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Oral Argument

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

5
6 IN THE MATTER OF Docket Nos.
7 SOUTH TEXAS PROJECT NUCLEAR 52-012-COL
8 OPERATING COMPANY 52-013-COL
9 (South Texas Project Units
10 3 and 4)

11
12 Thursday, October 21, 2010

13
14 Room 100

15 Bay City Civic Center

16 201 Seventh Street

17 Bay City, Texas

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

20
21 BEFORE THE LICENSING BOARD:

22 MICHAEL M. GIBSON, Chair

23 DR. GARY S. ARNOLD, Administrative Judge

24 DR. RANDALL J. CHARBENEAU, Administrative

25 Judge

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P R O C E E D I N G S

(9:03 a.m.)

1
2
3 JUDGE GIBSON: Good morning. Welcome to
4 oral argument on contention admissibility and summary
5 disposition with respect to the combined license
6 application for South Texas Nuclear Project's proposed
7 two nuclear reactors, Units 3 and 4.

8 First, I would like to introduce the Board
9 members. To my right, Judge Gary Arnold; to my left,
10 Judge Randy Charbeneau, and I am Michael Gibson.

11 Next I would like to have introductions of
12 counsel. Beginning on my right, your left, I would
13 like for lead trial counsel to introduce yourself,
14 state the name of your client, and introduce as well
15 any counsel who may be participating with you today.

16 MR. EYE: Robert Eye for the Intervenors,
17 and the Intervenor includes Public Citizen, SEED
18 Coalition, and several other individuals that have
19 also been designated as Intervenors in our case.

20 To my left is my associate, Brett Jarmer,
21 who entered his appearance yesterday in this matter,
22 and is a new lawyer in our firm, and we'll welcome
23 him. I'm glad that he's here, and we'll hopefully
24 give him a good experience about what these arguments
25 are all about.

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1 Also present is David Power, one of our
2 witnesses, and Karen Hadden is also -- is here as
3 well.

4 JUDGE GIBSON: Okay.

5 MR. EYE: So I believe that covers
6 everybody.

7 JUDGE GIBSON: Very well.

8 MR. EYE: Thank you, Your Honor.

9 MR. FRANTZ: I'm Steve Frantz from the law
10 firm of Morgan, Lewis & Bockius, in Washington, D.C..
11 I represent STP Nuclear Operating Company. With me at
12 the table is my partner John Matthews.

13 MR. SPENCER: I'm Michael Spencer. I
14 represent the NRC Staff, and with me is co-counsel
15 Anthony Wilson.

16 JUDGE GIBSON: Very well. Thank you. Now
17 that we've completed our introductions, I want to make
18 a couple of comments about why we're here and what we
19 hope to accomplish today, and then we can proceed to
20 argument.

21 South Texas has applied to the Nuclear
22 Regulatory Commission for a combined license to build
23 and operate two additional nuclear reactors, so-called
24 Units 3 and 4, near the current location of its Units
25 1 and 2.

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1 Several individuals, as well as several
2 groups, have challenged the proposed issuance of a
3 combined license for South Texas.

4 For the sake of convenience, we'll refer
5 to those persons and groups as Intervenors today.
6 They have been accorded standing to lodge the
7 challenge that they have to these new units.

8 Now, as I said earlier, the two issues
9 that we're going to be addressing today will be
10 contention admissibility and summary disposition. By
11 contention admissibility, we mean that a party must
12 show some legal or factual basis for the claim that it
13 asserts here, and that the claim is within the
14 permissible scope of matters that have been entrusted
15 to the Nuclear Regulatory Commission.

16 Intervenors have filed six new contentions
17 that it claims result from the Staff's issuance of a
18 draft environmental impact statement.

19 With respect to summary disposition, here
20 we're referring to motions that have been filed by the
21 Staff and by the Applicant to dismiss the sole
22 remaining admitted contention, Contention CL-2, which
23 concerns replacement power costs and severe accident
24 design mitigation alternatives, or as they will be
25 referred to through most of the argument, as SAMDAs.

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1 The issue before us on summary disposition
2 is whether there is a genuine issue of material fact
3 to adjudicate, and if not, whether as a matter of law,
4 the party that has filed this motion would prevail on
5 a trial at the merits.

6 Is there anything further that either of
7 the Board members wish to mention about how we're --
8 what we're going to be addressing today?

9 (No response.)

10 JUDGE GIBSON: Okay. Now, as we have done
11 in previous oral arguments in this matter, we will
12 approach oral argument a little differently than other
13 boards usually do, but we have a number of very
14 specific questions that we would like addressed, and
15 we intend to ask those of counsel here.

16 Rather than allotting each of you a
17 specific amount of time for argument and rebuttal, we
18 just want our questions answered, and I suspect by the
19 time we finish today -- and I think you have found
20 this to be the case in our prior arguments -- by the
21 end of the day, you got your opportunity to speak to
22 the issues and to address the issues of concern to us.

23 But as we have done previously, if it
24 turns out that we have not been able -- you have not
25 been able to make a point or points that you feel were

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1 not covered in the questions and provided there's
2 adequate time at the end of the day, we will afford
3 you an opportunity for a short closing.

4 So at this point, what I would like to do
5 is proceed to the Staff's motion for summary
6 disposition.

7 Counsel for NRC Staff, on page 1 of the
8 Intervenor's reply in opposition to your motion for
9 summary disposition, they assert that your motion is
10 based on the notion that all severe accident
11 mitigation design alternatives issues are resolved
12 through the ABWR -- that's advanced boiling water
13 reactor -- design certification rule. You would not
14 disagree with that characterization, would you?

15 MR. SPENCER: The characterization that
16 our motion is based upon the SAMDA evaluation
17 performed for the ABWR design certification, we agree
18 with that.

19 JUDGE GIBSON: Okay. Let's turn first to
20 10 CFR Part 52, Appendix A, under paragraph IV.
21 That's Roman numeral I-V. Got it?

22 MR. SPENCER: Yes.

23 JUDGE GIBSON: That's entitled, Issue
24 Resolution. Paragraph A states, "The Commission has
25 determined that the structure, systems, components,

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1 and design features of the U.S. Energy Act of 1954 as
2 amended and the applicable regulations identified in
3 Section V" -- that Roman numeral five -- "of this
4 appendix, and therefore provide adequate protection to
5 the health and safety of the public.

6 A conclusion that a matter is resolved
7 includes the finding that additional or alternative
8 structures, systems, components, design features,
9 design criteria, testing, analyses, acceptance
10 criteria or justifications are not necessary for the
11 U.S. ABWR design."

12 Did I read that correctly?

13 MR. SPENCER: Yes, Your Honor.

14 JUDGE GIBSON: Now, do I understand you to
15 say that this paragraph means that the Commission
16 intends that a party may not adjudicate the issues
17 resolved by the design control document?

18 MR. SPENCER: Yes, Your Honor.

19 JUDGE GIBSON: That's not a terribly
20 controversial proposition.

21 MR. SPENCER: No, Your Honor.

22 JUDGE GIBSON: Okay. Let's next go to
23 paragraph B. It provides, "The Commission considers
24 the following matters resolved within the meaning of
25 10 CFR 52.63(a)(5) in subsequent proceedings for

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1 issuance of a combined license, amendment of a
2 combined license or renewal of a combined license,
3 proceedings held 10 CFR 52.103 and enforcement
4 proceedings involving plants referencing this
5 appendix."

6 And after that, there are a number of
7 items, including paragraph VII. Correct?

8 MR. SPENCER: Yes, Your Honor.

9 JUDGE GIBSON: Okay. Now, on pages 8 to
10 9 of your motion, you claim that the Commission
11 specifically found that the TSD -- and I believe that
12 stands for technical support document, doesn't it?

13 MR. SPENCER: Yes, Your Honor.

14 JUDGE GIBSON: -- found that the TSD
15 evaluation provided a sufficient basis for concluding
16 that there are no additional cost beneficial SAMDAs,
17 whether considered during the design certification or
18 in connection with the licensing of a future facility
19 referencing the ABWR if the specific site parameters
20 for a site are within those specified in the TSD.

21 Did I read that correct?

22 MR. SPENCER: Yes, Your Honor.

23 JUDGE GIBSON: And then on page 9 of your
24 motion, you quoted paragraph (b)(7) as your support
25 for this proposition. Correct?

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1 MR. SPENCER: Yes, Your Honor.

2 JUDGE GIBSON: Let's go to paragraph
3 (b) (7). It provides, "All environmental issues
4 concerning severe accident mitigation design
5 alternatives associated with the information in the
6 NRC's final environmental assessment for the U.S. ABWR
7 design and revision 1 of the technical support
8 document for the U.S. ABWR dated December 1994 for
9 plants referencing this appendix whose site parameters
10 are within those specified in the technical support
11 document."

12 Did I read that correctly?

13 MR. SPENCER: Yes, Your Honor.

14 JUDGE GIBSON: Now, you obviously
15 italicized parts in your brief that you wanted us to
16 focus on. I would like to focus on the parts that you
17 did not italicize concerning severe accident
18 mitigation design alternatives associated with the
19 information in the NRC's final environmental
20 assessment for the U.S. ABWR design and revision 1 of
21 the technical support document for the U.S. ABWR dated
22 December 1994. Do you see that?

23 MR. SPENCER: Yes.

24 JUDGE GIBSON: It seems to me that where
25 we need to start is with the question: Where in the

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1 ABWR is replacement power cost stressed?

2 MR. SPENCER: Your Honor, I would disagree
3 with that, and --

4 JUDGE GIBSON: You will disagree with
5 what? That that's where we need to start?

6 MR. SPENCER: Yes, Your Honor.

7 JUDGE GIBSON: Okay. And why would you
8 say we don't need to start there?

9 MR. SPENCER: Well, several points.
10 First, the Commission said that the only purpose of a
11 SAMDA evaluation or SAMA evaluation is to determine
12 whether there is a cost-beneficial SAMDA, and it said
13 that recently in the Pilgrim case.

14 JUDGE GIBSON: Right.

15 MR. SPENCER: We cited that in our brief.
16 The EA and the technical support document address that
17 issue and conclude that there are no cost-beneficial
18 SAMDAs. Therefore, the EA and the ABWR technical
19 support document directly consider and resolve the
20 only ultimately relevant issue for SAMDA analysis,
21 that is, whether a cost-beneficial SAMDA is
22 identified.

23 That issue is resolved. It was explicitly
24 considered, and therefore, any other refinement to a
25 SAMDA analysis is not -- is irrelevant. It's

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1 resolved, too.

2 JUDGE GIBSON: Okay. Just indulge me.
3 Where in the U.S. ABWR DCD is replacement power cost
4 addressed specifically?

5 MR. SPENCER: I will need a moment to
6 consult.

7 MR. FRANTZ: Judge Gibson, if it will help
8 the Board, I can give you a reference. It's addressed
9 on page 32 of the technical support document in the
10 top paragraph on that page.

11 JUDGE GIBSON: Of the technical support
12 document.

13 MR. FRANTZ: Yes.

14 JUDGE GIBSON: Not in the ABWR DCD itself.
15 Correct?

16 MR. FRANTZ: That's correct.

17 JUDGE GIBSON: Okay.

18 (Pause.)

19 JUDGE GIBSON: Could I see page 32, while
20 they're looking for this?

21 MR. EYE: May I approach, Your Honor, and
22 look at it as well?

23 MR. FRANTZ: I do have copies for the
24 Board members and the parties if --

25 JUDGE GIBSON: That would be great. Just

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1 let me Mr. Eye see what you're talking about. He just
2 would like to see what you're going to show me.

3 MR. FRANTZ: (Handing documents.)

4 JUDGE GIBSON: Thank you so much.

5 Appreciate that.

6 This is my copy, so I can mark on it?

7 MR. FRANTZ: That's correct.

8 JUDGE GIBSON: Thank you. Thank you, Mr.

9 Frantz. Appreciate it.

10 (Pause.)

11 MR. SPENCER: Your Honor --

12 JUDGE GIBSON: Yes.

13 MR. SPENCER: -- it is addressed on page
14 33 of the technical support document, replace of power
15 costs, and it is also addressed in the EA,
16 environmental assessment. The EA on page 8 references
17 the technical support document's consideration of
18 replacement power costs, and on page 13, the Staff
19 addressed the issue of whether using a different
20 methodology based on NUREG -- excuse me -- page 11 of
21 this copy, page NUREG BR-0184 -- excuse me -- BR-0058,
22 whether using that analysis would change the result,
23 and NUREG BR-0058 accounts for replacement power costs
24 and the methodology.

25 JUDGE GIBSON: Okay. Well, it sounds like

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1 actually in the design control document, though,
2 there's not a specific reference to it. Is that
3 correct?

4 MR. SPENCER: Well, the technical support
5 document is not part of the DC --

6 JUDGE GIBSON: Right. I know, and I'm
7 just asking about design control document itself.

8 MR. SPENCER: I'm not aware that it does.

9 JUDGE GIBSON: But there is a reference to
10 it on both page 32 and 33 of the technical support
11 document.

12 MR. SPENCER: Yes, Your Honor.

13 JUDGE GIBSON: Okay. And what it
14 basically says on 32 is that they considered it, and
15 what it says on 33 is that it was based on 1.3 cents
16 per kilowatt hour differential as power cost. Is that
17 correct?

18 MR. SPENCER: Yes, Your Honor.

19 JUDGE GIBSON: And other than those three
20 sentences, I guess, in the technical support document,
21 there's not any specific reference to replacement
22 power costs. Correct?

23 MR. SPENCER: Well, it may be referenced
24 elsewhere in the document.

25 JUDGE GIBSON: Correct. Or it may be

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1 referenced in another document that may be support for
2 this, where they did the calculations, but actually in
3 this document, this is basically it. Right?

4 MR. SPENCER: I think that is the most
5 direct reference. I can't say that it's nowhere else
6 referenced anywhere in the document.

7 JUDGE GIBSON: Okay. Do you know of
8 anything to the contrary, Mr. Frantz, just on this
9 specific question of replacement power costs?

10 MR. FRANTZ: No, I don't.

11 JUDGE GIBSON: Okay. Thank you.

12 MR. SPENCER: But, Your Honor, I would
13 like to point out some regulations in Part 51 that
14 concern a SAMDA evaluation for a combined license
15 referencing a design certification that I believe is
16 relevant to this issue.

17 JUDGE GIBSON: 51 --

18 MR. SPENCER: Well, first 51.75(c).

19 JUDGE GIBSON: Okay.

20 MR. SPENCER: And that's for --

21 JUDGE GIBSON: Hold on a minute. For the
22 combined license stage, is that where we are?

23 MR. SPENCER: Yes. 51.75 DEIS for
24 combined license, and if you go to paragraph (c)(2),
25 combined license application reference a standard

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1 design certification --

2 JUDGE GIBSON: Okay.

3 MR. SPENCER: If the combined license
4 application references a standard design certification
5 and the site characteristics of the combined license's
6 site fall within the site parameters specified in the
7 design certification environmental assessment, then
8 the draft EIS for the combined license -- draft
9 combined license environmental impact statement shall
10 incorporate by reference the design certification
11 environmental assessment and summarize the findings
12 and conclusions of the environmental assessment with
13 respect to severe accident mitigation design
14 alternatives.

15 So that clearly indicates that if the site
16 characteristics fall within the site parameters, the
17 NRC is not to do an additional analysis only to
18 reference the previous analysis.

19 JUDGE ARNOLD: I do have a question on
20 that. In your draft EIS on page 5-110, you state,
21 "The technical support document does not contain a
22 specific list of site parameters." So how can you
23 qualify under that paragraph?

24 MR. SPENCER: Well, Your Honor, what the
25 Staff did is it looked at the analysis that was

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1 performed in the technical support document, and it
2 looked at the principal components of that analysis,
3 and which parts of that analysis were connected to
4 siting, which could vary between different sites and
5 which were -- and other values which were constants or
6 related to the design.

7 And the Staff identified in its summary
8 disposition motion, as explained in that motion, the
9 probability-weighted population dose risk as the site
10 parameter for comparison, and we performed the
11 evaluation, showed that the site characteristics fell
12 within the site parameters, and there has been no
13 contention filed on that. The Intervenors don't
14 dispute that. It's an undisputed fact.

15 JUDGE ARNOLD: Well, I have just looked at
16 page 33 of the technical support document, and within
17 the generic ABWR SAMDA, there is the assumption that
18 replacement power costs are the 1.3 cents per kilowatt
19 hour, and it seems to me that that is another relevant
20 parameter that could vary from site to site, and that
21 has been challenged by the Intervenors, that --

22 MR. SPENCER: Well, Your Honor, the
23 replacement power cost that was -- there's no
24 indication in this analysis that the replacement power
25 cost was based on any specific site, Texas versus

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1 North Carolina versus any other state or region.

2 And one of the principles of doing a SAMDA
3 analysis in the design certification is to do a
4 general analysis that will cover SAMDAs for the
5 design, no matter where the COL site is located. The
6 SAMDA analysis is intended to be good for those sites,
7 and I would bring up two points in this regard, Your
8 Honor.

9 One is the intent of a design
10 certification is to resolve issues without having to
11 revisit them later, and in paragraph (a) of Section VI
12 of Appendix A to Part 52, the Commission said that
13 they made a final safety finding on the design, and I
14 will quote now.

15 "A conclusion that a matter is resolved
16 includes the finding that additional or alternative
17 structures, systems, components, design features,
18 design criteria, testing, analyses, acceptance
19 criteria, or justifications are not necessary for the
20 ABWR design."

21 So I would focus on, you know, "additional
22 or alternative," and it includes justifications or
23 analyses. So the idea of doing -- there would be no
24 point to performing a SAMDA evaluation at a design
25 certification stage if it had to be revisited just

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1 because a plant referencing that cite was located in
2 a particular area. The idea is that the analysis was
3 performed to resolve the issues generically.

4 And I would like to point out one further
5 regulation in Part 51, 10 CFR 51.107(c).

6 JUDGE GIBSON: 107(c)?

7 MR. SPENCER: Yes. "Public hearings and
8 proceedings on issuance of a combined license," that's
9 the title of the regulation. "If the combined license
10 application references a standard design
11 certification, then the presiding officer in a
12 combined license hearing shall not admit contentions
13 proffered by any party concerning severe accident
14 mitigation design alternatives unless the contention
15 demonstrates that the site characteristics fall
16 outside the site parameters and the standard design
17 certification."

18 In this case, we've had a little more
19 complicated procedural posture, because the Applicant
20 in their ER never addressed this issue, so the
21 Intervenors didn't have anything to context in this
22 regard. But now that we have the -- the Staff has
23 performed its DEIS analysis and that is uncontested,
24 then the principle that this clearly stands for is
25 that a contention is not to be litigated if the site

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1 characteristics fall within the site parameters.

2 JUDGE ARNOLD: And that really focuses on
3 my question there. If it falls within the specified
4 site parameters and there is no specification of those
5 site parameters, it has instead been left up to NRC
6 Staff's judgment what the appropriate parameters
7 should be. Doesn't that kind of weaken your argument
8 that all of the SAMDA issues are off the table by rule
9 now?

10 MR. SPENCER: Your Honor, I do not believe
11 it does. We do not -- we agree that an Intervenor
12 could file a contention alleging that there are
13 different site parameters or that we did not do the
14 analysis correctly. They could have filed that
15 contention; they did not. And even when we filed our
16 summary disposition motion, they did not dispute any
17 of the facts. They just said -- they just made a
18 legal argument, and they did not contest our
19 conclusion that the site characteristics fall within
20 the site parameter.

21 And according to Commission case law, if
22 an opposing party does not contest a material fact,
23 then that fact is deemed admitted. So that's not a
24 disputed issue anymore in this -- that's not a
25 disputed issue in this proceeding.

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1 JUDGE CHARBENEAU: Would -- excuse me.

2 (Pause.)

3 JUDGE CHARBENEAU: Would collocation of
4 units be considered a site parameter?

5 MR. SPENCER: No, Your Honor. The
6 technical support document evaluation does not -- is
7 not based upon the number of units at a site, and that
8 would -- and I would have to bring up the point that
9 many license applications reference a unit at a multi-
10 unit site, so if that were considered to be a site
11 parameter, then finality would not apply in many
12 proceedings, because you would have to redo the
13 evaluation just because a COL application referenced
14 the standard design certification at a particular
15 site, which is against the whole policy of having a
16 standard design certification.

17 The standard design certification is
18 supposed to have a standard design that the NRC has
19 approved generically and that can be referenced at
20 different sites.

21 JUDGE CHARBENEAU: Thank you.

22 JUDGE GIBSON: Are the specific site
23 parameters that are -- you're suggesting are resolved
24 by this design control document, are they spelled out
25 anywhere exactly what the specific parameters are that

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1 are resolved? Is there a list we can go to and go,
2 okay, well, that parameter is resolved, period, end of
3 discussion?

4 MR. SPENCER: In the technical support
5 document, there is not a specific list of the site --
6 it doesn't have an explicit list of the site
7 parameters. There's no table that says, Here are the
8 site parameters for the evaluation. But we believe
9 that the site parameters are implicit in the way the
10 evaluation is performed, and we explained that in our
11 motion.

12 JUDGE ARNOLD: Well, let me ask Mr. Frantz
13 here. Your environmental report, apparent from my
14 reading it, looked at the generic ABWR SAMDA, and it
15 appears you weren't entirely satisfied that the costs
16 used in the generic evaluation fully encompassed the
17 costs at STP, and you did an additional bounding
18 calculation.

19 Do you think that the generic ABWR SAMDA
20 analysis by itself adequately accounts for the cost of
21 an accident at STP?

22 MR. FRANTZ: Yes, we do. We support the
23 Staff's motion, and we did provide the analysis in
24 Section VII(5)(s) of our environmental report,
25 basically to address this contention. We did not

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1 originally have that as part of our environmental
2 report, and the only reason we added it was to address
3 the contention admitted by the Board.

4 JUDGE ARNOLD: You submitted a table 7.3-
5 1, STP maximum averted cost risk for one ABWR net
6 present value, and in that, you had five different
7 costs: off-site exposure, off-site economic costs,
8 on-site exposure costs, on-site clean-up costs, and
9 replacement power costs. And by your numbers, the
10 off-site exposure cost is less than 1 percent of the
11 total cost of an accident.

12 And as I understand it, in the generic
13 ABWR SAMDA analysis, it's based -- the entire cost of
14 the accident is based upon off-site exposure cost,
15 which appears to be 1 percent.

16 MR. FRANTZ: Judge Arnold, I don't believe
17 that's correct. I believe that in the ABWR analysis,
18 we had evaluations not only of the off-site exposure
19 costs. We also had evaluations of replacement power
20 costs and a number of other factors, so it wasn't just
21 limited.

22 JUDGE ARNOLD: Okay. But it's buried in
23 the evaluation, and they were not looked at as
24 parameters of the SAMDA analysis.

25 MR. FRANTZ: I think that's correct.

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1 Typically replacement power costs would not be
2 considered as a site parameter, because it's not based
3 upon that particular site. It's basically a cost of
4 power in an area. It could be a service area. In
5 this case, it's ERCOT, which is almost the entire
6 state of Texas, so it's not linked to our particular
7 site.

8 JUDGE ARNOLD: Well, in your evaluation,
9 you looked at the replacement power costs of two units
10 for several years and the other two units for just a
11 couple of years. Now, that wasn't -- couldn't have
12 been included in the ABWR evaluation, but you added
13 that because --

14 MR. FRANTZ: Because the Board, I thought,
15 was directing us to. The Board admitted this
16 contention. We didn't believe the contention should
17 have come in obviously, but the Board did not agree
18 with us. And so to address the Board's issue, we
19 provided that analysis in the environmental report.

20 JUDGE ARNOLD: Thank you.

21 JUDGE GIBSON: Is -- did you have
22 something else to say, Mr. Frantz? Okay.

23 Is there any mention of replacement power
24 costs in the draft environmental impact statement?

25 MR. SPENCER: No, Your Honor, because

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1 we -- all we did was address, as 51.75(c) direct us
2 to, in the DEIS, we addressed whether the site
3 characteristics were within the site parameters. Once
4 we concluded that that was the case, we recognized
5 that SAMDA issues were resolved in this proceeding,
6 and there was nothing more to do.

7 JUDGE GIBSON: Okay. So the answer is you
8 had a reason for it, but, no, you didn't address it.

9 MR. SPENCER: That's correct, Your Honor.

10 JUDGE GIBSON: Okay. Now, on page 5-99 of
11 the draft EIS, you refer to a computer modeling
12 program called MACCS2. Is that right?

13 MR. SPENCER: Yes, Your Honor.

14 JUDGE GIBSON: Okay. And you indicate
15 that South Texas used that computer model to evaluate
16 the potential for severe accidents once it commences
17 operation at Units 3 and 4. Correct?

18 MR. SPENCER: Yes, Your Honor.

19 JUDGE GIBSON: And you also indicate that
20 this MACCS2 computer model assesses three types of
21 severe accident consequences. Those would be human
22 health, economic costs, and land area affected by
23 contamination. Is that correct?

24 MR. SPENCER: Yes, Your Honor.

25 JUDGE GIBSON: Let's turn to economic

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1 costs that the model evaluates, and again on page
2 5-99, you state, "Economic costs of a severe accident
3 include the costs associated with short-term
4 relocation of people, decontamination of property and
5 equipment, intradiction of food supplies, land and
6 equipment use, and condemnation of property."

7 Did I read that correctly?

8 MR. SPENCER: Yes, Your Honor.

9 JUDGE GIBSON: There's nothing in this
10 description of economic costs that mentions
11 replacement power costs, is there?

12 (Pause.)

13 MR. SPENCER: Your Honor, the MACCS code
14 does not address replacement power costs.

15 JUDGE GIBSON: Okay.

16 MR. SPENCER: It addresses off-site
17 economic consequences.

18 JUDGE GIBSON: I understand, but there's
19 no mention in there of replacement power costs.
20 Right? That is the answer.

21 MR. SPENCER: That is correct.

22 JUDGE GIBSON: Okay. Thank you. Now, as
23 Mr. Frantz has alluded to earlier this morning,
24 Contention 21 was admitted by this Board, and although
25 the Applicant and the Staff were opposed to the

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1 admission of that contention, it was based on the
2 notion that the environmental report did not address
3 the impacts of a severe accident at one or more units
4 at another unit at the facility. Correct?

5 MR. SPENCER: The Intervenors used the
6 term "severe radiological accident" in Contention 21.
7 We considered the contention not very specific, and so
8 it wasn't clear to us if they were addressing severe
9 accidents in a particular section of the ER.

10 JUDGE GIBSON: Okay. But it does involve
11 an accident at one unit and the possible impact on
12 another unit. Correct?

13 MR. SPENCER: Yes, Your Honor.

14 JUDGE GIBSON: Okay. And obviously,
15 although again it did not agree with us -- Mr. Frantz
16 has made that clear -- they went -- South Texas went
17 ahead and amended its application to try to address
18 the issue that was raised. Correct?

19 MR. SPENCER: Yes, Your Honor.

20 JUDGE GIBSON: And by doing that, it
21 mooted Contention 21. Are you with me?

22 MR. SPENCER: Oh, yes.

23 JUDGE GIBSON: Okay. And then Contention
24 CL-2 was essentially a legacy of that process, because
25 it challenged the Applicant's characterization of

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1 replacement power costs of such a shutdown at one unit
2 on the other units.

3 MR. SPENCER: Yes.

4 JUDGE GIBSON: Okay. At the time that you
5 filed your reply to Contention 21 and Contentions
6 CL-2, -3, and -4, the ABWR DCD had been issued.
7 Correct?

8 MR. SPENCER: Yes, Your Honor.

9 JUDGE GIBSON: But in your answer to those
10 two contentions, you did not assert that the design
11 control document for the ABWR resolved all
12 environmental issues in this proceeding concerning
13 SAMDAs, did you?

14 MR. SPENCER: We didn't, Your Honor, but
15 if I can explain?

16 JUDGE GIBSON: You did in your replies?

17 MR. SPENCER: No, Your Honor. If I can
18 explain why we did not, the contention -- because the
19 contention was based on the ER and the ER did not
20 address the issue, the factual predicate of the site
21 characteristics falling within the site parameters had
22 not yet been established in any analysis, so we
23 answered the contention based upon the fact that it
24 was a contention on the ER, and the ER did not address
25 the issue.

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1 If I could explain further, if we were to
2 have made an argument in an answer about finality, we
3 would have needed to have said that notwithstanding
4 what the ER says, Here is our own independent of
5 analysis of the SAMDA evaluation and the site
6 characteristics falling within the site parameters,
7 and that would not --

8 Considering that the contention stage
9 is -- rules envision a contention based on an existing
10 document and that the other parties answer the
11 contention to see whether it's admissible based on the
12 existing document, it would not have been appropriate
13 for us to have essentially raised this argument and
14 provided an independent analysis. That was more
15 appropriately done in a summary disposition motion and
16 in our later DEIS, which we issued later.

17 JUDGE GIBSON: But it would have been
18 dispositive of the contention, wouldn't it? If you
19 had just simply said, That issue was resolved by the
20 design control document, there's no reason.

21 MR. SPENCER: Well, Your Honor, it would
22 be -- it is dispositive, so long as there's no
23 admissible contention over whether the site
24 characteristics fall within the site parameters, so
25 it's conditionally dispositive. So the Intervenors

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1 would probably rightly have said, The ERs did not even
2 address this issue at all. We did not address it,
3 because the ER never addressed it, and we haven't had
4 a chance, a reasonable chance to contest what the
5 Staff is saying in this answer.

6 But we did give them the opportunity by
7 issuing a DEIS. They never -- they filed contentions
8 under the DEIS, but never filed contentions
9 challenging any part of our analysis of SAMDAs, and in
10 the summary disposition motion, in responding to that,
11 they have not challenged our factual -- the factual
12 underpinnings of our argument. They only make a legal
13 argument.

14 JUDGE GIBSON: This is the point that you
15 raised in footnote 9?

16 MR. SPENCER: (Perusing document.) Yes,
17 Your Honor.

18 JUDGE GIBSON: Let's look at the
19 regulation that you refer to there, 10 CFR
20 2.309(f)(2). It says, in part, "On issues arising
21 under the National Environmental Policy Act, the
22 petitioner shall file contentions based on the
23 applicant's environmental report. The petitioner may
24 amend those contentions or file new contentions if
25 there are data or conclusions in the NRC draft or

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1 final environmental impact statement, environmental
2 assessment, or any supplements relating thereto, that
3 differ significantly from the data or conclusions in
4 the applicant's documents."

5 Did I read that correctly?

6 MR. SPENCER: Yes, Your Honor.

7 JUDGE GIBSON: Now, clearly the
8 intervenors had properly raised a contention, which
9 was CL-2, based on the Applicant's environmental
10 report. You don't dispute that they did that.

11 MR. SPENCER: Yes, Your Honor.

12 JUDGE GIBSON: Okay. And there's no
13 mention of replacement power costs in the draft
14 environmental impact statement, as you've already
15 said. Correct?

16 MR. SPENCER: That's correct, Your Honor.

17 JUDGE GIBSON: There's no mention of that
18 contention in the draft environmental impact
19 statement, is there?

20 MR. SPENCER: No, Your Honor.

21 JUDGE GIBSON: So what footnote 9 is
22 really saying is that the NRC can eliminate
23 contentions, not by addressing them head-on, but by
24 avoiding them altogether and hoping that the
25 intervenors will be lulled into a false sense of

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1 security by thinking that they have a viable
2 contention. Is that essentially what you're saying in
3 footnote 9?

4 MR. SPENCER: That is not what we are
5 saying at all, Your Honor. What we are saying is that
6 the rules and the initial scheduling order of this
7 proceeding provided that there would be an opportunity
8 to file contentions on the DEIS and 2.309(f)(2)
9 specifically says that if the conclusions differ
10 significantly between the DEIS and the environmental
11 report, Intervenors are to file contentions on that.

12 The Intervenors chose not to do so, and
13 notwithstanding that fact, the Intervenors still do
14 not contest the factual underpinnings of our argument
15 in the DEIS. Even after filing our motion for summary
16 disposition, they still do not contest that.

17 JUDGE GIBSON: Okay. Let's review the
18 bidding. At the time the draft environmental impact
19 statement was issued, there was no doubt in your mind
20 that the Intervenors were challenging replacement
21 power costs, was there? They had an admitted
22 contention.

23 MR. SPENCER: Your Honor, at the -- are
24 you talking about when the DEIS was issued?

25 JUDGE GIBSON: That's right.

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1 MR. SPENCER: At that time they had an
2 admitted contention that did not mention replacement
3 power costs or any specific issue on severe accidents.
4 They had pending contentions that mentioned
5 replacement power costs based on the Applicant's new
6 ER Section 7.5(s), but there was no -- the original
7 contention was very short and did not mention -- as
8 far as I recall.

9 I do not recall that the original
10 contention -- I can try to check on that, but I do not
11 recall that the original contention mentioned the
12 replacement power costs specifically.

13 JUDGE GIBSON: I am sorry I do not have a
14 specific Federal Register cite for this. I copied the
15 language, so maybe somebody can help me out here, but
16 it is the NRC certification of the ABWR design. And
17 in that certification, it contains a statement about
18 replacement power costs.

19 And it says, in part, "For modifications
20 that reduce core damage frequency, GE reduced the
21 costs of the design alternatives by an amount
22 proportional to the reduction in the present worth of
23 the risk of the averted on-site costs. The on-site
24 costs that were considered include replacement power
25 at 1.3 cents kilowatt differential cost; direct

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1 accident costs, including on-site clean-up at 2
2 billion; and the economic loss to the facility at 1.4
3 billion. The resulting costs for each design are
4 given in Table 4 of the technical support document" --
5 which we've already discussed.

6 "The NRC Staff reviewed the bases for GE's
7 cost estimate and finds them acceptable. The NRC
8 staff has used GE's cost estimates in the cost benefit
9 analysis below. Only rough approximations of the
10 costs of specific alternatives are possible at this
11 time. Large uncertainties exist, because detailed
12 designs are not available and because experience with
13 construction and licensing problems that could surface
14 in this type of work is limited.

15 "However, even though the U.S. ABWR design
16 is still in design phase, relatively large costs are
17 anticipated for many of the design alternatives."

18 Now, the certification to the ABWR seems
19 to me -- and I'd love to hear your explanation why it
20 doesn't -- seems to caveat the SAMDA analysis by
21 noting that there are significant uncertainties in the
22 cost estimates that GE used.

23 MR. SPENCER: Your Honor, can I consult on
24 responding to that?

25 JUDGE GIBSON: Yes.

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1 (Pause.)

2 MR. SPENCER: Your Honor, I believe I
3 recognize the quotation.

4 JUDGE GIBSON: I'm sorry I did not have a
5 specific Federal Register cite for you.

6 MR. SPENCER: It sounds like the
7 environmental -- it comes from the environmental
8 assessment. It sounds similar to what's in the
9 environmental assessment.

10 JUDGE GIBSON: Okay.

11 MR. SPENCER: What we would point out is
12 that the NRC Staff in the EA did various sensitivity
13 analyses to see whether, you know, given the
14 uncertainties, whether if you had alternate
15 assumptions, whether you would identify cost-
16 beneficial SAMDA, so -- and the NRC concluded that
17 because there were such a gap between the maximum
18 benefit -- or the benefits of reducing the accident
19 compared with the cost of the SAMDAs, that even with
20 these alternative calculations, even with
21 uncertainties, no cost-beneficial SAMDA was
22 identified.

23 JUDGE GIBSON: Okay.

24 MR. FRANTZ: And, Judge Gibson, if I
25 may --

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1 JUDGE GIBSON: Please.

2 MR. FRANTZ: I think you're right that
3 there are substantial uncertainties, and the technical
4 support document, I think, takes that into account.
5 On page 33, the first full paragraph, it states, "The
6 cost estimates were intentionally biased on the low
7 side, because all known or reasonably expected costs
8 were accounted for in order that a reasonable
9 assessment of a minimum cost would be obtained.
10 Actual plant costs are expected to be higher than
11 indicated in this evaluation. All costs are
12 referenced in 1991 U.S. dollars."

13 So, again, I think because of those
14 uncertainties, the ABWR provided a minimum or low
15 cost.

16 JUDGE GIBSON: Thank you. Thank you very
17 much, Mr. Frantz. Okay.

18 Judge Arnold, did you have a question?

19 JUDGE ARNOLD: Just clarification. Those
20 were costs of implementing a SAMDA or costs that would
21 be averted by implementing a SAMDA?

22 MR. FRANTZ: Those were, I think, costs of
23 implementing the SAMDA.

24 JUDGE ARNOLD: Okay. Thank you.

25 JUDGE GIBSON: Mr. Eye, I haven't given

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1 you an opportunity to respond to any of this, and
2 before we move on, I wondered if there's anything else
3 you wanted to say, other than what you had in your
4 reply to the Staff's motion.

5 MR. EYE: I believe we covered the
6 essential points in our papers that we filed with the
7 panel. I will say that the discussion that has just
8 occurred, the colloquy between you -- the panel and
9 the counsel, has been illuminating. I don't know that
10 it changes the essential part of our argument,
11 however.

12 What's troubling, however, is that there
13 seems to be an assumption that when one -- arguably if
14 one satisfies the -- or if one answers the question
15 using the technical support document, for instance,
16 even with its admitted uncertainties and the Federal
17 Register notice that Your Honor quoted from a moment
18 ago, which I think properly does establish a rather
19 sizeable caveat.

20 Assuming all of that is adequate for
21 purposes of NRC analysis, does it answer NEPA, because
22 the NEPA analysis is not necessarily going to be
23 controlled in the same way, by the same analysis that
24 has been done inside the Agency by Staff, let's say.

25 I don't believe that one can read NEPA as

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1 foreclosing an analysis of replacement power costs in
2 a contemporary sense, particularly when the technical
3 support document quantifies the replacement power
4 costs at 0.13, and replacement power costs currently,
5 if I'm reading this correctly, would be somewhere in
6 the area of 0.34, some -- well, not quite three times
7 what was calculated in the technical support document.

8 And as this panel has pointed out in an
9 earlier order, NEPA does apply to this. We're talking
10 about alternatives. I mean, the very essence of the
11 SAMDA includes the concept of alternatives, which
12 dovetails with what NEPA really requires us to do.

13 So, again, I fully appreciate the colloquy
14 that I've benefitted from, sitting here in the last
15 hour or so. I don't think that it changes our
16 essential argument. In some ways, I think it
17 reinforces it. To the extent that the Staff argues
18 that the fact that we did not contest specific aspects
19 of the site parameters in our motion, I don't really
20 think, again, changes the essence of what we've
21 argued.

22 If something is included in the technical
23 support document that is found to later be
24 significantly altered by events, for example,
25 replacement power costs, NEPA, it would seem, would

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1 require to take that into account, notwithstanding a
2 policy decision by the Commission to, arguably, again,
3 giving them the benefit of that argument, that carves
4 replacement power costs out of subsequent discussions
5 within the context of the COL adjudication.

6 NEPA would not -- I don't think would
7 necessarily provide the same kind of defense to the
8 Staff in that regard, so I think that would be
9 essentially our observations about the status of the
10 replacement power costs analysis as it's presented the
11 technical support document, compared to what it is
12 currently.

13 And, again, Mr. Power noted that
14 replacement power costs have actually been
15 substantially higher than the .034. They've actually
16 extended all the way up to .077, so --

17 JUDGE GIBSON: Okay.

18 MR. EYE: -- we've got a huge range there
19 that, it seems to us, that NEPA would --

20 JUDGE GIBSON: Okay.

21 MR. EYE: -- require to be accounted for.

22 JUDGE GIBSON: And I know we'll get into
23 a lot of that in our discussion of the Applicant's
24 motion. I don't want to get into too much of the
25 detail of those things, but I just wanted to make sure

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1 there was nothing else you wanted to say.

2 Well, I think this would be -- unless
3 Judge Arnold or Judge Charbeneau has another question
4 on this, I think this would be a good time to take a
5 ten-minute break. We will recess for ten minutes.

6 (Whereupon, a short recess was taken.)

7 JUDGE GIBSON: All right. I think we will
8 do our best, by the way, to find you all a Federal
9 Register cite to the quote that I pasted in here and
10 then I didn't write down, but if anybody else finds it
11 in the interim, if you'd let us know, we'd appreciate
12 it. But we will endeavor to get that to you as soon
13 as we get back to Maryland.

14 Okay. I think we'd like to turn now to
15 the Applicant's motion for summary disposition.
16 Counsel for Intervenors, it seems to me that the basic
17 problem you face in opposing the South Texas motion
18 for summary disposition is South Texas's claim that it
19 adopted your proposed methodology, then made
20 calculations to demonstrate that there are no cost-
21 beneficial SAMDAs.

22 Based on the Commission's recent decision
23 in the Pilgrim case, to establish a factual dispute
24 that is material, you must show that its resolution
25 would produce a cost-beneficial or cost-effective

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1 SAMDA. So as we get into specific issues today, to
2 the extent possible, I would like you to be sure to
3 provide explanations for the Board about how a genuine
4 factual dispute exists with respect to that issue
5 under the Pilgrim case. Could you do that for us
6 whenever we address a specific issue? I think that
7 would be helpful.

8 MR. EYE: I'll try.

9 JUDGE GIBSON: Thank you. Okay. Counsel
10 for Intervenors, on page 3 of your response to the
11 Applicant's motion for summary disposition, you assert
12 that the cost threshold for assessing a SAMDA is not
13 the \$158,000 figure that the Applicant employed, but
14 instead is 131,000, based on the estimate of your
15 expert, Mr. Johnson. Is that correct?

16 MR. EYE: That is.

17 JUDGE GIBSON: Okay. Let's start with the
18 2009 ERCOT prices that Mr. Johnson claims are not
19 representative, but instead are aberrations resulting
20 from low natural gas prices. Now, in Mr. Johnson's
21 estimation, the actual trend of natural gas is going
22 up and not down. Is that correct?

23 MR. EYE: It is.

24 JUDGE GIBSON: Okay. And from Mr.
25 Johnson's perspective, were South Texas to use this

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1 higher replacement power cost, it would decrease the
2 cost threshold for evaluating the SAMDA. Is that
3 correct?

4 MR. EYE: It is.

5 JUDGE GIBSON: Okay. And in Mr. Johnson's
6 estimation, this 131,000 versus 158,000 is so
7 significant that it would change the cost benefit
8 evaluation.

9 MR. EYE: I think that's really a
10 combination of Mr. Johnson's conclusion and the
11 arguments that we --

12 JUDGE GIBSON: Okay.

13 MR. EYE: -- coupled with it.

14 JUDGE GIBSON: Okay. And so it would meet
15 the criteria under Pilgrim. Is that --

16 MR. EYE: Yes.

17 JUDGE GIBSON: -- your assertion?

18 MR. EYE: That is correct, Your Honor.

19 JUDGE GIBSON: Now, on page 4 of your
20 response to the Applicant's motion for summary
21 disposition, you assert that South Texas employed an
22 incorrect measure of inflation. Is that correct?

23 MR. EYE: It is correct.

24 JUDGE GIBSON: Okay. And you're
25 specifically claiming that the appropriate measure

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1 would be to use the personal consumption deflator, and
2 then exclude food and energy prices from it, and that
3 those adjustments would yield a reduction of the
4 \$158,000 figure to the \$131,000 figure. Is that
5 right?

6 MR. EYE: It is. There's one other step,
7 and that's the regional cost-of-living differential
8 that is covered on page 5 of our response to the
9 motion. So it's what you covered, Your Honor, and
10 then plus one other layer on that, and that is the
11 regional cost-of-living differential. And that brings
12 it down to the 131.

13 JUDGE GIBSON: Okay. Now, I'm a little
14 confused about this, because when I read it, I
15 thought -- was reading through it the 158,000 versus
16 131,000 was based on natural gas prices, but
17 apparently -- is it based on this personal cost
18 deflator less the cost of food and energy with the
19 regional cost differential? Or is it both, or is it
20 neither? It was a little hard for me to understand
21 how -- what we were supposed to accept as the basis
22 for getting from 158- to 131-.

23 MR. EYE: I believe it includes both.

24 JUDGE GIBSON: It would be both. Okay.
25 Thank you. Okay. Now, you also claim that South

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1 Texas used the Consumer Price Index to measure
2 inflation and that although the Consumer Price Index
3 is an accepted measure of inflation, you suggest that
4 the personal cost deflator is more precise and should
5 be used. Is that correct?

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

7 JUDGE GIBSON: Now, is it your position
8 that the \$158,000 figure is an unreasonable one?

9 MR. EYE: It is if you consider that it's
10 tied to measures that are -- that yield a
11 substantially higher number than our 131-. Yes. And,
12 you know, reasonableness is a hard thing to peg
13 sometimes, of course, and -- but in this instance, to
14 the extent, again, going back to Pilgrim, it would
15 make a difference in terms of how the case could be
16 decided.

17 JUDGE GIBSON: Uh-huh.

18 MR. EYE: I mean, if, in fact, the panel
19 or the Commission would accept that there's a -- that
20 the 131,000 is a more precise and reasonable figure,
21 it would require SAMDAs to be adopted that currently
22 would not be. So it's a bit of a combination of both
23 the difference between the 158- and 131-, with the --
24 if you will, the benefit of the Pilgrim decision,
25 which essentially says, Does it make a difference.

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1 And in this instance, it would make a difference.

2 JUDGE GIBSON: Okay. Counsel for South
3 Texas, is 131,000 the correct number for setting the
4 cost threshold for evaluating a SAMDA?

5 MR. FRANTZ: No, and I think for two
6 reasons. And Mr. Eye mentioned that there are two
7 factors that led the Intervenors to go from 158,000 to
8 the 131,000. The first one is the .91 multiplier that
9 they used to account for the regional price
10 differences, and we believe that that's an attack on
11 the finality of the ABWR technical support document.

12 As I quoted to the Board earlier this
13 morning, the \$100,000 for the least-cost SAMDA in the
14 technical support document was in 1991 dollars, and it
15 was a minimum cost. It was designed to be
16 intentionally low, and the technical support document
17 explains that the actual costs are likely to be
18 higher.

19 And for the Intervenors now to take the
20 position that the \$100,000 in 1991 dollars should be
21 multiplied by the .91 multiplier, I think, is an
22 attack on the finality of that technical support
23 document. So we believe that's inappropriate.

24 Even apart from that, even if you ignore
25 the finality, what we're dealing with here are SAMDAs,

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1 things like pumps and valves, that will not
2 necessarily be manufactured in this area. They could
3 be manufactured anywhere in the country, and so there
4 really isn't any basis to use that .19 multiplier to
5 account for regional prices differences when looking
6 at the SAMDAs.

7 JUDGE GIBSON: This seems to be something
8 that's come up a couple of times already today. It
9 sure would have been a lot easier for all of us, I
10 guess, if the author of the design control document
11 and the Commission in adopting the design control
12 document had flat said, These specific parts are
13 resolved with finality, and these specific parts need
14 to be adjusted for whatever local or regional or, you
15 know, individual plant considerations there are.

16 And we are -- because that was not done
17 with specificity, we are basically in the position of
18 trying to figure out, what was it that was resolved
19 with finality, and what was it that was left up to
20 further amplification. I won't say adjudication,
21 because it may well be that the amplification, which
22 you've attempted to do, by the way, with a supplement
23 to your ER, would effectively resolve, even though I
24 know you didn't think you needed to do that, Mr.
25 Frantz.

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1 But still it would have been helpful for
2 all of us if we had been provided with those sorts of
3 specific measures. Perhaps at some point in time the
4 Commission in its infinite wisdom will decide to lay
5 those out, because it certainly would make -- give us
6 the sort of specific plumb lines that we need in order
7 to know whether we're getting into something that's
8 been resolved and is beyond our purview, or if it is
9 something that is -- would be appropriate for further
10 consideration.

11 MR. FRANTZ: Judge Gibson, I think you're
12 right, and this may just be an artifact of the
13 historical chronology here. The technical support
14 document was prepared about three years before the
15 design certification rule was issued --

16 JUDGE GIBSON: Right.

17 MR. FRANTZ: -- and so was not prepared
18 with the rule language in mind. But apart from that,
19 if there's anything in the technical support document
20 that has finality, it should be the costs of the
21 SAMDAs, because that does not at all relate to the
22 siting parameters.

23 Also I might add that in this case, our
24 contention deals with replacement power costs. It
25 does not deal with the cost of SAMDAs, and I believe

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1 the intervenors' use of the .91 multiplier here is an
2 implicit attack on the cost of the SAMDAs, and that
3 really, I believe, is outside the scope of the
4 contention and is not properly raised in response to
5 our motion.

6 JUDGE GIBSON: And -- I'll let you respond
7 in a minute, Mr. Eye, but this is something that I was
8 going -- planning on getting into later, although I
9 suspect my colleagues would have jumped me before
10 that.

11 But it is important, I think, for all of
12 us to keep in mind that we have -- when we evaluate
13 these SAMDAs, we have to make sure that we're doing an
14 apples-to-apples comparison, and where the economic
15 numbers are based on 1993 dollars or 1996 dollars and
16 they're compared to -- the costs are compared to the
17 benefits in 1993 or 1996 dollars, then we can't adjust
18 that for 2008, because it was evaluated based on --
19 they did an apples-to-apples, and if we adjust one of
20 those costs or benefit figures for 2008 and we don't
21 adjust the other one for 2008 dollars, then we are not
22 making an apples-to-apples comparison, which I think
23 we would have to do.

24 MR. FRANTZ: And, Judge Gibson, I agree
25 with you entirely. I'm not saying that the

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1 Intervenor's attack on our use of the rate of
2 inflation is inappropriate or outside the scope of
3 this contention. I think it's within the scope of the
4 contention, so I'm not objecting to their rates of
5 inflation that they're raising.

6 I am saying that the multiplier to account
7 for regional price differences is an attack on the
8 SAMDA cost, and that's no longer dealing with apples
9 and apples here. He wants to say that the cost used
10 in the technical support document was too high for
11 this area, and we're saying that that's just an
12 appropriate attack at this point.

13 JUDGE GIBSON: Okay. Mr. Eye, if you have
14 anything else to say. If you don't, we'll carry on.

15 MR. EYE: I don't think that I do, other
16 than to say I think that to the extent that if I
17 understand Applicant's argument, it's okay to apply,
18 for example, the price deflator to bring the cost down
19 to what we had as 145,000 --

20 JUDGE GIBSON: Just a minute, Mr. Frantz.
21 Let him finish.

22 MR. EYE: But then it's not okay to do the
23 further refinement by using a regional cost-of-living
24 differential. And maybe I've misunderstood his
25 argument, but it seems to me that to the extent that

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1 he's accepting that inflation costs make a difference,
2 then to exclude some refinements to the inflation
3 calculation while accepting others, I'm not sure is
4 entirely consistent.

5 JUDGE GIBSON: Okay. Mr. Frantz?

6 MR. FRANTZ: First of all, we don't
7 believe that .91 is an adjustment for inflation. It
8 has nothing to do with inflation. It deal with
9 regional price differences. And all I said previously
10 was that their attack on our rate of inflation was
11 something within the scope of our contention. I did
12 not concede or did not mean to concede that their
13 arguments are otherwise permissible.

14 And we believe that their attempt to
15 provide for a different rate of inflation than the one
16 we used is contrary to case law under NEPA. In
17 particular, you mentioned the Pilgrim case. If you
18 read the Pilgrim case, the Pilgrim case says that a
19 NEPA analysis need not use the best methodology.
20 Instead all we need to do is use a reasonable
21 methodology.

22 And that same concept was embodied in the
23 Commission's decision in Prairie Island at COI-04-22,
24 where the Commission again repeated that there was no
25 requirement under NEPA to use the best methodology.

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1 Instead they went on to state that, "The question is
2 whether the economic assumptions are so distorted as
3 to impair a fair consideration of environmental
4 effects."

5 And it stated that environmental
6 consequences are relatively insignificant. Licensing
7 boards should not quibble over the details of economic
8 analysis. And that's, I think, precisely what we have
9 here. We're dealing with environmental impacts that
10 are small, namely the impacts from severe accidents,
11 and what we're looking at are alternatives to reduce
12 small environmental impacts.

13 JUDGE GIBSON: Uh-huh.

14 MR. FRANTZ: And we're quibbling over the
15 details of what inflation rate should be used. We
16 used the Consumer Price Index. The Intervenors'
17 answer on page 5 agrees that the Consumer Price Index
18 is "accepted."

19 Additionally on footnote 2 of the
20 Intervenors' affidavit, they cite to an Office of
21 Management and Budget document, and that document goes
22 on and states that the inflation is usually measured
23 by a broad-based price index, such as the implicit
24 deflator for the gross domestic product or the
25 Consumer Price Index.

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1 So I don't think there's any real doubt
2 here that the Consumer Price Index is a reasonable
3 methodology. They have an alternative method, and the
4 Staff, by the way, has an alternative method, and they
5 believe that we were too conservative in using the
6 Consumer Price Index, but nobody disputes that it's
7 reasonable.

8 And as long as we used a reasonable
9 methodology under NEPA, we should not be quibbling
10 over the details. And we don't believe it's
11 appropriate for the Intervenors to attack our rate of
12 inflation because they have a different proposal.

13 JUDGE GIBSON: Well, whatever the
14 Intervenors, you know, are hoping to do really is of
15 less consequence than whether or not, I think, under
16 Pilgrim it's reasonable, and I think we've already had
17 that discussion. So I think the focus that I want
18 both of you to carry forward and the Staff, to the
19 extent there are any questions that require
20 amplification from them, is really to focus on whether
21 or not a particular input is reasonable or not.

22 And I think, you know, the problem that
23 you face, Mr. Eye, is not that maybe there isn't a
24 better way to go. I think the question is: Is what
25 the Applicant did reasonable or not? And to the

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1 extent it's not reasonable, then certainly we need to
2 know about that.

3 Likewise, to the extent that -- if Mr. Eye
4 has proposed something that is unreasonable, we
5 certainly want to know that. But, you know, if all
6 we're talking about is trying to get to the best
7 economic analysis, that's something that the
8 Commission has effectively taken away from us by
9 virtue of the Pilgrim case, and essentially said,
10 We're just looking at what's reasonable.

11 So that's where we'll be focused today.
12 Let me ask you one other question, though; before we
13 get off this 158- versus 131-. Even if we -- you were
14 to assume that the 131,000 instead of 158,000 was the
15 correct threshold, would it make any difference?

16 MR. FRANTZ: If I could take this in two
17 steps, because there are two steps in his process.

18 JUDGE GIBSON: Yes.

19 MR. FRANTZ: If you discount the .91
20 multiplier but then use his rate of inflation, then it
21 makes no difference. Using their rate of inflation,
22 the cost of the SAMDAs comes out to \$141,300,
23 according to their affidavit at paragraph 3. However,
24 the maximum benefit of the SAMDAs is \$141,211 using a
25 very conservative 3 percent discount rate. So even

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1 accepting their interest rates, there still is no
2 cost-beneficial SAMDA.

3 JUDGE GIBSON: Okay.

4 MR. FRANTZ: Now, if we take the next step
5 and use both of their assumptions, the cost of the
6 SAMDAs then is reduced to 131,000. That still is
7 greater than the benefits, assuming a 7 percent
8 discount rate. And once again, they have not really
9 criticized our use of the 7 percent discount rate. At
10 a 7 percent discount rate, the maximum benefit's about
11 \$109,000, so that the costs still exceed the benefits.

12 And, in fact, on page 9 of their answer,
13 they concede that a 7 percent discount rate is
14 frequently used. They also have provided a report by
15 Clarence Johnson, dated December 21, 2009, on page 4,
16 which also uses a 7 percent discount rate. They also
17 don't contest our statement of material fact, number
18 3:E.1, which states the 7 percent discount rate is
19 reasonable.

20 So, again, using that 7 percent discount
21 rate, even taking their number of 131,000, the costs
22 still exceed the benefits.

23 JUDGE GIBSON: I have a question on that.
24 When you evaluate the cost benefit of implementing a
25 SAMDA, are you assuming that you reduce the core

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1 damage frequency down to zero, that you get rid of all
2 risk?

3 MR. FRANTZ: That's correct, and that's
4 also an extremely conservative assumption. For
5 example, there are approximately, I believe, four
6 different SAMDAs that cost less than \$299,000. The
7 best one, the very best one, only mitigates around 2
8 percent of the total core damage frequency. So by
9 assuming in our case that it gets 100 percent, we were
10 obviously extremely conservative.

11 And if we would use that 2 percent figure
12 instead, obviously there's nothing that -- there's no
13 SAMDA that even comes close to being cost-beneficial.
14 That was just one of a number of conservatisms that we
15 had in our assumptions.

16 JUDGE GIBSON: Thank you. Mr. Eye, before
17 we go on, was there anything else you wanted to say
18 about that one specific point?

19 MR. EYE: I would.

20 JUDGE GIBSON: Okay.

21 MR. EYE: The Applicant has said that
22 essentially the cost threshold is 158,000, and they've
23 argued that throughout their motion, and I haven't
24 heard anything particularly different today in that
25 regard.

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1 The Pilgrim case says if there's a
2 plausible likelihood of a particular input that would
3 change the SAMDA threshold, it's fair to address that.
4 This panel has to decide, I think -- well, I think his
5 panel has to decide whether, one, it's reasonable to
6 accept 158,000 when even if one were to exclude the
7 .91 multiplier for cost-of-living differential -- or
8 regional cost-of-living differentials, now we have a
9 SAMDA at -- I forget the exact number -- 140,000-some-
10 odd, which is essentially virtually the same as what
11 counsel has suggested as being a benefit of the SAMDA.

12 I think this panel has to decide whether
13 131,000 is reasonable, and if it is, then it can rule
14 that adopting the 131,000 under Pilgrim would change
15 that cost differential to SAMDA and make it -- and
16 essentially go from having to do SAMDAs to not having
17 to do SAMDAs. And that seems to the Intervenors to be
18 a crucial point here, that pre-Pilgrim, I'm not sure
19 that we really had that kind of guidance or as clear,
20 at least as far as I can plumb the depths of the case
21 law that addressed this.

22 I think Pilgrim did clarify and gave all
23 the parties and the panel essentially a task that is
24 somewhat decoupled from the question of
25 reasonableness. Instead, it is asking the question:

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1 If you consider that the 131- is a reasonable kind of
2 calculation, does it make a difference? And in our
3 view -- and perhaps this is a -- I mean, I don't want
4 to say that it's overly simplistic, but the difference
5 between 131- and 158,000 is obvious, and it would
6 change that threshold, that cost point threshold for
7 doing SAMDAs that now they would not be required to
8 do.

9 The argument that somehow it only -- you
10 only get a 2 percent benefit, I don't think Pilgrim
11 covered that. Pilgrim didn't say, oh, it has to be a
12 5 percent benefit in order to justify it; didn't say
13 it has to be a 10 percent benefit in order to justify
14 it. It said essentially: Does it change the outcome?
15 And in this instance, if one accepts 131,000 as the
16 more reasonable -- as a proper and reasonable
17 calculation, then it would change the outcome.

18 JUDGE GIBSON: What if you're being
19 reasonable, Mr. Eye; what if your Mr. Johnson's being
20 reasonable; and what if the Applicant is being
21 reasonable?

22 MR. EYE: Then we go --

23 JUDGE GIBSON: There is a range, I
24 suppose, of reasonableness. Reasonable minds can
25 differ. Is -- I think that what the Commission is

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1 saying in Pilgrim -- and please, you know, correct me
2 if I'm, you know, misguided here. But the impression
3 I get from Pilgrim is that our job is to try to kick
4 out the things that are unreasonable, and as long as
5 it is reasonable, then it's within the range that we
6 can evaluate. Is that not the case?

7 MR. EYE: Let me try to answer that
8 question. I don't think that it is entirely, because
9 I think that the Pilgrim case does recognize that
10 there's a range of reasonableness, that particularly
11 based on things economic is almost always the case
12 that there's a range. It's rare that there's a
13 particularly precise figure that can be calculated on
14 things that have variabilities, like economic
15 parameters.

16 But the language in Pilgrim that we have
17 focused on is not particularly tied to reasonableness.
18 It's tied to this, Have you advanced something that,
19 in the language of the opinion, looks genuinely
20 plausible, that could change the cost benefit
21 conclusions of a SAMDA candidate?

22 So it's -- one can still have a reasonable
23 outcome, but if the Commission or if the panel,
24 rather, would accept that our input, our calculation
25 of how to come up with the SAMDA candidate cost is --

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1 would have the effect of changing the cost benefit
2 conclusion, then that should be something that the
3 panel takes into consideration.

4 I'm not saying that the Pilgrim decision
5 essentially just said, Disregard reasonableness. I
6 don't think it did. But that to me, the way I read
7 Pilgrim, that was sort of their point of departure,
8 and then they said, Do you have something that could
9 change the cost benefit conclusion. And if it does,
10 then that's a fair issue to consider.

11 JUDGE GIBSON: I know Mr. Frantz is
12 probably itching to talk, but let me just ask you one
13 more question. If the Applicant puts forward under
14 Pilgrim a reasonable cost and benefit analysis, and
15 you, the Intervenors, put forth a reasonable
16 alternative to what they have done in one or more
17 inputs, does that then -- are you suggesting then that
18 Pilgrim says you need to adjudicate which one is
19 appropriate? Or are you saying that they -- are they
20 obligated to perform the SAMDA analysis, then, based
21 on your numbers? Or --

22 Because it seems to me -- I mean, the way
23 I was reading Pilgrim, it was, you know, the Applicant
24 is the one who's going to come forward with something.
25 They're going to come forward with what they believe

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1 is a SAMDA analysis, using the cost and benefits, and
2 if those are reasonable, if all those inputs are
3 reasonable, then I got the impression that that was
4 probably the end of the discussion.

5 And you seem to say that, no, if you have
6 reasonable alternatives, then those should be -- those
7 should supplant what were the reasonable inputs that
8 the Applicant used. Is that right?

9 MR. EYE: It depends. It depends on
10 whether or not -- in this instance, what the
11 Intervenors have advanced would actually change the
12 cost benefit conclusion. And, again, I saw the -- I
13 read the Pilgrim decision to say, reasonableness is
14 something that is sort of a point of departure for the
15 analysis.

16 JUDGE GIBSON: Uh-huh.

17 MR. EYE: And it requires, then, a further
18 step to determine whether or not in this instance the
19 Intervenors advanced something that's reasonable, and
20 I think that it's within the zone of reasonableness
21 here, and if it does, if it is reasonable and it does
22 have the effect of changing the cost benefit
23 conclusion of SAMDA, then it's a fair issue to
24 adjudicate.

25 JUDGE GIBSON: Okay. Okay, Mr. Frantz.

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1 MR. FRANTZ: One thing it won't change are
2 the environmental impacts. The environmental impacts
3 of severe accidents are characterized as small, so
4 regardless of what we do in SAMDA space, that
5 characterization is not going to change. And I think
6 that's exactly the point the Commission was trying to
7 make in Prairie Island.

8 When we're dealing with economic issues
9 really rather than environmental issues, we shouldn't
10 be quibbling over the details of an economic analysis,
11 as long as the analysis is reasonable.

12 Also as I discussed previously, even if
13 you take his assumption that the SAMDA cost is really
14 131,000, that still is greater than the maximum
15 benefit of the SAMDAs, of \$109,000, using a 7 percent
16 discount rate, which, again, they've conceded is
17 reasonable. So given that, even using his
18 assumptions, it does not make a difference in the
19 results. There still is no cost-beneficial SAMDA.

20 JUDGE GIBSON: Okay.

21 MR. EYE: May I just address that 7
22 percent, because that obviously makes a pretty big
23 difference here, in terms of what discount rate is --

24 JUDGE GIBSON: Sure.

25 MR. EYE: -- used or not used.

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1 JUDGE GIBSON: Sure.

2 MR. EYE: And, you know, we've addressed
3 that in a couple of places, but most particularly in
4 Mr. Johnson's affidavit at paragraph 7. You know,
5 whether it's -- and actually he makes a pretty good
6 argument here that even 3 percent is probably pretty
7 generous, given the relatively -- you know, relative
8 comparisons to other interest rates or discount rates
9 that have been used.

10 So, I mean, I don't necessarily accept
11 that the 7 percent should be adopted, to yield the
12 \$109,000 benefit obviously. We think there's a very
13 good reason to not use the 7 percent, and I think that
14 Mr. Johnson's affidavit sets that out.

15 JUDGE GIBSON: Now, in his original
16 affidavit back in December, he did use a 7 percent
17 discount rate, didn't he?

18 MR. EYE: I believe he did, at least for
19 some limited purpose.

20 JUDGE GIBSON: Was there something that
21 caused him to have this epiphany, to go from 7 to 3?

22 MR. EYE: Well, other than just a further
23 refinement of his analysis.

24 JUDGE GIBSON: Okay.

25 MR. EYE: I think that's the most likely

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1 explanation of that.

2 JUDGE GIBSON: Yes. Okay. Fair enough.
3 Thank you.

4 Do you have anything else on discount
5 rates or -- go ahead.

6 JUDGE ARNOLD: Let me just ask a
7 hypothetical question of Applicant. Let's just assume
8 for a moment that the Board actually decided that
9 really there does seem to be cost-effective SAMDAs
10 available. Would you implement them, or would you
11 refine the SAMDA to take advantage of that 2 percent
12 rather than 100 percent?

13 MR. FRANTZ: Oh, we would definitely
14 refine our analysis and take advantage of the 2
15 percent cost. That's a factor of 50 right there, that
16 when you apply that, there's obviously no cost-
17 beneficial SAMDA, so we would simply refine -- sharpen
18 our pencils and refine our analysis. There's a lot of
19 other meat or -- excess meat or fat in our analysis
20 that we could cut out.

21 JUDGE ARNOLD: Thank you.

22 JUDGE GIBSON: All right. You want to cut
23 the fat, not the meat.

24 MR. FRANTZ: Yes. Thank you, Judge
25 Gibson.

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1 JUDGE GIBSON: That's all right. Mr. Eye,
2 let's turn to your argument with respect to the impact
3 of a possible loss of the STP units from service as a
4 result of a severe accident at South Texas. It's your
5 assertion that South Texas has failed to account for
6 the severe impact such an outage would have on the
7 ERCOT service area, and you've alleged this in three
8 separate ways. Correct?

9 MR. EYE: Yes.

10 JUDGE GIBSON: Okay. First, you argue
11 that the Applicant has overestimated the contribution
12 that wind energy will make. Is that correct?

13 MR. EYE: Yes.

14 JUDGE GIBSON: Specifically you claim that
15 South Texas employed a 24.5 percent capacity factor
16 for wind, and ERCOT asserts that the correct amount
17 should be 9 to 11 percent. Is that correct?

18 MR. EYE: Yes.

19 JUDGE GIBSON: Now, let's stick with
20 Pilgrim. In your mind, is the 24.5 percent capacity
21 factor unreasonable?

22 MR. EYE: I believe that it is. I mean,
23 again, if we're going to look at how ERCOT calculates
24 capacity factor, I mean, we've got a huge difference
25 in terms of a percentage difference between what ERCOT

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1 uses and what has been advanced by the Applicant.

2 JUDGE GIBSON: Counsel for South Texas,
3 have you overstated wind energy?

4 MR. FRANTZ: No. In fact, I don't think
5 there's any dispute that the actual capacity factors
6 of wind are up around 24 percent, if not higher. The
7 lower number that Mr. Eye is referring to is an
8 assumption used by ERCOT in calculating the reserve
9 margins, and they take the conservative approach to
10 calculating reserve margins to make sure there is
11 sufficient capacity and reliability on the system, so
12 that each 9 percent they use in the reserve margin
13 calculation does not reflect the actual capacity
14 factor.

15 Instead, the differential reflects the
16 lack of reliability and the lack of being able to
17 dispatch wind power, because obviously the wind blows
18 at variable rates and variable times. So that's just
19 an economic assumption used by ERCOT. It doesn't
20 reflect the actual capacity factors of wind.

21 JUDGE ARNOLD: Let me ask. I got the
22 impression that that lower number was a number that at
23 any given instant, they for planning purposes can
24 assume that about 10 percent of the windmills will be
25 producing power.

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1 MR. FRANTZ: That's correct.

2 JUDGE ARNOLD: And it's really an
3 instantaneous value, not a long-term average, like a
4 capacity factor.

5 MR. FRANTZ: That's correct.

6 JUDGE ARNOLD: Thank you.

7 MR. FRANTZ: I might also add that for
8 this and the other two factors they mentioned, namely
9 the cost of ancillary services and the market -- what
10 they call the market power -- first of all, they don't
11 quantify what the impact is. We don't know whether
12 it's a \$1 impact or a \$100,000 impact or something
13 else.

14 And so that by itself does not really
15 raise a generally disputed material fact, because they
16 haven't really contested our numbers with anything
17 that's specific. It's more of a general denial or
18 general assertion. Again, under case law mere
19 assertions and denials are not sufficient to defeat a
20 motion for summary disposition.

21 But I think more importantly, it really
22 doesn't matter much, given the way we went about
23 calculating the costs of the market effects of
24 outages, but what we did was took two cases. We took
25 a case, assuming that all four STP units were

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1 operating throughout the year, and then another case
2 where none of the units were operating throughout the
3 year, and then look at the differential and the
4 overall costs of electricity throughout the ERCOT
5 region, and use that differential then to calculate
6 the market effects.

7 The three issues that they've raised, wind
8 power capacity factors, the costs of ancillary
9 services, and the market power effects, affect both of
10 those cases, both the case where we have four units
11 operating and no units operating. And because they
12 affect basically both sides of the equation, the net
13 effect is basically a wash.

14 And so you would not expect that these
15 issues would have any significant impact on our
16 calculation of costs, and they've not alleged it has
17 any significant impact on our calculation of costs.

18 JUDGE GIBSON: So, in effect, you're
19 saying that if you're going to do an apples-to-apples
20 comparison of with all four units operating and none
21 of the four units operating, you have to apply the
22 same wind capacity factor, the same ancillary cost
23 factors, and the same market power factor, whatever
24 that was. I didn't quite understand it, I have to
25 admit. Is that right?

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1 MR. FRANTZ: That's correct.

2 JUDGE GIBSON: Okay. Mr. Eye, do you
3 agree with Mr. Frantz, at least that in order to do an
4 apples-to-apples comparison, you've got to apply the
5 same percentage number to both sides of the equation?

6 MR. EYE: I agree with that.

7 JUDGE GIBSON: Okay. Okay. Let's turn to
8 the price spike issue. Now, after noting that South
9 Texas did address the notion that markets would adjust
10 to a loss of capacity at South Texas, Mr. Johnson had
11 a number of other criticisms that are in his original
12 affidavit that you have mentioned in your -- that you
13 mentioned in your reply that South Texas did not
14 address. And one of them is that there would be
15 economic dislocation. Is that correct?

16 MR. EYE: It is.

17 JUDGE GIBSON: Okay. The second criticism
18 is that there would be bankruptcy of retail service
19 providers.

20 MR. EYE: Well, I think that he pointed
21 that out as a potential consequence of price spikes,
22 that particularly in the ERCOT context, where in terms
23 of making offers to sell electricity is using kind of
24 a market approach.

25 JUDGE GIBSON: Uh-huh.

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1 MR. EYE: And to the extent that price
2 spikes would put some vendors of electricity beyond
3 what the market would be willing to pay, there is that
4 prospect that they run out of cash and become a
5 candidate for protection under the Bankruptcy Act. So
6 I don't want to over-generalize that too much.

7 But I think that what Mr. Johnson was
8 attempting to point out was that ERCOT really is kind
9 of a different breed, if you will, to a certain
10 extent. There is not the rate of return, for example,
11 that can be assured through a more conventional
12 regulated community in the electricity sense at least.

13 And the possibility of these kinds of
14 price spikes, that, for example, South Texas might
15 have to deal with could put them in a situation where
16 they were no longer competitive, and the product that
17 they had to sell wouldn't be marketed for that reason.
18 And to the extent that that could happen, then
19 obviously one can start to see the ripple effects in
20 terms of financial distress that would result.

21 JUDGE GIBSON: So is this effectively a
22 sort of subset of the first point of economic
23 dislocation, rather than a separate point? Is that a
24 fair statement?

25 MR. EYE: It is. It's a subset, and I

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1 think that that's what he was trying to say, but it
2 may not have come out as clearly as that.

3 JUDGE GIBSON: Okay. Then you assert that
4 South Texas's probability risk analysis must be
5 inaccurate, because the actual impact of these price
6 spikes is not 5 billion plus, but rather is 10 billion
7 plus. Is that correct?

8 MR. EYE: Well, it's at least that.

9 JUDGE GIBSON: At least 10 billion plus.

10 MR. EYE: At least 10 billion, and, of
11 course, we also advanced the quantification that some
12 have concluded resulted from in the 2001 California
13 sense with the rolling blackouts, and we called that
14 a \$45 billion in losses that were attributable to
15 that.

16 JUDGE GIBSON: Okay.

17 MR. EYE: So that may have set the bounds,
18 if you will, of where potential costs could be
19 quantified in the South Texas sense, or rather in the
20 ERCOT sense.

21 JUDGE GIBSON: So the 10 billion plus
22 figure is based on the Northeast rolling -- the
23 Northeast blackout --

24 MR. EYE: Correct.

25 JUDGE GIBSON: -- and the -- at least 10

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1 billion, and then you say a better number is actually
2 the 45 billion that occurred in the California rolling
3 blackouts.

4 MR. EYE: Well, it depends on how
5 conservative one wants to be here. We would advance
6 that it would be better to err on the side of
7 conservatism here and use a larger number to try to
8 account for these economic dislocations.

9 JUDGE GIBSON: Well, Mr. Johnson used the
10 10 billion originally, didn't he?

11 MR. EYE: I believe he did. Yes.

12 JUDGE GIBSON: And certainly you would say
13 that's a reasonable number then?

14 MR. EYE: It sets a point from which one
15 can say, is that an adequate kind of quantification of
16 those costs. You know, for one thing, the 10 billion
17 loss in the 2003 Northeast blackout would be more than
18 that now, just from -- just applying even a very
19 modest inflation factor, it would be more than the 10
20 billion.

21 JUDGE GIBSON: Again, we have to be
22 careful about apples to apples, because if you're
23 looking at cost and benefits in that time frame, you
24 know --

25 MR. EYE: I agree.

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1 JUDGE GIBSON: -- we have to -- okay.

2 MR. EYE: And I don't think that we
3 actually said that the 10 billion ought to be
4 considered to be a bigger number than that for those
5 purposes, but I think it was only to set a floor for
6 consideration of impacts that could be expected from
7 that -- the kind of blackout that the Northeast
8 experienced in '03.

9 JUDGE ARNOLD: I have a question on this
10 in that: Are these replacement power costs you're
11 talking about? Or is this a new cost that you're
12 challenging?

13 MR. EYE: Replacement power costs would be
14 part of that, but it would only be a part. For
15 example, the 45 billion that is attributable to the
16 California, part of that goes to what it cost
17 California to buy electricity from, well, various
18 vendors, including some here in Texas, Enron.

19 JUDGE ARNOLD: But it's really the cost to
20 the community caused by --

21 MR. EYE: Everything from downtime to
22 people being stuck in traffic, I suppose, because the
23 traffic light's not switching the way it should. So
24 it's a -- it takes into -- attempts to take into
25 account a broad spectrum of likely consequences.

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1 JUDGE GIBSON: Okay. Is the 5 billion
2 plus number that the Applicant used an unreasonable
3 one?

4 MR. EYE: Yes. In our estimation, it's
5 far too low.

6 JUDGE GIBSON: And this is based on the
7 experience in the California and the Northeast. Is
8 that a fair assessment?

9 MR. EYE: It is.

10 JUDGE GIBSON: Okay.

11 MR. EYE: Those are our two points of
12 reference.

13 JUDGE GIBSON: Okay. Mr. Frantz, is this
14 a fair criticism of your modeling?

15 MR. FRANTZ: No. In fact, I find this
16 whole discussion very confusing, because Mr. Eye has
17 moved from price spikes to the effect of grid outages,
18 and he seems to be conflating the two issues. They're
19 really quite separate issues. The 5 --

20 JUDGE GIBSON: I thought they were two
21 separate issues, too.

22 MR. FRANTZ: Yes. And --

23 MR. EYE: Well, I may have misunderstood
24 your question, Your Honor, but --

25 JUDGE GIBSON: Well, hold on just a

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1 second. Let's just make sure so we don't get off in,
2 you know, a weird area here. You -- I understood your
3 argument to be that there were some impacts of price
4 spikes that were 10 billion instead of the 5 billion
5 that the Applicant had suggested.

6 And then in a separate point you were
7 making, the effect -- economic costs of the outages
8 were 10 billion in the Northeast and 45 billion, but
9 that was a separate point from the price spikes. Am
10 I -- did we conflate these somehow and --

11 MR. EYE: I may have mistakenly done that.

12 JUDGE GIBSON: Okay. Okay.

13 MR. EYE: And I apologize. I think I
14 misunderstood your --

15 JUDGE GIBSON: I think Mr. Frantz and I
16 both thought that was your point earlier from reading
17 your brief, so --

18 MR. EYE: Well, and I'm not abandoning
19 that point.

20 JUDGE GIBSON: We're not suggesting you
21 abandon any point. We're just trying to make sure
22 that we understand this. Now, let's go back to the 5
23 billion, not based on the rolling blackouts but based
24 on the price spikes.

25 MR. EYE: Right.

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1 JUDGE GIBSON: And I want to know: Do you
2 consider the 5 billion input that the Applicant used,
3 instead of the 10 billion that you used, to be an
4 unreasonable one?

5 MR. EYE: Yes, we do.

6 JUDGE GIBSON: And why is that?

7 MR. EYE: And the reason is because as we
8 had read their joint affidavit, it really assumed a
9 doubling of the percentage impact based on 2008 price
10 spikes, but it didn't deal with the economic impact of
11 those price spikes. In other words, it looked only at
12 the percentage impact of the price impacts itself, but
13 it didn't take the next step and say, Well, what does
14 that mean when you increase the price that much; what
15 does it mean out in the economy? And we thought that
16 there was a -- that their analysis was -- just didn't
17 go far enough.

18 JUDGE GIBSON: Uh-huh. Uh-huh. Okay.
19 Mr. Frantz, Mr. -- please address these as two
20 separate issues.

21 MR. FRANTZ: Yes.

22 JUDGE GIBSON: First of all, with respect
23 to the price spike issue, not the outage issue, is
24 this a -- is the 10 billion plus that the Intervenors
25 have proposed an unreasonable input?

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1 MR. FRANTZ: It's, I think, based upon a
2 misreading of our affidavit.

3 JUDGE GIBSON: Okay.

4 MR. FRANTZ: Price spikes are a normal
5 occurrence in the ERCOT region. You know, typically
6 there are around 60 price spikes a year. Those price
7 spikes affect the average prices in the ERCOT market,
8 typically somewhere between 10 and 20 percent a year.
9 And so the average prices for ERCOT that we use for
10 2008 and 2009 already account for those normal price
11 spikes.

12 What we did, we just arbitrarily assumed
13 that there would be additional price spikes beyond the
14 normal price spikes, and we assumed that that would
15 add another 20 percent to the average cost. And
16 that's how we calculated the \$5 billion. That \$5
17 billion represents the next increment above what you
18 would normally see, and so there is no reason to
19 double-count that. The \$5 billion does represent the
20 increment due to South Texas, if you assume, in fact,
21 that there would be price spikes due to South Texas.

22 However, as we show, price spikes in ERCOT
23 typically are not due to plant outages. Plant outages
24 do occur, and they typically don't result in price
25 spikes, at least not anything that's very significant.

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1 Instead, price spikes in ERCOT are due to congestion
2 on the transmission grid.

3 But despite that fact, we just arbitrarily
4 assumed there'd be another 20 percent increase due to
5 South Texas and add that in to provide a very
6 conservative analysis, in an attempt to bound the
7 issue raised by the Intervenors.

8 JUDGE GIBSON: Okay. Now, with -- go
9 ahead, please.

10 JUDGE CHARBENEAU: Just try to help me
11 understand. You're saying that your expected price
12 spikes led to -- what would be a normal cost?

13 MR. FRANTZ: The normal cost fluctuates
14 greatly. For example, in 2009, the price was around
15 \$34 per megawatt hour. In 2008, it was close to \$80
16 per megawatt hour, so there's a huge variation from
17 year to year within ERCOT. And both of those costs
18 already -- those are average costs throughout the
19 entire year. Those average costs already include the
20 effects of the normal price spikes.

21 JUDGE CHARBENEAU: Okay. So those would
22 be already in ERCOT numbers.

23 MR. FRANTZ: That's correct.

24 JUDGE CHARBENEAU: And this is an
25 additional 20 percent beyond, quote, normal spikes.

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1 MR. FRANTZ: That's correct.

2 JUDGE CHARBENEAU: And that comes out to
3 be the 5 billion.

4 MR. FRANTZ: That's correct.

5 JUDGE CHARBENEAU: Okay. Thanks.

6 JUDGE GIBSON: So, in effect, is 10
7 billion a 40 percent -- would that be like a 40
8 percent number?

9 MR. FRANTZ: That's correct.

10 JUDGE GIBSON: Okay. Now --

11 MR. FRANTZ: Forty percent beyond the
12 normal --

13 JUDGE GIBSON: Correct.

14 MR. FRANTZ: -- 20 percent.

15 JUDGE GIBSON: Forty percent beyond the
16 normal. I agree. Now, Mr. Eye, I just want to make
17 sure before we get -- let Mr. Frantz talk about the
18 rolling blackouts, I want to make sure I understand.

19 The Applicant believes, I think, from what
20 Mr. Frantz said, that your expert may have
21 misunderstood what they did, that they basically
22 calculated, accepted all the normal price spikes, and
23 then basically put an additional 20 percent number on
24 there for price spikes based on the possible outage as
25 a very conservative number, and that putting a 10

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1 billion plus number on there would effectively be a
2 40 -- requiring a 40 percent contingency for price
3 spikes, and that that is unreasonable, that that would
4 be, you know, far excessive.

5 Do you disagree with the characterization?
6 You still may think your number's reasonable, but do
7 you disagree with their explanation for what that
8 number represents?

9 MR. EYE: I understand their explanation.

10 JUDGE GIBSON: Okay. Good. Okay. Fair
11 enough. Let's go to the outage, the impacts of the
12 outage using the Northeast blackout and the California
13 rolling blackouts. Was the -- is what the Intervenors
14 are proposing here unreasonable as an input to your
15 model?

16 MR. FRANTZ: Again, I'm not sure if it's
17 apples to apples. Let me start, first of all, with
18 the affidavits and the reports submitted by Mr.
19 Johnson. Mr. Johnson did not submit an affidavit in
20 response to our motion for summary disposition and
21 address this issue.

22 Now, his report back in December of 2009
23 did, but that report was never signed. It's never
24 been attested to. It really doesn't even qualify as
25 evidence in this proceeding, and therefore, it's not

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1 sufficient to address our motion for summary
2 disposition.

3 But going on to the facts, I'll take his
4 statements as they exist. First of all, we show in
5 our motion that the probability of a severe accident
6 at South Texas, plus following -- that causes a grid
7 outage has a probability of less than 10 to minus 8
8 per year. Mr. Johnson does not contest that number.

9 10 to minus 8 is by, I think, any
10 reasonable definition, remote and speculative, and
11 therefore, we aren't required to consider that under
12 NEPA. It's more akin, I think, to the worst case
13 analysis, and as the Commission has stated, a SAMDA
14 analysis should not be a worst case analysis. We
15 don't need to assume a grid outage because of the low
16 probability of it occurring, even if we do have an
17 outage at South Texas.

18 If you look at what we did, we assumed a
19 \$10 billion cost for a grid outage at Texas, based
20 upon the Intervenors' reference to the Northeast
21 blackout. They also referred to a \$45 billion cost
22 for California, but, again, that's not apples to
23 apples. The \$45 billion for California was not due to
24 grid outages. It was due to a combination of various
25 factors, including just the high prices of

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1 electricity.

2 So we don't believe that it's appropriate
3 to apply the full \$45 billion from California to Texas
4 for a grid outage, because they aren't the same
5 situations. The one was price increases due to the
6 unique market factors in California that just simply
7 don't exist in Texas..

8 JUDGE GIBSON: Okay.. Mr. Eye.

9 MR. EYE: Well, this is really the first
10 time that we've heard this aspect of the Applicant's
11 argument, at least as I recall. It's going to always
12 be difficult to do an apples-to-apples analysis,
13 because frankly, the frequency of blackouts that
14 happen on a scale that's large enough to be a
15 legitimate comparison are -- they're sufficiently
16 infrequent that it's hard to do that.

17 On the other hand, I think what Mr.
18 Johnson has advanced is the idea that at 10 billion,
19 you don't capture all of the costs that ought to be
20 considered. At 45 billion, as I understand Mr.
21 Frantz's argument, it may be that one has included
22 costs that would not otherwise be incurred in Texas.

23 But on the other hand, I don't know that
24 there's an inherently -- there's anything particularly
25 magic about the 10 billion, other than it was just

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1 a -- it was a cost that we could reference that was
2 related to a specific blackout.

3 JUDGE GIBSON: Uh-huh.

4 MR. EYE: The -- actually, if one were to
5 try to do a closer apples-to-apples comparison, taking
6 the Applicant's assumption about the duration of time
7 that would be expected to have these STP units out of
8 service, you have a situation that's closer to the
9 California rolling blackouts than you do with the
10 Northeast blackout that was of a fairly limited amount
11 of time. I forget exactly -- it was some number of
12 hours, as I recall.

13 I don't remember right now how many hours
14 it was, but it didn't have the same effect that
15 California had in 2001 of rolling blackouts that went
16 on for weeks. In fact, I think it went on for months,
17 as I recall, about the first quarter of 2001 when most
18 of this was occurring. And as a result, again, it's
19 hard to find an apples-to-apples comparison, just
20 because these qualitative kinds of events don't happen
21 often enough to do that.

22 But it seems that if you do have a
23 situation where these STP units are out for extended
24 periods of time, the likelihood of it creating the
25 sort of dislocations that were realized in California

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1 in 2001 would be a closer model to approximate rather
2 than the very short period of time that the Northeast
3 blackout lasted, and it still cost \$10 billion in
4 costs.

5 JUDGE GIBSON: Okay. Do you wish to talk
6 about this -- could you address this duration issue
7 Mr. Eye just raised?

8 MR. FRANTZ: Once an outage occurs on
9 ERCOT, ERCOT markets adjust. They bring on new units.
10 They bring in the rolling reserves, and so the market
11 has enough capacity to fill in behind the loss of the
12 four STP units. And so there's just no reason to
13 expect you're going to have rolling blackouts in Texas
14 from an event like this.

15 JUDGE GIBSON: That would last the length
16 of time -- and even if they did, they wouldn't last
17 the length of time that they did in California. Is
18 that --

19 MR. FRANTZ: I don't believe so. Yes.

20 JUDGE GIBSON: Okay.

21 JUDGE ARNOLD: Let me just ask. This --
22 and this is along the lines of my last question.
23 These outage costs are costs to the consumers of an
24 outage, so they're not replacement power costs.

25 MR. FRANTZ: That's correct.

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1 JUDGE ARNOLD: If they were to be included
2 in the SAMDA, they would have been included in the
3 off-site economic costs. Correct?

4 MR. FRANTZ: I don't believe that the ABWR
5 SAMDA analysis had an assumption like this. It's not
6 typical, by the way, to include assumptions like this,
7 and in part because, again, we don't believe it's
8 reasonable. It's more akin to the worst case
9 analysis. And so for the ABWR, all they looked at was
10 replacement power costs. They did not look at these
11 other market effects.

12 JUDGE ARNOLD: Okay. But these other
13 market effects, in your opinion, are they outside of
14 the scope of replacement power costs?

15 MR. FRANTZ: Yes. They're above and
16 beyond replacement power costs.

17 JUDGE ARNOLD: And this contention that
18 we're talking about is specifically about replacement
19 power costs, isn't it?

20 MR. FRANTZ: The Board's probably better
21 equipped to deal with this than I am, because it was
22 the Board who refashioned this contention.

23 JUDGE ARNOLD: Okay.

24 MR. FRANTZ: We addressed it in our
25 affidavit, because the Intervenors had addressed it in

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1 their original contention. When the Board
2 consolidated the contention, it wasn't quite clear to
3 me whether they wanted this in or out, so again, just
4 to be conservative, we decided to address it.

5 JUDGE ARNOLD: I believe the wording in
6 the admitted contention was specifically replacement
7 power costs. How can you word this to make it be in
8 the replacement power cost arena?

9 MR. EYE: Partly because replacement power
10 costs, to the extent that they are greater than what
11 would otherwise be -- than the costs would be
12 otherwise, if you weren't buying replacement power,
13 has a ripple effect throughout the economy, and it
14 impacts consumers accordingly.

15 JUDGE ARNOLD: Thank you.

16 JUDGE GIBSON: Okay. Let's turn to the
17 discount rate. You've criticized South Texas for
18 using a 3 percent discount rate instead of OMB's 2.2
19 percent discount rate. Is that correct?

20 MR. EYE: Yes.

21 JUDGE GIBSON: Why in your estimation is
22 the 2.2 rate more appropriate than the 3 percent rate
23 that South Texas employed?

24 MR. EYE: Well, partly because the -- as
25 Mr. Johnson pointed out, the -- to the extent that

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1 some -- a borrower like South Texas Project or its
2 parent company can, you know, borrow funds, it has the
3 capacity to borrow those at a relatively low rate.
4 And for them to come in and use a 3 percent rate sort
5 of doesn't take that into account.

6 And as Mr. Johnson points out, even OMB
7 takes a look at interest rates and the range that he
8 established as low as 2.2. I mean, there was 2.7, and
9 there were numbers that were higher. But in terms of
10 if you were really going to be able to calculate a
11 discount rate that might be applicable, a 2.2 percent
12 is, again, based on Mr. Johnson's analysis, as
13 plausible as the 3 percent.

14 JUDGE GIBSON: Okay. Do you think that
15 the 3.3 percent rate is unreasonable -- I mean, the 3
16 percent rate is unreasonable?

17 MR. EYE: Three percent? Under Pilgrim,
18 well, it could make a difference. I mean, if you
19 reduce it by that much and you take the Pilgrim
20 threshold, then it could make a difference in terms of
21 whether SAMDAs are cost-effective or not.

22 JUDGE GIBSON: Okay. Is 2.2 a reasonable
23 number, more reasonable than 3.0, so reasonable that
24 it should be considered under Pilgrim? What is your
25 assessment, Mr. Frantz?

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1 MR. FRANTZ: We used a 3 percent as a
2 sensitivity analysis. Our primary analysis was based
3 upon a 7 percent discount rate. And the Intervenor
4 did not contest our statement of material fact 3.E.1,
5 which states that 7 percent's reasonable, so that's
6 undisputed right now in the record, that 7 percent's
7 reasonable.

8 JUDGE GIBSON: Okay. Do you have anything
9 else on the motion for summary disposition that South
10 Texas has filed?

11 JUDGE ARNOLD: I know that you used the 7
12 percent and 3 percent in the -- what is it? --
13 revision 3 of the environmental report. Had you used
14 the 7 percent and 3 percent previously?

15 MR. FRANTZ: I believe it was in -- also
16 in Section 7.3 of the environmental report where we
17 looked at an accident of one unit. I'll confirm that,
18 Judge Arnold.

19 JUDGE ARNOLD: So it at least dates back
20 to Rev. 3 and possibly before.

21 MR. FRANTZ: That's correct.

22 JUDGE ARNOLD: Now, that would seem to be,
23 now, that your challenge is a little bit untimely. Is
24 there something new that would make this challenge
25 timely?

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1 MR. EYE: Well, it's the assumption that
2 under their original Rev. 3, I believe it is -- and,
3 again, I'd want to go back and check to make sure that
4 that's the case. It assumed an outage at one plant,
5 so, I mean, to the extent that that assumption would
6 have an effect, I suppose it might. But, you know, I
7 would need to go back and look at the environmental
8 report to confirm that the 3 percent and 7 percent
9 discount rates were applied there.

10 What we have in this contention really
11 assumes a different circumstance, and that inasmuch as
12 you've got a situation where you've got more than one
13 plant that has been affected to the point where it is
14 no longer available for service. Whether that would
15 have a concomitant effect on discount rates, Judge
16 Arnold, I don't know the answer to that.

17 MR. FRANTZ: Judge Arnold, I have been
18 able to confirm that ER Table 7.3-1 did use both a 7
19 and 3 percent discount rate.

20 JUDGE ARNOLD: And that was dated around?

21 MR. FRANTZ: I believe that's part of our
22 original environmental report, the most recent one --
23 yes. I believe that's our original environmental
24 report. I don't think we've changed that since Rev.
25 0. The rev I'm looking at is Rev. 3, but I'd have to

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1 go back and check to see whether it was actually in
2 Rev. 0.

3 JUDGE ARNOLD: Thank you.

4 JUDGE GIBSON: Was this motion timely
5 under the initial scheduling order?

6 MR. FRANTZ: Our motion? Yes, because our
7 motion is not tied to any particular event or any
8 particular document. And, in fact, we provided
9 affidavits which are really the basis for our motion,
10 and under the original scheduling order, I believe we
11 had until some period from the final environmental
12 impact statement to actually file motions for summary
13 disposition.

14 JUDGE GIBSON: Okay. Mr. Eye?

15 MR. EYE: I don't disagree with that. I
16 don't like the fact that there's that sort of
17 flexibility, but I don't disagree with the analysis of
18 how it fits in with the scheduling order.

19 JUDGE GIBSON: Okay. Well, I think what
20 we will do is recess. And can we all -- will we be
21 able to come back at one o'clock to finish up? Does
22 that work for everybody? One o'clock? Is that enough
23 time?

24 MR. FRANTZ: Yes.

25 JUDGE GIBSON: Okay. Good. We will

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1 reconvene at 1:00, and we'll stand in recess until
2 then.

3 (Whereupon, at 11:36 a.m., the oral
4 arguments in the above-entitled matter were recessed,
5 to reconvene at 1:00 p.m., this same day, Thursday,
6 October 21, 2010.)
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A F T E R N O O N S E S S I O N

(1:00 p.m.)

JUDGE GIBSON: Thank you. You may be seated.

We will now turn to the new contentions based on the draft environmental impact statement and look at number 1.

Mr. Eye, in your original Contention 26, you argued that the South Texas license application did not adequately evaluate a need for power from new Units 3 and 4. Under the terms of the initial scheduling order, a new contention is deemed timely under 2.309(f)(2)(iii) if it is filed within 40 days of the date that the draft environmental impact statement is issued. In our April 14 order, we extended this date by 14 days.

So what I want you to focus on when I ask you questions about timeliness is whether or not -- is what happened within that 54-day window of the date that you filed the new contentions that would justify you filing a new contention on the need for power. Okay?

MR. EYE: Yes.

JUDGE GIBSON: Okay. Now, Counsel for South Texas, on page 12 of your answer, you refer the

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1 Board to the Private Fuel Storage case. I reread that
2 case, and I don't want to quibble with you, but it
3 didn't seem quite as absolute a bar as you make it out
4 to be.

5 To me, that case says that where you have
6 a proprietary document that is not available to an
7 Intervenor, whether to admit a contention can turn on
8 whether a review of nonproprietary materials that were
9 timely available would indicate that the proprietary
10 information is not necessary as factual support for
11 the contention.

12 Do you disagree with my reading of that
13 case?

14 MR. FRANTZ: No.

15 JUDGE GIBSON: Okay. Let's -- Mr. Eye,
16 let's look at what South Texas has asserted here.
17 They have said that both the draft environmental
18 impact statement and the environmental report conclude
19 that studies performed by the Electric Reliability
20 Council of Texas, which we've previously referred to
21 as ERCOT, demonstrate that there is a need for power
22 from STP Units 3 and 4.

23 In particular, the draft environmental
24 impact statement claims that the planned capacity
25 output of 2,740 megawatts for proposed Units 3 and 4

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1 will be insufficient to meet ERCOT's 4,400 megawatts
2 of baseload generation that will be required by 2019,
3 much less the 10,417 megawatts that it needs by 2024.

4 Do you dispute this?

5 MR. EYE: The conclusion, yes.

6 JUDGE GIBSON: And why is that?

7 MR. EYE: It's a combination of reasons.

8 One is that it fails to take into account ongoing
9 efforts to tamp down demand, and it does not take into
10 account other generating resources that would be
11 expected or reasonably expected to come on line and be
12 available for dispatch by ERCOT. I mean, those are
13 the two broad categories.

14 JUDGE GIBSON: Okay. Recognizing that
15 there may be additional sources for those megawatts,
16 do you dispute the need that ERCOT apparently claims
17 they have of 4,400 megawatts by 2019 and 10,417
18 megawatts by 2024?

19 MR. EYE: Again, it didn't appear to us
20 that that took into account a demand reduction or a
21 demand-side management or any other aspect that would
22 have the effect of making the increase less severe
23 than what they have projected in terms of demand.

24 And it appeared to us that ERCOT had taken
25 a position that did not fully account, again, for all

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1 the capacity that would be reasonably expected to be
2 available to them during that time frame.

3 JUDGE GIBSON: Okay. Were they to
4 undertake a demand-side management program of the type
5 you're envisioning, are you suggesting they would be
6 able to make up this 4,400 megawatts by 2019 and the
7 10,417 megawatts by 2024?

8 MR. EYE: Well, let me -- the original
9 question was, do we agree that they're going to have
10 that shortfall at those times. And my answer was, I
11 don't agree that they're going to have that shortfall
12 at that time. Our contention is that the -- if one
13 takes into account DSM, for instance, and one takes
14 into account other generating sources, that the
15 projected decline in reserve margin, projected for
16 2019 would not occur because of the combination of
17 additional generating sources and the reduction in the
18 increase in demand.

19 In fact, it's not just a reduction in the
20 increase in demand. It's a decline in demand that
21 we -- again, based on not only just the demand-side
22 management, but -- well, for example, there was a 2.2
23 percent, I believe, decline in demand for '09. Does
24 that necessarily mean that that 2.2 percent or
25 approximately 2.2 percent will continue over time? I

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1 don't think we said that, but what we did say was
2 that's a significant event when one --

3 I mean, if you consider the general rule
4 was that there'd be an increase of 3 percent per year
5 in demand essentially as long as anybody could
6 foresee, if you figure that that didn't happen, and
7 not only that, but there was a 2.2 percent reduction,
8 you have a 5.2 percent swing at that point. That's
9 fairly significant. In fact, I am told that, for
10 example, demand-side management programs that reduce
11 demand by, you know, 1 percent or 1 percent and a
12 fraction are considered to be wildly successful.

13 And so it's really -- I don't think that
14 it's attributable to any one parameter that we see
15 that the likelihood of a margin -- a reserve margin
16 deteriorated to the point where they're really in sort
17 of a crisis mode happening by 2019.

18 One other thing that I think enters into
19 this, that really is an aspect of uncertainty about
20 these shortfalls that are presented in a very certain
21 way by the Applicant: As I read some of the ERCOT
22 data, they are reluctant to take a hard and fast
23 position, predicting reserves and so forth out to that
24 point. I think they take theirs out to 2015.

25 Now, I think the Applicant has

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1 extrapolated from that and come up with their own
2 likelihood of reserve margin shortfalls at that later
3 date of 2019. So in answer to your question, we don't
4 agree that it's a reasonable assumption that at 2019,
5 there will be this critical shortfall or critical
6 diminished reserve margin.

7 JUDGE GIBSON: Okay. Set that aside for
8 a minute. I want to focus on the Shearon Harris case.
9 South Texas cited this on page 20 of its answer, and
10 South Texas suggests that that case stands for the
11 proposition that the need-for-power analysis that
12 ERCOT made should be given great weight and that the
13 NRC should not second-guess the ERCOT projections
14 unless it contains a fundamental error or it is
15 seriously defective.

16 Now, let me ask you, first of all. You
17 don't dispute that that is what that case holds, do
18 you?

19 MR. EYE: That's correct. That was the
20 holding.

21 JUDGE GIBSON: Okay. Now, I realize that
22 you may believe that their numbers are fundamentally
23 erroneous or seriously defective, but as far as the
24 holding of that case, we're on the -- we're talking on
25 the same page of the same hymnal. Right?

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1 MR. EYE: Yes, sir.

2 JUDGE GIBSON: Okay. So do you -- is it
3 your position that the projections that ERCOT has made
4 are fundamentally erroneous or are seriously
5 defective?

6 MR. EYE: As we have set out in our
7 papers.

8 JUDGE GIBSON: Okay. I'll let you respond
9 in a minute, Mr. Frantz. There's a few more things I
10 want to talk about, get addressed first.

11 Okay. On page 26 and 27 of its answer to
12 your contentions, South Texas says that you have taken
13 several projections of power supply and need for power
14 out of context, because net/net, ERCOT says there's a
15 greater need for power than was the case in 2009. Do
16 you dispute South Texas's characterization of ERCOT's
17 projection that says there's an even greater need for
18 power than there was in 2009?

19 MR. EYE: As in currently?

20 JUDGE GIBSON: Right. Their current
21 projection right now. They're saying that -- South
22 Texas says that ERCOT says -- this is sort of like,
23 Ducky Lucky says. South Texas says ERCOT says there's
24 a greater need for power than there was in 2009.

25 MR. EYE: Well, I think it depends on how

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1 you look at it. I'll grant there was a reduction of
2 2.-some-odd percent in available generating resources,
3 as I recall.

4 JUDGE GIBSON: Uh-huh..

5 MR. EYE: But, on the other hand, just
6 every day virtually there is an increase in generating
7 capacity out there by virtue of more wind generators
8 being tilted up, more PB panels being plugged in, and
9 a concomitant reduction in need by the roll-out of DSM
10 programs and other attributes of tamping down the
11 demand curve.

12 So when there is this sort of conclusion
13 that the need is greater, I -- if one were to take a
14 snapshot, one could argue that it's -- that's barely
15 the case by some tenth of a percent or so. Inasmuch
16 as we point out that there was a 2.2 percent reduction
17 in demand, they point out that there was a 2.6, I
18 think it was, percent reduction in available capacity.
19 Then you could argue from that, that at the point that
20 that snapshot was taken, that there was a greater need
21 for power than there was before that.

22 JUDGE GIBSON: Uh-huh.

23 MR. EYE: The snapshot is, I think, a
24 useful tool, but it doesn't really tell you very much
25 about what is occurring on an ongoing basis, and

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1 that's really -- if I were to, you know, assign kind
2 of a theme to this contention that we have advanced,
3 it is that it needs to be looked at as an ongoing
4 process rather than just pulling out a particular
5 point in time and examining that.

6 JUDGE GIBSON: Uh-huh.

7 MR. EYE: And the legal -- the underlying
8 legal basis for that really goes to not only what, I
9 think, the Commission anticipates this kind of
10 analysis will be, rather than just a snapshot, but, in
11 fact, forward-looking and taking into account demand
12 and available generating resources. I think that's
13 what NEPA anticipates as well. Otherwise, you can be
14 sort of selective about the snapshot that you want to
15 use and tailor your arguments accordingly to that
16 snapshot.

17 So as I mentioned, this is really part of
18 an effort to emphasize that this needs to be looked at
19 more comprehensively than just the one point in time
20 that, I think, Your Honor suggests that there is more
21 need for power now than there was before. That, in an
22 isolated sense, may be correct, but I don't think it
23 satisfies what NEPA requires in terms of looking at
24 alternatives and why alternatives may be reasonable
25 and practicable under the circumstances that ERCOT is

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1 anticipating.

2 JUDGE GIBSON: Okay. On page 5 of your
3 contention --

4 MR. EYE: Okay.

5 JUDGE GIBSON: -- you assert that the
6 draft environmental impact statement does not account
7 for a compressed air energy storage project plan for
8 Texas by ConocoPhillips/General Compression that will
9 be available for baseload capacity.

10 MR. EYE: Correct.

11 JUDGE GIBSON: On page 23 of its answer,
12 South Texas asserts that this is not just -- that this
13 is just a pilot plant, and that regardless of whether
14 this is a pilot plant or not, do you know what the
15 maximum capacity of that plant is going to be?

16 MR. EYE: You know, I've inquired
17 actually, and the folks at General Compression are
18 loath to give out those kinds of numbers right now,
19 because they're still in the process of getting their
20 capital together. So they, at least publicly, and
21 based on telephone conversations I've had, they've not
22 pegged a number to it, again publicly. So I don't
23 know the answer to it.

24 Conceptually what's important, however, is
25 the idea that it is a baseload capacity facility. The

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1 economics of baseload would tend to weigh in favor of
2 having a larger facility rather than a smaller
3 baseload facility, if one were just to use sort of
4 general rules of thumb, and for purposes of NEPA, it's
5 not necessarily the capacity of the plant that counts;
6 it's whether it is a practicable alternative for
7 baseload generation purposes.

8 JUDGE GIBSON: Uh-huh.

9 MR. EYE: And the fact that it's a pilot
10 project does not account for the fact that you have
11 two -- that you've got a partnership between
12 ConocoPhillips and General Compression, that says this
13 can work, that they are investing their capital in it
14 on the premise that it will be a viable means by which
15 to generate baseload electricity.

16 And in addition to that, something that
17 we've covered in prior proceedings is, of course, the
18 Luminant and Shell proposal that is -- has not been at
19 least, again, publicly -- it's not been disclosed in
20 terms of what sort of capacity it would have, but that
21 there's no reason to think that it wouldn't also have
22 the same attributes as the General Compression and
23 ConocoPhillips proposal, that they, very frankly, put
24 forward as a baseload capacity facility.

25 So -- I forget now what your question was,

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1 Judge.

2 JUDGE GIBSON: Well, I wanted to know if
3 it was your understanding that it was a pilot plant or
4 whether it was going to be some commercial production
5 facility that was going to --

6 MR. EYE: Well, I don't know that a pilot
7 plant can't also be commercial production. In fact,
8 my sense is that given the rather large sum of money
9 it will take to develop this, that they're going to
10 want to have a rate of return on it. It's not just
11 going to be, you know, something that they can hold up
12 as a nice public relations effort, but they're going
13 to want to have, you know, positive reports from the
14 accountants when they close the circuit and get the
15 thing running.

16 JUDGE GIBSON: Okay. Now, one last
17 question on this before we turn to Mr. Frantz. Is
18 there -- is all of this stuff that pretty much came
19 about within the 54 days of the date that you filed
20 Contention DEIS-1?

21 MR. EYE: Pretty close. The agreement to
22 develop the ConocoPhillips/General Compression, the
23 date that I have it was April 14 of 2010.

24 JUDGE GIBSON: Uh-huh.

25 MR. EYE: The ERCOT data that we were

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1 relying on in the main came from their May 10, I
2 believe, report. It was May of 2010. I may not have
3 the actual day correct, Your Honor, but it was in May
4 of 2010, which would fall within that 54-day window.

5 JUDGE GIBSON: Uh-huh.

6 MR. EYE: To the extent that those were
7 our two primary -- or two of the primary sources, they
8 would fall within that 54-day window.

9 JUDGE GIBSON: Okay.

10 MR. EYE: I believe, anyway. April 14, I
11 believe, was in that 54 days.

12 JUDGE GIBSON: Okay.

13 MR. EYE: I had it my mind at one point
14 that it was. Now, I'm second-guessing myself, as I'm
15 wont to do, but I believe that's right.

16 JUDGE GIBSON: Okay. Fair enough. Mr.
17 Frantz?

18 MR. FRANTZ: Several points. First of
19 all, turning to the ConocoPhillips pilot plant, I
20 believe Mr. Eye may have somewhat overstated the
21 purpose of that project. If you turn to page 7, the
22 comments by Mr. Power which are attached to the
23 contention, that page 7 of the Power comments
24 indicates that it may be peaking, it may be
25 intermediate, it may be baseload. They haven't

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1 decided yet what it's going to be. So that's from the
2 intervenors' own document.

3 The fact is, again, it's only a possible
4 project, a proposed project. It's not been built yet,
5 and more fundamentally, it does not have an
6 interconnection agreement with ERCOT, and because it
7 does not have interconnection agreement with ERCOT,
8 it's not considered or accounted for when ERCOT
9 performs its analysis of reserve margin.

10 And that's only reasonable, because ERCOT
11 only looks at projects which are fairly well along and
12 fairly stable in trying to determine its reserve
13 margins. It wants to be conservative obviously in
14 making sure that the systems are reliable, and plants
15 that don't have an interconnection agreement are
16 somewhat speculative.

17 JUDGE GIBSON: Sure. I take it you all
18 don't have any information about what the capacity of
19 that --

20 MR. FRANTZ: No, we do not.

21 JUDGE GIBSON: -- plant is going to be
22 either. Okay.

23 MR. FRANTZ: Second of all, Mr. Eye
24 mentioned that ERCOT only does analysis out to 2014.
25 I believe, again, that probably is not correct. Just

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1 as an example, on page 8-16, the draft EIS, Table 8.2
2 indicates ERCOT gathered out to 2024, and that's just
3 one example, citing the ERCOT 2009 report. So ERCOT
4 does do data beyond 2014.

5 MR. SPENCER: Excuse me, Your Honor. This
6 is about the DEIS, so I'd like to chime in that --

7 JUDGE GIBSON: Please do.

8 MR. SPENCER: My understanding is that the
9 ERCOT numbers are from 2014, but that the NRC Staff
10 extended those to 2019 and 2024, based upon the ERCOT
11 data and projections.

12 MR. FRANTZ: ERCOT also -- I'd be happy to
13 provide the Board with the cite -- also has data out
14 to 2024. I'll find that at a convenient break and get
15 that to you.

16 JUDGE GIBSON: Okay. That would be great.
17 Let me just say, though, that just so we're clear on
18 the record, Mr. Eye's statement was probably correct
19 then, that the data that was available to him, to
20 which he was referring in the DEIS was based on ERCOT
21 numbers that went to 2014, that the Staff had then
22 taken and projected forward into 2019 and 2024. Is
23 that a fair assessment?

24 MR. SPENCER: That's my understanding. I
25 can check on that.

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1 JUDGE GIBSON: Okay. So -- and there may
2 be nothing wrong, certainly, with the Staff's
3 projection of that data. It's just that it didn't
4 actually come -- wasn't apparently one that ERCOT
5 made. It was one that the Staff extrapolated from
6 what ERCOT had done.

7 MR. FRANTZ: And, again, I think there are
8 other data that do go beyond 2014, 2015 period.

9 JUDGE GIBSON: Do you know if those other
10 ones are publicly available, Mr. Frantz?

11 MR. FRANTZ: Yes. These would be reports
12 on the NRC -- I'm sorry -- on the ERCOT web page.

13 JUDGE GIBSON: Since we're on this, it
14 looks like someone may have found something for you
15 there, so --

16 MR. FRANTZ: We will find the cite.

17 JUDGE GIBSON: Fair enough. Fair enough.
18 Okay. Go on to your third point. I'm sorry.

19 MR. FRANTZ: The third point is that the
20 ERCOT studies and the draft EIS do account for a
21 demand-side management. I would refer the Board here
22 to page 8-24 of the draft EIS, lines 20 through 27,
23 which states that ERCOT accounts for demand-side
24 management to programs that reduce demand by about 15
25 to 20 percent, and those are accounted for in the

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1 ERCOT reserve margin forecasts, and also in the NRC
2 forecasts.

3 JUDGE GIBSON: Hold on just one second.
4 Let's see if we can get Mr. Spencer to confirm those,
5 what you just said, because it does seem to be a
6 little confusing.

7 MR. SPENCER: Could you repeat the
8 statement?

9 MR. FRANTZ: I'm just trying to paraphrase
10 from the lines 20 through 27 on page 8-24. It says,
11 "The State of Texas has funded an ambitious demand-
12 side management program that is designed to reduce
13 electricity by 15 to 20 percent. This program is
14 included in the ERCOT forecast and is part of the 2009
15 calculation of need for power, a need for new
16 generating stations."

17 MR. SPENCER: Yes. That's true. And,
18 Your Honor, I may be mistaken on the 2019 and 2024.
19 I'll have to check into that, Your Honor.

20 JUDGE GIBSON: Okay.

21 MR. SPENCER: I see a table that indicates
22 that one of the ERCOT sources does give the data that
23 we used through 2019 and 2024.

24 JUDGE GIBSON: Okay. So you're going to
25 find out for us where that number came from in the

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1 2019 and 2024 numbers, whether those were NRC Staff
2 extrapolations of ERCOT data, or whether those were
3 actually numbers that were supplied to you by ERCOT.
4 Is that fair?

5 MR. SPENCER: Yes. And it may be after
6 the oral argument. Is that --

7 JUDGE GIBSON: That's fine. I'm not --
8 you don't have to go through hell to try to find those
9 for us, but if you could provide all of us with an
10 explanation for that, I think it would be useful,
11 because obviously, you know, Mr. Eye found stuff that
12 he thought was, you know, reliable through -- what? --
13 2014. I should say that ERCOT had said they would do
14 through 2014, and, you know, he's not --

15 He, at least, appears not to have seen
16 this other data, and perhaps he should have seen the
17 other data, but we just don't know that. And if you
18 could -- you know, if we could get that data to him,
19 I think, and to all of us, I think it would be useful.

20 MR. SPENCER: Okay.

21 JUDGE GIBSON: Okay. Now we've
22 interrupted you about five times, Mr. Frantz. I think
23 you were on point number 3, which had to do with
24 the --

25 MR. FRANTZ: Yes.

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1 JUDGE GIBSON: Yes. -- the demand-side
2 management.

3 MR. FRANTZ: Yes. And Mr. Eye has stated
4 that there are a lot of demand-side management
5 programs out there, but if you'll look at the
6 contention, a lot of what he references are proposed
7 rules, are proposed legislation, again, matters which
8 are not definitive and not settled at this point in
9 time, and he's asking the NRC to speculate as to the
10 final outcome of these proposed pieces of legislation
11 and proposed rules.

12 And looking at the -- for example, the
13 decision in the Bellefonte COL case, it's very clear
14 that when looking at NRC need-for-power evaluations,
15 you can't criticize those based upon proposed rules or
16 proposed legislation. You need something more
17 definitive, and ERCOT obviously itself is not looking
18 at these proposed rules and factoring in its own need-
19 for-power evaluation. So both legally under NEPA and
20 practically, these types of proposed rules and
21 proposed legislation or possible programs just simply
22 do not need to be considered.

23 JUDGE GIBSON: Okay. Just to make sure I
24 understand, the demand-side management number of 15 to
25 20 percent you mentioned --

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1 MR. FRANTZ: Uh-huh.

2 JUDGE GIBSON: -- is from the draft EIS.

3 Is that correct?

4 MR. FRANTZ: That's correct.

5 JUDGE GIBSON: And that was based on
6 information that the Staff calculated, or was that
7 based on information that ERCOT supplied? Do you
8 know?

9 MR. SPENCER: Your Honor, I should
10 probably answer that question by explaining how the
11 Staff approaches --

12 JUDGE GIBSON: Please, please do, Mr.
13 Spencer.

14 MR. SPENCER: -- a need-for-power
15 assessment.

16 JUDGE GIBSON: Thank you.

17 MR. SPENCER: When there's an independent
18 body such as ERCOT that performs need-for-power
19 analyses for a region, the NRC, according to its
20 guidance, relies upon that analysis if it finds that
21 it's, one, systematic; two, comprehensive; three,
22 subject to confirmation; and, four, responsive to
23 forecast uncertainty.

24 So we do an evaluation of the process that
25 ERCOT uses to come up with these numbers, rather than

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1 trying to redo all of it ourselves. And in our DEIS,
2 we actually went through those four factors, and we
3 explained why we found that the ERCOT process
4 satisfied all four of those factors. For that reason,
5 we found the ERCOT process reliable, and therefore, we
6 relied upon the ERCOT data in doing the need-for-power
7 analysis for STP.

8 JUDGE GIBSON: Okay. And I take it it is
9 your position as well that the Bellefonte decision
10 basically says what the NRC staff should be evaluating
11 is what is required and not what might -- what is in
12 some proposed rule with respect to demand-side
13 management?

14 MR. SPENCER: Well, we read the --

15 JUDGE GIBSON: And -- I'm sorry. Go
16 ahead.

17 MR. SPENCER: We read the NEPA case law
18 generally as focusing on anticipated not speculative
19 effects. We read the NRC case law that we cited in
20 our own answer to the contentions that there's nothing
21 wrong with having a conservative analysis, because if
22 your analysis is -- if you have too much power, if you
23 have more power than you need, you may have unneeded
24 power. If you have less power than you need, that's
25 a much more serious problem.

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1 We think that the ERCOT process is
2 reasonable. We think it's perfectly -- relying upon
3 that process is perfectly consistent with NEPA, and we
4 would not rely upon proposed rules or legislation that
5 may or may not come to fruition.

6 JUDGE GIBSON: Okay. Fair enough. Okay.
7 Now, I don't know if you had anything else you wanted
8 to say about demand-side management, but you can go to
9 point 4 if you want now, Mr. Frantz.

10 MR. FRANTZ: Yes. There are just a couple
11 references here I can provide on ERCOT's leads that go
12 out to 2024. For example, there's an ERCOT 2007
13 planning and hourly peak demand and energy forecast
14 document on page 20 that goes out there. There's
15 another one, ERCOT 2008 planning and hourly peak
16 demand and energy forecast, page 12, that goes out
17 that far.

18 These are -- have been compiled by the NRC
19 staff in a document and have been, I think, disclosed
20 as part of their hearing file index. The ADAMS number
21 is ML100600754. And I believe there are others. I
22 just -- this is just my very initial review of these
23 documents.

24 JUDGE GIBSON: Okay. And while you don't
25 know, because you weren't sitting there while the

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1 Staff made their calculations, it would be your
2 assumption that those, along with perhaps others,
3 formed the basis for the Staff's projection?

4 MR. FRANTZ: I assume so. Yes.

5 JUDGE GIBSON: Okay. But Mr. Spencer will
6 get us an answer when he can, but you don't have to do
7 it today. Okay?

8 MR. SPENCER: I'll try to do it as soon as
9 I can.

10 JUDGE GIBSON: I know you will. Okay.
11 Were those your points?

12 MR. FRANTZ: Those are my major points.
13 Yes.

14 JUDGE GIBSON: Okay. Good. Now, Mr. Eye,
15 is there anything else you wanted to say on that
16 before we turn to --

17 MR. EYE: Yes, sir.

18 JUDGE GIBSON: Please.

19 MR. EYE: ERCOT does not take into
20 account, for example, one parameter that we have
21 emphasized, and that is the building code upgrades, if
22 you will, that will have a substantial effect on
23 pushing demand down. I think that we referenced those
24 in several places, but in particular, I think Mr.
25 Power references those in his report. And it's our

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1 understanding that ERCOT does not roll those into
2 their projections.

3 JUDGE GIBSON: Okay. Before you go to
4 your next point, with respect to the building code, is
5 this something that is a mandate by a federal or state
6 agency?

7 MR. EYE: State.

8 JUDGE GIBSON: It's a mandate by the State
9 of Texas.

10 MR. EYE: It's an adopted building code.

11 JUDGE GIBSON: Through an adopted building
12 code, and that those building codes, in turn, will
13 effectuate demand-side reductions?

14 MR. EYE: Yes, sir.

15 JUDGE ARNOLD: Let me ask on that. Does
16 it require going back to currently existing buildings
17 and reinsulating them and all that, or does it just
18 apply to new buildings?

19 MR. EYE: I believe it applies to new
20 buildings, but I think that there is some language in
21 that code, if I recall, where essentially if you go in
22 and do a major gutting of a building and you redo it
23 more or less as if it were going to be a new building,
24 then you have to do it per the code.

25 JUDGE ARNOLD: So it's biggest effect

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1 isn't going to be reducing demand, but controlling the
2 increase in demand.

3 MR. EYE: It will have that effect. Yes.
4 But to the extent that it also then goes back and
5 picks up existing structures, then you would have some
6 effect on actually reducing the demand. As far as I
7 know, those -- that breakout, as far as how to
8 attribute or allocate present buildings being rehabbed
9 and upgraded compared to new construction, I don't
10 know that that differentiation has been made.

11 MR. FRANTZ: The contention states that
12 by, say, 2023, that building code might reduce demand
13 by approximately 2,000 megawatts, but as the Staff
14 points out in the DEIS, by approximately the same time
15 frame, 2024, there's going to be a need for 10,000
16 megawatts of baseload power, so even if you credit
17 this additional 2,000, there's still a need for 8,000
18 megawatts, so more than enough need to support South
19 Texas.

20 JUDGE GIBSON: Okay.

21 MR. EYE: May I address that?

22 JUDGE GIBSON: Yes, you can, but hold on.

23 MR. EYE: All right.

24 JUDGE GIBSON: Let me ask the Staff. Did
25 you all consider a building code change that

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1 apparently the State of Texas has effectuated to which
2 Mr. Eye just made reference?

3 MR. SPENCER: Your Honor, we did not
4 consider this -- specifically consider this building
5 code change in the DEIS need for power.

6 JUDGE GIBSON: So you don't -- you
7 personally wouldn't know one way or another whether
8 you should have or shouldn't have. It's just this is
9 basically the first time you've heard it. Is that a
10 fair statement?

11 MR. SPENCER: Well --

12 JUDGE GIBSON: It's okay if you have. I
13 mean --

14 MR. SPENCER: Well, I've certainly heard
15 it through the -- you know, within members of the
16 Staff, I'm not sure, you know, when was the first time
17 someone on the staff first learned of this building
18 code.

19 JUDGE GIBSON: Okay.

20 MR. SPENCER: So I can't -- so it's hard
21 for me to answer that.

22 JUDGE GIBSON: Well, it was a draft
23 environmental impact statement, and certainly, you
24 know, if this is something that needs to be
25 considered, you can sure address that.

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1 MR. SPENCER: Well, the Intervenors have
2 submitted these contentions as comments on the draft
3 environmental impact statement.

4 JUDGE GIBSON: Okay. Great, great. Okay.

5 MR. SPENCER: But I would like to
6 reiterate the point we made in our answer, that the
7 issue is that the Intervenors have tried to rely upon
8 some number from a 2007 report, which was issued
9 before the 2009 building code as projecting some
10 decrease in power demand in 2023, but that doesn't
11 really address the core of our conclusion, which was
12 with respect to the need for baseload power in the
13 2014 to 2019 time frame.

14 JUDGE GIBSON: I appreciate what you're
15 saying, that, you know, it would certainly not
16 diminish the fact there would still be a large need
17 for power, even if you adopted this building code. My
18 only question was just whether you had addressed it or
19 not, and it sounds like it wasn't, so okay.

20 Now you can respond, Mr. Eye. I'm sorry.

21 MR. EYE: Thank you. No one thing, either
22 in terms of generating capacity or demand-side
23 management, is going to address the entire scope of
24 issues that need to be dealt with to meet demand.
25 It's doing it one piece at a time or, you know, not

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1 necessarily at a time, but doing it in several pieces.
2 The building code is one aspect of it.

3 2,000 megawatts is virtually the -- you
4 know, that's a plant and a half of South Texas more or
5 less. But, again, I want to emphasize that no one
6 piece should be considered to be the answer, because
7 it's not. I don't think we've tried to advance our
8 contentions on that basis.

9 What we've tried to do is essentially
10 rework the table in the DEIS that lists out their
11 demand and their capacity -- or their generating
12 capacity numbers, and modify those with numbers that
13 we think are more realistic, that are more reasonable,
14 more likely, and in that regard, the cumulative effect
15 of those, both in terms of the demand-side management
16 piece and in the additional capacity piece, that's
17 where combined, it gives you the result that we
18 believe calls into question the conclusion that there
19 is a need for Units 3 and 4.

20 JUDGE GIBSON: Fair enough.

21 MR. EYE: And maybe that's self-evident,
22 but I wanted to make sure the record was clear on
23 that.

24 JUDGE GIBSON: That's fine.

25 MR. SPENCER: Your Honor, I want to

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1 clarify one thing on the building code.

2 JUDGE GIBSON: Please. Yes.

3 MR. SPENCER: Looking at our answer, I had
4 something in the back of my mind, and I checked, and
5 the -- probably the biggest reason why we didn't
6 consider the building code under DEIS is that the rule
7 that requires this code didn't come into -- wasn't a
8 final rule until June of this year, which was a
9 little -- almost three months after the DEIS was
10 published, so --

11 JUDGE GIBSON: Sure.

12 MR. SPENCER: -- it was only -- I'm not
13 even sure -- I'm not sure whether it was even a
14 proposed rule at the time --

15 JUDGE GIBSON: Sure.

16 MR. SPENCER: -- we published the DEIS.
17 One point I would like to make that's kind
18 of general to all of these, you know, need-for-power
19 discussions is that we're trying to make an analysis
20 in order to inform our NEPA decision-making, and the
21 analysis has to be made at some point in time. And
22 things are going to change all the time, and so
23 there's always going to be some new thing that comes
24 out.

25 And even if one of these contentions were

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1 admitted and you litigated that, as soon as you finish
2 litigating that and hold a hearing, you'd have a new
3 analysis or some new factor. So from our perspective,
4 the key question is: Is this -- does this new
5 information really call into question in a fundamental
6 way our need-for-power analysis?

7 JUDGE GIBSON: Uh-huh.

8 MR. SPENCER: And we don't think that
9 showing has been made.

10 JUDGE GIBSON: Okay. Fair enough. All
11 right. Do you have anything else --

12 JUDGE CHARBENEAU: Just a little
13 clarification. Looking at the contention, it talks
14 about a building code having the potential to reduce
15 peak demand by about 2,300 megawatts. Can you
16 translate the reduction in peak demand to a reduction
17 in baseload requirement? Can I read that to say,
18 2,000 megawatt reduction in baseload?

19 MR. EYE: I don't know the answer to that.
20 I can try to find out, but I don't know the answer to
21 that. Conceptually, to the extent that -- and, again,
22 if we just think about this in sort of a common-sense
23 way, if one builds a building that is appreciably more
24 energy-efficient, it will have an effect not only in
25 terms of the days when it's 105 degrees, but it's

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1 going to have an effect when -- you know, on more
2 moderate temperature days as well.

3 So, again, just applying that sort of
4 reasoning to it, one could project some diminished
5 baseload demand as well. The allocation of it, Judge
6 Charbeneau, I cannot sit here and in good faith give
7 you a break-out on that.

8 JUDGE GIBSON: Judge Arnold.

9 JUDGE ARNOLD: Okay. I'm going to go into
10 greater depth into something that Judge Gibson was
11 talking about or asked about. At this point of the
12 process, there's three ways to get a contention in.
13 Now, one of them is 10 CFR 2.309(c) for non-timely
14 contentions, but I've gotten the impression that you
15 consider this contention to be timely. Is that
16 correct?

17 MR. EYE: Under the scheduling order, that
18 was our evaluation of it.

19 JUDGE ARNOLD: There are two ways in which
20 to get a timely contention in, both covered by 10 CFR
21 2.309(f)(2). One of them is, in relevant part, "The
22 petitioner may file new contentions if there are data
23 or conclusions in the NRC draft environmental impact
24 statement that differ significantly from the data or
25 conclusions in the Applicant's documents."

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1 And the other way is also (f)(2). It
2 allows for timely new contentions based on new
3 information that is materially different than
4 information previously available.

5 I would like to go through these (a)
6 through (h) and have you tell me whether it's based on
7 a difference between the draft EIS and the ER, or
8 whether it's based on new information, and if you
9 could then identify the particulars of what is
10 different or new. So starting with (a) --

11 MR. EYE: (a), really there's two aspects
12 of (a). I take that back. That deals with
13 essentially the stimulus fund money, and as we point
14 out in our response, this original -- in our original
15 contentions, we advanced a contention that was similar
16 to this but that did not have the actual anticipated
17 reductions that would be expected.

18 Those quantifications were fairly recent,
19 and let me pull the -- it's in the Power report,
20 but -- additionally, the specification on the San
21 Antonio, the CEP reduction of 44.7 megawatts, again
22 that's cited in the Power report, and if I can have
23 just a moment, I will pull that.

24 (b) -- if we can go back to (a) when we
25 find that, if that's all right with you, Your Honor.

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1 JUDGE ARNOLD: Okay.

2 MR. EYE: (b) comes from the May 2010
3 ERCOT report.

4 JUDGE ARNOLD: Now, how -- okay. So this
5 is based on new information, not a difference between
6 the draft EIS and the ER. Correct?

7 MR. EYE: That's correct. Yes. (b) is.
8 That's correct. It was based on the May 2010 ERCOT.

9 JUDGE ARNOLD: Now, in what way does the
10 May 2010 ERCOT report differ in a -- is it materially
11 different from information previously available?

12 MR. EYE: Yes, sir, it is.

13 JUDGE ARNOLD: In what way?

14 MR. EYE: Well, it's a 2.2 percent
15 reduction in demand, and, again, if you go back and
16 take a look at historical projections for demand,
17 utility planners routinely and habitually figured 3
18 percent per year in demand increase. Well, not only
19 did it not go up 3 percent. It was reduced 2.2.
20 Again, a 5.2 percent swing. That's -- at least in our
21 estimation, Your Honor, that's material. That's a
22 material difference. In fact, arguably, it's a
23 historical -- historically significant material
24 difference in terms of tamping down demand or reducing
25 demand.

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1 Your Honor, I was just clarifying. If we
2 go back to 1, I can give you that.

3 JUDGE ARNOLD: Uh-huh.

4 MR. EYE: The 44.7 megawatt reduction came
5 from the April 26, 2010, CPS/Nexant measurement and
6 verification report.

7 JUDGE ARNOLD: Okay.

8 MR. EYE: (c) is, I believe, also
9 attributable to the May 2010 ERCOT report.

10 JUDGE ARNOLD: And the relevant new
11 information is the 793 megawatts?

12 MR. EYE: Yes, sir. And the anticipated
13 increase of another 115. I believe that's also new
14 data.

15 (d), I need to check for sure, but my
16 recollection is that also was derived from the May
17 2010 ERCOT report. Yes, it was.

18 Likewise with (e), I believe it's a May
19 2010 ERCOT origin.

20 (f), (f) is one of those that was just
21 alluded to by, I believe, Staff counsel. It may have
22 also been the Applicant. This refers to a proposal
23 that is advancing through the Texas PUC, and again I
24 think it was -- we included that as an indicator of
25 trends that are being evidenced in public policy-

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1 making to emphasize renewable capacity and the
2 increases related thereto.

3 I will concede the point that it is not
4 yet in effect, that the best I can say is it is
5 advancing through the regulatory process. We expect
6 that it will become final at some point, at which time
7 I suppose it may yield yet another contention for your
8 consideration.

9 (g) --

10 JUDGE ARNOLD: That's the energy
11 conservation code. When was that adopted?

12 MR. EYE: The adoption of it, I believe,
13 was -- it was published on May 1 of 2010, and I'm
14 going to take a bit of a leap here and presume that
15 publication gave the world notice that it was then in
16 effect. I don't believe that it -- the publication of
17 it, I believe, is what puts the world on notice that
18 they have to live with it at that point.

19 JUDGE ARNOLD: Okay.

20 MR. EYE: (h), the ConocoPhillips/General
21 Compression announcement was -- and, Judge Arnold, I
22 don't have the exact day. It was in April of this
23 year, and I can -- April 14 of this year.

24 JUDGE ARNOLD: Okay. Thank you.

25 MR. EYE: You're welcome.

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1 JUDGE ARNOLD: And you just heard the list
2 of the specific items. Do you want to go through each
3 one of them and just tell me what you think of them?

4 MR. FRANTZ: Yes. I'd be happy to do so,
5 and perhaps to start back at the beginning, the
6 language of 2.309(f)(2), and the first criterion is
7 there has to be a significant difference between the
8 data inclusions in the DEIS and the environmental
9 report, to be able to raise a contention without
10 anything further.

11 And we don't believe there is a material
12 difference between the conclusions and data in the
13 environmental report and the DEIS. Both of them
14 conclude that there's a need for power for South
15 Texas. Both of them are based upon ERCOT reports.
16 The Staff's report is more recent than ours, because
17 we submitted ours back in 2007 time frame. Theirs is
18 more recent. It has more recent ERCOT data in it, but
19 otherwise, they're based upon ERCOT's information.

20 JUDGE ARNOLD: But as Mr. Eye has just
21 gone through, he's identified new information, so that
22 comes under --

23 MR. FRANTZ: Yes.

24 JUDGE ARNOLD: -- the different part.

25 MR. FRANTZ: Yes. And that comes under

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1 the three criteria then in (f) (2). The first one is
2 whether they're timely. The second one is whether
3 there's a material difference and whether it was
4 previously available in other forms, and we believe in
5 general that this information was previously available
6 in some form.

7 Maybe the document that he's quoted was
8 not available, but similar information was available
9 previously, and I'd be happy to go through these one
10 by one. Looking at bases (a), one of the things they
11 reference is a savings of approximately 44 megawatts
12 in the San Antonio area, but their original
13 contention -- I think it was Contention 26 -- also
14 raised the prospects of around a 40-megawatt savings,
15 so this information that they cite, even though it may
16 be new, is not really materially different from what
17 information was previously available and what they
18 previously cited in their original Contention 26.

19 The contention or bases (b) involves the
20 May 2010 update by ERCOT. As we've discussed
21 previously, that information obviously -- it's a new
22 document, but it's not -- again, not materially
23 different from what we have seen previously coming out
24 of ERCOT and which is cited by the draft EIS. As we
25 discussed, that May update actually shows a lower

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1 reserve margin in the time frame of interest, in the
2 year 2014 time frame, for example.

3 Because it shows a lower reserve margin,
4 it indicates a greater need for power. So not only
5 isn't is materially different; it actually helps
6 support our case on the need for the power.

7 That's also true, of course, then for (c),
8 which is again based upon the ERCOT update, and then
9 by the way, also on (c), I think the Staff has pointed
10 out quite correctly that the draft EIS actually bounds
11 the information in (c). (c) claims that wind's going
12 to increase from approximately 708 megawatts to
13 approximately a little bit over 900 megawatts. But
14 the Staff's DEIS assumes that there's wind capacity of
15 more than that. So, again, there's nothing materially
16 different here between what the Intervenors are
17 arguing and what's in the draft EIS.

18 (d) and (e) are also based upon the ERCOT
19 update in May. Again we have discussed that, but I'd
20 also like to add on (e). They've argued that we
21 should account for planned units in the
22 interconnection study phase. They cite approximately
23 30,000 megawatts that are in this category.

24 ERCOT recognizes these but does not
25 account for that in their reserve margin. They only

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1 account for plants which actually have signed
2 interconnection agreements, because, again, plants
3 which are only in the study phase are somewhat
4 speculative, so what the I'm sorry are essentially
5 doing in (e) is attacking the ERCOT methodology.

6 They're asking the NRC to substitute its
7 judgment for ERCOT. ERCOT is assigned by state law
8 for doing these types of analysis and for ensuring
9 reliable power, and the Intervenors, I don't believe,
10 have shown any fundamental error in the ERCOT
11 approach. They have a different approach they'd like
12 to take, but they have not shown any fundamental
13 error, especially in light of the fact that, again,
14 ERCOT is assigned by law for ensuring reliable service
15 in the ERCOT area.

16 And as indicated by the appeal board in
17 the Duke Power case for Catawba at ALAB-355, 4 NRC at
18 page 410, you really can't cite these kinds of sites
19 for being somewhat conservative in their approach for
20 looking at need for power, given the fact that if
21 they're wrong, while there might be a little bit of
22 excess capacity out there, but if it turns out to be
23 a greater need than what they've estimated, then there
24 could be blackouts. And so by nature, these analysis
25 by state agencies are conservative, and they're

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1 entitled to some deference by the NRC.

2 JUDGE ARNOLD: Let me ask a little bit
3 more about the 31,757 megawatts. Those are plants
4 that are in the planning stage or have been proposed
5 or --

6 MR. FRANTZ: They're proposed plants, and
7 they have to go through a planning process where they
8 look at, if it were actually built and operated, what
9 would be the impact on the transmission grid.

10 JUDGE ARNOLD: Okay. And --

11 MR. FRANTZ: And until that's done and
12 until they've actually signed an agreement, then ERCOT
13 does not consider those in the reserve margin
14 calculation.

15 JUDGE ARNOLD: Okay. Are any of these
16 actually in the construction phase?

17 MR. FRANTZ: I don't believe so, but I
18 couldn't say for certain.

19 JUDGE ARNOLD: And this includes every
20 form of power production that might be considered in
21 Texas, some wind, some solar, some coal, some natural
22 gas. Any nuclear?

23 MR. FRANTZ: Our plant, for example. Yes.

24 JUDGE ARNOLD: Uh-huh. Okay. Well, on to
25 (f).

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1 MR. FRANTZ: On (f), this is a
2 nonrenewable mandate -- non-wind-renewable mandate.
3 I believe that that is only a proposed straw-man rule.
4 It's not actually been issued. Therefore, again,
5 under the decision in the Bellefonte COL case, there's
6 no requirement under NEPA to give any consideration to
7 this kind of proposed straw-man rule.

8 (g) talks about the building code, and
9 again, I think we've discussed that in the past. The
10 projected savings from that building code are far less
11 than the projected need, even including South Texas in
12 that mix.

13 And then (h) is the ConocoPhillips plant,
14 and I think, again, we've discussed that, where that's
15 simply a pilot plant. It doesn't have an
16 interconnection agreement. It's not considered by
17 ERCOT at this stage, and furthermore, it's not even
18 clear that it's going to be baseload. It may be
19 baseload; it may be peaking. And ConocoPhillips has
20 not decided that yet, based upon the information we
21 have in the record.

22 JUDGE ARNOLD: Okay. Thank you very much.

23 MR. EYE: I'm sorry. I want to address
24 something, and I'm going to ask the panel to take
25 administrative notice of part of the discussion that

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1 we advanced in the Comanche Peak docket.

2 There's an attachment to an exhibit in
3 that docket from the ConocoPhillips/Compression --
4 General Compression project. It references the press
5 release that they did when they announced this, and it
6 talks about baseload capacity. And I can provide that
7 to the panel, but just for our purposes in sort of the
8 short run here, I want to interject that, because the
9 whole point --

10 If you take a look at the General
11 Compression literature about this, their whole point
12 is to provide baseload capacity. That's their reason
13 for being, and if you take -- that is a part of the
14 Comanche Peak docket, and I don't have it in front of
15 me at this moment, but I can provide that to the
16 panel, and the press release explicitly calls out
17 baseload.

18 MR. FRANTZ: Mr. Power actually quotes
19 that on pages 6 and 7 of his comments which are in
20 this docket here in South Texas, and let me just
21 repeat what he says on the top of page 7 of his
22 comments, and this is, "The project shaves power from
23 the wind farms, so that it arrives to the customer
24 five days a week for eight hours (peaking), five to
25 seven days a week for 16 hours (intermediate), or

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1 seven days a week for 24 hours (baseload), or any
2 other demand curve that the customer may provide."

3 So given their own quotation here, this
4 might be baseload, it might be peaking, it might be
5 intermediate.

6 MR. EYE: Well, what it says is that the
7 case is a really good way to do load-following.
8 That's what that says. It does not say that it's
9 excluded from the possibility of being baseload. And,
10 again, I'd reference the Compression Engineering --
11 General Compression literature that explicitly calls
12 this out as baseload, and as I say, that's really
13 their objective here is to provide baseload.

14 Now, can it do other, intermediate and
15 peaking? Sure, because it's got load-following
16 characteristics that are amenable to that. But
17 they've not said that this is -- there's no inference
18 even that this is not intended to be a baseload
19 facility. That's really where they see their niche.

20 JUDGE ARNOLD: Okay. I'm done.

21 JUDGE GIBSON: Judge Charbeneau?

22 JUDGE CHARBENEAU: No.

23 JUDGE GIBSON: Okay. Let's turn to DEIS

24 2.

25 JUDGE ARNOLD: Let me just make a note

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1 that I'm going to ask a similar question on all of
2 these contentions.

3 JUDGE GIBSON: Okay. Did you need
4 something, Mr. Eye? Do we need to take a break now,
5 and then -- let's do that. Let's take a ten-minute
6 break, and then we'll start up. Be back in ten
7 minutes.

8 (Whereupon, a short recess was taken.)

9 JUDGE GIBSON: Mr. Eye --

10 MR. EYE: Yes, sir.

11 JUDGE GIBSON: -- you -- with respect to
12 your environmental DEIS Contention 2 on global
13 warming, one of the documents in which you rely is the
14 April 2010 EPA report, entitled, Climate Change
15 Indicators in the United States. Correct?

16 MR. EYE: Yes, sir.

17 JUDGE GIBSON: Mr. Frantz, you suggest
18 that this is not new data, and therefore, we should
19 not treat it as new information. Is that correct?

20 MR. FRANTZ: That's correct.

21 JUDGE GIBSON: What is your basis for
22 saying that this is not new data?

23 MR. FRANTZ: The EPA report obviously is
24 new, but the information that is the basis for the EPA
25 report is the same information that is available for

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1 the draft EIS. The underlying information has been
2 available for many years. For example, the EPA report
3 cites a U.S. Global Climate Change research program
4 report which is a 2009 report, and that report's also
5 the basis for the draft EIS. The EPA report is not
6 materially different from the draft EIS, the
7 information in the draft EIS.

8 JUDGE GIBSON: You know, when I read what
9 you said, I was taken back to my days when I was in
10 your shoes, representing parties in environmental and
11 toxic tort litigation, and it always -- it was always
12 a really big deal when EPA would come out with a
13 report and put its imprimatur on information. I know
14 that it was always a significant issue in that
15 litigation that I would be handling.

16 And although a lot of the data may have
17 come from disparate sources around, once EPA actually
18 compiled it and, like I said, put its imprimatur on
19 the data, then it was a significant event. Do you
20 think that this is not a significant event?

21 MR. EYE: The Intervenors cite the fact
22 that this report has indicators now of global warming,
23 and that's the big piece of information in that
24 report. But the fact that it has new indicators that
25 didn't previously exist is neither here nor there for

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1 the purposes of this contention.

2 What we're dealing with here are, What is
3 the actual climate change, not what indicators should
4 be used to measure climate change. So I'm basing my
5 analysis on what they've claimed to be the import of
6 that report, and they made these indicators.

7 JUDGE GIBSON: Okay.

8 MR. FRANTZ: I might add in any case that
9 even if you take this as a big deal -- and I'm not
10 going to disagree with you, Judge Gibson, that the --

11 JUDGE GIBSON: Well, you certainly can,
12 Mr. Frantz. You don't seem to feel constrained most
13 of the time, so --

14 MR. FRANTZ: I don't want to in this case,
15 and I don't think I need to in this case, primarily
16 because they're citing this report, not for the
17 impacts of South Texas but for the worldwide impacts
18 of global climate change, and they have not really
19 disputed the impacts from South Texas, and that's what
20 we're here to discuss.

21 JUDGE GIBSON: I agree; I agree. In that
22 regard, Mr. Eye, if we were to assume that this is a
23 new development that would justify our consideration
24 of it as some new information on which you might base
25 a new contention, I want to focus on what Mr. Frantz

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1 just suggests, and that is: What is it about this
2 that is of significance?

3 First, South Texas has suggested that its
4 contribution of greenhouse gases is essentially a spit
5 in the ocean, or whatever it would be in the air, and
6 it's so small that it would not have a material
7 bearing on global warming. And the Staff, at pages 23
8 to 28, in fact, relied on the EPA report that -- and
9 said that there's no dispute between you and the draft
10 environmental impact statement on this point. So
11 who's right?

12 MR. EYE: Well, let me address the second
13 point first, that is, the Staff's characterization
14 that there's no difference. The difference is that
15 the Intervenor's contend that every contribution to
16 greenhouse gas increases now makes a difference. We
17 don't have any more luxury time to deal with
18 greenhouse gases. This is it, and everything that
19 contributes to it brings us closer to that time when
20 there will be, if we haven't reached it already, when
21 there will be essentially irreversible and
22 irretrievable changes.

23 So there is a difference, and it's
24 measured perhaps in small increments, but when you are
25 dealing with tight margins to begin with in terms of

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1 how much margin we have to deal with before these
2 kinds of catastrophic changes that the climate change
3 indicators report discusses, every source of
4 greenhouse gases makes a difference.

5 JUDGE GIBSON: Okay.

6 MR. EYE: So that's the distinction that
7 I would draw between -- or the response I would make
8 to the Staff's characterization. And in some ways, I
9 think that is pertinent to the Applicant's position as
10 well, to the extent that they take the position that,
11 well, when you put this into the context of the entire
12 globe, gee, STP 3 and 4, not even really worth dealing
13 with. Again, tight margins require tight kinds of
14 considerations.

15 The other piece of this is that there's
16 also some dispute here about how to count these
17 contributions from STP 3 and 4. There seems to have
18 been some variance in the documents about whether to
19 adopt the greenhouse gas impacts from just the
20 operation of Units 3 and 4, or whether it's fair to
21 roll in all 13 or 14 steps in UFC, uranium fuel cycle,
22 as each of which has some contribution to greenhouse
23 gas accumulations.

24 And there is some dispute out in the
25 literature, as we've pointed out, as to exactly how to

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1 count this as well, and these are not necessarily well
2 understood quantifications, but to the extent that we
3 do have at least one author, the Sovacool piece that
4 we've cited, that really was a literature review and
5 did an average of what is believed to be contributed
6 by the uranium fuel cycle to greenhouse gases. To
7 look at that and rank order, it puts nuclear as
8 generating more greenhouse gases than, for example,
9 wind and solar, for instance.

10 This gets back to the consideration of
11 alternatives under NEPA. To the extent that now we
12 have an EPA report that says, we're rushing toward
13 major problems caused by climate change and global
14 warming, and we have data to suggest that there are
15 ways to generate electricity, even meet baseload, that
16 don't contribute as much to the greenhouse gas
17 accumulations as nuclear, makes this a viable
18 contention, again assuming that it's a priority to
19 advance generation modes that do not contribute to
20 greenhouse gas accumulations.

21 JUDGE GIBSON: Okay. Let's turn to
22 cooling water. South Texas has asserted that both
23 the -- its environmental report and the Staff's draft
24 environmental impact statement conclude that there
25 will be sufficient cooling water for Units 3 and 4 to

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1 go forward. Do you dispute that?

2 MR. EYE: Well, we think we disputed that
3 in the original set of contentions, Your Honor, and I
4 think that was rejected by the panel. So that
5 particular question I would answer by saying, yes, but
6 since you've ruled on it, it's more just for the
7 record, rather than to support a particular argument
8 at this point.

9 JUDGE GIBSON: Okay. In original
10 Contention 11, you argued that the application did not
11 adequately consider the impacts of global warming on
12 the plant operations, including water availability,
13 and I take it from the answer you've just given me,
14 then, that there wasn't really anything in the ensuing
15 54 days before you filed this application that gave
16 rise to new information that would form the basis for
17 asserting that there would not be sufficient water
18 available for Units 3 and 4. Is that correct?

19 MR. EYE: Not during those 54 days.

20 JUDGE GIBSON: Okay. Thank you. Okay.
21 Now, in -- let's look at the salinity impacts. South
22 Texas has suggested that if saltwater were to intrude
23 into the Colorado River, the facility would be
24 protected from saltwater intrusion in three different
25 ways.

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1 They have said South Texas is prohibited
2 from drawing water from the Colorado River if that
3 water exceeds a certain level of salinity. Secondly,
4 they've said that LCRA, the Lower Colorado River
5 Authority, is obligated to release water from its
6 upstream reservoirs to reduce the salinity. And it
7 says that their equipment is made of titanium and
8 stainless steel, and so is resistant to saltwater,
9 were it to intrude.

10 And, therefore, South Texas is essentially
11 arguing it's got a firewall; there is no basis for
12 this claim. How do you respond to that?

13 MR. EYE: Well, we were going off the
14 DEIS, and I don't remember specifically, but the
15 composition of the components that would be saltwater
16 resistant, I believe, was, I believe part of the DCD,
17 if I remember correctly. And to the extent that it --
18 that the panel is satisfied that the DCD addresses
19 effects of increased salinity in that regard, then I
20 would concede that point.

21 JUDGE GIBSON: Okay. Well, fair enough.
22 I mean, I think that we really -- you know, I felt
23 like we were going back over some old ground, because
24 original Contention 11 essentially said that global
25 warming would impact plant operations because of

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1 increased salinity, and I think we kind of beat this
2 horse.

3 MR. EYE: Well, the original contention,
4 I don't think we took it to the next step to say, and
5 there's components that could be made more vulnerable.
6 And so I think it was just a further refinement of it,
7 but I don't argue with your conclusion, Your Honor.

8 JUDGE GIBSON: And there's not anything in
9 the 54 days before you filed this contention that
10 would say, okay, well, we've got something new on
11 which to base this increased salinity issue.

12 MR. EYE: The only thing that would apply
13 to that, Your Honor, was that the DEIS didn't go into
14 the level of detail that would have revealed that, so
15 to the extent that we were --

16 JUDGE GIBSON: Okay.

17 MR. EYE: -- critical of what the DEIS
18 did, I think that's a fair criticism. On the other
19 hand, to the extent that these questions have been
20 adequately addressed, at least based upon the
21 representations made by the Applicant and depending
22 upon your judgment about it, then apparently the
23 question was answered.

24 JUDGE GIBSON: Okay. Fair enough.

25 MR. EYE: And thank you for helping me

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1 pronounce that. For some reason, I vapor-lock on
2 that.

3 JUDGE GIBSON: Well, I'll try not to make
4 you say salinity again.

5 MR. EYE: Thank you. I appreciate that.

6 JUDGE GIBSON: In your original Contention
7 11, you argued that the application did not adequately
8 consider how global warming would cause a significant
9 increase in cooling water temperature. Now, is there
10 anything new in the last 54 days before you filed this
11 contention that gave rise to the basis for a claim
12 that there was new information about global warming
13 that would adversely affect cooling water temperature
14 for Units 3 and 4?

15 MR. EYE: Well, again, Your Honor, to the
16 extent that we were keying off the DEIS, I think
17 that's the new event, if you will, that occurred
18 within the time frame in question. Of course, we
19 cited some of the units that have had issues with
20 cooling water, temperature spikes that made them
21 problematic in terms of how they were going to affect
22 operations. Something during that particular 54 days,
23 however, I think that other than keying off the DEIS,
24 the answer would be no.

25 JUDGE GIBSON: Okay.

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1 JUDGE ARNOLD: Did the DEIS differ in data
2 or conclusions from the environmental report in this
3 aspect?

4 MR. EYE: In terms of the impacts on
5 surface and groundwater?

6 JUDGE ARNOLD: Yes.

7 MR. EYE: It was essentially the same.
8 There may have been some differences on the margin,
9 Judge Arnold, but I believe that, in essence, they
10 were remarkably similar.

11 JUDGE ARNOLD: Uh-huh.

12 MR. EYE: I'm not sure that the DEIS
13 actually made a quantification of anticipated
14 increases in ambient that would, in turn, have an
15 increase -- or cause an increase in cooling water. I
16 don't believe the DEIS went to that point. And so
17 perhaps out of a well-trod path, we characterized this
18 as an omission.

19 JUDGE GIBSON: Mr. Eye, it sounds to me
20 like -- and I don't want to put words in your mouth,
21 but it sounds to me like although the new EPA report,
22 were it to be deemed to be new information,
23 essentially addresses the same issues that we've
24 already talked about, and we assumed, in disposing of
25 Contention 11 ultimately, that all of these issues and

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1 assumed essentially the same information, the same
2 conclusions that the EPA report came to, which is that
3 there would be global warming and all these --that it
4 would have affected these things, but South Texas has
5 essentially addressed all of the potential impacts at
6 the plant.

7 Again, I don't want to put words in your
8 mouth, but that's what it sounds like to me.

9 MR. EYE: Not exactly, Your Honor.

10 JUDGE GIBSON: Okay.

11 MR. EYE: And it's -- we addressed this,
12 at least in our response.

13 JUDGE GIBSON: Uh-huh.

14 MR. EYE: Part of this goes to this what
15 I have characterized -- I don't know that I used the
16 word "contradiction," but it appears to be at least an
17 inconsistency between on the one hand assuming that --
18 I mean, I don't really think that the Staff or the
19 Applicant said that this report is wrong.

20 JUDGE GIBSON: Right.

21 MR. EYE: In fact, I think they -- maybe
22 they didn't embrace it, but they didn't attack it for
23 being faulty.

24 JUDGE GIBSON: Right.

25 MR. EYE: And it's hard to read this

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1 report and not see that there are -- that there is
2 plenty of evidence to support the conclusion that
3 there are profound effects, destabilizing effects,
4 that ought to be anticipated.

5 JUDGE GIBSON: Uh-huh.

6 MR. EYE: You read the DEIS, and they say,
7 not destabilizing.

8 JUDGE GIBSON: Uh-huh.

9 MR. EYE: That was really one of the
10 reasons that we raised this to begin with was that the
11 DEIS -- to the extent that this is supposed to be
12 handed to a third person and the third person should
13 be able to look at the DEIS and say, Okay, all
14 material issues been dealt with in a way that is
15 coherent and consistent, it's hard to reconcile this
16 idea that on the one hand the EPA report makes fairly
17 dire statements about what should be expected and
18 anticipated, but then the DEIS says, Oh, but that's
19 not destabilizing.

20 JUDGE GIBSON: Uh-huh.

21 MR. EYE: I don't know that there's a way
22 to really reconcile those two, and it's more than
23 just, you know, an exercise in semantics.

24 JUDGE GIBSON: Sure.

25 MR. EYE: Particularly because of, as you

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1 say, the imprimatur of legitimacy that is ascribed to
2 the EPA report or that, I think, should be ascribed to
3 it.

4 JUDGE GIBSON: Right.

5 MR. EYE: It's more than semantics.

6 JUDGE GIBSON: Yes. I don't -- I
7 understand what you're saying, that the EPA report
8 does perhaps make -- give added weight to the notion
9 that, you know, global warming, climate change, carbon
10 emissions, all these things are -- you know, is a
11 serious problem, needs to be addressed, and that sort
12 of thing. I don't think there's really in doubt that
13 that's what that report says.

14 I think the question is, though, when you
15 actually apply that report to this facility, separate
16 and apart from the construction, but we're talking now
17 about operational issues, I think, when you actually
18 take the -- what this facility has done, you know, in
19 their planning for the word that you have trouble
20 pronouncing, salinity, for temperature, for
21 groundwater and surface water availability, for
22 impacts on its quality, most of the steps that they've
23 taken assume effectively, I think, that there will be
24 global warming, and that those -- the possibility of
25 global warming has to be addressed.

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1 And I think that Contention 11 essentially
2 raised those questions. I think they've been dealt
3 with, either in the original environmental report or
4 in supplements to it, and I guess what I'm saying is,
5 I'm not sure that the EPA report changes much in terms
6 of those specific issues. And I'm not hearing a lot
7 from you that can substantiate about how it would on
8 just those specific issues.

9 MR. EYE: But the DEIS speaks in general
10 terms about how the global warming effects will not be
11 destabilizing.

12 JUDGE GIBSON: Sure, sure.

13 MR. EYE: We take issue with that, and I
14 think the EPA report takes issue with it as well.

15 JUDGE GIBSON: How would you adjudicate
16 that, you know, the effects of global warming are more
17 pronounced? I mean, to me it's difficult to put that
18 in the context of the issues that we would be facing
19 here, and when you do that, I think you come up
20 against issues like, you know, carbon emissions
21 perhaps during construction, okay, or with respect to
22 operational issues, you're talking about the very
23 things we've been talking about, which were originally
24 addressed in Contention 11.

25 And it's just hard for me to see how that

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1 report really gets manifested in a specific issue that
2 we can deal with in this proceeding. Okay?

3 MR. EYE: Let me suggest the way that it
4 could be adjudicated under NEPA and in consideration
5 of alternatives, consideration of alternatives that do
6 not contribute to the greenhouse gas inventory either
7 at all or at the same level as STP 3 and 4 would. So
8 that's the way to adjudicate this is to have it be in
9 the aegis of NEPA and the consideration of
10 alternatives.

11 JUDGE GIBSON: And is that essentially
12 what we're left with, after we've talked about the
13 other issues that really were raised in Contention 11?
14 Is that really what we're talking about now is what's
15 left of DEIS 2 --

16 MR. EYE: Yes.

17 JUDGE GIBSON: -- is essentially that?

18 MR. EYE: I think that --

19 JUDGE GIBSON: Okay.

20 MR. EYE: In the main, I believe that that
21 would be a fair statement.

22 JUDGE GIBSON: Okay. Thank you.

23 JUDGE ARNOLD: In this EPA report, I
24 looked through it, and I could not find a statement
25 that says greenhouse gas emissions are destabilizing.

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1 MR. EYE: They don't say that. The DEIS
2 says it. The DEIS says that global warming, it will
3 have effects, but they will not be stabilizing.
4 That's not the EPA's vernacular; that's the Staff's.

5 JUDGE ARNOLD: You say that it's
6 contradicted by the EPA's report, so I would expect to
7 find something in there that said it is destabilizing.

8 MR. EYE: Well, I think that you have to
9 ask yourself, what is destabilizing. Is the creation
10 of millions of climate refugees, abandoning their
11 homes along the coast because sea levels have risen to
12 the point where they can't live there anymore, is that
13 destabilizing? Is the onset of heavier than normal
14 rainfall that might affect crop production and other
15 aspects of our society, is that destabilizing?

16 Those are the -- you're right, Dr. Arnold,
17 Judge Arnold. There was nothing in there that uses
18 the term "destabilizing." But there were descriptions
19 of the effects that, I think, could fairly be
20 characterized as having the potential to be
21 destabilizing.

22 JUDGE ARNOLD: Thank you.

23 JUDGE GIBSON: Judge Charbeneau?

24 JUDGE CHARBENEAU: No.

25 JUDGE GIBSON: Okay. Ready to start?

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1 JUDGE ARNOLD: Okay. The question I had
2 on Contention 1, now I'd like to apply it to
3 Contention 2. State on each one of these whether it's
4 based upon the DEIS differing from the environmental
5 report or on new information.

6 MR. EYE: (a) is the April 27, 2010, EPA
7 report. So is (b), to the extent that there are data
8 suggestive of increased ambient temperature and
9 increases on water temperature as well. I think (c)
10 falls into that same category. Ditto or same with
11 (d).

12 JUDGE ARNOLD: Okay. And you're saying
13 also then that this EPA report provides conclusions
14 that are materially different from information that
15 was available previously, such as you might have cited
16 for earlier contentions.

17 MR. EYE: Correct. For example, we never
18 had any idea that the DEIS was going to come forward
19 with a conclusion that said, Effects of climate change
20 are noticeable but not destabilizing. That was new,
21 so we responded --

22 JUDGE ARNOLD: Yes. But that doesn't
23 really address how the EPA data and conclusions differ
24 from prior available EPA reports. Let's see --

25 MR. EYE: Correct. The EPA -- excuse me.

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1 I didn't mean to interrupt you.

2 JUDGE ARNOLD: There are, let's see, U.N.
3 reports on climate change. How does the EPA differ
4 materially from prior data?

5 MR. EYE: Even the EPA concedes that one
6 of the functions of their report, their April 2010
7 report, is to acknowledge that heretofore their
8 climate change indicators had been not as effective in
9 terms of actually addressing climate change. So that
10 was new. That was a -- and we cite that in our
11 papers, that there's that recognition that even the
12 EPA, as of this year, took a step back and said, Are
13 the indicators that we have been relying on adequate
14 for purposes of projecting these changes that we would
15 anticipate. And the answer to that was, no, and so
16 they generated this report as a way to augment their
17 climate change analysis.

18 JUDGE ARNOLD: On basis (b), the final
19 statement, "Increased salinity of water in the
20 Colorado River could have adverse effects on plant
21 operation." Now, that seems to be an operational
22 issue. How is that an impact on the environment?

23 MR. EYE: Well, I think that we discussed
24 that a moment ago with Judge Gibson, and I conceded
25 the point, that to the extent that the DCD and other

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1 application documents posit that the components in
2 question will be resistant to the adverse effects of
3 increased salinity, I would concede that point.

4 JUDGE ARNOLD: Okay. For the Staff: The
5 DEIS considers alternatives to building STP 3 and 4,
6 and you consider reasonable alternatives. Do any of
7 those reasonable alternatives have lower greenhouse
8 gas emissions than STP 3 and 4?

9 MR. SPENCER: No, Your Honor.

10 JUDGE ARNOLD: Okay. So if STP doesn't
11 come around, whatever gets built is going to have a
12 bigger greenhouse gas impact probably?

13 MR. SPENCER: Yes, Your Honor, to meet the
14 baseload needs.

15 MR. EYE: May I address that, Your Honor?

16 JUDGE ARNOLD: Sure.

17 MR. EYE: Let's -- we differ with that in
18 a very significant way, and I would call out the fact
19 that the Staff is evidently not taking full -- not
20 evaluating the entire uranium fuel cycle when it talks
21 about operations and greenhouse gases that could
22 expected from Units 3 and 4.

23 The operational phases of a nuclear plant
24 are relatively greenhouse gas low in terms of the
25 emissions. It's the extraction of uranium, the

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1 refinement enrichment. Those are the stages that have
2 significant greenhouse gas inputs, and these are
3 documented in sources that we've provided to the
4 panel.

5 So we take sharp issue with the assertion
6 that Units 3 and 4 would, for example, have a lower
7 greenhouse gas footprint than, let's say, a wind and
8 CAES facility, than, let's say, a wind, CAES, and
9 natural gas facility's back-up. We don't think that
10 that would be necessary, given what we have in the
11 record now about General Compression's proposal that
12 would use no natural gas in their CAES facility. Now
13 you've got a facility that's virtually greenhouse gas-
14 less.

15 That's lower than anything STP 3 and 4
16 could ever posit. And, again, it depends on how you
17 count it. If you want to truncate the accounting for
18 greenhouse gases and say it's only what happens while
19 3 and 4 are active, up and running, well, I suppose
20 you can, but that understates significantly the
21 greenhouse gas inputs from the uranium fuel cycle.

22 MR. SPENCER: Your Honor, I would like
23 address what was just said in terms of the uranium
24 fuel cycle. The Intervenors never -- none of their
25 contentions directly challenge our calculation of

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1 greenhouse gas emissions from the uranium fuel cycle,
2 and we did, in fact, calculate those greenhouse gas
3 emissions from the uranium fuel cycles in our DEIS.

4 And in discussing the summary comparison
5 of alternatives in Section 9.2.5 of the DEIS, we did
6 compare -- do an apples-to-apples comparison, do a
7 comparison by generation type of the viable
8 alternatives: nuclear power, coal-fired natural gas,
9 and combination of alternatives. But we also -- that
10 was on page 9-30 and table 9-5.

11 However, we also, on page 9-29, in the
12 discussion, in the bottom paragraph, we stated, "Even
13 adding in the transportation emission for the nuclear
14 plant workforce and fuel cycle emissions would
15 increase the emissions for plant operation over a 40-
16 year period to about 45 million metric tons. This
17 number is still significantly lower than the emissions
18 for the other viable alternatives."

19 So we did address the uranium fuel cycle
20 in our DEIS, and the Intervenor's contention does not
21 take issue with that, and as we explained in our
22 answer, we only have to compare the impacts of viable,
23 reasonable alternatives, not alternatives that do not
24 meet the purpose and need of the project.

25 MR. EYE: Well, Your Honor, again, that's

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1 where we differ, that there are alternatives out there
2 that meet purpose and need but don't have the
3 greenhouse gas print that Units 3 and 4 would have.

4 MR. FRANTZ: If I could add something
5 here --

6 JUDGE ARNOLD: Be my guest.

7 MR. FRANTZ: The environmental report
8 characterized the impacts on air quality from South
9 Texas and characterized those impacts as small. That
10 includes, by the way, impacts from greenhouse gases.
11 The draft EIS also characterizes the impacts from STP
12 on air quality as small.

13 So, therefore, even if we had done the
14 analysis suggested by Mr. Eye, and assuming, again,
15 the impacts from wind and solar are ranked as small,
16 you have small versus small. There's no environmental
17 advantage in that comparison, so it would make no
18 difference to the outcome of this proceeding if we had
19 done exactly what he's advocating.

20 JUDGE ARNOLD: I'm done.

21 JUDGE GIBSON: Okay. Judge Charbeneau, do
22 you have anything?

23 JUDGE CHARBENEAU: You've already covered
24 mine.

25 JUDGE GIBSON: Okay. Mr. Eye, in your

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1 original Contention 20 and 23, you argued that South
2 Texas's application did not adequately compare nuclear
3 greenhouse gas with alternative energy technologies.
4 And South Texas has argued on page 10 that this new
5 contention should not be admitted, because both the
6 environmental report and the draft environmental
7 impact statement concluded that wind and solar alone
8 are not reasonable alternatives for producing baseload
9 power.

10 Now, setting aside for a moment whether
11 there was an adequate comparison of wind and solar
12 with nuclear, do you agree with South Texas that wind
13 and solar alone must be demonstrated to be capable of
14 producing baseload power before they can be considered
15 a reasonable alternative to nuclear power?

16 MR. EYE: Given the parameters within
17 which we are working, I have to agree with that.

18 JUDGE GIBSON: Okay.

19 MR. EYE: Now, I would say that we have
20 advanced in the record Dr. Dean's analysis that says
21 wind and solar can do that.

22 JUDGE GIBSON: Right.

23 MR. EYE: So --

24 JUDGE GIBSON: Okay. Is there any new
25 information that surfaced within 54 days of the date

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1 that you filed these new contentions to justify filing
2 a new contention on CO2 emissions from wind and solar
3 versus nuclear?

4 MR. EYE: Well, to the extent that the
5 DEIS in its Appendix I discusses the CO2 footprint of
6 the light-water reactor, that would be what we would
7 cite to, and we address that in our -- I believe in
8 the original -- or in DEIS Contention 3.

9 And, you know, what we argue there is that
10 there wasn't -- in that appendix, they really didn't
11 do a comparison of alternative generation modes,
12 because they took the position that there wasn't
13 really any other alternative renewal fuel generation
14 mode that was worth comparing.

15 And, again, you know, we've made a record
16 that we disagree with that and believe that their
17 Appendix I was incomplete for having not done that
18 piece.

19 JUDGE GIBSON: But that is ground we've
20 already tilled, in conjunction with Contentions 20 and
21 23 earlier.

22 MR. EYE: Well, in a general sense
23 perhaps, but not in the specific sense that the Staff
24 advanced in their appendix. Your Honor, we felt
25 compelled to address what we thought was a defective

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1 piece in the DEIS, at least in that Appendix I.

2 JUDGE GIBSON: Uh-huh.

3 MR. EYE: I'm not going to sit here and
4 say that there was no overlap with the original
5 contentions --

6 JUDGE GIBSON: Sure.

7 MR. EYE: -- because I think that there
8 is, and this is also about making record and so forth.
9 But that appendix -- it's difficult to read it and not
10 think that it could have been written in 1955.

11 JUDGE GIBSON: Uh-huh.

12 MR. EYE: Or '65.

13 JUDGE GIBSON: Yes.

14 MR. EYE: And so I think it begged -- from
15 our perspective, it really called out to be addressed,
16 and so that's we did.

17 JUDGE GIBSON: Okay. Fair enough. Mr.
18 Spencer, on page 41 of your answer, you describe a
19 scenario involving wind, hydro and natural gas. Why
20 did you not include solar in that scenario?

21 MR. SPENCER: Well, Your Honor, the NRC
22 looked at a combination of alternatives, and we looked
23 at a bunch of different combinations. There are many
24 multiples of possible combinations to look at, and we
25 chose one that we thought was a reasonable combination

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1 to look at, and it includes wind and it includes
2 compressed air energy storage, and it includes natural
3 gas, and it includes other means of generating power
4 that the Intervenors haven't filed a contention on.
5 It was just a reasonable alternative to consider.

6 So I don't think there was -- I'm not
7 aware of any specific reason why solar was excluded
8 versus some other possible component of the
9 combination of alternatives. But the NEPA only
10 requires us to look at a reasonable range of
11 alternatives. The Intervenors have not -- they don't
12 even address this discussion, must less explain how
13 the omission of solar from this discussion somehow
14 made our discussion unreasonable.

15 JUDGE GIBSON: Okay. I was just curious
16 why you hadn't addressed solar. It just seemed like
17 kind of a glaring omission to me, but, you know, maybe
18 it's not.

19 MR. SPENCER: We do --

20 JUDGE GIBSON: Just curious.

21 MR. SPENCER: -- not believe it to be so,
22 Your Honor.

23 JUDGE GIBSON: Okay. Mr. Eye, even if
24 they had added solar to the mix, is it your position
25 that they could get to baseload without using natural

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1 gas?

2 MR. EYE: Dr. Dean believes so.

3 JUDGE GIBSON: Okay.

4 MR. EYE: And so we have adopted his
5 conclusion. Yes.

6 JUDGE GIBSON: Okay.

7 MR. SPENCER: Your Honor, the Dean report,
8 as I recall, was submitted as one of the attachments
9 to the DEIS contention, but it wasn't really advanced
10 in the contention itself. It seems to have been more
11 part of their reply, but I'm not sure what in there
12 is -- what is the new information on which the
13 contention is based. The only thing I'm aware of is
14 this press release for the pilot project of
15 unspecified capacity.

16 And our DEIS already accounts for the
17 possibility that compressed air storage might be used
18 to meet a baseload power need, so of -- not 2,700
19 megawatts but lesser capacity, so in terms of new
20 information, we don't think there's any difference,
21 any real difference between what the Intervenors have
22 put forward and what our DEIS already recognizes.

23 MR. EYE: Your Honor, it is different.
24 The DEIS assumes that a CAES would use gas, and CAES
25 technology is not necessarily dependent on gas. Dr.

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1 Dean says so, and more importantly, the announcement
2 in April of this year by General Compression and
3 ConocoPhillips says they can run a CAES without gas.
4 That's substantially different than what's advanced in
5 the DEIS, and we take issue with that.

6 MR. SPENCER: I'd like to clarify one
7 point. The NRC Staff is not saying that one needs a
8 gas plant to run a wind facility with CAES. What the
9 NRC staff is saying is that in order to get up to
10 2,700 megawatts of baseload power, one needs to
11 include natural gas as a component of that.

12 JUDGE GIBSON: Right.

13 MR. SPENCER: So it's more of the scaling
14 to the amount of power needed that is the key issue
15 here.

16 JUDGE GIBSON: Without -- when the wind
17 doesn't blow, you've got to have some source of power.

18 MR. SPENCER: Well, that's true, Your --

19 JUDGE GIBSON: And natural gas would be
20 the means of power in the event that there weren't
21 wind?

22 MR. SPENCER: That's true, Your Honor, but
23 in terms of if you have wind with CAES.

24 JUDGE GIBSON: Right.

25 MR. SPENCER: Our DEIS looks at the fact

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1 that the CAES facilities that currently exist are less
2 than 300 megawatts and that there's nothing
3 contemplated beyond that. So wind storage with CAES
4 could only be a component of 2,700 megawatts. There's
5 no demonstrated, proven use of CAES with wind in the
6 amount of 2,700 megawatts.

7 JUDGE ARNOLD: If you had a 300-megawatt
8 plant that is wind with CAES producing baseload, could
9 you not build nine of them to achieve 2,700 megawatts?

10 MR. SPENCER: I think, you know -- Your
11 Honor, in terms of the technology of how that could
12 happen, I'm not sure I can answer that question,
13 because CAES does rely upon particular storage and
14 having the right geologic formations, so I cannot,
15 from a technological standpoint, I can't answer that
16 question. All I know is that the DEIS examined, you
17 know, the facilities that had been contemplated, and
18 they haven't been to that scale.

19 MR. FRANTZ: And perhaps if I could
20 address that also --

21 JUDGE GIBSON: Sure.

22 MR. FRANTZ: There are only two CAES
23 plants in operation. They're not used for baseload
24 power. Mr. Eye has referred to a possible project
25 which possibly might be constructed, that might

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1 provide some baseload power -- it might not; it might
2 provide peaking power -- of undisclosed capacity. The
3 fact of the matter is we have never seen a baseload
4 CAES project anywhere in the world.

5 It's very speculative whether one would
6 ever exist, and if it could, whether it would be
7 sufficient to supply 2,700 megawatts of power. So we
8 don't have anything that's proven. All we have are
9 theories and possibilities, but nothing that's proven.

10 MR. EYE: May I address that? In the
11 context of NEPA, the question is practicability. Is
12 it a practicable concept? And we've got two plants,
13 both of which, I think, have been running since the
14 1970s. The one in Germany is '75. I think the one in
15 McIntosh, Alabama, is in the 1970s as well. So the
16 concept is pretty well proven.

17 There's another one that's being built in
18 Iowa that, as Mr. Frantz will no doubt point out, is
19 not designated as a baseload per se facility, but the
20 concept itself is practicable, and that's the
21 touchstone under NEPA that should be considered here.

22 And there's case law under NEPA that we
23 cite somewhere in our paper -- I can't lay my hands on
24 it at this very moment -- that talks about that
25 aspect. It's not necessarily something that has to be

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1 bricks and mortar, already built and in operation, to
2 say that it's practicable.

3 We've got evidence of practicability here
4 in the two extant plants that have been running for
5 years, plus the -- I mean, I won't belabor it -- the
6 announcement of others, one of which is explicitly set
7 out to be -- have the capacity to handle baseload.

8 JUDGE ARNOLD: Well, I want to ask Staff
9 on this. Do you agree that you have to evaluate
10 alternatives that are practicable, or does the NRC use
11 the word "reasonable," and if so, do they mean the
12 same thing?

13 MR. SPENCER: Well, different terms are
14 used, but they represent the same basic concept of
15 reasonableness. And I would, you know, even point out
16 that the reasonableness has to account for
17 technological and economic considerations, and has to
18 use common sense. I'm actually in this case quoting
19 from one of the Intervenors' footnotes in their reply,
20 that they recognized this fact.

21 They say, "Reasonable alternatives are
22 those that are practical or feasible from the
23 technical and economic standpoint and using common
24 sense." So when we're looking at, you know, a planned
25 facility to meet generation needs, it is reasonable

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1 that that facility actually be demonstrated and
2 provable means of meeting that need instead of just a
3 possibility.

4 MR. FRANTZ: If I could also add, in
5 NUREG-1555, which is the NRC's environmental standard
6 review plan for new plants, it states that to be a
7 reasonable alternative, and "energy conversion
8 technology should be developed, proven and available
9 in the relevant region." And that's at page 9.2.2-4.
10 So the NRC guidance recognizes that you need something
11 that's proven to be a reasonable alternative.

12 MR. SPENCER: And we agree definitely that
13 the guidance says just that.

14 JUDGE ARNOLD: Okay. I think we've kind
15 of veered off course on this. Does anyone have
16 anything final to say on this?

17 MR. EYE: Only that the Staff concedes at
18 page 9-21, lines 8 through 11, that CAES might serve
19 as a means of providing baseload power.

20 JUDGE ARNOLD: My last question on this
21 is: Is this contention based upon a difference
22 between the DEIS and the environmental report, or is
23 it based on new information?

24 MR. EYE: We're on Contention 3. Correct?

25 JUDGE ARNOLD: Yes.

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1 MR. EYE: I kind of lost track there for
2 a second. It's based on what came out of the DEIS,
3 because as we kind of lead off with that contention as
4 Appendix I, and that really was the point of
5 departure.

6 JUDGE ARNOLD: I'm done.

7 JUDGE GIBSON: Judge Charbeneau?

8 JUDGE CHARBENEAU: No.

9 JUDGE GIBSON: Let's go to Contention 4.
10 Mr. Frantz, on page 10 of your answer, you indicate
11 that both the draft environmental impact statement and
12 the environmental report conclude that the air impacts
13 would be, quote, small.

14 MR. FRANTZ: Yes.

15 JUDGE GIBSON: Do I understand correctly
16 that the designation "small" is based on note 1 of
17 Table S-3 of 10 CFR 51.51?

18 MR. FRANTZ: Yes. And it's also based
19 upon the Staff's characterization in their DEIS. They
20 use the same definition.

21 JUDGE GIBSON: All right. And in your
22 estimation, footnote 1 of Table S-3 resolves
23 greenhouse gas impacts of the uranium fuel cycle.
24 Correct?

25 MR. FRANTZ: Yes. And also -- the

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1 Commission, of course, has directed all future
2 applicants and the STAFF in their DEISs to look at
3 greenhouse gases.

4 JUDGE GIBSON: Okay. Mr. Eye, in our
5 order of August 2009, we declined to admit a
6 contention similar to this based on this same Note 1
7 of Table S-3, so my question to you is: Is there some
8 new information that surfaced within 54 days of the
9 date you filed these new contentions to justify filing
10 a new one on the CO2 emissions during construction?

11 MR. EYE: Well, only that the language
12 used in the DEIS says that there will be mitigation of
13 CO2, but there's no specification whatsoever as to
14 what that is, and speaking as somebody who's had some
15 experience now over the last few years with mitigating
16 CO2, it's not as easy as it sounds.

17 And I think that to the extent that they
18 just put this out there as an aspirational goal is
19 great, but it's, how they're going to do it, and there
20 is -- that discussion in the DEIS was really absent.

21 JUDGE GIBSON: Well, let me -- let's focus
22 on this question of mitigation, because on page 41 to
23 43 of the answer to your contention, South Texas takes
24 issues with that characterization and says that the
25 air pollution mitigation measures that are supposed to

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1 be taken are not ones that refer to greenhouse gas
2 emissions, but they're rather referring to other
3 pollutants like particulates, dust, things like that,
4 and that the term "appropriate mitigation measures"
5 has no relationship to greenhouse gas emissions.

6 Do you think that they're in error in that
7 regard?

8 MR. EYE: Well, as I read the DEIS, they
9 certainly talked about mitigating air contamination
10 issues under Massachusetts against EPA.

11 JUDGE GIBSON: Right.

12 MR. EYE: CO2 is now considered under the
13 Clean Air Act, an air pollutant. I mean, we're still
14 in the stages of adopting regulations to adopt. The
15 Supreme Court has said for Clean Air Act purposes,
16 it's air pollutant.

17 JUDGE GIBSON: Okay.

18 MR. EYE: And so that is part of the
19 reason why we have advanced this contention about just
20 exactly what -- again, assuming that you've got a
21 pollutant called CO2, what do you do about it?

22 JUDGE GIBSON: Okay.

23 JUDGE CHARBENEAU: Does TCEQ look at CO2
24 as an air pollutant?

25 MR. EYE: I don't think they have yet. In

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1 fact, I don't think there's hardly any states that
2 have adopted their own CO2 regs, because they're all
3 waiting around for EPA to do it. Having spoken with
4 a number of state regulators, they're loath to go down
5 that path, that they think the EPA is going to do it
6 for them or ahead of them.

7 JUDGE CHARBENEAU: Yes, because as I read
8 the DEIS, it talks about development of the
9 construction environmental control plan that will
10 implement TCEQ requirements. And if TCEQ does not
11 look at CO2, then the intent in the DEIS does not
12 appear to be focused in the air pollution part on CO2.

13 MR. EYE: I don't know of any TCEQ CO2
14 regs, restrictions, limitations --

15 JUDGE CHARBENEAU: I'm not aware of any
16 either.

17 MR. EYE: -- that address it.

18 JUDGE GIBSON: Okay. They may control
19 NOx; they may control --

20 MR. EYE: Particulates, SO2.

21 JUDGE GIBSON: But do you -- can you
22 provide us with any additional guidance on what was
23 intended here with respect to the language,
24 appropriate mitigation measures, and whether that
25 apply -- at least the Staff's intent was to apply that

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1 to greenhouse gas emissions or only to other air
2 pollutants, more convention air pollutants?

3 MR. SPENCER: Your Honor, I think that if
4 I go through Section 4.7 in order, it may make this a
5 little more clear.

6 JUDGE GIBSON: Please do.

7 MR. SPENCER: Okay. Section 4.7 looks at
8 meteorological air quality impacts. The Intervenors
9 take issue with a sentence in the summary of Section
10 4.71, which is titled, Construction and
11 preconstruction activities.

12 JUDGE GIBSON: Uh-huh.

13 MR. SPENCER: In assessing air quality,
14 the Staff looked at various types of air qualities,
15 including criteria pollutants, and we noted that there
16 were mitigation measures committed to by the
17 Applicant. And then we directed our focus to
18 greenhouse gas emissions, and we stated that the
19 atmospheric impacts of greenhouse gases from
20 construction and preconstruction activities would not
21 be noticeable and additional mitigation would not be
22 warranted.

23 So we concluded that those impacts were
24 small, and the Intervenors have not contested that
25 conclusion on the impact level. When we -- we said

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1 additional mitigation would not be warranted, given
2 the fact that the impacts were small. However, some
3 of the mitigation measures previously discussed would
4 have an effect of mitigating greenhouse gas emissions,
5 such as minimizing daily emissions to -- by performing
6 construction vehicle maintenance, so that's discussed
7 previously on page 4-63.

8 And then in addition, in Section 4.7.2,
9 the next section which discusses traffic, there were
10 mitigation measures that were discussed there, talking
11 about mitigation measures that are typically used to
12 reduce traffic, include encouraging carpools,
13 establishing central parking and shuttling services to
14 and from the site, things of that nature.

15 Some of these mitigation measures that
16 have been committed to would also have an effect of
17 reducing greenhouse gas emissions. So we discussed
18 the impacts. We concluded that they were small. We
19 concluded that additional mitigation measures were not
20 warranted, and so that was our intent.

21 Now, the mitigation measures we listed are
22 the ones that have been committed to by the Applicant,
23 so that was already in the ER. If the Intervenors'
24 wanted to challenge those mitigation measures if they
25 felt additional mitigation measures were warranted

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1 beyond that, then they could have filed a contention
2 on the ER, but they did not do so.

3 JUDGE GIBSON: Okay. Were there any
4 mitigation measures that you all had envisioned for
5 control of air pollutants that would have been
6 specifically designed to abate greenhouse gas
7 emissions, or would those have been essentially
8 incidental to abating something else like NOx or
9 particulates and might have also reduced greenhouse
10 gas emissions?

11 MR. FRANTZ: As Mr. Spencer mentioned, the
12 major ones would be dealing with emissions from
13 vehicles, and to the extent you minimize all these
14 other pollutants, you also minimize the greenhouse
15 gases, too. But I don't think anything in there was
16 designed specifically for greenhouse gas.

17 JUDGE GIBSON: Great. Okay. Fair enough.
18 I just wanted to be sure we're all singing off the
19 same sheet of music. Okay. If we could turn to
20 Contention 5 --

21 JUDGE ARNOLD: Let me just --

22 JUDGE GIBSON: Oh, I'm sorry.

23 JUDGE ARNOLD: My single question on this
24 one: Is this based upon a difference between the ER
25 and the DEIS, or is it based on new information?

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1 MR. EYE: I thought it was based upon the
2 difference between the ER and the DEIS, but now I'm
3 second-guessing myself on that frankly. But that was
4 the original intent, if you will.

5 JUDGE GIBSON: You were under the
6 impression that when they said they were going to be
7 taking additional appropriate mitigation measures that
8 that encompassed as well mitigation measures to abate
9 greenhouse gas emissions.

10 MR. EYE: Correct.

11 JUDGE GIBSON: Sure.

12 MR. EYE: I did.

13 JUDGE GIBSON: I think a perfectly
14 understandable reading of that language. I think the
15 question, though, is: Was anything envisioned here
16 along those lines? And it sounds like there really
17 wasn't. It sounds like the focus was on more
18 conventional pollutants.

19 MR. EYE: It seemed that way.

20 JUDGE GIBSON: Okay. Anything else, Judge
21 Charbeneau?

22 JUDGE CHARBENEAU: No.

23 JUDGE GIBSON: Okay. If we could turn to
24 Contention 5, now, this contention concerns the
25 possible cumulative impacts on groundwater and

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1 nonradiological health if STP Units 3 and 4 are to be
2 licensed. Correct?

3 MR. EYE: Yes, it does. But, again -- and
4 we may have already covered the thrust of this in an
5 earlier part of the proceeding today, Your Honor,
6 inasmuch as conceptually, we differ with how the
7 requirement that the DEIS be clear and analytic can be
8 met when the impacts that are described in the DEIS
9 are not insignificant, and yet they are, on the other
10 hand, characterized as small.

11 And it was that clash of vernacular, if
12 you will, that seemed to us to raise a question of
13 whether or not you can get there from here, so to
14 speak.

15 JUDGE GIBSON: Right.

16 MR. EYE: And that was really the thrust
17 of that contention. It was grounded in this -- it
18 happened to be an instance it was grounded in the idea
19 that there were groundwater and nonradiological health
20 impacts and so forth, but that was really just sort of
21 a vehicle to point out that we've got this not
22 insignificant but it's still small.

23 JUDGE GIBSON: Right.

24 MR. EYE: And that was --

25 JUDGE GIBSON: I found that language to be

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1 curious as well. Mr. Spencer, could you address that?
2 There was -- on the one end, you state in the draft
3 environmental impact statement that the impacts of
4 global warming will be not insignificant with respect
5 to groundwater and nonradiological pollutants. But
6 then you say that these not insignificant impacts
7 don't rise to the level of an issue that needs to be
8 addressed. And I found that as sort of curious as Mr.
9 Eye did.

10 Do you have any idea what the --

11 MR. WILSON: Your Honor, Anthony Wilson.
12 I'll respond to that.

13 JUDGE GIBSON: Yes, sir.

14 MR. WILSON: The "are not insignificant"
15 was really referring to the potential impact of
16 climate change worldwide, but with respect to the --
17 the "small" referred to the nonradiological health
18 impacts on workers, and the distinction was being made
19 about the impact of this plant overall, that it does
20 not add to the potential climate change.

21 JUDGE GIBSON: Okay. When you finalize
22 that, you might want to tweak that language just a
23 little, to make it more clear that we're talking, you
24 know, about something not insignificant globally, but
25 the specific impacts locally are not going to be --

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1 MR. WILSON: Yes.

2 JUDGE GIBSON: I think that might be
3 helpful for the record.

4 MR. WILSON: Okay. I'll pass that on to
5 staff.

6 JUDGE GIBSON: I know it confused Mr. Eye,
7 and frankly, it confused me as well when I read it.

8 Okay. Turning to -- was there anything
9 you had on that, Judge Arnold?

10 JUDGE ARNOLD: Sure. A standard
11 question --

12 MR. EYE: Let me guess. You know, I only
13 had to work through five of them to figure out what
14 you're going to ask. Your Honor, essentially this
15 language about the "not insignificant," I don't
16 believe that that was a characterization that was
17 utilized in the environmental report, so it -- I guess
18 that's really both new in terms of that
19 characterization and different as well. So if I had
20 to choose between one or the other, I would say that
21 it's different, but I think it's got aspects of both.

22 JUDGE ARNOLD: Okay. Thank you.

23 JUDGE GIBSON: Let's go to Contention 6,
24 and this has to do with water use by the Las Brisas
25 Power Plant in Corpus Christi. Now, I understand that

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1 this is a plant that is going to be using petroleum
2 coke as fuel.

3 MR. EYE: That's my understanding, which
4 if I use the term "coal-fired," it's only because it's
5 a similar enough kind of boiler fuel that -- at any
6 rate, that was the --

7 JUDGE GIBSON: That's okay. My
8 understanding is they're going to be using petroleum
9 coke, and you're seeking to address the impact of
10 water use from this power plant in Corpus Christi on
11 water availability for this facility.

12 MR. EYE: Yes.

13 JUDGE GIBSON: STP 3 and 4. And do I
14 understand you to claim that the Las Brisas plant
15 either has acquired or will be acquiring water rights
16 in the Colorado River that are going to affect water
17 availability for STP Units 3 and 4?

18 MR. EYE: As I understand it, Your Honor,
19 the transaction has advanced to the point where the
20 governing body has authorized negotiations to go
21 forward and to finalize the sale of these rights.

22 JUDGE GIBSON: Is that the LCRA?

23 MR. EYE: The LCRA, yes.

24 JUDGE GIBSON: Lower Colorado River
25 Authority.

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1 MR. EYE: Yes.

2 JUDGE GIBSON: Fair enough. Okay. Is
3 this in the nature of a contention of omission, that
4 the environmental report and the draft environmental
5 impact statement failed to address whether the water
6 needs of Las Brisas are so significant that it's going
7 to affect water availability for STP Units 3 and 4?

8 MR. EYE: Somewhat, but I think it also
9 just raises the question generally about adequate
10 water quantity, and it follows on, if you will,
11 earlier contentions we've advanced about no -- that
12 there's an inadequate evidence to support that there
13 will be adequate surface water to meet 3 and 4's needs
14 for operations.

15 So the answer is, yes, it is partly an
16 omission, but it really does go to the broader
17 question about whether there's been an adequate
18 consideration of -- in a more global sense of whether
19 there's going to be adequate water to operate the
20 plan. But this specific piece, I think -- yes.

21 JUDGE GIBSON: Okay. Fair enough.

22 JUDGE CHARBENEAU: Can I ask a point of
23 clarification?

24 JUDGE GIBSON: Yes.

25 JUDGE CHARBENEAU: Are the water rights

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1 being discussed those of available water from LCRA, or
2 are they water rights already held by Corpus Christi?

3 MR. EYE: It's the water rights that are
4 held by Corpus Christi that they need to essentially
5 give up, but I think it's within the aegis of the LCRA
6 is kind of the umbrella organization that governs.

7 JUDGE CHARBENEAU: But in terms of LCRA
8 water availability, this would have no impact, because
9 those water rights are already owned by somebody who
10 is selling their -- that's like the rice farmers
11 giving up water rights.

12 MR. EYE: Yes. Yes, Your Honor. I would
13 agree with that. And, Judge Arnold, I believe the
14 announcement of this was in May of 2010.

15 JUDGE ARNOLD: I wasn't going to ask that
16 question.

17 JUDGE GIBSON: Okay. Now, I take it
18 that -- Judge Charbeneau just asked you the question,
19 so what's the beef, I guess, is our question. If the
20 water has already been allocated -- the water rights
21 have already been allocated and the entities from whom
22 Las Brisas will be purchasing that water are persons
23 who have already been allocated water in this
24 watershed, and none of those water rights are ones
25 that South Texas was going to utilize, then what harm

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1 does Las Brisas acquiring these water rights have on
2 water availability for South Texas Units 3 and 4?

3 MR. EYE: It's major competition for
4 scarce resource. It's another draw of 19,000 -- I
5 forget the exact -- 19,356 acre feet from the
6 Colorado, which also services obviously South Texas 3
7 and 4. It's simply a recognition that any water
8 rights that might be thought of as reserves that can
9 be called on to augment plant operations --

10 I think, as Mr. Frantz pointed out earlier
11 today, there are certain contingencies that would have
12 water released by the Lower Colorado River Authority
13 for -- you know, under certain circumstances and so
14 forth. Well, that would be something that would not
15 be available, because they would have already been
16 spoken for.

17 JUDGE GIBSON: So they wouldn't have water
18 to release in the case of an emergency, for example.

19 MR. EYE: Yes, sir.

20 JUDGE GIBSON: Okay. Mr. Frantz, could
21 you address the point that -- the competition for
22 scarce resources argument that Mr. Eye just made,
23 please.

24 MR. FRANTZ: There is no competition. Las
25 Brisas or -- I'm sorry -- Corpus Christi has their

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1 water rights. We have our water rights. And doing
2 the planning, the assumption's made that all the water
3 rights are fully used, so there is no credit at all
4 for that water right now in our analysis or the
5 analysis in the draft EIS.

6 And I can refer the Board here to a
7 document that's referenced in the draft EIS. It's the
8 2006 Lower Colorado River regional water planning
9 Region K water plan, and it's referenced at page 2-33
10 of the draft EIS. And that report, again, assumes
11 that there is no borrowing. You can't borrow unused
12 water.

13 So to the extent that Mr. Eye is claiming
14 that somehow if Las Brisas doesn't use this water, we
15 could have it released to us, that's not at all
16 accounted for in the regional water plan. It's not
17 accounted for in our analysis either.

18 JUDGE GIBSON: So in the case of a water
19 availability problem or an excess salinity problem,
20 where LCRA would be obligated to release additional
21 water from its upstream reservoirs, are you saying
22 that that obligation is in addition to and not in lieu
23 of all of the water that's been allocated to all
24 persons with water rights in the LCRA?

25 MR. FRANTZ: That's correct.

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1 JUDGE GIBSON: This watershed.

2 MR. FRANTZ: That's correct.

3 JUDGE GIBSON: So we don't have a
4 competition for scarce resources problem in your
5 estimation, because it's already accounted for.

6 MR. FRANTZ: Yes.

7 JUDGE GIBSON: Is that a fair statement?

8 MR. FRANTZ: Yes.

9 JUDGE GIBSON: Okay. Anything the Staff
10 wishes to add to that?

11 MR. WILSON: Staff agrees.

12 JUDGE GIBSON: Okay. Judge Charbeneau?

13 JUDGE CHARBENEAU: No, sir.

14 JUDGE GIBSON: Judge Arnold?

15 JUDGE ARNOLD: I guess I just want to
16 understand it a little bit better. Right now Corpus
17 Christi has the right to it, but it's not using it?
18 Is that --

19 MR. FRANTZ: I don't know all the facts
20 behind that.

21 JUDGE ARNOLD: Okay.

22 JUDGE GIBSON: My recollection -- and this
23 is totally not on the record. But just my
24 recollection from living here and doing some work down
25 there is that I believe that there was a long-term

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1 project for the City of Corpus Christi to purchase
2 water for building the bay, and I think that that was
3 what it was. They were going to build -- I don't know
4 if it's a lake or water transport or something, and I
5 think they ended up getting it from another source,
6 and so -- but I think that's the origin of this issue.

7 JUDGE ARNOLD: When this coal-fired plant
8 starts using the 19,356 acre feet per year, will the
9 flow through the Colorado River past STP decrease by
10 19,356 acre feet per year?

11 MR. FRANTZ: I can't say that exact
12 amount, because there's recharge into the ground and
13 other issues associated with it, evaporation and what
14 not. But presumably there would be some reduction.

15 JUDGE ARNOLD: So there may be some impact
16 upon the plant such as longer periods of brackish
17 water that's not swept out of the river, but as far as
18 your use is concerned, you're still guaranteed the
19 amount of water you need.

20 MR. FRANTZ: That's correct. Assuming
21 that Las Brisas takes all this water, we still have
22 enough water for our plant operation.

23 JUDGE ARNOLD: Okay. Thank you.

24 JUDGE GIBSON: Okay. I believe before we
25 start thinking about closing or adjourning, I believe

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1 we had a recent order from the Commission regarding
2 SUNSI, and I was wondering if the Staff could perhaps
3 give us an update on where we stand on that.

4 MR. SPENCER: Your Honor, which -- there
5 were several points raised in the Board's order, and
6 one point was with respect to whether the Intervenors
7 wished to request the draft ISG. Do you have any
8 specific questions?

9 JUDGE GIBSON: No. I don't have any
10 specific questions. I think the Commission was pretty
11 explicit about what they expected to be done, and I
12 was just curious. We've got to figure out what we're
13 going to do next, and I thought you might have some
14 report to us on what's going on, so we'd know whether,
15 you know, all this has been mooted, or whether there
16 are some specific steps that we need to take to
17 address the issue.

18 MR. SPENCER: Well, Your Honor, one
19 question raised in the order for oral argument had to
20 do with whether there needed to be a change to the
21 language in the initial scheduling order with regard
22 to third-party drafts -- or drafts sent to third
23 parties.

24 JUDGE GIBSON: Correct.

25 MR. SPENCER: And we do not believe that

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1 there's any need to change that, that the scheduling
2 order refers to internal drafts, so if a draft is
3 circulated to a party outside of an organization, its
4 agents, contractors, or outside -- in our case, we're
5 part of the Government -- then that would be -- we
6 would not consider that an internal draft.

7 MR. EYE: Did he say he does or doesn't?
8 I didn't catch --

9 JUDGE GIBSON: He does not consider that
10 an internal draft.

11 MR. EYE: Does not. Okay. I didn't --

12 JUDGE GIBSON: Well, the reason I asked
13 the question is: My recollection -- and, you know, I
14 certainly could have an inaccurate recollection, but
15 my recollection was that the argument was made that
16 this document did not need to be produced, because it
17 was a draft within the meaning of the initial
18 scheduling order, but, in fact, it had been shared
19 with a third party.

20 And I have to tell you that having done
21 some litigation for a significant part of my life and
22 been concerned with issues of privilege and
23 confidentiality and what not, that the notion that a
24 draft would be shared with a third party is -- doesn't
25 really add up to me, because when I think of a draft,

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1 I think of something that is designed for internal
2 review and that perhaps would not have to be produced
3 because of -- it might not qualify for attorney-client
4 privilege, but it would perhaps be something like that
5 internal deliberations privilege that we've seen some
6 discussion about, where not just for government
7 bodies, but for South Texas.

8 They had a draft, a letter, that they
9 were -- their staff was working on, and they had done
10 it without having an attorney involved. They produced
11 a final letter, and they wouldn't have to produce a
12 draft, and certainly my -- the way I envisioned it was
13 that that was what was going to be -- what was the
14 subject of that language in the initial scheduling
15 order.

16 I thought that someone had made the
17 argument that this was a draft within the meaning of
18 that initial scheduling order, and therefore, did not
19 need to be produced. Am I incorrect in that?

20 MR. SPENCER: Your Honor, the Commission
21 brought that issue up sua sponte. The parties and the
22 Board had proceeded under the access procedures
23 process and handled it that way. It was appealed to
24 the Commission, and the Commission treated it in an
25 entirely different way, and the Commission is the one

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1 that brought up this draft issue, because the
2 Commission decided to treat it under the disclosure
3 obligations in 233.6(b)(3), and then once it made that
4 step --

5 JUDGE GIBSON: Uh-huh.

6 MR. SPENCER: -- and then once it made
7 that step, then it started to take further steps and
8 talked about the drafts provision in the internal --
9 initial scheduling order. The NRC Staff never raised
10 this issue, because we never saw it as a 233.6(b)(3)
11 disclosure issue.

12 JUDGE GIBSON: Uh-huh.

13 MR. SPENCER: So we never made that
14 argument. Nobody else made that argument. The
15 Commission just raised the issue, and we don't see
16 that the draft provision in the initial scheduling
17 order, the internal draft provision, would apply to
18 drafts that are shared with other parties, like a
19 draft environmental impact statement. We wouldn't
20 take the position certainly that just because it has
21 the word "draft" attached to it, that it doesn't fall
22 within the disclosure provisions of 233.6(b) or the
23 initial scheduling order.

24 So we agree with -- I agree with the
25 Board's view as the Board expressed it in terms of the

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1 Board's understanding of the word "draft" for the
2 purposes of disclosure.

3 JUDGE GIBSON: Okay. Well, let's take it
4 to the next step. Is there any harm in spelling that
5 out, making clear that the drafts that we have
6 specified as not being subject to disclosure do not
7 encompass documents that have been disclosed to a
8 third party?

9 MR. SPENCER: I do not necessarily --
10 well, I don't see a harm in it, as long as it's
11 understood what third party is. Sometimes the -- when
12 an agency sends documents to its contractors or across
13 agencies, there can be deliberative process.

14 JUDGE GIBSON: Uh-huh.

15 MR. SPENCER: So with the proper
16 understanding, we do not see a problem with that.
17 However, the initial scheduling order already calls
18 them internal drafts.

19 JUDGE GIBSON: Right.

20 MR. SPENCER: So I think that the initial
21 scheduling order is already clear on that point.

22 JUDGE GIBSON: Well, I thought so, too,
23 until I read the Commission's order.

24 MR. SPENCER: But I think that the
25 parties -- and there was some discussion among the

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1. parties. We personally do not -- we feel it's clear,
2. and we do not feel there's a need to --

3. JUDGE GIBSON: Mr. Frantz?

4. MR. FRANTZ: I also agree that I don't
5. believe there's a need to revise the initial
6. scheduling order. We believe there may be difficulty
7. in trying to actually implement your suggestion. In
8. theory, it sounds great. I don't have any problems in
9. theory, but what happens is you have individuals and
10. they may have a draft, and maybe they're talking to
11. somebody from EPA or the Texas TCEQ, and they show the
12. draft.

13. Does that then become a document we have
14. to disclose? And trying to monitor all those
15. communications back and forth could be difficult. If
16. there is a modification, by the way, we would
17. obviously recommend that our contractors, for example,
18. and the Intervenors' contractors and the Staff
19. contractors be excluded from that, that they're not
20. third parties.

21. JUDGE GIBSON: Right.

22. MR. FRANTZ: But in general, we don't
23. believe that there's any need for that, and we believe
24. the Staff's explanation should be sufficient, and as
25. long as they follow that practice, we have no problem

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1 with it.

2 JUDGE GIBSON: Okay. Mr. Eye?

3 MR. EYE: Thank you, Your Honor. Two --
4 three points. One is that the most specific question,
5 I think, that the panel has to deal with is what's
6 going to happen with the current draft ISG 016? We
7 have communicated with Staff and the Applicant that as
8 long as we can be assured that we're going to get an
9 unredacted version of the final, we will waive access
10 to the draft. Now, there is that condition, the
11 unredacted version of the final, and we've
12 communicated that to opposing counsel.

13 JUDGE GIBSON: Are they going to object to
14 you as it not being timely if you don't -- if you wait
15 till you get a final copy?

16 MR. EYE: Probably. I mean, I don't want
17 to be, you know, presumptuous here, but if history is
18 any indicator, the answer would be yes. Second --

19 JUDGE GIBSON: You might want to think
20 about what kind of agreement you reach with them then.

21 MR. EYE: Yes. It has occurred to me, and
22 I just sent the e-mail to them late last week that
23 said if we can get the unredacted version.

24 JUDGE GIBSON: Okay.

25 MR. EYE: The second thing is that it

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1 seems to me that while none of us in arguing this
2 during the appeal saw that there was any great
3 significance in the word "draft" on that ISG-016, the
4 Commission sure thought it was significant.

5 JUDGE GIBSON: Uh-huh.

6 MR. EYE: And to that extent, I think that
7 we should address it in a fairly explicit way in the
8 scheduling order. And what I would suggest is that --
9 and this -- now, there's nothing particularly exotic
10 about this. I mean, protective orders get entered all
11 the time that cover non-testifying experts or, for
12 example, they're assisting with litigation, or experts
13 that are within the realm of privilege, for example,
14 or work product, those kinds of considerations.

15 That I don't have any problem with at all,
16 and I think everybody ought to have the benefit of
17 that, just to not interrupt the already difficult
18 scheduling requirements that are met or that are
19 required that we meet.

20 But when -- the example that Mr. Frantz
21 just gave of a letter or some other document that's
22 taken to a regulator, that's no longer privileged.
23 There's no work product privilege that's going to
24 attach to that. There's certainly no attorney-client
25 privilege that's going to attach to it at that point,

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1 unless there's some sort of prior understanding that
2 that's what's going to happen, and even then, that
3 might be subject to challenge.

4 JUDGE GIBSON: Well, quite honestly, I did
5 not -- I would not envision that language about drafts
6 to be one that would be confined to drafts that have
7 been reviewed by an attorney or are somehow subsumed
8 within an attorney work product privilege. I was
9 envisioning that drafts in terms of, you know, other
10 document production agreements that, you know, were
11 entered into when I had a prior life on the other side
12 of this bench, and, you know, it was basically, Look,
13 we're not after your drafts; you just go ahead and
14 produce whatever the final document was. And
15 everybody would agree to live with that and that sort
16 of thing.

17 Now, I think that -- I think Mr. Spencer
18 has raised a difficult question. If we were to put
19 something in there that would limit it to documents
20 that have not been disclosed to a third party, how do
21 you really decide what a third party is, because in
22 their case, you know, they may have a literal inter-
23 governmental personnel assignment guy working with
24 them from EPA on some radiation exposure issue.

25 Or they may be coordinating closely with

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1 an EPA employee on a specific issue that's going to
2 end up going in the draft environmental impact
3 statement. It's -- they've got drafts that they're
4 circulating among themselves about a specific
5 question. They need another agency's expertise on
6 this issue, the Fish and Wildlife Service. And, you
7 know, how would you really --

8 I wasn't envisioning -- I'd never even
9 thought about that issue before, but it's not one that
10 I had envisioned as calling those people third
11 parties. Okay? And so likewise, contractors. You
12 have a specific contractor that the Government assigns
13 to a task, to develop a paper or develop data on a
14 specific issue.

15 It seems to me that those things are
16 not -- those are within the subject of what we really
17 mean by drafts, because it's the work of the Agency or
18 it's the work of South Texas or it's the work of you,
19 g, trying to pull together your position on a specific
20 issue, and that's really what we're interested in.

21 But the Commission's order certainly threw
22 me a curve, because I had never envisioned that they
23 would treat what we were talking about, this document,
24 as being a draft. Now, it might be possible that we
25 could, for example, address this issue in a different

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1 way, and, you know, talk about it in terms of draft
2 documents that are disclosed to some group, for
3 example, would then no longer be drafts within the
4 meaning of this because it would not be internal.

5 But to me, it's a slippery slope, and it
6 is difficult. You guys are very creative lawyers. I
7 suspect you could probably come up with something, but
8 I will tell you this. My suspicion is that other
9 boards are going to be reading that opinion and trying
10 to figure out, what are we going to do for initial
11 scheduling orders.

12 And I will only tell you that if you all
13 don't want to be saddled with something you don't
14 like, it might behoove you all to get your heads
15 together and come up with a proposal, something we can
16 add to this, because actually it might turn out to be
17 to your benefit, because you may end up -- and I say
18 this for both Intervenors, Staff, and Applicants. You
19 may end up in something in another case that you don't
20 like.

21 If you all come up with something here,
22 after having, you know, gone through the crucible of
23 this now, we could put something in a scheduling order
24 to clean it up so that we would not create the
25 problems that you all have been talking about, but at

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1 the same time, we'll make sure that what the
2 Commission talked about in terms of a draft is
3 certainly not anything that we had intended by that
4 initial scheduling order.

5 I'm not obligating you to do this. I'm
6 only making a suggestion that I think may end up being
7 in your own interest.

8 MR. EYE: I appreciate that, and I keep
9 going back to kind of the origins of the draft ISG-016
10 that, you know, lit this fuse basically, and I think
11 that the Commission's view of that was once that got
12 shared with the regulated community --

13 JUDGE GIBSON: Right.

14 MR. EYE: -- because it did apparently --

15 JUDGE GIBSON: Uh-huh.

16 MR. EYE: -- and that they, the regulated
17 community -- I don't know whether they relied on it or
18 not, but, you know, it gets shared. That kind of took
19 it out of the, Don't share it with the Intervenor
20 category.

21 JUDGE GIBSON: Clearly.

22 MR. EYE: And so if we were to craft
23 something that drew some lines -- and I agree with
24 you; we need to be very careful about this, for fear
25 that having effects that are unintended --

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1 JUDGE GIBSON: It could have a bad impact
2 on Intervenors. It could have a bad impact on
3 Applicants. It could have a bad impact on the staff.

4 MR. EYE: It could.

5 JUDGE GIBSON: So you all give it some
6 thought. Okay? I'm not telling you you got to do it.
7 I'm just telling you that, you know, it might behoove
8 you to be a little more open to the possibility of
9 being creative here and coming up with something that
10 you all can live with, because it might pay dividends
11 in the long run.

12 Is there anything else about the SUNSI
13 order that we need to talk about, or you all are doing
14 whatever needs to be done to take care of it?

15 MR. SPENCER: Well, we're evaluating the
16 Commission's order and the consequences of that order.
17 We're in the process of doing that.

18 JUDGE GIBSON: Okay. What are you
19 envisioning perhaps? Would it help you if we issued
20 some kind of order to advise us of what you're doing?
21 Do you want to report to us at some point in time?
22 How would you like to proceed? I'm just -- I don't
23 want to not do what the Commission has directed us to
24 do. On the other hand, I realize that you all are
25 trying to evaluate the new guidance that you've been

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1 given.

2 MR. SPENCER: Well, in terms of the draft
3 ISG, the Commission focused on the final ISG and the
4 draft ISG.

5 JUDGE GIBSON: Right.

6 MR. SPENCER: With respect to the draft
7 ISG, the Intervenor's have said that they would waive
8 access to the draft ISG if they could get the final
9 unredacted ISG. And we could speak with them about
10 doing so under a protective order.

11 JUDGE GIBSON: Okay.

12 MR. SPENCER: That's the specific
13 direction in the Commission order, so is there any --

14 JUDGE GIBSON: No. How about if you all
15 just issue a one-paragraph report to us that just
16 says, Intervenor's and Staff are working together on
17 whatever it is, and that's enough. And that way we'll
18 have something in our files, so that the Commission
19 has issued an order, and we're not failing to carry
20 out something that needs to be done. You all are
21 doing the heavy lifting here. Okay? That's all I'd
22 need.

23 MR. SPENCER: And it may be the case that
24 if we -- that it may be more than a paragraph,
25 depending upon --

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1 JUDGE GIBSON: We can definitely take more
2 than a paragraph. I don't want to be burdensome on
3 you, Counsel.

4 MR. SPENCER: Okay.

5 JUDGE GIBSON: I'm just trying to make
6 sure that we have papered the file. Okay?

7 MR. SPENCER: Is there any date you want
8 that by?

9 JUDGE GIBSON: No. Get it within the
10 month. I don't care.

11 MR. SPENCER: Okay.

12 JUDGE GIBSON: Within the month is fine.
13 Okay.

14 MR. SPENCER: Within this month or within
15 30 days from today?

16 JUDGE GIBSON: Fair enough. How about by
17 Thanksgiving? You all don't want to work after
18 Thanksgiving -- okay? -- so just get it by
19 Thanksgiving.

20 MR. SPENCER: Okay.

21 JUDGE GIBSON: Okay. Is there anything
22 further on that?

23 JUDGE ARNOLD: No.

24 JUDGE GIBSON: Okay. Is there -- do you
25 feel the Muse calling and you must speak, Mr. Eye, or

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1 do you feel like you need to have a closing?

2 MR. EYE: Well, I will waive closing, but
3 I want to reserve the right to respond if somebody
4 else makes closing remarks.

5 JUDGE GIBSON: Clearly.

6 MR. FRANTZ: I have nothing to add.

7 JUDGE GIBSON: Okay.

8 MR. SPENCER: Nothing to add, Your Honor.

9 JUDGE GIBSON: Okay. Nothing you have to
10 respond to then, Mr. Eye.

11 MR. EYE: Fair enough.

12 JUDGE GIBSON: Okay. Well, with that, if
13 there is nothing further, we will stand adjourned, and
14 thank you for your time.

15 (Whereupon, at 3:56 p.m., the oral
16 arguments were concluded.)

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CERTIFICATE

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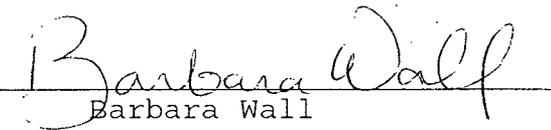
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