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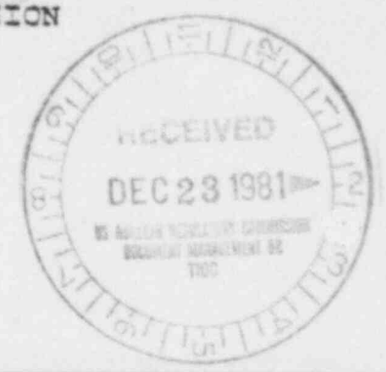

In the Matter of:

PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC., and WESTERN FARMERS ELECTRIC COOPERATIVE, (Black Fox Station, Units 1 and 2	DOCKET NO. STN 50-556CP STN 50-557CP

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UNITED STATES OF AMERICA

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC. and WESTERN FARMERS ELECTRIC COOPERATIVE,	)	Docket Nos. STN 50-556CP STN 50-557CP
	)	
(Black Fox Station, Units 1 and 2)	)	

Courtroom No. 5
United States Federal Courthouse
333 West 4th Street
Tulsa, Oklahoma

Wednesday
December 16, 1981

The above-entitled matter came on for further hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

SHELTON J. WOLFE, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

DR. PAUL W. PURDOM, Member
Administrative Judge
Atomic Safety and Licensing Board
Director of Environmental Studies Institute
at Drexel University
245 Gulph Hills Road
Radnor, Pennsylvania 19087

FREDERICK J. SHON, Member
Administrative Judge
Vice Chairman (Technical)
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

APPEARANCES:

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Oklahoma City, Oklahoma 73105

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WITNESSES:

None.

EXHIBITS

None.

P R O C E E D I N G S

9:00 a.m.

JUDGE WOLFE: Pursuant to the Order of October 14, 1981, the pre-hearing conference is now in session regarding the construction permit application of the Public Service Company of Oklahoma, et al, Black Fox Station, Units 1 and 2, Docket Nos. STN 50-556 and STN 50-557.

Will counsel identify themselves beginning to my left?

MR. GALLO: Thank you. My name is Joseph Gallo of the law firm of Isham, Lincoln & Beale, 1120 Connecticut Avenue, N. W., Washington, D. C. 20036.

To my right is Martha E. Gibbs and to my extreme right and behind me Victor Coleman of the same firm.

Together we represent the Applicants in this proceeding.

To my left I would also like to introduce to the Board John Zink who is Manager of Licensing for the Black Fox Station.

Chief Judge Wolfe, Purdom and Shon I want to welcome you back to Tulsa and also congratulate you on your good judgment for scheduling this pre-hearing. I understand there is three or four inches of snow in Washington.

JUDGE WOLFE: We so understand.

MR. FARRIS: Good morning, Judge.

JUDGE WOLFE Good morning.

MR. FARRIS: I am Joseph Farris with the law firm of Feldman, Hall, Franden, Reed & Woodard.

To my right is Ms. Nancy L. Woods a member of our firm. To my left is Mr. Dale Bridenbaugh, MHB Technical Associates, an expert witness.

We represent the Intervenors, Citizens' Action for Safe Energy, Lawrence Burrell and Illene Younghein.

MR. BARDRICK: My name is Michael Bardrick. I am Assistant Attorney General for the State of Oklahoma.

MR. THESSIN: My name is James Thessin. I am counsel for the NRC Staff.

With me is Dennis Dambly also of the Executive Legal Directors Office. To my far right Elaine Chan also of our office. On my left is Dino Scaletti, NRC Licensing Project Manager.

I might say that I can attest to the fact that there is a lot of snow in Washington.

JUDGE WOLFE: Mr. Bardrick, would you come forward and sit at this table, is you would?

MR. BARDRICK: Where is it that you wish? That I be at the front table?

JUDGE WOLFE: Yes, please.

MR. BARDRICK: Okay.

JUDGE WOLFE: Our Order of October 14, 1981, was

predicated on Applicants, the Intervenors and the State of Oklahoma's Joint Motion of September 25th with some modifications to our Order differing from the Joint Motion.

The Staff took exception to the Joint Motion only as to the provision for an opportunity to petition pursuant to 10 CFR 2.758.

That Order of October 14th provided for the filing by the parties of and our consideration of: "(1) Intentions challenging the sufficiency of Applicants' emergency plan and TMI Preliminary Safety Analysis Report Amendments to meet Nuclear Regulatory Commission regulations and (2) Motions to reopen the hearing record on other issues."

Parenthetically in other words our Order provided motions to reopen the record could be filed on contentions other than those challenging the sufficiency of Applicants' emergency plans and TMI PSAR amendments to meet the Nuclear Regulatory Commission regulations.

We are here then to consider motions to reopen the record and proposed contentions.

I don't know how long this will take. It may be necessary to recess say about 5:00 and resume tomorrow morning. The courtroom is available tomorrow morning; and we, likewise, are available.

Have the parties had any discussion about what they wish the Board to do: namely, to orally rule up and

down on the Motions to Reopen and upon the Proposed Contentions today and/or tomorrow or ruling up and down at a later date then issuing a written order explaining reasons why?

What is the parties' agreement, if any?

MR. GALLO: Judge Wolfe, during the discussions on the schedule, I think it was the concensus of the participants, including the NRC Staff, that we would prefer a ruling from the Bench orally, pursuant to the new amendment to 10 CFR 2.307(e), which provides with the discretion of the Court to rule orally from the Bench and follow up later with a written order explaining the bases.

We would prefer that so that we may initiate discovery effective with that ruling.

MR. FARRIS: Mr. Chairman, I think that is an accurate statement by Mr. Gallo. I think that is the wish of the Intervenors with one qualification.

We only received the responses to the Hydrogen Control Contentions on Monday; and, of course, the first chance that our expert has had to look at them is yesterday.

We are not prepared to respond to their responses to our Hydrogen Control Issues, and we would like the opportunity to respond either in writing or perhaps at a later pre-hearing conference on those issues.

As to the other contentions and the Motion to Reopen, we are prepared to go ahead today; and we would like

to have rulings as we proceed on both the Motions to Reopen and on the sufficiency of the other contentions, the non-hydrogen control issues, today or tomorrow, as the case my be.

JUDGE WOLFE: How much time would you need, Mr. Farris, to review Applicants' and Staff's responses to the hydrogen control contentions?

MR. FARRIS: I think in a couple of weeks we could get something put forward. We would be willing to submit it on the basis of our written response to their response at that time or we could take it up at the second pre-hearing conference. I believe it is scheduled for either January or February.

But in any event we would be willing to submit it on the written responses to the Board and let the Board rule on the basis of our responses.

JUDGE WOLFE: Mr. Thessin.

MR. THESSIN: The Staff would not object to allowing the Intervenors some time to respond in writing to the hydrogen control matter.

We believe, however, that in view of the fact that under the schedule they would have had only several days in any event if our responses had arrived at their offices the same day as they were filed.

I would hope that they be given a responable time but not excessively lengthy for a written response.

But otherwise I don't object in any way to their having that opportunity.

MR. GALLO: Your Honor, I would like to address that.

Reluctantly I must object to Mr. Farris's request. What I would rather see as an alternative proposal is that, since the Board is available tomorrow -- I was looking at the pleadings here that we filed on hydrogen control. The Staff's pleading is eight pages long, and ours is somewhat comparable.

I wonder if it isn't possible for Mr. Farris to prepare this evening with his consultant, and we could address these matters in the morning.

I would much prefer moving the schedule along in that fashion and not leave this particular issue out of sync as a disruptive factor to the schedule.

JUDGE WOLFE: Mr. Farris, both the Applicants' and Staff's responses to the proposed contention on the hydrogen control issues were dated December 8th.

When did you receive these two responses?

MR. FARRIS: Monday, the 14th.

JUDGE WOLFE: Would it be possible, Mr. Farris, for you to review the two responses tonight and respond to them orally tomorrow?

MR. FARRIS: Well, I assume anything is possible, Your Honor. The adequacy of the response is what I am worried

about. We have two other expert witnesses from MHB they we may need to consult on these responses, and I just am not sure of their availability tonight when we would have to be working on them.

Personally, if the Board is going to submit a written ruling on the sufficiency of our contentions, I don't see that two weeks, if we submit something to the Board within that period of time, would greatly prejudice anyone because your written ruling could incorporate your ruling on the hydrogen control issues.

If we are willing to stand on a written response to their responses to our contentions, I don't see how any party here is going to suffer any detriment because of that.

JUDGE WOLFE: All right, Mr. Farris, you may have until December 28th within which to file your response.

MR. FARRIS: Thank you.

MR. GALLO: Your Honor, do I understand that the Board is prepared to rule orally on the other issues today?

JUDGE WOLFE: We will recess after we have heard all argument, and we will discuss obviously in detail what has been urged today. We will then proceed to -- and I understand that there is no objection by the parties -- orally rule either late today or tomorrow yea or nea with regards to the Motions to Reopen and with regard to the admissibility of the contentions.

Thereafter we will issue a written Order explaining

in detail our reasons for granting or denying.

MR. GALLO: Thank you.

JUDGE WOLFE: And this in order that, as you before, the parties can proceed with discovery on the various contentions, if any, that are admitted.

We will now proceed to consider the Motions to Reopen the Record. If course will approach the lecturn and the microphone when necessary. The Board is able to hear you while you are seated at the table, but I think the reporter necessarily has to have you speak into that microphone.

Isn't that correct, Ms. Reporter?

(The Reporter answered in the affirmative.)

JUDGE WOLFE: First we will give consideration to Applicants' Motion to Reopen the Record dated November 5. We understand that in their reply filed on November 20th Intervenors have no objection to our granting Applicants' motion to reopen the record.

MR. FARRIS: That is correct.

JUDGE WOLFE: We understand from reading the Staff's response of November 20th that they have no objection if the record is opened for a limited purpose. I believe as to the first three issues, is that correct, Mr. Thessin? You have no objection whatsoever as to reopening the record on quality assurance or do I misunderstand your position?

MR. THESSION: The Staff's position on the motion

to reopen by the Applicants is that to the extent the Board grants the motion to reopen it should be a limited grant to the issues addressed by the new information.

In the case of item No. 4, which deals I believe with quality assurance, there is a very particular Board question that was being addressed. We would have no objection as to reopening with respect to that Board question.

We would not support a general reopening on the entire matter of quality assurance except as it is impacted by new information.

In other words we would not wish to have aspects unrelated to the new information which also deals with quality assurance explored in any newly reopened hearing.

It is our position that the new information defines the scope of the reopening, and that the Board should not generally reopen on a broad issue such as quality assurance but should reopen specifically on the relevance of the new information to the finding that must be made.

For example let's say under the quality assurance rule there is a requirement that the plan for quality assurance exhibit that there is sufficient independence between quality assurance personnel and the construction personnel.

As I understand the new information that is not at all an issue with respect to the change in circumstances. The change in circumstances goes to the number and qualifications

of the new personnel.

So if the record were reopened on the quality assurance, it should be reopened with respect to the training and qualifications of the personnel as that may relate to the ultimate finding of this Court.

The record should not also be reopened on the matter of independence of the quality assurance program or any other collateral issues to the new information.

My analogy is our argument with respect to the other three points as well. That to the extent that the issue is broader than is being addressed by the changed circumstances or new information the reopening should be carefully defined to be limited to the issue addressed by the new information.

JUDGE SHON: Mr. Thessin, I think that you are really putting two restrictions in a sense on this with their overlap being the thing that you would deem justifing reopening of the record; that is both the Board question as it originally existed and the new information that has been developed.

It appears in this case that to some extent these two matters do overlap. Is it just in that area that you feel it could be reopened?

MR. THESSIN: I think the question of quality assurance for this question is most pertinent. There is a Board question; and if I might read it, it might benefit the

people listening. I believe it was Board question 10-3 at the previous hearing, and that Board question indicated the Board's concern with what experience in the nuclear quality assurance area do the members of the Applicants' quality assurance staff have.

Now with respect to that particular Board question, the new information is material, substantive and dispositive I think of the finding that would be made on the Board question.

However, there were other questions the Board had with respect to quality assurance, and there are more generally other elements in the appendix dealing with quality assurance that could be at issue in a properly pled contention but are not right now.

My argument is that when we reopen we reopen with respect to the new information and not with respect to some other elements of the more general topic of quality assurance.

I am not sure if that is responsive.

JUDGE SHON: All right.

Suppose I was thinking that there might be a catagory of perhaps properly addressed contentions which would relate to some sort of new information that had no relationship to a previously asked Board question, like question 10-3.

It appears that is hypothetical and not the case that really confronts us so it doesn't really matter.

MR. THESSIN: I think the issue you raise will be

addressed when we come to the motion of the Intervenors' to reopen on containment design.

That in the Staff's opinion is a motion to reopen on an issue that may not have been within the scope of contention 16, and I think it is proper to consider such a motion but I think they must make the proper showing that there is new information that affects a finding that must be made and that it might affect that outcome.

So in response to your question their ability to reopen is not necessarily limited to the scope of the previous hearing.

It is limited however to the scope of the Board's authority and to the scope of the new information.

JUDGE WOLFE: All right, Mr. Thessin.

Any response, Mr. Gallo?

MR. GALLO: Judge Wolfe, I think the Staff's position does perhaps confuse the matter somewhat. I agree with Mr. Thessin that the scope of the reopened issue is limited to the Board's question that we moved to reopen on. I believe it is 13-1.

But I have to remind the Staff that the Board's jurisdiction here is plenary because this is a construction permit case. What we have as part of the Staff's requirements for the new TMI issues and the new TMI requirements are two matters that deal with QA.

In the Staff's pleadings they seen to indicate some uncertainty as to the status of the record with respect to the TMI issues. It is my firm belief that based on the Board's October 25, 1979, order the Board reopened the record on TMI issues as articulated in the Staff's letter of July 14, 1981, and also the emergency reponse issues that were developed pursuant to the recent amendment to appendix (e) to 10 CFR 50.

The record is open on those matters. In our PSAR amendment No. 17 we addressed the QA requirements that had been imposed by the Staff.

Those requirements and those responses in our PSAR amendment are really complete in that they cover almost all aspects of the QA issue. It is really a revisiting of the issue.

This Board has jurisdiction to decide for itself whether or not that response is adequate. What we are really talking about is the Intervenors' ability to participate in the QA issue.

The Intervenors have not offered any contentions in the area of QA related to TMI requirements so it is the Applicants' position that the Intervenors cannot participate or assert any controversy with respect to those issues because the time has pasted.

The Intervenors certainly can participate with respect to question 13-1. The Board of course has jurisdiction

over the entire gambit of QA and can ask questions and deal with those issues that it deems appropriate.

I think that clarification is necessary.

Thank you.

MR. FARRIS: Judge Wolfe.

JUDGE WOLFE: Yes, just a moment.

Yes, Mr. Farris.

MR. FARRIS: First of all, Judge Wolfe, I wonder if there is a conspiracy against the Intervenors again. The last time you were here I was calling you Chairman Wolfe; and now I find out that they have changed the rules again, and you are referred to as Judge Wolfe.

So if I call you Chairman once in a while, I apolize.

JUDGE WOLFE: That is quite all right.

MR. FARRIS: Second of all, we rarely find ourselves in the position of agreeing with the Applicants on anything, but I agree completely with the remarks that Mr. Gallo just made.

The Staff's reaction to the Applicants' Motion to Reopen is somewhat puzzling coming from a lawyer. He says that, yes, we will agree to reopening, but we want the Board to keep it relevant.

I think the Board has done a pretty good job of keeping things relevant. We are certainly not arguing that just

because they have reopened in the area of IGSEC that the entire gambit of IGSEC or QA or anything else is going to be open to controversy or litigation.

I don't understand what the Staff means when they say that the Staff has no objection to a limited reopening other than the comments that I just made.

If they mean that the parties are going to be restricted in cross-examination or in presenting their own evidence in so far as the record is opened to for the specific items that either the Applicants have indicated that they want it reopened for or that we have indicated that we want it reopened for, if we are successful, or indeed that the Staff has wanted the record reopened for.

I don't see any way and I don't know of any authority that the Board would have to limit the reopening other than to define the issue and limit the controversy to that issue.

I just want to go on the record to be clear that we would object to any limited ability to cross-examine or to present evidence on any issue that is reopened in so far as that issue goes.

JUDGE SHON: Mr. Farris, perhaps I don't understand, and I think the Board does not quite understand the exact nature of the difference between you just said and what the Staff has said.

As I understood the Staff, they were trying to make the restrictions upon the nature of the issues that could be introduced not upon your right to either cross-examine it or to present direct evidence on an issue once admitted.

These are rather different breeds of cats.

Is your understanding the same as mine to begin with?

MR. FARRIS: It is now, Mr. Shon, but from the written response the Staff had filed it was not clear at all to me.

That was reinforced by the Staff's own motion to reopen on the generic issues. That while they objected to our contention that related to some generic safety issues, they wanted to update the record with the same generic safety issues.

They seemed to indicate in some way that they were going to be able to walk in and say what the update was and walk out of the hearing room without being subjected to cross-examination or without allowing Intervenors to submit their own evidence with regard to the update on these issues.

If the Staff has now made it clear to the Board that they did not mean that, then I am satisfied.

JUDGE SHON: Mr. Thessin, is that the way you understand it too. That it is merely which issues are admissible and not regarding evidence introduced on specific issues which

you wish to restrict?

MR. THESSIN: That is correct.

I just wanted to make clear my position that when a reopened record is made that the issues must be carefully defined not that one party has more rights than another in the context of the reopened issue.

As I understood the positions of the parties the reopening was more vague than that. The issue was not so carefully defined, and I wanted to assert that one has the obligation to reopen the record with respect to a given issue and not generically with respect TMI issues or OA issues or whatever.

I think the Diablo Canyon case would speak to that, CLI 80-5 as we cited in our brief about the nature of the contentions that must be presented to TMI issues.

With respect to the generic issues which we addressed in our motion to reopen, I will defer my response on that.

I think Mr. Farris and I do have a difference of opinion on exactly what that means in the context of the generic issues.

JUDGE WOLFE: Yes, we will try to limit argument to Applicants' motion to reopen, but as I understand it then there is no real disagreement between the parties then.

Am I correct? You understand one another and

agree?

MR. FARRIS: Judge Wolfe, I think the panel and I at least agree that there is none. I hope the parties do. I see no controversy now.

MR. SHON: There may be some difference of opinion on specific issues as to whether there has been enough development in the meantime to warrant the question, but the general rules are agreed upon.

JUDGE WOLFE: Anything else on the Applicants' Motion to Reopen?

(No response.)

JUDGE WOLFE: All right.

Mr. Bardrick, did you have anything that you wanted to add?

MR. BARDRICK: I believe the parties have covered it, Judge.

JUDGE WOLFE: All right.

Feel free to make yourself known.

MR. BARDRICK: Thank you.

JUDGE WOLFE: All right.

We will proceed now to consider the Staff's Motion to Reopen of November 5, 1981.

We understand from the Intervenors' reply filed on November 20th that they have no objection. Is that right?

MR. FARRIS: Yes.

JUDGE WOLFE: All right.

There was a response filed by Applicants on November 20th. I think for the purposes of clarification, Mr. Gallo, perhaps you had best summarize your position, and we can ask you any questions necessary.

MR. GALLO: Again, Judge Wolfe, I have objection to the notion of reopening the record for purposes of updating generic unresolved safety questions and for the Staff to submit evidence on those matters.

The confusion stems from my reading of Staff's pleadings which seem to convey the thought that somehow the participation is limited with respect to those issues.

The Staff's Motion to Reopen is carefully couched to limit the reopening to the admission of the Safety Evaluation Report Supplement rather than what it might contain.

I consider that a significant difference. I think the notion of having to move to reopen to receive a safety evaluation document without considering what the document contains is really not very useful.

In my judgment that document may be admitted into evidence pursuant to 2.743, but it is subject to any objection at the time of offer depending on whether or not it contains relevant and probative evidence.

In my own notion what that document should contain is an evaluation of the Applicants' responses in the

PSAR to the TMI issues and to the emergency response matters as well as an update of the generic unresolved safety questions.

As I have previously said, there is no need to reopen the record with respect to the emergency response matters and the TMI issues. There is a need to reopen the record with respect to generic unresolved safety questions.

I believe sufficient time has passed so that under the Vermont Yankee rubric it is appropriate to reopen on those issues and it is appropriate for the Staff to update those various issues.

Since it was a contested issue in the hearings back in February 1979, the Intervenors have a full right to participate.

Now if the Staff is saying something different, then I disagree with whatever that is.

That is all I have.

JUDGE WOLFE: One additional thing, Mr. Gallo, in your response were you addressing both TMI-2 issues as well as generic unresolved issues or were you just targeting and centering and concentrating upon so-called TMI-2 generic issues?

MR. GALLO: The Applicants' response to the NRC Staff's motion to reopen we were focusing solely on the question of the generic unresolved safety issues because that was the only issue we thought was an appropriate subject to reopen.

As I indicated we are of the judgment that the Board has reopened on the TMI issues.

JUDGE WOLFE: Mr. Thessin, do you have a response?

MR. THESSIN: I think it is important to keep in mind a distinction that is being blurred in this discussion. The Staff has an obligation to perform a review. It has an obligation to write the results of that review in a Safety Evaluation Report.

Under the Rules it has an obligation to submit that report in the proceeding and have it admitted as evidence.

Now there is a second matter. The Staff has an obligation to address issues in controversy in the context of the proceedings.

When we look at reopening records, there are certain standards that have to be met. That matter has to involve new information; it has to be of significance, and it has to effect the outcome on an issue in controversy.

Admittedly everything in a Staff safety evaluation does not fall within those three criteria for reopening the record.

The Staff in the process of reviewing something may decide that the Applicant's response is adequate; that it in no way affects their conclusion that the operation of the component or system in question is safe; and therefore would not in any way be the stuff that is used to reopen records.

Now let's address specifically the points Mr. Gallo raised.

The Staff under River Bend had an obligation to review the adequacy of the Applicant's response and to review the licenseability of the plant in the context of unresolved safety issues.

The Staff performed that review in 1978; submitted the results of that review to this Board in February of 1979 in the context of testimony presented I believe on the 28th of that year.

The issue there was the adequacy of the Staff's review. The issue was not the specific substance of any one of the TASK Action Plans that were discussed.

For example, one of the TASK Action Plans deals with the question of water hammers. I think it is TASK Action Plan A-1.

The Staff in the upcoming safety evaluation report will conclude that there is no change in its conclusion on that issue. A conclusion that was presented in 1979.

Now in and of itself that is not the kind of evidence that justifies the reopening of the record. It is however the kind of information which the Staff customary includes in its safety evaluation report.

Now if Mr. Gallo is arguing that the Staff can only put into its safety evaluation report material which would

meet the standards for reopening a record, I think he is wrong.

So I do not think the admissibility of the safety evaluation turns on whether or not there is new information justifying reopening the record.

That is important because once the safety evaluation report is admitted, the issue as to its admission is whether it indicates an adequate Staff review. The issue is not whether the Applicant should be licensed in the face of TASK Action Plan A-1, dealing with water hammers, or any of the other TASK Action items that would be addressed.

The issue is whether the Staff has adequately reviewed those issues that determine if the plant should be licensed in the face of the fact that they are still unresolved.

In that sense there is a world of difference between the contentions Mr. Farris presented with respect to unresolved safety issues and the nature of the reopening which the Staff is attempting to move for in this proceeding.

The Staff is moving to have the results of its review presented in the record and to have the Board evaluate within the context of River Bend the results of that review.

That is quite different as the River Bend Case makes clear from putting in issue the Applicant's licensability in the face of any of the number of unresolved safety issues which may be discussed in that review.

Mr. Farris in his contentions in dealing with

equipment qualification is attempting to put in issue the Applicants' licensability in the face of any unresolved safety issue. I belive it is contention 10 dealing with the River Bend item.

That is different from the Staff's presentation of the adequacy of its review.

So in essence I would disagree with both Mr. Gallo and Mr. Farris.

JUDGE SHON: Does the Staff not also have a regulatory responsibility independently of the things that may have been raised -- contentions to reopen the record and so on -- to introduce under 2743(g) its safety evaluation whether or not it bears upon matters that may have changed in the meantime?

MR. THESSIN: That is correct, yes. That is the basis upon which was are asking that the record be reopened for the purpose of admitting that Safety Evaluation Report.

JUDGE SHON: And you don't however intend that that shall be the sole matter on which the record would be reopened, but that is all your motion covers as I understand it?

MR. THESSIN: That is correct. That is the only item for which we are the proponent.

Maybe if I could go back a little bit in my argument and approach it from the perspective of the TMI

requirements.

The Staff will analyze each and every requirement found in the proposed TMI ruling. That does not put in controversy the adequacy of the Applicants' response to each of those items unless there is independently a valid contention.

So the admission of the Safety Evaluation Report does not put in issue every item of the Applicants' compliance with the rule.

It puts in issue only the adequacy of the Staff's review.

If Intervenors wish to raise the adequacy of the Applicants' compliance to the rule, he must do so by contentions which are independent of the admission of the Safety Evaluation Report.

JUDGE SHON: If the Intervenor however wishes to raise matters concerning the accuracy of the Staff's review, he could do so only after he had seen the Safety Evaluation Report. Is this not right?

MR. THESSIN: Yes, that is correct.

JUDGE SHON: So that there might well be some other things that would arrise from the Safety Evaluation Report as well as some matters that the Safety Evaluation Report would represent evidence upon.

It is a chicken and egg sort of thing.

MR. THESSIN: That is correct. The schedule

takes into account the possibility that the Intervenors or other parties may wish to have issues put in controversy after they see the Staff's Safety Evaluation Report.

JUDGE SHON: Right.

I just wanted to establish that in your opinion it could be both the source of and testimony upon certain issues.

MR. THESSIN: That is correct.

JUDGE WOLFE: All right, Mr. Thessin.

MR. FARRIS: Judge Wolfe, if I understood what the Staff just said, it is what I thought they were saying all along about the generic safety issues.

Mr. Shon has cleared it up again, I think.

The Staff, as I indicated earlier, seems to think it can because it has the duty under River Bend come in and advise the Board of the status of the generic safety items. To advise the Board and to close their briefcase and walk out of the door.

That is what I want to make clear is that can't do it.

We have a contention 11 which we would be prepared to withdraw as long as there is an understanding that we would be able to challenge the adequacy of the Staff's review on these safety items at the time of the subsequent hearings.

If that is clear then we can withdraw our contention 11 which goes to two or three of these generic safety items and just be prepared to respond after we see the

Staff's Supplement Safety Evaluation Report on the generic safety issues.

MR. GALLO: Judge Wolfe, could I respond to the Staff's argument?

JUDGE WOLFE: Well, I would merely point out to Mr. Farris that what Mr. Thessin was saying is provided for in our Order of October 14, 1981, in part 2-D.

All right, yes, Mr. Gallo.

MR. GALLO: Judge Wolfe, after hearing Mr. Thessin's articulate argument I understand better the position of the Staff.

I must disagree on two grounds. Mr. Thessin argues that the Staff is a separate entity when it comes to determining what should or should not be included in the safety evaluation report; and that apparently the Staff is not bound by the same rules as any other party is in this proceeding given the status of this case with the record closed.

If the Staff wants to include information in the SER beyond that which it has moved to reopen on generic issues and beyond that opened by the Board, it needs to take some action pursuant to Vermont Yankee to reopen the record to to get those issues accepted into the proceeding.

To give a ludicrous example. If the Staff SER Supplement were to include Mr. Thessin's mothers favorite cookie recipe, we would object to the submission of that.

It cannot under the rubric of 2.743(g) be accepted into evidence in our judgment.

In our judgment all paragraph (g) provides is that the SER, whatever it is and whatever it contains, needs to go into evidence. There is no judgment in that subsection as to the admissibility of the document in terms of its content.

Something called the SER must be admitted into evidence so we disagree.

We think that given the status of this case the Staff is bound by the same groundrules as the Applicants and the Intervenors are with respect to the reopening.

Secondly Mr. Thessin's example with respect to unresolved issue A-1. I guess it was entitled "Water Hammers." We think it is not apt.

I would remind the Board that back in December of 1978 approximately the Intervenors filed a motion to delay the start of the hearings because the Staff position on unresolved safety questions pursuant to the River Bend Decision and the criteria established by that case had not issued yet; and that as a part of the decision of this Board on that motion, which was denied, was the outgrowth of the Intervenors' right to participate in those issues.

Indeed the Staff submitted extensive testimony and an entire day of cross-examination was conducted by Mr.

Farris with respect to the Staff's panel.

Given that context the question before the Board is has anything in that particular area occurred that satisfies the significant safety issue criterion of Vermont Yankee

In our judgment it has. Time has passed. Two years or more have passed. New unresolved safety issues have been added to the list. The posture in other issues has changed.

Given those circumstances we think it is appropriate for that issue to be reopened and also appropriate for the Intervenor to participate completely on that issue.

Finally I on behalf of the Applicants accept Mr. Farris'e offer to withdraw contention 11 as long as he is able to participate with respect to those unresolved safety questions delinated in contention 11 within the framework of the River Bend criteria in dealing with the unresolved safety questions.

If there are any questions, I will stay at the lecturn?

JUDGE WOLFE: No, thank you, Mr. Gallo.

Anything more?

(No response.)

JUDGE WOLFE: All right.

We will next consider --

MR. THESSIN: If I might add one point more.

JUDGE WOLFE: Yes.

MR. THESSIN: There is one troubling implication in Mr. Gallo's argument that I do not want the Board to overlook.

His argument in effect is that the Staff must first reopen the record before it can review the Applicants' responses or before it can ask the Applicants for any information because as he points out, quote, "the peculiar context of this case."

The Staff has an obligation to review the adequacy of the Applicants' application independent of whether or not it moves to reopen the record because it is only through that review that we are able to find out if there is any significant information which would warrant a reopening of this proceeding.

For example in the TMI requirements the Staff is not bound to first ask that the record be opened on the issue of TMI before it goes to the Applicants and asks them what are you going to do in the light of these new facts that have come to light.

I heard him saying that the Staff could not proceed with the review and file a written documentation of that review unless it first asks to reopen the record on the issue to review.

I think that is a fundamentally wrong premise

and fundamentally wrong reading of Vermont Yankee and the cases which follow that precedent.

I would like to point that out to the Board because it has implications for what can or cannot be within the scope of the Safety Evaluation Report.

We are not bound in that report to issues that we have previously reopened the record with respect to. We are bound to put in that report items which are within the scope of our authority.

Concededly my mother's cookie recipe would not be, but other items not necessarily at issue in this proceeding are within the scope of our authority and can legitimately be included in that Safety Evaluation Report and would not be subject to a motion to strike on the grounds that they are irrelevant to the issues in controversy.

Thank you.

JUDGE WOLFE: Next we will give consideration to Intervenors' Motion to Reopen.

Mr. Gallo.

Well, to save time, Mr. Gallo, we have your answer of November 20th. We have also Staff's response of November 23rd.

Perhaps to save time -- and I don't think we need any clarification of what you are saying in your answer or what Staff is saying in its response.

Perhaps we should proceed to hear argument by Mr. Farris.

MR. FARRIS: Judge Wolfe, Ms. Woods is going to handle this part. I gave her the easy part.

MS. WOODS: Gentlemen, I welcome the opportunity to appear before the Board. I am a new recruit to these proceedings and the great army of lawyers that represent everybody.

I notice that as one of the attorneys for the Intervenors that we are seated at a table without water and that we are in some sense, I feel, outcasts. I will proceed without water.

I would like to quickly address the issue of financial qualifications and the responses that both the Staff and the Applicants have made to our motion.

I feel that our motion to reopen based upon the newly discovered evidence and the new information essentially in the form of the Touche Ross Report is the most compelling new evidence that we could possibly provide today to this issue.

The Vermont Yankee test obviously requires that we have newly discovered matters. This is unquestionably new matter that has come since your decision in 1978 as to financial qualifications.

The information contained in the Touche Ross

Report I believe is of major significance to the financial qualifications of the Applicant PSO for this construction permit.

Mr. Bardrick of the Attorney General's Office is present here today, and I believe he is going to speak in just a few moments as to some of the evidence that was presented in the testimony before the Oklahoma Corporation Commission and some of the details that actually are presented in the Touche Ross Report.

But our purpose today really is to urge you to have this report entered into evidence. Intervenors believe it contains significant evidence.

JUDGE WOLFE: What for example?

MS. WOODS: For example the conclusion of the Touche Ross Report is that based upon their economic evaluation or their evaluation of economic viability of the project as it stands now to be a nuclear project that project should be concelled.

In the alternative they suggested that it be converted to a coal plant, which is not at issue here at all. But based on projections and their very detailed accounting analysis and updated projections they concluded that it should be cancelled.

I think that fact alone should be considered by this Board.

JUDGE SHON: Ms. Woods, as I understand it the Touche Ross Report made its recommendation against Black Fox on the grounds that Black Fox was a poor investment, is that right?

MS. WOODS: I will agree with that.

JUDGE SHON: Can you show us some direct nexus between the fact that it is a poor investment and the fact that it is unsafe, which is the bailiwick -- the domain of the interest protected by the Nuclear Regulatory Commission.

We are not here to guarantee the stockholders make money or that the rate payers won't even be overcharged but only to find out whether the plant can be safely built and operated.

I recognize that the Atomic Energy Act does require an examination into the financial ability of the PSO or of any utility, but what is the nexus between the single possibly ill-advised investment and safety as is reflected by the financial capability of a utility?

MS. WOODS: If I may, I will address your question specifically; but I would like to preface it with the argument that I don't believe -- well, particularly since you are raising the issue and the policy argument the Applicants have raised in their response.

They are essentially in their response making the same arguments that are contained in a new proposed rule

regarding the financial qualifications requirement and its relationship to safety.

I would like to on behalf of the Intervenor to remind the Board that is merely a proposed rule and that it may or may not get passed. At this point the existing regulation requires an investigation into the financial qualifications of the Applicant.

The underlying assumption is as a basis of that regulation is that those financial qualifications do have a relationship to safety.

Now I can give you all sorts of possibilities about why it might not. I don't think that my conjecture and my guesses about how the financial stability or the economic viability of the company that is building a nuclear power plant affects safety.

I don't think my guesses are necessary today because I think the rules require that you look into the financial qualification issue and assume that it does affect the safety issue.

What I am saying essentially is that their policy arguments are not apropos to the decision today. I think the rule as it stands that financial qualifications must be addressed and the financial qualifications issue has changed; and that there is new evidence we would like the Board to consider.

Now granted the rules may change between now and then. The policy may change, but it has not as yet.

To quote both gentlemen that have spoken for the Applicants and the Staff earlier in their urgings for your to reopen one of them said "times have changed" and one of them said "circumstances have changed" and one of them said "it is appropriate to update your information."

I say that all those phrases apply to our motion to reopen as to financial qualifications also.

JUDGE SHON: Well, if indeed then financial qualifications have some connection, however nebulous, with safety, exactly what does the fact that a particular thing may or may not be a good investment? What affect does that have upon the entire financial structure and financial qualifications?

Are you suggesting that PSO is likely to go broke if they go through with this plant?

MS. WOODS: I am suggesting that the Touche Ross Report indicates that the monies are so substantial and of hugh numbers -- We are talking about billions of dollars.

We are not talking about, gosh, it is going to cost a few hundred thousand more. We are talking about billions of dollars more.

We are talking in this instance about an entity, our Corporation Commission, that has not yet granted rate relief.

We have no guarantee at this point that PSO is going to be able to finance it. If it can't, I think the report reflects that without assistance from the Corporation Commission in rate relief they cannot stand alone.

I don't want to say they will sink, but they have serious financial troubles.

JUDGE SHON: I see.

MS. WOODS: I would like for Mr. Bardrick really to supplement my arguments about some of the details of the report.

JUDGE SHON: I am not trying to get you to go to the merits at this time, of course; but I wanted to have some feeling for the magnitude, if you want, of the error or the magnitude of the financial disaster that it entails.

I think that the billions that we are speaking about are not billions of dollars lost by building the plant but billions of dollars in cost of building the plant.

MS. WOODS: Increased costs, yes.

JUDGE SHON: Presumably if it were a sound investment those billions would make some of them up in addition to themselves.

MS. WOODS: Again, I think Mr. Bardrick will assist me in explaining to you how the report reflects that it is not and why you should consider the details and information contained in the report.

JUDGE SHON: Thank you.

MR. BARDRICK: I don't want to proceed out of order here. My arguments in this proceeding basically will be addressing the financial liability or qualifications of this project to the extent that anyone is going to desire to respond to the Intervenors' comments I believe theirs would best be directed to mine also in that my comments will echo and perhaps amplify the Intervenors' comments.

So at this time if I may speak on this financial qualifications issue, I think that would help the matter proceed in the way of responses.

JUDGE WOLFE: All right, Mr. Bardrick.

MR. GALLO: Judge Wolfe, I must object to argument presented by Counsel for the Attorney General. He did not submit a written pleading either affirmatively or in response to the various motions.

We essentially will hear for the first time his position. I think in those circumstances he should not be permitted to offer argument in support of the Intervenors' motion.

MR. BARDRICK: If I may respond to the objection?

JUDGE WOLFE: Yes.

MR. BARDRICK: 10 CFR 2.715 discusses the participation by a person not a party. Then in subpart (c) of that section 2.715 and I read it to you: "The Presiding

Officer will afford representatives of an interested State, County, Municipality and/or agencies thereof a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring a representative to take a position with respect to the issue."

So whether or not I am taking a position on any one issue I think the Rule at least allows me to give my thoughts for the panel's consideration on any particular issue.

Whether or not I am actually taking a position one way or the other and whether or not I am required to take a position; and further whether or not I have to state my position in writing in advance and submit it to all the parties I don't believe is the import of that particular provision.

If that is the desire of this Commission, I think that you are going to have to do some bending of the rules to get there.

That is my response to the objection.

JUDGE WOLFE: Certainly this lies within our discretion. The rule which you cite, 2.715(c), states that the Presiding Officer may require such a representative as you to indicate with reasonable specificity in advance of the hearing the subject matters on which he desires to participate.

I do invoke that portion of the rule now with respect to any future hearing we might have, but in the

present circumstance and on the argument it is within our discretion to allow you to so argue even though you did not submit any response or argument in writing.

All right, Mr. Bardrick.

MR. THESSIN: Before we proceed, may I say one point in clarification?

JUDGE WOLFE: Yes.

MR. THESSIN: Ms. Woods indicated that Mr. Bardrick would speak to what took place in a proceeding in another forum and would characterize the testimony presented.

I support Mr. Bardrick's right to argue, especially in view of the circumstances here where it is clear that he is arguing in support of a position that is well known to both the Staff and Applicants.

I however would have to object if he is going to characterize testimony which is not before this proceeding and which we do not have access to.

I am speaking not of the Touche Ross Report which all the parties have read, but to testimony that was presented in a rate case.

It would clearly be hearsay for anybody to characterize that testimony. I think that is a quite different matter than having Mr. Bardrick in support of the motion to reopen on financial qualifications.

I would ask the Board to make that distinction.

MR. BARDRICK: I would like to speak to his objection.

Whether or not it is clearly hearsay is a question that cannot be determined until we hear my comments. And hearsay by definition -- and I assume you are using the Federal Rules of Evidence with somewhat of a lax application because of the administrative proceeding we are involved in.

But I don't want a lax application for this particular argument because I think something needs to be stated at the outset.

Hearsay by definition is not a statement of a party. If I am going to present characterization of any testimony, I will directly quote the Senior Vice President of Finances for PSO, Mr. William Stratton.

He is a party to the proceeding in that he is a member of PSO. Members of PSO speaking in an official capacity and statements of a party to the proceedings that is not hearsay.

I am not going to tell you what we may have talked about out in the hall or someplace else; but if I do perhaps wrongfully undertake to present my characterization of any testimony, my characterization will be within the boundaries of the code of evidence.

Certainly I would expect any objections to be called forth to my and your attention when I am proceeding

irregularly.

JUDGE WOLFE: Well, we will proceed to hear you. This is oral argument, and we will give it what weight your argument deserves.

MR. BARDRICK: It is not sworn testimony. It is argument, and I am sure you are aware of it.

JUDGE WOLFE: All right.

MR. BARDRICK: All right, at this time, if you please, the question of the new evidence, fundamental change in circumstances, whatever you want to put a label on it, the hearing that is taking place in the Oklahoma Corporation Commission currently is under advisement to the Commission.

All the parties have submitted findings of fact and proposed orders. The Commission hasn't ruled.

The gist of the hearing -- one phase of it -- it was divided into three phases -- one phase of it is to examine the financial viability of the project and to give guidance if not an order to the company as to the thoughts of the Commission as to the pursuit of this Black Fox project.

The PSO Company through Mr. Stratton indicated that once an order from the Oklahoma Corporation Commission would be tendered that they would like about 30 days or so to examine the order and then make some sort of decision, be it to go forward with the project or abandon the project or to conform with any express desires of the Commission.

Now the last time an economic analysis was done on this project by PSO I believe was back in 1977. It is just lately and during the course of the case 27068 in front of the Oklahoma Corporation Commission where new studies have been undertaken.

PSO has engaged the services of Management Analysis Corporation, MAC, and the staff of the Corporation Commission engaged the services of Touche Ross Consulting Engineers.

Certain Intervenors also present at the hearing engaged the services of ESRG, Energy Systems Research Group, a non-profit corporation.

So much new study was done as to the financial viability of the project specifically as opposed to nuclear in general.

Furthermore Mr. Stratton in his pre-filed testimony, which is exhibit 237 in that cause. My copies of all the exhibits have got my editorial comments in the margins and what-have-you so it would be inappropriate for me to tender them to this Commission eventually.

But they said basically and Mr. Stratton stated as Senior Vice President of PSO that the Touche Ross figures and their own figures from their own independent study were not that far apart. In fact probably within 87 to 90 percent of each others figures.

It was the company's position at the hearing that even under supportive regulation, meaning rate regulation within the State of Oklahoma, the most probable case would put the company's financial tools or abilities to a severe test.

And certainly if the outer bounds estimates were to be forthcoming that the company really could not afford to carry on with the project.

New estimates and the figures from anywhere between 8 and 12 billion dollars for the total project came forth during the course of the hearing.

These figures were also found to be by the PSO Company.

This exceeds the net worth of the company.

I believe Mr. Shon asked was the company going to sink or something like that, yeah, I believe there is testimony in that record that --

JUDGE WOLFE: Let me interrupt. I may have to give reconsideration to my ruling. Let me ask you this question.

Obviously the Oklahoma Corporation Commission has not rendered a ruling as yet on the rate request by PSO, isn't that correct?

MR. BARDRICK: That is correct, sir.

JUDGE WOLFE: Is it your position that -- what is your position or what is the State of Oklahoma's position

with regard to the PSO's rate request?

MR. BARDRICK: Your question is what is the State of Oklahoma'a position with regard to increase precedence or binding nature on this Commission?

JUDGE WOLFE: No, you do or you do not favor PSO's rate request.

MR. BARDRICK: It is our position that we are against the rate request applied for by the company.

JUDGE WOLFE: I see.

Now it would be helpful if the State of Oklahoma has a position as to PSO's financial qualifications. Whether to the State of Oklahoma's mind there is reasonably assurance that PSO would be able to safely construct this plant.

We are more interested in that than what went on during the course of the Corporation Commission's hearings.

I don't think that would be helpful to us because ultimately the Corporation Commission is indeed going to make its own decision on that after reviewing the testimony which you are about to paraphrase to us.

What is your independent or what is the State of Oklahoma's independent judgment on Applicant's financial qualifications to safely construct this nuclear plant?

MR. BARDRICK: It is our position and we filed proposed findings of fact and a proposed order with the Commission -- and again it is under advisement right now

waiting to be decided upon.

We have gone on record as saying they cannot financially afford to go forward with this project.

Also there is a bailout, for want of a better term, proposal or three proposals before the Commission. In fact they are deciding if they decide to abandon could they recoup their investment to date.

It is our position that we are against the recouping their sum cost to date on this project. However, the fact that it is even being discussed indicates that if they lose their current investment now it is going to financial apocalypse for the company.

But the financial question in response to earlier question of how does finance relate to safety. For example in the way of new safety requirements or just additional delays in safety hearings, any of that--Any delay or any additional requirement is going to of course add to the financial burden of the project.

I am not talking about the mere passage of time and inflation. I am talking about something bigger than that. Everytime you have to reconsider the safety question -- the NRC looks at a safety matter and it could affect the Black Fox Project in any fashion -- any time any of that goes on and you are in fact delaying it, you are also delaying the building of new capacity.

If they have got a nuclear plant to serve their needs coming down the road, and yet that coming down the road capacity is going to be further away than they had anticipated, then they are going to have to do something else in the interim. Maybe build another coal plant let's say.

If they have to do that, that is financial constraints on the company again.

So I think that safety and financial issues are intertwined if nothing else just through the passage of time.

Not inflation mind you but just the other needs for capacity that they company may have.

I would state this though, without getting into specific testimony, certainly the State and the company has on file with the commission out proposed finds based on our summaries of evidence.

The hearing went on over nine weeks. There were over 40 some witnesses attended at the hearing.

If this Commission decides to reopen the issue of financial qualification and wants to hear new evidence -- hear the merits of it -- at that time I can state that the State of Oklahoma would be prepared to go ahead and present the evidence that has just been presented through September and October and November over at the Oklahoma Corporation Commission which includes the new studies and the new financial analysis that have been conducted. Much of which that is not complete

to this date by the company itself.

It is our argument that in fact there is new financial information that is coming to light now and has come to light in the last 15 weeks, and it is of such a magnitude as to warrant a reexamination by this Commission less this whole process be an exercise in futility.

The granting of a license and yet the inability to go forward with the project due to financial constraints.

At that point we would just join and hope this Commission would go ahead and hear evidence anew on the financial aspects of the project.

JUDGE WOLFE: All right, Mr. Bardrick.

Do you have anything, Mr. Gallo?

MR. GALLO: Judge Wolfe, I think the motion to reopen on financial qualifications needs to be viewed in the context of this case.

We have a finding by the NRC Staff in Supplements No. 1 and Supplement No. 2 to their Safety Evaluation Report that the Applicants in this proceeding are financially qualified.

The record is closed on that issue for ultimate decision pending before this Board.

We now have alleged new information which Intervenor believes should warrant reopening on that issue. The new information is the Touche Ross Report and certain

testimony and other material furnished by Applicant in my letter dated November 13, 1981.

Now is that information of sufficient magnitude to satisfy the Vermont Yankee test in that it relates to a significant safety question?

On the matter of whether or not that information is significant financial information I have no position on that question and I consider it to be irrelevant.

I can only observe that the Intervenors and the Attorney General are parties in the rate case. They did not support their allegations before this Board with affidavits of experts to try to assert and establish the relevance and importance of that issue to this proceeding.

Indeed the Staff has not seen fit to reopen on that issue and reevaluate its findings that were contained in supplements No. 1 and 2 to the Safety Evaluation Report.

As set forth in our brief we believe the question of whether or not financial qualifications is a safety related issue is really the nub to be considered and we cited the Seabrook case where the Commission considered the arguments presented by the Intervenors in that case and the dissent in the Appeal Board consideration of that case, which essentially were that if there is a safety relationship between financial qualification and an Applicant's ability to construct and operate a nuclear plant, then that relationship is often couched

in terms that if a licensee or a permit holder is short of funds he is going to cut corners, and that will have safety implications.

The Commission addressed that specifically in its consideration of the Seabrook case and said that experience has shown that what permit holders or licensees do is suspend construction and stop work until they do have the funds. They do not cut corners.

Beyond that the Commission pointed to the fact that it has an extensive organization that inspects ongoing plant construction, and that organization is Inspection and Enforcement. The Commission indicated great confidence in the ability of that organization to detect any corner cutting should it occur.

So we believe that given the posture before this Board of this case that these policy considerations as articulated by the Commission in the Seabrook case and in the proposed rule making are pertinent.

Certainly until a new rule comes out the Board has to make a finding under the old regulations, but that record has been established by the Staff and is pending before the Board.

The Board can take cognizance of the Commission's utterances in Seabrook and the proposed rule making in determining under Vermont Yankee whether or not we have a

significant safety related question here.

As we presented in our brief we believe the answer is no; and therefore there is no reason to reopen on this question.

Finally the whole question of the Public Service Company of Oklahoma's financial situation is being explored, as Mr. Bardrick has indicated, across nine weeks of testimony or nine weeks of hearings with over 40 witnesses in another forum. I suggest that it makes no sense whatsoever to repeat that sort of consideration in this forum.

That is all I have unless there are questions.

JUDGE PURDOM: I wonder, Mr. Gallo, if you or anyone else has an idea as to when the Corporation Commission is going to give its ruling?

MR. GALLO: The information I have, Judge Purdom, is that the Oklahoma Commission promised us a decision about the first of the year. That is this year.

JUDGE PURDOM: All right.

JUDGE WOLFE: Anything more?

MR. BARDRICK: I would like to state for the record that is consistent with our information that I updated yesterday.

It is probably going to be the end of the year or early January that they expect to come down with a decision.

JUDGE WOLFE: All right.

We will have a 15 minute recess.

(A short recess was held.)

JUDGE WOLFE: If the Oklahoma Corporation Commission grants Applicants' request for a rate increase, would you withdraw your contention if it was admitted?

MR. FARRIS: No, sir.

JUDGE WOLFE: Any why not?

MR. FARRIS: The estimate for the cost of Black Fox has gone from 2.2 billion approximately now to approximately 10 billion which includes cost of capital.

That is a four-fold increase in three years since 1978 which I believe was the last supplement to the SER promulgated, and the Staff found that the Applicant was financially qualified.

The rate increase that the PSO has asked for is something on the order of 150 million dollars, which 30 or 35 million dollars is allocated for Black Fox.

In my mind I think and in the mind of any reasonable person that is still going to fall far, far short of what PSO is going to need to build Black Fox.

If the Corporation Commission would grant construction work in progress for Black Fox, there would be a glimmer of hope at best.

JUDGE WOLFE: But that is not a request before the Commission now, is it?

MR. FARRIS: I believe they do, Mr. Bardrick?

MR. BARDRICK: Yes.

MR. FARRIS: They do have construction work in progress requested.

JUDGE WOLFE: I see.

MR. FARRIS: The Corporation Commission of Oklahoma to my knowledge has never granted construction work in progress for any project up to this time.

MR. BARDRICK: If the Court is interested in getting the most accurate information, we have a new Oklahoma Supreme Court decision come out within the last two weeks; and they set forth their thoughts on construction work in progress which heretofore had not been set forth.

I don't intend to speak to the specifics of the case. I could certainly supply the Commission with a copy of the decision if they desire.

However, I will tell you what my best recollection of the case is. They said construction work in progress is not for items that are way down the road. It is only the near term physical property that will be used and useful to the rate payers and current rate payers and certainly will be of use and useful to them within the time frame that the rates that should have been granted or were granted or not granted would have been in effect.

We are talking at least 10 years before this

plant could become commercially operable.

We have reurged in our findings this new announcement by the Court so I frankly don't feel the construction work in progress for a plant that is ten years down the road will be allowed by law.

Those are my thoughts on the matter, but there is new Oklahoma case law on the matter.

JUDGE SHON: How about loans for funds under construction.

MR. BARDRICK: That is the current situation in Oklahoma.

JUDGE SHON: I see. Thank you.

MR. FARRIS: Judge Wolfe, I am not violating any confidence by telling you that we have had meetings, the Intervenors, with representatives of the Public Service Company this past summer to talk about a deal, a settlement if you will, whereby PSO would be allowed to recover its money invested in Black Fox thus far and that the Intervenors wouldn't object to the Corporation Commission providing a bail out.

Mr. Stratton has indicated in his testimony that PSO is very clearly looking for some sort of a bail out from the Corporation Commission.

Now if that doesn't tell this Board that PSO has grave, grave doubts about its own ability to build this plant. Now whether or not it is a poor investment, their ability to

build it is what we are talking about.

Touche Ross has clearly concluded that it would be a poor investment. Just because that was the purpose of the Touche Ross Report doesn't mean that this Board can ignore it because of the safety impact of a company struggling to build a plant and the potential for cost cutting that that poses.

I believe it rather clearly poses that potential. Mr. Gallo has argued about relying on Inspection and Safety, but I think you are as well aware as I am of the limitations on Inspection and Enforcement Division of the NRC to watch the complete progress of a plant under construction.

If this Board were to find that this company is financially qualified on the basis of a three-year old record, frankly that is a fiction, gentlemen, with all due respect.

Because PSO has admitted and there is no controversy now that the costs have greatly, greatly escalated; and not to take a fresh look at their financial situation, when you have that duty under the regulations to find that they are financially qualified, it tantamount to this Court saying there is absolutely no connection between the company's financial qualifications and safety.

Mr. Shon, I am reminded of your example when you are talking about the automated liquid control system of a

$25,000 a year operator making a $15,000 decision by manually initiating the system.

I submit to you that a $100,000 a year executive at PSO might be tempted to make the same sort of multi-million dollar decisions at Black Fox; and that this Board needs to take a fresh look at the new economic realities of Black Fox.

JUDGE WOLFE: A final word, Mr. Gallo?

While you are up, and I will ask all the other parties to address this too, as we know the financial qualifications matter and the possible preclusion of any Board entertaining that as an issue. With that proposed rule pending, what are the parties' views in light of the Douglas Point case which in substance states that no licensing board shall give consideration to any matter which is or is about to become the subject of rule making?

Mr. Gallo, you may address that as well as any final responses to prior arguments by the parties.

MR. GALLO: Let me try to address that question first.

I am certainly tempted to jump up on the band wagon and say that the matter of financial qualifications is barred under the Douglas Point case and the subsequent Appeal Board decision of Rancho Seco because there is a pending ruling, but I read that rule making and the Commission action in the Statement of Considerations as not essentially relieving

this Board or any other Board of the affirmative obligation to see that applications comply with existing regulations.

One of the existing regulations is that financial qualifications regulation. It is our position that the evidence submitted to date based on the Staff's findings is adequate.

Mr. Farris argued that he believes there is a safety connection that would warrant reopening. We do not think so. We think that is the decision that this Board must find.

To answer your question we think Douglas Point is not applicable for the reasons I have stated.

JUDGE WOLFE: All right.

Yes, Mr. Thessin.

MR. THESSIN: Could I be heard on this subject?

JUDGE WOLFE: Certainly, I am sorry.

With multi-parties unless someone raises their hand or screams, I may not call on them for argument. So just raise your hand and come forward. Don't scream.

MR. THESSIN: We oppose the motion to reopen on the question of financial qualifications but for different reasons, I believe, than stated by Mr. Gallo.

Let me see if I can articulate what those bases are. The question that this Board and the Nuclear Regulatory Commission must address is whether the Applicant has a reasonable plan to finance this specific facility safely.

As the Board has indicated that does not involve any inquiry into whether this makes a good business judgment. It does not involve an inquiry into whether some other facility may be cheaper.

The financial qualifications rule just makes at issue the reasonableness of the plan to finance the facility.

The evidence presented and materials pointed to by the Intervenors do not address that issue. It is not enough to say that the record is several years old or stale or that there have been some changes.

Under the Vermont Yankee line of cases on opening records you have to point to particular information that might affect the outcome.

The problem Intervenors have I believe is that they are looking at the wrong outcome. They are looking at the question of whether some other investment may be more prudent from a business sense, but that is not the issue before us.

The issue before us is whether or not there is a reasonable plan to finance this facility. I maintain they have presented no evidence with respect to this.

I differ with Mr. Gallo in the route I take to get to that point. I would argue that they have failed to make the required nexus between any information and the standard by which we judge the reasonableness of the plan to finance the facility.

There information does not speak to that point, and therefore is not significant information which might affect the outcome.

I would take issue with the notion that, if I am understanding Mr. Gallo's argument correct, financial qualification in and of itself is not an issue of major significance as to plant safety; and therefore under Vermont Yankee could never be reopened.

If that is what he is saying, I would disagree because I think this Board has an obligation to insure that regulations are complied with whether or not we characterize those regulations as major issues of plant safety.

Now this disagreement may be more apparent than real, but the issue of plant safety goes to the question of whether the reasonableness of the plan has been met.

In other words, reasonableness is judged in the context of we are building a plant and we want to build it safely.

The question of plant safety is not taken into account on reopening the record. It is a legal distinction I admit, but I think one of some importance when we are considering this question of reopening records.

JUDGE WOLFE: Tick off for us now exactly what you have understood Ms. Woods and Mr. Farris to say. I take it what you are saying is that nothing that they have

said has been addressed to showing that there is any evidence that would indicate that there is no reasonable assurance that the Applicants could safely construct the plant?

This is what you are saying?

MR. THESSIN: I think the standard is slightly different as I would articulate.

I think the standard that there is no significant information which might affect the outcome. Now that is more than a speculative possibility that we may if we go down this road find something that may lead us to inquire further. It is more than that.

We have to show some information that on its face would be affecting the outcome of the decision you would have to make.

What I am saying is that when one points to information which on its face questions whether their bond rate in the light of the circumstances may diminish in stature or whether the cost of capital may increase. But that really is not our inquiry.

It is regardless of what the cost of this facility is, is the plan the Applicant is proposing reasonable. The plan, as I understand it, which he proposed when the Staff evaluated this question was a plan that entailed getting rate relief as necessary from the Corporation Commission. That is still the plan.

If it turns out that avenue is not available because of some future decision, then we would have to reexamine the question of whether the record deserved to be reopened.

We are not at that point right now. If we look at the Seabrook Decision where the Commission spoke at great length to this question, the Commission indicated that it is expected that there will be times of more or less stress in financing plants.

That is part of our expectation. More than just difficult periods must be shown to upset the finding that there is a reasonable plan under the circumstances.

I contend they have not shown that the plan is no longer reasonable. They are asking us to anticipate the possible adverse result which is purely speculative at this time.

JUDGE SHON: Mr. Thessin, even Mr. Gallo agrees that we are not precluded from investigating this matter by the Douglas Point line cases, and we must enforce the regulations as we find them.

MR. THESSIN: That is correct. That would be my position as well.

JUDGE SHON: Now 50.32(f) says that "The Applicant shall supply information sufficient to demonstrate to the Commission the financial qualifications of the Applicant to carry out in accordance with the regulations of this Chapter the activities for which the permit or license is sought. If

the application is for a construction permit, such information shall show that the Applicant possess the funds necessary to cover estimated construction costs and related fuel cycle costs or has reasonable assurance of getting them."

Mr. Farris has alleged that within the past couple of years, since the time when we last stopped looking at this plant, the estimated cost has risen a factor of four.

I don't know whether that is true or false, and I don't intend to get into the merits of that allegation here, but certainly if the cost of building the plant has gone up 300 percent, does that in itself not raise more than a hazzy possibility that they no longer have or could reasonably be expected to obtain funds necessary to complete construction in accordance with the chapter?

MR. THESSIN: Let me respond with two points.

I think you indicated earlier what is I think a useful way to approach this subject, and that is that we have a Corporation Commission which has a mandate to insure that the citizens of Oklahoma have the necessary power.

If it should conclude that this is a worthwhile project, it would fund it. I think the cost in and of itself, while it may make the magnitude of the financing plan different than what was previously understood, does not necessarily bring in doubt the reasonableness of the plan.

If the Corporation Commission decides it is needed

and useful, then we must presume it will fund it.

My second consideration that I would like for the Board to take into account is we are faced here with something different I think than an allegation which would state as follows: That the Applicant because of some change in circumstances can no longer sell the necessary bonds.

We may not know the results of that allegation until many years down the road, but yet we are forced to decide right now.

Here the allegation is different. It is that without rate relief they will not be able to build the plant. By concession of all the parties this rate decision is in the near term so it is not as if the best information available is a change in the price of the plant.

That information alone I do not think justifies a reopening of the record on this question.

If the new information had certain inferences which would lead us to doubt our conclusions, and if we could only satisfy outselves that those inferences were not the most probably without satisfying out interest by pursuing the matter, then I would say we would have to reopen the question.

But we can decide at this case whether or not these allegations will lead to the inference Intervenors allege by awaiting the decision of the Corporation Commission.

In other words, there is still another event in the chain that they point to that will have a bearing on this question, possibly dispositive; but which can be awaited and which would be, I think, the most appropriate information to examine in the context of reopening the record than the mere possibility that the Commission may or may not grant relief coupled with the fact that the plant is more expensive.

I am afraid I was not particularly clear, but if I may summarize.

The Intervenor must show new information which affects the outcome. The price of the plant alone is not new information that affects the outcome because it is the reasonableness of the plant.

While there are certain contingencies which could make that plan unreasonable, arguendo, those contingencies have not yet happened.

Until they happen, I think it is premature to say or even to suggest that there is information which affects the outcome on whether that plan is reasonable or not.

JUDGE SHON: There are two words in the English language that sound very much alike, and I am not sure which of the two you are using and in which sense.

They are plant, p-l-a-n-t, and plan, p-l-a-n. I think what you are referring to here is the reasonableness of the plan, meaning the financing plan, not the reasonableness

pf the plant, that is the nuclear power plant.

Is that right?

MR. THESSIN: Yes, I am referring to the reasonableness of the financing plan.

JUDGE SHON: I thought so, but I just wanted to make sure that was on the record.

JUDGE PURDOM: I am wondering if in light of your comments if you are suggesting that this Board consider holding the question open until the Corporation Commission rules?

You have kind of skirted and hinted at it a little bit, but you didn't say specifically.

MR. THESSIN: I think not. I am not suggesting that.

Let me see if I can put my remarks in a context which addresses your inquiry.

What I am suggesting is that the Intervenors and State to this point have shown no significant new information which affects the outcome on this matter.

In an effort to delineate why the information they presented is inadequate I have articulated what may be more significant in the context of the Rule to Reopen and in the context of the standard we must address, which is the reasonableness of the plan.

I have suggested that the actions of the Corporation Commission may be of more relevance.

Now I think it is incumbent on the parties who believe that any future action of the Corporation Commission is significant to come in and make the required showing.

In other words, I would not suggest that this motion linger and be interpreted in the light of some new information but rather that this motion be ruled upon; and then if the Corporation Commission were to act, and if someone believed that it was a significant change, they would come in again with a new finding.

Obviously our schedule does not prejudice somebody from coming in with a future motion to reopen when new information does arise.

I would suggest that that procedure be followed, and the motion as is be ruled upon. If some party thinks an additional change has taken place in the future, that party would file an additional motion to reopen.

JUDGE WOLFE: All right. Thank you.

Anything more? Mr. Farris.

MR. FARRIS: Judge Wolfe, if I understand the Staff correctly, they are saying that the plan is still reasonable.

That seems to ignore what seems to me a very fundamental given or premise in assessing the reasonableness of the plan, and that is the cost of the plant.

The plan to catch a rabbit would not be the same plan one would use to catch a bear. We submit that the quarry here is different. There is something fundamentally different about the quarry. The end result has changed, and that is the total cost of it -- the size of it.

The reasonableness of the plan cannot just be considered in the abstract. In fact it must be considered in the concrete, and the concrete is a 300 percent increase in the cost of the plant.

There is no controversy about that. No one has even suggested that there is a controversy about that.

If that fact alone is not sufficient, then so be it; but we submit that it is.

JUDGE WOLFE: All right.

We will now consider the second issue raised in the Intervenors' Motion to Reopen, namely with regard to the containment.

Mr. Farris.

MR. FARRIS: Judge Wolfe, our second motion to reopen goes to an issue that pertains to the containment area. You will recall that originally we had three contentions-- I am not sure of the number. Sixteen was one of them and perhaps three and five as well -- that impacted to the containment question in general.

I think the objection to our motion to reopen the

record goes to a couple of things.

In one point I believe the Staff indicated that our motion did not relate strickly to Contention 16. Well, certainly it doesn't. We cited to the Board our contention 16 verbatim in our motion to reopen, and then indicated there was another change that would affect the containment and enumerated six instances where we felt that there could be a significant safety impact created by this change.

The Staff I think seemed to suggest that unless it related and pertained to contention 16 then it was beyond the scope.

Your ruling as I understand of October 14 does not limit us to original contentions to reopen by any area where new information might have been developed that would meet the Vermont Yankee test.

That test is again that there is a new evidence of some major safety significance.

We submit the change in the containment that the Applicant has identified, and that is the construction of a concrete reinforcing wall outside the steel liner or steel containment shell in the annulus between the shell and the containment building may impact safety in the areas that we have indicated.

Now the purpose today I assume is not to again to go to the absolute merits and decide that it will

certainly have the impact.

We have submitted that it would have significant impact on safety in the following areas, a through f, and we would propose to the Board that the Board take evidence in that area to let us try and prove our thesis that it would have.

This is as far as I know and as far as I have been informed a new concept in the Mark-3 containment -- the use of this reinforcing wall.

We are familiar with the phenomenon of containment ringing, and this is as I understand it a devise to help control that phenomenon.

As we have seen through systems interaction sometimes the devise that is supposed to help control something may itself lead to other unforeseen events or occurrences that may have not been taken into account by the designers when they decided to use the concrete reinforcing wall.

Our experts have indicated that the items that we have indicated in our motion to reopen, a through f, are just some of those that they are concerned about.

JUDGE GHON: Mr. Farris, I notice that you also introduced what is essentially the same contention as your contention 12 for the reopened hearings.

Was this simply to have two strings to your bow in effect?

MR. FARRIS: Yes.

Frankly the Staff has probably more correctly characterized our contention 12 as a motion to reopen. It really does not relate to any Three Mile Island occurrences so far as we know at this point.

So really I think the Staff has properly characterized it, and that is really where we are going to focus our efforts on this.

If it doesn't come in as a motion to reopen, if this does not become an issue because of the plan to use this concrete reinforcing wall, then unless we go beyond the Three Mile Island contentions, it would not come in as contention 12.

JUDGE SHON: And it certainly wouldn't fall into any of these so-called River Bend items. So what you are proposing as a motion to reopen is simply to get it in without having to have it fall into either the catagory of Three Mile Island matters or unsettled generic items.

MR. FARRIS: It is certainly not generic as far as I know. It is unique to Black Fox. It may be adopted elsewhere; but we think that since it is a new look at something, we ought to take a good look at it.

Because we have postulated six different effects it could make, we think that those each could have major safety significance and would or could meet the Vermont Yankee test.

JUDGE WOLFE: Thank you.

MR. GALLO.

MR. GALLO: Judge Wolfe and members of the Board, it was the Applicants who made that distinction about the contention not being within the scope of the old contention 16.

Basically as we read the issue that Mr. Farris is attempting to place into controversy, it really had no connection with the old contention 16.

That contention dealt with the effects on containment of certain phenomenon which result from a loss of coolant accident -- containment interarity.

Essentially what Mr. Farris is attempting to put into controversy is the effect of a design change in and around the containment on various components and structures both in the containment building and in the auxillary building.

We perceive that as a different issue than what I call old contention 16; and therefore we think it is not appropriate to reopen old contention No. 16 to address that question.

I think, if I can speculate the reason that Mr. Farris placed essentially the same issue in two places is that there is some uncertainty as to where it belongs.

It is our view that the issue procedurally properly raised under new contentions based on the new information was submitted to the licensing board in late 1979.

The reason we treated it that way is that is how we view it. We view the new information supplied to the licensing board in late 1979 through a board notification which discusses the question of containment ringing to be, quote, "new information".

During the course of our discussions on the schedule, the Applicants agreed not to interpose the time limits objections to information that was developed since the accident at Three Mile Island.

We believe it is more appropriately treated as a new contention and have not objected to the time limits objection for the reason I have indicated.

In addressing it as a new contention as I recall agree with parts of it and object to parts of it on the grounds it does not meet 2.714.

That is how we view the contention.

JUDGE SHON: You do not object to the part letter "(e) vibratory motion transmitted to other structural components" because as you have said that certainly includes containment ringing, and that is what this design change was meant to meet.

However, as Mr. Farris points out, people often make changes in a design in order to aid them in one way and it later turns out that this disadvantaged them in some other way.

The other things you felt were unrelated to this

if I remember correctly.

What is wrong with the notion that perhaps heat transfer from the suppression pool or the stress levels in the welds might not arguably have been affected by making this design change without getting into the merits.

MR. GALLO: We argue that those assertions are not supported by any bases as required by 2.714.

That if he wants to make those assertions he has to provide an adequate basis for those. He hasn't done so. That is why we object to them.

Take your two examples. The question of stress levels in the welds and joints of the lining that arguably might result from the design change I submit have nothing to do with the five phenomena in old contention 16, namely vet clearing, pool swell, etcetera, and the effects of those phenomena on containment design.

JUDGE SHON: Well, I understand your position that it has nothing to do with old contention 16. What we are discussing now is whether other portions of the contention might not be admissable in and of themselves as you agree that 12(e) is.

MR. GALLO: That is right. My position on that particular aspect is that -- I don't have the notes with me up here at the podium -- but I recall what we argued.

We argued that not that he was without authority

to assert them, but that having asserted them he has not really provided the bases as I know the Board understands is required under Section 2.714. He hasn't explained how this design might adversely affect the stress levels in the welds the joints and the lining in the connecting pipe.

He hasn't explained how thermal transients might be affected by this design change.

JUDGE SHON: Thank you.

MR. GALLO: I might point out just one last thought. That he doesn't have to offer that explaination on the merits but so that we as the Applicants having the burden of proff know how to address the issue once it is raised.

That is the reason for providing the basis.

JUDGE SHON: I understand.

MR. GALLO: That is all I have on this point.

JUDGE PURDOM: Mr. Gallo, I believe in your response you may have used some arguments slightly different from some of those you used just now. I just wondered if you wanted to check those and see.

I believe on (a) and (b) you had said that those were not affected by the design change in your written response.

MR. GALLO: Can I have a moment to get the response we filed, Judge Wolfe?

JUDGE WOLFE: Yes.

MR. GALLO: Judge Purdom, I am looking at pages 36 through 39 of the Applicants' Response to the Intervenors' contentions, specifically dealing with proposed contention 12, containment design change.

With respect to sub-parts a, b, c and d we interposed objections to those sub-parts primarily for lack of bases and specificity.

On page 37 we say, "Sub-section (a) lacks specificity in that the use of the phrase thermal transients is ambiguous" and then we go on to explain why we believe that to be true.

We say simiarly on page 38 that "sub-section (b) provides no bases indicating that heat transfer from the suppression pool may be affected in any significant way by the proposed concrete reinforcement."

Then with respect to sub-section (c) we point out a commission regulation which establishes a requirement to meet certain codes and standards that is imposed on Applicants.

We fail to understand how Intervenors can provide any specifics or lack bases to challenge why that showing by us as Applicants isn't satisfactory.

The same on page 39 on sub-section (d) we indicate essentially a lack of specificity and bases objection.

Finally on sub-section (f) we say "It is inadmissable because no bases is given to the ascertion that in-service inspection of the leak rate analysis of the pool lines is required and desirable.

JUDGE PURDOM: I may have my notes confused with some other parties' response.

JUDGE SHON: I think, Mr. Gallo, the word lines in your reply and in the contention as it is quoted in your analysis of it should really be the word liner, should it not, Mr. Farris?

MR. GALLO: Yes.

JUDGE SHON: You mentioned the corrections were made but not in your -- when you read it, you read it as lines.

MR. GALLO: That is true. As I recall that certain errata were filed after these documents were filed and I believe one of the corrects was as you indicated.

JUDGE WOLFE: Mr. Thessin.

MR. THESSIN: I think I can be brief on this point.

The contention which the Intervenors have raised with respect to containment design must be judged by the standards for reopening the record.

The reason is -- is that to the extent that the record has been reopened, it has been reopened only with respect

to TMI issues and energency planning issues.

This as Mr. Farris concedes is not within the scope of either of those two matters.

Therefore I think we must look to the Commission's case law on reopening the record requiring significant new information that might affect the outcome.

One of the cases which I think is very pertinent in this instance is the Commission's decision in Diablo Canyon The Diablo Canyon Decision is 81-5 in which they interpret what was required for reopening on TMI issues.

In that decision they indicated that the bare submission of allegations or hypotheses are not adaquate; that new information must be pointed to which would affect the outcome.

I submit that in this case we have nothing more than a bare allegation; that this, as the Intervenors have said, could have a safety significance.

We have seen no affidavit. We have seen no citations to any authority or to any document which indicates that this is an issue of significance in the areas they have identified.

Without such a showing it is the Staff's position that they have failed to meet the standards for reopening the record.

For that reason they should be denied as an

issue in any reopened hearing.

I have no further comments.

JUDGE WOLFE: All right. Thank you.

Anything more?

(No response.)

JUDGE WOLFE: Mr. Farris, do you have anything more to add?

MR. FARRIS: No.

JUDGE SHON: I guess I was expecting you to push to address yourself in some measure to the matters of specificity and bases for sections a, b, c, d and f.

MR. FARRIS: I can, Mr. Shon, certainly.

JUDGE SHON: I would like that if you would do so and help us make up our minds.

MR. FARRIS: I was really kind of saving this until we got down to the new contentions on Three Mile Island, and I will probably find out that this decision has been reversed from Mr. Gallo.

In any event let me cite the Board the Allens Creek Decision. I had the pleasure of hearing Mr. Rosenthal expand on this opinion somewhat at a seminar in Washington.

The issue in this particular decision -- I will give you the cite in just a minute.

JUDGE SHON: I think we are all pretty familiar with Allens Creek.

MR. FARRIS: In any event the Appeal Board reversed the Licensing Board for denying a contention on the bases there was no assigned bases or it laced specificity.

The test -- and this was frankly a pretty far out contention that the Intervenor had made in that case. The test as Mr. Rosenthal pointed out is not whether we have assigned a factual basis to it because that is not the purpose or that is not the test that applies to a contention.

He said specifically and he quoted from a prior case, the Grand Gulf Case, "It is not the function of a Licensing Board to reach the merits of any contention contained there... Moreover Section 2.714 does not require the petition to detail the evidence which will be offered in support of each contention. It is enough that it is identified with reasonable specificity."

We think we have identified with reasonable specificity. The Applicant and the Staff certainly know how to conduct discovery. It is through interrogatories and depositions that they narrow down exactly what it is our experts have in mind when they say thermal transients may cause this problem and vibratory motion may cause this problem and let them pin them down and see if there are indeed factual underpinnings for the contention they have raised.

A contention is after all -- the purpose of it is to give a rough definition to an area of concern that we

have, and then you try to prove it or disprove it later through discovery and through the ajudicatory process.

The lack of specificity and bases as the Staff and the Applicant would have the Board interpret it is that we have to write page after page and have affadavits by our experts saying exactly how this is to be done.

That is simply not the purpose as I read the Allens Creek Decision which is later than any authority that either the Staff or the Applicant cited.

Indeed I think the concurring opinion of Mr. Farrar in the Allens Creek Case says, "My intuition tells me that when the facts are in for one reason or another the proffered alternative would not appear to be superior to the nuclear plant. But as I understand the principles that govern all judicial and administrative proceedings I am not allowed to decide cases on the bases of lack of knowledge, intuition, or personal predilections."

I submit to the Board that that is the case here today. While the Board and the other parties may not believe that we can prove our allegations, the test is simply have we made it with enough specificity that the other parties will have some idea of how to proceed with their discovery and how to pin us down on these issues.

JUDGE SHON: Now in the Allens Creek Case, Mr. Farris, unless my memory fails me, the Intervenor produced a

government report or document which he said gave indication that the alternative being proposed, which was an aquaculture sort of thing, was a viable alternative of one sort or another.

This is to me a good deal more than you have offered us to indicate that there may be something now wrong with the heat transfer or with the way in which the wells were designed or the inability to test the liner for leakage.

He didn't come forth with affidavits or anything, and I think no one expects that strong a prima facie showing in a case like this.

He did offer some sort of bases in that he offered a government report that he claimed said his contention was correct. Isn't that true?

MR. FARRIS: Yes, that is true. He did. While the Licensing Board and the Appeal Board didn't put much stock into it, they said there was something hanging out there.

We have something hanging out there. We have the PSAR that shows the planned installation of this concrete reinforcing wall. As the Board I am sure can take notice, I didn't bring these contentions out of my own knowledge as a lawyer. We have had our experts from the MHB help us bring this contention, and it was their position that these are problems as experts.

The fact that it is not in affidavit form I think is immaterial. I think the Board is well aware of where the

ideas for these contentions came from and the qualifications of the gentlemen who helped frame these ideas.

JUDGE SHON: You are not suggesting however that these cited sections of the PSAR Amendment or other cited sections of documents produced by the PSO suggest in themselves in some way that these things are problems, do you?

MR. FARRIS: Well, they suggest in themselves the fact that they put them in and we are now aware, Mr. Shon, of this new device or reinforcing wall I think suggests certainly but not expressly, no.

And PSO did not say that we are going to put this in and we are worried that it may have these effects. We say they put it in to stop one phenomenon and did not address at all what other possible phenomena that could result because of it.

That is the deficiency that we see. They did not address these other areas. At least the six that we could think of when we first became aware of this reinforcing wall.

JUDGE SHON: Thank you.

JUDGE WOLFE: The Allens Creek Case however involved the Licensing Board's ruling not admitting a proposed contention prior to hearing. What we have here now is a motion to reopen.

Are you saying that Vermont Yankee has been at least overruled by Allens Creek?

MR. FARRIS: Absolutely not.

One of Mr. Gallo's objections was that it lacked bases and specificity as though it were a new contention as opposed to a motion to reopen.

No, I still think the test as far as I know is Vermont Yankee; that there has to be some showing of significance to plant safety.

I agree that still is the test,but to address Mr. Gallo's and Mr. Shon's concerns I felt like specificity and bases as though it were a new contention itself.

The ruling as I understand that the Board limited us to open -- we could reopen on other issues. We weren't limited to our old contentions, but I assume that reopening on other issues as opposed to Three Mile Island related issues must meet the Vermont Yankee test.

We think that it does. Containment as you know as been one of the major issues in this case. We had three contentions that related to containment.

Anything that is as significant we feel as this concrete reinforcing wall may be would meet the Vermont Yankee test and could have major safety significance.

It is after all not a generic feature. As far as we know it was BWR-6 containment. It is new. It hasn't been looked at. It may become a generic feature, but we think this Board needs to look at it. It could have major safety significance

and therefore meet the Vermont Yankee test.

JUDGE WOLFE: So you think it is sufficient for you to plead that Applicant has not provided sufficient preliminary design information to show how it will affect the following five or six factors; that that is sufficient at this point and does meet the requirements of Vermont Yankee?

MR. FARRIS: Yes.

JUDGE WOLFE: All right.

We will now give consideration to the proposed contentions. I think the format should be that Mr. Farris will present his argument, and then we will have responses by Applicant and Staff and by Mr. Bardrick, is he so desires.

MR. FARRIS: Judge Wolfe, since we have 15 contentions with some sub-parts to some of them, I think I would prefer to address them one at a time.

JUDGE WOLFE: Yes, one at a time.

MR. FARRIS: Our first contention relates to "Environmental Qualifications." Specifically we stated that "The Applicant has not demonstrate it would be in compliance with NUREG-0588 and Generic Technical Activity A-24 for existing safety related equipment and equipment added as a result of post-TMI requirements."

Both the Applicant and the Staff oppose our first contention basically for the same grounds.

The Applicants said that it lacks bases, nexus and specificity and it is also the subject of rule making.

The Staff treated our first contention as a motion to reopen and made its comments accordingly.

We would concede that as to existing equipment the contention might be overbroad and not related to Three Mile Island, but certainly as to post-TMI added equipment it is very specific and certainly not a motion to reopen in that regard by the terms of the contention itself.

Further we suggest that even pre-TMI equipment that was not required to be added to the environmentally qualified list quite probably it will have to be qualified in the future.

For example the Applicants have indicated that the PSAR response to the requirement for detection of inadequate core cooling that existing equipment is going to be sufficient.

We submit that may not be true. That whatever equipment they have may now turn out to have to be environmentally qualified.

We submit that it would have to be environmentally qualified and that is going to be one of the lessons learned by Three Mile Island.

Again some equipment that before was not on the environmentally qualified list may have to be environmentally

qualified as a result of the experience at Three Mile Island.

So we submit that it is specific and it does have bases and clearly meets the test of Allens Creek.

MR. GALLO: Judge Wolfe, I yield to my colleague Ms. Gibbs.

JUDGE WOLFE: All right.

MS. GIBBS: Your Honor, I would first like to say that Applicants agree with the Intervenors in that we have two bases for objecting to their first contention.

The one I would like to address has to do with the fact that the subject matter, the environmental qualification of equipment, is soon to be the subject of rule making.

Judge Wolfe, as you mentioned before, there is a decision called Douglas Point. It says that when a matter is or is about to be considered in rule making Licensing Boards should not take up that matter individually in its proceedings.

Intervenors cites NUREG-0588 in their contention. The introduction to that NUREG clearly states that this NUREG is being considered in rule making by the Commission.

While the proposed rule has not yet been published, I don't think that anyone would quibble with the fact that it will be considered in rule making; and that under the teachings of Douglas Point that it should not be considered

here.

I think I should add that Douglas Point has been adhered to throughout the years and the Rancho Seco Decision of the Appeal Board in October of this year and also the decision of the Licensing Board in Waterford in September of this year both apply to that case.

Applicants feel that the proposed contention 1 does not have the requisite bases or specificity to qualify it for a contention.

I think this theme is important. It runs through all of the 15 contentions. Virtually none of them meet the requirements of 2.714(b).

While Applicants have certainly read the famous Allens Creek Decision about the bio-mass contention, we feel that Intervenors have not properly read that case and nothing in Allens Creek served to take away the requirement in 2.714.

The contention must have basis, and that basis must be set forth with specificity.

To read in full the first contention it is: "The Applicant has not demonstrated that it will be in compliance with NUREG-0588 and Generic Technical Activity A-24 for existing safety related equipment and equipment added as a result of post-TMI requirements."

Applicants would submit that just mentioning a NUREG document and a TASK Action Plan does not meet the

requirements of 2.714.

The Intervenor should have gone further and said in what respect is Applicants' proposal inadequate. For in the previous PSAR documents the Applicants have committed to certain environmental qualification projects.

Specifically Applicants have committed to file I (eee) 223 from 1974 and Reg. Guide 1.89. Intervenors have not bothered to say what is wrong with those particular committments.

I feel that Mr. Farris is not correct in his view that under Allens Creek all the Intervenors would have to do mention the subject matter, such as environmental qualification of equipment, and then utilize the discovery process through depositions or interrogatories or document discovery to focus in on what the contention actually is.

This is not a guessing game. I think the Applicants and the Staff are entitled to know exactly what it is that concerns the Intervenors.

Frankly it is impossible for us to select witnesses and prepare testimony and get ready for a hearing unless we know exactly what is at issue, especially with a field that is as broad as this one.

So in summary we feel that because this is going to be the subject of rule making and because Intervenors have not properly interpreted Allens Creek that contention 1

should be rejected.

MR. THESSIN: The Staff's position on Contention 1 is first that the issued raised is a matter subject to the standards for reopening a closed record.

I have spoken to this point in respect to the previous motions of the Intervenors to reopen the record. Let me reiterate the principle that I think the Board should keep in mind.

In dealing with these contentions that stray beyond the guidance found in the TMI requirements or beyond the Emergency Planning Rules every time an Applicant makes a change in design or every time the Staff issues a new publication that under the rule of Vermont Yankee in and of itself does not give rise to a reopening of the record on that issue.

If that were to be the case, there would be no end to litigation.

It is incumbent when the new information is presented, whatever it might be, that the Intervenor shall show how it might affect the outcome of the previous conclusion or the previous decision.

With that in mind I think it is clear, and I will not go over the same ground that is stated in the brief, that the question of environmental qualification of equipment is one of long standing.

The general design criteria requires that equipment be environmentally qualified. NEURG-0588 pre-existed the TMI requirements. It pre-existed the event at TMI.

The petition of the Union of Concerned Scientists led the Commission to look with great interest at environmental qualification back in 1978.

So it is clear that the issue has been one of significance and has been one that has had some high visability well before TMI and the accident that occurred there.

It therefore is not an issue that is suddenly taken on a new significance in the light of those events.

It is the Staff's position that the Intervenor has failed to make the showing on reopening the record with respect to equipment qualification; and therefore the contention should be denied for that reason.

With respect to equipment added as a result of the TMI accident, which is the limitation Mr. Farris has articulated this morning, I think that first the Board must come to grips with exactly what has been reopened with respect to TMI.

I think there are two possible definitions of that reopening. I believe implicit in Mr. Farris's articulation is the broader bases; and that is anything that is any way related to TMI, whether it is equipment added as a result of a new requirement or whatever, it is within

the scope of the reopened proceeding.

The Staff's position is more limited; that the Board meant to reopen with respect to new items that should be required as a result of the TMI accident.

Now there is an equipment qualification item in the Hydrogen Control Rule. If Mr. Farris is alleging that that requirement has not been met by the Applicants, then I would submit he has already duplicated it in his hydrogen control contention. It would be best addressed there where it is stated with greater specificity.

If he is stating something else, that every time the Applicant puts on a new piece of hardware that this issue can be raised in the context of post-TMI, then I would take issue with him and say that the contention must go through the same analysis.

JUDGE SHON: He particularly mentioned things that would indicate core uncovering or whether the core was getting wet and that sort of thing.

MR. THESSIN: In that case I think it is incumbent upon him to be more specific as to the standard he feels is violated.

There are numerous TMI requirements, some of which relate to equipment qualification. I think he has to articulate more specifically what his interest is, what equipment he thinks may not be qualified and what the standard is that he

is judging it against.

The way we have it right now we have a bare allegation that equipment as a result of TMI, without specification, is unqualified.

I do not think that is enough even if judged by the standards of Allens Creek.

I think in this particular context the Appeal Board has given us guidance in the River Bend Decision. In that decision the Intervenor came in and said that as a result of a TASK Action Plan and as a result of NUREG documents which the Intervenor felt had not been complied with that a contention should be allowed.

The Appeal Board said you have to be more specific. You have to show some nexus between the document that you allege has not been complied with and the Applicant's submittal.

You can't just say here is a document. I say he hasn't complied with it. I submit that is all Intervenor has done in this instance even if we judge his filing by the standards of a contention.

MR. FARRIS: First of all, Judge Wolfe, all of the or virtually all of the TMI contentions are about to become the subject of rule making.

If that rule were applied literally, then we wouldn't be able to raise any contentions at all whereas the

parties have already agreed that we can raise contentions relating to the adequacy of the response to the TMI requirements, which admittedly haven't even become final yet.

They are the subject of pending rule making. When they are published in the Federal Register, they will be final.

So if you apply that rule literally, then none of our contentions are going to stand; and the agreement of the parties to litigate the TMI issues has been for naught.

I would also suggest that the Staff is not the sole arbitrator of what is a TMI related contention. It may very well be that the Applicants and the Intervenors would see an issue as TMI related, and the Staff won't see it.

There were lots of recommendations out of the various investigations in the Three Mile Island that were not adopted by the Staff, and it could be the position of the Intervenors that some of these should be considered Three Mile Island related.

Having said that, I will go on to Contention 2 if that is the desire of the Board.

MR. THESSIN: You had asked the Staff to address the Douglas Point Decision as well.

I think since it may come up in the future I should really make a brief statement on that point.

I agree with Mr. Farris. I think the Applicant

reads Douglas Point too broadly.

A fair reading of Douglas Point is that the issue that is the subject of rule making would preempt consideration in an individual licensing proceeding if, and I would say only if, the Commission either explicitly or by strong implication says so.

If you remember in Douglas Point, the Licensing Board was faced with a contention that was directly dealt with by a rule which has been published in final form several weeks before and which was about to become final within the next few weeks.

So it was clear that the rule making process had been completed but for the 30 day publication.

I think in a case like that by strong implication the Commission is saying do not consider this issue in an individual licensing proceeding because the rule is about to become effective.

I think it is incumbent upon the Applicant, if he argues that Douglas Point is dispositive on any contention, that he must show how the rule making proceeding either explicitly or by strong implication indicates that the matter is to be treated generically and not also on a case-by-case basis.

I do not believe he has done that with respect to this contention.

It is not specific enough to meet the requirements of 2.714.

Our response to their response is that it is indeed specific. In particular 2(a), which calls for an on-line monitor for continuous sampling. We don't know how you could be much more specific than (a) is.

Now admittedly (b) and (c) are a little broad. Indeed I think that we will withdraw (b) and (c) because we feel that both of those contentions are addressed later, (b) within the ambit of contentions 8 and 9 relating to water level measurement and adequate core cooling. We feel (c) would be within the ambit of environmental qualifications, assuming it withstands the test of specificity and bases.

So we would agree to limit contention 2 to 2(a) only calling for an on-line monitor for coninuous sampling, and we submit that our contention 2 then should be received as a valid contention.

MS. GIBBS: Applicants object to the second proposed contention generally because of the bases and specificity defects that we discussed before.

I think an important point to make here is that we are dealing with a somewhat unique situation in that the Commission has come out with a proposed rule which details numerous requirements that Applicants must meet in order to get a construction permit in the light of Three

Mile Island.

Applicants have prepared a response to that which is contained in PSAR Amendments 17, 18 and 19 in which they specifically address each one of those requirements.

So in order for the Intervenors to state a proper contention I think it is necessary for this Board to impose a certain level of articulateness on them in order to find out exactly what in the Applicants' response the contention wasn't proper.

For example in contention 2 the Intervenors have sort of paraphrased the language of the requirement and said that Applicant has not provided sufficient preliminary design information to show such and such.

Whereas in response to the proposed rule 50.34(e)(2)(xii) and (e)(2)(xix) Applicants go on at great length in explaining exactly how they are going to impliment these post-accident monitoring requirements.

I don't believe that anything that Intervenors have put down in sub-sections (a), (b) or (c) really give the Applicants a clue as to what is wrong with our proposal.

JUDGE WOLFE: I understand Mr. Farris has withdrawn 2(b) and 2(c).

MS. GIBBS: Yes, I think it was especially appropriate for him to withdraw (b) because that deals with justification for alternatives to Reg. Guide 1.97, and

Applicants have proposed no such alternatives; and therefore would have nothing to justify.

MR. FARRIS: Can I withdraw it again?

MS. GIBBS: I can only say again that Applicants rely on our basic objection on specificity in this contention.

MR. THESSIN: If I could begin with a point of inquiry. I understand Mr. Farris has withdrawn contentions 2(b) and 2(c).

I understood some proviso about equipment qualification, and I wasn't sure if I heard correctly.

MR. FARRIS: I simply stated that we felt in preparing for the hearing that those were included within the gambit of others. That is not to say that my withdrawal is conditioned upon those other contentions being admitted. They will stand on their own we hope.

MR. THESSIN: I think I could summarize the Staff position as follows: That we are late in the day in this hearing in the sense that the parties have been involved in the proceeding for several years now.

The parties are on notice as to the kinds of issues that are litigated, how they are litigated and what not. I think we must look at specificity in the light of the position of the parties today and in the light of what the Applicant has provided and judge the specificity of the contentions against the statements already on the record.

I would just offer this thought for the Board's consideration. That in the PSAR Amendment 17, I believe it is pages 140 through 144, the Applicant has indicated how it plans on providing a sampling mechanism for the various halogens and other items that must be sampled under the proposed rule.

In the light of that discussion it does not seem too much to ask for the Intervenors to indicate in what way that response is inadequate with some particularization.

At the moment we have the bald assertion that in spite of these four pages of discussion it is inadequate, and we are left to speculate in what way it is inadequate and what particular part of it is inadequate.

I would submit that on behalf of the Staff that the specificity of this contention is lacking as a result.

Thank you.

JUDGE WOLFE: Anything more?

(No response.)

JUDGE WOLFE: All right.

We will proceed to proposed contention 3.

Mr. Farris.

MR. FARRIS: Our Contention 3 is as follows: "The Applicant has not adequately demonstrated a compliance with 10 CFR 50.34(e)(1)(iii), (v), (viii) and (xi) because

it has not fully resolved deficiencies in its computer models for ECCS and Fuel performance as identified in NUREG-0630."

PSO and the Staff have both objected that it lacked bases and has no relationship with TMI requirements.

Our response is simply that Three Mile Island again indicated that there was a lot of system interaction that was unexpected. There were a lot of lessons learned from Three Mile Island.

With the extent of the core damage still being unknown, as far as we understand it, at Three Mile Island, it seems to us that any deficiency in the core heating models could or would be TMI related.

The Staff has acknowledged deficiences in the models as set forth in NUREG-0630. We fail to see how they could complain of a lack of specificity since we have specifically pointed out to them deficiencies set out in their own publication.

It says that the Applicant has not adequately compensated for those.

It is our understanding that in Shoreham Docket at least the Staff required the Applicant to assume a penalty of 40 to 50 degrees in their ECCS model.

Also it has come to our attention that there have been some Japanese tests on core spray distribution on

the center of the core that further indicate some problems with or deficiencies in the ECCS models.

Again I don't see how they can say lack of bases or no relationship when that seems to be one of the very essences of one of the problems of Three Mile Island; and when they in fact have documented these deficiencies in NUREG-0630 to which we made reference.

MS. GIBBS: Applicants acknowledge that at first blush contention 3 certainly seems more promising than some of the others in terms of bases and specificity in that they do talk about certain computer code deficiencies that are discussed in a document entitled NUREG-0630.

However Applicants have examined NUREG-0630 and after this examination we are no longer convinced this is a legitimate contention.

While it is true that one page of that document talks about certain deficiencies in the computer models which are applicable to a GE plant such as Black Fox, there is not where in proposed contention 3 in which Intervenors discuss how those deficiencies relate to the four sub-parts of the proposed rule which they are talking about.

Those four parts have to do with things such as reactor coolant pump seal damage; separation of RC, IC and HPCS; restart of coarse spray; and LPCI; and alternate depressurization. There isn't any mention of what these possible

defects that are talked about in NUREG-0630 have to do with those four items.

Furthermore if you read page 68 of NUREG-0630 on which these defects are talked about, the implication of the importance of the defect is taken away almost as soon as it is mentioned.

For example, I am quoting from the NUREG document. It says, "Figure 54 exhibits substantial under-prediction of the incidence of ruputure at high stresses (pref-differentials), but the high stress portion of this curve is not relevant since BWR fuel rods are pressurized to a much lesser extent that PWR fuel rods."

I think the tenor of the discussion on that page is the same.

While there may be problems, they really don't appear to be significant.

I think the importance of that is born out by the fact that the NRC Staff has not gone back to the plants which were licensed using these models and asked them to make changes because of these deficiencies which are talked about in 0630.

I think for those reasons this contention really doesn't meet the requirements of 2.714.

JUDGE SHON: If I understand you correctly, Ms. Gibbs, you are saying in effect that if one looks at

the document that appears to be cited as a basis for this contention, NUREG-0630, one finds that BWR's are not really subject to the phenomenon mentioned here or at least not substantially?

MS. GIBBS: The phenomenon discussed don't appear to be important in the BWR context so that a fair reading of the documents doesn't really support the contention.

MR. THESSIN: Members of the Board, I would like to make a more limited argument on why I believe this contention is not specific enough.

I think a fair reading of Allens Creek prohibits us from going behind the citations of the document and finding other passages in that document which may refute the assertions presented by the Intervenors.

My understanding of Allens Creek, the proceeding that took place in that case, is that the Staff did cite to the very document the Intervenor had listed as his basis and indicated that the document on its face refuted that basis.

The Appeal Board specifically rejected that saying that was an analysis on the merits so I think the Staff would not want the Board to rule that this lacked bases because of any argument that NUREG-0630 may refute the allegation.

I think however it is also a standard of valid contentions that if proven to be true they must show some legal significance.

I think it is on that basis that the Intervenors' contention fails in this case.

They have stated that this deficiency in the model indicates that the Applicant has failed to comply with four TMI related requirements.

In other words a recent Appeal Board Decision, and I apologize for not having the citation. It is subsequent to the Rancho Seco Case. It is very recent.

The Appeal Board reiterated that a contention must be legally sufficient if proven to be true and must have some significance for licensing the plant.

It is not at all obvious how the deficiencies in this core cladding model impact upon the four TMI related rules that are cited by the Intervenors as at issue in this proceeding.

The Staff contends that the Intervenors must make some nexus between the assertion that the rules have not been complied with and the facts or the bases provided in support.

They have failed to do that in this case, and for that reason the contention should be rejected.

Thank you.

MR. FARRIS: In our fourth contention we have alleged that the Applicant has not preformed an independent human factors review of the control room design concepts to be utilized at Black Fox.

Both the PSO and the Staff have indicated that our contention should fail for lack of bases and specificity and in PSO's case there is no requirement for an independent review.

While we agree there is no literal requirement that we have discovered or no expressed requirement for an independent human factors review, it is Intervenors' position and contention that it is implicit, obvious and indeed logical that the designer of a complicated configuration such as the control room should not perform his own audit or his own criticism of his own design.

We feel that at the least the Applicant should be required to make some showing he is going to be drawing on the expertise of others in the industry with perhaps more experience in this area.

Certainly if one has reduced his design concept and submitted it for sale, he is not going to be critical of it. He obviously thinks it is good or he wouldn't be offering it as his product.

We submit that an review of the independent human factors of this concept should be required and is

implicit in the requirement as it stands although not an express requirement.

MS. GIBBS: Applicants disagree with the Intervenors' interpretation of sub-section (e)(2)(iii) of the proposed rule which deals with the control room design.

We believe that it is quite clear that proposed rule does not require an independent review from a human factors basis; and more importantly, if one reads Applicants' response to this rule in PSAR Amendment 17, it is clear that the guidance in NUREG-0700 has been utilized throughout the entire development of the control room.

It was used in developing the nuclear control room which Black Fox will utilize. There are other review procedures which are going to be followed which Applicants have committed to which will follow the guidance of NUREG-0700.

Frankly Applicants cannot understand what is wrong withtheir committment. There hasn't been anything really pointed out that shows how their committment is inadequate.

I think it is important to realize that sub-section (e)(2)(iii) does not require that certain things be done before a construction permit is issued.

Rather certain reviews must be completed before the operating license stage.

Applicants have committed to do that. Therefore

there is really no basis for complaining that certain things haven't been done as of today when that are not in fact required.

Therefore we feel that proposed contention 4 lacks bases and should be rejected.

MR. THESSIN: If I understood Mr. Farris correctly, I understood him to say that he would rewrite the contention by eliminating the second clause that begins "nor has it applied the evaluation criteria in NUREG-0700."

If that is his statement, in the light of the basis he has now presented, the Staff would accept the contention.

However I would have to point out that we would have to reevaluate the validity of the contention whenever the proposed rules become final to see if it challenges the rule since it is not clear that the rule requires an independent review, but that would be a question I would be willing to defer until another day.

Since he does not cite the proposed rule of the standard he believes has been violated, this is a different situation than those contentions in which he holds up the proposed rule as the standard by which the Applicant should be judged.

So to reiterate, if limited, as I believe Mr.

Farris meant to limit the contention, and in the light of the stated basis that Mr. Farris has presented this morning, the Staff is willing to accept the contention as so limited, subject to its right later to address the question of whether the new or more limited contention would violate the rules whenever they should become final.

MR. FARRIS: First I would agree that we would be willing to limit contention 4 to strike the last phrase, "nor has it applied the evaluation criteria in NUREG-0700." Nor would I have any objection to the Staff reasserting any objection it may have at a later point once it has the final rule in this regard.

Our next contention, Contention 5, relates to "Plant Shielding". Again we have been met with the objection by the Staff and by the Applicants that our contention lacks bases and specificity.

The Applicants and the Staff point out that the Applicants have committed to comply with the requirement of 10 CFR 50.34(e)(2)(vii), and they say that is enough.

We say that that committment standing alone is not enough. We would refer the Board to 10 CFR 50.34(a)(viii) which says, "A plan and schedule must be provided for the items that need additional research development."

We submit that this is an area where additional research and development is clearly needed as evidenced, if

nothing else, by the Applicants' submission which indicates their four or five different options for ways to achieve the requisite plant shielding.

10 CFR 50.34(a)(viii) says you must have a plan and schedule to show how you are going to meet this problem.

River Bend further says that a naked promise is not sufficient to overcome this type of objection. We simply cannot say we will comply and let that be sufficient. You must indicate how you are going to comply with the regulation and provide a schedule so that this Board can then make an intelligent determination of, yes, those alternatives seem feasible and, yes, that time table within which they propose to comply could be accommodated within the construction.

If they submit a schedule that would be impossible on its face or on close examination to be incorporated into the design, then they haven't met the regulation requirement of 50.34(a)(viii) or indeed the River Bend Decision.

MS. GIBBS: Applicants believe that once again Intervenors are confusing what is to be required at the construction permit stage with what is required at the operating licensing stage.

I think it is clear that sub (e)(2)(vii), which deals with plant shielding tells an Applicant to do certain

things before the operating licensing stage. Those things Applicants have committed to do in PSAR Amendment 17.

Here again Intervenors have not shown any reasons for what is wrong with Applicants' committment.

Further in response to Mr. Farris's assertion that there should have been more details about time schedules for research projects which would be necessary in this plant shielding area, I think he is confusing something that Applicants have put in their response to this requirement.

That is Applicants have identified five different options which were available to them for dealing with any potential problems that are uncovered in the plant shielding area such as: moving the offending radiation source to a less sensitive area, placing shielding around the offending radiation source and three other such options.

Listing options like that does not mean that more research is necessary in order to flush them out. It simply means that these are alternatives available to Applicants to chose from when they get to the point in designing the plant in which it is necessary to impliment this.

I think Intervenors'comments about the research schedule are inappropriate.

Frankly Applicants just do not understand what is wrong with their proposed solution to the plant

shielding requirements and believe that this contention lacks specificity and basis.

MR. THESSIN: If I could ask the Board's indulgence, could I think about Mr. Farris's remarks over the luncheon break and respond after lunch?

JUDGE WOLFE: Yes. We will recess until quarter until 2:00.

(Whereupon, at 12:30 p.m., the hearing in the above-entitled matter recessed for a luncheon break.)

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

2:00 p.m.

JUDGE WOLFE: The hearing will again be in session.

MR. THESSIN: I had asked the Board this morning for additional time to consider Mr. Farris's remarks, and it was in light of his additional elaboration. I was unclear if he was in any way modifying his contention.

On behalf of the Staff I must confess that I am still unclear whether he is in any way changing the wording of that contention.

It may be helpful if he is changing the wording for him to so state so that I could address the new wording rather than what is now before us.

JUDGE WOLFE: This is as to plant shielding?

MR. THESSIN: Yes.

JUDGE WOLFE: Mr. Farris.

MR. FARRIS: No, I didn't indicate any changes in the wording of the contention at all.

JUDGE SHON: I thought you were withdrawing the last part after the comma. I am sorry. That was the control room contention.

MR. FARRIS: Yes, I didn't make any changes to contention 5. I simply explained the rational, the basis, if you will.

MR. THESSIN: In light of that I would reiterate the arguments I have presented in the brief on behalf of the Staff.

The Intervenors propose to us a standard by which the Applicants' submittal and his behavior should be judged, and that is the proposed Rule 50.34(e)(2)(vii).

First that rule requires that certain actions be completed by the operating license stage.

While the Intervenors assert in their contention that the reviews must be completed today, the Staff believes that the Intervenors have failed to indicate how and why this higher standard should be imposed upon the Applicants.

For the reason the contention lacks bases.

With respect to Mr. Farris's assertion that the Applicants have done no more than make a bald promise that he will comply with this regulation, I would also disagree.

That statement flies in the face of the Applicants' detailed discussion of the schedule for such a review, his indication that the review is now on-going and will be completed within six months, and his additional information contained on pages 104 and following.

In the light of Applicants' submittal I believe it is incumbent upon the Intervenors to be more specific as to the way in which the review process is inadequate.

Finally, I think when the Applicant has come forward with various options that will be used, the Intervenors must do more than assert that those options have not been shown to be feasible.

The Intervenors must assert in what way and give some indication which of the options he believes are not feasible or challenge the state of the art.

JUDGE WOLFE: What is your understanding of the Appeal Board's decision in the Allens Creek case, Mr. Thessin; and wherein is that decision applicable here?

MR. THESSIN: I think there are two aspects to the Appeal Board's decision in Allens Creek that are of relevance here.

First it is clear to me from Allens Creek that when we are considering contentions we cannot go to the merits of those contentions. That is why --

JUDGE PURDOM: That goes back to Grand Gulf, right?

MR. THESSIN: Grand Gulf and Allens Creek in the sense that if you can refute the assertion with some information, even if contained in the same document cited by the Intervenor, it is not allowed as I read Allens Creek for that material to be considered.

The second point of Allens Creek is that a bald assertion must be modified by a reason, and that reason must

be stated with some specificity so that we know what the position is that must be addressed.

If we read the Allens Creek case carefully, it is clear that the Appeal Board is not rejecting the guidance they set forth in the Peach Bottom Decision where they indicated that you must be specific enough to put the parties on notice as to what they must address.

My argument is when the Intervenor proposes a standard by which the Applicant is to be judged and then deviates from that standard -- in this case requiring more at the CP stage of review than the standard he asserts has been violated would impose -- he has some obligation to indicate the bases for that assertion.

Otherwise the Applicant and the Staff has no indication of what must be addressed.

If it is asserted that the proposed rule is violated for a reason that is at odds with the proposed rule, I would be at a loss to figure out what type of testimony to present.

It seems to me it is a straight legal argument that the standard the Intervenor proposes is at odds internally inconsistent; and, therefore, as a matter of law, the contention should be rejected.

JUDGE WOLFE: With regard to your statement that the bases certainly must be furnished where the

Intervenor states that the Applicant must demonstrate greater compliance at the CP stage than the regulations require, is or is that not objectionable as a challenge to the regulation?

Or are you saying the regulation doesn't say that on its face and that this has been interpreted by the Staff to mean that these greater actions or steps or designs have to be developed at possibly a later date?

MR. THESSIN: Let me address your second question first.

Let us assume that the proposed rule is the standard as the Intervenor has asserted that we should judge the Applicants' behavior by in this case.

The proposed rule says that the Applicant must provide sufficient information to demonstrate the required actions will be satisfactorily completed by the operating license stage.

The Intervenor asserts that standard has been violated, and he asserts that it has been violated because the Applicant has failed to perform the review right now.

As I read the proposed rule, and as I read the assertion, the statements are at direct odds with each other.

My argument is that when the Intervenor asserts a contradictory set of principles by which the Applicant's behavior has to be judged, he has failed to specify the issue

that should be litigated; and the contention should fail as a result.

Now let me address your first question of whether this is a challenge to the rule or not.

We are in a somewhat peculiar posture. I think it is fair to characterize our use of the proposed rule in this instance.

The Commission in June or July of 1981 indicated to the Staff that it should use the proposed guidance or the guidance that was found in NUREG-0718, Revision 1, dealing with requirements for construction permit applicants that arise out of the Three Mile Island incident and should use the proposed rule in the process of evaluating the adequacy of the applications.

In the light of that Commission statement the Staff has gone forward and has reviewed the applications with respect to the rule and with respect to the Staff guidance.

I think that if the Staff on its own had begun to impose upon an Applicant a standard that went beyond the rule now in effect with out the Commission having told the Staff to do that, I think the Staff would be in a position of having to address whether it should go to the Commission under 2.758 to ask for a modification of the rule.

Similarly if the Intervenor or some other party

had come in and said that a requirement beyond the existing regulatory framework should be imposed on each utility, that assertion also should go to the Commission under 2.758.

I think we are agreed on the principle, and I think in view of the Commission's guidance to the Staff, the Commission has told the Staff and implicitly told the licensing Boards that -- let me take it one step at a time.

The Commission has told the Staff that it can impose the guidance at this point without having to first come to the Commission under 2.758.

It is the agreement of the parties in view of the eminence that appears to be the case,the eminence of a final rule on this matter,that we would proceed as if the rule would be the guidance by which this Applicant should be judged.

We have also indicated that if that assumption that the rule is about to be imposed is in fact incorrect, if later facts indicate that we are wrong on this, that we would come back and then have to reevaluate all the contentions in the light of whether or not they are implicitly lax on the current set of regulations imposed by the Commission.

I am not sure if that is responsive to your question.

JUDGE SHON: In effect your position on this is of the nature of a demur. You are saying they say the

Applicant has failed to perform these reviews, and you answer is, yes, but so what? That is what the proposed rule requires. They don't have to perform them at this stage.

MR. THESSIN: I think it is slightly different than that. Let me see if I can explain why.

It is the Intervenor which has chosen to judge the Applicant's action by the proposed rule. In that light the Intervenor must be held to a standard of consistency. I think that fair play requires no less.

If you will recall when we talked about the human factors review with respect to the control room design, the Staff indicated that it was prepared to accept the contention with the additional bases provided as modified.

Even though it was concerned that that contention, should the proposed rule become final, would be a challenge to that rule. The difference there was that the Staff, since the Intervenor had not asserted that the proposed rule was the standard, could not in good faith argue that this was a challenged to that proposed rule which hasn't come into effect yet.

So that would be the distinction between what we did there where the Intervenor had not asserted himself that the proposed rule should be the standard, and here where the Intervenor has asserted judge the Applicant by the proposed rule.

JUDGE SHON: Mr. Farris, I would like to hear you say a word or two about the Staff's position.

MR. FARRIS: That is what I intended to do.

JUDGE SHON: Thank you.

MR. FARRIS: I thought I made it clear in my response initially that what we were challenging here is not the level of review that must be done but the level of review that had been accomplished.

That is why we pointed out 10 CFR 50.34(a)(viii) and the River Bend Decision to say that the naked assertion that they will comply is not sufficient at this point.

We said that there was no plan in the schedule for this review to be accomplished.

Now I thought when the Staff started out they were going to respond to that because Mr. Thessin said that PSO had indicated it was going to complet this review within six months.

But in fact what PSO said was they were going to complete it in six months after the issuance of the construction permit; and then, seemingly contradictory, they say the review process is underway.

That says to me that it is underway, but they are not doing anything about it because it is not scheduled for completion until six months after some indeterminate point in the future.

That is exactly our criticism here; that they haven't complied. There is no assurance here that they are going to comply because who knows what level of review they have conducted at this point in so far as plant shielding is concerned.

If it is underway, then it should be completed at some indeterminate point. Under River Bend they should tell us what that point it.

Six months after the issuance of a construction permit tells me that they are not doing anything about it and they don't intend to do anything about it until after they get their construction permit.

That is our criticism. Not with the level of review that the law requires be done at this point, but that they haven't done any level.

Again I spoke about the Allens Creek Case earlier with respect to the motion to reopen. Again the Allens Creek case says that the contention -- it is enough that the contention be identified with reasonable specificity.

That to me is a standard. That is the lastest ALA or Appeal Board word on the subject as far as we know. Reasonable specificity I guess is a matter of degree.

I think especially Judge Wolfe would take notice that the trend clearly is to allow liberal pleadings and let discover and motions for summary disposition dispose of those

on the merits rather than at the pleadings stage.

We submit that standard should be applied and not into the merits of each one of these contentions as we are today.

Now unless there are any questions, I would like to move on to contention 6.

(No response.)

MR. FARRIS: Our contention 6 relates to the "Degraded Core-Reliability Analysis." With the explanation that we now have from the Applicant we would agree that the first complaint we make in contention 6 has been cleared up.

Our concern there was that the so-called "applicable accidents"of WASH-1400 was vague and PSO didn't necessarily in its PSAR indicate that those accidents and transients would be taken into account.

Now in their response after the words "applicable accidents " on page 24, they put in brackets "meaning BWR accidents".

If this is indeed what the Applicants mean, in other words if they will make this analysis against the background of all BWR accidents that are postulated in WASH-1400, then we have no problem.

It was just that it was not clear that was what they meant by the phrase "applicable accidents" to this point.

The rest of contention 6, however, we believe does state a valid contention.

JUDGE WOLFE: Let's see what you are striking.

MR. FARRIS: I will give you the exact language.

We would strike the phrase "they have failed to include accidents more severe than those listed in PSAR Chapter 15."

JUDGE SHON: You probably want to take the word "because" also.

MR. FARRIS: Yeah, we did repeat "because" later. That is correct.

But the second and third complaints -- the first regarding the extended Liquid Pathway Study. It is our feeling that the PRA, the Probability Risk Assessment Study, indicated that the liquid pathway release was significant. We think this could very likely affect the design decisions on hardware.

If it did turn out the the Extended Liquid Pathway Study did show significant risks and consequences, then it would seem logical that different hardware might be employed in the containment area.

Now as to the third portion the Staff has agreed that this is a valid contention, and we would hope that would be sufficient.

That is that the Applicant has not established

acceptance criteria for judging the acceptability of the results of the probability or the degraded core-reliability analysis so we would submit that the second and third portions of the contention are specific and should be admitted as contentions.

MS. GIBBS: If I may just respond preliminarily to two comments Mr. Farris made with regard to contention 5.

Applicants don't believe that we are trying to get into the merits of these contentions; that we are just trying to make sure that they are as specific as possible so that the Applicant and the Staff may prepare for a hearing and know how to write testimony and generally know what the Intervenors are driving at.

So I don't think it is a fair criticism that we are trying to decide the merits of the contentions today.

JUDGE WOLFE: Can't that be found out on discovery, Ms. Gibbs?

MS. GIBBS: While it is true you could get a better idea of what they mean in the discovery process, I don't think that is the way the NRC's rules of practice were meant to operate.

I think the decisions make clear that the decisions make clear that at the contention phase what the issue is, and that you shouldn't just be able to specify a general area such as equipment qualification and then try to

find out a few months down the road what they actually mean by that.

My second comment has to do with the fact that a certain date in the PSAR amendment was listed as being six months from the construction permit issuance.

I think if you read the PSAR Amendment you understand that because this application has been more or less in limbo since the TMI accident the Applicants have made the decision to reduce staffing on the project until the time of construction permit issuance and then go forward and that is why dates are mentioned in that manner in the document.

As for contention No. 6 only the second two parts remain since the Intervenors have withdrawn (a).

I don't believe that the Intervenors have given a proper reason for why the liquid pathway study is important. I think if the section on the proposed rule 50(e)(1)(i) is looked at and the discussions of what was mean to be accomplished in the PRA, it is clear that it is not going toward accident consequences.

What we are looking at is how to improve reliability of certain parts of the reactor system.

I don't think that just mentioning as they do, because they have not included an extended liquid pathway study including the effects of the under clay layer on the

liquid pathway, I don't think just saying that gives a specific enough basis as to why applicant should be required to look at that.

I think the same is true of the last part of the contention which criticizes the lack of acceptance criteria at this point.

I think the Applicants reponse in the PSAR makes clear that the establishment of acceptance criteria is forseen down the road, and I think that there is no requirement that they be set out today.

I don't think that Intervenors have made a case for why they are needed today.

Therefore we don't think that contention 6 is acceptable.

JUDGE WOLFE: Mr. Thessin.

MR. THESSIN: Members of the Board, the Staff originally had accepted the third clause of this contention on the grounds that it did state an adequate basis with specificity.

It is the Staff's position that we can now accept also the second part of that contention in the light of Mr. Farris's additional elaboration as to how the liquid pathway study would be of relevance to this analysis.

As the Staff has indicated in its original response to the Intervenors' contention, Intervenor had

provided insufficient bases for support -- excuse me a second. That the intervenors had failed to show how the performance of a liquid pathways study would lead to significant and practicably improvements in core and containment heat removal systems.

As I understand the intervenors' statement of bases he is now asserting that the consequence analysis found in the liquid pathways study would be of guidance in determining which improvement should be made to the core heat removal system.

In the light of that bases I think under the Allens Creek rule it is a valid contention.

JUDGE WOLFE: If I understand Mr. Farris, there are three parts. There are three sub-parts or items or issues within this contention.

You accept, Mr. Thessin, the second and third allegations or issues?

MR. THESSIN: Yes, that is correct.

Having stricken the clause dealing with "more severe accdidents than found under Chapter 15 analysis", we believe that the contention has now -- Mr. Farris has now supplied the nexus of how a liquid pathway study would be relevant to the PRA.

And whether to do agree or do not agree with the merits of that assertion, I think the Allens Creek Decision indicates that the contention is n w valid.

JUDGE WOLFE: Now as to the first phrase your position on that is what?

MR. THESSIN: It is the same.

Are you referring to the "accidents more severe that PSAR Chapter 15"?

It is my understanding that is no longer part of the contention.

JUDGE WOLFE: I wasn't reading that correctly.

JUDGE SHON: It is an introductory phrase.

It is my understanding that independent clause governs the three sub-statements, one of which Mr. Farris has withdrawn and the other two of which each starting with "because" you accept?

MR. THESSIN: Yes, I read the introductory independent clause to be limited by the because clause.

In that sense the contention is valid.

MR. FARRIS: Our contention 7 relates to the "Safety/Relief Valve Testing" and both Applicant and Staff have opposed this contention.

In particular the Applicant has said that the generic test of the valves will include the specific valves that will be purchased for Black Fox; that is they are going

to be included in those tests.

However our contention doesn't relate specifically or only to valves. It says, "To the plant-specific valve and piping design of Black Fox."

It is our position that the valves tested in a different piping configuration may not be valid tests -- those generic tests may not be valid to Black Fox Station.

They haven't indicated how they are going to verify that the generic tests are going to be applicable to Black Fox Station.

Further they haven't indicated that there is any plan or schedule for the ATWS testing.

Now admittedly the regulation provides that "actual testing under ATWS conditions need not be carried out until subsequent phases of the test program are developed."

Our problem is not with the per se. But that while the actual testing doesn't have to be done until later, the plan or description of how ATWS testing will be done should be required.

That is what we are saying. How are you going to test these valves over ATWS conditions when they are tested. We need to know that now.

If you don't know now, it could be later that there will not be an adequate way or that the way you chose will be inappropriate in some fashion.

Without some indication in the PSAR we simply can't judge that.

The Staff on the other hand has merely stated that the Applicant has stated it will "document the applicability of the results of generic tests to Black Fox Station."

Again we would hark back to 50.34(a)(viii) and the River Bend Decision. The Staff appears here to rely on the Applicants' naked promise that it will do so without any indication of how it will do so and how they are going to take generic tests and make them applicable to Black Fox Station.

MS. GIBBS: Applicants believe the proposed contention 7 is inadmissable because it lacks bases. I believe that the response in the PSAR to this section of the propose rule, which is (e)(2)(x), makes clear that the valves that would be purchased for Black Fox will be tested.

As far as Mr. Farris's comments of piping. It wasn't shown that piping would be shown to be applicable to Black Fox. I don't think that proposed rule requires testing of piping but tests of valves.

I don't think he has given any bases in this contention for why the Applicant should be required to go beyond what is in the proposed rule and make some sort of piping tests.

I think the same is true of ATWS. The rule

does not require testing under ATWS conditions. I don't believe that the Intervenors have shown why applicant should be required to do that.

MR. THESSIN: The Staff is forced to return to the arguments it presented in its brief. In the light of the fact that I believe the Intervenor has been stating some modifications again to this contention; and yet I am unclear as to what they are since he did not say that he would change the second clause for example or whatever.

As now stated as stated in the contention as filed before this Board, I think it suffers from two defects. The Intervenor contends that the Applicant has not committed to show the applicability of the generic tests, and that the PSAR seems to indicate that the Applicant has committed to show the applicability.

I thought I heard the Intervenor saying that he was now alleging the Applicant need show how those tests would be made applicable.

I think for the purpose of a reasoned discussion it may be advantageous to ask the Intervenor if the contention is being rewritten or if we are to address the contention as it was filed before the Board.

Since I think there is some ambiguity with what he said this morning or this afternoon and what he filed in his papers.

MR. FARRIS: Perhaps the word "adequately" should be inserted in there. "That the applicant has failed to comply because it has not adequately . . ."

I think that is implicitly in there because obviously they made the naked assertion that they did commit to do thus and so.

To that extent, yes, we would want to insert that word in there.

I thought that was the purpose of this hearing was to elaborate a little bit and to clear up ambiguities like that that may be causing problems.

MR. THESSIN: I have no objection to the Intervenor elaborating and clarifying when in the light of our criticism believes that his contention is overbroad or whatever.

I am at a loss though when that is not done expressly in the contention to know exactly what it is that I am to address in response.

That was the only point I was trying to make.

I must -- it is the Staff's position that even with the addition of the word "adequately" we are still left without a standard by which to judge whether or not the applicant has complied with what the Intervenor believes the standard to be.

I think Mr. Farris is right that adequately is

always within the context of the rule. You have to adaquately comply with the rule.

It is unclear to me though what that means in the light of the Applicants' committment to show the applicability of generic tests, in the light of the fact that this rule requires that the applicability be shown sometime before the operating license stage, and in the light of the fact that at the operating license stage an Intervenor is free to raise the question of whether that applicability has been shown.

At this point the Applicant by the standard suggested by the Intervenor for judging his performance must only show that it will be done by the operating license stage.

I fail to see how the insertion of the word "adequately" in any way tells us how the Applicants' response is deficient.

JUDGE SHON: Mr. Thessin, Mr. Farris has stated with regard to several of these contentions and to several of the Applicants' committments that a bald assertion that I commit to doing this or to achieving this goal is in his mind insufficient.

Is that sufficient in your way of thinking?

MR. THESSIN: Let's look at what the Applicant has actually done in this particular instance since I think it is easier to address in the specific rather than in the

more abstract.

If we look at the PSAR, I believe the discussion is in the area of pages 120 and 121 of Amendment 17.

The Applicant in the PSAR indicates that the valves he intends to use and the valves it may use were included in the BWR owner's group testing.

What those test were is described in some detail. The kinds of load factors that were involved, the water temperatures, etcetera.

It seems that in the light of this discussion the Intervenor must do more than say that is inadequate. The Applicant has shown how his specific valves were tested. He has committed to show to the extent necessary that the generic tests are applicable to Black Fox, and I think the rule on contentions, which is for the purpose of telling the parties what they must litigate, requires him to be more specific.

I think the Applicant has made more than a bald promise to show it. He has indicated the parameters within which the valves were tested and how he would go about showing that. He has committed to show it.

I think more is required in the light of that for a specific contention that passes muster under 2.714.

JUDGE SHON: What have you to say to the Intervenors' allegation that such testing as this cannot

really be generic but must be carried out by including the specific piping in the plant?

MR. THESSIN: My understanding as I speak on behalf of the Staff is that when some contention is advanced which turns on a principle that you must test it within the specific configuration of the plant at issue, then that should be the contention not some broad based statement with a very particular statement of bases.

If that is the Intervenors' interest, then let's rewrite the contention and analyze the rewritten contention.

That is why I asked earlier if you were rewriting the contention.

I think we must be careful. A contention must have a basis, and the basis must speak to the contention. If it only speaks to part of the contention, the contention should be so modified.

I would offer for your consideration whether the bases he has to support it here or stated here if deemed to be adequate would not justify a narrowing of this contention to a statement that he has failed to show the applicability of the generic tests because he has failed to show x, y and z.

Is that responsive to your question?

JUDGE SHON: I think so. I guess what I am

bothered by was the contention alleges, for example, "The Applicant has not committed to demonstrate the applicability of the generic valve tests described in the PSAR."

Then to pick a phrase at random on page 120 it says, "The tests set out, including the valve discharge, piping and supports was arranged to represent a typical BWR plant."

In a sense what he has alleged is that this plant isn't necessarily typical so maybe that is not good enough.

Is this not in some measure an admissable contention? That if you set it up for a typical plant, that is not good enough to measure the safety devises for this plant.

MR. THESSIN: I think we are talking about two different items here, and I want to make sure we are clear. If we are judging the adequacy of the present contention as presented to the Board on the papers, that is not the contention which you have just stated.

Your contention is much more narrow; that the applicability has not been indicated because the generic plant is not typical of Black Fox Station because of the difference in piping loads etcetera.

If the contention were narrowed, it would be much closer to being a contention which must be accepted under

Allens Creek.

The problem the Staff has is the bald statement is made that the Applicant has not committed and at the end of page 121 the Applicant says he commits.

On its face the contention lacks basis. There is not attempt to justify the statement that the Applicant is not committed. Instead what has happened is that we are justifying some different allegation.

I think that different allegation is a much more acceptable contention and I believe would pass muster under Allens Creek, but I think it would hinge on the precise wording so I am reluctant to say generally that it would be a valid contention.

I think it would be incumbent upon the Intervenor to rewrite the contention and then we could look at that rewritten contention in the light of the discussion.

MR. FARRIS: Our contention No. 8 relates to the "Detection of Inadequate Core Cooling." Both the applicant and the Staff have objected to this contention.

The Applicant says that our contention merely parrots the language of NUREG-0718 and therefore lacks basis.

We say that parroting the language gives it basis because that is exactly our contention. The applicant must demonstrate that their design concept is technically feasible.

The applicants have merely stated what their design concept is without elaboration in our opinion. Further the applicants have said that they plan no additional instrumentation at this point to monitor and inadequate core cooling. And I refer you to the PSAR, page 146, where they said that.

They did say that if the additional instrumentation is required they would do it and various other things, but they don't state why they feel that their present design concept is going to be adequate to detect inadequate core cooling.

The Staff has merely indicated that the contention should be rejected because it lacks basis.

They say that the applicants have provided design information. We simply say that design information is inadequate and we refer you again to the specific language of our contention which does indeed follow right along with NUREG-0718.

There is simply no demonstration by the applicant that their present design concept is going to provide the level of protection we feel that the NUREG requires.

MS. GIBBS: I think that proposed contention 8 presents perhaps the clearest picture of the differences between applicants and intervenors on really what is required

of a contention.

Intervenors have said that because they have quoted the language of proposed rule that deals with detection of inadequate core cooling and said that applicants don't meet that, that by itself is a proper contention.

I would reject that completely. Applicants have put four or five pages in the PSAR Amendment about this subject, detailing how they intend to meet the requirements of this sub-section.

I don't think it is adequate for the intervenors to just come back and say that is not good enough without giving any specifics as to what exactly is wrong.

Furthermore applicants have committed to meeting Reg. Guide 1.97 Rev. 2 which requires in-core thermocouples. I believe that applicants' committment has gone certainly as far as the proposed rule would require.

I don't understand what more could be required of us.

In view of all the details given by applicants I don't think that intervenors' contention passes muster under the requirements of 2.714.

MR. THESSIN: I think it would be helpful if we examined the statement in NUREG-0718, Revision 1, which is the negative of the intervenors' assertion.

The intervenors' contention parallels the statement of what is required under NUREG-0718, Revision 1. particularly with respect to the design concept being technically feasible.

I would make two points with reference to a contention which merely states the negative of the rule and indicates that the applicant has failed to comply.

In the light of the information presented by the applicant on the kinds of water level indicators that will be used and in light of the applicants' committment to be bound by the guidance in Reg. Guide 1.97 with respect to thermocouples. I think more is required to show in what way his design is inadequate and fails to meet the requirements of the rule.

In addition I think more is required than a simple assertion that the design is not technically feasible because if we look at the statement in NUREG-0718 closely it is preceded by the sentence "When new designs are offered, the applicant must show the applicability and the feasibility of the new design."

I think that is a fair reading of what the guidance requires. Not that everytime the applicant indicates how he is going to do something he has to also indicate a feasibility. Only when the design is asserted to be new, and the intervenor has not asserted in any way that these

designs, the thermocouples or any of the other detailed information indicated by the applicant in its PSAR is new design.

For that reason the contention is not specific enough to pass muster under 2.714.

MR. FARRIS: I would agree that just to state the negative of a rule in most cases would be overbroad; but if the rule is specific and narrow enough, then just to state the negative of the rule can be specific.

In this case the requirement of the inclusion of in-core thermocouples for BWR -- now PSO does have a statement in the PSAR that it will provide in-core thermocouples, but it doesn't really say that.

It says, "Nevertheless, due to the Staff's insistent, we will provide in-core thermocouples but only is the LaSalle docket indicates that they are going to be necessary."

That is one of our criticisms. They are not obsolutely committing to doing that. They are hedging all that they can in so far as provigin in-core thermocouples.

As we read the rule in question in-core thermocouples are a requirement for BWR's at this point.

JUDGE SHON: So really your only concern in this contention is that the applicant has used words like "nevertheless, due to insistance of the NRC Staff, PSO will

comply with the requirement for in-core thermocouples with the recogniztion and understanding that the requirement is being reconsidered with the LaSalle Station . . ."

You feel that is just too hedged a statement?

MR. FARRIS: Yes, we feel that what PSO is saying there is and prior to that and after that is that we feel our design is satisfactory as is, and we say that it is not because the requirements specifically require in-core thermocouples.

Either say you are going to put them in or not. If the rule changes, then they don't have to put them in.

PSO should say we will install in-core thermocouples.

JUDGE SHON: This scarcely seems to be a proper subject for fact finding litigation or for the presentation of witnesses at a hearing of the sort that we normally hold.

It is a question of how strong their committment is and might be a proper condition on a construction permit or something, but it doesn't seem something that the normal hearing process could grab hold of.

MR. FARRIS: Well, it would, Mr. Shon, in this respect that if they insist that their present design concept is adequate as is without in-core thermocouples, then I think that position would be a subject of litigation.

If they include the in-core thermocouples, then the rule has been satisfied and we have no reason to complain.

What we are worried about is they are not doing that, and we are complaining that their present design concept without in-core thermocouples is not technically feasible nor is it adequate.

Let me see if I can restate that. I am not saying that I want to litigate about a yes or no. We want a yes or not out of them.

What they appear to be saying in my mind is, no, but. They are saying no because they feel like they have already complied with the rule.

We say that is not adequate. That is the basis of our contention, and we would like the opportunity to demonstrate why it is not adequate without in-core thermocouples.

JUDGE SHON: It just seems to me that this might be a better subject for a rule making hearing concerned with exactly how that rule should be written.

If the rule comes out ultimately requiring in-core thermocouples, then there is no question about it. They will put in in-core thermocouples.

JUDGE WOLFE: You agree with that, don't you, Mr. Farris?

MR. FARRIS: I hope they do.

JUDGE WOLFE: I thought that your position was that there was some condition in there. I don't see the condition at all. As I see it and from what you tell me, applicant has committed to in-core thermocouples if the proposed rule is indeed a final rule.

MR. FARRIS: I have a problem because the rule is clear now that they are required. They are saying if on this particular docket they are not required, then we are -- then they don't require it for us.

I don't see any exceptions to the rule, but PSO seems to be carving out an exception for themselves somehow because they have a design concept they say is adequate without this.

That is what we have a problem with.

JUDGE WOLFE: Maybe we can have Ms. Gibbs clarify as to what this LaSalle matter has to do with all this. I thought it involved about whether or not the rule required it. I don't understand the condition involving the LaSalle installation.

MS. GIBBS: As I understand it, if the Staff determines that in-core thermocouples are not required in LaSalle, that would be the rule. That would then be adopted as a rule. Then they would not be required at Black Fox or at indeed any other plant.

All PSO is saying is that we will abide by the rule. If it requires in-core thermocouples, fine, we will do it; if it doesn't, then we won't.

There really isn't anything mysterious about our committment.

MR. GALLO: Could we have a moment?

JUDGE WOLFE: Yes.

MR. FARRIS: Apparently there is something mysterious if they can't agree.

MS. GIBBS: Just to restate this for the final time. If it is determined that in-core thermocouples are not required out of La Salle, they will not be put in Black Fox unless, when the rule finally comes out, the rule then requires in-core thermocouples in which case of course we will abide by the rule.

We also intend to abide by the final outcome of the rule.

JUDGE SHON: Mr. Thessin, is the Staff seriously contemplating shaping its rule entirely on its decision in the LaSalle Case or its position in the LaSalle case as it seems?

MR. THESSIN: Let me see if I can articulate it in this fashion. As I understand the applicants' committment they will abide by the rule.

As I understand Mr. Farris's contention is that

if the rule does not require in-core thermocouples or if the applicants independently decided not to provide such in-core thermocouples, then the design is defective.

The Staff believes that contention or that argument is premature. The applicant has committed right now and whatever the LaSalle docket and however that may or may not interact with the rule making -- I am not today prepared to indicate how that might be relevant to the rule making or not.

In any event when the time comes that the applicants' committment changes I think the Staff would maintain that would be the kind of new information which would allow Mr. Farris to amend his petition and assert a new contention.

JUDGE SHON: That might, however, happen long after a construction permit was written were one to be granted in this case, might it not?

MR. THESSIN: That is conceivable.

JUDGE SHON: Then his only recourse would be through 2.206 or some such regulation to attempt to ask the construction permit be suspended or modified.

That would require him to enter another litigation of a different kind.

MR. THESSIN: The rule we have assumed will come out very shortly. If the rule does not come out very

shortly before the time when the applicant is given a construction permit, we are going to have to analyze how we will deal with the Three Mile Island issues.

We will not be able to in that context continue assuming that the proposed rule is about to become final. In that case Mr. Farris will have an option of either pursuing his remedy under 2.758 asserting that the present Commission rules absent the proposed TMI requirements are inadequate because they do not require in-core thermocouples or asserting in some fashion that the TMI requirements should require them.

I think we are talking about an opportunity well before a construction permit is issued for Mr. Farris to amend his petition because under any scenario there will be new information that will cause us to reevaluate the proposed rule or the applicants' committment.

JUDGE SHON: What about the alternative of simply entering the rule making process and requiring and asking that the Commission require in-core thermocouples everywhere? That would seem a very good point to pry on -- to push into with your experts and their expertise, would it not, rather than in an individual case where the applicant has agreed to comply with this?

MR. FARRIS: We don't agree that he has agreed to comply necessarily. Certainly that avenue is open to us.

We also have the avenue in the context of this hearing. We have a date set by which we can challenge the rules themselves pursuant to 2.758 if the rule comes out by that time and does not include the requirement for in-core thermocouples.

We have been treating the rules for purposes of framing out contentions at this point as though they are carved in concrete, and that is what we are going by right now.

Assuming that to be the case that this will be the final rule, our position is simply that it is not clear to us that the applicant has firmly committed to comply with that rule which appears to require in-core thermocouples.

If they went to modify the language in their PSAR to say we will complay with the requirement to install in-core thermocouples, if that is the final form of the rule, without any hedging about the LaSalle docket or any other thing that I don't have any control over, that is different.

I judt think that the language is too ambiguous now that we can safely say that, and we can walk away from this contention.

MR. GALLO: Judge Wolfe, could I take a crack at perhaps causing Mr. Farris to withdraw this issue.

In the preparation of the language which is

the subject of discussion here, the applicants essentially were trying to pursue two paths.

The proposed rule does require unequivacally in-core thermocouples, but right now that proposed rule is nothing more than a Staff position. If the rule becomes final and is issued by the Commissioners --it has been pending for two years -- if it is issued and becomes final, then that proposed rule will become the final rule and we will be bound by the rule and we will have to put in in-core thermocouples unless we want to challenge the rule.

JUDGE WOLFE: Why didn't you just so state in the PSAR?

MR. GALLO: Because recognizing that the near term construction permit rule has been pending for two years, and that that commission has been unable to get a majority on the rule one way or the other, it may be that we will never get a rule.

Then we will have to be licensed under the Staff position, and the Staff has modified its position from that set forth in the proposed rule.

In the Allens Creek Docket, in the Boston Edison Pilgrim Docket and every other near-term construction permit docket they have been willing to accept the proposition that whether or not we put in in-core thermocouples or any other near term construction permit, applicant will put in in-core

thermocouples and will turn on a reconsideration of that question between the Staff and the Applicant or the licensee I should say in the LaSalle Docket.

If it turns out that during that reconsideration that the staff agrees with that licensee that in-core thermocouples are unnecessary, then we don't have to do it. But that is simply a Staff position.

If it turns out on the other hand that the Staff insists that they be inserted in LaSalle, then we will have to do it.

That is all that qualification means. That whole business is negated if the rule is issued. We are then in the position of having to challenge the rule ourselves if we want to avoid inserting in-core thermocouples at Black Fox.

MR. FARRIS: Could I ask if that means that if the rules are changed -- you don't mean by this that they are going to ask for an exception to the rule?

MR. GALLO: As far as I know, the Commission is not considering changes in proposed rules on this issue at all.

Secondly, if the rule requires in-core thermocouples, we have until a certain amount of time after the SER is issued to decide whether we want to challenge any aspect of the rule.

That would be one for us to consider, yes.

You would be put on full notice by our submission under 2.75(a)at that time in this proceeding.

MR. FARRIS: I appreciate what they have said.

If what Mr. Gallo has said is what I think he has said, that would be acceptable; but because I am not sure of what he said, we would not withdraw our contention and let the Board do with it what they will.

MR. THESSIN: If I could make one statement on that matter. I would just point out that the entire discussion we have had as to whether in-core thermocouples would be required at Black Fox is not the same thing as stated in this contention.

If we accept it as so discussed, I believe it requires that the contention first be rewritten.

JUDGE SHON: It certainly seems broader, particularly the last sentence seems to broaden it far beyond in-core thermocouples.

MR. FARRIS: The last sentence can be deleted. In both 8 and 9 the last sentence is merely a restatement of the more specific idea so I don't have any objection to striking the last sentence of contention 8 without withdrawing the whole contention.

Moving on to Contention 9. I would make the same statement with regard to con ention 9 that both the

applicant and the Staff have accepted the first statement in contention 9 or the first sentence. Both have problems with the second sentence, and we would agree it is mere excess verbage.

I don't think there is any controversy if I do delete the second sentence in contention 9 and move on to contention 10 unless Ms. Gibbs wants to argue again about my withdrawing.

MS. GIBBS: I will accept your gracious offer.

MR. FARRIS: Our contention 10 relates to our proposal that the applicant be required to document deviations from "regulatory practices".

The applicant or the Staff has indicated that -- has tried to interpret this as meaning documentation of standard review plans, and we didn't need to so narrowly limit it. That is why we used the term "practices".

Indeed I think our contention elaborated to some extent on that.

We understand also, and the PSO has challenged this contention on the basis that it is the subject of rule making.

I recognize that the word "not" was left of their quote on page 23 where they stated that the Appeal Board stated that "licensing boards should accept". I think they mean to say "should not accept", but we have already

discussed that particular point at length earlier.

There mere fact that it may be the subject of rule making is not necessarily fatal to the contention.

The proposed rule indeed indicates the concern and reason for the concern by the Intervenors about the requirement to document deviations from the regulatory guides.

It seems to us fundamental that the time to document such deviations would be now and not after the construction has been substantially completed.

It would do very little good to know after the fact where the deviations have occurred. It seems to us that any proposed deviations should be indicated now so that all the parties would be able to look at those deviations and make an intelligent assessment.

In July 14, 1981, there was a letter from Mr. Eisenhut to all the construction permit applicants whereby they were advised that the proposed rule for documentation of deviations was the only reason that this rule was not considered a part of the "Three Mile Island related requirements."

For that reason the Staff -- not for that reason but in spite of that statement by Mr. Eisenhut the Staff has said that this is not a Three Mile Island related requirement.

We say that it is. Again the Staff is not the

sole arbitrator of what is Three Mile Island related.

Indeed four groups investigated Three Mile Island: the Kemeny Group, the Rogovin Special Inquiry Group, the Bingham Amendment and the NRC Commission itself, who all recommended that documentation of deviations be required.

The fact that the staff itself has not seen fit to call the a, quote, "TMI-related requirement," end quote, is not necessarily the last word on the subject.

Now it could be that this would be considered a challenge to the regulations and could be deferred until later. However the scheduling order provides that by that date the challenges will be made.

It doesn't say anything they we couldn't raise the contention now at this point that the regulations shouldn't require documentation of deviations.

But be that as it may, we feel that our contention as stated calling for documentation of deviations is Three Mile Island related and does has a specific basis and should be accepted as a valid contention.

MR. GALLO: Judge Wolfe, I think I will address the last thought indicated by Mr. Farris first.

Our objection to this contention and the Staff's basis vary. It is our view that this is a Three Mile Island related issue.

It is accurate as the Staff has indicated that

the whole thought of examining licensed plants from the standpoint of compliance to the Standard Review Plan or existing regulations predated Three Mile Island, and that there was a memorandum written by the then Director of Nuclear Reactor Regulations, Ben Rusche, that predated Three Mile Island that discussed this particular subject.

But there was no serious consideration of the issue pre-Three Mile Island. It simply was something that was on the agenda that was to be considered at some future time.

It was not really receiving active consideration by the NRC.

After Three Mile Island then the Kemeny Report and the other reports and finally the principle catalyst being the Bingham Amendment to Section 110 of the Authorization Act for the NRC of 1980, that is when the NRC became serious about considering this matter.

So I think in that context it is clearly a Three Mile Island related issue.

I think the contention must be rejected because the Douglas Point Case fits on all fours. On any of the points that I have made here today I cannot disagree more strongly with the characterization made by Mr. Farris and also made by Mr. Thessin that somehow the Douglas Point Case couldn't defeat this type of contention.

Mr. Thessin said earlier that under his reading of Douglas Point that there were two situations that had to maintain before Douglas Point would be applicable. One was that your rule making would have to be well advanced and near completion, and the other was that the applicants must show either compliance with or some plans for compliance with whatever the rule making might have developed as a solution.

I think Staff misreads the Douglas Point case. At the noon recess I read the case, and I find nothing in that decision that indicates what Mr. Thessin said it holds.

The Appeal Board held that in that famous language now being quoted in all the briefs and in all the Board decisions that the "Vermont Yankee line of cases stands for the proposition that licensing boards should not accept in individual licensing proceeding contentions which are or about to become the subject of general rule making by the Commission."

Now it didn't apply that rule in Douglas Point because the rule making was over; and therefore it decided -- the Appeal Board decided that you could not object to a contention on that basis.

It was appropriate to consider whether or not the rule was being satisfied when the rule making was over and resulted in a ruling.

Here in this case we have proposed rule making.

The rule making is not over. It was published in the Federal Register on October 9, 1980, and it covers construction permit applications specifically, and it is still pending.

It covers the very essence of the contention that Mr. Farris is trying to offer here today.

Now the Appeal Board had reason to revisit the Douglas Point holding in Ranch Seco which is just a recent decision. You can look at that decision and you see nothing in that decision which contains the qualifications suggested by Mr. Thessin.

So pure and simple contention 10 should be rejected because it is barred by the Douglas Point and Rancho Seco rulings.

MR. THESSIN: If I might start by addressing the Douglas Point Rule since I believe the Applicant has misunderstood the statement of the rule as the Staff sees it.

Our belief or reading of the Douglas Point Decision is that when the Commission expressly indicates or by strong implication indicates that a matter is to be treated gererically rather than on a case by case basis -- by generically I mean in the context of rule making -- then the rule making preempts individual licensing decisions.

I think one example would be the Waste

Management Rule Making which is going on right now.

There is an explicit statement by the Commission that this matter is not to be considered by licensing boards in the context of case by case adjudication.

If you read the rule of Douglas Point as broadly as the Applicant would have us read it, we have several problems.

Let us presume that the proposed rule making is going to change the regulatory requirements an applicant must comply with by making these less strengent. Let's take as an example the financial qualifications rule.

Right now the rule is that the applicant must have a reasonable financing plan. The proposed rule is that the applicant's financing plan not be considered at the CP stage.

If we apply Douglas Point as the applicant would have us apply it, we are forced to say that because of the proposed rule making applicant need not any longer comply with one of our regulations which is still in existance.

So obviously that reading of Douglas Point must be wrong. Porposed rule makings do not reempt compliance by applicants with rules that are still in effect.

If however the proposed rule making is going to extend the reach of the commission in a given area, require more than the regulatory scheme now requires, the

proper challenge to a contention in that area is not that it is preempted by the proposed rule making, but that it is a challenge to the rules.

So the literal language of the Douglas Point Rule as stated by the applicant is incorrect.

JUDGE WOLFE: Is documentation of deviation is being treated generically by the Commission?

MR. THESSIN: It is being treated generically by the Commission, but there is no indication, as I read the statement of considerations in that matter, nor has the applicant pointed to any indication, that the Commission meant to otherwise preempt the considerations that in a licensing board proceeding --

JUDGE WOLFE: What wording have you seen in various proposed rules where the Commission has preempted or precluded boards from giving --

MR. THESSIN: I would point to the Waste Confidence Rule Making where there is an explicit statement that this matter need not be -- should not be considered by Boards.

MR. SHON: If my memory serves me, the Waste Confidence Rule Making is one of the few rule makings where such a statement was explicitedly included in the statement of considerations.

Douglas Point really only explained the Appeal

Board's decision in earlier Vermont Yankee case which I think had to do with reprocessing and the effects fuel cycling.

While that was the subject of a rule making, there the Commission I don't believe had made any such specific exclusion in the statement of considerations nor again later on in the Rancho Saco Case.

MR. THESSIN: I think the proper grounds for rejecting the contention in that area would be that it is a challege to the regulatory structure as it now exists.

If it is not now required by the rules, and if a party is contending that it should be required, that is a challenge to the regulatory structure and must be presented under 2.758.

JUDGE SHON: Are not the rules by and large stated to be minimized. These are the minimum with which you must comply. There may be reasons for having more strict rules to comply with. We have never said you can never require more than the bare rule, have we?

MR. THESSIN: I would offer for the Board's consideration the Maine Yankee line of cases. In Maine Yankee the appeal Board stated that compliance with the regulations is adequate for recieving a construction permit or an operating license.

It elaborated upon that statement in subsequent cases.

The Staff believes that the Maine Yankee line of cases stands for the compliance with part 50 regulations is all that the Board need look at before it decides whether or not to grant the construction permit to an applicant.

There are some rules which on their face indicate that they are minimum. Those rules I think you would interpret differently, but the Maine Yankee line of cases says that the part 50 rules -- compliance with them is adequate to receive a construction permit.

Consequently if a person alleges that the part 50 rules are not enough that more should be required, he is implicitly challenging the regulatory structure and it is incumbent upon him to go to the Commission under 2.758 and indicate that that regulatory structure should be waived or modified in this case.

It is not for the licensing boards to determine whether that regulatory structure is adequate or not.

That is what I mean when I say the proper objection to this contention is that it attempts to extend the reach of the Commission's rules. It would be 2.758 rather than the Douglas Point case

JUDGE SHON: Even if it extends its reach into another sphere where the regulations up to now have been silent?

MR. THESSIN: Exactly, I think that is the classic case of where you must use 2.758.

I am not saying the contention should be accepted. I am saying the grounds for rejection is not Douglas Point but it is that it is a challenge to the rules.

JUDGE SHON: I understand. Thank you.

MR. THESSIN: So in that sense I would disagree with the applicant.

I think also if you look at the Rancho Seco Case you will see that the licensing board below had reached the merits of the issue, and the Appeal Board said we need not under our suasponte review go into the merits because of Douglas Point. The merits were not in controversy. There had been a decision on the merits.

I question whether the Commission's hydrogen control decision in PMI might implicitly refute the notion that consideration of hydrogen control is barred by the rule.

The Staff as it is clear from the papers considers contention 10 on documentation of deviations to be a challenge -- to be a motion to reopen the record and contents that it is an issue which pre-dates Three Mile Island.

The Applicant has disagreed and has indicated that while there was some discussion of the requirement there

was no movement in that direction.

I think that is a misreading of the record of what took place previous to Three Mile Island.

In the letter cited by the intervenor in the contention itself -- I believe it is the September 1976 letter. That was the letter implimenting a Staff procedure for documenting deviations from the standard rule making.

That implimentation was withdrawn later on because the staff believed it was not a matter that addressed safety considerations, and it was creating a lot of paperwork without any increase in safety.

I think a fair reading of the previous record is that the Staff attempted a procedure for documenting deviations back as early as 1976 and later reconsidered that decision on the basis that it was not necessary for safety.

The Staff contends that what must be considered here is whether this issue of documenting deviations is something that was available to the intervenors at the previous hearing or whether it is now something new which arose and whose significance became apparent at Three Mile Island.

As I heard the intervenor speak this morning Mr. Farris indicated that he was not talking solely about documenting deviations from the standard review plan. He

was talking about documenting deviations from any number of staff guides, NUREG's, Reg. Guides and etcetera.

A number of questions arises with respect to the specificity of such a contention. Even if we assume that it a Three Mile Island related issue, first on what basis does the intervenor believe that Reg. Guides, NUREG's and other staff documents state regulatory requirements deviations from which must be documented.

The Reg. Guides and the NUREG's state on their face that they are guides from staff and that the applicant need not follow them. He need only state that he has an idea that is equivalent that gives us the equivalent amount of confidence that the plant will be safe.

I think it is incumbent upon him to be more specific as to what he believes is not being done, what deviations he believes represent safety questions because they are not documented and to provide a basis.

He has failed to do that.

I do not believe that this contention is barred by the rule of Douglas Point. I believe that a review of the staff documentation, part of which Mr. Farris has cited himself in his contention, will indicate that the staff tried to impliment such a procedure, withdrew that procedure after considering that it was not necessary for safety, and that all took place well in advance of the

Three Mile Island accident; and therefore was available to the intervenors at that point.

Finally, even if we believe this contention is addressing an issue newly raised because of the Three Mile Island accident, I think the contention fails for failure to be specific as to the nature of the deviations that he believes represent safety problems and the nature of the kinds of requirements that an applicant must meet.

That is a shorthand way of saying he must show why an applicant has to meet the Reg. Guides and the NUREGS when on their face they do not so require.

If there are no questions, that is all.

JUDGE WOLFE: Thank you.

MR. FARRIS: It is little consolation to me that Staff pulls out Mr. Gallo's Douglas Point knife and then shoots me with another gun.

I don't think we ought to die by either method.

First of all again we feel that the documentation of deviations issue does relate to Three Mile Island. As Mr. Thessin indicated we feel that obviously there was some discussion among people before Three Mile Island that this would be a nice requirement to have.

What we pointed out in our contention specifically was that this was a major lesson learned out of Three Mile Island because the documentation of deviation would have

helped perhaps mitigate or avoid that incident -- that accident.

To quote, "A major contributing factor to the TMI-2 accident was that the plant had not been required by the NRC Staff to be in compliance with the then current regulatory practices."

We feel that regardless of whether or not there was a specific rule to that effect, this is a lesson learned from Three Mile Island. It should be required not just to follow some accepted norms or minimums, and that this Board should recognize this and let us put on our evidence to show why we feel documentation of deviations presents a major safety concern regardless of Douglas Point and regardless of whether or not there was some discussion of the requirement for documentation of deviations prior to Three Mile Island.

Now moving on to our contentions 11 and 12, as indicated earlier today we will withdraw contention 11 based upon what I understand to be the concensus about the scope relating to the generic safety issue when the Staff provides its update in a subsequent supplement to the SER.

Likewise I think I indicated earlier this morning that our contention 12 is identical to our motion to reopen relating to concrete reinforcing walls outside

the steel liner on containment.

So No. 11 and 12 cease to become issues at this point. That leaves us only 13, 14 and 15.

I would suggest to the Board that I would like a few minutes to work with our expert before we take up those issues. I think perhaps we can eliminate a couple of sub-parts and finish here pretty shortly this afternoon.

JUDGE WOLFE: All right.

How much time would you need, Mr. Farris?

MR. FARRIS: Ten or fifteen minutes.

JUDGE WOLFE: We will recess until quarter of 4:00.

(A short recess was held.)

JUDGE WOLFE: Back on the record.

MR. FARRIS: I will move on to our contention 13 relating to emergency planning; and in connection with 13 we have five or rather six items, a through f. We would also withdraw 13(c), and I will address myself to 13(a), (b), (e) and (f).

First 13(a) the applicant accepts as a valid contention. The Staff opposes for the reason that the Staff says that there is no connection with the soil characteristics and the liquid pathways; but yet we would respond that contention 13(a) clearly makes reference to the specific soil characteristics and more specifically the under-clay

layers.

Now it could be the Staff has forgotten or at time time Mr. Thessin came in the so-called geologic anomoly with which we have been concerned when the excavation actually proceeded with Black Fox has implications we contend for the liquid pathway.

Thus since the applicant and intervenors agree this is a valid contention, we submit it should be accepted as one.

13(b) relates to sheltering facilities. The applicant has indicated that it has some problems with what the term "sheltering facilities" means, but yet the applicant uses the term "sheltering" in its PSAR at 4.3, .1 and .2.

While sheltering facilities per se are not required, because PSO has made reference to it, we are not sure whether they are indicating that sheltering or evacuation or both are going to be used so far as their emergency planning.

Therefore we have raised out contention 13(b) to require them to be more specific in identifying local sheltering facilities and what role if any they will play in emergency planning.

13(d) relates to the failure of the applicant to take into account local weather conditions in describing its emergency planning or EPZ's.

As the applicant indicates they have voluminous

materials on meteorological conditions. They in our opinion do not relate those conditions to the establishment of the EPZ but rather just adopt the generic EPZ's of 10 and 50 miles.

As to 13(e) again the applicant agrees that we have stated a valid contention. The staff says that we have not. I am not sure that I understand the Staff's objection. It relates to a requirement that specific accident sequences don't have to be related although it could be that the type of raionuclides are the function of a specific accident sequence. We don't believe the two are necessarily tied together.

13(f) relates to our contention that the applicant has failed to consider the consequences of 1, 2 or 3 accidental release at Black Fox Station at harvest time.

In this connection we would be prepared to offer evidence that at harvest time the health effects on the release -- accidental release -- can be as great as 10 times higher than at any other time, and therefore is a very significant consequence which should be considered in the emergency planning.

Indeed it is our information that the NRC has indicated that this is an inadequacy of WASH-1400.

Thus we submit that our items 13(a), (b), (d) (e) and (f) are valid contentions and again remind the Board

that the applicant agrees as to items 13(a) and (e).

MR. GALLO: Judge Wolfe, I will address the particular sub-parts of contention 13 that remain in controversy between the applicants and the intervenors.

We have no objection to 13(a).

With respect to 13(b), which states the number, location and capacity of local sheltering facilities and the degree of protection from radionuclides afforded thereby and that is prefaced by the statement that the "Applicants and Staff have failed to consider adequately or to account properly in the context of local emergency response needs for the number, location and capacity of local sheltering facilities . . ."

The citation that Mr. Farris made to Amendment 16 of the PSAR entitled "Sheltering" is really a discussion of a type of protective action to be taken in the case of an emergency situation; that is that is one of the protective actions that people in the area concerned can take shelter in whatever shelter happens to be available whether it is their own house or nearby high school.

The suggestion of the contention as we understand it is that some how or other that the need to account for an adequate number of shelters in a given area and a plan that doesn't account for these shelters is somehow inadequate.

I see nothing in appendix (e) that requires that or its underlying NUREG documents. In fact NUREG-0396 specifically has indicated that they rejected the notion of applicants constructing specific shelters for emergency sheltering purposes.

JUDGE SHON: Mr. Gallo, wouldn't it seem common sense that if you were going to evolve a plan for what to do in an emergency and if you had certain scales of emergencies which you might find it desirable either to evacuate people or ask them to take shelters, that you have to know what kind of shelters might be around for them to take before you say whether to evacuate or ask them to take shelter?

Wouldn't you have to take that into account in your planning? Not necessarily build more you understand, but just say there is a big cave over there that will accomodate all the people in this area so we probably wouldn't evacuate them. We would send them into the case or something.

MR. GALLO: My answer to your question is no. I don't know for what reason you would want to take that into account.

The shelters to the extent they exist, exist. They are there fortuitously for the benefit of individuals to use if it is necessary.

The applicant has no burden to instruct people

in and around a nuclear plant where the shelters are; that is, under the scheme established by the NRC, a responsibility of state and local agencies.

So I see no reason for the formulation of an emergency response plan by a licensee or an applicant for them to deal with the question of shelters.

I assume by your question you believe it might be instructive if one pointed out where they exist so they could be more readily used.

I see really that that is a function of the state and local agencies and not a function of the emergency response plan.

JUDGE WOLFE: What do you think that the appendix (e) and the underlying regulations do require for evacuation within the 10 mile zone?

MR. GALLO: They require an applicant to be prepared to take certain action in the way of notification, and the primary notitication is to state and local agencies who then have the responsibilties to decide what protective actions might be appropriate and to issue instructions accordingly.

They could run the gambit from doing nothing to evacuation.

JUDGE WOLFE: But you think application's obligations or duties are at an end once it is within 15

minutes after whatever the wording is -- the finding of an emergency. They must contact certain authorties. That is all that applicant has to do under appendix (e)?

MR. GALLO: They have a long list of responsibilities that they have to perform on-site with respect to taking emergency actions to deal with the particular accident of concern.

But, yes, under the scheme of appendix (e) the applicant's responsibility is essentially at the licensing stage to interact with state and local authorities to facilitate their actions in augmenting the on-site emergency plan.

That is my understanding of that requirement.

One part of appendix (e) requires that some evidence of agreements between the applicant and the local sheriff and other local authorities that they in fact will take the necessary actions once the notification has been furnished by the utility.

That is why FEMA reviews local and state emergency plans to see that they are effective in dealing with emergency situations in and around the plant.

MR. WOLFE: All right.

MR. GALLO: Moving along that brings me to 13(c), which has been withdrawn.

Again 13(d) we object to it in that it lacks

specificity and basis.

The allegation is simply that the"applicants have failed to account properly for local meteorological conditions, including the distribution of wind directions and speeds and the frequency of tornados."

Well, to anticipate questions I would agree that it is necessary to take that into account, but I think the specificity and basis obligation at 2.714 requires something more than a mere general reference to meteorological conditions.

Are we to assume, for example, all wind directions on a 360 degree circumference? Are we to assume all tornados from the highest speed to the lowest speed?

That seems to me that we ought to have some specificity and bases on that so we know exactly what it is we should address.

The fact that we might be able to gleen this information through discovery is just simply not satisfactory. The Commission's rules just don't provide for it that way. 2.714 unfortunately exists. The words specificity and basis have to mean something.

I submit they mean more detail than what is here.

Moving on to (e), which we have no objection to; and then finally 13(f). I see in our argument we did argue that there was a lack of specificity and basis with respect

to 13(f) because they failed to specify the crop or crops being harvested.

If I understand what Mr. Farris said here a moment ago, he made a sort of offer of proff that they would submit evidence on this point to clarify this matter up.

I guess on that particular aspect, if he was to assume the burden of going forward first on the issue -- We are not shifting the burden of proff, mind you, but simply assumming the burden of going forward first so we know what it is that we have to deal with, I would have no objection to that aspect.

But I am troubled about the reference to the consequences of a BWR-1, -2 and -3 accidental release. This particular scenerio was really dealt with under contention 14.

I believe I will reserve my discussion with respect to these accidents to that.

I would just like to ask a question. Where in appendix (e) and the underlying NUREG documents is it written or indicated that these particular aspects, scenerios or accident releases, are pertinent to emergency response evaluation?

That is all I have unless the Board has questions.

JUDGE SHON: What about the Staff's position

as expressed on page 37 of their reply that (e) and (f) which would require consideration of specific accident scenerios are in fact precluded by NUREG-054 and the Beaver Report in the design of emergency planning zones?

MR. GALLO: I was afraid somebody would ask that question.

I think the Staff is correct in its interpretation of the NUREG documents. I have had trouble taking that conclusion and trying to turning it into a legal objection because my reading of appendix (e) and the relevant portions of part 50 which reference those NUREG documents is such that I conclude that the NRC did not intent to incorporate those NUREG documents as part of the regulations.

Therefore the fact that the NUREG says what the Staff indicates is not dispositive of the question of whether or not the intervenors may attempt to challenge that in any event.

My position would by they have to provide bases for that challenge, but they are not barred under 2.758.

JUDGE WOLFE: Thank you.

MR. THESSIN: Members of the Board, I think it might be helpful if I began by stating the Staff's position on what is generically covered by the appendix dealing with emergency planning and what is left to a case by case

determination.

I think that is the central issue that the Board must face in determining which specific items in these contentions are valid as contentions and which are really challenges to the rule.

I think there is the additional question of whether the statements are made specifically or not to put the parties on notice, but by in large I think concentrating on what is in the rule, the generic requirement, and what is left for case by case determination is a helpful focus for approaching this contention and contention 14.

If one analyzes the process by which the rule was made and looks at the underlying NUREG documents 0396 and the subsequent NUREG documents 654 I believe, it is clear that those experts who took part in that exercise concluded that individual accident sequences may not be taken into account but that one must take a composite accident sequence and apply it as the target for which you would plan.

That became embodied in the concept of the EPZ's. A generic definition of the area for which planning must be undertaken.

Now the rule embodies this concept of the EPZ's and the Commission in both the statement of policy and new rules point to the guidance found in 0396 which

talks about how one decides on the size of the EPZ.

It indicates that one considers the EPZ's for the purpose of deciding whether it was properly drawn with respect to the local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries.

Now I think it is important to understand what that means. If one is planning for an emergency and one has a 10 mile EPZ, and at 10.1 miles you have a huge bottleneck. In the Washington area we can think of some of the bridges over Chesapeak Bay as potential bottlenecks.

I am less familiar with the geography in this region, but lets presume that there are similar bottlenecks 11 miles from the plant.

This rule would require you to extend the EPZ because it would be impossible to deal with the local emergency response committee without taking into account how you are going to control that bottleneck.

Now that is a quite different exercise than looking at specific accident scenerios and deciding how broad you need to be in terms of the nature of the release and how far to travel and whether in this case because of this characteristic it will go 11 miles or 10.

If we look at the process by which the EPZ's were drawn, it was a generic decision that planning would be most productive if done within this radius modified slightly here to there to take into account bottlenecks and other pecularities that would affect the ability of people to evacuate or take protective action.

It was not defined -- the EPZ was not drawn to be modified by specific consequences which could be hypthesized to have effects beyond the 10 mile radius or the 50 mile radius.

Mr. Gallo has indicated that he has a hard time making the link between NUREG documents and the final rule with respect to the specific characteristics and whether they should be taken into account when you are drawing EPZ's.

He concludes as the Staff does that the NUREG documents reach the decision that you need not take into account site-specific probabilities or plant-specific accident sequences.

The Commission recently within the last few weeks decided the San Onofre Decision, it is CLI-81-33, and it is dated December 8th of this year.

In that decision the Commission was faced with the question of whether one had to take into account the event of an earthquake in deciding the size of the EPZ.

The Commission indicated that the current regulations are designed with flexibility to accomodate a range of on-site accidents, including accidents that may be caused by severe earthquakes.

This does not, however, mean that emergency planning should be tailored to accomodate specific accident sequences or that emergency planning should also take into account the disruption and implimentation of off-site emergency plans caused by severe earthquakes.

What the Commission held is what the NUREG documents teach; that site-specific and plant-specific consequences are not to be looked at, but the Commission in the rule has spoken generically of what must be done and have made the decision that 10 miles is the area for which planning must be undertaken and 50 miles with respect to the ingestion pathway.

Even if one could hypothosize that in one case because of one scenerio this limit may not be the best.

With that in mind, let's go to the contention. The Staff was troubled by contention (a) because it was ambiguous to the Staff whether the intervenor was alleging that the standard of the appendix that there be reasonable assurance that adequately protective measures can and will be taken in the event of an emergency.

If the intervenor was alleging that because

this consequence analysis had not been performed, we have no reasonable assurance that adequate measures will be taken into account because we haven't thought about everything.

We weren't sure if that was the contention or if the intervenor was saying that because this specific local condition we think the ingestion pathway -- that the radius should be drawn much larger than it is drawn.

If that is the contention, then it should be rejected as an attack on the rule.

The commission has expressly rejected the site-specific characteristics for defining in terms of an accident sequence the radius of the EPZ from ingestion.

So if this contention were modified to say that therefore we have no reason assurances that adequate protective measures can be taken within the 50 mile radius, I think we are close to a valid contention.

If what the "therefore" clause is is "therefore" the EPZ should be 150 miles, we do not have a valid contention. It is an attack on the rule.

I think before a ruling is made on sub-part (a) that ambiguity should be clarified.

JUDGE SHON: Mr. Thessin, you seem to be thinking in terms of the EPZ as having a radius and in nuclinear geometry that is necessarily a circle.

I would think they are calling the Verde River

to our attention. They may be suggesting that in at least one direction downstream on the river perhaps the emergency planning zone should be quite different from the ways in other directions; that it might not be circular in shape at all.

Is that also in your view a challenge to the rule?

MR. THESSIN: Yes, sir, it would be.

It is a challenge in the sense as I pointed out to the NUREG documents and the history of the rule. It is a site-specific accident consequence which the commission has decided should be treated instead generically.

We will not look at one accident sequence and plan for it. What we will do is take a composite accident sequence, make a determination of how we can best use our efforts.

We have to remember that emergency planning is planning for an unknown happening or accident sequence. The commission has made the determination that this composite accident sequence optimizes the planning of it and one could argue that was based on the fact that at one plant where one accident sequence did not take place, ones plans might be otherwise inadequate for the accident sequence that actually did take place.

Therefore let's have a generic composite

accident sequence.

As you can modify the EPZ -- if it were required for example that at 51 miles because one had a milk supply at that point that could be affected, that might be a different situation.

But that is the emergency response once the accident has occurred. Not so much where the consequences have gone from the accident but where one must taken effective measures to protect the people within the radius.

JUDGE SHON: I guess I am still a little bit troubled about this business of you can have a blip because there is a bridge or because there is a dairy farm or because there is something on that order, but you couldn't have a blip because of wind zones flowing in one direction or because a river runs in another direction.

The commission has deliberately said approximately 10 miles and approximately 50 miles and suggested that these things might be modified.

Why the modification couldn't occur because of the meteorology or the hydrology or something like that rather than because of land use or traffic pattern, I don't see. There seems to be some distinction in your mind on these things.

As I say you can have blips for one reason but

not for another. The reasons that the intervenor seem to have suggested aren't the things that you like.

MR. THESSIN: Let me see if I can make my response more sharply focused. If there is a water intake point at 50 miles and that supplied the water within the 50 miles radius or let's take within 11 miles there is a water intake point, by the same rationale that one can reach out to control a bridge that becomes a bottleneck, I think one could reach out to control the water in-take point.

If however one is arguing that because of a river, we have a problem with the ingestion pathway that extends for 1000 miles, the commission has made the generic decision that one not need take that into account.

One can modify slightly the size of the EPZ but one can't reach out to the whole Atlantic Ocean or reach out to the while Gulf of Mexico.

It is that ambiguity which I find to be a problem in the intervenors' contention.

JUDGE SHON: Thank you.

MR. THESSIN: With respect to point (b) one must again focus on what the intervenor has in mind. I believe that it is ambiguous.

If intervenor is alleging that one must have special facilities or one must take into account special

facilities, caves or whatever, for protecting the population, the staff does not believe that is required by the emergency planning rule.

NUREG-0396 specifically says that is rejected that there be special facilities required.

If one is alleging that the applicant has failed to adequately take into account -- Let me stop there.

I am unclear as to what the intervenor is alleging with respect to part (b). Until it is made more specific, the contention should be rejected.

As I read Amendment 16 the applicants talked of the feasibility and the cost effectiveness that could accrue from having people stay in their own house. If intervenor is alleging that applicant has failed to analyze properly the adequacy of that response, then the intervenor should say so.

If the intervenor is alleging that people's houses aren't good enough shelters in any event, the intervenor should say so.

I think at the moment we are left to speculate what exactly is mean by the sheltering contention, and I think it should be rejected at this point as being nonspecific.

With respect to sub-part (d), the local meteorological conditions, I think if one reads again NUREG 0396 and if one focuses on what it is that we are attempting

to indicate whether there is reasonable assurances that adequate protective measures can and will be taken, if one is attempting to evaluate whether the response plan of the applicant adequately meets that standard, then it is unclear how the local meterological conditions are relevant to the findings and the scope of the EPZ.

When the EPZ's were defined, when the Task force attempted to determine what factors one would put into a composite scenerio, they looked at meteorology conditions. They assumed a so-called 95 percent worse case.

That the conditions would be better, the meteorology conditions would be better from the point of view of protecting the people in 95 percent of the cases and reached the generic decision about whether or not meteorology should be taken into account and decided that in defining and establishing the boundaries for the EPZ's that meteorology need not be taken into account.

Specifically that generic finding that the winds are likely to change within two or four hours anyway meant that one could not plan with respect to one specific meteorology condition since their finding was the meteorology varies over the course of an accident sequence.and that one

could not put all its eggs in the basket of one type of meteorology conditions when that was likely to change during the course of the accident.

It would be my position and the Staff's position that this could be a challenge to the Appendix which should be rejected on that basis.

With respect to sub-parts (e) and (f) I think that calls for a site-specific accident sequence to be evaluated, and I think that is directly at odds with the commission's statement in the San Onofre Decision and what is implicit in the entire concept of the appendix on emergency planning and would argue that they should be rejected for that basis.

MR. GALLO: May we have a few minutes?

JUDGE WOLFE: Yes.

MR. FARRIS: We would both like to reserve some time to look at the San Onofre Decision and perhaps provide some comments tomorrow. I don't know if the Board has seen the decision or not, but I would like to look at it in more detail.

I don't like to respond on the basis of the glance that I just saw, but I don't like what I just saw.

Frankly it just seems absurd to me that we can postulate that a tornado or an earthquake or some other event could cause the accident that we then can ignore that

event during emergency response time.

We assume it causes the accident, then the tornadc or earthquake disapates and is no longer a factor to be reckoned with does not make sense to me.

I am not sure that is what the commission meant, but a literal reading quickly seems to say that.

By the same token it seems absurd to me that the commission would say regardless of whatever plant-specific conditions you have we are going to use this magic 10 miles EPZ in a circle with the plant at the center of the circle and that is it. That is your generic EPZ.

If you have prevailing wind conditions out of the west 99 percent of the time, it seems to me that to the west of the plant you might be able to shorten it and to the east you had better take into account a larger EPZ.

But be that as it may, I will go ahead with contention 14.

JUDGE WOLFE: In other words you want us to reserve ruling on it until you can read the case and report back to us tomorrow?

MR. FARRIS: Yes, I would like to reserve the right, and I think Mr. Gallo would to, to comment further on that particular recent ruling.

MR. THESSIN: If I may make a statement. If the Board anticipates that it will take some time for them

to caucus and decide on a ruling anyway, and that it would be either later this evening or tomorrow morning, I would suggest that we break right now and plan on coming back tomorrow.

During the interim I can try to make a copy of this someplace out in the hall so everybody can review it tonight, and then we can more appropriately discuss contention 14 for which I think it will be at issue all having the benefit of reading the decision.

MR. FARRIS: Frankly I would like to go ahead. Mr. Bridenbaugh has a plane to catch. We only have basically one more contention to address. 15 I think we have reached agreement on.

I would like to go ahead and address contention 14. That is the only one left. Then we can speak tomorrow with regard to both 13 and 14 so far as this is concerned.

In case I need some help today I would like to have Mr. Bridenbaugh present.

JUDGE WOLFE: All right.

MR. FARRIS: Our contention 14 has several sub-parts, a through k. I would like to lump them together because I think they can be lumped together.

14(a), (b), (c) and (h) all relate to probabilities and our concern in all of those sub-parts is that WASH-1400 is the basis for those probabilities and

WASH-1400 as you know is based upon a different type BWR. That is a BWR MARK-1. Therefore the establishment of the 10 and 50 miles EPZ hasn't been demonstrated to be applicable to the Black Fox site.

14 (e) and (f) on the other hand are evacuation time estimates that are generic. They have no Black Fox specific calculations. That is our complaint.

They are simply that, generic calculations.

I have the same problem you may recall with turbin missiles. The turbin missile calculation was applied to Black Fox Station without taking into consideration the two unit configuration.

We would ask if the probabilities would be the same at Black Fox as they would be at a single unit configuration.

14(g), as I understand it, is acceptable as a valid contention which the applicant and the staff opposes.

14(g) relates to specific evacuation times for five different populated events. We don't see how it can be much more specific than that. We say that the applicant and staff have failed to properly account for those events.

14(i) can be withdrawn. It relates to shelter. I think our comments in regard to 13 in so far as shelter go are the same here.

14(j) and (k) speak for themselves. There is

really not much we can add to those. If they aren't specific, then they aren't specific but I submit that they are.

I don't see how they could be much clearer.

The Staff is generally objecting to 14 because it is premature. They state that there is no reason to consider now, and indeed that the regulations don't require that we need to consider these events now but at a later stage such as the operating license stage; but we submit that if there are design changes that emergency planning would warrant, certainly now is the time to take them into account rather than later.

There are, I am sure, certain things that would not impact design changes. They are either going to be there or not and the changes would have to be external to the plant.

However, we submit that certain accident releases and therefore accidentl releases on which the consequences could very obviously and clearly impact design changes and to the extent our contentions on 14 have raised those probabilities that would affect design changes they should be addressed now rather than later.

Let me go ahead, if I may, and handle 15 while I am up here. I will just make an announcement on it.

Originally 15 related to the technical support center and the EOF, Emergency Operations Facility, I believe.

Mr. Gallo has pointed out to me that since we raised this contention there has been a change in the PSAR to incl de the establishment of a secondary TSF location that will comply with the regulations to meet the two-minute access requirement.

Therefore, we can withdraw 15(a).

As to 15(b) we would limit it to the contention that it is beyond the 20-mile siting requirement and delete the contention that it is not designed to withstand tornado force winds because it has been brought to our attention that the regulations specifically include that EOF be able to withstand tornadic winds.

Therefore 15 strictly relates to the siting requirements, and I believe that neither staff nor applicant have objected to that contention as thus modified.

MR. GALLO: Judge Wolfe and members of the Board, in our response to contention 14 we catagorized the sub-parts into three groups.

It appeared to applicants when they were reviewing this contention that sub-part 14(a), (b), (c), (d) and (e) were essentially suggesting why a WASH-1400 type study had to be performed at Black Fox Station before a satisfactory emergency response plan could be developed and submitted to satisfy the requirements of Appendix E at part 50.

With that interpretation our review of Appendix E at part 50 and any other regulation dealing with the question of emergency response plans indicate no such requirement.

As a result we consider these sub-sections to be a challenge to the emergency response regulations of the NRC in part 50 and consequently must be submitted, if at all, as a challenge pursuant to 2.758.

Since it hasn't been done in this case, those sub-sections should be denied for that reason.

We also point out with respect to these sub-sections that we believe our interpretations of them are not consistent with the Board's view. We also go on to argue in the alternative that the requisite basis under section 2.714 is not present, and therefore they should be denied for that reason.

I won't repeat the various arguments which are set forth on specificity and basis on pages 49 and 50 of our brief.

JUDGE WOLFE: Yes, Mr. Gallo, we are at this point as you know only interested in -- we have read your submission so what are your responses to any arguments that Mr. Farris made orally?

MR. GALLO: I didn't glean any new argument from Mr. Farris with respect to the various points as he addressed

them. He simply advanced his arguments in perhaps a choice of different words.

With that I will rest unless there are any questions.

Of course we have accepted and not objected to certain parts of 14. That leaves one matter of the question of the San Onofre Decision cited by Mr. Thessin.

Mr. Farris adequately stated our position. We would like an opportunity to view that before we could complete our argument.

JUDGE WOLFE: All right.

MR. THESSIN: I think I can summarize my argument with respect to this contention by pointing to the assertion that the contention argues as follows: The applicant must do a plant-specific accident study before deciding upon its emergency plan.

The Staff believe that is a challenge to the regulations. It cites as support the San Onofre Decision and believes the entire contention will be rejected as a result.

Since by the terms of the contention all the sub-parts go to support the need for such a site-specific accident study, we feel that any such study for emergency planning is beyond the scope of the regulation and therefore a challenge to the rule.

JUDGE WOLFE: Anything more?

MR. GALLO: Judge Wolfe, I have a further matter unrelated to the question of intervenor's contentions that I would like to address before we recess.

JUDGE WOLFE: All right.

I will make this known now. When we recess in a few minutes, the Board intends to confer. We intend to hopefully be in a position when we reconvene tomorrow morning at 9:00 to orally rule yea or nea up and down the proposed contentions and the motions to reopen.

If perchance when we reconvene at 9:00 in the morning, we haven't resolved all of our rulings, we will meet you at 9:00 and so advice you that one or two hours may pass before we will be in a position to rule.

On those outstanding contentions that you have asked us to defer ruling on, we will defer ruling on. Perhaps at 9:00 you would be in a position to argue on those two contentions; therefore certainly we will hear argument on those two contentions at 9:00.

But if we haven't finished, we will recess for one or two hours. Most certainly even if we had been able to arrive at rulings we would still have to go to conference to resolve these other two contentions that you say are affected by the San Onofre ruling.

So we will meet at 9:00. We will hear additional

argument. We will undoubtedly have to recess again.

With that as background, yes, Mr. Gallo.

MR. GALLO: Judge Wolfe, the schedule that was approved by this Board in its Order provided that it was expected that the Staff's Safety Evaluation Supplement would issue by December 15th.

It is my understanding that it has not issued. It is my further understanding that there is great uncertainty as to when it will issue.

Dr. Zink, the Licensing Manager for PSO, indicates that he has heard estimates ranging from December 21st to the end of the month with no real assurance even then that we would see the document.

In these circumstances I have a motion that I am offering at this time to the Board. That motion is to request the Board to seek from the Staff officially on the record the reason for the delay and what the excuse is.

My reason for taking this action is two-fold. I think both of these reasons give ample cause for the motion. The one is that because of the untoward delay in this proceeding we have wanted to get moving with respect to the licensing of this particular activity. The effect in not issuing the Safety Evaluation Report is really a day to day slip in the schedule that we have all agreed to.

Secondly, and equally important, the proposed rule that was the subject or oral argument on dealing with compliance with regulations and standard review plans provides specifically that any applicants for nuclear power construction permits -- for a nuclear power construction permit for which the Staff Safety Evaluation Report TMI Supplemnt is issued before January 1, 1982, roughly 15 or 16 days from now, will be required to meet the proposed rule if it becomes effective at the operating license stage or at the SAR submission.

If the supplement issues after that date, it must be dealt with as a part of the construction permit activity.

We desire very much to be the beneficiary of that provision should it become a regulation of the NRC. For this reason we very much want to see that SER supplement issued prior to December 31 of this year.

The Board has the authority to grant my motion under the Off-Shore Power Systems Case where the Appeal Board held quite clearly that although the Board is limited in what it can tell the Staff to do or not do with respect to issuing documents, one thing it may do is ascertain why the document requested has not been forthcoming and look behind the reason or explanation to determine whether it is reasonable.

JUDGE WOLFE: All right, Mr. Gallo.

Mr. Thessin, let us hear from you.

Motion granted.

MR. THESSIN: Since the Staff takes seriously both its obligation under the schedule to produce the document on the date promised or as soon thereafter as possible as well it takes seriously its obligation to perform an adequate review, if I could defer the answer as to wher and why the document is delayed until tomorrow morning, I think I can give you a more accurate answer.

JUDGE WOLFE: That request is granted.

Bring it to my attention in the morning first thing, Mr. Thessin.

Mr. Gallo, is there anything you, applicant, owes to Staff before they can complete their SER Supplement 3 review?

I seem to remember a letter from somebody asking for information from applicant either with regard to unresolved generic issues or TMI-2 issues and it was dated on or about December 8th.

Have you furnished that information?

MR. GALLO: The information you referred to, Judge Wolfe, was furnished by the applicant on the 12th of December and submitted to the Staff at that time. I believe it was submitted by telecopy.

Basically it was information of a confirmatory

nature that dealt with matters that were discussed by the Staff at a meeting on November 6th.

MR. FARRIS: Judge Wolfe, I don't have any case authority for the request I am about to make.

Mr. Gallo has on several occasions declined to indicate to me what TSO's plans were about Black Fox Station, depending upon the Corporation Commission's order.

We are all spending a lot of time and effort working on the case that may become moot. The town is literally awash with rumours that TSO is going to cancel this plant if they get an appropriate order out of the Corporation Commission.

JUDGE WOLFE: Would you state that again, please?

MR. FARRIS: That TSO may very well cancel Black Fox Station and withdraw its application depending on the order they get from the Corporation Commission, specifically some sort of bail out for lack of a better term.

Earlier either you or Mr. Shon asked me if we would withdraw a contention dependent upon a certain outcome by the Corporation Commission. I think before we and you and Staff spend a lot of time and effort on this case I think it would be good to get an indication from the Public Service Company if indeed that is true that if they do get one of their three recommended bail outs from the

Corporation Commission, are they going to cancel Black Fox Station; and if so, I think all of us could save ourselves and our clients, whoever they may be, a lot of work and time and effort to wait until that order comes out and we get PSO's official response.

It seems to me that would certainly be the efficient thing to do.

JUDGE WOLFE: What are your present plans, Mr. Gallo?

Request granted.

MR. GALLO: Judge Wolfe, I think the testimony of William R. Stratton before the Oklahoma Corporation Commission puts the company's position clearly. I think it was alluded to by Mr. Bardrick this morning.

Mr. Stratton on behalf of the company indicated in his testimony that whatever decision comes out of the Oklahoma Commission it will be reviewed within approximately 30 days of its with our two co-applicants to determine what action is appropriate based on that decision.

The Public Service Company considers the OCC opinion on what should be done with respect to Black Fox as advisory. Beyond that the Public Service Company has a participation agreement, a binding contract with the other two co-applicants, which requires certain obligations.

The other two co-applicants are not subject

to the jurisdiction of the Oklahoma Corporation Commission.

There are many unresolved questions that have to be dealt with. Our present position is that we are going full forward with the licensing of Black Fox before the NRC.

What will happen after the Oklahoma Commission rules is to be seen. First we have to see what they say, and then the company will have to meet with its co-applicants and deal with that decision and come up with an approach to the final conclusion with respect to continuing or not continuing with Black Fox.

It certainly would be premature and improper to say at this time that, assuming a certain decision out of the Oklahoma Commission, PSO will take action A or action B.

We are prepared to go forward.

MR. FARRIS: Judge Wolfe, as Mr. Gallo indicated. They have promised a decsion by February 1. That is a joint decision of the Public Service Company and the co-applicants.

It seems to me that if that looms as a very real possibility; that is the cancellation of Black Fox Station; we are certainly wasting a lot of time and effort between now and then working on this case.

I think Mr. Gallo would have to acknowledge there is a very distinct, maybe a greater than 50/50, possibility that Black Fox as a nuclear plant will be cancelled.

JUDGE WOLFE: But this was true at the time you sponsored this joint motion. This was still a matter before the Oklahoma Corporation Commission, isn't that so?

MR. FARRIS: That is true with one exception. The time frame within which the Corporation Commission has promised to render its order was not then known nor had PSO indicated that it was going to take 30 days following that within which to make its decision.

Now the Corporation Commission has promised its ruling on January 1, and PSO has promised his decision on February 1.

So we are talking about 45 days from now when we are going to know for sure whether or not PSO is going to proceed or not.

I hate to incur the expenses for my client if it may be futile. I certainly don't think that you want to waste your time working on this case if you are going to be met with a withdrawal of the application by the Public Service Company.

In the total scheme of things that additional 45 days --

JUDGE WOLFE: What are you suggesting then?

MR. FARRIS: I suggest, Judge Wolfe, that these proceedings abate in light of PSO's public comments regarding that deadline and that no further action be taken by anybody

pending PSO's ultimate decision for the simple reason that we may very well all be wasting our time at a great expense to the taxpayers and our respective clients.

I think it does a disservice in light of PSO's acknowledged likelihood of that result occurring.

MR. GALLO: I must emphatically disagree on the odds suggested by Mr. Farris as to what action my client might take with respect to going forward or cancelling the plant.

I must strenuously object to the notion of abating these proceedings. And indeed there is precedent to deal with this very question.

During the days when there was some uncertainty as to whether the NRC had jurisdiction over water quality matters or clean air matters or whether the EPA had jurisdiction over those matters, intervenors argued on a regular basis that NRC licensing proceedings should abate and indeed the license should not issue at all until the water quality certificate was issued by EPA.

There is a long line of NRC precedent which indicates that a proceeding in another forum is not a proper grounds for denying or abating action with respect to NRC licensing proceedings.

I submit that those precedents are applicable to the very notion that Mr. Farris is advancing here this

afternoon.

JUDGE WOLFE: Well, I would certainly expect, Mr. Gallo, that if there is any determination by the applicant that they do wish to withdraw their application that within the hour you would advise the commission and this board and all parties of that determination.

I don't know that any such determination has been made. I don't think that even you, Mr. Farris, suggest that.

As I understand it, it may or may not be the determination of applicant at some future time.

Do I read you correctly?

MR. FARRIS: Your Honor, I cannot represent to you that given a particular ruling that PSO has already decided that they will cancel. I suspect that is true. I suspect very strongly that is true, but I cannot represent to you that I know that for a fact.

All I can tell you is that very clearly what the Corporation Commission does on or about January 1 is going to have a very, very large impact on that decision.

That the 45 days that might be lost waiting until we receive both the Corporation Commission's decision and PSO's decision in the scheme of things, considering how long it has taken and how much money has already been spent, would not be that significant as weighed against the amount

of money that would be saved by all the parties by waiting until that time.

But, no, to answer your question I cannot represent to you that I know that PSO is going to cancel.

JUDGE WOLFE: Well, the Board must balance these matters. We have been interested as I imagine that other parties have been that since February 28, 1979, there has been no action on this case at all other than the submission by the parties relating to the evidence adduced to that date.

We have to balance that period of delay and suspension against what might or might not happen in the next 45 days.

We must proceed expeditiously. I understand your apprehensions, Mr. Farris, on behalf of your clients; but we have this terrific backlog of months over a two-year period where absolutely nothing has happened in this case.

I am loathed to permit any more delay of any sort or period of suspension so your informal request I must deny.

Mr. Thessin, did you have anything to add?

MR. THESSIN: I would support that ruling.

MR. BARDRICK: I believe the Chair has stated its opinion at this point.

JUDGE WOLFE: I sometimes just ramble. It becomes more concrete it nobody objects. I will let you object.

MR. BARDRICK: Well, the decision has been stated. However, I personally don't feel that the passage of time operates against the granting of a delay. I think it strengthens the argument in favor of a delay.

If you can afford for whatever reasons to have this project sit idle for two years, to say that an additional 45 days is somehow going to make this whole scenerio much worse than it already is, I don't find that to be forthcoming.

I just support Mr. Farris's arguments in light of the fact that whatever does come out of the Corporation Commission is going to be of impact. If they say go ahead, or if they say back away. One or the other is certainly going to be of major impact.

I would be in favor of a delay.

I don't think there is anything magical about 45 days. It could be 50 days or 60 days or whatever. That is just the nature of the beast. I really couldn't state to the commission that the 45 days would be the upper limit.

JUDGE WOLFE: I have heard you out.

My oral ruling will stand.

MR. BARDRICK: May I bring up a different subject.

JUDGE WOLFE: Yes.

MR. BARDRICK: I have another committment tomorrow in Oklahoma City. I certainly have no objections