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NUCLEAR REGULATORY COMMISSION

Title: Oral Arguments In the Matter of Interim Storage Partners, LLC

Docket Number: 72-1050-ISFSI

Location: Midland, Texas

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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ORAL ARGUMENTS

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In the Matter of:	:	Docket No.
INTERIM STORAGE	:	72-1050-ISFSI
PARTNERS LLC	:	ASLBP No.
(WCS Consolidated	:	19-959-01-ISFSI-BD01
Interim Storage	:	
Facility)	:	

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Wednesday, July 10, 2019

Commissioner's Courtroom
Midland County Courthouse
500 N. Loraine Street
Midland, Texas

BEFORE :

PAUL S. RYERSON, Chair

NICHOLAS G. TRIKOUROS, Administrative Judge

DR. GARY S. ARNOLD, Administrative Judge

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P R O C E E D I N G S

8:30 a.m.

JUDGE RYERSON: Well, again welcome. Welcome again. We're here on the matter of an application by Interim Storage Partners, LLC, which we'll generally call ISP, if that's okay with the Applicant. And ISP's application is for a license from the Nuclear Regulatory Commission to construct and operate an interim storage facility for nuclear waste in Andrews County, Texas.

I'm Judge Ryerson. I'm trained as a lawyer. I chair the Atomic Safety and Licensing Board that the NRC has assigned to this particular proceeding.

On my right is Judge Arnold. Judge Arnold is a nuclear engineer. Dr. Arnold is a nuclear engineer. And on my left is Judge Trikouros, who's also a nuclear engineer.

At the outset, I very much want to thank the county commissioners and particularly Commissioner Prude who extended an offer to us to use this facility today so that we could be much closer than Rockville, Maryland, to the affected population by this application. I want to thank everyone in the courtroom, staff, for assisting us here. We very much

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1 appreciate their hospitality.

2 Today's proceeding concerns four requests
3 for an evidentiary hearing on ISP's application that
4 have been filed by a variety of different petitioners,
5 and I think we'll list them by name when we get to the
6 appearances of counsel.

7 But before that, I'd like to summarize how
8 we intend to proceed today. I think most of this was
9 set forth in the order we issued on June 7, but for
10 the benefit of everyone who's here, this is how we're
11 going to move forward.

12 Our purpose is a limited one today. It's
13 not to take appearances from the public and hear from
14 local governments or anything like that today.
15 Today's purpose is to hear arguments from the lawyers
16 who have filed petitions opposing the application and
17 from the lawyers for the Applicant and also lawyers
18 for the NRC staff on the sufficiency, the legal
19 sufficiency, of the petitions that have been filed in
20 opposition to ISP's application.

21 And our purpose is to determine whether
22 they have satisfied the NRC's legal requirements for
23 proceeding to essentially the next phase of an
24 adjudicatory proceeding, which would be in most cases
25 an evidentiary hearing. And if there were such a

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1 hearing, it would take place at a later time.

2 All members of the Board, I know, have
3 read the petitioners' and all the parties' pleadings
4 which total literally several hundred pages, and as it
5 turns out, the same three judges constituted a board
6 that heard arguments in an arguably similar
7 proceeding, a similar application, in New Mexico,
8 maybe all of 40 miles from here for an interim storage
9 site in the state of New Mexico.

10 But even though the sites are fairly
11 close, they are not the same. The applications are
12 certainly not the same. And so what we'd like to do
13 starting today as the first order of business is to
14 address the participants' views of how these
15 applications differ.

16 And so unlike our usual practice of
17 basically getting to the judges' questions right
18 away -- we may have some questions to interrupt your
19 presentations, but we'd like to start with longer than
20 usual presentations by the participants' counsel,
21 encouraging you to focus on how you -- what you see as
22 the significant differences between the Holtec
23 application in New Mexico and the ISP application here
24 in Texas.

25 After -- we're going to allow up to 45

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1 minutes for each participant -- each petitioner to
2 address that issue. And then after we hear from the
3 petitioners, we'll allow an equal time for ISP, and
4 then we will allow some time -- we have been fortunate
5 in the past that the NRC staff is usually quite crisp
6 and responsive in its comments, so we will not put a
7 time limit on them, but I imagine their comments will
8 be considerably less than 45 minutes.

9 Again, we may have some questions during
10 this phase, but this first phase of the proceeding is
11 primarily for the participants to address these issues
12 of how these somewhat similar cases may, in fact,
13 differ.

14 Tomorrow, we will have -- tomorrow or
15 later today, as it turns out, we will have more
16 focused questions from the Board to various
17 participants, and I think we might as well talk then
18 at that time about what the best rules would be to
19 proceed with that phase.

20 Let me talk a little bit before we begin
21 or take appearances about logistical matters. Please
22 silence your cell phones, if anyone has a cell phone
23 on.

24 While we're grateful for the County's
25 hospitality, we have provided water ourselves for

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1 everyone, so feel free to find a bottle of water --
2 when I say, everyone -- I'm sorry -- I mean the
3 counsel for the participants, not the entire audience,
4 but we have provided, I hope, enough water even to
5 deal with the temperature that we're enjoying here in
6 West Texas in July.

7 We'll take at least one short break in the
8 morning, maybe two and try to do the same in the
9 afternoon. We will probably stop at a convenient
10 opportunity around noon for lunch, and I don't believe
11 there's a cafeteria in this building, so we'll
12 probably allow at least 90 minutes so people can get
13 out and get some lunch if they so choose and also make
14 it back in time through the security here in order to
15 begin an afternoon session.

16 I'd like to finish by five o'clock today.
17 I don't know if we'll have to go to a second day. My
18 guess is that we will, but if we could finish today,
19 we will certainly do that. But my guess is that we
20 will need at least part of the day tomorrow.

21 So before we take appearances, any
22 other -- my other judges, members of the Board, have
23 any comments? Judge Trikouros?

24 JUDGE TRIKOUROS: No.

25 JUDGE RYERSON: Judge Arnold? Okay.

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1 Well, let's go through the four petitioners first, and
2 ask you to introduce yourselves. Also if you have any
3 questions about how we're proceeding today, this would
4 be a good time to ask those. So starting with Beyond
5 Nuclear --

6 MS. CURRAN: Good morning. My name is
7 Diane Curran. I am appearing on behalf of Beyond
8 Nuclear, and with me this morning is Mindy Goldstein,
9 my co-counsel of the Turner Environmental Law Clinic.
10 And we're the only petitioners' counsel sitting by a
11 mike, so maybe I'll stand up -- or maybe they can go
12 to --

13 JUDGE RYERSON: Oh, do we have a small
14 mike? I'm not sure that will work for the reporter.
15 The reporter needs to be able to record everything as
16 well, so let's see how that works.

17 So next we would go to the Sierra Club.
18 And welcome to you, Ms. Curran.

19 MS. CURRAN: Thank you.

20 JUDGE RYERSON: And Ms. Goldstein.

21 MR. TAYLOR: Wallace Taylor for the Sierra
22 Club. I do have a procedural question.

23 JUDGE RYERSON: Yes, sir.

24 MR. TAYLOR: You said 45 minutes for the
25 Applicants. Is that their total, or 45 minutes for

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1 each of the --

2 JUDGE RYERSON: No. What I said was 45
3 minutes for each petitioner.

4 MR. TAYLOR: Right.

5 JUDGE RYERSON: And then the Applicant
6 will have an equal time. If, for example, Ms.
7 Curran -- and she doesn't have to take less than 45
8 minutes, but she has one contention, and one might
9 even say it's more of a generic issue than a site-
10 specific issue. I don't know. She'll tell us that.
11 She takes ten minutes. I don't think ISP will want 45
12 minutes, but they're certainly not going to get 45
13 minutes. But then it will be each time. Yes. They
14 get to respond to each petitioner. Each time after
15 ISP responds, then the NRC staff, if it wishes may
16 make a comment or two as well.

17 MR. TAYLOR: Thank you.

18 JUDGE RYERSON: Thank you. And welcome to
19 you, Mr. Taylor.

20 And next we have what we're going to call
21 Joint Petitioners. There are seven or eight of them,
22 I think, and let me list them first and see if I get
23 them correct before you introduce yourself, Mr. Lodge.

24 We have Don't Waste Michigan, Citizens
25 Environmental Coalition, Citizens for Alternatives to

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1 Chemical Contamination, Nuclear Energy Information
2 Service, Public Citizen, Inc.; San Luis Obispo Mothers
3 for Peace; Sustainable Energy and Economic Development
4 Coalition, which we might abbreviate as SEED, I think,
5 if we talk about them individually; and then one
6 individual, Leona Morgan. Do I have it correct, sir?

7 MR. LODGE: You have it correct, sir.

8 JUDGE RYERSON: Thank you.

9 MR. LODGE: I'm Terry Lodge, and I
10 represent all of those organizations and people.

11 JUDGE RYERSON: Okay.

12 MR. LODGE: Thank you.

13 JUDGE RYERSON: Thank you, Mr. Taylor.
14 Welcome to you.

15 And then we have two organizations, Fasken
16 Land and Minerals, and also the Permian Basin Land and
17 Royalty Organization, of which, I believe, Fasken
18 would be a member -- is a member. And who is speaking
19 for Fasken?

20 MR. EYE: Good morning. My name is Robert
21 Eye. I represent Fasken and PBLRO, along with my
22 co-counsel, Timothy Laughlin.

23 JUDGE RYERSON: Thank you. Welcome to
24 you.

25 JUDGE RYERSON: Next to the Applicant,

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1 Interim Storage Partners, LLC.

2 MR. MATTHEWS: Good morning, members of
3 the Board. My name's Tim Matthews from Morgan, Lewis
4 & Bockius. I appear today on behalf of the Applicant,
5 Interim Storage Partners. With me at counsel table
6 today are my colleagues, Paul Bessette and Ryan
7 Lighty. I also have with us members of the
8 Applicant's staff, the joint venture partners of
9 Interim Storage Partners, Orano and Waste Control
10 Specialists.

11 I have Jeff Isakson, the president and CEO
12 of Interim Storage Partners; Elicia Sanchez, the
13 senior vice president of Waste Control Specialists;
14 Jack Boshoven, the chief engineer and manager of
15 engineering and licensing for the NRC project. I have
16 Jenny Caldwell, Waste Control Specialists geologist;
17 and Ben Mason, WCS's chief engineer, to assist us.

18 JUDGE RYERSON: Okay. Thank you, and
19 welcome to all of you, and -- pardon me.

20 MR. MATTHEWS: I did have one question.

21 JUDGE RYERSON: Yes, sir.

22 MR. MATTHEWS: With respect to the record
23 in the proceeding, the application for 72-1051 is not
24 part of the record in this proceeding. We understood
25 the Board's order, recognizing the similarity and the

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1 contentions between the two proceedings, and the
2 pleadings.

3 Applicant has looked at those and the
4 Board's order in LBP 19-4, and we are prepared to
5 respond to how the contentions as pled are similar or
6 different here, and how they would apply or not apply
7 to the ISP application in docket 72-1050. But we
8 wanted to make sure that we understand correctly that
9 the Board does not intend to incorporate the record
10 from 72-1051 into this proceeding.

11 JUDGE RYERSON: That is correct. That is
12 correct. I mean, the decision in that case is a
13 matter of public record clearly, but we're not
14 incorporating that proceeding into this.

15 NRC staff.

16 MS. KIRKWOOD: Sara Kirkwood for the NRC
17 staff, and I'm accompanied by my co-counsel, Alana
18 Wase, Joe Gillespie, and Thomas Steinfeldt. I also
19 have several members of the NRC staff with me.

20 I have project manager John-Chau Nguyen
21 and safety project manager/environmental project
22 manager Jim Park. I have branch chief John McKirgan
23 and Christopher Regan who's the deputy director for
24 the Division of Spent Fuel Management.

25 JUDGE RYERSON: Thank you, Ms. Kirkwood,

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1 and welcome to you.

2 MS. KIRKWOOD: My only question is: Would
3 it be possible for that smaller microphone to come at
4 our table? Can you hear this?

5 JUDGE RYERSON: No.

6 JUDGE ARNOLD: That's the microphone for
7 the court reporter.

8 JUDGE RYERSON: Okay. Yes. I -- before
9 we begin with the presentations, I should have
10 mentioned, too. For the benefit of the court
11 reporter, we can hear you very easily, I think, but
12 the court reporter is recording this, and so it is
13 very helpful if you speak fairly close to a
14 microphone.

15 VOICE: The audience cannot hear well, so
16 if everyone could please speak in a microphone, it
17 would be very much appreciated.

18 JUDGE RYERSON: Okay. Thank you for that
19 comment. Yes. All right. We were not aware -- can
20 everyone hear me in a normal voice towards the back?

21 VOICE: It's not bad.

22 JUDGE RYERSON: All right. If anyone
23 can't hear me, raise your hand. Right.

24 (General laughter.)

25 JUDGE RYERSON: All right. We will try to

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1 be as clear and reasonably loud as possible. And,
2 again, everybody can get as close to the microphone as
3 possible. Does that work better? Sounds to me like
4 it works better.

5 VOICES: Yes.

6 JUDGE RYERSON: Yes. Okay. Great.

7 All right. Any further comments? Judge
8 Arnold? Judge Trikouros?

9 Let's begin with Ms. -- Ms. Curran will be
10 beginning, I assume, for Beyond Nuclear.

11 MS. CURRAN: Good morning again. Thank
12 you very much for the opportunity to address the
13 admissibility of Beyond Nuclear's contention and our
14 standing.

15 Regarding admissibility, there is no
16 significant difference between the violations of the
17 Nuclear Waste Policy Act and Administrative Procedure
18 Act set forth in our contention in the Holtec
19 proceeding and our contention in this proceeding.

20 As we have demonstrated previously, to
21 approve or even consider a license application with
22 knowledge that it contains provisions that would allow
23 illegal conduct under the Nuclear Waste Policy Act
24 violates the APA. We are not going to repeat all the
25 arguments we made about those points before, but there

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1 is new information that we could have not addressed in
2 t h e H o l t e c p r o c e e d i n g .

3 And the first is, of course, the Holtec decision
4 that was issued by this panel in May.

5 The second is that the fact that the
6 existence of two similar cases raising the same legal
7 issues establishes a pattern, and we want to address
8 the significance of that pattern.

9 So first to LBP 19-04, your decision. In
10 that decision, this Board found that no harm would be
11 caused by considering and potentially approving a
12 license application that contained illegal provisions,
13 because both the Department of Energy and the license
14 applicant, in that case, Holtec, could be trusted to
15 follow the law. They simply would not implement or
16 act upon an illegal license application or license if
17 it was granted.

18 But shouldn't that reasoning apply to NRC
19 in the first instance? Why is there no presumption
20 that the NRC would not entertain or approve a license
21 application that contains illegal provisions? Why
22 doesn't the presumption that an agency will act in
23 accordance with the law apply to the NRC?

24 We'd like to assert here that it does.
25 The NRC cannot avoid its own obligation to act in

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1 accordance with the law by saying that down the road,
2 whoever is allowed -- whoever is granted the license
3 that would allow, you know -- technically, legally
4 allow that violation won't do it. The buck must stop
5 with the NRC. Indeed, the APA requires it.

6 And in the case of the license applicant,
7 whether Holtec or ISP, why should it be necessary or
8 appropriate to assume that they will not implement an
9 unlawful license provision? We should never have to
10 get to that point.

11 Here we are at the point where the NRC has
12 been asked to say and must say, under the APA, we will
13 not take action that violates the law. The APA simply
14 requires that federal agencies must follow the law.

15 To hold that illegal license provisions
16 are acceptable because a private licensee may be
17 trusted not to implement them is completely
18 inconsistent with the APA, and it affronts the dignity
19 of the APA-based licensing process by turning
20 licensing into a gentlemen's agreement, made with a
21 wink and a nod to the actual law but not conformance.

22 Most seriously, approving illegal
23 provisions on the ground that they may sometime and
24 somehow become legal in the future has two detrimental
25 effects on the integrity of the NRC's licensing

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1 process.

2 First, it turns the licensing process into
3 a guessing game. Participants in a hearing process
4 are asked to assume that the law may change in the
5 future, without knowing exactly how that might be. In
6 order to challenge the license application, they must,
7 without knowing what the future holds, challenge with
8 specificity -- that's an NRC requirement. They must
9 challenge with specificity the license application.

10 That puts participants in the position of
11 doing the impossible. A hypothetical cannot be
12 challenged for lack of veracity or reliability or
13 support for the very reason that it's hypothetical.
14 In other words, the Holtec decision puts petitioners
15 like Beyond Nuclear in the impossible position of
16 challenging hypothetical, of meeting -- of having to
17 satisfy NRC procedural requirements, requiring great
18 precision in pleading that address an application that
19 has no such precision. And that really turns the NRC
20 licensing process on its head.

21 The second point I want to make about
22 admissibility relates to the pattern here. The Holtec
23 application wasn't a one-off, and I heard Judge
24 Ryerson say at the very beginning, Again, welcome.
25 We're in a pattern that's happened again. It's not

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1 just one time that one license applicant has a
2 hypothetical in their application. This is something
3 that now is -- could be said perhaps to be regular.

4 We think it's a Pandora's box that this
5 licensing board has opened. In both of these cases,
6 we now have circumstances requiring local citizens to
7 muster their resources, to challenge an application
8 that is based on future changes to the law that may
9 never happen. Who knows how many more hypotheticals
10 the industry may dream up out of their eagerness to
11 get a business advantage by becoming the first in
12 line, so that their position to have the license in
13 hand after the law -- just in the law should change
14 the way they want it to change?

15 Allowing such hypothetical applications to
16 be considered and approved is an incredible waste of
17 the NRC's and the public's limited resources.

18 JUDGE RYERSON: Ms. Curran, if I can just
19 stop you there for a moment, I think where we may
20 differ is on your statement that this is an
21 application based on changes in the law.

22 MS. CURRAN: Uh-huh.

23 JUDGE RYERSON: I think one can fairly
24 read the Holtec decision as saying -- at least I think
25 this is what we tried to say, is that when you look at

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1 the record as developed in that adjudicatory
2 proceeding, it is clear that what the NRC is saying is
3 that if a license is granted, it would be a license to
4 engage in lawful sales, and that might change in the
5 future the scope of lawful sales.

6 I suppose a state could have a 21-year-old
7 drinking age and change it to 18. But that doesn't
8 mean normally, I think, that everyone who has a liquor
9 license has to go out and get a new liquor license to
10 sell to people between 18 and 21, that the thrust of
11 the application is to sell to all lawful applicants,
12 of which there are -- customers, rather, of which
13 there are potentially two kinds.

14 There would be utilities themselves or to
15 sell interim storage to DOE, if that were lawful, if
16 that becomes lawful, which, as you know, is a
17 realistic possibility. We're not saying it has to
18 happen, and as far as I can tell, the application does
19 not purport, at least, to be dependent on that. But
20 there's certainly a possibility that DOE -- Congress
21 could make DOE a lawful customer here.

22 So do you have a response to that view?

23 MS. CURRAN: Yes. Well, I can't imagine
24 that in, say, a liquor licensing context, that the --
25 a county government would give a liquor license that

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1 allows a company to sell to 15-year-olds, and then
2 says, Well, we assume that you would never carry that
3 out unless the law were changed to allow 15-year-olds
4 to buy liquor.

5 Very similar situation. I can't imagine
6 that this agency would issue a license to an applicant
7 or a nuclear power plant to, instead of storing spent
8 fuel on the site, to reprocess spent fuel, just in the
9 event that maybe reprocessing would one day become
10 permitted. It's just -- it's something that's not
11 allowed.

12 It shouldn't be in the license, because it
13 creates -- you know, just imagine yourself in the
14 position of the public, that a license has been issued
15 by a government agency that says, You may do something
16 illegal, that's currently illegal, in the event
17 that -- you know, in the event that it should become
18 legal in the future. We assume that you won't carry
19 it out until it becomes legal in the future.

20 It puts a burden -- it puts a burden of
21 vigilance on the public to be watching to see, will
22 someone try to get away with something because it's in
23 the license. You can do it. And here you say, well,
24 it's the DOE that has to act; it's the applicant that
25 has to act in concert. It's very unlikely that this

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1 would ever happen.

2 But this is a principle of licensing that
3 just shouldn't be breached. It shouldn't be breached
4 on practical grounds that, oh, well, this is -- how
5 could this ever happen. It should be dealt with when
6 it comes up. Licensing should not be issued for
7 activities that are known to be illegal under
8 currently law. Otherwise, it just turns the process
9 into a free-for-all.

10 Who couldn't now come in with a license
11 application that speculated on some nice things that
12 if they come to pass, I would like to be first in line
13 to take advantage of them. It puts an incredible
14 burden on the public. Look at all the people who are
15 here. We don't know if this is going to come to pass.

16 And certainly the very first application
17 that WCS filed, which was, I think, in 2016 had
18 nothing about private ownership of spent fuel. It was
19 clearly planned that this liability and ownership of
20 the fuel would be turned over to the DOE. And then
21 they changed the application and put this alternative
22 language in.

23 Well, is that just -- to us, it looks like
24 a fig leaf. I mean, we don't -- it's possible, I
25 guess, that ISP will decide that they're going to

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1 contract with individual licensees who are willing or
2 going to be willing to take the liability of
3 transportation and storage for an indefinite period,
4 but it seems pretty unlikely to us.

5 So this just creates -- the Federal
6 Government shouldn't be in the business of propping up
7 a project like this that's based on speculation about
8 the future. We should be dealing with reality, and
9 that is what the intervenor groups get told all the
10 time. Don't speculate about what might happen with
11 this application.

12 How many times have you seen that in an
13 NRC decision, where a petition for a hearing is
14 rejected because it speculated about future events
15 that might or might not occur, and the decision was,
16 this case has to be about the real facts, what's in
17 the application, what is really planned, and we have
18 to, you know, go on good faith that what is planned is
19 actually going to happen.

20 JUDGE RYERSON: There's also a line of
21 cases from the Commission, though, Ms. Curran -- I'm
22 sure you're familiar with them -- that basically says,
23 This is a license in this particular instance to
24 construct and operate. And the NRC's interest in the
25 commercial inviability of the operation is limited or

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1 nonexistent.

2 The NRC has a huge interest, primary
3 interest, in, is this constructed and operated safely,
4 but whether it is commercially viable, whether there
5 are, in fact, private entities out there that want to
6 contract with this facility, that's not primarily our
7 concern, as long as the NRC is assured that this will
8 be constructed safely, and if operated, operated
9 safely.

10 But does the Agency have to second-guess
11 the commercial liability of the option that's being
12 proposed, which is, at the moment, to deal with
13 private entities?

14 MS. CURRAN: Absolutely not. I agree with
15 you. If this application only consisted of an
16 application to deal with private entities and to
17 contract with them for transportation, storage,
18 financial assurance was demonstrated through private
19 entities, we would say, Fine, that's a commercial
20 business decision of the company; let them get their
21 license, and then they can decide, are they actually
22 going to act on it or not.

23 But that's not what we've got here. What
24 we've got here is, in addition, there's an illegal
25 provision that's included there as an alternative.

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1 And we saw arguments where -- I think it may have been
2 in the letter that ISP wrote -- well, there's cases
3 where there's two alternative roads considered. It
4 might have been in a PFS project. Take this road or
5 that road. Well, those are two legal roads.

6 This is -- the alternatives are there's a
7 legal alternative and an illegal alternative. And I
8 don't think that you should be in the business of
9 allowing an unlawful alternative, because it's a
10 possible business -- you know, would be advantageous
11 from a business standpoint. Your obligation is to
12 make sure that you're not dealing with approving
13 illegal provisions.

14 So we believe the appropriate thing to do
15 would be to say, Yes, go ahead with this application,
16 but we're not going to consider the illegal
17 provisions. And if you want to consider federal
18 ownership of spent fuel, if and when the law changes,
19 come back and amend your application, and we'll deal
20 with it then.

21 JUDGE RYERSON: What is ISP simply didn't
22 say who their customers were going to be, they just
23 filed an application and said, We'd like to construct
24 and operate a facility, and they didn't specify who
25 the customers would be?

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1 MS. CURRAN: Well, I think what they have
2 to do is they have to show some -- provide some
3 information for financial assurance purposes, and so
4 I'm not sure the degree to which they'd have to do it,
5 but they probably have to show where they're going to
6 get the money to take care of this facility over the
7 licensing proceeding -- the course of that proceeding.
8 So they'd have to say something about having
9 contracts. Okay?

10 JUDGE RYERSON: Yes. But would that
11 necessarily limit them? I mean, could they have
12 crafted this application in a way that would have
13 allowed private contracts or whatever sources they
14 were using for financial assurances, and just didn't
15 address the possibility of Congress creating a new
16 lawful option, which is a realistic possibility.

17 I think we have to recognize that.
18 There's been legislation, I think, every year for the
19 last several years proposing that. It may or may not
20 pass, but it's certainly not an unrealistic
21 possibility. I mean, are we just arguing about the
22 way they drafted their application is, I guess, what
23 I'm a little concerned about?

24 MS. CURRAN: No, I don't think so, Judge
25 Ryerson, because they would have had to say something

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1 about, We are going to have contracts and -- for
2 instance, I think they say the money is going to be
3 provided through the contract damage lawsuits that the
4 licensee has filed against the DOE for these fees that
5 those --

6 JUDGE RYERSON: But that's money that the
7 private companies, which is the option -- the option
8 you don't challenge --

9 MS. CURRAN: Right.

10 JUDGE RYERSON: -- is the private
11 companies. Those are the ones who are receiving money
12 now from DOE, because DOE did not honor its commitment
13 to start taking the nuclear waste back in 1998. So,
14 I mean, that would be solely on the private side,
15 would it not?

16 MS. CURRAN: Right. And they have -- in
17 order to get a license, I believe, the NRC staff would
18 have to, in a safety evaluation report, look at the
19 question of where are the funds going to come from to
20 maintain this facility over the course of the license
21 term. So they would be looking at who -- what
22 entities are going to contract with this company.

23 And if the DOE were not included as --
24 were not named as a potential owner, then I think the
25 only recourse that the Applicant would have would be

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1 to say, We plan to contract with X, Y and Z utilities,
2 and that they will provide the -- you know, we will --
3 they will be financing the cost of storing this
4 material.

5 JUDGE RYERSON: Yes. We'll go through --

6 MS. CURRAN: The other thing is, okay,
7 from the public's point of view -- this is a very
8 important part of it. Once something goes into a
9 license, then it precludes the public from challenging
10 anything later.

11 So in other words, if DOE -- later on,
12 legislation passes, and DOE is allowed to take title
13 to the spent fuel, we are very much restricted in what
14 we can say and concerns that we could raise about that
15 enormous change, because you will have already
16 approved DOE as the owner.

17 And so even though it's going to raise a
18 host of issues if that happens, it makes it very
19 difficult for the public to come back in, because you
20 approved a hypothetical based on a guess, and then
21 when the guess happens to come true, it turns out,
22 Well, that was decided ten years ago; where were you,
23 to anybody who wants to come in and say, We're
24 concerned about what this looks like with DOE
25 ownership.

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1 It's really not good decision-making.
2 Look at all the people in this room. All these people
3 want to be able to engage in a real proceeding and a
4 real decision-making process. They want to know,
5 who's going to be responsible for this fuel, because
6 this concerns us. So please don't give us a decision
7 that says, That all is going to be decided down the
8 road, and we're not going to let you have anything to
9 say about it because it's a hypothetical. It's
10 really -- it's quite unfair to the public who is
11 affected by this to do this kind of hypothetical
12 decision-making.

13 And then finally, I just -- one more point
14 about this is that there is a serious separation of
15 powers issue here. An executive agency is limited to
16 executing the legislation of Congress. And here
17 Congress has spoken without ambiguity. DOE cannot
18 take title to spent fuel without a permanent
19 repository in operation.

20 A decision by the NRC to act outside the
21 confines of Congress and congressional authorization
22 is arbitrary and capricious, because it exceeds the
23 authority of Congress, a separate branch of the
24 government.

25 Then I'd just like to turn to standing for

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1 a moment, because there is a slight difference with
2 respect to standing, although we would submit that --
3 well, it's different people, a different place,
4 slightly different distances from the reactor or from
5 the proposed storage facility. We have two standing
6 declarants, one who owns property and has business
7 interests within four miles, and one who lives within
8 seven miles of the proposed facility.

9 As this panel recently recognized in the
10 Holtec decision, there is no magic number for when the
11 proximity standing presumption applies. While it is
12 likely less than 50 miles, which is the number for
13 operating reactors, other ASLB panels have found
14 proximity standing for individuals living within 17
15 and ten miles of the storage facilities that -- and
16 facilities that were actually much smaller than this
17 one.

18 And in NEI versus EPA, which is a D.C.
19 Circuit decision reported at 373 F.3d. 1251, from
20 2004, the Court of Appeals found that someone living
21 and working 18 miles from the proposed Yucca Mountain
22 repository had standing. Given that, the Nuclear
23 Waste Policy Act has a preference for repositories
24 over above-ground storage as a safer means of storing
25 or disposing of spent reactor fuel.

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1 If you're comparing 18 miles from a
2 proposed repository with four and seven miles from an
3 above-ground storage facility, we are well within the
4 scope that was found to confer standing in the NEI
5 case.

6 And we also have shown traditional
7 standing, which is, I think, something that has been
8 raised, that in the Holtec case, the Applicant is
9 continuing to raise the standing issue in its appeal
10 to the Commissioner, so we just want to emphasize that
11 we think our pleadings show that we have standing
12 under traditional concepts of standing, in other
13 words, injury, causation and redressability.

14 Our people live and travel along
15 transportation routes. There are, you know, just
16 regular emissions along transportation routes. Normal
17 emissions could affect them. And then I just want to
18 point out that in the NEI case, the Court did go
19 through a traditional standing analysis and said that
20 one cannot have 100 percent confidence that the
21 containers and repository will not leak.

22 And they were looking at thousands of
23 years, and they found that the petitioners had
24 standing based on potential for leakage of containers
25 into the environment over thousands of years.

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1 Well, we have -- the situation here is no
2 different. There's no guarantee that there will never
3 be leakage or an accident from these containers, and
4 this is a very large quantity of spent fuel. It's
5 40,000 metric tons. That's half the existing
6 inventory of spent fuel in the United States. So
7 if --

8 JUDGE RYERSON: But not for thousands of
9 years. At least, that's what one would hope.

10 MS. CURRAN: That's what one would hope.
11 But one doesn't know, and it's very interesting that
12 when Congress passed the Nuclear Waste Policy Act, one
13 of the rationales for prohibiting the transfer of
14 ownership from private licensees to the Federal
15 Government until a repository was open was to make
16 sure that everybody was together and had a motivation
17 to find a repository.

18 So there's a really good policy-based
19 question of whether, if Congress should say, Okay,
20 we're going to transfer; we're going to let the DOE
21 take ownership of spent fuel during storage, then all
22 the air goes out of that tire of motivating these
23 licensees to find -- to help Congress to get together
24 with state and local governments and agree on X or Y
25 as a good location for a repository.

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1 And it's very possible under those
2 circumstances that this site in West Texas could be
3 there for a long, long time if that motivation is
4 lost. So I don't think you can say with certainty
5 that this will never -- this fuel will never be
6 moved -- or will be moved. It's possible that it will
7 not.

8 So in conclusion about standing, while
9 there are a multitude of tests for standing in spent
10 fuel storage cases, they all get to the same point,
11 that you can't say with certainty that containers
12 holding a large quantity of highly radioactive
13 material will never leak or be susceptible to acts of
14 eventual leaks of radioactivity, and therefore, people
15 who live as close as a few miles should have the right
16 to challenge the proposed action of locating this very
17 highly radioactive material in their neighborhood, in
18 their community. And Beyond Nuclear has shown through
19 its members' declarations that we do need that
20 standing.

21 Thank you. I don't have anything more.
22 I'm glad to answer questions later.

23 JUDGE RYERSON: Thank you, Ms. Curran. I
24 have a question that probably will go more to the NRC
25 staff when it's their turn, but I'll let you comment

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1 if you want to. I'll alert them to it.

2 My understanding would be that the staff,
3 in terms of their concern of financial assurances, is
4 focusing solely on the lawful option, which would be
5 at the moment the only possible option, and that is
6 based on ISP contracting with private utilities.

7 So, I mean, I don't think -- I'm guessing,
8 and they'll tell us later, but I'm guessing they are
9 not relying in any way on the possibility which
10 everybody seems to agree at the moment is unlawful of
11 ISP dealing directly with DOE, and so that's not -- I
12 don't see how it could be part of the financial
13 assurances package.

14 Do you -- I mean, am I wrong about that
15 from your standpoint? We'll hear from them later,
16 but --

17 MS. CURRAN: Well, as a practical matter,
18 Judge Ryerson, if the DOE owns the fuel, then what is
19 the -- I mean, it's the taxpayers paying for it, so
20 what are you going to say about whether there's
21 sufficient funds? Yes. There's infinite amount of
22 money to pay for it if the DOE owns it, so it's not
23 really -- it's a whole different ball game if the DOE
24 actually owns it.

25 JUDGE RYERSON: Right. But not the one

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1 they're examining right now, because they're
2 examining, I assume -- they'll tell us. But I assume
3 they're examining the lawful option as a basis for
4 going forward or not going forward.

5 MS. CURRAN: It still doesn't answer the
6 question that -- I hear an implicit question, if we
7 have a lawful alternative in this license, who cares
8 if there's an unlawful one, too, because we'll just
9 focus on the lawful part.

10 But then we just keep raising the same
11 question, as why, why are you allowing, if it's
12 perfectly permissible -- if they have the information
13 they need to issue a license based on lawful
14 provisions, then why, why allow consideration of an
15 application that contains provisions that concededly,
16 as all the applicants -- both Applicants have
17 conceded, they could not be implemented lawfully were
18 they granted.

19 So why should this agency start out by
20 entertaining or proposing to affirm unlawful license
21 provisions? Why not test it out and say, We're not
22 going to consider these; we're going to strike them
23 from the application. And if you want to go forward
24 with your application, then go ahead, but do it in an
25 appropriate and lawful way.

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1 JUDGE RYERSON: Thank you, Ms. Curran.

2 JUDGE ARNOLD: Not quite done.

3 JUDGE RYERSON: Not quite done.

4 JUDGE ARNOLD: You're not running this
5 alone.

6 JUDGE RYERSON: That's obviously true.

7 MS. CURRAN: I thought I could escape.

8 JUDGE ARNOLD: It has to do with the
9 standing. And one of your individuals is a D.K. Boyd.

10 MS. CURRAN: Yes.

11 JUDGE ARNOLD: D.K. Boyd also has
12 authorized Fasken to represent his interests. Do you
13 know of anything in the NRC regulations that allows an
14 individual to authorize two different organizations to
15 represent him?

16 MS. CURRAN: Judge Arnold, I am not 100
17 percent sure, but I believe that has been done in the
18 past. I can't see any reason why that person could
19 not be -- I think that Mr. Boyd has business interests
20 that are involved with Fasken and also has personal
21 interests that Beyond Nuclear represents, and I don't
22 see why there would be any reason to preclude him from
23 serving as a standing declarant for both petitioners.
24 But I'm not 100 percent sure if there's a case on
25 that. I don't know.

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1 JUDGE RYERSON: Actually the Commission
2 has spoken to that and at the very least discouraged
3 that. I think here we have representatives for groups
4 that if we treat Mr. Boyd for one but not for you,
5 you'd still have someone who lives within six or seven
6 miles.

7 MS. CURRAN: Yes. Mr. Boyd is within four
8 miles --

9 JUDGE RYERSON: It's an interesting issue,
10 and the Commission has spoken to it, but I think in
11 this instance, it's moot. It really would not
12 adversely affect you.

13 MS. CURRAN: Okay. Yes. And, again, as
14 you say, the Commission has discouraged it, but I
15 don't know if they've permitted it. Thank you.

16 JUDGE RYERSON: Judge Trikouros, did you
17 have anything?

18 JUDGE TRIKOUROS: Well, this was going to
19 be discussed more tomorrow, I think. But do you see
20 a distinction between the DOE situation that you've
21 just outlined and the other hypothetical situation
22 which is that some third party will take over to the
23 decommissioning of a plant in the future and become
24 the owner of that spent fuel, but in order to do that,
25 they would have to get approval from the Commission?

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1 Do you see a difference between that and
2 the DOE situation in the future? If, in fact, this
3 third party doesn't get the NRC license, then they
4 will not be owners of the fuel. If the DOE -- if the
5 law is not changed by Congress, then DOE will not
6 become owners of the fuel. Both basically
7 hypothetical situations that might occur. I don't --
8 do you see a difference there?

9 MS. CURRAN: The difference here is that
10 DOE is being put into the license now without it being
11 lawful. In your hypothetical, the third party comes
12 in later, wants to become the owner of the facility or
13 the spent fuel, and submits an application for
14 transfer of the license.

15 That's the way it should be done, is that
16 if there's going to be something that happens in the
17 future, then it's dealt with at that point. It would
18 not be appropriate, for instance, in the initial
19 license to say, The owner of the nuclear plant is
20 going to be A, B or C, and we don't know if it's going
21 to be -- it wouldn't be C unless the license -- unless
22 the law changed sometime in the future, but we're
23 going to write C into the license.

24 The hypothetical that you raised is that
25 a license amendment application is filed at the time

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1 when it becomes appropriate, at the time when it's
2 factually verifiable that this company wants to buy
3 this thing and is going to be the owner and has a
4 lawful right to own it.

5 JUDGE TRIKOUROS: If the license
6 application has said, current or future owners of the
7 spent fuel, would that be any different?

8 MS. CURRAN: It would be too vague,
9 because you don't want to have it unknown who is the
10 owner of the spent fuel. You want to know, who is it
11 and what are their qualifications.

12 JUDGE ARNOLD: One other thing. In your
13 contention, you argue that this contention is not
14 within the scope of these proceedings. Do you still
15 believe that?

16 MS. CURRAN: Yes.

17 JUDGE ARNOLD: Okay.

18 MS. CURRAN: But we -- we noticed you
19 didn't address it in your decision, but we figured it
20 was because you thought it was. And for us, the most
21 important thing is the -- we were looking for your
22 ruling on the validity of the Nuclear Waste Policy Act
23 claim and the APA claim, and that we do think that
24 this is an -- the NWPA compliance isn't within the
25 scope of issues that the licensing board is tasked to

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1 evaluate. But we think we're going to end up before
2 the Commission on the substantive issue.

3 JUDGE RYERSON: I think we regard -- at
4 least, I did -- the Commission's decision to have us
5 treat your motion to dismiss as a contention seemed to
6 me to resolve that issue from the Commission's
7 standpoint, but it's not the issue on the merits that
8 you're really concerned about, I don't believe.

9 MS. CURRAN: Yes.

10 JUDGE RYERSON: Okay. Any other
11 questions, gentlemen?

12 (No response.)

13 JUDGE RYERSON: Thank you, Ms. Curran.

14 MS. CURRAN: Thank you.

15 JUDGE RYERSON: Let's see. Oh, we haven't
16 been going for an hour yet, so unless I see a
17 overwhelming need for a break, let's begin with Mr.
18 Matthews. And I think, yes, about 45 minutes
19 actually.

20 MR. MATTHEWS: Judge Ryerson, I don't
21 believe we'll need 45 minutes.

22 JUDGE RYERSON: Okay.

23 MR. MATTHEWS: Would the Board prefer that
24 we address it from the podium or --

25 JUDGE RYERSON: I would -- we would prefer

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1 that. Yes. Thank you.

2 MR. MATTHEWS: Good morning again. Thank
3 you. So as to the specific question that the Board
4 asked as to the differences between the contentions
5 presented in this proceeding and that in docket
6 72-1051, ISP notes that it is the same contention. It
7 is the same pleading, in fact, that presented the
8 contention, the same arguments for it.

9 The difference here is that the petitioner
10 Beyond Nuclear did not seek to amend the contention in
11 this proceeding as it did in the other proceeding
12 where it sought that more limiting language,
13 suggesting surgical changes to the application. That
14 wasn't presented in the record here. It's being
15 advanced to the Board for the first time in this
16 proceeding today.

17 The arguments advanced by the parties were
18 the same. Both Holtec and ISP agreed with petitioners
19 that the contention was inadmissible for the reasons
20 that it had nothing to do with the authority sought by
21 the respective applicants under their licenses.

22 I think the Board made clear in LBP 17-4
23 that the license that the Applicant sought there and
24 we seek here does nothing to authorize DOE to use such
25 a facility. There's nothing that the NRC staff, this

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1 Board or the Commission can do that will change the
2 DOE's authority under the Nuclear Waste Policy Act.

3 The Board invited ISP to provide its
4 opinion with respect to DOE's authority on that
5 question, the merits question, if you will, and we
6 agreed that DOE may not, absent statutory change, make
7 use of our facility. So the positions of the parties
8 are the same, and the Board's holding in LBP 17 would
9 be identical here.

10 We point out -- and this is probably the
11 right place to do it -- as to standing, since
12 petitioners have advanced it. ISP articulated a
13 different basis by which petitioners, BN included,
14 would not have standing -- Beyond Nuclear here would
15 not have standing either, and that is the proximity
16 plus issue.

17 My colleague Ryan Lighty will address that
18 at the time that the Board would like to entertain
19 that, but that question, as to whether it has been
20 resolved by Commission direction as to away from
21 reactor dry storage was not presented in the other
22 proceeding. It is presented in our responses to the
23 contention, and we think it appropriate that the Board
24 address that.

25 The -- I guess, the final point, as we

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1 seem to be moved into the merits of it -- and that's
2 probably appropriate in this contention -- and that is
3 that the Board observed, as the Commission has already
4 decided in Hydro Resources and PFS, that Applicant
5 here is not asking for anything unusual or different.

6 To the extent that petitioners disagree
7 with Commission policy, it's exactly that, a
8 disagreement with Commission policy about whether an
9 application can be issued priori to receiving all
10 applicable authorizations, state, federal or local, or
11 whether the NRC has to be the final gatekeeper, and
12 the Commission has concluded that in the negative. It
13 does not. That's well established case law as the
14 Board cited and followed. So --

15 We would read through all the arguments,
16 inappropriate to address here. There were some
17 arguments, impassioned arguments about the public
18 being cut out if the NRC does not address the NWPA
19 issue. I'd just point out that, you know, perhaps
20 that's new here, that Congress decided where NWPA
21 challenges should be had. It's 119 of the Act. It's
22 in the Circuit Courts of Appeals. It didn't ask NRC
23 to be the arbiter of DOE's authority under the Nuclear
24 Waste Policy Act, so --

25 I'm happy to answer any questions.

1 JUDGE RYERSON: Okay. Just a procedural
2 one. I'm trying to decide when -- your position -- I
3 saw your position differed somewhat from the Holtec
4 position on standing, and we probably -- that really
5 applies to all the petitions here.

6 Would you -- ISP -- and this was the case
7 with Holtec as well. ISP would not acknowledge
8 standing on the part of any petitioner in this
9 proceeding. I think you articulated a slightly
10 different reason for that, and I'm just wondering the
11 best time to address that.

12 Maybe we should hold that, because it's
13 going to apply to everybody, and figure out a good
14 time to do it, and we'll continue now with the --
15 after we have questions from you, we'll continue with
16 the NRC staff on the Beyond Nuclear issue, its sole
17 contention, and then we'll probably take a break, and
18 we'll figure out when we want to talk about standing
19 per se, which, as I said, really applies -- your
20 argument applies to all of the petitioners here.

21 Okay. Let's do that. Judge Arnold, do
22 you have questions of Mr. Matthews?

23 JUDGE ARNOLD: Yes, I have a question.
24 Are you aware of any spent fuel or greater than class
25 C waste that is currently held by the Department of

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1 Energy?

2 MR. MATTHEWS: Yes, Dr. Arnold. In our
3 briefings, we cited to a Nuclear Waste Technical
4 Review Board report that quantified the holdings that
5 DOE had of commercial spent nuclear fuel, I think was
6 the question you were asking about. And it did have
7 a very limited quantity of special nuclear material
8 and reactor-related TTCC that it held from several
9 reactors.

10 JUDGE ARNOLD: Now, if you received your
11 license, would it be a violation of the Nuclear Waste
12 Policy Act for the Department of Energy to repackage
13 that fuel, put it in a certified cask, and ship it off
14 to your storage facility?

15 MR. MATTHEWS: In order for us to put it
16 into a cask that's already identified in our
17 license --

18 JUDGE ARNOLD: Uh-huh.

19 MR. MATTHEWS: If it were not a cask
20 that's already identified in our license, we would
21 need a license amendment. It would not be a violation
22 of the ISP license, presuming it met all of its
23 license conditions including the contract to provide
24 for decommissioning funding, the financing for it
25 that's all part and parcel.

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1 I expect that if DOE tried to do it as a
2 federal action, it would take action, and there would
3 be opportunity elsewhere for interested members of the
4 public to challenge if they thought that the
5 Department's pre-NWPA authority did not allow it. And
6 that's a question that has not been answered, whether
7 the -- Holtec went to this Agency's pre-NWPA
8 authority. I think that question is open.

9 JUDGE ARNOLD: I agree. Like the other
10 things do, but would it be a violation of the Nuclear
11 Waste Policy Act, since the DOE already holds title to
12 it?

13 MR. MATTHEWS: I'm not aware of any
14 federal case that's been cited, and I'm not aware of
15 any DOE position on that question which would be
16 entitled to Chevron deference in the first instance.
17 So it is -- it's an interesting case that I think that
18 ISP cannot answer today.

19 JUDGE ARNOLD: Thank you.

20 JUDGE RYERSON: Judge Trikouros.

21 JUDGE TRIKOUROS: No.

22 JUDGE RYERSON: Thank you, Mr. Matthews.

23 Well, let's hear from the NRC staff, and
24 then we will probably take a short break.

25 MS. KIRKWOOD: Do you want us --

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1 JUDGE RYERSON: Please. I believe only
2 that mike is hooked in with the court reporter, so we
3 have to live with the physical surroundings. Thank
4 you.

5 MS. KIRKWOOD: Your Honor, I am assuming
6 you would like us to address the question that you
7 asked about how the staff is reviewing the
8 application.

9 JUDGE RYERSON: Thank you.

10 AUDIENCE VOICES: We can't hear.

11 MS. KIRKWOOD: Can you hear me now? And
12 the answer is that the staff reviews the application
13 as it's presented to them. So to the --

14 VOICE: If you could speak slower, that
15 would help.

16 MS. KIRKWOOD: To the extent that the
17 Applicant is relying on any particular entity for
18 their financial qualifications, the staff will look at
19 that. We are still in the process of doing that
20 review, but we do take the application as it's
21 presented. We don't just -- if the Applicant's
22 assuming -- I mean, the Applicant has included it. We
23 assume that it's something that we need to look at.

24 JUDGE RYERSON: But, I mean, that seems
25 strange to me, because everybody agrees that one

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1 option is not presently a realistic option, so you're
2 looking at that as a hypothetical option. Tell me --
3 explain what you're really -- what the staff is doing
4 with that.

5 MS. KIRKWOOD: So I would note the staff
6 has not reached a conclusion on that, issue one. Two,
7 I would note that in a PFS proceeding for their
8 financial qualifications, they did not indicate who
9 the customer was. The financial qualifications was
10 based on a contract with spent fuel owners.

11 JUDGE RYERSON: So it's the conditions in
12 the contract that are material to you, regardless of
13 who the contract might ultimately be with.

14 MS. KIRKWOOD: Correct.

15 JUDGE RYERSON: Okay.

16 MS. KIRKWOOD: Well -- correct. Here, ISP
17 has chosen to indicate who those contract holders
18 might be, so the staff is looking at that to determine
19 whether or not it's relevant to our review.

20 JUDGE RYERSON: Okay. All right. Let me
21 ask you another question that comes up. Initially,
22 when -- several months ago when you responded to the
23 petitions, at the same time as ISP, the staff's
24 position was that Beyond Nuclear's sole contention was
25 admissible.

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1 Two things have happened since then. ISP
2 has withdrawn its application, its request for an
3 exemption from financing requirements, based upon DOE,
4 so that issue appears to have been taken off the
5 table.

6 And secondly, in response to our request,
7 they took the option to respond in writing before this
8 proceeding, so their position is absolutely clear that
9 as the law now stands, they agree that -- with Ms.
10 Curran that ISP cannot contract with DOE to take title
11 to nuclear waste.

12 So what is the staff's position today on
13 the admissibility of Ms. Curran's, Beyond Nuclear's
14 contention?

15 MS. KIRKWOOD: The staff had originally
16 thought this contention was admissible.

17 JUDGE RYERSON: Correct.

18 MS. KIRKWOOD: Beyond Nuclear responded by
19 saying that they thought the staff had made an error
20 and that it was not admissible. And so the staff is
21 a little -- the staff is not trying to waste a
22 contention on someone who doesn't want to litigate it.
23 I -- the staff --

24 JUDGE RYERSON: I think she wants to
25 litigate it, but maybe not in front of us, maybe

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1 elsewhere. But I'm sorry. Yes. Continue.

2 MS. KIRKWOOD: There's a lot of aspects to
3 this the staff thinks are inadmissible. We think that
4 any speculation regarding the likelihood of any entity
5 wanting to enter into a contract with ISP is
6 inadmissible. You know, speculation over their
7 potential market strategies, we think that's
8 inadmissible.

9 We think that the remedy that the
10 application has to be dismissed and renoticed, which
11 I think more came up in Holtec than in this
12 proceeding, is inadmissible, that that's not
13 admissible.

14 To go back to what I earlier stated, the
15 staff takes the application as it's come, and in this
16 case, even if they didn't need to, ISP has included
17 the option that DOE be the ultimate contract holder.
18 So to the extent --

19 JUDGE RYERSON: As an option that
20 everyone, Ms. Curran, Mr. Matthews, I believe the
21 Board, all agrees would be unlawful today unless
22 Congress changes the law. So I -- let me rephrase my
23 question to you.

24 At the end of the day, we have to decide
25 whether a contention is admissible, admissible in

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1 part, or not admissible. Where is the staff on that?
2 What would you do if you were sitting on the -- well,
3 not what you would do, but what's the staff's position
4 on the admissibility of the contention today?

5 MS. KIRKWOOD: The staff views the
6 contention as narrow to whether it is legally
7 permissible to include DOE as a potential customer, as
8 an admissible contention.

9 JUDGE RYERSON: Okay. Which, as I recall,
10 was your position ultimately in Holtec.

11 MS. KIRKWOOD: Yes.

12 JUDGE RYERSON: Okay. So you have not
13 changed your -- well, I won't say you haven't changed
14 your position, but you still would regarding Ms. --
15 Beyond Nuclear's contention as admissible in part.

16 MS. KIRKWOOD: If it -- if that aspect of
17 it is what they want to litigate.

18 JUDGE RYERSON: Okay. All right. I'm
19 sorry. Did you have some other comments that you
20 wanted to make?

21 MS. KIRKWOOD: Only if the Court has other
22 questions.

23 JUDGE RYERSON: Any questions?

24 JUDGE TRIKOUROS: Just a clarification.
25 Regardless of who takes title to the spent nuclear

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1 fuel, whether it be DOE in the future or some third
2 party, once they decommission the plant, that the NRC
3 has to approve -- right? -- whether it be DOE or a
4 third party.

5 MS. KIRKWOOD: Of who takes title to it?

6 JUDGE TRIKOUROS: Right. Ownership of it.

7 MS. KIRKWOOD: That's not necessarily part
8 of this licensing procedure. So as a -- the Part 72
9 license would not -- it would authorize ISP to possess
10 it, but they wouldn't actually transfer title.

11 JUDGE TRIKOUROS: Okay.

12 JUDGE RYERSON: Do you have more to
13 follow?

14 JUDGE TRIKOUROS: No. That's fine.

15 JUDGE RYERSON: Okay. Are we done? Thank
16 you, Ms. Kirkwood.

17 Let's take a ten-minute break and
18 reconvene at 10:20. Thank you.

19 (Whereupon, a short recess was taken.)

20 JUDGE RYERSON: We're back on the record.

21 Resuming our discussion, I believe we are
22 up to Sierra Club, Mr. Taylor, and you have up to 45
23 minutes.

24 MR. TAYLOR: Thank you. Thank you for
25 allowing us to make a presentation this morning.

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1 VOICE: Can't hear you.

2 MR. TAYLOR: Thank you for allowing us to
3 make a presentation this morning. I want to begin by
4 making sure the record is clear about Sierra Club's
5 position, considering the procedure for this hearing,
6 if I may.

7 The Board has asked us to, in our case,
8 differentiate ten contentions that we had in Holtec
9 with similar contentions in this case.

10 JUDGE RYERSON: Yes. If I may interrupt
11 you, we are encouraging you to pick the contentions
12 that you think would be helpful to focus on. We are
13 not directing that you have to do that. You have 45
14 minutes to do whatever you want --

15 MR. TAYLOR: Okay.

16 JUDGE RYERSON: -- but I think, given our
17 decision in Holtec, you might be well advised to focus
18 on contentions that superficially may seem similar,
19 the language may seem similar, but you may feel there
20 are differences factually, based on the sites, based
21 on the applications. But we're just encouraging to
22 that. You have 45 minutes to say whatever you think
23 is most useful.

24 MR. TAYLOR: Okay. But just to continue,
25 I guess what you just said makes our point, that

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1 you've already made a decision, and the impression
2 that's given is you've already made a decision in this
3 case, and that puts us in the position of an extra
4 burden, so to speak.

5 JUDGE RYERSON: Well, we're trying to do
6 the opposite. We were trying to give you every
7 opportunity to tell us what differences there are.

8 MR. TAYLOR: And I'll try to do that, but
9 I just wanted to make the record that by complying
10 with the Board's order, we're not conceding in any way
11 that we agree with the Board's decision in the Holtec
12 case.

13 JUDGE RYERSON: That's perfectly
14 understood. Thank you.

15 MR. TAYLOR: The first contention I wanted
16 to address is our contention number 6 in this case
17 regarding earthquakes. This is, of course, a
18 different location than the Holtec site, and it seems
19 to me that the question of earthquake potential is
20 almost by definition site-specific.

21 And we have a study that's particular to
22 this situation that we did not have in the Holtec
23 case. It's a study by the University of Texas and
24 Southern Methodist University, documenting seismic
25 impact of recent oil and gas drilling in the West

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1 Texas area. And I hoped to use an easel over there,
2 but I can't manage two microphones, so if I can just
3 do it from here.

4 This is a figure from the Texas-Southern
5 Methodist study, and it shows that --

6 JUDGE RYERSON: Is that part of your
7 petition, or is this --

8 MR. TAYLOR: Yes.

9 JUDGE RYERSON: -- a new document?

10 MR. TAYLOR: It's part of the exhibits.

11 JUDGE RYERSON: Great.

12 MR. TAYLOR: And it shows that in the West
13 Texas area, particularly in the area of this WCS site,
14 that since 2000 at least, the earthquake -- the
15 numbers have gone up, and since 2010, almost
16 exponentially. And so that, I think, is important.

17 MR. MATTHEWS: Is there a citation for
18 that exhibit, just so we --

19 MR. TAYLOR: It's the University of Texas
20 study.

21 JUDGE RYERSON: It probably had an exhibit
22 designation in your petition.

23 MR. MATTHEWS: It's in the --

24 MR. TAYLOR: It's in the petition, and I
25 gave the URL. It's titled, Historical review of

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1 induced earthquakes in Texas, by Frohlich and others.

2 MR. MATTHEWS: Sorry about that.

3 MR. TAYLOR: Secondly, in that same study,
4 there's a chart that shows the increase in injection
5 wells in recent times, and you can see the cluster
6 of -- it's almost solid -- of injection wells in the
7 area of the WCS site. So that's information that was
8 not pertinent to the Holtec case that shows the
9 earthquake potential.

10 And the point of the Texas study was that
11 induced earthquakes from the oil and gas drilling
12 increase because of the oil and gas drilling in the
13 area.

14 The ER in section 3.3.3 claims only
15 minimal risk of faulting with seismicity. There's no
16 mention of seismicity induced by oil and gas
17 exploration. That section refers to a seismic hazard
18 evaluation, but we don't know what is in that
19 evaluation. It was listed as proprietary.

20 If I can just take a moment, I know in the
21 Holtec case, the Board said, well, we could use the
22 SUNSI procedure. But to be clear there and again here
23 in this case, the SUNSI procedure is really a very,
24 very difficult procedure to use. You have to know
25 what your issues are.

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1 You have to know what your evidence is
2 almost within ten days after the start of the 60-day
3 period for filing your contentions. Then you have to
4 make the application to the NRC staff who are going to
5 determine whether you even have standing or whether
6 the contention might be admissible. And then there
7 may be restrictions even then on what you can get.

8 It just doesn't really allow the
9 intervenor an appropriate opportunity to get that
10 information. And, frankly, I'm not sure why that
11 study, which is so pertinent to the conclusion that
12 was made in the ER would be proprietary. It would be
13 a study that certainly anybody should be able to have
14 in order to evaluate the ER.

15 There are numerous statements in the ER in
16 section 3.3.3, but we're just not clear if the
17 statements are from the seismic hazard evaluation or
18 simply unsupported assertions.

19 The contention also again relies on a
20 study from Stanford University, and there are charts
21 in that study that show the -- what they call the slip
22 potential in the area. That's these green lines, and
23 the slip potential, as I understand it, means that
24 there's an increased possibility of faulting, and thus
25 it can increase possibility of earthquakes. And you

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1 can see that they're right there in the area of the
2 WCS site.

3 Also in that same Stanford study is a
4 chart that shows what they call the orientation of the
5 faulting, and you can see again right there in the
6 area of the WCS site, there is some shifting of the
7 orientation that would lead to an increased potential
8 for earthquakes.

9 So I think with all of that, we have shown
10 that there is a difference in the facts. There are
11 additional facts in this case that were not present in
12 the Holtec decision that make this contention
13 admissible in terms of the ER and the SAR in this case
14 not adequately addressing the earthquake potential.

15 The next one I wanted to address is the
16 one you discussed with Ms. Curran, violation of the
17 Nuclear Waste Policy Act, which is our contention 1.
18 Ms. Curran has done an excellent job of covering most
19 of that, but a couple of things I wanted to add.

20 First of all, in the Holtec case, the
21 initial documentation Holtec presented, other than the
22 ER, did list the nuclear plant owners as possible
23 owners of the title to the waste once it got to the
24 site. They just did not put it in their ER, and so we
25 argued, of course, that the addition of the nuclear

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1 plant owners was simply to make the proposal more
2 palatable, but not necessarily verifying or assuring
3 that the nuclear owners would want to retain
4 ownership.

5 Here, however, ISP, in their initial
6 documentation, never once in any of the documents
7 mentioned the nuclear plant owners. It was always
8 DOE, until Ms. Curran raised the issue. Then they
9 came up with revision 2 of their documentation, and
10 added the nuclear plant owners.

11 So I think here we have a much clearer
12 case that the addition of the nuclear plant owners is
13 simply a fig leaf to give the impression that this
14 project would be legal. But there's still no
15 assurance that the nuclear plant owners would want to
16 retain title. In fact, you know, the inference in the
17 documentation is that they want to get rid of it.
18 That's the point. But --

19 JUDGE RYERSON: Is that really an issue,
20 Mr. Taylor, in front of us? In other words, if ISP
21 constructs this facility and finds that there are no
22 takers, is that the NRC's concern? If it's
23 constructed safely and there are adequate assurances
24 it would be operated safely, if anybody wanted to send
25 their waste there but no one did, I mean, is that a

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1 bad thing? Is that something that we're supposed to
2 be concerned about?

3 MR. TAYLOR: I believe it is, because as
4 we said and as Ms. Curran said, it would be illegal,
5 and certainly you can't license an illegal --

6 JUDGE RYERSON: No. It wouldn't be
7 illegal if no one sent their waste there. Am I
8 correct?

9 MR. TAYLOR: Well, as proposed by ISP,
10 though, it would be illegal. They -- what it seems to
11 me they're doing is saying, We don't know what's going
12 to happen; give us a license anyway.

13 You know, in talking to Ms. Curran, you
14 raised the hypothetical of a liquor store owner and
15 the age of being able to buy liquor being changed.
16 But I think another analogy that may be closer is if
17 I'm still a law student and I say, Give me my law
18 license, and then if I graduate from law school and
19 pass the bar, then I'll be a lawyer, and I've already
20 got my license. That's kind of what we're looking at
21 here, it seems to me.

22 JUDGE RYERSON: Well, the analogy that
23 occurs to me is if you're a law student and you go to
24 a law firm and you say, Would you please hire me as a
25 law clerk until and when and if I get my -- I pass the

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1 bar, and then please hire -- we agree you'll hire me
2 as an associate. But there is a lawful option
3 meanwhile, and maybe that lawful option would go on
4 for a while if you fail the bar three times.

5 MR. TAYLOR: But in that case, Judge, you
6 are not getting paid for being an associate. You
7 don't get any of the other benefits, which is what
8 really ISP is asking for here. They're asking for a
9 license to be able to operate, and that's not the same
10 as if they said, Come to -- if they came in and said,
11 Well, if we get a license and we get the legal right
12 to store this waste, then we'll apply for a license.

13 That's kind of what this associate example
14 would be. But they aren't doing that. They're
15 saying, Give us a license now, and then later on, we
16 hope that we will be able to do it legally.

17 JUDGE TRIKOUROS: As a practical matter,
18 isn't it true that ISP is not going to lift a finger
19 to construct this facility unless they have signed
20 contracts from whoever is the spent nuclear fuel title
21 holder? I believe they went so far as to say that
22 directly at least once or twice in their
23 documentation. So there won't be a facility built
24 here if there aren't signed contracts.

25 So it's not hypothetical at all. It's

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1 very clear that it will only be built -- now, that's
2 their decision to do that. They could have done it
3 any way they wanted, but I don't think the NRC cares
4 one way or the other. But that is the reality.

5 MR. TAYLOR: But, I guess, my feeling is
6 that if it's illegal, the NRC can't license it. Even
7 though if theoretically, although we don't think so,
8 it would be safe and environmentally appropriate, if
9 it's illegal, they still can't license it, it doesn't
10 seem to me. I don't see how you can license something
11 that would be illegal.

12 And we don't know whether or not the
13 nuclear plant owners are even interested in doing
14 this. It seems to me at least if ISP proposes one
15 alternative of the nuclear plant owners taking title,
16 they should at least have something in the
17 documentation from nuclear plant owners that, yes, we
18 would be interested in doing that.

19 They don't need a signed contract or any
20 firm commitment, just some assurance or some
21 indication from nuclear plant owners that, yes, we'd
22 be interested in doing that. They don't even have
23 that much.

24 And so, I think, because of the way the
25 application was made here initially, with only DOE and

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1 then adding nuclear plant owners only as an
2 afterthought, after an issue was raised, it seems to
3 me it is just a fig leaf and that the real intent here
4 is for the DOE to take title, and that ISP would use
5 the license if it's issued as leverage to Congress to
6 say, well, look, we've got a license from the NRC, so
7 change the law for us. I think that's probably what's
8 going on.

9 I also wanted to talk about the
10 decommissioning funding. ISP lists only two sources
11 of funding, the DOE, which I think we all agree is
12 illegal, and reactor owners again. But ISP has
13 provided no plan that I could see in their
14 documentation as to how this would be funded, how it
15 complies at all with 72.30.

16 In Holtec, at least Holtec had a plan,
17 although we asserted that the numbers didn't add up.
18 At least they had a plan. ISP doesn't even have a
19 plan.

20 NUREG-1757, volume 3, which talks about
21 decommissioning, lists only specific acceptable
22 funding mechanisms: a trust fund, surety bond, letter
23 of credit, insurance policy, parent guarantee -- a
24 parent company guarantee, self guarantee, external
25 sinking funds which, I believe, is more or less what

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1 Holtec had proposed, a statement of intent from a
2 licensee that's a government entity, special
3 arrangements with a government entity, and standby
4 trust funds.

5 I don't see any of that in ISP's
6 decommissioning plan. Well, there is no plan. Their
7 proposal.

8 And then they say they're going to request
9 a waiver from the requirements of 72.30, but they cite
10 no regulation or other authority that would allow that
11 waiver. There is authority in Chapter 72 for a waiver
12 of certain requirements, but I don't believe the
13 conditions for those waivers would be present here,
14 and certainly ISP has not suggested any.

15 They just make the unsupported statement
16 they're going to ask for a waiver, but there's no
17 indication that they would get that waiver or how it
18 would work. So I think there is a distinction here
19 between the decommissioning funding plan from Holtec
20 and ISP.

21 JUDGE RYERSON: I'm sorry. Are we talking
22 about the waiver that -- there was a withdrawal of the
23 waiver request. Are we talking about something
24 different?

25 MR. TAYLOR: I didn't know that they had

1 withdrawn it. I'm looking at Appendix D in their
2 application, which is their decommissioning proposal,
3 and --

4 JUDGE RYERSON: There's a subsequent
5 letter, I think, June 3 -- yes. There's a June 3
6 letter. Mr. Matthews will probably address that.

7 MR. TAYLOR: Okay. I wasn't aware of
8 that.

9 JUDGE RYERSON: The request for an
10 exemption has been, I understand, withdrawn.

11 MR. TAYLOR: But anyway, there's just no
12 real plan presented that would satisfy 72.30. Then I
13 want to -- I talk about geology and groundwater, which
14 again seems to me to be quite site-specific.

15 First of all, here -- our submission has
16 shown that this site is over the Ogallala Aquifer.
17 The ISP documentation asserts that it is not, but in
18 the maps that we presented in our expert's report, the
19 Ogallala Aquifer would extend down to the site that's
20 being proposed for this -- for the CIS project.

21 Also, we disagree with the statement in
22 the environmental report about the depth of the
23 groundwater. The evidence we presented in our
24 contention shows that the groundwater is at a much
25 shallower level than indicated in the ER.

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1 The NRC standard review plan, which we
2 cited in our contention, says there's no evidence that
3 cladding of high burnup fuel will remain undamaged
4 during the licensing period. This is relevant,
5 because ISP and, I believe, the Board in the Holtec
6 decision relied to some extent on the allegation that,
7 well, the containers won't leak, so there's no issue
8 as far as groundwater or geology.

9 But here, as near as I can tell, there's
10 no discussion in the ER or the SAR about high burnup
11 fuel. You know, there's a reference in ER 4.2.6 to a
12 RADTRAN study that does not specifically address high
13 burnup fuel, and furthermore, that talks about
14 transportation issues and not issues at the site once
15 it's being stored.

16 And I think Judge Trikouros made a very
17 important point in the Holtec hearing that we had, is
18 that irrespective of whether there's a path from the
19 containers to the groundwater for any impact to the
20 groundwater or the containers, the ER is required to
21 make a thorough, accurate review of the site,
22 including geology and groundwater.

23 And so I think that even beyond the point
24 of whether or not there's a pathway, the ER fails to
25 adequately describe or address the condition of the

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1 geology and the groundwater in this area. And we've
2 shown that, and to the extent there's any
3 disagreement, I think that's a factual disagreement
4 that needs to be fleshed out at a hearing.

5 Our contention 14 dealt with the safety of
6 storage containers. In this case, the SAR at section
7 1.1 states that the containers to be stored at the ISP
8 facility are licensed for 20 years, and that the hope
9 is for them to be licensed for an additional 40 years.
10 That 60-year licensing period would be less than the
11 60- to 100-year life of the facility.

12 Furthermore, this scenario does not
13 account for the possibility that a permanent
14 repository may never be opened, and the CIS facility
15 would be a de facto permanent facility or a permanent
16 repository.

17 The container storage rule I don't believe
18 applies here because the container storage rule as I
19 read it and the GEIS that went along with it did not
20 really address specific containers. It was more of a
21 generic analysis, and each case would require a
22 determination of the appropriateness of the containers
23 for storage beyond the licensing period.

24 ISP, I believe, probably hopes that
25 they'll get licenses beyond the 60-year period they

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1 put in their documentation, but there's certainly no
2 assurance of that, and there's no assurance that this
3 site or this facility would be capable of storing
4 waste beyond that period.

5 And even so, they say the life of the
6 facility would be 60 to 100 years, so there's
7 absolutely no indication that they plan to license it
8 beyond that stated period that they've put in their
9 documentation.

10 And we believe -- and I think most of the
11 intervenors believe -- that if this facility and the
12 Holtec facility are licensed, that takes the political
13 pressure off to find a permanent repository, because
14 a permanent repository, as we've seen, is very
15 difficult to site. And there's absolutely no
16 indication that that siting would come anytime soon,
17 if it comes at all.

18 So we believe that the SAR in this case
19 does not adequately address the safety of the
20 containers beyond the licensing period, and certainly
21 beyond the stated life of the facility.

22 But to the extent that this is also
23 different than the Holtec case, in Holtec our
24 contention 9 was different in that it was focused on
25 the design and service lives of the Holtec containers,

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1 not the licensing period.

2 ISP has not described any design or
3 service life with the containers to be used in their
4 facility here, so we don't have anything to go on
5 there. We're just -- all we have is the licensing
6 period and the licensing of the containers.

7 Transportation issues is the next thing
8 I'd like to address, unless there are questions. In
9 the Holtec case, our contention 4 also dealt with
10 transportation issues, and there was some discussion
11 about the study that we relied on there by Dr. Marvin
12 Resnikoff and Matthew Lamb concerning a train
13 derailment into Baltimore that resulted in a fire and
14 whether that was pertinent to this case or not -- that
15 case, I should say, the Holtec case.

16 And here, however, we're relying on the
17 study that was done again by Dr. Resnikoff for Yucca
18 Mountain, and although in the Holtec case, this Board
19 criticized us for allegedly not disputing Holtec's
20 reliance on the Yucca Mountain EIS and not countering
21 that EIS as criticism of Dr. Resnikoff's report,
22 that's not an issue here.

23 In the Yucca Mountain report, what
24 happened was that the DOE, which, of course, had a
25 vested interest in seeing Yucca Mountain go forward --

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1 JUDGE RYERSON: It was the Applicant, as
2 I recall.

3 MR. TAYLOR: It was the Applicant. You
4 bet. And so they had a vested interest in criticizing
5 Dr. Resnikoff's report. It wasn't exactly an
6 independent, objective criticism of Dr. Resnikoff's
7 report. So that's why -- and we didn't think it was
8 going to be relied on to the extent that it was, and
9 we didn't challenge it.

10 But in this case --

11 JUDGE TRIKOUROS: Dr. Resnikoff's
12 analysis, if I remember correctly, used RADTRAN as
13 well as ISP. Correct?

14 MR. TAYLOR: Yes, yes. But he came up
15 with a different result, and we explain why, or at
16 least we tried to in our contention. In this case,
17 ISP does not rely on the Yucca Mountain EIS but had
18 its own evaluation in ER 4.2.

19 Our contention 4 in this case set forth
20 Dr. Resnikoff's specific criticisms of that evaluation
21 and challenged the conclusions of that study, so
22 that's something that was not in the Holtec case. And
23 whether or not you agree with Dr. Resnikoff's
24 criticism, at least we put it out there, and it
25 creates a factual issue that I think is appropriate

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1 for a full hearing.

2 We also had a declaration from Dr. Gordon
3 Thompson in this case that we didn't have in the
4 Holtec case, expressing some concerns about the
5 transportation of the waste. So those are all items
6 that were not present in the Holtec case that are
7 present here.

8 Contention 2 in this case that criticized
9 the ISP documentation for saying that CIS was safer
10 and more secure than on-site storage. We again cite
11 the container storage rule and the rule of
12 decommission report, both saying that on-site storage
13 is safe indefinitely.

14 And there was some indication that an ER
15 would not deal with safety, but if you read NUREG-
16 1748, section 6.3.11, which is the NRC guidance for
17 the licensing -- well, for ERs and EISs in waste
18 cases, it says that safety is an issue in terms of
19 public health and safety. So it is appropriate to
20 address that in the ER.

21 Dr. Thompson in his declaration points out
22 the alleged reasons that ISP lists for attempting to
23 justify this project are wants and not desires --
24 not -- they're wants or desires and not needs.

25 And, again, the NRC guidance for ERs

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1 specifically says that the ER has to present needs and
2 not simply a justification for the project.

3 And the ER here, in setting out what they call
4 their purpose and need, are simply things that are
5 desired but are not needed.

6 We also noted that on-site storage doesn't
7 mean that nothing is done. We're suggesting that the
8 ER should look at hardened on-site storage, because
9 that would increase the safety of on-site storage, and
10 may be even more safe than the CIS.

11 So just because we're saying that on-site
12 storage should be better evaluated doesn't mean that
13 on-site storage would be just, you know, putting it in
14 an unsafe container. We're saying you can bulk up
15 that on-site storage to make it safe. And the ER has
16 not adequately looked at the on-site storage.

17 JUDGE RYERSON: Just to alert you, Mr.
18 Taylor, I think we can give you about ten more
19 minutes.

20 MR. TAYLOR: Okay.

21 JUDGE RYERSON: Up to ten minutes.

22 MR. TAYLOR: And I think we already noted
23 that in this case, it doesn't appear that ISP has
24 adequately addressed the issue of high burnup fuel
25 that we set forth in contention 16.

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1 I would also note finally that the site
2 selection alternative -- or the site selection process
3 for alternatives as we've described in our contention
4 11 is not adequate. The site selection is not about
5 purpose and need. It's about the range of
6 alternatives.

7 And here, although ISP claims they've gone
8 through a rigorous site selection procedure, going
9 through several states and looking at various cities
10 and the 15 criteria, they amazingly came up with the
11 perfect site right next to their adjacent -- or their
12 existing low-level site on land already owned by WCS.

13 So we've explained in detail in our
14 contention why that site selection process was
15 inadequate and should not be allowed to qualify for an
16 adequate review of alternatives. NEPA is clear. The
17 regulations are clear that alternatives are a part of
18 the NEPA process, and without doing that, they have
19 not done a proper job.

20 If I still have a few minutes left,
21 contention 13 concerns the protected species of
22 lizards. And the -- we've shown how the ER says these
23 species are in the area. One has been sighted on the
24 site, and the other is likely in the area, but there's
25 been no study showing that they've done a proper job

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1 of surveying to see if those species are there, and if
2 they would be impacted.

3 And, finally, environmental justice, we
4 take issue with the hard and fast four-mile rule or
5 radius that was used. You know, we're not challenging
6 the regulation. That's simply guidance, and the
7 guidance itself says that that four-mile radius is --
8 well, flexible and only advisory.

9 And we've shown here how there are -- the
10 adjacent counties are majority minority and that that
11 was not properly taken into consideration, and that,
12 in fact, the area -- the region of interest that is
13 set forth in Appendix A, which is the socioeconomic
14 issues section, is 30 miles. And we have definitely
15 minority populations in the 30-mile region of
16 interest. So that hasn't been adequately addressed.

17 Thank you.

18 JUDGE RYERSON: Judge Arnold, do you have
19 any questions at this time?

20 JUDGE ARNOLD: On that last contention,
21 contention 13, I see actually two claims in the
22 statement of contention. One has to do with an
23 endangered species. The other one is there is no
24 discussion of any of the studies or surveys used to
25 determine if a species are present.

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1 So is part of your claim that that section
2 3.5.16, description of ecological studies, is
3 inadequate?

4 MR. TAYLOR: Yes.

5 JUDGE ARNOLD: Okay.

6 JUDGE RYERSON: Thank you, Mr. Taylor.

7 I think what we'll do is take another
8 break till -- a short one, till 11:15. Then we'll
9 hear from ISP's counsel and the NRC staff in response
10 to Mr. Taylor. Then we'll have lunch.

11 And I think when we take a break, the
12 Board will consider maybe how to handle the issue of
13 standing, the argument on standing that cuts across
14 all of the petitioners. We might do that today or
15 maybe tomorrow, depending on how we're doing.

16 But let's convene again at 11:15. Thank
17 you.

18 (Whereupon, a short recess was taken.)

19 JUDGE RYERSON: All right. We are back on
20 the record.

21 Before we hear from ISP's counsel in
22 response to Mr. Taylor, the Board has been talking
23 about this issue of standing -- I'll say, the argument
24 of standing that cuts across all petitioners. And I'm
25 pretty sure that we're going to need all of today for

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1 presentations. We'll finish today -- this morning
2 around lunchtime. Then we still have two petitioners
3 to address in the afternoon.

4 So I'm thinking -- we are thinking that
5 maybe the first thing we do tomorrow is address the
6 standing argument that ISP would like to make that
7 cuts across all petitioners.

8 Do you have a sense of how long that would be?

9 MR. LIGHTY: Your Honor, I think it would
10 be five, ten minutes, unless you have specific
11 questions, and then we will certainly be willing to
12 answer those.

13 JUDGE RYERSON: Okay. I mean, we're not
14 holding you strictly to that. This is kind of outside
15 of what we planned with the June 7 order. I think
16 since it goes to all petitioners, we would hear, if
17 need be, from everybody on the standing issue, but it
18 might be a good idea if overnight, after today's
19 session or at lunch, the petitioners' counsel might
20 agree on someone who takes a lead in response to the
21 argument.

22 I assume it's a variation of the argument
23 that was presented in their opposition, and Mr. Lodge
24 is standing up, because he wants to say something.

25 MR. LODGE: No. I have a question, Judge

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1 Ryerson.

2 JUDGE RYERSON: Yes.

3 MR. LODGE: Part of my presentation this
4 afternoon, given the fact that a similar group of
5 petitioning intervenors in the Holtec case were denied
6 standing, part of my presentation is going to address
7 in detail our particular case for legal standing here.

8 I am just asking if I am going to be
9 allowed to proceed this afternoon to do that, or if
10 that gets bundled into what's you're talking about.

11 JUDGE RYERSON: You may use your 45
12 minutes as you see fit.

13 MR. LODGE: Thank you.

14 JUDGE RYERSON: Again, as I said earlier,
15 we suggested, given the result in Holtec, that you
16 might find it most useful to use that time telling us
17 how this case is different. But it's entirely up to
18 you, however you wish to use your 45 minutes.

19 And, again, we'll let all the
20 petitioners -- all petitioners have an interest in
21 standing. This is an argument that cuts against the
22 standing of every petitioner, and so we'd let you all
23 speak. I just think it might, from your standpoint,
24 be most effective if you agree upon a lead on that.
25 But we'll deal with that then tomorrow. It doesn't

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1 sound like it's an unduly lengthy argument.

2 But we'll probably, unless we move very
3 rapidly this afternoon, we'll count on that as our
4 opening for tomorrow, and then we'll go to the phase
5 of the Judges' specific questions, some of which I
6 think are being answered in the course of these
7 presentations, so we may have fewer questions than we
8 otherwise would have had.

9 All right. So with that, Mr. Matthews,
10 are you responding to Mr. Taylor?

11 MR. MATTHEWS: Judge Ryerson, the three of
12 us, we have split the contentions by subject matter.

13 JUDGE RYERSON: Okay.

14 MR. MATTHEWS: So each of us have some of
15 these that Mr. Taylor --

16 JUDGE RYERSON: Well, that's fine. I
17 think if you move to the lectern, then you'll be
18 picked up by the court reporter, so that's the best
19 place to do it.

20 MR. MATTHEWS: We'll do that. Ryan Lighty
21 will go first and discuss the seismicity issue, and
22 then to avoid jumping up and down, he will address the
23 other contentions that he's responsible for, and Mr.
24 Bessette and I will then address the ones that we're
25 responsible for.

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1 JUDGE RYERSON: Right. And I certainly
2 don't want to tell you how to conduct your argument,
3 but I think all the Board members were interested in,
4 I think it is, Sierra Club number 4, whatever deals
5 with the transportation aspect, so I hope someone is
6 dealing with that.

7 MR. MATTHEWS: We are, Your Honor.

8 JUDGE RYERSON: Okay. Thank you.

9 MR. LIGHTY: Thank you, Your Honor. Ryan
10 Lighty for the Applicant. As Mr. Matthews mentioned,
11 I'm going to start off responding regarding Sierra
12 Club contention 6 on earthquake potential. Sierra
13 Club's counsel noted that there was a difference
14 between the pleadings in the two proceedings in that
15 the petition here referenced a University of Texas
16 study.

17 However, the statement of the contention
18 in the two proceedings is verbatim identical, except
19 for the name of the applicant. And the addition of
20 the UT study does not add anything material to the
21 arguments advanced. It merely stands for the
22 assertion that petroleum recovery activities may cause
23 induced seismicity, and that's a duplication of the
24 Stanford study, although with different geographic
25 areas, but the concept being that the petroleum

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1 recovery may cause induced seismicity.

2 There's no dispute with the application on
3 that point. The application explicitly recognizes
4 that possibility and analyzes it.

5 Second, Your Honor, a significant
6 difference between the Holtec proceeding and this is
7 that Sierra Club's arguments on earthquake potential
8 in the Holtec proceeding cited to the analysis that
9 was conducted. Here they simply complain that the SAR
10 and the attachment with the analysis is a SUNSI
11 document, so we're going a step further in their
12 failure to challenge the relevant content of the
13 application, and that is a significant difference
14 between the two proceedings that we think the Board
15 should be aware of.

16 If you have any questions on Sierra Club
17 6, I would be happy to answer those. Otherwise, I can
18 move on to --

19 JUDGE RYERSON: Judge Arnold, any
20 questions at this point?

21 JUDGE ARNOLD: No.

22 JUDGE RYERSON: Judge Trikouros?

23 JUDGE TRIKOUROS: No.

24 JUDGE RYERSON: Okay. Proceed.

25 MR. LIGHTY: Turning now to Sierra Club

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1 contention 4 regarding the transportation analysis,
2 again the statement of the contention is identical
3 between the two proceedings but for the name of the
4 applicant.

5 But in the ISP proceeding, there is a
6 different Lamb and Resnikoff study that was cited in
7 the petition. The title of that study is, Worst case
8 credible nuclear transportation accidents, analysis
9 for urban and rural Nevada.

10 Now, in the Holtec proceeding, there may
11 have been some question as to whether the report cited
12 was a worst case analysis. Here there can be no
13 doubt. The title of the document itself tells you
14 what it is.

15 More importantly, this analysis does not
16 challenge the sufficiency of ISP's RADTRAN analysis.
17 This document challenges and criticizes the DOE
18 RADTRAN analysis, and so to lodge arguments against an
19 analysis that's not in this application simply doesn't
20 dispute the application.

21 The closest that petitioners got to doing
22 so was simply copying and pasting some charts from the
23 Resnikoff analysis and saying, These are lower values.
24 But the ISP -- excuse me. The ISP analysis has lower
25 values. But it does not explain why that makes the

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1 application deficient.

2 Merely citing to a worst case analysis and
3 saying there's a discrepancy does not identify a
4 genuine dispute with the application. It doesn't
5 explain what that dispute is, why the analysis that
6 was conducted may have been deficient somehow.

7 JUDGE TRIKOUROS: In -- however, in your
8 analysis, you seem to go to great lengths to show that
9 various other studies agree with you, one of which, I
10 think, was the DOE study that we're talking about.
11 And, therefore, to some extent, then, Dr. Resnikoff's
12 challenge to the DOE RADTRAN study, which got the same
13 basic answers that your RADTRAN study got, has a
14 measure of validity, wouldn't you say?

15 MR. LIGHTY: Perhaps in an attenuated
16 fashion. I don't believe the ISP application gives
17 significant analysis to the DOE report. It's
18 certainly cited as a reference, and it is noted that
19 ISP's RADTRAN is consistent with the NRC's conclusions
20 in NUREG-2125, in the PFS analysis, in the DOE
21 analysis.

22 But still we don't have any explanation
23 for why the Lamb and Resnikoff report criticizing the
24 DOE analysis somehow presents a challenge to ISP's
25 analysis, even though ISP's conclusions may be similar

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1 to what all of the other studies have concluded.

2 JUDGE TRIKOUROS: I also wanted to just
3 point out that for further discussion tomorrow, that
4 the staff only recently identified a bunch of RAIs
5 regarding this subject and, you know, needed a
6 significant amount of additional information so that
7 they could understand the details of the RADTRAN study
8 that ISP conducted.

9 Therefore, it would be hard for me to
10 understand how Sierra Club could understand the
11 details and present an argument if they weren't
12 available even to the NRC.

13 MR. LIGHTY: I would first note that the
14 petition doesn't attempt to challenge the information
15 that was provided in the ISP RADTRAN analysis, and to
16 the extent that the new RADTRAN analysis that was
17 recently submitted -- and I believe there was -- that
18 was submitted on June 28 and notification to the Board
19 and all the parties was sent out regarding that.

20 The new RADTRAN analysis essentially was
21 a regeneration under the TN Americas quality assurance
22 plan, but it didn't reach any different conclusions.
23 The methodology was the same. It was just a rerun of
24 the RADTRAN, and so, you know, to the extent that
25 there may have been some additional information that

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1 was presented there, petitioner didn't seek to
2 challenge the absence of that information in the first
3 instance, and so they didn't identify that as their
4 purported dispute with the allocation.

5 JUDGE TRIKOUROS: The enclosures that were
6 provided in that, I think you mentioned, June 28
7 letter, notification letter, there were numerous
8 enclosures apparently. I don't think we saw more than
9 one or two of those, but those were not publicly
10 available?

11 MR. LIGHTY: I believe that there was a
12 proprietary attachment to the document with some
13 information about the actual calculation, but all of
14 the information was described in the publicly
15 available attachment to the Board notification.

16 JUDGE TRIKOUROS: You apparently provided
17 RADTRAN input files, pretty much anything you would
18 need to independently verify the calculation. But
19 that was not available to anyone else. I'm asking.

20 MR. LIGHTY: Yes. I believe that is
21 correct. The actual files are proprietary
22 information, and no petitioner sought to obtain SUNSI
23 authorization to view proprietary information in this
24 proceeding when they had the opportunity to do so.

25 MR. LIGHTY: If the Board has no other

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1 questions on Sierra Club 4, I'm happy to move on very
2 briefly to Sierra Club contention 11.

3 JUDGE ARNOLD: I do have a question, and
4 it has to do with the details of the shipping casks
5 being used in the transportation accident analysis.
6 And you may not be able to answer this. But I'm
7 wondering how important the actual structural details
8 of the casks are.

9 For instance, if you did a detailed finite
10 element analysis of the cask, putting it through the
11 accident transient, the details would be very
12 important. Alternatively, if you just used the design
13 criteria, you know, that the NRC says, these are the
14 things that the cask must survive and the analysis
15 just looks to see that the temperature's under that
16 temperature, the, you know, G forces are within it,
17 then there's no failure, in that type of analysis, the
18 details of the specific cask are not important because
19 it covers all the certified casks.

20 Which type of analysis are your accident
21 analysis? Do you know?

22 MR. LIGHTY: Unfortunately, that's not
23 something that I can answer regarding the details of
24 a finite element analysis inputs. You know, I would
25 note that any transportation cask is going to have to

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1 be NRC-approved, according to performance criteria,
2 and so I'm not sure that any difference would be
3 material.

4 But more importantly, petitioners didn't
5 present any information, any support for an argument
6 that there is a material difference. Any unsupported
7 speculation simply would not be enough for an
8 admissible contention.

9 JUDGE ARNOLD: Thank you.

10 JUDGE TRIKOUROS: The -- I got the
11 impression that the assumptions on the loss of
12 shielding transportation accident was sort of
13 nonmechanistic in the sense that basically said, the
14 cask loses a certain amount of shielding, and that was
15 it. It wasn't -- the cask itself didn't seem to me to
16 be analyzed. Can you comment on that?

17 MR. LIGHTY: That also is not something
18 I'm intimately familiar with. No. I would note that
19 the analysis, however, did use conservative bounding
20 in that all of the canisters that would be received at
21 ISP, stored at ISP, would be welded inert canisters,
22 and for the sake of conservatism, it was assumed that
23 welded inert canister would not be used.

24 In other words, I think the proper term
25 would be bolted canisters, which have a greater

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1 p r o b a b i l i t y o f l e a k s .

2 And so the analysis that was is very
3 conservative, very bounding analysis in that regard.

4 JUDGE TRIKOUROS: We'll pursue this
5 more --

6 MR. LIGHTY: Sure.

7 JUDGE TRIKOUROS: -- tomorrow.

8 MR. LIGHTY: Okay. Very good.

9 JUDGE TRIKOUROS: Or later today.

10 MR. LIGHTY: Okay. If there are no
11 further questions on Sierra Club 4, I will move on
12 very briefly to Sierra Club 11. This is the site
13 selection contention.

14 This was not a specific contention raised
15 in the Holtec proceeding. It is new here. But the
16 bottom line is that the petitioners provide no
17 explanation of how the process used here for site
18 selection circumvents reasonable consideration of
19 alternatives or is somehow less than what the NRC
20 requires in an environmental report.

21 The petitioners have a laundry list of
22 complaints about the issues that are discussed in the
23 ER, but it doesn't identify any legal deficiency,
24 anywhere the application's somehow deficient as a
25 matter of regulation or law. And so for the reasons

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1 that we discussed in our pleadings, we continue to
2 believe that contention is inadmissible.

3 And if there are no questions on Sierra
4 Club 11, I will move on to Sierra Club 15 very briefly
5 also. This is the environmental justice contention.
6 The Board in LBP 19-4 considered three environmental
7 justice related contentions from AFES, and the
8 conclusion for those contentions is entirely
9 applicable here.

10 The bottom line is that Sierra Club has
11 not pointed to any legal requirement for a more in-
12 depth EJ analysis. ISP addressed EJ to the depth
13 recommended by NRC guidance, and petitioners offer
14 nothing to explain why compliance with the guidance in
15 this case is somehow deficient.

16 They offer what they believe would be
17 their preferred radius for an EJ analysis, but they
18 don't offer any support for why that would demonstrate
19 a genuine dispute with the application. And so the
20 contention is inadmissible on those grounds.

21 And if there are no questions on that
22 contention, I will turn it over to my colleague Tim
23 Matthews.

24 MR. MATTHEWS: Thank you, sir. I will
25 start with Sierra Club 1. Sierra Club 1 is its

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1 version of the Nuclear Waste Policy Act --

2 VOICE: Can you speak louder, please.

3 MR. MATTHEWS: Thank you. Sierra Club 1
4 is its rendition of the Beyond Nuclear Nuclear Waste
5 Policy Act contention. Sierra Club in its filing of
6 this contention argued only standing and adopted
7 Beyond Nuclear's pleadings. In that regard, it is no
8 different than Beyond Nuclear. It was not amended as
9 it was in the other CISF proceeding, so all the
10 discussion we had earlier about Beyond Nuclear 1 hold
11 here, and we have not further to address on that
12 specific allegation.

13 There was a suggestion, though, here today
14 that is somewhat different from the pleadings that
15 went to the timing of ISP's revised application, I
16 think, and suggesting that the Board should read some
17 inference into it and suggest a fig leaf.

18 ISP's application was submitted after the
19 WCS version of the application had been suspended.
20 The joint venture parties formed Interim Storage
21 Partners, decided on a new business model or an
22 amended business model to incorporate both DOE and
23 private storage, and revised the application and
24 submitted it that way. It's that simple. There's no
25 reason for the Board to draw any untoward inference

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1 from it. It's that on Sierra Club 1.

2 Sierra Club 9 is similar and more, a
3 little bit. In fact, the staff's original reason for
4 suggesting that Beyond Nuclear and Sierra Club 1 were
5 admissible was that ISP had an exemption request that
6 relied on the Nuclear Waste Policy Act in their view,
7 and therefore, the contention would be admissible.

8 As the Board noted, the Applicants have
9 withdrawn that exemption request. It's no longer part
10 of the application. I think that was discussed in the
11 questions with respect to Sierra Club 9.

12 The Board's ruling in the similar
13 decommissioning funding or financial qualification
14 funding in Sierra Club 8 in the other proceeding, the
15 basis is similar. Here the fault of the petitioner is
16 different in that they failed to read the application,
17 and they assert that there is no decommissioning plan,
18 and appear to continue to assert that today, despite
19 it being answered in the briefs.

20 We point to the section in the application
21 and the attachment entitled, Decommissioning Plan. So
22 we think that answer is fully briefed, and we think
23 the Board's logic in Sierra Club 8 in the other
24 proceeding would apply fundamentally here as well.

25 There were two other contentions that I

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1 want to address briefly here with you today. I
2 suspect that they're ones that the Board may be
3 interested in discussing further. Did you have a
4 question, Judge?

5 JUDGE TRIKOUROS: Yes. I just wanted to
6 make sure that I understand the sequence. Originally
7 you were relying upon the DOE entirely for
8 decommissioning funds. Is that correct?

9 MR. MATTHEWS: The WCS application
10 originally submitted relied exclusively on DOE as the
11 only customer.

12 JUDGE TRIKOUROS: Okay. And the revision
13 basically took the DOE out of the picture and said
14 that you were going to meet the requirements of
15 72.13 -- .10.

16 MR. MATTHEWS: No. Not exactly. The
17 application as originally submitted for financial
18 qualification indicated that ISP would have a contract
19 with DOE as a customer, and it would -- in fact, the
20 license condition was there, that it would have an
21 external sinking fund and a contract with DOE.

22 It was modeled on the PFS application, so
23 that funds recovered from the customer would be
24 deposited in the external sinking fund, and the surety
25 would make the difference between the balance in the

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1 fund and the decommissioning cost estimate.

2 When Interim Storage Partners reactivated
3 the application, they amended it to include -- so not
4 to remove DOE, but to include -- let me step back. It
5 also had an alternative by which WCS would use an
6 exemption, based on other Part 70 facilities where DOE
7 would assume the financial obligation for
8 decommissioning the facility, so one of the other
9 listed provisions of 72.30.

10 Those two provisions were left in, so DOE
11 as a customer with the external sinking fund, or the
12 DOE exemption were left in the application in Rev. 2
13 when ISP reactivated it. But ISP added a third, and
14 that was that private customers would use that 72.30
15 external sinking fund combined with surety bonds.

16 So regardless of who the customer was,
17 when ISP recently, on June 3, removed that exemption
18 request, those two alternatives still exist.
19 Regardless of who the customer is, ISP will recover
20 those funds, deposit them into the external sinking
21 fund and make up delta with a surety bond.

22 JUDGE TRIKOUROS: And you appropriately
23 modified the license conditions as per --

24 MR. MATTHEWS: That's correct, Judge
25 Trikouros. We modified that amendment, modified

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1 everywhere the exemption was addressed and removed the
2 exemption request in 1.71.

3 JUDGE ARNOLD: I do have a simple
4 question. The petitioners have expressed doubts as to
5 whether or not it is credible that utilities owning
6 fuel might be willing to pay you to store their fuel.
7 Let's assume for a moment that they're correct and
8 they have cold feet and they will not allow you to
9 store the fuel, and the DOE just can't by law.

10 What, in that case, would your
11 decommissioning costs be? I mean, because you've
12 never gotten any fuel.

13 MR. MATTHEWS: There'd be even no
14 construction, Judge Arnold. It would be similar to
15 the status of the PFS license today. There's a
16 license that exists that hasn't been used.

17 JUDGE ARNOLD: So if petitioners are 100
18 percent correct, then there's no problem really.

19 MR. MATTHEWS: Petitioners assert that
20 there is a problem. They somehow believe that we will
21 have decommissioning expenditures prior to receipt of
22 fuel for storage. It's the opposite that you point
23 out, enshrined in the license conditions, that we
24 won't have the fuel absent the contract, so there will
25 be assurance of decommissioning funding prior to

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1 receipt of any fuel for storage. And that was
2 specifically modeled on the PFS precedent.

3 JUDGE ARNOLD: Thank you.

4 MR. MATTHEWS: The remaining two
5 contentions that -- the first that I have is the
6 location of the Ogallala Aquifer seems to be how the
7 petitioners style it and would have the Board think
8 about it. But it is a contention about the CISF
9 adversely affecting groundwater.

10 And in that regard, it is no different
11 than Sierra Club 15 in the other proceeding. The
12 location of the Ogallala Aquifer or Ogallala -- the
13 OAG Aquifer, the OAG Formation. Whether there's water
14 in that formation and where under the proposed CISF
15 site, we recognize that petitioners disagree with our
16 application, and we recognize that their expert
17 disagrees with the location of what Dr. Bobek believes
18 is the Ogallala Aquifer.

19 ISP has indicated where the water is,
20 regardless of what label any petitioner wants to put
21 on it. What petitioners have not shown here is the
22 same as what petitioners didn't show in the other
23 proceeding, and that is why dry pelletized fuel inside
24 clad has some risk, whether it be high burnup or
25 other, how somehow that radiological material could

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1 move from outside the clad to outside the welded can,
2 what medium there is to transport it from that dry can
3 onto a pad, and then how it would penetrate that layer
4 of ground to reach whatever water is there.

5 What ISP has shown in its applications is
6 that there is not water under the pad where it intends
7 to store the fuel. Petitioners have not shown that
8 there is water under the pad. They have shown that
9 there's water in the nearby vicinity, and they would
10 have the Board look at very large scale maps with
11 large dots that would cover many square miles on a
12 question that is very local. So --

13 JUDGE RYERSON: Yes. If I may interrupt
14 you, Mr. Matthews, it seemed to me, if I recall, you
15 made an argument that because of the lack of a pathway
16 for liquid, that the geology was therefore not
17 material to the outcome of whether there could be
18 liquid contamination.

19 But isn't -- doesn't ISP have an
20 independent obligation to analyze the geology and the
21 water structure per se, and isn't their argument that
22 they have raised at least, whether you agree with them
23 or not, they have at least raised an issue for a
24 hearing on that, regardless of whether there could be
25 groundwater contamination?

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1 MR. MATTHEWS: So separate from the safety
2 issue of groundwater, the NEPA issue of whether ISP
3 adequately analyzed the --

4 JUDGE RYERSON: Correct.

5 MR. MATTHEWS: -- the groundwater status
6 at the site.

7 JUDGE RYERSON: Correct. Does the
8 contention cover that?

9 MR. MATTHEWS: We know of no site that has
10 been more studied, more analyzed and more documented
11 with respect to groundwater. The fact that there are
12 petitioners' studies that they have found or
13 commissioned to identify groundwater in one place or
14 another does not somehow suggest that ISP has failed
15 to adequately assess the groundwater WCS, the partner,
16 has failed to assess.

17 In fact, it has been the subject of
18 extensive review in other proceedings that the
19 petitioners cite they say are still disputed, but
20 don't say where or by whom. And they cite the Texas
21 Water Development Board for being authoritative of
22 where the aquifers are, and even the Board doesn't
23 show the water there.

24 So, yes, they disagree, but they have not
25 shown how ISP's analysis is somehow inadequate from a

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1 NEPA perspective.

2 JUDGE RYERSON: Okay.

3 MR. MATTHEWS: From either a safety or a
4 NEPA perspective. And my last is high burnup fuel, in
5 this proceeding, Sierra Club 16. In the other
6 proceeding, this same issue was spread across several
7 different contentions. I believe they were Sierra
8 Club 20 through 23 in that proceeding, but presented
9 the same issues.

10 There are opinions about high burnup fuel
11 might react, and cite to DOE and NRC references for
12 concerns about high burnup fuel, but they don't point
13 to deficiency in the application, how the application
14 assessed high burnup fuel.

15 They say that we haven't, but failed to
16 address those sections of the application that do, as
17 it relates to the facility, and failed to address or
18 seek to go beyond the scope of this licensing
19 proceeding with the facility and get into the
20 licensing of the canisters themselves, the dry storage
21 systems that are subject of separate NRC licensing
22 process.

23 Those are incorporated by reference in the
24 CISF application. WCS commits, as in the other
25 application, that any high burnup fuel will be canned

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1 inside the canister. And petitioners haven't
2 suggested any reason why that is inadequate.

3 So the analysis that the Board applied in
4 those contentions 20 through 23 in the other
5 proceeding, that applies equally well here to the
6 reformulated contention 20 here -- I'm sorry --
7 contention 16.

8 JUDGE ARNOLD: When you load spent fuel,
9 is there a limit on the decay heat that can be within
10 one specific fuel assembly?

11 MR. MATTHEWS: ISP won't load spent fuel.

12 JUDGE ARNOLD: When the -- it's probably
13 in the certification --

14 MR. MATTHEWS: The certification for each
15 of those dry canister systems that are incorporated by
16 reference into the ISP application would be in chapter
17 12 of the application for each system. Each of the
18 eight systems are listed there, and those technical
19 specifications and requirements for those canisters
20 apply the same as they do today at the WCS CISF.

21 So, yes. There are limitations that apply
22 to each of the different designs as to -- and this is
23 where I get out in front of my headlights. It's burn
24 and temperature that they manage with the system.

25 JUDGE ARNOLD: But I'm thinking, for a

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1 specific canister design that has a limit on the decay
2 heat, the burnup that can be in it, if this canister
3 can take either low burnup or high burnup fuel, do
4 they require that the high burnup fuel that has
5 greater decay heat decayed longer in a spent fuel pool
6 before it's loaded?

7 MR. MATTHEWS: So, again, I'm not --

8 JUDGE ARNOLD: I'm just saying, is there
9 one thermal limit that is approved for all fuel,
10 regardless whether it's high or low burnup?

11 MR. MATTHEWS: I don't believe there's one
12 thermal limit that applies to every dry cask storage
13 system. They each have their own --

14 JUDGE ARNOLD: For a specific system.

15 MR. MATTHEWS: Each specific system has
16 its own licensing basis, and --

17 JUDGE ARNOLD: Okay. You just don't have
18 the --

19 MR. MATTHEWS: I don't have the --

20 JUDGE ARNOLD: -- expertise --

21 MR. MATTHEWS: -- answers for that, but
22 they carry over in the CISF -- so they don't change in
23 this application. They're incorporated by reference,
24 and the site application has a condition that is
25 specific, defining high burnup at 45,000. So if a

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1 canister wasn't loaded -- if it were somehow allowed
2 to be loaded with a higher burnup without canisters
3 and didn't meet the 45 in the ISP license, it wouldn't
4 be acceptable for receipt. Am I answering your
5 question?

6 JUDGE ARNOLD: No, no. I understand that
7 you don't have the technical expertise to answer what
8 I'm asking.

9 MR. MATTHEWS: I've proven that. Thank
10 you, Judge Arnold. I'll turn it over to my colleague,
11 Paul Bessette.

12 JUDGE RYERSON: Thank you, Mr. Matthews.

13 MR. BESSETTE: Good morning, Your Honor.
14 This is Paul Bessette, and I think I can be fairly
15 quick in our wrap-up on the remaining Sierra Club
16 contentions. And I'm going to start with general
17 categories.

18 First is Sierra Club's contentions
19 regarding purpose and need of the application. And
20 there's three contentions that generally are somewhat
21 repetitive and overlap, Sierra Club 2, which asserted
22 a lack of support in the ER for comparative safety and
23 security claims and that the application must examine
24 hardened on-site storage; Sierra Club 3, that there's
25 no need for the CISF and that it conflicts with

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1 container storage rule; and Sierra Club 8, that the
2 application is not supported by the Blue Ribbon
3 Commission.

4 Overall, all three of those contentions
5 are very similar or are identical to the Board's
6 decision in Sierra Club 2 and 3 in Holtec, which
7 addressed the comparative safety of fuel on site to
8 the continuous CISF; Sierra Club 6, which addressed
9 hardened on-site storage; and Sierra Club 7, which
10 addressed the Blue Ribbon Commission. We believe
11 those contentions are identical, and the Board's
12 decision applies to all of those.

13 Moving along, Sierra Club no-action
14 alternative, Sierra Club 7. Again, very similar.
15 Must discuss safer on-site storage of hardened on-site
16 storage, and the fact that fuel can be stored safely
17 and indefinitely on site. It must discuss the costs
18 and benefits.

19 The Board decision in Holtec 6 applies
20 equally here, and I would note that that was not
21 appealed in Holtec, nor was Sierra Club 2, 3, or 8.
22 The Board's decision applies here. The cost benefit
23 is discussed in the ER, particularly in our
24 application section 7.2 and 7.3. The no-action
25 alternative is maintaining the status quo. There's no

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1 need to evaluate alternate means of storing fuel at a
2 licensee's site.

3 The failure to discuss how HOSS is
4 relevant to the no-action alternative, it's not
5 licensed or implemented at any site, and the Continued
6 Storage Rule does not include any comparative safety
7 analysis of on-site to CISF storage. So, again,
8 Sierra Club 7, Board decision applies here as well.

9 There was another category of contentions
10 on the duration of the license, the de facto
11 repository, and for Sierra Club, that was Sierra Club
12 contention 5. It said ER must address the purpose,
13 need and environmental impacts if a permanent
14 repository is not found and the CISF become the de
15 facto permanent repository.

16 The Board decision in Sierra Club 5 and
17 also in Joint Petitioners 10 applies equally here, and
18 none of those were applied. Like the Holtec
19 application, the CISF -- the ISP application is only
20 for 40 years. Possible renewals are irrelevant. They
21 will be separate licensing actions.

22 The CISF continuous storage rule includes
23 the impact determinations from the continued storage
24 GEIS, which considers the environmental impacts beyond
25 the terminal license. That's a challenge to the

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1 Continued Storage Rule which is barred in this
2 proceeding without a waiver, which has not been
3 applied.

4 With regard to the container licensing
5 period, Sierra Club 14, which was discussed by Mr.
6 Taylor, says they have a 20-year licensing period, and
7 by the time that they get to the CISF, many of them
8 will already have been in service for many years. It
9 said we must evaluate the environmental impacts of the
10 containers beyond the 20-year period. They also
11 assert as part of that that it is a de facto
12 repository.

13 The Board's decision in Holtec, Sierra
14 Club 9, applies equally here for the same reasons.
15 And the Continued Storage Rule -- per the Continued
16 Storage Rule, we are not required to consider the
17 environmental impacts beyond 40 years. And it's not
18 relevant to this proceeding that extensions to the
19 cask life or the CISF are possible, as that is
20 governed by the Continued Storage Rule.

21 There is one different contention here,
22 Sierra Club 12. They assert the actual minimum
23 cooling time for a boiling water reactor fuel in new
24 homes MP-187 which is one of the casks in the ISP
25 application is greater than calculated through TN or

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1 Orano. Thus, the cladding will exceed the allowable
2 limits.

3 That is actually just a error in the
4 pleading. That cask, which is cited in our
5 application, does not allow storage of boiling water
6 reactor fuel, so that is a different contention, but
7 it's just a factual error. In addition, any
8 challenge -- even if it were allowed, that would be a
9 challenge to the CFC for that cask and beyond the
10 scope of this proceeding.

11 Finally, Sierra Club 13, which you
12 discussed earlier by Mr. Taylor, is a challenge to the
13 discussion of endangered species, particularly the
14 Texas horned lizard and the dune sagebrush lizard.
15 They say they have or may be present on the site, and
16 there is no discussion of any studies or surveys to
17 determine if the species are present or impact the
18 project.

19 I would note that the entirety of that
20 contention is one-and-a-half pages of double-spaced
21 pages, and they really on cite two statements in it.
22 We believe the Board decision in Sierra Club 12
23 applies equally here, although that was restricted to
24 the dune lizard.

25 Differently in that case, they provided

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1 maps and surveys, trying to show the presence of the
2 dune lizard on the Holtec site. Here they provided no
3 maps, no data, no citations to anything wrong in the
4 multiple sections of Section 3.5 or 4.5 of the
5 environmental report, so we believe the Board's
6 decision that it was unsupported applies equally here.

7 JUDGE RYERSON: Mr. Bessette --

8 MR. BESSETTE: Yes.

9 JUDGE RYERSON: -- if I recall, part of
10 petitioner's argument in contention 13 was that ISP
11 did cite authorities, studies that were not cited in
12 a way that anyone could find. Didn't they make that
13 argument?

14 MR. BESSETTE: They said the reports were
15 not available, but the reports are actually -- the
16 results of the reports and the findings of the reports
17 are thoroughly discussed throughout the application in
18 Section 3.5 and 4.5. So although they said they
19 couldn't put their hands on the reports, they never
20 challenged the multiple sections of the ER that
21 actually the results of all of those studies.

22 JUDGE RYERSON: Okay. But the application
23 discusses the results of those studies, but the
24 studies themselves were privately done, and they're
25 not available. Is that basically the state of

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1 affairs?

2 MR. BESSETTE: They were not included as
3 reference in the application. Yes, Your Honor.

4 JUDGE RYERSON: Okay.

5 MR. BESSETTE: But if you look at ER
6 Section 3.5, ER 4.5.4, ER 4.5.10, they are thoroughly
7 summarized, and petitioners haven't challenged any of
8 that information. They brought forth no public data,
9 no studies, nothing to challenge that information.

10 JUDGE RYERSON: Thank you.

11 JUDGE TRIKOUROS: And I think that is
12 something we want to just discuss when we get to
13 questions, I guess, in the morning or whenever we get
14 there. But that's not the end of it, at least not for
15 me anyway.

16 MR. BESSETTE: Yes, Your Honor. We'll be
17 available to discuss that in more detail. And that's
18 the summary of the remaining Sierra Club contentions,
19 Your Honors.

20 JUDGE RYERSON: Anything further, Judge
21 Arnold?

22 JUDGE ARNOLD: No.

23 JUDGE RYERSON: Judge Trikouros?

24 JUDGE TRIKOUROS: Not now.

25 JUDGE RYERSON: Thank you, Mr. Bessette.

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1 MR. BESSETTE: Thank you.

2 JUDGE RYERSON: And the NRC staff? And I
3 know at the start, I have one question for you about
4 Sierra Club, I think it would be, 9. Originally the
5 NRC staff thought -- took a position that Sierra Club
6 9 was admissible in part -- oh, you're switching
7 personnel out there. I must have struck a nerve
8 perhaps.

9 Initially the staff's position was that,
10 yes, Sierra Club 9 is admissible in part, but I was
11 wondering, in light of the withdrawal of the exemption
12 request by ISP, whether you have changed your
13 position.

14 MS. KIRKWOOD: Yes, Your Honor. Yes. The
15 exemption request was withdrawn, and so the challenge
16 to that is now moot, and Sierra Club did not amend
17 their contention.

18 JUDGE RYERSON: So in the staff's view,
19 Sierra Club contention 9 is now not admissible at all.

20 MS. KIRKWOOD: Correct.

21 JUDGE RYERSON: Thank you.

22 MR. GILLESPIE: Your Honor, Joe Gillespie
23 with the NRC staff. With the exception of your
24 question just now and contentions 4 and 16, the
25 staff --

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1 VOICE: We can't hear.

2 MR. GILLESPIE: The staff has nothing
3 further to add beyond its initial answer, which we
4 believe represents our positions. However, with
5 respect to contention 4, the staff originally stated
6 that it was admissible in part. However, based on the
7 additional information provided in the June 28 RAI
8 response, the staff believes this issue has been
9 superseded, as it's unclear what the precise dispute
10 that the petitioner has with the updated application.

11 Again, also a statement was made with
12 respect to contention 16, high burnup fuel. There was
13 a statement made that the issues related -- at least
14 there was a potential that all the designs of the
15 facility have an approved COC and are out of scope
16 under 72.46(e). However, that said, there is one
17 design of the facility -- I just wanted to point this
18 out -- that is not -- does not have an approved COC
19 under 72.14 with respect to storage, and --

20 VOICE: We can't understand you. You need
21 to --

22 JUDGE RYERSON: I think if you move the
23 mike slightly more directly --

24 MR. GILLESPIE: Is that better?

25 VOICE: Oh, yes.

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1 MR. GILLESPIE: That said, regardless of
2 whether it is out of scope of the hearing with respect
3 to that one design, the lack of specificity with the
4 dispute with the application and the lack of dispute
5 with the provisions in the application related to high
6 burnup fuel are still dispositive of this issue.

7 JUDGE RYERSON: So you're saying that
8 is -- we're talking about 16 now. The staff's view is
9 that is not admissible.

10 MR. GILLESPIE: Yes, Your Honor.

11 JUDGE RYERSON: But your position has
12 changed on Sierra Club contention 4. Correct?

13 MR. GILLESPIE: Yes, Your Honor. As it
14 stands today, this --

15 JUDGE RYERSON: Okay. We're here today.
16 So you have changed your position. You urged -- had
17 urged that Sierra Club 4 should be admitted in part,
18 and as we stand here or sit here today, your
19 position -- the NRC staff's position is that Sierra
20 Club 4 should not be admitted.

21 MR. GILLESPIE: Yes, Your Honor. Based on
22 the application as it stands today, because it's
23 unclear that we've -- the tables have changed such
24 that it's unclear exactly what particular section is
25 being disputed in the contention as originally

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1 written.

2 JUDGE RYERSON: Okay. Is there any
3 contention -- is there any Sierra Club contention the
4 NRC staff asserts is -- currently is admissible?

5 MR. GILLESPIE: No, Your Honor.

6 JUDGE RYERSON: Okay. Thank you. That's
7 it? Thank you, Mr. Gillespie.

8 MR. GILLESPIE: Thank you so much.

9 JUDGE TRIKOUROS: I have --

10 JUDGE RYERSON: Oh, I'm sorry. I keep
11 cutting off my colleagues here who have better
12 questions than I have.

13 JUDGE TRIKOUROS: The original basis for
14 the staff recommending this admission of contention 4
15 in part was, I thought, that there was a rather large
16 discrepancy between the Dr. Resnikoff analysis and the
17 analysis in the ER.

18 MR. GILLESPIE: Yes, Your Honor.

19 JUDGE TRIKOUROS: All right. Now the --
20 in response to an RAI, the transportation radiological
21 analysis was redone. From what I can see is that it
22 was done over again the same way but in accordance
23 with a quality assurance program that wasn't in place
24 in the first analysis.

25 But Dr. Resnikoff's study hasn't changed

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1 at all. It's still there, just as it was. The
2 results of the new analysis in the ER are no different
3 than the first analysis. So what is it that had made
4 you change your mind?

5 MR. GILLESPIE: Your Honor, specifically
6 there was a table in the original application that was
7 referenced by --

8 VOICE: Can't hear you.

9 MR. GILLESPIE: There was a table in the
10 original application that was referenced by the
11 petitioner that identified maximum dose for an
12 individual nearby and these different consequences.

13 JUDGE TRIKOUROS: Table 4-2.9, I think
14 you're talking about.

15 MR. GILLESPIE: Yes. Yes, Your Honor.

16 JUDGE TRIKOUROS: Yes.

17 MR. GILLESPIE: And I believe that's
18 been -- there's most clearly links to table 4-2.11 now
19 where it links a maximally exposed individual to
20 different levels of losses of shielding.

21 And in this case, it's unclear exactly how
22 that original dispute with that one number correlates
23 to the table now, because there's information on
24 different levels of shielding and what that
25 would entail. And there was no discussion of exactly

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1 what level of shielding was lost in the original
2 study.

3 JUDGE TRIKOUROS: So the Dr. Resnikoff
4 study is no basis at all in --

5 MR. GILLESPIE: I'm not sure the staff
6 would go that far. We haven't made a determination at
7 this stage as to what a reasonable value for these
8 individuals are at this stage.

9 JUDGE TRIKOUROS: Say that again. I'm
10 sorry.

11 MR. GILLESPIE: At this stage we have not
12 made a determination as to what exactly the
13 consequences of a transportation accident might be as
14 part of the RAI. It's under more review at this time.

15 JUDGE TRIKOUROS: Right. In fact, you
16 asked for just the very piece of information you could
17 ask for to independently verify it, and it hasn't been
18 done yet. So I was just curious. But at this point,
19 you've made the decision to -- that it's not
20 admissible any longer.

21 MR. GILLESPIE: Your Honor, it's not
22 admissible because the table that they disputed has
23 changed so significantly that we're not clear what the
24 dispute is at this stage. Instead of having a six-
25 value table, now there's a 50-value table, and it's

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1 just not clear to us.

2 JUDGE RYERSON: Are you suggesting, Mr.
3 Gillespie, you're going to come back to the Board and
4 say, Surprise, this is now an admissible contention?
5 I'm confused as to what you think the process is here.

6 MR. GILLESPIE: Well, the issue has -- at
7 this stage, I mean, for an admissible contention, it
8 has to provide a dispute with the application and
9 point to specific sections of the application. Our
10 position is that with respect to the original
11 application and that one -- it is admissible in part
12 with respect to that issue. But with respect to the
13 application as it stands today, there's no clear
14 dispute with it, and as a result, it would be
15 inadmissible as it stands today.

16 JUDGE RYERSON: Okay. But my question
17 was: As you -- as the staff continues its work, is
18 there a possibility you're going to change your mind?

19 MR. GILLESPIE: No, Your Honor.

20 JUDGE RYERSON: Okay. Thank you. Any
21 other questions, gentlemen, at this -- we may get back
22 to this issue tomorrow.

23 MR. GILLESPIE: Understood.

24 JUDGE RYERSON: Thank you, Mr. Gillespie.

25 All right. We're going to take a lunch

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1 break, and we will resume -- we will try to resume
2 promptly at 1:45. Thank you.

3 (Whereupon, at 12:15 p.m., the oral
4 arguments in the above-entitled matter were recessed,
5 to reconvene at 1:45 p.m., this same day, Wednesday,
6 July 10, 2019.)

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

(1:45 p.m.)

1
2
3 JUDGE RYERSON: Well, we are back on the
4 record, and I believe it is Mr. Lodge's turn. And I
5 should say before you begin, we were talking about the
6 standing issue, and you mentioned that you might want
7 to deal with that quite a bit. You have a number of
8 different clients who have different standing
9 positions. So feel free to say whatever you want, but
10 on the generic issue of -- the generic argument, if
11 you will, we will address that tomorrow. You can
12 address it now as well. That's up to you, but we will
13 address that tomorrow.

14 MR. LODGE: I'm fine. Can you hear me?

15 JUDGE RYERSON: It really matters whether
16 you turn right into that microphone and get close to
17 it.

18 MR. LODGE: Okay. Thank you. May it
19 please the panel and opposing counsel, other
20 intervenors, the Joint Petitioners have a number of
21 things to talk about today. However, I do feel
22 compelled to mention that we feel, my clients, that
23 is, feel that this is being conducted sort of as a
24 show-cause why contentions related to WCS should not
25 be dismissed if they are not sufficiently

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1 differentiated from similar contentions in Holtec.
2 And that isn't how it works.

3 The burden for admission of a contention
4 isn't on how it creates an issue of fact with the
5 Holtec application, but how it does so with the WCS
6 application. As the Board realizes, you're required
7 to arrive at an independent conclusion as to each
8 distinct license application.

9 What troubles me is the distinct
10 possibility that you will be put in the situation
11 where you might have to overrule, in effect, the
12 similar holdings in Holtec and will constrain
13 yourselves from doing that so as to not see
14 intervenors raise those in the appeal of the Holtec
15 license case. I'm very troubled by the appearance of
16 the posture of the licensing board at this point.

17 JUDGE RYERSON: I must say, you know, you,
18 in effect, raised that argument early on with the
19 motion for recusal which was denied and affirmed by
20 the Commission. So, I mean, we're aware of that
21 position, but frankly, boards and courts all the time
22 consider similar cases, and they just have to
23 differentiate them.

24 And I will say again what I said earlier.
25 Our intent in structuring the argument the way we did,

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1 giving you this opportunity in addition to responding
2 to our questions, this opportunity to differentiate
3 the cases, is solely for your benefit. I mean, you
4 don't have to do that. You could talk to us about
5 something else for 45 minutes.

6 But we thought it might be constructive to
7 do it that way, but you don't have to do it that way.
8 That's up to you.

9 MR. LODGE: Well, I thank you for that.
10 We took the Board's order of June 7 as a clear
11 suggestion as to what the Board wants to hear about,
12 and so I'm going to turn to that matter of responding
13 to the June 7 priorities, but I want it clear that the
14 Joint Petitioners are not waiving their objections by
15 doing that.

16 JUDGE RYERSON: Understood.

17 MR. LODGE: Thank you. So the first issue
18 I'm going to talk about is our contention 4, which is
19 analogous to contention number 3 in Holtec. That
20 pertains to low-level radioactive waste volumes which
21 we believe are grossly ignored, understated or
22 completely unmentioned in the application by WCS.

23 The circumstance that we see are that
24 there are two major streams of potentially low-level
25 radioactive waste. Now, I'm aware that the GEIS

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1 divides the notices that there may be something on the
2 order of, I believe, 639 cubic yards of low-level
3 radioactive waste that generically may be expected to
4 be generated by the CISF.

5 But the numbers are staggering the other
6 direction. For instance, there are going to be eight
7 concrete pads. I did my own political science major
8 simplistic mathematical calculations as to their
9 dimensions and came up with the fact that probably
10 gross amount of about 104,000 cubic meters of concrete
11 will ultimately be involved in the build-out of the
12 pads.

13 Now, I realize that not 100 percent of
14 this will be irradiated perhaps. That gets me to
15 another problem, though. That is that there's no
16 disclosure in the application nor discussion of low-
17 level radioactive waste irradiation potential, and
18 while, as I recall in Holtec, basically the burden was
19 put on the intervenors to scientifically show or
20 suggest that this phenomenon would even take place.
21 I think that's a ridiculous and legally misplaced
22 obligation.

23 It is the burden of the Applicant to
24 disclose and discuss its calculations as to what level
25 of irradiated concrete might be generated. Now, I

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1 also sat here this morning and I'm figuring this room
2 is about 45 feet side. The ceiling's about 12 feet
3 tall, and 600 cubic yards or 640 cubic yards is going
4 to run out maybe 30 feet. So half this room is all
5 the low-level radioactive waste that is anticipated in
6 the GEIS to be generated after perhaps a hundred years
7 and thousands of tons of SNF storage.

8 104,000 meters, cubic meters, or pick a
9 fraction, 80 percent of that, 60 percent of that if
10 irradiated would mean more than a hundred times the
11 volume I just described. It'd be 50 times the size of
12 this room in terms of the volume of concrete
13 irradiated low-level radioactive waste.

14 The numbers are staggeringly at odds.
15 There's a considerable issue of difference between our
16 position and what is stated in the application. But
17 wait. Don't answer yet, because there is the
18 additional completely unmentioned, undiscussed huge
19 problem, the huge what we'll call the zombie in the
20 living room of the TADs, the transportation, aging and
21 disposal canister problem.

22 In approximately 2006, Department of
23 Energy announces to the world that they are going to
24 insist that there be a standardized canister used for
25 deep repository storage, and for efficiency's sake,

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1 that they'll have to come up with a standard design,
2 but upstream of the repository is when the radioactive
3 waste has to be loaded into the canisters.

4 But what's happened in the interceding
5 dozen or so years is that the radioactive waste is
6 getting loaded into a bunch of different canisters,
7 most of which aren't even fit for transport usage at
8 this time, so they are rapidly becoming LLRW in their
9 own right. But they're sitting at reactor sites.

10 The problem is when does the material get
11 reloaded dangerously into transport canisters. Does
12 it happen at the reactor sites, when you have a dozen
13 sites that are closed and have no dry transfer or
14 other storage -- DTS or other capability, or does it
15 happen at WCS, which is saying, We are not planning on
16 having a DTS system for the first century.

17 There is also the question of what happens
18 if that occurs at DTS. You then are generating untold
19 volumes of metallic canisters that undoubtedly will be
20 irradiated. I realize that part of the mitigation
21 could be some sort of remediation and possible reuse
22 of the concrete or the metallurgical steel, but these
23 are huge quantities of low-level radioactive waste.
24 That latter is not mentioned anywhere in the
25 application. It's not discussed. It's not a problem

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1 apparently, even though it is a major, major issue.

2 So there is this entire problem of low-
3 level radioactive waste that is at -- considerably
4 controverted, let's say, by the prospects. Again, I
5 repeat. I don't believe it is the burden of
6 intervenors to have to prove beyond a reasonable doubt
7 that there will be a ton more than is projected in the
8 GEIS. I believe that the environmental and health and
9 safety aspects, the AEA and NEPA problems that this
10 posers, do have to be disclosed, and it isn't.

11 Now, we turn to contention 10, which is
12 also number 10 in Holtec. It's the matter of
13 operation of the facility beyond 120 years. There is
14 considerable evidence suggesting and, in fact, growing
15 evidence suggesting that WCS may operate beyond that,
16 I guess, presumed design basis.

17 As recently as late March or early April
18 this year, former Texas governor, now Department of
19 Energy Secretary Rick Perry indicated to a
20 congressional committee with considerable alacrity
21 that it was anticipated and more or less something he
22 was not uncomfortable with that there's a distinct
23 possibility that the operators of WCS and Holtec would
24 possibly at some future point just walk away, and
25 these two facilities become de facto permanent sites

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1 for disposal of spent nuclear fuel.

2 That's a kind of a stunning revelation,
3 notwithstanding the fact that -- I guess it's simply
4 surprising, since the promise, the pledge, the
5 marketing being peddled to the public says something
6 quite different, that it's interim, that we'll deal
7 with this. This is only to buy a little bit more
8 time.

9 And as Ms. Curran indicated this morning,
10 the NWPA policy as it exists on the books definitely
11 ties interim storage to the fate of a real repository.
12 So, again, this is a very, very serious problem.
13 There are indications in the record that we provided
14 in our petition, which, of course, was filed well
15 before Secretary Perry's comments, that even Holtec
16 had admitted the possibility that a facility should
17 expect to operate for perhaps 300 years.

18 But there are other problems. There's a
19 swap-out of the canisters, no matter if they're TADs
20 or other types of storage canisters. There is the
21 growing problem of accidents, of leakage, of
22 contamination, and no DTS system occurring in that
23 first hundred years.

24 The problem is that this is an evolving
25 plan. It's a moving target. It is not nailed down to

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1 paper. There are changes that are being made in the
2 plan even as we speak. It's a very troubling
3 situation. That is a contention that differs from the
4 Holtec one insofar as the fact that Secretary Perry
5 was talking with a certain degree of knowing and
6 personal experience as governor of the WCS facility
7 being one that could be walked away from.

8 Moving on to contention WCS -- our
9 contention WCS case number 12, which was number 4 in
10 Holtec. We contend that the GEIS simply does not
11 apply here, because of the fact that there are so many
12 design differences so far between WCS and the
13 theoretical facility described in the generic
14 environmental impact statement.

15 The GEIS, as I understand it, was more or
16 less taken from the model of private fuel storage
17 earlier this century. The WCS design doesn't employ
18 a spent fuel pool or other -- and I'm quoting -- other
19 bare fuel handling capability. The cask handling
20 building is designed to handle canisterized material
21 and does not have the capability to handle bare fuel.

22 A recovery method for the unlikely loss of
23 confinement event is independent of any bare fuel
24 handling facilities. Additionally, the WCS CISF does
25 not have a spent nuclear fuel pool or any associated

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1 waste generated as a result of pool operations or pool
2 maintenance.

3 The WCS emergency response plan does not
4 include arrangements and procedures for omissions
5 mitigation such as reduction -- that is to say,
6 reduction of emissions to the surrounding environment
7 of radiation or radioactive material from spent
8 nuclear fuel as a result of damage to SNF assemblies
9 or containers.

10 So we have another very large set of
11 distinctions that we believe mean that the WCS
12 proposal has to be treated as less -- as not a generic
13 proposal with the insularity of these critical
14 distinctions unresolved issues.

15 Turning to our contention 13, which was
16 comparable to -- roughly comparable to number 6 in the
17 Holtec case, reprocessing. There's been -- there have
18 been and are continuing to be new developments in
19 reprocessing. This panel sitting as the Holtec Judges
20 ruled that the reprocessing contention was
21 inadmissible because there isn't a hard enough --
22 hardened enough plan or intention that we were able to
23 find and put into the record.

24 We believe that, number one, legally
25 speaking, we're not required to show a hardened

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1 printed completed application or plan. We believe
2 that there are very considerable pieces of evidence
3 from a variety of sources as to the intentions of
4 several of the parties and several of the moving parts
5 of both Holtec and WCS.

6 There have been a number of pronouncements
7 widely publicized, nationally, as it were, by Holtec
8 officials and ELEA officials of -- pardon me -- not
9 Holtec officials, but ELEA, the Eddy-Lea Environmental
10 Alliance, which is the New Mexico sponsor, of course,
11 of the Holtec facility site.

12 They would love to see and believe for a
13 variety of economic reasons that New Mexico would be
14 a fine site for a plutonium reprocessing type of
15 facility. In Texas, his name comes up again. Former
16 Texas Governor Rick Perry, now Secretary of Energy, in
17 2014 a report from his Texas Council on Environmental
18 Quality was issued that said reprocessing is a fine
19 idea; the assets can be easily put in place. There
20 needs to be some type of arrangement made for this
21 sort of reclamation of plutonium.

22 And the sponsor of the WCS proposal is
23 Orano. Orano is a surviving entity, I guess, of
24 AREVA. AREVA has a demonstrated history of being
25 perhaps the largest corporate plutonium reprocessing

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1 company in the world, was a large promoter of GNEP,
2 the Global Nuclear Energy Partnership, in the early
3 part of this century, about ten or eleven years ago,
4 which was an initiative that went nowhere ultimately
5 but has not been forgotten nor apparently abandoned.

6 Moreover, under Secretary of Energy Rick
7 Perry, last fall the DOE issued notice in the Federal
8 Register, asking for comments. It wasn't a
9 rulemaking, but it was sort of an interesting inquiry,
10 asking for comments on what -- whether there was any
11 strong feeling about deregulating the waste generated
12 from nuclear reprocessing down to the level of low-
13 level radioactive waste, so they would not have to be
14 as expensively isolated and contained as high-level
15 nuclear waste.

16 I don't know what the status of that
17 inquiry is, but it happened on the watch of former
18 Governor Perry, who is a -- apparently a reprocessing
19 booster, as we know.

20 So beyond that, in the congressional
21 hearings in both houses just in the past three or four
22 weeks, discussing the Nuclear Waste Policy Act as
23 amended by 2019 proposals, the Nuclear Energy
24 Institute CEO has been -- or other officers have been
25 testifying before congressional committees about the

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1 desirability of reopening the reprocessing can of
2 worms via statutory changes.

3 And there's a history of statutory
4 changes. Back in the early part of this century,
5 approximately 2004, waste incident to reprocessing
6 statutorily became low-level radioactive waste for a
7 couple of sites. There has been at least one other
8 legislative attempt to expand it from, I believe it
9 was, Savannah Research site and another one, but to
10 expand it to include now Hanford and West Valley.

11 So there was considerable legislative --
12 there's some success in making that kind of change,
13 apparently relatively easily. And there's
14 contemporary discussion going on about nuclear
15 reprocessing in Congress. We believe you don't need
16 a hardened plan. We believe that the installation of
17 a CISF in West Texas would enable and facilitate
18 reprocessing. It is the missing ingredient, in fact,
19 that would ultimately gel the rest of a plan.

20 We believe that NEPA requires cumulative
21 impacts analysis of this strong possibility, that a
22 NEPA coverage of this proposal absolutely needs to
23 include serious identification and analysis of
24 reprocessing as an alternative.

25 Now, I'd like to switch -- I'd like to

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1 move the microphone, if I may, for a few minutes and
2 talk about standing. Is this thing still working?

3 On behalf of seven different groups and an
4 individual, we submitted a couple of dozen
5 declarations in support of our petition to intervene
6 in this. I want to talk about approximately ten of
7 them. And I'm going to be responding to the critique
8 of the Nuclear Regulatory Commission staff in their
9 opposition to the Joint Petitioners having any
10 recognizable standing.

11 JUDGE RYERSON: And if I can just
12 interrupt here for a moment --

13 MR. LODGE: I'm sorry.

14 JUDGE RYERSON: -- Mr. Lodge. These are
15 all part of your petition. Am I correct?

16 MR. LODGE: Well, they're either referred
17 to in our petition or they are lifted from -- they're
18 within the discussion of rail transportation within
19 the application.

20 JUDGE RYERSON: Okay. I mean, these are
21 not new documents, in other words.

22 MR. LODGE: No, no, no.

23 JUDGE RYERSON: Okay.

24 MR. LODGE: And let me sort of --

25 JUDGE RYERSON: I'm sorry. I said

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1 initially your petition. But you said some are from
2 the application itself.

3 MR. LODGE: They're all from the
4 environmental report.

5 JUDGE RYERSON: Okay. All right.

6 MR. LODGE: But first I want to talk about
7 what the declaration said. The NRC sort of derided
8 the declarations as being templated and essentially
9 not reflecting sufficient proximity or danger, as it
10 were, to the transportation routes. These all -- all
11 of the petitioners have manifested some serious
12 concerns about transportation.

13 The petitioners -- pardon me -- the
14 declarants identified routine radioactive emissions as
15 something that they were concerned about, as well as
16 nonroutine. And in our petition, we discuss the
17 standard for Yucca Mountain that was referenced for
18 purposes of the zone of influence, I believe is the
19 name, or pardon me, the region of influence, the ROI,
20 as being 50 miles for serious accidents, and
21 approximately 800 meters either side of a
22 transportation route for routine radioactive
23 emissions.

24 The problem that we have identified is
25 that apparently it would be helpful to illustrate on

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1 maps the principal means of transportation that is
2 going to be used for the radioactive waste.

3 So obviously this is a national map. This
4 appears in the application -- pardon me -- in the
5 environmental report WCS submitted. The circle --
6 let's see if I can point to things. It's not
7 cooperating.

8 The circle that you see in the lower left-
9 hand side is the region where WCS would be located,
10 and as you can also see, there's kind of a funneling
11 effect. The vast majority of the radioactive -- the
12 spent nuclear fuel is going to come from eastern
13 reactors. There is some that will come mainly down
14 the West Coast and across Arizona.

15 But there's a funneling effect that
16 occurs. The waste will come across from New England,
17 from the Central States, as it were, the Piedmont, I
18 guess, and ultimately from the Southeast, will
19 generally head west through major rail corridor areas.
20 As you can see, by the time things get to Dallas,
21 the -- we're down to only a couple of major railroad
22 routes from the East.

23 So there's a funneling effect. If there
24 are as many as 80,000 trips, 30,000 of which are bound
25 for WCS, we're talking certainly about three-quarters

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1 or more of those transport trips coming from the East
2 and an awful lot of them coming from the Northeast and
3 also in the Southeast, so just to give the Board that
4 idea as to what the national map looks like.

5 MR. MATTHEWS: I'm sorry to interrupt.

6 MR. LODGE: Yes.

7 MR. MATTHEWS: May I ask, for the benefit
8 of the record, what either page or figure number --

9 MR. LODGE: Sure.

10 MR. MATTHEWS: -- that is from the
11 application, just so those reading the transcript know
12 what we're all looking at.

13 MR. LODGE: Yes. Thank you. See that
14 Figure 2-2-4. I believe it's -- it may be page 2 --
15 I think I turned it on its side. Page 2-71, I think,
16 from the first ER.

17 JUDGE RYERSON: There's a date on there.
18 I don't know if that's helpful.

19 MR. LODGE: Yes. 11/18/16. Good. Thank
20 you. All right.

21 Then there is this, and we'll identify it.
22 Figure 2-6-1. That's page 2-78 from revision 2 of the
23 ER. And I just want to point out a couple of facets
24 here. One of them is that my Citizens Environmental
25 Coalition group from Upstate New York has posited

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1 declarations that indicate geographical proximity to
2 that blue route, that rail route that's identified,
3 and that the Nuclear Energy Information Service
4 declarants are in Chicago, which is clearly traversed
5 by that same route.

6 As you can see again, there's about a
7 approximately, roughly 50-mile stretch of rail that
8 goes up to and a little bit past WCS. Also there's an
9 obvious trunk route. I believe that's from the San
10 Onofre, but probably is a share of the trunk route
11 that would come down from maybe the Trojan plant as
12 well as Rancho Seco and Diablo Canyon and Mesa Verde.
13 I don't know.

14 Also, there's this interesting phenomenon,
15 and this all assumes, of course, that Yucca Mountain
16 is the repository site, but there's kind of a double
17 whammy of transport here. Initially the waste would
18 go to WCS for some period of time, then backtrack --
19 and this would be duplicative of a route probably
20 traversed by many thousands of canisters, but up into
21 Oklahoma and near to Kansas. You would have
22 duplication of the route, and then an entirely new
23 route taken out to Nevada.

24 So there would be -- you're moving the
25 waste twice, and you're moving it, if Yucca is the

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1 ultimate goal, you're moving it quite far. So -- and
2 this, of course, this route is going to be the same
3 for every storage canister that finds its way to WCS.

4 Finally I'd like to show you more of a
5 localized regional view of the rail system in Texas.
6 There's only one -- once you get off the main east-
7 west line -- and incidentally, this east-west line
8 goes through El Paso very clearly.

9 But once you get off of this route and
10 turn north, essentially 100 percent of the spent
11 nuclear fuel that's being delivered to WCS is going to
12 travel this route, the blue line, all the way up to
13 WCS. And it's all going to go through the small towns
14 nearby.

15 It's -- a lot of it is going to go past --
16 well, I'll start naming names in a minute, but the
17 circumstance that I want to point out is that the
18 funnel ultimately funnels everything down to this
19 route, and if we can demonstrate that -- what? --
20 30,000 separate trips are likely to be made on that
21 particular rail line and that there are people living,
22 recreating, working in proximity to it, we should --
23 our petitioners should be accorded some standing.

24 Up in Eunice, New Mexico, which is about
25 four or five miles from the WCS, one of the declarants

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1 for the SEED coalition is Brigitte Gardner-Aguilar,
2 who essentially lives near, within perhaps a couple of
3 blocks, of one or two Sierra Club declarants.

4 The NRC has recommended standing be
5 granted to the Sierra Club but when we have
6 demonstrated evidence at more than adequate evidence
7 of Ms. Gardner-Aguilar's presence in the same zone, if
8 you will, the NRC staff opposes.

9 JUDGE RYERSON: Excuse me. In the staff's
10 defense, did you mention that in your pleadings, or
11 did they have to ascertain that solely from knowing
12 where Eunice is and looking at the declaration?

13 MR. LODGE: I would have expected the NRC
14 staff to read the declaration --

15 JUDGE RYERSON: I understand. My question
16 was whether you brought it to their attention.

17 MR. LODGE: In rebuttal, yes.

18 JUDGE RYERSON: In -- I know in rebuttal,
19 but that was after they filed. We will get to asking
20 them whether they've changed their mind on that.
21 Thank you.

22 MR. LODGE: Very good. Thank you. We
23 also have SEED member Elizabeth Padilla who lives in
24 Andrews, which is about 37 miles from the WCS site --
25 it's the county seat in the same county as WCS -- and

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1 who attests to frequently traveling, often with family
2 members, directly past and adjacent to WCS, ultimately
3 down to El Paso, and I believe she mentions that she
4 crosses the rail line there at Monahans in route to El
5 Paso. Monahans is the intersection of the yellow and
6 blue.

7 Patricia Mona Golden, who is another SEED
8 declarant, lives a little bit west or to the left of
9 the blue line in Van Horn, Texas, which is between
10 Monahans and El Paso. And as I indicated, that
11 appears to be likely a prime route for spent nuclear
12 fuel moved from western power plants. So it is very
13 likely that hundreds of shipments will pass by her
14 town.

15 She lives a block from the rail line and
16 works a hundred feet from the rail line, also in Van
17 Horn. And I would incidentally like to point out that
18 with routine emissions -- I realize that there's a lot
19 of discussion about how close can you stand and how
20 dangerous can it get. The thing is that there's a
21 direct relationship. The farther you are from the
22 canister, the lower the radiation.

23 The DOE apparently believes that out to
24 about 800 yards, that there can be detectable
25 radiation levels from a spent nuclear fuel or a high-

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1 level radioactive waste canister, and any amount of
2 radioactive exposure that is involuntary can have both
3 medically and scientifically have implications. But
4 it also is something to which the general public
5 should not be exposed.

6 JUDGE RYERSON: A question and also just
7 to alert you, you have about ten minutes, Mr. Lodge.

8 MR. LODGE: Yes. Very good. Thank you.

9 JUDGE RYERSON: But what -- to what level
10 of assurance do we have that these transportations
11 would, in fact, be used? I mean, this is a -- would
12 be perhaps ultimately a 40,000 metric ton facility.
13 That is far less than the current amount of spent
14 nuclear fuel, and so presumably it's not taking all of
15 the nation's nuclear fuel. How do we even know that
16 there would be any fuel from the West going to this
17 facility?

18 MR. LODGE: If -- this gets into the thing
19 that troubles me the most about the controversy over
20 taking title and DOE involvement. If DOE is involved,
21 DOE is the aggregator. They are the customer of WCS
22 or Holtec. And if they are aggregating the waste,
23 then they're picking the routes.

24 But I, first of all, would observe that --
25 I don't know if I can bring a map up again. The last

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1 map I showed you, the 50 or -- that. There's 100
2 percent certainty that that blue line is going to
3 be -- it's going to see possibly tens of thousands of
4 shipments, 100 percent, if the WCS business model
5 reaches that which is not -- attains the success that
6 is not statutorily allowed right now.

7 So how can I predict it? I can predict
8 that stretch of it with very high confidence. I can
9 also suggest that WCS is proposing 40,000 metric tons,
10 which represents roughly 40 percent of the current
11 inventory of spent nuclear fuel.

12 And if they are successful in lining up
13 customers, whether it's one or many separate private
14 utilities, they are going to undoubtedly be using the
15 northern route that I showed you in the map from San
16 Onofre.

17 They undoubtedly -- assuming that they are
18 going to get customers from the northeastern
19 corridor -- I think that the problem here is that this
20 is an unprecedented, absolutely globally unprecedented
21 transportation scheme, that it has not been well
22 thought out even close, that it is not something that
23 legitimately can be kicked down the road eight or ten
24 years until the eve of when the shipments begin
25 because of the vast amount of emergency coordination

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1 and understanding and communication, and for that
2 matter, consent of communities through which the waste
3 is going to be transported.

4 I think that there are many unworked-out
5 problems that the Applicant is able to hide from by
6 saying, Oh, well, nothing's concrete, pardon the pun.
7 Nothing is set to paper. Nothing is firm yet. I
8 think what is firm is that there is a very high
9 probability that most of the major rail trunk lines
10 will be involved, and they will not be involved a
11 couple of times. They'll be involved hundreds of
12 times.

13 I want to show you another one. I want to
14 talk about Michigan. I want to talk about the Fermi
15 II Nuclear Power Plant, which is roughly halfway
16 between -- it's on the green or bluish line between
17 Detroit and -- you can't really see it very well, but
18 Toledo at the Ohio border. Monroe is about roughly --
19 the Fermi plant's about 20 miles north of the state
20 line.

21 There's only one rail route. There's one
22 rail spur that goes into the Fermi installation. It
23 comes out, and the only way, the only direction in
24 which SNF will be transported is north through heavily
25 urban, downtown area Detroit, on out, as you can see

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1 with the -- sort of the tan rail line, on out to
2 western Michigan and on down through the Chicago
3 region.

4 I have three declarations from people
5 living six miles or less from Fermi II who all attest
6 there's only one rail line in and out, and where it
7 goes. Two of those three declarants are within about
8 2.5 miles of the Fermi plant.

9 It is very clear to me that there's a 100
10 percent probability, if the stuff goes by rail, that
11 it's going through Detroit. And, again, I can't
12 predict with 100 percent certainty as to the entire
13 national rail grid, but when you are getting into the
14 possibility of tens of thousands of shipments,
15 separate canister shipments, it is, it seems to me,
16 very inevitable that there will be an awful lot of
17 those transportation corridors ultimately put to use
18 in the service of transporting spent nuclear fuel.

19 JUDGE RYERSON: And you have approximately
20 five minutes.

21 MR. LODGE: Thank you. I will be wrapping
22 up. The petitioners base their claim for standing on
23 proximity plus standing. And you have to have an
24 inherently dangerous radioactive material, in
25 combination with some sort of geographical proximity.

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1 I believe in many, many cases, we have
2 demonstrated that. A question, of course, is what
3 is -- how far away is safe? And that's why we have
4 advanced the argument that a 50-mile radius in the
5 event of serious accident ought to be used. The DOE
6 thinks so, so far, and we believe that in -- and
7 that's for nonroutine problems that occur in
8 transportation.

9 Just the routine emissions of radiation
10 are problematic enough. The declarants state that
11 they have concerns about driving by or driving on
12 highways parallel and close to rail lines, so they
13 have thought about, consciously taken into account the
14 facts of potential exposure to unwanted minor amounts
15 of radiation.

16 We believe that because of the inherent
17 dangerousness of this material, that our situation,
18 the situation of my clients, is very distinguishable
19 from the cases that were cited by this panel sitting
20 as the Holtec panel. The cases that were cited talked
21 about a few one-shot or few transports of low-level
22 radioactive waste, which is deemed not to be so
23 dangerous and pervasive.

24 They weren't cases that addressed the
25 possibility of thousands, of tens of thousands of

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1 shipments. And as you work things through the funnel,
2 you get a smaller and smaller, more definite routing
3 population that is possibly exposed to serious
4 problems, or at least routine emissions.

5 I'd just like to also point out with
6 respect to Diablo Canyon -- I'm not going to move the
7 map around to focus on Southern California. But
8 again, we have declarants, two of them, who identified
9 their proximity and location to rail and highway
10 routes, the only routes coming out of the Diablo
11 Canyon complex, and that they were within about four
12 or five miles, I think, for each of them.

13 With respect to Cervelle de Aslan
14 [phonetic], who is a public citizen declarant -- she
15 lives in El Paso -- stated that she lives within, I
16 believe, a block of the major rail line that we're
17 talking about that goes through El Paso. Rev. James
18 Caldwell of Houston, which is another funneling point
19 across the southern tier of states, lives about a mile
20 from a major funneling rail line.

21 If you saw on the map, the closer you get
22 to the Dallas-Fort Worth area, the greater the
23 funneling effect there. Dallas-Fort Worth seems to
24 become the zone through which a vast majority of the
25 waste will ultimately travel.

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1 We believe that we've made a very
2 compelling case for standing, at least of some of the
3 petitioning organizations, and that that needs to be
4 closely scrutinized. I apologize to the extent that
5 perhaps we should have relied more on the maps in our
6 written arguments, but the maps were there. The
7 information in the declarations was always there to be
8 laid and scrutinized alongside the maps. It is
9 certainly time for that to happen.

10 I am reserving the right to give any
11 further presentations or answers respecting the other
12 contentions I haven't talked about. Thank you.

13 JUDGE RYERSON: Okay. Thank you. I have
14 one question. If hypothetically we were to conclude
15 that SEED has standing but not your other many, many
16 clients, would you be continuing this proceeding on
17 behalf of SEED?

18 MR. LODGE: Certainly would.

19 JUDGE RYERSON: Okay. Judge Arnold, do
20 you have --

21 JUDGE ARNOLD: No.

22 JUDGE RYERSON: -- any questions? Judge
23 Trikouros?

24 JUDGE TRIKOUROS: No.

25 JUDGE RYERSON: Thank you, Mr. Lodge.

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1 Let's see. Mr. Bessette.

2 MR. BESSETTE: Yes, sir. Good afternoon.

3 I'm -- as we've done before, we're going to be
4 discussing groups of Joint Petitioners' contentions.

5 As a preliminary matter, Mr. Lodge kept
6 referring to WCS as the Applicant. I just want to
7 make sure we're clear that it's not WCS. It is
8 Interim Storage Partners.

9 VOICE: Can you speak a little louder,
10 please.

11 MR. BESSETTE: Yes. It is Interim Storage
12 Partners, not WCS.

13 I'm going to go through several of the
14 contentions, but I'd like to start in order of what
15 Mr. Lodge addressed. On contention 4 related to low-
16 level rad waste, he stated that there's no discussion
17 of the low-level rad waste potential for contamination
18 on the application. That is demonstrably false.

19 It is throughout the application,
20 including in ER Chapter 4, but more importantly, it's
21 discussed in the license application, Appendix B, the
22 decommissioning -- preliminary decommissioning plan;
23 in Appendix D, the decommissioning funding plan. And
24 the decommissioning funding plan very conservatively
25 assumes that 20 percent of all the pad surfaces are

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1 contaminated and go to low-level rad waste.

2 Importantly, Joint Petitioners never even
3 referenced Appendix B or Appendix D of the license
4 application.

5 With regard -- he had some discussion of
6 burden. We hear this complaint a lot, but at this
7 point in the proceeding, intervenors absolutely have
8 the burden to propose inadmissible contention. And
9 fundamentally they have a burden to review the
10 application and dispute it. So if there's entire
11 sections of the application that discuss the
12 information they're looking for and they don't
13 challenge it, that is a fundamental failure.

14 With regard to Joint Petition 4, I refer
15 the Board to their decision in JP-3, and that equally
16 applies here. The continued storage rule GEIS
17 discusses low-level rad waste generated during
18 decommissioning and cites small impacts. Any
19 challenges to decommissioning activities, which are
20 well beyond the license term of the facility, are
21 challenges to the Continued Storage Rule.

22 And petitioners only speculate about the
23 volumes and causes of the low-level rad -- the gross
24 volumes of low-level rad waste that they estimate. So
25 I refer the Board to their decision in Joint Petition

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1 3.

2 With regard to Joint Petition contention
3 10, Mr. Lodge referred to some statements by Secretary
4 Perry. Those statements are not in the record.
5 They're not part of the petition, and frankly, no one
6 even knows what he's talking about. We're not
7 familiar with those statements. So we'd seek to
8 strike any discussion of that.

9 If he thought it was important, he could have
10 amended his petition, and he certainly did not do
11 that.

12 With regard to Joint Petition 10, the
13 indefinite length of interim storage requires a NEPA
14 evaluation beyond 60 years. We refer the Board to
15 their decision in Joint Petition 10 in the Holtec
16 proceeding. That applies here.

17 The license application is only for 40
18 years, and so possible renewals are -- anything
19 environment -- environmental impacts beyond that
20 period are beyond this proceeding. The Continued
21 Storage Rule incorporates impact determinations from
22 the GEIS, which considers environmental impacts well
23 beyond this period, and NRC regulations bar
24 impermissible challenges to Continued Storage Rule
25 without waiver.

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1 With regard to their arguments regarding
2 cherry-picking of containers, we would note that is
3 pure speculation. They've cited zero examples of how
4 such a container could even exist at a plant site, and
5 further, there's nothing anywhere in our application
6 that suggests we would cherry-pick and leave
7 containers behind.

8 With regard to Joint Petition 12, where
9 they said the Continued Storage Rule does not apply
10 here, it was unclear the differences he was trying to
11 cite to the Holtec petition. The fact is the
12 Continued Storage Rule evaluates a similar facility,
13 the PFS facility, which has the same ultimate capacity
14 of 40,000 metric tons uranium, and the same footprint.

15 So there really are no differences, and
16 the Continued Storage Rule acknowledges there may be
17 site-specific differences of particular ISFSI
18 locations, but those differences are to be evaluated
19 as part of the site-specific license, which we
20 entirely did here in the environmental report.

21 With regard to Joint Petition 12, I refer
22 the Board to their decision in Joint Petition 4 in the
23 Holtec proceeding. It included issues regarding no
24 need to consider a dry transfer facility at this time,
25 and again, the GEIS acknowledges that not all storage

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1 facilities will match the assumed generic facility.
2 Site-specific impacts are analyzed as a licensing
3 action.

4 With regard to a few other contentions,
5 Your Honor, we'd like to -- on Joint Petition 8, which
6 was no-action alternative must discuss the hardened
7 on-site storage and at least four other alternatives,
8 including dry transfer of storage, modifications to
9 the emergency plan, modifications to the ISFSI design,
10 and ownership by the U.S. Government, we'd refer the
11 Board to the decision in Holtec 6 where they discuss,
12 among other things, HOSS is not relevant to the no-
13 action alternative.

14 With regard to Joint Petition contention
15 2, cherry-picking of canisters, we've already
16 discussed that as it was raised earlier. And Joint
17 Petitioners 11, which is no plans for a dry transfer
18 system to handle damaged, leaking or contaminated
19 systems, which we would refer the Board to their Joint
20 Petition 7 which applies here.

21 There is no facts or expert opinion that
22 canisters will arrive damaged to the interim storage
23 facility, and we cite to the PFS decision that an
24 accidental canister breach is not a credible scenario.
25 The Board cited to that decision in CLI 04-22, and we

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1 cite to that as well.

2 If you have no other questions, Your
3 Honor, I'll pass it on to one of my colleagues.

4 JUDGE RYERSON: Thank you. Any questions,
5 Judge Arnold? Or Judge Trikouros?

6 JUDGE ARNOLD: No.

7 JUDGE TRIKOUROS: No.

8 J U D G E R Y E R S O N :

9 Thank you, Mr. Besette.

10 MR. LIGHTY: Thank you, Your Honor. Just
11 very briefly, one additional contention here that we
12 heard about earlier from Joint Petitioners is Joint
13 Petitioners 13 regarding reprocessing. I would note
14 that counsel didn't note any distinctions in terms of
15 the applications, the facts, the proceedings at issue.

16 He simply noted the Board's citation in
17 the other proceeding to NEPA case law, that noted that
18 NEPA doesn't require analysis of potential actions
19 that are merely contemplated. Joint Petitioners'
20 argument was, quote, "We disagree legally," end quote.
21 That's not a distinction between the proceedings, and
22 the Board's decision in the other proceeding is fully
23 applicable here on the reprocessing contention.

24 Very briefly, I would like to discuss a
25 couple of the comments from Joint Petitioners on

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1 standing. I know we will talk about standing, the
2 more global issue, proximity plus presumption standing
3 at a later point. But just a couple of items for the
4 Board to keep in mind.

5 The maps that counsel referred to from the
6 environmental report were there for the purposes of
7 NEPA. This was to identify information, to provide
8 representative routes, to provide information, because
9 there are no specific transportation routes identified
10 at this point. There are no specific transportation
11 routes requested to be approved in this proceeding.
12 And so a proper understanding of those maps is
13 important for understanding what they do and the story
14 they do and do not tell.

15 For example, counsel spent a few minutes
16 speaking about Fermi up in Michigan. As noted in our
17 pleadings, the spent fuel at Fermi is not in a type of
18 canister that could even be accepted at ISP pursuant
19 to this application, so again, the maps and the routes
20 in the ER simply don't stand for likely routes to ISP.
21 And that's important to keep in mind.

22 As to counsel's statement that any amount
23 of radiation provides a basis for standing, that's
24 simply an incorrect statement of the law. We've cited
25 case law in our answer, noting that radiation that's

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1 four or five orders of magnitude below background
2 levels clearly falls below the level that could be
3 considered substantial enough for standing purposes.
4 So I think it's important to correct the record as to
5 the current state of the law on that issue.

6 And then finally, I would note, as the
7 Board correctly pointed out, Joint Petitioners raised
8 an entirely new theory of standing as to their SEED
9 individuals in the reply. It's inappropriate to raise
10 an entirely new theory of standing in a reply, and
11 that cannot be the basis for their standing argument.

12 They submitted their petition, relying
13 entirely on alleged proximity to hypothetical
14 transportation routes, and the Commission has spoken
15 clearly on this, that -- and noted, for example, in
16 CLI 04-17, mere geographic proximity to potential
17 transportation routes is insufficient to confer
18 standing.

19 In other words, we're out of the proximity
20 zone here. We're talking about going to traditional
21 standing, if you want to claim standing based on a
22 transportation route. And Joint Petitioners offer no
23 information that would establish traditional standing
24 in their argument.

25 JUDGE RYERSON: But the declaration from

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1 Ms. Gardner-Aguilar established that she lives within
2 five or six miles of the proposed facility, doesn't
3 it?

4 MR. LIGHTY: It provided an address. It
5 did not provide any distance to any particular
6 facility, transportation route, the ISP facility.
7 It --

8 JUDGE RYERSON: It's not a big place,
9 though. If she lives there, she has to be within a
10 few miles of the facility.

11 MR. LIGHTY: It's possible. It wasn't
12 pled. In other words, it wasn't demonstrated. Again,
13 the burden here is on --

14 JUDGE RYERSON: Well, the facts are there.
15 The facts are there. Granted, I believe that the
16 principal theory -- there are eight Joint Petitioners
17 or something like that, and the vast majority,
18 probably all of them, were talking about
19 transportation routes. But the facts are -- you'd
20 have to admit, the facts are there in the declaration.

21 If -- now, I know you disagree. But if
22 one thought that being within six miles of the
23 proposed facility gave you standing, they have
24 established that, haven't they?

25 MR. LIGHTY: I certainly agree that Ms.

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1 Gardner's petition gave her home address. If it was
2 incumbent on the Board and the parties and the staff
3 to go and Google and do their own research to
4 determine whether there is standing, then I would say,
5 yes, that's --

6 JUDGE RYERSON: But that was explicitly
7 clarified in the reply, was it not?

8 MR. LIGHTY: Raising a new theory of
9 standing in the reply, yes.

10 JUDGE RYERSON: Well --

11 MR. LIGHTY: Yes.

12 JUDGE RYERSON: I guess we're -- we have
13 to decide whether that's a new theory or not. It
14 would be impermissible, but a fact was clarified in
15 the reply.

16 MR. LIGHTY: Yes. And if you read the
17 declaration itself, it says, I live within a certain
18 distance of a transportation route. It does not say,
19 I live within a certain distance of a facility. So
20 the declaration, I think, speaks for what the theory
21 being advanced in the declaration was.

22 JUDGE RYERSON: I'm sorry. Continue, Mr.
23 Lighty.

24 MR. LIGHTY: And one final point of
25 clarification here. ISP will not be the shipper of

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1 spent fuel in this application. It's not requesting
2 authorization to do that. It does not contemplate
3 doing that in the future. That's something that
4 someone else would do, an activity that someone else
5 would do that's not within the scope of this
6 proceeding.

7 This proceeding won't approve any
8 transportation routes. It won't approve any rail
9 routes, any road routes, any barge routes. There's no
10 request to approve the specific places that spent fuel
11 would travel. And so I think that's again one more
12 important point to keep in mind here in terms of the
13 scope of this proceeding as noticed in the Federal
14 Register.

15 JUDGE RYERSON: Any questions, gentlemen?
16 Is that it? Thank you, Mr. Lighty.

17 MR. LIGHTY: Thank you very much.

18 MR. MATTHEWS: Good afternoon, panel. Tim
19 Matthews. There were a few other contentions that Mr.
20 Lodge did not address, and to address the Board's
21 question about what's different between this
22 proceeding and the contentions in the Holtec
23 proceeding, I wanted to very briefly touch on those.

24 In the -- with respect to the NWPA, the
25 Joint Petitioners filed an objection, which seems to

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1 be most analogous to the motion to dismiss, and it
2 would, therefore, fall within the same discussion that
3 we talked about earlier with respect to the NWPA
4 issues and the APA, NWPA-specific lack of NRC
5 jurisdiction to consider the application or that
6 allegation.

7 JUDGE RYERSON: Now, I -- this may not be
8 directly relevant, but when you talk about the NRC
9 jurisdiction to consider, I mean, in Yucca Mountain,
10 DOE moved to withdraw its application, and the
11 Board -- I was actually on the Board -- at the
12 direction of the Commission determined whether or not
13 that was lawful under the Nuclear Waste Policy Act.
14 I mean, is that inconsistent with the position you're
15 taking? I'm confused on that.

16 MR. MATTHEWS: Petitioners have asserted
17 that because of the NWPA, the NRC lacks authority
18 here. That was not the question --

19 JUDGE RYERSON: Correct.

20 MR. MATTHEWS: -- before the Board at
21 Yucca Mountain.

22 JUDGE RYERSON: But we were asked to
23 adjudicate the lawfulness of actions under the Nuclear
24 Waste Policy Act, of DOE's actions, a sister
25 government agency. In any event --

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1 MR. MATTHEWS: I can't speak to that,
2 Judge Ryerson.

3 JUDGE RYERSON: -- it may not be directly
4 relevant to your argument, but I was --

5 MR. MATTHEWS: That would be our view.

6 JUDGE RYERSON: That's your view. Okay.

7 MR. MATTHEWS: With respect to Joint
8 Petitioners 3, which is financial assurance, that is
9 very similar to the Sierra Club contention 9 that we
10 discussed earlier here today, and the financial
11 qualifications petition by Joint Petitioners in the
12 other proceeding, very similar, and the bases would be
13 the same.

14 There are two contentions in this
15 proceeding that are not -- don't have an analog in
16 Holtec. One was the foreign ownership, and we don't
17 have anything to add beyond our pleadings there. And
18 then -- that was JP-7 here.

19 And then Joint Petitioners 9 here was the
20 alleged misrepresentation of financial benefits under
21 the NEPA, essentially saying that we considered only
22 the benefits and not the costs. And, again, we point
23 to our pleadings there, but note that there is, on
24 this contention and several others that we'll be
25 addressing today and tomorrow, there are pending

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1 motions to strike, and I presume the Board will take
2 those in due course.

3 JUDGE RYERSON: We will decide everything
4 at one time, in a timely fashion. We'll get to that
5 at the end. Thank you. Oh, I'm sorry. Any questions
6 before we -- okay. Thank you, Mr. Matthews.

7 Before the staff people get up, I am going
8 to have two questions. It may affect who gets up. My
9 two questions to start will be: Have you -- you took
10 the position that Joint Petitioners did not have
11 standing, none of them had standing, was your
12 position. And I'm going to ask whether you have
13 reconsidered that as to SEED.

14 And my other question would be: You felt,
15 the staff felt, that contention 3, Joint Petitioners
16 contention 3 was admissible, at least in part, and I
17 believe that part related to the exemption request
18 which has been withdrawn.

19 So my question is: Have you changed the
20 staff's position on either of those -- on either that
21 standing matter and the admissibility of that
22 contention?

23 MS. KIRKWOOD: Can we have just one
24 minute?

25 JUDGE RYERSON: You may confer.

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1 (Pause.)

2 MR. GILLESPIE: Hello again. With respect
3 to Joint Petitioners contention 3, we consider that
4 issue moot, and see it as an inadmissible
5 contention --

6 JUDGE RYERSON: Okay.

7 MR. GILLESPIE: -- at this stage.

8 VOICE: Louder, please.

9 JUDGE RYERSON: Yes. If you would say
10 that again.

11 MR. GILLESPIE: Yes. At this stage,
12 because the exemption was withdrawn, we see this issue
13 as moot and inadmissible for that reason.

14 JUDGE RYERSON: Inadmissible. And if my
15 count is correct, the staff would then not find any
16 Joint Petitioners contention admissible at this point.
17 Is that correct?

18 MR. GILLESPIE: That is correct.

19 JUDGE RYERSON: That is correct. The
20 question -- you could argue it's moot, but the
21 question of standing then of SEED, what's your view on
22 that?

23 MR. GILLESPIE: Yes, Your Honor. As we
24 stated in the legal background section in our answer,
25 the mere fact that radioactive material transportation

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1 may occur in an area is insufficient to grant
2 standing.

3 With respect to SEED and Ms. Brigitte
4 Gardner-Aguilar specifically, the issues that she
5 alleged arise from the transportation of material to
6 the nuclear site. She doesn't allege any issues with
7 the facility.

8 JUDGE RYERSON: Well, she alleged she
9 lives -- not in these words, but she alleged that she
10 lives within six miles maximum or so of the proposed
11 facility. And the staff does not consider that, those
12 facts, sufficient to base standing on?

13 MR. GILLESPIE: As originally placed in
14 the declaration, she did not identify a distance, and
15 to contrast that with Ms. Rose Gardner alleges issues
16 related to the site, accidents that could occur,
17 things like that, which make her distinct from Ms.
18 Brigitte Aguilar.

19 JUDGE RYERSON: Okay.

20 MR. GILLESPIE: That being said, given her
21 proximity to the site, we would likely not have an
22 objection if standing was found on that basis.

23 JUDGE RYERSON: So you're -- excuse me.
24 You're saying you're not objecting if the Board were
25 to find standing, but you're not --

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1 MR. GILLESPIE: Yes, Your Honor.

2 JUDGE RYERSON: -- changing your position
3 on it.

4 MR. GILLESPIE: Yes. Based on proximity,
5 if the Board found that the address there was
6 sufficient --

7 JUDGE RYERSON: Was sufficient. Okay.

8 MR. GILLESPIE: -- information to find
9 that, then --

10 JUDGE RYERSON: Particularly with
11 clarification in the reply. We can argue whether that
12 reaches beyond the proper scope of a reply, but it was
13 explicitly made as an argument in the reply.

14 MR. GILLESPIE: Yes, Your Honor.

15 JUDGE RYERSON: All right. Those are my
16 two up-front questions, and now anything else you'd
17 like to talk about on this topic?

18 MR. GILLESPIE: No, Your Honor.

19 JUDGE RYERSON: Okay. Thank you.

20 Why don't we take a relatively short break
21 right now, and we'll resume -- I think we're now up to
22 the last set, the Fasken set. Right? Other than the
23 standing issue, which we'll probably get to tomorrow,
24 so why don't we take a break until 3:10, and then we
25 will resume at that point.

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1 (Whereupon, a short recess was taken.)

2 JUDGE RYERSON: Mr. Eye, I see you're in
3 the right location already. Welcome, and we will
4 begin with your presentation on behalf of Fasken.
5 I'll call both your clients Fasken collectively if
6 that's okay.

7 MR. EYE: Very well, Your Honor. Thank
8 you. Can I be heard?

9 VOICES: Yes.

10 MR. EYE: Okay. Good. We it please the
11 panel, we are glad to be here to present our case or
12 at least the case that we will summarize in front of
13 you that is also contained in our pleadings, in
14 opposition to the application to construct and operate
15 the CISF that ISP has advanced.

16 My name is Robert Eye, and along with my
17 co-counsel, Tim Laughlin, we represent Fasken Oil
18 Ranch and the Permian Basin Land and Royalty Owners.
19 Sometimes we call them PBLRO, and as Judge Ryerson
20 noted, we'll probably refer to them collectively as
21 Fasken, if that's not too confusing.

22 Fasken is representative of the ranching
23 and oil and gas industry located in the Permian Basin,
24 which turns out to be the most prolific oil and
25 natural gas production area in the world.

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1 As the panel is aware, in the Holtec case,
2 Fasken advanced a motion to dismiss as our sole issue.
3 As the panel will also recall, procedurally, when that
4 was filed, it was circuitously -- ended up at the NRC
5 secretary's office, which dismissed the motion, but
6 then referred it back to you to process as a
7 contention, which you then addressed in the Holtec
8 order.

9 So with that just brief background and
10 recollection, I want to get into some of the issues
11 that we believe are pertinent regarding the ISP
12 application.

13 But just before I do that, I want to note
14 the attendance today of a number of people associated
15 with Fasken and PBLRO. That include Fasken's
16 management and staff, and a number of PBLRO
17 supporters. And thank you for being here. It's much
18 appreciated.

19 If there are questions about contentions
20 2 and 4 that come up later during our presentation, I
21 would ask leave to defer those questions or to rather
22 refer those questions to my colleague Mr. Laughlin,
23 and then if there are questions concerning the motion
24 to dismiss or contentions 1, 3 and 5, I will do my
25 best to address those questions.

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1 Fasken opposes the licensing of the ISP
2 CISF because, among other reasons, there is a real
3 prospect here that this facility will become a de
4 factor permanent disposal facility. And I'll say more
5 about this in just a moment. But it's important to
6 realize the magnitude of the radioactive materials
7 that will be placed or anticipated to be placed at
8 this facility. It would represent the largest
9 concentration of radioactive materials ever amassed on
10 earth.

11 The opposition to the ISP proposal,
12 therefore, is based on its failure to meet the very
13 crucial requirements that pertain to these facilities
14 that are contained in the NRC regulations and its
15 guidance documents.

16 Now, the reality of amassing this
17 magnitude of radioactive materials should make strict
18 compliance with the application requirements a
19 foregone conclusion, but as we know, in any
20 proceeding, it's frequently arguable whether
21 compliance has been achieved or not. It's frequently
22 a nuanced question rather than a stark black and white
23 determination. We recognize that.

24 But it's important from our view to keep
25 in mind the stakes. The reality of this quantity of

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1 radioactive materials placed in the middle of the
2 Permian Basin raises the stakes considerably. It
3 could undermine our country's capacity to meet its own
4 energy needs if the Permian Basin was ever taken out
5 of production as a result of an accident and a
6 radiological release at the ISP facility.

7 A brief word about standing. Now, I know
8 that this is the favorite topic in many regards, but
9 I do want to just note that as determined in the
10 Holtec proceeding, Fasken/PBLRO has met the
11 requirements of standing based on the proximity plus
12 presumption.

13 In the current proceeding, NRC staff
14 agrees that PBLRO/Fasken have been that -- those
15 requirements and should be recognized as having
16 standing in this proceeding.

17 Given the similarity and proximity of
18 Fasken and Fasken's declarants related to standing in
19 the Holtec case and the ISP case, we think that it is
20 prudent and correct to handle the standing question
21 related to Fasken the same way in ISP as it was
22 addressed in the Holtec matter.

23 It was mentioned earlier there is a
24 prospect that this proposed facility will become, by
25 default, by default, the final and permanent

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1 disposition point of our country's commercial high-
2 level waste stream. A CISF is not a substitute for a
3 deep geological repository. They are different
4 species of facilities for good reason.

5 And any representation that somehow a CISF
6 can function, either in a quantitative sense for
7 controlling the release of radiation or over a long
8 duration of time as effectively as a deep geologic
9 repository flies in the face of the science that
10 supports deep geologic repositories as final
11 disposition points for high-level waste.

12 The availability of a CISF would
13 effectively relieve the pressure to establish a
14 permanent deep geologic repository. That is precisely
15 why the authors of the Nuclear Waste Policy Act
16 recognized that a CISF without a functioning permanent
17 repository would be a sitting duck to become a
18 permanent repository by default.

19 ISP has made no attempt, nor could it, to
20 show that its CISF would move our country any closer
21 to establishing a deep geologic repository.

22 Let me address some of our contentions.
23 The first contention we raise dovetails with our
24 motion to dismiss and is based in interpretations and
25 applications of the Nuclear Waste Policy Act. The so-

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1 called waste confidence contention includes an
2 assertion that the Applicant has failed to establish
3 a need for away-from-reactor high-level waste storage.

4 It posits that the preferences of reactor
5 owners for away-from-reactor storage are not the
6 same -- or we argue, rather, that the preferences of
7 reactor owners are not the same as the needs that are
8 the predicate for establishing away-from-reactor
9 storage. ISP has failed to prove that its CISF is any
10 safer than existing at-reactor storage facilities,
11 even though it does assert this in a conclusory
12 fashion.

13 It never supports with evidence why it
14 believes its facility is safer than at-reactor
15 storage. It simply concludes such. To accept this
16 requires a rejection of the findings by the -- that
17 underpin the Continued Storage Rule that were
18 developed in the waste confidence proceedings Blue
19 Ribbon Commission that specifically determined current
20 at-reactor storage is a safe and secure method to
21 manage the high-level waste stream for an indefinite
22 duration of time. That fact has not been undermined
23 in this proceeding. It's the premise from which we
24 should begin.

25 Does ISP base its assertion that a CISF

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1 would be safer because it is proposed to be built in
2 a less densely populated part of our country? If so,
3 such an assertion ignores the fact, for example, that
4 the cities of Midland and Odessa have a combined
5 population of around 300,000 people.

6 And simply because other areas in the
7 vicinity of the proposed facility may not have the
8 population densities that -- of their urban
9 counterparts, people living there are no less
10 deserving of protection that their urban counterparts
11 would expect.

12 Further, building this CISF in the Permian
13 Basin invites the possibility that the most productive
14 oil and gas production field in the world is put
15 needlessly at risk. In sum, ISP has not established
16 that there is a need for this CISF to safely manage
17 the high-level waste stream, let alone to do so in an
18 area that is crucial to the capacity of our country to
19 meet its energy needs.

20 In fact, under International Atomic Energy
21 Agency standards, which I understand don't apply, but
22 I think it's important to note that under IAEA
23 standards, this facility could not be built anywhere
24 near energy-related facilities. And that, I think, is
25 telling, and it shows that there are higher standards

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1 out there to which facilities in other parts of the
2 world would have to meet compared to this facility.

3 Our second contention argues that ISP has
4 failed in a rather spectacular way to fully evaluate
5 and characterize the region surrounding the CISF and
6 the unstable characteristics of the geology
7 surrounding the site, specifically the effect that
8 over 3,800 abandoned and temporarily abandoned wells,
9 including any number of unaccounted for orphan wells,
10 may have on the site.

11 As our declarant Tommy Taylor, an upper
12 management person for Fasken, said in his declaration,
13 the Applicant has understated the number of wells that
14 are within the vicinity of this particular site.

15 Staff agrees that this contention should
16 advance to adjudication, and we find that to be a
17 significant decision on the part of staff, because we
18 know they are by practice and by indications in the
19 Holtec proceeding and in this one, they are reluctant
20 to give any kind of an endorsement to a petitioner's
21 contentions, but they did this one, and we think that
22 that was a correct decision by staff.

23 Our third contention argues that ISP has
24 failed to address how its CISF will mitigate the
25 damage and release of radioactive materials in the

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1 event of a plausible malicious or accidental airplane
2 crash into the facility. ISP's dismissive attitude
3 about this contention is based on a probabilistic risk
4 assessment that says that there's less than a one in
5 a million chance on an annual basis of such an event
6 happening.

7 Now, it's interesting because ISP's
8 assertion in that regard doesn't cite to the NUREG
9 guidance that relates to CISFs. It cites instead to
10 a NUREG that addresses power reactors. I believe it's
11 light water power reactors specifically. Why the
12 difference? If one in a million chance of such an
13 event happening at a power reactor is the standard,
14 why should it be different under the NUREG that
15 addresses CISF events such as this?

16 Well, that difference is not -- it's not
17 clear why there's the difference, but let me posit a
18 potential reason. And it would be that the quantity
19 of radioactive materials at a PWR, a light-water
20 reactor, rather, is vastly smaller than that which
21 would be found at a fully subscribed CISF. So we find
22 it inappropriate for the Applicant to go to a NUREG
23 that relates to power reactors to determine the
24 probabilistic risk assessment for an airplane crash
25 into one of these facilities, rather than going to

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1 source document, the NUREG source document that
2 actually discusses CISFs.

3 And we discuss this extensively in our
4 pleadings. The Applicant does not explain -- or I
5 should say, doesn't address why it doesn't recognize
6 the NUREG that discusses CISFs, rather than its
7 preference for a light-water power reactor NUREG.

8 Now, this one in a million -- yes.

9 JUDGE TRIKOUROS: Yes. Just let me
10 interrupt you for a second. You're talking about the
11 initiating event frequency. Right? You're not
12 talking about a risk. You're talking about event
13 frequency. Right?

14 MR. EYE: I am. But as a practical
15 matter, they seem to be very close in terms of the
16 kind of assessment that should be made in terms of
17 whether we're allowing an inordinate risk or an
18 unreasonable risk to occur. But, yes. It is related
19 to the triggering event.

20 So ISP's position that this is only a one
21 in a million chance on an annualized basis, you know,
22 may be quite satisfying in an abstract statistical
23 sense, but it defies common sense in our contemporary
24 world. There are three major airports within 50 miles
25 of the WCS site, raising the possibility of short

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1 flight times from those airports to the ISP site.

2 So at the very least, it seems that ISP
3 should, instead of relying on what we consider to be
4 an irrelevant NUREG related to light-water reactors,
5 ought to at least back up and consider what the NUREG
6 that addresses CISFs has to say about airplane
7 crashes, and there it's quite unequivocal. It says
8 those incidents need to be analyzed and considered in
9 the context of an application.

10 But instead of doing that, they point us
11 over to a light-water reactor NUREG in this
12 probabilistic risk assessment which doesn't appear in
13 the CISF NUREG.

14 Our fourth contention contends that ISP
15 has failed to include adverse information regarding
16 the presence of groundwater formations beneath and
17 proximate to the ISP site, because our expert
18 witnesses have developed credible, scientifically
19 based information to indicate that there are, in fact,
20 aquifers and other water-bearing formations located
21 directly beneath the proposed site and proximate to
22 it, among other things these formations provide
23 potable water to the city of Midland and just about
24 every rancher pumping water between Andrews and
25 Midland.

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1 Now, these formations, including the Santa
2 Rosa Aquifer, are routinely used also by the oil and
3 gas industry in their exploration and extraction
4 activities. All this flies in the face of ISP's
5 evaluation of the hydrological formations and aquifers
6 below the site.

7 Furthermore, when considered in
8 conjunction with ISP's failure to identify the
9 presence of approximately 4,579 wells within ten miles
10 of the site that on a daily basis produce
11 approximately 10,100 barrels of oil and 85,000 MCF of
12 natural gas per day, ISP has also failed to discuss
13 how these might end up as vectors to groundwater
14 formations.

15 These factual disputes about the presence,
16 the extent and the nature of substrata water
17 formations below and proximate to the ISP site must be
18 resolved through an adjudicatory process. There are
19 too many issues of fact, and I might add that other
20 petitioners have raised these and similarly find that
21 there are contradictions between that which ISP has
22 advanced about the nature and extent of water
23 formations beneath and proximate to the site.

24 This is a classic example. This is a Rule
25 56 civil procedure question about summary judgment.

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1 We have conflicting evidence, conflicting credible
2 evidence, that has to be resolved in some way other
3 than a summary disposition proceeding such as the one
4 we are in now.

5 The fifth contention argues that ISP has
6 failed to adequately characterize its proposed
7 facility's effect on the areas' threatened and
8 endangered species and undermines the extensive
9 conservation efforts made in recent years by the
10 energy and ranching industries in an effort to
11 conserve the habitats of threatened and endangered
12 species.

13 We're down to the protected lizard species
14 specifically, but I want to make one mention about the
15 lesser prairie chicken. It's worth noting that one of
16 the reasons why its conservation effort was successful
17 was because it was spearheaded by the oil and gas
18 industry and the ranching interests in that area.

19 And while this may be counterintuitive,
20 they were successful. They took that commitment on.
21 They do not want to see it undone, their efforts,
22 their resources that they poured into that project.
23 They don't want to see it undone by the presence of
24 ISP's proposed CISF.

25 From the outset in this matter,

1 Fasken/PBLRO has asserted that ISP's application was
2 fatally flawed, because it depends on the Department
3 of Energy taking title to and liability for high-level
4 waste. This is, as the panel knows, the underlying
5 premise or one of the underlying premises of our
6 motion to dismiss, and it also is tied to our first
7 contention, our so-called waste confidence contention.

8 But for DOE to take title to the high-
9 level waste stream, there must be a deep geologic
10 repository that is able to receive high-level waste.
11 Of course, no such facility presently exists in the
12 United States. Despite ISP's refusal to acknowledge
13 this legal reality until just about two weeks ago,
14 when on June 28, it issued a letter that acknowledged
15 this legal barrier that it is now forced to confront,
16 ISP now agrees this requirement must be met before a
17 CISF may be used for high-level storage, high-level
18 waste storage.

19 ISP evidently recognizes that for its
20 proposal to be viable, the Nuclear Waste Policy Act
21 must be amended to allow use of a CISF without the
22 availability of a functioning deep geologic
23 repository. But such an amendment has not
24 materialized, and whether ISP will be rescued by an
25 act of Congress is utterly speculative.

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1 This proceeding should not continue based
2 on an act of Congress that may never materialize, and
3 I would note in rather stark contrast, a petitioner
4 that depends on nonexistent legislation to support a
5 contention would likely not be well received by this
6 panel. The same standard should apply to ISP's
7 application.

8 It is this panel's duty to determine
9 whether an Applicant has satisfied each of the
10 requirements that pertain to this CISF proposal, and
11 if they are not going to follow the NUREGs that
12 pertain directly to it, have some good reason why they
13 are deviating from that. These NUREGs are kind of a
14 moving target. They're cited when they favor ISP, but
15 not when they don't. They should be held to a higher
16 standard.

17 When an application is riddled with issues
18 of fact and that the Applicant has failed to satisfy
19 its essential burdens, this panel should deny the
20 application or at least advance the contentions to
21 final adjudication. And, of course, we think that the
22 motion to dismiss that we advanced early on in this
23 matter should be granted, and the application rejected
24 on that basis.

25 Finally, the concept of consent-based

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1 siting is being used apparently to convince the public
2 that their consent is an essential element for
3 licensing this facility. Legally, of course, that is
4 not the case.

5 But if consent-based siting is going to be
6 more than a ruse, it should be codified and defined
7 what consent means and a methodology adopted to
8 determine who should give what consent and at what
9 level, because to do otherwise sends a false message
10 to the public that their input can somehow be weighed
11 just as significantly as other evidence that the panel
12 considers.

13 Thank you, and we'll do our best to
14 respond to any questions that the panel may have.

15 JUDGE ARNOLD: Well, I have some questions
16 concerning standing. Now, the proximity assumption
17 normally involves a person who lives within 50 miles
18 of a commercial power plant. Proximity plus, I
19 assume, should mean you've got somebody who lives
20 within some proximity to the plant. So between Tommy
21 Taylor and D.K. Boyd, which one lives closest to the
22 ISP facility, and how far away is that?

23 MR. EYE: I think it's D.K. Boyd that
24 lives closer, and his exact -- the exact distance of
25 his residence from his ranch, I do not know. But

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1 proximity standing doesn't depend on residential
2 location -- let me put it this way. It can depend on
3 residential location, but it can also be tied to
4 somebody's occupation.

5 And D.K. Boyd's occupation is ranching.
6 He goes to his property on a regular basis, and it's
7 close to the proposed facility, and that provides a
8 basis for standing. Likewise Mr. Taylor, who in his
9 occupation has reasons to visit the area on a regular
10 basis as well.

11 So it's -- I think that the idea of
12 proximity is residential, but it also includes
13 occupational or other uses of property that are
14 proximate to a proposed facility.

15 JUDGE ARNOLD: According to D.K. Boyd's
16 statement, his brother runs the cattle operations, so
17 just the fact that he has a ranch there doesn't tell
18 me that he's there often enough to have a proximity
19 standing. How often is he there? And although part
20 of the ranch is within four miles of the CIS, looking
21 at a map of it, it looks like an awful lot of the
22 ranch isn't within four miles.

23 MR. EYE: He signed a declaration under
24 penalty of perjury that said his ranch is four
25 miles -- approximately four miles from the facility.

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1 JUDGE ARNOLD: The closest point.

2 MR. EYE: That's correct. And if we're
3 quibbling about four miles or five miles --

4 JUDGE ARNOLD: No. We're quibbling
5 about --

6 MR. EYE: -- that's really a
7 distinction --

8 JUDGE ARNOLD: -- four miles and 20 miles.

9 MR. EYE: Well, he --

10 JUDGE ARNOLD: I don't know the ranch.

11 MR. EYE: His ranching operation obviously
12 is something that he has a concern about not only
13 himself but his brother out there working it.

14 JUDGE RYERSON: Is his brother formally an
15 employee of his, or is it simply his brother works it,
16 and they somehow work that out?

17 MR. EYE: I think that they both have
18 interests in that ranching operation.

19 JUDGE RYERSON: I was curious. You know,
20 those of us from the East have a hard time with the
21 distances here in Texas. Unless it was a typo, I
22 think it said that the ranch is 137,000 acres.

23 MR. EYE: Yes. That was a typo. Yes.

24 JUDGE RYERSON: Pardon? That's a typo.
25 Okay.

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1 MR. EYE: That's a typo. I --

2 JUDGE RYERSON: I thought that a little
3 corner with four miles could be pretty far from part
4 of the ranch, so that's an error of probably at least
5 ten. Okay. Well, that answered my question.

6 Did you have some more, Judge Arnold, at
7 this point? We can get back to -- we'll be talking
8 about standing tomorrow in the context of the generic
9 issue that ISP is raising, and so we might have some
10 more individual questions at that point.

11 Judge Trikouros, are you --

12 JUDGE TRIKOUROS: Well, I have questions,
13 but I'm going to ask them tomorrow. I don't think I
14 want to ask them today.

15 JUDGE RYERSON: Okay. All right. Well,
16 thank you, Mr. Eye.

17 We're going to take a brief break right
18 now before we hear from ISP and the NRC staff. Why
19 don't we reconvene at four o'clock, and we will
20 probably finish up for the day after those two and
21 start again tomorrow, but we'll see you again at 4:00.
22 Thank you.

23 (Whereupon, a short recess was taken.)

24 JUDGE RYERSON: Mr. Matthews, are you
25 ready? Mr. Eye, did you have something to say?

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1 MR. EYE: Yes. I just would like to
2 correct the record, if I could, on --

3 JUDGE RYERSON: Certainly.

4 MR. EYE: In response to the question
5 about the dimensions of the ranch, actually the
6 declaration's correct. It is 137,599 acres, which by
7 quick calculation is about 250 square miles. So
8 that's correct, that he owns --

9 JUDGE RYERSON: 250. Yes. I did my own
10 calculation with things I'm more familiar with, and it
11 occurred to me that the ranch is about ten times the
12 size of Manhattan Island.

13 (General laughter.)

14 JUDGE RYERSON: And so --

15 MR. EYE: And easier to get around.

16 JUDGE RYERSON: While I have you, I think
17 we are going to -- we're going to be talking about
18 standing in a generic way tomorrow, and I did have
19 some questions about the affidavits on standing in the
20 case of Fasken.

21 We're not taking evidence tomorrow. You do
22 not have to bring your clients in, and I think there
23 would be objections if we did do that. But I am, just
24 to alert you, I'm going to ask some clarifying
25 questions about some of the more general statements.

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1 And so to the extent you are quite familiar with the
2 facts that are sort of underlying the more general
3 statements, fine. I don't know if you want to contact
4 either of those gentlemen.

5 but the nature of my questions would be
6 more in the case to compare with Holtec. I believe --
7 what was the gentleman's -- not Mr. Boyd, but --

8 MR. EYE: Taylor.

9 JUDGE RYERSON: Mr. Taylor?

10 MR. EYE: Tommy Taylor.

11 JUDGE RYERSON: Thomas Taylor, yes.

12 Another Taylor. Thomas Taylor had reasons to go to
13 the facility specifically, as I recall. Here the sort
14 of more general statements and it almost seems to come
15 down to his saying, Well, I drive on highways in that
16 area.

17 So I'm not limiting my questions to that
18 specific one, but those are the sorts of questions I
19 think I might have about fleshing out perhaps some of
20 those declarations as to exactly what they mean.

21 MR. EYE: I understand, and we'll do our
22 best to respond.

23 JUDGE RYERSON: Okay. Thank you.

24 MR. EYE: Thank you.

25 JUDGE RYERSON: Now, Mr. Matthews.

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1 MR. MATTHEWS: Thank you, Judge Ryerson.
2 I want to set this where I can still see my notes.
3 Are you able to hear me in the room?

4 VOICE: No. Microphone's not working. It
5 might need new batteries.

6 JUDGE RYERSON: Have you tried it really
7 close?

8 MR. MATTHEWS: Will that work?

9 JUDGE RYERSON: That certainly works for
10 us.

11 MR. MATTHEWS: I intend to address three
12 issues, and my colleagues will address the remaining
13 three of Fasken's issues and contentions.

14 The first, not a surprise, would be the
15 motion to dismiss on the NWPA basis. What's different
16 here that's sort of a procedural matter, I suppose, in
17 that the motion was styled for both CISF proceedings,
18 but there was a failure of service on it. It was not
19 served to the parties. I understand that the boards
20 have great leeway in how they interpret these, but a
21 failure of standing -- a failure of service -- there
22 are cases where failure of service, the Board has
23 taken note, and we just want to note that.

24 JUDGE RYERSON: Was this in your response?
25 Was that ever raised?

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1 MR. MATTHEWS: I'll confirm that, Your
2 Honor.

3 JUDGE RYERSON: Okay.

4 MR. MATTHEWS: I believe there was in our
5 initial objection, once it was referred -- we didn't
6 have a chance to respond to it. It wasn't served to
7 us, so it first landed on our point once the Secretary
8 referred it to the Board. So --

9 JUDGE RYERSON: So normally the Secretary
10 would be responsible for serving you. I mean, once
11 it's treated as a contention, they should have served
12 it.

13 MR. MATTHEWS: The Secretary did send it
14 to us, when the Secretary referred it to both dockets
15 and we received it then.

16 JUDGE RYERSON: Okay.

17 MR. MATTHEWS: But when it was initially
18 served on the other applicant, it was not served on us
19 as well.

20 JUDGE RYERSON: You have it.

21 MR. MATTHEWS: I'm merely preserving it,
22 Your Honor.

23 JUDGE RYERSON: You have it.

24 MR. MATTHEWS: We have it.

25 JUDGE RYERSON: Okay.

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1 MR. MATTHEWS: We have actual notice.

2 JUDGE RYERSON: You've had actual notice.

3 MR. MATTHEWS: At this point, we have
4 actual notice.

5 JUDGE RYERSON: Okay. You've made the
6 point.

7 MR. MATTHEWS: We have a lot of
8 contentions here, Your Honor. With respect to Fasken
9 3, there's been sort of a crab walk as to what this
10 contention is about, and that's what I wanted to bring
11 this -- there's not an analogous contention in the
12 Holtec proceeding.

13 This contention as styled was that the
14 application failed to meet the 72.122 design
15 requirements for protection of components important to
16 safety, in that if there was a credible accident,
17 specifically an aircraft impact, a fully loaded
18 aircraft, that somehow ISP had conceded was credible
19 and had failed to meet the 122 requirements for
20 protection.

21 In our response, ISP noted that it had
22 never conceded or considered an aircraft impact as a
23 credible accident. It did consider it in alert
24 classifications as required in the emergency planning
25 provisions, and those both derive from staff guidance

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1 requirements, separately for protection components
2 important to safety and for what needs to be
3 considered in an emergency response plan.

4 But the application, as noted in our
5 brief, clearly stated that just because it's in the
6 emergency response plan doesn't mean Applicant
7 considers it credible. And Applicant didn't consider
8 it credible. And that was the answer.

9 It seems now and in the reply, petitioners
10 want to point to guidance for the staff review that
11 says you must consider hazards in the area, including
12 airports and consider those and the guidance on how to
13 consider airports.

14 We've come a long way from physical fire
15 protection systems on the site being adequate from a
16 72.122 perspective. Nonetheless, petitioners haven't
17 asserted why ISP must conduct an aircraft crash
18 analysis. They point to a staff guidance document,
19 not a Commission requirement.

20 Nonetheless, ISP has done that analysis
21 and supplemented the application. It wasn't subject
22 of notification because it was outside the scope of
23 the contention, but it's there. It's in ADAMS. It
24 exists, and it concluded that the likelihood of an
25 aircraft crash, the probability of the initiating

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1 event was less than one times ten to minus 6, which is
2 the standard established in PFS, the Commission's
3 standard.

4 Petitioners might disagree with that
5 standard, but it is the standard that the Commission
6 has set for this Board and others to follow, as the
7 Board noted in the 19-4. So we make that point.

8 And then separately with respect to --
9 pause for a second, if there's anything about that.

10 JUDGE ARNOLD: I do have a question on
11 that. Your emergency response plan is the
12 consolidated emergency response plan. What is being
13 consolidated?

14 MR. MATTHEWS: Thank you, Judge Arnold.
15 The consolidated interim storage facility sits on the
16 WCS site. The WCS site is also the home for TCEQ
17 license low-level radioactive waste facilities. Those
18 facilities under the TCEQ regulation require an
19 emergency response plan.

20 Both the NRC and TCEQ recognize that the
21 licensee -- their respective licensees needs an
22 emergency response plan, and the NRC's guidance
23 indicates that where it makes those sense, those plans
24 ought to be consolidated, such that you can actually
25 carry them out.

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1 At the time of an event, you may not know
2 where it initiated. You want to be able to respond to
3 the plan appropriately, notifying law enforcement
4 agencies and the like, first responders.

5 So the plan recognizes that, and it specifically
6 delineates which portions are applicable to the CISF.

7 JUDGE ARNOLD: So this consolidated plan
8 evolved from an existing plan for the whole site,
9 or --

10 MR. MATTHEWS: I wouldn't quibble with
11 "evolved." There was an existing plan for the site,
12 and then ISP, WCS before it, began working on what
13 else needs to be included in this plan in order to
14 address the NRC requirements that may be different
15 from the TCEQ requirements.

16 JUDGE ARNOLD: Do you know if the airplane
17 crash alert was added to the existing plan as
18 consolidation, or did it already exist?

19 MR. MATTHEWS: I'll check on that, Judge
20 Arnold. I don't know off the top of my head. There
21 is NRC staff guidance that -- the REG guide for review
22 of a 72 facility that drives you to an ANSI standard
23 that includes a list of initiating events that need to
24 be considered, and aircraft is in there. So that's
25 the why it's there, but whether it preexisted, I will

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1 check and come back to the Board.

2 JUDGE ARNOLD: Thank you.

3 MR. MATTHEWS: Last is the groundwater
4 contention, and just a couple points on that. We've
5 addressed that today earlier in the context of Sierra
6 Club 10, and noting that it's not different materially
7 from Sierra Club 15 in the Holtec proceeding. Those
8 arguments still apply here. The Applicant -- or
9 sorry. The petitioner has not explained why any
10 radionuclide could ever get to groundwater if it
11 exists there, and there are a couple points to make.

12 The contention bootstraps this idea of a
13 fully loaded aircraft landing unintentionally on the
14 CISF. It doesn't somehow suggest that that's
15 plausible or probable. Just it relates back to the
16 other contention, saying, well, ISP has conceded that.
17 As we just talked about, that's not the case.

18 There is nothing that indicates there is
19 some initiating event that could cause fission product
20 to leave the clad, to leave the canister, to have a
21 transport mechanism to leave the pad and to reach the
22 groundwater. That didn't exist and doesn't exist.

23 JUDGE RYERSON: And just to clarify, the
24 possibility of an airplane intentionally landing is
25 beyond the scope of what we may consider, given the

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1 Commission's position on --

2 MR. MATTHEWS: We are still beyond the
3 Ninth Circuit. Yes, Judge Ryerson.

4 And with respect to the location of the
5 aquifer or aquifers as petitioners allege, there are
6 some significant deficiencies noted in our pleadings
7 that the Board may want to consider. That is, the
8 various petitioners don't agree as to where or which
9 water is under the site.

10 ISP has presented extensive analysis about
11 where groundwater or formations are, the geologic
12 structure, and where it has actually found water and
13 where it has not.

14 Petitioner has a supporting affidavit of
15 geologist Pachlhofer, who opines on many things, one
16 of which is geology. But for his assertions about
17 geology, he relies on Lehman and Rainwater, which was
18 one of the references in the ISP application.

19 Geologist Pachlhofer asserts that, with
20 reasonable scientific certainty, the Ogallala Aquifer
21 exists underneath the site of the proposed CISF. The
22 problem with the Pachlhofer assertion is it relies
23 only on Lehman and Rainwater, which comes to the
24 opposite conclusion. It says there is no Ogallala
25 Aquifer there. It says there's an Antlers Formation

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1 and, further in Exhibit 10 of Lehman and Rainwater,
2 says it's dry.

3 It says where the site is is between two
4 zero water level gradients. So it's completely
5 consistent with the application that ISP filed. Where
6 the expert's opinion is different from the sources
7 upon which he relies, it is not entitled to deference
8 from the Board, and there is nothing else, no
9 independent evaluations that geologist Pachlhofer
10 asserts that he conducted.

11 I'll stop there. I understand there may
12 be further questions today or tomorrow or whenever the
13 Board would like.

14 JUDGE RYERSON: Apparently no questions
15 now.

16 MR. MATTHEWS: Then I will turn over the
17 mike to my colleague Ryan Lighty.

18 JUDGE RYERSON: Okay. Thank you, Mr.
19 Matthews.

20 MR. LIGHTY: Thank you, Your Honor. I'm
21 just going to be speaking about Fasken and PBLRO
22 contention number 2 regarding oil and gas wells. I
23 would first note that the petitioner's argument here
24 is really twofold, asserting that the SAR fails to,
25 number one, mention and, number two, investigate what

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1 it asserts are thousands of wells within ten miles of
2 the site.

3 But it points to no requirement in Part 72
4 to list wells within any particular radius of the
5 site, and it provides no explanation for why the
6 radius that it has selected without explanation of ten
7 miles is a requirement that has not been met here.

8 To the second part of the argument that
9 the application does not investigate, the petitioner
10 simply has not looked at the appropriate portions of
11 the application. If you look at SAR section 2.6,
12 2.6.1 is a discussion of the basic geologic and
13 seismic information; in 2.6.2, vibratory ground
14 motion; 2.6.3, surface faulting; so on and so forth.

15 They don't challenge any of that
16 information, and more importantly, they don't
17 challenge the attachments to the SAR. Attachment D is
18 the probabilistic seismic hazards evaluation. That
19 document is a proprietary document that they did not
20 even attempt to request to access to dispute
21 information in that evaluation.

22 And Attachment E is the geotechnical
23 investigation. That document is public. It's also
24 not disputed, so to the extent petitioners argue that
25 there is no investigation of the geotechnical

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1 information here, it's simply incorrect. It's in the
2 application. It just has not been disputed here.

3 I would note that recently on May 31, we
4 did submit an RAI response that contains some
5 additional information regarding oil and gas wells in
6 the region. We still maintain that that disclosure is
7 not required under the regulation cited by
8 petitioners, 72.103(a)(1), but we did provide the
9 Board notification and the notice to the parties,
10 because it is generally relevant to the discussion
11 here. So even if there was some obligation to include
12 that information, that omissions has now been cured,
13 and there's no longer a live contention on this.

14 And importantly, the information as
15 provided shows that there are no active wells at the
16 site or within a mile of the site. And petitioners
17 haven't explained why the presence of thousands of
18 wells ten miles away from the site is material to
19 their contention when there's not any active wells
20 within a mile of the site. That's a sharp drop-off,
21 and there's no explanation of why that additional
22 information that they demand is material here.

23 And so for those reasons, we believe and
24 continue to believe that contention 2 is inadmissible.

25 JUDGE RYERSON: Thank you. Any questions

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1 on -- that's the sole contention you are dealing with?

2 MR. LIGHTY: Yes. Thank you, Your Honor.

3 JUDGE RYERSON: Thank you, Mr. Lighty.

4 MR. BESSETTE: Almost have clean-up for
5 the day, Your Honor, so hopefully I'll be short.

6 JUDGE RYERSON: We'll get with the NRC
7 staff yet.

8 MR. BESSETTE: I'm going to address Fasken
9 contentions 1 and 5.

10 VOICE: Pull down the microphone, please.
11 Thank you.

12 MR. BESSETTE: I did listen carefully to
13 Mr. Eye's discussion of Fasken 1, which discusses that
14 the CISF is not needed to ensure safe storage of spent
15 nuclear fuel, and also his arguments regarding a de
16 facto repository.

17 One issue I did hear that was new was that
18 we do not -- the siting would not meet international
19 siting standards for such a repository. That is a new
20 issue, not included in this pleading at all, so
21 similarly, that should be ignored.

22 Simply, Your Honor, I believe this is
23 identical, almost word for word, for Sierra Club 2 and
24 3, so the Board's decision on that applies equally.
25 And with regard to a de facto repository, the Board's

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1 decision on Joint Petition 10 and Sierra Club 5.

2 So if you have no questions, I'll move on.

3 JUDGE RYERSON: No questions at this
4 point.

5 MR. BESSETTE: All right. The next item,
6 Your Honor, is on Fasken item 5, challenging -- let me
7 find it -- the discussion in the environmental report
8 of endangered and threatened species. I did
9 acknowledge that Mr. Eye acknowledged currently -- the
10 original petition challenged that there was no
11 discussion of the lesser prairie chicken and dunes
12 sagebrush lizard as threatened or endangered.

13 Neither of those are threatened or
14 endangered under Texas or U.S. law, and Mr. Eye
15 admitted that, noting that the only species threatened
16 and endangered species is the Texas horned lizard,
17 which is endangered under Texas law only.

18 I would note that the contention itself
19 never mentions the Texas horned lizard. It's
20 completely silent on that. The only mention of the
21 Texas horned lizard is in the Pachlhofer declaration
22 on one page where he asserts that it would be affected
23 by radiation for the facility. So there's no
24 connection between the conservation efforts and the
25 Texas horned lizard in their petition or their expert

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1 reports.

2 The main consensus or main concern is that
3 the conservation efforts, to the extent they are even
4 relevant to this contention on the remaining species,
5 somehow are undermined by the efforts of the interim
6 storage project. But there is zero information on
7 what those conservation efforts are and how the
8 project would undermine them. They don't include that
9 as a reference. They don't cite what's being done,
10 and therefore, we don't -- it's unclear to us, besides
11 just simple construction, how we would undermine those
12 efforts.

13 As they assert to us that these studies
14 are outdated or we need more, we need more from them.
15 They have the burden to state how their conservation
16 efforts are somehow undermined by the project.

17 With regard to the assertion that these
18 studies are out of date somehow, this is very similar
19 to the Sierra Club petition on those studies. I would
20 note there is no law that requires us to do updated
21 studies if the discussion in the environmental report
22 provides an appropriate environmental baseline.

23 In addition, the environmental report does
24 discuss 2015 data from the U.S. Fish and Wildlife
25 Service regarding the status of threatened and

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1 endangered species, which they don't challenge.

2 That's all I have on Fasken 5.

3 JUDGE RYERSON: Okay. Any questions?

4 JUDGE ARNOLD: No questions.

5 MR. BESSETTE: All right. Thank you, Your
6 Honor.

7 JUDGE RYERSON: Thank you, Mr. Bessette.

8 You may -- well, as usual, I'm going to
9 have a question or two. You may want to hear what
10 they are. Let's see. Actually, yes. I'm going to
11 talk a little bit about or have some questions on
12 Fasken contention 2. I don't know if that affects who
13 would like to start. Mr. Gillespie.

14 MR. GILLESPIE: Yes, Your Honor.

15 JUDGE RYERSON: Yes. I mean, I don't want
16 to preempt what you're going to say, but I -- it did
17 seem to me -- this is a contention that the staff
18 proposed that we should admit, Fasken contention 2, as
19 I recall, in part.

20 And the staff's explanation of that -- I
21 know you have less time than we get to write these
22 things up, but it was fairly brief and seemed to spend
23 most of its time on why the contention should not be
24 admitted as to groundwater issues, but spent very
25 little time on the conclusion that it should be

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1 admitted as to geologic stability issues.

2 And I was just wondering -- well, let me
3 finish a related question, and that is whether you've
4 looked at RAI response, I think it is, 2.2-2 that was
5 recently filed that provided some additional
6 information that bears on this contention.

7 Having said all that, my question is: Has
8 the staff's position changed? And if it -- well,
9 first, has the staff's position changed?

10 MR. GILLESPIE: Yes, it has, Your Honor.

11 JUDGE RYERSON: And what is the staff's
12 position today?

13 MR. GILLESPIE: The position today is that
14 the contention is inadmissible. It's been rendered
15 moot by the updated information provided in the
16 application.

17 VOICE: We can't hear you.

18 JUDGE RYERSON: Yes. I think some of the
19 people would like to hear that more clearly.

20 MR. GILLESPIE: That we see the contention
21 as moot, based on the updated information provided in
22 the RAI response.

23 JUDGE RYERSON: Okay. I think that moots
24 my second question, so okay. Having said that, what
25 else would you like to address about the Fasken?

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1 MR. GILLESPIE: I believe my colleague has
2 something further to say.

3 JUDGE RYERSON: Ms. Kirkwood. And I
4 perhaps should have asked this to Mr. Gillespie. But
5 that means, unless you've changed some other views,
6 that means the staff would urge that no contention
7 submitted by Fasken is admissible.

8 MS. KIRKWOOD: That is correct.

9 JUDGE RYERSON: Although the staff has
10 maintained the staff supports the standing of the
11 Fasken petitioners.

12 MS. KIRKWOOD: Yes. That is correct, Your
13 Honor.

14 JUDGE RYERSON: Okay. Thank you.

15 MS. KIRKWOOD: Your Honor, I just -- the
16 staff just wanted to speak briefly to the discussion
17 regarding what NRC guidance required with respect to
18 aircraft crash probability. We thought there might
19 have been some confusion.

20 And we wanted to state that NUREG 1567,
21 Section 2.5.2, calls for potential hazards to be
22 reviewed that are nearby the site, and that includes
23 that for an installation near an airport, to consider
24 whether an aircraft -- consider aircraft size,
25 velocity, weight and fuel load in assessing the

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1 hazards of aircraft crashes. But it does not say that
2 it is ergo a credible event.

3 The Applicant also mentioned this, but the
4 Commission established the threshold for considering
5 the aircraft crash to be a credible event in the PFS
6 proceeding for ISFSIs and at one times ten to the
7 minus 6, which would apply to this proceeding.

8 And then the staff uses the guidance in
9 NUREG 0800 which applies directly to light-water
10 reactors in order to assess whether or not the -- in
11 order to assess the methodology for determining the
12 probability of an aircraft crash at a particular
13 installation because the guidance in that document is
14 more detailed, but it is not changing the standard
15 from that set by the Commission.

16 So that's the only thing that we wanted
17 to --

18 JUDGE RYERSON: Okay.

19 MS. KIRKWOOD: -- add to that response.

20 JUDGE RYERSON: While I have you --

21 MS. KIRKWOOD: Sure.

22 JUDGE RYERSON: -- and your answers are
23 subject to what you may hear tomorrow in response to
24 the Board's questions or the arguments about standing
25 as a more generic issue. But I think, as you've

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1 acknowledged, the staff's position has changed on a
2 few issues since the staff's original written
3 responses to the petitions.

4 And it might be useful to summarize, just
5 so we're clear, as of right now, the staff's position
6 is that Beyond Nuclear has established standing, and
7 the staff would urge the admission of Beyond Nuclear's
8 sole contention, at least in part.

9 MS. KIRKWOOD: Correct.

10 JUDGE RYERSON: With respect to Sierra
11 Club, the staff would find standing, I believe, but
12 would not find an admissible contention.

13 MS. KIRKWOOD: Correct.

14 JUDGE RYERSON: With respect to the Joint
15 Petitioners, the staff would not find standing but
16 would not object to the Board's finding standing for
17 SEED, but would find no admissible contentions.

18 And with respect to Fasken, the two Fasken
19 entities, the staff would find standing. That was
20 your written position. That has not yet changed.

21 MS. KIRKWOOD: Right.

22 JUDGE RYERSON: But would not find an
23 admissible contention. So if we were holding a
24 hearing today -- put aside motions for summary
25 disposition. If we were holding a hearing today, the

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1 staff's position would be we should have a hearing on
2 Beyond Nuclear's contention.

3 MS. KIRKWOOD: Correct.

4 JUDGE RYERSON: But the issue -- but let
5 me parse through one more thing, if I can. Is the
6 staff's view that we should have -- well, maybe it's
7 not a hearing. Maybe it's a legal issue contention
8 and doesn't require a factual hearing. Would that be
9 the staff's view?

10 MS. KIRKWOOD: Your Honor, I think there
11 is a good chance that that would not be -- that that
12 would not require an evidentiary hearing.

13 JUDGE RYERSON: An evidentiary hearing.
14 That we should perhaps have further briefing on the
15 question that you say is admissible. But if I'm
16 hearing you correctly, what you're saying is
17 admissible is not the issue of the lawfulness of DOE
18 taking title today. I think the Board thinks that's
19 not lawful. ISP has acknowledged that's not lawful.
20 But petitioners urged everyone that that's not lawful,
21 and I think the staff is agreeing, are you not, that
22 it's not lawful?

23 MS. KIRKWOOD: Staff hasn't taken a
24 position.

25 JUDGE RYERSON: The staff is not taking a

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1 position. Okay. I wasn't sure if you agreed it was
2 not lawful, but it was not clear to you whether it
3 would be a good thing to have it in the application,
4 even though you think it's not lawful.

5 MS. KIRKWOOD: Yes. Even --

6 JUDGE RYERSON: But you're not taking a
7 position on either.

8 MS. KIRKWOOD: We're not -- I want to be
9 very clear on this.

10 JUDGE RYERSON: Okay.

11 MS. KIRKWOOD: Even if you -- admitting
12 the contention assumes that there is at least a
13 plausible argument that it's not lawful, and which
14 appears to be obvious --

15 JUDGE RYERSON: Yes.

16 MS. KIRKWOOD: And so I think you could
17 sort of jump to the second part of that, which is
18 thus, is it acceptable to have it still in the license
19 application or not. And that's the part that we think
20 is an inadmissible contention.

21 JUDGE RYERSON: Okay. And you think
22 further briefing on that issue, beyond the hundreds of
23 pages we already have, would be helpful?

24 MS. KIRKWOOD: Your Honor, I don't
25 think -- the staff has not taken a position on that.

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1 We have an obligation to review the application and to
2 issue a license that we think is appropriate.

3 JUDGE RYERSON: Okay.

4 MS. KIRKWOOD: And I don't think
5 actually -- I think that the briefing thus far has
6 focused on the admissibility of the contention, not on
7 the merits of whether or not it's appropriate to
8 include that option in the --

9 JUDGE RYERSON: Yes. I mean --

10 MS. KIRKWOOD: -- license.

11 JUDGE RYERSON: -- when you're talking
12 about a legal issue contention, I think of necessity
13 sometimes the admissibility of the contention and the
14 outcome of a legal issue contention seemed often to be
15 very close. But I understand your position. I
16 appreciate it. Thank you.

17 Anything else?

18 MS. KIRKWOOD: Just to clarify slightly
19 our position on the SEED standing with the Joint
20 Petitioners, we don't object to SEED having standing
21 based on proximity to the facility. We do object to
22 SEED having standing based on transportation, based on
23 the transportation routes.

24 JUDGE RYERSON: Oh, I -- the statement
25 was -- so you slightly changed your position on that.

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1 MS. KIRKWOOD: I hope not.

2 JUDGE RYERSON: Well, at least you've
3 changed my understanding of your position. In other
4 words, you would agree -- does the staff agree that
5 SEED has presented facts that are sufficient for the
6 Board to find standing for SEED, based not -- on the
7 basis of Ms. Gardner-Aguilar's proximity of her
8 residence to the proposed facility?

9 MS. KIRKWOOD: Yes. But that's not
10 exactly what she said in the affidavit. I think you
11 could read --

12 JUDGE RYERSON: Oh, I know, I know.

13 MS. KIRKWOOD: -- it to include that.

14 JUDGE RYERSON: Okay. All right. I -- we
15 understand your position. Or I won't go quite that
16 far, but I think we've reached as far down that road
17 as we can get.

18 MS. KIRKWOOD: Okay.

19 JUDGE RYERSON: Thank you. Anything else?

20 MS. KIRKWOOD: I have nothing further.

21 JUDGE RYERSON: Okay. So we will convene
22 again tomorrow at nine o'clock. We'll begin with the
23 explanation of your views on the generic issue, why
24 nobody has standing, and we'll have a response to that
25 from petitioners, all the petitioners if they want to,

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1 but again, I encourage the petitioners to consider a
2 joint -- at least a lead by somebody on that issue.

3 We did offer -- I didn't mention it this
4 morning. We did offer in our order, the June 7 order,
5 the opportunity for very brief concluding statements
6 by everybody. I think many of you may feel you've
7 talked enough by the end of tomorrow morning or
8 whenever we finish tomorrow. But if there's a sense
9 that people would like to do that, you know, I think
10 we'll probably have time to allow that.

11 So you might want to think about whether
12 you want to give a brief summary statement, probably
13 five minutes for everyone, maybe a few more minutes
14 for the Applicant. It's four to one, but I'm not sure
15 how much one can do in five minutes versus seven
16 minutes, but we'll do something on that nature.

17 And I don't know if Ms. Curran is here.
18 Is she here? Oh, over here. That's why I didn't see
19 you. Sorry. I know that you -- last time we made
20 that as a possible offer, you were enthusiastically
21 accepting, and I assume you are again, that you would
22 like to have five minutes at the end to --

23 MS. CURRAN: Yes, if possible. But we
24 hope to be done by the lunch break.

25 JUDGE RYERSON: That's our hope as well.

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1 Okay. Well, I mean, we'll see how it goes. I think
2 we can probably do that. If there really isn't a
3 strong sense that that would be productive after a day
4 and a half, we don't -- certainly don't have to do it.

5 I see you, Mr. Matthews. You were eager
6 to say something.

7 MR. MATTHEWS: Thank you, Judge Ryerson.
8 I just wanted to -- we had a response to Judge
9 Arnold's question about the emergency plan --

10 JUDGE RYERSON: Oh, okay. Great.

11 MR. MATTHEWS: -- and that is, yes, today
12 the WCS emergency plan includes aircraft crash as a
13 site area emergency. It is one of the alerts.

14 JUDGE ARNOLD: Okay. So it's carried
15 over.

16 MR. MATTHEWS: Yes, Judge Arnold.

17 JUDGE RYERSON: All right. Thank you, Mr.
18 Matthews. Anything else, anyone?

19 We will resume at nine o'clock tomorrow.
20 Thank you.

21 (Whereupon, at 4:40 p.m., the oral
22 arguments in the above-entitled matter were recessed,
23 to reconvene at 9:00 a.m., Thursday, July 11, 2019.)

24

25