

**Official Transcript of Proceedings**  
**NUCLEAR REGULATORY COMMISSION**

Title: South Texas Project Nuclear Company  
Units 3 and 4  
Open Session

Docket Number: 52-012-COL and 52-013-COL  
ASLBP Number: 09-885-08-COL-BD01

Location: Rockville, Maryland

Date: Friday, November 13, 2009

Work Order No.: NRC-3211

Pages 551-597

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USNRC  
November 18, 2009 (1:30pm)  
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P R O C E E D I N G S

9:30 A.M.

1  
2  
3 JUDGE GIBSON: Please be seated. Good  
4 morning. Welcome to oral argument on contingent  
5 admissability over recent amendments to the combined  
6 operating license application for South Texas Nuclear  
7 Projects proposal to build and operate two nuclear  
8 reactors near Bay City, Texas.

9 First, I want to introduce the members of  
10 our panel. On my right, Judge Gary Arnold, to my  
11 left, Judge Randy Charbeneau, and I'm Michael Gibson.

12 Next I would like to have introductions of  
13 counsel, please.

14 MR. FRANTZ: On behalf of Intervenors, My  
15 name is Robert Eye, and appearing with me is Elizabeth  
16 Brown on behalf of SEED Coalition.

17 Alison Fisher for Public Citizen is  
18 expected to be here any minute.

19 JUDGE GIBSON: Will she be sitting with  
20 you at counsel table?

21 MR. EYE: I believe she will probably be  
22 in the audience.

23 JUDGE GIBSON: Okay.

24 MR. FRANTZ: My name is Steve Frantz. I'm  
25 counsel for the Applicant. I'm with the law firm of

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1 Morgan, Lewis & Bockius here in Washington, D.C. To  
2 my left is Stephen Burdick. Also in the audience are  
3 Al Gutterman and John Matthews from my firm, plus from  
4 South Texas Project NP Operating Company we have Mark  
5 McBurnett, Scott Head and Fred Puleo.

6 JUDGE GIBSON: Thank you.

7 MR. SPENCER: Your Honor, I'm Michael  
8 Spencer, representing the NRC staff. With me and also  
9 representing the NRC staff are Jessica Bielecki and  
10 Anthony Wilson. And in response to the Board's order  
11 Tuesday, we have brought Bern Stapleton and Earl Libby  
12 to serve the Board in making SUNSI and SGI  
13 determinations.

14 JUDGE GIBSON: Thank you. Having  
15 completed our introductions, I would like to make a  
16 few comments about why we're here and what we hope to  
17 accomplish today.

18 We are here today because South Texas  
19 Nuclear Project has applied to the Nuclear Regulatory  
20 Commission for a combined operating license to build  
21 and operate two additional nuclear reactors, so-called  
22 Units 3 and 4 near the current locations of its Units  
23 1 and 2.

24 Several individuals, as well as several  
25 groups, have challenged the proposed issuance of a

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1 combined operating license for these two units.

2 Previously, in June of this year, this  
3 Board heard oral argument in Bay Town, Texas regarding  
4 whether these Intervenors should be accorded standing  
5 and whether their contentions should be admitted.

6 In August and September of this year, this  
7 Board issued orders granting standing to the  
8 Intervenors, denying some of their contentions, and  
9 admitting some of their contentions.

10 We are here today because after oral  
11 argument in June, the Applicant amended its license  
12 application to address some new rules that the Nuclear  
13 Regulatory Commission has issued. The Intervenors  
14 have interposed seven new contentions to challenge the  
15 Applicant's amended license application. And the  
16 parties will address whether these contentions should  
17 be admitted.

18 Before we commence oral argument on these  
19 seven contentions, there is a pending motion to open  
20 this proceeding. We are going to carry the motion for  
21 the time being. Instead of ruling on the motion  
22 itself, I would like to try to establish some ground  
23 rules for how we will proceed today. And to the  
24 extent that this hearing can be open, it will be. To  
25 the extent it cannot be, it will not be, and we'll

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1 have to close it.

2 For those of you who were hoping to hear  
3 oral argument today, we'll certainly allow you to hear  
4 as much as possible, but to the extent that you have  
5 not signed a nondisclosure agreement, we will have to  
6 close the hearing and exclude you when we get to that  
7 point.

8 All three Board Members have a number of  
9 questions regarding these seven contentions and there  
10 certainly will be some questions that will implicate  
11 SUNSI material which is certain security-related  
12 proprietary information.

13 If during the course of argument today,  
14 the Applicant or the staff concludes that we are about  
15 to get into any kind of SUNSI material, I would like  
16 for you to please alert us to that and we will at that  
17 point try to figure out a way to address it. We will  
18 either try to revise our question or encourage the  
19 person answering to see if they can answer the  
20 question without getting into the SUNSI material. If  
21 that cannot be done, we will take that question and  
22 postpone it and we will have a closed session later in  
23 the date that will address all the matters that we  
24 cannot address in the open.

25 Is there anything further that either the

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1 Board Members wish to address?

2 I do want to emphasize one thing before we  
3 start and that is it is important not merely that the  
4 Applicant and the NRC staff object to this material,  
5 but it's also important that to the extent there is  
6 any such material, Mr. Eye, in particular, you need to  
7 be sure and be sensitive to that if you think that  
8 your answer to any question is going to implicate any  
9 material that has been requested to be SUNSI, not  
10 simply that -- I know there hasn't been ruling on this  
11 material. And please alert us to that fact. And  
12 again, we'll try to figure out a way to address this.

13 I realize that's a little bit clumsy, but  
14 in the interest of openness, we would like to keep as  
15 much of this open as we can.

16 MR. SPENCER: Your Honor?

17 JUDGE GIBSON: Yes.

18 MR. SPENCER: I would object to this to  
19 the extent that it may be by the time it's identified  
20 that SUNSI has been spoken, it's too late. It's  
21 already been spoken in a public proceeding and that as  
22 a practical matter it will be difficult, one, not only  
23 to answer questions to try to split out which part of  
24 the question is going to be SUNSI and which part of  
25 the answer to the question is going to be SUNSI and

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1 which part is not, but also if we make a misjudgment  
2 and our expert objects and says well, that's SUNSI,  
3 well it's already been spoken in the public session.  
4 So I think as a practical matter, it would be  
5 difficult to operate under the process you set out.

6 JUDGE GIBSON: Okay, thank you.

7 MR. FRANTZ: I concur with that. I think  
8 it's going to be very difficult as counsel to try to  
9 make an effective oral argument if I have to try to  
10 restrain myself on what I can say on the fear that I  
11 may be discussing SUNSI.

12 Obviously, all of these contentions  
13 pertain to our Mitigative Strategies Report. That  
14 report is SUNSI. The Intervenors do not disagree with  
15 that characterization.

16 There's also going to be, I would assume,  
17 a large amount of discussion regarding NEI 06-12.  
18 That design is SUNSI. I don't know how we really  
19 effectively proceed to discuss the contentions without  
20 being able to discuss either the Mitigative Strategies  
21 Report or NEI 06-12.

22 JUDGE GIBSON: Well, I suppose that we  
23 will have to be very careful about what questions we  
24 ask and you'll have to help us. But again, I would  
25 like to hold as much of this open as possible. It may

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1 be that we only have a few questions that we'll be  
2 able to ask. I don't know.

3 JUDGE ARNOLD: I just have a question for  
4 the Intervenor here. You've just had the Applicant  
5 characterizing you as agreeing that this material is  
6 SUNSI.

7 MR. EYE: Thanks, Your Honor. We agree  
8 that the Mitigative Strategies submittal that they  
9 filed with the NRC on May 29 of this year falls into  
10 the SUNSI category. We really part company on most  
11 everything else, particularly NEI 06-12. We part  
12 company on whether it's properly designated as SUNSI,  
13 even as you probably notice, there's an admission in  
14 that that not all of it is SUNSI and so -- and there's  
15 also a recognition from the staff in response to the  
16 motion we filed for a public hearing that the mootness  
17 briefs that have been filed in this proceeding should  
18 be outside this scope of SUNSI. And in those mootness  
19 briefs, there are certainly excerpts from NEI 06-12  
20 that are clearly -- well, not clearly -- not much is  
21 clear about SUNSI as it turns out, but it seems to us  
22 clearly that it falls outside the scope of what is  
23 intended to be a SUNSI document.

24 So the only thing that -- I think that  
25 what staff said was that we agree that the Applicant's

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1       submittal of May 29, 2009 that requires explosions  
2       mitigation would fall under the category of SUNSI.  
3       Beyond that, I think everything else is problematic at  
4       best.

5               MR. WILSON: Your Honor, if I may. Staff  
6       filed an errata yesterday which corrected a footnote  
7       that was incorrect in its response. In that footnote,  
8       we cited items 2, 3, and 4 as potentially being  
9       available to be made public, subject to the Board  
10      issuing an order under -- that would excuse it from  
11      the July protective order. That footnote should have  
12      simply cited items 2 and 3. That was filed late  
13      yesterday.

14             MR. EYE: Your Honor, that is what I just  
15      said. We said that the mootness briefs that the staff  
16      agrees that the mootness briefs fall outside SUNSI.  
17      I acknowledge that they filed the errata yesterday  
18      that made the correction. They had originally said  
19      that our contentions on the fires and explosions  
20      regulations fell outside SUNSI. They corrected that  
21      and we acknowledge that they have done so.

22             JUDGE GIBSON: Do I understand correctly  
23      that your Mitigative Strategies Report has been  
24      designated SUNSI?

25             MR. FRANTZ: That's correct.

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1 JUDGE GIBSON: And is it your estimation  
2 that every page of that document implicates SUNSI  
3 material? It seems to me there was a blanket  
4 designation. When I looked through it I thought well  
5 some of this is -- seems relatively -- it's difficult  
6 for me to see how it would be SUNSI.

7 MR. FRANTZ: Yes, I have not attempted to  
8 parse through the language to characterize some as  
9 SUNSI and some as not SUNSI.

10 JUDGE GIBSON: Yes.

11 MR. FRANTZ: And I'm not sure that I'm the  
12 right person to try to do that.

13 JUDGE GIBSON: I appreciate that. I was  
14 just curious what your view of it was because it seems  
15 to me that there's some material we don't want to get  
16 into.

17 MR. FRANTZ: Yes.

18 JUDGE GIBSON: There's some material, you  
19 know, that really is -- there's no reason for it not  
20 to be discussed in the open.

21 MR. FRANTZ: My belief is that the vast  
22 majority of that document is SUNSI.

23 JUDGE GIBSON: Okay.

24 MR. FRANTZ: It's discussing strategies.  
25 It's discussing actions. And there's very little

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1 background information there.

2 JUDGE GIBSON: With respect to NEI 06-12,  
3 it is my understanding that NEI is the one that  
4 classified that material or requested that material be  
5 classified as SUNSI. Is that correct?

6 MR. WILSON: Your Honor, if we could have  
7 Mr. Bern Stapleton and Mr. Earl Libby come forward?

8 JUDGE GIBSON: No, no, it's okay. I just  
9 want to know are they the ones who requested. That's  
10 all I'm asking.

11 MR. WILSON: Yes, they requested it.  
12 Staff then reviewed it.

13 JUDGE GIBSON: Next question. And the  
14 staff concurs in their judgment that it is SUNSI?

15 MR. WILSON: Yes, it does.

16 JUDGE GIBSON: Has there been any formal  
17 determination made by the Commission with respect to  
18 whether that entire document is SUNSI or not?

19 MR. WILSON: I would defer that question  
20 to Mr. Stapleton.

21 JUDGE GIBSON: I just asked you whether  
22 the Commission has made a ruling? That's all I asked.  
23 I don't think they've been asked to make a ruling.  
24 I'm just curious.

25 MR. SPENCER: I don't think the Commission

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1 makes rulings in the legal, formal sense on documents.

2 JUDGE GIBSON: I don't think so either.

3 I just wanted to be sure.

4 They have not been asked is this SUNSI or  
5 not. They have to said yes or no to that question,  
6 right? That's all I'm asking.

7 MR. SPENCER: Not that I'm aware, although  
8 NEI document comes from 2006. I'm not really familiar  
9 with the history of the document.

10 JUDGE GIBSON: Mr. Frantz, are you aware  
11 of there being any formal action by the Commission?

12 MR. FRANTZ: I am not aware of any.

13 JUDGE GIBSON: Okay, fine.

14 MR. SPENCER: Your Honor, could I have a  
15 few minutes to consult with the staff?

16 JUDGE GIBSON: Yes.

17 (Off the record.)

18 MR. EYE: Your Honor, I have one small  
19 housekeeping item now that counsel is back. I  
20 anticipate that Dr. Ed Lyman will be here as soon as  
21 his train probably pulls into the station. So we  
22 expect him to be here and I expect him to be at  
23 counsel table as well.

24 JUDGE GIBSON: Okay, and he signed a  
25 nondisclosure?

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1 MR. EYE: Yes, sir. He has.

2 JUDGE GIBSON: Yes, sir?

3 MR. SPENCER: Your Honor, I'd like to  
4 clarify an answer to your question. The staff, when  
5 it received the document agreed with the designation  
6 that NEI 06-12 was SUNSI. Two, there's a SUNSI policy  
7 in SECY 04-0191 which was approved by the Commission  
8 and the staff believes that NEI 06-12 clearly falls  
9 under the definition set out in that policy.

10 JUDGE GIBSON: Okay, and it's the staff's  
11 view that it does comply with the policy?

12 MR. SPENCER: That it is SUNSI under the  
13 policy?

14 JUDGE GIBSON: Right. Okay, good.

15 MR. EYE: Your Honor, may we heard on that  
16 point? On NEI 06-12 and its designation as SUNSI?

17 JUDGE GIBSON: Sure.

18 MR. EYE: First, it is not all SUNSI and  
19 even the document itself acknowledges that. In the  
20 forward to the document it says that only some parts.  
21 It doesn't designate which parts, but it says only  
22 some parts are SUNSI. Moreover, the deference to the  
23 SECY 04-0191, doesn't really answer the question about  
24 whether some parts of NEI 06-12 should come in and  
25 certain parts should come out. So I think that it

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1 would be --- this panel would have jurisdiction to  
2 make a ruling at this point if it so chose to  
3 designate some parts as permissible to come into the  
4 public hearing and certain parts not.

5 In that regard, if the panel would  
6 entertain, if you will, a proposal from the  
7 Intervenors, we would certainly be willing to  
8 designate at this time the part that we would like to  
9 have come in as part of the public hearing and at  
10 least for purposes of perhaps expediting the  
11 colloquies that we anticipate to happen, it might  
12 allow those kinds of exchanges to happen without  
13 shuffling people in and out, to accommodate a closed  
14 hearing.

15 And in fact, the part that we would  
16 specifically designated as of today that would come  
17 in, as part of the public hearing, has already been  
18 implicitly agreed to by the staff when it said that  
19 our mootness briefs could come in under the public  
20 hearing designation, because the part that we quoted  
21 in there would be the part that we would want to have  
22 as part of this public hearing.

23 JUDGE GIBSON: I appreciate your offer.  
24 Let me say that it seems to me that it's more likely  
25 that we would end up getting involved in an

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1 intractable discussion today and we have a limited  
2 amount of time and seven contentions to try to  
3 address.

4           How I would like to proceed is this. My  
5 questions and I think those of my colleagues here are  
6 going to be focused on legal obligations and to try to  
7 understand the legal basis for some of the claims that  
8 you are asserting. Some of those questions are going  
9 to have to be put off until the closed part of this  
10 because they're going to involve what is in the  
11 Mitigative Strategies Report that you think is  
12 inadequate. And I think most of those questions we're  
13 probably just going to have to put off because  
14 otherwise we have to make a formal ruling on this and  
15 I don't particularly want to do that.

16           But to the extent that these questions  
17 involve what is the legal basis for your assertion, it  
18 doesn't seem to me that that doesn't necessarily  
19 implicate SUNSI material. I would like to try to  
20 cover as much of those as we can. And again, please  
21 be sensitive in your answer and please -- I know you  
22 all will be very sensitive. We do not want any SUNSI  
23 material to be disclosed, but we do want to find out  
24 what the legal basis for that is. And I don't think  
25 there's any reason why those questions have got to be

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1 part of some closed proceeding.

2 MR. WILSON: Your Honor, at this time  
3 staff would have to renew its objection. We think  
4 that the risk of disclosure of SUNSI information is  
5 simply too great, whether that disclosure comes as a  
6 result of the questions or it comes as the result of  
7 the answers.

8 Moreover, we think that conducting an open  
9 proceeding puts staff in a tenable position of having  
10 to anticipate both the questions and the answers and  
11 to object in advance. And it would be very disruptive  
12 to the proceeding. So at this time, we would request  
13 a stay of this proceeding so that we may consult.

14 JUDGE GIBSON: Consult? What does that  
15 mean?

16 MR. WILSON: We would have to consult with  
17 our Deputy General Counsel.

18 JUDGE GIBSON: You're asking for a stay of  
19 the proceeding so you can consult?

20 MR. WILSON: A stay of the order which  
21 would hold this proceeding open.

22 JUDGE GIBSON: Well, as I say, we're going  
23 to be focusing on what are the legal requirements of  
24 50.54(hh) and what is your -- where do you find that  
25 in other things and where do you find the basis for

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1 what you're trying to get put in the Mitigative  
2 Strategies Report, not what is inadequate about what's  
3 in it.

4 MR. WILSON: Respectfully, we would seek  
5 that stay so that we could consult with regard to the  
6 immediate appeal. We certainly understand the  
7 position of the Board. Staff is in the role of trying  
8 to protect this information from disclosure because  
9 once the information is out, there's no way to undo  
10 that damage.

11 JUDGE GIBSON: Okay, your request is  
12 noted. And again, we're going to try to hew to asking  
13 questions that involve legal issues.

14 MR. WILSON: Then at this time, Your  
15 Honor, may be bring our witnesses forward, our experts  
16 forward so that they can be right here and better here  
17 to anticipate?

18 JUDGE GIBSON: Absolutely, absolutely. No  
19 problem at all with that. Do you all need additional  
20 chairs?

21 MR. FRANTZ: Yes.

22 (Pause.)

23 JUDGE GIBSON: Are we set? Do you all  
24 need any more chairs or anybody need to --

25 (Pause.)

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1 JUDGE GIBSON: Is everything okay, Mr.  
2 Frantz?

3 MR. FRANTZ: Yes.

4 JUDGE GIBSON: Okay, good. Mr. Eye, a  
5 phrase recurs throughout your contentions, which is  
6 the full spectrum of damaged stakes.

7 MR. EYE: Yes, sir.

8 JUDGE GIBSON: Now, I am curious about  
9 where that comes from. It looked to me like when I  
10 looked at 50.54(hh)(2) that that's not in there. You  
11 would agree with that, I take it?

12 MR. FRANTZ: Yes, sir. It is not there.

13 JUDGE GIBSON: And in the Statement of  
14 Considerations, which was published in the Federal  
15 Register with regard to 50.54(hh)(2), that term also  
16 does not appear there, does it?

17 MR. FRANTZ: I cannot answer that question  
18 without implicated a SUNSI document, Your Honor.

19 JUDGE GIBSON: I'm talking about the  
20 Statement of Considerations?

21 MR. FRANTZ: Actually, it is there.

22 JUDGE GIBSON: It is in the Statement of  
23 Considerations in the Federal Register?

24 MR. FRANTZ: Yes, sir. It is there, but  
25 it references a SUNSI document.

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1 JUDGE GIBSON: Okay.

2 MR. FRANTZ: To the extent it's there, but  
3 it's part of a SUNSI-related document that is cited  
4 specifically in the Statement of Considerations.  
5 That's NEI 06-12.

6 JUDGE GIBSON: Okay.

7 MR. FRANTZ: This raises the very problem.

8 JUDGE GIBSON: I was just going to say, my  
9 only question was whether it was in the Statement of  
10 Considerations. And what you're saying is, is it's  
11 not in the Statement of Considerations, but it is in  
12 a SUNSI document?

13 MR. EYE: That is referenced in the SOC.

14 JUDGE GIBSON: The phrase, full spectrum  
15 of damaged stakes.

16 MR. EYE: I see. It is, but it's in a  
17 document that's referenced in the SOC.

18 JUDGE GIBSON: Okay. It's my  
19 understanding that the Statement of Considerations, or  
20 at least the Applicant's explanation of the Statement  
21 of Considerations is that if one were to comply with  
22 NEI 06-12, that would effectively would be in  
23 compliance with 10 CFR 50.54(hh) (2).

24 MR. EYE: That's how they've argued it.

25 JUDGE GIBSON: I know. Now my question is

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1 there is -- you say on page 12 of your reply that the  
2 Commission apparently has not approved NEI 06-12 for  
3 COL Applicant.

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

5 JUDGE GIBSON: And to support your  
6 position you refer us to a statement from the  
7 Commission on the same page of the Federal Register,  
8 that it is "currently developing a draft regulatory  
9 guide that consolidates this guidance and addresses  
10 new reactors."

11 Is that the basis, your sole basis for  
12 your position that this does not apply to COLs?

13 MR. EYE: It is that and the fact that  
14 there is a distinction in the SOC between the  
15 applicability of NEI 06-12 to current operating  
16 reactors and then the recognition that there's new  
17 guidance being developed, yes, that is not yet  
18 released. It's still in the process of being  
19 developed. And in fact, my understanding is that  
20 there were meetings on it as recently as September and  
21 October about what the ISG guidance on new reactor  
22 compliance with 50.54(hh)(2) is going to say. So  
23 we're waiting for that as is, I presume, everybody  
24 else.

25 JUDGE GIBSON: Okay. But there's nothing

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1 on that page that says this doesn't apply to COL  
2 specifically, is there?

3 MR. EYE: It says it applies to current  
4 reactors.

5 JUDGE GIBSON: Okay. And so in your  
6 estimation they are not a current reactor?

7 MR. EYE: Units 3 and 4 are not.

8 JUDGE GIBSON: Mr. Frantz?

9 MR. FRANTZ: This is -- I can't answer the  
10 question without getting into SUNSI, because there are  
11 several revisions of NEI 06-12 and to explain how this  
12 all works I need to go into the details of NEI 06-12.

13 JUDGE GIBSON: I don't want you to tell me  
14 about NEI 06-12 or about any SUNSI document. I just  
15 want to know about what this language on the Federal  
16 Register says. That's all I want to know.

17 MR. FRANTZ: The language --

18 JUDGE GIBSON: This is the way he  
19 characterizes what that language means. I want to know  
20 do you agree and if not --

21 MR. FRANTZ: No, I don't agree.

22 JUDGE GIBSON: -- then why not based on  
23 what's in the Federal Register.

24 MR. FRANTZ: 06-12 rev 2 is approved for  
25 use in implementing the regulation. I could be used

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1 by current plants. I could be used by future plants.  
2 There's no prohibition against using it for future  
3 plants. The rule is the same for current plants and  
4 for future plants. There's no difference. And so if  
5 the guidance is adequate for current plants, it's also  
6 adequate for future plants.

7 JUDGE GIBSON: Staff, do you have a view  
8 about that, what the Federal Register language means,  
9 the Statement of Considerations?

10 MS. BIELECKI: Sure. I think it's  
11 important to note in the Federal Register why the  
12 Commission did state on the page that Mr. Eye cited  
13 NEI 06-12 was endorsed for current reactor licenses.  
14 I would also point on the previous page, 13957, the  
15 Commission also said that new reactors are required to  
16 employ the same strategies as current reactor  
17 licensees to address core cooling, spent fuel core  
18 cooling and containment integrity.

19 I think the distinction is, as the  
20 Commission states in the next sentence is that new  
21 reactors need to account for as appropriate specific  
22 features of plant design which operating reactors do  
23 not account for.

24 JUDGE GIBSON: Okay. Thank you. By the  
25 way, staff, do you agree that compliance with NEI 06-

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1 12 is sufficient for compliance with 10 CFR  
2 50.54(hh)(2)?

3 MS. BIELECKI: The Commission said that  
4 that is an acceptable for current reactors to comply,  
5 yes.

6 JUDGE GIBSON: And that would include  
7 COLs, in your estimation?

8 MS. BIELECKI: They have design, specific  
9 design issues that they would take into account for  
10 which is different than current operating licenses.  
11 I'm sorry, the COL applicants.

12 JUDGE GIBSON: Okay.

13 MS. BIELECKI: Yes.

14 JUDGE GIBSON: Thank you.

15 (Pause.)

16 JUDGE GIBSON: I have to say when I  
17 prepared some of these questions, I did not anticipate  
18 that we were going to be having to jump back and  
19 forth. And I appreciate the concerns that you all  
20 have expressed and we're trying to be as sensitive to  
21 those as possible. So I hope you'll bear with me.

22 (Pause.)

23 JUDGE CHARBENEAU: I have a question for  
24 Petitioners. In your review of the Mitigative  
25 Strategies Report, do you feel it adequately addresses

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1 the suggested content set forth in NEI 06-12?

2 MR. EYE: It does, at least to the extent  
3 that the prescriptive aspects are essentially copied  
4 from NEI 06-12. The introductory material  
5 disclaimers, it does not address at all. In fact,  
6 it's very careful not to deal with the disclaimers.  
7 So it's kind of a two-part answer, Judge. On the  
8 prescriptive part, yes. They've pretty much taken it  
9 on more or less word for word out of the template that  
10 NEI 06-12 suggests as the means by which they comply  
11 with the fires and explosions regulations. But the  
12 introductory material, the disclaimers as we've  
13 characterized them, they don't really deal with at  
14 all. So it's a yes and no.

15 JUDGE GIBSON: The Applicant has argued  
16 that what you are really seeking it to perform are  
17 design evaluations. Do you agree with that  
18 characterization?

19 MR. EYE: No, sir. We do not.

20 JUDGE GIBSON: Why? Without getting into  
21 any SUNSI material. Only design. I just want to know  
22 --

23 MR. EYE: There's nothing inherently about  
24 the design that is implicated in dealing with  
25 effective mitigation measures to address various

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1 scenarios that might arise in terms of damage states.  
2 The design aspect of this conundrum, if you will, is  
3 covered in the complementary rulemaking that covers  
4 50.150.

5 JUDGE GIBSON: Okay.

6 MR. EYE: And it's by title, in fact.  
7 It's the aircraft design impact rule.

8 JUDGE GIBSON: Okay.

9 MR. EYE: This doesn't have anything to do  
10 with design. In fact, there's nothing about design  
11 that implicates how to suppress a fire, how to deal  
12 with explosions. By the time fires and explosions  
13 happen, the design aspect is kind of a moot point.  
14 Now you're up to how do you suppress fires, how do you  
15 deal with the three objectives that are specified in  
16 50.54(hh)(2)? Reactor containment, core cooling, and  
17 spent fuel pool cooling. And those aren't inherently  
18 design issues; when you get to the point of mitigation  
19 strategies, so it's not a design question.

20 JUDGE GIBSON: Mr. Frantz?

21 MR. FRANTZ: Yes, I'm having difficulty  
22 trying to formulate an answer without getting into  
23 SUNSI.

24 JUDGE GIBSON: If you can't, we'll come  
25 back to this. That's fine.

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1 MR. FRANTZ: I would be much more  
2 comfortable in coming back.

3 JUDGE GIBSON: Okay. On pages 12 to 13 of  
4 the Applicant's answer, there's a quote in the  
5 Statement of Considerations to the rulemaking to 10  
6 CFR 50.54(hh)(2) and it concludes with this statement:  
7 "The NRC does not believe it is necessary or even  
8 practical that the prescription" -- and that means  
9 that the prescription that Applicants be required to  
10 evaluate specific types of fires and explosions and  
11 specific damaged stakes -- "be added to the final  
12 rule."

13 Now in your reply, you have sought to draw  
14 a distinction between types of fires and explosions on  
15 the one hand, and the nature and extent of the damage  
16 that the fires and the explosions cause. Is that  
17 correct?

18 MR. EYE: That is correct.

19 JUDGE GIBSON: And I take it the reason  
20 for that is because you want to sidestep this comment  
21 from the Commission in the Statement of Considerations  
22 where they say it is not necessary to evaluate these  
23 specific types of fires?

24 MR. EYE: We agree that it's not necessary  
25 to determine whether the fire originates from an

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1 electrical box that explodes or a truck bomb that  
2 explodes or an aircraft impact. That's -- again,  
3 we're sort of past that point when we're dealing with  
4 mitigation measures. Now we're dealing with the  
5 nature of the problem, whether it's large fires or  
6 explosions and the extent that it covers the area in  
7 a particular plant.

8 So that particular comment and response,  
9 we did not see -- it doesn't seem to have much  
10 applicability to what we're raising in our  
11 contentions. It's not a types of fire question. It's  
12 the magnitude and number of fires and explosions that  
13 need to be dealt with.

14 JUDGE GIBSON: Mr. Frantz?

15 MR. FRANTZ: I can't really answer without  
16 getting into SUNSI again. The contentions themselves  
17 are SUNSI. If I want to discuss what he's contending  
18 and what our response is, which is also SUNSI --

19 JUDGE GIBSON: I appreciate that, Mr.  
20 Frantz, and that's fine. We can get into this later.  
21 I'm just trying to see if there's a way you can talk  
22 about what's in the Statement of Considerations and  
23 the distinction that he's seeing to draw and whether  
24 or not you agree that this is a distinction without a  
25 difference that he's trying to make and if so why. Or

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1 if not, if you agree with that, that's fine.

2 MR. FRANTZ: I think it is a distinction  
3 without a difference, but to explain why I may need to  
4 get into SUNSI. And it is really awkward, I guess to  
5 try to have an oral argument this way.

6 JUDGE GIBSON: It is. It's quite awkward  
7 and you know, there are a lot of questions we can't  
8 ask and a lot of answers you can't give, until we  
9 close it. Let's get as much as we can in the public  
10 --

11 MR. EYE: Your Honor, if it helps any, we  
12 learned more about how SUNSI works and doesn't work  
13 during our proceeding yesterday on the Comanche Peak  
14 application.

15 To the extent that it helps, we'll  
16 withdraw our own designation of SUNSI on our  
17 contentions and whatever other pleadings because it's  
18 my understanding that's really what happens here is  
19 that the entity that submits the document in which  
20 I'll confess I was operating under a mistaken notion  
21 how that process works up until yesterday, but if it  
22 helps the process, we hereby withdraw all SUNSI  
23 designations on our pleadings that we filed, so that  
24 if that expedites this, then consider that to be the  
25 Intervenors' position.

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1 JUDGE GIBSON: Mr. Eye, I appreciate that.  
2 That's fine. We can deal with that, but I'm pretty  
3 confident that the staff's and the Applicant's  
4 answers, they're not going to be withdrawing their  
5 designation of them as SUNSI and to the extent that  
6 these other items, these other documents are  
7 implicated it's certainly important that we not  
8 disclose that material.

9 MR. EYE: Just trying to help.

10 (Laughter.)

11 JUDGE GIBSON: I'm sure you are. I'm sure  
12 you are.

13 I want to talk about 10 CFR 50.54(hh)(1).  
14 Now does that apply, Mr. Frantz, to COLs?

15 MR. FRANTZ: It applies to people who have  
16 a COL license, yes, it does. However, for people who  
17 are applying for a COL, there's no requirement that  
18 the application actually has information that  
19 addresses this issue.

20 JUDGE GIBSON: And the reason for that is  
21 that unlike 10 CFR 50.54(hh)(2), it would be your  
22 position that this is material or information that is  
23 not developed until we're further along in the  
24 process, perhaps to the point of where you're actually  
25 loading fuel in the reactors, correct?

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1 MR. FRANTZ: That's one reason, but I  
2 guess more explicitly, if you look at 52.80(d) that  
3 specifies which portions of 50.54(hh) come in to an  
4 application. 52.80(d) only specifies subsection 2 and  
5 not subsection 1.

6 JUDGE GIBSON: Having heard that, gotten  
7 the benefit of his explanation, what is your position  
8 about 50.54(hh)(1)?

9 MR. EYE: It appears on the face of the  
10 regulation, Your Honor, that it says at (hh)(1), it  
11 says each licensee shall develop, implement, and  
12 maintain procedures and so forth. So it seems to us  
13 that the intent of the Commission in adopting that was  
14 to have it apply to current license holders.

15 And in the Statement of Considerations, I  
16 think there was also some discussion about  
17 differentiating between the requirements of (hh)(1)  
18 and (hh)(2). And so I think that the intent of the  
19 Commission was to do more or less as Mr. Frantz  
20 suggests and that is to differentiate between current  
21 license holders and require them to do the --  
22 currently, to do the requirements that are (hh)(1) and  
23 then have applicants do (hh)(2) as a part of the COLA  
24 process and allow the (hh)(1) part to be dealt with at  
25 some later time.

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1 JUDGE GIBSON: It sounds to me like you  
2 all are in agreement then?

3 MR. FRANTZ: I believe we are.

4 MR. EYE: On the applicability of (hh) (1),  
5 I believe we are.

6 JUDGE GIBSON: I realize not on a lot of  
7 other things, Mr. Eye, but with respect to that, you  
8 are. Thank you.

9 (Laughter.)

10 Now with respect to aircraft impacts, they  
11 are specified in (hh) (1) and not specified in (hh) (2),  
12 correct, Mr. Eye?

13 MR. EYE: On the face of the regulation,  
14 I believe that is correct, Your Honor. However, in  
15 the Statement of Considerations, it's very clear that  
16 the anticipation is that the magnitude of fires and  
17 explosions would be that related to an aircraft impact  
18 or that would be an example of the magnitude.

19 JUDGE GIBSON: Okay. In that regard, I  
20 believe counsel for the Applicant on page 15 of your  
21 insert, you quote from the final security rule and say  
22 that -- and that refers to 74 Fed. Reg. 13958 which I  
23 think is this revision that Mr. Eye was just referring  
24 to, that says "large fires and explosions including,  
25 but not limited to those caused by the impacts of a

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1 large, commercial aircraft."

2 Is it acceptable not to address that issue  
3 as a legal matter in a Mitigative Strategies Report?

4 MR. FRANTZ: I am not sure what you mean  
5 by "that issue".

6 JUDGE GIBSON: The impact of a large,  
7 commercial aircraft. As a legal matter --

8 MR. FRANTZ: Yes, as a legal --

9 JUDGE GIBSON: Is it acceptable? I'm not  
10 asking you what you did, but in a Mitigative  
11 Strategies Report, is it acceptable not to address the  
12 impact of a large, commercial aircraft in a COLA?

13 MR. FRANTZ: This is not a yes or no  
14 answer. The Mitigative Strategies Report is designed  
15 to address the myriad of events, including things such  
16 as aircraft impacts. We are not required to discuss  
17 aircraft impacts specifically. What we're required to  
18 do is discuss what happens if there's a large loss of  
19 the area of the plant due to fires and explosions  
20 including from aircraft impacts. And that's what we  
21 did.

22 JUDGE GIBSON: Okay.

23 MR. EYE: Your Honor, we would -- I think  
24 it's a bit more nuanced than that. The whole point of  
25 citing large aircraft impacts was to give those who

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1 are involved and interested in this issue an idea of  
2 the magnitude of the fires and explosions that needed  
3 to be dealt with. That's why that's in there. They  
4 didn't use something else. They used very specific  
5 language about think in terms of the impact of large,  
6 commercial airliners.

7 So there's nothing -- well, I can't say  
8 anything else without implication --

9 JUDGE GIBSON: We don't want you to do  
10 that. I'm just talking about purely based on what  
11 this language says. It seems to me that we have a bit  
12 of a legal area of uncertainty here because we have an  
13 explicit reference to aircraft in (hh)(1) which would  
14 suggest that that definitely would be something that  
15 would need to be addressed before you put fuel in the  
16 reactor.

17 On the other end, we don't have an  
18 explicit reference then in (hh)(2) which would suggest  
19 that maybe it doesn't need to go in there and under,  
20 you know, *expressio unius est exclusio alterius*, that  
21 would suggest that once you put it in (hh)(1) it  
22 doesn't need to go in (hh)(2). But then again in the  
23 Statement of Considerations to (hh)(2), we have an  
24 explicit reference to, for example, large aircraft  
25 impact. And so I'm not suggesting that you all

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1 haven't fully explored the complication here, but it  
2 is something that we're going to be facing as a Board,  
3 how to reconcile that language.

4 MR. FRANTZ: And again, I think once we go  
5 into closed session, I can perhaps provide more  
6 explanation.

7 JUDGE GIBSON: Right. And certainly,  
8 we'll need to be looking at that.

9 MR. EYE: Your Honor, to the extent that  
10 it clarifies anything, it would be the Intervenors'  
11 position that the reference at 74-13927 sets out in  
12 very clear terms that the Commission anticipates that  
13 all of 54(hh) will develop mitigative strategies and  
14 response procedures for potential or actual aircraft  
15 attacks.

16 JUDGE GIBSON: Okay.

17 MR. EYE: For what it's worth.

18 JUDGE GIBSON: I understand. But I don't  
19 think that that necessarily proves your point. It may  
20 actually, you know, prove Mr. Frantz' point and that  
21 gets back to the complexity of this.

22 Without getting into anything that's in  
23 NEI 06-12, Mr. Eye, it's my understanding from your  
24 pleadings that you're suggesting that compliance with  
25 NEI 06-12 is not sufficient for compliance with 10 CFR

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1 50.54(hh)(2). Is that correct?

2 MR. EYE: It depends. Again, this is sort  
3 of like the answer to Judge Charbeneau. It depends on  
4 what part we're talking about. There's really a  
5 disconnect here, it seems to us, between what the  
6 Commission expects the mitigating strategies to  
7 accomplish and what the mitigating strategies in NEI  
8 06-12 would permit. In other words, it's our  
9 contention that what the Commission anticipates in  
10 terms of effective mitigative strategies, is not  
11 addressed adequately in the prescriptive measures of  
12 NEI 06-12 when one takes into consideration the  
13 disclaimers that precede the prescriptive methods that  
14 are in NEI 06-12.

15 JUDGE GIBSON: And are you talking about  
16 the disclaimers that the Commission has set forth in  
17 the Federal Register or are you talking about  
18 disclaimers that are contained in NEI 06-12 which we  
19 will not be talking about?

20 MR. EYE: The latter.

21 JUDGE GIBSON: Okay, fine. We'll have to  
22 get into the details of that later.

23 (Pause.)

24 JUDGE GIBSON: Staff, on page 14 of the  
25 Intervenors' reply, there is - -they talk about

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1 mitigative strategies, reactor design and the Aircraft  
2 Impact Rule. Without discussing either NEI 06-13 or  
3 NEI 06-12, I'm curious if you could explain, provide  
4 us with some explanation of how the NRC views these  
5 concepts to be related and the extent to which you  
6 view them to be separate and unrelated?

7 MR. EYE: Your Honor, one point of  
8 clarification, NEI 06-13 is a public document, so I  
9 think the questions and answers about it can be done  
10 in a public session.

11 JUDGE GIBSON: Okay.

12 MS. BIELECKI: So you mean how do we view  
13 the 50.54(hh)(2) and 51.150 requirements?

14 JUDGE GIBSON: That will be fine. You can  
15 talk about that. You might not be able to talk about  
16 anything else.

17 MS. BIELECKI: Okay, I'll try to do it on  
18 a high level. I don't know if this will be able to  
19 answer your question.

20 As the Commission states in the Statement  
21 of Considerations, it used these two rules as being  
22 comparable and complementary in that the 50.150  
23 addresses more of the design aspects for aircraft  
24 impact, whereas 50.54(hh)(2) addresses mitigative  
25 strategies intended to restore the three functions in

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1 the event of a large of area to the plant.

2 NEI 06-13, as Mr. Eye said, is a draft  
3 guidance document for 50.150. It is not -- the staff  
4 does not view it as guidance for compliance or a  
5 licensee should use it as guidance for compliance with  
6 50.54(hh) (2).

7 JUDGE GIBSON: Is it viewed as -- was it  
8 designed to be for compliance with 50.150?

9 MS. BIELECKI: It's a draft NEI document,  
10 so yes, that was the intent, and to explain the  
11 differences between the two, I think I'd have to get  
12 into NEI a little more.

13 JUDGE GIBSON: Thank you. Do you wish to  
14 add anything to that, Mr. Frantz?

15 MR. FRANTZ: I have the exact same  
16 response.

17 JUDGE GIBSON: Okay, well, you know, we  
18 ask one of these questions and I think that's a pretty  
19 darn straight forward and you know, it turns out it  
20 ends up implicating some of these things. So we'll  
21 postpone that.

22 Okay, I want to turn to contention three.  
23 Now is there anything in 50.54(hh) (2) that would  
24 require -- let me rephrase that.

25 What specific radiation exposure

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1 information in your estimation needs to be provided  
2 under 50.54(hh)(2)?

3 MR. EYE: I don't think I can answer  
4 without getting into NEI 06-12, Your Honor.

5 JUDGE GIBSON: Okay. Fair enough. I  
6 won't ask Mr. Frantz.

7 (Laughter.)

8 MR. FRANTZ: I agree with Mr. Eye.

9 JUDGE GIBSON: That's twice today. We've  
10 got to note this on our calendar.

11 (Laughter.)

12 (Pause.)

13 JUDGE GIBSON: Okay, I think we can talk  
14 about Subpart G. I think the rest of my questions --  
15 before I go there, do you all have any questions about  
16 anything that -- postpone it to the closed session?  
17 Okay.

18 I think I'd like to talk about Subpart G  
19 because I think the rest of my questions are going to  
20 be asked in closed session.

21 On page 22 of your petition, Mr. Eye, you  
22 seem to focus on cross examination, not on formal  
23 discovery. I'm curious as to whether there's anything  
24 about the seven contentions that you have asserted  
25 here, that necessitate the use of formal discovery.

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1 MR. EYE: Yes.

2 JUDGE GIBSON: Okay. Without getting into  
3 the actual merits of SUNSI material, what is it that  
4 you think would necessitate formal discovery?

5 MR. EYE: It's the underlying basis for  
6 the disclaimers in NEI 06-12, Your Honor.

7 JUDGE GIBSON: Okay. Anything else?

8 MR. EYE: There may be other aspects of  
9 the prescriptive measures that would prompt some --  
10 depending upon what we found in the underlying basis  
11 for the disclaimers, it might prompt then discovery on  
12 some of the prescriptive aspects of 06-12, but again,  
13 until you -- until we would have an opportunity to see  
14 the underlying fact bases for the disclaimers, it  
15 would be difficult to know whether that would require  
16 then further inquiry into the prescriptive aspects.

17 JUDGE GIBSON: Okay. When -- I read, re-  
18 read the CAN decision, Citizens Awareness Network, a  
19 1st Circuit decision and it appears to me that it  
20 would be under appropriate circumstances, it would be  
21 appropriate for cross examination by parties to be --  
22 to occur, even in the absence of formal discovery.

23 Other than this one thing involving formal  
24 discovery, involving the disclaimers that we'll talk  
25 about in closed session, it seems to me that you'd

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1 still be allowed under L to do cross examination if  
2 that were appropriate.

3 MR. EYE: I agree, Your Honor.

4 JUDGE GIBSON: But you still think G is  
5 needed here for these contentions?

6 MR. EYE: Based upon how we've developed  
7 our contentions and that they're keyed in large  
8 measure to the disclaimers, our answer would be yes.  
9 I'm not saying that Subpart L would be inappropriate  
10 or unacceptable. It's a matter of degrees, I suppose,  
11 as much as anything. But our preference would be  
12 Subpart G, but certainly we understand that Subpart G  
13 tends to be a statistical anomaly in terms of the  
14 frequency with which it is used. And accordingly --

15 JUDGE GIBSON: That's an interesting way  
16 to describe it.

17 MR. EYE: Accordingly, we recognize that  
18 there may be another method to adjudicate these under  
19 Subpart L that would be acceptable to the Intervenors.  
20 We ask for what we think we want, but we understand  
21 that there may be other means by which to get to the  
22 objective that we're seeking. So I don't want to  
23 belabor the point, but when I looked at Subpart G, it  
24 appealed to me in terms of trial practice, if you  
25 will. Subpart L appeals to me in terms of my

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1 instincts about trial practice, but less so. Because  
2 of the constraints that Subpart L anticipates.

3 JUDGE GIBSON: Sure. Well, from my days  
4 on that side of the bench, you know, I would think  
5 -- that there were an issue involving fraud or deception  
6 which I don't think you're asserting here, I could  
7 understand why that might be important, but it seems  
8 to me we're talking here about what is the -- whether  
9 some of these policy decisions are -- have been  
10 appropriately followed here and it seems to me that  
11 doesn't get into the sorts of confrontation of a  
12 witness that you would want to have. Is there  
13 something I'm missing?

14 MR. EYE: Perhaps, and that is in terms of  
15 determining the intent of the authors of NEI 06-12.  
16 And what their restrictions, directions, and  
17 constraints were when they developed the disclaimers,  
18 that seems to us to be something in the nature of an  
19 eyewitness account, what were they told? What were  
20 their understandings? What could they do? What could  
21 they not do in terms of developing the disclaimers and  
22 then essentially going on and dealing with the  
23 prescriptive measures. But it's really those  
24 disclaimers, Your Honor, that prompt our, what we  
25 believe, is the need to conduct an inquiry that goes

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1 into what their intentions were, what they were told,  
2 what they were directed to do and not do.

3 JUDGE GIBSON: Okay. Well, I think that  
4 these are things that we'll take up during the closed  
5 session which I think is going to be starting post  
6 haste. I think we've pretty well exhausted the  
7 materials that we can cover in an open session.

8 But I do want to pursue this -- your  
9 concern further when we can talk about those  
10 disclosures.

11 Okay, well, what I would like to do at  
12 this point is alert everyone who is sitting out there,  
13 if you have signed the nondisclosure agreement, you're  
14 welcome to stay. If you're a member of the staff to  
15 the ASLBP, you're welcome to stay, but to the extent  
16 that there's anyone who has not signed that  
17 nondisclosure agreement and is not with the ASLBP, I'm  
18 afraid you're going to probably have to leave. We are  
19 going to recess at this point and we will come back in  
20 15 minutes and get into -- we have closed session at  
21 that point.

22 MR. SPENCER: Your Honor, to clarify, the  
23 NRC staff, personnel, attorneys and I assume Applicant  
24 personnel and attorneys can also --

25 JUDGE GIBSON: Yes.

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1 MR. SPENCER: Okay.

2 (Whereupon, at 10:40 a.m., the open  
3 session of the hearing was adjourned.)  
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