

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

In the Matter of
U.S. Department of Energy
High Level Waste Repository
Docket No. 63-001-HWL

APRIL 2, 2009

TRANSCRIPT OF PROCEEDINGS

Oral Argument on Admissibility of Contentions

Before the Administrative Judges:

CAB-01

William J. Froehlich, Chairman

Thomas S. Moore

Richard E. Wardwell

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APPEARANCES

For the Nuclear Regulatory Commission Staff:

Mitzi Young, Esq
Kevin Roach, Esq
Dan Lenehan, Esq.
Andrea Silvia, Esq.
Daniel H. Fruchter, Esq.

For the Nuclear Energy Institute:

Jay E. Silberg, Esq.
David A.Repka, Esq.

For the Department of Energy:

Paul J.Zaffuts,Esq.
Donald J. Silverman, Esq.
Alex S.Polansky,Esq.
Michael Shebelskie, Esq.

For the State of Nevada:

Martin G.Malsch, Esq.
John Lawrence, Esq.
Charles Fitzpatrick,Esq.

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

Robert List, Esq.
Jennifer Gores,Esq.

For the State of California:

Tim Sullivan, Esq.
Kevin Bell, Esq.
Susan Durbin, Esq.

For the Caliente Hot Springs Resort:

John Huston, Esq.

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 Dr. Michael Baughman
7 Richard Sears, Esq.

8 For the Nevada County of Clark:

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

11 For the Timbisha Shoshone Tribe:

12 Darcie Houck, Esq.
13 Ed Beanan

14 For the Nevada County of Nye:

15 Rob Anderson, Esq.
16 Jeff VanNiel, Esq.

17 For the California County of Inyo:

18 Greg James, Esq.

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

23 For the Nevada Counties of Lincoln and Eureka:

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

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P R O C E E D I N G S

JUDGE FROEHLICH: We'll be on the record.
This is the third and final day of the oral argument
in the matter of the Department of Energy's
Application for Construction and Authorization of a
high-level waste repository at Yucca Mountain.

This Board has been designated CAB1 by
order of the Chief Judge on January 16th, 2009. And I
have been designated Chairman of this CAB.

My name is Judge William Froehlich. On my
right is Judge Thomas S. Moore, who, like me, has a
legal background. And on my left is Judge Richard E.
Wardwell, who has a technical background with a PhD
in civil engineering.

At this time I'd like to take the
appearances and start with the NRC staff.

>> MR. LENEHAN: Good morning, Your Honor,
Dan Lenehan, NRC staff.

>> MR. ROACH: Kevin Roach, NRC staff.

>> MS. YOUNG: Good morning, Mitzi Young
representing the NRC staff.

>> JUDGE FROEHLICH: Thank you. For the
NEI.

>> MR. SILBERG: Jay Silberg representing

1 Nuclear Energy Institute. Good morning.

2 >> JUDGE FROEHLICH: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 >> JUDGE FROEHLICH: For Caliente.

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

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

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

16 >> JUDGE FROEHLICH: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 >> JUDGE FROEHLICH: Thank you.

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

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

9 Hearing none, let's begin generally with
10 those items that were designated Item 4 on Appendix C
11 from the March 18th order.

12 Item 4 deals with concerns with climate
13 change related to human activity. You may recall on
14 the first day of the oral arguments in this
15 proceeding, Judge Ryerson of CAB3 relayed a request
16 from this Board that all parties review their
17 proffered contentions to see which contentions, if
18 any, would be affected by the Commission's recent
19 amendment to the Part 63 rules, specifically 63.305
20 and 63.342.

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

1 who you represent when speaking. If we could start
2 over there.

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

10 >> JUDGE FROEHLICH: White Pine?

11 >> MR. SEARS: Sears, White Pine County.

12 None, Your Honor.

13 >> JUDGE FROEHLICH: County of Clark?

14 >> MS. ROBY: Debra Roby, Clark County.

15 None of our contentions are directly affected by the
16 changes to Part 63.

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

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

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

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

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

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

7 >> JUDGE FROEHLICH: County of Nye.

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

11 >> JUDGE FROEHLICH: Inyo?

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

15 >> JUDGE FROEHLICH: Thank you. Please.

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

22 >> JUDGE FROEHLICH: Nevada counties of
23 Lincoln and Eureka?

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

1 >> JUDGE FROEHLICH: Yes. Thank you.

2 Caliente?

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

5 >> JUDGE FROEHLICH: State of California.

6 >> CALIFORNIA: Tim Sullivan for California.

7 All of our contentions are based on NEPA. We don't
8 think that the change in the regulation affects any
9 of those contentions.

10 >> JUDGE FROEHLICH: Okay. Four counties.

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

14 >> JUDGE FROEHLICH: State of Nevada?

15 >> MR. MALSCH: Thank you, Your Honor.

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

23 >> JUDGE FROEHLICH: NEI please?

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

1 >> JUDGE FROEHLICH: Okay. The DOE and the
2 staff were also asked which of the proposed
3 contentions are affected by the revisions to Part 63.
4 DOE, did you prepare a list or can you address that?

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

8 >> JUDGE FROEHLICH: And the NRC staff.

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

14 >> JUDGE FROEHLICH: Could I --

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

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

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

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

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

16 >> JUDGE MOORE: Okay. Thank you.

17 >> MS. YOUNG: One involves erosion in
18 300,000 years, I believe.

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

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

24 >> JUDGE WARDWELL: Thank you.

25 >> MS. YOUNG: I won't say it's a perfect

1 list.

2 >> JUDGE WARDWELL: Sure. I understand.

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

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

10 >> JUDGE WARDWELL: No. I was playing --
11 I'm sorry -- with you. Just -- I want to be
12 clarified on what your opinion is we should be using
13 as a basis to evaluate the application. And by that
14 I mean, Part 63 was first promulgated, I think, in
15 2001. It dealt only with a 10,000-year period. That
16 was short-lived.

17 In 2004, the circuit court ruling said that
18 wasn't a sufficient time period. EPA went back to
19 the drawing boards, published a proposed rule, I
20 think, in 2005, and I think the NRC did the same
21 thing in proposing a draft rule.

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

1 What rule controls what we should be
2 evaluating as a Board; the original one or the
3 recently adopted one?

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

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

17 I believe the Board's aware that the staff
18 provided notice of the date of that publication and
19 rule.

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

1 But you have here contentions, I believe,
2 that were filed under the current -- the rules prior
3 to the proposed revision of Part 63. So in the end
4 during the proceeding, it will be both rules that
5 apply, but I believe most of the petitioners here did
6 not specifically address the amended rules
7 implementing the EPA standard.

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

17 If the language about additional periods
18 was stricken, we understand all those, but she
19 identified Nevada Safety 154.

20 Could you tell me why it's not impacted in
21 your view, providing the Commission's final
22 March 13th amendments to Part 63?

23 >> MR. MALSCH: Yes, Judge Moore, I can.
24 And the initial focuses on the provision of the rule
25 which provides that DOE is required to include those

1 FEPs that are screened into the performance
2 assessments for the first 10,000 years after
3 repository closure, and before FEPs specifically
4 identified for inclusion later on. So if a feature,
5 process, or event is slated for inclusion in the
6 performance assessment for the first 10,000 years,
7 then it must be included thereafter.

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

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

21 So we're not alleging in that contention,
22 in any event, any effects beyond those that are
23 normally included in igneous events and FEPs for the
24 post 10,000-year period.

25 >> JUDGE MOORE: Thank you.

1 >> JUDGE WARDWELL: Back to staff and
2 Ms. Young. Could you comment on your impression of
3 the changes that have occurred between the proposed
4 NRC rule and the final NRC rule?

5 >> MS. YOUNG: Well, I believe the final
6 rule clarified --

7 >> JUDGE WARDWELL: In a general fashion.

8 >> MS. YOUNG: Yeah.

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

14 >> MS. YOUNG: I believe there was a change
15 also with respect to the total effective dose
16 equivalent.

17 >> JUDGE WARDWELL: And what about the
18 earthquake from the rise in the water level? Has
19 that changed or was that pretty much the same as it
20 was in the draft?

21 >> MS. YOUNG: Well, the magnitude in terms
22 of seismic activity was very similar. I believe
23 what the final rule basically identifies which FEPs
24 in addition to those that have been screened in for
25 the first 10,000 years have to be addressed in the

1 post-10,000 year period. Climate change is one of
2 those. Igneous activity is another; general
3 corrosion and seismicity.

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

6 >>NRC STAFF: That's correct.

7 >> JUDGE WARDWELL: I'm interested in the
8 differences between the proposed and the final, not
9 in the existing Part 63 and the proposed.

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

16 In terms of the admissibility, our
17 arguments regarding the admissibility of the
18 contentions would not change because of the rule.

19 >> JUDGE WARDWELL: Good. That's where I
20 was going next.

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

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

25 >> JUDGE WARDWELL: I'd like to ask a

1 question first.

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

3 >> JUDGE WARDWELL: I hadn't asked -- I
4 didn't want you to address those questions. You can
5 comment later, certainly. If you're clever enough,
6 you probably will weave it into the question that I
7 do ask. Surprise, surprise.

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

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

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

1 The LA was prepared using the proposed
2 rule. Contentions obviously would have been prepared
3 based upon an application that used the proposed
4 rule. So that's really the salient area.

5 >> JUDGE WARDWELL: Thank you. Nevada;
6 Mr. Fitzpatrick, or, Mr. Malsch, I don't know who --
7 or, Mr. Lawrence, whoever wishes to. I assume
8 Mr. Lawrence wasn't going to respond immediately,
9 just based on his distance from the table, but either
10 one of you; what was the philosophy you used when you
11 prepared your contentions?

12 Did you prepare them in anticipation of the
13 proposed rule being adopted or did you stay with the
14 2001 Part 63 rule?

15 >> MR. MALSCH: Marty Malsch for the State
16 of Nevada. We -- I would say we prepared our
17 contentions based upon the rules in effect but with
18 an eye toward the proposed rule. And so we were, we
19 think, especially careful in our contentions to where
20 appropriate, identify features, processes, and events
21 that were active and should be considered in the
22 first 10,000 years; aware of the fact that it would
23 be likely that, having done so, we would also have in
24 effect, a contention that went beyond 10,000 years.

25 >> JUDGE WARDWELL: And, in fact, you did

1 state that in several of your contentions, did you
2 not, that you have the comment that it goes 10,000
3 years and beyond, or, in fact, you, in some of them,
4 I think even show that some of the impacts that
5 you're concerned about would really start to take
6 place in hundreds of thousands of years in some of
7 your contentions; is that correct?

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

16 I don't think we have any contentions which
17 are exclusively related to the post-10,000 year
18 period.

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

1 thousands of years.

2 >> MR. MALSCH: Yes, indeed. I mean, I
3 think in all cases we have shown a sufficient impact
4 for the particular FEP to be included in the
5 10,000-year assessment, but indeed, it is true for
6 some of our contentions, things become more serious
7 or maybe additional aspects become more evident in
8 the post-10,000 year period.

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

17 >> MR. MALSCH: I guess you're correct. I
18 mean, in theory, every contention that we had that
19 goes beyond the 10,000-year period is a contention,
20 which, in theory, is allowable only under the new
21 rule because the previous rule was limited to
22 10,000 years.

23 But I understood the question to be whether
24 there was any aspect of the new NRC final rule that
25 would affect the admissibility of the contentions

1 that did go beyond 10,000 years. And my answer is
2 no.

3 >> JUDGE WARDWELL: That helps a lot.
4 Thanks for the clarification.

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

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

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

25 As we look at that 63.305(c), doesn't that

1 require that climate change be considered for the
2 postclosure period, past the 10,000-year period?

3 >> MR. ZAFFUTS: Yes, Your Honor, it does.
4 It does refer, though, to 342 to indicate how that is
5 being done. It's a very prescribed method, but it
6 does indicate that post-10,000 year climate change
7 does need to be addressed in the manner specified in
8 342.

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

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

14 >> JUDGE WARDWELL: -- of the difference
15 between the two?

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

24 And I think that's clear that it says that,
25 right? If you look at the -- that very first part,

1 that's what it's really saying; isn't it?

2 >> MR. ZAFFUTS: I think you need to get it
3 up on the screen here. Oh, okay. On the right side.
4 Yes. That's correct.

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

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

13 >> JUDGE WARDWELL: Yes.

14 >> MR. ZAFFUTS: -- then, yes, within the
15 10,000 years, then it does carry through, the
16 performance assessment; that's correct. And that is
17 how the SAR was prepared, with that consideration.

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

24

25 Is that a fair assessment of what it says?

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

3 Yes. And this is, though, I would
4 emphasize that the particular specification you're
5 talking about would apply to climate change FEPs that
6 were introduced newly for the post-10,000 year
7 period, as distinguished from climate change FEPs
8 identified relevant and appropriate for the first
9 10,000-year period and then continued.

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

16 >> MR. MALSCH: Again, Marty Malsch for
17 Nevada.

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

1 whatever reason in the first 10,000 years, a climate
2 change FEP along the particular lines of that
3 specified must be included in the post-10,000 year
4 period. But that's an additional FEP.

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

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

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

25 >> JUDGE MOORE: Mr. Malsch, you were

1 referring to the language in the Commission's
2 March 13th final rule in 63.342(c) --

3 >> JUDGE WARDWELL: Tom, can you speak into
4 the mic? I can't hear. Can you speak into the mic?

5 >> JUDGE MOORE: 342(c), what specific
6 language, when you said "and also" were you referring
7 to?

8 >> MR. MALSCH: It is the language at the
9 very end of the opening paragraph in 63.342(c). It
10 says "and also," and then there follows paragraphs
11 1 --

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

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

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

25 Are you saying that that permission to use

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

9 >> MR. MALSCH: Again, Marty Malsch for
10 Nevada.

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

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

1 10,000 years.

2 Well, obviously, if we're talking about a
3 FEP that is already included in the first 10,000-year
4 period, we're not talking about any increment of
5 uncertainty associated with simply passing through
6 the 10,000-year period.

7 So the notion that we have to be specific
8 and limit FEPs in the post-10,000 year period because
9 of uncertainty doesn't apply to FEPs that are carried
10 over because we already accept that amount of
11 uncertainty by virtue of including them in the first
12 10,000-year period.

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

21 If we're dealing with climate change and we
22 had a climate change that was evaluated as a FEP in
23 the first 10,000 years and it carries forward into
24 the next 10,000 years, it carries forward even if
25 it -- you know, either way, even if it wasn't

1 evaluated. Let's say it was evaluated in the first
2 10,000-year period, and it carries over into the
3 post-10,000 year period, doesn't 342 -- let me
4 rephrase that.

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

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

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

17 And let's say, for example, we have a
18 human-induced climate change FEP, which we say is
19 properly included in the performance assessment for
20 the first 10,000 years.

21 By the language of 63.342 on its face, that
22 is required to be included in the post-10,000 year
23 performance assessment.

24 But also there is to be included a
25 different type of climate change contention, if that

1 was necessary. So it seems to me by virtue of the
2 word "and also," by necessity the restrictions in,
3 for example, (c)(2) on climate change can only apply
4 to those FEPs that were not carried over by virtue of
5 the opening language in paragraph C. Otherwise the
6 language would not have been "and also." It would
7 have been "but."

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

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

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

21 >> JUDGE WARDWELL: I understand your
22 position.

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

24 >> JUDGE MOORE: May I?

25 >> JUDGE WARDWELL: Sure.

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

3 Under your reading of 63.342(c) what would
4 be the logic of a climate change FEP that didn't have
5 to be analyzed for the first 10,000 years, having to
6 be analyzed for the post-10,000 year period?

7 >> MR. MALSCH: Again, Marty Malsch from
8 Nevada.

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

16 The concern behind including these
17 additional items was that it was at least possible,
18 without having this rule constitute an actual review
19 of the license application -- but it was at least
20 possible that climate change FEPs would be FEPed out
21 in the first 10,000 years because of significance or
22 lack of significance in the first 10,000 years, but
23 that clearly that lack of significance would
24 dissipate after 10,000 years, and they would be of
25 great significance in the post-10,000 year period.

1 But then the concern was that introduced
2 huge amounts of additional uncertainty, therefore,
3 the limits were specified in the later paragraphs.

4 As I indicated that the whole concept
5 behind the limitations here on these categories of
6 FEPs in the post-10,000 year period was that there
7 had to be limits because these phenomena introduced
8 amounts of uncertainty greatly in excess of what one
9 saw in the first 10,000-year period.

10 Now, obviously just as 63.342(c) suggests,
11 if you're simply carrying over a FEP from the first
12 10,000-year period, you're not introducing increments
13 of uncertainty that would call you -- call upon the
14 need for these kinds of restrictions.

15 >> JUDGE MOORE: Is there any language in
16 the statement of considerations that you can point to
17 that supports the interpretation you've just given
18 us?

19 >> MR. MALSCH: Yes. I think it's the
20 language that I mentioned.

21 >> JUDGE MOORE: Okay. There's nothing
22 else?

23 >> MR. MALSCH: I believe there's nothing
24 else. I just thought it was remarkable that the use
25 of the italics there, as if to strongly emphasize the

1 point. I think, though, there is nothing in the
2 statement of considerations that's counter to my
3 interpretation.

4 >> JUDGE MOORE: Thank you.

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

8 >> MR. MALSCH: Let me just take a second
9 to find it.

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

11 >> MR. MALSCH: Yeah, it was 1081 -- the
12 precise citation is --

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

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

17 >> JUDGE WARDWELL: Thank you.

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

22 >> MR. ZAFFUTS: Sure. Paul Zaffuts, DOE.

23 No, it doesn't and I think it's -- I think
24 it's pretty simple. 63.342 provides two aspects of
25 how to address climate change. First, it's whether

1 it's going to be included in the first 10,000 years
2 or not. And it specifies the manner in which that is
3 being done. There's limits on that.

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

11 The second part of (c)(2) simply tells you
12 how that's going to be done whether it passes the
13 test for the first 10,000 years or not. If it's
14 going to be addressed in the post-10,000 year period,
15 this particular section discusses the manner in which
16 it's done. And the reason why it's in there is
17 precisely because of the time frame. It's got
18 nothing to do with how it got addressed in the first
19 place, in the first 10,000 years.

20 This is based upon the understanding, the
21 clear understanding by NRC and EPA that to attempt to
22 predict climate changes in such vast amounts of time,
23 from 10,000 years all the way up to a million years,
24 no matter how it was looked at in the first 10,000
25 years, it's just so speculative and so beyond the

1 capability of any particular model, the uncertainty
2 is so vast, that they just say, no, we're going to
3 not get into that game. We're going to tell you how
4 to do it.

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

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

15 >> MR. ZAFFUTS: Sure. The "also" simply
16 points out that you need to take climate change into
17 effect -- into account for the post-10,000 year
18 period. This idea of FEPing something out in the
19 first 10,000 years doesn't relieve you of the
20 obligation. Just like in seismic and igneous, you do
21 need, in fact, to look at the potential for climate
22 change in the post-10,000 year period.

23 You can't just say there's no seismicity or
24 volcanism in the first 10,000 years and then that
25 that's. The "and also" says, well, and also

1 notwithstanding what happens in (c)(1) -- or I'm
2 sorry in --

3 >> JUDGE MOORE: In (a).

4 >> MR. ZAFFUTS: In (a). You need to take
5 into account. You can't just ignore it. That's the
6 "and also." That's the way I interpret it, and I
7 think that's a very reasonable way to interpret it.

8 >> JUDGE MOORE: Why would the word in the
9 Statement of Considerations on page 10817, column 1
10 that Mr. Malsch points to the word "and" be
11 italicized, when the four that are listed, one of
12 them is climate change?

13 >> MR. ZAFFUTS: I think it's just how I
14 explained it, which is that it means that you need to
15 take that into account notwithstanding what happens
16 in the first 10,000 years. You can't FEP climate
17 change out and then ignore it in that post-10,000
18 year period. You need to look at it.

19 And the way you look at it is using this
20 methodology that's gone into great detail. And the
21 way that came up in great detail in 2.

22 It doesn't make sense to have gone through
23 that significant analysis and methodology by the NRC
24 and by EPA to discuss exactly how you're going to
25 examine a climate change in that period of time, when

1 that all goes out the window, just simply because
2 something had some effect in the first 10,000-year
3 period. That just doesn't make sense to me.

4 >> JUDGE MOORE: Counsel, would you forgive
5 me if I said I must disagree with you that it's
6 clear?

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

9 >> JUDGE WARDWELL: In regards to the
10 technique that's stated in 342(c)(2), that's not
11 required of the applicant to do that. That's just
12 one permissible way it could, correct?

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

19 >> JUDGE WARDWELL: It's permissible to use
20 that technique, but --

21 >> MR. ZAFFUTS: Permissible, but not
22 forced to use.

23 >> JUDGE WARDWELL: -- you don't need to
24 use it. You could continue with what you did in the
25 pre-10,000 years and just extend that. You may be

1 challenged, but yet you could do that. This is
2 another way you could have done it that is, I call
3 it, simplified.

4 >> MR. ZAFFUTS: Yes, you're not forced to
5 use this stylized percolation rate, if you don't --
6 if you don't -- one doesn't want to.

7 >> JUDGE WARDWELL: Based on your
8 statements earlier this morning that you did prepare
9 your application in anticipation of this rule being
10 adopted; what did you actually do to evaluate climate
11 change for the post-10,000 year period?

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

15 >> JUDGE WARDWELL: You want me to give you
16 a multiple-choice question, then?

17 >> MR. ZAFFUTS: I do believe we used a
18 de-percolation rate. Obviously there's a difference
19 in the numbers between the proposed and the final
20 that I don't believe is really relevant to this
21 discussion because we're talking about methodology,
22 not the precise numbers. But I'm quite confident
23 that we used that rate.

24 >> JUDGE WARDWELL: And did you limit it
25 only to that analysis and no other analysis for the

1 post-10,000 year period?

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

3 >> JUDGE WARDWELL: Thank you.

4 Mr. Malsch.

5 >> MR. MALSCH: Judge Wardwell, could I
6 just offer a hypothetical, which I think will
7 illustrate why DOE cannot possibly be correct in its
8 interpretation?

9 Imagine, if you will, a climate change FEP.
10 And let us suppose that the model consists of a
11 single differential equation, operating on
12 parameters -- let's make them non-dimensional,
13 parameters 0 to 20. And let us suppose that that
14 single differential equation operating on parameter
15 0 to 20 is applicable in the first 10,000 years and
16 also equally applicable in the post-10,000 year
17 period.

18 If we recognize that the whole reason for
19 specifying particular ways to deal with FEPs in the
20 later paragraphs is to eliminate the need to deal
21 with additional amounts of uncertainty that would
22 exist in the post-10,000 year period as distinguished
23 from the initial period.

24 I have here an example in which there is no
25 additional uncertainty introduced whatsoever. And so

1 the underlying purpose of the rule would not be
2 served by construing it the way DOE has offered it.

3 >> JUDGE WARDWELL: But how do you counter
4 the argument that seems to be logical to me, that the
5 reason for the log normal distribution de-percolation
6 rate was in recognition that we're dealing with such
7 extensive time frames, that to pretend that we can
8 vary the various inputs that get us to a point of
9 de-percolation in those extensive time frames would
10 be almost absurd to attempt to do that.

11 That it's hard enough for the first 10,000
12 years, let's not worry about the climate, the
13 interaction with the climate and the surface, the
14 interaction of the surface and the near subsurface,
15 and the vegetation associated with that, and then
16 finally get into the deeper zone, at time frames
17 where we aren't confident of what's really taking
18 place with whatever that differential equation you
19 use in your example is trying to represent in the
20 pre-10,000 year period.

21 Let's cut it off and just do a more
22 simplified thing and start at a percolation rate and
23 go from there.

24 Why isn't that a logical motivation for why
25 this is in place? And isn't that supported by any of

1 the statements of considerations that were brought up
2 by EPA and the NRC in promulgating these rules?

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

5 I just think that, first of all, it's not
6 consistent with what I think is pretty clear language
7 in the rule. And I also think that in my example --
8 we assume my example is a real example, and I've
9 offered a hypothetical in which the purpose to be
10 served by applying these restrictions is simply not
11 there.

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

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

25 So for example, if DOE had -- and I frankly

1 don't remember this, but if hypothetically DOE FEPed
2 out human-induced climate change for the first
3 10,000-year period, they would not have needed to
4 consider the issue whether, in the post-10,000 year
5 period. They should have continued to use the FEP as
6 they specified it or just used the FEP as later
7 defined.

8 >> JUDGE WARDWELL: If they had -- to be
9 sure I understand your position, the reason you're
10 interested in having them extend their pre-10,000
11 year FEP into the post-10,000 year period, is so that
12 you can then challenge that particular analysis that
13 they have run, which would be preempted by this log
14 normal distribution; is that correct?

15 >> MR. MALSCH: That's a possible
16 consequence of a different interpretation, that's
17 correct.

18 >> JUDGE WARDWELL: If, in fact, in their
19 current application they have some other analyses in
20 there that help support or back up -- and I don't
21 know this for a fact. I just want to know that, if,
22 in fact, there are some other analyses in there
23 besides just the de-percolation for the post-10,000
24 year period, do you believe that is susceptible to
25 challenge by a petitioner?

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

3 >> JUDGE WARDWELL: If there are other
4 analyses that were performed in addition to the deep
5 percolation analysis for the post-10,000 year period
6 relating to climate change, in DOE's application, and
7 I don't know whether there is or isn't, but if there
8 is, is that other analyses that they happen to
9 present in their application also susceptible to
10 challenge by a petitioner?

11 >> MR. MALSCH: Yes, indeed. Yes. Marty
12 Malsch, again.

13 Yes, indeed, I think it would. They would
14 then be following what would, in our view, be a
15 correct interpretation of the new NRC rule, but would
16 be doing it in a flawed technical manner, and that
17 would be subject to contentions.

18 >> JUDGE WARDWELL: DOE, would you agree
19 that if you happen to have calculations in your
20 application for the post-10,000 year period that are
21 in addition to or different than the de-percolation
22 rates allowed by 342(c)(2), that in fact, those are
23 challengeable by a petitioner? Would that not be the
24 technique, if they saw flaws in that technique?

25 >> MR. ZAFFUTS: Your Honor, Paul Zaffuts

1 for DOE. I'm quite confident we don't do that. And
2 with the hypothetical that's posed, I think if we're
3 relying on an analysis different than that, it would
4 be subject to this some type of challenge, sure. I
5 mean, it's not excluded.

6 >> JUDGE WARDWELL: Sure.

7 >> MR. ZAFFUTS: It wouldn't be omitted
8 from challenge. I wouldn't --

9 >> JUDGE WARDWELL: That's the importance
10 of the difference between you shall perform the
11 calculations using this de-percolation, and may use
12 the percolation rates in your analysis, if you choose
13 not to or if you choose to augment those analyses
14 with any other analyses, then, in fact, that would be
15 challengeable, where if you had only stuck with the
16 de-percolation rates as specified by the rule, then
17 that wouldn't be challengeable.

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

20 >> JUDGE WARDWELL: Correct.

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

24 One thing, though, Mr. Malsch mentioned his
25 hypothetical essentially postulating some absolutely

1 perfect model that can go out to a million years, and
2 if -- and under that hypothetical, the rules don't
3 make sense as written, or my interpretation of the
4 rules don't make sense.

5 Well, first of all, there is no such model,
6 and the NRC knows there's no such model or able --
7 ability to predict like that, and the EPA knows that.
8 They didn't write the rule with that hypothetical in
9 mind because it's not realistic.

10 They wrote it understanding that, as I said
11 earlier, the uncertainties in attempting to predict
12 out to a million years climate change are just so
13 great that they're not going to force DOE to attempt
14 to do so. I think that would just engulf a
15 proceeding.

16 So they said, that's -- we're not going to
17 do that. It doesn't make -- it doesn't help our
18 understanding -- meaning the NRC's understanding --
19 of whether this mountain will be able to perform its
20 function, so we're going to provide specifically what
21 the analysis should include and how you should do it.

22 It's just like they did for the
23 human-intrusion standard. I mean, there was the
24 ability to predict what people were going to do and
25 drill into the mountain in some future time. They

1 didn't want to get the -- that didn't make sense to
2 have to go to that type of speculation. So what they
3 did was say, we're going to prescribe specifically
4 how you're supposed to analyze it. Now, you have to
5 analyze it correctly. You have to apply this
6 correctly, and that would be subject to challenge.
7 If we -- you know, if they had said we had to use a
8 de-percolation rate of 20 millimeters a year, and we
9 only use 1, of course that would be a legitimate
10 challenge.

11 But it's a challenge to suggest that we are
12 being forced to use something other than what's in
13 here. As I said earlier, I just don't see that that
14 is consistent with the promulgation of these rules.

15 >> JUDGE WARDWELL: In your answer to some
16 of Nevada's contentions, you've raised the argument
17 that the impact of future anthropogenic greenhouse
18 gases on climate change is outside the scope of this
19 proceeding. Could you elaborate a little bit more on
20 the bases for that position?

21 >> MR. ZAFFUTS: Sure. We take that
22 position based upon our reading of the rule and the
23 statements of consideration that were included when
24 it was being promulgated.

25 >> JUDGE WARDWELL: And is this the

1 original rule or strictly in regards to the proposed
2 revision.

3 >> MR. ZAFFUTS: No. This is the original
4 rule, because we believe that's the case for the
5 pre-10,000 year period. And it really -- to make it
6 as simple as possible, it really comes down to the
7 concept of attempting to predict -- again, it's
8 uncertainty.

9 It's attempting to predict future
10 societies, what the political winds of the world are
11 going to be in the next 10,000 years with regard to
12 greenhouse gases and climate change, and I think we
13 can all understand that. The rule says we must vary
14 factors --

15 >> JUDGE WARDWELL: And where is this?
16 Could you cite this rule?

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

19 It specifically says we must vary factors
20 related to geology, hydrology and climate based upon
21 cautious but reasonable assumptions. In the
22 statements of consideration -- that's 66 Fed Reg --
23 Federal Register 55757, the NRC makes it clear with
24 regard to cautious and reasonable assumptions and
25 climate, it says that the "geologic record provides

1 evidence of past climate over long time frame, which
2 provides a strong basis for predicting future
3 changes."

4 The way I read that is that's why, unlike
5 other aspects of the biosphere, we are supposed to
6 change and examine what the changes are, because we
7 have the ability to do so within a reasonable amount
8 of uncertainty based upon the past geological record.

9 The distinction is made that that's not the
10 same with regard to other aspects of the bias here,
11 because human -- and it says -- it goes on to say,
12 because human behavior --

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

16 >> MR. ZAFFUTS: Sure. This is 66 Federal
17 Register, the first page of -- it's 55732 is the
18 first page, but the page I'm specifically referencing
19 is 55757.

20 >> JUDGE WARDWELL: And this is in the
21 Statement of Considerations and the promulgation of
22 the original 63 Rule?

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

24 >> JUDGE WARDWELL: Okay. Thank you.

25 >> MR. ZAFFUTS: Okay. Should I go ahead?

1 Okay.

2 If you go on to quote that, "Because human
3 behavior cannot be similarly predicted" -- that is
4 the same manner in which you can't predict climate
5 based upon the geological record -- "a similar
6 approach cannot be used for the REMI and the
7 influence that the local population has on the
8 biosphere."

9 And we need to understand that in this
10 context the biosphere includes climate. So in my
11 view and DOE's view that's the only way you can read
12 this with regard to climate change is that you need
13 to use the -- you use the geological record, future
14 effects based upon the attempt to predict -- attempt
15 to speculate on what human society's going to be
16 doing with regard to greenhouse gases is not the role
17 of the DOE in this particular position.

18 >> JUDGE WARDWELL: And could you read that
19 just one more time in regards to the REMI, and the
20 human factors?

21 >> MR. ZAFFUTS: "Because human behavior
22 cannot be similarly predicted, a similar approach
23 cannot be used for the REMI and the influence that
24 the local population has on the biosphere."

25 >> JUDGE WARDWELL: And aren't we talking

1 about something that's beyond the REMI in the local
2 population, though, when we're dealing with
3 anthropogenic changes affecting climate?

4 >>DOE: Oh, absolutely. And I think that
5 it makes my point even clearer, that if we can't even
6 predict on a small local potential population, how we
7 can possibly predict societal changes beyond that.
8 We're talking about a global situation with, you
9 know, hundreds of countries involved on this planet.

10 That the attempt to try to predict what's
11 going to be happening over the course of the next
12 10,000 years in this regard is just so speculative,
13 that would be an endless controversy related to how
14 that's done.

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

25 Couldn't one interpret it to be that and

1 not in relationship to large changes of climate?

2 That would be needed by the mass.

3 >> MR. ZAFFUTS: I think that's not
4 inconsistent. Yes.

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

7 >> MR. ZAFFUTS: I think that
8 interpretation is not inconsistent with the
9 understanding that the NRC had and the EPA had when
10 they were promulgating this, just the basic concept
11 of -- unlike -- unlike a geological record or --
12 well, let's use that.

13 Something that is utterly dependent upon
14 human behavior, whether it's localized, individuals
15 spraying down a mountain or societal based, over the
16 course of the next 10,000 years, that's just so
17 speculative that it is not to be addressed. It
18 doesn't have to be addressed in that way. It doesn't
19 mean -- well, I'll leave it at that.

20 >> JUDGE WARDWELL: But yet, couldn't it
21 also only be limited to that? Couldn't one read it
22 to say it is only limited to the REMI and a local
23 population disturbance on the climate change, that
24 you would only be allowed to look at regional
25 continental human behavior changes on the climate

1 change?

2 >> MR. ZAFFUTS: Like I said, I don't think
3 that's inconsistent. I don't agree that that's the
4 only way you should read that or that it should be
5 limited in that way.

6 >> JUDGE FROEHLICH: Judge Wardwell, would
7 this be a convenient time for us to take our morning
8 break.

9 >> JUDGE WARDWELL: Sure.

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

14 (Whereupon, a recess was taken)

15 >> JUDGE FROEHLICH: Please be seated.
16 We'll be back on the record.

17 Before we start, could I just ask
18 Mr. Zaffuts, could you give us the full Federal
19 Register cite to the statement considerations you
20 were referring to in the last series of answers
21 before we began?

22 >> MR. ZAFFUTS: I sure can.

23 >> JUDGE FROEHLICH: Thank you.

24 >> MR. ZAFFUTS: Paul Zaffuts, DOE. It
25 is -- I believe this is correct; 66 Federal Register.

1 And the first page of the entire notice is 55732.

2 The page I was quoting from is 55757.

3 >> JUDGE MOORE: And the column?

4 >> MR. ZAFFUTS: Let's see. Bear with me
5 just one second. It's the bottom of the second
6 column, Your Honor.

7 >> JUDGE MOORE: Thank you.

8 >> JUDGE FROEHLICH: Judge Wardwell.

9 >> JUDGE WARDWELL: Yeah.

10 >> MR. MALSCH: Your Honors, may I just
11 respond briefly to what DOE just offered about
12 interpreting 63.305?

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

15 Would you like to respond to anything that
16 DOE just said?

17 >> MR. MALSCH: I'll address that question
18 instead.

19 What DOE offered you before the break was
20 an interesting discussion in theory about how the
21 rule might have been drafted, but it doesn't pertain
22 to the rule as it was actually drafted.

23 If you look at 63.305, subsection by
24 subsection, you can see that, first of all, with --
25 and we're talking here about human-induced climate

1 changes.

2 It first of all says FEPs that describe the
3 reference biosphere must be consistent with present
4 knowledge of the conditions in the regions
5 surrounding the Yucca Mountain site.

6 We believe that our climate change
7 contentions are consistent with present knowledge of
8 the conditions in the regions surrounding the Yucca
9 Mountain site.

10 Paragraph B then says, "D should not
11 project changes in society." Our contentions don't
12 project changes in society. But it then continues.
13 "We may project changes in the biosphere." We
14 may not project claims in the biosphere other than
15 climate. And, of course, we are predicting climate
16 changes.

17 It then says, "We should not project
18 changes in human biology or increases or decreases in
19 human knowledge or technology." We are not doing
20 that either.

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

1 And we believe that our climate change
2 contentions are based upon those cautious but
3 reasonable assumptions. I would just say that,
4 frankly, the only way one could FEP out human-induced
5 climate changes would be by actually challenging the
6 rule and insisting that we should project changes in
7 society for purposes of licensing Yucca Mountain;
8 namely, we should project changes in society would
9 eliminate the concerns associated with human-induced
10 climate changes.

11 So our contentions are perfectly consistent
12 with the rule, and DOE's theory about what the rule
13 provides actually constitutes a rule challenge.

14 >> JUDGE WARDWELL: Thank you.

15 I think we've covered most of the -- you
16 know, by covering what we did, we've covered the
17 other scenarios that I'm interested in. I don't feel
18 a need to go into anything further in regards to
19 erosion or anything else like that.

20 I would like to turn to staff, though, and,
21 Ms. Young, would you like to comment on the plethora
22 of stuff that's come up so far, without being
23 specific to any particular areas so you're free to
24 reign on any of the comments since the last time we
25 chatted with you.

1 >> MS. YOUNG: Thank you, Judge Wardwell.
2 Commenting on the plethora might not be appropriate,
3 but in terms of Mr. Malsch's suggestion that the
4 revised rule regarding the post-10,000 year standard
5 would suggest a requirement to analyze additional
6 scenarios that were not addressed or screened in the
7 first 10,000-year period.

8 I think the staff -- or the Commission's
9 intent in issuing this rule was to provide additional
10 constraints on analyses done for the post-10,000 year
11 period. I would agree that the language of the
12 provision is not perfectly clear as to what's
13 required, but in terms of climate change, the staff
14 would agree with Judge Wardwell's interpretation,
15 your interpretation, that it basically provides
16 information on how you might do that post-10,000 year
17 analysis.

18 >> JUDGE WARDWELL: Whether it's a screen
19 FEP or a new FEP?

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

21 >> JUDGE WARDWELL: Thank you. And would
22 you like to comment in regards to the interpretation
23 of DOE relating to the REMI and the local human
24 activity in relationship to the greenhouse gases
25 associated with climate change?

1 >> MS. YOUNG: I believe climate change is
2 something that should be analyzed under 63.305(b).
3 However, it's obviously not clear, given the dispute
4 we're having here this morning in terms of what's
5 required, but (b) does provide that analysis should
6 assume that certain factors remain constant;
7 therefore, you wouldn't predict changes, economic
8 changes. I think there are words in the statement
9 consideration addressing the rule on that. So it is
10 difficult to predict changes to those factors.

11 >> JUDGE WARDWELL: Thank you.

12 Lastly, I think I would like to offer the
13 opportunity for those petitioners who felt their
14 contentions might be affected by the new rule to
15 comment, if they wish, on anything that has come up.
16 And let's -- let me start in the far corner with NCAC
17 first. You did say that your Miscellaneous 2 and the
18 NEPA 1 might be affected.

19 Is there anything you heard today that you
20 would like to comment on in regards to issues we were
21 trying to address?

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

23 >> JUDGE WARDWELL: Thank you.

24 Clark County, you said you didn't have any,
25 but you had your hand up; so I will allow you to

1 comment --

2 >> MS. ROBY: Thank you.

3 >> JUDGE WARDWELL: -- even though none of
4 your contentions supposedly are affected by this, but
5 maybe it's the human behavior aspect that we talked
6 about.

7 >>CLARK COUNTY: Thank you, Your Honor,
8 Debra Roby for Clark County. I just want to respond
9 to a few comments made by NRC staff this morning.
10 They said that they believed, in their review, that
11 Clark Safety 7 may be affected in their evaluation.
12 And I just wanted to note a couple of comments by NRC
13 staff raised some questions for us.

14 NRC staff said that they did not believe
15 they opposed contentions based on the proposed rule,
16 but there is that challenge to Clark Safety 7 in the
17 NRC response to Clark Safety 7. So I'm assuming
18 for -- since we're on the record today that staff
19 would not be opposing that if that was in fact, the
20 basis that Clark County was setting forth.

21 But Clark Safety 7 is not -- is about --
22 not so much about the human -- or the dose, but that
23 the DOE failed to look back far enough in history of
24 volcanism, failed to take into consideration the deep
25 melting models or the entire period of volcanism from

1 11 million years to the present. They only
2 considered a lesser period.

3 >> JUDGE WARDWELL: Thank you.

4 >> MS. YOUNG: Judge Wardwell, may the
5 staff be heard? Mitzi Young for the NRC staff.

6 >> JUDGE WARDWELL: Yes.

7 >> MS. YOUNG: Just to clarify, the staff's
8 statement was trying to address that we did not
9 solely object to the contention on the basis of the
10 rule. We had independent grounds for objecting to
11 the admissibility. Therefore, we believe the
12 proposed rule doesn't affect our arguments with
13 respect to admissibility or the contention in the
14 end.

15 >> JUDGE WARDWELL: Thank you for that
16 clarification.

17 TIM, I understand that you had 08 you
18 anticipated to -- here we are, yes.

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

21 >> JUDGE WARDWELL: Thank you. And that's
22 about it, unless there's someone else that would like
23 to add their comments in regards to those particular
24 issues we addressed talking about the new rule and
25 the potential limitations of humans' effects on

1 climate change in the original rule.

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

7 >> JUDGE WARDWELL: Okay. Thank you.

8 >> JUDGE FROEHLICH: All right. Moving
9 from Part 63, perhaps we'll take up the LSN questions
10 next.

11 The LSN was created in order to provide
12 parties with an expeditious method for managing the
13 large amount of documentary material in this
14 proceeding. Section 2.103 of Title 10 of CFR
15 outlines the obligations and the timetable for the
16 production of documentary material for the LSN, by
17 the DOE, the staff, and the potential parties, now
18 the petitioners to this case.

19 The LSN requirements are also spelled out
20 in the PAPO Board orders. And I note that
21 10 CFR 2.1000 states that the provisions of subpart
22 (j), where the LSN requirements appear, don't take
23 precedence over the normal, the customary 2.309
24 requirements for contention admissibility.

25 As I read the petitions to intervene, the

1 Department of Energy argues that the existence of the
2 LSN, as its publicly available electronic document
3 discovery system, creates a heightened obligation on
4 the petitioner for better or different contentions
5 that are normally admitted.

6 Is that a fair representation of your
7 position, DOE?

8 >> MR. SHEBELSKIE: Your Honor, Mike
9 Shebelskie for DOE.

10 >> JUDGE FROEHLICH: Thank you.

11 >> MR. SHEBELSKIE: I think a more refined
12 way of how we should have expressed that view was not
13 to suggest that the requirements of 2.309 do not
14 apply and govern the contention admissibility
15 standards.

16 Rather that in applying those standards,
17 the Boards should be mindful of the availability of
18 the documentary material that DOE has made available
19 on the LSN, as well as the fact that all the
20 petitioners are equally obligated to have made
21 available on the LSN all their, at least, supporting
22 information for these purposes.

23 So that when the Boards, for example, are
24 assessing whether or not there exists a genuine
25 dispute of fact, all -- if it's a contention that

1 DOE's analyses are in error in some way, petitioners
2 have access to all of our analysis in the LA, in the
3 supporting references and the vast body of
4 documentary material we have been made available.
5 And so they have the ability, therefore, to frame
6 focused and meaningful and very specific criticisms
7 of our analyses or work product.

8 And there is consistent, really, with what
9 the Commission has said in the rulemaking with
10 respect to the LSN, that on several occasions it
11 noted that part of the purpose or the achievement,
12 what we would expect from the LSN, is the ability for
13 the parties to frame meaningful and focused
14 contentions.

15 And the Commission reiterated that
16 expectation in its order from the summer of '08, in
17 which it upheld the PAPO Board's decision denying
18 Nevada's motion to strike DOE's LSN certification.

19 So really the Commission does have in mind
20 that contentions here are to be of the highest
21 quality and are to be specific and substantially
22 supported in detail with references to the LSN
23 materials available.

24 Likewise, even when a party is citing its
25 own supporting information, LSN requirements, plus

1 the orders of the Advisory PAPO Board require the
2 parties to either provide citations to LSN reference
3 materials or to attach the materials to their
4 petitions.

5 Again, so there's no accuse now in applying
6 this accepted criteria under 2.309 for parties not to
7 provide very detailed, very specific supported
8 contention on whether it's a genuine dispute, their
9 supporting references or materiality. That's what we
10 really meant by saying a heightened obligation for
11 the quality of the contentions, given the LSN.

12 >> JUDGE FROEHLICH: So with the existence
13 of the LSN, we're still applying the standard, the
14 traditional 2.309. That we're not -- you're not
15 really talking about a heightened standard. What
16 you're just looking for or arguing that the quality
17 of the contentions is required to be higher?

18 >> MR. SHEBELSKIE: Yes sir. It's a
19 similar application to the Commission's decision in
20 the Shieldalloy Decision, CLI 99-12, in which they
21 held that in that context that we agree with the
22 presiding officer that petitioners represented by
23 counsel are generally held to a higher standard than
24 pro se litigants.

25 I think a comparable principle can be held

1 here that all petitioners now have an extraordinary
2 access, unprecedented access to all of DOE's
3 supporting and non-supporting information and reports
4 and studies, and also unprecedented, all these
5 parties are under an obligation to have come forward
6 with all their supporting and non-supporting
7 information and likewise reports and studies.

8 And so unlike contentions that might
9 otherwise have been thought acceptable in other types
10 of cases, here, in applying the standards of 2.309,
11 the Boards ought to be particularly precise in
12 demanding that there be substantiation on the bases
13 of genuine dispute and materiality.

14 >> JUDGE FROEHLICH: I think I understand
15 the distinction that Shieldalloy and you drew between
16 pro se -- pleadings from pro se applicants and
17 pleadings from parties that are represented by
18 counsel.

19 Are you suggesting there's a different
20 standard, in this case where parties are represented
21 by counsel, than in other cases before the Board or
22 the Commission?

23 >> MR. SHEBELSKIE: Well, again, it's the
24 same criteria of 2.309. But to use Judge Gibson's
25 phraseology from yesterday; should parties be cut

1 slack in this proceeding?

2 The answer is no. All the petitioners here
3 are now represented by counsel. Under Shieldalloy,
4 that alone holds them to a generally higher standard,
5 but now we've got Shieldalloy plus, if I might say,
6 because we have counsel plus all the information is
7 now on the table for framing focused and meaningful
8 contentions.

9 >> JUDGE FROEHLICH: Doesn't that argument
10 cut the other way just as well? That in this case,
11 different from so many -- every other case the
12 Commission has ever had, that the volume of material
13 with which the parties are working is so large that
14 perhaps we should "cut them some slack," to use Judge
15 Gibson's term?

16 >> MR. SHEBELSKIE: No, Your Honor, I don't
17 think so, because from the very beginning of this
18 proceeding, in LSN the rulemaking going back over two
19 decades now, it was always contemplated and
20 understood that there would be a large volume of
21 documentary material available to petitioners for
22 framing their contentions.

23 And we really have the most extraordinary
24 thing done in this proceeding, is that there has been
25 advanced disclosure so petitioners have all this

1 information available. They have DOE's analyses,
2 works, and all. That's unlike any other petitioner
3 has ever had access to in any other proceeding.

4 >> JUDGE MOORE: Mr. Shebelskie, as you
5 know, you and I have worked our way through all of
6 the LSN for five years with the Prelicense
7 Application Presiding Officer Board.

8 What you just said brings to mind the
9 needle in a haystack problem. Your argument about a
10 heightened obligation looks to some of the very
11 extensive regulatory history of subpart (j) involving
12 the LSN and its predecessor, the LSS.

13 Also found in that legislative -- or
14 regulatory history are -- and in our statements from
15 the Commission that care needs to be taken not to
16 overburden the system with irrelevant material that
17 has the effect of cluttering the real purpose and
18 causing the needle in a haystack problem.

19 How does your argument take into account
20 the severe limitations of the LSN as far as a search
21 engine because of the lack of mandatory provisions;
22 although there are guidelines for -- that make
23 electronic searching more equivalent to what many of
24 us are used to in things like using Google or
25 comparable search engines, because there are

1 36 million plus pages of DOE material.

2 And by your own admission, if memory
3 serves -- and I emphasize, "if memory serves", I
4 believe, for example, DOE made a deliberate choice
5 with regard to circulated drafts, which is a
6 particular term defined in the regulations concerning
7 documentary material, to put them all in because it
8 was cheaper and quicker than to sort of them out.
9 And that kind of approach was used by DOE, and one of
10 the reasons why the collection is the size that it
11 exists.

12 So the Chairman's question to me takes on
13 added significance, because, even though there's an
14 unprecedented electronic documentary library system,
15 it has, to use an analogy that dates me, I'm afraid,
16 a faulty Dewey Decimal System card catalog.

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

19 First, just with regards to the search
20 ability of at least the DOE collection in the LSN, we
21 did not limit our bibliographic header information to
22 the bare minimum that the LSN regulations require.
23 But we adopted very full-some header information with
24 titles and authors and recipients, going far above
25 and beyond what the regulations require, what anybody

1 else required -- did with their headers, precisely to
2 help improve the search ability, at least of our
3 collection.

4 Second, with respect to search ability as
5 well, the LSN is word searchable through the text.
6 And so searches are not confined to information
7 contained in the bibliographic headers.

8 But I think more broadly, I think you have
9 to take a broader view of the LSN in connection
10 really with DOE's development of the work product on
11 this project, because this is not a situation where
12 petitioners, or any other stakeholder or interested
13 person, has only had access to DOE's work product and
14 understand what we're doing by simply periodically
15 trolling through the LSN.

16 The LSN really is an adjunct, in some
17 respects, perhaps, the lesser important adjunct, to
18 the vast public interactions between DOE and NRC over
19 the years, and with the TRB and other public bodies,
20 where DOE has developed its work product in stages
21 through iterations. And we've had opportunities for
22 stakeholders who are interested to be involved, to
23 track along what was being done.

24 And then when we first began to make
25 documents available in the LSN in 2004, and then we

1 updated all that in 2007, that information was all,
2 there and you could follow it along.

3 In DOE's record system has maintained with
4 respect to our, for example, analysis model reports,
5 the key building blocks underlying the LA, a
6 consistent terminology and document number. And we
7 go through iterative revs, or revisions, of those.
8 So one can pull the thread all the way through the
9 LSN collection if you're interested in a particular
10 subject matter in the AMR and follow that development
11 through, through the LSN.

12 In addition to all of that, the LSN
13 regulations provide as part of the informal discovery
14 available to any petitioner or potential party, even,
15 in the prelicense phase, request for information from
16 us.

17 Now, Nevada took full advantage of that,
18 particularly once we made our second collection
19 online starting in 2007. And we had discussion of
20 this in some of the PAPO Board hearings on the
21 motions to strike, where Nevada had the list of our
22 AMRs and our big tracking chart.

23 Your Honor, you may remember there's a 1500
24 list of documents on some key management documents
25 and the dates they were due, and Nevada was tracking

1 along when those would become available on the LSN.
2 And there was frequent interchange between counsel
3 for Nevada and counsel for DOE about what documents
4 they were interested in and what's the schedule for
5 them being on the LSN, and we would apprise them and
6 update them on that, so they could track along and
7 find in realtime, the final analyses as they wanted
8 them.

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

24 >> JUDGE MOORE: Okay. Accepting your
25 description of your collection and its virtues, how

1 does the minimum floor that is required by 309(f)(1)
2 for the admissibility of a contention change because
3 of any of that? And when subpart (j) was written, it
4 specifically excluded 309 from being changed?

5 >> MR. SHEBELSKIE: Yes, sir. Mike
6 Shebelskie again.

7 I think that the provision in 2.1000 that
8 says subpart (j) does not take precedence among other
9 things 2.309, means and simply means that the factors
10 of 2.309 that govern admissibility of contentions are
11 the factors that have to be pled and established in a
12 petition.

13 We're not saying anything differently from
14 that, but rather to take example -- an example with
15 the existence of a genuine dispute, if there's a
16 contention along the lines that DOE's analysis failed
17 to consider uncertainties, well, people shouldn't
18 just be able to leave that in that general term when
19 they have an extensive body of all of our analyses
20 that show exactly how we considered analysis.

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

23 How does the minimum floor for the
24 admissibility of a contention change because of the
25 LSN under 309?

1 Does your argument say that there is a
2 change -- whatever that minimum floor is changed
3 because of the LSN?

4 >> MR. SHEBELSKIE: Your Honor, I hope
5 we're not -- maybe I'm misunderstanding the semantics
6 of what you're asking me, because as I understand
7 your question, the answer would be, you employ the
8 same -- you apply the same legal factors that you're
9 looking to, but we now have -- we are looking at the
10 petition and the answer and the reply.

11 >> JUDGE MOORE: But I have that in every
12 case.

13 >> MR. SHEBELSKIE: Well, exactly. But
14 where someone alleges in a normal case, well, there's
15 an expert affidavit, say, or just a petition asserts,
16 that there's information that supports our
17 contention. In a normal case, you might say, well,
18 okay, they've asserted that, that's the minimum
19 floor, we'll accept that. But here, you should be
20 asking yourselves, is that general assertion
21 sufficient when they had an -- each petitioner has an
22 obligation to --

23 >> JUDGE MOORE: Is that a -- is that a
24 yes, Mr. Shebelskie?

25 >> MR. SHEBELSKIE: Well, I would say yes

1 in practical application.

2 >> JUDGE MOORE: Thank you.

3 >> JUDGE FROEHLICH: Let me just go a
4 little bit further with this, if I could. Before
5 Judge Moore's questions, we were talking about, as we
6 evaluate the contentions and their admissibility,
7 that there might be some slack cut if we had a pro se
8 petitioner.

9 Should there be any differentiation in the
10 amount of slack we cut between experienced NRC
11 practitioners and the parties who may be appearing
12 before this body for the very first time? Is there
13 any differentiation in the level of scrutiny that
14 those parties should be entitled to in their -- in
15 the admissibility of their contentions?

16 >> MR. SHEBELSKIE: Your Honor, I think
17 not. And, again, I think not because of what the
18 Commission has enjoined the role at large and all
19 interested stakeholders. They have made clear
20 throughout the rulemaking on the subpart (j), and in
21 their opinions over the years with respect to some of
22 the issues that came up from the PAPO Board, that all
23 potential participants needed then, years ago, to
24 start getting ready for this proceeding.

25 This is not something that has sprung --

1 been sprung on the parties with our application in
2 July of 2008. And so I think it's rather late in the
3 day, many years late, for parties to take -- advance
4 the position, Your Honor, just hypothecating.

5 >> JUDGE FROEHLICH: Judge Moore.

6 >> JUDGE MOORE: Mr. Shebelskie, doesn't
7 that coin also have a other side? That, again, if
8 memory serves, this proceeding to date prior to the
9 notice of opportunity -- well, prior to the filing of
10 the application in June of 2008, was hardly one that
11 could be tracked on a train schedule.

12 Indeed, I believe Section 114 of the Waste
13 Policy Act gave the Secretary 90 days after the
14 President's acceptance of the site certification to
15 file an application which would have made it -- and I
16 believe Section 114 says the Secretary shall file an
17 application with the Commission within 90 days.

18 And I believe that occurred in July of
19 2002, making the application due in October of 2002.

20 Backing up from that date, we had similar
21 fits and starts, as well as subsequent to the date
22 when the Waste Policy Act said there was supposed to
23 be an application.

24 Now, my point is simply that these are --
25 the now petitioners, prior to filing a petition, they

1 were potential parties under subpart (j). And I have
2 always thought the yo-yo analogy seemed to have some
3 application.

4 How is a party supposed to devote their
5 time and attention to a project that had a schedule
6 but the train kept constantly being derailed. Not in
7 any way placing blame. Please don't take it that
8 way. But you're saying that they've had all this
9 notice, but it's been a yo-yo.

10 And how -- the flip side of that coin is
11 that, certainly, you would have to have been living
12 on another planet not to been aware that it was a
13 project, but by the same token, it's hardly been a
14 smooth continuum, as the rules certainly
15 contemplated, as the Waste Policy Act certainly
16 contemplated, at which, in my view, speaking only for
17 myself, would give much more credence to your
18 argument.

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

23 When the Commission made its statements
24 about expecting parties to have focused -- focused
25 and meaningful contentions, that's against the

1 backdrop of a regulatory structure, where DOE would
2 make it's LSN certification a scant six months before
3 submitting the LA, and then petitions to intervene
4 would be due some short period of time after
5 docketing of the LA.

6 What has happened, really, over the last
7 two years, is DOE made its initial certification
8 deliberately in October of 2007, some nine months,
9 not six months in advance of submittal of the LA. We
10 prior to that had opened up our second collection as
11 of May 1st or April 30th of 2007, to give parties
12 even advanced access to those documents before our
13 certification.

14 And then, of course, the Commission has
15 extended, based on a motion or petition filed by
16 Nevada to extend the time they had to file the
17 petition.

18 So really in the certainly, last two years,
19 when despite the -- notwithstanding the history,
20 Judge Moore, you recounted, when the train then came
21 out of the station and people knew we were on track
22 then, DOE very deliberately, and then the Commission
23 added to it, provided the parties extra time than
24 what the bare -- the regulations themselves would
25 otherwise could have limited them to.

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

3 >> MR. FITZPATRICK: Yes, Your Honor,
4 Charles Fitzpatrick, State of Nevada. I'd like to
5 make a few comments about what's been said so far.
6 And maybe the most basic comment is it's too late for
7 DOE to wiggle off the hook, having briefed at length
8 an alleged requirement for a heightened expectation
9 to back down to that that's not really what they
10 meant and that they meant -- and then we shape shift,
11 though, into what we really meant was when you look
12 at the individual component parts of 309, yes, you
13 should apply a stricter standard. So, you know, it
14 ebbs and flows from heightened, now to didn't mean
15 that to back to we expect you to apply heightened.

16 Now, on the factual issues which are --
17 your question, Judge Froehlich, back a ways was: Is
18 there any legal support for the heightened
19 expectation? And I'll get to that in a second.

20 But on the factual issues, I'm willing for
21 the sake of this argument to sort of say there's a
22 wash between, on the one hand, the petitioners have
23 the benefit of more documents available to them. On
24 the flip side, they may have too many documents,
25 36 million pages available to them.

1 Many of the parties are new to NRC
2 proceedings. So that makes it more difficult for
3 them. And without going through my brief -- I won't,
4 but I'll just mention two points about the heightened
5 expectation and the vast quantity of available
6 documents.

7 When DOE made its second set, I guess they
8 call it, of documents available around May 1st, 2007,
9 that was an additional 2.1 million documents, that's
10 true. But about 2.0 million of those documents had
11 been already in the hands of DOE's LSN administrator,
12 Mr. Grazer.

13 As of August 2004, only a few months after
14 the first LSN, you know, initial certification, which
15 did not stand up, but well before, a couple of years
16 before, they gave Mr. Grazer, LSN administrator,
17 permission to reveal those documents publicly.

18 So the documents were in hand for a very
19 long time before they were revealed. So they don't
20 get brownie points for that.

21 And then just one other example. There's a
22 memo mentioned in our brief, and it's in the LSN and
23 the LSN numbers cited in our brief, where in
24 May 2007, they recounted the history of the TSPA and
25 said that there has been no publication of TSPA

1 information, despite, you know, vast quantities of
2 work done on it by DOE, since 2002, which I believe
3 was the TSPA so-called -SR for the site
4 recommendation. They concealed the versions of the
5 TSPA after that right up until the end of 2007 for
6 five years.

7 So, again, this is sort of water under the
8 bridge, and Judge Moore, Mr. Shebelskie, and I have
9 been through the wars about LSN certifications in the
10 past, and I don't want to regurgitate that stuff.
11 But it's simply a valid point to bring up in the
12 context of a so-called heightened expectation.

13 Getting to the basic question about the
14 regulation and authority for the proposition; is
15 there any?

16 First, let me say that we don't dispute
17 what the NRC has said about the implementation of the
18 requirements of 2.309(f)(1) through 6. In other
19 words, the component parts of contentions. That the
20 LSN document database availability gives the parties
21 an opportunity to frame focused and meaningful
22 contentions. That's what the NRC did say, and that's
23 what our goal has been.

24 What the NRC did not say was there's a
25 heightened standard because of the LSN. The NRC

1 could have said that, if they chose to. As a matter
2 of fact, DOE said in one of its briefs, "When the
3 Commission intends a specific result in its
4 regulations, it conveys that intent in an express
5 regulatory requirement. The Commission does not
6 leave the existence of important requirements to
7 guesswork, with interpretation." True.

8 So there is no regulation requiring a
9 heightened standard, but as a matter of fact, there
10 is the opposite. Because if you go through the
11 history of amendments to 10 CFR Part 2 to the 1991
12 amendments which are at line 56 Federal Register
13 7787, and you go to page 7789, I think it was a
14 predecessor of NEI, the industry representative,
15 that's, the background section and they're talking
16 about comments made, suggestions made, either adopted
17 or not adopted by the NRC in its regulation.

18 The NEI predecessor said -- or the
19 Commission reporting what the commenter said; the
20 commenter states "that the availability of
21 information in the LSS -- at the time -- it's become
22 LSN, but it was LSN. In the LSS database and of
23 certain types of discovery during the pre-application
24 license phase warrant a more substantial threshold
25 for contentions.

1 That's exactly what your question was
2 whether that does exist, in fact, in the law, that
3 requirement. Unfortunately, the response of the
4 Commission was, "The Commission disagrees that a
5 higher threshold is warranted for the admission of
6 initial contentions. An intervenor should not be
7 required to prove its case at the stage of initial
8 submission of contentions. This rule's requirement
9 that sufficient information be presented to establish
10 the existence of a general dispute with the applicant
11 on a material issue of fact or law allows the scope
12 of the proceeding to be defined in advance without
13 prematurely eliminating legitimate contentions."

14 Bottom line, the Commission considered that
15 this proposal 17 years ago, did not adopt it, and has
16 not adopted anything similar to it. To answer Judge
17 Moore's question, when the Commission adopted 2.309,
18 it well knew that an LSN database would be available
19 to participants and parties, and nonetheless did two
20 things, wrote the requirements of 2.309 the way it
21 did without some heightened wording for this
22 proceeding.

23 And Number 2, adopted 10 CFR 2.1000 which
24 specifically states that 2.309's criteria for a valid
25 contention take precedence over anything in

1 subpart (j).

2 >> JUDGE FROEHLICH: I take it from your
3 response that you believe that you've been held to
4 that higher standard that was never written into the
5 rule in the responses that have been filed by DOE;
6 that they applied a higher standard than what 2.309
7 would normally require?

8 >> MR. FITZPATRICK: Well, yes, Your Honor.
9 They've certainly sought to apply a higher standard
10 than what the rules require? Yes, sir.

11 >> JUDGE FROEHLICH: Okay. I know you've
12 been reluctant to use the phrase "heightened
13 standard" that appears in the pleadings, but is the
14 standard that you apply in your answers to the
15 contentions that were filed, is that reflected by
16 your argument earlier of what DOE believes the
17 parties should be held to in their contention
18 pleadings?

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

24 >> JUDGE FROEHLICH: No. I believe you
25 referred to them in the pleadings; although not

1 today, as the heightened standards. Is my
2 recollection of your pleadings, correct?

3 >> MR. SHEBELSKIE: Well, we discussed that
4 it is -- in the general section of our petition that
5 an application of the criteria under 2.309, the
6 Boards should take account of the availability, of
7 our information on the LSN, and the equal obligation
8 for all the parties to have made available and come
9 forward already with all their information.

10 This is -- and what -- and how this plays
11 out in practice in our objections -- and I'll give
12 you a general example -- I think is very consistent
13 with the rulemaking language that Mr. Fitzpatrick
14 just referred the Board to. Because in that same
15 rulemaking, to quote the Commission there, as an
16 example, they wrote that, quote, "The contention must
17 be supported by a concise statement of the alleged
18 facts or expert opinion together with specific
19 sources and documents of which the petitioner is
20 aware, which will be relied upon to establish the
21 facts or expert opinion."

22 And then the Commission went on in the
23 language Mr. Fitzpatrick discussed to say we're not
24 going to require litigation on the truth or not, a
25 trial on the merits, but what we are demanding, for

1 example, is that if there's specific information your
2 experts are relying on or that your contention relies
3 upon, you have to give, for example, the specific
4 citations to it.

5 Many of our objections to the contentions,
6 many of Nevada's in particular, we object because the
7 contention says other studies and information
8 supports our view here, without any citation,
9 specific or otherwise, as to what that information
10 is.

11 Nevada and every other petitioner has to
12 have had on the LSN their supporting information.
13 And what we're saying is the kind of specificity they
14 need to give is exactly what the Commission was
15 expecting early on, as part of -- and that's a
16 requirement of 309. And one other point --

17 >> JUDGE MOORE: Let me interrupt for a
18 moment and go back to my minimum floor. Whatever
19 that minimum floor is, is that the standard that DOE
20 applied in its answers in the admissibility of
21 contentions?

22 >> MR. SHEBELSKIE: Just a minute,
23 Your Honor. Your Honor, Mike Shebelskie.

24 In our answers to petition, we applied the
25 established standards under 2.309 as laid out in the

1 Commission's case law and as described in our answer.

2 >> JUDGE MOORE: Thank you.

3 >> MR. SHEBELSKIE: Your Honor, if I may
4 also just touch on one brief point for the record
5 that Mr. Fitzpatrick mentioned. He singled out, in
6 particular, our TSPA analysis and commented, in
7 essence, that it was maintained in, quote, "secrecy
8 for some certain years and didn't become available
9 till the summer of '08."

10 The record in the PAPO Board proceedings --
11 I won't belabor that -- laid out the history that the
12 TSPA was under revision for a couple of years, and
13 then the revised version came out in 2008. So it
14 wasn't in secret. It was being worked on, and a new
15 version developed.

16 But when we did release the revised version
17 of the TSPA that the LA is based on, DOE offered and
18 conducted a tutorial for Nevada and its experts, and
19 we invited the other affected units of local
20 government, that they could attend and participate to
21 understand what the new model was, how it was
22 structured, how it operated, et cetera, and answer
23 their questions.

24 I believe only Nye County took us up on
25 that and sent a representative, if I recall right,

1 but it was sparsely attended. Nevada did. And so we
2 have attempted and have been forthcoming in -- when
3 we finalize the analysis to make it available and to
4 explain it to all interested stakeholders, if they
5 were interested in that.

6 >> JUDGE FROEHLICH: Before we leave and
7 turn to compliance with the LSN, I wonder if any of
8 the other parties would like to be heard on the
9 standard applied, as it has to do with the existence
10 of the LSN? May I hear from staff and then we'll
11 pick up the other part.

12 >> MR. ROACH: Just briefly, Your Honor.
13 The staff --

14 >> JUDGE FROEHLICH: Your name, please.

15 >> MR. ROACH: Kevin Roach for the NRC
16 staff.

17 The staff notes that the Commission has
18 noted that the contention rule is strict by design.
19 The staff does not believe that any additional
20 heightened obligation attaches to the pleading
21 requirements by virtue of the existence of the LSN.

22 >> JUDGE FROEHLICH: Okay. Thank you.
23 Other parties, Four Counties?

24 >> MR. LIST: Yes. Robert List on behalf
25 of the Four Counties, Your Honor. I would just

1 simply note for the record that we, in our
2 contentions, do not cite, with I think, only one or
3 two of the exceptions, any of the LSN documents. And
4 those were documents, in fact, that we had submitted
5 to the LSN. So we did not rely heavily upon the LSN
6 at all. And yet the -- the answer from DOE
7 specifically throws the boilerplate heightened
8 obligation argument at us, and, frankly, it seems
9 inapplicable because we did not relay upon the LSN in
10 any depth.

11 >> JUDGE FROEHLICH: Thank you, Mr. List.
12 NEI?

13 >> MR. SILBERG: Jay Silberg for NEI. As
14 the representative of NEI's predecessor in the LSS
15 proceeding, going back to the late 1980's, I agree
16 with Nevada's characterization. The end result of
17 that process was not a heightened standard.

18 We strongly believe that the standards to
19 be applied for contentions in this proceeding are the
20 standards set forth in the regulations, neither
21 heightened nor lowered.

22 With respect to the LSN, we did cite to LSN
23 materials. Nonetheless, in our response to DOE, we
24 in several cases pointed out that our references were
25 not included in the LSN. They were, we pointed out,

1 in our response. We also relied on documents that
2 were copy-written. DOE objected to that. We also
3 pointed out in our reply that reason those documents
4 were not in the LSN was because they were
5 copy-written and that DOE had not taken advantage of
6 the procedures for getting hold of those documents,
7 which in fact, they had.

8 Regardless of which standards, whether the
9 standards are heightened, loosened, or as required in
10 the regulations, we think the contentions, at least
11 that we have set forth, meet those standards well in
12 excess of the requirements.

13 >> JUDGE FROEHLICH: Yes, please.

14 >> MR. WILLIAMS: Thank you, sir. Scott
15 Williams for NCAC. I wanted to follow up, as quickly
16 as I can, on Judge Moore and Judge Froehlich's
17 comments on this.

18 Our reading of the DOE's response to the
19 petition from the Native Council is that they have
20 also used the existence of the LSN as a heightened
21 standard for standing. They have objected to our
22 presence here today on the grounds that the NCAC,
23 without the benefit of counsel, did not participate
24 in the compilation of documents in the electronic
25 record.

1 To us, that is on all fours with the issues
2 which the two of you have raised in the last
3 discussion. Our clients are citizens. They reside
4 in the rural area surrounding this proposed facility.
5 They are Indians. They have unique interests in that
6 area. They have followed this extremely closely.
7 But without the benefit of counsel, without the
8 benefit of resources, it was not possible for them to
9 pay attention to this to the degree that DOE would
10 seem to require here.

11 So we affirm what, I think, are the
12 concerns that Judge Froehlich and Judge Moore have
13 raised here and ask that, in evaluating the petition
14 to intervene filed by the NCAC, you not apply
15 standards other than those found in 2.309.

16 >> JUDGE FROEHLICH: Thank you,
17 Mr. Williams. Any other party? Yes.

18 >> MS. ROBY: Yes. Debra Roby for Clark
19 County.

20 I believe Judge Moore has framed this very
21 well, and I believe counsel for Nevada supplemented
22 that very well as well.

23 The bottom line is there is no heightened
24 standard. The regulations 309 lay out what is
25 required for framing your contentions. And the

1 Board, in evaluating those contentions, applies the
2 standards stated in 309.

3 If there was a heightened standard, then
4 Judge Moore asked what would be that floor, how would
5 that affect the floor? And if one were to take the
6 DOE's view, no one in this room would meet that
7 floor, whatever that floor may be.

8 DOE mentioned -- counsel today mentioned
9 that in making documentary evidence available early
10 on, in one instance only Nevada was the party who
11 engaged in discussion with the DOE about certain
12 material. And despite even Nevada's admirable
13 efforts, even it doesn't meet whatever that floor is
14 that the DOE would apply.

15 I think that the DOE would -- the DOE's
16 arguments here are an impermissible attack on 309,
17 and they're done after the fact, after all of the
18 parties have proffered their contentions and framed
19 the contentions in accordance with 309. Thank you.

20 >> JUDGE FROEHLICH: Yes.

21 >> MS. HOUCK: Darcie Houck for TIM. And
22 we concur with the comments of Nevada and Clark
23 County and the staff and the other NC -- NCAC in
24 regards that there is not a heightened standard, and
25 that the comments of Your Honors regarding the fact

1 that there has been significant barriers to some of
2 the parties in being able to adequately participate,
3 and even though the information has been out there
4 for years, examples such as the Timbisha Shoshone
5 Tribe filed a petition with the Department of
6 Interior to be deemed an affected Indian tribe in
7 2001.

8 That petition was not certified and that
9 status was not granted until June of 2007, and it
10 took another year and a half to go through the
11 funding process so that the funding that they were
12 entitled to under the Nuclear Waste Policy Act -- a
13 partial portion of that wasn't issued until
14 October 2008. So they were dealing with numerous
15 barriers in regards to preparing and certifying their
16 LSN. And we would just ask that that be taken into
17 consideration here.

18 >> JUDGE FROEHLICH: So noted.

19 >> MS. HOUCK: Thank you.

20 >> JUDGE FROEHLICH: Any other party?

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

22 I'd like to echo the comments that have been made
23 here.

24 I also represent an entity that is, I think
25 to use Judge Moore's words, is essentially -- was

1 pro se up until very recently, and many of the
2 arguments DOE has raised objecting to our LSN
3 submissions has to do with the fact that we didn't
4 have the ability to do that.

5 But I also want to mention the earlier
6 Advisory PAPO Board orders made it clear that the LSN
7 is a standing for discovery. You don't give the
8 death penalty and keep somebody out at the contention
9 stage because they might not have made perfect
10 compliance with what is essentially discovery.

11 One other point I would like to make is
12 that in the June 20th order last year -- and I just
13 want to stress this -- that the Board did say that
14 the requirements that are set out in that order are
15 not intended to make the process more difficult
16 because the requirements are being imposed for the
17 first time in a unique and complex proceeding.
18 "Failure to comply with these case management
19 requirements shall not be grounds for any potential
20 party to object to the admissibility of a proffered
21 contention of the filing of the answer." Of course
22 then it goes on to discuss the 2.309 requirements.
23 So I think it made it very clear in that order.

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

1 >> MR. HUSTON: Judge Froehlich, this is
2 John Huston for Caliente Hot Springs. I am a
3 beginner here at NRC, and I appreciated the comments
4 in that regard, and, Judge Moore, this has got to be
5 the biggest haystack that I've ever seen, this LSN,
6 and sometimes to find things are difficult for a
7 beginner like me.

8 The other comment I'd make is this
9 apparently has been a long, long process. It's
10 been -- some of the history's been reviewed, 20
11 years. People come and go. People die. People
12 retire. And people who had an interest in standing
13 and own properties sell out and new people come in.
14 And so the idea that because this has been going on a
15 long time that the world has been on notice of their
16 interest in this proceeding, I find to be somewhat
17 lacking.

18 And then I would just ask the Commission to
19 take notice of the fact that this isn't the only
20 proceeding before a federal agency that this matter
21 involves. We've been before the Surface
22 Transportation, and that's been an educational
23 process, too. Thank you for your time.

24 >> JUDGE FROEHLICH: Thank you. Yes. Nye
25 County.

1 >> MR. VanNIEL: Jeffrey VanNiel on behalf
2 of Nye County, Your Honor.

3 With respect to the standard that 2.309
4 would specify as to the LSN requirements, Your Honor,
5 we think those basically speak for themselves. Judge
6 Moore clearly articulated what we think to be the
7 case, that the LSN does not add some additional level
8 of requirement to the floor that's set forth within
9 those requirements.

10 In our specific case, we attached or had
11 every -- we either attached a document to our
12 petition or had everything that we relied upon cited
13 to our LSN or from some other party's LSN, which we
14 believed was a requirement which was established or
15 at least articulated by the earlier PAPO order prior
16 to that event.

17 >> JUDGE FROEHLICH: Thank you. Let's move
18 on.

19 >> MR. SHEBELSKIE: Your Honor, if I may
20 just --

21 >> JUDGE FROEHLICH: Mr. Shebelskie.

22 >> MR. SHEBELSKIE: Thank you. If I may
23 just wrap up and make two quick observations in
24 response to what the other petitioners' comments
25 there.

1 We are not asking -- although we are being
2 accused of this, but we are not asking to apply
3 different standards than those under 309. This --
4 what we are asking for is directly analogous to what
5 boards like have this done all the time, that you
6 apply those standards to 309 when you're dealing with
7 the pro se petitioner in a less rigorous way than you
8 would with counsel filing the petitions.

9 In both instances, the Boards are applying
10 the standards of 309, but its expectations are
11 different and the application is more rigorous or
12 less flexible in the deliberately strict way, as the
13 NRC staff said, the Commission intended.

14 What we're asking here is no different,
15 that the boards in applying 309 needs to be mindful,
16 has to. That was the Commission's expectation, that
17 the parties would have access to our documents on the
18 LSN, and they would have already have come forward
19 with all of their supportive information to demand
20 the rigorous application of 309.

21 And then one second point with respect to
22 several of the other parties, other than Nevada, who
23 commented here about the needle in the haystack
24 issue. Their petitions are very focused in the main
25 on specific issues. For example, with both TIM and

1 TOP. Likewise with the NCAC and the Caliente Hot
2 Springs Resort. They have very focused limited
3 issues that they are interested in and they've
4 advanced contentions on. For them now to say, well,
5 there's a vast body of information and all of these
6 other analyses in the LSN and that should be problem,
7 that doesn't really bear on their petitions because
8 they were concerning themselves with everything.

9 Thank you, Your Honor.

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

12 As I've read the pleadings, DOE raises the
13 failure to demonstrate compliance with LSN procedures
14 and document production in order to argue why most
15 petitioners should not be allowed to participate in
16 this case.

17 In doing so DOE claims that Nevada
18 specifically has failed to demonstrate -- and I'm
19 emphasizing demonstrate -- substantial and timely
20 compliance with the LSN procedures. Subpart (j)
21 requires a party in order to participate in the
22 high-level waste proceeding to comply with the
23 requirements of 2.1003.

24 My question then to DOE is: What kind of a
25 showing is necessary to demonstrate substantial and

1 timely compliance?

2 >> MR. SHEBELSKIE: Your Honor, Mike
3 Shebelskie for DOE.

4 I think the answer is to look at 2.1012(b),
5 because their demands that the petitioner must
6 demonstrate substantial and timely compliance with
7 the requirements of 2.1003. And I believe that's now
8 being shown on the screen. So one place we need to
9 look to is 2.1003. And, secondly, actually, 1012
10 subpart (c) as well. And we're scrolling back to
11 that.

12 1012 subpart (c) provides that "The
13 presiding officer shall not make a finding of
14 substantial and timely compliance for any person who
15 is not in compliance with all applicable orders of
16 the" -- for the PAPO Board in this context. So we
17 need to consider what are the requirements of 2.1003
18 as amplified from the PAPO Board orders.

19 When we look at 2.1003, it provides, as
20 material -- as pertinent here, under subpart (a),
21 that each other -- after prescribing a deadline for
22 DOE and then the NRC staff to make its initial
23 certifications, it requires each other potential
24 party -- and I'm going to pause there -- that is
25 unqualified. That's not just -- its the State of

1 Nevada. It is each other potential party, including
2 interested governmental participant, that they shall
3 make available no later than 90 days after DOE's
4 certification under compliance of 2.1009(b) the
5 electronic files of -- under subpart (a)(1) here, all
6 documentary material. I'll pause there. So that's
7 the first requirement, milestone to establish that
8 demonstrates substantial and timely compliance.

9 Each petitioner here, without exception,
10 was required within 90 days of our initial
11 certification to make a certification to the PAPO
12 Board that they had made available all extant
13 documentary material as of that time. We'll talk a
14 little bit in a minute about what that really might
15 mean in context here.

16 Beyond that then, there were obligations to
17 continue to supplement that production. 2.1003(e)
18 has the general obligation, again, incumbent upon
19 each potential party without exception, including
20 interested governmental participants, that they shall
21 continue to supplement its documentary material made
22 available on the LSN with any additional material
23 created after the time of its initial certification.

24 That requirement was amplified by case
25 management orders with the PAPO Board that required

1 potential participants, on a monthly basis, to update
2 their LSN collections and provide certifications to
3 that effect.

4 Now -- and that continued every month until
5 they then submitted their petitions. So the
6 chronology here is DOE made its initial certification
7 in October of 2007. As a result of 2.1003 and
8 (a)(1), each potential participant had to then, in
9 January of 2008 -- the specific deadline was
10 January 17, 2008 -- provide a certification to the
11 PAPO Board that it has, at that point, made available
12 all its documentary material.

13 In order to make that certification in good
14 faith, of course, parties would have had to have had
15 requisite procedures and standards to identify
16 documentary material in their possession, custody,
17 and control, including that of their experts and
18 consultants, to have searched for those materials,
19 and then to have made them available as of
20 January 2008. And then to continue to supplement
21 production on a monthly basis, making monthly
22 certifications up until December 2008, when they
23 submitted their petitions.

24 In essence, then, Judge Froehlich, that is
25 what a petitioner in this case must be able to

1 demonstrate that they complied with all of those
2 obligations.

3 >> JUDGE FROEHLICH: So if they complied
4 with 2.1003, made all their documentary material
5 available, provided it and kept the updates, the
6 supplementation that's required by that section and
7 then certified their LSN collection, would they have
8 to do any more than that to demonstrate compliance?

9 >> MR. SHEBELSKIE: If there was then --
10 that is what they would need to do. If there is then
11 a question raised about -- because this is not just a
12 formalism. They just don't certify that -- the
13 requirement in --

14 >> JUDGE FROEHLICH: What more than
15 certify?

16 >> MR. SHEBELSKIE: Yes. They actually
17 have to -- if there's a question raised that, okay,
18 you gave a certification, for example, DOE says, but
19 it was a formal -- it was a hallow certification, and
20 here is a question -- we raise a question, certainly
21 a prima facie question calling to doubt the accuracy
22 of the certification, or calling to doubt the
23 sufficiency that, had they truly made available a
24 substantial good faith effort to identify and make
25 available their documentary material. And I think

1 they need to demonstrate that they have complied with
2 the substantive legal requirement to make available
3 all their documentary material.

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

10 >> MR. SHEBELSKIE: That could be, and I
11 think in the way you phrased that hypothetical, yes,
12 that if DOE said we think you're not in substantial
13 compliance because you haven't produced document X or
14 documents on this topic, and they respond with
15 evidence to say, yes, we have, here it is, and that's
16 acceptable to the Board, then that's a demonstration.

17 >> JUDGE FROEHLICH: Okay. Or they say what
18 the document that's missing can be found, let's say
19 in someone else's collection, too, would be
20 sufficient?

21 >> MR. SHEBELSKIE: Yes. If it's accurate,
22 yes.

23 >> JUDGE MOORE: Mr. Shebelskie, what's the
24 sequence in which DOE's displeasure is made known to
25 a potential party, now a petitioner, that there's an

1 inadequacy in DOE's view of their LSN document
2 collection? Would that not have been a motion to
3 strike the certification such as you filed against --
4 again, if memory serves, before the PAPO Board, the
5 City of Las Vegas, Clark County, the State of Nevada?

6 >> MR. SHEBELSKIE: Your Honor, Mike
7 Shebelskie. The short answer is no.

8 >> JUDGE MOORE: The answer is no?

9 >> MR. SHEBELSKIE: No. Here's why. Back
10 in the day, in January of '08, procedurally where we
11 were, was under 2.1003(a). All that regulation
12 requires is for the potential parties to provide the
13 certification to the then PAPO Board. There was no
14 requirement at that time, nothing in the regulations
15 that required the potential parties at that time to
16 make a demonstration of compliance.

17 >> JUDGE MOORE: But did not the
18 certification and both the regulations that call for
19 the certification and the PAPO Board orders and
20 decisions so require the same thing?

21 The certification was one delineated back
22 in 2004 in the PAPO Board's decision with respect to
23 Nevada's motion to strike DOE's initial
24 certification. And then all of the provisions that
25 you just outlined in the rules are encompassed within

1 that certification.

2 You can't certify something if you don't --
3 as I understand the requirement, certainly as I
4 understand what we said back in 2004, was that you
5 were certifying that you had procedures in effect,
6 that you had made a good faith effort to produce the
7 documents, and they were made available on the LSN.

8 And then the only question was timeliness
9 of when they filed their certification. The PAPO
10 Board put a monthly certification requirement --
11 supplementation and certification requirement into
12 effect. And those are the very things I understood
13 you to say complied with -- that would be the
14 demonstration.

15 >> MR. SHEBELSKIE: No. Two points,
16 Your Honor. The regulatory requirement that would
17 have been applicable here in January of -- in 2008,
18 90 days after our certification only calls upon
19 potential parties to provide a certification.

20 Now, obviously the certification has to be
21 in good faith and based on a good faith basis. The
22 PAPO Board's 2004 order directed, in fact, that the
23 certifications were not to elaborate beyond that
24 actually, which were just to be -- the expression is
25 similar to like a -- it was obviously bare bones, but

1 it was just to be a one-line certification, like the
2 NRC staff had given that didn't go into detail and
3 provide qualification, factual information,
4 et cetera. It was just the conclusionary
5 certification of compliance.

6 There was no requirement 90 days after our
7 certification for the parties, potential parties to
8 demonstrate substantial and timely compliance.

9 The regulation in 1012(b) creates new --
10 has different language for the obligation at the
11 petition stage. And it was very clear, and the
12 Commission has been very consistent in its rulemaking
13 from the very beginning in 1989 on this, that at this
14 point now, the Commission has used the language
15 requiring a demonstration of substantial and timely
16 compliance.

17 One of the -- and, indeed, probably the
18 most important obligation for compliance here is the
19 good faith production of all their documentary
20 material. So it's not merely that there's a
21 certification to that effect, but if a question has
22 been raised as to whether or not the party has
23 substantively complied with its obligation to produce
24 all of its documentary material, the burden now rests
25 upon it to demonstrate substantial and timely

1 compliance.

2 Judge Gibson yesterday referred to this as,
3 I think, a gate keeping requirement to get access to
4 party status.

5 So in those instances then, when
6 petitioners -- we are responding to their petitions.
7 And we looked at the entirety of the record. In some
8 instances people had not made certifications, initial
9 or supplemental. And in some instances they had made
10 certifications, but where we looked at their LSN
11 collections juxtaposed against their contentions, it
12 struck us that they had not been -- they are not in
13 substantial compliance with the underlying
14 substantive requirement to have produced all their
15 documentary material.

16 We then raised that in our objections, part
17 of our -- part of our answers, objecting to their
18 admission on that basis, and it's their burden to
19 demonstrate substantial and timely compliance.

20 >> JUDGE MOORE: I must be missing
21 something from your earlier explanation. One --
22 2.1003 incorporates the requirements of 2.1009.

23 2.1009, I believe, spells out all the
24 things that a party must do to be in compliance with
25 the regulations concerning their LSN collection and

1 necessarily then are certifying too that they have a
2 designated official who's in charge of all of this.
3 They've established procedures to implement the
4 requirements of 2.00 -- I'm sorry. 2.1003. They
5 provide training to their staff on procedures to
6 implement. And it goes down the list of five items.
7 And then there's the (b), the responsible official
8 must certify.

9 What have I missed that the certification
10 doesn't pick up that you have named as a requirement
11 for the demonstration?

12 >> MR. SHEBELSKIE: Well, the
13 demonstration -- well, first of all, 2.1003 doesn't
14 call upon the potential participants in the
15 prelicense phase to make any demonstration. It
16 doesn't say it shall demonstrate. It just says
17 certifies.

18 >> JUDGE MOORE: That's a given. But the
19 certification captures the requirements that you have
20 named that must be then demonstrated; is that
21 correct?

22 >> MR. SHEBELSKIE: Yes, yes.

23 >> JUDGE MOORE: Okay.

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

25 >> JUDGE MOORE: All right.

1 >> MR. SHEBELSKIE: Coming forward now to
2 the petition stage, 1210(b), under compliance, no
3 longer says it's sufficient for the petitioner simply
4 to certify when it submits its petition -- its
5 petition, that it is in compliance. It uses
6 different language.

7 Now, the threshold requirement is that a
8 person seeking party status won't be given that
9 status if it cannot demonstrate substantial and
10 timely compliance with the requirements. Now, what
11 does that mean will vary depending upon the
12 circumstances presented by a particular petition.

13 In instances where the petitioner never
14 made initial certification, never made any of the
15 monthly updates required by the PAPO boards, I don't
16 see how, as a matter of law, it can demonstrate it
17 has been in substantial and timely compliance.

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

20 >> MR. SHEBELSKIE: Yes.

21 >> JUDGE MOORE: -- initial certification
22 done timely and monthly supplementation and
23 certification thereof.

24 >> MR. SHEBELSKIE: Yes. If there is a
25 question -- a prima facie question raised that,

1 notwithstanding its certifications, it has not met
2 the underlying substantive requirement.

3 >> JUDGE MOORE: Except for the sake of
4 argument, your position, have you not just undercut
5 your position that it is the requirement of 2.1012(b)
6 that the petitioner, in its petition, must so
7 demonstrate because you have just told me that if
8 someone raises a prima facie case, then more is
9 required.

10 >> MR. SHEBELSKIE: Oh.

11 >> JUDGE MOORE: How can that possibly
12 occur if they have to do it upfront and they have no
13 idea unless they're mind readers, what's in DOE's
14 mind.

15 >> MR. SHEBELSKIE: Okay. I see,
16 Your Honor. I misunderstood the direction of your
17 question. I apologize.

18 They can respond to it in their reply is
19 how they do it.

20 >> JUDGE MOORE: Well, which then means
21 that your call upon them is in the answer, which is
22 a -- when I initially use the word "sequence," I had
23 in mind, doesn't it make sense for the process that
24 you've outlined to occur by you, in your answer, as
25 you have done, for lack of a better term, objected,

1 to the admission or the granting of any petition on
2 grounds that they have not complied with their LSN
3 requirements. They can -- excuse me -- respond in
4 the reply.

5 >> MR. SHEBELSKIE: Yes, Your Honor. I
6 understood your question to ask whether we needed to
7 file a motion objecting.

8 >> JUDGE MOORE: No.

9 >> MR. SHEBELSKIE: And that was the source
10 of my confusion. I apologize.

11 >> JUDGE MOORE: Let's go back to the
12 opportunity to file motions to strike which you
13 availed yourself of, Nevada availed itself of. Does
14 that not make both practical sense, and in reality
15 that's what happened when you had -- you among
16 others, had challenges to the certifications which
17 also necessarily encompassed these requirements that
18 are set forth in 2.1003 and 2.1009?

19 >> MR. SHEBELSKIE: No, Your Honor, I don't
20 think that follows either as a matter of substance
21 or, I'll say, even convenience, because back in the
22 prelicense phase, when the parties were required to
23 make their initial LSN certifications, that was it.
24 That was the only process required by the
25 regulations. It wasn't a process where the

1 petitioner -- the potential parties filed a
2 certification. The regulations called for us to give
3 an answer to it, and then for us -- and then for the
4 petitioner, the potential parties, to do a reply to
5 it, which is the process obviously you have with the
6 petitions to intervene.

7 Also substantively, there was no
8 requirement of -- under the regulations for any
9 demonstration. They only use that term. It's simply
10 file the certification, 90 days. It has to be in
11 good faith, and then that's -- the regulations are
12 otherwise silent. Here we have in 1012 --

13 >> JUDGE MOORE: Excuse me. Let me
14 interrupt. Doesn't -- but that certification,
15 necessarily, was certifying that they had made
16 available their LSN document collection and that was
17 in compliance with the requirements also of 2.1003
18 and 2.1009.

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

22 >> JUDGE MOORE: That's fine. You answered
23 my question.

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

25 >> JUDGE MOORE: Now, my next question is:

1 With regard to motions to strike, why, at least with
2 respect to the State of Nevada, was not the licensing
3 board's denial of your motion to strike their
4 certification, which was denied and then affirmed by
5 the Commission, res judicata, as to the matters that
6 you seek now to raise with respect to Nevada, at
7 least up to the point of initial certification?

8 >> MR. SHEBELSKIE: Oh, and I think,
9 Your Honor, that would be the case, if it's
10 collateral estoppel or not, but we're not -- we
11 weren't challenging that in our answer to their
12 petition. We accepted as a premise that their
13 production, as of January of 2008 had been upheld by
14 the PAPO Board.

15 >> JUDGE MOORE: Okay. Now, the doctrine,
16 as you, in your answers have pointed out with regard
17 to enumerable contentions, is one applicable
18 administrative proceedings, but, two, as generally
19 applied, encompasses not only matters raised but
20 matters that could have been raised.

21 Nothing in your challenge to Nevada's LSN
22 compliance was a matter that could not have been
23 raised by DOE in its motion to strike Nevada's
24 certification. So why does that not bar your
25 challenge that seeks to even challenge their initial

1 certification?

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

6 Rather, what we -- the thrust of our
7 objection there in the answer was that the PAPO Board
8 has said -- held that Nevada was not required, in
9 January of '08, to identify -- have identified all
10 its supporting and non-supporting information because
11 it was a reliance criteria and had the position --

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

15 >> MR. SHEBELSKIE: Right.

16 >> JUDGE MOORE: And that motion did not
17 raise, but could have raised each and every point
18 that you have now raised in your answer that was --
19 was, in fact, made in the dissent to the majority
20 decision. And you've reiterated those points of the
21 dissent in your answer here.

22 >> MR. SHEBELSKIE: Your Honor, let me make
23 two points. I'll respond to that, but then make --
24 I'd like to make a point that I think may
25 short-circuit some of the -- more of the questions on

1 this.

2 The answer to your question is our
3 objection in the answer to Nevada's petition was
4 objecting that Nevada -- it did not appear to us,
5 based on the limited supplemental production they had
6 done since their initial certification had undertaken
7 to identify additional supporting and non-supporting
8 information, as they developed their contentions.
9 That was a continuing obligation. That's part of
10 that supplemental production obligation that 2000 --
11 1003(e), the PAPO Board orders, and inherent in the
12 reliance concept requires petitioners to do.

13 Our objection -- that was -- that's our
14 objection in their answer.

15 Now, we made that objection, and I'll get
16 to the second point; so to close out that point. So
17 we were not saying we were challenging sufficiency of
18 their initial production, but rather based on the
19 facts and circumstances as they then were available
20 in the record when we answered their petition, it
21 seemed to us they had not made the supplemental
22 productions to identify additional supporting or
23 non-supporting information. All right. That said.

24 Second point here, to try to, perhaps, get
25 us to -- bring us up to date with the record. When

1 we filed that answer, all we had available to us was
2 Nevada's petition and what we could see in the
3 history of the LSN.

4 Nevada's petition just gave a blanket
5 certification without any facts and circumstances
6 that they had complied. But what the record in the
7 LSN showed, however, was essentially, little to any
8 supplementation from January up until maybe November,
9 the facts as set forth in our petition, until maybe 4
10 or 500 documents right at the tail end.

11 And we looked at those 400 some documents.
12 They did not strike us, and for the reasons given our
13 petition, to have been related to a result of the
14 supplemental information.

15 Now, Nevada has -- we did not have the
16 benefit of Mr. Fitzpatrick's declaration, and so the
17 process played out, Your Honor, as we were discussing
18 would be the process here. We raised the objection.
19 Nevada came forward with -- to make a factual
20 showing, not just assertions of counsel, but a sworn
21 declaration, saying that at least counsel had given
22 the instructions to the staff and to the experts, had
23 given the standards to look for the right types of
24 things, and they actually had done two or three
25 levels of review.

1 Now, if we had had the benefit of that
2 affidavit, but this other process plays out, we may
3 have taken a different approach. And so I'll accept
4 Mr. Fitzpatrick's representation, as that's what he's
5 done.

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

18 But what that should mean then is that all
19 the supporting information that Nevada and its
20 experts are relying on, then are in the LSN, and they
21 should not be able to come forward in the future
22 during the litigation phase and suddenly produce, oh,
23 here's information, analyses that we had that predate
24 December 2008. Oh, we just didn't -- we forgot to
25 put them on the LSN.

1 Likewise, when we get in discovery, and we
2 take depositions of their experts, and we find that
3 they did not, in fact, properly review their emails
4 and other documents for their non-supporting
5 information, or equally bad, they didn't preserve
6 them, then, we think a sanction will be appropriate.
7 That would be the next step.

8 >> JUDGE MOORE: Mr. Shebelskie, I believe
9 that's a given. And I specifically remember in the
10 PAPO that this was discussed at numerous case
11 management conferences.

12 >> MR. SHEBELSKIE: Yes, Your Honor. That
13 is a given.

14 >> JUDGE MOORE: So I think we can wrap
15 this up.

16 >> MR. SHEBELSKIE: Let me conclude this,
17 though, by saying this is not just going to be a --
18 this is not a hypothetical concern.

19 >> JUDGE MOORE: I fully understand that.

20 >> MR. SHEBELSKIE: All right, because this
21 is a new development that wasn't available to us when
22 we filed our answer because this relates to Nevada's
23 supplementation of their LSN collection in February
24 of 2009.

25 Having now repeatedly told licensing boards

1 that all that material was identified and produced;
2 in February of 2009 Nevada supplemented its LSN
3 collection with approximately 50 documents.

4 The bulk of those documents are reports by
5 two of their experts, Eugene Smith and Morey
6 Morganstein. Mr. Smith is one of their critical
7 experts on geoscience, and Mr. Morganstein on the
8 critical topics of corrosion. You would think, based
9 on their representations that they'd given about
10 compliance, that these would be moot documents. In
11 fact, most of these documents are reports that date
12 back to the period 2005 and 2006, and only now being
13 produced on the LSN.

14 What makes this particularly disturbing to
15 us is that we identified the absence of documentation
16 from experts Smith and Morganstein as part of our
17 initial challenge to Nevada's motion for initial
18 certification. We likewise raised this in our answer
19 to the petition.

20 In page 24, Footnote 1, we identified that
21 only one or two documents from Mr. -- Professor
22 Morganstein were in the supplemental production. We
23 found that incredible to believe.

24 On page 26 and 27 of our answer with
25 respect to Professor Smith, we noted that the

1 supplemental productions of Nevada still seemed
2 incomplete because his curriculum vitae attached to
3 their petition said he had prepared over 300 reports
4 for the Nevada Nuclear Waste Project Office. We
5 couldn't find 300 such reports. He also said he had
6 been continuing to do work since after 2005 through
7 2007. We couldn't find those either, and now,
8 suddenly they show up.

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

19 The Board fully concurred and put a good
20 faith standard into effect. And I would venture a
21 guess that the same complaint that you are now
22 making, if we were to put DOE's collection under a
23 microscope on the timing of how documents have been
24 put in, we might also find some documents that
25 because we knew there was a lap period -- a lag

1 period, all of that was taken into account, and all
2 of that is part of the good faith standard.

3 So I think your point has been made in the
4 past. We understand your point, and we are well
5 aware of that point.

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

7 >> JUDGE FROEHLICH: I think at this point
8 I'd like to hear from that declarant in the response.
9 Nevada, please.

10 >> MR. FITZPATRICK: Thank you, Your Honor,
11 Charles Fitzpatrick for Nevada.

12 Let me start at the tail end. I want to
13 address the stuff in order, but just the tail end is
14 important.

15 DOE's -- the issue of DOE's credibility was
16 raised both prior days of this proceeding, and so I
17 think it's important going forward, from the comments
18 that were made by judges, that where DOE's
19 credibility is questionable, that it be memorialized
20 in the record.

21 That's why I'm bringing up the last thing
22 that was said, was the alleged disturbance of DOE by
23 the fact that additional reports of Dr. Gene Smith
24 have suddenly appeared; although they were concealed
25 up until now.

1 The facts are -- and it's interesting where
2 it serves DOE's purpose, it accepts the
3 representations. Where it doesn't, it apparently
4 doesn't read them.

5 Because the issue of Dr. Smith and the
6 completeness of his reports on the LSN was raised,
7 DOE -- Nevada conducted another search, reported the
8 results of it to DOE by way of its -- a reply to DOE
9 in this proceeding, you know, just the reply on the
10 contentions.

11 With respect to Dr. Smith, some additional
12 activity reports were found, which Nevada does not
13 believe are studies or reports, documentary material
14 Number 3, or documentary material of any type.

15 Nevertheless -- nonetheless, Nevada
16 determined to add these documents to its LSN, and
17 make the documents available to DOE consistent in its
18 philosophy of erring in the direction of inclusion.
19 My point is we're talking good faith, bad faith.

20 >> JUDGE MOORE: Is that in your
21 declaration attached to your reply?

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

23 >> JUDGE MOORE: Okay. Thank you.

24 >> MR. FITZPATRICK: The point is that
25 throughout this proceeding in many different filings,

1 Nevada, with respect to LSN documentation, has said
2 over and over that we will be happy to fill any void,
3 any gap that anyone can show us, anything that's
4 missing. We'll be happy to provide it promptly on
5 request or notice --

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

9 >> MR. FITZPATRICK: All right. It's just
10 disturbing then that when we respond to an inquiry
11 about a particular expert's materials, conclude they
12 are not documentary material, need not be on the LSN,
13 but put them on in an abundance of caution and
14 cooperation, to be accused in a hearing of disturbing
15 conduct is itself disturbing. Moving back to --

16 >> JUDGE MOORE: Mr. Fitzpatrick, no good
17 deed goes unpunished.

18 >> MR. FITZPATRICK: That's true. Going
19 back to Judge Froehlich's original question with
20 respect to 2.1012(b) and its requirements, let me say
21 at the outset, I think the question was who has to
22 make a demonstration and what is the demonstration?
23 I'm combining your question with Judge Moore's
24 subsequent question.

25 Our answer to that is no one has to make a

1 demonstration. No one. That's not what 1012 says.
2 DOE's brief says that. It says -- 1012 says that the
3 parties must demonstrate whether the parties are
4 required to demonstrate, and it says that they must
5 make this demonstration in their petition for
6 intervention. But that's not what 1012 says. 1012
7 says they must be able to do so.

8 It says, quote, for once -- let's get the
9 quote. "If it cannot demonstrate, it may not be
10 granted party status. "If it cannot demonstrate."
11 It doesn't say it must demonstrate in its petition,
12 and it doesn't say it's required to in its petition.

13 Secondly, what must be demonstrated, I
14 think that's been covered correctly by Judge Moore
15 and I think NRC in its reply to contentions, it took
16 the position that we're a party. It cited the
17 regulations 103, 109. And it said that where a party
18 had certified in timely fashion its initial
19 certification and had done monthly certifications to
20 update it, that it would accept that -- those
21 representations.

22 The party signs its pleading under 2.304.
23 It's a representation that what is filed is the
24 truth, and NRC accepted that. But what may be most
25 important from Nevada's point of view, Nevada

1 believes that 2.1012 and the sanction that's
2 mentioned in there that won't be granted party status
3 if it cannot demonstrate.

4

5 First of all, let me say, we can
6 demonstrate and we tried at length to demonstrate it
7 in our reply.

8 But nonetheless, we don't have to
9 demonstrate it, nor do any of the other petitioners
10 who -- in whose jurisdiction the repository sits.
11 You have to be able to demonstrate it, don't even
12 need to be able to demonstrate it.

13 >> JUDGE FROEHLICH: Not even that.

14 >> MR. FITZPATRICK: According to 2.1000,
15 2.309, takes precedence over anything in subpart (j)
16 Such as 2.1012. And what 2.309 says about standing
17 for parties who live in the jurisdiction where the
18 repository is cited -- this is 2.309 --

19 >> JUDGE MOORE: But Mr. Fitzpatrick, that
20 doesn't go to LSN compliance. That goes to standing.
21 So I don't think it's relevant to whether or not the
22 petitioners have complied with the LSN compliance
23 requirements in subpart (j).

24 >> MR. FITZPATRICK: I respectfully suggest
25 2.3092(d)(iii) does address -- does deal with LSN as

1 well. Can I explain?

2 >> JUDGE MOORE: Would you give me the cite
3 again, please?

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

5 >> JUDGE MOORE: Contention admissibility
6 standards?

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

10 >> JUDGE MOORE: Please, again in
11 30 seconds, make your argument.

12 >> MR. FITZPATRICK: I'll do it in
13 30 seconds.

14 What that provision says, the Commission
15 shall permit intervention by the state and local
16 government body in which such area is located, and by
17 any affected federally recognized Indian tribe as
18 defined in Part 60 and 63.

19 >> JUDGE MOORE: All right. I understand
20 your argument.

21 >> MR. FITZPATRICK: May I finish? And
22 then it says, "provided, if the requirements of
23 paragraph F," only F, "of this section is satisfied
24 with respect to at least one contention." and then it
25 goes and says "all other petitions for intervention,"

1 meaning everybody but the resident in any such
2 proceeding must be reviewed under the provisions of
3 paragraphs A through F.

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

11 >> JUDGE MOORE: Thank you.

12 >> MR. FITZPATRICK: So it applies to that
13 as well. I think that it was evident that this
14 reading of 10.12, that it's not a requirement to make
15 a demonstration in your petition. It was apparently
16 agreed upon by all 14 petitioners and the NRC, and it
17 was only DOE that read it as a requirement in the
18 petition intervention. But again, disturbingly and
19 on the issue of credibility, DOE stated in its
20 response to seven of the petitioners who made no
21 demonstration that that's --

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

24 >> MR. FITZPATRICK: Thank you, Your Honor.
25 I'm done.

1 >> JUDGE FROEHLICH: I think this would be
2 a good point for us to take our -- would any other
3 party like to be heard at this point on this issue
4 and then we'll break for lunch.

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

8 >> JUDGE FROEHLICH: Why don't we do it
9 after lunch.

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

11 >> JUDGE FROEHLICH: We won't leave this
12 subject.

13 >> MS. ROBY: Sure.

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

18 (Whereupon luncheon recess was taken)

19 >> JUDGE FROEHLICH: Please be seated.
20 We'll be back on the record. I believe we left off
21 and I had cut off Clark County. Ms. Roby.

22 >> MS. ROBY: Thank you very much, Your
23 Honor. Before we broke, we were talking about LSN
24 compliance matters, and Clark County is among those
25 who has faced a challenge by the DOE for failing to

1 comply with LSN. We responded to that challenge in
2 our pleadings. I won't here repeat those arguments.
3 I just want to respond briefly to some of the
4 statements that I've heard today in a discussion that
5 has occurred today.

6 And I'll start by saying, and I don't mean
7 to be flip about this, but I can't tell what the
8 DOE's position is anymore.

9 I can't tell if they've abandoned certain
10 of their arguments or if they're clinging to certain
11 of those arguments in response to certain questions.
12 For example, in response to Judge Froelich's
13 very methodical approach to the DOE's argument, the
14 DOE was explaining sequentially what has to happen
15 for LSN compliance.

16 And, when DOE finished, Judge Froelich
17 asked, what else, is there anything else one must do.

18 And, at that point, DOE counsel had not
19 asserted that one must plead LSN compliance in their
20 petition in order to be in compliance.

21 That was followed by a question from Judge
22 Moore about what must one do to demonstrate, when is
23 demonstration required.

24 And at that point, DOE's counsel says after
25 a challenge. So, in your petition if one hasn't

1 challenged you, why would you put in a demonstration
2 if one hasn't challenged you?

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

12 We, of course, believe that there is no
13 requirement to plead it in the intervention. The
14 monthly certifications are the demonstrations in and
15 of themselves. And I think that's pretty clear.

16 Another thing that DOE's counsel said
17 before break is, a petitioner -- in response to Judge
18 Moore's questions, how does one respond to the prima
19 facie attack -- DOE's counsel said in the answer, in
20 the petition in the answer to the petition, DOE's
21 counsel said the answer is not the time to cure a
22 defect, implying that a response to a challenge on
23 the LSN would not be appropriate in the reply to an
24 answer from DOE.

25 So it's -- their position from one question

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

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

20 Although I would normally never presume to
21 speak for Judge Rosenthal, he has authorized me to
22 also speak in his behalf with respect to this
23 footnote. Judge Rosenthal and I comprised the
24 majority in LBP 08-05 27-- I'm sorry -- 67 NRC
25 205-2008. That ruling was affirmed by the

1 Commission. The majority ruling, to which there was
2 a lengthy dissent, denied, as I mentioned earlier
3 this morning, DOE's motion to strike LSN's
4 certification with the State of Nevada.

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

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

17 Because of that footnote, I -- that
18 essentially said that my silence was assent, I felt
19 that that clarification was justified.

20 Now, I would like to move on to another
21 subject. And Mr. Chairman --

22 >> MR. SHEBELSKIE: Your Honor, Mike
23 Shebelskie for DOE. There was one point that
24 Mr. Fitzpatrick made that I did want to respond to
25 regarding these reports that they produced in

1 January -- February of LSN.

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

10 >> MR. SHEBELSKIE: All right, thank you,
11 Your Honor.

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

18 And, in my view, you know, I understand
19 Part 63 to be a performance-based regulation, and it
20 has various ones that we talked about earlier in the
21 week. And for the sake of brevity, I'll just kind
22 of list the numbers now, the 101, 102(h), 102(j),
23 114(b, (c), and (g), 305(c). And these various
24 regulations require, you know, that various
25 parameters we looked at, that the performance be

1 based on credible models, that a wide range of both
2 good and bad effects be evaluated, and various
3 factors related to geoscience be considered and that
4 type of thing.

5 The question I want to make sure I
6 understand from DOE is, and I guess would be
7 Mr. Silverman, would you be the best one or would
8 there be someone else?

9 >> MR. SILVERMAN: I think when we hear the
10 question, it may be me or Mr. Zaffuts.

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

23 And so it has a lot of discussion of these
24 performance types of things that you must do that,
25 one, helps indicate that you did it right, and two,

1 helps build more assurances that the degree of
2 uncertainty is quantified correctly and that the
3 model results have some type of comfort level with
4 them. What's wrong with my summation of that?

5 Do you agree with that characterization or
6 do you generally agree with it?

7 Or I said agree twice.

8 Do you disagree with that? You know, I
9 think you know what I mean.

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

19 >>JUDGE WARDWELL: So, therefore, a
20 violation of those regulations, isn't that not a
21 dispute in and of itself?

22 Because, if you don't achieve those
23 regulations, regardless of the outcome of the TSPA,
24 you've violated the regulations and it is a viable
25 contention to be addressed to see whether that's

1 correct or not, because we lose that degree of
2 comfort with the uncertainty of the analysis and the
3 results that we see come out of the TSPA.

4 >> MR. SILVERMAN: I think what we were
5 saying was that, because of the certain
6 non-proscriptive nature of this regulation, that
7 there was a considerable range of acceptable, not an
8 unlimited range, but a considerable range of
9 acceptable interpretation and application on the part
10 of the applicant to apply these; that there could be
11 bounds exceeded.

12 If those bounds are exceeded and the
13 regulation is, in fact, violated, that may be a
14 material issue but that we did not think that most of
15 the allegations and contentions that we were dealing
16 with, if any, properly pled a violation.

17 >> JUDGE WARDWELL: That's pretty much a
18 repeat of what you said the other day. I guess it
19 will be left to us to judge how far. I'll get a
20 little bit more about digging into the merits of it
21 or digging into the SAR and LA, and, in fact, it will
22 be the next question after this one. But I think, on
23 one of the previous days, you referenced the fact
24 that similar contentions that were based on process,
25 which you can label as process regulations were

1 denied at Indian Point.

2 >> MR. SILVERMAN: Yes.

3 >>JUDGE WARDWELL: Do you remember that?

4 >> MR. SILVERMAN: Yes.

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

9 >> MR. SILVERMAN: I did not. What I was
10 doing was --

11 >>JUDGE WARDWELL: Thank you.

12 >> MR. SILVERMAN: Sure.

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

24 >> MR. SILVERMAN: Understood. We all
25 would like to do that.

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

8 And my question to you is -- is why doesn't
9 that just open up another whole new avenue of merits
10 activity?

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

17 And we're right in the middle of a merits
18 issue. How do you -- how do you contradict that
19 particular position that one may take with not --
20 with trying to say that -- just that you've opened up
21 more problems than you solved, by as soon as you
22 start looking at some technical detail that you
23 reference us to, that we'll be in a never ending
24 battle until we're actually looking at and trying to
25 evaluate something for a motion for summary

1 disposition or what should be held at a hearing.

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

19 Now, my point was that you may look at
20 those references. It's critical that you do, in our
21 view. And you may decide you don't have to
22 exhaustively resolve the issue. You don't have to
23 make the final evidentiary determination, but you
24 have to make the determination as to whether there is
25 a genuine material dispute. The way to do that is to

1 look at all that information at some level.

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

11 You may go to that SAR section. You must
12 go to that SAR section.

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

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

20 >>JUDGE WARDWELL: I don't believe -- I'll
21 clarify that.

22 >> MR. SILVERMAN: I could be wrong. I
23 don't mean to mischaracterize what he said. If he
24 agrees, that's great.

25 >>JUDGE WARDWELL: I think where he -- I

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

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

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

21 >>JUDGE WARDWELL: Thank you,
22 Mr. Silverman.

23 >> MR. SILVERMAN: Thank you.

24 >>JUDGE WARDWELL: Mr. Malsch, did you, in
25 fact, say over the last two days that you would agree

1 that if you said it's been omitted and DOE points out
2 that it hasn't been omitted, that you would agree
3 that contention should be rejected?

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

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

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

1 considered by definition of how considered really is
2 of a range of possible supports than just an absolute
3 like omissions might be?

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

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

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

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

23 >> JUDGE WARDWELL: And, DOE, how would you
24 respond? Would you agree with that definition of
25 considered or do you view considered to be similar to

1 omission in being a red or green-type of issue rather
2 than a -- there needs to be some evaluation of what
3 you're really doing when -- "considered" is an action
4 item, it's not just a presentation item?

5 >> MR. SILVERMAN: That is correct. And we
6 did not mean to suggest that "considered" is equated
7 with merely "mentioned." What we meant was
8 "considered" -- It has to be viewed in the context of
9 the regulations. The best example would be a feature
10 event or process under 63.114 may be considered,
11 meaning that it was evaluated to determine whether it
12 needed to be included or not. If it was determined
13 not to be -- you know, an included FEP, It was
14 properly -- and we made that judgment properly,
15 assume that -- it was properly considered. As to
16 your point, it does require more than a mention, but,
17 to our mind, it equates with an omission.

18 We think -- we have experienced attorneys
19 here. There are some contentions that say we failed
20 to consider. I believe there are numerous other
21 contentions that say we failed to adequately consider
22 or adequately address or adequately account for
23 certain things. So maybe we were wrong, but, when we
24 interpreted the petition of virtually any party and
25 they made a bare statement that we did not consider

1 something, we felt that was a contention of omission
2 and we responded in that way.

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

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

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

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

22 >> JUDGE MOORE: Okay. But doesn't that
23 push it into it is a genuine dispute, because I can't
24 decide on the face of this whether it was adequately
25 considered?

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

13 >> JUDGE MOORE: Judge Wardwell, could I
14 follow up?

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

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

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

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

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

25 >> MR. SILVERMAN: Well, it's hard for me

1 to quantify that.

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

4 >> MR. SILVERMAN: Right.

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

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

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

1 that's the crux of the contentions.

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

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

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

14 Let's go to a specific example. Let's go
15 to Nevada Safety 48, multiple scale thermal
16 hydrologic model. In a nutshell, this contention
17 asserts that SAR subsection 2.3.5.4 -- it's up on the
18 screen -- this is one of the Swellex rock bolt
19 contentions. And I recognize that DOE can make
20 several arguments, but let's just zero in on one that
21 we're dealing with.

22 If you look at DOE's answer, it says that,
23 in response to 309(f)(1)(v), that Nevada offers no
24 scientific or factual materials to support its
25 assertion, leaving the entire premise of the

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

13 Now, it is my considered opinion that that
14 does not definitively answer that the rock bolts will
15 be open. I'm assuming, because there is no textural
16 cite in the answer, that there is no text in the SAR
17 that so states.

18 My reading of many, many sections of the
19 SAR around and dealing with Swellex rock bolts, I
20 found no text that answered the question whether they
21 were open or closed after installation. Now that
22 picture, you tell me in an answer, an unsworn
23 document and argument of counsel, that they are open;
24 the citation does not definitively answer the
25 question. Is that not a -- definitionally a genuine

1 issue of material fact because that is the premise on
2 which this contention is built?

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

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

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

11 >> JUDGE MOORE: Perfectly understandable.

12 >> MR. SILVERMAN: And many others.

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

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

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

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

1 they have no other way of knowing that.

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

4 >> MR. SILVERMAN: Well, again, they're the
5 ones that -- how I do say this -- the contention,
6 itself, if it makes a factual allegation of an error
7 or deficiency of some sort has to provide some basis
8 for that.

9 They're the ones that selected the --

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

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

1 And this one, I think, illustrates the
2 point that this presents to me a genuine issue of
3 material fact.

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

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

18 >>JUDGE WARDWELL: We're not trying to rule
19 on this.

20 >> MR. SILVERMAN: -- into the petition
21 allegations, because there's two points I want to
22 make, where, if you have looked at the best
23 information we could provide and you can't resolve it
24 and the schematic is unacceptable to you, it doesn't
25 satisfy you and say, I see the answer, there's

1 nothing here. I understand this, it's a -- it's an
2 error on the petitioner's part, then you may very
3 well conclude that it's a genuine dispute.

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

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

8 >> MR. SILVERMAN: Yes, so I'm agreeing
9 with you up to that point.

10 >> JUDGE MOORE: And you have other
11 arguments?

12 >> MR. SILVERMAN: Excuse me?

13 >> JUDGE MOORE: You have other arguments
14 with this contention?

15 >> MR. SILVERMAN: Yes.

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

21 >> MR. SILVERMAN: Taking at face value,
22 and I didn't -- have actually myself studied that
23 figure, taking at face value that that figure doesn't
24 clearly prove our point. I will assume that -- it's
25 my hope and expectation that there will be many other

1 examples that we have cited that are clearer and are
2 more definitive and do allow you to conclude there is
3 no general material dispute. But that's -- all we're
4 asking is for you make that inquiry.

5 >> JUDGE MOORE: I understand. We've got
6 to move this along.

7 >> MR. SILVERMAN: Very good.

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

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

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

25 >> JUDGE MOORE: Mr. Malsch, let me stop

1 you right there. Did you say Nevada Miscellaneous 3?

2 >> MR. MALSCH: Miscellaneous 3. I believe
3 that's the one.

4 >> JUDGE MOORE: Okay. Please continue.

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

6 All I'm suggesting is that --

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

8 >> MR. MALSCH: -- at a very fundamental
9 level, one could approach each contention like the
10 one you were discussing with DOE by simply proceeding
11 no further than the text of the license application
12 itself and trying to resolve admissibility on that
13 basis.

14

15 I think, if you do so, you will find that,
16 in almost innumerable cases, that the LA itself
17 contains insufficient text to actually support hardly
18 anything, that one must go to the references. And,
19 for reasons that frankly escape me, DOE specifically
20 stated that none of the references are to be
21 considered to be part of the license application.

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

23 >> JUDGE MOORE: That's the supporting
24 information. The SAR, of course, is part of the
25 license application.

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

3 >> MR. SILVERMAN: One very brief remark,
4 if I may.

5 >> JUDGE MOORE: Very.

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

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

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

23 >> MR. MALSCH: Marty Malsch for Nevada. I
24 don't believe that in the statements to support five
25 or six in 2.309(f)(1) there needs to be supporting

1 documents supporting every single opinion offered. I
2 think it's enough that the supporting information
3 offers a non-conclusory reasonable sounding basis.
4 And that should be sufficient.

5 >> JUDGE WARDWELL: As I heard your argument
6 yesterday, I think I perceived you saying that you
7 would have provided it, at least in more cases, but
8 ran out of time or something to that effect?

9 >> MR. MALSCH: I mean, that is true. I
10 mean, we don't -- we didn't instruct the experts to
11 provide us with no references or a minimum number of
12 references.

13 We instructed them in what we thought were
14 the requirements of 2.309. We left it to their
15 judgment as to how many references to include. You
16 know, if we were in the process of drafting articles
17 for scholarly journals or preparing testimony for the
18 hearing, we might have insisted on more. But I did
19 not think that supporting references were required,
20 and, given the time constraints, I did not advise
21 them that they were required, and I don't think that
22 they were required. So --

23 >> JUDGE MOORE: And, if I understand your
24 argument correctly about paragraphs -- I'm sorry,
25 sections 5 and 6 of these contentions, that is, if

1 your view is accepted, the affidavit, those are the
2 expert opinions of the affiant?

3 >> MR. MALSCH: That is precisely correct.
4 Our paragraphs five were drafted essentially by our
5 experts. Those are their opinions.

6 >>JUDGE WALDWELL: Why didn't you take an
7 extra day and try to correct some of that as opposed
8 to submitting a day early, then, if you ran out of
9 time?

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

23 >> JUDGE MOORE: Thank you. If I'm not
24 mistaken for all of the petitioners,
25 wasn't -- weren't great efforts made by I guess it

1 was the Secretary's Office to get you to, because of
2 the EIE filing requirements, to file -- not allow it
3 to go to the last day because we were very concerned
4 a system may not perform as advertised?

5 >> MR. MALSCH: Again, Marty Malsch for
6 Nevada. That is true. We from almost the beginning
7 but certainly toward the end, our own completion
8 deadline was several days in advance of the deadline
9 set in the Commission's Notice of Hearing for
10 precisely that reason.

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

17 >>JUDGE WARDWELL: Would you like me to
18 proceed while you --

19 >> JUDGE MOORE: Please.

20 >>JUDGE WARDWELL: Mr. Silverman, if I
21 might, 114(c) says that, to effects, that there is a
22 need to consider alternative conceptual models and
23 evaluate their effects on performance, in not so many
24 words. I don't think that's an exact quote, but I
25 think that's the essence of it.

1 Do you know if there is a definition for
2 models in the regulations?

3 >> MR. SILVERMAN: I don't believe there
4 is.

5 >>JUDGE WARDWELL: So it wouldn't have to
6 be a numerical model, necessarily, it could be an
7 analogue model. By that, I mean it could be an
8 analysis approach is what's being referred to here?

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

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

18 >> MR. SILVERMAN: My understanding of what
19 the Department has done under 114(c) in terms of
20 consideration is to take a very careful look at all
21 features, events, and processes that they could
22 identify, and there are volumes on this subject.

23 I think the AMR -- I don't want to
24 mis-speak. There is a tremendous amount of
25 information on this, and I think there's a tremendous

1 amount of analytical work that went into deciding,
2 considering many of these features, events, and
3 processes in deciding that first gateway issue, which
4 is whether to include it or exclude it. It's not
5 merely -- and there are varying levels. There were
6 issues, I am certain, that were much easier to
7 dispense with and conclude they were properly
8 excluded and others that may have been very complex.

9 I can't speak to that in that great detail.
10 I could get more information, but I can assure you
11 that, in many cases, there was a considerable amount
12 of technical and engineering or scientific evaluation
13 that went into that consideration of whether to
14 include or exclude that particular FEP. And it
15 varied, I'm sure, based on the perceived importance
16 and the complexity of the issue, et cetera.

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

1 like that.

2 >> MR. SILVERMAN: I know nothing about
3 that model, but we have someone here who could answer
4 the question.

5 >> JUDGE WARDWELL: Right. And so, that --
6 the reason I remember it is because I have a
7 reasonable amount of experience working with the HELP
8 model, and the statements that were made are not
9 incorrect. It was derived for landfill design.
10 That's where the H-E-L-P comes from.

11 And it is a one-dimensional model, and it
12 is not necessarily simplistic. It uses, you know,
13 pretty good analogues, but yet it's not very exotic
14 either for comparing landfill design to applications
15 that we're dealing with -- landfill design for 20
16 years compared to somewhat longer periods we have to
17 deal with here.

18 So, if you -- under the assumption that it
19 is not a very robust approach, would you not agree
20 that that wouldn't be one that would qualify as
21 meeting the criteria of 114(c) to consider
22 alternative models and their performance by throwing
23 up something like that and then throwing it and
24 saying, well, that's not a good one so we're going to
25 throw that out and we can check off 114(c) in this

1 situation?

2 >> MR. SILVERMAN: Let me take one moment,
3 please.

4 >>JUDGE WARDWELL: Really, take your time.
5 Time's up.

6 >> MR. SILVERMAN: Now that Mr. Zaffuts has
7 explained it to me, I'm going to have him explain it
8 to you.

9 >>JUDGE WARDWELL: That's the way to do it.

10 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I
11 think what we're talking -- one thing I would like to
12 just try to explain to the best of my ability, which
13 may not be sufficient, the -- what you hypothesized I
14 think you pre-supposed that there was an
15 understanding; I don't know if there is or not, but
16 that there was some understanding that this model was
17 wholly inappropriate at the time that it was being
18 looked into.

19 I don't necessarily believe that would be
20 the case because what 114(c) suggests is that you
21 look around at the different models or the conceptual
22 hypotheses or what have you to get a better sense of
23 what is appropriate and what isn't appropriate. And
24 then you obviously hopefully pick the one that is the
25 most appropriate or best suited for the purposes.

1 Putting in the SAR the discussion of, well, here are
2 the ones that were considered and this is the reason
3 why one or two were deemed inappropriate, I think
4 that clearly satisfies the intent of (c) here.

5 And I think that, if the allegation is
6 that -- or the issue is that you knew from the get-go
7 and you were just trying to mark off a box and this
8 really wasn't a full consideration, I think that's an
9 issue that would need to be supported by sufficient,
10 you know, assertions of fact and bases. But I don't
11 think it gets into a violation.

12 I think, again, it becomes, like the vast
13 majority of Nevada's contentions in this regard if
14 they try to couch as violations, they're really
15 technical assessments and disagreements that need to
16 go to the next step or really assess the materiality
17 of the issue.

18 >>JUDGE WARDWELL: And isn't that best left
19 for a hearing?

20 >> MR. ZAFFUTS: Well, no, I think that's
21 something they need to -- if we are dealing with
22 materiality, that's a basis that they need to plead
23 with sufficient basis that it would make a difference
24 in the outcome of the case.

25 >>JUDGE WARDWELL: So hypothetically, let's

1 say this, if they are contesting that the 114(c) has
2 not been addressed because they interpret 114(c) a
3 little more rigorously than you do and they're saying
4 that 114(c) requires that you really look into the
5 models and run some performance of them to see what
6 the results come out to be, to compare them to what
7 you have done is see if there is some type of check
8 out.

9 And you have interpreted in your manner of
10 114(c) and have looked at a model that is not robust
11 and, yes, you came up pretty quickly to resolve that
12 it is not robust but, rather than move on and try to
13 find some other models that are more equivalent to
14 what we're trying to achieve here, you are using that
15 to qualify for 114(c). That, to me, says there is a
16 violation, a potential violation -- we're not doing
17 it on -- we're not making a decision on whether there
18 is -- but there is a potential violation of 114(c)
19 and there is a material dispute in regards to whether
20 or not this model really meets what's trying to be
21 derived and achieved out of that regulation.

22 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I
23 think you -- there is a premise or an earlier
24 assessment that the Board needs to make to get to the
25 next step of a material dispute, which is what is --

1 it's not easy necessarily with these types of
2 non-proscriptive type of requirements. Really, what
3 would constitute a failure or a violation of these
4 requirements?

5 I think that's, and I'm not going to step
6 in your shoes because I don't know, but I think
7 that's an answer or something, assessment, that you
8 have to make from a legal perspective, which is, what
9 does this really mean?

10 Does it really mean that there is just the
11 premise that you -- the hypothesis that you say or
12 does it mean more?

13 And, at that point if you determine there
14 is a violation or it properly pleads a violation with
15 sufficient bases, then I think that it would be a
16 material issue.

17 >>JUDGE WARDWELL: Premised on, they have
18 interpreted 114(c) to mean you need to do more than
19 just look at other models, that you actually have to
20 derive some -- I'm going under the assumption in my
21 hypothesis that a petitioner, and I happen to just
22 point to Nevada because they're the most visible one,
23 but the --

24 >> MR. SILVERMAN: Prolific.

25 >>JUDGE WARDWELL: -- you need to do more

1 than what you are achieving out of presenting what is
2 probably un-disputably a naive model for any attempts
3 that we're trying to do here at Yucca Mountain.
4 Under that premise, then, there is a dispute on
5 whether or not 114(c) is being addressed.

6 >> MR. SILVERMAN: It's un-disputably a
7 naive model, and you are the technical judge on the
8 panel. I would think you may have the basis to
9 conclude there was no material to dispute that, that
10 was not a model that if not used would not violate
11 this regulation, perhaps.

12 >>JUDGE WARDWELL: But those -- but I'm
13 going on the assumption -- I don't even know if this
14 is the case. I just remember the model was brought
15 up, so don't go looking for the contention because
16 you may not find it.

17 >> MR. SILVERMAN: Yes.

18 >>JUDGE WARDWELL: If this contention dealt
19 with a situation where you have said, in this
20 infiltration effort, we have looked at other models,
21 we have looked at the HELP model and, oh, gosh and by
22 glory, it's just not very robust, but, boy, we've
23 looked at the HELP model so we've done what 114(c)
24 has required.

25 And under that contention, the petitioner

1 has a different viewpoint of what 114(c) should be
2 doing, i.e., showing some performance and showing how
3 that relates to what has to actually be done here to
4 see whether the TSPA one and all this exoticness and
5 inability to really handle changes with it as we've
6 talked about the last two days is in the ballpark or
7 not. And, if -- or whether there's better models
8 that can and, if so, incorporate those as sub-models
9 into this vast program.

10 Is that not a material dispute between the
11 two parties that should be resolved at hearing?

12 >> MR. SILVERMAN: It is a question as to
13 whether our failure or the level of consideration of
14 the model that we did not include, in your opinion,
15 would violate the regulation to consider alternative
16 models, and that's the judgment that has to be made,
17 not evidentiary.

18 >> JUDGE MOORE: Mr. Silverman, at a
19 minimum, with Judge Wardwell's example where you're
20 obviously reading 114 to mean one thing and Nevada is
21 reading it to be something else. Isn't it a legal
22 issue, contention, that we have to let in and resolve
23 that?

24 Surely, we can't be resolving that --

25 >> MR. SILVERMAN: No, Your Honor, and I'll

1 give you an example because I go to the simple ones.

2 >> JUDGE MOORE: Did you say yes or no?

3 >> MR. SILVERMAN: I said no.

4 >> JUDGE MOORE: It's not a legal issue
5 that has to be resolved first?

6 >> MR. SILVERMAN: No, it is a legal issue.
7 You may be able to resolve it without going to
8 hearing.

9 Maybe I misunderstood your question.

10 >> JUDGE MOORE: No, no, I'm talking
11 contention admissibility and only contention
12 admissibility. Judge Wardwell's example, at a
13 minimum, don't we have this as a legal issue
14 contention that's to come in and we've got to resolve
15 that legal issue before we can get to whether or not
16 it was adequate?

17 >> MR. SILVERMAN: Are you asking me that,
18 because of the existence of the legal issue, there is
19 an admissible contention?

20 >> JUDGE MOORE: At least as a legal issue
21 there is.

22 >> MR. SILVERMAN: Not necessarily, and let
23 me give you a very, very brief and simple example
24 because I'm not an engineer. There is a contention,
25 Nevada contention, that says essentially you didn't

1 file an emergency plan. I may be --

2 >> JUDGE MOORE: I understand. Let's --

3 Dr. Wardwell, can we move on?

4 >>JUDGE WARDWELL: Yeah, I'm about ready to
5 move on. That was just an example.

6 >> MR. SILVERMAN: It just may not be a
7 genuine legal issue.

8 >>JUDGE WARDWELL: There are a couple more
9 things on models I want to fix before we move on to a
10 new subject area.

11 >> JUDGE MOORE: No, no, I'm going to use
12 an example.

13 >>JUDGE WARDWELL: Of a model?

14 >> JUDGE MOORE: Well, of the legal issue
15 problem.

16 >>JUDGE WARDWELL: Okay.

17 >> JUDGE MOORE: He just brought up an
18 emergency plan. I gave you one number off. I wanted
19 to go to Nevada Safety 4. I had said 5. We'll start
20 with 4. In a nutshell, that contention is labeled a
21 legal issue and it fails -- that DOE's quality
22 assurance requirements and description fails to
23 comply with applicable quality assurance criteria
24 because the SAR does not address repository
25 operations, permanent closure, and decontamination

1 and dismantling the surface facilities.

2 The DOE answer is essentially the same,
3 it's beyond the scope because the application for
4 construction authorization and contention -- the
5 application is for construction authorization and the
6 contention challenges aspects of the quality
7 assurance program that relates to repository
8 operation, closure and decontamination and
9 dismantling the service facilities.

10 You also say that it fails to raise a
11 material issue and to the findings that the NRC must
12 make for essentially the same reasons, and it fails
13 to raise the genuine issue of material fact or law
14 for the same reasons.

15 I'd like to walk through that regulation to
16 show you the problem we have. Let's start with
17 63.21. It's entitled Content of Application. If you
18 go to 63.21(c), it states -- starts by saying that
19 what the SAR must include. Then, if you look at
20 63.21.20, it states that the SAR -- what the SAR must
21 include with respect to quality assurance. And let's
22 quickly turn to 20.

23 It says, "a description of the quality
24 assurance program to be applied to the structures,
25 systems, and components important to safety and to

1 the engineered natural barriers important to the
2 wayside installation. The description of the quality
3 assurance program must include a discussion of how
4 applicable requirements of 63.142 will be satisfied."

5 Then you go to 63.142 entitled Quality
6 Assurance Criteria. And it starts off -- it's easier
7 for me to read my underlines -- 63.142 states in
8 pertinent part that DOE -- it repeats verbatim
9 63.21(c)(20). And then it says "these activities
10 include," and it begins to list things, but it lists
11 facility operation, performance closure,
12 decontamination, and dismantling the surface
13 facilities.

14 Then it states the description must
15 indicate how the applicable quality assurance
16 requirements will be satisfied.

17 And, as part of its answer, DOE says that
18 they don't have to deal with any of the last three,
19 repository operations, closure and decontamination,
20 dismantling and service facilities. And there is no
21 description in the SAR of those, not even a
22 description. And part of the argument turns to
23 63.144 that's saying here, 144 anticipates that there
24 will be downstream changes made as the process goes
25 along.

1 The problem is that 63.144, in my opinion,
2 starts out by saying changes to DOE's NRC-approved
3 safety analysis report, quality assurance program,
4 description are processed as follows.

5 Now, when you work your way through that,
6 we have a regulation that requires a description of
7 the QA program, and DOE is arguing that three of the
8 named components that the regulation says must be in
9 the description, they're going to do later, they're
10 not here.

11 That problem exists with many of the
12 features of 63.21(c). And in my view, it appears
13 that DOE has read the word "description" out of the
14 regulation for things that are downstream that deal
15 with decontamination, for example, of the service
16 facility. But the -- the regulation, the contents of
17 the application, specifically the SAR, it says they
18 must be included.

19 Now, we're faced consistently, in my view,
20 because I have waded through the contentions -- and I
21 think slogged is probably a better word -- the
22 contentions and the regulations with this kind of
23 problem. Is that not simply because of the word
24 "description"? And Judge Wardwell, I'm sure, will
25 like to deal with you on what an adequate description

1 is, but, clearly, if there's nothing there at all and
2 it's required by a description, isn't that an
3 admissible contention?

4 >> MR. SILVERMAN: It would be an
5 admissible contention if you reviewed this example or
6 another example and were able to conclude that there
7 was a legitimate question, a genuine dispute, about
8 the -- whether there was a violation of the
9 regulation or not.

10 >> JUDGE MOORE: Isn't it one step in front
11 of that for contention admissibility? This is
12 denominated as a legal issue. Isn't the first
13 question, first and foremost question, what the
14 regulation means and doesn't that put it into the
15 admissibility category?

16 >> MR. SILVERMAN: No, Your Honor, it does
17 not necessarily. It might. That's my point. You
18 may -- you can read some of these regulations. I
19 admit 63 is a pretty complex set of regulations. And
20 you can conclude, I know what that means and this
21 isn't the violation. There may be others where it's
22 more difficult for you, but there are contentions
23 that have been dismissed because they say a
24 regulation requires something and it, in fact,
25 doesn't. You may agree or not agree with us on this

1 one. I haven't looked at the details of it.

2 But it's common practice, I believe, to
3 have dismissed a contention at the admissibility
4 stage because the Board looks at an allegation of a
5 violation of a regulation, reads the regulation, and
6 says, I don't see a violation and not admit it.

7 There may be some recalled for briefing. Judge
8 Farrar mentioned on Monday there may be need for --

9 >> JUDGE MOORE: What's the definition of a
10 legal issue contention?

11 Is it not, at least at a minimum, what a
12 regulation means or doesn't mean, what a statute
13 means, what a statute doesn't mean?

14 >> MR. SILVERMAN: It is a genuine dispute
15 of material fact or law, a genuine dispute of law,
16 and genuine implies, in my mind, that the Board made
17 some due diligence inquiry and thought about the
18 regulation and what it means. If you can't -- if
19 have you difficulty resolving what it means, that
20 makes it more difficult.

21 >> JUDGE MOORE: Okay. The problem is we
22 are dealing in the context where we have this
23 contention and you look at DOE answer and it says
24 it's beyond the scope because we are only -- we don't
25 have to deal with that now. And it's not material

1 because we don't have to deal with those three things
2 now and it's not a genuine issue of material law or
3 fact because we don't have to deal with those three
4 things now.

5 >> MR. SILVERMAN: Uh-huh.

6 >> JUDGE MOORE: You -- that's all the
7 answer says. There may well be a great deal of
8 regulatory history behind this provision that's not
9 revealed to us in the answers of the petitions and
10 the replies.

11 And, if we have to take time out on the
12 hundreds of contentions that have been put before us
13 and do all the legal research without benefit of
14 brief, I am a bit old fashioned, as you know, and
15 that's called flying by the seat of the pants, and I
16 always prefer -- I don't always agree with counsel,
17 as you well know, Mr. Silverman, but I certainly
18 don't like to make judgments without knowing what
19 your position is.

20 And I thought it was, frankly, fundamental
21 and elementary that a legal issue contention is to be
22 dealt with by admissibility and we will deal with it.
23 The history of legal issue contentions in the
24 regulations that recognizes them and certainly in the
25 legislative history of the 1989 rule, specifically, I

1 believe, states, if memory serves, that they are to
2 be admitted and dealt with on briefing subsequent to
3 admission. That doesn't mean you go to hearing.
4 They just have to be dealt with, recognizing the need
5 for them to be ventilated by briefing.

6 >> MR. SILVERMAN: Your Honor, I
7 respectfully disagree that that is the necessary
8 result. I do agree in every case where there is a
9 legal issue. We need to go back to the point, and
10 you're going to probably chastise me for this, but
11 the first burden is to look at the petition and
12 satisfy yourself there is a fair claim of a violation
13 or regulation. And --

14 >> JUDGE MOORE: I understand your
15 position.

16 >> MR. SILVERMAN: And there may be legal
17 issues that are easily resolvable, and I believe
18 there are many contentions out there, and I'm just
19 basing this on my general experience -- I can't cite
20 a particular example to you off the top of my head --
21 where a contention has been dismissed at the
22 admissibility stage because the Board looked at it
23 and said, it's not a violation, end of story.

24 There have been many other examples as well
25 where the board has said, don't have enough

1 information, you need to add a brief.

2 >>JUDGE WARDWELL: And if we resolve that
3 there is a legal component associated with the
4 admissibility of this contention, isn't the proper
5 avenue, then, to have it admitted and then briefed?

6 >> MR. SILVERMAN: With all due respect,
7 legal component is too, too fuzzy a term, if I may
8 apologize.

9 >>JUDGE WARDWELL: You're accusing us of
10 something fuzzy?

11 >> MR. SILVERMAN: Well, I understand. The
12 regulation is clear. Implying it is difficult, is
13 there a genuine legal dispute, a genuine legal
14 dispute.

15 Just because there is a legal issue raised
16 does not mean the contention gets admitted.

17 >> JUDGE MOORE: This one's easy because
18 you didn't address those three subjects, I don't
19 believe. That's my next question.

20 Can you tell me whether the QARD or the SAR
21 describes anywhere facility operations,
22 permanent -- with respect to QA, facility operations,
23 permanent closure, decontamination, and dismantling
24 the surface facility?

25 >>JUDGE WARDWELL: While you're searching

1 that -- do you need some time for that, because I'd
2 like to ask a follow-up question in that interlude, a
3 short one?

4 >> MR. SILVERMAN: I actually do need a
5 break to confer, because I believe our technical
6 people have an input for me that they think is
7 important.

8 >> JUDGE MOORE: We can come back to it.
9 They're alerted now.

10 >> MR. SILVERMAN: Yes, but I'm going to
11 ask you to remind me because I've already forgotten
12 it.

13 >>JUDGE WARDWELL: After a break, we'll
14 come back to it, but, back to my statement; if we as
15 a Board deem that there still is a legal question due
16 to our un-fuzzy research into this, isn't the proper
17 avenue then and really the only avenue to brief it as
18 a legal question?

19 We wouldn't go to hearing on a legal
20 question, would we, necessarily? We would brief it
21 and resolve that and then that would allow us to make
22 a decision on that part of it to see whether or not
23 it then goes into the technical aspect of the genuine
24 dispute.

25 >> MR. SILVERMAN: If you as a Board

1 conclude there's a genuine legal dispute, then that's
2 the perfectly appropriate way to proceed --

3 >>JUDGE WARDWELL: That's all I want.
4 Thank you.

5 >> MR. SILVERMAN: -- briefing it and
6 resolving it after it's been admitted; but I would
7 ask, if we are going to address Judge Moore's
8 question, if you would indulge me and repeat it one
9 more time.

10 Oh, I know, it's whether the QARD, the
11 Q-A-R-D, includes content related to operations and
12 the other items mentioned in -- anything other than
13 construction and design. Closure.

14 >> JUDGE MOORE: Repository operation,
15 closure and decontamination, and dismantling the
16 surface facility.

17 >> MR. SILVERMAN: Thank you.

18 >>JUDGE WARDWELL: We'll come back to that,
19 I assume, after the break.

20 To Nevada and some of your questions, don't
21 you qualitatively indicate, and these are those
22 contentions dealing with the TSPA model; don't you
23 provide some qualitative outcomes that might resolve
24 as whatever it is you're contending might change in
25 your -- if it was changed the way you felt it should

1 be, you say it would result in movement in one
2 direction or another in regards to the outcome in
3 some cases?

4 >> MR. MALSCH: Marty Malsch of Nevada. I
5 believe that is generally true of our TSPA
6 contentions. We always tried to state something at
7 least qualitatively about what the implications were
8 of our contention if true.

9 >>JUDGE WARDWELL: I don't think I agree
10 with your statement that generally you did that.

11 I think there are cases where you have.
12 That's where my question is coming from. Do you
13 believe there are cases where you haven't provided
14 any indication of the outcome?

15 >> MR. MALSCH: I think the answer is no.
16 But --

17 >>JUDGE WARDWELL: Under the assumption
18 there are those that have provided absolutely no
19 indication of which way they should have gone. Do
20 you wish you had in that case?

21 Or was it your intent to have provided at
22 least a qualitative effect of your contention on the
23 outcome?

24 >> MR. MALSCH: I think, in every case when
25 it was reasonably within our ability to do so, we

1 made some statement about its implications.

2 >>JUDGE WARDWELL: If you didn't, would
3 that be grounds for dismissal?

4 >> MR. MALSCH: I would say, generally, no,
5 because usually we are dealing with a separate
6 enforceable violation, one of the requirements of 114
7 or 102 or 101. And, as long as we met -- provided a
8 reasonable basis to believe that that requirement is
9 not satisfied, then that -- a violation that of that
10 requirement is disqualifying of the TSPA and really
11 nothing more need be said about it.

12 The violation, itself, if supported,
13 provides a material issue for admission of the
14 contention. It would then be at the -- some later
15 stage to resolve whether for some other reason the
16 contention might not amount to anything or not fit
17 within the scope of the regulation.

18 >>JUDGE WARDWELL: Thank you, Mr. Malsch.

19 Mr. Silverman, if, in fact, some component
20 or input parameter to the TSPA model was flawed,
21 let's just for the sake of argument say it is flawed,
22 for whatever fashion and whatever that effect may
23 have on the outcome of the TSPA, whether it shows
24 that the resulting doses are less or more, isn't
25 that, by definition, a viable -- doesn't that

1 discredit the results of the TSPA model, because
2 there are no reasonable assurances associated with
3 those calculations and there is no indication of the
4 level of uncertainty if, in fact, the parameters were
5 flawed or if, you know, inadequate for whatever
6 reason?

7 >> MR. SILVERMAN: Well, when you used the
8 word "flawed," that harkens back to the Board's
9 question from one of the prior boards as to whether
10 the assertion of an error and omission by itself, an
11 error, a flaw, alleges a material dispute and a
12 material dispute. I think our response to that is
13 not necessarily. It depends. There are large and
14 significant errors, and there are small and
15 insignificant errors.

16 >>JUDGE WARDWELL: And I heard that, so I
17 don't think we need to repeat that, so I want to ask
18 the follow-up on that.

19 >> MR. SILVERMAN: I think it's the same
20 question.

21 >>JUDGE WARDWELL: Yeah, I want to follow
22 up on that, then. But we won't know what the impact
23 of those -- potentially, we may not know what the
24 impact of those are unless we start looking at the
25 merits of it, and, even then, it may be difficult to

1 ascertain. I raised a legitimate concern about
2 whether or not those results, by themselves, are
3 adequate, even if there is an indication that you may
4 end up with a lower dose associated with the correct
5 parameters.

6 >> MR. SILVERMAN: The question is whether
7 it's material or not, and I think that you'd have to
8 start by looking at the petition, itself, and whether
9 it's adequately pled, and I don't know whether I'm
10 plagiarizing from language from the State of Nevada's
11 pleadings or not, I think I might be, but, you know,
12 there is an error that occurs, assume an error
13 occurs, a very small error.

14 If you're measuring as the distance between
15 atoms, that may be a very significant error. If
16 you're measuring distance between two planets, it
17 would be completely inconsequential. It would not go
18 to the integrity of the analysis that you're doing to
19 measure that distance. It wouldn't be material, and
20 it wouldn't be a genuine material dispute. And so
21 that goes to sort of the 63.114 type of criteria that
22 you have to make hard decisions on.

23 >>JUDGE WARDWELL: Let's get to reality,
24 though, that we don't have those situations that are
25 as clear-cut as to whether we're measuring between

1 atoms or planets. And so we're in this la-la land
2 where it's not intuitively obvious which way it is,
3 certainly at the contention and admissibility stage.
4 By definition, doesn't that say we ought to go to
5 hearing to vet that, to find out that, to find out is
6 it atoms or planets?

7 >> MR. SILVERMAN: The only problem I'm
8 having with the discussion is, and I'm sure it's not
9 intended by the Board, because I think the Board
10 understands the principle as well or better than I
11 do, is that, at this stage of the proceeding, if
12 you're talking about what the applicant -- how has
13 the applicant responded? You know, the petitioner
14 has the initial pleading burden to demonstrate -- to
15 demonstrate -- that the 2.309 criteria are met, so
16 the first thing you must do in making these decisions
17 is look at that petition and analyze it.

18 And they must meet their burden before that
19 contention is admissible. And we don't seem to be
20 talking to that.

21 We seem to be talking an awful lot about
22 what the applicant's response is.

23 >>JUDGE WARDWELL: And I think we haven't
24 because I think that's second nature to us.

25 >> MR. SILVERMAN: Okay, fine. Then it

1 doesn't need to be stated further.

2 >> JUDGE MOORE: Let's go to Nevada Safety
3 5 as another example. It's entitled "Emergency
4 Plan." And, in a nutshell, it also is labeled a
5 legal issue that the SAR subsection 5.7 essentially
6 contains a mere commitment to develop an emergency
7 plan as opposed to a plan itself or even a
8 description of the plan.

9 And then it lists, I believe, seven items
10 that the State of Nevada feels should be included in
11 the description. Without needing to again work our
12 way through the regulation, because it parallels what
13 the QA regulation is, 63.21(c)(21) requires, among
14 other things, that the license application include a
15 description of the plan for responding to and
16 recovering from radiological emergencies.

17 And 63.21(a), of course, requires the
18 application to be as complete as possible in light of
19 the information that is reasonably available at the
20 time of docketing.

21 We have these seven that are listed. Let's
22 just look at the second one in the list that Nevada
23 lists maps identifying primary routes for emergency
24 response equipment access or evacuation are missing
25 from the SAR subsection 5.7.2.2.4. When you go to

1 those sections, you find that there is a description
2 that says something along the lines that the plan
3 will include a general map and the map will identify
4 primary routes of access for emergency response
5 equipment.

6 Nevada is calling for a map. And I think
7 the question really goes to how complete the
8 description has to be to be adequate, to be a
9 description.

10 Now, a map is a shortcut for showing the
11 primary access route for emergency response equipment
12 or a very complete description, for example, would be
13 that the routes will go from X to Y in Nye County and
14 from Y in Nye County to someplace in Clark County.
15 They will be over secondary roads; and you can go on
16 and on in that vein.

17 A map, on the other hand, cuts to the quick
18 and shows exactly where they are, what valley they go
19 through, what mountains they go over or don't go
20 over, et cetera.

21 One of the things that is nowhere to be
22 found in the answers except in totally conclusory
23 fashion is what's the adequacy of the description?

24 What is an adequate description? The
25 regulation just says there has to be a description.

1 It doesn't say it's got to be an inadequate
2 description. It doesn't say it's got to be an
3 adequate description. And, Mr. Silverman, you're
4 smiling because you're saying a description is a
5 description.

6 >> MR. SILVERMAN: No, I'm not.

7 >> JUDGE MOORE: But we're left to decide
8 at the contention admissibility stage, essentially,
9 the adequacy of the description with no guidance.

10 >> MR. SILVERMAN: Your Honor, on this one,
11 you are correct, the regulation only calls for a
12 description and it doesn't define precisely what
13 should be in that description. But we think we
14 provided an adequate description.

15 >> JUDGE MOORE: Nor is the word
16 "description" ever defined.

17 >> MR. SILVERMAN: That's correct. But it
18 is something less than a full emergency plan, and
19 there is no debate about.

20 >> JUDGE MOORE: It's a description, that
21 is true.

22 >> MR. SILVERMAN: And what we showed in
23 our view and which we think demonstrated that there
24 was no material fact -- I thank you for finally
25 picking one that I am familiar with -- is we cite to

1 SAR Section 5.7. We indicate -- we say several
2 things in response to this. One of the things is
3 we've got 59 pages of detail covering all of the 16
4 applicable emergency planning criteria that are in
5 the regulation.

6 >> JUDGE MOORE: And I read all 59 pages of
7 it, and one of the things that struck me in your
8 answer and in the staff's answer was not one of these
9 seven items that are claimed to be inadequately
10 described or addressed in your answer --

11 >> MR. SILVERMAN: I think you are saying
12 not one of these items was --

13 >> JUDGE MOORE: Addressed.

14 >> MR. SILVERMAN: -- in the description,
15 is that what you're saying?

16 >> JUDGE MOORE: No. In your answer, you
17 don't describe -- you don't address any of these
18 seven items. And, now, you talk all around them, but
19 these seven items are not addressed.

20 >> MR. SILVERMAN: Well, my response, and
21 most or all of this is derived from our answer, is
22 that Nevada lists the items, which DOE commits to
23 provide at a later date, the seven items. Our view
24 is they don't show the information is required. That
25 is their burden to show it's required by the

1 regulation initially, albeit the regulation may be
2 vague, nevertheless, it's their burden.

3 The precise content of the description
4 isn't defined, and I know that, in this particular
5 case, it is not at all uncommon for these types of
6 details to be included in a final emergency plan.
7 Where do you draw the line?

8 If you take this too far, the description
9 is the whole emergency plan, we have to submit a
10 whole emergency plan. There has to be a reasonable
11 line drawn somewhere. I mean, Nevada can point out
12 any number of -- since it is a description and it is
13 something less than a full emergency plan, then
14 clearly Nevada can always find something that wasn't
15 included.

16 And it's up to the Board to decide whether
17 we provided a reasonable and adequate description. I
18 think, when they -- when you see those words, it's
19 reasonable, have we provided a reasonable and
20 adequate description for the purposes that the
21 regulation calls for, recognizing that a full
22 emergency plan will be coming at a later date.

23 You know, issues like -- one of the other
24 things they mention is establishing letters of
25 agreement and MOUs. It is -- letters of agreement

1 with police, fire, other local community, public
2 service agencies, hospitals, and the like, ambulance
3 services, this is all the kind of thing that I have
4 never seen in an application except in the emergency
5 plan itself and not until the emergency plan itself
6 was issued.

7 Similarly, precise evacuation routes.
8 They're asking for things, in our view, that clearly
9 are regular recognized components of a full emergency
10 plan, and the bottom line on this is we don't think
11 they met their burden to show that this regulation is
12 violated.

13 >> JUDGE MOORE: Is it a legal issue as to
14 a question of what is an adequate description?

15 >> MR. SILVERMAN: It certainly has a legal
16 component to it, yes.

17 >> JUDGE MOORE: Okay, Mr. Malsch, do you
18 have anything to quickly add to this before we move
19 on?

20 >> MR. MALSCH: Just a brief comment. But
21 I think what has occurred here is that DOE is
22 inviting the Board to decide the merits of our
23 contention at the contention admissibility stage.

24 >> JUDGE MOORE: Quickly look at Nevada
25 Safety 36. This is -- will be one of -- my question

1 falls into the category of puzzlement. The
2 contention challenges the verification and validation
3 of the net infiltration model. Now, unlike almost
4 all of the Nevada contentions challenging various
5 aspects of various DOE models, Nevada Safety 36 does
6 not contain the standardized language at the end of
7 the contention that, because the TSPA is a complex,
8 nonlinear model and the changes and the results
9 obtained vary both as a function of time postclosure
10 and from realization to realization within a modeling
11 case, et cetera. Why?

12 >> MR. MALSCH: Marty Malsch, Nevada.
13 Judge Moore, I can answer that question.

14 >> JUDGE MOORE: And there -- I think I
15 found either three or five, I can't remember,
16 examples in the Nevada contentions that didn't have
17 it, and I was puzzled why.

18 >> MR. MALSCH: I think there are actually
19 more than that.

20 We did make a careful distinction. We
21 asked ourselves, putting aside whether or not it was
22 required, whether we could actually take the TSPA
23 model, modify it to include our contention, assuming
24 it's true, and attempt to demonstrate quantitatively
25 the results on doses or releases.

1 The first thing we discovered in thinking
2 about that question was that a whole bunch of our
3 contentions, and it's -- I don't remember how many,
4 but several of -- a bunch of them, and this would be
5 an illustration, were, if true, so utterly
6 destructive of the TSPA that it was not even possible
7 to imagine how one could modify the TSPA in a way
8 that could give us any dose calculation.

9 Others of our contentions, and these are
10 the ones listed in I think it's Appendix C to
11 Dr. Thorne's affidavit, but they all contain the
12 standard paragraph, and it was put in there carefully
13 and deliberately because we fought for those
14 contentions; such a thing would be at least
15 theoretically possible because the contention was not
16 so totally destructive; and then we attempted to
17 explain, I think successfully, why it was simply not
18 possible to do an effective job in demonstrating
19 quantitative effects on doses or releases.

20 >> JUDGE MOORE: I have a series of
21 miscellaneous questions that are -- that I don't have
22 answers for. These require just very, very quick
23 answers.

24 DOE, on Nevada Miscellaneous 2 entitled
25 "Alternative Waste Storage" --

1 >> MR. SILVERMAN: I'm sorry, the title of
2 it again?

3 >> JUDGE MOORE: Nevada Miscellaneous 2
4 entitled Alternative Waste Storage. It's labeled
5 again as a legal issue. In its answer, DOE argues
6 that Nevada's contentions are outside the scope of
7 the proceeding because the contention amounts to a
8 challenge to the waste -- Nuclear Waste Policy Act
9 that requires DOE to design and construct the
10 repository so as to permit the retrieval of spent
11 nuclear fuel.

12 In replying, Nevada argues that the
13 question of whether Section 122 of the Nuclear Waste
14 Policy Act, if violated, goes to the merits of the
15 legal issue contention, not whether the contention is
16 within the scope of the proceedings. Why is Nevada
17 wrong?

18 This goes back to the problem I had before
19 you before of legal issue. I have looked at the
20 statutes, those that are cited, the arguments
21 briefed, though they are in the answers and the
22 replies. And the conclusion I come to is I'm going
23 to have to scratch my head a great deal and work my
24 way through these statutes and I want to look at the
25 legislative history.

1 Why is that just not a classic example,
2 again, of a legal issue and why is Nevada's argument
3 that, your arguments, that it go to the merits of the
4 legal issue, not whether it's a legal issue
5 contention?

6 >> MR. SILVERMAN: I'm not familiar without
7 going back and re-reading our arguments, but I would
8 say that --

9 >> JUDGE MOORE: Perhaps that's unfair.

10 >> JUDGE FROEHLICH: This might be a
11 convenient time to break, but, because we have quite
12 a number of items left, I'd ask that we take a
13 ten-minute recess at this point and come back at 25
14 minutes to 4:00 by the clock in the back. We'll be
15 in recess.

16 [Whereupon a recess was taken]

17

18 >> JUDGE FROEHLICH: Mr. Silverman?

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

20 >> JUDGE MOORE: Is the answer yes or no?
21 It's there or not?

22 >> MR. SILVERMAN: The answer is 62. No.
23 One brief, one very brief comment before I move on.
24 I just hope the Board recognizes that -- and I know
25 the Board recognizes, and I probably speak for all

1 the counsel that when it's difficult for us to
2 respond on a particular contention as effectively as
3 we like.

4 >> JUDGE MOORE: I absolutely understand.

5 >> MR. SILVERMAN: But let me respond to
6 this one because I just want to briefly refer you to
7 what we said. The answer to the question is, whether
8 the quality assurance report -- the quality assurance
9 requirements document contains a discussion of
10 quality assurance provisions beyond operation into as
11 I said, beyond construction, operation, closure, and
12 both closure, decommissioning is no. I can point out
13 --

14 >> MR. MOORE: That's all I need to know.

15 >> MR. SILVERMAN: I would like to point
16 out -- you know what was referred to in our Answer,
17 then the Yucca Mountain review plan provision?

18 >> JUDGE MOORE: I do.

19 >> MR. SILVERMAN: Thank you.

20 >> JUDGE MOORE: Clark County, your Safety
21 Contention 2: DOE's answer quotes an SAR subsection
22 and that quotation ends with a citation to BSC2007-A
23 Section 6.5. In your reply, you point out
24 that -- without citation, that what is cited in the
25 SAR by DOE is the same email that is the substance of

1 your contention.

2 Can you tell me what the BSC 2007a Section
3 6.5 citation is? And if you can't, the question will
4 be asked of DOE also. We have no idea what that is.

5 >> MS. ROBY: I would have to check with
6 one of my counsel who's with me behind me, if that's
7 all right?

8 >> JUDGE MOORE: DOE, do you have any idea,
9 this is the one that involves an e-mail from two
10 individuals, one of whom is a DOE, one of whom is at
11 the Air Force about the test -- the Nevada test site.
12 And their contention is I believe ground to ground
13 missiles.

14 >> JUDGE FROEHLICH: Okay, it's been
15 displayed.

16 >> JUDGE MOORE: Here it is up on the
17 screen. This is what the section says and the site
18 is BSC 2007a Section 6.5. We have no idea what that
19 is and where we can find it and what it says.

20 >> MR. SILVERMAN: We'll have to check the
21 record system, the LSN system and give you that
22 precise reference.

23 >> JUDGE MOORE: We would appreciate that
24 because Clark County in their reply, as I said,
25 indicates that, I believe, if I'm reading their reply

1 correctly, is just referring to the same e-mail that
2 is an LSN document.

3 >> JUDGE FROEHLICH: State of Nevada.

4 >> MR. LAWRENCE: Nevada is John Lawrence.

5 I believe I know what that reference is.

6 >> JUDGE MOORE: Please.

7 >> MR. LAWRENCE: Typically, I've found
8 those references at the end of that particular SAR
9 section. So at the end of 1.1 or 111, or whatever
10 the appropriate subsection is to find references, you
11 will find all the referenced documents in an
12 alphabetical listing.

13 >> JUDGE MOORE: Okay, thank you. I
14 appreciate that. DOE, look at Nevada Miscellaneous
15 1; erosion of geologic disposal. This is Nevada's
16 contention that says in 52 -- 50,000 to a million
17 years, the overburden will erode away, leaving the
18 cask exposed, thereby it doesn't meet the definition
19 of a geologic repository.

20 One of your responses I found quite
21 puzzling. It was that this is a direct challenge to
22 DOE's site recommendation and as a result, it's
23 outside the scope of the proceeding.

24 If I -- if that argument's accepted,
25 doesn't it also mean that the NRC could find that the

1 predicted erosion rates make the site unsuitable, yet
2 be powerless not to issue the construction permit on
3 the same ground?

4 >> MR. SILVERMAN: Let me scroll down a bit
5 and see what our answer is, what you are referring
6 to, Your Honor.

7 Your Honor, my off-the-cuff answer to this
8 is that there is a provision in the EPA that says the
9 citing decision isn't easy to be challenged, that the
10 citing decision was decided by Congress and it is a
11 challenge --

12 >> JUDGE MOORE: Okay. So for the sake of
13 argument, I accept that. And doesn't that also mean
14 that if the staff were to find that the erosion rates
15 at Yucca Mountain that predicted by DOE weren't
16 unacceptable, that they're powerless not to grant you
17 a construction permit for the same reason?

18 >> MR. SILVERMAN: I'd say that would
19 probably be an issue for Congress to deal with at
20 that point if that was -- they were to find.

21 >> JUDGE FROEHLICH: I was going to follow
22 up on the Clark Safety 2, which had to do with
23 ground-to-ground missiles in that curad site, but I
24 would like to switch to maybe Nye Joint Safety 6,
25 please. And that one deals with potential for

1 aircraft crashes of a Category 2 event sequence.
2 Could you in just a sentence or two, Counsel for Nye,
3 summarize your concerns?

4 >> MR. VanNIEL: Jeff VanNiel for Nye
5 County, Your Honor. Essentially our concern Your
6 Honor is DOE in the LA assumes the flight
7 restrictions will exist, yet, has not shown that it
8 actually has the authority to implement those
9 restrictions at this time.

10 >> JUDGE FROEHLICH: Okay. And then I
11 would ask DOE what assurances are there in the
12 LA concerning restrictions in place to prevent over
13 flights over the repository, and is that different
14 from the restrictions that are referenced in Nevada
15 test site in general?

16 >> MR. SILVERMAN: Your Honor, I can only
17 presume that we have provided in our answer the
18 restrictions that exist and that we're relying on at
19 this time and that they are based upon a license
20 application with a reference. I really don't know
21 the answer to your question.

22 >> MR. SILVERMAN: Can you enlighten me to
23 the DOE's authority to implement airspace
24 restrictions? Is that something within the DOE's
25 control or is this an Air Force control or FAA?

1 I'm unclear where to find the resolution to
2 this whole question on the contentions that raise
3 airspace questions.

4 >> MR. SILVERMAN: I would have to consult
5 to get you an answer on that, Your Honor, I'm sorry.
6 Bear with me one second.

7 >> JUDGE WARDWELL: While you are
8 discussing, if I might go back to Nye, would you be
9 comfortable, if in fact, they did show that there was
10 a link with the -- achieving air restrictions from, I
11 assume, would be FAA, that that would resolve your
12 contention?

13 >> MR. VanNIEL: Jeff VanNiel again for Nye
14 County, Your Honor. Yes, Your Honor, if there was
15 some binding commitment that they were able to show
16 that they would, in fact, have that authority. But a
17 mere commitment akin to the land use questions that
18 came up before, a commitment that they'll give
19 something in the future doesn't provide us with the
20 comfort factor that we feel we need, given the fact
21 that the repository is presently designed for those
22 restrictions to be in place.

23 >> JUDGE WARDWELL: How about a documented
24 history of the ability of a federal agency to get an
25 air restriction when requested from the FAA for

1 things such as cruise missile testings, military
2 operational areas, sensitive areas, presidential
3 retreats, that type of thing.

4 >> MR. VanNIEL: Jeff VanNiel again for Nye
5 County, Your Honor. As one of the other panels
6 mentioned, either yesterday or the day before, there
7 have been other incidents in which federal agencies
8 were unable to agree at times when it was necessary
9 for things to occur.

10 So the assurance that they will be able to
11 do in the future is what gives rise to our concern,
12 that they don't actually have that authority at this
13 time.

14 >> JUDGE FROEHLICH: DOE?

15 >> JUDGE WARDWELL: IF we can possibly get
16 everyone conferring, we can go home, leave, go out
17 the back door.

18 >> MR. VanNIEL: Part of our concern, Your
19 Honor, is that the DOE referenced authority that they
20 used in their Answer to our contentions relates to
21 their control over the test site and not with respect
22 to the repository, itself. And part of the other
23 concern is that the Air Force is the party, part and
24 parcel with the FAA that needs to be the people that
25 agree to those flight restrictions.

1 And you know, the fact that they have
2 control over what happens at the airspace, at the
3 test site, doesn't necessarily mean they have control
4 over the airspace at Yucca Mountain.

5 >> JUDGE WARDWELL: But is there any
6 controlled airspace above Yucca Mountain at this
7 time?

8 >> MR. LIST: Your Honor, Robert List from
9 Four Counties.

10 >> JUDGE WARDWELL: I'd like to finish with
11 him. If they aren't able to answer, I'll get to you.

12 >> MR. VanNIEL: Jeff VanNiel again for Nye
13 county. It's my understanding, Your Honor, there is
14 no control over the airspace above Yucca Mountain
15 because of Yucca Mountain. The only control that DOE
16 would exert at this time is because of its ability to
17 control for the test site.

18 >> JUDGE FROEHLICH: You misunderstood my
19 question, I believe.

20 >> MR. VanNIEL: I'm sorry.

21 >> JUDGE WARDWELL: Are there any FAA
22 controlled restrictions for flights over the Yucca
23 Mountain airspace at this time?

24 Is it controlled airspace above there at
25 this time?

1 >> MR. VanNIEL: I understand that there
2 is, Your Honor. I'm just trying to get specific
3 references to who that party is controlling it.

4 >> JUDGE WARDWELL: Yeah, I don't think I
5 need that because I think it's probably clear that it
6 is a military operated area or a missile operated
7 area and part of the Air Force.

8 >> MR. LIST: Robert List from Four
9 Counties. My understanding is -- I speak as a pilot,
10 it is a -- it's currently a restricted area by the
11 FAA because of the Air Force activity and the test
12 site activity.

13 >> JUDGE FROEHLICH: Thank you. I'd like
14 to hear from DOE.

15 >> MR. SILVERMAN: And I think that's
16 pretty consistent which I'm being told by our people,
17 which is there is a restriction established by the
18 FAA which is controlled by the Department of Energy
19 which covers the GROA area, the surface area at the
20 GROA at this time. There is a specific restriction
21 for air flights.

22 >> JUDGE MOORE: Is that in your answer?

23 >> MR. SILVERMAN: Not from the quick look,
24 that I can see Your Honor. It may be there.

25 >> JUDGE WARDWELL: Yet, you are requiring

1 something different. You're taking away from the Air
2 Force what they now -- the airspace they own and
3 taking it away from their operations. Isn't that the
4 contention of Nye that's a problem?

5 >> MR. SILVERMAN: I'd like to see the
6 contention again. I would say that one of the things
7 we do say in the answer is that we commit to certain
8 specific restrictions that will be established, I
9 think, as conditions -- I think as conditions of the
10 license application.

11 And it's not unusual in an application to
12 make certain commitments to achieve -- do certain
13 things in the future that are not in place at the
14 time the application is filed.

15 >> JUDGE MOORE: Okay. Are --

16 >> JUDGE FROEHLICH: You have to follow --
17 is there a requirement for a follow-up beyond the FAA
18 with the Air Force because of the current situation
19 and the current control of the airspace, is that
20 correct?

21 Or did I miss something from your answer?

22 >> MR. SILVERMAN: My understanding from
23 our Answer that there is additional -- that there are
24 additional commitments, agreements, restrictions that
25 will be needed before we receive the license to

1 receive and possess. And that's -- not construct.
2 And that's the argument that we make in our answer.
3 Of course that's when the hazard is there.

4 >> JUDGE MOORE: Is all of this figured
5 into the aircraft crash analysis?

6 >> MR. SILVERMAN: I'd have to get someone
7 up here to talk to you about the specifics of what
8 went into the air crash analysis, Your Honor.

9 >> JUDGE FROEHLICH: I'd like to ask of the
10 Commission staff, to clarify for me their response to
11 Nye Safety 1 and 2, where you did not oppose the
12 admission of those contentions, and Nye Safety 3 and
13 primarily and to a lesser extent 4, where you had
14 some, I guess, had some concerns in a post-admission.

15 Although, in the staff response, you said
16 that Nye Safety 3 was virtually identical to 1 and 2.

17 Could you explain a little more of your
18 reasoning for your position on these contentions?

19 >> MR. LENEHAN: Your Honor, this is Dan
20 Lenehan for the staff. Could you give us one moment
21 to pull up the contentions and our responses and then
22 we can respond after we see what we have here.

23 >> JUDGE FROEHLICH: Indeed, if you'd like
24 the Clerk to pull up your response to 3 or any of
25 these, let me know.

1 >> MR. LENEHAN: The contention and the
2 response, one at a time, please, Your Honor.

3 >> JUDGE FROEHLICH: Mr. Lenehan, why don't
4 you take a moment and Judge Moore, why don't you ask
5 the next question so we can move this along?

6 >> JUDGE MOORE: Mr. Malsch, I have a
7 question with Nevada Miscellaneous 01, erosion and
8 geological disposal. You denominated it as a legal
9 issue but it is entirely premised on the validity of
10 your Nevada Safety 41, which is the erosion question.

11 I don't think I have ever seen something
12 called a legal issue that required a factual premise
13 to be accepted. Usually, it's the reverse of that.
14 The legal issue is decided so that you can determine
15 what the factual situation will -- how it will sort
16 itself out.

17 Here, assuming the Nevada Safety 41, which
18 is the factual component of the erosion rates were
19 found to be valid, the legal issue you pose is
20 irrelevant.

21 If the factual premise is found to be
22 invalid, the legal question is irrelevant. So how
23 can this be a legal issue?

24 >> MR. MALSCH: Marty Malsch for the State
25 of Nevada. I think it's a bit more complicated than

1 that.

2 First of all, the legal issue posed in the
3 contention does have a factual premise. And the
4 factual premise is as stated in the other contention.
5 The complication is that the other contention is a
6 TSPA contention and as drafted and if you consider
7 DOE's Answer in the staff's answer, it is susceptible
8 to we would say, invalid, but anyway, arguments by
9 DOE with respect to particular aspects under Part 63,
10 dealing with the admissibility of TSPA contentions.

11 None of those considerations would have any
12 bearing on the legal issue because the legal issue we
13 are raising is purely based upon a factual showing
14 outside of the scope of Part 63.

15 So let me put it this way: You could, if
16 the contention upon which it relies is not successful
17 on its factual merits, putting aside legal niceties
18 associated with Part 63, i.e, we're simply wrong
19 about erosion, and the legal issue goes away.

20 If for some reason the premise in
21 the other contention is not allowed or loses on the
22 merits because of the peculiar provisions in Part 63,
23 there would still be the issue of putting Part 63
24 requirements aside whether simply as a factual
25 matter, we are correct or not about erosion.

1 Now the easiest way to resolve the issue is
2 to ask the question and litigate the question whether
3 or not we are, in fact, right about erosion. If we
4 are right, then the legal issue is posed. And then
5 there is the further -- it's clearly there for that
6 particular legal issue and then we could address
7 further, the question whether there are some other
8 unrelated problems with the underlying contention
9 associated with Part 63.

10 Let me give you an illustration. Let us
11 suppose the underlying contention is -- loses on the
12 merits because we have not established it as a valid
13 FEP. That would be dispositive I think under Part
14 63, but it would not be dispositive of our legal
15 issue because the legal issue simply poses the
16 question whether erosion will or will not occur,
17 quite apart from what 63 requirements may be.

18 So there's not an exact one-to-one match.

19 >> JUDGE MOORE: Have you ever seen a legal
20 issue contention that had a factual premise that had
21 to be demonstrated before the legal issue had any
22 meaning, because in my experience, I can -- they are
23 all the reverse?

24 >> MR. SILVERMAN: I can't think offhand of
25 any one. I can think also of no other way to state

1 the contention.

2 >> JUDGE FROEHLICH: Mr. Lenehan, do you
3 have an answer yet or do you need a little more time?

4 >> MR. LENEHAN: Could you please repeat
5 the question, Your Honor?

6 >> JUDGE FROEHLICH: I was seeking a little
7 clarification of why the Staff did not oppose a Nye
8 Safety 1 and 2 but opposed Nye 3 and 4, where as it
9 states at page 1034 of your answer, at least as to 3,
10 they're virtually identical.

11 >> MR. LENEHAN: The difference, Your
12 Honor, is --

13 >> MR. ROACH: The difference Your Honor is
14 -- Kevin Roach for the NRC staff. The difference, is
15 Your Honor, in Nye Safety 3 as opposed to 1 and 2,
16 they attacked the underlying model and this is not
17 the case in 1 and 2.

18 >> JUDGE FROEHLICH: Nye would care to
19 respond?

20 >> MR. ANDERSON: Your Honor, this is Rob
21 Anderson on behalf of Nye County request to be able
22 to speak even though Mr. VanNiel is the primary
23 speaker today.

24 >> JUDGE FROEHLICH: At this point as long
25 as it's quick, please proceed.

1 >> MR. ANDERSON: Very good, sir. Nye 1 and
2 2 and 3 all deal with the adequacy of currently
3 existing of performance confirmation planning. And
4 it's correct as NRC's staff has stated that 1 and 2
5 deal with matters that are not a part of the TSPA and
6 that Nye 3 does involve challenge to aspects of the
7 cite scale model.

8 But we believe that it is alleged and has
9 provided the factual support that would indicate that
10 it shows an inadequacy in the plan at this point in
11 time.

12 >> JUDGE FROEHLICH: Thank you. Is there
13 anything that you care to add at this point?

14 >> MR. LENEHAN: No, Your Honor, thank you.

15 >> JUDGE WARDWELL: I have a few questions
16 dealing with issues that are covered in a number of
17 contentions. And I'm sorry I don't have reference to
18 those contentions, but hopefully, we'll be able to
19 get some insight into what's trying to be resolved
20 here.

21 The first one deals with, and I'll address
22 this to Mr. Malsch or whoever else in Nevada would
23 like to respond to this, but I believe you've raised
24 a contention or multiple contentions that relate to
25 the failure of some SSC, System Structure Component

1 during the preclosure period, such as TAVER, whatever
2 else you want to pronounce the acronym with the
3 conclusion that this will affect the TSPA later on by
4 preventing canister placement and the operations of
5 the tunnel because of any failure of components that
6 were used during operations.

7 This raises the question of -- and in the
8 process of addressing those contentions, it raised
9 the question of whether or not maintenance has been
10 considered, but there was no discussion of that in
11 your contention whatsoever.

12 And it struck many of us that well, if one
13 of these systems broke down, then why not they have
14 some maintenance plan?

15 Why wouldn't maintenance cover that so they
16 don't repeat any operation that then may influence
17 how the model is set up and addressed during the
18 postclosure period?

19 >> MR. MALSCH: Again, Marty Malsch from
20 the State of Nevada. It's hard to answer your
21 question precisely, but in the abstract, it seems to
22 me there would be two questions raised.

23 >> JUDGE WARDWELL: Well, let me, look, can
24 I chunk it down for you, then. Do these types of
25 contentions come to mind?

1 Do you understand the type of contention
2 I'm dealing with WHERE YOU SAY something is going to
3 break during operations is going to affect
4 postclosure?

5 >> MR. MALSCH: Right. I understand
6 generally what we're talking about. And I think --

7 >> JUDGE WARDWELL: And what about
8 maintenance not repairing those types of things so it
9 doesn't affect postclosure? That's my question.

10 >> MR. MALSCH: I guess that would be an
11 issue. I guess the question would be -- I don't
12 recall what DOE said in its answer about whether
13 maintenance would cover those activities.

14 I would say that if the SAR discussed the
15 problems and then provided that there would be a
16 reasonable solution to those problems in terms of
17 maintenance, and our contention didn't address the
18 maintenance question, then our contention has a
19 problem.

20 >> JUDGE WARDWELL: Thank you. DOE, do you
21 remember those contentions and how you responded to
22 them?

23 >> MR. SILVERMAN: I personally don't
24 recall a specific contention. I don't recall whether
25 we mentioned maintenance or not. I would -- I don't

1 know if this is helpful or not, but one thought on
2 this kind of a contention, unless that SSC has been
3 alleged to have been wrongly identified as
4 non-important to waste isolation, then that
5 contention is inadmissible.

6 >> JUDGE WARDWELL: I'm not sure that's
7 necessarily the issue we are trying to resolve. I
8 think we got enough guidance from Nevada, however, to
9 help us assess these contentions.

10 Sticking with DOE, I think for the next
11 one, there are things called performance margin
12 analysis -- analyses. Could let me know what those
13 are? And then it goes on in regards to I think your
14 position these are not required to demonstrate
15 compliance with Part 63. And I want to explore that
16 a little more.

17 So if you can start by telling us what
18 those are and why, why aren't they needed to
19 demonstrate compliance with Part 63?

20 >> MR. ZAFFUTS: Sure. Paul Zaffuts for
21 DOE. The performance margin analysis, I cannot tell
22 you whether there is more than one or not. I believe
23 there is only one. It's one assessment.
24 It's -- it's not required -- it is an assessment that
25 was done outside of the TSPA. It's not a TSPA

1 assessment. We're not relying on it and SAR doesn't
2 rely on it and it's very clear that it's not relied
3 upon for Part 63 compliance, meaning, we don't use it
4 to assess or determine whether we need the ultimate
5 mean dose requirements.

6 It's also not used to -- under the QARD
7 2-A Program under the QA validation of TSPA, but it
8 is used to instruct and inform, it was used to
9 instruct and inform the Department as to the
10 conservatisms and to try to assess the nature of the
11 conservatisms that are in the TSPA, the significant
12 conservatisms in there by running this separate
13 assessment with those conservatisms or with the data
14 or other types of things that do not include those
15 conservatisms.

16 So it was just a way to get some
17 qualitative assessment of the amount of conservatism.
18 As I said, it was not used. Nowhere in the SAR does
19 it suggest that it was used for determining or
20 demonstration of Part 63 requirements.

21 >> JUDGE WARDWELL: To help me understand
22 what these are, could you describe the similarities
23 and/or the differences between the PMA and the
24 uncertainty analysis and the sensitivity analyses
25 that were performed?

1 No is an answer.

2 >> MR. ZAFFUTS: No.

3 >> JUDGE WARDWELL: Nevada, do you recall a
4 contention or contentions that related -- that you
5 submitted that related to the PMA?

6 >> MR. MALSCH: I'm Marty Malsch from
7 Nevada. I believe we have two contentions addressed
8 to the performance margin's analysis. And I don't
9 have them in front of me, but, oh, yes, they're in
10 Nevada 170 and 171, Nevada Safety 170 and 171.

11 >> JUDGE WARDWELL: How do you respond to
12 the position that DOE is saying in regard to those
13 and how we as a Board should treat the PMAs, if in
14 fact, they aren't required? Or do you believe they
15 are required as far as 63?

16 >> MR. MALSCH: Again, Marty Malsch for
17 Nevada. We did not and do not believe that they are
18 required by Part 63. But as we read the SAR, they
19 were being offered by DOE in support of the
20 credibility of a CSPA.

21 Now, I think and our position was if it's
22 there, we're entitled to challenge it. But I think
23 there is a very simple way we can resolve this
24 contention based upon DOE's statements here today.

25 If in fact, the performance margins

1 analysis will not be used to show compliance with any
2 provision in Part 63, then I think there is an easy
3 way to resolve the contention.

4 The Board can admit the contention. We can
5 reach a stipulation that it will not be used to
6 resolve anything to comply with Part 63 and the
7 contention goes away because it's a purely academic
8 contention.

9 >> JUDGE WARDWELL: Are you interested in
10 demonstrating some one upmanship in your knowledge
11 and tackling the question of what is the similarities
12 or differences between PMA and the uncertainty
13 analyses and the sensitivity analyses that have been
14 performed by DOE?

15 >> MR. MALSCH: I can try. I think what
16 they have done in performance margin analysis is do a
17 mini kind of TSPA, eliminating margins, and then
18 showing that, in fact, a realistic effort to show
19 compliance would show even lower doses than the
20 assertedly conservative TSPA that was advanced in the
21 license application.

22 >> JUDGE WARDWELL: That's not a bad whack
23 at it, is it, DOE, do you think?

24 >> MR. ZAFFUTS: I thought that's what I
25 said.

1 >> JUDGE WARDWELL: I think so too. Thank
2 you, I appreciate that.

3 I guess this is best addressed to
4 Mr. Malsch and Nevada. You had some contentions that
5 dealt with the -- stating that there is a deficiency
6 because a secondary data source was used.

7 What do you mean by a secondary data source
8 if, in fact, you can recall those contentions and
9 what's the problem with using a secondary data
10 source?

11 >> MR. MALSCH: I'm sorry, I don't -- I
12 don't think I can answer that question without going
13 into the specific contention.

14 >> JUDGE WARDWELL: You don't recall having
15 a contention such as that?

16 >> MR. MALSCH: I don't specifically
17 recall, no.

18 >> JUDGE WARDWELL: DOE, here's your chance
19 to get even.

20 Do you recall any contentions they
21 submitted that dealt with a secondary data source?
22 And do you understand what they mean by a secondary
23 data source?

24 >> MR. ZAFFUTS: Judge Wardwell, I was
25 hoping that as before, no, would be an acceptable

1 answer because I'm not familiar with any contention
2 that is alleged. It doesn't mean it's not there.

3 >> JUDGE WARDWELL: Thank you. Let's see
4 if we get anywhere with this one, Nevada. Is it my
5 understanding there are some contentions dealing with
6 external problems such as manufacturing problems and
7 then are reflected in potential problems at the site?
8 Do you recall contentions such as those?

9 >> MR. MALSCH: Yes, I do.

10 >> JUDGE WARDWELL: And there seems to be
11 simply a listing of these items in the bases
12 statement associated with all those particular
13 manufacturing problems, with no direct connection to
14 the license application developed further in a
15 contention.

16 And could you elaborate a little bit more
17 on why you believe that's a problem and what's the
18 heart of your contention when you are dealing with
19 these external manufacturing problems?

20 And why isn't it addressed in a routine
21 manner through any quality assurance program or other
22 controlling device such as that?

23 >> MR. MALSCH: Marty Malsch for Nevada. I
24 think the thrust of those contentions is that because
25 of manufacturing and other problems, specifically

1 with such things as a drip shield, that DOE's
2 assumptions regarding the precise performance of the
3 drip shield in its TSPA are unfounded.

4 And I think this goes to, in a real way,
5 the whole concept of a FEP analysis. It seems to me
6 there are some very clear definitions of when FEPs
7 are included, in or out, based upon probability.

8 And it seemed to us that based upon known
9 history and practice with regard to these kinds of
10 fabrications is not designs, that based upon the NRC
11 definition of a FEP and the probability threshold,
12 you simply could not FEP out manufacturing defects
13 and problems. And the DOE had utterly failed to
14 address this problem in its license application.

15 >> JUDGE WARDWELL: Thank you. I'll get
16 back to you after I go to DOE. I want to talk a
17 little bit more about those FEPs.

18 Would you like to respond in regards to the
19 inability to FEP out manufacturing problems or have,
20 in fact, you did evaluate them in your analyses?

21 >> MR. ZAFFUTS: I believe there was an
22 assessment like every FEP. There was an assessment
23 that was considered. And all I can say is -- my
24 understanding is, my expectation was that it was
25 applied to considerations in 114 (e) and (f) were

1 applied appropriately.

2 And if it is a challenge, then they have to
3 demonstrate a material dispute. So that's about all I
4 can say about that particular one. I'm not familiar
5 with it.

6 >> MR. WARDWELL: Thank you. In my
7 recollection, there is a table or tables that show
8 those components that are FEPed in or FEPed out.

9 My question comes to the degree of
10 technical background as you provide for each one of
11 those so that someone could assess the adequacy of
12 FEPing or FEPing out.

13 Could you elaborate a little bit more on
14 your knowledge of what was done by your organization
15 provided with the application or the SAR.

16 >> MR. ZAFFUTS: Right. One thing to
17 understand is that the technical backup for those
18 exclusion determinations or inclusion determinations
19 are in a separate document, the features, events and
20 processes, AMR. So it's a cited document, a couple
21 thousand pages. Each one of those has varying
22 degrees of assessments that are done. There's no one
23 size fits all.

24 Some were done with models, modeling,
25 mathematical analyses. Some were done, assessed more

1 on a qualitative assessment, looking at what the
2 ultimate determination of either probability, a
3 probability analysis to meet the standards set forth
4 in 114(e) or a consequence assessment, which deals
5 with the significance issue. And I think, like I
6 said, there was no one size fits all.

7 Some were based upon like I said, different
8 models. Some were done more associated with -- if
9 something would be significant or maybe it could be
10 encompassed by another FEP, but it was a very logical
11 analytical progression for all of those. So you just
12 have to look at each one.

13 >> MR. SILVERMAN: I wanted to underscore,
14 that's all reflected in the FEP AMR, all that
15 rationale.

16 >> MR. WARDWELL: Thank you. If that
17 helps. Mr. Malsch, in your review of FEPs in
18 general, and the contentions that came out of those,
19 are there ones that you are challenging because there
20 is not sufficient information in regards to assess
21 whether or not they should or should be included --
22 should or should not be included? Or are you -- did
23 you find that there wasn't enough information to
24 assess that and not necessarily disagree with the
25 assessment that was performed?

1 >> MR. MALSCH: Marty Malsch for Nevada.
2 I'm sure in all of our FEP contentions, we either
3 found an insufficient basis for exclusion, as for
4 example, the FEP document says excluded on legal
5 ground, which we didn't understand or --

6 >> MR. WARDWELL: Are there FEPs that say
7 just that?

8 >> MR. MALSCH: I think there are FEPs
9 that say just that and perhaps our previous dialogue
10 about the manufacturing defect contention as an
11 example. It may be that that is one of those cases
12 where manufacturing design defects was FEPed out on a
13 legal basis that we were required to assume the
14 perfect functioning of the Quality Assurance Program.

15 Now, there may be other FEPs that were
16 not FEPed out on legal grounds, but FEPed out on
17 technical grounds that we found inadequate. But I'm
18 sure in every case of our FEP contention, we did in
19 fact examine the FEP AMR very carefully.

20 >> MR. WARDWELL: Back to DOE: In our
21 discussions all this week, we've wrestled with this
22 material dispute as we're well aware of by today's
23 discussion. As we wrestle with this, could you
24 describe for me why your organization would feel it
25 be detrimental to admit the contention and then let

1 it be resolved at the summary disposition stage when
2 there is an opportunity to better explore these types
3 of conditions that we wrestle with in regards to the
4 merits and not have to worry about it at this point?

5 Let's go ahead and admit it and, if, in
6 fact, it's clear that the merits are there, it will
7 be resolved before we have to take time at a Hearing.

8 >> MR. SILVERMAN: I'd like to answer that.
9 This is Mr. Silverman, Your Honor. Any applicant or
10 virtually any applicant I'm aware of, would feel that
11 it is appropriate to not expend the resources and the
12 time to litigate issues that that applicant, before
13 the NRC, does not believe raises a genuine dispute of
14 a material fact or law.

15 In this case, we've got a governmental
16 agency with a mandate from Congress, aggressive time
17 line for licensing of three to four years -- three
18 years, with an extension of four, an enormous number
19 of contentions to deal with and complex issues, and
20 it would clearly be detrimental to simply throw up
21 our hands and say, let's just let a contention in
22 that doesn't meet the standards and we'll expend the
23 discovery resources, the witness preparation
24 resources, the testimony preparation resources, the
25 Board's time, the motions that go all along with

1 that, and it is clearly -- would be detrimental to
2 the program and to the mandate that's currently in
3 the Nuclear Waste Policy Act.

4 >> MR. WARDWELL: Well, I think some of
5 those you mentioned --

6 >> JUDGE MOORE: But Mr. Silverman, none of
7 them are according to DOE are admissible.

8 >> MR. SILVERMAN: That's your call to
9 make, Your Honor. Our point is however you decide,
10 it is not in -- it is perfectly appropriate -- it is
11 inappropriate for contentions that objectively are
12 not admissible to be admitted on the theory that,
13 let's just let it in because we can spend the time
14 and resources to litigate it. And particularly in
15 the case of this project.

16 >> MR. WARDWELL: And I understand that
17 position. Again, the ones we are wrestling with are
18 the ones that are not clear that what you described
19 is there, and how do we wrestle with that.

20 I understand that you can't provide any
21 more guidance than what you just did and --

22 >> MR. MALSCH: Judge Wardwell, excuse me,
23 Marty Malsch for Nevada. I believe I've located the
24 contention you referred to dealing with secondary
25 sources. It's Nevada Safety 118. And we do not bear

1 in that contention challenge, we make use of
2 secondary sources per se. We merely challenge DOE's
3 use of these particular sources.

4 >> MR. WARDWELL: But what did you mean by
5 a secondary source as opposed to a primary source?

6 >> MR. MALSCH: I think, if I read the
7 contention properly, a secondary source would be an
8 article or study that relies upon, let's say a body
9 of secondary sources would rely upon a single body of
10 experiments and data located in one primary source by
11 the original researcher.

12 So the original researcher does a study and
13 that produces and generates studies about the
14 studies, if you will.

15 >> MR. WARDWELL: I'll read the transcript.
16 I think I understand what you are saying but -- and I
17 just have one last one, and it deals with -- it was
18 brought up in regards to Nevada Safety 172. And I
19 guess I'll direct this to DOE, Mr. Silverman, if you
20 want to pass it on to whoever.

21 And it deals with the contention that says
22 that DOE is required to but does not intend to
23 require reasonable assurances with respect to the
24 contents and the proper packaging of those contents
25 by nuclear utilities, providing waste to DOE for the

1 proposed repository and transportation aging and
2 disposal canisters.

3 In your answer on Page 1593 as one of the
4 items you bring up, you state that a challenge to the
5 standard contract among parties under the National
6 Waste Policy Act is outside the scope of this
7 proceeding.

8 Section 302 of the National Waste Policy
9 Act makes it clear that the acceptance of spent
10 nuclear fuel by DOE for disposal at the Yucca
11 Mountain repository is governed by the contract
12 between DOE and the generator of the spent nuclear
13 fuel, and that DOE is responsible for establishing
14 the terms and conditions of that contract.

15 While I understand that the contract for
16 that is there; are you implying that neither DOE nor
17 the staff will have any control over the types of
18 things that might be placed in that canister and
19 brought to the site?

20 >> MR. SILVERMAN: Your Honor, I want to
21 give you an answer and then I'd like to go back and
22 look at the original statement of the contention, but
23 I'm sure we're not alleging that.

24 What I think we are saying is that what
25 goes on at the utility site in packaging spent fuel

1 for shipment to Yucca Mountain is within the gambit
2 of the NRC's jurisdiction under the Part 50 licenses
3 of the utilities, is, I believe, and will be subject
4 to some quality verification by the Department and I
5 will look around in a minute and see if I'm
6 misstating that. But it is not something that is
7 addressable in this proceeding which relates to the
8 licensing of this facility.

9 It's just as the transportation safety --
10 the safety of transportation of material being
11 shipped to Yucca Mountain is outside the scope of the
12 proceeding, but not outside the scope of the NRC's
13 jurisdiction to the extent that it relates to both
14 certifications of casks. So it's analogous. But if
15 I didn't answer your question I'd go back to see.

16 >> MR. WARDWELL: What about the contents
17 in those cannisters?

18 >> MR. SILVERMAN: What about it? I'm
19 sorry.

20 >> MR. WARDWELL: I mean, the statement
21 that you -- that I read from your answer talked about
22 the contents or maybe it was the contention that
23 questioned the contents. And I'm questioning to you,
24 does not the contents of what's in those cannisters
25 have some affect on the performance and resulting

1 potential impacts associated with Yucca Mountain once
2 it arrives there?

3 I mean, are you saying that we -- there is
4 no -- NRC has no control over what a given utility
5 may put in there under that contract?

6 >> MR. SILVERMAN: I'm certain that's not
7 true, that NRC has no control. I'm also certain that
8 that issue is outside the scope of this proceeding,
9 because there's nothing in Part 63 that I know of, if
10 I could just do a quick verification here.

11 >> MR. WARDWELL: As you do that, I think
12 I'll go to Nevada, and make sure I'm paraphrasing
13 your contention correctly. And I'll go to staff to
14 see what they might be able to shed some light on
15 whether NRC has a control, it's not necessarily in
16 this proceeding.

17 Have I characterized, at least in part,
18 some of what you are contesting in this contention or
19 am I off base?

20 >> MR. MALSCH: No, Judge Wardwell, you
21 have captured all or most of the contention.

22 >> MR. WARDWELL: Eloquently, you say.

23 >> MR. MALSCH: I'm sure. Whatever the
24 NRC's or DOE's jurisdiction may be over the
25 facilities where the casks are being loaded, it is

1 certainly within the scope of this licensing to
2 decide what is an acceptable disposal content at the
3 Yucca Mountain site and surely this Board, the
4 Commission has jurisdiction over issues relating to
5 licensing of the Yucca Mountain site.

6 >> MR. WARDWELL: Staff, Ms. Young, will
7 you -- are you able to shed any light on this
8 contention in regards to whether NRC has some control
9 authority for the contents of the cannisters as they
10 are being filled, either under this part or some
11 other part?

12 >> MS. YOUNG: Mitzi Young for the NRC
13 staff. I'm not familiar with this contention,
14 directly. However, I'm sure when activities are
15 being conducted at the sites where fuel is currently
16 stored, the NRC has inspection staff available to
17 monitor those activities. However, if DOE takes
18 title to the high-level waste at reactive sites for
19 the spent fuel under their standard contract, NRC is
20 not involved until it's received at the geological
21 repository operations area.

22 >> MR. WARDWELL: Mr. Silberg for NEI,
23 would you like to comment?

24 >> MR. SILBERG: Yes, the cannisters --

25 >> MR. WARDWELL: State your name.

1 >> MR. SILBERG: I' m sorry, Jay Silberg,
2 Nuclear Energy Institute. The cannisters into which
3 spent fuel would be loaded at reactor sites come with
4 licensing documents called certificates of -- COCs,
5 Certificates of Compliance which sets forth the
6 regulatory limits on what can be placed inside those
7 containers.

8 Any activity at the reactor site in terms
9 of loading of those cannisters would be done by the
10 utilities, subject to NRC oversight, subject to
11 compliance with the requirements of the Certificates
12 of Compliance. So the work at the sites would be
13 done under very strict NRC control and NRC
14 regulation -- regulatory requirements.

15 >> MS. YOUNG: If I caught your question,
16 was it under the scope of Part 63? Maybe I
17 misunderstood.

18 >> MR. WARDWELL: It was. It was twofold,
19 I wanted to see whether there was any or and if there
20 is any clarification under what part that is, that
21 would be helpful also.

22 >> MS. YOUNG: I believe it's Part 71, but
23 I could be wrong, for Certificates of Compliance?

24 >> MR. SILBERG: For transportation, it
25 would be Part 71; for storage, it would be Part 72.

1 >> MR. WARDWELL: Thank you, Mr. Silberg.
2 DOE do you -- you don't have any grounds to dispute
3 what was said?

4 >> MR. SILVERMAN: Not by Mr. Silberg, no.

5 >> MR. WARDWELL: Mr. Malsch, for Nevada,
6 do you have grounds for dispute of what was said
7 regardless of how it affects your contention?

8 >> MR. MALSCH: Yeah, I do not question
9 that the loading/unloading of casks is subject to NRC
10 jurisdiction in some places. The issue here is that
11 it turns out that the precise contents of the
12 cannisters have an important role in whether -- in
13 assumptions made in the total system performance
14 assessment. And whatever may be the dividing point
15 between jurisdiction here or there, it is surely
16 within this Board's authority to decide that this
17 particular assumption in the TSPA is unfounded
18 without the existence of some sort of an adequate
19 Quality Assurance Program controlling how the
20 contents are loaded and precisely what they are.

21 So it has a direct bearing -- a direct
22 bearing on the total system performance assessment
23 and, therefore, it raises a material issue.

24 >> MR. WARDWELL: Thank you. We'll finish
25 with the DOE.

1 >> MR. SILVERMAN: Your Honor, the tran
2 -- it's an analogous situation. The transport of
3 these materials in these certificates -- in these
4 certified casks also has a bearing on the safety, if
5 it's an attachment, for example, of the repository.
6 But it is outside, clearly outside the scope of this
7 proceeding. It's governed by the transportation
8 regulations in Part 71 that define the criteria for
9 issuing a Certificate of Compliance to use in a cask.
10 It is one thing to say it's a limited jurisdiction of
11 the NRC. These matters are not within the scope of
12 Part 63.

13 >> MR. WARDWELL: Thank you, Mr. Silverman.

14 >> JUDGE MOORE: I appreciate a 30-second
15 answer, Mr. Silberg -- Mr. Silverman.

16 What is the relationship between the NRC's
17 incident response plan and emergency plans by
18 applicants and licensees?

19 Is there any?

20 >> MR. SILVERMAN: I know a fair amount
21 about utility, industry emergency response plans, I
22 don't know much about the NRC's incident response
23 plan. I'm sure there is a coordination -- major
24 coordination --

25 >> JUDGE MOORE: I'm referring to your

1 Footnote 15 in your answer to Nye Joint Safety 5 and
2 I'm not sure that I understand that there's any
3 relationship at all between the agency's incident
4 response plan and applicant or licensees emergency
5 plan.

6 >> MR. SILVERMAN: Well, I don't even know
7 what my footnote says, Your Honor. Hold on one
8 second, bear with me.

9 >> JUDGE MOORE: On the screen in front of
10 you know now. Unfortunately, it runs onto two pages.

11 >> MR. SILVERMAN: I believe this is a
12 contention that alleges that we failed to comply with
13 a national incident, which is not the NRC system.
14 It's I think an inner-agency system and we'd make a
15 simple point, I think, in this response. This is
16 just not a requirement that applies to the Applicant.
17 I see we do talk about the incidence response.

18 >. MR. ANDERSEN: Your Honor, if I might
19 respond on behalf of Nye County. Robert Anderson.
20 This is an unusual, a one-of-a-kind licensing where
21 the Applicant must be a department within the Federal
22 Government. I don't understand the footnote. I
23 mean, they're both a licensee and a federal agency
24 subject to Homeland Security requirements, just like
25 every other federal department.

1 >> JUDGE MOORE: I don't think I'm going to
2 get an answer. We need to move on. I understand --

3 >> MR. SILVERMAN: One quick one, Your
4 Honor, which is compliance with MIMs, whatever it
5 is, is not a Part 63 requirement.

6 >> JUDGE MOORE: I understand that.

7 What I didn't understand was what your
8 reference to the NRC incident response plan and the
9 fact that the agency in response to the presidential
10 directives has determined that it requires no change
11 to incident response plans. How are incident
12 response plans, if at all, distinct from emergency
13 plans? Are they two totally separate items, as I
14 believe they are?

15 >> MR. SILVERMAN: I believe they are. I
16 think what we say in the footnote is --

17 >> JUDGE MOORE: Okay. They don't have any
18 connection with one another?

19 >> MR. SILVERMAN: Well, I don't know that.

20 >> JUDGE MOORE: Okay. I think we've
21 reached the point where the Board has gone through
22 and asked all the questions it has of the parties
23 participants for the proceedings. Since we do have
24 just a little bit of time left, I think what we'll do
25 is go back and scratch anything that was itching,

1 that came out in the course of our questioning today.
2 Or if you really have to -- in the prior two days --
3 take maybe a minute or two each and resist the
4 temptation to turn this into a closing argument. As
5 we started this morning, I start with the NCAC, and
6 we will go around the back, please.

7 >> MR. WILLIAMS: Scott Williams for the
8 Native Community Action Council; a few sentences.
9 There has been several references today and in the
10 previous two days about the procedural requirements
11 for establishing standing and admissible contentions.
12 There have been references today -- including those
13 by DOE -- to the fact that non-represented parties
14 are entitled to some "slack," which was Judge
15 Gibson's word.

16 We're confident that we have established
17 standing inadmissible contentions. We ask the Board
18 to provide the procedural flexibility that the
19 Commission's orders seems to require here. It's our
20 belief that the Indian people who live in the area
21 surrounding Yucca Mountain have a lot to contribute.
22 We suggest that the Commission would benefit from a
23 full record and encourage you to allow us to
24 participate. Thank you.

25 >> JUDGE FROEHLICH: Thank you,

1 Mr. Williams. White Pine.

2 >> MR. SEARS: Sears for White Pine County.
3 The Department of Energy has maintained for the
4 substantial portion of three days with five expert
5 lawyers -- I think I counted that correctly -- that
6 meeting the contention requirements is really not
7 that difficult and a strict application of the rules
8 should occur.

9 If compliance with the meeting requirements
10 is not that difficult, because the regulations are
11 clear on their face, why does it take five expert
12 lawyers -- plus judges -- to debate the meaning of
13 these regulations over that period of time?

14 This facile illustration speaks, Your
15 Honor, to Judge Froehlich's question whether some
16 petitioners, who don't have five expert lawyers or,
17 as in my case, may be stuck with a poor but country
18 lawyer should be cut some slack because of their lack
19 of substantial resources and experts. We appreciate
20 your attention to our contentions.

21 >> JUDGE FROEHLICH: Thank you.

22 TIM -- oh, I'm sorry, Clark County.

23 >> MS. ROBY: Very briefly, Your Honor,
24 thank you. I just want to comment briefly on the
25 exchange between Judge Wardwell and the DOE on the

1 fact that the Board is grappling with this
2 materiality question when it's difficult to determine
3 on which side of the line the contention falls,
4 what's the harm in letting it in.

5 And I'd just like to say that the DOE's
6 response seems to indicate that strict adherence to
7 the requirements in this case means that the
8 interests of safety should not also be considered.
9 This is a unique case. This is the only case of its
10 kind.

11 Part 63 was developed specifically for this
12 case. So where we even have the Board having
13 difficulty deciding which case it's on, which -- what
14 materiality really means, the DOE would assert that
15 its meaning is the only one that counts. And we
16 would simply state that there may be interpretations
17 of what materiality means and the contention
18 admissibility stage, it ought to fall in favor of the
19 Petitioner. Thank you.

20 >> JUDGE FROEHLICH: Thank you. Ms. Houck.

21 >> MS. HOUCK: Thank you, Your Honor.

22 Darcie Houck for the Timbisha Shoshone tribe or TIM.
23 I'd like to make the comment that despite the
24 differences in regards to the intergovernmental
25 dispute, both TIM and TOP do share the concerns of

1 the protection of the tribe's resources and ensuring
2 that this Board is informed about the potential,
3 substantial and adverse impacts that the tribe may
4 suffer; and that voice does need to be heard in these
5 proceedings. And we support NCAI's petition as well
6 the native people in this area are going to be
7 impacted and do need a voice in this proceeding and
8 we would also support the comments of other parties
9 regarding the flexibility and weighing in favor of
10 the petitioners to grant contention status as well as
11 standing. Thank you.

12 >> JUDGE FROEHLICH: Thank you. For Nye
13 County.

14 >> MR. VanNIEL: Jeff VanNiel for Nye
15 County. Thank you, Your Honor, both for the time
16 over these last three days and the opportunity to
17 participate in these proceedings. We look forward to
18 the Board's order in May and to moving rapidly
19 forward with hearings on the contentions in the near
20 future.

21 >> JUDGE FROEHLICH: Thank you. The County
22 of Inyo.

23 >> MR. JAMES: Greg James for the County of
24 Inyo. Thank you, Your Honor. The County has nothing
25 further. We will submit our position on our papers.

1 >> JUDGE FROEHLICH: Thank you. Top.

2 >> MR. POLAND: Thank you, Your Honor.

3 Doug Poland on behalf of TOP. I'd like to thank the
4 Board for its time and your obviously extensive
5 efforts to prepare for this argument this week. It's
6 been impressive. I stated TOP's position on the
7 other issues over the past two days and will limit my
8 comments now very briefly to the LSN. TOP pleads a
9 single NEPA contention. It's amended petition
10 identifies concessions in DOE's FEIS and SEIS that
11 contamination from the geological repository might be
12 discharged in the Death Valley Springs.

13 TOP's single NEPA contention
14 further pleads that the contamination of the springs
15 will have a devastating impact on Timbisha Shoshone
16 culture and religious practices. Those injuries are
17 set forth in the affidavits and declarations that we
18 have put on the LSN. TOP's amended petition also
19 identifies and cites other documents in the LSN to
20 support the contention. Despite having done this and
21 despite our reliance on DOE's own statements and its
22 own documents, DOE argues that TOP should be barred
23 from presenting a single contention to this Board
24 based on an alleged failure to demonstrate
25 substantial and timely compliance with the

1 LSN requirements. Mind you, DOE has not raised a
2 single complaint that it could not find any of the
3 LSN materials that we cite or that it cannot evaluate
4 our contention because we failed to make a document
5 available.

6 Instead, DOE relies on procedural rules
7 that they argue create an absolute bar to
8 participation as a party. That position squarely
9 puts form over substance. It ignores the purpose of
10 the LSN as well as the Advisory PAPO Board's own
11 statement that procedural requirements are not to
12 make the process more difficult and the failure to
13 comply with case management requirements are not to
14 be used as grounds to object to the admissibility of
15 a proffered contention.

16 TOP has not ignored the LSN requirements.
17 It has acted in good faith. We believe, as
18 Construction Authorization Board 2 noted yesterday,
19 that at the very least, DOE must show some prejudice
20 if it seeks to make an issue of LSN compliance. DOE
21 makes no such claim as to TOP. We believe this is
22 truly a case of no harm, no foul; and that contrary
23 to DOE's arguments, the LSN requirements do not bar
24 TOP's participation as a full party in this
25 proceeding. Thank you.

1 >> JUDGE FROEHLICH: Thank you. Mr. --

2 >> MS. CURRAN: Your Honor, this is Diane
3 Curran for Eureka County. I know that Eureka has
4 been instructed not to participate in this
5 proceeding; but if I could just have a moment, I want
6 to thank you for the efforts you've made to web
7 stream this proceeding. It's meant a lot to the
8 officials in Eureka County and I understand that it
9 was many people tuned in to these proceedings over
10 the last couple days.

11 And I'd also like to thank you for the
12 efforts that you made to ensure that the written
13 materials were put on the media so that people
14 viewing from far away could see what you are talking
15 about. We really hope that this is the beginning of
16 a tradition. Thank you.

17 >> JUDGE FROEHLICH: Thank you, Ms. Curran.
18 For Caliente.

19 >> MR. HUSTON: Your Honor, John Huston for
20 Caliente Hot Springs Resort. Thank you for your time
21 and the opportunity that's been afforded to us. We
22 have no documents that have not been entered on the
23 LSN by DOE or other parties and you probably don't
24 expect to receive any. Thank you for your
25 constitution of our contention and your understanding

1 of us as a limited resource private party. Thanks
2 again.

3 >> JUDGE FROEHLICH: Thank you. The State
4 of California.

5 >> MR. SULLIVAN: Tim Sullivan for
6 California. We appreciate all of the time and effort
7 that all the Boards have put into this issue and all
8 the great level of preparation. And we have nothing
9 further to add.

10 >> JUDGE FROEHLICH: Thank you. Four
11 Counties.

12 >> MR. LIST: Yes. Robert List on behalf
13 of Four Counties. First, let me say that, that we've
14 spent at good deal of time today talking about the --
15 the safety contentions. And I know that the NEPA
16 contentions have not been the centerpiece here today.
17 However, I would note the parallel between the points
18 that were debated here concerning the -- the bald
19 denial by the -- by DOE that they have failed to meet
20 the adequacy standards because those same -- those
21 same standards -- of adequacy are very close
22 standards also apply to the NEPA contentions. And we
23 could simply point out we face the same thing. And
24 we would simply point out we have alleged in, for
25 example, NEPA 1 and NEPA 2 of the four counties, that

1 DOE has utterly failed to confront or to address two
2 very critical environmental issues or to discuss
3 mitigation on them. And we believe that very firmly.

4 I also would like to comment about the fact
5 that Mr. Silverman shortly ago, about 15/20 minutes
6 ago, made what we used to call in law school a
7 pregnant negative comment, namely, he denied that
8 there is any responsibility or jurisdiction over
9 transportation on the part of NRC. And that simply
10 is not the case.

11 The point -- in fact we point to 51, which
12 includes a vast array of requirements under NEPA.
13 And NEPA, of course, if one looks at the
14 environmental impact statement and the NEPA documents
15 that were submitted in this matter, by the applicant,
16 extensively touch upon transportation in many
17 respects.

18 However, they failed to do so in a -- in
19 the kind of a detailed way that is required under the
20 National Environmental Policy Act. And so they have
21 brought to this -- to this Board and to the
22 Commission an application with an attendant NEPA
23 document concerning transportation that is flatly
24 sparse and lacks the kind of detail that is required.

25 And while we fully recognize that the --

1 that the repository is the centerpiece of much of the
2 attention and will be throughout this process, to
3 those people who live within the State of Nevada, who
4 live in communities where much of this material is
5 going to be transported, that's the closest they're
6 ever going to come to a dangerous circumstance.

7 And while we're not out in any way to kill
8 this project, we simply want to see it done properly.
9 I'm not suggesting that the scope of jurisdiction
10 over safety and emergency response on transportation
11 extends to every road and every byway in America.
12 But I am suggesting that it is within the scope of
13 this Board and of the Commission insofar as the State
14 of Nevada is concerned where this funneling effect of
15 2700 -- minimum of 2700 trucks will likely pass and
16 that's very close to the 2800 trains in terms of
17 numbers, will likely pass through these communities.

18 And I would cite one case in closing to the
19 Board. It's Thomas Vs. Peterson, 753 Fed. 2nd,
20 754, which involves a -- it's a 9th Circuit case
21 which involved a plan to log a forest area and the
22 Court held that there was a logical extension, an
23 inextricable link to the road that led to the area
24 that was to be logged, and indicated that they had to
25 consider the roadway as well. It's a connected

1 action.

2 And so we -- we urge this Board and the
3 Commission, ultimately, to reject the concept that
4 transportation in a broad sense is off limits.

5 We urge the adoption of our -- of our
6 contentions; and we thank this Board for its very
7 extensive preparation and conduct.

8 >> JUDGE FROEHLICH: Thank you, Mr. List.
9 For the State of Nevada.

10 >> MR. MALSCH: Yes. Thank you. We would,
11 first of all, like to express our -- on behalf of
12 Nevada, express our appreciation to this Board and
13 the other two Boards for the time and attention they
14 devoted to the issues today and the last few days. I
15 think the three days, as it demonstrated, that the
16 Boards were very carefully prepared for these series
17 of hearings and we thought that the questions asked
18 were thoughtful and incisive.

19 As I'm sure the Board appreciates, it took
20 a very substantial effort by Nevada to file the
21 contentions it did, since there was over -- there
22 were over 8600 pages in the license application and
23 the hundreds of thousands of pages in supporting
24 references.

25 This took an extraordinary effort on the

1 part of the Nevada DOE technical team and I have to
2 tell you that it took more than an extraordinary
3 effort to file our point-by-point rebuttals to the
4 answers that were filed by DOE and the NRC staff. We
5 were, frankly, surprised and dismayed at the answers
6 by DOE and NRC staff because we thought we had
7 crafted exceptionally well-supported and well-defined
8 contentions.

9 We were also dismayed to learn the first
10 thing Tuesday morning that it is still the position
11 of a new DOE Secretary that Nevada has not raised a
12 single legitimate safety issue about the safety of
13 the Yucca Mountain Repository.

14 We believe that our contentions meet and
15 in, I think, all cases vastly exceed the Commission
16 contention requirements and that the three Boards
17 should so find. Thank you very much.

18 >> JUDGE FROEHLICH: Thank you. DOE.

19 >> MR. SILVERMAN: Thank you, Your Honor.

20 I do want to -- as everyone else -- express our
21 appreciation on behalf of the Department of Energy
22 and my personal appreciation for a Board that
23 conducts itself not only professionally, but with a
24 sense of humor, even if sometimes we're the brunt of
25 that sense of humor. It actually makes it much more

1 palatable and pleasing to go through this experience.
2 Thank you for that. Mr. Shebelskie just has a couple
3 quick remarks prompted by the closing remarks of the
4 other parties.

5 >> MR.SHEBELSKIE: Your Honors, the LSN is
6 not a technicality. It is a fundamental aspect of
7 this proceeding that the Commission established 20
8 years ago to govern this and to act as a means to
9 facilitate the Commission's ability to meet the
10 statutory schedule under the Nuclear Waste Policy
11 Act.

12 In order to achieve that, it was
13 fundamental for the document production process to
14 take place up front before we got to this point in
15 time here. It is nothing unfair. It's actually a
16 procedure and a requirement that was the result of
17 negotiated rulemaking with DOE and Nevada and
18 affected stakeholders.

19 They agreed to this; and the Commission
20 adopted it in its initial rulemaking as early as 53
21 Federal Register 4.4.4.1.1.

22 The Commission had said that no person may
23 be granted party or interested governmental
24 participant status in a hearing if it is not in
25 substantial and timely compliance with requirements

1 imposed with 10003 at the time specified for the
2 submission of petitions to intervene. This is a
3 substantive requirement that everyone has been on
4 notice on for a long time.

5 We are accused of taking an indiscriminate
6 approach to this to people or to demand form over
7 substance. What we did -- we didn't challenge
8 everyone's petition on the basis of LSN compliance.

9 Had we done that, I'm sure Nevada and Clark
10 County would be saying, look at that, they accuse
11 everybody of noncompliance. This is sort of in the
12 "no good deed goes unpunished" category. We try to
13 be circumspect and tailored in our objections. And
14 we objected on the two main circumstances were
15 presented to us.

16 The first was when the petitioner had done
17 nothing in the pre-license phase. They had made no
18 certifications. They had produced no documents.
19 They had not complied with the PAPO Board's orders
20 for monthly supplements and certifications. In those
21 cases, in those instances, it was appropriate to
22 object, because it's a straight out unqualified
23 failure to comply with the requirements.

24 The other situation with that posed by
25 Nevada, Inyo County, and Clark County, where they had

1 made certifications, but when we looked at their
2 contentions, measured against their LSN collections,
3 because as a matter of fact the question has been
4 raised in our mind whether you have made a good faith
5 effort to identify and in some cases, supporting
6 information and in all three, your nonsupporting
7 information. Nevada has come back in their reply
8 with a factual foundation to say that they had done
9 it. The other two have not.

10 Clark County argued to you, that, yes, they
11 answered all of our factual objections in their
12 answer; but what they've provided was what Judge
13 Moore described earlier today in response to the
14 characterization of one of our replies, is a unsworn
15 document that consists merely of argument of counsel.

16 Clark County has not provided any affidavit
17 or any factual support from their LSN administrator,
18 from their experts, saying that, in fact, they did
19 undertake a good faith search for all the documents
20 including the nonsupporting information. They have
21 instead said we didn't have to do it and based on the
22 fact that they have not supplemented their production
23 Since they filed a petition with any meaningful
24 document, and they said they don't intend to do this.

25 It is prejudicial to DOE that we have not

1 been provided party's documents during the
2 pre-application phase, for whatever purposes we might
3 be able to make of it then, including in response to
4 preparation for our answers.

5 In summation, Your Honor, this is not a
6 technicality. It's a fundamental point that we had
7 to live with and the parties aren't required to
8 comply with this going forward, the schedule is in
9 jeopardy.

10 >> JUDGE FROEHLICH: Thank you, Mr.
11 Shebelskie. NEI.

12 >> MR. REPKA: David Repka for the Nuclear
13 Energy Institute. NEI looks forward to participating
14 in this proceeding on specific substantive issues in
15 a very substantive way as we go forward drawing on
16 the substantial expertise that's available to the --
17 to NEI. I want to say at the outset that NEI has
18 painstakingly and carefully complied with
19 LSN requirements and no party has objected to NEI's
20 fulfillment of those obligations.

21 Second, there was some discussion this
22 morning of the threshold for a pleading of
23 inadmissible contention. NEI believes that the
24 contention threshold standards are what they are to
25 be applied neither in a reduced nor a heightened way,

1 but instead, in a fair and even-handed manner by the
2 licensing Board. Against that standard, we believe
3 that all of our nine proposed contentions have
4 sufficient basis and specificity to meet the
5 Commission's requirements.

6 With respect to the issue of materiality,
7 we believe that all of our issues meet the NRC's
8 requirements and are material -- directly material to
9 the issues in this proceeding, whether based upon an
10 argument that they will help establish compliance
11 with the NRC regulations, or in some cases, they
12 suggest a specific noncompliance with an NRC
13 regulation, either related to, for example,
14 requirements on the total system performance
15 assessment or the NRC's requirements for as low as
16 reasonably achievable for occupational doses. Or in
17 some cases, both related to compliance and specific
18 noncompliances.

19 With respect to arguments related to the
20 ALARA or As Low As Reasonably Achievable standard, we
21 didn't have much discussion with that in the last
22 three days. But we do reject the Department's notion
23 that anything that takes place outside the GROA is
24 not relevant to this proceeding or material to this
25 proceeding. In fact, I think Nevada has made a

1 similar argument and to the extent that issues --
2 related issues on activities outside the GROA raised
3 by Nevada are admitted, some of those NEI contentions
4 must be admitted as well. For example, contentions
5 related to the disposal, dual purpose cannisters or
6 tag cannisters, things that aren't directly
7 attributable to the proposed design and operation of
8 the facility are material to this proceeding. And
9 NEI's contentions should be admitted on that basis.

10 And then finally, I would that say some of
11 the other contentions -- and we address this in our
12 reply finding, they go directly to matters raised by
13 other parties. To the extent those contentions of
14 other parties are admitted that are related, NEI
15 contention must be admitted as well. That's all I
16 have.

17 >> JUDGE FROEHLICH: Thank you.

18 >> MS. ROBY: Your Honor, for Clark County,
19 if I may either now or after NRC staff speaks, I feel
20 I would be remiss if I did not respond to the remarks
21 of DOE's counsel.

22 >> JUDGE FROEHLICH: No, let's wrap this up
23 NRC staff.

24 >> MS. YOUNG: Thank you, Judge Froehlich.
25 The staff also thanks the Board for the opportunity

1 to answer your probing and piercing questions and we
2 hope that the staff's answers have been able to
3 assist you in the inquiry you have before you. The
4 Commission's standards are strict by design and the
5 staff's responses did apply those standards in
6 determining whether the admissibility requirements of
7 10 CFR 2.309 were met.

8 And previously, there was a discussion
9 between I believe Judge Wardwell and Mr. Silverman,
10 if not Mr. Malsch discussing performance assessment
11 and consideration of uncertainty. I would commend to
12 the Board's reading the final rule, statements
13 consideration, the final rule issued
14 November 2nd, 2001, and at page 55747, there is a
15 discussion by the Commission of what's required for
16 addressing uncertainties. And under Issue 2, there's
17 a statement that some uncertainties would be directly
18 included in DOE's estimate of performance. For
19 example, DOE is expected to conduct uncertainty
20 analysis, i.e., evaluation of how uncertainty and
21 parameter values affect uncertainty in the estimate
22 of dose, including the consideration of disruptive
23 events and associated probability of occurrence.

24 Other uncertainties are not necessarily
25 quantified but are considered during the development

1 of the conceptual models for the performance
2 assessment, e.g, consideration of alternative models,
3 inclusion and exclusion of FEPs. Also in
4 responding to a question of Judge Wardwell's
5 previously regarding Nevada Safety 172, I may not
6 have heard your question before I answered. The
7 staff did not object to the admission of that
8 contention. The contents of a tag cannister are
9 relevant to a repository performance. That concludes
10 the staff's remarks.

11 >> JUDGE FROEHLICH: Thank you, Ms. Young.
12 On behalf of this Construction Authorization Board
13 CAB-1 and the two Boards that preceded us this week,
14 I want to thank the parties and the petitioners for
15 the quality of their pleadings and for their candid
16 answers during this oral argument.

17 It has been immensely helpful to us in
18 making our decision and will help us get that
19 decision out just as quickly as possible. Thank you
20 all for your attendance and for your input. We stand
21 adjourned.

22 [Whereupon, the hearing was adjourned]

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CERTIFICATE OF REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of the U.S. Department of Energy [High-Level Waste Repository] Docket No. 63-001-HLW on April 2, 2009 in Las Vegas, Nevada, was held as herein appears, and that this is the Original Transcript thereof for the file of the U.S. Nuclear Regulatory Commission taken by Caption Reporters Inc., and that the transcript is a true and accurate record of the foregoing proceedings.

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