

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3
4
5 ATOMIC SAFETY AND LICENSING BOARD

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7
8 In the Matter of

9 Docket No. 63-001-HLW

10 U.S. DEPARTMENT OF ENERGY

11 (High-Level Waste Repository) March 25, 2009

12
13 MARCH 31, 2009

14 TRANSCRIPT OF PROCEEDINGS --

15 Before the Administrative Judges:

16
17 ASLBP BOARD

18 09-878-HLW-CAB03

19 Paul S. Ryerson, Chairman

20 Michael C. Farrar

21 Mark O. Barnett

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APPEARANCES

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For the Nuclear Regulatory Commission Staff:

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Andrea Silvia
Daniel Fruchter

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Jay Silberg
David Repka

For the Department of Energy:

Tom Schmutz
Don Silverman

For the State of Nevada:

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John Lawrence
Charles Fitzpatrick

For the Nevada Counties of Churchill, Esmeralda,
Lander and Mineral:

Robert List
Jennifer Gores

For the State of California:

Tim Sullivan
Susan Durbin

For the Caliente Hot Springs Resort:

John Huston

1 APPEARANCES (Continued)

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3 Rovianne Leigh
4 Scott Williams

5 For the Nevada County of White Pine:

6 Michael Baughman
7 Richard Sears

8 For the Nevada County of Clark:

9 Alan Robbins
10 Debra Roby

11 For the Timbisha Shoshone Tribe:

12 Darcie Houck
13 Ed Beanan

14 For the Nevada County of Nye:

15 Rob Anderson
16 Jeff VanNiel

17 For the Nevada County of Inyo:

18 Greg James

19 For the Timbisha Shoshone Yucca Mountain Oversight
20 Program:21 Doug Poland
22 Hannah Renfro

23 For the Nevada Counties of Lincoln and Eureka:

24 Diane Curran
25 Baird Whegart

1 PROCEEDINGS

2 >>JUDGE RYERSON: Good morning. Please be
3 seated. Welcome everyone.

4 In June 2008, the Department of Energy
5 applied to the Nuclear Regulatory Commission for
6 permission to construct a repository at Yucca
7 Mountain for high-level nuclear waste.

8 We're here today for oral argument on
9 petitions to intervene in the hearing that the NRC
10 will conduct on this application.

11 My name is Judge Paul Ryerson. I'm an
12 administrative judge on the Atomic Safety and
13 Licensing Board panel. And I'm Chair of what has
14 been designated Construction Authorization Board
15 Three, which is one of three boards that will be
16 considering the Yucca Mountain application in the
17 next two days.

18 To my right is Judge Mike Farrar, who, like
19 me, is trained as a lawyer. And on my left is our
20 third judge, Dr. Mark Barnett, who is an
21 environmental engineer.

22 The proceedings today are being webcast by
23 the NRC, and, in addition, they're being carried
24 internally by the agency's digital data management
25 system, or DDMS. They're being shown in the

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1 headquarters facility in Rockville, Maryland, and in
2 addition they are being broadcast internally on the
3 NRC's internal television system, broadband system.

4 Before we begin, before I ask counsel to
5 introduce themselves, I'd like to explain for the
6 benefit of the public how today's proceeding fits
7 into the NRC's review of the Yucca Mountain
8 application.

9 When an application comes into the agency,
10 it is reviewed first by the NRC staff, and analyzed
11 by the staff from the standpoint of safety, security,
12 and environmental compliance.

13 The Atomic Safety and Licensing Board is
14 entirely separate and distinct from the staff. We do
15 not have communications about the merits of our
16 proceedings with the staff or, for that matter, with
17 the Commissioners.

18 The staff, in fact, appears as a party in
19 our proceedings. And ultimately the Commission has
20 jurisdiction to hear appeals from our decisions, but
21 again, we do not communicate with commissioners about
22 any of the merits of these proceedings while they're
23 underway.

24 Our purpose today is an important one, but
25 it's also in a sense a very narrow and limited one.

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1 The law provides an opportunity for
2 interested stakeholders to identify issues on which
3 they would like to have a hearing. Twelve petitions
4 have been filed in the Yucca Mountain proceeding by
5 various petitioners, and in addition two counties
6 have asked to participate. Not as parties, but as
7 interested government units.

8 Now, to participate as a party in a
9 hearing, a petitioner essentially has to make two
10 showings. It has to show that it has standing to
11 participate, and it's got to put forward at least one
12 admissible contention. The Petitioners here have put
13 forth over 300 contentions between them, and these
14 are discrete issues or challenges to aspects of the
15 application.

16 Our task, as I said, is a fairly limited
17 one and narrow one over the next several days and
18 next several weeks while we consider our decision.

19 We're really here to ask or to try to help
20 us get answers to two questions.

21 First, which petitioners have standing.
22 And that's not a terribly difficult job this time
23 because of the 12 petitioners, the majority have
24 automatic standing under the commission's
25 regulations. They're units of local government that

1 are deemed to be considered affected by this
2 proceeding. So standing will not be an issue for
3 most of the petitioners. It will be an issue for
4 some of them.

5 The second major question that we need to
6 look at is: Does each Petitioner have at least one
7 admissible contention? The Commission's rules -- the
8 Commission's rules are fairly specific and require
9 compliance with a number of specific requirements for
10 contention to be admissible, but basically these
11 rules are getting at two issues.

12 The first -- the first issue, is the issue
13 appropriate for hearing. In other words, is it
14 material to a decision that the NRC must make.

15 The second question is: Has the Petitioner
16 demonstrated enough to show that a hearing on the
17 issue will not, in effect, be a waste of everyone's
18 time. Petitioner does not have to win its case at
19 this state of the proceeding, but it must show a
20 genuine dispute.

21 So again, we're not here over the next few
22 days to decide the merits of these three under
23 contention. We're here, in effect, to show at this
24 stage or determine at this stage whether there's a
25 genuine dispute whether the pleadings are, in that

1 sense, adequate.

2 Now, before I ask the parties to introduce
3 themselves, I'd like to ask Judge Farrar: Do you
4 have any comment?

5 >>JUDGE FARRAR: No, thank you,
6 Mr. Chairman.

7 >>JUDGE RYERSON: Let's start in the first
8 row on my left. And I'd ask the parties to introduce
9 yourselves. The microphones will work much better if
10 you simply remain seated. We'll start with the NRC
11 staff.

12 >>MR. FRUCHTER: Dan Fruchter, counsel for
13 NRC staff.

14 >>MS. SILVIA: Andrea Silvia.

15 >>MS. YOUNG: Mitzie Young, representing
16 the NRC staff.

17 >>JUDGE RYERSON: Welcome. The Nuclear
18 Energy Institute.

19 >>MR. SILBERG: Jay Silberg representing
20 the Nuclear Energy Institute.

21 >>MR. REPKA: David Repka on behalf of the
22 Nuclear Energy Institute.

23 >>JUDGE RYERSON: Welcome, gentlemen.

24 >>MR. SCHMUTZ: Tom Schmutz representing
25 DOE.

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1 >>MR. SILVERMAN: Don Silverman
2 representing DOE.

3 >>JUDGE RYERSON: Welcome.

4 >>MR. MALSCH: Marty Malsch, representing
5 the State of Nevada.

6 >>MR. FITZPATRICK: Charles Fitzpatrick,
7 state of Nevada.

8 >>MR. LAWRENCE: John Lawrence, State of
9 Nevada.

10 >>JUDGE RYERSON: Welcome.

11 >>MR. MALSCH: Judge, also I'd like to
12 introduce people in the audience. One is Mr. Bruce
13 Breslow, who is the director of the Nuclear Project
14 in Nevada, and Marty Abbs (phn), who's the deputy
15 attorney general.

16 >>JUDGE RYERSON: Welcome.

17 >>MR. LIST: Robert List on behalf of the
18 four Nevada counties, Churchill, Esmeralda, Lander
19 and Mineral.

20 >>MS. GORES: Jennifer Gores on behalf of
21 the four counties.

22 >>JUDGE RYERSON: Welcome.

23 >>MR. SULLIVAN: Tim Sullivan with
24 California Attorney General's Office on behalf of
25 California.

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1 >>MS. DURBIN: Susan Durbin with the
2 Attorney General's office, State of California.

3 >>JUDGE RYERSON: Welcome. We have a
4 difficult sight line to the next person, but . . .

5 >>MR. HUSTON: John Huston, Caliente Hot
6 Springs Resort.

7 >>JUDGE RYERSON: As we go around, I should
8 remind the parties that, although our mikes are
9 always on here on the bench, I think you have to hit
10 a button to put your mike on. And when you're
11 finished, you probably want to hit the button to take
12 it off so we don't hear what you're saying. I'm
13 sorry. Begin on the far right.

14 >>MR. WHEGART: Baird Whegart representing
15 Lincoln County.

16 >>MS. CURRAN: Diane Curran for Eureka
17 County.

18 >>MR. POLAND: Good morning, Your Honor,
19 Doug Poland before on behalf of the Timbisha Shoshone
20 Yucca Mountain Oversight Program, nonprofit
21 corporation.

22 >>JUDGE RYERSON: Welcome.

23 >>MS. RENFRO: Good morning, Hannah Renfro,
24 always representing that Timbisha Shoshone Yucca
25 Mountain Oversight Program, nonprofit corporation.

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1 >>JUDGE RYERSON: Thank you.

2 >>MR. JAMES: Good morning. Greg James
3 representing the County of Inyo. And the County of
4 Inyo would like to invite the State of California,
5 Kevin Bell, to join at the counsel table. He will
6 not be addressing the commission this morning.

7 >>JUDGE RYERSON: Thank you. We have Nye
8 County.

9 >>MR. VanNEIL: Jeff VanNiel on behalf of
10 Nye County.

11 >>JUDGE RYERSON: Welcome.

12 >>MS. HOUCK: Darcie Houck on behalf of the
13 Timbisha Shoshone Tribe, and I have Ed Beanan of the
14 tribal council with me. He will not be addressing.

15 >>JUDGE RYERSON: Welcome.

16 >>MS. ROBY: Good morning. Debra Roby on
17 behalf of Clark County, Nevada.

18 >>MR. ROBBINS: Good morning. Alan Robbins
19 on behalf of Clark County, Nevada.

20 >>JUDGE RYERSON: Welcome.

21 >>MR. SEARS: Good morning. I'm Richard
22 Sears. I'm elected District Attorney of White Pine
23 County. I don't represent the county. I also think
24 I'm the only elected official in this august body.

25 >>MR. BAUGHMAN: Good morning, Your Honor,

1 Dr. Mike Baughman representing White Pine County.

2 >>JUDGE RYERSON: Welcome to both of you.

3 >>MR. WILLIAMS: Scott Williams,
4 Your Honor, representing the Native Community Action
5 Council.

6 >>MS. LEIGH: Good morning, Your Honor.
7 Rovianne Leigh also on behalf of the Native Community
8 Action Council.

9 >>JUDGE RYERSON: Okay. Again, welcome.

10 Obviously, we have a number of participants
11 and parties here, and we on the bench are going to
12 try, as best we can, to address you by name. If we
13 fail to do that, for the benefit of the reporter who
14 probably has the toughest job here today, please do
15 remember to announce your name before you speak.

16 Okay. Today our principal purpose is to go
17 over the issues that are identified in Appendix A to
18 the Board's March 18 order. It occurred to us, as we
19 reviewed the contentions in this matter, that I think
20 are set forth in something like 12,665 pages, that a
21 number of overarching issues, principally overarching
22 legal issues, are likely to determine the
23 admissibility of large numbers of contentions. So it
24 is our hope today to principally focus on issues of
25 that nature; although we would no doubt have some

1 questions about specific contentions as well.

2 It is our plan to dispense with formal
3 openings. We have read your petitions and answers
4 and replies, all 12,665 pages of them. And so it
5 will not be necessary to simply repeat what is in
6 your papers.

7 At the end of the day, we will try, as time
8 permits, to give every party or participant an
9 opportunity to sum up and to address anything that
10 they have felt is not adequately covered by our
11 questions during the day. We'll obviously try, as
12 best we can when we ask a question, and after we get
13 an answer, to cover that same round, as appropriate,
14 with other interested parties in that -- in that
15 particular issue. But we do hope to have time at the
16 end of the day for all of you to say what you'd like
17 about what's on your mind, and, hopefully, we will
18 avoid undue repetition in that exercise.

19 A couple of words about logistics. It's
20 our intention to break for lunch, depending on where
21 we are, about noon. Given where this facility is in
22 Las Vegas and the logistics of everyone getting back
23 through security, we're really forced to give you at
24 least 90 minutes' lunch. So that's what we plan to
25 do. And hopefully we can all get back here in that

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1 time frame. We will take at least one or two breaks
2 in the morning and in the afternoon. And we
3 certainly hope to finish by 5:00 o'clock and get you
4 all out of here then. And, again, we will -- the
5 next board, Board Two will be starting at
6 9:00 o'clock tomorrow.

7 Any comments from Judge Farrar on the
8 procedures?

9 >>JUDGE FARRAR: No. You had the Board
10 Three assignment, the Board One assignment.

11 >>JUDGE RYERSON: Okay. All right. Is
12 there anything any of the parties or participants
13 feel we need to address now of a procedural nature?
14 Mr. Malsch?

15 >>MR. MALSCH: I had one preliminary
16 question. As the Board is aware, DEO's answer was
17 filed on the last business day of the prior
18 administration. We are all, I think, today presuming
19 that DOE's answer is still the position of the
20 Department of Energy, but I think it would be useful
21 before we proceed to argument just to obtain a
22 confirmation from DOE, that, indeed, its answer does
23 still represent the position of the Department of
24 Energy.

25 >>JUDGE RYERSON: It's the only answer we

1 have and we're making that assumption. I don't know
2 if Mr. Silverman wants to comment on that or not.

3 >>: MR. SILVERMAN: Your assumption is
4 correct, Your Honor.

5 >>JUDGE RYERSON: Thank you. Okay. We
6 have -- we do have a request to relay from
7 Construction Authorization Board Number One, which
8 will be sitting on Thursday, and that relates to the
9 revisions to Part 63 of Title II of the Code of
10 Federal Regulations.

11 The Commission recently adopted revisions
12 that I think were published in the Federal Register
13 on March 13 and become effective on April 13. Those
14 regulations, those changes in Part 63 will, no doubt,
15 be effective by the time we issue our decision, which
16 we presently contemplate to be in May.

17 And Board Three would appreciate if all of
18 the petitioners could be prepared on Thursday to
19 inform Board Three of which of their petitions they
20 believe are affected by the recent revisions to
21 Part 63.

22 And in the case of the parties, that's the
23 DOE and the NRC staff, Board Three would appreciate
24 it if you would be prepared to address all of the
25 contentions and let Board Three know which you

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1 believe are affected by the changes to Part 63.

2 All right. Any questions about that?

3 Okay. Well, let's begin then. We do want
4 to take one issue out of order. Otherwise, we'll
5 pretty much follow the order in Appendix A. But it
6 seemed to us, to the boards, in reading the briefs,
7 that there was very little that the State of Nevada,
8 the Department of Energy, and the NRC staff agreed
9 upon, with one exception. And that is, Mr. Repka,
10 that you don't belong here.

11 All of the -- all of the three above have
12 challenged your right to standing and have urged us
13 not to grant you discretionary standing. So we'd
14 like to begin and take, hopefully, less than an hour
15 on that issue, and then turn to some of the other
16 issues that face us.

17 And I'd like to begin, if I may, with one
18 question -- with one or two questions, Mr. Repka.
19 The Nuclear Energy Institute -- that's NEI -- is
20 seeking representational standing as a right. Is
21 that correct?

22 >>MR. REPKA: That is correct, Judge.

23 >>JUDGE RYERSON: And you're not seeking
24 standing based -- you're not seeking organizational
25 standing as a right?

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1 >>MR. REPKA: That's correct. We are
2 seeking standing based on the standing of our
3 members.

4 >>JUDGE RYERSON: Of your members.

5 And you are seeking in the alternative,
6 discretionary intervention?

7 >>MR. REPKA: That's correct.

8 >>JUDGE RYERSON: Okay. Does it make a
9 difference to you which you get and why?

10 >>MR. REPKA: It does not make a difference.
11 We do believe that we are entitled to standing of
12 right, and we have requested representational
13 standing as a right for several independent reasons
14 based upon injuries to members under the Atomic
15 Energy Act, under the National Environmental Policy
16 Act, and the Nuclear Waste Policy Act.

17 So there are separate sufficient basis to
18 demonstrate standing as of right. But discretionary
19 standing is equivalent standing in practical effect,
20 and we don't have a preference of one over the other.

21 >>JUDGE FARRAR: As one of those you
22 mentioned under the Nuclear Waste Policy Act, how
23 much reliance do you put on the fact that your
24 members have made large financial contributions to
25 the Waste Fund? How important is that to your claim

1 of standing as a right?

2 >>MR. REPKA: I think that's a significant
3 basis for standing as a right under the Nuclear Waste
4 Policy Act. I think that the distinction drawn in
5 the pleadings of the other parties, with respect to
6 economic injuries, is one that has no bearing under
7 the Nuclear Waste Policy Act because of the
8 contributions of our members from the Nuclear Waste
9 Fund.

10 Again, that's only one basis for standing,
11 but that is a sufficient and separate basis.

12 >>JUDGE FARRAR: Do you think your
13 contributions to that fund put you in a position,
14 like one of our precedents, where a co-owner of a
15 facility was allowed to have standing on the license
16 application? You wouldn't go that far; would you?

17 >>MR. REPKA: I wouldn't go that far. I
18 would say that those cases with co-owners related to
19 standing under the Atomic Energy Act and under the
20 National Environmental Policy Act. And we do
21 reference those cases with respect to our arguments
22 under that basis. That's not something we were
23 specifically relying upon under the Nuclear Waste
24 Policy Act.

25 There the precedent in the Court of Appeals

1 under the NEI v. Nevada case that we cited in our
2 briefs is the operative precedent that we're relying
3 upon.

4 >>JUDGE FARRAR: To what extent is the fact
5 that you all have contributed to this fund not put
6 you in any better position than the taxpayers who
7 attack federal government programs because they say
8 those are our tax dollars and we don't want them to
9 go in support of program X, and the courts routinely
10 throw them out?

11 >>MR. REPKA: I think it's a very different
12 situation for a couple of reasons. First, clearly
13 the members of the Nuclear Energy Institute are the
14 direct beneficiaries of -- the intended direct
15 beneficiaries of the High-Level Waste Repository. So
16 it is a fairly narrow set of individual entities,
17 which is very different from the generalized rate
18 payer or taxpayer cases.

19 >>JUDGE FARRAR: Except your members got
20 that money from us. They got the money from the rate
21 payers who are substantially the same as the
22 taxpayers.

23 >>MR. REPKA: But for a very specific
24 purpose, for funding the Nuclear Waste Repository.

25 >>JUDGE FARRAR: Unlike my federal income

1 tax which goes into the general fund.

2 >>MR. REPKA: Correct. Now, the second
3 basis, again, if you look at the Court of Appeals
4 decision that we referenced, what makes us very
5 different from those cases, is there is clearly
6 direct economic injury to members from continued
7 on-site storage of nuclear waste. And that has a
8 direct economic and radiological safety and
9 environmental impact on the member companies. And I
10 think that that's -- that's a factor that's in
11 addition to reliance on contributions from the
12 Nuclear Waste Fund, which is -- makes the Nuclear
13 Energy Institute very, very different from the
14 generalized rate payer and taxpayer interests.

15 >>JUDGE RYERSON: Mr. Repka, on the
16 question of radiological injury to -- I guess it's
17 primarily employees of members; is that correct?

18 >>MR. REPKA: I think it's a little bit
19 more than that under radiological injuries. I think
20 that there clearly are occupational exposures
21 associated with continued on-site storage. But I
22 think that there are radiological injuries associated
23 with just the continued management of spent fuel for
24 an extended period of time.

25 That's essentially a radiological safety

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1 activity. If there were any failure to meet that
2 obligation that the potential injury goes beyond just
3 occupational exposures. There are environmental
4 injuries associated with continued on-site storage of
5 spent fuel that are public injuries because of the
6 delay in decommissioning sites that would be caused
7 by having a completed decommissioning added nuclear
8 site, save for the continued presence of the spent
9 fuel that delays release of that site for other
10 beneficial purposes.

11 So I think it's more than just radiological
12 injuries to employees. It's contamination of
13 property. It's security and other factors.

14 >>JUDGE RYERSON: If you submitted with
15 your reply, as I recall, some supplemental affidavits
16 concerning -- certainly explaining the union
17 membership in the Institute.

18 In your view, do we need to consider those
19 supplemental affidavits? Or in your view, is your
20 original petition sufficient?

21 >>MR. REPKA: We believe strongly that our
22 original petition was sufficient. We provided the
23 explanation of the union membership to address a
24 very, very specific question raised by the parties
25 with respect to injuries at the -- to perspective

1 workers at the Yucca Mountain site, but we don't
2 believe that an affidavit was necessary to address
3 that. That's clearly our members and those injuries
4 clearly exist.

5 >>JUDGE FARRAR: But you provided
6 affidavits on the first go-round about the member
7 utility companies. You mentioned unions. I think a
8 one-word mention in your original petition, that you
9 had no affidavits from them.

10 Would you assert that with organizations
11 like yours that have a continuing existence for
12 purposes other than this proceeding, that there's a
13 presumption of corporate regularity, that if the
14 organization says -- the organization votes to file a
15 lawsuit, that that necessarily means under the
16 organization's bylaws, that every member kind of
17 automatically or implicitly authorizes that lawsuit?

18 >>MR. REPKA: I think you can assume that
19 there's a governing structure that applies, and we
20 would -- and, yes, we're relying on that. In
21 addition to the fact that the NRC's case law and
22 precedence I think is fairly clear with respect to
23 representational standing to one member to --
24 preferably by affidavit to show that the member has
25 authorized the entity, and we exceeded the more

1 than -- we provided more than one member.

2 >>JUDGE FARRAR: Well, but your opposition
3 has an argument that the one member -- the members
4 that that you had affidavits from are coming in
5 basing their standing under the Nuclear Waste Policy
6 Act, whereas the union workers would be the ones who
7 have standing -- who could make a stronger claim to
8 standing under the Atomic Energy Act.

9 So it may be important that we -- it's
10 conceivable that the only people that you would
11 piggyback on would be the union people under the
12 Atomic Energy Act.

13 >>MR. REPKA: I think that, again, there
14 we're relying on the fact that, as members, we are
15 authorized by the governing structure of the
16 organization to represent members, and we believe
17 that NEI is authorized and would represent those
18 members in addition to other members.

19 >>JUDGE FARRAR: Before we go any further,
20 Mr. Chairman, Mr. Silverman, why don't you address
21 that last issue of the status of the different -- or
22 people and organizations they claim to represent.

23 And I think the Chairman made clear, our
24 modus operandi today is not going to be one side as,
25 you know, an extensive length of time. We're going

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1 to jump back and forth and get everybody's opinion as
2 we go along.

3 >>MR. SILVERMAN: I hope to answer your
4 question, Judge Farrar. There's an awful lot of NRC
5 cases where an entity, an organization, it might not
6 be a nonprofit organization, an environmental
7 organization, files a petition, and claims it wants
8 to participate in the proceeding and claims standing.

9 But the case law has made clear that they
10 have to provide an indication through affidavits or
11 some statement that the individual members authorize
12 that organization to represent them.

13 Why that's important here is, yes, NEI has
14 provided affidavits from corporate members, but when
15 it comes to radiological injury, which is two of the
16 three prongs that they've alleged as a basis for
17 standing, I don't believe a corporation or an entity
18 or an organization can have a radiological injury. I
19 think it's an individual.

20 And I think what's fundamentally lacking
21 here in the NEI case was an affidavit from an
22 individual member alleging that they would be
23 impacted from a -- have a radiological injury
24 associated with the operation of Yucca Mountain.

25 >>JUDGE FARRAR: Aren't the utility

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1 companies in a -- maybe I shouldn't use this word --
2 paternalistic relationship to their employees. In
3 other words, if the utilities are in, aren't they
4 there representing not only the utilities' business
5 interest but one of their great resources, their
6 employees?

7 >>MR. SILVERMAN: I really don't see that.
8 I don't see how it's different from any other
9 organization that has members who want to petition to
10 participate in an NRC proceeding.

11 >>JUDGE RYERSON: Well, doesn't an employer
12 always have an interest in, if nothing else, not
13 being sued by its employees or in the employee
14 productivity. Quite apart from the paternalistic
15 interest in the welfare of employees, doesn't an
16 employer always have an interest in the health of its
17 employees from at least that narrow perspective?

18 >>MR. SILVERMAN: Oh, I imagine that's
19 right, Your Honor. I don't think it's a cognizable
20 injury under the Atomic Energy Act, however, in this
21 proceeding.

22 >>JUDGE FARRAR: In terms of the same
23 employees, you make an argument that anything outside
24 the Geologic Repository Operations Area, which we're
25 will shorten to GROA in the future, is outside the

1 scope of the proceeding, but we have -- because we
2 cannot, in this proceeding, regulate what goes on at
3 the individual utility sites where the spent fuel now
4 is.

5 That may be true, but our cases don't say
6 that you can only have standing based on interests we
7 regulate. Our cases say you can have standing based
8 on impacts felt at a distance because of the thing
9 we're regulating.

10 So you're going to have to enlighten me on
11 why you think that the scope is limited -- for
12 standing purposes is limited to things happening at
13 the GROA.

14 >>MR. SILVERMAN: That's a very appropriate
15 question, Your Honor.

16 >>JUDGE FARRAR: Thank you.

17 >>MR. SILVERMAN: And particularly, because
18 I think, very frankly, we were not as clear as we
19 should have been in our pleading on the matter.

20 We do recognize that the cases very clearly
21 show that, when an applicant applies for a license,
22 that in considering standing, you may in fact,
23 consider impacts from that proposed licensed facility
24 and that licensed activity to individuals who are
25 outside the boundaries of the facility at the 50-mile

1 presumption and reactor cases, and you have the other
2 standing law that shows that.

3 And we did imply that that's what we were
4 saying. What we were really, frankly, trying to say,
5 what the distinction is in this case, between those
6 cases which we well recognize and what we have here,
7 is that the NEI petition alleges that those
8 radiological injuries are attributable not to the
9 proposed activity, which is the Yucca Mountain
10 Repository, not to the application that is before us,
11 but to the sort of ancillary effect of having to
12 continue to store radioactive waste at the nuclear
13 power plants.

14 The injury in their allegations is coming
15 from the action -- from the activities at the nuclear
16 power plant.

17 >>JUDGE FARRAR: I would reframe it and
18 say, aren't they saying their injury is coming
19 from -- their standing is based on the possibility
20 that if they're not here in the case, a possible
21 outcome of the case is the repository won't be built,
22 it will be delayed, and that possible outcome of the
23 case -- and all you need is one possible outcome of
24 the case for standing -- will have an impact on their
25 workers who'll have to be working or being around the

1 spent fuel at the reactor site for a longer period?

2 >>MR. SILVERMAN: They are alleging that,
3 yes.

4 >>JUDGE FARRAR: Sounds pretty good to me.
5 What's wrong with it?

6 >>MR. SILVERMAN: Well, once again, as I
7 said, I think that the case law focuses on whether an
8 individual, who may live 5, 10, 50 miles away, has --
9 may be injured as a result of the operation -- direct
10 result of the operation of the licensed activity.

11 >>JUDGE FARRAR: Here, it's from the
12 non-operation. You're right. That's the normal
13 case.

14 >>MR. SILVERMAN: Right. Right.

15 >>JUDGE FARRAR: If the facility goes
16 ahead, we're going to be injured at a distance. Here
17 they're saying, if the facility doesn't go ahead --
18 this is a peculiar case.

19 But what's outlandish about it, they say if
20 we have this bad outcome for their people, it will be
21 a bad outcome for the workers, from the non-going
22 ahead of the project.

23 >>MR. SILVERMAN: Right. No, I understand
24 the rationale that the repository doesn't get licensed
25 in a timely fashion, and that has the effect of

1 requiring additional long-term storage or some of the
2 other contentions relate to the use of DPCs and TADs
3 at the reactor facilities. But again, I think it is
4 distinguishable because they are alleging that the
5 injury is coming from the activity -- directly from
6 the Part 50 licensed activity, and that's different
7 than the other cases.

8 >>JUDGE RYERSON: Mr. Repka, don't you also
9 allege that you have unions as members, and that the
10 union -- the individuals who are members of the
11 unions are likely to work at the repository and the
12 construction of the repository? Is that part of your
13 basis for standing?

14 >>MR. REPKA: Yes, that's correct, Judge
15 Ryerson.

16 >>JUDGE RYERSON: And is that raised in
17 your original petition, or is that just in your
18 supplemental affidavits?

19 >>MR. REPKA: No. that's included in our
20 original petition, in the affidavit of Mr. McCullum
21 mentions the fact that unions are members of NEI.

22 >>JUDGE RYERSON: Okay. I noted with
23 interest your --

24 >>MR. SILVERMAN: That was in the original?

25 >>MR. REPKA: There is a statement in the

1 original affidavit that unions are members, that's
2 correct.

3 >>JUDGE FARRAR: But he doesn't expand on
4 it. It was in the supplemental pleadings that they
5 expanded on it and said all these different tradesmen
6 would be working at Yucca Mountain.

7 >>MR. REPKA: Right. To respond to some of
8 the points made by the other parties.

9 >>JUDGE RYERSON: Okay. You take the
10 position, Mr. Repka, in your reply that historically
11 the commission has been generous -- that's your
12 word -- in allowing parties or petitioners to cure
13 procedural defects in their replies. And I believe
14 your members have, from time to time, perhaps more
15 than from time to time taken a different view.

16 Is that your -- is that your position that
17 the commission has historically been generous in
18 allowing procedural defects to be cured in replies?

19 >>MR. REPKA: I think that's absolutely
20 true, just as a statement of fact, regardless of what
21 industry position may have been in individual cases.
22 I think the case law speaks for itself that, with
23 respect to affidavit requirements or pleading
24 requirements, the commission has been allowed some
25 latitude there.

1 Again, I don't think that that's necessary
2 in this case. I don't think it's necessary for us or
3 the Board to rely upon that. I am a little
4 concerned. I think I'm hearing a new argument from
5 the Department this morning that we would need to
6 have affidavits from individual employees. That's
7 not an argument that's been made in any of the papers
8 today.

9 But I do disagree with that argument. And,
10 again, I think that the pleading requirement is one
11 of having a member provide an affidavit demonstrating
12 that the member has authorized the association. And
13 we more than met that requirement on the initial
14 filing.

15 >>JUDGE FARRAR: And would you say your
16 supplemental filing is in the nature of explanation
17 of your original as opposed to the thing your members
18 always object to supplemental filings that open up a
19 new --

20 >>MR. REPKA: Yes. And that's absolutely
21 true, Judge Farrar. That's exactly what it does.

22 >>JUDGE FARRAR: Mr. Silverman, what do you
23 think about that?

24 >>MR. SILVERMAN: I'm sorry. Would you
25 repeat.

1 >>JUDGE FARRAR: The question was: Is
2 there supplemental filing, just explanatory to their
3 original, or does it, as companies often do,
4 complaining about the normal interveners that
5 introduces brand-new information.

6 >>MR. SILVERMAN: Well, the supplemental
7 filing, I think, does a couple of things. One, as
8 far as I'm concerned, basically it restates the same
9 interest that they alleged in their original
10 pleading, which they're obviously entitled to do.

11 Other than that, the claims that come to
12 mind that are new are their -- they reference their
13 participation in the PAPO proceedings, in this case,
14 as a suggestion that that should provide a basis for
15 standing, which we think is wrong.

16 >>JUDGE FARRAR: Well, if that's wrong, why
17 did you not object to their -- why are we -- several
18 years down the road here, they participated without
19 any objection from any of you in the PAPO proceeding
20 and now you're objecting to their standing?

21 >>MR. SILVERMAN: Oh, because there was no
22 requirement for standing in the PAPO proceeding.
23 None at all. That would have been entirely premature
24 and inappropriate for us to argue that you had to
25 show legal standing to participate in that

1 proceeding.

2 >>JUDGE FARRAR: What you mean by --
3 bystanders could have come in and said we want to be
4 part of this proceeding?

5 >>MR. SILVERMAN: I have to refer to the
6 rules, but any potential -- some language like any
7 potential party, potential party, can participate in
8 that proceeding as long as they're complying with the
9 LSN obligations. That was -- standing is not a
10 prerequisite for participation in the PAPO
11 proceedings, and I can, with a moment or two, find
12 the regulations that specify that. So that would
13 have been inappropriate for us to raise that at that
14 point. We're now at the contention admissibility
15 stage, which is an intervene stage, and it is a
16 relevant consideration.

17 >>JUDGE RYERSON: Would you say, moving on
18 for the moment to the issue of discretionary
19 intervention, would you regard NEI's participation in
20 the PAPO proceedings as a relevant factor in,
21 perhaps, recognizing discretionary intervention for
22 them?

23 >>MR. SILVERMAN: Well, I guess I'd want to
24 know more about that. I don't believe they've
25 alleged that as a basis for discretionary

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1 intervention. So I'm not sure what the -- how that
2 would support a discretionary intervention argument.
3 It's not an argument they've made, to the best of my
4 knowledge.

5 >>JUDGE RYERSON: Well, one of the issues
6 under discretionary invention -- intervention is
7 whether a party is likely to assist in developing a
8 record. You have here an organization that has
9 participated voluntarily in pre-application
10 proceedings. I suppose it's also an entity that has
11 participated in litigation.

12 >>MR. SILVERMAN: Yes.

13 >>JUDGE RYERSON: And whether we are bound
14 by the DC Circuit's finding that they had standing in
15 the context of the NEI case in 2004, I suppose -- and
16 whether one agrees with their position on the merits
17 or not, wouldn't it be the case that their history of
18 involvement is a positive factor in terms of the
19 possibility of discretionary standing?

20 >>MR. SILVERMAN: Our view on the question
21 of their ability to contribute to the development of
22 a sound record is that they do allege that they have
23 direct substantive expertise in a very general way.
24 There is no doubt that the utilities are cognizant
25 and very experienced with the spent fuel handling,

1 but their pleadings don't really specifically -- they
2 don't identify specific experts upon which they would
3 rely, which is one of the factors to be considered,
4 at the evidentiary hearing, or their qualifications.

5 There are some affidavits. Those
6 affidavits are provided in support of their
7 contentions, primarily, but not -- none of them
8 mention specifically this factor one and the -- which
9 is the contribution to a sound record, and that these
10 individuals who have filed the affidavits would
11 likely be their experts, and they don't really, as
12 far as we're concerned, give the Board a sufficient
13 basis to conclude that they should prevail on that
14 particular factor.

15 >>JUDGE RYERSON: What about the factor of
16 broadening issues or delay. I believe -- and I'm
17 sure Mr. Repka will correct me if I'm wrong. I
18 believe they have nine contentions, nine proposed
19 contentions; is that right?

20 >>MR. REPKA: That sounds right.

21 >>JUDGE RYERSON: And we are faced with 328
22 or 329 proposed contentions, which means, if my math
23 is correct, that their presence would appear to
24 complicate the proceeding by a factor of 2.8 percent
25 or thereabouts.

1 I mean, is that something that is a
2 relevant consideration for discretionary
3 intervention? It doesn't sound like, you know, we
4 have most -- we have 12 petitioners, most of whom
5 have automatic standing. So we're not -- if we were
6 to allow discretionary standing, we don't open up the
7 flood gates potentially, and we don't seem to
8 dramatically complicate what is already a rather
9 complicated proceeding. Is that something we should
10 consider or is that an improper consideration?

11 >>MR. SILVERMAN: Well, the factor is an
12 important consideration to the extent to which they'd
13 inappropriately broaden the proceeding. And I
14 completely trust your math. I'm sure I couldn't do
15 it myself.

16 And clearly that in the scheme of the
17 number of contentions we have, when you just look at
18 the number of contentions, it's a relatively small
19 number. But I'd like to point out that the standard
20 is would the potential party inappropriately broaden
21 the proceeding?

22 What we have here is largely a set of
23 contentions asserting that the Department of Energy's
24 analyses are overly conservative and that -- and I
25 want to stress the word in the standard that applies

1 here. Inappropriately broaden this proceeding.

2 What we would be doing, we would be having
3 the NRC, you the licensing board, adjudicating
4 whether the Department was too conservative. That's
5 a very unusual situation, maybe unprecedented, I'm
6 not sure. Clearly unusual. It's, in our view,
7 inappropriate. It would result in wholly different
8 testimony from the Department of Energy and other
9 parties than we would need to provide in response to
10 other petitioners. We would now not only have to
11 show that we were sufficiently safe and we meet the
12 regulations, but now we have to show that we're not
13 too conservative in order to rebut these contentions.

14 So our view is that second important
15 standard under discretionary intervention really does
16 not cut in favor of NEI.

17 >>JUDGE FARRAR: Was it your brief or
18 somebody else's that said the remedy is to talk to
19 you all?

20 >>MR. SILVERMAN: I believe we said under
21 ability to represent -- another party who could
22 represent the interests of that other party, that
23 since we both have an interest in licensing the
24 facility safely, but as prompt as possible, that the
25 Department effectively does represent their interest.

1 >>JUDGE FARRAR: So they should talk to
2 you?

3 >>MR. SILVERMAN: That will be fine.

4 >>JUDGE FARRAR: They've been talking to
5 you all about a lot of things for a long time;
6 haven't they?

7 >>MR. SILVERMAN: Are you referring to
8 anything in particular, Judge Farrar?

9 >>JUDGE FARRAR: Yes. Yes. We're
10 referring to the --

11 >>MR. SILVERMAN: Spent fuel.

12 >>JUDGE FARRAR: -- spent fuel pickup, that
13 I don't think has happened unless something happened
14 this morning.

15 >>MR. SILVERMAN: Not to the best of my
16 knowledge. Clearly there's a contractual dispute
17 there. I think that's a different animal than the
18 disagreement or -- well, the issues raised about the
19 extent to which we've been overconservative. You
20 know, and disagreement is probably the wrong word,
21 because I think the Department feels they've been
22 very conservative and very careful in their analysis.

23 >>JUDGE FARRAR: Well, just my
24 seat-of-the-pants layman's knowledge, if there's
25 anybody in the world who has access to talk to you

1 all, it's NEI. The fact that they're here
2 petitioning for us -- petitioning to have an
3 adjudication in front of us, can't we draw from that
4 they believe you've not been responsive? I mean, I
5 can't imagine that all these years, while DOE has
6 been putting this application together, that their
7 members have not been talking to.

8 >>MR. SILVERMAN: I do not know the answer
9 to the question as to whether the NEI has approached
10 the Department regarding the specific issues, the
11 alleged over conservatisms that are the subject of
12 these contentions. I imagine there have been
13 discussions along the way.

14 >>JUDGE FARRAR: Were they the people you
15 make an oblique reference in your brief to some
16 industry organization that filed comments in 1989
17 about let's limit discretionary intervention? Was
18 that them or their predecessor?

19 >>MR. SILVERMAN: It was not NEI, because
20 NEI did not exist then. It was the predecessor
21 organizations.

22 >>JUDGE FARRAR: Atomic Industrial Atomic
23 Industrial Form. Mr. Repka, do you --

24 >>MR. REPKA: I believe it would have been
25 Newmark at that point.

1 >>MR. SILVERMAN: There were several.
2 Several named.

3 >>JUDGE FARRAR: Mr. Silverman, you cited a
4 case -- I want to say it was 100 years ago, but Judge
5 Rosenthal and I were both on it. The North Anna case
6 about the -- I think it was Sun Ship Building, where
7 there was an issue about some big mechanical pieces
8 and whether they were well built. And the case
9 looks, on its surface, like it stands for the fact
10 that, gee, here's the company that built it, they're
11 coming in, and this is the perfect kind of
12 discretionary intervention because they'll give us
13 good, honest information about the merits of these
14 issues that were there the fabricator of these major
15 parts.

16 But when you look behind the surface, there
17 were allegations that that company was, in fact,
18 involved in civil litigation because of their
19 deficient -- allegedly deficient performance, and
20 there was some suggestion that rather than trying to
21 just help the NRC solve this problem, they were in
22 there to get a leg up on their civil litigation by
23 establishing what a great -- establishing in front of
24 us what a great job they had done. And, in fact,
25 that would enhance their reputation, which was in

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1 some jeopardy in the business community. That's the
2 premise of my question.

3 My question is: They don't -- if that's
4 how you look at them, they're not the standout,
5 all-time discretionary intervenor who had only pure
6 motives unlike, you know, NEI here which has its, you
7 know, economic interests and so forth.

8 I think that was a question, but you and I
9 have done this before, so . . .

10 >>MR. SILVERMAN: I'd have to go back and
11 recheck North Anna, frankly. I accept your
12 description of it with respect to potential other
13 motives of Sun Ship Building.

14 But our view here -- and I hope I answer
15 your question -- is very simply that the economic
16 interest they allege is no different than the
17 economic interest alleged in other cases where
18 standing has been denied.

19 It's based not upon radiological injury.
20 It's not linked to radiological injury as its pled.
21 It's based upon the cost of having to continue to
22 store fuel. It's based upon the contributions to the
23 Nuclear Waste Fund, and that is no different, in our
24 view, than the other economic injury cases we've
25 seen, which have resulted in a determination of a

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1 lack of standing under the Atomic Energy Act.

2 >>JUDGE FARRAR: You ever read district
3 court and Court of Appeals' opinions that start out,
4 this case comes -- you know, this case arises under
5 the voting rights act or this case arises under the
6 federal tort claims act, write that first sentence of
7 our opinion for me. This case arises under?

8 >>MR. SILVERMAN: This case arises under
9 the Atomic Energy Act?

10 >>JUDGE FARRAR: Now, the staff's brief
11 starts out with a couple of pages saying it arises
12 under the Nuclear Waste Policy Act.

13 >>MR. SILVERMAN: I was getting there. I
14 think there's several statutes, not in any
15 particular order. The Atomic Energy Act, the
16 National Environmental Policy Act, and the NWPA, yes.

17 >>JUDGE FARRAR: Well, but isn't -- is that
18 an important distinction, given the distinction that
19 you try to draw, that their standing is under -- that
20 their claimed interest falls under something that
21 their contentions have nothing to do with, namely the
22 Nuclear Policy -- Nuclear Waste Policy Act?

23 In other words, you're saying, their
24 contentions are only Atomic Energy Act, only NEPA.
25 They're saying they come in under the Nuclear Waste

1 Policy Act. You say, well, that's kind of not
2 relevant here, but isn't that -- isn't that why we're
3 here, the Nuclear Waste Policy Act?

4 >>MR. SILVERMAN: The Nuclear Waste Policy
5 Act is why we're here. And if I can take a moment,
6 I'll explain briefly, summarize our position on the
7 NWPA and why don't we think that provides standing in
8 this case.

9 NWPA is a multi-faceted statute. There is
10 no doubt that it provides -- that an injury, an
11 economic injury like the dispute over the standard
12 contract is within the zone of interests that could
13 be cognizable, and litigable, and has, in fact, been
14 litigated in federal court, pursuant to specific
15 provisions of the NWPA that put a contractual
16 obligation on the Department of Energy.

17 But that doesn't mean -- that's an economic
18 injury, and that's cognizable in the federal courts
19 under certain provisions of the Atomic Energy Act.
20 The provisions that lead to the standard contract.

21 That doesn't mean that same economic
22 injuries within the zone of interest to be litigated
23 here under other specific provisions of the NWPA.
24 The NWPA does direct the NRC to promulgate
25 regulations under the Atomic Energy Act and the

1 Energy Reorganizers Act, but they're focused on
2 radiological help and safety.

3 The point is NEI -- the NWPA may afford NEI
4 and its -- or its members standing for one purpose in
5 one form, but not necessarily for a different purpose
6 in a different form.

7 And, in fact, as I think you know and we in
8 cited in our briefs, when the commission modified its
9 part two regulations in 1989 to implement some of the
10 NWPA provisions, they even said -- they anticipated,
11 quote, that the industry's interest in the high-level
12 waste is economic, which led them to conclude that
13 maybe their best option would be discretionary
14 intervention.

15 I do not think it's correct to say -- to
16 consider the NWPA as a monolithic statute, where it
17 affords standing in one form; it does not necessarily
18 afford standing in another form. And the NEI case
19 specifies that a Board or a court should consider the
20 specific provisions of the statute under which the
21 litigation is occurring and not look at the statute
22 as a whole, in making that judgment.

23 >>JUDGE FARRAR: Let me ask on that score,
24 Mr. Mulsch and Mr. Repka, if I understand your
25 position which we've not yet ruled on, that

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1 Mr. Mulsch has no right to be heard on this. But
2 indulge me anyhow, subject to your objection.

3 >>MR. REPKA: I was simply looking for an
4 opportunity to reply to Mr. Silverman, but I'll
5 wait --

6 >>JUDGE FARRAR: No. Then go ahead. We'd
7 rather conduct this this way.

8 >>MR. REPKA: Okay. A couple of points I
9 wanted to respond to. First, I want to make it very
10 clear that Nuclear Energy Institute's position in
11 this proceeding is licensing of the project. And we
12 support license of the project, and I think that puts
13 us in a little different light, in terms of our
14 contentions, but we'll get to that.

15 Mr. Silverman picks on one aspect of the
16 contention, and that's the assertion that the
17 application is, in some respects, overconservative.
18 Overconservative.

19 Our contentions do a lot of things, and
20 that's one of the things it does say, but I think --
21 and Mr. Silverman claims that is unprecedented. And
22 I don't think that really is true. I think that the
23 flip side of over-conservatism is compliance and
24 safety margin. And one of the things we would seek
25 to establish is that there is sufficient safety

1 margin. It will be help to establish compliance, and
2 I think licensees or applicants make that argument
3 all of the time, and that will be not unduly delay
4 the proceeding. I think that -- as we said in our
5 papers, I think will actually support and, in some
6 respects, expedite the proceeding. So I think that
7 picking on the contentions related to
8 over-conservatism in the context of standing is
9 misplaced.

10 Second, Judge Farrar, you mentioned the Sun
11 Ship Building case. And I just wanted to mention one
12 other case in which discretionary standing was
13 granted. And that's a case, Ohio Edison Company
14 involving the Perry Nuclear Power Plant. It actually
15 dealt with a proposal to eliminate anti-trust license
16 conditions, and an entity, Alabama Electric Company,
17 was granted standing. And the basis for that was
18 that they were a direct beneficiary of the conditions
19 involved. And I think that the Nuclear Energy
20 Institute here is directly analogous to that, as a
21 direct beneficiary of the repository involved.

22 Third point, there was some discussion of
23 the Nuclear Waste Policy Act, and how it might be a
24 basis for standing in other matters. For example,
25 might be a basis for standing in litigation

1 surrounding damages under the standard contract. But
2 somehow that that wouldn't provide standing in this
3 form.

4 Well, again, I think the Nuclear Waste
5 Policy Act has many aspects to it, and I think that,
6 as we've pointed out repeatedly, one of as the
7 aspects and purposes of the Nuclear Waste Policy Act
8 is the citing of our repository, the licensing
9 process for a repository, the funding mechanism for a
10 repository. And all of that puts our participation
11 well within that zone of interest, and we're not
12 relying on precisely the same basis that we might --
13 we might relay for standing in waste litigation in
14 the district court.

15 >>JUDGE FARRAR: If we found you had no
16 standing as of right, but had discretionary standing,
17 what we would then -- would we still have to look at
18 your contentions to see which ones come in?

19 >>MR. REPKA: I believe that that would be
20 true; that discretionary standing would not eliminate
21 the admissible contention standard. However, again,
22 we are a supporter of the project. And I think that
23 puts our role in a slightly different perspective. I
24 think we have proposed contentions to try to meet the
25 contention standard. But again, I think we would be

1 looking to participate in a way that would support
2 the project where we have that expertise, and based
3 upon discretionary standing or any other kind of
4 standing.

5 >>JUDGE FARRAR: Well, if we let you in, do
6 you think that gives you a roving commission to help
7 us help the other litigants, assuming that some of
8 their contentions come in -- to help them or oppose
9 them?

10 In other words, are you going to -- I guess
11 the question is: Is your game plan, if you succeed
12 here, to be heard only on the contentions you filed,
13 the 2.8 percent add on that Judge Ryerson mentioned,
14 or are you going to be a roving commissioner --
15 commission, helping us out on everything?

16 >>MR. REPKA: I think roving commissioner's
17 probably too broad a characterization. I mean, I
18 think we would be looking to where we appropriately
19 join other contentions, or we would do so, or adopt
20 contentions of other parties or appropriately seek
21 leave to participate on other issues where we felt we
22 could do that, but I think that's probably getting
23 ahead of ourselves. At this point we don't know what
24 the contentions are.

25 Again, it's a little bit of a unique

1 position for an entity that would support the project
2 because, again, we're filing a pleading at a point
3 where we don't know what all the other contentions
4 are.

5 >>JUDGE FARRAR: Let me interrupt you
6 there, Mr. Silverman. We've never had a problem in
7 our decisions -- I mean, there's nothing wrong with
8 someone wanting to intervene to support a project.
9 For example, the tribe came in one segment of the --
10 the ruling segment of the tribe came in the private
11 fuel storage proceeding to support the project. So
12 there's nothing wrong with coming in to support the
13 project.

14 >>MR. SILVERMAN: I'm not aware of a
15 general principle of law that says that can't be
16 done.

17 >>JUDGE RYERSON: I'd like to hear if
18 there's a view of the NRC staff on this issue.
19 Ms. Young, does the staff have a position on these
20 points. Judge Ryerson, Daniel Fruchter will be
21 addressing questions on NEI standing.

22 >>JUDGE RYERSON: Okay.

23 >>MR. FRUCHTER: Is your question specific
24 to an issue that's come up or just the general issue
25 of NEI standing?

1 >>JUDGE RYERSON: Yeah. I think, just as a
2 practical matter, we'd like to wrap this up in a
3 couple of minutes. And if you have -- if, having
4 heard the arguments, there's some points you'd like
5 to make, please do. If the points have been covered,
6 there's no need to speak.

7 >>MR. FRUCHTER: Sure. I'll try to avoid
8 filibustering.

9 The staff opposes the intervention of NEI
10 in this proceeding. As our response makes clear, the
11 crux of NEI's argument is economic. And while they
12 have raised other potential radiological issues or
13 asserted other radiological injuries, they've done so
14 on -- really on behalf of workers, in the context
15 that they've alleged occupational exposures. NEI's
16 members, its corporations do not sustain occupational
17 exposures. They have not demonstrated that they're
18 authorized to represent the workers who might be
19 sustaining those occupational exposures.

20 With regard to --

21 >>JUDGE FARRAR: They do represent the
22 unions, though.

23 >>MR. FRUCHTER: That's correct.

24 >>JUDGE FARRAR: And don't unions exist for
25 the sole purpose of representing their workers?

1 >>MR. FRUCHTER: I believe that that's what
2 they would say. As the commission's decision in
3 Palisades filled last year held, though, the
4 representational standing of unions to represent
5 their members should not be assumed. Like anyone
6 else, they have the obligation to come forward and
7 show that they're authorized to represent their
8 members.

9 With regard to the issue of standing --

10 >>JUDGE BARNETT: I'm a little confused.
11 So your argument is that only individuals can have
12 radiological injuries or that organizations can, but
13 that they are not -- they haven't shown that they're
14 representing the proper organization? Which one is
15 it?

16 >>MR. FRUCHTER: Sure. Certainly someone
17 other than an individual can sustain a radiological
18 injury. The specific radiological injuries that are
19 asserted by NEI are occupational exposures, if you
20 look at the affidavits that they provided. And I
21 would say that it's not possible for a corporation to
22 sustain an occupational exposure.

23 Your Honor's brought up the idea that they
24 might have an interest in avoiding or defending
25 lawsuits brought by their employees. I think that

1 just brings us back to this issue of an economic
2 interest. While there certainly may be one, we would
3 say that it's economic in nature.

4 >>JUDGE BARNETT: Well, so if an individual
5 was worried about an occupational exposure, who would
6 represent them, if they had an interest in this
7 proceeding? Would an individual have to represent
8 himself?

9 >>MR. FRUCHTER: No. The individual would
10 authorize -- the individual could represent himself.
11 The individual could also authorize an organization
12 in which he was a member to represent him. That's
13 not what we have here.

14 >>JUDGE BARNETT: Okay. So your contention
15 is that NEI is not properly authorized to represent
16 individuals -- these individuals; is that right?

17 >>NRC STAFF: Right. It's not authorized
18 to represent the workers who would be sustaining
19 these alleged occupational exposures.

20 With regard to standing under the NWPA,
21 both the NEI -- the EPA case in the DC circuit and
22 also the Supreme Court on which it relies, Bennett v.
23 Spear make clear that, you know, really the crux of
24 standing is the particular provision of law at issue.

25 While it's certainly true that this case

1 was arising under the NWPA, it's arising under a
2 particular provision that calls for the NRC to make a
3 determination as to whether the application is
4 consistent with public health and safety. And
5 there's no purpose in that provision to protect the
6 economic interests of NEI.

7 So looking at the particular provision of
8 NWPA under which the proceeding is taking place, the
9 staff is of the view that that also does not protect
10 economic interests, which may be unlike some of the
11 provisions having to do with standard contracts or
12 ground water standards.

13 >>JUDGE RYERSON: Does the staff have a
14 position on NEI's summary of the standard for our
15 considering new affidavits in the reply?

16 >>MR. FRUCHTER: Well, I think that they're
17 looking at NEI's original petition. It think that it
18 does not raise the issue of an injury to employees
19 who maybe working at the repository and may sustain
20 occupational exposures in a way that was clear to --
21 certainly to the staff. It wasn't clear that that
22 injury was raised as a basis for standing.

23 So we would argue that, you know, having
24 not been raised in the initial filing, it would not
25 be proper to raise an entirely new type of injury in

1 the reply filing. But I think that the more
2 important part of that is that they -- well, they
3 raise that in the reply. The authorization came from
4 an NEI employee, and not from a union and not from a
5 worker who actually would be working at the
6 repository. So there's several layers of
7 organizations and representation, and that chain has
8 not been connected.

9 >>JUDGE RYERSON: So your view is that,
10 even if we were to consider the supplemental
11 affidavits, that that's not sufficient because they
12 were from the unions and not from the workers
13 themselves?

14 >>NRC STAFF: Exactly, Your Honor.

15 >>JUDGE FARRAR: Let me ask you: We know
16 that the staff has a -- is always part of the
17 proceedings; so I'm not trying to oust you, but start
18 with that premise that --

19 >>MR. FRUCHTER: Thank you.

20 >>JUDGE FARRAR: -- I accept that you're
21 here, and you're always here, and we always enjoy
22 hearing your position.

23 But when you come down to it, doesn't NEI
24 have more of an interest and more standing to be in
25 this proceeding than you do? The staff plays a

1 tremendous role. They will spend years looking at
2 the safety and environment, but mostly in this case,
3 the safety impacts of this project.

4 And it's not going to get through unless
5 the staff regulators, all several thousand of them,
6 approve it. And that's a legitimate job.

7 But when you come -- but the staff has no
8 promotional role. So in a sense, while you want
9 to -- while we want to make sure that your people
10 back home are reviewing the safety aspects of this,
11 you don't really have a dog in this fight in this
12 hearing.

13 You don't really have an interest in
14 whether we -- we were to let these contentions in and
15 end up turning down the proposal or whether we
16 approve the proposal. Your work goes on, and you're
17 not promotional. So it's troubling me that you all
18 opposed NEI's standing, when in the context I just
19 said it, one could say they have more interest or
20 right to be here than you do.

21 Now, that's not -- don't go back home and
22 tell everybody that I said you don't belong in these
23 proceedings. We know how that goes. But it's a
24 serious question. They care more about this
25 proceeding than you, don't they?

1 >>MR. FRUCHTER: If your question is
2 whether the staff can show the kind of radiological
3 injury that would give standing in an NRC proceeding,
4 I think Your Honor is exactly correct. I don't think
5 the staff would be radiologically injured by the
6 outcome of the --

7 >>JUDGE FARRAR: I'm not talking about
8 radiological injury. I'm talking about a staff
9 corporate interest. They have a distinct corporate
10 interest in not letting this go forward unless it
11 meets all the safety standards. That's the
12 regulators back home. But you all sitting in this
13 courtroom have no corporate interest in whether this
14 project succeeds or fails; do you?

15 >>MR. FRUCHTER: That's not only exactly
16 true, but that's the explicit intent of Congress,
17 one, in creating the NRC, and, two, in instructing
18 the NRC to conduct this licensing proceeding in the
19 first place. They believed it was essential that the
20 NRC have no promotional interest in the outcome of
21 the proceeding and, nonetheless, instructed the NRC
22 to conduct the hearing under the rules of hearing,
23 which include having the staff as a party.

24 >>JUDGE FARRAR: Right. That's why you're
25 here. But these people have been lobbying for this

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1 proposal for 20 years. Why is that not -- that
2 interest not an overwhelming one?

3 >>MR. FRUCHTER: I would -- the staff is
4 not of the position that NEI has no interest in the
5 outcome of the proceeding, but that the interest that
6 they have is economic, and, therefore, not protected
7 by the Atomic Energy Act and NEPA. It is not
8 connected to radiological --

9 >>JUDGE FARRAR: It is protected by the
10 Nuclear Waste Policy Act which your brief starts out
11 by saying it's what the case is about.

12 >>MR. FRUCHTER: It is protected, arguably,
13 by certain portions of the Nuclear Waste Policy Act,
14 but not by the -- not by the provision under which
15 this proceeding is taking place.

16 >>JUDGE RYERSON: The staff opposes
17 discretionary intervention as well; is that correct?

18 >>MR. FRUCHTER: That's correct,
19 Your Honor.

20 >>JUDGE RYERSON: Why?

21 >>MR. FRUCHTER: There's essentially two --
22 they're the two most important factors, one weighing
23 in favor and one weighing against discretionary
24 intervention. So I'll sort of focus on those.

25 In favor of discretionary intervention is

1 the extent to which the Petitioner is going to assist
2 in developing a sound record.

3 The staff is of the view that, while NEI
4 has made a general assertion that it has expertise,
5 and certainly the staff does not disagree with
6 that -- well, NEI has asserted that they have general
7 expertise that will be brought to bear on the
8 proceeding. They have not showed, however, that they
9 would assist in developing a sound record on the
10 issues that are properly under consideration in the
11 proceedings.

12 >>JUDGE FARRAR: How could they do that
13 since there are 300 contentions, theoretically an
14 issue, and no one will know until May 11th or
15 thereafter which issues, if any, are coming. So how
16 could they have told us in their petitions some
17 months ago specifically which experts they'd bring to
18 bear on which issues?

19 >>MR. FRUCHTER: Certainly in their initial
20 filing it would not have been possible for them to
21 assign experts to specific contentions. But, that
22 said, there are certain issues that are overarching
23 in the proceeding and certain technical issues that
24 we know are going to be litigated to some extent and
25 discussed during the course of the proceedings, so

1 the staff is of the view that they could have set
2 forth the expertise that we brought to bear in much
3 greater detail than they have done.

4 With regard to the factor weighing against
5 intervention, the extent to which their participation
6 will broaden the proceeding impermissibly, Your
7 Honors are correct that, in terms of the number of
8 contentions that they would add to the proceeding,
9 that number would not necessarily be significant in
10 terms of the overall proffered contentions. We don't
11 know whether it would be significant in the context
12 of the admitted contentions.

13 But the question, I think, is the issues
14 that would be raised by NEI, in the staff you would
15 improperly broaden the proceeding. To my
16 understanding, NEI is the only party that's
17 interested in arguing and presenting evidence that
18 DOE's design is overly conservative.

19 >>JUDGE FARRAR: Suppose they'd nine
20 contentions that went the other way, that no one else
21 had raised. Wouldn't that broaden the proceedings to
22 the same extent? What does it matter which way their
23 contentions go. They've got nine different
24 contentions. Doesn't that broaden the proceeding by
25 2.8 percent, whichever way those contentions go?

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1 >>MR. FRUCHTER: Well, in terms of
2 proffered contentions, again, we don't know what the
3 numerical extent would be in terms of admitted
4 contentions. But, as Your Honor pointed out,
5 there's, you know, over 300 proffered contentions,
6 and it's not clear to what extent they would be
7 participating on those other contentions, if they
8 were admitted.

9 But I think the broader question is not the
10 number of contentions but the issues that are raised.
11 Specifically speaking, NEI is interested raising an
12 issue that no other party is interested in raising.

13 >>JUDGE BARNETT: So is that -- that's not
14 allowed? You have to -- they're not allowed to raise
15 issues that no one else has raised?

16 >>NRC STAFF: No. The staff would not take
17 the position that it's not allowed. The standard,
18 though, for discretionary intervention is very high,
19 as all the parties agree. And the issue is whether
20 they have sufficiently fulfilled that standard.

21 And I think the fact that they are
22 interested in litigating this issue of whether DOE's
23 design is overly conservative goes to that factor,
24 which is whether they will broaden or delay the
25 proceeding. So we're not saying that that's an

1 impermissible topic area to raise, but I do believe
2 that it weighs against discretionary intervention.

3 >>JUDGE BARNETT: Well, in effect, that
4 could be the outcome, right, because if they're -- if
5 they were raising -- if they were making the same
6 argument that the design wasn't conservative enough,
7 then it wouldn't be broadening the proceedings, in
8 your view; is that correct? It wouldn't be
9 appreciably broadening the proceedings in your view?

10 >>MR. FRUCHTER: I mean, it would depend on
11 the specific issues that they were raising. It
12 wouldn't be broaching the issues in the same precise
13 way, but it would really depend on the specific
14 contentions that were proffered as to, you know, what
15 extent they were broadening the proceeding.

16 >>JUDGE BARNETT: So I mean, in effect,
17 because they have contentions that go the opposite
18 direction of other contentions, then, in effect, in
19 your view that's overly broadening the proceedings;
20 is that correct?

21 >>MR. FRUCHTER: Well, I think the issues
22 that they're seeking to raise, are impermissibly
23 broadening -- or would impermissibly broaden -- I
24 don't mean impermissibly, but inappropriately the
25 proceeding. Not the fact that they're in favor of

1 intervention or that they have an interest in showing
2 a greater margin of safety than is assumed by DOE.

3 >>JUDGE BARNETT: What would make their
4 contentions then -- what is it about their
5 contentions that make them so that they would
6 inappropriately broaden the proceedings? What is
7 it -- what's the issue, the general issue about that?

8 >>MR. FRUCHTER: Sure. I think the purpose
9 of the proceeding is to show or to discern the extent
10 to which DOE's submitted application is consistent
11 with public health and safety. NEI's sort of
12 underlying argument is, well, what could DOE's
13 application be changed to and still be consistent
14 with public health and safety. And I think if that's
15 an issue, that's not within the scope of the
16 proceeding otherwise.

17 >>JUDGE RYERSON: Okay. You know, I think
18 we're reaching the point where we hoped to pretty
19 much conclude argument on this. I believe Judge
20 Farrar has one more question.

21 >>JUDGE FARRAR: Mr. Mulsch, I threatened a
22 few minutes ago to ask you a question. Yours is the
23 only brief that I think doesn't cite the DC Circuit's
24 NEI case, but you do cite the Supreme Court postal
25 workers case.

1 As I read that case, that decision, the
2 postal workers, Supreme Court held, had no cognizable
3 interest or standing in the overarching issue of how
4 the postal service is going to be run for the benefit
5 of the country. And they came -- but they were
6 trying to raise issues under that overarching
7 statute, even though their standing came only from
8 all these much later provisions that said how the
9 postal service should treat its workers.

10 Isn't that the flip side of what we have
11 here? And, therefore, not particularly helpful.
12 What we have here is the overarching statute these
13 people are arguing they have a right under, and maybe
14 not so much their economic interest under the Atomic
15 Energy Act and NEPA. So I'm wondering if the case
16 decision you cite is particularly helpful to us.

17 >>NEVADA: Judge Farrar, we think the case
18 is actually quite helpful. And is pretty close to
19 analogous to the situation we have here.

20 In this case, which is Conference v.
21 American Postal Workers Union, there were two
22 statutes involved. It was something called the
23 private express statutes. There were statutes also
24 dealing with postal workers. And there was a second
25 statute called the Postal Reorganization Act.

1 And in that case, the union was challenging
2 regulations that allowed -- based on standing,
3 exclusively upon the 1970 Reorganization Act, but its
4 actual claims in the case were all based upon the
5 private express statutes.

6 And the court held that its injuries were
7 not within the zone of interest protected by a
8 relevant statutes because their injuries were not
9 cognizable, or there was no evidence they were
10 protected by the private express statutes.

11 And I think that the postal reorganization
12 act stands in relation to the private express
13 statutes, just like the NWPA stands in relation to
14 the Atomic Energy Act, because what was interesting
15 is that the reorganization act actually reenacted a
16 number of provisions of the private express statutes.
17 And yet the court nevertheless said that since there
18 was no effort to change the private express statutes,
19 that you couldn't sweep those up into the zone of
20 interest.

21 And similarly here, there is no claim by
22 NEI in any of its contentions that there was any
23 violation of a Nuclear Waste Policy Act. And the
24 Nuclear Waste Policy Act does say that you apply the
25 Atomic Energy Act standards. But that doesn't sweep

1 up, within the interest protected, all of the Atomic
2 Energy Act. And as we pointed out in our papers, we
3 think that NEI's interests are solely economic and
4 beyond the zone protected by NEPA and the Atomic
5 Energy Act, which are the only two statutes upon
6 which they base their contentions. So we think the
7 case is directly on point.

8 >>JUDGE RYERSON: Mr. Repka, you want to
9 respond to that?

10 >>MR. REPKA: Yes, Judge Farrar. In fact,
11 when we're looking at standing under the Nuclear
12 Waste Policy Act, we're looking at standing under
13 only one statute, the Nuclear Waste Policy Act. So
14 the case -- the air courier case is completely in
15 opposite for that argument.

16 This case is brought under the Nuclear
17 Waste Policy Act, and implicates other statutes as
18 well. Certainly the Atomic Energy Act and NEPA. But
19 it comes under the licensing provision of the Nuclear
20 Waste Policy Act. And for that purpose, looking
21 again at the question of the zone of interest of the
22 Nuclear Waste Policy Act, we are looking at the one
23 and the same statute, which is -- relates to the
24 licensing and the funding of that project. So I
25 think we are very clearly within the zone of

1 interest, and the particular case really is not
2 helpful.

3 >>JUDGE FARRAR: Is this case different
4 from almost anything else, in that here you have, in
5 effect an act of Congress that says we want you to do
6 this project?

7 In other words, when we talk about what
8 does it arise under, it's -- your average utility who
9 wants to build a nuclear power plant doesn't have an
10 express instruction from Congress that we really want
11 you to do that. There's a system set up, if you want
12 to do it.

13 Does that make this case different and your
14 standing different because -- because you are not
15 only within the zone of interests. Are you -- are
16 your members the real party in interest under that --

17 >>MR. REPKA: Yes is the answer to your
18 question. As I said, before I characterize it as the
19 direct beneficiaries of the statute. And I think
20 that makes the Nuclear Energy Institute and its
21 members clearly within the zone of interest of the
22 statute.

23 Mr. Mulsch is focusing on whether or not
24 there's an alleged violation of the Nuclear Waste
25 Policy Act, and I don't think that's the correct

1 question. I don't think whether or not there's a
2 violation is at all relevant. The point is the
3 statute calls for a specific citing and funding and
4 licensing of a specific project, which we support.

5 At the very beginning of this conference,
6 Judge Ryerson talked about the purpose today was to
7 identify interested stakeholders. Well, I can't
8 imagine a more interested stakeholder than the
9 Nuclear Energy Institute. Yes, there are many other
10 interested stakeholders, and -- but none more so than
11 the members of NEI. So I think the answer to your
12 question is, yes, the Nuclear Waste Policy Act is a
13 direct mandate from Congress and the Nuclear Energy
14 Institute's interest is well within that zone of
15 interest.

16 >>JUDGE RYERSON: All right. Thank you all
17 for your comments. I think we'll take our first
18 break now. I have 10:22. I want to resume at 10:35.
19 And we'll begin with the environmental questions.

20 (A recess was taken)

21 >>JUDGE RYERSON: Could we come to order,
22 please. Okay. Welcome back.

23 For the benefit of those who are on the web
24 streaming site, apparently there was a technical
25 difficulty, and there was neither video nor audio for

1 the first half hour or so this morning.

2 My understanding, we now have audio on the
3 web stream, and we'll have both video -- should have
4 both video and audio this afternoon. For anyone
5 who's interested, it's also my understanding, the
6 proceeding will be on the web stream site for about
7 90 days or so after the proceeding. So it goes.

8 Okay. The next general area we want to
9 cover deals with environmental contentions. And as
10 all of the participants are certainly aware, there's
11 kind of a long and complicated history to the
12 treatment of environmental contentions. The National
13 Waste Policy Act contemplated that the Nuclear
14 Regulatory Commission would not take a fresh look at
15 environmental issues, as it would normally do in a
16 situation like this, but that the NRC would adopt, to
17 the extent practicable, the environmental documents
18 prepared in the first instance by the Department of
19 Energy, the applicant. And recognizing that, the
20 Commission adopted rules unique to environmental
21 contentions that specified the circumstances under
22 which it would be appropriate to adopt NEI -- or
23 DOE's environmental documents.

24 And I won't get too -- into too long a
25 history of what happened after that, but there was --

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1 things didn't develop as originally contemplated.
2 There was a decision in the DC Circuit in which it
3 was represented to the court that there would
4 certainly be some level of opportunity for
5 petitioners to present environmental issues to the
6 Board or to the Commission in this proceeding.

7 So we have a separate set of regulations
8 that the Commission originally adopted, and then we
9 have the notice of hearing, which amplifies on those
10 original regulations and explains how they are to be
11 reconciled with the representations to the court in
12 the NEI case in 2004, all of which is a long way of
13 saying there's some special rules here. And we are
14 interested in the views of the parties and the
15 participants as to how, in light of this history,
16 they should be applied.

17 Let me begin with 2 CFR 51.109(a)(2).
18 That's the original regulation concerning
19 environmental contentions, and it says that, after
20 the adoption decision by the staff or by the
21 Commission, any party to the proceeding who contends
22 that it is not practicable to adopt the DOE
23 environmental impact statement as it may have been
24 supplemented shall file a contention to that effect
25 after publication with the notice of hearing in the

1 federal register, and it proceeds to say, "Such
2 contention must be accompanied by one or more
3 affidavits."

4 Is there anyone here who does not read that
5 section as requiring affidavit support for any
6 environmental contention?

7 >>MR. REPKA: Judge Ryerson?

8 >>JUDGE RYERSON: Yes.

9 >>MR. REPKA: May I be heard on that?

10 >>JUDGE RYERSON: Certainly, Mr. Repka.

11 >>MR. REPKA: I think that there would be
12 an exception to that with respect to an environmental
13 contention that raises essentially a matter of law,
14 and I think that that applies to NEI/NEPA 3 which
15 raises the issue of whether or not there needs to be
16 a discussion of terrorism impacts in the
17 environmental impact statement. So I think that
18 would be an exception.

19 >>JUDGE RYERSON: Okay. Let's just start
20 in order. Does the NRC staff have a view as to
21 whether there's any exception to the affidavit
22 requirement?

23 >>MS. SILVIA: Well, the regulations don't
24 provide for any exceptions. With respect to NEI's
25 point about the purely legal contentions, the staff

1 believes the petitioner should have addressed that
2 and explained in the petitions why they felt an
3 affidavit was not required.

4 >>JUDGE RYERSON: Okay. Excuse me. Yeah.
5 Again, I should remind everyone to please, please for
6 the benefit of the reporter, announce your name, if I
7 haven't called you by name.

8 >>MS. SILVIA: That was Andrea Silvia for
9 the NRC staff.

10 >>JUDGE RYERSON: Thank you.

11 >>MR. SCHMUTZ: Your Honor, Tom Schmutz for
12 DOE. We don't see any exceptions. And I have great
13 difficulty with the notion about purely legal
14 contentions. For the most part, any contentions that
15 are here are generally mixed contentions. There are
16 always going to be some factual component that has to
17 be dealt with. So we would heartedly disagree with
18 the notion that this rule doesn't mean exactly what
19 it says, which is that every contention,
20 environmental contention, must be accompanied by and
21 supported by an affidavit.

22 >>JUDGE RYERSON: Nevada have a position on
23 that?

24 >>MR. MALSCH: John Malsch, State of
25 Nevada. We would agree with NEI, that the only

1 exception would be for a legal issue.

2 >>JUDGE RYERSON: Okay. All of Nevada's
3 environmental contentions did have an affidavit;
4 didn't they?

5 >>MR. MALSCH: Correct. The only one we
6 filed that was a purely legal issue was NEPA 17.

7 >>JUDGE RYERSON: And that does not have an
8 affidavit?

9 >>MR. MALSCH: I'll be checking.

10 >>JUDGE RYERSON: Pardon?

11 >>MR. MALSCH: I'll be checking. I'll get
12 you an answer.

13 >>JUDGE RYERSON: Anyone else have a view
14 on whether the regulation has to be read literally or
15 whether there's an exception?

16 Okay. Nye County.

17 >>MR. ANDERSON: Your Honor, Robert
18 Anderson for Nye County. Your Honor, we included in
19 an affidavit with our NEPA contention. However, we
20 agree with NEI that it is possible to articulate the
21 NEPA contention based solely on the law and the
22 record, as it stands, to articulate an omission that
23 would be required to be included in the
24 considerations under NEPA.

25 >>JUDGE RYERSON: Okay. And would you

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1 agree that that's an exception that the board would
2 have to find that's really inconsistent with the
3 regulation on its face? There's no exception in the
4 regulation, correct?

5 >>MR. ANDERSON: That's correct.

6 >>MR. REPKA: Judge Ryerson, may I be heard
7 on that question? This is David Repka, NEI.

8 >>JUDGE RYERSON: Yes, Mr. Repka.

9 >>MR. REPKA: The regulation speaks to a
10 contention being accompanied by one or more
11 affidavits which set forth factual and/or technical
12 bases for the claim. And I think that where a
13 contention has no factual or technical basis but
14 rather a legal basis, that language does not
15 specifically address it.

16 So with respect to your proposition that an
17 exception would be contrary to the specific language,
18 I think there is room in that language to allow the
19 exception that we're talking about.

20 >>JUDGE RYERSON: Okay. Clark County.

21 >>MS. ROBY: Yes. Debra Roby. Clark
22 County would agree with the position of NEI, as we
23 were just reading through (a)(2), pointing to that
24 very same language that states, "The contention must
25 be accompanied by one or more affidavits which set

1 forth the factual and/or technical bases for the
2 claim." And a legal requirement or a legal argument
3 would not necessarily be in an affidavit.

4 >>JUDGE RYERSON: I'm sorry. Timbisha
5 Shoshone. Am I --

6 >>MR. POLAND: Your Honor, we'll just
7 shorten it to the Timbisha Oversight Program. Doug
8 Poland on behalf of the Timbisha Oversight Program.
9 We would agree that where there are either factual
10 matters that are set forth in the EIS or otherwise in
11 the record, that it is not necessary to have an
12 affidavit that would be submitted with the
13 contentions, if they rest on purely a legal basis.

14 >>JUDGE RYERSON: Okay. I think we have
15 the two views. Does Inyo County have a different
16 view?

17 >>MR. JAMES: No.

18 >>JUDGE RYERSON: The two views seem to be
19 the regulation means what it says; there must be an
20 affidavit. Some have a view that, if there is no
21 factual basis, that it's a purely legal contention,
22 then an affidavit is not required.

23 There are a couple of criteria, again,
24 staying in 51.109, and I believe that only one is
25 potentially relevant in these circumstances, and that

1 would be that the contention -- or it refers actually
2 to the affidavit, I believe -- present significant
3 and substantial new information or new considerations
4 that would render the environmental impact statement
5 inadequate.

6 In other words, the relevant test, at least
7 I think as the Board reads it, certainly as I read
8 it, is -- before you get to the notice of hearing,
9 the test is significant and substantial new
10 information or new considerations.

11 Anyone have a different view of what the
12 test is before we get to the notice of hearing? In
13 other words, what the regulation that applies would
14 be?

15 Wow, we seem to have agreement on at least
16 one issue.

17 >>MR. REPKA: Dave Repka for NEI.

18 >>JUDGE RYERSON: Yes.

19 >>MR. REPKA: Not to spoil the agreement.

20 I would just add the qualifier, as read in accordance
21 with the NEI versus EPA case. I think that case
22 provides significant perspective on what the new
23 information standard means.

24 >>JUDGE RYERSON: Okay.

25 >>MR. SCHMUTZ: Actually, I'll add

1 something to that as well, if you don't mind,
2 Your Honor.

3 >>JUDGE RYERSON: Yes. I'm sorry. Mr.?

4 >>MR. SCHMUTZ: Mr. Schmutz. I'm sorry.

5 Actually it doesn't have anything about
6 what new information means. It talks about new
7 considerations. But as I understand Your Honor's
8 point, we haven't gotten to that point. We're
9 talking about what the reg provides on its face, and
10 it is, as you've read it, it requires as an exception
11 to adoption. And adoption, I would point out, is
12 essentially presumed unless one of two things occur.

13 For this proceeding it's new information or
14 new considerations that are significant or
15 substantial.

16 >>JUDGE RYERSON: Okay. Now, we go from
17 there to the notice of hearing, and the notice of
18 hearing says under 10 CFR 51.109(c), the presiding
19 officer should treat as a cognizable new
20 consideration an attack on the Yucca Mountain
21 environmental impact statements based on significant
22 and substantial information that, if true, would
23 render the statements inadequate.

24 In other words, I think the Commission has
25 dropped "new" out of the test. Does anyone disagree

1 with that? New is gone? If it's significant and
2 substantial, it is deemed to be new. Is that a
3 reading that is shared by everyone here?

4 All right. We do -- we do have agreement.
5 So when you put -- when you put these provisions
6 together, isn't it the case that the test comes down
7 to whether -- well, I should state, there is a
8 further condition that we apply, to the extent
9 possible. The reopening provisions under the
10 Commission's regulations, and we'll get to that in a
11 moment.

12 But subject to that, is there any doubt,
13 does anyone have a different view than that the test
14 that we start with is whether a contention presents
15 significant and substantial information that, if
16 true, would render the statements inadequate, that
17 is, the environmental statements inadequate? The
18 staff? Mr. Fruchter?

19 >>MR. FRUCHTER: Your Honor, just a brief
20 comment on the previous question, which was presuming
21 that if something is substantial and significant,
22 then it's always considered to be a new
23 consideration.

24 The staff did take the position, and we are
25 still of the view, that substantive challenges to the

1 EIS that have already been adjudicated on the merits,
2 for example, by, you know, the DC Circuit would not
3 be considered new unless the petitioner raised new
4 information.

5 >>JUDGE RYERSON: But the notice of hearing
6 has no such exception by its terms; does it?

7 >>MR. FRUCHTER: I believe that's correct.

8 >>JUDGE RYERSON: But it does require us to
9 interpret all of this in light of the NEI case,
10 specifically?

11 >>MR. FRUCHTER: Right.

12 >>MR. SCHMUTZ: Well, I would add one
13 thing. I think I'm in agreement with the staff.
14 This is Tom Schmutz for DOE.

15 I would say one thing. The notion -- and I
16 know we're going to get to it, but now, since it's
17 been brought up, the notion of res judicata,
18 timeliness, and finality all have to be taken into
19 account as we look at the environmental contentions
20 that have been filed here.

21 I'm particularly concerned -- I don't want
22 it to be left unsaid -- and specifically with regard
23 to transportation contentions, for example. We think
24 there's a big gap between repository safety
25 contentions and transportation contentions. And that

1 res judicata time does play a fairly significant role
2 in dealing with those contentions.

3 >>JUDGE RYERSON: Right. And we actually
4 have broken out the transportation-related
5 environmental contentions as a separate issue that
6 we'll get to after we try to figure out what's
7 required for environmental contentions.

8 >>MR. SCHMUTZ: I didn't mean to jump in
9 there.

10 >>JUDGE RYERSON: Quite all right.

11 All right. Now, there's also requirement,
12 and now we go back to 51.109, and 51.109 says that,
13 to the extent possible, not practicable but possible,
14 we're supposed to apply both the procedures and the
15 criteria in the reopening provisions, which currently
16 appear, I think, in 10 CFR 2.36.

17 Anybody disagree that we are required to
18 apply the reopening criteria to the extent possible?
19 Great. Or at least we have agreement again.

20 >>MR. LAWRENCE: Your Honor. State of
21 Nevada. John Lawrence.

22 >>JUDGE RYERSON: Mr. Lawrence.

23 >>MR. LAWRENCE: We believe that's a
24 criteria for you to apply as presiding officers.

25 >>JUDGE RYERSON: Correct. I think that's

1 what I said, but maybe not.

2 >>MR. LAWRENCE: I just wanted to make that
3 clear.

4 >>JUDGE RYERSON: Thank you. Okay. So say
5 that we apply it or a pleading addresses it, either
6 way. It seems, again, I think to the board and
7 certainly to me, that there is a potential for some
8 overlap between these requirements. And I'd like to
9 review both the procedural and substantive
10 requirements in the reopening provision to see -- to
11 see, well, basically how they fit with the
12 requirements in 51.109 as modified by the notice of
13 hearing. Everyone still on board? Let's go through
14 these. Here are the criteria that exist under the
15 reopening provision. The first is the motion must be
16 timely.

17 Now, the Commission's notice of hearing
18 specified when petitions have to be filed. So is
19 there anyone here who thinks there's a timeliness
20 issue that needs to be addressed in the context of
21 the reopening criteria? Everybody understand the
22 question? Okay. I'm going to assume you do. But
23 there doesn't seem to be a timeliness factor.

24 The second criteria is the motion must
25 address a significant safety or environmental issue,

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1 but we're already there because, under 109 and the
2 Commission's notice of hearing, there already has to
3 be a significant or substantial environmental issue.
4 So that seems redundant to me at least, as well.

5 Does anybody else see that as not a
6 redundant requirement?

7 Great. The third requirement -- and here
8 we may have some differences. The third criteria is
9 the motion must demonstrate that a materially
10 different result would be or would have been likely
11 had the newly proffered evidence been considered
12 initially.

13 In other words, the test is -- forget new
14 because that's out of here. The test is whether this
15 substantial information would end up with a different
16 result.

17 Now, the National Environmental Policy Act,
18 which is the principal statute we're dealing here
19 with, is entirely a procedural statute. In other
20 words, it requires disclosure or consideration and
21 disclosure of environmental consequences of
22 significant federal action, but it doesn't require
23 one result or another. In other words, for -- in the
24 licensing process, provided an agency adequately
25 considers and discloses environmental considerations,

1 basically, the agency can do pretty much what it
2 wants. It can consider other factors that it deems
3 more important. It may make a decision that national
4 security interests trump environmental
5 considerations, can do any number of things, as long
6 as it doesn't act arbitrarily and capriciously.

7 So the NEPA statute, the National
8 Environmental Policy Act, is inherently a procedural
9 statute. That being so, the way I think the Board
10 would be perhaps inclined to read this materially
11 different result requirement would be coming back to
12 what is in the notice of hearing, that this is
13 something that could change significantly
14 significant -- sufficiently significant to charge the
15 environmental documents on which the -- on which the
16 agency is relying.

17 But it could never be the case that under
18 NEPA the significant materially different result
19 would be a different licensing decision because NEPA
20 doesn't go to the licensing decision. Surely on this
21 point we're going to have some disagreement. But let
22 me start with the staff. Am I stating your view or
23 do you have a different view?

24 >>MS. SILVIA: This is Andrea Silvia for
25 the NRC staff, and we agree with Your Honor that the

1 materially different result would essentially be that
2 the EIS could not be adopted by the NRC staff and it
3 would require supplementation, and that goes to the
4 same standard that the alleged deficiency or
5 additional information would result in a seriously
6 different picture of the environmental landscape.

7 >>JUDGE RYERSON: Thank you. NEI?

8 >>MR. REPKA: Yeah, this is David Repka.
9 We agree with your characterization of the issue,
10 Judge Ryerson.

11 >>JUDGE RYERSON: Okay. And the Department
12 of Energy?

13 >>MR. SCHMUTZ: Let's see if we can get
14 that thing on. We agree with the staff. I'm not
15 sure what NEI's disagreement --

16 >>JUDGE RYERSON: Mr. Schmutz. I'm sorry.
17 If you'd announce your name.

18 >>MR. SCHMUTZ: Oh, I'm sorry. Once again,
19 Tom Schmutz, representing the Department of Energy.

20 We agree with what the staff said. I'm not
21 sure I understand what NEI said. But we think that
22 the decision to be made, looking at these things, is
23 whether to adopt.

24 And there is a presumption in this reg, as
25 well as in the NWPA, that adoption is going to be

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1 what occurs, absent, excuse me, to exception. So
2 it's the adoption decision we're looking at, and we
3 think, just as the staff said perfectly well, they
4 would have to come up with some sort of environmental
5 contention that it was sufficiently serious to
6 require the EIS not to be adoptable unless
7 supplemented.

8 >>JUDGE FARRAR: Or just amended in some
9 fashion?

10 >>MR. SCHMUTZ: I think it would have to a
11 formal supplement. I don't think there's any other
12 way, really, to deal with this.

13 >>JUDGE FARRAR: Again, as Judge Ryerson
14 put it, you're not saying the ultimate result would
15 have to be different; just that here's a section
16 that doesn't measure up and we'll put out a
17 supplement --

18 >>MR. SCHMUTZ: That's correct, Your Honor.
19 I agree entirely with Judge Ryerson, that it is a
20 procedural statute. It doesn't dictate an outcome in
21 the case. But we're talking about an adoption
22 decision. That's what this is all directed at.

23 >>JUDGE RYERSON: Right. Now, if I recall
24 in your papers, DOE expressed a concern that we
25 shouldn't admit contentions that merely flyspeck

1 DOE's environmental document. But doesn't the
2 standard, which is, what, significant and substantial
3 standard, preclude that?

4 In other words, wouldn't -- if we were --
5 if a competent affidavit, a competent, well-reasoned
6 affidavit, concludes this is significant and
7 substantial, or we conclude that this -- that the
8 facts presented in an affidavit are potentially
9 significant and substantial, doesn't that take care
10 of your concern that we're flyspecking the DOE
11 environmental document?

12 >>MR. SCHMUTZ: I think that's right,
13 Your Honor, if the Board finds that it is a
14 substantial environmental issue being raised and it
15 needs to be litigated and its materiality is without
16 doubt, then, yeah, that's not flyspecking in our
17 view.

18 >>JUDGE RYERSON: Mr. Malsch, do you have a
19 view that differs from what's been said so far?

20 >>MR. MALSCH: Your Honor, I'm going to let
21 Mr. Lawrence answer that question.

22 >>MR. LAWRENCE: I generally agree with
23 what has been reached, as long as we're not requiring
24 a different result in the EIS. The failure to
25 disclose adequate impacts in the EIS is all that's

1 sufficient. The materially different result would be
2 the failure for the EIS to disclose environmental
3 impacts.

4 >>JUDGE RYERSON: That the result is a
5 change in the environmental document?

6 >>MR. LAWRENCE: That's correct. The
7 document has to be changed regardless of the outcome
8 of that document.

9 >>JUDGE RYERSON: Okay. All right. Well,
10 we -- I was about to say we're reaching consensus,
11 and did I see a hand up in the back? Yes.

12 MS. HOUCK: The Timbisha Shoshone Tribe
13 would agree with the statements of Nevada, and just,
14 again, reiterate that it is a procedural document and
15 it's based on informed decision-making. So if
16 there's a showing that there's substantial
17 information that's missing in the document that would
18 require additional assessment, that our position is
19 that that's all that's necessary.

20 >>JUDGE RYERSON: Thank you. And that's
21 Ms. Houck?

22 MS. HOUCK: Yes. I apologize.

23 >>JUDGE RYERSON: Well, let's continue on.
24 We have other comments. Mr. List.

25 >>MR. LIST: Judge Ryerson, thank you very

1 much. Bob List on behalf of the four counties. We
2 would agree, and by way of example, I would simply
3 say that, in our judgment, the EIS documents, NEPA
4 documents, fail to set forth a very significant and
5 substantial area and to demonstrate -- and we believe
6 that a -- had it been done properly, that it would
7 have shown, in our instance, in the case of a couple
8 of our contentions, impacts on traffic, on highways,
9 on first responder capabilities. And all of those
10 matters should have been a part of the EIS, so that
11 procedurally the public and interested individuals
12 and entities would have had notice of it and an
13 opportunity to participate.

14 So we believe it is a procedural statute.
15 And in talking about a substantially different result
16 in this instance, it would have been included in the
17 documentation so the notice would have been given to
18 the public.

19 >>JUDGE RYERSON: Thank, you Mr. List.

20 California, yes, Mr. --

21 >>MR. SULLIVAN: Tim Sullivan with the
22 state of California. We agree completely with
23 Your Honor's characterization of how 2.326 operates
24 in the context of a NEPA contention.

25 And I just want to remind the Board that

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1 NRC staff and DOE attack our petition, in very large,
2 part on the idea that each of those factors has to be
3 supported by evidence in an affidavit. So while we
4 completely agree that those -- that those factors
5 would operate the way that you described, we disagree
6 that they are actually a threshold evidentiary
7 pleading requirement.

8 Also, the staff just articulated a standard
9 that there would be a -- that the NEPA documents
10 are -- can't be adopted unless there's a -- if
11 there's a seriously different picture of the
12 environment. And that's a -- that's a kind of
13 standard that might be appropriate for a -- a court
14 to look at reopening an administrative process. But
15 that's not the situation we find ourselves in here.
16 And I think, under the regulations in the NEI case,
17 all that needs -- that the -- that the materially
18 different outcome is just showing that the DOE's NEPA
19 documents are inadequate under NEPA and, therefore,
20 can't be adopted.

21 >>JUDGE RYERSON: Okay. Do you read the
22 Commission's notice of hearing and the significant
23 and substantial test as different from that, as being
24 too rigorous, or is that the way you simply read the
25 Commission's --

1 >>MR. SULLIVAN: No, I don't read it as
2 being too rigorous.

3 >>JUDGE RYERSON: Okay. Thank you. We're
4 happy to hear from anyone else. You don't all need
5 to say you agree with us. So if you do, we'll move
6 on to another point.

7 Okay. There's one -- you will recall that
8 we are required, according to 51.109, to apply both
9 the criteria and the procedures of the reopening
10 provisions to the extent possible. So we get then to
11 the procedures for reopening, which say the motion
12 must be accompanied by affidavits that set forth the
13 factual and/or technical bases. Well, this starts
14 sounding familiar to us, at least.

15 I guess my fundamental question is: Is the
16 affidavit requirement in the reopening provision
17 essentially -- let's put aside the possibility of an
18 exception for purely legal contentions, if there is
19 such a thing or are such a thing.

20 But otherwise all -- by everyone's
21 agreement, all environmental contentions will have an
22 affidavit to comply with 51.109, so my question is:
23 Do they need another affidavit to comply with
24 2.326(b) or does one affidavit do it?

25 >>MR. SCHMUTZ: This is Tom Schmutz. Might

1 I respond to that?

2 >>JUDGE RYERSON: Yes, certainly.

3 >>MR. SCHMUTZ: 2.326 imposes some
4 additional requirements that we believe must be in
5 the affidavit. We're not suggesting that there needs
6 to be two affidavits. There's one affidavit. But
7 2.326 also provides that the affidavit must be given
8 by a competent individual with knowledge of the facts
9 alleged or by experts in disciplines appropriate to
10 this issues raised. And an affidavit providing
11 expert opinion signed by someone who has not
12 demonstrated competency has not submitted an
13 appropriate affidavit.

14 >>JUDGE FARRAR: If I may interrupt you,
15 shouldn't an affidavit under 51.109 be submitted by
16 somebody who's competent?

17 >>MR. SCHMUTZ: One would hope so,
18 Your Honor, but this regulation makes it abundantly
19 clear to me that, at the contention and admissibility
20 stage, challenges can be made to the competency of
21 the experts in addressing whether or not that
22 affidavit supports the contention.

23 I can't read it any other way. A competent
24 individual with knowledge of the facts or -- and so
25 it's an issue that can be challenged. More

1 importantly in some ways, the --

2 >>JUDGE FARRAR: Are you making that
3 argument only under this regulation we're talking
4 about now or are you making that as a broader
5 argument as to affidavits generally in support of
6 contentions?

7 >>MR. SCHMUTZ: Well, I'm certainly making
8 it now in support of this. Whether or not it has a
9 broader application to safety contentions -- for
10 example, I'm dealing with NEPA contentions. I know
11 2.309 sets forth the requirements for contentions
12 raising safety or health issues, and I'm not speaking
13 to those, and I'll defer to Mr. Silverman.

14 >>JUDGE FARRAR: Because I was nervous
15 there for a minute that you were going to ask us to
16 have many hearings on the merits on the affidavits
17 supported --

18 >>MR. SCHMUTZ: No.

19 >>JUDGE FARRAR: -- in support of ordinary
20 contentions.

21 >>MR. SCHMUTZ: No, Your Honor. Not all.
22 But I do think in this case we have a regulation that
23 makes a pointed statement about competency, and all
24 we're asking for you to look at the -- you know, as
25 you review the contentions, you'll look at the

1 affidavits, you'll look at the statement of
2 credentials, and you'll say, okay, does this sound
3 like the kind of person who can give this kind of
4 opinion testimony. It's a threshold question, but it
5 is one that has to be addressed.

6 More importantly, though, and the
7 Commission, I think, has actually spoken to this,
8 which is the second part, evidence contained in the
9 affidavits must meet the admissibility standards of
10 this subpart.

11 In 2008 NEI -- NEI -- Nevada submitted a
12 petition for rule-making, trying to get the
13 Commission to follow the NEI decision -- trying to
14 get the Commission to remove the requirement for
15 2.326, and the Commission refused to do that. And,
16 in doing so, Nevada advised the Commission that the
17 admissibility -- that 51.109(a)(2) -- and I'll read
18 from the notice, the Commission's notice, conditions
19 the admissibility of a contention which asserts that
20 NRC should not adopt the EIS to the satisfaction to
21 the extent possible of a standard free opening, a
22 closed record under 10 CFR 2.326.

23 The petitioner, Nevada, asserts that the
24 principal difference between this standard and the
25 contention standard in 10 CFR 2309(f) that applies to

1 other issues is that the former requires submission,
2 requires, in support of the contention, the admission
3 of -- the submission of admissible evidence.

4 The Commission does not, in denying -- in
5 saying, no, we are going to apply it. We do intend
6 that 2.326 apply, and nowhere takes issue with the
7 notion, just as they proposed, that any contention,
8 environmental contention, must be supported by
9 admissible evidence.

10 And the Commission also noted that
11 51.109 -- in that case, they have adopted that as a,
12 quote, contention standard.

13 So I think the Commission has told us that
14 under 2.326 it is important that we look at the
15 affidavits and we look at the quality of the
16 submission and ensure ourselves that what is being
17 provided from a competent expert, able to give
18 opinion testimony, and that to the extent it is
19 supported by additional materials -- that that --
20 that those additional materials provide -- or be
21 admissible evidence, whatever they might be.

22 >>JUDGE RYERSON: All right. If I
23 understand your position, it's that affidavits in
24 support of an environmental contention, because of
25 the requirements of 2.326, may have to meet a higher

1 standard than in support of other contentions. I
2 mean, there's no affidavit requirement at all for
3 contentions in general?

4 >>MR. SCHMUTZ: Under 2.309.

5 >>JUDGE RYERSON: But there is an affidavit
6 requirement, at least for most environmental
7 contentions, under 51.109. And you're saying, if I
8 hear you correctly, that there is a different
9 standard that applies under 2.326. In other words,
10 we have to be a little tougher in accepting
11 affidavits because of 2.326 than we might otherwise
12 be in just accepting affidavits under 51.109?

13 >>MR. SCHMUTZ: That is correct. That is
14 our position, Your Honor. And we think that is the
15 intent of the Commission when it denied Nevada's
16 petition for rule making.

17 >>JUDGE FARRAR: But isn't -- oh, go ahead.

18 >>JUDGE RYERSON: Now, you described these
19 affidavits as being admissible. I mean, are you --
20 how -- well, first -- two questions.

21 How -- maybe you could explain exactly what
22 that standard is and then, secondly, what you would
23 expect us to do to apply that standard.

24 >>MR. SCHMUTZ: Sure. Let's start with
25 the -- I don't believe that the affidavit necessarily

1 itself has to be admissible. In fact, in the hearing
2 process, for example, I rather doubt the Commission
3 would -- or this board would allow affidavits to take
4 the place of live witnesses.

5 This is a pleading requirement which has to
6 provide sufficient detail. It's essentially saying
7 provide sufficient detail of reliable information to
8 us from competent individuals that demonstrate that
9 the contention you're raising is significant and
10 substantial and raises a material issue. And we
11 want -- we're going to impose a fairly high standard
12 when we look at those -- those affidavits, and
13 particularly if they've attached materials to them,
14 whether or not that -- those materials would
15 ultimately in a hearing, for example, be admissible.

16 But the -- we're not saying that the
17 affidavits themselves would somehow be admitted in
18 the proceeding at all.

19 >>JUDGE FARRAR: And it's your view that we
20 should look at affidavits and make a judgment
21 ourselves, not that there should be some sort of
22 hearing process with respect to the competency of the
23 experts?

24 >>MR. SCHMUTZ: Absolutely. This is all on
25 the paper. This is just as you review the contention

1 as you would under -- what I do know about 2.309 is
2 there's a materiality requirement for all
3 contentions, and you're going to look at all
4 contentions and you're going to make judgments as to
5 whether or not these contentions are of any
6 consequence or the kind of things that we ought to be
7 hearing in this proceeding; are they important enough
8 to merit litigation. We're not saying a whole lot
9 different with regard to the affidavits that have to
10 be submitted in support of environmental contentions.
11 They have to provide -- although we are saying that
12 there's a slightly higher -- somewhat higher burden
13 in terms of supporting those with evidence.

14 >>JUDGE FARRAR: But isn't the premise of
15 that position that your environmental impact
16 statement has already been subject to adjudication?

17 >>MR. SCHMUTZ: No. As a matter of fact,
18 the Commission, for example, when it promulgated the
19 final rule under 51.109, specifically disclaimed any
20 reliance in imposing these heightened requirements on
21 there having been judicial review and was not relying
22 on, for example, principle of collateral estoppel to
23 somehow take -- to somehow support a heightened
24 standard under 51.109 and 2.326. It's right in the
25 preamble to the final rule.

1 >>JUDGE FARRAR: And when were those rules
2 adopted?

3 >>MR. SCHMUTZ: 1989.

4 >>JUDGE FARRAR: And the NEI decision came
5 after that, I believe.

6 >>MR. SCHMUTZ: Yes; correct.

7 >>JUDGE FARRAR: And that didn't change
8 anything?

9 >>MR. SCHMUTZ: No, it didn't. I don't
10 believe that it -- well, it changed -- here's what it
11 did do: It did make -- it did, as we've talked
12 about, put in a -- or allow parties to submit
13 contentions which otherwise would not have been
14 allowable as new considerations. The new, as Judge
15 Ryerson appropriately pointed out, has kind of been
16 removed from that requirement. That's what NEI did.
17 And I would say, also, with regard to, you know, res
18 judicata issues and finality issues, it does have
19 some role which we'll talk about, I'm sure, later in
20 transportation contentions.

21 >>JUDGE RYERSON: I guess the question I
22 have is: We are now at the contention admissibility
23 phase. We are not making determinations on the
24 merits of any contentions, and since there is an
25 affidavit requirement under 51.109, we will -- we

1 will be looking at affidavits for compliance with
2 51.109 in the context of not making merit space
3 determinations. And I'm just -- I'm not sure I
4 understand how different your slightly tougher
5 standard would be for affidavits under the companion
6 section that we're talking about, you know, and how,
7 as a practical matter, we would make that
8 determination for purposes of either admitting or not
9 admitting a particular environmental contention.

10 >>MR. SCHMUTZ: Well, for example,
11 Your Honor, as we looked at the environmental
12 contentions in the affidavits that were submitted, we
13 had, in many cases, problems with the competency of
14 the individuals providing those affidavits. We had
15 people -- transportation people talking about
16 radiologic consequences and the like. We didn't
17 think that was appropriate. So certainly with regard
18 to the competency of the individual, which was set
19 out there, I think that is something the Board has to
20 take into account, has to look at the competency in
21 every instance.

22 >>JUDGE RYERSON: But we would look at that
23 under 51.109; wouldn't we?

24 >>MR. SCHMUTZ: I don't know that that's
25 so. I know it is so under 2.326, though. And the

1 Commission has said -- and we had some problems with
2 some of the submissions of the experts, some of the
3 materials that they were relying on and offering as
4 evidence in support of their contentions. And we
5 think that you have to look at that, at those
6 materials that are being submitted, and determine
7 whether or not those materials are appropriate to
8 support the contention. There's no -- you know,
9 there were experts that simply threw out large
10 numbers of documents that they didn't author without
11 any demonstration that they were even adopting or had
12 done even any study to adopt the positions taken in
13 those papers. Those would be questionable, of
14 questionable admissibility.

15 >>JUDGE RYERSON: Let me ask the NRC staff
16 for a view on this. Ms. Young, or --

17 >>MS. SILVIA: Andrea Silvia for the NRC
18 staff.

19 >>JUDGE RYERSON: Okay. My specific
20 question is whether the staff believes that there is
21 a practical difference between the affidavit
22 requirements under 51.109, which we clearly have to
23 apply, and whether 2.326 really, in any kind of
24 practical way, changes that affidavit requirement.

25 >>MS. SILVIA: Right. The staff doesn't

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1 believe, Your Honor, that there's any practical
2 difference between the affidavit requirements in the
3 two.

4 >>JUDGE RYERSON: Thanks. Anyone else want
5 to speak to this at this point?

6 >>MR. LAWRENCE: State of Nevada, John
7 Lawrence.

8 >>JUDGE RYERSON: Mr. Lawrence.

9 >>MR. LAWRENCE: Two points. First, we
10 believe there's a threshold requirement to even get
11 into 2.326. You get into 2.326 if you're reopening
12 the record. You're talking about a 2008 EIS,
13 supplemental EIS, or rail alignment EIS. Those
14 records are opened. They haven't been adjudicated by
15 anybody. We're not reopening the 2002 EIS. That's
16 when you would get into 2.326.

17 But, secondly, if you were to get into
18 2.326, you, as presiding officers, would have that
19 role, and you'd have that role only because
20 51.109(a)(2) gave it to you, and it gave it to you to
21 resolve disputes. That resolution occurs at the
22 merit stage, not at the admissibility stage.

23 >>JUDGE RYERSON: Well, I understand your
24 position that we are required to apply it, the
25 reopening provisions. And I think I understand

1 your -- your position is, since there's nothing to
2 reopen, they don't apply. It's not possible to apply
3 them? Is that a fair statement of your view?

4 >>MR. LAWRENCE: Depending upon how the
5 contention was pled, absolutely, sir.

6 >>JUDGE RYERSON: Okay. A different view
7 that one could have is that the Commission was simply
8 using this provision and saying, we understand you're
9 not reopening a record, but because of the
10 circumstances that the Commission originally expected
11 to occur, which would be judicial review of DOE's
12 environmental documents which never happened for a
13 whole set of complicated reasons -- that they are
14 simply saying, you know, there's no record to reopen
15 as such, but, because of these circumstances, we'd
16 like you to take a hard look at -- and sort of an
17 extra hard look at this type of contention and apply
18 reopening standards to the extent possible, insofar
19 as possible.

20 And so it does seem to me that, if these
21 were to be applied -- I mean, my -- there is
22 certainly an argument to be made, if I understand
23 it -- and I suspect you're making this in the
24 alternative at least -- that, you know, where we are
25 now, these the 2.326 requirements are essentially

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1 redundant.

2 But the notion that they purely go to our
3 role seems to me maybe inconsistent with the
4 statement, for example, that, in the affidavits under
5 the reopening vision, it says each of the criteria
6 must be addressed separately with a specific
7 explanation of why it has been met. I mean, that is
8 a requirement not on us. But if it's applicable,
9 it's clearly a requirement on a petitioner, because
10 it goes to how the affidavit is framed.

11 So doesn't that suggest that the Commission
12 contemplated that the petitioner should at least be
13 aware of and taking these additional requirements
14 into account?

15 >>MR. LAWRENCE: Two answers. First, with
16 regard to the provision in 2.326, to have a
17 materially different result, obviously you need to
18 plead that. That's a separate requirement than
19 51.109(a)(2), and I believe we have pled that in each
20 one of our environmental contentions. So, yes, there
21 is an expectation that the pleading will contain that
22 information. And, if we provide it for you, then
23 your job is to simply look at it as opposed to try to
24 find it.

25 However, I don't believe there's any

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1 requirement to do that now at this stage, the
2 admissibility stage. I don't believe there's a
3 requirement to resolve this dispute. You're simply
4 trying to find out whether the contention has been
5 pled properly, comply with the requirements, and
6 contain sufficient information to reach conclusions
7 that, if true, the EIS would have to be modified in
8 some manner.

9 >>JUDGE RYERSON: All right. Thank you.
10 We will turn shortly to transportation-related
11 environmental contentions, but first let me say,
12 Judge Farrar, do you have any questions? Judge
13 Barnett?

14 Is there anyone else who wants to speak
15 purely to these special requirements for
16 environmental contentions?

17 >>MS. SILVIA: This is Andrea Silvia for
18 the NRC staff. I just would like to add that, in the
19 Commission's notice of hearing, they stated that the
20 51.109 requirements should be applied consistent with
21 NEI versus EPA. The Commission's denial of Nevada's
22 petition to amend Section 51.109 and OGP's subsequent
23 letter clarifying the Commission's denial, and in
24 that letter clarifying the Commission's denial of
25 Nevada's rule-making petition, it specifically states

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1 that the higher threshold for evidence needed to
2 support contentions in 51.109(a)2 remains in effect,
3 which just further supports the position that at the
4 contention admissibility stage, the higher
5 requirement's that this is the appropriate time.

6 >>JUDGE FARRAR: But didn't the Commission
7 say to apply that consistent with the NEI decision?

8 >>MS. SILVIA: Correct.

9 >>JUDGE RYERSON: Do you -- Ms. Silvia, do
10 you see any practical effect at this point, given
11 what the Commission has done in the notice of
12 hearing, for example, particularly deleting the "new"
13 requirement -- how does the NEI decision of 2004 and
14 in particular the representations that the staff made
15 to the Court of Appeals in connection with that
16 opinion, how -- what effect do they have now? Do
17 they still have a significant effect?

18 I know the Commission said we should take
19 it into account, but are there specific things we
20 need to do or consider in light of the NEI decision
21 that are not already addressed by the elements that
22 we look at now in view of the regulations and in view
23 of the notice of hearing that the Commission has
24 drafted.

25 >>JUDGE FARRAR: Ms. Silvia, before you

1 answer that, let me modify Judge Ryerson's question.
2 The representations made to the court were not by the
3 NRC staff. It was by the Commission through its duly
4 authorized lawyers.

5 >>MS. SILVIA: Right. The staff's position
6 is that the NEI case didn't have any effect on the
7 pleading requirements. It addressed what substantive
8 issues Nevada may be able to bring, but it didn't
9 have any effect on the procedural requirements that
10 we've just been discussing here.

11 >>JUDGE RYERSON: All right. Well, I
12 suggest then we move along to the somewhat related
13 question of environmental contentions that address
14 not directly the repository itself but, rather,
15 transportation of nuclear waste to the repository.

16 And my first question, and I think this is
17 one that I'll probably go along the front row with,
18 at least initially, is whether the NRC, at least in
19 the limited way that it's still required to evaluate
20 environmental consequences -- whether it must
21 evaluate all the environmental consequences of the
22 proposed repository or only those that involve areas
23 where the NRC has direct supervisory responsibility
24 or direct regulatory responsibility.

25 I think -- I think it may have been

1 California's filing that suggested that without
2 transportation of waste to the repository that you
3 would just have a large expensive hole in the ground
4 at Yucca Mountain. But the two do seem somewhat
5 related.

6 And, I guess, let me start with the staff.
7 What is your view? Does the NRC have some level of
8 responsibility to look at environmental consequences
9 of both the transportation of waste and the
10 repository itself?

11 >>MR. FRUCHTER: Dan Fruchter for the NRC
12 staff. Yes is the short answer to your question.

13 I think that your question involved whether
14 the NRC must analyze all environmental impacts. I
15 would modify that slightly and say that the NRC has
16 to analyze, and, again, in this very context-specific
17 way, all environmental impacts that are reasonably
18 foreseeable and also that are approximately or
19 legally caused by the NRC's proposed action, which is
20 licensing the repository.

21 >>JUDGE FARRAR: That's not any dramatic
22 new doctrine. That's been NEPA for almost 40 years,
23 right?

24 >>MR. FRUCHTER: That's correct.

25 >>JUDGE RYERSON: Okay. NEI, Mr. Repka, do

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1 you have a comment?

2 >>MR. REPKA: Yes. This is David Repka for
3 NEI. We agree with that formulation that the staff
4 just stated that NRC does have responsibility under
5 NEPA for reasonably foreseeable effects that are
6 proximately related to the licensing action, and that
7 could, in fact, extend to activities and actions and
8 effects that are in areas unregulated by the NRC. So
9 we agree with that.

10 With respect to transportation
11 specifically, we take no position on that, but we do
12 believe that that may be in a different category,
13 given that the Department of Energy has done specific
14 environmental analysis, and certainly the NRC has the
15 ability to tier off and take credit for work done by
16 other government agencies.

17 >>JUDGE RYERSON: Okay. Let me ask DOE,
18 and I know you have some related arguments dealing
19 with res judicata and some other issues, but, before
20 we get to that, is your view that the NRC begins with
21 some level of responsibility to examine the
22 consequences of waste transportation?

23 >>MR. SCHMUTZ: I think that the
24 department's view is that the NRC may have some
25 responsibilities as it looks at cumulative impacts of

1 the repository, to take into account impacts from
2 transportation that are related to it.

3 We don't believe that, however, the NRC can
4 look behind the EIS prepared by the Department of
5 Energy, and we have some arguments in support of
6 that, which I hope we get to that.

7 >>JUDGE RYERSON: Okay. We'll get back to
8 that.

9 >>JUDGE FARRAR: Is that part of the EIS or
10 is that a separate EIS you did carrying out some
11 other obligation of the department?

12 >>MR. SCHMUTZ: No, the department -- well,
13 it's in three or four different documents now. We
14 have the original 2002.

15 >>JUDGE FARRAR: Have any of those been
16 subject to --

17 >>MR. SCHMUTZ: EIS, yes.

18 >>JUDGE FARRAR: Have any of those been
19 subject to judicial review?

20 >>MR. SCHMUTZ: On transportation issues,
21 yes, and upheld.

22 >>JUDGE FARRAR: Which one?

23 >>MR. SCHMUTZ: The 2002 FEIS, the record
24 of decision on the choice of the Caliente Carter has
25 been upheld. The mostly rail scenario and the final

1 environmental impact statement supporting that has
2 been upheld.

3 >>JUDGE FARRAR: So if the NRC staff says
4 those are good, you just fold them in, and you would
5 say people can't file contentions at all that would
6 challenge that?

7 >>MR. SCHMUTZ: That's correct, Your Honor,
8 both on res judicata grounds in the case of Nevada
9 and on timeliness grounds for everyone else. You
10 have 180 days to contest. We would also say -- I'm
11 just going to add one more thing, and I hope I'm not
12 unduly complicating things.

13 There was a new record of decision
14 supported by a supplemental environmental impact
15 statement dealing with the alignment, and there's
16 a -- of the railroad in the Caliente Carter. And
17 that new environmental impact statement, record of
18 decision, when it came out in October, that it's
19 subject to review if petitions are filed by about
20 April 6th. We don't believe that the transportation
21 portions of that can be brought here and contentions
22 raised about that. The items considered in that
23 environmental impact statement, that they have to go
24 to the DC Circuit on transportation issues or
25 whatever Court of Appeals has appropriate venue.

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1 >>JUDGE RYERSON: Let me come back to you
2 in just a moment on that issue, Mr. Schmutz. I have
3 a feeling that on this side of the room I will not
4 get any disagreement. So let me just see if I do.

5 Does everyone who hasn't yet spoken agree
6 that there is some responsibility to -- for the NRC
7 to look at both the transportation of waste and the
8 repository itself from an environmental standpoint?
9 Does everybody -- does anybody disagree with that? I
10 wouldn't think so.

11 Okay. So the question is, coming back to
12 the Department of Energy, your position, as I
13 understand it, is that many of these issues have been
14 or could have been litigated through review in the
15 federal courts, in effect?

16 >>MR. SCHMUTZ: Through the DOE procedures.

17 >>JUDGE RYERSON: I'm sorry. Your mic is
18 off.

19 >>MR. SCHMUTZ: Your Honor, this is Tom
20 Schmutz again. Through the DOE notice and comment
21 procedures initially, and people availed themselves
22 of that. There were hundreds and hundreds of
23 comments submitted and responded to, and then
24 ultimately through the Court of Appeals. And I
25 think -- I only have one other thing.

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1 I think the NEI decision that we're talking
2 about, if you take a look at it, they actually
3 distinguish between transportation proceedings before
4 the Department of Energy and essentially repository
5 proceedings before the NRC. It's explicitly stated
6 in there. So the DC Circuit team and NEI seem to
7 understand that distinction as well.

8 >>JUDGE FARRAR: Let me put to you a
9 position that I'm not sure if it's been raised by the
10 parties or not.

11 But since the NRC did establish special
12 requirements for environmental contentions, couldn't
13 one argue that the NRC recognized that there would be
14 an opportunity to -- for petitioners or potential
15 petitioners to litigate the environmental -- to
16 litigate DOE's environmental documents, in effect,
17 through the Court of Appeals and that the
18 Commission's response to that was to narrow the
19 opportunities for review before the Commission but
20 not to eliminate them, that the Commission recognized
21 that many issues would be or could have been
22 litigated, and that's why we have special
23 requirements. The intent is to narrow them but not
24 to eliminate them. Is that a fair position or do you
25 disagree?

1 >>MR. SCHMUTZ: Yes. I would limit it to
2 repository to impact the -- the environmental impact
3 dealing with the repository, not transportation.

4 >>JUDGE RYERSON: But why? Because we go
5 back to the notion that -- put aside DOE. If the
6 Nuclear Waste Policy Act didn't require the NRC to
7 adopt DOE's environmental documents to the extent
8 practicable, then each agency would have an
9 independent responsibility under NEPA to examine the
10 environmental consequences of this action.

11 And the NRC's responsibility would extend,
12 would it not, to both the repository itself and the
13 related transportation of nuclear waste? So we start
14 with some level of responsibility there that has been
15 cut back by the act and by the implementing
16 regulations but not totally eliminated.

17 >>MR. SCHMUTZ: I think there's substantial
18 case law that would provide that where the federal
19 agency or two federal agencies are involved -- and
20 I'm going to call it an overall project, and that's
21 not quite accurate, and they each have separate
22 independent jurisdiction over portions of it, and
23 particularly where one of the federal agencies, as is
24 the case with the Department of Energy, has an
25 overall responsibility, has to do environmental

1 impact statement of the whole, and the other federal
2 agency, in this case the NRC, has environmental
3 responsibility and jurisdiction over only a portion
4 of that project, that that lesser agency has no
5 jurisdiction and has no responsibilities under NEPA
6 to consider the environmental impact statements being
7 prepared by another federal agency.

8 And I would point, for example, there's a
9 case out of the Ninth Circuit called California Trout
10 v. Schaefer, a Ninth Circuit decision. I point it
11 out because I noted that the State of California
12 pointed to a case in another Ninth Circuit decision
13 called Thomas v. Peterson, a case in which the very
14 same agency segmented two portions of an overall
15 project. We all know that that's not appropriate.

16 In the case of California Trout v.
17 Schaefer, the court specifically said, where there
18 are two agencies, two federal agencies, with
19 independent jurisdiction, as the case here is it, it
20 is DOE that has jurisdiction over transportation, not
21 the NRC. And that agency has prepared an
22 environmental impact statement over, in this case,
23 transportation, that the other agency has no
24 jurisdiction or responsibilities under NEPA to
25 prepare such an environmental impact statement over

1 that other activity, and it's quite clear.

2 >>JUDGE FARRAR: Was that a case where the
3 other agency had hearing and adjudicatory powers like
4 we do?

5 >>MR. SCHMUTZ: No, not that I recall. In
6 that case, for example, it involved the Corps and it
7 involved the Bureau of Reclamation and it involved
8 the preparation of environmental impact statements
9 and whether or not they had to cover certain areas,
10 which is the issue here.

11 >>JUDGE FARRAR: Well, is the issue here
12 that you've just stated a perfect example of where
13 those heightened motion to reopen standards should
14 come in, if we give you what you said, this thing is
15 essentially closed. It's been reviewed, but does
16 that mean we have no jurisdiction to consider it even
17 if somebody walked in here with a motion to reopen
18 the environmental impact statement because some
19 dramatic new impact had been discovered, and even
20 though you've done a statement that's been commented
21 on and duly approved by a court, that there's now
22 something and we're the only place that's open for
23 business; so let's do it here under a motion to
24 reopen?

25 >>MR. SCHMUTZ: If you belief that

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1 exclusive jurisdiction is in the court, that
2 exclusive means exclusive. And if that situation
3 occurred with regard to transportation -- and I'm
4 going to limit it to transportation. --

5 >>JUDGE FARRAR: Right.

6 >>MR. SCHMUTZ: If that occurred with
7 regard to transportation, whatever avenues of relief
8 you had are in the DC Circuit, not before this
9 agency.

10 >>JUDGE FARRAR: I thought you were going
11 to say their avenue for relief is to come back to
12 DOE.

13 >>MR. SCHMUTZ: Oh, well, certainly.
14 You're absolutely right. I misspoke. In the first
15 instance certainly to the DOE and then getting the
16 final agency decision on whatever petition they might
17 file to go to the DC Circuit or whatever other Court
18 of Appeals had appropriate jurisdiction, venue
19 primarily.

20 >>JUDGE FARRAR: And so we would wait for
21 you all to redo that so we could fold it in here, or
22 wouldn't it be faster for us to hear what you have to
23 say?

24 >>MR. SCHMUTZ: I guess what I'm saying is
25 that -- well, if that -- if that case occurred and if

1 there was a significant change that was going to
2 occur and if it affected the -- your review of
3 cumulative impact, for example, I know the staff
4 takes that, that may be so. But that's the route.
5 It is not to be litigated in this proceeding.

6 >>JUDGE RYERSON: Now, the "it" you're
7 referring to is the record of decision, or what is
8 the "it" you're referring to?

9 >>MR. SCHMUTZ: What I'm talking about is
10 the environmental impact statement, the record of
11 decision supported by an environmental impact
12 statement. And they always are. And that's what
13 allows one to go to the Court of Appeals.

14 >>JUDGE RYERSON: Nevada, what's your view
15 on that, Mr. Malsch?

16 >>MR. MALSCH: Let me address first -- I'm
17 Martin Mulsch from Nevada -- DOE's argument from this
18 morning.

19 First of all, the mere fact that the
20 Nuclear Waste Policy Act provides an opportunity for
21 judicial review within 180 days of an issuance of
22 record of decision or impact statement, in our mind,
23 has no effect at all on one's hearing rights before
24 the Nuclear Regulatory Commission.

25 Second, putting aside res judicata and

1 collateral estoppel issues, which Mr. Lawrence can
2 address, I just wanted to mention that the Nuclear
3 Waste Policy Act was enacted against a backdrop in
4 which the Commission was very clear, even where
5 another federal agency was an applicant, that the
6 Commission itself would exercise its independent
7 power and do its own environmental impact statement.

8 For example, in the case of TVA
9 applications for nuclear power plant construction
10 permits, it was the Commission's consistent practice
11 of not deferring to some supposed exclusive
12 jurisdiction under NEPA to the Tennessee Valley
13 Authority but instead of assuming that its role as an
14 independent regulatory agency required it to do its
15 own environmental impact statement.

16 The principal effect of the Nuclear Waste
17 Policy Act was that Congress understood this was the
18 NRC's practice and modified it only to the extent
19 that, instead of having to write its own statement of
20 an issue, it was allowed under certain circumstances
21 to adopt DOE's.

22 But that was certainly not in derogation of
23 the requirement under NEPA that the agency's impact
24 statement had to be considered in the agency review
25 process.

1 And in this case, the agency review process
2 is, in the case of Part 63, the adjudicatory hearing
3 process provided for. So we do get a right to a
4 hearing on NEPA issues, in general, provided we've
5 met appropriate pleading requirements, regardless of
6 other opportunities for judiciary review and
7 regardless of what may have been the practice of the
8 Bureau of Reclamation in some case in the Ninth
9 Circuit.

10 >>JUDGE RYERSON: Does the NRC staff have a
11 view on this issue?

12 >>MR. FRUCHTER: Staff does not disagree
13 with Nevada's formulation. That is to say, the
14 Nuclear Waste Policy Act is specifically provided for
15 the type of analysis that the NRC will conduct, and
16 that is to say, perform a review of the environmental
17 impact statements authored by DOE and decide to what
18 extent it's practicable to adopt those, and that, you
19 know, essentially for this purpose means to what
20 extent are those environmental impact statements
21 adequate.

22 Once that determination has been made, the
23 NRC has been required to adopt the EIS. But I do not
24 believe that that would foreclose any possibility of
25 review of the adequacy of that environmental impact

1 statement in the present proceeding. In fact, you
2 know, I think the NEI v. EPA case counsels to the
3 contrary, in other words, that this is the
4 appropriate forum to consider substantive challenges
5 to the EIS.

6 >>JUDGE RYERSON: Including the
7 transportation aspect?

8 >>MR. FRUCHTER: The aspects of the
9 transportation analysis that have been adopted.

10 >>JUDGE RYERSON: Okay. I guess one --
11 Mr. Schmutz, one question I have is: In terms of res
12 judicata effects, if I understand your argument, it's
13 that the 2008 documents are governed by -- your view,
14 that the exclusive remedy is to go to the DC Circuit,
15 if I -- if I understand that.

16 But assume for the moment you're wrong
17 about exclusive jurisdiction. Nonetheless we have --
18 we have cases. We have a 2006 DC Circuit case
19 dealing with transportation.

20 Is it your view that, even if there weren't
21 exclusive jurisdiction in the federal circuit courts,
22 that there would be res judicata, say, at least as to
23 Nevada --

24 >>MR. SCHMUTZ: Yes.

25 >>JUDGE RYERSON: -- by reason of that?

1 >>MR. SCHMUTZ: Yes. Yes, Your Honor.

2 >>JUDGE RYERSON: But if that were our
3 basis, there would be no res judicata obviously as to
4 any post-2006 documents, correct? There couldn't be?

5 >>MR. SCHMUTZ: Correct.

6 >>JUDGE RYERSON: And there wouldn't be
7 res judicata, would there, as to a potential party
8 here who was not a party to the 2006 proceeding; is
9 that correct?

10 >>MR. SCHMUTZ: That follows.

11 >>JUDGE RYERSON: You follow. Okay.

12 >>JUDGE FARRAR: Why does that follow?

13 >>MR. SCHMUTZ: There wouldn't be
14 res judicata. They weren't a party.

15 >>JUDGE FARRAR: Right.

16 >>MR. SCHMUTZ: But timeliness would kick
17 in. It would be a final decision.

18 >>JUDGE FARRAR: But there's some --
19 whether it's collateral estoppel or some doctrine
20 related to res judicata, they had an opportunity to
21 be heard in that DC Circuit, even if Nevada went up.
22 Didn't the others have an opportunity, and, having
23 not exercised that opportunity, they'd be foreclosed?

24 >>MR. SCHMUTZ: Absolutely, but not by
25 res judicata. I guess that's the only thing I'm

1 saying. But they are foreclosed, absolutely. You're
2 absolutely right.

3 >>JUDGE FARRAR: By one of those related
4 documents?

5 >>JUDGE RYERSON: Judge Farrar is being a
6 little unfair because I was posing the hypothetical
7 where you were restricted to res judicata.

8 >>MR. SCHMUTZ: Right.

9 >>JUDGE RYERSON: And I know your argument
10 is broader. It goes to exclusive.

11 >>MR. SCHMUTZ: And I would be remiss
12 allowing you to -- or at least to push back a little
13 bit on the assumption that you made me take on the
14 exclusivity provision with regard to the most
15 latest -- the most latest -- the latest environmental
16 documents. We believe that it's the transportation
17 portion of those and the record of decision that
18 those are exclusively before -- can only be heard by
19 the Court of Appeals.

20 >>JUDGE RYERSON: Yeah, I understand that's
21 your position.

22 >>MR. SCHMUTZ: And just to expand one
23 other thing, we are saying that the NEPA
24 responsibilities imposed upon the NRC by NEPA do not
25 extend to transportation. And we've adequately, I

1 think, set it forth in the paper. I'm going to add
2 one other thing. There is an Entergy case,
3 relicensing case, by the Commission which was cited
4 on by California -- I happened to look at it the
5 other night -- in which the Nuclear Regulatory
6 Commission took a position that, where it doesn't
7 have jurisdiction, it can't change the result of a
8 sister agency's determination, environmental
9 determination, it needn't look at it. It is quite
10 close to this situation. It's an Entergy case
11 involving Wolf Creek. I can give you the citation to
12 it.

13 >>JUDGE FARRAR: They don't need to look at
14 it, even to say we'll import --

15 >>MR. SCHMUTZ: Correct.

16 >>JUDGE FARRAR: We're going to import
17 whatever those environmental outcomes or impacts are.

18 >>MR. SCHMUTZ: That would be correct.

19 >>JUDGE FARRAR: They can't even import
20 those into their -- wait, 15 minutes ago or 20
21 minutes ago I thought you conceded that, even though
22 we don't -- the NRC doesn't regulate something, it
23 must take into account all the impacts of the
24 proposal that's in front of it.

25 >>MR. SCHMUTZ: I hope what I said was

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1 that, at most, the NRC, if it felt it necessary to
2 look at cumulative impacts, would have to accept the
3 DOE's transportation impact statements as they stand,
4 if it felt it necessary to look at cumulative
5 impacts, but not -- I'm not suggesting that I think
6 that legally that's required. I'm just saying I
7 think that's where the staff is coming out. I think
8 they're looking at it. I'm just saying, if they're
9 going to do that, you can't look behind those
10 documents.

11 And I think there's substantial case law on
12 this jurisdictional issue out of the Fourth Circuit,
13 several cases out of the Ninth Circuit, out of the
14 Supreme Court, and the decisions of this agency which
15 support the notion that you don't look at -- in this
16 case at transportation, which is a -- raises a
17 jurisdictional issue. No one concedes or contends, I
18 don't believe, that the AEA or the Nuclear Waste
19 Policy Act defers jurisdiction on this agency for the
20 transportation of nuclear waste other than the
21 certification of casks.

22 >>JUDGE RYERSON: Yeah, I mean -- okay.
23 Let me -- you mentioned Supreme Court, and there is
24 one case -- I believe you cited it -- the Department
25 of Transportation versus Public Citizen case. I

1 suspect this is your area, Mr. Schmutz.

2 Could you elaborate upon how you feel that
3 is relevant here?

4 >>MR. SCHMUTZ: I'm going to create and say
5 that that stands for a limited but important
6 position. The facts of the case, as we all know, are
7 a bit odd. And so -- but I think --

8 >>JUDGE RYERSON: We probably all don't
9 know.

10 >>MR. SCHMUTZ: It had to do with allowing
11 trucks in from Mexico, and we had one agency who was
12 responsible for getting inspection routines. And at
13 the same time the President of the United States
14 imposed a moratorium on trucks coming in. The agency
15 that was going to impose the inspection routines had
16 no responsibility, no jurisdiction, to actually allow
17 the trucks in. But it did have jurisdiction to
18 create safety requirements and inspection routines.

19 So it created them, and it said what's the
20 environmental impact statement or environmental
21 impact of these trucks kind of hanging around at the
22 border, you know, blowing diesel smoke into the air,
23 more of it than would formerly be there. That's the
24 impact that they looked at.

25 They didn't look at the impact of those

1 trucks entering the United States and, you know,
2 spewing noxious fumes all over the country. They
3 didn't look at the national impact of that. And they
4 didn't do it because they had no jurisdiction over
5 the activity of allowing those trucks into the
6 United States. It was up to the President to do
7 that.

8 So it's a -- I guess the California
9 trucking case, I suppose I like in kind of saying
10 that's the case we ought to be looking at, because it
11 was two federal agencies, both of whom had
12 environmental responsibilities. But it does stand
13 for the proposition that where one agency doesn't
14 have jurisdiction over an activity and can't change
15 the outcome, NRC -- I mean, in our view, the Nuclear
16 Regulatory Commission can't tell us how to ship --
17 you know, what kind of shipments we're going to have
18 in New Jersey. We don't believe that that is within
19 their jurisdiction.

20 >>JUDGE FARRAR: But the Public Citizen
21 doesn't stand for what you just said.

22 >>MR. SCHMUTZ: It stands for the
23 proposition that, if the agency that is doing the
24 environmental impact statement doesn't have
25 jurisdiction in this case over the entry of the

1 trucks, it needn't look at the impact of the entry of
2 the trucks.

3 >>JUDGE FARRAR: I thought it said where no
4 federal agency has any jurisdiction, because the
5 President is not subject to NEPA.

6 >>MR. SCHMUTZ: That's fine.

7 >>JUDGE FARRAR: So where no federal agency
8 has jurisdiction, the federal agency in question
9 doesn't have to do a NEPA statement at all.

10 >>MR. SCHMUTZ: No. It did have to do a
11 NEPA statement. The federal agency did a NEPA
12 statement with regard to the responsibility it was
13 responsible for, which was the inspection routine.

14 >>JUDGE FARRAR: Right. But it had nothing
15 to do with this business around the border.

16 >>MR. SCHMUTZ: Oh, it didn't have to look
17 at the national impacts of allowing those trucks into
18 the United States. That's what the case stands for.

19 >>JUDGE RYERSON: Because that was a
20 decision made by the President.

21 >>MR. SCHMUTZ: And they couldn't change
22 it. And the Commission in the Entergy case actually
23 cited the Public Citizen case for the proposition
24 that, where it doesn't have jurisdiction over an
25 activity, it needn't look at the environmental

1 impact. That was an NPDBS case under the Clean Water
2 Act, and it wasn't going to look behind the EPA's
3 decision and consider the impacts associated with
4 that grant of that permit.

5 We are not -- let me -- we are looking at
6 cases and what we believe the Board should look at
7 are the cases where there are two independent
8 agencies with -- it's not quite concurrent, but with
9 jurisdiction over a project, different aspects of it.
10 That's what we're relying on. I'm not trying to sell
11 this Board on Public Citizen. I don't think anybody
12 quite understands the ramifications of that, but I do
13 understand the ramifications of the California Trout
14 case and several of the cases cited in California
15 Trout. And I do understand the Commission's decision
16 in Entergy, which I think is supportive of the
17 California Trout case.

18 >>JUDGE RYERSON: Okay. I think you've
19 answered my question.

20 >>MR. SCHMUTZ: Probably way too lengthy.

21 >>JUDGE RYERSON: As you are probably well
22 aware, Public Citizen was a unanimous decision
23 authored by Justice Thomas, and it's hard for me to
24 imagine that that unanimous decision of the Supreme
25 Court had as dramatic an impact on NEPA as I thought

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1 you were arguing. That's all. I may have
2 misunderstood the scope of your argument.

3 >>MR. SCHMUTZ: I think it has the same --
4 I don't think it stands for any more, Judge Ryerson,
5 than California Trout stands for. I really don't.
6 It's an on-fact situation. But I don't think it
7 stands for any more than that case stands for. And
8 that case, I think, is on all fours with what we're
9 faced with here.

10 >>JUDGE RYERSON: Okay. Did I see a hand
11 up in the back for Clark?

12 >>MS. ROBY: Yes, Debra Roby for Clark
13 County. Just a couple of comments in response to the
14 Department of Energy. It appears that the DOE's
15 position is premised upon the belief that the NRC has
16 no duty to prepare an EIS. In the Citizen case, the
17 agency did not have a duty to prepare an EIS. It did
18 prepare an EIA. It did not prepare an EIS. No
19 matter what would have happened, no matter the result
20 of the EIS, the agency couldn't counter-mandate the
21 decision of the President of the United States.

22 In this case it's a different scheme. We
23 have -- the NRC is required to prepare an invalue --
24 an environmental assessment and review the EIS. At
25 the very least review the EIS. To the extent it

1 cannot adopt the DOE's EIS, it then has to make a
2 decision in what areas that it can adopt or will
3 require supplement.

4 But that indicates an independent
5 evaluation on the merits of the EIS, not simply
6 conducting a review on whether the Department of
7 Energy's EIS is, say, arbitrary or capricious like a
8 review court would perform. There is a duty here for
9 the NRC to perform an evaluation to evaluate the
10 environmental impacts. And Clark County would argue
11 that that does include the impacts associated with
12 transportation of waste to the facility.

13 The EISs were part and parcel of the
14 license application that was submitted to the NRC.
15 But for the NRC's decision to license -- or to
16 authorize construction of this facility, there would
17 be no impacts on the transportation route.
18 Therefore, those -- the impacts associated with that
19 undertaking are relevant and should be addressed as
20 part of this proceeding.

21 >>JUDGE RYERSON: Thank you.

22 Mr. List.

23 >>MR. LIST: Yes, Judge Ryerson. Thank
24 you. I would point out that one of the NEPA
25 regulations, 40 CFR 1508.8 Sub (a) and (b) define

1 effects which are synonomous with impacts under the
2 act, as either direct, which are based on the action
3 itself, in this case, the repository, or indirect
4 effects which are caused by the action.

5 And there are three criteria, as we read
6 that regulation, which are as follows: That the --
7 first of all, is the indirect action caused by the
8 direct action? Certainly the repository is the
9 driving factor that would initiate the transportation
10 itself.

11 Secondly, is it further in distance? In
12 other words, is it off-site. Certainly the
13 transportation is.

14 And finally, is it reasonably foreseeable?
15 And certainly the transportation is reasonably
16 foreseeable. It's an integral part of the completion
17 of the fulfillment of the repository.

18 I would point out there are a couple of
19 important cases that directly, I think, support that
20 proposition. The first is Sierra Club versus Marsh,
21 a First Circuit case in 1985 involving the Federal
22 Highway Administration and the Corps of Engineers.
23 And they held in that case, the court did, that the
24 FHA did not meet their NEPA burden because they
25 didn't consider whether agency approved of a --

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1 approving of a cargo port and causeway to an island
2 would lead to further industrial development on the
3 island, which was outside their direct jurisdiction.

4 The point of the case was that neither the
5 Corps nor FHA, the Federal Highway Administration,
6 had any ability to regulate or to prevent development
7 on the island that was privately owned and under the
8 jurisdiction of the local government. And yet the
9 court required consideration of that future
10 environmental impact caused by the action that was
11 under consideration.

12 Another important case was *Sierra Club v.*
13 *Montiella*, 459 Fed Supp 2nd 76, which held that the
14 National Park Service did have to consider impacts
15 caused by activities outside their preserve, despite
16 the fact that the National Park Service had no
17 ability to consider those impacts under National Park
18 Service regulations because their Organic Act gave
19 them the ability to prevent the action in question.
20 In other words, the fundamental primary park activity
21 that was under consideration in the EIS process.

22 And so, in short, the agency can rely on
23 the limitation of authority where the statute gives
24 the agency authority but the agency's own regs limit
25 the authority.

1 I'd also point out that, in the Nuclear
2 Waste Policy Act itself, there were certain EIS
3 analyses that were excluded from what the Commission
4 had to take under consideration. For example, they
5 did not include in those exclusions -- or, rather,
6 they did include in those exclusions non-geological
7 alternatives to Yucca Mountain. They could have but
8 did not exclude transportation.

9 I would also point out that other Nuclear
10 Regulatory Commission regulations address
11 transportation impacts where there is seemingly no
12 direct regulatory authority on the part of NRC,
13 specifically, as to renewal of licenses of
14 generators.

15 The specific regulation in that case is
16 51.53(c)32(j) in which it points out that an
17 operating license at the renewable -- at the
18 renewable stage, all applicants shall assess the
19 impact of highway traffic generated by the proposed
20 project.

21 Well, in that case they specifically
22 recognized that they did have such authority, and, in
23 fact, the CEQ regulations defining the scope of an
24 action, which is what we're talking about here with
25 reference certainly to the repository, an action to

1 be considered by an EIS action is defined as --
2 includes a connected action.

3 And we believe this is a connected action.
4 Actions are connected if under that regulation if
5 they automatically trigger other actions which
6 require or cannot or will not proceed unless the
7 actions are taken previously and simultaneously,
8 which is our case, and are interdependent parts of a
9 larger action and dependent on the larger action for
10 their justification.

11 So what we have here is what is, in effect,
12 an inextricably linked connected further activity
13 that is kicked off by virtue of the repository
14 itself. And DOE should not be allowed to evade its
15 responsibility to have incorporated consideration of
16 transportation.

17 >>JUDGE RYERSON: Thank you, Mr. List.

18 California, yes.

19 >>MS. DURBIN: Susan Durbin for the State
20 of California. Your Honor, I'd like to address
21 several points that the DOE lawyer raised. The first
22 is about the Department of Transportation versus
23 Public Citizen case. In that case, the most
24 important factor was not whether the Federal Motor
25 Carrier Safety Administration had authority or

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1 jurisdiction over the trucks entering the
2 United States. It was whether it had discretion to
3 control it.

4 Under the FMSA's statutes, if the trucks
5 met a specified series of criteria, FMCSA had no
6 discretion. It had to issue a license. Similarly in
7 the NPDBS case that the counsel just cited, the
8 Supreme Court said under the Clean Water Act there
9 was a specific set of criteria that, if met, required
10 the issuance of a permit, and that the court could
11 not take Congress' place and add another criterion to
12 that list. There was no discretion in the agency to
13 deny a permit where the criteria were met.

14 The question is not authority. It's
15 discretion. And in the case of the NRC, there is, as
16 we discussed in our papers, great discretion in the
17 part of the hearing officers and, therefore, in the
18 Commission, to consider the environmental effects of
19 the project, and even to deny the project or
20 condition it to protect environmental values. That's
21 why this proceeding is not at all like the Public
22 Citizen proceeding. There is discretion here. There
23 was no discretion there.

24 As to the exclusive remedy, there is
25 nothing in the Nuclear Waste Policy Act that

1 creates -- that robs the NRC of the ability to look
2 at the environmental documents. Simply because the
3 judicial review is placed in the circuits of appeal,
4 and not in the district court. The intent of
5 Congress is clearly to say that the judicial review
6 will not take place in the district courts. It will
7 take place in the Courts of Appeal. That does
8 nothing to affect the jurisdiction of the NRC to look
9 at the decision it is making and the environmental
10 documents that would support it.

11 Now, DOE is being way too modest in its
12 description of its environmental documents. After
13 2006 any documents that were used to support the 2008
14 ROD, there was a complete reexamination of many
15 facets of transportation, including what kind of
16 casks would be transported, whether barging would be
17 used, exact routing decisions and so forth; it was
18 quite a different document, and those things can
19 still be looked at. They have not been subject to
20 any judicial determination. There's no res judicata,
21 there's no estoppel, either.

22 >>JUDGE RYERSON: Ms. Durbin, if I can
23 interrupt. Their position, I take it, on those
24 documents is that the exclusive remedy is in the
25 Court of Appeals at this point. Correct.

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1 >>MS. DURBIN: That is how I understand
2 their position, but I do not see anything in the
3 statute that actually creates that exclusive remedy.

4 >>JUDGE RYERSON: What you're saying is if
5 they're wrong on that, if nothing is new and
6 different, that it should be looked at this point.

7 >>MS. DURBIN: Correct, Your Honor. And
8 finally I'd like to get to the question that DOE says
9 the NRC cannot go behind DOE's environmental
10 documents. What it's suddenly trying to do, here and
11 in its papers, is to place the NRC in the position of
12 a reviewing court, and to hold NRC to the standard of
13 deference that a review in court gives to an
14 administrative agency. Well, I work for the attorney
15 general's office in California, and we defend cases
16 like that all the time.

17 The reason that a review in court does not
18 go behind the documents it ceded, does not go behind
19 the administrative record, is a separation of powers
20 of argument. That an administrative agency, part of
21 the executive branch, was given the authority to make
22 certain policy and technical decisions, a separate
23 branch, the judicial branch, does not have the
24 authority, under separation of powers, to look at
25 those decisions that were committed specifically to

1 the executive branch.

2 Here that does not fly. The NRC is an
3 executive -- is part of the executive branch, even if
4 it is not in the standard administrative organization
5 under the President. It's part of the executive
6 branch. It is not part of the judicial branch. It
7 is a sister agency with equal standing with the DOE,
8 and is not obligated to give deference to DOE's
9 determinations.

10 In fact, how can the NRC determine if it is
11 practicable to adopt DOE's environmental documents,
12 if it does not take a hard look at the actual effects
13 and measure whether DOE has covered them all and
14 covered them accurately. It cannot carry out its
15 responsibility under the Nuclear Waste Policy Act if
16 it gives that degree of deference.

17 We would analogize it to an agency that has
18 a contractor prepare an environmental impact
19 statement for them. They will use that to the extent
20 that they believe that it's correct, but it does not
21 excuse the agency from its forming the obligation to
22 make sure that all significant effects, direct and
23 indirect, have been addressed.

24 We think that the Nuclear Waste Policy Act
25 does not remove the NEPA obligation from NRC. It

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1 still remains. It simply can use DOE's documents to
2 the extent they're useful and adequate.

3 >>JUDGE FARRAR: Ms. Durbin, I'm under the
4 view you said about internal state business, in
5 leaving aside the judiciary, the judiciary always
6 reviews agencies and says NEPA's just a procedural
7 statute.

8 Did I hear, if ever so subtly in what you
9 said, that as far as internal state business is
10 concerned, NEPA, or the state equivalent of NEPA, is
11 not just a procedural statute; that it's a mandate to
12 the executive branch to get it right?

13 >>MS. DURBIN: No. it's a mandate on the
14 executive branch to have all the information that
15 enable it to get it right.

16 California's equivalent does have a
17 standard mandate. NEPA does not.

18 >>JUDGE RYERSON: I was about to say,
19 unless there's a burning desire to make -- we'll give
20 DOE the last word on this at least before lunch, I
21 think.

22 >>MR. SCHMUTZ: I almost always take the
23 last word. I just want to clarify one thing.

24 >>JUDGE RYERSON: Is your mike on? It may
25 not be.

1 >>MR. SCHMUTZ: I'm sorry. This is Tom
2 Schmutz. What I am talking about and what DOE is
3 talking about is just the transportation portion of
4 the EISs. We're not talking about what the NRC does
5 or doesn't have to do with the repository SCIS and
6 FDIS, number one.

7 Number two, when we're saying on
8 transportation, we're not talking about deference.
9 We're saying with regard to transportation, you don't
10 have any jurisdiction over it. If you want to look
11 at it for cumulative impacts, fine. You take them as
12 we found them. We're a sister agency. We have
13 jurisdiction over it. You don't.

14 Our environmental impact statements are not
15 anything -- on transportation are not something you
16 ought to be going behind. You take those impacts,
17 add them to the impacts in the repository that you
18 think are appropriate and determine what your
19 cumulative impacts are. That's our position.

20 >>JUDGE RYERSON: Okay. I think we are
21 understand that. Mr. Malsch.

22 >>MR. MALSCH: Judge Ryerson, I just would
23 like to make a few brief statements about collateral
24 estoppel and res judicata, since we seem to be the
25 ones primarily on the receiving end of those

1 arguments. And I just want to address them briefly.

2 First of all, for one to even ask the
3 question, there has to be a decision on the merits,
4 and the only conceivable decision on the merits on
5 any NEPA issues involved in this proceeding is the
6 decision of the Court of Appeals and Nevada v. DOE.
7 That's the first point.

8 The second point is that the standard for
9 review of a reviewing court in that case is arbitrary
10 and capricious. That does not resemble, in any
11 respect, the standard for review that the Commission
12 would apply in adopting the DOE statement. So right
13 away, we have automatically a difficulty in applying
14 any concept of res judicata and collateral estoppel
15 because the ultimate standard of judgment is
16 different before the agency as contrasted with the
17 Court of Appeals.

18 Thirdly, even if you assume that the
19 decision of a court has some collateral estoppel
20 effect on the agency because they are applying the
21 same standard, I would submit that if you look
22 carefully at our NEPA contentions, you will see that
23 not one of them was addressed on the merits in the
24 Court of Appeals decision.

25 So there is no collateral estoppel effect,

1 even assuming, putting aside difficulties about
2 judicial review standards as opposed to the NRC
3 review standard.

4 >>JUDGE RYERSON: And if there were, is
5 that something that would be more appropriately
6 raised on the merits in the context of an
7 adjudicatory hearing as opposed to a contention
8 admissibility. It's kind of moot, I guess, could you
9 say, but none of them are governed by res judicata.

10 >>MR. MALSCH: Well, I would say none of
11 them. But I would make the observation, though, that
12 DOE, in issuing its 2008 environmental documents,
13 reexamined a great deal of the environmental
14 landscape. And it gets very complicated to discern
15 exactly where DOE's reexamination in 2008 ended and
16 where -- and did not re-exam some of the earlier
17 decisions that went up for review in 2006, in our
18 petition in 2004. And that gets very complicated.

19 And it might benefit from more specific --
20 to the extent that documents apply at all, it seems
21 to me they can only possibly apply, looking at things
22 on a very specific contention-by-contention basis and
23 examining precisely what was the scope of DOE's 2008
24 reexamination. And that maybe something that's
25 entirely appropriate for a merits hearing rather than

1 just argument on the basis of papers.

2 >>JUDGE RYERSON: All right. Thank, you
3 Mr. Malsch.

4 >>JUDGE FARRAR: Not to ruin your lunch
5 hour that's about to come up, but I want -- it's an
6 item not on the agenda that I want you to address
7 after lunch. I think we can do it very quickly.

8 Mr. Malsch or the state said in its safety
9 contention 146, I think it was, that this was
10 essentially a one-step licensing process.

11 In responding to that, the other parties
12 didn't say it wasn't a one-step licensing process.
13 I'd like to discuss with you in the afternoon the
14 impact of Part 2, specifically 2.1021 and 2.1022,
15 which seem to talk about this as a two-part licensing
16 process. Of course, maybe a third part 100 years
17 from now. But I'd like to discuss that with the
18 notion in mind, some contentions of all the parties
19 may be premature at this point, if there's going to
20 be another phase a couple of years from now where we
21 could hear those.

22 So that's the purpose for asking the
23 question. So if you all could be ready to discuss
24 that, I think we can do it with some very short
25 questions and answers after lunch.

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1 >>JUDGE RYERSON: Thank you, Judge Farrar.
2 In addition to the issue that Judge Farrar has
3 raised, a principal subject for this afternoon,
4 before we get into the closings that we hope we have
5 time for, will be issues that pertain to the
6 model-based contentions dealing with the total system
7 performance assessment.

8 I have exactly 12:15. So if we give you
9 the 90 minutes we promised, and as I said this
10 morning, I think you do need that, trying to get
11 lunch in this area and get back through security.

12 >>JUDGE FARRAR: Mr. Chairman, with your
13 indulgence, let me give them one more homework
14 assignment.

15 >>JUDGE RYERSON: Of course, Judge Farrar.

16 >>JUDGE FARRAR: Thank you. Mr. Malsch in
17 his reply to DOE's brief, pages 1 to 2, came up with
18 four snappy retorts to the DOE position. I'd like to
19 give -- since he had the last word, give DOE a chance
20 to respond to the latter three of those. The first
21 is within the jurisdiction of one of our other
22 boards, but the latter three of those on pages 1 to 2
23 of his 999-page reply has, I think, four bullets, and
24 let's talk about the last three after lunch.

25 >>JUDGE RYERSON: Okay. In light of the

1 additional homework assignment, we'll give you an
2 extra five minutes for lunch. So let's be back here
3 ready to go back to work at is 1:50 sharp.

4 (A recess was taken.)

5 >> JUDGE RYERSON: Please be seated. Okay.

6 Welcome back. I think, as we indicated
7 shortly before the lunch break, Judge Farrar has a
8 few questions; and then we're going to turn to the
9 model-based contentions.

10 >> JUDGE FARRAR: Okay. This is on the
11 general question of -- where the contentions have
12 been filed prematurely, I promised Judge Ryerson I'd
13 get it done in two minutes, so please keep your
14 answers short, if you can. The state said in Nevada
15 said in Contention 146 that this was essentially a
16 one-stage licensing process. The key other parties
17 did not challenge that. They may have their own
18 reasons for wishing it was a one-stage licensing
19 process.

20 The Department of Energy, based on those
21 two sections of Part 2 that I cited to you, do you
22 agree that we're looking at a two-stage license
23 process right now, a construction authorization; and,
24 second, the equivalent of an operating license called
25 a use and possession License?

1 >> MR. SILVERMAN: I'm sorry, this is Don
2 Silverman. Judge Farrar, I do have them in my notes,
3 but again, they were 10 CFR --

4 >>JUDGE FARRAR: 2.1021, which says there
5 will be a first pre-hearing conference and a
6 construction authorization phase; and then we could
7 have a first pre-hearing conference at the receive
8 and possess phase.

9 So that tells -- and then the second
10 provision about the next section, 10.22 talks about
11 the second pre-hearing conference and again mentions
12 it at two phases. It mentions two, yes, two phases
13 for a second pre-hearing conference.

14 >>MR. SILVERMAN: There is -- the
15 regulations do provide that the department has to
16 update the license application, the construction
17 authorization application to support a license to
18 possess and use and it's in Part 63.

19 The precise procedures to follow and
20 whether there is a right to a hearing, an opportunity
21 for a hearing and all that, I'm really not prepared
22 to answer that at this point.

23 I would say, because I think that the
24 regulations aren't entirely clear in that regard.
25 What I would say is just a couple of things. One is

1 that I don't believe -- at least the Department has
2 argued -- and I could be wrong, but I don't recall, a
3 contention where we've alleged it was filed
4 prematurely and it's appropriate for a later phase in
5 the proceedings.

6 >> JUDGE FARRAR: You haven't said that,
7 but it's subliminal in some of them that I could see,
8 gee, maybe this one doesn't get admitted because it's
9 not timely to hear it now, so we'll say to the state
10 or the other parties, nice contention, you've
11 reserved your rights, come back in seven years.

12 >> MR. SILVERMAN: Frankly, I am not in a
13 position now to state a department position that we
14 think that there is another opportunity for hearing
15 at the possession and use license stage. That's
16 something we'd have to look harder at. Let me say
17 this...

18 >> JUDGE FARRAR: Then why would 10.21 and
19 10.22 talk about a first and second pre-conference
20 hearing at the license -- at the possession phase if
21 there wasn't some sort of potential hearing in play?

22 >> MR. SILVERMAN: I don't know, Your
23 Honor. I have to look harder at that.

24 >> JUDGE FARRAR: Are you saying you don't
25 know or you don't wanna tell me?

1 >> MR. SILVERMAN: No, I really don't know,
2 because, it -- it, you know, it does talks about --

3 >> JUDGE FARRAR: I know what it talks
4 about. Let me -- let me -- that's all I need. Let
5 me ask the staff about this; what is the staff's
6 position on this?

7 >> MR. FRUCHTER: I think the -- any
8 opportunity for a hearing in the subsequent phase
9 would be restricted to consideration of whether the
10 actual construction of the repository was done
11 consistent with the -- any construction authorization
12 that was issued by the NRC.

13 >> JUDGE FARRAR: But you noticed a number
14 of the contention -- a number of responses to
15 contentions say, we don't need to do that yet or
16 we'll figure that out while we're building it, so
17 those are the kind of contentions I have in mind --
18 and I take it what you just said is for that kind of
19 contention, there would be a second phase where that
20 could be considered?

21 >> MR. FRUCHTER: Well, if the contention
22 was properly pled and did set out a genuine dispute
23 on whether there was a difference -- in other words,
24 the construction was not according to the
25 specifications that were laid out, then there could

1 be a admissible contention, correct.

2 >> JUDGE FARRAR: So I take it you are in
3 agreement with the NRC fact sheet that appears on the
4 web under the aegis of the Office of Public Affairs
5 at Page 5 on the light and fact sheet for licensing
6 Yucca Mountain, it says "if construction would be
7 authorized before beginning to operate the facility,
8 DOE would have to update the application," blah,
9 blah, blah. "This application would also be subject
10 to staff technical review and hearing processes."

11 >> MR. FRUCHTER: I don't have that fact
12 sheet in front of me. That sounds right.

13 >> JUDGE FARRAR: You have no disagreement
14 to that that you want to state today?

15 >>MR. FRUCHTER: I do not.

16 >>JUDGE FARRAR: NEI, what do you think?

17 Another?

18 >> MR. SILBERG: Judge Farrar, I'm Jay
19 Silberg for NEI. I am quite clear that this is a
20 multi-stage process. As the Commission of the
21 Federal Register noticed back in 1999, the report
22 refers to four major decisions: The constructional
23 authorization, the license to receive and replace
24 waste, the license amendment for permanent closure,
25 and termination of the license.

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1 And Part 63 is pretty clear when it says it
2 distinguishes between the construction authorization
3 in Sections 63.32, among others, and the license and
4 its conditions at 63.42. And then 63.46, where it
5 refers to the license amendment required to make in
6 place high-level wastes irretrievable and other
7 factors. And there are clearly differences in these
8 steps.

9 It's clear that the performance
10 confirmation program that's called for in Part 63
11 contemplates there will be a lot of additional
12 information that is developed during construction
13 and, indeed, during operation. That additional
14 information has to be input into the license. The
15 license has to be amended. At the time of license
16 amendment, as with any other NRC license amendment,
17 there is an opportunity for a hearing. Those details
18 have not yet been worked out.

19 >> JUDGE FARRAR: But the -- you agree with
20 the concept that's multi-stage?

21 >> MR. SILBERG: Yes. And I think the
22 other important consequence of that is that the
23 showing one needs to make at the different stages is
24 dependent upon the information. For instance, it is
25 assumed that we will have more information after

1 construction. So one need not prove everything at
2 the constructional authorization phase because there
3 will be further information coming forward during
4 that process.

5 >> JUDGE FARRAR: Thank you, Mr. Silberg. I
6 appreciate that.

7 In light of this, Mr. Malsch, is the state
8 claiming to its express view this is essentially -- I
9 know you used the word "essentially" -- essentially a
10 one-step licensing process?

11 >> MR. MALSCH: Yes, we -- we adhere to
12 that position; and let me explain why. The essence
13 of Nevada Safety 146 is under Part 63. This is
14 essentially a one-step process in -- that is
15 analogous to the combined licensing process under
16 Part 52, which has also been characterized as
17 essentially a one-step process; although it does
18 provide for a further step that takes place and
19 requires approvals before operations.

20 So there is no doubt under Part 63, that
21 there is a construction authorization stage, which is
22 filed at some point by a stage which involves a
23 proceeding and an opportunity for a hearing on a
24 license to receive and possess.

25 >> JUDGE FARRAR: At which point you'd have

1 some kind of opportunity to file new contentions?

2 >> MR. MALSCH: We would but the difficult
3 question which Section 146 poses is, is not so much
4 how much -- how many stages there are, but what kind
5 of information Part 63 requires for the first stage.
6 And what we say is that if you look at 63 and its
7 history, it is quite clear that there cannot be any
8 issuance of a construction authorization provision in
9 the application at the time of the construction
10 authorization stage of final design information and
11 when we point out that various reasons for that --

12 >> JUDGE FARRAR: I don't want to get into
13 the details of the contention. I just want to have
14 this concept in mind, because I think it may have
15 broader applications this 146 and I wanted to get
16 your views on this.

17 >> MR. MALSCH: It might -- I just want to
18 make a point, though. It's important on this
19 contention, and maybe a few others also, when the
20 Commission promulgated Part 63, it noted that -- I'm
21 sorry, the contention requirement, it noted that
22 there would be such a thing as legal contentions.
23 Nebraska Safety 146 is expressly designated as a
24 legal contention and the preamble to the contention
25 rule in 89 provides specifically that legal

1 contentions would be admitted and then decided on the
2 basis -- decided later on the basis of Briefing an
3 argument; and this is one example where we would
4 anticipate being given the opportunity after the
5 contention is admitted to fully brief and argue the
6 point.

7 >> JUDGE FARRAR: Okay. We will come back
8 to that point later. Given that I have exceeded the
9 two minutes I promised Judge Ryerson, does anybody
10 have anything -- any of the other parties have
11 anything that they feel absolutely compelled to add
12 that's different from what they've heard?

13 Okay. Thank you.

14 Thank you, Mr. Chairman.

15 >> JUDGE RYERSON: All right. Let's turn
16 now to the contentions that are -- that address the
17 model, that is, the requirement in Part 63.

18 >> MR. SILVERMAN: Your Honor, I apologize.
19 Did Judge Farrar want us to address the three snappy
20 answers --

21 >> JUDGE FARRAR: That's another thing that
22 we're going to move toward -- what Judge Ryerson is
23 about to tell you -- and then we'll do that after
24 that.

25 >> MR. SILVERMAN: Fine, thank you, I'm

1 sorry to interrupt.

2 >> JUDGE RYERSON: No problem. So we'll
3 deal with the model now -- the model base
4 contentions, and then address Judge Farrar's other
5 points. Mr. Silverman, Part 63 requires a
6 performance assessment. And I guess my question is,
7 does it -- does it not require a performance
8 assessment that demonstrates more than simply
9 compliance with dose standards?

10 In other words, aren't there specific
11 requirements in the regulations that the total system
12 performance assessment must comply with, in addition
13 to demonstrating compliance with dose standards out
14 in the distant future?

15 Is that question clear?

16 >> MR. SILVERMAN: I think it is clear.
17 And I think that you could be referring to the
18 pre-closure or the post-standard requirements where
19 there is a dose standard in each case. And the
20 answer is, yes, it does require more. I consider
21 those regulations, I think the ones that you are
22 referring to, I like to call them the process
23 regulations, how you do it, how you get to the
24 conclusion.

25 So, yes, they do require more. There

1 are -- there is language in the rule that tells you
2 how to do the total system performance assessment for
3 post-closure and the pre-closure analysis.

4 >> JUDGE BARNETT: Can I follow up to that?
5 Can I talk to that?

6 So, for the -- we're talking about the post
7 performance -- total performance assessment, we're
8 talking about the total system performance
9 assessment, the post-closure assessment?

10 >> MR. SILVERMAN: Yes.

11 >> JUDGE BARNETT: So then in that case, if
12 there are requirements in addition to just
13 demonstrating a dose effect, so would Nevada at this
14 stage then necessarily need to demonstrate a dose
15 effect for each contention?

16 >> MR. SILVERMAN: Our view is that Nevada
17 does need to demonstrate that the allegations of
18 errors and efficiencies in the TSPA area do
19 necessitate a demonstration of an exceedence of the
20 mean dose limits and that is derived from the
21 materiality requirement which specifies that the
22 issue must make a difference in the outcome of the
23 proceeding.

24 And what I would say about those process
25 regulations is they are very general with intent and

1 there is a reason for those; and the reasons
2 expressed in the regulations which is the difficulty
3 of predicting performance out many, many thousands of
4 years, and they do provide a considerable amount of
5 flexibility to the applicant in determining -- not
6 complete flexibility as Nevada has alleged, we argue,
7 that is not the case but they do provide a
8 substantial amount of flexibility for engineering
9 judgment, scientific judgment, to determine -- to
10 flush out the analysis.

11 So, simply alleging that there is some
12 uncertainty that we didn't consider, simply alleging
13 that there is an error of some sort or an omission or
14 a use of older data or something is not -- does not
15 demonstrate materiality. It doesn't even demonstrate
16 that the process regulation has been violated because
17 to me, you have to show at a minimum that the
18 integrity of the analysis is violated in some way.

19 But our position on TSPA is, yes, on
20 materiality purposes where they are alleging this
21 could impact the results of the TSPA, that they do
22 need to show -- to make some showing that it could
23 affect the mean dose. And I'm prepared at the
24 appropriate time to discuss the notion of how
25 difficult that would be for them, whether that's

1 within the means of the State of Nevada or others.

2 I don't think you asked me that yet.

3 >> JUDGE RYERSON: I think that's correct.
4 Well, we can perhaps get to that later.

5 >> JUDGE BARNETT: Can I follow up?

6 >> JUDGE RYERSON: Sure.

7 >> JUDGE BARNETT: So would you argue then
8 DOE does not have a duty to have a defensible and
9 reasonable set of parameters or that Nevada couldn't
10 attack the reasonableness of DOE's parameters using
11 the TSPA model without re-running the model by using
12 a different set of parameters; would that be
13 particularly off-base for Nevada to contend?

14 >> MR. SILVERMAN: Would it be off-base for
15 them to use a different set --

16 >> JUDGE BARNETT: For them to contend that
17 your parameters, for example, were unreasonable,
18 undefensible?

19 Would that be a reasonable contention
20 without having to run the model again with a
21 different set of parameters that they felt was more
22 reasonable?

23 >> MR. SILVERMAN: It would not -- we don't
24 think they'd meet their burden merely by alleging
25 that there is some other data that should be used or

1 some uncertainty we didn't consider. But we don't
2 believe they need to re-run the model entirely.

3 We agree with the State of Nevada that it
4 could not be practical for them to do the multiple
5 thousands of runs of different elements of code --
6 computer code that the state - that the Department of
7 Energy did; but we think that they had a significant
8 opportunity to do more than they did. They were
9 required to do more. They acknowledge they could
10 have done more, but they failed to do that.

11 >> JUDGE BARNETT: Okay.

12 But -- so -- you don't think they would
13 need to do that on every single contention; is that
14 correct?

15 >> MR. SILVERMAN: Our view is to support a
16 contention -- let's take TSPA, for example, which
17 alleges any typical sort of -- any error or
18 deficiency in that analysis, that they would need to
19 provide some basis for concluding it would affect the
20 outcome and it would affect the ultimate result.
21 They do not need to do that by re-running or
22 replicating in its entirety, the TSPA.

23 They've acknowledge, first of all, the
24 Department has given them the tools to run the TSPA,
25 has done training on how to run the TSPA, has worked

1 with them to make sure it was operational in their
2 systems. Their expert, Dr. Thorne has stated he had
3 the ability to run selected runs at a minimum.

4 And we're not suggesting a full run. What
5 we're saying is when you have a contention and you
6 are providing -- proposing a contention to the
7 Licensing Board, it's incumbent upon the State of
8 Nevada, with those tools that they had, to do some
9 selective analysis, to do -- run a limited set,
10 focusing on the issue they think is material, whether
11 it's a corrosion analysis or an infiltration
12 analysis.

13 Do some analysis using the model that's
14 been provided to you with the experts who purportedly
15 are qualified to run that -- or alternatively,
16 provide a qualitative analysis based upon expert
17 opinion that would demonstrate a prima facie case.

18 They don't have to provide proof of their
19 contention. We do that. A prima facie case is some
20 indication, some reasonable basis, expert basis for
21 concluding that the result would be different and we
22 would not exceed -- that we would exceed our dose
23 standards.

24 And that could be an expert describing
25 scientific studies that are relevant or that are

1 based upon their own experience; but in most or all
2 of the cases that we looked at, in TSPA spaces, in
3 particular, we felt all we got was essentially a bare
4 allegation that we didn't do something or we didn't
5 do something adequately. But the dots weren't
6 connected to show the process regulation, the
7 boundaries have been exceeded.

8 >> JUDGE RYERSON: I suppose,
9 Mr. Silverman, one of the issues that the Board has
10 to consider is again, we're going back to a test
11 which is the adequacy of a Pleading and what is
12 required in a Pleading. And we are in agreement, I
13 don't think anyone is suggesting -- you are certainly
14 not suggesting we have to get into the merits of
15 allegation.

16 I certainly don't need to make
17 determinations on the merits. So to step back from
18 what Nevada could or could not do, but just get back
19 to what has to be shown to have an admissible
20 contention, why is it not the case that an
21 allegation -- that a contention that alleges a
22 violation of an NRC regulation and is supported by
23 some form of reasonably confident and reasoned
24 Affidavit support that says, this, in effect, this
25 would be a violation of a regulation.

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1 Why isn't that enough?

2 Why do they have to have any kind of
3 empirical demonstration beyond that of an effect upon
4 ultimate dose?

5 >> MR. SILVERMAN: I think it does depend
6 on the nature of the contention and I think it is
7 different when it comes to these process regulations.
8 Let me give you an example. I think that if we were
9 required at this stage to submit an emergency plan--
10 let's be a little more specific, one that deals with
11 protecting the public from offsite public, and we
12 submitted an emergency plan that only covered the
13 on-site workers, if someone alleged that that
14 regulation was violated with sufficient basis that we
15 didn't provide what is required by the rule, that's
16 in processed regulation and that could be an
17 admissible contention if it's supported by adequate
18 support and adequate demonstration that appears that
19 the regulations violated it.

20 It's different, we believe, in the context
21 of these process regulations and we think that the
22 case law is supportive of us. The Board has
23 specifically asked us about cases we cited on pages
24 53 to 57 of our Answer. And I think this is the
25 right time to talk about those cases because I think

1 the question you posed -- the questions posed was on
2 the NRC cases on which DOE relies on Pages 53 through
3 57, did the petitioners allege violations of specific
4 regulatory requirements?

5 What I read into that is you were asking,
6 gee, maybe those particular contentions that were
7 dismissed in those cases, were dismissed because they
8 didn't cite a regulatory violation. I'm presuming
9 that was what you were wondering about that.

10 The answer to your question is: Did
11 petitioners allege violations of specific regulatory
12 environmental requirements?

13 The answer in three of those cases, the
14 three main cases we cite is, yes, they did. And
15 in -- what I'd like to do is briefly summarize, if I
16 can.

17 >> JUDGE RYERSON: And is that apparent
18 from the decision or did you have to go back to the
19 underlying record?

20 >> MR. SILVERMAN: In some cases, you can
21 see it in the decisions, but I went back to the
22 petitions, themselves, and read the contentions.

23 And I will be brief -- but the point we
24 were trying to make in these cases is even though a
25 regulatory violation was alleged, clearly -- and I

1 will hit these very briefly for you -- the decisions
2 by the Boards and by the Commission -- and I will
3 read the brief snippets of language -- indicate that
4 the decision to not admit the contention was based
5 upon really the failure to really demonstrate the
6 result or the impact of the -- of the alleged
7 violation. And it's interesting to note that in, I
8 think all the cases, certainly the first two, it was
9 a process regulation.

10 In the Duke Energy case, which is LBP0317,
11 the contention specifically alleged violations of
12 Part 51 and Part 54, having to do with severe
13 accident mitigation alternative analyses, and they
14 also cited a violation of the regulations dealing
15 with requirements for the Aging Management Program
16 for licensing renewal proceedings. They specifically
17 cited those regulations.

18 The contention- when the Board in the Duke
19 case rejected the -- excuse me, the contention, it
20 did so for failure to explain the implications of the
21 alleged deficiencies. And that's really very
22 analogous to the Nevada contentions and the positions
23 we've taken in this case. In the Entergy case, which
24 is Indian Point --

25 >> JUDGE RYERSON: Who was that Board,

1 Mr. Silverman?

2 >> MR. SILVERMAN: I don't -- I could find
3 that for you here, but I don't know off the top of my
4 head.

5 >> JUDGE RYERSON: That's okay. I'll find
6 it on my own.

7 >> MR. SILVERMAN: I have only two more
8 cases. I'll be very brief with them both. In
9 Entergy -- this is another case we cite in that
10 section of the Brief. It's LBP0813. Again, the
11 contention was based upon a SAMA, Severe Accident
12 Mitigation Analysis issue. The contention explicitly
13 cited alleged violations of NEPA and of Part 54,
14 particularly Appendix B of Part 54.

15 The Board, nevertheless, rejected the
16 contention as inadmissible.

17 And the last case I want to cite is
18 Dominion where we have some language from the
19 Commission. This is the Millstone case. It's
20 LBP03-12. And it was affirmed by the Commission in
21 CLI-03-14. Here in the contention, the Petitioner
22 allege a violation of the significant hazards
23 consideration requirements set forth in Part 50 --
24 Section 50.92-C, specifically. And we did not meet
25 the requirements under NEPA for a categorical

1 exclusion; and it cited the regulation again.

2 The Board did not admit the contention; and
3 the Commission in upholding the Board, stated the
4 Petitioner, quote," never provides any accident or
5 dose analysis of its own and therefore, never
6 indicates how a significant radiological release may
7 occur as a result of the proposed changes." These
8 were proposed changes to text specs. So these are
9 three cases we cited where a Petitioner specifically
10 alleged the regulatory violation really related
11 primarily to process regulations, and the Boards and
12 the Commission required more.

13 >> JUDGE RYERSON: Were the contentions --
14 in your view, what's your best case on the facts in
15 terms of being similar to the contentions that
16 are -- that are proffered in this case?

17 >> MR. SILVERMAN: I'm not sure what you
18 mean by that, Your Honor.

19 >> JUDGE RYERSON: In other words, it seems
20 to me you can look at this from two directions. The
21 contentions that are set forth in this case, while
22 you properly say they don't allege an impact on dose,
23 or demonstrate an impact on dose, nonetheless, at
24 least in my experience, are considerably more
25 detailed than many of the contentions that have been

1 rejected in other cases.

2 There may have been an allegation of a
3 violation of a -- what you characterize as a process
4 regulation, but I question whether the contentions
5 looked like the contentions that we have here. Did
6 they have the degree of specificity?

7 Is there any particular case that comes to
8 mind that you would urge us to read carefully?

9 >> MR. SILVERMAN: I'd be happy to provide
10 that information to you. I'm confident that we will
11 find contentions that are not as well written as
12 those of Nevada and some that are far better written,
13 in our view and in fact, were probably were admitted
14 in some cases.

15 Off the top of my head, on these particular
16 cases, I think the contentions were fairly clear and
17 there was some detail there, but it's hard for me to
18 characterize that.

19 >> JUDGE RYERSON: Approaching it from the
20 other direction, you characterize, I guess, Part 63
21 or parts of Part 63 as process regulations. And I'm
22 not -- it's not clear to me that there are some
23 regulations that the Applicant is bound to follow and
24 other regulations that seem to have a lesser
25 standard. I mean isn't -- why is compliance with a

1 regulation not mandatory?

2 >> MR. SILVERMAN: Compliance with a
3 regulation is mandatory. In the case of these
4 particular regulations, particularly with TSPA , as I
5 said, there is very considerable amount of
6 flexibility and space for engineering and scientific
7 expert judgment in deciding how to implement those
8 regulations.

9 You may or may not agree with us on the
10 issue of mean dose, but if -- even if you did not,
11 what I believe is the difficult job of the Boards to
12 do is to examine these contentions beyond these sort
13 of overarching issues like this one that we're
14 discussing right now.

15 I'm not suggesting that you engage in an
16 analysis of the merits, but in each of these cases or
17 almost all of these cases, the Applicant, the
18 Department of Energy has -- let me back up, Nevada
19 has alleged certain facts, the Department has
20 responded.

21 It's incumbent in deciding whether that
22 regulation is -- has been violated for you to look at
23 those facts to some degree at some level. An obvious
24 example is, if a contention says something was
25 omitted from the SAR and we cite the pages of the SAR

1 where that analysis was not admitted in the SAR. You
2 need to look at those facts and make that judgment.

3 At the end of the day, it comes down to the
4 importance of the issue in the overall regulation.

5 And many of the contentions -- most of the
6 contentions in our view, allege an error, a problem,
7 use of improper data, but don't show how that exceeds
8 the boundaries of the process regulation that's
9 before us.

10 >> JUDGE RYERSON: Let me -- if I may, let
11 me turn that argument around a little bit and see,
12 and characterize and a lot may reject my
13 characterization of their argument, but to some
14 extent, it seems to me that these regulations remind
15 me of high school Algebra class.

16 You seem to be saying, look, as long as we
17 get the answer right, that's all we need to do. As
18 long as we are comfortable, DOE is comfortable that
19 we're going to meet the dose standards and we have a
20 model that in our view, DOE's view says that, we're
21 okay. But it seems to me that the regulations as
22 Nevada is pointing out -- at least that's what I
23 think they're saying -- is we got to show the work.

24 It's not enough to have the right answers,
25 you have to show the work. You have to, in other

1 words, comply explicitly with a variety of specific
2 conditions in the regulations that exist above and
3 beyond getting the right answer. In other words,
4 it's not good enough to prove dose compliance by any
5 means you choose. You've got to prove dose
6 compliance according to the regulations in a certain
7 way. You got to show the work, by analogy. And, you
8 know, is that a mischaracterization of what the
9 regulations require?

10 >> MR. SILVERMAN: No, I don't think so. I
11 think that you do have to show the work. I think
12 that this is a unique regulation that provides a very
13 large swath for reasoned expert judgment in deciding
14 what work is satisfactory to produce the correct
15 result.

16 >> JUDGE BARNETT: But it doesn't provide
17 an infinite swath?

18 >> MR. SILVERMAN: Absolutely not. We have
19 been accused of that and we are not alleging that.

20 >> JUDGE BARNETT: So let me just give you
21 a hypothetical -- and I'm not trying to pin you down
22 here, I just want to make sure I understand your
23 answer. If Nevada were to contend that in one of the
24 TSPA analysis that DOE should have used ten inches of
25 rain a year, and they used a thousand inches of rain

1 a year, would that be an admissible contention
2 without Nevada then running the TSPA code, to see
3 what the actual implications of using a thousand
4 versus ten were?

5 >> MR. SILVERMAN: No. No, because it
6 sounds like a large difference, but it -- this is a
7 complex analysis. It's not -- and I'm hardly the
8 expert on this. I'll get over my head very quickly.
9 But as I understand it, it's a nonlinear analysis in
10 the sense that there are multiple models being run
11 feeding into each other.

12 And the simple allegation that we
13 underestimated the amount of precipitation, all that
14 tells you is we underestimated the amount of
15 precipitation. It does not tell you that we exceeded
16 the bounds of uncertainties. It doesn't tell you --
17 that are --

18 >>JUDGE BARNETT: Well, assuming they had
19 appropriate citations that it was well beyond the,
20 you know, assuming they had appropriate references
21 that it was 10 inches a year and a thousand was way
22 outside the bounds, yeah, assuming they had some
23 basis for it. But if they had an adequate scientific
24 basis for saying they should have used 10, and they
25 used a thousand; would that then be an admissible

1 contention without running the TSPA model?

2 >> MR. SILVERMAN: I think the contention,
3 they would not necessarily have to run the TSPA
4 model, but they would have to provide an adequate
5 basis, if not in running portions, in selectively
6 running the model and expert judgment with an
7 adequately reasoned basis.

8 >> JUDGE RYERSON: Let me change Judge
9 Barnett's hypothetical just a little. Assume the
10 regulation said you shall use for the annual
11 rainfall, the mean of the last 50 years and you
12 decided to use something else; does that on its own,
13 constitute a violation of the regulation which is
14 ipso facto admissible?

15 >> MR. SILVERMAN: I think if we had that
16 kind of regulation, the answer would be yes, but we
17 don't generally have that kind of regulation in TSPA
18 and pre-closure space.

19 >> JUDGE BARNETT: Some you do and some you
20 don't. That was just a hypothetical made up. Let
21 me -- you said there's a lot of flexibility in
22 meeting these regulations, but some of them don't
23 seem -- at least to my reading -- to give you any
24 flexibility. They say, let's do this.

25 >> MR. SILVERMAN: Oh, there are some parts

1 of 63 that are like that, yes, I don't think they
2 are --

3 >> JUDGE BARNETT: But I think you are
4 saying that even for those parts of violations --
5 there are violations and there are violations; and
6 until your opponent points out that that's a
7 violation that has consequences for the outcome, that
8 that's not an admissible contention?

9 >> MR. SILVERMAN: No. Again, I go back to
10 my emergency plan. That's kind of like you are using
11 the mean precipitation rate over the last 50 years'
12 example. It's very prescriptive. It's very precise.
13 It says thou shall submit a plan. You don't submit a
14 plan. It's deterministic if you will --

15 >> JUDGE BARNETT: Okay, so a violation of
16 a prescriptive-- a contention alleging with the right
17 basis, and so forth, a violation of a
18 prescriptive regulation is admissible on its face?

19 >> MR. SILVERMAN: Well, I hate to use the
20 words like "on its face." It can be admissible. I
21 would say yes. And I think that this argument that
22 we've made is largely confined to the TSPA
23 contentions.

24 >> JUDGE BARNETT: Okay. You said earlier
25 that you could come up with some cases where there

1 were better drafted contentions than Nevada has
2 submitted here that were admitted. Can you tell me
3 of a single instance in which the Department of
4 Energy is not opposed a single contention that has
5 ever been filed in front of us?

6 >> MR. SILVERMAN: Well, the only
7 proceeding I know about is this one.

8 >> JUDGE BARNETT: No, we have the Mox
9 proceeding that you and I are in.

10 >> MR. SILVERMAN: In the Mox proceeding,
11 we challenged all the contentions. May I speak --
12 may I respond to that?

13 I'm not sure exactly what your point is,
14 but let me say this about what we did--

15 >> JUDGE BARNETT: Well, your point was
16 floating around out here are a lot of far better
17 drafted contentions than Nevada filed.

18 I was here seven years, a long time ago on
19 on the Amended Appeal Board, and I have been here
20 seven years now; and I'm trying to find those. There
21 were some good ones by the State of Utah and we'll
22 come to those later in a PFS case, but --

23 >> MR. SILVERMAN: Your Honor, I was making
24 a general statement. I just think it stands to
25 reason and based upon my general recollection and

1 experience, that there are some that, as I said, that
2 are far more poorly drafted than in the State of
3 Nevada and others that were likely better drafted. I
4 would like to respond --

5 >> JUDGE BARNETT: Would you like the
6 opportunity in the next ten days or so to submit to
7 us some contentions from some other cases you think
8 are far better drafted?

9 >> MR. SILVERMAN: We can certainly look
10 for those. If you like that, we would try to provide
11 that.

12 >> JUDGE BARNETT: Okay.

13 >> MR. SILVERMAN: Was that a yes, Your
14 Honor?

15 >> JUDGE BARNETT: Yes.

16 >> MR. SILVERMAN: May I add one comment
17 with respect to your remark about the -- having
18 not -- having challenged every contention in this
19 proceeding and in the Moxs proceeding?

20 Thank you. I'll be brief on this. I just
21 want to make it clear to this Board and all the
22 Boards, we -- in preparing for this proceeding and
23 for what we anticipated to be an unprecedented number
24 of contentions, thought a lot about the process, put
25 a team together of people to work on it, we were

1 given directions to calls balls and strikes as we see
2 them, and assumed before we ever got any contentions
3 that there would be some that we would conclude and
4 acknowledge up front were admissible. That was our
5 going-in assumption and our client's going-in
6 assumption.

7 Once we got into contentions, in good
8 faith, we evaluated them as the representative of the
9 Department of Energy and reached the conclusion that
10 in our view, they were not admissible. You may or
11 may not agree with us.

12 I suspect you will not agree with us in all
13 cases, but it was a good faith judgment based upon
14 our interpretation of the law and it was not a
15 pre-ordained conclusion. And I wanted that to be
16 made very clear.

17 >> JUDGE BARNETT: The question, let's get
18 back to the very basics, a violation of a
19 prescriptive regulation -- -- a violation of a
20 prescriptive regulation, assuming that it meets all
21 the other criteria that's admissible. You don't need
22 to show what the consequences of that violation are.
23 Is that correct?

24 >> MR. SILVERMAN: Well, as in the example
25 of the emergency plan, yes.

1 >> JUDGE BARNETT: Because we've always
2 held the rank and file intervenors, the citizens
3 groups, whenever they say that an application is not
4 any good and the applicant comes back and says it
5 meets the regulation and the intervenors say so what,
6 we say to them, You can't challenge the regulation?

7 That's up to the folklore of the beginning
8 of the agency.

9 That got converted so that the staff and
10 the applicant are also bound by the regulations.
11 They don't see the way the regulations are binding on
12 them.

13 I think that's been our precedence for any
14 number of years. So I'm trying to ask the question
15 here, are you asking us to depart from those
16 precedents in this case that if it's something
17 particular about this case so that a -- an allegation
18 of a prescriptive regulation is not necessarily
19 admissible, meaning your client, alone, of the people
20 who appear in front of here, gets to challenge
21 regulations without seeking a waiver from the --

22 >> MR. SILVERMAN: No, we don't. We don't
23 have that right or authority.

24 >> JUDGE RYERSON: Thank you.

25 >> MR. SILVERMAN: May I have one moment?

1 >> JUDGE RYERSON: Sure.

2 >> MR. SILVERMAN: Thank you. Your Honor,
3 one more point -- two more points, briefly. I agree
4 with you on the prescriptive regulation argument. As
5 I said before, we don't believe that's what the TSPA
6 process regulations are. The one thing I'd like to
7 point out is this: It seems to me what's good for
8 the goose is good for the gander.

9 If in fact, a contention is admitted on the
10 basis of an allegation that the regulation is
11 violated without -- and that's the material issue,
12 the Board decides that's the material issue, and if
13 you don't have to look at the effect of that on the
14 final outcome of the analysis, then it seems to me
15 that when we go to evidentiary hearing, the burden
16 shifts, of course, as you know to the applicant.

17 I don't understand why if we follow that
18 logic, the applicant wouldn't meet its burden merely
19 by showing it met the regulations regardless of the
20 impact on dose or the ultimate outcome.

21 >> JUDGE FARRAR: Right. That seems to me
22 that that's the flipside of what we disagreed on.
23 Mr. Chairman, I'm sorry we got distracted from the
24 talk about the model but it seemed that these
25 questions fit in with that point.

1 >> JUDGE RYERSON: I do have a question
2 for you, Mr. Silverman, but I don't know if you are
3 prepared to address or not; but the case that you
4 cite 427 times, I believe, the Duke energy case,
5 CLI9911, for the proposition that a dispute is
6 material, if its resolution would make a difference
7 in the outcome of the licensing proceeding. I mean,
8 do the -- that language is in the Decision because
9 it's a quote from the Federal Register Final Rule
10 Notice, I believe.

11 But I don't see how the facts of that case,
12 myself, really support that at all. I don't know if
13 you are prepared to address that or one of your
14 colleagues is.

15 >> MR. SILVERMAN: I'm not sure any of us
16 are prepared to address the specific facts of that
17 case.

18 >> JUDGE RYERSON: Okay. I note that the
19 case also says that our contention rule should not be
20 turned into a fortress to deny intervention.

21 >> MR. SILVERMAN: Understood.

22 >> JUDGE RYERSON: It's an interesting
23 case. I commend it to you. Let me ask this; there
24 may be some dispute as to what Nevada would be
25 required to -- to show in order to have an admissible

1 contention.

2 You acknowledge they don't need to re-run
3 the entire model, but you do ask for some sort of
4 imperical demonstration of an effect. Is there a
5 factual dispute on the record in front of us as to
6 what Nevada can do and if there is a factual dispute
7 of that nature, does that preclude our ruling against
8 Nevada at this stage, on a factual question?

9 >> MR. SILVERMAN: Right. No, the answer
10 to your first question, there is no factual dispute,
11 and if there were, I do not think it would require
12 you to rule in their favor; and let me explain. This
13 goes to your question, I think, the first part, is
14 there a factual dispute concerning the Petitioner's
15 ability to replicate the TSPA?

16 First of all, by replicate, we interpret
17 that to mean to essentially completely reproduce.
18 There isn't a factual dispute. We do not believe
19 Nevada could do that.

20 But we don't think, as I said before, that
21 that ability was a prerequisite for Nevada or any of
22 the Petitioners to meet their burden. As I talked
23 about in terms of providing selective analysis,
24 limited -- limited runs at the TSPA, qualitative
25 expert based analysis for the reasoned basis.

1 If you read replicate to mean something
2 less than you fully replicate, there also, I believe,
3 is no factual dispute because in Nevada's reply -- I
4 have it highlighted, I need to find the phrase -- and
5 there is an acknowledgment that they could have run
6 limited runs of the TSPA to produce some results.

7 And there are multiple statements by their
8 expert that they had the tools and the ability to
9 modify the parameters of the analysis and produce
10 their own results and reach a conclusion.

11 Now, even if there is a factual dispute on
12 either of those issues, it is not the sort of dispute
13 that the burden -- that the presumption goes to the
14 Ptitioner. The issue of whether Nevada can replicate
15 the TSPA, regardless of how you define that, to me
16 that's an ancillary issue.

17 It's not the kind of material issue that
18 goes -- it wouldn't be subject of a contention. If
19 Nevada filed a contention that said we can't
20 replicate the TSPA, I don't think you'd admit that.

21 It's an ancillary issue. It's a procedural
22 issue. It doesn't -- the resolution of it would not
23 lead to a finding that we meet the requirements or we
24 don't meet the requirements. So I do not think in
25 any way, shape or form there was a presumption in

1 favor of the Petitioners in that regard.

2 >> JUDGE RYERSON: Okay. Mr. Malsch, you
3 have been kind of quiet on this side of the aisle for
4 the moment. Did you want to address these points at
5 this time?

6 >> MR. MALSCH: Let me address two points;
7 the first is that -- what is true in this proceeding
8 is, as has been true in a quarter century of NRC
9 practice, an allegation that a regulation, an
10 allegation that an applicable regulation has been
11 violated raises a material issue, period.

12 And I would point out to you that we have
13 140 -- about approximately 140 contentions addressing
14 the total system performance assessment. Each of
15 those contentions specifically alleges that a
16 violation of several -- one or more particular
17 provisions in Part 63 which address how the
18 performance assessment shall be conducted.

19 We cited to 63.102-A that there had to be
20 included a full range of reasonable defensible
21 parameters; 63.102-H, that all models and parameters
22 had to be credible and include uncertainty; 63.114-B
23 that the model had to include uncertainty and
24 variability parameters and provide the technical
25 basis for parameters and probabilities; 63.114-G,

1 which requires that the models provide -- have been
2 supported by an adequate technical basis.

3 We have 140 or so contentions which
4 specifically allege a violation of one or more of
5 these divisions. We have an additional dozen or so
6 contentions that also allege specific violations of
7 63.114-C, which requires consideration of all
8 conceptual models; 63.114-B, which requires a full
9 accounting and explanation of uncertainties; and
10 63.102-J -- 63.102-J which requires consideration of
11 futures, processes and events.

12 Now, what's interesting about these
13 regulations is the Commission went out of its way to
14 promugate in Parts 63 to explain how each of these
15 requirements had its own independent significance and
16 enforceability. And to understand that, you need to
17 go back a little bit into the history of Part 63.

18 Part 63 was originally spun off of Part 60,
19 which was a generic regulation applicable to
20 repositories in general. Part 63, in addition -- and
21 we're talking about post-closure safety. In addition
22 to requiring for post-closure safety purposes,
23 compliance with an ultimate dose standard using a
24 performance assessment, also had a requirement for
25 individual barriers to meet particular subsystem

1 performance requirements. For example, ground water
2 travel time was specified.

3 When the Commission developed Part 63, it
4 did not include any of these substance and
5 performance requirements, leading commenters to
6 accuse the Commission that it was doing something it
7 had never done before, namely, the whole safety case
8 depend solely upon the results of the equivalent of a
9 probabilistic risk assessment and nothing else.

10 In responding to those comments, the
11 Commission was very clear that that was not what it
12 was doing, that the post-closure safety did not
13 depend solely upon meeting a simple dose standard at
14 the end of a total system performance assessment,
15 that instead, post-closure safety depended upon a
16 comprehensive collection of requirements, including
17 the ones that I mention here.

18 So, we say that a contention which alleges,
19 for example, a violation of a requirement that a
20 model be adequately supported is material per se,
21 nothing else need be shown, just as would be the case
22 in a reactor case, an allegation that the general
23 design criteria were not complied with or emergency
24 planning requirements were not complied with would
25 also be material per se without some further showing

1 of a lack of reasonable assurance or without some
2 further showing that some design basis, those
3 calculations had been violated.

4 >> JUDGE FARRAR: Mr. Malsch, can I
5 interrupt you there? Are you saying that applies to
6 these process kind of regulations, that you shall do
7 it this way, as much as it does to a regulation that
8 says, the tie rod should be made out of titanium?

9 Are you saying they're both the same?

10 >> MR. MALSCH: That is exactly correct.
11 There is nothing whatsoever in the history of Part 63
12 that would suggest a distinction between process
13 regulations or, on the one hand, the other kinds of
14 regulation or process regulation versus some other
15 kinds of regulation. They're all independently
16 enforceable, all -- and they all have independent
17 significance.

18 The Commission does not suggest any place
19 these are of lesser significance. In fact, as I
20 said, they were very clear that post-closure safety
21 depended upon a comprehensive collection of
22 requirements, including all of these process
23 requirements. Just to borrow a little bit from what
24 Judge Ryerson said, they were as much concerned about
25 how you got the result as they were with the result

1 itself.

2 And that is why we think that all of our
3 TSPA contentions raise material issues. Now, second,
4 let me address the other question dealing with our
5 capabilities. First of all, I don't think you need
6 to reach this question because, as I just said, I
7 think our TSPA contentions all raise material issues.
8 But if there were to be some further additional
9 showing to be required and, frankly, I did not
10 understand from DVR argument what exactly that is --
11 but let's suppose in some cases there is required
12 some sort of further demonstration.

13 We asked ourself that question because we
14 anticipated that DOE would make the precise argument
15 that it made in its Answer. So we asked ourselves, is
16 it possible for us to actually do a dose calculation
17 that would gauge an estimate in some quantitative way
18 the precise impact of our contention, if true?

19 Well, it turns out that for about maybe
20 50 -- except for about 100 of our contentions, our
21 contentions are so utterly destructive of the TSPA
22 model, so that if you assume they are true, which is
23 what you should do if you address a materialiality
24 question, if you assume they are true, there is
25 literally no model left to run, no calculation can be

1 made .

2 There are about 100 or so -- I think it's
3 101 -- contentions which actually, if true, would not
4 be so completely destructive of the TSPA model. It
5 wouldn't be something of a structure in place that we
6 could conceivably modify. Now, so we asked
7 ourselves, well, what would be involved in doing
8 that?

9 Well, first of all, we thought to give DOE
10 the benefit of the doubt, let's assume instead of
11 having 100 contentions, we really have 19
12 contentions, because it turns out our 100 contentions
13 here break down into 19 separate categories.

14 So let's talk about to give DOE the benefit
15 of the doubt. Let's say we only have 19 groups of
16 contentions. What would be required actually to
17 demonstrate quantitatively their effects on dose?

18 Well, first of all, let's just take one,
19 one of the 19, what would we have to do?

20 Well, first of all, we'd have to develop a
21 QA program for modifying the TSPA because otherwise
22 unless our own calculation and model changes were
23 fully subject to and implemented under a Quality
24 Assurance program, our results would have no
25 credibility. So we first have to develop our own QA

1 program.

2 Secondly, we would have to actually model
3 the TSPA code, not just in one case, but in five
4 separate modeling cases. The DOE TSPA actually is
5 comprised of about five separate modeling cases.
6 There is the igneous intrusive case -- the igneous
7 extrusive case, the early waste package failure case.

8 And then there are two separate cases in
9 the so-called nominal scenarios. Each one of the
10 those cases involves a variance in the TSPA model.

11 So to include any one of our contentions to
12 accomodate it, to change the model to include it, we
13 would have to actually make as many as five changes
14 in -- as many as five separate TSPA models.

15 That would take literally in the case of
16 some contentions, months of work. But that's not --
17 but that's just the beginning. There are -- there is
18 no requirement for us to show that any one
19 contention by itself would influence the dose.

20 It would be perfectly permissible for us to
21 argue the combinations of contentions would have an
22 effect on the dose that would be significant. There
23 are --

24 >>JUDGE BARNETT: Let me follow up on that.
25 So you do think that you need to consider these

1 contentions in combination; is that right, not one at
2 a time -- consider the technical questions about the
3 contentions on the TSPA model, you have to consider
4 those in combination, is that not one at a time?

5 >>MR. MALSCH: I don't think you have to
6 consider them in combination but I think as long as
7 we are talking about demonstrating significance, to
8 rule out any one contention on the basis of a lack of
9 demonstration, quantitative effect on dose, it
10 wouldn't be sufficient just to show that that one
11 contention had no effect. You'd have to show that one
12 contention in combination with all other contentions
13 had no effect on dose.

14 And I can tell you that just taking 19
15 contentions, not 101, the number of possible
16 combinations is in the quad trillions.

17 >>JUDGE BARNETT: That's exactly right.
18 Doesn't that actually go -- extend beyond DOE's
19 capability of testing all --

20 >> MR. MALSCH: That would actually even
21 extend beyond DOE's capability. Mr. Silverman's
22 argument here today is a little bit misleading.
23 There is no doubt he can run the TSPA code on our
24 computers. We can run it. The question is not
25 whether we can run it. The question is whether for

1 the thousands of different combinations we can -- we
2 would possibly have the time and resources to make
3 the necessary number of model changes to show the
4 dose effects of any one contention or any combination
5 of contentions. What DOE is effectively asking us to
6 do is the impossible, and the impossible actually
7 denies us due process of law.

8 >> JUDGE BARNETT: But would you be asking
9 DOE to do the impossible?

10 >> MR. MALSCH: We would not be asking DOE
11 to do the impossible. I mean, that would be their
12 option. If you look at the way we structure our
13 contentions -- let's say we have a contention -- we
14 have a group of contentions with the tax their
15 massive infiltration model. We believe the effect of
16 our contentions is to utterly destroy the model.

17 DOE could respond to our contentions by
18 correcting the model, without doing any dose
19 calculations. They could just say, we corrected the
20 model. Or they can explain why our concerns about why
21 the model is incorrect were not well-founded.

22 So they are -- it is within their
23 discretion in defending -- in making their case, to
24 address each of our contentions on a model-by-model
25 basis and on a 114-A basis, 114-G basis and just

1 defend their models one by one.

2 That's the perfectly permissible way for
3 them to go about making their case.

4 >> JUDGE BARNETT: But you couldn't test the
5 implications of your contentions one by one?

6 >> MR. MALSCH: Pardon?

7 >> JUDGE BARNETT: You couldn't also then
8 test the implications of your contentions one by one?

9 So, as I understand your argument, there
10 were two many combinations of your contentions for
11 you to test, but -- and by extension, there would be
12 too many for DOE to contest, so they can analyze the
13 effects one by one but you couldn't do the same
14 thing?

15 >> MR. MALSCH: No, and when I say analyze
16 the effects, they can defend purely on the basis of
17 compliance with the individual requirements in Part
18 63. I'll give you an example. Let's take the
19 massive infiltration contentions.

20 We say their model is in a number of
21 respects, not scientifically supported. How would
22 DOE -- that contention gets admitted, how would DOE
23 make its case?

24 We presumably -- make it case by either
25 we're wrong and its model is correct just on the

1 basis of the merits of the model, without getting
2 into any dose calculations, or it could defend its
3 case by producing a corrected model and say, ah,
4 we're taking care of your problems. Again, there
5 would be no need to be a separate dose calculation by
6 DOE . They would simply defend their models on a
7 scientific basis, scientific discipline, by
8 scientific discipline.

9 That would be sufficient without going to
10 dose calculations. Now, let me just mention one last
11 thing; and that is, I do believe that Dr. Thorne's
12 Affidavit is essentially un rebutted. There was no
13 other Affidavit which rebuts what effectively what
14 Dr. Thorne said. Most of the DOE's applicants said
15 we could have run some contentions. He does not say
16 which contentions or he doesn't say how much time
17 does it take and he doesn't address the combination
18 problem.

19 Under NRC case law, Petitioners are to be
20 given the benefit of the doubt in really uncontention
21 admissibility. And I think that means that the
22 Board, in ruling on our contention admissibility in
23 the TSPA field should take what Dr. Thorne said as a
24 given.

25 But I want to emphasize, you don't even

1 have to even reach that question because I think each
2 of our TSPA contentions are separately admissible.
3 They separately raise a material question just
4 because each of them involves a separate violation of
5 the requirement of Part 63.

6 >> JUDGE BARNETT: Well, for example, if
7 you were -- if you were -- if the contention was they
8 had estimated the probability of volcanic eruption as
9 half of what the actual probability was, there is no
10 specific requirement or regulation that it has to be
11 some given number.

12 They can allege their number is wrong. So
13 that's not a regulation -- that's not a regulation
14 violation per se.

15 >> MR. MALSCH: It is. I mean, in each --
16 let's take that as an example. We have alleged that
17 their models for igneous events are wrong in several
18 respects because they don't include certain kinds of
19 phenomenon. They don't include certain categories of
20 data.

21 >> JUDGE BARNETT: Let's restrict it to
22 where a parameter is wrong. That's a separate case.
23 Their frequency that they use, estimated frequency of
24 volcanic eruption was half of the value that it
25 should have been. There are contentions like that.

1 That's not a violation of the specific
2 regulation; right?

3 >> MR. MALSCH: No, I think it is.

4 I mean, under 62 -- 63.101-A, there is a
5 separate and enforceable requirement that the TSPA
6 include the full range of defensible and reasonable
7 parameters.

8 So a contention which says they have not
9 included the full range of defensible and reasonable
10 parameters, is material per se, regardless of whether
11 that would have an effect of dose. And that's
12 because of the way the NRC carefully structured Part
13 63. They took great pains to explain that it wasn't
14 just the ultimate dose calculation.

15 It was also such things as including the
16 full range of defensible and reasonable parameters.

17 >> JUDGE BARNETT: Okay. So would Nevada
18 ever need to show any implication of the contention
19 at all of the TSPA model or is it sufficient to say
20 this parameter is not right, this model left this
21 out; any implication?

22 >> MR. MALSCH: I think that's all we have
23 to show. I think we have to show that they violated
24 these requirements, that either their models are not
25 supported scientifically, that they don't include the

1 full range of defensible reasonable usable
2 parameters. They don't include certain essential
3 factors.

4 They omit a FEP, for example. I think
5 that's enough to get our contentions admitted. And
6 this is no departure from standard NRC practice. It
7 has always been the case that a contention which
8 alleges a violation of a regulation is -- raises a
9 material issue. And it was NRC's decision to
10 separately promulgate this collection of
11 requirements.

12 And that was their decision, they're
13 separately enforceable. The Commission took great
14 pains to emphasize that its ultimate decision on
15 post-closure safety depend upon not just the dose
16 calculation by compliance with these separate
17 requirements.

18 And so we think a violation of these
19 separate requirements raises a material issue.

20 Now, I would grant you that these
21 requirements are standard in non-prescriptive
22 fashion, but that doesn't make a violation of them
23 any less material than it would, for example, a
24 violation of the general design criteria, which are
25 also expressed in general principles; the immaterial

1 just because the regulation is non-prescriptive.

2 There is no distinction in terms of
3 materialiality between prescriptive requirements and
4 non-prescriptive requirements, between substantive
5 requirements and positive requirements. They are all
6 independently significant and separately enforceable.

7 >> JUDGE RYERSON: I think Mr. Silverman is
8 straining to say something at this point; and then I
9 have a question for you, Mr. Silverman. Why don't
10 you --

11 >> MR. SILVERMAN: Thank you. A few points:
12 Mr. Malsch continues to refer to in response to Judge
13 Barnett's questions which I think were good
14 questions, that a mere allegation of an error or
15 deficiency in omission is material per se.

16 Well, materialiality is one part of the
17 test for admitting the contention.

18 We also have to have a genuine dispute
19 about that material issue. And to find a genuine
20 dispute, you must do more than look at the allegation
21 of the Petitioner. You must also look at the
22 response of the Applicant.

23 And it is beyond the legal overarching
24 issues that you must look.

25 As I said, not a full merits analysis,

1 we're not asking for an evidentiary judgment here;
2 but there are and I believe it's consistent with
3 Board practice in the past that you look at the
4 facts. We've cited sections of the SAR that are
5 responsive to the Nevada contentions. It may be that
6 they allege an omission. We show where it's
7 addressed. They may say, there is an uncertainty, we
8 describe why it clearly is bounded by what we've done
9 or not relevant to the ultimate determination. Or
10 why it doesn't violate Section 63.114, the
11 post-closure analysis, which has such broad methods,
12 if you will, for going through the process of doing
13 the post-closure analysis and talks very generally
14 about including certain data, accounting for
15 uncertainties, considering alternatives, et cetera.

16 So it's not enough to be just material.

17 You must look at the facts at some level -- at some
18 level in deciding whether to admit these contentions.

19 There are a couple of other things I'd like
20 to mention and I'd be happy to take your question,
21 Judge, is there no requirement for them to have done
22 a Quality Assurance Program. That's not a
23 requirement of the Petitioner or we wouldn't have
24 asked that. And we would have be laughed out of the
25 boardroom if you challenge them on the basis of not

1 having a qualified QA program for their contentions.

2 Finally, there has been some suggestion
3 about cumulative impact of these contentions. When
4 we had the Advisory PAPO Board pre-hearing conference
5 in March -- May of last year, this very subject came
6 up. I think it was Judge Moore. I could be wrong.
7 It might have been you, Judge Ryerson; but the issue
8 said, it was very clear that if the Petitioner felt
9 that they wanted to argue that an individual
10 contention combined with other individual contentions
11 cumulatively demonstrated a material issue and a
12 genuine dispute, that they should do that, either by
13 way of summing them up and saying that or having an
14 extra contention that specified that.

15 We honestly do need read the Nevada
16 Petition to have done that, to have accumulated and
17 have argued that the cumulative impact needs to be
18 considered.

19 >> JUDGE RYERSON: I think you've answered
20 one of my questions, is whether you disagreed at all
21 with Mr. Malsch's description of what would be
22 required. But let me ask the second question and you
23 sort of lead into this. You say that there's got to
24 be at least some level of demonstration.

25 >> MR. SILVERMAN: Yes.

1 >> JUDGE RYERSON: And the question I guess
2 for us again dealing with the adequacy of a pleading
3 is what that level is. And I hate to keep returning
4 to this case that you cite 427 times to us; but that
5 case says that there must be at least some minimal
6 factual and legal foundation in support of the
7 contention, some minimal factual and legal
8 foundation. Is that the wrong test?

9 Because --

10 >> MR. SILVERMAN: No --

11 >> JUDGE RYERSON: Because this sounds like
12 a minimal factor.

13 >> MR. SILVERMAN: That's good law. That's
14 good law; but you can't judge whether there is a
15 minimal showing by reading the factual allegations in
16 one pleading. You've got to look at the other side.

17 I acknowledge that you may look at a
18 contention and you may look at an answer of the
19 Department and you may say, you know, they've raised
20 the legitimate issue. This may be your judgment; and
21 it is not clear to us on its face that, that it's not
22 an issue -- that it's not an a genuine issue.

23 Some of Nevada's arguments leave the word
24 "genuine" out of this criteria; but there are others
25 you will read, where I think you can conclude merely

1 by reading the pleadings and perhaps looking -- not
2 perhaps, really, it's a difficult job, but looking at
3 the things we cite in the SAR often and in most of
4 our responses and conclude there is no genuine issue
5 there. And you don't go beyond the pleadings and the
6 references, and that is your call to make. It's not
7 necessarily an easy one; but it is -- it does require
8 you to look at both sides and to delve down to some
9 level of review of both sides of the allegations.

10 >> JUDGE RYERSON: I would very much like
11 to hear the NRC staff's position on whether an
12 allegation of a violation of any Commission
13 regulation is a material -- raises a material issue
14 for an option. Could one of you please speak to
15 that?

16 >> MS. YOUNG: Mitzi Young for the NRC
17 staff. The staff's position is that depending on the
18 contention and the regulation that's alleged to be
19 violated, it could be a material issue.

20 The staff did not do a wholesale objection
21 to the contentions based on materiality. There are
22 contentions where Intervenor suggests that
23 radionuclides and radiological exposures would be
24 increased.

25 And those contentions specifically, the

1 staff would expect demonstration provided by Nevada
2 would address what those impacts would be.

3 However, there are contentions that allege
4 certain particular processes were not followed. The
5 staff does not object to those contentions as being
6 immaterial.

7 >> JUDGE FARRAR: You said at the
8 beginning, Ms. Young, staff's position is that a
9 violation -- an allegation of a regulation could be
10 material.

11 >> MS. YOUNG: It could be.

12 >> JUDGE FARRAR: I think Judge Ryerson's
13 question -- it's not his, mine is -- is a violation
14 of a regulation always material on its face?

15 >> MS. YOUNG: Well, materiality has
16 different meanings, obviously. There is materiality
17 that can affect the outcome of the proceeding. But
18 there's also materiality with what can bear on the
19 staff evaluation of a particular standard.

20 >> JUDGE FARRAR: Our precedence have
21 always said that applicants just like the
22 intervenors is bound by the regulations unless they
23 ask the Commission for a waiver or an exemption.

24 >> MS. YOUNG: Or an exemption --

25 >> JUDGE FARRAR: Or an exemption, fine,

1 whatever they ask. But if they don't ask for that,
2 what is the force behind that precedent or that
3 principle that I just stated, if we say, yes, you
4 violated the regulation, you didn't get a waiver and
5 exemption, but we're not going to hear the
6 contention? That makes that principle a dead letter.

7 So I need to know what the -- if the
8 staff's position is, a allegation or violation of a
9 regulation is always per se, material?

10 >> MS. YOUNG: It depends on what that
11 contention is alleging, was or was not fullfilled a
12 regulatory requirement.

13 >> JUDGE FARRAR: The answer is no?

14 >> MS. YOUNG: Again --

15 >> JUDGE FARRAR: You are saying the answer
16 is no, that it's not always material?

17 >> MS. YOUNG: An Intervenor can provide a
18 contention that says the regulation is violated
19 because the walls of the repository will be blue. Is
20 that material to fulfilling some requirement --

21 >> JUDGE FARRAR: The Commission
22 regulations says the walls of the repository should
23 be pink and they say they are going to be blue.
24 That's my question; is that per se, an admissible
25 contention?

1 >> MS. YOUNG: That could be but again
2 again, you have to look at the particular regulation
3 that's at issue with respect to the challenges raised
4 by the petitioner.

5 >> JUDGE RYERSON: Do either of the Judges
6 have something?

7 >. MR. ANDERSEN: Your Honor, Rob Andersen
8 on behalf of Nye County. One of the problems that I
9 had with DOE's approach with review of this
10 particular issue is it didn't make a distinction
11 between what it has perhaps called a process
12 regulation and one that is quote/unquote:
13 "Prescriptive" as Judge Farrar has pointed out.

14 I can tell you that they made the same
15 materiality challenge to every one of our
16 contentions, and I'd like to make a point that hasn't
17 been stressed enough, although alluded to by the
18 Board, and that is the following -- every single one
19 of the emergency response planning regulations,
20 performance confirmation, quality assurance
21 regulations are bottomed on a record that
22 demonstrates why it is significant to safety.

23 And it's presumed that if you violated
24 that, you violated a principle that the Board has
25 established or the Commission has established as a

1 safety significant matter. Now, that isn't every
2 single regulation.

3 I think I understand why my colleagues from
4 NRC staff are shuffling a little bit, because there
5 certainly could be a regulation that isn't
6 significant enough to justify.

7 >> JUDGE FARRAR: If there were, why would
8 the Commission bother to expend the effort to adopt
9 it?

10 >> MR. ANDERSON: Again, I would go back to
11 what the record is that establishes the regulation.
12 What is the bottom line support for establishing the
13 regulation in the first place.

14 And then cited in our materials and others
15 is the Massachusetts case out of the Federal Circuit,
16 where, indeed, NRC wouldn't allow evidence on impact
17 to dose because they said underline emergency
18 response regulations is the commitment by the
19 Commission to the principle, that if you violated
20 that regulation, you were violating a safety
21 principle.

22 So there was no demonstration allowed, even
23 though the Petitioner wanted to do it, of showing
24 those implications. I would say to the Board, in
25 conclusion, that we urge you to carefully look at DOE

1 's arguments in this regard to make sure this
2 so-called process argument on materialiality doesn't
3 wash over into areas where it clearly has to do with
4 a specific alleged violation of a safety significant
5 regulation that NRC has promulgated. They were --

6 >> JUDGE RYERSON: Thank you Mr. Anderson.
7 This may be a good time for a break. I don't see any
8 other hands up. So I'm going to say it's a good time
9 for a break. Why don't we try to do this, in
10 literally nine minutes and begin again promptly at
11 3:15.

12 (A recess was taken)

13 >> JUDGE RYERSON: `Please be seated.
14 Okay. I think Judge Barnett has a couple of further
15 questions on the model, then we will turn to some of
16 the subjects that Judge Farrar wanted to cover.

17 >> MS. YOUNG: Judge Ryerson?

18 >>JUDGE RYERSON: Yes.

19 >>MS. YOUNG: Mitscy Young from the NRC
20 staff. I just wanted to clarify one thing in terms
21 of my answers to Judge Farrar. When the staff was
22 talking about it would depend on the nature of a
23 regulatory requirement, one example could be 63.114-E
24 and F which talks about DOE having to provide the
25 technical basis for inclusion or exclusion of FEPS.

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1 And that a specific FEP must be evaluated
2 in detail if the magnitude and time of resulting
3 radiological exposures to the reasonably maximally
4 exposed individual or the radionuclide releases to
5 the successful environment would be significantly
6 changed by the omission.

7 If Nevada, for example, were to raise a
8 contention that allege that a particular FEP was not
9 properly excluded, there has to be in that situation,
10 a showing of what the significance would be in terms
11 of results. So again, it depends on what the
12 regulatory requirement is that's being alleged that
13 DOE has failed to satisfy.

14 >> JUDGE RYERSON: Thank you.

15 Judge Barnett?

16 >> JUDGE BARNETT: I have a question for
17 Mr. Malsch or Mr. Lawrence.

18 For the TSPA contentions, if DOE's answer
19 is that this is a non-safety item or not important to
20 safety item or not important to waste test isolation,
21 and Nevada's reply doesn't address that or doesn't
22 say this is important to safety use, is that an
23 admissible contention?

24 Should we have contentions on things that
25 aren't important to safety, that nobody has argued is

1 important to safety?

2 >> MR. MALSCH: I think you are referring
3 to the contention we had with respect to retrieval
4 plans.

5 >>JUDGE BARNETT: I can't remember
6 specifically.

7 >>MR. MALSCH: I believe it's retrieval
8 plans. And here was the difficulty. Our basic goal
9 was to assure that retrieval plans are subject to
10 quality assurance requirements.

11 And more specifically, I guess, structured
12 system equipment necessary to implement retrieval
13 plans are subject to full quality assurance
14 requirements.

15 Under DOE's QARD, a structured system or
16 component is not subject to the QARD unless it is
17 either important to safety or important to waste
18 isolation.

19 We agree it doesn't make any difference
20 under which category something falls. If it falls
21 under either one, it's subject to quality assurance
22 and that's sufficient.

23 The problem is from our standpoint was that
24 the criteria for deciding whether a piece of
25 equipment was important to safety is so different

1 than the criteria that applied in deciding whether a
2 piece of equipment was important to waste isolation,
3 that if you applied the wrong set of criteria, the
4 result would be that a structured system or component
5 important to retrieval would be ruled not important
6 to safety because that criterion focuses solely on
7 safety of workers, not post-closure safety.

8 The result would be that it would not be
9 subject to quality assurance by reason of it being
10 important to safety, and they never asked the
11 question whether it should be important -- it should
12 be subject to quality assurance, because it is
13 important to waste isolation, the result as a whole.

14 >> JUDGE BARNETT: Okay. I can't remember
15 the specifics but let me just give you a
16 hypothetical. If Nevada's contention was based on
17 component A and DOE's answer was Component A is not
18 important to safety and they show the table where it
19 says it's not important to safety, it's not important
20 to waste isolation and show the table that says that.

21 And then Nevada's reply does not address
22 that or offer a contention that, well, it should be
23 important to safety, it should be important to waste
24 isolation, then would that be an admissible
25 contention, where there is no such disagreement

1 about -- no explicit disagreement about whether it is
2 or isn't an important to safety?

3 If DOE has classified it is not important
4 to safety, Nevada doesn't make the argument that it
5 is important to safety, is it an admissible
6 contention?

7 >>MR. MALSCH: Let me put it this way, I
8 think we have to -- we have disagree with either the
9 classification or the application of the wrong -- the
10 application of the classification criteria.

11 If hypothetically one were to conceive
12 that retrieval is not important to waste isolation,
13 then our contention goes away.

14 But we've argued specifically that it is
15 important to waste isolation considered in the
16 broader sense, and therefore, it should be subject to
17 quality assurance as important to waste isolation,
18 and DOE never even considered that issue.

19 >> JUDGE BARNETT: I'm not trying to pin
20 you down so much. I just want to understand. Let's
21 leave the specific contention out because I don't
22 remember. Say it's Component A and Nevada's
23 contention is based on Component A. DOE's response
24 is, it's not important to safety, here's the table
25 where it says it's not important to safety; it's not

1 important to waste isolation. Here is the table
2 where it says it at.

3 And then Nevada can not come back and argue
4 that it is important to safety, it is important to
5 waste isolation and here is where it says that.

6 Is that an admissble contention?

7 >> MR. MALSCH: I think we would have to
8 counter the table or argument that it is neither.
9 DOE has -- points to something in the application
10 which properly -- which classifies it as one or the
11 other. And I think we've got a problem with our
12 contention. I think though in the particular case I'm
13 thinking of, they utterly failed to consider whether
14 structured systems of components important to
15 retrieve were important to waste isolation, and
16 therefore, the gap.

17 >> JUDGE BARNETT: I want to thank you.
18 Along similar lines, if the contention said that
19 DOE assumes X, and DOE's answer was well, we don't
20 assume X, it's not referenced anywhere in the license
21 applications at least, and then, Nevada is required
22 to come back and say, here is where you assumed X, in
23 Nevada's reply; would that be an admissible
24 contention?

25 >> MR. MALSCH: I think if we pointed to a

1 alleged defect in the application or one of the
2 supporting references, and that defect in fact, did
3 not exist, I think that's not an admissible
4 contention. I don't think we have any contentions
5 in that category. But when we allege an omission, I
6 think the omission has to be there.

7 >> JUDGE BARNETT: Thank you.

8 >>JUDGE RYERSON: Judge Farrar, do you have
9 any questions?

10 >> JUDGE FARRAR: Yes, let's turn to what
11 we mentioned before lunch, the State of Nevada reply
12 brief to DOE, pages one to two and four bullets and
13 we'll add that up. The first bullet, I think is
14 fairly covered by point 4-A of the proceedings
15 tomorrow, so we won't do that.

16 The fourth bullet about the regulation,
17 where we talked about it at some length, I have a
18 couple follow-up questions.

19 Mr. Silverman, several times there was a
20 regulation that DOE -- I'm sorry -- that Nevada said
21 you're not in compliance with the regulation and the
22 regulation was non-prescriptive giving you the
23 flexibility that you said you had.

24 But your Answer said, it's a challenge to
25 the regulation. So it was as though you said, since

1 the regulation gives us flexibility, saying we don't
2 comply with it is a challenge to the regulation,
3 whereas another reading would be it's not a challenge
4 to the regulation, it's a challenge to whether you
5 have used that flexibility wisely and have come up
6 with a solution that fits within the meaning of the
7 regulation.

8 Do you want to address anything, do you
9 want to say anything in response to that?

10 >> MR. SILVERMAN: Yes. Does that refer to
11 one of these particular bullets?

12 >> JUDGE FARRAR: Weel, it's -- no, it's
13 kind of a variation of this question -- it's the
14 flip side of here's a prescriptive regulation and you
15 don't comply with it. Here's one where you say,
16 well, the regulation isn't prescriptive, so the
17 challenge in the regulation, when they challenge us,
18 because we have infinite flexibility.

19 >> MR. SILVERMAN: No, we did not mean to
20 suggest infinite flexibility. What we meant when we
21 said challenge to the regulations, you have a
22 regulation like 63-114 which is your how to on your
23 TSPA post-closure analysis.

24 And it requires adequate and accurate
25 generally analyses and considerations of uncertainty,

1 considerations of alternative models, inclusion of
2 data in broad ranges of areas like geology,
3 hydrology, et cetera.

4 And when -- what we were just trying to say
5 is all Nevada is saying there is another uncertainty
6 here, or there is a piece of data that's being used.
7 Without showing that we have violated this regulation
8 which gives us fairly broad relay based upon expert
9 scientific judgment that what we are trying to say is
10 that is, that is in essence, a challenge to
11 regulation.

12 It's a regulation, not just this reg, but
13 the preamble regulation 63.101 I think and 102, they
14 talk about the conceptual framework, go on and on and
15 on about the complexity, the difficulty into the
16 future, the need for flexibility for the applicant to
17 do these analyses. So that's the point we were
18 trying to make, maybe not as artfully as we should
19 have.

20 >> JUDGE FARRAR: What contention, do you
21 refer to a specific contention there? Okay, fine.

22 >>MR. SILVERMAN: Thank you.

23 >>JUDGE FARRAR: Thank you Mr. Silverman.
24 Mr. Malsch, let me ask you a different question on
25 this same subject.

1 There are times when DOE says that your
2 contention should be rejected because
3 you're -- you're asking them to consider something
4 they don't have to.

5 For example, if the regulation says your
6 tires have to withstand certain conditions and they
7 say, we have synthetic rubber number 93 that does
8 this. If you say well, you didn't consider synthetic
9 rubber number 95, and they say, look, if 93 does the
10 job, we don't have to consider all the others that
11 might do the job better because we just don't have to
12 do that.

13 We've come up with a proposal that meets
14 what the regulations are looking for. So they oppose
15 a number of your contentions on the ground that you
16 are asking them to look at one or an infinite number
17 of other things that would also do the job. And all
18 they have to do is say they've done the job.

19 How do you respond to that?

20 >> MR. MALSCH: Well, I think there could
21 be two categories of contentions to which that
22 question would apply. We have a whole category of
23 contentions which alleges that DOE's -- one or more
24 of the TSPA models is not considered the full range
25 of defensible and reasonable parameters.

1 It would be possible for us to argue that
2 it is non-compliant with that provision because a
3 contention did not include a particular range of
4 parameters or -- and that would make the contention
5 admissible assuming --

6 >> JUDGE FARRAR: That's not the kind that
7 was self supporting. That's not what I was talking
8 about.

9 >> MR. MALSCH: The second category would be
10 where we -- I guess in retrospect, there are three
11 categories. The second category would be where we
12 have tapped a DOE's model that is either wrong or
13 unsupported, because it did not include consideration
14 of a necessary phenomena.

15 For example, if a necessary element in
16 estimating corrosion was ignored in DOE's model, we
17 have attacked the validity of that model.

18 The third category and that's I think
19 fairly standard stuff -- the third category is
20 actually unique to Part 63 and performance
21 assessments. And that is the requirement would
22 consider alternative assesment of models of things
23 consistent with data and scientific understanding.
24 We do have a number of contentions --

25 JUDGE FARRAR: I thought there were some

1 alternative materials that you just said they should
2 have used, and --

3 >> MR. MALSCH: Oh, there are a few
4 contentions where we say that.

5 >>JUDGE FARRAR: And I think they say,
6 look, the material we selected does the job. You can
7 challenge us, the material we selected is inadequate,
8 but you can't say we need to consider all these
9 others that are also adequate or maybe more than
10 adequate, because we don't need to use those. That's
11 the one I'm talking about.

12 >> MR. MALSCH: Okay.

13 I think a contention which simply says that
14 they could have used these materials which are
15 better. The ones they've chosen would not by itself
16 be an admissible contention.

17 I think though in the contentions we're
18 thinking of, we went on to explain that there were
19 problems with the materials that they were using that
20 might -- and we went ahead and suggested how those
21 might be cured.

22 I agree with your hypothetical, a
23 contention that says what they did was fine, but this
24 would have been better, is not admissible per se.

25 >> JUDGE FARRAR: All right. I think that

1 takes care of that bullet. Let's look at the second
2 bullet. Mr. Silverman, this is the one about your
3 application having to be as complete as possible and
4 many of the petitioners challenge various aspects of
5 the application and sometimes you give the answer,
6 well, that was all we had at the time.

7 What do we do; is Mr. Malsch right in this
8 point and what do we do with that?

9 One thing we can do is, fine, we'll admit
10 the contention and we'll go to hearing. And by then
11 you will have more information and we'll test it. I
12 take it you would not like us to do that?

13 >> MR. SILVERMAN: I think that this bullet
14 and it is then later reflected in a little bit more
15 detail in the generic section of Nevada's pleading,
16 is a mischaracterization of our position.

17 We do on a number of occasions indicate
18 that 63.21-A provides that those applications should
19 be as complete as possible and available information.

20 But we do not say and I do not think we
21 intimate at all that that gives us carte blanche to
22 exclude any information required or to provide as I
23 think they say here, it would be acceptable to submit
24 a one-sentence application.

25 We didn't assert 63.21-A eliminates the

1 need to comply with the rest of 63.21, which does
2 have specific requirements in it.

3 When Nevada makes this allegation, they in
4 the front of their response, they point to two pages.
5 And I'd just like to make it clear that we are
6 providing the indication to you and the references so
7 you can see that is not what we did. They point to
8 page 1351 and page 1500 of DOE's answer.

9 If you look at pages 1349 to 1358 of DOE's
10 answer which bounds page 1351, you will see -- the
11 issue is whether we provide a final design
12 information in the LA. We referenced 6321-A.

13 But we went on for several pages to
14 recognize that we have to provide sufficient
15 information under the balance of 63.21.

16 We explain that the regulation doesn't
17 provide final design information, so we address
18 content and substance. We specifically identified
19 the information in the license application that
20 satisfies 63.21-B, the rest of that regulation.

21 So we took on the substance. We didn't
22 just say whatever we say is good enough. We said
23 look in the LA and you will see that these locations,
24 information we believe is sufficient to meet the
25 regulations.

1 And in this case, it dealt with the
2 specific allegations regarding the transport and
3 replacement vehicle, the multi-tax and transportation
4 and disposal containers.

5 So we have not taken the position that
6 there is no minimum amount of information. And
7 that's an example that -- that if you look at those
8 pages, you will see that we do not do what Nevada
9 alleges in this bullet, which is argue with that
10 63.21 gives us carte blanche.

11 Very briefly, the other reference that
12 Nevada cites for that proposition is page 1500 of our
13 answer. If you look on pages 1491 to 1500, which
14 deals with waste retrieval, whether there's an
15 adequate plan for waste retrieval, if we're not able
16 to put the drip shields in.

17 We reference 63.21 again but we also
18 explain how we meet Section 63.21C-7, that it doesn't
19 require a formal retrieval plan. It goes to the
20 substance of the regulation.

21 We state, quote " the only issue for
22 consideration is whether the description of the
23 retrieval plan is sufficient"and we identify again
24 the specific information in the LA that satisfies
25 that regulation.

1 We're not saying we have carte blanche to
2 put in as little as we want and in these cases that
3 were cited by Nevada, if you look at them, you will
4 see that we refer you specifically to the LA where we
5 think we have given you sufficient information.

6 >> JUDGE RYERSON: All right,
7 Mr. Silverman, if I could follow up on that.

8 It seems that everyone has to agree that
9 when we are talking about compliance years out,
10 potentially a million years out in some aspects, that
11 there is going to be a level of uncertainty.

12 Nevada's point, as I understand it, is that
13 there is a level of uncertainty that is unacceptable.
14 Your point, if I understand it, is that you have come
15 forward with -- given the state of knowledge right
16 now, an acceptable level of uncertainty.

17 But doesn't -- for purposes again of the
18 adequacy of a pleading, doesn't that bring us into a
19 factual dispute on the merits that requires further
20 proceedings to make factual determinations on who's
21 right?

22 >> MR. SILVERMAN: Your Honor, it may in
23 some cases and it may not in others. It really
24 depends on looking at the pleadings and again the
25 reputation in the Applicant's response because as I

1 said, in cases, you will find, I am confident that we
2 adequately refute and you will conclude there is no
3 genuine dispute because it will be obvious on its
4 face.

5 It will be clear and -- and that will be
6 sufficient. So I think there could be both cases in
7 any given situation.

8 >> JUDGE RYERSON: Thank you.

9 >> JUDGE FARRAR: In reading your response,
10 Mr. Silverman, to Nevada's Contention 147, I asked
11 myself the question, DOE -- and following up with
12 what Judge Ryerson just said, DOE making the argument
13 that this case is so complex that we can not be
14 expected to get it right and so minor errors don't
15 matter, or in the vernacular, it's close enough for
16 government work.

17 That flavor seems to run through this,
18 while this is a tough case, don't worry about it.

19 >> MR. SILVERMAN: No, and I don't remember
20 what's in 147, but I can assure you, that's not what
21 we're arguing. If that's not TSPA's contention, what
22 we're arguing, we said before is if you look at
23 63.114, there are small errors and there are large
24 errors.

25 And a small error even if it's true would

1 not necessarily violate one of these regulations in
2 this particular section of the code.

3 >> JUDGE FARRAR: And, of course you didn't
4 say that exactly 147. That was my rough paraphrase.
5 I think that we covered indirectly the third to the
6 last bullet of the State's points. So Mr. Chairman,
7 I'm finished with that, unless someone had a -- I
8 only asked those two parties, because that was
9 Mr. Malsch's State of Nevada's challenge to DOE,
10 particularly which is why I involved him in that
11 questioning. Go ahead Mr. Malsch.

12 >> MR. MALSCH: I want to indicate if the
13 board is interested, I can explain why the cases you
14 cited in support of their position are utterly did
15 not stand for that proposition, but this is the Duke
16 case and some other cases.

17 >> JUDGE FARRAR: I heard those already.

18 >> MR, MALSCH: I'd be willing to discuss
19 them, if the Board is interested.

20 >> JUDGE FARRAR: We have a lot of business
21 yet to conduct.

22 >> MR. ROBBINS: Your Honor, Alan Robbins.
23 Procedurally Your Honor, I'm not the designated
24 counsel to speak today but may I have permission to
25 speak briefly?

1 >> JUDGE RYERSON: Yes, you may.

2 >> MR. ROBBINS: Thank you. I want to use
3 Clark County's contentions regarding forecasted
4 volcanism as examples of the discussion that has been
5 going on for quite some time here. Frankly, one that
6 we think is very simple. We have an allegation,
7 supported by the Affidavit, recognized expert,
8 geologist, not an expert candy cone maker or
9 something, a geologist. He's been in the field, I
10 mean out in the field doing studies, not just in the
11 field of geology, who is alleging with explanation
12 that DOE's assumptions regarding forecasted volcanic
13 volcanic activity are incorrect.

14 Counsel for DOE is just saying there are
15 big errors and small errors. We have expert
16 supported allegations about significant
17 understatement of forecast of future volcanic
18 activity. And needless to say, that's among the
19 contentions that DOE finds inadmissible because it is
20 a proposed contention in this case and they of course
21 find them in all inadmissible.

22 Well, if that is too small and minor to be
23 admissible, you might be interested although probably
24 rhetorical to know, how big does a contention have to
25 get before it matters, to warrant at least being the

1 the subject matter of a hearing in this proceeding?

2 It boggles the mind.

3 I'd also like to go back to Your Honor's
4 example that well, what if the -- I'm still on
5 volcanism -- what if the regulations say use this
6 kind of material, a material that meets this
7 specification. They say, we'll use the model A and
8 somebody allege I'll use type B. That is not the
9 nature of our volcanic activity contention.

10 But DOE's response suggests that that is.
11 They respond as if that's the kind of contention
12 we're raising. It's not. It's as if we've said,
13 well, you're using a backup access of the forecast
14 for volcanic activity and let's do it on the shelf as
15 a different forecast of why, why did you choose Y
16 instead of X?

17 And they're saying a variety of different
18 things, none of which are fair issue for hearing.
19 But plainly, that is not the nature of our
20 contention.

21 And it is not the kind of contention that
22 is conducive to saying they specifically violated a
23 designated standard or a prescription because the
24 forced regulations don't specify the forecasted level
25 of expected volcanic activity that is to be modeled,

1 but instead, there are other regulations that among
2 other things require them to support the models that
3 they use and the assumptions and data that go into
4 it.

5 And that is the nature of the regulations
6 that we allege they have violated by ignoring
7 wholesale, information known to them that
8 significantly affects the forecasted level of
9 volcanic activity.

10 So, at times, it's been clear which kinds
11 of contentions which would underline this discussion.
12 At other times, it's a little more robust.

13 But I want to put a point on it because
14 these are among the very important contentions that
15 we are raising.

16 >> JUDGE RYERSON: Mr. Silverman, if I
17 understand your point, is that you are urging us to
18 look at contentions, you are asking the Board to look
19 at contentions and decide on the pleadings whether
20 the allegation is conceivably substantial enough to
21 constitute a violation of the regulations. Am I
22 correctly stating your view?

23 >> MR. SILVERMAN: Well, the burden is
24 to demonstrate a genuine issue of material fact or
25 law.

1 >> JUDGE RYERSON: A genuine issue of
2 material fact. And I guess, my question is this;
3 you've said earlier, that although your going in
4 proposition was that you expected to find some
5 admissible contentions, you ultimately did not.

6 If we took out your argument as to the
7 adequacy of the form of affidavits and I don't want
8 to get into discussing that.

9 I think another Board is going to deal with
10 that tomorrow or Friday, or Thursday. But let's
11 assume that all of the affidavits in this case, were
12 in proper form.

13 >> MR. SILVERMAN: I'm sorry, were what?

14 >> JUDGE RYERSON: Were in proper form.

15 >> MR. SILVERMAN: In proper form.

16 >> JUDGE RYERSON: In correct form. And
17 included within the body of the Affidavit, everything
18 that is adopted from paragraph five or paragraph six
19 or both, in particular contentions; are there any
20 contentions on that basis that you believe would be
21 admissible?

22 >> MR. SILVERMAN: Well, that would be --
23 there would be some if that were the only argument
24 that we made in response to that contention. In
25 other words --

1 >> JUDGE FARRAR: There are no contentions
2 where that's the only argument that you made?

3 >> MR. SILVERMAN: That's my point.
4 Logically, you are saying we presume --

5 >> JUDGE FARRAR: Although some of them may
6 have been influenced, since you don't like the
7 affidavits, then maybe it doesn't amount to a genuine
8 issue.

9 >> MR. SILVERMAN: Bear with me. I think
10 I'm trying to answer your question just very straight
11 forwardly. If we have a situation where we all
12 presume the affidavits are adequate for purposes of
13 the 2.309 criterion that requires a supporting fact,
14 an expert opinion and if that were the only argument
15 that we make in response to that contention, argument
16 was inadmissible, then it would be inadmissible.

17 I don't know whether there are any of those
18 or not. I suspect in most cases we made several
19 arguments. Now, we may be wrong on the others you
20 may find. But there are other arguments.

21 >>CHAIRMAN RYERSON: Okay. I guess -- you
22 were suggesting earlier, we should be taking a hard
23 look at individual contentions from the standpoint of
24 whether they in fact, present a genuine dispute.

25 And I guess I was asking, if you were

1 looking fresh at the contentions yourself and
2 assuming, again, we may not assume this form is
3 correct, but assuming that the form on the Affidavit
4 were correct, I take it your position is, since you
5 have made other arguments in every instance, it
6 remains your view that there are no genuine disputes?

7 >> MR. SILVERMAN: That's based on our
8 pleadings. And really, the critical point I've been
9 trying to make and probably being redundant at this
10 point, but I also feel like maybe I haven't been as
11 clear, is over these few days, we're talking about
12 what the Board's described as overarching legal
13 issues.

14 And all I'm saying is that the Board has a
15 difficult job and when you see the responses, you
16 need to view them in their totality, both the
17 petition and the answer and the reply. If you
18 disagree with us on one of these legal principles,
19 you still have to look at the factual response.

20 You have to look at our references to the
21 SAR, to other portions of the license application or
22 to a citation to a regulation which we provide or to
23 a citation to a background supporting document, which
24 we reference.

25 There is a threshold for you to decide

1 where it becomes a merits determination. And you
2 may, contrary to our position, conclude it's
3 admissible or it's a genuine dispute, but there is a
4 threshold that has to be crossed. And that's what
5 we're requesting.

6 >> JUDGE FARRAR: Mr. Silverman, suppose we
7 find an issue or two or ten that we think have -- at
8 bottom, they are legal issues.

9 Do you have any objection to us admitting
10 those contentions and calling for briefing of the
11 legal issues, kind of like you would file a motion to
12 dismiss that contention because the law is on your
13 side rather than theirs?

14 >> MR. SILVERMAN: You'd have to first
15 find it's a genuine legal dispute. If you did, then
16 you'd admit the contention and if you wanted it
17 resolved, then, yes, motions -- a brief would be a
18 good way to resolve that issue.

19 >> JUDGE FARRAR: Okay. let me -- do you
20 want to go ahead?

21 >> JUDGE RYERSON: Yeah, you know I said at
22 the outset, we hoped to reserve some time for kind of
23 a final cleanup of anything anyone feels has not been
24 adequately addressed. I would urge you when we do
25 that not to feel constrained to say something if you

1 really have nothing to say at this point. We've
2 heard a lot.

3 But I know Judge Farrar has some questions
4 that he'd like to address, I think on some specific
5 contentions and would like to try to reserve enough
6 time to at least give everyone an opportunity to say
7 whatever they'd like.

8 >> JUDGE FARRAR: In order to honor what
9 the Chairman wants to do on the short snappy answers
10 to the -- don't feel compelled to give a non-snappy
11 answer.

12 Let me first ask the staff, in the State of
13 Nevada's reply brief to you, at pages one to two,
14 they say you have insisted on a depth of support for
15 these contentions that's not necessary and, in fact,
16 it's preposterous.

17 Let me put that a different way. A long
18 time ago, we had no -- almost no bar to Intervenors
19 coming in. And through the years, the Commission has
20 raised the bar and many Intervenors and experts in
21 most cases, we deny most of the contentions because
22 the Intervenors haven't met that bar.

23 But you can't read this case without coming
24 to a sense that the bar was here and the State of
25 Nevada and some of the other petitioners far surpass

1 that bar, so the bar got raised so they didn't quite
2 reach it.

3 I have that feeling when I read some of the
4 Staff's answers. Am I wrong to think that the bar
5 has been raised? In other words, that yeah, the bar
6 has been raised -- because I have to tell you,
7 comparing these contentions to others that I have
8 seen, they seem at least superficially to be a lot
9 better.

10 We're going to talk about the aircraft
11 issues in PFS. I think that came in, Mr. Silberg,
12 correct me if I'm wrong, I wasn't there at the time,
13 but that came in on a five-line contention?

14 Am I right?

15 >>MR. SILBERG: Close to that, yes.

16 >>JUDGE FARRAR: Go ahead Ms. Young.

17 >> MS. YOUNG: Mitzy Young for NRC staff.

18 I don't believe the bar has been raised. I believe
19 when you are evaluating the contention with respect
20 to the proposed action, you need to evaluate it in
21 the context of the issues that are challenged. Part
22 63 is a risk-informed performance-based regulation.

23 Many times the contentions used very
24 broad-brush in terms of identifying multiple sections
25 of Part 63 that they believe had been -- DOE has been

1 sufficient in satisfying.

2 But when you looked at that list of issues
3 or sections that they identified, it seemed like
4 their concern was not with respect to all of the
5 sections, although, they did a pretty good job
6 showing the relationships between various
7 regulations. Byt they had a concern about a
8 specific, more narrow regulatory requirement.

9 To that extent, in looking at contentions
10 for this proceeding, the staff under the time
11 constraints it had, given the brevity of reply time,
12 tried to reasonably construe each contention in the
13 context of the matters raised.

14 We did not arbitrarily raise the bar. Now,
15 we recognize as you did, Judge Farrar, that in many
16 years passed, contentions in both the reactor
17 proceedings and the issues and the informal
18 proceedings, until the contention requirement was
19 imposed, people got in with very little explanations
20 for supporting an issue, but in each instance, we
21 were reading Nevada's pleadings and trying to
22 understand what was the real concern being raised,
23 was there a genuine issue of dispute as to the
24 material issue of law of fact; what was the
25 supporting information and given the technical issues

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1 involved, it was important.

2 In each instance, the staff reasonably
3 construed the petition and tried to understand what
4 was in that and our objection, which pertained mostly
5 to the adequacy of support and whether a genuine
6 dispute had been raised, were done using the
7 standards that the Commission has elucidated for
8 admission of contentions.

9 So it's hard to compare repository
10 contentions to reactor contentions because obviously,
11 reactor -- well on the principles of allegation has
12 been well trodden, there are a lot of different
13 issues.

14 Obviously, there are fluctuations between
15 the individual boards. You asked a question about
16 who served on the Board with respect to a question --
17 answer by Don Silverman. Anne Young was the Chairman
18 of one of those boards. You have different readings
19 in the context of the matters raised.

20 >> JUDGE FARRAR: Let me interrupt. The
21 key thing you are saying though is you want me to put
22 aside what I think I know from the past because Part
23 63 is really a different animal?

24 >> MS. YOUNG: It is and obviously, this is
25 a case of first impression, and Nevada and the other

1 parties have, you know, labored hard to try to raise
2 issues, but this staff and those who are responding
3 to petitions there also labored equally hard, if not
4 longer, although in a shorter period of time to try
5 to understand the issues raised and whether they were
6 adequately contained in the context of the regulatory
7 requirements contentions.

8 >> JUDGE FARRAR: That's a fair answer.
9 Thank you. I don't need a reply. We need to get
10 through this or we won't get through this. I'll give
11 you ten seconds.

12 >> MR. MALSCH: Just to make a quick
13 observation. When the Commission entertained
14 contentions in the first license renewal proceedings,
15 it didn't cast the past aside. When it entertained
16 contentions in the first storage proceeding, it
17 didn't cast the past aside. When it entertained
18 contentions in the first enrichment progressive
19 conservative, it didn't cast the past aside.

20 I would call the attention to the
21 Commission contentions of the LES case and they
22 invited the Board to compare that contention with any
23 of ours and conclude, that we believe would be the
24 case, that our contention is, if anything, better
25 than theirs and that was admitted by the Commission,

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1 and not a licensing board.

2 >> JUDGE FARRAR: Thank you, Mr. Malsch.
3 Mr. Silverman, let's talk about on a general basis,
4 your contentions.

5 >> MS. YOUNG: Judge Farrar, if I could
6 respond briefly to one issue.

7 >> JUDGE FARRAR: I really got to get
8 through this. Go ahead.

9 >> MS. YOUNG: Mr. Malsch suggested in the
10 first license renewal proceeding the Commission
11 didn't pass -- use a different standard. There were
12 no contentions admitted in the first license renewal
13 proceedings.

14 >> JUDGE FARRAR: Thank you.
15 Mr. Silverman, let's talk about your contentions 174
16 to 183 which are the air crash contentions and just
17 talk about them generally. A few years ago, we had a
18 proceeding at PFS where we ended up with two phases,
19 a total of 60 days of hearing.

20 The company lost on the first go-around,
21 one on the second go-around on contentions. And the
22 original contention which as Mr. Silver recalls, was
23 very simple, had very little in it and behind it.

24 We ended up having a hearing on issues that
25 looked very much like these issues, 174 to 183. We

1 had the very same witnesses that the State of Nevada
2 brings forward.

3 I'm having trouble saying that what they've
4 put forward isn't as much as the State of Utah put
5 forward and State of Utah won the first phase of that
6 case and for a time, had the project blocked.

7 I'm having trouble finding any way that I
8 could reject these contentions. Can you help me with
9 that?

10 >> MR. SILVERMAN: As much as I'd like to,
11 Your Honor, without going back and reviewing them, I
12 apologize Your Honor, without trying to compare and
13 contrast, I apologize.

14 >> JUDGE FARRAR: But this generally, this
15 is the PFA-- PFS case all over again --

16 >> MR. SILVERMAN: I sat on the PFS Board.
17 I really can't do it.

18 >> JUDGE FARRAR: Mr. Silberg, in case you
19 get admitted here, should these contentions be
20 admitted?

21 >> MR. SILBERG: Ive not read them, Your
22 Honor.

23 >> JUDGE FARRAR: Moving right along. Is
24 there some contentions and when I speak of specific
25 contentions now, I'm not so much interested in the

1 contention, itself as in the principle behind it,
2 which might affect a number of other contentions.

3 Contention 139 states the issue is whether
4 the DOE has to file a description of something now or
5 details. And DOE says we don't need details now, we
6 only need descriptions. When do we get the details,
7 Mr. Silverman?

8 And I don't mean just on this one, but
9 generally, if your application only needs a
10 description, when do we get the details? Is that at
11 phase 2 of Mr. Silbur's multi-phase?

12 >> MR. SILVERMAN: Did you say 139?

13 I'm not familiar with the numbers. There
14 were contentions made with material plans, a county
15 plan as I recall --

16 >> JUDGE FARRAR: I'll tell you in just a
17 second; 139 was emergency, yeah, dealing with
18 radiological emergencies.

19 >> MR. SILVERMAN: I had a different number
20 for that. The regulation and I -- it would take me a
21 moment to find it, the regulations specifies when
22 and it's required to be submitted.

23 >> JUDGE FARRAR: The description now, if I
24 read the rate carefully enough, I'll find out -- when
25 the details have to be supplied.

1 >> MR. SILVERMAN: Yes, sir.

2 >> JUDGE FARRAR: Now, if thigh challenged.
3 If they look for details now and we say sorry, it's a
4 bad contention, you can't get the details now.

5 Do they get to come back with a contention
6 at a later stage and say, now, we gave us the details
7 and we don't owe is that the time contention?

8 >> MR. SILVERMAN: If their contention when
9 we submit an emergency plan is that emergency plan is
10 inadequate, and they file that contention within a
11 reasonable amount of time after the emergency plan is
12 made available, that -- that's timely.

13 >> JUDGE FARRAR: That's timely. Still
14 they have to meet the other stuff. But they're not
15 out of time. They've raised it now?

16 You are saying, in fact, it's too early to
17 give you that now, go away?

18 >> MR. SILVERMAN: I can't challenge the
19 emergency plan that doesn't exist and is required to
20 be submitted. And I believe there is a rulemaking on
21 the security issues, some issue that specifies -- I
22 think it hasn't gone final yet, the exact dates when
23 the fiscal security TSPA plans have to be committed.
24 It's not now. It' s later

25 >> MS. ROBY: Your Honor, Deborah Roby for

1 Clark County:. A follow-up to that.

2 I believe there is case law that states if
3 an emergency plan is to be prepared at a later stage,
4 if that contention should still be admitted at this
5 stage and to prevent that from being admitted at this
6 stage may deny it down the road, you may be faced
7 with an untimely --

8 >> JUDGE FARRAR: So under your theory, you
9 would admit it and hold it in abeyance until it
10 became ripe?

11 >> MS. ROBY: Yes, I would admit it at this
12 stage.

13 >> JUDGE FARRAR: It would eventually do
14 the emergency plan?

15 >> MS. ROBY: Correct.

16 >> JUDGE FARRAR: And then they'd have to
17 file in effect --

18 >> MS. ROBY: At that point, there may be
19 an amended contention based upon the filing of the
20 information at that point. But the contention would
21 already be in. Then it would be an amended
22 contention then.

23 >> JUDGE FARRAR: Let me say,
24 Mr. Silverman, you don't agree?

25 >> MR. SILVERMAN: Ten seconds or less, the

1 regulation in 63.21, it's a sub element 21 which says
2 the description of the plan for responding or
3 covering a description of the plan for emergencies,
4 we laid out in our Answer why there was a history of
5 that, I believe, why that only requires a description
6 at this time of a full emergency plan is not
7 required.

8 So I wouldn't agree these should be
9 admitted now and held in abeyence.

10 >> JUDGE RYERSON: But again, you would
11 agree, once the plan exists, a proper consensus could
12 be filed at that time?

13 >> MR. SILVERMAN: Absolutely.

14 >> JUDGE FARRAR: Contentions -- contention
15 148, there is a mention of human factors. And I
16 think that's the one where you accuse the State of
17 Nevada of not coming up with enough information to
18 show the human factors was an issue. I seem to
19 recall we wrote in PFS where the company tried to win
20 the case on the theory that don't worry about the
21 mathematical formula said, we could count on the
22 human factors of the pilots' action to take care of
23 things.

24 And we said, no, no, in things nuclear,
25 human factors are bad things. We try to make sure we

1 don't rely on infallible human behavior, because
2 that's not how things go. Why is this not like, not
3 like that where we're -- where when you challenge
4 human factors, you have a very, very low threshold of
5 acceptance to get in.

6 You seem to show much to say, don't let
7 them rely on, you know, the human factors are going
8 to save the day.

9 >> MR. SILVERMAN: Well, two responses,
10 one, human factors can be interpreted in two
11 different ways.

12 One that I recognize, the principle in the
13 nuclear industry that the best protection is a
14 passive barrier and/or an engineered barrier. It's
15 active and then human action is sort of the lowest
16 level -- I appreciate that.

17 On the other hand, there's the other side
18 of the human factors is an analysis of building it
19 into the design and operation of a facility; it's a
20 positive thing.

21 It's something that's done in most
22 facilities I know, that I'm -- I'm afraid I'm going
23 to disappoint you. Again, I'm not familiar with
24 PFS in detail. I would have to go back and compare
25 the two. I apologize. It's hard for me to give you

1 an answer on that.

2 >> JUDGE FARRAR: Mr. Malsch, do you want
3 want to address that quickly?

4 >>MR. MALSCH: With the definitions of
5 local threshold, this would be the least case in
6 which one would ignore human factors considerations
7 might have an effect on the ultimate result. We have
8 had at least this one contention, that is a safety
9 148 and perhaps some others in which we specifically
10 challenge DOE's basis and assumptions reporting human
11 factors.

12 I think there are a number of factors in
13 which we thought was a ridiculous argument, the
14 contention should be dismissed because we presume
15 their quality assurance program function perfectly.
16 There would be no deviations and as far as human
17 factors are concerned, everyone performs perfectly,
18 we have absolutely no basis for that in this case at
19 all.

20 >> JUDGE FARRAR: A contention that Nevada
21 of 149 raised to me the question which others did,
22 Mr. Silverman, sometimes the contention seems
23 self-evident. You are saying they didn't supply this
24 and they didn't supply that.

25 But some contentions just seem

1 self-evidently to be raising a legitimate issue, but
2 your response never seems to recognize that.

3 You always say they fell short in terms of
4 affidavits or expertise or references or so forth.

5 Do have you a general -- I'm sorry I can't
6 ask you a more specific question.

7 I'm trying to let you understand at least
8 one board member's thinking in reviewing those, so
9 you have a chance to respond.

10 >> MR. SILVERMAN: Well, my response is
11 two-fold and being repetative.

12 The first is the contention may seem self
13 evident, if you conclude it is self-evident after
14 reviewing my answer, you have a judgment to make, you
15 may conclude it is admissible.

16 >> MR. SILVERMAN: I'm saying when you see
17 one side of the story, it may appear to be
18 self-evident. It may not.

19 >> JUDGE FARRAR: Fair comment. In
20 Contention 157 on volcanism, DOE raised the Bolotte
21 Defense, and, in effect, said- maybe it was the
22 staff. I think it was DOE, hold on. No, DOE raised
23 the Bolotte Defense, which was the name of a case in
24 the enforcement arena that, where a court of appeals
25 says you can't get standing to say NRC Enforcement

1 Act, proposed NRC enforcement action didn't go far
2 enough.

3 And you use that as a defense to say, in
4 that where the state wants more completeness and
5 accuracy, that Blotte is asking for that, then staff
6 can ask for that in an enforcement progressive
7 conservative. I didn't follow that.

8 >> MR. SILVERMAN: Give us just one moment
9 I will be brief. I haven't read the contention
10 again, in response, on the complete inaccuracy, if if
11 the applicant has not completed information in 63.7
12 and that's an enforcement matter. That's completely
13 an enforcement matter.

14 >> JUDGE FARRAR: It may be an enforcement
15 matter. In other words, if you file an incomplete
16 and inaccurate application, the NRC may get after you
17 and maybe some other agencies of government. But we
18 have a hearing here, the fact that they have that
19 authority to go after you in enforcement actions,
20 doesn't mean that the state or other petitioners
21 can't also say that that part of your application is
22 seriously deficient and therefore, your application
23 should not be granted.

24 Now, Boltte doesn't take away our authority
25 in a non-enforcement case. Bolotte takes away our

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1 authority in an enforcement case. I'm asking if it
2 takes it away in a non-enforcement case.

3 >> MR. SILVERMAN: Well, in skimming our
4 answer, I think the argument that we make are that
5 when staff reviews an application, they review it
6 first to see if its docketable. They then review the
7 legal requirements to see if it meets the legal
8 requirements. That's the licensed application for
9 review. I think what you were saying here is that's
10 different from an allegation that we have failed to
11 provide complete and accurate information is
12 different than an allegation that we omitted
13 information that should have been included generally.

14 >> JUDGE FARRAR: One is not exclusive of
15 the other. If the staff thinks you committed -- some
16 call it fraud, they'll go after the enforcement. But
17 the State and the other petitioners can also say that
18 application is unworthy of being granted, because
19 it's missing some stuff. That was mentioned -- .

20 >> MR. SILVERMAN: This is typically not a
21 complete and accuracy issue under 63.10, that's a
22 violation of a specific regulation in 63 that says
23 thou shall provide this information and we provided
24 it.

25 >> JUDGE FARRAR: When are you going to

1 Contension 162, when are you going to submit a
2 retrieval plan?

3 >> MR. SILVERMAN: It is not my intention
4 to have a flipant answer, I have to pin.touch-tone
5 regulation, I strongly suggest many in my answer.

6 >> JUDGE FARRAR: Seven years or 100 years?

7 >> MR. SILVERMAN: Ive I can get back to
8 with you that information.

9 Probably specific in the regulation.

10 >> JUDGE FARRAR: Well, if it is, we'll
11 find it. This came up mostly to my attention in
12 connection with Nevada 163. Sometimes your paragraph
13 six goes on for vast numbers of pages convincing us
14 that there is no genuine dispute as to a material
15 fact.

16 And after I read Nevada's six pages on that
17 subject and your six pages on that subject, my
18 conclusion is, it sounds like a dispute to me. And
19 if you can't be dismissive of them in a fairly short
20 time, isn't that a clue that there is something,
21 there is a real controversy here that we need to get
22 to the bottom of, not to a pleading ruling?

23 >> MR. SILVERMAN: Is that an indicator of
24 a genuine dispute because the two parties have gone
25 on at length about the issue? It may or may not be,

1 Your Honor.

2 >> JUDGE FARRAR: It may be a way to
3 encourage shorter filings, I suppose.

4 >> MR. SILVERMAN: It may be that it took
5 that long to explain the issue, but, nevertheless, at
6 the end of the day, with the -- it's apparent on its
7 face the matter did not come into dispute, these are
8 complex issues, particularly in the -- .

9 >> JUDGE FARRAR: Looking back on 149, I
10 think that's one of the ones where the state said,
11 you don't have any reasons that you've put forward
12 on this particular facet of the case. And you snap
13 back at them, well, you didn't give any reason saying
14 why didn't we give any reasons?

15 If you have no reason, isn't that a valid
16 contention?

17 You have fallen down on the job by not
18 supporting what you have done, how can they say more
19 than that?

20 How can they have reasons to counter your
21 lack of reasons?

22 >> MR. SILVERMAN: They would have to
23 explain, among other things, where in the regulations
24 it requires to provide, when we say reasons, on a
25 technical basis, maybe, in other words, that there

1 was a requirement to provide the technical basis on
2 that information, their burden initially.

3 >> JUDGE FARRAR: Mr. Malsch, I have one
4 question for you .

5 You have a number of contentions starting
6 at 184 that deal with land use. And I kind of split
7 them into two parts, one of which, one batch of them
8 says they don't have the necessary approvals yet to
9 build this thing. They have to get all these
10 different approvals.

11 Why is that not like our old cases where we
12 say, we're going to award the license for the reactor
13 even if they don't have this state permit and that
14 state permit because either they'll get there, that's
15 not our business, either they'll get those, or they
16 won't get them and they can't proceed.

17 What is different about that first half of
18 your land use issues where we can't just say, let's
19 wait and see if they get those. We don't care if
20 they get those permits, that's somebody else's
21 business.

22 >> MR. MALSCH: I think the distinction is
23 as in this case as our contention provides and our
24 Reply provides, Part 63 requires that the rights or
25 approvals be obtained.

1 >> JUDGE FARRAR: So it's our regulation
2 rather than the state of Connecticut's regulation?

3 >> MR. MALSCH: That's correct. We're not
4 arguing as a general proposition that everything
5 should be held up because of some other permit
6 requirement. We're arguing Part 63.

7 >> JUDGE FARRAR: Mr. Silverman, on the
8 second batch of those lands use things -- oh and on
9 the one or two of the aircraft ones, particular the
10 ones about the fly overs and so forth, you say, don't
11 worry about it, we don't have the permission yet, but
12 we'll get the permission.

13 And I think the second batch of the land
14 use said, you don't have the authority to keep our
15 people off the land. These are people who would get
16 an excessive dose, presumably would get some kind of
17 an excessive dose.

18 Now, the aircraft when you say, we'll just
19 go to the Chief of Staff of the Air Force and we'll
20 get those permits and the people won't fly over.
21 What we learned in the PFS case is the Chief of Staff
22 of the Air Force doesn't like getting all these
23 requests because it severely limits the Air Force's
24 ability to train their people.

25 So why are -- any contention that says you

1 don't have the control you need to have, why are
2 those not valid contentions. And when you leave them
3 lingering around and when you get those permissions,
4 then the contention goes away.

5 But I, after what I learned in PFS, I'm
6 reluctant to say, don't worry about it, you will get
7 those permits.

8 In fact, the PFS project is not going
9 forward today, because after finally winning the case
10 with us, the company was unable to get a couple
11 permits from other agencies that it seemed they ought
12 to have been very routine.

13 >> MR. SILVERMAN: DOE counsel is
14 conferring. One moment, Your Honor.

15 It seems to me the way to deal with this,
16 if it isn't a licensed commission, they move on.

17 >> JUDGE FARRAR: So, does that mean,
18 Mr. Silber, you admit the contention and work out the
19 condition or you don't admit it and trust the staff
20 to put it in the contention and give me the good
21 suggestion but give me the mechanics of how you do
22 it?

23 >>MR. SILBER: I think you can do it either
24 way.

25 >> JUDGE FARRAR: Okay, thank you.

1 >>MR. SILVERMAN: I understand unlicensed
2 conditions may be appropriate as a result of a
3 proceeding on the admitted contentions, and again,
4 not being completely familiar with the details of
5 those specific contentions, the issue depends on
6 whether we are required to have those permits now or
7 not as a condition or a prerequisite of the condition
8 without regard to precisely what we have said in the
9 answers, which I have to go back and look at.

10 >> JUDGE FARRAR: Why would you want to
11 authorize you to build a multi--billion dollar
12 facility and then at the phase 2 of this multi-phase
13 proceeding say, oh, that farmer can still come on the
14 ground, because he has an easement, sorry, you can't
15 get a use of possession permit, why would we want to
16 government to function that way?

17 >> MR. SILVERMAN: Well, the first response
18 to that thing is you would not have that contention
19 if there was not in fact a requirement to have that
20 permit as a condition of getting the construction
21 permit. Number 1. Number 2, in that regard, in
22 regard to your question what you were referring to,
23 where you have any number of environmental permits
24 that may come later, which the NRC doesn't hold the
25 licensing up for. Same thing, mainly, get those

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1 permits Yet, the licensing goes forward. I
2 understand Mr. Malsch's point regarding the
3 legislation required, certainly it's a requirement.
4 But your point, it's no different.

5 >> JUDGE FARRAR: Thank you all for the
6 quick answers to I know you weren't particularly
7 prepared for those questions, but so I look forward
8 to at least get your views that will help us as we go
9 back through the action. Chairman chairman thank
10 you, Mr. Farrar .

11 >> JUDGE RYERSON: Why don't we take one
12 last break for ten minutes or eight minutes, come
13 back at 4:30. What I'd like you to give some thought
14 to. During the short break, we will give thought to
15 whether we have final questions.

16 We'd like to give as we said at the
17 beginning, we'd like to give you an opportunity to
18 address anything on today's topics. You'll have two
19 more days. There is no need for a grand summation of
20 your position. And honestly -- grand summation of
21 your position. Honestly, use it at this point.

22 It's been a long day, we don't need to hear
23 anything that you don't want to give us. But we'll
24 give you eight minutes and we'll be back at 4:30.
25 We'll see if we have further questions and we'll hear

1 from whoever would like to speak at that time.

2 >> JUDGE RYERSON: Please be seated. All
3 right. You will be either pleased or displeased to
4 know that the Board has at this time no further
5 questions.

6 Now, we will be either pleased or
7 displeased as the case may be to see further
8 enlightenment you wish to share with us. Again, I
9 emphasize there will be two more days before the two
10 other boards, so we're really not looking for a grand
11 summation of any kind. We're looking to give you an
12 opportunity to crisply address any of today's issues,
13 where there just wasn't an opportunity or you really
14 thought of an important point leader. So in that
15 spirit, why don't go around the room and ask the NRC,
16 staff anything to add?

17 >>MS. YOUNG: Mitscy Young for the staff,
18 no further comments.

19 >> MR. SILBERG: Three very short points,
20 first, thank you for giving us the opportunity. The
21 second, with respect to materiality, we believe the
22 contention can be material even if there is no
23 violation of regulation alleged. Second with
24 materiality, the contention that argues for over
25 conservative can be just as material as the one that

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1 argues for under-conservatism. Finally I have been
2 litigating contentions s for 40 years. I
3 can't speak for the other party's contentions, but I
4 know ours are more specific with more basis and more
5 care to their legal underpinning than any contentions
6 I have ever seen in a law practice before this.

7 Chairman: Thank you, Mr. Silberg.
8 Mr. Silverman?

9 >> MR. SILVERMAN: We appreciate it as
10 well, excellent discussion and exchange, we have
11 nothing further. Chairman Mr. Malsch, for Nevada.

12 >> MR. MALSCH: One ten-second comment,
13 first of all, we appreciate the time the board spent
14 today on the issues involved, secondly, I want to
15 pick up on an interesting observation or hypothetical
16 observation by judge Farrar, which is when you are
17 looking at specific facts and contention, you look at
18 our contention and DOE's reply and say, who can
19 figure this out?

20 I think the case law clearly indicates the
21 contention under those circumstances should get
22 admitted and I refer the board to LBP-06-when the
23 Plaver Decision 112, which stands for the newly
24 contentions at the admissibility stage the boards or
25 commission should draw inferences in favor of

1 admission.

2 CHAIRMAN RYERSON: Thank you Mr. Malsch,
3 Mr. List, anything for the four counties?

4 >> MR. LIST: If I may, Your Honor, at the
5 risk of violating a pattern that seemed to have
6 started here, I would like to take a few moments to
7 discuss what we believe is for the future of our
8 counties, from the public standpoint is
9 extraordinarily important. This is our one chance to
10 address this board and to talk to Your Honors about
11 what we think are critical issues for our people.

12 You mentioned at the outset of today's
13 proceedings that, that we don't have to win the case
14 here today, and that, that what we do have to show is
15 a genuine issue, a genuine dispute. I think you also
16 said that we don't have to decide it on the merits
17 today, and we recognize that.

18 And I think that some of the legal
19 principles which were collected in the Crowe-Beaut
20 case are worth thinking about as we conclude these
21 discussions about the NEPA contentions in particular.
22 The petitioner in that case reminded us is not
23 required to prove its case if the contention stays.
24 We must only make a minimal showing that material
25 facts are in dispute.

1 And we believe that we have done that. And
2 we've met the depth required in the documentation
3 that we have submitted. And I would just suggest
4 that, that it might be worthwhile for the board or
5 your staff to look back at the original FIS, the
6 final impact statement and contact that with the
7 supplemental final supplemental impact statement.

8 The supplemental environmental impact
9 statement changed the size and the weight of the
10 trucks and did not do the kind of analysis that they
11 did previously for the other trucks that had
12 originally been proposed. They went from, from legal
13 weight trucks to overweight trucks. Substantial
14 difference. They went from trucks less than 80,000
15 pounds to trucks averaging around 115,000 pounds; a
16 significant difference. Difference in length as
17 well. They also increased between those two
18 environmental impact statements, the number of
19 shipments from 1100 to 2700.

20 So they nearly doubled the weight on the
21 trucks and they more than doubled about 150% increase
22 of the number of truck shipments. So 2700 truck
23 shipments, they've given an awful lot of concern in
24 the environmental supplemental Environmental Impact
25 Statement to 2800 train shipments, but very, very

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1 sparse consideration to 2700 truck shipments.

2 We believe that our affidavits that support
3 our position on NEPA Contention Number one are very,
4 very clear, both the Affidavit and the original
5 petition, Number three, and the Affidavit or
6 attachment Number one to the reply laid out in depth
7 the enormous impact that these truck shipments will
8 have.

9 The -- I think it's totally unrealistic,
10 also, if you look at the supplemental Environmental
11 Impact Statement, to see that they have considered no
12 routes in Nevada off of the interstate freeways, that
13 is, there are two across Interstate-15 and
14 Interstate-80. The only route they've considered to
15 the repository, itself, is from Las Vegas off of
16 Interstate-15.

17 It's the only one that's shown on any of
18 the exhibits or any of -- or discussed in any of
19 their documentation.

20 The fact is that DOE policy presently
21 prohibits even low-level waste from coming to Las
22 Vegas. Secondly, by DOE's own admission, the state,
23 under DOT regulations designates the off interstate
24 routes and it's unimaginable the State of Nevada
25 would ever designate highway 95 from Las Vegas out to

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1 the site, bringing in traffic to this community.

2 And, thirdly, the level of service in Las
3 Vegas is by DOE's own admission, congested.

4 And so, we -- what we're suggesting is that
5 the omission of the realistic fact that these
6 shipments are gonna take place -- going to take place
7 not from Las Vegas but through our four counties. It
8 was talked about in the original final impact --
9 Environmental Impact Statement, that none of the
10 supplemental.

11 I think we've shown that clearly through
12 the Massie Affidavit and through the two patent
13 affidavits. I should also mention that they very
14 briefly touched -- briefly touched on task in Nevada
15 off the interstate freeways. They picked five
16 locations, all of them near get a 510. Three of them
17 on 95 South, where there is unlikely to ever be a
18 single shipment seen.

19 One of them on the road over to Death
20 Valley, which would be a very unusual place to have
21 shipments, although, there may be some, and one right
22 at the gate but none in the 40 counties.

23 Each of the locations they've chosen is in
24 the middle of nowhere, away from the community, away
25 from the town, when in reality, these shipments will

1 go on two-lane highways, right through these
2 communities. These are inextricably connected to
3 this repository project.

4 There is no doubt if one considers what
5 makes this plan, this whole plan go. They have to,
6 they have to consider it. The -- I think similarly,
7 and they've attempted to do some calculation on
8 radiation doses for the maximum exposed workers and
9 members of the public in the spring, on 95 South of
10 the repository where it's unlikely there will ever be
11 a single shipment.

12 The SEIS also estimates the total number of
13 shipments by train, as I mentioned, they go through
14 extensive analysis of the details and the procedures
15 and processes necessary to deal with the train. Not
16 only in this EIS but also, of course, in the county
17 rail analysis and the Environmental Impact Statement
18 there.

19 We think that our affidavits clearly show
20 new information, within the meaning of 51.109 and we
21 note that the EIS does address environmental impacts
22 of transportation by truck on a national scale, but
23 they don't do it in Nevada and the defect in that
24 approach to it, is that they simply don't address the
25 environmental impacts which will result in the

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1 confluence of trucks coming off of the Interstate and
2 proceeding to the Yucca Mountain projects. Every
3 single truck has to come down that two-lane highway.

4 And so what you is a convergence, sort of a
5 funneling of thousands of traveling through several
6 hundred miles through small towns adjacent to the
7 counties, adjacent to my county. And to ignore that
8 is a violation, we believe, of the case law and of
9 the regulation. There is zero recognition resulting
10 in the environmental impacting damage on the roads,
11 themselves. The burden of the sequential impact on
12 the first responders which are enormously
13 significant.

14 The absence of communication interrupt our
15 operability among first responders and law
16 enforcement on these counties an communities that
17 adjacent to the site.

18 The affidavits demonstrate that there are a
19 tremendous absence of staff and individuals dependent
20 largely on volunteers. They don't have the
21 equipment. DOE attempts to gloss over that by
22 sayingwell, we are going saying wellto give them the
23 training and planning required under section 180-C of
24 the Nuclear Waste Policy Act.

25 But planning and training certainly does

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1 not equip or staff these people to deal with the
2 emergencies that clearly are gonna rise.

3 So we suggest to you that the NEPA document
4 is absolutely inadequate. They have not taken a hard
5 look at the consequences of this project and of the
6 important aspect of it. They have not come up with a
7 mitigation plan at all. In so far as the matters
8 that I just touched upon and by which, of course,
9 they are required to do.

10 Even if they haven't mentioned some of the
11 mitigation measures, that's insufficient. They have
12 to have a reason discussion.

13 So for all these reasons, they fall short
14 of what the law requires and these are critically
15 important matters to the residents of this community.
16 We're not out to kill this project. Let me make that
17 clear. The people in these communities have taken a
18 constructive approach. They're the ones that live
19 closest to the project.

20 And they have every right to insist that
21 the documentation done in this matter be done in
22 accordance with law and that they have an opportunity
23 to come in and be heard and, and I think it's also
24 worth mentioning that the DOE, itself, in a previous,
25 in the final Environmental Impact Statement, actually

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1 said they were responsible for developing a response
2 policy. And yet, they didn't do it. They don't talk
3 about it in the supplemental EIS. How big are the
4 impacts?

5 We've made an effort on our own to quantify
6 it. There is a reason these units of government are
7 called defective units.

8 Congress calls them that.

9 That's because they are defected. Our
10 analysis shows that about one million dollars in
11 highway improvements are needed -- \$185 million are
12 needed in highway improvements. 16 million in
13 capital costs to equipment or first responders, an
14 annual cost of another \$15 million and 7 million to
15 establish the ability to communicate.

16 Currently a sheriff in one county can't
17 talk to a sheriff in another county or to the highway
18 patrol or to the ambulance company or to the
19 volunteers that run them to the hospital, the ward
20 of the hospital. None of them are able to do that.

21 That's another \$7 million. These are poor
22 counties as the affidavits show that don't have the
23 money to deal with that.

24 So they -- people need to be put on notice.
25 These things need to be quantified and discussed in

1 such a way that it can be addressed.

2 >> JUDGE RYERSON: Mr. List, I want to
3 assure you this board and this other board will be
4 reading each of the 328 or 329 contentions we
5 appreciate you filing. If you can wrap up in the
6 next minute or so, I appreciate it.

7 >> MR. LIST: I'm almost to the end. I
8 appreciate your indulgence, Your Honor. In our way,
9 we've taken a bit of a hard look to look at these
10 things and do what the DOE should have done.

11 We've demonstrated that in our Affidavits.
12 I also want to mention in closing that this is the
13 time that this contention needs to be taken up. It
14 should not be deferred. It takes years to design and
15 to put together the kind of improvements we're
16 talking about and then to construct hundreds of miles
17 of highway, to put together the funding that's
18 necessary and these things don't all get built at
19 once.

20 It should not be put off until the time
21 when the, when the actual time comes, the day comes
22 when they're ready to complete the, have completed
23 the construction. And they're ready to put the
24 material in.

25 So in essence, I appreciate your indulgence

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1 and I want to simply say that we feel very
2 passionately about this and trust this Board and the
3 other boards to read carefully and to take into
4 account matters we put forth. Chairman thank you.
5 Mr. List, Mr. Sullivan for California.

6 The NRC has an obligation to, under NEPA to
7 consider the environmental impacts of not just the
8 construction, but of the repository, but also
9 connected aces, even if they're not owe actions even
10 if they're not under regulatory control.

11 Transportation and construction are inextricably
12 linked. It's irrational to do just one or the other.
13 They have to go together. The NEI case, NRC's own
14 regulations and the hearing notice all allow parties
15 to litigate substantive NEPA issues in this
16 proceeding. I want to talk a little bit about what
17 has not come before us. Specifically, in the
18 Nebraska versus DOE case. California -- Nevada
19 versus DOE case. So res judicata, collateral
20 estoppel don't apply to us. There were few issues
21 decide on the merits in that case. Is court looked
22 at the 2002 repository EIS. No court has ever
23 considered the other documents since that 2000 EIS.

24 In 2008, the Department of Energy issued a
25 record decision that said that before we analyze the

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1 route and the minor route is environmentally
2 preferably. Over preferable. But we're not going to
3 choose that one. No court has ever looked at the
4 difference between the minor and the Kelley route and
5 whether or not DOE adequately analyzed that.

6 No court has ever ruled on transportation
7 impact outside of Nevada, whether those have been
8 properly analyzed by DOE. So we make it all these
9 issues as outlined in our contentions are proper for
10 this proceeding.

11 >> JUDGE RYERSON: Thank you, Mr. Sullivan.
12 Mr. Huston. His second -- Yucca Mountain -- his
13 secretary testified, I think we can do better. All
14 of the parties here have filed contentions, agree in
15 some part or parcel or portions or spirit with the
16 Secretary of Energy. My concern is that DOE is
17 wasting our time and treasury and those in Nevada and
18 California and that the counties as represented here,
19 and the other parties and the U.S. treasury, itself,
20 and this proceeding presently lacks foundation and
21 DOE candor at its very corridors.

22 If so, DOE should withdraw at its earlier
23 opportunity as topics discussed today may, in fact,
24 have no relevance or values or to the public. Only
25 if DOE intends to proceed to construction are all our

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1 efforts in the expenditures and time here today and
2 in the future justified and have any value. We're
3 all -- the administration is determined not to
4 proceed. All we lack is withdrawal of the LA.

5 >> JUDGE RYERSON: Mr. Huston, thank you.
6 I, at this point, we are dealing with analyzed
7 application that is in front of the NRC and it's
8 not -- it is really not analyzed issue that is
9 relevant to this Board as to whether DOE should or
10 should not be withdrawing the application. If you
11 have comments beyond that, of a brief nature, please,
12 please continue.

13 >>MR. POLAND: Thank you, Your Honor, yes.

14 On behalf of the Timbisha overcytokines, program, we
15 understand there will be native American issues
16 discussed tomorrow. However, because our sole
17 contention is that NEPA contention, those are the
18 issues put forth before the Board today, I wanted to
19 very briefly address those. As I mentioned, the
20 Timbisha oversights program proffers just with you
21 one contention that notes DOE's conception in the
22 EIS and the SEIS that contaminants from the
23 repository might contribute to and discharge into the
24 Death Valley Springs.

25 That contention is supported by affidavits

1 of members of the Timbisha Shoshone Tribe that live
2 in the Death Valley area as well as analyzed expert
3 anthropologist that tribal cultural religious and
4 other interests, which are based on the purity of the
5 water, including Death Valley, would be greatly
6 harmed by the contamination of those springs.

7 It's notable that NRC staff does not impose
8 the admissibility of this single NEPA concept that
9 the Timbisha oversights program is proper. The DOE,
10 however, does oppose this contention and I would like
11 to address two points of difference. First,
12 DOE argues that this contention does not raise a
13 significant issue and is not material. Now, some
14 people might feel Native American religion and
15 culture as history.

16 Although, it is true, the Timbisha and
17 Shoshone practice their religion for thousands of
18 years. Their culture and religious practices which
19 revolve around procuring springs and water are very
20 much alive. They are practiced now as they were a
21 thousand years ago.

22 The notion that the devastation of analyzed
23 entire people's cultural and religious practices
24 stretching back thousands of years is not significant
25 or material. It is culturally myopic. It is

1 offensive and it is just plain wrong and CE-2
2 regulations and NRC regulations and NRC guidance.

3 I suspect that for many of us in this room,
4 our cultural heritage and our religious practices
5 are not just significant to us, they are central
6 parts of our lives. It is no less so for the
7 Timbisha Shoshone. Second point of difference.
8 DOE claims that it took a hard look at cultural
9 impacts that the regulations required of them to take
10 and that that hard look is reflected in the EIS.
11 What the DOE sites for this proposition is a single
12 page in the FDIS and a single page in the SDIS.
13 Both pages essentially, the same thing. The passage
14 from SDIS reads as follows:

15 "The American Indian people believe
16 cultural resources are not limited to the remains of
17 native ancestors, but include all natural resources
18 and geologic formations in the region, such as plants
19 and animals and natural land forms. Equally
20 important are water resources and minerals. "

21 Now, this is supposedly the hard look at
22 DOE took at the impact on
23 Timbisha-Shoshone interests. This is patently
24 deficient in two ways. It lumps together the
25 cultural interests of all American Indian tribes as

1 though they are identical and there are no
2 differences.

3 Second, it says only that water resources
4 and minerals are important. It mentions nothing
5 about the devastating impact on Timbisha culture and
6 religious practices that contamination of the Death
7 Valley Springs would have. In sum, if the purpose of
8 NEPA and the implementing regulations of the CEX and
9 NRC is to ensure that the decision-makers in this
10 proceeding have before them analyses of all the
11 important effects and results from the repository, it
12 is clear that the contentions, the Timbisha Oversight
13 Program has raised are significant, they are Steeler,
14 they will help develop a sound record. They should
15 be admitted. Thank you.

16 >> JUDGE RYERSON: Thank you. Nye County.
17 Mr. Andersen.

18 >. MR. ANDERSEN: Yes, Your Honor. On
19 behalf of Nye County, first of all, I want to express
20 our appreciation also as the host county for the
21 repository for this opportunity to discuss with you
22 contentions which report that the residents in my
23 county and to their safety and, second, Judge
24 Ryerson, you did a far more cogent job of explaining
25 the inconsistent statutory, regulatory and notice

1 requirement apply to the as missability of NEPA than
2 I ever could have. So we came with some trepidation
3 that might come out with a principle that my county
4 could not live.

5 We are on the fence that the Board
6 recognizes in determining the NEPA contention is not
7 tied to the old outcome on the decision on whether
8 or not to construct the project but, rather, whether
9 or not analyzed omission was significantly and
10 environmentally under consideration from the
11 Environmental Impact Statement should be
12 supplemented. That's the outcome of the concern.

13 Finally, we support the standing of NEI of
14 a party in this proceeding and have joined in
15 adopting to their contentions and they've adopted to
16 some of our contentions. We do that for a number of
17 reasons, but we believe that meet all the Supreme
18 Court and NRC standards for standing as a party after
19 their full participation at this point and perhaps
20 most importantly because we believe NEI members have
21 hasn't handled fuel for many years and historic and
22 expertise in those issues and are essentially to
23 NRC's resolution, informed resolution. Thank you,
24 Your Honor.

25 >> JUDGE RYERSON: Thank you, Mr. Andersen.

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1 Mr. Miss Houck.

2 >> MS. HOUCK: Thank you, Your Honor, the
3 tribe would like to thank the Board. The
4 Timbisha-Shoshone, works with the State of California
5 and other parties regarding the environmental
6 contention. We also concur with the statements made
7 by Mr. Poll and I'm not going to repeat those. But I
8 will note by virtue of the language and the
9 regulations by being certified as analyzed effective
10 native tribe the Timbisha-Shoshone Tribe may suffer
11 adverse impacts to its land. That would put the
12 nuclear waste policy act and the state the
13 Timbisha-Shah shownee tribe a generic or two
14 paragraph reference to potential impossibility to
15 native Americans.

16 There is nothing in the environmental
17 document that addresses the specific substantial and
18 adverse impacts that the tribe suffers as a result of
19 this project back located in the proposed area.
20 Therefore, based on the discussions today regarding
21 what is significant and material, this document is
22 lacking significant and material information that is
23 required and, therefore, the document would be
24 fatally flawed if decision-makers don't count
25 information as to the direct impact that the tribe is

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1 going to suffer. So we would ask the board to take
2 that into consideration wo when the contention is
3 proffered by the tribe.

4 >> JUDGE RYERSON: Thank you. For Clark
5 county, Ms. Roby.

6 >> MS. ROBY: Thank you very much, on
7 behalf of caloric county, we, too, would like to.
8 Thank the board, for the thought and preparation
9 performed today. Very briefly, we do agree with the
10 comments, closing remarks by the state of Nevada,
11 state of California and the four counties with
12 respect to environmental impacts. There is no
13 question that in the event of analyzed emergency,
14 Clark County will be among the first responders and
15 evaluation of impacts related to transportation,
16 related to the licensing of this repository are
17 absolutely important to Clark County. And finally,
18 we agree with the State of California with respect to
19 the admissibility of contentions and where there is
20 substantial discussion, in the pleadings, it ought to
21 fall in favor of ad mission. That type of discussion
22 indicates that there is a genuine issue of material
23 fact proper for a full and are robust record. Thank
24 you.

25 CHAIRMAN RYERSON: Thank you. For White

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1 County, Mr. Sears.

2 >> MR. SEARS: I am sure you are tired of
3 being thanked. Turning for your attention however I
4 would like to say something on behalf of the voters
5 that sent me here.

6 White Pine County is north of this project
7 and the tendency may be to think that we are north of
8 this project that we are upwind of this project and
9 we are -- that, okay, if you read our pleading, which
10 I'm sure you have, our concern, our position is that
11 the DOE repository situation is something like a
12 chemical company kicking mercury into a river.

13 And then looking upstream and saying, no
14 problem. We are downstream from that mercury spill.
15 I'd ask you to take a careful look at our expert
16 affidavits that show that. Thank you Chairman.
17 Thank you. And Mr. Williams.

18 >>MR. WILLIAMS: We are at the end of the
19 line, I think our wise choice would be to hold our
20 comments until tomorrow. Thank you very much.

21 >> CHAIRMAN RYERSON: All right. Thank
22 you all. That concludes what we intended to cover
23 today. One thing I want to mention before a couple
24 other words, is we've run just slightly over 5:00.
25 They will be hoping that you leave the facility

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1 fairly promptly. We have gone a little over our 5:00
2 time. You know, as our March 18 Order indicates,
3 Construction Authorization Board 2 will be here at
4 9:00 tomorrow to continue primarily on the issues
5 that are identified in Appendix B and perhaps most
6 importantly, on behalf of our Board, I really would
7 like to thank all of you for your comments.

8 We also appreciate that you are required by
9 the rigorous briefing schedule that has been imposed
10 in this matter, to briefly analyze enormous number of
11 issues in a short period of time and we are very
12 appreciative of that.

13 We know you have done a lot of work in a
14 limited time period and we expect to and hope to
15 mirror that as we move into a decision phase and have
16 a prompt decision and a timely decision for you. Any
17 comments to Judge Farrar?

18 Again, thank you very much. We stand
19 adjourned until tomorrow morning at 9:00.

20 (Whereupon, proceedings were concluded.)
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