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NUCLEAR REGULATORY COMMISSION

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Comanche Peak Nuclear Plant, Hearing
Proprietary Session

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ASLBP Number: 09-886-09-COL-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PROPRIETARY

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In the Matter of:	:	Docket Nos.
LUMINANT GENERATION	:	52-034-COL and
COMPANY, LLC	:	52-035-COL
(Comanche Peak Nuclear	:	ASLBP No. 09-886-
Power Plant, Units 3 and 4	:	09-COL-BD01

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Thursday, November 12, 2009

10:54 a.m.

Nuclear Regulatory Commission

Hearing Room T-3B45

11545 Rockville Pike

Rockville, Maryland

BEFORE:

ANN MARSHALL YOUNG, Chair

GARY S. ARNOLD, Administrative Judge

ALICE C. MIGNEREY, Administrative Judge

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

(10:54 a.m.)

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3 JUDGE YOUNG: Okay. All right. So for
4 the Court Reporter, at this point we just start a
5 new booklet, continuous page numbering, but
6 designate this -- this should be marked I think, as
7 your contract says, "Proprietary" on top.

8 MS. VRAHORETIS: Your Honor, I would
9 just also ask that all recording equipment be turned
10 off.

11 JUDGE YOUNG: Yes, thank you very much.
12 That is turned off? Okay.

13 MR. LIBBY: If we could add to that cell
14 phones.

15 JUDGE YOUNG: Cell phones, turn off,
16 anything else that could have the capability to
17 record or transmit.

18 Okay. Contention 1, I want to ask one
19 basic question before you start. Your basic
20 argument is that without a specification of the
21 damage states, the full spectrum of damage states,
22 it is impossible to do an analysis of the adequacy
23 of the mitigation strategies in the report.

24 Maybe this is just coming from my non-
25 technical background, but what would have prevented

1 you from hypothesizing X damage state, one airplane?
2 At one point you mention multiple airplanes, two
3 airplanes of a certain size with so much fuel --
4 hypothesizing that and then doing your own analysis
5 of whether you believe the report is adequate or not
6 adequate with regard to damage caused -- I confuse
7 the two things, the initiating event and the damage
8 state, but damage states caused by a particular
9 initiating event, that the report is adequate or
10 inadequate to address that.

11 MR. EYE: There is really I think two
12 things that bear on that, Your Honor. First is that
13 we still look at this as a contention of omission,
14 and that it should not be up to the intervenors to
15 hypothesize in terms of the various --

16 JUDGE YOUNG: But let me just get to my
17 question. You are --

18 MR. EYE: Oh, sorry.

19 JUDGE YOUNG: The omission that you
20 allege, and the reason you say it should be there,
21 is you say that it should be there because it is
22 impossible to analyze the adequacy of the mitigative
23 measures without information on the damage states.

24 And so my question goes to that. Is it
25 really impossible? Couldn't one, you or anyone,

1 hypothesize the whole spectrum of damage states that
2 they could think of, and determine which ones the
3 measures could adequately address and which ones
4 they couldn't?

5 MR. EYE: Theoretically, that would be
6 possible, I suppose, except for the recognition
7 that, for example, in the introductory material that
8 NEI 06-12, there was a comment that all of these
9 particular damage states are -- I think they use the
10 word "imponderable."

11 JUDGE YOUNG: Right. But let's assume
12 that at least for those you could think of, that one
13 could think of, what is to stop anybody from
14 hypothesizing X damage state, and then looking at
15 the measures and determining, well, would they
16 adequately handle that or not?

17 MR. EYE: Your Honor, you have just
18 summed up the essence of our omission contention,
19 that that is a burden that falls upon the applicant
20 to do rather than the intervenors.

21 JUDGE YOUNG: But it is your burden --
22 let me get the -- it is your burden, if you believe
23 that the application fails to contain information on
24 a relevant matter, as required by law, to identify
25 the failure and the supporting reasons for your

1 belief. And as I understand it now from your reply
2 that you contend that these damage states should be
3 identified because of the wording of the rules
4 themselves, that that -- those rules, 52.80(d) and
5 50.54(hh)(2), require that, implicitly require that.

6 And the reason for your belief that the
7 report should contain the specification of damage
8 states is because it is impossible to analyze
9 otherwise. So that doesn't -- you don't even need
10 to get into a burden. You need to look at, well, is
11 it really impossible?

12 And I guess what I'm not following is I
13 don't see that it would be impossible to determine
14 the adequacy, because anyone could hypothesize
15 damage states. At least I might not be able to
16 hypothesize as many as an expert would, but I could
17 hypothesize some. And that is sort of what I am not
18 following.

19 And then, the next question I guess, and
20 then we will see what other questions come, but is
21 what in the rules requires that? Or is this
22 something that you want the rules to require, but
23 they don't really require?

24 MR. EYE: May I have just a moment, Your
25 Honor?

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(Pause.)

We think it is an explicit requirement in the rules, and here is why. And this goes to the question that you raised in your order a couple of days ago. That is, is there a way to read into 50.54(hh)(2) the word "effective," that the measures that are submitted for this body's consideration be effective?

And I think that that as a matter of law is required, and here is my reasoning in that regard. For example, in the Federal Register notice it announced the fires and explosions regulations at 74 Federal Register 13958. It says, "Licensees will be able to implement effective mitigative measures for large fires and explosions."

Second, the basic canon of statutory construction also applies to regulation construction as well, and I cite an NRC case in that regard, matter of Hydro Resources. It is found at 63 NRC 483. The specific cite is at 491, and that is a 2006 case.

In that regard, the Commission said that a regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the

1 overall purpose of the regulation, and by reflecting
2 on the practical effect of possible interpretations.

3 Moreover, we think that it is another
4 basic canon of statutory regulation construction, is
5 that 50.54(hh)(2) should be construed in pari
6 materia with the requirements of 10 CFR 50.150. The
7 point really is is to protect the public as much as
8 possible from a major release from one of these
9 facilities.

10 Moreover, we think that if there is not
11 a requirement to read effectiveness into these
12 regulations that we have essentially set up an
13 artificial framework that disregards the need for
14 effectiveness. And that sort of disregard is
15 indicative of ignoring a relevant factor in the
16 analysis of the adequacy of the particular
17 regulations.

18 Moreover, as you have heard the
19 intervenors argue in the past, we think the public
20 interest, as statutorily specified at 42 U.S.C.
21 2133, subpart D, requires this sort of reading in of
22 effectiveness.

23 Finally, it is common sense. Would the
24 NRC go to the time and trouble to adopt 50.54(hh)(2)
25 only to have applicants offer ineffective mitigation

1 measures? That seems at best unlikely that that
2 would be how the NRC would proceed.

3 Nobody wants to have ineffective
4 measures. So how do we judge effectiveness? As I
5 pointed out, or as we pointed out in our brief, the
6 term "strategic" really has its roots in the
7 military vernacular. And "strategic planning" means
8 that there is at least some idea as to the overall
9 objectives that are to be achieved in a particular
10 operation, in a particular task.

11 Here there is no specification as to
12 what those overall objectives might be, let alone a
13 discussion of the scope of the problems that might
14 be encountered in the instance of a large loss of a
15 nuclear plant due to fires and explosions. And,
16 Your Honor, we do, in a way, raise exactly what you
17 have suggested when in one of the briefs that we
18 wrote we said that the applicant doesn't talk about
19 whether they are going to be fighting one fire, two
20 fires, five fires, or 10 fires.

21 We don't know the answer to that. We
22 don't know the magnitude of explosions that might in
23 fact have to be dealt with through these mitigative
24 measures. Could we have stepped back and
25 hypothesized particular damage states that might be

1 -- that we would say have to be looked at?

2 Well, I think that we could have, and I
3 think that we did in a way do that by raising this
4 question in terms of the numbers of fires that might
5 have to be dealt with at a particular moment. But
6 there is -- I guess it is a tactical decision on the
7 part of the intervenors to offer this up as an
8 omission contention, but with the recognition that
9 it seems pretty obvious that if you don't read in a
10 requirement that these be effective measures, then
11 what is the point of having 50.54(hh)(2)?

12 And if they are going to be effective,
13 there has to be some as objective a way as possible
14 to measure effectiveness. And the only way to do
15 that is to have a starting point in terms of, well,
16 what are you trying to accomplish? What is the
17 scope of the problem that needs to be dealt with?

18 JUDGE YOUNG: But let me ask you, who is
19 going to be looking at this to determine whether it
20 meets the requirements? I am assuming that the
21 staff will, and ultimately the Commission will. Why
22 couldn't the staff -- the same question I will pose
23 to you. Why couldn't the staff even more look at
24 the spectrum of damage states and measure the report
25 against a list of -- the realm of damage states that

1 could occur? And I am hesitant to use a word like
2 "reasonably."

3 I don't want to put some value judgment
4 on. But why couldn't the staff do that without the
5 applicant having listed all of them? That gets back
6 to my same question -- there has to be a reason that
7 it would need to be in there, and I'm just not
8 following why, if anyone looking at it and judging
9 the effectiveness of the measures, couldn't use
10 their own knowledge to know or set out the damage
11 states that it would need to address, and then judge
12 the measures against those damage states. Why does
13 there have to be a list in there? Is there
14 something particular about that that I am not
15 getting?

16 MR. EYE: The full spectrum of damage
17 states has not been disclosed. The full spectrum of
18 damage states that is referenced in NEI 06-12 is not
19 specified in that document, and the important -- the
20 reason that that is important, Your Honor, is
21 because in that introductory section, which talks
22 about high-level insights having been gained through
23 various analyses of plans and plants, and so forth,
24 says that the mitigative measures that the applicant
25 has adopted are not effective under the full

1 spectrum of damage states. Or I should be more
2 specific, may not be effective under the full
3 spectrum of damage states.

4 JUDGE YOUNG: Could you also read those
5 statements as being sort of a pragmatic approach in
6 saying, look, we have considered everything, and we
7 need to say that there are probably some things that
8 we might not have thought of, and there are probably
9 some things that would fall under that category that
10 we can't guarantee that we could protect against
11 everything, you know, an H-bomb, I don't know, I
12 mean, can't you -- is it not interpretable in that
13 sort of pragmatic way --

14 MR. EYE: It --

15 JUDGE YOUNG: -- rather than you seem to
16 be interpreting it as an admission of inadequacy.
17 But couldn't it also be interpreted as sort of a
18 pragmatic approach to -- there are probably things
19 we haven't thought of or that we couldn't possibly
20 think of everything.

21 MR. EYE: Your Honor, I think one could
22 look at it that way, but that really, I don't think,
23 is consistent with what that introductory remark
24 says. That introductory remark says that there is a
25 spectrum of damage states. Now, that spectrum has

1 not been disclosed or identified, but there is --
2 the authors of that document have identified a
3 spectrum. They have not discussed it nor disclosed
4 it.

5 They also say at the tail of the severe
6 end of that spectrum the mitigative measures that
7 they prescribe in NEI 06-12 may not be effective.
8 So it is not really a matter of imagining a
9 particular damage state. It is keying off of what
10 the authors of that document acknowledge is a part
11 of the damage state spectrum that is not adequately
12 covered or may not be adequately covered by the
13 mitigative measures that have been adopted.

14 So I think that in terms of trying to
15 think of all of the possible scenarios, much of that
16 may have already been done by the authors of that
17 document, as they suggest they seem to be able to
18 identify a part of the damage spectrum that isn't
19 necessarily going to be dealt with effectively by
20 the mitigative measures in the prescriptive part of
21 NEI 06-12.

22 So as a pragmatic matter, I think it is
23 even more important now to recognize that we have
24 got damage states that don't necessarily respond to
25 the mitigative measures that are adopted by -- that

1 have been adopted by the applicant. So it is --
2 that is a pragmatic consideration. That is not just
3 a theoretical consideration.

4 We don't know, because, again, we
5 haven't gotten to do discovery on this, because we
6 haven't moved to that aspect of the case --

7 JUDGE YOUNG: But you do have an expert
8 who would probably be knowledgeable in some of these
9 types of damage states.

10 MR. EYE: Yes. But, again, and that is
11 one of the reasons why we offered up the suggestion
12 that we say, "Are they dealing with one fire? Two
13 fires? Five or 10 fires?" Moreover, we don't have
14 access to safeguard information. That is off limits
15 for the intervenors. And so the -- when we talk
16 about the full spectrum of damage states, I am
17 presuming that that falls into some sort of
18 safeguards category.

19 JUDGE YOUNG: But couldn't your expert
20 -- getting back to my original question --
21 hypothesize X damage state and make -- do an
22 analysis and make a determination whether the
23 measures would address X damage state, Y damage
24 state, Z damage state?

25 MR. EYE: Your Honor, I think he could

1 once we had the information that the authors of
2 NEI 06-12 were focusing on, where they said that
3 there was a part of the damage spectrum that would
4 not respond effectively to the mitigative measures.

5 If we can all work with the same
6 information --

7 JUDGE YOUNG: What I'm saying is, can't
8 he produce the information of different damage
9 states that might occur, and then measure the
-10 mitigative measures against that hypothesized damage
11 state?

12 MR. EYE: He probably could
13 theoretically do something like that, but -- Dr.
14 Lyman is saying that, no, he couldn't come up with
15 all of that. But the importance here is that this
16 is a contention of omission. This is not something
17 that we are obligated necessarily to fill in the
18 blanks for the applicant.

19 JUDGE YOUNG: You have to give a reason
20 that it needs to be there, and you have to show that
21 there is a legal requirement that it be there. So
22 those are the two things I am trying to get you to
23 focus on.

24 MR. EYE: Your Honor, and that is what I
25 did when I began. There is a legal requirement that

1 these mitigative measures be effective. That is a
2 legal requirement that I think is -- I mean, the
3 applicant and staff may argue otherwise, but from a
4 legal and a pragmatic sense, to adopt ineffective
5 measures seems to be contrary to everything that
6 these regs are supposed to do.

7 JUDGE YOUNG: But let me ask you, there
8 are a lot of regulations out there, a lot of
9 government regulations addressing all sorts of
10 things. Regulations -- bacon has to be -- not
11 contain any bacteria and be safe, it can't make
12 people sick, whatever.

13 Does every regulation have to specify --
14 if the regulation is written in terms of X has to be
15 safe, does it have to specify all of the things that
16 it needs to protect against? All of the types of
17 contamination that could possibly occur? I mean,
18 there could be slaughterhouses where any number of
19 types of contamination could happen that could lead
20 to unsafe bacon.

21 Does the rule have to -- does the rule
22 mean that the slaughterhouse has to give a list of
23 all possible sources of contamination, or does the
24 rule mean that the slaughterhouse has to assure that
25 the meat that comes out of it is safe, and not to

1 have any bacteria in it from any source?

2 I mean, I am just having a hard time
3 conceptually following. What you seem to be saying
4 would make regulations become awfully -- could make
5 regulations become awfully complex if the principal
6 that you seem to be espousing were applied to all
7 regulations. Maybe I'm missing something, but --

8 MR. EYE: No. If a slaughterhouse is
9 required to process swine, so that you don't get
10 trichinosis in the bacon or the sausage or whatever,
11 that can be put on their spectrum of potential
12 damage that could happen. That is understood. And
13 that is a task that they are, under specific
14 regulations, required to do.

15 JUDGE YOUNG: But don't they need to go
16 farther than just protect against trichinosis?
17 Don't they need to protect against e. coli and
18 anything, even if you -- even if it's not listed,
19 they have to make sure that the bacon that goes out
20 there to the public is not contaminated with
21 anything.

22 MR. EYE: That's right. Your Honor, to
23 bring it back to the analogy to this, let's say that
24 those regs say that the bacon -- that the means by
25 which to protect food safety at that particular

1 slaughterhouse must be effective -- must be
 2 effective -- and take account of the full spectrum
 3 of potential pathogens, and so forth, that could
 4 contaminate food. Effectiveness.

5 And the slaughterhouse comes forward and
 6 says, "Well, we've got a report here that says that
 7 we can't -- that we know that there's a part of the
 8 contamination spectrum, that the measures that the
 9 slaughterhouse has adopted may not be effective on.
 10 But we want you to accept our methods anyway, even
 11 though there is a recognition that they may not be
 12 effective.

13 Effectiveness has a legal requirement
 14 here, and that is one of the reasons why we have
 15 advanced this contention the way we have.

16 And, actually, you know, I have been
 17 misspeaking, and my colleague just pointed this out.
 18 In NEI 06-12, it is more definitive than whether or
 19 not the full spectrum of damage states may not be
 20 effectively mitigated. It says in the last bullet
 21 point,

22 [Redacted] (b)(4)
 23 It is less equivocal. It is rather
 24 unequivocal in that regard.

25 So that if the slaughterhouse comes

Exemption 4 NEI

1 forward and says, "Well, we have adopted measures to
2 deal with food safety and pathogens, and so forth,
3 but these aren't going to be effective under every
4 scenario that we know about." It's not scenarios
5 that we don't know about, but under scenarios that
6 we know about, "These measures may not be effective,
7 but we want you to accept them anyway."

8 And that is our problem with this is
9 that it is not -- you know, it is not a question of
10 whether or not the mitigative strategies will be
11 effective under the full spectrum of damage states,
12 because they won't.

13 JUDGE YOUNG: Did the slaughterhouse
14 say, "We have done everything. We have provisions
15 to clean this area, that area, to have the employees
16 do -- wear certain things and wash their hands, or
17 use clean tools, and so forth.

18 However, there are certain strains of
19 drug-resistant bacteria that seem to persist out
20 there and come up from time to time, and we can't
21 guarantee that something like that wouldn't occur."
22 I mean, is -- I don't know if that's realistic in
23 that context, but certainly we all know about drug-
24 resistant bacteria that all of the experts have
25 difficulty dealing with.

1 So couldn't you have -- couldn't that be
2 something of that nature? I mean, you are depending
3 -- you are sort of depending on that as to fill in
4 the "why," the reason, right? I mean, that is what
5 it comes down to. That is the way, isn't it?

6 MR. EYE: Partially, but it is also the
7 legal requirement that these mitigative measures be
8 effective. And, you know, if the slaughterhouse
9 comes forward and says, "Gee, you know, we are doing
10 everything we can, but, still, we may not be
11 effective, I think it is then the duty of the
12 regulatory agency to either deal with that
13 particular gap in effectiveness by perhaps public
14 education about how to deal with contaminated food,
15 or whatever, or to require that the regulated
16 community go back and figure out how to meet their
17 legal requirement of effectiveness.

18 And so this is really kind of a two-
19 pronged approach here, but the underlying reason why
20 we have raised -- or one of the underlying reasons
21 why we have raised this contention is because there
22 is a recognition that effectiveness is not to be had
23 under the full spectrum of damage states.

24 Well, if the slaughterhouse can't be
25 effective in controlling the pathogens that are in

1 their product that they put on the loading dock and
2 ship out to the public to be consumed, then there is
3 a problem, and that problem needs to be dealt with
4 in an effective way to protect the public from
5 potential harm.

6 To bring it back to this context, we
7 don't really have the benefit of a public education
8 campaign, like you do "Cook pork thoroughly" until,
9 you know, it is not pink or whatever. We don't have
10 the benefit of that here.

11 It is this body that really is
12 interposing itself between the harm and preventing
13 the harm to the public, because, I mean, there is
14 really no effective substitute for that in this
15 context, in the nuclear regulatory context.

16 So our objections are really geared
17 also, you know, toward a recognition that as a
18 practical matter we didn't raise this. It was the
19 industry's document that raised it. You know, I
20 wish I could take credit for it, but I can't. It
21 was in black and white in front of me. It took me
22 several times to read it, frankly, to appreciate its
23 significance, because that sort of blunt candor
24 isn't something that one always finds in industry
25 documents, but here it is.

1 It's an admission. It's an admission
2 against their own interest, and --

3 JUDGE YOUNG: So it's your -- so if we
4 separated out the part of the contention that is
5 talking about, or could be talking about, damage
6 states that anybody could hypothesize, figure out
7 what they were, would what would be left of your
8 contention be the mitigative measures report is
9 inadequate to the extent that it does not -- to the
10 extent that it is based on NEI 06-12, is that what
11 it is?

12 MR. EYE: Yes.

13 JUDGE YOUNG: And admits that it will
14 not ensure success under the full spectrum of
15 potential damage states?

16 MR. EYE: That is certainly a core part
17 of our contention, Your Honor.

18 JUDGE YOUNG: What else is there besides
19 that?

20 MR. EYE: Well, as far as contention 1
21 is concerned?

22 JUDGE YOUNG: Yes. Where you actually
23 -- where there is actually a reason that something
24 should be there that anybody -- any expert at least
25 -- couldn't fill in because it would be more or less

1 obvious to such an expert.

2 MR. EYE: Well --

3 JUDGE YOUNG: You know, certain things
4 like aircraft, or this or that, have numbers of
5 fires, explosions, in this part of the plant, or
6 that part of the plant. I mean, most things could
7 be hypothesized I think. And so what you are
8 challenging is, well, that is true, except these --
9 they admit that the measures, to the extent they are
10 based on NEI 06-12, will not ensure success under
11 the full spectrum of potential damage states. So we
12 can get X distance but not all the way to the end.

13 MR. EYE: Correct. And we don't know
14 what that distance is between where the measures
15 that they have offered up will be effective, where
16 those fit on the damage spectrum. We don't know the
17 answer to that. What we do know is that we do have
18 the benefit of 07-13, NEI 07-13, which deals with
19 the 50.150 design impact rule.

20 And it does -- for whatever reason, it
21 does go into various damage state descriptions, both
22 qualitatively and, to a certain extent,
23 quantitatively. There is certainly an attempt to
24 describe in some detail.

25 There is no suggestion in that

1 particular document that it covers the full
2 spectrum, but it, frankly, does more than what 06-12
3 does. So I think that the NEI designation that they
4 have made in their -- in the disclaimers part, if
5 you will, which is how we have been describing this,
6 is somewhat arbitrary until we know, one, how they
7 came up with the damage spectrum; and, two, where
8 these mitigative measures fit on it.

9 We know that it doesn't go all the way
10 out to the end, but we don't know how far back to
11 the left side, if you will, of the damage spectrum
12 these measures will be effective. We don't know the
13 answer to that.

14 May I have just a moment, Your Honor?

15 (Pause.)

16 Your Honors, as far as our capacity to
17 hypothesize the various damage states that might
18 enure under certain scenarios, these really do
19 involve specific kinds of threats that presumably
20 have been discussed or covered in either internal
21 NRC safeguards-related information or in information
22 that has been generated outside of NRC that is,
23 again, covered by some sort of safeguards
24 designation.

25 So we really are left with examining

1 what has been done by the applicant in terms of
2 offering up its mitigative strategies, rather than
3 -- and pointing out what hasn't been done rather
4 than coming up with hypothetical situations that
5 might not be covered by the mitigative measures that
6 have been offered up. And in a way --

7 JUDGE YOUNG: Could you say that over
8 again?

9 MR. EYE: Sure.

10 JUDGE YOUNG: Start over that -- those
11 last two sentences I think.

12 MR. EYE: Well, Your Honor, we are in a
13 situation where we -- to come up with the
14 hypotheticals that you were suggesting earlier would
15 require us to rely on presumably safeguards threat-
16 related information in terms of just exactly what
17 threats create what damage state.

18 And so instead what we have done is look
19 at the mitigative measures that have been offered
20 up, and then compare them to the disclaimer in the
21 beginning part of NEI 016, which candidly says that
22 these mitigative measures will not be effective
23 under all damage states. And yet --

24 JUDGE YOUNG: Do you really need to know
25 the threat for -- to determine types of damage

1 states when you are looking at fires and explosions?
2 Do you have to know all of the threats? And I guess
3 a second, related question is: we live in a cost-
4 benefit world, and, for example, for a severe
5 accident mitigation alternative that plants are
6 required to look at, the analysis includes cost-
7 benefit analysis.

8 Isn't it understandable that one would
9 not want to say, "Well, we guarantee total -- that
10 we will deal with everything completely and totally
11 no matter what the damage?" Isn't it sort of
12 understandable that you would say, "Well, this may
13 not include everything"? I'm just throwing it out
14 there to see what your -- I mean, you seem to be
15 focusing on that narrow little range or what --
16 however wide it is, that range beyond a certain
17 point.

18 But the way the contention is written it
19 is written to cover the whole spectrum of all the
20 damage states. And you are saying that you can't
21 analyze the effectiveness without knowing all of the
22 damage states. It seems to me at this point you
23 have admitted that you could analyze the damage, you
24 could analyze the effectiveness of the measures with
25 regard to most damage states that could be imagined,

1 but with regard to this range that the NEI document
 2 says are sort of imponderable, you can't analyze the
 3 effectiveness of dealings with -- dealing with the
 4 imponderables, basically. Am I omitting something
 5 there?

6 MR. EYE: Well, Your Honor, this isn't
 7 an imponderable. The authors of NEI 06-12 said that
 8 there is a spectrum of potential damage states.
 9 That is not an imponderable. And that last bullet
 10 point --

11 JUDGE YOUNG: The third place that that
 12 is -- in a way, you could say that refers up to the
 13 third bullet, the potential endless combinations and
 14 permutations of potential damage states are
 15 imponderable. And then, they talk about a flexible
 16 response and the value of costly new fixed hardware
 17 not being guaranteed.

18 And then, they end up by saying,
 19 "Identified response capabilities will not ensure
 20 success under the full spectrum." That could mean a
 21 number of different things, but if you can -- it
 22 still seems like it would be a somewhat narrow range
 23 compared to those that anyone could hypothesize.

24 MR. EYE: That is where we run into the
 25 gap in information. We don't know what -- where the

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1 mitigative strategies that have been offered up by
2 the applicant fall on the spectrum of damage states
3 in terms of effectiveness.

4 JUDGE YOUNG: You could hypothesize most
5 of them, though, you admit.

6 MR. EYE: I don't really know that we
7 could hypothesize most of them.

8 JUDGE YOUNG: A large number.

9 MR. EYE: I think we could come up with
10 -- we could come up with some, but whether or not
11 they are consistent with what the authors of NEI 06-
12 12 see as the full spectrum of damage states, I
13 don't know.

14 JUDGE YOUNG: But you don't care about
15 that. What you care about is whether they would be
16 effective, whether the measures would be effective
17 against all of the damage states, at least that you
18 could think of, with the possibility of there being
19 maybe some others out there that you didn't think of
20 and that NEI didn't think of.

21 MR. EYE: Well, NEI 06-12 did think
22 of --

23 JUDGE YOUNG: Go ahead.

24 JUDGE ARNOLD: I actually have a
25 question for staff. We are discussing essentially

1 10 CFR 50.54(hh)(2), which is a new requirement in
2 the Code of Federal Regulations. Does that apply to
3 existing plants as well as new plants?

4 MS. VRAHORETIS: Yes, Your Honor, I
5 believe it applies to all plants.

6 JUDGE ARNOLD: Okay. Do you know if any
7 of the existing plants have complied with that?

8 MS. VRAHORETIS: I would have to consult
9 with staff on that, Your Honor.

10 (Pause.)

11 Yes, Your Honor. All currently
12 operating nuclear power plants have complied with
13 this regulation.

14 JUDGE ARNOLD: Do you know if the
15 determination of the staff that they complied, did
16 that require a complete definition of damage states
17 for the individual plants?

18 MS. VRAHORETIS: Please let me ask the
19 staff member.

20 (Pause.)

21 No, Your Honor. They did not require
22 operating reactors to identify or delineate full
23 spectrums of damage states.

24 JUDGE ARNOLD: We have proposed by Mr.
25 Eye that the regulations require that the measures

1 taken be effective. Is there an expectation in the
2 review that the staff will come to the conclusion
3 that the entire range of damage states you will be
4 able to show protection from, that you will have --
5 that they will have a successful strategy? Or will
6 there be some conditions that are beyond that?

7 MS. VRAHORETIS: One moment, Your Honor.

8 (Pause.)

9 Your Honor, there will be some events
10 that are considered beyond design basis events, and
11 for those, that limited category of events, there
12 may be some mitigative strategies that are not
13 completely successful. But it is all in how you
14 determine or define what "effective" or "successful"
15 means.

16 JUDGE YOUNG: Aren't these all beyond
17 design basis?

18 MS. VRAHORETIS: Yes, Your Honor.

19 JUDGE YOUNG: That these are supposed to
20 be protected against?

21 MS. VRAHORETIS: Yes.

22 JUDGE YOUNG: But you just said that
23 there may be some beyond design basis.

24 MS. VRAHORETIS: In terms of the entire
25 spectrum of damage states.

1 JUDGE ARNOLD: Meaning that there are
2 some design basis events that you can protect for
3 and some that you can't.

4 MS. VRAHORETIS: Well, Your Honor, I
5 think in the -- the overall regulatory framework for
6 this is not only 50.54(hh)(2) and 52.80(d), but it
7 is also 50.150. So there is -- through the design
8 process, some of these issues will be -- will be
9 dealt with, and then -- and that is prior to any
10 type of an event.

11 And then, the mitigative strategies are
12 to put procedures in place to handle anything after
13 such an event. It is not just what -- the event,
14 but it is what can we do before and what are some
15 effective things we can do afterward.

16 JUDGE ARNOLD: You mentioned the term
17 "beyond design basis event." And I have tried to
18 find if that has a regulatory definition, but I have
19 failed, although it is a term that is commonly used.
20 Do you think you could possibly describe how a
21 beyond design basis event differs from a design
22 basis event in terms of how it is approached by the
23 applicant's license and by the regulatory
24 requirements of the NRC?

25 MS. VRAHORETIS: If I could consult with

1 staff, Your Honor.

2 (Pause.)

3 Thank you, Your Honor, for that moment.

4 I would just point Your Honor to Appendix A to
5 Part 50 in the regulations, which sets forth general
6 design criteria for nuclear power plants. And this
7 section of the regulations spells out all of the
8 things that a nuclear power plant has to be designed
9 for for the safe operation of the plant.

10 And then, I would also point Your Honor
11 to the statement of considerations for this power
12 reactor security rule, that the Commission believes
13 that mitigation of the effect of impact through
14 design should be regarded as a safety enhancement.
15 So this is something above what is necessary for
16 safe operation of the plant. It is beyond the
17 design basis.

18 JUDGE ARNOLD: I guess what I am trying
19 to get to is Mr. Eye said that he believes it is a
20 regulatory requirement that the actions taken in
21 response to (hh) (2) have to be effective. And I'm
22 wondering if that is necessarily true for things
23 that are beyond the design basis.

24 MS. VRAHORETIS: There is a difference,
25 though, between effective and guaranteeing success.

1 And I think that is where Mr. Eye is substituting
2 his judgment for what the regulation should say for
3 the Commission's determination of what safe and
4 effective would be.

5 JUDGE ARNOLD: Mr. Eye, we have been
6 having a good conversation here, and I can't believe
7 that you don't want to comment on it.

8 (Laughter.)

9 So it's your turn.

10 MR. EYE: Thank you, and thank you for
11 your powers of clairvoyance, too.

12 (Laughter.)

13 There is no definition of "effective,"
14 and, you know, if you take a look at the definition
15 -- however, we do have a definition of "beyond
16 design basis." It's in the NRC glossary. I found
17 it. It's --

18 JUDGE YOUNG: What do you mean by the
19 "NRC glossary," just for my information?

20 MR. EYE: If you go on the NRC main
21 website, there is a link that says "Glossary."

22 JUDGE YOUNG: Okay.

23 MR. EYE: It is really helpful. I mean,
24 I have used it a bunch of times, because I'm not
25 smart enough to know what all of these things mean,

1 so I go to the dictionary and the glossary and it
2 tells me.

3 But there is a definition for "beyond
4 design basis," and we have incorporated that into
5 our analysis. Just because something is beyond
6 design -- and, in fact, if you take a look at the
7 statement of considerations when they announced the
8 fires and explosions rule, they assumed that these
9 things are going to be beyond design basis. I mean,
10 nuclear power plants are not designed to accommodate
11 a 747 flying into the lobby.

12 So what do you do about it? You assume
13 it is beyond design basis. That is the starting
14 point for the technique of analysis, it seems to me,
15 to determine whether or not mitigative measures will
16 be effective. Well, what does "effective" mean? It
17 is not -- "effective" is not defined in the
18 regulation for sure. "Effective" is used throughout
19 the statements of consideration. I mean, I didn't
20 count up the number of times, but it is -- a number
21 of times. It leaves it pretty I think beyond
22 argument that the Commission assumes that these
23 mitigative measures are going to be effective, but
24 it is not defined what that means.

25 So where do we go to determine

1 effectiveness? Does that --

2 JUDGE YOUNG: Let me -- I'm sorry, I'm
3 going to interrupt here. There is on the
4 applicant's answer, on page 12, the applicant quotes
5 from the statement of considerations for the
6 supplemental proposed rule a comment that was
7 received that said the -- this -- what was then Part
8 73, Appendix C, later moved to 50.54(hh) does not
9 specify what types of fires or explosions the
10 licensee must prepare for, or what areas of the
11 plant are considered particularly susceptible to
12 damage or destruction.

13 And then, the Commission's response that
14 is quoted says, "The Commission did not intend to
15 limit beyond design basis scenarios to aircraft
16 attack, but instead called for the development of
17 mitigation measures to generally deal with the
18 situation in which large areas of the plant were
19 lost due to fires and explosions," whatever the
20 initiator, beyond design basis initiator.

21 And then, it says some more, and then it
22 takes about performance-based criteria. Well, I
23 will just read. "Accordingly, as with the original
24 Section B, 5(b) requirements, this proposed rule
25 would apply only performance-based criteria so that

1 individual licensees would have to determine the
2 most appropriate site-specific measures that would
3 meet general performance criteria."

4 Now, you may want to ask a question of
5 the applicant and the staff later on performance-
6 based criteria, but most notably the Commission says
7 in response to that comment, which is similar to
8 what you are arguing, "The NRC does not believe it
9 is necessary or even practical that the prescription
10 suggested by the stakeholder be incorporated into
11 the rule."

12 So the Commission, in interpreting the
13 rule that it was proposing to adopt, said, "We are
14 saying what applicants have to plan for -- or what
15 they have to plan for in terms of what they have to
16 do to protect large areas. But we don't think that
17 it is necessary," but then they say "or practical,"
18 that they would have to specify the types of fires
19 and explosions in the areas of the plant that might
20 be affected.

21 How do you respond to that? You are
22 talking about what the statement of considerations
23 says about it having -- the measures having to be
24 effective, but the Commission also in the statement
25 of considerations for the proposed supplemental rule

1 said this. How do you respond to that?

2 MR. EYE: Let's deconstruct the comment,
3 Your Honor. The comment says that the regs should
4 have included a discussion of the types of fires or
5 explosions the licensee should prepare for. We are
6 beyond that. We are well beyond that. We are not
7 talking about --

8 JUDGE YOUNG: Isn't the essence of what
9 the commenter is talking about, though, in
10 referencing types of fires or explosions in areas of
11 the plant, aren't they really sort of getting to the
12 damage state argument that you are making?

13 MR. EYE: I --

14 JUDGE YOUNG: And what -- I mean, I
15 don't think you can completely discount the
16 similarity, can you?

17 MR. EYE: Well, I think there is an
18 apples and oranges problem. We are not -- the types
19 and the -- what types of fires or explosions really
20 goes, again, to the kind of initiating event that
21 might --

22 JUDGE YOUNG: Is it necessarily --
23 couldn't it be a fire that involved X type of --
24 what is the word I'm looking for? Not fuel as in
25 fuel from the airplane, but fuel as in --

1 MR. EYE: A diesel fire. I'm sorry.

2 JUDGE YOUNG: Okay. A diesel fire of a
3 certain size, an explosion of a certain size in a
4 certain location. Doesn't that get to damage
5 states?

6 MR. EYE: Well, I don't think that the
7 response to the comment anticipated that. The
8 comment -- types of fires, is it electrical, is it
9 caused by the nuclear fuel catching fire, is it some
10 other sort of initiating event? Those are types of
11 fires.

12 We are talking in contention number 1
13 about the magnitude and numbers of fires,
14 irrespective of the type, whether it's electrical or
15 caused by, you know, the diesel generator catching
16 fire or the fuel catching fire. Those, at least in
17 -- as we viewed this, those are classified as types.
18 We differentiate that, or distinguish that, rather,
19 from numbers and magnitudes of fires.

20 JUDGE YOUNG: So you would presume that
21 the Commission, in talking about effectiveness,
22 implicitly meant to say that, well, we don't think
23 that you need to specify the initiator, but implicit
24 in what we are saying, you have to specify the
25 damage states, how much damage there is, and what

1 locations, and the type of damage?

2 MR. EYE: Well, the Commission said that
3 there is supposed to be an assumption of large loss
4 of plant area. Now, "large" again begs some
5 clarification. But we get that to a certain extent
6 when the Commission follows on and says, "Think in
7 terms of an aircraft impact as an example of a large
8 explosion and fire." Use that as sort of your -- as
9 an idea of the magnitude of a fire, an explosion,
10 you might have to deal with.

11 Maybe it is not an aircraft that flies
12 into a plant. Perhaps it is a truck bomb that is
13 parked next to it that explodes, that causes a large
14 fire and explosion as a result. So the nature of
15 the initiating event to us is less important than
16 some sort of a specification as to what -- the
17 magnitude of the event, and then it can be
18 determined whether the mitigative measures that have
19 been adopted will be effective.

20 It is -- so the comment and response, we
21 think we are really geared more toward the notion
22 that the reg, ultimately the regulation that was
23 adopted, the commenters seem to be saying, "Look,
24 you should be saying explicitly that these are the
25 types of fires that need to be dealt with --

1 electrical, combustible," or whatever.

2 JUDGE YOUNG: Okay.

3 MR. EYE: And that was rejected.

4 JUDGE YOUNG: Let me just ask one more
5 question, and then my colleagues may have some
6 additional questions, and then I think maybe you can
7 wrap up. Oh, no, they are going to have their
8 chances. Don't worry about that.

9 (Laughter.)

10 We're not going to wrap up without them.
11 We just go in order.

12 So in response to the staff's statement
13 that "effective" doesn't mean that it has to -- and
14 I'm paraphrasing here, because I don't remember the
15 exact phrase, but that "effective" doesn't mean that
16 you have to be successful against every imaginable
17 or possible damage state -- for example, the whole
18 plant, just throwing that out -- I am still left
19 with the impression that what the contention really
20 consists of boiled down is that you more or less
21 agree that those damage states that anyone, or at
22 least any expert could hypothesize, anyone could
23 imagine and hypothesize, and use that to measure the
24 effectiveness of the strategies and measures, that
25 for those there is no reason that the damage states

1 would need to be included, because one could fill
2 those in, anyone with a reasonable level of
3 expertise could fill those in, that what you are
4 challenging is the failure to specify damage states
5 that any reasonable expert would not be able to fill
6 in, because they are sort of at the end of the
7 spectrum that -- of probability and imagination and
8 maybe level of damage.

9 I'm not using scientific terms, I'm
10 sure, but you get -- you get what I'm saying. I'm
11 still left with that that's what remains of your
12 contention, and that the argument against that is,
13 well, we can only do what is practical. You can't
14 -- just my example before of a bomb that created a
15 fire that covered the whole containment, say, the
16 whole thing. That there are certain things that you
17 just can't -- or the whole plant, for that matter,
18 that you just can't protect against.

19 Now, I am, again, using lay examples,
20 but that is sort of what is left, in my mind, of
21 what your contention is, and that sort of goes
22 against the practicality argument that I understand
23 to be coming from the other side against your
24 contention.

25 Tell me what I'm missing, and then --

1 MR. EYE: There is nothing -- I'm sorry.
2 JUDGE YOUNG: Others may have questions.
3 MR. EYE: I don't see anything in the --
4 on the face of the regulation that excuses the
5 applicant from determining what measures will be
6 effective under the full spectrum of damage states.
7 The statement of considerations that adopted -- that
8 came with the adoption of these regulations don't
9 somehow carve out exceptions that the applicant can
10 use to avoid dealing with this full spectrum of
11 damage states.

12 That is not to be found anywhere, and it
13 is not -- the statement of considerations doesn't
14 say, "Come up with mitigative measures that are
15 pragmatic." It says they are to be effective. And
16 is there a difficulty by -- is there a difficulty in
17 postulating the full spectrum of damage states?
18 Well, evidently somebody has done that, because the
19 06-12 document says that there is a part of the
20 spectrum where these measures will not be effective.

21 That is a legal problem, because there
22 is nothing in the statement of considerations -- or
23 the regulation or the announcement of it in the
24 Federal Register that says, "Oh, by the way, if
25 there is a part of the damage spectrum that is

1 really severe, and it is going to be hard for you to
2 get effective measures to deal with it, you don't
3 need to." That I don't see anywhere in the -- any
4 of the rulemaking.

5 And I think that it would come as
6 something of a surprise to -- well, I think it would
7 come as a surprise to almost anybody who looks at
8 this where experts, at least in the context of the
9 NEI 06-12 acknowledge that there are some damage
10 states that these very complex and presumably well
11 thought through mitigative measures won't do you any
12 good.

13 So is that effective? Well, it is
14 effective up to a point -- a point that has yet to
15 be defined by either the applicant or the staff.

16 (Pause.)

17 In our contention, we do point out that
18 there is a certain minimum that ought to be done.
19 If you take a look at the second half of the
20 contention, we say that at a minimum the applicant
21 ought to describe damage footprints quantitatively
22 and qualitatively.

23 And then, we take the language right out
24 of 07-13 that they -- the authors of that document
25 utilized. They put together composite damage

1 footprints.. They looked at descriptions of
2 anticipated physical damage, shock damage, fire
3 damage, fire spread, and rolled that into the
4 expected response to the design impact rule.

5 So it is not as if these are tasks that
6 are as imponderable perhaps as suggested in the
7 other part of the introductory language, because
8 somebody else down the hall at NEI did that, or at
9 least they attempted to cover a severe part of the
10 damage spectrum. Now, did they go all the way out
11 to the end of it? Well, we don't know the answer to
12 that.

13 JUDGE YOUNG: Do you know whether your
14 expert could go all the way out to the end of that
15 and hypothesize damage states?

16 MR. EYE: I'm sorry, Your Honor. Could
17 you repeat the question?

18 JUDGE YOUNG: Could your expert go all
19 the way out to the end of that and hypothesize
20 damage states?

21 MR. EYE: Could he?

22 JUDGE YOUNG: Right.

23 MR. EYE: Because of the limitation on
24 our access to information about threat, the kinds of
25 threats, and so forth, it really isn't possible for

1 us to make that --

2 JUDGE YOUNG: Imagining all the threats
3 it could be, could your expert go all the way out to
4 the end, imagining all the possible threats, and
5 imagine all of the possible damage states that could
6 come from all the possible threats?

7 MR. EYE: Dr. Lyman is a very bright and
8 able person. Now, asking him to do that, what you
9 have just described, may not be -- when it is all
10 said and done, he comes up with the list of
11 scenarios that he can conjure up, if you will. And,
12 Your Honor, I would suggest I can make a
13 modification to that to come up with another one.
14 And so it is -- again, it is not necessarily up to
15 us to come up with this spectrum of damage states to
16 which the mitigative measures is to be applied.

17 JUDGE YOUNG: But if he could, there is
18 no reason that they have to be -- it would have to
19 be done by the applicant, right, if he could do
20 that?

21 MR. EYE: Oh, I think that they would
22 have to be done by the applicant in order to prove
23 -- to prove, by a preponderance of the evidence,
24 that their mitigative measures will work. And they
25 haven't --

1 JUDGE YOUNG: Well, we're at the
2 admissibility stage now.

3 MR. EYE: But at this point, the
4 applicant hasn't described a single damage state --
5 not one -- to which their mitigative measures apply.
6 Not one, let alone at the extreme part. They
7 haven't described the one at the less extreme part.
8 No description whatsoever. We don't know whether
9 their mitigative measures will handle a grass fire
10 on the north 40 of the property, let alone --

11 JUDGE YOUNG: Your law clerk couldn't
12 tell you that, couldn't analyze that?

13 MR. EYE: Based on the information that
14 we have been provided by -- in the mitigative
15 measures, I don't know that that is possible, Your
16 Honor. And, again, this is an omission contention.
17 This is something that we contend they have not done
18 to prove effectiveness.

19 JUDGE YOUNG: Okay. Let me ask you to
20 sort of start wrapping up. And, Judge Mignerey or
21 Judge Arnold, do you --

22 JUDGE ARNOLD: No, I am going to ask
23 staff more questions.

24 JUDGE YOUNG: Okay. Do you have any
25 more questions for them, for the intervenor?

1 JUDGE ARNOLD: Only if he was finished
2 with his discussion of beyond design basis and what
3 the requirements are for showing protection for
4 them.

5 MR. EYE: Well, I would refer you to the
6 discussion that we have made of that particular
7 point in our papers, Your Honor. And, specifically,
8 you would find that in our contentions at page 8,
9 and specifically we reference that at footnote 5.

10 And we -- I mean, that is our best
11 attempt I guess at integrating or dealing with the
12 intersection of beyond design basis and these fires
13 and explosions regulations. And I think it is just
14 really important to note that 50.54(hh) assumes
15 beyond design basis..

16 It doesn't -- it doesn't say you can
17 deal with these things on a design basis, because,
18 if you can do that, then there would really have
19 been very little need to enhance the response
20 capabilities that are anticipated through
21 50.54(hh) (2). These are enhanced capabilities,
22 because of the beyond design basis scenarios. If it
23 was just design basis, then they have already done
24 that through their original FSAR.

25 So, and there is -- and, again, at

1 page 13957 of the Federal Register that announced
2 these, it says that the rule contemplates that the
3 initiating events -- initiating event for such large
4 fires and explosions could be any number of beyond
5 design basis events.

6 But, really, what is important is once
7 we -- NEI 06-112 is really -- NEI 06-12, rather, is
8 a really valuable document. It is really valuable
9 for a lot of different reasons. But one of the
10 reasons it is so valuable is because it raises
11 questions that ought to be answered, and ought to be
12 answered in terms of whether or not objectively
13 speaking -- objectively speaking -- there is a means
14 by which to judge the effectiveness of the
15 mitigative measures that they have offered up.

16 How does one go about doing that without
17 having some assumptions going in as to the scope of
18 the problem that is going to be dealt with by these
19 mitigative measures? If the mitigative measures
20 that are deployed on a nuclear-powered submarine or
21 ship are not geared to the size of the reactor, the
22 potential fire spread, the radiological hazards that
23 are involved, the radiological exposures that might
24 be experienced as a result of responding to it, what
25 good are those measures, if they are not scaled up,

1 both in a quantitative and qualitative way, to meet
2 the problems that might confront a ship at sea?

3 If they go out to sea with mitigative
4 measures that we don't know whether they are scaled
5 up adequately, then there is -- at least in the
6 judgment of the intervenors, that is an unreasonable
7 risk that you have put those personnel in the line
8 of.

9 JUDGE YOUNG: It is getting close to 10
10 after noon. Would you rather continue on with --
11 contention 1 is obviously the long one. It is the
12 one that all -- most of the others refer back to.

13 So I am thinking that we have covered a
14 lot of the argument on some of the other
15 contentions, so we do have some time this afternoon.
16 Would you rather continue with the applicant and the
17 staff now, or break for lunch now and come back for
18 the applicant and staff arguments?

19 I think my colleagues are suggesting
20 that we go ahead with the applicant's and see how
21 far we get, and then maybe we will break for the
22 staff's, or if we have -- I think we ought to break
23 at least by 1:00.

24 MR. FRANTZ: Okay. I am happy to break
25 now and come back after lunch, if that is

1 satisfactory to the Board, rather than have my own
2 argument broken up in the middle for lunch.

3 JUDGE YOUNG: Okay. All right. Then,
4 let's reconvene at, let's see, quarter past 1:00.
5 All right? 1:15. And remember, everyone here, you
6 are not supposed to be talking about this outside
7 either.

8 (Whereupon, at 12:08 p.m., the
9 proceedings in the foregoing matter
10 recessed for lunch.)

11 JUDGE YOUNG: All right, Mr. Frantz or
12 Mr. Rund, who is going to do your argument?

13 MR. FRANTZ: I will do the argument.

14 JUDGE YOUNG: All right, go ahead.

15 MR. FRANTZ: First of all, we had a
16 long discussion this morning on evaluating damage
17 states. And the bottom line is, the rule does not
18 require evaluation of damage state, or
19 identification of damage states. Not only doesn't
20 the rule require it, it's not discussed at all
21 anywhere in the statement of considerations. There
22 is no requirement there to look at damage states.
23 And if you look at NEI 0612, which is the
24 commission-endorsed guidance for implementing the
25 rule, there is no requirement in that guidance

1 document to evaluate or identify damage states.

2 So the intervenors essentially are
3 trying to impose their view of what the law should
4 be, on the agency. And the fact is, the Commission
5 hasn't gone that direction. And what they are doing
6 is essentially a challenge to the rule itself.

7 In this regard the Commission itself has
8 stated that this rule is not a design-related rule.
9 And what the intervenors essentially are asking us
10 to do is to identify initiating events, calculate
11 the resulting damage states, and then compare our
12 mitigated measures against those damage states.
13 Well, that's what you do in a design-related rule.
14 It's not what you do in the kind of rule we have
15 here in 50.54(hh)(2). This rule as the Commission
16 stated is an operational rule. It is --

17 MS. VRAHORETIS: Your Honor, if I could
18 just interrupt. There is a person in the room that
19 we don't recognize. If we could just ask to
20 reconfirm that everyone in the room has permission
21 to be here or authority to be here?

22 JUDGE YOUNG: I think that is an NRC
23 employee who works on this floor. He probably was
24 just curious about sitting in on the hearing.

25 MR. FRANTZ: As the Commission has

1 described this in the statement of considerations
2 rule, this is a programmatic, an operational
3 programmatic rule. And in that regard I think it is
4 somewhat analogous for example to the emergency
5 preparedness rule, which is also an operational
6 programmatic rule. When we develop an emergency
7 plan, we don't postulate particular events or
8 accidents. And then decide whether or not our
9 emergency plan or procedures are adequate vis-à-vis
10 those events or accidents. Instead we develop
11 procedures and programs and training based upon the
12 fact that you may have a myriad of accidents of
13 events. We don't have to predict the accident or
14 event beforehand to develop an effective emergency
15 preparedness plan..

16 Similarly we don't have to predict the
17 events beforehand in order to have effective
18 mitigation measures for fires and explosions.

19 The intervenor has implied that we need
20 to evaluate what they call the full spectrum of
21 damage states. Again, that is not anywhere in the
22 rule; it's not anywhere in the considerations; and
23 it's not required in the guidance document.

24 And in fact I think it's not even
25 possible. As Judge Young pointed out earlier this

1 morning, obviously we can't prevent and protect
2 against all events. You mentioned for example an H-
3 bomb being exploded, as a prime example. Obviously
4 if we have an atomic bomb that explodes in or around
5 the plant, there is not much that we are going to be
6 able to do that is going to be able to mitigate that
7 event.

8 And there are other kinds of events you
9 can postulate, too, which it is not practicable to
10 mitigate those events.

11 Judge Young you also mentioned that in
12 your view NEI 06-12 establishes a pragmatic
13 standard, and I agree with that. And more
14 importantly I think that is what the Commission has
15 laid out. For example in the statement of
16 considerations for the rule, and I'll refer to 74
17 Federal Register at 13928 and 13957, the Commission
18 stated that the mitigation measures only need to be
19 readily available; we have to use readily available
20 resources at the plant, and other practicable
21 measures.

22 We aren't required to design for
23 everything that might possibly occur. There is a
24 pragmatic approach that's embodied in the statement
25 of considerations for the rule.

1 JUDGE YOUNG: What page is that again?

2 I'm sorry.

3 MR. FRANTZ: 13928 and 13957 and there
4 are similar statements by the way in the statement
5 of considerations for the various proposed rules.

6 As I mentioned we aren't required to
7 postulate or identify damage states. Instead what
8 NEI 06-12 embodies, and again this is the
9 Commission-endorsed approach that has been used for
10 a hundred and some plants already successfully that
11 are operating, there is a flexible response. This
12 flexible response for energy is based upon two basic
13 concepts: one is diversity. Every plant has certain
14 designated safety-related systems to protect against
15 accidents. What NEI 06-12 says is that there should
16 be alternatives that are based on diversity.

17 (b)(4)

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20 The concept of diversity says that we
21 should have something that does not rely on electric
22 power to power the pumps for the fire protection
23 system. So in our cases and in other cases there
24 typically is a diesel pump and an electrical power
25 pump. So that even if you use electrical power,

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EXEMPTION 4. LUMINOUS

1 diversity provides this additional protection and
2 the capability to supply cooling water even if you
3 entire electrical supply is wiped out.

4 The other concept embodied in this
5 flexible response strategy is the concept of
6 separation, that to the extent you have alternatives
7 that are alternatives to your normal safety-related
8 systems, those alternatives should be separated from
9 the safety-related systems. Separation can either
10 be distance, for example,

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12 (b)(4)
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EXEMPTION 4 NEI

15 And by having this type of very flexible
16 response strategy you are able to mitigate a myriad
17 of events that perhaps you can't even predict
18 beforehand, because you have something that is
19 separate and diverse from your normal systems. And
20 that is the concept embodied in NEI 06-12, it's a
21 concept that's been used for the existing operating
22 plants.

23 And what is why these strategies that
24 we've built are effective, to use the language of
25 the intervenors. And also, the language of the

1 statement of consideration. By having systems
 2 which are separate and diverse we are assured of
 3 having effective mitigation alternatives out there.

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EXEMPTION 4 LUMENANT

16 Again this is the flexible response
 17 strategy that is embodied in 06-12, and which
 18 assures that we have something that is effective.

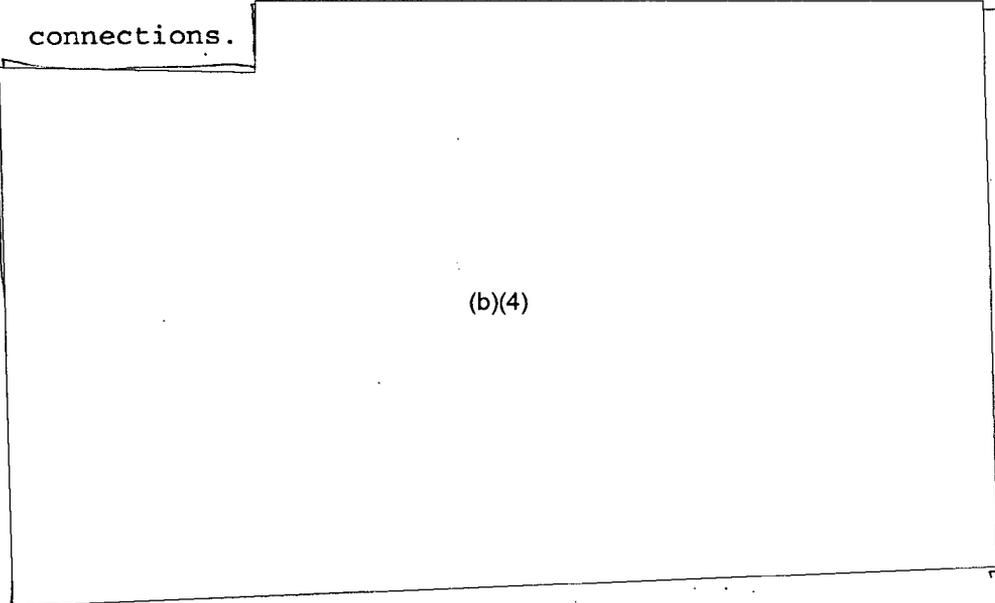
19 JUDGE YOUNG: There is some reference,
 20 maybe not in this contention, but to - the last
 21 contention about the water supply -

22 (b)(4)

EXEMPTION 4 LUMENANT

23 MR. FRANTZ: I believe it can.
 24 Typically what would be done is, there is the fire
 25 main system that runs around the plant. It

1 originates outside the power block, and there are
2 connections.



Exemption 4 LUMINANT

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So I think that addresses most of the arguments they have raised. Again, I just would urge the board to go back and look at the statement of consideration, because it is an operational rule; we aren't required to postulate these kinds of design-related events that they want us to postulate. That is simply a challenge to the rule itself, and if you think of this in terms of an operational rule rather than a design rule, I think it really helps you conceive of what the Commission was trying to require.

JUDGE YOUNG: Would you explain exactly, and maybe give a definition, of what you mean by operational rule?

MR. FRANTZ: An operational rule does

1 not require you to typically establish any new
 2 design features or functions. You use what is
 3 currently available at the plant, and then you
 4 develop procedures, and you develop training to use
 5 what is readily available. So in our case for
 6 example we have lots of developed procedures for how
 7 we use these various alternatives that I've
 8 discussed. We have to establish training, so
 9 personnel are training in how to use the existing
 10 equipment.

[Redacted area containing (b)(4)]

Exemption of relevant

14 But that could be construed as
 15 being a piece of equipment, or a tool, rather than a
 16 design feature.

17 JUDGE YOUNG: Another term you use I
 18 might ask you to define or discuss, and also whether
 19 it is related to operational, the word, operational,
 20 is performance based.

21 MR. FRANTZ: I think performance based
 22 in this context means that you can have the strategy
 23 that is developed around concepts of diversity and
 24 separation so that you have something that is
 25 available to provide water to the spent fuel pool.

1 and to the containment in the event that your normal
2 safety systems are not available. And that is how I
3 would characterize performance based in the context
4 of this rule. You have something that is different
5 than you would normally rely on, and you have some
6 assurance that that different alternative is going
7 to be available, given that you have a large area of
8 the plant that is disabled due to the fire or
9 explosion.

10 JUDGE YOUNG: That you think would be
11 able to perform?

12 MR. FRANTZ: That's correct.

13 JUDGE YOUNG: Thank you. Go ahead.

14 MR. FRANTZ: I'm just checking my notes
15 to make sure I haven't missed anything. The
16 intervenors here are really conflating the aircraft
17 impact assessment rule, which is in Section 50.150
18 of the regulations, with the rule on fires and
19 explosions. And I think it's instructive to compare
20 those rules, because they are very different.

21 The 50.150 applies for example to design
22 certification applicants. It's a design-related
23 rule. That rule requires you to postulate a certain
24 even involving a certain aircraft size, a certain
25 angle of attack, a certain fuel loading, and then

1 determine what the damage states are, and then
2 design provisions to deal with it. If you look at
3 50.54(hh)(2) it's a very different rule. It doesn't
4 require you to postulate any particular initiating
5 event. It doesn't require you to do any design
6 evaluations. It doesn't require you then to compare
7 what you come up with in terms of a design
8 evaluation versus your mitigative strategies. Again
9 it's an operational rule and not a design rule, and
10 if you juxtapose the 50.105 against 50.54(hh)(2)
11 that becomes very apparent.

12 JUDGE YOUNG: What does 50.150 say?

13 MR. FRANTZ: 50.150 is the aircraft
14 impact rule.

15 JUDGE YOUNG: You didn't mean to say
16 105?

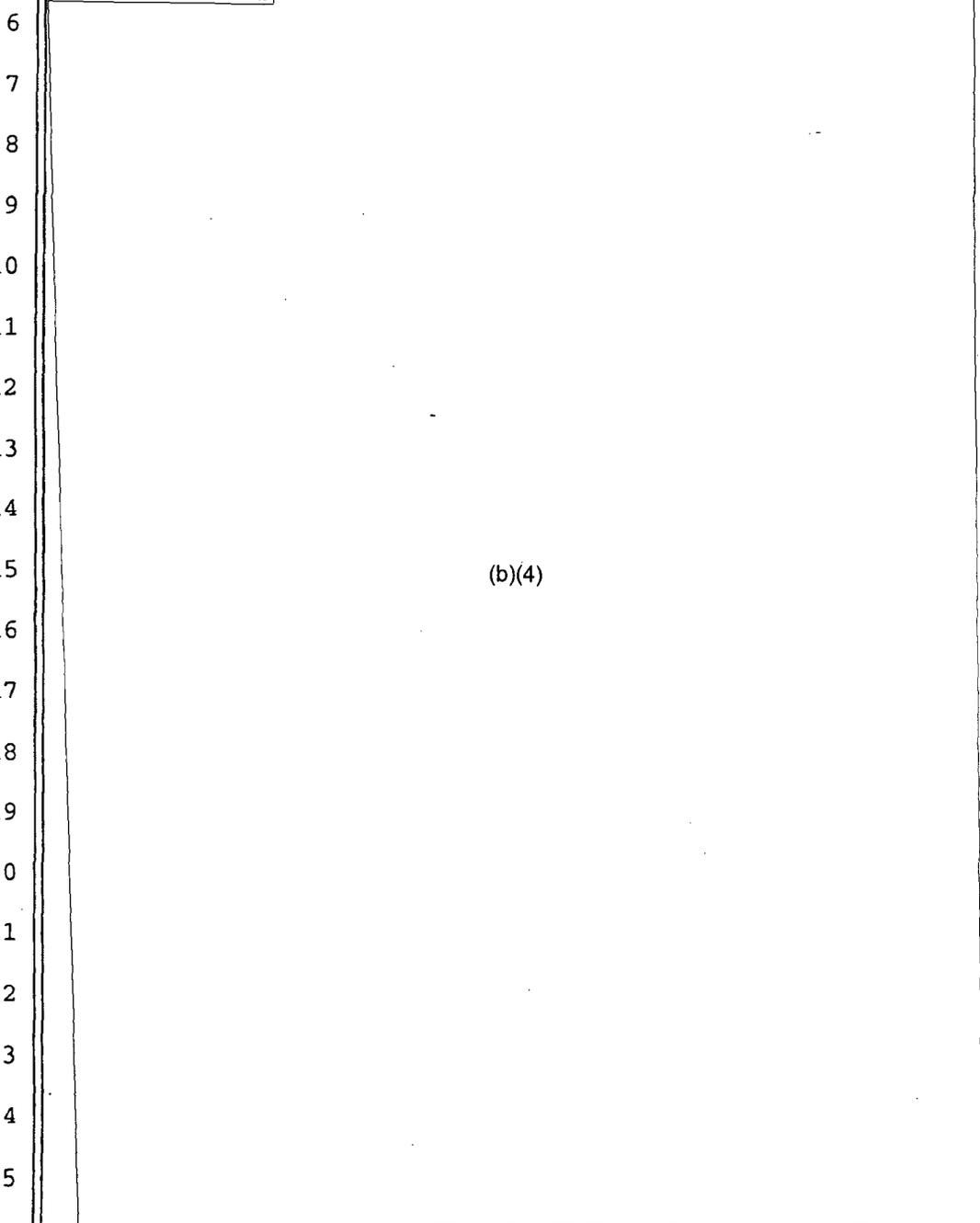
17 MR. FRANTZ: I'm sorry, did I say 105?
18 I apologize.

19 JUDGE YOUNG: I just wanted to make
20 sure.

21 MR. FRANTZ: It might also help if I
22 give you another very specific example of how this
23 flexible strategy works in practice. And I'd like
24 to use the example of the spent fuel pool cooling.
25 In the case of Commanche Peak, we have a normal

1 safety-related make up system. We also had two non-
2 safety systems that could be used to provide makeup.

3 Above and beyond that as part of our
4 mitigative strategies we developed several other
5 strategies.



(b)(4)

Exemption of LUMINANT

(b)(4)

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Again, it's this kind of very flexible response strategy that we think is very effective, and accomplishes the purpose of the rule and the goals of the rule.

And I might add that when it comes to these very specifics, the intervenors really haven't questioned the accuracy of these to deal, for example, with spent fuel pool cooling.

I think that's probably enough for right now to summarize our position based on what we heard this morning from the intervenors.

MS. VRAHORETIS: Thank you, Your Honor.

I would just like to reiterate that we are here to determine the admissibility of contentions. And to do that the contention has to meet all of the criteria in 2.309(f)(1). The rule language in 10 CFR 50.54(hh)(2) does not contain a requirement that the applicant identify the number

EXEMPTION / HUMANITY

1 and magnitude of fires and explosions resulting in
2 the loss of large areas of the plant; nor is the
3 applicant required to provide or describe a full
4 spectrum of damages. And neither in the pleadings
5 or in the argument today have the intervenors
6 provided that legal basis for the requirement that
7 they assert.

8 The Commission has already studied the
9 full spectrum of damage states, and the insights
10 gained from that study, and those studies, was used
11 to develop our reactor security rule. The
12 intervenors have acknowledged this. They've
13 acknowledged that the Commission had these studies
14 and that these studies were used. You will find
15 their acknowledgment in their pleadings, the new
16 contention, at page 10, footnote 6.

17 I would also like to direct your
18 attention to pages 10 - 11 of the answer that we
19 filed on behalf of the staff which referenced the
20 Commission's study of the full spectrum of damage
21 states.

22 The rule contemplates a change in threat
23 environment and a variety of causes that might
24 result in issues that require mitigation. And the -
25 this is expressed at 74 Federal Register 13926 and

1 13957. And I think perhaps Mr. Eye provided the
2 best illustration of why his proposal that the
3 applicant be required to list and specify a full
4 spectrum of damage states would be ineffective and
5 unsuccessful when he says that you can always come
6 up with one worse. That's why I believe the
7 Commission used the language at Federal Register
8 13957 when it said that the approach was going to be
9 performance based. In considering whether
10 specifically including certain strategies in the
11 rule, the Commission decided that more general
12 performance-based language in 50.54(hh)(2) was a
13 better approach to account for future reactor
14 facility designs that may contain features that
15 preclude the need for some of the strategies that
16 may be used at operating reactors.

17 In addition we did speak this morning at
18 length about how do you measure effectiveness.
19 Effectiveness in this context is measured by the
20 redundancy, the flexibility, the multiplicity and
21 the diversity in the systems that are used, both in
22 type and distances. And successfully measured by
23 the ability to restore and maintain core cooling,
24 containment, and spent fuel pool cooling in order to
25 minimize the dose to the public.

1 And I believe if you look at 74 Federal
2 Register 13958 you will see a reference to those
3 goals.

4 In this context the NRC rules focus on
5 what do we need to protect, not the damage state.
6 And success is measured by the flexibility and
7 diversity of the program towards that end.

8 I'd also like to reiterate that the
9 burden is on the intervenors in this context. They
10 can't speculate on information that they didn't even
11 apply to receive. We've heard numerous times today
12 that they haven't had access to SGI so they can't
13 comment. But they have had, been on notice, of what
14 the Commission requires in order to gain access to
15 SGI. Because the Commission issued a SUNSI SGI
16 order in this case, which they successfully complied
17 with in order to gain access to SUNSI.

18 They have not requested or applied for
19 SGI, so they can't complain that they don't have
20 access to it.

21 And in addition, we have heard numerous
22 times today, the applicant should be required to do
23 this, or the rules should do this. And I believe
24 the exact language of the contention uses that
25 language. The applicant should be required to

1 describe. These are buzzwords whenever there is a
2 challenge to a rule or a regulation. And it is
3 inappropriate in this context to be challenging a
4 rule for what it does not require. That is a
5 violation of 10 CFR 2.335(a).

6 JUDGE YOUNG: But they are arguing at
7 this point that the rule properly interpreted
8 includes that requirement. So I think that is their
9 response to the argument about challenging the rule.

10 MS. VRAHORETIS: That is a point well
11 taken, Your Honor. But to the extent that they are
12 attacking NEI 06-12, I would just point out that
13 this is not a rule. While the Commission has
14 endorsed it, the Commission endorsed it as providing
15 acceptable means of compliance. Applicants are free
16 to come up with other means that may be better.
17 It's not a rule; it's not a requirement.

18 And the contention has to challenge the
19 application, not the staff's review of the
20 application.

21 If you have any questions, I'd be happy
22 to take them.

23 JUDGE ARNOLD: Yes, I do.

24 Let's see, 10 CFR 52.80(d) requires the
25 application to include a description and plan for

1 implementation. Is there an expectation that a
2 description and a plan for implementation, is that
3 supposed to be sufficient to determine whether or
4 not the applicant has complied with 50.54 (hh) (2),
5 or is there more information coming later that is
6 needed to make that interpretation?

7 MS. VRAHORETIS: Yes, Your Honor, I
8 believe that is correct. I think that is what is
9 more commonly understood by an operational program.

10 JUDGE YOUNG: Which is correct?

11 MS. VRAHORETIS: There is some
12 information provided now, and then there is more
13 information provided later.

14 JUDGE YOUNG: But he asked, is the rule
15 intended - does the rule contemplate that you should
16 be able to determine the efficacy or adequateness of
17 compliance at this point? Or do you have to wait
18 until later until the procedures are implemented and
19 so forth in order to determine the adequacy of the
20 measures in a mitigative strategy report?

21 MS. VRAHORETIS: Well, what the rule
22 would require now is a description in the
23 application. And the more detailed procedures would
24 come later.

25 JUDGE YOUNG: But based on what has

1 been provided to this point, can the staff for
2 example make a determination as to whether what has
3 been provided is adequate to satisfy 50.54 (hh) (2)?

4 MS. VRAHORETIS: Well, I don't know
5 that the staff has made a determination that
6 anything is acceptable at this point. I think what
7 the Commission has said is that NEI 06-12 provides a
8 means by which applicants can comply with the rule.

9 JUDGE YOUNG: But can the staff make a
10 determination as to adequacy based on what has been
11 provided in the mitigative strategies report?

12 MS. VRAHORETIS: Insofar as the
13 strategies comply with guidance and the rule itself,
14 yes. But in terms of the details fo the plan, it is
15 my understanding that those are developed later, and
16 it's more of an inspection process where the staff
17 will inspect the plan to determine whether or not it
18 meets the safety goal. And in the course of the
19 staff's review there may be other things that are
20 required.

21 JUDGE YOUNG: I'm sorry, you can do it
22 later, but if you have to do it now, if you have to
23 make that determination at this point, can the staff
24 do that based on what is provided in the report?

25 MS. VRAHORETIS: May I consult with the

1 staff, Your Honor?

2 (Counsel consults with staff)

3 MS. VRAHORETIS: If the question that
4 you are asking, Your Honor, is, would the
5 applicants' mitigative strategies report have
6 sufficient detail for the staff to make a safety
7 finding the answer is yes.

8 JUDGE YOUNG: A what?

9 MS. VRAHORETIS: A safety finding,
10 necessary for --

11 JUDGE YOUNG: A safety finding?

12 MS. VRAHORETIS: Yes. Yes.

13 JUDGE YOUNG: What do you mean by
14 safety finding?

15 MS. VRAHORETIS: Well, that's the
16 finding that the staff have to make in order for the
17 application to be acceptable.

18 (Pause)

19 And then the staff can find that the
20 regulatory basis is satisfied, and the license can
21 be issued.

22 JUDGE ARNOLD: And you can do that
23 from the description and the implementation plan
24 alone?

25 MS. VRAHORETIS: Yes.

1 JUDGE YOUNG: So that safety finding
2 means that you find that they will be able to
3 mitigate against loss of large area caused by fires
4 and explosions based on what is in this report?

5 MS. VRAHORETIS: Yes, Your Honor. And
6 I would direct Your Honor to 74 Federal Register
7 13933, where the Commission states that the most
8 appropriate and efficient process for the Commission
9 is to review these procedures as part of the review
10 of operation procedures.

11 JUDGE YOUNG: Which column are you in?

12 MS. VRAHORETIS: I'm in the center
13 column. And beyond design basis guidelines. The
14 Commission views the mitigative strategies as
15 similar to those operational programs for which a
16 description of the program is provided and reviewed
17 by the Commission as part of the combined license
18 application, and subsequently the more detailed
19 procedures are implemented by the applicant and
20 inspected by the NRC before plant operation.

21 Because the Commission finds that the
22 most effective approach is for the mitigative
23 strategies at least at the programmatic level to be
24 developed before construction and reviewed and
25 approved during licensing, a requirement for

1 information has been added to Section 52.80. Et
2 cetera.

3 Judge Arnold, did that answer your
4 question?

5 JUDGE ARNOLD: It pretty much surprised
6 me, because I look at that mitigative action report,
7 and it's all kinds of premises with very little
8 detail. And I guess - I think you understood the
9 question and you've given me an answer that answers
10 that question.

11 MS. VRAHORETIS: Thank you.

12 JUDGE ARNOLD: My questions have been
13 answered.

14 JUDGE YOUNG: Did you have any further
15 argument?

16 MS. VRAHORETIS: No, thank you, Your
17 Honor.

18 JUDGE YOUNG: Any quick rebuttal from
19 intervenors?

20 MR. EYE: I will do my best to be
21 brief, Your Honor.

22 Let me try to address the points as they
23 I believe were raised, first of all by the
24 applicant. We're not challenging the rule. What we
25 want is compliance with the rule, demonstrated

1 compliance with the rule, not possible compliance
2 but compliance with the rule.

3 Performance-based standards are fine if
4 you know against what these standards must be
5 applied. What is the performance that is expected
6 in a given context?

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EXEMPTION 4 LUMINANT

15 That's is a performance based problem.

16 Existing plants and their compliance
17 with 50.54(hh)(2) is irrelevant here, because we
18 didn't intervene in those cases; we intervened in
19 this case. These regs didn't come into effect until
20 March of this year, the end of March of this year .
21 We intervened in this case; what people are doing in
22 other cases we don't really know. And it doesn't
23 matter. We want compliance here. We want
24 application of effective measures here. So what is
25 going on in other cases is really not particularly

1 relevant.

2 And it's particularly relevant when the
3 inner staff guidance that is still under development
4 that is supposed to provide the means by which to
5 determine compliance with 50.54 (hh) (2) hasn't been
6 released for purposes of application. It is still
7 being worked up, and yet we have staff ready to give
8 the imprimatur of approval for the submittal when
9 its own staff hasn't developed guidance to determine
10 its adequacy. We're jumping the gun at the very
11 least.

12 JUDGE YOUNG: Let me ask you, based on
13 some of the statements in the statement of
14 consideration and what the staff has said, the -
15 let's say the rule - what the rule requires is a
16 statement of - let's see, a description of the
17 program is provided and reviewed as part of the
18 license application, and subsequently more detailed
19 procedures are implemented by the applicant and
20 inspected by the NRC before plant operations.

21 If what the rule means is that you
22 don't actually have to specify the actual
23 procedures, you don't have to get into the level of
24 detail that is intended to come later, are you
25 disagreeing with that approach? Are you saying that

1 that approach did not allow for a meaningful
2 determination of adequacy at the program description
3 point in the process?

4 I understand that you are arguing that
5 the rule itself should be interpreted - the way we
6 should interpret the rule is that it requires the
7 things that you are arguing in order to allow for
8 meaningful analysis of whether the - a mitigated
9 strategy report is effective or is adequate to show
10 that the plant will effectively deal with various
11 damage states.

12 If the rule is interpreted as the staff
13 argues, with some support in a statement of
14 consideration, how is what you're arguing not
15 challenging the rule itself?

16 MR. EYE: The rule itself says that
17 there is supposed to be mitigative measures to deal
18 with loss of large areas of the plant due to fires,
19 explosions. There is nothing about what we are
20 saying here that challenges that rule either on its
21 face or as it is being applied. In fact it is being
22 sort of amended or modified on the fly by the
23 applicant and how it is interpreting it and by the
24 staff in essentially approving how it is being
25 applied by the applicant. Therefore --

1 JUDGE YOUNG: Well, what I was trying
2 to get you to do is to look at what the Commission
3 said in the statement of consideration. And they do
4 talk about a sort of two-step process, and the
5 details, all the procedural details aren't put in
6 until after the application is approved, basically,
7 before plant operation. Do you disagree with that
8 approach? Under that approach how do you view what
9 should happen at each stage?

10 MR. EYE: I do not conceptually
11 disagree with the two-step approach, but it depends
12 on how the first step is dealt with. If the first
13 step is dealt with in an attenuated truncated way
14 that doesn't address effectively the full spectrum
15 of damage states, for instance, then the second step
16 will likewise be defective.

17 If the first step however is done in a
18 way that does address the full spectrum of damage
19 states, then the later programmatic details of how
20 to carry that out should reflect that premise that
21 the full spectrum of damage states have been dealt
22 with so that at the programmatic or more detailed
23 level, the operational level if you will, that will
24 be carried out likewise in an effective way, because
25 it will have already built in to that detailed look

1 the idea that you have got the full spectrum of
2 damage states covered.

3 JUDGE YOUNG: And your argument that
4 the rule should be interpreted the way you are
5 arguing is basically that in order for effectiveness
6 to be analyzed and determined and assured, you have
7 to have that information? Right?

8 MR. EYE: The information about the
9 full spectrum of damage states?

10 JUDGE YOUNG: Right.

11 MR. EYE: Yes.

12 JUDGE YOUNG: Are there any other
13 arguments that you want to make, or that you want to
14 summarize, whichever the case may be, in support of
15 that particular interpretation of the rules?

16 MR. EYE: Well, first the statement of
17 considerations also says that NEI 06-12 only applies
18 to existing reactors. So it's applicability to new
19 reactors is problematic. So that is why we are
20 waiting for the interim staff guidance to emerge to
21 determine whether it interprets the requirements
22 under 50.54 (hh) (2) the same way as NEI 06-12 has
23 interpreted it. We don't know the answer to that
24 yet.

25 But as far as the two step approach I

1 think that we have effectively covered that. The -
2 I didn't hear the applicant reject the idea that
3 these mitigative measures are to be effective. But
4 I didn't hear the applicant suggest either that it
5 has considered a particular spectrum of damage
6 states. What really do their mitigative measures
7 apply to? We simply do not know the answer to that
8 question.

9 There has been no demonstration, no
10 really even attempt to demonstrate, that the
11 mitigative measures could be effective. The rule
12 itself says nothing - that is the regulation itself
13 I should say - says nothing about a pragmatic
14 approach. It says what it says, and it's hard to
15 read into the rule itself that there is some sort of
16 an attenuated basis upon which these mitigative
17 measures are to be considered.

18 JUDGE YOUNG: There is a reference I
19 think in NEI 06-12 to --

20 JUDGE ARNOLD: Well, there's a section,
21 a 10-page section, 4.0, actions for new plants.

22 MR. EYE: That is correct, and I've
23 seen that as well. And that has to be also measured
24 against the statement of considerations where it
25 says that NEI 06-12 is to be used for existing

1 reactors, and that the staff is directed to deal -
2 or to develop different guidance for new units.

3 May Dr. Lyman illuminate here a bit?

4 JUDGE YOUNG: Any objection?

5 MR. BIGGINS: Judge, this isn't really
6 a time for any expert testimony. This hearing
7 wasn't posted for it. We would expect that counsel
8 would present legal argument for the intervenors.

9 MR. FRANTZ: And the applicant agrees
10 with Mr. Biggins on that one.

11 JUDGE YOUNG: I think counsel would be
12 able to --

13 MR. EYE: ISG 16 is the document that
14 is being developed as a response to the Commission's
15 directive in the statement of considerations for the
16 adoption of 50.54 (hh)(2). It's still in the
17 development stage, and there have been meetings that
18 have been held in relation to that. Dr. Lyman
19 happened to attend some. In fact there have been
20 some as recently as I think last month - well,
21 September-October. And this is still in its nascent
22 stages. And yet if we do what the applicant and the
23 staff suggest it will render ISG 16 essentially
24 superfluous, because this plan, the mitigative
25 measures, will have already been deemed to have been

1 acceptable, notwithstanding anything that ISG 16
2 might require.

3 So again it's rushing to judgment. I
4 don't know the answer why the applicant decided on
5 May 22nd, 2009, to submit its mitigative measures
6 plan when it knew that ISG 16 was in the development
7 phase.

8 Now maybe they know something that we
9 don't about what ISG 16 in its final iteration will
10 say or not say. But nevertheless, I think for the
11 purposes of determining whether this meets the staff
12 guidance as far as acceptability, ISG 16 ought to at
13 least be allowed to run its course, be developed, be
14 released, and then look at it to determine whether
15 or not you can measure - you can determine
16 compliance with 50.54 (hh) (2).

17 At 74 Federal Register at 13958, Your
18 Honor, and this is the first column, about two-
19 thirds of the way down, it says, quote: Commission-
20 issued guidance parens safeguards information parens
21 to current reactor licensees on February 25, 2005,
22 and additionally endorsed NEI 06-12 provision 2 by
23 letter dated December 22, 2006, as an acceptable
24 method for current reactor licensees to comply with
25 the mitigative strategies requirement. These two

1 sources of guidance provide an acceptable means for
2 developing and implementing mitigative strategies.
3 The Commission is currently developing a draft
4 regulatory guide that consolidates this guidance and
5 addresses new reactor design.

6 JUDGE YOUNG: There is a citation in
7 the staff's response on the mootness issue, that may
8 also be - I couldn't find it in the staff's
9 response. But footnote 13 on page 7 of the staff
10 response on the mootness issue, refers to some
11 language on page 13957 that new reactor licensees
12 are required to employ the same strategies as
13 current reactor licensees to address core cooling
14 and spent fuel cooling and containment integrity. I
15 was just trying to find that sentence on the actual
16 page --

17 MR. FRANTZ: It's in the middle column,
18 Judge Young, in the middle of that column.

19 JUDGE YOUNG: Yes, I see, okay. I
20 wanted to give you an opportunity to respond to
21 that. It goes on to say the mitigative strategies
22 employed by new reactors as required by this rule
23 would also need to account for as appropriate the
24 specific features of the plant design or any design
25 changes made as a result of an aircraft assessment

1 that would be performed in accordance with the
2 proposed aircraft impact assessment rule.

3 MR. EYE: That sentence, Your Honor,
4 was not in the footnote that you just read.

5 JUDGE YOUNG: Right, it wasn't. But I
6 wanted to give you an opportunity to respond to the
7 sentence that the staff did quote.

8 MR. EYE: Well, I think it has to be
9 read in context with the sentence that follows it as
10 well, about the mitigative strategies employed by
11 new reactors as required, would as require to
12 account for as appropriate the specific features of
13 the plant design or any design changes made as a
14 result of aircraft assessment that would be
15 performed in accordance with the aircraft impact
16 assessment rule. And there are some citations to
17 the Federal Register Notice for that.

18 JUDGE YOUNG: Right, but let's assume
19 that the applicant would be complying with the
20 aircraft impact assessment rule, but it does seem
21 like the sentence that the staff has cited says that
22 they would employ the same strategies, and what
23 would be added on there is the aircraft impact
24 assessment rule which new licensees, which existing
25 licensees may not be required to comply with in the

1 same way.

2 MR. EYE: May I, Your Honor?

3 JUDGE YOUNG: Yes.

4 MR. EYE: No, I think that this is, in
5 grafting additional requirements for a new reactor
6 applicants, that current existing reactors don't
7 have to do. But since we've got 50.158 - or 50.150
8 in the mix now, and because the two rulemakings are
9 supposed to be complementary, that it makes sense
10 that whatever is submitted by the applicant - and
11 it's my information that the applicant hasn't
12 submitted anything that shows compliance with 50.150
13 - they have not submitted anything to show
14 compliance with 50.150, it's uncertain or unknown
15 whether that which they would submit under 50.150
16 would meet the requirements specified in that
17 sentence, that is, to show that their 50.54(hh)(2)
18 will work in relationship to whatever plant design
19 features or any design changes that results from the
20 aircraft assessment rule.

21 That is a part of this puzzle that isn't
22 on the table yet, because the applicant hasn't made
23 a submittal to show compliance with 50.150. And so
24 we don't know. So really there are two things
25 missing.

1 JUDGE YOUNG: But that is a different
2 rule. I think we can presume as this goes forward
3 that something will be submitted by the applicant
4 regarding 50.150, right?

5 MR. EYE: I presume, although I guess
6 we just have to wait and see. But will 50.150, what
7 is submitted there, satisfy what is in this Federal
8 Register notice? We don't know. Instead what the
9 applicant and staff ask panel to do is to
10 essentially make the assumption that whatever is
11 submitted under 50.150 will complement adequately
12 that which is already presented in the mitigating
13 factors. And this Federal Register notice seems to
14 direct that they be looked at in tandem, rather than
15 in isolation. And I think that it is just hard to
16 read those few sentences that we just covered in any
17 way that says, well, you can consider them in
18 isolation from each other; they're essentially
19 mutually exclusive. There is language throughout
20 the Federal Register notice that says 50.150
21 rulemaking, and 50.54(hh) rulemaking are
22 complementary, which makes sense. They ought to be
23 complementary. You are dealing with - you are in a
24 context where there is a fair amount of potential
25 for overlap.

1 JUDGE YOUNG: Has the time passed for
2 the applicant to file something under 50.150?

3 MR. EYE: I would think it has. I
4 don't really know the answer to that.

5 JUDGE YOUNG: There's no contention
6 alleging that they applicant should have by this
7 point, and does not contain anything on that, is
8 there?

9 MR. FRANTZ: Judge Young, if I can just
10 step briefly in here? First of all, it's the
11 obligation of the design and certification
12 applicant, in our case, to make the presentation, we
13 will simply adopt and incorporate by reference the
14 certified design. That is design certification
15 rulemaking. We don't have to submit anything. It's
16 going to be taken care of through the design
17 certification rule.

18 And I believe Mitsubishi has already
19 made that submission? Yes, Mitsubishi has already
20 made that submission on the design certification
21 application docket.

22 MR. EYE: Your Honor, the ISG 16
23 internal staff guidance - or interim staff guidance,
24 rather - has not been released. It's not been
25 approved. And it's intended to be used as a means

1 to judge the compliance with 50.54(hh)(2). That's
2 its function, for new reactors. And yet what
3 applicant and staff do is ask you to ignore that.

4 JUDGE YOUNG: Well, when that comes out
5 you have challenges, and that would be new
6 information that you could file a new contention on.

7 MR. EYE: Correct, and I am presuming
8 that that means that there would not have been a
9 ruling on whether 50.54(hh)(2) has been complied
10 with by the applicant. If there has already been a
11 ruling on it then --

12 JUDGE YOUNG: Ruling by?

13 MR. EYE: You, this panel.

14 JUDGE YOUNG: I don't think we are
15 going to be making a ruling on whether applicant has
16 complied with 50.54(hh)(2). All we're called upon
17 to make a ruling on at this point is whether you
18 have submitted an admissible contention. I don't
19 think we can transform that into our making a ruling
20 on whether the applicant has satisfied the
21 requirement of 50.54(hh)(2).

22 MR. EYE: I'm sorry, didn't mean to
23 interrupt. And because what you are called upon to
24 do now is make a ruling on admissibility, one of the
25 things that ought to inform your opinion in that

1 regard, I think, would be whether the staff guidance
2 has been measured against the submittal, the
3 mitigative measures submittal. This is an omission
4 contention, and we are simply saying that they
5 haven't done what needs to be done under the rule,
6 and the fact that there is an interim staff guidance
7 out there that may tell us whether the staff thinks
8 they've done what they need to do, is a piece that
9 ought to be considered, we think, in the context of
10 making a decision about the admissibility of this
11 particular contention.

12 But the importance of this contention,
13 really, I want to kind of get it back on track, we
14 tried to craft this contention very carefully with
15 the idea that a critical analysis of a plan to deal
16 with large fires and explosions ought to have enough
17 detail to it to know whether or not the performance-
18 based measures will perform under the spectrum of
19 possible damage states.

20 JUDGE YOUNG: Let me ask you another
21 quick question. Maybe we can try to wrap up on this
22 contention. One of the reasons we issued the last
23 order directing you to address the principles of
24 statutory construction is that that is really what
25 is required in looking at your argument, that the

1 rule requires these things. There is a principle of
2 statutory construction that you want to avoid an
3 absurd result. There is a rule that says you read
4 statutes and rules in this case according to their
5 plain meaning. There are a lot of others. But I
6 can't think of one that short of a rule having an
7 absurd result you should read a rule to accomplish a
8 desired result. In other words the rule may not say
9 what you want it to say, but unless - from a legal
10 standpoint, unless it - unless the interpretation of
11 the rule that your opponents argue would lead to an
12 absurd result, how can we construe the rule to mean
13 what you want it to say other than by applying your
14 logic? And is reading the rule as argued by the
15 applicant and the staff supported by quite a few
16 statements in the statement of considerations, sort
17 of in the nature of legislative history? Is reading
18 the rule as they argue - does that rise to the level
19 of leading to an absurd result? Or is it more for
20 you a result that you don't like but that is not
21 absurd?

22 And if it doesn't rise to the level of
23 being absurd, what other principle in statutory
24 construction can we refer to that would support your
25 reading of the rules? And I just want to give you

1 the opportunity to deal with that directly before we
2 close on this.

3 MR. EYE: Thank you, Your Honor.

4 Well, one canon of statutory
5 construction says that you interpret statutes or in
6 this case regulations to be consistent with the
7 intent of that body that drafted and adopted those.
8 It seems to me that it is hard to read the statement
9 of considerations, or the language of 50.54(hh)(2)
10 on its face and not conclude that the Commission
11 anticipates that mitigative measures will be
12 effective. That's a canon of statutory construction
13 that is cited at 63 NRC 483 at page 491, a 2006
14 case, in the matter of Hydro Resources.

15 JUDGE YOUNG: But then the next step is
16 that in order to be effective the rule requires
17 specific things, namely the definition of all the
18 damage states. Where is your authority for that?

19 MR. EYE: The authority for that, Your
20 Honor, is in the idea that these measures will be
21 effective. We don't know what damage states to
22 which they will be effective. We have no idea.
23 There is nothing in anything that has been submitted
24 by the applicant that says, these will work up to
25 this point, under these conditions, these mitigating

1 measures will be effective. Beyond this point we
2 make no representations as to effectiveness.

3 And it's sort of an arbitrary
4 delineation that the applicant has made and that the
5 staff has evidently endorsed that they can simply
6 say, these are our measures. We don't make any
7 representation whatsoever whether they will be
8 effective at a particular point on the damage
9 spectrum, but here they are. Is that effectiveness,
10 is that a way to demonstrate effectiveness?

11 JUDGE YOUNG: What do you have to say
12 to the arguments about performance based and
13 operational rules?

14 MR. EYE: Performance based really
15 means that you have - let's think about the typical
16 job description that has a set of performance-based
17 criteria. Well, the employee's job performance is
18 judged against the criteria that are specified. In
19 this instance the criteria are whether the measures
20 can be effective in the context of a large loss of
21 plant due to fires and explosions.

22 We don't know whether that is the case.
23 There has been no submittal by the applicant to
24 demonstrate that it would be effective. And the NEI
25 06-12 really suggest that it would not be effective

1 after some point is reached on the damage spectrum.

2 So performance-based standards are fine
3 as long as there are criteria against which to judge
4 the performance. Those criteria have not been
5 adopted by the applicant, or have not been included
6 in its submittal. The criteria that are extant now
7 in NEI 06-12 are intended to apply to existing
8 reactors, and we have this ISG 16 that is in the
9 process of being developed that would presumably
10 apply to new reactors.

11 So performance-based standards make
12 sense; they really do. But they don't make sense in
13 isolation. They have to be put into a context, and
14 without that context then the performance-based
15 standards don't - they are not meaningful. You
16 don't know to which they apply, under what
17 conditions they are going to work and when they
18 won't work.

19 So I think that it makes sense to have a
20 performance-based system, but perform against what
21 standards? Will the mitigative measures that have
22 been suggested work in the instance that counsel for
23 the applicants suggest,

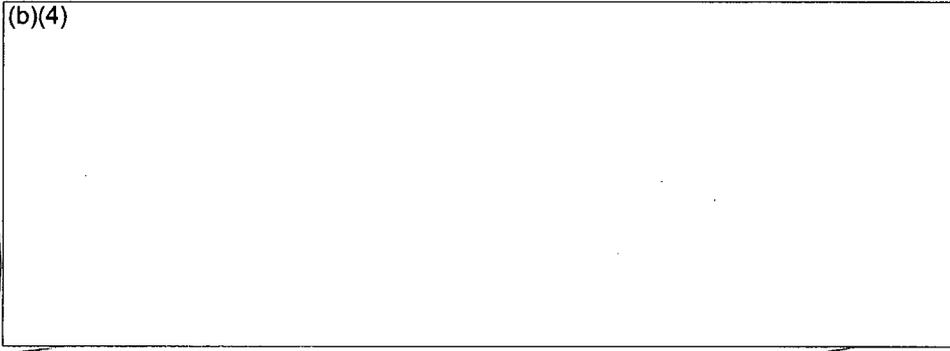
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Then you've got performance-based standards that are not being met, because if the performance-based standard is you can do makeup water to spent fuel pool and reactor core and deal with fires that are burning, now you've got some specification, as to how to be effective.

JUDGE YOUNG: Let me ask you one last question. Would you make the same sort of argument in court regarding the interpretation of the statute where if it - items comparable to the damage states that you are arguing should be in effect incorporated into the rule, would you make the same argument that a statute that doesn't contain those words should be construed to contain those words as you are making here? Or do you see this as being a different standard, because this is an administrative agency?

MR. EYE: No, I would make the same argument, Your Honor. And the reason is --

JUDGE YOUNG: Do you know of any court

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1 cases that have upheld that type of an argument?

2 MR. EYE: That would require that there
3 be a showing that there is - that a statute, even
4 though let's say it doesn't use the words that the
5 measure be effective, that it presumes that they be
6 effective?

7 JUDGE YOUNG: That the statute should
8 be read to add specific criteria that are not
9 contained in the statute?

10 MR. EYE: Well, if the one criterion
11 that we are talking about is effectiveness, then
12 yes, the courts would do that, because they are
13 going apply the canon of statutory construction that
14 says, we are not going to interpret a statute or
15 regulation that would not give effect to what the
16 drafters intended or what the adopting body
17 intended.

18 And it's hard to - again it's hard to -
19 would the NRC adopt 50.54(hh)(2) if they didn't
20 intend for those measures to be effective? I think
21 a court would say, yes, there has to be a showing of
22 effectiveness. Otherwise what you have are words on
23 a piece of paper that may or may not mean something
24 when the rubber meets the road and they have got to
25 be used, and they have got to be implemented in an

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1 effective way.

2 JUDGE YOUNG: I think we've probably -
3 I'll see if my colleagues have any questions. But
4 if you want to provide any citations or any case law
5 on that afterwards, I think it would be reasonable
6 to allow you to do that in say five days.

7 MR. EYE: Fine, and I would start off
8 my citations by again reiterating I the matter of
9 Hydro Resources.

10 JUDGE YOUNG: Right, I wrote that down
11 when you gave it to us before. But if you have any
12 others on adding specific criteria, reading into a
13 statute specific criteria that aren't specifically
14 listed there, I want to give you the opportunity to
15 file those. Could you do that within five days?

16 MR. EYE: Five business days?

17 JUDGE YOUNG: By next Tuesday?

18 MR. EYE: I don't get back to my office
19 until next Wednesday.

20 JUDGE YOUNG: When would be good for
21 you?

22 MR. EYE: End of the week.

23 JUDGE YOUNG: Okay.

24 MR. EYE: Like a week from tomorrow.

25 JUDGE YOUNG: Like a week from

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1 tomorrow?

2 MR. EYE: I want to make sure my
3 assignment is clear here. You want me to find cases
4 that say that a court would engraft language, for
5 example, effectiveness language, even though the
6 statute might not say these measures ought to be
7 effective?

8 JUDGE YOUNG: Right, and graft specific
9 criteria for judging effectiveness into a statute
10 that doesn't contain that language within it?

11 MR. EYE: I'll do my best.

12 JUDGE YOUNG: If you have any support
13 for that. That's essentially what you are arguing,
14 so if you have any support for that in any case law
15 and statutory construction, I want to give you the
16 opportunity to file that.

17 MR. EYE: I'll do my best, Your Honor.

18 JUDGE YOUNG: Okay, thank you.

19 MR. FRANTZ: Judge Young, can I just
20 correct the record on one area? Mr. Eye said that
21 NEI 06-12 rev 2 is not applicable to new reactors,
22 instead the staff in the units were developing
23 guidance for new reactors. LB in fact has issued in
24 Rev 3. I do believe that any new reactor can still
25 apply Rev 2 of NEI 06-12 to it. And in this regard

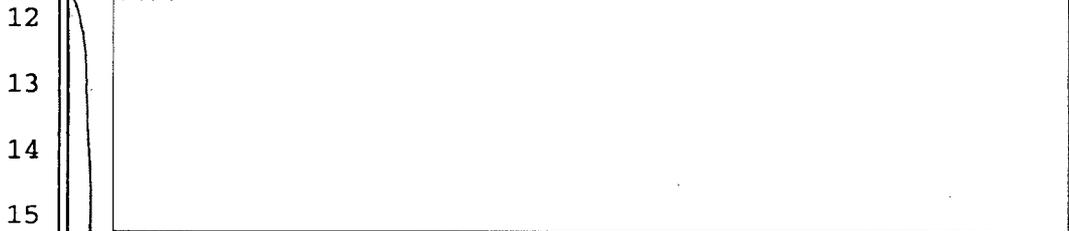
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1 Rev 3 does not employ new or more stringent criteria
2 as alleged by Mr. Eye; it's just the reverse. The
3 new reactors have features, design features in them,
4 that make unnecessary in some cases some of the
5 strategies that were developed for the existing
6 operating reactors.

7 Just a case in point, for example, new
8 reactors typically employ what's called divisional
9 separation where in one area of the plant you only
10 have one division, and anything dealing with other
11 divisions are in other areas of the plant.

12 (b)(4)



16 We have not, at Commanché Peak, we have
17 not done that, even though we do have this
18 divisional separation in our design. We are using
19 Rev 2, and therefore we are actually employing more
20 stringent criteria to us than we might otherwise
21 need to.

22 JUDGE YOUNG: Anything further on
23 contention one?

24 MS. VRAHORETIS: Yes, just to clarify,
25 Your Honor.

1 The staff has not made any finding
2 regarding mitigative strategies report in this case.
3 Any such finding would be in the staff's SER, which
4 is not final and has not been issued. And I think
5 maybe Mr. Eye misunderstood that the process is
6 still ongoing, and maybe that's why he believes that
7 some future staff guidance, the interim staff
8 guidance as he's referenced it, is still draft and
9 has not been finalized, is being rendered
10 superfluous. He may misunderstand the process.

11 If and when that interim staff guidance
12 becomes final and is used by the staff, if that
13 gives rise to an RAI that generates new information,
14 that would be possibly the opportunity for an
15 intervenor to submit a new contention. But the fact
16 that staff may be working on guidance is not a
17 reason to hold this contention in abeyance or defer
18 ruling on it, because otherwise no contention would
19 ever reach resolution, because the staff is always
20 working on guidance, and always working on
21 something.

22 And also I would just note that where
23 Mr. Eye wants more detail at this point, that is not
24 required by your rule, and a contention that
25 advocates stricter requirements than the Agency

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1 rules impose or otherwise seeks to litigate generic
2 determinations that the Commission has made is
3 inadmissible.

4 And this contention is inadmissible.

5 JUDGE YOUNG: Let's take five minutes,
6 and come back to contention two.

7 (Whereupon at 2:27 p.m. the proceeding
8 in the above-entitled matter went off the record to
9 return on the record at 2:37 p.m.)

10 JUDGE YOUNG: Okay, all right.

11 MR. EYE: Your Honor, will you open
12 this part?

13 JUDGE YOUNG: I think we just should
14 stay in closed until we get to the point where
15 someone suggests we open it. Because I think the
16 same principles apply to all the contentions.

17 MR. EYE: Your Honor, may I have a
18 continuing objection then?

19 JUDGE YOUNG: Right.

20 MR. EYE: Thank you.

21 JUDGE YOUNG: Have we lost Mr.
22 Stapleton? Should we wait for him? Nobody talk
23 about any safeguards until he gets back?

24 Okay, let's go ahead, if you think there
25 is anything that we need to think about, feel free

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1 to interrupt. Staff, is that all right with you if
2 we don't wait for Mr. Stapleton to get back?

3 MS. VRAHORETIS: That's fine, Your
4 Honor.

5 JUDGE YOUNG: Anybody else?

6 MR. FRANTZ: No objection.

7 JUDGE YOUNG: On contention two, let's
8 assume that all your arguments on contention one
9 we've heard and they don't need to be repeated on
10 any party's part. Go ahead, Mr. Eye.

11 MR. EYE: Thank you.

12 This is again predicated on the idea
13 that there needs to be a description of full
14 spectrum damage states in order to do effective
15 event guidelines. And this is a contention about
16 the various aspects of the mitigative strategy table
17 that are essentially deferred to some future action.

18 I would draw the panel's attention to
19 the footnote that we have put together, it's
20 footnote 7, it begins on page 12 of our contentions,
21 but take a look at the footnote as it continues over
22 onto page 13. The first one in that footnote is -
23 comes out of the MST, and it's 1.2.11. It says that
24 somewhere down in the future, in the future, the'
25 applicant will, quote, establish supplemental

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1 methods responding to events.

2 What on earth does that mean? And are
3 there methods now, is this some sort of recognition
4 that the methods that they have developed to this
5 point are not effective, because they intend to
6 develop supplemental methods for responding to
7 events.

8 And that brings up the other part of
9 this contention: events. What does that mean? What
10 is the event or the events by which we are to
11 determine whether their MST are effective?

12 We don't know the answer to that. Even
13 the applicant in its brief, page 19, in response to
14 our contentions, says something to the effect that a
15 flexible response is intended to address a variety
16 of extreme conditions with the reactor and the spent
17 fuel pool; and that's at page 19.

18 What is this variety of extreme
19 conditions? They posit the extreme conditions here.
20 What are those? And do the extreme conditions that
21 they reference but don't describe, covered
22 effectively by their mitigative strategies? We
23 don't know the answer to that question, and their
24 submittal doesn't answer that question either.

25 Along with that what is the range of

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1 extreme conditions that their flexible response is
2 intended to address? Again, this is verbiage from
3 their brief. What the applicant offers up for your
4 consideration in this regard is meaningless unless
5 it is put into a quantitative or qualitative, or
6 both, context. Instead it appears that what is the
7 intent here is the provide you a bare bones approach
8 with the idea that at some later date, unspecified
9 later date, things like establishing supplemental
10 methods for responding to events, whatever that may
11 mean, will be developed. And is that not a
12 recognition that perhaps the methods for responding
13 to events now is inadequate, if they are in fact
14 having to develop, or they are committing to
15 developing, supplemental methods of responding to
16 events. Supplementing what? What is it that needs
17 to be supplemented? Don't know the answer to that
18 question.

19 The event guidelines, it's a term, it
20 looks like on its face it's sort of innocuous, event
21 guidelines. But in fact event guidelines are the
22 basis for action. They define what actions will be
23 taken. The event guidelines inform how to approach
24 a particular problem.

25 So event guidelines, undefined. Event,

1 undefined. And this will come as no surprise to
2 you: we contend that whatever their event guidelines
3 are ought to be measured against whether they are
4 effective in the full spectrum of damage states that
5 could be confronted.

6 JUDGE YOUNG: How are you - again, I
7 don't want to open this whole door, everything
8 again, but there are several places in the
9 statements of considerations where the Commission
10 seems to be contemplating this sort of thing. I
11 don't know that they ever use the word, event
12 guidelines. But how do you deal with those?

13 MR. EYE: Event guidelines, well, for
14 example, is the event one where there is one fire or
15 10 fires? Or is the event one where there are 10
16 fires plus the loss of spent fuel cooling capacity
17 and reactor cooling capacity? Those are events.

18 JUDGE YOUNG: How do you deal with the
19 Commission's statement that the procedures, the
20 specifics, will be filled in later, the specific
21 procedures and so forth will be filled in later?

22 MR. EYE: I don't have any problem with
23 that as long as the beginning point allows some
24 meaningful definition for what's supposed to be
25 filled in later. There ought to be a context to

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1 determine what is filled in later; that's absent.

2 Moreover there is no specification as to
3 what fire model has been used to determine an event
4 guideline. What fire model are they applying here?
5 Because if it's the fire model that they discussed
6 in their FSAR it's way short of dealing with a large
7 fire or explosion. I mean it doesn't even come
8 close to it.

9 So what fire model are we talking about?
10 It's not specified whatsoever, and this is not a
11 small matter, because in fact there is an
12 expectation, a rather specific expectation, that
13 some of these event guidelines will be dealt with in
14 a more developed way sooner. And I'll give you a
15 very good example.

16 There is an expectation that
17 50.54(hh)(2) will deal with, quote, treatment of
18 uncertainties, parentheses, hot shorts, spurious
19 actuation, comma, actual fire spread, comma, shock
20 effects, comma, estimated physical damage footprint,
21 end of parentheses, which overly complicate the
22 assessment and are best address through
23 50.54(hh)(2):

24 JUDGE YOUNG: Where again were you
25 reading from?

1 MR. EYE: Well, I'm reading from our
2 brief, but this is a quotation from NEI 07-13,
3 provision seven, May 2009. Page 10 of our
4 contentions.

5 It continues, that 50.54(hh)(2) requires
6 all new plants to develop mitigation strategies to
7 address large areas of the plant due to fires,
8 explosions from any cause. What is important here
9 is that you can go through the mitigating strategies
10 that have been offered up by the applicant, and it's
11 a fairly tedious exercise, but it's worth doing, and
12 you can't find any reference to hot shorts, spurious
13 actuations, actual fire spread, shock effects, or
14 estimated physical damage footprint.

15 Now the NEI staff has put together 07-13
16 said we don't have to deal with that in the aircraft
17 impact design rule. Why? Because they are dealing
18 with that down the hall in the 50.54(hh) department.
19 And yet are any of these specifics covered? No.
20 And is this an event - or is this a future action
21 that will be contemplated to be dealt with under
22 some event guideline that is committed to for future
23 action? Don't know, but once again, these are gaps,
24 not that are trivial. That laundry list of things
25 that came out of NEI 07-13 were important enough

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1 that the authors called them out specifically and
2 said, these have to be dealt with in the context of
3 fires and explosions. And if we go through their
4 list of future commitments, maybe those - maybe
5 they're buried in there somewhere, or camouflaged in
6 there. But they are not otherwise in their
7 mitigating strategies.

8 So are we -- we're shooting somewhat at
9 a moving target here, where the target is not even
10 revealing itself. So the premise of the second
11 contention really is that their future commitments -
12 and conceptually I don't disagree that future
13 commitments if they are reasonable can be put off to
14 some future date, but it's still got to be judged
15 against whether or not it's going to be effective in
16 the full spectrum of damage states.

17 JUDGE YOUNG: Anything further?

18 MR. EYE: I think that for now will do
19 as far as my summation.

20 JUDGE YOUNG: Mr. Frantz?

21 MR. FRANTZ: Let me try to address
22 point by point some of the issues raised by Mr. Eye.

23 First of all it's critical the use of
24 the term, supplemental measures, in item 1.2.11 of
25 the mitigative strategy statement. I think all that

1 means is that these are the strategies that we've
2 developed for pooling fuel. They're something
3 beyond what is described here really in the report
4 itself.

5 What this means it that we need to
6 establish the procedures.

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8 (b)(4)
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Exemption of Lumbering

12 He also was critical of the use of the
13 term, extreme conditions, the use of the term,
14 events. He suggested that we needed to define our
15 fire model. These are all nothing more than a
16 variation of his existing theme that we need to
17 identify damage states, and I think we discussed
18 that at length earlier today that we don't need to
19 identify damage states. We don't need to define
20 these extreme conditions, these events, or to
21 specify fire models.

22 JUDGE YOUNG: Let me ask you maybe what
23 is an obvious question. The event guideline, that
24 term is used in your mitigative strategies table.
25 And the 52.80 does require a description and plans

1 for implementation of the guidance and strategies
2 intended to maintain and restore - et cetera. I can
3 see the different between planning and
4 implementation. But describing guidance and
5 strategies and providing plans for implementation, I
6 could see that as legitimately including something
7 called event guidelines. I mean that is more in
8 keeping with sort of the plain reading of the rule.
9 Then the question becomes, what does description
10 mean? What does the word, plan, mean?

11 MR. FRANTZ: Yes, I think first of all
12 the event guidelines are basically analogous to
13 procedures. And I might add that this is not a
14 novel concept embodied in 50.54(hh)(2). There are
15 numerous operational programs that are described in
16 our application including the emergency preparedness
17 program, the quality assurance program, and there
18 are perhaps a dozen or I guess more than a dozen
19 actual other programs are at issue, production
20 program. And what the regulations basically require
21 for all these operational programs is that they be
22 described at a certain level of detail with staff
23 guidance, for example, that describes the amount of
24 information we need to put into our application.
25 But in terms of actually developing the implementing

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1 procedures, and providing training to our employees
2 on those procedures, that does not need to be done
3 at this stage of the process. Instead it's done
4 during construction, after we know for example what
5 the detailed specifications are for equipment; after
6 we have the organization for the operation finalized
7 in more detail than is necessary now at this stage
8 in the process. So this is typical of all of our
9 operational programs.

10 JUDGE YOUNG: I guess what I'm having
11 trouble with here, I can see procedures being
12 different than descriptions and plans for
13 implementation. I can see implementation being
14 different than description and plans for
15 implementation. But the description of plans, the
16 description and plans for implementation of that
17 guidance and strategy, I think we've discussed
18 before that the level of detail comes into play
19 here. And in a sense this is more arguably part of
20 what's stated in the rules. And I don't have a
21 clear idea what the -- from reading the rule that
22 there is anything that tells me well this is - this
23 level of detail is not required at this stage, this
24 level of detail is only required later. That much -
25 that's something where I can see an argument being

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1 made based on the rule much more effectively than
2 the argument that things like damage states would
3 have to be included at this point.

4 And what I understand you to be saying
5 is that the general practice is that this level of
6 detail, these types of descriptions or whatever you
7 want to call this level of detail, is not required
8 in practice, and that there may be guidance
9 documents that address that. But what supports your
10 interpretation of this rule that something called
11 events guideline could be what you state?

12 MR. FRANTZ: This is why I think NEI
13 06-12 is so valuable, because it lays out the level
14 of detailed information that is necessary for the
15 application, and we have followed that guidance in
16 developing our application. It doesn't mean that
17 staff may, for example, have an RAI that maybe want
18 additional detail in one area rather than another
19 area. That always happens as part of the normal
20 give and take of an application process. But I
21 think in general what we have done is follow the NEI
22 guidance on level of detail. And therefore in
23 general, I think we have the right amount of detail
24 for our application, with the remaining implementing
25 details for procedures to be developed later during

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1 construction.

2 JUDGE YOUNG: And your authority for
3 that, apart from NEI 06-12?

4 MR. FRANTZ: Well, the fact that the
5 Commission has endorsed, and accepted that in the
6 statement of considerations for the final rule.

7 JUDGE YOUNG: Are there any particular
8 parts of that document that you can point us to on
9 that? You may have to some extent in your argument.
10 I don't see - you refer to response capability --

11 MR. FRANTZ: A lot of this is embodied
12 in the details obviously of 06-12, but for - let me
13 just pick one example.

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(b)(4)

Exemption 4 / 6 NEI

(b)(4)

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EXEMPTION 4 LUMENANT F NEI

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EXEMPTION 4 LUMBERMAN & NEAL

JUDGE YOUNG: Tell me what an event guideline is as compared to a procedure?

MR. FRANTZ: I'm not sure there is a whole lot of difference. Let me consult my client.

(Counsel consults with client)

JUDGE YOUNG: Do you have a definition of it anywhere?

MR. FRANTZ: Not that I'm aware offhand. Essentially it's called a guideline because again this is a flexible response strategy. We aren't trying to predict beforehand the exact

1 nature of the event. And therefore for example we
2 can't tell our employees to go to the southeast
3 corner of the spent fuel building, because maybe
4 that is where the fire and explosion is occurring.
5 Maybe they need to go to the northeast corner. We
6 won't know that until we actually have the event
7 itself. Therefore these are described as
8 guidelines, because they guide how the employees,
9 responders, deal with the event in general, rather
10 than telling them specifically where to go.

11 JUDGE YOUNG: Describe what an event
12 guideline would sound like. Would it be more in the
13 nature of, in certain types of events you do X, Y
14 and Z, or can you tell me what - I mean procedure is
15 more clear. You do XYZ. Event guideline, what did
16 it sound like?

17 MR. FRANTZ: These are still to be
18 developed of course, at least for new plants. But I
19 think in general, and I ask my people to correct me
20 if I'm wrong here, that you'd have one for various
21 types of scenarios, for example, a scenario
22 involving the spent fuel pool, a scenario involving
23 the containment, and the fuel in the containment.
24 And for each of these different scenarios you would
25 describe in general what your sources of water are,

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1 what your available equipment or systems may be, and
2 how they can be used to help mitigate the event.

3 JUDGE YOUNG: But that would not be the
4 initiating event. The event would be the -
5 basically the spent fuel pool had been hit and there
6 is X amount of damage.

7 MR. FRANTZ: I think it is probably
8 more symptom based.

9 JUDGE YOUNG: More what?

10 MR. FRANTZ: Symptom bases, you look at
11 what the symptoms are and then you respond to those,
12 or condition based.

13 JUDGE YOUNG: So there's guidelines for
14 personnel to follow in doing what they're supposed
15 to do to address whatever has happened?

16 MR. FRANTZ: That's correct. And again
17 they have to be flexible because we can't predict
18 beforehand every permutation of events. We have to
19 have a flexible guideline that can deal with
20 multiple types of events.

21 JUDGE YOUNG: I'm assuming that's a
22 term of art somehow. Do you know where it came
23 from? What the origin of that particular term is?

24 MR. FRANTZ: I do not offhand. There
25 are other kinds of guidelines which are somewhat

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1 similar. For example there are severe accident
2 mitigation guidelines that tell operators how to
3 deal with severe accidents that occur in the plant.
4 There's emergency operating procedures that are a
5 little bit more detailed, that deal with again the
6 symptoms in the core and how the operator respond to
7 those.

8 JUDGE YOUNG: Go ahead.

9 MR. FRANTZ: Mr. Eye also quoted from
10 NEI 07-13, statement to the effect that uncertainty
11 is involving hot shorts, shock events, and certain
12 other events to be taken care of under the
13 50.54(hh)(2) rule. First of all I might add that
14 that is a guideline developed for the aircraft
15 impact assessment rule; it's not a guideline for
16 50.54(hh)(2). In any case even if you assumed that
17 it is applicable to 50.54(hh)(2) I think the
18 statement has been taken out of context by the
19 intervenors. I think all it indicates is that there
20 was no reason to account for this, in doing the
21 aircraft impact assessments, because the
22 uncertainties are relatively difficult to predict
23 and relatively minor compared to the overall event.
24 And typically for accident analysis you do realistic
25 evaluations.

1 But in context of 50.54(hh)(2) I think
 2 all that statement in the guideline from 07-13
 3 indicates is that because we have flexible
 4 strategies, those flexible strategies are inherently
 5 going to be able to account for these kinds of
 6 incidents. That's all it means. It doesn't mean we
 7 need a specific evaluation of hot shorts, or a
 8 specific evaluation of shock effects. All it means
 9 is that the flexible strategies are capable of
 10 dealing with these types of events.

11 JUDGE YOUNG: So that is the case?
 12 They are?

13 MR. FRANTZ: I believe that, yes, I
 14 think it's fair to say that we can account for hot
 15 shorts. For example I mentioned the two principles
 16 of separation and diversity .

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 21 (b)(4)
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EXEMPTED BY LUMINANT

1 independent of electrical power.

2 JUDGE YOUNG: Anything further?

3 MR. FRANTZ: No, I do not.

4 JUDGE YOUNG: Ms. Vraholetis?

5 MS. VRAHORETIS: Just briefly, Your

6 Honor:

7 I just wanted to clarify, as counsel for
8 the applicant did, that the guidance document, NEI
9 07-13, pertains to rule 50.150, and not to
10 50.54(hh)(2). And when you ask where would the
11 details be found, guidance documents help determine
12 the details that are needed to comply with the
13 regulation. And the Commission has specifically
14 endorsed NEI 06-12, that endorsement is at 74
15 Federal Register 13958, as an acceptable means of
16 providing the detail that is necessary. And at 74
17 Federal Register 13957 stated that new reactor
18 applicants would be required to use the same
19 strategies as current reactor licensees to address
20 core cooling, spent fuel pool cooling, and
21 containment integrity.

22 But once again ultimately the staff will
23 make a determination as to whether or not the
24 requirements are met.

25 Thank you.

1 JUDGE YOUNG: Anything further, just to
2 wrap up on two?

3 MR. EYE: Thank you, Your Honor.

4 A couple of things. Counsel for the
5 applicant mentioned that event guidelines, in
6 response to your question, Your Honor, trying to
7 define event guidelines that event equates to, I
8 think the word he used was a symptom. Well,
9 symptoms come in all varieties. Some symptoms are
10 minor; some symptoms are severe. What events do
11 their mitigating strategies address, minor symptoms
12 or the severe symptoms? We don't know the answer to
13 that question.

14 He picked out one aspect of that
15 reference that I made to NEI 07-13, where it
16 anticipated that there would be very specific kinds
17 of questions answered in the context of
18 50.54(hh)(2). He mentioned that there is no need to
19 worry about hot shorts, because they have all kind
20 of pumping capacity to deal with. But also in that
21 excerpt fro 07-13 was an expectation that actual
22 fire spread would be covered, and it wasn't. Actual
23 fire spread is not actually discussed in NEI 06-13,
24 or the applicant's submittal for that matter; just
25 not there.

1 So the left hand and the right hand here
2 are supposed to be operating in a complementary
3 fashion, because these are complementary
4 rulemakings. What one misses, the other one is
5 supposed to pick up. The NEI guidance at 07-13
6 calls out several very specific things that it
7 expects will be covered in the fires/explosions reg,
8 and the submittals under it. It hasn't been done.

9 Now I guess we can excuse that if we
10 decide that it's not an important thing to be dealt
11 with. But the authors of 07-13, and say, we are not
12 dealing with these aspects, like actual fire spread,
13 because that's being dealt with by our complementary
14 counterparts that are dealing with fires and
15 explosions.

16 So I think that this, instead of
17 undermining our argument, actually I think it
18 supports our argument. Symptoms: how do you treat
19 the symptoms? You can't treat the symptoms until
20 you know what the symptoms are, and you can make
21 some sort of a realistic assessment, a triage of
22 those symptoms. And here the one-size-fits-all
23 mitigative strategies that are offered up by the
24 applicant are to fit some symptoms - we don't know
25 what - but they are certainly not intended to cover

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1 all symptoms.

2 JUDGE YOUNG: Getting back to what your
3 original argument was, I just re-read it, and what
4 you actually seem to be saying in the Contention 3
5 is not that you're challenging the lack of LOLA
6 guidelines or event guidelines at this point, but
7 that there is a failure to specify whether these
8 guidelines, and event guidelines, will be developed
9 based on a damage footprint of sufficient extent and
10 severity to accommodate the likely impact of large
11 commercial airliners and/or the full spectrum of
12 damage states.

13 So in a sense it's the same contention
14 as Contention 1, except that it's challenging the
15 particular part of the mitigation strategy report
16 that the table - that refers to the guidelines, and
17 fails to specify the damage footprint that the
18 guidelines will be based on. So I mean you are not
19 really challenging that the event guidelines are not
20 here at this point.

21 MR. EYE: Well, we are challenging them
22 on the basis that the event guidelines don't mean
23 anything without context, because we do say there is
24 no way to determine whether they are going to be
25 effective under the full spectrum of damage states.

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1 Don't know the answer to that, and Your Honor's
2 question about, what does event guideline mean,
3 yielded the answer, this is like a symptom. And I
4 don't necessarily agree with that, although I think
5 we could probably if we thought about that, maybe
6 come up with some other description. But symptom
7 is, for the sake of argument, okay.

8 JUDGE YOUNG: The real challenge, the
9 way you've written your contention and in your
10 pleadings, is to the fact that there is no
11 specification of whether they are going to be
12 developed based on damage footprint, basically
13 saying damage states that you are challenging in
14 Contention 1, or lack of specification of damage
15 states.

16 MR. EYE: As I mentioned earlier, I
17 don't disagree with that characterization. But to
18 just - to expand on it, or just explain it, it
19 really does go to the lack of definition of what
20 event guidelines mean. To us event guidelines ought
21 to mean a specification of events in the full
22 spectrum of damage states. And I think that that is
23 a reasonable reading of the contention, that those
24 event guidelines need to be developed with that
25 premise, that there are a spectrum of damage states

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1 that need to be considered, and the event guidelines
2 are developed accordingly.

3 But it developed into an interesting
4 colloquy between Your Honor and counsel for the
5 applicant when you asked the question. I think
6 it's a question that needs to be asked about, what
7 does this mean. I tried to do that in the
8 contention; I didn't do a very good job of it. But
9 that is really one of the questions that comes out
10 of this, is what - the term, event guidelines,
11 sounds again almost innocuous, but it means a lot,
12 particularly if we do analogize it to a symptom.
13 Some symptoms you can ignore; some symptoms you need
14 to get attention.

15 JUDGE YOUNG: Anything further on
16 Contention 2?

17 MR. FRANTZ: No, Your Honor.

18 JUDGE YOUNG: Okay, let's move on to
19 three.

20 And I think that this one does not
21 specifically refer back to 1, is that correct?

22 MR. FRANTZ: That is correct.

23 MR. EYE: Well, it does - to a certain
24 extent, Your Honor, it does. It does - at least in
25 part refer back to the full spectrum of damage

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1 states. But it's only a part of it. It can - it's
2 not - it can be independent of that. But it doesn't
3 need to be analyzed necessarily strictly in the
4 context of full spectrum of damage states. But --

5 JUDGE YOUNG: I think you asked us to
6 go back and incorporate your arguments on Contention
7 1?

8 MR. EYE: I believe that's correct. I
9 think I did that quite deliberately.

10 JUDGE YOUNG: Okay.

11 MR. EYE: Essentially in Contention 3,
12 Your Honor, the applicant wants to have essentially
13 a pass on this one by simply incorporating its
14 existing dose assessments for units #1 and #2. And
15 there is no showing, in the mitigative strategies
16 that have been offered up, that this model was
17 developed with 50.54(hh)(2) in mind. Certainly
18 there is no indication that there dose assessments
19 were developed on the basis of a full spectrum of
20 damage states and the radiation exposures that would
21 occur as a consequence of that; or recognition of
22 what fighting a reactor fire can do to emergency
23 personnel. And that is essentially we believe a
24 necessary aspect of 50.54(hh)(2), that is, that part
25 of the effectiveness of that will be to determine

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1 radiological impact on emergency responders, and
2 others that might be in the vicinity of course, but
3 particularly when it comes to the responders that
4 have to show up on site to deal with this.

5 There is no dose assessment that has
6 been done by the applicant, at least that has been
7 offered in the context of mitigative strategies,
8 that could inform your judgment as to whether their
9 dose assessment that they've adopted from their
10 units #1 and #2 will be effective, and that is a -
11 what we believe is a contention of omission that
12 needs to be dealt with in order to demonstrate that
13 the regulatory requirements have actually been
14 addressed.

15 JUDGE YOUNG: Does that conclude your
16 argument?

17 MR. EYE: Yes.

18 JUDGE YOUNG: Mr. Frantz?

19 MR. FRANTZ: Let me take the last point
20 that he raised first. He said that our application
21 does not have any dose assessment. That's
22 absolutely correct. We are not required to have a
23 dose assessment as part of our application. There
24 is nothing in the regulation that requires a dose
25 assessment. There is nothing in the statement of

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1 consideration that would require us to provide a
2 dose assessment. And there is nothing in NEI 06-12
3 that require us to provide a dose assessment.

4 Therefore again he's trying to rewrite
5 the regulations, and that constitutes an
6 impermissible challenge to the regulations.

7 With respect to the model itself, again,
8 we aren't actually required to supply the model as
9 part of our application. Instead as part of the
10 guidance document it says that we should evaluate
11 our model to make sure it can be used. Well, we are
12 using the existing emergency plan model for dose
13 assessments that was developed for unit #1 and #2.
14 That accounts obviously for application of the
15 security rule, (b) (5) (B) which deals with fires and
16 explosions. There is no reason to believe that the
17 models we are using for unit #1 and #2 obviously
18 would not be applicable to #3 and #4. And the
19 intervenors have identified nothing that would raise
20 a question regarding the use of the existing dose
21 assessment models for #3 and #4.

22 JUDGE YOUNG: Anything further?

23 MR. FRANTZ: No.

24 JUDGE YOUNG: Staff?

25 MR. BIGGINS: Thank you, Your Honor.

1 James Biggins for the staff.

2 The staff responds to this contention
3 and points out that the intervenors have not
4 provided a concise statement of alleged facts or
5 expert opinions that support their position. I'd
6 specifically point out that the intervenors are
7 assuming that responders will face conditions that
8 exceed those addressed in the emergency plan.
9 However they don't provide any factual or expert
10 support for this argument.

11 The emergency plan actually includes, as
12 a general emergency class event, a terrorist action
13 that leads to a general emergency, the highest of
14 four classes of emergency event. The emergency
15 plan, general emergency, includes conditions where
16 two fission product barriers are breached, and a
17 third barrier is compromised, or has failed.

18 This contention suggests that doses to
19 onsite responders will not be controlled for this
20 whole spectrum of damage states. The initiating
21 cause of a general emergency is not the controlling
22 factor for a radiological dose assessment during an
23 emergency. Rather, the loss of the fission product
24 barrier drives the dose assessment.

25 So the primary point that I'd like to

1 make is that in the mitigative strategy table item
2 1.3.3.3, the applicant relies on the existing
3 emergency plan for controlling dose to onsite
4 respondents, and the intervenors do not provide any
5 support for their assertion that reliance on that
6 emergency plan is insufficient.

7 Thank you.

8 JUDGE YOUNG: Going back to the
9 intervenors for a moment, you argue that this is a
10 contention of omission. And I'm understanding from
11 that that the omission is a substantiation of the
12 assertion that the existing dose projection models
13 from the emergency plan are adequate to project
14 doses to onsite responders under the condition
15 envisioned for the event as specified in MST
16 1.3.3.3.

17 The sort of structure of your contention
18 seems to fall into this, you state that they are
19 contentions of omission; therefore you don't need to
20 - I'm assuming you would make the same argument here
21 - therefore you don't need to provide the same kind
22 of expert support or fact that you would if it were
23 a regular contention.

24 I don't think you would disagree that
25 you would have to show that the thing you are

1 alleging is missing, is required by law, and that
2 there is a reason that it has to be contained in the
3 application.

4 So do you want to just - I'm trying to
5 look quickly just to see whether you say it's a
6 contention of omission. You say, the table is
7 deficient because it fails to substantiate -- to the
8 extent that we look at it as a regular contention,
9 you might want to address the arguments made by
10 applicant and staff with regard to support for the
11 contention, and to the extent that you are
12 contending it's a contention of omission, could you
13 address how it's required by law, and the reason
14 that it needs to be included. And that would be the
15 substantiation of the assertion that the existing
16 dose projection models in the emergency plan are
17 adequate. And you might give us that response in
18 light of what I think the applicant in particular, I
19 think the staff may have mentioned this also, but
20 that the emergency plans contemplates terrorist
21 activity - I'm paraphrasing here - but on the same
22 basic level as we are talking about here. I think
23 that's what I understood. Is that a correct
24 paraphrase?

25 MR. FRANTZ: That is correct.

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1 MR. EYE: Yes, it does, but it doesn't
2 say anything about the spectrum of damage states
3 that are to be expected.

4 JUDGE YOUNG: Now do you talk about
5 damage states here?

6 MR. EYE: Yes, ma'am, I do, the last
7 sentence of the contention. In bold face.

8 JUDGE YOUNG: Okay, the applicant has
9 not - further, the applicant has not established
10 that the dose assessment models are adequate to do
11 the assessment in any event, taking into account the
12 full spectrum of damage states.

13 But the thing that you are alleging is
14 missing is the substantiation that the existing dose
15 projection models are adequate to protect doses - to
16 project doses to onsite responders?

17 MR. EYE: Correct, Your Honor.

18 First, this is not a gratuitous act
19 that the applicant has undertaken. I mean they've
20 done it because it's in their mitigative strategies
21 table of 1.3.3, where they say that they are going
22 to evaluate existing dose projection models for
23 their adequacy in projecting doses to event
24 responders on site under the conditions envisioned
25 for this event.

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1 What are the conditions that are
2 envisioned for this event? We don't know the answer
3 to that; they don't say. But I think it's important
4 to realize that what they want to do is add two new
5 reactors that are actually larger than #1 and #2 in
6 terms of their nominal capacity, or rated capacity,
7 are larger than #1 and #2, and this panel has
8 already admitted a co-location contention that says
9 you need to take into account damage at #1 for
10 effects at others.

11 JUDGE YOUNG: Let me interrupt you,
12 because I'm not following here. If it's a
13 contention of omission, the alleged omission has to
14 be required by law, and you have to give a reason
15 why it should be included. So you are giving your
16 logical - I mean your argument that the logic is
17 that it would need to be included. But we are
18 getting back to 50.54(hh)(2), and you are basically
19 arguing that that rule should be construed to
20 include a specific requirement for substantiation of
21 whatever dose model you come up with.

22 And that, again, based on my experience
23 with statutory construction and regulatory
24 construction applying the same concepts, that's a
25 bit of a stretch under the normal circumstances

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1 where you are talking about something fairly
2 specific that you are arguing an existing rule
3 should be construed to implicitly require.

4 But that appears to be what you are
5 arguing. Am I right?

6 MR. EYE: Somewhat, yes, you are right.
7 But there is a demonstration of compliance that is
8 required. And --

9 JUDGE YOUNG: Where is the
10 demonstration of compliance required? Where and by
11 what?

12 MR. EYE: Well, it's in the Federal
13 Register notice.

14 JUDGE YOUNG: What is the rule we are
15 talking about? Are we talking about 50.54(hh)(2),
16 right?

17 MR. EYE: Yes, Your Honor.

18 JUDGE YOUNG: Okay, let's go to that
19 rule, and help me out by telling me what words in
20 the rule - subsection three is actions to minimize
21 radiological release. And I think what you are
22 asking is that we read into that a requirement that
23 any dose assessments that are done pursuant to that
24 requirement must be substantiated, specifically the
25 substantiation must be specifically stated.

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1 MR. EYE: NEI 06-12, that they have
2 embraced, requires dose assessments. Now if you
3 want to make NEI 06-12 the implementing mechanism
4 for 50.54(hh)(2) then that would be where it's
5 required, that there be accurate dose assessments.
6 And they are the ones - they, meaning applicant and
7 staff - who are advocating that that guidance
8 document essentially controlled the outcome here.
9 Well, we don't agree with that altogether, but there
10 are aspects of it that we think are acceptable.

11 JUDGE YOUNG: Which part of NEI 06-12
12 does that?

13 MR. EYE: It'll take a moment to find
14 it, Your Honor.

15 (Pause)

16 JUDGE YOUNG: I mean a typical
17 contention would come in and say, this dose
18 assessment is not adequate to address what would be
19 required. And you're wanting to say, well, this is
20 a contention of omission; therefore we don't need to
21 say it's not adequate. The applicant needs to show
22 that it's adequate under 50.54(hh)(2), and -so now
23 we are looking at the mitigative strategies - I mean
24 we're looking at the NEI documents to see what it
25 says.

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(Pause)

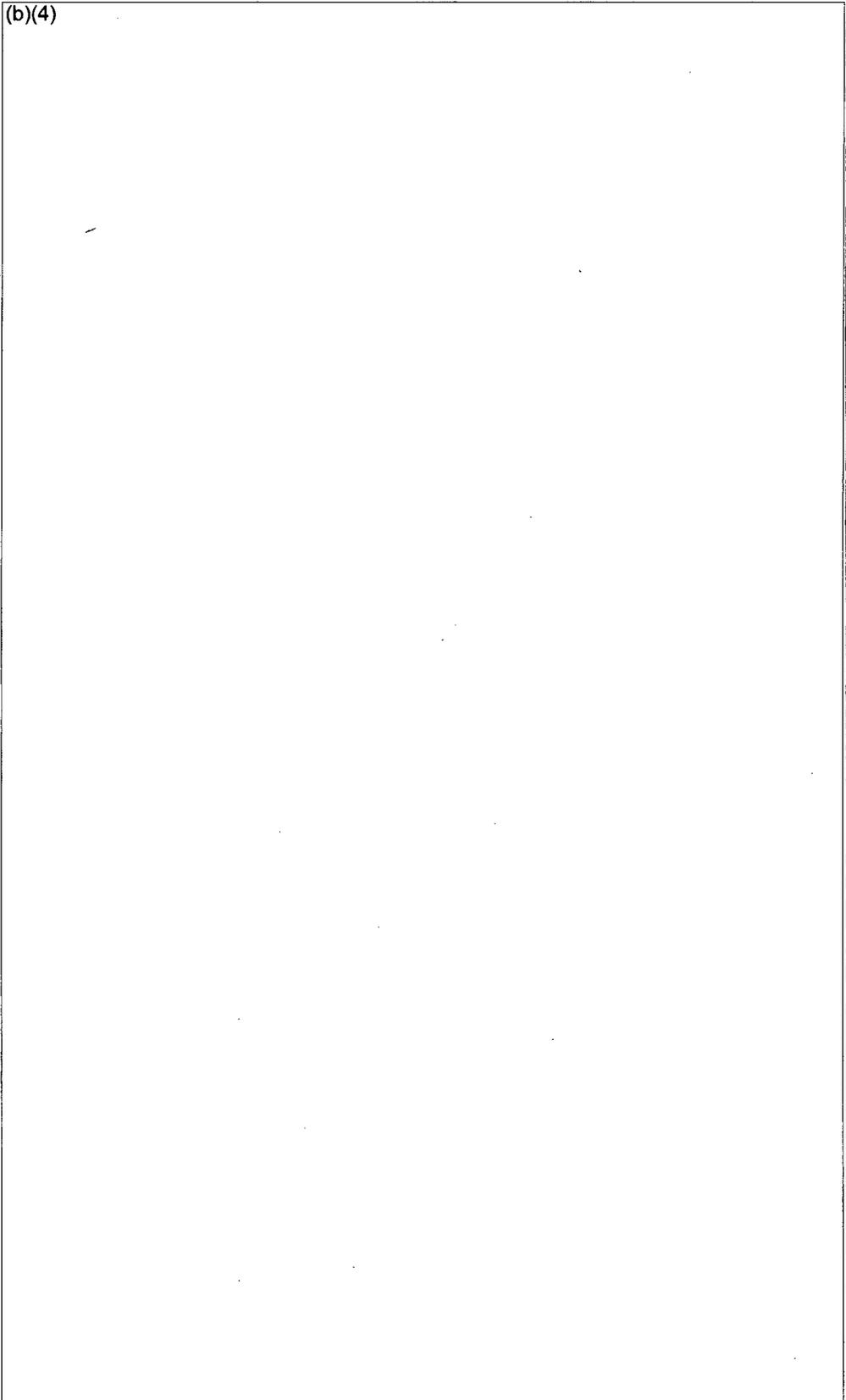
MR. EYE: Your Honor, I am looking for
that citation.

(b)(4)

Exemption 4 LUMINENT

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Exemption 4 Luminant

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Exemption 4 Lumped

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EXEMPTION 4 LUMENOR

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EXEMPTED 4 LUMENANT

MR. EYE: That is part of it, Your Honor, yes, and then the other part of it goes to using their verbiage here, quote, under the conditions envisioned for this event. What does that mean? This event? That sounds fairly specific. What is the event that they are using to evaluate existing dose projections.

JUDGE YOUNG: Well, there if you are at the same time arguing that this part of the NEI document should be considered to be the legal authority as it were, legal regulatory authority,

1 for the requirement that you are saying should have
 2 been met, and at the same time you seem to be
 3 challenging that requirement because that is what
 4 the requirement states.

5 MR. EYE: No, I'm not challenging what
 6 the requirement is. It's up to the applicant to
 7 determine what the event is that they will use to
 8 project dose assessments.

9 (b)(4)
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summary of NEI document

JUDGE YOUNG: Do you agree with intervenors that the NEI document can serve as legal authority for an alleged omission under 10 CFR 2.309 (f) (6)?

MR. FRANTZ: Hypothetically I think it certain cases it could be, because the guidance document has been endorsed by the commission. If we had not fully addressed the guidance document, and had not justified an alternative, yes, in that case I would see where that would be a valid basis for a claim of omission. But in here we fully have

1 addressed that. This item says, discuss the impact
2 and dose that was considered in the development of
3 these mitigative strategies. And what we have is
4 the dose assessment model that we are using for
5 units #1 and #2, we use that for #3 and #4 also,
6 and that will be used to assess the doses during
7 this event, namely, that would involve water
8 scrubbing, to make sure that our emergency
9 responders don't receive excess doses.

10 So we have fully addressed in our case
11 the NEI guidance document.

12 MR. EYE: Your Honor, I want to make
13 sure that our contention in this regard is viewed in
14 two parts really. The omission contention goes both
15 to the fact that there is no substantiation of the
16 efficacy or the adequacy of the existing dose
17 projection levels as it would be applied with the
18 additions of units #3 and #4. That is one aspect of
19 the contention, and it can stand alone if you will
20 the way we've structured it.

21 The second part says, goes to really
22 this verbiage about conditions envisioned for this
23 event. And while I understand counsel's
24 interpretation of this that the words, this event,
25 mean spraying to minimize releases, that's arguments

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1 of counsel. And generally arguments of counsel
2 aren't the same thing as evidence.

3 And that is one of the reasons why this
4 contention got developed, is because if you look
5 through the mitigative strategies table, and the
6 body of the submittal, there is no discussion about
7 how the existing dose models are adequate, how
8 they've been essentially adopted and applied. And
9 this is particularly the case when we've got design
10 of the units #3 and #4 that is a different design
11 than units #1 and #2, and the assumption that
12 everything that fits on #1 and #2 will fit on #3 and
13 #4 in the context of this dose assessment is where
14 we see a deficiency and omission.

15 JUDGE ARNOLD: Let me just ask the
16 model that you have in use for units #1 and #2,
17 that's already an approved model and satisfies
18 (hh) (2) for units #1 and #2?

19 MR. FRANTZ: I believe it does for
20 units #1 and #2, yes, it satisfies the rule. The
21 staff has already found that it satisfied the
22 (b) (5) (B) requirements, and the Commission has found
23 that that sufficiently satisfied the rules.

24 JUDGE ARNOLD: Okay, and for
25 petitioner, do you have any evidence that units #3

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1 and #4 are so different from units #1 and #2 that an
2 approved procedure for #1 and #2 wouldn't be
3 applicable to #3 and #4? Or are you basically
4 speculating that there are differences that would
5 cause that to happen?

6 MR. EYE: It's not speculation that
7 you've added a major increase in radioactive
8 inventory onsite when you add units #3 and #4. That
9 is not speculation; that is reality. Moreover, yes,
10 the differences in the reactor designs and so forth,
11 I can't tell you chapter and verse right now whether
12 they are so different that they would cause a
13 difference in the dose projection model. But
14 nevertheless there is this assumption in the
15 mitigative strategies table that --

16 JUDGE YOUNG: Excuse me, is this
17 someone that one of the parties know?

18 JUDGE MIGNEREY: He is a judge.

19 JUDGE YOUNG: Oh, okay, pardon me.
20 Pardon me.

21 MR. EYE: I kind of lost my train.

22 JUDGE YOUNG: Let me ask this little
23 dumb question right quick. The dose assessment
24 model for the emergency plan, does it project dose -
25 it's not the same dose as projected for four units

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1 as compared to one? It would be for each unit, so
2 each unit would add the same amount in addition to
3 the others. You seem to be saying that because the
4 two new units would add a lot to it, but then I
5 think you just were saying that you don't really
6 know exactly how much difference there would be
7 between unit #3 and unit #2 for example?

8 MR. EYE: Well, in terms of rated
9 capacity, if memory serves correct, units #3 and #4
10 are about 25 percent larger than units #1 and #2, so
11 there is a difference that extrapolated out could
12 conceivably have an impact in terms of the total
13 amount of radioactivity inventory onsite, for
14 instance.

15 The dose assessments for units #1 and #2
16 don't assume that there's going to be anything other
17 than units #1 and #2 onsite, and all of a sudden
18 we've got units #3 and #4 on site, and the reasoning
19 here is that you don't necessarily exclude the
20 possibility of all these units being involved in a
21 particular fire and explosion incident. You can't
22 rule that out. So if you have more than two units
23 involved, then you've got a dose assessment, or
24 you've got a potential for doses, that will exceed
25 that which was evaluated for units #1 and #2.

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1 So this wholesale adoption of #1 and #2
2 seems to us to be inadequate for purposes of
3 applying it to units #3 and #4. But there has
4 certainly been - the omission here is the lack of
5 substantiation that the dose projection models are
6 adequate for units #3 and #4, because they were
7 adequate for units #1 and #2. And there is a gap
8 there, simply because they are adequate for #1 and
9 #2 does not per se mean that they will be adequate
10 for #3 and #4. But our omission contention goes to
11 the fact that there is a lack of substantiation for
12 this fact assertion that they have made in the MST
13 at 1.3.3.

14 JUDGE YOUNG: And you're asserting that
15 substantiation is required by the phrase, discuss
16 the impact and dose that was considered in the
17 development of these mitigative strategies, and
18 also, evaluate existing dose projection models?
19 That that language is what requires that to be
20 there?

21 MR. EYE: I believe that that is
22 correct, Your Honor. I'm assessing this a little
23 bit on the fly.

24 JUDGE YOUNG: I know you are, and that's
25 one thing that concerns me a little bit, because you

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1 don't really mention in this contention the same way
2 you do in some of the others that this is a
3 contention of omission. And so what you seem to be
4 doing in all of your contentions is trying to say
5 that the applicant has not met a burden of some sort
6 or other. And you justify placing that burden on
7 the applicant at this point by saying this is a
8 contention of omission, because a regular
9 contention, the burden is on you to show that you
10 have met all the provisions of 2.309(f)(1). And you
11 have to show a genuine dispute among other things.
12 You have to support it with facts. And you seem to
13 be arguing that we don't have to do this because
14 this is a contention of omission, and then you are
15 basing that on either 50.54(hh)(2) or in this case
16 that the language in the NEI document.

17 MR. EYE: Well, yes.

18 JUDGE YOUNG: And yet you say you are
19 working through it at this point. I think if you
20 are working through it at this point, I think you
21 can understand that maybe it seems a little bit of a
22 stretch for a contention of omission.

23 MR. EYE: Well, let me try to clarify
24 that. Because if you take a look at the contention
25 itself it talks about what wasn't done, that there

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1 is not a substantiation of the adequacy of these
2 dose projections. The lack of substantiation is an
3 omission. Particularly when it is specifically
4 required in the NEI document.

5 JUDGE YOUNG: Well, the NEI document
6 does not say substantiation. It says other things,
7 and you are arguing that that should be interpreted
8 to implicitly include substantiation.

9 MR. EYE: Well, it's a fact assertion
10 that they have done, that they have put forward here
11 to say that they have met that requirement, but
12 there is nothing to support that as far as evidence
13 or facts.

14 JUDGE YOUNG: Let me just ask you, why
15 haven't you in this contention or otherwise, why
16 haven't you said, well, what they've done is
17 inadequate. They have done something, but we're
18 alleging that it's not adequate. We're alleging
19 that this doesn't satisfactorily address the
20 requirements? What you are doing instead is you are
21 saying, well, this is a contention of omission, and
22 we don't have to show that it's inadequate; they
23 have to show that they are adequate and they haven't
24 done that. And that is sort of the model that you
25 have used for all of your contentions, right? Am I

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1 missing something? In general?

2 MR. EYE: In a general sense, yes. I
3 mean that is the nature of omission contentions. As
4 I understand them, that we show that there is
5 something that is required, by law. It's not there.
6 And that it should be.

7 JUDGE YOUNG: And you have to give the
8 reasons it should be included. Okay.

9 MR. BIGGINS: Your Honor, if I may
10 that point as well.

11 JUDGE YOUNG: Are you - do you have
12 anything to wrap up?

13 MR. EYE: Not unless I hear something
14 subsequently.

15 JUDGE YOUNG: That's fine. We'll let
16 you come back. Go ahead.

17 MR. BIGGINS: In our answer to this
18 contention we specifically point out that it appears
19 to us that the intervenors are attempting to shift
20 the burden here. And I would pose that merely
21 labeling a contention a contention of omission does
22 not mean that they do not have to meet the otherwise
23 applicable requirements of 2.309(f)(1). And I would
24 also like to specifically address where there has
25 been some confusion on the record I believe

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1 regarding the mitigative strategies table that is
2 part of the NEI 06-12, that table labeled as Draft A
3 which the board cited in the intervenors' cite as
4 well.

5 JUDGE YOUNG: Labeled what?

6 MR. BIGGINS: Draft A, Draft A, Judge.
7 Draft A.

8 JUDGE YOUNG: Oh, Draft A, thank you.

9 MR. BIGGINS: Correct. In the lower
10 left-hand corner of the table, and that's page six -
11 -

12 JUDGE YOUNG: We are looking at
13 revision 3, so it doesn't say that.

14 MR. BIGGINS: Right, and I would point
15 out again that that table was added to Revision 3.
16 It was not part of Revision 2, which was endorsed by
17 the Commission. So that particular table has not
18 received any staff approval or endorsement by the
19 Commission at this time. And so to the extent that
20 the intervenors are attempting today to rely on that
21 as some kind of authority whether or not information
22 is missing from the applicant's material, I would
23 argue that that is misplaced reliance on that then-
24 draft document.

25 So if this truly is going to be

1 considered a contention of omission, I don't believe
2 the intervenors can rely on that document to say
3 there is an omission. Instead if this contention is
4 looked at the way I looked at it, as a contention
5 that says on its face that doses to onsite
6 responders will be greater under the loss of large
7 areas of plant than what the emergency plan takes
8 into account, they have not provided the support
9 necessary for a contention under 2.309. And with
10 that I would say either way this Board interprets
11 this contention, whether it's one of omission or
12 not, the intervenors haven't met either standard for
13 admissibility. Thank you.

14 JUDGE YOUNG: Do you want to respond?

15 MR. EYE: Yes, thank you. I want to
16 make sure I heard something that was stated by
17 counsel just now, and I want to make sure I heard it
18 correctly. Revision 3 NEI 06-12 has not been
19 endorsed by the Commission; is that correct?

20 JUDGE YOUNG: That's what he said.

21 MR. EYE: Thank you.

22 JUDGE YOUNG: I think he also said that
23 this table was not part of the Revision 2 that the
24 Commission approved. Is that what you said?

25 MR. BIGGINS: That is also correct,

1 Your Honor.

2 MR. EYE: Well, it's been taken on by
3 the applicant as part of its mitigative strategies
4 table, and again, whether it's now a part of a
5 revised NEI 06-12 that's been endorsed or hasn't
6 been endorsed, when it was prepared and submitted on
7 May 22nd of this year, they certainly treated it
8 like a regulatory requirement. I mean I find it -- I
9 doubt that they would do something like that
10 fortuitously, particularly if it had something as
11 serious as dose assessments.

12 But the counsel said that the way he
13 reads this it's not an omission contention. The
14 omission talks about deficiencies, first sentence.
15 If the mitigative strategies table is deficient
16 because it fails to substantiate an assertion.
17 That is an omission of something that ought to be
18 done, so that the Commission can make a reasoned
19 decision. The Commission shouldn't have to assume
20 that the substantiation is there; they should have
21 it put in front of them to show in fact that this
22 assertion has a factual underpinning. And that is
23 part of the omission, part of the contention of
24 omission.

25 JUDGE YOUNG: You do understand that as

1 judges we are bound by the rule of law that protects
2 whoever is supported by what the law says. The law
3 includes regulations. People can disagree about
4 whether a rule or law is good or bad or goes far
5 enough or doesn't go far enough, but in order to be
6 fair to you or anyone else we must be guided by what
7 the law says. And that includes rules. And in this
8 instance, if the fact that the applicant may have
9 agreed that this was what they were relying on, and
10 that they might equate it with the regulatory
11 requirement, what we need to do is follow what the
12 law says. And the contention admissibility
13 requirements, which are as I think we spelled out in
14 a fair amount of detail in our ruling on original
15 contentions, stripped and that's what we have to
16 follow.

17 A contention of omission, that word's
18 not used. But when a petitioner believes that
19 something is not - that something has not been
20 included that should have been included, and that it
21 is required by law, and you have to give the reason
22 that it should have been included.

23 And so if you want to just wrap up here
24 and touch on those two points, because that is what
25 we have to look at. Whatever your logic may be for

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1 how things should be, if they are not supported by
2 what the law says, what the regulation says, then we
3 can't really consider it.

4 MR. EYE: I understand, Your Honor,
5 thank you for that.

6 At Federal Register 74, volume 73, page
7 13957, middle column, about halfway down, it says,
8 paragraph: the actions to minimize radiological
9 release provision in 50.54(hh) --

10 JUDGE YOUNG: I'm sorry, 13957?

11 MR. EYE: Yes.

12 JUDGE YOUNG: Starting?

13 MR. EYE: Middle column, not quite
14 halfway down.

15 JUDGE YOUNG: Is it a paragraph that
16 starts a new paragraph?

17 MR. EYE: There is a new paragraph that
18 begins: the action to minimize radiological --

19 JUDGE YOUNG: I'm not seeing that
20 paragraph. Oh, the little paragraph. Thank you.

21 MR. EYE: Sorry, I probably wasn't
22 describing it very well. But it says the actions to
23 minimize radiological release provision in
24 50.54(hh)(2)(I) includes consideration of the
25 following: water spray scrubbing and dose to onsite

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1 responders. That's the Federal Register notice that
2 is - we've all been referring to the Federal
3 Register notice for various purposes, but certainly
4 that would obligate the applicant to describe the
5 dose to onsite responders, or what they anticipate
6 the dose would be. That projection is in their MST
7 at 1.3.3 where they say, whatever the dose
8 projection was for unit #2 they're saying is the
9 same for #3 and #4. Well, there is no
10 substantiation that dose responses for #1 and #2 are
11 in fact applicable to #3 and #4.

12 JUDGE YOUNG: Okay, so where is the
13 requirement for a substantiation?

14 MR. EYE: Well, generally assertions -
15 again if we want to go with rule of law, one of the
16 rules of law is that when you make an assertion of
17 fact there be evidence to support it.

18 JUDGE YOUNG: We are not talking about
19 assertions of fact, we are talking about rules. WE
20 are talking about whether a rule encompasses
21 requirements that you are saying should be viewed as
22 implicitly encompassed within the rules. And now
23 you referred us to the actions to minimize
24 radiological release provision of the rules,
25 includes consideration - consideration - of the

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1 following, two, dose to onsite responders.
2 Consideration of dose. It doesn't say
3 substantiation of any thing, and you are asking us
4 to read that into it.

5 MR. EYE: The difference between
6 consideration and substantiation, I would argue, is
7 a very fine line. How do you consider something in
8 an adequate way without knowing that it's been
9 substantiated?

10 MR. BIGGINS: Your Honor, if I may
11 very briefly point out, the very next sentence in
12 that Federal Register notice in the statement of
13 consideration shows that the Commission specifically
14 excluded those 14 strategies from its rule
15 requirement.

16 JUDGE YOUNG: Anything further on
17 Contention 3? Anything further?

18 MR. BIGGINS: No, Your Honor.

19 JUDGE YOUNG: Do you want to respond to
20 that?

21 MR. FRANTZ: No, I think it's been well
22 discussed, and probably could move on to Contention
23 4.

24 JUDGE YOUNG: All right, let's move on.
25 On Contention 4, I'm going to start you

1 off by asking a basic question. A contention
2 usually involves an assertion. You make some
3 assertions in the first non-bolded paragraph after
4 the bolded part. But in your other contentions the
5 bolded part is the actual contention. And just
6 reading the bolded part I'm not clear exactly what
7 the contention is.

8 MR. EYE: I can see why. This is about
9 the disconnect between the idea put forth in NEI 06-
10 12 that there will be some damage states to which
11 mitigative strategies will be ineffective. If that
12 is the case, then indeed it will require heroic
13 action to bring whatever out of control situation is
14 going on at a plant under control. Heroic action
15 will be required.

16 JUDGE YOUNG: What's the contention?

17 MR. EYE: The contention is that heroic
18 action will be required under certain damage states,
19 extreme damage states, in order to bring a plant
20 back under control, to accomplish the three
21 objectives that 50.54(hh) requires, containment
22 integrity, spent fuel cooling - or reactor fuel
23 cooling and spent fuel pool cooling, that if the
24 mitigative strategies are unsuccessful as NEI 06-12
25 says that they will be under certain damage states,

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1 then in fact it will require some sort of heroic
2 action in order to bring those three objectives into
3 - to manifest those three objectives into reality.

4 JUDGE YOUNG: Let me ask you a simple
5 straightforward question. To the extent that this
6 is a regular contention, what dispute with the
7 application do you have, and to the extent that this
8 is a contention of omission, what is the law that -
9 what do you allege has been omitted, and what is the
10 law that requires that it be included?

11 MR. EYE: Well, first of all we believe
12 that while NEI 06-12 says that there should be no
13 heroic actions required to carry out the mitigative
14 strategies that they have set forth in there, the
15 document also says that those mitigative strategies
16 will not be successful under all damages.

17 JUDGE YOUNG: Let's put that aside for
18 a minute. To the extent that this is a regular
19 contention, what in the application are you
20 disputing?

21 MR. EYE: The fact that there is no
22 heroic action required to achieve the three
23 objectives under 50.54(hh)(2).

24 JUDGE YOUNG: The fact that the
25 application mitigative strategies report does not

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1 contain what?

2 MR. EYE: It says that no heroic action
3 will be required, because it adopts NEI 06-12, which
4 says no heroic action should be required to carry
5 out these mitigative strategies. Well, but the real
6 objective is not to carry out the mitigative
7 strategies. The real objective is to control those
8 three conditions: spent fuel pool cooling; reactor
9 fuel cooling; and containment integrity.

10 But if the mitigative strategies are
11 unsuccessful at doing that, heroic action like that
12 which was required at Chernobyl for example will be
13 required.

14 JUDGE YOUNG: Okay.

15 JUDGE ARNOLD: It sounds to me as
16 though the content is that the mitigative strategy
17 plan is wrong in that it is saying no heroic
18 actions are required. That's the start of it; I'm
19 not sure about the rest.

20 MR. EYE: It's wrong to the extent that
21 it says that in light of its own recognition that
22 not all these mitigative strategies will be
23 successful under all damage states. It is wrong. I
24 mean it's wrong if an inconsistency is wrong. It's
25 inconsistent.

1 JUDGE ARNOLD: And then you go on from
2 that to say, therefore there is an omission of those
3 actions above and beyond what is in there now that
4 would be required to successfully combat that -
5 those events that could not otherwise be
6 successfully terminated.

7 MR. EYE: Correct, or to achieve the
8 three objectives of 50.54 (hh) (2). Correct, Your
9 Honor.

10 JUDGE YOUNG: But isn't it completely a
11 contention of omission?

12 MR. EYE: Yes.

13 JUDGE YOUNG: And the omission is that
14 it does not include the need for heroic action?

15 MR. EYE: Yes, and as we point out that
16 there are no procedures to determine who will be
17 designated to receive higher doses of radiation to
18 go in and do the heroic actions necessary to achieve
19 the regulatory objectives of containment integrity,
20 reactor fuel cooling and spent fuel pool cooling.

21 JUDGE YOUNG: And where is the
22 requirement in the law that those be included?

23 MR. EYE: That those three objectives
24 be included?

25 JUDGE YOUNG: That the need for heroic

1 action and the last thing you just said.

2 MR. EYE: Well the three objectives are
3 part and parcel of the regulation, the containment
4 integrity --

5 JUDGE YOUNG: What part of the
6 regulation requires a statement that heroic actions
7 will be required --

8 MR. EYE: I'm sorry, NEI 06-12 says
9 that no heroic actions should be required. And we
10 are simply saying that even under NEI 06-12 in the
11 preface in the introduction where it says these
12 mitigative strategies are not going to work under
13 all damage states, then the question is, well, what
14 are you going to do.

15 JUDGE YOUNG: You're arguing what
16 should be, what you think should be. What I'm
17 trying to get you to do like I have with the other
18 one is look at what we have to actually consider in
19 determining whether the contention is admissible.
20 To the extent that it is a contention of omission,
21 and I think it's completely a contention of
22 omission, you just said, then I'm asking where is it
23 required by law that these things have to be in the
24 application, and in this case in the mitigative
25 strategy, or else where in the application? And

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1 what is the reason that they need to be included?
2 Start with the first one: what regulation or law
3 requires that they be included?

4 MR. EYE: Well the NEI 06-12 has been
5 as we've spoken about earlier today adopted by the
6 agents or the Commission as regulatory guidance to
7 implement the fires/explosion regulation.

8 JUDGE YOUNG: But you say at the very
9 beginning that NEI 06-12 guidance assumes no heroic
10 action. So how could it say that and also require
11 that heroic action be included.

12 MR. EYE: I see.

13 JUDGE YOUNG: There has to be some
14 requirement for the omission that you are alleging,
15 and what I'm trying to get you to tell you in
16 determining whether to admit your contention, we
17 can't just look at whether we think, oh that's a
18 good idea. We need to look at where is it required,
19 where is it - I'll read it to you again. I don't
20 think you have done a lot of these cases, and that
21 may be why, but what we have to look at is
22 2.309(f)(1), small Roman numerals one through six,
23 and the contention of omission is addressed in the
24 last part of small Roman numeral six: If a
25 petitioner believes that the application fails to

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1 contain information on a relevant matter as required
2 by law, the identification of each failure and the
3 supporting reasons for the petitioner's belief that
4 it has to be included.

5 You're saying, well, you're arguing,
6 this doesn't make sense in the NEI document, but I'm
7 just asking you a simple question: where is it
8 required by law that it state that heroic actions
9 will be required, and I can't remember the exact
10 other things you said.

11 MR. EYE: Well, actually it states in
12 NEI 06-12 that heroic actions should not be
13 required.

14 JUDGE YOUNG: How is it required by law
15 that they are required, even if you assume that NEI
16 06-12 somehow constitutes a regulation. Which is a
17 jump in itself. The regulation we are talking about
18 is 50.54(hh)(2) or 50.82(d), or 52.80(d). And so
19 when I look at those, what are you relying on to say
20 well that is the part of the rule that requires that
21 this be included?

22 MR. EYE: It's because the --

23 JUDGE YOUNG: Not why it's because,
24 tell me the section. Tell me the words. That's the
25 question I'm trying to get you to answer.

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1 MR. EYE: The objectives of
2 50.54(hh)(2) are to achieve three criteria, three
3 objectives: reactor containment; reactor fuel
4 cooling; and spent fuel pool cooling. The NEI 06-12
5 says that to carry out the mitigative strategies to
6 achieve those objectives should not require heroic
7 action. On the other hand the document also says
8 that the mitigative strategies will not be
9 successful under all damage states.

10 Therefore if that is the case then the
11 mitigative strategies that they have offered up are
12 out the window. They are no longer effective. They
13 are not achieving the three regulatory objectives
14 that 50.54(hh)(2).

15 JUDGE YOUNG: Okay, I'm going to ask
16 you once more, and then I'm just going to drop it,
17 because I'm not sure you're understanding the
18 question. I don't hear you telling me what law
19 requires what your arguing should be in the report
20 should be there. I don't hear you telling me that.
21 Do you care to tell me where is it required by law?

22 MR. EYE: 42 USC 2133 Subpart D, Your
23 Honor.

24 JUDGE YOUNG: Protecting public safety.

25 MR. EYE: Yes, ma'am.

1 JUDGE YOUNG: Anything further? Go
2 ahead.

3 MR. EYE: Your Honor, may I have one
4 moment to consult?

5 JUDGE YOUNG: Yes.

6 (Pause)

7 MR. EYE: Thank you.

8 JUDGE YOUNG: Go ahead.

9 MR. FRANTZ: On its fact if you look at
10 the bolded contention itself, it only deals with NEI
11 06-12. It doesn't seem to deal with our
12 application. And therefore since contentions must
13 focus on applications, that's grounds for objecting
14 to this contention in and of itself.

15 But I might also add that not only does
16 NEI 06-12 state there is no need for heroic action,
17 but I think that is also embodied, the concept is
18 embodied in the statement of considerations for the
19 rule, were the rule says that you only need to use
20 readily available resources and practicable
21 measures. That also implies that there is no need
22 to go and use heroic measures.

23 But the basic premise is just wrong as
24 we discussed earlier today. There is no requirement
25 in the rule that we mitigate the full spectrum of

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1 damage events. As you point out, Judge Young, we
2 are not going to be able to mitigate events
3 involving, for example, an H bomb explosion. There
4 are just certain events that you aren't going to be
5 able to mitigate using readily available or
6 practicable measures. So their fundamental premise
7 is just incorrect. And I think again this just
8 follows from what we discussed earlier on Contention
9 1.

10 JUDGE YOUNG: Staff?

11 MR. BIGGINS: Thank you, Your Honor.
12 I don't want to belabor this issue. I would point
13 out as well that the contention itself appears to
14 raise some issues solely related to the guidance
15 document, and it's hard to discern exactly what this
16 contention is. I would point out just generally
17 that the Commission's contention admissibility
18 requirements are strict by design, and I don't
19 believe that as we stated in our response this
20 contention meets many of the criteria of
21 2.309(f)(1).

22 Thank you.

23 JUDGE YOUNG: Any response, Mr. Eye?

24 MR. EYE: No, ma'am.

25 JUDGE YOUNG: I don't want to shut you

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1 down. I just want you to understand the basis on
 2 which we need to make our decision, and give you an
 3 opportunity, a full opportunity to respond to that.
 4 Because in some instances - well, here - well, I
 5 don't think I need to say anything else.

6 MR. EYE: I understand, Your Honor. I
 7 understand what you're saying, Your Honor.

8 JUDGE YOUNG: All right, now going to
 9 five. You want to proceed

10 MR. EYE: This again, Your Honor,
 11 begins with the premise that the applicant has
 12 assumed that it will have adequate water resources
 13 to fight fires and deal with the aftermath of
 14 explosions under all damage states. And we would
 15 contend that they have not adopted an analysis that
 16 looks at all damage states, and so accordingly there
 17 is no way to determine whether their assertion that
 18 they have adequate water to fight fires is valid.

19 Moreover, having - it can be water water
 20 everywhere and not a drop to drink if you don't have
 21 pumps and pipes to move the water from where you
 22 have it to where you want it to be. This whole
 23 mitigative strategy depends on functioning pumps and
 24 pipes.

25 (b)(4)

Exemption 4 comment

EXEMPTION 4
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(b)(4)

But there is no indication

that the applicant has taken into account the types of pumps needed to move water from where you have it to where you need it will be available under all damage states. And so they talk in their submittal about - from an event perspective. An event perspective: what does that mean? What even perspective are we talking about here? They are the ones that offer up the idea that under whatever scenarios they are operating under, under whatever assumptions they are operating under, they have enough water. Well, maybe they do have enough water. They have an enormous reservoir that presumably they can draw from in the worst case scenario to fight fires - if they have pipes and pumps to do it.

If they don't have pipes and pumps to do it, then it's water water everywhere, not a drop to put out the fire.

JUDGE YOUNG: Are you alleging affirmatively that it's inadequate?

MR. EYE: We are alleging that there is

1 no support for the assertion by the applicant that
2 adequate supplies of pumping capacity is available,
3 simultaneously for emergency reactor cooling, spent
4 fuel pool cooling and suppressing multiple fires.
5 That's what we're alleging.

6 JUDGE YOUNG: And did your response to
7 the question I was asking before, where is the
8 requirement in law that all these specific things be
9 included, your answer would be?

10 MR. EYE: 42 USC 2133 parent Subpart D
11 is the general rule of law. Whether it's - whether
12 this particular assertion that they have an
13 unlimited amount of water is adequate to - untested
14 as it apparently is, as we argue that it is untested
15 - does it meet the requirements of 50.54(hh)(2) that
16 says you've got to have mitigative strategies that
17 are adequate to meet the three objectives. Are
18 there mitigating strategies which assume extant
19 pumps and pipes adequate to meet the three
20 objectives? Under the full spectrum of damage
21 states, that concept has been rejected by the
22 applicant and the staff, but we think is still a
23 viable concept to judge the mitigative strategies
24 against, under the full spectrum of damage states,
25 will the pipes and pumps necessary to move water be

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1 available?

2 And if they are not, then they don't
3 meet the requirements of 50.54(hh)(2) of having an
4 effective mitigative strategy.

5 JUDGE YOUNG: So you are reading into
6 that rule the word, effective, and the word,
7 adequate, among others, and I guess my question
8 would be, reading the rule as it's written is there
9 any particular part of that that you are arguing
10 that it requires the information that you are
11 asserting should be included?

12 MR. EYE: In subsection - it's
13 subsection two, double I, it does talk about
14 operations to mitigate fuel damage, and actions to
15 minimize radiological release. If you don't have
16 the basic infrastructure left after what ever
17 initiating event has occurred that would compromise
18 or destroy the capacity to move water from where you
19 have it to where you need it, then they are not
20 going to be able to meet the regulatory requirement
21 to mitigate fuel damage and minimize radiological
22 releases.

23 That doesn't require reading anything
24 into the rule.

25 JUDGE YOUNG: What would you do with

1 the words, intended to maintain and restore cooling,
2 et cetera.

3 MR. EYE: Well, intent can be a
4 slippery term. But intent I think has to be judged
5 by the plans, by the assumptions that underlie those
6 plans --

7 JUDGE YOUNG: Let me ask you, would
8 there be a difference in a rule that said each
9 licensee shall develop and implement guidance and
10 strategies that will assure that core cooling
11 containment and spent fuel pool cooling capabilities
12 are maintained, restored and protected, and a rule
13 that says, each licensee shall develop and implement
14 guidance and strategies intended to maintain or
15 restore cooling, would there be any difference in
16 the meaning of those two?

17 MR. EYE: Between a word like assure
18 and a word like intend?

19 JUDGE YOUNG: Right. Just someone
20 looking at that and applying rules of statutory
21 construction, would they interpret those to be the
22 same?

23 MR. EYE: No, they would not.

24 JUDGE YOUNG: Because it sounds as
25 though you are interpreting this rule that uses the

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1 word, intend, to be that they shall assure?

2 MR. EYE: They shall do whatever is
3 necessary to meet the requirements of 42 USC
4 2133(d).

5 JUDGE YOUNG: In other words, they do
6 whatever is required to protect the public safety
7 they will assure that that's done.

8 MR. EYE: No, their intent should be to
9 protect the health and safety, and if their - then
10 how do we judge their intent? We judge their intent
11 by the circumstances surrounding their intent.

12 Which goes to things like mitigative strategies, NEI
13 06-12, and whatever else is out there to help us
14 determine whether or not their intent is adequate.
15 In other words, whether they can manifest their
16 intent through their actual actions.

17 JUDGE YOUNG: Let me just ask you, all
18 of your contentions allege that the applicant has
19 not justified or substantiated or words to that same
20 effect. That what they are doing is adequate to
21 meet the requirements of protecting health and
22 safety, to meet the requirements of maintaining and
23 restoring core containment and spent fuel pool
24 containment - cooling capabilities, et cetera. Are
25 there any actual inadequacies that you are alleging?

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1 Are you affirmatively alleging any inadequacies? Or
2 am I correct in assuming that all of your
3 contentions allege that there is no way to tell
4 whether they're adequate because the applicant has
5 not substantiated that the measures in the report
6 that they've submitted are sufficient or adequate?

7 MR. EYE: Your Honor, rather than make
8 a blanket characterization of all the contentions, I
9 would prefer that the contentions be considered in
10 their individual capacity.

11 JUDGE YOUNG: I just want to make sure
12 that I'm understanding. I don't - just speak to
13 this one. Are you alleging any inadequacy in what
14 the applicant has done? Are you alleging that they
15 have failed, that their report is inadequate in the
16 goal of maintaining or restoring cold cooling
17 containment, spent fuel pool cooling capabilities,
18 under the circumstances associated with loss of
19 large areas of the plant due to explosions or fire,
20 to include strategies in fire fighting, operations
21 to mitigate fuel damage, and actions to minimize
22 radiological release.

23 You're alleging any specific
24 inadequacies?

25 MR. EYE: Well, if inadequacies mean

1 that there is no discussion of the number and
2 magnitude of fires that they'd have to deal with in
3 the full spectrum of damage states, then yes, that's
4 an inadequacy.

5 JUDGE YOUNG: An omission that you are
6 alleging, right?

7 MR. EYE: True, it is.

8 JUDGE YOUNG: But are you alleging that
9 what they have done is inadequate?

10 MR. EYE: Well, yes, because we also
11 say in this contention that there is no support, no
12 evidentiary support, for the client's contention
13 that adequate supplies and pumping capacity is
14 available simultaneously for emergency reactor
15 cooling, spent fuel pool cooling and suppressing
16 multiple fires. They say that, but there is no
17 evidentiary support for it.

18 JUDGE YOUNG: Right, so the basis for
19 your allegations of inadequacies are that the
20 applicant has provided no support. So I think we
21 unfortunately get back to what the staff were
22 arguing: you are sort of wanting to shift the burden
23 to the applicant on each of these instances by
24 writing them as contentions of omission, and in none
25 are you actually alleging that anything the

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1 applicant does will result in a failure to meet
2 what's required in this rule.

3 MR. EYE: As we argue there is no way
4 to tell. There is no way to tell whether their
5 mitigative strategies are going to be effective,
6 because they don't match them up against any
7 particular damage state. So the answer to your
8 question is I think yes. I mean I think I agree
9 with your characterization that this is about
10 shifting the burden to the applicant, but that is
11 the nature of an omission contention is to say,
12 there's a gap here that needs to be filled.

13 So I think in the main I agree with what
14 you said, but again in terms of individual
15 contentions I think that they should be considered
16 on an individual basis. Do they share common
17 characteristics? Yes, they do. But that doesn't
18 necessarily mean that everyone of them is going to
19 be in lock step with the others.

20 JUDGE YOUNG: Anything further?

21 MR. EYE: No, not at this time, Your
22 Honor.

23 JUDGE YOUNG: Mr. Frantz?

24 MR. FRANTZ: Judge, I'd like to
25 initially state that I agreed with your

1 characterization of these contentions. I do believe
 2 it's an improper shifting of the burden from the
 3 intervenors to the applicant. It's up to the
 4 intervenors to show, one, that either there is some
 5 requirement in the regulation that we have not
 6 addressed, and they have not done that; or two, to
 7 provide some basis for believing that our mitigative
 8 strategies are inadequate, and they have not done
 9 that either.

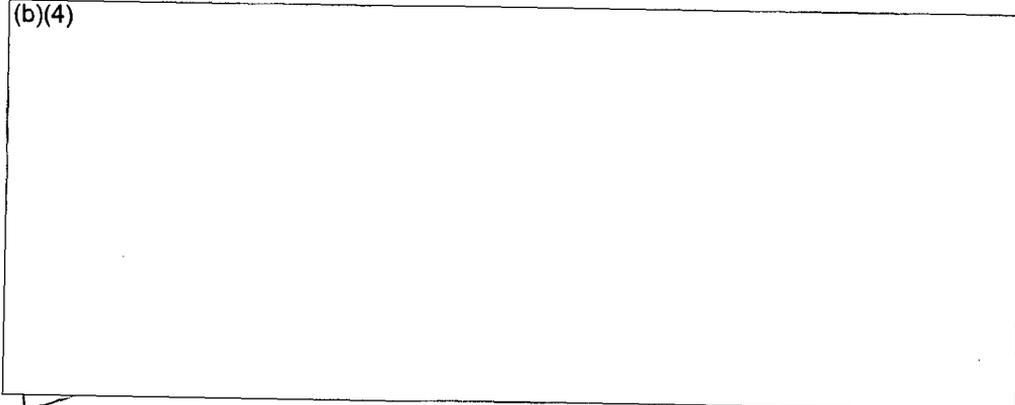
10 But there is another issue here I'd like
 11 to raise, because I think what they have done is
 12 just simply taken statements out of context from our
 13 report. This content, if you go to page 18 of their
 14 contentions, deals with item number 1.2.12. And
 15 it's in that context that our report says that we
 16 have essentially an unlimited water supply.

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Exemption of Linnant

(b)(4)

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*Exempt from
Lump sum*

So first of all we aren't dealing with fires, putting our fires; we aren't dealing with pooling of the spent fuel pool. We aren't dealing with cooling of the core. This item deals with the component cooling water heat exchanger.

Second of all, it deals with whether there is water available in the loss of normal cooling water, and if there is no we are supposed to supply a contract water supply within 12 hours. We state we don't need a contract water supply because we have an essentially unlimited amount of water in the Squaw Creek Reservoir. That particular reservoir has over 150,000 acre-feet, which is equal to approximately 50 billion gallons of water. Certainly by any definition that is a sufficient amount of water for the component cooling water heat exchanger.

And if the intervenors believe it is not sufficient then it is incumbent upon them to provide

1 some basis for believing it's not adequate, and they
2 have not done so.

3 JUDGE YOUNG: You are saying that where
4 they say this middle assumes an unlimited amount of
5 water available for cooling and fire suppression,
6 fire suppression is not included within that
7 particular one?

8 MR. FRANTZ: It does mention fire
9 mitigation in our right-hand column. For cooling of
10 the component heat exchanger and fire mitigation.
11 Again, given the large volumes of water that we are
12 talking about, there is no doubt that we have
13 sufficient water. And providing a contract water
14 supply from an off-site source in this case is just
15 unnecessary.

16 And that is the whole context. Whether
17 we need to have a contract with an offsite water
18 supply. And we are saying we don't because of the
19 Squaw Creek Reservoir. That is the whole context
20 here.

21 And given that context it's clear that
22 this contention just has no basis whatsoever and
23 should be rejected.

24 JUDGE YOUNG: Staff.

25 MS. VRAHORETIS: Yes, just briefly,

1 Your Honors.

2 The intervenors cite to the Atomic
3 Energy Act, specifically 42 USC 2133(d) as though it
4 is some requirement in addition to the regulation.
5 I would just like to clarify that under 42 USC
6 Section 2133 (a) the Nuclear Regulatory Commission
7 is authorized to issue licenses. And to do that it
8 is also authorized to promulgate and adopt any such
9 conditions as the Commission may by rule or
10 regulation establish to effectuate the purposes and
11 provisions of the Atomic Energy Act.

12 And then in subsection (c) of the
13 Atomic Energy Act it specifies that in any event no
14 license may be issued to any person within the
15 United States if, in the opinion of the Commission,
16 the issuance of a license to such person would be
17 inimical to the common defense and security or to
18 the health and safety of the public.

19 This doesn't set forth some additional
20 requirement separate from the regulations, but
21 rather the regulations are drafted and adopted in
22 order to fulfill the purposes of the act. So when
23 you ask the intervenors to state a regulatory basis,
24 the regulatory basis has to be in the regulations.
25 It wouldn't be in the regulations if it wasn't

1 authorized by the Act.

2 And we do agree that this contention
3 basically seeks to have it both ways, arguing it
4 both as a contention of omission and also as a
5 contention of inadequacy. But in either scenario,
6 the intervenors have failed to meet the contention
7 admissibility requirements under 2.309(f)(1)
8 subsection 5, in that they challenge the adequacy of
9 total pumping capacity and the adequacy of fire
10 suppression capacity, but they don't describe how
11 the capacities are inadequate, nor do they provide
12 any type of factual or expert support for the
13 position that the total capacity required for
14 suppression capacity are inadequate. This renders
15 this contention inadmissible.

16 And then also trying to argue it as a
17 contention of omission, they have failed to identify
18 any regulatory basis for the requirements that they
19 seek. Effectiveness is not based on damage states.
20 There is no requirement in the regulations that the
21 applicant specify or enumerate damage states.
22 Effectiveness will be determined based on the
23 redundancy, diversity, multiplicity and flexibility
24 of the mitigative strategies which are intended to
25 restore or maintain core cooling containment and

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1 spent fuel pool cooling, not based on damage states
2 for any particular event.

3 Thank you.

4 JUDGE YOUNG: Any response?

5 MR. EYE: I never suggested for a
6 moment that the Atomic Energy Act engrafts
7 additional requirements. It is the requirement.
8 It's the act of Congress that says that all other
9 actions need to be judged by. So it's not an
10 additional requirement.

11 And I don't think I've ever
12 characterized it as an additional requirement. It's
13 the Article 1 branch that decided how to set the
14 broad policy that an Article 2 agency is to
15 implement; that's pretty fundamental.

16 If you look at the specific provision in
17 the MST that is at issue in this case, they talk
18 about an event from an event perspective, they have
19 adequate water. What does event perspective mean?
20 Does it mean under all - under the entire spectrum
21 of damage states? Does it mean an attenuated
22 spectrum of damage states? Does it mean - what is
23 event? That's the omission here; it goes to the
24 applicant's failure to provide adequate information
25 to you to determine whether or not they do have

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1 adequate means by which to meet the regulatory
2 objectives of 50.54(hh)(2). They say they do, but
3 then they say from an event perspective. That
4 really begs description and definition in order to
5 determine whether or not you can accept their
6 assertion that they've got adequate means to move
7 unlimited amounts of water where they want it.

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(b)(4)

Exemption of Lumentum

(b)(4)

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MR. EYE: True, but from an event perspective can they move the water from where they got it to where they need it. That's our contention, and that has not been addressed in the mitigative strategies, and that's what we addressed.

We key it from this particular 1.2.12 in their MST, but the contention is broader than that. It says, under the spectrum of damage states, can they count on the presence of pipes and pumps to move water to do what they say they want it to do, and that is for fire suppression and for cooling purposes. And there is nothing in their mitigative strategy table that - or their mitigative strategy in general, that provide any assurance that they would have the basic infrastructure available when they need it to accomplish the purposes of 50.54(hh)(2).

(b)(4)
If you

believe that's insufficient he has some obligation to come forward with some basis for believing it's insufficient. He has not done so in this case.

MR.. EYE: What we've done is point out

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1 the fact that there is a spectrum of damage that the
2 applicant hasn't addressed, and that that aspect of
3 the spectrum of damage would include the loss or
4 basic infrastructure needed for cooling and fire
5 suppression purposes.

6 JUDGE YOUNG: Anything further on
7 Contention 5?

8 MR. EYE: Not from intervenors.

9 JUDGE YOUNG: Anything further that
10 would require us to stay in closed session?

11 MR. EYE: Not that I know of.

12 MR. FRANTZ: No.

13 JUDGE YOUNG: If the Court Reporter
14 could stop the closed session part of the
15 transcript, and we'll move back into open session.

16 MR. EYE: Your Honor, actually, given
17 the panel's rulings, some of the arguments on the
18 subpart (g) I suppose implicate the same assertions
19 that we have made in prior contentions concerning
20 the applicability of NEI 06-12. So in order to
21 effectuate the panel's rulings --

22 JUDGE YOUNG: Let's go back into closed
23 session. You can just stay in it.

24 I would ask that the camera be turned
25 off.

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(Comments off the record)

JUDGE YOUNG: Okay, then let's move on to the Subpart G request.

MR. EYE: Your Honor, our objective in seeking Subpart G hearing is to essentially get to the bottom of the NEI 06-12 assertions about the full spectrum of damage states, and how those relate to the mitigative strategies, and the inadequacies of the mitigative strategies. Whoever authored NEI 06-12 has information about the spectrum of damage states that would presumably apply to these mitigative strategies. For some reason they didn't disclose those in the mitigative strategies document, NEI 06-12. Why that omission occurred I don't know, but that would be one of the objectives that we would try to achieve through a Subpart G hearing.

It does deal with a past event. The past even is the drafting and adoption of NEI 06-12 by the applicant as its basic template if you will, at least the prescriptive of NEI 06-12, as a template to model their own or craft their own mitigative strategies from. But at the same time we think a Subpart G hearing is pertinent here because it would allow an inquiry into the underlying basis

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1 for this full spectrum of damage states and to
2 determine whether there is any possible way that the
3 mitigative strategies that are prescribed in 06-12
4 can be useful or can be - can be projected to be
5 effective in dealing with the full spectrum of
6 damage states.

7 We recognize that a Subpart G hearing is
8 an exception to the rule, and it's primarily in this
9 instance to get to the bottom of this divergence in
10 the 06-12 document between the disclaimers and the
11 prescriptive part of the document, because there is
12 a disconnect there, at least in our view.

13 If the Commission determines that a
14 Subpart G proceeding is not applicable here, then
15 obviously we would seek a hearing under the Subpart
16 that does allow for - the subpart that we are
17 proceeding under in the rest of our contention,
18 which is Subpart L.

19 So but in the first instance we believe
20 a Subpart G hearing is pertinent, and any
21 alternative to a Subpart L hearing would be the next
22 best from our perspective.

23 JUDGE YOUNG: Applicant.

24 MR. FRANTZ: Yes, under 10 CFR Section
25 2.310(d) there is a provision for Subpart G

1 proceedings only basically in two cases: one for
2 resolution of issues of material fact regarding the
3 past activity where the credibility of an eyewitness
4 is at issue. Well, we aren't dealing with that
5 here. We aren't dealing with past activity. We
6 aren't dealing with eyewitnesses. We are dealing
7 with a guidance document. Guidance documents are
8 typically involved in NRC proceedings, and just
9 because we have a guidance document, there might be
10 a question in his mind as to what it means, there is
11 no reason to go to Subpart G just because of that.

12 The second issue that warrants a Subpart
13 G hearing when the motive or intent of the party or
14 eyewitness is material. Again, we aren't dealing
15 with motive or intent issues here. We aren't
16 dealing with eyewitnesses here. It just is not
17 appropriate under the regulations to go to Subpart G
18 under these procedures.

19 I might add that the Commission itself
20 has just recently ruled in the Crowe Butte
21 Resources case, which is CLI 09-12, issued on June
22 25th, at pages 49 through 51, that Subpart G
23 proceedings are really not appropriate and are not
24 really helpful in resolving complex technical
25 issues. And that's what we have here. Instead, the

1 Commission characterized Subpart G as being an
2 extraordinary action.

3 Again, Subpart G would be valuable I
4 think in cases where you had perhaps an enforcement
5 action involving a past activity, and there's
6 questions on what actually happened that was the
7 subject of the enforcement action. We aren't
8 dealing with anything remotely similar to that here.

9 As a result Subpart G proceedings are
10 certainly not appropriate in this case.

11 JUDGE YOUNG: Staff.

12 MS. VRAHORETIS: Yes, just briefly,
13 Your Honor.

14 We would just note that the Commission
15 has stated that the provisions under 10 CFR
16 2.310(b), particularly subsection one regarding the
17 use of Subpart G procedures regarding material fact
18 issues, credibility of eyewitnesses, does not
19 include disputes between the parties over the
20 qualifications of professional credibility of expert
21 witnesses who have no firsthand knowledge of the
22 disputed events and facts. And that statement by
23 the Commission is found at 69 Federal Register at
24 222, where 2.310(b) is discussed.

25 We would also note that if Subpart G

1 offered that document, they're eyewitnesses. They
2 know about the full spectrum of damage states. And
3 we would like to know about the full spectrum of
4 damage states to determine, whether or not given
5 that we can count on the mitigative strategies that
6 have been offered up as means by which to meet the
7 regulatory objectives of 50.54(hh)(2).

8 So I don't believe that the arguments
9 that have been made by the applicant and staff
10 necessarily are determinative of whether or not a
11 Subpart G proceeding ought to go forward. We
12 recognize it's extraordinary; we don't argue with
13 that, we know it is. But on the other hand, this is
14 a pretty extraordinary situation, where you have
15 this sort of admission that you can't count on the
16 mitigative strategies to be effective.

17 And the number one basis for that we
18 believe is extremely important for this panel and
19 for the Commission in general to understand. And
20 that was the basis on which we made the motion for
21 a Subpart G.

22 JUDGE YOUNG: All right, is there
23 anything else at this point that anyone thinks we
24 would need to remain in closed session for?

25 All right, now we can switch back to

1 open, and I don't think there is much remaining - I
2 guess I will start a new sentence.

3 (Whereupon at 4:55 p.m. the closed
4 proceeding was adjourned, and the proceeding resumed
5 in open session at 4:55 p.m.)
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PROPRIETARY INFORMATION

CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Luminant Generation Company
 Comanche Peak Nuclear Plant

Name of Proceeding: Hearing-Closed Session

Docket Number: 52-034-COL and 52-035-COL
 ASLBP No. 09-886-09-COL-BD01

Location: Rockville, Maryland

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.


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Official Reporter
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