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Title: TMI-2 Solutions, Inc.

Docket Number: 50-320-LA-2

ASLBP Number: 23-977-02-LA-BD01

Location: Rockville, Maryland

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: : Docket No.

TMI-2 SOLUTIONS, LLC : 50-320-LA-2

:

(License Amendment Request : ASLBP No.

for Three Mile Island : 23-977-02-LA-BD01

Nuclear Station, Unit 2) :

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Thursday, January 19, 2023

Hearing Room T3 D50

Two White Flint North

11555 Rockville Pike

Rockville, Maryland

BEFORE:

E. ROY HAWKENS, Chair

NICHOLAS G. TRIKOUROS, Administrative Judge

DR. GARY S. ARNOLD, Administrative Judge

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1 APPEARANCES:

2 On Behalf of the Petitioner:

3 LYNNE BERNABEI, ESQ.

4 KRISTEN SINISI, ESQ.

5 of: Bernabei & Kabat, PLLC

6 1400 16th Street NW

7 Suite 500

8 Washington, D.C. 20036

9 202-644-9935

10

11 On Behalf of TMI Solutions, LLC:

12 AMY C. ROMA, ESQ.

13 DANIEL F. STENGER, ESQ.

14 STEPHANIE FISHMAN, ESQ.

15 of: Hogan Lovells US, LLP

16 555 13th Street, NW

17 Washington, D.C. 20004

18 202-637-6831

19 Amy.Roma@hoganlovells.com

20 Daniel.Stenger@hoganlovells.com

21 Stephanie.Fishman@hoganlovells.com

22

23 On Behalf of the Nuclear Regulatory Commission:

24 JOSEPH D. McMANUS, ESQ.

25 ANGELA B. COGGINS, ESQ.

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TRAVIS C. JONES, ESQ.

of: Office of the General Counsel

U.S. Nuclear Regulatory Commission

Mail Stop - O-14 A44

Washington, D.C. 20555-0001

301-415-5356

Angela.Coggins@nrc.gov

Joseph.McManus@nrc.gov

ALSO PRESENT:

ERIC EPSTEIN, Petitioner

AMY HAZELHOFF, Vice President of Regulatory Affairs,
EnergySolutions

SHAUN ANDERSON, NMSS/DUWP/RDB, NRC

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

10:00 a.m.

CHAIR HAWKENS: Good morning, we'll hear oral argument today in a license amendment proceeding entitled TMI-2 Solutions, LLC. Docket number 50-320-LA-2. Petitioner, Mr. Eric Epstein, challenges the request submitted by the applicant, TMI-2 Solutions, to amend its possession only license for Three Mile Island Nuclear Station Unit Two. My name is Roy Hawkens, I'm a legal judge, I chair this licensing board.

And I am joined by Technical Judge Nick Trikouros and Technical Judge Dr. Gary Arnold. We're also joined by our law clerk, Emily Newman, as well as law clerk Allison Wood, who is participating remotely. This argument is being held in the hearing room at the RNC headquarters in Rockville, Maryland, and I'll note this is the first in person hearing we've had since the pandemic, and I'm pleased to welcome counsel and those here assembled in the audience.

For interested persons who could not be here, we have a listen only telephone line, and in addition a court reporter is preparing a transcript that will be accessible to the public next week in the NRC's electronic hearing docket. The proposed

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1 licensed amendment that petitioner challenges, as it's
2 characterized in the Federal Register, seeks to revise
3 the license conditions for TMI Unit Two to comport
4 with current plant conditions and to enable the plant
5 to transition to a decommissioned status.

6 Petitioner argues the proposed amendment
7 should be denied, because it improperly fails to
8 consider potential harm to the environment, including
9 harm from recriticality due to airplane crashes,
10 explosions, fires, and terrorist attacks. The
11 applicant and the NRC staff oppose the petition
12 arguing petitioner lacks standing and fails to proffer
13 an admissible contention.

14 We'll hear argument today from counsel on
15 behalf of all three parties. For the record, would
16 counsel please introduce themselves and any colleagues
17 who are accompanying them, starting with petitioner?

18 MS. BERNABEI: Good morning, this is Lynne
19 Bernabei and Kristen Sinisi representing the
20 petitioner, Eric Epstein.

21 CHAIR HAWKENS: Thank you.

22 MS. ROMA: Good morning, I'm Amy Roma, and
23 at the law firm of Hogan Lovells, and I'm representing
24 the licensee, TMI Solutions. To my right is my
25 colleague Daniel Stenger and Amy Hazelhoff from TMI

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1 Solutions, and in the front row there is our colleague
2 Stephanie Fishman.

3 CHAIR HAWKENS: Thank you.

4 MR. McMANUS: Good morning, Your Honors.
5 My name is Joseph McManus, and I, along with Angela
6 Coggins and Travis Jones, am counsel for the NRC
7 staff. We also have in the hearing room Shaun
8 Anderson as a staff technical expert.

9 CHAIR HAWKENS: All right, thank you,
10 welcome to all of you. As explained in this board's
11 December 12 scheduling order, the parties will be
12 allotted 30 minutes to present argument, and
13 petitioner may reserve up to ten minutes for rebuttal.
14 The board's law clerk, Ms. Newman, will keep track of
15 the time, when five minutes are left, the yellow light
16 will be illuminated.

17 When time is expired, that'll be the green
18 light. When five minutes are left, yellow will come
19 on. When time has expired, the red light will
20 illuminate. Do counsel have any questions?

21 MR. EPSTEIN: I just wanted clarification,
22 the pronunciation on my name is Epstein. I just
23 wanted to clarify the pronunciation of my name is
24 Epstein, not Epstein. I don't want to be confused
25 with some other people who have been recently in the

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1 media. If you forget, there's Einstein, Epstein,
2 Frankenstein, I'm the Jew in the middle.

3 CHAIR HAWKENS: Thank you, Mr. Epstein.
4 Any other questions from counsel? Judge Trikouros,
5 Judge Arnold, anything to add before we begin?

6 JUDGE ARNOLD: No.

7 JUDGE TRIKOUROS: No.

8 CHAIR HAWKENS: All right, Ms. Bernabei as
9 petitioner, you may start. And before proceeding, how
10 much time, if any would you like to reserve for
11 rebuttal?

12 MS. BERNABEI: Five minutes please.

13 CHAIR HAWKENS: Five minutes, all right.
14 Thank you, you may proceed, Ms. Bernabei.

15 MS. BERNABEI: Okay. I want to give a
16 little factual background, because some of us have
17 been living with this case for a long time, over 25
18 years --

19 CHAIR HAWKENS: Before you begin, a
20 question, it's my understanding based on email
21 exchanges between Mr. Epstein and our law clerk that
22 you just recently have become acquainted with this
23 case in early January, is that correct?

24 MS. BERNABEI: With this particular
25 petition. But I have represented TMIA and Mr. Epstein

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1 going back to the 90s.

2 CHAIR HAWKENS: I commend you for your
3 willingness and ability to prepare on such short
4 notice.

5 MS. BERNABEI: Thank you. What I'd like
6 to sort of give a general outline and then get into
7 the more technical argument, what we really have in
8 this case is a fairly new licensee, a new licensee
9 certainly to TMI-2, which has no experience working
10 with this damaged reactor.

11 CHAIR HAWKENS: Ms. Bernabei, we're
12 familiar with the background in the petitioner, and
13 given the serious questions, issues involved both in
14 standing, and in contention, admissibility, I think
15 we'd be grateful if you'd turn to them reasonably
16 promptly.

17 MS. BERNABEI: Okay. Mr. Epstein has been
18 a pro se petitioner up to this point in time, and as
19 you all know, there is a relaxed standard for standing
20 for pro se litigants. The recent cases of Seabrook,
21 and also Fermi, which is a 2020 case, said that
22 petitioners, when they are not represented by counsel,
23 that the NRC considers them to have relaxed standing.
24 And while they -- and they generally look at not the
25 standing, but the contentions, if they're good

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1 contentions.

2 And I would just note that Mr. Epstein --

3 CHAIR HAWKENS: Can you -- I understand
4 there's a relaxed, more lenient standards for
5 pleading. But the standards for standing itself, I
6 don't think are any different from any other party, is
7 that correct, is that your understanding?

8 MS. BERNABEI: No, that isn't. What the
9 Seabrook case says is we generally construe standing
10 in favor of the petitioner. The requirements for
11 standing are not strict by design, this is especially
12 so when we're a pro se petitioner. I think Mr.
13 Epstein has consistently established in other
14 proceedings going back 30 years that he has a
15 sufficient interest.

16 He not only lives in the community, works
17 in the community, he's also been the signatory to a
18 number of agreements to monitor the safety of the
19 plant.

20 CHAIR HAWKENS: As I understand from your
21 briefing, you're alleging three theories for standing,
22 discretionary intervention, proximity, and
23 traditional?

24 MS. BERNABEI: Yes, Your Honor.

25 CHAIR HAWKENS: Do you agree that

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1 discretionary intervention is simply not available
2 under the regulations?

3 MS. BERNABEI: In this particular case, I
4 would argue that it is, because of the special, unique
5 nature of TMI-2, and --

6 CHAIR HAWKENS: All right, well I don't
7 think you'll get very much traction. You can argue
8 that if you like, but I think you'll have better
9 traction with the other two theories.

10 MS. BERNABEI: Well, the essential point
11 is that Mr. Epstein lives, works, and has monitored
12 the damaged reactor for 30 years at least. And he has
13 been granted standing in other proceedings, in two
14 agreements signed by the Nuclear Regulatory
15 Commission, they have acknowledged, as has the
16 licensee in those instances, that he has an interest
17 in the proceeding.

18 CHAIR HAWKENS: As between proximity
19 presumption standing and traditional standing, which
20 is the strongest theory of standing in your view?

21 MS. BERNABEI: Traditional standing.

22 CHAIR HAWKENS: All right, would you
23 address that?

24 MS. BERNABEI: Yes. I think you can't
25 sort of separate it from the contentions itself under

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1 the case law. The case law says if you have standing
2 or an interest in the possible danger of a nuclear
3 plant, now most of these occur when the plant is
4 licensing. We have a unique situation here with the
5 damaged reactor. But if you have an interest in
6 possible emissions from a damaged reactor in this
7 case, you can have standing.

8 And I would just note that the cases, and
9 they're very recent cases, they're 2020, say very
10 clearly that the standards are relaxed, and what the
11 board or the NRC should look at is the contentions,
12 and whether the contentions are valid contentions,
13 they don't look at standing by and large. They are
14 very liberal in construing standards. And I think Mr.
15 Epstein, throughout this 30 years, has established
16 that he is currently the main person that monitors the
17 site under the safe store.

18 He signed two agreements, including the
19 original one in the early 1990s and the recent one
20 when the licensee was changed. And he continues to
21 monitor and follow all the studies, and the Federal
22 Register, and what's coming out in terms of that. And
23 the contentions he makes are serious ones, and I'd
24 like to just go to those.

25 CHAIR HAWKENS: Before you do that, can I

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1 ask a couple more questions about standing?

2 MS. BERNABEI: Sure.

3 CHAIR HAWKENS: Typically there's a
4 causation component, and here when there's a license
5 amendment, they must show that the amendment being
6 challenged will cause a distinct new harm or threat to
7 him or increase the threat or harm that currently
8 exists. And can you explain how these proposed
9 license amendments fit that description?

10 MS. BERNABEI: Yes. You have in this
11 instance a very poorly set forth plan. The NRC has
12 not even done a final analysis of it. And the plan,
13 among other problems, has that -- we contend, and
14 there's expert evidence that has been presented, that
15 this plant, given the damaged nature of the fuel, the
16 amount of the fuel, and the particular unknown
17 configuration of the fuel could still go critical,
18 that's number one.

19 Number two, there has never been an
20 analysis of the particular dangers that Mr. Epstein
21 brought up in his original petition, that has to do
22 with a potential fire, terrorist attack, or aircraft
23 accident. And the reason that these were never looked
24 at is because this plant was shut down very early,
25 before 9/11, and before there was the new regulations

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1 that have to do with the potential dangers.

2 So, we think that these contentions about
3 a terrorist attack, an aircraft attack, and an
4 internal threat have never been looked at in this
5 plant, because it was simply not necessarily, because
6 it was in so called safe store. With the licensee,
7 the new licensee is asking for a radical change in
8 that. And the particular danger is one, it could go
9 critical.

10 And these kinds of accidents, which have
11 never been looked at after the initial licensing of
12 TMI-2, could cause radiation exposure. We know for a
13 fact that the occupational exposure would be
14 heightened by a factor of two if it is decommissioned.
15 I'd also like to say --

16 CHAIR HAWKENS: Before you go to that, and
17 we'll be getting more into that when you get into your
18 contention admissibility arguments, but did you
19 represent Mr. Epstein in the 2020 case of TMI Nuclear
20 Station Units One and Two?

21 MS. BERNABEI: No, Your Honor, but this is
22 --

23 CHAIR HAWKENS: Are you familiar with that
24 case?

25 MS. BERNABEI: Yes.

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1 CHAIR HAWKENS: In that case, the
2 licensing board held that he did not demonstrate
3 either proximity presumption standing, or more
4 pertinent here, more traditional standing. Can you
5 distinguish that case from this case?

6 MS. BERNABEI: Yes, Your Honor. This is
7 a radical departure. This is a radical departure from
8 the status of the damaged reactor. We no longer have
9 one licensee for two reactors. We have TMI-1, that
10 has no regulatory responsibility over TMI-2. And this
11 is a radical departure from the safe store in which
12 this reactor is being held. And at the time, in the
13 1990s, the NRC staff and the licensee signed an
14 agreement saying we don't know how to get rid of the
15 damaged fuel.

16 We don't have a place to put it, we don't
17 really have a firm plan. So, we're going to keep it
18 in safe store. Mr. Epstein at that point agreed to
19 it. Since that time, nothing's changed inside of TMI-
20 2, except the licensee has changed multiple times.
21 And what we have is a plan that is not fully thought
22 out in terms of how they're going to get rid of the
23 damaged fuel.

24 They cannot rely on TMI-1 any longer,
25 because TMI-1 is decommissioning, it's a different

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1 licensee, has no requirement to take the damaged fuel.
2 We have an extra wrinkle, which we explained in the
3 supplemental pleading, which we just became aware of,
4 is that TMI-2 Solutions has no guarantee of water to
5 kind of do this decommissioning, and that TMI-1 is
6 under strict requirement from the Susquehanna -- the
7 Pennsylvania Commission.

8 That it shall not, except for minimal
9 amounts, give any water to TMI-2. So, the difference
10 here is you have a licensee, TMI-1, which was the
11 licensee for both reactors, that has a plan for
12 decommissioning. Here you have a newcomer, TMI-2
13 Solutions, that really has a very, very, I would say
14 tenuous plan. They don't know where they're going to
15 put the waste.

16 They have no contractual -- TMI-1 is
17 struggling to handle its own waste, no contractual
18 obligation to take things from TMI-2, because it's a
19 different licensee. Idaho has no obligation to take
20 this waste, and there's no water that's guaranteed for
21 the cleanup. So, the worst thing that could happen,
22 and the most danger of radiation exposure proven to
23 the workers, the workers are going to be exposed, the
24 estimates are two times the radiation exposures as if
25 you kept it in safe store until there were a better

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1 plan.

2 There's radiation exposure, and there's
3 just simply not a good, thought out plan of how to do
4 this. And TMI-2 Solutions says well, we want to
5 regularize, normalize this. This is not a normal
6 plant. This is a damaged reactor with a great deal of
7 damaged fuel in an uncertain condition. And that
8 means you can't pretend, which I think TMI-2 Solutions
9 is trying to do, that this is a regular plant, it's
10 not a regular plant.

11 And there's no firm plan as to where
12 they're going to store this waste once they remove it.
13 Idaho won't necessarily take it, and TMI-1 is under no
14 obligation --

15 CHAIR HAWKENS: The waste storage is not
16 really a component of either of your contentions as I
17 need them.

18 MS. BERNABEI: No, it is, Your Honor,
19 because if it goes critical while they're in the midst
20 of this unformed plan, they have no ability to handle
21 what they're supposed to do. And the fact that the
22 plan is so poor from the beginning, I think sheds
23 light on the credibility and the competence of TMI-2
24 Solutions to carry out this plan.

25 CHAIR HAWKENS: Okay, why don't you go

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1 into your contention admissibility arguments please?

2 MS. BERNABEI: Well, number one, it's been
3 established for a long time, and this was basically
4 the basis on which the safe store, which this reactor
5 is still in, it's still in safe store. The basis for
6 that is that we contended, Mr. Epstein contended, and
7 TMIA contended that it could still go critical. There
8 have been no studies that show that it can't. And
9 given that uncertainty --

10 CHAIR HAWKENS: Is contention one, it
11 looks -- the only difference between the two
12 contentions on their face appears to be a
13 recriticality component that's in contention two, but
14 in contention one in the basis several times, you
15 argue about recriticality occurring, the possibility
16 of it. So, it appears that the two contentions are
17 substantially identical, or at least substantially
18 similar, is that correct?

19 MS. BERNABEI: I would say in part, okay?
20 They rely on two things, one is that recriticality is
21 possible. Two, there have never been analyses of
22 these hazards and what it would do to the damaged
23 reactor. And there just hasn't been any. So, if you
24 start carting this fuel around, and there's an
25 aircraft -- there's now an international airport near

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1 Harrisburg, or if there's a terrorist attack, this
2 plant has not been analyzed for any of those.

3 Because it was already shut down by the
4 time these NRC regulations went into effect. So, you
5 have an untested damaged plant. So, it's not just
6 recriticality, it's also environmental damage from
7 these kind of attacks that could occur.

8 CHAIR HAWKENS: So, it's your position in
9 both contention that NEPA requires the analysis for
10 airplane accidents, fires, explosions, terrorist
11 attacks which could result in recriticality?

12 MS. BERNABEI: Yes, yes.

13 CHAIR HAWKENS: Okay.

14 MS. BERNABEI: And the NRC and the
15 licensee have argued there's a categorical exclusion,
16 we don't think that that applies, because there's
17 exceptions including that there may be an increase in
18 the amount of effluence, and there may be a
19 significant increase, and I think this is in Mr.
20 Epstein's pleading, in the cumulative occupational
21 radiation exposure. The studies that have been done
22 say that would double.

23 So, we also think the categorical
24 exclusion does not apply, because there are special
25 circumstances. This is the only plant in the United

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1 States that has been so heavily damaged. And so --

2 CHAIR HAWKENS: I didn't see in any of
3 your pleadings the term special circumstances.

4 MS. BERNABEI: Well, it's in the
5 controlling regulation, Mr. Epstein --

6 CHAIR HAWKENS: I'm aware of that, but --

7 MS. BERNABEI: Mr. Epstein did this as --

8 CHAIR HAWKENS: In order to put the
9 licensing board on notice, and the other parties on
10 notice, it's an argument that should be expressed in
11 your pleadings.

12 MS. BERNABEI: Well, Your Honor he's --
13 excuse me. He's a pro se plaintiff, and I think the
14 licensing boards and the NRC appeals boards have been
15 very clear that he should be given leeway. The facts
16 are in his pleadings, and he has said all over his
17 pleadings that there are special circumstances, and
18 that's a categorical --

19 CHAIR HAWKENS: Well, no, he's never used
20 the term special circumstances.

21 MS. BERNABEI: Well, let me tell you where
22 he raised that, page 17. NEPA requires the NRC to
23 consider and attempt to avoid or mitigate significant
24 adverse environmental damage. And he also says the
25 NRC should take a hard look at environmental impacts,

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1 and that NEPA places upon the agency the obligation to
2 consider every significant aspect. And then page 18
3 to 20 of the original petition, he says his entire
4 argument talks about the special circumstances that
5 apply to TMI-2. TMI-2 -- Three Mile Island Two --

6 CHAIR HAWKENS: What page is that on? I'm
7 sorry.

8 MS. BERNABEI: 18 through 20, these are
9 where he argues that Three Mile Island --

10 CHAIR HAWKENS: Did he use the term
11 special circumstances? I just want to be clear,
12 because I hadn't seen it, perhaps I overlooked it.

13 MS. BERNABEI: He implies an exception to
14 categorical exclusion. But he was a pro se plaintiff,
15 he makes it very clear that Three Mile Island Unit Two
16 is unique. And I think the panel can take judicial
17 notice that this is a unique situation. There is no
18 other plant in the United States that had a near
19 meltdown with a heavily damaged core going into a
20 possible decommissioning.

21 The other thing that I wanted to address
22 in the legal terms is that the NRC and TMI-2
23 arguments, and Mr. Epstein did not challenge the NRC's
24 preliminary determination of no significant hazards.
25 In fact the controlling regulation, this is 10 CFR

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1 50.92[©] states the NRC may determine that a proposed
2 amendment involves no significant hazards if operation
3 of a facility in accordance with an amendment would
4 not, and then they give a series of things.

5 Involve a significant increase in the
6 probability or consequences of an accident. We
7 believe that they have not demonstrated that. And
8 throughout the pleadings, the NRC and the licensee
9 attempt to put the burden on Mr. Epstein to show there
10 will be an accident. That's not his burden, the
11 burden is on the licensee and the NRC to show that
12 there is no probability, or very low probability of an
13 accident.

14 Number two, create the possibility of a
15 new or different kind of accident from any kind of
16 accident previously evaluated. This is a plant that
17 hasn't operated for 40 years, 35 years. So, this is
18 certainly ripe for the kind of accident that the NRC
19 has never evaluated. And then number three, it says
20 it does not involve a significant reduction in the
21 margin of safety.

22 We think that it does reduce that margin
23 of safety in the ways we've described. And the
24 ultimate issue here is you have a plant that's been in
25 safe store for 30 years. It's never been subject to

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1 the same regulatory authority, and now you have a new
2 licensee that can't depend on TMI-1 to protect it.
3 And I want to just point out where he made these
4 arguments in his petition page one, the proposed LAR
5 will reduce safety margins and increase the likelihood
6 of significant hazards during phase 1B and phase two.
7 Page four --

8 CHAIR HAWKENS: And how will it do that?
9 I agree there are a number of assertions, but are they
10 supported, and do they point to a particular provision
11 in the LAR?

12 MS. BERNABEI: Yes. The proposed
13 amendment undermines the cleanup by deleting or
14 modifying technical specifications for PDMS, that's
15 the safe store, leaving out surveillance requirements,
16 and leaving out administrative controls. And it also
17 allows --

18 CHAIR HAWKENS: I'm familiar with that
19 passage, and I highlighted it because it's not clear
20 to me what particular provisions he's pointing to and
21 how those provisions impair the cleanup.

22 MS. BERNABEI: Because if you remove all
23 the controls, and they're storing high level waste on
24 an island in the Susquehanna River for an undetermined
25 period of time without surveillance --

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1 CHAIR HAWKENS: What controls though, we
2 didn't point out where -- it's a fairly extensive
3 license amendment request, and it makes conclusory
4 representations about what's in there, and then makes
5 conclusory representations about the adverse impact.
6 And it may -- perhaps it will cause an adverse impact,
7 but it was incumbent on him to satisfy the
8 admissibility requirements to identify the specific
9 provision.

10 And explain why it was deficient and why
11 it would have the adverse impact. And I had
12 difficulty seeing that in the pleading.

13 MS. BERNABEI: Okay, well look at page
14 four, the relocation of the debris. He says after the
15 applicant vacates Three Mile Island, it poses a
16 significant hazard based on the inability of the
17 federal government to locate a permanent waste site.
18 That is absolutely clear from the license amendment,
19 that the federal government has not guaranteed a site
20 for the waste.

21 That is what he says is a significant
22 hazard, that fits within. On page six, footnote six,
23 it says the applicant sites the DOE contracts number
24 -- and I won't quote it, because it's in footnote six,
25 of page six, abnormal waste contract, but it omits any

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1 details about post storage safety challenge. And
2 those are that they won't find a permanent home for
3 this waste.

4 TMI-1, which is very well explained, TMI-1
5 won't accept this waste, and it will start
6 decommissioning and not be able to finish it because
7 there's no home for this waste. Now, that's explained
8 very carefully, and that's actually the gist of the
9 whole license amendment. But they're going to remove
10 this waste with no clear plan of where it's going to
11 go.

12 CHAIR HAWKENS: It's difficult for me to
13 connect that harm with the express language of your
14 two contentions, which talk about the failure to
15 conduct any kind of NEPA consideration for those four
16 triggering events, which would result in
17 recriticality.

18 MS. BERNABEI: If you take the waste out
19 of TMI-2 and don't have a home for it somewhere else,
20 that imposes an environmental hazard. It's not upon
21 Mr. Epstein to make out the burden or to -- it's not
22 his burden to show that it will definitely lead to
23 irradiation, it's the burden of the licensee and the
24 NRC staff to show that it won't. And if they do not
25 have -- and we filed something last night, which you

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1 may not have had a chance to review, but this licensee
2 --

3 CHAIR HAWKENS: We have not had a chance
4 to review that.

5 MS. BERNABEI: I understand. That it has
6 no home for this waste, TMI-1 is under no obligation
7 to take it, different licensee, different regulatory
8 authority, Idaho is not taking it, and now we know
9 they don't even have any guarantee of water if the
10 decommissioning goes through. And TMI-1 is prohibited
11 from giving its water to TMI-2. So, if it takes this
12 fuel out, and it has no permanent home for this waste,
13 it will lead to additional radiation exposure.

14 But that's the burden of the licensee and
15 the NRC to prove that that's not true. And that's the
16 argument he's raised, page one, page four, and then
17 page six, footnote six.

18 CHAIR HAWKENS: Can you reconcile your
19 contentions with the Oyster Creek 2007 Commission
20 decision, which was affirmed by the Third Circuit?

21 MS. BERNABEI: Oyster Creek was a normal
22 reactor. Oyster Creek had no damaged core, no unknown
23 amount of damaged fuel, and no uncertain configuration
24 of fuel. It was a plant at the end of its normal
25 operating cycle. So, it's a totally different set of

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1 facts. You didn't have, what we contend is a damaged
2 reactor that's been in safe store with an uncertain
3 amount of damaged fuel and a potential for
4 recriticality.

5 CHAIR HAWKENS: With one percent of fuel,
6 as opposed to 100 percent at Oyster Creek.

7 MS. BERNABEI: The problem is that you
8 know what that core looks like. You don't know what
9 the remaining core at TMI-2 looks like. It's a normal
10 reactor in the sense that TMI-2 I think calls it
11 regularized, normalized, it's a regular reactor, it's
12 had no serious damage. So, it doesn't have highly
13 radioactive damage fuel in the same sense that TMI-2
14 does.

15 The problem with TMI-2, which the NRC has
16 always recognized, that's why it's sitting in safe
17 store, and that's why it shouldn't be granted, is they
18 don't know what this looks like. They don't know,
19 because they can't get close enough to it, so they
20 have to use all kinds of things that have been
21 controversial.

22 CHAIR HAWKENS: Well, let's talk a little
23 bit about your concern about, and I see as you do, the
24 time has expired, but we have a few more questions for
25 you.

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1 MS. BERNABEI: Okay.

2 CHAIR HAWKENS: The pleadings don't
3 address in any detail the license amendment requests
4 extensive discussion and calculations and conclusions
5 that it's impossible for criticality to occur, even in
6 the most ideal setting for criticality. Can you
7 address that please?

8 MS. BERNABEI: Number one, the amount of
9 damaged fuel that exists in TMI-2 is uncertain, they
10 don't know. And they used, I believe it's 1100 as
11 their figure, and said there's a plus or minus 5
12 percent. The figures range up to 1300, so we don't --
13 nobody knows, because there's been so many different
14 calculations of this, how much damaged fuel there is.
15 And the other issue, which they've never addressed, is
16 it's not just the amount.

17 Assuming for the moment that they're right
18 on the assumption you can't go critical at 1100 or
19 1200, okay? The thing that they haven't addressed is
20 the configuration of the fuel, which no one knows
21 about. And so the problem is the configuration of
22 this damaged fuel is unknown.

23 JUDGE TRIKOUROS: I have a question in
24 that regard. If I remember the LAR analysis
25 correctly, the configuration that they chose to do the

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1 criticality analysis was, let's just say the optimum
2 worst conservative configuration one can achieve for
3 criticality, which really is a spherical
4 configuration.

5 You're saying there's some likelihood that
6 the configuration of the fuel at TMI-2 today could
7 somehow be rearranged by processes that would be
8 ongoing that would create a configuration that would
9 be more severe than a sphere?

10 MS. BERNABEI: Possibly, because, and I'm
11 going to get the technical term wrong, the way the
12 fuel is held, they're cracking, there's crack in
13 what's holding, I don't know if it's called caskets,
14 they're cracking in those. And so it may be
15 rearranged, and the problem is this has been basically
16 an abandoned plant for 25 years. So, we don't know
17 what configuration -- we didn't know back then, and we
18 don't know now, because it is changing.

19 And the second thing is the NRC has never
20 done their own analysis of this. They've just said
21 okay, you say it's okay, so it's okay. That's, we
22 think an abdication of the staff's responsibility.
23 So, we do think that it can still go critical given
24 the failure to do a deep analysis of this.

25 JUDGE TRIKOUROS: So, you're saying that

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1 the analysis that was presented in the LAR was not
2 deep enough?

3 MS. BERNABEI: I'm saying it's untested.
4 It's been unreviewed, not peer reviewed, and I think
5 Mr. Epstein deserves the opportunity in the hearing to
6 challenge it, that's what I'm saying. Because the NRC
7 staff has not done an adequate review of it. I mean
8 they admit this is a preliminary review, and there is
9 no evidence that we've seen of their review of it, in
10 terms of a final review of it. We think it's
11 premature at this point.

12 JUDGE TRIKOUROS: All right, well I guess
13 we'll have that opportunity to ask that question of
14 the staff shortly.

15 JUDGE ARNOLD: I would like to just go
16 back for a moment to the question of standing. And I
17 personally, let me explain how I see the situation,
18 and you can tell me where I'm wrong. Now, the 50 mile
19 proximity presumption was based upon a plant that has
20 a full core load, a full equilibrium decay heat, is
21 hot, and is at power. And that is not what we have at
22 TMI-2.

23 We have 99 percent of the fuel removed,
24 which means we have two orders of magnitude less
25 radioactive material in it, plus in the 40 some odd

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1 years, it's decayed by a factor of approximately ten
2 to the fourth. Now, what those two reductions do, is
3 it makes the remaining fuel in the core or in the
4 plant, has about one one millionth of the
5 radioactivity of the operating plant for which the 50
6 mile proximity presumption was developed.

7 Now, in my mind, if I scale down the area
8 of the proximity presumption using the radiological
9 hazard that exists at TMI-2, I come up with the
10 proximity presumption would give standing to people
11 who are within 264 feet of the reactor. That's based
12 just on what the radiological hazard is now. So, how
13 do I come to grips with your claim that there's a risk
14 beyond the plant boundary?

15 MS. BERNABEI: A few things. One is the
16 amount of fuel is uncertain. And scientifically, you
17 have an assumption that has wildly various
18 assumptions, they can't all be right. It cannot all
19 -- they can't all be correct, and what that shows is
20 that there's uncertainty in the assumptions, number
21 one. Number two, it's not in a configuration that's
22 known, because you can't really examine the damaged
23 fuel, and the configuration is changing.

24 So, what we have is something that's
25 uncertain, been studied for a while, not really in

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1 depth, because people can't go down and look at this
2 stuff given the situation with the reactor. A regular
3 operating reactor, you know what the core looks like,
4 you know what it looks like when it's shutdown, you
5 know the amount of fuel and where it is. You don't
6 have any of those assurances with this facility, which
7 means you have to look better.

8 Now, just to prove this point, is this was
9 the whole premise, that you don't know what's in the
10 core, when the NRC and the then licensee entered into
11 the safe store agreement, you don't know about this
12 core, because it's a heavily damaged reactor. So,
13 what we're saying is you have to take more precautions
14 to let these newcomers on the block, TMI-2 Solutions,
15 start carting around this waste that we think still
16 could go critical and expose the community without a
17 really, really good plan, and they don't have a good
18 plan.

19 That's our basic. And so I think the
20 assumptions that you're raising are different for an
21 operating plant that's coming to the end of its life
22 where you know what the core looks like, versus TMI-2.

23 JUDGE ARNOLD: Thank you.

24 CHAIR HAWKENS: A couple more questions,
25 and we won't hold this against your rebuttal time.

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1 You include in your reply brief, a paper by Dr. Kaku,
2 when was that --

3 MS. BERNABEI: Kaku, Michio Kaku, yes.

4 CHAIR HAWKENS: Thank you, I'll need to
5 get my pronunciations correct. When was that written?

6 MS. BERNABEI: That was, I guess he has
7 issued testimony all through the 80s, and I believe
8 are --

9 MR. EPSTEIN: That original was '87, and
10 there was a modified testimony in '90.

11 MS. BERNABEI: And we actually have copies
12 if you'd like, we don't have multiple copies, but we
13 can get them to you, of his testimony, but the facts
14 remain the same. There's multiple estimates of how
15 much damaged fuel remains in the reactor, and the
16 configuration is unknown. And his opinion is that
17 that is enough to go to criticality. Or at least, let
18 me put the burden the right way, the licensee cannot
19 show that that will not lead to criticality.

20 That's the point, not that Mr. Epstein has
21 to show that it leads to criticality.

22 MR. EPSTEIN: There's studies if you want
23 to look at them, I don't know if you recall the
24 advisory panel, Mike Masnick, the NRC, we had '93
25 hearings, those studies are entered into evidence as

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1 we were going through this. So, you already have it,
2 we can bring it, but it's already been entered into
3 evidence at an NRC hearing.

4 MS. BERNABEI: Is that -- I think we have
5 some of them, which we can hand up.

6 CHAIR HAWKENS: That's not necessary,
7 thank you. In fact we prefer not to have that at this
8 juncture. Now of course the LAR does contain, as I
9 said, extensive analyses, and although you make
10 representations about what Dr. Rasmussen has said and
11 what Dr. Kaku has said, there's nothing in your
12 pleadings which indicate they have reviewed the LAR,
13 is that correct?

14 MS. BERNABEI: No, but if we were granted
15 a hearing, we would get an expert that was capable of
16 reviewing it and giving an opinion. The whole thing
17 in our mind is premature. This has been rushed
18 through for no apparent purpose, to take this plant
19 that has been shut down comfortably for 30 years and
20 rush it through to decommissioning. There's no
21 reason, because this is not a great plan. So, we
22 think Mr. Epstein deserves a hearing.

23 CHAIR HAWKENS: Ms. Bernabei, I know you
24 weren't involved in the filing of the reply brief, but
25 the deadline for filing was December 5, and it was

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1 filed the next day without any representation that
2 good cause was satisfied. In fact it erroneously
3 stated it was timely filed, and I'm wondering why we
4 should consider it, given --

5 MS. BERNABEI: I can't answer that, other
6 than Mr. Epstein is pro se.

7 MR. EPSTEIN: Yeah, based on my
8 conversations with -- and I don't --

9 JUDGE TRIKOUROS: Mr. Epstein, could you
10 use the microphone?

11 MR. EPSTEIN: Yeah, this is probably a
12 horrible way to start the response, I'm pretty anal.
13 It was done a week before, I waited to file it, I was
14 under the impression that it was under the deadline,
15 that's why there was no comment as to -- because I
16 think you're actually right Judge Hawkens, I said it
17 was timely, because in my opinion, when I did the
18 calculation, and conversations I had, I was under the
19 impression it was timely.

20 There was no exigent circumstance that
21 caused it other than maybe I need a better calendar,
22 I don't know what to tell you. But if you look at my
23 filings and pleadings, I'm always ahead of the game.

24 CHAIR HAWKENS: Almost always.

25 MR. EPSTEIN: Well, yeah, I mean again --

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1 CHAIR HAWKENS: I understand, thank you.
2 That explains, I understand, thank you Mr. Epstein.

3 MR. EPSTEIN: If you use a Jewish
4 calendar, I'm a couple days ahead, but I guess we're
5 using the lunar.

6 CHAIR HAWKENS: All right.

7 MS. BERNABEI: And I might just note, he
8 is pro se, and there's no prejudice. I mean when
9 you're dealing with a pro se, you give some leniency.

10 CHAIR HAWKENS: I understand. Do you have
11 any more questions for Ms. Bernabei before we?

12 JUDGE TRIKOUROS: Yeah, I just want to
13 follow up on the criticality issue. It's your opinion
14 that the criticality possibilities at TMI-2 are
15 likely, or unlikely at the present time?

16 MS. BERNABEI: Let me run it the other way
17 for you, not to not answer your question. But I don't
18 think the burden is on Mr. Epstein to have someone
19 make that determination. I think it's on the licensee
20 and the staff to assure you, or whoever is going to
21 make the final decision, that it is not at all likely.
22 That they can represent that it is not at all likely.

23 And our opinion is that it's probable
24 enough, given this plan, that it has to be further
25 looked into, and that's why we want a hearing.

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1 MR. EPSTEIN: Can I add something quickly
2 since I wrote it? Real briefly. This is what we were
3 told when the plant was being built, Unit One came
4 online in '74, TMI-2 in '79, the exact quote from the
5 company is an accident here is as likely as a meteor
6 falling from the sky. This is theoretical, and if you
7 look at what we said, it is unlikely. But when we had
8 the accident, failure of imagination.

9 Same thing, O rings in the space shuttle.
10 I just think we need, deserve the ability to have a
11 hearing to examine it. So, nobody's saying it's
12 ultimately going to happen, hopefully it won't, I live
13 there.

14 MS. BERNABEI: And can I just raise one
15 thing? This plant was built to sustain supposedly the
16 most severe accident, and you'll have to forgive me,
17 it's class eight, class nine, I can't remember the
18 classes any longer. It was meant to not have the core
19 melt under that serious an accident, but it exceeded
20 the basis on which it was built. That accident was
21 greater than what the NRC said licensees had to plan
22 for.

23 So, we've already had a problem with this
24 plant that the accident that occurred exceeded, and
25 led to, we believe exposure of radiation beyond the

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1 design basis that the NRC originally said could never
2 happen, it did happen. I'm sorry to interrupt you.

3 JUDGE TRIKOUROS: Yeah, with respect,
4 again, I want to close this criticality question. The
5 licensee performed a fairly detailed analysis in the
6 LAR. It looked like they made extremely conservative
7 assumptions and reached the conclusion that the
8 possibility of a criticality is essentially not
9 credible, that it is not a credible event.

10 And in your pleadings you did not
11 specifically evaluate that at the level where we could
12 see that you've done a review of it and had reasons
13 why you believe it's incorrect. And you've told us
14 this morning that you would be satisfied if the staff
15 reviewed it and found it to be an acceptable analysis,
16 is that correct?

17 MS. BERNABEI: It depends on what the
18 staff does, it hasn't done it up to now. But the
19 reason we haven't done that analysis is because we
20 haven't had a hearing in which we could find an expert
21 who would apply that math. We need a hearing so this
22 can be explored, that's what Mr. Epstein is asking
23 for, because that's what a hearing is for, it's to
24 challenge the assumptions.

25 And I think frankly this whole thing is

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1 premature. You have a pretty inexperienced licensee
2 that talks about normalizing or regularizing this
3 plant, has no place for the waste, has no committed
4 space for the waste, and no water. It seems like it's
5 premature. The NRC staff should finish its review, we
6 can look at it, and we may still ask for a hearing,
7 but it should be able to be challenged in a hearing by
8 Mr. Epstein.

9 JUDGE TRIKOUROS: Right, but prior to
10 getting to the hearing, there's a requirement that one
11 has to show that there's something to litigate, and
12 that has not been done in terms of this, and again I
13 want to focus on criticality, because I want to finish
14 that. And we'll talk about that with the staff when
15 they get to the podium.

16 MS. BERNABEI: I think that the key on
17 this, and this is in -- and they weren't in the right
18 form, so we do have the declarations and testimony
19 from Michio Kaku, who is sort of a world famous
20 physicist, that it's not just the amount, it's also
21 the configuration, and that has not been addressed.
22 The configuration of the fuel. They've said okay, up
23 to 1100, we know it can't go critical. But one of the
24 estimates is it could be as much as 1300.

25 But Kaku makes the express statement that

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1 it's the configuration of the fuel, which also makes
2 this a more complicated problem, and it can go
3 critical.

4 MR. EPSTEIN: Can I add something?
5 Because I wrote it, is the key point, as someone who
6 has tracked this issue for 43 years is not necessarily
7 commission, but omission. If you haven't looked at
8 the scenarios or viability of an external threat and
9 the external threat reconfiguring or creating an
10 accident that we haven't really looked at, it's hard
11 for me at the time -- I read the LAR.

12 I can't look at something that wasn't
13 written, what I'm postulating is that we deserve the
14 opportunity to look at an external accelerant here.
15 This is all internal configuration, and theories are
16 only as good as the theory. And I'm saying that, my
17 profession is a Holocaust historian, and I believe
18 when you look at history and facts, you have people
19 who look at the facts, and you also have the context
20 of on the ground.

21 And I think the two merge here is that the
22 experience that I've had, that we've had over time,
23 and that's why I put in there what Distenfeld came up
24 with, Lee Thonus came up with, Mike Masnick, who is a
25 good friend of mine. This has been a fluid adventure.

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1 You keep saying 99 percent, based on what I see in
2 Idaho, I think it could be 97 percent. So again,
3 you're starting from a place at 99 in the K effective
4 that can't happen that I don't agree with. And I'd
5 like the opportunity to argue that.

6 JUDGE TRIKOUROS: All right, fine, thank
7 you.

8 CHAIR HAWKENS: Anything else? No, all
9 right, thank you very much.

10 MS. ROMA: Good morning, Your Honors.

11 CHAIR HAWKENS: Good morning, Ms. Roma.

12 MS. ROMA: My name is Amy Roma, just again
13 for the court reporter, and I am representing TMI-2
14 Solutions. I was briefly going to mention, I'm doing
15 some pivoting here based on the type of questions you
16 asked earlier, so I was going to briefly explain the
17 state of the plant, very briefly, because it goes into
18 the radiological risk that addresses both standing and
19 contentions.

20 So, as you alluded to earlier, the 1979,
21 there was an accident at TMI-2, the plant shut down,
22 it only operated for a few months before the accident
23 occurred. All the fuel has been defueled from the
24 plant. Only about one percent of the spent fuel
25 remains on site, and that is dispersed throughout

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1 various systems. And it wasn't pulled out back in the
2 1980s when most of the defueling was done because of
3 the form that it took and the location that it was.

4 So, there's some dust at the bottom of the
5 plant, there's some hardened spent fuel on piping and
6 equipment, and there's some film on other equipment.
7 So, it's not just sitting like a core configured for
8 an operating plant, it's dispersed throughout. So, it
9 wasn't removed at the time, because it was
10 inaccessible or too difficult to pull out as part of
11 the defueling.

12 So, back in the 80s, 99 percent of the
13 fuel was taken out of the plant, put into casks, and
14 sent offsite. So, it's now at a DOE national lab.
15 So, what we're dealing with here when we're looking at
16 any radiological risk from the plant, is actually a
17 very small amount of material. In 2020 TMI-2
18 Solutions -- the plant has been sitting for basically
19 30 years in a monitored manner, per an amendment to
20 the NRC license in the early 90s that transferred it
21 to a possession only license.

22 So, it's not been operating, there hasn't
23 really been a lot of activities at the site, and in
24 2020, TMI-2 Solutions, who is the most experienced
25 nuclear decommissioning company in the United States

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1 acquired the plant for purposes of decommissioning the
2 facility, removing the remaining radioactive material,
3 and releasing the site. So, the fact that this was
4 going to be moving into an active decommissioning site
5 has been known for quite some time.

6 And in fact was inevitable, since the
7 plant was shut down, and moved into monitored storage
8 in 1990. The decommissioning of the TMI-2 plant is
9 separated essentially for purposes of our discussion
10 today into two remaining phases, phase 1B and phase
11 two. Phase 1B is the next phase of decommissioning,
12 where TMI-2 Solutions will be focused on reducing the
13 source term at the plant by removing the remaining
14 spent fuel and moving it into spent fuel casks.

15 The total number of casks that we're
16 talking about here is estimated to be in the 12 to 15
17 cask total range. So, unlike an operating plant,
18 which has an ISFSI with 50 to 100 or more spent fuel
19 casks, we're only talking about 12 to 15 casks. So,
20 it's a small amount of casks. And it's to remove the
21 residual radioactive material in order to reduce the
22 dose to the decommissioning workers, and in line with
23 ALARA, the as low as reasonably achievable principle.

24 So, once this is done, TMI-2 Solutions
25 will essentially have made the plant more in line with

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1 other shut down facilities that are undergoing
2 decommissioning. The environmental impacts of the
3 phase 1B activities were previously analyzed by the
4 NRC in the programmatic environmental impact statement
5 for TMI-2.

6 For the next phase, in phase two, the
7 plant will be dismantled with equipment like the
8 reactor vessel head being one of the last things to be
9 dismantled, and otherwise, after all the spent fuel
10 debris has been removed. So, removing kind of the
11 major equipment that is around the plant won't happen
12 until towards the end stage of phase two. The
13 environmental impacts of the phase two activities were
14 previously analyzed by the NRC, and the generic
15 environmental impact statement for TMI-2.

16 So, in order to transition from the
17 monitored stage to the active decommissioning stage in
18 phases 1B and 2, TMI-2 Solutions will need to submit
19 a number of license amendment requests in order to
20 move into that decommissioning phase.

21 JUDGE TRIKOUROS: Let me ask you, the
22 material that will go into these canisters, will it be
23 only spent nuclear fuel, or will it be structural
24 material to which the fuel has adhered and somehow
25 connected?

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1 MS. ROMA: I think they're going to try to
2 get it off as much as possible, and if I need to, I
3 can refer to our technical specialist that we have
4 here. They're going to try to get it off as much as
5 possible and then put it into the casks for storage
6 and disposal.

7 JUDGE TRIKOUROS: From the material that
8 I've seen in the pleadings, it looks like the plant
9 will be sort of cut up into pieces, which will include
10 the nuclear material.

11 MS. ROMA: Yes.

12 JUDGE TRIKOUROS: And that material will
13 be cut up in such a manner that it will fit in the
14 canisters?

15 MS. ROMA: That is my understanding.

16 JUDGE TRIKOUROS: All right, thank you.

17 MS. ROMA: So, the particular license
18 amendment that we're talking about today is limited in
19 scope, and it is consistent with the TMI-2
20 decommissioning plan that has been in place for a
21 number of years. The LAR would amend the TMI-2
22 possession only license and the associated PDMS
23 related tech specs, because it's no longer going to be
24 in the post defueling monitored storage state, and is
25 instead going to be in a decommissioning state.

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1 There are a number of license conditions
2 and technical specifications that need to be removed
3 from the license in order to permit them to move into
4 that next phase. Other factors, other administrative
5 changes are the administrative control will be moved
6 into -- will be removed from the license and moved
7 into a decommissioning quality assurance program for
8 example.

9 Notably, the LAR does not propose changing
10 the reactor building, so structurally TMI-2 is going
11 to remain essentially the same, with no new risks
12 raised under this license amendment request. This
13 also aligns with the NRC staff's preliminary
14 determination with respect to the LAR involving a no
15 significant hazards consideration, which means that
16 the proposed license amendment does not involve a
17 significant increase in probability, or create the
18 possibility of an accident that has not already been
19 previously analyzed.

20 To be admitted into a proceeding on this
21 license amendment request as required by 10 CFR 2.309,
22 the petitioner must demonstrate standing and offer at
23 least one admissible contention. The fact that he is
24 a pro se litigant no longer pro se is irrelevant to
25 meeting the NRC regulatory requirements for both

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1 standing and for contention of this ability, and the
2 applicant is still required to align with Commission
3 case law in this area.

4 CHAIR HAWKENS: Are you familiar with the
5 Seabrook case that Ms. Bernabei mentioned, which said
6 case law relaxes the standing standards for pro se
7 litigants?

8 MS. ROMA: So, it's relaxed, but it's not
9 eliminated. He still has to make the showings of
10 standards, which is either traditional proximity or
11 discretionary standard. He can probably just be -- we
12 can probably be a little bit more permissive in how he
13 gets there, but there's still a regulatory requirement
14 for standing, and there's still a Commission precedent
15 on how standing is met.

16 And that is not to say that just because
17 he cannot meet the requirements for a hearing on this
18 license amendment request, that the petitioner cannot
19 participate in other ways, such as through submitting
20 comments, participating in public meetings, or joining
21 the citizens advisory panel for the plant. But the
22 hearing requirements are strict by the design, and the
23 petitioner does not even come near meeting their
24 threshold.

25 With respect to the petition, I'm first

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1 going to address standing, and then I'm going to move
2 into the contention admissibility. With respect to
3 standing, the petitioner asserts that he has standing
4 to intervene under both traditional and proximity
5 standing. And it sounds like their focus is really on
6 meeting the threshold for traditional standing, and
7 also requests that he be granted discretionary
8 intervention.

9 He does not meet the criteria, as I think
10 the board has already acknowledge, for discretionary
11 intervention, so I'm not going to address it, on its
12 face, it doesn't meet the requirements of the
13 regulation. So, standing is not a mere legal
14 technicality, it has an essential element in
15 determining whether there is any legitimate role for
16 this adjudicatory body in dealing with a particular
17 grievance raised by the petitioner.

18 So, I'm going to walk through the elements
19 of standing and explain why he doesn't meet them.
20 With respect to traditional standing, in order to
21 demonstrate that he has met traditional standing, the
22 petitioner must show that he has personally suffered
23 or will suffer a distinct harm known as an injury in
24 fact, that the injury is caused by the challenged
25 action, that the injury is likely to be redressed by

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1 a favorable decision.

2 So, the reason I wanted to take the time
3 to go through the condition of the plant and the scope
4 of the license amendment request that is being made is
5 because the petitioner has not shown how he can meet
6 the injury in fact element. When asserting standing
7 in a license amendment proceeding such as this one, it
8 is incumbent upon the petitioner to provide some
9 plausible chain of causation explaining how the
10 proposed license amendment will result in a distinct
11 and substantiated new harm or threat that will lead to
12 offsite radiological consequences.

13 To show injury in fact, the Commission has
14 held that pleadings must be more than academic
15 exercises in the conceivable. A plaintiff must allege
16 that he has or will in fact be harmed by the
17 challenged agency action, not that he can imagine
18 circumstances in which he can be affected by the
19 agency's action. And I just want to push back on the
20 contentions made by the petitioner's counsel just now,
21 that all the burden is on the applicant and the NRC
22 staff to prove that none of the statements that the
23 petitioner says are true.

24 Those are not the legal standards for this
25 proceeding. The burden on him is to show that he

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1 meets the regulatory requirements for both standing
2 and contentions to intervene, and that he provides the
3 logical argument, as well as any necessary evidence in
4 order to make his case. And so, it's not on us, just
5 because he says it's true, to assume it is, and prove
6 that it's not.

7 The petitioner argues that -- his
8 arguments here have been insufficient to establish
9 traditional standing to intervene, as the petitioner
10 never squarely addresses the injury element. When the
11 petitioner claims the LAR will result in adverse
12 health and safety risk to him personally, he's failed
13 to provide any evidentiary support or plausible
14 connection to demonstrate that such an injury is more
15 than speculative, or somehow traceable to the actions
16 requested in the LAR.

17 Especially since TMI-2 is permanently
18 defueled, and the spent fuel has been moved offsite.
19 There's such a small amount of radioactive material
20 here, he has not shown how that small amount of
21 radioactive material could possibly cause him injury.
22 The petitioner also fails to show that plausible chain
23 of causation, explaining that the LAR would result in
24 a distinct substantiated harm or threat --

25 CHAIR HAWKENS: Ms. Roma, may I interrupt

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1 please?

2 MS. ROMA: Yes.

3 CHAIR HAWKENS: They do say that they have
4 -- in their pleadings, they represent statements by
5 Dr. Rasmussen and Dr. Kaku, that criticality is
6 conceivable, not likely, but could be possible. How
7 do you respond to that? I think they seem to hinge a
8 lot of their contention admissibility, as well as
9 standing arguments on that.

10 MS. ROMA: So, I think we've seen a lot of
11 attempts in the previous arguments to try to
12 rehabilitate a petition that doesn't otherwise meet
13 the contention admissibility standards. So, in the
14 actual petition for a hearing to intervene, there's
15 random quotes to reports with no reports provided.
16 There's no explanation of the qualifications of the
17 people that are being quoted.

18 There's no explanation of how what is
19 being quoted possibly or even logically connects to
20 the arguments at hand. He quotes some numbers saying
21 there's this amount of material, and that amount of
22 material, but I don't know where those come from or
23 what the bases are. So, we're left sorting a needle
24 through the haystack trying to make sense --

25 CHAIR HAWKENS: Hold on, they did include

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1 a paper by Dr. Kaku in the reply, and I just want to
2 make sure, it appears since you did not object to the
3 untimeliness of it, that you would not oppose us
4 exercising our discretion to consider it, is that?

5 MS. ROMA: No, that was my next sentence,
6 was that it was untimely. It was not submitted in
7 time, it should not be considered in this proceeding.
8 Likewise, all the arguments that were made --

9 CHAIR HAWKENS: There's some irony in you
10 making an untimely objection to their untimely reply.

11 MS. ROMA: Well, also the filing that was
12 made last night at 7:30 at night when we have a 10:00
13 o'clock oral argument, of which they extensively
14 incorporated new water arguments, also it's not part
15 of this proceeding today.

16 CHAIR HAWKENS: That's not part of this
17 proceeding, we agree.

18 MS. ROMA: And so to the extent that in
19 the reply brief, he attaches one report, it still is
20 not clear whether report that was attached is the 1987
21 report that was referenced in the petition. It also,
22 in order to put the applicant and the staff on notice
23 as to the arguments he's making, had to be attached in
24 the original petition that he filed. I looked through
25 it, I think calling it a report appears generous.

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1 It doesn't appear to have any technical
2 analysis in it, it doesn't have any citations to
3 underlying information upon which he was relying,
4 there's no explanation of his credentials or what he's
5 talking about. And so, even on its face, even
6 assuming it is admissible, which I contend it's not,
7 even assuming that the filing was timely and that we
8 should consider it, it should have been in the
9 original petition.

10 So that we can better evaluate what the
11 arguments are that the petitioner is trying to make.
12 Otherwise, again, we're all left trying to find a
13 needle in the haystack about what the arguments are
14 that he's making. So, the other thing that I wanted
15 to point out is that the NRC has consistently denied
16 standing when the threat of injury was too
17 speculative.

18 So, we have no evidence, no logical
19 explanation, no expert witness, no legal analysis to
20 explain how this injury is even plausible. And in
21 fact, with respect to the criticality, and I'll go
22 into this more when I go into the contentions, I did
23 note earlier that the programmatic EIS and the generic
24 EIS are bounding for both the phase 1B and phase 2
25 decommissioning.

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1 And in the programmatic, I ask, for
2 example which covers the phase 1B decommissioning, the
3 NRC did look at criticality and did determine that it
4 was not credible. And so, that was already in a
5 previous EIS that was not addressed at all by the
6 petitioner. And if you look at the -- when the
7 applicant first moved into the PDMS stage, they had to
8 submit a defueling completion report and a license
9 amendment request in order to move to a possession
10 only license.

11 This was 30 years ago, and in order to do
12 that, they had to show that criticality was not
13 possible based on the amount of material and the
14 configuration of the plant. So, that is discussed to
15 some extent in the license amendment request in the,
16 I believe it's attachment five, which is the spent
17 fuel mass limit analysis.

18 So, the LAR also states that the prior
19 analysis shows that there is no postulated accidents
20 that can occur during the next phase of
21 decommissioning that could be enabled under the
22 license amendment request, and that could result in
23 the dose at the site boundary exceeding regulatory
24 limits.

25 JUDGE ARNOLD: If I may interrupt, you've

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1 hit upon my single question for you. I noted that in
2 your answer, you stated that exact thing. When you
3 say prior analysis, were these just analyses that have
4 been done, were sitting on the shelf, or were they for
5 a licensing action?

6 MS. ROMA: The programmatic environmental
7 impact statement and the generic environmental impact
8 statement I believe contains analysis.

9 JUDGE ARNOLD: So, these conclusions are
10 conclusions that have been reviewed by the NRC and
11 factored into a licensing action?

12 MS. ROMA: Correct.

13 JUDGE ARNOLD: Thank you.

14 MS. ROMA: With respect to proximity based
15 standing, the petitioner claims that he has
16 demonstrated standing by his proximity to TMI-2,
17 claiming he lives within 12 miles of the plant.
18 However, he fails to meet the standard for proximity
19 standard as well. As this board noted, the only
20 presumption for proximity standing for 50 miles is for
21 a significant licensing action such as the
22 construction of a new plant.

23 For everything else, to establish
24 proximity standing, the standard is more than just
25 living near the site. The petitioner has the burden

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1 to provide a fact specific standing allegation, not
2 just conclusory statements, and he needs to show
3 how there's an obvious potential for offsite
4 consequences.

5 Again, the reason why I wanted to start my
6 argument by explaining what the radiological footprint
7 at the plant was, and what we were dealing with, and
8 the fact that significant prior submissions to the
9 NRC, including NEPA analysis conducted by the NRC show
10 that recriticality is not possible. The fact that the
11 applicant provided extensive information on this in
12 the license amendment request doesn't change the fact
13 that because it's not credible, the likelihood of him
14 being able to demonstrate that he has injury
15 essentially disappears.

16 But with proximity standing, it's not just
17 that he can be injured, it's that there's an obvious
18 potential for offsite consequences. And a very
19 similar case to this one, in the Zion licensing
20 proceeding, and the Zion plant by the way, is also
21 decommissioned by Energy Solutions, the parent company
22 of TMI-2 Solutions, so they have extensive
23 decommissioning experience.

24 The petitioner in that proceeding tried to
25 argue proximity standing, and that petitioner was ten

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1 miles away, so closer than the current petitioner, and
2 in that case the licensing board said that given the
3 shut down nature of the plant, the fact that the fuel
4 has been removed from the core and is in the spent
5 fuel pool, there is no obvious potential for off-site
6 consequences.

7 In that plant they still had spent fuel on
8 site sitting in a spent fuel pool. Here we've had 99
9 percent of the spent fuel removed, and it's off site
10 in Idaho. And so, just like the petitioner couldn't
11 get proximity standing in that case, the petitioner
12 here also cannot satisfy proximity standing, because
13 there's no obvious potential for off-site
14 consequences.

15 CHAIR HAWKENS: Ms. Roma, can you address
16 petitioner's claim that this license amendment would
17 condemn TMI to become a high level waste site for an
18 indefinite period of time at an undisclosed area on
19 the site?

20 MS. ROMA: So, the spent fuel that is
21 going to be removed from the plant is going to go into
22 a spent fuel cask, and it's going to be put on an
23 independent spent fuel storage installation facility,
24 an ISFSI, just like every other reactor in the United
25 States.

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1 CHAIR HAWKENS: Would that require another
2 discrete license amendment request, or is that?

3 MS. ROMA: For the ISFSI, I don't believe
4 the ISFSI has currently been built. There's a general
5 license for the ISFSI.

6 CHAIR HAWKENS: All right, so it would go
7 into an existing ISFSI.

8 MS. ROMA: Yes. It also will not
9 contribute to the criticality argument, which is the
10 contention that he's arguing.

11 JUDGE TRIKOUROS: Well, let me ask a
12 question regarding that. There's a phase three to
13 this decommissioning process I understand. Phase
14 three would be the management of all of those high
15 integrity containers that are grouped together in an
16 ISFSI, and that contain all the remaining spent fuel?

17 MS. ROMA: Yes, correct.

18 JUDGE TRIKOUROS: But again, not separate
19 spent fuel, but tied with the structural elements as
20 well?

21 MS. ROMA: Correct.

22 JUDGE TRIKOUROS: So, the likelihood of a
23 criticality in all of those containers, would that be
24 any different than the likelihood of criticality with
25 the fuel currently sitting inside the reactor vessel

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1 and the attached piping I assume?

2 MS. ROMA: I would imagine it would be
3 even less, so even less than non-critical.

4 JUDGE TRIKOUROS: It would be though, at
5 the mercy of the elements, right? So, that ISFSI
6 would have to be designed for, I assume earthquake,
7 flood, and TMI has had issues with floods in the past,
8 et cetera, tornadoes.

9 MS. ROMA: Yes, it would have to be
10 designed to withstand all of those.

11 JUDGE TRIKOUROS: Right, and that would be
12 submitted to the NRC for approval, I assume?

13 MS. ROMA: Correct, and the NRC also needs
14 to approve the casks that will be used to hold the
15 debris.

16 JUDGE TRIKOUROS: The high integrity
17 canisters haven't been approved yet, is that what
18 you're saying?

19 MS. ROMA: So, there's tons of MPCs,
20 multipurpose canisters that are used for spent fuel
21 storage, but I believe that the one that will be used
22 for this specific facility is under review from the
23 NRC.

24 JUDGE TRIKOUROS: All right, but it hasn't
25 been licensed yet by the NRC?

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1 MS. ROMA: Correct.

2 JUDGE TRIKOUROS: Okay.

3 CHAIR HAWKENS: But that's not part of
4 this license amendment request Ms. Roma?

5 MS. ROMA: No, it's not part of this
6 license amendment request.

7 CHAIR HAWKENS: So, would that mean that
8 the challenges to the future storage of this would
9 appear to be outside the scope of this proceeding,
10 because it's not related to this LAR?

11 MS. ROMA: That is correct. I'm now going
12 to turn to the contention admissibility standards,
13 okay? To grant the petition, the board must first
14 find that the petitioner not only meets the NRC
15 standing requirements, but also has submitted at least
16 one contention that satisfies each of the six
17 admissibility criteria set forth in 10 CFR
18 2.309(f)(1).

19 The proposed contentions must be rejected,
20 because the petitioner's claims, which we address as
21 a single contention, because I think Judge Hawken, as
22 you noted in the questioning that you had before, the
23 only difference in the actual words of the contention
24 is one contention says criticality, and the other one
25 doesn't, but then the arguments are copy and pasted

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1 from each other and nearly identical, so we just
2 combine them into one.

3 So, this contention fails to meet the
4 contention admissibility criteria, including by
5 failure to show a genuine dispute of fact or law with
6 the license amendment request, and failing to offer
7 anything more than speculative assertions unsupported
8 by evidence. This is particularly important, because
9 the NRC's six contention admissibility requirements
10 are according to the Commission, strict by design, and
11 they serve multiple functions.

12 Including focusing the hearing process on
13 real disputes that can be resolved to giving all
14 parties notice regarding the petitioner's grievances,
15 and three, assuring that hearings are triggered only
16 by petitioners able to provide at least a minimum
17 factual and legal foundation in support of their
18 contentions.

19 It's not up to the hearing stage to see if
20 the petitioner can find a witness that can help
21 support their contentions or evidence to support their
22 contentions. It's a threshold consideration as to
23 whether the contention is admissible in the first
24 place. Otherwise we're left with just the petitioner
25 saying all these things can happen, and therefore I

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1 want a hearing, so that I can eventually prove it to
2 you.

3 And so, any claims that this is moving
4 along fast, or somehow the petitioner didn't know this
5 was coming, when TMI-2 Solutions acquired this plant
6 in 2020, at which he tried to petition to intervene,
7 and was denied, he knew that they were moving towards
8 decommissioning. This specific license amendment
9 request was submitted over a year ago.

10 The notice in the Federal Register came
11 out months ago, and then he filed the petition. So,
12 we've had plenty of time to know this was coming, and
13 for the petitioner to be able to kind of assemble the
14 bare minimum of factual and legal information he
15 needed in order to make the argument, he just failed
16 to in his petition.

17 CHAIR HAWKENS: Ms. Roma, can you address
18 Ms. Bernabei's assertion that it's implicit in Mr.
19 Epstein's pleading that he was challenging the
20 categorical exclusion?

21 MS. ROMA: I did not find it explicit at
22 all.

23 CHAIR HAWKENS: Maybe I misspoke, she said
24 it was implicit.

25 MS. ROMA: Yes, I did not find it implicit

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1 either. I could not tell what NEPA criteria he was
2 trying to challenge. He was just saying there's all
3 these accidents, it's going to make everything go
4 critical, and therefore NEPA requires you to consider
5 this with no analysis of what NEPA requires.
6 Absolutely no analysis that there's an existing NEPA
7 analysis with the programmatic EIS, and with the
8 generic EIS that covers both phase 1B and two.

9 He just said there was no NEPA. But he
10 also did not say why the applicant did not meet the
11 criteria for a categorical exclusion. And it's
12 expressly explained in detail in the license amendment
13 request, and there's an attachment, I can't remember,
14 maybe it's attachment one, section four explains in
15 detail why it meets the criteria for a categorical
16 exclusion.

17 And then the NRC's analysis in the Federal
18 Register, he didn't have to dig too deep to find the
19 categorical exclusion, or the NRC's analysis in the
20 Federal Register notice walking through why the NRC
21 was making an initial finding of no significant
22 impacts with respect to whether this license amendment
23 introduced any new risk that was previously
24 unanalyzed.

25 So, I think we have that entirely

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1 unaddressed in the petition, and it was up to this
2 licensing board and the staff and the applicant to try
3 to piece through what NEPA argument he was trying to
4 make. And at bottom, first he doesn't challenge the
5 categorical exclusion or explain why the categorical
6 exclusion does not apply, and that's a legal analysis
7 that he could have walked through.

8 Second, he didn't show that there was no
9 analysis of credible accidents or criticality that
10 needed to be done under NEPA and ignored the fact of
11 the PEIS and GEIS in analyzing these issues. And
12 third, he says you have to consider it because I said,
13 that's basically what it comes down to. And now
14 they're trying to push it back on us and say well no,
15 we have to prove what you're saying doesn't make
16 sense.

17 So, what we're arguing is you did not
18 explain how any of these accidents are credible, and
19 therefore warrant a new NEPA analysis for this
20 specific license amendment request. And he kind of
21 conflates a lot of different things, including arguing
22 that the NEPA analysis requires a consideration of the
23 environmental impacts of terrorism, which is not true
24 for this case.

25 I believe that you mentioned the Third

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1 Circuit decision saying that terrorism events at
2 nuclear power plants are too speculative to be
3 required to be considered under NEPA. And the Third
4 Circuit is where the TMI-2 plant is located. And so,
5 we don't have any legal connecting of the dots, and we
6 don't have any factual connecting of the dots to try
7 to make this argument make sense. We have to read a
8 lot between the lines to even come to the analysis
9 that I just gave.

10 CHAIR HAWKENS: If this licensing board
11 were to conclude that Mr. Epstein did not argue that
12 an exception should be applied here to the categorical
13 exclusion, does that result in the rejection of both
14 contentions?

15 MS. ROMA: No, then we would need -- if
16 this licensing board held that a categorical exclusion
17 was not --

18 CHAIR HAWKENS: If we found that he waived
19 or failed to argue that categorical exclusion should
20 not have been applied, should we therefore conclude
21 that both contentions should be rejected?

22 MS. ROMA: Yes, because there'd be no
23 basis to even consider them.

24 CHAIR HAWKENS: Okay, I just wanted to
25 make sure that was your position.

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1 MS. ROMA: Okay, I wanted to make sure I
2 was understanding your question.

3 CHAIR HAWKENS: I had a lot of negatives
4 in there.

5 MS. ROMA: I was trying to follow them,
6 but I got there in the end. And so the requirements
7 for contention admissibility again, is to focus on
8 real disputes, giving the parties notice of what the
9 actual grievances are, and having something factually
10 or legally to litigate. That's where there has to be
11 a genuine dispute of material fact in law.

12 We don't have any of that here. At best
13 we have a promise that it would be coming in the event
14 that a hearing is granted. And that is not the time,
15 that doesn't meet the contention admissibility
16 standards set forth in the regulations. And then
17 let's see, we've just covered some of my arguments, so
18 I'm trying to skip ahead. So, I address the NEPA.

19 Here, the NEPA analysis is not required
20 for this LAR, because we've already said that the
21 license amendment request is bounded by the prior
22 environmental impact statements in any event, and the
23 LAR introduces no new significant hazards,
24 considerations that would increase the probability or
25 create the possibility of an accident that was not

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1 otherwise considered. And then --

2 CHAIR HAWKENS: Ms. Roma, may I interrupt
3 again?

4 MS. ROMA: Yes.

5 CHAIR HAWKENS: Mr. Epstein indicates in
6 his reply that the remaining mass of core debris
7 material in TMI-2 was determined using theoretical
8 calculations that were not peer reviewed, are
9 calculations and analyses in the LAR required to be
10 peer reviewed?

11 MS. ROMA: There's no requirement that any
12 document that's ever submitted to the NRC be peer
13 reviewed, it's not publication in a journal, it's the
14 preparation submission of a licensing submittal for
15 the NRC, and there's no requirements for peer review.
16 I would also note that if you look at the attachment
17 five of the LAR, at page five and six they explain how
18 the analysis came to be.

19 So this isn't an analysis, the spent fuel
20 mass limits are not an analysis in a vacuum. This is
21 building upon over 30 years of information that has
22 been evaluated by the licensee, and a lot of that
23 initial analysis about recriticality, and proving to
24 the NRC that criticality was not possible was
25 submitted as part of the possession only license

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1 transmission. And so, in that they had actually a
2 slightly higher number.

3 And if you look at the attachment five in
4 the license amendment request, it actually explains
5 how they came to a slightly lower number for purposes
6 of those calculations, and among other things it was
7 based on physical information. So, it kind of
8 explains what information went into that, and it's
9 actually a pretty extensive attachment that walks
10 through the analysis that they did on how to get to
11 that number.

12 CHAIR HAWKENS: I see your time has
13 expired --

14 JUDGE TRIKOUROS: Let me just -- should we
15 --

16 CHAIR HAWKENS: Go ahead, no, if you have
17 a question.

18 JUDGE TRIKOUROS: Mr. Epstein was
19 concerned that there were no design basis accidents
20 associated with TMI-2, and I was wondering if you
21 could explain why there are no design basis accidents
22 associated with TMI-2?

23 MS. ROMA: There are currently no design
24 basis accidents for TMI-2, because it doesn't have a
25 reactor vessel pressure boundary, so it's not

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1 required.

2 JUDGE TRIKOUROS: The analysis presented
3 in the LAR basically says without a reactor pressure
4 boundary, and without an event that exceeds 10 CFR
5 100.11, there cannot be a design basis accident. Does
6 that mean there is no accident, or that it simply
7 doesn't meet the definition of a design basis accident
8 under Part 50 requirements?

9 MS. ROMA: It means it doesn't meet the
10 definition of a design basis accident, and so --

11 JUDGE TRIKOUROS: Right, not that there
12 are no accidents.

13 MS. ROMA: Correct.

14 JUDGE TRIKOUROS: Thank you.

15 MS. ROMA: Thank you.

16 CHAIR HAWKENS: Did you have any
17 questions?

18 JUDGE ARNOLD: No.

19 CHAIR HAWKENS: Okay.

20 MR. McMANUS: May it please the board, my
21 name is Joseph McManus, and I am the representing
22 counsel for the NRC staff. I realize Your Honors have
23 read our brief, but I'd like to reiterate that it is
24 the staff's position that the petitioner has not met
25 his burden in establishing standing in this

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1 proceeding, and that the proffered contentions do not
2 meet the Commission's contention admissibility
3 requirements.

4 Though, I'd like to start with some
5 background. TMI-2 is currently in a safe store like
6 position condition called post defueled monitoring
7 storage, or PDMS. The facility was authorized for
8 this status in 1993 via license amendment. TMI-2 is
9 a defueled reactor, although some fuel debris remains
10 at the site. This proceeding concerns a license
11 amendment request that proposes to delete certain
12 technical specifications and limiting conditions for
13 PDMS.

14 Other requirements that are no longer
15 applicable to the facility, updating safe fuel mass
16 limits, and proposes administrative changes to the
17 TMI-2 license. The licensee states that it submitted
18 this application to support its ability to enter
19 active radiological decommissioning. Regarding the
20 staff's status on the review of the application, the
21 NRC staff is currently in review of the application,
22 and has made no final determination on whether to
23 grant the application as of yet.

24 The staff sent out requests for additional
25 information to the licensee within the last month.

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1 The NRC staff has not yet conducted its safety or NEPA
2 evaluation, so to repeat, has accordingly made no
3 determination whether it will grant TMI-2 Solutions'
4 license amendment request. Returning to the
5 petition's standing in this proceeding, it is the NRC
6 staff's position that the petitioner has not met his
7 burden under relevant NRC case law.

8 In a license amendment case such as this,
9 petitioner needs to assert an injury in fact
10 associated with the license amendment at hand, not
11 argue general objections or grievances with the
12 facility or licensee. Here the petitioner failed to
13 establish a plausible nexus between the proposed
14 license amendment and his asserted harm, and also
15 failed to indicate --

16 CHAIR HAWKENS: Counsel quick
17 interruption. When you said the staff has not yet
18 completed its NEPA analysis, do I understand you to
19 mean the staff has not yet examined the categorical
20 exclusion conclusion reached by TMI-2 Solutions?

21 MR. McMANUS: It's made its preliminary
22 finding, but it hasn't --

23 CHAIR HAWKENS: So, when you say you
24 haven't done your NEPA analysis, that's what you're
25 referring to?

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1 MR. McMANUS: Correct.

2 CHAIR HAWKENS: Okay, thank you.

3 MR. McMANUS: So, going to petitioner's
4 standing in the proceeding, here the petitioner failed
5 to establish a plausible nexus between the proposed
6 license amendment and its asserted harm. And has also
7 failed to indicate how the proposed license amendment
8 would obviously increase the risk of an off-site
9 release of radioactive fission products, as instructed
10 by the Commission's 1999 Zion decision.

11 For the reasons stated in the staff's
12 brief, the Commission's Zion decision concerning
13 standing is directly on point, and this board should
14 find it controlling. As the TMI-1 and 2 board in 2020
15 did in another similar license amendment proceeding.
16 The petitioner has not established standing under
17 traditional judicial standing requirements or the
18 proximity presumption.

19 Petitioner should also be denied
20 discretionary standing by this board as a matter of
21 law, which I think we've discussed earlier today. For
22 these reasons, the petition should be denied. Turning
23 to the proffered contentions, the petitioner argues
24 that the license amendment request does not comply
25 with NEPA, because it failed to consider the potential

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1 for harm that would result from an airplane crash,
2 explosion, fire, or terrorist attack.

3 And that significant and reasonable
4 foreseeable harm could result in recriticality from an
5 airline crash explosion, fire, or terrorist attack.
6 The hearing request should not be granted because none
7 of these environmental contentions are admissible
8 under 10 CFR 2.309(f)(1). And again, the petitioner
9 fails to connect his asserted claims with the
10 licensing action and the applicable requirements at
11 hand.

12 In the license amendment request, the
13 licensee argues that the proposed changes to the
14 license meet the criteria for a categorical exclusion
15 under 10 CFR 51.22(c)(9). The petitioner does not
16 challenge the licensee's proposal, notwithstanding the
17 process for him to challenge categorical exclusions by
18 showing special circumstances, or by showing that the
19 license amendment, if granted, would increase releases
20 of effluence, or increase individual or cumulative
21 occupational radiation exposure.

22 CHAIR HAWKENS: Counsel, why shouldn't we
23 agree with Ms. Bernabei that that argument was
24 implicit in the pro se petitioner's pleading?

25 MR. McMANUS: Well, Your Honor, I don't

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1 think that -- well, speaking on behalf of the NRC
2 staff, it was not implicit. All parties have to be
3 put on notice, and there was no indication that the
4 petitioner was challenging the special circumstances
5 or any categorical exclusion. Going back to the TMI-1
6 and 2 case in 2020, the petitioner actually was put on
7 notice on how to challenge the special circumstances.

8 He was the petitioner in that case, and in
9 that decision, it was very similar situation, it was
10 a license amendment case for TMI-1 and 2, and in that
11 decision by that licensing board, it was a similar
12 finding, or that's what the board held, that the
13 petitioner then failed to challenge the categorical
14 exclusion. So, as we have here, the petitioner was
15 put on notice on how to challenge the categorical
16 exclusion, and --

17 CHAIR HAWKENS: As I recall, that aspect
18 of the licensing board's conclusion was affirmed by
19 the Commission, and that's why the Commission rejected
20 the petition, is that correct?

21 MR. McMANUS: Yes, I recall it was
22 appealed, or one aspect was appealed, but I believe it
23 was affirmed, that's correct judge.

24 CHAIR HAWKENS: Thank you. Counsel, can
25 you address in the pleading, Mr. Epstein claimed that

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1 the proposed amendment undermines the cleanup by
2 deleting and modifying technical specs for the PDMS
3 surveillance requirements and administrative controls,
4 and claims that's an adequate basis for going forward?

5 MR. McMANUS: Well, Your Honor, all I can
6 really say at this time is the NRC staff is still
7 conducting its review. I don't see that in the --
8 besides his bare assertions, I didn't see any evidence
9 or factual basis to back that up, besides just the
10 assertion. So, I didn't see the dispute, or a direct
11 attack on the application, or pointing to directly
12 where that dispute was between where in fact the
13 petitioner is challenging against the application.

14 So, besides just that bare assertion, I
15 can't really speak to that, that's all I have.

16 CHAIR HAWKENS: All right, thank you.

17 MR. McMANUS: So, just continuing on,
18 ultimately the proffered contingents did not meet the
19 2.309(f)(1) standard either because they're not
20 adequately supported by facts or expert opinion, they
21 are out of scope, or they fail to show a genuine
22 dispute with the application. For example, regarding
23 the petition being supported by facts or expert
24 opinion, certain claims reference particular studies
25 without citations to those studies, and the petitioner

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1 fails to explain why those studies are relevant.

2 Moreover, the petition is full of
3 generalized grievances against the licensee and the
4 NRC, but fails to show a genuine dispute with the
5 application, as required under 10 CFR 2.309(f)(1)(6).
6 Parties in a proceeding are entitled to a fair chance
7 to defend, and are therefore entitled to be told at
8 the outset with clarity and precision what arguments
9 are being advanced, and what relief is being sought,
10 and that was not done here.

11 And that's Fermi CLI 15 18. Accordingly,
12 the board should deny the petition. So, if the board
13 has any further questions for the NRC staff, I'd be
14 happy to take them now.

15 JUDGE TRIKOUROS: With respect to
16 criticality, you heard the arguments that were made
17 earlier. It sounds like the petitioners didn't have
18 the resources to review and comment on the detailed
19 criticality analysis that was performed in the LAR.
20 The question came up has the staff reviewed and
21 approved this? And we were getting some conflicting
22 answers to that question really. Could you identify
23 whether or not the staff has reviewed and approved the
24 criticality analysis in the LAR?

25 MR. McMANUS: So, the staff is currently

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1 reviewing, they're conducting a criticality analysis
2 as part of this LAR. But I would just comment that if
3 we look at the contentions themselves, the criticality
4 portion of the contention, well contention two, you
5 look at the criticality is a very small portion, if
6 you look at the contention as written, as proffered.

7 So, it looks like you need, as proffered
8 by the petitioner, the petitioner is asserting that to
9 get to criticality, we would need an airplane crash,
10 a fire, or a terrorist attack. So, I would just kind
11 of note that for the record.

12 JUDGE TRIKOUROS: Could the staff say
13 anything regarding the likelihood of a criticality at
14 this time?

15 MR. McMANUS: I don't believe so, I would
16 have to confer with the staff. No, it's still in
17 review right now.

18 JUDGE TRIKOUROS: Is the staff reviewing
19 the calculations that are in the LAR in addition to
20 doing their own criticality analysis, sort of an
21 independent criticality analysis?

22 MR. ANDERSON: Yes, we will be doing
23 independent analysis and calculations.

24 JUDGE TRIKOUROS: Okay, thank you.

25 JUDGE ARNOLD: I have a question on a

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1 different topic. You've already heard my impression
2 of the radiological threat of TMI-2, as compared to an
3 operating nuclear power plant, and the impression I
4 get is that TMI-2 is no longer a reactor plant, it's
5 more like a former nuclear facility that remains
6 highly contaminated. What I would like to know is
7 what is it's legal status?

8 Is it still being treated as a reactor, or
9 is it an old facility that's contaminated?

10 MR. McMANUS: Well, it does have a Part 50
11 license, and it will continue to have a Part 50
12 license, so yeah, that's -- so it will continue to be
13 a reactor Part 50 license.

14 JUDGE ARNOLD: Okay, thank you.

15 CHAIR HAWKENS: Mr. McManus, does the NRC
16 staff like TMI-2 Solutions raise an untimely objection
17 to the untimely reply?

18 MR. McMANUS: Your Honor, we failed to
19 object at that time, and given that Mr. Epstein was
20 pro se, we didn't object. So --

21 CHAIR HAWKENS: That's fine, thank you,
22 just wondering your position.

23 MR. McMANUS: We're not taking a position
24 on the reply.

25 CHAIR HAWKENS: All right.

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1 JUDGE TRIKOUROS: Do you agree with the
2 discussion we had earlier regarding design basis
3 accidents, that the statement that there are no design
4 basis accidents for TMI-2 refers to the -- how it
5 meets the Part 50 definition of a design basis
6 accident? Not that there aren't any accidents
7 considered, but that the accidents considered simply
8 won't meet the definition?

9 MR. McMANUS: Right, so the accident under
10 50.2 definitions, but there could be accidents at a
11 decommissioning facility, is that what you're saying,
12 Your Honor?

13 JUDGE TRIKOUROS: Yeah, so I think there's
14 been some confusion, when one says there are no design
15 basis accidents at TMI-2, that there are no accidents
16 considered at TMI-2, and I wanted to make clear what
17 the truth of that was.

18 MR. McMANUS: Yeah, I think that's
19 correct.

20 JUDGE TRIKOUROS: All right, thank you.

21 CHAIR HAWKENS: Following up on that Mr.
22 McManus, I know in the LAR, there was a discussion
23 about a high integrity container fire during
24 commissioning, as well as discussions about other
25 types of fires, and seeing as I read both contentions

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1 as contentions of omission, which saying there was no
2 analysis for a fire, given that there was in fact
3 analysis about a fire, is that a basis for rejecting
4 that component of both contentions?

5 MR. McMANUS: I believe so, Your Honor.
6 And actually I believe in petitioner's pleading, the
7 petitioner did mention the high HIC canister, because
8 they did -- he did quote the RAIs to that, but indeed
9 there was analysis to the HIC fire. So, if there was
10 any consideration that there was a contention of
11 omission, the LAR does have fire analysis.

12 CHAIR HAWKENS: All right, thank you.

13 JUDGE TRIKOUROS: We talked about phase
14 three of the decommissioning, storing many of these
15 high integrity canisters on site. I don't think a
16 location has been identified as far as I know, but
17 there will be a site, an area on site that these will
18 be stored. Does that go through -- and we also have
19 been told that the specific high integrity canister
20 has not yet been selected I believe, or that --

21 MR. McMANUS: Your Honor, I believe that's
22 what the licensee said.

23 JUDGE TRIKOUROS: Right, and I wanted to
24 just make sure that I understood what would be the
25 licensing requirements for this ISFSI, that if we call

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1 it an ISFSI, what would be the licensing requirements
2 for that? Would there be a separate licensing
3 requirement for that, or is this part of the
4 decommissioning?

5 MR. McMANUS: Well, Your Honor, just to be
6 clear, just to reiterate, this is outside of this
7 proceeding, phase three. This ISFSI, phase three that
8 we're talking about, this is outside of the scope of
9 this proceeding. But my understanding is that the
10 licensee, as a Part 50 licensee, they have a general
11 license to store fuel. And so they can -- by having
12 that, they can store fuel on site without going
13 through a licensing process.

14 So, there would be no need to lodge a --
15 to have a -- to ask the NRC for a license to store
16 fuel, because they have a Part 50 license, but that's
17 outside of the scope of this proceeding. But that's
18 up to the licensee. I mean that's up to -- that's
19 outside of the scope of this proceeding. The staff
20 doesn't know, that's up to them.

21 JUDGE TRIKOUROS: So, the categorical
22 exclusion analysis didn't consider the likelihood of
23 an accident or release of radiation associated with
24 the ISFSI, it was only looking at the plant itself,
25 and the radioactive material in the plant itself?

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1 MR. McMANUS: Right, because it's outside
2 of the scope of this license amendment.

3 JUDGE TRIKOUROS: All right, thank you.

4 CHAIR HAWKENS: Anything else? Thank you,
5 Mr. McManus.

6 MR. McMANUS: Thank you, Your Honors.

7 MS. BERNABEI: I know I only have a few
8 minutes.

9 CHAIR HAWKENS: We were responsible for
10 you using much of your time before, and going
11 overtime, so please use your full five minutes,
12 although you're not required to.

13 MS. BERNABEI: Okay. I wanted to just
14 point out the rebuttal to some of the plant's. The
15 special circumstances, if you do a fair reading of the
16 pro se petition of Mr. Epstein's petition, it's all
17 over the petition. TMI-2 is a special circumstance,
18 there's no other plant in the United States that's
19 being considered for decommissioning. I'd also like
20 to point out one of the exceptions that he's relying
21 on.

22 Which is that there will be, the former
23 licensee acknowledged that there will be significant
24 -- two times the occupational exposure if it's
25 decommissioned at this time. This is GPU Nuclear

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1 appendix H of August of 2013, this is cited in his
2 brief, and it basically says --

3 CHAIR HAWKENS: What page of the brief is
4 it on?

5 MS. BERNABEI: I can find it for you, I
6 don't have it in front of me. But it is cited in his
7 brief, and I'm sorry, this is PDMS Safety Analysis
8 Report Update GPU Nuclear August 23rd, 2013. And this
9 is what he cites to in his brief, and we can find the
10 page number. It says by placing TMI-2 in a long term
11 monitored storage condition at this time, until the
12 time of decommissioning, is that a 30 day delay, now
13 we're talking about 2013.

14 A 30 day delay -- 30 year delay, I'm
15 sorry, 30 year delay from 2013 would reduce worker
16 exposure by a factor of approximately two. This is
17 from the licensee at that time, GPU Nuclear. It
18 decided that waiting for 30 years would reduce
19 occupational exposure. Mr. Epstein clearly stated
20 that in his brief, and cited to that study. The other
21 thing I'd like --

22 CHAIR HAWKENS: Can you tell me how you
23 insinuate that particular claim into the language of
24 your two contentions?

25 MS. BERNABEI: That any event of an

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1 unsettling event, such as an air attack or a terrorist
2 attack, that number is going to continue, and possibly
3 be aggravated by the plant going critical. So, what
4 I'm trying to show is that this is an exception from
5 the categorical exclusion, that there is a significant
6 increase in occupational radiation exposure, and he
7 set that out in his brief.

8 The other thing that we have from the LAR
9 itself, there was some question about well petitioner
10 never looked at the LAR, so he doesn't know that
11 there's no surveillance, there's no removal of all
12 these protections, internal controls. In fact he
13 reviewed the LAR and saw that those had been removed,
14 those surveillance and other protections that are in
15 the steady state.

16 The other thing I wanted to point out that
17 there was a question about do you need peer review.
18 You don't need peer review, but you need standard
19 scientific studies that tell you how much is the
20 damaged core that's remaining. We have wildly
21 different estimates, and any scientist will tell you
22 when you can't reproduce an evaluation such as that,
23 it is not a solid evaluation.

24 If it tends from 650 to 1300, there is
25 controversy that makes any estimate not scientifically

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1 valid, and that's particularly the case when you have
2 a configuration such as this. So, you don't need peer
3 review, but you do need a scientific analysis that
4 says why are all these experts coming up with
5 different evaluations. The other thing I'd like to
6 mention is there was this statement that the EIS that
7 was conducted looked into these issues.

8 That's simply not true. The only issue,
9 and this is on -- I'm losing track of my papers here.
10 This was on the EIS conducted by TMI-2, okay this is
11 May 16th, 2022 supplement. TMI Solutions states that
12 the only -- the most limiting scenario is a reactor
13 building fire, okay? So, they say that that's the
14 design basis accident they look at. They specifically
15 do not look at a terrorist attack or an aircraft
16 attack.

17 And the last thing I'd like to mention is
18 all this talk, which just emphasizes our point that
19 this is all premature, I think the Commission should
20 order a hearing, all these things should be examined.
21 It is simply not true that TMI-1, which formally was
22 linked at the hip with TMI-2 is going to accept this
23 waste, or even can accept this waste. And given that
24 that's simply not contractually, or in a regulatory
25 manner required of TMI-1, in fact that's part of the

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1 reason it spun of TMI-2.

2 Is that you can't find that this is a
3 rational, or a kind of plan that protects the public
4 health and safety.

5 CHAIR HAWKENS: Questions?

6 JUDGE TRIKOUROS: No.

7 CHAIR HAWKENS: Thank you Ms. Bernabei.

8 MS. BERNABEI: Thank you.

9 CHAIR HAWKENS: On behalf of the board, I
10 want to express our gratitude to counsel and
11 petitioner for their written pleadings, for their oral
12 presentation today, and consistent with our regulatory
13 milestone, we'll endeavor issuing a decision on this
14 particular hearing request within 45 days unless
15 there's a wrinkle thrown in as a result of the
16 additional pleadings submitted yesterday, but we'll
17 handle that going forward.

18 I'd also like to acknowledge and express
19 gratitude for the continuing support of the panel's IT
20 expert, Andrew Welkie, thank you Andy. The panel's
21 administrative assistant, Twana Ellis, and the board's
22 law clerks, Emily Newman and Allison Wood. And
23 lastly, we appreciate the services of the court
24 reporter, Jim Cordes, thank you Jim. Do you have any
25 follow up questions after we adjourn for the parties?

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1 We will, so I'll ask the parties after we
2 adjourn to remain present, so Jim can ensure the
3 transcripts are accurate. Judge Trikouros do you have
4 any additional questions or comments?

5 JUDGE TRIKOUROS: No, thank you.

6 JUDGE ARNOLD: No.

7 CHAIR HAWKENS: The case is submitted, and
8 we are adjourned, thank you.

9 (Whereupon, the above-entitled matter went
10 off the record at 11:50 a.m.)

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