

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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)) "Final Official Transcript"
)

HASTINGS, MINNESOTA

BEFORE :

WILLIAM J. FROEHLICH, Chairman
 DR. GARY S. ARNOLD, Administrative Judge
 DR. THOMAS J. HIRONS, Administrative Judge

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P R O C E E D I N G S

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

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

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

Today's proceeding is publicly noticed by the ASLBP order issued on October 16, 2008. That orders was published in the Federal Register on October 22nd, 73 Federal Register 63032, and the order lays out in general terms what we will be discussing here today and the types of questions we would like to have answered at this oral argument.

For the record, today's date is Wednesday, October 29th, 2008, and it's 9:04 a.m., in Courtroom 2-E at the Dakota County

1 Judicial Center in Hastings, Minnesota.

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

8 To my right is Judge Thomas Hirons. Judge Hirons has a
9 Ph.D. in nuclear engineering from North Carolina State
10 University and has worked for the Los Alamos National
11 Laboratory for 32 years.

12 Before going to Los Alamos, Judge Hirons was an assistant
13 professor of mechanical and nuclear engineering at the
14 University of Notre Dame.

15 As I mentioned earlier, my name is William Froehlich.
16 I've been designated Chairman of this Atomic Safety and
17 Licensing Board. I'm a lawyer by training, with 32 years of
18 federal administrative and regulatory law experience. And
19 because I'm a lawyer and one of the judges here, I serve as
20 chair on procedural issues.

21 I'd also like to introduce a few others people from the
22 Atomic Safety and Licensing Board panels.

1 To my far left is our law clerk, an attorney, Matthew
2 Rottman. We have two administrative and logistical support
3 members with us, Ms. Patricia Harwich over in the corner, and
4 Joe Deucher, who runs the computer equipment and audiovisual
5 equipment.

6 Mr. Deucher has been working with the Dakota County court
7 officials to web stream today's proceedings.

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

12 Before we begin, I'd like to thank the folks from the
13 Dakota County Judicial Center who made it possible for us to
14 use their facilities and for their help in coordinating all
15 matters relating to this oral argument.

16 Commander Blair Anderson, Chief Deputy Dave Bellows, and
17 especially Cary Nygaard from the Dakota County Facilities
18 Office.

19 Our court reporters today are Ms. Lorraine Carter and Ms.
20 Denise Phipps. Denise Phipps is starting first, and Lorraine
21 will kick in at the appropriate time.

22 There will be an electronic transcript made of our

1 argument today, and it will be posted on the NRC website
2 shortly.

3 At this point, perhaps, I would ask the parties to
4 introduce themselves. I'd like for lead counsel to introduce
5 themselves, state your name and your client, introduce any
6 counsel who may be participating with you in the argument
7 today.

8 Could we start please with the Petitioner?

9 >> MR. MAHOWALD: Good morning. My name is Philip
10 Mahowald. I'm general counsel for the Prairie Island Indian
11 Community. I'm here today on behalf of the Prairie Island
12 Indian Community. With me at the table is Mr. Christopher
13 Grimes, who is a nuclear engineer consultant, retained by the
14 Community to assist us in this matter. I'd also like to
15 recognize Tribal Council President, Ron Johnson, who is sitting
16 in the audience today.

17 >> JUDGE FROEHLICH: For the Applicant, please.

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

22 >> JUDGE FROEHLICH: For NCC Staff.

1 >> MS. MIZUNO: For the NRC staff, Office of General
2 Counsel, Beth Mizuno. And with me today is David Roth, also
3 with the Office of General Counsel, and Marcia Simon with the
4 Office of General Counsel.

5 We are accompanied today with Richard Plasse, Nathan
6 Goodman and James Davis. They are with the NRC Division of
7 License Renewal.

8 >> JUDGE FROEHLICH: Now just a few words about
9 housekeeping and introductory material before we start,
10 housekeeping matters. Please turn off your cell phones, set
11 them on vibrate. And if you have any conversations on the cell
12 phone or otherwise, please take them out in the hall.

13 The media is welcome. We are electronically connected,
14 but there may be people from the media here. The NRC Office of
15 Public Information, Ms. Prema Chandrathil is here.

16 If you have any questions or need an additional
17 information about the proceedings, about what is happening
18 today or what will happen along the license renewal process,
19 feel free to speak with Prema.

20 Members of the public are free to observe the proceedings
21 today and all NRC hearings, but only counsel for the parties
22 would be allowed to speak today, because it is on their filed

1 pleadings that the Board has questions.

2 For the benefit of the public or any media, I thought it
3 might be useful to spend just a few minutes to explain the role
4 of the Atomic Safety and Licensing Board, a brief history of
5 the proceeding and the purpose of today's argument.

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

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

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

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

5 So the important point I think I'd like to make is, when
6 we talk about the NRC here, we're really talking about three
7 different entities, the commissioners back in Washington, the
8 Staff represented here, and the ASLBP, the board hearing the
9 case. The proceedings we're discussing today discuss, deals
10 with the application dated April 11th, 008, filed by Northern
11 States Power Co. to renew its operating license for the Prairie
12 Island Nuclear Generating Plant.

13 The current license expires on August 9th, 2013. And
14 Northern States -- for Unit 1. And Northern States seeks to
15 renew that for 20 years. The Unit 2 license expires October
16 29, 2014, and Northern Seeks to extend that for 20 years to
17 October 29, 2034.

18 On May 6, 2008, the NRC published a Notice of Receipt of
19 the license renewal application. On June 17th, the NRC
20 published a Notice for Acceptance of Docketing, and provided an
21 opportunity for hearing on the issue.

22 On August 18th, Prairie Island Indian Community filed a

1 timely petition to intervene in this matter.

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

6 The Board will decide whether the Prairie Island Indian
7 Community request for hearing should be granted. We will
8 decide whether or not the Prairie Island Indian Community has
9 filed what's known as admissible contentions.

10 The NRC has a regulation that we're all bound to apply.
11 It's found at 10 CFR 2.309(f)(1), and that includes six
12 criteria that every contention that's admitted must meet.
13 We'll go through each contention that was filed and see whether
14 it meets those six criteria.

15 The criteria include a number of different things. For
16 example, provide a specific statement or law or fact to be
17 raised or controverted. A brief explanation of the basis for
18 the contention. The Petitioner must show that the contention
19 is within the scope of the proceeding, and is material to the
20 findings of the NRC must ultimately make in this matter.

21 Finally, the Petitioner must provide a concise statement
22 of the alleged facts or expert opinions which support the

1 Petitioner's position on the issue and which the Petitioner
2 intends to rely on at hearing, together with references to
3 specific sources or documents on which the Petitioner intends
4 to rely.

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

8 So today we'll be talking and probing the Petitioner about
9 each of the contentions and trying to figure out whether they
10 meet those six criteria I just outlined. If they meet the six
11 criteria, we'll rule that the contention is admissible. If
12 they don't, we're obligated to rule that they're not
13 admissible.

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

19 At this point I'd like to ask my two colleagues if there's
20 anything they'd like to raise at this point if they have any
21 comments.

22 >> JUDGE HIRONS: No.

1 >> JUDGE ARNOLD: No.

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

5 Each one will get 15 minutes to give an uninterrupted
6 opening statement for us, and then we'll turn to review the
7 admissibility of each individual contention.

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

12 So that there will be some contentions for which we don't
13 have any contentions, on those contentions we'll allow the
14 parties to make a statement if they wish explaining or
15 amplifying their position.

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

21 Our law clerk, Matthew Rottman, will keep time on this.
22 And he has a one-minute warning card. He'll hold that up. I'd

1 ask when you see that card, you finish up your sentence and
2 end your presentation. We'll try to keep this on schedule.

3 Does anyone here, any of the parties have any questions or
4 concerns about the procedures I've outlined? Hearing none,
5 let's begin. I'd like please an opening statement from the
6 Petitioner, Mr. Mahowald.

7 >> MR. MAHOWALD: Would the Board prefer that we
8 stand?

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

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

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

23 The Community is concerned that the renewal of the PINGP

1 license may result in a detrimental effect to the health and
2 safety of the Community members and also cause an adverse
3 impact on the environment.

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

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

15 It is not the Community's role to fill in the holes and
16 omissions of the License Renewal Application or the
17 Environmental Report. That is the Applicant's responsibility.

18 The Community believes that each of its contentions state
19 a viable, admissible factually supported contention.

20 Five of our contentions are based on deficiencies in NSP's
21 environmental report. NSP has failed to adequately disclose
22 information required under 10 CFR Part 51. The ER fails to

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

4 The Environmental Report Severe Accident Mitigation
5 Analysis underestimates the cost of a severe accident.

6 The Environmental Report fails to include complete and
7 adequate information and analysis on endangered and threatened
8 species.

9 The Environmental Report fails to consider the disparate
10 impact of higher than average cancer rates and other adverse
11 health impacts on the Prairie Island Indian Community.

12 The Environmental Report contains a seriously flawed
13 Environmental Justice Analysis that does not adequately assess
14 the impacts of the PINGP on the Prairie Island Indian
15 Community.

16 The five remaining contentions address the deficiencies in
17 NSP's License Renewal Application. NSP has failed to
18 adequately address issues required by 10 CFR Part 54.

19 In particular, the License Renewal Application does not
20 include an adequate plan to monitor and manage the effects of
21 aging for containment codings.

22 The License Renewal Application does not include an

1 adequate plan to monitor and manage the effects of aging due
2 to embrittlement of the reactor pressure vessel and the
3 associated internals.

4 The License Renewal Application program commitment to do
5 whatever the NRC tells them to do does not demonstrate the
6 effectiveness of an aging management program for managing
7 primary stress corrosion cracking from nickel alloy components.

8 Four, the License Renewal Application does not include an
9 adequate plan to provide inspection and monitoring for
10 corrosion or leaks in all buried systems, structures and
11 components, that may convey or contain radioactively
12 contaminated water or other fluids and/or may be important for
13 the plant safety.

14 And, finally, the License Renewal Application does not
15 include an adequate program for managing flow accelerated
16 corrosion.

17 The Community has endeavored to work with NSP to address
18 the Community's concerns, and even offered to review NSP's
19 Environmental Report before it was filed to ensure the
20 Community's interests were adequately disclosed and protected.
21 NSP declined.

22 After NSP filed its License Renewal Application, the

1 community again sought to work with NSP on these issues in
2 order to avoid, if possible, having to file a petition to
3 intervene. Those efforts were not fruitful and the Community
4 made the decision to file its petition to intervene which was
5 approved by motion of the tribal council.

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

10 First, the protection of burial mounds and other areas of
11 cultural, historic or spiritual significance is of vital
12 importance to the Community.

13 The staff meeting nearly one year ago, the Community
14 raised concerns about burial mounds after reviewing the 106
15 Group's map that showed that the location of the cooling towers
16 overlap with a known burial mound group.

17 For months, the Community sought an explanation from NSP.
18 But it wasn't until the Archeological Environmental Site Audit
19 that NSP's representatives announced that six burial mounds
20 were indeed destroyed during the construction of the cooling
21 towers.

22 We also learned, during that site visit, that two

1 previously unknown sites, a burial mound site and an
2 artifacts gather, were discovered during the construction of
3 the discharge channel in the 1980s.

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

7 The Environmental Report fails to include information
8 sufficient to make an accurate assessment of whether any
9 historic or archeological properties will be affected by the
10 proposed license renewals.

11 The Community is also concerned about the health and
12 safety of its youngest most vulnerable members, since children
13 are more susceptible to ionizing radiation than adults.
14 Particularly for children, there is no safe level of exposure
15 to radiation.

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

21 This was even though the emissions from those plants
22 during the normal operations were low.

1 The Ulm Physician's Initiative issued a warning on
2 January, in January of 2008 following up on the KiKK study, and
3 said, pointing out that the children living near German nuclear
4 power plants have a 60 percent increased risk of cancer and 121
5 percent increased rate of Leukemia. These are truly alarming
6 findings.

7 The Ulm Physician's Initiative pointed out the need to
8 critically re-examine previous assumptions about radiation risk
9 and emissions exposure limits and called for improved
10 monitoring of emissions.

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

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

1 relicensed for an additional 20 years.

2 This study would also include a detailed monitoring of all
3 radionuclide emissions, including the release of tritium and
4 other radioactive contaminants into the air, Mississippi
5 River/Sturgeon Lake, including both the water and sediments, as
6 well as in the groundwater.

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

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

17 Finally, the Community is deeply concerned about the
18 general lack of attention given to the Community in the
19 Environmental Report. The Environmental Report minimizes the
20 presence of the tribe, the tribal population, tribal resources
21 and landholdings, home sites, community demographics, including
22 population growth and the tourist population relating to the

1 Community's gaming enterprise, hotel and marina operations.

2 We believe that this demonstrates, unfortunately, the same
3 lack of regard and respect for the Community and its members
4 that occurred 40 years ago when the plant was first cited for
5 and constructed on Prairie Island.

6 With respect to the Motion to Strike, the Community
7 believes that it has complied in all respects with the
8 necessary pleadings and that the Motion to Strike should be
9 denied in all respects.

10 We believe that each of the arguments raised in our reply
11 were appropriate and amplifications of the facts raised in our
12 initial pleading, and we will deal with that obviously in more
13 detail as we go into it this afternoon.

14 At this point I would just reserve any remaining time for
15 rebuttal.

16 >> JUDGE FROEHLICH: Thank you. On behalf of the
17 Applicant, please.

18 >> MR. LEWIS: Thank you. Good morning. The issue
19 before the Board is whether the Indian Community's contentions
20 meet the NRC's threshold pleading requirements, which Judge
21 Froehlich correctly described and outlined.

22 Those threshold requirements were established by the

1 Commission to make sure that the NRC's hearing processes is
2 only invoked when it deserves to be invoked, because the
3 Commission recognized that the hearing process has costs. It
4 has a cost in time. It has a cost in diverting resources of
5 the Staff, of the Applicant, and it has a significant monetary
6 cost.

7 Just, in time frame, a hearing can extend the licensure
8 proceeding by a year on the nominal schedule and potentially
9 more.

10 And on the economic cost, hearings typically cost hundreds
11 of thousands of dollars and can run into millions. So it is a
12 burdensome process. That does not mean it's not legitimate and
13 warranted. It simply means that, before it is invoked, there
14 needs to be a demonstration that there is a material genuine
15 dispute that deserves to invoke the process.

16 And that is why the Commission has established these
17 threshold requirements. Among the requirements is the
18 requirement that the proponent of a contention provide
19 sufficient information to show that there's a genuine material
20 dispute.

21 I view that as the overarching requirement: Have they
22 provided sufficient information to show there really is

1 substance there, something that deserves it to be litigated.

2 A second requirement, I think it's peripheral, is that
3 they have to provide facts or expert opinion, together with
4 documents and references, with sources and references that
5 support those assertions. And, again, the intent of the
6 Commission is to make sure there's real substance before the
7 hearing process is invoked.

8 We have submitted our answer and maintain that the Indian
9 Community, with all due respect, has not met these threshold
10 requirements.

11 In particular, in general, their contentions have
12 allegations but they don't have the sort of support that shows
13 that in fact there is indeed something behind them. In some
14 cases there's simply no support provided for claims that really
15 are expert opinion. And in other cases, they're references to
16 documents from other pleadings without a real demonstration
17 that those apply to our proceeding and somehow demonstrated a
18 dispute with our application.

19 Since the Indian Community focused initially on the
20 archeological contention, Contention 1, let me use that as an
21 example.

22 The Indian Community, in its petition, I believe page 10,

1 referred to the desecration of resources during construction
2 and referred to the excavation of a burial mound or burial
3 mounds in the vicinity of the cooling towers.

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

8 And, in fact, there is not support for that
9 characterization. The facts are these: That Northern States
10 Power hired a prominent archeologist, Eldon Johnson, who in
11 fact was the State of Minnesota's first state archeologist to
12 survey the site prior to construction.

13 The group of mounds that was in the vicinity of the
14 cooling towers were already known, and they were examined
15 specifically by Dr. Johnson before there was any construction
16 activity to determine whether it was appropriate to conduct
17 that construction in that area.

18 Four of these mounds -- there was a group of six mounds.
19 Four of these mounds essentially had been leveled by decades of
20 farming and plowing. Two of the mounds were larger and
21 appeared to remain intact.

22 And so those two mounds were excavated to determine

1 whether they were sources that needed to be protected. When
2 Dr. Johnson excavated those mounds, they found no remains. They
3 found no mortuary artifacts. They found no indications at all
4 of burials.

5 Currently, those mounds have an official 9 designation
6 in the Office of State Archeologist of Minnesota, and they are
7 designated as earthworks, not burial mounds.

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

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

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

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

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

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

19 Northern States Power again retained Dr. Johnson in 1980
20 because they needed to make significant modifications to their
21 discharge system. So they brought Dr. Johnson back in, and
22 this was a significant construction activity. And they

1 surveyed again before they did this additional activity.

2 They did find two areas.

3 I believe the Indian Community raised this issue the first
4 time in their reply, and we don't think it was necessary.

5 Probably brought up in the contention. But because they didn't
6 raise it, and just recently in this argument I believe I heard
7 the Indian Community refer to this as one of these areas as a
8 discovery of a burial mound. Both of these areas that were
9 discovered in 1980 are classified as artifact-scattered areas.

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

15 The Indian Community infers some of these discoveries
16 back, at least that the original surveys were no good. I think
17 that the appropriate inference is that Northern States Power
18 knows when it needs to do additional surveys and does them.
19 And when these two artifacts-scattered areas were examined,
20 they then adjusted the project to minimize the impact on these
21 artifact-scattered areas.

22 So rather than showing any sort of insensitivity, in fact,

1 it shows remarkable efforts to make sure that, when we do
2 additional construction activities, we know what we're
3 affecting and we minimize that effect.

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

9 But I think that simply ignores the original 1960 and 1967
10 surveys of Dr. Johnson, which specifically looked at the main
11 plant construction area. And the Steam Generator Replacement
12 Project will occur in that area, in areas where in fact the
13 original Steam Generator Replacement Project had occurred
14 several years ago occurred, next to a parking lot in an area
15 that's very, very disturbed.

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

20 Let me also address the concern that was raised in this
21 argument that somehow we've not been sufficiently responsive to
22 the Indian Community's concerns or have not reached out to

1 them.

2 I think that that's an unfortunate perception by the
3 Indian Community. I don't want to impugn them, but I think
4 that, again, Northern States Power has made considerable
5 efforts to reach out to them, to address their concerns.

6 We did provide the 106 Group report to them before we
7 filed the License Renewal Application. We met with them. We
8 fielded a bunch of questions for them, not only on the
9 archeological resource but on other contentions.

10 When they raised requests for additional information
11 related to the 106 Group, we went out and commissioned a
12 further study which we've now given them in draft.

13 We've made quite extraordinary efforts to reach out to the
14 community and be responsive to their concerns. And we're
15 continuing to do that. We're continuing to, notwithstanding
16 the fact that we're now in this litigation mode, we're still
17 willing and in fact scheduled to meet with the Indian Community
18 to try to resolve some of these concerns. It's very much our
19 intention to try and be good neighbors.

20 One thing I do want to point out, though, about the
21 discussions that occurred before the License Renewal
22 Application, while we were trying to respond to their concern

1 about the License Renewal Application, there was also a
2 request by the Indian Community that we consider reopening a
3 prior monetary settlement. And so it wasn't just responding to
4 the contentions. As these things, it was a more complicated
5 issue than just addressing their environmental concerns and
6 assertions and archeological resources.

7 I guess, in sum, I think that some of the
8 characterizations by the Community are unfortunate, because I
9 think that the real record and demonstration over many, many
10 years is that Northern States Power has been a very, very good
11 neighbor and a very, very good environmental steward.

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

19 Let me just very briefly talk about the Motion to Strike.
20 We've argued it at some length. I'm not going to repeat it.
21 But there is a number of reasons why allowing new arguments to
22 be raised after initial contention is inappropriate, the

1 Commission Report says it guts their rules, makes them sort
2 of meaningless if you can come in later and just recast the
3 contention and come in with new bases.

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

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

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

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

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

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

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

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

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

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

20 In some instances, our position is a purely legal one.
21 And one of those legal issues that has to do with contention
22 admissibility that has been touched on is whether a contention

1 is within the scope of this proceeding. And it is that, that
2 I'd like to discuss a little more fully.

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

8 But we also look at the conduct of those operations over
9 the period of extended operation for license renewal, for the
10 additional 20 years that we're talking about here in this
11 proceeding.

12 Now, Prairie Island, like all plants, is subject to NRC
13 regulation and must adhere to its Current Licensing Basis. We
14 also call it the CLB, the Current Licensing Basis. And it must
15 adhere to this basis during its day-to-day operations. Because
16 current operations are already addressed, they're being
17 addressed by ongoing regulatory programs and through the
18 Current Licensing Basis.

19 The Commission has determined by rule that the license
20 renewal proceeding does not need to revisit these current
21 operating issues. Thus, current operating issues are outside
22 of the scope of this license renewal proceeding.

1 What needs to be addressed -- what needs to be addressed
2 in this proceeding is what is it that needs to be done in order
3 to ensure that over time, as the plant ages, it will continue
4 to operate in accordance with its Current Licensing Basis and,
5 thus, in a way that is consistent with public health and
6 safety.

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

10 Emergency planning and security. Those are issues that
11 are covered by current operating requirements. And those
12 issues will be issues, they're issues today, they will be
13 issues 20 years from now, during the period of extended
14 operations. Where an issue is addressed by current ongoing
15 regulatory programs, those issues are outside of the scope of a
16 license renewal proceeding.

17 There's a similar idea with respect to environmental
18 issues. There, the Commission is required to examine the
19 impact on the environment that would flow from its approval of
20 the License Renewal Application. And some of these
21 environmental effects are going to be the same for all plants.
22 We call those generic effects.

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

7 These Category 1 effects are addressed by regulation. And
8 they are addressed by the NRC in its Generic Environmental
9 Impact Statement. We call that the GEIS, the G-E-I-S. The
10 Commission has analyzed the mitigation of Category 1 issues and
11 has determined that no further mitigation of Category 1 adverse
12 impacts will likely be sufficiently beneficial to warrant
13 implementation.

14 In contrast, Category 2 effects are effects that are
15 specific to each plant. Category 2 effects -- with respect to
16 Category 2 effects, we're talking about environmental impacts
17 that are specific in this case to Prairie Island.

18 Those will be addressed separately by the Staff when it
19 prepares its supplement to the GEIS. We call that the
20 Supplemental Environmental Impact Statement, or SEIS, S-E-I-S.
21 The environmental issues that are covered by the GEIS are
22 outside the scope of this proceeding, because they have already

1 been addressed.

2 Now, regarding the individual contentions, we appreciate
3 the list of questions that the Board has provided the parties
4 in advance of this proceeding. They have been very helpful.

5 I will be addressing some of them. My colleagues, Mr.
6 Roth and Ms. Simon, will be addressing others. As Mr. Roth
7 filed the Staff's response to the Motion to Strike, he will be
8 addressing that. And any time that he or I have not used, we'd
9 like to reserve for rebuttal. Mr. Roth.

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

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

19 As counsel for the Applicant has said, admissions already
20 discussed these, the two cases are Palisades and Louisiana
21 Enrichment Services, as we cited in our written pleadings.
22 These put down Commission standards that your reply has to be

1 narrowly focused, can't introduce new arguments and new
2 issues.

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

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

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

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

18 Now, I would encourage the Board to take a look at
19 whatever photographs Mr. Lewis has because one of the things
20 that you're going to see is that the 6 Group's Cultural
21 Resource Assessment Map that was circulated to the Community in
22 September, or in November of 2008, excuse me, includes an area

1 where -- that is outside of what is defined as the
2 historically disturbed area.

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

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

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

18 Again, the admission right there in front of the NRC staff
19 and everybody else who was in attendance was nothing was done
20 to scope. Nothing was done to find out where we were digging.
21 It was just somebody coming out with another person to dig in
22 the ground and do some tests.

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

5 However, the NRC told us that that was beyond the scope of
6 our cooperative agency so we were not allowed to see it. And
7 to the best of my knowledge that report is still not available
8 on the ADAMS site.

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

13 So, again, when it comes right down to it, the Community
14 has stated viable contentions, has articulated a factual basis
15 to support those contentions. And if we have anything right
16 now, it's a fact dispute that should be left for the hearings
17 stage.

18 At this point in time we are not required to prove our
19 case. We are simply required to show that there are facts to
20 support our contentions, that there is a dispute of material
21 fact, and that the further inquiry is necessary.

22 And we cited to a long line of cases in our reply brief to

1 support that fact. Again, also supporting the fact that a
2 reply is permitted to legitimately amplify the factual
3 arguments that were made in the original petition.

4 That is exactly what we did. We also welcome the inquiry
5 with respect to tritium, because there certainly is publicly
6 available information. But from the Community's perspective
7 that information is woefully lacking and doesn't allow the
8 Community to do what it needs to do to evaluate the release of
9 radioactive contaminants, including tritium.

10 Take, for example, the 2006 REMP Report. There is a well
11 that's monitored monthly on site. It's Well P-10. That
12 included tritium levels from 400 some odd picocurie up to
13 almost 37, almost nearly 3800 picocurie per liter for the year
14 2006 on a monthly basis.

15 NSP also disclosed that during August of 006 there was an
16 unusual release of approximately 168 gallons of water with a
17 concentration of over 19,000 picocurie per liter. But,
18 curiously, when you go to the REMP Report and the final chart
19 for 2006, it's called the Complete Data Report. Well P-10 is
20 supposed to include 12 months of data.

21 However, if you look at that chart, the chart excludes the
22 months of February, March, May, June and August.

1 So it's not enough to simply say that there's publicly
2 available information out there. As we'll get into in further
3 detail, hopefully later on today and hopefully in the hearing
4 process, there's a legitimate concern about the information
5 that's being released and its potential impact on the
6 Community. Thank you.

7 >> JUDGE FROEHLICH: I'm informed that the Applicant
8 has no time remaining, although the Staff 8 does. Do you
9 care to respond?

10 >> MS. MIZUNO: Yes, Judge Froehlich. On the issue of
11 the Motion to Strike and the concept that the rules on motions
12 to strike is based on, that that concept is, as counsel have
13 noted, is the idea of fundamental fairness.

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

17 And this morning I believe I heard a new contention with
18 respect to Contention 4, which is the contention on
19 radiological impacts.

20 And that new piece that I believe I heard this morning was
21 a request by the Prairie Island Indian Community that
22 additional studies be conducted for the Prairie Island plant

1 site. That is not, from my view of the pleadings so far,
2 included in anything that has been filed in writing by the PIIC
3 -- is not in the Prairie Island Indian Community's Petition for
4 Intervention and Request for Hearing.

5 Therefore, the Staff has not had an opportunity to address
6 that issue. And this, we believe, is an example of the kind of
7 fairness issue that the rules were designed to preclude. I'm
8 done, Your Honor.

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

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

17 >> MS. MIZUNO: Your Honor, Beth Mizuno on behalf of
18 the Staff. The answer to your question is, yes, the Staff
19 believes still there is a question with respect to standing.
20 And I'd like to make it clear at the outset that there is no
21 intention on the Staff's part to suggest that Mr. Mahowald's
22 integrity is at question here. It is not.

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

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

13 However, standing is critical to these petitions for
14 intervention. And for that reason we raised this issue. The
15 way this has come about and the way the pleadings are
16 structured is identical to the way the issue arose in the
17 1995/1996 proceeding with respect to Prairie Island's
18 Independent Spent Fuel Storage Installation. We call that the
19 ISFSI, I-S-F-S-I, the ISFSI. And in that instance, assistant
20 general counsel for the tribe filed on behalf of the tribe. It
21 is no different here.

22 And because we cannot waive standing, because standing has

1 to be demonstrated with the Petition for Intervention, we
2 believe we have a problem here with respect to standing.

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

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

8 >> JUDGE FROEHLICH: As a member of the bar, he
9 purports to represent the Indian tribe. Is there anything in
10 the Commission's rules that requires anything more than an
11 attorney's assertion that he represents the client that sits
12 with him?

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

15 >> JUDGE FROEHLICH: And you don't challenge the
16 right of Mr. Lewis to represent the Applicant?

17 >> MS. MIZUNO: That is correct, Your Honor. We do
18 not.

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

21 >> MS. MIZUNO: You mean --

22 >> JUDGE FROEHLICH: That tribal counsel wouldn't have

1 standing to represent the tribe, or the Community, I'm sorry?

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

5 With respect to the role of the Office of General Counsel,
6 we are authorized to speak on behalf of the Agency. With
7 respect to the Applicant, the Applicant filed its License
8 Renewal Application and did that. With respect to the Indian
9 Point questions on standing, those were organizational and
10 representational standing, and affidavits were filed on behalf
11 of the Intervenors in that instance to establish
12 representational standing.

13 What we have here is not representational standing. The
14 Prairie Island Indian Community has sought organizational
15 standing. And it is our belief, as the prior ISFSI board
16 obviously felt, under those circumstances it is appropriate to
17 ask the tribe to authorize the representation by counsel.

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

21 >> MS. MIZUNO: No, sir, it did not. The Prairie
22 Island Indian Community, the footnote that Your Honor is

1 referring to distinguished this case from the prior ISFSI
2 case on the grounds that the prior ISFSI case had been brought
3 by private counsel, not by general counsel associated with the
4 tribe, and therefore that was why the request was made by the
5 Board.

6 But when we pulled up the original petition, and we have
7 given the ADAMS number, the accession number for the document
8 retrieval system, when we pulled that document up by that
9 number, we discovered that, indeed, the original filing had not
10 been filed by general counsel for the tribe but, rather, by
11 outside counsel. And that is another issue that we have with
12 respect to the representation.

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

14 >> MR. MAHOWALD: I believe I understand the NRC's
15 concerns with respect to that. My thinking was that my
16 declaration dated September 19th, 2008, would have addressed
17 that concern, because I note in paragraph 2 of that
18 declaration: "On July 16, 2008, the Prairie Island Indian
19 Community Tribal Council approved a motion authorizing general
20 counsel Philip R. Mahowald to prepare and file a Petition to
21 Intervene and request an adjudicatory hearing in the United
22 States Nuclear Regulatory Commission's Atomic Safety and

1 Licensing Board on Nuclear Management Company, LLC's
2 application for renewal of its license to operate Units 1 and 2
3 of the Prairie Island Nuclear Generating Plant.

4 Again, I'm here as a member of the bar. Also, I guess, I
5 would also add that I'm admitted to the bar of the Prairie
6 Island Indian Community Tribal Court and representing on behalf
7 of my client and my employer.

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

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

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

16 >> JUDGE FROEHLICH: What is it that you would like
17 from the Community?

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

1 standing, our procedural regulations.

2 And in the Entergy license transfer case, the decision
3 from the Commission came down within this last month.

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

9 And in that case the Commission stated that the
10 authorization that was filed with the reply, i.e., it was not
11 filed with the petition, was not an appropriate basis for
12 demonstrating standing and denied standing in that case. So we
13 feel that this is an issue that still needs to be resolved.
14 And we put it before you, Your Honors.

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

19 >> MR. MAHOWALD: Your Honor, I guess I'm particularly
20 troubled by the last comments there with reference to a case
21 where the claim then is that the standing coming later or the
22 proof of standing coming later is defective.

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

6 >> JUDGE FROEHLICH: Counsel, for the standing of the
7 Community or standing of the representative of the Community?

8 >> MS. MIZUNO: It would be the standing of the
9 Prairie Island Indian Community, Your Honor. And in the
10 Entergy license transfer case, the standing of -- it was one of
11 the labor unions that had sought intervention, that standing
12 was denied. And with respect to that, the standing was denied
13 because of an untimely showing of the basis for standing.

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

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

21 >> JUDGE FROEHLICH: I'd like to move forward and
22 address the file contentions of the Community. The first

1 contention being the one that dealt with historical and
2 archeological resources.

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

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

11 We believe, again, as we stated generally in our
12 introductory statement, that this particular contention is well
13 supported and we have outlined sufficient facts in our petition
14 to intervene.

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

1 Furthermore, Regulatory Guide 4.2, Supplement 1, has
2 detailed instructions for the Applicant on the assessment of
3 historical and archeological resources. Now, we believe that
4 the Applicant's Environmental Report is deficient because the
5 information in the Environmental Report is based upon a
6 literary review of cultural resources at the site. And that
7 would be the 106 Group report.

8 This literature relied on review work that was done in the
9 1960s. As we noted in our reply, in our arguments again today,
10 we find that the findings of that 1960 survey are inadequate
11 because it seems to -- again, we can get into this down the
12 road -- seems to me that Dr. Johnson's focus was with the
13 Bartron Village site as opposed to the areas where the plant
14 was going to be constructed.

15 But, again, the information that was also revealed during
16 the site audit visit after we filed our petition to intervene
17 also raised some questions with regard to the effectiveness and
18 the sufficiency of those disclosures.

19 Now, we also note that, again, the point raised in the
20 opening argument that there's a discrepancy in the draft report
21 and the draft cultural resources map that was prepared by the
22 106 Group, an area that was designated as historically

1 disturbed and then was later amended to include this parking
2 lot area. But where it fits in specifically with respect to
3 the License Renewal Application is we are still waiting for an
4 explanation.

5 And it's not clear to us, from viewing the Environmental
6 Report, where the temporary structures and other activities
7 that will be related to the Steam Generated Replacement
8 Project will be occurring.

9 And so I guess from our perspective it's a straightforward
10 contention of omission. We're simply trying to figure out
11 where these activities will occur. And from our perspective,
12 since we were not there, we were not on site, it's not simply
13 sufficient to say that it will be in the same place where the
14 previous Steam Generated Replacement Project occurred.

15 Because as we understand it, there will be temporary
16 structures built, warehouses and things like that. We assume
17 that there will be electricity, plumbing utilities provided,
18 things of that nature.

19 So we're simply looking for an accurate and complete
20 disclosure of where that's going to take place. Now, the other
21 thing that we have mentioned in our petition is that the 106
22 Group report stated no construction activities were planned

1 during the renewal period.

2 That fact in and of itself seems inconsistent with the
3 Applicant's admission that there will be construction
4 activities related to the Steam Generator Replacement Project.

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

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

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

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

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

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

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

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

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

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

16 >> JUDGE FROEHLICH: And is it your position that the
17 106 report that suggests that further field assessment is
18 necessary, is that where the Community is going? Is that what
19 they're after?

20 >> MR. MAHOWALD: Yes, Your Honor. And we believe
21 that that view is corroborated and supported by the finding in
22 1980 of a previously unknown, which I guess it was our

1 understanding based on the site audit was a burial mound
2 group and an archeological scatter. Mr. Lewis disagrees with
3 that.

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

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

16 So there are some sensitivities here that, unfortunately,
17 in the past, may not have been duly regarded. And we also
18 understand, too, that sensitivities have changed over the years
19 and that this is not 1960. This is not 1968. It's 2008.

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

22 And, again, to the extent that NSP moves to strike those

1 portions of our reply, obviously where we talked about the
2 information that we learned after we filed our Petition to
3 Intervene, we would respectfully like to add that to the
4 record. But I guess, more fundamentally, when it comes to
5 whether we've stated an admissible contention, our threshold
6 pleading, our initial petition, in our view, states the
7 requisite information needed to have an admissible contention
8 of omission.

9 We've noted the requirements for an archeological
10 assessment. We've also highlighted in our original petition
11 the specific facts that cause us to question the, I guess, the
12 safety, if you will, and the thoroughness of their
13 archeological monitoring program. That's still an ongoing
14 problem. It's still an ongoing conversation.

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

21 And, again, we think all of those facts state viable and
22 admissible contention to get this matter, I guess, explored in

1 further detail down the road.

2 >> JUDGE FROEHLICH: Mr. Lewis.

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

8 Our response was that the Indian Community simply haven't
9 addressed the information that was in the application; that the
10 application, in fact, indicated that the area would be
11 northwest of the turbine building and it would be in a
12 disturbed area.

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

17 Now, the argument has now morphed into, well, maybe we
18 don't have enough information; maybe we can't trust you. When
19 you say it's in a disturbed areas, maybe we think you're not
20 telling us the truth. But generally that is not a good
21 contention, unless there's a darned good basis for impugning
22 the integrity of an applicant and the veracity of its

1 statements.

2 The 106 Group report was characterized as a literature
3 assessment, and that's indeed correct. But that doesn't make
4 it deficient. The reason it was a literature assessment is
5 because there was many decades of prior surveys and data and
6 knowledge.

7 And so the purpose was not to go out and resurvey the
8 site. The purpose was to collect in one place and document the
9 very extensive knowledge of the site. And so the fact that it
10 was a literary assessment in our estimation is immaterial.

11 >> JUDGE FROEHLICH: Mr. Lewis, is it correct that the
12 106 Group study, not only did they did not conduct any new
13 surveys, they looked at the literature that existed, but
14 there's no specific analyzation of future projects or of
15 contemplated events that are going to occur on the site?

16 >> MR. LEWIS: The Indian Community is correct, they
17 were not aware of the Steam Generator Replacement Project. But
18 they were not asked to analyze whether that would have an
19 effect.

20 What they were doing is documenting the surveys -- they
21 were charged with identifying what areas have been identified
22 as being sufficiently known to lack archeological resources,

1 that they've been characterized as disturbed, and there's no
2 need for a further assessment and what areas should be
3 identified as undisturbed so that we knew, if we did work
4 outside specific bounds, that we should indeed go back and do
5 further surveys. And that was the purpose of the assessment.

6 >> JUDGE FROEHLICH: Could you address for 9 me the
7 steam generator replacements, that project's relationship to
8 the License Renewal Application; is it in, is it part of? Is it
9 something completely separate?

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

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

21 >> JUDGE FROEHLICH: I ask you that because the
22 contention as originally framed spoke to whether an historic or

1 archeological property would be affected by the proposed
2 license renewal. And I wanted to know specifically how the
3 steam generator replacement fit in with that portion of the way
4 the contention was originally framed.

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

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

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

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

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

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

6 >> MR. MAHOWALD: For example, on this particular
7 contention that the assessment of archeological issues, from
8 the Applicant's perspective, it was adequate for them to say
9 that the construction activities in association with the Steam
10 Generator Replacement Project would be approximately 0 yards
11 northwest of the turbine building.

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

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

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

7 And, again, it raised questions for us, because we're
8 trying to ascertain if they are doing enough to identify
9 potential sacred sites, potential burial mounds, because, as
10 the 106 Group reports, that area is replete with sites of
11 historical and archeological significance.

12 And so, again, there's just a whole series of events based
13 on the ongoing relationship with the parties. Which, again, I
14 think are facts that are sufficiently set forth in our Petition
15 to Intervene, as well as legitimately amplified in our reply
16 that express our concerns that we don't have all of the answers
17 we need to make sure that those sites of historical,
18 archeological and cultural significance aren't impacted during
19 the relicensing period.

20 And that would be specific to, as we indicated in our
21 Petition to Intervene, not only the Steam Generator Replacement
22 Project, but also the expansion of the ISFSI site. Because

1 they are going to be proposing to expand that to hold up to
2 98 casks for dry cask storage.

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

4 >> JUDGE ARNOLD: Let me see if this is the answer I'm
5 getting. First off, the Environmental Report is not written so
6 that you can assure that cultural resources are protected or
7 anything. They are written so that the NRC staff can come out
8 with an Environmental Impact Statement that fully addresses all
9 of the issues.

10 What you're saying is: If the information provided causes
11 you to have doubts, then you would infer that the NRC would
12 reasonably also have doubts and not be able to come up with
13 an Environmental Impact Statement that fully fulfilled the
14 requirements of NEPA; is that...

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

20 And I would have to say that based on the -- I
21 participated. I was fortunate enough to be able to go to the
22 site audit. And the NRC staff who participated, they were very

1 knowledgeable, very conscientious, and actually asking
2 probing questions and wanting to look further into all of these
3 details. So I do hope -- and, again, I guess we won't know,
4 but I do hope that the NRC will address these issues in further
5 detail in their Environmental Impact Statement.

6 But the trouble that we have as an outside participant is
7 the rules and the procedures say that we've got a petition to
8 intervene right now. And so we are simply trying to assert and
9 protect the interests of the community, and the only way we can
10 under the time frames that are allowed by the rules of this
11 Board and of this Commission.

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

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

19 >> MS. MIZUNO: Understood, Your Honor. The answer to
20 the question is actually no. But that's because not -- the NRC
21 Staff's work in this area is not relying solely on the
22 Applicant's Environmental Report as has been discussed. There

1 was an environmental site audit. And currently the NRC
2 environmental staff is working on its evaluation of the issue
3 of impacts on archeological and historical assets or sites.

4 One of the things that, rather, the basis for the Staff's
5 objection to admissibility of this contention goes to basis and
6 failure to raise a material, genuine material dispute.

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

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

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

1 topic or it would just be voluminous.

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

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

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

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

18 They indicated that there was this refurbishment activity.
19 It was in the main area of the plant. It was an area that was
20 disturbed, and therefore it was an area that would not be
21 expected to effect archeological resources.

22 But, in addition, we indicated that we are indeed putting

1 in place a procedure that we'll provide further protection
2 just in case there is something unexpected that's discovered.
3 And that procedure is one that requires, if there's any
4 discovery of archeological resources, to immediately halt the
5 work and to consult with an archeologist and to consult with
6 the state.

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

12 We did not put in the 106 Group report as a full provision
13 because it simply does identify where some burial mounds are,
14 and it's generally inappropriate to put those types of
15 materials on the public docket. You don't want to encourage
16 amateur archeologists from going out and disturbing sites.
17 I do not know whether the Board has a copy of these; and, if
18 they like, I can provide them, but we need to make sure they're
19 not put on ADAMS.

20 >> JUDGE FROEHLICH: I don't think we need a copy, but
21 the Staff obviously has a copy of the Cultural Resource
22 Assessment, the 2008 report, the Staff has that?

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

2 >> JUDGE ARNOLD: One other short question.

3 Previously disturbed area. I've got a general idea what that
4 means, but when you disturb an area, is that pretty much a
5 guarantee that there's nothing left of historical or
6 archeological interest, or...

7 >> MR. LEWIS: We can't go that far. Archeological
8 resources can be buried at depths, depends on how great the
9 area of disturbance was.

10 The area of the main plant was built was an area that was
11 cultivated for like maybe a century, a long, long time, very
12 heavily disturbed before the plant was constructed. And
13 portions of the plant, of course, in an area of the power
14 block, excavation down to the bedrock and there's indeed
15 nothing.

16 In this general plant area, initially Dr. Johnson did a
17 survey and indicated that there was no visible indication of
18 cultural significance. He came back before construction in '67
19 and dug a series of trenches.

20 And my understanding is there's a criticism that maybe
21 today you wouldn't do that. But things have changed since the
22 '60s and that's how they did it at the time. And they found no

1 indication. But, no, we can't guarantee that perhaps there's
2 something in some location that's buried at a depth that just
3 wasn't spotted.

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

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

10 >> JUDGE HIRONS: Is the footprint for the temporary
11 structures and equipment pretty exactly defined? Or can you
12 look up ahead toward it?

13 >> MR. LEWIS: I can show you the photograph of where
14 we believe the structures will go, and there's some structures
15 that already exist because they were used. The decontamination
16 facility that was used for the first project still exists and
17 would be the intent to use it again. There were also two large
18 well houses that were used. I think the intent would be to use
19 those again.

20 The demands of the facilities would be temporary office
21 facilities for quite a considerable workforce, 700, 600,
22 something like that, good-sized workforce, and lay-down areas.

1 But there is an area that was used for this purpose in the
2 prior project.

3 The project, though, has not been engineered yet. There's
4 fundamental issues like how do you get the steam generators in
5 the containment. Can you use the hatch, or do you have to open
6 up a greater hole in the side of containment, and obviously
7 those issues will dictate what resources you need on the site
8 and how many workers, what sort of lay-down areas, how many
9 workers and what support.

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

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

17 >> MR. LEWIS: That's what the environmental report
18 covers, yes.

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

1 (Recess taken)

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

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

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

20 The site restoration study that was done for the
21 dispersion of that looking at a much smaller area. My
22 recollection is the study referring to an area of less than ten

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

9 >> JUDGE ARNOLD: A question for the Petitioner: Was
10 part of your concern here that the specific value of the Indian
11 community's property was not reflected in the cost estimates
12 involved in the SAMA analysis?

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

14 >> JUDGE ARNOLD: That would be because the general
15 characterization of the area around the plant is different from
16 the characterization of the casino and other facilities?

17 >> MR. MAHOWALD: Correct, Your Honor. I guess I
18 think the explanation would be that whereas oftentimes the
19 analysis of a rural area, the Prairie Island Reservation
20 doesn't fit those demographics in any way given the large
21 volume of visitors that come on and the high volume of traffic.
22 That's one aspect to it.

1 But with respect to the site restoration study, we do
2 believe that the report can be used to develop different inputs
3 to be used in the MACCS 2 code which would take into account
4 and provide a better analysis than is currently employed?

5 >> JUDGE ARNOLD: So you do believe that what you
6 desire to have done is capable or MACCS 2 code is capable of
7 doing that?

8 >> MR. MAHOWALD: Correct.

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

11 >> MR. MAHOWALD: Correct.

12 >> JUDGE FROEHLICH: Then I guess that raises the
13 question to the Applicant, what sorts of site
14 specific inputs were used in the use of the MACCS code to
15 address concern that it was not site specific enough from the
16 petitioner's perspective?

17 >> MR. LEWIS: Perhaps I should try to explain the
18 MACCS 2 modeling interpretation but the MACCS 2 model five mile
19 from five to ten miles and then, at ten mile increments out
20 to 50-miles. And what it does is it assigns a percentage of
21 farm and non-farm property in each of the specialists which is
22 derived from and assigns a value typically, and it basically

1 contains the contamination under a whole range of
2 meteorological conditions to each spatial element and has a
3 number of runs, and you can take different percentages. But
4 for SAMA analysis, you use the mean value, figure out whether
5 something is cost beneficial and is appropriate. It then looks
6 at, okay, here's the level of contamination in each spatial
7 element, what do we need to remediate that level of
8 contamination, and it is based on the EPA's protective action
9 guidelines.

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

13 (Short interruption)

14 >> JUDGE FROEHLICH: Could I have the reporter read
15 back the last line that you have so that will refresh your
16 recollection? (Reporter read back the last sentence as follows:
17 (And the last line was what do we need to remediate that level
18 of contamination and it's based on the EPA protection action
19 guidelines?))

20 >> JUDGE FROEHLICH: Mr. Lewis?

21 >> MR. LEWIS: That's what we are talking about here,
22 there is criteria that's derived from the EP. And in our model

1 is 3 RIMP by persons on table S property I think EPA is over
2 50 years. The EPA is five gram standard part of the action
3 guidelines that assumed that two labs could be incurred in the
4 emergency and intermediate phase and this 3 RIMP allocated to
5 the long term phase and so you try to demonstrate what would it
6 take to make property -- make that 3 RIMP standard.

7 The code first looks at decontamination, model scenarios,
8 decontamination factor of 3 and 1 of 15. There are different
9 costs that it says with that level of decontamination, can you
10 get down to a 3 RIMP standard. If you can't with
11 decontamination, then, it looks at interdiction up to 30 years
12 and determines with a decontamination plus interdiction, you
13 get down to the 3 RIMP and if you can't, then, the property is
14 condemned and the value of the property is lost.

15 If you can have the standard, it does cost benefit
16 analysis. If the cost of decontamination and interdiction
17 exceed the value of the property and the property would also be
18 condemned. And if it is cost beneficial, it looks after
19 decontamination costs, the interdiction comes, the loss
20 determined on the property and the depreciation of the property
21 that was there and the fact that it is designed to take into
22 account the economic loss of that property being out of

1 service.

2 Again, what it is doing, it is looking at the economic
3 impact over the 50-mile area though it is using -- again, the
4 Set Top Model applies the value of the property the subject
5 property in each of these spatial elements.

6 If you in fact came in and said well, the Indian community
7 is more valuable and should have a higher percentage, that
8 actually wouldn't work with the code because what you're doing
9 then is looking at these values. And so presumably, there are
10 properties that have a higher value and properties that
11 probably have a lower property with a lower value by simply
12 increasing the value.

13 If I can even do that, it would not necessarily be an
14 accurate result. I could do that sensitivity analysis and
15 could put it at a higher value for nonfarm property in that
16 spatial element and see what the difference was. But it
17 wouldn't necessarily give me any valid determination of whether
18 it's cost beneficial and that defeats the whole -- the purpose
19 is not to look at the impact.

20 The NRC already looked at that in the GIS and said they
21 are small for all appliances, that was a generic determination.
22 But the NRC said, they are small, we still should look at

1 mitigation and be site specific.

2 So what this is trying to do is determine is there a cost
3 beneficial that needs to be looked at and therefore, the
4 purpose really is not to say what 0 is the specific impact on
5 the Indian community; the purpose is to say when I look at the
6 consequences of an accident over a 50-mile range and I look at
7 the possible production and accompanying risk, as a consequence
8 of that accident over a 50 mile radius, is some SAMA cost
9 beneficial?

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

19 >> MR. MAHOWALD: Only insofar as it referred to the
20 Sandia Study, as a source of contamination and information
21 decontamination. I think the crux of the contention is that
22 the Sandia Study provides different assumptions about potential

1 clean up costs and that contention was admitted in the Indian
2 Point case for that reason among others. We think that the
3 different assumptions that the Sandia Study brings, a potential
4 cleanup cost of the Prairie Indian land cleanup is more
5 appropriate here.

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

11 >> MR. MAHOWALD: That's correct. I think with
12 respect to that particular piece of the contention, it's -- we
13 wanted to highlight the uniqueness of the Prairie Island
14 community because the land that the Prairie Island community
15 has is land that is held in the trust by the Federal
16 Government. It's not like the community can simply relocate
17 out of the area.

18 That is the land that was set aside as reservation for the
19 community. And that has all sorts of legal implications to
20 relocate. You have to go through a deed of trust process,
21 things like that. If you want to relocate your gaming
22 enterprise, you go through another set of regulations. So I

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

3 >> JUDGE FROEHLICH: Mr. Lewis?

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

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

21 And I would submit that again back to the original point
22 that the contention is a general dispute. I think it was

1 incumbent upon the Indian community to if they wanted to
2 raise this issue, to get an expert to challenge the
3 inappropriateness about factors in the application and not rely
4 on just general suspicions.

5 >> MS. MIZUNO: Yes, Your Honor. The question that
6 the staff -- sorry, that the Board posed to us asked about our
7 views to the applicant of the MACCS 2 code. And we believe
8 that the MACCS 2 code is applicable to the situation and we
9 would say that we don't view the petitioner as arguing the
10 MACCS code as inapplicable.

11 What they are arguing about is specifically one set of
12 inputs to the MACCS 2 code and I think the Board recognized
13 that is with the question with respect to what damage it would
14 do to the code if certain Sandia Report items were imported,
15 could it be done without doing damage to the 19 code.

16 Could the code still run, could it still work? One of the
17 things that I think needs to be highlighted about the MACCS 2
18 code and the decontamination costs and how those factor in with
19 each other is this idea and it is that decontamination costs
20 are just one of the inputs to the MACCS 2 code.

21 There are a lot of other inputs and of course, depending
22 on how the inputs are manipulated, you can change the result.

1 Put another way, specifically, for the MACCS 2 code,
2 depending on the change to your inputs, a severe accident
3 mitigation alternative that was not cost beneficial may become
4 potentially cost beneficial because what the SAMA analysis, the
5 SAMA analysis, it doesn't stop at decontamination costs.
6 That's just one of the inputs.

7 The point of the SAMA analysis is to identify mitigation
8 alternatives that are cost-effective. And decontamination
9 costs are just a part of the calculation that goes into
10 identifying cost-effective mitigation alternatives. It's not
11 the end result.

12 And the problem here with this contention is that it
13 focuses on that intermediate stage and doesn't focus on the end
14 result. There is no assertion in the contention that changing
15 this specific input will result in additional mitigation
16 alternatives becoming cost-effective. That isn't alleged.

17 And in the reply, the Prairie Island Indian community in
18 its reply, not in its petition but in its reply, the Indian
19 community stated it is reasonable to assume that a change in
20 the input will change the end result. And it is the NRC
21 staff's position that an assumption is not appropriate here.
22 For purposes of establishing admissible contention, we need

1 support, not assumptions.

2 >> JUDGE FROEHLICH: I'd like to move to Contention 3.
3 This deals with the analysis in the Environmental Report on the
4 dangers and threats of species. The Petitioner allege it is
5 inadequate and incomplete and not in compliance with the
6 regulations. I have just kind of a very, very technical
7 question of the Petitioner. On the last line on page 13 of
8 your Reply, you state that the NRC staff pointed out in its
9 Answer that Northern States' assessment of the impact of
10 mussels are inadequate. Can you focus me on that, where that
11 is. I didn't pick up on this initially.

12 >> MR. MAHOWALD: Page 13, I wasn't -I didn't hear the
13 reply.

14 >> JUDGE FROEHLICH: Well, I believe I guess when I
15 read this, it states the NRC staff pointed out in its Answer
16 that Northern States' assessment on the impact of mussels is
17 inadequate. Where is that in the Staff's Answer? 22

18 >> MR. ROTH: Your Honors, if I may, David Roth for
19 the staff. I believe keeping in mind what the intention of the
20 counsel was, was to write that the staff had pointed out there
21 was information with ER and that they were continuing to
22 disagree that it was adequate information rather than being

1 bred that they were identifying what staff stated was
2 inadequate.

3 I believe that's how that sentence is supposed to be. I
4 recall looking at that myself going back and saying, when did I
5 write this.

6 >> JUDGE FROEHLICH: Thank you. I think that that
7 clarifies my question. I guess in our analysis, the Higgins-
8 Eye Pearly mussel is an endangered species and therefore we are
9 required to assess the impact on it. The Applicant states --
10 if I understand his pleadings - that they have studied these
11 impacts and the Petitioner has stated that it has not done so
12 adequately. What is the staff's position on the assessment
13 relating to that mussel --

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

17 >> MR. ROTH: Well, Staff of course has not published
18 our Environmental Impact Statement or the supplement to the
19 Environmental Impact Statement. So it's premature to do any
20 final analysis. What we are saying is not to imply that the
21 renewed decision is not being made by this.

22 However, the staff did accept the application for review.

1 They did not reject it. And to date, there aren't any RAIs,
2 request for additional information specific to the contents of
3 the Endangered Species Act of the Pearly Eye. Which translates
4 to Staff accepted the analysis that was there.

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

8 >> MR. ROTH: Yes, the Staff is.

9 >> JUDGE FROEHLICH: I guess that throws it back to
10 the Petitioner. What more are you seeking to be done regarding
11 the Higgins Pearly Eye mussel?

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

18 And furthermore, in Section 4.7, the ER concludes by
19 stating that renewal of the PINGP license is not expected to
20 jeopardize the continued existence of any threatened or
21 endangered species or result in the destruction of adverse
22 modification of any critical habitat because the current

1 operational practice would not be affected by license
2 renewal.

3 And NRC concludes that impact threatened by species from
4 license renewal will be small and would not award mitigation.
5 And we believe that is more of a conclusionary statement that
6 does not accurately and sufficiently assess the impact of the
7 proposed action on this endangered species. And I guess the --

8 >> JUDGE FROEHLICH: What is the support for that
9 belief?

10 >> MR. MAHOWALD: Well, I guess the belief is that we
11 don't know based on what's contained in the Environmental
12 Report what the basis of the Applicant's statement is. And so
13 we are left wanting to know more; how did the Applicant reach
14 that conclusion and how did the Applicant come to quantify the
15 significance of its own conclusion that some larva Higgins-Eye
16 will be carried downstream into the power plant intake screen
17 house.

18 How do they know that? How do they expect to measure that?
19 How do they expect to monitor the intake and things like that?

20 So I guess that's what we are trying to point out is from
21 our perspective, we simply don't understand the basis for the
22 Applicant's statements.

1 >> JUDGE FROEHLICH. Can I just ask the Applicant,
2 is the basis of your statement, the 316-B demonstration on the
3 subject --

4 >> MR. LEWIS: No, sir. The Indian Community's
5 argument is the same problem as its original contention. In
6 our Answer, we pointed out that in addition to the
7 conclusions, looking at the conclusion statements and saying it
8 was conclusionary, most conclusions are but they are ignoring
9 that the meat of the analysis in Section 4.7 which we cite on
10 pages 23 and 24 of our analysis where we looked at the life
11 cycle of the Higgins.

12 This is a mussel that basically raises its larva by
13 allowing it to parasitically attach to the gills of the fish.
14 It has a lure and the fish are lured in by a portion of its
15 mantle and it looks like a worm or something and comes in
16 closely and releases its larva and they attach to the gills of
17 the fish and then are raised that way and eventually when they
18 mature, they drop off, they are no longer in the larva stage
19 and they drop off.

20 We consulted with the Minnesota Department of Natural
21 Resources before submitting the Environmental Report and we
22 obtained this information and so we are making this discussion

1 carefully that any larva who do not attach immediately are
2 basically nonviable and if they don't have a stream, it will
3 impinge.

4 They are not going to have an effect because they are not
5 attached to a fish and they are not going to survive. So we
6 put that in our report to expressly explain why there is no
7 effect and it wasn't done lightly. It was done - I want to
8 avoid the word "consultation" because consultation with an
9 endangered species is a term that applies specifically to the
10 interactions that occur between NRC and the Fish and Wildlife
11 Service.

12 But we did our own communications and tried to make sure
13 we understand why the Minnesota Department of Natural Resources
14 put it where they were and they had determined yes, this was a
15 good place, this was a place where they survived and we don't
16 think there will be an effect. And we documented that in the
17 ER. And that portion wasn't challenged in the contention and
18 it's not challenged today. Simply ignoring it creates a
19 dispute with their application.

20 >> JUDGE FROEHLICH. Does staff want to be heard?

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

22 >> JUDGE HIRONS: Let's switch now to the avian

1 mortality and the issue with the transmission lines. And I
2 guess the Petitioner, I have two questions: This is stated to
3 be a Category One issue based on what's in the generic
4 Environmental Impact Statement. So, was there any thought of
5 directly requesting a waiver of that ruling in order to make
6 the case that you have?

7 And secondly, on page 15 of the Prairie Island Indian
8 Community Reply where avian mortality is discussed and also the
9 process of counting dead birds, and a statement is made that
10 the Applicant has made no operational changes to minimize this.
11 And I wonder what you had in mind or what you were referring to
12 as operational changes?

13 >> MR. MAHOWALD: I think with respect to that as a
14 Category 1 issue, I believe that we cite to the fact that
15 Prairie Island was singled out as a plant on a site specific
16 basis and it experienced some avian mortality issues and that
17 it had high rates of avian mortality which of course ties into
18 our original contention discussing it as a significant fly away
19 for various migratory birds.

20 With respect to the question as to our concerns, I guess
21 we point out there that where it says that the ER discloses
22 that and this is again on page 15 of our Reply quoting the ER

1 at page 3-13 that very few bird casualties had been observed at
2 PINGP were long associated transmission lines since 1978 but
3 systematic searches or formal avian collision studies have not
4 been conducted.

5 And so, I guess we're left with the interpretation I guess
6 of that as saying how do we know -- how can we ascertain avian
7 mortality when we are no longer looking for it, no longer
8 trying to measure it? That raises a question from our
9 perspective and an issue of deficiency in the ER.

10 >> JUDGE HIRONS: That doesn't really answer the
11 question that you allude to operational changes. Am I missing
12 something?

13 >> MR. MAHOWALD: Perhaps I misunderstood your
14 question.

15 >> JUDGE HIRONS: If I can read from the response of
16 the community: Did the Applicant make operational changes in
17 the nuclear PINGP to reduce avian mortality, or did it just
18 stop looking for dead birds? Is that sort of something you
19 were just throwing out there, which is true?

20 >> MR. MAHOWALD: That is our concern because there is
21 the reference to -- again, the portion that I just quoted which
22 talks about the finding since 1978 but also adds that

1 systematic searches for formal avian collision studies have
2 not been conducted. So I guess the question is, is did they
3 change their procedures for monitoring because -- can you say
4 that there is no longer any impact when you're not actually
5 looking to find out --

6 >> MR. HIRONS: I understand what you're saying about
7 that. I guess maybe I'm missing something. I'm just still
8 focused on you alluding to operational changes. Is the change
9 not counting birds?

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

11 >> JUDGE HIRONS: Okay.

12 >> JUDGE FROEHLICH: I'd like to ask the Staff, I
13 guess the bird study that was done for a period '73 to '78;
14 does that study now, 30 years old sufficient to meet the
15 requirements of the Endangered Species Act or NEPA if we have a
16 Category 2 question here?

17 >> MR. ROTH: If it is something, Category 2, it has
18 to be analyzed an endangered species Category 2 then it does
19 have to be initially analyzed. Endangered Species is treated
20 by the Commission as Category 2 and the applicant's ER does
21 have discussions of endangered avians.

22 >> JUDGE FROEHLICH: As I understand their study of

1 the Endangered Species, the last I guess study of the avian
2 species, was that study done between 1973 and 1978? I think
3 what the Petitioner is saying is there has not been any
4 subsequent studies and if there is an endangered species
5 involved, is it necessary to have a more recent study?

6 >> MR. ROTH: I do not believe there has been any
7 endangered species identified that would make it necessary to
8 have a more recent study.

9 >> JUDGE FROEHLICH: We have to back up and see if
10 there is something here in this contention that moves us to a
11 Category 1 issue or Category 2 issue; is that what's you're
12 saying?

13 >>MR. ROTH: That's correct.

14 >> JUDGE FROEHICH: I guess the Petitioner, the burden
15 to come forward with what endangered species are we referring
16 to get us into a Category 2 analysis?

17 >> MR. MAHOWALD: I guess we're back to that problem
18 of there's -- how do we identify the birds that are being
19 studied? So that's -- we're having difficulty with the
20 Environmental Report because there's not a disclosure of the
21 birds that are experiencing the avian mortality. I guess with
22 respect to whether this is a Category 1 versus a Category 2

1 issue, again, I guess we think it is site specific but if we
2 need to request a waiver, we can pursue that that way. I guess
3 that is another option to move forward.

4 >> JUDGE FROEHLICH: Can I ask the Applicant, did the
5 first study 1973 to '78 reveal any threatened or endangered
6 species?

7 >> MR. LEWIS: The description of the study in the
8 generic Environmental Impact Study, it identifies the birds
9 that were found in the study and none of them were threatened
10 or endangered.

11 In addition, in our environmental report, we list the
12 endangered species that are recognized to be present at the
13 plant or in the vicinity of the transmission lines associated
14 with the plant and this we did after discussing it with the
15 state and federal agencies. We acknowledged and we have not
16 identified any threatened or endangered species along the
17 transmission lines.

18 The point that hasn't been responsive to these calls,
19 these transmission lines will operate whether the plant does or
20 not and therefore, there is in fact no causal connection
21 between license renewal and the impact of these transmission
22 lines regardless of whether the plant is operating or not.

1 >> JUDGE FROEHLICH: So the transmission lines that
2 we're referring to, not the lines that would be from the plant
3 to the grid? I'll withdraw that.

4 Contention 4: This deals with the environmental report and
5 the consideration of the impact on the cancer rates on the --
6 adjacent minority community. I guess I would ask the
7 Petitioner to state what is the plant specific new and specific
8 information which requires this Category 1 issue to be
9 reexamined for Prairie Island?

10 >> MR. MAHOWALD: Where we view it as a plant specific
11 issue is with respect to the findings of the KiKK Study where
12 there was a higher incidence of childhood cancer within a five
13 kilometer radius of power plants. I guess that is obviously a
14 general statement of the Prairie Island Indian community
15 located within that 3-mile radius in large part.

16 So that is one of the issues that we raised. We also
17 believe that the cancer studies that are being performed and
18 reported on now do create new and significant information or do
19 qualify as new and significant information because we had the
20 KiKK study followed up by the Owens Initiative and again, we
21 made reference to it today because it occurred after we filed
22 our petition to intervene and the Swiss Government also

1 following up with the CANUPS Study.

2 We believe that again, this is new and significant
3 information that warrants a closer examination of the potential
4 threat to the children of the Prairie Island Indian Community.

5 >> JUDGE FROEHLICH: Applicant, I would like to hear a
6 little bit more from your perspective. I'm assuming that this
7 is a Category 1 issue and this is not site specific?

8 >> MR. LEWIS: That's correct. Let me back up though.
9 I do object to the references that encompass the Owens
10 initiative and the Swiss study. There is absolutely no way I
11 could respond. If there was a basis for a new contention, then
12 it should have been proffered as a new contention. But to come
13 in and do an argument and cite brand new information, it
14 doesn't allow us to provide a meaningful response.

15 But it doesn't make any difference in this instance. This
16 is clearly a 22 Category 1 issue and you can't admit it -- the
17 Board can't. The Commission grants the waiver. The grounds
18 for granting the waiver is that the Petitioner has to submit a
19 petition to the Board and has to make a prima fascia showing
20 that the rule doesn't serve its purpose and they have to be
21 supported by affidavits. That's certainly not been done.

22 If the Board thinks there is a prima facia showing under

1 the rule, is 2.335 I believe, it then refers the petition to
2 the Commission for a ruling. If the Board believes there is
3 not a prima facie showing, then the Board denies it. None of
4 that procedure has been followed. Beyond that, the Commission
5 has indicated that a waiver to allow litigation of a Category 1
6 or any rule, an NRC proceeding must be based upon a showing
7 particular to that plant.

8 What I've heard is the suggestion that new studies suggest
9 there is higher risk to children, or other populations close to
10 a plant. That is not specific. The Indian community resides
11 near a plant but every plant has people who live near the
12 plant, and has children who live in the vicinity of a specific
13 plant.

14 They are simply saying that the NRC, risk estimators are
15 generically wrong or inappropriate and if that's the case, the
16 Commission case law in Etenergy and Turkey Point indicating that
17 a rulemaking petition is the appropriate course, not a petition
18 for waiver in this proceeding.

19 Finally, we did take a look at the KiKKI Study and some of
20 the studies that were reported and didn't see in fact any
21 discussion of real information on the risk casualty. They
22 never looked at what was the dose people received and

1 therefore, they never attempted to raise or analyze any sort
2 of dose response relationship.

3 So it isn't clear to me and certainly is no demonstration
4 that the NRC's generic risk estimator which it is indeed based
5 on the model, is wrong.

6 >> JUDGE FROEHLICH: Petitioner, you wanted to
7 respond?

8 >> MR. MAHOWALD: Yeah, I wanted to point out that we
9 did make reference to both Kikk study and the Ulms Physicians
10 Initiative in our original petition and that was -- I would
11 also make reference to Exhibit E of my declaration, Exhibit
12 August 18, 2008. I do agree that the reference to the CANUPS
13 is coming up late and that was a study that was announced in
14 late September after all the filings in this case.

15 >> JUDGE FROEHLICH: As to Mr. Lewis' point, I'm
16 referring this to a plant specific argument to move us from
17 Category 1 to Category 2. Where is that in the petition?

18 >> MR. MAHOWALD: Again, I guess as we articulate in
19 our reply, we've indicated that it's our view that we don't
20 have sufficient data in terms of the disclosure of tritium
21 releases and other radiological contaminants to actually
22 perform the baselines that would be necessary to create that

1 site specific link.

2 >> JUDGE FROEHLICH: Does Staff wish to be heard?

3 >> MS. MIZUNO: Yes, Your Honor. Our objection to the
4 admissibility of this contention is based on the lack of
5 support, a lack of basis. And nothing we've heard moves us
6 from that position. That's all, Your Honor.

7 >> JUDGE FROEHLICH. Thank you. Let's move on to
8 Contention 5 dealing with the Environmental Justice Report.
9 It's alleged in the 5th Contention that the environmental
10 justice analysis does not adequately assess the impact of the
11 Prairie Island on the adjacent minority community.

12 >> JUDGE ARNOLD: I have only one question and I'm
13 going to ask this of both Petitioner and Staff. Where in the
14 code of federal regulations or any other legal requirements
15 document is the licensee required to perform an environmental
16 justice review or provide any information per the Commission's
17 environmental justice review? Start with the Petitioner.

18 >> MR. MAHOWALD. We would point to Regulatory Guide
19 4.2. Supplement 1 which says the Staff expects the Applicant
20 to provide information on the environmental justice issue. So
21 we think that that is the regulatory authority for that.

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

1 >> MR. MAHOWALD: Correct --

2 >> JUDGE ARNOLD -- that which you stated is followed
3 by a specific list that request demographic information. So is
4 there anything to suggest that there's any review involved?

5 >> MR. MAHOWALD: It appeared from I guess our reading
6 of the Environmental Report that there was actually no effort
7 made to address any environmental justice issues.

8 >> JUDGE ARNOLD: Staff, I'm looking for a requirement
9 to do anything having to do with the Environmental Justice
10 Review.

11 >> MS. SIMON: Your Honor, Marcia Simon for the Staff.
12 The answer to your question is there is no requirement in the
13 code of federal regulations or any other legal requirement
14 that the applicant do an Environmental Justice Review.

15 >> JUDGE ARNOLD: Okay, thank you. One more question
16 for Petitioner -- and I think the demographic information that
17 was provided seemed to follow very specifically, the guidance
18 that was in that Reg Guide but in following that guidance, very
19 specifically, it seemed to average out the Indian community so
20 that they never appeared. Is that part of your contention as
21 well?

22 >> MR. MAHOWALD: That is a concern because it goes

1 far beyond the immediate boundaries of the Prairie Island
2 Indian community. I believe it is a 50-mile radius as opposed
3 to again, we're talking about certainly within a -mile radius
4 would be all of the lands owned in trust by the community at
5 this time.

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

8 >> MS. SIMONS: I'd just look at the Environmental
9 Report, Your Honor. They analyzed over 2,000 block groups
10 within a 50-mile radius and I'm not exactly sure of what the
11 definition of a block group is but I think that they are
12 distinct areas within that 50-mile radius. So presumably,
13 the areas immediately around the plant including the PIC were
14 contained in that.

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

16 >> JUDGE FROEHLICH: Sure.

17 >> MR. LEWIS: There were two block groups and the
18 Indian Community actually falls within two different block
19 groups and so we did follow the NRC methodology that Reg Guide
20 tells us to provide the demographic information that the NRC
21 can then use and we provided it and we followed the NRC
22 methodology.

1 The Indian community I believe has 250 members who
2 reside in the community. And the block group is a bigger area
3 that's actually two blocks so the population is split. And
4 when you look at the criteria for whether there is a minority
5 population under the NRC guidance which is - does the
6 percentage of the minority population exceed the average by 20
7 percentage points or is it more than 50 percent of the area,
8 just because there is a small population there that does not
9 meet that criteria.

10 But because of that on the map, we identified where the
11 minority populations were in addition to showing where the
12 block groups that had minority populations who specifically
13 identified the Indian community, their tribal lands, they were
14 able to identify them notwithstanding the fact that they
15 actually meet the numerical test in the NRC guidance.

16 >> JUDGE FROEHLICH: So then, I'd like to follow-up
17 your answer with the Petitioner. I think what I'm hearing from
18 Mr. Lewis, that the Indian community was contained in the study
19 of two blocks, population and there was some additional alert
20 or some kind of additional markings made that the Indian
21 community, it was addressed within that portion of it.

22 I guess I will ask Petitioner, what more do you want them

1 to do? Do you want them to break down the blocks in smaller
2 sections beyond what the Reg Guide states? Or what is it that
3 they didn't do -- that's not to put them out of compliance with
4 what the regulatory guidance suggest they do?

5 >> MR. MAHOWALD: I guess this also relates to the
6 previous contention that we discussed where we do believe that
7 there is a disproportionate impact on the tribal community
8 being in close proximity to the power plant - we found a KiKK
9 study -- followed up there.

10 In terms of what they would have to do, we -- I guess --
11 let me just consult and see if I can get you a more specific
12 answer. I think what we are looking for is now that there is
13 an identification of the minority community, there needs to be
14 a better specification of what the impact or the impacts
15 actually are, so --to fulfill the environmental justice
16 requirement.

17 >> JUDGE FROEHLICH: But that additional information,
18 that's not part of the Reg Guide or any regulation or
19 requirement; is that correct?

20 >> MR. MAHOWALD: Well, again, we understand in terms
21 of the NRC's requirement, it's implied in there that there
22 needs to be some sort of handling in addressing of

1 environmental justice issues. But, it's a fairly complicated
2 analysis. We concede that.

3 >> MS. SIMON: Your Honor, may I comment on that
4 briefly?

5 >> JUDGE FROEHLICH: Please respond.

6 >> MS. SIMON: The Reg Guide as was pointed out is
7 guidance. It's not a rule requirement. And it clearly states
8 that the staff does an environmental justice review. Also, it
9 does not mention the word "applicant." It is clearly an onus on
10 the Staff. That is part of its obligation.

11 So, there are two elements to the review, the
12 identification of the minority population which was done
13 through -- pursuant to NRC guidance by the applicant in the
14 Environmental Report and there is the identification of
15 possible disproportionate impacts which is really going to be
16 done by the staff. That's the staff's job.

17 I would also like to mention that there is a Memorandum
18 of Understanding between the tribe and the NRC and under that,
19 environmental justice is one area in which the staff is
20 actively pursuing to work with the tribe on that. So even
21 regardless of what is in the Applicant's information, the NRC's
22 independent review which it is required to do under NEPA will

1 involve the Prairie Island Indian Community.

2 >> MR. MAHOWALD: One follow-up. Again, we do
3 recognize that the community does have a role as a cooperating
4 agency and environmental justice does fall within the scope of
5 that relationship.

6 But I guess the question that we would come back to is
7 that we understand that the NRC has to perform this function
8 but how can it perform this function without requiring
9 information from the applicant.

10 Reg Guide provides that the Supplemental Environmental
11 Impact Statement is going to be based on information provided
12 in the ER, environmental report developed during the staff site
13 specific scoping process. Obviously the tribe can contribute
14 to that through the cooperating agency but it does seem to me
15 that the need to have the applicant address this is at least
16 implied in that REG guide.

17 >> JUDGE FROEHLICH: Any response from Applicant or
18 Staff? Last colloquy.

19 >> MR. LEWIS: Only that Staff does perform its own
20 independent analysis and in fact is required in many instances
21 under NEPA to do its own hard look and look at information and
22 data and it does so from many sources as public meetings. It

1 gets information, it consults with other agencies so no it
2 does not depend solely on the environmental report.

3 >> JUDGE FROEHLICH: Staff has the opportunity to send
4 request for additional information and Petitioner has an
5 obligation to pass along whatever studies it would have to the
6 Staff, used by Staff in preparing the final statement.

7 >> MS. SIMON: That's correct, Your Honor and also,
8 I'd just echo what the Applicant attorney said, that the staff
9 actually will do its own -- it will actually look into these
10 issues independently and so, even if in theory the applicant
11 provided no information, the staff would still have to do that
12 under NEPA.

13 >> JUDGE FROEHLICH: Just procedural, when the
14 Environmental Report comes out and it contains a section on
15 environmental justice and I anticipate it will, at that point,
16 if the Petitioner believes that the environmental analysis
17 conducted by the staff is logged insufficient, that would be an
18 opportunity for them to file a new contention.

19 >> MS. SIMON: Yes, I Your Honor you are referring to
20 the supplemental EIS report yes, that's true, under 2309F-2
21 they can file that.

22 >> JUDGE FROEHLICH: Thank you. Is there anything

1 else any one wants to say to the Board on Contention 5 before
2 I go to Contention 6?

3 Contention 6 deals with the monitoring and managing the
4 effects of agent that contains sodium and integrity is directly
5 related to plant safety in the performance of the emergency
6 core cooling systems.

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

15 >> MR. MAHOWALD: First, yes, we do believe so because
16 if you look at the -- Part 54 states that the second and
17 equally important principle of license renewal holds that the
18 plant specific licensing basis must be maintained during the
19 renewal term in the same manner and to the same extent as
20 during the original licensing term.

21 This principle would be accomplished in part through a
22 program of age-related by degradation management for system

1 structures and components that are important to license
2 renewal as defined in the previous rule, 60 F R 22464. So the
3 second principle of license renewal, the Aging Management Plan,
4 the current licensing term should be maintained during the
5 renewal for those system structure components that are within
6 the scope of license renewal as defined by Part 54.4.

7 >> JUDGE ARNOLD: Thank you. Applicant?

8 >> MR. LEWIS: Yes, Judge. Let me be sure I
9 understand your question. Are you asking whether if an issue
10 is addressed by the current licensing basis outside -- is
11 necessarily outside the scope of license renewal?

12 >> JUDGE ARNOLD: I think that's correct. I'm asking
13 if it's been identified as an aging management program and
14 satisfactorily addressed during the current licensing period.
15 When you come to re-licensing, is it treated -- can it be
16 treated as an issue that's already been solved and refer back
17 to that solution.

18 Or, are you starting from ground zero in the re-licensing
19 process and go through and define the whole agent management
20 program there?

21 >> MR. LEWIS: I understand now. As a matter of law,
22 it is not excluded from the scope of license renewal. It can

1 still be on the table. The Commission when it promulgated
2 its license renewals did recognize that there were certain
3 programs that are part of the core licensing basis and managing
4 agent and it credited some of those programs in the rule.

5 In particular, it credited the Maintenance Rule and the
6 Fire Protection Rule for active components. But it declined to
7 go further at the time and it indicated in the rulemaking that
8 if in the future, they decide to credit additional programs in
9 order to take an outside scope, they would do that by further
10 rulemaking.

11 What the NRC staff did do however and then it was
12 consistent with the Commission's recognition that there are
13 indeed effective aging management programs in place ,is it
14 tries to inventory those programs and capture them. That was
15 the whole purpose of the GALL Report was to identify those
16 existing aging management programs - I think they were called
17 existing effective programs at that time, all terminology that
18 Ms. Grimes will remember.

19 So the purpose there was to try to figure out what are
20 plants already doing and a part of the current licensing basis
21 that we don't have to take as hard look at because that's what
22 we look at and that's the whole purpose, doesn't mean they are

1 outside scope is beyond the challenge and so I would submit
2 just the fact that we have something addressed by the COB,
3 doesn't take it outside of your purview.

4 >> JUDGE FROEHLICH: Staff?

5 >> MS. SIMON: Your Honor, if an aging issue is
6 identified in the current licensing term, obviously, there is
7 still going to be an aging issue currently at renewal terms.
8 So there does need to be an aging management program for it.

9 However, as Applicant's counsel has noted, the GALL Report
10 was developed specifically to look at a number of aging
11 management programs and try to streamline the process and see
12 if they can generically, be acceptable.

13 And I'd like to point the Board to a recent decision which
14 was issued by the Commission about 3 weeks ago. It's -- the
15 caption is kind of 22 long. It involves Oyster Creek Pilgrim
16 at Mount 23 Yankee Point. And it's CLI-0823.

17 In that decision, the Commission discusses the GALL Report
18 and endorses the entire process by which if an applicant states
19 that it's aging management program will be consistent with the
20 Gall, then, it does not have to separately demonstrate the
21 adequacy. That alone will demonstrate the adequacy of the
22 aging management program.

1 So, as long as the Applicant is using a program and
2 stating the program will be consistent with the GALL or that if
3 it is adding enhancements, that with the enhancements, it will
4 be consistent with the GALL, then that gives reasonable
5 assurance that aging will be adequately managed during the
6 extended period of operation.

7 >> JUDGE ARNOLD: Okay, so much for the generic
8 question. Now, paint chips. We've known about those for
9 years, coding issues, issues with coding. We have known about
10 strainers clogging for years and years. So I guess I'd like to
11 find out and it's probably in all this paperwork but is that
12 covered under the Gall Report, methodologies for handling aging
13 of codings? I'll start with the Applicant?

14 >> MR. LEWIS: I believe the GALL Report does have an
15 aging management program that the applicant could adopt through
16 managed aging of codings. In our case, we are not relying on
17 codings to protect the metals of any safety related components
18 inside containment and so the issue is simply to debrief that
19 issue on the strainer.

20 And our position was simply that we weren't trying to
21 maintain the coding so that they don't fail. Instead, we had
22 analysis that said let them fail, I shouldn't say that - it's

1 not that flippant -- the analysis says yes, if the qualified
2 codings fails in the area of impact, and if non- qualified and
3 degrading codings failed outside the area of impact, our
4 strainers won't be blocked and our emergency core cooling
5 systems will still work.

6 So rather than having a program that is making sure
7 codings don't fail, we have analysis that says equipment will
8 still perform its function. And for that reason, it just
9 didn't fall within the definition of the scope.

10 >> JUDGE ARNOLD: But your analysis basically says if
11 no more than this amount of codings fails and it seems to be a
12 generous amount --

13 >>MR. LEWIS: -- That is correct.

14 >>JUDGE ARNOLD: Then, your strainers are fine. And
15 do you then do anything that says and we know that we will not
16 have more coding failure than this because....

17 >> MR. LEWIS: Yes, we have a containment inspection
18 program which keeps a log of the degraded codings in order to
19 constantly validate the assumption that's in our generic letter
20 2004-02 analysis.

21 >> JUDGE ARNOLD: Petitioner, any comments on that?

22 >> MR. MAHOWALD: I think the concern that we have

1 with respect to that and I will have to consult with respect
2 to the letter that was just referenced, but I think the concern
3 that we had was the Applicant's assumption of failure in that
4 if it's not -- that the assumption can be incorrect if you're
5 13 not taking into account an adequate maintenance and
6 monitoring program.

7 I guess I would liken it to if you take a power wash to a
8 newly painted home, and you apply that -- the jetstream to the
9 siding, you're going to get a dispersal that's more likely
10 going to be a smaller amount with smaller size particles.

11 However, if you take that same power washer to a home that
12 has aging peeling paint, you're very likely to get larger
13 pieces of paint that could clog the sump strainer. And so, our
14 concern is that perhaps the assumption would lead to an
15 incorrect finding that at all times, you're going to have
16 smaller particles that get caught up in the sump strainer.

17 >> JUDGE ARNOLD: So if I can ask Petitioner on the
18 conclusion reached that there will not be an effect and I
19 believe you mentioned the assumption in the calculation is that
20 all the programs are -- suddenly come off -- that was a worst
21 case analysis.

22 >> MR. LEWIS: There's a zone of instance of a worst

1 case break and all codings are assumed to come up and become
2 debris. And then, there is the entire rest of containment
3 beyond the zone of influence of the worst case pipe break. All
4 unqualified coding are assumed to come up from spray and
5 chemical and become debris and all degraded dequalified codings
6 are assumed to fail and become debris.

7 >> JUDGE HIRONS: So then are you saying that your
8 conclusion is that you disagree with the results of that
9 analysis, that it would not affect the operation of the
10 assumption?

11 >>MR. MAHOWALD: About whether there is an adequate
12 monitor management program because even with those
13 assumptions, unless you have an adequate monitor management
14 program, you still run the risk you will have larger particles
15 that could still clog the containment.

16 >> JUDGE HIRONS: So that's the principle thrust of
17 your contention?

18 >> MR. MAHOWALD: Correct.

19 >> MS. MIZUNO: Yes, Your Honor, Beth Mizuno for the
20 NRC staff. Our focus would go back to the original question
21 which was with respect to what age if there is a current
22 program to manage age fact; is that sufficient?

1 And we would point the Board to the Commission's
2 decision in the Turkey Point case decided in which this
3 Commission stated some age related issues are adequately dealt
4 with by regulatory process and may not be subject to further
5 review during the license renewal proceeding. That's what we
6 think controls in this instance as far as the aging of the
7 containment.

8 What we understand the Applicant is talking about in what
9 the Board recognized as the worst case scenario is an event
10 driven event. It's not an aging event. It's an accident.
11 It's an event and that's -- that is different in our view from
12 a purely aging related degradation. That's all.

13 >> JUDGE FROEHLICH: We're at the noon hour. Did you
14 want to be heard?

15 >> MR. MAHOWALD: Just one very quick response to the
16 Staff's comment. We don't believe this Turkey Point Decision
17 is an appropriate decision. We do not think that coding at
18 issue here are analogous to the emergency planning that was
19 discussed in the Turkey Point Decision, ongoing regulatory
20 programs, excuse me.

21 >> JUDGE FROEHLICH: I note we're at the noon hour. I
22 propose we adjourn until 1:00 p.m. and resume and take up

1 Contention 7 and contentions that follow after that. We will
2 stand in recess.

3 >> JUDGE FROEHLICH: So we resume at 1:15. Have a leisurely
4 lunch.

5 (Whereupon, Court recessed for lunch)

6 (Whereupon the proceedings continued)

7 >> JUDGE FROEHLICH: We're back on the record. This
8 afternoon we'll begin with Contention 7, the monitor and
9 managing of aging due to embrittlement, reactor vessels and
10 associated materials.

11 Contention 7. Judge Arnold. Our closed captioning is
12 trailing us. We'll wait a moment.

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

20 My questions are mostly concerned, at least for
21 Petitioner, with the treatment of embrittlement on the vessel
22 internals, in that I picked out, within the containment, a

1 chain of events.

2 One, that embrittlement was inadequately accounted for in
3 the vessel analysis, or in the analysis of the internals, that
4 in a shock, if the internals are embrittled, they could fail.

5 And then, finally, that the failure of the internals could
6 lead to a core configuration that could not be cooled. And
7 what I was really looking for is what are the facts in the
8 original contention that supports that chain of logic.

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

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

1 accident, LOCA, that would be link two. Again, at page 8 of
2 our petition.

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

11 So I want to note that that comes from our original
12 petition. But I also want to make the statement and the
13 argument that all of those are purely factual statements as
14 well. And I'm not sure if the Applicant or the NRC staff is
15 going to disagree with the truthfulness of those; but, again,
16 from our perspective, in terms of stating a factually specific
17 contention, we would cite to the declaration of Dr. Lahey that
18 was submitted in the Indian Point decision, but we would also
19 say that his observations are stand-alone facts that can be
20 utilized to state a valid and admissible contention.

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

1 >> MR. LEWIS: I would, with all due respect to my
2 colleague, disagree. This is a purely factual issue. This is
3 a highly technical matter of expert opinion on whether there
4 are significant -- severe decompression shock loads that would
5 occur that would affect the internals, the internals without
6 pressurized components.

7 The Pressurized Thermal Shock Rule, which applies to the
8 vessel itself, was based on studies that indicated that for
9 embrittlement to be a concern for the carbon steel vessel,
10 there needed to be both a pressure shock and a thermal shock.

11 And thermal shock alone was insufficient. I guess I've
12 never seen any basis to indicate that with respect to internals
13 inside the reactor, which aren't pressurized and therefore
14 don't, as far as I know, are not subject to any sort of rapid
15 depressurization stress, that there are those kind of stresses
16 that could, coupled with thermal stress, cause a failure.

17 I'm also not sure and see nothing in Dr. Lahey's original
18 declaration that really explains what these stresses are, what
19 the thermal stresses are and how quickly these components would
20 be subject to cool-down. And it's very, very much a matter of
21 expert opinion and simply no basis for it. This is not an
22 analysis that was part of the original licensing basis of a

1 plant.

2 And I think if one is positing a brand new phenomena that
3 needs to be managed, there needs to be more than simply saying
4 embrittlement may occur, which, of course, is obviously the
5 case.

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

10 And as far as whether there's sufficient technical opinion
11 basis to demonstrate a genuine material issue, our position is
12 it's just not shown.

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

18 >> MR. LEWIS: Okay. Each vessel had six capsules
19 originally. And in each vessel, four capsules have already
20 been removed and tested. Therefore, each vessel has two left.
21 So four in total. Two left.

22 That is, as we pointed out in our answer stated in the

1 USAR, Updated Safety Analysis Report, for the plant and
2 therefore it's on the docket and available and should have been
3 addressed. How the capsules will be tested on a going-forward
4 basis is answered and addressed directly in the Reactor Vessel
5 Surveillance Program described in the GALL report, which we've
6 referenced and adopted.

7 And it states that if an applicant has a surveillance
8 program that consists of capsules with projected fluence of
9 less than the projected 60-year fluence, at the end of the 40
10 years at least one capsule is to remain in the reactor vessel
11 and tested during the period of extended operation.

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

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

22 Right now our estimation is the prior four capsules on

1 each vessel that have been tested had less than the 60-year
2 fluence, or 60-year fluence corresponds to 54 effective full
3 power years in our case.

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

7 >> MR. LEWIS: I'm not exactly sure how you calculate
8 the fluence. I'd have to -- I'm told their location the way
9 they lead the fluence of the vessel. And there's a procedure
10 and program for how you calculate the fluence and ensure that
11 it's representative. In fact, conservative for the vessel
12 materials.

13 I don't know the details of that program. As I said, the
14 four that we've tested so far had less than the 54 full-power
15 years, so we do need to test under the GALL program one more
16 capsule for each vessel.

17 Right now we've done preliminary calculations. And the
18 capsules there right now actually exceed the 54 full-power
19 years now. And so our current expectation is that we'll remove
20 and test them in 2011 and 2012.

21 And then just one capsule for each unit. And we'll have
22 one later on that we could use but would not need to meet the

1 GALL program. At that point we would have tested specimens
2 from each vessel with the end-of-life fluence and condition.

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

6 >> MR. LEWIS: Right now, the preliminary calculations
7 are all the remaining capsules in there have already exceeded
8 54 effective full-power years. So they're already
9 representative of end-of-life conditions. So they just need to
10 be removed and tested, and we'll have data on end-of-life
11 conditions.

12 I think you asked are they destructively tested. And my
13 understanding, I've never actually seen a Charpy test, but I
14 understand there's a Charpy test. That's a great big hammer
15 that swings down and breaks them.

16 But I do understand that capsules can sometimes be saved
17 and reconstituted and used and that's also beyond me on how
18 they do it. But I think there is some program. You asked a
19 question about the program enhancements. The program
20 enhancements are described completely in our License Renewal
21 Application in the appendix that describes this program. It's
22 simply that.

1 When you remove a capsule, even after we test it, we
2 will then preserve the specimens if we ever need them again.
3 And the enhancement is no more than that.

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

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

8 >> JUDGE ARNOLD: Thank you. Petitioner, do you have
9 anything to add?

10 >> MR. MAHOWALD: No.

11 >> JUDGE HIRONS: Let's see, I wanted to ask -- you
12 mentioned four of the six had been removed and then the fifth
13 one would be around 2012 or '13, roughly.

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

15 >> JUDGE HIRONS: '11 or '12. And then the final
16 one would be left until the end of the license renewal period
17 or --

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

22 >> JUDGE HIRONS: You would determine that how?

1 >> MR. LEWIS: You keep track of the fluence under
2 the program and calculate it. I don't know how often it's
3 calculated, but it's calculated regularly.

4 >> JUDGE HIRONS: Okay. Thank you.

5 >> JUDGE FROEHLICH: Beyond the surveillance plan that
6 you just described, are there any proposed enhancements or
7 additions to that program?

8 >> MR. LEWIS: The only two program enhancements are
9 the enhancements that are specifically described on page B-69
10 of our Aging Management Program. They are a requirement to
11 ensure all withdrawn and tested surveillance capsules not
12 discarded as of August 11th, 2000, are placed in storage for
13 possible reconstitution and use, and a requirement that in the
14 event spare capsules were drawn, the untested are placed in
15 storage and maintained for future inspection.

16 They're both simply enhancements to make sure that we
17 don't discard specimens either after they were tested or in the
18 event they were withdrawn.

19 >> JUDGE FROEHLICH: Thank you. Anything else?

20 >> JUDGE ARNOLD: I'm satisfied.

21 >> JUDGE HIRONS: Thank you.

22 >> JUDGE FROEHLICH: Let's move, please, to Contention

1 8, dealing with the primary stress corrosion and cracking for
2 nickel alloy components. The Board in its notice of this
3 argument had asked that the Petitioner address where the stress
4 corrosion cracking issue is addressed as part of the Current
5 Licensing Basis.

6 And the parties are prepared to address the generic
7 question, which we have touched on a little bit already this
8 morning. If an issue is subject to an Aging Management Plan
9 during the licensing period, is it required to be addressed as
10 part of the relicensing? We'll start with Petitioner.

11 >> MR. MAHOWALD: First off, stress corrosion cracking
12 is part of the CLB, and we're not challenging the CLB. But as
13 we indicated earlier, yes, it is also part of the Aging
14 Management Program. And we cited for that proposition Part 54,
15 which states in the statements of consideration for Part 54,
16 that the second and equally important principle of license
17 renewal holds that the plant specific licensing basis must be
18 maintained during the renewal term in the same manner and to
19 the same extent as during the original licensing term.

20 Its principle would be accomplished in part through a
21 program of age-related degradation management for systems,
22 structures and components that are important to the license

1 renewal as defined in the previous rule.

2 The second principle of license renewal of Aging
3 Management Plans and the current license term should be
4 maintained during the renewal term for those systems,
5 structures and components that are within the scope of license
6 renewal as defined by Part 54.4. So that is our answer to that
7 question. And I'm trying to think if there was a further
8 question.

9 >> JUDGE FROEHLICH: Go ahead.

10 >> JUDGE ARNOLD: As Judge Froehlich mentioned, this
11 was the second or third contention that really had to do with
12 an aging management issue identified prior to the relicensing
13 process. And I understand the Petitioner's position on this.

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

20 >> MR. LEWIS: What we did in our application --
21 again, on pressurized stress corrosion cracking, there's an
22 upper head issue and a lower head issue. The upper head issue

1 is, there's no uncertainty involved. It's very specific.

2 The requirements are not being put in the regulations.

3 And so the only place I think that is challenged by the
4 Interveners is with respect to how we're managing pressurized
5 water stress corrosion cracking of the instrument tubes in the
6 lower vessel penetrations.

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

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

19 The GALL report addresses it exactly the way we've
20 addressed it in the application. In fact, what we committed
21 to in our application is what the GALL report requires.

22 The GALL report, and this is NUREG 1801, pages Roman

1 Numeral IV.A2-4, A2-5, A2-7, different places, say, for
2 nickel alloy. "For nickel alloy, comply with applicable NRC
3 orders and provide a commitment in the FSAR supplement to
4 submit plant-specific AMP to implement applicable Bulletins and
5 Generic Letters and staff-accepted industry guidelines." So
6 what the GALL report tells applicants to do is do exactly what
7 we've done, credit the Generic Letters and Bulletins and
8 guidance that's out there that's handling this issue in the
9 interim and also commit that while in the long-term the NRC has
10 finished the research and decided what else they want us to do,
11 we'll do them.

12 And so we've dutifully said exactly what the NRC guidance
13 asks us to say. I would suggest that this is analogous to the
14 way the NRC used to treat what was known as generic safety
15 issues and unresolved safety issues. Those are issues that
16 were in and around when the plants were initially licensed and
17 the Commission had to grapple how do we do initially licensing
18 when there's an unresolved issue, an issue they categorized as
19 unresolved.

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

1 In essence, what it says is the fact there's an
2 emerging issue when the NRC is doing research out there is not
3 an impediment to licensing. If somebody wants to raise it,
4 they can; but they really need to explain why the NRC's interim
5 solution is not good enough. Just say what is some issue
6 that's still being subject to research is not enough to make an
7 admissible contention, show that there's a specific risk for a
8 plant and what the NRC is telling licensees to do in the
9 interim is not good enough.

10 Our whole basic response is here the NRC issued a Generic
11 Letter. They said do full metal inspections. We're doing full
12 metal inspections. Why is it that what we're doing is not
13 adequate to manage this aging phenomena until the NRC
14 finishes its research, amends the ASME code and tells us to do
15 more.

16 >> JUDGE FROEHLICH: Care to respond?

17 >> MR. MAHOWALD: Yes. As we indicated in our
18 original petition, we do believe that the License Renewal
19 Application program commitment to do whatever the NRC tells us
20 to do does not demonstrate the effectiveness of an Aging
21 Management Program. We believe that the License Renewal
22 Application violates CFR Section 54.21(a)(3) because it does

1 not address all 10 elements of an effective Aging Management
2 Program for the aging effects on nickel alloy components and
3 wells. So we stand by that original contention.

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

5 >> MS. SIMON: Marcia Simon for the Staff. With
6 regard to the original contention, the asserted violation of
7 54.21(a)(3) and not addressing the 10 elements, the 10 elements
8 are in the standard review plan, which is NUREG 1800. I
9 believe they're in Appendix A.

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

14 And as I mentioned before lunch, this can be done by a
15 commitment, by stating that the Aging Management Program is
16 consistent with the GALL or that, if enhancements are being
17 proposed, that the enhancements will be consistent with the
18 GALL.

19 >> JUDGE FROEHLICH: Anything else?

20 >> JUDGE ARNOLD: No.

21 >> JUDGE HIRONS: Well, you actually answered my
22 question before I asked it. But you quoted from what was in

1 your response that you don't have to answer all of the 10
2 elements, but you have to have an effective Aging Management
3 Program, and I was going to ask you to expand on that a little,
4 which I think you just did.

5 >> MS. SIMON: I'll just add that if the Applicant's
6 Aging Management Program that they propose was not consistent
7 with the GALL, that is when they would have to address the 10
8 elements. So as long as they -- if they can state that it's
9 going to be consistent. And the NRC staff does an audit to
10 make sure that they really are, that it is consistent.

11 >> JUDGE HIRONS: Thank you.

12 >> JUDGE FROEHLICH: Moving now to radioactively
13 contaminated water or other fluids relating to plant safety. I
14 guess I'll start with the Petitioner and Contention 9. And
15 this deals with the piping systems, buried systems that may
16 convey or contain ask specifically what piping systems this
17 contention has in mind. And after you name them, what safety-
18 related function those systems play.

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

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

11 So our concern is, or our question is: What does that
12 program apply to? What systems does it apply to? And so, once
13 again, we are essentially stating a contention of omission,
14 that we're not in a position to identify those systems because
15 it hasn't been adequately identified and disclosed in the LRA.

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

21 They include the chemical and volume control system,
22 component cooling system, cooling water system, fire protection

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

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

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

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

19 On each of these tables they identify the components that
20 are within scope, the materials and the environment. And so
21 you can go through these tables with respect to every system
22 that is within scope and you can see a component like piping

1 and you can see environment buried. And that tells you --
2 and you can see the material, carbon steel.

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

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

14 I'm limiting this to buried pipes with water. There's
15 also a plant station and instrument air system that has buried
16 piping, but obviously not one that has fluence.

17 And none of these three systems has radioactive water in
18 them. I'm not sure I answered -- was that your entire
19 question.

20 >> JUDGE FROEHLICH: I think we broke down to which
21 piping is buried. I think you've addressed that. And then the
22 last part of your answer indicates that none of those buried

1 pipes contain or could contain radioactive fluids or could
2 contain contaminated water or radioactive fluids.

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

4 >> JUDGE FROEHLICH: That's what I understood.

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

9 >> MR. LEWIS: The fire protection system piping
10 system and fuel oil piping do not interface with any
11 radioactive contaminated systems. With respect to the cooling
12 water piping, only the intake piping is buried and within
13 scope.

14 The discharge piping is above grade until there's a point,
15 I believe, at which there's above-grade dump. And there is
16 buried piping below that. But it's not relied on as being
17 safety-related because you have above-grade dump capability.
18 So, yes, there could be radioactive contamination in the
19 cooling water system discharge piping, but the portion that's
20 within scope and safety-related is above-grade and not buried.

21 >> JUDGE ARNOLD: Okay. Thank you. Another part of
22 this contention had to do with what inspections, and there

1 seemed to be a desire on the part of Petitioner that there be
2 some sort of an inspection to establish baseline conditions.
3 I'd like, first off, for the Petitioner to explain, is that a
4 requirement? If so, where it comes from, and how exactly
5 establishing baseline conditions differs from a normal
6 inspection.

7 >> MR. MAHOWALD: The basis for establishing the
8 baselines is to have a way to monitor the effectiveness of your
9 programs, because once you establish your baselines you can
10 ascertain whether -- and monitor the integrity and performance
11 of the underground piping.

12 >> JUDGE ARNOLD: I did see in the description of the
13 plan there will be some form of inspection done on each of the
14 systems in the 10 years prior, just before the start of the
15 extended licensing period and another sometime within the next
16 10 years. Would that inspection during the, what, in the 10
17 years prior to license extension, provide a baseline or would
18 that in some way be inadequate? Let me ask Petitioner first.

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

22 >> JUDGE ARNOLD: Let me ask Applicant now, what's

1 your opinion on baseline conditions and need to know them.

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

7 The concept of this inspection is that piping that are
8 properly protected by these coal tar enameled coatings are
9 really very, very well protected. And when you're talking
10 about service water system piping which is well-designed
11 massive piping that is very well coated to prevent degradation,
12 what you're doing is, in essence, confirming that the coating
13 remains in effect and protective.

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

20 You have baseline knowledge already. The piping was
21 installed. So every plant has very specific specifications of
22 the pipe wall thickness and the coating thickness and the

1 conditions. So you know where it's meant to be, because it's
2 meant to be in a basically nondegraded condition.

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

9 >> JUDGE ARNOLD: Thank you.

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

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

14 >> MR. LEWIS: They haven't been done at Prairie
15 Island yet, so I'm not sure I know how they will do them. But
16 the program hopes to be able to take into account opportunistic
17 inspections, because you really want to avoid digging up piping
18 unnecessarily.

19 In fact, every time you dig it up you're creating a
20 potential challenge to the coding. So at some point you become
21 counterproductive. You have to then make sure that when you
22 dig it up you don't damage the coding. And these buried piping

1 often are buried under conditions where you make sure the
2 soil around them is noncorrosive and you can provide other
3 protections. When you dig them up, you disturb all that.

4 So there's a desire not to overdo it, because that itself
5 is a challenge to the piping. But typically -- and there is
6 guidance. I just can't remember. I'm sorry; I'll have to look
7 back at the GALL report. But the GALL report actually itself
8 provides you some guidance on where you should look. You
9 should be looking at an area that's representative of
10 conditions where you might expect to be more susceptible to
11 degradation.

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

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

20 >> MR. LEWIS: Yes, absolutely.

21 >> JUDGE FROEHLICH: To the Petitioner, I note that
22 you also fault the application because it contains no provision

1 for cathodic protection. Is it your position, in light of
2 what I read in the replies from both the Applicant and Staff,
3 that a cathodic protection plan should be part of the Aging
4 Management Program for the buried pipes?

5 >> MR. MAHOWALD: We're not quite sure on that one
6 yet.

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

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

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

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

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

6 >> MR. MAHOWALD: No.

7 >> JUDGE FROEHLICH: You've withdrawn Contention 10?

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

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

12 >> JUDGE HIRONS: I wanted to ask a question of
13 Petitioner with regard, the Checkworks Code or program is at
14 the heart of this contention. And Petitioner mentions, see,
15 I believe it's on page 41, as far as clearly the validity of
16 this code depends on the amount of operating experience and
17 data that is put into the code. And they mention 10 to 15
18 years as a minimum number amount of time to get data into the
19 code, operating data into the code. And in response to that,
20 the applicant has mentioned that the Checkworks Code has
21 something of the order of 20 years, its operating experience
22 data at this point. So I'd like the Petitioner to respond

1 whether you think this is still not adequate or is more data
2 needed?

3 >> MR. MAHOWALD: I think with respect to the time
4 issue, the 10 to 15 years was actually what was in the Indian
5 point decision. But we still believe -- the Indian Point
6 contention -- but we still think that the data, at least, or
7 the disclosure is insufficient.

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

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

12 >> JUDGE ARNOLD: I have no questions on this.

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

19 It will be the Board's intention to take back to
20 Washington, the issues that have come up in the discussion of
21 the contentions, the original standing issue that was raised by
22 the Staff in its pleadings, and the motion to strike, put this

1 all in our single order on the contentions. I'll alert the
2 parties that under the current schedule that would be due on or
3 about November 5th, when we get back, it may take us a little
4 longer if so we'll issue an order to the Commission and the
5 parties the date we'll have our order out.

6 I'd like to turn now to the Motion to Strike. Northern
7 States being the Movant. We'll hear from you first, followed
8 by the Staff and reply from the Petitioner.

9 >> MR. LEWIS: I'll keep this very short. I mean the
10 Commission has spoken to this issue twice; that a reply is not
11 an appropriate vehicle to provide new basis to a contention to
12 try and correct the absence and support from a contention or to
13 recast the contention to raise new issues.

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

19 And I can't think of anything more clearer than an
20 inadmissible attempt to supplement and provide missing bases
21 than providing a declaration in a reply. And, similarly, even
22 today the references to the Swiss study and other new

1 allegations, that under the Commission's precedent allowing
2 that, simply eviscerates the rules, by allowing an Intervener
3 to ignore the initial threshold requirements and coming in at a
4 later stage.

5 And, once more, from Applicant's perspective, it denies us
6 the effective opportunity to really respond to the allegations
7 and explain why they aren't within the scope or why they don't
8 have basis.

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

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

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

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

1 to were things that were not referenced in the new study.

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

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

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

16 With Contention 1, with the archeological sites and so on,
17 I guess there was a certain amount of material that was
18 available to the Petitioner when contentions were due and
19 evidently there was other material that came into their
20 possession afterwards. Could you just elaborate on which items
21 legitimately came in afterwards that they would not have had a
22 chance to include in their original petition?

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

11 But I would submit to you that the NRC does have rules for
12 amending contentions and for filing late filed contentions.
13 And if indeed there is new information provided later, the
14 appropriate course is to move for leave to amend the contention
15 and explain the good cause.

16 That then allows the other parties to respond to identify
17 whether it was indeed new information. Because a lot of
18 information in Miss Hildebrandt's report, of course, is also in
19 the 106 Group report. And, in addition, all of her report is
20 in fact based on survey documents and other historic
21 information that's available in a number of sources, in
22 particular, the Office of State Archeologist. So we might well

1 be able to say if there had been a request for a late
2 contention, this is not new at all, this is a matter of public
3 record.

4 And we just have not had that opportunity. So the
5 appropriate course, if there is indeed new information that
6 comes in after the contention, is to come to the Board and say
7 we need to amend our contention, here's the good cause for it,
8 and then that allows us to respond, not only to whether it's
9 good cause but to the substantive allegations.

10 >> JUDGE FROEHLICH: Petitioner, I guess you would
11 view this material as being amplification of your original
12 contention and material that came to you after the deadline.

13 >> MR. MAHOWALD: Correct, Your Honor. We would also
14 point out that we do believe that our original contentions did
15 provide adequate facts to support, to establish the basis of
16 our contentions and to create disputes of fact on those issues,
17 and that the subsequent efforts to amplify those arguments in
18 the reply are completely permissible; because, again, obviously
19 we were mindful of the threshold requirements. We believe we
20 achieved those.

21 But those aren't sort of the gatekeeper from here on in
22 that we can't add new information and new detail to support our

1 contentions, especially when that information comes to us
2 after the deadline for Petitioner to intervene. So that's the
3 Community's position on that point.

4 >> MR. LEWIS: I actually do have to make a correction
5 because I misspoke. I said that Miss Hildebrandt's report was
6 provided to the Indian Community after they filed the petition.
7 I was looking at the dates. In fact, we gave it to them four
8 days before. That's a very short time, but it was not in fact
9 given to them beforehand. It was given to them afterwards. It
10 was given to them before.

11 There's an August 14th letter from Xcel to Mr. Ron Johnson
12 providing that draft report. And it's still in draft. So we
13 actually provided it before the intervention petition.

14 >> JUDGE FROEHLICH: Any reply or comment?

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

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

1 >> MS. MIZUNO: Yes, Your Honor. With respect to
2 Contention 1, we agree with Northern States Power that if there
3 is new information that changes the situation such that a new
4 contention could be brought, then the rules provide for late-
5 filed contentions. And they provide for contentions.

6 But in this case the Petitioner did not avail themselves
7 of those avenues. And, therefore, we believe that the Motion
8 to Strike is appropriate. Particularly with respect to
9 Contention 1. We've split up the contentions as you
10 understand, so if there are issues you have with respect to
11 specific contentions on the Motion to Strike, we would probably
12 divide our answer among the three of us.

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

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

21 >> JUDGE FROEHLICH: Petitioner.

22 >> MR. MAHOWALD: I believe we've set forth our

1 position as well adequately in our brief. Again, we have
2 satisfied our pleading burden as a threshold matter. We do
3 believe that each and every one of the items that we
4 referenced in our reply were legitimate amplifications of our
5 original contentions. So, again, this is not an attempt where
6 there was an after-the-fact effort to impermissibly remediate
7 any of the deficiencies in any of the original contentions.

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

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

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

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

21 I appreciate your patience, sirs. We would just like to
22 remind you, as well know, the NRC staff cannot waive the

1 standing issue. The Applicant cannot waive the standing
2 issue. It is up to the Board to rule on standing.

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

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

18 >> JUDGE FROEHLICH: Although we had a -- we had
19 agreed we wouldn't interrupt you. I beg your indulgence, and
20 say: What in the regulations requires them to submit more than
21 what they have in this docket so far? That's what I can't
22 find.

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

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

9 >> MS. MIZUNO: Yes, I understand, Your Honor. I see
10 where you're coming from.

11 >> JUDGE FROEHLICH: This is not a pro se, saying I
12 purport to represent such and so. This is an attorney, member
13 of the bar, who comes before us saying I represent the
14 Community. And he has also filed a declaration which says that
15 the tribe, the Community has passed a resolution authorizing
16 him to present their views. Shouldn't that be enough coming
17 from counsel?

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

21 >> JUDGE FROEHLICH: Is that a board position?

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

1 >> JUDGE FROEHLICH: A licensing board position,
2 not a commission?

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

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

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

6 >> JUDGE FROEHLICH: Thank you.

7 >> MS. MIZUNO: Very well. May I address a couple of

8 --

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

11 >> MS. MIZUNO: No trouble, Your Honor. With respect
12 to NEPA issues, we would like to emphasize the point that
13 under the National Environmental Protection Act, it is the
14 NRC's action of approving a license renewal. If we do, we have
15 to be able to say what the environmental impact of that are.

16 NEPA does not require the Applicant to do anything. It
17 requires action on our part, and what the Applicant is filing
18 in its Environmental Report is not required under NEPA. What
19 it does is it assists us. But ultimately it is the Agency
20 that, the Commission, that has to issue an Environmental Impact
21 Statement.

22 And this idea is reflected in the regulation at 10 CFR

1 51.41, 10 CFR 51.41, which states the Commission may require
2 an applicant for a permit, license or other form of permission
3 or amendment to, or renewal of a permit, license or other form
4 of permission, or petitioner for rulemaking, to submit such
5 information in order -- to submit such information to the
6 Commission as may be useful in aiding the Commission in
7 complying with Section 102.2 of NEPA.

8 The Commission will independently evaluate and be
9 responsible for the reliability of any information which it
10 uses. So the discussion of what exactly is required of the
11 applicants under the regulations of Subpart 51 which discussed
12 the Environmental Report, the Staff is of the opinion that the
13 material that was submitted was sufficient for us to be able to
14 do our work.

15 And we just want it to be very clear that NEPA does not
16 apply to the Applicant. It applies to us. With respect to the
17 issues regarding the safety and engineering questions, largely
18 we have addressed those issues in our answer, in our reply,
19 where we have stated that in various instances, some of them
20 lack support. Some of them lack a basis. Some of them lack
21 materiality and fail to raise a genuine issue of fact or law.
22 And we're comfortable standing on our written submissions.

1 That concludes our concluding statement, Your Honor.

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

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

6 >> MR. MAHOWALD: Thank you. First off, I would like
7 to add one more fact for the Board's consideration with respect
8 to this standing issue. With all due respect to counsel for
9 the NRC, under the laws of the Prairie Island Indian Community,
10 a quorum of the tribal council is authorized to act on behalf
11 of the tribal council.

12 They are not required to do each and every action by
13 formal writing, whether it be by a written resolution or some
14 sort of declaration that would be acceptable to the NRC. The
15 tribal council is authorized under the laws of the Prairie
16 Island Indian Community to make formal action on behalf of the
17 Community by a motion.

18 The motion that was cited in my August -- actually,
19 September 19th declaration, I believe it was, was a motion that
20 was passed by a quorum. Actually, a unanimous 5-0 vote of the
21 Prairie Island Indian Community tribal council. So as an
22 employee of the Prairie Island Indian Community, and as an

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

5 So, again, I don't think the Community would take the view
6 that it does not need to provide a note to satisfy the NRC.
7 And I suspect that the state of New York probably didn't have
8 to do so in the Indian Point decision. One item that I would
9 like to address in connection with the Motion to Strike: There
10 was, of course, some argument about the Petitioner raising new
11 items.

12 Now, the Applicant, today, talked about photographs, that
13 it was ready, willing and able to provide the Board. Again, we
14 would encourage the Board to look at those, because I think it
15 would touch highly on the contention that we raised, our first
16 contention, with the ever-shifting nature of what ground has
17 been historically disturbed and what hasn't and when and under
18 what circumstances that parking lot was erected and if indeed
19 that parking lot is the parking lot that will store and house
20 equipment for the Steam Generator Replacement Project.

21 But, again, I bring that up because it was first raised by
22 counsel for the Applicant. But I think there's an interesting

1 issue that we hope to get a chance to follow up on down the
2 road. The other item that I would also like to say with
3 respect to the Motion to Strike is, yes, we did -- there was
4 delivery of Miss Hildebrandt's preliminary draft study on or
5 about August 14th.

6 That was provided to us in confidence and confidential,
7 and originally the intent was that the Prairie Island Indian
8 Community would work with Xcel to finalize that, offer its
9 comments before that was passed on to the NRC. So we have
10 never thought that we could go ahead and utilize that
11 particular report based on our agreement to treat it as a
12 confidential document.

13 And, again, that, as we indicated earlier, that issue
14 itself is one that is being addressed between NSP and the
15 tribal council. They will be meeting to discuss those
16 findings, which, again, came as some surprise to the president
17 of the tribal council and the assistant secretary/treasurer
18 when they were participating in the site audit visit.

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

1 The other items that I would like to -- there are a
2 couple of other items that I would like to address, and it ties
3 really, ultimately, with sort of a thread that runs through
4 each and every one of our contentions.

5 Obviously, the rules of procedure and the legal
6 requirements for this body require that we parse them out and
7 deal with them individually. But from the Community's
8 perspective, these represent a cumulative risk, a cumulative
9 risk that is borne disproportionately by the Prairie Island
10 Indian Community, given their close proximity to the PINGP.
11 They're in a very unique set of circumstances that raise all
12 sorts of issues.

13 But these are cumulative and integrated risks that,
14 although parsed out separately under the rules, do represent an
15 integrated risk that is uniquely borne by the Prairie Island
16 Indian Community. And with respect to the contentions that
17 we've raised, we have pointed out omissions, discrepancies,
18 deficiencies in the license renewal application and the
19 Environmental Report that, frankly, make it very difficult for
20 us to state contentions on some sets of circumstances.

21 But under the law governing, that in and of itself is a
22 viable, admissible contention if we point out what the law

1 requires and where the License Renewal Application or the
2 Environmental Report is deficient.

3 So with respect to Contention No. 4, and actually as it
4 relates to the piping issue as well, one of the things that the
5 Community continues to believe is necessary is that under
6 Section 316-B, that the best available technology needs to be
7 used for all monitoring, whether it's for groundwater, thermal
8 discharge, the adequacy of the piping, and the monitoring, the
9 Aging Monitoring Programs.

10 We want to make sure this is a safe plant and that the
11 people in closest proximity to it are not put in undue risk. A
12 couple other points that I'd like to follow up on as well:
13 Early on, Judge Arnold was asking questions about how much
14 information is enough to satisfy the Applicant's obligation.

15 That, of course, ties back to our contentions of omission.
16 That's not a fine line, but we certainly need enough
17 information to satisfy the basic elements of what's required.
18 Then it's up to the NRC to test and refine that information.

19 For example, on archeological and historical information,
20 no information was provided on where the refurbishment
21 activities would take place relative to previously disturbed
22 areas and undisturbed areas.

1 On endangered species, not enough information to
2 justify the conclusion of no effect on Higgins-Eye or avian
3 species. Then on environmental justice, there was no
4 information at all on the impacts coming from the Applicant.

5 On endangered species, we don't believe that the Category
6 1 finding on transmission lines defeats the validity of the
7 Community's contention on the Category 2 issue of endangered
8 avian species. There's simply not adequate information in the
9 Environmental Report to reach any conclusion on the effect of
10 the transmission lines on endangered avian species.

11 It's all very conclusionary, with no rationale or evidence
12 for the conclusion that there is no impact. However, we would
13 desire to file for waiver and demonstrate special circumstances
14 if the Board does not adopt our Category 2 argument.

15 Judge Hirons asked why we use the term "operational
16 changes" in connection to this contention. It was part of a
17 question on why the high avian mortality of the 1973 to 1978
18 period mysteriously dropped, forming the basis for Applicant's
19 conclusion that there was no impact on endangered species. Was
20 it because they did something different in regard to the
21 transmission lines? We couldn't figure out what that would
22 be. Or did they simply stop looking for dead birds?

1 In other words, some evidence that they actually do
2 know what's happening with avian mortality and endangered
3 species.

4 On Contention 4, we would file a waiver claiming special
5 circumstances relative to the PINGP with the focus of releases
6 from the plant, because the focus of releases from the plant is
7 primarily on the Community and studies of higher incidence of
8 cancer of Native Americans warrant some closer look at
9 potential adverse health impacts specific to the Prairie Island
10 Indian Community.

11 On environmental justice, there's an implicit requirement
12 in NRC practice that the Applicant evaluate the impacts on
13 minority communities, specified in Reg Guide, Commission Policy
14 Statement on Environmental Justice will be treated as a normal
15 NEPA review issue.

16 We interpret this as requiring the traditional process of
17 the Applicant submitting information in its ER on potential
18 impacts. We suspect that this would be clearer if the
19 Executive Order on Environmental Justice would have been
20 promulgated when Appendix B was added to Part 51. But the
21 timing was off. See footnote 6 in Appendix B. And the Agency
22 has never clarified the Applicant's responsibilities on

1 environmental justice in Part 51.

2 But the NRC practice as reflected in the Reg Guide is
3 clear that the Applicant should provide information in the
4 Environmental Report on potential impacts to minority
5 communities. The applicant in this case has not done this.
6 Thank you for your time.

7 >> JUDGE FROEHLICH: Thank you. Well, I just would
8 like to say, and my colleagues have said to me, that this oral
9 argument has been helpful to this Board; that we appreciate the
10 efforts the Staff and the Applicant and Petitioner have put
11 into their arguments and to the clarifications they have given
12 us.

13 As I had mentioned earlier, we're going to take this
14 record back to Washington and come out with our decision
15 addressing the initial standing issue, the 11 contentions,
16 one withdrawn, the 10 contentions that are before us, as well
17 as the motion to strike. I thank you all for your
18 participation and your help in this matter. We stand
19 adjourned.

20 (Proceedings concluded at 2:25 p.m.)

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CERTIFICATION

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of Northern States Power Co. (formerly Nuclear Management Company, LLC.) (Prairie Island Nuclear Generating Plant, Units 1 and 2) Docket Nos. 50-282-LR and 50-306-LR, Hastings, Minnesota were held as herein appears, and that this is the Interim Draft transcript thereof for the file of the United States Nuclear Regulatory Commission taken and transcribed by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

LORRAINE CARTER, RPR

Official Reporter

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