7 However, Section A2.8," excuse me, "Sections A2.8 and
8 B.2.1.8 describe the new buried piping tanks and
9 inspection programs."

10 So our concern is, or our question is: What
11 does that program apply to? What systems does it
12 apply to?

13 And so, once again, we are essentially
14 stating a contention of omission, that we're not in a
15 position to identify those systems because it hasn't
16 been adequately identified and disclosed in the LRA.

17 So with respect to your other question, LRA
18 Section 2.3.3, identify several systems that could
19 have buried pipings or tanks and potentially contain
20 radioactive material during normal operation or as a
21 result of an accident or transient condition.

22 They include the chemical and volume control

1 system, component cooling system, cooling water
2 system, fire protection system, heating system, plant
3 sample system, spent fuel pool cooling system, waste
4 disposal system, and the water treatment system.

5 >> JUDGE FROEHLICH: I think what you want
6 me to do is to ask the Applicant to explain to me the
7 extent in which the Prairie Island facility has buried
8 piping, what type of systems utilize these buried
9 pipes and which pipes, if any, are within the scope of
10 the license renewal.

11 >> MR. LEWIS: Yes, I'll do that. Let me
12 just start with the explanation or response to the
13 assertion that our application doesn't identify what
14 buried piping is within scope.

15 The application identifies the components
16 that are within scope in a set of tables. There's a
17 table for each of the systems. And, therefore, for
18 example, Table 3.3.3.2-6 is the table for the cooling
19 water system. There's a table for the fire protection
20 system. There's a table for the fuel oil system.

21 On each of these tables they identify the
22 components that are within scope, the materials and

1 the environment. And so you can go through these
2 tables with respect to every system that is within
3 scope and you can see a component like piping and you
4 can see environment buried. And that tells you -- and
5 you can see the material, carbon steel.

6 So by looking through the tables, this is
7 the NRC's recommended format, this table format. All
8 you have to do is go through the table for each of the
9 systems. You look for buried, or run a word search
10 for "buried" and you'll see in these tables the
11 listing every time there's a system that has piping
12 that's buried and what is the material.

13 So does our application, and I can give you
14 specific pages, if you'd like. Those tables indicate
15 that the systems that have buried piping are the
16 cooling water supply, the cooling water system, the
17 fire protection system and the fuel oil system.

18 I'm limiting this to buried pipes with
19 water. There's also a plant station and instrument
20 air system that has buried piping. But obviously not
21 one that has fluence.

22 And none of these three systems has

1 radioactive water in them. I'm not sure I answered --
2 was that your entire question.

3 >> JUDGE FROEHLICH: I think we broke down
4 to which piping is buried. I think you've addressed
5 that. And then the last part of your answer indicates
6 that none of those buried pipes contain or could
7 contain radioactive fluids or could contain
8 contaminated water or radioactive fluids.

9 >> MR. LEWIS: That's correct.

10 >> JUDGE FROEHLICH: That's what I
11 understood.

12 >> JUDGE ARNOLD: First, let me ask: When
13 you say they don't contain radioactive fluid, does
14 that also include under accident conditions there's no
15 circumstances under which they could?

16 >> MR. LEWIS: The fire protection piping
17 system and fuel oil piping do not interface with any
18 radioactive contaminated systems. With respect to the
19 cooling water piping, only the intake piping is buried
20 and within scope.

21 The discharge piping is above grade until
22 there's a point, I believe, at which there's

1 above-grade dump. And there is buried piping below
2 that. But it's not relied on as being safety-related
3 because you have above-grade dump capability. So,
4 yes, there could be radioactive contamination in the
5 cooling water system discharge piping, but the portion
6 that's within scope and safety-related is above-grade
7 and not buried.

8 >> JUDGE ARNOLD: Okay. Thank you. Another
9 part of this contention had to do with what
10 inspections, and there seemed to be a desire on the
11 part of Petitioner that there be some sort of an
12 inspection to establish baseline conditions.

13 I'd like, first off, for the Petitioner to
14 explain, is that a requirement? If so, where it comes
15 from, and how exactly establishing baseline conditions
16 differs from a normal inspection.

17 >> MR. MAHOWALD: The basis for establishing
18 the baselines is to have a way to monitor the
19 effectiveness of your programs, because once you
20 establish your baselines you can ascertain whether --
21 and monitor the integrity and performance of the
22 underground piping.

1 >> JUDGE ARNOLD: I did see in the
2 description of the plan there will be some form of
3 inspection done on each of the systems in the 10 years
4 prior, just before the start of the extended licensing
5 period and another sometime within the next 10 years.

6 Would that inspection during the, what, in
7 the 10 years prior to license extension, provide a
8 baseline or would that in some way be in adequate?
9 Let me ask Petitioner first.

10 >> MR. MAHOWALD: It might be. But I guess
11 until we see it and evaluate it, we really don't know
12 what the baseline condition is going to be. So I
13 guess it's possible.

14 >> JUDGE ARNOLD: Let me ask Applicant now,
15 what's your opinion on baseline conditions and need to
16 know them.

17 >> MR. LEWIS: Okay. Let me just back up
18 one instance. We are committing to follow the GALL
19 program for buried pipes and tanks. It is the program
20 the NRC has determined to be adequate based on having
21 looked at many plants.

22 The concept of this inspection is that

1 piping that are properly protected by these coal tar
2 enameled coatings are really very well protected. And
3 when you're talking about service water system piping
4 which is well-designed massive piping that is very
5 well coated to prevent degradation, what you're doing
6 is, in essence, confirming that the coating remains in
7 effect and protective.

8 You're not trying to trend a corrosion rate.
9 This is not a wall-thinning exercise where you want to
10 know what's the thickness now and what is it later.
11 You are simply confirming that the very protective
12 feature of the coating remains in effect and,
13 therefore, you have confidence that this piping is
14 retaining its integrity in its ability to perform its
15 function.

16 You have baseline knowledge already. The
17 piping was installed. So every plant has very
18 specific specifications of the pipe wall thickness and
19 the coating thickness and the conditions. So you know
20 where it's meant to be, because it's meant to be in a
21 basically nondegraded condition.

22 Yes, you'll get further information in the

1 inspection prior to the period of extended operation.
2 But that, again, is not meant to be trending
3 wall-thinning; that shouldn't be occurring. It's
4 simply meant to be confirming that your protective
5 coatings remain in place and you'll do yet another
6 confirmation in the period of extended operation.

7 >> JUDGE ARNOLD: Thank you.

8 >> JUDGE FROEHLICH: I'd like to ask
9 Petitioner --

10 >> JUDGE HIRONS: Can you give me a couple
11 of examples of what these inspection programs consist
12 of or how they're done?

13 >> MR. LEWIS: They haven't been done at
14 Prairie Island yet, so I'm not sure how they will do
15 them. But the program hopes to be able to take into
16 account opportunistic inspections, because you really
17 want to avoid digging up piping unnecessarily. In
18 fact, every time you dig it up you're creating a
19 potential challenge to the coating. So at some point
20 you become counterproductive. You have to then make
21 sure that when you dig it up you don't damage the
22 coating. And these buried piping often are buried

1 under conditions where you make sure the soil around
2 them is noncorrosive and you provide other
3 protections. When you dig them up, you disturb all
4 that. So there's a desire not to overdo it, because
5 that itself is a challenge to the piping.

6 But typically -- and there is guidance. I
7 just can't remember. I'm sorry, I'll have to look
8 back at the GALL report. But the GALL report actually
9 itself provides you some guidance where you should
10 look. You should be looking at an area that's
11 representative of conditions where you might expect to
12 be more susceptible to degradation.

13 I think as far as how it's done, it would
14 simply be an excavation to look at the piping in a
15 location that there's some basis to believe is
16 representative. And I can, if you want, I'd have to
17 go back and look at the GALL report to see as far as
18 what.

19 >> JUDGE HIRONS: That's fine. I think
20 you're generally saying you're using the guidelines in
21 the GALL report.

22 >> MR. LEWIS: Yes, absolutely.

1 >> JUDGE FROEHLICH: To the Petitioner, I
2 note that you also fault the application because it
3 contains no provision for cathodic protection. Is it
4 your position, in light of what I read in the replies
5 from both the Applicant and staff, that a cathodic
6 protection plan should be part of the Aging Management
7 Program for the buried pipes?

8 >> MR. MAHOWALD: We're not quite sure on
9 that one yet.

10 >> JUDGE FROEHLICH: Just so I'm clear, in
11 the Applicant and Staff's reply, was it the position
12 or the statement that by implementing such a program
13 this could cause damage not only to these pipes but to
14 adjacent pipes or other pipes nearby? Was that the
15 gist of --

16 >> MR. LEWIS: Maybe the Staff's. I don't
17 think I put that in our answer. We didn't credit
18 cathodic protection because it wasn't a required
19 element of the GALL program. Our pipes are in fact
20 cathodic protected. They actually have cathodic
21 protection. We just didn't have to credit it because
22 it wasn't part of the GALL program.

1 >> JUDGE FROEHLICH: Staff wish to be heard
2 on the issue of the buried pipes?

3 >> MS. SIMON: The only thing I would do,
4 Your Honor, is just reiterate, probably reiterate from
5 our answer anyway. So I really don't think it's
6 necessary. Thank you.

7 >> JUDGE FROEHLICH: Let's move on, please,
8 to Contention 10. And this deals with the electrical
9 transformer and whether or not they should or
10 shouldn't be included in an Aging Management Plan. I
11 guess I'd begin with the Petitioner. Is this still a
12 viable contention?

13 >> MR. MAHOWALD: No.

14 >> JUDGE FROEHLICH: You've withdrawn
15 Contention 10?

16 >> MR. MAHOWALD: Yes, we have.

17 >> JUDGE FROEHLICH: All right. Then we can
18 move swiftly to Contention 11, dealing with flow
19 accelerated corrosion.

20 >> JUDGE HIRONS: I wanted to ask a question
21 of Petitioner with regard, the Checkworks Code or
22 program is at the heart of this contention. And

1 Petitioner mentions, see, I believe it's on page 41,
2 as far as clearly the validity of this code depends on
3 the amount of operating experience and data that is
4 put into the code.

5 And they mention 10 to 15 years as a minimum
6 number amount of time to get data into the code,
7 operating data into the code. And in response to
8 that, the applicant has mentioned that the Checkworks
9 Code has something of the order of 20 years operating
10 experience data at this point.

11 So I'd like the Petitioner to respond
12 whether you think this is still not adequate or is
13 more data needed?

14 >> MR. MAHOWALD: I think with respect to
15 the time issue, the 10 to 15 years was actually what
16 was in the Indian point decision. But we still
17 believe -- the Indian Point contention. But we still
18 think that the data, at least, or the disclosure is
19 insufficient.

20 >> JUDGE HIRONS: But you did reference the
21 10 to 15 years for Prairie Island as being applicable
22 to Prairie Island as well?

1 >> MR. MAHOWALD: Yes, we did.

2 >> JUDGE ARNOLD: I have no questions on
3 this.

4 >> JUDGE FROEHLICH: We have two more
5 elements, two more items to discuss this afternoon.
6 We'd like to hear further argument on the Motion to
7 Strike and then opportunity for closing arguments.
8 What I would propose at this point is to take up the
9 Motion to Strike. The parties can elaborate or add to
10 pleadings that are already before us.

11 It will be the Board's intention to take
12 back to Washington the issues that have come up in the
13 discussion of the contentions, the original standing
14 issue that was raised by the Staff in its pleadings,
15 and the motion to strike, put this all in our single
16 order on the contentions.

17 I'll alert the parties that under the
18 current schedule that would be due on or about
19 November 5th, when we get back it may take us a little
20 longer if so we'll issue an order to the Commission
21 and the parties the date we'll have the our order out.

22 I'd like to turn now to the Motion to

1 Strike. Northern States being the Movant. We'll hear
2 from you first, followed by the Staff and reply from
3 the Petitioner.

4 >> MR. LEWIS: I'll keep this very short. I
5 mean the Commission has spoken to this issue twice;
6 that a reply is not an appropriate vehicle to provide
7 new bases to a contention to try and correct the
8 absence and support from a contention or to recast the
9 contention to raise new issues.

10 The Indian Community is certainly correct
11 that it is possible to have some elaboration, but that
12 is what the NRC has indicated, the Commission has
13 indicated narrow legal argument on why its contentions
14 are admissible. Not new bases, not new declarations
15 provided for the first time in a reply.

16 And I can't think of anything more clearer
17 than an inadmissible attempt to supplement and provide
18 missing bases than providing a declaration in a reply.
19 And, similarly, even today the references to the Swiss
20 study and other new allegations, that under the
21 Commission's precedent allowing that, simply
22 eviscerates the rules, by allowing an intervenor to

1 ignore the initial threshold requirements and coming
2 in at a later stage. And, once more, from Applicant's
3 perspective, it denies us the effective opportunity to
4 really respond to the allegations and explain why they
5 aren't within the scope or why they don't have bases.

6 >> JUDGE FROEHLICH: Mr. Lewis, at least on
7 that point you just raised, the Swiss study did come
8 in on the reply. But the other two studies I should
9 have alerted you, I guess, or did alert you to where
10 they were coming from or what they were -- or where
11 they were going with that.

12 So is the Motion to Strike solely to the new
13 study, the Swiss study, or to the initial two studies
14 that were included?

15 And then I guess my question is: Isn't that
16 sufficient to alert you, and I guess the Staff, to the
17 fact that this is the kind of an argument that they
18 were making and these were the types of arguments that
19 you should be able to reply to?

20 >> MR. LEWIS: I don't believe we
21 objected -- and we specified in our motion very
22 specifically the portions we objected to. And I

1 believe that all the portions we objected to were
2 things that were not referenced in the new study.

3 I do think it's not legitimate to reference
4 one study and then in a later reply come in with a
5 different one, because it has basically denied us the
6 right to provide a response. It takes a while to look
7 at and understand references and whether they're
8 supportive and be able to argue them. And Applicants
9 and the Staff deserve the opportunity to do that in
10 the written answers and not on the fly in a prehearing
11 conference.

12 So I would submit that what the Commission
13 said should be taken at face value, which is that the
14 reply should be used for logical legal responses to
15 the contentions and not an effort to supplement the
16 bases or proffer missing support.

17 >> JUDGE FROEHLICH: Thank you. If we could
18 address, I guess, a bit of the contentions that were
19 raised in the notification.

20 With Contention 1, with the archeological
21 sites and so on, I guess there was a certain amount of
22 material that was available to the Petitioner when

1 contentions were due and evidently there was other
2 material that came into their possession afterwards.
3 Could you elaborate on which items legitimately came
4 in afterwards that they would not have had a chance to
5 include in their original petition?

6 >> MR. LEWIS: I believe the only document
7 that was provided to the Indian Community after the
8 contention came in, but I'm not sure -- from my
9 knowledge, the only document that was given to them
10 after the contentions came in was our follow-up
11 assessment performed at their request. It was a study
12 by graduate student called Emily Hildebrandt, which
13 was providing further information based on a
14 literature search and search of files in the
15 universities to try and pull together every piece of
16 literature on the archeological studies that had
17 occurred.

18 That was provided afterwards. But I would
19 submit to you that the NRC does have rules for
20 amending contentions and for filing late filed
21 contentions, and if indeed there is new information
22 provided later, the appropriate course is to move for

1 leave to amend the contention and explain the good
2 cause.

3 That then allows the other parties to
4 respond to identify whether it was indeed new
5 information. Because a lot of information in Miss
6 Hildebrandt's report, of course, is also in the 106
7 Group report. And, in addition, all of her report is
8 in fact based on survey documents and other historic
9 information that's available in a number of sources,
10 in particular in the Office of State Archeologist. So
11 we might well be able to say if there had been a
12 request for a late contention, this is not new at all,
13 this is a matter of public record.

14 And we just have not had that opportunity.
15 So the appropriate course, if there is indeed new
16 information that comes in after the contention, is to
17 come to the Board and say we need to amend our
18 contention, here's the good cause for it, and then
19 that allows us to respond, not only to whether there's
20 good cause but to the substantive allegations.

21 >> JUDGE FROEHLICH: Petitioner, I guess you
22 would view this material as being amplification of

1 your original contention and material that came to you
2 after the deadline.

3 >> MR. MAHOWALD: Correct, Your Honor. We
4 would also point out that we do believe that our
5 original contentions did provide adequate facts to
6 support, to establish the basis of our contentions and
7 to create disputes of fact on those issues, and that
8 the subsequent efforts to amplify those arguments in
9 the reply are completely permissible; because, again,
10 obviously we were mindful of the threshold
11 requirements. We believe we achieved those. But
12 those aren't sort of the gatekeeper from here on in
13 that we can't add new information and new detail to
14 support our contentions, especially when that
15 information comes to us after the deadline for
16 Petitioner to intervene. So that's the Community's
17 position on that point.

18 >> MR. LEWIS: I actually do have make a
19 correction. Because I misspoke. I said that Miss
20 Hildebrandt's report was provided to the Indian
21 Community after they filed the petition. I was
22 looking at the dates. In fact, we gave it to them

1 four days before. That's a very short time, but it
2 was not given to them afterwards.

3 It was given to them before. There's an
4 August 14th letter from Xcel to Mr. Ron Johnson
5 providing that draft report. And it's still in draft.
6 So we actually provided it before the intervention
7 petition.

8 >> JUDGE FROEHLICH: Any reply or comment?

9 >> MR. MAHOWALD: Sure. I guess four days
10 in advance of a petition to intervene, I guess,
11 technically that particular report would have been
12 before the deadline. But the substance of what the
13 items we referenced in our reply was information that
14 was provided during the site audit visit on
15 August 21st, again, three days after the deadline to
16 file our petition.

17 >> JUDGE FROEHLICH: Staff wish to be heard?

18 >> MS. MIZUNO: Yes, Your Honor. With
19 respect to Contention 1, we agree with Northern States
20 Power that if there is new information that changes
21 the situation such that a new contention could be
22 brought, then the rules provide for late-filed

1 contentions. And they provide for contentions.

2 But in this case the Petitioner did not
3 avail themselves of those avenues. And, therefore, we
4 believe that the Motion to Strike is appropriate.

5 Particularly with respect to Contention 1.
6 We've split up the contentions as you understand, so
7 if there are issues you have with respect to specific
8 contentions on the Motion to Strike, we would probably
9 divide our answer among the three of us.

10 >> JUDGE FROEHLICH: Okay. Is there
11 anything you would like to add to the Motion to Strike
12 or the argument on it? If not, I'll just talk to
13 Petitioner one last time on their response and then
14 we'll take up the Motion to Strike as part of our
15 ruling on the admission of the contentions.

16 >> MR. LEWIS: No, sir, we set out our
17 argument as well as we could.

18 >> JUDGE FROEHLICH: Petitioner.

19 >> MR. MAHOWALD: I believe we've set forth
20 our position as well adequately in our brief. Again,
21 we have satisfied our pleading burden as a threshold
22 matter. We do believe that each and every one of the

1 items that we referenced in our reply were legitimate
2 amplifications of our original contentions.

3 So, again, this is not an attempt where
4 there was an after-the-fact effort to impermissibly
5 remediate any of the deficiencies in any of the
6 contentions.

7 >> JUDGE FROEHLICH: In that case, let's
8 move to a closing argument. I'd like to hear, I
9 think, from the Applicant followed by the Staff,
10 followed by the Petitioner, as closing.

11 >> MR. LEWIS: I hope I don't disappoint
12 you, I was going to forego a closing argument unless
13 you really want me to talk for another 15 minutes.

14 >> JUDGE FROEHLICH: You're certainly free
15 to suspend closing argument, if you don't care to
16 avail yourself of it.

17 Does Staff care to?

18 >> MS. MIZUNO: Yes, Your Honor. And I
19 would ask your indulgence to return to that very
20 uncomfortable question regarding standing that we
21 discussed earlier.

22 I appreciate your patience, sirs. We would

1 like to remind you, as well know, the NRC staff cannot
2 waive the standing issue. The Applicant cannot waive
3 the standing issue. It is up to the Board to rule on
4 standing.

5 And in our view of ourselves, partly as the
6 entity that created these rules of practice, we see
7 ourselves in a sense as gatekeepers. And so where
8 there is an issue with respect to standing, we believe
9 that we have to bring it to the Board's attention.
10 And we're not doing this as a result of any kind of
11 personal animosity and certainly not with respect to
12 any animosity with respect to the tribe. And
13 particularly not in any attempt to cast any kind of
14 doubt as to Mr. Mahowald's reputation and his
15 representation that he does in fact represent the
16 tribe. That is not our desire at all.

17 But we do see an issue because to this day
18 we do not -- the Board does not have a communication
19 from a tribal official that states that this
20 litigation is authorized. And that is what we felt
21 that we were required to bring to the Board's
22 attention.

1 >> JUDGE FROEHLICH: Although we had a -- we
2 had agreed we wouldn't interrupt you. I beg your
3 indulgence, and say: What in the regulation requires
4 them to submit more than what they have in this docket
5 so far? That's what I can't find.

6 >> MS. MIZUNO: Your Honor, I would say that
7 you -- I can't find it either.

8 >> JUDGE FROEHLICH: Aren't there certain
9 obligations or responsibilities that members of the
10 bar have when they report before a federal body and
11 they say they represent a party; and they in fact
12 shouldn't represent that party, aren't there severe
13 sanctions within the bars of all the states that would
14 come down upon counsel for the Community?

15 >> MS. MIZUNO: Yes, I understand. I see
16 where you're coming from.

17 >> JUDGE FROEHLICH: This is not a pro se,
18 saying I purport to represent such and so. This is an
19 attorney, member of the bar, comes before us saying I
20 represent the Community. And he has also filed a
21 declaration which says that the tribe, the Community
22 has passed a resolution authorizing him to present

1 their views. Shouldn't that be enough coming from
2 counsel?

3 >> MS. MIZUNO: In the instance of the
4 initial ISFSI board proceeding, it was determined not
5 to be enough. That was a --

6 >> JUDGE FROEHLICH: Is that a board
7 position?

8 >> MS. MIZUNO: Yes, that's a board.

9 >> JUDGE FROEHLICH: A licensing board
10 position, not a commission?

11 >> MS. MIZUNO: That's correct.

12 >> JUDGE FROEHLICH: That's not binding on
13 this Board.

14 >> MS. MIZUNO: Yes, I understand that, Your
15 Honor.

16 >> JUDGE FROEHLICH: Thank you.

17 >> MS. MIZUNO: Very well. May I address a
18 couple of --

19 >> JUDGE FROEHLICH: Yes. I'm sorry, I
20 interrupted. I wanted to put this one to rest.

21 >> MS. MIZUNO: No trouble, Your Honor.

22 With respect to NEPA issues, we would like

1 to emphasize the point that under the National
2 Environmental Protection Act, it is the NRC's action
3 of approving a license renewal. If we do, we have to
4 be able to say what the environmental impact of that
5 are.

6 NEPA does not require the Applicant to do
7 anything. It requires action on our part, and what
8 the Applicant is filing in its Environmental Report is
9 not required under NEPA.

10 What it does, it assists us. But ultimately
11 it is the Agency that, the Commission, that has to
12 issue an Environmental Impact Statement.

13 And this idea is reflected in the regulation
14 at 10 CFR 51.41, 10 CFR 51.41, which states that a
15 Commission may require an applicant for a permit,
16 license or other form of permission or amendment to,
17 or renewal of a permit, license or other form of
18 permission, or petitioner for rulemaking, to submit
19 such information in order -- to submit such
20 information to the Commission as may be useful in
21 aiding the Commission in complying with Section 102.2
22 of NEPA. The Commission will independently evaluate

1 and be responsible for the reliability of any
2 information which it uses.

3 So the discussion of what exactly is
4 required of the applicants under the regulation
5 Subpart 51 which discussed the Environmental Report,
6 the Staff is of the opinion that the material that was
7 submitted was sufficient for us to be able to do our
8 work.

9 And we just want it to be very clear that
10 NEPA does not apply to the Applicant. It applies to
11 us.

12 With respect to the issues regarding the
13 safety and engineering questions, largely we have
14 addressed those issues in our answer, in our reply,
15 where we have stated that in various instances some of
16 them lack support. Some of them lack a basis. Some
17 of them lack materiality and fail to raise a genuine
18 issue of fact or law.

19 And we're comfortable standing on our
20 written submissions. That concludes our concluding
21 statement, Your Honor.

22 >> JUDGE FROEHLICH: Counsel, I thank you.

1 Petitioner, you have 10 minutes or so to
2 amplify your answer to the Motion to Strike and any
3 other matter which you wish to address.

4 >> MR. MAHOWALD: Thank you. First off, I'd
5 like to add one more fact for the Board's
6 consideration with respect to this standing issue.

7 With all due respect to counsel for the NRC,
8 under the laws of the Prairie Island Indian Community,
9 a quorum of the tribal council is authorized to act on
10 behalf of the tribal council. They are not required
11 to do each and every action by formal writing, whether
12 it be by a written resolution or some sort of
13 declaration that would be acceptable to the NRC.

14 The tribal council is authorized under the
15 laws of the Prairie Island Indian Community to make
16 formal action on behalf of the Community by a motion.
17 The motion that was cited in my August -- actually,
18 September 19th declaration, I believe it was, was a
19 motion that was passed by a quorum. Actually, a
20 unanimous 5-0 vote of the Prairie Island Indian
21 Community tribal council.

22 So as an employee of the Prairie Island

1 Indian Community, and as an attorney representing them
2 in this proceeding, I'm obviously obligated to follow
3 the directive of the duly appointed tribal council,
4 which, again, was passed by a 5-0 motion on July 16,
5 2008.

6 So, again, I don't think the Community would
7 take the view that it does not need to provide a note
8 to satisfy the NRC. And I suspect that the state of
9 New York probably didn't have to do so in the Indian
10 Point decision.

11 One item that I would like to address in
12 connection with the Motion to Strike: There was, of
13 course, some argument about the Petitioner raising new
14 items. Now the Applicant, today, talked about
15 photographs, that it was ready, willing and able to
16 provide the Board.

17 Again, we would encourage the Board to look
18 at those, because I think it would touch highly on the
19 contention that we raised, our first contention, with
20 the ever-shifting nature of what ground has been
21 historically disturbed and what hasn't and when and
22 under what circumstances that parking lot was erected

1 and if indeed that parking lot is the parking lot that
2 will store and house equipment for the Steam Generator
3 Replacement Project.

4 But, again, I bring that up because it was
5 first raised by counsel for the Applicant. But I
6 think there's an interesting issue that we hope to get
7 a chance to follow up on down the road.

8 The other item that I would also like to say
9 with respect to the Motion to Strike is, yes, we
10 did -- there was delivery of Miss Hildebrandt's
11 preliminary draft study on or about August 14th. That
12 was provided to us in confidence and confidential, and
13 originally the intent was that the Prairie Island
14 Indian Community would work with Xcel to finalize
15 that, offer its comments before that was passed on to
16 the NRC.

17 So we have never thought that we could go
18 ahead and utilize that particular report based on our
19 agreement to treat it as a confidential document.

20 And, again, that, as we indicated earlier,
21 that issue itself is one that is being addressed
22 between NSP and the tribal council. They will be

1 meeting to discuss those findings, which, again, came
2 as some surprise to the president of the tribal
3 council and the assistant secretary/treasurer when
4 they were participating in the site audit visit.

5 Again, if we need to supplement our
6 Contention No. 1 with this late-acquired evidence,
7 we'd be happy to do so if the Board deems it
8 necessary. We'll obviously await your ruling and
9 proceed accordingly, if that is necessary.

10 The other items that I would like to --
11 there are a couple of other items that I would like to
12 address, and it ties really, ultimately, with sort of
13 a thread that runs through each and every one of our
14 contentions.

15 Obviously, the rules of procedure and the
16 legal requirements for this body require that we parse
17 them out and deal with them individually. But from
18 the Community's perspective, these represent a
19 cumulative risk, a cumulative risk that is borne
20 disproportionately by the Prairie Island Indian
21 Community, given their close proximity to the PINGP.

22 They're in a very unique set of

1 circumstances that raise all sorts of issues. But
2 these are cumulative and integrated risks that,
3 although parsed out separately under the rules, do
4 represent an integrated risk that is uniquely borne by
5 the Prairie Island Indian Community.

6 And with respect to the contentions that
7 we've raised, we have pointed out omissions,
8 discrepancies, deficiencies in the license renewal
9 application and the Environmental Report that,
10 frankly, make it very difficult for us to state
11 contentions on some sets of circumstances.

12 But under the law governing, that in and of
13 itself is a viable, admissible contention if we point
14 out what the law requires and where the License
15 Renewal Application or the Environmental Report is
16 deficient.

17 So with respect to Contention No. 4, as it
18 relates to the piping issue as well, one of the things
19 that the Community continues to believe is necessary
20 is that under Section 316-B, that the best available
21 technology needs to be used for all monitoring,
22 whether it's for groundwater, thermal discharge, the

1 adequacy of the piping, and the monitoring, the Aging
2 Monitoring Programs.

3 We want to make sure this is a safe plant
4 and that the people in closest proximity to it are not
5 put in undue risk.

6 A couple other points that I'd like to
7 follow up on as well: Early on Judge Arnold was
8 asking questions about how much information is enough
9 to satisfy the Applicant's obligation. That, of
10 course, ties back to our contentions of omission.
11 That's not a fine line, but we certainly need enough
12 information to satisfy the basic elements of what's
13 required. Then it's up to the NRC to test and refine
14 that information.

15 For example, archeological and historical
16 information, no information was provided on where the
17 refurbishment activities would take place relative to
18 previously disturbed areas and undisturbed areas.

19 On endangered species, not enough
20 information to justify the conclusion of no effect on
21 Higgins-Eye or avian species. Then on environmental
22 justice, there was no information at all on the

1 impacts coming from the Applicant.

2 On endangered species, we don't believe that
3 the Category 1 finding on transmission lines defeats
4 the validity of the Community's intention on the
5 Category 2 issue of endangered avian species.

6 There's simply not adequate information in
7 the Environmental Report to reach any conclusion on
8 the effect of the transmission lines on endangered
9 avian species. It's all very conclusary, with no
10 rationale or evidence for the conclusion that there is
11 no impact.

12 However, we would desire to file for waiver
13 and demonstrate special circumstances if the Board
14 does not adopt our Category 2 argument.

15 Judge Hirons asked why we use the term
16 "operational changes" in connection to this
17 contention. It was part of a question on why the high
18 avian mortality of the 1973 to 1978 period
19 mysteriously dropped, forming the basis for
20 Applicant's conclusion that there was no impact on
21 endangered species. Was it because they did something
22 different in regard to the transmission lines? We

1 couldn't figure out what that would be. Or did they
2 simply stop looking for dead birds?

3 In other words, some evidence that they
4 actually do know what's happening with avian mortality
5 and endangered species.

6 On Contention 4, we would file a waiver
7 claiming special circumstances relative to the PINGP
8 with the focus of releases from the plant, because the
9 focus of releases from the plant is primarily on the
10 Community and studies of higher incidence of cancer of
11 Native Americans warrant some closer look at potential
12 adverse health impacts specific to the Prairie Island
13 Indian Community.

14 On environmental justice, there's an
15 implicit requirement in NRC practice that the
16 Applicant evaluate the impacts on minority
17 communities, specified in Reg Guide, Commission Policy
18 Statement on Environmental Justice will be treated as
19 a normal NEPA review issue.

20 We interpret this as requiring the
21 traditional process of the Applicant submitting
22 information in its ER on potential impacts. We

1 suspect that this would be clearer if the Executive
2 Order on Environmental Justice would have been
3 promulgated when Appendix B was added to Part 51.

4 But the timing was off. See footnote 6 in
5 Appendix B. And the Agency has never clarified the
6 Applicant's responsibilities on environmental justice
7 in Part 51. But the NRC practice as reflected in the
8 Reg Guide is clear that the Applicant should provide
9 information in the Environmental Report on potential
10 impacts to minority communities.

11 The applicant in this case has not done
12 this. Thank you for your time.

13 >> JUDGE FROEHLICH: Thank you.

14 Well, I just would like to say, and my
15 colleagues have said to me, that this oral argument
16 has been helpful to this Board; that we appreciate the
17 efforts the Staff and the Applicant and Petitioner
18 have put into their arguments and to the
19 clarifications they have given us.

20 As I had mentioned earlier, we're going to
21 take this record back to Washington and come out with
22 our decision addressing the initial standing issue,

1 the 11 contentions, one withdrawn, the 10 contentions
2 that are before us, as well as the motion to strike.
3 I thank you all for your participation and your help
4 in this matter. We stand adjourned.

5 (Proceedings concluded at 2:25 p.m.)

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1 This is to certify that the attached
2 proceedings before the United States Nuclear
3 Regulatory Commission in the matter of Northern States
4 Power Co. (formerly Nuclear Management Company, LLC.)
5 (Prairie Island Nuclear Generating Plant, Units 1 and
6 2) Docket Nos. 50-282-LR and 50-306-LR, Hastings,
7 Minnesota were held as herein appears, and that this
8 is the Interim Draft transcript thereof for the file of the
9 United States Nuclear Regulatory Commission taken and
10 transcribed by me or under the direction of the court
11 reporting company, and that the transcript is a true
12 and accurate record of the foregoing proceedings.

13

14 LORRAINE CARTER, RPR

15 Official Reporter

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18 CAPTION REPORTERS Inc.

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