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NUCLEAR REGULATORY COMMISSION

Title: Comanche Peak Nuclear Power Plant
Oral Arguments

Docket Number: 52-034-COL and 52-035-COL

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

Location: Granbury, Texas

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

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

Thursday, October 28, 2010

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

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

BEFORE THE LICENSING BOARD:

ANN MARSHALL YOUNG, Chair

DR. GARY S. ARNOLD, Administrative Judge

DR. ALICE C. MIGNEREY, Administrative Judge

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1 APPEARANCES:

2 On behalf of the NRC:

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10 On behalf of the Applicant:

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17 On behalf of the Petitioners:

18 ROBERT V. EYE, ESQ.

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P R O C E E D I N G S

(9:00 a.m.)

1
2
3 JUDGE YOUNG: We'll go on the record. My
4 name is Ann Marshall Young. I'm the chair of the
5 Board. To my left is Judge Alice Mignerey, and to my
6 right is Judge Gary Arnold, and I think everyone knows
7 our respective backgrounds and so forth.

8 Let's start with the Applicant over here
9 and have you introduce yourselves and anyone with you.

10 MR. FRANTZ: My name is Steve Frantz. I'm
11 from the law firm of Morgan, Lewis & Bockius in
12 Washington, D.C. We represent Luminant, the
13 Applicant. To my left is my associate, Jon Rund.

14 MS. VRAHORETIS: Good morning, Your Honor.
15 I am Susan Vrahoretis. I represent the NRC Staff.
16 With me at counsel table to my left is my colleague,
17 Stephanie Liaw, to my right, James Biggins.

18 MR. EYE: Good morning. My name is Robert
19 Eye, here on behalf of the Intervenors. Also
20 appearing with me today are some of the Intervenors
21 and staff. Karen Hadden is the executive director of
22 the SEED Coalition; Tom Smith is the executive
23 director of the Texas Public Citizen Office, and David
24 Power is the deputy director of that office.

25 JUDGE YOUNG: All right. Before we get to

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1 the motion for summary disposition of the new
2 contentions on ISG-16, we got your notice that you no
3 longer want to ask for the interim document as long as
4 you have access to the final document, and we
5 understand that there was some kind of arrangement
6 being worked out in the context of the South Texas
7 case. Have you resolved that and does that take care
8 of things? Is there anything remaining in dispute on
9 that whole issue?

10 MR. EYE: Your Honor, I believe we have it
11 squared away. We've been communicating since the
12 panel ordered us to state our position, and I believe
13 that pursuant to an agreement that we worked out with
14 counsel for the NRC that we do not have any unresolved
15 disputes in relation to that matter.

16 JUDGE YOUNG: So do you have the document
17 yet?

18 MR. EYE: No. My understanding is that I
19 should get it sometime in the next week.

20 JUDGE YOUNG: Sometime next week. Okay.
21 So I believe our scheduling order indicated that any
22 new information you would have 30 days from receipt of
23 that to file any new contentions, so just keep that in
24 mind.

25 Are there any other preliminary matters

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1 before we move on to argument for summary disposition
2 first?

3 MS. VRAHORETIS: No, Your Honor.

4 JUDGE YOUNG: All right. We have
5 questions, and since we didn't set any time limits, I
6 think probably you all understood that we weren't
7 really going to have oral argument in the normal sense
8 unless any of the parties have anything that they want
9 to make us aware of that we don't otherwise elicit.

10 With regard to this summary disposition
11 motion, we have several questions for the Applicant
12 and several questions for the Intervenors. Why don't
13 we start with the Applicant. On page 42 of the motion
14 where you have the table, would we be correct in
15 assuming that the source for the statements on the
16 impacts of nuclear is the Table B-1 to Part 51?

17 MR. FRANTZ: No. This is derived from our
18 affidavit, which in turn is derived in part from the
19 draft of our environmental impact statement and our
20 environmental report.

21 JUDGE YOUNG: Okay. Because I don't think
22 you give any specific sites. I know you go through in
23 your discussion of the impacts of the bounding cases,
24 but for nuclear are there specific places in the
25 affidavit that those come from?

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1 MR. FRANTZ: Yes. This exact same table
2 appears on page 26 of the affidavit.

3 JUDGE YOUNG: As to the impacts of
4 nuclear, you cite the Bellefonte case, I believe, as
5 authority for using Table B-1. And what was the
6 rationale, the basic rationale for using that same
7 table?

8 MR. FRANTZ: We did not use the table
9 itself, we used the definition of the terms small,
10 moderate and large from that table and the
11 regulations.

12 JUDGE YOUNG: Okay. So you didn't take
13 these directly from the table.

14 MR. FRANTZ: That's correct.

15 JUDGE YOUNG: Okay. So the source for all
16 your statements would be in the affidavit.

17 MR. FRANTZ: That's correct and which, in
18 turn, again references the draft EIS and the
19 environmental report.

20 JUDGE YOUNG: Okay. So that clarifies.

21 Let me just ask the Intervenor. You
22 haven't disputed in your response to the statement of
23 material facts -- well, you haven't disputed a lot of
24 things, but one of the things you haven't disputed is
25 that the facts that the Applicant characterizes as

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1 being uncontested are, in fact, uncontested.

2 MR. EYE: The facts that we have cited in
3 our response to their uncontested facts are the ones
4 that we believe are still in dispute. So I think if
5 Your Honor is referencing the table you were just
6 asking the Applicant's counsel about, I interpreted
7 that table to be essentially derived from their
8 environmental report, thereby essentially making it
9 beyond something that we could contest because it had
10 been in the environmental report and those matters are
11 essentially, I guess, beyond dispute.

12 JUDGE YOUNG: So you agree that they're
13 uncontested.

14 MR. EYE: Yes. Anything that we didn't
15 site as contested is uncontested, I think as a matter
16 of law.

17 JUDGE YOUNG: The reason I ask is because
18 in the Dean affidavit, he does appear to challenge
19 some facts or characterizations of the impact of
20 nuclear power, but that's, I think, the only place I
21 saw that, and if you're agreeing that you don't
22 dispute that, then that resolves that issue.

23 Did either of you have any questions on
24 that?

25 JUDGE ARNOLD: Only on his specific

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1 statement.

2 JUDGE YOUNG: Okay. Anything else on the
3 impacts of nuclear then? That's off the table. I
4 don't think we even need to talk about that any
5 further at this point.

6 MR. EYE: Well, Your Honor, I think that
7 we did raise questions about the comparisons of the
8 impacts of nuclear, for example, water, compared to
9 renewables.

10 JUDGE YOUNG: But the only part of that
11 that you would be able to challenge would be the
12 impacts of the renewables.

13 MR. EYE: Correct. We were assuming that
14 the impacts of nuclear were essentially set in place,
15 and so to the extent that you were contrasting those
16 with renewable.

17 JUDGE YOUNG: The only thing you were
18 challenging was the renewable impacts.

19 MR. EYE: Yes.

20 JUDGE YOUNG: Okay. All right. Then I
21 think our main questions, and I'll just start out,
22 have to do with the circumstance that in your response
23 to the Applicant's statement of facts you basically
24 challenge one, two, three, four, five aspects of those
25 facts, and nothing else.

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1 MR. EYE: We didn't believe any other
2 facts were material in terms of disputed material
3 facts, that's correct. We set out what we believe are
4 material disputes.

5 JUDGE YOUNG: Because if that's the case,
6 I think that we're likely not to give any
7 consideration to any arguments that you make in your
8 response or in the Dean affidavits that would seem to
9 challenge things other than the facts that you
10 challenge in your specific response to the statement
11 of facts.

12 MR. EYE: Well, Your Honor, essentially,
13 as far as the summary disposition motion is concerned,
14 we have two approaches to dealing with it, and of
15 course, to the extent that the motion assumes that
16 it's not feasible or viable to look at combinations of
17 alternatives as sufficient to supply baseload power,
18 we addressed that. I don't know that there really was
19 very many material facts posited by the Applicant that
20 addressed our argument that essentially the
21 feasibility of alternatives has already been proven by
22 the fact that those alternatives are now extant and
23 used by ERCOT each and every day to supply electric
24 power to customers in their service territory.

25 I don't know that there was anything in

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1 the material facts that said otherwise, and so to the
2 extent that we were making an argument that depended
3 on something in their statement of facts, we disputed
4 those that were pertinent but we essentially had
5 departed from their motion and said there are other
6 ways to approach this that answer the questions that
7 they raised in their motion for summary disposition.

8 And as far as the aesthetic impacts are
9 concerned, I think we did actually contest at least
10 some aspect of the aesthetic impacts in our response
11 by pointing out that the Applicant had not addressed
12 certain aspects of the legal requirements.

13 JUDGE YOUNG: Where are you referring to
14 now?

15 MR. EYE: I'm referring to the body of our
16 brief where we point out that the Applicant, what they
17 didn't do, essentially, was take on the place
18 difference between -- well, they didn't differentiate
19 between aesthetic impacts of one place or another as
20 we read the Seabrook case requiring them to do so.

21 So I guess in response to your question,
22 what we did was essentially take their motion and make
23 our arguments based on what we believed were pertinent
24 facts both in the DEIS and their ER, and crafted our
25 legal arguments accordingly.

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1 JUDGE YOUNG: Okay. I think, and I'll ask
2 Judges Mignerey and Arnold to add their thoughts on
3 this, but I think one sense that we've had is that
4 some of the arguments on summary disposition are sort
5 of going past each other. There's not a precise
6 connection always between what's asserted in the
7 motion and the statement of material facts in support
8 of that and your response. And so what we're trying
9 to get an idea of is where you dispute something.

10 And I guess going back to the Applicant
11 and the Staff, where the Intervenors are disputing
12 something apart from those specific facts that you
13 dispute in your response to the statement of facts,
14 how that interacts and how the Applicant's arguments
15 interact with the statement of facts. There seems to
16 be some going across purposes there. So correct me if
17 I'm wrong, but I think as a Board that would be where
18 it would be helpful for us to hear some clarification
19 from all of the parties.

20 Do either of you have anything to add on
21 that?

22 JUDGE ARNOLD: I think that's the nature
23 of the argument here. But let me ask, you were
24 talking about the difference in where the land is as
25 to what its used for might have a different impact.

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1 Are you saying that, let's see, this 204,000 acres of
2 land, or the bounding case to 59 square miles, that
3 there is someplace where you could take and put a
4 plant occupying that amount of area where the
5 aesthetic impact would be less than large?

6 MR. EYE: Well, yes, I think that that is
7 the case. I mean, you're talking to somebody who grew
8 up in northwest Kansas. Fifty-nine square miles of
9 territory out in northwest Kansas really isn't very
10 much territory and there's plenty of space that's 59
11 square miles where very few people live out in the
12 high plains, and I think that's probably the case in
13 west Texas as well.

14 The point, however, is that under the
15 Seabrook case there is an obligation to essentially be
16 site-specific. It's not a one size or one site fits
17 all kind of analysis. In the Seabrook case they said
18 cooling towers right on the shoreline may be too
19 obtrusive and interferes with people's aesthetic sense
20 of what that shoreline presents, it might interfere
21 with tourist activities and so forth. But then the
22 Seabrook case goes on and points out that there were
23 other places that those cooling towers could be placed
24 that would not have the same sort of aesthetic
25 impacts.

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1 So we took the holding from the Seabrook
2 case and applied it to the case of wind generators and
3 said, Frankly, yes, if you put 59 square miles worth
4 or a wind generator plant in the suburbs of Dallas or
5 Fort Worth or some other urban area, the impacts will
6 be different than if you put it in a more remote place
7 where the impacts would be qualitatively and
8 quantitatively different as well in terms of the
9 number of people that would be actually affected.

10 What we didn't see, and this may go to
11 part of your question, Judge Young, as well, what we
12 didn't see in the Applicant's motion was that
13 differentiation between place, intended establishment
14 of an admittedly large wind generator, wind farm.

15 JUDGE YOUNG: Can in interrupt? You did
16 not, however, challenge any of the statement of
17 material facts that the Applicant submitted with
18 regard to environmental impacts of wind, solar,
19 natural gas, anything. You didn't challenge anything
20 relating to environmental impacts in terms of the
21 facts that the Applicant submitted.

22 MR. EYE: As I understood it, Judge Young,
23 most of those came out of the environmental report
24 that had been prepared.

25 JUDGE YOUNG: I'm not talking about where

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1 they came from, I'm talking about just in your two-
2 page response to the Applicant's statement of facts.
3 There's no reference, you don't make any challenges
4 that I see relating to the Applicant's asserted
5 statement of material facts regarding impacts, and
6 under the rules if you don't challenge them, they're
7 uncontroverted.

8 MR. EYE: Well, they can be uncontroverted
9 and still not support the Applicant's argument or be
10 consistent with what the law requires.

11 JUDGE YOUNG: Okay. So where the
12 Applicant in its statement of material facts refers to
13 moderate impacts, moderate impacts, so forth, you
14 agree that there's no challenge to those but you're
15 saying even taking all those facts as true --

16 MR. EYE: They don't meet their legal
17 burden.

18 JUDGE YOUNG: Of showing?

19 MR. EYE: That there's an impact, an
20 adverse -- and I assume we're talking about aesthetics
21 now -- that there's an adverse impact on aesthetics in
22 every spot where those wind generators would be
23 placed, and that's where we part company with the
24 Applicant.

25 JUDGE YOUNG: Why didn't you raise that in

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1 your response to the statement of material facts?

2 MR. EYE: Well, again, for one thing, it
3 was our understanding that those came from out of the
4 environmental report thereby putting them beyond
5 contest because we hadn't contested them in an earlier
6 contention. And moreover, to the extent that our
7 legal argument depends upon their differentiation in
8 terms of the impacts based on where these wind
9 generators would be located, they didn't do that.

10 And under the Seabrook case, as we read
11 it, they're required to make that differentiation and
12 they didn't do that, so as a matter of law, their
13 motion should fail because they assume that the
14 impacts would be the same irrespective of where these
15 generators would be placed, and that's not the legal
16 test that they're supposed to use as specified in the
17 Seabrook case.

18 JUDGE ARNOLD: Just one note, that 59
19 square mile site mentioned, that was the equivalent to
20 the 38,000 acres fully occupied by facilities and
21 roads, the whole thing would be significantly larger,
22 and I just can't see 59 square miles of paved roads
23 and turbine foundations and solar panels as having a
24 small impact anywhere.

25 MR. EYE: But they didn't discuss where

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1 the impacts would occur. I mean, we're taking on
2 essentially an assumption that the impacts are the
3 same no matter where they occur, and that is a crucial
4 legal distinction that ought to be applied to the
5 Applicant's motion. They made the assumption in their
6 motion that if you put this wind generating facility
7 that you just described, Judge Arnold, anywhere, the
8 impacts would be the same.

9 And the NRC case law says you have to go to a
10 location- specific type of analysis to make that
11 determination, something that they did not do, either
12 in their arguments or their supporting affidavits
13 didn't do that either.

14 JUDGE YOUNG: Looking back at contention
15 A, the subject of the motion for summary disposition,
16 the only part of that relating to impacts is subpart
17 D, just to restate the contention: The Applicant has
18 not considered the feasibility under NEPA of an
19 alternative consisting of a combination --

20 JUDGE MIGNEREY: Do you have a page on
21 that, please?

22 JUDGE YOUNG: It's on page 74-75 and also
23 on page 86-87.

24 JUDGE MIGNEREY: Okay.

25 JUDGE YOUNG: Applicant has not considered

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1 the feasibility under NEPA of an alternative
2 consisting of a combination of solar and wind energy,
3 energy storage methods, including CAES and molten salt
4 storage, and natural gas supplementation to produce
5 baseload power with specific regard to: (a) the
6 reasonable availability of the four parts of such
7 combination for consolidation into an integrated
8 system to produce baseload power; (b) the feasibility
9 of the use of such a combination in the area of Texas
10 served by the plant; (c) the extent to which there may
11 be efficiencies arising from overlapping uses of land
12 for each of the four parts of the combination as well
13 as for other reasonable purposes; and (d) if it is
14 shown that such an alternative is environmentally
15 preferable to the extent to which operation and
16 maintenance costs of solar in such a combination may
17 be a comparative benefit.

18 As I understand it, and correct me if I'm
19 wrong, the Applicant is not challenging the
20 feasibility or availability of those four parts
21 separately, but they're challenging the feasibility of
22 the combination in the area of Texas. That's your
23 primary challenge, and you're also saying that it's
24 not been shown that the four-part alternative is
25 environmentally preferable.

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1 Is that a fair summary, or am I leaving
2 anything out?

3 MR. FRANTZ: It's not quite correct. In
4 terms of the feasibility of the four-part combination,
5 we do not contest the feasibility of the four-part
6 combination. What we have said is that a four-part
7 combination where natural gas produces the majority of
8 the electricity, that is proven. However, the
9 converse is not the case where you have natural gas
10 not producing the majority of the electricity, where
11 you have the renewables producing the majority, that
12 is not proven.

13 And a utility or a merchant generator who
14 wants to invest in a large generating facility would
15 not invest in something that's not proven. So that's
16 where we stand on the issue.

17 JUDGE YOUNG: But basically you're saying
18 is it's not feasible, the four-part combination is not
19 feasible because it would not be -- nobody would
20 invest in it.

21 MR. FRANTZ: We're saying it's feasible
22 but it's not reasonable for somebody like Luminant to
23 select that alternative. And so technically it's
24 feasible, theoretically it's feasible, but it's not
25 reasonable for a merchant generator to select that

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1 alternative.

2 JUDGE YOUNG: And you're also saying that
3 it's not environmentally preferable.

4 MR. FRANTZ: That's correct.

5 JUDGE YOUNG: But as to (a) and (c),
6 you're not raising any challenges about this four-part
7 separately or the efficiency -- in your conservative
8 models you assume some efficiencies from overlapping
9 uses of land. Right?

10 MR. FRANTZ: That's correct.

11 JUDGE YOUNG: Okay. So we're really
12 centering in on the reasonableness of the four-part
13 combination for baseload power and the
14 environmental -- you're challenging that the
15 alternative would be environmentally preferable.

16 MR. FRANTZ: That's correct. And with
17 respect to the first part, we're only contesting that
18 aspect where natural gas is not producing the
19 majority. Where natural gas does produce the majority
20 of the power, we concede that that's proven and
21 reasonable.

22 JUDGE YOUNG: Okay. So as to that part,
23 you're only argument is that it's not environmentally
24 preferable.

25 MR. FRANTZ: That's correct.

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1 JUDGE YOUNG: Okay. So getting back to
2 the environmental impacts, basically what you would
3 need to show is that they would be environmentally
4 preferable, and looking at the statement of facts on
5 the environmental impacts, you don't challenge those.
6 So if you could sort of zero in on how you would make
7 the argument that it would be environmentally
8 preferable and cite us to specific pages in your
9 filings and to those in the Applicant's filings that
10 you challenge, if you could do that with regard to the
11 environmental preferability.

12 MR. EYE: In terms of the legal burden
13 that Luminant has, it has to show that it's not only
14 that it's fact statement supports its argument, but it
15 has to also satisfy minimum legal standards that apply
16 to that.

17 JUDGE YOUNG: Okay. Let's get back to the
18 point. All right? I read over what the contention
19 was. That's the subject of the motion for summary
20 disposition. We need to remember that. That's why I
21 tried to focus us on the parts of the contention that
22 are at issue, and that's been clarified. So what the
23 Applicant needs to do is show that there's no dispute
24 of material fact and that they're entitled to judgment
25 as a matter of law with regard to those disputed

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1 facts. Okay?

2 So let's focus, if you could, please, on
3 those areas of disagreement and how do you contest the
4 Applicant's argument that there's no genuine dispute
5 of material fact with regard to the environmental
6 preferability or comparison between a nuclear and the
7 alternatives that we're talking about here, and point
8 us to places in your filings where you contest what
9 the Applicant says on those.

10 MR. EYE: Well, where we have contested it
11 is in the argument where we --

12 JUDGE YOUNG: Which page or pages?

13 MR. EYE: In our response to the motion
14 beginning at page 6 and through, it looks like, about
15 page 8 or 9, page 9.

16 JUDGE YOUNG: All right. Now, in terms of
17 the comparison, the table that we were talking about
18 earlier, I think that's where the Applicant -- correct
19 me if I'm wrong -- sort of pulls together your
20 arguments on that comparison.

21 MR. FRANTZ: That's correct.

22 JUDGE YOUNG: So let's look at that table.
23 There you talk about water use, pages 8 and 9 is where
24 you talk about the comparisons. You talk about future
25 land use, land use, what the Applicant says is land of

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1 nuclear, the impacts would be moderate. Go ahead.

2 MR. EYE: I didn't know that there was --
3 I didn't catch what the question was, Your Honor. I'm
4 sorry.

5 JUDGE YOUNG: To look at this table where
6 the Applicant draws comparisons.

7 MR. EYE: Right.

8 JUDGE YOUNG: What I'm trying to get you
9 to do is focus us on where specifically you disagree
10 with the Applicant on the comparison of impacts.

11 MR. EYE: Right.

12 JUDGE YOUNG: And how you argue
13 specifically that the alternative, the four-part
14 alternative would be environmentally preferable.

15 MR. EYE: Your Honor, I've lost my place.
16 What page is that table on?

17 JUDGE YOUNG: It's on page 42 and then
18 also back in the affidavit again at page --

19 MR. EYE: Right. I've got it. Thank you.

20 JUDGE YOUNG: Okay.

21 MR. EYE: Your Honor, where this table is
22 defective, and this is how we've addressed it in our
23 argument --

24 JUDGE YOUNG: And if you could just cite
25 the pages for us.

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1 MR. EYE: Sure. In our argument at
2 page -- beginning at the bottom of page 6. The legal
3 defect of their argument is that their bounding cases
4 in terms of the impacts of alternative fuels or
5 renewable fuels doesn't differentiate in terms of
6 place or the location where those impacts would occur,
7 and we made that argument in our response, as I say,
8 beginning on page 6 and forward from there. And
9 again, as a matter of law, in terms of judging
10 aesthetic impacts, it appears to us that it's well
11 said in NRC jurisprudence that there's a requirement
12 to be site-specific, or location-specific, if you
13 will, to really make a comparison between the impacts
14 of one particular technology as opposed to another.

15 JUDGE YOUNG: Okay. Maybe we're going
16 like this too, but here's what I'm trying to hear from
17 you, in the table, and I believe that there was a
18 place in the affidavit -- if you can point me to that
19 page again.

20 MR. FRANTZ: I believe it's page 26.

21 JUDGE YOUNG: Twenty-six, right. The
22 Applicant says the impacts of nuclear, the aesthetic
23 impacts of nuclear are small, and you don't dispute
24 that.

25 MR. EYE: That's what they said, right,

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1 and that's what they said all along, and we're sort of
2 bound by that.

3 JUDGE YOUNG: Okay. You don't dispute
4 that. So in order to show that the alternative is
5 preferable, you'd have to show not only that it was
6 small but that it was smaller.

7 MR. EYE: Arguably, but the burden to
8 prove that is on the Applicant.

9 JUDGE YOUNG: But you just agreed that you
10 don't dispute the Applicant's statement that the
11 aesthetic impacts of nuclear are small. That's
12 undisputed. So in terms of the comparison as to
13 aesthetics, in order to challenge that, you would have
14 to show they were small or smaller.

15 And with regard to the subject matter of
16 the contention, if it's not in dispute that the
17 aesthetic impacts are small for nuclear, and the issue
18 is solely environmental preferability to the extent
19 that impacts come into play, then it would see that
20 the Applicant would have met its burden with regard to
21 impacts if you haven't disputed that they're small and
22 you haven't shown that the alternative is preferable
23 with regard to this contention.

24 MR. EYE: With all due respect, Judge,
25 they have not carried their burden. The Seabrook case

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1 requires them to look at impacts on a location-
2 specific basis. They didn't do that. They made the
3 argument that essentially says the impacts at one
4 place are the same as any other place.

5 JUDGE YOUNG: The impacts of the
6 alternative? You're talking about the impacts of the
7 alternative.

8 MR. EYE: Yes. That was their legal
9 burden under their motion to make that distinction.

10 JUDGE YOUNG: So you're arguing that
11 because they didn't specify the location, they didn't
12 specify the impacts by location that they have not met
13 their burden of showing that the alternative is not
14 environmentally preferable. Would that be -- you
15 disagree with that characterization of the issue at
16 least?

17 MR. FRANTZ: I do both in terms of the
18 facts and the law. In terms of the law, the Seabrook
19 case dealt with the aesthetics of the proposed
20 project, namely the nuclear power plant, it did not
21 deal with the aesthetics of alternatives. And there's
22 nothing in Seabrook that would require you to pick
23 sites for alternatives such as, in a case like this,
24 for wind and solar power.

25 In our case what we did do, we assumed

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1 that the site fort the wind and the solar would be
2 western Texas and that the quality of the land would
3 be low. I'll refer the Board to paragraph 78 of our
4 affidavit. So even though we may not have picked a
5 particular location, we have picked an area out in
6 western Texas for the sites for the wind and solar.
7 So I think we have met our burden. Even if you apply
8 the Seabrook case to this particular instance, I
9 believe we've satisfied it by picking a site in
10 western Texas.

11 JUDGE YOUNG: I believe you gave some
12 reasons for why you picked the west Texas site.

13 MR. FRANTZ: Yes. That's where most of
14 the wind resources are in Texas and that's also where
15 the best solar power locations would be in Texas.

16 JUDGE YOUNG: Okay. Why don't you finish
17 up your argument on the environmental preferability.

18 MR. EYE: Thank you, Your Honor.

19 The point really is not necessarily -- I
20 think that the Applicant reads Seabrook too narrowly
21 because it really wouldn't be fair to compare
22 alternative sites for nuclear, for example, and not
23 compare alternative sites for the alternatives, and to
24 the extent that they've selected west Texas, that's
25 fine but what they didn't do was then go on and say

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1 here are the aesthetic impacts that would be expected
2 from putting those kinds of wind generators and solar
3 generators in west Texas.

4 Contrast that with how the record was
5 developed in Seabrook where they had witnesses come
6 forward and testify as to aesthetic impacts as to
7 location-specific.

8 JUDGE YOUNG: Of the power plant.

9 MR. EYE: Well, it was of the cooling
10 towers.

11 JUDGE YOUNG: Part of the plant.

12 MR. EYE: Part of the plant. Correct.
13 And in this instance there's nothing in the record
14 that says that people in west Texas consider these
15 kinds of generating modes to be particularly
16 objectionable or aesthetically displeasing or how one
17 would characterize that. And that's an important
18 distinction in terms of how these records have been
19 developed, the parallel records between what happened
20 in Seabrook and here.

21 Their affiance, as we mentioned in our
22 papers, are clearly well qualified to discuss at least
23 some aspects of their assertions, but two things are
24 missing: one, they don't say anything or suggest in
25 their affidavits that there's an aesthetically

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1 objectionable aspect of a large scale wind or solar
2 project, and two, they don't have anybody from west
3 Texas as an affiant who would suggest that there's
4 objectionable aspects to those kinds of technologies
5 that are extant, and it would have seemed if there
6 were those kind of objections they would have been
7 able to be developed, and that's in pretty sharp
8 contrast to how the NRC approached this choice of
9 location for cooling towers in Seabrook.

10 MR. HANCOCK: Have you presented any
11 specific facts that would establish that the aesthetic
12 impacts of any four-part combination would be lower
13 than this small for nuclear?

14 MR. EYE: Well, to the extent that we have
15 pointed out that there is nothing in the record that
16 says that these --

17 JUDGE YOUNG: No, I'm not asking --

18 MR. EYE: And that's a kind of factual
19 argument.

20 JUDGE YOUNG: Okay. Well, no. But what
21 I'm asking is have you set forth any affirmative facts
22 to show that the aesthetic impacts of the four-part
23 combination would be less than the designated small
24 impacts for nuclear?

25 MR. EYE: No, we have not, Your Honor.

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1 JUDGE YOUNG: Okay. Have you set forth
2 any specific facts that would show that any other
3 environmental impacts of the four-part alternative
4 would be less than those of nuclear?

5 MR. EYE: Well, we certainly brought out
6 that water use argument, in comparing the water use.
7 Again, the Applicant dismisses the hardware argument
8 as they say that it wouldn't be -- although I'm not
9 sure I believe that that argument is consistent with
10 what I understood the Applicant to say today, inasmuch
11 as now they're saying that these are feasible
12 alternatives in combination, even if they're
13 reasonable, they're feasible, a distinction that I'm
14 not sure that under NEPA would hold much water. But
15 at any rate, we do point out that there's a clear
16 difference in terms of the water usage between
17 renewables and nuclear.

18 JUDGE YOUNG: Okay. In the chart that the
19 Applicant has created here, which I'm assuming is
20 consistent with everything in their statement of
21 material facts, under water use and quality, the
22 Applicant appears to concede that their bounding case
23 two there would be smaller environmental impacts for
24 the four-part alternative than for nuclear, small to
25 moderate as compared to moderate.

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1 So what's your argument as to what the
2 significance of any differences would be as to the
3 overall environmental impacts and whether the four-
4 part combination would be preferable?

5 MR. EYE: Well, to the extent that they're
6 saying that the water use and quality is moderate on
7 their table, we've addressed that on page 9 of our
8 response.

9 JUDGE YOUNG: Water use and quality of
10 what is moderate?

11 MR. EYE: On their bounding case one and
12 two.

13 JUDGE YOUNG: Okay. What I'm asking --
14 maybe I didn't ask it very clearly, but what I'm
15 asking is basically what you're arguing is that the
16 water use impacts of the four-part combination would
17 be even less than what the Applicant has attributed to
18 them in their chart.

19 MR. EYE: Yes, and we addressed that on
20 page 9.

21 JUDGE YOUNG: What impact would that have
22 if you made it even smaller and how much smaller do
23 you make it, and if so, tell me where, and then what
24 impact would that have on the overall preferability?

25 MR. EYE: If one were to modify that table

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1 under bounding case one and bounding case two for
2 water use and quality, if those were now, instead of
3 moderate under case one and small to moderate under
4 case two, were both characterized as small, it would
5 begin again to tip the balance in favor of renewables
6 and tip it against the nuclear.

7 JUDGE YOUNG: How much of a difference
8 would it make?

9 MR. EYE: Well, as we point out on page 9
10 of our response, Your Honor, the Applicant didn't
11 quantify the water use amounts for the combination of
12 alternatives, but what we do argue is that to the
13 extent that if one were just to take a look at the
14 water use and quality projected for Units 3 and 4, and
15 then what we know about the combination of
16 alternatives and relatively water use that would be
17 involved, it would in comparison be smaller.

18 But again, the Applicant didn't quantify
19 what the total water use would be expected from a
20 combination of alternatives.

21 JUDGE YOUNG: What's your argument on how
22 any differences that you're asserting, how significant
23 those would be in terms of the environmental
24 preferability issue?

25 MR. EYE: Well, the argument is that, for

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1 one, how I read their motion, they really broke it
2 into two main categories, one was the feasibility and
3 reasonableness and then there was the aesthetic piece.
4 But to the extent that there was an attempt to say on
5 their table on page 42 of the motion that this somehow
6 tips the balance in favor of nuclear, I don't know
7 that you can read that table even in its present
8 form, even if it weren't modified as we would suggest
9 it ought to be, even in its present form it doesn't
10 appear to be, with the exception of aesthetics -- and
11 we think that there's a legal problem with that -- but
12 if you take aesthetics out of that table, the
13 comparisons between nuclear and the bounding cases 1
14 and 2 are essentially very close.

15 And again, even on the land use
16 quantities, that's really tied back to aesthetics in
17 large part. So with those two parameters, controlling
18 for those two parameters, the comparisons are very,
19 very similar, not the same. And the legal problems
20 that exist with their aesthetic arguments -- and
21 again, I think those are tied back to land use in
22 large measure -- would then have this essentially be
23 a table that recognized that the two bounding cases
24 were essentially the same as the nuclear.

25 And if one were to take the legal argument

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1 that aesthetic impacts and land use impacts in west
2 Texas would be, relatively speaking, small, then you
3 have a table that tips the balance in favor of
4 renewable primarily because it gets the edge on water
5 use.

6 JUDGE YOUNG: Can you point us to the
7 places in your filings that would support an argument
8 that would change the land use impacts of the four-
9 part combination -- we've already talked about the
10 aesthetics and the water use, I believe. You make the
11 challenge about the specific location, but in any of
12 the affidavits can you point us to the specific place
13 where it's asserted as fact that the land use impacts,
14 for the others as well, would be different?

15 MR. EYE: On page 7 of our response we
16 note that land use is a local and regional matter.

17 JUDGE YOUNG: Okay. Where in your
18 affidavits, your Dean affidavits -- in other words,
19 facts as opposed to argument or assertion?

20 MR. EYE: Well, I am reasonably sure that
21 Dr. Dean points out that --

22 MR. EYE: Could you just take a minute and
23 find the places where he says those things?

24 MR. EYE: Dr. Dean discussed the bounding
25 cases in --

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1 JUDGE YOUNG: In the September 15?

2 MR. EYE: Yes, ma'am. He begins on
3 bounding case one at the bottom of page 1, and in
4 terms of the location aspect of this, there is a
5 discussion at the top of page 3 of the Dean affidavit,
6 and it goes down the page 3 and then over to the top
7 of 4, and his bounding case two begins on the middle
8 of page 4.

9 JUDGE YOUNG: Just where does he talk
10 about the specific impacts? Over on page 4 I see he
11 talks about he challenges the large impact that the
12 Applicant assesses. Does he affirmatively say that
13 the impacts would be smaller than that?

14 MR. EYE: Well, I think that to the extent
15 that -- I think he recognizes that the Applicant's
16 assessment of the small impacts -- or I'm sorry -- the
17 moderate impacts, he discusses those on page 3 and
18 over to page 4. I'm not sure that he used the small,
19 moderate and large vernacular, but what he does say is
20 that in west Texas where wind and solar organically
21 should be, and it also happens to correspond where the
22 environmental impact is inherently lowest, so to the
23 extent that he characterizes it qualitatively, he used
24 the term inherently lowest.

25 JUDGE YOUNG: Where is that?

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1 MR. EYE: It's at the top of 3, the top
2 paragraph on page 3.

3 JUDGE YOUNG: He says that would be where
4 the environmental impact is inherently lowest. Does
5 he ever say how low? Does he ever say affirmatively
6 how low, how high, how large?

7 MR. EYE: I don't know that he quantifies
8 the term lowest, Your Honor. I don't believe that he
9 actually assigned a numerical value to it, and I don't
10 know that numerical values on that kind of impact --
11 I'm not saying it can't be done, but I don't that it
12 was really done of what either the Applicant has done
13 or how we've responded to it.

14 JUDGE YOUNG: Well, the contention, the
15 part of the contention that this relates to has to do
16 with environmental preferability, so if the Applicant
17 says we're putting forth these facts and we're saying
18 that we've shown that the four-part combination is not
19 environmentally preferable and you haven't
20 controverted that with affirmative facts, how could we
21 find that the four-part combination is environmentally
22 preferable if you haven't even said that?

23 MR. EYE: Well, that's what the Applicant
24 has said that it's environmentally preferable, but
25 it's sort of conclusory in term of how they approach

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1 that.

2 JUDGE YOUNG: The question was do you say
3 that the four-part combination is environmentally
4 preferable?

5 MR. EYE: I believe that we do, Your
6 Honor.

7 JUDGE YOUNG: Do you ever come out and
8 just say it?

9 MR. EYE: Well, I may not have just kind
10 of flat out said, but it's inherent in the argument
11 that it's preferable because one, it uses less water,
12 it does not have aesthetic impacts that inherently
13 are -- that undermine its feasibility. But did I
14 say and did I use a sentence that said it is
15 preferable, I don't remember that I did, but it
16 certainly is preferable when one looks at the
17 component parts in terms of, if nothing else, water
18 use and in terms of the -- well, I've made my argument
19 on Seabrook.

20 JUDGE ARNOLD: I have a question on the
21 water use impact, and I would like to start with the
22 Applicant. You have a statement in your affidavit:
23 "The impacts on water use and quality from the natural
24 gas plant would be comparable to the impacts
25 associated with CPNPP Units 3 and 4, which are

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1 characterized in the DEIS as moderate.

2 I'm just wondering where does the natural
3 gas plant -- I know a nuclear power plant uses it for
4 cooling all the time, how does a natural gas plant use
5 that much water?

6 MR. FRANTZ: For the same purposes. You
7 need water to cool the condensers.

8 JUDGE ARNOLD: Okay. So this would be
9 natural gas being used to generate steam?

10 MR. FRANTZ: Yes.

11 JUDGE ARNOLD: And that's the most likely
12 natural gas plant that you would construct, that's the
13 alternative you were evaluating.

14 MR. FRANTZ: Yes.

15 JUDGE ARNOLD: Mr. Eye, you challenged the
16 water use, and in reading your statement I don't see
17 any quantification of how much water you think the
18 alternatives would use or any facts that substantiate
19 that the water usage would be less than Applicant has
20 claimed. Could you point me to any such information?

21 MR. EYE: In the Smith report there in
22 Table 2 there is a comparison to the various energy
23 types and water use.

24 JUDGE YOUNG: Refresh my memory of where
25 the Smith report is.

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1 MR. EYE: I misspoke. Let me clarify
2 that. In the Smith report there was a table that was
3 essentially omitted that would have shown the
4 comparisons between the various energy types and their
5 water consumption patterns.

6 JUDGE YOUNG: And again, where is the
7 Smith report?

8 MR. EYE: It's part of our response, it's
9 actually part of the DEIS response.

10 JUDGE YOUNG: Okay. So it's incorporated
11 within that response.

12 MR. EYE: I'm sorry. It's a part of the
13 DEIS contentions.

14 JUDGE YOUNG: That's what I was wondering.
15 So you didn't submit it in support of your response to
16 summary disposition.

17 MR. EYE: No, Your Honor, we did not, and
18 again, I took the position that it was Applicant's
19 burden to come forward with evidence to show that in
20 fact the water usage -- from the argument they were
21 making that the water usage of gas is comparable to
22 nuclear, and they didn't do that.

23 JUDGE YOUNG: They do have the
24 responsibility to show that they're entitled to
25 judgment as a matter of law based on the facts that

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1 they assert, but you also have the responsibility to
2 controvert any facts that they put forward, and if you
3 don't, then they're considered to be uncontroverted.

4 MR. EYE: But they didn't advance any
5 facts in terms of water use of the alternatives that
6 were part of this contention. I mean, they said that
7 the water usage was less but in their motion I don't
8 believe that they ever quantified the difference, and
9 that's really the movant's burden at that point. If
10 they're going to make the argument that this is
11 somehow preferable based on water usage --

12 JUDGE YOUNG: They do give the table.

13 MR. EYE: But it's not quantified, it's
14 just qualitative descriptive terms. And I think that
15 Your Honor's question went to whether or not there was
16 a quantification of the difference, and the Applicant
17 says there's a difference but they didn't quantify it.

18 JUDGE YOUNG: Well, they quantified it to
19 the extent of using the terms moderate, small and
20 large.

21 MR. EYE: In my mind that's not
22 quantification, that's qualification, those are
23 subjective qualitative terms rather than quantitative
24 descriptions.

25 JUDGE YOUNG: There's another aspect of

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1 the summary disposition -- or this whole issue on
2 summary disposition and that is that the Staff in its
3 response basically said, well, the contention is moot
4 in any event because the DEIS addresses all the parts
5 of the contention, and so there's nothing left to the
6 challenge. Correct, that's one of your argument,
7 Staff?

8 MS. VRAHORETIS: Yes, Your Honor.

9 JUDGE YOUNG: Do we have more questions on
10 the other parts, on the Applicant's arguments and the
11 responses to those, or we can come back to those. I
12 just was asking the Intervenors to respond to the
13 Staff's argument that the contention is in any event
14 moot given the DEIS.

15 MR. EYE: Well, Your Honor, in some
16 respects the DEIS suffers from some of the same flaws,
17 if you will, that the Applicant's motion does inasmuch
18 as it didn't make differentiations in terms of
19 aesthetic impacts from one location to another, and so
20 forth.

21 JUDGE YOUNG: All right. Back up for a
22 second. The contentions says that the Applicant has
23 not considered these things. In other words, I think
24 the Staff makes an argument somewhere that it's a
25 contention of omission and the Staff in the DEIS has

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1 filled any parts of that omission. "The DEIS does
2 consider these things, therefore, this contention is
3 moot."

4 Correct me if I'm wrong on characterizing
5 your argument.

6 MS. VRAHORETIS: No, Your Honor. That is
7 a correct summary of it.

8 MR. EYE: As I recall the DEIS, Your
9 Honor, I don't think that they made the
10 differentiation in terms of location impact, for
11 example, on aesthetics.

12 JUDGE YOUNG: Okay. Here's what I'm
13 trying to get to, it could be that the DEIS is
14 completely wrong in everything it says. Let's just
15 assume that for argument's sake. If it considers it
16 then the Staff is saying that fills the omission. May
17 not consider it appropriate -- I mean, that's not what
18 the Staff is saying, but let's just assume for
19 argument's sake that everything they said in there was
20 wrong. If they considered it and they went into more
21 than just a cursory consideration, then the argument
22 is that it's moot because now they've considered it.
23 So you would have to raise challenges to anything in
24 the DEIS that was new and different in order to
25 challenge it, which maybe gets to contentions. But

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1 how do you respond to just the argument that it is
2 moot?

3 MR. EYE: Well, I don't think it's moot
4 because did they consider, for instance, the site-
5 specific impact. That really wasn't considered in the
6 DEIS, as I recall. In other words, they didn't say
7 well, the aesthetic impacts in a high-density
8 metropolitan area would be different than they are in
9 a low-density rural area. I don't think that
10 distinction was drawn, as I recall, in the DEIS, as an
11 example.

12 JUDGE YOUNG: I'm trying to find my copy
13 of the DEIS. Have you got a copy of it? The
14 alternatives section 9.2.4 and 9.3. Are there any
15 other parts besides those?

16 MS. VRAHORETIS: Your Honor, this specific
17 issue is addressed in the DEIS and I believe the
18 Applicant also referenced that portion of the DEIS in
19 the motion for summary disposition. Just to
20 clarify --

21 JUDGE YOUNG: I was just asking about
22 9.2.4 and 9.3?

23 MS. VRAHORETIS: Yes, and I believe it's
24 on page 9-23.

25 JUDGE YOUNG: Go ahead.

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1 MS. VRAHORETIS: In the DEIS on page 9-23
2 where the Staff discusses that an area the size of
3 Rhode Island would be needed for 10,000 megawatts
4 electric based on 5,700 wind turbines. The Staff also
5 addresses the fact that these turbines would be placed
6 in areas with lower population densities and notes
7 that these areas are often also prized for their
8 natural beauty unimpaired by human activity.

9 So in addition to describing wind
10 resources in the western part of Texas, which is where
11 they are most plentiful in the ERCOT region, the DEIS
12 does address aesthetic impacts in the western portion
13 of Texas in areas of lower density, contrary to the
14 Intervenors' argument here today.

15 MR. EYE: Your Honor, what the Staff
16 suggests in their argument is essentially conclusions,
17 and these aesthetic impacts are sometimes hard to view
18 because aesthetics in themselves can be pretty
19 subjective, but I don't see that that argument
20 necessarily obviates the necessity of bringing in some
21 sort of evidence that would support their statement
22 that says that these less populated areas are often
23 prized for their natural beauty unimpaired by human
24 activity. Whether that is true or not is at the core
25 of this.

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1 Again, in contrast to Seabrook when they
2 actually had witnesses come in and say that these
3 cooling towers right on the coast would be
4 objectionable. It is that kind of evidence that is
5 absent here, and they make that statement in the
6 attribution.

7 JUDGE YOUNG: Excuse me, but is it absent
8 to the extent that there's not even any consideration
9 of it? On the mootness issue here.

10 MR. EYE: Right. I mean, if consideration
11 is all it takes is an unattributed conclusory
12 statement, then I agree with you. If that's all it
13 takes, if the threshold is so low that they could make
14 a statement that says what we just read, if that meets
15 the test of the panel's threshold or consideration,
16 then I concede that point. I think the bar is a
17 little higher than that.

18 JUDGE YOUNG: Where is your support for
19 that in terms of the issue of mootness and mootness of
20 contentions of omission?

21 MR. EYE: Yes, ma'am. If you'll notice
22 that particular sentence that they cite to doesn't
23 have any source for it.

24 JUDGE YOUNG: Where is your authority for
25 what you just argued on the standard for what

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1 consideration needs to be in arguments on mootness of
2 contentions of omission? You said the bar was too
3 low. Where is your authority for that?

4 MR. EYE: Your Honor, I would have to
5 provide for you to the panel, although I believe I
6 argued something very similar to this in terms of the
7 fires and explosions contentions that we argued last
8 year, that is that -- I really can't get into that
9 argument now because we were in closed session, but
10 the authority that we panel in a supplemental filing
11 it discussed essentially how low the threshold should
12 be in order to satisfy the legal requirements here I
13 think might have some applicability.

14 JUDGE YOUNG: Do you want to submit that
15 within a week, any legal authority to support that
16 argument on how high the bar should be on what
17 consideration should consist of in order to render a
18 contention moot? And then if anyone wants to respond
19 to that, they can have another week after that to
20 respond.

21 MR. EYE: Your Honor, could you articulate
22 the question again. I want to make sure that I get
23 your question answered the way you asked it. I beg
24 your pardon.

25 JUDGE YOUNG: My question was what was

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1 your support for your argument on how the bar should
2 be for what constitutes consideration as stated in
3 actually the contention in the context of mootness.
4 The contention says, "The Applicant has not considered
5 the feasibility under NEPA of an alternative
6 consisting of combination of solar and wind storage
7 and natural gas to produce baseload power specifically
8 with regard to..." and then it has the four
9 subsections. The contention used the word considered.

10 MR. EYE: I'll do my best to provide a
11 response, Your Honor.

12 JUDGE YOUNG: All right.

13 MS. VRAHORETIS: Your Honor, if I just may
14 state briefly, in 10 CFR 2.309(f)(2), the regulations
15 state that once there is an EIS, the petitioner may
16 amend those contentions that were filed against the ER
17 or file new contentions if there are data or
18 conclusions in the NRC draft or final environmental
19 impact statement that differ significantly from the
20 data or conclusions in the applicant's documents.

21 And it is notable that the regulation, I
22 believe in making this provision, it's notable that it
23 does not also state that the ER and the EIS are
24 equivalent or make any other sort of provision that a
25 contention that is admitted against the ER

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1 automatically applies to the EIS.

2 And I would also draw Your Honor's
3 attention to the McGuire case, CLI-02-28, 56 NRC 383
4 provides that when allegedly omitted information is
5 considered by the Staff in an EIS, the contention is
6 moot. And I would also ask that Your Honor look at
7 Duke Energy case for Catawba.

8 JUDGE YOUNG: Give me that last cite
9 again. I'm sorry; I didn't get the last cite.

10 MS. VRAHORETIS: CLI-02-28, 56 NRC 383.
11 And also the Catawba case, LBP-04-7, 59 NRC 259, which
12 held that when an applicant's response addressed an
13 alleged omission which was the subject of a
14 contention, albeit minimally, the motion as granted,
15 the motion to dismiss the contention for if the ER or
16 the EIS on its face comes to grips with all the
17 important considerations, nothing more need be done.
18 And that's in the early site permit case for the
19 Clinton ESP site, CLI-05-29, 62 NRC 801 at page 811,
20 which also quoted the early site permit case for the
21 Grand Gulf site, CLI-05-4, 61 NRC 10 at page 13.

22 So Your Honor, just to sum up, the EIS --
23 the DEIS does address all aspects of both contention
24 18 and alternatives contention A, and it's our
25 position that we do not oppose the Applicant's motion

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1 for summary judgment -- summary disposition, we
2 believe that it's warranted, but an additional reason
3 that these contentions should be dismissed is that
4 they are moot.

5 Thank you.

6 JUDGE YOUNG: I think I would like to hear
7 just anything further from you, Mr. Eye, and then I
8 wanted to give the Applicant an opportunity to respond
9 to any of your arguments on summary disposition. And
10 you can talk about mootness and the grounds that the
11 Applicant asserted for summary disposition, anything
12 that we may have not asked about or that you want to
13 point out.

14 MR. EYE: We made our arguments in our
15 brief, Your Honor, as far as there's this underlying
16 argument that the Applicant has made that somehow the
17 four-part alternative is not reasonable, and yet at
18 the same time the Applicant concedes that the four-
19 part alternative is feasible. The way we read the
20 NEPA and case law would suggest that a recognition of
21 feasibility is another way of saying that an
22 alternative is reasonable. It may be somewhat
23 semantic, but to the extent that the Applicant is
24 relying on that semantic difference, we think that
25 feasibility and reasonableness in the NEPA context

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1 essentially mean the same thing.

2 The other part of the Applicant's argument
3 suggests that somehow this isn't reasonable because
4 nobody is using these four parts to generate useful
5 electricity for customers. As we point out, ERCOT
6 essentially is doing that even as we speak because it
7 does manage electricity generated from those four
8 sources on a daily basis, an hourly basis, and it's
9 not done necessarily under the umbrella of a specific
10 utility, but it's done in a broader fashion, and in
11 that regard it certainly does show that the four-part
12 alternative can meet the needs for power, and it's
13 proved each day that ERCOT manages their various
14 generating sources and does it in a way to manage the
15 grid and provide service to their customers.

16 So in terms of the first part of the
17 Applicant's argument on feasibility/reasonableness, we
18 think that both as a matter of law, because
19 feasibility and reasonableness mean the same thing
20 under the NEPA context, and as a matter of fact, it's
21 shown that those four alternatives -- nobody has said
22 that those four alternatives are not in existence now
23 and providing electricity to the ERCOT grid and so
24 forth, so that it is something that is being done
25 currently.

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1 JUDGE YOUNG: What would you contend
2 should remain for any hearing on this?

3 MR. EYE: Your Honor, in terms of the
4 contentions that was admitted, arguably what the
5 Applicant has submitted would be perhaps better
6 characterized as a motion for partial summary
7 disposition. I believe that subpart A would still be
8 a viable issue for hearing.

9 JUDGE YOUNG: I think the Applicant is
10 not -- you don't have any argument with it.

11 MR. FRANTZ: We agree that the four-part
12 combination is feasible.

13 MR. EYE: But not reasonable.

14 JUDGE YOUNG: Okay. What I'm trying to
15 get you to focus on is what would remain for hearing,
16 what would the issue or issues be for any hearing.

17 MR. EYE: Well, subpart A goes to the
18 reasonable availability of the four parts and we think
19 that that would still be a viable issue to advance.

20 JUDGE YOUNG: But wasn't your position
21 that you agreed that each of the four parts were
22 separately reasonably available?

23 MR. FRANTZ: Yes, and in combination.

24 JUDGE YOUNG: Pardon?

25 MR. FRANTZ: Yes, and in combination.

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1 MR. EYE: But I thought I heard him say
2 today that they didn't think it was reasonable, and
3 reasonable really goes to the underlying legal
4 acceptability of the contention. If the panel would
5 rule that feasible or not, it's not reasonable, then
6 the contention would be dismissed.

7 JUDGE YOUNG: So the issue for hearing
8 would be the reasonableness of having this four-part
9 combination in the area of Texas served by the
10 Comanche Peak plant in the combination where natural
11 gas is not the primary source?

12 MR. EYE: Right, and when you say the part
13 that Comanche Peak would service, I'm assuming that
14 that means ERCOT, the ERCOT service area. So yes, we
15 would think that that would be a viable issue to
16 advance here, the reasonableness of the four-part
17 combination since apparently the reasonableness is
18 being contested.

19 JUDGE YOUNG: Anything else?

20 MR. EYE: As I understand it, there is no
21 dispute over (b) in terms of the feasibility, so to
22 the extent that there's agreement amongst the parties
23 that it's feasible, I suppose that part is just set
24 aside as an uncontested fact and law, an issue of fact
25 and law.

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1 I don't think that subpart C is really
2 addressed in any direct way, the overlapping uses and
3 efficiencies that might come out of that. I don't
4 know that that's being contested by the Applicant.
5 And the big one is sub D and that's the environmental
6 preferability, nuclear versus the four-part
7 alternative, and the four-part alternative then is the
8 end remaining further contention.

9 In that regard, Your Honor, given that B
10 there's agreement on that, it would be A, C and D,
11 subpart A -- excuse me.

12 JUDGE YOUNG: Anything further?

13 MR. EYE: I don't believe so.

14 JUDGE YOUNG: Mr. Frantz, do you want to
15 respond?

16 MR. FRANTZ: Yes. First of all, I'd like
17 to call the Board's attention to paragraph 40 of our
18 affidavit where contrary to the allegations we've
19 heard this morning, our affidavit does address why we
20 believe the impacts would on aesthetics be large if
21 you use solar.

22 JUDGE YOUNG: Excuse me for just a second.
23 I need to get back to the right document. Say that
24 again.

25 MR. FRANTZ: It would be paragraph 40 of

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1 our affidavit. And that paragraph explains why we
2 believe the impacts on aesthetics will be large. It's
3 not just a conclusion, there is some explanation, much
4 like the NRC Staff has explained and the DEIS also
5 explains why the impacts on aesthetics would be large
6 from wind power. So there is support, factual
7 support, evidentiary support in the record for why the
8 impacts would be large. In contrast, the Intervenor
9 have provided nothing, no affidavit, no other
10 evidentiary material to the contrary, all they have
11 are legal arguments.

12 Turning to water use, on page 9 of their
13 answer to our motion they state that Comanche Peak
14 would consume approximately 1.3 million gallons per
15 minute. I'd just like to point out to the Board that
16 that value is not correct. The value that he's
17 referring to there is a system flow rate, not a water
18 consumption rate. The actual net water consumption
19 rate is substantially less than that, it's around
20 18,000 gallons per minute. And I'd like to refer the
21 Board there to our report at 3.4-10, and there's
22 similar information in the draft environmental impact
23 statement at 3.33.

24 The Intervenor this morning have said
25 that even if their arguments are accepted, the bottom

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1 line would be, in terms of that table that compares
2 the environmental impacts, that the comparisons,
3 quote, would be similar, if not the same. I would
4 suggest that if the impacts from the four-part
5 combination and nuclear are similar, if not the same,
6 then we're entitled to summary disposition.

7 They must prove that the alternative is
8 environmentally preferable. If the alternative is
9 simply the same as nuclear, then it becomes, under
10 NEPA, the Applicant's business decision which
11 alternative to select. And so because they have not
12 shown that the alternatives are preferable, then they
13 are not entitled to defeat of our motion for summary
14 disposition.

15 JUDGE YOUNG: And what's the authority for
16 that last principle you gave?

17 MR. FRANTZ: I can provide that for the
18 Board if you'd like.

19 JUDGE YOUNG: You may have. It would just
20 be helpful to have that.

21 MR. FRANTZ: I might also call the Board's
22 attention to the fact that the Intervenors have not
23 contested our statement of material fact 5.A, which
24 states that the four-part combination would have
25 greater environmental impacts in the areas of land

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1 use --

2 JUDGE YOUNG: I'm sorry; you're going to
3 have to give me a minute to find that.

4 MR. FRANTZ: 5.A, which appears on 13 of
5 our statement of material facts.

6 JUDGE YOUNG: Okay.

7 MR. FRANTZ: And they've not contested
8 this statement which says that the four-part
9 combination has greater environmental impacts in the
10 areas of land use and aesthetics and would probably
11 have greater environmental impacts in the area of air
12 quality and upon the amount of natural gas being used.
13 And because that's uncontested I think that again
14 supports our motion for summary disposition.

15 They also say that they contest the fact
16 that we believe that the four-part combination where
17 natural gas is not the majority producer, they say
18 that that is a reasonable combination, however, they
19 have not contested our statement of material fact
20 1.5.6, which appears on page 5 of our statement of
21 material facts.

22 JUDGE YOUNG: One point?

23 MR. FRANTZ: I'm sorry. 1.F.6.

24 JUDGE YOUNG: Okay, point 6.

25 MR. FRANTZ: On page 5, which says that,

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1 again, a utility or a merchant generator does not
2 select an alternative or generating source that's not
3 been proven when the company wants to engage in a
4 large-scale generation project. And to me that's
5 dispositive of the issue of reasonableness, and
6 because they've not contested that, we're entitled to
7 summary disposition on the reasonableness issue.

8 They state that they contest paragraph 6
9 of the contention -- I'm sorry -- paragraph C of the
10 contention, which deals with overlapping land use.
11 Well, they have not provided anything on overlapping
12 land use. In fact, our motion and affidavit assume
13 that overlapping land use is possible. So for the
14 life of me, I don't know what more we could do and why
15 they contest disposition of paragraph C.

16 And so for the most part, what we have are
17 legal arguments rather than factual evidence which
18 contests our motion, therefore, we believe we're
19 entitled to summary disposition.

20 JUDGE YOUNG: Go ahead.

21 MR. EYE: I just want to clarify one
22 thing. As far as the table is concerned that we've
23 been talking about, I think I did point out that water
24 usage would be a critical difference, so that I think
25 on other parameters we might have something that would

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1 be similar or the same, but in terms of water usage,
2 there is a decided advantage to the alternatives as
3 far as water is concerned. And also the fact that the
4 table doesn't quantify the water usage of alternatives
5 I think is a material fact.

6 Insofar as the statement of fact that
7 counsel has mentioned on this, I believe, F.6
8 appearing on page 5 of their statement, it says
9 utilities and merchant generators use proven
10 technologies for large generating facilities. Well,
11 we addressed that in terms of proven in our legal
12 argument saying that in fact that these are proven,
13 and moreover, I think it's important that the
14 Applicant doesn't argue that they're not proven. They
15 nuance it somewhat and say instead that they're not
16 reasonable, and again, that really goes to more of a
17 legal argument than it does a fact-based argument,
18 Your Honor.

19 JUDGE YOUNG: They say it is typical and
20 prudent for a utility or a merchant generator to
21 establish that the technology has been demonstrated at
22 an existing commercial generating facility or to
23 develop a pilot project for a small-scale facility to
24 prove that the technology works and is cost-effective.
25 And you don't contest that.

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1 MR. EYE: I think that's just almost
2 common knowledge, or that's common sense. I don't
3 necessarily dispute that as they've raised it here,
4 but in the context of this case if what they are
5 suggesting is that, for example, compressed air energy
6 storage isn't proven, we know that at least on scales
7 of the 300-megawatt size, more or less, it is proven.

8 And that's part of the record in CAES,
9 CAES being C-A-E-S, that's a part of our record now,
10 and so there's really nothing to contest in terms of
11 that particular fact statement because what they're
12 suggesting is that they wouldn't invest in something
13 that's speculative, if you will. I don't want to put
14 words in their mouth, so to speak, but there's nothing
15 speculative about any of the four parts that have been
16 advanced in this contention, and they've all been
17 proven in their individual capacities, and what we'd
18 argue is that they've been proved as a combination any
19 the application of those technologies in the ERCOT
20 service territory and how they provide electric power
21 now.

22 JUDGE YOUNG: For baseload they've been
23 proven as a combination.

24 JUDGE MIGNEREY: Baseload I think is the
25 key, is it not?

1 MR. EYE: Well, the to the extent that
2 ERCOT is drawing electricity and power from wind
3 generators and solar and others and putting it into
4 the grid, it doesn't really differentiate one electron
5 from a peak and a baseload use, necessarily. It's
6 therefore used in the grid -- or on the grid.

7 JUDGE YOUNG: The contention concerns
8 baseload power.

9 MR. EYE: Right, and we'd go back to what
10 we've argued earlier and that is that the Conoco
11 Phillips compression engineering proposal, as it's
12 been announced, at any rate, would be suitable for
13 baseload. That's the compressed air energy storage
14 project that was announced in the spring. And that's
15 dealing with technology that would be arguably outside
16 of the quote, mainstream, end quote, of energy
17 technologies that we're dealing with here other than
18 wind, solar and gas. And the way that the contention
19 was admitted has the assumption that there would be
20 this gas supplementation, the availability of gas for
21 supplementation, which what I read is that you'd use
22 gas if you need it. If you don't need it, then it's
23 not used.

24 But it starts out, again the way I read
25 it, the contention starts out with the idea that when

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1 solar and CAES are used and if you need it, you
2 supplement it with gas. That's how I read the
3 supplementation in the context of that particular
4 contention. No argument about those being feasible in
5 their individual abilities to meet the needs of the
6 Applicant. And then when you add the supplementation
7 of gas, then it seems to really make it very clear
8 that the four-part alternative is not only feasible
9 but also reasonable to meet baseload needs.

10 MR. FRANTZ: Judge, if I may respond every
11 quickly. Mr. Eye said that there's nothing in our
12 motion that addresses whether or not the four-part
13 combination where natural gas is not in the majority,
14 whether or not that's proven. Paragraph 72 of our
15 affidavit on page 18 --

16 JUDGE YOUNG: Seventy-two?

17 MR. FRANTZ: Yes, paragraph 72 on page 18
18 where we discuss that combination, and the affidavit
19 says, "Such a combination has not been proven for
20 producing baseload power equivalent to CPNPP Units 3
21 and 4." And then it lists a number of reasons there.
22 So in fact we do address why they're not proven.

23 Mr. Eye also said that water, in his mind,
24 has a decided advantage when comparing the four-part
25 combination versus nuclear, but again, he has nothing

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1 in his affidavit that would justify that conclusion.

2 Furthermore, he argues that we needed some
3 kind of quantitative comparison between nuclear and
4 the four-part combination on water. We do state that
5 the amounts of water used for bounding case one are
6 comparable, they're not identical but they are
7 comparable. And the reason, frankly, why we can't
8 give an absolute number is you need to design the
9 plant to actually give a precise number. But we do
10 know that the numbers are basically very similar
11 because the heat loads are going to be very similar.

12 JUDGE YOUNG: All right. Anything further
13 on the motion for summary disposition?

14 MR. EYE: Well, to just address that last
15 point, again, water usage is tied to how often natural
16 gas would actually be used to meet the baseload needs.
17 Again, the way I read the contentions, natural gas is
18 to supplement the three, not necessarily that it would
19 be running continually. I think that their assumption
20 is that it uses the same amount of water because it's
21 running continuously, that natural gas would be
22 running continuously, and that's not consistent with
23 how the contention as admitted. That's just not a
24 valid assumption based on the contention itself.

25 MR. FRANTZ: Judge Young, we recognize

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1 that. That's why our bounding case two states that
2 the impacts on water use are small to moderate.
3 Bounding case two really corresponds to the situation
4 Mr. Eye just mentioned where natural gas is not
5 producing the majority of the electricity.

6 MR. EYE: But we don't know how much
7 natural gas they're really assuming is going to be
8 used in bounding case two, they just say it's not
9 going to produce the majority.

10 MR. FRANTZ: Mr. Eye, that's not an
11 accurate characterization. We do have a very precise
12 number in our affidavit. We state that natural gas
13 would basically produce a million megawatt hours per
14 year, which is equivalent to a 135-megawatt natural
15 gas plant operating at 85 percent capacity.

16 JUDGE YOUNG: Where is that?

17 MR. FRANTZ: That's on page 22 of our
18 affidavit.

19 MR. EYE: I stand corrected on that,
20 Counsel. Thank you.

21 JUDGE YOUNG: And so again, Mr. Eye, I
22 think it could fairly be said that in response to your
23 original contentions and then contention A as we
24 allowed it to go forward the last go-round, a lot of
25 facts have been gone into and brought out with regard

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1 to the four-part alternative, and so on that, would
2 you like to close by saying -- what else?

3 JUDGE ARNOLD: I haven't started yet.

4 JUDGE YOUNG: Oh, pardon me. Close with
5 me by saying what you would say would remain for
6 hearing on this particular issue and anything else.

7 MR. EYE: Well, subpart D as to the
8 reasonableness. It appears that we have agreed that
9 there is really no contest on parts A, B and C. Part
10 D as to the reasonableness, there does appear to be a
11 contested issue of fact in that regard.

12 JUDGE YOUNG: Two things. Do you want to
13 respond before we go to Judge Arnold -- I'm sorry --
14 do you want to respond Applicant's argument about the
15 preferability? And they're going to provide a cite
16 for that and you'll be able to respond to that then,
17 but do you want to respond to anything on that now?
18 And then also, on subpart D what it actually says is
19 if it is shown that it's environmentally preferable,
20 then the extent to which operation and maintenance
21 costs of solar may be of comparative benefit.

22 MR. EYE: Well, I think that we have shown
23 that it is preferable, Your Honor, and nobody has
24 raised -- it's preferable on the aesthetics for the
25 reasons we've have argued and as a legal matter

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1 they've not carried their burden in that regard. And
2 in terms of the more specific environmental piece, in
3 terms of water usage, again we think that their table
4 is not adequate to prove that the four-part
5 alternative is not environmentally preferable.

6 JUDGE ARNOLD: Okay. Mr. Eye, my
7 questions have to do with your response to Applicant's
8 statement of facts and I just want to understand the
9 five points and what your disagreement is.

10 The first one is you disagree with
11 Applicant's statement at 1.C.1, pumping hydropower
12 storage is not available in the ERCOT region. Two
13 questions: is that really relevant since the
14 contention itself talks about CAES storage and solar
15 and wind and natural gas but doesn't touch upon
16 hydropower; and two, do you have any facts suggesting
17 that hydropower storage is available?

18 MR. EYE: Well, as I point out, they made
19 that statement and then referenced a source. I looked
20 up the source and it didn't say that, so to me that's
21 an unsupported fact that they advanced. And somewhere
22 in the recesses of my memory I do remember seeing a
23 map that I think it was in the city of Austin that
24 there was a small hydro project. It's the lake at
25 Buchanan Dam is pumped hydro. As I recall, there's a

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1 designation on a map to that effect.

2 So I responded to mainly because I saw
3 that it was an unsupported fact.

4 JUDGE ARNOLD: Let me ask the Applicant
5 then, is this really relevant to your motion?

6 MR. FRANTZ: Not really, and in any case,
7 we do have citations. If you look at page 9.2-12 of
8 our environmental report, we state that there's not
9 sufficient new hydro capability available in Texas.
10 On the next page 9.2-13, we state that there are no
11 major pumped storage facilities in Texas. So I think
12 there is adequate support in the record of the fact
13 that pumped hydrostorage just is not a feasible way of
14 storing energy in Texas.

15 JUDGE ARNOLD: Okay. The second alleged
16 fact that you object to is 1.C.4 that says, Several
17 combined renewable energy and CAES projects are under
18 development. Are you saying that they aren't, or what
19 exactly is your objection to that statement?

20 MR. EYE: We have said that we objected to
21 is the characterization that they wouldn't be for
22 baseload. What we say here is that, "The affiance at
23 paragraph 53 state that the Luminant shallow end CAES
24 project is not for baseload generation with no
25 citations or supporting documentation or other

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1 evidence." And so they say that, and in fact, I
2 believe that even the Staff in its DEIS concedes that
3 CAES isn't a viable baseload generating modality.

4 MR. FRANTZ: And if I could just briefly
5 respond. Our affidavit said that that project is not
6 designed to produce baseload power. I don't know that
7 we need a citation other than our affiance. This is
8 a Luminant project and we're able to testify to that
9 fact directly, we don't need a citation beyond the
10 affidavit itself.

11 MR. EYE: Well, the affidavit -- well,
12 never mind.

13 JUDGE YOUNG: The third one was 1.E.1. It
14 says, "Most of the applicable wind and solar power in
15 Texas is in the western portion of the state. There
16 currently is transmission congestion in the ERCOT
17 region."

18 What exactly is it that you object to
19 there?

20 MR. EYE: What we are suggesting, and Dr.
21 Dean discussed in his report, was that a CAES
22 capability would tend not to be as congesting on the
23 grid.

24 JUDGE YOUNG: What page were you talking
25 about? I'm sorry. You had said page asterisk, what

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1 page are you talking about?

2 MR. EYE: Let me find that, Your Honor.
3 I apologize.

4 JUDGE YOUNG: Also, if you could clarify,
5 it looks like you've left out a word, CAES facilitates
6 transmission and provides -- I assume you mean
7 ancillary something and a word was left out there?

8 MR. EYE: Services, I believe is the word
9 that got dropped.

10 Your Honor, I'll find that page reference.
11 If you want to do it during a break or something, I
12 can come back to it. I mean, if you want to take the
13 time now, I'll continue to look for it.

14 JUDGE YOUNG: I think we'd like to wrap up
15 the summary disposition in the morning.

16 MR. EYE: Okay.

17 JUDGE YOUNG: Let's take five minutes and
18 you can look for it.

19 (Whereupon, a brief recess was taken.)

20 JUDGE YOUNG: Did you find the reference?

21 MR. EYE: Yes. I'm sorry, Your Honor.

22 JUDGE YOUNG: And I think there's another
23 place also, your footnote 3. Maybe we should have
24 mentioned that before, but anyway, what did you find?

25 MR. EYE: Judge Arnold, I'm not sure this

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1 is the reference, what I was referring to, and I
2 apologize for this, on page 4 of Dr. Dean's report.

3 JUDGE YOUNG: The September 15?

4 MR. EYE: Yes. It's the second full
5 paragraph.

6 JUDGE MIGNEREY: Although there is?

7 MR. EYE: Yes, in the second sentence of
8 that there is a reference to smoothing out composite
9 variations and reducing ran rates I believe have
10 effects on system congestion.

11 JUDGE YOUNG: That's on system congestion.

12 MR. EYE: Congestion on the system. For
13 some reason that particular reference, I believe that
14 that's what I'm referring to in that, but for some
15 reason I think that there's another reference to that
16 as well, and I will endeavor to find it, but that's
17 what I've found thus far.

18 JUDGE YOUNG: Did you want to say what
19 footnote 3 is referring to?

20 MR. EYE: I'll have to find it, Your
21 Honor. I wasn't looking for that originally.

22 JUDGE ARNOLD: Going back to my question,
23 1.E.1, which we were just discussing, basically your
24 disagreement is not with what's there but rather that
25 it's incomplete.

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1 MR. EYE: That would be a fair
2 characterization, Your Honor.

3 JUDGE ARNOLD: Okay. Statement 1.F.4 that
4 says, "With a few exceptions, wind, solar and natural
5 gas have been operated as independent projects rather
6 than as part of a combination." What exactly is your
7 disagreement with that?

8 MR. EYE: Because they're operated in
9 combination every day on the ERCOT system, and I think
10 that we argued that, pointed to the discussion of that
11 in the -- I think it was in the ER.

12 JUDGE YOUNG: But you're not saying
13 combination projects, you're just saying the whole
14 system takes from different sources. That's what
15 you're saying. Right?

16 JUDGE ARNOLD: Well, let me ask Applicant,
17 when you wrote this did you mean rather than as part
18 of a combination providing a specific amount of
19 baseload power?

20 MR. FRANTZ: A combination project that
21 would produce the amount of baseload power equivalent
22 to Comanche Peak.

23 JUDGE ARNOLD: And you don't really
24 disagree with what Mr. Eye is saying in that they've
25 all been used in the combination within ERCOT.

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1 MR. FRANTZ: With a couple of exceptions.
2 I don't believe that there is, for example, solar
3 thermal storage in Texas, I don't believe that there
4 is CAES in Texas yet, and I don't believe there are
5 solar power facilities yet in Texas, even though they
6 are coming, but they're not there yet, I don't
7 believe.

8 MR. EYE: Well, I don't know that we've
9 got -- I don't think that we address it in exactly the
10 same way. What we were suggesting is that, for
11 example, CAES, we said would be something like
12 geothermal as a stored source or the pumped hydro that
13 we were speaking about earlier. So counsel is right,
14 there is no existing CAES facility in Texas, I'll
15 grant you that, but there are certainly a lot of PV
16 panels that are in existence and plugged in currently
17 and working in Texas and they put electricity back
18 into the grid.

19 So to the extent that those discreet parts
20 are part of a larger system providing service is the
21 point that we would want to make.

22 JUDGE ARNOLD: Okay, thank you. And the
23 last fact was 3.A.2, "If natural gas is used as the
24 heat source for CAES, the natural gas usage for
25 generating electricity from CAES is between one-third

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1 and one-half that needed to generate the same amount
2 of electricity at a natural gas plant."

3 Do you disagree with that fact?

4 MR. EYE: Well, Dr. Dean quantified it at
5 less than that, and I'll find the page reference to
6 that in his report. I wasn't looking for that
7 earlier. But yes, that's what we referenced in Dr.
8 Dean's report.

9 MR. FRANTZ: And Judge Arnold, if I may
10 quickly, that does not really affect our conclusions
11 because we assume that CAES has no environmental in
12 our two bounding cases.

13 JUDGE ARNOLD: Thank you.

14 JUDGE YOUNG: Anything else before we wrap
15 up on summary disposition?

16 MR. FRANTZ: Yes. Judge Young, you had
17 asked for citations to case law which states that an
18 alternative is environmentally preferable there's no
19 grounds for considering other issues like economics
20 and business decisions by the applicants, and I'll
21 refer the Board here to the recent Commission case in
22 the summer at CLI-10-1 at pages 30 and 31, and that
23 decision also has a nice block quotation from the
24 Midland case at ALAB-458 at 7 NRC 155, page 162. And
25 both of those cases basically say again that unless an

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1 alternative is environmentally preferable, you don't
2 even look at things like economics.

3 Additionally, with respect to the hydro
4 issue, there is one more citation I'd like to get on
5 the record.

6 JUDGE YOUNG: With regard to?

7 MR. FRANTZ: Hydro pump storage.

8 JUDGE YOUNG: Okay.

9 MR. FRANTZ: In Section 9.2.2.11.2.1 of
10 our supplement to the environmental report, which
11 addresses the four-part combination, it specifically
12 addresses hydro pump storage and explains why it's not
13 available in Texas.

14 JUDGE YOUNG: Okay. Anything else on
15 summary disposition?

16 Let me just get to the right papers to
17 start us off on talking about the contentions. 10 CFR
18 2.309(f)(2) states in part that new contentions may be
19 filed if there are data or conclusions in the NRC, in
20 this case, draft environmental impact statement that
21 differ significantly from the data or conclusions in
22 the applicant's documents. Otherwise, contentions may
23 be amended or new contentions filed after the initial
24 filing only with leave of the presiding officer upon
25 a showing that: (1) the information up on which the

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1 amended or new contention is based was not previously
2 available, (2) the information upon which the amended
3 or new contention is based is materially different
4 than information previously available; and (3) the
5 amended or new contention has been submitted in a
6 timely fashion based on the availability of the
7 subsequent information.

8 The Intervenors' arguments are that they
9 filed this within 30 days and therefore they meet
10 subsection (3). As to whether information in the DEIS
11 is significantly different from the ER or ER update,
12 and whether there's new information that was not
13 previously available or whether the information on
14 which the contention is based was materially
15 different, I think the Applicant's arguments are that
16 all of the new contentions -- or that none of the new
17 contentions meet those criteria.

18 MR. FRANTZ: That's correct.

19 JUDGE YOUNG: In the Staff's response, I
20 think I did this correctly, I believe that the Staff
21 argues either or both that the information in the
22 DEIS -- it hasn't been shown that the information in
23 the DEIS is significantly different or that the
24 contention was based on new information. With regard
25 to most of the parts of contention 1, 3, 4 and 6, on

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1 1A I don't think the Staff says that, on 2 and 5 I
2 have questions marks, and on some of the ones where
3 you say that the contention is based on information
4 that's not significantly different than the ER, you
5 don't go on to say that the contention -- it hasn't
6 been shown that the contention is based on new
7 information not previously available.

8 What I'm trying to get at here is we'd
9 like to really look at the timeliness issue of all the
10 contentions first, and does the Staff concede that
11 some of these contentions or parts of some of these
12 contentions are timely in the sense of being based on
13 new information or significant differences in the
14 DEIS? That's the basic question. I wasn't clear,
15 based on the specific things you argued, whether you
16 were making concessions on some of them or partial
17 concessions on some of them.

18 MS. VRAHORETIS: No, Your Honor, we didn't
19 intend to make partial concessions. We may not have
20 raised the argument explicitly to each of them. With
21 respect to specific contentions, if we thought the
22 argument was stronger we raised it, but I would not
23 generally concede that the new contentions are based
24 on new and materially different or significant
25 information.

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1 JUDGE YOUNG: Okay. Before we get to any
2 of the other arguments on any of the contentions
3 separately, we would like to focus on the parts of the
4 DEIS that come into play and the parts of the ER that
5 are similar or different and/or any materially new
6 information that the contentions are based on. So
7 this is a little early for lunch but it might be
8 efficient if we gave you a little extra time for lunch
9 and you can go through and be prepared to point us to
10 those specific places, and this would go to all
11 parties.

12 In the case of the Applicant and the
13 Staff, point to the parallel places. Now, I know you
14 do this in several separate places, but if we could
15 just go through just this on all the contentions. And
16 then for the Intervenors, if it's different to be able
17 to point to all the places where it's different
18 because I think that is a major hurdle for you to
19 overcome before we even get to some of the other
20 arguments having to do with whether they're adequately
21 supported, whether there's a genuine dispute, whether
22 the issues are material.

23 Does that make sense to everyone? Would
24 it be helpful to have some time to go through that so
25 that we can just sort of systematically go through

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1 them on that question alone, which I've included in
2 this sort of envelope of timeliness?

3 MR. FRANTZ: Yes, that make sense, Judge
4 Young.

5 MS. VRAHORETIS: Yes, Your Honor.

6 JUDGE YOUNG: Okay. Then maybe it would
7 make sense to take an early lunch break and give you
8 a little extra time to do that. It's almost 11:30.
9 Do you think we could be back in the room before 1:00
10 ready to start right at 1:00? Okay. And then
11 meanwhile we're going to try to get copies of these up
12 on two different computers so that we'll be able to
13 look at the specific parts of it, so be prepared with
14 specific sections and page numbers and so forth so
15 that we can sort of go through that with regard to
16 each contention.

17 All right. Then we'll look forward to
18 seeing you after lunch.

19 (Whereupon, at 11:30 a.m., the hearing was
20 recessed, to reconvene this same day, Thursday,
21 October 28, 2010, at 1:00 p.m.)

22

23

24

25

A F T E R N O O N S E S S I O N

(1:00 p.m.)

1
2
3 JUDGE YOUNG: All right. Everyone ready?
4 Contention 1 has a number of different subparts or
5 bases, so why don't we start with that and just go
6 through them one by one, and let us know which parts
7 of the relevant documents we should be looking at. Do
8 you want to start?

9 MR. EYE: The first 1A, this net revenue
10 question was, as far as I can tell, unique to the
11 DEIS, was dealt with in the environmental report. So
12 to the extent that it is key to the DEIS with an ER
13 counterpart, the relevant date would be the date of
14 the DEIS, which is August -- first week of this
15 year -- I don't have the exact date. At any rate,
16 that would be the timing issue on 1A.

17 JUDGE ARNOLD: You didn't cite to where in
18 the DEIS that is.

19 MR. EYE: It's referenced in the Power
20 report.

21 JUDGE YOUNG: I was just looking in the
22 Power report and I was trying to find that as well.

23 MR. EYE: Judge Arnold, what I referenced
24 in the DEIS was page 8-1.

25 JUDGE YOUNG: Where do you make that

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1 reference?

2 MR. EYE: It's in footnote 3.

3 JUDGE YOUNG: Of?

4 MR. EYE: Of the contentions -- excuse
5 me -- of the response to the answers.

6 JUDGE YOUNG: Footnote 3 of that response.

7 MR. EYE: Yes.

8 JUDGE YOUNG: So was there any other
9 reference to the DEIS with regard to A? I guess
10 Section 8.1.3, is that the same reference?

11 MR. EYE: I believe it is or it's a part
12 of that. I'm not sure it's on the same page but it's
13 the same reference point.

14 JUDGE YOUNG: What order do you want to go
15 in, Staff or Applicant next?

16 MR. FRANTZ: I'd be happy to go.

17 JUDGE YOUNG: Okay.

18 MR. FRANTZ: First of all, I would just
19 like to note that all of the references cited in their
20 contentions and all of the references cited in their
21 reports attached to their contentions were dated more
22 than 30 days prior to submission of the contentions,
23 and so we believe that none of these references are
24 timely in accordance with the Board's initial
25 scheduling order. They should have been filed earlier

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1 based upon our environmental report because they were
2 available earlier.

3 Additionally, with respect to this
4 particular issue, we don't believe, and the Staff can
5 confirm this, we don't believe that their draft EIS
6 even addresses this issue and neither does our
7 environmental report. Neither one addresses
8 profitability or net revenues. That's an economic
9 issue, it's not a need for power issue, and so it's
10 nothing that either one of our reports addresses. The
11 Intervenors could have raised this earlier based upon
12 the environmental report.

13 JUDGE YOUNG: When you cite these
14 sections, where on that page are you talking

15 MR. EYE: I'm looking for it now, Your
16 Honor.

17 MR. FRANTZ: If it might help, I believe
18 the reference he's referring to is at the bottom of
19 page 8-1 of the draft EIS.

20 MR. EYE: It is. It's lines 43 and 44.
21 Thank you, Counsel.

22 JUDGE YOUNG: NRC Staff's determination is
23 that market conditions justify the proposal.

24 MR. FRANTZ: And market conditions in that
25 context, if you look at the previous sentence, it

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1 refers to supply and demand, not to profitability or
2 net revenues.

3 JUDGE YOUNG: Is there any relevant part
4 of the environmental report to look at here?

5 MR. FRANTZ: No. Again, we don't believe
6 there's any issue at all involving profitability
7 that's reasonably before the NRC.

8 MR. EYE: Well, I don't want to preempt
9 but I didn't know that we were going to get into the
10 substance of the contentions.

11 JUDGE YOUNG: Let's stick to these.

12 MR. BIGGINS: Thank you, Your Honor. I
13 will be addressing contention 1.

14 Regarding contention 1A, I would note that
15 the Power report does specifically reference the
16 Staff's EIS determination on page 3 of the Power
17 report, and it points out the EIS citation 8-1, that
18 page, line 43 regarding market conditions, however,
19 ultimately the Staff views this contention, this basis
20 as questioning whether or not the EIS contains a
21 determination of financial profitability of the plant,
22 and in that regard, the profitability of the plant or
23 a positive net revenue is not discussed in either the
24 ER or the EIS, so there is no particular page
25 reference.

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1 Since it's not in either, it is the
2 Staff's position that this should have been raised as
3 a contention of omission against the ER..

4 JUDGE YOUNG: So in what way are you
5 saying that you based this on new information?

6 MR. EYE: Well, there's no reference to
7 anything about market conditions in the ER. The first
8 time we see anything about a reference to market
9 conditions is in the DEIS. I think that's what both
10 the Staff and Applicant have explained, that it wasn't
11 in the ER.

12 And to the extent that "market conditions"
13 is defined by the preceding sentence as strictly
14 related to supply and demand, I think that may be an
15 overly restrictive reading because as we argue in our
16 contention, to the extent that nuclear power is priced
17 over its counterpart generators, that particular
18 segment of power would not be competitive, and
19 arguably, therefore not needed.

20 MR. BIGGINS: And Your Honor, the EIS in
21 its reference to market conditions is specifically
22 talking about the need for power analysis, not a
23 financial profit for the plant, and the Intervenors
24 acknowledge this even in their reply where they state
25 on page 3: And while the DEIS defines the "market

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1 conditions" parameter narrowly to include only
2 projected supply and demand, the proposed contention
3 argues that consideration of net revenues is also a
4 relevant factor in determining the validity of the
5 Staff's conclusion.

6 And so this contention focuses on net
7 revenues and that is not discussed in either the ER or
8 EIS, and essentially by alleging that the EIS needs to
9 contain that information, that's a contention of
10 omission that should have been raised against the ER.

11 JUDGE YOUNG: Was there a need for power
12 section in the ER?

13 MR. FRANTZ: Yes. It would be Chapter 8
14 of the ER.

15 JUDGE YOUNG: Okay. So what we're talking
16 about is this one sentence that says the market
17 conditions justify Luminant's proposal. That's what
18 you're challenging, that one sentence.

19 MR. EYE: Yes. And I need to make one
20 more reference on the timing. That was also based on
21 the state of the market report from August of this
22 year.

23 JUDGE YOUNG: State of the market report
24 being?

25 MR. EYE: The Potomac state of the market

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1 report -- I'm sorry -- the ERCOT state of the market
2 report.

3 JUDGE YOUNG: Date of which is?

4 MR. EYE: I believe August 10, 2010.

5 JUDGE MIGNEREY: And that is reference 3
6 in your contentions, the ERCOT report under A?

7 MR. EYE: I believe it is, Your Honor,
8 yes.

9 MR. BIGGINS: Ultimately, Your Honor,
10 regarding timeliness for contention 1A, if the
11 Intervenors argument is, as I interpret the contention
12 to be, that the IES needs to contain an analysis of
13 the profitability of the proposed plant. That would
14 be an argument under NEPA, which the Staff does not
15 concede NEPA requires an analysis of profitability.
16 But ultimately, if it's not contained in the EIS and
17 it wasn't contained in the ER, for a timeliness matter
18 it should have been raised as a contention of omission
19 against the ER.

20 JUDGE YOUNG: What are the similarities
21 and differences in the need for power sections apart
22 from the fact that there's this new sentence about
23 market conditions justifying the proposal?

24 MR. FRANTZ: The ER and the DEIS come to
25 very similar conclusions. They both conclude that

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1 around 2019 or so there's going to be a need for more
2 baseload power in the ERCOT region sufficient to
3 support the entry of Comanche Peak 3 and 4 that in
4 later years, for example, 2024 there's going to be a
5 greater need than that. Staff is a bit more
6 conservative because they had more recent data. Both
7 our environmental report and the draft EIS are based
8 upon ERCOT studies.

9 Because our environmental report was about
10 a year earlier, we used earlier ERCOT studies, the
11 Staff used more recent ERCOT studies which showed a
12 decrease in the demand due to the recent recession,
13 and so they do have more recent data than we have, but
14 they rely upon the same source, namely the ERCOT
15 studies.

16 JUDGE YOUNG: So is what we're look at
17 here whether there's a significant difference?

18 MR. FRANTZ: I think the language in the
19 regulation is differs significantly, and if they only
20 differ significantly, then the Intervenors must
21 satisfy the three criteria in 2.309(f)(2).

22 JUDGE YOUNG: Right. So you're arguing
23 that despite the fact that the DEIS uses some more
24 recent studies and has some differences that it's not
25 significant enough to say that it differs

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1 significantly from the data or conclusions in your ER.

2 MR. FRANTZ: That's correct.

3 JUDGE YOUNG: Okay. And the Staff agrees
4 with that?

5 MR. BIGGINS: That's correct.

6 JUDGE YOUNG: And so the significant
7 differences that you're arguing are the sentence about
8 market conditions and the Potomac study.

9 MR. EYE: And the ERCOT study. I may have
10 mis-stated. That is the August.

11 JUDGE YOUNG: The new ERCOT -- an ERCOT
12 study that was dated August 10, 2010.

13 MR. EYE: I believe that's correct, Your
14 Honor.

15 JUDGE YOUNG: And the significant
16 differences are the lower demand.

17 MR. EYE: That's part of it.

18 JUDGE YOUNG: And the other part?

19 MR. EYE: Is that there is more generating
20 capacity than has been accounted for. So it's lower
21 demand and more generating capacity, thereby shrinking
22 the -- or reducing the reserve margin problem.

23 JUDGE YOUNG: And how much of a difference
24 is it?

25 MR. EYE: I would have to add it up, Your

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1 Honor, but it includes the addition on the generating
2 capacity side and it would include the addition of
3 what we've argued is the high wind or the wind
4 scenario that's adopted by ERCOT. It would include
5 the non --

6 JUDGE YOUNG: Middle wind. Is that what
7 you said?

8 MR. EYE: Right. They have three
9 scenarios and they ended up picking the middle one in
10 terms of the anticipated amount of capacity if they
11 were going to build the transmission lines.

12 JUDGE YOUNG: And do we have a copy of
13 this? This was submitted with your contention?

14 MR. EYE: It is referenced, yes. I don't
15 know that we gave you a copy of the report but the
16 report is referenced and I think there's a link to it.

17 JUDGE YOUNG: And where is the reference?

18 MR. EYE: I'll find it.

19 JUDGE YOUNG: The Potomac study is 2009.
20 Right?

21 MR. EYE: That's correct. I believe the
22 Potomac study was -- I think it was provided to ERCOT,
23 presented to ERCOT in August of this year. That's
24 when we became aware of it.

25 JUDGE YOUNG: The Potomac study?

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1 MR. EYE: That's my understanding.

2 JUDGE YOUNG: The ERCOT 2009 state of the
3 market report?

4 MR. EYE: The Potomac.

5 JUDGE YOUNG: By Potomac Economics, Ltd.?

6 MR. EYE: Right, was presented in August
7 of 2010.

8 JUDGE YOUNG: Where do you state that?

9 MR. EYE: I'm not sure that I did say it
10 in the papers.

11 JUDGE YOUNG: Do you agree?

12 MR. FRANTZ: I think it's July 2010 is the
13 date we have.

14 Also, Judge Young, to respond to your
15 question, there is a nice table on page 8-21 of the
16 draft EIS which compares the Luminant's predictions of
17 load versus the NRC Staff's based upon the different
18 ERCOT studies, and as that table shows, there is
19 around approximately a 3,000 megawatt difference in
20 2014 going up to around a 5,000 megawatt difference in
21 2024. But in both cases, based upon the data that the
22 Staff used and the data we used, there's still a need
23 for additional capacity in the 2019 and 2024 time
24 frame.

25 JUDGE YOUNG: Okay. Just getting back to

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1 this, you're saying that the new information is this
2 2009 study that was submitted to ERCOT in 2010, and do
3 you have a copy of it? Do you have any authority for
4 when it was provided to ERCOT?

5 MR. EYE: It was at the August 2010 ERCOT
6 board.

7 JUDGE YOUNG: Okay. Where do you mention
8 that?

9 MR. EYE: I don't.

10 JUDGE YOUNG: You don't.

11 MR. EYE: As I said earlier, I did not
12 include this.

13 JUDGE YOUNG: Okay. You're asking us to
14 take your word today when you haven't provided it in
15 any of your filings, you have not provided us a copy
16 of it, and you are asking us to take your word today
17 and use that in making a determination whether there
18 are significant differences?

19 MR. EYE: I am not asking you to take my
20 word for it. I will provide you the documentation,
21 but I have not done it up to this point.

22 JUDGE YOUNG: Why not?

23 MR. EYE: Oversight.

24 MR. FRANTZ: Judge Young, for the
25 information of the Board, we did attach excerpts from

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1 that report as an Attachment 2 to our response to the
2 contentions, and the cover page indicates it's July
3 2010.

4 JUDGE YOUNG: Could you, at the very
5 least, tell us where you make specific references to
6 that report in such a way that we would know what you
7 are referring to?

8 MR. EYE: It's referenced in the David
9 Power report.

10 JUDGE YOUNG: Where in the David Power
11 report?

12 MR. EYE: It's pages 1 and 2

13 JUDGE YOUNG: Pages 1 and 2, which lines?

14 MR. EYE: I think it's at the bottom of
15 page, bottom of page 1.

16 JUDGE YOUNG: What I referred to before
17 where it says, and I quote, "The ERCOT 2009 state of
18 the market report by Potomac Economics, Ltd." with no
19 citation, unless I'm missing something, to what hat is
20 or where we would ever find it?

21 MR. EYE: That's correct, Your Honor.
22 It's misstated. It should have been the Potomac 2009
23 report was provided to ERCOT in 2010.

24 JUDGE YOUNG: How many go-rounds have we
25 had so far of contentions? We have at least three

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1 before now. Right?

2 MR. EYE: Two or three.

3 JUDGE YOUNG: Three, I think. Okay.

4 Anything else on 1A?

5 Okay. 1B, what are you referring to
6 there?

7 MR. EYE: It's the same report and it's
8 page 43 of that report that we were referencing --
9 just spoke about in reference to 1A.

10 JUDGE YOUNG: I'm sorry. Say that over
11 again. Page 43 of the Potomac.

12 MR. EYE: Yes. And this is a somewhat
13 subtle point, but as I recall, there is no reference
14 to the differentiation that we draw in 1B in the ER.
15 We're differentiating between peak baseload in DEIS in
16 1B and I don't recall that that differentiation was
17 addressed in the ER.

18 JUDGE YOUNG: We can get into this more
19 later, but just quickly, are you -- I'm not altogether
20 clear how this peak load issue relates to the baseload
21 in any event.

22 MR. EYE: It's simply is saying that if
23 there is a need for power, the need for power based on
24 these data would reflect that the need is more geared
25 toward meeting peak demand rather than baseload

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1 demand.

2 JUDGE ARNOLD: Do you mean to imply that
3 the need for peak power means there's not a need for
4 baseload power?

5 MR. EYE: No, I do not mean to imply that.
6 But it's the quantities that make a difference here
7 and differentiating between -- because remember the
8 purpose and need as specified by the Applicant was the
9 need to generate baseload power. Based upon this
10 contention, we believe that the need is more to handle
11 peak load rather than baseload, and that looking at
12 baseload what's in existence now and what's planned
13 for additions outside of the Comanche Peak Units 3 and
14 4, it would be adequate baseload generating capacity,
15 which we cover in a subsequent contention.

16 MR. FRANTZ: Judge Young, our
17 environmental report does not reflect the recession
18 and the downturn that was mentioned by Mr. Eye, so
19 this is new relative to the environmental report, but
20 I would point out the Staff does account for this in
21 their draft EIS, so I don't see anything that's
22 materially different in any issue of material fact
23 here.

24 In fact, if you look at the table or graph
25 on page 8-11 of the draft environmental impact

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1 statement, it shows the effects of the recession
2 because there's a leveling off of demand and then it
3 picks up in subsequent years, as you would expect
4 after the recession is over. So again, I think the
5 very phenomenon that Mr. Eye is mentioning has already
6 been accounted for in the draft EIS.

7 JUDGE YOUNG: Staff.

8 MR. BIGGINS: Yes, Your Honor. I would
9 point out that for all of the remaining bases, the
10 Staff in its pleading tried to provide the page
11 numbers for the Board's consideration. I would like
12 to make clear that the Staff's position regarding the
13 (f)(2) requirement is that the Intervenors does have
14 to show, in other words, has the burden to point out
15 the difference, and they didn't do that anywhere in
16 their pleadings.

17 JUDGE YOUNG: Right. We understand that.

18 MR. BIGGINS: To answer your specific page
19 number questions, though, the Staff points out that
20 its treatment of the baseload versus peak power issue
21 is in the DEIS at 8-6, and the environmental report
22 addresses in a summary at 8.4-9.

23 JUDGE YOUNG: Anything else on 1B? 1C.
24 Why don't we start with the Applicant and then go over
25 and that might be a little bit more streamlined.

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1 MR. FRANTZ: We don't believe that there's
2 anything that's materially different that's been
3 raised by the Intervenors here. This deals with the
4 amount of wind that's available. The increases that
5 are predicted by Mr. Eye are fully accounted for in
6 the draft EIS. Again, there's just no genuine dispute
7 of material fact on the amount of wind. I think the
8 estimates are very consistent.

9 JUDGE YOUNG: Well, just on the parts of
10 the DEIS and the ER, are there particular parts that
11 are particularly relevant to look at in terms of the
12 timing and whether there's significant differences?

13 MR. FRANTZ: I'm trying to pull up the ER
14 here. The ER, of course, as I had mentioned before,
15 is based upon the ERCOT studies, which do account for
16 wind and predicted increases in wind capacity. Let me
17 try to get you an exact page cite here. On page 8.3-4
18 we have predicted increases in wind generation from
19 2008 through 2013, and it's very similar to what the
20 Staff has in its draft EIS in terms of increases over
21 those years.

22 JUDGE YOUNG: And Staff, can you tell us
23 what page in the DEIS?

24 MR. BIGGINS: Sure. Your Honor, if you
25 look at the contention as a wind capacity contention,

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1 wind capacity is discussed in the DEIS at 8-17 and 8-
2 118 and in the environmental report at 8.3-1 through
3 8.3-5. However, if you're looking at the contention
4 basis as future generation, the future generation
5 profile in ERCOT is discussed in the DEIS at 8-18 and
6 in the ER at 8.3-2 to 8.3-3 and also 8.3-5.

7 JUDGE MIGNEREY: And Table 8.3-1?

8 JUDGE YOUNG: 8.3-5?

9 MR. BIGGINS: Page 8.3-5.

10 JUDGE YOUNG: Okay.

11 JUDGE MIGNEREY: And it's summarized in
12 Table 8.3-1 in the ER?

13 MR. BIGGINS: In the ER for future
14 generation, I believe it is. I didn't specifically
15 say that.

16 JUDGE MIGNEREY: Table 8.3-1 looks like
17 it's a summary of past and future capacity.

18 JUDGE YOUNG: Okay. Mr. Eye.

19 MR. EYE: Part of what we were referencing
20 was in the Power report and it was a reference that's
21 found at Texasrenewables.com, and I believe that that
22 was May 2010.

23 JUDGE YOUNG: Where in the Power report?
24 I think you have a footnote to page 3. Is that what
25 you're talking about?

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1 MR. EYE: Our statement is on page 4. Let
2 me make sure I'm on the right one here. I believe it
3 is page 3, Your Honor, and that's in subpart 3 or
4 number 3 on that page.

5 JUDGE YOUNG: Page 3 of the Power report?

6 MR. EYE: Yes, and there's a number 3 on
7 that page.

8 MR. EYE: I see number 4, 5, 6 and 7 on
9 that page, I don't see a subpart 3 on that page. I'm
10 sorry; maybe I'm looking at the wrong page. Subpart
11 3, okay. I was looking at page 4. Where you cite
12 page 9-21, lines 3 through 8 of what?

13 MR. EYE: That is the DEIS.

14 JUDGE YOUNG: Well, you say on those pages
15 Luminant concluded.

16 MR. EYE: Oh, I'm sorry; I beg your
17 pardon. That's the ER if I referenced Luminant. It
18 sounds like the reference itself is to the
19 environmental report.

20 JUDGE YOUNG: Well, then how is that
21 timely?

22 MR. EYE: Well, I think that I was just
23 trying to compare what the ER said, referenced the ER
24 to show that it was different.

25 JUDGE YOUNG: Okay. So where's the

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1 reference to the DEIS, what part of the DEIS?

2 MR. EYE: It's the table that was just
3 referenced by counsel for NRC Staff, the summary
4 table.

5 JUDGE YOUNG: 8.3-1. And where do you
6 cite that?

7 MR. EYE: I think it's cited in the Power
8 report.

9 JUDGE YOUNG: Where, at what part of the
10 report?

11 MR. EYE: Can I have just a second, Your
12 Honor?

13 (Pause.)

14 JUDGE YOUNG: It looks like you may be
15 referring to the DEIS at page 9-21.

16 MR. EYE: 9-21, Your Honor?

17 JUDGE ARNOLD: In the DEIS it makes a
18 statement about Luminant.

19 MR. EYE: As I recall, Your Honor, the
20 reference to the 10,000 megawatts was from the ER and
21 then the ERCOT reference was from their state of the
22 market report -- or from their report in May of this
23 year.

24 JUDGE YOUNG: Anything more on 1C? Okay,
25 1D, increases in wind carrying capacity

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1 MR. FRANTZ: This allegation is based upon
2 a possible study that's being prepared by ERCOT that
3 might change their existing effective load carrying
4 capacity of 8.7 percent for wind. This proposed study
5 is not mentioned, as far as I know, in either our
6 environmental report or in the draft EIS.

7 JUDGE ARNOLD: Could you explain what wind
8 carrying capacity is?

9 MR. FRANTZ: Yes. Wind, on the average,
10 in Texas probably has a capacity factor of
11 approximately 25-30 percent, give or take a few
12 percent here and there, but for reliability purposes,
13 ERCOT values it at 8.7 percent because wind is not
14 dispatchable unlike, say, natural gas where you just
15 can't tell a wind turbine to start turning if the wind
16 is not blowing. Because it's not dispatchable, ERCOT
17 values it less in terms of judging the reliability of
18 the system.

19 JUDGE ARNOLD: So it's basically of all
20 the wind that is available, you can for planning
21 purposes assume that at least 8.7 percent of it is
22 going to be available at any given time?

23 MR. FRANTZ: That's correct.

24 JUDGE YOUNG: So you're saying that ERCOT
25 has a proposed study, or maybe they're working on it

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1 now.

2 MR. FRANTZ: Yes, according to
3 Intervenors. But both our environmental report and
4 the draft EIS only refer to the existing load carrying
5 capacity of 8.7 percent.

6 MR. EYE: Your Honor, I'm told that in
7 their May report, ERCOT's May report of this year,
8 they referenced that they are in the process of doing
9 the revision to their wind load carrying capacity in
10 recognition that it needs to be revised.

11 JUDGE YOUNG: And so how is reliance on
12 that timely at this point? And how would we find it?

13 MR. EYE: It's in the May 2010 report that
14 is part of the Applicant's filings.

15 JUDGE YOUNG: How would we find it by
16 reading your filings?

17 MR. EYE: I think we referenced the ERCOT
18 website.

19 JUDGE YOUNG: And that refers to December
20 2009?

21 MR. EYE: I think it refers to the May.
22 It's reported in the May 2010 report.

23 JUDGE YOUNG: Referring to December 2009
24 as reported in May 2010, and what is it that makes it
25 timely now? What's new and different in the DEIS,

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1 what's new that would make this contention timely now?

2 MR. EYE: Well, it's that there is no
3 reference to it in the DEIS. The DEIS assumes that
4 there's a static amount of wind carrying capacity at
5 the 8.7 percent, and as of May of this year, there's
6 a recommendation by ERCOT that is in the process of
7 being revised in recognition of additional wind coming
8 onto the system, and based upon that one would suppose
9 that that revision will have a higher wind carrying
10 capacity because there's more wind.

11 JUDGE YOUNG: Okay. Let me just
12 interrupt. The DEIS figure, is that different than
13 the ER figure?

14 MR. BIGGINS: Your Honor, if I may?

15 JUDGE YOUNG: Go ahead.

16 MR. BIGGINS: The DEIS and the ER both use
17 the ERCOT figure of 8.7 percent, so there's no
18 difference in that regard regarding the current load
19 carrying capacity for wind. The DEIS has it on page
20 8-19, the ER has it on 8.3-4, discusses load carrying
21 capacity -- pardon me. Also in Table 8.3-1 and on
22 page 8.4-3 and also 8.4-4 and 8.4-9 is where I see it
23 in the ER.

24 I would point out that I agree with the
25 Applicant in this point that neither the ER nor the

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1 EIS discussed an increase to that load carrying
2 capacity based on the report cited by the Intervenors
3 in footnote 6 of the Power report where they
4 reference, "On March 25, 2010 ERCOT reported on a new
5 study to revise these calculations." And so neither
6 the ER nor the EIS discussed that planned study to
7 revise the calculation as referenced by the
8 Intervenors.

9 JUDGE YOUNG: So basically, as I'm
10 understanding it, there's no difference between the ER
11 and the DEIS, in March and in May there were
12 references maybe to ERCOT doing a new study, but those
13 are the most recent things that we have with regard to
14 1D.

15 MR. EYE: I believe that's correct, Your
16 Honor.

17 JUDGE YOUNG: Okay. Anything else on 1D?
18 1E.

19 MR. FRANTZ: 1E involves the transition
20 from a zonal to a nodal system of dispatching
21 generating stations. This change has been in the
22 works for years. There's no reason that the
23 Intervenors could not have raised this with respect to
24 our environmental report.

25 JUDGE YOUNG: Staff.

1 MR. BIGGINS: Yes. Thank you, Judge. The
2 Staff in its DEIS did discuss the switch to the nodal
3 system at 8-4 to 8-5 of the EIS. The ER does not
4 adjust its need for power analysis, in other words, it
5 is not specifically discussed, and so the Staff in our
6 pleadings simply said, See generally Chapter 8 of the
7 ER for the proposition that it's not discussed there.

8 However, I would point out that neither
9 did the DEIS adjust the need for power amount based on
10 the switch to the nodal deployment, so in essence,
11 there is no difference in the treatment, it's simply
12 a matter of the DEIS does discuss that there will be
13 a change.

14 JUDGE YOUNG: And Intervenors, what you're
15 wanting us to do is consider that notwithstanding that
16 the DEIS mentioned the anticipated change in December,
17 that the DEIS did not treat that or analyze the effect
18 of that. Would that fit with what you were just
19 saying, Mr. Biggins?

20 MR. BIGGINS: That is correct. And I do
21 have a reference, I don't have it open in front of
22 me, but I do believe ERCOT has been discussing that
23 for as far back as 2003, I think was the original
24 mandate to ERCOT to begin to look at that change.

25 MR. EYE: Your Honor, I believe the reason

1 we raise it now is because the change is anticipated,
2 I believe, to come into reality about now. I think
3 it's in the next month or two. December 1 is, I
4 believe, the official date for that. And so I'm not
5 sure that we knew the exact date that it was supposed
6 to be in effect until fairly recently, and I think
7 that was referenced in the Power report and I believe
8 that that came from a meeting of ERCOT.

9 JUDGE YOUNG: In the Power report, the
10 site you give I think is page 4, so I think I've got
11 the right page now, page 4, number 5.

12 MR. BIGGINS: And Judge.

13 JUDGE YOUNG: Go ahead.

14 MR. BIGGINS: I did find my reference. I
15 do have it in the pleading on page 15 of the Staff's
16 answer: "According to the ERCOT website in September
17 2003, as part of Project 26376, the Public Utility
18 Commission of Texas ordered ERCOT to develop a nodal
19 wholesale market design." And so it's been in the
20 works since 2003.

21 I would point out, though, that regarding
22 the substance of this contention, the Power report
23 does not quantify, and neither does the DEIS, the
24 amount of efficiency from switching to the nodal
25 system because at this point it would be speculative

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1 and it's not quantifiable.

2 JUDGE YOUNG: I think the Power report
3 says there should be significant reductions in
4 congestion based dispatch of generation resources.
5 Anything else more specific on that? Is there
6 anyplace other than heading 5 on page 4 that discusses
7 this?

8 MR. EYE: I think that's the place where
9 it's referenced, Your Honor.

10 MR. BIGGINS: So in essence, Judge, to the
11 extent that the Intervenors fault the DEIS discussion,
12 in reality I don't believe there could be any further
13 discussion in the DEIS quantifying any kind of energy
14 efficiency from the switch since we don't believe that
15 it's possible at this point.

16 JUDGE YOUNG: Anything else on that one?
17 Okay, 1F

18 MR. FRANTZ: 1F pertains to a responsive
19 reserves. The Intervenors have contended that we
20 should account for the amount of responsive reserves
21 that are qualified rather than that are actually
22 purchased. Both the environmental report and the
23 draft EIS, and ERCOT, by the way, only account for
24 purchased responsive in calculating the effective
25 load. They do not account for qualified reserves,

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1 they only account for those that are actually
2 purchased.

3 In that regard, by the way, this is not
4 new either. The same type of information was also
5 available in the 2008 state of the market report at
6 page 16. So the fact that there are certain amounts
7 that are qualified and different amounts that are
8 actually purchased and accounted for in the ERCOT
9 evaluation, a reserve margin is not new.

10 MR. BIGGINS: For the Staff, Your Honor,
11 the responsive reserves are treated on page 8-12 of
12 the DEIS and in the ER they are at 8.4-5 to 8.4-6.
13 And I would also point out that the qualified versus
14 the purchased responsive reserves are treated
15 essentially -- or counted essentially the same in the
16 ER as they are in the EIS in that the EIS only counts
17 the purchased responsive reserves and doesn't count
18 the qualified responsive reserves.

19 JUDGE YOUNG: Go ahead.

20 MR. EYE: As far as the timing is
21 concerned, Your Honor, the first document that I saw
22 that related to this was I think referenced in the
23 ERCOT report in May of this year. There may have been
24 an earlier reference that I did not pick up. I hear
25 counsel say that it was referenced in '08.

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1 MR. FRANTZ: The 2008 state of the market
2 report.

3 MR. EYE: The argument is that this
4 differentiation between qualified and purchased is
5 simply an artificial difference and that if ERCOT has
6 qualified a source as being something that they can
7 and in fact they do quantify it, then it ought to be
8 counted in the reserves -- or rather in the generating
9 capacity in the DEIS.

10 JUDGE YOUNG: So there's nothing since May
11 that's new or different.

12 MR. EYE: Not that I know of.

13 JUDGE YOUNG: So do you have any argument
14 that this is in any way timely?

15 MR. EYE: Well, as we point out in our
16 brief, if in fact you determine that the May date
17 falls out of timeliness --

18 JUDGE YOUNG: Well, it's more than 30 days
19 ago. I mean, it's more than 30 days after the DEIS.

20 MR. EYE: I understand.

21 JUDGE YOUNG: So it's not a matter of
22 we've already determined that and we spelled out that
23 if it was not within that 30 days, you need to address
24 the factors in 2.309(c), I believe.

25 MR. EYE: Which we did in our brief.

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1 JUDGE YOUNG: Where?

2 MR. EYE: It's at page 13, middle of the
3 page.

4 JUDGE YOUNG: Under 1N --

5 MR. EYE: DEIS contention. It's
6 unrelated.

7 JUDGE YOUNG: Okay. That's a conclusion
8 as to the whole 1.

9 MR. EYE: Correct, yes.

10 JUDGE YOUNG: Anything on good cause? Am
11 I missing that?

12 MR. EYE: Well, I think that the good
13 cause is that --

14 JUDGE YOUNG: Is there anything there?
15 Did you write anything there on good cause?

16 MR. EYE: What I wrote is obviously there.
17 I don't know -- I considered the mistakes to be
18 related to good cause. To the extent that the
19 timeliness consideration comes into play, those
20 factors that we go through in 2.309.

21 JUDGE YOUNG: The only reference I see
22 would be additionally data released from ERCOT in May
23 2010 are more current and presumably more precise, 10
24 CFR 2.309(c)(1)(I), which is the good cause provision.
25 What I've not seen is any reference to good cause for

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1 the failure to file on time.

2 MR. EYE: I guess I didn't argue that
3 particular point other than that what I said here.

4 JUDGE YOUNG: So I guess we have to
5 presume that there really wasn't any particular reason
6 that you could not have filed it earlier.

7 MR. EYE: None that you would probably
8 consider to be justified.

9 JUDGE YOUNG: The --

10 MR. EYE: None that you would probably
11 consider to be justified.

12 JUDGE YOUNG: Well, without being offered
13 any whatsoever, it's sort of hard to find that one
14 would be justified.

15 Anything else on 1F?

16 (No response.)

17 JUDGE YOUNG: Okay. 1G.

18 MR. FRANTZ: Yes. 1G pertains to
19 allegations that we should have considered the use of
20 turbine in the cooling for the natural gas plants in
21 the ERCOT region.

22 That issue is not discussed, I don't
23 believe; neither the draft EIS or the environmental
24 report, but I might also add that this has been a
25 concept that's been around for many years. There's no

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1 reason the Intervenors could not have raised this in
2 response to our environmental report.

3 MR. BIGGINS: For the Staff, Judge.
4 Specifically if you consider the contention as a
5 matter of the amount of natural gas generation
6 considered in the need-for-power analysis, natural gas
7 generation would be included in the EIS in 8-15 to
8 page 8-17 and in the ER 8.3-1 to 8.3-2.

9 However, I would point out that the
10 contention is very specific in not just talking about
11 natural gas generation but turbine inlet cooling, and
12 neither the ER nor the EIS considers turbine inlet
13 cooling.

14 JUDGE YOUNG: There's no significant
15 difference between them?

16 MR. BIGGINS: Correct.

17 JUDGE YOUNG: Mr. Eye?

18 MR. EYE: We brought it up when we became
19 aware of it, Your Honor.

20 JUDGE YOUNG: So you're not asserting any
21 significant difference, and you say you asserted when
22 you became of it.

23 MR. EYE: The gas generating innovation
24 or -- to reduce inlet temperatures during times of
25 high ambient temperatures.

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1 JUDGE YOUNG: And so any arguments on
2 timeliness?

3 MR. EYE: Other than what we've already
4 pointed out on the page in our response, no.

5 JUDGE YOUNG: 1H.

6 MR. FRANTZ: 1H pertains to energy
7 efficiency and how that affects demand. The
8 environmental review, at page 8.2-4 discusses this.
9 It's also discussed on page 8.14 of the draft EIS, and
10 in particular on that page of the DEIS it shows that
11 there's a certain amount of megawatt savings from one
12 of the Texas bills that passed, plus there's
13 additionally ERCOT accounts for trends in its loads
14 based on demand-side management and energy efficiency.

15 So there's two ways ERCOT accounts for
16 this, and, again, we use also the ERCOT methodology,
17 so we believe we're consistent between the
18 environmental review and the draft EIS.

19 The contention has a couple of references
20 in support of this allegation. One, it references
21 approximately 44 megawatts of savings that was
22 achieved by CPS Energy in San Antonio.

23 JUDGE YOUNG: That's in the Power report?

24 MR. FRANTZ: Yes. On page 5 of the Power
25 report, paragraph number 8.

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1 I might add that this is the same issue
2 that was raised by the Intervenors in the South Texas
3 proceeding last year. So this certainly is not new;
4 they certainly could have raised it here earlier.

5 They also refer here to certain proposed
6 rules. These rules have not been enacted yet. I
7 don't believe that we discuss those specifically, and
8 I don't believe the Staff does either in its draft
9 EIS.

10 MR. BIGGINS: I would just point out that
11 generally energy efficiency is discussed in the DEIS
12 on pages 8-14 to 8-15 and also 8-21 to 8-22 and then
13 in the ER at 8.2-4, 8.4-5 to 8.4-6.

14 JUDGE YOUNG: Your arguments -- let me
15 just say -- let me interject here. I think I've said
16 this before in other -- if I haven't, I will now -- in
17 other sessions that we've held, Mr. Eye.

18 One of the things about following the
19 rules, it sort of goes along with our responsibilities
20 under the rule of law, and we do that no matter who
21 the party is, so that if the NRC staff or an applicant
22 argued something and if it doesn't fit within the rule
23 or the law, then we're not going to favor them and not
24 favor you; that's how we're fair to all parties, is we
25 apply the law and the rules to all parties equally.

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1 And some of the things that I hear you
2 saying is, Well, you wouldn't consider our -- you,
3 emphasized, would not consider our reasons to be good
4 ones.

5 We are here to look to whether the rules
6 have been complied with, and so we need to hear, if
7 there are reasons, what they are, in order to
8 determine whether there's some good cause where you
9 haven't filed something on a timely basis as it's been
10 defined.

11 What's your argument here? Do you dispute
12 the statements to the effect that there appear to be
13 no significant differences? Maybe I'm
14 mischaracterizing that, but I think I understood that.
15 Is that correct?

16 MR. BIGGINS: Well, Your Honor, I think
17 the Staff's main point -- I believe that is a point of
18 the Staff, but the Staff's main point is that it is
19 incumbent upon the Intervenors, under 2.309(f)(2)
20 to -- for contentions based on the DEIS, point out the
21 differences between the DEIS and the ER and cite to
22 those documents.

23 And nowhere in contention 1 did they
24 really do that.

25 JUDGE YOUNG: But you're also saying that

1 there are no significant differences, I think. Right?

2 MR. BIGGINS: I don't know -- yes. But I
3 don't know that the Staff even needs to go that far.

4 JUDGE YOUNG: Right. No, I understand
5 that, but --

6 MR. BIGGINS: Okay.

7 JUDGE YOUNG: I'm just saying let's
8 assume, for argument's sake, that even if they haven't
9 raised it, I think the Applicant and the Staff are
10 saying these things are addressed both in the ER and
11 the DEIS, and there is nothing new.

12 MR. BIGGINS: My hesitation is that I
13 wouldn't want to overstate it and say that the DEIS is
14 identical to the ER, because it's not. And in
15 particular the Staff points out in the need-for-power
16 analysis that the DEIS takes into account more current
17 information.

18 And in need-for-power determination we
19 rely more heavily on the current ERCOT numbers versus
20 the numbers that the Applicant came up with in their
21 ER.

22 So in order to reach our need-for-power
23 conclusion, we've used more recent numbers, and there
24 is ultimately a difference in the numbers that we've
25 used.

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1 The fact that both the ER and the EIS
2 conclude that there is a need for power, obviously
3 there's no difference in that.

4 So I don't want to overstate the point
5 that there's no difference between the two of them.
6 So in other words, to us, from the Staff's point of
7 view, that would mean that there's no significant
8 difference.

9 JUDGE YOUNG: Okay. Let me see if I
10 understand this. Both the ER and the DEIS consider
11 the subject matter. The DEIS considers more recent
12 information.

13 The Intervenors -- Mr. Eye, you're saying
14 that the DEIS doesn't consider it sufficiently. Is
15 that what you're saying?

16 MR. EYE: Yes.

17 JUDGE YOUNG: By not fully accounting for
18 it.

19 MR. EYE: Yes.

20 JUDGE YOUNG: Okay. So what's your
21 argument on how significant the differences are, such
22 that this part of the contention is timely?

23 MR. EYE: Your Honor, if you take a look
24 at -- I believe it's Table 8.1 in the -- I'm sorry --
25 8-2 in the DEIS, what we have argued is that the

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1 parameter for energy efficiency programs that are
2 listed under the load forecast category, if you take
3 a look at -- and this is on page 8-16, Table 8-2,
4 under load forecast.

5 The fifth item down deals with energy
6 efficiency programs. As you can see, for each year
7 from 2010 to 2024, there's an entry of 242 megawatts,
8 and it is the contention of the Intervenors that,
9 given the trends toward energy efficiency, plus the
10 contention that we -- that 1J, which deals with
11 building codes, for example, that 242 megawatts is
12 understated; it should be more than 242 when --
13 because even though ERCOT takes into account the
14 savings from -- that are attributable to Texas House
15 Bill 3693, we contend that there are other savings
16 that will be realized that are not accounted for in
17 that 242 megawatts.

18 And as an example of that would be what we
19 discuss at subpart J, which deals with the building
20 codes, that savings from the building code changes are
21 not accounted for.

22 So we believe it unreasonable to attribute
23 only 242 megawatts of savings for each year from 2010
24 to 2024.

25 MR. BIGGINS: And, Your Honor, that is a

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1 great example of how the ER and the EIS do not
2 significantly differ, because neither of them take
3 into account that proposed legislation, Texas House
4 bill, nor do they specifically account for
5 improvements in building codes.

6 And to the extent that they do discuss
7 energy efficiency, there is a discussion of energy
8 efficiency, as I provided those page numbers both
9 today and in our pleading.

10 However, it is again incumbent upon the
11 Intervenors to show for each of these contentions that
12 there is a -- since these are contentions based on the
13 DEIS, that there is a significant difference between
14 the ER and the DEIS, upon which the contention is
15 based.

16 MR. EYE: Your Honor, the only thing I
17 would point out is that the building code in question
18 that -- and we're jumping -- I'm jumping ahead to J.
19 That was adopted, or at least notice of it went out in
20 May of this year, and it was something that was fairly
21 well known that was going to be adopted, and --

22 JUDGE YOUNG: Okay.

23 MR. EYE: And in the course of this case,
24 I figured that when the DEIS came out, that there
25 would be some recognition of that adoption of the

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1 building code, because it's -- the whole point of that
2 building code was to save energy. Or I don't want to
3 say the whole point; one of the main points of the
4 adoption of the building code was to save energy.

5 And it wasn't addressed in the ER because
6 the ER was like two years or more before the building
7 code was adopted, and the DEIS was published after the
8 code was adopted but not -- but the DEIS didn't
9 reference the new building code or the savings that
10 would be expected to be derived from it.

11 JUDGE YOUNG: The Texas bill you referred
12 to, was that related to the building codes?

13 MR. EYE: It's the energy efficiency rule,
14 and I think that it has some reference to more
15 efficient buildings, but the actual code itself, which
16 we project would have more savings than what it is
17 captured in Senate Bill -- or, I'm sorry -- House Bill
18 3693.

19 So the building code changes are on top of
20 what House Bill 3693 would project as savings.

21 JUDGE YOUNG: And the date of -- that
22 House Bill 3693 was enacted was --

23 MR. EYE: Was 2007.

24 MR. FRANTZ: Judge, may I also add here,
25 I think the Intervenors may be misinterpreting this

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1 line item for the 242 megawatts of savings from energy
2 efficiency.

3 That's due to basically one bill; that's
4 House Bill 3693. As indicated by the NRC staff on
5 page 8-14 of their draft EIS, other trends in demand-
6 side management and energy efficiency are captured
7 through the load projections, and so

8 JUDGE YOUNG: Through the what
9 projections?

10 MR. FRANTZ: Load projections.

11 JUDGE YOUNG: Load projections.

12 MR. FRANTZ: And so we shouldn't try to
13 assume that that 242 accounts for all demand-side
14 management, all energy efficiency. It's really only
15 due to that one bill.

16 MR. EYE: Which is what we've argued, Your
17 Honor. And yet in the table itself, which is what we
18 have to go on as far as what -- the energy efficiency
19 savings that they project, it's 242, notwithstanding
20 the unquantified reference on page 8-14 of other
21 aspects of efficiency that might also result in
22 savings.

23 It's the table -- the quantified amount in
24 the table that we were using as a point of departure
25 for contention.

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1 JUDGE YOUNG: So as I understand it,
2 you're not arguing that the DEIS is significantly
3 different; you're arguing that when the new building
4 codes went into effect in May 2010, you expected that
5 the DEIS that would change more -- would have changes
6 that would take those into account --

7 MR. EYE: That's correct.

8 JUDGE YOUNG: -- more than they do, and
9 that's your reason for not raising it earlier.

10 MR. EYE: Yes.

11 JUDGE YOUNG: Okay. 1I?

12 MR. FRANTZ: 1I is a statement that we've
13 not accounted for and the Staff's not accounted for,
14 a proposed change in a rule that would require more
15 non-wind renewables to be -- account for in the
16 renewable portfolio in the state.

17 Again, that's not mentioned directly by
18 our environmental review or by the Staff's draft
19 Environmental Impact Statement. It's only a proposed
20 rule; it's not been enacted yet.

21 I might also add that even though the mix
22 between wind and other non-renewables is affected, the
23 total portfolio amount is not affected, and so it
24 would not affect the overall resources that are
25 available.

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1 MR. BIGGINS: Thank you, Judge. Yes, the
2 future generation profile is discussed in the DEIS on
3 page 8-18 and in the ER on pages 8.3-2 to 8.3-3 and
4 also 8.3-5.

5 MR. EYE: Your Honor, this is a timing
6 issue about something that we believe will happen in
7 the future, so I think it would be better served as a
8 future contention rather than one that you would take
9 into your consideration now.

10 However, on the other hand, I think that
11 this is indicative of essentially what we've argued
12 throughout here, and that is that the 242 megawatts,
13 or rather the table, 8-2, is in flux, both because
14 there are efficiencies that are being adopted that
15 lower demand and there -- for example, the proposed
16 rule that would be in effect, at least under the
17 current plan by 2015, would add 500 megawatts of
18 capacity that's not accounted for in the table.

19 JUDGE YOUNG: So you disagree with what
20 Mr. Frantz said about the total portfolio not being
21 any different?

22 Is that what I understood you to say?

23 MR. FRANTZ: Yes. The total amount from
24 wind and other non-renewables has remained the same,
25 even though there's now a mandate that you have some

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1 non-wind portion as part of that mix.

2 MR. EYE: I don't agree that the totals
3 would remain the same, because if you add, for
4 example, 500 megawatts of non-wind renewables, it
5 changes the totals in Table 8-2, because that 500
6 megawatts is not accounted for in that table.

7 JUDGE YOUNG: Where in the Power report do
8 you address this? I know on page 6 -- you cite page
9 6, but -- let's see. (Perusing document.)

10 Anything other than paragraph 9?

11 MR. EYE: It's subsection 9 on that page.

12 JUDGE YOUNG: Right. What's the -- just
13 to throw this in at this point, what's the support for
14 this providing an additional 500 megawatts instead of
15 changing the proportions in the mix, is what I think
16 I understand the Applicant to be saying.

17 MR. EYE: From our view, Your Honor, these
18 are 500 megawatts that would be new capacity that
19 would be added into the -- well, for example, in the
20 other -- in the last category on page 8-17, the other
21 potential resources, it could legitimately -- that 500
22 megawatts could legitimately be added there to
23 increase the total amount of capacity that would be
24 listed.

25 JUDGE YOUNG: And there's a reference to

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1 the date the hearing was held. Is there any reference
2 anywhere to the actual --

3 MR. EYE: Start date?

4 JUDGE YOUNG: No, not start date. The
5 mandate, the new PUC standard -- I mean, did you cite
6 or have you provided a copy of what that says itself?

7 MR. EYE: I'm sorry, Your Honor. The
8 comments regarding that proposed rule? Is that what
9 you're referring to?

10 JUDGE YOUNG: Paragraph 9 on page 6.

11 MR. EYE: Right.

12 JUDGE YOUNG: You refer to what the PUC is
13 considering.

14 MR. EYE: Correct.

15 JUDGE YOUNG: You refer to a project
16 number.

17 MR. EYE: Yes.

18 JUDGE YOUNG: You cite, in footnote 12,
19 when the hearing on the rule was held, final comments;
20 rule would apply starting in 2011 at 100 megawatts and
21 ramp up to 500 megawatts by 2015.

22 But looking at this, I wouldn't have any
23 idea where to do this -- where to find this, other
24 than going out and investigating -- looking -- trying
25 to find a website for -- I guess for the Texas PUC and

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1 searching through all their potential rules and seeing
2 if I could track down what this actually says.

3 Do you provide a way that one could find
4 out what it actually says?

5 MR. EYE: We can.

6 JUDGE YOUNG: Did you?

7 MR. EYE: Not in here. We did not, other
8 than just --

9 JUDGE YOUNG: Is there any reason why not?
10 I mean, aren't those things generally -- don't they
11 generally have a way to cite them?

12 MR. EYE: Yes, there is generally a way to
13 cite those.

14 JUDGE YOUNG: Isn't that standard legal
15 practice to provide citations for things like that?

16 MR. EYE: Well, this -- yes, it is.

17 JUDGE YOUNG: So without having that,
18 there's really no way for us to tell, rather than just
19 deciding whether we want to believe Mr. Frantz or you
20 or Mr. Power.

21 MR. EYE: Well, you -- there ~~is~~ the PUC
22 website that you can check the project number to --

23 JUDGE YOUNG: If we were to look it up on
24 our own --

25 MR. EYE: That's true.

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1 JUDGE YOUNG: -- and try to find it.

2 MR. EYE: That's correct.

3 JUDGE YOUNG: And search through it and
4 try to find the exact right page of it, if we could.

5 Okay. 1J.

6 MR. FRANTZ: 1J alleges that we've not
7 accounted for new building codes, and there are two
8 references here. One is to a 2007 report by the
9 American Council for Energy Efficiency Economy.
10 Obviously that report is three years old now, and
11 could have been -- that issue could have been raised
12 with respect to our environmental review.

13 They also reference an IECC 2009 rule, and
14 I don't believe that either our environmental review
15 or the NRC staff's draft Environmental Impact
16 Statement accounts for that -- or it doesn't mention
17 it. It may account for it, but it does not mention
18 it.

19 MR. BIGGINS: Yes, Judge. Energy
20 efficiency and demand-side management are generally
21 discussed in the DEIS pages 8-14 to 8-15 and also 8-21
22 to 8-22 and in the ER on pages 8.2-4 and 8.4-5 to 8.4-
23 6.

24 But I would also point out that neither of
25 those two specific reports mentioned by the

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1 Intervenor are addressed themselves in either the ER
2 or the EIS.

3 JUDGE YOUNG: So you're saying there are
4 no significant differences between the two.

5 MR. BIGGINS: There's certainly no
6 significant difference between the two with regard to
7 the fact that neither of them talk about those two
8 reports.

9 JUDGE YOUNG: Mr. Eye.

10 MR. EYE: Well, we talked about this just
11 a moment ago, Your Honor.

12 JUDGE YOUNG: Right.

13 MR. EYE: And I don't want to be
14 repetitious, other than to --

15 JUDGE YOUNG: This is about the
16 possible -- for the new building codes that now have
17 a reference of May 2010, which you didn't find out
18 about until more recently.

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

20 JUDGE YOUNG: 1K.

21 MR. EYE: Your Honor, may I put one other
22 thing out, however.

23 JUDGE YOUNG: Oh, on J? Okay.

24 MR. EYE: And it's on J. Neither the
25 Staff nor the Applicant account for this in their

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1 quantifications on Table 8-2, and the reports that try
2 to project how much savings would occur, as Mr. Frantz
3 pointed out, have been around since, in one case, 2007
4 and, in another case, 2009.

5 But until they were actually adopted, of
6 course, and became essentially the rule that builders
7 had to follow in Texas, it wasn't clear that that
8 would actually happen, that those savings would
9 actually be realized.

10 Once those -- that code was adopted, it
11 seems reasonable to go back and look at the savings
12 that are projected through the new building codes and
13 take those into account.

14 It's not that anybody disputes the fact
15 that these building codes are now in effect, but that
16 there's no accounting for it in this adjudication,
17 other than what the Intervenors have advanced.

18 To the extent that there are significant
19 savings that would be realized, it becomes a part of
20 the calculus of lowering demand and increasing
21 generating capacity that we believe is woven
22 throughout this contention and its various subparts.

23 JUDGE YOUNG: And on the timeliness
24 requirements of the rule, which we are required to
25 follow, I think all I'm hearing is that you didn't

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1 hear about the May 2010 new building codes until
2 recently.

3 MR. EYE: Until later, and as I understand
4 it, the effective date of it is -- was 1 September of
5 2010, while the announcement of it was earlier.

6 MR. BIGGINS: Your Honor, I don't believe
7 that Intervenors' argument today is clearly captured
8 in their contention the way that they wrote the
9 contention.

10 However, what I am hearing is that because
11 Table 8-2 doesn't specifically contain a line item for
12 these building codes or the other things that they
13 point out in their contention, there is somehow some
14 insufficiency in the information in the EIS.

15 However, the Staff does point out that on
16 page 8-14 that other trends in energy efficiency
17 increases are captured through the monthly load
18 forecasting model.

19 And I would contend to the Board that the
20 Staff's general argument presented in our pleading
21 that the Staff is able, under the NRC case law, to
22 rely heavily on ERCOT for the need-for-power analysis.
23 This is ultimately a challenge to how ERCOT accounts
24 for energy efficiency in its need-for-power
25 calculations.

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1 And ultimately what the contention boils
2 down to, then, is a challenge to the Staff's ability
3 to rely on the ERCOT reports and the ERCOT analysis
4 for need for power.

5 MR. EYE: In that regard, I think that
6 that's a fair point to raise, and so what -- I don't
7 necessarily agree with it, but it's a fair point to
8 raise.

9 The point is that they go back to text and
10 they say, Oh, but increases in efficiency, they're
11 accounted for in the monthly forecast. But in their
12 table, the 242 remains static for 14 years.

13 It doesn't look like to me that the text
14 on page 8-14 matches the quantifications in their
15 Table 8-2, because it really seems that there's not
16 going to be any more efficiency in 2024 than there is
17 in 2010.

18 And that doesn't -- I mean -- so even if
19 you give their argument full sway here that somehow
20 these additional efficiencies are accounted for, as
21 they mention in their text, there's no accounting for
22 it in their table.

23 JUDGE YOUNG: If you considered this to be
24 this important and you actually did read our
25 scheduling order and the provision on timeliness,

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1 because you cited part of it relating to 10 CFR
2 2.309(f)(2)(iii), then if it was that important to
3 you, I guess I'm having a hard time understanding why
4 you wouldn't have complied with the requirements --
5 the specific requirements that we did set out in our
6 scheduling order of October 28, 2009, in which we
7 said -- we specifically said that the motion should
8 cover -- if you're not certain whether something's
9 timely or untimely or would fall under 2.309(f)(2) or
10 2.309(c), the motion should cover the three criteria
11 of 10 CFR 2.309(f)(2) and the eight criteria of 10 CFR
12 2.309(c), as well as the criteria of 10 CFR
13 2.309(f)(1).

14 MR. EYE: Perhaps this would be answered
15 by the fact that these building codes went into effect
16 1 September of this year.

17 JUDGE YOUNG: What would be answered by
18 that?

19 MR. EYE: The timeliness.

20 JUDGE YOUNG: The fact that you did not
21 address any of these criteria is excused by the fact
22 that it goes into effect in September of this year?

23 MR. EYE: It would have been timely -- the
24 contention would have been timely on the basis of --

25 JUDGE YOUNG: Did you ever make a

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1 reference to that?

2 MR. EYE: No, we did not, and that should
3 have been done.

4 JUDGE YOUNG: Did you make any references
5 to any of these things?

6 MR. EYE: Well, we made references to
7 things about the building code, yes.

8 JUDGE YOUNG: No, I'm talking about these
9 criteria --

10 MR. EYE: Oh.

11 JUDGE YOUNG: -- that we're required to
12 follow.

13 MR. EYE: But if the building code goes
14 into effect in September 1 of this year --

15 JUDGE YOUNG: Which -- did you make any
16 reference to that?

17 MR. EYE: No, I did not, but I --

18 JUDGE YOUNG: Did you make -- how would we
19 know this?

20 MR. EYE: By an oral motion I'm making
21 right now to amend our contention to note that
22 September 1 --

23 JUDGE YOUNG: And what about the
24 Commission's rule that doesn't permit amendment except
25 under certain circumstances?

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1 MR. EYE: Well, I'm -- I am making an oral
2 motion at this time to amend that part of our
3 contention to add the effective date of that building
4 code as being September 1, 2010.

5 JUDGE YOUNG: Based on?

6 MR. EYE: Based on the 2.309 requirement
7 that we specify timeliness.

8 JUDGE YOUNG: I'm sorry. What?

9 MR. EYE: Based on the requirement 2.309
10 that we specify why something is timely.

11 JUDGE YOUNG: And it's timely, again,
12 because?

13 MR. EYE: It went into effect September 1
14 of 2010, "it" being the building code.

15 JUDGE YOUNG: And you filed, what, on
16 October 1, 2010?

17 MR. EYE: I think it was October 4, but
18 I --

19 JUDGE YOUNG: It went into effect at that
20 point, so your argument that the effective date should
21 be considered as good cause --

22 MR. EYE: That's correct.

23 JUDGE YOUNG: How did you know -- did you
24 not know about it before its effective date?

25 MR. EYE: I did not.

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1 JUDGE YOUNG: How did you find out about
2 it?

3 MR. EYE: I was told by our witness.

4 JUDGE YOUNG: Your witness being --

5 MR. EYE: Mr. Power.

6 JUDGE YOUNG: When did he find out about
7 it?

8 MR. EYE: I'm not sure when he found out
9 about it.

10 MR. BIGGINS: Judge, I would like to
11 respond to that as well.

12 JUDGE YOUNG: Sure. Of course. I'm just
13 trying to find --

14 MR. BIGGINS: On page --

15 JUDGE YOUNG: Just hold on.

16 I'm just trying to understand. You don't
17 know when he found out about it.

18 MR. EYE: I do not, Your Honor.

19 JUDGE YOUNG: Do you want to find out?

20 MR. EYE: I can ask.

21 (Pause.)

22 MR. EYE: Apparently there was a
23 publication of notice sometime in the month of August,
24 but -- apparently there's been some indication that
25 this was going to go into effect since earlier in

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1 2010, sometime in the first part of 2010, but there
2 wasn't an indication -- specific indication as to when
3 it would actually take effect until August of this
4 year, which was when the September 1 date was
5 announced.

6 MR. BIGGINS: Your Honor, I'm confused
7 about which building code we're discussing. If we're
8 still on basis J and we're referring to the -- or if
9 the Intervenors are referring to the 2009 IECC code in
10 Texas, in our pleading, on page 23, I pointed out that
11 the 2009 IECC code will not apply in Texas until April
12 2011; however, that's based on final rule 34 Texas
13 Administrative Code Section 19.53, which was published
14 in the Texas Register at 35 Texas Register 4727,
15 specifically page 4729, on June 4, 2010.

16 So I don't know where they're getting
17 their September date if that's the code that they're
18 referring to.

19 JUDGE YOUNG: Anything else on 1J?

20 (No response.)

21 JUDGE YOUNG: K.

22 MR. FRANTZ: Subpart K alleges that we had
23 not accounted for energy efficiency identified in a
24 2010 report on energy efficiency in the South. As
25 we've discussed in the past, both the ER and the DEIS

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1 do discuss energy efficiency in general; neither one
2 discussed this particular report.

3 I might add that this particular report is
4 not based upon any existing policies in Texas or even
5 any proposed policies in Texas. These are just
6 hypothetical policies that could be enacted, and we
7 don't believe it even pertains to need for power; it's
8 more the nature of an alternative than a need-for-
9 power analysis.

10 JUDGE YOUNG: And this is the reference to
11 the April 13, 2010, Georgia Institute of Technology
12 and Duke University State Profiles of Energy
13 Efficiency Opportunities in the South? Is that the
14 right reference?

15 MR. FRANTZ: I believe it is, yes.

16 MR. BIGGINS: It is.

17 JUDGE YOUNG: And that's the complete
18 citation? Staff?

19 MR. BIGGINS: Your Honor, I would agree
20 that neither the ER nor the DEIS specifically refer to
21 the energy efficiency in the South report, and I can
22 give the Board the same citations as the last basis to
23 the general discussion of energy efficiency in the EIS
24 and the ER; it's the same citations. I don't know if
25 you want me to repeat them again.

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1 JUDGE YOUNG: Why don't you repeat them.

2 MR. BIGGINS: Certainly. For energy
3 efficiency, the DEIS discusses that on pages 8-14 to
4 8-15 and also 8-21 to 8-22 and in the ER it's 8.2-4
5 and 8.4-5 to 8.4-6.

6 JUDGE YOUNG: Same ones you've given for
7 several others.

8 MR. BIGGINS: Correct.

9 JUDGE YOUNG: Okay.

10 All right, Mr. Eye.

11 MR. EYE: We raised it when we found out
12 about it, Your Honor. That is our timing response.

13 JUDGE YOUNG: And when did you find out
14 about it?

15 MR. EYE: Shortly before filing this --
16 the DEIS contentions. Exact date, I don't recall when
17 I was actually informed of the study, but it was in
18 the process of going through the DEIS and working on
19 the contentions.

20 JUDGE YOUNG: So it's not really based on
21 the DEIS; it's based on this report.

22 MR. EYE: Well, it's also a recognition
23 the DEIS, in our view, understates the role of
24 efficiency in terms of curtailing demand. Yes.

25 JUDGE YOUNG: But it's not based on any

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1 significant difference between the ER and the DEIS --

2 MR. EYE: I would agree.

3 JUDGE YOUNG: -- under (f)(2) --
4 2.309(f)(2). It's based on the assertedly new
5 information that you're saying was not previously
6 available.

7 MR. EYE: Yes, Your Honor.

8 JUDGE YOUNG: Well, you're saying --

9 MR. EYE: I wasn't aware of it.

10 JUDGE YOUNG: -- you were not aware of it.

11 MR. EYE: Right. Availability -- of
12 course, if it was published in April of this year, it
13 was available then, but I was not aware of it until
14 shortly before we filed the contentions in October of
15 this year.

16 JUDGE YOUNG: And again you have not, as
17 we stated in our scheduling order, addressed any of
18 the late-filing criteria.

19 MR. EYE: I pointed out in our response,
20 on page 13, where we went through those -- we went
21 through 2.309.

22 JUDGE YOUNG: Page what?

23 MR. EYE: 13.

24 JUDGE YOUNG: And you're aware of the case
25 law that says that good cause is the most important

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1 criterion?

2 MR. EYE: I am.

3 JUDGE YOUNG: And yet we don't hear any
4 cause for not being aware of it before that.

5 MR. EYE: That's correct.

6 JUDGE YOUNG: 1L.

7 MR. FRANTZ: 1L basically contends that
8 our environmental review and the draft -- really the
9 draft EIS does not account for additional government
10 funds that may become available for energy efficiency.

11 And, again, we've already discussed where
12 we have an evaluation of energy efficiency --

13 JUDGE YOUNG: It's the same citation.

14 MR. FRANTZ: Yes, same citations. I might
15 add that most of the money that they're referring to
16 is not existing money; it's instead just nothing more
17 than a proposed piece of legislation in HR 5019.

18 MR. BIGGINS: The staff position is that
19 neither the ER nor the EIS specifically account for
20 the government funding cited by the Intervenors.

21 JUDGE YOUNG: This same citations as
22 before.

23 And the reference to this in the Power
24 report is paragraph 12 on page I guess 7?

25 MR. EYE: That's correct.

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1 JUDGE YOUNG: And you say over 6 billion
2 in energy efficient retrofit incentives. Is there any
3 reference to how much of that would go to Texas?

4 MR. EYE: Not in here, Your Honor,
5 although -- and in the report it's footnoted; 218
6 million I believe is the amount that's the share
7 allocated for Texas.

8 JUDGE YOUNG: What footnote?

9 MR. EYE: It would be -- (Perusing
10 document.) I need to give you a corrected footnote on
11 that, Your Honor.

12 JUDGE YOUNG: Well, I don't see any
13 footnote.

14 MR. EYE: I -- well, there is a -- there
15 should be one, and that's the correction that needs to
16 be made to the designated 12 on that additional
17 federal incentives.

18 JUDGE YOUNG: And let's assume for
19 argument's sake we were to allow you to give us the
20 footnote. Do you have it now?

21 MR. EYE: Yes. I --

22 (Pause.)

23 MR. EYE: State Energy and Conservation
24 Office, where they're discussing stimulus funds, and
25 that is referenced on 8/30/2010.

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1 JUDGE YOUNG: Referenced?

2 MR. EYE: That's the date of the
3 reference.

4 JUDGE YOUNG: Anything else on 1L?

5 (No response.)

6 JUDGE YOUNG: 1M.

7 MR. FRANTZ: 1M basically contends that
8 the need-for-power analysis should have accounted for
9 more compressed-air energy storage. Obviously we've
10 been litigating this in a different context for --
11 over the last year.

12 It's not timely raised here. Both are
13 in -- the environmental review at section 9.2 and the
14 Staff's DEIS at 9.2 do discuss compressed-air energy
15 storage.

16 Let me point out that there is none
17 existing in Texas. There are some proposed projects
18 available, but they don't have interconnection
19 agreements right now with ERCOT in Texas and they're
20 therefore not accounted for in the ERCOT need-for-
21 power analysis for the reserve margin and certainly
22 are not accounted for in either our environmental
23 review or the Staff's DEIS, because they are just too
24 speculative to be accounted by ERCOT.

25 And since both of us follow the ERCOT

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1 methodology, neither one account for compressed-air
2 energy storage.

3 MR. BIGGINS: The Staff agrees that in
4 chapter 8 of the ER, in chapter 8 of the DEIS, neither
5 the ER nor the DEIS specifically account for CAES.

6 JUDGE YOUNG: Accounts for the --

7 MR. BIGGINS: Compressed-air energy
8 storage.

9 JUDGE YOUNG: Okay.

10 MR. EYE: Your Honor, I would need a
11 moment to locate it, but I believe in the DEIS
12 there's -- the Staff says that there would be CAES as
13 a -- could be a viable baseload generating source.

14 MR. FRANTZ: You're right, Mr. Eye. I
15 mentioned that in section 9.2 of both the
16 environmental review and the draft EIS, but that's the
17 alternative section, not the need-for-power section.

18 MR. EYE: Well, irrespective of where it
19 may be located, the importance of it is that --
20 recognition by the Staff that CAES is a viable
21 baseload source. Moreover --

22 JUDGE YOUNG: Hold on. You're asking a
23 lot of really leaning over way backwards in your favor
24 to even think about these being timely, but now maybe
25 I misheard, but you're arguing that one part of what

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1 the Staff says should be taken by us as an argument
2 against the Staff not raising it in another part of
3 what the Staff produced?

4 MR. EYE: No.

5 JUDGE YOUNG: Well, the part that we're
6 talking about now says the DEIS does not fully account
7 for CAES capacity reasonably available in Texas and
8 ERCOT.

9 And now didn't you just say that the Staff
10 did suggest that it should be considered?

11 MR. EYE: They said that it would be --
12 that CAES represents a potential viable baseload
13 source, but there's no quantification of it or
14 recognition of it in their summaries, so it's seen as
15 a -- as something that's viable or feasible, but
16 there's no attempt to account for it in any
17 quantitative way by -- in the DEIS.

18 And also I'd point out that ERCOT has also
19 said that there's no technical reason why CAES can't
20 be a part of their generating mix.

21 JUDGE YOUNG: We've been sort of allowing
22 for getting into the substance from time to time here,
23 but what about the timeliness issue and what about
24 whether it's significantly different in the DEIS from
25 what's in the ER?

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1 MR. EYE: Well, in the ER there's really
2 no recognition of CAES's being something that they're
3 going to -- that would be adopted, so that would be a
4 difference.

5 JUDGE YOUNG: And in the DEIS?

6 MR. EYE: There is a recognition that it's
7 something that could be adopted, although they stop at
8 that point and don't actually account for it in any
9 quantitative way.

10 JUDGE YOUNG: And so you're saying that
11 the fact that the Staff does account for it somewhat
12 is legitimate -- is a significant enough change that
13 it justifies your raising the issue that they haven't
14 gone far enough at this point.

15 MR. EYE: Yes.

16 JUDGE ARNOLD: You'll have to clarify
17 where in the DEIS it says that CAES is a source of
18 power.

19 MR. EYE: We'll find it, Your Honor.

20 MR. BIGGINS: Your Honor, maybe I can add
21 some clarification to that. The Staff does concede
22 that CAES is discussed in the alternatives chapter,
23 Chapter 9 of the EIS, and I can give you a citation:
24 page 9-21.

25 However, at no point does the Staff

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1 consider it in the need-for-power analysis, because it
2 not by itself a source of generation specifically, and
3 also because the Staff uses a very specific
4 methodology for determining what is and is not
5 considered as far as future generation goes, and that
6 is discussed in several places in the EIS, and I can
7 give you those citations for future generation.

8 Planned generation capacity is discussed
9 in the EIS on pages 8-15 to 8-18, and also in the ER
10 on pages 8.3-1 to 8.3-3.

11 And, again, neither the EIS nor the ER
12 account for CAES in the need-for-power analysis.

13 JUDGE YOUNG: Anything else on 1M?

14 (No response.)

15 JUDGE YOUNG: All right. Let's finish up
16 1 with 1N.

17 MR. FRANTZ: 1N states or alleges that the
18 DEIS does not account for a high wind case that
19 appears in the ERCOT transmission study. That study
20 is dated 2008.

21 Obviously the Intervenors could have
22 raised this issue long before now. With respect to
23 that study, neither chapter 8 of the environmental
24 review nor the DEIS discussed this study. I believe
25 it is mentioned, though, in chapter 9 in the draft

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1 EIS.

2 JUDGE ARNOLD: The nature of that study,
3 is it a planning document or just looking at the
4 hypothetical situations?

5 MR. FRANTZ: It looks at a number of
6 different hypothetical situations just to test the
7 reliability of the electrical grid and to see whether
8 or not there might be needs to upgrade the grid or add
9 to the capacity of the grid. It's not a need-for-
10 power study.

11 JUDGE YOUNG: Staff?

12 MR. BIGGINS: Yes. The Staff essentially
13 agrees with that, because the study itself points out
14 that it's a study regarding transmission capacity.

15 However, again, neither the EIS nor the ER
16 discussed the high-wind scenario, but planned
17 generation capacity is discussed in the EIS on pages
18 8-15 to 8-18 and in the ER 8.3-1 to 8.3-3.

19 JUDGE YOUNG: 8-15 to 8-18 in the DEIS and
20 8.3-1 to -3 in the ER.

21 MR. BIGGINS: Correct.

22 JUDGE YOUNG: Thank you.

23 Mr. Eye.

24 MR. EYE: Your Honor, on page 9-29 of the
25 DEIS, beginning at line 15, there is the discussion

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1 that we reference. The -- in the Applicant's response
2 they point out that, number one, this is a
3 generation -- or a transmission study that's -- that
4 is the underpinning for this particular reference;
5 however, what we found significant was that in terms
6 of ERCOT's projections of what generating capacity
7 would be accounted for, it did not include Units 3 and
8 4 of Comanche Peak.

9 As I recall the ER, there's no reference
10 to that in the environmental review. That would have
11 been the significantly new different -- or
12 significantly different information that was -- that
13 we cited.

14 JUDGE YOUNG: Do you want to respond to
15 that, Mr. Biggins?

16 MR. BIGGINS: Certainly, Judge. As our
17 pleading points out, the Staff specifically considers
18 future generation as an interconnection agreement, and
19 that is discussed in chapter 8.

20 The discussion in chapter 9 was used in
21 the context of trying to come up with an appropriate
22 number for the installed wind capacity and the
23 potential for wind capacity in Texas so that the Staff
24 could use a reliable number in its alternatives
25 analysis.

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1 However, the ERCOT report itself, first in
2 the high-wind generation case, cites to the fact that
3 there would be the South Texas Project, but it doesn't
4 cite specifically why it used South Texas rather than
5 Comanche Peak.

6 In other words, if you look at that one
7 paragraph that the Intervenors cite in ERCOT long-term
8 system assessment -- or at least the one that we found
9 on the web --

10 JUDGE YOUNG: And that's the one that's
11 cited in footnote 18?

12 MR. BIGGINS: I believe it is. They
13 didn't provide a specific citation to it to find it,
14 but the -- and I have no reason to believe that the
15 one I found is not it.

16 JUDGE YOUNG: Wait. Hold on. There's a
17 website for the -- an ERCOT report in footnote 18? Is
18 that --

19 MR. BIGGINS: Okay. Yes. That is it.
20 And so in that high-wind generation case, under
21 scenario development, it talks about how overall they
22 added new wind capacity, to bring the total up to
23 24,622 megawatts to achieve the target reserve margin
24 for ERCOT. Two nuclear units, totaling 2,724
25 megawatts at the South Texas Project were added, as

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1 were 3,295 megawatts of combustion gas turbines at
2 buses across the system.

3 And I believe the point that ERCOT is
4 making there is that in addition to the high-wind --
5 the additional wind capacity in the high-wind
6 scenario, there would have to be other generation
7 sources to maintain the reserve margin.

8 And so it appears from a simple reading of
9 it that they just picked some. It doesn't mean that
10 they don't think Comanche Peak is needed. They make
11 no assessment as to a need for Comanche Peak.

12 And if you were to consider the report as
13 a whole, the previous scenario, scenario D, nuclear
14 generation, talks about Comanche Peak 3, Comanche Peak
15 4, South Texas 3, South Texas Project 4, Victoria City
16 Nuclear 1 and Victoria City Nuclear 2.

17 So I don't think -- I think the context
18 for this quotation that the Intervenors are using is
19 completely missing in the way that they used the
20 statement.

21 And so I don't believe the ERCOT long-term
22 system assessment report, on its face, stands for the
23 premise that ERCOT somehow found no need for the
24 Comanche Peak nuclear power plant.

25 JUDGE YOUNG: Mr. Eye.

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1 MR. EYE: Well, from what Staff counsel
2 has argued -- I mean, he's really reading into what
3 the ERCOT report said and didn't say, and as far as
4 scenario -- the scenario that had both South Texas and
5 Comanche Peak in it, I don't believe that scenario was
6 adopted by ERCOT. I think they adopted a scenario
7 that didn't include Comanche Peak.

8 Now, why they did that is not exactly
9 clear. All we know is that they did it. And it was
10 the Staff's decision to cite that in the DEIS.

11 And to the extent that the reserve margin
12 can be maintained without including Units 3 and 4, as
13 reflected in that paragraph on page 9-29, it's simply
14 support for our assertion that the power from Units 3
15 and 4 of Comanche Peak would not be needed in order to
16 maintain reserve margins under that particular
17 scenario that is described in the DEIS, and that's why
18 we made the contention that we did.

19 JUDGE YOUNG: Anything further on
20 contention 1 part N or basis N?

21 (No response.)

22 JUDGE YOUNG: All right. Let's see if we
23 can go through the rest of these a little more
24 expeditiously.

25 Contention 2?

1 MR. FRANTZ: On contention 2 there's an
2 allegation that the Staff has inappropriately
3 accounted for the CO2 emissions from compressed-air
4 energy storage. Here the Intervenors don't cite to
5 anything besides the draft EIS itself. There is no
6 references to any other supporting information. This
7 contention has no support other than the statements
8 actually in the contention itself.

9 I might also add I believe they just
10 miscited the draft EIS, and the draft EIS does not
11 state that there will be any CO2 emissions from
12 compressed air.

13 JUDGE YOUNG: And the differences?

14 MR. FRANTZ: I don't think there's any
15 differences at all. We deal with this in detail in
16 our motion for summary disposition also, where we show
17 that the existing compressed-air energy storage
18 facilities that are currently operating in the world
19 both use natural gas as a heat source, and so they
20 both have CO2 emissions.

21 There are some possibilities that you
22 could actually have compressed air without natural gas
23 as the heat source; you could use another heat source.
24 There's no dispute at all on this. Frankly there's no
25 material issue here.

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1 MS. VRAHORETIS: Your Honor, for the
2 Staff, if I could just focus on responding to the
3 timeliness argument, particularly with respect to the
4 Intervenors' consolidated response, where they focus
5 the issue of DEIS contention 2 on CAES or compressed-
6 air energy storage as a baseload alternative to
7 natural gas.

8 There is no significant difference between
9 the way that issue was treated in the ER and how it
10 was treated in the DEIS, and to support that, I would
11 reference the update tracking report that the
12 Applicant submitted on December 8, 2009.

13 It's a letter from Rafael Flores,
14 updating --

15 JUDGE YOUNG: Do you cite that in your --

16 MS. VRAHORETIS: Yes -- no. We didn't,
17 because this is the timeliness argument that you asked
18 us to address over the lunch break.

19 JUDGE YOUNG: Okay.

20 MS. VRAHORETIS: Mr. Flores' letter --

21 JUDGE YOUNG: Yes. Start over with that
22 cite.

23 MS. VRAHORETIS: I apologize. It's the
24 Applicant update tracking report, dated December 8,
25 2009. It's a letter from Rafael Flores, updating

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1 Revision 1 of the Applicant's ER.

2 It is available at ADAMS Accession Number
3 ML093440179 on page 26 of that letter CAES is
4 addressed under Energy Storage Options at section
5 9.2.2.11.2, and CAES is addressed in detail at page 27
6 of that letter at section 9.2.2.11.2.2.

7 JUDGE YOUNG: The first one was
8 9.2.2.11.2, and then there was an extra 2 on the next
9 one?

10 MS. VRAHORETIS: Yes.

11 JUDGE YOUNG: Okay.

12 MS. VRAHORETIS: And in the DEIS NRC Staff
13 addressed wind with and without energy storage at
14 pages 9-20 through 9-25, and on page 9-21 of the DEIS,
15 the DEIS includes a specific description of
16 compressed-air energy storage, and I believe that the
17 Intervenors have misread this, but that argument goes

18 more to the admissibility of the contention and not
19 the timeliness.

20 And CAES was also addressed in the
21 combination of alternatives at page 9-28 of the DEIS,
22 and there is no significant difference between the
23 conclusions that the Applicant reached in its update
24 tracking report that's been available since December
25 of 2009 or the DEIS that was made available and public

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1 on August 6, 2010.

2 JUDGE YOUNG: Mr. Eye.

3 MR. EYE: What we focused on, Your Honor,
4 was that on Table 9-6 in the DEIS at page 9-33,
5 there's an entry for combination of alternatives that
6 specifies that the CO2 emissions would amount to 180
7 million metric tons.

8 We took issue with that, because it assumes that
9 natural gas would be a component of CAES, and under
10 the -- for example, the -- what Dr. Dean references
11 and also the ConocoPhillips-General Compression
12 technology would not use natural gas, and therefore
13 the 180,000 -- I'm sorry -- 180 million metric tons of
14 CO2 would be incorrect under that premise, that
15 natural gas would not be used in that particular
16 combination of alternatives, and so that -- we focused
17 on that particular table and the text that discussed
18 it as being incorrect.

19 JUDGE ARNOLD: Did you take a look at Note
20 D from that table? It says that 108 [sic] million
21 assumes that natural gas generation is the only
22 significant producers of carbon dioxide emissions.

23 MR. EYE: We did take into account of
24 that, but that we're saying is that they didn't take
25 into account the ConocoPhillips-General Compression

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1 proposal that doesn't use natural gas in their CAES,
2 so --

3 JUDGE ARNOLD: Well, I believe what this
4 is -- means -- tell me if I'm wrong. The natural gas
5 is used in two ways: One is direct natural gas
6 supplementation, and the other one is heating the CAES
7 to produce stored power.

8 And I thought this note meant that you
9 were only attributing the CO2 to the natural gas
10 direct generation and not CAES.

11 MS. VRAHORETIS: That's correct, Your
12 Honor.

13 JUDGE YOUNG: This is what you talk about
14 in your response to the contention -- I've got your
15 unnumbered pages -- but anyway, where you talk about
16 the Intervenors' misconstruing that particular table.

17 MS. VRAHORETIS: Yes, Your Honor.

18 Initially it appeared that DEIS contention 2 was based
19 on a misreading of the DEIS, and then in the
20 Intervenors' consolidated response they focused more
21 on the flaw in the DEIS being not considering CAES as
22 a complete replacement for natural gas.

23 And there has been no showing by the
24 Intervenors that CAES could produce the supplemental
25 baseload power that natural gas would provide in the

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1 combination of alternatives.

2 And the CO2 emissions in the table that
3 are attributed to the combination of alternatives
4 exclude any type of CO2 emissions that might come from
5 any portion of the combination other than the
6 supplemental natural gas.

7 And the way that that analysis is
8 structured, it accounts for increases in wind and
9 increases in solar and increases in the other
10 renewables reducing in some measure the use of natural
11 gas.

12 The CO2 emissions do not come from any
13 portion other than the natural gas.

14 MR. EYE: And I understand that much, but
15 what I'm suggesting is that they need another line to
16 Table 9.6 that says combination of alternatives, CAES
17 without natural gas, since we've got a CAES project
18 that's being advanced by ConocoPhillips and General
19 Compression that uses a technology -- CAES technology
20 that does not utilize natural gas.

21 So what we're contending is that Table 9.6
22 needs another entry to account for that permutation of
23 the CAES technology.

24 JUDGE YOUNG: Let's take a break right now
25 and come back, wrap up on this one, and then move on

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1 to the other ones and try to finish up by a reasonable
2 time today. Fifteen minutes.

3 (Whereupon, a brief recess was taken.)

4 JUDGE YOUNG: Okay. Anything further on
5 timeliness of contention 2?

6 MS. VRAHORETIS: Yes, Your Honor. If I
7 could just clarify the -- if the argument that the
8 Intervenors are raising now is that compressed-air
9 energy storage should have been considered as
10 another --

11 JUDGE YOUNG: Should have been?

12 MS. VRAHORETIS: Considered in the DEIS as
13 another alternate source of baseload generation, that
14 was addressed in the DEIS in the evaluation of wind
15 power generation, from pages 9-20 through 9-24 of the
16 DEIS.

17 And the conclusions that the Staff reached
18 in the DEIS are not significantly different from the
19 conclusions that the Applicant reached that wind
20 power, with or without energy storage in the form of
21 compressed-air energy storage or some other form of
22 storage is not a viable alternative to the two new
23 units.

24 So that would be an additional reason why
25 this argument is now not timely.

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1 JUDGE YOUNG: Anything else on that one?
2 Mr. Eye?

3 MR. EYE: Your Honor, the consideration of
4 the CAES in the DEIS was CAES that assumed that there
5 would still be gas used in the CAES process.

6 And we contend that there ought to have
7 been -- that there should have been an analysis of
8 CAES technology that does not rely upon gas, so that
9 would be -- we've argued that.

10 JUDGE YOUNG: That's something you're
11 raising now that was not in the original contention.
12 Right?

13 MR. EYE: No. I think it was -- it's a
14 part of the original contention we filed. And it's --
15 because -- and it goes back to that table 9-6. If you
16 assume CAES technology that doesn't use gas, then
17 you'd need another line on Table 9-6 to account for
18 accommodation of alternatives that doesn't rely upon
19 CAES that utilizes gas.

20 JUDGE ARNOLD: But wouldn't it have the
21 same CO2 emissions?

22 MR. EYE: No. ConocoPhillips-General
23 Compression technology does not rely upon natural gas
24 in its CAES technology.

25 JUDGE ARNOLD: But this 180 million does

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1 not use natural gas, or it doesn't account for any
2 carbon dioxide from the CAES.

3 MR. EYE: Well, the 180 million metric
4 tons is attributable to some emissions of natural gas
5 from the combination of alternatives. What we're
6 suggesting is that there is a combination of
7 alternatives that doesn't rely on natural gas, that
8 the CAES --

9 JUDGE ARNOLD: So you're suggesting a
10 combination of alternatives where there is no natural
11 gas at all supplied to it.

12 MR. EYE: That's correct.

13 JUDGE ARNOLD: And how would that not be
14 a new contention that could have been offered up on
15 the environmental review?

16 MR. EYE: We're offering it because,
17 number one, in this -- in the DEIS the Staff
18 recognizes that CAES is -- has the potential to
19 provide baseload, but they leave it at that point.
20 They don't say CAES that uses natural gas, CAES that
21 uses -- that doesn't use natural gas, and we're
22 suggesting that that additional permutation of the
23 CAES technology that does not rely upon natural gas
24 should also be considered in the context of the DEIS.

25 JUDGE ARNOLD: Okay. I asked you before,

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1 and you didn't answer. Where do they state in the
2 DEIS that CAES is available for baseload power?

3 MR. EYE: Mr. Biggins gave the reference,
4 and I may have written it down, or I could -- Mr.
5 Biggins, could you --

6 MS. VRAHORETIS: Your Honor, it's at DEIS
7 page 9-21, but it in no way states that CAES is
8 available as a baseload source of generation. CAES is
9 not available as a baseload source of generation.

10 JUDGE ARNOLD: I see on that page you say
11 CAES to store and distribute energy, and you consider
12 it available for that, but not generation.

13 MS. VRAHORETIS: And it improves the
14 availability of wind generation; wind is the
15 generation. CAES is the storage, not the generation.

16 JUDGE YOUNG: That's what I was going to
17 ask as well. How -- where do you get the air that's
18 in the storage?

19 MR. EYE: From either -- from some other
20 generating source. Wind or solar either one could run
21 the pumps that would compress the air.

22 JUDGE YOUNG: But you're talking CAES as
23 baseload. That implies that you're not talking about
24 anything else with it. Right?

25 MR. EYE: No, it implies that you'd have

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1 to have some mechanism to compress the air, and that
2 would come -- at least in terms of the General
3 Compression and ConocoPhillips proposal, they're going
4 to use wind to compress air.

5 But you could probably use any generating
6 source to compress air as far as that's concerned.
7 It's -- air compression isn't that exotic a
8 technology.

9 And I -- and Staff counsel makes a valid
10 point, and I believe that that point was also raised
11 by Dr. Dean, that CAES is a storage mechanism to
12 provide dispatchable power that would be generated by
13 wind or solar or some other means.

14 So I appreciate Staff counsel's
15 clarification on that point, and it's a valid point.

16 JUDGE ARNOLD: Now I'm to the point I
17 don't see how it differs from the contentions earlier
18 on combinations of wind and storage or solar and
19 storage to provide baseload.

20 JUDGE YOUNG: That's what I was just
21 looking back at myself, actually.

22 MR. EYE: Well, the difference is the
23 recognition by the Staff that there -- that CAES as
24 it's on page 9-21 does have means by which to make
25 wind a baseload capacity.

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1 JUDGE ARNOLD: Could you tell me where it
2 connects CAES to baseload power? I do not see that.

3 MR. EYE: Well, line 28, for example. It
4 says, To improve the availability of energy from wind
5 for the purpose of baseload supply, ERCOT considers
6 compressed-air energy storage to store and distribute
7 energy from wind.

8 JUDGE ARNOLD: That says to improve its
9 ability to approach a baseload supply.

10 MR. EYE: Right. And we reference another
11 ERCOT report that says ERCOT doesn't see any technical
12 reasons that would bar CAES from being implemented or
13 deployed.

14 JUDGE ARNOLD: I'm done.

15 JUDGE YOUNG: Anything else on 2?

16 (No response.)

17 JUDGE YOUNG: All right. Timeliness on 3.

18 MR. EYE: Your Honor, we would move to
19 withdraw 3 --

20 JUDGE YOUNG: Okay.

21 MR. EYE: -- if that's a motion that the
22 Panel would entertain.

23 JUDGE YOUNG: It's nice to have a little
24 light moment.

25 All right. So let's move to 4, then, on

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1 water temperature. How is this new?

2 MR. EYE: Your Honor --

3 JUDGE YOUNG: The Staff is pretty good
4 about giving us sections. Let's start with what
5 sections in the DEIS --

6 JUDGE YOUNG: Do you want to amend this in
7 any way?

8 MR. EYE: Thank you, Your Honor. Could I
9 just have leave to make a bit of an explanation and a
10 motion in that regard?

11 Your Honor, having gone back and
12 reconsidered the underlying information on contention
13 4, the triggering event for that was a water
14 temperature problem that occurred at the LaSalle
15 nuclear plant on August 12, 2010, that got us looking
16 at the water temperature issues related to Comanche
17 Peak.

18 Unfortunately, that reference to the
19 LaSalle water temperature problem didn't make it in to
20 the contention.

21 What we would like to do is ask for leave
22 to supplement that contention to bring to the Panel's
23 attention that triggering event of August 12, 2010,
24 where the LaSalle plant experienced water temperature
25 problems to the point where it had to be taken out of

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1 operation, and integrate that into the existing
2 contention and provide it to you on Monday.

3 And then -- yes, that would be our -- that
4 would be what we ask the Panel for leave to do.

5 JUDGE ARNOLD: And that is the major
6 change you want to make to make to it? -- just a
7 trigger to make it timely?

8 MR. EYE: Yes.

9 JUDGE ARNOLD: Okay.

10 MR. EYE: I mean, that's the -- that's
11 what -- yes.

12 JUDGE YOUNG: What argument do you want to
13 make in support of allowing you to amend at this
14 point?

15 MR. EYE: Your Honor, the triggering event
16 on August 12 was what got us looking at the whole
17 question of temperatures of water for operation and so
18 forth.

19 In the process of doing that, we looked at
20 the Comanche Peak's specific case without going back
21 and referencing the triggering event of August 12 at
22 the LaSalle plant, and essentially it just got lost in
23 the shuffle, I suppose, as much as anything, because
24 we moved on from the triggering event rather rapidly
25 onto the Comanche Peak aspect of the water temperature

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1 issue without going back and picking up the reference
2 to the LaSalle triggering event of August 12 of this
3 year.

4 If one assumes that the August 12
5 triggering event would be timely, then it would be
6 something that the Panel in its judgment could then
7 consider in the context of whether the similar -- or
8 the contention related to Comanche Peak about water
9 temperatures would have some viability.

10 Additionally, as the Applicant points out,
11 we referenced Squaw Creek Reservoir when we should
12 have been talking about Lake Granbury, and in that
13 regard we have scrubbed, if you will, the contention,
14 or made it more focused on the Lake Granbury piece
15 rather than -- or Lake Granbury as cooling water
16 source rather than Squaw Creek Reservoir.

17 But the -- and that would be the substance
18 of what we would be focused on in a contention that we
19 would again seek leave to submit to you as -- in
20 amended form Monday.

21 JUDGE YOUNG: And we've discussed in
22 various previous oral arguments the Commission's case
23 law saying that in the reply on a contention you can't
24 raise anything new unless it's legitimate
25 amplification of the initial one and, in addition,

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1 that any new contention would need to be based on
2 material that was not previously available or
3 materially different than what was previously
4 available, and then you would get into the good-cause
5 factors, or the good cause and the other factors under
6 2.309(c).

7 And again, I shouldn't, I don't think,
8 really have to emphasize that this is part of the
9 governing law here. So what argument do you have with
10 regard to those standards?

11 MR. EYE: Well, as far as the good
12 cause -- I'm sorry. As far as -- this would be what
13 we would consider to be legitimate amplification on
14 the original contention; that is, pointing out that on
15 August 12 of this year there was an event that caused
16 water temperatures to get to a point where they would
17 no longer be -- the LaSalle plant was no longer able
18 to operate.

19 So it's amplifying on the contention that
20 we have in front of you now to that extent, and I
21 suppose it really has a dual purpose: One purpose is
22 the timeliness, and two just to show that this isn't
23 something that's within the realm of possibility; it
24 actually happened.

25 So that would be kind of a legitimate

1 amplification of what has already been submitted to
2 the Panel.

3 JUDGE YOUNG: I don't know whether you're
4 aware, but the Commission has really been moving in
5 the direction of requiring parties to spell out -- and
6 expecting boards to specify which particular if not
7 bases -- I mean, there's one case in which the
8 Commission indicated that we should have -- that the
9 specific bases should be designated as admitted or
10 not, or at least specific parts of a contention.

11 And under some of that case law it would
12 seem that that might be arguably the kind of thing
13 that the Commission is talking about.

14 I want to hear from the Staff and the
15 Applicant on that, but in addition to that -- since I
16 didn't hear any response, in addition to that, the
17 August -- you said August 10 or 12?

18 MR. EYE: 12th. It was reported on the
19 13th.

20 JUDGE YOUNG: Okay. That would still put
21 you more than the 30 days after that date, even if you
22 had raised it as part of the contention.

23 And so, again, I mean, the standards are
24 very strict; there's no question about that. And as
25 I said, making our rulings based on the rules protects

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1 you as well as anybody else.

2 And so if we feel that it's appropriate to
3 overlook the rules in your favor now, the same
4 principle might be applied against you later by
5 some -- I mean, against you or some other intervenor
6 later.

7 So I'm not sure -- what's your argument
8 that sort of overrides that consideration? How do the
9 rules and the case law that govern -- how do they
10 permit us to do that?

11 MR. EYE: You have some discretion in
12 terms of the parameters in the regs --

13 JUDGE YOUNG: Okay. Let's be specific.
14 Okay? We have discretion within the bounds of what
15 the law and the rules require, and I've just gone over
16 why it's important that we consider that we're bound
17 by the rule of law and that we follow that.

18 And I've just gone over some of the
19 Commission's rules and case law on this timeliness
20 issue, which they obviously consider to be very
21 important. And they've included those in their rules
22 and included multiple references to those in their
23 case law.

24 And when you say we have considerable
25 discretion, we do not have discretion to override the

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1 rules. And so I'm asking you to direct your attention
2 to the rules and specifically the rules on untimely
3 raising -- I know you've said that it's amplification,
4 and we'll take that under advisement.

5 But on the timeliness issue, you're
6 talking about something for which the 30 days -- let's
7 assume the 30 days in our scheduling order applied.
8 That would have run out on September 11. Right?

9 And so, I mean, it's no surprise to anyone
10 that we're under extremely strict rules here. So I
11 hear you saying we should ignore them.

12 MR. EYE: Your Honor, I am not asking you
13 to ignore the rules, and I am not asking you to
14 exercise extraordinary discretion. We're not asking
15 for special treatment, and I don't want to leave the
16 impression that we are.

17 As far as the rule that you're
18 referencing, the -- to the extent that 10 CFR (c) (1),
19 (2), (3), and (4) are implicated, that goes to our --
20 the Intervenors' status as parties.

21 We are essentially the only party here
22 that's raising issues that are really contrary to what
23 the Applicant has advanced in their proposal.

24 To the extent that it's an important
25 consideration to the Commission -- that is, our

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1 environmental considerations being fully addressed
2 under NEPA -- then that would provide a basis for
3 including this proposed amended contention.

4 I don't -- we would submit that it does
5 not needlessly broaden the scope of issues, because
6 it's anticipated that the water issues would be
7 something that would be covered by the adjudication.

8 JUDGE YOUNG: You're arguing that this
9 incident should -- you should be allowed to raise it
10 now as part of your justification for saying that the
11 contention itself is timely. Right?

12 MR. EYE: Well, no. It would be not
13 timely, but sometimes untimely or nontimely
14 contentions are admitted if there's good reason to do
15 so.

16 JUDGE ARNOLD: Just let me ask this one
17 question of Staff:

18 This event when LaSalle's power was
19 limited, is that the -- by temperature, is that the
20 first time this has ever happened that a power plant
21 had to reduce power due to temperature limitations, to
22 your knowledge?

23 MS. LIAW: May I take a moment to consult
24 with the Staff?

25 JUDGE ARNOLD: Sure.

1 (Pause.)

2 MR. RUND: Your Honor, if you wish, we
3 could answer the question and Staff could follow.

4 JUDGE ARNOLD: Fine.

5 MR. RUND: This has happened at other
6 plants across the country, I believe, in the last
7 couple of years, at Browns Ferry. There have been
8 incidents where plants have been forced to shut down
9 or at least lower power levels due to water
10 temperatures.

11 And I'd also like to point out that the
12 Intervenors appeared to be aware of this possibility
13 when they filed their original petition to intervene.
14 The original contention 11 had asked for a
15 temperature-sensitive analysis since plant operations
16 are dependent upon a narrow band of water
17 temperatures, and so they have actually raised this
18 precise issue before.

19 And so the fact that more recently another
20 plant has experienced this type of event is not an
21 appropriate trigger for a late file or for a new
22 contention.

23 MR. EYE: Well, it supports the original
24 contention with new evidence.

25 JUDGE YOUNG: The original being

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1 contention 4 now?

2 MR. EYE: I think it was -- well, I'm
3 sorry. The contention we filed when we were
4 petitioners, and I think that was contention 11.

5 JUDGE YOUNG: Eleven?

6 MR. EYE: I believe it was 11. And so we
7 didn't have the LaSalle example of a plant that was
8 actually required to go into a shutdown due to water
9 temperatures when we filed that contention 11. That
10 has happened subsequently.

11 JUDGE YOUNG: But I think they're saying
12 that this is not -- that other -- this has happened at
13 other plants. Did you -- was that before the original
14 contention as well?

15 MR. RUND: I believe so. I don't have a
16 date in front of me, but I've seen this issue raised
17 in other COL proceedings where intervenors have
18 attempted to cite to other plants as an example of
19 this.

20 MR. EYE: We're citing the LaSalle
21 example.

22 JUDGE YOUNG: On the timeliness of
23 contention 4, what are the relevant sections of the
24 DEIS and the ER and the differences or similarities
25 between those? Staff is pretty good about giving

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1 those to us before. Do you have those right at hand?

2 MS. LIAW: Yes, Your Honor. As a
3 preliminary matter, neither the ER nor the DEIS
4 addresses impacts of global warming on the operations
5 of the two proposed units.

6 However, as we noted in our brief, the
7 FSAR in the application does provide temperatures at
8 which the design inlet and outlet temperatures for the
9 circulating water system, when exceeded, at which the
10 condenser could lose vacuum, resulting in a turbine
11 trip and resulting thus in adverse impact on plant
12 operations; i.e., reduced power or shutdown.

13 So these issues were addressed in the FSAR
14 but not in the ER --

15 JUDGE YOUNG: The F-S-A-R, you mean.

16 MS. LIAW: The F-S-A-R. That's correct.

17 JUDGE YOUNG: And do you know what
18 section?

19 MS. LIAW: Yes. That is the FSAR at 10.4-
20 11, Table 10.4.5-1(r).

21 JUDGE YOUNG: Okay.

22 MS. LIAW: And that's -- and we noted that
23 in our brief on page 52, footnote 22.

24 JUDGE YOUNG: Okay. And what's the date
25 of the FSAR?

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1 MS. LIAW: We believe it was November 2009
2 that was issued, Your Honor, revision 1.

3 JUDGE YOUNG: And what was your -- the
4 citation you gave me to the page and footnote, again?
5 I'm sorry.

6 MS. LIAW: The page in the FSAR, Your
7 Honor?

8 JUDGE YOUNG: I thought it was --

9 MS. LIAW: Or the page of our answer?

10 JUDGE YOUNG: -- in your --

11 MS. LIAW: Yes. It's in our brief, on
12 page 52 in footnote 22.

13 JUDGE YOUNG: Note 22. Okay. So there
14 are no differences, because neither the DEIS nor the
15 ER address it, but the FSAR addressed it.

16 MS. LIAW: That's correct, Your Honor.

17 JUDGE YOUNG: Okay. Mr. Eye, what's your
18 argument on timeliness?

19 MR. EYE: Other than what I've made just
20 previously, Your Honor, in this contention -- I think
21 that that is our argument on timeliness.

22 JUDGE YOUNG: Okay. I think when I said
23 that you were raising the LaSalle incident to argue
24 timeliness, you said no. Right?

25 MR. EYE: Well, if I did --

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1 JUDGE YOUNG: What is your -- repeat your
2 argument on timeliness, because I've forgotten it in
3 all the talk about other things.

4 MR. EYE: In the process of doing
5 contention 4, it was really triggered by the LaSalle
6 announcement that they had gone -- that they had been
7 forced to go out of operation or off operation because
8 of the water temperature issue.

9 That then brought us to looking at what
10 happens at Comanche Peak under those circumstances;
11 that is, is there a water temperature issue here that
12 could be affected by global warming.

13 And the result of it was contention 4
14 suggesting --

15 JUDGE YOUNG: And so -- go ahead.

16 MR. EYE: -- suggesting that increased
17 ambient temperatures would have an effect --

18 concomitant effect on water temperatures that could
19 cause the same sort of problem, if you will, that they
20 experienced at LaSalle in August of this year.

21 So it -- if I said that it doesn't have
22 anything -- it didn't relate to timeliness, I -- if
23 that's what Your Honor understood, then I didn't speak
24 accurately about that. That's really what got us
25 looking at the whole Comanche Peak relationship

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1 between ambient temperature increases and increases in
2 water temperature that might cause problems for
3 Comanche Peak Units 3 and 4.

4 As we provided the Panel in our filing, we
5 had a report that was prepared by an engineering firm
6 that talked about intake water temperatures and --

7 JUDGE YOUNG: Smith report?

8 MR. EYE: Yes. That acknowledged this is
9 something that is out there, and it has to be
10 addressed, and so that's -- the genesis of it, if you
11 will, was -- however, was the August 12 LaSalle water
12 temperature problem.

13 JUDGE YOUNG: So is there anything else on
14 which you're basing your timeliness argument, other
15 than this LaSalle incident?

16 MR. EYE: Well, what the -- the
17 considerations that I went through a moment ago

18 about -- that are under 2.309 as far as not expanding
19 the issues needlessly, but these are material issues
20 as far as the Commission is concerned in terms of
21 evaluating the proposed license application.

22 I mean, I went through those a moment ago,
23 but --

24 JUDGE YOUNG: Okay. And let's get back to
25 those, then. Good cause -- I think you're aware the

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1 Commission has said good cause is the most important
2 consideration.

3 And what was the cause for your not
4 raising any issue that would have been based on the
5 LaSalle incident within 30 days after that or even
6 when you filed these on --

7 MR. EYE: October 4?

8 JUDGE YOUNG: Well, maybe these would have
9 been within 30 days.

10 (Pause.)

11 JUDGE YOUNG: So the reason you didn't
12 include a reference in the contentions?

13 MR. EYE: We moved from the LaSalle
14 incident to an examination of how water temperatures
15 related to ambient temperature increases would affect
16 Comanche Peak, and just -- our point of departure was
17 LaSalle, but we didn't go back and reference the point

18 of departure. Instead we just focused on the Comanche
19 Peak part, instead of bringing this Panel's attention
20 to the LaSalle event that caused them to go offline
21 because of increased water temperatures.

22 JUDGE YOUNG: Anything other than that,
23 other than just not thinking about it?

24 MR. EYE: I wouldn't characterize it as
25 not thinking about it, because it was really what

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1 we --

2 JUDGE YOUNG: Not thinking about it
3 sufficiently to --

4 MR. EYE: Not including it.

5 JUDGE YOUNG: -- cause you to write it
6 down on paper?

7 MR. EYE: We didn't include it. That's
8 true. We did not.

9 JUDGE YOUNG: Nobody got sick? Nobody was
10 in the hospital, et cetera, et cetera?

11 MR. EYE: I don't believe anybody was sick
12 or in the hospital or even some extraordinary events
13 that would intervene to the point where it would cause
14 somebody to just completely be unable to include that
15 reference to LaSalle.

16 MS. LIAW: May I add one thing, Your
17 Honor?

18 We would urge the Board to look at Susquehanna case,
19 LBP-07-4, in which that board did rule on the untimely
20 attempt of a petitioner to expand the scope of issues
21 in their reply brief.

22 And in that case the Board held that a
23 board would take into account any information from
24 reply briefs that legitimately amplified issues
25 presented in the original petitions, but it would not

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1 consider instances of what essentially constitute
2 untimely attempts to amend the original petitions.

3 And that board footnoted the LES case at
4 CLI-04-25, and they noted that the Commission, in
5 that -- in both LES rulings pointed out, A petitioner
6 may -- in instances of exigent or unavoidable
7 circumstances, may file a request for an extension of
8 time to file an original hearing petition and
9 contentions.

10 In that case this was not done, and
11 neither has this been done in this case, Your Honor,
12 so Staff would urge the Board not to accept any late-
13 filed amplification in the reply brief.

14 May I have also one moment to consult?

15 JUDGE YOUNG: Go ahead.

16 (Pause.)

17 MS. LIAW: Co-counsel has just brought to
18 my attention that one of the Intervenor's websites --
19 Public Citizen's website, at citizen.org, as noted
20 some of these events on their site, events that have
21 happened since 2006, 2007, as far as the issues that
22 are being raised by the Intervenor's.

23 JUDGE YOUNG: All right. Anything more on
24 timeliness and contention 4 from any party?

25 (No response.)

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1 JUDGE YOUNG: All right. Let's move on to
2 contention 5.

3 MR. EYE: Move to dismiss.

4 JUDGE YOUNG: Withdrawn?

5 MR. EYE: Move to withdraw, if that's the
6 proper motion.

7 JUDGE YOUNG: Okay. And then contention
8 6.

9 MR. EYE: Withdraw.

10 JUDGE YOUNG: All right. On the substance
11 of the contentions and the arguments as to whether
12 they meet 10 CFR 2.309(f)(1), the six criteria under
13 that, we've sort of -- some of the argument has gone
14 into that, from place to place.

15 But we want to allow you to -- if there's
16 anything that's been overlooked that any party wants
17 to bring out for us to hear today, we'll hear it.

18 And I guess we would like to hear a little
19 more on that with regard to 1H, and after we hear from
20 you, we may have specific questions.

21 Are there any other parts of contention 1
22 that any party wants to bring to our attention?

23 MR. FRANTZ: Yes, very briefly. The
24 contention is supported by two reports, by Mr. Power
25 and Mr. Smith; however, the Intervenors have not

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1 discussed the qualifications of these gentlemen to
2 sponsor these reports.

3 Under the rules, in particular
4 2.309(f)(1)(v), there's a requirement that if they
5 sponsor expert reports like this, they need to
6 demonstrate the qualifications of these individuals to
7 be competent to testify or to sponsor the information
8 in question. They've not done so in this case.

9 And therefore I would urge the Board to
10 discount those two reports entirely.

11 JUDGE YOUNG: What were you citing for
12 that? 2.309(f)?

13 MR. FRANTZ: (f)(1)(v), and then there's
14 also some case law that we cite in our answer. For
15 example, we cite to the Progress Energy case, CLI-10-
16 2, dated January 7 of this year. We also have other
17 cases that we cite: Millstone at LBP-04-15, 60 NRC
18 81, at page 91; Private Fuel Storage at LBP-98-13, 47
19 NRC 360, at page 367.

20 JUDGE YOUNG: And that relates to all the
21 contentions?

22 MR. FRANTZ: Yes. To the extent they cite
23 those reports. Yes.

24 JUDGE YOUNG: Right.

25 Staff?

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1 MR. BIGGINS: Yes. Thank you, Your Honor.
2 I would point out that not just for basis H but for
3 each of bases proffered by the Intervenors, the
4 Staff's primary argument is the fact that the
5 Intervenors haven't show materiality under
6 2.309(f)(1)(vi), and specifically, if you look at each
7 individual basis or even all of the bases taken
8 together in total, at no point do the Intervenors
9 quantify the energy efficiencies or the efficiencies
10 from building codes or any of the examples to turn
11 around and make the material statement that, Because
12 of those things, there will be no need for power as
13 concluded by the staff.

14 Instead they focus on reduction or an
15 efficiency, and the Intervenors claim over and over
16 that essentially the DEIS should have considered these
17 things.

18 Well, in effect the DEIS does consider it,
19 because the DEIS relies on the ERCOT analysis, and the
20 ERCOT analysis takes into account energy efficiency.

21 So ultimately what these bases in
22 contention 1 boil down to are two things: one, a lack
23 of a material dispute with the ultimate conclusion
24 that there is or is not a need for power to justify
25 the plant. The Staff found a need for power;

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1 specifically in the dates that the Staff looked at,
2 the years that the Staff looked at, as set out in
3 chapter 8.

4 And then also the fact that the Staff gets
5 to rely, under NRC case law, on state-generated
6 analysis, and the Staff did that, and that analysis
7 does take into account energy efficiency, and
8 ultimately the Staff's reliance on that is based on,
9 as stated in our pleading, a four-part test.

10 And once the Staff determines that the
11 ERCOT study meets that four-part test, it is
12 essentially reasonable, under NEPA, for the Staff to
13 rely on that analysis.

14 And at no point do the Intervenors point
15 out that there is some fundamental flaw with the ERCOT
16 analysis in order to meet the materiality
17 determination that there is no need for power.

18 So whether you look at basis H
19 individually or basis H in combination with all of the
20 other bases in contention 1, ultimately at no point do
21 the Intervenors say there is no need for power. And
22 without saying that, they do not establish a material
23 dispute with the Staff's conclusion that there's a
24 need for power.

25 Thank you.

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1 JUDGE YOUNG: Mr. Eye.

2 MR. EYE: 242 megawatts of energy
3 efficiency programs in 2010 and 242 megawatts in 2024
4 doesn't take into account the building code
5 improvements, doesn't assume anything about more
6 efficient use of electricity. It assumes that that's
7 a static number.

8 We don't believe that that's a reasonable
9 conclusion. Does that by itself dispute the need for
10 power? By itself it does not, although it would
11 diminish the need for power, but as counsel for Staff
12 alludes, to a certain extent that -- it has to be put
13 into the overall calculus.

14 We think that 8.2 on that particularly
15 parameter of energy efficiency, it's not reasonable to
16 assume that that number remains static for 14 years,
17 given the circumstances.

18 That doesn't answer the question
19 altogether whether there's a need for power. That has
20 to then be looked at in light of other parameters,
21 including other generating resources that are
22 available.

23 The cumulative effect of those
24 considerations does dispute whether there's a need for
25 power. It's not as simple as pulling one parameter

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1 out and saying that that by itself undermines the
2 conclusion that there is a need for power. It's done
3 in tandem with other aspects to both increase
4 generating capacity that -- or available generating
5 capacity and reduces the demand.

6 JUDGE YOUNG: Do you ever say that the
7 cumulative effect of all these things would lead to a
8 conclusion that there's not a need for power?

9 MR. EYE: I don't know that I -- we use
10 those exact words, no. I don't believe we do use
11 those exact words.

12 JUDGE ARNOLD: Since it was brought up by
13 Mr. Eye, could I ask Applicant about that 242
14 megawatts? I understand from the DEIS page 8-14 that
15 those are principally associated with Texas House Bill
16 3693.

17 What does that bill do?

18 MR. FRANTZ: I'm not familiar with all of
19 the aspects of that bill, but I think what Mr. Eye has
20 done here is mix apples and oranges.

21 Looking at that table on page 8-15 of the
22 draft EIS, the line item for the 242 is solely due to
23 an energy savings from that House Bill 3693.

24 As explained on just the previous page, at
25 the bottom of page 8-14, there are other line items

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1 that account for other trends in demands not matched
2 by energy efficiency, namely the first line, which is
3 the peak load.

4 That's -- there are actually two different
5 lines here that deal with energy efficiency, and one
6 labeled demand-side is solely due to that one bill.

7 The other kinds of demand-side efficiencies would
8 be accounted for in the first line under peak load.

9 JUDGE YOUNG: Under peak --

10 MR. FRANTZ: Peak load.

11 JUDGE YOUNG: Peak load.

12 MR. BIGGINS: If I may respond to that as
13 well, Your Honor.

14 JUDGE ARNOLD: Sure.

15 MR. BIGGINS: I agree with that
16 assessment. Essentially the line item, again, in the
17 table does not need to reflect every energy efficiency

18 bill; it doesn't have to reflect every change in
19 building codes.

20 Essentially those things are considered by
21 ERCOT in their analysis, and they are reflected, as
22 appropriate, in the peak load numbers for ERCOT in all
23 of the tables that list the peak load.

24 And so Table 8-1, for example, looks at
25 the ERCOT number for peak load megawatts: 70,837. In

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1 other words, as ERCOT has in their analysis considered
2 appropriate, they have accounted for energy efficiency
3 and demand-side management. The Staff is simply
4 adding one specific line item to particularly account
5 for Texas House Bill 3693, which was passed.

6 So the Staff adding that particular item
7 doesn't mean that ERCOT didn't take it into account
8 when ERCOT came up with their peak load number.

9 JUDGE MIGNEREY: That clarifies it. Thank
10 you.

11 JUDGE YOUNG: Anything further? Any other
12 substantive issues that any of the parties want to
13 particularly bring to our attention before we adjourn
14 for the day?

15 MS. VRAHORETIS: On contention 1 or any of
16 the contentions?

17 JUDGE YOUNG: Any of the contentions.

18 MS. VRAHORETIS: If I could just
19 clarify -- make a few points of clarification on CO2
20 emissions related to DEIS contention 2, Your Honor.

21 JUDGE YOUNG: Okay.

22 MS. VRAHORETIS: With respect to wind
23 power, the DEIS neglects CO2 emissions from
24 manufacturing, installation and maintenance; small,
25 localized, short-term traffic associated with

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1 installation and maintenance; and finds no greenhouse
2 gas emissions from wind power, and that's in the DEIS
3 at pages 9-22 and 9-23.

4 The CO2 emissions for a 40-year period for
5 reasonable alternatives are limited to the emissions
6 from power generation and do not include CO2 emissions
7 for workforce transportation, building, fuel cycle, or
8 decommissioning, and this is in the DEIS at page 9-30.

9 CO2 emissions for generation alternative
10 such as wind, solar, and hydropower would be
11 associated with workforce transportation,
12 construction, and decommissioning of the facilities,
13 and because these forms of generation do not involve
14 combustion, the impacts are minor, and they would have
15 minimal cumulative impact, and this in the DEIS at
16 page 9-32.

17 The CO2 emissions for the combination
18 alternative come solely from the natural gas
19 component; that's in the DEIS at 9-32.

20 The CO2 emissions for the nuclear
21 option -- this is the proposed Units 3 and 4 at
22 Comanche Peak -- do include the CO2 emissions from
23 power generation as well from transportation and fuel
24 cycle emissions, and that's in the DEIS at page 9-30.

25 And it's my understanding that

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1 construction costs were not included for any of these
2 alternatives, because it was assumed that the
3 construction of any large generating facility would
4 have similar CO2 emissions, and it would not be
5 helpful to the decision-maker to include that
6 information.

7 Thank you.

8 JUDGE YOUNG: Any response, Mr. Eye?

9 MR. EYE: It's hard to see where tilting
10 at wind generators has the same CO2 impact as building
11 a nuclear power plant.

12 I mean, all things considered, both in
13 terms of the number of people that it takes to build
14 it and the duration of time it takes to build it, the
15 number of pieces of equipment, the tremendous amount
16 of concrete that's used in building a nuclear power
17 plant, compared to tilting at wind generators or

18 installing PVs, but to the extent that -- well, that's
19 what I would say in response to it.

20 JUDGE YOUNG: So that relates to
21 construction.

22 MS. VRAHORETIS: We have nothing further,
23 Your Honor.

24 MR. FRANTZ: And we have nothing further,
25 likewise.

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1 JUDGE YOUNG: All right. Well, it's been
2 lovely spending a day with you. And we hope everyone
3 has safe trips back to wherever you're going, and we
4 will get out rulings on these as soon as possible.

5 I think the Applicant provided the
6 citation to the preferability on the preferability
7 issue.

8 Did you still want to provide the
9 arguments on the standards in looking at mootness?

10 MR. EYE: I will do my best to provide
11 that by next Thursday, Your Honor.

12 JUDGE YOUNG: What's the date? That would
13 be --

14 MR. EYE: I think it's the 4th.

15 JUDGE YOUNG: -- November 4. And then a
16 week after for responses. We may not do an order on
17 that right away, so we'll just -- that would be
18 November 11. We'll just look forward to hearing from
19 you.

20 Thank you all, and I guess that would
21 conclude this proceeding.

22 (Whereupon, at 4:55 p.m., the hearing in
23 the above-entitled matter was recessed, to reconvene
24 at 9:00 a.m., Thursday, June 11, 2009.)

25

CERTIFICATE

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

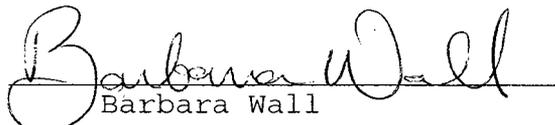
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ASLBP Number: 09-886-09-COL-BD01

Location: Granbury, Texas

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