

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3
4 ATOMIC SAFETY AND LICENSING BOARD

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7 In the Matter of)
8) Docket No. 63-001-HLW
9 U.S. DEPARTMENT OF ENERGY)
High-Level Waste Repository)

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13 TRANSCRIPT OF PROCEEDINGS

14 Oral Argument on Admissibility of Contentions

15
16 Before the Administrative Judges:

17
18 ASLBP BOARD

19 09-878-HLW-CAB03

20 William Froehlich, Chairman

21 Thomas S. Moore

22 Richard E. Wardwell

APPEARANCES

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For the Nuclear Regulatory Commission Staff:

Mitzi Young
Kevin Roach
Dan Lenehan

For the Nuclear Energy Institute:

Jay Silberg
David Repka

For the Department of Energy:

Paul Zaffuts
Don Silverman
Michael Shebelskie

For the State of Nevada:

Martin Malsch
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
Kevin Bell
Susan Durbin

For the Caliente Hot Springs Resort:

John Huston

1 APPEARANCES (Continued)

2 For the Native Community Action Council:

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 Nuclear Energy Institute. Good morning.

2 >> JUDGE FROEHLICH: Thank you.

3 >> MR. REPKA: David Repka, NEI.

4 >> JUDGE FROEHLICH: For the Department of
5 Energy.

6 >> MR. ZAFFUTS: Paul Zaffuts, DOE.

7 >> MR. SILVERMAN: Don Silverman, DOE.

8 >> MR. SHEBELSKIE: Mike Shebelskie, DOE.

9 >> JUDGE FROEHLICH: For the State of
10 Nevada.

11 >> MR. FITZPATRICK: Charles Fitzpatrick,
12 State of Nevada.

13 >> JUDGE FROEHLICH: Please turn on your
14 mike.

15 >> MR. FITZPATRICK: Charles Fitzpatrick,
16 State of Nevada.

17 >> MR. LAWRENCE: John Lawrence, State of
18 Nevada.

19 >> MR. MALSCH: Marty Malsch, State of
20 Nevada.

21 >> MR. LIST: Good morning, Your Honor,
22 Robert List on the behalf of the four counties of
23 Churchill, Esmeralda, Lander, and Mineral.

24 >> MS. GORES: Jennifer Gores on behalf of
25 the four counties.

1 >> JUDGE FROEHLICH: The State of
2 California.

3 >> MR. SULLIVAN: Good morning, Tim
4 Sullivan for the State of California.

5 >> MR. BELL: Good morning, Kevin Bell,
6 State of California.

7 >> JUDGE FROEHLICH: For Caliente.

8 >> MR. HUSTON: Good morning, Your Honor.
9 John Huston for Caliente Hot Springs Resort.

10 >> JUDGE FROEHLICH: Okay. For the Nevada
11 Counties of Lincoln and Eureka.

12 >> MS. CURRAN: Good morning. I'm Diane
13 Curran for Eureka County, and I wanted to let you
14 know that Mr. Whipple for Lincoln County is in a
15 court appearance and will be here a little later.

16 >> JUDGE FROEHLICH: Thank you.

17 >> MR. POLAND: Good morning, Your Honor,
18 Doug Poland on behalf of the Timbisha Shoshone Yucca
19 Mountain Oversight Program, Non-Profit Corporation.
20 And with me this morning is Joe Kennedy, Chairman
21 with the Timbisha Shoshone Tribe.

22 >> MR. JAMES: Good morning. Greg James
23 for the County of Inyo. And the county has invited a
24 representative of the State of California to join us
25 at counsel table.

1 >> MS. DURBIN: Good morning, Your Honor,
2 Susan Durbin for the State of California.

3 >> JUDGE FROEHLICH: For the County of Nye?

4 >> MR. ANDERSON: Good morning, Your Honor.
5 Robert Anderson on behalf of Nye County.

6 >> MR. VanNIEL: Morning. Jeff VanNiel on
7 behalf of Nye County.

8 >> MS. HOUCK: Good morning, Your Honor.
9 Darcie Houck on behalf of the Timbisha Shoshone
10 Tribe, and with me this morning is Ed Beanan of the
11 tribal council.

12 >> MS. ROBY: Good morning, Debra Roby on
13 behalf of the Clark County, Nevada.

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

16 >> MR. SEARS: Good morning, Judges. Rich
17 Sears on behalf of White Pine County.

18 >> DR. BAUGHMAN: Good morning, Your Honor,
19 Dr. Mike Baughman representing White Pine County.

20 >> MR. WILLIAMS: Scott Williams, Your
21 Honor, for the Native Community Action Council.

22 >> MS. LEIGH: Good morning, Your Honor.
23 Rovianne Leigh also on behalf of the Native Community
24 Action Council.

25 >> JUDGE FROEHLICH: Thank you.

1 This Board will address the issue set forth
2 generally in Appendix C of the March 18th, 2009,
3 order, setting the terms, logistics, and questions
4 for oral argument.

5 We also have additional specific questions
6 which were not included in that appendix. At this
7 point, are there any preliminary matters which any of
8 the parties or participants may wish to raise?

9 Hearing none, let's begin generally with
10 those items that were designated item 4 on Appendix C
11 from the March 18th order. Item 4 deals with
12 concerns with climate change related to human
13 activity. You may recall on the first day of the
14 oral arguments in this proceeding, Judge Ryerson of
15 CAB3 relayed a request from this Board that all
16 parties review their proffered contentions to see
17 which contentions, if any, would be affected by the
18 Commission's recent amendment to the Part 63 rules,
19 specifically 63.305 and 63.342.

20 Could each petitioner, perhaps starting
21 from the back with the Native American -- Native
22 Community Action Council tell us which of their
23 contentions, if any, would be impacted by this
24 amendment. And please remember to give your name and
25 who you represent when speaking. If we could start

1 over there.

2 >> MR. WILLIAMS: Scott Williams for NCAC,
3 Your Honor. There are two contentions labeled
4 Miscellaneous 2, which has to do with the use of
5 water by native people and contention -- NEPA
6 Contention 1, which has to do with the impacts of the
7 facility on the cultural uses of the land and water
8 by native people.

9 >> JUDGE FROEHLICH: White Pine.

10 >> MR. SEARS: Sears, White Pine County.
11 None, Your Honor.

12 >> JUDGE FROEHLICH: County of Clark?

13 >> MS. ROBY: Debra Roby, Clark County.
14 None of our contentions are directly affected by the
15 changes to Part 63.

16 >> JUDGE FROEHLICH: The Timbisha Shoshone
17 Tribe?

18 >> MS. HOUCK: Yes, Your Honor, we do have
19 one contention that deals specifically with climate
20 change, and that one is TIM NEPA Contention 08. And
21 their may be some impact to that contention, but I
22 don't believe the other ones.

23 >> JUDGE FROEHLICH: Okay. You're
24 Ms. Houck?

25 >> MS. HOUCK: Yes. I apologize.

1 >> JUDGE MOORE: I'm sorry, Counsel. I
2 couldn't hear you. Could you repeat those, please?

3 >> MS. HOUCK: Yes, Your Honor. Ms. Houck
4 for the Timbisha Shoshone Tribe, and it would be TIM
5 NEPA 08, regarding future climate change impacts.

6 >> JUDGE FROEHLICH: County of Nye.

7 >> MR. VanNIEL: Jeffrey VanNiel on behalf
8 of Nye County. None of our contentions are directly
9 impacted by the change, Your Honor.

10 >> JUDGE FROEHLICH: Inyo.

11 >> MR. JAMES: Greg James, County of Inyo.
12 None of our contentions are directly affected,
13 Your Honor.

14 >> JUDGE FROEHLICH: Thank you. Please.

15 >> MR. POLAND: Doug Poland for Timbisha
16 Oversight Program, or TOP. Your Honor, we have just
17 one NEPA contention. I do not believe that it will
18 be directly impacted. There may be some impact, but
19 I don't think that it would change the fundamental of
20 the contention we've raised.

21 >> JUDGE FROEHLICH: Nevada counties of
22 Lincoln and Eureka.

23 >> MS. CURRAN: We don't have any
24 contentions Your Honor.

25 >> JUDGE FROEHLICH: Yes. Thank you.

1 Caliente.

2 >> MR. HUSTON: Your Honor, none are
3 affected. Thank you.

4 >> JUDGE FROEHLICH: State of California.

5 >> CALIFORNIA: Tim Sullivan. Tim Sullivan
6 for California. All of our contentions are based on
7 NEPA. We don't think that the change in the
8 regulation affects any of those contentions.

9 >> JUDGE FROEHLICH: Okay. Four counties.

10 >> MR. LIST: Yes, Your Honor, Robert List
11 on behalf of the Four Counties. None of our
12 contentions are affected or impacted.

13 >> JUDGE FROEHLICH: State of Nevada?

14 >> MR. MALSCH: Thank you, Your Honor.
15 Marty Malsch for the State of Nevada. We also have
16 reviewed all of our contentions, focusing, of course,
17 on our safety contentions because those are the ones
18 that are potentially impacted. And we reviewed all
19 of them including the climate contentions and do not
20 believe that any of them are affected by the NRC's
21 final rule.

22 >> JUDGE FROEHLICH: NEI please.

23 >> MR. REPKA: David Repka, NE. None of
24 our contentions are affected by the rule.

25 >> JUDGE FROEHLICH: Okay. The DOE and the

1 staff were also asked which of the proposed
2 contentions are affected by the revisions to Part 63.
3 Did you prepare a list or can you address that?

4 >> MR. ZAFFUTS: We did the review the
5 contentions, Your Honor, and we, too, believe that
6 none are affected by the change in the rule.

7 >> JUDGE FROEHLICH: And the NRC staff.

8 >> MS. YOUNG: The staff's review of the
9 contentions reveals that potentially Nevada Safety
10 11.41 and 46 could be affected by the rule. Nevada
11 13 and 19 could be affected, and Clark County 7 and
12 Nevada Safety 154.

13 >> JUDGE FROEHLICH: Could I --

14 >> JUDGE MOORE: Ms. Young, would you mind
15 repeating that list for me again, please.

16 >> MS. YOUNG: Hopefully, I can reproduce
17 it.

18 The list includes Nevada Safety 11.41, and
19 46. I believe they contain arguments about what's
20 required for or what the effect of analysis would be
21 for 10,000 years and beyond. Nevada 13 and 19,
22 potentially, Nevada Safety 13 and 19, and Clark 7,
23 and Nevada Safety 154, which has to do with igneous
24 events.

25 >> JUDGE MOORE: Ms. Young, when you look

1 at the Nevada safety contentions, which there are six
2 that you have named, is that because they contain the
3 language to the effect of and beyond or that they're
4 speaking to a period up to 10,000 years, and then
5 they have two or three words to the effect of "and
6 beyond" or "additional years" or something like that.

7 >> MS. YOUNG: I believe that's correct.
8 So it's not necessarily stated in the contention.
9 154, I think, talks about the igneous evaluation that
10 has to be conducted for the million-year period.
11 Other contentions seem to address the 10,000-year
12 period, but some of the bases discussion seems to
13 mention "and beyond" or 300,000 years, for example.

14 >> JUDGE MOORE: Okay. Thank you.

15 >> MS. YOUNG: One involves erosion in
16 300,000 years, I believe.

17 >> JUDGE WARDWELL: And just for
18 clarification, Ms. Young, you've included those that
19 say, for instance, for the 10,000-year period "and
20 beyond" as part of your list?

21 >> MS. YOUNG: The staff tried to do that.

22 >> JUDGE WARDWELL: Thank you.

23 >> MS. YOUNG: I won't say it's a perfect
24 list.

25 >> JUDGE WARDWELL: Sure. I understand.

1 Along these lines, I'd like to pursue
2 talking about Part 63 and the recently published
3 revisions to it and how it affects this hearing.
4 I'll probably start with the staff just because they
5 have were looking the other way, and not paying
6 attention.

7 >> MS. YOUNG: I didn't hear that. I'm
8 sorry, Judge Wardwell.

9 >> JUDGE WARDWELL: No. I was playing --
10 I'm sorry -- with you. Just -- I want to be
11 clarified on what your opinion is we should be using
12 as a basis to evaluate the application. And by that
13 I mean, Part 63 was first promulgated, I think, in
14 2001. It dealt only with a 10,000-year period. That
15 was short-lived. In 2004, the circuit court ruling
16 said that wasn't a sufficient time period. EPA went
17 back to the drawing boards, published a proposed
18 rule, I think, in 2005, and I think the NRC did the
19 same thing in proposing a draft rule.

20 The application was then submitted in June
21 of '08, and the EPA published their final rule, I
22 believe, in the fall of '08, and then NRC published
23 their rule, final rule this March.

24 What rule controls what we should be
25 evaluating as a Board? The original one or the

1 recently adopted one?

2 >> MS. YOUNG: Well, I believe the
3 petitioners in this proceeding filed their petitions
4 based on the current rule; although there was -- were
5 some petitioners who mentioned the pending
6 rule-making.

7 But I believe the Board has also provided
8 an opportunity in the January 9th, 2009, order for
9 petitioners to raise contentions based on NRC's
10 implementation of the new EPA standards. And that
11 order on page 4 addresses the deadline for timely
12 submission of those contentions, which is
13 approximately 60 days after the Federal Register
14 publication. I believe the Board's aware that the
15 staff provided notice of the date of that publication
16 and rule.

17 So pursuant to orders of this Board
18 previously, the petitioners have an opportunity to
19 refile contentions. Now, whether that could be
20 done -- or amended contentions. Whether that can be
21 done before the deadline of the Board's issuance of
22 an order, the staff would say probably not.

23 But you have here contentions, I believe,
24 that were filed under the current -- the rules prior
25 to the proposed revision of Part 63. So in the end

1 during the proceeding, it will be both rules that
2 apply, but I believe most of the petitioners here did
3 not specifically address the amended rules
4 implementing the EPA standard.

5 >> JUDGE MOORE: Mr. Malsch, you obviously
6 disagreed with NRC's analysis that six of your safety
7 contentions are impacted. Specifically, Ms. Young
8 mentioned Nevada Safety 154 as -- if I'm stating what
9 she said correctly as being different from those
10 contentions that -- of Nevada that contained some
11 language that indicated that it was focused on the
12 first 10,000-year period and then -- and additional
13 years or additional periods.

14 If the language about additional periods
15 was stricken, we understand all those, but she
16 identified Nevada Safety 154.

17 Could you tell me why it's not impacted in
18 your view, providing the Commission's final
19 March 13th amendments to Part 63.

20 >> MR. MALSCH: Yes, Judge Moore, I can.
21 And the initial focuses on the provision of the rule
22 which provides that DOE is required to include those
23 FEPs that are screened into the performance
24 assessments for the first 10,000 years after
25 repository closure, and before FEPs specifically

1 identified for inclusion later on.

2 **So if a feature, process, or event is slated for**
3 **inclusion in the performance assessment for the first**
4 **10,000 years, then it must be included thereafter.**

5 And Nevada -- the particular contention you
6 mentioned talks about phenomena, features, processes
7 and events, that occur within the first 10,000 years
8 and should be included as a FEP for that purpose.

9 In addition, for that particular
10 contention, I don't think even if -- the way the rule
11 is drafted, I think we're dealing here with
12 frequencies of igneous events, and its effect on the
13 repository. And I think even under other provisions
14 of the Commission's new rule they would be
15 included in the post-10,000 year assessment because
16 they deal directly with and only with intersection of
17 the repository and resulting affects. So we're not
18 alleging in that contention, in any event, any
19 effects beyond those that are normally included in
20 igneous events and FEPs for the post 10,000-year
21 period.

22 >> JUDGE MOORE: Thank you.

23 >> JUDGE WARDWELL: Back to staff and
24 Ms. Young. Could you comment on your impression of
25 the changes that have occurred between the proposed

1 NRC rule and the final NRC rule?

2 >> MS. YOUNG: Well, I believe the final
3 rule clarified --

4 >> JUDGE WARDWELL: In a general fashion.

5 >> MS. YOUNG: Yeah.

6 >> JUDGE WARDWELL: Were there significant
7 changes exclusive of, you know, fine tuning that
8 constant in time log normal distribution for climate
9 change, was there anything else that was
10 significantly changed between the two rules?

11 >> MS. YOUNG: I believe there was a change
12 also with respect to the total effective dose
13 equivalent.

14 >> JUDGE WARDWELL: And what about the
15 earthquake for the rise in the water level? Has that
16 changed or was that pretty much the same as it was in
17 the draft?

18 >> MS. YOUNG: Well, the magnitude, in
19 terms of seismic activity was very similar. I
20 believe what the final rule basically identifies
21 which FEPs in addition to those that have been
22 screened in for the first 10,000 years have to be
23 addressed in the post-10,000 year period. Climate
24 change is one of those. Igneous activity is another.
25 General corrosion, and seismicity.

1 >> JUDGE WARDWELL: But again, some of
2 those were covered in the proposed --

3 >>NRC STAFF: That's correct.

4 >> JUDGE WARDWELL: I'm addressing the
5 differences between the proposed and the final, not
6 in the existing Part 63 and the proposed.

7 >>NRC STAFF: Right. But I believe a
8 number -- the contentions rarely raise the proposed
9 rule. So in terms of the staff's arguments regarding
10 the admissibility of contentions, even for the ones
11 the staff mentioned, I was responding generally to
12 the -- were they potentially affected.

13 In terms of the admissibility, our
14 arguments regarding the admissibility of the
15 contentions would not change because of the rule.

16 >> JUDGE WARDWELL: Good. That's where you
17 was going next.

18 DOE, when you -- and I don't know who would
19 like to address.

20 >> MR. ZAFFUTS: Paul Zaffuts, DOE. One
21 thing I want to just make clear --

22 >> JUDGE WARDWELL: I'd like to ask a
23 question first.

24 >> MR. ZAFFUTS: Oh, I'm sorry.

25 >> JUDGE WARDWELL: I hadn't asked -- I

1 didn't want you to address those questions. You can
2 comment later, certainly. If you're clever enough,
3 you probably will weave it into the question I do
4 ask. Surprise, surprise.

5 But anyhow, I was curious on how did you
6 approach preparing your application? Did you
7 anticipate this rule being approved in some fashion
8 so that your application can withstand a challenge
9 from either the existing rule or recently published
10 one that will be effective in April.

11 >> MR. ZAFFUTS: Not to be accused of being
12 clever, but that's exactly what I was going to inform
13 the Board.

14 The application was prepared, and Nevada
15 and other parties are aware of this, and, I think,
16 clear in the SAR, where we use the term "proposed
17 rule." It was prepared using the standards in the
18 proposed rule. So, you know, I think the relevant
19 question here is, Judge Wardwell, as you have been
20 focusing on the differences between the proposed rule
21 and the final rule. So that's really what the
22 relevant differences would be.

23 The LA was prepared using the proposed
24 rule. Contentions obviously would have been prepared
25 based upon an application that used the proposed

1 rule. So that's really the salient area.

2 >> JUDGE WARDWELL: Thank you. Nevada.
3 Mr. Fitzpatrick, or, Mr. Malsch, I don't know who --
4 or, Mr. Lawrence, whoever wishes to. I assume
5 Mr. Lawrence wasn't going to respond immediately,
6 just based on his distance from the table, but either
7 one of you.

8 What was the philosophy you used when you
9 prepared your contentions? Did you prepare them in
10 anticipation of the proposed rule being adopted or
11 did you stay with the 2001 Part 63 rule?

12 >> MR. MALSCH: Marty Malsch for the State
13 of Nevada.

14 We -- I would say we prepared our
15 contentions based upon the rules in effect. But with
16 an eye toward the proposed rule. And so we were, we
17 think, especially careful in our contentions to,
18 where appropriate, identify features, processes, and
19 events that were active and should be considered in
20 the first 10,000 years. Aware of the fact that it
21 would be likely that, having done so, we would also
22 have a contention that went beyond 10,000 years.

23 >> JUDGE WARDWELL: And, in fact, you did
24 state that in several of your contentions, did you
25 not, that you have the comment that it goes 10,000

1 years and beyond, or, in fact, you, in some of them,
2 I think even, showed that some of the impacts that
3 you're concerned about would really start to take
4 place in hundreds of thousands of years in some of
5 your contentions; is that correct?

6 >> MR. FITZPATRICK: Well, not exactly. I
7 think in all cases of our contentions, we have --
8 when we're dealing with features, processes, and
9 events, we have offered, with sufficient support, the
10 idea that the particular feature, event, or process
11 that we're talking about actually should be -- if it
12 had not been, should have been included in the DOE
13 10,000-year performance assessment. I don't think we
14 have any contentions which are exclusively related to
15 the post-10,000 year period.

16 >> JUDGE WARDWELL: Yeah. I did not mean
17 by my statement that it was exclusive for that, but
18 within that context, I think that the answer to my
19 question would be, yes, in regards to if we tied
20 together the fact that you started off talking about
21 the pre-10,000 year period, but then went on to show
22 some effects that did occur in the hundreds of
23 thousands of years.

24 >> MR. MALSCH: Yes, indeed. I mean, I
25 think in all cases we have shown a sufficient impact

1 for the particular FEP to be included in the
2 10,000-year assessment, but, indeed, it is true for
3 some of our contentions, things become more series or
4 maybe additional aspects become more evident in the
5 post-10,000 year period.

6 >> JUDGE WARDWELL: Just so I understand
7 the philosophy of what you understood when you
8 decided that you didn't have any contentions that are
9 affected by the final rule, why didn't you include
10 those ones -- why didn't you say that the ones that
11 did have statements like "10,000 years and beyond"
12 have some potential changes or effects associated
13 with them relate to the new rule?

14 >> MR. MALSCH: I guess you're correct. I
15 mean, in theory, every contention that we had that
16 goes beyond the 10,000-year period is a contention,
17 which, in theory, is allowable only under the new
18 rule because the previous rule was limited to
19 10,000 years.

20 But I understood the question to be whether
21 there was any aspect of the new NRC final rule that
22 would affect the admissibility of the contentions
23 that did go beyond 10,000 years. And my answer is
24 no.

25 >> JUDGE WARDWELL: That helps a lot.

1 Thanks for the clarification.

2 I think it would be worthwhile now to try
3 to walk through a couple of scenarios to help clarify
4 in my mind how we apply the new rule. And to do
5 that, I think we'll look specifically at 63.305,
6 63.342 and apply it to a couple of scenarios. One
7 being climate change, both in the pre-10,000 year
8 period, and the post-10,000 year period. And for
9 other FEPs, and specifically using corrosion as the
10 one FEP that I think is of interest for both the pre
11 and post-10,000 year period.

12 And I think I will ask Mr. Welke, if he
13 might, to pull up -- or have ready to pull up. I
14 don't think we necessarily -- yeah. Let's wait. If
15 you pull it up that fast. Let's go back to -- people
16 get bored on the Internet just seeing that. They'd
17 much rather look at us, I'm sure, than to look at
18 that page.

19 So let's start by looking at the climate
20 change for the post-10,000 year period. And I'll
21 start with DOE.

22 As we look at that 63.305(c), doesn't that
23 require that climate change be considered for the
24 post-closure period, past the 10,000-year period?

25 >> MR. ZAFFUTS: Yes, Your Honor, it does.

1 It does refer, though, to 342 to indicate how that is
2 being done. It's a very prescribed method, but it
3 does indicate that post-10,000 year climate change
4 does need to be addressed in the manner specified in
5 342.

6 >> JUDGE WARDWELL: And the need to address
7 climate change also existed in the current
8 regulations. It just didn't deal with the
9 post-10,000 year period? Is that a fair summary --

10 >> MR. ZAFFUTS: That's correct.

11 >> JUDGE WARDWELL: -- of the difference
12 between the two?

13 With regard to 63.342(c), just make sure
14 I'm reading that correctly -- and this -- I think it
15 would be worthwhile to pull up that, to talk about
16 and look at that first sentence that says if an FEP
17 like climate change is included in the performance
18 assessment for the first 10,000 years, it must be
19 included in the performance assessment for a later
20 period as well.

21 And I think that's clear that it says that,
22 right? If you look at the -- that very first part,
23 that's what it's really saying; isn't it?

24 >> MR. ZAFFUTS: I think you need to get it
25 up on the screen here. Oh, okay. On the right side.

1 Yes. That's correct.

2 >> JUDGE WARDWELL: And, if, in fact, you
3 have looked at it for the first 10,000-year period,
4 then it has to be looked at for the next -- for the
5 post-10,000 year period, for the period of geological
6 stability.

7 >> MR. ZAFFUTS: If the FEP has been -- has
8 met the standards required for inclusion, which is a
9 burden in and of itself --

10 >> JUDGE WARDWELL: Yes.

11 >> MR. ZAFFUTS: -- then, yes, within the
12 10,000 years then it does carry through, the
13 performance assessment; that's correct. And that is
14 how the SAR was prepared, with that consideration.

15 >> JUDGE WARDWELL: Turning to Nevada, in
16 regards to 63.342(c)(2), which allows an applicant as
17 one option, as I interpret it, to simplify a
18 performance assessment associated with climate change
19 by representing it as a designated constant in time
20 depercolation rate for the post-10,000 year period.

21 Is that a fair assessment of what it says?

22 >> MR. MALSCH: Yes, Your Honor. Marty
23 Malsch for the State of Nevada.

24 Yes. And this is, though, I would
25 emphasize that the particular specification you're

1 talking about would apply to climate change FEPs that
2 were introduced newly for the post-10,000 year
3 period, as distinguished from climate change FEPs
4 identified relevant and appropriate for the first
5 10,000-year period and then continued.

6 >> JUDGE WARDWELL: And where do you reach
7 that -- what leads you to that conclusion that it
8 only -- as I understood what you just said, it only
9 applies to new climate changes? I guess I don't
10 understand your response and the designation between
11 the two of the pre and post-climate change scenarios.

12 >> MR. MALSCH: Again, Marty Malsch for
13 Nevada.

14 That's because of the express language in
15 62.342(c). It says specifically that, for
16 performance assessments in the post-10,000 year
17 period, DOE must evaluate all of the FEPs included in
18 paragraph A, which is the 10,000-year assessment, and
19 also -- so this is an additional specification which
20 makes it clear that, for example, in the case of a
21 climate change FEP, if it had not been included for
22 whatever reason in the first 10,000 years, a climate
23 change FEP along the particular lines of that
24 specified must be included in the post-10,000 year
25 period. But that's an additional FEP.

1 And I would emphasize that's because of the
2 language and also at the end of paragraph C, just
3 before paragraph 1 begins. And if you see in the
4 preamble to the rule, on page 10817 in the first
5 column, DOE makes a -- I mean, makes a similar
6 statement.

7 It says, "DOE is required to include those
8 FEPs that are screened into the performance
9 assessments for the first 10,000 years after
10 repository closure, and -- and -- and they actually
11 italicized the word "and" as if to emphasize it --
12 "and the four FEPs specifically identified for
13 inclusion, i.e., seismicity, igneous, climate change,
14 and general corrosion."

15 So I think what the rule is clearly telling
16 us is that in the post-10,000 year period you carry
17 over FEPs properly included in the first 10,000
18 years, and then, in addition, no matter what, you
19 have to include the additional four FEPs, but within
20 the limitations specified in the rule.

21 >> JUDGE MOORE: Mr. Malsch, you were
22 referring to the language in the Commission's
23 March 13th final rule in 63.342(c) --

24 >> JUDGE WARDWELL: Tom, can you speak into
25 the mike? I can't hear. Can you speak into the

1 mike?

2 >> JUDGE MOORE: 342(c), what specific
3 language, when you said "and also" were you referring
4 to?

5 >> MR. MALSCH: It is the language at the
6 very end of the opening paragraph in 63.342(c). It
7 says "and also," and then there follows paragraphs
8 1 --

9 >> JUDGE MOORE: I see. Thank you.

10 >> JUDGE WARDWELL: So as I understand your
11 position that any FEP that passed the screening and
12 was evaluated for the pre-10,000 year period has to
13 be evaluated for the post-10,000 year period, and
14 those climate change -- and then we have those
15 additional ones that are added on to that that follow
16 with the "and also" after the 342(c) introductory
17 paragraphs.

18 342(c)(2) that talks with climate change
19 then gives a method to handle climate change by
20 saying it may be evaluated by a constant in time, log
21 normal distribution percolation rate.

22 Are you saying that that permission to use
23 that particular technique to evaluate climate change
24 only applies to those climate change FEPs that are
25 new, that exist only after the post-10,000 year

1 period, or for both of the climate change FEPs, those
2 that were carried over from the pre-10,000 year
3 period because they're evaluated then and any new
4 ones that come into play only because of their age
5 being in the post-10,000 year period?

6 >> MR. MALSCH: Again, Marty Malsch for
7 Nevada.

8 I think the rule is very clear that the
9 specification only applies to FEPs that are newly
10 included in the post-10,000 year period. So that
11 a -- for example, an igneous or climate change FEP
12 that was properly included in the assessment for the
13 first 10,000-year period continues in the post-10,000
14 year period, unaffected by these later
15 specifications.

16 And I would add that that's fully
17 consistent with the overall philosophy of both -- of
18 the EPA underlying rule, which is that these
19 particular four items had to be specified so as to
20 eliminate, I think what EPA referred to as boundless
21 speculation in the post-10,000 year period. An
22 amount of speculation and uncertainty which increased
23 after 10,000 years.

24 Well, obviously, if we're talking about a
25 FEP that is already included in the first 10,000-year

1 period, we're not talking about any increment of
2 uncertainty associated with simply passing through
3 the 10,000-year period.

4 So the notion that we have to be specific
5 and limit FEPs in the post-10,000 year period because
6 of uncertainty doesn't apply to FEPs that are carried
7 over because we already accept that amount of
8 uncertainty by virtue of including them in the first
9 10,000-year period.

10 >> JUDGE WARDWELL: I think where I'm
11 getting confused is possibly that you, in your
12 responses, make sure you're including all the FEPs.
13 The scenario I was bringing up was climate change,
14 and I'd like to simplify it so that I can make sure I
15 understand it. I need things chunked down for me so
16 I don't get overwhelmed. Just, you know a hard scrap
17 old farmer from the backwoods.

18 If we're dealing with climate change and we
19 had a climate change that was evaluated as a FEP in
20 the first 10,000 years and it carries forward into
21 the next 10,000 years, it carries forward even if
22 it -- you know, either way, even if it wasn't
23 evaluated. Let's say it was evaluated in the first
24 10,000-year period, and it carries over into the
25 post-10,000 year period, doesn't 342 -- let me

1 rephrase that.

2 Why doesn't -- or how -- let me -- I'll
3 rephrase it a third time, actually never having said
4 anything yet, but I will try to come up with a phrase
5 I'm interested in saying.

6 What in 342(c)(2) excludes the use of
7 that -- of the constant in time depercolations --
8 let's call it a simplification or -- let's call it a
9 simplification of assessing climate change, only to
10 those that weren't carried forward?

11 >> MR. MALSCH: Again, Marty Malsch for
12 Nevada. I think it's the language at the end of (c),
13 just before the paragraphs begin, "and also."

14 And let's say, for example, we have a
15 human-induced climate change FEP, which we say is
16 properly included in the performance assessment for
17 the first 10,000 years. By the language of 63.342 on
18 its face, that is required to be included in the
19 post-10,000 year performance assessment.

20 But also there is to be included a
21 different type of climate change contention, if that
22 was necessary. So it seems to me by virtue of the
23 word "and also," by necessity the restrictions in,
24 for example, (c)(2) on climate change can only apply
25 to those FEPs that were not carried over by virtue of

1 the opening language in paragraph C. Otherwise the
2 language would not have been "and also." It would
3 have been "but."

4 >> JUDGE WARDWELL: For those climate
5 change FEPs that are carried over from the
6 10,000-year period, it would be your position that
7 they be addressed the way they were in the pre-10,000
8 year period then, and not using the log normal
9 distribution, depercolation rate?

10 >> MR. MALSCH: That's precisely correct.

11 However, if for some reason, in my
12 hypothetical climate change FEP, it's determined not
13 to be a proper FEP for the first 10,000 years, well,
14 then what you end up with is a different FEP on
15 climate change, but precisely as specified there in
16 paragraph 2.

17 >> JUDGE WARDWELL: I understand your
18 position.

19 DOE, would you like to respond to how --

20 >> JUDGE MOORE: May I?

21 >> JUDGE WARDWELL: Sure.

22 >> JUDGE MOORE: Mr. Malsch, one final
23 question before we turn to DOE.

24 Under your reading of 63.342(c) what would
25 be the logic of a climate change FEP that didn't have

1 to be analyzed for the first 10,000 years, having to
2 be analyzed for the post-10,000 year period?

3 >> MR. MALSCH: Again, Marty Malsch from
4 Nevada.

5 I think the concept here is the drafters of
6 the rule knew that DOE was excluding FEPs on the
7 basis of consequence, which is to say they were
8 screened out in the first 10,000 years because,
9 although they met the probabilities threshold, they
10 did not meet some concept of consequence in the
11 performance assessment.

12 The concern behind including these
13 additional items was that it was at least possible,
14 without having this rule constitute an actual review
15 of the license application -- but it was at least
16 possible that climate change FEPs would be FEPed out
17 in the first 10,000 years because of significance or
18 lack of significance in the first 10,000 years, but
19 that clearly that lack of significance would
20 dissipate after 10,000 years, and they would be of
21 great significance in the post-10,000 year period.
22 But then the concern was that introduced huge amounts
23 of additional uncertainty, therefore, the limits were
24 specified in the later paragraphs.

25 As I indicated that the whole concept

1 behind the limitations here on these categories of
2 FEPs in the post-10,000 year period was that there
3 had to be limits because these phenomena introduced
4 amounts of uncertainty greatly in excess of what one
5 saw in the first 10,000-year period.

6 Now, obviously just as 63.342(c) suggests,
7 if you're simply carrying over a FEP from the first
8 10,000-year period, you're not introducing increments
9 of uncertainty that would call you -- call upon the
10 need for these kinds of restrictions.

11 >> JUDGE MOORE: Is there any language in
12 the statement of considerations that you can point to
13 that supports the interpretation you've just given
14 us?

15 >> MR. MALSCH: Yes. I think it's the
16 language that I mentioned.

17 >> JUDGE MOORE: Okay. There's nothing
18 else?

19 >> MR. MALSCH: I believe there's nothing
20 else. I just thought it was remarkable that the use
21 of the italics there, as if to strongly emphasize the
22 point. I think, though, there is nothing in the
23 statement of considerations that's counter to my
24 interpretation.

25 >> JUDGE MOORE: Thank you.

1 >> JUDGE WARDWELL: Could you repeat that
2 reference again, just so when I review the
3 transcripts I don't have to go back 20 pages?

4 >> MR. MALSCH: Let me just take a second
5 to find it.

6 >> JUDGE MOORE: It was 1018, first column.

7 >> MR. MALSCH: Yeah, it was 1081 -- the
8 precise citation is --

9 >> JUDGE MOORE: I'm sorry it's 817.

10 >> MR. MALSCH: Right. It's 10817, and
11 it's in column 1, just under, I believe, the response
12 to the first comment in issue 1.

13 >> JUDGE WARDWELL: Thank you.

14 DOE, the views just expressed by Nevada,
15 are they consistent with your interpretation of how
16 these new rules will be applied in regards to climate
17 change alone? We'll deal with the other FEPs later.

18 >> MR. ZAFFUTS: Sure. Paul Zaffuts DOE.

19 No, it doesn't and I think it's -- I think
20 it's pretty simple.

21 63.342 provides two aspects of how to
22 address climate change. First, it's whether it's
23 going to be included in the first 10,000 years or
24 not. And it specifies the manner in which that is
25 being done. There's limits on that.

1 The purpose of (c)(2) -- in fact, (c)(1)
2 and (c)(3), I believe, as well, is to ensure that
3 there is some consideration of climate in the
4 post-10,000 year period, irrespective of whether it
5 has an effect on the first 10,000 years or not. I
6 mean, that is just to ensure that the climate change
7 in that long period is taken into account.

8 The second part of (c)(2) simply tells you
9 how that's going to be done. Whether it passes the
10 test for the first 10,000 years or not, if it's going
11 to be addressed in the post-10,000 year period, this
12 particular section discusses the manner in which it's
13 done. And the reason why it's in there is precisely
14 because of the time frame. It's got nothing to do
15 with how it got addressed in the first place, in the
16 first 10,000 years. This is based upon the
17 understanding, the clear understanding by NRC and EPA
18 that to attempt to predict climate changes in such a
19 vast amounts of time, from 10,000 years all the way
20 up to a million years, no matter it was looked at in
21 the first 10,000 years, it's just so speculative and
22 so beyond the capability of any particular model, the
23 uncertainty is so vast, that they just say, no, we're
24 going to not get into that game. We're going to tell
25 you how to do it.

1 It doesn't matter what happens in the first
2 10,000 years, how you analyzed it. This is how you
3 analyze the effects in the post-10,000 year period.
4 And I think that's consistent with the statement's
5 consideration throughout both the EPA's rule-making
6 proposed and final, as well as the NRC's. I just
7 don't see how you could even interpret it in any
8 other way.

9 >> JUDGE MOORE: Then what's the point of
10 the word also that Mr. Malsch points out?

11 >> MR. ZAFFUTS: Sure. The "also" simply
12 says that you need to take climate change into
13 effect -- into account for the post-10,000 year
14 period. This idea of FEPing something out in the
15 first 10,000 years doesn't relieve you of the
16 obligation. Just like in seismic and igneous, you do
17 need, in fact, to look at the potential for climate
18 change in the post-10,000 year period. You can't
19 just say there's no seismicity or volcanism in the
20 first 10,000 years and then that that's. The "and
21 also" says, well, and also notwithstanding what
22 happens in (c)(1) -- or I'm sorry in --

23 >> JUDGE MOORE: In (a).

24 >> MR. ZAFFUTS: In (a). You need to take
25 into account. You can't just ignore it. That's the

1 "and also." That's the way I interpret it, and I
2 think that's a very reasonable way to interpret it.

3 >> JUDGE MOORE: Why would the word in the
4 Statement of Considerations on page 10817, column 1
5 that Mr. Malsch points to the word "and" be
6 italicized, when the four that are listed, one of
7 them is climate change?

8 >> MR. ZAFFUTS: I think it's just how I
9 explained it, which is that it means that you need to
10 take that into account notwithstanding what happens
11 in the first 10,000 years. You can't FEP climate
12 change out and then ignore it in that post-10,000
13 year period. You need to look at it. And the way
14 you look at it is using this methodology that's gone
15 into great detail. And the way that came up in great
16 detail in 2.

17 It doesn't make sense to have gone through
18 that significant analysis and methodology by the NRC,
19 and by EPA to discuss exactly how you're going to
20 examine a climate change in that period of time, when
21 that all goes out the window, just simply because
22 something had some effect in the first 10,000-year
23 period. That just doesn't make sense to me.

24 >> JUDGE MOORE: Counsel, would you forgive
25 me if I said I must disagree with you that it's

1 clear?

2 >> MR. ZAFFUTS: Yes. I'm sorry. Yes, you
3 can disagree with me. I appreciate that.

4 >> JUDGE WARDWELL: In regards to the
5 technique that's stated in 342(c)(2), that's not
6 required of the applicant to do that. That's just
7 permissible way it could, correct.

8 >> MR. ZAFFUTS: Sure. If there was
9 amazingly accurate model that goes out to a million
10 years and we had access to it and there was such a
11 thing -- I don't believe there is -- then would be --
12 I believe this -- what all this says is that would be
13 an acceptable method.

14 >> JUDGE WARDWELL: It's permissible to use
15 that technique, but --

16 >> MR. ZAFFUTS: Permissible, but not
17 forced to use.

18 >> JUDGE WARDWELL: -- you don't need to
19 use it. You could continue with what you did in the
20 pre-10,000 years and just extend that. You may be
21 challenged, but yet you could do that. This is
22 another way you could have done it that is, I call
23 it, simplified.

24 >> MR. ZAFFUTS: Yes, you're not forced to
25 use this stylized percolation rate, you don't -- if

1 you don't -- one doesn't want to.

2 >> JUDGE WARDWELL: Based on your
3 statements earlier this morning that you did prepare
4 your application in anticipation of this rule being
5 adopted, what did you actually do to evaluate climate
6 change for the post-10,000 year period?

7 DOE: It's my understanding, and I may be
8 getting a little beyond my lack of technical
9 ability and knowledge of the LA, but --

10 >> JUDGE WARDWELL: You want me to give you
11 a multiple-choice question then?

12 >> MR. ZAFFUTS: I do believe we use a
13 depercolation rate. Obviously there's a difference
14 in the numbers between the proposed and the final
15 that I don't believe is really relevant to this
16 discussion because we're talking about methodology
17 not the precise numbers, but I'm quite confident that
18 we used that rate.

19 >> JUDGE WARDWELL: And did you limit it
20 only to that analysis and no other analysis for the
21 post-10,000 year period?

22 >> MR. ZAFFUTS: I believe that's correct.

23 >> JUDGE WARDWELL: Thank you.

24 Mr. Malsch.

25 >> MR. MALSCH: Judge Wardwell, could I

1 just offer a hypothetical, which I think will
2 illustrate why DOE cannot possibly be correct in its
3 interpretation?

4 Imagine, if you will, a climate change FEP.
5 And let us suppose that the model consists of a
6 single differential equation, operating on
7 parameters -- let's make them non-dimensional,
8 parameters 0 to 20. And let us suppose that that
9 single differential equation operating on parameter
10 0 to 20 is applicable in the first 10,000 years and
11 also equally applicable in the post-10,000 year
12 period.

13 If we recognize that the whole reason for
14 specifying particular ways to deal with FEPs in the
15 later paragraphs is to eliminate the need to deal
16 with additional amounts of uncertainty that would
17 exist in the post-10,000 year period as distinguished
18 from the initial period, I have here an example in
19 which there is no additional uncertainty introduced
20 whatsoever. And so the underlying purpose of the
21 rule would not be served by construing it the way DOE
22 has offered it.

23 >> JUDGE WARDWELL: But how do you counter
24 the argument that seems to be logical to me, that the
25 reason for the log normal distribution depercolation

1 rate was in recognition that we're dealing with such
2 extensive time frames, that to pretend that we can
3 vary the various inputs that get us to the point of
4 depercolation in those extensive time frames would be
5 almost absurd to attempt to do that. That it's hard
6 enough for the first 10,000 years, let's not worry
7 about the climate, the interaction with the climate
8 and the surface, the interaction of the surface and
9 the near subsurface, and the vegetation associated
10 with that, and then finally get into the deeper zone,
11 at time frames where we aren't confident of what's
12 really taking place with whatever that differential
13 equation you use in your example is trying to
14 represent in the pre-10,000 year period. Let's cut
15 it off and just do a more simplified thing and start
16 at a percolation rate and go from there.

17 Why isn't that a logical motivation for why
18 this is in place? And isn't that supported by any of
19 the statements of considerations that were brought up
20 by EPA and the NRC in promulgating these rules?

21 >> MR. MALSCH: Again, Marty Malsch from
22 Nevada.

23 I just think that, first of all, it's not
24 consistent with what I think is pretty clear language
25 in the rule. And I also think that in my example --

1 we assume my example is a real example, and I've
2 offered a hypothetical in which the purpose to be
3 served by applying these restrictions is simply not
4 there.

5 >> JUDGE WARDWELL: What did DOE do in
6 their application in regards to the post-10,000 year
7 period. Do you know off the top of your head?

8 >> MR. MALSCH: I believe the license
9 application is specifically or explicitly premised
10 upon the proposed rule. So they would have
11 applied -- in the post-10,000 year period, they would
12 have applied the limitations in the proposed rule for
13 the post-10,000 year period. But I suspect, though,
14 that also, for some of the FEPs we're talking about,
15 they didn't have to resolve the question to be
16 addressed here, because they had FEPed them out, the
17 first 10,000 year period.

18 So for example, if DOE had -- and I
19 apparently don't remember this, but if hypothetically
20 DOE FEPed out human-induced climate change for the
21 first 10,000-year period, they would not have needed
22 to consider the issue whether, in the post-10,000
23 year period, they should have continued to use the
24 FEP as they specified it or just used the FEP as
25 later defined.

1 >> JUDGE WARDWELL: If they had -- to be
2 sure I understand your position. The reason you're
3 interested in having them extend their pre-10,000
4 year FEP into the post-10,000 year period is so that
5 you can then challenge that particular analysis that
6 they have run, which would be preempted by this log
7 normal distribution; is that correct?

8 >> MR. MALSCH: That's a possible
9 consequence of a different interpretation, that's
10 correct.

11 >> JUDGE WARDWELL: If, in fact, in their
12 current application they have some other analyses in
13 there that help support or back up -- and I don't
14 know this for a fact. I just want to know that, if,
15 in fact, there are some other analyses in there
16 besides just the depercolation for the post-10,000
17 year period, do you believe that is susceptible to
18 challenge by a petitioner?

19 >> MR. MALSCH: I'm sorry. Could you
20 repeat your question again?

21 >> JUDGE WARDWELL: If there are other
22 analyses that were performed in addition to the deep
23 percolation analysis for the post-10,000 year period,
24 relating to climate change, in DOE's application, and
25 I don't know whether there is or isn't, but if there

1 is, is that other analyses that they happen to
2 present in their application also susceptible to
3 challenge by a petitioner?

4 >> MR. MALSCH: Yes, indeed. Yes. Marty
5 Malsch, again.

6 Yes, indeed, I think it would. They would
7 then be following what would, in our view, be a
8 correct interpretation of the new NRC rule, but would
9 be doing it in a flawed technical manner, and that
10 would be subject to contentions.

11 >> JUDGE WARDWELL: DOE, would you agree
12 that if you happen to have calculations in your
13 application for the post-10,000 year period that are
14 in addition to or different than the depercolation
15 rates allowed by 342(c)(2), that in fact, those are
16 challengeable by a petitioner? Would that not be the
17 technique, if they saw flaws in that technique?

18 >> MR. ZAFFUTS: Your Honor, Paul Zaffuts
19 for DOE. I'm quite confident we don't do that. And
20 with the hypothetical that's posed, I think if we're
21 relying on an analysis different than that, it would
22 be subject to this some type of challenge, sure. I
23 mean, it's not excluded.

24 >> JUDGE WARDWELL: Sure.

25 >>DOE: It wouldn't be omitted from

1 challenge. I wouldn't --

2 >> JUDGE WARDWELL: That's the importance
3 of the difference between you shall perform the
4 calculations using this depercolation, and may use
5 the percolation rates in your analysis, if you choose
6 not to or if you choose to augment those analyses
7 with any other analyses, then, in fact, that would be
8 challengeable. Where if you had only stuck with the
9 depercolation rates as specified by the rule, then
10 that wouldn't be challengeable.

11 >> MR. ZAFFUTS: If you're relying on that
12 to meet the performance requirements of Part 63?

13 >> JUDGE WARDWELL: Correct.

14 >> MR. ZAFFUTS: Yes. If I could, again, I
15 don't believe that's in the LA; so it's really kind
16 of a hypothetical, moot point.

17 One thing, though, Mr. Malsch mentioned his
18 hypothetical essentially postulating some absolutely
19 perfect model that can go out to a million years, and
20 if -- and under that hypothetical, the rules don't
21 make sense as written, or my interpretation of the
22 rules don't make sense.

23 Well, first of all, there is no such model,
24 and the NRC knows there's no such model or able --
25 ability to predict like that, and the EPA knows that.

1 They didn't write the rule with that hypothetical in
2 mind because it's not realistic.

3 They wrote it understanding that, as I said
4 earlier, the uncertainties in attempting to predict
5 out to a million years climate change are just so
6 great that they're not going to force DOE to attempt
7 to do so. I think that would just engulf a
8 proceeding.

9 So they said, that's -- we're not going to
10 do that. It doesn't make -- it doesn't help our
11 understanding -- meaning the NRC's understanding --
12 of whether this mountain will be able to perform its
13 function. So we're going to provide specifically
14 what the analysis should include and how you should
15 do it.

16 It's just like they do for the
17 human-intrusion standard. I mean, there was the
18 ability to predict what people were going to do and
19 drill into the mountain in some future time. They
20 didn't want to get the -- that didn't make sense to
21 have to go to that type of speculation. So what they
22 did was say, we're going to prescribe specifically
23 how you're supposed to analyze it. Now, you have to
24 analyze it correctly. You have to apply this
25 correctly, and that would be subject to challenge, if

1 we -- you know, if they had said we had to use a
2 depercolation rate of 20 millimeters a year, and we
3 only use 1, of course that would be a legitimate
4 challenge. But it's a challenge to suggest that we
5 are being forced to use something other than what's
6 in here. As I said earlier, I just don't see that
7 that is consistent with the promulgation of these
8 rules.

9 >> JUDGE WARDWELL: In your answer to some
10 of Nevada's contentions, you've raised the argument
11 that the impact of future anthropogenic greenhouse
12 gases on climate change is outside the scope of this
13 proceeding. Could you elaborate a little bit more on
14 the bases for that position?

15 >> MR. ZAFFUTS: Sure. We take that
16 position based upon our reading of the rule and the
17 statements of consideration that were included when
18 it was being promulgated.

19 >> JUDGE WARDWELL: And is this the
20 original rule or strictly in regards to the proposed
21 revision.

22 >> MR. ZAFFUTS: No. This is the original
23 rule, because we believe that's the case for the
24 pre-10,000 year period. And it really -- to make it
25 as simple as possible, it really comes down to the

1 concept of attempting to predict -- again, it's
2 uncertainty. It's attempting to predict future
3 societies, what the political winds of the world are
4 going to be in the next 10,000 years with regard to
5 greenhouse gases and climate change, and I think we
6 can all understand that. The rule says we must vary
7 factors --

8 >> JUDGE WARDWELL: And where is this?
9 Could you cite this rule?

10 >> MR. ZAFFUTS: Oh, sure. It's 63.305(c),
11 which we have spoken about earlier.

12 It specifically says we must vary factors
13 related to geology, hydrology and climate based upon
14 cautious but reasonable assumptions. In the
15 statements of consideration -- that's 66 Fed Reg --
16 Federal Register 55757, the NRC makes it clear with
17 regard to cautious and reasonable assumptions and
18 climate, it says that the geologic record provides
19 evidence of past climate over long time frame, which
20 provides a strong basis for predicting future
21 changes.

22 The way I read that is that's why, unlike
23 other aspects of the biosphere, we are supposed to
24 change and examine what the changes are, because we
25 have the ability to do so within a reasonable amount

1 of uncertainty based upon the past geological record.

2 The distinction is made that that's not the
3 same with regard to other aspects of the bias here,
4 because human -- and it says -- it goes on to say,
5 because human behavior --

6 >> JUDGE WARDWELL: And I'm sorry. I got
7 diverted up here. Where are you reading from now; so
8 that I can get back on track?

9 >> MR. ZAFFUTS: Sure. This is 66 Federal
10 Register, the first page of -- it's 55732 is the
11 first page, but the page I'm specifically referencing
12 is 55757.

13 >> JUDGE WARDWELL: And this is in the
14 Statement of Considerations and the promulgation of
15 the original 63 rule?

16 >> MR. ZAFFUTS: That's correct.

17 >> JUDGE WARDWELL: Okay. Thank you.

18 >> MR. ZAFFUTS: Okay. Should I go ahead?
19 Okay.

20 If you go on to quote that, "Because human
21 behavior cannot be similarly predicated" -- that is
22 the same manner in which you can't predict climate
23 based upon the geological record -- "a similar
24 approach cannot be used for the REMI and the
25 influence that the local population has on the

1 biosphere." And we need to understand that in this
2 context the biosphere includes climate. So in my
3 view and DOE's view that's the only way you can read
4 this with regard to climate change is that you need
5 to use the -- you use the geological record, future
6 effects based upon the attempt to predict -- attempt
7 to speculate on what human society's going to be
8 doing with regard to greenhouse gases is not the role
9 of the DOE in this particular position.

10 >> JUDGE WARDWELL: And could you read that
11 just one more time in regards to the REMI, and the
12 human factors?

13 >> MR. ZAFFUTS: "Because human behavior
14 cannot be similarly predicated, a similar approach
15 cannot be used for the REMI and the influence that
16 the local population has on the biosphere."

17 >> JUDGE WARDWELL: And aren't we talking
18 about something that's beyond the REMI in the local
19 population, though, when we're dealing with
20 anthropogenic changes affecting climate?

21 >>DOE: Oh, absolutely. And I think that
22 it makes my point even clearer, that if we can't even
23 predict on a small local potential population, how we
24 can possibly predict societal changes beyond that.
25 We're talking about with global situation with, you

1 know, hundreds of countries involved on this planet.

2 That the attempt to try to predict what's
3 going to be happening over the course of the next
4 10,000 years in this regard is just so speculative,
5 that would be an endless controversy related to how
6 that's done.

7 >> JUDGE WARDWELL: But I -- one could read
8 that statement to mean, you're not supposed to change
9 the REMI and any activities that are done out here,
10 i.e., for instance, you couldn't set up a fire
11 training area where you would start spraying the
12 mountainside with a bunch of water or something like,
13 on a local basis, and you can't change the behavior
14 of the REMI, where, all of a sudden, they wanted to
15 drink 14 times the amount of water that they do now,
16 or some aspect like that.

17 Couldn't one interpret it to be that and
18 not in relationship to large changes of climate?
19 That would be needed by the mass.

20 >> MR. ZAFFUTS: I think that's not
21 inconsistent. Yes.

22 >> JUDGE MOORE: I'm sorry. Counsel, did
23 you say not inconsistent?

24 >> MR. ZAFFUTS: I think that
25 interpretation is not inconsistent with the

1 understanding that the NRC had and the EPA had when
2 they were promulgating this, just the basic concept
3 of -- unlike -- unlike a geological record or --
4 well, let's use that.

5 Something that is utterly dependent upon
6 human behavior, whether it's localized, individuals
7 spraying down a mountain or societal based, over the
8 course of the next 10,000 years, that's just so
9 speculative that it is not to be addressed. It
10 doesn't have to be addressed in that way. It doesn't
11 mean -- well, I'll leave it at that.

12 >> JUDGE WARDWELL: But yet, couldn't it
13 also only be limited to that? Couldn't one read it
14 to say it is only limited to the REMI and a local
15 population disturbance on the climate change, that
16 you would only be allowed to look at regional
17 continental human behavior changes on the climate
18 change?

19 >> MR. ZAFFUTS: Like I said, I don't think
20 that's inconsistent. I don't agree that that's the
21 only way you should read that or that should be
22 limited in that way.

23 >> JUDGE FROEHLICH: Judge Wardwell, would
24 this be a convenient time for us to take our morning
25 break.

1 >> JUDGE WARDWELL: Sure.

2 >> JUDGE FROEHLICH: I would propose that
3 we take a break for 15 minutes. We will all
4 reconvene at 10:30 by the clock on the back of the
5 wall, please. 15 minutes.

6 (A recess was taken)

7 >> JUDGE FROEHLICH: Please be seated.
8 we'll be back on the record.

9 Before we start, could I just ask
10 Mr. Zaffuts, could you give us the full Federal
11 Register cite to the statement considerations you
12 were referring to in the last series of answers
13 before we began?

14 >> MR. ZAFFUTS: I sure can.

15 >> JUDGE FROEHLICH: Thank you.

16 >> MR. ZAFFUTS: Paul Zaffuts, DOE. It
17 is -- I believe this is correct; 66 Federal Register.
18 And the first page of the entire notice is 55732.
19 The page I was quoting from is 55757.

20 >> JUDGE MOORE: And the column?

21 >> MR. ZAFFUTS: Let's see. Bear with me
22 just one second. It's the bottom of the second
23 column, Your Honor.

24 >> JUDGE MOORE: Thank you.

25 >> JUDGE FROEHLICH: Judge Wardwell.

1 >> JUDGE WARDWELL: Yeah.

2 >> MR. MALSCH: Your Honors, may I just
3 respond briefly to what DOE just offered about
4 interpreting 63.305?

5 >> JUDGE WARDWELL: No. I'd rather you
6 address my question, Mr. Malsch.

7 Would you like to respond to anything that
8 DOE just said?

9 >> MR. MALSCH: I'll address that question
10 instead.

11 What DOE offered you before the break was
12 an interesting discussion in theory about how the
13 rule might have been drafted, but it doesn't pertain
14 to the rule as it was actually drafted.

15 If you look at 63.305, subsection by
16 subsection, you can see that, first of all, with --
17 and we're talking here about human-induced climate
18 changes.

19 It first of all says FEPs that describe the
20 reference biosphere must be consistent with present
21 knowledge of the conditions in the regions
22 surrounding the Yucca Mountain site.

23 We believe that our climate change
24 contentions are consistent with present knowledge of
25 the conditions in the regions surrounding the Yucca

1 Mountain site.

2 Paragraph B then says, "D should not
3 project changes in society." Our contentions don't
4 project changes in society. But it then continues.
5 "We may project changes in the biosphere." We
6 may not project claims in the biosphere other than
7 climate. And, of course, we are predicting climate
8 changes.

9 It then says, "We should not project
10 changes in human biology or increases or decreases in
11 human knowledge or technology." We are not doing
12 that either.

13 It further says in paragraph (c), "We shall
14 vary factors relating to climate based upon cautious
15 but reasonable assumptions, consistent with present
16 knowledge of factors that could affect the Yucca
17 Mountain disposal system over the next period."

18 And we believe that our climate change
19 contentions are based upon those cautious but
20 reasonable assumptions. I would just say that,
21 frankly, the only way one could FEP out human-induced
22 climate changes would be by actually challenging the
23 rule and insisting that we should project changes in
24 society for purposes of licensing Yucca Mountain;
25 namely, we should project changes in society would

1 eliminate the concerns associated with human-induced
2 climate changes.

3 So our contentions are perfectly consistent
4 with the rule, and DOE's theory about what the rule
5 provides actually constitutes a rule challenge.

6 >> JUDGE WARDWELL: Thank you.

7 I think we've covered most of the -- you
8 know, by covering what we did, we've covered the
9 other scenarios that I'm interested in. I don't feel
10 a need to go into anything further in regards to
11 erosion or anything else like that.

12 I would like to turn to staff, though, and,
13 Ms. Young, would you like to comment on the plethora
14 of stuff that's come up so far, without being
15 specific to any particular areas so you're free to
16 reign on any of the comments since the last time we
17 chatted with you.

18 >> MS. YOUNG: Thank you, Judge Wardwell.
19 Commenting on the plethora might not be appropriate,
20 but in terms of Mr. Malsch's suggestion that the
21 revised rule regarding the post-10,000 year standard
22 would suggest a requirement to analyze additional
23 scenarios that were not addressed or screened in in
24 the first 10,000-year period.

25 I think the staff -- or the Commission's

1 intent in issuing this rule was to provide additional
2 constraints on analyses done for the post-10,000 year
3 period. I would agree that the language of the
4 provision is not perfectly clear as to what's
5 required, but in terms of climate change, the staff
6 would agree with Judge Wardwell's interpretation,
7 your interpretation, that it basically provides
8 information on how you might do that post-10,000 year
9 analysis.

10 >> JUDGE WARDWELL: Whether it's a screen
11 FEP or a new FEP?

12 >> MS. YOUNG: That's correct.

13 >> JUDGE WARDWELL: Thank you. And would
14 you like to comment in regards to the interpretation
15 of DOE relating to the REMI and the local human
16 activity in relationship to the greenhouse gases
17 associated with climate change?

18 >> MS. YOUNG: I believe climate change is
19 something that should be analyzed under 63.305(b).
20 However, it's obviously not clear, given the dispute
21 we're having here this morning in terms of what's
22 required, but (b) does provide that analysis should
23 assume that certain factors remain constant;
24 therefore, you wouldn't predict changes, economic
25 changes. I think there are words in the statement

1 consideration addressing the rule on that. So it is
2 difficult to predict changes to those factors.

3 >> JUDGE WARDWELL: Thank you.

4 Lastly, I think I would like to offer the
5 opportunity for those petitioners who felt their
6 contentions might be affected by the new rule to
7 comment, if they wish, on anything that has come up,
8 and let's -- let me start in the far corner with NCAC
9 first. You did say that your Miscellaneous 2 in the
10 NEPA 1 might be affected.

11 Is there anything you heard today that you
12 would like to comment on in regards to issues we were
13 trying to address.

14 >> MR. WILLIAMS: No, sir. Thank you.

15 >> JUDGE WARDWELL: Thank you.

16 Clark County, you said you didn't have any,
17 but you had your hand up; so I will allow you to
18 comment --

19 >> MS. ROBY: Thank you.

20 >> JUDGE WARDWELL: -- even though none of
21 your contentions supposedly are affected by this, but
22 maybe it's the human behavior aspect that we talked
23 about.

24 >>CLARK COUNTY: Thank you, Your Honor,
25 Debra Roby for Clark County. I just want to respond

1 to a few comments made by NRC staff this morning.
2 They said that they believed, in their review, that
3 Clark Safety 7 may be affected in their evaluation.
4 And I just wanted to note a couple of comments by NRC
5 staff raised some questions for us.

6 NRC staff said that they did not believe
7 they opposed contentions based on the proposed rule,
8 but there is that challenge to Clark Safety 7 in the
9 NRC response to Clark Safety 7. So I'm assuming
10 for -- since we're on the record today that staff
11 would not be opposing that that was, in fact, the
12 basis that Clark County was setting forth.

13 But Clark Safety 7 is not -- is about --
14 not so much about the human -- or the dose, but that
15 the DOE failed to look back far enough in history of
16 volcanism, failed to take into consideration the deep
17 melting models or the entire period of volcanism from
18 11 million years to the present. They only
19 considered a lesser period.

20 >> JUDGE WARDWELL: Thank you.

21 >> MS. YOUNG: Judge Wardwell, may the
22 staff be heard. Mitzi Young for the NRC staff.

23 >> JUDGE WARDWELL: Yes.

24 >> MS. YOUNG: Just to clarify, the staff's
25 statement was trying to address that we did not

1 solely object to the contention on the basis of the
2 rule. We had independent grounds for objecting to
3 the admissibility. Therefore, we believe the
4 proposed rule doesn't affect our arguments with
5 respect to admissibility or the contention in the
6 end.

7 >> JUDGE WARDWELL: Thank you for that
8 clarification.

9 TIM, I understand that you had '08 you
10 anticipated to -- here we are, yes.

11 >> MS. HOUCK: We have no further comment
12 on the matter. Thank, you Your Honor.

13 >> JUDGE WARDWELL: Thank you. And that's
14 about it, unless there's someone else that would like
15 to add their comments in regards to those particular
16 issues we addressed talking about the new rule and
17 the potential limitations of humans' effects on
18 climate change in the original rule.

19 >> MR. POLAND: Your Honor, if I could,
20 Doug Poland for TOP. I had mentioned before there --
21 sorry. Right over here. There may be a potential
22 effect, but just to clarify, it does not affect the
23 admissibility of the contention that TOP has raised.

24 >> JUDGE WARDWELL: Okay. Thank you.

25 >> JUDGE FROEHLICH: All right. Moving

1 from Part 63, perhaps we'll take up the LSN questions
2 next.

3 The LSN was created in order to provide
4 parties with an expeditious method for managing the
5 large amount of documentary material in this
6 proceeding. Section 2.103 of Title 10 of CFR
7 outlines the obligations and the timetable for the
8 production of documentary material for the LSN, by
9 the DOE, the staff, and the potential parties, now
10 the petitioners to this case.

11 The LSN requirements are also spelled out
12 in the TAPA Board orders. And I note that
13 10 CFR 2.1000 states that the provisions of subpart
14 (j), where the LSN requirements appear, don't take
15 precedence over the normal, the customary 2.309
16 requirements for contention admissibility.

17 As I read the petitions to intervene, the
18 Department of Energy argues that the existence of the
19 LSN, as its publicly available electronic document
20 discovery system, creates a heightened obligation on
21 the petitioners for better or different contentions
22 that are normally admitted.

23 Is that a fair representation of your
24 position, DOE?

25 >> MR. SHEBELSKIE: Your Honor, Mike

1 Shebelskie for DOE.

2 >> JUDGE FROEHLICH: Thank you.

3 >> MR. SHEBELSKIE: I think a more refined
4 way of how we should have expressed that view was not
5 to suggest that the requirements the 2.309 do not
6 apply and govern the contention admissibility
7 standards.

8 Rather that in applying those standards the
9 Boards should be mindful of the availability of the
10 documentary material that DOE has made available on
11 the LSN, as well as the fact that all the petitioners
12 are equally obligated to have made available on the
13 LSN all their, at least, supporting information for
14 these purposes.

15 So that when the Boards, for example, are
16 assessing whether or not there exists a genuine
17 dispute of fact, all -- if it's a contention that
18 DOE's analyses are in error in some way, petitioners
19 have access to all of our analysis in the LA, in the
20 supporting references and the vast body of
21 documentary material we have been made available.
22 And so they have the ability, therefore, to frame
23 focused and meaningful and very specific criticisms
24 of our analyses or work product.

25 And there is consistent, really, with what

1 the Commission has said in the rule-making with
2 respect to the LSN, that on several occasions it
3 noted that part of the purpose or the achievement,
4 what we would expect from the LSN, is the ability for
5 the parties to frame meaningful and focused
6 contentions.

7 And the Commission reiterated that
8 expectation in its order from the summer of '08, in
9 which it upheld the TAPA Board's decision denying
10 Nevada's motion to strike DOE's LSN certification.

11 So really the Commission does have in mind
12 that contentions here are to be of the highest
13 quality and to are to be specific and substantially
14 supported in detail with references to the LSN
15 materials available.

16 Likewise, even when a party is citing its
17 own supporting information, LSN requirements, plus
18 the orders of the advisory PAPO Board require the
19 parties to either provide citations to LSN reference
20 materials or to attach the materials to their
21 petitions.

22 Again, so there's no accuse now in applying
23 this accepted criteria under 2.309 for parties not to
24 provide very detailed, very specific supported
25 contention on whether a genuine dispute, they're

1 supporting references or materiality. That's what we
2 really meant by saying a heightened obligation for
3 the quality of the contentions, given the LSN.

4 >> JUDGE FROEHLICH: So with the existence
5 of the LSN, we're still applying the standard, the
6 traditional 2.309. That we're not -- you're not
7 really talking before heightened standard. What
8 you're just looking for or arguing that the quality
9 of the contentions is required to be higher?

10 >> MR. SHEBELSKIE: Yes sir. It's a
11 similar application to the Commission's decision in
12 the Shieldalloy decision, CLI 99-12, in which they
13 held that in that context that we agree with the
14 presiding officer that petitioners represented by
15 counsel are generally held to a higher standard than
16 pro se litigants.

17 I think a comparable principle can be held
18 here that all petitioners now have an extraordinary
19 access, unprecedented access to all of DOE's
20 supporting and non-supporting information and reports
21 and studies, and also unprecedented all these parties
22 are under an obligation to have come forward with all
23 their supporting and non-supporting information and
24 likewise reports and studies.

25 And so unlike contentions that might

1 otherwise have been thought acceptable in other types
2 of cases, here, in applying the standards of 2.309,
3 the Boards out to be particularly precise in
4 demanding that there be substantiation on the bases
5 of genuine dispute and materiality.

6 >> JUDGE FROEHLICH: I think I understand
7 the distinction that Shieldalloy and -- you drew
8 between pro se -- pleadings from pro se applicants
9 and pleadings from parties that are represented by
10 counsel.

11 Are you suggesting there's a different
12 standard, in this case where parties are represented
13 by counsel, than in other cases before the Board or
14 the Commission?

15 >> MR. SHEBELSKIE: Well, again, it's the
16 same criteria of 2.309. But to use Judge Gibson's
17 phraseology from yesterday, should parties be cut
18 slack in this proceeding.

19 The answer is no. All the petitioners here
20 are now represented by counsel. Under Shieldalloy,
21 that alone holds them to a generally higher standard,
22 but now we've got Shieldalloy plus, if I might say,
23 because we have counsel plus all the information is
24 now on the table for framing focused and meaningful
25 contentions.

1 >> JUDGE FROEHLICH: Doesn't that argument
2 cut the other way just as well? That in this case,
3 different from some many -- every other case the
4 Commission has ever had, that the volume of material
5 with which the parties are working is so large that
6 perhaps we should cut them some slack, to use Judge
7 Gibson's term?

8 >> MR. SHEBELSKIE: No, Your Honor, I don't
9 think so, because from the very beginning of this
10 proceeding, in LSN the rule-making going back over
11 two decades now, it was always contemplated and
12 understood that there would be a large volume of
13 documentary material available to petitioners for
14 framing their contentions.

15 And we really have the most extraordinary
16 thing done in this proceeding, is that there has been
17 advanced disclosure so petitioners have all this
18 information available. They have DOE's analyses,
19 works, and all. That's unlike any other petitioner
20 has ever had access to in any other proceeding.

21 >> JUDGE MOORE: Mr. Shebelskie, as you
22 know, you and I have worked our way through all of
23 the LSN for five years with the Prelicense
24 Application Presiding Officer Board.

25 What you just said brings to mind the

1 needle in a haystack problem. Your argument about a
2 heightened obligation looks to some of the very
3 extensive regulatory history of subpart (j) involving
4 LSN and its predecessor, the LSS.

5 Also found in that legislative -- or
6 regulatory history are -- and in our statements from
7 the Commission that care needs to be taken not to
8 overburden the system with irrelevant material that
9 has the effect of cluttering the real purpose and
10 causing the needle in a haystack problem.

11 How does your argument take into account
12 the severe limitations of the LSN as far as a search
13 engine because of the lack of mandatory provisions;
14 although there are guidelines for -- that make
15 electronic searching more equivalent to what many of
16 us are used to in things like using Google or
17 comparable search engines, because there are
18 36 million plus pages of DOE material.

19 And by your own admission, if memory
20 serves -- and I emphasize, if memory serves -- I
21 believe, for example, DOE made a deliberate choice
22 with regard to circulated drafts, which is a
23 particular term defined in the regulations concerning
24 documentary material, to put them all in because it
25 was cheaper and quicker than to sort them out. And

1 that kind of approach was used by DOE, and one of the
2 reasons why the collection is the size that it
3 exists.

4 So the chairman's question to me takes on
5 added significance, because, even though there's an
6 unprecedented electronic documentary library system,
7 it has, to use an analogy that dates me, I'm afraid,
8 a faulty Dewey Decimal System card catalog.

9 >> MR. SHEBELSKIE: Your Honor, Mike
10 Shebelskie. Several points in response to that.

11 First, just with regards to the
12 searchability of at least the DOE collection in the
13 LSN. We did not limit our biographic header
14 information to the bare minimum that the LSN
15 regulations require. But we adopted very fulsome
16 header information with titles and authors and
17 recipients, going far above and beyond what the
18 regulations require, what anybody else required --
19 did with their headers, precisely to help improve the
20 searchability, at least of our collection.

21 Second, with respect to searchability as
22 well, the LSN is word searchable through the text.
23 And so searches are not confined to information
24 contained in the biographic headers.

25 But I think more broadly, I think you have

1 to take a broader view of the LSN in connection
2 really with DOE's development of the work product on
3 this project, because this is not a situation where
4 petitioners, or any other stakeholder or interested
5 person, has only had access to DOE's work product and
6 understand what we're doing by simply periodically
7 trolling through the LSN.

8 The LSN really is an adjunct, in some
9 respects, perhaps, the lesser important adjunct, to
10 the vast public interactions between DOE and NRC over
11 the years, and with the TRB and other public bodies,
12 where DOE has developed its work product in stages
13 through iterations. And we've had opportunities for
14 stakeholders who are interested to be involved, to
15 track along what was being done.

16 And then when we first began to make
17 documents available in the LSN in 2004, and then we
18 updated all that in 2007, that information was all,
19 there and you could follow it along.

20 In DOE's record system has maintained with
21 respect to our, for example, analysis model reports,
22 the key building blocks underlying the LA, a
23 consistent terminology and document number. And we
24 go through iterative revs, or revisions, of those.
25 So one can pull the thread all the way through the

1 LSN collection if you're interested in a particular
2 subject matter in the AMR and follow that development
3 through, through the LSN.

4 In addition to all of that, the LSN
5 regulations provide as part of the informal discovery
6 available to any petitioner or potential party, even,
7 in the prelicense phase, request for information from
8 us.

9 Now, Nevada took full advantage of that,
10 particularly once we made our second collection
11 online starting in 2007. And we had discussion of
12 this in some of the PAPO Board hearings on the
13 motions to strike, where Nevada had the list of our
14 AMRs and our big tracking tractor. Your Honor, you
15 may remember there's a 1500 list of documents on some
16 key management documents and the dates they were due,
17 and Nevada was tracking along when those would become
18 available on the LSN. And there was frequent
19 interchange between counsel for Nevada and counsel
20 for DOE about what documents they were interested in
21 and what's the schedule for them being on the LSN,
22 and we would apprise them and update them on that, so
23 they could track along and find in real time, the
24 final analyses as they wanted them.

25 No other potential -- no other petitioner

1 here, no other stakeholder in the world ever asked us
2 for that kind of information. And so given all the
3 public interactions for 20 years we've had, the
4 public bodies, given the information we've made
5 available on the LSN, and the ease -- the extra
6 efforts we went to to make it searchable and to
7 provide it, a way to pull the threads through search
8 terms and common terminology, and their --
9 essentially their failure to ever even ask us for
10 information they were interested in, helping them
11 locate things in the LSN, I don't think it's a fair
12 criticism to say that really the Commission's
13 expectations should now be set aside because there
14 happens to be a large volume of documents.

15 >> JUDGE MOORE: Okay. Accepting your
16 description of your collection and its virtues, how
17 does the minimum floor that is required by 309(f)(1)
18 for the admissibility of a contention change because
19 of any of that? And when subpart (j) was written, it
20 specifically excluded 309 from being changed.

21 >> MR. SHEBELSKIE: Yes, sir. Mike
22 Shebelskie again.

23 I think that the provision in 2.1000 that
24 says subpart (j) does not take precedence among other
25 things 2.309, means and simply means that the factors

1 of 2.309 that govern admissibility of contentions are
2 the factors that have to be pled and established in a
3 petition.

4 We're not saying anything differently from
5 that. But rather to take example -- an example with
6 the existence of a genuine dispute. If there's a
7 contention along the lines that DOE's analysis failed
8 to consider uncertainties, well, people shouldn't
9 just be able to leave that in that general term when
10 they have an extensive body of all of our analyses
11 that show exactly how we considered analysis.

12 >> JUDGE MOORE: I'm sorry. Perhaps I
13 didn't ask the question precisely.

14 How does the minimum floor for the
15 admissibility of a contention change because of the
16 LSN under 309?

17 Does your argument say that there is a
18 change -- whatever that minimum floor is is changed
19 because of the LSN?

20 >> MR. SHEBELSKIE: Your Honor, I hope
21 we're not -- may be I'm misunderstanding the
22 semantics of what you're asking me, because as I
23 understand your question, the answer would be, you
24 employ the same -- you apply the same legal factors
25 that you're looking to, but we notify -- we are

1 looking at the petition and the answer and the reply.

2 >> JUDGE MOORE: But I have that in every
3 case.

4 >> MR. SHEBELSKIE: Well, exactly. But
5 where someone alleges in a normal case, well, there's
6 an expert affidavit, say, or just a petition asserts,
7 that there's information that supports our
8 contention, in a normal case, you might say, well,
9 okay, they've asserted that, that's the minimum
10 floor, we'll accept that, but, here, you should be
11 asking yourselves, is that general assertion
12 sufficient when they had an -- each petitioner has an
13 obligation to --

14 >> JUDGE MOORE: Is that a -- is that yes,
15 Mr. Shebelskie?

16 >> MR. SHEBELSKIE: Well, I would say yes
17 in practical application.

18 >> JUDGE MOORE: Thank you.

19 >> JUDGE FROEHLICH: Let me just go a
20 little bit further with this, if I could. Before
21 Judge Moore's questions we were talking about, as we
22 evaluate the contentions and their admissibility,
23 that there might be some slack cut if we had a pro se
24 petitioner. Should there be any differentiation in
25 the amount of slack we cut between experienced NRC

1 practitioners and the parties who may be appearing
2 before this body for the very first time? Is there
3 any differentiation in the level of scrutiny that
4 those parties should be entitled to in their -- in
5 the admissibility of their contentions?

6 >> MR. SHEBELSKIE: Your Honor, I think
7 not. And, again, I think not because of what the
8 Commission has enjoined the role at large and all
9 interested stakeholders. They have made clear
10 throughout the rule-making on the subpart (j), and in
11 their opinions over the years with respect to some of
12 the issues that came up from the PAPO Board, that all
13 potential participants needed then, years ago, to
14 start getting ready for this proceeding. This is not
15 something that has sprung -- been sprung on the
16 parties with our application in July of 2008. And so
17 I think it's rather late in the day, many years late,
18 for parties to take -- advance the position,
19 Your Honor, just hypothecating.

20 >> JUDGE FROEHLICH: Judge Moore.

21 >> JUDGE MOORE: Mr. Shebelskie, doesn't
22 that coin also have an other side? That, again, if
23 memory serves, this proceeding to date prior to the
24 notice of opportunity -- well, prior to the filing of
25 the application in June of 2008, was hardly one that

1 could be tracked on a train schedule.

2 Indeed, I believe Section 114 of the Waste
3 Policy Act gave the secretary 90 days after the
4 president's acceptance of the site certification to
5 file an application which would have made it -- and I
6 believe Section 114 says the secretary shall file an
7 application with the Commission within 90 days. And
8 I believe that occurred in July of 2002, making the
9 application due in October of 2002.

10 Backing up from that date, we had similar
11 fits and starts, as well as subsequent to the date
12 when the Waste Policy Act said there was supposed to
13 be an application.

14 Now, my point is simply that these are --
15 the now petitioners, prior to filing a petition, they
16 were potential parties under subpart (j). And I have
17 always thought the yo-yo analogy seemed to have some
18 application.

19 How is a party supposed to devote their
20 time and attention to a project that had a schedule
21 but the train kept constantly being derailed. Not in
22 way placing blame. Please don't take it that way,
23 but you're saying that they've had all this notice,
24 but it's been a yo-yo.

25 And how -- the flip side of that coin is

1 that, certainly, you would have to have been living
2 on another planet not to been aware that it was a
3 project, but by the same token, it's hardly been a
4 smooth continuum, as the rules certainly
5 contemplated, as the Waste Policy Act certainly
6 contemplated, in which, in my view, speaking only for
7 myself, would give much more credence to your
8 argument.

9 >> MR. SHEBELSKIE: Your Honor, I think you
10 can compare the bare minimum that the Commission's
11 regulations provided and contrast that favorably to,
12 really, just take the last two years.

13 When the Commission made its statements
14 about expecting parties to have focused -- focused
15 and meaningful contentions, that's against the
16 backdrop of a regulatory structure, where DOE would
17 make it's LSN certification a scant six months before
18 submitting the LA, and then petitions to intervene
19 would be due some short period of time after
20 docketing of the LA.

21 What has happened, really, over the last
22 two years, is DOE made its initial certification
23 deliberately in October of 2007, some nine months,
24 not six months in advance of submittal of the LA. We
25 prior to that opened up our second collection as of

1 May 1st or April 30th, 2007, to give parties even
2 advanced access to those documents before our
3 certification. And then, of course, the Commission
4 has extended, based on a motion or petition filed by
5 Nevada to extend the time they had to file the
6 petition.

7 So really in the, certainly, last two
8 years, when despite the -- notwithstanding the
9 history, Judge Moore, you recounted, when the train
10 then came out of the station and people knew we were
11 on track then, DOE very deliberately, and then the
12 Commission added to it, provided the parties extra
13 time than what the bare -- the regulations themselves
14 would otherwise could have limited them to.

15 >> JUDGE MOORE: Mr. Fitzpatrick, would you
16 care to comment on any of this?

17 >> MR. FITZPATRICK: Yes, Your Honor,
18 Charles Fitzpatrick, State of Nevada. I'd like to
19 make a few comments about what's been said so far.
20 And maybe the most basic comment is it's too late for
21 DOE to wiggle off the hook, having briefed at length
22 an alleged requirement for a heightened expectation
23 to back down to that that's not really what they
24 meant and that they meant -- and then we shape shift,
25 though, into what we really meant was when you look

1 at the individual component parts of 309, yes, you
2 should apply a stricter standard. So, you know, it
3 ebbs and flows from heightened, now to didn't mean
4 that to back to we expect you to apply heightened.

5 Now, on the factual issues which are --
6 your question, Judge Froehlich, back a ways was: Is
7 there any legal support for the heightened
8 expectation, and I'll get to that in a second.

9 But on the factual issues, I'm willing for
10 the sake of this argument to sort of say there's a
11 wash between, on the one hand, the petitioners have
12 the benefit of more documents available to them. On
13 the flip side, they may have too many documents,
14 36 million pages available to them.

15 Many of the parties are new to NRC
16 proceedings. So that makes it more difficult for
17 them. And without going through my brief -- I won't,
18 but I'll just mention two points about the heightened
19 expectation and the vast quantity of available
20 documents.

21 When DOE made its second set, I guess they
22 call it, of documents available around May 1st, 2007,
23 that was an additional 2.1 million documents, that's
24 true. But about 2.0 million of those documents had
25 been already in the hands of DOE's LSN administrator,

1 Mr. Grazer, as of August 2004, only a few months
2 after the first LSN, you know, initial certification,
3 which did not stand up, but well before, a couple of
4 years before they gave Mr. Grazer, LSN administrator,
5 permission to reveal those documents publicly.

6 So the documents were in hand for a very
7 long time before they were revealed. So they don't
8 get brownie points for that.

9 And then just one other example. There's a
10 memo mentioned in our brief, and it's in the LSN and
11 the LSN numbers cited in our brief, where in
12 May 2007, they recounted the history of the TSPA and
13 said that there has been no publication of TSPA
14 information, despite, you know, vast quantities of
15 work done on it by DOE, since 2002, which I believe
16 was the TSPA so-called -SR for the site
17 recommendation. They concealed the versions of the
18 TSPA after that right up until the end of 2007 for
19 five years.

20 So, again, this is sort of water under the
21 bridge, and, Judge Moore, Mr. Shebelskie, and I have
22 been through the wars about LSN certifications in the
23 past, and I don't want to regurgitate that stuff, but
24 it's simply a valid point to bring up in the context
25 of a so-called heightened expectation.

1 Getting to the basic question about the
2 regulation and authority for the proposition, is
3 there any.

4 First, let me say that we don't dispute
5 what the NRC has said about the implementation of the
6 requirements of 2.309(f)(1) through 6. In other
7 words, the component parts of contentions. That the
8 LSN document database availability gives the parties
9 an opportunity to frame focused and meaningful
10 contentions. That's what the NRC did say, and that's
11 what our goal has been.

12 What the NRC did not say was there's a
13 heightened standard because of the LSN. The NRC
14 could have said that, if they chose to. As a matter
15 of fact, DOE has said in one of its briefs, "When the
16 Commission intends a specific result in its
17 regulations, it conveys that intent in an express
18 regulatory requirement. The Commission does not
19 leave the existence of important requirements to
20 guesswork, with interpretation." True.

21 So there is no regulation requiring a
22 heightened standard, but as a matter of fact, there
23 is the opposite. Because if you go through the
24 history of amendments to 10 CFR Part 2 to the 1991
25 amendments, which are at line 56 Federal Register

1 7787, and you go to page 7789, I think it was a
2 predecessor of NEI, the industry representative
3 that's, the background section and they're talking
4 about comments made, suggestions made, either adopted
5 or not adopted by the NRC in its regulation.

6 The NEI predecessor said -- or the
7 Commission reporting what the commenter said. The
8 commenter states that The availability of information
9 in the LSS -- at the time -- it's become LSN, but it
10 was LSN. In the LSS database and of certain types of
11 discovery during the preapplication license phase
12 warrant a more substantial threshold for contentions.

13 That's exactly what your question was
14 whether that does exist, in fact, in the law, that
15 requirement. Unfortunately, the response of the
16 Commission was, "The Commission disagrees that a
17 higher threshold is warranted for the admission of
18 initial contentions. An intervenor should not be
19 required to prove its case at the stage of initial
20 submission of contentions. This rule is requirement
21 that sufficient information be presented to establish
22 the existence of a general dispute with the applicant
23 on a material issue of fact or law allows the scope
24 of the proceeding to be defined in advance without
25 prematurely eliminating legitimate contentions."

1 Bottom line, the Commission considered that
2 this proposal 17 years ago, did not adopt it, and has
3 not adopted anything similar to it. To answer Judge
4 Moore's question, when the Commission adopted 2.309,
5 it well knew that an LSN database would be available
6 to participants and parties, and nonetheless did two
7 things, wrote the requirements of 2.309 the way it
8 did without some heightened wording for this
9 proceeding, and No. 2, adopted 10 CFR 2.1000 which
10 specifically states that 2.309's criteria for a valid
11 contention take precedence over anything in
12 subpart (j).

13 >> JUDGE FROEHLICH: I take it from your
14 response that you believe that you've been held to
15 that higher standard that was never written into the
16 rule in the responses that have been filed by DOE,
17 that they applied a higher standard than what 2.309
18 would normally require?

19 >> MR. FITZPATRICK: Well, yes, Your Honor.
20 They've certainly sought to apply a higher standard
21 than what the rules require, yes, sir.

22 >> JUDGE FROEHLICH: Okay. I know you've
23 been reluctant to use the phrase "heightened
24 standard" that appears in the pleadings, but is the
25 standard that you applied in your answers to the

1 contentions that were filed -- is that reflected by
2 your argument earlier of what DOE believes the
3 parties should be held to in their contention
4 pleadings?

5 >> MR. SHEBELSKIE: Our answer to each
6 petition or contention sets forth our specific
7 objections and the grounds for those objections. And
8 so whether you want to call them heightened standards
9 or not, those are the grounds that we're relying on.

10 >> JUDGE FROEHLICH: No. I believe you
11 referred to them in the pleadings; although not
12 today, as the heightened standards. Is my
13 recollection of your pleadings correct?

14 >> MR. SHEBELSKIE: Well, we discussed that
15 it is -- in the general section of our petition that
16 an application of the criteria under 2.309, the
17 Boards should take account of the availability, of
18 our information on the LSN, and the equal obligation
19 for all the parties to have made available and come
20 forward already with all their information.

21 This is -- and what we have -- and how this
22 plays out in practice in our objections -- and I'll
23 give you a general example -- I think is very
24 consistent with the rule-making language that
25 Mr. Fitzpatrick just referred the Board to. Because

1 in that same rule making, to quote the Commission
2 there, as an example, they wrote that, quote, "The
3 contention must be supported by a concise statement
4 of the alleged facts or expert opinion together with
5 specific sources and documents of which the
6 petitioner is aware, which will be relied upon to
7 establish the facts or expert opinion."

8 And then the Commission went on in the
9 language Mr. Fitzpatrick discussed to say we're not
10 going to require litigation on the truth or not, a
11 trial on the merits, but what we are demanding, for
12 example, is that if there's specific information your
13 experts are relaying or that your contention relies
14 upon, you have to give, for example, the specific
15 citations to it.

16 Many of our objections to the contentions,
17 many of Nevada's in particular, we object because the
18 contention says other studies and information
19 supports our view here, without any citation,
20 specific or otherwise, as to what that information
21 is.

22 Nevada and every other petitioner has to
23 have had on the LSN their supporting information.
24 And what we're saying is the kind of specificity they
25 need to give is exactly what the Commission was

1 expecting early on, as part of -- and that's a
2 requirement of 309. And one other point --

3 >> JUDGE MOORE: Let me interrupt for a
4 moment and go back to my minimum floor. Whatever
5 that minimum floor is, is that the standard that DOE
6 applied in its answers in the admissibility of
7 contentions?

8 >> MR. SHEBELSKIE: Just a minute,
9 Your Honor. Your Honor, Mike Shebelskie.

10 In our answers to petitions we applied the
11 established standards under 2.309 as laid out in the
12 Commission's case law and as described in our answer.

13 >> JUDGE MOORE: Thank you.

14 >> MR. SHEBELSKIE: Your Honor, if I may
15 also just touch on one brief point for the record
16 that Mr. Fitzpatrick mentioned. He singled out, in
17 particular, our TSPA analysis and commented, in
18 essence, that it was maintained in, quote, secrecy
19 for some certain years and didn't become available
20 till the summer of '08.

21 The record in the PAPO Board proceedings --
22 I won't belabor that -- laid out the history that the
23 TSPA was under revision for a couple of years, and
24 then the revised version came out in 2008. So it
25 wasn't in secret. It was being worked on, and a new

1 version developed.

2 But when we did release the revised version
3 of the TSPA that the LA is based on, DOE offered and
4 conducted a tutorial for Nevada and its experts, and
5 we invited the other affected units of local
6 government, that they could attend and participate to
7 understand what the new model was, how it was
8 structured, how it operated, et cetera, and answer
9 their questions. I believe only Nye County took us
10 up on that and sent a representative, if I recall
11 right, but it was sparsely attended. Nevada did.
12 And so we have attempted and have been forthcoming
13 in -- when we finalize the analysis to make it
14 available and to explain it to all interested
15 stakeholders, if they were interested in that.

16 >> JUDGE FROEHLICH: Before we leave and
17 turn to compliance with the LSN, I wonder if any of
18 the other parties would like to be heard on the
19 standard applied, as it has to do with the existence
20 of the LSN? May I hear from staff and then we'll
21 pick up the other part.

22 >> MR. ROACH: Just briefly, Your Honor.
23 The staff --

24 >> JUDGE FROEHLICH: Your name, please.

25 >> MR. ROACH: Kevin Roach for the NRC

1 staff.

2 The staff notes that the Commission has
3 noted that the contention rule is strict by design.
4 The staff does not believe that any additional
5 heightened obligation attaches to the pleading
6 requirements by virtue of the existence of the LSN.

7 >> JUDGE FROEHLICH: Okay. Thank you.
8 Other parties, Four Counties.

9 >> MR. LIST: Yes. Robert List on behalf
10 of the Four Counties, Your Honor. I would just
11 simply note for the record that we, in our
12 contentions, do not cite, with, I think, only one or
13 two of the exceptions, any of the LSN documents. And
14 those were documents, in fact, that we had submitted
15 to the LSN. So we did not rely heavily upon the LSN
16 at all. And yet the -- the answer from DOE
17 specifically throws the boilerplate heightened
18 obligation argument at us, and, frankly, it seems
19 inapplicable because we did not relay upon the LSN in
20 any depth.

21 >> JUDGE FROEHLICH: Thank you, Mr. List.
22 NEI?

23 >>NEI: Jay Silberg for NEI. As the
24 representative of NEI's predecessor in the LSS
25 proceeding, going back to the late 1980's, I agree

1 with Nevada's characterization. The end result of
2 that process was not a heightened standard.

3 We strongly believe that the standards to
4 be applied for contentions in this proceeding are the
5 standards set forth in the regulations, neither
6 heightened nor lowered.

7 With respect to the LSN, we did cite to LSN
8 materials. Nonetheless, in our response to you, we
9 in several cases pointed out that our references were
10 not included in the LSN. They were, we pointed out,
11 in our response. We also relied on documents that
12 were copywritten. DOE objected to that. We also
13 pointed out in our reply that reason those documents
14 were not in the LSN was because they were copywritten
15 and that DOE had not taken advantage of the
16 procedures for getting hold of those documents, which
17 in fact, they had.

18 Regardless of which standards, whether the
19 standards are heightened, loosened, or as required in
20 the regulations, we think the contentions, at least
21 that we have set forth, meet those standards well in
22 excess of the requirements.

23 >> JUDGE FROEHLICH: Yes, please.

24 >> MR. WILLIAMS: Thank you, sir, Scott
25 Williams for NCAC. I wanted to follow up, as quickly

1 as I can, on Judge Moore and Judge Froehlich's
2 comments on this.

3 Our reading of the DOE's response to the
4 petition from the Native Council is that they have
5 also used the existence of the LSN as a heightened
6 standard for standing. They have objected to our
7 presence here today on the grounds that the NCAC,
8 without the benefit of counsel, did not participate
9 in the compilation of documents in the electronic
10 record.

11 To us, that is on all fours with the issues
12 which the two of you have raised in the last
13 discussion. Our clients are citizens. They reside
14 in the rural area surrounding this proposed facility.
15 They are Indians. They have unique interests in that
16 area. They have followed this extremely closely.
17 But without the benefit of counsel, without the
18 benefit of resources, it was not possible for them to
19 pay attention to this to the degree that DOE would
20 seem to require here.

21 So we affirm what, I think, are the
22 concerns that Judge Froehlich and Judge Moore have
23 raised here and ask that, in evaluating the petition
24 to intervene filed by the NCAC, you not apply
25 standards other than those found in 2.309.

1 >> JUDGE FROEHLICH: Thank you,
2 Mr. Williams. Any other party? Yes.

3 >> MS. ROBY: Yes. Debra Roby for Clark
4 County.

5 I believe Judge Moore has framed this very
6 well, and I believe counsel for Nevada supplemented
7 that very well as well.

8 The bottom line is there is no heightened
9 standard. The regulations 309 lay out what is
10 required for framing your contentions. And the
11 Board, in evaluating those contentions, applies the
12 standards stated in 309.

13 If there was a heightened standard, then
14 Judge Moore asked what would be that floor, how would
15 that affect the floor. And if one were to take the
16 DOE's view, no one in this room would meet that
17 floor, whatever that floor may be.

18 DOE mentioned -- counsel today mentioned
19 that in making documentary evidence available early
20 on, in one instance only Nevada was the party who
21 engaged in discussion with the DOE about certain
22 material. And despite even Nevada's admirable
23 efforts, even it doesn't mean whatever that floor is
24 that the DOE would apply.

25 I think that the DOE would -- the DOE's

1 arguments here are an impermissible attack on 309,
2 and they're done after the fact, after all of the
3 parties have proffered their contentions and framed
4 the contentions in accordance with 309. Thank you.

5 >> JUDGE FROEHLICH: Yes.

6 >> MS. HOUCK: Darcie Houck for TIM. And
7 we concur with the comments of Nevada and Clark
8 County and the staff and the other NC -- NCAC in
9 regards that there is not a heightened standard, and
10 that the comments of Your Honors regarding the fact
11 that there has been significant barriers to some of
12 the parties in being able to adequately participate,
13 and even though the information has been out there
14 for years, examples such as the Timbisha Shoshone
15 Tribe filed a petition with the Department of
16 Interior to be deemed an affected Indian tribe in
17 2001.

18 That petition was not certified and that
19 status was not granted until June of 2007, and it
20 took another year and a half to go through the
21 funding process so that the funding that they were
22 entitled to under the Nuclear Waste Policy Act -- a
23 partial portion of that wasn't issued until
24 October 2008. So they were dealing with numerous
25 barriers in regards to preparing and certifying their

1 LSN. And we would just ask that that be taken into
2 consideration here.

3 >> JUDGE FROEHLICH: So noted.

4 >> MS. HOUCK: Thank you.

5 >> JUDGE FROEHLICH: Any other party?

6 >> MR. POLAND: Yes. Doug Poland for TOP.

7 I'd like to echo the comments that have been made
8 here.

9 I also represent an entity that is, I think
10 to use Judge Moore's words, is essentially -- was
11 pro se up until very recently, and many of the
12 arguments DOE has raised objecting to our LSN
13 submissions has to do with the fact that we didn't
14 have the ability to do that.

15 But I also want to mention the earlier
16 advisory PAPO Board orders made it clear that the LSN
17 is a standing for discovery. You don't give the
18 death penalty and keep somebody out at the contention
19 stage because they might not have made perfect
20 compliance with what is essentially discovery.

21 One other point I would like to make is
22 that in the June 20th order last year -- and I just
23 want to stress this -- that the Board did say that
24 the requirements that are set out in that order are
25 not intended to make the process more difficult

1 because the requirements are being imposed for the
2 first time in a unique and complex proceeding.
3 "Failure to comply with these case management
4 requirements shall not be grounds for any potential
5 party to object to the admissibility of a proffered
6 contention of the filing of the answer." Of course
7 then it goes on to discuss the 2.309 requirements.
8 So I think it made it very clear in that order.

9 >> JUDGE FROEHLICH: Thank you Mr. Poland.
10 Any other party? Yes, sir.

11 >> MR. HUSTON: Judge Froehlich, this is
12 John Huston for Caliente Hot Springs. I am a
13 beginner here at NRC, and I appreciated the comments
14 in that regard, and, Judge Moore, this has got to be
15 the biggest haystack I've ever seen, this LSN, and
16 sometimes to find things are difficult for a beginner
17 like me.

18 The other comment I'd make is this
19 apparently has been a long, long process. It's
20 been -- some of the history's been reviewed. 20
21 years. People come and go. People die. People
22 retire. And people who had an interest in standing
23 and own properties sell out and new people come in.
24 And so the idea that because this has been going on a
25 long time that the world has been on notice of their

1 interest in this proceeding, I find to be somewhat
2 lacking.

3 And then I would just ask the Commission to
4 take notice of the fact that this isn't the only
5 proceeding before a federal agency that this matter
6 involves. We've been before the Surface
7 Transportation, and that's been an educational
8 process, too. Thank you for your time.

9 >> JUDGE FROEHLICH: Thank you. Yes. Nye
10 County.

11 >> MR. VanNIEL: Jeffrey VanNiel on behalf
12 of Nye County, Your Honor.

13 With respect to the standard that 2.309
14 would specify as to the LSN requirements, Your Honor,
15 we think those basically speak for themselves. Judge
16 Moore clearly articulated what we think to be the
17 case, that the LSN does not add some additional level
18 of requirement to the floor that's set forth within
19 those requirements.

20 In our specific case, we attached or had
21 every -- we either attached a document to our
22 petition or had everything that we relied upon cited
23 to our LSN or from some other party's LSN, which we
24 believed was a requirement which was established or
25 at least articulated by the earlier PAPO order prior

1 to that event.

2 >> JUDGE FROEHLICH: Thank you. Let's move
3 on.

4 >> MR. SHEBELSKIE: Your Honor, if I may
5 just --

6 >> JUDGE FROEHLICH: Mr. Shebelskie.

7 >> MR. SHEBELSKIE: Thank you. If I may
8 just wrap up and make two quick observations in
9 response to what the other petitioners' comments
10 there.

11 We are not asking -- although we are being
12 accused of this, but we are not asking to apply
13 different standards than those under 309. This --
14 what we are asking for is directly analogous to what
15 boards like have this done all the time, that you
16 apply those standards to 309, when you're dealing
17 with the pro se petitioner in a less rigorous way
18 than you would with counsel filing the petitions.

19 In both instances, the Boards are applying
20 the standards of 309, but its expectations are
21 different and the application is more rigorous or
22 less flexible in the deliberately strict way, as the
23 NRC staff said, the Commission intended.

24 What we're asking here is no different,
25 that the boards in applying 309 needs to be mindful,

1 has to. That was the Commission's expectation, that
2 the parties would have access to our documents on the
3 LSN, and they would have already have come forward
4 with all of their supportive information to demand
5 the rigorous application of 309.

6 And then one second point with respect to
7 several of the other parties, other than Nevada, who
8 commented here about the needle in the haystack
9 issue. Their petitions are very focused in the main
10 on specific issues. For example, with both TIM and
11 TOP. Likewise with the NCAC and the Caliente Hot
12 Springs Resort. They have very focused limited
13 issues they are interested in and they've advanced
14 contentions on. For them now to say, well, there's a
15 vast body of information and all of these other
16 analyses in the LSN and that should be problem, that
17 doesn't really bear on their petitions because they
18 were concerning themselves with everything. Thank
19 you, Your Honor.

20 >> JUDGE FROEHLICH: Thank you. Let's move
21 now to issues that concern the LSN compliance.

22 As I've read the pleadings, DOE raises the
23 failure to demonstrate compliance with LSN procedures
24 and document production in order to argue why most
25 petitioners should not be allowed to participate in

1 this case.

2 In doing, so DOE claims that Nevada
3 specifically has failed to demonstrate -- and I'm
4 emphasizing demonstrate -- substantial and timely
5 compliance with the LSN procedures. Subpart (j)
6 requires a party in order to participate in the
7 high-level waste proceeding to comply with the
8 requirements of 2.1003.

9 My question then to DOE is: What kind of a
10 showing is necessary to demonstrate substantial and
11 timely compliance?

12 >> MR. SHEBELSKIE: Your Honor, Mike
13 Shebelskie for DOE.

14 I think the answer is to look at 2.1012(b),
15 because their demands that the petitioner must
16 demonstrate substantial and timely compliance with
17 the requirements of 2.1003. And I believe that's now
18 being shown on the screen. So one place we need to
19 look to is 2.1003. And, secondly, actually, 1012
20 subpart (c) as well. And we're scrolling back to
21 that.

22 1012 subpart (c) provides that "The
23 presiding officer shall not make a finding of
24 substantial and timely compliance for any person who
25 is not in compliance with all applicable orders of

1 the" -- for the PAPO Board in this context. So we
2 need to consider what are the requirements of 2.1003
3 as amplified from the PAPO Board orders.

4 When we look at 2.1003, it provides, as
5 material -- as pertinent here, under subpart (a),
6 that each other -- after prescribing a deadline for
7 DOE and then the NRC staff to make its initial
8 certifications, it requires each other potential
9 party -- and I'm going to pause there -- that is
10 unqualified. That's not just -- its the State of
11 Nevada. It is each other potential party, including
12 interested governmental participants, that they shall
13 make available no later than 90 days after DOE's
14 certification under compliance of 2.1009(b) the
15 electronic files of -- under subpart (a)(1) here, all
16 documentary material. I'll pause there. So that's
17 the first requirement, milestone to establish that
18 demonstrates substantial and timely compliance.

19 Each petitioner here, without exception,
20 was required within 90 days of our initial
21 certification to make a certification to the PAPO
22 Board that they had made available all extant
23 documentary material as of that time. We'll talk a
24 little bit in a minute about what that really might
25 mean in context here.

1 Beyond that then, there were obligations to
2 continue to supplement that production. 2.1003(e)
3 has the general obligation, again, incumbent upon
4 each potential party without exception, including
5 interested governmental participants, that they shall
6 continue to supplement its documentary material made
7 available on the LSN with any additional material
8 created after the time of its initial certification.

9 That requirement was amplified by case
10 management orders with the PAPO Board that required
11 potential participants, on a monthly basis, to update
12 their LSN collections and provide certifications to
13 that effect.

14 Now -- and that continued every month until
15 they then submitted their petitions. So the
16 chronology here is DOE made its initial certification
17 in October of 2007. As a result of 2.1003 and
18 (a)(1), each potential participant had to then, in
19 January of 2008 -- the specific deadline was
20 January 17, 2008 -- provide a certification to the
21 PAPO Board that it has, at that point, made available
22 all of its documentary material.

23 In order to make that certification in good
24 faith, of course, parties would have had to have had
25 requisite procedures and standards to identify

1 documentary material in their possession, custody,
2 and control, including that of their experts and
3 consultants, to have searched for those materials,
4 and then to have made them available as of
5 January 2008. And then to continue to supplement
6 production on a monthly basis, making monthly
7 certifications up until December 2008, when they
8 submitted their petitions.

9 In essence, then, Judge Froehlich, that is
10 what a petitioner in this case must be able to
11 demonstrate that they complied with all of those
12 obligations.

13 >> JUDGE FROEHLICH: So if they complied
14 with 2.1003, made all their documentary material
15 available, provided it and kept the updates, the
16 supplementation that's required by that section and
17 then certified their LSN collection, would they have
18 to do any more than that to demonstrate compliance?

19 >> MR. SHEBELSKIE: If there was then --
20 that that is what they would need to do. If there
21 was then a question raised about -- because this is
22 not just a formalism. They just don't certify
23 that -- the requirement in --

24 >> JUDGE FROEHLICH: What more than
25 certify.

1 >> MR. SHEBELSKIE: Yes. They actually
2 have to -- if there's a question raised that, okay,
3 you gave a certification, for example, DOE says, but
4 it was a formal -- it was a hallow certification, and
5 here is a question -- we raise a question, certainly
6 a prima facie question calling to doubt the accuracy
7 of the certification, or calling to doubt the
8 sufficiency that, had they truly made available a
9 substantial good faith effort to identify and make
10 available their documentary material. And I think
11 they need to demonstrate that they have complied with
12 the substantive legal requirement to make available
13 all their documentary material.

14 >> JUDGE FROEHLICH: So in the example you
15 just gave, there would be a challenge by DOE or some
16 party as to something being missing. They would
17 write back and say, no, it's not missing, or it is
18 there, or whatever. Would that the demonstration of
19 compliance with that final response?

20 >> MR. SHEBELSKIE: That could be, and I
21 think in the way you phrased that hypothetical, yes,
22 that if DOE said we think you're not in substantial
23 compliance because you haven't produced document X or
24 documents on this topic, and they respond with
25 evidence to say, yes, we have, here it is, and that's

1 acceptable to the Board, then that's a demonstration.

2 >> JUDGE FROEHLICH: Okay. Or they say
3 what the document that's missing can be found, let's
4 say in someone else's collection, too, would be
5 sufficient?

6 >> MR. SHEBELSKIE: Yes. If it's accurate,
7 yes.

8 >> JUDGE MOORE: Mr. Shebelskie, what's the
9 sequence in which DOE's displeasure is made known to
10 a potential party, now petitioner, that there's an
11 inadequacy in DOE's view of their LSN document
12 collection? Would that not have been a motion to
13 strike the certification, such as you filed against,
14 and if memory serves, before the PAPO Board, the City
15 of Las Vegas, Clark County, the State of Nevada?

16 >> MR. SHEBELSKIE: Your Honor, Mike
17 Shebelskie. The short answer is no.

18 >> JUDGE MOORE: The answer is no?

19 >> MR. SHEBELSKIE: No. Here's why. Back
20 in the day, in January of '08, procedurally where we
21 were was under 2.1003(a). All that regulation
22 requires is for the potential parties to provide the
23 certification to the then PAPO Board. There was no
24 requirement at that time, nothing in the regulations
25 that required the potential parties at that time to

1 make a demonstration of compliance.

2 >> JUDGE MOORE: But did not the
3 certification and both the regulations that call for
4 the certification and the PAPO Board orders and
5 decisions so require the same thing?

6 The certification was one delineated back
7 in 2004 in the PAPO Board's decision with respect to
8 Nevada's motion to strike DOE's initial
9 certification. And then all of the provisions that
10 you just outlined in the rules are encompassed within
11 that certification.

12 You can't certify something if you don't --
13 as I understand the requirement, certainly as I
14 understand what we said back in 2004, was that you
15 were certifying that you had procedures in effect,
16 that you had made a good faith effort to produce the
17 documents, and they were made available on the LSN.
18 And then the only question was timeliness of when
19 they filed their certification. The PAPO Board put a
20 monthly certification requirement -- supplementation
21 and certification requirement into effect. And those
22 are very things that I understood you to say complied
23 with -- that would be the demonstration.

24 >> MR. SHEBELSKIE: No. Two points,
25 Your Honor. The regulatory requirement that would

1 have been applicable here in January of -- in 2008,
2 90 days after our certification, only calls upon
3 potential parties to provide a certification.

4 Now, obviously the certification has to be
5 in good faith and based on a good faith basis. The
6 PAPO Board's 2004 order directed, in fact, that the
7 certifications were not to elaborate beyond that,
8 actually, were just to be -- the expression is
9 similar to like a -- it was obviously bare bones, but
10 it was just to be a one-line certification, like the
11 NRC staff had given that didn't go into detail and
12 provide qualification, factual information,
13 et cetera. It was just the conclusionary
14 certification of compliance.

15 There was no requirement 90 days after our
16 certification for the parties, potential parties to
17 demonstrate substantial and timely compliance.
18 **The regulation in 1012(b) creates new -- has**
19 **different language for the obligation at the petition**
20 **stage. And it was very clear, and the Commission has**
21 **been very consistent in its rule-making from the very**
22 **beginning in 1989 on this, that at this point now the**
23 **Commission has used the language requiring a**
24 **demonstration of substantial and timely compliance**
25 **know.**

1 One of the -- and, indeed, probably the
2 most important obligation for compliance here is the
3 good faith production of all their documentary
4 material. So it's not nearly that there's a
5 certification to that effect, but if a question has
6 been raised as to whether or not the party has
7 substantively complied with its obligation to produce
8 all of its documentary material, the burden now rests
9 upon it to demonstrate substantial and timely
10 compliance. Judge Gibson yesterday referred to this
11 as, I think, a gate keeping requirement to get access
12 to party status.

13 So in those instances then, when
14 petitioners -- we are responding to their petitions.
15 And we looked at the entirety of the record. In some
16 instances people had not made certifications, initial
17 or supplemental, and in some instances they had made
18 certifications, but where we looked at their LSN
19 collections juxtaposed against their contentions, it
20 struck us that they had not been -- they are not in
21 substantial compliance with the underlying
22 substantive requirement to have produced all their
23 documentary material. We then raised that in our
24 objections, part of our -- part of our answers,
25 objecting to their admission on that basis, and it's

1 their burden to demonstrate substantial and timely
2 compliance.

3 >> JUDGE MOORE: I must be missing
4 something from your earlier explanation. One --
5 2.1003 incorporates the requirements of 2.1009.
6 2.1009, I believe, spells out all the
7 things that a party must do to be in compliance with
8 the regulations concerning their LSN collection and
9 necessarily then are certifying to that they have a
10 designated official who's in charge of all of this.
11 They've established procedures to implement the
12 requirements of 2.00 -- I'm sorry. 2.1003. They
13 provide training to their staff on procedures to
14 implement. And it goes down the list of five items.
15 And then there's the (b), the responsible official
16 must certify.

17 What have I missed that the certification
18 doesn't pick up that you have named as a requirement
19 for the demonstration?

20 >> MR. SHEBELSKIE: Well, the
21 demonstration -- well, first of all, 2.1003 doesn't
22 call upon the potential participants in the
23 prelicense phase to make any demonstration. It
24 doesn't say it shall demonstrate. It just says
25 certifies.

1 >> JUDGE MOORE: That's a given. But the
2 certification captures the requirements that you have
3 named that must be then demonstrated; is that
4 correct?

5 >> MR. SHEBELSKIE: Yes. Yes.

6 >> JUDGE MOORE: Okay.

7 >> MR. SHEBELSKIE: At that point in time.

8 >> JUDGE MOORE: All right.

9 >> MR. SHEBELSKIE: Coming forward now to
10 the petition stage, 1210(b), under compliance, no
11 longer says it's sufficient for the petitioner simply
12 to certify when it submits its petition -- its
13 petition, that it is a compliance. It uses different
14 language.

15 Now, the threshold requirement is that a
16 person seeking party status won't be given that
17 status if it cannot demonstrate substantial and
18 timely compliance with the requirements. Now, what
19 does that mean will vary depending upon the
20 circumstances presented by a particular petition.

21 In instances where the petitioner never
22 made initial certification, never made any of the
23 monthly updates required by the PAPO boards, I don't
24 know, as a matter of law, it can demonstrate it has
25 been in substantial and timely compliance.

1 >> JUDGE MOORE: Okay. But let's take the
2 example of a petitioner who has --

3 >> MR. SHEBELSKIE: Yes.

4 >> JUDGE MOORE: -- initial certification,
5 done timely and monthly supplementation and
6 certification thereof.

7 >> MR. SHEBELSKIE: Yes. If there is a
8 question -- a prima facie question raised that,
9 notwithstanding its certifications, it has not met
10 the underlying substantive requirement.

11 >> JUDGE MOORE: Except for the sake of
12 argument your position, have you not just undercut
13 your position that it is the requirement of 2.1012(b)
14 that the petitioner, in its petition, must so
15 demonstrate, because you have just told me that, if
16 someone raises a prima facie case, then more is
17 required.

18 >> MR. SHEBELSKIE: Oh.

19 >> JUDGE MOORE: How can that possibly
20 occur if they have to do it upfront and they have no
21 idea unless they're mind readers what's in DOE's
22 mind.

23 >> MR. SHEBELSKIE: Okay. I see,
24 Your Honor. I misunderstood the direction of your
25 question. I apologize.

1 They can respond to it in their reply is
2 how they do it.

3 >> JUDGE MOORE: Well, which then means
4 that your call upon them is in the answer, which is
5 a -- when I initially use the word "sequence," I had
6 in mind, doesn't it make sense for the process that
7 you've outlined to occur by you, in your answer, as
8 you have done, for lack of a better term, objected,
9 to the admission or the granting of any petition on
10 grounds that they have not complied with their LSN
11 requirements. They can, excuse me, respond in the
12 reply.

13 >> MR. SHEBELSKIE: Yes, Your Honor. I
14 understood your question to ask whether we needed to
15 file a motion objecting.

16 >> JUDGE MOORE: No.

17 >> MR. SHEBELSKIE: And that was the source
18 of my confusion. I apologize.

19 >> JUDGE MOORE: Let's go back to the
20 opportunity to file motions to strike, which you
21 availed yourself of, Nevada availed itself of, does
22 that not make both practical sense, and in reality
23 that's what happened when you had -- you among
24 others, had challenges to the certifications which
25 also necessarily encompassed these requirements that

1 are set forth in 2.1003 and 2.1009?

2 >> MR. SHEBELSKIE: No, Your Honor, I don't
3 think that follows either as a matter of substance
4 or, I'll say, even convenience. Because back in the
5 prelicense phase, when the parties were required to
6 make their initial LSN certifications, that was it.
7 That was the only process required by the
8 regulations. It wasn't a process where the
9 petitioner -- the potential parties filed a
10 certification, the regulations called for us to give
11 an answer to it, and then for us -- and then for the
12 petitioner, the potential parties, to do a reply to
13 it, which is the process obviously you have with the
14 petitions to intervene.

15 Also substantively there was no requirement
16 of -- under the regulations for any demonstration.
17 They only use that term. It's simply file the
18 certification, 90 days. It has to be in good faith,
19 and then that's -- the regulations are otherwise
20 silent. Here we have in 1012 --

21 >> JUDGE MOORE: Excuse me. Let me
22 interrupt. Doesn't -- but that certification,
23 necessarily, was certifying that they had made
24 available their LSN document collection and that was
25 in compliance with the requirements also of 2.1003

1 and 2.1009.

2 >> MR. SHEBELSKIE: Oh, yes, Your Honor,
3 but your question, as I understood it, was asking why
4 didn't you file a motion to strike --

5 >> JUDGE MOORE: That's fine. You answered
6 my question.

7 >> MR. SHEBELSKIE: -- and not do it now.

8 >> JUDGE MOORE: Now, my next question is:
9 With regard to motions to strike, why, at least with
10 respect to the State of Nevada, was not the licensing
11 board's denial of your motion to strike their
12 certification, which was denied and then affirmed by
13 the Commission, res judicata, as to the matters that
14 you seek now to raise with respect to Nevada at least
15 up to the point of initial certification?

16 >> MR. SHEBELSKIE: Oh, and I think,
17 Your Honor, that would be the case, if it's
18 collateral estoppel or not, but we're not -- we
19 weren't challenging that in our answer to their
20 petition. We accepted as a premise that their
21 production, as of January of 2008 had been upheld by
22 the PAPO Board.

23 >> JUDGE MOORE: Okay. Now, the doctrine,
24 as you, in your answers have pointed out with regard
25 to enumerable contentions, is one applicable

1 administrative proceedings, but, two, as generally
2 applied, encompasses not only matters raised but
3 matters that could have been raised.

4 Nothing in your challenge to Nevada's LSN
5 compliance was a matter that could not have been
6 raised by DOE in its motion to strike Nevada's
7 certification. So why does that not bar your
8 challenge that seeks to even challenge their initial
9 certification?

10 >> MR. SHEBELSKIE: Your Honor, I don't
11 believe our answer to Nevada's petition challenges or
12 seeks to challenge their initial certification in
13 January of '08, and that certainly wasn't our intent.

14 Rather, what we -- the thrust of our
15 objection there in the answer was that the PAPO Board
16 has said -- held that Nevada was not required, in
17 January of '08, to identify -- have identified all
18 its supporting and non-supporting information because
19 it was a reliance criteria and had the position --

20 >> JUDGE MOORE: Back up, Mr. Shebelskie.
21 The motion was denied on the grounds that DOE had not
22 met its burden as the movant to carry its motion.

23 >> MR. SHEBELSKIE: Right.

24 >> JUDGE MOORE: And that motion did not
25 raise, but could have raised each and every point

1 that you have now raised in your answer that was --
2 was, in fact, made in the dissent to the majority
3 decision, and you've reiterated those points of the
4 dissent in your answer here.

5 >> MR. SHEBELSKIE: Your Honor, let me make
6 two points. I'll respond to that, but then make --
7 I'd like to make a point that I think may
8 short-circuit some of the more of the questions on
9 this.

10 The answer to your question is our
11 objection in the answer to Nevada's petition was
12 objecting that Nevada -- it did not appear to us,
13 based on the limited supplemental production they had
14 done since their initial certification -- had
15 undertaken to identify additional supporting and
16 non-supporting information, as they developed their
17 contentions. That was a continuing obligation.
18 That's part of that supplemental production
19 obligation that 2000 -- 1003(e), the PAPO Board
20 orders, and inherent in the reliance concept requires
21 petitioners to do. Our objection -- that was --
22 that's our objection in their answer.

23 Now, we made that objection, and I'll get
24 to the second point. So to close out that point. So
25 we were not saying we were challenging sufficiency of

1 their initial production, but rather based on the
2 facts and circumstances as they then were available
3 in the record, when we answered their petition, it
4 seemed to us they had not made the supplemental
5 productions to identify additional supporting or
6 non-supporting information. All right. That said.

7 Second point here, to try to, perhaps, get
8 us to -- bring us up to date with the record. When
9 we filed that answer, all we had available to us was
10 Nevada's petition and what we could see in the
11 history of the LSN.

12 Nevada's petition just gave a blanket
13 certification without any facts and circumstances
14 that they had complied. But what the record in the
15 LSN showed, however, was essentially, little to any
16 supplementation from January up until maybe November,
17 the facts as set forth in our petition, until maybe 4
18 or 500 documents right at the tail end.

19 And we looked at those 400 and some
20 documents. They did not strike us, and for the
21 reasons given our petition, to have been related to a
22 result of the supplemental information.

23 Now, Nevada has -- we did not have the
24 benefit of Mr. Fitzpatrick's declaration, and so the
25 process played out, Your Honor, as we were discussing

1 would be the process here. We raised objection.
2 Nevada came forward with -- to make a factual
3 showing, not just assertions of counsel, but a sworn
4 declaration, saying that at least counsel had given
5 the instructions to the staff and to the experts, had
6 given the standards to look for the right types of
7 things, and they actually had done two or three
8 levels of review.

9 Now, if we had had the benefit of that
10 affidavit, but this other process plays out, we may
11 have taken a different approach. So I'll accept
12 Mr. Fitzpatrick's representation, as that's what he's
13 done.

14 So here's where I think we are now then
15 with respect to Nevada, and uniquely to Nevada.
16 Nevada has now sworn through -- through the briefing
17 we had on the initial motion to strike and now in its
18 petition, that it has exhaustively looked for all its
19 supporting -- exhaustively looked for all its
20 supporting and non-supporting information, canvassed
21 all of its experts, all of its contractors and pushed
22 that requirement down to their subcontractors and
23 have produced all their reports and studies. That's
24 the record. We'll accept Mr. Fitzpatrick's
25 representation.

1 But what that should mean then is that all
2 the supporting information that Nevada and its
3 experts are relying on, then are in the LSN, and they
4 should not be able to come forward in the future
5 during the litigation phase and suddenly produce, oh,
6 here's information, analyses that we had that predate
7 December 2008. Oh, we just didn't -- we forgot to
8 put them on the LSN.

9 Likewise, when we get in discovery, and we
10 take depositions of their experts, and we find that
11 they did not, in fact, properly review their emails
12 and other documents for their non-supporting
13 information, or equally bad they didn't preserve
14 them, then we think a sanction will be appropriate.
15 That would be the next step.

16 >> JUDGE MOORE: Mr. Shebelskie, I believe
17 that's a given. And I specifically remember in the
18 PAPO that this was discussed at numerous case
19 management conferences.

20 >> MR. SHEBELSKIE: Yes, Your Honor. That
21 is a given.

22 >> JUDGE MOORE: So I think we can wrap
23 this up.

24 >> MR. SHEBELSKIE: Let me conclude this,
25 though, by saying this is not just going to be a --

1 this is not a hypothetical concern.

2 >> JUDGE MOORE: I fully understand that.

3 >> MR. SHEBELSKIE: All right. Because
4 this is a new development that wasn't available to us
5 when we filed our answer because this relates to
6 Nevada's supplementation of their LSN collection in
7 February of 2009.

8 Having now repeatedly told licensing boards
9 that all that material was identified and produced,
10 in February of 2009 Nevada supplemented its LSN
11 collection with approximately 50 documents.

12 The bulk of those documents are reports by
13 two of their experts, Eugene Smith and Morey
14 Morganstein. Mr. Smith is one of their critical
15 experts on geoscience, and Mr. Morganstein on the
16 critical topic of corrosion. You would think, based
17 on their representations that they'd given about
18 compliance, that these would be new documents. In
19 fact, most of these documents are reports that date
20 back to the period 2005 and 2006, and only now
21 produced on the LSN.

22 What makes this particularly disturbing to
23 us is that we identified the absence of documentation
24 from experts Smith and Morganstein as part of our
25 initial challenge to Nevada's motion for initial

1 certification. We likewise raised this in our answer
2 to the petition. In page 24, Footnote 1, we
3 identified that only one or two documents from Mr. --
4 Professor Morganstein were in the supplemental
5 production. We found that incredible to believe.

6 On page 26 and 27 of our answer, with
7 respect to Professor Smith, we noted that the
8 supplemental productions of Nevada still seemed
9 incomplete because his curriculum vitae attached to
10 their petition said he had prepared over 300 reports
11 for the Nevada Nuclear Waste Project Office. We
12 couldn't find 300 such reports. He also said he had
13 been continuing to do work since after 2005 through
14 2007. We couldn't find those either, and now,
15 suddenly they show up.

16 >> JUDGE MOORE: Mr. Shebelskie, during the
17 PAPO phase and in the initial PAPO Board's
18 decision -- and I believe it was perhaps repeated in
19 the majority decision in denial of your motion to
20 strike Nevada's certification -- it's pointed out
21 that the good faith standard, which was one that
22 Nevada -- I'm sorry -- that DOE argued for very
23 strenuously initially, and that mistakes would be
24 made and nobody was perfect and that's why the word
25 "all" in the regulations was not to be read

1 literally.

2 The Board fully concurred and put a good
3 faith standard into effect, and I would venture to
4 guess that the same complaint that you are now
5 making, if we were to put DOE's collection under a
6 microscope on the timing of how documents have been
7 put in, we might also find some documents that
8 because we knew there was a lap period, a lag period,
9 all of that was taken into account, and all of that
10 is part of the good faith standard.

11 So I think your point has been made in the
12 past. We understand your point, and we are well
13 aware of that point.

14 >> MR. SHEBELSKIE: Thank you, Your Honor.

15 >> JUDGE FROEHLICH: I think at this point
16 I'd like to hear from declarant in the response.
17 Nevada, please.

18 >> MR. FITZPATRICK: Thank you, Your Honor,
19 Charles Fitzpatrick for Nevada.

20 Let me start at the tail end. I want to
21 address the stuff in order, but just the tail end is
22 important.

23 DOE's -- the issue of DOE's credibility was
24 raised both prior days of this proceeding, and so I
25 think it's important going forward, from the comments

1 that were made by judges, that where DOE's
2 credibility is questionable, that it be memorialized
3 in the record.

4 That's why I'm bringing up the last thing
5 that was said, was the alleged disturbance of DOE by
6 the fact that additional reports of Dr. Gene Smith
7 have suddenly appeared; although they were concealed
8 up until now.

9 The facts are -- and it's interesting where
10 it serves DOE's purpose, it accepts the
11 representations; where it doesn't, it apparently
12 doesn't read them.

13 Because the issue of Dr. Smith and the
14 completeness of his reports on the LSN was raised,
15 DOE -- Nevada conducted another search, reported the
16 results of it to DOE by way of its -- a reply to DOE
17 in this proceeding, you know, just the reply on the
18 contentions.

19 With respect to Dr. Smith, some additional
20 activity reports were found, which Nevada does not
21 believe are studies or reports, documentary material
22 No. 3, or documentary material of any type.

23 Nevertheless -- nonetheless, Nevada
24 determined to add these documents to its LSN, and
25 make the documents available to DOE consistent in its

1 philosophy of erring in the direction of inclusion.

2 My point is we're talking good faith, bad faith.

3 >> JUDGE MOORE: Is that in your

4 declaration attached to your reply?

5 >> MR. FITZPATRICK: Yes, Your Honor.

6 >> JUDGE MOORE: Okay. Thank you.

7 >> MR. FITZPATRICK: The point is that
8 throughout this proceeding in many different filings,
9 Nevada, with respect to LSN documentation, has said
10 over and over that we will be happy to fill any void,
11 any gap that anyone can show us, anything that's
12 missing. We'll be happy to provide it promptly on
13 request or notice --

14 >> JUDGE MOORE: Mr. Fitzpatrick, let me
15 interrupt. That's all in your reply. We're well
16 aware of that theme throughout the process.

17 >> MR. FITZPATRICK: All right. It's just
18 disturbing then that when we respond to an inquiry
19 about a particular expert's materials, conclude they
20 are not documentary material, need not be on the LSN,
21 but put them on in an abundance of caution and
22 cooperation, to be accused in a hearing of disturbing
23 conduct is itself disturbing.

24 >> JUDGE MOORE: Mr. Fitzpatrick, no good
25 deed goes unpunished.

1 >> MR. FITZPATRICK: That's true. Going
2 back to Judge Froehlich's original question with
3 respect to 2.1012(b) and its requirements, let me say
4 at the outset, I think the question was who has to
5 make a demonstration and what is the demonstration.
6 I'm combining your question with Judge Moore's
7 subsequent question.

8 Our answer to that is no one has to make a
9 demonstration. No one. That's not what 1012 says.
10 DOE's brief says that. It says -- 1012 says that the
11 parties must demonstrate whether the parties are
12 required to, and it says that they must make this
13 demonstration in their petition for intervention.
14 But that's not what 1012 says. 1012 says they must
15 be able to do.

16 It says, quote, for once -- let's get the
17 quote. "If it cannot demonstrate, it may not be
18 granted party status, if it cannot demonstrate." It
19 doesn't say it must demonstrate in its petition, and
20 it doesn't say it's required to in its petition.

21 Secondly, what must be demonstrated, I
22 think that's been covered correctly by Judge Moore
23 and I think NRC in its reply to contentions, it took
24 the position that we're a party. It cited the
25 regulations 103, 109. And it said that where a party

1 had certified in timely fashion its initial
2 certification and had done monthly certifications to
3 update it, that it would accept that -- those
4 representations.

5 The party signs its pleading under 2.304.
6 It's a representation that what is filed is the
7 truth, and NRC accepted that. But what may be most
8 important from Nevada's point of view, Nevada
9 believes that 2.1012 and the sanction that's
10 mentioned in there that won't be granted party
11 status, if it cannot demonstrate. First of all, let
12 me say, we can demonstrate and we tried at length to
13 demonstrate it in our reply.

14 But nonetheless, we don't have to
15 demonstrate it, nor do any of the other petitioners
16 who -- in whose jurisdiction the repository sits.
17 You have to be able to demonstrate it. Don't even
18 need to be able to demonstrate it.

19 >> JUDGE FROEHLICH: Not even that.

20 >> MR. FITZPATRICK: According to 2.1000,
21 2.309, takes precedence over anything in subpart (j).
22 And what 2.309 says about standing for parties who
23 live in the jurisdiction where the repository is
24 cited -- this is 2.309 --

25 >> JUDGE MOORE: But, Mr. Fitzpatrick, that

1 doesn't go to LSN compliance. That goes to standing.
2 So I don't think it's relevant to whether or not the
3 petitioners have complied with the LSN compliance
4 requirements in subpart (j).

5 >> MR. FITZPATRICK: I respectfully suggest
6 2.3092(iii) does address -- does deal with LSN as
7 well. Can I explain?

8 >> JUDGE MOORE: Would you give me the cite
9 again, please?

10 >> MR. FITZPATRICK: 2.309(d)(2)(iii).

11 >> JUDGE MOORE: Contention admissibility
12 standards?

13 >> MR. FITZPATRICK: Yes, Your Honor,
14 written for this proceeding, with this repository,
15 with subpart (j) well-known and in mind.

16 >> JUDGE MOORE: Please, again in
17 30 seconds, make your argument.

18 >> MR. FITZPATRICK: I'll do it in
19 30 seconds.

20 What that provision says, the Commission
21 shall permit intervention by the state and local
22 government body in which such area is located, and by
23 any affected federally recognized Indian tribe as
24 defined in Part 60 and 63.

25 >> JUDGE MOORE: All right. I understand

1 your argument.

2 >> MR. FITZPATRICK: May I finish? And
3 then it says, provided, if the requirements of
4 paragraph F, only F, of this section is satisfied
5 with respect to at least one contention, and then it
6 goes and says all other petitions for intervention,
7 meaning everybody but the resident in any such
8 proceeding must be reviewed under the provisions of
9 paragraphs A through F.

10 In other words, the whole nine yards of
11 309. You go back to A of 309, and that also requires
12 under (a) the Board shall consider failure -- any
13 failure of the petitioner to participant as a
14 potential party to the prelicense application phase
15 under subpart (j) in addition to the fact that's
16 mentioned in paragraph (d).

17 >> JUDGE MOORE: Thank you.

18 >> MR. FITZPATRICK: So it applies to that
19 as well. I think that it was evident that this
20 reading of 10.12, that it's not a requirement to make
21 a demonstration in your petition. It was apparently
22 agreed upon by all 14 petitioners and the NRC, and it
23 was only DOE that read it as a requirement in the
24 petition intervention. But again, disturbingly and
25 on the issue of credibility, DOE stated in its

1 response to seven of the petitioners who made no
2 demonstration that that's --

3 >> JUDGE MOORE: That's all in your brief,
4 Mr. Fitzpatrick. We're well familiar with it.

5 >> MR. FITZPATRICK: Thank you, Your Honor.
6 I'm done.

7 >> JUDGE FROEHLICH: I think this would be
8 a good point to take our -- would any other party
9 like to be heard at this point on this issue and then
10 we'll break for lunch.

11 >> MS. ROBY: Yes. Debra Roby for Clark
12 County. We can do it now or we can do it after
13 lunch, whichever you'd prefer.

14 >> JUDGE FROEHLICH: Why don't we do it
15 after lunch.

16 >> MS. ROBY: That's fine.

17 >> JUDGE FROEHLICH: We won't leave this
18 subject.

19 >> MS. ROBY: Sure.

20 >> JUDGE FROEHLICH: I see by the clock at
21 the back, it's 20 minutes after 12:00. We'll
22 reconvene at 1:50, 90 minutes for lunch. We stand in
23 recess.

24 (A recess was taken)

25 >> JUDGE FROEHLICH: Please be seated.

1 We'll be back on the record. I believe we left off
2 and I had cut off Clark County. Ms. Roby.

3 >> MS. ROBY: Thank you very much, Your
4 Honor. Before we broke, we were talking about LSN
5 compliance matters, and Clark County is among those
6 who has faced a challenge by the DOE for failing to
7 comply with LSN. We responded to that challenge in
8 our pleadings. I won't here repeat those arguments.
9 I just want to respond briefly to some of the
10 statements that I heard today in a discussion that
11 has occurred today.

12 And I'll start by saying, and I don't mean
13 to be flip about this, but I can't tell what the
14 DOE's position is anymore. I can't tell if they've
15 abandoned certain of their arguments or if they're
16 clinging to certain of those arguments in response to
17 certain questions. For example, in response to Judge
18 Froelich's very methodical approach to the DOE's
19 argument, the DOE was explaining sequentially what
20 has to happen for LSN compliance. And, when DOE
21 finished, Judge Froelich asked, what else, is there
22 anything else one must do.

23 And, at that point, DOE counsel had not
24 asserted that one must plead LSN compliance in their
25 petition in order to be in compliance.

1 That was followed by a question from Judge
2 Moore about what must one do to demonstrate, when is
3 demonstration required.

4 At, that point, DOE's counsel says after a
5 challenge, so, in your petition if one hasn't
6 challenged you, why would you put in a demonstration
7 if one hasn't challenged you?

8 DOE's counsel, Judge Moore asked about,
9 when that challenge occurs, if they haven't pled,
10 when do they have the opportunity to the do that.
11 DOE's counsel says, "Well, in their reply." So, at
12 this point, it's unclear whether a failure -- DOE's
13 position, that is, a failure to plead that is grounds
14 for denying intervention or whether failure to
15 respond to that is grounds for denial for
16 intervening.

17 We, of course, believe that there is no
18 requirement to plead it in the intervention. The
19 monthly certifications are the demonstrations in and
20 of themselves. And I think that's pretty clear.

21 Another thing that DOE's counsel said
22 before break is a petitioner -- in response to Judge
23 Moore's questions how does one respond to the prima
24 facie attack, DOE's counsel said in the answer. In
25 the petition in the answer to the petition, DOE's

1 counsel said the answer is not the time to cure a
2 defect, implying that a response to a challenge on
3 the LSN would not be appropriate in the reply to an
4 answer from DOE.

5 So it's -- their position from one question
6 to the next appears to be inconsistent here today,
7 and it also appears to be inconsistent with what is
8 in their pleadings. It's just difficult to pin down
9 what the position is. And we would agree with
10 counsel from Nevada that there is no affirmative
11 requirement to plead it in the intervention. The
12 10.12(b) doesn't state what the DOE claims it states
13 and that Clark County is in full compliance with LSN
14 requirements, and, having faced the challenge, we
15 actually answered that in our petition -- or in our
16 reply to the DOE's answer.

17 >> JUDGE MOORE: We will have to sort this
18 out, and we will. Before we leave the subject of the
19 LSN, because there appears to be a misapprehension by
20 DOE concerning LBP 08-05 which was the majority
21 decision, clerk, would you bring up footnote 9 from
22 page 20 of DOE's answer to petition to intervene,
23 please, and I would just like to make a point of
24 clarification.

25 Although I would normally never presume to

1 speak for Judge Rosenthal, he has authorized me to
2 also speak in his behalf with respect to this
3 footnote. Judge Rosenthal and I comprised the
4 majority in LBP 08-05 67 NRC 205-2008. That ruling
5 was affirmed by the Commission. The majority ruling,
6 to which there was a lengthy dissent, denied, as I
7 mentioned earlier this morning, DOE's motion to
8 strike LSN's certification with the State of Nevada.

9 It is my firm belief that no reasonable
10 reading of LBP 08-05 could allow rules of the
11 slightest doubt that the majority was disagreeing
12 with the dissent with respect to the so-called 2007
13 call memo or any other matter put forth by the
14 dissent.

15 But, even if that were not the case, there
16 is no accepted judicial doctrine that the majority's
17 silence in the face of a dissent is acquiescence in
18 any point in the dissent. Until I was treated to
19 footnote 9 in DOE's answer, I would have thought that
20 point was obvious.

21 Because of that footnote that essentially
22 said that my silence was assent, I felt that that
23 clarification was justified.

24 Now, I would like to move on to another
25 subject. Mr. Chairman --

1 >> MR. SHEBELSKIE: Your Honor, Mike
2 Shebelskie for DOE. There was one point that
3 Mr. Fitzpatrick made that I did want to respond to
4 regarding these reports that they produced in
5 January -- February of LSN.

6 >> JUDGE MOORE: I think we're done with
7 LSN. We're going to try very hard at the end of -- I
8 believe the chairman's plan is to, like the other
9 boards, at the end of the day, give everyone a few
10 moments to try to scratch whichever itches they
11 believe were outstanding from the matters we covered
12 today, and you should get that opportunity then. We
13 must move on.

14 >> MR. SHEBELSKIE: All right, thank you,
15 Your Honor.

16 >> JUDGE WARDWELL: Yes, and, along those
17 lines, I'd like to follow up on some of the
18 discussion that took place on Tuesday and Wednesday
19 regarding some of these various regulations and their
20 interaction with what might be a material dispute or
21 not.

22 And, in my view, you know, I understand
23 Part 63 to be a performance-based regulation, and it
24 has various ones that we talked about earlier in the
25 week, and, for the sake of brevity, I'll just kind

1 of list the numbers now, the 101, 102(h), 102(j),
2 114(b, (c), and (g), 305(c). And these various
3 regulations require, you know, that various
4 parameters we looked at that the performance be based
5 on credible models, that a wide range of both good
6 and bad effects be evaluated, and various factors
7 related to geoscience be considered and that type of
8 thing.

9 The question I want to make sure I
10 understand from DOE is, and I guess would be
11 Mr. Silverman, would you be the best one or would
12 there be someone else?

13 >> MR. SILVERMAN: I think when we hear the
14 question. It may be me or Mr. Zaffuts.

15 >> JUDGE MOORE: We'll start with you.
16 Feel free to hand her off. I know on Tuesday, I
17 think it was, when you qualified these as process
18 regulations, I think, in my viewpoint, I'd categorize
19 them more as kind of preconditions qualifying
20 criteria that really the TSPA has to meet regardless
21 of the adequacy of the TSPA, that these are
22 established to assure that the analysis is done
23 correctly, that it isn't merely to do -- to come up
24 with a number and a result but to also have some
25 assurances because of the complexity of this that

1 it's being done right. And so it has a lot of
2 discussion of these performance types of things that
3 you must do that, one, helps indicate that you did it
4 right and, two, helps build more assurances that the
5 degree of uncertainty is quantified correctly and
6 that the model results have some type of comfort
7 level with them. What's wrong with my summation of
8 that?

9 Do you agree with that characterization or
10 do you generally agree with it?

11 Or I said agree twice.

12 Do you disagree with that? You know, I
13 think you know what I mean.

14 >> MR. SILVERMAN: This is Mr. Silverman.
15 I think I agree with your characterization. I think
16 it's similar to what I was trying to say when I used
17 the very shorthand phrase "process regulation." It's
18 a description of how you do the analyses and the
19 purpose of those parameters, those requirements in
20 those regulations. It's to ensure that the analysis
21 is adequate. I think that's similar to what you've
22 said.

23 >>JUDGE WARDWELL: So, therefore, a
24 violation of those regulations isn't that data
25 disputed in and of itself?

1 Because, if you don't achieve those
2 regulations, regardless of the outcome of the TSPA,
3 you've violated the regulations and it is a viable
4 contention to be addressed to see whether that's
5 correct or not, because we lose that degree of
6 comfort with the uncertainty of the analysis and the
7 results that we see come out of the TSPA.

8 >> MR. SILVERMAN: I think what we were
9 saying was that, because of the certain
10 non-proscriptive nature of this regulation, that
11 there was a considerable range of acceptable, not an
12 unlimited range, but a considerable range of
13 acceptable interpretation and application on the part
14 of the applicant to apply these, that there could be
15 bounds exceeded, if those bounds are exceeded and the
16 regulation is, in fact, violated, that may be a
17 material issue but that we did not think that most of
18 the allegations and contentions that we were dealing
19 with, if any, properly pled a violation.

20 >>JUDGE WARDWELL: That's pretty much a
21 repeat you said the other day. I guess it will be
22 left to us to judge how far. I'll get a little bit
23 more about digging into the merits of it or digging
24 into the SAR and SLA, and, in fact, it will be the
25 next question after this one, but I think, on one of

1 the previous days, you referenced the fact that
2 similar contentions that were based on process, which
3 you can label as process regulations were denied at
4 Indian Point.

5 >> MR. SILVERMAN: Yes.

6 >>JUDGE WARDWELL: Do you remember that?

7 >> MR. SILVERMAN: Yes.

8 >>JUDGE WARDWELL: Did you look at the
9 contentions that were accepted at Indian Point and
10 whether those were based on process, quote/unquote,
11 to use your term, process regulations?

12 >> MR. SILVERMAN: I did not. What I was
13 doing was --

14 >>JUDGE WARDWELL: Thank you.

15 >> MR. SILVERMAN: Sure.

16 >>JUDGE WARDWELL: I'm not meaning to cut
17 you off. We took a look at our schedule, by the way,
18 and I think you'll see that we're going to try to
19 keep things moving along so we can get all these
20 loose ends tied up that various things have taken
21 place over the last three days, so, if we have the
22 appearance we're being rude, it's merely to for the
23 sake of watching the clock and making sure everyone
24 catches their flight tomorrow, because we want to be
25 out of here by at least 6:00 or 7:00 tomorrow

1 morning, I think.

2 >> MR. SILVERMAN: Understood. We all
3 would like to do that.

4 >>JUDGE WARDWELL: Good. Now, getting into
5 your comment that follows up on what you've said just
6 previously in regards to the degrees, you suggested
7 that, to really determine a material dispute, we, as
8 a board, ought to start digging into the references
9 that you make to the SAR and the license application,
10 where you referenced them in your answer.

11 And my question to you is -- is why doesn't
12 that just open up another whole new avenue of merits
13 activity?

14 As soon as reference us to look at
15 something, don't we raise more problems like
16 evaluating does it say what you say it says, does it
17 really support your position and then, likewise, is
18 what you referenced us to taken out of context and
19 don't we then have to look at either side of that?

20 And we're right in the middle of a merits
21 issue. How do you -- how do you, how do you
22 contradict that particular position that one may take
23 with not -- with trying to say that just that you've
24 opened up more problems than you solved, by as soon
25 as you start looking at some technical detail that

1 you reference us to, that we'll be in a never ending
2 battle until we're actually looking at and trying to
3 evaluate something for a motion for summary
4 disposition or what should be held at a hearing.

5 >> MR. SILVERMAN: Your Honor, I think
6 there is no bright line, and I understand your
7 concern about moving past whatever that appropriate
8 line is into an inappropriate merits consideration
9 that is best and properly left for the evidentiary
10 proceeding. But what we were trying to communicate,
11 in my experience at least, in being involved in NRC
12 proceedings and reading NRC cases, that the board
13 members, when they review a petition to determine if
14 there is an admissible contention, they look at the
15 answer as well, of course, and it applies. Very,
16 very common for those not only to cite law but to
17 cite other references and information of a factual
18 nature and that it's very, very common for some
19 inquiry to be made into that information, and there
20 have been contentions that have been dismissed
21 because of that investigation into those preferences.

22 Now, my point was that you may look at
23 those references. It's critical that you do, in our
24 view. And you may decide you don't have to
25 exhaustively resolve the issue, you don't have to

1 make the final evidentiary determination, but you
2 have to make a determination as to whether there is a
3 material dispute. The way to do that is to look at
4 all that information at some level.

5 My simple example -- I may be able to come
6 up with others, if necessary -- but my simple
7 example, if you carried this to an extreme that you
8 shouldn't get into looking at the references or
9 considering the factual assertions in the answer, you
10 have a petition -- you have a contention that says,
11 we omitted X from our application. And we respond
12 with two lines, we did not omit it, see SAR section
13 blank. You may go to that SAR section. You must go
14 to that SAR section.

15 >>JUDGE WARDWELL: I think Nevada agreed to
16 that, if I remember their testimony -- or their
17 argument, sorry.

18 >> MR. SILVERMAN: I'd like to hear that.
19 I thought I heard quite a bit of language from Mr.
20 Malsch that, If they say it's so and we disagree,
21 then there's a material dispute.

22 >>JUDGE WARDWELL: I don't believe -- I'll
23 clarify that.

24 >> MR. SILVERMAN: I could be wrong. I
25 don't mean to mischaracterize what he said. If he

1 agrees, that's great.

2 >>JUDGE WARDWELL: I think where I heard
3 that, and we're going to explore that a little bit
4 more, is in regards to phrases like has not
5 considered it in the application, have not included
6 it. And I'll get to that later in a while.

7 >> MR. SILVERMAN: So, just to sum up very
8 quickly, the omission example is the easiest one.
9 But there are others where, if you look at the SAR
10 section we reference or the AMR that may be
11 referenced or any other LSN document that might have
12 referenced, you may in some instances, you will in
13 some instances, we believe, be able to go back to a
14 regulation like 63.114 and conclude I don't even see
15 a prima facie violation of this, I don't see a
16 genuine dispute as to a violation of this regulation.

17 There will likely be others where you
18 frankly and properly throw your hands up in the air
19 and say, this one's got to go to a hearing. But I
20 don't think you can get there by ignoring portions of
21 these responses, and we think it's common practice
22 when we read board decisions.

23 >>JUDGE WARDWELL: Thank you,
24 Mr. Silverman.

25 >> MR. SILVERMAN: Thank you.

1 >>JUDGE WARDWELL: Mr. Malsch, did you, in
2 fact, say over the last two days that you would agree
3 that if you said it's been omitted and DOE points out
4 that it hasn't been omitted, that you would agree
5 that contention should be rejected?

6 >> MR. MALSCH: Yes, I did agree. Although
7 I will also say that oftentimes it may not be
8 absolutely clear on the face of things whether it has
9 been omitted or included. And, in such cases, I
10 certainly have no objection to looking at the
11 underlying documents. All I would say is that the
12 case law is very that the support for a contention is
13 supposed to be viewed in a light favorable to the
14 petitioner.

15 And so, if after looking at the various
16 references and the petition and the answers and
17 replies, the board actually has some reasonable doubt
18 as to who is right, the answer is the contention gets
19 admitted and the matter proceeds either to summary
20 judgment phase or to the hearing phase.

21 >>JUDGE WARDWELL: How do you view the
22 words "considered" and "included"? Would you agree
23 that they aren't absolute single value qualifying
24 determinations but, rather, cover a range that needs
25 to be looked at that, in essence, whenever the word

1 "considered" -- when you use the word "considered,"
2 did it -- and by inference include adequately
3 considered by definition of how considered really is
4 of a range of possible supports than just an absolute
5 like omissions might be?

6 >> MR. MALSCH: Yes. I mean, when we
7 can -- when we meant considered, we meant considered
8 in a meaningful, effective way. An example comes to
9 mind.

10 I think, in one of our igneous contentions,
11 we allege that certain factors bearing on the
12 probability of igneous events had not been
13 considered. DOE replied by saying, look here, see,
14 see, see, what you said was, in fact, considered.
15 And our answer was, wait a minute, we don't -- we
16 agree that somebody in the bowels of your agency or
17 contractor organization thought about the issue, but
18 what we're saying is -- is that it had no influence
19 whatsoever on your ultimate conclusion about the
20 issue of igneous event probability. In our mind,
21 that is not a meaningful consideration.

22 >> JUDGE MOORE: And that the word
23 "considered" means something more than "mentioned"?

24 >> MR. MALSCH: Yes, of course.

25 >> JUDGE WARDWELL: And, DOE, how would you

1 respond? Do you agree with that definition of
2 considered or do you view considered to be similar to
3 omission in being a red or green-type of issue rather
4 than a -- there needs to be some evaluation of what
5 you're really doing when -- "considered" is an action
6 item, it's not just a presentation item?

7 >> MR. SILVERMAN: That is correct. And we
8 did not mean to suggest that considered is equated
9 with merely mentioned. What we meant was
10 "considered" -- It has to be reviewed in the context
11 of the regulations. The best example would be a
12 feature event or process under 63.114 may be
13 considered, meaning that it was evaluated to
14 determine whether it needed to be included or not.
15 If it was determined not to be -- you know, an
16 included FEP, It was properly -- and we made that
17 judgment properly, assume that -- it was properly
18 considered. As to your point, it does require more
19 than a mention, but, to our mind, it equates with an
20 omission. We think -- we have experienced attorneys
21 here. There are some contentions that say we failed
22 to consider. I believe there are numerous other
23 contentions that say we failed to adequately consider
24 or adequately address or adequately account for
25 certain things. So maybe we were wrong, but, when we

1 interpreted the petition of virtually any party and
2 they made a bare statement that we did not consider
3 something, we felt that was a contention of omission
4 and we responded in that way.

5 >> JUDGE MOORE: If the consideration in
6 the SAR to which we are pointed is totally
7 conclusory, how are we to then deal with the adequacy
8 of the consideration?

9 >> MR. SILVERMAN: Your Honor, if it's a
10 contention of omission, then there is no issue of the
11 adequacy. If it's -- go ahead, sir.

12 >> JUDGE MOORE: Yeah, not a contention of
13 omission; but many times the SAR sections that I
14 pointed to there's a very conclusory statement that
15 something was considered. It doesn't tell me how,
16 when, who, where, what depth, what they did, what the
17 analysis was, none of that's there. How then am I to
18 determine whether it was adequately considered, and
19 is that not something for the merits?

20 >> MR. SILVERMAN: No, it's not something
21 for the merits. It's something for you to decide as
22 to where it's a genuine material dispute or not. If
23 you look at our --

24 >> JUDGE MOORE: Okay. But doesn't that
25 push it into it is a genuine dispute, because I can't

1 decide on the face of this whether it was adequately
2 considered?

3 >> MR. SILVERMAN: In your hypothetical, I
4 would say that you may very well conclude in that
5 case that the petitioner has alleged something, we
6 say we've adequately -- we did not adequately address
7 something. We say we adequately addressed something
8 and we pointed to some discussion in the SAR. If you
9 look at that discussion and that discussion isn't
10 sufficiently persuasive to you because it's too
11 conclusory or it is a bare conclusion without
12 anything more, I would suggest you're probably right.
13 You don't have enough information to decide -- you
14 would admit that contention.

15 >> JUDGE MOORE: Could I follow up?

16 >> MR. SILVERMAN: May I add one
17 clarification?

18 In many cases, we cite to the SAR and
19 underlying reference documents. So it's not just --
20 it's whatever we've cited to.

21 >> JUDGE MOORE: How deep do I have to
22 mine?

23 >> MR. SILVERMAN: What we've cited.

24 >> JUDGE MOORE: But then the SAR then
25 sends me to the underlying documents.

1 >> MR. SILVERMAN: Well, it's hard for me
2 to quantify that.

3 >> JUDGE MOORE: I recognize we're talking
4 hypothetically.

5 >> MR. SILVERMAN: Right.

6 >> JUDGE MOORE: One of the things that I
7 know I have wrestled with and I must assume my
8 colleagues also, that I'm sent to the SAR and the SAR
9 says it's black or it's white, take your pick. I
10 read it, and it's very gray to me. I then have a
11 contention and an affiant with purported expertise
12 that meets at least minimal standards for expertise
13 that says that it's neither black nor white, it's
14 green and it implies that it's blue.

15 Now, to me, I am not in a position at
16 contention admissibility to resolve that, because I
17 look at what's in the SAR and I'm being told on the
18 one hand it's black or it's white.

19 I found that it's gray. I can't
20 definitively say that it is one or the other. And
21 we're into a dispute, and, the more technical it is,
22 it was written by more technical people, It's being
23 interpreted by more technical people, and they're
24 fighting over what it means. How is that to be
25 decided without having -- it is, to me,

1 definitionally a genuine issue of material fact if
2 that's the crux of the contentions.

3 >> MR. SILVERMAN: In your hypothetical,
4 you've done exactly what we've asked you to do, that
5 is, look at those references and see if it is clear
6 that there is -- based on the references, whether it
7 be the SAR or a reference document, that there is no
8 genuine dispute. You've gone through that evaluation
9 because you've examined that.

10 That's your judgment to make on a
11 case-by-case basis.

12 >> JUDGE MOORE: >>Judge Wardwell, do you
13 want to continue or do you want me to finish the
14 issue?

15 Let's go to a specific example. Let's go
16 to Nevada Safety 48, multiple scale thermal
17 hydrologic model. In a nutshell, this contention
18 asserts SAR subsection 2.3.5.4 -- it's up on the
19 screen -- this is one of the Swellex rock bolt
20 contentions. And I recognize that DOE can make
21 several arguments, but let's just zero in on one that
22 we're dealing with. If you look at DOE's answer, it
23 says that, in response to 309(f)(1)(v), that Nevada
24 offers no scientific or factual materials to support
25 its assertion, leaving the entire premise of the

1 contention unsubstantiated, and that premise is
2 stated as being the entire argument as premised on
3 Nevada's unsupported view that water might be sealed
4 in the rock bolts after installation but, in fact,
5 the rock bolts will be left open after installation.
6 And there is a citation, and it's to an LSN document,
7 and it's to figure 6-30. Now, if you are a magician
8 and you can actually get figures in the LSN to come
9 up, you solved part of the problem. But, because I
10 pre-arranged to have this done, this is a picture of
11 figure 6-30. It is a schematic. It's not an
12 engineering drawing.

13 Now, it is my considered opinion that that
14 does not definitively answer that the rock bolts will
15 be open. I'm assuming, because there is no textural
16 cite in the answer, that there is no text in the SAR
17 that so states. My reading of many, many sections of
18 the SAR around and dealing with Swellex rock bolts, I
19 found no text that answered the question whether they
20 were open or closed after installation. Now that
21 picture, you tell me in an answer, an unsworn
22 document and argument of counsel, that they are open,
23 the citation does not definitively answer the
24 question. Is that not a -- definitionally a genuine
25 issue of material fact? Because that is the premise

1 on which this contention is built.

2 >> MR. SILVERMAN: Could I ask at least to
3 go back and read that language one more time of the
4 contention -- of our answer?

5 >> JUDGE MOORE: In the contention or in
6 your -- sure.

7 >> MR. SILVERMAN: I'd just like to see the
8 context for a moment because I'm not intimately
9 familiar with this particular one.

10 >> JUDGE MOORE: Perfectly understandable.

11 >> MR. SILVERMAN: And many others.

12 >> JUDGE MOORE: There's only hundreds and
13 hundreds of them.

14 >> MR. SILVERMAN: There's two comments I'd
15 make, I think two comments. One, we are saying, and
16 we'd have to go back to what Nevada says, but at
17 least in this here, we're saying that their view --
18 I'm sorry, that Nevada's premise is unsupported.
19 That's the first thing that has to be decided, in
20 your view, is it or is it not?

21 If it's unsupported, that's probably --

22 >> JUDGE MOORE: Well, no, they say that
23 the rock bolts will be -- hold water after
24 installation. Now, there's nothing in the SAR and
25 they have no other way of knowing that.

1 That's something uniquely within the
2 province of DOE.

3 >> MR. SILVERMAN: Well, again, they're the
4 ones that -- how I do say this?

5 The contention, itself, if it makes a
6 factual allegation of an error or deficiency of some
7 sort has to provide some basis for that.

8 They're the ones that selected the --

9 >> JUDGE MOORE: Well, their basis is they
10 have read the SAR, and nowhere does the SAR say,
11 because -- and I couldn't find it, and it's obviously
12 not there or you would have cited it, I must assume,
13 the best you can do is cite a figure which is, at
14 best, indeterminate because it's a schematic, one,
15 it's not an engineering drawing and, as a schematic,
16 it does not definitively answer that question. They
17 have drawn the conclusion and made the statement that
18 it's not -- it's not open.

19 Now, I recognize what they said in the
20 reply. Okay, you say it's open. If it's open, it
21 raises a host of other problems. I'm just using this
22 as an illustrative example of the kinds of things
23 that I have wrestled with in trying to do the very
24 things we're talking about. And this one, I think,
25 illustrates the point that this presents to me a

1 genuine issue of material fact.

2 >>JUDGE WARDWELL: And, to say it another
3 way, you know, you're saying it's open, therefore,
4 the water can't recycle. It refers to a schematic
5 that doesn't show whether or not that takes place or
6 not and has no description of how that rock bolt
7 works in order to ascertain this. And then I say,
8 well, we're getting into the merits, anyhow. I mean,
9 that's left for post-admissibility phase, either
10 through summary disposition or at a hearing. What's
11 wrong with that position?

12 >> MR. SILVERMAN: In some cases, and this
13 may be a good case, I'm not sure -- I'd want to also
14 go back and look if we really wanted to explore
15 that --

16 >>JUDGE WARDWELL: We're not trying to rule
17 on this.

18 >> MR. SILVERMAN: -- into the petition
19 allegations, because there's two points I want to
20 make, where, if you have looked at the best
21 information we could provide and you can't resolve it
22 and the schematic is unacceptable to you, it doesn't
23 satisfy you, and say, I see the answer, there's
24 nothing here, I understand this, it's a -- it's an
25 error on the petitioner's part, then you may very

1 well conclude that it's a genuine dispute.

2 I would like to say, it still remains the
3 burden of the petitioner at first, initial burden, to
4 demonstrate materiality as well.

5 >> JUDGE MOORE: Oh, I understand that.

6 >> MR. SILVERMAN: So I'm agreeing with you
7 up to that point.

8 >> JUDGE MOORE: And you have other
9 arguments?

10 >> MR. SILVERMAN: Excuse me?

11 >> JUDGE MOORE: You have other arguments
12 with this contention?

13 >> MR. SILVERMAN: Yes.

14 >> JUDGE MOORE: I just wanted to bring
15 that up. This is -- now I understand, and it has
16 helped me what your position is on how we're supposed
17 to I guess mining is as good a word as any with what
18 we're dealing with here.

19 >> MR. SILVERMAN: Taking at face value,
20 and I didn't -- have actually myself studied that
21 figure, taking at face value that that figure doesn't
22 clearly prove our point, I will assume that it's my
23 hope and expectation that there will be many other
24 examples that we have cited that are clearer and are
25 more definitive and do allow you to conclude there is

1 no general material dispute. But that's -- all we're
2 asking is for you make that inquiry.

3 >> JUDGE MOORE: I understand. We've got
4 to move this along.

5 >> MR. SILVERMAN: Very good.

6 >> MR. MALSCH: Excuse me, Judge Moore,
7 could I just add just a quick comment to that?

8 And that is your discussion actually
9 highlights an issue we raised in a separate
10 contention, Nevada miscellaneous 03 LA references.
11 It is an interesting fact that, after due
12 consideration, apparently, the -- the Department of
13 Energy specifically decided that none of their
14 references were to be considered to be actually part
15 of the license application or safety analysis report.

16 So, on the most fundamental level, since
17 contentions are to be only addressed to the
18 application, in theory, one might resolve contentions
19 along these lines by just looking to see what the
20 application, itself, says, without regard to the
21 reference.

22 >> JUDGE MOORE: Mr. Malsch, let me say you
23 there. Did you say Nevada miscellaneous 3?

24 >> MR. MALSCH: Miscellaneous 3. I believe
25 that's one.

1 >> JUDGE MOORE: Okay. Please continue.

2 >> MR. MALSCH: I believe I'm finished.

3 All I'm suggesting is I now --

4 >> JUDGE MOORE: I now have the contention.

5 >> MR. MALSCH: -- at a very fundamental
6 level, one could approach each contention like the
7 one you were discussing with DOE by simply proceeding
8 no further than the text of the license application
9 itself and trying to resolve admissibility on that
10 basis. I think, if you do so, you will find that, in
11 almost innumerable cases, that the LA itself contains
12 insufficient text to actually support hardly
13 anything, that one must go to the references, and,
14 for reasons that frankly escape me, DOE specifically
15 stated that none of the references are to be
16 considered to be part of the license application.

17 >> MR. SILVERMAN: Your Honor, may I --

18 >> JUDGE MOORE: That's the supporting
19 information. The SAR, of course, is part of the
20 license application.

21 >> MR. MALSCH: Of course, yeah. But that
22 is also true of the SAR.

23 >> MR. SILVERMAN: One very brief remark,
24 if I may.

25 >> JUDGE MOORE: Very.

1 >> MR. SILVERMAN: It will be very brief.
2 Just as I recognize and acknowledge that, well, as
3 I -- and ask you to look at our support and
4 references, we need to remember that the burden is on
5 the petitioner and you must, of course, look at
6 theirs as well to see if there is a -- their factual
7 interpretations --

8 >> JUDGE MOORE: Mr. Silverman, that is a
9 fact very well known, and you have never let me
10 forget that over many, many years.

11 >>JUDGE WARDWELL: Turning to Nevada,
12 earlier this week there was a discussion supporting
13 documents as required by 309(f)(1). And I was
14 wondering do you believe that 309(f)(1)(v) requires
15 as a threshold bar that references to supporting
16 documents is a threshold submittal to meet contention
17 admissibility?

18 >> MR. MALSCH: Marty Malsch for Nevada. I
19 don't believe that in the statements to support five
20 or six in 2.309(f)(1) there needs to be supporting
21 documents supporting every single opinion offered. I
22 think it's enough that the supporting information
23 offers a non-conclusory reasonable sounding basis.
24 And that should be sufficient.

25 >>JUDGE WARDWELL: As I heard your argument

1 yesterday, I think I perceived you saying that you
2 would have provided it, at least in more cases, but
3 ran out of time or something to that effect?

4 >> MR. MALSCH: I mean, that is true. I
5 mean, we don't -- we didn't instruct the experts to
6 provide us with no references or a minimum number of
7 references. We instructed them in what we thought
8 were the requirements of 2.309, we left it to their
9 judgment as to how many references to include. You
10 know, if we were in the process of drafting articles
11 for scholarly journals or preparing testimony for a
12 hearing, we might have insisted on more. But I did
13 not think that supporting references were required,
14 and, given the time constraints, I did not advise
15 them that they were required, and I don't think that
16 they were required.

17 >> JUDGE MOORE: And, if I understand your
18 argument correctly about paragraphs -- I'm sorry,
19 sections 5 and 6 of these contentions, that is, if
20 your view is accepted, the affidavit, those are the
21 expert opinions of the affiant?

22 >> MR. MALSCH: That is precisely correct,
23 our paragraphs five were drafted essentially by our
24 experts. Those are their opinions.

25 >> JUDGE WALDWELL: Why didn't you take an

1 extra day and try to correct some of that as opposed
2 to submitting a day early, then, if you ran out of
3 time?

4 >> MR. MALSCH: If we were talking about,
5 you know, a few dozen contentions, that would have
6 been possible, but, as it is, we had an 8600-page
7 license application, several hundred thousand pages
8 of references, different groups of experts saying it
9 is a considerable, logistical challenge to put those
10 together, and then also -- perhaps, again, this is in
11 the category of no good deed goes punished -- we made
12 a special effort toward the very end of the process
13 to categorize our contentions under subject matters,
14 and that took some effort, also, which effort could
15 not be completed until all the contentions were put
16 together in final form.

17 >> JUDGE MOORE: Thank you. If I'm not
18 mistaken for all of the petitioners,
19 wasn't -- weren't great efforts made by I guess it
20 was the secretary's office to get you to, because of
21 the EIE filing requirements to file not allow it to
22 go to the last day because we were very concerned a
23 system may not perform as advertised?

24 >> MR. MALSCH: Again, Marty Malsch for
25 Nevada. That is true. We from almost the beginning

1 but certainly toward the end, our own completion
2 deadline was several days in advance of the deadline
3 set in the Commission's notice of hearing for
4 precisely that reason.

5 >> JUDGE MOORE: Thank you. Let's turn to
6 Nevada Safety 5. And this illustrates another point
7 that I'm having and I believe many of my colleagues
8 may be wrestling with as well. It's labeled -- just
9 a minute. I may have called up the wrong contention.
10 I apologize.

11 >>JUDGE WARDWELL: Would you like me to
12 proceed while you --

13 >> JUDGE MOORE: Please.

14 >>JUDGE WARDWELL: Mr. Silverman, if I
15 might, 114(c) says that, to effects, that there is a
16 need to consider alternative conceptual models and
17 evaluate their effects on performance, in not so many
18 words. I don't think that's an exact quote, but I
19 think that's the essence of it. Do you know if there
20 is a definition for models in the regulations?

21 >> MR. SILVERMAN: I don't believe there
22 is.

23 >>JUDGE WARDWELL: So it wouldn't have to
24 be a numerical model, necessarily, it could be an
25 analog model, by that I mean it could be an analysis

1 approach is what's being referred to here?

2 >> MR. SILVERMAN: That's my understanding.

3 >>JUDGE WARDWELL: The mere mention of an
4 outdated model or one that is obviously too
5 simplistic for what we're trying to achieve would not
6 meet your definition of being one of those that you
7 have considered just by you bringing it up and then
8 throwing it out as kind of a straw man approach, or
9 would you, in fact, think that is sufficient to meet
10 the requirements for consideration under 114(c)?

11 >> MR. SILVERMAN: My understanding of what
12 the department has done under 114(c) in terms of
13 consideration is to take a very careful look at all
14 features, events, and processes that they could
15 identify, and there are volumes on this subject. I
16 think the AMR -- I don't want to misspeak. There is
17 a tremendous amount of information on this, and I
18 think there's a tremendous amount of analytical work
19 that went into deciding, considering many of these
20 features, events, and processes in deciding that
21 first gateway issue, which is whether to include it
22 or exclude it. It's not merely -- and there are
23 varying levels. There were issues, I am certain,
24 that were much easier to dispense with and conclude
25 they were properly excluded and others that may have

1 been very complex. I can't speak to that in that
2 great detail. I could get more information, but I
3 can assure you that, in many cases, there was a
4 considerable amount of technical and engineering or
5 scientific information that went into that
6 consideration of whether to include or exclude that
7 particular FEP. And it varied, I'm sure, based on
8 the perceived importance and the complexity of the
9 issue, et cetera.

10 >>JUDGE WARDWELL: One just came to mind as
11 we were talking, and that dealt with I think it was
12 in the area of infiltration. I assume it was. It
13 may have been related to the interactions of the
14 topsoil layer and the vegetation; I don't know. But
15 the one I remember seeing someone referenced was the
16 HELP model and then it was categorically thrown out
17 as being -- the model being derived for other
18 purposes and being a one-dimensional model, something
19 like that.

20 >> MR. SILVERMAN: I know nothing about
21 that model, but we have someone here who could answer
22 the question.

23 >>JUDGE WARDWELL: Right. So, that -- the
24 reason I remember it is because I have a reasonable
25 amount of experience working with the HELP model, and

1 the statements that were made are not incorrect. It
2 was derived for landfill design. That's where the
3 H-E-L-P comes from. And it is a one-dimensional
4 model, and it is not necessarily simplistic. It
5 uses, you know, a pretty good analogs, but yet it's
6 not very exotic either for carrying landfill design
7 to applications that we're dealing with -- landfill
8 design for 20 years compared to somewhat longer
9 periods we have to deal with here.

10 So, if you -- under the assumption that it
11 is not a very robust approach, would you not agree
12 that that wouldn't be one that would qualify as
13 meeting the criteria of 114(c) to consider
14 alternative models and their performance by throwing
15 up something like that and then throwing it and
16 saying well, that's not a good one so we're going to
17 throw that out and we can check off 114(c) in this
18 situation?

19 >> MR. SILVERMAN: Let me take one moment,
20 please.

21 >>JUDGE WARDWELL: Really, take your time.
22 Time's up.

23 >> MR. SILVERMAN: Now that Mr. Zaffuts has
24 explained it to me, I'm going to have him explain it
25 to you.

1 >>JUDGE WARDWELL: That's the way to do it.
2 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I
3 think what we're talking -- one thing I would like to
4 just try to explain to the best of my ability, which
5 may not be sufficient, but what you hypothesized I
6 think you pre-supposed that there was an
7 understanding, I don't know if there is or not, but
8 there was some understanding that this model was
9 wholly inappropriate at the time that it was being
10 looked into. I don't necessarily believe that would
11 be the case. Because what 114(c) suggests is that
12 you look around at the different models or the
13 conceptual hypotheses or what have you to get a
14 better sense of what is appropriate and what isn't
15 appropriate, and then you obviously hopefully pick
16 the one that is the most appropriate or best suited
17 for purposes. Putting in the SAR the discussion of,
18 well, here are the ones that were considered and this
19 is the reason why one and two were deemed
20 inappropriate, I think that clearly satisfies the
21 intent of (c) here.

22 And I think that, if the allegation is that
23 or the issue is that you knew from the get-go and you
24 were just trying to mark off a box and this really
25 wasn't a full consideration, I think that's an issue

1 that would need to be supported by sufficient, you
2 know, assertions of fact and bases. I don't think it
3 gets into a violation. I think, again, it becomes,
4 like the vast majority of Nevada's contentions in
5 this regard if they try to couch as violations,
6 they're really technical assessments and
7 disagreements that need to go to the next step or
8 really assess the materiality of the issue.

9 >>JUDGE WARDWELL: Isn't that best left for
10 a hearing?

11 >> MR. ZAFFUTS: Well, no, I think that's
12 something they need to -- if we are dealing with
13 materiality, that that's a basis that they need to
14 plead with sufficient basis that it would make a
15 difference in the outcome of the case.

16 >>JUDGE WARDWELL: So hypothetically, let's
17 say this, if they are contesting 114(c) has not been
18 addressed because they interpret 114(c) a little more
19 rigorously than you do and they're saying that 114(c)
20 requires you really look into the models and run some
21 performance of them to see what their results come
22 out to be, to compare them to what you have done is
23 see if there is some type of check on it. And you
24 have interpreted in your manner of 114(c) and have
25 looked at a model that is not robust and, yes, you

1 came up pretty quickly to the resolve that it is not
2 robust but, rather than move on and try to find some
3 other models that are more equivalent to what we're
4 trying to achieve here, you are using that to qualify
5 for 114(c), that, to me, says there is a violation, a
6 potential violation -- we're not doing it on -- we're
7 not making a decision of whether there is -- but
8 there is a potential violation of 114(c) and there is
9 a material dispute in regards to whether or not this
10 model really meets what's trying to be derived and
11 achieved out of that regulation.

12 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I
13 think there is a premise or an earlier assessment
14 that the board needs to make to get to the next step
15 of a material dispute, which is what is -- it's not
16 easy necessarily with these types of non-proscriptive
17 type of requirements, Really, what would constitute a
18 failure or a violation of these requirements?

19 I think that's, and I'm not going to step
20 into your shoes because I don't know, but I think
21 that's an answer or something, assessment, that you
22 have to make from a legal perspective, which is, what
23 does this really mean?

24 Does it mean that there is just the premise
25 that you -- the hypothesis that you say or does it

1 mean more?

2 And, at that point if you determine there
3 is a violation or it properly pleads a violation with
4 sufficient bases, then I think that it would be a
5 material issue.

6 >>JUDGE WARDWELL: Premised on, they have
7 interpreted 114(c) to mean you need to do more than
8 just look other models, that you actually have to
9 derive some -- I'm going under the assumption in my
10 hypothesis that a petitioner, and I happen to just
11 point to Nevada because they're the most visible one,
12 but the --

13 >> MR. SILVERMAN: Prolific.

14 >>JUDGE WARDWELL: You need to do more than
15 what you are achieving out of presenting what is
16 probably undisputably a naive model for any attempts
17 that we're trying to do here at the Yucca Mountain.
18 Under that premise, then, there is a dispute on
19 whether or not 114(c) is being addressed.

20 >> MR. SILVERMAN: It's undisputably a
21 naive model, and you are the technical judge on the
22 panel. I would think you may have to conclude there
23 was no material to dispute that, that was not a model
24 that if not used would not violate this regulation,
25 perhaps.

1 >>JUDGE WARDWELL: But those -- but I'm
2 going on the assumption -- I don't even know if this
3 is the case. I just remember the model was brought
4 up, so don't go looking for the contention because
5 you may not find it.

6 >> MR. SILVERMAN: Yes.

7 >>JUDGE WARDWELL: If this contention dealt
8 with a situation where you have said, in this
9 infiltration effort, we have looked at other models,
10 we have looked at the HELP model and, oh, gosh and by
11 glory, it's not very robust, but, boy, we've looked
12 at the HELP model so we've done what 114(c) has
13 required and under that contention the petitioner has
14 a different viewpoint of what 114(c) should be doing,
15 i.e., showing some performance and showing how that
16 relates to what has to actually be done here to see
17 whether the TSPA one and all this exoticness and
18 inability to really handle changes with it as we've
19 talked about the last two days is in the ballpark or
20 not. And, if -- or whether there's better models
21 that can and, if so, incorporate those as submodels
22 into this vast program. Is that not a material
23 dispute between the two parties that should be
24 resolved at hearing?

25 >> MR. SILVERMAN: It is a question as to

1 whether our failure or the level of consideration of
2 the model that we did not include, in your opinion,
3 would violate the regulation to consider alternative
4 models, and that's the judgment that has to be made,
5 not evidentiary.

6 >> JUDGE MOORE: Mr. Silverman, at a
7 minimum, with Judge Wardwell's example where you're
8 obviously reading 114 to mean one thing and Nevada is
9 reading it to be something else, isn't it a legal
10 issue, contention, that we have to let in and resolve
11 that?

12 Surely, we can't be resolving that --

13 >> MR. SILVERMAN: No, Your Honor, and I'll
14 give you an example. I go to the simple ones.

15 >> JUDGE MOORE: Did you say yes or no?

16 >> MR. SILVERMAN: I said no.

17 >> JUDGE MOORE: It's not a legal issue
18 that has to be resolved first?

19 >> MR. SILVERMAN: It is a legal issue.
20 You may be able to resolve it without going to
21 hearing. Maybe I misunderstood your question.

22 >> JUDGE MOORE: No, no, I'm talking
23 contention admissibility and only contention
24 admissibility. Judge Wardwell's example, at a
25 minimum, don't we have this as a legal issue

1 contention that's to come in and we've got to resolve
2 that legal issue before we can get to whether or not
3 it was adequate?

4 >> MR. SILVERMAN: Are you asking me that,
5 because of the existence of the legal issue, there is
6 an admissible contention?

7 >> JUDGE MOORE: At least as a legal issue
8 there is.

9 >> MR. SILVERMAN: Not necessarily, and let
10 me give you a very, very brief and simple example
11 because I'm not an engineer. There is a contention,
12 Nevada contention, that says essentially you didn't
13 file an emergency plan. I may be --

14 >> JUDGE MOORE: I understand. Let's --
15 Dr. Wardwell, can we move on?

16 >>JUDGE WARDWELL: Yeah, I'm about ready to
17 move on. That was just an example.

18 >> MR. SILVERMAN: It just may not be a
19 genuine legal issue.

20 >>JUDGE WARDWELL: There are a couple more
21 things on models I want to fix before we move on to a
22 new subject area.

23 >> JUDGE MOORE: No, no, I'm going to use
24 an example.

25 >>JUDGE WARDWELL: Of a model?

1 >> JUDGE MOORE: Well, of the legal issue
2 problem.

3 >>JUDGE WARDWELL: Okay.

4 >> JUDGE MOORE: He just brought up an
5 emergency plan. I gave you one number off. I wanted
6 to go to Nevada Safety 4. I had said five. We'll
7 start with four. In a nutshell, that contention is
8 labeled a legal issue and it fails -- that DOE's
9 quality assurance requirements and description fails
10 to comply with applicable quality assurance criteria
11 because the SAR does not address repository
12 operations, permanent closure, and decontamination
13 and dismantling the surface facilities.

14 The DOE answer is essentially the same,
15 it's beyond the scope because the application for
16 construction authorization and contention -- the
17 application is for construction authorization and the
18 contention challenges aspects of the quality
19 assurance program that relates to repository
20 operation, closure and decontamination and
21 dismantling the service facilities.

22 You also say that it fails to raise a
23 material issue and to the findings that the NRC must
24 make for essentially the same reason and it fails to
25 raise the genuine issue of material factor law for

1 the same reasons.

2 I'd like to walk through that regulation to
3 show you the problem we have. Let's start with
4 63.21. It's entitled content of application. If you
5 go to 63.21(c), it states -- starts by saying that
6 what the SAR must include. Then, if you look at
7 63.21.20, it states that the SAR -- what the SAR must
8 include with respect to quality assurance. And let's
9 quickly turn to 20. It says, a description of the
10 quality assurance program to be applied to the
11 structures, systems, and components important to
12 safety and to the engineered natural barriers
13 important to the wayside installation. The
14 description of the quality assurance program must
15 include a discussion of how applicable requirements
16 of 63.142 will be satisfied.

17 Then you go to 63.142 entitled quality
18 assurance criteria. And it starts off -- it's easier
19 for me to read my underlines -- 63.142 states in
20 pertinent part that DOE -- it repeats verbatim
21 63.21(c)(20). And then it says these activities
22 include, and it begins to list things, but it lists
23 facility operation, performance closure,
24 decontamination, and dismantling the surface
25 facilities. Then it states the description must

1 indicate how the applicable quality assurance
2 requirements will be satisfied.

3 And, as part of its answer, DOE says that
4 they don't have to deal with any of the last three,
5 repository operations, closure and decontamination,
6 dismantling and service facilities, and there is no
7 description in the SAR of those, not even a
8 description. And part of the argument turns to
9 63.144 that's saying here 144 anticipates that there
10 will be downstream changes made as the process goes
11 along. The problem is that 63.144, in my opinion,
12 starts out by saying changes to DOE's NRC-approved
13 safety analysis report, quality assurance program,
14 description are processed as follows.

15 Now, when you work your way through that,
16 we have a regulation that requires a description of
17 the QA program, and DOE is arguing that three of the
18 named components that the regulation says must be in
19 the description, they're going to do later, they're
20 not here. That problem exists with many of the
21 features of 63.21(c). And, in my view, it appears
22 that DOE has read the word "description" out of the
23 regulation for things that are downstream that deal
24 with decontamination, for example, of the service
25 facility; but the -- the regulation, the contents of

1 the application, specifically the SAR, it says they
2 must be included.

3 Now, we're faced consistently, in my view,
4 because I have waded through the contentions, and I
5 think slogged is probably a better word, the
6 contentions and the regulations with this kind of
7 problem. Is that not simply because of the word
8 "description"? And Judge Wardwell, I'm sure, will
9 like to deal with you on what an adequate description
10 is, but, clearly, if there's nothing there at all and
11 it's required by a description, isn't that an
12 admissible contention?

13 >> MR. SILVERMAN: It would be an
14 admissible contention whether you reviewed this
15 example or another example and were able to conclude
16 that there was a legitimate question, a genuine
17 dispute, about the -- whether there was a violation
18 of the regulation or not.

19 >> JUDGE MOORE: Isn't it one step in front
20 of that for contention admissibility? This is
21 denominated as a legal issue. Isn't the first
22 question, first and foremost question, what the
23 regulation means and doesn't that put it into the
24 admissibility category?

25 >> MR. SILVERMAN: No, Your Honor, it does

1 not necessarily. It might. That's my point. You
2 may -- you can read some of these regulations. I
3 admit 63 is a pretty complex set of regulations. You
4 can conclude, I know what that means and this isn't
5 the violation. There may be others where it's more
6 difficult for you, but there are contentions that
7 have been dismissed because they say a regulation
8 requires something and it, in fact, doesn't. You may
9 agree or not agree with us on this one. I haven't
10 looked at the details of it.

11 But it's common practice, I believe, to
12 have dismissed a contention at the admissibility
13 stage because the board looks at an allegation of a
14 violation of a regulation, reads the regulation, and
15 says, I don't see a violation and not admit it.
16 There may be some recalled for briefing. Judge
17 Farrar mentioned on Monday there may be need for --

18 >> JUDGE MOORE: What's the definition of a
19 legal issue contention?

20 Is it not, at least at a minimum, what a
21 regulation means or doesn't mean, what a statute
22 means, what a statute doesn't mean?

23 >> MR. SILVERMAN: It is a genuine dispute
24 of material fact or law, a genuine dispute of law,
25 and genuine implies, in my mind, that the board made

1 some due diligence inquiry and thought about the
2 regulation and what it means. If you can't -- if
3 have you difficulty resolving what it means, that
4 makes it more difficult.

5 >> JUDGE MOORE: The problem is we are
6 dealing in the context where we have this contention
7 and you look at DOE answer and it says it's beyond
8 the scope because we are only -- we don't have to
9 deal with that now and it's not material because we
10 don't have to deal with those three things now and
11 it's not a genuine issue of material law or fact
12 because we don't have to deal with those three things
13 now.

14 >> MR. SILVERMAN: Uh-huh.

15 >> JUDGE MOORE: You -- that's all the
16 answer says. There may well be a great deal of
17 regulatory history behind this provision that's not
18 revealed to us in the answers of the petitions and
19 the replies, and, if we have to take time out on the
20 hundreds of contentions that have been put before us
21 and do all the legal research without benefit of
22 brief, I am a bit old fashioned, as you know, and
23 that's called flying by the seat of the pants, and I
24 always prefer -- I don't always agree with counsel,
25 as you well know, Mr. Silverman, but I certainly

1 don't like to make judgments without knowing what
2 your position is.

3 And I thought it was, frankly, fundamental
4 and elementary that a legal issue contention is to be
5 dealt with by admissibility and we will deal with it.
6 The history of legal issue contention in the
7 regulations that recognizes them and certainly in the
8 legislative history of the 1989 rule, specifically, I
9 believe, states, if memory serves, that they are to
10 be admitted and dealt with on briefing subsequent to
11 admission. That doesn't mean you go to hearing.
12 They just have to be dealt with, recognizing the need
13 for them to be ventilated by brief.

14 >> MR. SILVERMAN: Your Honor, I
15 respectfully disagree that that is the necessary
16 result. I do agree in every case where there is a
17 legal issue. We need to go back to the point, and
18 you're going to probably chastise me for this, but
19 the first burden is to look at the petition and
20 satisfy yourself there is a fair claim of a violation
21 or regulation. And --

22 >> JUDGE MOORE: I understand your
23 position.

24 >> MR. SILVERMAN: And there may be legal
25 issues that are easily resolvable, and I believe

1 there are many contentions out there, and I'm just
2 basing this on my general experience -- I can't cite
3 a particular example to you off the top of my head --
4 where a contention has been dismissed at the
5 admissibility stage because the board looked at it
6 and said, it's not a violation, end of story. There
7 have been many other examples as well where the board
8 has said, don't have enough information, you need to
9 add a brief.

10 >>JUDGE WARDWELL: If we resolve that there
11 is a legal component associated with the
12 admissibility of this contention, isn't the proper
13 avenue, then, to have it admitted and then briefed?

14 >> MR. SILVERMAN: With all due respect,
15 legal component is to, to fuzzy a term, if I may
16 apologize.

17 >>JUDGE WARDWELL: You're accusing us of
18 something fuzzy?

19 >> MR. SILVERMAN: Well, I understand. The
20 regulation is clear. Implying it is difficult, is
21 there a genuine legal dispute, a genuine legal
22 dispute.

23 Just because there is a legal issue raised
24 does not mean the contention gets admitted.

25 >> JUDGE MOORE: This one's easy because

1 you didn't address those three subjects, I don't
2 believe. That's my next question. Can you tell me
3 whether the QARD or the SAR describes anywhere
4 facility operations, permanent -- with respect to QA,
5 facility operations, permanent closure,
6 decontamination, and dismantling the surface
7 facility?

8 >>JUDGE WARDWELL: While you're searching
9 that -- do you need some time for that? Because I'd
10 like to ask a follow-up question in that interlude, a
11 short one.

12 >> MR. SILVERMAN: I actually do need a
13 break to confer, because I believe our technical
14 people have an input for me that they think is
15 important.

16 >> JUDGE MOORE: We can come back to it.
17 They're alerted now.

18 >> MR. SILVERMAN: Yes, but I'm going to
19 ask you to remind me because I've already forgotten
20 it.

21 >>JUDGE WARDWELL: After a break, we'll
22 come back to it, but, back to my statement, if we as
23 a board deem that there still is a legal question due
24 to our unfuzzy research into this, isn't the proper
25 avenue then and really the only avenue to brief it as

1 a legal question?

2 We wouldn't go to hearing on a legal
3 question, would we, necessarily, we would brief it
4 and resolve that and then that would allow us to make
5 a decision on that part of it to see whether or not
6 it then goes into the technical aspect of the genuine
7 dispute.

8 >> MR. SILVERMAN: If you as a board
9 conclude there's a genuine legal dispute, then that's
10 the perfectly appropriate way to proceed --

11 >>JUDGE WARDWELL: That's all I want.

12 Thank you.

13 >> MR. SILVERMAN: -- briefing it and
14 resolving it after it's been admitted; but I would
15 ask, if we are going to address Judge Moore's
16 question, if you would indulge me and repeat it one
17 more time.

18 Oh, I know, it's whether the QARD, the
19 Q-A-R-D, includes content related to operations and
20 the other items mentioned in -- anything other than
21 construction and design. Closure.

22 >> JUDGE MOORE: Repository operation,
23 closure and decontamination, and dismantling the
24 surface facility.

25 >> MR. SILVERMAN: Thank you.

1 >>JUDGE WARDWELL: We'll come back to that,
2 I assume, after break.

3 To Nevada and some of your questions, don't
4 you qualitatively indicate, and these are those
5 contentions dealing with the TSPA model, don't you
6 provide some qualitative outcomes that might resolve
7 as whatever it is you're contending might change in
8 your -- if it was changed the way you felt it should
9 be, you say it would result in movement in one
10 direction or another in regards to the outcome in
11 some cases?

12 >> MR. MALSCH: Marty Malsch of Nevada. I
13 believe that is generally true of our TSPA
14 contentions. We always tried to state something at
15 least qualitatively about what the implications were
16 of our contention if true.

17 >>JUDGE WARDWELL: I don't think I agree
18 with your statement that generally you did that.

19 I think there are cases where you have.
20 That's where my question is coming from. Do you
21 believe there are cases where you haven't provided
22 any indication of the outcome?

23 >> MR. MALSCH: I think the answer is no.

24 But --

25 >>JUDGE WARDWELL: Under the assumption

1 there are those that have provided absolutely no
2 indication of which way they should have gone, do you
3 wish you had in that case?

4 Or was it your intent to have provided at
5 least a qualitative effect of your contention on the
6 outcome?

7 >> MR. MALSCH: I think, in every case when
8 it was reasonably within our ability to do so, we
9 made some statement about its implications.

10 >> JUDGE WARDWELL: If you didn't, would
11 that be grounds for dismissal?

12 >> MR. MALSCH: I would say, generally, no,
13 because usually we are dealing with a separate
14 enforceable violation, one of the requirements of 114
15 or 102 or 101. And, as long as we met -- provided a
16 reasonable basis to believe that that requirement is
17 not satisfied, then that a violation that of that
18 requirement is disqualifying of the TSPA and really
19 nothing more need be said about it.

20 The violation, itself, if supported,
21 provides a material issue for admission of the
22 contention. It would then be at the -- some later
23 stage to resolve whether for some other reason the
24 contention might not amount to anything or not fit
25 within the scope of the regulation.

1 >>JUDGE WARDWELL: Thank you, Mr. Malsch.
2 Mr. Silverman, if, in fact, some component
3 or input parameter to the TSPA model was flawed,
4 let's just for the sake of argument say it is flawed,
5 for whatever fashion and whatever that effect may
6 have on the outcome of the TSPA, whether it shows
7 that the resulting doses are less or more, isn't
8 that, by definition, a viable -- doesn't that
9 discredit the results of the TSPA model, because
10 there are no reasonable assurances associated with
11 those calculations and there is no indication of the
12 level of uncertainty if, in fact, the parameters were
13 flawed or if, you know, inadequate for whatever
14 reason?

15 >> MR. SILVERMAN: Well, when you used the
16 word "flawed," that harkens back to the board's
17 question from one of the prior boards as to whether
18 the assertion of an error and omission by itself, an
19 error, a flaw, alleges a material dispute and a
20 material dispute. I think our response to that is
21 not necessarily. It depends. There are large and
22 significant errors, and there are small and
23 insignificant errors.

24 >>JUDGE WARDWELL: And I heard that, so I
25 don't think we need to repeat that, so I want to ask

1 the follow-up on that.

2 >> MR. SILVERMAN: I think it's the same
3 question.

4 >>JUDGE WARDWELL: Yeah, I want to follow
5 up on that, then. But we won't know what the impact
6 of those -- potentially, we may not know what the
7 impact of those are unless we start looking at the
8 merits of it, and, even then, it may be difficult to
9 ascertain. I raised a legitimate concern about
10 whether or not those results, by themselves, are
11 adequate, even if there is an indication that you may
12 end up with a lower dose associated with the correct
13 parameters.

14 >> MR. SILVERMAN: The question is whether
15 it's material or not, and I think you have to start
16 by looking at the petition, itself, and whether it's
17 adequately pled, and I don't know whether I'm
18 plagiarizing from language from Nevada's pleadings or
19 not, I think I might be, but, you know, there is an
20 error that occurs, assume an error occurs, a very
21 small error, if you're measuring as the distance
22 between atoms, that may be a significant error. If
23 you're measuring distance between two planets, it
24 would be completely inconsequential. It would not go
25 to the integrity of the analysis that you're doing to

1 measure that distance. It wouldn't be material, and
2 it wouldn't be a genuine material dispute, and so
3 that goes to sort of the 63.114 type of criteria that
4 you have to make hard decisions on.

5 >>JUDGE WARDWELL: Let's get to reality,
6 though, that we don't have those situations that are
7 as clear-cut as to whether we're measuring between
8 atoms or planets. And so we're in this la-la land
9 where it's not intuitively obvious which way it is
10 certainly at the contention and admissibility stage.
11 By definition, doesn't that say we ought to go to
12 hearing to find out that, to find out is it atoms or
13 planets?

14 >> MR. SILVERMAN: The only problem I'm
15 having with this discussion is, and I'm sure it's not
16 intended by the board, because I think the board
17 understands the principle as well or better than I
18 do, is that, at this stage of the proceeding, if
19 you're talking about what the applicant -- how has
20 the applicant responded, you know, the petitioner has
21 the initial pleading burden to demonstrate -- to
22 demonstrate -- that the 2.309 criteria are met, so
23 the first thing you must do in making these decisions
24 is look at that petition and analyze it, and they
25 must meet their burden before that contention is

1 admissible. And we don't seem to be talking to that.

2 We seem to be talking an awful lot about
3 what the applicant's response is.

4 >>JUDGE WARDWELL: And I think we haven't
5 because I think that's second nature to us.

6 >> MR. SILVERMAN: Okay, fine. Then it
7 doesn't need to be stated further.

8 >> JUDGE MOORE: Let's go to Nevada Safety
9 5 as another example. It's titled emergency plan.
10 And, in a nutshell, it also is labeled a legal issue
11 that SAR subsection 5.7 essentially contains a mere
12 commitment to develop an emergency plan as opposed to
13 a plan itself or even a description of the plan.

14 And then it lists, I believe, seven items
15 that the State of Nevada feels should be included in
16 the description. Without needing to again work our
17 way through the regulation, because it parallels what
18 the QA regulation is, 63.21(c)(21) requires, among
19 other things, that the license application include a
20 description of the plan for responding to and
21 recovering from radiological emergencies. And
22 63.21(a), of course, requires the application to be
23 as complete as possible in the light of the
24 information that is reasonably available at the time
25 of docketing.

1 We have these seven that are listed. Let's
2 just look at the second one in the list that Nevada
3 lists maps identifying primary routes for emergency
4 response access or evacuation are missing from the
5 SAR subsection 5.7.2.2.4. When you go to those
6 sections, you find that there is a description that
7 says something along the lines that the plan will
8 include a general map and the map will identify
9 primary routes of access for emergency response
10 equipment. Nevada is calling for a map, and I think
11 the question really goes to how complete the
12 description has to be to be adequate, to be a
13 description.

14 Now, a map is a shortcut for showing the
15 primary access route for emergency response equipment
16 or a very complete description, for example, would be
17 that the routes will go from X to Y in Nye County and
18 from Y in Nye County to someplace in Clark County,
19 they will be over secondary roads; and you can go on
20 and on in that vein. A map, on the other hand, cuts
21 to the quick and shows exactly where they are, what
22 valley they go through, what mountains they go over
23 or don't go over, et cetera.

24 One of the things that is nowhere to be
25 found in the answers except in totally conclusory

1 fashion is what's the adequacy of the description?

2 What is an adequate description? The
3 regulation just says there has to be a description.
4 It doesn't say it's got to be an inadequate
5 description. It doesn't say it's got to be an
6 adequate description. And, Mr. Silverman, you're
7 smiling because you're saying a description is a
8 description.

9 >> MR. SILVERMAN: No, I'm not.

10 >> JUDGE MOORE: But we're left to decide
11 at the contention admissibility stage, essentially,
12 the adequacy of the description with no guidance.

13 >> MR. SILVERMAN: Your Honor, on this one,
14 you are correct, the regulation only calls for a
15 description and it doesn't define precisely what
16 should be in that description. We think we provided
17 an adequate description.

18 >> JUDGE MOORE: Nor is the word
19 "description" ever defined.

20 >> MR. SILVERMAN: That's correct. But it
21 is something less than a full emergency plan, and
22 there is no debate about.

23 >> JUDGE MOORE: It's a description, that
24 is true.

25 >> MR. SILVERMAN: And what we showed and

1 which we think demonstrated that there was no
2 material fact -- I thank you for finally picking one
3 that I am familiar with -- is we cite to SAR section
4 5.7. We indicate -- we say several things in
5 response to this. One of the things is we've got 59
6 pages of detail covering all the of the 16 applicable
7 emergency planning criteria that are in the
8 regulation.

9 >> JUDGE MOORE: And I read all 59 pages of
10 it, and one of the things that struck me in your
11 answer and in the staff's answer was not one of these
12 seven items that are claimed to be inadequately
13 described or addressed in your answer.

14 >> MR. SILVERMAN: I think you are saying
15 not one of these items was --

16 >> JUDGE MOORE: Addressed.

17 >> MR. SILVERMAN: -- in the description,
18 is that what you're saying?

19 >> JUDGE MOORE: No. In your answer, you
20 don't describe -- you don't address any of these
21 seven items. And, now, you talk all around them, but
22 these seven items are not addressed.

23 >> MR. SILVERMAN: Well, my response, and
24 most or all of this is derived from my answer, is
25 that Nevada lists the items, which DOE commits to

1 provide at a later date, the seven items. Our view
2 is they don't show the information is required. That
3 is their burden to show it's required by the
4 regulation initially, albeit the regulation may be
5 vague, nevertheless, it's their burden. The precise
6 content of the description isn't defined, and I know
7 that, in this particular case, it is not at all
8 uncommon for these types of details to be included in
9 a final emergency plan. Where do you draw the line?

10 If you take this too far, the description
11 is the whole emergency plan, we have to submit a
12 whole emergency plan. There has to be a reasonable
13 line drawn somewhere. I mean, Nevada can point out
14 any number of -- since it is a description and it is
15 something less than a full emergency plan, then
16 clearly Nevada can always find something that wasn't
17 included, and it's up to the board to decide whether
18 we provided a reasonable and adequate description. I
19 think, when they -- when you see those words, it's
20 reasonable, have we provided a reasonable and
21 adequate description for the purposes that the
22 regulation calls for, recognizing that a full
23 emergency plan will be coming at a later date.

24 You know, issues like -- one of the other
25 things they mention is establishing letters of

1 agreement and MOUs. It is -- letters of agreement
2 with police, fire, other local community, public
3 service agencies, hospitals, and the like, ambulance
4 services, this is all the kind of thing that I have
5 never seen in an application except in the emergency
6 plan itself and not until the emergency plan itself
7 was issued.

8 Similarly, precise evacuation routes.
9 They're asking for things, in our view, that clearly
10 are regular recognized components of a full emergency
11 plan, and the bottom line on this is we don't think
12 they met their burden to show that this regulation is
13 violated.

14 >> JUDGE MOORE: Is it a legal issue as to
15 a question of what is an adequate description?

16 >> MR. SILVERMAN: It certainly has a legal
17 component to it, yes.

18 >> JUDGE MOORE: Mr. Malsch, do you have
19 anything to quickly add to this before we move on?

20 >> MR. MALSCH: Just a brief comment. But
21 I think what has occurred here is that DOE is
22 inviting the board to decide the merits of our
23 contention at the contention admissibility stage.

24 >> JUDGE MOORE: Quickly look at Nevada
25 Safety 36. This is -- will be one of -- my question

1 falls into the category of puzzlement. The
2 contention challenges the verification and validation
3 of the net infiltration model. Now, unlike almost
4 all of the Nevada contentions challenging various
5 aspects of various DOE models, Nevada Safety 36 does
6 not contain the standardized language at the end of
7 the contention that, because the TSPA is a complex,
8 nonlinear model and the changes and the results
9 obtained vary both as a function of time post-closure
10 and from realization realization to realization
11 within a modeling case, et cetera. Why?

12 >> MR. MALSCH: Marty Malsch, Nevada.
13 Judge Moore, I can answer that question.

14 >> JUDGE MOORE: There I think I found
15 either three or five, I can't remember, examples in
16 the Nevada contentions that didn't have it, and I was
17 puzzled why.

18 >> MR. MALSCH: I think there are actually
19 more than that.

20 We did make a careful distinction. We
21 asked ourselves, putting aside whether or not it was
22 required, whether we could actually take the TSPA
23 model, modify it to include our contention, assuming
24 it's true, and attempt to demonstrate quantitatively
25 the results on doses or releases. The first thing we

1 discovered in thinking about that question was that a
2 whole bunch of our contentions, and it's -- I don't
3 remember how many, but several of -- a bunch of them,
4 and this would be an illustration, were, if true, so
5 utterly destructive of the TSPA that it was not even
6 possible to imagine how one could modify the TSPA in
7 a way that could give us any dose calculation.

8 Others of our contentions, and these are
9 the ones listed in I think it's appendix C to
10 Dr. Thorne's affidavit, but they all contain the
11 standard paragraph, and it was put in there carefully
12 and deliberately because we fought for those
13 contentions, such a thing would be at least
14 theoretically possible because the contention was not
15 so totally destructive; and then we attempted to
16 explain, I think successfully, why it was simply not
17 possible to do an effective job in demonstrating
18 quantitative effects on doses or releases.

19 >> JUDGE MOORE: I have a series of
20 miscellaneous questions that are -- that I don't have
21 answers for. These require just very, very quick
22 answers.

23 DOE, on Nevada Miscellaneous 2 entitled
24 alternative waste storage --

25 >> MR. SILVERMAN: I'm sorry, the title of

1 it again?

2 >> JUDGE MOORE: Nevada Miscellaneous 2
3 entitled alternative waste storage. It's labeled
4 again as a legal issue. In its answer, DOE argues
5 that Nevada's contentions are outside the scope of
6 the proceeding because the contention amounts to a
7 challenge to the waste -- Nuclear Waste Policy Act
8 that requires DOE to design and construct the
9 repository so as to permit the retrieval of spent
10 nuclear fuel.

11 In replying, Nevada argues that the
12 question of whether Section 122 of the Nuclear Waste
13 Policy Act, if violated, goes to the merits of the
14 legal issue contention, not whether the contention is
15 within the scope of the proceedings. Why is Nevada
16 wrong?

17 This goes back to the problem I had before
18 you before of legal issue. I have looked at the
19 statutes, those that are cited, the arguments
20 briefed, though they are in the answers and the
21 replies, and the conclusion I come to is I'm going to
22 have to scratch my head a great deal and work my way
23 through these statutes and I want to look at the
24 legislative history. Why is that just not a classic
25 example, again, of a legal issue and why is Nevada's

1 argument that, your arguments, that it go to the
2 merits of the legal issue, not whether it's a legal
3 issue contention?

4 >> MR. SILVERMAN: I'm not familiar without
5 going back and re-reading our arguments, but I would
6 say that --

7 >> JUDGE MOORE: Perhaps that's unfair.

8 >> JUDGE FROEHLICH: -- this might be a
9 convenient time to break, but, because we have quite
10 a number of items left, I'd ask that we take a
11 ten-minute recess at this point and come back at 25
12 minutes to 4:00 by the clock in the back. We'll be
13 in recess.

14 [Recess taken]

15 >> MR. SILVERMAN: Yes, Your Honor.

16 >> JUDGE MOORE: Yes or no? It's there or
17 not.

18 >> MR. SILVERMAN: The answer is 62. No.
19 One brief, one very brief comment before I move on.
20 I just hope the Board recognizes that -- and I know
21 the Board recognizes, and I probably speak for all
22 the counsel that when it's difficult for us to
23 respond on a particular contention as effective as we
24 like.

25 >> JUDGE MOORE: I absolutely understand.

1 >> MR. SILVERMAN: But let me respond to
2 this one because I just want to briefly refer you to
3 what we said. The answer to the question is, whether
4 the quality assurance report, the quality assurance
5 requirements document contains a discussion of
6 quality assurance provisions beyond operation into as
7 I said, beyond construction, operation, closure, and
8 both closure, decommissioning is no.

9 >> MR. MOORE: That's all I need to know.

10 >> MR. SILVERMAN: I would like to point
11 out -- you know what was referred to in our Answer,
12 then the Yucca Mountain review plan provision?

13 >> JUDGE MOORE: I do.

14 >> MR. SILVERMAN: Thank you.

15 >> JUDGE MOORE: Clark County, your Safety
16 Contention 2, DOE's answer quotes an SAR subsection
17 and that quotation ends with a citation to BSC2007-A
18 Section 6.5. In your reply, you point out
19 that -- without citation, that what is cited in the
20 SAR by DOE is the same e-mail that is the substance
21 of your contention.

22 Can you tell me what the BS C2007-A Section
23 6.5 citation is? If you can't, the question will be
24 asked of DOE also. We have no idea what that is.

25 >> MS. ROBY: I would have to check with

1 one of my counsel behind me, if that's all right.

2 >> JUDGE MOORE: DOE, do you have any idea,
3 this is the one that involves an e-mail from two
4 individuals, one of whom is a DOE, one of whom is at
5 the Air Force about the test, the Nevada test site.
6 And their contention is I believe ground to ground
7 missiles.

8 >> JUDGE FROEHLICH: Okay, it's been
9 displayed.

10 >> JUDGE MOORE: Here it is up on the
11 screen. This is what the section says and the site
12 is BS C2007A Section 6.5. We have no idea what that
13 is and where we can find it and what it says.

14 >> MR. SILVERMAN: We'll have to check the
15 record system, and give you that precise reference.

16 >> JUDGE MOORE: We would appreciate that
17 because Clark County, in their Reply, as I said,
18 indicates that that, I believe, if I'm reading that
19 Reply correctly, is just referring to the same e-mail
20 that is an LSN document.

21 >> MR. SILVERMAN: State of Nevada.

22 >> MR. LAWRENCE: Nevada, Yes, John
23 Lawrence. I believe I know what that reference is.

24 >> JUDGE MOORE: Please.

25 >> MR. LAWRENCE: Typically, I' ve

1 found those references at the end of that SAR
2 section. So at the end of 1.1 or 111, or whatever
3 the appropriate subsection is to find references, you
4 will find all the referenced documents in an
5 alphabetical listing.

6 >> JUDGE MOORE: Thank you. I appreciate
7 that. DOE, look at Nevada Miscellaneous One
8 erosion and geologic disposal. This is Nevada's
9 contention that says in 50,000 to a million years,
10 the overburden will erode away, leaving the cask
11 exposed, thereby it doesn't meet the definition of a
12 geological repository.

13 One of your responses I found quite
14 puzzling; it was that this is a direct challenge to
15 DOE's site recommendation and as a result, it's
16 outside the scope of the proceeding. If that
17 argument's accepted, doesn't it also mean that the
18 NRC could find that the predicted erosion rates make
19 the site unsuitable, yet be powerless not to issue
20 the construction permit on the same ground?

21 >> MR. SILVERMAN: Let me scroll down a bit
22 and see what our Answer is, what you are referring
23 to, Your Honor.

24 Your Honor, my off the cuff answer to this
25 is there is a provision in the EPA that says the

1 citing decision isn't easy to be challenged, that the
2 citing decision was decided by Congress and it is a
3 challenge --

4 >> JUDGE MOORE: Okay. So for the sake of
5 argument, I accept that. And doesn't that also mean
6 that if the staff were to find that the erosion rates
7 at Yucca Mountain that predicted by DOE were
8 unacceptable, that they're powerless not to grant you
9 a construction permit for the same reason?

10 >> MR. SILVERMAN: I'd say that would
11 probably be an issue for Congress to deal with at
12 that point if that was the way it was defined.

13 >> JUDGE FROEHLICH: I was going to follow
14 up on the Clark Safety 2, which had to do with
15 ground-to-ground missiles in that curad site, but I
16 would like to switch to maybe Nye Joint Safety 6,
17 please. And that one deals with potentials for
18 aircraft crashes of a Category 2 event sequence.
19 Could you in just a sentence or two, Counsel for Nye,
20 summarize your concerns?

21 >> MR. VANIEL: Jeff VanNiel for Nye County,
22 Your Honor. Essentially our concern YOur Honor is
23 DOE in the LA assumes the flight restrictions will
24 exist, yet, has not shown that it actually has the
25 authority to implement those restrictions at this

1 time.

2 >> JUDGE FROEHLICH: And then I would ask
3 DOE what assurances are there in the LA concerning
4 restrictions in place to prevent over flights over
5 the repository and is that different from the
6 restrictions that are referenced in that test site in
7 general?

8 >> MR. SILVERMAN: Your Honor, I can only
9 presume that we have provided in our Answer the
10 restrictions that exist and that we're relying on at
11 this time and that they are based upon a license
12 application with a reference. I really don't know
13 the answer to your question.

14 >> JUDGE FROEHLICH: Can you enlighten me
15 to the DOE's authority to implement airspace
16 restrictions? Is that something within the DOE's
17 control or is this an Air Force control or FAA?

18 I'm unclear where to find the resolution to
19 this whole question on the contentions that raise
20 airspace questions.

21 >> MR. SILVERMAN: I would have to consult
22 to get you an answer on that, Your Honor, I'm sorry.
23 Bear with me one second.

24 >> JUDGE WARDWELL: While you are
25 discussing, if I might go back to Nye, would you be

1 comfortable, if in fact, they did show that there was
2 a link with the -- achieving air restrictions from, I
3 assume, would be FAA, that that would resolve your
4 contention?

5 >> MR. VanNIEL: Jeff vanNiel for Nye
6 County, Your Honor. Yes, Your Honor, if there was
7 some binding commitment that they were able to show
8 that they would, in fact, have that authority. But a
9 mere commitment akin to the land use questions that
10 came up before, a commitment that they'll give
11 something in the future doesn't provide us with the
12 comfort factor that we feel we need, given the fact
13 that the repository is presently designed for those
14 restrictions to be in place.

15 >> JUDGE WARDWELL: How about a documented
16 history of the ability of a federal agency to get an
17 air restriction when requested from the FAA for
18 things such as cruise missile testings, military
19 operational areas, sensitive areas, presidential
20 retreats, that type of thing.

21 >> MR. VanNIEL: Jeff vanNiel again for Nye
22 County, Your Honor. As one of the other panels
23 mentioned, either yesterday or the day before, there
24 have been other incidents in which federal agencies
25 were unable to agree at times when it was necessary

1 for things to occur.

2 So the assurance that they will be able to
3 do is in the future is what gives rise to our
4 concern, that they don't actually have that authority
5 at this time.

6 >> JUDGE FROEHLICH: DOE?

7 >> MR. WARDWELL: We can possibly get
8 everyone conferring, we can go home, leave, go out
9 the back door.

10 >> MR. VanNIEL: Part of our concern, Your
11 Honor, is that the DOE referenced authority that they
12 used in their Answer to our contentions relates to
13 their control over the test site and not with respect
14 to the repository, itself. And part of the other
15 concern is that the Air Force is the party, part and
16 parcel with the FAA that needs to be the people that
17 agree to those flight restrictions. And you know,
18 the fact that they have control over what happens at
19 the airspace, at the test site, doesn't necessarily
20 mean they have control over the airspace at Yucca
21 Mountain.

22 >> MR. WARDWELL: Is there any controlled
23 airspace above Yucca Mountain at this time?

24 >> MR. LIST: Your Honor, Robert List from
25 Four Counties.

1 >> JUDGE FROEHLICH: I'd like to finish
2 with him. If they aren't able to answer, then I'll
3 get to you.

4 >> MR. VanNIEL: Jeff VanNiel for Nye
5 county. It's my understanding, Your Honor, there is
6 no control over the airspace above Yucca Mountain
7 because of Yucca Mountain. The only control DOE
8 would exert at this time is because of its ability to
9 control for the test site.

10 >> JUDGE FROEHLICH: You misunderstood my
11 question.

12 >> MR. VanNIEL: I'm sorry.

13 >> MR. WARDWELL: Are there any FAA
14 controlled restrictions for flights over the Yucca
15 Mountain airspace at this time?

16 Is it a controlled airspace above there at
17 this time?

18 >> MR. VanNIEL: I understand, there is,
19 Your Honor. I'm just trying to get specific
20 references to who that party is controlling it.

21 >> MR. WARDWELL: I don't think I need that
22 because I think it's probably clear that it is a
23 military operated area or a missile operated area.

24 >> MR. LIST: Robert List from Four
25 Counties. My understanding is -- I speak as a pilot,

1 it is a -- it's currently a restricted area by the
2 FAA because of the Air Force activity and the test
3 site activity.

4 >> JUDGE FROEHLICH: Thank you. I'd like
5 to hear from DOE.

6 >> MR. SILVERMAN: I think that's pretty
7 consistent which I'm being told by our people, which
8 is there is a restriction established by the
9 FAA which is controlled by the Department of Energy
10 which covers the GROA area, the surface area at this
11 time. There is a specific restriction for air
12 flight.

13 >> JUDGE MOORE: Is that in your Answer?

14 >> MR. SILVERMAN: Not from a quick look,
15 Your Honor. It may be there.

16 >> MR. WARDWELL: Yet, you are requiring
17 something different. You're taking away from the Air
18 Force what they now -- the airspace they own and
19 taking it away from their operations. Isn't that the
20 contention from Nye that's Aruba's problem?

21 >> MR. SILVERMAN: I'd like to see the
22 contention again. I would say one of the things we
23 do say in the Answer is that we commit to certain
24 specific restrictions that will be established, I
25 think, as conditions -- I think as conditions of the

1 license application.

2 And it's not unusual in an application to
3 make certain commitments to achieve, do certain
4 things in the future that are not in place at the
5 time the application is filed.

6 >> JUDGE MOORE: Okay. Are --

7 >> JUDGE FROEHLICH: You have to follow --
8 is there a requirement for a follow-up beyond the FAA
9 would be the Air Force because of the current
10 situation and the current control of the airspace, is
11 that correct?

12 Or did I miss something from your Answer?

13 >> MR. SILVERMAN: My understanding from
14 our Answer that there is additional -- that there are
15 additional commitments, agreements, restrictions that
16 will be needed before we receive the license to
17 receive and possess. And that's not construct. And
18 that's the argument that we make in our Answer. Of
19 course that's when the hazard is in.

20 >> JUDGE MOORE: Is all of this figured
21 into the aircraft crash analysis?

22 >> MR. SILVERMAN: I'd have to get someone
23 up here to talk to you about the specifics of what
24 went into the air crash analysis.

25 >> JUDGE FROEHLICH: I'd like to ask of the

1 Commission staff, to clarify for me their response to
2 Nye Safety 1 and 2, where you did not oppose the
3 admission of those contentions and Nye Safety 3 and
4 primarily and to a lesser extent 4, where you had
5 some, I guess, had some concerns in a post-admission.

6 Although, in the staff response, you said
7 that Nye Safety 3 was virtually identical to 1 and 2.

8 Could you explain a little more of your
9 reasoning for your position on these contentions?

10 >> MR. LENEHAN: Your Honor, this is Dan
11 Lenehan for the staff. Could you give us one moment
12 to pull up the contentions and our responses and we
13 can respond after we see what we have here.

14 >> JUDGE FROEHLICH: Indeed, if you'd like
15 the Clerk to pull up your response, let me know.

16 >> MR. LENEHAN: The contention and the
17 response, one at a time, please, Your Honor.

18 >> JUDGE FROEHLICH: Mr. Lenehan, why don't
19 you take a moment. Judge Moore, why don't you ask
20 the next question so we can move this along?

21 >> JUDGE MOORE: Mr. Malsch, I have a
22 question with Nevada Miscellaneous 1, Erosion and
23 Geological Disposal. You denominated as a legal
24 issue but it is entirely premised on the validity of
25 your Nevada Safety 41, which is the erosion question.

1 I don't think I have ever seen something
2 called a legal issue that required a factual premise
3 to be accepted. Usually, it's the reverse of that.
4 The legal issue is decided so that you can determine
5 what the factual situation will -- how it will sort
6 itself out.

7 Here, assuming the Nevada Safety 41, which
8 is the factual component of the erosion rates were
9 found to be valid, the legal issue you pose is
10 irrelevant.

11 If the factual premise is found to be
12 invalid, the legal question is irrelevant. So how
13 can this be a legal issue?

14 **>> MR. MALSCH: Marty Malsch for the State
15 of Nevada. I think it's a bit more complicated than
16 that.**

17 First of all, the legal issue posed in the
18 contention does have a factual premise. And the
19 factual premise is as stated in the other contention.
20 The complication is that the other contention is a
21 TSPA contention and as drafted and if you consider
22 DOE's Answer in the staff's Answer, it is susceptible
23 to we would say, invalid, but anyway, arguments by
24 DOE with respect to particular aspects under Part 63,
25 dealing with the admissibility of TSPA contentions.

1 None of those considerations would have any
2 bearing on the legal issue because the legal issue we
3 are raising is purely based upon a factual showing
4 outside of the scope of Part 63.

5 So let me put it this way: You could, if
6 the contention upon which it relies is not successful
7 on its factual merits, putting aside legal niceties
8 associated with Part 63, i.e., we're simply wrong
9 about erosion and the legal issue goes away.

10 If for some reason the premise
11 and the other contention is not allowed or loses on
12 the merits because of the peculiar provisions in Part
13 63, there would still be the issue of putting Part 63
14 aside as a factual matter, we are correct or not
15 about erosion.

16 Now the easiest way to resolve the issue is
17 to ask the question and litigate the question whether
18 or not we are, in fact, right about erosion. If we
19 are right, then the legal issue is posed. And then
20 there is the further -- it's clearly there for that
21 particular legal issue and then we could address
22 further the question whether there are some other
23 unrelated problems with the underlying contention
24 associated with Part 63.

25 Let me give you an illustration. Let us

1 suppose the underlying contention is -- loses on the
2 merits because we have not established it as a valid
3 FEP. That would be dispositive I think under Part
4 63.

5 But it would not be dispositive of our
6 legal issue because the legal issue simply poses the
7 question whether erosion will or will not occur,
8 quite apart from what 63 requirements may be.

9 So there's not an exact one-to-one match.

10 >> JUDGE MOORE: Have you ever seen a legal
11 issue contention that had a factual premise that had
12 to be demonstrated before the legal issue had any
13 meaning, because in my experience, I can -- they are
14 all the reverse.

15 >> MR. SILVERMAN: I can't think offhand of
16 any one. I can think also of no other way to state
17 the contention.

18 >> JUDGE FROEHLICH: Mr. Lenehan, do you
19 have an answer or do you need a little more time?

20 >> MR. LENEHAN: Could you repeat the
21 question, Your Honor?

22 >> JUDGE FROEHLICH: I was seeking a little
23 clarification of why the Staff did not oppose a Nye
24 Safety 1 and 2 but opposed a Nye 3 and 4, where as it
25 states at page 1034 of your Answer, at least as to 3,

1 they're virtually identical.

2 >> MR. LENEHAN: The difference, Your
3 Honor, is --

4 >> MR. ROACH: The difference Your Honor --
5 Kevin Roach for the NRC staff. The difference, is
6 Your Honor, in Nye Safety 3 as opposed to 1 and 2,
7 they attacked the underlying model and this is not
8 the case in 1 and 2.

9 >> JUDGE FROEHLICH: Would Nye would care
10 to respond?

11 >. MR. ANDERSEN: Your Honor, this is Rob
12 Anderson on behalf of Nye County requesting to be
13 able to speak even though Mr. VanNiel is the primary
14 speaker today.

15 >> JUDGE FROEHLICH: At this point as long
16 as it's quick, please proceed.

17 >> MR. ANDERSON: Nye 1 and 2 and 3 all
18 deal with the adequately of currently existing of
19 performance confirmation planning. And it's correct
20 as NRC's staff has stated that 1 and 2 deal with
21 matters that are not a part of the TSP and that Nye 3
22 does involve challenge to aspects of the cite scale
23 model, but we believe that it is alleged and has
24 provided the factual support that would indicate that
25 it shows an inadequacy in the plan at this point in

1 time.

2 >> JUDGE FROEHLICH: Is there anything that
3 you care to add at this point?

4 >> MR. LENEHAN: No, Your Honor, thank.

5 >> JUDGE WARDWELL: I have a few questions
6 dealing with issues that are covered in a number of
7 contentions. And I'm sorry I don't have reference TO
8 those contentions, but hopefully, we'll be able to
9 get some insight into what's trying to be resolved
10 here.

11 The first one deals with, and I'll address
12 this to Mr. Malsch or whoever else in Nevada would
13 like this respond to this, but I believe you've
14 raised a contention or multiple contentions that
15 relate to the failure of some SSC, System Structure
16 Component during the pre-closure period, such as
17 whatever you else you want to pronounce the acronym
18 with the conclusion that this will affect the TSPA
19 later on by preventing canister placement and the
20 operations of the tunnel because of any failure of
21 components that were used during operations.

22 This raises the question of -- and in the
23 process of addressing those contentions, it raised
24 the question of whether or not maintenance has been
25 considered, but there was no discussion of that in

1 your contention whatsoever.

2 And it struck many of us that well, if one
3 of these systems broke down, then why not, they have
4 some maintenance plan?

5 Why wouldn't maintenance cover that so they
6 don't repeat any operation that then may influence
7 how the model is set up and addressed during the
8 post-closure period?

9 >> MR. MALSCH: Again, Marty Malsch from
10 the State of Nevada. It's hard to answer your
11 question precisely, but in the abstract, it seems to
12 me there would be two questions raised.

13 >> MR. WARDWELL: Well, let me, look, can I
14 chunk it down for you then. Do these types of
15 contentions come to mind?

16 Do you understand the type of contention
17 I'm dealing with? Something is going to break during
18 operations is going to affect post-closure.

19 >> MR. MALSCH: Right. I understand
20 generally what we're talking about. And I think --

21 >> MR. WARDWELL: And what about
22 maintenance not repairing those types of things so it
23 doesn't affect post-closure? That's my question.

24 >> MR. MALSCH: That would be an issue. I
25 guess the question would be -- I don't recall what

1 DOE said in its Answer about whether maintenance
2 would cover those activities.

3 I would say that if the SAR discussed the
4 problems, and then provided that there would be a
5 reasonable solution to those problems in terms of
6 maintenance, and our contention didn't address the
7 maintenance question, then our contention has a
8 problem.

9 >> MR. WARDWELL: DOE, do you remember
10 those contentions and how you responded to them?

11 >> MR. SILVERMAN: I personally don't
12 recall a specific contention. I don't recall whether
13 we mentioned maintenance or not. I would -- I don't
14 know if this is helpful or not, but one thought on
15 this kind of a contention, unless that SSC has been
16 alleged to have been wrongly identified as
17 non-important to waste isolation, then that
18 contention is inadmissible.

19 >> MR. WARDWELL: I'm not sure that's
20 necessarily the issue we are trying to resolve. I
21 think we got enough guidance from Nevada, however, to
22 help us them to assess these contentions.

23 Sticking with DOE, I think for the next
24 one, there are things called performance margins
25 analysis, analyses. Could let me know what those

1 are? And then it goes on in regards to I think your
2 position and these are not required to demonstrate
3 compliance with Part 63. And then I want to explore
4 that a little more.

5 So if you can start by telling us what
6 those are and why, why aren't they needed to
7 demonstrate compliance with Part 63?

8 >> MR. ZAFFUTS: Sure. Paul Zaffuts for
9 DOE. The performance margin analysis, I cannot tell
10 you whether there are more than one. I believe there
11 is only one. It's one assessment. It's -- it's not
12 required -- it is an assessment that was done outside
13 of the TSPA. It's not a TSPA assessment. We're not
14 relying on it and SAR doesn't rely on it and it's
15 very clear it's not relied upon for Part 63
16 compliance, meaning, we don't use it to assess or
17 determine whether we need the ultimate mean dose
18 requirements.

19 It's also not used to -- under the cord 2-A
20 Program under the Q. A. Validation of TSPA, but it is
21 used to instruct and inform, it was used to instruct
22 and inform the Department as to the conservatisms and
23 to try to assess the nature of the conservatisms that
24 are in the TSPA, specifically conservatisms in there
25 by running this separate assessment with those

1 conservativisms or with the data or other types of
2 things that do not include those conservativisms. So
3 it was just a way to get some qualitative assessment.
4 As I said it was not used. Nowhere in the SAR does
5 it suggest that it was used for determining or
6 demonstration of Part 63 requirements.

7 >> MR. WARDWELL: Help me understand what
8 these are. Could you describe the similarities
9 and/or the differences between the PMA and the
10 uncertainty analysis and the sensitivity analyses
11 that were performed?

12 No is an answer.

13 >> MR. ZAFFUTS: No.

14 >> MR. WARDWELL: Nevada, do you recall a
15 contention or contentions that you submitted that
16 related to the PMA?

17 >> MR. MALSCH: I'm Marty Malsch from
18 Nevada. I believe we have two contentions addressed
19 to the performance margin analysis. And I don't have
20 them in front of me, but, oh, yes, they're in Nevada
21 170 and 171, Nevada Safety 170 and 171.

22 >> JUDGE WARDWELL: How do you respond to
23 the position that DOE is saying in regard to those
24 and that enter and how we as a Board should treat the
25 PMAs, if in fact, they aren't required, or do you

1 believe they are required as far as 63?

2 >> MR. MALSCH: Again, Marty Malsch for
3 Nevada. We did not and do not believe that they are
4 required by Part 63. But as we read the SAR, they
5 were being offered by DOE in support of the
6 credibility of a CSPA.

7 Now, I think and our position was if it's
8 there, we're entitled to challenge it. But I think
9 there is a very simple way we can resolve this
10 contention based upon DOE's statements here today.

11 If in fact, the performance margins
12 analysis will not be used to show compliance with any
13 provision in Part 63 then I think there is an easy
14 way to resolve the contention.

15 The Board can admit the contention. We can
16 reach a stipulation but it will not be used to
17 resolve anything to comply with Part 63 and the
18 contention goes away because it's a purely academic
19 contention.

20 >> MR. WARDWELL: Are you interested in
21 demonstrating some one upmanship in your knowledge
22 and tackling the question of what is the similarities
23 or differences between PMA and the uncertainty
24 analyses and the sensitivity analyses that have been
25 performed by DOE?

1 >> MR. MALSCH: I can try. I think what
2 they've done in performance margin analysis is do a
3 minnie kind of TSPA, eliminating margins, and then
4 showing that, in fact, a realistic effort to show
5 compliance would show even lower doses than the
6 assertedly conservative TSPA that was advanced in the
7 license application.

8 >> MR. WARDWELL: That's not a bad whack at
9 it, is it, DOE, you think?

10 >> MR. ZAFFUTS: I thought that's what I
11 said.

12 >> MR. WARDWELL: I think so. Thank you, I
13 appreciate that.

14 >> MR. WARDWELL: I guess this is best
15 addressed to Mr. Malsch and Nevada. You had some
16 contentions that dealt with the -- stating that there
17 is a deficiency because a secondary data source was
18 used.

19 What do you mean by a secondary data source
20 if, in fact, you can recall those contentions and
21 what's the problem of using a secondary data source?

22 >> MR. MALSCH: I'm sorry, I don't -- I
23 don't think I can answer that question without going
24 into the specific contention.

25 >> MR. WARDWELL: You don't recall having a

1 contention such as that?

2 >> MR. MALSCH: I don't specifically
3 recall, no.

4 >> MR. WARDWELL: DOE, here's your chance
5 to get even.

6 Do you recall any contentions they
7 submitted that dealt with a secondary data source?
8 And do you understand what they mean by a secondary
9 data source?

10 >> MR. ZAFFUTS: Judge Wardwell, I was
11 hoping that as before, no would be an acceptable
12 answer because I'm not familiar with any contention
13 that is alleged. It doesn't mean it's not there.

14 >> MR. WARDWELL: Thank you. Let's see if
15 we get anywhere with this one. Is it my
16 understanding there is some contentions dealing with
17 external problems such as manufacturing problems and
18 then a reflected in potential problems at the site?
19 do you recall contentions such as those?

20 >> MR. MALSCH: Yes, I do.

21 >> MR. WARDWELL: And there seems to be
22 simply a listing of these items in the basis
23 statement associated with those particular
24 manufacturing problems, with no direct connection to
25 the license application developed further in a

1 **contention.**

2 And could you elaborate a little bit more
3 on why you believe that's a problem and what's the
4 heart of your contention when you are dealing with
5 these external manufacturing problems? And why isn't
6 it addressed in a routine manner through any quality
7 assurance program or other controlling device such as
8 that?

9 **>> MR. MALSCH: Marty Malsch for Nevada. I**
10 **think the thrust of those contentions is that because**
11 **of manufacturing and other problems, specifically**
12 **with such things as a drip shield, that DOE's**
13 **assumptions regarding the precise performance of the**
14 **drip shield in its TSPA are unfounded.**

15 And I think this goes to, in a real way,
16 the whole concept of a FEP analysis. It seems to me
17 there are some very clear definitions of when FEPs
18 are included, in or out, based upon probability.

19 And it seemed to us that based upon known
20 history and practice with regard to these kinds of
21 fabrications is not designs, that based upon the NRC
22 definition of a FEP and the probability of threshold,
23 we simply could not FEP out manufacturing defects and
24 problems. And the DOE had utterly failed to address
25 this problem in its license application.

1 >> JUDGE WARDWELL: Thank you. I'll get
2 back to you after I go to DOE. I want to talk a
3 little bit more about those FEPs.

4 Would you like to respond if regards to the
5 inability to FEP out manufacturing problems or have,
6 in fact, you did evaluate them in your analyses?

7 >> MR. ZAFFUTS: I think there was an
8 assessment like every FEP. There was an assessment
9 that was done that was considered. And all I can say
10 is -- my understanding is, my expectation was it was
11 applied to considerations in 114 E and F were applied
12 appropriately.

13 And if it was a challenge, they may have to
14 demonstrate a material dispute. So that's about all I
15 can say about that particular one.

16 >> MR. WARDWELL: Thank you. In my
17 recollection, there is a table or tables that show
18 those components that are FEP in or FEP out.

19 My question comes to the degree of
20 technical background as you provide for each one of
21 those so that's to assess the adequacy of FEPing or
22 FEPing out. Could you elaborate a little bit more on
23 your knowledge of what was done by your organization
24 Provided the application or the TPSA --

25 >> MR. ZAFFUTS: Right. One thing to

1 understand is that the technical backup for those
2 exclusion determinations or inclusion determinations
3 are in a separate document, features, events and
4 processes, AMR. So it's a cited document, a couple
5 thousand pages. Each one of those has varying
6 degrees of assessments that are done. There's no one
7 size fits all.

8 Some were done with models, modeling,
9 mathematical analyses. Some were done, assessed more
10 on a qualitative assessment, looking at what the
11 ultimate determination of either probability, a
12 probability analysis to meet the standards set forth
13 in 114-E or a consequence assessment, which deals
14 with the significance issue. And I think, like I
15 said, there was no one size fits all.

16 Somewhere based upon like I said, different
17 models, some were done more associated with -- if
18 something would be significant or maybe it could be
19 encompassed by another FEP, but it was a very logical
20 analytical progression for all of those.

21 >> MR. SILVERMAN: I wanted to underscore,
22 that's all reflected in the FEP AMR, all that
23 rationale.

24 >> MR. WARDWELL: Thank you. If that
25 helps. Mr. Malsch, in your review of FEPs in

1 general, and the contentions that came out of those,
2 are there ones that you are challenging because there
3 is not sufficient information in regards to assess
4 whether or not they should or should be included --
5 should or should not be included? Or are you -- did
6 you find that there wasn't enough information to
7 assess that and not necessarily disagree with the
8 assessment that was performed?

9 >> MR. MALSCH: Marty Malsch for Nevada.
10 I'm sure in all of our FEP contentions we either
11 found an insufficient basis for exclusion, as for
12 example the FEP document says excluded on legal
13 ground, which we didn't understand or --

14 >> MR. WARDWELL: Are there FEPs that say
15 just that?

16 >> MR. MALSCH: I think there are FEPs
17 which say that and perhaps our previous dialogue
18 about the manufacturing defect contention as an
19 example. It may be that that is one of those cases
20 where manufacturing design defects was FEPed out on a
21 legal basis that we were required to assume the
22 perfect functioning of the Quality Assurance Program.

23 Now, there may be other FEPs that were
24 not FEPed out on legal grounds, but FEPed out on
25 technical grounds that we found inadequate, but I'm

1 sure in every case of our FEP contention, we did in
2 fact examine the FEP AMR very carefully.

3 >> MR. WARDWELL: Back to DOE: In our
4 discussions all this week, we've wrestled with this
5 material dispute as we're aware of by today's
6 discussion. As we wrestle with this, could you
7 describe to me why your organization would feel it be
8 detrimental to admit the contention and then let it
9 be resolved at the summary disposition stage when
10 there is an opportunity to the better explore these
11 types of conditions that we wrestle with and in
12 regards to the merits and not have to worry about it
13 at this point?

14 Let's go ahead and admit it and, if, in
15 fact, it's clear that the merits are there, it will
16 be resolved before we have to take time out at a
17 Hearing.

18 >> MR. SILVERMAN: I'd like to answer that.
19 This is Mr. Silverman, Your Honor. Any applicant or
20 virtually any applicant, I'm aware of, would feel
21 that it is appropriate to not extend the resources
22 and the time to litigate issues that that applicant,
23 before the NRC, does not believe raises a genuine
24 dispute of a material fact or law. In this case,
25 we've got a governmental agency with a mandate from

1 Congress, aggressive time line for licensing of
2 three-to-four years -- three years, with an extension
3 of four, an enormous number of contentions to deal
4 with and complex issues; and it would clearly be
5 detrimental to simply throw up our hands and say,
6 let's just let a contention in that doesn't meet the
7 standard and we'll expend the discovery resources,
8 the witness preparation resources, the testimony
9 preparation resources, the Board's time, the motions
10 that go all along with that, and it is clearly --
11 would be a detrimental to the program and to the
12 mandate that's currently in the Nuclear Waste Policy
13 Act.

14 >> MR. WARDWELL: Well, I think some of
15 those you mentioned.

16 >> JUDGE MOORE: None of them are
17 admissible.

18 >> MR. SILVERMAN: That's your call to
19 make, Your Honor. Our point is however you decide,
20 it is not in -- it is perfectly appropriate -- it is
21 inappropriate for contentions that objectively are
22 not admissible to be admitted on the theory that,
23 let's just let it in, because we can spend the time
24 and resources to litigate it. And particularly in
25 this case of the project.

1 >> MR. WARDWELL: And I understand that
2 position. Again, the ones we are wrestling with are
3 the ones that are not clear as what you described is
4 there, and how do we wrestle as added?

5 I understand that you can't provide any
6 more guidance than what you just did and --

7 >> MR. MALSCH: Judge Wardwell, excuse me,
8 Marty Malsch for Nevada. I believe I've located the
9 contention you referred to dealing with secondary
10 sources. It's Nevada Safety 118. And we do not bear
11 in that contention challenge, we make use of
12 secondary sources per se. We merely challenge DOE's
13 use of these particular sources.

14 >> MR. WARDWELL: But what did you mean by
15 a secondary source as opposed to a primary source?

16 >> MR. MALSCH: I think, if I read the
17 contention properly, a secondary source would be an
18 article or study that relies upon, let's say a body
19 of secondary sources would rely upon a single body of
20 experiments and data located in one primary source by
21 the original researcher.

22 So the original researcher does a study and
23 that produces and generates studies about the
24 studies, if you will.

25 >> MR. WARDWELL: I'll read the transcript.

1 I think I understand what you are saying and I just
2 have one last one, and it deals with -- it was
3 brought up in regards to Nevada Safety 172, and I
4 guess I will direct this to DOE, Mr. Silverman, if
5 you want to pass it on to whoever.

6 And it deals with the contention that says
7 that DOE is required to but does not intend to
8 require reasonable assurances with respect to the
9 contents and the proper packaging of those contents
10 by nuclear utilities, providing waste to DOE for the
11 proposed repository and transportation aging and
12 disposal canisters.

13 In your Answer on Page 1593 as one of the
14 items you bring up, you state that a challenge to the
15 standard contract among parties under the National
16 Waste Policy Act is outside the scope of this
17 proceeding. Section 302 of the National Waste Policy
18 Act makes it clear that the acceptance spent nuclear
19 fuel by DOE for disposal at the Yucca Mountain
20 repository is governed by the contract between DOE
21 and the generator of this spent nuclear fuel, and
22 that DOE is responsible for establishing the terms
23 and conditions of that contract.

24 While I understand that the contract for
25 that is there, are you implying that neither DOE nor

1 the staff will have any control over the types of
2 things that might be placed in that cannister and
3 brought to the site?

4 >> MR. SILVERMAN: Your Honor, I want to
5 give you an answer, and then I'd like to go back and
6 look at the original statement of the contention, but
7 I'm sure we're not alleging that.

8 What I think we are saying is that what
9 goes on at the utilities site in packaging spent fuel
10 for shipment to Yucca Mountain is within the gambit
11 of NRC's jurisdiction under the Part 50 licenses of
12 the utilities, is, I believe, and will be subject to
13 some quality verification by the department and I
14 will look around in a minute and see if I'm
15 misstating that; but it is not something that is
16 addressable in this proceeding which relates to the
17 licensing of this facility. It's just as the
18 transportation safety, the safety of transportation
19 of material being shipped to Yucca Mountain is
20 outside the scope of the proceeding, but not outside
21 the scope of the NRC's jurisdiction to the extent
22 that it relates to both certifications of casks, so
23 it's analogous, but if I didn't answer your question
24 I'd go back to see.

25 >> MR. WARDWELL: What about the contents

1 of those cannisters?

2 >> MR. SILVERMAN: What about it? I'm
3 sorry.

4 >> MR. WARDWELL: I mean, the statement
5 that you -- that I read from your Answer talked about
6 the contents or maybe it was the contention that
7 questioned the contents; and I'm questioning to you,
8 does not the contents of what's in those cannisters
9 have some affect on the performance and resulting
10 potential impacts associated with the Yucca Mountain
11 once it arrives there?

12 I mean, are you saying that there is no --
13 NRC has no control over what a given utility may put
14 in there under that contract?

15 >> MR. SILVERMAN: I'm certain that's not
16 true, that NRC has no control. I'm also certain that
17 that issue is outside the scope of this proceeding,
18 because there's nothing in Part 63 that I know of, if
19 I can do a quick verification here.

20 >> MR. WARDWELL: As you do that, I think
21 I'll go to Nevada, and make sure I'm paraphrasing
22 their contention correctly and I'll go to staff to
23 see what the staff to see what they might be able to
24 shed some light on whether NRC has a control, it's
25 not necessarily in this proceeding. Have I

1 characterized, at least in part, some of what you are
2 contesting in this contention or am I off base?

3 >> MR. MALSCH: No, Judge Wardwell, you
4 have captured all or most of the contention.

5 >> MR. WARDWELL: Eloquently, I must say?

6 >> MR. MALSCH: I'm sure. Whatever the
7 restriction may be over the facilities where the
8 casks are being moated. It is certainly within the
9 scope of this licensing to decide what is an
10 acceptable disposal content at the Yucca Mountain
11 site and surely this Board, the commission has
12 jurisdiction over issues relating to licensing of the
13 Yucca Mountain site.

14 >> MR. WARDWELL: Staff, Ms. Young, will
15 you -- are you able to shed any light on this
16 contention in regards to whether NRC has some control
17 authority for the contents of the cannisters as they
18 are being filled, either under this part or some
19 other part?

20 >> MS. YOUNG: Mitzi Young for NRC staff.
21 I'm not familiar with this contention, directly;
22 however, I'm sure when activities are being conducted
23 at the sites where fuel is currently stored, the NRC
24 has an effective staff available to monitor those
25 activities. However, if DOE takes title to the

1 high-level waste at reactive sites for the spent fuel
2 under their standard contract, NRC is not involved
3 until it's received at the geological repository
4 operations area.

5 >> MR. WARDWELL: Mr. Silberg for NEI,
6 would you like to comment?

7 >> MR. SILBERG: Yes, the cannisters --

8 >> MR. WARDWELL: State your name.

9 >> MR. SILBERG: I' m sorry, Jay Silberg,
10 the cannisters into which spent fuel would be loaded
11 at reactor sites come with licensing documents called
12 certificates of -- COCs, Certificates of Compliance
13 which sets forth the regulatory limits on what can be
14 placed inside those containers. NEI activity at the
15 reactor site in terms of loading of those cannisters
16 would be done by the utilities, subject to NRC
17 oversight, subject to compliance with the
18 requirements of the Certificates of Compliance. So
19 the work at the sites would be done under very strict
20 NRC control and NRC regulation -- regulatory
21 requirements.

22 >> MS. YOUNG: If I caught your question,
23 was it under the scope of Part 63? Maybe I
24 misunderstood.

25 >> MR. WARDWELL: It was. It was twofold,

1 I wanted to see whether there was any or if there is
2 any clarification under what part that is, that would
3 be helpful also.

4 >> MS. YOUNG: I believe it's Part 71, but
5 I could be wrong, for Certificates of Compliance?

6 >> MR. SILBERG: For transportation, it
7 would be Part 71; for storage, it would be Part 72.

8 >> MR. WARDWELL: Thank you, Mr. Silberg.
9 DOE do you -- you don't have any grounds to dispute
10 what was said?

11 >> MR. SILVERMAN: Not by Mr. Silberg, no.

12 >> MR. WARDWELL: Mr. Malsch, for Nevada,
13 do you have grounds for dispute regardless of how it
14 affects your contention?

15 >> MR. MALSCH: Yeah, I do not question
16 that the loading/unloading of casks is subject to
17 jurisdiction in some places. The issue here is that
18 it turns out that the precise contents of the
19 cannisters have an important role in whether -- in
20 assumptions made in the total performance assessment;
21 and whatever may be the dividing point between
22 jurisdiction here and there, it is surely within this
23 Board's authority to decide that this particular
24 assumption in the TSPA is unfounded without the
25 existence of some sort of an adequate Quality

1 Assurance Program controlling how the contents are
2 loaded and precisely what they are. So it has a
3 direct bearing -- a direct bearing on the total
4 systems performance assessment and, therefore, it
5 raises a material issue.

6 >> MR. WARDWELL: Thank you. We'll finish
7 with the DOE.

8 >> MR. SILVERMAN: Your Honor, the
9 trance -- an analogous situation, the transport of
10 these materials in these certificates -- in these
11 certified Casks also has a bearing on the safety, if
12 it's an attachment, for example, of the repository,
13 but it is outside, clearly outside the scope of this
14 proceeding, it's governed by the transportation
15 regulations in Part 71 that define the criteria for
16 issuing a Certificate of Compliance to use in a Cask.
17 It is one thing to say it's a limited jurisdiction of
18 the NRC. These matters are not within the scope of
19 Part 63.

20 >> MR. WARDWELL: Thank you, Mr. Silverman.

21 >> JUDGE MOORE: I appreciate a 30-second
22 answer, Mr. Silberg -- Mr. Silverman. What is the
23 relationship between NRC's incident response plan and
24 emergency plans by Applicant and licenses?

25 Is there any?

1 >> MR. SILVERMAN: I know a fair amount
2 about utility, industry emergency response plans, I
3 don't know much about the NRC's incident response
4 plan. I'm sure there is a coordination -- major
5 coordination project.

6 >> JUDGE MOORE: I'm referring to your
7 Footnote 15 in your Answer to Nye Joint Safety 5 and
8 I'm not sure that I understand that there's any
9 relationship at all between the agency's incident
10 response plan and Applicant or Licensees emergency
11 plan.

12 >> MR. SILVERMAN: Well, I don't even know
13 what my footnote says, Your Honor. Hold on one
14 second, bear with me.

15 >> JUDGE MOORE: On the screen in front of
16 you know now. Unfortunately, it runs onto two pages.

17 >> MR. SILVERMAN: I believe this is a
18 contention that alleges that we failed to comply with
19 a national incident, right, which is not the NRC
20 system. It's a I think an inner-agency system and
21 we'd make a simple point, I think, in this response.
22 This is just not a requirement that applies to the
23 Applicant. I see we do talk about the incidence
24 response.

25 >. MR. ANDERSEN: Your Honor, if I may

1 reply, Robert Anderson. This is an unusual, a
2 one-of-a-kind licensing where the Applicant must be a
3 department within the Federal government. I don't
4 understand the footnote. I mean, they're both a
5 licensee and a federal agency subject to Homeland
6 Security requirements, just like every other Federal
7 department.

8 >> JUDGE MOORE: I don't think I'm going to
9 get an answer. We need to move on. I understand --

10 >> MR. SILVERMAN: One quick one, Your
11 Honor, which is compliance with MIMs, whatever it
12 is, is not a Part 63 requirement.

13 >> JUDGE MOORE: I understand that.

14 What I didn't understand was what your
15 reference to the NRC incident response plan and the
16 fact that the agency in response to the presidential
17 directives has determined that it requires no change
18 to incident response plans. How are incident
19 response plans, if at all, distinct from emergency
20 plans? Are they two totally separate items, as I
21 believe they are?

22 >> MR. SILVERMAN: I believe they are. I
23 think what we say in the footnote --

24 >> JUDGE MOORE: Okay. They don't have any
25 connection with one another?

1 >> MR. SILVERMAN: Well, I don't know that.

2 >> JUDGE MOORE: Okay. I think we've
3 reached the point where the Board has gone through
4 and asked all the questions it has of the party
5 participants for the proceedings. Since we do have
6 just a little bit of time left, I think what we'll do
7 is go back and scratch anything that was itching,
8 that came out in the course of our questioning today
9 or if you really have to -- in the prior two days --
10 take maybe a minute or two each and resist the
11 temptation to turn this into a closing argument. As
12 we started this morning, I start with the NCAC, and
13 we will go around the back, please.

14 >> MR. WILLIAMS: Scott Williams for the
15 Native Community Action Council, a few sentences.
16 There has been several references today and in the
17 previous two days about the procedural requirements
18 for establishing standing and admissible contentions.
19 There have been references today -- including those
20 by DOE -- to the fact that non-represented parties
21 are entitled to some slack, which was Judge Gibson's
22 word. We're confident that we have established
23 standing inadmissible contentions. We ask the Board
24 to provide the procedural flexibility that the
25 Commission's Orders seems to require here. It's our

1 belief that the Indian people who live in the area
2 surrounding Yucca Mountain have a lot to contribute.
3 We suggest that the Commission would benefit from a
4 full record and encourage you to allow us to
5 participate. Thank you.

6 >> JUDGE FROEHLICH: Thank you,
7 Mr. Williams. White Pine.

8 >> MR. SEARS: Mr. Richard Sears for White
9 Pine County. The Department of Energy has maintained
10 for the substantial portion of three days with five
11 expert lawyers -- I think I count that correctly --
12 that meeting the contention requirements is really
13 not that difficult and a strict application of the
14 rules should occur. If compliance with the meeting
15 requirements is not that difficult, because the
16 regulations are clear on their face, why does it take
17 five expert lawyers -- less judges -- to debate the
18 meaning of these regulations over that period of
19 time?

20 This facile illustration speaks, Your
21 Honor, to Judge Froehlich's question whether some
22 Petitioners, who don't have five expert lawyerd or,
23 as in my case, they'd be stuck with a poor but
24 country lawyer should be cut some slack because of
25 their lack of substantial resources and experts. We

1 appreciate your attention to our contentions.

2 >> JUDGE FROEHLICH: Thank you.

3 TIM -- oh, I'm sorry, Clark County.

4 >> MS. ROBY: Very briefly, Your Honor,
5 thank you. I want to comment briefly on the exchange
6 between Judge Wardwell and DOE on the fact that the
7 Board is grappling with this materiality question
8 when it's difficult to determine on which side of the
9 line the contention falls, so what's the harm in
10 letting it in?

11 And I'd just like to say that the DOE's
12 response seems to indicate that strict adherence to
13 the requirements in this case means that the
14 interests of safety should not also be considered.
15 This is a unique case. This is the only case of its
16 kind. Part 63 was developed specifically for this
17 case. So where we even have the Board having
18 difficulty deciding which case it's on, which -- what
19 materiality really means, the DOE would assert that
20 it's meaning is the only one that counts; and we
21 would simply state that there may be interpretations
22 of what materiality means and the contention
23 admissibility stage, it ought to fall in favor of the
24 Petitioner.

25 >> JUDGE FROEHLICH: Thank you. Miss

1 Houck.

2 >> MS. HOUCK: Thank you, Your Honor.
3 Darcie Houck with the Timbisha Shoshone tribe or TIM.
4 I'd like to make the comment that despite the
5 differences in regards to put the intergovernmental
6 dispute, both TIM and TOP do share the concerns of
7 the protection of the tribe's resources and ensuring
8 that this Board is informed about the potential,
9 substantial and adverse impacts that the tribe may
10 suffer; and that voice needs to be heard in these
11 proceedings and we support NCAI's Petition as well
12 the native people in this area are going to be
13 impacted and do need a voice in this proceeding and
14 we would also support the comments of other parties
15 regarding the flexibility and weighing in favor of
16 the Petitioners to grant contention status as well as
17 standing. Thank you.

18 >> JUDGE FROEHLICH: Thank you. For Nye
19 County.

20 >> MR. VanNIEL: Jeff VanNiel for Nye
21 County. Thank you, Your Honor, both for the time
22 over these last three days and the opportunity to the
23 participate in these proceedings. We look forward to
24 the Board's Order in May and to moving rapidly
25 forward with Hearings on the contentions in the near

1 future.

2 >> JUDGE FROEHLICH: Thank you. The County
3 of Inyo.

4 >> MR. JAMES: Greg James, for the County
5 of Inyo. Thank you, Your Honor, the County has
6 nothing further. We will submit our position on our
7 papers.

8 >> JUDGE FROEHLICH: Top.

9 >> MR. POLAND: Thank you, Your Honor.
10 Doug Poland on behalf of TOP. I'd like to thank the
11 Board for its time and your obviously extensive
12 efforts to prepare for this argument this week. It's
13 been impressive. I stated TOP's position on the
14 other issues over the past two days and will limit my
15 comments briefly to the LSN. TOP pleads a single
16 NEPA contention. It's amended Petition identifies
17 concessions in DOE's FEIS and SEIS that contamination
18 from the geological repository might be discharged in
19 the Death Valley Springs.

20 TOP's single NEPA contention
21 further pleads that the contamination of the springs
22 will have a devastating impact on Timbisha Shoshone
23 culture and religious practices. Those injuries are
24 set forth in the Affidavits and declarations that we
25 have put on the LSN. TOP's amended Petition also

1 identifies and cites other documents in the LSN to
2 support the contention. Despite having done this and
3 despite our reliance on DOE's own statements and its
4 own documents, DOE argues that TOPs should be barred
5 from presenting a single contention to this Board
6 based on an alleged failure to demonstrate
7 substantial and timely compliance with the
8 LSN requirements. Mind you, DOE has not raised a
9 single complaint that it could not find any of the
10 LSN materials that we cite or that it cannot evaluate
11 our contention because we failed to make a document
12 available.

13 Instead, DOE relies on procedural rules
14 that they argue create an absolute bar to
15 participation as a party. That position squarely
16 puts form over substance. It ignores the purpose of
17 the LSN as well as the advisory PAPO Board's own
18 statement that procedural requirements are not to
19 make the process more difficult and the failure to
20 comply with case management requirements are not to
21 be used as grounds to object to the admissibility of
22 a proffered contention.

23 TOP has not ignored the LSN requirements.
24 It has acted in good faith. We believe, as
25 Construction Authorization Board 2 noted yesterday,

1 that at the very least, DOE must show some prejudice
2 if it seeks to make an issue of LSN compliance. DOE
3 makes no such claim as to TOP. We believe this is
4 truly a case of no harm, no foul; and contrary to
5 DOE's arguments, the LSN requirements do not bar
6 TOP's participation as a full party in this
7 proceeding. Thank you.

8 >> JUDGE FROEHLICH: Thank you. Mr. --

9 >> MS. CURRAN: Your Honor, this is Diane
10 Curran for Eureka County. I know that Eureka has
11 been instructed not to participate in this
12 proceeding; but if I could just have a moment, I want
13 to thank you for the efforts you have made to
14 webstream this proceeding. It's means a lot to the
15 officials in Eureka County and I understand that it
16 was many people tuned in to these proceedings over
17 the last couple days.

18 And I'd also like to thank you for the
19 efforts that you made to ensure that the written
20 materials were put on the media so that people
21 viewing from far away could see what you are talking
22 about. We really hope that this is the beginning of
23 a tradition. Thank you.

24 >> JUDGE FROEHLICH: Thank you, Miss
25 Curran. For Caliente.

1 >> MR. HUSTON: Your Honor, John Huston for
2 Caliente Hot Springs Resort. Thank you for your time
3 and the opportunity that's been afforded to us. We
4 have no documents that have not been entered on the
5 LSN by DOE or other parties and you probably don't
6 expect to receive any. Thank you for your
7 constitution of our contention and your understanding
8 of us as a limited resource private party. Thanks
9 again.

10 >> JUDGE FROEHLICH: Thank you. The State
11 of California.

12 >> MR. SULLIVAN: Tim Sullivan for
13 California. We appreciate all of the time and effort
14 that all the Boards have put into this issue and all
15 the great level of preparation; and we have nothing
16 further to add.

17 >> JUDGE FROEHLICH: Thank you. Four
18 Counties.

19 >> MR. LIST: Yes. Robert List on behalf
20 of Four Counties. First, let me say that, that
21 we've spent at good deal of time today talking about
22 the -- the safety contentions. And I know that the
23 NEPA contentions have not been the centerpiece here
24 today. However, I would note the parallel between
25 the points that were debated here concerning the --

1 the bald denial by the -- by DOE that they have
2 failed to meet the adequacy standards. Because those
3 same -- those same standards -- those same standards
4 of adequacy are very close standards also apply to
5 the NEPA contentions. And we could simply point out
6 we face the same thing. And we would simply point
7 out we have alleged in, for example, NEPA 1 and NEPA
8 2 of the four counties that DOE has utterly failed to
9 confront or to address two very critical
10 environmental issues or to discuss mitigation on
11 them. And we believe that very firmly.

12 I also would like to comment about the fact
13 that Mr. Silverman shortly ago, about 15/20 minutes
14 ago, made what we used to call in law school a
15 pregnant negative comment. Namely, he denied that
16 there is any responsibility or jurisdiction over
17 transportation on the part of NRC. And that simply
18 is not the case.

19 The point -- in fact we point to 51, which
20 includes a vast array of requirements under NEPA.
21 And NEPA, of course, if one looks at the
22 environmental impact statement and the NEPA documents
23 that were submitted in this matter, by the Applicant,
24 extensively touch upon transportation in many
25 respects. However, they failed to do so in a -- in

1 the kind of a detailed way that is required under the
2 National Environmental Policy Act. And so they have
3 brought to this -- to this Board and to the
4 Commission an application with an attendant NEPA
5 document concerning transportation, that is flatly
6 sparse and lacks the kind of detail that is required.

7 And while we fully recognize that the --
8 that the repository is the centerpiece of much of the
9 attention and will be throughout this process, to
10 those people who live within the State of Nevada, who
11 live in communities where much of this material is
12 going to be transported, that's the closest they're
13 ever going to come to a dangerous circumstance and
14 while we're not out in any way to kill this project,
15 we simply want to see it done properly. I'm not
16 suggesting that the scope of jurisdiction over safety
17 and emergency response on transportation extends to
18 every road and every byway in America; but I am
19 suggesting that it is within the scope of this Board
20 and of the Commission insofar as the State of Nevada
21 is concerned where this funneling effect of 2700 --
22 minimum of 2700 trucks will likely pass and that's
23 very close to the 2800 trains in terms of numbers,
24 will likely pass through these communities.

25 And I would cite one case in closing to the

1 Board. It's Thomas Vs. Peterson, 753 Fed. 2nd,
2 754, which involves a -- it's a 9th Circuit case
3 which involved a plan to log a forest area and the
4 Court held that there was a logical extension, an
5 inextricable link to the road that led to the area
6 that was to be logged and indicated that they had to
7 consider the roadway as well. It's a connected
8 action. And so we -- we urge this Board and the
9 Commission, ultimately, to reject the concept that
10 transportation in a broad sense is off limits.

11 We urge the adoption of our -- of our
12 contentions; and we thank this Board for its very
13 extensive preparation and conduct.

14 >> JUDGE FROEHLICH: Thank you, Mr. List.
15 For the State of Nevada.

16 >> MR. MALSCH: Yes. Thank you. We would,
17 first of all, like to express our -- on behalf of
18 Nevada, express our appreciation to this Board and
19 the other two Boards for the time and attention they
20 devoted to the issues today and the last few days. I
21 think the three days, as it demonstrated, that the
22 Boards were very carefully prepared for these series
23 of hearings and we thought that the questions asked
24 were thoughtful and incisive. As I'm sure the Board
25 appreciates, it took a very substantial effort by

1 Nevada to file the contentions it did, since there
2 was over -- there were over 8600 pages in the license
3 application and the hundreds of thousands of pages in
4 supporting references.

5 This took an extraordinary effort on the
6 part of the Nevada DOE technical team and I have to
7 tell you it took more than an extraordinary effort to
8 file our point-by-point rebuttals to the Answers that
9 were filed by DOE and the NRC staff. We were,
10 frankly, surprised and dismayed at the Answers by DOE
11 and NRC staff because we thought we had crafted
12 exceptionally well-supported and well-defined
13 contentions.

14 We were also dismayed to learn the first
15 thing Tuesday morning they needed still the position
16 of a new DOE secretary that Nevada has not raised a
17 single legitimate safety issue about the safety of
18 the Yucca Mountain repository. We believe that our
19 contentions meet and in, I think, all cases vastly
20 exceed the Commission contention requirements and
21 that the three Boards should so find. Thank you very
22 much.

23 >> JUDGE FROEHLICH: Thank you. DOE.

24 >> MR. SILVERMAN: Thank you, Your Honor.

25 I do want to -- as everyone else -- express our

1 appreciation on behalf of the Department of Energy
2 and my personal appreciation for a Board that
3 conducts itself not only professionally, but with a
4 sense of humor, even if sometimes we're the brunt of
5 that sense of humor, it actually makes it much more
6 palatable and pleasing to go through this experience.
7 Thank you for that. Mr. Shebelskie has a couple
8 quick remarks prompted by the other parties.

9 >> MR.SHEBELSKIE: Your Honor, the LSN is
10 not a technicality. It is a fundamental aspect of
11 this proceeding that the Commission established 20
12 years ago to govern this and to act as a means to
13 facilitate the Commission's ability to meet the
14 statutory schedule under the Nuclear Waste Policy
15 Act. In order to achieve that, it's fundamental for
16 the document production process to take place up
17 front before we got to this point in the time here.
18 It is nothing unfair. It's actually a procedure and
19 a requirement that was the result of negotiated
20 rule-making with DOE and Nevada and affected
21 stakeholders. They agreed to this; and the
22 Commission adopted it in its initial rule-making as
23 early as the 53 Federal Register 4.4.4.1.1.

24 The Commission had said that no person may
25 be granted party or governmental participant status

1 in the Hearing if it is not a substantial and timely
2 compliance with requirements imposed with 1003 at the
3 time specified for the submission of Petitions to
4 Intervene. This is a substantive requirement that
5 everyone has been on notice for a long time. We are
6 accused of taking an indiscriminate approach to this
7 to people or to demand form over substance. What we
8 did -- we didn't challenge everyone's Petition on the
9 basis of LSN compliance.

10 Had we done that, I'm sure Nevada and Clark
11 County would be saying, look at that, they accuse
12 everybody of noncompliance. This is sort of in the
13 "one no good deed goes unpunished category". We try
14 to be circumspect and tailored in our objections.
15 And we objected on the two main circumstances were
16 presented to us.

17 The first was when Petitioner had done
18 nothing in the pre-license phase. They had made no
19 certifications. They had produced no documents.
20 They had not complied with the PAPO Board's orders
21 for monthly supplements and certifications. In those
22 cases, in those instances, it was appropriate to
23 object, because it's a straight out unqualified
24 failure to comply with the requirements. The other
25 situation with that posed by Nevada, Inyo County, and

1 Clark County, where they had made certifications, but
2 when we looked at their contentions, measured against
3 their LSN collections, because as a matter of fact
4 the question has been raised in our minds whether you
5 have made a good faith effort to identify and in some
6 cases, supporting information and in all three, your
7 nonsupporting information. Nebraska has come back in
8 their reply with a factual foundation to say that
9 they had done it. The other two have not.

10 Clark County argued to you, that, yes, they
11 answered all of our factual objections in their
12 answer; but what they've provided was what Judge
13 Moore described earlier today in response to the
14 characterizations of one of our replies is that
15 unsworn document that consists merely of argument of
16 council. Clark County has not provided any Affidavit
17 or any factual support from their LSN administrator,
18 from their experts, saying that, in fact, they did
19 undertake a good faith search for all the documents
20 including the nonsupporting information. They have
21 instead said we didn't have to do it and based on the
22 fact that they have not supplemented their production
23 since they filed a Petition with any meaningful
24 document, and they said they don't intend to do this.
25 It is prejudicial to DOE that we have not been

1 provided party's documents during the pre-application
2 phase, for whatever purposes we might be able to make
3 up then, including in response to preparation for
4 our answers.

5 In summation, Your Honor, this is not a
6 technicality. It's a fundamental point that we had
7 to live with and the parties aren't required to
8 comply with this going forward, the schedule is in
9 jeopardy.

10 >> JUDGE FROEHLICH: Thank you. NEI.

11 >> MR. REPKA: David Repka for NEI. NEI
12 looks forward to participating in this proceeding on
13 specific substantive issues in a very substantive way
14 as we go forward drawing on the substantial expertise
15 that's available to the -- to NEI. I want to say at
16 the outset that NEI has painstakingly and carefully
17 complied with LSN requirements and no party has
18 objected to NEI's fulfillment of those obligations.

19 Second, there was some discussion this
20 morning of the threshold for a pleading of
21 inadmissible contention. NEI believes that a
22 contention threshold standards are what they are to
23 be applied neither in a reduced nor a heightened way,
24 but, instead, in a fair and even-handed manner by the
25 licensing Board. Against that standard, we believe

1 that all of our nine proposed contentions have
2 sufficient basis and specificity to meet the
3 Commission's requirements. With respect to the issue
4 of materiality, we believe that all of our issues
5 meet the NRC's requirements and are material --
6 directly material to the issues in this proceeding,
7 whether based upon an argument that they will help
8 establish compliance with the NRC regulations or in
9 some cases, they suggest a specific noncompliance
10 with an NRC regulation, either related to, for
11 example, requirements on the total system performance
12 assessment or the NRC's requirements for as well as
13 reasonably achievable for occupational doses. Or in
14 some cases, both related to compliance and specific
15 noncompliances.

16 With respect to arguments related to the
17 ALARA or As Low As Reasonably Achievable Standard, we
18 didn't have much discussions with that in the last
19 three days; but we do reject the Department's notion
20 that anything that takes place outside the GROA is
21 not relevant to this proceeding or material to this
22 proceeding. In fact, I think Nevada has made a
23 similar argument and to the extent that issues --
24 related issues on activities outside the GROA raised
25 by Nevada are admitted. Some of those

1 NEI contentions must be admitted as well. For
2 example, contentions related to the dual purpose
3 cannisters or reach attack cannister, receive design,
4 things that aren't directly attributable to the
5 proposed design and operation of the facility are
6 material to this proceeding; and NEI's contentions
7 should be admitted on that basis.

8 And then finally, I would say some of the
9 other contentions -- and we address this in our reply
10 finding. They go directly to matters raised by other
11 parties. To the extent those contentions of other
12 parties are admitted that are related, the NEI
13 contention must be admitted as well. That's all I
14 have.

15 >> JUDGE FROEHLICH: Thank you.

16 >> MS. ROBY: Your Honor, for Clark County,
17 if I may either now or after NRC staff speaks, I feel
18 I would be remiss if I did not respond to the remarks
19 of DOE's counsel.

20 >> JUDGE FROEHLICH: No, let's wrap this up
21 then. NRC staff.

22 >> MS. YOUNG: Thank you, Judge Froehlich.
23 The staff also thanks the Board for the opportunity
24 to answer your probing and piercing questions and we
25 hope that the staff's answers have been able to

1 assist you in the inquiry you have before you. The
2 commission's standards are strict by design and the
3 staff's responses did apply those standards in
4 determining whether the admissibility requirements of
5 10 CFR 2.309 were met. And previously, there was a
6 discussion between I believe Judge Wardwell and
7 Mr. Silverman, if not Mr. Malsch discussing
8 performance assessment and consideration of
9 uncertainty. I would commend to the Board's reading
10 the final rule, statements consideration, the final
11 Rule was issued November 2nd, 2001, and at page
12 55747, there is a discussion of, by the Commission of
13 what's required for addressing uncertainties. And
14 under issue 2, there's a statement that some
15 uncertainties would be directly included in DOE's
16 estimate of performance. For example, DOE is
17 expected to conduct uncertainty analysis, i.e., the
18 evaluation of how uncertainty parameter values affect
19 uncertainty in the estimate of dose, including the
20 consideration of disruptive events and associated
21 probability of the occurrence.

22 Other uncertainties are not necessarily
23 quantified but are considered during the development
24 of the conceptual models for performance assessment,
25 e.g, consideration of alternative models, inclusion

1 and exclusion of FEPs. Also in responding to a
2 question of Judge Wardwell's previously regarding
3 Nevada Safety 172, I may not have heard your
4 question. Before I answered. The staff did not
5 object to the admission of that contention. The
6 contents of attack cannister are relevant to a
7 repository performance. That concludes the staff's
8 remarks.

9 >> JUDGE FROEHLICH: Thank you, Ms. Young.
10 On behalf of this Construction Authorization Board
11 CAB-1 and the two Boards that preceded us this week,
12 I want to thank the Parties and the Petitioners for
13 the quality of their Pleadings and for their candid
14 answers during this oral argument. It has been
15 immensely helpful to us in making our decision and
16 will help us get that decision out just as quickly as
17 possible. Thank you all for your attendance and for
18 your input. We stand adjourned.

19 [Whereupon, the hearing was adjourned]
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