

RAS Z-2

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Luminant Generation Company
Comanche Peak Nuclear Power Plant
Units 3 and 4

Docket Number: 52-034/035-COL
ASLBP Number: 09-886-09-COL-BD01

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

IN THE MATTER OF	Docket Nos.
LUMINANT GENERATION	52-034-COL
COMPANY, LLC	52-035-COL
(Comanche Peak Nuclear Power	ASLBP No.:
Plant, Units 3 and 4)	09-886-09-COL-BD01

Wednesday, June 10, 2009

Jury Selection Room
Hood Country Justice Center
1200 West Pearl Street
Granbury, Texas

The above-entitled matter came on for oral
argument at 9:00 a.m.

BEFORE THE LICENSING BOARD:

ANN MARSHALL YOUNG, Chair
DR. GARY S. ARNOLD, Administrative Judge
DR. ALICE C. MIGNEREY, Administrative Judge

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1 APPEARANCES:

2 On behalf of the NRC:

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5 JAMES P. BIGGINS, ESQ.

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10 On behalf of the Applicant:

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18 On behalf of the Petitioners:

19 ROBERT V. EYE, ESQ.

20 Kauffman & Eye

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22 Topeka, Kansas 66603

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P R O C E E D I N G S

1 JUDGE YOUNG: Let's go on the record.

2
3 Good morning. My name is Ann Marshall Young.
4 I'm the chair of this licensing board. I am the
5 lawyer member of the Board, and I'm going to ask
6 Judge Arnold and Judge Mignerey to introduce
7 themselves and provide their areas of expertise.

8 JUDGE ARNOLD: My name is Judge Arnold. I am
9 technical judge on this Board. My degrees are in
10 math and nuclear engineering, and I have spent all
11 of my career essentially in the nuclear reactors
12 program, designing for the Navy.

13 JUDGE YOUNG: Judge Mignerey?

14 JUDGE MIGNEREY: Yes. I'm Judge Mignerey. I
15 am a part-time technical judge. I am a professor of
16 chemistry at the University of Maryland, and my
17 specialty is nuclear chemistry.

18 JUDGE YOUNG: Thank you. And then let's just
19 start over here at the left with the Applicant's
20 counsel.

21 MR. FRANTZ: My name is Steve Frantz. I'm
22 counsel for Luminant Generation Company. I'm with
23 the law firm Morgan, Lewis & Bockius in Washington,
24 D.C. On my left is Jon Rund, and on my right is
25 Tim Matthews, also Morgan, Lewis.

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1 JUDGE YOUNG: All right. Do you want to
2 introduce any other people that may be taking any
3 part or that you may be speaking with, or --

4 MR. FRANTZ: Right now we don't anticipate
5 having any other speakers.

6 JUDGE YOUNG: All right. Very good.
7 All right. NRC Staff?

8 MR. BIGGINS: Thank you, Judge. Yes. Good
9 morning. My name is James Biggins with the NRC
10 Staff. With me today is Marcia Simon and Susan
11 Vrahoretis. Also present today are the
12 environmental project manager, and sitting in, a
13 replacement for the safety project manager.

14 JUDGE YOUNG: Do you want to provide their
15 names?

16 MR. BIGGINS: Certainly. Mike Willingham and
17 Phil Ward. Also present we have Barry Zalcman.
18 Thank you.

19 JUDGE YOUNG: And for the Petitioners? I'm
20 going to move this phone just a little bit so I can
21 see you better.

22 MR. EYE: Good morning, Your Honor. My name
23 is Robert Eye. I'm the attorney for the
24 Petitioners. I'm with the firm of Kauffman & Eye,
25 Topeka, Kansas, and on my left is Eliza Brown, and

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1 Karen Hadden is on camera, and they're both staff
2 members with the SEED Coalition, one of the
3 Petitioners.

4 JUDGE YOUNG: And do you have any other of the
5 Petitioners that you'd like to introduce?

6 MR. EYE: We have Don Young in the audience,
7 representing the firm, and his -- there he is -- is
8 here as well.

9 (Pause to reconnect conference call.)

10 JUDGE YOUNG: While she's doing this, this is
11 Sara Cueler, who's helping us from our office, and
12 this is Matthew Rotman, who's our law clerk, and
13 since I'm a little bit technologically challenged,
14 I'm going to keep them here till we make sure this
15 is working.

16 (Pause.)

17 JUDGE YOUNG: Mr. Eye, were you finished
18 making your introductions?

19 MR. EYE: Yes, Your Honor. Thank you.

20 JUDGE YOUNG: Okay. All right. Also by way
21 of introduction and also to allay any possible
22 confusion, I want to just explain a little bit about
23 who we are and what we do.

24 This Board is part of a panel of legal and
25 technical judges in various areas of expertise. We

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1 are an entity that is independent of the NRC Staff,
2 who's here today as a party. Our job is to act as
3 neutral adjudicators, bound only by the law,
4 including statutes, rules, and controlling case law
5 precedent, which includes courts' decisions and
6 those of the Nuclear Regulatory Commission itself.

7 It is by following the law and deciding cases
8 without fear or favor toward any party, including
9 the NRC Staff or any other party, that we fulfill
10 our duties as Administrative Judges.

11 We are here to hear the arguments of all
12 parties. We have read the pleadings on the issues
13 before us, which today include mainly the
14 admissibility of certain contentions filed by the
15 Petitioners under the requirements of 10 CFR, or
16 Code of Federal Regulations, Section 2.309,
17 subsection (f)(1)(I) through (vi).

18 We may interrupt the arguments from time to
19 time to ask questions or focus the inquiry on
20 particular points, and we have issued a memorandum
21 to the parties with some specific questions that we
22 will expect the parties to address in their
23 arguments.

24 Therefore, as a general rule, we don't expect
25 that counsel would merely repeat everything that's

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1 been written in the written pleadings that have been
2 filed with us, other than to provide very brief
3 summaries as appropriate for clarification.

4 We welcome you all to this proceeding. Unless
5 the parties have any other matters that require our
6 immediate attention, we will begin the argument this
7 morning with argument on the Applicant's motion to
8 strike portions of the Petitioners' replies, and
9 then move on to argument on the contentions in
10 numerical order.

11 So, Mr. Frantz, do you want to start or
12 identify who's going to make that argument?

13 MR. FRANTZ: Yes. Thank you, Judge Young.

14 JUDGE YOUNG: Yes. Did you have anything
15 else?

16 MR. EYE: I'm sorry, Your Honor. Sorry, Mr.
17 Frantz. I did have a preliminary matter.

18 JUDGE YOUNG: Okay.

19 MR. EYE: Your Honor, last week we made an
20 inquiry about access to the Internet, and we were
21 assured that that would be -- that we would have it.
22 Is there something that we need to do, because we've
23 been unsuccessful up to this point about getting it,
24 so perhaps rescue has just appeared, so all I had to
25 do was ask, I guess. So thank you, Your Honor.

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1 JUDGE YOUNG: Do we need to take a minute to
2 let -- does everyone else that needs that have it?

3 (Pause.)

4 MR. EYE: There was a time, Your Honor, when
5 these kinds of proceedings weren't dependent on
6 these machines, so -- but it's a new age, so we're
7 going to take advantage of it.

8 (Pause.)

9 MR. EYE: Your Honor, I think we can proceed
10 on the motion if that's all right with that panel.

11 JUDGE YOUNG: All right. Mr. Frantz?

12 MR. FRANTZ: Thank you, Judge Young.

13 Initially I'd like to point out that our
14 motion to strike is narrowly focused and conforms
15 with NRC precedent. We are not attempting to strike
16 the entire set of the Petitioners' reply. Instead
17 we're only looking to strike portions of that reply,
18 namely those portions that seek to expand the scope
19 of the contentions or to add new supporting
20 information for the contentions.

21 As discussed in more detail in our motion to
22 strike in Section 3 of that motion, there are
23 numerous NRC precedents, both at the Commission
24 level and Licensing Board level, that hold that a
25 reply may not be used to expand the scope of a

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1 contention or to add new technical support for a
2 contention.

3 The Petitioners' reply runs afoul of this
4 longstanding precedent. In particular, Contentions
5 2 and 8 in the initial petition to intervene pertain
6 to the content of the environmental report.
7 However, in the reply, Petitioners for the first
8 time raise issues related to compliance with 10 CFR
9 52.79(a)(3) which pertains to the content of the
10 final safety analysis report, not the environmental
11 report.

12 Similarly, Contention 3 in the initial
13 petition pertains to the content of the
14 environmental report, but the reply instead refers
15 to compliance with 10 CFR 50.54(hh), which is a
16 safety contention or safety regulation and not an
17 environmental regulation. So it's very clear that
18 with respect to these three contentions, they're
19 attempting to expand it from an environmental
20 contention to also include safety issues, which we
21 believe is impermissible under the NRC precedents.

22 Additionally, with respect to Contentions 2, 8
23 and 9 in the Petitioners' reply, they raise new
24 references, technical references, to outside web
25 pages. They have new reports attached to their

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1 reply that were not part of the initial petition,
2 and we believe that these are all impermissible and
3 should be struck under the NRC precedents.

4 Contrary to the Petitioners' arguments, these
5 additional references to regulations and these
6 additional technical reports are not mere legitimate
7 amplifications. Legitimate amplification would be
8 an additional explanation of their initial
9 contention or perhaps a response to arguments that
10 we raised in our answer or the Staff raised in its
11 answers. Instead, what they're doing is trying to
12 expand the scope to now include safety issues and to
13 provide new technical references to cure the defects
14 in their initial petition.

15 JUDGE YOUNG: Let me just interrupt you there,
16 because the real question here is what constitutes
17 legitimate amplification.

18 MR. FRANTZ: Yes.

19 JUDGE YOUNG: And so it would be helpful if
20 you could be specific with regard to any case law
21 that you're aware of that provides any definition of
22 that term. Otherwise it sort of tends to fall into
23 one of those categories of legitimate amplification
24 may to some extent be what's in the eye of the
25 beholder.

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1 MR. FRANTZ: Yes. I realize that the term is
2 somewhat flexible, and there's not a precise
3 definition, but the precedents do very clearly
4 indicate that, one, you cannot supply new technical
5 reports, either new affidavits, new reports from
6 technical experts or new technical citations. Those
7 all go well beyond legitimate amplification.

8 JUDGE YOUNG: Have you provided the case law
9 that supports your argument in your original motion
10 or --

11 MR. FRANTZ: Yes. In Section 3 of that
12 motion. Also, I might call the Board's attention to
13 a very recent case involving the Bellefonte COL
14 proceeding. In that case, the Petitioners did
15 something very similar to what Petitioners are doing
16 here. In Bellefonte, Petitioners in their reply had
17 new affidavits. They had new technical reports from
18 other reported experts. They had new references to
19 web pages.

20 And the Applicants moved to strike, and the
21 Board granted that motion to strike. That's just
22 one example among many where either the licensing
23 boards or the Commission itself has struck new
24 technical supporting documents for a contention.

25 Additionally, as I mentioned, when the

1 Petitioners attempt to expand the scope of the
2 contention, to go from an environmental to safety,
3 that is clearly more than a legitimate
4 amplification. That's an expansion of the scope.

5 JUDGE YOUNG: Mr. Eye?

6 MR. EYE: Thank you, Your Honor. As you noted
7 a moment ago, it is rather subjective in terms of
8 determining precisely what falls into the category
9 of legitimate amplification.

10 Your Honor, it's our contention that citation
11 to additional provisions that bear on the
12 Commission's decision to license or not license
13 these plants are always germane. They always come
14 into the discussion about the application, and to
15 the extent that those particular provisions were not
16 explicitly called out in the original petition, I
17 think that the Applicant is on notice that all
18 provisions that bear on licensing within the NRC
19 regulations are something that they need to be
20 prepared to address and deal with.

21 To the extent that the Applicant has not had
22 an opportunity to fully expand on the issues that we
23 raised in our reply, particularly related to
24 52.79(a)(3) and 50.54(hh), there are provisions in
25 the regulations that would allow this Panel to

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1 permit the Applicant to, I guess, do a surreply and
2 address those issues at more length as they would
3 see fit, although I think that they pretty well
4 covered them in the papers that they've already
5 filed, but nevertheless, there is that regulatory
6 provision where they could expand on those arguments
7 if they wanted to.

8 The legitimate amplification argument, we
9 think, applies here primarily not only because
10 safety considerations are always pertinent, but also
11 because if we look at the specific things that we
12 did add, they didn't change the contentions. They
13 didn't alter the primary focus of the contentions.
14 What they did was attempt to clarify or bring
15 additional information that would have some bearing
16 on helping the panel and those others in the
17 Commission that are responsible for making these
18 decisions.

19 It was our intention all along -- and we tried
20 to do our best at this -- to give the decision-
21 makers here the maximum amount of information that
22 we could, and to the extent that that may have
23 crossed some line, vague though it may be, that was
24 not necessarily legitimate amplification, we would
25 urge this panel to err on the side of considering

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1 more information rather than less, and if in the
2 process of considering more information rather than
3 less, it is prejudicial to the Applicant, then I
4 think the Applicant should be given an opportunity
5 to respond in some meaningful way.

6 We're not here to do anything that's unfair,
7 but what we are here to do, we hope, is to bring
8 pertinent information to the attention of this Panel
9 and the Commission generally to assist as best we
10 can in making an informed decision about the
11 application that's before you.

12 JUDGE YOUNG: Thank you.

13 Does the NRC wish to speak?

14 MR. BIGGINS: Yes, Judge, thank you.

15 The Staff, as stated in the motion, agreed
16 with the motion that the portions of the reply that
17 the Applicant seeks to strike are not legitimate
18 amplification of the originally filed contentions.

19 The Staff would point out that the Louisiana
20 Energy Services case, and as recently followed in
21 Crow Butte, provide precedent that could help guide
22 this Board to determine whether or not this is
23 legitimate amplification or not.

24 The Staff position is that any citations to
25 the Code or requirements should have been provided

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1 in the original petition, and providing them in the
2 reply is not legitimate amplification.

3 JUDGE YOUNG: Let me interrupt you there. Why
4 would that not be legal argument that would be of
5 the kind that would be allowed on any issue before a
6 legal forum?

7 MR. BIGGINS: Well, Judge, particularly in
8 citing new provisions that may have additional or
9 supplementary requirements would be a requirement
10 that the Petitioners should have raised in their
11 original petition. If it's additional argument --

12 JUDGE YOUNG: Well, let me interrupt you
13 again. In the initial petition there's no
14 requirement that any statutory or regulatory
15 citations be provided in the original petition. If
16 there is, tell me where that comes from.

17 MR. BIGGINS: Well, I agree with you on that
18 point, Judge. The point I would make is that the
19 contention itself has to be defined in the petition,
20 and to the extent that a citation to an additional
21 Code section would raise a new or additional facet
22 to an issue -- that new argument is really what it
23 is -- should have been raised in the petition, not
24 in a reply.

25 JUDGE YOUNG: If the legal argument that's

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1 made, at least in part by virtue of reference to a
2 section of the regulations, for example, that may
3 not have been cited previously, and the legal
4 argument that's being made is on the same issue
5 raised in the original contention, wouldn't you
6 agree that that would be acceptable?

7 MR. BIGGINS: If it does not expand the
8 contention, yes, I would agree that that would be
9 acceptable.

10 JUDGE YOUNG: So we get back to the thing that
11 we all learned in law school about defining what the
12 issues are.

13 MR. BIGGINS: Certainly, Judge, and as with
14 these contentions, the contention itself has to be
15 properly set forth in the petition, meeting the
16 requirements of 2.309(f)(1).

17 If citing an additional Code section in the
18 Commission's rules doesn't expand the argument and
19 is already supported by a contention, the Staff
20 would agree that that would be proper. However, if
21 the contention is one of omission where the
22 Petitioners are claiming that the Applicant didn't
23 meet certain rule requirements and then in the reply
24 they're citing a new rule requirement that could not
25 be reasonably included in the interpretation of that

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1 contention, that's a new argument and should have
2 been properly made in the petition itself.

3 JUDGE YOUNG: What might be helpful -- and
4 I'll just tell you at this point that we're going to
5 take the motion under advisement, and in making our
6 rulings on the contentions we will not consider
7 anything that we don't find would constitute
8 legitimate amplification -- it might be helpful, as
9 we go through the arguments today, if the parties
10 have specific arguments on the information that
11 you're challenging and whether that would fall
12 within the issue originally set forth in the
13 contention, you can make those more specifically
14 with regard to the contentions in question, and then
15 we'll take those arguments under advisement as well,
16 because I think that it comes down to an issue-by-
17 issue determination and what's an issue and what's a
18 sub-issue and what's a side issue and so forth. So
19 that might be helpful for us in hearing the
20 arguments today.

21 Go ahead.

22 MR. BIGGINS: One last point, Judge, is the
23 argument that a surrebuttal could cure any
24 prejudice. The Commission, in its rulings, hasn't
25 said that it's not permissible to go outside of

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1 legitimate amplification except when a cure can be
2 had to the prejudice. The first and primary
3 consideration that the Board must face is whether or
4 not under the Commission precedent this is a
5 legitimate amplification or not. So the question
6 that the Board has to answer is not whether or not a
7 prejudice could be cured with a surrebuttal. Thank
8 you.

9 JUDGE YOUNG: Any further argument?

10 MR. FRANTZ: No, Your Honor.

11 JUDGE YOUNG: All right. Then let's move
12 forward to argument on Contention 1, and on the
13 argument on the contentions, in light of our earlier
14 advice and the advice this morning about not just
15 repeating what's in the pleadings, we were thinking
16 that the best way to proceed would be to start with
17 the party who would be the next one to reply to the
18 last pleading that was filed.

19 In other words, the Petitioners have filed
20 replies, so on all those to which the Petitioners
21 have filed specific replies, we would start with the
22 Applicant; on all those where the Petitioners did
23 not file specific replies -- and we may have
24 questions about those when we get to them -- have
25 the Petitioners start first and then have the NRC

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1 Staff go last on each argument.

2 Does that make sense to everyone? Does anyone
3 have any objection to that?

4 MR. BIGGINS: That's agreeable to the Staff,
5 Judge.

6 MR. EYE: No objection from Petitioners, Your
7 Honor.

8 MR. FRANTZ: That's fine.

9 JUDGE YOUNG: And I guess even though you did
10 provide a reply on 1, in one sense, this make not
11 make sense as much for Contention 1, so maybe we'll
12 make an exception at the start, and that's because
13 the question that we had previously asked in our
14 memorandum of May 27 was given that we need to make
15 our determinations on all the contentions under
16 Section 2.309(f)(1), how could the Licensing Board
17 find Contention 1 to be admissible under the
18 criteria of Section 2.309(f)(1) in light of the
19 Commission's April 27 order denying your motion to
20 stay the proceeding, and in light of a more recent
21 Commission decision -- not a more recent -- yes,
22 more recent -- in the Sharon Harris case to the same
23 effect.

24 Would you care to address that, because that's
25 really what we need to look at here and I'll be

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1 frank with you, we have a hard time seeing how we
2 would not be bound by that precedent.

3 MR. EYE: Your Honor, so do we, but we're here
4 to make a good record; that's part of our function
5 here, and please recall that procedurally we filed
6 our motion to stay contemporaneously with the
7 petition, and they, at least at the beginning,
8 tracked along together.

9 To the extent that the motion has been denied
10 and we felt compelled to try to preserve the
11 contention -- again, primarily to make a good
12 record -- and so we made the reply that we did. But
13 we certainly understand, and I've read the Sharon
14 Harris decision and the cases that preceded it as
15 well, and it appears to us that if Commission
16 precedent is going to be followed here and we're
17 going to be bound by it -- at least in this
18 particular proceeding -- it appears that that
19 contention would have been dealt with in the form of
20 the motion.

21 But I want to make sure that the record is
22 clear: We consider it still to be a good
23 contention, and I won't belabor the argument, but we
24 do believe that to disconnect the reactor
25 certification from the balance of the issues doesn't

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1 do justice to why they ought to be considered
2 together, that is the significant differences
3 between the reactor that is being proposed and its
4 predecessors. And to the extent that the cart is
5 before the horse, we think that that's contrary to
6 really what the Atomic Energy Act would anticipate
7 to be certain that licenses are only issued
8 consistent with the public's interest.

9 This may be, as much as anything, an argument
10 about sequencing, but it also, we believe, extends
11 beyond that inasmuch as we now have something of an
12 artificial demarcation between the reactor
13 certification process and everything else, and we
14 think that they are organically considered together,
15 that they should be considered organic and together,
16 and that's the argument that we've made.

17 And consistent with the Panel's directions, I
18 will do my best not to be too repetitious from what
19 we've already said in our papers, but we do
20 recognize the underlying legal issues here in terms
21 of this being bound by Commission precedent and so
22 forth.

23 JUDGE YOUNG: Are you arguing to any extent
24 that there are specific omissions in the application
25 comparable to those, for example, in the Sharon

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1 Harris case? Are you making that argument at all?
2 Or it sounds as though you're agreeing that we could
3 not -- not agreeing, I'm not saying what our ruling
4 would be, but that you're more ore less conceding
5 that we would not have the authority under the
6 precedent to find this particular contention
7 admissible.

8 MR. EYE: That is correct, Your Honor. We
9 think that to the extent that you are going to
10 recognize and be bound by Commission precedent, you
11 really don't have much flexibility on this
12 particular contention, and partly because of the way
13 the motion was handled originally.

14 JUDGE YOUNG: Okay. In light of that, do the
15 Applicant or the NRC Staff have any arguments on
16 Contention 1?

17 MR. FRANTZ: We have no further arguments.
18 Mr. Eye appears to have conceded that this
19 contention should be dismissed.

20 MR. BIGGINS: The Staff would agree with that.

21 JUDGE YOUNG: All right.

22 MR. EYE: Your Honor, I want to make sure that
23 the record is clear. I'm not conceding that the
24 contention should be dismissed, what I'm saying is
25 that because of the precedent here --

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1 JUDGE YOUNG: We don't have the authority.

2 MR. EYE: -- you don't have the authority.

3 I'm not suggesting that as a matter of law because
4 of the legal reasoning that we've cited in our
5 arguments.

6 JUDGE YOUNG: We understood that. Does any
7 other party have anything to argue in response to
8 that? It may not be appropriate at this point; that
9 may come up later.

10 MR. FRANTZ: I would just simply add that he
11 appears to be contesting Commission policy and
12 Commission regulations, and obviously the Board is
13 bound by that as well as the parties.

14 JUDGE YOUNG: All right. Now, on Contention 2
15 having to do with the relation to the Waste
16 Confidence Rule, we have a similar question there,
17 where even though the Petitioners have provided a
18 reply, the question is more or less directed more at
19 the Petitioners, so does anyone have any objection
20 to letting the Petitioners argue first on that one?

21 MR. RUND: No.

22 JUDGE YOUNG: Mr. Eye.

23 MR. EYE: Thank you, Your Honor.

24 Your Honor, in large measure, the progression
25 of arguments related to Yucca Mountain we believe

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1 have to take account of the events on the ground
2 that are happening in rather rapid-fire order these
3 days, but it also ought to take account in terms of
4 the longer history related to the availability of
5 Yucca Mountain, and we believe that it is time for
6 the Commission, both as a legal matter and as a
7 policy matter, to step back and ask some serious
8 questions about whether or not there's still a basis
9 to have confidence in the Waste Confidence Rule.

10 Now, the argument -- I'm sorry.

11 JUDGE YOUNG: And you said it's time for the
12 Commission, and so you might want to be specific
13 about what you're asking this Board to do and what
14 you're wanting to make a record on in terms of
15 asking the Commission to do.

16 MR. EYE: I am, Your Honor, and I will
17 endeavor to do so.

18 Primarily, Your Honor, our contention was
19 triggered by statements made in the environmental
20 report by the Applicant that seemed, a reasonable
21 reading of those, to assume that its waste could be
22 dispositioned at Yucca Mountain, and we take issue
23 with that.

24 And to the extent that the environmental
25 report makes the assumption that their waste would

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1 be dispositioned at Yucca Mountain, it allows the
2 Applicant then to either defer or escape altogether
3 for regulatory purposes the necessity of dealing
4 with having waste on its site for indefinite
5 duration of time. In other words, the out that
6 Yucca Mountain represents allows them to defer, for
7 example, seeking an on-site spent fuel storage
8 capacity license.

9 And some of our contentions that deal with
10 high-level waste and reflecting back on it really
11 probably ought to be read sort of in pari materia,
12 If you will, inasmuch as they are generally focused
13 on the idea that reliance on the Waste Confidence
14 Rule for this particular Applicant and this
15 particular application allows them to avoid
16 questions about indefinite duration of time storage
17 of spent fuel and other high-level waste on site.

18 JUDGE YOUNG: When you say indefinite, you're
19 talking about post-closure?

20 MR. EYE: I don't know that I would
21 necessarily define it that way, but it would include
22 post-closure, for sure.

23 JUDGE YOUNG: To the extent that you're
24 talking about post-closure, wouldn't the
25 decommissioning process address that? To the extent

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1 that it would not, if you could focus your argument
2 on that and also on, again, what you think we have
3 any authority to do.

4 MR. EYE: I think that you --

5 JUDGE YOUNG: And again, in our next question
6 we mention vis-a-vis Secretary Chu's statement, the
7 statement of our former Chairman Klein's May 12
8 statement.

9 MR. EYE: Yes, Your Honor. Clearly, the
10 juxtaposing of Secretary Chu and Commissioner
11 Klein's views about this helped sharpen our thinking
12 about what this panel can and could or shouldn't do.
13 Again, we believe that decommissioning, yes, will
14 include at some point -- under the rules, at any
15 rate -- that they will have to remove spent fuel and
16 high-level waste from the site in order to be able
17 to say that they've decommissioned Comanche Peak
18 Units 3 and 4, which raises other questions, because
19 with all due respect to Commissioner Klein, we
20 believe it's speculative in terms of trying to
21 predict whether a spent-fuel repository will be
22 available, and we believe it's even more speculative
23 to say when it will.

24 MR. EYE: On the other hand, to the extent
25 that Secretary Chu, who is in a position to make

1 certain policy decisions at least for this
2 Administration over the next whatever course of time
3 they would be in office, that's not speculative.
4 That's the here and now. Those are the events on
5 the ground.

6 And we think that it's important that this
7 Panel and, frankly, all interested parties take
8 account of those events on the ground and factor
9 them into whatever decisions need to be made. In
10 this instance specifically, it would be that, given
11 that there is no prospect for waste coming out of
12 Units 3 and 4, that it would ever be dispositioned
13 to a repository at Yucca Mountain, and it's partly
14 because it may not be available at all, but it would
15 certainly not be available for these wastes, because
16 it would have already reached its capacity.

17 Alternatives need to be considered,
18 alternatives in terms of management of that waste
19 stream, instead of going down the path of seeking a
20 license, getting a license, operating the plant, and
21 then realizing that they don't have an off-site
22 repository to which to take their waste. So we back
23 up.

24 Can they then invoke the Waste Confidence Rule
25 about how long they can manage waste on site?

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1 Commissioner Klein's comments that you cite to in
2 the speech that he gave, I believe, last month -- I
3 believe it was May -- effectively expanded the
4 length of time that applicants ought to be able to
5 confidently manage waste on site.

6 What was missing in that speech -- and I'm
7 sure that it's in the background documentation and
8 so forth that Commissioner Klein relied on, although
9 it was not cited in his speech -- is what
10 assumptions went into that. What assumptions went
11 into the idea that it could be maintained on site in
12 an environmentally safe and secure way for the
13 durations of time that are suggested?

14 JUDGE YOUNG: Let me interrupt you there
15 again. There's another factor that we probably
16 ought to acknowledge here, because in our office,
17 there are people involved in a hearing on Yucca
18 Mountain, and I think there've been statements to
19 the effect that whatever happens will depend on the
20 science, whether the science supports it and so
21 forth. So could you sort of include that in your
22 balancing there?

23 MR. EYE: I certainly will, Your Honor. And
24 if I may share an anecdote that I think captures or
25 perhaps responds to your question, back in the late

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1 1980s, when Yucca Mountain was one of the three
2 finalists to be the repository, the other two
3 finalists were Deaf Smith County, Texas, and
4 Richland, Washington. And an inquiry was made to me
5 at the time, because I was involved in some nuclear
6 regulatory work, about which site would be
7 ultimately selected, and it didn't take me any time
8 at all to respond. It was Yucca Mountain.

9 And the person said, Why; is it because the
10 science is so superior there? I said, No. It's
11 because at the time the Speaker of the House of
12 Representatives was Jim Wright from Texas, and the
13 majority leader was Tom Foley from Washington. So
14 there is a scientific dimension to it, but it's more
15 than science. It's acceptability by the society in
16 general and whether it will be politically workable.

17 Those are dimensions that certainly don't
18 exclude the science, but the science can't be looked
19 at in a vacuum either. It has to be looked at in
20 the broader sphere of both social and political
21 considerations. And so we fast-forward to our
22 situation now, and Yucca Mountain is on deck, and
23 yet there seems to be -- there are scientific
24 objections to it. I mean, even Secretary Chu
25 suggested that we can do better than Yucca Mountain,

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1 but there are also --

2 JUDGE YOUNG: Did you say can or cannot?

3 MR. EYE: We can do better than Yucca
4 Mountain. I believe it was the response to the
5 question Senator McCain posed to him in that
6 hearing, where he said that Yucca Mountain was no
7 longer going to be pursued as a repository by this
8 Administration, and the follow-up question was, Then
9 what do we do, and I believe Secretary Chu said, in
10 sort of an abbreviated way, We can do better.

11 Now, precisely what that means, I'm not sure,
12 but I'm going to take it at face value that in his
13 judgment -- and I think that we have to ascribe a
14 fair amount of expertise to that -- that he believes
15 that Yucca Mountain, on either scientific, social,
16 or political grounds, is something that we can do
17 better.

18 And so in terms of the scientific dimension,
19 yes, I think that those debates will go on for a
20 long time in terms of whether the geologic
21 repository plan to Yucca Mountain is acceptable from
22 a scientific perspective.

23 But I think that if the discussion is
24 attenuated and ends with that, then we will not be
25 addressing two of the more critical aspects of the

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1 problem, and that is whether it is either socially
2 and/or politically acceptable for that waste stream
3 to end up in Yucca Mountain, Nevada, or whatever
4 destination it may have.

5 JUDGE YOUNG: Let me see if I can just get us
6 focused back off the politics a little bit on to
7 what we can do and on to the Waste Confidence Rule.
8 I want to ask the Staff when we get to them -- or
9 actually if you want to tell us quickly now --
10 what -- if you want to give us an update on the
11 progress of the update to the Waste Confidence Rule.

12 And, I guess, in the context of that, the
13 general principle in our proceedings that -- and
14 there's precedent on this -- that if there is a
15 current rulemaking, it's not something that we would
16 address in an adjudication, because it's obviously
17 much more of a generic issue than it is specific to
18 one plant.

19 Do you have a quick response on that?

20 MS. SIMON: Yes, Your Honor. This is Marcia
21 Simon for the Staff. Our understanding is that the
22 rule, the proposed rule responding to comments, has
23 gone up to the Commission. We don't have any update
24 as far as an expected date when it would be
25 finalized, however. But I guess at this point I

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1 would remind the Board that there is an existing
2 rule in place, and that rule will be in effect until
3 any new rule is enacted.

4 JUDGE YOUNG: Go ahead.

5 MR. EYE: Thank you, Your Honor. Which gives
6 rise to: What can this Panel do? And I think
7 that -- in terms of a very functional approach, that
8 ought to be the question on virtually every
9 contention, as far as that's concerned.

10 This Panel, it seems to me, could take the
11 approach that under the -- recognizing that the
12 Waste Confidence Rule is in flux, could essentially
13 take a step back and wait to see what the new Waste
14 Confidence Rule is going to look like. Perhaps it
15 will be a duplicate of the current rule. We don't
16 know how the Commission is ultimately going to
17 address this.

18 But to proceed with the idea that all the work
19 that's gone in to amend the current Waste Confidence
20 Rule will not have substantive effect on it seems to
21 me to be not taking account of the realities that
22 pertain to the Waste Confidence Rule proceedings.

23 JUDGE YOUNG: But what about the fact that
24 there is obviously a rulemaking going on? It's now
25 with the Commission, so -- and there is precedent

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1 set that says that when there's a rulemaking in
2 progress, then that's something that we would not
3 address in an adjudication proceeding.

4 MR. EYE: Your Honor, given the fact that the
5 timing is as it is and we're -- as we've just been
6 informed by Staff counsel, that the proposed rule
7 has been handed up to the Commission for
8 deliberation, it doesn't seem to me to be a stretch
9 to have this Panel take account of that
10 administrative decision, and instead of perhaps
11 having to require a repetition of the petition
12 process under a new Waste Confidence Rule that might
13 be issued down the line, why don't we wait to see
14 what the new Waste Confidence Rule actually reads
15 like, and proceed under it, if in fact it's
16 substantially different.

17 But right now, I agree with you, that there is
18 a -- that the current rule is in place, but the
19 reality is it's being challenged, both internally at
20 the Commission -- I mean, there's -- and
21 externally, and the Commission has seen fit to
22 elevate this to a proceeding that has taken, I would
23 presume, an enormous amount of Commission resources
24 to deal with, and proceeding in this particular
25 adjudication, not taking that into account seems to

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1 me to run the risk of sort of an inefficient
2 process, if you will, inasmuch as we might be back
3 here at some point, making arguments under the new
4 Waste Confidence Rule and how the application does
5 or doesn't conform to it.

6 So I don't know that there would necessarily
7 be in a practical and legal sense -- if this Panel,
8 for example, were to rule that it would not deal
9 with the contentions related to the Waste Confidence
10 Rule that we have posed until or unless there is a
11 new Waste Confidence Rule and at that time, take up
12 the application in light of the new rule, doesn't
13 seem to me to be either a radical departure from
14 sort of an orderly process, nor does it disregard
15 the fact that there is a Waste Confidence proceeding
16 that is tracking along with what we're doing here.
17 It --

18 JUDGE YOUNG: So in other words, hold off.

19 MR. EYE: To the extent that you can,
20 essentially stop the clock and find out what the new
21 Waste Confidence Rule says. And that would -- I
22 mean, I'm certainly not going to try to argue the
23 case for the Applicant, but they're in kind of a
24 different position as well. The rules are changing
25 not only for the Petitioner; they're changing for

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1 everybody else.

2 And to that extent, a more efficient way to
3 approach this might be to stop, suspend that
4 particular aspect of the adjudication until a new
5 Waste Confidence Rule is issued, because if the
6 Waste Confidence Rule essentially accepts the fact
7 that there is no capacity for the new reactors'
8 waste and that a second repository must be
9 established, or if the Waste Confidence proceeding
10 that is now under consideration concedes that Yucca
11 Mountain will not be available, now we're talking
12 about establishing not one new repository, but two
13 or perhaps more, depending upon just what kind of
14 capacity each one of these new facilities that are
15 yet unsited, unplanned, unspoken of in many
16 respects, would have.

17 These are very speculative matters at this
18 point, and yet they bear on a very important aspect
19 of the combined license application, and that is
20 what to do with this waste stream.

21 JUDGE YOUNG: Thank you.

22 Did you have any questions?

23 JUDGE ARNOLD: Yes. I do have a question. In
24 your -- and this I will address to the Staff. In
25 the original petition, you stated, "The Waste

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1 Confidence decision is inapplicable, because it only
2 applies to reactors that are currently operating and
3 not new reactors such as the proposed Comanche Peak
4 Units 3 and 4."

5 I have read Licensing Board decisions that
6 have stated that the Waste Confidence decision is
7 applicable to new reactors, but I have not read
8 anything convincing in either the regulations or
9 other writings from the Commission that clearly says
10 that this Waste Confidence Rule applies to new, not-
11 yet-built reactors as well as currently licensed
12 reactors. Do you know of any reference that would
13 support the view that it does apply?

14 MS. SIMON: Your Honor, the Staff believes
15 that the cases -- the recent Licensing Board cases
16 involving COL licensing applications do support the
17 proposition, and we would point to our answer at
18 page 13 and also in the Applicant's answer at page
19 22, I believe they set out in a little bit more
20 detail the logic behind that, and they do cite to
21 the -- I think the 1999 Waste Confidence update, for
22 example, which was a Commission statement of
23 consideration.

24 JUDGE ARNOLD: The closest thing I've seen --
25 and this was in the Applicant's response, is 72

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1 Federal Register, 49352, where it says the NRC is
2 revising 51.23(b) and (c) to indicate that the
3 provisions of these paragraphs also apply to
4 combined licenses, which comes real close, except
5 that the Waste Confidence is 51.23(a), not (b) or
6 (c). So it's almost as though they specifically
7 avoided saying that the Waste Confidence Rule was
8 applicable to new reactors.

9 And I'm not yet at a point where I know which
10 way to go on this, so I would ask if the Staff has
11 anything else to say on that.

12 MS. SIMON: Your Honor, I would just refer you
13 to the Licensing Board decision in the Lee case,
14 William States Lee, which is LBP-08-17 --

15 JUDGE YOUNG: I'm sorry. Could you repeat
16 that a little bit louder?

17 MS. SIMON: Sure. It's the William States Lee
18 COL proceeding, which is LBP-08-17, and referring to
19 page 29 of the slip opinion, they concluded that in
20 light of the plain language of the rule and its
21 regulatory history, the Waste Confidence Rule
22 applies, and I believe that they, either in the text
23 or in the text and footnotes, explain that -- in
24 more detail their reasoning, and that would be the
25 reasoning that we would point you to.

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1 MR. EYE: Excuse me. Could we get that
2 citation one more time?

3 JUDGE YOUNG: I think it's on page 13 of
4 your -- the same one you cite there.

5 MS. SIMON: Yes, Your Honor.

6 MR. EYE: All right. Okay. Thank you.

7 MR. RUND: Judge Arnold, you asked about, I
8 think, why the Commission didn't update paragraph
9 (a) of the Waste Confidence Rule.

10 The regulation reads that it applies to any
11 reactor, so while paragraph (b) didn't mention COL
12 applications, there was no need to update paragraph
13 (a), because it was broad enough to encompass COL
14 applications and reactors under Part 52.

15 JUDGE ARNOLD: Let me just explain my
16 conundrum with that. If they're saying "any
17 reactors" meaning "current reactors," that's a
18 bounded set. There's some way that they could in
19 their minds justify that we can store the waste for
20 a bounded set of reactors.

21 But if you're talking about current and any
22 possible future reactor, that's an unbounded set of
23 reactors. You don't know how many, and I would find
24 it very difficult to be able to say, I have
25 confidence that we can store fuel for an unspecified

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1 number of reactors. So that's my logic that did not
2 make that convincing to me.

3 MR. RUND: There are earlier statements of
4 considerations on the Waste Confidence Rule which --
5 and the Commission has expressed an intent for the
6 Waste Confidence Rule to apply to future reactors.
7 Now, I think I understand your concern. This is a
8 rule that isn't going to be looked at and isn't
9 going to be changed for the next 50 to 100 years,
10 and reactors can continue to be built.

11 I see where you're coming from, but the
12 Commission undertakes a review of this regulation on
13 a regular basis and hasn't sought the need to really
14 change that aspect of the regulation.

15 JUDGE ARNOLD: Okay. So your argument would
16 be when they say "any reactor," they know they're
17 going to be looking at that in five years, so it's
18 any reactor that's conceivable within the next five
19 years.

20 MR. RUND: Well it's not only that. The
21 Commission -- and I'll quote a little bit from our
22 brief where the Commission has in, I think it was,
23 the 1990 rulemaking stated that it believes Congress
24 will provide the needed institutional support to
25 essentially add any new repositories that are

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1 needed, if the additional new reactors would produce
2 waste that would exceed their expected capacity.

3 Now, you know, of course, that's an issue that
4 the Commission is looking at now as part of a
5 rulemaking, and the Board recognized there's
6 Commission precedent that holds that when
7 contentions raise issues that are being dealt with
8 in ongoing rulemaking, the Board should reject those
9 contentions.

10 And I refer the Board to the Oconee case at
11 CLI 99-11, and this contention, Contention 2, as
12 well as Contention 3 and Contention 6, essentially
13 are a challenge to both the current regulation
14 that's in place and also the ongoing rulemaking.

15 JUDGE YOUNG: Over to you, Mr. Eye.

16 MR. EYE: Thank you, Your Honor.

17 Your Honor, this is a little bit of a
18 semantics analysis, I suppose to a certain extent,
19 inasmuch as the term "any reactor," as you suggest,
20 is not exactly the model of clarity. Does it mean
21 any reactor extant? We think that's what it means
22 because if it means anything else, now you're in the
23 realm of speculation.

24 The new reactors haven't been built in this
25 country for going on 30 years, and so when this

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1 verbiage was used, "any reactor," we think a more
2 reasonable interpretation of it is that it was the
3 set that is extant today, not those which might be
4 added five years from now or ten years from now or
5 whatever time that capacity might be added. It's a
6 numbers game to a certain extent.

7 We know what the DOE's policy is as far as the
8 capacity for spent fuel from the commercial waste
9 stream is going to be at Yucca Mountain if Yucca
10 Mountain is ever available, and we know that the
11 capacity or that the amount of spent fuel that would
12 be available under DOE policy will probably be
13 reached in terms of the total metric tonnage around
14 the country sometime in the next year or two or so.

15 How does that then allow any room, any
16 capacity for waste coming out of Comanche Peak Units
17 3 and 4? There will be no room, so for the
18 Applicant, and the Staff, for that matter, to take
19 the position that "any reactor" just has an open-
20 ended capacity assumption we think is not supported
21 by either evidence, reason or logic.

22 JUDGE YOUNG: Let's go to the Applicant now
23 and let me ask you to start by addressing, in light
24 of the question that Judge Arnold asked and in light
25 of the realities that have been brought out by the

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1 Petitioners about what's going on with the current
2 Administration, how do you respond to the
3 Petitioners' suggestion that we hold off on making
4 our ruling on the contentions relating -- you said
5 Contention 2, but let's just say the contentions
6 that would relate to this issue until we see what
7 the Commission has done.

8 And more specifically, the Commission may take
9 care of all these issues, but were the Commission to
10 issue a rule that left open the question of new
11 reactors, conceivably that might make a difference
12 in what our ruling would be if we held off on making
13 our ruling. What's your response to the suggestion
14 that we do hold off and any ramifications of that?

15 MR. RUND: We think it's inappropriate and
16 inconsistent with Commission regulations and
17 Commission precedent. There's a current Waste
18 Confidence Rule that's in place, paragraph (a)
19 covers "any reactor."

20 JUDGE YOUNG: But let's assume that we were to
21 interpret "any reactor" to mean current reactors;
22 then conceivably we could make a ruling that the
23 contention is not a challenge to the current rule
24 because the rule does not apply to new reactors.

25 We realize another licensing board has ruled

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1 that it does apply to new reactors, but we're not
2 bound by other licensing board rulings, so why would
3 it not be appropriate to hold off on making our
4 ruling?

5 And when you mentioned that there was
6 precedent, is there precedent on holding off on
7 making a ruling delaying a ruling until the
8 conclusion of the rulemaking? I guess I'm not aware
9 of any off the top of my head.

10 MR. RUND: The precedent is the Oconee case at
11 CLI 99-11. It dealt with an issue that was being
12 dealt with in a rulemaking, and the Commission
13 indicated that it's appropriate to reject those
14 contentions and not hold those contentions in
15 abeyance.

16 In fact, there's really one exception to this
17 rule, and it deals with design certifications, and
18 it arises out of the New Reactor Policy Statement,
19 and there's a draft policy statement that suggested
20 that contentions dealing with design certification
21 rulemakings be held in abeyance, and if members of
22 the public had commented and said that's consistent
23 with Commission policy, when you've got those types
24 of contentions, the commenters noted, Commission
25 precedent holds that you should reject those

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1 contentions, and the Commission agreed.

2 JUDGE YOUNG: Have you cited these in your
3 answer?

4 MR. RUND: I have that citation here; I'm not
5 sure that we've cited it for that specific point or
6 answer, but it was Volume 73 of the Federal Register
7 at page 59558 is the Commission's response to that
8 comment, and the Commission recognized that normally
9 that is the case but it was going to make an
10 exception with regard to design certification
11 rulemakings given the unique circumstances, and that
12 with those types of contentions if they were
13 otherwise admissible, they should be held in
14 abeyance, but for all other types of contentions,
15 it seems as if the appropriate thing for a licensing
16 board to do is to reject those contentions that deal
17 with subjects that are being dealt with in an
18 ongoing rulemaking.

19 JUDGE YOUNG: Thank you. Continue if you have
20 any other argument.

21 MR. RUND: Yes, I'd just like to point out a
22 couple of more points. The application doesn't rely
23 on Yucca Mountain; it relies on the Waste Confidence
24 Rule. The environmental report does contain, in
25 passing, a discussion of Yucca Mountain, but nowhere

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1 does it say that we're relying on Yucca Mountain to
2 be available; it said we're relying on the current
3 regulation which is in effect, and challenges to
4 that regulation are barred under 10 CFR 2.335.

5 Also, I'd like to note that with regard to the
6 statements that the Board has noted from Secretary
7 Chu and then-Chairman Klein, those comments really
8 should have no impact on the Board's decision,
9 because under the current Waste Confidence Rule,
10 whether you view it as a challenge to the current
11 Waste Confidence Rule or a challenge to the ongoing
12 Waste Confidence Rule, these contentions -- and
13 really this issue applies to Contentions 2, 3 and
14 Contention 6 -- these contentions are challenges to
15 those provisions.

16 JUDGE YOUNG: Let me ask you a question.
17 Let's say that there were no statement by then
18 Chairman Klein and let's say that there were a rule
19 that said X and there was a massive amount of
20 evidence and statements and so forth that said not
21 only is X not true but Y is true. At some point
22 doesn't it become almost absurd to say we're going
23 to reject a contention because it's challenging a
24 rule that says X when you've got -- and I'm talking
25 about an extreme case here, but wouldn't you agree

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1 that there would be some extreme case where it would
2 just -- I mean, there are statutes on the books that
3 in various states and maybe federal statutes as well
4 that they're just not enforced, they're not longer
5 applicable, but they're still there -- isn't there
6 some situation where that argument would not hold
7 true in light of just overwhelming evidence to the
8 contrary of what the rule says?

9 MR. RUND: As far as contention admissibility
10 goes, I don't think that's the case. There are
11 instances where under 10 CFR 2.335(b) that a
12 petitioner could seek a waiver of a regulation --
13 here the Petitioners haven't done so, and really it
14 would be inappropriate because this is a generic
15 issue and waiver is limited to circumstances that
16 are unique to a specific application.

17 JUDGE YOUNG: If a waiver is not appropriate
18 and you had one of these situations where it was
19 just outside the realm of reality -- and I'm talking
20 an extreme situation -- but somehow recognizing the
21 reality of the situation which is sort of one of the
22 arguments that Petitioners' are making.

23 MR. RUND: Where you're dealing with a rule
24 that's in place that, under your hypothetical, is
25 absurd, there is an opportunity for members of the

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1 public to petition for rulemaking and that really is
2 the appropriate remedy in that situation, not to
3 submit a contention that challenges the regulation

4 And to move away from your hypothetical back
5 to the contentions we have here, there is an ongoing
6 rulemaking and Petitioners, in fact, cited comments
7 and if it was concluded impermissibly in the reply,
8 as Mr. Frantz indicated, you don't need to consider
9 that.

10 But you may want to take note that to the
11 extent that they have a problem with the proposed
12 rule, they've already used the remedy and used the
13 process that's appropriate to deal with their
14 concerns by submitting comments, and presumably the
15 NRC will review their comments and determine whether
16 or not to follow their suggestions.

17 JUDGE YOUNG: I think in light of the fact
18 that there's a current rulemaking going on, this may
19 be an academic inquiry, but there could be
20 consequences. I mean, obviously the reason that
21 they're raising the issue is because of the concerns
22 associated with keeping waste on site. Do you want
23 to address that?

24 MR. RUND: Yes, I would. I'd just note that
25 paragraph (b) of the current Waste Confidence Rule

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1 just says that the environmental report doesn't need
2 to contain information to evaluate spent fuel
3 storage after operations, and that's the regulation
4 that we have, and they haven't suggested waiving it,
5 and it's really the only other option if they want
6 to bring a contention.

7 And in fact, I note that in the proposed
8 update to the Waste Confidence Rule, the Commission
9 recognized as much, and I think there is a footnote
10 where the Commission recognized that. The only way
11 you could bring these types of contentions in
12 proceedings is if the waiver requirements are
13 satisfied, and here they aren't.

14 JUDGE YOUNG: What's the citation for that
15 footnote?

16 MR. RUND: It really was two places, but I'll
17 give you the more detailed discussion. It's Volume
18 73 of the Federal Register, and it's page 59558,
19 Footnote 10.

20 JUDGE YOUNG: Okay. D you want to give the
21 other one?

22 MR. RUND: I think that one suffices. The
23 other one is a little briefer, and that's really
24 where the substance of the Commission's discussion
25 about the waiver requirements in terms of the Waste

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1 Confidence Rule issues were addressed.

2 JUDGE YOUNG: Anything further?

3 Judge Mignerey, did you have any questions?

4 (No response.)

5 JUDGE YOUNG: Oh, dear, I think we've lost

6 her.

7 (Pause.)

8 JUDGE YOUNG: Did you say you were just about

9 finished?

10 MR. RUND: That's all we had on Contention 2.

11 JUDGE YOUNG: Okay. Let's take five minutes
12 to see if we can check this out, and then come back
13 to the Staff and then if you have any further
14 argument.

15 (A brief recess was taken.)

16 JUDGE YOUNG: Okay. We'll resume as soon as
17 we get Judge Mignerey back on the line.

18 JUDGE MIGNEREY: Hello.

19 JUDGE YOUNG: All right. We're back together.

20 JUDGE MIGNEREY: We're going to try again.

21 JUDGE YOUNG: All right, and feel free to
22 call, Judge Mignerey.

23 JUDGE MIGNEREY: Okay, I will. The thing is
24 when it just goes dead, I don't know whether it's
25 gone dead or somebody is talking so quietly I have

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1 no idea that they're talking.

2 JUDGE YOUNG: So everyone might want to speak
3 up.

4 All right, so we're back on the record. NRC
5 Staff, your arguments on the issue of the Waste
6 Confidence Rule and Contention 2. And let me just
7 ask are you going to have any additional or separate
8 argument to make on Contention 3, or have you
9 already made all your argument that would also apply
10 to it?

11 MR. EYE: Your Honor, I think that the
12 arguments we've been making currently really apply
13 to both 2 and 3, and I appreciate that you're
14 willing to kind of lump those together for these
15 purposes because I think it logically follows.

16 JUDGE YOUNG: Okay. Judge Mignerey, also
17 speak up if you cannot hear anything, and we'll be
18 glad to ask people to raise their voices in here.

19 JUDGE MIGNEREY: Understood.

20 JUDGE YOUNG: Okay. Go ahead.

21 MS. SIMON: Thank you, Your Honor.

22 I'd first like to address the issue of the
23 definition of "any reactor," and I'd like to point
24 out to the Board that if you look at the proposed
25 2008 rule, the language of 5123(a) does not change,

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1 it still says "any reactor" and certainly if "any
2 reactor" did not include new reactors but now it was
3 going to include new reactors, there would be a need
4 to clarify that in the language of the rule. And
5 let me just refer you to 73 Federal Register, page
6 59551 -- that's the language of the proposed rule

7 Also, I'd like to point out that the Waste
8 Confidence Decision by the Commission and the
9 accompanying Waste Confidence Rule is a prediction.
10 If you look at the 1990 rule, which is at 55 Federal
11 Register 38475, and if you look at the --

12 JUDGE YOUNG: Fifty-five?

13 MS. SIMON: I'm sorry; 55-38475, and if you
14 also look at the 1999 update, 64 Federal Register
15 68006, the Commission has committed to reviewing the
16 rule if any significant circumstances warrant it or
17 every ten years, whichever comes first, and it is a
18 prediction, so they are looking to the future and I
19 think that "any" therefore should be any foreseeable
20 reactors.

21 JUDGE MIGNEREY: This is Judge Mignerey. If
22 someone has been talking, it has been absolutely
23 mute on my end.

24 JUDGE YOUNG: I know you have a soft voice, so
25 get maybe a little closer to the microphone.

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1 MS. SIMON: Judge Mignerey, can you hear me
2 now?

3 JUDGE MIGNEREY: Yes, I can. Thank you.

4 MS. SIMON: Okay. So again, our argument
5 would be that the word "any" means any: It doesn't
6 many existing; it doesn't mean current. If the
7 Commission had wanted to say that, they would have
8 used that language.

9 The Staff's position in general on Contentions
10 2 and 3 is that first and foremost they're
11 challenges to the Waste Confidence Rule and
12 therefore are not admissible on that basis.

13 In addition, they're not admissible because
14 they are part of an ongoing rulemaking, and we would
15 agree with what the Applicant stated earlier
16 regarding whether or not a contention should be held
17 in abeyance with respect to the Waste Confidence
18 Rule. We believe that only the design certification
19 contentions were intended by the Commission to be
20 held in abeyance under their policy statement.

21 Also, spent fuel storage and spent fuel
22 disposition are clearly generic issues and Supreme
23 Court precedent as well as Federal Appellate Court
24 precedent clearly gives the Commission the right to
25 deal with those through rulemaking rather than

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1 through adjudication.

2 The Petitioners have had an opportunity to
3 participate in that rulemaking, and indeed two of
4 the documents that they've submitted in this
5 proceeding are essentially comments that were sent
6 in as part of that rulemaking, and so they have had
7 an opportunity to pose their concerns to the
8 Commission.

9 With respect to the statements of Secretary
10 Chu and former Chairman Klein, we would note that
11 neither of those statements are rules; they're
12 certainly made by high-ranking officials, but
13 they're not rules, and therefore they have no
14 binding legal status with the Board.

15 Both Secretary Chu's statement and former
16 Chairman Klein's statement are essentially
17 considered already in the statement of consideration
18 in the proposed rule. In fact, Chairman Klein's
19 statement echoes -- if you look at 73 Federal
20 Register 59549 to 59550, you'll see all the
21 information in former Chairman Klein's statement
22 essentially stated in the proposed rule, and one of
23 the elements of that is doubts or the possibility
24 that Yucca Mountain might not be available, and so
25 therefore we feel that Secretary Chu's statement is

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1 embodied in that as well. But they don't have
2 binding status on the Board.

3 I'd also like to point out that the proposed
4 rule, as we pointed out in our pleading, the
5 proposed rule does not contradict the existing rule
6 in any way.

7 I think that's all that we have, Your Honor.

8 JUDGE YOUNG: Okay. Do you have any rebuttal?

9 MR. EYE: Very briefly, Your Honor. We
10 appreciate that this perhaps could be characterized
11 as a kind of academic question in a way, but on the
12 other hand, from a legal perspective, we believe
13 that this Panel and the Commission generally has a
14 duty to consider the relevant factors that bear on
15 any particular licensing decision.

16 Relevancy is bounded not necessarily by what
17 is encompassed in a Federal Register notice or by
18 the CFRs; relevancy is a legal term, as this Panel
19 knows, that takes into account things that go
20 perhaps beyond what has been considered in previous
21 proceedings.

22 It's relevant that there is no capacity
23 available onsite, it's relevant that there is a
24 stall on getting offsite capacity. So
25 consequently -- and we've cited cases under the

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1 Administrative Procedure Act, specifically the
2 Kempthorne case -- it's 473 F.3d 94 -- that
3 essentially stands for the proposition that
4 notwithstanding whatever constraints that the Staff
5 and Applicant would have you operate under in terms
6 of considering whether offsite capacity is a
7 relevant consideration, we believe that it's
8 relevant to whether the application is adequate in
9 terms of it anticipating what needs they will have
10 on site for spent fuel storage, and for that reason,
11 we think that it would be an error of judgment not
12 to take those relevant factors into account and make
13 them a part of this licensing decision.

14 And I think that when this Panel took the
15 perhaps rather extraordinary step of actually making
16 a citation to not only Secretary Chu's comments that
17 we put in our petition, but then juxtaposing those
18 to then-Chairman Klein's comments, it's a
19 recognition, at least implicitly, that things are
20 going on outside the constraints of the rulemaking
21 that will have ultimately a bearing on the very real
22 and very pragmatic decisions that need to be made
23 about how to handle this waste stream. And for that
24 reason, we would urge that the contentions at issue
25 be admitted to this adjudication.

1 JUDGE YOUNG: Just one question, from me,
2 anyway. The requirements for contention
3 admissibility include not just that issues be
4 material but also that the issue is within the scope
5 of the proceeding, and I think probably some of the
6 case law that talks about licensing boards not
7 considering contentions on issues that are the
8 subject of rulemaking goes to whether an issue is
9 within the scope of a proceeding.

10 It may be relevant to the ultimate issues at
11 issue in the application but it may not be within
12 the scope of the adjudication because it's being
13 dealt with in another context. Do you want to
14 address that?

15 MR. EYE: Yes, Your Honor, thank you.

16 Again, to the extent that there is a
17 disconnect between a rulemaking proceeding and a
18 COLA adjudication, we think that it ought to be a
19 consideration to err on the side of making sure that
20 the COLA adjudication gets the attention, both in
21 terms of these contentions and any others that are
22 required, in order to ensure compliance with the
23 Atomic Energy Act that licenses only be issued that
24 are consistent with the public's interest.

25 JUDGE YOUNG: But if there is case law that

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1 says we are not to consider in an adjudication
2 issues that are being dealt with in rulemaking and
3 the rule that sets the criteria for contention
4 admissibility includes one that says that a
5 contention must demonstrate that the issue is within
6 the scope of the proceeding, that's not something
7 that would be sort of fuzzy so that we would err on
8 the side of one thing or another. That's pretty
9 clear, isn't it?

10 MR. EYE: It depends. It's clear if we want
11 to operate under this idea that this particular
12 application that is before you now need not take
13 into consideration the reality that Yucca Mountain
14 will not be available for its waste stream.

15 JUDGE YOUNG: Well, but I guess the issues
16 that are facing us -- and I want you to address
17 those -- one, the Commission does have various ways
18 of addressing what they call generic issues in
19 various contexts, and the Commission has also stated
20 its concern about the efficient use of resources.

21 So if the Yucca Mountain issue is being dealt
22 with in another context, among those being the
23 current rulemaking on the Waste Confidence Rule,
24 then I'm not sure that no matter how good or
25 relevant your arguments on the merits of addressing

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1 the issues may be, if the issues are going to be
2 addressed in other contexts and there's law, there's
3 precedent that says we should not address those if
4 we find that you have not demonstrated that issue
5 you raise is within the scope of the proceeding,
6 then we really don't have any authority to -- I
7 mean, as I explained at the beginning, our function,
8 our neutrality, our duty to the rule of law depends
9 on our following the law which includes rules and
10 precedents as well as statutes, and you would not
11 want us to bend that in favor of the Staff, for
12 example.

13 And so in the same way, I don't think we can
14 bend that in favor of however impassioned or
15 sympathetic argument you may have on an issue in
16 general. If the law is not there to support our
17 admitting the contention, then we have as
18 responsibility to the rule of law and to following
19 whatever law is applicable in this situation.

20 So that's a mouthful, but do you want to
21 respond to that.

22 MR. EYE: Yes, I do. I certainly am not
23 advocating and the Petitioners don't advocate that
24 you depart from the rule of law.

25 JUDGE YOUNG: I didn't think you were.

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1 MR. EYE: And if I've suggested otherwise, it
2 was a misstatement on my part. I'm simply saying
3 that interpretation of the rule of law here, as we
4 see it, is a good deal more expansive than perhaps
5 the Staff and Applicant see it and perhaps the Panel
6 views it.

7 JUDGE YOUNG: Or perhaps the President views
8 it.

9 MR. EYE: Or perhaps. And that, again, is-
10 probably subject to some challenge down the line
11 perhaps. But if we go back to -- and I think that
12 it's a very pertinent consideration that you raise,
13 because it certainly has a bearing on Petitioners
14 how efficiently these processes roll out.

15 We don't have the resources that other parties
16 do, and so we think that it is important that not
17 only for Commission purposes but for all parties'
18 purposes that we proceed in this thing as
19 efficiently as possible.

20 And in that regard, I guess we go back to the
21 suggestion that we made earlier: what is really
22 wrong with giving this some time to mature and take
23 into consideration what is not on the back burner
24 but what is moved up to the front burner in terms of
25 modifications to the Waste Confidence Rule or

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1 proposed modifications of the rule, and deal with
2 the reality of whatever that may be at the time
3 rather than using a somewhat artificial constraint
4 of what we think might be the rules in the future.
5 Efficiency does make a difference.

6 JUDGE YOUNG: Now, you do realize that if the
7 new rule were to raise something new --

8 Judge Mignerey, are you still with us?

9 JUDGE MIGNEREY: Yes, I am. I guess I just
10 have one comment to make, and that is the
11 Petitioner's reply to plead for something that he
12 called, I guess, sort of reality, and I don't think
13 we have any good idea what the reality will be when
14 a reactor actually comes on line.

15 JUDGE YOUNG: And the issue that I was going
16 to raise, which sort of relates to that, is that if
17 the new rule were to raise an issue that were not
18 there before, such that you could legitimately get
19 in a new contention under the rules on late-filed
20 contentions, then that would be open to you. I
21 think one of the other parties mentioned that
22 earlier.

23 MR. EYE: True, assuming that the license
24 proceeding had not progressed to a point where
25 issuance of the license was effectively a fait

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1 accompli. Then it would be too late for us to raise
2 a contention on a license that's already out the
3 door and in the Applicant's hands.

4 So that is a concern for us, and while we
5 recognize that these proceedings on COLA
6 adjudications tend to move, in relative terms,
7 rather slowly, that doesn't necessarily have to be
8 the case, and having worked in agencies before, I
9 know that agencies get the reputation of moving very
10 slowly, but when agencies decide they need to move
11 fast, they can, and we don't want to be in a
12 situation where we're operating under the Waste
13 Confidence Rule as it is now and a license is issued
14 and then the real beneficiaries of a modified Waste
15 Confidence Rule, or supposedly that we may be the
16 beneficiaries of that, we are foreclosed from
17 raising those arguments because the license
18 proceeding has matured to the point where it's
19 really no longer germane.

20 JUDGE YOUNG: By the way, I apologize for
21 that; there's no way I can turn off other rings if
22 we're leaving it open for Judge Mignerey to call.

23 MR. EYE: Understood.

24 JUDGE YOUNG: Anything further surrounding
25 issues or concern? There was the issue that you

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1 raised on terrorism, and if we did have a question
2 on that, in light of the various case law that we
3 cited in our question 3(c) in our May 27 memorandum,
4 do you want to address that? And I think you had
5 another contention -- Contention 19 also dealt with
6 that, and we're sort of in a similar situation here.
7 Go ahead.

8 MR. EYE: Thank you, Your Honor.

9 Your Honor, one thing I think is noteworthy is
10 that most of the cases that were cited in the
11 memorandum that the Panel sent around in
12 anticipation of this hearing really predate the
13 reality now of, using the Commission's language, of
14 a changed-threat environment, inasmuch as the new
15 regulations that deal with fires and explosions that
16 I'm sure we'll probably address at some point in
17 this proceeding.

18 This is another one of those reality checks,
19 if you will, and we recognize that in the original
20 petition, we didn't take up the question of whether
21 there ought to be a 50.54(hh) consideration of
22 spent-fuel -- dry-cask storage of spent fuel and so
23 forth on site, but nevertheless, the concept of
24 guarding against inadvertent radiological accidents
25 or accidents -- releases, rather, caused by

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1 malicious acts, we think, is always germane to these
2 proceedings. I mean, that's really the point is to
3 control releases, to prevent releases.

4 And to the extent that we see that off-site
5 disposition of high-level waste streams will not be
6 available, it leaves only one place for that waste
7 to go, and that is on site, so that triggers then
8 other considerations about the safety and security
9 of those particular facilities.

10 JUDGE YOUNG: I'm not following, I guess. The
11 changed-threat environment, what did you mean by
12 that, and why would not the Commission's decisions
13 on terrorism-related issues -- and the case -- I
14 think there is a pending case on this, I think maybe
15 in the First Circuit. Is that right? Or that it
16 soon will be before the First Circuit. But before
17 us, the Commission has ruled that we don't address
18 those issues in these types of proceedings. So I
19 wasn't following what you meant.

20 MR. EYE: Right. Well, we take issue with
21 that inasmuch as now that there's been a formalized
22 regulatory decision in the context of 50.54(hh),
23 that essentially embraces the idea that now more
24 must be done --

25 JUDGE YOUNG: You're talking about fire

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1 protection.

2 MR. EYE: I am, and -- fire and explosion
3 protection and mitigation related to that. We think
4 it's a logical extension of that to take into
5 account those same considerations as it bears on
6 dry-cask storage on site. Are we asking this Panel
7 and the Commission to expand the scope of its
8 considerations? Yes, we are. I'm not going to sit
9 here and say otherwise, because we are. And why?
10 Because we think it's consistent with the public's
11 interest and those considerations that are germane
12 under the Atomic Energy Act.

13 JUDGE YOUNG: If we address the fire
14 protection considerations in the contention on that,
15 how is there something left to address in this
16 context?

17 MR. EYE: Because 50.54(hh) addresses the
18 capacity of the licensee to maintain reactor -- or
19 containment integrity, core cooling, and spent-fuel
20 pool cooling. It doesn't extend to dry-cask
21 storage, and we think that that's a consideration
22 that's relevant and that would be, I think, a factor
23 that ought to be considered in the context of these
24 contentions related to onsite dry-cask storage.
25 It's just one of several contentions or

1 considerations we think have a bearing on the whole
2 onsite storage question.

3 MR. RUND: I'd just like to point out that the
4 cases that the Board cited are recent, 2007, and the
5 Third Circuit decision was 2009. That was just
6 issued a few months ago, and those cases, we
7 believe, are controlling. I'd also like to point
8 out the NEPA principle that's expressed in those
9 Commission decisions and in Third Circuit decision
10 aren't based on an assessment of the current-threat
11 environment. They're based on traditional NEPA
12 principles that are somewhat analogous to tort
13 principles in that NRC licensing decisions aren't
14 the proximate cause of the environmental impacts
15 caused by terrorist activities.

16 The Commission and Third Circuit have held
17 that the terrorist activities aren't the cause --
18 I'm sorry -- the impacts resulting from those
19 activities are too far removed and too attenuated
20 from the NRC actions to warrant consideration under
21 NEPA. And, you know, Petitioners -- now they're
22 referencing in their reply impermissibly and here at
23 oral argument a safety regulation, which is
24 50.54(hh).

25 And while Mr. Frantz has already addressed the

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1 motion to strike, I just want to note that original
2 Contention 3 referenced the environmental report, I
3 counted, at least five or six times, and now
4 they're, in their reply, attempting to essentially
5 submit a new contention which, I recognize, overlaps
6 a bit another contention, which we'll address later.

7 JUDGE YOUNG: Let me back up just a second.
8 In the Commission's decisions that we cited in our
9 question 3(c), those, I believe, all relate to
10 license renewals, and there are Licensing Board
11 decisions in COL cases, but there's no Commission
12 decision in a COL case. Could there be -- could the
13 types of cases be viewed differently since a COL is
14 talking about the -- from the start essentially, and
15 license renewal cases have traditionally been fairly
16 limited in scope in comparison, for example, to a
17 COL case?

18 MR. RUND: In fact, actually, one of the cases
19 the Board did cite -- and we cited it on brief --
20 was in the Grand Gulf early site permit proceeding
21 which, while not a COL, is a Part 52 proceeding that
22 involved a new reactor, and while it's an early site
23 permit, we think it's applicable here. It's also a
24 Part 52 case.

25 JUDGE YOUNG: Go ahead.

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1 MR. RUND: I just would want to add that we
2 believe that the Grand Gulf decision, because it is
3 a Part 52 case, and the Oyster Creek decision, while
4 a license renewal case, that the logic applies, and
5 those decisions are binding on the Board for
6 Contention 3, as well as Contention 19.

7 JUDGE YOUNG: Staff?

8 MS. SIMON: Thank you, Your Honor. We agree
9 with the Applicant that the cases you cited are
10 controlling. We would also note that the holding in
11 these cases is that the NRC is not required under
12 NEPA to consider environmental impacts of a
13 terrorist attack on a nuclear power plant, and we
14 believe that the NEPA issue is similar, both in
15 license renewal and in the COL proceeding, even
16 though in a license renewal proceeding, the safety
17 side is limited to aging. So we would say that
18 those cases are applicable, and therefore, that the
19 terrorism aspect of Contention 3 and Contention 19,
20 which essentially is a challenge to those cases, are
21 both precluded by those cases which, since it's
22 Commission precedent, must be followed by the Board.

23 May I just make one more note? If the
24 Petitioners are concerned that the new rule in
25 50.54(hh) should change something, then they do have

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1 the avenue of a petition for rulemaking under 10 CFR
2 2.802 to bring those concerns to the Commission.

3 JUDGE YOUNG: The concerns about bringing the
4 casks as part of the -- bringing that within the
5 ambit of the rule?

6 MS. SIMON: Right. If they felt that the new
7 fire safety rule should include that, then they
8 could bring that to the Commission's attention
9 through a petition for rulemaking.

10 JUDGE YOUNG: Do you have any questions?
11 Judge Mignerey, do you have any questions?

12 JUDGE MIGNEREY: No, I do not.

13 JUDGE YOUNG: Did you have anything, just to
14 wrap up?

15 MR. EYE: Very briefly, Your Honor. The
16 opinions, the judicial opinions about the scope of
17 NEPA as it applies to this question are not uniform,
18 as we know. There is a controlling Ninth Circuit
19 opinion that says otherwise, that says NEPA does
20 require a terrorist-related analysis. Now, the
21 Commission has taken the position that it will
22 observe the Ninth Circuit's decision within the
23 Judge of the Ninth Circuit, but outside of it, they
24 reject it.

25 We're on sort of a constitutional collision

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1 course here, if you will, and in order to avoid
2 that, which I think our system really demands that
3 we try to avoid, we're simply urging that the Ninth
4 Circuit's decision about this matter be embraced and
5 that it become Commission precedent, and --

6 JUDGE YOUNG: But, again, that's with the
7 Commission, and, you know, these issues may be
8 resolved at a level higher than this one, but what
9 we have to decide may not be what you're wishing we
10 would decide, but be limited to what we have
11 authority to decide.

12 MR. EYE: And we understand that, Your Honor,
13 and, again, part of our function here is to make
14 sure that we make an adequate record, so that in
15 terms of potential subsequent reviews, either
16 administratively or judicial, that there's something
17 there for those forums to consider.

18 JUDGE YOUNG: Okay. All right. If there's
19 nothing more on Contentions 2 and 3, the next two
20 contentions, 4 and 5, you did not file any reply on,
21 and I guess -- I think you made a proviso that that
22 should not be taken to mean that you agree that the
23 contentions should be dismissed, but how should we
24 take your failure to reply to the Applicant's and
25 Staff's arguments?

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1 MR. EYE: That we stand on the papers that we
2 filed originally, Your Honor.

3 JUDGE YOUNG: Do you have anything further to
4 add with regard to those? We have them before us.

5 MR. EYE: Right. And, Your Honor, and
6 actually we've -- I think some of our discussion
7 has, by inference, dealt with some of the issues
8 that are raised in those various contentions.

9 In terms of the question that you raised,
10 then -- and I don't want to anticipate, but you do
11 address a question specifically to Contention 5,
12 which is one of the contentions that there was not a
13 specific reply on. To the extent that those
14 questions that you've raised, that you want us to
15 address, if you want us to do that now, we can.
16 Otherwise, it's just however you want to proceed.

17 JUDGE YOUNG: Did any other party have any
18 arguments on Contention 4?

19 MR. MATTHEWS: This is Tim Matthews. I'll be
20 addressing Contention 4 for the Applicant.

21 We, I guess, would point out that this
22 contention is one that has already been addressed 25
23 years ago in a similar adjudicatory proceeding and
24 been addressed all the way through the United States
25 Supreme Court and we think is resolved, and leave it

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1 at that, Your Honor.

2 MS. SIMON: Your Honor, the Staff doesn't have
3 anything to add to the arguments already made.

4 JUDGE YOUNG: All right. Then on the question
5 on Contention 5 -- and that just had to do with the
6 particular part of the rule that -- I'm not sure.

7 It might make most sense to have Applicant or
8 the Staff begin on this one, that -- I think the
9 argument was that the table sets forth the
10 requirements, and there is language that talks about
11 that the table may be supplemented.

12 And I guess our question there was: If it may
13 be supplemented, how are the things that are in the
14 table, how would they be viewed as limiting if the
15 rule itself says that the table may be supplemented?

16 MS. SIMON: Did you want the Staff to go
17 first, Your Honor?

18 JUDGE YOUNG: I guess I was looking at the
19 Staff, because we were talking about a rule, but
20 whichever one of you want to go first.

21 MR. MATTHEWS: I'm happy to address it, Judge.

22 JUDGE YOUNG: Okay.

23 MR. MATTHEWS: The 1984 rule recognized some
24 confusion in earlier decisions and added to Table S3
25 language in 51.51 that the Board cited in its

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1 question, recognizing that the table, which only
2 identifies the quantity of the effluents, not the
3 health effects, that the language that the Board
4 cites notes that that table, the data regarding
5 emissions, can be supplemented by the Applicant in
6 its environmental report to address those health
7 effects.

8 And a different section of the regulations,
9 41.45(b)(1), talks about the level of detail
10 required to be addressed for a particular
11 environmental impacts. In the environmental report,
12 the Applicant does address the environmental
13 impacts. That's in Section 5 -- I'm sorry -- the
14 health effects, 5.7.1.7, where it addresses Table
15 S3's effluents.

16 The Petitioner here does not challenge, either
17 by omission that the health effects aren't -- or
18 alleges health effects aren't addressed, I guess,
19 but doesn't challenge the Applicant's discussion of
20 the health effects. Rather, the Petitioners'
21 challenge is to the quantity of the effluents and
22 therefore impermissible.

23 JUDGE YOUNG: Go ahead.

24 MS. SIMON: Your Honor, the Staff would just
25 like to note that any additional analysis that is

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1 provided by the Applicant could be the subject of an
2 admissible contention, provided that the contention
3 admissibility rules are met, and as just stated by
4 the Applicant --

5 JUDGE MIGNEREY: If anything's being said, I
6 can't hear anything.

7 MS. SIMON: I'm sorry.

8 JUDGE MIGNEREY: This is Judge Mignerey.

9 MS. SIMON: The staff --

10 JUDGE YOUNG: Move the microphone a little bit
11 closer.

12 MS. SIMON: I'll be eating it.

13 JUDGE YOUNG: If possible.

14 MS. SIMON: Basically what the Applicant just
15 stated regarding the fact that the petition does not
16 address any supplemental discussion in his
17 contention but it's really attacking what -- the
18 content of Table S3 itself, and therefore, it's an
19 attack on Table S3 and not on any supplemental
20 discussion.

21 JUDGE YOUNG: Does that conclude your
22 argument?

23 MS. SIMON: Yes, Your Honor.

24 JUDGE YOUNG: And I guess the question for you
25 really is: You say the off-site releases could

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1 originate from various things, but you don't provide
2 much specific support, and you're nodding your head.

3
4 MR. EYE: Well, correct, Your Honor. I mean,
5 the contention says what it says. But to a certain
6 extent, it's based upon an assumption that's made in
7 the environmental report by the Applicant, and the
8 assumption is likewise not very well supported in
9 the environmental report. Why? Because they're
10 dealing with some imponderables to a certain extent.

11
12 They are too dealing with predictions about
13 what will happen or not happen in the future. Their
14 assumption and prediction is that everything will go
15 as planned and that there will never be any
16 significant releases to the environment of radiation
17 from these waste management activities. That's an
18 assumption that we frankly think is something that
19 should be challenged.

20 JUDGE YOUNG: But the assumption is based on
21 the requirements of the rule essentially. Would you
22 agree?

23 MR. EYE: At least in part it is. Yes. It's
24 based on that, and again, it's based on the
25 necessity for the Applicant, in order to get its

1 license, to perpetuate this assumption that there
2 will be no significant off-site releases of
3 radiation related to their waste management
4 activities. And that is a prediction.

5 That's an assumption that bears on the
6 public's health and the environment. And to the
7 extent that it's inconsistent with the public's
8 interest, it's inconsistent with what is required
9 under the Atomic Energy Act, and that's the point of
10 our contention.

11 Let me summarize. It's difficult to square
12 the Atomic Energy Act's mandate that licenses only
13 be issued consistent with the public's interest when
14 what we have related to Contention 5 is an
15 assumption that is untested, a prediction that is
16 based upon assumptions about what will happen in the
17 future. It's difficult for us to square that with
18 being in the public's interest when there is so --
19 from a public health and environmental perspective,
20 there's so much at stake potentially.

21 And so what we want this Board to do is
22 essentially require the Applicant to back up and ask
23 themselves some hard questions about onsite
24 processing accidents, transportation accidents, off-
25 site processing and so forth, in order to sharpen

1 their assumptions and predictions about what
2 consequences there could be related to releases of
3 radiation when they engage in these kinds of
4 management activities for waste.

5 JUDGE YOUNG: You're being sort of general
6 here, and I guess I'm having a little bit of trouble
7 understanding where you depart from what the rules
8 require the Applicant to do and the extent to which
9 the contention would be a challenge to those, and
10 the extent to which it would be anything other than
11 that, particularly in view of the fact that the
12 support you give for the contention is very sparse
13 and somewhat speculative.

14 MR. EYE: It's a commonsense kind of approach,
15 Your Honor. It's a commonsense approach that
16 challenges the Applicant to take account of things
17 that they are now essentially protected from
18 assuming under the rule.

19 JUDGE YOUNG: Let me --

20 MR. EYE: The rule the way it's structured
21 allows the Applicant to avoid addressing what we can
22 consider to be pertinent questions, and --

23 JUDGE YOUNG: Well, then, why is not your
24 challenge, then, a challenge again to the rule,
25 which is something that is outside the scope of an

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1 adjudication, which is something that if you have a
2 concern about what the rule permits, then your
3 remedy would be to ask the Commission to change the
4 rule.

5 MR. EYE: That would be one remedy. Another
6 remedy would be a citation to the Atomic Energy Act
7 with the pertinent question being: Is issuance of a
8 license without taking into consideration the kinds
9 of issues that we've raised in Contention 5
10 consistent with the public's interest? And
11 that's --

12 JUDGE YOUNG: And you might bring that --

13 MR. EYE: -- our overarching --

14 JUDGE YOUNG: You might bring that at a level
15 higher than we are, but we're here today on -- first
16 of all, on what contentions are admissible under the
17 contention admissibility rules.

18 And I don't know that we need to go into all
19 the history of why the contention admissibility
20 rules are there and why the various provisions of
21 them are there, but the basic idea is to make sure
22 that in an adjudication, the issues that are
23 admitted for adjudication are limited to those that
24 are appropriate for adjudication and can -- and I'm
25 paraphrasing here -- but can reasonably be resolved

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1 in an adjudication.

2 And the types of issues you're raising here
3 and possibly elsewhere tend -- sound in some sense
4 more like policy issues, challenges, you say, to the
5 adequacy of a rule, which are not the kind of issues
6 that are normally and that can maybe reasonably be
7 addressed in an adjudication, which is geared more
8 towards specific factual issues that are subject to
9 what takes place in litigation.

10 MR. EYE: Right. And we recognize those
11 constraints that this Board operates under, Your
12 Honor. I'm not disputing that. But, again, we're
13 here partly also to make sure that we make a good
14 record --

15 JUDGE YOUNG: Okay.

16 MR. EYE: -- and preserve these issues as is
17 needed.

18 JUDGE YOUNG: And you've done that. Thank
19 you.

20 MR. EYE: Thank you.

21 JUDGE YOUNG: Anything further?

22 JUDGE ARNOLD: Yes.

23 JUDGE YOUNG: Go ahead.

24 JUDGE ARNOLD: Absolutely. First, in this
25 contention, Petitioners state, "The environmental

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1 report assumes that there will be no significant
2 radioactive releases to the environment related to
3 off-site disposal."

4 Applicant, would you agree that that's a
5 proper -- a correct characterization? Did you make
6 that assumption, or was that the result of some sort
7 of evaluation?

8 MR. MATTHEWS: The Applicants, pursuant to 10
9 CFR 51.51 incorporated Table S3 as required. Table
10 S3 considers releases, both from high-level waste
11 and low-level wastes. In fact, it very
12 conservatively estimates those releases,
13 conservatively meaning higher.

14 The Table S3 makes some very conservative
15 assumptions, as the Supreme Court recognized, about,
16 for example, early release of fission-product gases
17 and higher fuel consumption than a -- in the nominal
18 reactor than Comanche Peak would actually use.

19 So the question is, we think, not whether
20 Table S3 is correct. It's whether Table S3
21 considered release of radionuclides.

22 JUDGE ARNOLD: And in your understanding of
23 the derivation of that table, was it just back-of-
24 the-envelope estimation or was there some explicit
25 evaluation, looking at specific radionuclides, their

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1 decay, their transport and whatever.

2 MR. MATTHEWS: Judge Arnold, I'd say the
3 record is very clear --

4 JUDGE MIGNEREY: This is Judge Mignerey. I
5 believe the problem is we have voice-activated
6 microphones, and if you do not get close enough to
7 activate them, I hear absolutely nothing.

8 MR. MATTHEWS: Thank you, Judge Mignerey.
9 I'll lean in.

10 The record is very clear with respect to the
11 references cited in footnote 1 to Table S3. They
12 extensively evaluate radiological release at all
13 phases of the uranium fuel cycle, and in fact, the
14 uranium fuel cycle analysis is specifically for
15 that -- for consideration of these environmental
16 effects in the context of reactor licensing. They
17 are not, for example, to consider the environmental
18 effects in licensing Yucca Mountain or any other
19 waste storage or disposal facility.

20 JUDGE ARNOLD: In 10 CFR 51 on environmental
21 reports, it basically says that the report should
22 discuss environmental impacts to an extent
23 proportional to their significance. Would you
24 consider what you did concerning Table S3 to be
25 consistent with the environmental importance of

1 disposal?

2 MR. MATTHEWS: Absolutely, Judge Arnold. As
3 the Commission has held, the impacts of the uranium
4 fuel cycle itself are very low. We are talking here
5 about one aspect of the uranium fuel cycle, and I
6 would point the Board to a recent Commission
7 decision denying a petition to amend Table S3. It's
8 in March of 2008.

9 The Commission held that, "The NRC has made a
10 generic determination that the radiological impacts
11 of the uranium fuel cycle will remain at or below
12 the Commission's regulatory limits, and as such, are
13 of small significance." That's just over a year
14 ago, so to the extent that things have changed, it
15 has only moved in the more conservative direction.

16 JUDGE ARNOLD: Okay.

17 JUDGE YOUNG: But do you have a more specific
18 citation for that?

19 MR. MATTHEWS: I'm sorry. It's 73 Federal
20 Register 14946 at 14947.

21 JUDGE YOUNG: Thank you.

22 JUDGE ARNOLD: The petition goes on to say
23 that, "The COLA should fully consider the public
24 health and environmental consequences of major
25 releases to the environment of radioactive materials

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1 as a result of off-site disposal activities. Off-
2 site releases could originate from onsite
3 processing, transportation accidents, off-site
4 processing, and long-term releases from the disposal
5 site."

6 Now, I would basically think that long-term
7 releases from the disposal site and off-site
8 processing would really fall under the licensing
9 activity doing the processing or the storage and be
10 more appropriate there. But I do see on-site
11 processing and transportation accidents. Does your
12 environmental report address those?

13 MR. MATTHEWS: Judge Arnold, the Commission
14 considered not only each phase of the uranium fuel
15 cycle, but considered what aspects in each of those
16 phases would be of environmental significance. It
17 considered those and specifically addressed them.
18 So to the extent that the Commission has held -- has
19 decided what's important, yes. It specifically
20 includes management of low-level wastes in Table S3,
21 including transportation.

22 JUDGE ARNOLD: Is that S3 or S4, because it
23 says if you don't meet all the criteria for S4, you
24 have to do a separate evaluation.

25 MR. MATTHEWS: Table S4 goes to transportation

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1 of radioactive wastes, and Table S4 is incorporated
2 in the application as well. It is addressed in
3 Section 5.7, consideration of the uranium fuel
4 cycle. There is a discussion in the environmental
5 report.

6 Petitioners do not cite any authority -- they
7 don't quarrel with any aspect of what is in the
8 environmental report. They don't raise an issue
9 under 1(e)(6) or f(1)(6) -- point to some issue,
10 much less cite authority challenging what is in the
11 report or the Commission's regulation.

12 JUDGE YOUNG: Okay. Thank you.

13 And over to Petitioner, you've characterize it
14 as an assumption, whereas Applicant says that there
15 is a significant evaluation behind it. So when I
16 look at your contention and it says that that
17 assumption should not be used, I would expect to see
18 something here that clearly showed some evidence
19 that that statement was wrong. What do you have
20 to -- what can you provide in that arena?

21 MR. EYE: That the assumption about no
22 releases is wrong?

23 JUDGE ARNOLD: Correct.

24 MR. EYE: It would be partly based on the lack
25 of actual experience that we have with anything that

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1 even resembles dealing with high-level wastes at a
2 repository or with the frequency of transportation
3 necessity to get those materials there. These
4 are -- the assumptions are based upon a lack of
5 actual operating experience.

6 So it's a little bit like trying to prove a
7 negative, I suppose, and, again, we go back to
8 taking a commonsense approach to these kinds of
9 questions.

10 Now, again, I want to make sure that I don't
11 get crossways with the Board. We cited 5.7.1.6 in
12 our contention and essentially noted that the
13 Applicant had adopted the assumptions that were
14 built into the NRC's policy about no releases being
15 pertinent -- or being made or being realized over --
16 through these activities.

17 We think that's an assumption that's not
18 justifiable, and to the extent that we are here to
19 preserve that issue and to make some record on it,
20 that's partly our function, and to the extent that
21 it is to call attention to what we think is a
22 deficiency in the license application that has its
23 origins in what we consider to be a deficient NRC
24 policy, then we are making a record on that as well,
25 to the extent that these are assumptions.

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1 I mean, it jumped out at me when I read the
2 environmental report that such absolute terms were
3 used, absolute terms like, There will be no
4 significant radioactive release. There are very few
5 absolutes in this world, as I've experienced it, and
6 to say that there will be no significant radioactive
7 release over the duration of time that we're dealing
8 with seems to me to be an absolutism that we should
9 be very cautious about adopting and embracing.

10 And that's why we're here is to make a record
11 on those kinds of assumptions.

12 JUDGE YOUNG: But isn't the operative word
13 there, though, "significant"?

14 MR. EYE: Yes. Well, there's two operative
15 words: "no" and "significant." Yes. And
16 significant really doesn't have -- I mean, it's not
17 necessarily self-defining in this context. What is
18 significant to one person may be insignificant to
19 another.

20 JUDGE YOUNG: Do you have any support for the
21 argument that the determinations that were made in
22 adopting the tables don't address the issue of
23 significance effectively?

24 MR. EYE: To the extent that there is an
25 understatement --

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1 JUDGE YOUNG: I mean, not that we would allow
2 a challenge to the rule, but --

3 MR. EYE: Right..

4 JUDGE YOUNG: -- I think the significance
5 issue -- I think the argument that we would hear
6 from the Applicant would be that the significance
7 issue is addressed in the rule.

8 MR. EYE: Well, to the extent that we believe
9 that the significance is tied to assumptions about
10 exposures to radiation and the health effects
11 related thereto, we think that those assumptions are
12 not robust enough, if you will.

13 They don't account for the full range of
14 potential health effects that might be realized from
15 a, quote, insignificant release of radiation even,
16 because it's the Commission's policy that exposure
17 to any ionizing radiation carries with it the risk
18 of radiation-related disease and/or genetic defects.
19 So significance really here begs some definition, I
20 suppose, because even under the NRC's policy, any
21 exposure carries risk, and to the extent that there
22 is risk, that has significance.

23 And so if we -- again, I don't want to play a
24 semantics game, but you pointed out, isn't the
25 operative word "significant." Any release is

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1 significant to the extent that it has a health
2 effect or the potential for a health effect.

3 JUDGE YOUNG: Right. But you are -- we still
4 sort of circle back around to it being a challenge
5 to the rule, it sounds like.

6 MR. EYE: It -- well, implicitly it is, but
7 this Applicant is the beneficiary of that, and to
8 the extent that we are trying to keep the Applicant
9 from becoming the beneficiary of this rule, that's
10 our purpose or one of our purposes here.

11 JUDGE ARNOLD: You look like you want to say
12 something.

13 MS. SIMON: I just wanted to reiterate that
14 the statement that the Petitioners are challenging
15 is a statement regarding NRC's assumptions that are
16 built into Table S3 regarding the releases from
17 wastes, and as you pointed out, it is a challenge to
18 the rule, a challenge to Table S3. There is no
19 dispute in the petition regarding the Applicant's
20 analysis of transportation impacts, for example,
21 which are in -- not only in Section 5.7, but, I
22 believe, also in Sections 3.8 and 7.4 of the
23 environmental report.

24 JUDGE YOUNG: Let's take five minutes.

25 (A brief recess was taken.)

1 JUDGE YOUNG: All right. Back on the record.

2 I was just saying we'll move on to Contention
3 6 now, and then we don't know how long or involved
4 or what the nature of the argument on Contention 7
5 will be in light of the recent filings from the
6 Applicant related to Contention 7. If they're
7 relatively short, we can try to deal with those
8 before lunch, otherwise, maybe we can just summarize
9 what needs to be addressed and then be prepared to
10 come back after lunch and address that.

11 On Contention 6, that's another on which you
12 did not file a reply, and I guess some of the issues
13 in Contention 6 are similar to some of the other
14 issues we've been discussing with regard to raising
15 general sort of overarching concerns that may not be
16 that related to the types of things that are
17 normally addressed in litigation settings.

18 What would you like to add with regard to
19 those concerns? And I assume you're standing on
20 your original contention there. Do you have
21 anything just briefly to address the other concern
22 that I just mentioned?

23 ME. EYE: To the extent that it is, again,
24 going back and dealing with assumptions made to the
25 benefit of the Applicant based on Commission rules

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1 and so forth, my response would be the same as
2 before, Your Honor. I don't want to belabor the
3 record, but that would be how we would deal with
4 that.

5 JUDGE YOUNG: Applicant?

6 ME. RUN: We have nothing further to add other
7 than the fact that Contention 6 is also a challenge
8 to the Waste Confidence Rule as it stands now, and
9 it also relates to the ongoing rulemaking, and
10 therefore, is outside the scope of the proceeding.

11 JUDGE YOUNG: Staff?

12 MS. SIMON: Thank you, Your Honor. I would
13 like to address the question that the Board asked to
14 the Petitioners, because I'd like to make a
15 clarification.

16 It is technically possible under the
17 regulations for a licensee to store spent fuel after
18 the termination of a part 52 license. The way that
19 would happen would be if the licensee applied for
20 and obtained a part 72 license before the Part 52
21 license was terminated, and if the licensee did so,
22 they would be subject to the decommissioning
23 requirements of Part 72 when they wanted to end that
24 license and the spent fuel would then have to be
25 transported offsite. So I just wanted to make a

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1 technical correction to that.

2 The point that the Staff was trying to make
3 was that as long as spent fuel is on site, the site
4 will be subject to an NRC license and NRC regulatory
5 authority, therefore, the specific issue that was
6 raised in this contention, which is that the COLA
7 should consider public health and environmental
8 consequences of requiring government units to become
9 custodian of spent fuel after the license lapses is
10 really not a possible scenario under the
11 regulations.

12 JUDGE YOUNG: I guess one thing, having done a
13 license termination proceeding in the past, that I
14 might share with you is that at the point at which a
15 license termination plan is being undertaken, there
16 is a right to a hearing at that point. Do you have
17 anything to add in light of what the Staff has said?

18 ME. EYE: Your Honor, I don't other than to
19 say the import of our contention was really, again,
20 we're dealing with such long periods of time and so
21 many imponderables in terms of -- and I'm not
22 casting aspersions on the Applicant at all here, but
23 we know that some of our major business institutions
24 that have been longstanding in our country and our
25 economy have failed, have gone away, and it cuts

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1 across industrial lines, whether it's the airlines,
2 utilities, whatever.

3 And it's, to us, incumbent to try take into
4 account the scenarios, the contingencies that might
5 pertain to dealing with a default, because there is
6 no means by which to prevent a default. A default,
7 by its very nature, is outside the scope of what a
8 legal requirement would allow, but defaults happen
9 on contracts and in other matters, and it just seems
10 to us that when we're talking about virtually
11 generations of time that a contingency that deals
12 with what happens to a facility where there has been
13 a default of a license is a pertinent consideration,
14 and that was primarily the emphasis of that
15 contention.

16 JUDGE YOUNG: Let me just ask a question of
17 the Staff with regard to the last issue touched on.

18 There are financial requirements of
19 applicants. Do you want to just give a short
20 explanation of what provisions there are that would
21 address the concerns about defaults?

22 ME. BIGGINS: Jim Biggins for the Staff, Your
23 Honor. I'll answer this specific question.

24 50.75 provides for decommissioning funding
25 assurance for the disposal of waste, and so the

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1 Commission does take into consideration through its
2 rules -- as a later contention you can address -- is
3 the ability of the licensee to dispose of waste on
4 site and off site. So that is not necessarily
5 directly addressed in anticipation of question 6,
6 but the Commission does have rules and procedures
7 for dealing with the disposal of waste, so that's
8 what we would follow.

9 JUDGE YOUNG: Did the Applicant want to make
10 any response to the last concern raised?

11 ME. RUN: I'd just like to add that this
12 contention is focused on the environmental impacts
13 of onsite storage, and that's squarely addressed in
14 the current Waste Confidence Rule, paragraph (b),
15 which does apply clearly to combined license
16 applications.

17 MS. SIMON: Your Honor, may I just make one
18 more point? I don't have the Atomic Energy Act in
19 front of me, but I believe it's Sections 186 and 188
20 there's discussion of revocation of licenses, and I
21 believe that there is a provision that allows the
22 Commission to take control of a site in
23 circumstances where, for instance, a license has
24 been revoked, so I would imagine that those sections
25 would apply also in the case of a default.

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1 The Commission does, as Mr. Biggins said, have
2 regulations specifically to decommissioning funding
3 requirements that have to be reviewed that try to
4 minimize any possibility of that, of a default, but
5 in that event, I believe the Commission does have
6 some power to take control of the site.

7 JUDGE YOUNG: Anything further?

8 ME. EYE: Only, Your Honor, to the extent
9 that, I mean, we're sort of going into a separate
10 contention on the funding assurance, but we're
11 proceeding somewhat along those lines in this
12 argument anyway; I don't see anything wrong with
13 doing that.

14 You know, the funding assurance really is a
15 stream of revenue that accumulates over time, and
16 the accumulation -- the large accumulation of
17 funding over time is really what counts. If there's
18 a default that predates that and the funding has not
19 reached a point where it's a meaningful enough
20 amount of money to deal with the consequences of
21 spent fuel and so forth, now you've got a situation
22 where the default has happened, the stream of
23 revenue has stopped, yet there's still problems with
24 spent fuel that need to be dealt with. Well, who's
25 going to embrace that problem?

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1 And as we suggest in our contention, really
2 the only institutions in our society that are set up
3 to do that in any kind of meaningful way would be
4 units of government, and to the extent that that is
5 a scenario that can't be ruled out, there are health
6 and environmental effects that we believe ought to
7 be accounted for and dealt with accordingly.

8 JUDGE YOUNG: Just one last question from me
9 on this. Do you have any authority for the idea
10 that this adjudication should consider, for example,
11 what governmental entity will have responsibility
12 for these problems that you assert cannot be ruled
13 out?

14 ME. EYE: The Atomic Energy Act, 42 USC
15 2133(d), which says these license ought to be issued
16 in the public interest or consistent with the public
17 interest -- I'm paraphrasing, but that's essentially
18 the legal authority that we believe ultimately would
19 have to be satisfied.

20 MS. SIMON: Your Honor, may I just respond
21 briefly and say that even if a government entity did
22 take over, they would have to have an NRC license to
23 possess spent fuel on the site, so again, there's no
24 situation where spent fuel onsite would not be
25 covered by an NRC license.

1 ME. EYE: Well, Your Honor, that again assumes
2 that a governmental entity will do two things: one,
3 apply for the license, and get it. And those are
4 assumptions, those are predictions, and to the
5 extent that they are questions that even Staff now
6 implicitly raises, we think that they're germane to
7 the COLA adjudication.

8 JUDGE YOUNG: Anything further on Contention
9 6?

10 (No response.)

11 JUDGE YOUNG: All right. Contention 7
12 presents a couple of unusual situations. This is
13 one in which the Staff agreed that it was
14 admissible; however, the Applicant has filed
15 subsequent information recently which it asserts in
16 effect renders Contention 7 moot, because you do
17 address the things that are challenged in Contention
18 7.

19 Mr. Eye, what's your position in response to
20 the information that's been filed by the Applicant,
21 and where do you see us going from here?

22 ME. EYE: Thank you, Your Honor.

23 The information at issue has been classified
24 as SUNSI, S-U-N-S-I, and we've made an application
25 to get access to it under that provision. We

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1 haven't gotten a response to that application for
2 access as of yet. So we don't know, frankly,
3 whether what's been submitted is consistent with
4 what's required under the regulatory provisions or
5 not, or whether it's arguable even.

6 JUDGE YOUNG: But you have made an
7 application. That's really what I was trying to get
8 at.

9 ME. EYE: We have. It's last week that we
10 made it.

11 JUDGE YOUNG: Once that's resolved, then if
12 you wish to challenge that information, then you can
13 file a new contention. Basically the rule of thumb
14 we often use is once you become aware of new
15 information that could lead to a new contention, if
16 you file that new contention within 30 days of
17 receiving that new information. And I think, unless
18 anyone points out a reason --

19 ME. BIGGINS: Judge, Jim Biggins for the Staff
20 again. We are currently reviewing that SUNSI access
21 request. I would point out that that is not a
22 matter for decision by this Board according to the
23 order that as attached to the Federal Register
24 notice of hearing. Once the Staff makes its
25 determination, according to that order, there is a

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1 specific period of time -- I believe it's 25 days --
2 for filing a contention based on the information,
3 and so the Staff's position is that both the Staff,
4 the Applicant and the Petitioners are all bound by
5 the terms of that order.

6 JUDGE YOUNG: That's fine, thank you for
7 pointing that out. So that would be 25 days then.

8 ME. EYE: That's what we assumed it would be.
9 And again, we're operating under the assumption that
10 we're going to get access.

11 JUDGE YOUNG: What is the provision in the
12 order, if any, about the circumstances of any appeal
13 of the Staff's order if it were to be a denial?

14 ME. BIGGINS: If the Staff denies the request,
15 the Petitioner, or as the order calls them, the
16 Requester, has the opportunity to appeal the Staff's
17 decision, and that appeal would likely be referred
18 to this Board for consideration.

19 JUDGE YOUNG: That's what I've done in
20 previous cases, so I sort of assumed that probably
21 would be what would happen here.

22 ME. BIGGINS: I would ask that this Board be
23 very careful in discussing this matter at this time
24 because of the separation of function consideration
25 that if there is an appeal from any decision,

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1 whether it be by the Petitioners or by the
2 Applicant, this Board would have to consider it, and
3 we wouldn't want any bias to occur from today's
4 proceeding.

5 JUDGE YOUNG: We will assure you that we will
6 refrain from all possible bias, at least any that
7 we're aware of.

8 ME. BIGGINS: Thank you, Judge.

9 JUDGE YOUNG: And if you want to try to make
10 us aware of any that we're not aware of, you're free
11 to do that too.

12 So it sounds as though you're all -- everybody
13 is on the same page here; we all know what's going
14 to happen at this point, and so there's not really
15 anything more to discuss with regard to Contention 7
16 today, or is there?

17 ME. FRANTZ: I'm afraid I'm not quite on the
18 same page.

19 JUDGE YOUNG: Or, okay. Excuse me for
20 stepping ahead too far.

21 ME. BIGGINS: The Staff would like to respond
22 to the question itself as well. I don't believe
23 we've had that opportunity yet.

24 JUDGE YOUNG: Now, the question, you mean?

25 ME. BIGGINS: The question specifically asking

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1 what the significance of the filing is, and the
2 Staff's position originally on Contention 7 was that
3 it was admissible in part; however, the Staff
4 position now is that with the filing the contention
5 is now moot, the portion that was admissible is
6 moot.

7 JUDGE YOUNG: But that's based on the
8 information that we don't have now. Right?

9 ME. BIGGINS: Well, the Staff has that
10 information and believes that the information meets
11 at least filing requirements for the rule itself.
12 Similar to a docketing decision, the Staff would
13 reserve the right to ask RAIs of the Applicant as
14 necessary, but we believe the information moots the
15 contention, which was one purely of omission.

16 The contention was essentially that there was
17 a new rule, the information as not provided as
18 required by the rule, the Staff's position is that
19 the information has now been provided, and
20 therefore, that contention itself is moot.

21 If, as new information, a new contention could
22 be crafted by the Petitioners, obviously that would
23 fall under the criteria for a late-filed contention.

24 JUDGE YOUNG: And since you're talking about
25 information that none of us, other than the

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1 Applicant and the Staff has, is there anything left?

2 Judge?

3 JUDGE ARNOLD: I believe so.

4 JUDGE YOUNG: Go ahead.

5 JUDGE ARNOLD: The original petition makes
6 reference in several places to design control
7 documents and that's outside of the scope of the
8 COLA, so I'm thinking that there is -- and I make
9 the assumption that what the Applicant submitted did
10 not address any changes to any of the design control
11 documentation. Is that correct?

12 ME. FRANTZ: First of all, if I may state our
13 position, we also agree that the contention is now
14 moot.

15 Judge Arnold, turning to your question, I
16 can't get into the details, obviously, of the
17 report, but it is SUNSI. I will note that the
18 applicant for the design and certification for the
19 U.S. APWR did submit a report that addresses the
20 substance of the rule, even though the rule was not
21 in effect at that point in time, and we then
22 developed our report under 52.80(d) of the rule in
23 light of the information supplied by the design and
24 certification applicant.

25 JUDGE ARNOLD: So I guess I'm getting the

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1 impression now that there are issues -- there are
2 potential issues still there, but we're not in the
3 position to address them now.

4 MR. BIGGINS: Judge, if I may, to directly
5 respond to your questions well, Staff believes that
6 the portion of the contention that attacked the
7 design certification was the inadmissible portion of
8 the contention, and so now the contention is
9 either -- is wholly inadmissible, either because it
10 was an attack on the design certification document,
11 or is not moot based on filing by the Applicant.

12 JUDGE ARNOLD: My intention was to see if we
13 could address at this time that portion of the
14 contention that you originally considered
15 inadmissible, and I'm starting to think that we
16 can't, simply because of the Applicant's statement
17 that there has been some change to the design
18 control documents.

19 MR. FRANTZ: I'm sorry. I may not have been
20 precise. I did not say that there was a change.

21 JUDGE ARNOLD: Oh.

22 MR. FRANTZ: I said that we developed our
23 report in light of the report submitted by
24 Mitsubishi for the U.S. APWR design certification.
25 And, again, I hate to go into much more detail,

1 because this is all classified or SUNSI information,
2 both from Mitsubishi's standpoint and from our
3 aspect, for our COL application.

4 JUDGE ARNOLD: Does anyone see any reason then
5 why we can't address that portion of the contention
6 that the Staff considered inadmissible right from
7 the start, that being safety analysis, PRA, and
8 other documents of that sort?

9 MR. FRANTZ: Well, I agree certainly there.
10 To the extent that they're challenging the PRA, that
11 would obviously be outside the scope of this
12 proceeding and outside the scope, frankly, of
13 50.54(hh). 50.54(hh) pertains to a deterministic
14 event, namely you postulate a large fire or
15 explosion. It has nothing to do with the PRA per
16 se.

17 Similarly, to the extent that they challenged
18 the environmental report, again, there's something
19 that is relevant in 50.54(hh) to the environmental
20 report. That's a safety evaluation, not an
21 environmental evaluation. And then based upon the
22 reply from the Petitioners, I understand that there
23 are criticisms of the DCD for the U.S. APWR were
24 based upon the fact that they don't believe the DCD
25 addresses fully the new rule 50.54(hh).

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1 And so I don't -- based upon that
2 representation by the Petitioners, I don't believe
3 that they were intending to challenge the DCD. What
4 they were intending to do is to challenge whether or
5 not the Applicant for the COLA had submitted the
6 report required by 52.80(d).

7 JUDGE ARNOLD: Let's go to the Petitioner and
8 see what they intended.

9 MR. EYE: Thank you, Your Honor. Actually,
10 counsel for the Applicant, his comments just now
11 are, I think, pretty close to what we were
12 attempting to do. What we recognize is that there's
13 something of a hierarchy of documentation here that
14 results in an environmental report and an
15 application. That hierarchy includes the design
16 control document, and it includes the FSAR.

17 Now, to the extent that we have a new
18 regulatory provision that's been adopted by the
19 Commission in March of this year, that implicates
20 that hierarchy of documents, both the DCD and the
21 FSAR and the ER, or whatever else in that compendium
22 might be germane. It is something that ought to be
23 considered. It's a new circumstance.

24 To be fair to the Applicant, when they drew up
25 their DCD and their FSAR and their ER, 50.54(hh) was

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1 just a glimmer in somebody's imagination, I suspect,
2 or maybe it doesn't even reach that point. Well,
3 now 50.54(hh) is the law of the land, and whatever
4 documentation in that hierarchy has a bearing on it,
5 on 50.54(hh), the compliance therewith, ought to be
6 considered in this COLA adjudication, because the
7 environmental report really is just -- has -- is
8 built on the foundation of the DCD and the FSAR, at
9 least in large measure.

10 And when we went back and looked at the DCD,
11 it was for the purpose of determining, What does it
12 say now; how does it address now the prospect of
13 large fires and explosions taking major portions of
14 a plant out of service; what does it say now,
15 because it was possible from our view that they
16 already anticipated that.

17 Well, when we went back and looked at the
18 source documents, it was pretty clear to us that
19 they had not anticipated the magnitude of fires and
20 explosions that are anticipated under the new
21 regulatory requirements, and so we did criticize
22 those. But it was for the purpose of saying, If
23 they're offering up the status quo to you as
24 satisfying 50.54(hh), it's not enough; it doesn't
25 work.

1 And that was part of our emphasis there was
2 anticipating that the Applicant might attempt to
3 say, Well, we've already addressed 50.54(hh) in our
4 current documentation, and we were anticipating that
5 and addressed it accordingly. But -- and this may
6 be far too -- you know, splitting hairs far too
7 much.

8 Whether our contention -- the balance of our
9 contention is considered moot and we wait around to
10 see what the information -- assuming we get access
11 to it and that we can evaluate it and so forth, and
12 then we do another contention, or whether this Panel
13 simply says, We're going to hold back in abeyance
14 for now, until the Petitioners get an opportunity to
15 see the information that's been filed and amend
16 their contention accordingly.

17 Procedurally it probably doesn't make very
18 much difference, so long as we get access to the
19 information that we need to make that evaluation.
20 In our papers I believe what we've suggested is the
21 latter, that you not find that this contention is
22 moot, but rather find that the original contention,
23 as bifurcated under the Staff's analysis and the
24 Applicant's analysis, bifurcated, one, to say, was
25 the information in the original documentation -- I

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1 think there was an agreement, implicitly, that it
2 was not, making the contention germane -- but then
3 the substance of the information having now been
4 submitted renders the contention moot.

5 We would prefer that you just not make a
6 ruling on that mootness argument now, until we do
7 have an opportunity to address the new information
8 and submit that evaluation to this Panel for its
9 consideration, and then make a determination as to
10 whether or not the contention should be admitted
11 into the full adjudication. It's more of a
12 procedural mechanism than anything else.

13 MR. FRANTZ: If I could respond briefly to
14 that, first of all, Judge Arnold, I have been
15 authorized by my client to say that our 52.80(d)
16 report does not deviate from the design control
17 document, so at least we can tell you that much.

18 With respect to comments by Petitioners that
19 you perhaps hold this contention in abeyance pending
20 their access to our report, again, I think the case
21 law is very clear that the appropriate process is to
22 dismiss the contention as moot and then enable the
23 Petitioners, as warranted, to raise a new contention
24 based upon the new information that we've submitted.

25 JUDGE YOUNG: The only problem about holding

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1 it moot at this point is that we don't have access
2 to the information that you've submitted at this
3 point. We have not been provided it, and I'm not
4 sure that -- I mean, in one sense, it seems to make
5 more sense to just hold off until the decision has
6 been made, and if necessary, appealed and another
7 decision made on access before ruling on the
8 contention as a whole.

9 I mean, there may be some parts of it that
10 could be separated out, but in looking at it, it
11 almost seems as though those are not part of the
12 contention itself. They're part of the argument in
13 support of the contention. So I guess I'm not
14 following how we would rule that it's moot at this
15 point.

16 MR. FRANTZ: You do have the representation by
17 counsel for the NRC Staff that they have reviewed
18 our report and find it essentially to be equivalent
19 to a docketing decision, where they found it be
20 sufficient to further --

21 JUDGE YOUNG: I'm not sure that would lead us
22 to automatically do that.

23 MR. FRANTZ: No. But I think given that
24 representation by the Staff, that's a sufficient
25 basis for classifying it as moot, with the

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1 realization that Petitioners can always submit a new
2 contention based upon the content of that report
3 once they have access to it.

4 JUDGE YOUNG: Well, unless you gave me some
5 specific authority that we would rely on that
6 representation by the Staff, in the absence of
7 seeing the information on which a mootness
8 determination were made, I don't see how we could
9 make that --

10 MR. FRANTZ: Okay. I would suggest then,
11 because it is with the NRC, that I believe the Board
12 could get access to that document if they wanted to.

13 MR. BIGGINS: Yes.

14 JUDGE YOUNG: And I'm not sure the Board would
15 want to, at least I'm not sure that I would feel
16 comfortable making a determination based on
17 information that all parties did not have access to.
18 Is there really any reason not to hold off on this?

19 MR. FRANTZ: Well, right now, both the
20 Applicant and the NRC Staff object to all the
21 contentions. If you want to --

22 JUDGE YOUNG: Is there any reason to support
23 your objection? Is there any real practical reason
24 why we shouldn't hold off on making this ruling
25 until all parties have access to the information on

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1 which the ruling would be based?

2 MR. FRANTZ: Yes, because we --

3 MR. BIGGINS: Judge --

4 MR. FRANTZ: -- believe that the parties --

5 that the Petitioners have not satisfied the
6 requirements for admissibility as a party --

7 JUDGE YOUNG: What is the practical impact of
8 holding off on making a ruling?

9 MR. BIGGINS: Judge, if I may --

10 JUDGE YOUNG: Hold on.

11 MR. BIGGINS: Yes, Judge.

12 JUDGE YOUNG: Hold on. What is the practical
13 impact of holding off on making the ruling?

14 MR. FRANTZ: The practical impact is that the
15 Petitioners then essentially have party status, and
16 you've admitted them as Intervenors. And that's the
17 practical harm to us.

18 JUDGE YOUNG: Well, I'm not sure that you can
19 even say that at this point, but in any event, do
20 you have any support for the argument that an
21 adjudicator would make a ruling based on information
22 that one party does not have access to and on which
23 there has been a request for access and the
24 determination on which has not yet been made? I
25 mean, I think that would go beyond any normal

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1 understanding of what adjudication consists of.

2 MR. FRANTZ: Well, there are oftentimes NRC
3 Staff determinations that are not subject to review
4 by the Board. For example --

5 JUDGE YOUNG: But that one is.

6 MR. FRANTZ: And what I'm suggesting here is
7 that, for example, the Staff determination on
8 docketing can be accepted by the Board without
9 further review. I think this decision also by the
10 Staff, that the report that we've submitted is
11 sufficient for their review under the rule. That
12 should be sufficient for rendering this condition
13 moot.

14 JUDGE YOUNG: Anything further?

15 MR. BIGGINS: Yes, Judge. The Staff position
16 is that it is a Staff determination whether or not
17 the Petitioners receive access to the SUNSI
18 information. Yes, that is reviewable by the Board
19 should it be denied and appealed. However, the
20 Board has to consider the situation where if SUNSI
21 access is denied and the Board were to uphold that
22 determination, then this contention would have to be
23 ruled on by the Board without allowing access to the
24 Petitioners to the information.

25 JUDGE YOUNG: Let's assume that possibility

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1 were to occur.

2 MR. BIGGINS: Certainly.

3 JUDGE YOUNG: Is there really any reason to
4 make that determination now, based on the
5 possibility that we might get to that point, rather
6 than waiting to that point and having that brief,
7 because we're talking about extremely unusual
8 situation where any forum would render a decision
9 where all parties did not have access to the
10 information, and we're being asked to do that in the
11 absence of further briefing on the possibility that
12 we might get to a point where we would rule that the
13 Petitioner should not have access to this? I mean,
14 do you realize what you're arguing here?

15 MR. BIGGINS: I do. I do, Judge. And I would
16 point out that that is a possibility considered in
17 the Commission's order that was part of the notice
18 of hearing, Federal Register notice. If the --

19 JUDGE YOUNG: Where? Give us the reference to
20 that.

21 MR. BIGGINS: The Federal Register notice
22 itself?

23 JUDGE YOUNG: To the part where the Commission
24 made a specific -- said anything whatsoever that
25 should lead us to a conclusion that we should make a

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1 ruling of this nature.

2 MR. BIGGINS: My point, Judge, referring to
3 the Federal Register notice, was that there is a
4 possibility that SUNSI access can be denied. That's
5 the whole point of an access --

6 JUDGE YOUNG: And there's something in the --

7 MR. BIGGINS: -- provision.

8 JUDGE YOUNG: -- Federal Register notice to
9 suggest that determinations should be made prior to
10 reaching that point?

11 MR. BIGGINS: As a --

12 JUDGE YOUNG: What is the practical reason for
13 doing it now rather than after the point at which
14 any determinations are made on access?

15 MR. BIGGINS: As a practical matter, this is a
16 contention purely of omission, and the information
17 has been provided, which the staff has received and
18 accepted the information and says that it is now --
19 has now been provided on the docket, the Board has
20 access to that information to make its
21 determination.

22 Access by the Petitioners is not necessary for
23 the Board to review that information and determine
24 whether or not the contention -- that portion of the
25 contention is now moot.

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1 JUDGE YOUNG: All right. If the parties would
2 like to brief this issue, you're free to do that,
3 but -- and we'll set any necessary deadlines for you
4 to do that, but I personally would expect to get
5 some good legal authority for the argument that we
6 should, especially at this point, make any ruling
7 based on information of which all parties are not
8 aware.

9 I mean, the general case law out there in the
10 rest of the world -- we're talking about very
11 cutting-edge issues, and you're blithely arguing to
12 us that we should make a ruling based on information
13 that the Petitioners don't have access to. And so
14 before we do that, I will expect to get briefs from
15 all parties on any legal authority that we have any
16 authority to do that, especially at this point.

17 So one would be the authority for us to do
18 that and the extent to which that goes, and two
19 would be why we should do that now, rather than wait
20 until later.

21 And I haven't heard one practical reason that
22 would persuade me at this point that there's any
23 benefit in doing this now rather than a few months
24 down the line, how that would make any difference to
25 anyone such that we should do it at this point.

1 The Applicant says that we should do it at
2 this point because that might result in Petitioner
3 getting party status. I'm not sure I follow the
4 logic of that. That could be included in the
5 briefs, but --

6 MR. BIGGINS: Perhaps I --

7 JUDGE YOUNG: -- I certainly, -- certainly you
8 would need to brief this further before you got any
9 ruling from us of that nature, at least from me.

10 MR. BIGGINS: Well, Judge, perhaps I
11 misunderstand the Board's position, but my point --
12 the simple point I am trying to make is that the
13 Board can -- has the authority to make the decision
14 on this contention, even if the Petitioners are not
15 allowed access to that information, and if you look
16 at the inverse of the situation, if the Board
17 refuses to rule on this contention until the
18 Petitioners are granted access, that is an
19 assumption that they would be granted access under
20 the --

21 JUDGE YOUNG: Mr. Biggins, you're not
22 listening very well, or you're --

23 MR. BIGGINS: -- terms of the --

24 JUDGE YOUNG: -- not understanding very well.
25 My question to you is: Why should we even make a

1 determination on this until the access determination
2 has been made? I might also point out that we're
3 talking not about safeguards information or
4 classified information. We're talking about
5 unclassified, not safeguards information, and
6 whether they should have access to that so that they
7 can draft a contention that addresses the
8 information to which they now do not have access.

9 And I don't think you realize how unusual the
10 arguments you're making are. I mean, these are
11 issues that -- any -- these are issues on which
12 cutting-edge rulings and determinations are being
13 made now, and we're talking about national security
14 being involved, which generally would involve
15 classified information. And you're talking about
16 nonclassified, not even safeguards information.

17 So let's just --

18 MR. BIGGINS: Judge --

19 JUDGE YOUNG: I mean, unless you really
20 have -- just hold on.

21 MR. BIGGINS: Yes, Judge.

22 JUDGE YOUNG: Unless you really have something
23 that you really need to say now about this, I think
24 you should refrain and file a brief on this further,
25 so what do you need to say now?

1 MR. BIGGINS: I do not disagree with the Board
2 that you could wait until the SUNSI determination
3 could be made. My -- I believe the Board can wait
4 until that decision is made before ruling on this
5 contention, and the Staff would not be providing a
6 brief arguing otherwise.

7 However, I would note that there is a
8 situation where under the Commission policy, under
9 the Commission order, the Petitioners may not ever
10 get information to that SUNSI information. If that
11 were to occur, the Board has the ability to review
12 the information and make a determination on the
13 contention.

14 I'm not saying that the Board needs to rule
15 before either, one, reviewing the information
16 itself -- I think that is necessary -- or, two,
17 waiting for the SUNSI determination. I see no
18 reason why we cannot wait for the SUNSI
19 determination.

20 JUDGE YOUNG: Then what is it that you're
21 trying to say?

22 MR. BIGGINS: What I'm trying to say is if the
23 circumstance were to occur that the Staff denied the
24 request, the Board upheld that request, and even if
25 it were appealed to the Commission, the Commission

1 upheld that request. --

2 JUDGE YOUNG: The denial, you mean.

3 MR. BIGGINS: Correct. The Board by reviewing
4 the information itself still has the ability to rule
5 on the contention, even in that situation.

6 JUDGE YOUNG: And why should we do it now
7 rather than later, again?

8 MR. BIGGINS: Again, it is not our position
9 that you should do it now rather than waiting --

10 JUDGE YOUNG: All right.

11 MR. BIGGINS: -- for the SUNSI access.

12 JUDGE YOUNG: All right. If you're not making
13 the argument that we should do it now, then we can
14 wait until later, and the only person who -- the
15 only party that disagrees with that at this point, I
16 would presume, would be the Applicant. If you want
17 to make an argument on that to finish up on that,
18 you may.

19 MR. FRANTZ: Could I ask one clarifying
20 question?

21 Let's turn the question around. If the NRC
22 Staff does grant access to SUNSI, would the Board
23 then feel free to rule that this contention is moot?

24 JUDGE YOUNG: We began our questioning asking
25 what the ramifications of what you have filed are.

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1 I think that at that point, and from my view, it
2 would make sense to get the parties' argument on
3 whether or not it's moot after they've gotten
4 access. We could hold a telephone argument; I mean,
5 these things can be handled.

6 To take the extreme measure that you're
7 advocating of making rulings before they have
8 access, I think, one, is an extreme measure, and
9 two, if they already had access at this point, we
10 could then hear their argument on the mootness
11 issue.

12 MR. FRANTZ: I understand.

13 JUDGE YOUNG: Later we can get pleadings, we
14 can do telephone arguments, there are ways to handle
15 these things. If any of the parties would like us
16 to do anything other than that, or if there are any
17 other alternative ways to address this before we
18 leave we can discuss a deadline for briefing of
19 that.

20 Did you want to add anything?

21 MR. BIGGINS: Judge, may I ask a clarifying
22 question? I guess it's my understanding then that
23 the Board would defer ruling on the contention
24 admissible or inadmissible rather than simply
25 admitting it and determining that it's moot? In

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1 other words, my understanding of what you're saying
2 is that the Board would not rule on the
3 admissibility of the contention until the Board has
4 reviewed the SUNSI information and a determination
5 has been made whether or not the Petitioners have
6 access to the SUNSI information.

7 JUDGE YOUNG: The Board has not had a chance
8 to confer on this; we just got the information
9 today, but I think it's fairly obvious that if we
10 defer our ruling, we would not admit the contention;
11 we would neither admit or deny it, we would wait
12 until the Staff has made its determination on
13 access, if necessary, we would rule on any appeal of
14 that, and then if ultimately the Petitioners got
15 access to the information, we would hear the
16 argument on whether it's moot, and the Petitioners
17 would then also have an opportunity to file an
18 amended contention. All these things could be
19 decided in due course.

20 MR. BIGGINS: That answers my question. Thank
21 you, Your Honor.

22 JUDGE YOUNG: All right. Now, as I said, we
23 haven't conferred on this, but to me that sounds
24 like the logical way to approach it.

25 Did you have another view, Judge?

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1 JUDGE ARNOLD: Well, yes, I do. I look at
2 51.54(hh) and I see that, for instance, each
3 licensee shall develop and implement guidance and
4 strategies intended to maintain or restore core
5 cooling, et cetera, which says to me it's got to be
6 guidance.

7 It doesn't give any criteria on how well the
8 core cooling has to be established, criteria on the
9 containment or anything; it's basically you have to
10 show that you're going to be able to do something or
11 you're going to have a procedure in place to do
12 something to improve the situation.

13 On a plain reading of this, if you say our
14 strategy to restore core cooling is a bucket
15 brigade, well, you've met the strict requirement of
16 this. You have a procedure; it's just not a very
17 good one.

18 So I'm wondering what is the relevant
19 information. To me, the relevant information is
20 that they've submitted something that they say
21 fulfills this; it's not the contents of that.

22 So I say that until I hear something else, I
23 think the Petitioners have received the information
24 necessary to rule on whether or not guidance and
25 strategies have been developed.

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1 So let me ask Petitioners, do you agree or
2 disagree that your initial contention saying that
3 this information has not been provided -- strictly
4 has not been provided, is that contention moot, or
5 has it still not been provided?

6 MR. EYE: Your Honor, I don't know the answer
7 to that question, because I don't know what the
8 information says, and I'm not willing to draw the
9 bright line between submitting information and just
10 automatically assuming that it meets even minimum
11 guidance requirements. I don't take leaps of faith
12 like that, and my clients wouldn't want me to do
13 that, I don't think.

14 And so I disagree with the idea as this
15 contention is evolving -- and it is evolving because
16 just the nature of the timeline it's on, these regs
17 only became active March 27 or 29 of this year, so
18 we're certainly on the front edge of it -- I don't
19 necessarily take the position that it's a contention
20 purely of omission.

21 I think that to the extent that the day that
22 we were required to file our contentions, April 6 of
23 this year, we were operating on the assumption --
24 and I think it was legitimate -- that the
25 information had not been submitted, so at that point

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1 it was on the idea that it was an omission.

2 But we also, perhaps precipitously, took the
3 approach that we would likely argue with the
4 sufficiency of what was submitted if in fact what
5 has happened happened, and that is that there's been
6 no amendment of the underlying DCD, and we attack
7 the DCD in our petition because it doesn't
8 adequately address the points that are raised in
9 50.54(hh) -- it, at least in our view, just does not

10 Now, if they adopted what's in the DCD and
11 perhaps added or modified information somehow in
12 their most recent submittal, that's really a
13 question of adequacy in terms of whether it's met
14 the minimum requirements under 50.54(hh).

15 And I don't think that this Board has
16 discretion to time its decisions consistent with
17 either access to information that we may or may not
18 get, appeals from those access decisions, and then
19 bundle it up with the other decisions that have to
20 be made about the admissibility of the contentions
21 that we've submitted for the Panel's discussion --
22 or consideration, rather.

23 MR. BIGGINS: Judge, the Staff position is
24 that, yes, a determination could be made by the
25 Board at this time because the information has been

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1 supplied; however, again, we recognize that it would
2 be reasonable to wait until the SUNSI access
3 determination is made. However, a bucket brigade
4 would not be acceptable to the Staff. I cannot get
5 into the details of the submission, of course, but
6 the Staff position is that the information submitted
7 meets the requirements of the rule.

8 Very specific or detailed staff guidance for
9 this rule has not been issued and won't be issued
10 until approximately September. I don't think we
11 need to wait that long to determine the sufficiency
12 of this information to determine that, as a
13 contention of omission, the information has now been
14 supplied.

15 With that, the Staff position is still that
16 the contention itself is moot to that extent and
17 inadmissible to the extent that it was originally an
18 attack on the design certification document.

19 JUDGE ARNOLD: I was not suggesting that Staff
20 would consider a bucket brigade adequate, but it
21 would mean that that specific hole in the
22 application was filled, although very poorly.

23 MR. BIGGINS: We do believe that the hole in
24 the application has been filled; however, again,
25 that is akin to a docketing decision. Let me be

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1 very clear, this is not a docketing decision. It's
2 akin to that to the extent that the Staff has
3 received and accepted the information; the Staff
4 still needs to conduct its analysis and review of
5 the information which would be documented in the
6 final safety evaluation report.

7 JUDGE ARNOLD: How long would you anticipate
8 it will take before the access decision is made?

9 MR. BIGGINS: We have, under the order, ten
10 days from receipt of the request. Although there
11 was some problem with receiving the request, I
12 believe we received it -- and don't hold me to
13 this -- on the 6th, so we have a very short
14 turnaround time to make our determination, and
15 according to the order, again, there's a very short
16 turnaround time for even appealing the decision.
17 That's why the Staff believes it is reasonable to
18 wait for a determination on access to the SUNSI
19 question.

20 JUDGE ARNOLD: Okay, thank you very much.

21 MR. FRANTZ: One other piece of information
22 for you, Judge Arnold: There is guidance that's
23 still in draft form, and our letter to the NRC dated
24 May 29 does refer to this guidance, and this is
25 public now. It's Guidance NEI 06-12, which has

1 what's called B.5.b guidance for preparing the types
2 of reports.

3 JUDGE YOUNG: What's the word you used?

4 MR. FRANTZ: I'm sorry.

5 JUDGE YOUNG: It has B something?

6 MR. FRANTZ: B.5.b.

7 JUDGE YOUNG: B.5.b.

8 MR. FRANTZ: Phase 2 and 3 submittal
9 guideline. So again, we're not writing on a totally
10 white piece of paper here; we do have some guidance
11 that we're following. That guidance is currently
12 being reviewed, as Mr. Biggins indicated, for
13 endorsement by the NRC.

14 JUDGE ARNOLD: I'm satisfied.

15 JUDGE YOUNG: Just one more question for the
16 Petitioners.

17 Apart from the issues that we've been
18 discussing or apart from the issues that relate to
19 the information that we don't have before us, to the
20 extent that you're challenging the design document,
21 do you want to make any argument why that would not
22 be a challenge to a rule in effect?

23 MR. EYE: Yes, Your Honor, I would be happy to
24 address that. We recognize that the general rule is
25 that a DCD has the protection, if you will, of a

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1 rulemaking, and then it's then arguably invulnerable
2 to a subsequent collateral attack.

3 But when a DCD is written under one regulatory
4 regimen and that regulatory regimen then changes in
5 some rather fundamental ways, then the information
6 in the DCD ought to be fair game for criticism,
7 particularly in the context of a COLA adjudication
8 that's now operating under the new regulatory
9 regimen.

10 Moreover, the environmental report and the
11 FASR both adopt the DCD, and I don't think there's
12 any argument that the FASR and the ER can certainly
13 be considered as germane issues to be raised with
14 this Panel and the adjudication in a more general
15 sense, so that if there is a defect in the
16 underlying DCD that ripples through the FASR and the
17 ER and it's related to a regulatory provision that's
18 been adopted by the Commission -- in the case,
19 50.54(hh) -- that ought to be dealt with in the
20 context of the adjudication.

21 It should not preclude -- well, let me
22 approach it this way: If it does, if in fact the
23 DCD somehow precludes us from judging or contesting
24 the sufficiency of the Applicant's submittal that
25 they claim conforms with the requirements of

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1 50.54(hh), then we're really -- we don't have any
2 opportunity under the adversarial process to bring
3 that issue to you even, and we're shut out from that
4 which I don't think, under the adjudicatory process
5 under 10 CFR 2.3 is really permissible.

6 JUDGE YOUNG: I think the Commission has
7 pointed out that -- I'm not looking in the right
8 place, but there are other means to challenge the
9 design documents if there should be a change in
10 those, and if any party can help me out here, I'm
11 thinking that the Commission has addressed the
12 ability to later on down the line address any future
13 issues in the design as it becomes more final.

14 MR. EYE: Well, Your Honor, this has become
15 final to the extent that we now know that the DCD
16 for Comanche Peak hasn't been altered, so maybe
17 we're arguing about something that's not really
18 ultimately going to be pertinent.

19 To the extent that that hasn't been amended as
20 a result of the 50.54(hh) requirements, then we move
21 on to what has been amended, and if that is the FASR
22 and the ER, as a practical matter, then that would
23 certainly be something that could be dealt with in
24 the context of a contention and the COLA
25 adjudication without having to resort to the DCD.

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1 And again, we're shadowboxing here to a
2 certain extent, because we don't know what
3 information has actually been submitted.

4 JUDGE YOUNG: Is the -- oh, excuse me.

5 MR. EYE: And to that extent, I think that how
6 you approach this to begin with still makes the best
7 sense, and that is let's deal with this when
8 everybody has got the same access to the same
9 information.

10 Now, if it turns out that for whatever reason
11 the Staff says that we should not get access to that
12 information, then we'll take that up in an appeal,
13 and if the appeal affirms the Staff decision, then
14 it does and we'll deal with that. But it seems to
15 me we're sort of rushing to that position needlessly
16 at this point.

17 JUDGE YOUNG: What I was trying to do is just
18 address the issue of the extent to which your
19 arguments challenge the design control document.

20 Let me just ask the Staff, do you know whether
21 there's any intent to change that?

22 MR. BIGGINS: Judge, I don't believe there's
23 any intent to change the Commission's policy that a
24 design control document cannot be attacked in an
25 adjudication.

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1 JUDGE YOUNG: No, no. To change this
2 particular design control document, the PRA and the
3 severe accident evaluation, based on the changes in
4 the rule.

5 MR. BIGGINS: I don't have any information
6 regarding that, Judge.

7 MR. FRANTZ: Judge, again, this is a
8 deterministic rule; it's not a probabilistic rule.
9 Under the rule there's a need to postulate from
10 whatever cause, a large fire or explosion, and so
11 the PRA is not at issue in this proceeding.

12 Additionally, I might add that the new rule,
13 the 50.54(hh)(2) and 52.80(d) do not apply strictly
14 to design certification applications; they're
15 directed towards applicants for licenses and holders
16 of licenses.

17 MR. BIGGINS: And, Judge, I believe you were
18 looking for a citation to Commission policy
19 statement. I have it on page 19 as printed from the
20 website, I believe, regarding a person having
21 standing with respect to one of the facilities
22 proposed in the applications.

23 It's the Staff's position that the Commission
24 has made very clear that a contention which is
25 otherwise admissible under 2.309, with respect to

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1 the application being contested, when it relates to
2 the design certification document, could be held in
3 abeyance, and I believe you referred to that
4 earlier.

5 I think that's the situation here, that the
6 Petitioners are talking about, where if they believe
7 they're trying to hit a moving target regarding the
8 design certification itself, yes, an applicant has
9 the ability to reference a design certification
10 that's been docketed but is not yet finalized.

11 And what that does is anytime there are
12 changes to the design certification document which
13 would affect the combined license application -- for
14 instance, if some provision in the design
15 certification document as deleted by the design
16 certification applicant, that could be an issue for
17 a new contention, and the Petitioners certainly have
18 the ability to raise new contentions in that regard.

19 JUDGE YOUNG: What was the citation again?

20 MR. BIGGINS: I have it on page 19, but I
21 think the --

22 JUDGE YOUNG: Of your --

23 MR. BIGGINS: -- Federal Register notice of 73
24 FR has it on page 20972.

25 JUDGE YOUNG: Thank you.

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1 MR. FRANTZ: Judge Young, if I could raise
2 just one more point very briefly, there may be a
3 situation that arises where the NRC denies access to
4 SUNSI, so they never do get access to our 52.80(d)
5 report. At some point, the Board's going to have to
6 rule on that contention, even though they don't have
7 access.

8 JUDGE YOUNG: Well, I think the issue is: Is
9 there any reason to do that before we even --

10 MR. FRANTZ: No.

11 JUDGE YOUNG: -- make the ruling on the
12 access.

13 MR. FRANTZ: I understand. I think Mr.
14 Biggins is right that, you know, given the short
15 time frame they have for making the initial
16 determination and given the Board's timelines for
17 issuing an order based upon this prehearing
18 conference and the pleadings to date, I think the
19 shorter timeline is Mr. Biggins' timeline, rather
20 than your timeline. So in that case, it makes sense
21 to just hold off.

22 JUDGE YOUNG: Okay. Anything else on
23 Contention 7 now, or is now a good time to break for
24 lunch?

25 (No response.)

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1 JUDGE YOUNG: All right. We're a little late.
2 It's 20 to 1:00 now. Let's say be back and ready to
3 go on the record at a quarter to 2:00.

4 (Whereupon, at 12:40 p.m., the hearing in the
5 above-entitled matter was recessed, to reconvene at
6 1:45 p.m., this same day, Wednesday, June 10, 2009.)
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A F T E R N O O N S E S S I O N

1
2 JUDGE YOUNG: Before we go to Contention 8,
3 anything further on Contention 7?

4 MR. BIGGINS: Nothing further from the Staff,
5 Judge.

6 JUDGE YOUNG: And so I guess we're all agreed
7 we're going to wait to hear from the Staff on the
8 access issue, and then if it runs counter, then
9 there'll be time for appeal, and you'll notify them
10 about the time for appeal.

11 MR. BIGGINS: Would the Board like to be
12 served with a copy of our determination?

13 JUDGE YOUNG: Yes. I think it would probably
14 be good to serve everyone. If anything else comes
15 up on that, the parties can file written pleadings.
16 We're not -- I guess there's no need at this point
17 for any briefing. If we see any further need in the
18 future for briefing, we'll let you know. If any
19 party wants to raise an issue, you can file
20 something in writing or also request a telephone
21 conference at any time on this or any of the other
22 issues.

23 So if there's nothing more on that, we'll move
24 to Contention 8, and we did have a reply on that, so
25 I think we'll start with the Applicant on this one.

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1 MR. FRANTZ: Thank you, Judge Young. First of
2 all, I would like to address the question posed by
3 the Board in its memorandum of May 27.

4 The Board asked which were the most relevant
5 regulations to this contention, and with respect to
6 the need for a license for waste disposal, the most
7 relevant regulations are 10 CFR Section 61.2, and
8 20.2001(a)(3). Both of those indicate that there's
9 no need for a separate license for effluents per se.

10 Other --

11 JUDGE YOUNG: Repeat the second one for me,
12 please.

13 MR. FRANTZ: 20.2001(a)(3). That regulation
14 essentially allows an existing licensee to dispose
15 of radioactive material through its effluents,
16 provided that the effluents are within NRC limits.

17 JUDGE YOUNG: I'm sorry. It was just brought
18 to my attention that Judge Mignerey -- we don't
19 think she's on yet, so --

20 (Pause.)

21 JUDGE YOUNG: We can go off the record for a
22 minute.

23 (Off the record.)

24 JUDGE YOUNG: We had just started on
25 Contention 8. We apologize for not waiting, and if

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1 you want to just recap briefly.

2 MR. FRANTZ: Yes. I would like to first
3 address the Board's questions posed in its
4 memorandum of May 27. The most relevant regulations
5 that pertain to disposal are in --

6 JUDGE YOUNG: Judge Mignerey, can you hear
7 counsel?

8 JUDGE MIGNEREY: I can hear you, but I cannot
9 hear counsel.

10 MR. FRANTZ: Can you hear me now?

11 (No response.)

12 JUDGE YOUNG: Did you hear that?

13 JUDGE MIGNEREY: No.

14 MR. FRANTZ: Can you hear this?

15 (No response.)

16 JUDGE YOUNG: Bring it closer. I think --

17 MR. FRANTZ: Can you hear this?

18 (No response.)

19 JUDGE YOUNG: Maybe it's not on. Pull it a
20 little closer, if possible.

21 MR. FRANTZ: Can you hear this?

22 JUDGE MIGNEREY: Yes, I can.

23 MR. FRANTZ: Okay. The most relevant
24 regulations that pertain to waste disposal are in 10
25 CFR Section 61.2, which basically states that for

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1 land disposal of waste received from third parties,
2 there's a need for a license, but there's no
3 requirement in Part 61 itself that requires a
4 license for waste generated by the licensee itself.

5 The second provision is in 20.2001(a)(3) which
6 allows for disposal of radioactive material in
7 effluents, provided that the effluents are within
8 NRC limits.

9 The NRC limits in question are for the most
10 part in Section 20.1301 and 1302, which establish
11 dose limits for members of the public; additionally,
12 Appendix B to Part 20 has limits on concentrations
13 of various radionuclides in effluents.

14 JUDGE YOUNG: B? B or D, did you say?

15 MR. FRANTZ: B. I'm sorry.

16 JUDGE YOUNG: B.

17 MR. FRANTZ: In that regard, one regulation
18 which we think is particularly important in this
19 proceeding -- and we'll mention it not only here on
20 this contention but also on other contentions -- is
21 note 3 in Table B-1 to Appendix B to Part 51, and
22 that regulation has a definition of the term "small"
23 for the purposes of environmental impact statements,
24 in particular for license renewal statements, but
25 obviously that's also generically applicable

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1 elsewhere, too.

2 And that definition basically states that
3 radiological impacts shall be deemed to be small if
4 the effluents and doses are within NRC limits.
5 That's the definition of the term "small," and
6 that's exactly what we have here at Comanche Peak.
7 We have predicted effluents which are well within
8 NRC limits, and therefore, by definition, those
9 environmental impacts are small.

10 Turning to Petitioners' reply, the reply has
11 numerous new references to web pages, both in terms
12 of allegations regarding dam failures and global
13 warming. We believe that those should all be
14 struck, as mentioned earlier today and in our motion
15 to strike. None of those references were in the
16 initial petition to intervene, and it's not
17 appropriate at this point for the Petitioners to be
18 raising new technical supporting documents.

19 But even if the Board were to consider these
20 documents, we don't believe that they establish a
21 genuine dispute on any material fact. First of all,
22 you don't even have to get to their allegations
23 regarding dam failure or dewatering of the
24 reservoir, because their premise is wrong. Their
25 premise is that there's a radiological problem with

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1 Squaw Creek Reservoir. That simply is not true.

2 As shown in our environmental report at
3 Section 6.2.5, the tritium levels currently in Squaw
4 Creek Reservoir where we discharge are well within
5 regulatory limits for tritium. Additionally, we do
6 periodic environmental monitoring of the sediment in
7 the reservoir, and that monitoring shows no
8 detectable radionuclides due to operation of
9 Comanche Peak 1 and 2. And, therefore, there simply
10 is no radiological problem with the reservoir,
11 contrary to the allegations by the Petitioners.

12 Additionally, going forward in the future, we
13 will have monitoring programs for our effluents.
14 Those programs are discussed in the environmental
15 report, Sections 3.5.1 and 6.2. Those monitoring
16 programs will ensure that in the future, we continue
17 to meet all NRC limits on effluents, and therefore,
18 again, by definition, the radiological impacts are
19 small, and the Board doesn't even need to reach the
20 issue on dam failure or dewatering.

21 But even if you take Petitioners' arguments at
22 face, let's assume that there is a dam failure.
23 Let's assume that there is dewatering. They have
24 provided absolutely no basis for an allegation that
25 that would result in any significant environmental

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1 impact. There's nothing in their report -- in their
2 petition.

3 They have no technical reports that they
4 reference. There's no expert opinions. There's
5 nothing anywhere in Contention 8 that would indicate
6 that there'd ben any significant radiological
7 impact, either from a dam breach or from dewatering,
8 and therefore, for numerous reasons, we believe that
9 this contention should be dismissed for failure to,
10 one, establish a genuine dispute on material fact,
11 and, two, for failure to have any adequate technical
12 support.

13 JUDGE YOUNG: Does that conclude your --

14 MR. FRANTZ: Yes, it does.

15 JUDGE YOUNG: Can you help me out a little
16 bit? In your response -- I understood you just now
17 to say that you're monitoring and you will be doing
18 monitoring to make sure that there's nothing in the
19 sediment and there will not be anything in the
20 sediment, such that -- let me see if I understood
21 you -- such that even if there were a dam failure
22 and/or drought drying up the water, that anything
23 that could be released would still be within the
24 regulatory limits. Is that what --

25 MR. FRANTZ: That's very close, Judge Young.

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1 Just a few clarifications.

2 We're not saying there's nothing in the
3 sediment. We're saying there's nothing that's
4 detectable in the sediments, due to Comanche Peak 1
5 and 2. We do -- there are core sensitivities for
6 our monitoring instruments, and there may be
7 something that's below the technical levels, but we
8 have not found anything detectable due to Comanche
9 Peak 1 and 2.

10 In the future, we are not going to say there's
11 never going to be anything in the sediment. What
12 we're saying is that the effluents will all be
13 within NRC limits, and therefore, by definition, the
14 impacts are small.

15 JUDGE ARNOLD: When you discussed some of the
16 relevant regulations, you mentioned 10 CFR
17 20.2001(a)(3), saying that basically you can
18 discharge without a permit, as long as you maintain
19 below the limits, and looking at that, it says the
20 limits of 20.1301 --

21 MR. FRANTZ: Yes.

22 JUDGE YOUNG: -- which are expressed in terms
23 of their effect on the public. Well, if you're
24 discharging to a lake, you're in a controlled
25 environment with a lot of water shielding, so there

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1 could be, in fact, quite a lot of radionuclides in
2 there, and still not be affecting the public, but if
3 that water is released through a dam break or
4 something, you'd have it in a new configuration that
5 could possibly affect the public. Do you have any
6 comment on that?

7 MR. FRANTZ: Yes. And we do, again, periodic
8 monitoring of the water in Squaw Creek Reservoir.
9 We ensure that the levels of radioactivity in the
10 water are within NRC limits.

11 JUDGE YOUNG: The other part I wanted to get
12 from you is in your -- where in your answer do you
13 say that?

14 MR. FRANTZ: We do --

15 JUDGE YOUNG: That even with a dam failure,
16 the monitoring that you will have in place will
17 detect anything that would, in the event of a dam
18 failure or drought drying up everything, keep any
19 radionuclides within --

20 MR. FRANTZ: Yes. I don't believe our
21 application --

22 JUDGE YOUNG: -- regulatory limits.

23 MR. FRANTZ: -- itself discusses dam failure.
24 What we do discuss is our monitoring of Squaw Creek
25 Reservoir, and what we say is that that monitoring

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1 does go out and checks for tritium and other gamma
2 emitters, for example, and ensures that they are
3 within acceptable limits. And therefore by
4 definition, if the reservoir is within acceptable
5 limits, if you breach the dam, you're still going to
6 be acceptable downstream, in terms of the
7 radionuclides at least.

8 JUDGE YOUNG: If -- what happens with the
9 monitoring? If the monitoring were to detect
10 something, how would you address that?

11 MR. FRANTZ: I may have to call upon some of
12 my friends back here to help, but I believe, first
13 of all, there's reporting obligations that we'd have
14 to make to the NRC, and also, of course, this is --
15 we do this monitoring periodically, so this would
16 not be something that would come upon us unknown and
17 wouldn't be surprising us, because we do have
18 periodic monitoring.

19 We'd be able to detect trends and shifts, and
20 we do trending of the activity in water, so we would
21 know, I think, well before we would ever reach any
22 kind of limit that we were approaching it, and we'd
23 take appropriate corrective action.

24 Let me confer quickly with my client and see
25 whether they have anything further.

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1 (Pause.)

2 MR. FRANTZ: Yes. My client has basically
3 confirmed what I have said, and, again, we have to
4 use the off-site dose calculation manual to look at
5 the activity off-site and calculate the impacts,
6 potential impacts, and make sure again that we're
7 within regulatory limits, and if we're not, we're
8 going to have to take mitigation measures. And we
9 do trending under that program, too, to make sure
10 that if we are trending up, we can take mitigation
11 before we exceed limits.

12 JUDGE YOUNG: Judge Mignerey, did you have any
13 questions for Mr. Frantz before we move on?

14 JUDGE MIGNEREY: I don't have any questions.
15 I think I just have some clarifications, so on page
16 39 of the response, basically you'd describe the
17 remediation parameters or scenarios should the
18 effluents be too low. Correct? So you do have a
19 back-up plan in situations of very low flow. Is
20 that correct?

21 MR. FRANTZ: It's a little bit -- that's
22 close, but it's a little bit different. This is an
23 issue that was raised by the petition to intervene.
24 They are contending, based upon FSAR Section 11.2,
25 that we're going to be releasing tritium in excess

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1 of NRC limits. They have simply mischaracterized
2 and misread FSAR Section 11.2.

3 What that says is that when we have maximum
4 tritium production department when all four units
5 are operating, the releases, if we were to release
6 them, could possibly exceed limits. And so what we
7 would do in that case to prevent us from exceeding
8 limits on our releases, we would divert the effluent
9 to a holding --

10 JUDGE MIGNEREY: Right. You're using the
11 mitigation methods that you described.

12 MR. FRANTZ: Yes. We use either evaporation
13 ponds and holding tanks where we would divert the
14 effluent.

15 JUDGE MIGNEREY: Right. Thank you.

16 JUDGE YOUNG: I guess we'll go to you next and
17 then the Staff last. Okay.

18 MR. EYE: Okay. Thank you, Your Honor.

19 JUDGE YOUNG: And if you could respond to the
20 issue that was just discussed and to the basic issue
21 that the application does contain provisions for
22 monitoring and for catching anything before it would
23 reach a point where, even were there a dam break or
24 the drought, those limits would not be exceeded.

25 MR. EYE: Thank you, Your Honor. The

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1 environmental report of the Applicant is what
2 triggered this contention, the plain verbiage that
3 it used in its application.

4 It said that Squaw Creek Reservoir is the only
5 thing that's being continuously impacted beyond just
6 the plant itself from a radiological standpoint.
7 But we don't know -- and it's being impacted by
8 tritium, of course, which is fairly well understood
9 and quantified.

10 But what we don't understand is this
11 radioactive particulate, which I assume is either
12 cladding or resin or some sort of solid that is
13 escaping whatever means by which those particles are
14 supposed to be kept sequestered, and they end up in
15 the Squaw Creek Reservoir, but we don't know the
16 size. We don't know the source terms. We don't
17 know the quantity.

18 And so we take it, I guess, on the assumption
19 that even not knowing the what, when, size and
20 source terms and so forth, that it's okay, but
21 there's no analysis by the Applicant to tell us what
22 those particulate are; they simply say that they
23 have radioactive particulate matter that's released
24 and it's deposited in the sediment layer of the
25 reservoir. Well, that tells us just enough to ask

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1 more questions.

2 And when they say that there's a small
3 radioactive or radiological impact, there's no
4 analysis to support that, particularly when it comes
5 to these particulate. The reservoir is large; it's
6 got a large sediment layer.

7 I can't think that they're doing such a
8 comprehensive monitoring of the sediment layer that
9 they're finding all particulate, and as we know
10 radioactive particulate in sediments of cooling
11 reservoirs is not an unusual phenomenon; it's
12 something that nuclear plants do routinely, but that
13 doesn't necessarily mean we should excuse it and
14 just leave them to discharge this without any
15 description or quantification.

16 So in terms of the regulations that pertain --
17 and we've already cited one, and I didn't do it in a
18 frivolous way -- it seemed to us that discharging
19 radioactive particulate that would otherwise be
20 dispositioned in a low-level radioactive waste dump,
21 putting it into the sediment layer was sort of a de
22 facto disposal point. So should it meet the
23 qualifications of a low-level radioactive waste
24 facility? Well, that was our argument.

25 I think in addition to that, to the extent

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1 that the Applicant has an obligation to fully
2 quantify the kinds and quantities of radioactive
3 materials that will be generated, it ought to
4 include what's being put into the Squaw Creek
5 Reservoir.

6 In that regard, the final disposition of these
7 radioactive particulate, whether they remain in the
8 sediment indefinitely or whether they escape and get
9 either airborne or downstream, whether there's an
10 environmental or public health impact will be
11 largely impacted by what isotopes are actually being
12 discharged, their source terms and whatever other
13 health physics considerations that would have to
14 pertain to that. Are these particulate, for
15 example -- we don't know: Are they the size of a
16 breadbox, or are they the size of a thumbnail or are
17 they microscopic?

18 JUDGE YOUNG: Are you challenging the
19 monitoring that they're doing that would detect
20 these things?

21 MR. EYE: Well, I suppose in a way, but really
22 what we're challenging is their right to discharge
23 unquantified, unspecified radioactive particulate
24 into the Squaw Creek Reservoir.

25 JUDGE YOUNG: If what they do discharge

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1 meets -- are within or under the regulatory
2 requirements, what would your dispute with that be?

3 MR. EYE: One of the disputes is that there's
4 a cumulative effect. The Applicant itself says that
5 there's a cumulative impact of each passing year of
6 operational activities related to the buildup of
7 these radioactive particulate in the sediment, but
8 there's no quantification of that. You, as a Panel,
9 are left to, I guess, fill in that information for
10 yourself.

11 So we are disputing their right to do this
12 without fully describing it in terms of kinds and
13 quantities. Otherwise, where is the limit on the
14 size of the particulate that they can discharge?
15 Where is the limit on the quantity of particulate
16 that they can discharge?

17 And in terms of if it's cobalt or cobalt-60
18 particulate and it's in the sediment, unless they
19 just happen to find it, they probably won't count it
20 as something that's a radioactive problem, but that
21 doesn't mean that the problem isn't there just
22 because they've not found it or not quantified or
23 adequately described it otherwise.

24 So I agree that they do monitoring, but even
25 by their own admission they have radioactive

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1 particulate in that sediment. Well, what is it,
2 what's the size of it, how frequently is it
3 discharged, what kind of radioactive material is it?

4 And I guess the longer-term question would be
5 is this something that we can project out over the
6 course of the life of the plant and get a quantity
7 analysis about how much will be in that reservoir
8 the day that they stop operations. Could that have
9 a radiological impact that's greater than small? We
10 don't know, because that analysis isn't provided.

11 So when we looked at this and saw that there
12 was an admission about cumulative impacts, it seemed
13 to us that if there was a recognition of an impact
14 that it was cumulative and that they knew at least
15 the basic contours of what was causing this impact,
16 that there ought to be further analysis to fill in
17 these informational gaps.

18 JUDGE YOUNG: Before we move on, do you want
19 to address this issue of there does seem to be an
20 inconsistency between this cited section on page
21 5.11-3 and what you say?

22 MR. FRANTZ: I don't think there's anything
23 inconsistent at all. What we're saying is that
24 currently, given our current monitoring, we have no
25 detectable levels in the sediment. We're not saying

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1 that's going to be the case forever, but we are
2 saying that we will do monitoring to ensure that the
3 levels remain acceptable.

4 By the way, also I believe that our
5 environmental monitoring report that we submit to
6 the NRC does identify what these detectable levels
7 are, so it's not a mystery what the levels are right
8 now.

9 More important, Mr. Eye's statement that the
10 COL application does not identify by radionuclide
11 the amounts being released each year is just simply
12 incorrect, and I refer to the Board to SR Table
13 11.2-10R through 11.2-13R where there are annual
14 discharge limits -- not limits; I think it's what we
15 expect to be released for various conditions, and
16 it's an annual release of numerous different
17 radionuclides; there's pages of them here.

18 JUDGE YOUNG: And where are those found in the
19 application?

20 MR. FRANTZ: In the final safety analysis
21 report Table 11.2-10R through 11.2-13R.

22 JUDGE YOUNG: Are there any particular pages,
23 or do you just find them by reference?

24 MR. FRANTZ: If you'll hold on for a second, I
25 can give you the pages. It begins on page 11.2-6

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1 and that goes through page 11.2-13.

2 JUDGE YOUNG: In the application. I was just
3 asking our law clerk if we could pull those up.

4 MR. FRANTZ: And also to get back to your
5 question, Judge Young, again, we are saying that in
6 the environmental report that's possible that there
7 might be some accumulation of radionuclides in the
8 sediment, but our point here is that, again, it's
9 all within limits and therefore, by definition, the
10 environmental impact is small.

11 JUDGE YOUNG: You say that in the event of, I
12 think it was, the tritium that you would divert part
13 of the liquid into another pond. What if you were
14 to reach a limit with particulate matter?

15 MR. FRANTZ: I don't know the answer to that
16 question offhand, but my expectation is that
17 tritium, that probably is the most likely to have
18 reached that limit because tritium can't be filtered
19 unlike, say, particulate.

20 JUDGE YOUNG: Filtered?

21 MR. FRANTZ: Yes.

22 MR. EYE: Tritium is clearly a pernicious
23 problem because it can't be filtered; it's just
24 discharged, and in the FSAR, as I recall it from
25 memory, there was a concern that when all four units

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1 would be operating, they might reach the acceptable
2 limits.

3 Now, to the extent that they can divert it and
4 hold it and wait for the tritium to decay to a point
5 where they can then discharge more into the
6 reservoir has a lot of assumptions tied to it. One
7 is just exactly how long they can wait for it to
8 decay -- it's got, obviously, a quantifiable decay
9 time -- and the capacity of the ponds that they
10 would divert into to wait until it decayed enough.

11 Particularly when you've got a recognition by
12 the Applicant that with all four units running you
13 might be tripping that limit, it seems that they're
14 really running an unnecessary risk in some respects
15 with having concentrations of tritium in that water
16 that will either be exceeded or could be exceeded.

17 Now, the other question that I think ought to
18 be raised is whether tritium monitoring is on a
19 continuous as a real-time basis so that they can
20 know whether there's a tritium level that is about
21 to exceed or whether it has to wait for the
22 monitoring to happen and then you find it's in
23 exceedance, and you do something about it at that
24 point. And honestly, in deconstructing the FSAR, I
25 couldn't tell exactly what their monitoring program

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1 called for in that regard.

2 But this is, again, triggered by their own
3 recognition that they're going to be generating a
4 lot of tritium and that it might be enough to cause
5 a regulatory limit problem in the Squaw Creek
6 Reservoir

7 JUDGE YOUNG: But in their answer and in what
8 Mr. Frantz has said, they do describe the precaution
9 to prevent the buildup of tritium and also the
10 diversion technique to deal with the problem. Do
11 the Petitioners have a specific dispute with that?

12 MR. EYE: No, Your Honor, other than whether
13 there is a means by which to accurately determine
14 the time at which that diversion ought to occur. In
15 other words, we think that the regulatory limit
16 ought never be exceeded, and if they monitor
17 periodically and they find that it's been exceeded,
18 then I think per force of logic it means that it's
19 been in exceedance for some period of time, and then
20 they can take remedial measures and do the
21 diversions and so forth that their plan would
22 anticipate.

23 And again, that particular narrow aspect was
24 one I just couldn't answer based on what I read in
25 the FSAR or the environmental report, for that

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1 matter, in terms of just when it would be that they
2 would know that they had gone in excess of the
3 regulatory limit.

4 JUDGE YOUNG: I'm the non-technical person up
5 here so I'm going to ask for help from all parties
6 here, but I'm trying to get a handle on this. If,
7 as they say, their application does address the
8 manner in which they anticipate and prevent the
9 buildup of tritium in the reservoir, and then if
10 necessary, divert it, and if you don't any dispute
11 with what they're doing, I guess my question would
12 be what -- if there's no dispute, we can't admit a
13 contention, so what would be the dispute that would
14 be left to be litigated with regard to tritium? And
15 then with regard to the particulate matter -- well,
16 let's deal with it one by one.

17 MR. EYE: Tritium first.

18 JUDGE YOUNG: Okay.

19 MR. EYE: The tritium, our contention is based
20 on the statement in the application that with all
21 four units running they run the risk of exceeding
22 tritium levels -- I believe is a pretty close
23 verbatim quote. If that's the case, then the
24 Petitioners contend that there ought to be some
25 means by which to know precisely when they will trip

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1 the regulatory limit to prevent going in excess.

2 And based on what we can glean from the
3 documentation of the Applicant, it appears that they
4 would have to wait for the next monitoring cycle to
5 know whether or not they had been in exceedance
6 status.

7 JUDGE YOUNG: But if they're doing the
8 trending -- and that's why I asked the question do
9 you have a dispute with what they describe about
10 what they're doing and with the references to the
11 sections of FSAR -- if they're doing these things,
12 I'm trying to get you to be a little more specific
13 on where you have a dispute with what they're doing.

14 If the monitoring that's described is done in
15 such a manner that they would not reach a point of
16 violating the limits because they would know about
17 it approaching that point well before and they would
18 take precautions well before they approached that
19 limit, where's the specific dispute?

20 I mean, obviously you can be concerned about
21 the possibility of exceeding the limits, but if
22 there's a description in the application of how they
23 plan to do their monitoring so that they would be
24 able to catch it before it approached the limit and
25 then they have a procedure in place to divert if

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1 they reached -- if they approached that limit, then
2 what is your specific dispute with that?

3 MR. EYE: Part of it is really due to the
4 nature of tritium itself with a half life of about
5 twelve years, and it's that it has the potential to
6 accumulate over time, obviously, because that's why
7 they monitor for it.

8 We don't dispute that they monitor, we don't
9 dispute that they can track and trend; that's what
10 they're in the business to do, at least partially.
11 We don't dispute that they have a means by which to
12 divert and at least on a temporary basis maybe deal
13 with what looks like a situation where they've
14 either exceeded tritium limits or they're tracking
15 and trending very close to doing that.

16 But that really doesn't give the Petitioners
17 the kind of assurance that over time their
18 methods -- not the monitoring, but the methods by
19 which to deal with remediation -- will be effective
20 so that the Squaw Creek Reservoir will continue to
21 be the kind of facility that they need to discharge
22 water into.

23 So in other words, if they're tracking and
24 trending and they find that they are moving up
25 toward the limits where they would be in excess of

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1 the regulatory standard and they begin their
2 diversion, is this a function of having to wait for
3 a long period of time until the decay level drops to
4 a point in the reservoir where they can again begin
5 to discharge water into the diversion structures?
6 That really isn't addressed.

7 I mean, they don't take on the question of the
8 tritium levels in the diversion structures, only the
9 tritium levels in the reservoir itself, so that's on
10 the tritium side. It's just -- it's that
11 recognition that they are going to be generating a
12 lot and that there may be management problems with
13 making sure that it doesn't exceed regulatory
14 limits.

15 I don't want to repeat myself on the
16 particulate. I think we've laid that out as best we
17 can. I will say, however, in response to the
18 Applicant that we looked at the table that they just
19 referenced, and there's not a specific
20 quantification in this as to specific particulates
21 that are being discharged.

22 There is a very long list, and you can see it,
23 but it does not specify what particulates are being
24 discharged. They may be in there, but they are not
25 called out to relate back to the statement in their

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1 environmental report about the accumulation of these
2 particulates in the sediment of Squaw Creek
3 Reservoir.

4 Well, I don't know that that -- for us, that
5 doesn't seem like an adequate specification, given
6 the recognition that there is this accumulation in
7 the sediment.

8 JUDGE YOUNG: Can you clarify?

9 MR. FRANTZ: Yes. I want to correct a couple
10 of misperceptions here.

11 One, we would not hold up tritium until it
12 decays. That is not the method specified in our
13 environmental report or FSAR. Instead what we would
14 do -- and this is clearly listed on page 11.2-3 of
15 the SR -- we would dilute the tritium and then
16 release it.

17 Second of all, Mr. Eye has perhaps mixed up
18 some monitoring that we do. We do two types of
19 monitoring. We do the periodic environmental
20 monitoring of the Squaw Creek Reservoir, but we do
21 continuous monitoring of effluents. That's process
22 monitoring.

23 And as described in page 6.2-1 of our
24 environmental report, "Radioactive liquids are
25 filtered, treated, sampled, prior to discharge, and

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1 monitored continuously during release." And so we
2 do have continuous monitoring of effluent releases.

3 Finally, with respect to his last comment
4 about these tables and the FSAR, I don't know what
5 he's talking about. We have listed every
6 radionuclide that's being emitted to identify their
7 concentrations and show that they're a very small
8 fraction of the limits. I don't know what more he
9 could possibly want than what we have in those
10 tables of the FSAR.

11 JUDGE YOUNG: Are you looking at the same
12 thing? Can you refer to pages so that we -- can we
13 clarify what the different perceptions are here?

14 MS. BROWN: 11.2-6, FSAR.

15 MR. FRANTZ: And going to that page -- and
16 I'll just start. There's a list there. It must be
17 20 or 30 radionuclides, isotopes, various isotopes,
18 on that very page. There are more pages. And for
19 each of those isotopes, it identifies there were
20 these quantities, generation quantities, from
21 various sources, and then the total amount of the
22 releases, and then going on to Table 11.2-12R, which
23 is on page -- starts on page 11.2-10, again it has
24 the list of isotopes, and for each one, it has a
25 discharge concentration, and microcuries per

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1 milliliter. It has the concentration limit for that
2 isotope, and it has the fraction of the
3 concentration limit.

4 JUDGE YOUNG: Are you seeing what he's talking
5 about?

6 MR. EYE: Yes, Your Honor. But, again, this
7 is a table that specifies liquid discharges. It
8 doesn't specify solids that are being discharged,
9 and in that regard, do I take the explanation by
10 counsel to mean, for example, that there are
11 particulates of cobalt that can be found? -- because
12 they list a very long line-up of isotopes. Which of
13 those are the particulate that are being
14 discharged? -- because that specification or that
15 differentiation isn't made.

16 MR. FRANTZ: These are the total effluent
17 limits and expected amounts. It doesn't really
18 matters what the form is, whether it's dissolved
19 matter, whether it's particulate matter. It's all
20 listed here on this table, including cobalt-60 and
21 cobalt-58.

22 MR. EYE: And so do I take it to mean that
23 when counsel says that before this liquid is
24 discharged, it's, I think -- I'm not sure I got the
25 full listing, but it's filtered, treated, monitored,

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1 and there are still particulates that are
2 discharged.

3 MR. FRANTZ: Yes.

4 MR. EYE: That's our problem, Your Honor.

5 Even with the --

6 MR. FRANTZ: That's not --

7 MR. EYE: I'm sorry.

8 MR. FRANTZ: I'm sorry, Mr. Eye. Go ahead.

9 MR. EYE: Even with their best efforts
10 minimize discharge and particulates on that
11 assumption, they're still being discharged, and so
12 it's our position that these are essentially waiting
13 in the sediment to go somewhere, to be dispositioned
14 either over time, before they decay, because some of
15 these have very long decay times.

16 JUDGE YOUNG: But, I guess, we sort of tend to
17 keep going -- coming back around to an issue of
18 whether what's being disputed is something that is
19 permitted by the regulations and that, as I
20 understand the Applicant, they're saying that they
21 do monitoring, they keep records of what the various
22 substances are, whether they be particulates or
23 dissolved in liquid, effluents, and that anything
24 that is discharged would be under and within the
25 limits that are permitted under the regulations.

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1 And so if you're -- if what you're disputing
2 is those discharges that are permitted under the
3 regulations, then wouldn't that be a dispute with
4 the regulation?

5 MR. EYE: No, Your Honor. They say that there
6 is a radiological impact to that reservoir from
7 radioactive particulate. Because they meet
8 regulatory limits on an annual basis says nothing
9 what the long-term radiological impact would be on
10 that sediment 30, 40 years down the line, after it's
11 accumulated all these radioactive particulates.

12 It's the Petitioners' position that before you
13 all make a decision about whether there ought to be
14 a license that issues to this proposed facility or
15 not, you ought to know what the end result will be
16 in that sediment as far as the build-up of
17 radioactive particulate.

18 If you take a particular snapshot over any one
19 year's period -- okay. Let's work on the assumption
20 that it meets regulatory limits. Does that tell us
21 anything about what that sediment will be like 30 or
22 40 years after it's been continuously impacted, by
23 their own admission?

24 JUDGE YOUNG: If they're required to take
25 samples on a periodic basis and the samples would

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1 include everything that's been built up and the
2 samples are required to meet the regulatory limits,
3 wouldn't that address your concern?

4 MR. EYE: In the analysis that they've done so
5 far, there's no indication of a cumulative impact
6 analysis, other than just they've qualitatively
7 described it in the environmental report, but what
8 was the radioactive limits of that sediment five
9 years ago? What is it now? What is it going to be
10 30 years from now? They say that there's a
11 cumulative impact. Well, what is it? I mean,
12 that's our question.

13 JUDGE ARNOLD: Let me just ask Applicant a
14 question that may help on this.

15 I mentioned earlier that looking at 10 CFR
16 20.2001, it said you can discharge as long as you're
17 below the limits of 1301, and I noted that those
18 limits were in terms of dose rate.

19 Now, if you're evaluating the dose rate from
20 the effluent that has gone into the lake, does that
21 not account for all radioactive materials that have
22 been deposited in that lake and are still there?

23 MR. FRANTZ: I don't know the details. I
24 assume that that is the case. Yes.

25 JUDGE ARNOLD: So it is a cumulative impact.

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1 Cumulatively what you've discharged in here is
2 giving a dose less than, I think it was --

3 MR. FRANTZ: Yes. We --

4 JUDGE YOUNG: -- .1 --

5 MR. FRANTZ: -- certainly do monitor, and
6 monitoring by definition in the environment does
7 pick up the cumulative impacts on the environment,
8 by definition.

9 JUDGE YOUNG: Since you said you weren't
10 absolutely clear on that, can you talk with your
11 people and also tell us where in the application
12 that issue would be addressed, in terms of what type
13 of monitoring or sampling or testing that would be
14 done to address the accumulating over the years
15 sediment and what it contains?

16 MR. FRANTZ: I will check with my client and
17 get back to you at the break -- after the break.

18 JUDGE YOUNG: Judge Mignerey, do you have
19 anything to add or ask on this?

20 JUDGE MIGNEREY: No, I do not.

21 JUDGE ARNOLD: I do, and it's back on the
22 tritium. Once again, the question's for the
23 Applicant. The environmental report, Section 5.2.1
24 states, "Under this maximum tritium-generation
25 condition and maintaining a 20 percent margin below

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1 the off-site dose calculation manual" -- and then it
2 goes on. From that, it would seem to infer that
3 your own goal is to maintain tritium levels at 80
4 percent of the limit.

5 MR. FRANTZ: I believe that's correct. Yes.

6 JUDGE YOUNG: Maintain or not go over?

7 MR. FRANTZ: Not go above the --

8 JUDGE ARNOLD: Let's assume that you were at
9 80 percent of the limit, and you have four plants
10 operating at full power. Do you have any idea of
11 the time frame it would take to exceed 100 percent
12 without taking any action? Is it hours? Days?
13 Weeks?

14 MR. FRANTZ: I don't know, but, again, we do
15 continuous monitoring of our effluents. Our process
16 monitoring is continuous, and so we would know it
17 immediately, essentially.

18 JUDGE ARNOLD: Well, I'm just saying, because
19 if this is something that would take months to
20 occur, I would think even periodic monitoring would
21 be enough, whereas if we're talking days, you could
22 miss it. And so if you could maybe get back and
23 answer with that, too.

24 MR. FRANTZ: Yes.

25 JUDGE YOUNG: Did you have anything further,

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1 Mr. Eye?

2 MR. EYE: Your Honor, I want to make sure that
3 our record is clear on this, and I want to -- this
4 citation to the FSAR that we were referring to is on
5 page 11.2-2, and it says, "However, during the
6 maximum tritium-generation condition (i.e., all four
7 units operating full power), the tritium
8 concentration could be exceeded."

9 And then there's a discussion about the 20
10 percent that they want to maintain, so that's -- I
11 just want to make sure that we made clear to you
12 what provision it was that triggered our contention
13 and concern.

14 The only other thing I would want to raise is
15 related to the argument that has come up about
16 maintaining dam structural integrity and so forth.
17 And I -- this is disputed matter in the context of
18 the motion to strike. At least part of it is, at
19 any rate. And although the way we responded to this
20 by citing Federal Rule of Evidence 702, which deals
21 with expert testimony and so forth. It seemed to us
22 to be a legal response to their objections.

23 And in that regard, it seems to us that there
24 are -- it's not only that the dam -- maintaining the
25 dam's structural integrity is important from a

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1 radiological standpoint, not needlessly exposing
2 downstream people to tritium exposures and
3 particulates or whatever it might be, but without
4 that dam, they don't operate the plant. I mean,
5 it's a necessary facility in order to have that
6 plant function, and, I mean, it just seems to us
7 that if it's a, to use some slang, kind of a deal-
8 breaker, if it's not there, that it's so important
9 that it ought to get a lot more attention than it
10 did in the environmental report, because it got
11 virtually no attention in the environmental report,
12 the dam structure itself.

13 I don't even remember specifically whether it
14 was described in any kind of quantified or even
15 qualitative way. So that's -- we think that the dam
16 is an under-studied aspect of the plant, and so we
17 would urge that the Commission or this Panel take
18 that up in a way so that there can be some assurance
19 that 30 years from now, 40 years now, that dam is
20 still going to be serviceable, because again,
21 without it, the plant shuts down. If there are four
22 of them, all four of them would shut down.

23 MR. FRANTZ: Can I just add one more thing?
24 We've heard a lot from Mr. Eye, but we have
25 absolutely nothing in his petition to intervene or

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1 in his reply, for that matter, that provide any
2 technical support for any of his allegations
3 regarding radiological impacts. There's absolutely
4 nothing, and as a result, his contention is
5 especially deficient under Section 2.309(f)(1)(5).

6 He's doing nothing but speculating at this
7 point, and there is plenty of Commission precedent
8 that speculation is not a sufficient basis for a
9 contention. That's all we have here in Contention
10 8, is speculation.

11 MR. EYE: It's hardly speculation when we take
12 the facts out of the environmental report that the
13 Applicant's prepared.

14 JUDGE YOUNG: Let me just ask this couple of
15 questions, and then we'll get to the Staff. And,
16 again, I'm asking, from a layperson's perspective,
17 so that I'll be clear at least.

18 With regard to the quotation from page 11.2-2,
19 that the tritium concentration could be exceeded, is
20 there another place where the application says that
21 if it is exceeded, that would be taken care of in
22 advance by the diversion, or what is -- how do you
23 deal with that statement?

24 MR. FRANTZ: Well, again, once we -- we do
25 have our effluent process monitoring on a continuous

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1 basis, and if we were to exceed our limits, we'd
2 have to stop the discharges right then.

3 JUDGE YOUNG: So that statement -- and we were
4 trying to get it up, but we don't have that right
5 here. That statement, how would you explain that
6 statement?

7 MR. FRANTZ: It's an attempt to explain our
8 process and our operations. What it's saying is
9 that if we were to get close to exceeding our
10 limits, what we'll do is just divert the effluent to
11 evaporation ponds or holdup tanks and we would only
12 then discharge it -- if you go on to the next page,
13 we would discharge it when we have enough other
14 water to dilute the effluent to make sure it's
15 within our tritium limits.

16 JUDGE YOUNG: With regard to the purpose of
17 the reservoir and the dam, is what you're arguing
18 that in effect it's sort of a redundancy because
19 your procedures are sufficient to ensure that
20 whatever goes into it would be under the limits but
21 that this is sort of a secondary protective measure.
22 How do you address what Mr. Eye said about that it's
23 required for the operation of the plant?

24 MR. FRANTZ: He's correct with respect to
25 Units 1 and 2; I don't believe he's correct with

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1 respect to Units 3 and 4. For Units 3 and 4 the
2 cooling water for the circulating water system is
3 drawn from Lake Granbury, not from Squaw Creek
4 Reservoir, so there's a different cooling source for
5 Units 3 and 4 than there is for 1 and 2.

6 We do use the common discharge port for
7 radioactive effluents for all four units. The
8 discharges, though, from the circulating water
9 system do go back to Lake Granbury, so we do have
10 two different discharge ports, if you will: one for
11 cooling of Units 3 and 4 and that goes back to Lake
12 Granbury, and one for other kinds of discharges
13 which goes into Squaw Creek Reservoir.

14 JUDGE YOUNG: Does that address your --

15 MR. EYE: It confirms what we said: To the
16 extent that they need a point of discharge and they
17 no longer have a retention structure to keep the
18 radioactive water that's discharged impounded, that
19 seems to us to be a pretty serious operational
20 point.

21 MR. FRANTZ: And we could discharge that
22 directly into a stream, a river or ocean or
23 anything, as long as we're within limits.

24 JUDGE YOUNG: So that gets back to my earlier
25 question: To the extent that it's there to be a

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1 place to discharge into, are you relying on it as a
2 redundancy, as a secondary protective measure
3 following the first protective measure, which is to
4 make sure that there are no discharges that go into
5 it, or that there are no discharges that accumulate
6 that would violate the regulatory requirements in
7 the first place? Am I understanding that right?

8 MR. FRANTZ: The primary purpose of Squaw
9 Creek Reservoir is to act as a cooling source for
10 Units 1 and 2; it's not to act as a backup for
11 dilution, as far as I know.

12 We do additional monitoring, not only in Squaw
13 Creek Reservoir but elsewhere out in the environment
14 to, again, make sure that to the extent there is any
15 accumulation we catch that, and to the extent that
16 there may be accidental releases, we catch that.

17 But again, I don't think Squaw Creek Reservoir
18 is designed or intended to be as a backup for our
19 process effluent system; that's designed to release
20 effluents within NRC concentration limits.

21 MR. EYE: I think we've exhausted this
22 particular point as far as Petitioners are
23 concerned, at least right now.

24 JUDGE YOUNG: Okay, Ms. Simon.

25 MS. SIMON: Thank you, Your Honor.

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1 I'd like to initially add just one -- well,
2 two citations to the regulatory requirements. One
3 is I'm not sure that anyone mentioned Part 50,
4 Appendix I, which is the as low as reasonably
5 achievable, or ALARA, guidance, and I think Section
6 2(a) deals with the liquid effluent limits in that
7 regard.

8 And I'd also like to say that another
9 regulatory requirement that's relevant to consider
10 in Contention 8, as with other contentions, is
11 2.309(f)(1), and as was pointed out a few minutes
12 ago, getting back to a big-picture perspective,
13 there is no adequate support for this contention
14 under 2.309(f)(1)(5).

15 Commission case law is clear that it's the
16 Petitioners' burden to provide the necessary
17 support, as is shown most recently in Sharon Harris,
18 CLI 09-8, slip opinion at page 9, where the
19 Commission reiterates that. So the Staff's position
20 is that Petitioners did not and still has not
21 provided that necessary support.

22 JUDGE YOUNG: Can you address the issue of
23 support by separating it out into the different
24 parts of the argument?

25 MS. SIMON: Certainly, Your Honor, and I think

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1 we've addressed this to some extent in our pleading,
2 but I'll review it for you.

3 With respect to the -- there are several, I
4 guess, parts to this contention as originally
5 written with respect to the environmental and public
6 health impacts of dam failure leading to release of
7 radioactive particulate. There were no effects in
8 the original petition to demonstrate any risk of dam
9 failure or any risk that radioactive particulate and
10 sediment would be transported downstream in the
11 event of dam failure.

12 JUDGE YOUNG: On the dam failure itself, how
13 do you address the argument in the reply that for
14 some things they're sort of self-evident and you
15 don't really need expert opinion. Dam failure, it's
16 being argued, is something that's more or less in
17 the common realm of knowledge that people in the
18 public have so that the type of support that you're
19 arguing would be necessary is not really required.

20 MS. SIMON: It's true in general that dams do
21 fail; however, the issue there is whether this
22 particular dam will fail, and certainly there's been
23 no provision of information to show that every dam
24 will fail within a reasonable time frame -- I'm not
25 talking about 10,000 years, but with adequate

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1 maintenance and monitoring of a dam, it's not
2 necessarily true that it's common knowledge that a
3 particular dam will fail.

4 JUDGE YOUNG: But just limiting it to that --
5 and obviously, this is just one part of it and this
6 is why I asked you to separate it out into parts,
7 because without the radiological consequences, the
8 relevance of that would be drastically lowered, but
9 if -- well, I'm not sure -- if the application does
10 not contain the type of specification of what the
11 maintenance would be or analysis of the life span of
12 the dam would be, and assuming there were some
13 consequences of that, would you still be arguing
14 that there would need to be more support than was
15 provided for the argument that there's nothing in
16 the application to address the types of things
17 you're talking about? That's a little circular, but
18 do you understand what I'm getting at?

19 MS. SIMON: I think I do, and please correct
20 me if I misunderstand.

21 But first of all, we don't feel that there was
22 any support, so it's not a question of whether there
23 was enough support. Second, I'd like to just return
24 to the contention admissibility requirement, and the
25 burden is on the Petitioners.

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1 If they contend that there's a risk that this
2 dam is going to fail, they are the ones who have to
3 provide some support for that.

4 JUDGE YOUNG: Well, but let me back up. If
5 I'm understanding them to be saying that there's
6 nothing in the application showing that the dam will
7 remain strong, then the contention is not that the
8 dam will fail; the contention is that there is
9 nothing in the application to assure that it won't
10 fail.

11 So it somewhat becomes a matter of semantics,
12 but I think that could be a significant difference,
13 and if the argument is made that there's nothing in
14 the application to support that it won't fail and
15 you're raising the argument that, well, with proper
16 maintenance, et cetera, the dam shouldn't fail, is
17 there anything in fact in the application that
18 addresses maintaining the dam so that it won't fail?

19 MS. SIMON: I don't believe that it's
20 necessary to go to that, because the contention as
21 written, as specifically written by Petitioners, was
22 not that there's no information in the application
23 saying that the dam won't fail; the contention as
24 written --

25 JUDGE YOUNG: Well, it says, "There's no

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1 discussion in the environmental report of any
2 contingencies for a dam failure or the environmental
3 and public health consequences when radioactive-
4 laden sediment would be transported downstream as a
5 result."

6 So actually it says the environmental report
7 assumes that the dam will remain intact and
8 structurally reliable. There's no discussion for
9 any contingencies for dam failure.

10 So I guess it's a matter of interpretation,
11 but I think it could be reasonably read as saying by
12 saying that the environmental report assumes that
13 the dam will remain intact, that what's being said
14 there is that the environmental report doesn't
15 specify how assurance of the -- how the Applicant
16 will assure that the dam will remain intact, they're
17 just assuming it. That's what the Petitioners are
18 saying.

19 MS. SIMON: Right, but the entire contention
20 is that the dam will fail and there will be
21 environmental and public health radiological
22 impacts; that was the contention.

23 JUDGE YOUNG: Well, the contention actually is
24 inadequate, because it fails to fully analyze the
25 radiological hazards that will blah, blah, blah --

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1 pardon me.

2 (General laughter.)

3 JUDGE YOUNG: And then continuing on in the
4 basis for it, it addresses the issue of the dam
5 again as being -- by saying that the environmental
6 report assumes that the dam will remain intact.

7 Both of them seem to be -- in both cases they
8 seem to be challenging the lack of analysis rather
9 than asserting affirmatively that there will be a
10 failure, and I think it's sort of a difference maybe
11 that has some significance in terms of looking at
12 contention admissibility.

13 Now, with all that said, since the main thrust
14 of the contention has to do with radiological
15 hazards, this is sort of a side issue, but with
16 regard to the dam itself, I'm not sure that you're
17 really addressing what's being said which is that
18 the application doesn't analyze it.

19 MS. SIMON: The safety of the dam is discussed
20 in the FSAR on page 2.4-8. I don't know whether
21 that section, off the top of my head, that discusses
22 maintenance; I believe it discusses the design
23 flood, for example, that it's designed for, and
24 information like that. So there's not absolutely
25 nothing in the application regarding the structure

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1 of the dam.

2 JUDGE YOUNG: Okay, well, anyway, you can move
3 on to the --

4 MS. SIMON: Okay.

5 JUDGE ARNOLD: Well, let me just ask, if it
6 were a contention of omission saying that the
7 application omitted a specific discussion, to be
8 admissible, wouldn't there also have to be a showing
9 that that information should have been in the COLA?

10 MS. SIMON: Yes, that's correct, Judge Arnold.
11 There would have to be a showing that there's a
12 regulatory requirement for that information.

13 JUDGE ARNOLD: Did you see that in there
14 anywhere?

15 JUDGE YOUNG: Where is the requirement that
16 there has to be a showing of a regulatory
17 requirement?

18 MS. SIMON: How else could you show that it
19 was an omission if you didn't have some requirement
20 for the information?

21 JUDGE YOUNG: Well, I'm not sure that I agree
22 that this is a contention of omission, but let's
23 assume that it is what has been termed a contention
24 of omission. Couldn't there be a contention of
25 omission that says the application does not contain

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1 X, which is necessary to assure the safety of the
2 public in these specific circumstances without
3 making any reference, any citation to a regulatory
4 requirement?

5 MS. SIMON: I think there has to be a specific
6 citation to a requirement.

7 JUDGE YOUNG: Where does it say that in the
8 rule? This is a very strict rule, and if it doesn't
9 say that in the rule, I'm not sure that we should
10 add it to the rule

11 MS. SIMON: There is no rule specifically
12 regarding a contention of omission, and the Staff,
13 it is not our position that this is a contention of
14 omission, this is a contention of inadequacy with
15 failing to analyze -- among other things, failing to
16 analyze the environmental and public health impacts
17 of radiological releases if the dam should fail. So
18 I'm not sure that it's even necessary to go to the
19 contention of omission.

20 JUDGE YOUNG: Okay. Then we can get back on
21 to the radiological hazards, or if you want to
22 finish up on that before you move on.

23 MS. SIMON: Thank you, Your Honor.

24 The other part of that equation is that the
25 Applicant has concluded that the environmental

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1 impacts of the particulate release into the
2 reservoir will be small, and that has not been
3 disputed: no facts or other support by the
4 Petitioner.

5 Our arguments with regard to dewatering and
6 airborne transfer are essentially similar; again, no
7 facts or expert support.

8 But let me also just say with regard to the
9 dam integrity, the Petitioner is now saying that
10 it's not just the issue of impacts from radiological
11 effluence but also purely that the dam is needed for
12 the function of the plant. That's a whole new
13 contention.

14 The Staff doesn't see that in the original
15 contention; there's nothing about the dam being
16 needed for the function of the plant, so we would
17 argue that that's essentially trying to amend the
18 contention at this point.

19 JUDGE YOUNG: I didn't take what they were
20 saying as trying to say that that was the
21 contention; I took that as an argument in support of
22 the contention that they made, but, in other words,
23 to stress the necessity of the dam to prevent the
24 release of the particulate matter or other matter
25 that would be in the reservoir, but maybe I

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1 misunderstood.

2 MS. SIMON: In the event that the Board did
3 take it that way, then I just wanted to state our
4 position.

5 Again with regard to the tritium and the
6 statement by the Petitioner, which was to the effect
7 that they will be generating a lot of tritium and
8 there may be management problems to make sure that
9 they don't exceed regulatory requirements, the
10 Applicant has provided information in the
11 application, showing how it meets the various
12 regulatory requirements, which are stated in terms
13 of dose, or in the case of the table in Part 20 in
14 terms of concentrations.

15 The Petitioners have not provided any
16 analysis, any facts, any expert opinion to contend
17 that the Applicant's analyses are somehow incorrect.
18 And, again, it's a lack of support for their
19 contention. They're making assertions without
20 support, and so we feel that that does not meet the
21 admissibility requirement.

22 And I think other than that, the other aspects
23 of the contention -- for instance, the
24 groundwater -- we didn't discuss, and I think that's
25 adequately addressed in our pleading.

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1 MR. EYE: Your Honor, I wanted to make sure
2 that the Panel has the citation in the FSAR that may
3 shed some light on this. The FSAR at 2.4.4.1 -- and
4 you'll find that at page 2.4-24 -- says,
5 "Structural" --

6 JUDGE YOUNG: Back up and say that again. I'm
7 sorry.

8 MR. EYE: Sure. It's page 2.4-24, and it's --
9 if you have it then, it's the second paragraph of
10 that section, Your Honor, that begins with the
11 sentence, "Structural analysis of each structure has
12 not been performed as a part of this analysis. The
13 potential backwater effects of dam failures on the
14 Brazos River are examined." And then it goes on
15 with some more discussion about 500-year flood and
16 so forth.

17 But we take that first sentence as indicating
18 that they -- that the Applicant has not done any
19 kind of an analysis of the dam.

20 JUDGE YOUNG: Anything further on
21 Contention --

22 MR. FRANTZ: Yes. I just -- not that we
23 haven't done any analysis. Obviously we have done
24 an analysis. We had to build the dam to begin with,
25 and in that regard, the dam's been in existence

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1 since 1977 and was built for serving Units 1 and 2.
2 Therefore, it's not very surprising that our FSAR
3 for 3 and 4 don't discuss the structural engineering
4 criteria for that dam. It's just not relevant to
5 our application.

6 JUDGE YOUNG: You were going to get back to us
7 with two --

8 MR. FRANTZ: Yes. I need to get -- perhaps at
9 the break, if I can discuss with my client the
10 matters, I'll get back to you immediately after the
11 break.

12 JUDGE YOUNG: Okay. Is there anything else on
13 Contention 8?

14 MS. SIMON: Your Honor --

15 JUDGE YOUNG: Yes.

16 MS. SIMON: -- I'd just like to add that
17 again, there was no dispute raised with Section
18 2.4.4.1 in the FSAR in the petition.

19 JUDGE YOUNG: Maybe it would be good to take a
20 break now so you can do that now, and we'll deal
21 with that before we move on. Okay. Ten minutes.

22 (A brief recess was taken.)

23 JUDGE YOUNG: All right. Mr. Frantz.

24 MR. FRANTZ: Yes. Thank you. The Board had
25 two questions. The first question essentially asked

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1 whether our dose evaluations accounted for the
2 accumulation of radionuclides in the environment,
3 and the answer is, yes, they do. Based upon our
4 weekly and monthly environmental monitoring, we use
5 the results of that monitoring then to do our
6 calculation of doses to members of the public.

7 And because by definition we're doing
8 environmental monitoring, that does account for the
9 accumulation of any radionuclides out in the
10 environment. The --

11 JUDGE YOUNG: Could you explain that to me in
12 maybe a little bit more simplified terms? When you
13 do the environmental monitoring -- you said by
14 virtue of the fact that you do the environmental
15 monitoring.

16 MR. FRANTZ: Yes.

17 JUDGE YOUNG: You're talking about off-site.

18 MR. FRANTZ: That's correct.

19 JUDGE YOUNG: Well, what about the argument
20 that it accumulates in the reservoir?

21 MR. FRANTZ: Well, to me, the reservoir would
22 be, quote, off-site. That's part of the off-site
23 monitoring program, as distinct from in-plant, in-
24 process monitoring of the effluent.

25 JUDGE YOUNG: So when you say you do the

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1 monitoring of effluent, you're talking about the
2 effluent into the reservoir?

3 MR. FRANTZ: Yes. As I said, we do continuous
4 monitoring there, and then when it's outside our
5 plant systems, we then do the environmental
6 monitoring on a weekly and monthly basis.

7 JUDGE YOUNG: And when you take -- the
8 argument, as I understood it, was that there's no
9 means to measure how much accumulates in the
10 sediment at the bottom of the reservoir.

11 MR. FRANTZ: No. There is a way, and we do in
12 fact do periodic sampling of that sediment. What we
13 have found over 15 years is that there has never
14 been any detectable levels of radionuclides due to
15 plant effluents from Units 1 and Units 2.

16 Now, there are other radionuclides, naturally
17 occurring radionuclides. Cesium-137, if I recall
18 that correctly, has been detected, but that was
19 detected even before we began plant operation, so we
20 don't attribute that to plant operation.

21 JUDGE YOUNG: So the sampling that you do of
22 the sediment would be that you would actually go
23 down to the mud and go deep enough so that it would
24 take into account everything that had accumulated
25 there over the years, not just the top.

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1 MR. FRANTZ: Now, I don't know how deep it
2 goes, but I assume it would be deep enough to
3 account for that. Yes. I'll ask my people to
4 correct me if I'm wrong.

5 (Pause.)

6 MR. FRANTZ: Yes. It does take into account
7 sediment buildup.

8 JUDGE YOUNG: Okay. Just out of curiosity, is
9 that mentioned in the application anywhere or --

10 MR. FRANTZ: I don't know that the details of
11 the sampling in the sediment are discussed, but
12 again, I'll --

13 (Pause.)

14 MR. FRANTZ: Yes. Again to put this on the
15 record, it does not say all the details and the
16 methodology. It basically has the locations and
17 frequencies of collection.

18 JUDGE YOUNG: Is there any kind of generally
19 accepted state-of-the-art method for sampling
20 sediments?

21 (Pause.)

22 JUDGE YOUNG: Are you going to be able to
23 summarize that, or do you --

24 MR. FRANTZ: I think it's better if he just
25 comes up to the microphone and introduces himself

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1 and identifies his position and informs the Board.
2 I don't need to be an intermediary on this.

3 MR. BIGGINS: Judge, the Staff will consider
4 this legal argument rather than testimony.

5 MR. FLOYD: Yes. My name is Edwin Floyd, and
6 I'm environmental specialist with ENERCON Services.
7 I also used to work in this area of Comanche Peak,
8 in the environmental monitoring and effluents.

9 The sampling of sediment here in like Lake --
10 Squaw Creek, Squaw Creek Reservoir, Tres Rios, which
11 is downstream -- the sediment is so thin, there's
12 not much sediment, and so you can't do a dredge or
13 anything with mechanical devices, so we use the
14 samples or take them with a shovel, and they have to
15 gather at least 2.2 kilograms of the sediment in
16 that area, and it's collected, and that's done every
17 quarter. And then each one of those samples is
18 tested for gamma-isotopic radionuclides.

19 JUDGE YOUNG: Obviously we are sort of getting
20 into discussing some factual issues. I asked the
21 question in response to your concern about the
22 accumulation, and I think this is more, at this
23 point, to sort of provide clarification of that
24 issue that you raised today. But at the risk of
25 continuing this, I'd like to ask a little bit more

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1 clarification about how you do that.

2 You say you use a shovel. What kind of -- are
3 you talking about -- what kind of a shovel are you
4 talking about, and where in the reservoir would that
5 happen?

6 MR. EYE: Your Honor, I wish to object to
7 this --

8 JUDGE YOUNG: Okay.

9 MR. EYE: -- on the record. I want to make
10 sure that this is outside of what is expected or
11 anticipated in this particular oral argument, and
12 if --

13 JUDGE YOUNG: It is, and --

14 MR. EYE: I mean, I'm not trying to constrain
15 the Panel from gathering information that it
16 believes it needs, but I want to make a record
17 objection to this.

18 JUDGE YOUNG: No. You're fine to make that
19 objection, and I'm just rereading your contention
20 and trying to find anyplace where you mention the
21 cumulative effect. Can you help me out here?

22 MR. EYE: I'll try. (Perusing document.) I
23 think it's first in the quotation from the
24 environmental report that talks about the cumulative
25 radiological impact on Squaw Creek Reservoir.

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1 That's the first place that jumps out as I scan
2 this, Your Honor.

3 Then at the top of page 27, the paragraph that
4 states that there's no plan to remove or remediate
5 the particulate matter that is accumulating, and
6 instead there'll be just -- they'll wait for it to
7 decay, which I think infers that there's a
8 cumulative impact.

9 JUDGE YOUNG: Okay. We won't go any further
10 with this, because obviously I sort of invited your
11 objection, so --

12 On the other question -- thank you, sir,
13 anyway. We appreciate it.

14 On the other question?

15 MR. FRANTZ: Yes. The other question from the
16 Board was how long would it take to go from the 80
17 percent limit up to the 100 percent limit. And our
18 people say they estimate it's only on the order of
19 months, probably close to a year for that to occur,
20 and in contrast, we do tritium monitoring on weekly
21 and monthly basis, so we would catch that well
22 before we would reach the 100 percent limit.

23 JUDGE YOUNG: Okay. Any follow-up on
24 Contention 8?

25 MR. EYE: I think not from the Petitioners,

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1 Your Honor.

2 MR. FRANTZ: We have no more.

3 JUDGE YOUNG: All right. I guess where we
4 went just now sort of brings up the whole issue of
5 not getting into the merits of the contention.

6 Obviously there's been some argument back and
7 forth in the pleadings and here today about what the
8 actual situation is, and part of that was to address
9 the extent to which the contention challenges
10 radiological releases that would be -- that would
11 exceed radiological regulatory limits, and those
12 that might be within limits.

13 And I think we tried to get some clarification
14 earlier from you as to which you are -- and when I
15 say you, I mean the Petitioners -- which you are
16 alleging, and I think the way the cumulative
17 discussion came up was that despite the assurances
18 in the responses, answers, that there are measures
19 there to address the -- to make sure that any
20 releases don't violate the radiological limits, you
21 felt that there was still this question of
22 accumulation.

23 Looking at this contention as being narrowed
24 to the accumulation issue, is there anything that
25 any of the parties would wish to add on Contention

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1 8, without getting into -- getting testimony from
2 non-lawyers?

3 MR. FRANTZ: Just that to date there has been
4 no detectable accumulation of particulate in the
5 sediments, which is their issue.

6 JUDGE YOUNG: And to the extent that that
7 would leave open the possibility that there could in
8 the future be detectable?

9 MR. FRANTZ: And, again, if there is, it would
10 be in such small amounts, well within regulatory
11 limits, that by definition, the environmental impact
12 would be small.

13 JUDGE YOUNG: And the way that you're going to
14 assure that, by reference to the application --

15 MR. FRANTZ: That's correct, with our
16 environmental monitoring program that we discussed,
17 and our process monitoring, and we've discussed and
18 it's discussed in detail in Section 6.2 of the
19 environmental report.

20 MR. EYE: Your Honor, if I may just be heard
21 briefly on that, the reason I'm troubled by that
22 statement is because the environmental report says,
23 without quantification, that there is a radiological
24 impact on Squaw Creek Reservoir that is accumulating
25 due to plant operations, and then --

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1 JUDGE YOUNG: That's the part you've quoted.

2 MR. EYE: And it segues right into
3 particulate. Now, it's either one way or the other.
4 I mean, if there's been no empirical evidence to
5 support that there's a radiological impact, as I
6 think I just understood, then why the statement in
7 the environmental report that says that there is?

8 JUDGE YOUNG: It says there's an impact, and
9 then that takes us back to the nature of the impact,
10 whether it's an impact that we exceed the regulatory
11 limits or not.

12 MR. EYE: Right. And, for example, I would
13 have liked -- I mean, in a different hearing, I
14 would like to have cross-examined the person that
15 came to the table just a moment ago, to get some
16 specifications on precisely where they get their
17 samples in relation to the discharge point. Is it
18 right at the discharge point, or is it across the
19 reservoir? Is it just precisely where?

20 I mean, these are -- it's simply inconsistent
21 to suggest on the one hand, as it does in the
22 environmental report, that there are these
23 cumulative radiological impacts, and then to
24 essentially say that they've never been detected.

25 JUDGE YOUNG: All right. If there's nothing

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1 further on Contention 8, thank you all, and we will
2 move on to Contention 9. And this, I believe, is
3 one on which we did get a reply, so we'll start with
4 you again, Mr. Frantz.

5 MR. FRANTZ: Judge Young, it might be helpful,
6 though, if we could get some clarification from the
7 Petitioners first.

8 The Board had a question, asking the
9 Petitioners to identify the Savannah River study
10 that apparently forms the basis for Dr. Makhijani's
11 two statements. Before I start my reply or my
12 presentation, it would be very helpful to have an
13 answer to that question first.

14 MR. EYE: May I have just a moment, Your
15 Honor? I think I can --

16 (Pause.)

17 MR. EYE: Your Honor, the --

18 JUDGE MIGNEREY: This is Judge Mignerey. Is
19 anybody saying anything?

20 JUDGE YOUNG: No, we weren't. I think
21 someone's about to, though.

22 MR. EYE: Sorry, Judge. I was searching for
23 some documentation.

24 I took question 9(a), Your Honor, to mean --
25 it says, "Petitioner should be prepared to clarify

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1 Dr. Makhijani's reference to the Savannah River
2 study." I took that to mean that you wanted some,
3 why did we cite to it, and why was it a basis for
4 the contention and the arguments in support thereof.

5 And so that's pretty much what I was prepared
6 to talk about in terms of Dr. Makhijani's reliance
7 on the Savannah River study where the more advanced
8 lab-tap model was used, which under Dr. Makhijani's
9 analysis yielded a more accurate dose projection.

10 JUDGE YOUNG: I think we were -- it was going
11 more to the --

12 JUDGE ARNOLD: We want the reference.

13 JUDGE YOUNG: The actual reference.

14 MR. EYE: Right. And we're trying to locate
15 that, actually. Your Honor, can we try to contact
16 Dr. Makhijani and see if we can get specific
17 citation to that and provide it to you when we're
18 able to -- he's traveling, but we do -- we're able
19 to talk to him by -- or contact him by email, and if
20 that would be permissible, then we would certainly
21 do our best to get the specific citation to that as
22 soon as we're able to contact him and get that.

23 MR. FRANTZ: Judge Young, this, I think,
24 clearly indicates the problem we had with this
25 contention.

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1 They don't identify the source of their study.
2 We don't know what they're referring to. We can't
3 look at the report to make sure they're accurately
4 characterizing it, and we have no basis for knowing
5 what they're referring to. It's an unidentified
6 report. They have some obligation to come forward
7 to identify this report, so that we know what we
8 have to defend against.

9 We think we know what the report is. There is
10 a report that we cite in our answer. It's 1991
11 report by the Westinghouse Savannah River Company,
12 with number WSRC-RP-91-9975. We think that's the
13 report, because it seems to correspond with some of
14 the allegations in the contention, but we don't know
15 for sure. And a lot of our answer and a lot of what
16 I'm going to be saying here today is based upon that
17 Westinghouse 1991 Savannah River report.

18 Going to their reply, they do have a second
19 statement by Dr. Makhijani. That was not contained
20 in their initial petition. They had just a simple
21 one-page statement initially.

22 Again, I think the Board should strike this
23 longer statement in the Petitioners' reply because
24 it was not contained in their initial contention.
25 They have an obligation to come forward with this

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1 information up front and not withhold it until their
2 reply.

3 But even if the Board were to consider it, we
4 don't believe that it creates any genuine dispute of
5 material fact.

6 JUDGE YOUNG: Judge Arnold just suggested
7 something that might make sense here. Would it make
8 sense to put this contention off until tomorrow
9 morning?

10 MR. FRANTZ: I would be happy to do that.
11 Yes.

12 JUDGE YOUNG: Okay. And then we'll have more
13 information at that time.

14 MR. EYE: Thank you.

15 JUDGE YOUNG: Okay. Then on Contention 10, I
16 don't think you provided a reply.

17 MR. EYE: That is correct, Your Honor. And
18 this was the subject of one of your specific
19 questions that, if you would like, I could try to
20 respond to. This dealt with the MOX fuel
21 contention.

22 There probably is some confusion that's been
23 created here as a result of the reference to MOX
24 fuel in the Applicant's environmental report. We
25 took the reference and discussion in the

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1 environmental report about MOX fuel. We inferred
2 from that, that that was the fuel of choice for this
3 particular -- or the proposed reactors, Units 3 and
4 4.

5 Based upon the Applicant's answers and the
6 Staff as well, I believe, but certainly Applicant,
7 there appears to be at this time, at any rate, no
8 intention to use MOX fuel, at least at the beginning
9 of the operations of Units 3 and 4. I think that's
10 what I understand the Applicant's position to be.

11 And to the extent that that's the case, then I
12 don't know that this particular MOX fuel contention
13 should go into an adjudicatory phase, but -- and I
14 apologize if there was some needless work done with
15 this. It was simply in response to the statement in
16 the ER about MOX fuel, and we took that to mean that
17 that's what they were going to utilize, so --

18 JUDGE YOUNG: And if there were any plan in
19 the future to use it, as the Staff points out, there
20 would be a requirement for a license amendment, and
21 there'd be the right to a hearing on that. So can
22 we take it you're withdrawing Contention 10?

23 MR. EYE: Yes. At this time, we will. If
24 they submit their license, then we'll probably be
25 back to talk about that.

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1 JUDGE YOUNG: Okay.

2 MR. EYE: Thank you

3 JUDGE YOUNG: So then moving on to Contention
4 11, the impacts of global warming and climate
5 change, I should --

6 MR. EYE: Your Honor, may I make a suggestion
7 about how to handle Contention 11?

8 JUDGE YOUNG: Sure. Go ahead.

9 MR. EYE: I would suggest, if there's no
10 objection, of course, that we, for purposes of
11 brevity, combine 11 and 12, because they really are
12 kind of running in tandem, and to the extent that
13 we're talking about relationship between greenhouses
14 gases, global warming, inadequate water, those two
15 contentions are, I think, pretty closely related in
16 subject matter.

17 MR. FRANTZ: Judge Young, I think we would
18 object to that. We do see these as being separate
19 and raising very distinct issues, and we'd like to
20 deal with these separately.

21 JUDGE YOUNG: Staff have a view?

22 MR. BIGGINS: Judge, regarding the questions,
23 was the Board going to follow its questions next, or
24 are we going contention by contention now?

25 JUDGE YOUNG: What's your view on how we

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1 should go?

2 MR. BIGGINS: Well, I think it would be
3 appropriate to finish the questions that you had,
4 that the Board specifically had.

5 JUDGE YOUNG: And --

6 MR. BIGGINS: And then if you have additional
7 questions on the other contentions, obviously we're
8 available to answer them.

9 JUDGE YOUNG: And which question were you
10 referring to?

11 MR. BIGGINS: I was seeing question number 12
12 being next. And I did not see a question specific
13 to Contention 12.

14 JUDGE YOUNG: So are you agreeing with -- do
15 you think we should do Contentions 11 and 12
16 separately? Do you see any reason to do them
17 together?

18 MR. BIGGINS: I was prepared to respond to
19 your question 12, and if you want to handle
20 Contentions 11 and 12, we'll certainly respond to
21 those as well.

22 JUDGE YOUNG: Okay. So you have no view on
23 it. Let's just do them separately.

24 So I think you did file a reply on
25 Contention --

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1 MR. EYE: I don't think we did on 11, Your
2 Honor.

3 JUDGE YOUNG: Let me just get the right thing
4 in front of me here.

5 MR. EYE: I'll look again, but --

6 JUDGE YOUNG: You reference your reply to
7 Contention 8.

8 MR. EYE: Correct, Your Honor. We did.
9 That's right. I apologize. And, Your Honor,
10 without belaboring the record, that was primarily to
11 address the dilution factor that would be assumed --
12 which assumes an adequate supply of fresh water to
13 do the dilution, so as to bring tritium levels down
14 to the mark where they need to be to meet regulatory
15 standards.

16 And so we referenced the reply related to
17 number 8 for 11, because it's our contention that
18 with inadequate water resources, the dilution factor
19 would be inherently more difficult to achieve.

20 JUDGE YOUNG: All right. So do you want to go
21 first on Contention 11, or -- with that said or --

22 MR. FRANTZ: I'd be happy to.

23 JUDGE YOUNG: -- any proposal to --

24 MR. FRANTZ: Let me address the Board's
25 question first that it asked regarding the

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1 environmental regulations that pertain to global
2 warming and climate change, and I guess the short
3 answer is there are no NRC regulations that
4 specifically deal with climate change and global
5 warming.

6 There is another regulation, though, that just
7 deals in general with the topic, and that's 10 CFR
8 Section 51.45(b)(1), which states that in
9 environmental reports, the impacts shall be
10 discussed in proportion to their significance.

11 Similarly, if you go on to 10 CFR Part 51,
12 Appendix A.6, which deals with the contents of an
13 environmental statement, that regulation states,
14 "Data and analysis in a statement will be
15 commensurate with the importance of the impact, with
16 less important materials summarized, consolidated,
17 or simply referenced. Effort and attention will be
18 concentrated on important issues. Useless bulk will
19 be eliminated."

20 Turning and look at Contention 11 in light of
21 these regulations, Petitioners have provided
22 absolutely no basis for believing that Comanche Peak
23 would have any impact on global warming or climate
24 change. It has absolutely no technical support, no
25 expert opinion, nothing that would indicate that our

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1 plant will impact global warming.

2 JUDGE YOUNG: I think that the contention goes
3 more to that global warming may have an impact on --

4 MR. FRANTZ: Judge, you just stole my thunder
5 on that one. That was my very next statement.

6 JUDGE YOUNG: Oh.

7 MR. FRANTZ: And I think you're absolutely
8 right.

9 JUDGE YOUNG: Go right ahead.

10 MR. FRANTZ: The issue with this contention is
11 whether global warming will impact water
12 availability for use by the plant, not whether the
13 plant will impact global warming.

14 And with respect to the real issue in this
15 contention, again the Petitioners have provided
16 absolutely nothing, no expert opinion, on technical
17 support, no references, nothing that would impact --
18 that would show that there's going to be an impact
19 on water availability due to global warming.

20 Because they haven't provided any technical
21 support, this contention should be rejected pursuant
22 to Section 2.309(f)(1)(5).

23 JUDGE YOUNG: Now, there is case law that says
24 that you don't have to have expert's report. You
25 can have a fact-based argument.

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1 MR. FRANTZ: That's correct, but you need some
2 facts. You just can't have argument by counsel, so,
3 for example --

4 JUDGE YOUNG: But there are facts -- there are
5 allegations that there could be protracted drought.

6 MR. FRANTZ: Those are allegations and
7 speculation by counsel. The rules contemplate more
8 than that. It doesn't have to be an affidavit from
9 an expert. It could be, as they do in other cases,
10 citing to a technical report in literature. It
11 could be an NRC guidance document. It could be an
12 industry guidance document, but they need something
13 besides just pure speculation by counsel, and that's
14 what they don't have here.

15 JUDGE YOUNG: So are you arguing that global
16 warming, which might include protracted drought, is
17 speculation?

18 MR. FRANTZ: Yes, I am. There's nothing --
19 it's speculation on his part that there's nothing in
20 his contention that supports that allegation.

21 I might also add, by the way, that we do have
22 a section in our environmental report that looks at
23 water availability, including droughts, and
24 particularly our Chapter 2 of our environmental
25 report looks at this, and we show that even given

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1 droughts, we still have sufficient water
2 availability.

3 Petitioners have not cited that discussion.
4 They have not contested that discussion, so
5 therefore their contention also fails to satisfy
6 Section 2.309(f)(1)(6), which requires them to
7 contest the relevant portions of our environmental
8 report.

9 JUDGE YOUNG: Does your answer give that
10 reference? It was Chapter 2?

11 MR. FRANTZ: Yes.

12 JUDGE YOUNG: I'm trying to remember if you --
13 yes. You referenced sections --

14 MR. FRANTZ: Yes. It's, I believe, 2.3 of the
15 environmental report has a fairly extensive
16 discussion --

17 JUDGE YOUNG: Right. Historic droughts. You
18 do. That's right.

19 MR. FRANTZ: In this regard, by the way, their
20 contention is very similar to a contention that was
21 raised recently in the William States Lee COL
22 proceeding, and the Board rejected that contention,
23 again saying that the Petitioners' assumptions
24 regarding droughts were unsupported, and they had
25 failed to address the relevant portions of the

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1 application. For the same reasons, we believe the
2 Board should reject this contention.

3 There are a number of other allegations in
4 this contention that seem to have no relevance at
5 all to the contention itself. Again, the
6 contention, as you've pointed out, Judge Young, is
7 the impact of global warming on water availability,
8 but they have a couple pages in here regarding
9 impacts on Squaw Creek Reservoir, chemical
10 discharges, water quality, aquatic impacts, thermal
11 discharges. None of those have any relevance to
12 their contention itself. They just seem to be
13 thrown in randomly in this contention.

14 Therefore, the Board, I think, can just reject
15 this contention without even addressing these
16 ancillary statements or allegations by the
17 Petitioners. But, again, even if the Board were to
18 consider these other ancillary issues, there just,
19 again, is not any expert support for them.

20 They don't contest the relevant portions of
21 our environmental report. For example, Chapter 5 of
22 our environmental report discusses in detail the
23 environmental impacts of chemical discharges, water
24 quality issues, aquatic impacts, and thermal
25 discharges.

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1 Petitioners don't contest any of that in this
2 contention, so again, these other ancillary
3 allegations are also insufficient to satisfy the
4 Section 2.309(f)(1)(5) and (6); therefore, the
5 Board, I think can just reject this contention
6 without even addressing these ancillary statements
7 or allegations by the Petitioners.

8 But again, even if the Board were to consider
9 these other ancillary issues, there just, again, is
10 not any expert support for them; they don't contest
11 the relevant portions of our environmental report.
12 For example, Chapter 5 of our environmental report
13 discusses in detail the environmental impacts of
14 chemical discharges, water quality issues, aquatic
15 impacts and thermal discharges.

16 Petitioners don't contest any of that in this
17 contention, so again, these other ancillary
18 allegations are also insufficient to satisfy Section
19 2.309(f)(1)(5) and (6).

20 JUDGE YOUNG: Mr. Eye, can you address in the
21 course of your argument the failure to address the
22 sections in the environmental report that do talk
23 about historic droughts?

24 MR. EYE: I don't think I can elaborate on it
25 any more than we did in our original petition, Your

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1 Honor, or in the reply where we cited some
2 additional references to droughts and so forth.

3 JUDGE YOUNG: Staff?

4 MR. BIGGINS: Yes, thank you, Your Honor.

5 I'll start with the Staff's position that its answer
6 does address the admissibility of the contention
7 under 2309(f)(1). But go directly to your question
8 on 12, which I read as a very broad question, so
9 I'll start with a broad answer, particularly
10 regarding what environmental regulations relate to
11 the matters that might be taken into account for
12 global warming or climate change.

13 And the Staff position is that there are no
14 directly applicable regulations that speak directly
15 to global warming or climate change; however, at a
16 high level, Section 102 of NEPA does provide that
17 all agencies of the Federal Government shall, and
18 then 102, Subsection (2), paragraphs (a), (c) and
19 (f) provide some detail, including: "Include in
20 every recommendation a report on proposals for
21 legislation and other major federal actions
22 significantly affecting the quality to human
23 environment. A detailed statement by the
24 responsible official on: 1) the environmental
25 impact of the proposed action..." And there are

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1 more requirements within Section 102 of NEPA; I
2 won't go through all of them at this time.

3 The overall view of the Staff, though, is that
4 the Staff must review and provide in its EIS an
5 analysis of the significant impacts of this proposed
6 action which part of that will be an analysis of
7 global warming or climate change to determine,
8 first, whether they are significant, and then,
9 second, if they are not significant, to eliminate
10 them from detailed study as provided in the numerous
11 sections of Part 51, but particularly 10 CFR 51.29

12 The scoping process description gives an idea
13 of how the staff would approach these kinds of
14 issues. First, the Staff, in subsection (a)(2),
15 would identify the significant issues to analyze in
16 depth, and then in (a)(3) identify and eliminate
17 from detailed study issues which are peripheral and
18 are not significant.

19 So in that respect, the Staff will look at
20 global warming and climate change from the
21 environmental perspective in order to comply with
22 the requirements of NEPA, and that analysis will be
23 in our EIS.

24 Now, on the safety side, there is also a
25 consideration in our regulations -- and I don't

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1 believe this was raised by the Petitioners --
2 generic design criteria 2, in 10 CFR Part 50,
3 Appendix A, provides that: "The design basis for
4 protection against natural phenomena would be
5 structures, systems and components important to
6 safety shall be designed to withstand the effects of
7 natural phenomena such as earthquakes, tornadoes,
8 hurricanes, floods, tsunami, seiches and loss of
9 capability to perform their safety functions, and
10 the design basis for these structures, systems and
11 components shall reflect: 1) appropriate
12 consideration of the most severe of the natural
13 phenomena that have been historically reported for
14 the site and surrounding area with sufficient margin
15 for the limited accuracy, quantity and period of
16 time in which the historical data have been
17 accumulated."

18 And so to sum up the Staff's approach, we will
19 be looking at, from one perspective or another,
20 climate change and global warming regarding both how
21 the plant could affect global warming or climate
22 change, and, two, how global warming or climate
23 change could affect the safe operation of the plant.

24 And I believe we can essentially eliminate
25 most of the concerns about the construction phase,

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1 because the Staff's view and understanding of global
2 warming is that it's not going to happen overnight.
3 We're talking about a long-term process.

4 And so we're primarily on the safety side
5 focusing on the safe operation of the plant. And
6 one citation that was not provided by the Applicant
7 or the Petitioners was to the final safety analysis
8 report of the COL application, where starting in
9 Section 2.3 on page 2.3-1, the application does
10 discuss meteorology and looks in depth from that
11 point all the way through -- I guess it would be
12 maybe into 2.4 even -- at the historical climatology
13 of the region and the area, the locality, and using
14 that predicts how that would affect the safe
15 operation of the plant, looking at floods, looking
16 at droughts, and other natural phenomena in order to
17 comply with GDC 2.

18 JUDGE YOUNG: To comply with?

19 MR. BIGGINS: The generic design criteria 2,
20 GDC 2 -- pardon me.

21 And so the way that the Staff looks at this
22 is, from the safety perspective, the Petitioners
23 haven't raised a dispute with all of this analysis
24 that is contained in the application, and so where
25 the portions of the contention start to talk about

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1 availability of water or drought or anything like
2 that, they have failed to review the application
3 completely and raise a material dispute.

4 With respect to the environmental analysis,
5 particularly how this plant will affect or could
6 possibly affect global warming or climate change,
7 that analysis is embodied in another regulation that
8 we've discussed in depth today, 51.51, the
9 environmental data of the uranium fuel cycle, Table
10 S3, and Table S3 considers the impacts of the
11 operation of the plant on the environment.

12 And although it was part of the background
13 information that was considered when the table was
14 created, I don't believe the Staff position is that
15 carbon dioxide -- which is what we're really talking
16 about when we're talking about global warming
17 impacts from operation of the plant were
18 specifically incorporated -- they're at least not
19 enumerated necessarily in Table S3.

20 However, the Staff believes that a CO2
21 emission could easily be calculated from Table S3
22 and the information supporting Table S3, and there
23 will be an analysis in the EIS regarding generally
24 global warming and climate change as the operation
25 of the plant could affect them.

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1 And so to that extent, I don't believe the
2 Petitioners have raised a dispute properly, either
3 on the safety side or on the environmental side, in
4 response to your question number 12.

5 And let me look back briefly. As the Staff --
6 and I won't go through all of this again because
7 it's laid out in our answer -- approximately nine
8 claims that the staff identified in Contention 11
9 and for the reasons cited in our answer, we believe
10 each one of those claims fails to meet the
11 admissibility criteria of 2.309(f)(1).

12 And with that, I'll take any questions that
13 you have.

14 JUDGE YOUNG: Taking each one of those as
15 support for the claim made in the contention itself,
16 how do you address those?

17 MR. BIGGINS: As support for the claim in the
18 contention?

19 JUDGE YOUNG: Right. Rather than treating
20 each one separately as a separate contention, and I
21 think we've gotten into this in other cases.

22 MR. BIGGINS: Well, certainly, however, I read
23 the contention itself as they set it out that the
24 Applicant failed to analyze the impacts of global
25 warming on rainfall, and my reading of each one of

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1 those claims, perhaps two of them relate to the
2 contention and the rest do not.

3 First, the impacts will include protracted
4 drought, which may compromise water resources. This
5 one may perhaps deal with global warming on
6 rainfall, however, again, the report that the
7 Petitioners used to support this talks about manmade
8 drought conditions from a decrease in end-stream
9 flow-ups has noting to do with global warming.

10 They also, again, when you're talking about
11 compromising water resources, you're talking a
12 safety analysis for the operation of the plant,
13 you're not talking about how the plant would
14 contribute to global warming or climate change, and
15 that first claim does not raise a dispute with the
16 information that's contained in the FSAR.

17 Claim 2 that relatively high levels of tritium
18 exist at this site versus other sites. In support
19 of this claim, they cited the Rice report, although
20 the Rice report itself identifies that Mr./Dr.
21 Rice -- I don't recall his status -- had
22 insufficient time to perform a thorough review.
23 I don't see how he can draw legitimate conclusions
24 if he's unable to perform his review.

25 In addition to that, there's no other

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1 information specific to this site or other sites
2 regarding tritium levels, and this is one of those
3 claims that has nothing to do with global warming or
4 its impacts on rainfall in the area.

5 Claim 3, the ER concedes that radioactive
6 particulate will be deposited in the sediment layer
7 of the SCR. Again, I don't see how that supports a
8 contention that alleges that there are impacts of
9 global warming on rainfall in this area. And I
10 believe that to the extent that they raise this
11 claim in this contention, it merely is a repetition
12 of the claim that was raised in Contention 8.

13 Claim 4, the Petitioners should assume that
14 the SCR dam will fail. Again, I don't see how this
15 is related to the impacts of global warming on
16 rainfall, and again, it is also raised in Contention
17 8 and has been dealt with thoroughly today.

18 Claim 5, the SCR perimeter security must be
19 provided beyond the operation of the license. Staff
20 position is that this also is not related to impacts
21 of global warming on rainfall and is outside of the
22 scope of this proceeding regardless, because it
23 relates to an issue beyond the operation of the
24 license.

25 Claim 6, that the Petitioners must resolve

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1 post-license ownership of the SCR in the COLA.
2 Again, the Staff does not see how this relates to
3 the impacts of global warming on rainfall and also
4 believes that dealing with post-license issues is
5 beyond the scope of this licensing proceeding.

6 Claim 7, the Applicant must analyze pollution
7 impacts from chemical treatment of water. I believe
8 this was raised in the previous contention. As the
9 Staff noted, in the answer the environmental report
10 does address liquid effluent impacts in the
11 environmental report Sections 3.6 and I believe 1.2,
12 and again has nothing to do with the impacts of
13 global warming on rainfall.

14 Claim 8, the COLA should consider impacts to
15 water waste quantity and quality, and while this may
16 be peripherally related in perhaps a cumulative way
17 to water quantity availability based on rainfall
18 amounts, they don't raise that issue; rather, they
19 simply say that the Petitioners must consider those
20 impacts and don't provide any details or analysis or
21 factual or expert support, for that matter.

22 And then claim 9 that the Staff identified,
23 heat energy and water directly released into the
24 atmosphere contribute to global warming. We think
25 that this might be the one claim that truly does

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1 relate to global warming as the operation of the
2 plant might affect global warming or climate change;
3 however, there is no support for this particular
4 claim to indicate that either the amount of heat
5 energy or the water vapor released from the
6 operation of the plant would have any effect or any
7 significant effect on global warming or climate
8 change, and without supporting that contention -- or
9 that claim, it fails to support the contention and
10 the contention would be inadmissible.

11 JUDGE YOUNG: What about the requirement in
12 51.45 -- and I think the Applicant mentioned this
13 that section -- that the environmental report shall
14 contain a description of the actions, statement of
15 its purposes, a description of the environment
16 affected. How does that relate to the subject you
17 addressed?

18 MR. BIGGINS: A description of the environment
19 affected?

20 JUDGE YOUNG: Right, which the allegation is
21 that there will be global warming, which will be
22 part of what should be taken into account.

23 MR. BIGGINS: From the heat energy and the
24 water directly released, that last claim? I want to
25 make sure I understand your question.

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1 JUDGE YOUNG: That global warming would be
2 part of the environment affected, insofar as it
3 affects the amount and whether there will be an
4 adequate supply of fresh water for purposes of plant
5 operations.

6 MR. BIGGINS: To the extent that the
7 regulation requires the Applicant to describe the
8 environment, the environmental report does do that
9 in Chapter 2, and the Petitioners don't raise any
10 dispute with the description of the environment in
11 that regard.

12 Now, where you've gotten back to whether or
13 not there is adequate water for the safe operation
14 of the plant, again, that's addressed in the final
15 safety analysis report, which the Petitioners don't
16 cite at all any of the lengthy analysis of the
17 climatology or availability of water for operation
18 of the plant

19 JUDGE ARNOLD: Let me just ask a hypothetical
20 question. If there was -- if global warming did
21 lead to a significant change in the climate,
22 significantly reducing the availability of water,
23 would there be some point at which plant operation
24 would be deemed no longer viable?

25 MR. BIGGINS: I take it from your question

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1 you're assuming this climate change or global
2 warming or drought would occur during the operating
3 life of the plant, and so within the licensed
4 operation period, if that were to occur, the FSAR
5 does describe the minimum water requirements for the
6 plant, and below which the plant cannot operate, but
7 that --

8 JUDGE YOUNG: Do you have a cite on that?

9 MR. BIGGINS: I don't. I'm simply responding
10 to the question. It's my understanding that
11 information's in the application.

12 JUDGE YOUNG: Okay. If you could provide that
13 later, just --

14 MR. BIGGINS: Certainly, Judge. So I'll
15 provide information specific to the water
16 requirements of the plant.

17 JUDGE YOUNG: The section of the FSAR that you
18 just referenced that requires minimum water
19 requirements for plant operation, I think is how you
20 described it.

21 MR. BIGGINS: I might have a section here I
22 can refer to.

23 JUDGE YOUNG: I didn't mean to interrupt the
24 flow of your argument. I just thought you might
25 have the cite handy.

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1 (Pause.)

2 MR. BIGGINS: Low water considerations are
3 identified in FSAR Section 2.4.11, starting on page
4 2.4-36. Plant requirements are specifically
5 addressed in 2.4.11.5, starting on page 2.4-38.

6 JUDGE YOUNG: Thank you.

7 MR. BIGGINS: Certainly. And so to ensure
8 that I respond to your question, Judge Arnold, we're
9 not talking about a situation that would happen
10 overnight, so for safe shutdown of the plant, if
11 water was not available, it would be something that
12 the plant operators would be able to identify over
13 time, and once they determined that they reached
14 that minimum water amount, they'd be able to safely
15 shut down the plant.

16 JUDGE ARNOLD: I do have another question for
17 Petitioner. I found the idea of global climate
18 change, the effects on operation, intriguing, but I
19 did not see anything in the petition that showed
20 definitively that global warming will lead to a
21 reduced amount of water, so I took a look, and, in
22 fact, I found there's a lot of theories by reputable
23 researchers, some that say, yes, there'll be less
24 rain.

25 There's a lot of them that say there'll be

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1 increased rain because of increased evaporation, and
2 then there's another group that says hot and dry
3 areas will get hotter and drier, and wet areas will
4 get wetter. So I'm not seeing a general consensus
5 on what the effect of global warming will be.

6 Faced with that situation, how does somebody
7 try to analyze the effect on that plant?

8 MR. EYE: Your Honor, I think that you've
9 identified the conundrum, frankly, that many
10 climatologists and climate models are facing. But
11 the reality is that the way we get our arms around
12 that is through the NEPA process, and what I just
13 heard Staff counsel suggest that is going to be done
14 in the anticipated environmental impact statement
15 related to Units 3 and 4 will be an attempt, at
16 least, to figure out what impacts might occur as a
17 result of global warming, as related to plant
18 operations.

19 And more specifically, I think one of the
20 issues that will pertain to that is the provision in
21 the FSAR about minimum water requirements in order
22 for operations to continue.

23 You're right. Climatologists have not
24 definitively determined precisely what the effects
25 will be at a particular geographic point. We

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1 cite -- and, again, this is a disputed matter, but
2 in our reply we cite to an article that was
3 published in Science last year, I believe it was,
4 that talked about a -- they used the term "permanent
5 drought." Now, "permanent" sounds -- you know, I
6 was criticizing somebody earlier today for using
7 absolutist terms. Well, "permanent" sounds pretty
8 absolute to me.

9 But in terms of the way the article couched
10 its analysis, it was that at least for the
11 foreseeable future, there would be a protracted
12 drought that was more severe than had been
13 experienced in the southwest part of our country
14 during anybody's living memory.

15 The manifestations of that, it seems to us,
16 ought to be covered or ought to be thought of as
17 contingencies for plant operations that would be a
18 natural thing to be covered in the environmental
19 report and the supporting documentation.

20 However, having heard Staff counsel for the
21 Commission today say that these will be issues that
22 will be covered in the context of the EIS frankly
23 encourages us that the precise task that you
24 outlined earlier about just how does one go about
25 doing this, will be -- there'll be a good-faith

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1 attempt to do that.

2 And frankly, that may be the better forum, may
3 be the better mechanism to address that, and in the
4 scoping comments for the EIS that we submitted,
5 we -- there was at least one provision in there
6 where we talked about projected climate change and
7 impacts on plant operations and so forth.

8 So to the extent that we've got another
9 process kind of running parallel to this, one that
10 might be a more appropriate way to deal with these
11 kinds of questions, that particular part of our
12 contention might be better dealt with in the EIS.

13 JUDGE ARNOLD: Okay. Also, reading from your
14 petition, to somewhat change the subject, "The COLA
15 should also include an analysis of pollution impacts
16 downstream from water contaminated by chemical
17 treatment such as biocides, algicides, pH
18 adjusters" -- blah, blah, blah.

19 Okay. Noting that the environmental report
20 does say, "The water treatment chemicals are
21 designed to be consumed by the system with residual
22 concentrations remaining in the effluent as at trace
23 to nondetectable levels," does that, in your mind --
24 is that not a statement of what the effect on the
25 environment is?

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1 MR. EYE: It -- I'm sorry. I didn't mean
2 to --

3 JUDGE ARNOLD: Go ahead.

4 MR. EYE: At any one snapshot of time, yes.
5 But, again, we're talking about plant operations
6 that could continue for many decades, and, again,
7 we're talking about cumulative impacts, and so I
8 think that's what that was geared toward. Right.

9 At any one point, a particular discharge might
10 have down to trace or something akin to that, but
11 we're going to have discharges over upwards of 30
12 years presumably if this thing -- if these units
13 would run at least that long and perhaps longer,
14 based on relicensing that's going on. So I think
15 that's the import of that observation, Your Honor.

16 JUDGE ARNOLD: Thank you.

17 JUDGE YOUNG: In view of what you just said
18 about the Staff's plans for EIS and also taking into
19 account the reference that Mr. Biggins provided of
20 FSAR at Section 2.4.11 and then under that 5 and 38,
21 I think, that there are requirements for minimum --
22 there are minimum water requirements for safe
23 operation, for operation, what remains in the
24 contention, and are you in a position to withdraw
25 any parts of it or if not, what would remain?

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1 MR. EYE: Your Honor, I think that the part
2 that would be most appropriately withdrawn, based
3 upon the comments of Staff counsel, would be the
4 relationship between global warming and protracted
5 drought in plant operations, to the extent that
6 those are going to be covered in the EIS.

7 I want to be -- I don't want to withdraw this
8 contention prematurely, but since we're on the
9 record and so forth, I think that we can rely on the
10 comments of Staff counsel that this will be included
11 in the scope of issues that would be analyzed in the
12 EIS.

13 So I think that that particular discrete issue
14 could be and probably might better be dealt with in
15 the context of the EIS.

16 JUDGE YOUNG: I guess I'm not following
17 completely what would be left, and also in terms of
18 the parts of the FSAR that staff cited, if there is
19 a provision in the application that says that there
20 are minimum water requirements and that if they
21 aren't met, the plant won't operate, and you haven't
22 disputed that, what happens to the contention? And
23 when I say, the contention, I mean the bolded part
24 on page 31 where the number 11 and then the four
25 lines there.

1 MR. EYE: Your Honor, it may be that we're
2 advancing toward the end of the day, and I'm not
3 sure I completely understood your question.

4 Is it if we reserve for the EIS the question
5 of the relationship between global warming and
6 potential impacts on plant operations, then
7 Contention 11 as set forth in the bold would be
8 covered by --

9 JUDGE YOUNG: Well, that --

10 MR. EYE: -- that.

11 JUDGE YOUNG: -- and also the section in the
12 FSAR. If it's required in the application that you
13 have to have enough water and the contention is the
14 application's inadequate because there's nothing to
15 assure an adequate supply of water, in fact that
16 section appears to assure that there -- that if
17 there's not an adequate supply of water, then the
18 plant won't be operating, if I understood it
19 correctly.

20 MR. EYE: I see. I'm sorry. I did
21 misunderstand. Correct. I mean, your analysis is
22 correct, Your Honor. And I think that what the
23 import of this contention is that in light of what
24 we know concerning the potential impacts of global
25 warming and so forth, the assumption that there will

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1 be adequate water to meet the FSAR operational
2 requirements is in doubt.

3 JUDGE YOUNG: But does the FSAR assume that,
4 if the FASR says -- if it sets a minimum water
5 requirement, that is there, in fact -- is there in
6 fact an assumption that there will be an adequate
7 supply, if there's a provision in the FSAR that
8 addresses what happens if there's not?

9 MR. EYE: Well, yes, but --

10 JUDGE YOUNG: Am I talking in circles here?

11 MR. EYE: Well, I see -- I think I see your
12 question.

13 This partly is due to some assumptions in the
14 environmental report that there will be adequate
15 water supplies available for plant operations, and,
16 true, I think it's -- you know, in legal vernacular,
17 it's black-letter law that you need sufficient
18 supplies of fresh water to run the nuclear plants.

19 In the environment report, there is -- the
20 point of departure in the environmental report is
21 that there will be adequate supplies of water for
22 plant operations.

23 We take the position that, given the impacts
24 of global warming, climate change, protracted
25 drought, that assertion in the environmental report

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1 may not be a valid one.

2 And so I don't want to say that there's no
3 relationship between the environmental report's
4 assumption that there will be adequate water and the
5 FSAR provision that says, at some specified trip
6 point, if you decrease water past that point, plant
7 operations cease. True, but I think that's kind of
8 apples and oranges.

9 The FSAR provision is almost an emergency kind
10 of situation, not unlike they faced at Vogtle and, I
11 think, the Hatch plant in Georgia last summer or
12 last fall when water levels dropped to the point
13 where the intakes were darn near exposed or
14 partially exposed, and I think they got very
15 concerned about plant operations at that point.

16 That's kind of an emergency provision. The
17 environmental report takes a longer view and says,
18 We're going to have enough water to support plant
19 operations through the term of the license, and it's
20 that assumption that we would take issue with, given
21 the impacts of global warming.

22 JUDGE YOUNG: All right. The Applicant cites
23 several sections of the environmental report that do
24 talk about historic flow data of the Brazos River
25 and historic droughts and so forth. How -- do you

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1 want me to repeat?

2 MR. EYE: If you would, Your Honor. I
3 apologize. Thank you.

4 JUDGE YOUNG: On page 55 of the Applicant's
5 answer, the Applicant cites the sections of the
6 environmental report that talk about monthly flow
7 data of the Brazos River and historic -- recent and
8 historic droughts, which would seem to go to the
9 issue that you're raising in the contention, and
10 which you have not disputed, I don't believe.

11 MR. EYE: Well, the historic data are what
12 they are. It's the projected availability of water
13 that we believe comes into play in this contention.
14 The historic data are reflective of adequate water
15 flow, but it's our contention that now that climate
16 change is happening, we can't necessarily rely upon
17 the historic data for support to make a decision
18 about future operations.

19 JUDGE YOUNG: Okay. So you're concerned about
20 the sort of area before we get to such a water
21 shortage that plant operations would cease under the
22 FSAR provision, which would be impacted somehow by
23 global warming before they got to that point.

24 I guess if I understood your argument a minute
25 ago right, if the FSAR provision is based on

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1 regulatory requirements, is the conceptual area, I
2 guess, that exists prior to the point at which water
3 resources would be inadequate, how would those come
4 into play?

5 MR. EYE: They matter, Your Honor, in a couple
6 of ways, one of which may not have been very well
7 articulated, but all of this underpins the decision
8 by the Applicant to use water resources for purposes
9 of nuclear power generation.

10 We think that there are probably better uses
11 for those resources than using them for nuclear
12 plant operations, particularly as those water
13 resources become more scarce, and as Dr. Trungale
14 notes in his report, it's not only that we've got a
15 global-warming sort of climate change looming over
16 us, but downstream users, to the extent that we've
17 got -- I think it's Dr. Trungale or Mr. Trungale
18 characterizes it -- a manmade drought. I mean, you
19 can pull enough water out of the Brazos River,
20 downstream it's going to look like there's a drought
21 effect.

22 So under the reasoning in the contention, it
23 really extends both to upstream availability for
24 adequate quantities of water for plant operations,
25 but it also extends the discussion to downstream

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1 impacts, which would be aggravated, exacerbated by
2 very large withdrawals of water out of the Brazos.

3 JUDGE YOUNG: So on the question of
4 materiality, a genuine material dispute, how would
5 you just concisely phrase that?

6 MR. EYE: The issue is whether the
7 environmental report makes a faulty assumption about
8 the availability of fresh water for plant operations
9 during the term of the license.

10 JUDGE YOUNG: And if the provision in the FSAR
11 provides that if there's not enough water, it won't
12 operate, what's the material issue left then?

13 MR. EYE: The material issue left then is the
14 impact that the plant will have already had on water
15 resources downstream as documented by the Trungale
16 report, for one thing, and the decision initially to
17 build a nuclear plant knowing that these fresh water
18 resources are essential in order for plant
19 operations.

20 In other words, if a key piece of the puzzle
21 is you must have fresh water at levels to satisfy
22 the plant needs and there's doubt about the
23 availability of that resource for plant purposes,
24 then is it in the public interest for a plant to be
25 licensed?

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1 JUDGE YOUNG: I'm just trying to put my
2 fingers on the Trungale report. I've got too many
3 stacks of papers up here.

4 MR. EYE: Your Honor, I have a copy of it
5 here, if you'd like.

6 JUDGE ARNOLD: Everyone has it before her.

7 (General laughter.)

8 JUDGE YOUNG: I've got it now. Okay.

9 Anything further on Contention 11?

10 MR. BIGGINS: Judge, I would have just a brief
11 comment. The Staff believes that the contention is
12 inadmissible as pleaded by the Petitioners, and the
13 Staff does not agree to reserve any issues for the
14 environmental impact statement. And I would point
15 out for the record, since Mr. Eye emphasized it,
16 that the Staff, along with Judge Arnold's
17 observations, is not going to come up with some
18 cohesive global warming/climate change model to
19 explain future conditions in this area; that's
20 beyond the copse of our environmental impacts
21 statement review and analysis.

22 We will analyze it in accordance with what we
23 believe our NEPA obligations are, but we don't have
24 any crystal ball either to determine exactly what
25 those impacts are.

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1 And to the extent that the Applicant relies on
2 historical data to determine what future likely
3 water availability, the Petitioners haven't provided
4 any facts or experts in order to support their own
5 belief that there will not be water.

6 And so at this point, I think what the Staff
7 is left with to rely on, as well as the Applicant
8 and this Board, is the historical data, and I
9 believe that is also what the experts that Judge
10 Arnold cited also rely on.

11 I have nothing further. Thank you.

12 MR. FRANTZ: Your Honor, I'd also just like to
13 reiterate too that Petitioners have provided nothing
14 to indicate that global warming would have any
15 impact on the flow in the Brazos River or the levels
16 on Lake Granbury, which is the source of our cooling
17 water for Units 3 and 4.

18 JUDGE YOUNG: The source of?

19 MR. FRANTZ: Cooling water. And because they
20 have provided no support at all for their
21 allegations, this contention must be dismissed.

22 MR. EYE: Part of it depends on how you handle
23 the additional materials that we submitted in our
24 reply as well. I think that to the extent that we
25 cited some additional materials that would suggest

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1 that in fact a protracted drought condition could
2 pertain to this area, we would submit that would be
3 another kind of support for this contention.

4 JUDGE YOUNG: All right. Thank you all.

5 Moving now to Contention 12.

6 MR. EYE: Your Honor, may I clarify one thing
7 too, based upon Staff counsel's comments?

8 To the extent that there was a commitment by
9 the Petitioners to withdraw that contention based
10 upon a commitment from the Staff to address it in
11 the EIS, given the somewhat qualified answer that
12 Staff counsel just gave, if there was an implication
13 from the Petitioners that we were prepared to do
14 that, I think we would have to withdraw that at this
15 time.

16 JUDGE YOUNG: So you're withdrawing your
17 withdrawal; you're not withdrawing the contention.

18 MR. EYE: Thank you, Your Honor. That's a
19 good way to put it.

20 JUDGE YOUNG: All right. So now moving to
21 Contention 12, it's all on one page. Do you think
22 we can get that done in the next half hour or so?

23 And I don't think that we had a reply on this
24 or any of the remaining ones, other than 9, which we
25 haven't addressed yet, so we'll start with you.

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1 MR. EYE: Thank you, Your Honor.

2 The reason that we think that there's now a
3 legal obligation to consider the greenhouse gas
4 impacts related to the UFC, arises from the Supreme
5 Court's decision in Massachusetts against EPA, a
6 decision that was rendered just two years and a
7 couple of months ago, it was the first week of April
8 2007, as I recall.

9 And in that particular case, seminal case, to
10 the extent that it interpreted the Clean Air Act to
11 require that carbon dioxide now be considered an air
12 pollutant, and there now has been, I think perhaps
13 even subsequent to filing our petition or close in
14 that time, an endangerment finding by the
15 Environmental Protection Agency that says in fact
16 CO2 is a pollutant.

17 So it's our contention that, given the legal
18 requirements now under Mass. v EPA and the
19 endangerment finding that was done by EPA recently,
20 there is a requirement to look at the uranium fuel
21 cycle for its greenhouse gas impacts. And that, in
22 sum, is why we included that particular contention.

23 JUDGE YOUNG: And how is that something that
24 is material to this particular adjudication?

25 MR. EYE: Well, the United States Supreme

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1 Court says that CO2 is considered a pollutant, and
2 the uranium fuel cycle, as we note here, has various
3 places along the way where there can be anticipated
4 CO2 discharges and subsequent greenhouse gas
5 impacts.

6 So it's not unlike a coal plant that now may
7 be submitting documentation for its license: What
8 does it have to do that it didn't have to do before
9 April 2007? -- take into account CO2. And the legal
10 landscape has changed because of Massachusetts
11 against EPA, and I think it's further changed by the
12 endangerment finding that EPA has done.

13 So we're suggesting that not unlike other
14 large stationary sources that now will have to
15 factor in a CO2 impact in terms of what they can
16 expect over the long term for their facilities,
17 likewise for this particular proposed expanded
18 nuclear plant operation, because CO2 is a pollutant
19 under the Clean Air Act, it ought to be separately
20 or discreetly analyzed in the context of the
21 environmental report.

22 JUDGE YOUNG: Applicant?

23 MR. FRANTZ: Thank you, Judge.

24 This contention should be rejected, because it
25 lacks any supporting basis whatsoever and fails to

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1 address any material issue related to this
2 proceeding to the issue of issuance of a COLA.

3 It fails to recognize that the issues they
4 want addressed are addressed in the environmental
5 report. And finally, because it's a collateral
6 attack on Table S3 that hasn't been granted
7 authority by the Commission to raise, with respect
8 to Petitioners' assertion that somehow Mass. V. EPA
9 is related to this proceeding, they couldn't be more
10 wrong.

11 Mass. v. EPA dealt with Section 202 of the
12 Clean Air Act, and all the Supreme Court decided was
13 that the EPA had the authority to regulate tailpipe
14 emissions from new automobiles. It has absolutely
15 nothing to do with NEPA; it has absolutely nothing
16 to do with licensing of Comanche Peak 3 and 4. I
17 think we can set that aside unless there are some
18 questions further on it.

19 The endangerment finding is not part of the
20 contention; it's not part of the basis. We'd argue
21 the same thing. It's completely unrelated. I'd
22 point out that it's nowhere identified as part of
23 the basis for this contention.

24 To the extent the Petitioners are providing a
25 contention of omission, again, it's just simply

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1 wrong. As it's noted in our brief and in the
2 Staff's brief, the carbon dioxide or greenhouse gas
3 air impacts from uranium fuel cycle are addressed.

4 For the uranium fuel cycle, the electrical
5 generation, electrical use by other components of
6 the uranium fuel cycle are addressed in Section
7 5.7.1.3. Chemical effluents, including carbon
8 dioxide of the uranium fuel cycle, are in 5.7.1.4;
9 transportation in 5.7.2.

10 The benefits of carbon dioxide avoidance by
11 use of Comanche Peak 3 and 4 for generation of
12 baseload electric power is contained in 10.3.2.2 and
13 10.3.3. Air impacts from construction of the plant
14 are 4.4.1.6. Air impacts of operation are in
15 5.5.1.3. And the core of their contention that
16 somehow the uranium fuel cycle impacts need to be
17 offset from our assertion of CO2 avoidance are
18 specifically addressed as quoted in our brief in
19 Section 5.2.1.2.4.

20 So I don't know what more we could say about
21 the uranium fuel cycle, and we shouldn't have to
22 guess. Petitioners haven't cited any deficiency.
23 To the extent it's not a contention of omission,
24 that it's somehow of inadequacy, they haven't
25 pointed to any of these sections and identified how

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1 they're inadequate.

2 There's just nothing -- and certainly there
3 isn't any factual basis, let alone expert reports --
4 stating that the carbon dioxide or other greenhouse
5 gas emissions from the uranium fuel cycle would be
6 anything different than what we've provided in the
7 report.

8 There's just nothing here. There's no basis.
9 There's nothing provided in the contention that
10 would allow this Panel to admit it. There's just
11 nothing there.

12 And, finally, I'd note that carbon dioxide
13 emissions are considered as part of Table S3,
14 although not specifically enumerated. I would bring
15 the Panel's attention to footnote 1, where it
16 indicates that -- where it's clear from the
17 underlying documents cited further in that same
18 footnote, where it's clear that those documents have
19 addressed it, the table should be read as a specific
20 zero entry.

21 As with the section cites and page cites in
22 our brief, we point to where WASH-1428 and NUREG-
23 1116 -- or 0116 talk about gaseous emissions
24 including carbon dioxide.

25 The issue here is not whether if Table S3 were

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1 written today, how it would consider carbon dioxide
2 now. The only question is whether the Commission
3 has already described for us how carbon dioxide will
4 be addressed, and it has in Table S3 and in 5151
5 that requires us to adopt Table S3. We've done
6 that.

7 Petitioners haven't asserted even that there
8 will be some different number than the default zero
9 entry finding, and further, as we talked earlier in
10 respect to Contention 4 with respect to Table S3,
11 they're free to challenge the health effects of
12 anything in Table S3. They just haven't done it.
13 There's nothing that says our assessment of health
14 effects is anything other than correct.

15 The Board in Sharon Harris said that unless
16 you -- unless the Petitioner cites some alternative
17 energy, some alternative for electric baseload
18 generation from -- than nuclear, then you don't even
19 get into consideration of the offsets from the
20 uranium fuel cycle. Here Petitioners haven't
21 asserted some other basis or some other viable
22 alternative for electric baseload generation that
23 would support that threshold question of whether we
24 get the uranium fuel cycle.

25 So sorry for the long list, but that's what we

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1 were presenting. The two-paragraph contention does
2 not provide any basis for admissibility. Thank you.

3 JUDGE YOUNG: All right. Staff?

4 MR. BIGGINS: Yes, Your Honor. The
5 Petitioners, to begin with, do not address the fuel
6 cycle impacts discussion in the environmental
7 report, and the Staff is left, after reviewing the
8 petition, with the question of why should greenhouse
9 gas discussion be added beyond what is already
10 there.

11 I believe the Petitioners are stating that the
12 uranium fuel cycle has substantial greenhouse gas
13 impacts. However, they haven't provided any support
14 to identify why those are substantial, especially in
15 comparison to alternate baseload energy sources
16 which would have much, much larger greenhouse gas
17 impacts.

18 I believe the Staff position is that the
19 greenhouse gas impacts from the uranium fuel cycle
20 are determined in the underlying assertions that
21 were used to create Table S3, although they are not
22 enumerated there, and that the Staff believes that
23 the greenhouse gas impacts from the uranium fuel
24 cycle would not be substantial.

25 In fact, they would be insignificant, and to

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1 that extent, I don't believe that this Board, as
2 cited in our petition, needs to flashback and review
3 in some greater detail the actual calculations of
4 carbon dioxide from the uranium fuel cycle, because
5 under NEPA, again, matters that are not significant
6 can be dismissed.

7 And I would point out again, as I believe we
8 pointed out in our answer, that recent decisions in
9 Bellefonte and Lee were -- which had similar
10 contentions also dismissed them. That's all I have.
11 Thank you.

12 JUDGE YOUNG: Any quick rebuttal on that?

13 MR. EYE: Just very briefly, Your Honor. We
14 have offered up in a separate contention discussion
15 about alternative base load, and it's -- to the
16 extent that there is a relationship between
17 contentions overall in this matter, I would ask the
18 Panel to incorporate that discussion that we made
19 about alternative base load into the description
20 that we attached to this particular contention.

21 But beyond that, I'm looking at the provisions
22 or at the sections, rather, in the environmental
23 report that were cited, and for example, 5.7.1.3
24 talks about the fossil fuel effects.

25 There's no separate discussion in there about

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1 CO2, and we think that because of the designation
2 now of CO2 specifically as a pollutant under the
3 Clean Air Act, notwithstanding that Mass. v. EPA
4 dealt with tailpipe standards, the majority opinion
5 did not differentiate sources for CO2.

6 It said in its holding CO2 is a pollutant
7 under the Clean Air Act. It didn't say, it's a
8 pollutant if it's emitted from a tailpipe or a smoke
9 stack or any other source. It said, It is a
10 pollutant to be regulated under the Clean Air Act,
11 or least that the EPA had to make a decision on
12 endangerment one way or the other, which they've now
13 done, of course.

14 So to the extent that there's an assertion by
15 the Applicant and Staff that somehow the
16 environmental report does adequately discuss impacts
17 of CO2 subsequent to the holding in Mass. v. EPA, we
18 would respectfully disagree.

19 JUDGE YOUNG: One of the requirements of
20 2.309(f)(1) is that you provide sufficient
21 information to show that a genuine dispute exists
22 with the Applicant on a material issue of law or
23 fact, and that this information must include
24 references to specific portions of the application,
25 including the environmental report and safety

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1 report, that the Petitioner disputes and the
2 supporting reasons for each dispute.

3 You haven't cited any of those sections in
4 here.

5 MR. EYE: That's correct, Your Honor. We
6 cited the legal -- the legal argument that we made
7 revolved around Massachusetts against EPA, and that
8 was the import of our argument.

9 JUDGE YOUNG: All right. It's ten to 5:00.
10 We have --

11 MR. RUND: Judge Young, before you wrap up,
12 may we have the opportunity to respond to the
13 assertions about alternatives to baseload
14 generation?

15 JUDGE YOUNG: You can. We can do that -- I'm
16 assuming you're talking about Contention --

17 MR. RUND: Oh, I don't want to address that
18 contention now. I just want to address the --

19 JUDGE YOUNG: Oh, okay.

20 MR. RUND: -- invitation to incorporate that
21 by reference into this contention.

22 JUDGE YOUNG: Oh, okay. Go ahead.

23 MR. RUND: We'll address the merits of that
24 separately, and because it's unsupported, Mr. Frantz
25 will address that.

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1 JUDGE YOUNG: Go ahead.

2 MR. RUND: We don't think it's appropriate --
3 the requirement is the contention provided support.
4 It should be a stand-alone --

5 (Pause.)

6 JUDGE YOUNG: Excuse me. Go ahead.

7 MR. RUND: We don't believe it's appropriate
8 to be incorporating other sections of the
9 Petitioners' document that they now at hearing think
10 are convenient and might support their contention.

11 The obligation is to provide that basis in the
12 statement of the contention. It's not there. It's
13 simply not there, and I'll leave it at that.

14 We'll agree to disagree about what the Supreme
15 Court said, and I think they were clear. It's not
16 ambiguous about what they said. The Panel's more
17 than capable of interpreting that. And I'd add
18 Bellefonte to the list of -- I'm sorry -- Harris to
19 the list of Panels that have rejected similar
20 contentions. Thank you.

21 JUDGE YOUNG: All right. So we have left
22 Contentions 9, and then 13 through --

23 JUDGE ARNOLD: Through 18.

24 JUDGE YOUNG: -- 19 -- aren't there 19?

25 JUDGE ARNOLD: Oops. I didn't flip far

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1 enough. 19.

2 JUDGE YOUNG: Is there anything else that
3 anybody thinks that we can properly do today or any
4 objection to leaving the rest of those until
5 tomorrow?

6 MR. EYE: No objection by Petitioners, Your
7 Honor.

8 JUDGE YOUNG: Any thoughts on that?

9 MR. BIGGINS: None.

10 JUDGE YOUNG: Okay. All right. Then we'll
11 reconvene at nine o'clock tomorrow morning and go, I
12 guess, straight to contention 9, and whatever it was
13 that we were going to follow up on. There was some
14 reason we were doing that, and it's escaping me
15 right this moment, but --

16 MR. EYE: About Contention 9?

17 JUDGE YOUNG: Right.

18 MR. EYE: It was -- we're waiting for some
19 communication --

20 JUDGE YOUNG: The reference to the Savannah
21 River study. Right. Okay. So you'll have that for
22 us.

23 MR. EYE: We have emailed Dr. Makhijani
24 already and asked him to make sure that we've got
25 the right reference, so --

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1 JUDGE YOUNG: Okay. All right. Then we can
2 go off the record, and we'll look forward to seeing
3 you tomorrow morning.

4 (Whereupon, at 4:55 p.m., the hearing in the
5 above-entitled matter was recessed, to reconvene at
6 9:00 a.m., Thursday, June 11, 2009.)
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CERTIFICATE

This is to certify that the attached proceedings
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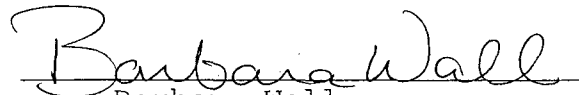
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Docket Number: 52-034-COL & 52-035-COL

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