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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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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY AND LICENSING BOARD PANEL
4 ORAL ARGUMENTS
5

6 IN THE MATTER OF Docket Nos.
7 LUMINANT GENERATION 52-034-COL
8 COMPANY, LLC 52-035-COL
9 (Comanche Peak Nuclear Power ASLBP No.
10 Plant, Units 3 and 4) 09-886-09-COL-BD01
11

12 Thursday, June 11, 2009

13
14 Jury Selection Room
15 Hood Country Justice Center
16 1200 West Pearl Street
17 Granbury, Texas
18

19 The above-entitled matter resumed for oral
20 argument at 9:00 a.m.

21
22 BEFORE THE LICENSING BOARD:

23 ANN MARSHALL YOUNG, Chair

24 DR. GARY S. ARNOLD, Administrative Judge

25 DR. ALICE C. MIGNEREY, Administrative Judge

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1 APPEARANCES:

2 On behalf of the NRC:

3 SUSAN VRAHORETIS, ESQ.

4 MARCIA J. SIMON, ESQ.

5 JAMES P. BIGGINS, ESQ.

6 U.S. NRC Office of the General Counsel

7 Mail Stop 0-15 D21

8 Washington, DC 20555-001

9

10 On behalf of the Applicant:

11 TIMOTHY P. MATTHEWS, ESQ.

12 STEVEN P. FRANTZ, ESQ.

13 JONATHON M. RUND, ESQ.

14 Morgan, Lewis & Bockius, LLP

15 1111 Pennsylvania Ave., NW

16 Washington, D.C. 20004

17

18 On behalf of the Petitioners:

19 ROBERT V. EYE, ESQ.

20 Kauffman & Eye

21 112 SW Sixth Avenue, Suite 202

22 Topeka, Kansas 66603

23

24

25

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JUDGE YOUNG: We'll begin with Contention 9 this morning. Let's go on the record.

And, Mr. Eye, you were to have some information for us.

MR. EYE: Yes. Good morning, Your Honor. And we have established that the study actually that counsel for the Applicant referenced is the correct study that Dr. Makhijani referenced regarding Savannah River, so we've come to consensus on the reference document. That may be the end of the consensus, but we have arrived at that.

JUDGE YOUNG: All right. So let's just -- Mr. Frantz?

MR. FRANTZ: Yes. I think there may be other areas where we may have consensus, but given the fact that we now know the source of this report, the report itself states on its face that it was developed for Savannah River. It was based upon site-specific characteristics of Savannah River. That's clear on the face of the report.

And as I go forward this morning, I'll explain in more detail why some of the assumptions used for the Savannah River study either are not applicable to Comanche Peak or do not have any material effect

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1 on the results of the dose calculation for Comanche
2 Peak.

3 I'd like to first, though, turn to the
4 question posed by the Board, and that question
5 pertains to the dose conversion factors, and there
6 are two different types of dose conversion factors
7 of interest that have been mentioned by the
8 Petitioners.

9 The first pertains to conversion of dose from
10 consumption of commercial fish and saltwater
11 invertebrates, and the second pertains to conversion
12 of dose in different age groups, namely from adults
13 and children.

14 Turning to the first one, this is conversion
15 of dose due to consumption of commercial fish and
16 saltwater invertebrates. That issue simply is not
17 material to Comanche Peak. Dr. Makhijani and
18 Petitioners allege that using the LADTAP XL code for
19 Savannah River would result in an order or two
20 magnitude higher doses for consumption of commercial
21 fish and shellfish.

22 And even if that's assumed to be true and even
23 if you applied LADTAP XL to Comanche Peak, it would
24 have no effect, because as they did very clearly on
25 page 5.4-4 of our environmental report, there is no

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1 commercial fishery, and there is no consumption of
2 invertebrates in the area around Comanche Peak, so
3 essentially there is no dose due to that particular
4 pathway, and, therefore, their allegations just
5 simply are not applicable to Comanche Peak and do
6 not affect our dose calculations.

7 Second of all, I might add that even if you
8 had assumed that there is commercial fishery around
9 Comanche Peak and consumption of invertebrates,
10 there still is no information in the record that
11 would indicate any material impact on our dose
12 calculation. In fact, the very report that they
13 cite indicates to the contrary.

14 Again, all they have done is pick one pathway,
15 the pathway involving consumption of fish and
16 invertebrates, and there are a number of other
17 different pathways, including drinking water,
18 boating, swimming, food arrogated with water and so
19 forth. And the particular pathway they have picked
20 doesn't really have a great contribution to the
21 total dose.

22 And looking at the report that they cite, the
23 report itself states that if you compare the results
24 of LADTAP II with the results of LADTAP XL, which is
25 the Savannah River report, LADTAP XL results in "an

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1 insignificant increase in predictions of" --

2 JUDGE YOUNG: Where are you reading from?

3 MR. FRANTZ: Pardon?

4 JUDGE YOUNG: Oh, okay. Never mind.

5 MR. FRANTZ: -- "results in an insignificant
6 increase in predictions of total dose to the maximum
7 in an individual and a 10 percent in total
8 population dose." So it's very clear given this
9 statement in the very report that they cite that
10 this pathway involving commercial fisheries and
11 saltwater invertebrates simply is not material to
12 the results in terms of the total doses.

13 Furthermore, as we mentioned yesterday,
14 Petitioners have not disputed that our effluents
15 will be within NRC regulatory limits. As a result,
16 by definition, the impacts, environmental impacts,
17 will be small. And so even if you change perhaps
18 the ultimate dose number by a slight amount, that
19 number won't have any effect on the ultimate
20 conclusion that the impacts are small.

21 And so for a number of reasons here, all their
22 issues simply are not material to our calculation
23 doses and to our conclusion that the environmental
24 impacts are small.

25 I'd also like to now turn to their allegations

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1 regarding dose conversion factors to adults and
2 children, and again they have just simply
3 mischaracterized our environmental report.

4 Contrary to their statements, we did not
5 calculate doses to all individuals based upon the
6 dose to an adult. Instead, as clearly indicated in
7 FSAR 11.2-15R and environment table 5.4-8, we
8 calculated doses for four different age groups,
9 namely adults, teenagers, children and infants, so
10 we did use different dose calculation factors and
11 conversion factors for each of these groups, and
12 there's nothing, of course, anywhere in the petition
13 to indicate that we used the wrong conversion
14 factors for any one of these particular groups.
15 They just, again, have just simply mischaracterized
16 our report.

17 I might further add LADTAP II which is the
18 code we have used for Comanche Peak has been
19 explicitly approved by the NRC for use in COL
20 applications. I'll refer the Board to Regulatory
21 Guide 1.206. Now, I realize that's not dispositive.
22 It's not a regulation. But the Commission has held
23 that the NRC guidance is entitled to special weight,
24 and in light of that special weight, it really is
25 incumbent upon the Petitioners to provide far more

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1 than they have in this case, and they just simply
2 have not established a genuine dispute of material
3 fact. As a result, we believe this contention
4 should be dismissed. Thank you.

5 JUDGE YOUNG: Mr. Eye, what's your response?

6 MR. EYE: Your Honor, the analysis done by Dr.
7 Makhijani was intended to be illustrative of the
8 discrepancies in terms of the projected dose rates
9 between LADTAP II and LADTAP XL. It was not
10 intended to necessarily cover every parameter, but
11 rather to illustrate that there was an understated
12 dose projection.

13 More specifically, the criticism that the
14 pathway, the shellfish -- or commercial fish and
15 invertebrates are not pertinent to the Comanche Peak
16 situation would lead -- really is missing the point.
17 The shellfish and invertebrate are simply there to
18 illustrate that there is an understatement, an
19 underestimation of the doses that would be
20 projected.

21 It is not necessarily intended to cover every
22 single pathway or every single potential exposure,
23 but rather as an illustration or representation of
24 Dr. Makhijani's conclusions regarding the
25 deficiencies in LADTAP II and, in his judgment, the

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1 --superior analytical benefits of the LADTAP XL code.

2 JUDGE YOUNG: Is there any part of this study
3 that indicates that there is such a systematic
4 understatement of doses in LADTAP II?

5 MR. EYE: Your Honor, I believe that what -- I
6 don't think that it calls it out explicitly. I
7 think it has to be inferred from a comparison of the
8 data that are collected here, compared to data that
9 would be used out of LADTAP II. In other words, a
10 side-by-side comparison is not done in this Savannah
11 River study, if that's the import of your question.

12 Your Honor, if I may, just one --

13 JUDGE YOUNG: Go ahead.

14 MR. EYE: -- additional comment about this.
15 In reflecting on this particular contention and Dr.
16 Makhijani's underlying report and recognizing that
17 LADTAP II is, I guess you could almost call it,
18 something of an institution in terms of the NRC's
19 analytical methods to project doses, this may be
20 another one of those contentions that lends itself
21 perhaps to a petition for rulemaking in order to
22 fully explore what deficiencies there are in LADTAP
23 II compared to LADTAP XL.

24 And in that regard, I mean, I'm not suggesting
25 that we will withdraw the contention, but I do want

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1 - the panel to recognize that we understand that as in
2 several other of our contentions, this really goes
3 to an institutional kind of assumption that's built
4 into NRC's analytical methods, that to the extent we
5 believe is deficient or needs to be updated, would
6 also lend itself to a potential petition for
7 rulemaking.

8 JUDGE YOUNG: You referred to Dr. Makhijani's
9 underlying report. Which --

10 MR. EYE: It's the report that he prepared in
11 the reply to the --

12 JUDGE YOUNG: May 8?

13 MR. EYE: -- Staff. Actually I -- I believe
14 it is the May 8. I forget the exact date, but it
15 was sometime first part of May. May 8. Okay.
16 Right. Thank you.

17 JUDGE YOUNG: Okay.

18 JUDGE ARNOLD: I have a question for the
19 Petitioner. The second paragraph of this
20 contention, in discussing the Savannah River study,
21 states, "Further, the dose conversion factors used
22 in even the more recent model are for adults." And
23 then later on in that paragraph, it says, "The FSAR
24 needs to be completely redone using the most recent
25 validated approaches for estimating dose and

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1 estimating" -- well -- --

2 So the logic there seems to be that the
3 Savannah River study used the wrong dose conversion
4 factor so the FSAR needs to be redone.

5 MR. EYE: That may have been a clumsy wording.
6 No. It is that the Savannah River study's use of
7 the XL, LADTAP XL code produced a more reliable and
8 precise projection of doses than the LADTAP II that
9 was used to project doses in the Comanche Peak ER
10 and FSAR.

11 JUDGE ARNOLD: So -- well, let me then ask:
12 Do you have any specific problem with the dose
13 conversion factors that were used in the FSAR?

14 MR. EYE: For Comanche Peak, not --

15 JUDGE ARNOLD: For Comanche Peak.

16 MR. EYE: Only to the extent that they are
17 tied to LADTAP II.

18 JUDGE ARNOLD: Let me ask Applicant. Are the
19 dose conversion factors actually tied to LADTAP, or
20 are they done kind of a separate thing? Or how do
21 the two tie together?

22 MR. EYE: LADTAP II is the code that's used to
23 calculate doses or estimate the doses for various
24 factors, and as we mentioned and Mr. Eye now seems
25 to be withdrawing his contention regarding

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1 differences between children and adults. I think
2 that's what he's now -- he's now limiting this to
3 the shellfish and invertebrates.

4 I might add, by the way, that there is no
5 indication in this Westinghouse Savannah River
6 report of a systematic underestimation of the doses.
7 To the contrary, that statement I quoted right at
8 the initial part of my presentation shows that for
9 the maximum-exposed individual, there is no increase
10 in total dose, and for the population as a whole,
11 there's only a 10 percent increase.

12 So that sort of belies their argument that
13 there's a systematic underestimation. It just
14 simply does not appear in the total results.

15 JUDGE YOUNG: Did you ever reply to that? I
16 wanted to ask you about that, the statement in the
17 report itself that talks about the insignificant
18 increase in predictions of total dose to the maximum
19 individual and a 10 percent increase in a total dose
20 to the Savannah River user population.

21 MR. EYE: The Savannah River study is offered
22 up as only an illustration of the difference between
23 LADTAP II and LADTAP XL. In terms of the paragraph
24 in the -- I believe it's in the introduction part of
25 the summary or in the summary section of the SRS

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1 study, it says what counsel says, what he read.

2 But this study is offered as simply an
3 illustration that there is a difference between
4 LADTAP II and LADTAP XL, and in our contention, we
5 believe that the more advanced or more precise means
6 by which to project doses ought to be used as
7 opposed to one that is less precise or that would
8 systematically underestimate those projected doses.

9 JUDGE YOUNG: If you look at the figures in
10 the FSAR and you increase them by 10 percent, would
11 that lead you to challenge the actual dose figures
12 in the FSAR?

13 MR. EYE: To the extent that they're off by
14 whatever increment, then they're not as precise as
15 another model would yield.

16 JUDGE YOUNG: But specifically.

17 MR. EYE: I'm sorry. Your question was?

18 JUDGE YOUNG: Do you have a specific challenge
19 to the FSAR, to any sections of the dose figures in
20 the FSAR --

21 MR. EYE: I see. I didn't understand your
22 question. Yes. Well, as we say in the contention,
23 when LADTAP II is used, it gives a lower projected
24 dose than LADTAP XL across the board.

25 JUDGE YOUNG: What I'm trying to get to is:

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1 What would the impact of adding 10 percent to all -
2 those doses be?

3 MR. EYE: From a public health perspective, it
4 would --

5 JUDGE YOUNG: Would it put them over the
6 regulatory limits?

7 MR. EYE: I see. I don't know the answer to
8 that question, Your Honor.

9 MR. FRANTZ: Your Honor, perhaps I can respond
10 to that. First of all, there are no dose limits for
11 the population as a whole, and that's what LADTAP XL
12 is predicting as an increase.

13 Even if you assume that there's a 10 percent
14 increase for the maximum-exposed individual, we're
15 still well below regulatory limits. As discussed on
16 page 49 of our answer, the doses calculated for
17 Comanche Peak in LADTAP II were approximately 1
18 millirem per year. The Appendix I limit for this
19 pathway, liquid pathway, is 3 millirem per year,
20 which is three times what we calculated.

21 And the dose limit in 10 CFR 20.1301 is 100
22 millirem per year, and we're obviously one one-
23 hundredth of that. So we have plenty of margin
24 between our calculated dose and the dose limits in
25 the NRC regulations.

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1 JUDGE YOUNG: Anything further, Mr. Eye?

2 MR. EYE: No, Your Honor.

3 JUDGE YOUNG: Staff?

4 MS. SIMON: Thank you, Judge Young. Marcia
5 Simon for the Staff. Much of what I planned to
6 argue has been covered by the Applicant, so I'm
7 trying to be brief.

8 I would like to reiterate that the Savannah
9 River study provides information about differences
10 between LADTAP II and LADTAP XL for commercial fish
11 and saltwater invertebrates and explains on page 8
12 and 9 of that report why there is that difference.

13 So the Savannah River study does not provide
14 any indication of a systematic underestimation
15 because the only specific underestimation indicated
16 in there is for the commercial fish and saltwater
17 invertebrates, and that is explained. Therefore, we
18 continue to hold the position that this aspect of
19 the contention is not adequately supported as we
20 discussed in our answer.

21 We also in our answer referred the Board to
22 Regulatory Guide 1.109 and the individual dose
23 factors for four different age groups in that
24 Regulatory Guide. Those dose factors are the same
25 ones that are provided in the LADTAP user's manual

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1 and-technical guide which is NUREG/CR-4013, and on
2 page 5.4-5 of the environmental report, the
3 Applicant indicates that LADTAP II program as
4 described in that NUREG is what was used in making
5 the calculations for Comanche Peak.

6 And, therefore, it is clear that the assertion
7 that only adult dose conversion factors were used is
8 incorrect, and therefore, that aspect of the
9 contention should be rejected.

10 JUDGE ARNOLD: I do have one last question
11 actually for Petitioners. If -- let's assume that
12 it were established that the codes are
13 systematically different. Do you have anything to
14 indicate which ones of the codes is yielding the
15 more accurate solution? Just because it's different
16 doesn't mean it's different in the correct
17 direction.

18 MR. EYE: Granted. I think that the reasoning
19 or the logic here is that we presume that each
20 refinement of LADTAP is intended to yield a more
21 precise dose projection, and to the extent that
22 LADTAP XL has come in the progressions after LADTAP
23 II, that it would be presumed to be a more precise
24 instrument by which to make these projections.

25 JUDGE ARNOLD: Do you know if it's undergone

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1 any validation, any comparison with data or anything
2 of that sort?

3 MR. EYE: Well, to the extent that it was
4 relied upon, for example, in the Savannah River
5 study, I am going to assume that the Westinghouse
6 contractors that prepared that study would not have
7 relied on LADTAP XL if it would have yielded less
8 precise results than another model, for example,
9 LADTAP II.

10 JUDGE ARNOLD: Thank you very much.

11 MR. EYE: You're welcome.

12 MS. SIMON: Your Honor, I just had a couple
13 more points. I wanted to briefly address Dr.
14 Makhijani's reply. As discussed yesterday in the
15 argument concerning the motion to strike, the Staff
16 believes that this response is an improper
17 augmentation of the reply under the case law in
18 Louisiana Energy Services, CLI-0435, and the
19 Palisades study, CLI -- Palisades case, CLI-0617.
20 And so we would refer the Board to those cases.

21 But even if this reply is considered by the
22 Board, we just wanted to state our position that
23 there's nothing in here that supports the inference
24 that LADTAP II uses only adult dose conversion
25 factors.

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1 The fact that Part 50, Appendix I, is based on
2 ICRP Publication 2 has nothing to do with LADTAP.
3 LADTAP is a computer program that was written to
4 estimate doses from liquid effluents, and it's not
5 tied in any way specifically to Part 50, Appendix I.

6 I'd also like to point the Board to the Staff
7 requirements memo from the SECY-08-0197 that was
8 provided with the reply, and that is found at Adams
9 ML090920103. It was issued on April 2, 2009, and in
10 that Staff requirements memo, the Commission stated
11 that it agrees with the ACRS that there is no
12 evidence that -- agrees with the Staff and the
13 ACRS -- that's the Advisory Committee on Reactor
14 Safeguards -- that the current NRC regulatory
15 framework continues to provide adequate protection
16 of the health and safety of workers, the public and
17 the environment.

18 So regardless of what Part 50 is based and
19 whether there's any difference between Part 50 and
20 Part 20 in terms of their basis, the entire
21 regulatory framework provides adequate protection of
22 public health and safety, and the environment, and
23 therefore, any differences are not material to this
24 contention.

25 And, finally, I'd just like to point out that

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1 the two quotations from the ICRP-2 that are on page
2 4 of Dr. Makhijani's reply refer only to
3 calculations in that publication, so, again, they
4 don't refer to calculations that are performed in
5 LADTAP II. So, in summary, this reply does not
6 support the conclusion that LADTAP II is obsolete or
7 is based only adult dose conversion factors.

8 JUDGE YOUNG: Judge Mignerey, do you have any
9 questions on this contention?

10 JUDGE MIGNEREY: I have no particular
11 questions. I think my concerns have been covered by
12 other questions. Thank you.

13 JUDGE YOUNG: Anything further on Contention
14 9?

15 MR. EYE: Not from Petitioners, Your Honor.

16 JUDGE YOUNG: All right. Then the next
17 contention we will be looking at would be Contention
18 13, having to do with impacts from severe
19 radiological accident scenarios on operation of
20 other units at the Comanche Peak site. I don't
21 believe that we had a reply on that contention, so
22 we'll go first to you, Mr. Eye.

23 MR. EYE: Thank you, Your Honor. Your Honor,
24 the Panel asked a specific question about this
25 contention, and it is essentially asking what those

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1 effects might be and what parts of the application
2 that they were -- were or, I guess, maybe should
3 they have been addressed.

4 There is a discussion in Chapter 7 of the
5 environment report about accident scenarios and so
6 forth, but I don't believe that there is a
7 discussion in that particular section about the
8 contingency that we were addressing in the
9 contention that would postulate a severe
10 radiological accident at one unit affecting the
11 operations at one or the other three units, if these
12 were to be built and put into operation.

13 To the extent that it is not covered in the
14 environmental report, that is, the interrelationship
15 of these units in the context of a severe
16 radiological accident, we would offer it up as a
17 contention of omission and simply point out that
18 this is to us a logical kind of analysis that ought
19 to be done, given that the Applicant has chosen to
20 collocate these four units in relatively close
21 proximity to each other, and that it seems to be a
22 reasonable kind of contingency to consider when it
23 cannot be ruled out that a radiological accident at
24 one unit could have adverse impacts on the other
25 three.

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1 It's more of, I think, a logical kind of
2 commonsense sort of contention that simply is
3 intended to point out that there is a gap in the
4 environmental report in that regard. I mean,
5 collocation makes sense in some respects. There are
6 certain economies of scale. There are some shared
7 facilities that can be utilized and some benefits
8 that would inure as a result of collocation, and
9 those, I think, are covered either generally or
10 specifically in the environmental report, in the
11 FSAR and so forth.

12 But the downside of collocation should also be
13 considered, and the primary downside would be the
14 one that we postulate, and that would be a severe
15 radiological accident that would affect operations
16 at the other collocated units. So in that regard,
17 we think that it's -- in order to have a
18 comprehensive kind of analysis of the nature of
19 collocation of these units where the benefits are
20 covered, there ought to also be in fairness an
21 analysis of any potential detrimental effects that
22 might occur as a result of these collocations or the
23 collocation.

24 JUDGE YOUNG: The references in the
25 Applicant's response to the sections of FSAR that

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1 evaluate the effects of explosive hazards at
2 Comanche Peak's Unit 1 and 2, and the impact of on-
3 site fires, how do those play into your analysis?

4 MR. EYE: Well, they certainly -- I mean,
5 those are potential postulated events certainly
6 that, you know, are within the realm of possibility,
7 of course, but they don't go on and discuss how
8 those might implicate operations at other units.

9 JUDGE YOUNG: Well, the Applicant says that
10 they do analyze whether they pose threat to Units 3
11 and 4. Do we have those sections?

12 JUDGE ARNOLD: What sections are --

13 JUDGE YOUNG: FSAR 2.2.3.1.1.2 and 1.4.

14 MR. FRANTZ: Yes. The pages references, Your
15 Honor, are also FSAR page 2.2-13, which is the first
16 full paragraph on that page, and then page 2.2-19
17 and 20.

18 JUDGE YOUNG: And there are further references
19 in the Applicant's response.

20 MR. EYE: Your Honor, I do -- thank you. I do
21 recall this, and I just had a lapse at that moment.
22 They do discuss obviously what they say here, but,
23 again, it presumes that there would be no adverse
24 impact on the operations of other units. And all
25 we're suggesting is that they need to go the next

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1 step and presume that there is a detrimental effect
2 on operation of Units 3 and 4.

3 For example -- and this would have probably
4 been one that might have brought this to a little
5 more clarity. If we take into account the scenario
6 of the large commercial aircraft impacting a reactor
7 with subsequent loss of plant and so forth, that's a
8 scenario that conceivably could implicate Units 3
9 and 4, even though they're a quarter mile away.

10 If we think in terms of a loss of the spent-
11 fuel pool or the radioactive inventory in the spent-
12 fuel pool, we think about the loss of the reactor
13 core itself, the loss of containment integrity. It
14 seems that there would be certainly situations where
15 that would be so disruptive or that there would be
16 sufficient radiological impacts that it would be
17 hazardous for personnel to continue to operate units
18 even though they're a quarter mile away, that it
19 would imprudent or hazardous for individuals to
20 actually go and try to operate those other units.

21 And that assumes that there would be no
22 collateral damage to Units 3 and 4 from an accident
23 at either Unit 1 or 2 or both. So what we're
24 suggesting is that there ought to -- there should be
25 an assumption that that scenario could play out,

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1 that there could be an interference with the
2 operation of Units 3 and 4 and have that be a part
3 of the accident scenario analysis that is done in
4 the environmental report.

5 JUDGE ARNOLD: Well, actually my questions are
6 for Applicant. Let's hear from them first.

7 MR. FRANTZ: It's very clear that Petitioners
8 are engaging in nothing but pure speculation. They
9 have nothing -- they have no expert opinions; they
10 have no technical support; they don't reference any
11 documents. They have nothing that would indicate
12 that an accident at Unit 1 or Unit 2 would impact
13 Units 3 or 4.

14 And in contrast to the nothing that they have,
15 we do have analysis in our FSAR that show that an
16 explosion at Units 1 or 2 or a fire outside of Units
17 3 and 4 would not impact Units 3 and 4, so we do
18 have that explicit evaluation in the FSAR.

19 Furthermore, we have looked at accidents,
20 radiological accidents, at Units 1 and 2, and we
21 have shown that the radiological impacts of those
22 accidents are within the bounds of what we've
23 calculated for an accident at 3 or 4.

24 For example, we're required by General Design
25 Criteria 19 to assume that there is an accident at

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1 one of our Units 3 or 4 and to calculate the dose on
2 the control room operators, and we did that. It's
3 in the DCD for the U.S. APWR, and we've shown that
4 that calculated dose is within the five-rem limits
5 of GDC 19.

6 We have also done a similar calculation for
7 accidents at 1 and 2 to see what their impact would
8 be on 3 and 4 control room operators, and shown
9 that, again, we're bounded by the doses in the DCD
10 itself. Now, that currently is not in the FSAR
11 that's this evaluation.

12 We have, though, submitted a letter to the NRC
13 dated November 4 of 2008, which would add a
14 discussion of this to the FSAR, and it would be
15 placed in FSAR Section 4.4.4. And so in the next
16 annual revision to our COL application as required
17 by the regulations, we'll have this evaluation.
18 It's already on the docket.

19 So it's very clear that there is no impact
20 from an accident at 1 and 2 on the operation of 3
21 and 4, based upon our evaluations that are on the
22 docket. His assumption that we need to go ahead and
23 anyway assume that there is an impact is simply
24 without any basis, and furthermore, it's just
25 inconsistent with NEPA. NEPA does not require these

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1 hypothetical worst-case evaluations, and there's
2 just simply no legal reason to assume that there's
3 an adverse impact on 3 and 4, especially after we've
4 shown that there is no impact. So his contention is
5 both legally and factually baseless and should be
6 dismissed.

7 JUDGE ARNOLD: You've managed to answer
8 probably 90 percent of my question. Let me just
9 ask. When you say you've evaluated a radiological
10 incident at Unit 1 or 2, is that the type that would
11 result from a severe accident, or are you talking a
12 spill?

13 MR. FRANTZ: This would be from basically a
14 loss-of-coolant accident.

15 JUDGE ARNOLD: Thank you.

16 JUDGE YOUNG: What would -- a couple
17 questions. What would be the difference between the
18 accidents that you do describe in the FSAR and an
19 aircraft crash?

20 MR. FRANTZ: I don't believe that there would
21 be any difference. I'm not sure that we've done any
22 evaluation, but, again, there's a quarter-mile
23 separation between Units 1 and 2 and Units 3 and 4,
24 so all you're talking at this point is mostly the
25 fire hazard, and as explained in the FSAR, there is

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1- ... a stand-off difference around each of the reactors ...
2 which is totally cleared of brush, so the fires
3 would not be able to spread to the reactor itself --
4 to another reactor itself.

5 JUDGE YOUNG: And you have now done the
6 analysis for the aircraft crash for Units 3 and 4.

7 MR. FRANTZ: That rule is not yet effective,
8 and we -- my understanding is that evaluation
9 perhaps is in process. Maybe it's even been
10 submitted on the docket for the DCD, but I don't
11 think that's part of the COL application itself.

12 JUDGE YOUNG: And just another sort of basic
13 question: You've put these in FSAR. Is there --
14 what's the reason that similar analyses are not in
15 the environmental report?

16 MR. FRANTZ: Yes. Very clearly, we've shown
17 in the FSAR that these events have no impact on the
18 other units, and so if there's no impact, there's no
19 reason to discuss them in the environmental report.
20 Our existing evaluations of accidents in Chapter 7
21 in the environmental report are applicable and
22 bounding.

23 JUDGE YOUNG: Judge Mignerey, did you have any
24 questions?

25 JUDGE MIGNEREY: No, I do not.

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1 JUDGE YOUNG: Does that conclude your --

2 MR. FRANTZ: Yes, it does. Thank you.

3 JUDGE YOUNG: NRC Staff?

4 MR. BIGGINS: Thank you, Your Honor. James
5 Biggins for the Staff.

6 I have a difficult time understanding the
7 Petitioners' position that this information needs to
8 be in the environmental report. To me it seems that
9 they are confusing an environmental matter and a
10 safety matter. As stated today, Mr. Eye said the
11 primary downside that we need to look is the effect
12 on operations.

13 When we're talking about the safe operation of
14 Units 3 and 4, that would be a matter for the FSAR
15 which does discuss control room habitability in case
16 of accidents in order to safely shut down those
17 units as necessary.

18 In addition, the Petitioners did not provide
19 any counter-argument in the reply or acknowledge the
20 letter cited in the Staff's answer as just
21 referenced by the Applicant, the November 4, 2008,
22 letter which was a resolution of a docketing issue
23 that did discuss the impacts of an accident on the
24 safe operation of Units 3 and 4 from an accident at
25 Units 1 and 2.

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1 -- With that information being on the docket, the
2 Petitioners are responsible for being aware of it
3 and addressing it, and certainly had the opportunity
4 to do so after the Staff identified it in the
5 Staff's answer.

6 So I think the bottom line that this Board
7 must consider is that the question that the
8 Petitioners have failed to answer here is why this
9 information must be discussed in the environmental
10 report versus final safety analysis report, and they
11 don't provide any reason. They don't provide any
12 legal authority for their claim that it needs to be
13 in there, and they simply do not acknowledge the
14 discussion that is on the docket in the November 4,
15 2008, letter.

16 And with that, the Staff would rely on its
17 answer, and I have nothing further.

18 JUDGE YOUNG: Mr. Eye, what reason is there
19 that the information that's in the FSAR should be in
20 the environment report first, and then, second,
21 what -- given the information that has been provided
22 what, in addition, would you say should be provided?

23 MR. EYE: Your Honor, I will do a mea culpa in
24 terms of not being aware of the November submittal
25 to the NRC from Luminant. That was an oversight on

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1 --my part, and I will certainly do my best to correct
2 that.

3 Why should it be in the environmental report,
4 I believe was the first part of your question. Your
5 Honor, it's implicit in the environmental report
6 throughout that Units 3 and 4 would be a dependable
7 and reliable source of baseload generation for
8 Luminant and its customers.

9 Implicit in that is that the kind of accidents
10 that we postulate or project that ought to be
11 considered at another collocated unit might cause
12 that particular assumption about reliable service
13 and so forth to not be the case, and to the extent
14 that that is one of the assumptions that underpins
15 the impetus to move forward with this proposed
16 expansion, we think that it ought to be at least
17 considered; that the scenario that interfered -- or
18 an accident that interferes with operations at
19 another unit ought to at least be considered.

20 JUDGE YOUNG: What would it -- what
21 information are you saying would be provided if it
22 were in the environmental report that has not
23 already been provided otherwise?

24 MR. EYE: Well, in terms of the availability
25 of these units in the scenario where there would be

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1 a major radiological release or radiological
2 accident at another unit, will all the units
3 still -- the remaining units that are not directly
4 involved in an accident, are they still going to be
5 available.

6 JUDGE YOUNG: Are you saying that the analysis
7 that they've done in the FSAR and in the November
8 filing does not provide that?

9 MR. EYE: Well, we have just heard counsel
10 suggest that the accident that was considered would
11 be a loss-of-cooling accident, but as I understand
12 it, there would probably be gradations of a LOCA in
13 terms of how severe it might be. I mean, not all
14 LOCAs are considered to be -- I think this had the
15 same kind of radiological impact, and to the extent
16 that there is an accident scenario under a LOCA, for
17 example, that would result in a total loss of
18 inventory of radiation in the containment, then
19 that's one scenario that is -- that would be
20 sufficiently extreme that although not beyond the
21 realm of possibility, that would be appropriate to
22 be considered in terms of whether or not collocating
23 these units is in the public's interest.

24 Moreover, there is -- given now the -- I think
25 the vernacular is the changed-threat environment and

1 the recognition that--there could be an impact from a
2 large commercial airliner into a nuclear plant and
3 the loss of the spent-fuel pool, the loss of
4 containment integrity, the loss of reactor coolant,
5 it seems that in that kind of scenario that
6 certainly is not beyond what the NRC is now
7 recognizing as a possibility --

8 I mean, the whole premise of 50.54(hh) and so
9 forth takes that into account, makes that a
10 possibility, a scenario that is -- under our
11 thinking is required to be considered, not only in
12 terms of how we presented it in earlier
13 contentions -- I think it's Contention 7 -- but in
14 any other aspect of plant operations.

15 And there is -- I mean, it's not just an
16 operational issue. There are radiological impacts
17 that ought to be considered, it seems to us. And
18 those impacts are, let's assume, limited to plan
19 personnel who would be exposed. Well, that's a
20 legitimate concern that the public would have an
21 interest in seeing analyzed and resolved
22 sufficiently so that going forward with this could
23 be consistent with what the Atomic Energy Act
24 demands.

25 JUDGE YOUNG: My questions are obviously from

1. a nontechnical perspective, but I'm trying to sort
2 of get a handle on a couple of things. One, let's
3 assume that the information on an aircraft crash is
4 provided with regard to Units 3 and 4, or all the
5 units, and how those -- how that would affect each
6 unit itself.

7 Is it possible that the effect that it would
8 have -- that the effect of an aircraft crash on Unit
9 3, for example, would effectively bound the possible
10 impact from the effect of an aircraft crash on Unit
11 1 and the impact that would have on Unit 3, for
12 example? I mean, what would be -- if that's
13 provided when the rule becomes effective, what would
14 be the difference between the impact that that would
15 have on a particular unit and the impact that a
16 crash on another unit would have on the --

17 MR. EYE: It's possible that that could bound
18 it. Yes. I think that there are probably some
19 additional assumptions that would have to be rolled
20 into that to make it an effective scenario to
21 consider. For example -- and it's not set out
22 explicitly in the Federal Register notice and the
23 administrative materials related to 50.54(hh),
24 because there it says that the licensee should
25 consider the three main requirements; that is, loss

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1 of containment integrity, loss of reactor coolant,
2 loss of spent-fuel pool.

3 What we're suggesting is: What if you
4 considered all three that have happened, not just
5 one out of the three or two out of the three, but
6 you lose all three of those? In other words, it
7 is -- given the magnitude of a particular crash
8 scenario, that can't be ruled out.

9 If that particular kind of release,
10 radiological hazard, is considered, I think that
11 would be an adequate kind of analysis to determine
12 whether there would be such adverse effects on
13 collocated units that would either cause a
14 radiological hazard to personnel working there that
15 would be unacceptable, or whether it would
16 effectively preclude operation of those units and
17 thereby cause disruption of the public's best
18 welfare as well.

19 So I think that what you suggest, at least
20 conceptually, is correct and would possibly address
21 our contention and concerns. But, again, I think
22 it's all dependent on the underlying assumptions
23 that go into that and just what the magnitude of a
24 postulated radiation release would be.

25 In other words, if it's -- I think as Judge

1 - Arnold asked earlier, you know, really what kind of
2 an accident are you talking about? Are you talking
3 about a spill inside the containment that it can be
4 effectively contained pretty readily and so forth?
5 Or are you talking about an accident that has a 747
6 loaded with jet fuel, crashing into a nuclear plant?
7 They are substantially different,

8 And we're simply suggesting that in the
9 changed-threat environment in which we now realize
10 we are living in, the more extreme accident
11 scenarios now are recognized by the Agency, by the
12 Commission, as something that should be considered
13 at least in some aspects of the licensee's
14 application, and in that regard, we think it's a
15 logical sort of extension to consider whether they
16 would have an adverse effect on the operation of
17 collocated units.

18 So it's really asking the Commission to take
19 account of these large magnitude accidents and a
20 full analysis of possible adverse effects. One of
21 those would be on collocated units.

22 JUDGE YOUNG: When you talk about the new
23 threat environment, I'm assuming you're talking
24 about post-9/11 terrorist threats.

25 MR. EYE: Yes.

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1 JUDGE YOUNG: And so to that extent, we're
2 getting back into the same issue that -- I can't
3 remember which -- was it Contention --

4 MR. EYE: It was probably Contention --

5 JUDGE YOUNG: -- 3 or 4?

6 MR. EYE: I believe it was.

7 JUDGE YOUNG: So the same arguments would
8 apply --

9 MR. EYE: Yes, Your Honor.

10 JUDGE YOUNG: -- to the extent that you're
11 basing the contention on that. And the contention
12 is not that specific. You say now that you're
13 asking the Commission to consider that more than is
14 going to be required should be required. That
15 sounds like you're challenging the rule as written
16 or the lack of a more stringent rule. Am I
17 understanding that correctly?

18 MR. EYE: That's one way it could be
19 interpreted, Your Honor, but, no. I think what
20 we're saying is that if you take a look at Chapter 7
21 of the environmental report, there is not a detailed
22 discussion in there about the contingencies that we
23 offer up in this contention. It's not there. And
24 even if you look at the FSAR, at least as prepared
25 now, not taking into account what the November

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1 submittal said necessarily, but it's not in the
2 environmental report now in terms of the accident
3 scenarios. There's scant discussion about the
4 effects on collocated units.

5 JUDGE YOUNG: Well, I think Mr. Frantz's
6 response earlier was that if in the FSAR, an
7 analysis has been done and it shows that there would
8 be no impact, then I think his argument was that
9 there -- that would mean that there would be no need
10 to discuss it in the environmental report. What's
11 your response to that? Did I state that correctly?

12 MR. FRANTZ: Yes.

13 MR. EYE: Our response to that would simply
14 be, Your Honor, that we don't believe that that
15 takes into account the severity, the potential
16 severity of accidents that could reasonably be
17 foreseen in the event that a large commercial
18 airliner has an impact with one of the units.

19 JUDGE YOUNG: And then, I guess -- then we get
20 back to the issue of if, under the new rule, the
21 Applicant were to provide the analysis of an
22 aircraft crash, then I think your argument was,
23 well, it would require them to analyze either the --
24 of the three things that you listed.

25 And so your argument would be that there would

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1 need to be an analysis of all three together, and
2 then in addition to that, the -- whether there would
3 be any different impact that should be analyzed of
4 one collocated unit on another. Am I understanding
5 that that's sort of the --

6 MR. EYE: That's the gist of it, Your Honor.
7 Yes.

8 JUDGE YOUNG: Okay. Anything further from
9 you?

10 MR. EYE: Not at this time, Your Honor.

11 JUDGE YOUNG: Since we've sort of narrowed
12 that down, does Applicant or the Staff have any
13 response to that?

14 MR. FRANTZ: Yes, just very quickly. One,
15 it's apparent he's engaging in nothing but pure
16 speculation, and for that reason alone, the
17 contention can be dismissed. But I think more
18 importantly, what he's asking the Commission to do
19 is just totally inconsistent with its own
20 regulations and the policies and the NEPA itself.

21 First of all, there is no requirement, not in
22 the proposed aircraft impact rule or anywhere else,
23 to consider both loss of containment and loss of
24 core cooling. That's his allegation, and we should
25 consider that.

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1 And then he's asking us not only to consider
2 loss of containment and loss of core cooling, but
3 also then that that somehow impacts another unit,
4 and we've just -- he says we just need to assume
5 that the second unit's also adversely impacted.
6 This type of hypothetical worst-case analysis is
7 just totally inconsistent with NEPA and is not
8 required.

9 JUDGE YOUNG: Based on the NEPA case law about
10 worst-case --

11 MR. FRANTZ: Yes. That's correct. And I
12 might add further to the extent he's postulating
13 that this all arises because of the heightened
14 threat security levels and due to a terrorist
15 attack, that's solely inconsistent with the
16 Commission policy on not considering under NEPA
17 terrorist attacks, which has been upheld by the
18 Third Circuit.

19 And so, just for numerous reasons, both legal
20 and factual, this contention just should be
21 dismissed.

22 JUDGE YOUNG: When you -- you said you weren't
23 sure whether the additional information --

24 MR. FRANTZ: Yes. The design certification
25 application -- once the new rule becomes

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1 effective -- it hasn't been published yet, I don't
2 believe, in the Federal Register. But once it
3 becomes effective, the design certification
4 application will need to provide information on
5 aircraft impacts and show compliance with the
6 aircraft impact rule.

7 JUDGE YOUNG: Anything further on Contention
8 13?

9 MR. BIGGINS: The Staff has nothing further.

10 MR. EYE: Your Honor, I would only state for
11 the record that the submittal of November, November
12 4, 2008, assumes that simultaneous -- this is a
13 quote from the proposed amendment to their FSAR at
14 Section 6.4.4. It says that, "Simultaneous post-
15 accident radiological releases from multiple units
16 at a single site are not considered to be credible."
17 Why not? Why isn't that credible?

18 MR. FRANTZ: Well, the answer to that is that
19 you're looking at core damage frequencies roughly on
20 the order of 10 to minus 5. To have simultaneous
21 accidents, you're talking about 10 to the minus 10.
22 That certainly is not a credible event under
23 anybody's definition of credible.

24 MR. EYE: Perhaps the quantification of that
25 does not seem credible, but again, is that -- I

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1 -- guess my question would be: Does that take into
2 account -- and that's the quantitative assessment of
3 the probabilities of something like this happening.
4 Is that an adequate basis to reject the scenario
5 that is suggested in this contention, that there is
6 a severe enough radiological hazard or a severe
7 enough radiological release that it would affect the
8 operations at other units.

9 The Applicant seems to suggest that that's
10 just not something that we need to think about, and,
11 again, it seems to us, if you take a look at the
12 Federal Register notice that announced the 50.54(hh)
13 amendments, the changed-threat environment
14 explicitly calls out that applicants ought to take
15 into account the impacts of commercial aircraft and
16 reactors. It doesn't say, And all you have to do is
17 assume that you're going to lose one unit. It
18 doesn't say that.

19 JUDGE YOUNG: Are you talking about the new
20 rule?

21 MR. EYE: Yes.

22 JUDGE YOUNG: So presumably that would be
23 complied with.

24 MR. EYE: Well, I'm not sure that compliance
25 with the rule necessarily rules out taking into

1 account a magnitude of radiological release that is
2 greater than what is assumed in the FSAR. The FSAR
3 has a bound -- has bounding that assumes that
4 there's going to be a radiological release from only
5 a single unit, and we would take issue with that.
6 That seems sort of arbitrary to say that there's not
7 a possibility, a reasonable possibility, of thinking
8 about a multiple-unit loss, or taking into
9 account -- counsel suggests that there's no need to
10 take account of the loss of all three of the
11 parameters suggested in the rule: loss of
12 containment integrity, core cooling, and spent-fuel
13 pool. Why not?

14 JUDGE YOUNG: How do you respond to the
15 argument that under NEPA a worst-case scenario is
16 not required to be considered?

17 MR. EYE: Well, that's the general rule
18 certainly, but I'm not even sure that the loss of
19 two units, if you've got four, is considered to be a
20 worst-case scenario. That wouldn't be a worst-case
21 scenario. If you've got four units collocated, the
22 worst-case scenario would be loss of all four.

23 JUDGE ARNOLD: Let me ask the Staff. In the
24 environmental report, Applicant should look at
25 external events and their effects on the plant if

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1 that-external event is a credible event. Now, is
2 there -- how do they determine credibility? Is it
3 probability-based, or how do you decide what should
4 be in there and what shouldn't?

5 MR. BIGGINS: In the environmental report or
6 the final safety analysis report? See, when you're
7 talking about external events, obviously the final
8 safety analysis report has the discussion about the
9 safe operation of the plant, taking into account
10 external events. For example, as I discussed
11 yesterday, GDC-2 talks about natural events, floods,
12 droughts, tsunamis, et cetera. And those kinds of
13 events are discussed in the FSAR.

14 When you're talking about the environmental
15 report, the environmental report is focusing
16 primarily on the environmental impacts from this
17 action, from the construction and operation of the
18 plant. And in looking at the environmental impacts,
19 the primary focus is going to be on what impacts
20 does the plant have on the environment.

21 And in that regard, severe accidents and other
22 nearby hazards are analyzed in regard to their
23 likelihood of having an impact on the plant and on
24 the environment, and severe accidents are discussed
25 in the environmental report in Chapter 7.

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1 And I would point out for the Board that as
2 this contention is evolving through Mr. Eye's
3 arguments here today, none of this is raised in the
4 contention. Mr. Eye doesn't -- the Petitioners do
5 not argue specifically in their petition or in their
6 reply that the severe accident analysis in Chapter 7
7 of the ER is inadequate in any way. And so I think
8 in getting back to the contention itself, you know,
9 if the Board is looking at this contention itself,
10 again, this -- I believe that the Petitioners are
11 mixing two different things.

12 They're mixing what should be in the
13 environmental report regarding environmental impacts
14 with the safe operation of the plan, which is
15 contained in the final safety analysis report, and
16 they have neither discussed or challenged the
17 discussion of the safe operation of the plants,
18 either through the control room habitability section
19 or the information provided in the November 4
20 letter, nor have they taken any contrary position to
21 the discussion of severe accidents -- the
22 environmental impacts from severe accidents in the
23 environmental report in Chapter 7.

24 So if you divide this contention into either
25 facet, whether it be an environment contention or a

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1 safety contention, there really is no substance in
2 this contention that challenges either the analysis
3 in the FSAR or the analysis in the environmental
4 report.

5 MR. EYE: May I?

6 JUDGE YOUNG: Let me ask -- oh, I'm sorry. Do
7 you have --

8 JUDGE ARNOLD: No.

9 JUDGE YOUNG: -Hold on just one second.

10 I think the question was: How is it
11 determined which types of severe accidents -- what
12 level of severe accidents are credible enough that
13 they need to be addressed in the environmental
14 report? And looking back to the original
15 contention, it's pretty simple and straightforward.
16 Chapter 7 has no discussion or analysis of the
17 impact of a severe radiological accident at any one
18 of the four units on the other units.

19 And just looking at it from that standpoint, I
20 don't think there's any dispute that Chapter 7 does
21 not contain that, and so the question is: Should
22 it? And is there a dispute on whether it should?
23 Obviously there's a dispute on whether it should.
24 The responses point out that in the FSAR, certain
25 things are addressed that deal with the impact of

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1 accidents on other -- accidents at other units on
2 remaining units.

3 But what is it -- just looking at it very
4 simply and straightforwardly, at the contention
5 itself, what is it that says that the environmental
6 report does not need to address severe -- the impact
7 of severe accidents at other units on collocated
8 units? Is it some measure of credibility? If so,
9 what's the measure of credibility? Is it
10 probability? Why shouldn't -- why should the
11 environmental report not be required to consider
12 this as a potential severe accident that might have
13 an impact?

14 MR. BIGGINS: Okay. I believe there are a few
15 questions there to answer, starting with first it's
16 the burden of the Petitioner to provide the
17 authority for why the environmental report must
18 contain information that they say is omitted from
19 it.

20 JUDGE YOUNG: Okay. Let's back up for a
21 second. I'm not really asking for a litany of the
22 case law on who has what burden. I'm looking at the
23 contention itself, and it says, The environmental
24 report deals with severe accidents. Chapter 7 deals
25 with severe accidents, but there's no discussion of

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1 impacts from severe radiological accidents on other
2 units -- the impact on collocated units. That's the
3 contention itself.

4 And just looking at it from a practical
5 perspective, one might think, if you've got four
6 reactors in relatively close proximity, why wouldn't
7 the environmental report consider the accident at
8 one on another. Now, it may be because the severe
9 accidents that are considered would bound any damage
10 or any impact from an accident at another.

11 I'm asking you to address the simple practical
12 question that the contention raises in one's mind
13 about, well, why doesn't it contain that. Why
14 shouldn't it contain the alleged omitted material?

15 MR. BIGGINS: Your Honor, again, the
16 contention says that we need to consider the impacts
17 of severe radiological accidents on the operation of
18 the other units, and that is a matter to be
19 addressed in the FSAR. The safe operation of the
20 plants is a safety question, not an environmental
21 question. The environmental report --

22 JUDGE YOUNG: Well, you added the word
23 "operation."

24 MR. BIGGINS: I don't believe I --

25 JUDGE YOUNG: Okay. You're right.

1 MR. BIGGINS: I don't believe I --

2 JUDGE YOUNG: You're right. The word
3 "operation" is in --

4 MR. BIGGINS: So with that being the
5 contention, again it's the Staff's position that the
6 safe operation of the other units is addressed in
7 final safety analysis report, and --

8 JUDGE YOUNG: And that's where --

9 MR. BIGGINS: -- with that being the
10 contention, they're not talking about, what are the
11 environmental impacts of a severe accident. They
12 didn't ask us that. They asked: What are the
13 consequences on operation of the other units?
14 That's the contention.

15 And if the contention had been, What are the
16 environmental impacts of a severe accident, it
17 doesn't matter which reactor it occurs at. That's
18 addressed in the severe accidents analysis in
19 Chapter 7. That section, that chapter, contains an
20 analysis of the environmental impacts. So that is
21 in the ER.

22 But, again, what the contention actually says
23 is the effects on operation of the other units.
24 That's an FSAR question.

25 JUDGE YOUNG: Okay. Now I -- thank you for

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1 clarifying that for me... The matter of safe
2 operation of other units is not an environmental
3 issue; it's a safety issue, and it's addressed in
4 the FSAR. So let's take this one step, though.
5 Let's assume that the contention is looking at the
6 impact more broadly, including environmental
7 impacts.

8 Chapter 7, as I understand it, does not
9 contain any analysis of an accident at one unit on
10 the other units as an environmental matter. Does it
11 contain -- is what you're arguing that what it does
12 contain bounds the environmental impacts of an
13 accident at one unit on the other units?

14 MR. BIGGINS: I believe the analysis in
15 Chapter 7 contains the analysis of environmental
16 impacts from a severe accident. So I believe the
17 accidents discussed in the FSAR regarding an
18 accident at one unit which could affect another unit
19 are bounded by the analysis in the environmental
20 report regarding severe accidents.

21 JUDGE YOUNG: So the severe accidents
22 discussed in the environmental report, you're
23 saying, are severe enough that they would bound an
24 accident in another unit. Now, there was some
25 discussion about how severe those were.

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1 And then Judge Arnold asked the question: If
2 the environmental report has to contain analysis of
3 accidents that are considered to be credible, how is
4 that credibility determined? That was the initial
5 question that started this, and I never heard an
6 answer to that. I'm just trying to get sort of a
7 basic clarification here of what is required to be
8 in the environmental report and how that's
9 determined.

10 MR. BIGGINS: Yes, Judge. And the analysis in
11 the environmental report is controlled by the NEPA
12 case law which only requires us -- requires the
13 Applicant and likewise for the environmental impact
14 statement, the Staff to look at the reasonably
15 foreseeable impacts from this proposed action.
16 We're not required to look at, as they discussed,
17 the worst-case scenario.

18 So the severe accidents analysis, the impacts,
19 environmental impacts from a severe accident in the
20 environmental report, the Staff believes, does
21 comply with the requirements of NEPA, and --

22 JUDGE YOUNG: Because you're saying that what
23 it covers is everything that's reasonably
24 foreseeable, and I guess the question was: How
25 would you determine -- how is it determined -- how

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1 -do you argue it should be determined what is
2 reasonably foreseeable, and if it doesn't contain a
3 discussion of an accident at one unit and the
4 impacts of that accident on other units, how does --

5 Just from a very simple perspective, how does
6 the Staff look at what is reasonably foreseeable,
7 credible?

8 MR. BIGGINS: Again, that severe accident
9 would bound an accident at one unit --

10 JUDGE YOUNG: What severe accident?

11 MR. BIGGINS: The severe accident -- the
12 environmental impacts of a severe accident. The
13 severe accident described in Chapter 7 of the
14 environmental report would be bounding regarding the
15 accidents described in the contention, an accident
16 at one reactor with its effects on another reactor.

17 JUDGE YOUNG: And you're saying that the
18 accident that's described in Chapter 7 would bound
19 it because the foreseeability of how severe that
20 would be is determined how?

21 MR. BIGGINS: The level of severity of the
22 severe accident?

23 JUDGE YOUNG: Right.

24 MR. BIGGINS: Let me confer with the Staff.
25 One moment.

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1 (Pause.)

2 MR. BIGGINS: Judge, the magnitude of the
3 severe accident considered in Chapter 7 and how that
4 is determined, I believe that's your question.

5 JUDGE YOUNG: Right.

6 MR. BIGGINS: That is a beyond-design-basis
7 accident, and it is not determined based on
8 probability but rather severity and risk, and the
9 environmental standard review plan sets out the
10 details for what must be and what does not need to
11 be considered for the severity level of that beyond-
12 design-basis accident.

13 And so where the FSAR would be focusing more
14 on a design-basis accident and how it might impact
15 other units, the environmental impacts analyzed in
16 Chapter 7 for an accident would be a beyond-design-
17 basis accident, and it would be -- again, the
18 severity is determined not based on probability.

19 JUDGE YOUNG: But based on?

20 MR. BIGGINS: Risk.

21 JUDGE YOUNG: Let's just assume for sake of
22 argument -- and this is -- I'm sure I'm not
23 articulating these and other questions very well,
24 but I'm sort of struggling with it, trying to come
25 up with some.

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1 Let's assume for argument's sake that the
2 contention had extensive support for the argument
3 that the environmental report should consider the
4 impact of a severe accident at one unit on the other
5 collocated units. What would your response be to
6 that? Would you still be arguing that the
7 environmental report does not need to consider that?
8 And if so, what would you be basing that on?

9 MR. BIGGINS: My response, Judge, would be
10 that the environmental impacts from a severe
11 accident are already contained in Chapter 7 and that
12 in this situation, the Petitioners did not raise any
13 dispute with that analysis.

14 JUDGE YOUNG: All right. Let me see if I can
15 articulate this better. Does the environmental
16 report, does it somehow implicitly include an
17 analysis of the impacts of an accident at one unit
18 on other units?

19 MR. BIGGINS: I do not believe the
20 environmental report specifically talks about an
21 accident at one unit and its impacts on another
22 unit. I believe that the analysis is bounding in
23 the environmental report for that type of accident.

24 JUDGE YOUNG: Okay. So that's the response.
25 It doesn't implicitly include that, but it's

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1 bounding because the accident is severe enough that
2 it would incorporate all -- at least equivalent, if
3 not more, damage to any given unit --

4 MR. BIGGINS: That is the Staff's position.

5 JUDGE YOUNG: -- that could be caused by an
6 accident at another unit.

7 MR. BIGGINS: I'm sorry. Yes. That is the
8 Staff's position.

9 JUDGE YOUNG: Okay. And your argument is that
10 the petition has not disputed that approach.

11 MR. BIGGINS: My argument is that the petition
12 focuses on the operation of the units, and since the
13 contention focuses on the operation of the units, it
14 really doesn't even raise a dispute with the
15 environmental report. It's simply trying to
16 transfer analysis that belongs in the FSAR into the
17 environmental report.

18 JUDGE YOUNG: But assuming that the contention
19 weren't limited to operation, it was more broadly
20 stated as some of the discussion in the basis for
21 the contention is, it's more broadly stated and does
22 go to environmental impacts, your argument that, to
23 the extent that the environmental report does not
24 specifically include that, it -- such impacts are
25 implicitly included because the severe accident that

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1 is addressed is required to be addressed and you
2 view Chapter 7 of this environmental report as
3 actually addressing bounds any such hypothetical
4 accident at another unit.

5 MR. BIGGINS: With that assumption, yes. I
6 agree with that.

7 JUDGE YOUNG: Okay.

8 JUDGE ARNOLD: Question for Applicant: I'm
9 looking at 7.1.1 of the environmental report,
10 Section of accidents for severe accidents. It says,
11 "The design-basis accidents considered in this
12 section come from Chapter 15 of the Mitsubishi heavy
13 industries APWR design control document." Would
14 that design control document assume the presence of
15 two other operating nuclear reactors within a
16 quarter mile?

17 MR. FRANTZ: No. That is focused solely on
18 the reactor, the single reactor.

19 JUDGE ARNOLD: Thank you. How can we be sure
20 then that analysis selected from that document would
21 cover all conditions that may have to do with an
22 accident occurring at some other reactor in close
23 proximity?

24 MR. FRANTZ: Because Luminant has done the
25 analysis for an accident at 1 and 2, and showed that

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1 the results are bounded by the results for the DCD,
2 so we've done the very analysis that you suggested.

3 JUDGE ARNOLD: Is that documented in that
4 November --

5 MR. FRANTZ: Yes.

6 JUDGE ARNOLD: -- report?

7 MR. FRANTZ: That's correct. And also, might
8 I add in response to one of Judge Young's earlier
9 questions regarding NEPA and what NEPA requires.
10 NEPA does only have a rule of reason, and it only
11 requires evaluation of credible events, and I think
12 a recent Licensing Board decision helped define what
13 credible events are.

14 I refer the Board to the Calvert Cliffs COL
15 proceeding, and in that proceeding, the Board looked
16 at external events, and for those external -- and
17 that's basically what we have here. We have one
18 event, one unit potentially affecting another unit,
19 and in that decision, the Board ruled that if the
20 external event is less than 10 to minus 6, that's
21 not credible. It need not be evaluated under NEPA.

22 More importantly, I think, perhaps for our
23 purposes is that the Board in Calvert Cliffs said
24 it's up to the Petitioner to make the showing as
25 part of its contention that the external event is

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1 -- credible. And if the Petitioner does not make a
2 showing that it's credible, it need not -- the
3 contention should be dismissed.

4 And, again, that's exactly what we're faced
5 with here. Petitioners have not made the showing
6 that this external event, namely one reactor
7 affecting another reactor, is credible, and because
8 they've not made the showing, the contention should
9 be dismissed under Section 2.309(f)(1)(v).

10 JUDGE YOUNG: Getting back to the bounding
11 question --

12 JUDGE ARNOLD: Hold on.

13 JUDGE YOUNG: Oh, I'm sorry.

14 JUDGE ARNOLD: Petitioner's been wanting to
15 say something for a while.

16 MR. EYE: Just briefly, Your Honor, a couple
17 of quick observations. One is that in the
18 environmental report at 7.2.1, it seems to be that
19 the assumption about the accident that would be in
20 question here has two broad pieces. One, it
21 involves substantial deterioration of the fuel in
22 the reactor, including getting to the point of
23 melting.

24 And, second, it involves deterioration of the
25 containment system to the point where it would not

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-1 perform its intended function in limiting the
2 release of radioactive materials. So in that
3 regard, it does cover potentially two of the three
4 release points that we discussed earlier, but it
5 omits any discussion of the loss of the spent-fuel
6 pool. That's one point.

7 A second point is that -- and this is
8 certainly an evolving discussion, because of how
9 licensees and applicants are trying to deal with
10 this duty that they now have to take into account
11 the potential impacts or effects of an aircraft
12 impact.

13 The South Texas, for example, plant did an
14 exercise recently that assumed two airplanes, two
15 aircraft or commercial airliners crash into the
16 site, not one but two. Now, that wasn't prompted by
17 anything that the Petitioners asked them to do
18 directly. They did that on their own.

19 Now, it seems that if that particular
20 applicant is setting the bar at that level for their
21 own internal analytical purposes, and presumably
22 something that they would ultimately present to the
23 Commission for purposes of approval, then that's no
24 longer beyond the realm of possibility. They are
25 integrating that into their own analysis.

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1 -- So--I think that in that regard, there's kind
2 of an attempt here to artificially constrain what
3 the possibilities may be, based upon some
4 quantitative analyses as to probability. And it's
5 the Petitioners' position that that should not limit
6 what is required to be done, given that we've got
7 this new requirement in 50.54(hh) and we've got
8 other applicants and licensees, for that matter,
9 doing analyses that assume more than one aircraft
10 crashing into a nuclear plant in one particular
11 accident scenario.

12 MR. FRANTZ: Mr. Eye, excuse me. Could you
13 provide a citation for that?

14 MR. EYE: For the STP?

15 MR. FRANTZ: Yes.

16 MR. EYE: I don't have it off the top of my
17 head. I know that that was the -- it was a recent
18 briefing, I believe, that was --

19 MS. BROWN: It was a meeting between the NRC
20 and STP, discussing their 2008 --

21 MR. EYE: Safety report, I --

22 MS. BROWN: -- safety assessment, in Bay City
23 last week. They --

24 MS. HADDEN: We have a videotape we're happy
25 to share.

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1 MS. BROWN:— They discussed this drill in
2 detail.

3 MR. FRANTZ: You're saying it's a drill.

4 MS. BROWN: No. It was a -- like it was a --
5 what do you --

6 MR. EYE: An exercise.

7 MS. BROWN: An exercise, a scenario that
8 they --

9 MR. FRANTZ: I'm also counsel for South Texas.
10 That's why I was somewhat surprised to hear this,
11 because I'm not aware of any analysis that we've
12 ever submitted on the STP docket that would
13 encompass two airplane crashes.

14 MR. EYE: Your Honor, also there's one other
15 aspect of this that I think is perhaps getting a
16 little bit clouded here, and it is the case that if
17 you look strictly at the verbiage in the contention
18 in the boldface, it limited to operational
19 considerations. But as a practical matter,
20 operational -- if there are interruptions in
21 operations capabilities, it's because there has been
22 an environmental impact. It's because that there's
23 been interference with either workers being able to
24 get to the plant or remain there safely.

25 So to the extent that there's an attempted

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1- limitation on this contention because of the word
2 "operational," operational really presumes that
3 you've already gone past the environmental impacts,
4 and you've moved into operational impacts, or so
5 that would follow.

6 And there's one other aspect of this that I
7 think is interesting. We've focused pretty much on
8 terrorist attacks, airplanes crashing into plants
9 and so forth. That doesn't take account into -- for
10 more generalized scenarios for accidents that could
11 be caused, for example, severe seismic events that
12 would impact all four units or perhaps not
13 necessarily the same, but there would be potential
14 impacts for all four.

15 So I don't want to have the Panel go away with
16 the idea that somehow this -- what we're arguing in
17 this contention is such a limited scope. We really
18 think that this contention opens up a very wide
19 possibility of accident scenarios and is not limited
20 to just necessarily operational impacts, because if
21 it's operationally impacted, it's already been
22 impacted environmentally.

23 JUDGE YOUNG: I want to get back to a question
24 I wanted to ask the Applicant and maybe share with
25 you a bit of how I'm looking at this at this point

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1 or how it's possible to look at this.

2 If you don't consider the word "operation" to
3 be sort of a term of art and you look at the
4 contention as being basically the environmental
5 report should consider the impacts of an accident,
6 of a severe accident on one -- at one unit on the
7 other units, the question of the foreseeability of
8 that seems to be -- I mean, it's sort of -- from at
9 least one perspective, one could say that, well,
10 it's as foreseeable that an accident could occur at
11 another unit as it would be that it could occur at
12 the unit you're looking at itself.

13 So let's get past the foreseeability aspect of
14 it. I'm trying to get back sort of to where I was
15 with the Staff, and this is what I'm -- where I'm
16 sort of struggling here. Because it would seem just
17 as easy to foresee an accident at any of the units,
18 unless the analysis that's done with regard to the
19 units in question effectively bounds any accident
20 that could occur at another unit, then I'm left
21 wondering, Well, why didn't the environmental report
22 consider an accident at another unit.

23 And so from the standpoint of a nontechnical
24 person, just using common sense, it seems as though
25 the impact of an accident, let's say, on Unit 3, the

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1 - impact of an accident at Unit 3 would have a
2 greater -- would be greater on Unit 3 than the
3 impact of an accident at Unit 1 would be on Unit 3,
4 simply because it's right there rather than at
5 another place.

6 MR. FRANTZ: That's correct.

7 JUDGE YOUNG: So I guess what I'm trying to
8 get at is: How -- one, you look at the severity of
9 the accidents that has to be considered.

10 MR. FRANTZ: Maybe if I can just jump in here,
11 I don't think the question is whether or not an
12 accident at one unit is foreseeable. I think the
13 question is not only is it foreseeable, but is it
14 foreseeable that that could then impact the second
15 unit.

16 And when you start multiplying all these
17 probabilities and if you take into account our
18 evaluations that we have performed, which show that,
19 for example, Unit 3 and 4 can withstand explosions
20 and fires and radiological events at 1 and 2, there
21 just is -- it's not foreseeable that you're going to
22 impact 3 and 4 from an accident at 1 and 2.

23 JUDGE YOUNG: Well, why would -- it seems like
24 it would -- I mean, I guess I'm not following that.
25 It seems like it would be foreseeable that there

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1 - could be some impact of an accident at one unit on
2 the other units, you know. And so then I look -- I
3 mean, obviously if there's something happening at
4 one unit and you've got another one a quarter of a
5 mile away, there could be some impacts. I don't
6 know what those would be, but there could be some
7 impacts.

8 Then does the bounding analysis take care of
9 it? Or is it a question of the type of impact would
10 be different than the impact of an accident at the
11 same unit? And, you know, I'm just trying to look
12 at this from a very basic level.

13 MR. FRANTZ: At a very basic level, the
14 probability of a severe accident at a reactor -- I
15 don't know the exact core damage frequency for
16 Comanche Peak 1 and 2, but for that vintage plant,
17 basically the core damage frequency is around 10 to
18 minus 5 approximately. The probability of a large
19 release is about a factor of 10 lower, or 10 to the
20 minus 6.

21 So you're talking about extremely low-
22 probability events just to begin with. And then
23 when you start looking at what impact that event may
24 have on another reactor, you're getting well
25 extenuated, well beyond any rule of reason under

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NEPA. — — — — —

There may, in fact, under some worst-case scenarios be an effect. I don't know whether that's even possible, but assuming that there might be, but we're talking about events which are so low in probability that they are not required to be considered under NEPA. It's not under NEPA's rule of reason. And environmental reports aren't required to go through every postulated scenario and say, Yes, that has no effect; that has no effect; that has no effect; that has no effect.

JUDGE YOUNG: Could we just get back to the basic level that my question's at? If the -- if what is considered in the environmental report, the severe accident section of that, if what is considered incorporates all the damage that you believe could be reasonably foreseen as a result of an accident at a unit, can you just address the simple bounding question?

Is it -- would that encompass any possible damage, the same level of any possible damage that could result from an accident at another unit? And maybe I'm going off here. I'm just -- I'm thinking that it seems like it logically would.

MR. FRANTZ: Yes. I can't say down to the

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1 _third or fourth significant digit it would be, but I
2 think you're talking about under, again, for NEPA
3 purposes something that's so close that the
4 differences would not be significant.

5 JUDGE YOUNG: Before we move on, do you want
6 to just address this bounding issue, just at the
7 end, because without carrying your contention
8 farther than it is already here, because how could
9 there be any additional impact of any significance
10 above and beyond the impact of a severe accident at
11 the unit itself? And you haven't challenged the
12 issue of the severity of the accident or accidents
13 that are analyzed in Chapter 7.

14 MR. EYE: I think that implicitly we have
15 challenged it inasmuch as we suggested they have not
16 taken an accident scenario that's severe enough, and
17 so I think that implicitly we have said that they
18 have not taken into account an accident that's so
19 severe that it would impact the operations at
20 collocated units.

21 And in the discussion we've had today, I think
22 we've established that, in fact, the level of
23 severity of the accident does not include, for
24 example, loss of all the three parameters considered
25 under 50.54(hh).

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1 JUDGE YOUNG: But let's consider what it does
2 include, what it does include. What it does include
3 would be the impact on a unit itself of an accident
4 at that unit.

5 MR. EYE: Correct. It does.

6 JUDGE YOUNG: So how could an accident at
7 another unit be more significant than an accident at
8 the unit itself? Maybe this is totally simplistic,
9 but --

10 MR. EYE: I'm not sure I know how to answer
11 that question, Your Honor, to be completely candid,
12 but what I do understand is this much. So now we
13 understand that motivated people who want to do
14 damage are not going to be constrained by
15 probabilistic analyses based upon statistical --

16 JUDGE YOUNG: I'm going to ask you to avoid
17 the terrorism arguments. That just confuses the
18 issue at this point. I understand that you're
19 saying that that's part of it, but that's something
20 that we've already discussed, and I don't see any
21 need to discuss it further now, unless there's
22 something that you left out that I'm not
23 considering.

24 MR. EYE: No. And what I'm trying to get to
25 is if you take the loss of coolant accident, a

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1 . severe loss of coolant accident at one unit that
2 disables it to the point where it's no longer
3 operational, disables it to the point where it's a
4 hazard to be near, all we're suggesting is a similar
5 kind of radiological hazard could also pertain to a
6 collocated unit, not necessarily that the flames get
7 to the collocated unit, not necessarily that a
8 missile emanating from one unit gets to another.
9 We're talking about the radiological hazards.

10 If the contamination is of a nature and extent
11 that it is so severe at the damaged unit that it has
12 a similar kind of contamination effect at a
13 collocated unit, then under your question, that is,
14 well, why shouldn't the bounding of the damage at
15 one unit limit the damage at another unit. Fine.

16 If the radiological hazard is so severe at the
17 hazard at the unit that's been damaged that it has a
18 similar kind of radiological impact on a collocated
19 unit, then that should be the bounding. It's not
20 necessarily limited to the direct effects of fires
21 and explosions. This goes to a radiological
22 contamination aspect, and I think that the
23 contention actually calls that particular part out
24 in terms of its -- it's a contamination -- a
25 radiation contamination issue rather than the flames

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1 - or the fire explosion aspect of it.

2 JUDGE YOUNG: So what you're basically
3 challenging is you're saying because the severity
4 level of the accident that's analyzed in Chapter
5 7 -- or I'm paraphrasing here. You're saying that
6 the accident that is considered is not sufficient,
7 because it does not extend to the impact of that
8 accident on other units.

9 MR. EYE: Yes. At least not to the extent
10 where there is an assumption that you have such a
11 severe radiation hazard that it would effectively
12 contaminate the environment to the point where
13 operations could be implicated.

14 JUDGE YOUNG: But they've addressed the
15 operational issues in the FSAR.

16 MR. EYE: Well, but that didn't assume that
17 you had a radiological hazard that is as we
18 suggested, where you've got a loss of the core, loss
19 of spent-fuel pool, loss of reactor containment. I
20 don't believe that those are built into their
21 assumptions in the FSAR, and it's certainly not
22 built into their assumptions in Chapter 7 of the ER.
23 I mean, the description of the accidents in the
24 environmental report just does not have that -- it
25 doesn't go to that extent.

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1 JUDGE YOUNG: Mr. Frantz, why doesn't the
2 environmental report include a discussion of the
3 impact of an accident that would affect the spent-
4 fuel pool, not only on that unit but on the other
5 units?

6 MR. FRANTZ: Well, with respect to your second
7 question first, it's remote and speculative. All
8 these accidents that he's talking about are remote
9 and speculative. The effect that you're talking
10 about, a severe accident in one unit impacting
11 another unit, there's just no basis to believe
12 that's credible.

13 Going to your first question, the reason that
14 it's -- a spent-fuel accident's not considered is
15 because almost all studies nowadays show that a
16 reactor accident, severe accident, is bounding of
17 the impacts of a spent-fuel accident, and therefore,
18 there's no reason to also look at the spent-fuel
19 accident, given the bounding effects of the reactor
20 accident.

21 JUDGE YOUNG: And those bounding effects are
22 the ones that are discussed in the FSAR?

23 MR. FRANTZ: In the environmental report.

24 JUDGE YOUNG: In the -- I'm talking about the
25 parts of the FSAR that talk about the effects on

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1 operations at other units. Would they coincide?

2 MR. FRANTZ: Yes, yes. That's correct. An
3 accident -- a design-basis accident in a spent-fuel
4 pool has lower impacts than a loss-of-coolant
5 accident.

6 JUDGE YOUNG: And the accidents that you
7 discuss in the FSAR are of the level of severity
8 that would bound an accident at the spent-fuel pool?

9 MR. FRANTZ: A design-basis accident. That's
10 correct.

11 JUDGE YOUNG: And what about the beyond
12 design-basis accident that would be discussed in the
13 environmental report?

14 MR. FRANTZ: Yes. The FSAR only looks at
15 design-basis events and design-basis conditions.

16 JUDGE YOUNG: Right, right.

17 MR. FRANTZ: And so it does not look at severe
18 accidents. The environmental report does look at
19 severe accidents, and in that regard, Section 2, 7.2
20 of the environmental report looks at a severe
21 reactor accident which bounds a severe spent-fuel
22 accident.

23 JUDGE YOUNG: This is hypothetical, but if
24 you -- I'm trying to understand these issues. If
25 you had included in your analysis in the FSAR not

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1 just the design-basis accident but the beyond-
2 design-basis accidents that would be considered in
3 the environmental report, would that change the
4 results of those? Do you know?

5 MR. FRANTZ: I don't know. I do not know.

6 JUDGE YOUNG: Because that's sort of what, I
7 guess, this contention goes to.

8 MR. FRANTZ: Well, it does not -- the
9 contention does not go to our FSAR. It goes to the
10 environmental --

11 JUDGE YOUNG: No, no. But conceptually it
12 goes to what the impact would be in a beyond-design-
13 basis accident of the sort that you analyze at the
14 design-basis level --

15 MR. FRANTZ: That's correct.

16 JUDGE YOUNG: -- in the FSAR. So just very
17 simply and concisely and in lay terms, why do you
18 think that the environmental report should not have
19 included that analysis of the nature that's provided
20 in the FSAR with regard to beyond-design-basis
21 accidents?

22 MR. FRANTZ: It simply is not credible, and
23 under NEPA's rule of reason, there's no reason to
24 evaluate that. And Petitioners have not provided
25 any factual support which would substantiate their

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1 -- claims that this is at all a credible event. In
2 fact, what they're postulating is well beyond what
3 any notice regulation has ever required or what any
4 environmental report or environmental impact
5 statement has ever required. It just is not
6 credible under NEPA's rule of reason.

7 JUDGE YOUNG: I guess this -- and maybe I'm
8 beginning to beat a dead horse here, but I guess in
9 some way, there's some level of commonsense issue
10 that arises here when you're talking about building
11 additional units at existing plants that the
12 contention raises in one's mind.

13 It would seem that it would be a fairly
14 commonsensical conclusion to make that the more
15 units you have at a given site, that there could be
16 the possibility of greater impacts from any accident
17 that occurred at a given site, when there are more
18 units rather than fewer units.

19 And looking at it from that commonsensical
20 perspective, your argument that it's just not
21 reasonably credible doesn't really address that
22 commonsense approach. I mean, isn't it -- when you
23 add more units, isn't it sort of obvious that if
24 there were an accident, there could be more impacts?

25 MR. FRANTZ: No. In fact, I think we've

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1 already shown at a design-basis level that there is
2 no impact. It doesn't not necessarily follow that
3 if you had a severe accident, there'd be any impact
4 either, and again, it's Petitioners' burden to show,
5 come up with something that would indicate that this
6 is credible, and they have not done so.

7 And so I don't buy into this argument we
8 necessarily have to assume an impact. That's not
9 the case. These units are located a quarter mile
10 away. There's a fair amount of distance between
11 them. There's just no reason to believe that
12 there's going to be an impact on a second unit.

13 JUDGE YOUNG: Well, I guess -- okay. Let me
14 give you an example, to sort of describe what I'm
15 talking about. We hear all the time about these
16 forest fires, and there's discussion of how close
17 together houses are and how when they fight the
18 fires, they may burn down a certain area so that the
19 fire can't go -- it will reach an area, and if that
20 area has been burned, then that will stop the fire
21 from going further.

22 So proximity is obviously something that
23 anybody who watches news reports of these forest
24 fires and how they fight them -- it obviously plays
25 into it. And if you have a neighborhood where there

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1 are a lot of houses close together, then it's more
2 likely that more houses are going to -- I mean, it
3 seems commonsensical to me that you're going to have
4 more damage to more houses than you would have where
5 houses are, you know, a quarter of a mile apart or a
6 mile apart, that there might be some difference
7 between that, and, one, based on just the proximity
8 itself, and, two based on how you fight the fire.

9 So transferring that sort of commonsensical
10 knowledge over, that's what I'm basing it on, so I
11 am left a little bit with a sense that when you say,
12 well, it's just not credible, that that's sort of a
13 conclusory statement, and then you say, Well, they
14 have the burden to show that it is credible. And
15 when I look at the contention and I think, Okay,
16 just looking at it from a logical perspective --

17 MR. FRANTZ: Judge Young, all I can say is
18 we've been doing NEPA law now for 39 years. We've
19 been doing NEPA analysis for nuclear power plants
20 for 39 years. We've been collocating plants
21 together for 39 years -- or actually more than that.
22 And never has there ever been a case where we've
23 ever had to evaluate the environmental impacts of an
24 accident at one unit on a second unit. And I think
25 it's very clear, because that is just not considered

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1. to be a credible event.

2. And it's under NEPA's rule of reason -- in
3. fact, for the first ten to fifteen years of NEPA
4. administration by the NRC, we didn't even consider
5. severe accidents at one unit, let alone consider
6. them impacting a second unit. We're talking about
7. probabilities which are just too low to be
8. reasonable to evaluate under NEPA.

9. JUDGE YOUNG: But I think the Staff says it's
10. not looked at from a probability perspective. It's
11. looked at from a risk perspective. You know, I --

12. MR. FRANTZ: The risk is probability times
13. consequences.

14. JUDGE YOUNG: You're right. There may not be
15. anything more that can be said. I may have carried
16. this as far as it needs to go, so I guess I'll say
17. gain, like I said quite a while ago, it seems now:
18. Is there anything else that anyone wants to say
19. about Contention 13 before we take a break and then
20. come back and move on to the remaining contentions?

21. MR. BIGGINS: No, Judge. Thank you.

22. JUDGE YOUNG: All right. Thank you. Let's
23. take ten minutes.

24. (Whereupon, a short recess was taken.)

25. JUDGE YOUNG: All right. Contention 14. I

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1 - think from -- let's see. From here on out,
2 basically, Mr. Eye, could you just -- you didn't
3 file a reply. To give you every benefit of the
4 doubt, I want you to respond to the arguments made
5 in the Applicant's and Staff's responses.

6 To the extent that you haven't done that and
7 don't do that, then I think we have to assume that
8 you don't have any response to it. And I know
9 you've said you stand on your original contentions,
10 but in some cases, the responses -- and I'm talking
11 here not just Contention 14 but the remaining
12 contentions. To some extent --

13 I'm sorry. I don't know that Judge Mignerey
14 has called in yet. Judge Mignerey? We were just
15 talking to her, and she was going to call back in in
16 a couple minutes.

17 I think I can go ahead and finish saying this,
18 though. It's more introductory. On all of these,
19 there's some specific things that are said in the
20 responses that -- there she is. Judge Mignerey?

21 JUDGE MIGNEREY: This is Judge Mignerey.

22 JUDGE YOUNG: All right. There's some
23 specific -- I was just giving some introductory
24 remarks. There's some specific statements that are
25 made in the responses that we want to give you the

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1 opportunity to respond to.

2 So on Contention 14, what do you have to say
3 on that one?

4 MR. EYE: Thank you, Your Honor. In summary,
5 what we were attempting to convey in Contention 14
6 is that there is an implication in the Applicant's
7 environmental report that because domestic resources
8 for uranium primarily, I guess, based upon economic
9 conditions have more or less dried up, at least
10 presently, that the foreign sources of uranium for
11 fuel at Comanche Peak Units 3 and 4 would be
12 primarily relied upon.

13 And it struck the Petitioners as raising at
14 least a couple of issues that are particularly, we
15 thought, germane to these proceedings. One was
16 triggered by the assertion in the environmental
17 report at page 5.7-4 that uranium mining and milling
18 and enrichment are currently more "environmentally
19 friendly." And that statement stood alone and was
20 not supported by any analysis that we could locate
21 in the environmental report.

22 And in considering the answers to that
23 contention, it does not appear that there was any --
24 that the Staff or the Applicant really differed with
25 our assertion that there was not an analysis of the

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1 statement that these particular activities are now
2 more environmentally friendly, and it essentially
3 calls out for more analysis to determine whether
4 that is the case.

5 Again, the backdrop of this is whether these
6 activities related to the uranium fuel cycle are,
7 one, as the Applicant suggests, more environmentally
8 friendly, and, two, whether in that case compared to
9 what, and is that still consistent with a license
10 issuing under the Atomic Energy Act being in the
11 public's interest. And it's a contention that's
12 really -- it's an omission contention inasmuch as
13 there's this statement that's not supported in the
14 environmental report. And I don't know that that's
15 been directly refused in -- by the Staff or the
16 Applicant.

17 The other two parts of the contention go to
18 whether it is a -- whether there should be an
19 analysis in the environmental report of being
20 dependent on foreign sources for uranium and whether
21 that dependence on foreign sources presents a
22 potentially harmful environmental or public health
23 consequence. Part of this is kind of a commonsense
24 question that we raise, and that is, when there is a
25 dependence on a foreign source, the possibility

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1 certainly exists of it being interrupted or inflated
2 in price because of that remote source.

3 To the extent that there is a direct economic
4 impact that could be foreseen in that regard, it was
5 our argument in the contention that that economic
6 impact under NEPA could legitimately and should be
7 legitimately considered in the environmental report
8 or in the application generally.

9 Finally, we are back once again to this
10 question about the changed-threat environment that
11 is permeating much of this proceeding, the changed-
12 threat environment post-9/11/2001, of course. And
13 in the third part of our contention, we do raise the
14 question about whether having attenuated -- I'm
15 sorry -- having longer supply lines rather than
16 shorter supply lines make access to foreign sources
17 of uranium more vulnerable to attack by those who
18 would have malicious intentions.

19 And in that regard, we believe that there are
20 public health and environmental impacts that inure
21 to that. And in response, primarily the Applicant
22 and the Staff rely on the provisions of 2.309(f) and
23 its various subparts to suggest that these issues
24 that we've raised in the contention are either
25 precluded because it's a challenge to Table S3, and

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1 we do not believe that it is an inherent challenge
2 to Table S3. This is an apples and -- the Table S3,
3 it's an apples-and-oranges comparison.

4 We don't see it in that respect, primarily
5 because, among other things, Table S3 was developed
6 long before the changed-threat environment that the
7 Commission now recognizes, and Table S3 wasn't ever
8 intended to address issues related to malicious
9 intent necessarily or the accidents that could occur
10 as a result thereof, and I recognize that Table S3
11 is a generic application, talking about doses and so
12 forth, but in this instance, reading Table S3 and
13 its footnotes, it just didn't seem that it addressed
14 the kinds of consequences that could be foreseen
15 from depending on foreign sources for uranium.

16 And --

17 JUDGE YOUNG: It does address environmental
18 effects of uranium mining and milling.

19 MR. EYE: It does, Your Honor, but it also, it
20 presumes that uranium mining and milling will be
21 done under standards as we understand them in the
22 United States, not necessarily what might be
23 happening in Congo or other places where uranium
24 might be mined. And in that regard, there is an
25 environmental effect, and the environmental report

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1 essentially concludes that this is too attenuated to
2 really take into consideration.

3 In other words, because it's a foreign source,
4 you know, many thousands of miles away, that that
5 somehow does not necessarily have a direct effect on
6 our environment or the public health consequences
7 related thereto, and so there's no need to get into
8 that aspect of it, and we take issue with that. We
9 think that irrespective of the locus of the mining
10 operations, there ought to be some consideration as
11 to whether there will be environmental impacts that
12 result therefrom.

13 JUDGE YOUNG: You say in your contention
14 that -- you refer to economic impacts, but I don't
15 see where you talk about environmental impacts here.

16 MR. EYE: In the first paragraph on page 36,
17 Your Honor, we say that, "There's no analysis in the
18 environmental report of environmental or public
19 health impacts of mining and milling uranium in
20 foreign countries."

21 JUDGE YOUNG: Right. But you said that the
22 argument could be made that that's attenuated
23 because we're talking about environmental effects in
24 other countries, and you said, but we do allege
25 environmental impacts here. Your next paragraph

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1- talks about economic impacts here, but I don't see
2 where you talk about environmental impacts here.

3 MR. EYE: Oh, environmental impacts as in the
4 United States.

5 JUDGE YOUNG: Right.

6 MR. EYE: Your Honor, I think that when we say
7 that there is no analysis in the environmental
8 report of environmental or public health impacts of
9 mining and milling operations in foreign countries,
10 it doesn't necessarily mean that the public health
11 impacts stop at the boundaries of Canada, for
12 instance, where some uranium is mined and so forth.

13 We are taking a -- not to be -- it may be a
14 poor word choice, but we're taking sort of a global
15 approach here, in looking at this not necessarily
16 from the perspective of national boundaries, but
17 rather from the increase in background radiation
18 that is created anytime that these activities,
19 particularly enrichment, mining, milling and so
20 forth go on, that there's a generalized increase in
21 the background radiation, and therefore that's an
22 environmental impact that has public health
23 consequences that notwithstanding the assertion by
24 the Applicant that these activities are now, quote,
25 more environmentally friendly, end quote. It still

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1 has the effect of raising background radiation
2 levels when these activities occur.

3 JUDGE YOUNG: However, the rule does -- 51.45
4 does say that the impact shall be discussed in
5 proportion to their significance, and you don't seem
6 to mention any impacts that would have any
7 significance -- a significant level of significance,
8 to be redundant there, other than economic impacts
9 from dependence on foreign sources when they may be
10 interrupted or artificially inflated.

11 MR. EYE: That is one of the impacts, Your
12 Honor, but again, when we say that there's no
13 analysis of the public health impacts of mining and
14 milling in foreign countries, that really presumes
15 that that impact does not -- just because it's
16 happening in a foreign country doesn't mean that
17 there's no some impact here.

18 JUDGE YOUNG: Right. That's why I raise the
19 question of significance, though.

20 MR. EYE: Oh, I see. Well, quantifying that
21 impact, I think, is something that we didn't do. We
22 did not put a quantification on it. I think that
23 it's well understood that these activities raise
24 background levels of radiation, and that raising
25 background levels of radiation, according to the

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1 NRC's own finding that any exposure to radiation
2 carries with it the increased risk of disease or
3 genetic defects, in and of itself carries the
4 argument that there is an environmental or public
5 health impact.

6 JUDGE YOUNG: So do you think that any impact
7 of uranium milling and mining in a foreign country
8 would be greater than that addressed in Table S3?

9 MR. EYE: It could. I don't know the answer
10 to that question in a categorical way, Your Honor.
11 Ours was more related to increased activities in
12 this regard, increased radiation levels, and
13 therefore, it has a public health and environmental
14 consequence.

15 JUDGE YOUNG: Anything further on this
16 contention?

17 MR. EYE: Not at this time, Your Honor.

18 JUDGE YOUNG: Applicant?

19 MR. MATTHEWS: Thank you, Judge Young. Tim
20 Matthews for the Applicant.

21 Petitioners' contention on dependence on
22 foreign uranium is now the fifth iteration of a
23 contention that has been rejected by four separate
24 Boards. In order, North Anna, Bellefonte, Lee and
25 Harris all rejected it and all for the same reasons,

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1 that-it lacked adequate support and that it didn't
2 raise any material issue of dispute.

3 Where this contention differs from the ones
4 that have been rejected is those contentions
5 provided some basis. This one provides nothing. It
6 provides advocacy. There are no facts. 309(f)(1)
7 provides a road map for Petitioners to present
8 contentions to the Board, simple steps Petitioners
9 need to touch, bases to touch. In this case, they
10 haven't touched any of them. There's nothing here
11 that would formulate a basis for a contention that
12 this Board should hear.

13 Without reiterating all the arguments we had
14 in our briefs, I'll respond to Petitioners'
15 arguments today. First, I guess, most significant
16 is the collateral attack on Table S3. As I
17 understand Petitioners' argument, it's a concession
18 that it's an attack on Table S3, and characterizing
19 it as apples or oranges or anything else doesn't
20 change the nature of the attack. It's unauthorized.
21 It's generic, so no authority would be granted by
22 the Commission.

23 The only argument given is that Table S3 is
24 old, and it's not intended to address malicious
25 intent. Neither of those are issues that are

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1 available for this Board to consider. The
2 Commission has made clear the environmental impacts,
3 the impacts of the uranium fuel cycle are what they
4 are in Table S3. There's an avenue for asking the
5 Commission to change Table S3. I think Petitioners
6 indicated yesterday they were interested in filing a
7 petition to do that. That is the appropriate forum,
8 not here.

9 Petitioners assert that the Applicant's
10 assertion in 5.7-4 or on 5.7-4, that impacts are
11 more environmentally friendly, is not supported by
12 additional analysis. There's no additional analysis
13 required for exactly the reason you pointed out
14 earlier, Judge Young, is that the significance of
15 the impacts governs what has to be discussed. The
16 uranium fuel cycle impacts are small to begin with.
17 The impacts of improvements to the uranium fuel
18 cycle wouldn't seem to trip the trigger of creating
19 a greater significance that would need to be
20 addressed in comments.

21 But that confuses the burden. The burden is
22 on the Petitioner to show that there's some material
23 issue. That brings us back to 1(f)(3), to show that
24 there's an issue within the scope of this
25 proceeding, and that was absent in the contention

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1 description itself and in the reply argument today.

2 To the assertion that it's a contention of
3 omission, that it doesn't address the issues that
4 Petitioners would like to address, that's just flat
5 wrong. It fails to -- it indicates either they
6 didn't read the application, the environmental
7 report or choose not to. 5.7.1 talks about the
8 impacts of the uranium fuel cycle. 5.7.2 talks
9 about transportation impacts. 10.2.2.4 addresses
10 directly reliability of supply. Petitioners don't
11 contend -- don't offer some different conclusion.

12 The assertion that the commonsense view that
13 an international supply of uranium would create
14 vulnerability on its face makes no sense. We're
15 talking about international diversity of supply, so
16 to the extent there's a Congolese uranium embargo on
17 the United States, our friends in Canada and
18 Australia will be able to address the market, and if
19 anything, our analysis indicates that the market for
20 uranium is resilient to demand, that supply meets
21 demand and will meet demand for the foreseeable
22 future.

23 The suggestion that this is an environmental
24 contention that addresses increase in background
25 radiation is nowhere in the contention. That

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1 appeared for the first time here today. There's no
2 basis for it, and again, it's advocacy. There's no
3 statement of fact. There's no even commonsense
4 basis to suggest that this is somehow going to --
5 well, certainly not meet the level of 3(f)(5) that
6 requires some tangible fact. It's mere advocacy.

7 I'm going to see if there's anything else
8 beyond what I've touched on in reply that was in our
9 brief that I've highlighted. I think not. I'll
10 respond to the Board questions.

11 JUDGE YOUNG: Staff?

12 MS. VRAHORETIS: Your Honor, this is Susan
13 Vrahoretis for the NRC Staff. Without restating the
14 arguments that we made in our answer, I would just
15 like to briefly respond to a couple of things that
16 the Petitioner has raised for the first time today.

17 In addition to other collateral attacks that
18 have been made in this proceeding on Table S3, with
19 respect to this contention, Petitioner is today
20 arguing that Table S3 is outdated and old and should
21 be updated. And I would just point out for the
22 record that an adjudication in an individual COLA
23 application proceeding would not be the appropriate
24 format to do that.

25 That might be the subject of a petition for

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1 - rulemaking under 10 CFR 2.806, and I would note that
2 the regulations contain provisions that the
3 Petitioners and any other interested person can
4 consult with the NRC Staff for guidance on that were
5 an interested person to be serious about pursuing
6 that.

7 If someone really believed that that was
8 something that the NRC had not taken into
9 consideration, that would be a generic issue that
10 would apply far beyond this adjudication, and it
11 wouldn't be appropriate to admit this contention and
12 deal with that issue here, nor has there been
13 adequate support to indicate that that's really an
14 issue that we need to consider here.

15 In addition just briefly, on the issue of
16 foreign milling, mining, and enrichment, the
17 Petitioner has not provided any support for this
18 aspect of the contention, either in the initial
19 petition, not in the reply, and not today. Foreign
20 mining and milling of uranium in other countries is
21 not something that the NRC or the United States has
22 any jurisdiction over, and moreover, these are
23 things that are subject to economic factors that are
24 beyond the NRC's or the United States' control, and
25 they are the subject of regulatory bodies in these

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1 other foreign sovereign countries.

2 Now, the NRC does have quite a bit of
3 interaction and collaboration, cooperation with
4 other foreign countries, and to the extent that we
5 can be of service, they do work with other countries
6 to help develop the programs that we use in our
7 country for their use in their own countries, but we
8 have no control over that. That's not the
9 subject -- proper subject of a contention in a COLA
10 proceeding.

11 And were the increase in demand to change
12 economic factors so that it became economically
13 advantageous in this country for mining and milling
14 and enrichment to start up again, those types of
15 activities would be the subject of different
16 proceedings, not this one, that would be governed by
17 other portions of the Code of Federal Regulations.

18 It wouldn't be something that an interested
19 party could just spring up and do overnight. There
20 would be regulations and applications and thorough
21 evaluations and opportunities for public comment and
22 involvement before licenses to conduct any such
23 activities would be granted.

24 I have nothing further unless you have any
25 questions.

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1 JUDGE YOUNG: Thank you. Anything further,
2 Mr. Eye?

3 MR. EYE: No, Your Honor.

4 JUDGE YOUNG: All right. You had a question?

5 JUDGE ARNOLD: Yes. I have a two-part
6 question for Petitioner. In the second paragraph
7 where you're discussing economic impacts, you say,
8 "The economic impacts from such dependence can be
9 far-ranging and adverse. Accordingly, such impacts
10 should be considered in the COLA."

11 My first question is: Do you have anything to
12 support that the impact would be adverse? And,
13 secondly, given that the impact is adverse, what is
14 the requirement, where is the requirement that that
15 be evaluated in the COLA?

16 MR. EYE: Second question, Your Honor, first,
17 if you would: The basis really is the Atomic Energy
18 Act and determination whether or not licenses are
19 issued in the public's interest. And I think that
20 as a statutory matter, that's the backdrop for that
21 particular -- or that would be the response to that
22 question.

23 First -- the first question is: What is the
24 adversity? The mantra since 1973 in this country is
25 that we have to wean ourselves off of foreign

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1- sources of oil, but implicit in that is that foreign
2 sources of any kind of energy source make us
3 vulnerable as a nation state. And that's the
4 potentially adverse consequence.

5 It's the idea that we build a huge nuclear
6 infrastructure that's dependent on foreign source of
7 uranium, and all of a sudden, that's not available
8 to us. Could that have adverse impacts? I think
9 that it follows on as a matter of logical
10 consequence that it could. Some of this in this
11 room are old enough to remember the oil embargo of
12 '73. Did that have adverse impacts? It certainly
13 did. Regrettably, we didn't adapt very well as a
14 result, but that's another matter.

15 But should we just disregard the lessons of
16 that? Should we just disregard the experience of
17 it? And it seems that we are going down this same
18 path once again. The Applicant in its environmental
19 report concedes that domestic sources for uranium
20 have, because of various reasons, most of them
21 economic-based, have limited domestic access. And
22 so that's the underlying reasoning for that part of
23 the contention, Your Honor.

24 JUDGE ARNOLD: Thank you.

25 MR. EYE: You're welcome.

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1 JUDGE YOUNG: Judge Mignerey, did you have any
2 questions on this contention?

3 JUDGE MIGNEREY: I do not.

4 JUDGE YOUNG: All right. Let's move on to
5 Contention 15, and both 15 and 16 have to do with
6 decommissioning. Is there any benefit to hearing
7 argument on those together, or does it make more
8 sense to hear the argument separately?

9 MR. FRANTZ: Judge Young, I would recommend
10 that we hear those separately. They're very
11 fundamentally different issues. The one issue is
12 the environmental issue. That's on Contention 15.
13 With respect to Contention 16, that's a
14 decommissioning funding issue, and they're entirely
15 separate regulations, entirely separate discussions
16 in our COL application.

17 JUDGE YOUNG: You're right. Point taken.

18 Mr. Eye, on Contention 15?

19 MR. EYE: Yes, Your Honor. Contention 15
20 asserts that the environmental report is deficiency
21 because it does not have a detailed analysis of the
22 anticipated environmental impacts that would be
23 anticipated from decommissioning, and we take issue
24 with the -- both the Applicant's decision not to get
25 into those kinds of detailed discussions, and as a

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1 - basis for that, implicitly, we are taking issue with
2 the Commission's decision to allow applicants to
3 defer that decision to some future time.

4 So we are back to part of the discussion that
5 we've had on other contentions, that this probably
6 although raises a contention here, implicitly
7 triggers the rulemaking provisions of the NRC's
8 procedures. But nevertheless, there are statements
9 in the environmental report that are made that
10 perhaps they are gratuitous, but that imply that the
11 environmental consequences of decommissioning are
12 expected to be negligible.

13 And the support for that generally goes back
14 to NRC rulemaking proceedings and regulations that
15 seem to say the same thing, and we take issue with
16 that. And, again, to the extent that that gets into
17 the -- a rulemaking petition, we recognize that that
18 is a potential remedy that we have. However, this
19 is not unlike some of the other contentions that
20 we've raised that were based upon statements made in
21 the environmental report that seem to us just to
22 call out for some kind of a response.

23 JUDGE YOUNG: Excuse me. Judge Mignerey?

24 (No response.)

25 (Pause to reconnect.)

1 JUDGE MIGNEREY: This is Judge Mignerey. I'm
2 sorry. I bumped my receiver. I am back on line.

3 JUDGE YOUNG: Okay. Thank you. Go ahead.

4 MR. EYE: Thank you, Your Honor. The other
5 more specific aspect of this contention that raises
6 concerns for the Petitioners really relates to
7 assumptions that are made that although technology
8 to deal with decommissioning has not yet been
9 developed, that it will be developed, and this is
10 not unlike the assumption that is made about
11 someplace to take high-level waste and spent fuel at
12 some time in the future, even though that reality is
13 not present today.

14 And, again, the Applicant is making a bet.
15 They're making a bet that at the time the
16 decommissioning has to occur, the kind of
17 technologies that are required to do it safely and
18 effectively will have been developed and field-
19 tested and so forth to the point where they have
20 applications in their own decommissioning scenarios.
21 But it doesn't exist today.

22 JUDGE YOUNG: What is -- let me ask the Staff
23 something right quick. There has been no change in
24 the rules that permit members of the public to
25 petition to intervene in license termination

1 proceedings. --Correct?

2 MS. VRAHORETIS: No, Your Honor. There's no
3 change. That still provides an opportunity to
4 petition for a hearing. Right.

5 JUDGE YOUNG: Something fairly fundamental
6 that's been argued, and I'd just like to hear your
7 response on it at this time. Why do you -- how do
8 you show that this is an issue that's within the
9 scope of this proceeding?

10 MR. EYE: Because it has environmental
11 effects.

12 JUDGE YOUNG: When it comes time for this --
13 any plan to decommission and terminate the license,
14 as counsel just pointed out, there is an opportunity
15 for a hearing at which time the environmental
16 effects are relevant issues. What is your argument
17 that would place within the scope of this proceeding
18 specifically?

19 MR. EYE: It's to avoid those future
20 environmental consequences and public health
21 impacts. It's to avoid it. Inasmuch as we
22 recognize that there are environmental and public
23 health consequences related to decommissioning, is
24 there a way to avoid those adverse impacts? And the
25 way to avoid the adverse impacts is not to engage in

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1 activity in the first place.

2 JUDGE YOUNG: That's rather self-evident, I
3 guess. But in terms of what is required to be
4 included in an application, do you have anything
5 other than the general statement that the
6 application, by addressing such impacts at this
7 point, could somehow prevent impacts that -- or
8 avoid -- prevent impacts that would do anything to
9 cause the subsequent later impacts to be less
10 serious than they would otherwise be?

11 MR. EYE: Yes, Your Honor. The point of this
12 whole proceeding is to provide the decision-makers
13 with a good basis to determine whether or not this
14 license should issue, and if the environmental
15 report had come out in a straightforward way and
16 said, We don't know how we're going to decommission
17 this plant; we don't know what we're going to do
18 with the waste streams; and we haven't analyzed the
19 public health impacts, the environmental
20 consequences, if it had said that straight out,
21 because that's what -- that's essentially the import
22 of what they are doing in the environmental
23 report -- then the decision-maker would have a basis
24 to do one of two things, either reject the proposal
25 or require that the Applicant back up and do the

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1 kinds of analyses that would answer those questions
2 about the consequences related to decommissioning.

3 And in that regard, it's back to the whole
4 fundamental purpose of NEPA, for example, that is,
5 to give decision-makers an adequate basis to make
6 informed decisions. And here decision-makers won't
7 have that information in either a site-specific way
8 or -- in a site-specific way related to Comanche
9 Peak.

10 JUDGE YOUNG: Go ahead.

11 MR. EYE: That concludes my statement.

12 JUDGE YOUNG: Go ahead.

13 MR. RUND: This is Jon Rund for the Applicant.

14 I think it's important first to draw a distinction
15 between the specific decommissioning plans that the
16 Applicant will eventually use, which sounds like is
17 the fundamental problem that the Petitioners have.
18 They want the detailed plans now, but fundamentally
19 that's not the way NRC's regulations are set up.
20 Specifically under 10 CFR 52.110(d), a post-shutdown
21 decommissioning activities report needs to be
22 submitted, a PSDAR that describes decommissioning
23 plans.

24 Now, importantly, though, this PSDAR doesn't
25 need to be submitted at this stage. It needs to be

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1 -submitted two years after operations cease, and
2 importantly this PSDAR will need to demonstrate that
3 the environmental impacts of decommissioning
4 activities are bounded by earlier NRC NEPA
5 documents.

6 Now, essentially what Petitioners want the
7 Board to do is rewrite that regulation to require
8 the submission of that document describing which
9 decommissioning activity -- what the decommissioning
10 activities are going to be at this stage. Now,
11 that's fundamentally inconsistent with NRC's
12 decommissioning framework, and therefore the Board
13 should reject this contention in accordance with 10
14 CFR 2.335(a).

15 Now, to the extent that this contention could
16 be read or the Petitioners are alleging that the
17 environmental impacts, regardless of what
18 decommissioning plans are speculative or are not
19 well understood or are based on technology that
20 isn't yet available, that's just inconsistent. The
21 impacts of decommissioning nuclear facilities are
22 well understood.

23 The NRC, in fact, has issued a generic
24 environmental impact statement, NUREG 0586,
25 Supplement 1, which discusses those impacts. Now,

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1 consistent with traditional-NEPA principles, we have
2 incorporated those analyses into the environmental
3 report.

4 Now, the Petitioners could have -- the
5 decommissioning GEIS is available on the NRC
6 website, and they could have challenged any of the
7 specific evaluations that are in that document, if
8 they had a problem or thought that the environmental
9 impacts were understated there. They could have
10 challenged those impacts, but they didn't. Instead,
11 they just essentially claimed that the analysis in
12 the ER is inadequate.

13 But these type of conclusory statements are
14 insufficient to establish a genuine dispute of
15 material fact. If I might just highlight a couple
16 sections from the GEIS which are referenced in our
17 brief, but they talk about radiological impacts, but
18 radiological impacts are discussed in Section 4.3.8
19 of the GEIS. Transportation impacts are discussed
20 in 4.3.17 of the GEIS, and the potential impacts of
21 decommissioning on irreversible and irretrievable
22 resources are discussed in Section 4.3.18 of the
23 GEIS.

24 And each of these sections concludes that the
25 impacts of decommissioning are small. The

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1 Petitioners provide no indication why any of these
2 GEIS determinations are incorrect or shouldn't also
3 apply to the Comanche Peak site.

4 JUDGE YOUNG: All those parts have been
5 incorporated by reference into your --

6 MR. RUND: We include a table that lists which
7 impacts are generically determined. I don't think
8 the ER gets down to the level of detail of, you
9 know, basically including a table of contents of the
10 GEIS, but for specific issues, we do indicate in, I
11 think it is, Table 5.9-1 which impacts are able to
12 be determined generically. And because they fail to
13 dispute any of those specific evaluations or even
14 really reference them, they fail to satisfy 10 CFR
15 2.309(f)(1)(vi) and fail to raise a genuine dispute
16 of material fact.

17 JUDGE YOUNG: Does that conclude your
18 argument?

19 MR. RUND: Yes. Thank you.

20 JUDGE YOUNG: All right. Staff?

21 MS. VRAHORETIS: Just briefly, Your Honor. I
22 will not restate the answer that we gave. I believe
23 it's comprehensive in addressing the issues that the
24 Petitioners raise. However, today I would just like
25 to address two points, that being Petitioners'

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1 -statement that there are assumptions being made that
2 technology has not been developed for
3 decommissioning but will be developed sometime in
4 the future doesn't exist today and is not available
5 for the decision-maker, and also that NEPA requires
6 the decision-makers have this information before
7 they make a decision as to whether or not to grant
8 or deny this license application.

9 I would just point out that the NRC has
10 successfully decommissioned numerous plants, and the
11 technology for decommissioning is very well
12 understood. The fact that there may be improvements
13 or developments in technology that improve that
14 process doesn't mean that it doesn't exist today,
15 and I would just point out from Volume 53 of the
16 Federal Register at 24028, the NRC discussed this,
17 and described in NUREG CR-0672 -- and, again, this
18 is from 1988.

19 At that point, some of the lessons learned
20 from past decommissionings demonstrated aspects of
21 practicality and acceptability of various different
22 decommissioning approaches. And at that time in
23 1988, the Commission found that the necessary
24 technology not only existed but had been safely and
25 successfully applied numerous times to a wide

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1 .. variety of nuclear installations. So we have had
2 the technology since prior to 1988.

3 And just to give Your Honor a reference, you
4 had asked whether the decommissioning rule still
5 provides for an opportunity for a hearing. I would
6 just like to give you the site. The rule was
7 updated July 29, 1996. The site for that is 61
8 Federal Register 39278 at 39280, where it states
9 that, "The approval process for the license
10 termination plan provides for a hearing opportunity
11 under 10 CFR Part 2."

12 And a very helpful case that describes that is
13 the Haddam Neck case at 58 NRC 262, page 293, which
14 cites the Commission's decision in Yankee Nuclear,
15 which is CLI-98-21 that emphasizes that that license
16 termination plan proceeding is the Petitioners' one
17 opportunity to litigate the method of
18 decommissioning. It's beyond the scope of this
19 licensing action.

20 I have nothing further, unless you have any
21 questions.

22 JUDGE YOUNG: Thank you.

23 MS. VRAHORETIS: Thank you.

24 MR. EYE: Briefly, Your Honor, I have just a
25 couple of points to make. Number one, we cite in

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1 our petition promotional materials that were
2 generated by the reactor manufacturer, Mitsubishi.
3 It says in their promotional materials that
4 there's -- that they have not developed all the
5 technology that's necessary for decommissioning, and
6 we cite that in our petition.

7 Number two, while there have been
8 decommissioned units, none have been the size of a
9 1,600-megawatt unit like that which is proposed for
10 Comanche Peak Units 3 and 4, and the size, the
11 magnitude of that decommissioning task presents
12 additional problems of a magnitude that are greater
13 than have ever been faced by any decommissioning
14 activity in our country.

15 And, third, again, I appreciate that there are
16 NRC rulemakings, NUREGs. There are NRC decisions
17 that address this. But those have to be reconciled
18 and measured against 42 U.S.C. 2133, subpart (d).
19 That says licenses should not be issued if they are
20 contrary to the common defense, security, health and
21 safety of the country -- or the public, rather.

22 So, I mean, I appreciate that there are these
23 approaches that have been taken within the
24 Commission and so forth, but, again, we keep going
25 back to the basic statutory provision in the Atomic

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1 Energy Act that there be a showing that there is not
2 going to be an adverse impact on the health and
3 safety of the public by issuing a license.

4 And at least in terms of this particular
5 contention related to decommissioning, we think that
6 it's difficult to reconcile the statutory
7 requirement with this idea that you can go forward
8 with what is in this case 3,200 megawatts worth of
9 nuclear plant without the idea that you've got some
10 way to demonstrably establish that decommissioning
11 can be done consistent with the public's health and
12 safety. And that would include, as we note in here,
13 dealing with the waste streams that are created
14 through decommissioning.

15 Thank you, Your Honor.

16 MR. RUND: If I may, just one comment about
17 the Mitsubishi document, the citation in the
18 petition that he's referring to, all it says is
19 Mitsubishi nuclear plants, page 27. This type of
20 unspecified, vague reference to a document that we
21 haven't had a chance to examine isn't sufficient to
22 support admissibility contention, and for that
23 proposition, I refer the Board to the Seabrook
24 decision at CLI-89-3, 29 NRC at page 240 to 241.

25 We think we may have actually figured out

1 --what document they're --- the extensive research
2 they're talking about, and it really -- all it
3 says -- and, you know, this may not be the document,
4 given the vagueness in the citation, but from what
5 we could tell, all this document actually says is,
6 MHI, Mitsubishi Heavy Industries, is developing
7 reactor vessel dismantling equipment and other
8 technologies for the decommissioning of nuclear
9 plants.

10 I mean, that's kind of the extent to which
11 technologies aren't available. It's just saying
12 that this company is developing them. It doesn't
13 really support the proposition for which they're
14 citing it for.

15 MR. EYE: Well, developing and developed are
16 two different things, so I would -- and I think that
17 probably is the document. I mean, it sounds --

18 JUDGE YOUNG: What is the document, and why
19 did you not cite it? I actually had a question mark
20 beside that.

21 MR. EYE: Yes. We've got the document in
22 hand, Your Honor. Well, I should say, I know where
23 it is in my office at any rate. I just overlooked
24 attaching it to the petition. But it is, as counsel
25 has suggested, clear from that that the technologies

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-1 have not yet been developed. They are in the
2 process of being developed.

3 Now, is a technology that is being developed
4 the same as something that a decision-maker can be
5 assured will be adequate for the task? I think that
6 there is a leap of faith there, and leaps of faith
7 when it comes to issuing licenses under the Atomic
8 Energy Act would not be permissible considering the
9 constraints that the Act imposes.

10 JUDGE YOUNG: Anything further on this
11 contention?

12 MS. VRAHORETIS: Yes, Your Honor. Just
13 briefly. I would just point out at 10 CFR 52.110,
14 subsection (f)(2), licensees are not authorized to
15 perform any decommissioning activities that would
16 result in significant environmental impacts that had
17 not been previously been reviewed. So there is no
18 basis for the speculation that things would be
19 occurring sometime in the future that had not been
20 considered.

21 Also I would just like to clarify that the
22 Petitioner is referring to technology not having
23 been developed in the Mitsubishi document, and I
24 believe that that document states that the equipment
25 has not been developed, not the technology but the

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1 ...equipment.. And there's a big difference there, and.
2 an imprecise reading of the document does not create
3 an issue for litigation.

4 MR. EYE: Well, I stand corrected if I
5 referred to technology and equipment as being -- as
6 having some equivalency.

7 JUDGE YOUNG: All right. We have four more
8 contentions. I had thought earlier we could maybe
9 get all of them done before lunch, but since we do
10 have four more, it might make sense to keep
11 everybody sharp to take a lunch break and come back
12 and finish after lunch, so let's be back at 1:15.

13 (Whereupon, at 12:15 p.m., the hearing in the
14 above-entitled matter was recessed, to reconvene at
15 1:15 p.m., this same day, Thursday, June 11, 2009.)

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1 interrupted or a suspended or unavailable state law
2 funding stream and is equivalent both in terms of
3 dependability and amounts that would be available,
4 based on that, we think that the decommissioning
5 funding assurance contention has been adequately
6 responded to by the Applicant and Staff.

7 So we -- I guess we would concede the point
8 that there is -- that they have answered the
9 questions that we raised in the original petition.

10 JUDGE YOUNG: So you're withdrawing Contention
11 16?

12 MR. EYE: Yes, Your Honor.

13 JUDGE YOUNG: All right. Let's move to 17
14 then, and 17 -- on 17, the Applicant has filed its
15 letter of April 28 and the attached sensitivity
16 analysis which addresses -- does it address what you
17 were concerned about in 17?

18 MR. EYE: To some extent it does. However, as
19 I understand what they submitted in response, there
20 is now an assumption that the original part of the
21 contention that we asserted regarding the fact that
22 evacuees would effectively, quote, disappear, end
23 quote, once they got more than 25 miles from
24 Comanche Peak, as I understand what's been
25 submitted, there is now a refinement of that, and

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1 that they would not -- that they're taken into
2 account in a different kind of way.

3 Nevertheless, as you will note in our
4 Contention 17, we take the position that the results
5 of the dose and dollar risk assessments in the
6 original environmental report at Table 7.2-5 don't
7 fully capture the costs that would -- that are at
8 risk in the context of this evacuation plan.

9 And as I understand it, there's still an
10 assumption that either 100 percent or essentially
11 100 percent of everybody would be evacuated, and I
12 don't know that that in and of itself -- I mean,
13 we've asserted in our contention that that's not a
14 reasonable kind of assumption, and it would follow
15 on, as I have thought about this, Then what is a
16 reasonable assumption in terms of what percentage of
17 people would actually be evacuated.

18 And, you know, again, I don't know that it's
19 our position or it's our burden to necessarily
20 quantify what percentage of people would be
21 successfully evacuated in an accident situation, but
22 to the extent that there's the assumption that
23 everybody would be evacuated, we think that that's
24 not a reasonable assumption.

25 The filing that has been made by the Applicant

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1 --in regard to this contention I assume is going to be..
2 made a part of the application, I mean, if that's
3 what's intended, but nevertheless, there's still, I
4 think -- it's not reasonable to assume that 100
5 percent of all affected individuals would be
6 evacuated, and the Staff says that, you know, Why
7 not; why shouldn't 100 percent be used.

8 And again it's a little bit like trying to
9 prove a negative, but the assumption that there
10 would be complete success on evacuating all
11 individuals from the zone that would be affected is
12 just an overreach, and is, in our judgment, a far-
13 too-optimistic assessment as to what might be able
14 to be accomplished in an evacuation scenario.

15 JUDGE YOUNG: What figure are you thinking,
16 because in the new analysis, they did an additional
17 analysis, assuming an evacuation of 90 percent.

18 MR. EYE: Right. Well, and that leaves the
19 question: What about the other 10? And so I don't
20 know that there's a magic number, Your Honor, as far
21 as what is a sufficient percentage of people that
22 they will successfully -- that they can postulate
23 that they will successfully evacuate. They have
24 gone from 100 to 90, and I don't know that that's a
25 realistic figure either.

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1 But the fact that they have now moved their
2 target back to 90 percent really opens two other
3 questions. One is, as I mentioned earlier, what
4 happens to the other 10 percent? How do we account
5 for that?

6 JUDGE YOUNG: Well, but let's talk about this
7 contention. This contention challenges the 100
8 percent and the 25-mile distance. And the new
9 analysis addresses those, doesn't it?

10 MR. EYE: It uses different --

11 JUDGE YOUNG: It does what you're challenging
12 them for not doing before.

13 MR. EYE: Right. But, again, I'm not
14 accepting that 90 percent is any more accurate a
15 figure than 100 percent was.

16 JUDGE YOUNG: I think that under NRC practice
17 as it's evolved, when information is provided that
18 addresses an omission, then the next step would be
19 for the -- well, not necessarily the next step, but
20 the Petitioner can file an amended contention. You
21 say the environmental report makes unrealistic
22 assumptions.

23 The only two that I see that you mention are
24 the 100 percent figure and the 25-mile distance.
25 And if the new sensitivity analysis or analyses

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1 addresses both of those concerns, what's left of...
2 this contention?

3 MR. EYE: Only the question of whether the
4 sensitivity analysis itself is adequately supported
5 to arrive at the conclusions that it did.

6 JUDGE YOUNG: Did you challenge that?

7 MR. EYE: We have not, Your Honor.

8 JUDGE YOUNG: Then there would not be anything
9 left to the contention, would there?

10 MR. EYE: It appears so.

11 JUDGE YOUNG: Okay. So you withdraw 17 then?

12 MR. EYE: As a formal matter, I will not -- I
13 don't think I want to withdraw it, Your Honor. I
14 mean, I will concede the points that those two
15 numbers are addressed, but I don't want to take the
16 step of withdrawing this contention.

17 JUDGE YOUNG: I know yesterday I think I was
18 talking about a rule of thumb that's often applied
19 in NRC adjudications that where the rules at 2.309,
20 subsection (f) talk about contentions that are filed
21 based on new information or late-filed contentions.
22 If you receive new information, a lot of Boards have
23 set a time limit of 30 days from the receipt of that
24 information to file a new contention based on the
25 new information, and if you don't meet that time

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1. fine -- well, then, I-guess, actually you probably
2 already have not met it.

3 MR. EYE: That's correct, Your Honor. I
4 think -- I forget the exact date when that
5 information was provided, but it was, I think, in
6 April or --

7 JUDGE YOUNG: It was dated April 28.

8 MR. EYE: Right.

9 JUDGE YOUNG: So am I correct in assuming
10 we're not going -- you're not planning to file
11 anything.

12 MR. EYE: That's correct, Your Honor.

13 JUDGE YOUNG: Okay. Anything further on
14 Contention 17?

15 MR. EYE: Not from the Petitioners, Your
16 Honor.

17 JUDGE YOUNG: From the Applicant?

18 MR. RUND: This is Jon Rund for the Applicant.
19 Just a few points. That April 28 letter committed
20 to update the application. It didn't formally
21 update it, but that letter was submitted on the
22 docket, and under oath and affirmation under penalty
23 of perjury, and it does commit to update the
24 application.

25 In fact, it provides basically a TRAC change

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1 version of the application that showed what the
2 updated application will look like. So we think
3 that's sufficient for the purposes of contention
4 admissibility, to essentially moot this contention.

5 I'd also like to point out that whether the
6 Petitioners intended to challenge the 100 percent
7 evacuation, the original 25-mile assumption, or the
8 new ones. They haven't provided any factual support
9 that explains why those assumptions are incorrect.
10 I'd note that the 100 percent evacuation assumption
11 wasn't -- we didn't make that up out of thin air.
12 That came out of Part 5 of the application, the
13 emergency plan, and it's based on evacuation time
14 estimates which Petitioners haven't challenged.

15 And as far as the -- I thought I heard the
16 Petitioners mention concern about the 10 percent of
17 the population within ten miles that wouldn't be
18 evacuated. I just want to note that that's a
19 conservative assumption for purposes of the severe
20 accident analysis. It basically increases the total
21 dose to the population. A similar change was not
22 made to the emergency plan. We still have
23 demonstrated in Part 5 of the application that 100
24 percent of the population can be evacuated in Part
25 5, and Petitioners really haven't challenged that

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1 - portion of the application.

2 JUDGE YOUNG: Staff?

3 MR. BIGGINS: Rather than belabor this issue,
4 I would just point out on the Staff's behalf that
5 the Petitioners really haven't shown how different
6 assumptions would materially affect the analysis,
7 and to that extent, they don't meet the criteria in
8 2.309(f)(1) for this contention. Nothing further
9 from the Staff.

10 JUDGE YOUNG: Anything more on Contention 17?

11 MR. EYE: Not from Petitioners, Your Honor.

12 JUDGE YOUNG: All right. Contention 18? Go
13 ahead.

14 MR. EYE: Thank you, Your Honor. Your Honor,
15 this is perhaps one of the contentions that presents
16 the stark differences in how the parties view the
17 future of baseload generation in our country. The
18 Applicants have embraced the idea that large,
19 centralized generating stations, in this case a
20 nuclear-fueled generating station, is a superior
21 means by which to meet their baseload generating
22 requirements.

23 And in that regard, the Applicants and the
24 Staff -- or the Applicant and the Staff ignore
25 essentially the means by which base load can be met,

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1 baseload needs can be met by other than, in this
2 case, a nuclear fuel plant. For example, we
3 provided documentation in the petition that directly
4 answers the question whether, for instance, wind can
5 be used for base load, and effectively the
6 documentation that we presented said that wind is a
7 potential base load.

8 Now, there are some underlying assumptions
9 about that, of course. One is that it's deployed on
10 a broad enough scale that it can meet baseload
11 requirements, or in the alternative or in addition
12 to, perhaps, that some other means by which baseload
13 needs could be met using wind would be a compressed
14 air energy storage methodology, which is being used
15 in various plants, certainly in Europe. There are
16 some other prototypes elsewhere. But this is not a
17 technology that is so experimental that it should
18 not be in the mix of things that are considered as
19 viable alternatives to base load fueled by, in this
20 case, nuclear fuel.

21 So in the first instance, we think that there
22 was an inadequate basis for comparison between
23 nuclear and renewable alternatives to draw the
24 conclusion that the Applicant did that anything
25 other than, in this case, nuclear would not meet

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1 -their baseload demand needs. -

2 Second, we think that it's necessary to give
3 the decision-makers in this case the best base of
4 information to work from that there be a careful
5 analysis of -- I think the term of art that is
6 usually used is externalities, and in that regard,
7 we do advocate that there be a side-by-side
8 comparison of renewables and nuclear in terms of
9 those externality costs, both in terms of
10 environmental and public health.

11 And in order to do that, it would require the
12 Applicant to draw -- or take a different approach
13 that would actually quantify the long-term public
14 health and environmental consequences of a nuclear
15 fueled plant, including a mortality and morbidity
16 analysis that would be related to that generating
17 technology, compared to its renewable alternatives.

18 The methodology used by the Applicant is
19 really -- it's so dismissive of anything except
20 nuclear that it's -- the whole tone and tenor of the
21 environmental report makes the assumption that only
22 nuclear will do, and that's contrary to what's
23 happening on the ground around us every day. It's
24 frequently said in the media -- and it may just be a
25 function of repetition, and once a reporter hears it

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1 and it gets in the print or on the electronic media
2 one time, it tends to be repeated.

3 We frequently hear the statistic that 20
4 percent of the baseload generation of the United
5 States is supplied by nuclear. Well, that certainly
6 at one time was the case, but every day that a new
7 wind generator goes up or every day that a new
8 photovoltaic panel is installed, the percentage of
9 generating capacity that this country can draw on is
10 slightly altered. We haven't added nuclear
11 generating capacity now for going on 30 years, all
12 the while in small increments at first, now in
13 larger increments as time goes along, we're adding
14 renewable generating capacity.

15 And yet that reality of the growth of
16 renewable capacity is essentially ignored by the
17 Applicant, and their point of departure in their
18 environmental report is that nuclear is such a
19 superior means by which to generate baseload
20 capacity that really nothing else can possibly
21 compare to it. And we definitely take issue with
22 that.

23 And, again, the facts on the ground are
24 tending to contradict much of what the Applicant is
25 asserting in terms of renewables not being able to

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1 fill the gap in terms of the demands for generating
2 capacity.

3 And I must also add here a note that is
4 particularly troubling to the Petitioners, and that
5 is that Comanche Peak, because it has adopted the
6 designation as a merchant power plant, is not
7 required to do an analysis in terms of building
8 baseload generating capacity, and instead of adding
9 capacity, using efficiency to either avoid capacity
10 additions or to delay capacity additions.

11 Energy efficiency is real. It accounts for
12 major savings in terms of not only rates that are
13 paid, but it represents potential savings in terms
14 of environmental and public health consequences that
15 result from the use of nuclear fuel.

16 JUDGE YOUNG: How do you address the argument
17 that the Commission has said that alternatives that
18 don't address the goal of the Applicant or the
19 purpose of the Applicant is not necessary?

20 MR. EYE: In two ways, Your Honor. First, we
21 think that we have addressed the -- to the extent
22 that the stated need of the Applicant to have
23 baseload capacity, we've shown in our petition and
24 the supporting documentation that there are
25 alternatives that are both cost-effective in a

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1 megawatt-by-megawatt comparison,-- and in terms of
2 lower cost --

3 JUDGE YOUNG: I was talking about your last
4 argument about the demand side of efficiencies.

5 MR. EYE: On the demand side.

6 JUDGE YOUNG: Right.

7 MR. EYE: Your Honor, in that regard -- and
8 you might almost be able to predict what I'm going
9 to say, I suppose, because 42 U.S.C. 2133(d) says
10 these licenses should be issued only in the
11 public's -- consistent in the public's interest, and
12 an artificial designation as a merchant power
13 plant -- because it is -- it's a legal designation.
14 It really has nothing to do with the technology
15 that's being used to generate electricity. It has
16 nothing to do with the costs that relate to the
17 generation of that electricity, either in dollars or
18 public health and the environmental costs. It's a
19 legal designation.

20 JUDGE YOUNG: I'm not talking about the
21 designation. I'm talking about specifically what
22 the Staff argues on page 69 of their response, to
23 the extent that you're arguing that demand side
24 management is an alternative to baseload generation.

25 MR. EYE: Your Honor, every authority that

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1 they cite for that proposition is an-NRC-based rule,
2 either in -- it's either in a regulation or in an
3 NRC memorandum opinion.

4 JUDGE YOUNG: Which bind us.

5 MR. EYE: I agree. But we're here to make a
6 record and say that this -- what we consider to be
7 an artificial constraint making this designation
8 that demand side management is not necessary to be
9 analyzed by the Applicant is not consistent with
10 what the Atomic Energy Act requires in terms of
11 making sure that these licenses are in the public's
12 interest.

13 And it would be one thing if demand-side
14 management was pie in the sky, but utilities are
15 investing heavily in demand-side management all over
16 this country. It's happening as we speak. Major
17 investments are going to demand-side management, and
18 these are being done because it makes business sense
19 to do so.

20 But on the other hand, the reason that the
21 Applicant is excused from doing that is because they
22 declared themselves a merchant power plant, and that
23 excuses them from that whole analytical task, and we
24 think that that's contrary to what the Atomic Energy
25 Act contemplates when it requires that these

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1 -licenses be issued only in the public's interest:

2 JUDGE YOUNG: Do you have any further argument
3 at this point?

4 MR. EYE: Your Honor, I think that that is
5 what we needed to say in terms of the argument at
6 this point, and we would, of course, probably want
7 to take a chance -- or we will probably want to
8 reply to that which we hear from the Applicant and
9 the Staff. Thank you.

10 JUDGE YOUNG: Before the Applicant, let me
11 just ask you. Taking away the demand side part of
12 the contention, you seem to argue in response to the
13 argument that alternative sources of energy could
14 supply baseload generation that they're just not
15 reasonable arguments. There is a dispute, but
16 you're saying that they are --

17 MR. FRANTZ: I don't know that there's a
18 dispute. What we say with respect to combinations
19 of wind and solar power with, they mention,
20 batteries and compressed air is that they have not
21 shown that those are commercially viable
22 alternatives. We're not saying that they don't
23 exist. We're not saying that they couldn't exist.
24 We're saying that they're not commercially viable
25 alternatives, and therefore, they do not need to be

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1 considered in detail under NEPA.

2 If you'll look at what they cite, all they
3 have -- they have no information at all other than
4 at the very end of their contention, they cite their
5 report by Dr. Makhijani, and you look at his
6 statements. He says, for example, that companies
7 are "experimenting" with batteries. He says that
8 the Shell Company may store energy using compressed
9 air. He states that the National Renewable Energy
10 Lab has "a scheme" for using compressed air and wind
11 power to produce baseload power.

12 But there's nowhere in Dr. Makhijani's report
13 that indicates that using, for example, compressed
14 air and wind power is currently a commercially
15 viable alternative for producing baseload power. In
16 that regard, Comanche Peak Units 3 and 4 are
17 designed to produce 3,200 megawatts of electricity
18 as a baseload power plant. There's just nothing
19 anywhere that would indicate that compressed air and
20 wind has that capability, certainly nothing in
21 existence today that even comes close to that.

22 So in the absence of any support that
23 compressed air and wind in combination is a
24 commercially viable alternative, there's no reason
25 to consider it any further under NEPA.

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1 I might also add that, I think as you pointed
2 out, Judge Young, is that the Clinton early site
3 permit proceeding clearly indicates that things like
4 conservation and wind and solar power in isolation
5 simply are not sufficient to constitute a reasonable
6 alternative to a baseload power plant. I might add
7 that it's not just the Commission who has ruled on
8 this.

9 That case went up through the Seventh Circuit
10 Court of Appeals, and I'm personally familiar with
11 that because I argued the case before the Seventh
12 Circuit, and the Seventh Circuit upheld the
13 Commission decision and confirmed that under NEPA,
14 there's no requirement to consider conservation as
15 an alternative to a baseload power plant. That
16 Court also upheld the deference given to the stated
17 goal of the Applicant. In this case Section 9.2 of
18 our environmental report clearly states that our
19 goal is to produce baseload power.

20 The Petitioners state that we should consider
21 the facts on the ground and that there is increasing
22 wind and solar power. Well, yes, there is
23 increasing wind and solar power, but there's no
24 indication at all that this increase or any of the
25 existing wind and solar power is being used to

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1 generate baseload power. So once again, they are
2 stating these purported facts, but they don't seem
3 to have any material impact on the adequacy of our
4 environmental report.

5 JUDGE YOUNG: What about the references to
6 advances including compressed air, energy storage,
7 improved battery storage, casting doubt on your
8 environmental report's assumptions about problems
9 with intermittency?

10 MR. FRANTZ: Yes. That's all they can come up
11 with. They cast doubt. They don't say that it's
12 commercially viable, and their expert report that
13 they attached to their contention does not state
14 it's commercially viable. Instead, at most it
15 indicates that people are starting to look at this
16 as a possible means in the future, but it's not
17 currently commercially viable. And they haven't
18 provided any evidence to the contrary.

19 JUDGE YOUNG: And you're saying that the
20 Clinton decision addresses the commercial viability,
21 such that it would include this context?

22 MR. FRANTZ: No. The Clinton early site
23 permit proceeding only dealt with demand-side
24 management --

25 JUDGE YOUNG: Right.

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1 ----- MR. FRANTZ: -- wind and solar power in-
2 isolation. It did not deal with commercial
3 viability issues. Now, other decisions, I think,
4 have shown very clearly that to be a reasonable
5 alternative, it must be something that's viable,
6 commercially viable.

7 Finally, the Petitioners allege that we need a
8 comparison of the environmental impacts of renewable
9 energy and nuclear power. In fact, we have a
10 comparison. If you look at Section 9.2 of our
11 environmental report, that section has subsections
12 that deal with each type of alternative, including
13 wind, solar, geothermal, biomass, and a variety of
14 other alternatives. In each case, those subsections
15 go through and discuss the environmental impacts of
16 the alternative, and then they compare those
17 environmental impacts versus the impacts of nuclear
18 power, so, in fact, there is a comparison.

19 It may not be in the form that they would
20 prefer, but we do have a comparison. They seem to
21 say that we need a --

22 JUDGE YOUNG: Where is -- I'm sorry. Where is
23 the comparison of impacts on the --

24 MR. FRANTZ: Let me just point out one example
25 on wind. Okay. For example, on wind power, on page

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1 9.2-9, which is under criterion 4, if you would have--
2 that page in front of you --

3 JUDGE YOUNG: 9.2-9? (Perusing document.)
4 The solar -- the comparison?

5 MR. FRANTZ: Yes. Under criterion 4, for
6 example, the very first sentence says that because
7 of the large land impacts wind power, wind is
8 considered to have potential environmental impacts
9 greater than those expected for the proposed
10 Comanche Peak Units 3 and 4, and there are very
11 similar statements in the other sections that deal
12 with other alternatives. Those are the kinds of
13 comparisons we have.

14 Now, again, it's not in the form that
15 Petitioners would prefer, but, again, as long as any
16 precedents hold, the Boards are not here to flyspeck
17 the environmental reports and to request a different
18 format, for example, that has no material effect on
19 the results.

20 In this regard, for example, they point out
21 that it has no material effect on the results. In
22 this regard, for example, they point out that Mayday
23 comparison, side-by-side comparison in the areas of
24 mortality, accidents, and greenhouse gases would
25 show that the alternatives involving renewable

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1 energy might be preferable. -- --

2 But, again, they have absolutely no technical
3 support for that or legal support. One, there's no
4 requirement for that kind of side-by-side comparison
5 with respect to alternatives which are not shown to
6 be preferable. Second of all -- or viable, as
7 reasonable alternatives.

8 Second of all, with respect to accidents, for
9 example, Chapter 7 of our environmental report does
10 show that the impacts of accidents would be small,
11 and so even if we were to engage in this side-by-
12 side comparison between nuclear and alternatives,
13 you would not see any preference for the renewable
14 energy alternatives with respect to accidents, given
15 the fact that nuclear power has small impacts in
16 this area.

17 And so for these types of reasons, we believe
18 that they have not raised a material issue. They
19 have not adequately supported their contention, and
20 in some respects, their contention is just simply
21 inconsistent with governing legal precedent. And,
22 therefore, we recommend that the Board dismiss this
23 contention.

24 JUDGE YOUNG: Could you just point me to the
25 place in your response where you give the case law

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1 and commercial viability?

2 MR. FRANTZ: We don't have that in our -- I
3 don't believe we have that exactly in our answer.
4 I'd be happy to give you the citations if you'd
5 like, Judge Young, after the prehearing conference.

6 JUDGE YOUNG: Okay. And on solar, where is
7 the section on solar?

8 MR. FRANTZ: That would be in -- I believe
9 it's in the section following wind. Let me check
10 quickly. Yes. That discussion begins on page
11 9.2-10, and that discussion encompassed both
12 solar/thermal and photovoltaic cells.

13 JUDGE YOUNG: Okay. Does Staff have any
14 argument?

15 MR. BIGGINS: Yes. Thank you, Your Honor. I
16 won't reiterate everything we said in our answer.
17 However, I do believe that comprehensively covers
18 the arguments that the Petitioners made, especially
19 in light of the fact that they didn't reply to that.

20 I would add just a couple comments based on
21 the discussions here today, that it's difficult to
22 discern whether or not the Petitioners concede that
23 once an alternative is rejected as not meeting the
24 purpose and need of the proposed action, additional
25 detailed study of the alternative is unnecessary.

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1 I don't believe they've gone so far as to
2 concede that, and I would point out that the
3 Commission rules and case law on that matter is very
4 clear, and it is binding on the Staff, the
5 Applicants, Petitioners and this Board as well.

6 In addition to that, the Petitioners
7 particularly identify other -- what they, I guess,
8 suggested alternative means of generating electric
9 power. However, what their petition really lacks is
10 an explanation of how those suggested alternatives
11 would meet the purpose and need of the proposed
12 action.

13 And, Judge Young, you have specifically asked
14 the Applicants to identify their authority for
15 saying that it needs to be commercially viable,
16 whereas although the Staff doesn't use that
17 language, we would hold that in order to meet the
18 purpose and need of the proposed action, we are
19 talking about a viable alternative. If they were
20 not a viable alternative, it would not, by
21 definition, meet the purpose and need of the
22 proposed action.

23 And in looking at the suggested alternatives
24 put forth by the Petitioners here, we have no idea
25 based on the petition whether any of those would

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1 - actually-be-able to meet the purpose and need of
2 generating baseload power at this magnitude. In my
3 own understanding, I believe that many of those
4 suggested alternatives, the largest facilities in
5 existence in the world even, are only a fraction of
6 the size of this proposed plant.

7 And without additional information from the
8 Petitioners to show that those would, in the words
9 of the Applicant, be commercially viable or in the
10 Staff position, meet the purpose and need of the
11 proposed action, without showing that, the
12 Petitioners don't meet their burden of making this
13 contention admissible under 2.309.

14 And the last point I would make is that
15 although the Petitioners have repeatedly argued at
16 this hearing that whatever decision comes out of
17 this Board or out of this licensing action, it has
18 to be in the public interest. It is the Staff's
19 position that it is the Commission itself as the
20 appointees of the president that they determine
21 under the Atomic Energy Act what the public interest
22 in light of the regulations that they pass and the
23 guidance that they enact.

24 And so it is the Commission that determines
25 the public interest, and so to the extent that the

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1 -Petitioners would have us disregard Commission rules
2 or Commission policies or Commission case law for
3 that matter, that is contrary to what the Commission
4 believes the public interest is under the Atomic
5 Energy Act. And with that, I have no additional
6 comments.

7 JUDGE YOUNG: You wouldn't dispute that where
8 there's not a rule or any case law addressing some
9 aspect of the public interest, that members of the
10 public can challenge or can assert -- make
11 assertions regarding the public interest that would
12 not be contrary to existing rules and law, would
13 you?

14 MR. BIGGINS: If it's not contrary to an
15 existing rule or statement by the Commission, then I
16 would agree with the Board that anyone can make an
17 argument what that public interest is.

18 JUDGE YOUNG: I guess if you take out of the
19 contention that the challenge is based on demand-
20 side management, what's left is -- based on the
21 Clinton decision, what's left is the alternative
22 sources and technological advances that overcome
23 intermittency problems that are described in the
24 environmental report, the advances of compressed air
25 energy storage and improved battery storage.

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1 To that extent, I think you make the argument
2 that the EIS must only briefly discuss the reasons
3 why an alternative was rejected for more detailed
4 study. Just summarize your argument in response to
5 those two particulars. Those are what I find, if
6 you subtract out the other part.

7 MR. BIGGINS: Yes, Judge. If you subtract out
8 the demand-side management argument, the suggested
9 alternatives proposed by the Petitioners -- again,
10 the Petitioners, in order to form a valid contention
11 here, would have to show that in order to warrant
12 any detailed study in the EIS, that those suggested
13 alternatives would be able to meet the purpose and
14 need of the proposed action. And I don't --

15 JUDGE YOUNG: Well, let's back up for just a
16 second. I think what they're saying is that -- and
17 they may not be saying it very strongly or in a
18 great amount of detail, but I think what they're
19 saying is that these advances in compressed air
20 energy storage and improved battery storage supports
21 their argument that these alternatives could provide
22 that level of power.

23 MR. BIGGINS: They --

24 JUDGE YOUNG: It may -- go ahead.

25 MR. BIGGINS: May I respond? Thank you. They

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-1 have made that basic assertion, but they provide
2 absolutely no support other than Dr. Makhijani's
3 report which I guess we would agree with the
4 Applicant that it doesn't show that those are
5 actually capable of meeting the purpose and need of
6 this proposed action. So even though there may be
7 advances, even though, you know, you can combine
8 wind power generation with some method of storage,
9 we're still not talking about an alternative on the
10 scale of providing this level of baseload power.

11 JUDGE YOUNG: The one --

12 MR. BIGGINS: And Petitioners haven't provided
13 any information about how it would or possibly could
14 meet that scale.

15 JUDGE YOUNG: I guess my one concern on this
16 is these assertions of fact, these fact-based
17 arguments, are provided to support the contention.
18 I know in other cases I've heard the argument made
19 many times actually that there needs to be support
20 for various statements that are part of the basis
21 for the contention. In other words, there needs to
22 be support for the support.

23 It sort of becomes a sort of bootstrap kind of
24 argument, when, in fact, a Petitioner has made
25 statements as support for the contention. Those

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1 statements may not ultimately prove the point. You
2 say they have not shown through the Makhijani report
3 or otherwise, they have not shown that these could
4 provide a level of power that would meet baseload
5 power generation requirements.

6 But I guess I have a little bit of concern
7 that once you start talking like that, you're sort
8 of getting into the merits. It may be that you're
9 correct that they have not proven their case at this
10 point, but if the standard is a fact -- a minimal
11 level of fact-based argument sufficient to warrant
12 further inquiry --

13 MR. BIGGINS: Perhaps, Judge, I can clarify my
14 point by being more specific.

15 JUDGE YOUNG: Okay.

16 MR. BIGGINS: If the Petitioners, in arguing
17 that you could combine wind with compressed gas
18 storage in order to form a baseload power generation
19 source, had provided --

20 JUDGE MIGNEREY: This is Judge Mignerey. I'm
21 losing counsel again.

22 MR. BIGGINS: I will speak up. If the
23 Petitioners in their statement that you can combine
24 wind-generating power with a storage mechanism had
25 provided even a, you know, minimal background of how

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1 - much power that would generate, then we might be
2 able to compare it to this proposed action of
3 generating an estimated 3,200 megawatts of
4 electricity without identifying even the level of
5 power that they're talking about for wind generation
6 and a storage mechanism. They don't demonstrate
7 that this could meet the purpose and need.

8 On the other side, in -- that would be
9 additional facts. That would be facts that would
10 support it. On the expert opinion side, even an
11 assertion made by an expert that is not -- that does
12 not identify how the expert made that assertion is
13 insufficient when the Commission can't see how they
14 reached that conclusion.

15 And, in particular, if the expert report had
16 provided an analysis of how many wind turbines we're
17 talking about, an analysis or expert opinion of how
18 much -- what the gas storage mechanism would look
19 like, in order to show that it truly is a viable
20 alternative or an alternative that would meet the
21 purpose and need of this proposed action, if that
22 were in the expert report, perhaps this would be an
23 admissible contention.

24 But where the Petitioners are simply
25 providing, These are other suggested ways of

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1 generating power and combining them allows it to be
2 a baseload-type power generation source, that's not
3 sufficient. That doesn't provide enough information
4 for us to say, Yes, that should be compared; that
5 could meet the purpose and need here and should be
6 compared in detailed analysis in EIS. And without
7 doing that, they're really not raising any proper
8 contention or any argument or dispute, material
9 dispute, with the analysis that is provided in the
10 environmental report.

11 JUDGE YOUNG: You may be ultimately right on
12 the merits, but aren't you skipping one step? And I
13 guess that step would be you seem to be going -- you
14 said, If they had provided numbers that would
15 warrant a more detailed study in the EIS, if I
16 understood you correctly. But for contention --
17 that would be the standard at a hearing, because
18 otherwise the contention would have disappeared.
19 And if the EIS already did that more detailed study,
20 then that standard would have been met.

21 But if a contention says X alternative needs
22 to be considered and gives some facts but doesn't
23 give enough figures to warrant a more detailed study
24 in the EIS but may warrant further inquiry, in other
25 words, further inquiry in the nature of what would

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1- those numbers be; are those numbers great enough to
2 warrant a more detailed analysis than the EIS, the
3 case law includes -- on contention admissibility,
4 includes at least the idea that at least you need
5 enough of a fact-based argument to warrant further
6 inquiry.

7 Aren't you sort of skipping that step by
8 saying that you need enough to get you to the point
9 of saying the EIS needs more detail, detailed
10 analysis? That's sort of the end point. The
11 contention admissibility stage, you don't just
12 automatically go to the end point. You need to see
13 whether there's enough there to warrant further
14 inquiry in a hearing where, for example, evidence
15 about those numbers would come out. I mean, there
16 has to be some difference.

17 MR. BIGGINS: There has to be some difference.
18 I agree with you, Judge. However, there has to
19 also, under 2.309 -- I don't believe we're skipping
20 a step. There has to also be support to show that
21 that contention merits further discussion, that it
22 merits a hearing. And simply suggesting additional
23 alternatives does not meet that requirement. They
24 have to be able to provide enough information to
25 show that they have a material dispute with this

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1- application.

2 And you're going to have to have some level of
3 detail, looking at the application and, you know,
4 proposing suggested alternatives, to show that --
5 you're going to have to provide enough facts to show
6 that there is a material dispute. So to some
7 extent, the Board will have to delve into or be
8 provided -- let me put it this way -- be provided by
9 the Petitioner with enough facts to demonstrate a
10 material dispute. And when we look back at this
11 particular contention, we do not have enough to see
12 that this is material.

13 JUDGE YOUNG: Okay. What -- let me go through
14 this on a little bit more elementary level. Let's
15 see.

16 (Pause.)

17 JUDGE YOUNG: I'm looking for the page that I
18 had the four -- on the intermittency, the comparison
19 of the alternatives. Let's see. Where was that? I
20 had it up a minute ago. I just -- do you know?

21 MR. FRANTZ: On wind, for example, I think it
22 was at page 9.2-9. I think --

23 JUDGE YOUNG: Not on the impacts, on the --
24 let's see. I got it out of here. Where you discuss
25 the problems with intermittency. I got it out of

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-1 -- your thing. I'm-going to have to go back and find
2 where I got it from.

3 MR. FRANTZ: Yes. On, for example, page 9.2-
4 8, there are statements there to the effect that
5 wind power has a capacity factor typically in the
6 range of 25 percent, perhaps up to 45 percent.

7 JUDGE YOUNG: Is that where you use the word
8 "intermittency" or "intermittent"?

9 MR. FRANTZ: I don't know whether that page
10 uses the term "intermittent" or not, but obviously a
11 capacity factor of 25 to 45 percent would qualify as
12 intermittent.

13 JUDGE YOUNG: Where does 9.2 start?

14 MR. FRANTZ: It starts on -- okay. I do have
15 a statement here. On the bottom of page 9.2-7, the
16 last carryover paragraph, it says, "Wind power is an
17 intermittent form of energy that is not suitable for
18 baseload power, because wind power generation is
19 highly variable on an hourly, daily, weekly,
20 seasonal and annual basis."

21 JUDGE YOUNG: Okay. I'm looking at Section --
22 it skips away from that page every time I try to --
23 (Pause.)

24 JUDGE YOUNG: In any event, I can't find the
25 page again. I had it up a minute ago, but it's

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1 skipping-around up here, and I can't find it. There
2 was a discussion in the environmental report about
3 the problems with some of these alternatives, that
4 they weren't reliable because of intermittent --
5 problems with intermittent availability. Do you
6 know what I'm talking about?

7 MR. BIGGINS: I understand your point. Yes,
8 Judge.

9 JUDGE YOUNG: Okay. That's what was in the
10 environmental report. So what the Petitioners
11 assert as a matter of fact is that in response to
12 the concerns about intermittency, there are, they
13 say, "recent advances in technology, such as
14 compressed air energy storage and improved battery
15 storage capacity."

16 On somewhat the same kind of parallel level of
17 detail and specificity with what's in the
18 environmental report, saying the problem is
19 intermittency and the contention comes in and says,
20 Well, the way you deal with intermittency are these
21 things, and you're faulting the contention for not
22 providing more detailed facts, giving figures for
23 how long the storage devices would last and how well
24 they would address intermittency.

25 But for contention admissibility purposes,

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1 you're asking us to sort of draw a line and say, --
2 Even though they have challenged that specific part
3 of the application with specific factual assertions
4 as to what types of measures would address the
5 intermittency problems posed in the environmental
6 report, you're saying that's not enough; the line
7 should be drawn here, because they haven't shown
8 numbers.

9 It becomes -- it's not -- what you're
10 challenging is not the nature of what they've
11 provided. What you're challenging is the amount of
12 what they've provided, it seems to me. You're
13 saying that even though they have provided some
14 facts, they're not enough facts; they're not
15 detailed enough facts to warrant more detailed
16 consideration in the environmental report.

17 And it seems to me that that sort of is
18 getting into a merits argument and into an argument
19 that does not address the nature of what's been
20 provided. It addresses your view that it's not
21 enough, that it's not detailed enough. So what is
22 there to support that the line should be drawn where
23 you're saying it should be drawn with regard to this
24 specific part of the support for the contention?

25 MR. BIGGINS: Judge, first let me point out

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1- that I don't believe these are additional facts. I
2 believe these were expert assertions made by Dr.
3 Makhijani.

4 JUDGE YOUNG: I'm talking about the
5 contention -- the basis for the contention provided
6 in the petition itself.

7 MR. BIGGINS: Which was based on Dr.
8 Makhijani's assertion.

9 JUDGE YOUNG: I'm talking about the basis for
10 the contention itself. I'm not talking about the
11 Makhijani report. I'm talking about the basis for
12 the contention on page 42 of the petition.

13 MR. BIGGINS: Right. But I believe the
14 language "advances in storage" come from Dr.
15 Makhijani's --

16 JUDGE YOUNG: Does that really make --

17 MR. BIGGINS: -- expert report.

18 JUDGE YOUNG: -- any difference? Is it not a
19 fact-based argument?

20 MR. BIGGINS: Yes, it does make a difference.

21 JUDGE YOUNG: Is it not a fact-based argument?

22 MR. BIGGINS: It is not, because it is
23 essentially an unsupported expert assertion which in
24 the USEC case, the ruling was that that's
25 insufficient.

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1 JUDGE YOUNG: Let me be more clear about what
2 I'm talking about. If you look at the petition on
3 pages 42 through 44, on page 42 the second
4 paragraph -- well, first paragraph, they cite the
5 environmental report at pages 9.2-1, et seq. It
6 says, "The COLA should evaluate alternative sources
7 of generating capacity based on current data
8 available regarding capacity factors, technological
9 advances that overcome intermittency objections
10 regarding wind and solar power," and so on.

11 Then the next paragraph says, "The Comanche
12 Peak environmental report assumes that renewable
13 fuel, such as wind and solar, cannot provide
14 adequate baseload generating capacity. However,
15 recent advances in technology such as compressed air
16 energy storage and improved battery storage capacity
17 cast doubt on some of the environmental report's
18 assumptions concerning problems with intermittency."

19 Then if you look on page 44, the only mention
20 of Dr. Makhijani's report, it says, "As further
21 support for this contention, please see the attached
22 report."

23 MR. BIGGINS: Judge, again, I believe that's
24 merely an assertion and doesn't provide support for
25 the contention. That is the Staff position.

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1 -- JUDGE YOUNG: Well, what is a fact-based
2 argument? What is it? If only a fact-based
3 argument that there is case law to support -- you
4 don't need expert opinion, you don't need documents,
5 you can have only a fact-based argument --

6 MR. BIGGINS: Let me illustrate through a
7 question back.

8 JUDGE YOUNG: -- if it's sufficient to warrant
9 further -- hold on. -- if it's sufficient to
10 warrant further inquiry. So what I'm trying to get
11 you focus in on here is specific assertions of fact
12 have been made, a fact-based argument. A fact-based
13 argument is merely assertions of fact in an argument
14 form that has some logic to it. I would assume that
15 that's what that means.

16 And the fact-based argument is in dispute with
17 the environmental report. We say that the
18 intermittency concerns that are mentioned there can
19 be dealt with or that these advances, specific
20 advances, compressed air energy storage and improved
21 battery storage, cast some doubt. Now, that's a
22 little fuzzy.

23 MR. BIGGINS: Right.

24 JUDGE YOUNG: But what I'm trying to get you
25 to focus on is: Given the level of detail that is

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1 provided in the environmental report, is not this
2 level of detail somewhat comparable to that, such
3 that it might warrant further inquiry as to, for
4 example, how well would compressed air energy
5 storage address intermittency problems with wind
6 power, and what --

7 MR. BIGGINS: So the answer is, no, because --
8 let me point out. The environmental report states
9 the capacity factor for the wind power generation.
10 How much does the battery storage or compressed air
11 storage increase that capacity factor? We have no
12 idea, because the Petitioners haven't provided that
13 basic level of detail in their contention. How do
14 we know that it increases it enough to be able to
15 meet the purpose and need of this proposed action?

16 JUDGE YOUNG: You start our your sentences,
17 your questions with, How do we know. The term that
18 the Commission has used is, Further inquiry is
19 warranted. So you don't have to show enough to make
20 you know anything. A petitioner has to show enough
21 to warrant further inquiry, which itself would then
22 lead possibly to some conclusions, and you may be
23 absolutely right about the conclusions.

24 But I'm trying to get you to focus on the
25 minimal level that is required to be in a

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1 contention, and you seem to be wanting what would
2 obviously be a much better contention in the sense
3 of more well-supported, extensively well-supported,
4 but for the basic requirements of contention
5 admissibility and the requirement that enough to
6 warrant further inquiry, which can be through expert
7 opinion, can be through documents, or could be
8 merely a fact-based argument.

9 MR. BIGGINS: But not assertions, Judge.

10 JUDGE YOUNG: What's the difference? What's
11 the difference between a fact-based argument and
12 assertions?

13 MR. BIGGINS: An assertion would be that there
14 are advances in battery and compressed air storage.

15 JUDGE YOUNG: And they have made that --

16 MR. BIGGINS: Assertion.

17 JUDGE YOUNG: -- assertion. What would be a
18 fact-based argument?

19 MR. BIGGINS: How do we know the accuracy of
20 that assertion? There is not enough for the Board
21 to make a reflective assessment of that assertion,
22 and that is contention admissibility criteria. That
23 is not --

24 JUDGE YOUNG: I think we're sort of going
25 around in circles, because the contention itself is

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1 what must be supported by fact-based argument.

2 Any -- I mean, any contention is an assertion
3 itself. Any allegation in any kind of complaint
4 anywhere is an assertion, in the sense that it
5 alleges certain things.

6 MR. BIGGINS: Perhaps we are going around in
7 circles. Maybe --

8 JUDGE YOUNG: Again, we get into this thing
9 where the argument is made that you need to have
10 support for the support for the support, when the
11 contention admissibility rules say you need to have
12 support for the contention, which can be on a level
13 of at least a fact-based argument.

14 JUDGE ARNOLD: Can I get in here for a moment?

15 JUDGE YOUNG: Go ahead.

16 JUDGE ARNOLD: 10 CFR 2.309(f)(v), the
17 contention admissibility standards. Let's see.
18 "The petition must provide a concise statement of
19 the alleged facts or expert opinions which support
20 the requestor's/petitioner's position on the issue
21 and on which the petitioner intends to rely at
22 hearing, together with references to the specific
23 sources and documents on which the
24 requestor/petitioner intends to rely to support its
25 position on the issue."

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1 -- I see alleged facts in here. I'm not seeing
2 references to support. Okay?

3 MR. EYE: May I --

4 JUDGE ARNOLD: Sure.

5 MR. EYE: -- address that? Thank you, Your
6 Honor. First, specifically and very narrowly, page
7 38 of Dr. Makhijani's report says -- I'm sorry. It
8 begins on page 38. The specific quote I'm looking
9 at is at the bottom of page 39, and this is a
10 section of the report that deals with other
11 nonintermittent energy options.

12 And it says, "Shell and Luminant have proposed
13 to develop a compressed air energy storage facility
14 in Texas near Comanche Peak." On Monday, July 30,
15 2007, there was an announcement by Shell and the
16 Applicant to build 3,000 megawatts of wind capacity
17 in Briscoe County, southeast of Amarillo. Part of
18 that -- and to this -- and I want to be very candid.
19 I don't know what the progress has been by the
20 Applicant in this regard, but part of that proposal,
21 Your Honor, was to include a CAES component.

22 JUDGE YOUNG: CAES?

23 MR. EYE: Compressed air energy storage. And
24 we referenced that specific project in Dr.
25 Makhijani's report as a consideration to deal with

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1- -- intermittency problems. Now, that, I think, meets
2 not only what you were talking about, Judge Arnold,
3 but I think it meets Judge Young's considerations as
4 well in that regard.

5 If, in fact, what we're looking at is the
6 question, Is there enough in our petition, both in
7 the assertion that we made in the petition itself
8 and in Dr. Makhijani's supporting documentation, and
9 as it turns out, even the Applicant's own project
10 that is, I presume, underway, we have satisfied that
11 criterion to provide support for the asserted fact.
12 And if you want to just use that as a basis to fill
13 the gap on the requirement that we provide
14 sufficient support, that should do it.

15 JUDGE YOUNG: I think one of the problems
16 we're having here is there's a lot of case law out
17 there on these contention admissibility
18 requirements. The requirement at number 5, I
19 believe there's case law that says that you don't
20 have to provide all the sources and documents on
21 which you plan to rely at the hearing.

22 Obviously you have to provide enough to
23 warrant further inquiry, but you don't have to
24 provide everything that you're going to provide at
25 the hearing. Otherwise, you would be converting

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1 contention admissibility into proving your case at
2 the hearing stage.

3 So the question is: How much do you have to
4 provide? And it may be that we've reached the point
5 of not benefitting from any further argument on the
6 issue, but it's sort of laid out . You haven't --

7 MR. FRANTZ: Yes.

8 JUDGE YOUNG: -- said anything about it.
9 Would you like to say something?

10 MR. FRANTZ: Yes, please. I think Judge
11 Arnold pointed to the correct phrased there, under
12 2.309(f)(1)(v). It's that last clause, together
13 with references to the specific sources and
14 documents. You're right, Judge Young. They don't
15 have to provide everything, but they have to provide
16 something. In this case, they haven't provided that
17 something. They haven't provided enough to show
18 that wind with compressed air is capable of
19 generating baseload power equivalent to Comanche
20 Peak. They reference --

21 JUDGE YOUNG: To show that, but is it to show
22 that wind -- say what you just said again, that that
23 would be sufficient. They would have to show that.
24 What's the difference between that and proving that
25 at a hearing?

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1 MR. FRANTZ: I'm not asking them for truth.
2 I'm asking them if they have a technical report or a
3 technical reference or an expert affidavit that at
4 least states that compressed air, in conjunction
5 with wind, can provide baseload power.

6 JUDGE YOUNG: But there is no -- there is case
7 law that says that you don't have to have an expert
8 opinion.

9 MR. FRANTZ: I'm not saying --

10 JUDGE YOUNG: Or a technical report or a
11 document.

12 MR. FRANTZ: Judge Young, that's just one
13 alternative.

14 JUDGE YOUNG: Right.

15 MR. FRANTZ: Either an expert affidavit or a
16 supporting report or a reference to a report. And
17 they don't have --

18 JUDGE YOUNG: Or a fact-based argument.
19 That's what --

20 MR. FRANTZ: No, no, no.

21 JUDGE YOUNG: -- the case law says.

22 MR. FRANTZ: I'm sorry. The fact-based
23 argument alone is not sufficient. They need,
24 according to 2.309(f)(1)(v), "references to the
25 specific sources and documents on which

1 requestor/petitioner intends to rely." That's a
2 requirement in the regulations, and they have not
3 met that with respect to compressed air and wind and
4 solar power.

5 They reference this statement on page 39 in
6 Dr. Makhijani's report about this proposed project
7 by Shell and Luminant, but reading that statement,
8 there's no reference in that sentence to producing
9 baseload power. They're saying; "Shell and Luminant
10 have proposed to develop a compressed air storage
11 facility in Texas near Comanche Peak." They don't
12 say that that facility is capable of producing
13 baseload power.

14 I also would like to just briefly respond to
15 some of the very earlier questions and comments
16 regarding the public interest standard in the Atomic
17 Energy Act. There is no general public interest
18 requirement for issuance of a license for a nuclear
19 power plant. The public interest is satisfied with
20 respect to Section 103 by showing added protection
21 of safety, reasonable assurance of safety. There is
22 no requirement that the NRC make an overall public
23 interest finding in order to issue a license under
24 the Atomic Energy Act.

25 JUDGE YOUNG: I don't know if anyone has the

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1 capacity to look up Westlaw here, but you might want
2 to look up Oconee CLI-99-11, 49 NRC at 342. "A
3 petitioner must support its contentions with
4 documents, expert opinion, or at least a fact-based
5 argument. "A petitioner must present sufficient
6 information" -- this is from a different case -- "to
7 show a genuine dispute and reasonably indicating
8 that further inquiry is important. Some sort of
9 minimal basis indicating the potential validity of
10 the contention is required."

11 MR. FRANTZ: That is one of the requirements,
12 but it's not sufficient by itself. They also, as I
13 said, have to meet this requirement in
14 2.309(f)(1)(v). There are six requirements in
15 Section 2.309.

16 JUDGE YOUNG: That's right. That's right,
17 except (f)(1)(v) is not to be read as requiring --
18 that is not to be read as requiring specific
19 documents. But how are you -- I mean, it's not to
20 be read as providing everything that they're going
21 to rely on at the hearing.

22 MR. FRANTZ: I agree, but they need something.

23 JUDGE YOUNG: They need something. They need
24 at least a fact-based argument, sufficient to
25 warrant further inquiry.

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1 - MR. FRANTZ: Judge, I respectfully dissent,
2 Judge Young. It says in the regulations, "with
3 references to the specific sources and documents on
4 which they're relying." The language is very clear
5 on its face.

6 JUDGE YOUNG: Right. "On which they're
7 relying."

8 MR. FRANTZ: And they have not done that here.
9 The documents on which they've cited do not provide
10 any support for their statement that compressed air
11 in conjunction with wind can produce baseload power.

12 JUDGE YOUNG: They refer to Dr. Makhijani's
13 report. It may not be a lot. It may not be a lot,
14 but the Commission has also said that -- they've
15 said that we are to bar contentions where
16 petitioners have only what amounts to generalized
17 suspicions, hoping to substantiate them later. And
18 it does obviously say that they need to provide
19 whatever -- references to whatever documents and
20 sources they're going to rely on later, but that
21 does not -- if they don't have any, a fact-based
22 argument is enough.

23 MR. FRANTZ: That just is not consistent with
24 the language of the regulation or, I believe, with
25 the relevant case law.

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1- JUDGE YOUNG: Well-- --

2 MR. FRANTZ: Now, for example, that was
3 true --

4 JUDGE YOUNG: -- one good thing about the law
5 is that there's room for differences of opinion.

6 MR. FRANTZ: Yes. Well, Judge Young, I might
7 say your position was true perhaps back in the 1970s
8 and 1980s, but the Commission changed the rules and
9 required now this type of very specific supporting
10 documentation. Notice pleading, that's essentially
11 what his contention and most of the other
12 contentions consist of. Notice pleading is no
13 longer sufficient for admission of a contention
14 under the Commission's rules.

15 JUDGE YOUNG: That is an argument. However, a
16 lot of this case law is still valid, and a lot of it
17 is based on similar language. The changes that took
18 place -- and we're getting into an argument here
19 that I'm not sure we need to get into. But the
20 changes that took place did not change these
21 particular provisions.

22 MR. FRANTZ: They did, I believe, in the late
23 1980s. These provisions were added to the rule.

24 JUDGE YOUNG: This was in 1999, the case that
25 I cited to you.

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1 MR. FRANTZ: And, again, I understand that, --
2 and I would suggest that, again, language here in
3 the rule is quite specific on the need for some
4 support. I think the language you may have in mind
5 pertains to more of contentions of omission where --

6 JUDGE YOUNG: No. I see where you're going
7 with this, but I think the problem here is that
8 we've got a set of rules that are subject to widely
9 varying interpretations. Probably more time is
10 spent on contention admissibility determinations
11 than most any other part of the adjudication process
12 in NRC practice, and probably the reason for that is
13 because these rules are subject to interpretation,
14 and they're constantly being argued over.

15 There's case law out there that's all over the
16 map, as you know. We'll take your arguments under
17 advisement. Does anyone have anything further you
18 want to say?

19 MR. EYE: I do not.

20 MR. BIGGINS: No, Judge.

21 MR. EYE: I think we've pointed out what we
22 needed to, other than to say that we think that
23 we've satisfied the criterion, whether it's based
24 upon the case law interpretation or just the bare
25 language of the CFR itself, Your Honor, based upon

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1 the references that I made earlier to Dr.
2 Makhijani's report and the Luminant decision to
3 pursue wind along with CAES. Thank you, Your Honor.

4 JUDGE YOUNG: Okay. All right. We're down to
5 the very last one, and I don't think we're going to
6 take as long on this one, because this one involves
7 the terrorist issue that we've talked about before.
8 Do you have anything you want to add at this point
9 about that? You've pretty much made your record, I
10 think, probably already.

11 MR. EYE: I have, except for one narrow legal
12 point, Your Honor, and I think that that -- one of
13 the reasons that we raised this contention is to
14 juxtapose the decision of the Ninth Circuit in San
15 Luis Obispo, a concerned mother's case that we cite
16 in our petition, with the NRC's very contrary policy
17 position that they've taken that they will not
18 require an analysis of the probability of terrorist
19 attacks in an environmental impact statement.

20 We have now in our country, as I mentioned, I
21 think, yesterday -- we're kind of on a collision
22 course, and it's -- we want to make sure that our
23 position is clear, that we believe as related to
24 Comanche Peak, there ought -- there should be a
25 consideration of its proximity to Dallas-Fort Worth

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1 Airport and, for that matter, other airports in the
2 region that would accommodate large commercial
3 airliners, and the possibility of commercial
4 airliners being used to attack the Comanche Peak
5 reactors.

6 And although we recognize that the NRC has
7 taken the policy position to reject the Ninth
8 Circuit's opinion, we are asserting that the Ninth
9 Circuit opinion should prevail, and if this appears
10 that we are attempting to set the stage for a
11 judicial challenge to the NRC's rule in the matter
12 of Pacific Gas and Electric Company that we cite on
13 page 44 of our petition, that would probably not be
14 an unreasonable assumption on anybody's part.

15 We think this is an extremely important
16 question, and it would be one thing if we were
17 essentially alone in this position, but it -- I
18 think we have to take it a bit more seriously when
19 the Ninth Circuit is essentially saying the same
20 thing. And I think significantly, that certiorari
21 was denied by the Supreme Court in 2007, making --
22 giving the Ninth Circuit's decision in the San Luis
23 Obispo Mothers for Peace case at last in some
24 respects a more viable, a more persuasive opinion.

25 Separation of our powers in our country and in

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1 our constitutional system is extremely important,
2 and we recognize that the differences of opinion
3 that exist between the Ninth Circuit in the third
4 branch and the NRC in the first branch is
5 permissible. It can happen in our system. It makes
6 things very interesting and contentious and complex.

7 But when the decision has to be made
8 ultimately about whether the issues regarding
9 terrorist attacks by airplanes should be taken into
10 account as a policy matter in issuing decisions, we
11 have taken the position that the Ninth Circuit
12 opinion should prevail, and that would mean that the
13 NRC's position would have to yield.

14 So that is why we have raised this contention
15 as a legal matter, but it is really raised because
16 we are very concerned about the prospect of attacks
17 by air on nuclear power plants, not only here but
18 elsewhere. Thank you.

19 JUDGE YOUNG: Anything for -- you want to
20 respond?

21 MR. RUND: If I may, just a few points. I
22 mean, I think we addressed this pretty thoroughly
23 yesterday, but I just want to note -- I don't have
24 the citation in front of me, but I know there is
25 Supreme Court case law out there that a denial of

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1 cert should have no bearing on the merits of the
2 underlying Court of Appeals decision.

3 I'd also like to just note, unique to this
4 contention, the claims that the Petitioners have
5 just repeated about the location of the Dallas-Fort
6 Worth Airport are completely unsupported. They
7 essentially just say, it's a possibility, but they
8 provide no factual support as required by 10 CFR
9 2.309(f)(1)(v).

10 JUDGE YOUNG: Staff?

11 MR. BIGGINS: Just very briefly, Judge. Thank
12 you.

13 The Commission's position on the necessity of
14 examining the impacts of terrorism under NEPA, I
15 believe, is clear. Notwithstanding a recent
16 decision by the United States Court of Appeals for
17 the Ninth Circuit, holding that the NRC may not
18 exclude NEPA terrorism contentions categorically, we
19 reiterate our longstanding view that NEPA demands no
20 terrorism inquiry, and that was the Oyster Creek
21 case.

22 And so to that extent, the Staff believes that
23 the Third Circuit decision, which has upheld the
24 Commission's position, is what does apply in this
25 case. That's all I have. Thank you.

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1 - JUDGE YOUNG: Anything further?

2 MR. EYE: I think not, Your Honor. Thank you.

3 JUDGE YOUNG: Well, we've enjoyed being with
4 you for two days here in Texas, and --

5 MR. BIGGINS: Judge, sorry to interrupt. I do
6 have one general matter that I would like to
7 address, and that is the reference yesterday by
8 Judge Arnold to climate change studies which he said
9 he reviewed in response to this case, and I would
10 like to set forth that it's the Staff's position
11 that it's important that any matters that this Board
12 considers in order to reach its decision must be on
13 the record and that the Board must allow the Staff,
14 the Applicants, and the Petitioners an opportunity
15 to respond to any of those materials that may be
16 relied on by the Board.

17 I would point out: Judge Arnold didn't
18 indicate that he was relying on those studies, but I
19 just felt that it was necessary to raise that as an
20 issue.

21 JUDGE YOUNG: Do you know which -- can you
22 give them a reference to the specific study?

23 JUDGE ARNOLD: I really can't. I just
24 glanced -- I was just simply trying to establish
25 whether or not there was consensus that global

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1 - warming would lead to a reduction in rainfall, and
2 all I really noted was they seemed to not be in
3 agreement.

4 MR. BIGGINS: I don't think that contradicted
5 my assumption that the Board would be relying on the
6 record anyway. I just wanted to point that out.
7 Thank you.

8 JUDGE YOUNG: All right. Before we leave, I
9 think the only thing that we're still expecting is
10 you were going to give us citations to the case law
11 on commercial viability. You said you had some.

12 MR. FRANTZ: That's correct, and I will do
13 that most likely after I get back to Washington, and
14 I'll send a letter to the Board and copies to the
15 parties.

16 JUDGE YOUNG: That's fine. Was there anything
17 else? I don't think there was anything else left
18 hanging, was there?

19 MR. BIGGINS: The Staff has nothing else.
20 Thank you.

21 MR. EYE: On behalf of Petitioner, I don't
22 believe so, Your Honor. I think we were -- I think
23 we've gotten loose ends taken care of, or at least
24 as much as we can in this proceeding.

25 JUDGE YOUNG: All right. Well, again, we've

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1 enjoyed being with you here, and have a good trip
2 back for those of you who are leaving. And enjoy
3 the summer, for those of you who are staying.

4 MR. EYE: Thank you.

5 MR. BIGGINS: Thank you, Judge.

6 JUDGE YOUNG: That concludes this proceeding.

7 (Whereupon, at 2:55 p.m., the hearing in the
8 above-entitled matter was concluded.)
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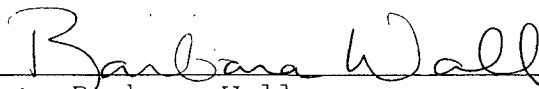
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