

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

In the Matter of  
U.S. Department of Energy  
High Level Waste Repository

Docket No. 63-001-HLW

March 31, 2009

TRANSCRIPT OF PROCEEDINGS  
Oral Argument on Admissibility of Contentions  
Before the Administrative Judges

CAB-03

Paul S. Ryerson, Chairman

Michael C. Farrar

Mark O. Barnett

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APPEARANCES

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## 1 APPEARANCES (Continued)

2 For the Native Community Action Council:

3 Rovianne Leigh, Esq.  
4 Scott Williams, Esq.

5 For the Nevada County of White Pine:

6 Richard Sears, Esq.

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8 Alan Robbins, Esq.  
9 Debra Roby, Esq.

10 For the Timbisha Shoshone Tribe:

11 Darcie Houck, Esq.  
12 Ed Beanan

13 For the Nevada County of Nye:

14 Robert M. Anderson  
15 Jeffrey D. VanNiel, Esq.

16 For the California County of Inyo:

17 Gregory L. James, Esq.  
18 Kevin Bell, Esq.19 For the Timbisha Shoshone Yucca Mountain  
20 Oversight Program:21 Douglas M. Poland, Esq.  
22 Hannah Renfro

23 For the Nevada Counties of Lincoln and Eureka:

24 Diane Curran, Esq.  
25 Baird Whegart, Esq.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 So again, we're not here over the next few  
22 days to decide the merits of these 300 contentions.  
23 We're here, in effect, to show at this stage or  
24 determine at this stage whether there's a genuine  
25 dispute whether the pleadings are, in that sense,

1     adequate.

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

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

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

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

14                    >>MS. SILVIA: Andrea Silvia.

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

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

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

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

23                    >>JUDGE RYERSON: Welcome, gentlemen.

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

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

3 >>JUDGE RYERSON: Welcome.

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

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

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

10 >>JUDGE RYERSON: Welcome.

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

16 >>JUDGE RYERSON: Welcome.

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

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

22 >>JUDGE RYERSON: Welcome.

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

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

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

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

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

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

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

18 >>JUDGE RYERSON: Welcome.

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

23 >>JUDGE RYERSON: Welcome.

24 >>MS. RENFRO: Good morning, Hannah Renfro,  
25 also representing the Timbisha Shoshone Yucca

1 Mountain Oversight Program, nonprofit corporation.

2 >>JUDGE RYERSON: Thank you.

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

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

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

12 >>MR. ANDERSON: Robert Anderson on behalf  
13 of Nye Counsel.

14 >>JUDGE RYERSON: Welcome.

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

18 >>JUDGE RYERSON: Welcome.

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

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

23 >>JUDGE RYERSON: Welcome.

24 >>MR. SEARS: Good morning. I'm Richard  
25 Sears. I'm elected District Attorney of White Pine

1 County. I don't represent the county. I also think  
2 I'm the only elected official in this body.

3 >>MR. BAUGHMAN: Good morning, Your Honor,  
4 Dr. Mike Baughman representing White Pine County.

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

6 >>MR. WILLIAMS: Scott Williams,  
7 Your Honor, representing the Native Community Action  
8 Council.

9 >>MS. LEIGH: Good morning, Your Honor.  
10 Rovianne Leigh also on behalf of the Native Community  
11 Action Council.

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

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

19 Okay. Today our principal purpose is to go  
20 over the issues that are identified in Appendix A to  
21 the Board's March 18 order. It occurred to us, as we  
22 reviewed the contentions in this matter, that I think  
23 are set forth in something like 12,665 pages, that a  
24 number of overarching issues, principally overarching  
25 legal issues, are likely to determine the

1 admissibility of large numbers of contentions. So it  
2 is our hope today to principally focus on issues of  
3 that nature; although we would no doubt have some  
4 questions about specific contentions as well.

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

10           At the end of the day, we will try, as time  
11 permits, to give every party or participant an  
12 opportunity to sum up and to address anything that  
13 they have felt is not adequately covered by our  
14 questions during the day.

15           We'll obviously try, as best we can when we  
16 ask a question, and after we get an answer, to cover  
17 that same ground, as appropriate, with other  
18 interested parties in that -- in that particular  
19 issue. But we do hope to have time at the end of the  
20 day for all of you to say what you'd like about  
21 what's on your mind, and, hopefully, we will avoid  
22 undue repetition in that exercise.

23           A couple of words about logistics. It's  
24 our intention to break for lunch, depending on where  
25 we are, about noon. Given where this facility is in

1 Las Vegas and the logistics of everyone getting back  
2 through security, we're really forced to give you at  
3 least 90 minutes' lunch. So that's what we plan to  
4 do. And hopefully we can all get back here in that  
5 time frame. We will take at least one or two breaks  
6 in the morning and in the afternoon. And we  
7 certainly hope to finish by 5 o'clock and get you all  
8 out of here then. And, again, we will -- the next  
9 board, Board Two will be starting at 9 o'clock  
10 tomorrow.

11 Any comments from Judge Farrar on the  
12 procedures?

13 >>JUDGE FARRAR: No. You had the Board  
14 Three assignment, the Board One assignment.

15 >>JUDGE RYERSON: Okay. All right. Is  
16 there anything any of the parties or participants  
17 feel we need to address now of a procedural nature?  
18 Mr. Malsch?

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

1 confirmation from DOE, that, indeed, its Answer does  
2 still represent the position of the Department of  
3 Energy.

4 >>JUDGE RYERSON: It's the only answer we  
5 have and we're making that assumption. I don't know  
6 if Mr. Silverman wants to comment on that or not.

7 >>: MR. SILVERMAN: Your assumption is  
8 correct, Your Honor.

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

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

21 And Board Three would appreciate if all of  
22 the petitioners could be prepared on Thursday to  
23 inform Board Three of which of their petitions they  
24 believe are affected by the recent revisions to  
25 Part 63.

1           And in the case of the parties, that's the  
2 DOE and the NRC staff, Board Three would appreciate  
3 it if you would be prepared to address all of the  
4 contentions and let Board Three know which you  
5 believe are affected by the changes to Part 63.

6           All right. Any questions about that?

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

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

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

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

2 >>JUDGE RYERSON: And you're not seeking  
3 standing based -- you're not seeking organizational  
4 standing as a right?

5 >>MR. REPKA: That's correct. We are  
6 seeking standing based on the standing of our  
7 members.

8 >>JUDGE RYERSON: Of your members.  
9 And you are seeking in the alternative,  
10 discretionary intervention?

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

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

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

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

25 >>JUDGE FARRAR: As one of those you

1 mentioned under the Nuclear Waste Policy Act, how  
2 much reliance do you put on the fact that your  
3 members have made large financial contributions to  
4 the Waste Fund? How important is that to your claim  
5 of standing as a right?

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

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

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

21 >>MR. REPKA: I wouldn't go that far. I  
22 would say that those cases with co-owners related to  
23 standing under the Atomic Energy Act and under the  
24 National Environmental Policy Act. And we do  
25 reference those cases with respect to our arguments

1 under that basis. That's not something we were  
2 specifically relying upon under the Nuclear Waste  
3 Policy Act.

4 There the precedent in the Court of Appeals  
5 under NEI v. Nevada case that we cited in our briefs  
6 is the operative precedent that we're relying upon.

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

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

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

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

3 >>JUDGE FARRAR: Unlike my federal income  
4 tax which goes into the general fund.

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

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

21 >>MR. REPKA: I think it's a little bit  
22 more than that under radiological injuries. I think  
23 that there clearly are occupational exposures  
24 associated with continued on-site storage. But I  
25 think that there are radiological injuries associated

1 with just the continued management of spent fuel for  
2 an extended period of time.

3 That's essentially a radiological safety  
4 activity. If there were any failure to meet that  
5 obligation that the potential injury goes beyond just  
6 occupational exposures.

7 There are environmental injuries associated  
8 with continued on-site storage of spent fuel that are  
9 public injuries because of the delay in  
10 decommissioning sites that would be caused by having  
11 a completed decommissioning added nuclear site, save  
12 for the continued presence of the spent fuel that  
13 delays release of that site for other beneficial  
14 purposes.

15 So I think it's more than just radiological  
16 injuries to employees. It's contamination of  
17 property. It's security and other factors.

18 >>JUDGE RYERSON: You submitted with your  
19 reply, as I recall, some supplemental affidavits  
20 concerning -- certainly explaining the union  
21 membership in the Institute.

22 In your view, do we need to consider those  
23 supplemental affidavits? Or in your view, is your  
24 original petition sufficient?

25 >>MR. REPKA: We believe strongly that our

1 original petition was sufficient. We provided the  
2 explanation of the union membership to address a  
3 very, very specific question raised by the parties  
4 with respect to injuries at the -- to perspective  
5 workers at the Yucca Mountain site, but we don't  
6 believe that an affidavit was necessary to address  
7 that. That's clearly our members and those injuries  
8 clearly exist.

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

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

22 >>MR. REPKA: I think you can assume that  
23 there's a governing structure that applies, and we  
24 would -- and, yes, we're relying on that, in addition  
25 to the fact that the NRC's case law and precedence I

1 think is fairly clear with respect to  
2 representational standing which you need one member  
3 to -- preferably by affidavit to show that the member  
4 has authorized the entity. And we exceeded the more  
5 than -- we provided more than one member.

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

13 So it may be important that we -- it's  
14 conceivable that the only people that you would  
15 piggyback on would be the union people under the  
16 Atomic Energy Act.

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

23 >>JUDGE FARRAR: Before we go any further,  
24 Mr. Chairman, Mr. Silverman, why don't you address  
25 that last issue of the status of the different -- or

1 people in organizations they claim to represent.

2 And I think the Chairman made clear, our  
3 modus operandi today is not going to be one side as,  
4 you know, an extensive length of time. We're going  
5 to jump back and forth and get everybody's opinion as  
6 we go along.

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

13 But the case law has made clear that they  
14 have to provide an indication through affidavits or  
15 some statement that the individual members authorize  
16 that organization to represent them.

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

24 And I think what's fundamentally lacking  
25 here in the NEI case was an affidavit from an

1 individual member alleging that they would be  
2 impacted from a -- have a radiological injury  
3 associated with the operation of Yucca Mountain.

4 >>JUDGE FARRAR: Aren't the utility  
5 companies in a -- maybe I shouldn't use this word --  
6 paternalistic relationship to their employees. In  
7 other words, if the utilities are in, aren't they  
8 there representing not only the utilities' business  
9 interest but one of their great resources, their  
10 employees?

11 >>MR. SILVERMAN: I really don't see that.  
12 I don't see how it's different from any other  
13 organization that has members who want to petition to  
14 participate in an NRC proceeding.

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

22 >>MR. SILVERMAN: Oh, I imagine that's  
23 right, Your Honor. I don't think it's a cognizable  
24 injury under the Atomic Energy Act, however, in this  
25 proceeding.

1 >>JUDGE FARRAR: In terms of the same  
2 employees, you make an argument that anything outside  
3 the Geologic Repository Operations Area, which we're  
4 will shorten to GROA in the future, is outside the  
5 scope of the proceeding, but we have -- because we  
6 cannot, in this proceeding, regulate what goes on at  
7 the individual utility sites where the spent fuel now  
8 is.

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

14 So you're going to have to enlighten me on  
15 why you think that the scope is limited -- for  
16 standing purposes is limited to things happening at  
17 the GROA.

18 >>MR. SILVERMAN: That's a very appropriate  
19 question, Your Honor.

20 >>JUDGE FARRAR: Thank you.

21 >>MR. SILVERMAN: And particularly, because  
22 I think, very frankly, we were not as clear as we  
23 should have been in our pleading on that matter.

24 We do recognize that the cases very clearly  
25 show that, when an applicant applies for a license,

1 that in considering standing, you may in fact,  
2 consider impacts from that proposed licensed facility  
3 and that licensed activity to individuals who are  
4 outside the boundaries of the facility at the 50-mile  
5 presumption and reactor cases, and you have the other  
6 standing law that shows that.

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

18           The injury in their allegations is coming  
19 from the action -- from the activities at the nuclear  
20 power plant.

21           >>JUDGE FARRAR: I would reframe it and  
22 say, aren't they saying their injury is coming  
23 from -- their standing is based on the possibility  
24 that if they're not here in the case, a possible  
25 outcome of the case is the repository won't be built,

1 it will be delayed, and that possible outcome of the  
2 case -- and all you need is one possible outcome of  
3 the case for standing -- will have an impact on their  
4 workers who will have to be working or being around  
5 the spent fuel at the reactor site for a longer  
6 period?

7 >>MR. SILVERMAN: They are alleging that,  
8 yes.

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

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

16 >>JUDGE FARRAR: Here, it's from the  
17 non-operation. You're right. That's the normal  
18 case.

19 >>MR. SILVERMAN: Right.

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

24 But what's outlandish about it, they say if  
25 we have this bad outcome for their people, it will be

1 a bad outcome for the workers, from the non-going  
2 ahead of the project.

3 >>MR. SILVERMAN: Right. No, I understand  
4 the rationale that the repository doesn't get licensed  
5 in a timely fashion, and that has the effect of  
6 requiring additional long-term storage or some of the  
7 other contentions relate to the use of TADs at the  
8 reactor facilities.

9 But again, I think it is distinguishable  
10 because they are alleging that the injury is coming  
11 from the activity -- directly from the Part 50  
12 licensed activity, and that's different than the  
13 other cases.

14 >>JUDGE RYERSON: Mr. Repka, don't you also  
15 allege that you have unions as members, and that the  
16 union -- the individuals who are members of the  
17 unions are likely to work at the repository, in the  
18 construction of the repository? Is that part of your  
19 basis for standing?

20 >>MR. REPKA: Yes, that's correct, Judge  
21 Ryerson.

22 >>JUDGE RYERSON: And is that raised in  
23 your original petition, or is that just in your  
24 supplemental affidavits?

25 >>MR. REPKA: No. that's included in our

1 original petition, in the affidavit of Mr. McCullum  
2 mentions the fact that unions are members of NEI.

3 >>JUDGE RYERSON: Okay. I noted with  
4 interest your --

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

6 >>MR. REPKA: There is a statement in the  
7 original affidavit that unions are members, that's  
8 correct.

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

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

15 >>JUDGE RYERSON: Okay. You take the  
16 position, Mr. Repka, in your reply that historically  
17 the Commission has been generous -- that's your  
18 word -- in allowing parties or petitioners to cure  
19 procedural defects in their replies. And I believe  
20 your members have, from time to time, perhaps more  
21 than from time to time taken a different view.

22 Is that your -- is that your position that  
23 the Commission has historically been generous in  
24 allowing procedural defects to be cured in replies?

25 >>MR. REPKA: I think that's absolutely

1 true, just as a statement of fact, regardless of what  
2 industry position may have been in individual cases.  
3 I think the case law speaks for itself that, with  
4 respect to affidavit requirements or pleading  
5 requirements, that the Commission has been allowed  
6 some latitude there.

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

15           But I do disagree with that argument. And,  
16 again, I think that the pleading requirement is one  
17 of having a member provide an affidavit demonstrating  
18 that the member has authorized the association. And  
19 we more than met that requirement on the initial  
20 filing.

21           >>JUDGE FARRAR: And would you say your  
22 supplemental filing is in the nature of explanation  
23 of your original as opposed to the thing your members  
24 always object to, supplemental filings that open up a  
25 new --

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

3 >>JUDGE FARRAR: Mr. Silverman, what do you  
4 think about that?

5 >>MR. SILVERMAN: I'm sorry. Would you  
6 repeat.

7 >>JUDGE FARRAR: The question was: Is  
8 there supplemental filing, just explanatory to their  
9 original, or does it, as companies often do,  
10 complaining about the normal interveners that  
11 introduces brand-new information.

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

17 Other than that, the claims that come to  
18 mind that are new are their -- they reference their  
19 participation in the PAPO proceeding, in this case,  
20 as a suggestion that that should provide a basis for  
21 standing, which we think is wrong.

22 >>JUDGE FARRAR: Well, if that's wrong, why  
23 did you not object to their -- why are we several  
24 years down the road here, they participated without  
25 any objection from any of you in the PAPO proceeding

1 and now you're objecting to their standing?

2 >>MR. SILVERMAN: Oh, because there was no  
3 requirement for standing in the PAPO proceeding, none  
4 at all. That would have been entirely premature and  
5 inappropriate for us to argue that you had to show  
6 legal standing to participate in that proceeding.

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

10 >>MR. SILVERMAN: I have to refer to the  
11 rules, but any potential -- some language like any  
12 potential party, potential party, can participate in  
13 that proceeding as long as they're complying with the  
14 LSN obligations. That was -- standing is not a  
15 prerequisite for participation in the PAPO  
16 proceeding, and I can, with a moment or two, find the  
17 regulations that specify that.

18 So that would have been inappropriate for  
19 us to raise that at that point. We're now at the  
20 contention admissibility stage, which is an intervene  
21 stage, and it is a relevant consideration.

22 >>JUDGE RYERSON: Would you say, moving on  
23 for the moment to the issue of discretionary  
24 intervention, would you regard NEI's participation in  
25 the PAPO proceedings as a relevant factor in,

1 perhaps, recognizing discretionary intervention for  
2 them?

3 >>MR. SILVERMAN: Well, I guess I'd want to  
4 know more about that. I don't believe they've  
5 alleged that as a basis for discretionary  
6 intervention. So I'm not sure what the -- how that  
7 would support a discretionary intervention argument.  
8 It's not an argument they've made, to the best of my  
9 knowledge.

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

17 >>MR. SILVERMAN: Yes.

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

25 >>MR. SILVERMAN: Our view on the question

1 of their ability to contribute to the development of  
2 a sound record is that they do allege that they have  
3 direct substantive expertise in a very general way.  
4 There is no doubt that the utilities are cognizant  
5 and very experienced with the spent fuel handling,  
6 but their pleadings don't really specifically -- they  
7 don't identify specific experts upon which they would  
8 rely, which is one of the factors to be considered,  
9 at the evidentiary hearing, or their qualifications.

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

20           >>JUDGE RYERSON: What about the factor of  
21 broadening issues or delay. I believe -- and I'm  
22 sure Mr. Repka will correct me if I'm wrong. I  
23 believe they have nine contentions, nine proposed  
24 contentions; is that right?

25           >>MR. REPKA: That sounds right.

1 >>JUDGE RYERSON: And we are faced with 328  
2 or 329 proposed contentions, which means, if my math  
3 is correct, that their presence would appear to  
4 complicate the proceeding by a factor of 2.8 percent  
5 or thereabouts.

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

15 Is that something we should consider or is  
16 that an improper consideration?

17 >>MR. SILVERMAN: Well, the factor is an  
18 important consideration to the extent to which they'd  
19 inappropriately broadened the proceeding. And I  
20 completely trust your math. I'm sure I couldn't do  
21 it myself.

22 And clearly that in the scheme of the  
23 number of contentions we have, when you just look at  
24 the number of contentions, it's a relatively small  
25 number. But I'd like to point out that the standard

1 is, would the potential party inappropriately broaden  
2 the proceeding?

3           What we have here is largely a set of  
4 contentions asserting that the Department of Energy's  
5 analyses are overly conservative and that -- and I  
6 want to stress the word in the standard that applies  
7 here, "inappropriately" broaden this proceeding.

8           What we would be doing, we would be having  
9 the NRC, you the licensing board, adjudicating  
10 whether the Department was too conservative. That's  
11 a very unusual situation, maybe unprecedented, I'm  
12 not sure, clearly unusual. It's, in our view,  
13 inappropriate.

14           It would result in wholly different  
15 testimony from the Department of Energy and other  
16 parties than we would need to provide in response to  
17 other petitioners. We would now not only have to  
18 show that we were sufficiently safe and we meet the  
19 regulations, but now we have to show that we're not  
20 too conservative in order to rebut these contentions.

21           So our view is that second important  
22 standard under discretionary intervention really does  
23 not cut in favor of NEI.

24           >>JUDGE FARRAR: Was it your brief or  
25 somebody else's that said the remedy is to talk to

1 you all?

2 >>MR. SILVERMAN: I believe we said under  
3 ability to represent -- another party who could  
4 represent the interests of that other party, that  
5 since we both have an interest in licensing the  
6 facility safely, but as promptly as possible, that  
7 the Department effectively does represent their  
8 interest.

9 >>JUDGE FARRAR: So they should talk to  
10 you?

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

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

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

17 >>JUDGE FARRAR: Yes. Yes. We're  
18 referring to the --

19 >>MR. SILVERMAN: Spent fuel.

20 >>JUDGE FARRAR: -- spent fuel pickup, that  
21 I don't think has happened unless something happened  
22 this morning.

23 >>MR. SILVERMAN: Not to the best of my  
24 knowledge. Clearly there's a contractual dispute  
25 there. I think that's a different animal than the

1 disagreement or -- well, the issues raised about the  
2 extent to which we've been overconservative. You  
3 know, I shouldn't -- and disagreement is probably the  
4 wrong word, because I think the Department feels  
5 they've been very conservative and very careful in  
6 their analysis.

7 >>JUDGE FARRAR: Well, just my  
8 seat-of-the-pants layman's knowledge, if there's  
9 anybody in the world who has access to talk to you  
10 all, it's NEI. The fact that they're here  
11 petitioning for us -- petitioning to have an  
12 adjudication in front of us, can't we draw from that  
13 they believe that you've not been responsive? I  
14 mean, I can't imagine that all these years, while DOE  
15 has been putting this application together, that  
16 their members have not been talking to you.

17 >>MR. SILVERMAN: I do not know the answer  
18 to the question as to whether the NEI has approached  
19 the Department regarding the specific issues, the  
20 alleged over conservatisms that are the subject of  
21 these contentions. I imagine there have been  
22 discussions along the way.

23 >>JUDGE FARRAR: Were they the people you  
24 make an oblique reference in your brief to some  
25 industry organization that filed comments in 1989

1 about let's limit discretionary intervention? Was  
2 that them or their predecessor?

3 >>MR. SILVERMAN: It was not NEI, because  
4 NEI did not exist then. It was the predecessor  
5 organizations.

6 >>JUDGE FARRAR: Atomic Industrial, Atomic  
7 Industrial Form. Mr. Repka, do you --

8 >>MR. REPKA: I believe it would have been  
9 Newmark at that point.

10 >>MR. SILVERMAN: There were several.  
11 Several named.

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

25 But when you look behind the surface, there

1 were allegations that that company was, in fact,  
2 involved in civil litigation because of their  
3 deficient -- allegedly deficient performance, and  
4 there was some suggestion that rather than trying to  
5 just help the NRC solve this problem, they were in  
6 there to get a leg up on their civil litigation by  
7 establishing what a great -- establishing in front of  
8 us what a great job they had done.

9 And, in fact, that would enhance their  
10 reputation, which was in some jeopardy in the  
11 business community. That's the premise of my  
12 question.

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

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

20 >>MR. SILVERMAN: I'd have to go back and  
21 re-check North Anna, frankly. I accept your  
22 description of it with respect to potential other  
23 motives of Sun Ship Building.

24 But our view here -- and I hope I answer  
25 your question -- is very simply that the economic

1 interest they allege is no different than the  
2 economic interest alleged in other cases where  
3 standing has been denied.

4 It's based not upon radiological injury.  
5 It's not linked to radiological injury as its pled.  
6 It's based upon the cost of having to continue to  
7 store the fuel.

8 It's based upon the contributions to the  
9 Nuclear Waste Fund, and that is no different, in our  
10 view, than the other economic injury cases that we've  
11 seen, which have resulted in a determination of a  
12 lack of standing under the Atomic Energy Act.

13 >>JUDGE FARRAR: You ever read District  
14 Court and Court of Appeals' opinions that start out,  
15 this case comes -- you know, this case arises under  
16 the Voting Rights Act or this case arises under the  
17 Federal Tort Claims Act, write that first sentence of  
18 our opinion for me. This case arises under?

19 >>MR. SILVERMAN: This case arises under  
20 the Atomic Energy Act?

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

24 >>MR. SILVERMAN: I was getting there. I  
25 think there's several statutes, not in any

1 particular order. The Atomic Energy Act, the  
2 National Environmental Policy Act, and the NWPA, yes.

3 >>JUDGE FARRAR: Well, but isn't -- is that  
4 an important distinction, given the distinction that  
5 you try to draw, that their standing is under -- that  
6 their claimed interest falls under something that  
7 their contentions have nothing to do with, namely the  
8 Nuclear Policy -- Nuclear Waste Policy Act?

9 In other words, you're saying, their  
10 contentions are only Atomic Energy Act, only NEPA.  
11 They're saying they come in under the Nuclear Waste  
12 Policy Act. You say, well, that's kind of not  
13 relevant here, but isn't that -- isn't that why we're  
14 here, the Nuclear Waste Policy Act?

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

20 NWPA is a multi-faceted statute. There is  
21 no doubt that it provides -- that an injury, an  
22 economic injury like the dispute over the standard  
23 contract is within the zone of interests that could  
24 be cognizable, and litigable, and has, in fact, been  
25 litigated in Federal Court, pursuant to specific

1 provisions of the NWPA that put a contractual  
2 obligation on the Department of Energy.

3 But that doesn't mean -- that's an economic  
4 injury, and that's cognizable in the federal courts  
5 under certain provisions of the Atomic Energy Act,  
6 the provisions that lead to the standard contract.

7 That doesn't mean that same economic  
8 injuries within the zone of interest to be litigated  
9 here under other specific provisions of the NWPA.  
10 The NWPA does direct the NRC to promulgate  
11 regulations under the Atomic Energy Act and the  
12 Energy Reorganizers Act, but they're focused on  
13 radiological health and safety.

14 The point is NEI -- the NWPA may afford NEI  
15 and its -- or its members standing for one purpose in  
16 one form, but not necessarily for a different purpose  
17 in a different form.

18 And, in fact, as I think you know and we  
19 cited in our briefs, when the Commission modified its  
20 Part Two regulations in 1989 to implement some of the  
21 NWPA provisions, they even said -- they anticipated,  
22 quote, that the industry's interest in the high-level  
23 waste is economic, which led them to conclude that  
24 maybe their best option would be discretionary  
25 intervention.

1           I do not think it's correct to say -- to  
2 consider the NWPA as a monolithic statute, where it  
3 affords standing in one form; it does not necessarily  
4 afford standing in another form. And the NEI case  
5 specifies that a Board or a court should consider the  
6 specific provisions of the statute under which the  
7 litigation is occurring and not look at the statute  
8 as a whole, in making that judgment.

9           >>JUDGE FARRAR: Let me ask on that score,  
10 Mr. Malsch and Mr. Repka, if I understand your  
11 position which we've not yet ruled on, that  
12 Mr. Malsch has no right to be heard on this. But  
13 indulge me anyhow, subject to your objection.

14           >>MR. REPKA: I was simply looking for an  
15 opportunity to reply to Mr. Silverman, but I'll  
16 wait --

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

19           >>MR. REPKA: Okay. A couple of points I  
20 wanted to respond to. First, I want to make it very  
21 clear that Nuclear Energy Institute's position in  
22 this proceeding is licensing of the project. And we  
23 support licensing of the project, and I think that  
24 puts us in a little different light, in terms of our  
25 contentions, but we'll get to that.

1           Mr. Silverman picks on one aspect of the  
2           contention, and that's the assertion that the  
3           application is, in some respects, overconservative.  
4           Overconservative.

5           Our contentions do a lot of things, and  
6           that's one of the things it does say, but I think --  
7           and Mr. Silverman claims that is unprecedented. And  
8           I don't think that really is true. I think that the  
9           flip side of over-conservatism is compliance and  
10          safety margin.

11          And one of the things we would seek to  
12          establish is that there is sufficient safety margin.  
13          It will be help to establish compliance, and I think  
14          licensees or applicants make that argument all of the  
15          time, and that will be not unduly delay the  
16          proceeding. I think that -- as we said in our  
17          papers, I think will actually support and, in some  
18          respects, expedite the proceeding. So I think that  
19          picking on the contentions related to  
20          over-conservatism in the context of standing is  
21          misplaced.

22          Second, Judge Farrar, you mentioned the Sun  
23          Ship Building case. And I just wanted to mention one  
24          other case in which discretionary standing was  
25          granted. And that's a case, Ohio Edison Company

1 involving the Perry Nuclear Power Plant. It actually  
2 dealt with a proposal to eliminate anti-trust license  
3 conditions, and an entity, the Alabama Electric  
4 Company, was granted standing. And the basis for  
5 that was that they were a direct beneficiary of the  
6 conditions involved. And I think that the Nuclear  
7 Energy Institute here is directly analogous to that,  
8 as a direct beneficiary of the repository involved.

9 Third point, there was some discussion of  
10 the Nuclear Waste Policy Act, and how it might be a  
11 basis for standing in other matters. For example,  
12 might be a basis for standing in litigation  
13 surrounding damages under the standard contract, but  
14 somehow that that wouldn't provide standing in this  
15 form.

16 Well, again, I think the Nuclear Waste  
17 Policy Act has many aspects to it, and I think that,  
18 as we've pointed out repeatedly, one of the aspects  
19 and purposes of the Nuclear Waste Policy Act is the  
20 citing of our repository, the licensing process for a  
21 repository, the funding mechanism for a repository.  
22 And all of that puts our participation well within  
23 that zone of interest. And we're not relying on  
24 precisely the same basis that we might -- we might  
25 rely for standing in waste litigation in the district

1 court.

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

6 >>MR. REPKA: I believe that that would be  
7 true; that discretionary standing would not eliminate  
8 the admissible contention standard. However, again,  
9 we are a supporter of the project. And I think that  
10 puts our role in a slightly different perspective. I  
11 think we have proposed contentions to try to meet the  
12 contention standard.

13 But again, I think we would be looking to  
14 participate in a way that would support the project  
15 where we have that expertise, and based upon  
16 discretionary standing or any other kind of standing.

17 >>JUDGE FARRAR: Well, if we let you in, do  
18 you think that gives you a roving Commission to help  
19 us help the other litigants, assuming that some of  
20 their contentions come in -- to help them or oppose  
21 them?

22 In other words, are you going to -- I guess  
23 the question is: Is your game plan, if you succeed  
24 here, to be heard only on the contentions you filed,  
25 the 2.8 percent add on that Judge Ryerson mentioned,

1 or are you going to be a roving commissioner --  
2 commission, helping us out on everything?

3 >>MR. REPKA: I think roving commissioners  
4 is probably too broad a characterization. I mean, I  
5 think we would be looking to where we appropriately  
6 join other contentions, or we would do so, or adopt  
7 contentions of other parties or appropriately seek  
8 leave to participate on other issues where we felt we  
9 could do that. But I think that's probably getting  
10 ahead of ourselves. At this point we don't know what  
11 the contentions are.

12 Again, it's a little bit of a unique  
13 position for an entity that would support the project  
14 because, again, we're filing a pleading at a point  
15 where we don't know what all the other contentions  
16 are.

17 >>JUDGE FARRAR: Let me interrupt you  
18 there, Mr. Silverman. We've never had a problem in  
19 our decisions -- I mean, there's nothing wrong with  
20 someone wanting to intervene to support a project.  
21 For example, the tribe came in one segment of the --  
22 the ruling segment of the tribe came in the private  
23 fuel storage proceeding to support the project. So  
24 there's nothing wrong with coming in to support the  
25 project.

1 >>MR. SILVERMAN: I'm not aware of a  
2 general principle of law that says that can't be  
3 done.

4 >>JUDGE RYERSON: I'd like to hear if  
5 there's a view of the NRC staff on this issue.  
6 Ms. Young, does the staff have a position on these  
7 points?

8 MS. YOUNG: Judge Ryerson, Daniel Fruchter  
9 will be addressing questions on NEI standing.

10 >>JUDGE RYERSON: Okay.

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

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

20 >>MR. FRUCHTER: Sure. I'll try to avoid  
21 filibustering.

22 The staff opposes the intervention of NEI  
23 in this proceeding. As our response makes clear, the  
24 crux of NEI's argument is economic. And while they  
25 have raised other potential radiological issues or

1 asserted other radiological injuries, they've done so  
2 on, really on behalf of workers, in the context that  
3 they've alleged occupational exposures. NEI's  
4 members, its corporations do not sustain occupational  
5 exposures. They have not demonstrated that they're  
6 authorized to represent the workers who might be  
7 sustaining those occupational exposures.

8 With regard to --

9 >>JUDGE FARRAR: They do represent the  
10 unions, though.

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

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

14 >>MR. FRUCHTER: I believe that that's what  
15 they would say. As the Commission's decision in  
16 Palisades filed last year held, though, the  
17 representational standing of unions to represent  
18 their members should not be assumed. Like anyone  
19 else, they have the obligation to come forward and  
20 show that they're authorized to represent their  
21 members.

22 With regard to the issue of standing --

23 >>JUDGE BARNETT: I'm a little confused.  
24 So your argument is that only individuals can have  
25 radiological injuries or that organizations can, but

1 that they are not -- they haven't shown that they're  
2 representing the proper organization? Which one is  
3 it?

4 >>MR. FRUCHTER: Sure. Certainly someone  
5 other than an individual can sustain a radiological  
6 injury. The specific radiological injuries that are  
7 asserted by NEI are occupational exposures, if you  
8 look at the affidavits that they provided. And I  
9 would say that it's not possible for a corporation to  
10 sustain an occupational exposure.

11 Your Honors brought up the idea that they  
12 might have an interest in avoiding or defending  
13 lawsuits brought by their employees. I think that  
14 just brings us back to this issue of an economic  
15 interest. While there certainly may be one, we would  
16 say that it's economic in nature.

17 >>JUDGE BARNETT: Well, so if an individual  
18 was worried about an occupational exposure, who would  
19 represent them, if they had an interest in this  
20 proceeding? Would an individual have to represent  
21 himself?

22 >>MR. FRUCHTER: No. The individual would  
23 authorize -- the individual could represent himself.  
24 The individual could also authorize an organization  
25 in which he was a member to represent him. That's

1 not what we have here.

2 >>JUDGE BARNETT: Okay. So your contention  
3 is that NEI is not properly authorized to represent  
4 individuals -- these individuals; is that right?

5 >>NRC STAFF: Right. It's not authorized  
6 to represent the workers who would be sustaining  
7 these alleged occupational exposures.

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

13 While it's certainly true that this case  
14 was arising under the NWPA, it's arising under a  
15 particular provision that calls for the NRC to make a  
16 determination as to whether the application is  
17 consistent with public health and safety. And  
18 there's no purpose in that provision to protect the  
19 economic interests of NEI.

20 So looking at the particular provision of  
21 NWPA under which the proceeding is taking place, the  
22 staff is of the view that that also does not protect  
23 economic interests, which may be unlike some of the  
24 provisions having to do with standard contracts or  
25 ground water standards.

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

4 >>MR. FRUCHTER: Well, I think that they're  
5 looking at NEI's original petition. I think that it  
6 does not raise the issue of an injury to employees  
7 who may be working at the repository and may sustain  
8 occupational exposures in a way that was clear to --  
9 certainly to the staff. It wasn't clear that that  
10 injury was raised as a basis for standing.

11 So you know, we would argue that, you know,  
12 having not been raised in the initial filing, it  
13 would not be proper to raise an entirely new type of  
14 injury in the reply filing. But I think that the  
15 more important part of that is that they -- well,  
16 they raise that in the reply.

17 The authorization came from an NEI  
18 employee, and not from a union and not from a worker  
19 who actually would be working at the repository. So  
20 there's several layers of organizations and  
21 representation, and that chain has not been  
22 connected.

23 >>JUDGE RYERSON: So your view is that,  
24 even if we were to consider the supplemental  
25 affidavits, that that's not sufficient because they

1 were from the unions and not from the workers  
2 themselves?

3 >>MR. FRUCHTER: Exactly, Your Honor.

4 >>JUDGE FARRAR: Let me ask you: We know  
5 that the staff has a -- is always part of the  
6 proceedings; so I'm not trying to oust you, but let's  
7 start with that premise that --

8 >>MR. FRUCHTER: Thank you.

9 >>JUDGE FARRAR: -- I accept that you're  
10 here, and you're always here, and we always enjoy  
11 hearing your position.

12 But when you come down to it, doesn't NEI  
13 have more of an interest and more standing to be in  
14 this proceeding than you do? The staff plays a  
15 tremendous role. They will spend years looking at  
16 the safety and environment, but mostly in this case,  
17 the safety impacts of this project.

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

21 But when you come -- but the staff has no  
22 promotional role. So in a sense, while you want  
23 to -- while we want to make sure that your people  
24 back home are reviewing the safety aspects of this,  
25 you don't really have a dog in this fight in this

1 hearing.

2           You don't really have an interest in  
3 whether we -- we were to let these contentions in and  
4 end up turning down the proposal or whether we  
5 approve the proposal. Your work goes on, and you're  
6 not promotional. So it's troubling me that you all  
7 opposed NEI's standing, when in the context I just  
8 said it, one could say they have more interest or  
9 right to be here than you do.

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

15           >>MR. FRUCHTER: If your question is  
16 whether the staff can show the kind of radiological  
17 injury that would give standing in an NRC proceeding,  
18 I think Your Honor is exactly correct. I don't think  
19 the staff would be radiologically injured by the  
20 outcome of the --

21           >>JUDGE FARRAR: I'm not talking about  
22 radiological injury. I'm talking about a staff  
23 corporate interest. They have a distinct corporate  
24 interest in not letting this go forward unless it  
25 meets all the safety standards. That's the

1 regulators back home. But you all sitting in this  
2 courtroom have no corporate interest in whether this  
3 project succeeds or fails; do you?

4 >>MR. FRUCHTER: That's not only exactly  
5 true, but that's the explicit intent of Congress,  
6 one, in creating the NRC, and, two, in instructing  
7 the NRC to conduct this licensing proceeding in the  
8 first place. They believed it was essential that the  
9 NRC have no promotional interest in the outcome of  
10 the proceeding and, nonetheless, instructed the NRC  
11 to conduct the hearing under the rules of hearing,  
12 which include having the staff as a party.

13 >>JUDGE FARRAR: Right. That's why you're  
14 here. But these people have been lobbying for this  
15 proposal for 20 years. Why is that not -- that  
16 interest not an overwhelming one?

17 >>MR. FRUCHTER: I would -- the staff is  
18 not of the position that NEI has no interest in the  
19 outcome of the proceeding, but that the interest that  
20 they have is economic, and, therefore, not protected  
21 by the Atomic Energy Act and NEPA. It is not  
22 connected to radiological --

23 >>JUDGE FARRAR: It is protected by the  
24 Nuclear Waste Policy Act which your brief starts out  
25 by saying it's what this case is about.

1 >>MR. FRUCHTER: It is protected, arguably,  
2 by certain portions of the Nuclear Waste Policy Act,  
3 but not by the -- not by the provision under which  
4 this proceeding is taking place.

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

7 >>MR. FRUCHTER: That's correct,  
8 Your Honor.

9 >>JUDGE RYERSON: Why?

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

14 In favor of discretionary intervention is  
15 the extent to which the Petitioner is going to assist  
16 in developing a sound record.

17 The staff is of the view that, while NEI  
18 has made a general assertion that it has expertise,  
19 and certainly the staff does not disagree with  
20 that -- well, NEI has asserted that they have general  
21 expertise that will be brought to bear on the  
22 proceeding. They have not showed, however, that they  
23 would assist in developing a sound record on the  
24 issues that are properly under consideration in the  
25 proceedings.

1           >>JUDGE FARRAR: How could they do that  
2 since there are 300 contentions, theoretically an  
3 issue, and no one will know until May 11th or  
4 thereafter which issues, if any, are coming in. So  
5 how could they have told us in their petitions some  
6 months ago specifically which experts they'd bring to  
7 bear on which issues?

8           >>MR. FRUCHTER: Certainly in their initial  
9 filing it would not have been possible for them to  
10 assign experts to specific contentions. But, that  
11 said, there are certain issues that are overarching  
12 in the proceeding and certain technical issues that  
13 we know are going to be litigated to some extent and  
14 discussed during the course of the proceedings. So  
15 the staff is of the view that they could have set  
16 forth the expertise that we brought to bear in much  
17 greater detail than they have done.

18           With regard to the factor weighing against  
19 intervention, the extent to which their participation  
20 will broaden the proceeding impermissibly, Your  
21 Honors are correct that, in terms of the number of  
22 contentions that they would add to the proceeding,  
23 that number would not necessarily be significant in  
24 terms of the overall proffered contentions. We don't  
25 know whether it would be significant in the context

1 of the admitted contentions.

2 But the question, I think, is the issues  
3 that would be raised by NEI, in the staff view would  
4 improperly broaden the proceeding. To my  
5 understanding, NEI is the only party that's  
6 interested in arguing and presenting evidence that  
7 DOE's design is overly conservative.

8 >>JUDGE FARRAR: Suppose it had nine  
9 contentions that went the other way, that no one else  
10 had raised. Wouldn't that broaden the proceedings to  
11 the same extent? What does it matter which way their  
12 contentions go? They've got nine different  
13 contentions. Doesn't that broaden the proceeding by  
14 2.8 percent, whichever way those contentions go?

15 >>MR. FRUCHTER: Well, in terms of  
16 proffered contentions, again, we don't know what the  
17 numerical extent would be in terms of admitted  
18 contentions. But, as Your Honor pointed out,  
19 there's, you know, over 300 proffered contentions,  
20 and it's not clear to what extent they would be  
21 participating on those other contentions, if they  
22 were admitted.

23 But I think the broader question is not the  
24 number of contentions but the issues that are raised.  
25 And simply speaking, NEI is interested raising an

1 issue that no other party is interested in raising.

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

5 >>MR. FRUCHTER: No. The staff would not  
6 take the position that it's not allowed. The  
7 standard, though, for discretionary intervention is  
8 very high, as all the parties agree. And the issue  
9 is whether they have sufficiently fulfilled that  
10 standard.

11 And I think the fact that they are  
12 interested in litigating this issue of whether DOE's  
13 design is overly conservative goes to that factor,  
14 which is whether they will broaden or delay the  
15 proceeding. So we're not saying that that's an  
16 impermissible topic area to raise, but I do believe  
17 that it weighs against discretionary intervention.

18 >>JUDGE BARNETT: Well, in effect, that  
19 could be the outcome, right, because if they're -- if  
20 they were raising -- if they were making the same  
21 argument that the design wasn't conservative enough,  
22 then it wouldn't be broadening the proceedings, in  
23 your view; is that correct? It wouldn't be  
24 appreciably broadening the proceedings in your view?

25 >>MR. FRUCHTER: I mean, it would depend on

1 the specific issues that they were raising. It  
2 wouldn't be broadening the issues in the same precise  
3 way, but it would really depend on the specific  
4 contentions that were proffered as to, you know, to  
5 what extent they were broadening the proceeding.

6 >>JUDGE BARNETT: So in effect, because  
7 they have contentions that go the opposite direction  
8 of other contentions, then, in effect, in your view  
9 that's overly broadening the proceedings; is that  
10 correct?

11 >>MR. FRUCHTER: Well, I think the issues  
12 that they're seeking to raise, are impermissibly  
13 broadening -- or would impermissibly broaden -- I  
14 don't mean impermissibly, but inappropriately broaden  
15 the proceeding. Not the fact that they're in favor  
16 of intervention or that they have an interest in  
17 showing a greater margin of safety than is assumed by  
18 DOE.

19 >>JUDGE BARNETT: What would make their  
20 contentions then -- what is it about their  
21 contentions that make them so that they would  
22 inappropriately broaden the proceedings? What is  
23 it -- what's the issue, the general issue about that?

24 >>MR. FRUCHTER: Sure. I think the purpose  
25 of the proceeding is to show or to discern the extent

1 to which DOE's submitted application is consistent  
2 with public health and safety. NEI's sort of  
3 underlying argument is, well, what could DOE's  
4 application be changed to and still be consistent  
5 with public health and safety. And I think if that's  
6 an issue that's not within the scope of the  
7 proceeding otherwise.

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

12 >>JUDGE FARRAR: Mr. Malsch, I threatened a  
13 few minutes ago to ask you a question. Yours is the  
14 only brief that I think doesn't cite the DC Circuit's  
15 NEI case, but you do cite the Supreme Court postal  
16 workers case.

17 As I read that case, that decision, the  
18 postal workers, Supreme Court held, had no cognizable  
19 interest or standing in the overarching issue of how  
20 the postal service is going to be run for the benefit  
21 of the country. And they came -- but they were  
22 trying to raise issues under that overarching  
23 statute, even though their standing came only from  
24 all these much later provisions that said how the  
25 postal service should treat its workers.

1           Isn't that the flip side of what we have  
2 here and therefore, not particularly helpful. What  
3 we have here is the overarching statute these people  
4 are arguing they have a right under, and maybe not so  
5 much their economic interest under the Atomic Energy  
6 Act and NEPA. So I'm wondering if the case decision  
7 you cite is particularly helpful to us.

8           >>MR. MALSCH: Judge Farrar, we think the  
9 case is actually quite helpful and is pretty close to  
10 analogous to the situation we have here.

11           In this case, which is Conference v.  
12 American Postal Workers Union, there were two  
13 statutes involved. It was something called the  
14 private express statutes. There were statutes also  
15 dealing with postal workers. And there was a second  
16 statute called the Postal Reorganization Act.

17           And in that case, the union was challenging  
18 regulations that allowed -- based on standing,  
19 exclusively upon the 1970 Reorganization Act, but its  
20 actual claims in the case were all based upon the  
21 private express statutes.

22           And the court held that its injuries were  
23 not within the zone of interest protected by the  
24 relevant statutes because their injuries were not  
25 cognizable, or there was no evidence they were

1 protected by the private express statutes.

2 And I think that the Postal Reorganization  
3 Act stands in relation to the private express  
4 statutes, just like the NWPA stands in relation to  
5 the Atomic Energy Act, because what was interesting  
6 is that the Reorganization Act actually reenacted a  
7 number of provisions of the private express statutes.  
8 And yet the court nevertheless said that since there  
9 was no effort to change the private express statutes,  
10 that you couldn't sweep those up into the zone of  
11 interest.

12 And similarly here, there is no claim by  
13 NEI in any of its contentions that there was any  
14 violation of a Nuclear Waste Policy Act. And the  
15 Nuclear Waste Policy Act does say that you apply the  
16 Atomic Energy Act standards. But that doesn't sweep  
17 up, within the interest protected, all of the Atomic  
18 Energy Act.

19 And as we pointed out in our papers, we  
20 think that NEI's interests are solely economic and  
21 beyond the zone protected by NEPA and the Atomic  
22 Energy Act, which are the only two statutes upon  
23 which they base their contentions. So we think the  
24 case is directly on point.

25 >>JUDGE RYERSON: Mr. Repka, you want to

1 respond to that?

2 >>MR. REPKA: Yes, Judge Farrar. In fact,  
3 when we're looking at standing under the Nuclear  
4 Waste Policy Act, we're looking at standing under  
5 only one statute, the Nuclear Waste Policy Act. So  
6 the case -- the Air Courier case is completely in  
7 opposite for that argument.

8 This case is brought under the Nuclear  
9 Waste Policy Act, and implicates other statutes as  
10 well. Certainly the Atomic Energy Act and NEPA. But  
11 it comes under the licensing provision of the Nuclear  
12 Waste Policy Act. And for that purpose, looking  
13 again at the question of the zone of interest of the  
14 Nuclear Waste Policy Act, we are looking at the one  
15 in the same statute, which is -- relates to the  
16 licensing and the funding of that project. So I  
17 think we are very clearly within the zone of  
18 interest, and the particular case really is not  
19 helpful.

20 >>JUDGE FARRAR: Is this case different  
21 from almost anything else, in that here you have, in  
22 effect an act of Congress that says we want you to do  
23 this project?

24 In other words, when we talk about what  
25 does it arise under, it's -- your average utility who

1 wants to build a nuclear power plant doesn't have an  
2 express instruction from Congress that we really want  
3 you to do that. There's a system set up, if you want  
4 to do it.

5 Does that make this case different and your  
6 standing different because -- because you are not  
7 only within the zone of interests, are your members  
8 the real party in interest under that --

9 >>MR. REPKA: Yes is the answer to your  
10 question. As I said before, I characterized it as  
11 the direct beneficiaries of the statute. And I think  
12 that makes the Nuclear Energy Institute and its  
13 members clearly within the zone of interest of the  
14 statute.

15 Mr. Malsch is focusing on whether or not  
16 there's an alleged violation of the Nuclear Waste  
17 Policy Act, and I don't think that's the correct  
18 question. I don't think whether or not there's a  
19 violation is at all relevant. The point is the  
20 statute calls for a specific citing and funding and  
21 licensing of a specific project which we support.

22 At the very beginning of this conference,  
23 Judge Ryerson talked about the purpose today was to  
24 identify interested stakeholders. Well, I can't  
25 imagine a more interested stakeholder than the

1 Nuclear Energy Institute.

2 Yes, there are many other interested  
3 stakeholders, and -- but none more so than the  
4 members of NEI. So I think the answer to your  
5 question is, yes, the Nuclear Waste Policy Act is a  
6 direct mandate from Congress and the Nuclear Energy  
7 Institute's interest is well within that zone of  
8 interest.

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

13 (A recess was taken)

14 >>JUDGE RYERSON: Could we come to order,  
15 please. Okay. Welcome back.

16 For the benefit of those who are on the web  
17 streaming site, apparently there was a technical  
18 difficulty, and there was neither video nor audio for  
19 the first half hour or so this morning.

20 My understanding, we now have audio on the  
21 web stream, and we'll have both video -- should have  
22 both video and audio this afternoon. For anyone  
23 who's interested, it's also my understanding, the  
24 proceeding will be on the web stream site for about  
25 90 days or so after the proceeding. So it goes.

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

17           And I won't get too -- into too long a  
18 history of what happened after that, but there was --  
19 things didn't develop as originally contemplated.  
20 There was a decision in the DC Circuit in which it  
21 was represented to the court that there would  
22 certainly be some level of opportunity for  
23 petitioners to present environmental issues to the  
24 Board or to the Commission in this proceeding.

25           So we have a separate set of regulations

1 that the Commission originally adopted, and then we  
2 have the notice of hearing, which amplifies on those  
3 original regulations and explains how they are to be  
4 reconciled with the representations to the court in  
5 the NEI case in 2004, all of which is a long way of  
6 saying there's some special rules here. And we are  
7 interested in the views of the parties and the  
8 participants as to how, in light of this history,  
9 they should be applied.

10 Let me begin with 2 CFR 51.109(a)(2).  
11 That's the original regulation concerning  
12 environmental contentions, and it says that, after  
13 the adoption decision by the staff or by the  
14 Commission, any party to the proceeding who contends  
15 that it is not practicable to adopt the DOE  
16 environmental impact statement as it may have been  
17 supplemented shall file a contention to that effect  
18 after publication with the notice of hearing in the  
19 federal register, and it proceeds to say, "Such  
20 contention must be accompanied by one or more  
21 affidavits."

22 Is there anyone here who does not read that  
23 section as requiring affidavit support for any  
24 environmental contention?

25 >>MR. REPKA: Judge Ryerson?

1 >>JUDGE RYERSON: Yes.

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

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

4 >>MR. REPKA: I think that there would be  
5 an exception to that with respect to an environmental  
6 contention that raises essentially a matter of law,  
7 and I think that that applies to NEI/NEPA 3 which  
8 raises the issue of whether or not there needs to be  
9 a discussion of terrorism impacts in the  
10 environmental impact statement. So I think that  
11 would be an exception.

12 >>JUDGE RYERSON: Okay. Let's just start  
13 in order. Does the NRC staff have a view as to  
14 whether there's any exception to the affidavit  
15 requirement?

16 >>MS. SILVIA: Well, the regulations don't  
17 provide for any exceptions. With respect to NEI's  
18 point about the purely legal contentions, the staff  
19 believes the petitioner should have addressed that  
20 and explained in the petitions why they felt an  
21 affidavit was not required.

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

1 >>MS. SILVIA: That was Andrea Silvia for  
2 the NRC staff.

3 >>JUDGE RYERSON: Thank you.

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

15 >>JUDGE RYERSON: Nevada have a position on  
16 that?

17 >>MR. MALSCH: John Malsch, State of  
18 Nevada. We would agree with NEI, that the only  
19 exception would be for a legal issue.

20 >>JUDGE RYERSON: Okay. All of Nevada's  
21 environmental contentions did have an affidavit;  
22 didn't they?

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

25 >>JUDGE RYERSON: And that does not have an

1 affidavit?

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

3 >>JUDGE RYERSON: Pardon?

4 >>MR. MALSCH: I'll be checking. I'll get  
5 you an answer.

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

9 Okay. Nye County.

10 >>MR. ANDERSON: Your Honor, Robert  
11 Anderson for Nye County. Your Honor, we included in  
12 an affidavit with our NEPA contention. However, we  
13 agree with NEI that it is possible to articulate the  
14 NEPA contention based solely on the law and the  
15 record, as it stands, to articulate an omission that  
16 would be required to be included in the  
17 considerations under NEPA.

18 >>JUDGE RYERSON: Okay. And would you  
19 agree that that's an exception that the board would  
20 have to find that's really inconsistent with the  
21 regulation on its face? There's no exception in the  
22 regulation, correct?

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

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

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

2 >>MR. REPKA: The regulation speaks to a  
3 contention being accompanied by one or more  
4 affidavits which set forth factual and/or technical  
5 bases for the claim. And I think that where a  
6 contention has no factual or technical basis but  
7 rather a legal basis, that language does not  
8 specifically address it.

9 So with respect to your proposition that an  
10 exception would be contrary to the specific language,  
11 I think there is room in that language to allow the  
12 exception that we're talking about.

13 >>JUDGE RYERSON: Okay. Clark County.

14 >>MS. ROBY: Yes. Debra Roby. Clark  
15 County would agree with the position of NEI, as we  
16 were just reading through (a)(2), pointing to that  
17 very same language that states, "The contention must  
18 be accompanied by one or more affidavits which set  
19 forth the factual and/or technical bases for the  
20 claim." And a legal requirement or a legal argument  
21 would not necessarily be in an affidavit.

22 >>JUDGE RYERSON: I'm sorry. Timbisha  
23 Shoshone. Am I --

24 >>MR. POLAND: Your Honor, we'll just  
25 shorten it to the Timbisha Oversight Program. Doug

1 Poland on behalf of the Timbisha Oversight Program.  
2 We would agree that where there are either factual  
3 matters that are set forth in the EIS or otherwise in  
4 the record, that it is not necessary to have an  
5 affidavit that would be submitted with the  
6 contentions, if they rest on purely a legal basis.

7 >>JUDGE RYERSON: Okay. I think we have  
8 the two views. Does Inyo County have a different  
9 view?

10 >>MR. JAMES: No.

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

16 There are a couple of criteria, again,  
17 staying in 51.109, and I believe that only one is  
18 potentially relevant in these circumstances, and that  
19 would be that the contention -- or it refers actually  
20 to the affidavit, I believe -- present significant  
21 and substantial new information or new considerations  
22 that would render the environmental impact statement  
23 inadequate.

24 In other words, the relevant test, at least  
25 I think as the Board reads it, certainly as I read

1 it, is -- before you get to the notice of hearing,  
2 the test is significant and substantial new  
3 information or new considerations.

4 Anyone have a different view of what the  
5 test is before we get to the notice of hearing? In  
6 other words, what the regulation that applies would  
7 be?

8 Wow, we seem to have agreement on at least  
9 one issue.

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

11 >>JUDGE RYERSON: Yes.

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

13 I would just add the qualifier, as read in accordance  
14 with the NEI versus EPA case. I think that case  
15 provides significant perspective on what the new  
16 information standard means.

17 >>JUDGE RYERSON: Okay.

18 >>MR. SCHMUTZ: Actually, I'll add  
19 something to that as well, if you don't mind,  
20 Your Honor.

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

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

23 Actually it doesn't have anything about  
24 what new information means. It talks about new  
25 considerations. But as I understand Your Honor's

1 point, we haven't gotten to that point. We're  
2 talking about what the reg provides on its face, and  
3 it is, as you've read it, it requires as an exception  
4 to adoption. And adoption, I would point out, is  
5 essentially presumed unless one of two things occur.

6 For this proceeding it's new information or  
7 new considerations that are significant or  
8 substantial.

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

17 In other words, I think the Commission has  
18 dropped "new" out of the test. Does anyone disagree  
19 with that? New is gone? If it's significant and  
20 substantial, it is deemed to be new. Is that a  
21 reading that is shared by everyone here?

22 All right. We do -- we do have agreement.  
23 So when you put -- when you put these provisions  
24 together, isn't it the case that the test comes down  
25 to whether -- well, I should state, there is a

1 further condition that we apply, to the extent  
2 possible. The reopening provisions under the  
3 Commission's regulations, and we'll get to that in a  
4 moment.

5 But subject to that, is there any doubt,  
6 does anyone have a different view than that the test  
7 that we start with is whether a contention presents  
8 significant and substantial information that, if  
9 true, would render the statements inadequate, that  
10 is, the environmental statements inadequate? The  
11 staff? Mr. Fruchter?

12 >>MR. FRUCHTER: Your Honor, just a brief  
13 comment on the previous question, which was presuming  
14 that if something is substantial and significant,  
15 then it's always considered to be a new  
16 consideration.

17 The staff did take the position, and we are  
18 still of the view, that substantive challenges to the  
19 EIS that have already been adjudicated on the merits,  
20 for example, by, you know, the DC Circuit would not  
21 be considered new unless the petitioner raised new  
22 information.

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

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

1 >>JUDGE RYERSON: But it does require us to  
2 interpret all of this in light of the NEI case,  
3 specifically?

4 >>MR. FRUCHTER: Right.

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

8 I would say one thing. The notion -- and I  
9 know we're going to get to it, but now, since it's  
10 been brought up, the notion of res judicata,  
11 timeliness, and finality all have to be taken into  
12 account as we look at the environmental contentions  
13 that have been filed here.

14 I'm particularly concerned -- I don't want  
15 it to be left unsaid -- and specifically with regard  
16 to transportation contentions, for example. We think  
17 there's a big gap between repository safety  
18 contentions and transportation contentions. And that  
19 res judicata time does play a fairly significant role  
20 in dealing with those contentions.

21 >>JUDGE RYERSON: Right. And we actually  
22 have broken out the transportation-related  
23 environmental contentions as a separate issue that  
24 we'll get to after we try to figure out what's  
25 required for environmental contentions.

1 >>MR. SCHMUTZ: I didn't mean to jump in  
2 there.

3 >>JUDGE RYERSON: Quite all right.

4 All right. Now, there's also requirement,  
5 and now we go back to 51.109, and 51.109 says that,  
6 to the extent possible, not practicable but possible,  
7 we're supposed to apply both the procedures and the  
8 criteria in the reopening provisions, which currently  
9 appear, I think, in 10 CFR 2.36.

10 Anybody disagree that we are required to  
11 apply the reopening criteria to the extent possible?  
12 Great. Or at least we have agreement again.

13 >>MR. LAWRENCE: Your Honor. State of  
14 Nevada. John Lawrence.

15 >>JUDGE RYERSON: Mr. Lawrence.

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

18 >>JUDGE RYERSON: Correct. I think that's  
19 what I said, but maybe not.

20 >>MR. LAWRENCE: I just wanted to make that  
21 clear.

22 >>JUDGE RYERSON: Thank you. Okay. So say  
23 that we apply it or a pleading addresses it, either  
24 way. It seems, again, I think to the board and  
25 certainly to me, that there is a potential for some

1 overlap between these requirements. And I'd like to  
2 review both the procedural and substantive  
3 requirements in the reopening provision to see -- to  
4 see, well, basically how they fit with the  
5 requirements in 51.109 as modified by the notice of  
6 hearing. Everyone still on board? Let's go through  
7 these. Here are the criteria that exist under the  
8 reopening provision. The first is the motion must be  
9 timely.

10 Now, the Commission's notice of hearing  
11 specified when petitions have to be filed. So is  
12 there anyone here who thinks there's a timeliness  
13 issue that needs to be addressed in the context of  
14 the reopening criteria? Everybody understand the  
15 question? Okay. I'm going to assume you do. But  
16 there doesn't seem to be a timeliness factor.

17 The second criteria is the motion must  
18 address a significant safety or environmental issue,  
19 but we're already there because, under 109 and the  
20 Commission's notice of hearing, there already has to  
21 be a significant or substantial environmental issue.  
22 So that seems redundant to me at least, as well.

23 Does anybody else see that as not a  
24 redundant requirement?

25 Great. The third requirement -- and here

1 we may have some differences. The third criteria is  
2 the motion must demonstrate that a materially  
3 different result would be or would have been likely  
4 had the newly proffered evidence been considered  
5 initially.

6 In other words, the test is -- forget new  
7 because that's out of here. The test is whether this  
8 substantial information would end up with a different  
9 result.

10 Now, the National Environmental Policy Act,  
11 which is the principal statute we're dealing here  
12 with, is entirely a procedural statute. In other  
13 words, it requires disclosure or consideration and  
14 disclosure of environmental consequences of  
15 significant federal action, but it doesn't require  
16 one result or another. In other words, for -- in the  
17 licensing process, provided an agency adequately  
18 considers and discloses environmental considerations,  
19 basically, the agency can do pretty much what it  
20 wants. It can consider other factors that it deems  
21 more important. It may make a decision that national  
22 security interests trump environmental  
23 considerations, can do any number of things, as long  
24 as it doesn't act arbitrarily and capriciously.

25 So the NEPA statute, the National

1 Environmental Policy Act, is inherently a procedural  
2 statute. That being so, the way I think the Board  
3 would be perhaps inclined to read this materially  
4 different result requirement would be coming back to  
5 what is in the notice of hearing, that this is  
6 something that could change significantly  
7 significant -- sufficiently significant to charge the  
8 environmental documents on which the -- on which the  
9 agency is relying.

10 But it could never be the case that under  
11 NEPA the significant materially different result  
12 would be a different licensing decision because NEPA  
13 doesn't go to the licensing decision. Surely on this  
14 point we're going to have some disagreement. But let  
15 me start with the staff. Am I stating your view or  
16 do you have a different view?

17 >>MS. SILVIA: This is Andrea Silvia for  
18 the NRC staff, and we agree with Your Honor that the  
19 materially different result would essentially be that  
20 the EIS could not be adopted by the NRC staff and it  
21 would require supplementation, and that goes to the  
22 same standard that the alleged deficiency or  
23 additional information would result in a seriously  
24 different picture of the environmental landscape.

25 >>JUDGE RYERSON: Thank you. NEI?

1 >>MR. REPKA: Yeah, this is David Repka.  
2 We agree with your characterization of the issue,  
3 Judge Ryerson.

4 >>JUDGE RYERSON: Okay. And the Department  
5 of Energy?

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

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

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

13 We agree with what the staff said. I'm not  
14 sure I understand what NEI said. But we think that  
15 the decision to be made, looking at these things, is  
16 whether to adopt.

17 And there is a presumption in this reg, as  
18 well as in the NWPA, that adoption is going to be  
19 what occurs, absent, excuse me, to exception. So  
20 it's the adoption decision we're looking at, and we  
21 think, just as the staff said perfectly well, they  
22 would have to come up with some sort of environmental  
23 contention that it was sufficiently serious to  
24 require the EIS not to be adoptable unless  
25 supplemented.

1 >>JUDGE FARRAR: Or just amended in some  
2 fashion?

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

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

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

16 >>JUDGE RYERSON: Right. Now, if I recall  
17 in your papers, DOE expressed a concern that we  
18 shouldn't admit contentions that merely flyspeck  
19 DOE's environmental document. But doesn't the  
20 standard, which is, what, significant and substantial  
21 standard, preclude that?

22 In other words, wouldn't -- if we were --  
23 if a competent affidavit, a competent, well-reasoned  
24 affidavit, concludes this is significant and  
25 substantial, or we conclude that this -- that the

1 facts presented in an affidavit are potentially  
2 significant and substantial, doesn't that take care  
3 of your concern that we're flyspecking the DOE  
4 environmental document?

5 >>MR. SCHMUTZ: I think that's right,  
6 Your Honor, if the Board finds that it is a  
7 substantial environmental issue being raised and it  
8 needs to be litigated and its materiality is without  
9 doubt, then, yeah, that's not flyspecking in our  
10 view.

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

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

15 >>MR. LAWRENCE: I generally agree with  
16 what has been reached, as long as we're not requiring  
17 a different result in the EIS. The failure to  
18 disclose adequate impacts in the EIS is all that's  
19 sufficient. The materially different result would be  
20 the failure for the EIS to disclose environmental  
21 impacts.

22 >>JUDGE RYERSON: That the result is a  
23 change in the environmental document?

24 >>MR. LAWRENCE: That's correct. The  
25 document has to be changed regardless of the outcome

1 of that document.

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

5 MS. HOUCK: The Timbisha Shoshone Tribe  
6 would agree with the statements of Nevada, and just,  
7 again, reiterate that it is a procedural document and  
8 it's based on informed decision-making. So if  
9 there's a showing that there's substantial  
10 information that's missing in the document that would  
11 require additional assessment, that our position is  
12 that that's all that's necessary.

13 >>JUDGE RYERSON: Thank you. And that's  
14 Ms. Houck?

15 MS. HOUCK: Yes. I apologize.

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

18 >>MR. LIST: Judge Ryerson, thank you very  
19 much. Bob List on behalf of the four counties. We  
20 would agree, and by way of example, I would simply  
21 say that, in our judgment, the EIS documents, NEPA  
22 documents, fail to set forth a very significant and  
23 substantial area and to demonstrate -- and we believe  
24 that a -- had it been done properly, that it would  
25 have shown, in our instance, in the case of a couple

1 of our contentions, impacts on traffic, on highways,  
2 on first responder capabilities. And all of those  
3 matters should have been a part of the EIS, so that  
4 procedurally the public and interested individuals  
5 and entities would have had notice of it and an  
6 opportunity to participate.

7 So we believe it is a procedural statute.  
8 And in talking about a substantially different result  
9 in this instance, it would have been included in the  
10 documentation so the notice would have been given to  
11 the public.

12 >>JUDGE RYERSON: Thank, you Mr. List.  
13 California, yes, Mr. --

14 >>MR. SULLIVAN: Tim Sullivan with the  
15 state of California. We agree completely with  
16 Your Honor's characterization of how 2.326 operates  
17 in the context of a NEPA contention.

18 And I just want to remind the Board that  
19 NRC staff and DOE attack our petition, in very large,  
20 part on the idea that each of those factors has to be  
21 supported by evidence in an affidavit. So while we  
22 completely agree that those -- that those factors  
23 would operate the way that you described, we disagree  
24 that they are actually a threshold evidentiary  
25 pleading requirement.

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

14           >>JUDGE RYERSON: Okay. Do you read the  
15 Commission's notice of hearing and the significant  
16 and substantial test as different from that, as being  
17 too rigorous, or is that the way you simply read the  
18 Commission's --

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

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

25           Okay. There's one -- you will recall that

1 we are required, according to 51.109, to apply both  
2 the criteria and the procedures of the reopening  
3 provisions to the extent possible. So we get then to  
4 the procedures for reopening, which say the motion  
5 must be accompanied by affidavits that set forth the  
6 factual and/or technical bases. Well, this starts  
7 sounding familiar to us, at least.

8 I guess my fundamental question is: Is the  
9 affidavit requirement in the reopening provision  
10 essentially -- let's put aside the possibility of an  
11 exception for purely legal contentions, if there is  
12 such a thing or are such a thing.

13 But otherwise all -- by everyone's  
14 agreement, all environmental contentions will have an  
15 affidavit to comply with 51.109, so my question is:  
16 Do they need another affidavit to comply with  
17 2.326(b) or does one affidavit do it?

18 >>MR. SCHMUTZ: This is Tom Schmutz. Might  
19 I respond to that?

20 >>JUDGE RYERSON: Yes, certainly.

21 >>MR. SCHMUTZ: 2.326 imposes some  
22 additional requirements that we believe must be in  
23 the affidavit. We're not suggesting that there needs  
24 to be two affidavits. There's one affidavit. But  
25 2.326 also provides that the affidavit must be given

1 by a competent individual with knowledge of the facts  
2 alleged or by experts in disciplines appropriate to  
3 this issues raised. And an affidavit providing  
4 expert opinion signed by someone who has not  
5 demonstrated competency has not submitted an  
6 appropriate affidavit.

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

10 >>MR. SCHMUTZ: One would hope so,  
11 Your Honor, but this regulation makes it abundantly  
12 clear to me that, at the contention and admissibility  
13 stage, challenges can be made to the competency of  
14 the experts in addressing whether or not that  
15 affidavit supports the contention.

16 I can't read it any other way. A competent  
17 individual with knowledge of the facts or -- and so  
18 it's an issue that can be challenged. More  
19 importantly in some ways, the --

20 >>JUDGE FARRAR: Are you making that  
21 argument only under this regulation we're talking  
22 about now or are you making that as a broader  
23 argument as to affidavits generally in support of  
24 contentions?

25 >>MR. SCHMUTZ: Well, I'm certainly making

1 it now in support of this. Whether or not it has a  
2 broader application to safety contentions -- for  
3 example, I'm dealing with NEPA contentions. I know  
4 2.309 sets forth the requirements for contentions  
5 raising safety or health issues, and I'm not speaking  
6 to those, and I'll defer to Mr. Silverman.

7 >>JUDGE FARRAR: Because I was nervous  
8 there for a minute that you were going to ask us to  
9 have many hearings on the merits on the affidavits  
10 supported --

11 >>MR. SCHMUTZ: No.

12 >>JUDGE FARRAR: -- in support of ordinary  
13 contentions.

14 >>MR. SCHMUTZ: No, Your Honor. Not all.  
15 But I do think in this case we have a regulation that  
16 makes a pointed statement about competency, and all  
17 we're asking for you to look at the -- you know, as  
18 you review the contentions, you'll look at the  
19 affidavits, you'll look at the statement of  
20 credentials, and you'll say, okay, does this sound  
21 like the kind of person who can give this kind of  
22 opinion testimony. It's a threshold question, but it  
23 is one that has to be addressed.

24 More importantly, though, and the  
25 Commission, I think, has actually spoken to this,

1 which is the second part, evidence contained in the  
2 affidavits must meet the admissibility standards of  
3 this subpart.

4 In 2008 NEI -- NEI -- Nevada submitted a  
5 petition for rule-making, trying to get the  
6 Commission to follow the NEI decision -- trying to  
7 get the Commission to remove the requirement for  
8 2.326, and the Commission refused to do that. And,  
9 in doing so, Nevada advised the Commission that the  
10 admissibility -- that 51.109(a)(2) -- and I'll read  
11 from the notice, the Commission's notice, conditions  
12 the admissibility of a contention which asserts that  
13 NRC should not adopt the EIS to the satisfaction to  
14 the extent possible of a standard free opening, a  
15 closed record under 10 CFR 2.326.

16 The petitioner, Nevada, asserts that the  
17 principal difference between this standard and the  
18 contention standard in 10 CFR 2309(f) that applies to  
19 other issues is that the former requires submission,  
20 requires, in support of the contention, the admission  
21 of -- the submission of admissible evidence.

22 The Commission does not, in denying -- in  
23 saying, no, we are going to apply it. We do intend  
24 that 2.326 apply, and nowhere takes issue with the  
25 notion, just as they proposed, that any contention,

1 environmental contention, must be supported by  
2 admissible evidence.

3           And the Commission also noted that  
4 51.109 -- in that case, they have adopted that as a,  
5 quote, contention standard.

6           So I think the Commission has told us that  
7 under 2.326 it is important that we look at the  
8 affidavits and we look at the quality of the  
9 submission and ensure ourselves that what is being  
10 provided from a competent expert, able to give  
11 opinion testimony, and that to the extent it is  
12 supported by additional materials -- that that --  
13 that those additional materials provide -- or be  
14 admissible evidence, whatever they might be.

15           >>JUDGE RYERSON: All right. If I  
16 understand your position, it's that affidavits in  
17 support of an environmental contention, because of  
18 the requirements of 2.326, may have to meet a higher  
19 standard than in support of other contentions. I  
20 mean, there's no affidavit requirement at all for  
21 contentions in general?

22           >>MR. SCHMUTZ: Under 2.309.

23           >>JUDGE RYERSON: But there is an affidavit  
24 requirement, at least for most environmental  
25 contentions, under 51.109. And you're saying, if I

1 hear you correctly, that there is a different  
2 standard that applies under 2.326. In other words,  
3 we have to be a little tougher in accepting  
4 affidavits because of 2.326 than we might otherwise  
5 be in just accepting affidavits under 51.109?

6 >>MR. SCHMUTZ: That is correct. That is  
7 our position, Your Honor. And we think that is the  
8 intent of the Commission when it denied Nevada's  
9 petition for rule making.

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

11 >>JUDGE RYERSON: Now, you described these  
12 affidavits as being admissible. I mean, are you --  
13 how -- well, first -- two questions.

14 How -- maybe you could explain exactly what  
15 that standard is and then, secondly, what you would  
16 expect us to do to apply that standard.

17 >>MR. SCHMUTZ: Sure. Let's start with  
18 the -- I don't believe that the affidavit necessarily  
19 itself has to be admissible. In fact, in the hearing  
20 process, for example, I rather doubt the Commission  
21 would -- or this board would allow affidavits to take  
22 the place of live witnesses.

23 This is a pleading requirement which has to  
24 provide sufficient detail. It's essentially saying  
25 provide sufficient detail of reliable information to

1 us from competent individuals that demonstrate that  
2 the contention you're raising is significant and  
3 substantial and raises a material issue. And we  
4 want -- we're going to impose a fairly high standard  
5 when we look at those -- those affidavits, and  
6 particularly if they've attached materials to them,  
7 whether or not that -- those materials would  
8 ultimately in a hearing, for example, be admissible.

9 But the -- we're not saying that the  
10 affidavits themselves would somehow be admitted in  
11 the proceeding at all.

12 >>JUDGE FARRAR: And it's your view that we  
13 should look at affidavits and make a judgment  
14 ourselves, not that there should be some sort of  
15 hearing process with respect to the competency of the  
16 experts?

17 >>MR. SCHMUTZ: Absolutely. This is all on  
18 the paper. This is just as you review the contention  
19 as you would under -- what I do know about 2.309 is  
20 there's a materiality requirement for all  
21 contentions, and you're going to look at all  
22 contentions and you're going to make judgments as to  
23 whether or not these contentions are of any  
24 consequence or the kind of things that we ought to be  
25 hearing in this proceeding; are they important enough

1 to merit litigation. We're not saying a whole lot  
2 different with regard to the affidavits that have to  
3 be submitted in support of environmental contentions.  
4 They have to provide -- although we are saying that  
5 there's a slightly higher -- somewhat higher burden  
6 in terms of supporting those with evidence.

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

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

19 >>JUDGE FARRAR: And when were those rules  
20 adopted?

21 >>MR. SCHMUTZ: 1989.

22 >>JUDGE FARRAR: And the NEI decision came  
23 after that, I believe.

24 >>MR. SCHMUTZ: Yes; correct.

25 >>JUDGE FARRAR: And that didn't change

1 anything?

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

14 >>JUDGE RYERSON: I guess the question I  
15 have is: We are now at the contention admissibility  
16 phase. We are not making determinations on the  
17 merits of any contentions, and since there is an  
18 affidavit requirement under 51.109, we will -- we  
19 will be looking at affidavits for compliance with  
20 51.109 in the context of not making merit space  
21 determinations. And I'm just -- I'm not sure I  
22 understand how different your slightly tougher  
23 standard would be for affidavits under the companion  
24 section that we're talking about, you know, and how,  
25 as a practical matter, we would make that

1 determination for purposes of either admitting or not  
2 admitting a particular environmental contention.

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

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

17 >>MR. SCHMUTZ: I don't know that that's  
18 so. I know it is so under 2.326, though. And the  
19 Commission has said -- and we had some problems with  
20 some of the submissions of the experts, some of the  
21 materials that they were relying on and offering as  
22 evidence in support of their contentions. And we  
23 think that you have to look at that, at those  
24 materials that are being submitted, and determine  
25 whether or not those materials are appropriate to

1 support the contention. There's no -- you know,  
2 there were experts that simply threw out large  
3 numbers of documents that they didn't author without  
4 any demonstration that they were even adopting or had  
5 done even any study to adopt the positions taken in  
6 those papers. Those would be questionable, of  
7 questionable admissibility.

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

10 >>MS. SILVIA: Andrea Silvia for the NRC  
11 staff.

12 >>JUDGE RYERSON: Okay. My specific  
13 question is whether the staff believes that there is  
14 a practical difference between the affidavit  
15 requirements under 51.109, which we clearly have to  
16 apply, and whether 2.326 really, in any kind of  
17 practical way, changes that affidavit requirement.

18 >>MS. SILVIA: Right. The staff doesn't  
19 believe, Your Honor, that there's any practical  
20 difference between the affidavit requirements in the  
21 two.

22 >>JUDGE RYERSON: Thanks. Anyone else want  
23 to speak to this at this point?

24 >>MR. LAWRENCE: State of Nevada, John  
25 Lawrence.

1 >>JUDGE RYERSON: Mr. Lawrence.

2 >>MR. LAWRENCE: Two points. First, we  
3 believe there's a threshold requirement to even get  
4 into 2.326. You get into 2.326 if you're reopening  
5 the record. You're talking about a 2008 EIS,  
6 supplemental EIS, or rail alignment EIS. Those  
7 records are opened. They haven't been adjudicated by  
8 anybody. We're not reopening the 2002 EIS. That's  
9 when you would get into 2.326.

10 But, secondly, if you were to get into  
11 2.326, you, as presiding officers, would have that  
12 role, and you'd have that role only because  
13 51.109(a)(2) gave it to you, and it gave it to you to  
14 resolve disputes. That resolution occurs at the  
15 merit stage, not at the admissibility stage.

16 >>JUDGE RYERSON: Well, I understand your  
17 position that we are required to apply it, the  
18 reopening provisions. And I think I understand  
19 your -- your position is, since there's nothing to  
20 reopen, they don't apply. It's not possible to apply  
21 them? Is that a fair statement of your view?

22 >>MR. LAWRENCE: Depending upon how the  
23 contention was pled, absolutely, sir.

24 >>JUDGE RYERSON: Okay. A different view  
25 that one could have is that the Commission was simply

1 using this provision and saying, we understand you're  
2 not reopening a record, but because of the  
3 circumstances that the Commission originally expected  
4 to occur, which would be judicial review of DOE's  
5 environmental documents which never happened for a  
6 whole set of complicated reasons -- that they are  
7 simply saying, you know, there's no record to reopen  
8 as such, but, because of these circumstances, we'd  
9 like you to take a hard look at -- and sort of an  
10 extra hard look at this type of contention and apply  
11 reopening standards to the extent possible, insofar  
12 as possible.

13           And so it does seem to me that, if these  
14 were to be applied -- I mean, my -- there is  
15 certainly an argument to be made, if I understand  
16 it -- and I suspect you're making this in the  
17 alternative at least -- that, you know, where we are  
18 now, these the 2.326 requirements are essentially  
19 redundant.

20           But the notion that they purely go to our  
21 role seems to me maybe inconsistent with the  
22 statement, for example, that, in the affidavits under  
23 the reopening vision, it says each of the criteria  
24 must be addressed separately with a specific  
25 explanation of why it has been met. I mean, that is

1 a requirement not on us. But if it's applicable,  
2 it's clearly a requirement on a petitioner, because  
3 it goes to how the affidavit is framed.

4 So doesn't that suggest that the Commission  
5 contemplated that the petitioner should at least be  
6 aware of and taking these additional requirements  
7 into account?

8 >>MR. LAWRENCE: Two answers. First, with  
9 regard to the provision in 2.326, to have a  
10 materially different result, obviously you need to  
11 plead that. That's a separate requirement than  
12 51.109(a)(2), and I believe we have pled that in each  
13 one of our environmental contentions. So, yes, there  
14 is an expectation that the pleading will contain that  
15 information. And, if we provide it for you, then  
16 your job is to simply look at it as opposed to try to  
17 find it.

18 However, I don't believe there's any  
19 requirement to do that now at this stage, the  
20 admissibility stage. I don't believe there's a  
21 requirement to resolve this dispute. You're simply  
22 trying to find out whether the contention has been  
23 pled properly, comply with the requirements, and  
24 contain sufficient information to reach conclusions  
25 that, if true, the EIS would have to be modified in

1 some manner.

2 >>JUDGE RYERSON: All right. Thank you.  
3 We will turn shortly to transportation-related  
4 environmental contentions, but first let me say,  
5 Judge Farrar, do you have any questions? Judge  
6 Barnett?

7 Is there anyone else who wants to speak  
8 purely to these special requirements for  
9 environmental contentions?

10 >>MS. SILVIA: This is Andrea Silvia for  
11 the NRC staff. I just would like to add that, in the  
12 Commission's notice of hearing, they stated that the  
13 51.109 requirements should be applied consistent with  
14 NEI versus EPA. The Commission's denial of Nevada's  
15 petition to amend Section 51.109 and OGP's subsequent  
16 letter clarifying the Commission's denial, and in  
17 that letter clarifying the Commission's denial of  
18 Nevada's rule-making petition, it specifically states  
19 that the higher threshold for evidence needed to  
20 support contentions in 51.109(a)2 remains in effect,  
21 which just further supports the position that at the  
22 contention admissibility stage, the higher  
23 requirement's that this is the appropriate time.

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

1 >>MS. SILVIA: Correct.

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

11 I know the Commission said we should take  
12 it into account, but are there specific things we  
13 need to do or consider in light of the NEI decision  
14 that are not already addressed by the elements that  
15 we look at now in view of the regulations and in view  
16 of the notice of hearing that the Commission has  
17 drafted.

18 >>JUDGE FARRAR: Ms. Silvia, before you  
19 answer that, let me modify Judge Ryerson's question.  
20 The representations made to the court were not by the  
21 NRC staff. It was by the Commission through its duly  
22 authorized lawyers.

23 >>MS. SILVIA: Right. The staff's position  
24 is that the NEI case didn't have any effect on the  
25 pleading requirements. It addressed what substantive

1 issues Nevada may be able to bring, but it didn't  
2 have any effect on the procedural requirements that  
3 we've just been discussing here.

4 >>JUDGE RYERSON: All right. Well, I  
5 suggest then we move along to the somewhat related  
6 question of environmental contentions that address  
7 not directly the repository itself but, rather,  
8 transportation of nuclear waste to the repository.

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

18 I think -- I think it may have been  
19 California's filing that suggested that without  
20 transportation of waste to the repository that you  
21 would just have a large expensive hole in the ground  
22 at Yucca Mountain. But the two do seem somewhat  
23 related.

24 And, I guess, let me start with the staff.  
25 What is your view? Does the NRC have some level of

1 responsibility to look at environmental consequences  
2 of both the transportation of waste and the  
3 repository itself?

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

6 I think that your question involved whether  
7 the NRC must analyze all environmental impacts. I  
8 would modify that slightly and say that the NRC has  
9 to analyze, and, again, in this very context-specific  
10 way, all environmental impacts that are reasonably  
11 foreseeable and also that are approximately or  
12 legally caused by the NRC's proposed action, which is  
13 licensing the repository.

14 >>JUDGE FARRAR: That's not any dramatic  
15 new doctrine. That's been NEPA for almost 40 years,  
16 right?

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

18 >>JUDGE RYERSON: Okay. NEI, Mr. Repka, do  
19 you have a comment?

20 >>MR. REPKA: Yes. This is David Repka for  
21 NEI. We agree with that formulation that the staff  
22 just stated that NRC does have responsibility under  
23 NEPA for reasonably foreseeable effects that are  
24 proximately related to the licensing action, and that  
25 could, in fact, extend to activities and actions and

1 effects that are in areas unregulated by the NRC. So  
2 we agree with that.

3 With respect to transportation  
4 specifically, we take no position on that, but we do  
5 believe that that may be in a different category,  
6 given that the Department of Energy has done specific  
7 environmental analysis, and certainly the NRC has the  
8 ability to tier off and take credit for work done by  
9 other government agencies.

10 >>JUDGE RYERSON: Okay. Let me ask DOE,  
11 and I know you have some related arguments dealing  
12 with res judicata and some other issues, but, before  
13 we get to that, is your view that the NRC begins with  
14 some level of responsibility to examine the  
15 consequences of waste transportation?

16 >>MR. SCHMUTZ: I think that the  
17 department's view is that the NRC may have some  
18 responsibilities as it looks at cumulative impacts of  
19 the repository, to take into account impacts from  
20 transportation that are related to it.

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

25 >>JUDGE RYERSON: Okay. We'll get back to

1 that.

2 >>JUDGE FARRAR: Is that part of the EIS or  
3 is that a separate EIS you did carrying out some  
4 other obligation of the department?

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

8 >>JUDGE FARRAR: Have any of those been  
9 subject to --

10 >>MR. SCHMUTZ: EIS, yes.

11 >>JUDGE FARRAR: Have any of those been  
12 subject to judicial review?

13 >>MR. SCHMUTZ: On transportation issues,  
14 yes, and upheld.

15 >>JUDGE FARRAR: Which one?

16 >>MR. SCHMUTZ: The 2002 FEIS, the record  
17 of decision on the choice of the Caliente Carter has  
18 been upheld. The mostly rail scenario and the final  
19 environmental impact statement supporting that has  
20 been upheld.

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

25 >>MR. SCHMUTZ: That's correct, Your Honor,

1 both on res judicata grounds in the case of Nevada  
2 and on timeliness grounds for everyone else. You  
3 have 180 days to contest. We would also say -- I'm  
4 just going to add one more thing, and I hope I'm not  
5 unduly complicating things.

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

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

23           Does everyone who hasn't yet spoken agree  
24 that there is some responsibility to -- for the NRC  
25 to look at both the transportation of waste and the

1 repository itself from an environmental standpoint?  
2 Does everybody -- does anybody disagree with that? I  
3 wouldn't think so.

4 Okay. So the question is, coming back to  
5 the Department of Energy, your position, as I  
6 understand it, is that many of these issues have been  
7 or could have been litigated through review in the  
8 federal courts, in effect?

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

10 >>JUDGE RYERSON: I'm sorry. Your mic is  
11 off.

12 >>MR. SCHMUTZ: Your Honor, this is Tom  
13 Schmutz again. Through the DOE notice and comment  
14 procedures initially, and people availed themselves  
15 of that. There were hundreds and hundreds of  
16 comments submitted and responded to, and then  
17 ultimately through the Court of Appeals. And I  
18 think -- I only have one other thing.

19 I think the NEI decision that we're talking  
20 about, if you take a look at it, they actually  
21 distinguish between transportation proceedings before  
22 the Department of Energy and essentially repository  
23 proceedings before the NRC. It's explicitly stated  
24 in there. So the DC Circuit team and NEI seem to  
25 understand that distinction as well.

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

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

19 >>MR. SCHMUTZ: Yes. I would limit it to  
20 repository to impact the -- the environmental impact  
21 dealing with the repository, not transportation.

22 >>JUDGE RYERSON: But why? Because we go  
23 back to the notion that -- put aside DOE. If the  
24 Nuclear Waste Policy Act didn't require the NRC to  
25 adopt DOE's environmental documents to the extent

1 practicable, then each agency would have an  
2 independent responsibility under NEPA to examine the  
3 environmental consequences of this action.

4           And the NRC's responsibility would extend,  
5 would it not, to both the repository itself and the  
6 related transportation of nuclear waste? So we start  
7 with some level of responsibility there that has been  
8 cut back by the act and by the implementing  
9 regulations but not totally eliminated.

10           >>MR. SCHMUTZ: I think there's substantial  
11 case law that would provide that where the federal  
12 agency or two federal agencies are involved -- and  
13 I'm going to call it an overall project, and that's  
14 not quite accurate, and they each have separate  
15 independent jurisdiction over portions of it, and  
16 particularly where one of the federal agencies, as is  
17 the case with the Department of Energy, has an  
18 overall responsibility, has to do environmental  
19 impact statement of the whole, and the other federal  
20 agency, in this case the NRC, has environmental  
21 responsibility and jurisdiction over only a portion  
22 of that project, that that lesser agency has no  
23 jurisdiction and has no responsibilities under NEPA  
24 to consider the environmental impact statements being  
25 prepared by another federal agency.

1           And I would point, for example, there's a  
2 case out of the Ninth Circuit called California Trout  
3 v. Schaefer, a Ninth Circuit decision. I point it  
4 out because I noted that the State of California  
5 pointed to a case in another Ninth Circuit decision  
6 called Thomas v. Peterson, a case in which the very  
7 same agency segmented two portions of an overall  
8 project. We all know that that's not appropriate.

9           In the case of California Trout v.  
10 Schaefer, the court specifically said, where there  
11 are two agencies, two federal agencies, with  
12 independent jurisdiction, as the case here is it, it  
13 is DOE that has jurisdiction over transportation, not  
14 the NRC. And that agency has prepared an  
15 environmental impact statement over, in this case,  
16 transportation, that the other agency has no  
17 jurisdiction or responsibilities under NEPA to  
18 prepare such an environmental impact statement over  
19 that other activity, and it's quite clear.

20           >>JUDGE FARRAR: Was that a case where the  
21 other agency had hearing and adjudicatory powers like  
22 we do?

23           >>MR. SCHMUTZ: No, not that I recall. In  
24 that case, for example, it involved the Corps and it  
25 involved the Bureau of Reclamation and it involved

1 the preparation of environmental impact statements  
2 and whether or not they had to cover certain areas,  
3 which is the issue here.

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

18 >>MR. SCHMUTZ: If you belief that  
19 exclusive jurisdiction is in the court, that  
20 exclusive means exclusive. And if that situation  
21 occurred with regard to transportation -- and I'm  
22 going to limit it to transportation. --

23 >>JUDGE FARRAR: Right.

24 >>MR. SCHMUTZ: If that occurred with  
25 regard to transportation, whatever avenues of relief

1 you had are in the DC Circuit, not before this  
2 agency.

3 >>JUDGE FARRAR: I thought you were going  
4 to say their avenue for relief is to come back to  
5 DOE.

6 >>MR. SCHMUTZ: Oh, well, certainly.  
7 You're absolutely right. I misspoke. In the first  
8 instance certainly to the DOE and then getting the  
9 final agency decision on whatever petition they might  
10 file to go to the DC Circuit or whatever other Court  
11 of Appeals had appropriate jurisdiction, venue  
12 primarily.

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

17 >>MR. SCHMUTZ: I guess what I'm saying is  
18 that -- well, if that -- if that case occurred and if  
19 there was a significant change that was going to  
20 occur and if it affected the -- your review of  
21 cumulative impact, for example, I know the staff  
22 takes that, that may be so. But that's the route.  
23 It is not to be litigated in this proceeding.

24 >>JUDGE RYERSON: Now, the "it" you're  
25 referring to is the record of decision, or what is

1 the "it" you're referring to?

2 >>MR. SCHMUTZ: What I'm talking about is  
3 the environmental impact statement, the record of  
4 decision supported by an environmental impact  
5 statement. And they always are. And that's what  
6 allows one to go to the Court of Appeals.

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

9 >>MR. MALSCH: Let me address first -- I'm  
10 Martin Malsch from Nevada -- DOE's argument from this  
11 morning.

12 First of all, the mere fact that the  
13 Nuclear Waste Policy Act provides an opportunity for  
14 judicial review within 180 days of an issuance of  
15 record of decision or impact statement, in our mind,  
16 has no effect at all on one's hearing rights before  
17 the Nuclear Regulatory Commission.

18 Second, putting aside res judicata and  
19 collateral estoppel issues, which Mr. Lawrence can  
20 address, I just wanted to mention that the Nuclear  
21 Waste Policy Act was enacted against a backdrop in  
22 which the Commission was very clear, even where  
23 another federal agency was an applicant, that the  
24 Commission itself would exercise its independent  
25 power and do its own environmental impact statement.

1           For example, in the case of TVA  
2 applications for nuclear power plant construction  
3 permits, it was the Commission's consistent practice  
4 of not deferring to some supposed exclusive  
5 jurisdiction under NEPA to the Tennessee Valley  
6 Authority but instead of assuming that its role as an  
7 independent regulatory agency required it to do its  
8 own environmental impact statement.

9           The principal effect of the Nuclear Waste  
10 Policy Act was that Congress understood this was the  
11 NRC's practice and modified it only to the extent  
12 that, instead of having to write its own statement of  
13 an issue, it was allowed under certain circumstances  
14 to adopt DOE's.

15           But that was certainly not in derogation of  
16 the requirement under NEPA that the agency's impact  
17 statement had to be considered in the agency review  
18 process.

19           And in this case, the agency review process  
20 is, in the case of Part 63, the adjudicatory hearing  
21 process provided for. So we do get a right to a  
22 hearing on NEPA issues, in general, provided we've  
23 met appropriate pleading requirements, regardless of  
24 other opportunities for judiciary review and  
25 regardless of what may have been the practice of the

1 Bureau of Reclamation in some case in the Ninth  
2 Circuit.

3 >>JUDGE RYERSON: Does the NRC staff have a  
4 view on this issue?

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

15 Once that determination has been made, the  
16 NRC has been required to adopt the EIS. But I do not  
17 believe that that would foreclose any possibility of  
18 review of the adequacy of that environmental impact  
19 statement in the present proceeding. In fact, you  
20 know, I think the NEI v. EPA case counsels to the  
21 contrary, in other words, that this is the  
22 appropriate forum to consider substantive challenges  
23 to the EIS.

24 >>JUDGE RYERSON: Including the  
25 transportation aspect?

1 >>MR. FRUCHTER: The aspects of the  
2 transportation analysis that have been adopted.

3 >>JUDGE RYERSON: Okay. I guess one --  
4 Mr. Schmutz, one question I have is: In terms of res  
5 judicata effects, if I understand your argument, it's  
6 that the 2008 documents are governed by -- your view,  
7 that the exclusive remedy is to go to the DC Circuit,  
8 if I -- if I understand that.

9 But assume for the moment you're wrong  
10 about exclusive jurisdiction. Nonetheless we have --  
11 we have cases. We have a 2006 DC Circuit case  
12 dealing with transportation.

13 Is it your view that, even if there weren't  
14 exclusive jurisdiction in the federal circuit courts,  
15 that there would be res judicata, say, at least as to  
16 Nevada --

17 >>MR. SCHMUTZ: Yes.

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

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

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

23 >>MR. SCHMUTZ: Correct.

24 >>JUDGE RYERSON: And there wouldn't be  
25 res judicata, would there, as to a potential party

1 here who was not a party to the 2006 proceeding; is  
2 that correct?

3 >>MR. SCHMUTZ: That follows.

4 >>JUDGE RYERSON: You follow. Okay.

5 >>JUDGE FARRAR: Why does that follow?

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

8 >>JUDGE FARRAR: Right.

9 >>MR. SCHMUTZ: But timeliness would kick  
10 in. It would be a final decision.

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

17 >>MR. SCHMUTZ: Absolutely, but not by  
18 res judicata. I guess that's the only thing I'm  
19 saying. But they are foreclosed, absolutely. You're  
20 absolutely right.

21 >>JUDGE FARRAR: By one of those related  
22 documents?

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

1 >>MR. SCHMUTZ: Right.

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

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

13 >>JUDGE RYERSON: Yeah, I understand that's  
14 your position.

15 >>MR. SCHMUTZ: And just to expand one  
16 other thing, we are saying that the NEPA  
17 responsibilities imposed upon the NRC by NEPA do not  
18 extend to transportation. And we've adequately, I  
19 think, set it forth in the paper. I'm going to add  
20 one other thing. There is an Entergy case,  
21 relicensing case, by the Commission which was cited  
22 on by California -- I happened to look at it the  
23 other night -- in which the Nuclear Regulatory  
24 Commission took a position that, where it doesn't  
25 have jurisdiction, it can't change the result of a

1 sister agency's determination, environmental  
2 determination, it needn't look at it. It is quite  
3 close to this situation. It's an Entergy case  
4 involving Wolf Creek. I can give you the citation to  
5 it.

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

8 >>MR. SCHMUTZ: Correct.

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

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

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

18 >>MR. SCHMUTZ: I hope what I said was  
19 that, at most, the NRC, if it felt it necessary to  
20 look at cumulative impacts, would have to accept the  
21 DOE's transportation impact statements as they stand,  
22 if it felt it necessary to look at cumulative  
23 impacts, but not -- I'm not suggesting that I think  
24 that legally that's required. I'm just saying I  
25 think that's where the staff is coming out. I think

1 they're looking at it. I'm just saying, if they're  
2 going to do that, you can't look behind those  
3 documents.

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

15           >>JUDGE RYERSON: Yeah, I mean -- okay.  
16 Let me -- you mentioned Supreme Court, and there is  
17 one case -- I believe you cited it -- the Department  
18 of Transportation versus Public Citizen case. I  
19 suspect this is your area, Mr. Schmutz.

20           Could you elaborate upon how you feel that  
21 is relevant here?

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

1 >>JUDGE RYERSON: We probably all don't  
2 know.

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

12 So it created them, and it said what's the  
13 environmental impact statement or environmental  
14 impact of these trucks kind of hanging around at the  
15 border, you know, blowing diesel smoke into the air,  
16 more of it than would formerly be there. That's the  
17 impact that they looked at.

18 They didn't look at the impact of those  
19 trucks entering the United States and, you know,  
20 spewing noxious fumes all over the country. They  
21 didn't look at the national impact of that. And they  
22 didn't do it because they had no jurisdiction over  
23 the activity of allowing those trucks into the  
24 United States. It was up to the President to do  
25 that.

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

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

15           >>MR. SCHMUTZ: It stands for the  
16 proposition that, if the agency that is doing the  
17 environmental impact statement doesn't have  
18 jurisdiction in this case over the entry of the  
19 trucks, it needn't look at the impact of the entry of  
20 the trucks.

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

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

25           >>JUDGE FARRAR: So where no federal agency

1 has jurisdiction, the federal agency in question  
2 doesn't have to do a NEPA statement at all.

3 >>MR. SCHMUTZ: No. It did have to do a  
4 NEPA statement. The federal agency did a NEPA  
5 statement with regard to the responsibility it was  
6 responsible for, which was the inspection routine.

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

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

12 >>JUDGE RYERSON: Because that was a  
13 decision made by the President.

14 >>MR. SCHMUTZ: And they couldn't change  
15 it. And the Commission in the Entergy case actually  
16 cited the Public Citizen case for the proposition  
17 that, where it doesn't have jurisdiction over an  
18 activity, it needn't look at the environmental  
19 impact. That was an NPDBS case under the Clean Water  
20 Act, and it wasn't going to look behind the EPA's  
21 decision and consider the impacts associated with  
22 that grant of that permit.

23 We are not -- let me -- we are looking at  
24 cases and what we believe the Board should look at  
25 are the cases where there are two independent

1 agencies with -- it's not quite concurrent, but with  
2 jurisdiction over a project, different aspects of it.  
3 That's what we're relying on. I'm not trying to sell  
4 this Board on Public Citizen. I don't think anybody  
5 quite understands the ramifications of that, but I do  
6 understand the ramifications of the California Trout  
7 case and several of the cases cited in California  
8 Trout. And I do understand the Commission's decision  
9 in Entergy, which I think is supportive of the  
10 California Trout case.

11 >>JUDGE RYERSON: Okay. I think you've  
12 answered my question.

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

14 >>JUDGE RYERSON: As you are probably well  
15 aware, Public Citizen was a unanimous decision  
16 authored by Justice Thomas, and it's hard for me to  
17 imagine that that unanimous decision of the Supreme  
18 Court had as dramatic an impact on NEPA as I thought  
19 you were arguing. That's all. I may have  
20 misunderstood the scope of your argument.

21 >>MR. SCHMUTZ: I think it has the same --  
22 I don't think it stands for any more, Judge Ryerson,  
23 than California Trout stands for. I really don't.  
24 It's an on-fact situation. But I don't think it  
25 stands for any more than that case stands for. And

1 that case, I think, is on all fours with what we're  
2 faced with here.

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

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

15 In this case it's a different scheme. We  
16 have -- the NRC is required to prepare an invalue --  
17 an environmental assessment and review the EIS. At  
18 the very least review the EIS. To the extent it  
19 cannot adopt the DOE's EIS, it then has to make a  
20 decision in what areas that it can adopt or will  
21 require supplement.

22 But that indicates an independent  
23 evaluation on the merits of the EIS, not simply  
24 conducting a review on whether the Department of  
25 Energy's EIS is, say, arbitrary or capricious like a

1 review court would perform. There is a duty here for  
2 the NRC to perform an evaluation to evaluate the  
3 environmental impacts. And Clark County would argue  
4 that that does include the impacts associated with  
5 transportation of waste to the facility.

6           The EISS were part and parcel of the  
7 license application that was submitted to the NRC.  
8 But for the NRC's decision to license -- or to  
9 authorize construction of this facility, there would  
10 be no impacts on the transportation route.  
11 Therefore, those -- the impacts associated with that  
12 undertaking are relevant and should be addressed as  
13 part of this proceeding.

14           >>JUDGE RYERSON: Thank you.

15           Mr. List.

16           >>MR. LIST: Yes, Judge Ryerson. Thank  
17 you. I would point out that one of the NEPA  
18 regulations, 40 CFR 1508.8 Sub (a) and (b) define  
19 effects which are synonymous with impacts under the  
20 act, as either direct, which are based on the action  
21 itself, in this case, the repository, or indirect  
22 effects which are caused by the action.

23           And there are three criteria, as we read  
24 that regulation, which are as follows: That the --  
25 first of all, is the indirect action caused by the

1 direct action? Certainly the repository is the  
2 driving factor that would initiate the transportation  
3 itself.

4 Secondly, is it further in distance? In  
5 other words, is it off-site. Certainly the  
6 transportation is.

7 And finally, is it reasonably foreseeable?  
8 And certainly the transportation is reasonably  
9 foreseeable. It's an integral part of the completion  
10 of the fulfillment of the repository.

11 I would point out there are a couple of  
12 important cases that directly, I think, support that  
13 proposition. The first is Sierra Club versus Marsh,  
14 a First Circuit case in 1985 involving the Federal  
15 Highway Administration and the Corps of Engineers.  
16 And they held in that case, the court did, that the  
17 FHA did not meet their NEPA burden because they  
18 didn't consider whether agency approved of a --  
19 approving of a cargo port and causeway to an island  
20 would lead to further industrial development on the  
21 island, which was outside their direct jurisdiction.

22 The point of the case was that neither the  
23 Corps nor FHA, the Federal Highway Administration,  
24 had any ability to regulate or to prevent development  
25 on the island that was privately owned and under the

1 jurisdiction of the local government. And yet the  
2 court required consideration of that future  
3 environmental impact caused by the action that was  
4 under consideration.

5 Another important case was Sierra Club v.  
6 Monticella, 459 Fed Supp 2nd 76, which held that the  
7 National Park Service did have to consider impacts  
8 caused by activities outside their preserve, despite  
9 the fact that the National Park Service had no  
10 ability to consider those impacts under National Park  
11 Service regulations because their Organic Act gave  
12 them the ability to prevent the action in question.  
13 In other words, the fundamental primary park activity  
14 that was under consideration in the EIS process.

15 And so, in short, the agency can rely on  
16 the limitation of authority where the statute gives  
17 the agency authority but the agency's own regs limit  
18 the authority.

19 I'd also point out that, in the Nuclear  
20 Waste Policy Act itself, there were certain EIS  
21 analyses that were excluded from what the Commission  
22 had to take under consideration. For example, they  
23 did not include in those exclusions -- or, rather,  
24 they did include in those exclusions non-geological  
25 alternatives to Yucca Mountain. They could have but

1 did not exclude transportation.

2 I would also point out that other Nuclear  
3 Regulatory Commission regulations address  
4 transportation impacts where there is seemingly no  
5 direct regulatory authority on the part of NRC,  
6 specifically, as to renewal of licenses of  
7 generators.

8 The specific regulation in that case is  
9 51.53(c)32(j) in which it points out that an  
10 operating license at the renewable -- at the  
11 renewable stage, all applicants shall assess the  
12 impact of highway traffic generated by the proposed  
13 project.

14 Well, in that case they specifically  
15 recognized that they did have such authority, and, in  
16 fact, the CEQ regulations defining the scope of an  
17 action, which is what we're talking about here with  
18 reference certainly to the repository, an action to  
19 be considered by an EIS action is defined as --  
20 includes a connected action.

21 And we believe this is a connected action.  
22 Actions are connected if under that regulation if  
23 they automatically trigger other actions which  
24 require or cannot or will not proceed unless the  
25 actions are taken previously and simultaneously,

1 which is our case, and are interdependent parts of a  
2 larger action and dependent on the larger action for  
3 their justification.

4 So what we have here is what is, in effect,  
5 an inextricably linked connected further activity  
6 that is kicked off by virtue of the repository  
7 itself. And DOE should not be allowed to evade its  
8 responsibility to have incorporated consideration of  
9 transportation.

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

11 California, yes.

12 >>MS. DURBIN: Susan Durbin for the State  
13 of California. Your Honor, I'd like to address  
14 several points that the DOE lawyer raised. The first  
15 is about the Department of Transportation versus  
16 Public Citizen case. In that case, the most  
17 important factor was not whether the Federal Motor  
18 Carrier Safety Administration had authority or  
19 jurisdiction over the trucks entering the  
20 United States. It was whether it had discretion to  
21 control it.

22 Under the FMSA's statutes, if the trucks  
23 met a specified series of criteria, FMSA had no  
24 discretion. It had to issue a license. Similarly in  
25 the NPDBS case that the counsel just cited, the

1 Supreme Court said under the Clean Water Act there  
2 was a specific set of criteria that, if met, required  
3 the issuance of a permit, and that the court could  
4 not take Congress' place and add another criterion to  
5 that list. There was no discretion in the agency to  
6 deny a permit where the criteria were met.

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

17           As to the exclusive remedy, there is  
18 nothing in the Nuclear Waste Policy Act that  
19 creates -- that robs the NRC of the ability to look  
20 at the environmental documents. Simply because the  
21 judicial review is placed in the circuits of appeal,  
22 and not in the district court. The intent of  
23 Congress is clearly to say that the judicial review  
24 will not take place in the district courts. It will  
25 take place in the Courts of Appeal. That does

1 nothing to affect the jurisdiction of the NRC to look  
2 at the decision it is making and the environmental  
3 documents that would support it.

4 Now, DOE is being way too modest in its  
5 description of its environmental documents. After  
6 2006 any documents that were used to support the 2008  
7 ROD, there was a complete reexamination of many  
8 facets of transportation, including what kind of  
9 casks would be transported, whether barging would be  
10 used, exact routing decisions and so forth; it was  
11 quite a different document, and those things can  
12 still be looked at. They have not been subject to  
13 any judicial determination. There's no res judicata,  
14 there's no estoppel, either.

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

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

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

25 >>MS. DURBIN: Correct, Your Honor. And

1 finally I'd like to get to the question that DOE says  
2 the NRC cannot go behind DOE's environmental  
3 documents. What it's suddenly trying to do, here and  
4 in its papers, is to place the NRC in the position of  
5 a reviewing court, and to hold NRC to the standard of  
6 deference that a review in court gives to an  
7 administrative agency. Well, I work for the attorney  
8 general's office in California, and we defend cases  
9 like that all the time.

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

20 Here that does not fly. The NRC is an  
21 executive -- is part of the executive branch, even if  
22 it is not in the standard administrative organization  
23 under the President. It's part of the executive  
24 branch. It is not part of the judicial branch. It  
25 is a sister agency with equal standing with the DOE,

1 and is not obligated to give deference to DOE's  
2 determinations.

3 In fact, how can the NRC determine if it is  
4 practicable to adopt DOE's environmental documents,  
5 if it does not take a hard look at the actual effects  
6 and measure whether DOE has covered them all and  
7 covered them accurately. It cannot carry out its  
8 responsibility under the Nuclear Waste Policy Act if  
9 it gives that degree of deference.

10 We would analogize it to an agency that has  
11 a contractor prepare an environmental impact  
12 statement for them. They will use that to the extent  
13 that they believe that it's correct, but it does not  
14 excuse the agency from its forming the obligation to  
15 make sure that all significant effects, direct and  
16 indirect, have been addressed.

17 We think that the Nuclear Waste Policy Act  
18 does not remove the NEPA obligation from NRC. It  
19 still remains. It simply can use DOE's documents to  
20 the extent they're useful and adequate.

21 >>JUDGE FARRAR: Ms. Durbin, I'm under the  
22 view you said about internal state business, in  
23 leaving aside the judiciary, the judiciary always  
24 reviews agencies and says NEPA's just a procedural  
25 statute.

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

6           >>MS. DURBIN: No. it's a mandate on the  
7           executive branch to have all the information that  
8           enable it to get it right.

9           California's equivalent does have a  
10          standard mandate. NEPA does not.

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

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

17          >>JUDGE RYERSON: Is your mike on? It may  
18          not be.

19          >>MR. SCHMUTZ: I'm sorry. This is Tom  
20          Schmutz. What I am talking about and what DOE is  
21          talking about is just the transportation portion of  
22          the EISs. We're not talking about what the NRC does  
23          or doesn't have to do with the repository SCIS and  
24          FDIS, number one.

25          Number two, when we're saying on

1 transportation, we're not talking about deference.  
2 We're saying with regard to transportation, you don't  
3 have any jurisdiction over it. If you want to look  
4 at it for cumulative impacts, fine. You take them as  
5 we found them. We're a sister agency. We have  
6 jurisdiction over it. You don't.

7 Our environmental impact statements are not  
8 anything -- on transportation are not something you  
9 ought to be going behind. You take those impacts,  
10 add them to the impacts in the repository that you  
11 think are appropriate and determine what your  
12 cumulative impacts are. That's our position.

13 >>JUDGE RYERSON: Okay. I think we are  
14 understand that. Mr. Malsch.

15 >>MR. MALSCH: Judge Ryerson, I just would  
16 like to make a few brief statements about collateral  
17 estoppel and res judicata, since we seem to be the  
18 ones primarily on the receiving end of those  
19 arguments. And I just want to address them briefly.

20 First of all, for one to even ask the  
21 question, there has to be a decision on the merits,  
22 and the only conceivable decision on the merits on  
23 any NEPA issues involved in this proceeding is the  
24 decision of the Court of Appeals and Nevada v. DOE.  
25 That's the first point.

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

11           Thirdly, even if you assume that the  
12 decision of a court has some collateral estoppel  
13 effect on the agency because they are applying the  
14 same standard, I would submit that if you look  
15 carefully at our NEPA contentions, you will see that  
16 not one of them was addressed on the merits in the  
17 Court of Appeals decision.

18           So there is no collateral estoppel effect,  
19 even assuming, putting aside difficulties about  
20 judicial review standards as opposed to the NRC  
21 review standard.

22           >>JUDGE RYERSON: And if there were, is  
23 that something that would be more appropriately  
24 raised on the merits in the context of an  
25 adjudicatory hearing as opposed to a contention

1 admissibility. It's kind of moot, I guess, could you  
2 say, but none of them are governed by res judicata.

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

12 And it might benefit from more specific --  
13 to the extent that documents apply at all, it seems  
14 to me they can only possibly apply, looking at things  
15 on a very specific contention-by-contention basis and  
16 examining precisely what was the scope of DOE's 2008  
17 reexamination. And that maybe something that's  
18 entirely appropriate for a merits hearing rather than  
19 just argument on the basis of papers.

20 >>JUDGE RYERSON: All right. Thank, you  
21 Mr. Malsch.

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

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

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

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

19           >>JUDGE RYERSON: Thank you, Judge Farrar.  
20 In addition to the issue that Judge Farrar has  
21 raised, a principal subject for this afternoon,  
22 before we get into the closings that we hope we have  
23 time for, will be issues that pertain to the  
24 model-based contentions dealing with the total system  
25 performance assessment.

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

5           >>JUDGE FARRAR: Mr. Chairman, with your  
6 indulgence, let me give them one more homework  
7 assignment.

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

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

18           >>JUDGE RYERSON: Okay. In light of the  
19 additional homework assignment, we'll give you an  
20 extra five minutes for lunch. So let's be back here  
21 ready to go back to work at is 1:50 sharp.

22           (A recess was taken.)

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

24           Welcome back. I think, as we indicated  
25 shortly before the lunch break, Judge Farrar has a

1 few questions; and then we're going to turn to the  
2 model-based contentions.

3 >> JUDGE FARRAR: Okay. This is on the  
4 general question of pre -- where the contentions have  
5 been filed prematurely. I promised Judge Ryerson I'd  
6 get it done in two minutes, so please keep your  
7 answers short, if you can.

8 The State of Nevada said in Contention 146  
9 that this was essentially a one-stage licensing  
10 process. The key other parties did not challenge  
11 that. They may have their own reasons for wishing it  
12 was a one-stage licensing process.

13 The Department of Energy, based on those  
14 two sections of Part 2 that I cited to you, do you  
15 agree that we're looking at a two-stage license  
16 process right now, a construction authorization; and  
17 second, the equivalent of an operating license called  
18 a use and possession license?

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

22 >>JUDGE FARRAR: 2.102-1 which says there  
23 will be a first pre-hearing conference and a  
24 construction authorization phase; and then we could  
25 have a first pre-hearing conference at the receive

1 and possess phase.

2 So that tells -- and then the second  
3 provision about the next section, 10.22 talks about  
4 the second pre-hearing conference and again mentions  
5 it at two phases. It mentions two, yes, two phases  
6 for a second pre-hearing conference.

7 >>MR. SILVERMAN: There is -- the  
8 regulations do provide that the Department has to  
9 update the license application, the Construction  
10 Authorization Application to support a license to  
11 possess and use and it's in Part 63.

12 The precise procedures to follow and  
13 whether there is a right to a hearing, an opportunity  
14 for a hearing and all that, I'm really not prepared  
15 to answer that at this point.

16 I would say -- because I think that the  
17 regulations aren't entirely clear in that regard.  
18 What I would say is just a couple of things. One is  
19 that I don't believe -- at least the Department has  
20 argued -- and I could be wrong, but I don't recall, a  
21 contention where we've alleged it was filed  
22 prematurely and it's appropriate for a later phase in  
23 the proceedings.

24 >> JUDGE FARRAR: You haven't said that,  
25 but it's subliminal in some of them that I could see,

1     gee, maybe this one doesn't get admitted because it's  
2     not timely to hear it now, so we'll say to the state  
3     or the other parties, nice contention, you've  
4     reserved your rights, come back in seven years.

5             >> MR. SILVERMAN: Frankly, I am not in a  
6     position now to state a department position that we  
7     think that there is another opportunity for hearing  
8     at the possession and use license stage. That's  
9     something we'd have to look harder at. Let me say  
10    this...

11            >> JUDGE FARRAR: Then why would 10.21 and  
12    10.22 talk about a first and a second pre-conference  
13    hearing at the license -- at the possession phase if  
14    there wasn't some sort of potential hearing in play?

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

17            >> JUDGE FARRAR: Are you saying you don't  
18    know or you don't want to tell me?

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

21            >> JUDGE FARRAR: I know what it talks  
22    about. Let me -- let me -- that's all I need. Let  
23    me ask the staff about this; what is the staff's  
24    position on this?

25            >> MR. FRUCHTER: I think the -- any

1 opportunity for a hearing in the subsequent phase  
2 would be restricted to consideration of whether the  
3 actual construction of the repository was done  
4 consistent with the -- any construction authorization  
5 that was issued by the NRC.

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

14 >> MR. FRUCHTER: Well, if the contention  
15 was properly pled and did set out a genuine dispute  
16 on whether there was a difference -- in other words,  
17 the construction was not according to the  
18 specifications that were laid out, then there could  
19 be an admissible contention, correct.

20 >> JUDGE FARRAR: So I take it you are in  
21 agreement with the NRC fact sheet that appears on the  
22 web under the aegis of the Office of Public Affairs  
23 at Page 5 on the light and fact sheet for licensing  
24 Yucca Mountain, it says "if construction would be  
25 authorized before beginning to operate the facility,

1 DOE would have to update the application," blah,  
2 blah, blah. "This application would also be subject  
3 to staff technical review and hearing processes."

4 >> MR. FRUCHTER: I don't have that fact  
5 sheet in front of me, but that sounds right.

6 >> JUDGE FARRAR: You have no disagreement  
7 to that that you want to state today?

8 >>MR. FRUCHTER: I do not.

9 >>JUDGE FARRAR: NEI, what do you think?  
10 Another?

11 >> MR. SILBERG: Judge Farrar, I'm Jay  
12 Silberg for NEI. I think it's quite clear that this  
13 is a multi-stage process. As the Commission of the  
14 Federal Register noticed back in 1999, the report  
15 refers to four major decisions: The constructional  
16 authorization, license to receive and replace waste,  
17 license amendment for permanent closure, and  
18 termination of the license.

19 And Part 63 is pretty clear when it says it  
20 distinguishes between the construction authorization  
21 in Sections 63.32 among others, and the license and  
22 its conditions at 63.42. And then 63.46, where it  
23 refers to the license amendment required to make in  
24 place high-level wastes retrievable and other  
25 factors. And there are clearly differences in these

1 steps.

2           It's clear that the performance  
3 confirmation program that's called for in Part 63  
4 contemplates that there will be a lot of additional  
5 information that is developed during construction  
6 and, indeed, during operation.

7           That additional information has to be input  
8 into the license. The license has to be amended. At  
9 the time of license amendment, as with any other NRC  
10 license amendment, there is an opportunity for a  
11 hearing. Those details have not yet been worked out.

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

14           >> MR. SILBERG: Yes. And I think the  
15 other important consequence of that is that the  
16 showing that one needs to make at the different  
17 stages is dependent upon the information. For  
18 instance, it is assumed that we will have more  
19 information after construction.

20           So one need not prove everything at the  
21 construction authorization phase because there will  
22 be further information coming forward during that  
23 process.

24           >> JUDGE FARRAR: Thank you, Mr. Silberg. I  
25 appreciate that.

1           In light of this, Mr. Malsch, is the state  
2 claiming to its express view this is essentially -- I  
3 know you used the word "essentially" -- essentially a  
4 one-step licensing process?

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

14           So there is no doubt under Part 63, that  
15 there is a construction authorization stage, which is  
16 filed at some point by a stage which involves a  
17 proceeding and an opportunity for a hearing on a  
18 license to receive and possess.

19           >> JUDGE FARRAR: At which point you'd have  
20 some kind of opportunity to file new contentions?

21           >> MR. MALSCH: We would but the difficult  
22 question which the question which Section 146 poses  
23 is, is not so much how much -- how many stages there  
24 are, but what kind of information Part 63 requires  
25 for the first stage. And what we say is that if you

1 look at 63 and its history, it is quite clear that  
2 there cannot be any issuance of a construction  
3 authorization without provision in the application at  
4 the time of the construction authorization stage of  
5 final design information. And then we point out that  
6 various reasons for that.

7 >> JUDGE FARRAR: I don't want to get into  
8 the details of the contention. I just want to have  
9 this concept in mind, because I think it may have  
10 broader applications, this 146 and I wanted to get  
11 your views on this.

12 >> MR. MALSCH: It might -- I just want to  
13 make a point, though. It's important on this  
14 contention, and maybe a few others also, when the  
15 Commission promulgated Part 63, it noted that -- I'm  
16 sorry, the contention requirements in Part 2, it  
17 noted that there would be such a thing as legal  
18 contentions. Nevada Safety 146 is expressly  
19 designated as a legal contention and the preamble to  
20 the contention rule in 89 provides specifically that  
21 legal contentions would be admitted and then decided  
22 on the basis -- decided later on the basis of  
23 briefing an argument; and this is one example where  
24 we would anticipate being given the opportunity after  
25 the contention is admitted to fully brief and argue

1 the point.

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

8 Okay. Thank you. Thank you, Mr. Chairman.

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

12 >> MR. SILVERMAN: Your Honor, I apologize.  
13 Did Judge Farrar want us to address the three snappy  
14 answers --

15 >> JUDGE FARRAR: That's another thing that  
16 we're going to move toward -- what Judge Ryerson is  
17 about to tell you -- and then we'll do that after  
18 that.

19 >> MR. SILVERMAN: Fine, thank you, I'm  
20 sorry to interrupt.

21 >> JUDGE RYERSON: No problem. So we'll  
22 deal with the model now -- the model base  
23 contentions, and then address Judge Farrar's other  
24 points.

25 Mr. Silverman, Part 63 requires a

1 performance assessment. And I guess my question is,  
2 does it -- does it not require a performance  
3 assessment that demonstrates more than simply  
4 compliance with dose standards?

5 In other words, aren't there specific  
6 requirements in the regulations that the total system  
7 performance system assessment must comply with, in  
8 addition to demonstrating compliance with dose  
9 standards out in the distant future?

10 Is that question clear?

11 >> MR. SILVERMAN: I think it is clear.  
12 And I think that you could be referring to the  
13 pre-closure or the postclosure requirement where  
14 there is a dose standard in each case. And the  
15 answer is, yes, it does require more.

16 I consider those regulations, I think the  
17 ones that you are referring to, I like to call them  
18 the process regulations, how you do it, how you get  
19 to the conclusion.

20 So, yes, they do require more. There  
21 are -- there is language in the rule that tells you  
22 how to do the total system performance assessment for  
23 postclosure and the pre-closure analysis.

24 >> JUDGE BARNETT: Can I follow up to that?  
25 Can I follow up that?

1           So, for the -- we're talking about the post  
2 performance -- total performance assessment, we're  
3 talking about the total system performance  
4 assessment, the postclosure assessment?

5           >> MR. SILVERMAN: Yes.

6           >> JUDGE BARNETT: So then in that case, if  
7 there are requirements in addition to just  
8 demonstrating a dose effect, so would Nevada at this  
9 stage then necessarily need to demonstrate a dose  
10 effect for each contention?

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

19          And what I would say about those process  
20 regulations is they are very general with intent and  
21 there is a reason for those. And the reasons  
22 expressed in the regulations which is the difficulty  
23 of predicting performance out many, many thousands of  
24 years, and they do provide a considerable amount of  
25 flexibility to the applicant in determining -- not

1 complete flexibility as Nevada has alleged, we argue,  
2 that is not the case but they do provide a  
3 substantial amount of flexibility for engineering  
4 judgment, scientific judgment, to determine -- to  
5 flush out the analysis.

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

14           But our position on TSPA is, yes, on  
15 materiality purposes where they are alleging this  
16 could impact the results of the TSPA, that they do  
17 need to show -- to make some showing that it could  
18 affect the mean dose. And I'm prepared at the  
19 appropriate time to discuss the notion of how  
20 difficult that would be for them, whether that's  
21 within the means of the State of Nevada or others.

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

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

25           >> JUDGE BARNETT: Can I follow up?

1 >> JUDGE RYERSON: Sure.

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

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

12 >> JUDGE BARNETT: For them to contend that  
13 your parameters, for example, were unreasonable,  
14 undefensible?

15 Would that be a reasonable contention  
16 without having to run the model again with a  
17 different set of parameters that they felt was more  
18 reasonable?

19 >> MR. SILVERMAN: It would not. We don't  
20 think they'd meet their burden merely by alleging  
21 that there is some other data that should be used or  
22 some uncertainty we didn't consider. But we don't  
23 believe they need to re-run the model entirely.

24 We agree with the State of Nevada that it  
25 would not be practical for them to do the multiple

1 thousands of runs of different elements of code --  
2 computer code that the state - that the Department of  
3 Energy did. But we think that they had a significant  
4 opportunity to do more than they did. They were  
5 required to do more. They acknowledge they could  
6 have done more, but they failed to do that.

7 >> JUDGE BARNETT: Okay.

8 But -- so -- you don't think they would  
9 need to do that on every single contention; is that  
10 correct?

11 >> MR. SILVERMAN: Our view is to support a  
12 contention -- let's take TSPA, for example, which  
13 alleges any typical sort of -- any error or  
14 deficiency in that analysis; that they would need to  
15 provide some basis for concluding it would affect the  
16 outcome and it would affect the ultimate result.  
17 They do not need to do that by re-running or  
18 replicating in its entirety, the TSPA.

19 They've acknowledged, first of all, the  
20 Department has given them the tools to run the TSPA,  
21 has done training on how to run the TSPA, has worked  
22 with them to make sure it was operational in their  
23 systems.

24 Their expert, Dr. Thorne has stated he had  
25 the ability to run selected runs at a minimum.

1           And we're not suggesting a full run. What  
2 we're saying is when you have a contention and you  
3 are providing -- proposing a contention to the  
4 Licensing Board, it's incumbent upon the State of  
5 Nevada with those tools that they had, to do some  
6 selective analysis, to do -- run a limited set,  
7 focusing on the issue they think is material, whether  
8 it's a corrosion analysis or an infiltration  
9 analysis.

10           Do some analysis using the model that's  
11 been provided to you with the experts who purportedly  
12 are qualified to run that, or alternatively, provide  
13 a qualitative analysis based upon expert opinion that  
14 would demonstrate a prima facie case.

15           They don't have to provide proof of their  
16 contention. We do that. A prima facie case is some  
17 indication, some reasonable basis, expert basis for  
18 concluding that the result would be different and we  
19 would not exceed -- that we would exceed our dose  
20 standards.

21           That could be an expert describing  
22 scientific studies that are relevant or that are  
23 based upon their own experience; but in most or all  
24 of the cases that we looked at in TSPA spaces, in  
25 particular, we felt all we got was essentially a bare

1 allegation that we didn't do something or we didn't  
2 do something adequately. But the dots weren't  
3 connected to show that the process regulation, the  
4 boundaries have been exceeded.

5 >> JUDGE RYERSON: I suppose,  
6 Mr. Silverman, one of the issues that the Board has  
7 to consider is again, we're going back to a test  
8 which is the adequacy of a pleading and what is  
9 required in a pleading. And we are in agreement, I  
10 don't think anyone is suggesting -- you are certainly  
11 not suggesting we have to get into the merits of the  
12 allegation.

13 I certainly don't need to make  
14 determinations on the merits. So to step back from  
15 what Nevada could or could not do, but just get back  
16 to what has to be shown to have an admissible  
17 contention, why is it not the case that an  
18 allegation -- that a contention that alleges a  
19 violation of an NRC regulation and is supported by  
20 some form of reasonably confident and reasoned  
21 affidavit support that says, this, in effect, this  
22 would be a violation of a regulation.

23 Why isn't that enough?

24 Why do they have to have any kind of  
25 empirical demonstration beyond that of an effect upon

1 ultimate dose?

2 >> MR. SILVERMAN: I think it does depend  
3 on the nature of the contention and I think it is  
4 different when it comes to these process regulations.  
5 Let me give you an example.

6 I think that if we were required at this  
7 stage to submit an emergency plan -- let's be a  
8 little more specific, one that deals with protecting  
9 the public from offsite public, and we submitted an  
10 emergency plan that only covered the on-site workers;  
11 if someone alleged that that regulation was violated  
12 with sufficient basis, that we didn't provide what is  
13 required by the rule, that's not processed regulation  
14 and that could be an admissible contention if it's  
15 supported by adequate support and adequate  
16 demonstration that appears that the regulations  
17 violated it.

18 It's different, we believe, in the context  
19 of these process regulations. And we think that the  
20 case law is supportive of us. The Board has  
21 specifically asked us about cases we cited on pages  
22 53 to 57 of our Answer. And I think this is the  
23 right time to talk about those cases because I think  
24 the question you posed -- the questions posed was on  
25 the NRC cases on which DOE relies on Pages 53 through

1 57, did the petitioners allege violations of specific  
2 regulatory requirements?

3           What I read into that is you were asking,  
4 gee, maybe those particular contentions that were  
5 dismissed in those cases, were dismissed because they  
6 didn't cite a regulatory violation. I'm presuming  
7 that was what you were wondering about that.

8           The answer to your question is: Did  
9 petitioners allege violations of specific regulatory  
10 environmental requirements?

11           The answer in three of those cases, the  
12 three main cases we cite is, yes, they did. And  
13 in -- what I'd like to do is briefly summarize, if I  
14 can.

15           >> JUDGE RYERSON: And is that apparent  
16 from the decision or did you have to go back to the  
17 underlying record?

18           >> MR. SILVERMAN: In some cases, you can  
19 see it in the decisions, but I went back to the  
20 petitions, themselves, and read the contentions.

21           And I will be brief -- but the point we  
22 were trying to make in these cases is even though a  
23 regulatory violation was alleged, clearly -- and I  
24 will hit these very briefly for you -- the decisions  
25 by the Boards and by the Commission -- and I will

1 read the brief snippets of language -- indicate that  
2 the decision to not admit the contention was based  
3 upon really the failure to really demonstrate the  
4 result or the impact of the -- of the alleged  
5 violation. And it's interesting to note that in, I  
6 think all the cases, certainly the first two, it was  
7 a process regulation.

8 In the Duke Energy case, which is LBP0317,  
9 the contention specifically alleged violations of  
10 Part 51 and Part 54, having to do with severe  
11 accident mitigation alternative analyses, and they  
12 also cited a violation of the regulations dealing  
13 with requirements for the Aging Management Program  
14 for licensing renewal proceedings. They specifically  
15 cited those regulations.

16 The contention - when the Board in the Duke  
17 case rejected the -- excuse me, the contention, it  
18 did so for failure to explain the implications of the  
19 alleged deficiencies. And that's really very  
20 analogous to the Nevada contentions and the positions  
21 we've taken in this case. In the Entergy case, which  
22 is Indian Point --

23 >> JUDGE RYERSON: Who was that Board,  
24 Mr. Silverman?

25 >> MR. SILVERMAN: I don't -- I could find

1 that for you here, but I don't know off the top of my  
2 head.

3 >> JUDGE RYERSON: That's okay. I'll find  
4 it on my own.

5 >> MR. SILVERMAN: I have only two more  
6 cases. I'll be very brief with them both. In  
7 Entergy -- this is another case we cite in that  
8 section of the brief. It's LBP0813. Again, the  
9 contention was based upon a SAMA, Severe Accident  
10 Mitigation Analysis issue. The contention explicitly  
11 cited alleged violations of NEPA and of Part 54,  
12 particularly Appendix B of Part 54.

13 The Board, nevertheless, rejected the  
14 contention as inadmissible.

15 And the last case I want to cite is  
16 Dominion where we have some language from the  
17 Commission. This is the Millstone case. It's  
18 LBP03-12. And it was affirmed by the Commission in  
19 CLI-03-14. Here in the contention, the Petitioner  
20 allege a violation of the significant hazards  
21 consideration requirements set forth in Part 50 --  
22 Section 50.92-C, specifically. And we did not meet  
23 the requirements under NEPA for a categorical  
24 exclusion; and it cited the regulation again.

25 The Board did not admit the contention; and

1 the Commission in upholding the Board, stated the  
2 Petitioner, quote," never provides any accident or  
3 dose analysis of its own and therefore, never  
4 indicates how a significant radiological release may  
5 occur as a result of the proposed changes." These  
6 were proposed changes to text specs.

7 So these are three cases we cited where a  
8 petitioner specifically alleged the regulatory  
9 violation, really related primarily to process  
10 regulations, and the Boards and the Commission  
11 required more.

12 >> JUDGE RYERSON: Were the contentions --  
13 in your view, what's your best case on the facts in  
14 terms of being similar to the contentions that  
15 are -- that are proffered in this case?

16 >> MR. SILVERMAN: I'm not sure what you  
17 mean by that, Your Honor.

18 >> JUDGE RYERSON: In other words, it seems  
19 to me you can look at this from two directions. The  
20 contentions that are set forth in this case, while  
21 you properly say they don't allege an impact on dose,  
22 or demonstrate an impact on dose, nonetheless, at  
23 least in my experience, are considerably more  
24 detailed than many of the contentions that have been  
25 rejected in other cases.

1           There may have been an allegation of a  
2 violation of a -- what you characterize as a process  
3 regulation, but I question whether the contentions  
4 looked like the contentions that we have here. Did  
5 they have the degree of specificity?

6           Is there any particular case that comes to  
7 mind that you would urge us to read carefully?

8           >> MR. SILVERMAN: I'd be happy to provide  
9 that information to you. I'm confident that we will  
10 find contentions that are not as well written as  
11 those of Nevada and some that are far better written,  
12 in our view. And in fact, were probably admitted in  
13 some cases.

14           Off the top of my head, on these particular  
15 cases, I think the contentions were fairly clear and  
16 there was some detail there, but it's hard for me to  
17 characterize that.

18           >> JUDGE RYERSON: Approaching it from the  
19 other direction, you characterize, I guess, Part 63  
20 or parts of Part 63 as process regulations. And I'm  
21 not -- it's not clear to me that there are some  
22 regulations that the Applicant is bound to follow and  
23 other regulations that seem to have a lesser  
24 standard. I mean isn't -- why is compliance with a  
25 regulation not mandatory?

1 >> MR. SILVERMAN: Compliance with a  
2 regulation is mandatory. In the case of these  
3 particular regulations, particularly with TSPA , as I  
4 said, there is a very considerable amount of  
5 flexibility and space for engineering and scientific  
6 expert judgment in deciding how to implement those  
7 regulations.

8 You may or may not agree with us on the  
9 issue of mean dose, but if -- even if you did not,  
10 what I believe is the difficult job of the Boards to  
11 do is to examine these contentions beyond these sort  
12 of overarching issues like this one that we're  
13 discussing right now.

14 I'm not suggesting that you engage in an  
15 analysis of the merits, but in each of these cases or  
16 almost all of these cases, the Applicant, the  
17 Department of Energy has -- let me back up. Nevada  
18 has alleged certain facts, the Department has  
19 responded.

20 It's incumbent in deciding whether that  
21 regulation is -- has been violated for you to look at  
22 those facts to some degree at some level. An obvious  
23 example is, if a contention says something was  
24 omitted from the SAR and we cite the pages of the SAR  
25 where that analysis was not admitted, you need to

1 look at those facts and make that judgment.

2           At the end of the day, it comes down to the  
3 importance of the issue in the overall analysis  
4 that's required by the regulations. And many of the  
5 contentions -- most of the contentions in our view,  
6 allege an error, a problem, use of improper data, but  
7 don't show how that exceeds the boundaries of the  
8 process regulation that's before us.

9           >> JUDGE RYERSON: Let me -- if I may, let  
10 me turn that argument around a little bit and see,  
11 and characterize and a lot may reject my  
12 characterization of their argument, but to some  
13 extent, it seems to me that these regulations remind  
14 me of high school Algebra class.

15           You seem to be saying, look, as long as we  
16 get the answer right, that's all we need to do. As  
17 long as we are comfortable, DOE is comfortable that  
18 we're going to meet the dose standards and we have a  
19 model that in our view, DOE's view says that, we're  
20 okay.

21           But it seems to me that the regulations as  
22 Nevada is pointing out -- at least that's what I  
23 think they're saying -- is we got to show the work.

24           It's not enough to have the right answer,  
25 you have to show the work. You have to, in other

1 words, comply explicitly with a variety of specific  
2 conditions in the regulations that exist above and  
3 beyond getting the right answer.

4 In other words, it's not good enough to  
5 prove dose compliance by any means you choose.  
6 You've got to prove dose compliance according to the  
7 regulations in a certain way. You got to show the  
8 work by analogy. And, you know, is that a  
9 mischaracterization of what the regulations require?

10 >> MR. SILVERMAN: No, I don't think so. I  
11 think that you do have to show the work. I think  
12 that this is a unique regulation that provides a very  
13 large swath for reasoned expert judgment in deciding  
14 what work is satisfactory to produce the correct  
15 result.

16 >> JUDGE BARNETT: But it doesn't provide  
17 an infinite swath?

18 >> MR. SILVERMAN: Absolutely not. We have  
19 been accused of that and we are not alleging that.

20 >> JUDGE BARNETT: So let me just give you  
21 a hypothetical -- and I'm not trying to pin you down  
22 here, I just want to make sure I understand your  
23 answer. If Nevada were to contend that in one of the  
24 TSPA analysis that DOE should have used ten inches of  
25 rain a year, and they used a thousand inches of rain

1 a year; would that be an admissible contention  
2 without Nevada then running the TSPA code to see what  
3 the actual implications of using a thousand versus  
4 ten were?

5 >> MR. SILVERMAN: No. No, because it  
6 sounds like a large difference, but it -- this is a  
7 complex analysis. It's not -- and I'm hardly the  
8 expert on this. I'll get over my head very quickly.  
9 But as I understand it, it's a nonlinear analysis in  
10 the sense that there are multiple models being run  
11 feeding into each other.

12 And the simple allegation that we  
13 underestimated the amount of precipitation, all that  
14 tells you is we underestimated the amount of  
15 precipitation. It does not tell you that we exceeded  
16 the bounds of uncertainties. It doesn't tell you --  
17 that are --

18 >> JUDGE BARNETT: Well, assuming they had  
19 appropriate citations that it was well beyond the,  
20 you know, assuming they had appropriate references  
21 that it was 10 inches a year and a thousand was way  
22 outside the bounds, yeah, assuming they had some  
23 basis for it. But if they had an adequate scientific  
24 basis for saying they should have used 10, and they  
25 used a thousand; would that then be an admissible

1 contention without running the TSPA model?

2 >> MR. SILVERMAN: I think the contention,  
3 they would not necessarily have to run the TSPA  
4 model, but they would have to provide an adequate  
5 basis, if not in running portions, in selectively  
6 running the model and expert judgment with an  
7 adequately reasoned basis.

8 >> JUDGE RYERSON: Let me change Judge  
9 Barnett's hypothetical just a little. Assume the  
10 regulation said you shall use for the annual  
11 rainfall, the mean of the last 50 years and you  
12 decided to use something else; does that on its own,  
13 constitute a violation of the regulation which is  
14 ipso facto admissible?

15 >> MR. SILVERMAN: I think if we had that  
16 kind of regulation, the answer would be yes, but we  
17 don't generally have that kind of regulation in TSPA  
18 and pre-closure space.

19 >> JUDGE BARNETT: Some you do and some you  
20 don't. That was just a hypothetical made up. Let  
21 me -- you said there's a lot of flexibility in  
22 meeting these regulations, but some of them don't  
23 seem -- at least to my reading -- to give you any  
24 flexibility. They say, let's do this.

25 >> MR. SILVERMAN: Oh, there are some parts

1 of 63 that are like that, yes, I don't think they  
2 are --

3 >> JUDGE BARNETT: But I think you are  
4 saying that even for those parts of violations --  
5 there are violations and there are violations; and  
6 until your opponent points out that that's a  
7 violation that has consequences for the outcome, that  
8 that's not an admissible contention?

9 >> MR. SILVERMAN: No. Again, I go back to  
10 my emergency plan. That's kind of like you are using  
11 the mean precipitation rate over the last 50 years'  
12 example. It's very prescriptive. It's very precise.  
13 It says thou shall submit a plan. You don't submit a  
14 plan. It's deterministic if you will --

15 >> JUDGE BARNETT: Okay, so a violation of  
16 a prescriptive-- a contention alleging with the right  
17 basis, and so forth, a violation of a  
18 prescriptive regulation is admissible on its face?

19 >> MR. SILVERMAN: Well, I hate to use the  
20 words like "on its face." It can be admissible. I  
21 would say yes. And I think that this argument that  
22 we've made is largely confined to the TSPA  
23 contentions.

24 >> JUDGE BARNETT: Okay. You said earlier  
25 that you could come up with some cases where there

1 were better drafted contentions than Nevada has  
2 submitted here that were admitted. Can you tell me  
3 of a single instance in which the Department of  
4 Energy is not opposed a single contention that has  
5 ever been filed in front of us?

6 >> MR. SILVERMAN: Well, the only  
7 proceeding I know about is this one.

8 >> JUDGE BARNETT: No, we have the Mox  
9 proceeding that you and I are in.

10 >> MR. SILVERMAN: In the Mox proceeding,  
11 we challenged all the contentions. May I speak --  
12 may I respond to that?

13 I'm not sure exactly what your point is,  
14 but let me say this about what we did--

15 >> JUDGE BARNETT: Well, your point was  
16 floating around out here are a lot of far better  
17 drafted contentions than Nevada filed.

18 I was here seven years, a long time ago on  
19 on the Amended Appeal Board, and I have been here  
20 seven years now; and I'm trying to find those. There  
21 were some good ones by the State of Utah and we'll  
22 come to those later in a PFS case, but --

23 >> MR. SILVERMAN: Your Honor, I was making  
24 a general statement. I just think it stands to  
25 reason and based upon my general recollection and

1 experience, that there are some that, as I said, that  
2 are far more poorly drafted than in the State of  
3 Nevada and others that were likely better drafted. I  
4 would like to respond --

5 >> JUDGE BARNETT: Would you like the  
6 opportunity in the next ten days or so to submit to  
7 us some contentions from some other cases you think  
8 are far better drafted?

9 >> MR. SILVERMAN: We can certainly look  
10 for those. If you like that, we would try to provide  
11 that.

12 >> JUDGE BARNETT: Okay.

13 >> MR. SILVERMAN: Was that a yes, Your  
14 Honor?

15 >> JUDGE BARNETT: Yes.

16 >> MR. SILVERMAN: May I add one comment  
17 with respect to your remark about the -- having  
18 not -- having challenged every contention in this  
19 proceeding and in the Moxs proceeding?

20 Thank you. I'll be brief on this. I just  
21 want to make it clear to this Board and all the  
22 Boards, we -- in preparing for this proceeding and  
23 for what we anticipated to be an unprecedented number  
24 of contentions, thought a lot about the process, put  
25 a team together of people to work on it, we were

1 given directions to calls balls and strikes as we see  
2 them, and assumed before we ever got any contentions  
3 that there would be some that we would conclude and  
4 acknowledge up front were admissible. That was our  
5 going-in assumption and our client's going-in  
6 assumption.

7           Once we got into contentions, in good  
8 faith, we evaluated them as the representative of the  
9 Department of Energy and reached the conclusion that  
10 in our view, they were not admissable. You may or  
11 may not agree with us.

12           I suspect you will not agree with us in all  
13 cases, but it was a good faith judgment based upon  
14 our interpretation of the law and it was not a  
15 pre-ordained conclusion. And I wanted that to be  
16 made very clear.

17           >> JUDGE BARNETT: The question, let's get  
18 back to the very basics, a violation of a  
19 prescriptive regulation -- -- a violation of a  
20 prescriptive regulation, assuming that it meets all  
21 the other criteria that's admissible. You don't need  
22 to show what the consequences of that violation are.  
23 Is that correct?

24           >> MR. SILVERMAN: Well, as in the example  
25 of the emergency plan, yes.

1 >> JUDGE BARNETT: Because we've always  
2 held the rank and file intervenors, the citizens  
3 groups, whenever they say that an application is not  
4 any good and the applicant comes back and says it  
5 meets the regulation and the intervenors say so what,  
6 we say to them, You can't challenge the regulation?

7 That's up to the folklore of the beginning  
8 of the agency.

9 That got converted so that the staff and  
10 the applicant are also bound by the regulations.  
11 They don't see the way the regulations are binding on  
12 them.

13 I think that's been our precedence for any  
14 number of years. So I'm trying to ask the question  
15 here, are you asking us to depart from those  
16 precedents in this case that if it's something  
17 particular about this case so that a -- an allegation  
18 of a prescriptive regulation is not necessarily  
19 admissible, meaning your client, alone, of the people  
20 who appear in front of here, gets to challenge  
21 regulations without seeking a waiver from the --

22 >> MR. SILVERMAN: No, we don't. We don't  
23 have that right or authority.

24 >> JUDGE RYERSON: Thank you.

25 >> MR. SILVERMAN: May I have one moment?

1 >> JUDGE RYERSON: Sure.

2 >> MR. SILVERMAN: Thank you. Your Honor,  
3 one more point -- two more points, briefly. I agree  
4 with you on the prescriptive regulation argument. As  
5 I said before, we don't believe that's what the TSPA  
6 process regulations are. The one thing I'd like to  
7 point out is this: It seems to me what's good for  
8 the goose is good for the gander.

9 If in fact, a contention is admitted on the  
10 basis of an allegation that the regulation is  
11 violated without -- and that's the material issue,  
12 the Board decides that's the material issue, and if  
13 you don't have to look at the effect of that on the  
14 final outcome of the analysis, then it seems to me  
15 that when we go to evidentiary hearing, the burden  
16 shifts, of course, as you know to the applicant.

17 I don't understand why if we follow that  
18 logic, the applicant wouldn't meet its burden merely  
19 by showing it met the regulations regardless of the  
20 impact on dose or the ultimate outcome.

21 >> JUDGE FARRAR: Right. That seems to me  
22 that that's the flipside of what we disagreed on.  
23 Mr. Chairman, I'm sorry we got distracted from the  
24 talk about the model but it seemed that these  
25 questions fit in with that point.

1 >> JUDGE RYERSON: I do have a question  
2 for you, Mr. Silverman, but I don't know if you are  
3 prepared to address or not; but the case that you  
4 cite 427 times, I believe, the Duke energy case,  
5 CLI9911, for the proposition that a dispute is  
6 material, if its resolution would make a difference  
7 in the outcome of the licensing proceeding. I mean,  
8 do the -- that language is in the Decision because  
9 it's a quote from the Federal Register Final Rule  
10 Notice, I believe.

11 But I don't see how the facts of that case,  
12 myself, really support that at all. I don't know if  
13 you are prepared to address that or one of your  
14 colleagues is.

15 >> MR. SILVERMAN: I'm not sure any of us  
16 are prepared to address the specific facts of that  
17 case.

18 >> JUDGE RYERSON: Okay. I note that the  
19 case also says that our contention rule should not be  
20 turned into a fortress to deny intervention.

21 >> MR. SILVERMAN: Understood.

22 >> JUDGE RYERSON: It's an interesting  
23 case. I commend it to you. Let me ask this; there  
24 may be some dispute as to what Nevada would be  
25 required to -- to show in order to have an admissible

1 contention.

2           You acknowledge they don't need to re-run  
3 the entire model, but you do ask for some sort of  
4 imperical demonstration of an effect. Is there a  
5 factual dispute on the record in front of us as to  
6 what Nevada can do and if there is a factual dispute  
7 of that nature, does that preclude our ruling against  
8 Nevada at this stage, on a factual question?

9           >> MR. SILVERMAN: Right. No, the answer  
10 to your first question, there is no factual dispute,  
11 and if there were, I do not think it would require  
12 you to rule in their favor; and let me explain. This  
13 goes to your question, I think, the first part, is  
14 there a factual dispute concerning the Petitioner's  
15 ability to replicate the TSPA?

16           First of all, by replicate, we interpret  
17 that to mean to essentially completely reproduce.  
18 There isn't a factual dispute. We do not believe  
19 Nevada could do that.

20           But we don't think, as I said before, that  
21 that ability was a prerequisite for Nevada or any of  
22 the Petitioners to meet their burden. As I talked  
23 about in terms of providing selective analysis,  
24 limited -- limited runs at the TSPA, qualitative  
25 expert based analysis for the reasoned basis.

1           If you read replicate to mean something  
2 less than you fully replicate, there also, I believe,  
3 is no factual dispute because in Nevada's reply -- I  
4 have it highlighted, I need to find the phrase -- and  
5 there is an acknowledgment that they could have run  
6 limited runs of the TSPA to produce some results.

7           And there are multiple statements by their  
8 expert that they had the tools and the ability to  
9 modify the parameters of the analysis and produce  
10 their own results and reach a conclusion.

11           Now, even if there is a factual dispute on  
12 either of those issues, it is not the sort of dispute  
13 that the burden -- that the presumption goes to the  
14 Ptitioner. The issue of whether Nevada can replicate  
15 the TSPA, regardless of how you define that, to me  
16 that's an ancillary issue.

17           It's not the kind of material issue that  
18 goes -- it wouldn't be subject of a contention. If  
19 Nevada filed a contention that said we can't  
20 replicate the TSPA, I don't think you'd admit that.

21           It's an ancillary issue. It's a procedural  
22 issue. It doesn't -- the resolution of it would not  
23 lead to a finding that we meet the requirements or we  
24 don't meet the requirements. So I do not think in  
25 any way, shape or form there was a presumption in

1 favor of the Petitioners in that regard.

2 >> JUDGE RYERSON: Okay. Mr. Malsch, you  
3 have been kind of quiet on this side of the aisle for  
4 the moment. Did you want to address these points at  
5 this time?

6 >> MR. MALSCH: Let me address two points;  
7 the first is that -- what is true in this proceeding  
8 is, as has been true in a quarter century of NRC  
9 practice, an allegation that a regulation, an  
10 allegation that an applicable regulation has been  
11 violated raises a material issue, period.

12 And I would point out to you that we have  
13 140 -- about approximately 140 contentions addressing  
14 the total system performance assessment. Each of  
15 those contentions specifically alleges that a  
16 violation of several -- one or more particular  
17 provisions in Part 63 which address how the  
18 performance assessment shall be conducted.

19 We cited to 63.102-A that there had to be  
20 included a full range of reasonable defensible  
21 parameters; 63.102-H, that all models and parameters  
22 had to be credible and include uncertainty; 63.114-B  
23 that the model had to include uncertainty and  
24 variability parameters and provide the technical  
25 basis for parameters and probabilities; 63.114-G,

1 which requires that the models provide -- have been  
2 supported by an adequate technical basis.

3 We have 140 or so contentions which  
4 specifically allege a violation of one or more of  
5 these divisions. We have an additional dozen or so  
6 contentions that also allege specific violations of  
7 63.114-C, which requires consideration of all  
8 conceptual models; 63.114-B, which requires a full  
9 accounting and explanation of uncertainties; and  
10 63.102-J -- 63.102-J which requires consideration of  
11 futures, processes and events.

12 Now, what's interesting about these  
13 regulations is the Commission went out of its way to  
14 promugate in Parts 63 to explain how each of these  
15 requirements had its own independent significance and  
16 enforceability. And to understand that, you need to  
17 go back a little bit into the history of Part 63.

18 Part 63 was originally spun off of Part 60,  
19 which was a generic regulation applicable to  
20 repositories in general. Part 63, in addition -- and  
21 we're talking about postclosure safety. In addition  
22 to requiring for postclosure safety purposes,  
23 compliance with an ultimate dose standard using a  
24 performance assessment, also had a requirement for  
25 individual barriers to meet particular subsystem

1 performance requirements. For example, ground water  
2 travel time was specified.

3           When the Commission developed Part 63, it  
4 did not include any of these substance and  
5 performance requirements, leading commenters to  
6 accuse the Commission that it was doing something it  
7 had never done before, namely, the whole safety case  
8 depend solely upon the results of the equivalent of a  
9 probabilistic risk assessment and nothing else.

10           In responding to those comments, the  
11 Commission was very clear that that was not what it  
12 was doing, that the postclosure safety did not depend  
13 solely upon meeting a simple dose standard at the end  
14 of a total system performance assessment, that  
15 instead, postclosure safety depended upon a  
16 comprehensive collection of requirements, including  
17 the ones that I mention here.

18           So, we say that a contention which alleges,  
19 for example, a violation of a requirement that a  
20 model be adequately supported is material per se,  
21 nothing else need be shown, just as would be the case  
22 in a reactor case, an allegation that the general  
23 design criteria were not complied with or emergency  
24 planning requirements were not complied with would  
25 also be material per se without some further showing

1 of a lack of reasonable assurance or without some  
2 further showing that some design basis, those  
3 calculations had been violated.

4 >> JUDGE FARRAR: Mr. Malsch, can I  
5 interrupt you there? Are you saying that applies to  
6 these process kind of regulations, that you shall do  
7 it this way, as much as it does to a regulation that  
8 says, the tie rod should be made out of titanium?

9 Are you saying they're both the same?

10 >> MR. MALSCH: That is exactly correct.  
11 There is nothing whatsoever in the history of Part 63  
12 that would suggest a distinction between process  
13 regulations or, on the one hand, the other kinds of  
14 regulation or process regulation versus some other  
15 kinds of regulation. They're all independently  
16 enforceable, all -- and they all have independent  
17 significance.

18 The Commission does not suggest any place  
19 these are of lesser significance. In fact, as I  
20 said, they were very clear that postclosure safety  
21 depended upon a comprehensive collection of  
22 requirements, including all of these process  
23 requirements. Just to borrow a little bit from what  
24 Judge Ryerson said, they were as much concerned about  
25 how you got the result as they were with the result

1     itself.

2                     And that is why we think that all of our  
3     TSPA contentions raise material issues.  Now, second,  
4     let me address the other question dealing with our  
5     capabilities.  First of all, I don't think you need  
6     to reach this question because, as I just said, I  
7     think our TSPA contentions all raise material issues.  
8     But if there were to be some further additional  
9     showing to be required and, frankly, I did not  
10    understand from DVR argument what exactly that is --  
11    but let's suppose in some cases there is required  
12    some sort of further demonstration.

13                    We asked ourself that question because we  
14    anticipated that DOE would make the precise argument  
15    that it made in its Answer.  So we asked ourselves, is  
16    it possible for us to actually do a dose calculation  
17    that would gauge an estimate in some quantitative way  
18    the precise impact of our contention, if true?

19                    Well, it turns out that for about maybe  
20    50 -- except for about 100 of our contentions, our  
21    contentions are so utterly destructive of the TSPA  
22    model, so that if you assume they are true, which is  
23    what you should do if you address a materialiality  
24    question, if you assume they are true, there is  
25    literally no model left to run, no calculation can be

1 made.

2           There are about 100 or so -- I think it's  
3 101 -- contentions which actually, if true, would not  
4 be so completely destructive of the TSPA model. It  
5 wouldn't be something of a structure in place that we  
6 could conceivably modify. Now, so we asked  
7 ourselves, well, what would be involved in doing  
8 that?

9           Well, first of all, we thought to give DOE  
10 the benefit of the doubt, let's assume instead of  
11 having 100 contentions, we really have 19  
12 contentions, because it turns out our 100 contentions  
13 here break down into 19 separate categories.

14           So let's talk about to give DOE the benefit  
15 of the doubt. Let's say we only have 19 groups of  
16 contentions. What would be required actually to  
17 demonstrate quantitatively their effects on dose?

18           Well, first of all, let's just take one,  
19 one of the 19, what would we have to do?

20           Well, first of all, we'd have to develop a  
21 QA program for modifying the TSPA because otherwise  
22 unless our own calculation and model changes were  
23 fully subject to and implemented under a Quality  
24 Assurance program, our results would have no  
25 credibility. So we first have to develop our own QA

1 program.

2           Secondly, we would have to actually model  
3 the TSPA code, not just in one case, but in five  
4 separate modeling cases. The DOE TSPA actually is  
5 comprised of about five separate modeling cases.  
6 There is the igneous intrusive case -- the igneous  
7 extrusive case, the early waste package failure case.

8           And then there are two separate cases in  
9 the so-called nominal scenarios. Each one of the  
10 those cases involves a variance in the TSPA model.

11           So to include any one of our contentions to  
12 accommodate it, to change the model to include it, we  
13 would have to actually make as many as five changes  
14 in -- as many as five separate TSPA models.

15           That would take literally in the case of  
16 some contentions, months of work. But that's not --  
17 but that's just the beginning. There are -- there is  
18 no requirement for us to show that any one  
19 contention by itself would influence the dose.

20           It would be perfectly permissible for us to  
21 argue the combinations of contentions would have an  
22 effect on the dose that would be significant. There  
23 are --

24           >>JUDGE BARNETT: Let me follow up on that.  
25 So you do think that you need to consider these

1 contentions in combination; is that right, not one at  
2 a time -- consider the technical questions about the  
3 contentions on the TSPA model, you have to consider  
4 those in combination, is that not one at a time?

5 >>MR. MALSCH: I don't think you have to  
6 consider them in combination but I think as long as  
7 we are talking about demonstrating significance, to  
8 rule out any one contention on the basis of a lack of  
9 demonstration, quantitative effect on dose, it  
10 wouldn't be sufficient just to show that that one  
11 contention had no effect. You'd have to show that one  
12 contention in combination with all other contentions  
13 had no effect on dose.

14 And I can tell you that just taking 19  
15 contentions, not 101, the number of possible  
16 combinations is in the quad drillions.

17 >>JUDGE BARNETT: That's exactly right.  
18 Doesn't that actually go -- extend beyond DOE's  
19 capability of testing all --

20 >> MR. MALSCH: That would actually even  
21 extend beyond DOE's capability. Mr. Silverman's  
22 argument here today is a little bit misleading.  
23 There is no doubt he can run the TSPA code on our  
24 computers. We can run it. The question is not  
25 whether we can run it. The question is whether for

1 the thousands of different combinations we can -- we  
2 would possibly have the time and resources to make  
3 the necessary number of model changes to show the  
4 dose effects of any one contention or any combination  
5 of contentions. What DOE is effectively asking us to  
6 do is the impossible, and the impossible actually  
7 denies us due process of law.

8 >> JUDGE BARNETT: But would you be asking  
9 DOE to do the impossible?

10 >> MR. MALSCH: We would not be asking DOE  
11 to do the impossible. I mean, that would be their  
12 option. If you look at the way we structure our  
13 contentions -- let's say we have a contention -- we  
14 have a group of contentions with the tax their  
15 massive infiltration model. We believe the effect of  
16 our contentions is to utterly destroy the model.

17 DOE could respond to our contentions by  
18 correcting the model, without doing any dose  
19 calculations. They could just say, we corrected the  
20 model. Or they can explain why our concerns about why  
21 the model is incorrect were not well-founded.

22 So they are -- it is within their  
23 discretion in defending -- in making their case, to  
24 address each of our contentions on a model-by-model  
25 basis and on a 114-A basis, 114-G basis and just

1 defend their models one by one.

2 That's the perfectly permissible way for  
3 them to go about making their case.

4 >> JUDGE BARNETT: But you couldn't test  
5 the implications of your contentions one by one?

6 >> MR. MALSCH: Pardon?

7 >> JUDGE BARNETT: You couldn't also then  
8 test the implications of your contentions one by one?

9 So, as I understand your argument, there  
10 were two many combinations of your contentions for  
11 you to test, but -- and by extension, there would be  
12 too many for DOE to contest, so they can analyze the  
13 effects one by one but you couldn't do the same  
14 thing?

15 >> MR. MALSCH: No, and when I say analyze  
16 the effects, they can defend purely on the basis of  
17 compliance with the individual requirements in Part  
18 63. I'll give you an example. Let's take the  
19 massive infiltration contentions.

20 We say their model is in a number of  
21 respects, not scientifically supported. How would  
22 DOE -- that contention gets admitted, how would DOE  
23 make its case?

24 We presumably -- make the case by either  
25 we're wrong and its model is correct just on the

1 basis of the merits of the model, without getting  
2 into any dose calculations, or it could defend its  
3 case by producing a corrected model and say, ah,  
4 we're taking care of your problems. Again, there  
5 would be no need to be a separate dose calculation by  
6 DOE. They would simply defend their models on a  
7 scientific basis, scientific discipline, by  
8 scientific discipline.

9           That would be sufficient without going to  
10 dose calculations. Now, let me just mention one last  
11 thing; and that is, I do believe that Dr. Thorne's  
12 Affidavit is essentially un-rebutted. There was no  
13 other Affidavit which rebuts what effectively what  
14 Dr. Thorne said. Most of the DOE's applicants said  
15 we could have run some contentions. He does not say  
16 which contentions or he doesn't say how much time  
17 does it take, and he doesn't address the combination  
18 problem.

19           Under NRC case law, petitioners are to be  
20 given the benefit of the doubt in really contention  
21 admissibility. And I think that means that the  
22 Board, in ruling on our contention admissibility in  
23 the TSPA field should take what Dr. Thorne said as a  
24 given.

25           But I want to emphasize, you don't even

1 have to even reach that question because I think each  
2 of our TSPA contentions are separately admissible.  
3 They separately raise a material question just  
4 because each of them involves a separate violation of  
5 the requirement of Part 63.

6 >> JUDGE BARNETT: Well, for example, if  
7 you were -- if you were -- if the contention was they  
8 had estimated the probability of volcanic eruption as  
9 half of what the actual probability was, there is no  
10 specific requirement or regulation that it has to be  
11 some given number.

12 They can allege their number is wrong. So  
13 that's not a regulation -- that's not a regulation  
14 violation per se.

15 >> MR. MALSCH: It is. I mean, in each --  
16 let's take that as an example. We have alleged that  
17 their models for igneous events are wrong in several  
18 respects because they don't include certain kinds of  
19 phenomenon. They don't include certain categories of  
20 data.

21 >> JUDGE BARNETT: Let's restrict it to  
22 where a parameter is wrong. That's a separate case.  
23 Their frequency that they use, estimated frequency of  
24 volcanic eruption was half of the value that it  
25 should have been. There are contentions like that.

1           That's not a violation of the specific  
2 regulation; right?

3           >> MR. MALSCH: No, I think it is.

4           I mean, under 62 -- 63.101-A, there is a  
5 separate and enforceable requirement that the TSPA  
6 include the full range of defensible and reasonable  
7 parameters.

8           So a contention which says they have not  
9 included the full range of defensible and reasonable  
10 parameters, is material per se, regardless of whether  
11 that would have an effect of dose. And that's  
12 because of the way the NRC carefully structured Part  
13 63. They took great pains to explain that it wasn't  
14 just the ultimate dose calculation.

15           It was also such things as including the  
16 full range of defensible and reasonable parameters.

17           >> JUDGE BARNETT: Okay. So would Nevada  
18 ever need to show any implication of the contention  
19 at all of the TSPA model or is it sufficient to say  
20 this parameter is not right, this model left this  
21 out; any implication?

22           >> MR. MALSCH: I think that's all we have  
23 to show. I think we have to show that they violated  
24 these requirements, that either their models are not  
25 supported scientifically, that they don't include the

1 full range of defensible reasonable usable  
2 parameters. They don't include certain essential  
3 factors.

4           They omit a FEP, for example. I think  
5 that's enough to get our contentions admitted. And  
6 this is no departure from standard NRC practice. It  
7 has always been the case that a contention which  
8 alleges a violation of a regulation is -- raises a  
9 material issue. And it was NRC's decision to  
10 separately promulgate this collection of  
11 requirements.

12           And that was their decision, they're  
13 separately enforceable. The Commission took great  
14 pains to emphasize that its ultimate decision on  
15 postclosure safety depend upon not just the dose  
16 calculation by compliance with these separate  
17 requirements.

18           And so we think a violation of these  
19 separate requirements raises a material issue.

20           Now, I would grant you that these  
21 requirements are standard in non-prescriptive  
22 fashion, but that doesn't make a violation of them  
23 any less material than it would, for example, a  
24 violation of the general design criteria, which are  
25 also expressed in general principles; the immaterial

1 just because the regulation is non-prescriptive.

2 There is no distinction in terms of  
3 materiality between prescriptive requirements and  
4 non-prescriptive requirements, between substantive  
5 requirements and positive requirements. They are all  
6 independently significant and separately enforceable.

7 >> JUDGE RYERSON: I think Mr. Silverman is  
8 straining to say something at this point; and then I  
9 have a question for you, Mr. Silverman. Why don't  
10 you --

11 >> MR. SILVERMAN: Thank you. A few points:  
12 Mr. Malsch continues to refer to in response to Judge  
13 Barnett's questions which I think were good  
14 questions, that a mere allegation of an error or  
15 deficiency in omission is material per se.

16 Well, materiality is one part of the test  
17 for admitting the contention.

18 We also have to have a genuine dispute  
19 about that material issue. And to find a genuine  
20 dispute, you must do more than look at the allegation  
21 of the Petitioner. You must also look at the  
22 response of the Applicant.

23 And it is beyond the legal overarching  
24 issues that you must look.

25 As I said, not a full merits analysis,

1 we're not asking for an evidentiary judgment here;  
2 but there are and I believe it's consistent with  
3 Board practice in the past that you look at the  
4 facts. We've cited sections of the SAR that are  
5 responsive to the Nevada contentions. It may be that  
6 they allege an omission. We show where it's  
7 addressed. They may say, there is an uncertainty, we  
8 describe why it clearly is bounded by what we've done  
9 or not relevant to the ultimate determination. Or  
10 why it doesn't violate Section 63.114, the  
11 postclosure analysis, which has such broad methods,  
12 if you will, for going through the process of doing  
13 the postclosure analysis and talks very generally  
14 about including certain data, accounting for  
15 uncertainties, considering alternatives, et cetera.

16           So it's not enough to be just material.  
17 You must look at the facts at some level -- at some  
18 level in deciding whether to admit these contentions.

19           There are a couple of other things I'd like  
20 to mention and I'd be happy to take your question,  
21 Judge, is there no requirement for them to have done  
22 a Quality Assurance Program. That's not a  
23 requirement of the Petitioner or we wouldn't have  
24 asked that. And we would have be laughed out of the  
25 boardroom if you challenge them on the basis of not

1 having a qualified QA program for their contentions.

2 Finally, there has been some suggestion  
3 about cumulative impact of these contentions. When  
4 we had the Advisory PAPO Board pre-hearing conference  
5 in March -- May of last year, this very subject came  
6 up. I think it was Judge Moore. I could be wrong.  
7 It might have been you, Judge Ryerson; but the issue  
8 said, it was very clear that if the Petitioner felt  
9 that they wanted to argue that an individual  
10 contention combined with other individual contentions  
11 cumulatively demonstrated a material issue and a  
12 genuine dispute, that they should do that, either by  
13 way of summing them up and saying that or having an  
14 extra contention that specified that.

15 We honestly do need read the Nevada  
16 Petition to have done that, to have accumulated and  
17 have argued that the cumulative impact needs to be  
18 considered.

19 >> JUDGE RYERSON: I think you've answered  
20 one of my questions, is whether you disagreed at all  
21 with Mr. Malsch's description of what would be  
22 required. But let me ask the second question and you  
23 sort of lead into this. You say that there's got to  
24 be at least some level of demonstration.

25 >> MR. SILVERMAN: Yes.

1 >> JUDGE RYERSON: And the question I guess  
2 for us again dealing with the adequacy of a pleading  
3 is what that level is. And I hate to keep returning  
4 to this case that you cite 427 times to us; but that  
5 case says that there must be at least some minimal  
6 factual and legal foundation in support of the  
7 contention, some minimal factual and legal  
8 foundation. Is that the wrong test?

9 Because --

10 >> MR. SILVERMAN: No --

11 >> JUDGE RYERSON: Because this sounds like  
12 a minimal factor.

13 >> MR. SILVERMAN: That's good law. That's  
14 good law; but you can't judge whether there is a  
15 minimal showing by reading the factual allegations in  
16 one pleading. You've got to look at the other side.

17 I acknowledge that you may look at a  
18 contention and you may look at an answer of the  
19 Department and you may say, you know, they've raised  
20 the legitimate issue. This may be your judgment; and  
21 it is not clear to us on its face that, that it's not  
22 an issue -- that it's not an a genuine issue.

23 Some of Nevada's arguments leave the word  
24 "genuine" out of this criteria; but there are others  
25 you will read, where I think you can conclude merely

1 by reading the pleadings and perhaps looking -- not  
2 perhaps, really, it's a difficult job, but looking at  
3 the things we cite in the SAR often and in most of  
4 our responses and conclude there is no genuine issue  
5 there. And you don't go beyond the pleadings and the  
6 references, and that is your call to make. It's not  
7 necessarily an easy one; but it is -- it does require  
8 you to look at both sides and to delve down to some  
9 level of review of both sides of the allegations.

10 >> JUDGE RYERSON: I would very much like  
11 to hear the NRC staff's position on whether an  
12 allegation of a violation of any Commission  
13 regulation is a material -- raises a material issue  
14 for an option. Could one of you please speak to  
15 that?

16 >> MS. YOUNG: Mitzi Young for the NRC  
17 staff. The staff's position is that depending on the  
18 contention and the regulation that's alleged to be  
19 violated, it could be a material issue.

20 The staff did not do a wholesale objection  
21 to the contentions based on materiality. There are  
22 contentions where Intervenor suggests that  
23 radionuclides and radiological exposures would be  
24 increased.

25 And those contentions specifically, the

1 staff would expect demonstration provided by Nevada  
2 would address what those impacts would be.

3           However, there are contentions that allege  
4 certain particular processes were not followed. The  
5 staff does not object to those contentions as being  
6 immaterial.

7           >> JUDGE FARRAR: You said at the  
8 beginning, Ms. Young, staff's position is that a  
9 violation -- an allegation of a regulation could be  
10 material.

11           >> MS. YOUNG: It could be.

12           >> JUDGE FARRAR: I think Judge Ryerson's  
13 question -- it's not his, mine is -- is a violation  
14 of a regulation always material on its face?

15           >> MS. YOUNG: Well, materiality has  
16 different meanings, obviously. There is materiality  
17 that can affect the outcome of the proceeding. But  
18 there's also materiality with what can bear on the  
19 staff evaluation of a particular standard.

20           >> JUDGE FARRAR: Our precedence have  
21 always said that applicants just like the  
22 intervenors is bound by the regulations unless they  
23 ask the Commission for a waiver or an exemption.

24           >> MS. YOUNG: Or an exemption --

25           >> JUDGE FARRAR: Or an exemption, fine,

1 whatever they ask. But if they don't ask for that,  
2 what is the force behind that precedent or that  
3 principle that I just stated, if we say, yes, you  
4 violated the regulation, you didn't get a waiver and  
5 exemption, but we're not going to hear the  
6 contention? That makes that principle a dead letter.

7 So I need to know what the -- if the  
8 staff's position is, a allegation or violation of a  
9 regulation is always per se, material?

10 >> MS. YOUNG: It depends on what that  
11 contention is alleging, was or was not fulfilled a  
12 regulatory requirement.

13 >> JUDGE FARRAR: The answer is no?

14 >> MS. YOUNG: Again --

15 >> JUDGE FARRAR: You are saying the answer  
16 is no, that it's not always material?

17 >> MS. YOUNG: An Intervenor can provide a  
18 contention that says the regulation is violated  
19 because the walls of the repository will be blue. Is  
20 that material to fulfilling some requirement --

21 >> JUDGE FARRAR: The Commission  
22 regulations says the walls of the repository should  
23 be pink and they say they are going to be blue.  
24 That's my question; is that per se, an admissible  
25 contention?

1 >> MS. YOUNG: That could be but again, you  
2 have to look at the particular regulation that's at  
3 issue with respect to the challenges raised by the  
4 petitioner.

5 >> JUDGE RYERSON: Do either of the Judges  
6 have something?

7 >. MR. ANDERSEN: Your Honor, Rob Anderson  
8 on behalf of Nye County. One of the problems that I  
9 had with DOE's approach with review of this  
10 particular issue is it didn't make a distinction  
11 between what it has perhaps called a process  
12 regulation and one that is quote/unquote:  
13 "Prescriptive" as Judge Farrar has pointed out.

14 I can tell you that they made the same  
15 materiality challenge to every one of our  
16 contentions, and I'd like to make a point that hasn't  
17 been stressed enough, although alluded to by the  
18 Board, and that is the following -- every single one  
19 of the emergency response planning regulations,  
20 performance confirmation, quality assurance  
21 regulations are bottomed on a record that  
22 demonstrates why it is significant to safety.

23 And it's presumed that if you violated  
24 that, you violated a principle that the Board has  
25 established or the Commission has established as a

1 safety significant matter. Now, that isn't every  
2 single regulation.

3 I think I understand why my colleagues from  
4 NRC staff are shuffling a little bit, because there  
5 certainly could be a regulation that isn't  
6 significant enough to justify.

7 >> JUDGE FARRAR: If there were, why would  
8 the Commission bother to expend the effort to adopt  
9 it?

10 >> MR. ANDERSON: Again, I would go back to  
11 what the record is that establishes the regulation.  
12 What is the bottom line support for establishing the  
13 regulation in the first place.

14 And then cited in our materials and others  
15 is the Massachusetts case out of the Federal Circuit,  
16 where, indeed, NRC wouldn't allow evidence on impact  
17 to dose because they said underline emergency  
18 response regulations is the commitment by the  
19 Commission to the principle, that if you violated  
20 that regulation, you were violating a safety  
21 principle.

22 So there was no demonstration allowed, even  
23 though the Petitioner wanted to do it, of showing  
24 those implications. I would say to the Board, in  
25 conclusion, that we urge you to carefully look at DOE

1 's arguments in this regard to make sure this  
2 so-called process argument on materiality doesn't  
3 wash over into areas where it clearly has to do with  
4 a specific alleged violation of a safety significant  
5 regulation that NRC has promulgated. They were --

6 >> JUDGE RYERSON: Thank you Mr. Anderson.  
7 This may be a good time for a break. I don't see any  
8 other hands up. So I'm going to say it's a good time  
9 for a break. Why don't we try to do this, in  
10 literally nine minutes and begin again promptly at  
11 3:15.

12 (A recess was taken)

13 >> JUDGE RYERSON: `Please be seated.  
14 Okay. I think Judge Barnett has a couple of further  
15 questions on the model, then we will turn to some of  
16 the subjects that Judge Farrar wanted to cover.

17 >> MS. YOUNG: Judge Ryerson?

18 >>JUDGE RYERSON: Yes.

19 >>MS. YOUNG: Mitscy Young from the NRC  
20 staff. I just wanted to clarify one thing in terms  
21 of my answers to Judge Farrar. When the staff was  
22 talking about it would depend on the nature of a  
23 regulatory requirement, one example could be 63.114-E  
24 and F which talks about DOE having to provide the  
25 technical basis for inclusion or exclusion of FEPS.

1 And that a specific FEP must be evaluated in detail  
2 if the magnitude and time of resulting radiological  
3 exposures to the reasonably maximally exposed  
4 individual or the radionuclide releases to the  
5 successful environment would be significantly changed  
6 by the omission.

7 If Nevada, for example, were to raise a  
8 contention that allege that a particular FEP was not  
9 properly excluded, there has to be in that situation,  
10 a showing of what the significance would be in terms  
11 of results. So again, it depends on what the  
12 regulatory requirement is that's being alleged that  
13 DOE has failed to satisfy.

14 >> JUDGE RYERSON: Thank you.

15 Judge Barnett?

16 >> JUDGE BARNETT: I have a question for  
17 Mr. Malsch or Mr. Lawrence.

18 For the TSPA contentions, if DOE's answer  
19 is that this is a non-safety item or not important to  
20 safety item or not important to waste test isolation,  
21 and Nevada's reply doesn't address that or doesn't  
22 say this is important to safety use, is that an  
23 admissible contention?

24 Should we have contentions on things that  
25 aren't important to safety, that nobody has argued is

1 important to safety?

2 >> MR. MALSCH: I think you are referring  
3 to the contention we had with respect to retrieval  
4 plans.

5 >>JUDGE BARNETT: I can't remember  
6 specifically.

7 >>MR. MALSCH: I believe it's retrieval  
8 plans. And here was the difficulty. Our basic goal  
9 was to assure that retrieval plans are subject to  
10 quality assurance requirements.

11 And more specifically, I guess, structured  
12 system equipment necessary to implement retrieval  
13 plans are subject to full quality assurance  
14 requirements.

15 Under DOE's QARD, a structured system or  
16 component is not subject to the QARD unless it is  
17 either important to safety or important to waste  
18 isolation.

19 We agree it doesn't make any difference  
20 under which category something falls. If it falls  
21 under either one, it's subject to quality assurance  
22 and that's sufficient.

23 The problem is from our standpoint was that  
24 the criteria for deciding whether a piece of  
25 equipment was important to safety is so different

1 than the criteria that applied in deciding whether a  
2 piece of equipment was important to waste isolation,  
3 that if you applied the wrong set of criteria, the  
4 result would be that a structured system or component  
5 important to retrieval would be ruled not important  
6 to safety because that criterion focuses solely on  
7 safety of workers, not postclosure safety.

8           The result would be that it would not be  
9 subject to quality assurance by reason of it being  
10 important to safety, and they never asked the  
11 question whether it should be important -- it should  
12 be subject to quality assurance, because it is  
13 important to waste isolation, the result as a whole.

14           >> JUDGE BARNETT: Okay. I can't remember  
15 the specifics but let me just give you a  
16 hypothetical. If Nevada's contention was based on  
17 component A and DOE's answer was Component A is not  
18 important to safety and they show the table where it  
19 says it's not important to safety, it's not important  
20 to waste isolation and show the table that says that.

21           And then Nevada's reply does not address  
22 that or offer a contention that, well, it should be  
23 important to safety, it should be important to waste  
24 isolation, then would that be an admissible  
25 contention, where there is no such disagreement

1 about -- no explicit disagreement about whether it is  
2 or isn't an important to safety?

3 If DOE has classified it is not important  
4 to safety, Nevada doesn't make the argument that it  
5 is important to safety, is it an admissible  
6 contention?

7 >>MR. MALSCH: Let me put it this way, I  
8 think we have to -- we have disagree with either the  
9 classification or the application of the wrong -- the  
10 application of the classification criteria.

11 If hypothetically one were to conceive  
12 that retrieval is not important to waste isolation,  
13 then our contention goes away.

14 But we've argued specifically that it is  
15 important to waste isolation considered in the  
16 broader sense, and therefore, it should be subject to  
17 quality assurance as important to waste isolation,  
18 and DOE never even considered that issue.

19 >> JUDGE BARNETT: I'm not trying to pin  
20 you down so much. I just want to understand. Let's  
21 leave the specific contention out because I don't  
22 remember. Say it's Component A and Nevada's  
23 contention is based on Component A. DOE's response  
24 is, it's not important to safety, here's the table  
25 where it says it's not important to safety; it's not

1 important to waste isolation. Here is the table  
2 where it says it at.

3 And then Nevada can not come back and argue  
4 that it is important to safety, it is important to  
5 waste isolation and here is where it says that.

6 Is that an admissible contention?

7 >> MR. MALSCH: I think we would have to  
8 counter the table or argument that it is neither.  
9 DOE has -- points to something in the application  
10 which properly -- which classifies it as one or the  
11 other. And I think we've got a problem with our  
12 contention. I think though in the particular case I'm  
13 thinking of, they utterly failed to consider whether  
14 structured systems of components important to  
15 retrieve were important to waste isolation, and  
16 therefore, the gap.

17 >> JUDGE BARNETT: I want to thank you.  
18 Along similar lines, if the contention said that  
19 DOE assumes X, and DOE's answer was well, we don't  
20 assume X, it's not referenced anywhere in the license  
21 applications at least, and then, Nevada is required  
22 to come back and say, here is where you assumed X, in  
23 Nevada's reply; would that be an admissible  
24 contention?

25 >> MR. MALSCH: I think if we pointed to a

1 alleged defect in the application or one of the  
2 supporting references, and that defect in fact, did  
3 not exist, I think that's not an admissible  
4 contention. I don't think we have any contentions  
5 in that category. But when we allege an omission, I  
6 think the omission has to be there.

7 >> JUDGE BARNETT: Thank you.

8 >>JUDGE RYERSON: Judge Farrar, do you have  
9 any questions?

10 >> JUDGE FARRAR: Yes, let's turn to what  
11 we mentioned before lunch, the State of Nevada reply  
12 brief to DOE, pages one to two and four bullets and  
13 we'll add that up. The first bullet, I think is  
14 fairly covered by point 4-A of the proceedings  
15 tomorrow, so we won't do that.

16 The fourth bullet about the regulation,  
17 where we talked about it at some length, I have a  
18 couple follow-up questions.

19 Mr. Silverman, several times there was a  
20 regulation that DOE -- I'm sorry -- that Nevada said  
21 you're not in compliance with the regulation and the  
22 regulation was non-prescriptive giving you the  
23 flexibility that you said you had.

24 But your Answer said, it's a challenge to  
25 the regulation. So it was as though you said, since

1 the regulation gives us flexibility, saying we don't  
2 comply with it is a challenge to the regulation,  
3 whereas another reading would be it's not a challenge  
4 to the regulation, it's a challenge to whether you  
5 have used that flexibility wisely and have come up  
6 with a solution that fits within the meaning of the  
7 regulation.

8 Do you want to address anything, do you  
9 want to say anything in response to that?

10 >> MR. SILVERMAN: Yes. Does that refer to  
11 one of these particular bullets?

12 >> JUDGE FARRAR: Well, it's -- no, it's  
13 kind of a variation of this question -- it's the  
14 flip side of here's a prescriptive regulation and you  
15 don't comply with it. Here's one where you say,  
16 well, the regulation isn't prescriptive, so the  
17 challenge in the regulation, when they challenge us,  
18 because we have infinite flexibility.

19 >> MR. SILVERMAN: No, we did not mean to  
20 suggest infinite flexibility. What we meant when we  
21 said challenge to the regulations, you have a  
22 regulation like 63-114 which is your how to on your  
23 TSPA postclosure analysis.

24 And it requires adequate and accurate  
25 generally analyses and considerations of uncertainty,

1 considerations of alternative models, inclusion of  
2 data in broad ranges of areas like geology,  
3 hydrology, et cetera.

4           And when -- what we were just trying to say  
5 is all Nevada is saying there is another uncertainty  
6 here, or there is a piece of data that's being used.  
7 Without showing that we have violated this regulation  
8 which gives us fairly broad relay based upon expert  
9 scientific judgment that what we are trying to say is  
10 that is, that is in essence, a challenge to  
11 regulation.

12           It's a regulation, not just this reg, but  
13 the preamble regulation 63.101 I think and 102, they  
14 talk about the conceptual framework, go on and on and  
15 on about the complexity, the difficulty into the  
16 future, the need for flexibility for the applicant to  
17 do these analyses. So that's the point we were  
18 trying to make, maybe not as artfully as we should  
19 have.

20           >> JUDGE FARRAR: What contention, do you  
21 refer to a specific contention there? Okay, fine.

22           >>MR. SILVERMAN: Thank you.

23           >>JUDGE FARRAR: Thank you Mr. Silverman.  
24 Mr. Malsch, let me ask you a different question on  
25 this same subject.

1           There are times when DOE says that your  
2 contention should be rejected because  
3 you're -- you're asking them to consider something  
4 they don't have to.

5           For example, if the regulation says your  
6 tires have to withstand certain conditions and they  
7 say, we have synthetic rubber number 93 that does  
8 this. If you say well, you didn't consider synthetic  
9 rubber number 95, and they say, look, if 93 does the  
10 job, we don't have to consider all the others that  
11 might do the job better because we just don't have to  
12 do that.

13           We've come up with a proposal that meets  
14 what the regulations are looking for. So they oppose  
15 a number of your contentions on the ground that you  
16 are asking them to look at one or an infinite number  
17 of other things that would also do the job. And all  
18 they have to do is say they've done the job.

19           How do you respond to that?

20           >> MR. MALSCH: Well, I think there could  
21 be two categories of contentions to which that  
22 question would apply. We have a whole category of  
23 contentions which alleges that DOE's -- one or more  
24 of the TSPA models is not considered the full range  
25 of defensible and reasonable parameters.

1           It would be possible for us to argue that  
2   it is non-compliant with that provision because a  
3   contention did not include a particular range of  
4   parameters or -- and that would make the contention  
5   admissible assuming --

6           >> JUDGE FARRAR: That's not the kind that  
7   was self supporting. That's not what I was talking  
8   about.

9           >> MR. MALSCH: The second category would be  
10   where we -- I guess in retrospect, there are three  
11   categories. The second category would be where we  
12   have tapped a DOE's model that is either wrong or  
13   unsupported, because it did not include consideration  
14   of a necessary phenomena.

15           For example, if a necessary element in  
16   estimating corrosion was ignored in DOE's model, we  
17   have attacked the validity of that model.

18           The third category and that's I think  
19   fairly standard stuff -- the third category is  
20   actually unique to Part 63 and performance  
21   assessments. And that is the requirement would  
22   consider alternative assessment of models of things  
23   consistent with data and scientific understanding.  
24   We do have a number of contentions --

25           JUDGE FARRAR: I thought there were some

1 alternative materials that you just said they should  
2 have used, and --

3 >> MR. MALSCH: Oh, there are a few  
4 contentions where we say that.

5 >>JUDGE FARRAR: And I think they say,  
6 look, the material we selected does the job. You can  
7 challenge us, the material we selected is inadequate,  
8 but you can't say we need to consider all these  
9 others that are also adequate or maybe more than  
10 adequate, because we don't need to use those. That's  
11 the one I'm talking about.

12 >> MR. MALSCH: Okay.

13 I think a contention which simply says that  
14 they could have used these materials which are  
15 better. The ones they've chosen would not by itself  
16 be an admissible contention.

17 I think though in the contentions we're  
18 thinking of, we went on to explain that there were  
19 problems with the materials that they were using that  
20 might -- and we went ahead and suggested how those  
21 might be cured.

22 I agree with your hypothetical, a  
23 contention that says what they did was fine, but this  
24 would have been better, is not admissible per se.

25 >> JUDGE FARRAR: All right. I think that

1 takes care of that bullet. Let's look at the second  
2 bullet. Mr. Silverman, this is the one about your  
3 application having to be as complete as possible and  
4 many of the petitioners challenge various aspects of  
5 the application and sometimes you give the answer,  
6 well, that was all we had at the time.

7 What do we do; is Mr. Malsch right in this  
8 point and what do we do with that?

9 One thing we can do is, fine, we'll admit  
10 the contention and we'll go to hearing. And by then  
11 you will have more information and we'll test it. I  
12 take it you would not like us to do that?

13 >> MR. SILVERMAN: I think that this bullet  
14 and it is then later reflected in a little bit more  
15 detail in the generic section of Nevada's pleading,  
16 is a mischaracterization of our position.

17 We do on a number of occasions indicate  
18 that 63.21-A provides that those applications should  
19 be as complete as possible and available information.

20 But we do not say and I do not think we  
21 intimate at all that that gives us carte blanche to  
22 exclude any information required or to provide as I  
23 think they say here, it would be acceptable to submit  
24 a one-sentence application.

25 We didn't assert 63.21-A eliminates the

1 need to comply with the rest of 63.21, which does  
2 have specific requirements in it.

3 When Nevada makes this allegation, they in  
4 the front of their response, they point to two pages.  
5 And I'd just like to make it clear that we are  
6 providing the indication to you and the references so  
7 you can see that is not what we did. They point to  
8 page 1351 and page 1500 of DOE's answer.

9 If you look at pages 1349 to 1358 of DOE's  
10 answer which bounds page 1351, you will see -- the  
11 issue is whether we provide a final design  
12 information in the LA. We referenced 6321-A.

13 But we went on for several pages to  
14 recognize that we have to provide sufficient  
15 information under the balance of 63.21.

16 We explain that the regulation doesn't  
17 provide final design information, so we address  
18 content and substance. We specifically identified  
19 the information in the license application that  
20 satisfies 63.21-B, the rest of that regulation.

21 So we took on the substance. We didn't  
22 just say whatever we say is good enough. We said  
23 look in the LA and you will see that these locations,  
24 information we believe is sufficient to meet the  
25 regulations.

1           And in this case, it dealt with the  
2 specific allegations regarding the transport and  
3 replacement vehicle, the multi-tax and transportation  
4 and disposal containers.

5           So we have not taken the position that  
6 there is no minimum amount of information. And  
7 that's an example that -- that if you look at those  
8 pages, you will see that we do not do what Nevada  
9 alleges in this bullet, which is argue with that  
10 63.21 gives us carte blanche.

11           Very briefly, the other reference that  
12 Nevada cites for that proposition is page 1500 of our  
13 answer. If you look on pages 1491 to 1500, which  
14 deals with waste retrieval, whether there's an  
15 adequate plan for waste retrieval, if we're not able  
16 to put the drip shields in.

17           We reference 63.21 again but we also  
18 explain how we meet Section 63.21C-7, that it doesn't  
19 require a formal retrieval plan. It goes to the  
20 substance of the regulation.

21           We state, quote " the only issue for  
22 consideration is whether the description of the  
23 retrieval plan is sufficient"and we identify again  
24 the specific information in the LA that satisfies  
25 that regulation.

1           We're not saying we have carte blanche to  
2 put in as little as we want and in these cases that  
3 were cited by Nevada, if you look at them, you will  
4 see that we refer you specifically to the LA where we  
5 think we have given you sufficient information.

6           >> JUDGE RYERSON: All right,  
7 Mr. Silverman, if I could follow up on that.

8           It seems that everyone has to agree that  
9 when we are talking about compliance years out,  
10 potentially a million years out in some aspects, that  
11 there is going to be a level of uncertainty.

12           Nevada's point, as I understand it, is that  
13 there is a level of uncertainty that is unacceptable.  
14 Your point, if I understand it, is that you have come  
15 forward with -- given the state of knowledge right  
16 now, an acceptable level of uncertainty.

17           But doesn't -- for purposes again of the  
18 adequacy of a pleading, doesn't that bring us into a  
19 factual dispute on the merits that requires further  
20 proceedings to make factual determinations on who's  
21 right?

22           >> MR. SILVERMAN: Your Honor, it may in  
23 some cases and it may not in others. It really  
24 depends on looking at the pleadings and again the  
25 reputation in the Applicant's response because as I

1 said, in cases, you will find, I am confident that we  
2 adequately refute and you will conclude there is no  
3 genuine dispute because it will be obvious on its  
4 face.

5           It will be clear and -- and that will be  
6 sufficient. So I think there could be both cases in  
7 any given situation.

8           >> JUDGE RYERSON: Thank you.

9           >> JUDGE FARRAR: In reading your response,  
10 Mr. Silverman, to Nevada's Contention 147, I asked  
11 myself the question, DOE -- and following up with  
12 what Judge Ryerson just said, DOE making the argument  
13 that this case is so complex that we can not be  
14 expected to get it right and so minor errors don't  
15 matter, or in the vernacular, it's close enough for  
16 government work.

17           That flavor seems to run through this,  
18 while this is a tough case, don't worry about it.

19           >> MR. SILVERMAN: No, and I don't remember  
20 what's in 147, but I can assure you, that's not what  
21 we're arguing. If that's not TSPA's contention, what  
22 we're arguing, we said before is if you look at  
23 63.114, there are small errors and there are large  
24 errors.

25           And a small error even if it's true would

1 not necessarily violate one of these regulations in  
2 this particular section of the code.

3 >> JUDGE FARRAR: And, of course you didn't  
4 say that exactly 147. That was my rough paraphrase.

5 I think that we covered indirectly the third to the  
6 last bullet of the State's points. So Mr. Chairman,  
7 I'm finished with that, unless someone had a -- I  
8 only asked those two parties, because that was  
9 Mr. Malsch's State of Nevada's challenge to DOE,  
10 particularly which is why I involved him in that  
11 questioning. Go ahead Mr. Malsch.

12 >> MR. MALSCH: I want to indicate if the  
13 board is interested, I can explain why the cases you  
14 cited in support of their position are utterly did  
15 not stand for that proposition, but this is the Duke  
16 case and some other cases.

17 >> JUDGE FARRAR: I heard those already.

18 >> MR, MALSCH: I'd be willing to discuss  
19 them, if the Board is interested.

20 >> JUDGE FARRAR: We have a lot of business  
21 yet to conduct.

22 >> MR. ROBBINS: Your Honor, Alan Robbins.  
23 Procedurally Your Honor, I'm not the designated  
24 counsel to speak today but may I have permission to  
25 speak briefly?

1 >> JUDGE RYERSON: Yes, you may.

2 >> MR. ROBBINS: Thank you. I want to use  
3 Clark County's contentions regarding forecasted  
4 volcanism as examples of the discussion that has been  
5 going on for quite some time here. Frankly, one that  
6 we think is very simple. We have an allegation,  
7 supported by the Affidavit, recognized expert,  
8 geologist, not an expert candy cone maker or  
9 something, a geologist. He's been in the field, I  
10 mean out in the field doing studies, not just in the  
11 field of geology, who is alleging with explanation  
12 that DOE's assumptions regarding forecasted volcanic  
13 volcanic activity are incorrect.

14 Counsel for DOE is just saying there are  
15 big errors and small errors. We have expert  
16 supported allegations about significant  
17 understatement of forecast of future volcanic  
18 activity. And needless to say, that's among the  
19 contentions that DOE finds inadmissible because it is  
20 a proposed contention in this case and they of course  
21 find them in all inadmissible.

22 Well, if that is too small and minor to be  
23 admissible, you might be interested although probably  
24 rhetorical to know, how big does a contention have to  
25 get before it matters, to warrant at least being the

1 subject matter of a hearing in this proceeding? It  
2 boggles the mind.

3 I'd also like to go back to Your Honor's  
4 example that well, what if the -- I'm still on  
5 volcanism -- what if the regulations say use this  
6 kind of material, a material that meets this  
7 specification. They say, we'll use the model A and  
8 somebody allege I'll use type B. That is not the  
9 nature of our volcanic activity contention.

10 But DOE's response suggests that that is.  
11 They respond as if that's the kind of contention  
12 we're raising. It's not. It's as if we've said,  
13 well, you're using a backup access of the forecast  
14 for volcanic activity and let's do it on the shelf as  
15 a different forecast of why, why did you choose Y  
16 instead of X?

17 And they're saying a variety of different  
18 things, none of which are fair issue for hearing.  
19 But plainly, that is not the nature of our  
20 contention.

21 And it is not the kind of contention that  
22 is conducive to saying they specifically violated a  
23 designated standard or a prescription because the  
24 forced regulations don't specify the forecasted level  
25 of expected volcanic activity that is to be modeled,

1 but instead, there are other regulations that among  
2 other things require them to support the models that  
3 they use and the assumptions and data that go into  
4 it.

5 And that is the nature of the regulations  
6 that we allege they have violated by ignoring  
7 wholesale, information known to them that  
8 significantly affects the forecasted level of  
9 volcanic activity.

10 So, at times, it's been clear which kinds  
11 of contentions which would underline this discussion.  
12 At other times, it's a little more robust.

13 But I want to put a point on it because  
14 these are among the very important contentions that  
15 we are raising.

16 >> JUDGE RYERSON: Mr. Silverman, if I  
17 understand your point, is that you are urging us to  
18 look at contentions, you are asking the Board to look  
19 at contentions and decide on the pleadings whether  
20 the allegation is conceivably substantial enough to  
21 constitute a violation of the regulations. Am I  
22 correctly stating your view?

23 >> MR. SILVERMAN: Well, the burden is  
24 to demonstrate a genuine issue of material fact or  
25 law.

1 >> JUDGE RYERSON: A genuine issue of  
2 material fact. And I guess, my question is this;  
3 you've said earlier, that although your going in  
4 proposition was that you expected to find some  
5 admissible contentions, you ultimately did not.

6 If we took out your argument as to the  
7 adequacy of the form of affidavits and I don't want  
8 to get into discussing that.

9 I think another Board is going to deal with  
10 that tomorrow or Friday, or Thursday. But let's  
11 assume that all of the affidavits in this case, were  
12 in proper form.

13 >> MR. SILVERMAN: I'm sorry, were what?

14 >> JUDGE RYERSON: Were in proper form.

15 >> MR. SILVERMAN: In proper form.

16 >> JUDGE RYERSON: In correct form. And  
17 included within the body of the Affidavit, everything  
18 that is adopted from paragraph five or paragraph six  
19 or both, in particular contentions; are there any  
20 contentions on that basis that you believe would be  
21 admissible?

22 >> MR. SILVERMAN: Well, that would be --  
23 there would be some if that were the only argument  
24 that we made in response to that contention. In  
25 other words --

1 >> JUDGE FARRAR: There are no contentions  
2 where that's the only argument that you made?

3 >> MR. SILVERMAN: That's my point.  
4 Logically, you are saying we presume --

5 >> JUDGE FARRAR: Although some of them may  
6 have been influenced, since you don't like the  
7 affidavits, then maybe it doesn't amount to a genuine  
8 issue.

9 >> MR. SILVERMAN: Bear with me. I think  
10 I'm trying to answer your question just very straight  
11 forwardly. If we have a situation where we all  
12 presume the affidavits are adequate for purposes of  
13 the 2.309 criterion that requires a supporting fact,  
14 an expert opinion and if that were the only argument  
15 that we make in response to that contention, argument  
16 was inadmissible, then it would be inadmissible.

17 I don't know whether there are any of those  
18 or not. I suspect in most cases we made several  
19 arguments. Now, we may be wrong on the others you  
20 may find. But there are other arguments.

21 >>CHAIRMAN RYERSON: Okay. I guess -- you  
22 were suggesting earlier, we should be taking a hard  
23 look at individual contentions from the standpoint of  
24 whether they in fact, present a genuine dispute.

25 And I guess I was asking, if you were

1 looking fresh at the contentions yourself and  
2 assuming, again, we may not assume this form is  
3 correct, but assuming that the form on the Affidavit  
4 were correct, I take it your position is, since you  
5 have made other arguments in every instance, it  
6 remains your view that there are no genuine disputes?

7 >> MR. SILVERMAN: That's based on our  
8 pleadings. And really, the critical point I've been  
9 trying to make and probably being redundant at this  
10 point, but I also feel like maybe I haven't been as  
11 clear, is over these few days, we're talking about  
12 what the Board's described as overarching legal  
13 issues.

14 And all I'm saying is that the Board has a  
15 difficult job and when you see the responses, you  
16 need to view them in their totality, both the  
17 petition and the answer and the reply. If you  
18 disagree with us on one of these legal principles,  
19 you still have to look at the factual response.

20 You have to look at our references to the  
21 SAR, to other portions of the license application or  
22 to a citation to a regulation which we provide or to  
23 a citation to a background supporting document, which  
24 we reference.

25 There is a threshold for you to decide

1 where it becomes a merits determination. And you  
2 may, contrary to our position, conclude it's  
3 admissible or it's a genuine dispute, but there is a  
4 threshold that has to be crossed. And that's what  
5 we're requesting.

6 >> JUDGE FARRAR: Mr. Silverman, suppose we  
7 find an issue or two or ten that we think have -- at  
8 bottom, they are legal issues.

9 Do you have any objection to us admitting  
10 those contentions and calling for briefing of the  
11 legal issues, kind of like you would file a motion to  
12 dismiss that contention because the law is on your  
13 side rather than theirs?

14 >> MR. SILVERMAN: You'd have to first  
15 find it's a genuine legal dispute. If you did, then  
16 you'd admit the contention and if you wanted it  
17 resolved, then, yes, motions -- a brief would be a  
18 good way to resolve that issue.

19 >> JUDGE FARRAR: Okay. let me -- do you  
20 want to go ahead?

21 >> JUDGE RYERSON: Yeah, you know I said at  
22 the outset, we hoped to reserve some time for kind of  
23 a final cleanup of anything anyone feels has not been  
24 adequately addressed. I would urge you when we do  
25 that not to feel constrained to say something if you

1 really have nothing to say at this point. We've  
2 heard a lot.

3 But I know Judge Farrar has some questions  
4 that he'd like to address, I think on some specific  
5 contentions and would like to try to reserve enough  
6 time to at least give everyone an opportunity to say  
7 whatever they'd like.

8 >> JUDGE FARRAR: In order to honor what  
9 the Chairman wants to do on the short snappy answers  
10 to the -- don't feel compelled to give a non-snappy  
11 answer.

12 Let me first ask the staff, in the State of  
13 Nevada's reply brief to you, at pages one to two,  
14 they say you have insisted on a depth of support for  
15 these contentions that's not necessary and, in fact,  
16 it's preposterous.

17 Let me put that a different way. A long  
18 time ago, we had no -- almost no bar to Intervenors  
19 coming in. And through the years, the Commission has  
20 raised the bar and many Intervenors and experts in  
21 most cases, we deny most of the contentions because  
22 the Intervenors haven't met that bar.

23 But you can't read this case without coming  
24 to a sense that the bar was here and the State of  
25 Nevada and some of the other petitioners far surpass

1 that bar, so the bar got raised so they didn't quite  
2 reach it.

3 I have that feeling when I read some of the  
4 Staff's answers. Am I wrong to think that the bar  
5 has been raised? In other words, that yeah, the bar  
6 has been raised -- because I have to tell you,  
7 comparing these contentions to others that I have  
8 seen, they seem at least superficially to be a lot  
9 better.

10 We're going to talk about the aircraft  
11 issues in PFS. I think that came in, Mr. Silberg,  
12 correct me if I'm wrong, I wasn't there at the time,  
13 but that came in on a five-line contention?

14 Am I right?

15 >>MR. SILBERG: Close to that, yes.

16 >>JUDGE FARRAR: Go ahead Ms. Young.

17 >> MS. YOUNG: Mitzi Young for NRC staff.

18 I don't believe the bar has been raised. I believe  
19 when you are evaluating the contention with respect  
20 to the proposed action, you need to evaluate it in  
21 the context of the issues that are challenged. Part  
22 63 is a risk-informed performance-based regulation.

23 Many times the contentions used very  
24 broad-brush in terms of identifying multiple sections  
25 of Part 63 that they believe had been -- DOE has been

1 sufficient in satisfying.

2 But when you looked at that list of issues  
3 or sections that they identified, it seemed like  
4 their concern was not with respect to all of the  
5 sections, although, they did a pretty good job  
6 showing the relationships between various  
7 regulations. But they had a concern about a  
8 specific, more narrow regulatory requirement.

9 To that extent, in looking at contentions  
10 for this proceeding, the staff under the time  
11 constraints it had, given the brevity of reply time,  
12 tried to reasonably construe each contention in the  
13 context of the matters raised.

14 We did not arbitrarily raise the bar. Now,  
15 we recognize as you did, Judge Farrar, that in many  
16 years passed, contentions in both the reactor  
17 proceedings and the issues and the informal  
18 proceedings, until the contention requirement was  
19 imposed, people got in with very little explanations  
20 for supporting an issue, but in each instance, we  
21 were reading Nevada's pleadings and trying to  
22 understand what was the real concern being raised,  
23 was there a genuine issue of dispute as to the  
24 material issue of law of fact; what was the  
25 supporting information and given the technical issues

1 involved, it was important.

2 In each instance, the staff reasonably  
3 construed the petition and tried to understand what  
4 was in that and our objection, which pertained mostly  
5 to the adequacy of support and whether a genuine  
6 dispute had been raised, were done using the  
7 standards that the Commission has elucidated for  
8 admission of contentions.

9 So it's hard to compare repository  
10 contentions to reactor contentions because obviously,  
11 reactor -- well on the principles of allegation has  
12 been well trodden, there are a lot of different  
13 issues.

14 Obviously, there are fluctuations between  
15 the individual boards. You asked a question about  
16 who served on the Board with respect to a question --  
17 answer by Don Silverman. Anne Young was the Chairman  
18 of one of those boards. You have different readings  
19 in the context of the matters raised.

20 >> JUDGE FARRAR: Let me interrupt. The  
21 key thing you are saying though is you want me to put  
22 aside what I think I know from the past because Part  
23 63 is really a different animal?

24 >> MS. YOUNG: It is and obviously, this is  
25 a case of first impression, and Nevada and the other

1 parties have, you know, labored hard to try to raise  
2 issues, but this staff and those who are responding  
3 to petitions there also labored equally hard, if not  
4 longer, although in a shorter period of time to try  
5 to understand the issues raised and whether they were  
6 adequately contained in the context of the regulatory  
7 requirements contentions.

8 >> JUDGE FARRAR: That's a fair answer.  
9 Thank you. I don't need a reply. We need to get  
10 through this or we won't get through this. I'll give  
11 you ten seconds.

12 >> MR. MALSCH: Just to make a quick  
13 observation. When the Commission entertained  
14 contentions in the first license renewal proceedings,  
15 it didn't cast the past aside. When it entertained  
16 contentions in the first storage proceeding, it  
17 didn't cast the past aside. When it entertained  
18 contentions in the first enrichment progressive  
19 conservative, it didn't cast the past aside.

20 I would call the attention to the  
21 Commission contentions of the LES case and they  
22 invited the Board to compare that contention with any  
23 of ours and conclude, that we believe would be the  
24 case, that our contention is, if anything, better  
25 than theirs and that was admitted by the Commission,

1 and not a licensing board.

2 >> JUDGE FARRAR: Thank you, Mr. Malsch.  
3 Mr. Silverman, let's talk about on a general basis,  
4 your contentions.

5 >> MS. YOUNG: Judge Farrar, if I could  
6 respond briefly to one issue.

7 >> JUDGE FARRAR: I really got to get  
8 through this. Go ahead.

9 >> MS. YOUNG: Mr. Malsch suggested in the  
10 first license renewal proceeding the Commission  
11 didn't pass -- use a different standard. There were  
12 no contentions admitted in the first license renewal  
13 proceedings.

14 >> JUDGE FARRAR: Thank you.  
15 Mr. Silverman, let's talk about your contentions 174  
16 to 183 which are the air crash contentions and just  
17 talk about them generally. A few years ago, we had a  
18 proceeding at PFS where we ended up with two phases,  
19 a total of 60 days of hearing.

20 The company lost on the first go-around,  
21 one on the second go-around on contentions. And the  
22 original contention which as Mr. Silver recalls, was  
23 very simple, had very little in it and behind it.

24 We ended up having a hearing on issues that  
25 looked very much like these issues, 174 to 183. We

1 had the very same witnesses that the State of Nevada  
2 brings forward.

3 I'm having trouble saying that what they've  
4 put forward isn't as much as the State of Utah put  
5 forward and State of Utah won the first phase of that  
6 case and for a time, had the project blocked.

7 I'm having trouble finding any way that I  
8 could reject these contentions. Can you help me with  
9 that?

10 >> MR. SILVERMAN: As much as I'd like to,  
11 Your Honor, without going back and reviewing them, I  
12 apologize Your Honor, without trying to compare and  
13 contrast, I apologize.

14 >> JUDGE FARRAR: But this generally, this  
15 is the PFA-- PFS case all over again --

16 >> MR. SILVERMAN: I sat on the PFS Board.  
17 I really can't do it.

18 >> JUDGE FARRAR: Mr. Silberg, in case you  
19 get admitted here, should these contentions be  
20 admitted?

21 >> MR. SILBERG: I've not read them, Your  
22 Honor.

23 >> JUDGE FARRAR: Moving right along. Is  
24 there some contentions and when I speak of specific  
25 contentions now, I'm not so much interested in the

1 contention, itself as in the principle behind it,  
2 which might affect a number of other contentions.

3           Contention 139 states the issue is whether  
4 the DOE has to file a description of something now or  
5 details. And DOE says we don't need details now, we  
6 only need descriptions. When do we get the details,  
7 Mr. Silverman?

8           And I don't mean just on this one, but  
9 generally, if your application only needs a  
10 description, when do we get the details? Is that at  
11 phase 2 of Mr. Silberg's multi-phase?

12           >> MR. SILVERMAN: Did you say 139?

13           I'm not familiar with the numbers. There  
14 were contentions made with material plans, a county  
15 plan as I recall --

16           >> JUDGE FARRAR: I'll tell you in just a  
17 second; 139 was emergency, yeah, dealing with plans  
18 for radiological emergencies.

19           >> MR. SILVERMAN: I had a different number  
20 for that. The regulation and I -- it would take me a  
21 moment to find it, the regulations specifies when  
22 that's to be required to be submitted.

23           >> JUDGE FARRAR: The description now, if I  
24 read the rate carefully enough, I'll find out -- when  
25 the details have to be supplied.

1 >> MR. SILVERMAN: Yes, sir.

2 >> JUDGE FARRAR: Now, if thigh challenged.  
3 If they look for details now and we say, sorry, it's  
4 a bad contention, you can't get the details now.

5 Do they get to come back with a contention  
6 at a later stage and say, now, we gave us the details  
7 and we don't owe -- is that the time contention?

8 >> MR. SILVERMAN: If their contention when  
9 we submit an emergency plan is that the emergency  
10 plan is inadequate, and they file that contention  
11 within a reasonable amount of time after the  
12 emergency plan is made available, that -- that's  
13 timely.

14 >> JUDGE FARRAR: That's timely. Still  
15 they have to meet the other stuff. But they're not  
16 out of time because they've raised it now?

17 You are saying, in fact, it's too early to  
18 give you that now, go away?

19 >> MR. SILVERMAN: I can't challenge the  
20 emergency plan that doesn't exist and is required to  
21 be submitted. And I believe there is a rulemaking on  
22 the security issues, and MCA issues that specifies --  
23 I think it hasn't gone final yet, the exact dates  
24 when the fiscal security TSPA plans have to be  
25 submitted. It's not now. It' s later

1 >> MS. ROBY: Your Honor, Debra Roby for  
2 Clark County: A follow-up to that.

3 I believe there is case law that states if  
4 an emergency plan is to be prepared at a later stage,  
5 if that contention should still be admitted at this  
6 stage and to prevent that from being admitted at this  
7 stage may deny it down the road. You may be faced  
8 with an untimely --

9 >> JUDGE FARRAR: So under your theory, you  
10 would admit it and just hold it in abeyance until it  
11 became ripe?

12 >> MS. ROBY: I would admit it at this  
13 stage, yes.

14 >> JUDGE FARRAR: It would eventually do  
15 the emergency plan?

16 >> MS. ROBY: Correct.

17 >> JUDGE FARRAR: And then they'd have to  
18 file in effect --

19 >> MS. ROBY: At that point, there may be  
20 an amended contention based upon the filing of the  
21 information at that point. But the contention would  
22 already be in. And then it would be an amended  
23 contention at that point.

24 >> JUDGE FARRAR: Let me say,  
25 Mr. Silverman, you don't agree?

1 >> MR. SILVERMAN: Ten seconds or less; the  
2 regulation in 63.21, it's a sub element of 21 which  
3 says the description of the plan for responding or  
4 covering a description of the plan for emergencies.  
5 We laid out in our Answer why there was a history of  
6 that, I believe, why that only requires a description  
7 at this time and a full emergency plan is not  
8 required.

9 So I wouldn't agree these should be  
10 admitted now and held in abeyance.

11 >> JUDGE RYERSON: But again, you would  
12 agree that once the plan exists, a proper contention  
13 could be filed at that time?

14 >> MR. SILVERMAN: Absolutely.

15 >> JUDGE FARRAR: Contentions -- Contention  
16 148, there is a mention of human factors. And I  
17 think that's the one where you accuse the State of  
18 Nevada of not coming up with enough information to  
19 show that human factors was an issue. I seem to  
20 recall we wrote in PFS where the company tried to win  
21 the case on the theory that don't worry about what  
22 the mathematical formula said, we could count on the  
23 human factors of the pilots' action to take care of  
24 things.

25 And we said, no, no, in things nuclear,

1 human factors are bad things. We try to make sure we  
2 don't rely on infallible human behavior, because  
3 that's not how things go.

4 Why is this not like, not like that where  
5 we're -- where when you challenge human factors, you  
6 have a very, very low threshold of acceptance to get  
7 in.

8 You don't have to show much to say, don't  
9 let them rely on, you know, the human factors are  
10 going to save the day.

11 >> MR. SILVERMAN: Well, two responses:  
12 One, human factors can be interpreted in two  
13 different ways.

14 One that I recognize, the principle in the  
15 nuclear industry that the best protection is a  
16 passive barrier and/or an engineered barrier. It's  
17 active and then human action is sort of the lowest  
18 level -- I appreciate that.

19 On the other hand, there's the other side  
20 of the human factors which is an analysis of building  
21 it into the design and operation of a facility; it's  
22 a positive thing.

23 It's something that's done in most  
24 facilities I know, that I'm -- I'm afraid I'm going  
25 to disappoint you. Again, I'm not familiar with

1 PFS in detail. I would have to go back and look at  
2 this contention and compare the two. I apologize.  
3 It's hard for me to give you an answer on that.

4 >> JUDGE FARRAR: Mr. Malsch, do you want  
5 want to address that quickly?

6 >>MR. MALSCH: With the definition of  
7 features, process and events in this case, most  
8 people would say a very low threshold, this would be  
9 the least case in which one would ignore human  
10 factors considerations might have an effect on the  
11 ultimate result.

12 We have had at least this one contention,  
13 that is Safety 148 and perhaps some others in which  
14 we specifically challenge DOE's basis and assumptions  
15 regarding human factors.

16 I think there are a number of factors in  
17 which we thought was a ridiculous argument, the  
18 contention should be dismissed because we presume  
19 that the construction authorization that their  
20 quality assurance program function perfectly. There  
21 would be no deviations and so far as human factors  
22 are concerned, we should assume at this stage that  
23 everyone performs perfectly. We see absolutely no  
24 basis for that in this case at all.

25 >> JUDGE FARRAR: A contention, Nevada 149

1 raised to me, the question which others did,  
2 Mr. Silverman, sometimes the contention seems  
3 self-evident. You are saying they didn't supply this  
4 and they didn't supply that.

5 But some contentions just seem  
6 self-evidently to be raising a legitimate issue. But  
7 your response never seems to recognize that.

8 You always say they fell short in terms of  
9 affidavits or expertise or references or so forth.

10 You gave a general -- I'm sorry I can't  
11 ask you a more specific question.

12 I'm trying to let you understand at least  
13 one board member's thinking in reviewing those, so  
14 you have a chance to respond.

15 >> MR. SILVERMAN: Well, my response is  
16 two-fold and I'm being repetitive.

17 The first is the contention may seem self  
18 evident. If you conclude it is self-evident after  
19 reviewing our answer, you have a judgment to make and  
20 you may conclude it is admissible.

21 To answer these questions on the individual  
22 contentions, I need to go back --

23 >> JUDGE FARRAR: These ideas, we've done a  
24 lot of work already but after this argument, we have  
25 a lot more to do. Let me go back and review it. I'm

1 trying to get some principles to apply to that next  
2 round.

3 >> MR. SILVERMAN: When you see one side of  
4 the story, it may also be self evident and then you  
5 find out later it's not.

6 >>JUDGE FARRAR: Fair comment. In  
7 Contention 157 on volcanism, DOE raised the Bolotte  
8 Defense, and, in effect, said maybe it was the staff.  
9 I think it was DOE, hold on. No, DOE raised the  
10 Bolotte Defense which was the name of a case in the  
11 enforcement arena where a court of appeals says you  
12 can't get standing to say that NRC Enforcement Act,  
13 proposed NRC enforcement action didn't go far enough.

14 And you use that as a defense to say, in --  
15 that where the state wants more completeness and  
16 accuracy, that Bolotte is barred from asking for  
17 that, that only the staff can ask for that in an  
18 enforcement proceeding and I didn't follow that.

19 >> MR. SILVERMAN: Give us just one moment.  
20 I will be brief. I haven't read the contention  
21 again, in the response. But on completeness and  
22 accuracy, if the applicant has not provided completed  
23 and accurate information in 63.7(10), that's an  
24 enforcement matter. That's clearly an enforcement  
25 matter.

1 >> JUDGE FARRAR: It may be an enforcement  
2 matter. In other words, if you file an incomplete  
3 and inaccurate application, the NRC may get after you  
4 and maybe some other agencies of government. But we  
5 have a hearing here, the fact that they have that  
6 authority to go after you in enforcement action,  
7 doesn't mean that the state or other petitioners  
8 can't also say that that part of your application is  
9 seriously deficient and therefore, your application  
10 should not be granted.

11 Now, Bolotte doesn't take away our  
12 authority in a non-enforcement case. Bolotte takes  
13 away our authority in an enforcement case. I'm  
14 asking if it takes it away in a non-enforcement case.

15 >> MR. SILVERMAN: Well, in skimming our  
16 answer, I think the arguments we make are that when  
17 staff reviews an application, they review it first to  
18 see if its docketable. They have done that. They  
19 then review the legal requirements to see if it meets  
20 the legal requirements. That's the licensed  
21 application for review.

22 I think what you were saying here is that's  
23 different from an allegation that we have failed to  
24 provide -- failure to provide complete and accurate  
25 information is different than an allegation that we

1 omitted information that should have been included  
2 generally.

3 >> JUDGE FARRAR: One is not exclusive of  
4 the other. If the staff thinks you committed -- some  
5 call it fraud -- they'll go after enforcement. But  
6 the State and the other petitioners can also say,  
7 that application is unworthy of being granted,  
8 because it's missing some stuff. That was  
9 mentioned --

10 >> MR. SILVERMAN: Just in my mind, that is  
11 typically not a complete and accuracy issue under  
12 63.10. That's a violation of a specific regulation  
13 in 63 that says "thou shall provide this information"  
14 and we didn't provide it.

15 >> JUDGE FARRAR: When are you going to --  
16 Contention 162, when are you going to submit a  
17 retrieval plan?

18 >> MR. SILVERMAN: This is not intended to  
19 be a flip answer, Your Honor but it's when the  
20 regulations requires it. I have to pinpoint the  
21 regulation, but I strongly suspect in my answer we  
22 identify --

23 >> JUDGE FARRAR: Seven years or 100 years?

24 >> MR. SILVERMAN: I can get back to with  
25 you that information. It's probably specific in the

1 regulation.

2 >> JUDGE FARRAR: Well, if it is, we'll  
3 find it. This came up mostly to my attention in  
4 connection with Nevada 163. Sometimes your paragraph  
5 six goes on for vast numbers of pages convincing us  
6 that there is no genuine dispute as to a material  
7 fact.

8 And after I read Nevada's six pages on that  
9 subject and your six pages on that subject, my  
10 conclusion is, it sounds like a dispute to me. I  
11 mean, if you can't be dismissive of them in a fairly  
12 short time, isn't that a clue that there is  
13 something, there is a real controversy here that we  
14 need to get to the bottom of, not through a pleading  
15 ruling?

16 >> MR. SILVERMAN: Is that an indicator of  
17 a genuine material dispute because the two parties  
18 have gone on at length about the issue? It may or  
19 may not be, Your Honor. It depends.

20 >> JUDGE FARRAR: It may be a subtle way to  
21 encourage shorter filings, I suppose.

22 >> MR. SILVERMAN: Yes. It may be that it  
23 took that long to explain the issue, but,  
24 nevertheless, at the end of the day, it's apparent,  
25 would be apparent on its face that the matter did not

1 raise a genuine dispute. These are complex issues,  
2 particularly in TSPA space.

3 >> JUDGE FARRAR: Moving back -- I forgot  
4 something on 149. I think that's one of the ones  
5 where the State said, you don't have any reasons that  
6 you've put forward on this particular facet of the  
7 case. And you snap back at them, well, you didn't  
8 give any reason saying why we didn't give any  
9 reasons?

10 If you have no reasons, isn't that a valid  
11 contention? You have fallen down on the job by not  
12 supporting what you've done. How can they say more  
13 than that?

14 How can they have reasons to counter your  
15 lack of reasons?

16 >> MR. SILVERMAN: They would have to  
17 explain, among other things, where in the regulations  
18 it requires to provide -- when we say "reasons make  
19 its technical basis", maybe, in other words, that  
20 there was a requirement to provide the technical  
21 basis for some piece of information, their burden  
22 initially.

23 >> JUDGE FARRAR: Mr. Malsch, I have one  
24 question for you.

25 You have a number of contentions starting

1 at 184 that deal with land use. And I kind of split  
2 them into two parts, one of which, one batch of them  
3 says they don't have the necessary approvals yet to  
4 build this thing. They have to get all these  
5 different approvals.

6 Why is that not like our old cases where we  
7 say, we're going to award the license for the reactor  
8 even if they don't have this state permit and that  
9 state permit because either they'll get there, that's  
10 not our business, either they'll get those, or they  
11 won't get them and they can't proceed.

12 What is different about that first half of  
13 your land use issues where we can't just say, let's  
14 wait and see if they get those. We don't care if  
15 they get those permits, that's somebody else's  
16 business.

17 >> MR. MALSCH: I think the distinction is  
18 that in this case as our contention provides and our  
19 Reply provides, Part 63 requires that the rights or  
20 approvals be obtained.

21 >> JUDGE FARRAR: So it's our regulation  
22 rather than the State of Connecticut's regulation?

23 >> MR. MALSCH: That's correct. We're not  
24 arguing as a general proposition that everything  
25 should be held up because of some other permit

1 requirement. We're simply arguing the matter  
2 applying to Part 63.

3 >> JUDGE FARRAR: Mr. Silverman, on the  
4 second batch of those lands use things -- oh and on  
5 the one or two of the aircraft ones, particularly the  
6 ones about the fly-overs and so forth, you say, don't  
7 worry about it, we don't have the permission yet, but  
8 we'll get the permission.

9 And I think the second batch of the land  
10 use said, you don't have the authority to keep our  
11 people off the land. These are people who would get  
12 an excessive dose, presumably would get some kind of  
13 an excessive dose.

14 Now, the aircraft ones, you say, we'll just  
15 go to the Chief of Staff of the Air Force and we'll  
16 get those permits and the people won't fly over.  
17 What we learned in the PFS case is the Chief of Staff  
18 of the Air Force doesn't like getting all these  
19 requests because it severely limits the Air Force's  
20 ability to train their people.

21 So why are -- any contention that says you  
22 don't have the control you need to have, why are  
23 those not valid contentions and we'll just leave them  
24 lingering around and when you get those permissions,  
25 then the contention goes away.

1           But I -- after what I learned in PFS, I'm  
2 reluctant to say, don't worry about it, you'll get  
3 those permits.

4           In fact, the PFS project is not going  
5 forward today because after finally winning the case  
6 with us, the company was unable to get a couple of  
7 permits that seemed -- from other agencies -- that  
8 seemed they ought to have been very routine.

9           >> MR. SILVERMAN: One moment, Your Honor.

10           >>MR. SILBERG: While DOE counsel is  
11 conferring; it seems to me -- this is Mr. Silberg for  
12 NEI -- that the easy way to deal with this is by  
13 license condition. It is a clear requirement, they  
14 can't go forward without it. Put it in as a license  
15 condition; we move on.

16           >> JUDGE FARRAR: So, does that mean,  
17 Mr. Silberg, you admit the contention and tell the  
18 parties to work out the condition or you don't admit  
19 it and trust the staff to put in the condition. Good  
20 suggestion but give me the mechanics of how you do  
21 it?

22           >>MR. SILBERG: I think you can do it  
23 either way.

24           >> JUDGE FARRAR: Okay, thank you.

25           >>MR. SILVERMAN: I understand unlicensed

1 conditions may be appropriate as a result of a  
2 evidentiary proceeding on the admitted contentions,  
3 and again, not being completely familiar with the  
4 details of those specific contentions, the issue  
5 depends upon whether we are required to have those  
6 permits now or not, as a condition -- I'm sorry, as a  
7 prerequisite of the issuance of the construction  
8 authorization. That's without regard to precisely  
9 what we have said in the answers, which I'd have to  
10 go back and look at.

11 >> JUDGE FARRAR: Why would we want to  
12 authorize you to build a multi-billion dollar  
13 facility and then at the phase 2 of this multi-phase  
14 proceeding, say, oh, that farmer can still come on  
15 the grounds because he has an easement, so sorry, you  
16 can't get a use and possession permit. Why would you  
17 want to government to function that way?

18 >> MR. SILVERMAN: Well, the first response  
19 to that thing is you would not have that contention  
20 if there was not in fact a requirement to have that  
21 permit as a condition of getting the construction  
22 authorization, number one.

23 And number two, in regard to your question  
24 what you were referring to, where you have any number  
25 of environmental permits that may come later, which

1 the NRC doesn't hold the licensing up for. Same  
2 thing, you may not get those permits, yet, the  
3 licensing goes forward. I understand Mr. Malsch's  
4 point regarding the legislation required, certainly  
5 it's a requirement. But to your point, it's no  
6 different.

7 >> JUDGE FARRAR: Thank you all for the  
8 quick answers too. I know you weren't particularly  
9 prepared for those questions, but I thought it was  
10 important to at least get your views. It will help  
11 us as we go back through the contentions.

12 >> JUDGE RYERSON: Thank you Mr. Farrar.  
13 Why don't we take one last break for ten minutes or  
14 eight minutes, come back at 4:30.

15 What I'd like you to give some thought to  
16 during this short break, we will give some thought to  
17 whether we have final questions. And we'd like to  
18 give as we said at the beginning, we'd like to give  
19 you an opportunity to address anything on today's  
20 topics. You'll have two more days. There is no need  
21 for a grand summation of your position.

22 And honestly, if you don't feel you need to  
23 say anything on any of the issues at this point; it's  
24 been a long day, and we don't need to hear anything  
25 that you don't want to give us. But we'll give you

1 eight minutes and we'll be back at 4:30. We'll see  
2 if we have further questions and we'll hear from  
3 whoever would like to speak at that time.

4 (Whereupon a short break taken)

5 >>JUDGE RYERSON: Please be seated. All  
6 right. You will be either pleased or displeased to  
7 know that the Board has at this time no further  
8 questions.

9 Now, we will be either pleased or  
10 displeased as the case may be to see whether there is  
11 further enlightenment you wish to share with us.

12 Again, I emphasize there will be two more  
13 days before the two other boards, so we're really not  
14 looking for a grand summation of any kind. We're  
15 looking to give you an opportunity to crisply address  
16 any of today's issues, where there just wasn't an  
17 opportunity or you really thought of an important  
18 point later.

19 So in that spirit, why don't we just go  
20 around the room and ask the NRC, staff anything to  
21 add?

22 >> MS. YOUNG: Mitzi Young for the NRC  
23 staff. The staff has no further comments.

24 >> JUDGE RYERSON: Thank you Ms. Young. NEI?

25 >> MR. SILBERG: Jay Silberg for NEI. Three

1 short points, Your Honor. First, thank you for giving  
2 us an opportunity to hear our case on standing.

3 Second, with respect to materiality, we  
4 believe that the contention can be material even if  
5 there is no violation of the regulation as alleged.

6 Second with materiality, the contention  
7 that argues for over conservative can be just as  
8 material as one that argues for under-conservatism.  
9 And finally with regard to contentions, I have been  
10 litigating contentions for 40 years. I can't speak  
11 for the other party's contentions, but I know ours  
12 are more specific with more basis and more care as to  
13 their legal underpinning than any contentions that I  
14 have ever seen in a law practicing before this  
15 agency.

16 >>JUDGE RYERSON: Thank you, Mr. Silberg.  
17 Mr. Silverman?

18 >> MR. SILVERMAN: We appreciate the time  
19 as well, excellent discussion today Your Honor and  
20 excellent exchange. And we have nothing further.

21 >>JUDGE RYERSON: Thank you. Mr. Malsch,  
22 for Nevada.

23 >> MR. MALSCH: Just one ten-second  
24 comment. First of all, we appreciate the time the  
25 Board spent today on the issues involved. Secondly,

1 I just wanted to briefly pick up on an interesting  
2 observation or hypothetical offered by Judge Farrar,  
3 which is when you are looking at whether there is  
4 sufficient support and facts and opinion for a  
5 contention, and you look at our contention and you  
6 look at DOE's and the staff's answer and reply and  
7 say, who can figure this out?

8 I think the case law would rather clearly  
9 indicate that the contention under those  
10 circumstances should get admitted and I just refer  
11 the Board to LaMont Yankee case LBP-06-20 and the  
12 Commission's Paliverde decision in CLI.91-12, both of  
13 which stand for the general proposition that newly  
14 contentions at the admissibility stage, the boards or  
15 Commission should draw inferences in favor of  
16 admission.

17 CHAIRMAN RYERSON: Thank you, Mr. Malsch.  
18 Mr. List, anything for the four counties?

19 >> MR. LIST: If I may, Your Honor, at the  
20 risk of violating a pattern that seemed to have  
21 started here, I would like to take a few moments to  
22 discuss what we believe is for the future of our  
23 counties, from a public policy standpoint, is  
24 extraordinarily important.

25 This is our one chance to address this

1 Board and to talk to Your Honors about what we think  
2 are critical issues for our people.

3           You mentioned at the outset of today's  
4 proceedings that, that we don't have to win the case  
5 here today, and that, that what we do have to show is  
6 a genuine issue, a genuine dispute. I think you also  
7 said that we don't have to decide it on the merits  
8 today, and we recognize that.

9           And I think that some of the legal  
10 principles which were collected in the Crowe-Beaut  
11 case are worth thinking about as we conclude these  
12 discussions about the NEPA contentions in particular.  
13 The petitioner in that case reminded us is not  
14 required to prove its case if the contention stays.  
15 We must only make a minimal showing that material  
16 facts are in dispute.

17           And we believe that we've done that. And  
18 we've met the depth required in the documentation  
19 that we have submitted. And I would just suggest  
20 that, that it might be worthwhile for the Board or  
21 your staff to look back at the original FEIS, the  
22 Final Environmental Impact Statement and contact that  
23 with the supplemental final supplemental impact  
24 statement.

25           The Supplemental Environmental Impact

1 Statement changed the size and the weight of the  
2 trucks and did not do the kind of analysis that they  
3 did previously for the other trucks that had  
4 originally been proposed. They went from, from legal  
5 weight trucks to overweight trucks; substantial  
6 difference.

7 They went from trucks less than 80,000  
8 pounds to trucks averaging around 115,000 pounds; a  
9 significant difference, difference in length as well.  
10 They also increased between those two environmental  
11 impact statements, the number of shipments from 1100  
12 to 2700.

13 So they nearly doubled the weight on the  
14 trucks and they more than doubled about 150 percent  
15 increase of the number of truck shipments. So 2700  
16 truck shipments, they've given an awful lot of  
17 concern in the environmental supplemental  
18 Environmental Impact Statement to 2800 train  
19 shipments, but very, very sparse consideration to  
20 2700 truck shipments.

21 We believe that our affidavits that support  
22 our position on NEPA Contention Number One are very,  
23 very clear, both the Affidavit and the original  
24 petition is number three. And the Affidavit or  
25 attachment Number One to the reply, laid out in depth

1 the enormous impact that these truck shipments will  
2 have.

3 The -- I think it's totally unrealistic,  
4 also, if you look at the Supplemental Environmental  
5 Impact Statement, to see that they have considered no  
6 routes in Nevada off of the interstate freeways, that  
7 is, there are two across Interstate-15 and  
8 Interstate-80. The only route they've considered to  
9 the repository, itself, is from Las Vegas off of  
10 Interstate-15.

11 It's the only one that's shown on any of  
12 the exhibits or any of -- or discussed in any of  
13 their documentation.

14 The fact is that DOE policy presently  
15 prohibits even low-level waste through Las Vegas.  
16 Secondly, by DOE's own admission, the State, under  
17 DOT regulations designates the off interstate routes  
18 and it's unimaginable that the State of Nevada would  
19 ever designate Highway 95 from Las Vegas out to the  
20 site bringing in traffic to this community.

21 And, thirdly, the level of service in Las  
22 Vegas is by DOE's own admission, congested.

23 And so, we -- what we're suggesting is that  
24 the omission of the realistic fact that these  
25 shipments are going to take place -- not from Las

1 Vegas but through our four counties, has not been  
2 recognized. It was talked about in the original  
3 final impact -- final Environmental Impact Statement,  
4 but not in the supplemental.

5 I think we've shown that clearly through  
6 the Massie Affidavit and through the two patent  
7 affidavits.

8 I should also mention that they very  
9 briefly touched on traffic in the state of Nevada off  
10 of the interstate freeways. They picked five  
11 locations, all of them right near Gate 510; three of  
12 them on 95 South where there is unlikely to ever be a  
13 single shipment seen.

14 One of them on the road over to Death  
15 Valley, which would be a very unusual place to have  
16 shipments, although there may be some, and one right  
17 at the gate, but none up in the four counties where  
18 in all likelihood we are going to see significant  
19 shipments as we demonstrated in our affidavits.

20 Each of the locations they've chosen was in  
21 the middle of nowhere, away from the communities,  
22 away from the towns, when in reality, these shipments  
23 are going to go on two-lane highways right through  
24 these communities. These are inextricably connected  
25 to this repository project.

1           There is no doubt if one considers what  
2 makes this plan -- this whole plan go, they have to  
3 consider it. The -- I think similarly, and they've  
4 attempted to do some calculation on radiation doses  
5 for maximum exposed workers and members of the public  
6 caused by Nevada transportation. The only location  
7 chosen for that was in Indian Springs which again was  
8 on 95 South of the repository where it's unlikely  
9 there will ever be a single shipment.

10           The SEIS also estimates the total number of  
11 shipments by train, as I mentioned. They go through  
12 extensive analysis of the details and the procedures  
13 and processes necessary to deal with the train, not  
14 only in this EIS but also, of course, in the county  
15 rail analysis study and the Environmental Impact  
16 Statement there.

17           We think that our affidavits clearly show  
18 new information within the meaning of 51.109 and we  
19 note that the EIS does address environmental impacts  
20 of transportation by truck on a national scale, but  
21 they don't do it in Nevada.

22           And the defect in that approach to it is  
23 that they simply don't address the environmental  
24 impacts which will result in the confluence of trucks  
25 coming off of the Interstate and proceeding to the

1 Yucca Mountain project.

2           Every single truck has to come down that  
3 two-lane highway. And so what you have is a  
4 convergence, sort of a funneling effect of thousands  
5 of trucks, overweight trucks after they leave the  
6 interstate system traveling through several hundred  
7 miles through small towns adjacent to the counties,  
8 adjacent to Nye County.

9           And to ignore that is a violation, we  
10 believe, of the case law and of the regulation.  
11 The -- there is zero recognition nor discussion of  
12 the resulting environmental impacts on the traffic  
13 congestion and safety, and the impact and damage on  
14 the roads, themselves. The burden of the  
15 consequential impact on the first responders which  
16 are enormously significant.

17           The absence of communication  
18 inner-operability among first responders and law  
19 enforcement on these counties and communities that  
20 are adjacent to the site.

21           The affidavits demonstrate that there are a  
22 tremendous absence of staff and individuals are  
23 dependent largely on volunteers. They don't have the  
24 equipment. DOE attempts to gloss over that by saying  
25 well, we're going to give them the training and

1 planning required under Section 180-C of the Nuclear  
2 Waste Policy Act.

3 But planning and training certainly does  
4 not equip or staff these people to deal with the  
5 emergencies that clearly are going to arise.

6 So we suggest to you that the NEPA document  
7 is absolutely inadequate. They have not taken a hard  
8 look at the consequences of this project and of the  
9 important aspect of it. They have not come up with a  
10 mitigation plan at all insofar as the matters that I  
11 just touched upon which, of course, they are required  
12 to do.

13 Even if they haven't mentioned some of the  
14 mitigation measures, that's insufficient. They have  
15 to have a reason discussion.

16 So for all these reasons, they fall short  
17 of what the law requires and these are critically  
18 important matters to the residents of these  
19 communities. We're not out to kill this project.  
20 Let me make that clear. The people in these  
21 communities have taken a constructive approach.  
22 They're the ones that live closest to the project.

23 And they have every right to insist that  
24 the documentation done in this matter be done in  
25 accordance with law, that they have an opportunity to

1     come in and be heard.  And I think it's also worth  
2     mentioning that the DOE, itself, in a previous -- in  
3     the final Environmental Impact Statement, actually  
4     said they were responsible for developing a response  
5     policy.  And yet, they didn't do it.  They don't talk  
6     about it in the supplemental EIS.  How big are the  
7     impacts?

8                 We've made an effort on our own to quantify  
9     it.  There is a reason these units of government are  
10    called defective units of government.  Congress calls  
11    them that.

12                That's because they are defective.  Our  
13    analysis shows that about \$185 million dollars in  
14    highway improvements are needed in just these four  
15    counties, another \$18 million annually to maintain  
16    them; about \$16 million in capital costs to equip our  
17    first responders, an annual operating cost there of  
18    another \$15 million.  And \$7 million to establish the  
19    ability to communicate.

20                Currently a sheriff in one county can't  
21    talk to a sheriff in another county or to the highway  
22    patrol or to the ambulance company, or to the  
23    volunteers that run them, or to the hospital.  None  
24    of them are able to do that.

25                That's another \$7 million.  These are poor

1 counties as the affidavits show that don't have the  
2 money to deal with that.

3 So they -- people need to be put on notice  
4 these things need to be quantified and discussed in  
5 such a way that they can be addressed.

6 >> JUDGE RYERSON: Now, Mr. List, I want to  
7 assure you that this Board and the other boards will  
8 be carefully reading each of the 328 or 29  
9 contentions that we have. And I appreciate you  
10 highlighting them. If you can wrap up in the next  
11 minute or so, I'd appreciate it.

12 >> MR. LIST: I will. I'm almost to the  
13 end. I appreciate your indulgence, Your Honor. So  
14 in our limited way, we've taken a bit of a hard look  
15 to look at these things and do what DOE should have  
16 done.

17 We've demonstrated those in our Affidavits.  
18 I also want to in closing mention that this is the  
19 time that this contention needs to be taken up. It  
20 should not be deferred. It takes years to design and  
21 to put together the kind of improvements we're  
22 talking about and then to construct hundreds of miles  
23 of highway, to put together the funding that's  
24 necessary and these things don't all get built at  
25 once. And it should not be put off until the time

1 when the actual time comes, the day comes when  
2 they're ready to complete the construction and  
3 they're ready to put the material in.

4 So in essence, I appreciate your indulgence  
5 and I want to simply say that we feel very  
6 passionately about this and trust this Board and the  
7 other boards to read carefully and to take into  
8 account the matters that we've put forth.

9 >>JUDGE RYERSON: Thank you Mr. List.  
10 Mr. Sullivan for California.

11 >>MR. SULLIVAN: Thank you, Your Honor. We  
12 appreciate the opportunity to participate in this  
13 procedure and we also greatly appreciate the extreme  
14 amount of preparation and thought that the panel has  
15 obviously given to all of these issues and I think  
16 all the attorneys in the room can appreciate that.

17 The NRC has an obligation to, under NEPA to  
18 consider the environmental impacts of not just the  
19 construction of the repository, but also connected  
20 actions even if they're not under NRC's direct  
21 regulatory control. Transportation and construction  
22 are inextricably linked.

23 It's irrational to just do just one or the  
24 other. They have to go together. The NEI case,  
25 NRC's own regulations and the hearing notice all

1 allow parties to litigate substantive NEPA issues in  
2 this proceeding.

3 I want to talk a little bit about what has  
4 not come before us, specifically, in the Nevada vs.  
5 DOE case. California is not a party there so res  
6 judicata, collateral estoppel don't apply to us.

7 There were very few issues that were  
8 actually decided on the merits in that case. The  
9 court in Nevada vs. DOE looked at the 2002 repository  
10 EIS. No court has ever considered the other  
11 documents since that 2000 EIS.

12 In 2008, the Department of Energy issued a  
13 record decision that said that although we analyzed  
14 the Minor route and the Caliente route and the Minor  
15 Route is environmentally preferably. But we're not  
16 going to choose that one. No court has ever looked  
17 at the difference between the Minor and the Caliente  
18 Route and whether or not DOE adequately analyzed  
19 that.

20 No court has ever ruled on transportation  
21 impacts outside of Nevada, whether those have been  
22 properly analyzed by DOE. So we think that all these  
23 issues as outlined in our contentions are proper for  
24 this proceeding. Thank you.

25 >> JUDGE RYERSON: Thank you, Mr. Sullivan.

1 Mr. Huston?

2 >> MR. HUSTON: Your Honors, thank you. We  
3 are I'm certain the only private party at this  
4 proceeding, that small land owner in Lincoln County.  
5 At the outset of the hearing today, Mr. Sullivan was  
6 asked whether there had been any change in DOE's  
7 position.

8 It was unclear to me whether the question  
9 was directed toward the DOE's commitment or lack  
10 thereof to the license application and this process.  
11 Toward the end of the questioning, Judge Farrar asked  
12 why contention could not be maintained, to the effect  
13 that DOE did not control the site and what it needed  
14 to complete the project. And possibly that farmer  
15 that maintained the right to walk around the site.

16 This Board and CHS, Caliente Hot Springs  
17 Resort, it seems that the Commission are well aware  
18 that the project subject to the LAN is in the  
19 President's words, quote, unquote "dead."

20 Further, the Secretary of Energy confirmed  
21 that the administration determined that Yucca  
22 Mountain would never be built in testimony before a  
23 Senate on natural resources on March 17th of this  
24 year. When asked by Senator McCain, what is wrong  
25 with Yucca Mountain, his secretary testified, I think

1 we can do better.

2 All of the parties here who have filed  
3 contentions agreed in some part or portion or spirit  
4 with the Secretary of Energy.

5 My concern is that DOE is wasting my time  
6 and Treasury and those of Nevada and California and  
7 that the counties represented here, and the other  
8 parties and the U.S. treasury, itself, and this  
9 proceeding presently lacks foundation and DOE candor  
10 at its very core.

11 If so, DOE should withdraw the LAN at its  
12 earlier opportunity as topics discussed today may, in  
13 fact, have no relevance or value to the parties or to  
14 the public. Only if DOE intends to proceed to  
15 construction are all our efforts and expenditures and  
16 time here today and in the future justified and have  
17 any value.

18 We're all -- the administration is  
19 determined not to proceed. All we lack is withdrawal  
20 of the LA --

21 >> JUDGE RYERSON: Mr. Huston, thank you.  
22 I, at this point, we are dealing with an application  
23 that is in front of the NRC and it's not -- it is  
24 really not an issue that is relevant to this Board as  
25 to whether DOE should or should not be withdrawing

1 the application. If you have comments beyond that of  
2 a brief nature, please, please continue.

3 >> MR. HUSTON: Well, with all due respect,  
4 these proceedings are probably costing about \$2  
5 million dollars but with regard to the topics  
6 discussed here today, Caliente Hot Springs finds  
7 itself in agreement with Nevada, California, the Four  
8 Counties, and the tribes on the issues. Thank you.

9 >> JUDGE RYERSON: Thank you, Mr. Huston.  
10 Ms. Curran, your participation as a  
11 non-party is not opposed so I'll pass you by. We'll  
12 move on to Mr. Poland, is that it?

13 >> MR. POLAND: Thank you, Your Honor, yes.  
14 On behalf of the Timbisha Oversight Program, we  
15 understand there will be some native American issues  
16 that will be discussed tomorrow. However, because  
17 our sole contention is that NEPA contention, those  
18 are the issues before this Board today, I wanted to  
19 very briefly address those.

20 As I mentioned, the Timbisha Oversight  
21 Program proffers just one contention, that's a NEPA  
22 contention contained in our amended petition. That  
23 contention notes DOE's concession in the EIS and the  
24 SEIS that contaminants from the geologic repository  
25 might contribute to and discharge into the Death

1 Valley Springs.

2 That contention also is supported by  
3 affidavits of members of the Timbisha Shoshone Tribe  
4 who live in the Death Valley area as well as an  
5 expert anthropologist that tribal cultural religious  
6 and other interests, which are based on the purity of  
7 the water, including Spring's Death Valley, would be  
8 greatly harmed by the contamination of those springs.

9 It's notable that the NRC staff does not  
10 oppose the admissibility of this single NEPA  
11 contention that the Timbisha Oversight Program is  
12 proper. The DOE, however, does oppose this  
13 contention and I would like to address two points of  
14 difference. First, DOE argues that this contention  
15 does not raise a significant issue and is not  
16 material.

17 Now, some people might view Native American  
18 religion and culture as history.

19 Although, it is true that the Timbisha  
20 Shoshone has maintained their culture and practiced  
21 their religion for thousands of years. Their culture  
22 and religious practices which revolve around the  
23 purity springs and water are very much alive. They  
24 are practiced now as they were a thousand years ago.

25 The notion that the devastation of an

1 entire people's cultural and religious practices  
2 stretching back thousands of years is not significant  
3 or material, is culturally myopic. It is offensive  
4 and it is just plain wrong under CEQ regulations, NRC  
5 regulations and NRC guidance.

6 I suspect that for many of us in this room,  
7 our cultural heritage and our religious practices are  
8 not just significant to us, they are central parts of  
9 our lives. It is no less so for the Timbisha  
10 Shoshone.

11 Second point of difference. DOE claims  
12 that it took the hard look at cultural impacts that  
13 the regulations required it to take and that that  
14 hard look is reflected in the EIS. What DOE sites  
15 for this proposition is a single page in the FDIS and  
16 a single page in the SDIS. Both pages say  
17 essentially, the same thing. The passage from  
18 SDIS reads as follows:

19 "The American Indian people believe  
20 cultural resources are not limited to the remains of  
21 native ancestors, but include all natural resources  
22 and geologic formations in the region, such as plants  
23 and animals and natural land forms. Equally  
24 important are water resources and minerals."

25 Now, this is supposedly the hard look that

1 DOE took at the impact on Timbisha Shoshone cultural  
2 interests. This is patently deficient in at least  
3 two ways. It lumps together the cultural interests of  
4 all American Indian tribes as though they are  
5 identical and there are no differences.

6 Second, it says only that water resources  
7 and minerals are important. It mentions nothing  
8 about the devastating impact on Timbisha culture and  
9 religious practices that contamination of the Death  
10 Valley Springs would have.

11 In sum, if the purpose of NEPA and the  
12 implementing regulations of the CEQ and NRC is to  
13 ensure that the decision-makers in this proceeding  
14 have before them analyses of all the important  
15 effects and consequences that might result from the  
16 proposed geological repository, then it is clear that  
17 the contentions the Timbisha Oversight Program has  
18 raised are significant, they are material, they will  
19 help develop a sound record. They should be  
20 admitted. Thank you.

21 >> JUDGE RYERSON: Thank you Mr. Poland.  
22 Mr. James for Inyo County?

23 >> MR. JAMES: Yes, good afternoon. I  
24 simply want to commend your Board for the excellent  
25 preparation for this hearing and for conducting an

1 excellent hearing this afternoon and this morning.

2 Thank you.

3 >> JUDGE RYERSON: Thank you. Nye County.

4 Mr. Anderson?

5 >> MR. ANDERSON: Yes, Your Honor. On  
6 behalf of Nye County, first of all, we want to  
7 express our appreciation also as the host county for  
8 the repository, for this opportunity to discuss with  
9 you contentions which are important to the residents  
10 of Nye County and to their safety.

11 And second, Judge Ryerson, you did a far  
12 more cogent job of explaining the disparate and  
13 seemingly inconsistent statutory, regulatory and  
14 notice requirements that apply to the admissibility  
15 of NEPA than I ever could have. So we came here with  
16 some trepidation that it might come out with a  
17 principle that Nye County could not live.

18 But we are now convinced that the Board  
19 recognizes that determining the admissibility of NEPA  
20 contentions is not tied to the ultimate outcome on of  
21 the decision on whether or not to construct the  
22 project but, rather, whether or not an omission of a  
23 considerate was significantly and environmentally  
24 under consideration from the Environmental Impact  
25 Statement should be supplemented. That's the outcome

1 of the concern.

2 Finally, we support the standing of NEI as  
3 a party in this proceeding and have joined in  
4 adopting two of their contentions and they've adopted  
5 some of our contentions.

6 We do that for a number of reasons, but we  
7 believe they meet all the Supreme Court and NRC  
8 standards for standing as a party. We're somewhat  
9 surprised at the opposition that's been received  
10 after their full participation to this point and  
11 perhaps most importantly we support it because we  
12 believe NEI members have handled fuel for many years,  
13 storage and otherwise and have decades of technical  
14 expertise in those issues and are essential to NRC's  
15 resolution, informed resolution of these issues.  
16 Thank you, Your Honor.

17 >> JUDGE RYERSON: Thank you, Mr. Anderson.  
18 Ms. Houck?

19 >> MS. HOUCK: Thank you, Your Honor. The  
20 tribe would like to thank the Board for taking the  
21 time today. The Timbisha Shoshone Tribe concurs with  
22 the comments of Nevada, the Four Counties and the  
23 State of California and the other parties concerning  
24 the issues regarding the environmental contentions.

25 We also concur with the statements made by

1 Mr. Poland and I'm not going to repeat those. But I  
2 will note that by virtue of the language in the  
3 Nuclear Waste Policy Act and the regulations by being  
4 certified as an affected native tribe, the Timbisha  
5 Shoshone Tribe may suffer substantial and adverse  
6 impacts to its lands.

7           And that is what the language in both the  
8 Nuclear Waste Policy Act and the regulations state  
9 and that is the Timbisha Shoshone Tribe, not a  
10 generic one paragraph or two paragraph reference to  
11 potential impacts to native Americans.

12           There is nothing in the environmental  
13 document that addresses the specific substantial and  
14 adverse impacts that the tribe may suffer as a result  
15 of this project being located in the proposed area.

16           Therefore, based on the discussions today  
17 regarding what is significant and material, this  
18 document is lacking significant and material  
19 information that is required and, therefore, the  
20 document would be fatally flawed as decision-makers  
21 don't have the information as to the direct impact  
22 that the tribe is going to suffer.

23           So we would ask the Board to take that into  
24 consideration when examining the contentions proffered  
25 by the tribe.

1 >> JUDGE RYERSON: Thank you. For Clark  
2 County, Ms. Roby.

3 >> MS. ROBY: Thank you very much. On  
4 behalf of Clark County, we, too, would like to thank  
5 the Board for what was a very good discussion today  
6 and what is obviously a lot of thought and  
7 preparation performed by the Board for today.

8 Very briefly, we do agree with the  
9 comments, closing remarks by the State of Nevada,  
10 State of California and the Four Counties with  
11 respect to environmental impacts. There is no  
12 question that in the event of an emergency, Clark  
13 County will be among the first responders and  
14 evaluation of impacts related to the transportation,  
15 related to the licensing of this repository are  
16 absolutely important to Clark County.

17 And finally, we agree with the State of  
18 California with respect to the admissibility of  
19 contentions and where there is substantial discussion  
20 in the pleadings, it ought to fall in favor of  
21 admission. That type of discussion indicates that  
22 there is a genuine issue of material fact proper for  
23 a full and robust record. Thank you.

24 CHAIRMAN RYERSON: Thank you. And for  
25 White Pine County, Mr. Sears.

1 >> MR. SEARS: I'm sure you are tired of  
2 being thanked and would like to get out of here.

3 >> JUDGE RYERSON: Enough times, already,  
4 thank you.

5 >> MR. SEARS: Turning for your attention  
6 however, I would like to say something on behalf of  
7 the voters that sent me here.

8 White Pine County is north of this project  
9 and the tendency may be to think because we are north  
10 of this project that we are upwind of this project.  
11 We are not. And that of course is if you read our  
12 pleading, which I'm sure you have.

13 Our concern, our position is that the DOE  
14 posite is something like a chemical company kicking  
15 mercury into a river, and then looking upstream and  
16 saying, no problem. We are downstream from that  
17 mercury spill. I'd ask you to take a careful look at  
18 our expert affidavits that show that. Thank you.

19 >> JUDGE RYERSON: Thank you. .

20 >> JUDGE RYERSON: Thank you. And

21 Mr. Williams.

22 >>MR. WILLIAMS: We are at the end of the  
23 line here today. Your Honor, I think the wise choice  
24 would be to withhold our comments until tomorrow, so  
25 we will. Thank you very much.

1 >>JUDGE RYERSON: Thank you. All right.  
2 And thank you all. That concludes what we intended to  
3 cover today. One thing I want to mention before a  
4 couple other words, is we've run just slightly over  
5 5:00, so the guards will be trying to shoo you out of  
6 the facility so they can go home, but there will be a  
7 few minutes for you to talk to each other but they  
8 will be hoping that you leave the facility fairly  
9 promptly.

10 We have gone a little bit over our 5:00  
11 time. You know, as our March 18 order indicates,  
12 Construction Authorization Board 2 will be here at  
13 9:00 tomorrow to continue primarily on the issues  
14 identified in Appendix B. And perhaps most  
15 importantly, on behalf of our Board, I really would  
16 like to thank all of you for your comments.

17 We talked about them during the break and  
18 at lunch and we found them very helpful. We found  
19 the quality of argument very high and several people  
20 commented on that. We also appreciate that you are  
21 required by the rigorous briefing schedule that has  
22 been imposed in this matter, to brief an enormous  
23 number of issues in a short period of time and we are  
24 very appreciative of that.

25 We know you have done a lot of work in a

1 limited time period and we expect to and hope to  
2 mirror that as we move into a decision phase and have  
3 a prompt decision and a timely decision for you. Any  
4 comments Judge Farrar?

5 >> JUDGE FARRAR: No.

6 >> JUDGE RYERSON: Judge Barnett?

7 Again, thank you very much. We stand  
8 adjourned until tomorrow morning at 9:00.

9 (Whereupon, proceedings were concluded)

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