

1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

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4  
5 ATOMIC SAFETY AND LICENSING BOARD

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7  
8 In the Matter of

9 Docket No. 63-001-HLW

10 U.S. DEPARTMENT OF ENERGY

11 (High-Level Waste Repository) March 25, 2009

12  
13 MARCH 31, 2009

14 TRANSCRIPT OF PROCEEDINGS --

15 Before the Administrative Judges:

16  
17 ASLBP BOARD

18 09-878-HLW-CAB03

19 Paul S. Ryerson, Chairman

20 Michael C. Farrar

21 Mark O. Barnett

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## APPEARANCES

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For the Nuclear Regulatory Commission Staff:

Mitzi Young  
Andrea Silvia  
Daniel Fruchter

For the Nuclear Energy Institute:

Jay Silberg  
David Repka

For the Department of Energy:

Tom Schmutz  
Don Silverman

For the State of Nevada:

Martin Malsch  
John Lawrence  
Charles Fitzpatrick

For the Nevada Counties of Churchill, Esmeralda,  
Lander and Mineral:

Robert List  
Jennifer Gores

For the State of California:

Tim Sullivan  
Susan Durbin

For the Caliente Hot Springs Resort:

John Huston

## 1 APPEARANCES (Continued)

2 For the Native Community Action Council:

3 Rovianne Leigh  
4 Scott Williams

5 For the Nevada County of White Pine:

6 Michael Baughman  
7 Richard Sears

8 For the Nevada County of Clark:

9 Alan Robbins  
10 Debra Roby

11 For the Timbisha Shoshone Tribe:

12 Darcie Houck  
13 Ed Beanan

14 For the Nevada County of Nye:

15 Rob Anderson  
16 Jeff VanNiel

17 For the Nevada County of Inyo:

18 Greg James

19 For the Timbisha Shoshone Yucca Mountain Oversight  
20 Program:21 Doug Poland  
22 Hannah Renfro

23 For the Nevada Counties of Lincoln and Eureka:

24 Diane Curran  
25 Baird Whgart

1 >>JUDGE RYERSON: Good morning. Please be  
2 seated. Welcome everyone.

3 In June 2008, the Department of Energy  
4 applied to the Nuclear Regulatory Commission for  
5 permission to construct a repository at Yucca  
6 Mountain for high level nuclear waste.

7 We're here today for oral argument on  
8 petitions to intervene in the hearing that the NRC  
9 will conduct on this application.

10 My name is Judge Paul Ryerson. I'm an  
11 administrative judge on the Atomic Safety and  
12 Licensing Board panel. And I'm Chair of what has  
13 been designated Construction Authorization Board  
14 Three, which is one of three boards that will be  
15 considering the Yucca Mountain application in the  
16 next two days.

17 To my right is Judge Mike Farrar, who, like  
18 me, is trained as a lawyer. And on my left is our  
19 third judge, Dr. Mark Barnett, who is an  
20 environmental engineer.

21 The proceedings today are being webcast by  
22 the NRC, and, in addition, they're being carried  
23 internally by the agency's digital data management  
24 system, or DDMS. They're being shown in the  
25 headquarters facility in Rockville, Maryland, and in

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1 addition they are being broadcast internally on the  
2 NRC's internal television system, broadband system.

3 Before we begin, before I ask counsel to  
4 introduce themselves, I'd like to explain for the  
5 benefit of the public how today's proceeding fits  
6 into the NRC's review of the Yucca Mountain  
7 application.

8 When an application comes into the agency,  
9 it is reviewed first by the NRC staff, and analyzed  
10 by the staff from the standpoint of safety, security,  
11 and environmental compliance.

12 The Atomic Safety and Licensing Board is  
13 entirely separate and distinct from the staff. We do  
14 not have communications about the merits of our  
15 proceedings with the staff or, for that matter, with  
16 the commissioners. The staff, in fact, appears as a  
17 party in our proceedings. And ultimately the  
18 commission has jurisdiction to hear appeals from our  
19 decisions, but again, we do not communicate with  
20 commissioners about any of the merits of these  
21 proceedings while they're underway.

22 Our purpose today is an important one, but  
23 it's also in a sense a very narrow and limited one.

24 The law provides an opportunity for  
25 interested stakeholders to identify issues on which

1 they would like to have a hearing. Twelve petitions  
2 have been filed in the Yucca Mountain proceeding by  
3 various petitioners, and in addition two counties  
4 have asked to participate. Not as parties, but as  
5 interested government units.

6 Now, to participate as a party in a  
7 hearing, a petitioner essentially has to make two  
8 showings. It has to show that it has standing to  
9 participate, and it's got to put forward at least one  
10 admissible contention. The petitioners here have put  
11 forth over 300 contentions between them, and these  
12 are discrete issues or challenges to aspects of the  
13 application.

14 Our task, as I said, is a fairly limited  
15 one and narrow one over the next several days and  
16 next several weeks while we consider our decision.

17 We're really here to ask or to try to help  
18 us get answers to two questions.

19 First, which petitioners have standing.  
20 And that's not a terribly difficult job this time  
21 because of the 12 petitioners, the majority have  
22 automatic standing under the commission's  
23 regulations. They're units of local government that  
24 are deemed to be considered affected by this  
25 proceeding. So standing will not be an issue for

1 most of the petitioners. It will be an issue for  
2 some of them.

3 The second major question that we need to  
4 look at is: Does each petitioner have at least one  
5 admissible contention? The commission's rules -- the  
6 commission's rules are fairly specific and require  
7 compliance with a number of specific requirements for  
8 contention to be admissible, but basically these  
9 rules are getting at two issues.

10 The first -- the first issue, is the issue  
11 appropriate for hearing. In other words, is it  
12 material to a decision that the NRC must make.

13 The second question is: Has the petitioner  
14 demonstrated enough to show that a hearing on the  
15 issue will not, in effect, be a waste of everyone's  
16 time. Petitioner does not have to win its case at  
17 this state of the proceeding, but it must show a  
18 genuine dispute.

19 So again, we're not here over the next few  
20 days to decide the merits of these three under  
21 contention. We're here, in effect, to show at this  
22 stage or determine at this stage whether there's a  
23 genuine dispute whether the pleadings are, in that  
24 sense, adequate.

25 Now, before I ask the parties to introduce

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1 themselves, I'd like to ask Judge Farrar: Do you  
2 have any comment?

3 >>JUDGE FARRAR: No thank you,  
4 Mr. Chairman.

5 >>JUDGE RYERSON: Let's start in the first  
6 row on my left. And I'd ask the parties to introduce  
7 yourselves. The microphones will work much better if  
8 you simply remain seated. We'll start with the NRC  
9 staff.

10 >>MR. FRUCHTER: Dan Fruchter, counsel for  
11 NRC staff.

12 >>MS. SILVIA: Andrea Silvia.

13 >>MS. YOUNG: Mitzie Young, representing  
14 the NRC staff.

15 >>JUDGE RYERSON: Welcome. The Nuclear  
16 Energy Institute.

17 >>MR. SILBERG: Jay Silberg representing  
18 the Nuclear Energy Institute.

19 >>MR. REPKA: David Repka on behalf of the  
20 Nuclear Energy Institute.

21 >>JUDGE RYERSON: Welcome, gentlemen.

22 >>MR. SCHMUTZ: Tom Schmutz representing  
23 DOE.

24 >>MR. SILVERMAN: Don Silverman  
25 representing DOE.

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1 >>JUDGE RYERSON: Welcome.

2 >>MR. MALSCH: Marty Malsch, representing  
3 the State of Nevada.

4 >>MR. FITZPATRICK: Charles Fitzpatrick,  
5 state of Nevada.

6 >>MR. LAWRENCE: John Lawrence, State of  
7 Nevada.

8 >>JUDGE RYERSON: Welcome.

9 >>MR. MALSCH: Judge, also I'd like to  
10 introduce people in the audience. One is Mr. Bruce  
11 Breslow, who is the director of the Nuclear Project  
12 in Nevada, and Marty Abbs (phn), who's the deputy  
13 attorney general.

14 >>JUDGE RYERSON: Welcome.

15 >>MR. LIST: Robert List on behalf of the  
16 four Nevada counties, Churchill, Esmeralda, Lander  
17 and Mineral.

18 >>MS. GORES: Jennifer Gores on behalf of  
19 the four counties.

20 >>JUDGE RYERSON: Welcome.

21 >>MR. SULLIVAN: Tim Sullivan with  
22 California Attorney General's Office on behalf of  
23 California.

24 >>MS. DURBIN: Susan Durbin with the  
25 Attorney General's office, State of California.

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1 >>JUDGE RYERSON: Welcome. We have a  
2 difficult sight line to the next person, but . . .

3 >>MR. HUSTON: John Huston, Caliente Hot  
4 Springs Resort.

5 >>JUDGE RYERSON: As we go around, I should  
6 remind the parties that, although our mikes are  
7 always on here on the bench, I think you have to hit  
8 a button to put your mike on. And when you're  
9 finished, you probably want to hit the button to take  
10 it off so we don't hear what you're saying. I'm  
11 sorry. Begin on the far right.

12 >>MR. WHEGART: Baird Whegart representing  
13 Lincoln County.

14 >>MS. CURRAN: Diane Curran for Eureka  
15 County.

16 >>MR. POLAND: Good morning, Your Honor,  
17 Doug Poland before on behalf of the Timbisha Shoshone  
18 Yucca Mountain Oversight Program, nonprofit  
19 corporation.

20 >>JUDGE RYERSON: Welcome.

21 >>MS. RENFRO: Good morning, Hannah Renfro,  
22 always representing that Timbisha Shoshone Yucca  
23 Mountain Oversight Program, nonprofit corporation.

24 >>JUDGE RYERSON: Thank you.

25 >>MR. JAMES: Good morning. Greg James

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1 representing the County of Inyo. And the County of  
2 Inyo would like to invite the State of California,  
3 Kevin Bell, to join at the counsel table. He will  
4 not be addressing the commission this morning.

5 >>JUDGE RYERSON: Thank you. We have Nye  
6 County.

7 >>MR. VanNEIL: Jeff VanNiel on behalf of  
8 Nye County.

9 >>JUDGE RYERSON: Welcome.

10 >>MS. HOUCK: Darcie Houck on behalf of the  
11 Timbisha Shoshone Tribe, and I have Ed Beanan of the  
12 tribal council with me. He will not be addressing.

13 >>JUDGE RYERSON: Welcome.

14 >>MS. ROBY: Good morning. Debra Roby on  
15 behalf of Clark County, Nevada.

16 >>MR. ROBBINS: Good morning. Alan Robbins  
17 on behalf of Clark County, Nevada.

18 >>JUDGE RYERSON: Welcome.

19 >>MR. SEARS: Good morning. I'm Richard  
20 Sears. I'm elected District Attorney of White Pine  
21 County. I don't represent the county. I also think  
22 I'm the only elected official in this august body.

23 >>MR. BAUGHMAN: Good morning, Your Honor,  
24 Dr. Mike Baughman representing White Pine County.

25 >>JUDGE RYERSON: Welcome to both of you.

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1 >>MR. WILLIAMS: Scott Williams,  
2 Your Honor, representing the Native Community Action  
3 Council.

4 >>MS. LEIGH: Good morning, Your Honor.  
5 Rovianne Leigh also on behalf of the Native Community  
6 Action Council.

7 >>JUDGE RYERSON: Okay. Again, welcome.

8 Obviously, we have a number of participants  
9 and parties here, and we on the bench are going to  
10 try, as best we can, to address you by name. If we  
11 fail to do that, for the benefit of the reporter who  
12 probably has the toughest job here today, please do  
13 remember to announce your name before you speak.

14 Okay. Today our principal purpose is to go  
15 over the issues that are identified in Appendix A to  
16 the Board's March 18 order. It occurred to us, as we  
17 reviewed the contentions in this matter, that I think  
18 are set forth in something like 12,665 pages, that a  
19 number of overarching issues, principally overarching  
20 legal issues, are likely to determine the  
21 admissibility of large numbers of contentions. So it  
22 is our hope today to principally focus on issues of  
23 that nature; although we would no doubt have some  
24 questions about specific contentions as well.

25 It is our plan to dispense with formal

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1 openings. We have read your petitions and answers  
2 and replies, all 12,665 pages of them. And so it  
3 will not be necessary to simply repeat what is in  
4 your papers.

5           At the end of the day, we will try, as time  
6 permits, to give every party or participant an  
7 opportunity to sum up and to address anything that  
8 they have felt is not adequately covered by our  
9 questions during the day. We'll obviously try, as  
10 best we can when we ask a question, and after we get  
11 an answer, to cover that same round, as appropriate,  
12 with other interested parties in that -- in that  
13 particular issue. But we do hope to have time at the  
14 end of the day for all of you to say what you'd like  
15 about what's on your mind, and, hopefully, we will  
16 avoid undue repetition in that exercise.

17           A couple of words about logistics. It's  
18 our intention to break for lunch, depending on where  
19 we are, about noon. Given where this facility is in  
20 Las Vegas and the logistics of everyone getting back  
21 through security, we're really forced to give you at  
22 least 90 minutes' lunch. So that's what we plan to  
23 do. And hopefully we can all get back here in that  
24 time frame. We will take at least one or two breaks  
25 in the morning and in the afternoon. And we

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1 certainly hope to finish by 5:00 o'clock and get you  
2 all out of here then. And, again, we will -- the  
3 next board, Board Two will be starting at  
4 9:00 o'clock tomorrow.

5 Any comments from Judge Farrar on the  
6 procedures?

7 >>JUDGE FARRAR: No. You had the Board  
8 Three assignment, the Board One assignment.

9 >>JUDGE RYERSON: Okay. All right. Is  
10 there anything any of the parties or participants  
11 feel we need to address now of a procedural nature?  
12 Mr. Malsch?

13 >>MR. MALSCH: I had one preliminary  
14 question. As the Board is aware, DEO's answer was  
15 filed on the last business day of the prior  
16 administration. We are all, I think, today presuming  
17 that DOE's answer is still the position of the  
18 Department of Energy, but I think it would be useful  
19 before we proceed to argument just to obtain a  
20 confirmation from DOE, that, indeed, its answer does  
21 still represent the position of the Department of  
22 Energy.

23 >>JUDGE RYERSON: It's the only answer we  
24 have and we're making that assumption. I don't know  
25 if Mr. Silverman wants to comment on that or not.

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1 >>: MR. SILVERMAN: Your assumption is  
2 correct, Your Honor.

3 >>JUDGE RYERSON: Thank you. Okay. We  
4 have -- we do have a request to relay from  
5 Construction Authorization Board Number One, which  
6 will be sitting on Thursday, and that relates to the  
7 revisions to Part 63 of Title II of the Code of  
8 Federal Regulations.

9 The Commission recently adopted revisions  
10 that I think were published in the Federal Register  
11 on March 13 and become effective on April 13. Those  
12 regulations, those changes in Part 63 will, no doubt,  
13 be effective by the time we issue our decision, which  
14 we presently contemplate to be in May.

15 And Board Three would appreciate if all of  
16 the petitioners could be prepared on Thursday to  
17 inform Board Three of which of their petitions they  
18 believe are affected by the recent revisions to  
19 Part 63.

20 And in the case of the parties, that's the  
21 DOE and the NRC staff, Board Three would appreciate  
22 it if you would be prepared to address all of the  
23 contentions and let Board Three know which you  
24 believe are affected by the changes to Part 63.

25 All right. Any questions about that?

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1           Okay. Well, let's begin then. We do want  
2 to take one issue out of order. Otherwise, we'll  
3 pretty much follow the order in Appendix A. But it  
4 seemed to us, to the boards, in reading the briefs,  
5 that there was very little that the State of Nevada,  
6 the Department of Energy, and the NRC staff agreed  
7 upon, with one exception. And that is, Mr. Repka,  
8 that you don't belong here.

9           All of the -- all of the three above have  
10 challenged your right to standing and have urged us  
11 not to grant you discretionary standing. So we'd  
12 like to begin and take, hopefully, less than an hour  
13 on that issue, and then turn to some of the other  
14 issues that face us.

15           And I'd like to begin, if I may, with one  
16 question -- with one or two questions, Mr. Repka.  
17 The Nuclear Energy Institute -- that's NEI -- is  
18 seeking representational standing as a right. Is  
19 that correct?

20           >>MR. REPKA: That is correct, Judge.

21           >>JUDGE RYERSON: And you're not seeking  
22 standing based -- you're not seeking organizational  
23 standing as a right?

24           >>MR. REPKA: That's correct. We are  
25 seeking standing based on the standing of our

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1 members.

2 >>JUDGE RYERSON: Of your members.

3 And you are seeking in the alternative,  
4 discretionary intervention?

5 >>MR. REPKA: That's correct.

6 >>JUDGE RYERSON: Okay. Does it make a  
7 difference to you which you get and why?

8 >>MR. REPKA: It does not make a difference.  
9 We do believe that we are entitled to standing of  
10 right, and we have requested representational  
11 standing as a right for several independent reasons  
12 based upon injuries to members under the Atomic  
13 Energy Act, under the National Environmental Policy  
14 Act, and the Nuclear Waste Policy Act.

15 So there are separate sufficient basis to  
16 demonstrate standing as of right. But discretionary  
17 standing is equivalent standing in practical effect,  
18 and we don't have a preference of one over the other.

19 >>JUDGE FARRAR: As one of those you  
20 mentioned under the Nuclear Waste Policy Act, how  
21 much reliance do you put on the fact that your  
22 members have made large financial contributions to  
23 the Waste Fund? How important is that to your claim  
24 of standing as a right?

25 >>MR. REPKA: I think that's a significant

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1 basis for standing as a right under the Nuclear Waste  
2 Policy Act. I think that the distinction drawn in  
3 the pleadings of the other parties, with respect to  
4 economic injuries, is one that has no bearing under  
5 the Nuclear Waste Policy Act because of the  
6 contributions of our members from the Nuclear Waste  
7 Fund.

8           Again, that's only one basis for standing,  
9 but that is a sufficient and separate basis.

10           >>JUDGE FARRAR: Do you think your  
11 contributions to that fund put you in a position,  
12 like one of our precedents, where a co-owner of a  
13 facility was allowed to have standing on the license  
14 application? You wouldn't go that far; would you?

15           >>MR. REPKA: I wouldn't go that far. I  
16 would say that those cases with co-owners related to  
17 standing under the Atomic Energy Act and under the  
18 National Environmental Policy Act. And we do  
19 reference those cases with respect to our arguments  
20 under that basis. That's not something we were  
21 specifically relying upon under the Nuclear Waste  
22 Policy Act.

23           There the precedent in the Court of Appeals  
24 under the NEI v. Nevada case that we cited in our  
25 briefs is the operative precedent that we're relying

1 upon.

2 >>JUDGE FARRAR: To what extent is the fact  
3 that you all have contributed to this fund not put  
4 you in any better position than the taxpayers who  
5 attack federal government programs because they say  
6 those are our tax dollars and we don't want them to  
7 go in support of program X, and the courts routinely  
8 throw them out?

9 >>MR. REPKA: I think it's a very different  
10 situation for a couple of reasons. First, clearly  
11 the members of the Nuclear Energy Institute are the  
12 direct beneficiaries of -- the intended direct  
13 beneficiaries of the High-Level Waste Repository. So  
14 it is a fairly narrow set of individual entities,  
15 which is very different from the generalized rate  
16 payer or taxpayer cases.

17 >>JUDGE FARRAR: Except your members got  
18 that money from us. They got the money from the rate  
19 payers who are substantially the same as the  
20 taxpayers.

21 >>MR. REPKA: But for a very specific  
22 purpose, for funding the Nuclear Waste Repository.

23 >>JUDGE FARRAR: Unlike my federal income  
24 tax which goes into the general fund.

25 >>MR. REPKA: Correct. Now, the second

1 basis, again, if you look at the Court of Appeals  
2 decision that we referenced, what makes us very  
3 different from those cases, is there is clearly  
4 direct economic injury to members from continued  
5 on-site storage of nuclear waste. And that has a  
6 direct economic and radiological safety and  
7 environmental impact on the member companies. And I  
8 think that that's -- that's a factor that's in  
9 addition to reliance on contributions from the  
10 Nuclear Waste Fund, which is -- makes the Nuclear  
11 Energy Institute very, very different from the  
12 generalized rate payer and taxpayer interests.

13 >>JUDGE RYERSON: Mr. Repka, on the  
14 question of radiological injury to -- I guess it's  
15 primarily employees of members; is that correct?

16 >>MR. REPKA: I think it's a little bit  
17 more than that under radiological injuries. I think  
18 that there clearly are occupational exposures  
19 associated with continued on-site storage. But I  
20 think that there are radiological injuries associated  
21 with just the continued management of spent fuel for  
22 an extended period of time.

23 That's essentially a radiological safety  
24 activity. If there were any failure to meet that  
25 obligation that the potential injury goes beyond just

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1 occupational exposures. There are environmental  
2 injuries associated with continued on-site storage of  
3 spent fuel that are public injuries because of the  
4 delay in decommissioning sites that would be caused  
5 by having a completed decommissioning added nuclear  
6 site, save for the continued presence of the spent  
7 fuel that delays release of that site for other  
8 beneficial purposes.

9 So I think it's more than just radiological  
10 injuries to employees. It's contamination of  
11 property. It's security and other factors.

12 >>JUDGE RYERSON: If you submitted with  
13 your reply, as I recall, some supplemental affidavits  
14 concerning -- certainly explaining the union  
15 membership in the Institute.

16 In your view, do we need to consider those  
17 supplemental affidavits? Or in your view, is your  
18 original petition sufficient?

19 >>MR. REPKA: We believe strongly that our  
20 original petition was sufficient. We provided the  
21 explanation of the union membership to address a  
22 very, very specific question raised by the parties  
23 with respect to injuries at the -- to perspective  
24 workers at the Yucca Mountain site, but we don't  
25 believe that an affidavit was necessary to address

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1 that. That's clearly our members and those injuries  
2 clearly exist.

3 >>JUDGE FARRAR: But you provided  
4 affidavits on the first go-round about the member  
5 utility companies. You mentioned unions. I think a  
6 one-word mention in your original petition, that you  
7 had no affidavits from them.

8 Would you assert that with organizations  
9 like yours that have a continuing existence for  
10 purposes other than this proceeding, that there's a  
11 presumption of corporate regularity, that if the  
12 organization says -- the organization votes to file a  
13 lawsuit, that that necessarily means under the  
14 organization's bylaws, that every member kind of  
15 automatically or implicitly authorizes that lawsuit?

16 >>MR. REPKA: I think you can assume that  
17 there's a governing structure that applies, and we  
18 would -- and, yes, we're relying on that. In  
19 addition to the fact that the NRC's case law and  
20 precedence I think is fairly clear with respect to  
21 representational standing to one member to --  
22 preferably by affidavit to show that the member has  
23 authorized the entity, and we exceeded the more  
24 than -- we provided more than one member.

25 >>JUDGE FARRAR: Well, but your opposition

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1 has an argument that the one member -- the members  
2 that that you had affidavits from are coming in  
3 basing their standing under the Nuclear Waste Policy  
4 Act, whereas the union workers would be the ones who  
5 have standing -- who could make a stronger claim to  
6 standing under the Atomic Energy Act.

7 So it may be important that we -- it's  
8 conceivable that the only people that you would  
9 piggyback on would be the union people under the  
10 Atomic Energy Act.

11 >>MR. REPKA: I think that, again, there  
12 we're relying on the fact that, as members, we are  
13 authorized by the governing structure of the  
14 organization to represent members, and we believe  
15 that NEI is authorized and would represent those  
16 members in addition to other members.

17 >>JUDGE FARRAR: Before we go any further,  
18 Mr. Chairman, Mr. Silverman, why don't you address  
19 that last issue of the status of the different -- or  
20 people and organizations they claim to represent.

21 And I think the Chairman made clear, our  
22 modus operandi today is not going to be one side as,  
23 you know, an extensive length of time. We're going  
24 to jump back and forth and get everybody's opinion as  
25 we go along.

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1 >>MR. SILVERMAN: I hope to answer your  
2 question, Judge Farrar. There's an awful lot of NRC  
3 cases where an entity, an organization, it might not  
4 be a nonprofit organization, an environmental  
5 organization, files a petition, and claims it wants  
6 to participate in the proceeding and claims standing.

7 But the case law has made clear that they  
8 have to provide an indication through affidavits or  
9 some statement that the individual members authorize  
10 that organization to represent them.

11 Why that's important here is, yes, NEI has  
12 provided affidavits from corporate members, but when  
13 it comes to radiological injury, which is two of the  
14 three prongs that they've alleged as a basis for  
15 standing, I don't believe a corporation or an entity  
16 or an organization can have a radiological injury. I  
17 think it's an individual.

18 And I think what's fundamentally lacking  
19 here in the NEI case was an affidavit from an  
20 individual member alleging that they would be  
21 impacted from a -- have a radiological injury  
22 associated with the operation of Yucca Mountain.

23 >>JUDGE FARRAR: Aren't the utility  
24 companies in a -- maybe I shouldn't use this word --  
25 paternalistic relationship to their employees. In

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1 other words, if the utilities are in, aren't they  
2 there representing not only the utilities' business  
3 interest but one of their great resources, their  
4 employees?

5 >>MR. SILVERMAN: I really don't see that.  
6 I don't see how it's different from any other  
7 organization that has members who want to petition to  
8 participate in an NRC proceeding.

9 >>JUDGE RYERSON: Well, doesn't an employer  
10 always have an interest in, if nothing else, not  
11 being sued by its employees or in the employee  
12 productivity. Quite apart from the paternalistic  
13 interest in the welfare of employees, doesn't an  
14 employer always have an interest in the health of its  
15 employees from at least that narrow perspective?

16 >>MR. SILVERMAN: Oh, I imagine that's  
17 right, Your Honor. I don't think it's a cognizable  
18 injury under the Atomic Energy Act, however, in this  
19 proceeding.

20 >>JUDGE FARRAR: In terms of the same  
21 employees, you make an argument that anything outside  
22 the Geologic Repository Operations Area, which we're  
23 will shorten to GROA in the future, is outside the  
24 scope of the proceeding, but we have -- because we  
25 cannot, in this proceeding, regulate what goes on at

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1 the individual utility sites where the spent fuel now  
2 is.

3 That may be true, but our cases don't say  
4 that you can only have standing based on interests we  
5 regulate. Our cases say you can have standing based  
6 on impacts felt at a distance because of the thing  
7 we're regulating.

8 So you're going to have to enlighten me on  
9 why you think that the scope is limited -- for  
10 standing purposes is limited to things happening at  
11 the GROA.

12 >>MR. SILVERMAN: That's a very appropriate  
13 question, Your Honor.

14 >>JUDGE FARRAR: Thank you.

15 >>MR. SILVERMAN: And particularly, because  
16 I think, very frankly, we were not as clear as we  
17 should have been in our pleading on the matter.

18 We do recognize that the cases very clearly  
19 show that, when an applicant applies for a license,  
20 that in considering standing, you may in fact,  
21 consider impacts from that proposed licensed facility  
22 and that licensed activity to individuals who are  
23 outside the boundaries of the facility at the 50-mile  
24 presumption and reactor cases, and you have the other  
25 standing law that shows that.

1           And we did imply that that's what we were  
2 saying. What we were really, frankly, trying to say,  
3 what the distinction is in this case, between those  
4 cases which we well recognize and what we have here,  
5 is that the NEI petition alleges that those  
6 radiological injuries are attributable not to the  
7 proposed activity, which is the Yucca Mountain  
8 Repository, not to the application that is before us,  
9 but to the sort of ancillary effect of having to  
10 continue to store radioactive waste at the nuclear  
11 power plants.

12           The injury in their allegations is coming  
13 from the action -- from the activities at the nuclear  
14 power plant.

15           >>JUDGE FARRAR: I would reframe it and  
16 say, aren't they saying their injury is coming  
17 from -- their standing is based on the possibility  
18 that if they're not here in the case, a possible  
19 outcome of the case is the repository won't be built,  
20 it will be delayed, and that possible outcome of the  
21 case -- and all you need is one possible outcome of  
22 the case for standing -- will have an impact on their  
23 workers who'll have to be working or being around the  
24 spent fuel at the reactor site for a longer period?

25           >>MR. SILVERMAN: They are alleging that,

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1 yes.

2 >>JUDGE FARRAR: Sounds pretty good to me.  
3 What's wrong with it?

4 >>MR. SILVERMAN: Well, once again, as I  
5 said, I think that the case law focuses on whether an  
6 individual, who may live 5, 10, 50 miles away, has --  
7 may be injured as a result of the operation -- direct  
8 result of the operation of the licensed activity.

9 >>JUDGE FARRAR: Here, it's from the  
10 non-operation. You're right. That's the normal  
11 case.

12 >>MR. SILVERMAN: Right. Right.

13 >>JUDGE FARRAR: If the facility goes  
14 ahead, we're going to be injured at a distance. Here  
15 they're saying, if the facility doesn't go ahead --  
16 this is a peculiar case.

17 But what's outlandish about it, they say if  
18 we have this bad outcome for their people, it will be  
19 a bad outcome for the workers, from the non-going  
20 ahead of the project.

21 >>MR. SILVERMAN: Right. No, I understand  
22 the rationale that the repository doesn't get licensed  
23 in a timely fashion, and that has the effect of  
24 requiring additional long-term storage or some of the  
25 other contentions relate to the use of DPCs and TADs

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1 at the reactor facilities. But again, I think it is  
2 distinguishable because they are alleging that the  
3 injury is coming from the activity -- directly from  
4 the Part 50 licensed activity, and that's different  
5 than the other cases.

6 >>JUDGE RYERSON: Mr. Repka, don't you also  
7 allege that you have unions as members, and that the  
8 union -- the individuals who are members of the  
9 unions are likely to work at the repository and the  
10 construction of the repository? Is that part of your  
11 basis for standing?

12 >>MR. REPKA: Yes, that's correct, Judge  
13 Ryerson.

14 >>JUDGE RYERSON: And is that raised in  
15 your original petition, or is that just in your  
16 supplemental affidavits?

17 >>MR. REPKA: No. that's included in our  
18 original petition, in the affidavit of Mr. McCullum  
19 mentions the fact that unions are members of NEI.

20 >>JUDGE RYERSON: Okay. I noted with  
21 interest your --

22 >>MR. SILVERMAN: That was in the original?

23 >>MR. REPKA: There is a statement in the  
24 original affidavit that unions are members, that's  
25 correct.

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1 >>JUDGE FARRAR: But he doesn't expand on  
2 it. It was in the supplemental pleadings that they  
3 expanded on it and said all these different tradesmen  
4 would be working at Yucca Mountain.

5 >>MR. REPKA: Right. To respond to some of  
6 the points made by the other parties.

7 >>JUDGE RYERSON: Okay. You take the  
8 position, Mr. Repka, in your reply that historically  
9 the commission has been generous -- that's your  
10 word -- in allowing parties or petitioners to cure  
11 procedural defects in their replies. And I believe  
12 your members have, from time to time, perhaps more  
13 than from time to time taken a different view.

14 Is that your -- is that your position that  
15 the commission has historically been generous in  
16 allowing procedural defects to be cured in replies?

17 >>MR. REPKA: I think that's absolutely  
18 true, just as a statement of fact, regardless of what  
19 industry position may have been in individual cases.  
20 I think the case law speaks for itself that, with  
21 respect to affidavit requirements or pleading  
22 requirements, the commission has been allowed some  
23 latitude there.

24 Again, I don't think that that's necessary  
25 in this case. I don't think it's necessary for us or

1 the Board to rely upon that. I am a little  
2 concerned. I think I'm hearing a new argument from  
3 the Department this morning that we would need to  
4 have affidavits from individual employees. That's  
5 not an argument that's been made in any of the papers  
6 today.

7 But I do disagree with that argument. And,  
8 again, I think that the pleading requirement is one  
9 of having a member provide an affidavit demonstrating  
10 that the member has authorized the association. And  
11 we more than met that requirement on the initial  
12 filing.

13 >>JUDGE FARRAR: And would you say your  
14 supplemental filing is in the nature of explanation  
15 of your original as opposed to the thing your members  
16 always object to supplemental filings that open up a  
17 new --

18 >>MR. REPKA: Yes. And that's absolutely  
19 true, Judge Farrar. That's exactly what it does.

20 >>JUDGE FARRAR: Mr. Silverman, what do you  
21 think about that?

22 >>MR. SILVERMAN: I'm sorry. Would you  
23 repeat.

24 >>JUDGE FARRAR: The question was: Is  
25 there supplemental filing, just explanatory to their

1 original, or does it, as companies often do,  
2 complaining about the normal interveners that  
3 introduces brand-new information.

4 >>MR. SILVERMAN: Well, the supplemental  
5 filing, I think, does a couple of things. One, as  
6 far as I'm concerned, basically it restates the same  
7 interest that they alleged in their original  
8 pleading, which they're obviously entitled to do.

9 Other than that, the claims that come to  
10 mind that are new are their -- they reference their  
11 participation in the PAPO proceedings, in this case,  
12 as a suggestion that that should provide a basis for  
13 standing, which we think is wrong.

14 >>JUDGE FARRAR: Well, if that's wrong, why  
15 did you not object to their -- why are we -- several  
16 years down the road here, they participated without  
17 any objection from any of you in the PAPO proceeding  
18 and now you're objecting to their standing?

19 >>MR. SILVERMAN: Oh, because there was no  
20 requirement for standing in the PAPO proceeding.  
21 None at all. That would have been entirely premature  
22 and inappropriate for us to argue that you had to  
23 show legal standing to participate in that  
24 proceeding.

25 >>JUDGE FARRAR: What you mean by --

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1 bystanders could have come in and said we want to be  
2 part of this proceeding?

3 >>MR. SILVERMAN: I have to refer to the  
4 rules, but any potential -- some language like any  
5 potential party, potential party, can participate in  
6 that proceeding as long as they're complying with the  
7 LSN obligations. That was -- standing is not a  
8 prerequisite for participation in the PAPO  
9 proceedings, and I can, with a moment or two, find  
10 the regulations that specify that. So that would  
11 have been inappropriate for us to raise that at that  
12 point. We're now at the contention admissibility  
13 stage, which is an intervene stage, and it is a  
14 relevant consideration.

15 >>JUDGE RYERSON: Would you say, moving on  
16 for the moment to the issue of discretionary  
17 intervention, would you regard NEI's participation in  
18 the PAPO proceedings as a relevant factor in,  
19 perhaps, recognizing discretionary intervention for  
20 them?

21 >>MR. SILVERMAN: Well, I guess I'd want to  
22 know more about that. I don't believe they've  
23 alleged that as a basis for discretionary  
24 intervention. So I'm not sure what the -- how that  
25 would support a discretionary intervention argument.

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1 It's not an argument they've made, to the best of my  
2 knowledge.

3 >>JUDGE RYERSON: Well, one of the issues  
4 under discretionary invention -- intervention is  
5 whether a party is likely to assist in developing a  
6 record. You have here an organization that has  
7 participated voluntarily in pre-application  
8 proceedings. I suppose it's also an entity that has  
9 participated in litigation.

10 >>MR. SILVERMAN: Yes.

11 >>JUDGE RYERSON: And whether we are bound  
12 by the DC Circuit's finding that they had standing in  
13 the context of the NEI case in 2004, I suppose -- and  
14 whether one agrees with their position on the merits  
15 or not, wouldn't it be the case that their history of  
16 involvement is a positive factor in terms of the  
17 possibility of discretionary standing?

18 >>MR. SILVERMAN: Our view on the question  
19 of their ability to contribute to the development of  
20 a sound record is that they do allege that they have  
21 direct substantive expertise in a very general way.  
22 There is no doubt that the utilities are cognizant  
23 and very experienced with the spent fuel handling,  
24 but their pleadings don't really specifically -- they  
25 don't identify specific experts upon which they would

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1     rely, which is one of the factors to be considered,  
2     at the evidentiary hearing, or their qualifications.

3             There are some affidavits. Those  
4     affidavits are provided in support of their  
5     contentions, primarily, but not -- none of them  
6     mention specifically this factor one and the -- which  
7     is the contribution to a sound record, and that these  
8     individuals who have filed the affidavits would  
9     likely be their experts, and they don't really, as  
10    far as we're concerned, give the Board a sufficient  
11    basis to conclude that they should prevail on that  
12    particular factor.

13            >>JUDGE RYERSON: What about the factor of  
14    broadening issues or delay. I believe -- and I'm  
15    sure Mr. Repka will correct me if I'm wrong. I  
16    believe they have nine contentions, nine proposed  
17    contentions; is that right?

18            >>MR. REPKA: That sounds right.

19            >>JUDGE RYERSON: And we are faced with 328  
20    or 329 proposed contentions, which means, if my math  
21    is correct, that their presence would appear to  
22    complicate the proceeding by a factor of 2.8 percent  
23    or thereabouts.

24            I mean, is that something that is a  
25    relevant consideration for discretionary

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1 intervention? It doesn't sound like, you know, we  
2 have most -- we have 12 petitioners, most of whom  
3 have automatic standing. So we're not -- if we were  
4 to allow discretionary standing, we don't open up the  
5 flood gates potentially, and we don't seem to  
6 dramatically complicate what is already a rather  
7 complicated proceeding. Is that something we should  
8 consider or is that an improper consideration?

9 >>MR. SILVERMAN: Well, the factor is an  
10 important consideration to the extent to which they'd  
11 inappropriately broaden the proceeding. And I  
12 completely trust your math. I'm sure I couldn't do  
13 it myself.

14 And clearly that in the scheme of the  
15 number of contentions we have, when you just look at  
16 the number of contentions, it's a relatively small  
17 number. But I'd like to point out that the standard  
18 is would the potential party inappropriately broaden  
19 the proceeding?

20 What we have here is largely a set of  
21 contentions asserting that the Department of Energy's  
22 analyses are overly conservative and that -- and I  
23 want to stress the word in the standard that applies  
24 here. Inappropriately broaden this proceeding.

25 What we would be doing, we would be having

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1 the NRC, you the licensing board, adjudicating  
2 whether the Department was too conservative. That's  
3 a very unusual situation, maybe unprecedented, I'm  
4 not sure. Clearly unusual. It's, in our view,  
5 inappropriate. It would result in wholly different  
6 testimony from the Department of Energy and other  
7 parties than we would need to provide in response to  
8 other petitioners. We would now not only have to  
9 show that we were sufficiently safe and we meet the  
10 regulations, but now we have to show that we're not  
11 too conservative in order to rebut these contentions.

12 So our view is that second important  
13 standard under discretionary intervention really does  
14 not cut in favor of NEI.

15 >>JUDGE FARRAR: Was it your brief or  
16 somebody else's that said the remedy is to talk to  
17 you all?

18 >>MR. SILVERMAN: I believe we said under  
19 ability to represent -- another party who could  
20 represent the interests of that other party, that  
21 since we both have an interest in licensing the  
22 facility safely, but as prompt as possible, that the  
23 Department effectively does represent their interest.

24 >>JUDGE FARRAR: So they should talk to  
25 you?

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1 >>MR. SILVERMAN: That will be fine.

2 >>JUDGE FARRAR: They've been talking to  
3 you all about a lot of things for a long time;  
4 haven't they?

5 >>MR. SILVERMAN: Are you referring to  
6 anything in particular, Judge Farrar?

7 >>JUDGE FARRAR: Yes. Yes. We're  
8 referring to the --

9 >>MR. SILVERMAN: Spent fuel.

10 >>JUDGE FARRAR: -- spent fuel pickup, that  
11 I don't think has happened unless something happened  
12 this morning.

13 >>MR. SILVERMAN: Not to the best of my  
14 knowledge. Clearly there's a contractual dispute  
15 there. I think that's a different animal than the  
16 disagreement or -- well, the issues raised about the  
17 extent to which we've been overconservative. You  
18 know, and disagreement is probably the wrong word,  
19 because I think the Department feels they've been  
20 very conservative and very careful in their analysis.

21 >>JUDGE FARRAR: Well, just my  
22 seat-of-the-pants layman's knowledge, if there's  
23 anybody in the world who has access to talk to you  
24 all, it's NEI. The fact that they're here  
25 petitioning for us -- petitioning to have an

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1 adjudication in front of us, can't we draw from that  
2 they believe you've not been responsive? I mean, I  
3 can't imagine that all these years, while DOE has  
4 been putting this application together, that their  
5 members have not been talking to.

6 >>MR. SILVERMAN: I do not know the answer  
7 to the question as to whether the NEI has approached  
8 the Department regarding the specific issues, the  
9 alleged over conservatisms that are the subject of  
10 these contentions. I imagine there have been  
11 discussions along the way.

12 >>JUDGE FARRAR: Were they the people you  
13 make an oblique reference in your brief to some  
14 industry organization that filed comments in 1989  
15 about let's limit discretionary intervention? Was  
16 that them or their predecessor?

17 >>MR. SILVERMAN: It was not NEI, because  
18 NEI did not exist then. It was the predecessor  
19 organizations.

20 >>JUDGE FARRAR: Atomic Industrial Atomic  
21 Industrial Form. Mr. Repka, do you --

22 >>MR. REPKA: I believe it would have been  
23 Newmark at that point.

24 >>MR. SILVERMAN: There were several.  
25 Several named.

1 >>JUDGE FARRAR: Mr. Silverman, you cited a  
2 case -- I want to say it was 100 years ago, but Judge  
3 Rosenthal and I were both on it. The North Anna case  
4 about the -- I think it was Sun Ship Building, where  
5 there was an issue about some big mechanical pieces  
6 and whether they were well built. And the case  
7 looks, on its surface, like it stands for the fact  
8 that, gee, here's the company that built it, they're  
9 coming in, and this is the perfect kind of  
10 discretionary intervention because they'll give us  
11 good, honest information about the merits of these  
12 issues that were there the fabricator of these major  
13 parts.

14 But when you look behind the surface, there  
15 were allegations that that company was, in fact,  
16 involved in civil litigation because of their  
17 deficient -- allegedly deficient performance, and  
18 there was some suggestion that rather than trying to  
19 just help the NRC solve this problem, they were in  
20 there to get a leg up on their civil litigation by  
21 establishing what a great -- establishing in front of  
22 us what a great job they had done. And, in fact,  
23 that would enhance their reputation, which was in  
24 some jeopardy in the business community. That's the  
25 premise of my question.

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1           My question is: They don't -- if that's  
2 how you look at them, they're not the standout,  
3 all-time discretionary intervenor who had only pure  
4 motives unlike, you know, NEI here which has its, you  
5 know, economic interests and so forth.

6           I think that was a question, but you and I  
7 have done this before, so . . .

8           >>MR. SILVERMAN: I'd have to go back and  
9 recheck North Anna, frankly. I accept your  
10 description of it with respect to potential other  
11 motives of Sun Ship Building.

12           But our view here -- and I hope I answer  
13 your question -- is very simply that the economic  
14 interest they allege is no different than the  
15 economic interest alleged in other cases where  
16 standing has been denied.

17           It's based not upon radiological injury.  
18 It's not linked to radiological injury as its pled.  
19 It's based upon the cost of having to continue to  
20 store fuel. It's based upon the contributions to the  
21 Nuclear Waste Fund, and that is no different, in our  
22 view, than the other economic injury cases we've  
23 seen, which have resulted in a determination of a  
24 lack of standing under the Atomic Energy Act.

25           >>JUDGE FARRAR: You ever read district

1 court and Court of Appeals' opinions that start out,  
2 this case comes -- you know, this case arises under  
3 the voting rights act or this case arises under the  
4 federal tort claims act, write that first sentence of  
5 our opinion for me. This case arises under?

6 >>MR. SILVERMAN: This case arises under  
7 the Atomic Energy Act?

8 >>JUDGE FARRAR: Now, the staff's brief  
9 starts out with a couple of pages saying it arises  
10 under the Nuclear Waste Policy Act.

11 >>MR. SILVERMAN: I was getting there. I  
12 think there's several statutes, not in any  
13 particular order. The Atomic Energy Act, the  
14 National Environmental Policy Act, and the NWPA, yes.

15 >>JUDGE FARRAR: Well, but isn't -- is that  
16 an important distinction, given the distinction that  
17 you try to draw, that their standing is under -- that  
18 their claimed interest falls under something that  
19 their contentions have nothing to do with, namely the  
20 Nuclear Policy -- Nuclear Waste Policy Act?

21 In other words, you're saying, their  
22 contentions are only Atomic Energy Act, only NEPA.  
23 They're saying they come in under the Nuclear Waste  
24 Policy Act. You say, well, that's kind of not  
25 relevant here, but isn't that -- isn't that why we're

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1 here, the Nuclear Waste Policy Act?

2 >>MR. SILVERMAN: The Nuclear Waste Policy  
3 Act is why we're here. And if I can take a moment,  
4 I'll explain briefly, summarize our position on the  
5 NWPA and why don't we think that provides standing in  
6 this case.

7 NWPA is a multi-faceted statute. There is  
8 no doubt that it provides -- that an injury, an  
9 economic injury like the dispute over the standard  
10 contract is within the zone of interests that could  
11 be cognizable, and litigable, and has, in fact, been  
12 litigated in federal court, pursuant to specific  
13 provisions of the NWPA that put a contractual  
14 obligation on the Department of Energy.

15 But that doesn't mean -- that's an economic  
16 injury, and that's cognizable in the federal courts  
17 under certain provisions of the Atomic Energy Act.  
18 The provisions that lead to the standard contract.

19 That doesn't mean that same economic  
20 injuries within the zone of interest to be litigated  
21 here under other specific provisions of the NWPA.  
22 The NWPA does direct the NRC to promulgate  
23 regulations under the Atomic Energy Act and the  
24 Energy Reorganizers Act, but they're focused on  
25 radiological help and safety.

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1           The point is NEI -- the NWPA may afford NEI  
2 and its -- or its members standing for one purpose in  
3 one form, but not necessarily for a different purpose  
4 in a different form.

5           And, in fact, as I think you know and we in  
6 cited in our briefs, when the commission modified its  
7 part two regulations in 1989 to implement some of the  
8 NWPA provisions, they even said -- they anticipated,  
9 quote, that the industry's interest in the high-level  
10 waste is economic, which led them to conclude that  
11 maybe their best option would be discretionary  
12 intervention.

13           I do not think it's correct to say -- to  
14 consider the NWPA as a monolithic statute, where it  
15 affords standing in one form; it does not necessarily  
16 afford standing in another form. And the NEI case  
17 specifies that a Board or a court should consider the  
18 specific provisions of the statute under which the  
19 litigation is occurring and not look at the statute  
20 as a whole, in making that judgment.

21           >>JUDGE FARRAR: Let me ask on that score,  
22 Mr. Mulsch and Mr. Repka, if I understand your  
23 position which we've not yet ruled on, that  
24 Mr. Mulsch has no right to be heard on this. But  
25 indulge me anyhow, subject to your objection.

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1 >>MR. REPKA: I was simply looking for an  
2 opportunity to reply to Mr. Silverman, but I'll  
3 wait --

4 >>JUDGE FARRAR: No. Then go ahead. We'd  
5 rather conduct this this way.

6 >>MR. REPKA: Okay. A couple of points I  
7 wanted to respond to. First, I want to make it very  
8 clear that Nuclear Energy Institute's position in  
9 this proceeding is licensing of the project. And we  
10 support license of the project, and I think that puts  
11 us in a little different light, in terms of our  
12 contentions, but we'll get to that.

13 Mr. Silverman picks on one aspect of the  
14 contention, and that's the assertion that the  
15 application is, in some respects, overconservative.  
16 Overconservative.

17 Our contentions do a lot of things, and  
18 that's one of the things it does say, but I think --  
19 and Mr. Silverman claims that is unprecedented. And  
20 I don't think that really is true. I think that the  
21 flip side of over-conservatism is compliance and  
22 safety margin. And one of the things we would seek  
23 to establish is that there is sufficient safety  
24 margin. It will be help to establish compliance, and  
25 I think licensees or applicants make that argument

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1 all of the time, and that will be not unduly delay  
2 the proceeding. I think that -- as we said in our  
3 papers, I think will actually support and, in some  
4 respects, expedite the proceeding. So I think that  
5 picking on the contentions related to  
6 over-conservatism in the context of standing is  
7 misplaced.

8           Second, Judge Farrar, you mentioned the Sun  
9 Ship Building case. And I just wanted to mention one  
10 other case in which discretionary standing was  
11 granted. And that's a case, Ohio Edison Company  
12 involving the Perry Nuclear Power Plant. It actually  
13 dealt with a proposal to eliminate anti-trust license  
14 conditions, and an entity, Alabama Electric Company,  
15 was granted standing. And the basis for that was  
16 that they were a direct beneficiary of the conditions  
17 involved. And I think that the Nuclear Energy  
18 Institute here is directly analogous to that, as a  
19 direct beneficiary of the repository involved.

20           Third point, there was some discussion of  
21 the Nuclear Waste Policy Act, and how it might be a  
22 basis for standing in other matters. For example,  
23 might be a basis for standing in litigation  
24 surrounding damages under the standard contract. But  
25 somehow that that wouldn't provide standing in this

1 form.

2 Well, again, I think the Nuclear Waste  
3 Policy Act has many aspects to it, and I think that,  
4 as we've pointed out repeatedly, one of as the  
5 aspects and purposes of the Nuclear Waste Policy Act  
6 is the citing of our repository, the licensing  
7 process for a repository, the funding mechanism for a  
8 repository. And all of that puts our participation  
9 well within that zone of interest, and we're not  
10 relying on precisely the same basis that we might --  
11 we might relay for standing in waste litigation in  
12 the district court.

13 >>JUDGE FARRAR: If we found you had no  
14 standing as of right, but had discretionary standing,  
15 what we would then -- would we still have to look at  
16 your contentions to see which ones come in?

17 >>MR. REPKA: I believe that that would be  
18 true; that discretionary standing would not eliminate  
19 the admissible contention standard. However, again,  
20 we are a supporter of the project. And I think that  
21 puts our role in a slightly different perspective. I  
22 think we have proposed contentions to try to meet the  
23 contention standard. But again, I think we would be  
24 looking to participate in a way that would support  
25 the project where we have that expertise, and based

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1 upon discretionary standing or any other kind of  
2 standing.

3 >>JUDGE FARRAR: Well, if we let you in, do  
4 you think that gives you a roving commission to help  
5 us help the other litigants, assuming that some of  
6 their contentions come in -- to help them or oppose  
7 them?

8 In other words, are you going to -- I guess  
9 the question is: Is your game plan, if you succeed  
10 here, to be heard only on the contentions you filed,  
11 the 2.8 percent add on that Judge Ryerson mentioned,  
12 or are you going to be a roving commissioner --  
13 commission, helping us out on everything?

14 >>MR. REPKA: I think roving commissioner's  
15 probably too broad a characterization. I mean, I  
16 think we would be looking to where we appropriately  
17 join other contentions, or we would do so, or adopt  
18 contentions of other parties or appropriately seek  
19 leave to participate on other issues where we felt we  
20 could do that, but I think that's probably getting  
21 ahead of ourselves. At this point we don't know what  
22 the contentions are.

23 Again, it's a little bit of a unique  
24 position for an entity that would support the project  
25 because, again, we're filing a pleading at a point

1 where we don't know what all the other contentions  
2 are.

3 >>JUDGE FARRAR: Let me interrupt you  
4 there, Mr. Silverman. We've never had a problem in  
5 our decisions -- I mean, there's nothing wrong with  
6 someone wanting to intervene to support a project.  
7 For example, the tribe came in one segment of the --  
8 the ruling segment of the tribe came in the private  
9 fuel storage proceeding to support the project. So  
10 there's nothing wrong with coming in to support the  
11 project.

12 >>MR. SILVERMAN: I'm not aware of a  
13 general principle of law that says that can't be  
14 done.

15 >>JUDGE RYERSON: I'd like to hear if  
16 there's a view of the NRC staff on this issue.  
17 Ms. Young, does the staff have a position on these  
18 points. Judge Ryerson, Daniel Fruchter will be  
19 addressing questions on NEI standing.

20 >>JUDGE RYERSON: Okay.

21 >>MR. FRUCHTER: Is your question specific  
22 to an issue that's come up or just the general issue  
23 of NEI standing?

24 >>JUDGE RYERSON: Yeah. I think, just as a  
25 practical matter, we'd like to wrap this up in a

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1 couple of minutes. And if you have -- if, having  
2 heard the arguments, there's some points you'd like  
3 to make, please do. If the points have been covered,  
4 there's no need to speak.

5 >>MR. FRUCHTER: Sure. I'll try to avoid  
6 filibustering.

7 The staff opposes the intervention of NEI  
8 in this proceeding. As our response makes clear, the  
9 crux of NEI's argument is economic. And while they  
10 have raised other potential radiological issues or  
11 asserted other radiological injuries, they've done so  
12 on -- really on behalf of workers, in the context  
13 that they've alleged occupational exposures. NEI's  
14 members, its corporations do not sustain occupational  
15 exposures. They have not demonstrated that they're  
16 authorized to represent the workers who might be  
17 sustaining those occupational exposures.

18 With regard to --

19 >>JUDGE FARRAR: They do represent the  
20 unions, though.

21 >>MR. FRUCHTER: That's correct.

22 >>JUDGE FARRAR: And don't unions exist for  
23 the sole purpose of representing their workers?

24 >>MR. FRUCHTER: I believe that that's what  
25 they would say. As the commission's decision in

1 Palisades filled last year held, though, the  
2 representational standing of unions to represent  
3 their members should not be assumed. Like anyone  
4 else, they have the obligation to come forward and  
5 show that they're authorized to represent their  
6 members.

7 With regard to the issue of standing --

8 >>JUDGE BARNETT: I'm a little confused.

9 So your argument is that only individuals can have  
10 radiological injuries or that organizations can, but  
11 that they are not -- they haven't shown that they're  
12 representing the proper organization? Which one is  
13 it?

14 >>MR. FRUCHTER: Sure. Certainly someone  
15 other than an individual can sustain a radiological  
16 injury. The specific radiological injuries that are  
17 asserted by NEI are occupational exposures, if you  
18 look at the affidavits that they provided. And I  
19 would say that it's not possible for a corporation to  
20 sustain an occupational exposure.

21 Your Honor's brought up the idea that they  
22 might have an interest in avoiding or defending  
23 lawsuits brought by their employees. I think that  
24 just brings us back to this issue of an economic  
25 interest. While there certainly may be one, we would

1 say that it's economic in nature.

2 >>JUDGE BARNETT: Well, so if an individual  
3 was worried about an occupational exposure, who would  
4 represent them, if they had an interest in this  
5 proceeding? Would an individual have to represent  
6 himself?

7 >>MR. FRUCHTER: No. The individual would  
8 authorize -- the individual could represent himself.  
9 The individual could also authorize an organization  
10 in which he was a member to represent him. That's  
11 not what we have here.

12 >>JUDGE BARNETT: Okay. So your contention  
13 is that NEI is not properly authorized to represent  
14 individuals -- these individuals; is that right?

15 >>NRC STAFF: Right. It's not authorized  
16 to represent the workers who would be sustaining  
17 these alleged occupational exposures.

18 With regard to standing under the NWPA,  
19 both the NEI -- the EPA case in the DC circuit and  
20 also the Supreme Court on which it relies, Bennett v.  
21 Spear make clear that, you know, really the crux of  
22 standing is the particular provision of law at issue.

23 While it's certainly true that this case  
24 was arising under the NWPA, it's arising under a  
25 particular provision that calls for the NRC to make a

1 determination as to whether the application is  
2 consistent with public health and safety. And  
3 there's no purpose in that provision to protect the  
4 economic interests of NEI.

5           So looking at the particular provision of  
6 NWPA under which the proceeding is taking place, the  
7 staff is of the view that that also does not protect  
8 economic interests, which may be unlike some of the  
9 provisions having to do with standard contracts or  
10 ground water standards.

11           >>JUDGE RYERSON: Does the staff have a  
12 position on NEI's summary of the standard for our  
13 considering new affidavits in the reply?

14           >>MR. FRUCHTER: Well, I think that they're  
15 looking at NEI's original petition. It think that it  
16 does not raise the issue of an injury to employees  
17 who maybe working at the repository and may sustain  
18 occupational exposures in a way that was clear to --  
19 certainly to the staff. It wasn't clear that that  
20 injury was raised as a basis for standing.

21           So we would argue that, you know, having  
22 not been raised in the initial filing, it would not  
23 be proper to raise an entirely new type of injury in  
24 the reply filing. But I think that the more  
25 important part of that is that they -- well, they

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1 raise that in the reply. The authorization came from  
2 an NEI employee, and not from a union and not from a  
3 worker who actually would be working at the  
4 repository. So there's several layers of  
5 organizations and representation, and that chain has  
6 not been connected.

7 >>JUDGE RYERSON: So your view is that,  
8 even if we were to consider the supplemental  
9 affidavits, that that's not sufficient because they  
10 were from the unions and not from the workers  
11 themselves?

12 >>NRC STAFF: Exactly, Your Honor.

13 >>JUDGE FARRAR: Let me ask you: We know  
14 that the staff has a -- is always part of the  
15 proceedings; so I'm not trying to oust you, but start  
16 with that premise that --

17 >>MR. FRUCHTER: Thank you.

18 >>JUDGE FARRAR: -- I accept that you're  
19 here, and you're always here, and we always enjoy  
20 hearing your position.

21 But when you come down to it, doesn't NEI  
22 have more of an interest and more standing to be in  
23 this proceeding than you do? The staff plays a  
24 tremendous role. They will spend years looking at  
25 the safety and environment, but mostly in this case,

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1 the safety impacts of this project.

2 And it's not going to get through unless  
3 the staff regulators, all several thousand of them,  
4 approve it. And that's a legitimate job.

5 But when you come -- but the staff has no  
6 promotional role. So in a sense, while you want  
7 to -- while we want to make sure that your people  
8 back home are reviewing the safety aspects of this,  
9 you don't really have a dog in this fight in this  
10 hearing. You don't really have an interest in  
11 whether we -- we were to let these contentions in and  
12 end up turning down the proposal or whether we  
13 approve the proposal. Your work goes on, and you're  
14 not promotional. So it's troubling me that you all  
15 opposed NEI's standing, when in the context I just  
16 said it, one could say they have more interest or  
17 right to be here than you do.

18 Now, that's not -- don't go back home and  
19 tell everybody that I said you don't belong in these  
20 proceedings. We know how that goes. But it's a  
21 serious question. They care more about this  
22 proceeding than you, don't they?

23 >>MR. FRUCHTER: If your question is  
24 whether the staff can show the kind of radiological  
25 injury that would give standing in an NRC proceeding,

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1 I think Your Honor is exactly correct. I don't think  
2 the staff would be radiologically injured by the  
3 outcome of the --

4 >>JUDGE FARRAR: I'm not talking about  
5 radiological injury. I'm talking about a staff  
6 corporate interest. They have a distinct corporate  
7 interest in not letting this go forward unless it  
8 meets all the safety standards. That's the  
9 regulators back home. But you all sitting in this  
10 courtroom have no corporate interest in whether this  
11 project succeeds or fails; do you?

12 >>MR. FRUCHTER: That's not only exactly  
13 true, but that's the explicit intent of Congress,  
14 one, in creating the NRC, and, two, in instructing  
15 the NRC to conduct this licensing proceeding in the  
16 first place. They believed it was essential that the  
17 NRC have no promotional interest in the outcome of  
18 the proceeding and, nonetheless, instructed the NRC  
19 to conduct the hearing under the rules of hearing,  
20 which include having the staff as a party.

21 >>JUDGE FARRAR: Right. That's why you're  
22 here. But these people have been lobbying for this  
23 proposal for 20 years. Why is that not -- that  
24 interest not an overwhelming one?

25 >>MR. FRUCHTER: I would -- the staff is

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1 not of the position that NEI has no interest in the  
2 outcome of the proceeding, but that the interest that  
3 they have is economic, and, therefore, not protected  
4 by the Atomic Energy Act and NEPA. It is not  
5 connected to radiological --

6 >>JUDGE FARRAR: It is protected by the  
7 Nuclear Waste Policy Act which your brief starts out  
8 by saying it's what the case is about.

9 >>MR. FRUCHTER: It is protected, arguably,  
10 by certain portions of the Nuclear Waste Policy Act,  
11 but not by the -- not by the provision under which  
12 this proceeding is taking place.

13 >>JUDGE RYERSON: The staff opposes  
14 discretionary intervention as well; is that correct?

15 >>MR. FRUCHTER: That's correct,  
16 Your Honor.

17 >>JUDGE RYERSON: Why?

18 >>MR. FRUCHTER: There's essentially two --  
19 they're the two most important factors, one weighing  
20 in favor and one weighing against discretionary  
21 intervention. So I'll sort of focus on those.

22 In favor of discretionary intervention is  
23 the extent to which the petitioner is going to assist  
24 in developing a sound record.

25 The staff is of the view that, while NEI

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1 has made a general assertion that it has expertise,  
2 and certainly the staff does not disagree with  
3 that -- well, NEI has asserted that they have general  
4 expertise that will be brought to bear on the  
5 proceeding. They have not showed, however, that they  
6 would assist in developing a sound record on the  
7 issues that are properly under consideration in the  
8 proceedings.

9 >>JUDGE FARRAR: How could they do that  
10 since there are 300 contentions, theoretically an  
11 issue, and no one will know until May 11th or  
12 thereafter which issues, if any, are coming. So how  
13 could they have told us in their petitions some  
14 months ago specifically which experts they'd bring to  
15 bear on which issues?

16 >>MR. FRUCHTER: Certainly in their initial  
17 filing it would not have been possible for them to  
18 assign experts to specific contentions. But, that  
19 said, there are certain issues that are overarching  
20 in the proceeding and certain technical issues that  
21 we know are going to be litigated to some extent and  
22 discussed during the course of the proceedings, so  
23 the staff is of the view that they could have set  
24 forth the expertise that we brought to bear in much  
25 greater detail than they have done.

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1           With regard to the factor weighing against  
2 intervention, the extent to which their participation  
3 will broaden the proceeding impermissibly, Your  
4 Honors are correct that, in terms of the number of  
5 contentions that they would add to the proceeding,  
6 that number would not necessarily be significant in  
7 terms of the overall proffered contentions. We don't  
8 know whether it would be significant in the context  
9 of the admitted contentions.

10           But the question, I think, is the issues  
11 that would be raised by NEI, in the staff you would  
12 improperly broaden the proceeding. To my  
13 understanding, NEI is the only party that's  
14 interested in arguing and presenting evidence that  
15 DOE's design is overly conservative.

16           >>JUDGE FARRAR: Suppose they'd nine  
17 contentions that went the other way, that no one else  
18 had raised. Wouldn't that broaden the proceedings to  
19 the same extent? What does it matter which way their  
20 contentions go. They've got nine different  
21 contentions. Doesn't that broaden the proceeding by  
22 2.8 percent, whichever way those contentions go?

23           >>MR. FRUCHTER: Well, in terms of  
24 proffered contentions, again, we don't know what the  
25 numerical extent would be in terms of admitted

1 contentions. But, as Your Honor pointed out,  
2 there's, you know, over 300 proffered contentions,  
3 and it's not clear to what extent they would be  
4 participating on those other contentions, if they  
5 were admitted.

6 But I think the broader question is not the  
7 number of contentions but the issues that are raised.  
8 Specifically speaking, NEI is interested raising an  
9 issue that no other party is interested in raising.

10 >>JUDGE BARNETT: So is that -- that's not  
11 allowed? You have to -- they're not allowed to raise  
12 issues that no one else has raised?

13 >>NRC STAFF: No. The staff would not take  
14 the position that it's not allowed. The standard,  
15 though, for discretionary intervention is very high,  
16 as all the parties agree. And the issue is whether  
17 they have sufficiently fulfilled that standard.

18 And I think the fact that they are  
19 interested in litigating this issue of whether DOE's  
20 design is overly conservative goes to that factor,  
21 which is whether they will broaden or delay the  
22 proceeding. So we're not saying that that's an  
23 impermissible topic area to raise, but I do believe  
24 that it weighs against discretionary intervention.

25 >>JUDGE BARNETT: Well, in effect, that

1 could be the outcome, right, because if they're -- if  
2 they were raising -- if they were making the same  
3 argument that the design wasn't conservative enough,  
4 then it wouldn't be broadening the proceedings, in  
5 your view; is that correct? It wouldn't be  
6 appreciably broadening the proceedings in your view?

7 >>MR. FRUCHTER: I mean, it would depend on  
8 the specific issues that they were raising. It  
9 wouldn't be broaching the issues in the same precise  
10 way, but it would really depend on the specific  
11 contentions that were proffered as to, you know, what  
12 extent they were broadening the proceeding.

13 >>JUDGE BARNETT: So I mean, in effect,  
14 because they have contentions that go the opposite  
15 direction of other contentions, then, in effect, in  
16 your view that's overly broadening the proceedings;  
17 is that correct?

18 >>MR. FRUCHTER: Well, I think the issues  
19 that they're seeking to raise, are impermissibly  
20 broadening -- or would impermissibly broaden -- I  
21 don't mean impermissibly, but inappropriately the  
22 proceeding. Not the fact that they're in favor of  
23 intervention or that they have an interest in showing  
24 a greater margin of safety than is assumed by DOE.

25 >>JUDGE BARNETT: What would make their

1 contentions then -- what is it about their  
2 contentions that make them so that they would  
3 inappropriately broaden the proceedings? What is  
4 it -- what's the issue, the general issue about that?

5 >>MR. FRUCHTER: Sure. I think the purpose  
6 of the proceeding is to show or to discern the extent  
7 to which DOE's submitted application is consistent  
8 with public health and safety. NEI's sort of  
9 underlying argument is, well, what could DOE's  
10 application be changed to and still be consistent  
11 with public health and safety. And I think if that's  
12 an issue, that's not within the scope of the  
13 proceeding otherwise.

14 >>JUDGE RYERSON: Okay. You know, I think  
15 we're reaching the point where we hoped to pretty  
16 much conclude argument on this. I believe Judge  
17 Farrar has one more question.

18 >>JUDGE FARRAR: Mr. Mulsch, I threatened a  
19 few minutes ago to ask you a question. Yours is the  
20 only brief that I think doesn't cite the DC Circuit's  
21 NEI case, but you do cite the Supreme Court postal  
22 workers case.

23 As I read that case, that decision, the  
24 postal workers, Supreme Court held, had no cognizable  
25 interest or standing in the overarching issue of how

1 the postal service is going to be run for the benefit  
2 of the country. And they came -- but they were  
3 trying to raise issues under that overarching  
4 statute, even though their standing came only from  
5 all these much later provisions that said how the  
6 postal service should treat its workers.

7           Isn't that the flip side of what we have  
8 here? And, therefore, not particularly helpful.  
9 What we have here is the overarching statute these  
10 people are arguing they have a right under, and maybe  
11 not so much their economic interest under the Atomic  
12 Energy Act and NEPA. So I'm wondering if the case  
13 decision you cite is particularly helpful to us.

14           >>NEVADA: Judge Farrar, we think the case  
15 is actually quite helpful. And is pretty close to  
16 analogous to the situation we have here.

17           In this case, which is Conference v.  
18 American Postal Workers Union, there were two  
19 statutes involved. It was something called the  
20 private express statutes. There were statutes also  
21 dealing with postal workers. And there was a second  
22 statute called the Postal Reorganization Act.

23           And in that case, the union was challenging  
24 regulations that allowed -- based on standing,  
25 exclusively upon the 1970 Reorganization Act, but its

1 actual claims in the case were all based upon the  
2 private express statutes.

3 And the court held that its injuries were  
4 not within the zone of interest protected by a  
5 relevant statutes because their injuries were not  
6 cognizable, or there was no evidence they were  
7 protected by the private express statutes.

8 And I think that the postal reorganization  
9 act stands in relation to the private express  
10 statutes, just like the NWPA stands in relation to  
11 the Atomic Energy Act, because what was interesting  
12 is that the reorganization act actually reenacted a  
13 number of provisions of the private express statutes.  
14 And yet the court nevertheless said that since there  
15 was no effort to change the private express statutes,  
16 that you couldn't sweep those up into the zone of  
17 interest.

18 And similarly here, there is no claim by  
19 NEI in any of its contentions that there was any  
20 violation of a Nuclear Waste Policy Act. And the  
21 Nuclear Waste Policy Act does say that you apply the  
22 Atomic Energy Act standards. But that doesn't sweep  
23 up, within the interest protected, all of the Atomic  
24 Energy Act. And as we pointed out in our papers, we  
25 think that NEI's interests are solely economic and

1 beyond the zone protected by NEPA and the Atomic  
2 Energy Act, which are the only two statutes upon  
3 which they base their contentions. So we think the  
4 case is directly on point.

5 >>JUDGE RYERSON: Mr. Repka, you want to  
6 respond to that?

7 >>MR. REPKA: Yes, Judge Farrar. In fact,  
8 when we're looking at standing under the Nuclear  
9 Waste Policy Act, we're looking at standing under  
10 only one statute, the Nuclear Waste Policy Act. So  
11 the case -- the air courier case is completely in  
12 opposite for that argument.

13 This case is brought under the Nuclear  
14 Waste Policy Act, and implicates other statutes as  
15 well. Certainly the Atomic Energy Act and NEPA. But  
16 it comes under the licensing provision of the Nuclear  
17 Waste Policy Act. And for that purpose, looking  
18 again at the question of the zone of interest of the  
19 Nuclear Waste Policy Act, we are looking at the one  
20 and the same statute, which is -- relates to the  
21 licensing and the funding of that project. So I  
22 think we are very clearly within the zone of  
23 interest, and the particular case really is not  
24 helpful.

25 >>JUDGE FARRAR: Is this case different

1 from almost anything else, in that here you have, in  
2 effect an act of Congress that says we want you to do  
3 this project?

4 In other words, when we talk about what  
5 does it arise under, it's -- your average utility who  
6 wants to build a nuclear power plant doesn't have an  
7 express instruction from Congress that we really want  
8 you to do that. There's a system set up, if you want  
9 to do it.

10 Does that make this case different and your  
11 standing different because -- because you are not  
12 only within the zone of interests. Are you -- are  
13 your members the real party in interest under that --

14 >>MR. REPKA: Yes is the answer to your  
15 question. As I said, before I characterize it as the  
16 direct beneficiaries of the statute. And I think  
17 that makes the Nuclear Energy Institute and its  
18 members clearly within the zone of interest of the  
19 statute.

20 Mr. Mulsch is focusing on whether or not  
21 there's an alleged violation of the Nuclear Waste  
22 Policy Act, and I don't think that's the correct  
23 question. I don't think whether or not there's a  
24 violation is at all relevant. The point is the  
25 statute calls for a specific citing and funding and

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1 licensing of a specific project, which we support.

2 At the very beginning of this conference,  
3 Judge Ryerson talked about the purpose today was to  
4 identify interested stakeholders. Well, I can't  
5 imagine a more interested stakeholder than the  
6 Nuclear Energy Institute. Yes, there are many other  
7 interested stakeholders, and -- but none more so than  
8 the members of NEI. So I think the answer to your  
9 question is, yes, the Nuclear Waste Policy Act is a  
10 direct mandate from Congress and the Nuclear Energy  
11 Institute's interest is well within that zone of  
12 interest.

13 >>JUDGE RYERSON: All right. Thank you all  
14 for your comments. I think we'll take our first  
15 break now. I have 10:22. I want to resume at 10:35.  
16 And we'll begin with the environmental questions.

17 (A recess was taken.)

18 >>JUDGE RYERSON: Could we come to order,  
19 please. Okay. Welcome back.

20 For the benefit of those who are on the web  
21 streaming site, apparently there was a technical  
22 difficulty, and there was neither video nor audio for  
23 the first half hour or so this morning.

24 My understanding, we now have audio on the  
25 web stream, and we'll have both video -- should have

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1 both video and audio this afternoon. For anyone  
2 who's interested, it's also my understanding, the  
3 proceeding will be on the web stream site for about  
4 90 days or so after the proceeding. So it goes.

5           Okay. The next general area we want to  
6 cover deals with environmental contentions. And as  
7 all of the participants are certainly aware, there's  
8 kind of a long and complicated history to the  
9 treatment of environmental contentions. The National  
10 Waste Policy Act contemplated that the Nuclear  
11 Regulatory Commission would not take a fresh look at  
12 environmental issues, as it would normally do in a  
13 situation like this, but that the NRC would adopt, to  
14 the extent practicable, the environmental documents  
15 prepared in the first instance by the Department of  
16 Energy, the applicant. And recognizing that, the  
17 Commission adopted rules unique to environmental  
18 contentions that specified the circumstances under  
19 which it would be appropriate to adopt NEI -- or  
20 DOE's environmental documents.

21           And I won't get too -- into too long a  
22 history of what happened after that, but there was --  
23 things didn't develop as originally contemplated.  
24 There was a decision in the DC Circuit in which it  
25 was represented to the court that there would

1 certainly be some level of opportunity for  
2 petitioners to present environmental issues to the  
3 Board or to the Commission in this proceeding.

4 So we have a separate set of regulations  
5 that the Commission originally adopted, and then we  
6 have the notice of hearing, which amplifies on those  
7 original regulations and explains how they are to be  
8 reconciled with the representations to the court in  
9 the NEI case in 2004, all of which is a long way of  
10 saying there's some special rules here. And we are  
11 interested in the views of the parties and the  
12 participants as to how, in light of this history,  
13 they should be applied.

14 Let me begin with 2 CFR 51.109(a)(2).  
15 That's the original regulation concerning  
16 environmental contentions, and it says that, after  
17 the adoption decision by the staff or by the  
18 Commission, any party to the proceeding who contends  
19 that it is not practicable to adopt the DOE  
20 environmental impact statement as it may have been  
21 supplemented shall file a contention to that effect  
22 after publication with the notice of hearing in the  
23 federal register, and it proceeds to say, "Such  
24 contention must be accompanied by one or more  
25 affidavits."

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1           Is there anyone here who does not read that  
2 section as requiring affidavit support for any  
3 environmental contention?

4           >>MR. REPKA: Judge Ryerson?

5           >>JUDGE RYERSON: Yes.

6           >>MR. REPKA: May I be heard on that?

7           >>JUDGE RYERSON: Certainly, Mr. Repka.

8           >>MR. REPKA: I think that there would be  
9 an exception to that with respect to an environmental  
10 contention that raises essentially a matter of law,  
11 and I think that that applies to NEI/NEPA 3 which  
12 raises the issue of whether or not there needs to be  
13 a discussion of terrorism impacts in the  
14 environmental impact statement. So I think that  
15 would be an exception.

16           >>JUDGE RYERSON: Okay. Let's just start  
17 in order. Does the NRC staff have a view as to  
18 whether there's any exception to the affidavit  
19 requirement?

20           >>MS. SILVIA: Well, the regulations don't  
21 provide for any exceptions. With respect to NEI's  
22 point about the purely legal contentions, the staff  
23 believes the petitioner should have addressed that  
24 and explained in the petitions why they felt an  
25 affidavit was not required.

1 >>JUDGE RYERSON: Okay. Excuse me. Yeah.  
2 Again, I should remind everyone to please, please for  
3 the benefit of the reporter, announce your name, if I  
4 haven't called you by name.

5 >>MS. SILVIA: That was Andrea Silvia for  
6 the NRC staff.

7 >>JUDGE RYERSON: Thank you.

8 >>MR. SCHMUTZ: Your Honor, Tom Schmutz for  
9 DOE. We don't see any exceptions. And I have great  
10 difficulty with the notion about purely legal  
11 contentions. For the most part, any contentions that  
12 are here are generally mixed contentions. There are  
13 always going to be some factual component that has to  
14 be dealt with. So we would heartedly disagree with  
15 the notion that this rule doesn't mean exactly what  
16 it says, which is that every contention,  
17 environmental contention, must be accompanied by and  
18 supported by an affidavit.

19 >>JUDGE RYERSON: Nevada have a position on  
20 that?

21 >>MR. MALSCH: John Malsch, State of  
22 Nevada. We would agree with NEI, that the only  
23 exception would be for a legal issue.

24 >>JUDGE RYERSON: Okay. All of Nevada's  
25 environmental contentions did have an affidavit;

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1 didn't they?

2 >>MR. MALSCH: Correct. The only one we  
3 filed that was a purely legal issue was NEPA 17.

4 >>JUDGE RYERSON: And that does not have an  
5 affidavit?

6 >>MR. MALSCH: I'll be checking.

7 >>JUDGE RYERSON: Pardon?

8 >>MR. MALSCH: I'll be checking. I'll get  
9 you an answer.

10 >>JUDGE RYERSON: Anyone else have a view  
11 on whether the regulation has to be read literally or  
12 whether there's an exception?

13 Okay. Nye County.

14 >>MR. ANDERSON: Your Honor, Robert  
15 Anderson for Nye County. Your Honor, we included in  
16 an affidavit with our NEPA contention. However, we  
17 agree with NEI that it is possible to articulate the  
18 NEPA contention based solely on the law and the  
19 record, as it stands, to articulate an omission that  
20 would be required to be included in the  
21 considerations under NEPA.

22 >>JUDGE RYERSON: Okay. And would you  
23 agree that that's an exception that the board would  
24 have to find that's really inconsistent with the  
25 regulation on its face? There's no exception in the

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1 regulation, correct?

2 >>MR. ANDERSON: That's correct.

3 >>MR. REPKA: Judge Ryerson, may I be heard  
4 on that question? This is David Repka, NEI.

5 >>JUDGE RYERSON: Yes, Mr. Repka.

6 >>MR. REPKA: The regulation speaks to a  
7 contention being accompanied by one or more  
8 affidavits which set forth factual and/or technical  
9 bases for the claim. And I think that where a  
10 contention has no factual or technical basis but  
11 rather a legal basis, that language does not  
12 specifically address it.

13 So with respect to your proposition that an  
14 exception would be contrary to the specific language,  
15 I think there is room in that language to allow the  
16 exception that we're talking about.

17 >>JUDGE RYERSON: Okay. Clark County.

18 >>MS. ROBY: Yes. Debra Roby. Clark  
19 County would agree with the position of NEI, as we  
20 were just reading through (a)(2), pointing to that  
21 very same language that states, "The contention must  
22 be accompanied by one or more affidavits which set  
23 forth the factual and/or technical bases for the  
24 claim." And a legal requirement or a legal argument  
25 would not necessarily be in an affidavit.

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1 >>JUDGE RYERSON: I'm sorry. Timbisha  
2 Shoshone. Am I --

3 >>MR. POLAND: Your Honor, we'll just  
4 shorten it to the Timbisha Oversight Program. Doug  
5 Poland on behalf of the Timbisha Oversight Program.  
6 We would agree that where there are either factual  
7 matters that are set forth in the EIS or otherwise in  
8 the record, that it is not necessary to have an  
9 affidavit that would be submitted with the  
10 contentions, if they rest on purely a legal basis.

11 >>JUDGE RYERSON: Okay. I think we have  
12 the two views. Does Inyo County have a different  
13 view?

14 >>MR. JAMES: No.

15 >>JUDGE RYERSON: The two views seem to be  
16 the regulation means what it says; there must be an  
17 affidavit. Some have a view that, if there is no  
18 factual basis, that it's a purely legal contention,  
19 then an affidavit is not required.

20 There are a couple of criteria, again,  
21 staying in 51.109, and I believe that only one is  
22 potentially relevant in these circumstances, and that  
23 would be that the contention -- or it refers actually  
24 to the affidavit, I believe -- present significant  
25 and substantial new information or new considerations

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1 that would render the environmental impact statement  
2 inadequate.

3 In other words, the relevant test, at least  
4 I think as the Board reads it, certainly as I read  
5 it, is -- before you get to the notice of hearing,  
6 the test is significant and substantial new  
7 information or new considerations.

8 Anyone have a different view of what the  
9 test is before we get to the notice of hearing? In  
10 other words, what the regulation that applies would  
11 be?

12 Wow, we seem to have agreement on at least  
13 one issue.

14 >>MR. REPKA: Dave Repka for NEI.

15 >>JUDGE RYERSON: Yes.

16 >>MR. REPKA: Not to spoil the agreement.

17 I would just add the qualifier, as read in accordance  
18 with the NEI versus EPA case. I think that case  
19 provides significant perspective on what the new  
20 information standard means.

21 >>JUDGE RYERSON: Okay.

22 >>MR. SCHMUTZ: Actually, I'll add  
23 something to that as well, if you don't mind,  
24 Your Honor.

25 >>JUDGE RYERSON: Yes. I'm sorry. Mr.?

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1 >>MR. SCHMUTZ: Mr. Schmutz. I'm sorry.

2 Actually it doesn't have anything about  
3 what new information means. It talks about new  
4 considerations. But as I understand Your Honor's  
5 point, we haven't gotten to that point. We're  
6 talking about what the reg provides on its face, and  
7 it is, as you've read it, it requires as an exception  
8 to adoption. And adoption, I would point out, is  
9 essentially presumed unless one of two things occur.

10 For this proceeding it's new information or  
11 new considerations that are significant or  
12 substantial.

13 >>JUDGE RYERSON: Okay. Now, we go from  
14 there to the notice of hearing, and the notice of  
15 hearing says under 10 CFR 51.109(c), the presiding  
16 officer should treat as a cognizable new  
17 consideration an attack on the Yucca Mountain  
18 environmental impact statements based on significant  
19 and substantial information that, if true, would  
20 render the statements inadequate.

21 In other words, I think the Commission has  
22 dropped "new" out of the test. Does anyone disagree  
23 with that? New is gone? If it's significant and  
24 substantial, it is deemed to be new. Is that a  
25 reading that is shared by everyone here?

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1           All right. We do -- we do have agreement.  
2       So when you put -- when you put these provisions  
3       together, isn't it the case that the test comes down  
4       to whether -- well, I should state, there is a  
5       further condition that we apply, to the extent  
6       possible. The reopening provisions under the  
7       Commission's regulations, and we'll get to that in a  
8       moment.

9           But subject to that, is there any doubt,  
10       does anyone have a different view than that the test  
11       that we start with is whether a contention presents  
12       significant and substantial information that, if  
13       true, would render the statements inadequate, that  
14       is, the environmental statements inadequate? The  
15       staff? Mr. Fruchter?

16           >>MR. FRUCHTER: Your Honor, just a brief  
17       comment on the previous question, which was presuming  
18       that if something is substantial and significant,  
19       then it's always considered to be a new  
20       consideration.

21           The staff did take the position, and we are  
22       still of the view, that substantive challenges to the  
23       EIS that have already been adjudicated on the merits,  
24       for example, by, you know, the DC Circuit would not  
25       be considered new unless the petitioner raised new

1 information.

2 >>JUDGE RYERSON: But the notice of hearing  
3 has no such exception by its terms; does it?

4 >>MR. FRUCHTER: I believe that's correct.

5 >>JUDGE RYERSON: But it does require us to  
6 interpret all of this in light of the NEI case,  
7 specifically?

8 >>MR. FRUCHTER: Right.

9 >>MR. SCHMUTZ: Well, I would add one  
10 thing. I think I'm in agreement with the staff.  
11 This is Tom Schmutz for DOE.

12 I would say one thing. The notion -- and I  
13 know we're going to get to it, but now, since it's  
14 been brought up, the notion of res judicata,  
15 timeliness, and finality all have to be taken into  
16 account as we look at the environmental contentions  
17 that have been filed here.

18 I'm particularly concerned -- I don't want  
19 it to be left unsaid -- and specifically with regard  
20 to transportation contentions, for example. We think  
21 there's a big gap between repository safety  
22 contentions and transportation contentions. And that  
23 res judicata time does play a fairly significant role  
24 in dealing with those contentions.

25 >>JUDGE RYERSON: Right. And we actually

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1 have broken out the transportation-related  
2 environmental contentions as a separate issue that  
3 we'll get to after we try to figure out what's  
4 required for environmental contentions.

5 >>MR. SCHMUTZ: I didn't mean to jump in  
6 there.

7 >>JUDGE RYERSON: Quite all right.

8 All right. Now, there's also requirement,  
9 and now we go back to 51.109, and 51.109 says that,  
10 to the extent possible, not practicable but possible,  
11 we're supposed to apply both the procedures and the  
12 criteria in the reopening provisions, which currently  
13 appear, I think, in 10 CFR 2.36.

14 Anybody disagree that we are required to  
15 apply the reopening criteria to the extent possible?  
16 Great. Or at least we have agreement again.

17 >>MR. LAWRENCE: Your Honor. State of  
18 Nevada. John Lawrence.

19 >>JUDGE RYERSON: Mr. Lawrence.

20 >>MR. LAWRENCE: We believe that's a  
21 criteria for you to apply as presiding officers.

22 >>JUDGE RYERSON: Correct. I think that's  
23 what I said, but maybe not.

24 >>MR. LAWRENCE: I just wanted to make that  
25 clear.

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1 >>JUDGE RYERSON: Thank you. Okay. So say  
2 that we apply it or a pleading addresses it, either  
3 way. It seems, again, I think to the board and  
4 certainly to me, that there is a potential for some  
5 overlap between these requirements. And I'd like to  
6 review both the procedural and substantive  
7 requirements in the reopening provision to see -- to  
8 see, well, basically how they fit with the  
9 requirements in 51.109 as modified by the notice of  
10 hearing. Everyone still on board? Let's go through  
11 these. Here are the criteria that exist under the  
12 reopening provision. The first is the motion must be  
13 timely.

14 Now, the Commission's notice of hearing  
15 specified when petitions have to be filed. So is  
16 there anyone here who thinks there's a timeliness  
17 issue that needs to be addressed in the context of  
18 the reopening criteria? Everybody understand the  
19 question? Okay. I'm going to assume you do. But  
20 there doesn't seem to be a timeliness factor.

21 The second criteria is the motion must  
22 address a significant safety or environmental issue,  
23 but we're already there because, under 109 and the  
24 Commission's notice of hearing, there already has to  
25 be a significant or substantial environmental issue.

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1 So that seems redundant to me at least, as well.

2 Does anybody else see that as not a  
3 redundant requirement?

4 Great. The third requirement -- and here  
5 we may have some differences. The third criteria is  
6 the motion must demonstrate that a materially  
7 different result would be or would have been likely  
8 had the newly proffered evidence been considered  
9 initially.

10 In other words, the test is -- forget new  
11 because that's out of here. The test is whether this  
12 substantial information would end up with a different  
13 result.

14 Now, the National Environmental Policy Act,  
15 which is the principal statute we're dealing here  
16 with, is entirely a procedural statute. In other  
17 words, it requires disclosure or consideration and  
18 disclosure of environmental consequences of  
19 significant federal action, but it doesn't require  
20 one result or another. In other words, for -- in the  
21 licensing process, provided an agency adequately  
22 considers and discloses environmental considerations,  
23 basically, the agency can do pretty much what it  
24 wants. It can consider other factors that it deems  
25 more important. It may make a decision that national

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1 security interests trump environmental  
2 considerations, can do any number of things, as long  
3 as it doesn't act arbitrarily and capriciously.

4           So the NEPA statute, the National  
5 Environmental Policy Act, is inherently a procedural  
6 statute. That being so, the way I think the Board  
7 would be perhaps inclined to read this materially  
8 different result requirement would be coming back to  
9 what is in the notice of hearing, that this is  
10 something that could change significantly  
11 significant -- sufficiently significant to charge the  
12 environmental documents on which the -- on which the  
13 agency is relying.

14           But it could never be the case that under  
15 NEPA the significant materially different result  
16 would be a different licensing decision because NEPA  
17 doesn't go to the licensing decision. Surely on this  
18 point we're going to have some disagreement. But let  
19 me start with the staff. Am I stating your view or  
20 do you have a different view?

21           >>MS. SILVIA: This is Andrea Silvia for  
22 the NRC staff, and we agree with Your Honor that the  
23 materially different result would essentially be that  
24 the EIS could not be adopted by the NRC staff and it  
25 would require supplementation, and that goes to the

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1 same standard that the alleged deficiency or  
2 additional information would result in a seriously  
3 different picture of the environmental landscape.

4 >>JUDGE RYERSON: Thank you. NEI?

5 >>MR. REPKA: Yeah, this is David Repka.  
6 We agree with your characterization of the issue,  
7 Judge Ryerson.

8 >>JUDGE RYERSON: Okay. And the Department  
9 of Energy?

10 >>MR. SCHMUTZ: Let's see if we can get  
11 that thing on. We agree with the staff. I'm not  
12 sure what NEI's disagreement --

13 >>JUDGE RYERSON: Mr. Schmutz. I'm sorry.  
14 If you'd announce your name.

15 >>MR. SCHMUTZ: Oh, I'm sorry. Once again,  
16 Tom Schmutz, representing the Department of Energy.

17 We agree with what the staff said. I'm not  
18 sure I understand what NEI said. But we think that  
19 the decision to be made, looking at these things, is  
20 whether to adopt.

21 And there is a presumption in this reg, as  
22 well as in the NWPA, that adoption is going to be  
23 what occurs, absent, excuse me, to exception. So  
24 it's the adoption decision we're looking at, and we  
25 think, just as the staff said perfectly well, they

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1 would have to come up with some sort of environmental  
2 contention that it was sufficiently serious to  
3 require the EIS not to be adoptable unless  
4 supplemented.

5 >>JUDGE FARRAR: Or just amended in some  
6 fashion?

7 >>MR. SCHMUTZ: I think it would have to a  
8 formal supplement. I don't think there's any other  
9 way, really, to deal with this.

10 >>JUDGE FARRAR: Again, as Judge Ryerson  
11 put it, you're not saying the ultimate result would  
12 have to be different; just that here's a section  
13 that doesn't measure up and we'll put out a  
14 supplement --

15 >>MR. SCHMUTZ: That's correct, Your Honor.  
16 I agree entirely with Judge Ryerson, that it is a  
17 procedural statute. It doesn't dictate an outcome in  
18 the case. But we're talking about an adoption  
19 decision. That's what this is all directed at.

20 >>JUDGE RYERSON: Right. Now, if I recall  
21 in your papers, DOE expressed a concern that we  
22 shouldn't admit contentions that merely flyspeck  
23 DOE's environmental document. But doesn't the  
24 standard, which is, what, significant and substantial  
25 standard, preclude that?

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1           In other words, wouldn't -- if we were --  
2 if a competent affidavit, a competent, well-reasoned  
3 affidavit, concludes this is significant and  
4 substantial, or we conclude that this -- that the  
5 facts presented in an affidavit are potentially  
6 significant and substantial, doesn't that take care  
7 of your concern that we're flyspecking the DOE  
8 environmental document?

9           >>MR. SCHMUTZ: I think that's right,  
10 Your Honor, if the Board finds that it is a  
11 substantial environmental issue being raised and it  
12 needs to be litigated and its materiality is without  
13 doubt, then, yeah, that's not flyspecking in our  
14 view.

15           >>JUDGE RYERSON: Mr. Malsch, do you have a  
16 view that differs from what's been said so far?

17           >>MR. MALSCH: Your Honor, I'm going to let  
18 Mr. Lawrence answer that question.

19           >>MR. LAWRENCE: I generally agree with  
20 what has been reached, as long as we're not requiring  
21 a different result in the EIS. The failure to  
22 disclose adequate impacts in the EIS is all that's  
23 sufficient. The materially different result would be  
24 the failure for the EIS to disclose environmental  
25 impacts.

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1 >>JUDGE RYERSON: That the result is a  
2 change in the environmental document?

3 >>MR. LAWRENCE: That's correct. The  
4 document has to be changed regardless of the outcome  
5 of that document.

6 >>JUDGE RYERSON: Okay. All right. Well,  
7 we -- I was about to say we're reaching consensus,  
8 and did I see a hand up in the back? Yes.

9 MS. HOUCK: The Timbisha Shoshone Tribe  
10 would agree with the statements of Nevada, and just,  
11 again, reiterate that it is a procedural document and  
12 it's based on informed decision-making. So if  
13 there's a showing that there's substantial  
14 information that's missing in the document that would  
15 require additional assessment, that our position is  
16 that that's all that's necessary.

17 >>JUDGE RYERSON: Thank you. And that's  
18 Ms. Houck?

19 MS. HOUCK: Yes. I apologize.

20 >>JUDGE RYERSON: Well, let's continue on.  
21 We have other comments. Mr. List.

22 >>MR. LIST: Judge Ryerson, thank you very  
23 much. Bob List on behalf of the four counties. We  
24 would agree, and by way of example, I would simply  
25 say that, in our judgment, the EIS documents, NEPA

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1 documents, fail to set forth a very significant and  
2 substantial area and to demonstrate -- and we believe  
3 that a -- had it been done properly, that it would  
4 have shown, in our instance, in the case of a couple  
5 of our contentions, impacts on traffic, on highways,  
6 on first responder capabilities. And all of those  
7 matters should have been a part of the EIS, so that  
8 procedurally the public and interested individuals  
9 and entities would have had notice of it and an  
10 opportunity to participate.

11           So we believe it is a procedural statute.  
12 And in talking about a substantially different result  
13 in this instance, it would have been included in the  
14 documentation so the notice would have been given to  
15 the public.

16           >>JUDGE RYERSON: Thank, you Mr. List.

17           California, yes, Mr. --

18           >>MR. SULLIVAN: Tim Sullivan with the  
19 state of California. We agree completely with  
20 Your Honor's characterization of how 2.326 operates  
21 in the context of a NEPA contention.

22           And I just want to remind the Board that  
23 NRC staff and DOE attack our petition, in very large,  
24 part on the idea that each of those factors has to be  
25 supported by evidence in an affidavit. So while we

1 completely agree that those -- that those factors  
2 would operate the way that you described, we disagree  
3 that they are actually a threshold evidentiary  
4 pleading requirement.

5           Also, the staff just articulated a standard  
6 that there would be a -- that the NEPA documents  
7 are -- can't be adopted unless there's a -- if  
8 there's a seriously different picture of the  
9 environment. And that's a -- that's a kind of  
10 standard that might be appropriate for a -- a court  
11 to look at reopening an administrative process. But  
12 that's not the situation we find ourselves in here.  
13 And I think, under the regulations in the NEI case,  
14 all that needs -- that the -- that the materially  
15 different outcome is just showing that the DOE's NEPA  
16 documents are inadequate under NEPA and, therefore,  
17 can't be adopted.

18           >>JUDGE RYERSON: Okay. Do you read the  
19 Commission's notice of hearing and the significant  
20 and substantial test as different from that, as being  
21 too rigorous, or is that the way you simply read the  
22 Commission's --

23           >>MR. SULLIVAN: No, I don't read it as  
24 being too rigorous.

25           >>JUDGE RYERSON: Okay. Thank you. We're

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1 happy to hear from anyone else. You don't all need  
2 to say you agree with us. So if you do, we'll move  
3 on to another point.

4 Okay. There's one -- you will recall that  
5 we are required, according to 51.109, to apply both  
6 the criteria and the procedures of the reopening  
7 provisions to the extent possible. So we get then to  
8 the procedures for reopening, which say the motion  
9 must be accompanied by affidavits that set forth the  
10 factual and/or technical bases. Well, this starts  
11 sounding familiar to us, at least.

12 I guess my fundamental question is: Is the  
13 affidavit requirement in the reopening provision  
14 essentially -- let's put aside the possibility of an  
15 exception for purely legal contentions, if there is  
16 such a thing or are such a thing.

17 But otherwise all -- by everyone's  
18 agreement, all environmental contentions will have an  
19 affidavit to comply with 51.109, so my question is:  
20 Do they need another affidavit to comply with  
21 2.326(b) or does one affidavit do it?

22 >>MR. SCHMUTZ: This is Tom Schmutz. Might  
23 I respond to that?

24 >>JUDGE RYERSON: Yes, certainly.

25 >>MR. SCHMUTZ: 2.326 imposes some

1 additional requirements that we believe must be in  
2 the affidavit. We're not suggesting that there needs  
3 to be two affidavits. There's one affidavit. But  
4 2.326 also provides that the affidavit must be given  
5 by a competent individual with knowledge of the facts  
6 alleged or by experts in disciplines appropriate to  
7 this issues raised. And an affidavit providing  
8 expert opinion signed by someone who has not  
9 demonstrated competency has not submitted an  
10 appropriate affidavit.

11 >>JUDGE FARRAR: If I may interrupt you,  
12 shouldn't an affidavit under 51.109 be submitted by  
13 somebody who's competent?

14 >>MR. SCHMUTZ: One would hope so,  
15 Your Honor, but this regulation makes it abundantly  
16 clear to me that, at the contention and admissibility  
17 stage, challenges can be made to the competency of  
18 the experts in addressing whether or not that  
19 affidavit supports the contention.

20 I can't read it any other way. A competent  
21 individual with knowledge of the facts or -- and so  
22 it's an issue that can be challenged. More  
23 importantly in some ways, the --

24 >>JUDGE FARRAR: Are you making that  
25 argument only under this regulation we're talking

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1 about now or are you making that as a broader  
2 argument as to affidavits generally in support of  
3 contentions?

4 >>MR. SCHMUTZ: Well, I'm certainly making  
5 it now in support of this. Whether or not it has a  
6 broader application to safety contentions -- for  
7 example, I'm dealing with NEPA contentions. I know  
8 2.309 sets forth the requirements for contentions  
9 raising safety or health issues, and I'm not speaking  
10 to those, and I'll defer to Mr. Silverman.

11 >>JUDGE FARRAR: Because I was nervous  
12 there for a minute that you were going to ask us to  
13 have many hearings on the merits on the affidavits  
14 supported --

15 >>MR. SCHMUTZ: No.

16 >>JUDGE FARRAR: -- in support of ordinary  
17 contentions.

18 >>MR. SCHMUTZ: No, Your Honor. Not all.  
19 But I do think in this case we have a regulation that  
20 makes a pointed statement about competency, and all  
21 we're asking for you to look at the -- you know, as  
22 you review the contentions, you'll look at the  
23 affidavits, you'll look at the statement of  
24 credentials, and you'll say, okay, does this sound  
25 like the kind of person who can give this kind of

1 opinion testimony. It's a threshold question, but it  
2 is one that has to be addressed.

3 More importantly, though, and the  
4 Commission, I think, has actually spoken to this,  
5 which is the second part, evidence contained in the  
6 affidavits must meet the admissibility standards of  
7 this subpart.

8 In 2008 NEI -- NEI -- Nevada submitted a  
9 petition for rule-making, trying to get the  
10 Commission to follow the NEI decision -- trying to  
11 get the Commission to remove the requirement for  
12 2.326, and the Commission refused to do that. And,  
13 in doing so, Nevada advised the Commission that the  
14 admissibility -- that 51.109(a)(2) -- and I'll read  
15 from the notice, the Commission's notice, conditions  
16 the admissibility of a contention which asserts that  
17 NRC should not adopt the EIS to the satisfaction to  
18 the extent possible of a standard free opening, a  
19 closed record under 10 CFR 2.326.

20 The petitioner, Nevada, asserts that the  
21 principal difference between this standard and the  
22 contention standard in 10 CFR 2309(f) that applies to  
23 other issues is that the former requires submission,  
24 requires, in support of the contention, the admission  
25 of -- the submission of admissible evidence.

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1           The Commission does not, in denying -- in  
2 saying, no, we are going to apply it. We do intend  
3 that 2.326 apply, and nowhere takes issue with the  
4 notion, just as they proposed, that any contention,  
5 environmental contention, must be supported by  
6 admissible evidence.

7           And the Commission also noted that  
8 51.109 -- in that case, they have adopted that as a,  
9 quote, contention standard.

10           So I think the Commission has told us that  
11 under 2.326 it is important that we look at the  
12 affidavits and we look at the quality of the  
13 submission and ensure ourselves that what is being  
14 provided from a competent expert, able to give  
15 opinion testimony, and that to the extent it is  
16 supported by additional materials -- that that --  
17 that those additional materials provide -- or be  
18 admissible evidence, whatever they might be.

19           >>JUDGE RYERSON: All right. If I  
20 understand your position, it's that affidavits in  
21 support of an environmental contention, because of  
22 the requirements of 2.326, may have to meet a higher  
23 standard than in support of other contentions. I  
24 mean, there's no affidavit requirement at all for  
25 contentions in general?

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1 >>MR. SCHMUTZ: Under 2.309.

2 >>JUDGE RYERSON: But there is an affidavit  
3 requirement, at least for most environmental  
4 contentions, under 51.109. And you're saying, if I  
5 hear you correctly, that there is a different  
6 standard that applies under 2.326. In other words,  
7 we have to be a little tougher in accepting  
8 affidavits because of 2.326 than we might otherwise  
9 be in just accepting affidavits under 51.109?

10 >>MR. SCHMUTZ: That is correct. That is  
11 our position, Your Honor. And we think that is the  
12 intent of the Commission when it denied Nevada's  
13 petition for rule making.

14 >>JUDGE FARRAR: But isn't -- oh, go ahead.

15 >>JUDGE RYERSON: Now, you described these  
16 affidavits as being admissible. I mean, are you --  
17 how -- well, first -- two questions.

18 How -- maybe you could explain exactly what  
19 that standard is and then, secondly, what you would  
20 expect us to do to apply that standard.

21 >>MR. SCHMUTZ: Sure. Let's start with  
22 the -- I don't believe that the affidavit necessarily  
23 itself has to be admissible. In fact, in the hearing  
24 process, for example, I rather doubt the Commission  
25 would -- or this board would allow affidavits to take

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1 the place of live witnesses.

2 This is a pleading requirement which has to  
3 provide sufficient detail. It's essentially saying  
4 provide sufficient detail of reliable information to  
5 us from competent individuals that demonstrate that  
6 the contention you're raising is significant and  
7 substantial and raises a material issue. And we  
8 want -- we're going to impose a fairly high standard  
9 when we look at those -- those affidavits, and  
10 particularly if they've attached materials to them,  
11 whether or not that -- those materials would  
12 ultimately in a hearing, for example, be admissible.

13 But the -- we're not saying that the  
14 affidavits themselves would somehow be admitted in  
15 the proceeding at all.

16 >>JUDGE FARRAR: And it's your view that we  
17 should look at affidavits and make a judgment  
18 ourselves, not that there should be some sort of  
19 hearing process with respect to the competency of the  
20 experts?

21 >>MR. SCHMUTZ: Absolutely. This is all on  
22 the paper. This is just as you review the contention  
23 as you would under -- what I do know about 2.309 is  
24 there's a materiality requirement for all  
25 contentions, and you're going to look at all

1 contentions and you're going to make judgments as to  
2 whether or not these contentions are of any  
3 consequence or the kind of things that we ought to be  
4 hearing in this proceeding; are they important enough  
5 to merit litigation. We're not saying a whole lot  
6 different with regard to the affidavits that have to  
7 be submitted in support of environmental contentions.  
8 They have to provide -- although we are saying that  
9 there's a slightly higher -- somewhat higher burden  
10 in terms of supporting those with evidence.

11 >>JUDGE FARRAR: But isn't the premise of  
12 that position that your environmental impact  
13 statement has already been subject to adjudication?

14 >>MR. SCHMUTZ: No. As a matter of fact,  
15 the Commission, for example, when it promulgated the  
16 final rule under 51.109, specifically disclaimed any  
17 reliance in imposing these heightened requirements on  
18 there having been judicial review and was not relying  
19 on, for example, principle of collateral estoppel to  
20 somehow take -- to somehow support a heightened  
21 standard under 51.109 and 2.326. It's right in the  
22 preamble to the final rule.

23 >>JUDGE FARRAR: And when were those rules  
24 adopted?

25 >>MR. SCHMUTZ: 1989.

1 >>JUDGE FARRAR: And the NEI decision came  
2 after that, I believe.

3 >>MR. SCHMUTZ: Yes; correct.

4 >>JUDGE FARRAR: And that didn't change  
5 anything?

6 >>MR. SCHMUTZ: No, it didn't. I don't  
7 believe that it -- well, it changed -- here's what it  
8 did do: It did make -- it did, as we've talked  
9 about, put in a -- or allow parties to submit  
10 contentions which otherwise would not have been  
11 allowable as new considerations. The new, as Judge  
12 Ryerson appropriately pointed out, has kind of been  
13 removed from that requirement. That's what NEI did.  
14 And I would say, also, with regard to, you know, res  
15 judicata issues and finality issues, it does have  
16 some role which we'll talk about, I'm sure, later in  
17 transportation contentions.

18 >>JUDGE RYERSON: I guess the question I  
19 have is: We are now at the contention admissibility  
20 phase. We are not making determinations on the  
21 merits of any contentions, and since there is an  
22 affidavit requirement under 51.109, we will -- we  
23 will be looking at affidavits for compliance with  
24 51.109 in the context of not making merit space  
25 determinations. And I'm just -- I'm not sure I

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1 understand how different your slightly tougher  
2 standard would be for affidavits under the companion  
3 section that we're talking about, you know, and how,  
4 as a practical matter, we would make that  
5 determination for purposes of either admitting or not  
6 admitting a particular environmental contention.

7 >>MR. SCHMUTZ: Well, for example,  
8 Your Honor, as we looked at the environmental  
9 contentions in the affidavits that were submitted, we  
10 had, in many cases, problems with the competency of  
11 the individuals providing those affidavits. We had  
12 people -- transportation people talking about  
13 radiologic consequences and the like. We didn't  
14 think that was appropriate. So certainly with regard  
15 to the competency of the individual, which was set  
16 out there, I think that is something the Board has to  
17 take into account, has to look at the competency in  
18 every instance.

19 >>JUDGE RYERSON: But we would look at that  
20 under 51.109; wouldn't we?

21 >>MR. SCHMUTZ: I don't know that that's  
22 so. I know it is so under 2.326, though. And the  
23 Commission has said -- and we had some problems with  
24 some of the submissions of the experts, some of the  
25 materials that they were relying on and offering as

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1 evidence in support of their contentions. And we  
2 think that you have to look at that, at those  
3 materials that are being submitted, and determine  
4 whether or not those materials are appropriate to  
5 support the contention. There's no -- you know,  
6 there were experts that simply threw out large  
7 numbers of documents that they didn't author without  
8 any demonstration that they were even adopting or had  
9 done even any study to adopt the positions taken in  
10 those papers. Those would be questionable, of  
11 questionable admissibility.

12 >>JUDGE RYERSON: Let me ask the NRC staff  
13 for a view on this. Ms. Young, or --

14 >>MS. SILVIA: Andrea Silvia for the NRC  
15 staff.

16 >>JUDGE RYERSON: Okay. My specific  
17 question is whether the staff believes that there is  
18 a practical difference between the affidavit  
19 requirements under 51.109, which we clearly have to  
20 apply, and whether 2.326 really, in any kind of  
21 practical way, changes that affidavit requirement.

22 >>MS. SILVIA: Right. The staff doesn't  
23 believe, Your Honor, that there's any practical  
24 difference between the affidavit requirements in the  
25 two.

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1 >>JUDGE RYERSON: Thanks. Anyone else want  
2 to speak to this at this point?

3 >>MR. LAWRENCE: State of Nevada, John  
4 Lawrence.

5 >>JUDGE RYERSON: Mr. Lawrence.

6 >>MR. LAWRENCE: Two points. First, we  
7 believe there's a threshold requirement to even get  
8 into 2.326. You get into 2.326 if you're reopening  
9 the record. You're talking about a 2008 EIS,  
10 supplemental EIS, or rail alignment EIS. Those  
11 records are opened. They haven't been adjudicated by  
12 anybody. We're not reopening the 2002 EIS. That's  
13 when you would get into 2.326.

14 But, secondly, if you were to get into  
15 2.326, you, as presiding officers, would have that  
16 role, and you'd have that role only because  
17 51.109(a)(2) gave it to you, and it gave it to you to  
18 resolve disputes. That resolution occurs at the  
19 merit stage, not at the admissibility stage.

20 >>JUDGE RYERSON: Well, I understand your  
21 position that we are required to apply it, the  
22 reopening provisions. And I think I understand  
23 your -- your position is, since there's nothing to  
24 reopen, they don't apply. It's not possible to apply  
25 them? Is that a fair statement of your view?

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1 >>MR. LAWRENCE: Depending upon how the  
2 contention was pled, absolutely, sir.

3 >>JUDGE RYERSON: Okay. A different view  
4 that one could have is that the Commission was simply  
5 using this provision and saying, we understand you're  
6 not reopening a record, but because of the  
7 circumstances that the Commission originally expected  
8 to occur, which would be judicial review of DOE's  
9 environmental documents which never happened for a  
10 whole set of complicated reasons -- that they are  
11 simply saying, you know, there's no record to reopen  
12 as such, but, because of these circumstances, we'd  
13 like you to take a hard look at -- and sort of an  
14 extra hard look at this type of contention and apply  
15 reopening standards to the extent possible, insofar  
16 as possible.

17 And so it does seem to me that, if these  
18 were to be applied -- I mean, my -- there is  
19 certainly an argument to be made, if I understand  
20 it -- and I suspect you're making this in the  
21 alternative at least -- that, you know, where we are  
22 now, these the 2.326 requirements are essentially  
23 redundant.

24 But the notion that they purely go to our  
25 role seems to me maybe inconsistent with the

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1 statement, for example, that, in the affidavits under  
2 the reopening vision, it says each of the criteria  
3 must be addressed separately with a specific  
4 explanation of why it has been met. I mean, that is  
5 a requirement not on us. But if it's applicable,  
6 it's clearly a requirement on a petitioner, because  
7 it goes to how the affidavit is framed.

8 So doesn't that suggest that the Commission  
9 contemplated that the petitioner should at least be  
10 aware of and taking these additional requirements  
11 into account?

12 >>MR. LAWRENCE: Two answers. First, with  
13 regard to the provision in 2.326, to have a  
14 materially different result, obviously you need to  
15 plead that. That's a separate requirement than  
16 51.109(a)(2), and I believe we have pled that in each  
17 one of our environmental contentions. So, yes, there  
18 is an expectation that the pleading will contain that  
19 information. And, if we provide it for you, then  
20 your job is to simply look at it as opposed to try to  
21 find it.

22 However, I don't believe there's any  
23 requirement to do that now at this stage, the  
24 admissibility stage. I don't believe there's a  
25 requirement to resolve this dispute. You're simply

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1     trying to find out whether the contention has been  
2     pled properly, comply with the requirements, and  
3     contain sufficient information to reach conclusions  
4     that, if true, the EIS would have to be modified in  
5     some manner.

6             >>JUDGE RYERSON: All right. Thank you.  
7     We will turn shortly to transportation-related  
8     environmental contentions, but first let me say,  
9     Judge Farrar, do you have any questions? Judge  
10    Barnett?

11            Is there anyone else who wants to speak  
12    purely to these special requirements for  
13    environmental contentions?

14            >>MS. SILVIA: This is Andrea Silvia for  
15    the NRC staff. I just would like to add that, in the  
16    Commission's notice of hearing, they stated that the  
17    51.109 requirements should be applied consistent with  
18    NEI versus EPA. The Commission's denial of Nevada's  
19    petition to amend Section 51.109 and OGP's subsequent  
20    letter clarifying the Commission's denial, and in  
21    that letter clarifying the Commission's denial of  
22    Nevada's rule-making petition, it specifically states  
23    that the higher threshold for evidence needed to  
24    support contentions in 51.109(a)2 remains in effect,  
25    which just further supports the position that at the

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1 contention admissibility stage, the higher  
2 requirement's that this is the appropriate time.

3 >>JUDGE FARRAR: But didn't the Commission  
4 say to apply that consistent with the NEI decision?

5 >>MS. SILVIA: Correct.

6 >>JUDGE RYERSON: Do you -- Ms. Silvia, do  
7 you see any practical effect at this point, given  
8 what the Commission has done in the notice of  
9 hearing, for example, particularly deleting the "new"  
10 requirement -- how does the NEI decision of 2004 and  
11 in particular the representations that the staff made  
12 to the Court of Appeals in connection with that  
13 opinion, how -- what effect do they have now? Do  
14 they still have a significant effect?

15 I know the Commission said we should take  
16 it into account, but are there specific things we  
17 need to do or consider in light of the NEI decision  
18 that are not already addressed by the elements that  
19 we look at now in view of the regulations and in view  
20 of the notice of hearing that the Commission has  
21 drafted.

22 >>JUDGE FARRAR: Ms. Silvia, before you  
23 answer that, let me modify Judge Ryerson's question.  
24 The representations made to the court were not by the  
25 NRC staff. It was by the Commission through its duly

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1 authorized lawyers.

2 >>MS. SILVIA: Right. The staff's position  
3 is that the NEI case didn't have any effect on the  
4 pleading requirements. It addressed what substantive  
5 issues Nevada may be able to bring, but it didn't  
6 have any effect on the procedural requirements that  
7 we've just been discussing here.

8 >>JUDGE RYERSON: All right. Well, I  
9 suggest then we move along to the somewhat related  
10 question of environmental contentions that address  
11 not directly the repository itself but, rather,  
12 transportation of nuclear waste to the repository.

13 And my first question, and I think this is  
14 one that I'll probably go along the front row with,  
15 at least initially, is whether the NRC, at least in  
16 the limited way that it's still required to evaluate  
17 environmental consequences -- whether it must  
18 evaluate all the environmental consequences of the  
19 proposed repository or only those that involve areas  
20 where the NRC has direct supervisory responsibility  
21 or direct regulatory responsibility.

22 I think -- I think it may have been  
23 California's filing that suggested that without  
24 transportation of waste to the repository that you  
25 would just have a large expensive hole in the ground

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1 at Yucca Mountain. But the two do seem somewhat  
2 related.

3 And, I guess, let me start with the staff.  
4 What is your view? Does the NRC have some level of  
5 responsibility to look at environmental consequences  
6 of both the transportation of waste and the  
7 repository itself?

8 >>MR. FRUCHTER: Dan Fruchter for the NRC  
9 staff. Yes is the short answer to your question.

10 I think that your question involved whether  
11 the NRC must analyze all environmental impacts. I  
12 would modify that slightly and say that the NRC has  
13 to analyze, and, again, in this very context-specific  
14 way, all environmental impacts that are reasonably  
15 foreseeable and also that are approximately or  
16 legally caused by the NRC's proposed action, which is  
17 licensing the repository.

18 >>JUDGE FARRAR: That's not any dramatic  
19 new doctrine. That's been NEPA for almost 40 years,  
20 right?

21 >>MR. FRUCHTER: That's correct.

22 >>JUDGE RYERSON: Okay. NEI, Mr. Repka, do  
23 you have a comment?

24 >>MR. REPKA: Yes. This is David Repka for  
25 NEI. We agree with that formulation that the staff

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1 just stated that NRC does have responsibility under  
2 NEPA for reasonably foreseeable effects that are  
3 proximately related to the licensing action, and that  
4 could, in fact, extend to activities and actions and  
5 effects that are in areas unregulated by the NRC. So  
6 we agree with that.

7 With respect to transportation  
8 specifically, we take no position on that, but we do  
9 believe that that may be in a different category,  
10 given that the Department of Energy has done specific  
11 environmental analysis, and certainly the NRC has the  
12 ability to tier off and take credit for work done by  
13 other government agencies.

14 >>JUDGE RYERSON: Okay. Let me ask DOE,  
15 and I know you have some related arguments dealing  
16 with res judicata and some other issues, but, before  
17 we get to that, is your view that the NRC begins with  
18 some level of responsibility to examine the  
19 consequences of waste transportation?

20 >>MR. SCHMUTZ: I think that the  
21 department's view is that the NRC may have some  
22 responsibilities as it looks at cumulative impacts of  
23 the repository, to take into account impacts from  
24 transportation that are related to it.

25 We don't believe that, however, the NRC can

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1 look behind the EIS prepared by the Department of  
2 Energy, and we have some arguments in support of  
3 that, which I hope we get to that.

4 >>JUDGE RYERSON: Okay. We'll get back to  
5 that.

6 >>JUDGE FARRAR: Is that part of the EIS or  
7 is that a separate EIS you did carrying out some  
8 other obligation of the department?

9 >>MR. SCHMUTZ: No, the department -- well,  
10 it's in three or four different documents now. We  
11 have the original 2002.

12 >>JUDGE FARRAR: Have any of those been  
13 subject to --

14 >>MR. SCHMUTZ: EIS, yes.

15 >>JUDGE FARRAR: Have any of those been  
16 subject to judicial review?

17 >>MR. SCHMUTZ: On transportation issues,  
18 yes, and upheld.

19 >>JUDGE FARRAR: Which one?

20 >>MR. SCHMUTZ: The 2002 FEIS, the record  
21 of decision on the choice of the Caliente Carter has  
22 been upheld. The mostly rail scenario and the final  
23 environmental impact statement supporting that has  
24 been upheld.

25 >>JUDGE FARRAR: So if the NRC staff says

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1 those are good, you just fold them in, and you would  
2 say people can't file contentions at all that would  
3 challenge that?

4 >>MR. SCHMUTZ: That's correct, Your Honor,  
5 both on res judicata grounds in the case of Nevada  
6 and on timeliness grounds for everyone else. You  
7 have 180 days to contest. We would also say -- I'm  
8 just going to add one more thing, and I hope I'm not  
9 unduly complicating things.

10 There was a new record of decision  
11 supported by a supplemental environmental impact  
12 statement dealing with the alignment, and there's  
13 a -- of the railroad in the Caliente Carter. And  
14 that new environmental impact statement, record of  
15 decision, when it came out in October, that it's  
16 subject to review if petitions are filed by about  
17 April 6th. We don't believe that the transportation  
18 portions of that can be brought here and contentions  
19 raised about that, the items considered in that  
20 environmental impact statement, that they have to go  
21 to the DC Circuit on transportation issues or  
22 whatever Court of Appeals has appropriate venue.

23 >>JUDGE RYERSON: Let me come back to you  
24 in just a moment on that issue, Mr. Schmutz. I have  
25 a feeling that on this side of the room I will not

1 get any disagreement. So let me just see if I do.

2 Does everyone who hasn't yet spoken agree  
3 that there is some responsibility to -- for the NRC  
4 to look at both the transportation of waste and the  
5 repository itself from an environmental standpoint?  
6 Does everybody -- does anybody disagree with that? I  
7 wouldn't think so.

8 Okay. So the question is, coming back to  
9 the Department of Energy, your position, as I  
10 understand it, is that many of these issues have been  
11 or could have been litigated through review in the  
12 federal courts, in effect?

13 >>MR. SCHMUTZ: Through the DOE procedures.

14 >>JUDGE RYERSON: I'm sorry. Your mic is  
15 off.

16 >>MR. SCHMUTZ: Your Honor, this is Tom  
17 Schmutz again. Through the DOE notice and comment  
18 procedures initially, and people availed themselves  
19 of that. There were hundreds and hundreds of  
20 comments submitted and responded to, and then  
21 ultimately through the Court of Appeals. And I  
22 think -- I only have one other thing.

23 I think the NEI decision that we're talking  
24 about, if you take a look at it, they actually  
25 distinguish between transportation proceedings before

1 the Department of Energy and essentially repository  
2 proceedings before the NRC. It's explicitly stated  
3 in there. So the DC Circuit team and NEI seem to  
4 understand that distinction as well.

5 >>JUDGE FARRAR: Let me put to you a  
6 position that I'm not sure if it's been raised by the  
7 parties or not.

8 But since the NRC did establish special  
9 requirements for environmental contentions, couldn't  
10 one argue that the NRC recognized that there would be  
11 an opportunity to -- for petitioners or potential  
12 petitioners to litigate the environmental -- to  
13 litigate DOE's environmental documents, in effect,  
14 through the Court of Appeals and that the  
15 Commission's response to that was to narrow the  
16 opportunities for review before the Commission but  
17 not to eliminate them, that the Commission recognized  
18 that many issues would be or could have been  
19 litigated, and that's why we have special  
20 requirements. The intent is to narrow them but not  
21 to eliminate them. Is that a fair position or do you  
22 disagree?

23 >>MR. SCHMUTZ: Yes. I would limit it to  
24 repository to impact the -- the environmental impact  
25 dealing with the repository, not transportation.

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1 >>JUDGE RYERSON: But why? Because we go  
2 back to the notion that -- put aside DOE. If the  
3 Nuclear Waste Policy Act didn't require the NRC to  
4 adopt DOE's environmental documents to the extent  
5 practicable, then each agency would have an  
6 independent responsibility under NEPA to examine the  
7 environmental consequences of this actions. And the  
8 NRC's responsibility would extend, would it not, to  
9 both the repository itself and the related  
10 transportation of nuclear waste? So we start with  
11 some level of responsibility there that has been cut  
12 back by the act and by the implementing regulations  
13 but not totally eliminated.

14 >>MR. SCHMUTZ: I think there's substantial  
15 case law that would provide that where the federal  
16 agency or two federal agencies are involved -- and  
17 I'm going to call it an overall project, and that's  
18 not quite accurate, and they each have separate  
19 independent jurisdiction over portions of it, and  
20 particularly where one of the federal agencies, as is  
21 the case with the Department of Energy, has an  
22 overall responsibility, has to do environmental  
23 impact statement of the whole, and the other federal  
24 agency, in this case the NRC, has environmental  
25 responsibility and jurisdiction over only a portion

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1 of that project, that that lesser agency has no  
2 jurisdiction and has no responsibilities under NEPA  
3 to consider the environmental impact statements being  
4 prepared by another federal agency.

5 And I would point, for example, there's a  
6 case out of the Ninth Circuit called California Trout  
7 v. Schaefer, a Ninth Circuit decision. I point it  
8 out because I noted that the State of California  
9 pointed to a case in another Ninth Circuit decision  
10 called Thomas v. Peterson, a case in which the very  
11 same agency segmented two portions of an overall  
12 project. We all know that that's not appropriate.

13 In the case of California Trout v.  
14 Schaefer, the court specifically said, where there  
15 are two agencies, two federal agencies, with  
16 independent jurisdiction, as the case here is it, it  
17 is DOE that has jurisdiction over transportation, not  
18 the NRC. And that agency has prepared an  
19 environmental impact statement over, in this case,  
20 transportation, that the other agency has no  
21 jurisdiction or responsibilities under NEPA to  
22 prepare such an environmental impact statement over  
23 that other activity, and it's quite clear.

24 >>JUDGE FARRAR: Was that a case where the  
25 other agency had hearing and adjudicatory powers like

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1 we do?

2 >>MR. SCHMUTZ: No, not that I recall. In  
3 that case, for example, it involved the Corps and it  
4 involved the Bureau of Reclamation and it involved  
5 the preparation of environmental impact statements  
6 and whether or not they had to cover certain areas,  
7 which is the issue here.

8 >>JUDGE FARRAR: Well, is the issue here  
9 that you've just stated a perfect example of where  
10 those heightened motion to reopen standards should  
11 come in, if we give you what you said, this thing is  
12 essentially closed. It's been reviewed, but does  
13 that mean we have no jurisdiction to consider it even  
14 if somebody walked in here with a motion to reopen  
15 the environmental impact statement because some  
16 dramatic new impact had been discovered, and even  
17 though you've done a statement that's been commented  
18 on and duly approved by a court, that there's now  
19 something and we're the only place that's open for  
20 business; so let's do it here under a motion to  
21 reopen?

22 >>MR. SCHMUTZ: If you believe that  
23 exclusive jurisdiction is in the court, that  
24 exclusive means exclusive. And if that situation  
25 occurred with regard to transportation -- and I'm

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1 going to limit it to transportation. --

2 >>JUDGE FARRAR: Right.

3 >>MR. SCHMUTZ: If that occurred with  
4 regard to transportation, whatever avenues of relief  
5 you had are in the DC Circuit, not before this  
6 agency.

7 >>JUDGE FARRAR: I thought you were going  
8 to say their avenue for relief is to come back to  
9 DOE.

10 >>MR. SCHMUTZ: Oh, well, certainly.  
11 You're absolutely right. I misspoke. In the first  
12 instance certainly to the DOE and then getting the  
13 final agency decision on whatever petition they might  
14 file to go to the DC Circuit or whatever other Court  
15 of Appeals had appropriate jurisdiction, venue  
16 primarily.

17 >>JUDGE FARRAR: And so we would wait for  
18 you all to redo that so we could fold it in here, or  
19 wouldn't it be faster for us to hear what you have to  
20 say?

21 >>MR. SCHMUTZ: I guess what I'm saying is  
22 that -- well, if that -- if that case occurred and if  
23 there was a significant change that was going to  
24 occur and if it affected the -- your review of  
25 cumulative impact, for example, I know the staff

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1 takes that, that may be so. But that's the route.  
2 It is not to be litigated in this proceeding.

3 >>JUDGE RYERSON: Now, the "it" you're  
4 referring to is the record of decision, or what is  
5 the "it" you're referring to?

6 >>MR. SCHMUTZ: What I'm talking about is  
7 the environmental impact statement, the record of  
8 decision supported by an environmental impact  
9 statement. And they always are. And that's what  
10 allows one to go to the Court of Appeals.

11 >>JUDGE RYERSON: Nevada, what's your view  
12 on that, Mr. Malsch?

13 >>MR. MALSCH: Let me address first -- I'm  
14 Martin Mulsch from Nevada -- DOE's argument from this  
15 morning.

16 First of all, the mere fact that the  
17 Nuclear Waste Policy Act provides an opportunity for  
18 judicial review within 180 days of an issuance of  
19 record of decision or impact statement, in our mind,  
20 has no effect at all on one's hearing rights before  
21 the Nuclear Regulatory Commission.

22 Second, putting aside res judicata and  
23 collateral estoppel issues, which Mr. Lawrence can  
24 address, I just wanted to mention that the Nuclear  
25 Waste Policy Act was enacted against a backdrop in

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1     which the Commission was very clear, even where  
2     another federal agency was an applicant, that the  
3     Commission itself would exercise its independent  
4     power and do its own environmental impact statement.

5             For example, in the case of TVA  
6     applications for nuclear power plant construction  
7     permits, it was the Commission's consistent practice  
8     of not deferring to some supposed exclusive  
9     jurisdiction under NEPA to the Tennessee Valley  
10    Authority but instead of assuming that its role as an  
11    independent regulatory agency required it to do its  
12    own environmental impact statement.

13            The principal effect of the Nuclear Waste  
14    Policy Act was that Congress understood this was the  
15    NRC's practice and modified it only to the extent  
16    that, instead of having to write its own statement of  
17    an issue, it was allowed under certain circumstances  
18    to adopt DOE's. But that was certainly not in  
19    derogation of the requirement under NEPA that the  
20    agency's impact statement had to be considered in the  
21    agency review process.

22            And in this case, the agency review process  
23    is, in the case of Part 63, the adjudicatory hearing  
24    process provided for. So we do get a right to a  
25    hearing on NEPA issues, in general, provided we've

1 met appropriate pleading requirements, regardless of  
2 other opportunities for judiciary review and  
3 regardless of what may have been the practice of the  
4 Bureau of Reclamation in some case in the Ninth  
5 Circuit.

6 >>JUDGE RYERSON: Does the NRC staff have a  
7 view on this issue?

8 >>MR. FRUCHTER: Staff does not disagree  
9 with Nevada's formulation. That is to say, the  
10 Nuclear Waste Policy Act is specifically provided for  
11 the type of analysis that the NRC will conduct, and  
12 that is to say perform a review of the environmental  
13 impact statements authored by DOE and decide to what  
14 extent it's practicable to adopt those, and that, you  
15 know, essentially for this purpose means to what  
16 extent are those environmental impact statements  
17 adequate.

18 Once that determination has been made, the  
19 NRC has been required to adopt the EIS. But I do not  
20 believe that that would foreclose any possibility of  
21 review of the adequacy of that environmental impact  
22 statement in the present proceeding. In fact, you  
23 know, I think the NEI v. EPA case counsels to the  
24 contrary, in other words, that this is the  
25 appropriate forum to consider substantive challenges

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1 to the EIS.

2 >>JUDGE RYERSON: Including the  
3 transportation aspect?

4 >>MR. FRUCHTER: The aspects of the  
5 transportation analysis that have been adopted.

6 >>JUDGE RYERSON: Okay. I guess one --  
7 Mr. Schmutz, one question I have is: In terms of res  
8 judicata effects, if I understand your argument, it's  
9 that the 2008 documents are governed by -- your view,  
10 that the exclusive remedy is to go to the DC Circuit,  
11 if I -- if I understand that.

12 But assume for the moment you're wrong  
13 about exclusive jurisdiction. Nonetheless we have --  
14 we have cases. We have a 2006 DC Circuit case  
15 dealing with transportation.

16 Is it your view that, even if there weren't  
17 exclusive jurisdiction in the federal circuit courts,  
18 that there would be res judicata, say, at least as to  
19 Nevada --

20 >>MR. SCHMUTZ: Yes.

21 >>JUDGE RYERSON: -- by reason of that?

22 >>MR. SCHMUTZ: Yes. Yes, Your Honor.

23 >>JUDGE RYERSON: But if that were our  
24 basis, there would be no res judicata obviously as to  
25 any post-2006 documents, correct? There couldn't be?

1 >>MR. SCHMUTZ: Correct.

2 >>JUDGE RYERSON: And there wouldn't be  
3 res judicata, would there, as to a potential party  
4 here who was not a party to the 2006 proceeding; is  
5 that correct?

6 >>MR. SCHMUTZ: That follows.

7 >>JUDGE RYERSON: You follow. Okay.

8 >>JUDGE FARRAR: Why does that follow?

9 >>MR. SCHMUTZ: There wouldn't be  
10 res judicata. They weren't a party.

11 >>JUDGE FARRAR: Right.

12 >>MR. SCHMUTZ: But timeliness would kick  
13 in. It would be a final decision.

14 >>JUDGE FARRAR: But there's some --  
15 whether it's collateral estoppel or some doctrine  
16 related to res judicata, they had an opportunity to  
17 be heard in that DC Circuit, even if Nevada went up.  
18 Didn't the others have an opportunity, and, having  
19 not exercised that opportunity, they'd be foreclosed?

20 >>MR. SCHMUTZ: Absolutely, but not by  
21 res judicata. I guess that's the only thing I'm  
22 saying. But they are foreclosed, absolutely. You're  
23 absolutely right.

24 >>JUDGE FARRAR: By one of those related  
25 documents?

1 >>JUDGE RYERSON: Judge Farrar is being a  
2 little unfair because I was posing the hypothetical  
3 where you were restricted to res judicata.

4 >>MR. SCHMUTZ: Right.

5 >>JUDGE RYERSON: And I know your argument  
6 is broader. It goes to exclusive.

7 >>MR. SCHMUTZ: And I would be remiss  
8 allowing you to -- or at least to push back a little  
9 bit on the assumption that you made me take on the  
10 exclusivity provision with regard to the most  
11 latest -- the most latest -- the latest environmental  
12 documents. We believe that it's the transportation  
13 portion of those and the record of decision that  
14 those are exclusively before -- can only be heard by  
15 the Court of Appeals.

16 >>JUDGE RYERSON: Yeah, I understand that's  
17 your position.

18 >>MR. SCHMUTZ: And just to expand one  
19 other thing, we are saying that the NEPA  
20 responsibilities imposed upon the NRC by NEPA do not  
21 extend to transportation. And we've adequately, I  
22 think, set it forth in the paper. I'm going to add  
23 one other thing. There is an Entergy case,  
24 relicensing case, by the Commission which was cited  
25 on by California -- I happened to look at it the

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1 other night -- in which the Nuclear Regulatory  
2 Commission took a position that, where it doesn't  
3 have jurisdiction, it can't change the result of a  
4 sister agency's determination, environmental  
5 determination, it needn't look at it. It is quite  
6 close to this situation. It's an Entergy case  
7 involving Wolf Creek. I can give you the citation to  
8 it.

9 >>JUDGE FARRAR: They don't need to look at  
10 it, even to say we'll import --

11 >>MR. SCHMUTZ: Correct.

12 >>JUDGE FARRAR: We're going to import  
13 whatever those environmental outcomes or impacts are.

14 >>MR. SCHMUTZ: That would be correct.

15 >>JUDGE FARRAR: They can't even import  
16 those into their -- wait, 15 minutes ago or 20  
17 minutes ago I thought you conceded that, even though  
18 we don't -- the NRC doesn't regulate something, it  
19 must take into account all the impacts of the  
20 proposal that's in front of it.

21 >>MR. SCHMUTZ: I hope what I said was  
22 that, at most, the NRC, if it felt it necessary to  
23 look at cumulative impacts, would have to accept the  
24 DOE's transportation impact statements as they stand,  
25 if it felt it necessary to look at cumulative

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1 impacts, but not -- I'm not suggesting that I think  
2 that legally that's required. I'm just saying I  
3 think that's where the staff is coming out. I think  
4 they're looking at it. I'm just saying, if they're  
5 going to do that, you can't look behind those  
6 documents.

7           And I think there's substantial case law on  
8 this jurisdictional issue out of the Fourth Circuit,  
9 several cases out of the Ninth Circuit, out of the  
10 Supreme Court, and the decisions of this agency which  
11 support the notion that you don't look at -- in this  
12 case at transportation, which is a -- raises a  
13 jurisdictional issue. No one concedes or contends, I  
14 don't believe, that the AEA or the Nuclear Waste  
15 Policy Act defers jurisdiction on this agency for the  
16 transportation of nuclear waste other than the  
17 certification of casks.

18           >>JUDGE RYERSON: Yeah, I mean -- okay.  
19 Let me -- you mentioned Supreme Court, and there is  
20 one case -- I believe you cited it -- the Department  
21 of Transportation versus Public Citizen case. I  
22 suspect this is your area, Mr. Schmutz.

23           Could you elaborate upon how you feel that  
24 is relevant here?

25           >>MR. SCHMUTZ: I'm going to create and say

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1 that that stands for a limited but important  
2 position. The facts of the case, as we all know, are  
3 a bit odd. And so -- but I think --

4 >>JUDGE RYERSON: We probably all don't  
5 know.

6 >>MR. SCHMUTZ: It had to do with allowing  
7 trucks in from Mexico, and we had one agency who was  
8 responsible for getting inspection routines. And at  
9 the same time the President of the United States  
10 imposed a moratorium on trucks coming in. The agency  
11 that was going to impose the inspection routines had  
12 no responsibility, no jurisdiction, to actually allow  
13 the trucks in. But it did have jurisdiction to  
14 create safety requirements and inspection routines.

15 So it created them, and it said what's the  
16 environmental impact statement or environmental  
17 impact of these trucks kind of hanging around at the  
18 border, you know, blowing diesel smoke into the air,  
19 more of it than would formerly be there. That's the  
20 impact that they looked at.

21 They didn't look at the impact of those  
22 trucks entering the United States and, you know,  
23 spewing noxious fumes all over the country. They  
24 didn't look at the national impact of that. And they  
25 didn't do it because they had no jurisdiction over

1 the activity of allowing those trucks into the  
2 United States. It was up to the President to do  
3 that.

4 So it's a -- I guess the California  
5 trucking case, I suppose I like in kind of saying  
6 that's the case we ought to be looking at, because it  
7 was two federal agencies, both of whom had  
8 environmental responsibilities. But it does stand  
9 for the proposition that where one agency doesn't  
10 have jurisdiction over an activity and can't change  
11 the outcome, NRC -- I mean, in our view, the Nuclear  
12 Regulatory Commission can't tell us how to ship --  
13 you know, what kind of shipments we're going to have  
14 in New Jersey. We don't believe that that is within  
15 their jurisdiction.

16 >>JUDGE FARRAR: But the Public Citizen  
17 doesn't stand for what you just said.

18 >>MR. SCHMUTZ: It stands for the  
19 proposition that, if the agency that is doing the  
20 environmental impact statement doesn't have  
21 jurisdiction in this case over the entry of the  
22 trucks, it needn't look at the impact of the entry of  
23 the trucks.

24 >>JUDGE FARRAR: I thought it said where no  
25 federal agency has any jurisdiction, because the

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1 President is not subject to NEPA.

2 >>MR. SCHMUTZ: That's fine.

3 >>JUDGE FARRAR: So where no federal agency  
4 has jurisdiction, the federal agency in question  
5 doesn't have to do a NEPA statement at all.

6 >>MR. SCHMUTZ: No. It did have to do a  
7 NEPA statement. The federal agency did a NEPA  
8 statement with regard to the responsibility it was  
9 responsible for, which was the inspection routine.

10 >>JUDGE FARRAR: Right. But it had nothing  
11 to do with this business around the border.

12 >>MR. SCHMUTZ: Oh, it didn't have to look  
13 at the national impacts of allowing those trucks into  
14 the United States. That's what the case stands for.

15 >>JUDGE RYERSON: Because that was a  
16 decision made by the President.

17 >>MR. SCHMUTZ: And they couldn't change  
18 it. And the Commission in the Entergy case actually  
19 cited the Public Citizen case for the proposition  
20 that, where it doesn't have jurisdiction over an  
21 activity, it needn't look at the environmental  
22 impact. That was an NPDBS case under the Clean Water  
23 Act, and it wasn't going to look behind the EPA's  
24 decision and consider the impacts associated with  
25 that grant of that permit.

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1           We are not -- let me -- we are looking at  
2 cases and what we believe the Board should look at  
3 are the cases where there are two independent  
4 agencies with -- it's not quite concurrent, but with  
5 jurisdiction over a project, different aspects of it.  
6 That's what we're relying on. I'm not trying to sell  
7 this Board on Public Citizen. I don't think anybody  
8 quite understands the ramifications of that, but I do  
9 understand the ramifications of the California Trout  
10 case and several of the cases cited in California  
11 Trout. And I do understand the Commission's decision  
12 in Entergy, which I think is supportive of the  
13 California Trout case.

14           >>JUDGE RYERSON: Okay. I think you've  
15 answered my question.

16           >>MR. SCHMUTZ: Probably way too lengthy.

17           >>JUDGE RYERSON: As you are probably well  
18 aware, Public Citizen was a unanimous decision  
19 authored by Justice Thomas, and it's hard for me to  
20 imagine that that unanimous decision of the Supreme  
21 Court had as dramatic an impact on NEPA as I thought  
22 you were arguing. That's all. I may have  
23 misunderstood the scope of your argument.

24           >>MR. SCHMUTZ: I think it has the same --  
25 I don't think it stands for any more, Judge Ryerson,

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1 than California Trout stands for. I really don't.  
2 It's an on-fact situation. But I don't think it  
3 stands for any more than that case stands for. And  
4 that case, I think, is on all fours with what we're  
5 faced with here.

6 >>JUDGE RYERSON: Okay. Did I see a hand  
7 up in the back for Clark?

8 >>MS. ROBY: Yes, Debra Roby for Clark  
9 County. Just a couple of comments in response to the  
10 Department of Energy. It appears that the DOE's  
11 position is premised upon the belief that the NRC has  
12 no duty to prepare an EIS. In the Citizen case, the  
13 agency did not have a duty to prepare an EIS. It did  
14 prepare an EIA. It did not prepare an EIS. No  
15 matter what would have happened, no matter the result  
16 of the EIS, the agency couldn't counter-mandate the  
17 decision of the President of the United States.

18 In this case it's a different scheme. We  
19 have -- the NRC is required to prepare an invalue --  
20 an environmental assessment and review the EIS. At  
21 the very least review the EIS. To the extent it  
22 cannot adopt the DOE's EIS, it then has to make a  
23 decision in what areas that it can adopt or will  
24 require supplement.

25 But that indicates an independent

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1 evaluation on the merits of the EIS, not simply  
2 conducting a review on whether the Department of  
3 Energy's EIS is, say, arbitrary or capricious like a  
4 review court would perform. There is a duty here for  
5 the NRC to perform an evaluation to evaluate the  
6 environmental impacts. And Clark County would argue  
7 that that does include the impacts associated with  
8 transportation of waste to the facility.

9 The EISS were part and parcel of the  
10 license application that was submitted to the NRC.  
11 But for the NRC's decision to license -- or to  
12 authorize construction of this facility, there would  
13 be no impacts on the transportation route.  
14 Therefore, those -- the impacts associated with that  
15 undertaking are relevant and should be addressed as  
16 part of this proceeding.

17 >>JUDGE RYERSON: Thank you.

18 Mr. List.

19 >>MR. LIST: Yes, Judge Ryerson. Thank  
20 you. I would point out that one of the NEPA  
21 regulations, 40 CFR 1508.8 Sub (a) and (b) define  
22 effects which are synonymous with impacts under the  
23 act, as either direct, which are based on the action  
24 itself, in this case, the repository, or indirect  
25 effects which are caused by the action.

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1           And there are three criteria, as we read  
2 that regulation, which are as follows: That the --  
3 first of all, is the indirect action caused by the  
4 direct action? Certainly the repository is the  
5 driving factor that would initiate the transportation  
6 itself.

7           Secondly, is it further in distance? In  
8 other words, is it off-site. Certainly the  
9 transportation is.

10           And finally, is it reasonably foreseeable?  
11 And certainly the transportation is reasonably  
12 foreseeable. It's an integral part of the completion  
13 of the fulfillment of the repository.

14           I would point out there are a couple of  
15 important cases that directly, I think, support that  
16 proposition. The first is Sierra Club versus Marsh,  
17 a First Circuit case in 1985 involving the Federal  
18 Highway Administration and the Corps of Engineers.  
19 And they held in that case, the court did, that the  
20 FHA did not meet their NEPA burden because they  
21 didn't consider whether agency approved of a --  
22 approving of a cargo port and causeway to an island  
23 would lead to further industrial development on the  
24 island, which was outside their direct jurisdiction.

25           The point of the case was that neither the

1 Corps nor FHA, the Federal Highway Administration,  
2 had any ability to regulate or to prevent development  
3 on the island that was privately owned and under the  
4 jurisdiction of the local government. And yet the  
5 court required consideration of that future  
6 environmental impact caused by the action that was  
7 under consideration.

8 Another important case was Sierra Club v.  
9 Monticella, 459 Fed Supp 2nd 76, which held that the  
10 National Park Service did have to consider impacts  
11 caused by activities outside their preserve, despite  
12 the fact that the National Park Service had no  
13 ability to consider those impacts under National Park  
14 Service regulations because their Organic Act gave  
15 them the ability to prevent the action in question.  
16 In other words, the fundamental primary park activity  
17 that was under consideration in the EIS process.

18 And so, in short, the agency can rely on  
19 the limitation of authority where the statute gives  
20 the agency authority but the agency's own regs limit  
21 the authority.

22 I'd also point out that, in the Nuclear  
23 Waste Policy Act itself, there were certain EIS  
24 analyses that were excluded from what the Commission  
25 had to take under consideration. For example, they

1 did not include in those exclusions -- or, rather,  
2 they did include in those exclusions non-geological  
3 alternatives to Yucca Mountain. They could have but  
4 did not exclude transportation.

5 I would also point out that other Nuclear  
6 Regulatory Commission regulations address  
7 transportation impacts where there is seemingly no  
8 direct regulatory authority on the part of NRC,  
9 specifically, as to renewal of licenses of  
10 generators.

11 The specific regulation in that case is  
12 51.53(c)32(j) in which it points out that an  
13 operating license at the renewable -- at the  
14 renewable stage, all applicants shall assess the  
15 impact of highway traffic generated by the proposed  
16 project.

17 Well, in that case they specifically  
18 recognized that they did have such authority, and, in  
19 fact, the CEQ regulations defining the scope of an  
20 action, which is what we're talking about here with  
21 reference certainly to the repository, an action to  
22 be considered by an EIS action is defined as --  
23 includes a connected action.

24 And we believe this is a connected action.  
25 Actions are connected if under that regulation if

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1 they automatically trigger other actions which  
2 require or cannot or will not proceed unless the  
3 actions are taken previously and simultaneously,  
4 which is our case, and are interdependent parts of a  
5 larger action and dependent on the larger action for  
6 their justification.

7           So what we have here is what is, in effect,  
8 an inextricably linked connected further activity  
9 that is kicked off by virtue of the repository  
10 itself. And DOE should not be allowed to evade its  
11 responsibility to have incorporated consideration of  
12 transportation.

13           >>JUDGE RYERSON: Thank you, Mr. List.

14           California, yes.

15           >>MS. DURBIN: Susan Durbin for the State  
16 of California. Your Honor, I'd like to address  
17 several points that the DOE lawyer raised. The first  
18 is about the Department of Transportation versus  
19 Public Citizen case. In that case, the most  
20 important factor was not whether the Federal Motor  
21 Carrier Safety Administration had authority or  
22 jurisdiction over the trucks entering the  
23 United States. It was whether it had discretion to  
24 control it.

25           Under the FMSA's statutes, if the trucks

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1 met a specified series of criteria, FMCSA had no  
2 discretion. It had to issue a license. Similarly in  
3 the NPDBS case that the counsel just cited, the  
4 Supreme Court said under the Clean Water Act there  
5 was a specific set of criteria that, if met, required  
6 the issuance of a permit, and that the court could  
7 not take Congress' place and add another criterion to  
8 that list. There was no discretion in the agency to  
9 deny a permit where the criteria were met.

10           The question is not authority. It's  
11 discretion. And in the case of the NRC, there is, as  
12 we discussed in our papers, great discretion in the  
13 part of the hearing officers and, therefore, in the  
14 Commission, to consider the environmental effects of  
15 the project, and even to deny the project or  
16 condition it to protect environmental values. That's  
17 why this proceeding is not at all like the Public  
18 Citizen proceeding. There is discretion here. There  
19 was no discretion there.

20           As to the exclusive remedy, there is  
21 nothing in the Nuclear Waste Policy Act that  
22 creates -- that robs the NRC of the ability to look  
23 at the environmental documents. Simply because the  
24 judicial review is placed in the circuits of appeal,  
25 and not in the district court. The intent of

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1 Congress is clearly to say that the judicial review  
2 will not take place in the district courts. It will  
3 take place in the Courts of Appeal. That does  
4 nothing to affect the jurisdiction of the NRC to look  
5 at the decision it is making and the environmental  
6 documents that would support it.

7 Now, DOE is being way too modest in its  
8 description of its environmental documents. After  
9 2006 any documents that were used to support the 2008  
10 ROD, there was a complete reexamination of many  
11 facets of transportation, including what kind of  
12 casks would be transported, whether barging would be  
13 used, exact routing decisions and so forth; it was  
14 quite a different document, and those things can  
15 still be looked at. They have not been subject to  
16 any judicial determination. There's no res judicata,  
17 there's no estoppel, either.

18 >>JUDGE RYERSON: Ms. Durbin, if I can  
19 interrupt. Their position, I take it, on those  
20 documents is that the exclusive remedy is in the  
21 Court of Appeals at this point. Correct.

22 >>MS. DURBIN: That is how I understand  
23 their position, but I do not see anything in the  
24 statute that actually creates that exclusive remedy.

25 >>JUDGE RYERSON: What you're saying is if

1 they're wrong on that, if nothing is new and  
2 different, that it should be looked at this point.

3 >>MS. DURBIN: Correct, Your Honor. And  
4 finally I'd like to get to the question that DOE says  
5 the NRC cannot go behind DOE's environmental  
6 documents. What it's suddenly trying to do, here and  
7 in its papers, is to place the NRC in the position of  
8 a reviewing court, and to hold NRC to the standard of  
9 deference that a review in court gives to an  
10 administrative agency. Well, I work for the attorney  
11 general's office in California, and we defend cases  
12 like that all the time.

13 The reason that a review in court does not  
14 go behind the documents it ceded, does not go behind  
15 the administrative record, is a separation of powers  
16 of argument. That an administrative agency, part of  
17 the executive branch, was given the authority to make  
18 certain policy and technical decisions, a separate  
19 branch, the judicial branch, does not have the  
20 authority, under separation of powers, to look at  
21 those decisions that were committed specifically to  
22 the executive branch.

23 Here that does not fly. The NRC is an  
24 executive -- is part of the executive branch, even if  
25 it is not in the standard administrative organization

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1 under the President. It's part of the executive  
2 branch. It is not part of the judicial branch. It  
3 is a sister agency with equal standing with the DOE,  
4 and is not obligated to give deference to DOE's  
5 determinations.

6 In fact, how can the NRC determine if it is  
7 practicable to adopt DOE's environmental documents,  
8 if it does not take a hard look at the actual effects  
9 and measure whether DOE has covered them all and  
10 covered them accurately. It cannot carry out its  
11 responsibility under the Nuclear Waste Policy Act if  
12 it gives that degree of deference.

13 We would analogize it to an agency that has  
14 a contractor prepare an environmental impact  
15 statement for them. They will use that to the extent  
16 that they believe that it's correct, but it does not  
17 excuse the agency from its forming the obligation to  
18 make sure that all significant effects, direct and  
19 indirect, have been addressed.

20 We think that the Nuclear Waste Policy Act  
21 does not remove the NEPA obligation from NRC. It  
22 still remains. It simply can use DOE's documents to  
23 the extent they're useful and adequate.

24 >>JUDGE FARRAR: Ms. Durbin, I'm under the  
25 view you said about internal state business, in

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1 leaving aside the judiciary, the judiciary always  
2 reviews agencies and says NEPA's just a procedural  
3 statute.

4 Did I hear, if ever so subtly in what you  
5 said, that as far as internal state business is  
6 concerned, NEPA, or the state equivalent of NEPA, is  
7 not just a procedural statute; that it's a mandate to  
8 the executive branch to get it right?

9 >>MS. DURBIN: No. it's a mandate on the  
10 executive branch to have all the information that  
11 enable it to get it right.

12 California's equivalent does have a  
13 standard mandate. NEPA does not.

14 >>JUDGE RYERSON: I was about to say,  
15 unless there's a burning desire to make -- we'll give  
16 DOE the last word on this at least before lunch, I  
17 think.

18 >>MR. SCHMUTZ: I almost always take the  
19 last word. I just want to clarify one thing.

20 >>JUDGE RYERSON: Is your mike on? It may  
21 not be.

22 >>MR. SCHMUTZ: I'm sorry. This is Tom  
23 Schmutz. What I am talking about and what DOE is  
24 talking about is just the transportation portion of  
25 the EISs. We're not talking about what the NRC does

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1 or doesn't have to do with the repository SCIS and  
2 FDIS, number one.

3           Number two, when we're saying on  
4 transportation, we're not talking about deference.  
5 We're saying with regard to transportation, you don't  
6 have any jurisdiction over it. If you want to look  
7 at it for cumulative impacts, fine. You take them as  
8 we found them. We're a sister agency. We have  
9 jurisdiction over it. You don't.

10           Our environmental impact statements are not  
11 anything -- on transportation are not something you  
12 ought to be going behind. You take those impacts,  
13 add them to the impacts in the repository that you  
14 think are appropriate and determine what your  
15 cumulative impacts are. That's our position.

16           >>JUDGE RYERSON: Okay. I think we are  
17 understand that. Mr. Malsch.

18           >>MR. MALSCH: Judge Ryerson, I just would  
19 like to make a few brief statements about collateral  
20 estoppel and res judicata, since we seem to be the  
21 ones primarily on the receiving end of those  
22 arguments. And I just want to address them briefly.

23           First of all, for one to even ask the  
24 question, there has to be a decision on the merits,  
25 and the only conceivable decision on the merits on

1 any NEPA issues involved in this proceeding is the  
2 decision of the Court of Appeals and Nevada v. DOE.  
3 That's the first point.

4 The second point is that the standard for  
5 review of a reviewing court in that case is arbitrary  
6 and capricious. That does not resemble, in any  
7 respect, the standard for review that the Commission  
8 would apply in adopting the DOE statement. So right  
9 away, we have automatically a difficulty in applying  
10 any concept of res judicata and collateral estoppel  
11 because the ultimate standard of judgment is  
12 different before the agency as contrasted with the  
13 Court of Appeals.

14 Thirdly, even if you assume that the  
15 decision of a court has some collateral estoppel  
16 effect on the agency because they are applying the  
17 same standard, I would submit that if you look  
18 carefully at our NEPA contentions, you will see that  
19 not one of them was addressed on the merits in the  
20 Court of Appeals decision.

21 So there is no collateral estoppel effect,  
22 even assuming, putting aside difficulties about  
23 judicial review standards as opposed to the NRC  
24 review standard.

25 >>JUDGE RYERSON: And if there were, is

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1 that something that would be more appropriately  
2 raised on the merits in the context of an  
3 adjudicatory hearing as opposed to a contention  
4 admissibility. It's kind of moot, I guess, could you  
5 say, but none of them are governed by res judicata.

6 >>MR. MALSCH: Well, I would say none of  
7 them. But I would make the observation, though, that  
8 DOE, in issuing its 2008 environmental documents,  
9 reexamined a great deal of the environmental  
10 landscape. And it gets very complicated to discern  
11 exactly where DOE's reexamination in 2008 ended and  
12 where -- and did not re-exam some of the earlier  
13 decisions that went up for review in 2006, in our  
14 petition in 2004. And that gets very complicated.

15 And it might benefit from more specific --  
16 to the extent that documents apply at all, it seems  
17 to me they can only possibly apply, looking at things  
18 on a very specific contention-by-contention basis and  
19 examining precisely what was the scope of DOE's 2008  
20 reexamination. And that maybe something that's  
21 entirely appropriate for a merits hearing rather than  
22 just argument on the basis of papers.

23 >>JUDGE RYERSON: All right. Thank, you  
24 Mr. Malsch.

25 >>JUDGE FARRAR: Not to ruin your lunch

1 hour that's about to come up, but I want -- it's an  
2 item not on the agenda that I want you to address  
3 after lunch. I think we can do it very quickly.

4 Mr. Malsch or the state said in its safety  
5 contention 146, I think it was, that this was  
6 essentially a one-step licensing process.

7 In responding to that, the other parties  
8 didn't say it wasn't a one-step licensing process.  
9 I'd like to discuss with you in the afternoon the  
10 impact of Part 2, specifically 2.1021 and 2.1022,  
11 which seem to talk about this as a two-part licensing  
12 process. Of course, maybe a third part 100 years  
13 from now. But I'd like to discuss that with the  
14 notion in mind, some contentions of all the parties  
15 may be premature at this point, if there's going to  
16 be another phase a couple of years from now where we  
17 could hear those.

18 So that's the purpose for asking the  
19 question. So if you all could be ready to discuss  
20 that, I think we can do it with some very short  
21 questions and answers after lunch.

22 >>JUDGE RYERSON: Thank you, Judge Farrar.  
23 In addition to the issue that Judge Farrar has  
24 raised, a principal subject for this afternoon,  
25 before we get into the closings that we hope we have

1 time for, will be issues that pertain to the  
2 model-based contentions dealing with the total system  
3 performance assessment.

4 I have exactly 12:15. So if we give you  
5 the 90 minutes we promised, and as I said this  
6 morning, I think you do need that, trying to get  
7 lunch in this area and get back through security.

8 >>JUDGE FARRAR: Mr. Chairman, with your  
9 indulgence, let me give them one more homework  
10 assignment.

11 >>JUDGE RYERSON: Of course, Judge Farrar.

12 >>JUDGE FARRAR: Thank you. Mr. Malsch in  
13 his reply to DOE's brief, pages 1 to 2, came up with  
14 four snappy retorts to the DOE position. I'd like to  
15 give -- since he had the last word, give DOE a chance  
16 to respond to the latter three of those. The first  
17 is within the jurisdiction of one of our other  
18 boards, but the latter three of those on pages 1 to 2  
19 of his 999-page reply has, I think, four bullets, and  
20 let's talk about the last three after lunch.

21 >>JUDGE RYERSON: Okay. In light of the  
22 additional homework assignment, we'll give you an  
23 extra five minutes for lunch. So let's be back here  
24 ready to go back to work at is 1:50 sharp.

25 (A recess was taken.)

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1 >> JUDGE RYERSON: Please be seated. Okay.

2 Welcome back. I think, as we indicated  
3 shortly before the lunch break, Judge Farrar has a  
4 few questions; and then we're going to turn to the  
5 model-based contentions.

6 >> JUDGE FARRAR: Okay. This is on the  
7 general question of -- where the contentions have  
8 been filed prematurely, I promised Judge Ryerson I'd  
9 get it done in two minutes, so please keep your  
10 answers short, if you can. The state said in Nevada  
11 said in Contention 146 that this was essentially a  
12 one-stage licensing process. The key other parties  
13 did not challenge that. They may have their own  
14 reasons for wishing it was a one-stage licensing  
15 process. The Department of Energy, based on those  
16 two sections of Part 2 that I cited to you, do you  
17 agree that we're looking at a two-stage license  
18 process right now, a construction authorization; and,  
19 second, the equivalent of an operating license called  
20 the use and possession license?

21 >> MR. SILVERMAN: I am sorry, this is Don  
22 Silverman. Judge Farrar, I do have them in my notes,  
23 but again, they were 10 CFR --

24 >> MR. SILVERMAN: 2.1021, which says  
25 there will be a first pre-hearing conference and a

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1 construction authorization phase; and then we could  
2 have a first pre-hearing conference at the receive  
3 and possess phase, so that tells -- and then the  
4 second provision about the next section 10.22 talks  
5 about the second pre-hearing conference and again  
6 mentions it at two phases -- it mentions two, yes,  
7 two phases for a second pre-hearing conference.

8 >> JUDGE FARRAR: There is -- the  
9 regulations do provide that the department has to  
10 update the license applications, the construction  
11 authorization application to support a license to  
12 possess and use and it's in Part 63, the precise  
13 procedures to follow the site procedures, on whether  
14 there is a right to a hearing, an opportunity for a  
15 hearing, and all that, I'm really not prepared to  
16 answer that at this point. I would say, because I  
17 think that the regulations aren't entirely clear in  
18 that regard. What I would say is just a couple of  
19 things. One is that I don't believe -- at least the  
20 department has argued -- and I could be wrong, but  
21 don't recall, we have read it was filed prematurely  
22 and it's appropriate for a later phase in the  
23 proceedings.

24 >> JUDGE FARRAR: You haven't said that,  
25 but it's subliminal in some of them that I could see,

1     gee, maybe this one doesn't get admitted because it's  
2     not timely to hear it now. So we'll say to the state  
3     or the other parties, nice contention, you've  
4     reserved your rights, come back in seven years.

5             >> MR. SILVERMAN: Frankly, I am not in a  
6     position now to say to the department that we think  
7     there is another opportunity for hearing at the  
8     possession and use licensing stage. That's something  
9     we'd have to look harder at. Let me say this...

10            >> JUDGE FARRAR: Then why would 10.21 and  
11     10.22 talk about a first and second pre-conference  
12     hearing at the license -- at the possession phase if  
13     there wasn't some sort of potential Hearing in play?

14            >> MR. SILVERMAN: I don't know, Your  
15     Honor. I have to look harder at that.

16            >> JUDGE FARRAR: Are you saying you don't  
17     know or you don't wanna tell me?

18            >> MR. SILVERMAN: No, I really don't know,  
19     because, it -- it, you know, it does talks about --

20            >> JUDGE FARRAR: I know what it talks  
21     about. Let me -- let me -- that's all I need. Let  
22     me ask the staff about this...what is the staff's  
23     position on this?

24            >> MR. FRUCHTER: I think the -- any  
25     opportunity for a hearing in the subsequent phase

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1 would be restricted to consideration of whether the  
2 actual construction of the repository was done  
3 consistent with the -- any construction authorization  
4 that was issued by the NRC.

5 >> JUDGE FARRAR: But you noticed a number  
6 of the contention -- a number of responses to  
7 contentions say, we don't need to do that yet or  
8 we'll figure that out while we're building it, so  
9 those are the contentions I have in mind -- and I  
10 take it what you just said is for that kind of  
11 contention, there would be a second phase where that  
12 could be considered?

13 >> MR. FRUCHTER: Well, if the contention  
14 was properly pled and did set out a genuine dispute  
15 on whether there was a difference -- in other words,  
16 the construction was not according to the  
17 specifications that were laid out, then there could  
18 be a considerable contention, correct.

19 >> JUDGE FARRAR: So I take it you are in  
20 agreement with the NRC fact sheet that appears on the  
21 web under the aegis of the Office of Public Affairs  
22 at Page 5 on the light and fact sheet for licensing  
23 Yucca Mountain, it says if construction would be  
24 authorized before beginning to operate the facility,  
25 DOE would have to update the application, blah, blah,

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1     blah. This application would also be subject to  
2     staff technical review and hearing processes.

3             >> MR. FRUCHTER: I don't have that fact  
4     sheet in front of me. That sounds right.

5             >> JUDGE FARRAR: You have no disagreement  
6     to that, that you want to state today? NEI, what do  
7     you think? Another?

8             >> MR. SILBERG: Judge Farrar, I'm Jay  
9     Silberg for NEI. I am quite clear that this is a  
10    multi-stage process. The position of the Federal  
11    Register notice back in 1999, the report refers to  
12    four major decisions: The constructional  
13    authorization, the license to receive and replace  
14    waste, the license amendment for permanent closure,  
15    and termination of the license; and Part 63 is pretty  
16    clear when it says it distinguishes between the  
17    construction authorization in Sections 63.32, among  
18    others, and the license and its conditions at 63.42;  
19    and then 63.46, where it refers to the license  
20    amendment required to make in place high level wastes  
21    irretrievable and other factors. And there are  
22    clearly differences in these steps. It's clear that  
23    the performance confirmation program that's called  
24    for in Part 63 contemplates there will be a lot of  
25    additional information that is developed during

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1 construction and, in deed, during operation. That  
2 additional information has to be input into the  
3 license. The license has to be amended. At the time  
4 of license amendment, as with any other NRC license  
5 amendment, there is an opportunity for a hearing.  
6 Those details have not yet been worked out.

7 >> JUDGE FARRAR: But the con -- you agree  
8 with the concept that's multi-stage?

9 >> MR. SILBERG: Yes. And I think the  
10 other important consequence of that is that the  
11 showing one needs to make at the different stages is  
12 dependent upon the information. For instance, it is  
13 assumed that we will have more information after  
14 construction. So one need not prove everything at  
15 the construction phase because there will be further  
16 information coming forward during that process.

17 >> JUDGE FARRAR: Thank you, Mr. Silberg. I  
18 appreciate that.

19 In light of this, Mr. Malsch, is the state  
20 claiming to its express views this is essentially --  
21 I know you used the word "essentially" -- to  
22 essentially a one-step licensing process?

23 >> MR. MALSCH: Yes, we -- we adhere to  
24 that position; and let me explain why, the essence of  
25 Nevada Safety 146 is under Part 63. This is

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1 essentially a one-step process in -- that is  
2 analogous to the combined licensing process under  
3 Part 52, which has also been characterized as  
4 essentially a one-step process; although it does  
5 provide for a further step that takes place and  
6 requires approvals before operations. So there is no  
7 doubt under Part 63, that there is a construction  
8 authorization stage, which is filed at some point by  
9 a stage which involves a proceeding and an  
10 opportunity for a hearing on a license to receive and  
11 possess.

12 >> JUDGE FARRAR: At which point you'd have  
13 some kind of opportunity to the file new contentions?

14 >> MR. MALSCH: We would, but the difficult  
15 question which Section 146 poses is, is not so much  
16 how much -- how many stages there are, but what kind  
17 of information Part 63 requires for the first stage.  
18 And what we say is that if you look at 63 and its  
19 history, it is quite clear that there cannot be any  
20 issuance of a construction provision in the  
21 application at the time of the construction  
22 authorization stage of final design information and  
23 when we point out that --

24 >> JUDGE FARRAR: I don't want to get into  
25 the details of the contention. I want to have this

1 concept in mind, because I think it may have broader  
2 applications this 146 and I wanted to get your views  
3 on this.

4 >> MR. MALSCH: It might -- I just want to  
5 make a point, though, it's important on this  
6 contention, and maybe a few others also, when the  
7 commission promulgated Part 63, it noted that -- I'm  
8 sorry, the contention requirement, it noted that  
9 there would be such a thing as legal contentions  
10 Nebraska Safety 146 is expressly designated as a  
11 legal contention and the preamble to the contention  
12 rule in 89 provided specifically that legal  
13 contentions would be admitted and then decided on the  
14 basis -- decided later on the basis of Briefing an  
15 argument; and this is one example where we would  
16 anticipate being given an opportunity after the  
17 contention is admitted to fully brief and argue the  
18 point.

19 >> JUDGE FARRAR: Okay. We will come back  
20 to that point later. I have exceeded the two minutes  
21 I promised Judge Ryerson. Does anybody have  
22 anything -- any of the other parties have anything  
23 that they feel absolutely compelled to add that's  
24 different from what they've heard?

25 Okay. Thank you.

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1 Thank you, Mr. Chairman.

2 >> JUDGE RYERSON: All right. Let's turn  
3 now to the, the contentions that are -- that address  
4 the model, that is the requirement in Part 63.

5 >> MR. SILVERMAN: Your Honor, I apologize.  
6 Did Judge Farrar want us to address the three snappy  
7 answers --

8 >> JUDGE FARRAR: Is what Judge Ryerson is  
9 about to tell you -- and we'll do that after that.

10 >> MR. SILVERMAN: Thank you, I'm sorry to  
11 interrupt.

12 >> JUDGE RYERSON: Fine. No problem. So  
13 we'll deal with the model now -- the model base  
14 contentions, and then address Judge Farrar's other  
15 points. Mr. Silverman, Part 63 requires a  
16 performance assessment and I guess my question is,  
17 does it -- does it not require a performance  
18 assessment that demonstrates more than simply  
19 compliance with those standards?

20 In other words, aren't there specific  
21 requirements in the regulations that the total system  
22 performance assessment must comply with, in addition  
23 to, demonstrating compliance with those standards out  
24 in the distant future?

25 Is that question clear?

1 >> MR. SILVERMAN: I think it is clear.  
2 And I think that you could be referring to the  
3 pre-closure or post-standard requirements; and the  
4 answer is, yes, it does require more. I consider  
5 those regulations, I think the ones that you are  
6 referring to, I like to call them in the process  
7 regulations, how you do it, so, yes, they do require  
8 more. There are -- there is language in the rule  
9 that tells you how to do the total system performance  
10 assessment for post-closure and pre-closure analysis.

11 >> JUDGE BARNETT: Can I follow up to that?  
12 Can I talk to that?

13 So, for the -- we're talking about the post  
14 performance -- total performance assessment, we're  
15 talking about the total system, the post-closure  
16 assessment?

17 >> MR. SILVERMAN: Yes.

18 >> JUDGE BARNETT: So then in that case, if  
19 there are requirements in addition to demonstrating a  
20 dose effect, would Nevada at this stage then  
21 necessarily need to demonstrate a dose effect for  
22 each contention?

23 >> MR. SILVERMAN: Our view is that Nevada  
24 does need to demonstrate that the allegations of  
25 errors and efficiencies in the TSPA area do

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1       necessitate a demonstration of an exceedence of those  
2       limits and that is derived from the materiality  
3       requirement, which specifies that the issue must make  
4       a difference in the outcome of the proceeding. And  
5       what I would say about those process regulations is  
6       they are very general with intent and there is a  
7       reason for those; and the reasons expressed in the  
8       regulations, which is the difficulty of predicting  
9       performance out many, many thousands of years, and  
10      they do provide a considerable amount of flexibility  
11      to the applicant in determining -- not complete  
12      flexibility as Nebraska has alleged, we argue, that  
13      is not the case but they do provide a substantial  
14      amount of flexibility for engineering judgment,  
15      scientific judgment, to determine -- to flush out the  
16      analysis. So, simply alleging that there is some  
17      uncertainty that we didn't consider, simply alleging  
18      that there is an error of some sort or an omission or  
19      a use of older data or something is not, does not  
20      demonstrate materiality. It doesn't demonstrate that  
21      the process regulation has been violated because to  
22      me, you'd have to show at a minimum that the  
23      integrity of the analysis is violated in some way;  
24      but our position on TSPA is, yes, on materiality  
25      purposes where they are alleging this could impact

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1 the results of the TSPA , that they do need to  
2 show -- to make some showing that it could affect the  
3 mean dose. And I'm prepared at the appropriate time  
4 to discuss the notion of how difficult that would be  
5 with them, whether that's within the means of the  
6 State of Nevada or others.

7 I don't think you asked me that yet.

8 >> JUDGE RYERSON: I think that's correct.  
9 Well, we can perhaps get to that later.

10 >> JUDGE BARNETT: Can I follow up?

11 >> JUDGE RYERSON: Sure.

12 >> JUDGE BARNETT: So would you argue then  
13 DOE does not have a duty to have a defensible and  
14 reasonable set of parameters or that Nevada couldn't  
15 attack the reasonableness of DOE's parameters or  
16 using the TSPA model by using a different set of  
17 parameters, would that be particularly off-base for  
18 Nevada to contend?

19 >> MR. SILVERMAN: Would it be off-base for  
20 them to use a different set --

21 >> JUDGE BARNETT: For them to contend that  
22 your parameters, for example, were unreasonable,  
23 undefensible?

24 Would that be a reasonable contention  
25 without having to run the model again with a

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1 different set of parameters that they thought was  
2 more reasonable?

3 >> MR. SILVERMAN: It would not -- we don't  
4 think they'd meet their burden merely by alleging  
5 that there is data that wasn't used; but we don't  
6 believe they need to run the model entirely. We  
7 agree with the State of Nevada that it could not be  
8 practical for them to do the multiple thousands of  
9 runs of different elements of code -- computer code  
10 that the Department of Energy did; but we think they  
11 had a significant opportunity to the do more than  
12 they did. They were required to do more. They  
13 acknowledge they could have done more, but they  
14 failed to do that.

15 >> JUDGE BARNETT: Okay .

16 But so not that -- you don't think they  
17 would do that on every single contention; is that  
18 correct?

19 >> MR. SILVERMAN: Uh, our view is to  
20 support a contention -- let's take TSPA , for  
21 example, which alleges any typical sort of error or  
22 deficiency in that analysis, that they would need to  
23 provide some basis for concluding it would affect the  
24 outcome and it would affect the ultimate result.  
25 They do not need to do that by rerunning or

1 replicating in its entirety TSPA .

2           They acknowledge, first of all, the  
3 department has given them the tools to run into TSPA  
4 , has done training on how to run the TSPA, has  
5 worked with them to make sure it was operational in  
6 their systems. Their expert, Dr. Thorne stated he  
7 had the ability to run selected runs at a minimum.

8           What we're saying is when you have a  
9 contention and you are providing -- proposing a  
10 contention to the Licensing Board, it's incumbent  
11 upon the State of Nevada, with those tools that they  
12 had, to do some selective analysis, to do run a  
13 limited set, focusing on the issue they think is  
14 material, whether it's a corrosion analysis or an  
15 infiltration analysis. Do some analysis using the  
16 model that's been provided to you with the experts  
17 who purportedly are qualified to run that -- or  
18 alternatively, provide a qualitative analysis based  
19 upon expert opinion that would demonstrate a prima  
20 facie case. They don't have to provide proof of  
21 their contention. A prima facie case is some  
22 indication, some reasonable basis, expert basis for  
23 concluding the result would be different and we would  
24 not exceed -- that we would exceed our dose  
25 standards -- and that could be an expert describing

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1 scientific studies that are relevant or that are  
2 based upon their own experience; but in most or all  
3 of the cases that we looked at, in TSPA spaces, in  
4 particular, we felt all we got was essentially a bare  
5 allegation that we didn't do something or we didn't  
6 do something adequately, but the dots weren't  
7 connected to show the process regulation, the  
8 boundaries have been exceeded.

9 >> JUDGE RYERSON: I suppose,  
10 Mr. Silverman, one of the issues that the Board has  
11 to consider is again we're going back to a test,  
12 which is the adequacy of a Pleading and what is  
13 required in a Pleading and we are in agreement, I  
14 don't think anyone is suggesting -- you are certainly  
15 not suggesting we have to get into the merits of  
16 allegation .

17 I certainly don't need to make  
18 determinations on the merits. So to step back from  
19 what Nevada could or could not do, but just get back  
20 to what has to be shown to have an admissible  
21 contention, why is it not the case that an  
22 allegation -- that a contention that alleges a  
23 violation of an NRC regulation and is supported by  
24 some form of reasonably confident or reason of  
25 Affidavit support that says, this, in effect, this

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1 would be a violation of regulation. Why isn't that  
2 enough?

3 Why do they have to have any kind of  
4 empirical demonstration beyond that of an effect upon  
5 ultimate dose?

6 >> MR. SILVERMAN: I think it does depend  
7 on the nature of the contention and I think it is  
8 different when it comes to these process regulations.  
9 Let me give you an example. I think that if we were  
10 required at this stage to submit an emergency plan.

11 Let's be a little more specific, one that  
12 deals with protecting the public from offsite public  
13 and we submitted an emergency plan that covered  
14 on-site workers, if someone alleged that that  
15 regulation was violated with sufficient basis that we  
16 didn't provide what is required by the rule that's in  
17 processed regulation and that could be an admissible  
18 contention if it's supported by adequate support and  
19 adequate demonstration that appears that the  
20 regulations violated it. It's different, we believe,  
21 in the context of these process regulations and we  
22 think that the case law is supportive of us. The  
23 Board has specifically asked us about cases we cited  
24 on Pages 53 to 57 of our Answer. And I think this is  
25 the right time to talk about those cases, because I

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1 think the question you posed -- the question poses  
2 was on the NRC cases on which DOE relies on Pages 53  
3 to 57, did the petitioner allege violation of  
4 specific regulatory requirements?

5 The answer in three of those cases, the  
6 three we cite, what I read into that is you were  
7 asking, gee, maybe those particular contentions that  
8 were dismissed in those cases, were dismissed because  
9 they didn't cite a regulatory violation; and I'm  
10 presuming that was what you were wondering about  
11 that.

12 The answer to your question is: Did  
13 Petitioners allege violations of specific regulatory  
14 environmental requirements?

15 The answer in three of those cases, the  
16 three main cases we cite is, yes, they did. And  
17 in -- what I'd like to do is briefly summarize, if I  
18 can.

19 >> JUDGE RYERSON: And is that an apparent  
20 decision or did you have to go back to the underlying  
21 record?

22 >> MR. SILVERMAN: In some cases, you can  
23 see the it in the Decisions, but I went back to the  
24 Petitions, themselves, and read the contentions --  
25 and I will be brief -- but the point we were trying

1 to make in these cases is even though a regulatory  
2 violation was alleged, clearly -- and I will hit  
3 these very briefly for you -- the Decisions by the  
4 Boards and by the Commission -- and I will read the  
5 Brief snippets of language -- indicate that the  
6 Decision to not admit the contention was based upon  
7 not really -- the contention was based on really the  
8 failure to really demonstrate the result or the  
9 impact of the -- of the alleged violation. And it's  
10 interesting to note that in, I think all the cases,  
11 certainly the first two, it was a process regulation.  
12 In the Duke energy case, which is LBT0317, the  
13 contention specifically alleged violations of Part 51  
14 and Part 54, having to do with severe accident  
15 mitigation alternative analyses. And they also cited  
16 a violation of the regulations dealing with  
17 requirements for the aging management program for  
18 licensing renewal proceedings. They specifically  
19 cited those regulations. When the Board in the Duke  
20 case rejected the -- excuse me, the contention, it  
21 did so for failure to explain the implications of the  
22 alleged deficiencies. And that's really very  
23 analogous to the Nevada contentions and the positions  
24 we've taken in this case. In the Entergy case, which  
25 is Indian Point --

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1 >> JUDGE RYERSON: Who was that Board,  
2 Mr. Silverman?

3 >> MR. SILVERMAN: I don't -- I could find  
4 that for you here, but I don't know off the top of my  
5 head.

6 >> JUDGE RYERSON: That's okay. I'll find  
7 it on my own.

8 >> MR. SILVERMAN: I have only two more  
9 cases. I'll be very brief with them both. In  
10 Entergy -- this is another section we cite in that  
11 section of the Brief. It's LBP0813. Again, the  
12 contention was based upon a SAMA, Severe Accident  
13 Mitigation Analysis, issue. The contention explicitly  
14 cited alleged violations of NEPA and Part 54,  
15 particularly Appendix B of Part 54. The Board,  
16 nevertheless, rejected the contention as  
17 inadmissible. The last case I want to cite is  
18 Dominion where we have some language from the  
19 Commission. This is the Millstone case. It's  
20 LBP03-12. And it was affirmed by the commission in  
21 CLI-03-14. Here in the contention, the Petitioner  
22 alleged a violation of the significant hazards  
23 consideration requirements set forth in Part 50 --  
24 Section 59.2-C, specifically. We did not meet the  
25 requirements under NEPA for a categorical exclusion;

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1 and cited the regulation. Again, the Board did not  
2 admit the contention; and the Commission in upholding  
3 the Board stated the Petitioner, quote, " never  
4 provides any accident or dose analysis of its own  
5 and, therefore, never indicates how a significant  
6 radiological release may occur as a result of the  
7 proposed changes," these were proposed changes to  
8 text specs. So these were the three cases we cited  
9 where a Petitioner alleged the regulatory violation  
10 process really related primarily to process  
11 regulations; and the Board's information required  
12 more.

13 >> JUDGE RYERSON: Chairman were the  
14 contentions -- in your view, what's the best  
15 contention of the facts in terms of being similar to  
16 the contentions that are -- that are proffered in  
17 this case?

18 >> MR. SILVERMAN: I'm not sure what you  
19 mean by that, Your Honor.

20 >> JUDGE RYERSON: In other words, if you  
21 look at this in two directions. The contentions that  
22 are set forth in this case, while you properly say  
23 they don't allege an impact on dose, nonetheless, at  
24 least in my experience, are considerably more  
25 detailed than many of the contentions that have been

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1 rejected in other cases. There may have been an  
2 allegation of a violation of a -- what you  
3 characterize as a process regulation, but I question  
4 whether the contentions looked like the contentions  
5 that we have here. Did they have the-degree of  
6 specificity?

7 Is there any particular case that comes to  
8 mind that you would urge us to read carefully?

9 >> MR. SILVERMAN: I'd be happy to provide  
10 that information to you I'm confident that we will  
11 find contentions that are not as well written as  
12 those of Nevada and some that are far better written,  
13 in our view and, in fact, were -- probably were  
14 admitted in some cases. Off the top of my head, on  
15 these particular cases, I think the contentions were  
16 fairly clear and there was some detail there, but  
17 it's hard for me to characterize that.

18 >> JUDGE RYERSON: Approaching it from the  
19 other direction, you characterize, I guess, Part 63  
20 or Parts of Part 63 as process regulations. And I'm  
21 not -- it's not clear to me that there are some  
22 regulations that the Applicant is bound to follow and  
23 other regulations that seem to have a lesser  
24 standard. I mean isn't -- why is compliance with a  
25 regulation not mandatory?

1 >> MR. SILVERMAN: Compliance with a  
2 regulation is mandatory. In the case of these  
3 particular regulations, particularly with TSPA , as I  
4 said, there is a very considerable amount of  
5 flexibility and space for engineering and scientific  
6 expert judgment in deciding how to implement those  
7 regulations. You may or may not agree with us on the  
8 issue of mean dose, but if -- even if you did not,  
9 what I believe is the difficult job of the Boards do  
10 is to examine these contentions beyond these sort of  
11 overarching issues like this one that we're  
12 discussing right now. I am not suggesting that you  
13 engage in an analysis of the merits, but in each of  
14 these cases or almost all of these cases, the  
15 Applicant, the Department of Energy has -- let me  
16 back up, Nevada has alleged certain facts, the  
17 department has responded. It's incumbent in deciding  
18 whether that regulation is -- has been violated for  
19 you to look at those facts to some-degree at some  
20 level. An obvious example is, if a contention says  
21 something was omitted from the SAR and we cite the  
22 places where that analysis was not admitted in the  
23 SAR. You need to look at those facts and make a  
24 judgment. At the end of the day, it comes down to  
25 the importance of the issue in the -- importance of

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1 the issue in the overall regulation. And many of the  
2 contentions -- most of the contentions in our view,  
3 allege an error, a problem, use of improper data,  
4 but don't show how that exceeds the boundaries of the  
5 process regulation that's before us.

6 >> JUDGE RYERSON: Let me -- if I may, let  
7 me turn that argument around a little bit and see,  
8 and characterize and a lot may reject my  
9 characterization of the argument, but to some extent,  
10 it seems to me that these regulations remind me of  
11 high school Algebra class.

12 You seem to be saying, look, as long as we  
13 get the answer right, that's all we need to do. As  
14 long as we are comfortable, DOE is comfortable that  
15 we're going to meet the dose standards and we have a  
16 model that in our view, DOE's view says that, we're  
17 okay; but it seems to me that the regulations as  
18 Nevada is pointing out -- at least that's what I  
19 think they're saying -- is we got to show the work .

20 It's not enough to have the right answers  
21 you have to show the work. You have to, in other  
22 words, comply explicitly with a variety of specific  
23 conditions in the regulations that exist above and  
24 beyond getting the right answer. In other words,  
25 it's not good enough to prove dose compliance by any

1 means you choose. You've got to prove dose  
2 compliance according to the regulations in a certain  
3 way. You got to show the work, by analogy; and, you  
4 know, is that a mischaracterization of what the  
5 regulations require?

6 >> MR. SILVERMAN: No, I don't think so. I  
7 think that you do have to show the work, I think that  
8 this is a unique regulation that provides a very  
9 large swath for reasoned expert judgment in deciding  
10 what work is satisfactory to provide the correct  
11 result.

12 >> JUDGE BARNETT: But it doesn't provide  
13 an infinite swath?

14 >> MR. SILVERMAN: Absolutely not. We have  
15 been accused of that and we are not alleging that.

16 >> JUDGE BARNETT: So let me just give you  
17 a hypothetical -- and I'm not trying to pin you down  
18 here, I just want to make sure I understand your  
19 answer. If Nevada were to contend that and one of  
20 the TSPA analysis that DOE should have used ten  
21 inches of rain a year, and they used a thousand  
22 inches of rain a year, would that be an admissible  
23 contention without Nevada then running the TSPA code,  
24 to see what the actual implications of using a  
25 thousand versus ten were?

1 >> MR. SILVERMAN: No. No. Because it  
2 sounds like a large difference, but it -- this is a  
3 complex analysis. It's not -- and I'm hardly the  
4 expert on this. I'll get over my head very quickly.  
5 But as I understand it, it's a nonlinear analysis in  
6 the sense that there are multiple models being run.  
7 Feeding into each other. The simple allegation that  
8 we underestimated the amount of precipitation, all  
9 that tells you is we underestimated the amount of  
10 precipitation. It does not tell you that we exceeded  
11 the bounds of uncertainties. It doesn't tell you --  
12 that are --

13 >> MR. SILVERMAN: Well, assuming they had  
14 appropriate citations that it was well beyond the,  
15 you know, assuming they had appropriate inferences  
16 that it was 10 inches per year, it was way outside  
17 the bounds, they may have had some basis for it. If  
18 they had an adequate scientific basis for saying they  
19 should have used 10, would that then be an admissible  
20 contention of running the TSPA model?

21 >> MR. SILVERMAN: I think the contention,  
22 it would not necessarily be in the TSPA model, but  
23 they would have to on that basis, if not in running  
24 selectively the model and expert judgment with an  
25 adequately reasoned basis.

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1 >> JUDGE RYERSON: Let me change Judge  
2 Barnett's hypothetical, just a little. Assume the  
3 regulation said you shall use for the annual rainfall  
4 the mean of the last 50 years and you decided to use  
5 something else.

6 Does that on its own constitute a violation  
7 of the regulation which is ipso facto admissible?

8 >> MR. SILVERMAN: I think if we had that  
9 kind of a regulation the answer would be yes, but we  
10 don't have that kind of regulation for closure space.

11 >> JUDGE BARNETT: Some you do and some you  
12 don't. You said that was just a hypothetical you  
13 made up. You said there's a lot of flexibility in  
14 meeting these regulations, but some of them don't  
15 seem -- at least to my reading -- to give you  
16 flexibility. They say, let's do this.

17 >> MR. SILVERMAN: Oh, there are some parts  
18 of 63 that are like that, yes, I don't think they  
19 are -- .

20 >> JUDGE BARNETT: But I don't think you  
21 are saying even for those parts, of violations --  
22 there are violations and there are violations; and  
23 until your opponent points out that that's a  
24 violation that has consequences for the outcome, that  
25 that's not an admissible violation?

1 >> MR. SILVERMAN: No, as I pointed out, I  
2 go back to my emergency plan. That's kind of like  
3 you are using the mean precipitation rate over the  
4 last 50 years' example. It's very prescriptive.  
5 It's very precise . it says thou shall submit a plan.  
6 You don't submit a plan. It's determine --

7 >> JUDGE BARNETT: And so a violation of a  
8 contention alleging the right basis, and so forth, a  
9 violation of a prescriptive regulation is admissible  
10 on its face?

11 >> MR. SILVERMAN: I hate to use the words  
12 on its face. It can be admissible. I would say yes.  
13 I think this argument that we made is largely  
14 contrived to the TSPA contentions.

15 >> JUDGE BARNETT: Okay. You said earlier  
16 that you could come up with some cases where there  
17 were better drafted contentions than Nevada has  
18 submitted here that were admitted. Can you tell me  
19 of a single instance in which the Department of  
20 Energy is not opposed to a single contention that  
21 were filed in front of us?

22 >> MR. SILVERMAN: Well, the only  
23 proceeding I know about is this one.

24 >> JUDGE BARNETT: No, we have the Mock's  
25 proceeding that you and I are in.

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1 >> MR. SILVERMAN: In the Mock's proceeding  
2 we challenged all contentions, may I speak -- may I  
3 respond to that?

4 I'm not sure exactly what your point is,  
5 but let me say this about what we did.

6 >> JUDGE BARNETT: Your point was floating  
7 around out here are a lot of far better drafted  
8 contentions than Nevada filed.

9 >> JUDGE BARNETT: I was here seven years,  
10 a long time ago on the Appeal Board, and I have been  
11 here seven years now; and I'm trying to find those --  
12 there were some good ones by the State of Utah and  
13 we'll come to those later in a PFS case, but --

14 >> MR. SILVERMAN: Your Honor, I was making  
15 a general statement. I just think it stands to  
16 reason and based upon my general recollection and  
17 experience that there are some that, as I said, that  
18 are far more poorly drafted than in the State of  
19 Nevada and others that were better drafted. I would  
20 like to respond --

21 >> JUDGE BARNETT: Would you like the  
22 opportunity in the next ten days or so to submit to  
23 us contentions from some other cases you think are  
24 far better drafted?

25 >> MR. SILVERMAN: We can certainly look

1 for those. If you like that, we would try to provide  
2 that.

3 >> JUDGE BARNETT: Okay.

4 >> MR. SILVERMAN: Is that a yes, Your  
5 Honor?

6 >> JUDGE BARNETT: Yes.

7 >> MR. SILVERMAN: May I add one comment  
8 with respect to your remark about the -- having  
9 not -- having challenged every contention in this  
10 proceeding and in the Mock's proceeding?

11 Thank you. I'll be brief on this. I just  
12 want to make it clear to this Board and all the  
13 Boards, we -- in preparing for this proceeding and  
14 for what we anticipated to be an unprecedented number  
15 of contentions, fought a lot about the process, put a  
16 team together of people to work on it, we were given  
17 directions to calls balls and strikes as we see them,  
18 and assumed before we ever got any contentions that  
19 there would be some that we would conclude and  
20 acknowledge up front were admissible. That was our  
21 going-in assumption and our client's going-in  
22 assumption .

23 Once we got into intentions, in good faith,  
24 we evaluated them as the representative of the  
25 Department of Energy and reached the conclusion that

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1 in our view, they were not ad missable. You may or  
2 may not agree with us.

3 I suspect you will not agree with us in all  
4 cases, but it was a good faith judgment based on our  
5 interpretation of the law and it was not a  
6 pre-ordained conclusion. And I wanted that to be  
7 made very clear.

8 >> JUDGE BARNETT: Now the question, let's  
9 get back to the very basic a violation of an  
10 allegation of a violation of a prescriptive  
11 regulation, assume that it meets all the other  
12 criteria that's admiss- -- you don't need to show  
13 what the alleged violations are. Is that correct?

14 >> MR. SILVERMAN: Well, as in the example  
15 of the emergency plan, yes.

16 >> JUDGE BARNETT: Because we've always  
17 held the rank and file intervenors, the citizens  
18 groups and whenever they say that an application is  
19 not any good, and the applicant comes back and says  
20 it meets the regulation and the intervenors say, "So  
21 what?" We say to them, "You can't challenge the  
22 regulation?"

23 That's up to -- been the folk lore of the  
24 beginning of the agency.

25 That got converted so that the staff and

1 the applicant are also bound by the regulations, they  
2 don't see the way the regulations are binding on  
3 them.

4 I contest in our precedence for any number  
5 of years. So I'm trying to ask the question  
6 here...are you asking as to departure from those  
7 precedence, and if it's something in particular about  
8 this case so that a -- an allegation of a  
9 prescriptive regulation is not necessarily  
10 admissible, meaning your client, alone, of the people  
11 who appear in front of here, gets to challenge  
12 regulations without seeking a waiver from the --

13 >> MR. SILVERMAN: No, we don't. We don't  
14 have that right or authority.

15 >> JUDGE RYERSON: Thank you.

16 >> MR. SILVERMAN: May I have one moment?

17 >> JUDGE RYERSON: Sure.

18 >> MR. SILVERMAN: Your Honor, one more  
19 point -- two more points. I agree with you on the  
20 prescriptive argument for we don't believe that's  
21 what the TSPA says regulations are. The one thing  
22 I'd like to point out is this...it seems what's good  
23 for the goose is good for the gander. If a  
24 contention is admitted on the basis of an allegation  
25 is admitted and that's the material issue, the Board

1 decides that's the material issue, you don't have to  
2 look at the effect of that on the final outcome of  
3 the analysis then it seems to me that when we go to  
4 evidentiary hearing, the burden shifts, of course, as  
5 you know to the I don't understand why if we follow  
6 that law the applicant wouldn't meet its burden  
7 merely by showing it met the regulations of the  
8 impact on dose or outcome.

9 >> JUDGE FARRAR: Right. It seems to me  
10 that that's the flipside of what we disagree on.  
11 Mr. Chairman, I'm sorry we got distracted from the  
12 talk about the model but it seemed that these  
13 questions fit in on that point.

14 >> JUDGE RYERSON: I do have a question  
15 for you, Mr. Silverman, but I don't know if you are  
16 prepared to address or not; but the case that you  
17 cite 427 times, I believe, the Duke energy case,  
18 CLI9911. For the proposition that a dispute is  
19 material, if its resolution would make a difference  
20 in the outcome of the licensing proceeding. I mean,  
21 do the -- that, that language is in the Decision  
22 because it's a quote from the Federal Register Final  
23 Rule Notice, I believe. But I don't see how the  
24 facts of that case, myself, really support that at  
25 all. I don't know if you are prepared to address

1 that or one of your colleagues is.

2 >> MR. SILVERMAN: I'm not sure that any of  
3 us are prepared to address the specific facts of that  
4 case.

5 >> JUDGE RYERSON: Okay. It also says that  
6 our contention rule should not be turned into a  
7 fortress to deny intervention.

8 >> MR. SILVERMAN: Understood.

9 >> JUDGE RYERSON: It's an interesting  
10 case. I commend it to you. Let me ask  
11 this -- there -- there may be some dispute as to what  
12 Nevada would be required to -- to show in order to  
13 have an admissible contention.

14 You acknowledge they don't need to re-run  
15 the entire model, but you do ask for some sort of  
16 imperical demonstration of an effect. Is there a  
17 factual dispute on the record in front of us as to  
18 what Nevada can do and if there is a factual dispute  
19 of that nature, does that preclude our ruling against  
20 Nevada at this stage right on a factual question?

21 >> MR. SILVERMAN: Right. No, the answer  
22 to your first question I think is there is no factual  
23 dispute; and if there were, I do not think it would  
24 require you to rule in their favor -- and let me  
25 explain. This goes to your question, I think, the

1 first part is there a factual dispute to replicate  
2 with the TSPA? First of all, by replicate, we  
3 interpret that to mean that to essentially completely  
4 reproduce. There isn't a factual dispute. We do not  
5 believe Nevada could do that.

6 But we don't think, as I said before, that  
7 that ability was a prerequisite for Nevada or any of  
8 the Petitioners to meet their burden. As I have  
9 talked about in terms of providing selective  
10 analysis, limited -- limited runs at the TSPA ,  
11 qualitative expert based analysis for the reasoned  
12 basis. If you re-replicate means something less than  
13 you fully replicate. There also, I believe, is no  
14 factual dispute because in Nevada's reply -- I have  
15 it highlighted, I need to find the phrase -- and ther  
16 is acknowledgment that they could have run limited  
17 runs of the TSPA to produce some results; and there  
18 are multiple statements by their expert that they had  
19 the tools and the ability to modify the parameters of  
20 the analysis and produce their own results and reach  
21 a conclusion. Now, even if there is a factual  
22 dispute on either of those issues, it is not the sort  
23 of dispute that the burden -- that the presumption  
24 goes to the Pttitioner. The issue of whether Nevada  
25 can replicate the TSPA, regardless of how you define

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1 that, that's an ancillary issue. It's not the kind  
2 of material issue that goes -- it wouldn't be subject  
3 of contention. If Nevada filed a contention that  
4 said we can't replicate the NTSPA, I don't think  
5 you'd admit that.

6 It's an ancillary issue. It's a procedural  
7 issue. It doesn't -- the Resolution of it would not  
8 lead to a finding that we meet the requirements or we  
9 don't meet the requirements. So I do not think in  
10 any way, shape or form there was a presumption in  
11 favor of the Petitioners in that regard.

12 >> JUDGE RYERSON: Okay. Mr. Malsch, you  
13 have been kind of quiet on this side of the aisle.  
14 Did you want to address these points at this time?

15 >> MR. MALSCH: Let me address two points,  
16 the first is that -- what is true in this proceeding  
17 is, as has been true in a quarter century of NRC  
18 practice, an allegation that a regulation, an  
19 allegation that an applicable regulation has been  
20 violated raises a material issue period. And I would  
21 point out to you, that we have 140 -- about  
22 approximately 140 contentions addressing the total  
23 system performance assessment. Each of those  
24 contentions, specifically alleges a violation of  
25 several -- one or more particular provisions in Part

1 63 which address how the performance assessment shall  
2 be conducted. It's cited to 63.102.5 -- A that there  
3 had to be included a full range of reasonable  
4 parameters, 63102-H,1, all models and parameters had  
5 to be included and include uncertainty. 63, 24.114  
6 -B that the model had to include uncertainty and  
7 variability parameters and provide the technical  
8 basis for parameters and probabilities. 63.114-G,  
9 which requires that the models have been supported by  
10 an adequate technical basis. We have 140 or so  
11 contentions which specifically allege a violation of  
12 one or more of these divisions. We have an  
13 additional dozen or so contentions that also allege  
14 specific violations of 64.114-C, of all conceptual  
15 models. 63.114-B, which requires a full accounting  
16 and explanation of uncertainties; and 63.1012-J --  
17 63.102-J which requires consideration of futures  
18 processes and events. Now, what's interesting about  
19 these regulations is the system went out of its way  
20 in Parts 63 to explain how each of these requirements  
21 had its own independent significance and  
22 enforceability. And to understand that, you need to  
23 go back a little bit into the history of part 63  
24 P.a.r.t 63 was originally spun off of Part 60, which  
25 was a generic regulation applicable to repositories

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1 in general. Part 63, in addition -- and we're  
2 talking about post-closure safety. In addition to  
3 requireing for post-closure safety purposes,  
4 compliance with an ultimate dose standard using a  
5 performance assessment. Also had a requirement for  
6 individual barriers to meet particular subsystem  
7 performance requirements. For example, ground water  
8 travel time was specified.

9 When the Commission developed Part 63, it  
10 did not include any of these substance and  
11 performance requirements, leading commoners to accuse  
12 the commission that it was doing something it had  
13 never done before, namely, the whole safety case  
14 depends solely upon the results of the equivalent of  
15 a probabilistic risk assessment and nothing else.

16 In responding to those comments, the  
17 commission was very clear that that was not what it  
18 was doing. The post-closure safety did not depend  
19 solely upon meeting a simple dose standard at a total  
20 performance assessment, that instead, post-closure  
21 safety depended upon a comprehensive collection of  
22 requirements, including the ones that I mentioned  
23 here. So, we say that a contention, which alleges,  
24 for example, a violation of a requirement that a  
25 model be adequately supported is material per se,

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1 nothing else need be shown, just as the case of an  
2 allegation that the design were not required with or  
3 emergency planning wer not complied with would also  
4 be materials per se without some further showing of  
5 lack of reasonable assurance or without some further  
6 showing that some design basis, those calculations  
7 had been violated.

8 >> JUDGE FARRAR: Mr. Malsch, can I  
9 interrupt you there? Are you saying that applies to  
10 these process kind of regulations?

11 That you shall do it this way, as much as  
12 it does to a regulation that says, the tie rods  
13 should be made out of titanium?

14 Are you saying they're both the same?

15 >> MR. MALSCH: That is exactly correct.  
16 There is nothing that suggests in the history of Part  
17 63 that would suggest a distinction between process  
18 regulations or, on the one hand, the different -- the  
19 other kind of regulation or process regulation versus  
20 some other kind of regulation, they're all  
21 independently enforceable, all -- they all have  
22 independent significance. The Commission does not  
23 suggest any are of lesser significance. In fact, as  
24 I said, they were very clear that post-closure safety  
25 was dependent upon a comprehensive collection of

1 requirements, including all of these requirements.  
2 Just to borrow a little bit from what Judge Ryerson  
3 said, they were as much concerned about how you got  
4 the result as they were with the result itself. And  
5 that is why we think that all of our TSPA contentions  
6 raise material issues. Now, second, let me address  
7 the other question dealing with our capabilities.  
8 First of all, I don't think you need to reach this  
9 question because, as I said, I think our TSPA  
10 contentions all are raising material issues ;but if  
11 there were to be some further additional showing to  
12 be required and, frankly, I did not understand from  
13 DVR what exactly that is -- but let's suppose in some  
14 cases there is required some sort of further  
15 demonstration. We asked ourself that question  
16 because we anticipated the precise argument. So we  
17 asked ourselves, is it possible for us to actually do  
18 a dose calculation that would gauge an estimate in  
19 some quantitative way the precise impact of our  
20 contention, if true?

21 Well, it turns out that for about is maybe  
22 50 -- except for about 100 of our contentions, our  
23 contentions are so utterly destructive of the TSPA  
24 models, so that if you assume they are true, which is  
25 what you should do if you address a materialiality

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1 question, if you assume they are true, there is  
2 literally no model left to run, no calculation can be  
3 made. There are about 100 or so -- I think it's  
4 101 -- contentions which actually, if true, would not  
5 be so completely destructive of the TSPA model.  
6 There wouldn't be something of a structure in place  
7 that we could conceivably modify. Now, so we asked  
8 ourselves, what would be involved in doing that?

9 Well, first of all, we thought to give the  
10 DOE the benefit of the doubt. So let's assume  
11 instead of having 100 contentions, we really have 19  
12 contentions, because it turns out there are 100  
13 contentions here breaks down into 19 separate  
14 categories. So let's talk about to give DOE the  
15 benefit of the doubt, let's say we only have 19  
16 groups of contentions, what would be required  
17 actually to demonstrate quantitatively their effects  
18 on dose?

19 Well, first of all, let's just take one,  
20 one of the 19, what would we have to do?

21 Well, first of all, we'd have to develop a  
22 key weigh program for modifying TSPA unless our own  
23 model changes, we are fully subject to an implemented  
24 under a coop insurance program, our results would be  
25 no credibility. Secondly, we would have to model the

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1 TSPA code, not just in one case, but in five  
2 separate modeling cases. The DOE TSPA is comprised  
3 of five separate models. There is the igneous  
4 intrusive case, the igneous and extrusive case, the  
5 early waste package failure case.

6 And then there are two scenarios -- each  
7 one of the those cases involves a variance in the  
8 TSPA model. So, to conclude, any one of our  
9 contentions to accomodate it to change the model to  
10 include it, we would have to make as many as five  
11 changes in as many as five separate TSPA models.  
12 That would take literally in the case of some  
13 contentions months of work; but that's not -- but  
14 that's just the beginning. There are -- there is no  
15 requirement for us to show that any one contention  
16 that would influence the dose. It would be perfectly  
17 permissible for us to arguabe it would have an  
18 affect on the dose that would be significant. There  
19 are some -- let me follow up on that.

20 >> JUDGE FARRAR: So you do you think you  
21 need to consider these in combination; is that right?

22 To consider the technical questions about  
23 the TSPA, you have to consider those in combination,  
24 not one at a time?

25 >> JUDGE BARNETT: That's exactly right.

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1 Doesn't that extend beyond the capability of testing?

2 >> MR. MALSCH: That would extend beyond  
3 DOE's capability. Mr. Silverman's argument today is  
4 a little misleading. There is no doubt he can run  
5 the TSPA code on our computers. We can run it. The  
6 question is not whether we can run it. The question  
7 is whether for the thousands of different  
8 combinations we can -- we would possibly have the  
9 time and resources to make the necessary number of  
10 model changes to show the dose effects of any one  
11 contention or any combination of contentions. What  
12 DOE is effectively asking us to do is the impossible,  
13 and the impossible actually denies us due process of  
14 law.

15 >> JUDGE BARNETT: Would you be asking DOE  
16 to do the impossible?

17 >> MR. MALSCH: Not asking DOE to do the  
18 impossible. I mean, that would be their option. If  
19 you look at the way we structure our contentions --  
20 let's say we have contention -- a group of  
21 contentions with the tax infiltration model. We  
22 believe the effect of our contentions is to utterly  
23 destroy the model. DOE could respond to our  
24 contentions by correctly correcting the model,  
25 without doing any calculations. They could just say,

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1 "We corrected the model." Or they could explain why  
2 our concerns about why the model is incorrect, were  
3 not well-founded. So they are -- it is within their  
4 discretion to making their case, to address each of  
5 our contentions on a model-by-model basis and on a  
6 114-A basis, 114-D basis, and just defend their  
7 models one by one. That's a perfectly permissible  
8 way for them to go about making their case.

9 >> JUDGE BARNETT: But you couldnt test the  
10 implications them one by one?

11 >> MR. MALSCH: Pardon?

12 >> JUDGE BARNETT: You couldn't test the  
13 implications one by one?

14 So, as I understand your argument, there  
15 were two many combinations of your contentions for  
16 you to test, but -- and by extension, there would be  
17 too many for DOE to contest, is they can analyze one  
18 by one but you couldn't do the same thing?

19 >> MR. MALSCH: No, and I say analyze the  
20 effects, they can defend purely on the basis of  
21 compliance with the individual requirements of Part  
22 63. I'll give you an example. Let's take the  
23 massive infiltration contentions.

24 We say their model is -- in a number of  
25 respects -- not scientifically supported. How would

1 DOE -- that contention gets admitted, how would DOE  
2 make its case?

3 We presumably -- either we're wrong and  
4 its model is correct just on the basis of the merits  
5 of the model, without getting into any dose  
6 calculations or it could defend its case by producing  
7 a corrected model and say, ah, we're taking care of  
8 your problems. Again, there would be no need to be a  
9 separate dose calculation by DOE . They would simply  
10 defend their models on a scientific basis, scientific  
11 discipline, by scientific discipline. That would be  
12 sufficient without going to dose calculations. Now,  
13 let me just mention one last thing; and that is I do  
14 believe that Dr. Thorne's Affidavit is essentially  
15 un rebutted. There was no other Affidavit with rebuts  
16 what effectively what Dr. Thorne said. Most of the  
17 DOE 's applicants said we could have run some  
18 contentions. He does not say which contentions or he  
19 doesn't say how much time does it take and he doesn't  
20 address the combination problem. Under NRC case law,  
21 Petitioners are to be given the benefit of the doubt  
22 in really uncontention admissibility. And I think  
23 that means that the Board, in ruling on our  
24 contention admissibility, in the TSPA field should  
25 take what Dr. Thorne said as a given; but I want to

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1 emphasize, you don't have to even reach that question  
2 because I think each of our TSPA contentions are  
3 separately admissible, they separately raise a  
4 material question, just because each of them involves  
5 a separate violation of the requirement of Part 63.

6 >> JUDGE BARNETT: Well, for example, if  
7 you were -- if you were -- the estimated, if the  
8 contention was they had estimated the probability of  
9 volcanic eruption as half of what the eruption was,  
10 there is no specific regulation that it has to be  
11 some given numbers.

12 They can allege their number is wrong. So  
13 that's not a regulation -- that's not regulation  
14 violation per se?

15 >> MR. MALSCH: It is. I mean, in each --  
16 let's take that as an example. We have alleged that  
17 their models for igneous events are wrong in several  
18 respects, because they don't include certain kinds of  
19 phenomenon. They don't include certain categories of  
20 data.

21 >> JUDGE BARNETT: Let's restrict it to  
22 where a parameter is wrong. Their frequency that  
23 they use, estimated frequency of volcanic eruption is  
24 half of the value that it should have been. There  
25 are contentions like that.

1           That's not a violation of the specific  
2 regulation; right?

3           >> MR. MALSCH: No, I think it is.

4           I mean, under 62 -- 63-101-A, there is a  
5 separate and re-enforceable climate that the TSPA  
6 include the full range of defensible and reasonable  
7 parameters. So a contention which says they have not  
8 included the full range of defensible and reasonable  
9 parameters, use material per se,  
10 regardless -- material per se, regardless of whether  
11 that would have an effect of dose. That's because of  
12 the way NRC carefully structured Part 63. They took  
13 great pains to explain that it wasn't just the  
14 ultimate dose calculation.

15           It was also such things as including the  
16 full range of defensible and reasonable parameters.

17           >> JUDGE BARNETT: Okay. So would Nevada  
18 ever need to show any contention at all of the model  
19 or is it sufficient to say this parameter is not  
20 right, this model --

21           >> MR. MALSCH: I think that's all we have  
22 to show. I think we have to show they violated these  
23 requirements, that either their models are not  
24 supportive, scientifically, that they don't include  
25 the full range of reasonable usable parameters. They

1 don't include certain factors. They omit a theft,  
2 for example. I think that's enough to get our  
3 contentions submitted; and this is no departure from  
4 standard NRC practice. It has always been the case  
5 that a contention, which alleges a violation of a  
6 regulation is -- raises a material issue. And it  
7 was NRC's decision to separately promulgate this  
8 collection of requirements. And that was their  
9 decision, they're separately enforceable. The  
10 Commission took great pains to emphasize that its  
11 ultimate decision that you depend upon not just the  
12 dose calculation but compliance with these separate  
13 requirements.

14           And so we think a violation of these  
15 separate requirements raises a material issue. Now,  
16 I would grant you that these requirements are stated  
17 in non-prescriptive fashion, but that doesn't make a  
18 violation of them any less material than it would,  
19 for example, a violation of the general design  
20 criteria, which are also expressed in general  
21 principles. The immaterials, just because the  
22 regulation is non-prescriptive. There is no  
23 distinction in terms of materialiality between  
24 prescriptive requirements and non-prescriptive  
25 requirements, between some of the requirements and

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1 process requirements. They are all independently  
2 significant and separately enforceable.

3 >> JUDGE RYERSON: I think Mr. Silverman is  
4 straining to say something at this point; and I have  
5 a question for you, Mr. Silverman. Why don't you --

6 Thank you.

7 >> MR. SILVERMAN: A few points.

8 Mr. Malsch continues to refer to Judge Barnett's  
9 question in response to Judge Barnett's questions,  
10 that an error or omission is material, which I think  
11 are good questions, that -- and their allegation of  
12 an omission is material per se. Well, materiality  
13 is one part of the test for admitting the contention.

14 We also have to have a genuine dispute  
15 about that material issue. And to find a genuine  
16 dispute, you must do more than look at the allegation  
17 of the Petitioner. You must also look at the  
18 response of the Applicant.

19 And it is beyond the legal overarching  
20 issues that you must look.

21 As I said, and not a full merits analysis.

22 We're not asking for an evidentiary  
23 judgment here; but there are and I believe it's  
24 consistent with Board practice in the past. You look  
25 at the facts. We cited a section of the SAR, maybe

1 they allege an omission. They may say, there is an  
2 uncertainty, we describe why it clearly is bounded by  
3 what we've done or not relevant to the ultimate  
4 determination or why it doesn't violate Section  
5 63.114, the post-closure analysis, which has such  
6 broad methods, if you will, for going through the  
7 process of doing the post-closure analysis and talks  
8 very generally about including certain data,  
9 accounting for uncertainties, considering  
10 alternatives, et cetera. So it's not just the  
11 material, you must look at the facts at some level --  
12 at some level in deciding to admit these contentions.  
13 There are some other things I'd like to mention and  
14 I'd be happy to take your question, Judge, is there  
15 no requirement for them to have done a Quality  
16 Assurance Program. That's not a requirement of the  
17 Petitioner or we wouldn't have asked that and we  
18 would be laughed out of the board room if you  
19 challenge them on the basis of not having a qualified  
20 Q-A program for their contentions.

21 Finally, there has been some suggestion of  
22 cumulative impact of these contentions. When we had  
23 the Advisory PAPO Board pre-hearing conference in  
24 March -- May of last year this very subject came up.  
25 I think it was Judge Moore. I called be wrong. It

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1 might have been you, Judge Ryerson; but the issue  
2 said, it was very clear that if the Petitioner felt  
3 that they wanted to argue that an individual  
4 contention to -- combined with other individual  
5 contentions cumulatively demonstrated a material  
6 issue and a genuine dispute that they should do that,  
7 either by way of summing them up and saying that or  
8 having an extra contention that's specified that. We  
9 honestly did need read the Nevada Petition to have  
10 done that, to have accumulated and have argued that  
11 the cumulative impact needs to be considered.

12 >> JUDGE RYERSON: I think you've answered  
13 one of my questions, is whether you disagreed at all  
14 with Mr. Malsch's description of what would be  
15 required; but let me ask the second question and you  
16 sort of lead into this. You say that there's got to  
17 be at least some level of demonstration.

18 >> MR. SILVERMAN: Yes.

19 >> JUDGE RYERSON: And the question I guess  
20 from us in dealing with the adequacy of a Pleading is  
21 what that level is. And I hate to keep our returning  
22 to this case that you cite 427 times to us; but that  
23 case says that there must be at least some minimal  
24 factual and legal foundation in support of the  
25 contention, some minimal factual and legal

1 foundation. Is that the wrong test?

2 Because --

3 >> MR. SILVERMAN: No.

4 >> JUDGE RYERSON: This sounds like a  
5 minimal factor.

6 >> MR. SILVERMAN: That's good law. That's  
7 good law; but you can't judge whether there is a  
8 minimal showing by reading the factual allegations in  
9 one Pleading. You've got to look at the other side.  
10 I acknowledge that you may look at a contention and  
11 you may look at an Answer in this department and you  
12 may say, you know, they've raised the legitimate  
13 issue. This may be your judgment; and it is not  
14 clear to us on its face that, that it's not an  
15 issue -- that it's not an a genuine issue. Some of  
16 Nevada's arguments leave the word "genuine" out of  
17 this criteria; but there are others you will read,  
18 where I think you can conclude merely by reading the  
19 Pleading and perhaps looking -- not perhaps, really,  
20 it's a difficult job, but looking at the things we  
21 cite in the SAR often and in most of our responses  
22 and conclude there is no genuine issue there. And  
23 you don't go beyond the Pleadings and the references,  
24 and that is your call to make. It's not necessarily  
25 an easy one; but it is -- it does require you to look

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1 at both sides and to delve down to some level of  
2 review of both sides of the allegations.

3 >> JUDGE RYERSON: I would very much like  
4 to hear the NRC's staff's position on whether an  
5 allegation of a violation of any commission  
6 regulation is a material -- raises a material issue  
7 for an option. Could one of you please speak to  
8 that?

9 >> MS. YOUNG: Mitzi Young for the NRC  
10 staff. The staff position is that --it could be a  
11 material issue. The staff did not do a wholesale  
12 objection to the contention of materiality. The  
13 contentions where Intervenor suggests that we do  
14 nucleides and radiologic exposures would be  
15 increased and specifically the staff would be  
16 provided by the State of Nevada would suggest what  
17 those would be; however, there are contentions that  
18 certain particular processes were not followed. The  
19 staff does not object to those contentions being  
20 material.

21 >> JUDGE FARRAR: You said at the  
22 beginning, Miss Young, that the staff's allegation of  
23 a violation of a regulation could be material.

24 >> MS. YOUNG: It could be.

25 >> JUDGE FARRAR: I think Judge Ryerson's

1 question -- it's not his, mind is -- is a violation  
2 of a regulation always material in on its face?

3 >> MS. YOUNG: Well, materiality has  
4 differenct meanings, obvioiusly. There is  
5 materiality that can affect the outcome of the  
6 proceeding. There is materiality with what can bear  
7 on the staff evaluation of a particular standard.

8 >> JUDGE FARRAR: Our precedence have  
9 always said an Applicants just like Intervenors are  
10 bound unless they ask the Commission for a waiver or  
11 an exemption.

12 >> MS. YOUNG: Or an exemption or a waiver.

13 >> JUDGE FARRAR: Fine, whatever they ask;  
14 but if they don't ask for that, what is the force  
15 behind that precedent or that principal that I just  
16 stated, if we say, yes, you violated the regulation,  
17 you didn't get a waiver or an exemption, but we're  
18 not going to hear the contention. That makes that  
19 principle a dead letter. So I need to know what  
20 the -- if the staff's position is -- what the staff's  
21 position is, that an allegation of a violation of an  
22 allegation of a violation or a regulation is always  
23 per se material?

24 >> MS. YOUNG: It depends on what that  
25 contention was alleging or not, a regulatory

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1 requirement.

2 >> JUDGE FARRAR: The answer is no?

3 >> MS. YOUNG: Again.

4 >> JUDGE FARRAR: You are saying it is not  
5 always material?

6 >> MS. YOUNG: Can provide a contention  
7 that says the regulation is violated because the  
8 walls of the repository will be blue. Is that  
9 material to to fulfilling some requirement?

10 >> JUDGE FARRAR: The the Commission  
11 regulations says the walls of the repository is going  
12 to be pink. They they they're going to be blue,  
13 that's my question, is that a per se admissible  
14 contention?

15 >> MS. YOUNG: Again, you have to look at  
16 the particular regulation that's at issue with  
17 respect to the challenges faced by this issue.

18 >> JUDGE RYERSON: Do either of the Judges  
19 have something?

20 >. MR. ANDERSEN: Rob Andersen on behalf of  
21 Nye County. One of the problems I have with review  
22 of this particular issue is it didn't make a  
23 distinction between what it has perhaps called a  
24 process regulation and one that is quote/unquote  
25 prescriptive, as Judge Farrar has pointed out. I can

1 tell you they made the same materialiality challenge  
2 to every one of our contentions, and I'd like to make  
3 a point that hasn't been stressed enough, although  
4 alluded to by the Board, and that is the  
5 following -- every single one of the emergency  
6 response planning regulations, performance  
7 conciliation, quality assurance regulations are  
8 bottomed on a record that demonstrates why it is  
9 significant to safety; and it's presumed that if you  
10 violated that, you violated a principle that the  
11 Board has established or the Commission has  
12 established as a safety significant matter. Now,  
13 that isn't every single regulation.

14 I think I understand why my colleagues from  
15 NRC staff are shuffling a little bit, because there  
16 certainly could be a regulation that isn't  
17 significant enough to justify.

18 >> JUDGE FARRAR: If there were, why would  
19 the ccommission bother to extend an effort to change  
20 it?

21 >> Again, I would go back to the record  
22 which establishes the regulation. What is the bottom  
23 line support, for establishing the regulation in the  
24 first place. Cited in our materials and others is  
25 the Massachusetts case out of the Federal Circuit,

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1 where, in deed, NRC wouldn't allow evidence on impact  
2 to dose because they said underline emergency  
3 response regulations is the commitment to apply the  
4 principles. Thar -- if you violated that regulation,  
5 you were violating a safety principle. So there was  
6 no demonstration allowed, even though the Petitioner  
7 wanted to do it, of showing those implications. I  
8 would say to the Board, in conclusion, that we urge  
9 you to carefully look at DOE 's arguments in that  
10 regard to make sure this so-called process of  
11 materialiality doesn't wash over into years where it  
12 clearly has to do with a specific alleged violation  
13 of a safety-specific regulation that NRC has  
14 promulgated. They were --

15 >> JUDGE RYERSON: This may be a good  
16 time for a break. I don't see any other hands up.  
17 Why don't we try to do this, in literally nine  
18 minutes -- and we begin again promptly at 3:15.

19 (A recess was taken.)

20 >> JUDGE RYERSON: `Please be seated.  
21 Okay. I think Judge Barnett has a couple of further  
22 questions on the model, then we will turn to some of  
23 the subjects that Judge Farrar wanted to cover.

24 >> MS. YOUNG: Judge Ryerson, Mitscy Young  
25 from the NRC staff. I just wanted to clarify one

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1 thing in terms of my answers to Judge Farrar. When  
2 the staff was talking about it would depend on the  
3 nature of a regulatory requirement, one example  
4 could be 63.114-E and F which talks about DOE having  
5 to provide the technical basis for inclusion or  
6 exclusion of thefts.

7 And that a specific theft must be evaluated  
8 in detail if the magnitude and time of resulting  
9 radiological exposures to the reasonably maximally  
10 exposed individual or the radionuclide release to  
11 the successful environment would be significantly  
12 changed by the omission.

13 If Nevada, for example, were to raise a  
14 contention that allege that a particular theft was  
15 not properly excluded, there has to be in that  
16 situation, a showing of what the significance would  
17 be in terms of results. So again, it depends on  
18 what the regulatory requirement is that's being  
19 alleged that DOE has failed to satisfy.

20 >> JUDGE RYERSON: Thank you.

21 Judge Barnett?

22 >> JUDGE BARNETT: I have a question for  
23 Mr. Malsch or Mr. Lawrence. For the  
24 TSPA contentions, if DOE's answer is that this is a  
25 non-safety item or not important to safety item or

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1 not important to waste isolation, and Nevada's reply  
2 doesn't address that or doesn't say this is  
3 important to safety issue, is that an admissible  
4 contention?

5           Should we have contentions on things that  
6 aren't important to safety, that nobody has argued  
7 is important to safety?

8           >> MR. MALSCH: I think you are referring  
9 to the contention we had with respect to retrieval  
10 plans. I believe it's retrieval plans. And here was  
11 the difficulty. Our basic goal was to assure that  
12 retrieval plans are subject to quality assurance  
13 requirements.

14           And more specifically, I guess, structured  
15 system equipment necessary to implement retrieval  
16 plans are subject to full quality assurance  
17 requirements.

18           Under DOE's QARD, a structured system or  
19 component is not subject to the QARD unless it is  
20 either important to safety or important to waste  
21 isolation.

22           We agree it doesn't make any difference  
23 under which category something falls. It falls under  
24 either one, it's subject to quality assurance and  
25 that's sufficient.

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1           The problem is from our standpoint was that  
2     the criteria for deciding whether a piece of  
3     equipment was important to safety is so different  
4     than the criteria that applied in deciding whether a  
5     piece of equipment was important to waste isolation;  
6     That if you applied the wrong set of criteria, the  
7     result would be that a structured system or component  
8     important to retrieval would be ruled not important  
9     to safety, because that criterion focuses solely on  
10    safety of workers, not post closure safety.

11           The result would be that it would not be  
12    subject to quality assurance by reason of it being  
13    important to safety, and they never asked the  
14    question whether it should be important, it should  
15    be subject to quality assurance because it's  
16    important to waste isolation the result as a whole.

17           >> JUDGE BARNETT: Okay. I can't remember  
18    the specifics but let me give you a hypothetical.  
19    If Nevada 's contention was based on component A and  
20    DOE's answer was component A is not important to  
21    safety and they show the table where it says it's not  
22    important to safety, it's not important to waste  
23    isolation and show the table that says that, and  
24    Nevada's reply does not address that or offer a  
25    contention that it should be an important to waste

1 isolation, is that a admissible contention,  
2 whether there is no such disapproval or  
3 disagreement about whether it is or it isn't an  
4 important safety?

5 If DOE is classified, it is not important  
6 to safety, if they make an argument it is important  
7 to safety?

8 >. MR. ANDERSEN: Let me put it this way, I  
9 think we have to disagree with either the  
10 classification --

11 >> MR. MALSCH: The classification or the  
12 application of the wrong classification criteria. If  
13 hypothetically one would conceive that -- if  
14 hypothetically, it is considered in the broader  
15 sense, therefore, it should be subject to quality  
16 assurance as more than to the waste isolation and  
17 DOE should consider that issue.

18 >> JUDGE BARNETT: I'm not trying to  
19 pinpoint. I want to understand, let's leave the  
20 specific contention out. Say it's component and  
21 Nevada's contention is based on component A, DOE's  
22 response is, it's not more than to the safety, here's  
23 a table where it says it's not more than to the  
24 safety, it's not fortunate waste isolation. Here is  
25 a -- they believe that it says that.

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1 Nevada will not come back and argue it is  
2 important for safety, it is important to wayside; is  
3 that a contention?

4 >> MR. MALSCH: I think we would have to  
5 counter the table or argument that it is not. DOE  
6 has -- points to something in the application which  
7 properly classes it as one or the other. I think  
8 though in the particular case I'm thinking of, they  
9 utterly failed to consider whether structure exoarnts  
10 more than to the retrieve the waste isolation. There  
11 are the gap.

12 >> JUDGE BARNETT: I want to thank you.  
13 Along similar lines, if the contention says  
14 DOE assumes X, and it's not in the life applications,  
15 and then, Nevada is required to come back and say  
16 here is why, is the syntax and a plot of the reply,  
17 is that a contention?

18 >> MR. MALSCH: I think if we pointed to a  
19 alleged defect in the references, and that defect in  
20 fact, did not exist, I think that's not an admissible  
21 contention. I don't think we have any alleged  
22 omission, I think the omission has to be there.

23 >> JUDGE BARNETT: Thank you. Judge  
24 Farrar, do you have any questions?

25 >> JUDGE FARRAR: Yes, let's turn to --

1 before lunch, the State of Nevada requires a brief,  
2 DOE, pages one to two and four bullets and we'll add  
3 that up. The first bullet, I think is fairly covered  
4 by point 4A of the proceedings tomorrow, so we won't  
5 do that.

6 The fourth bullet about the regulation,  
7 where we talked about it at some length, I have a  
8 couple follow-up questions.

9 Mr. Silverman, several times there was a  
10 regulation that DOE -- I'm sorry -- that Nevada said  
11 you are not in compliance with the regulation and the  
12 regulation was non-prescriptive giving you the  
13 flexibility that you said you had.

14 But your Answer said, it's a challenge to  
15 the regulation. So it was as though you said, since  
16 the regulation gives us flexibility, saying we don't  
17 comply with it is a challenge to the regulation,  
18 whereas another reading would be it's not a challenge  
19 to the regulation, it's a challenge to whether you  
20 have used that flexibility wisely and have come up  
21 with a solution that fits within the meaning of the  
22 regulation.

23 Do you want to address anything, do you  
24 want to say anything in response to that?

25 >> MR. SILVERMAN: Yes. Does that refer to

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1 one of these particular bullets?

2 >> JUDGE FARRAR: No, it's kind of a  
3 variation of question -- it's the flip side of  
4 here's a prescriptive regulation and you don't comply  
5 with it. Here's one where you say, the regulation  
6 isn't prescriptive, so the challenge in the  
7 regulation, when they challenge us, we have infinite  
8 flexibility.

9 >> MR. SILVERMAN: No, we did not mean to  
10 suggest infinite flexibility. What we meant, you  
11 have a challenge, 63-114 which is your how to on your  
12 post-closure analysis. And it requires adequate and  
13 accurate generally analyses and considerations of  
14 uncertainty, considerations of alternative models,  
15 inclusion of data in broad ranges of areas like  
16 geology, hydrology, theology, et cetera. And -- what  
17 we were just trying to say is Nevada is saying there  
18 is another uncertainty here, or there is a piece of  
19 data being used, without showing that we have  
20 violated this regulation which gives us fairly broad  
21 relay based upon expert scientific judgment that what  
22 we tested, that is, in essence, a challenge to  
23 regulation.

24 It's a regulation, not just this, but a  
25 preamble regulation 63.101 and 102. They talk about

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1 the conceptual framework, go on and on about the  
2 flexibility. The difficulty for the future, the need  
3 for flexibility for the applicant to do these  
4 analyses. So that's what we were trying to make,  
5 maybe not as artfully as we should have.

6 >> JUDGE FARRAR: What contention, do you  
7 refer to a specific contention there? Okay, fine.

8 >> MR. MALSCH: Thank you.

9 >>JUDGE FARRAR: Mr. Silverman, let me ask  
10 you a different question on this same subject. There  
11 are times when DOE says that your contention should  
12 be rejected because you're -- you're asking them to  
13 consider something they don't have to. For example,  
14 if the regulation says your tires have to withstand  
15 certain conditions and they say, we have synthetic  
16 rubber number 93 that does this. If you say you  
17 didn't consider synthetic rubber number 95, and they  
18 say, look, if 93 does the job, we don't have to  
19 consider all the others that might do the job better.  
20 We just don't have to do that.

21 We've come up with a proposal that meets  
22 what the regulations are looking for. So they oppose  
23 a number of contentions on the ground that you are  
24 asking them to look at one or an infinite number of  
25 other things that would also do the job. And all

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1 they have to do is say they've done the job.

2 How do you respond to that?

3 >> MR. MALSCH: Well, I think there could  
4 be two categories of contentions to which that  
5 question could apply. We have a whole category of  
6 contentions which alleges that DOE's -- one or more  
7 of the TSPA models does not consider the full range  
8 of defensible and reasonable parameters.

9 It would be possible for us to argue that  
10 it is non-compliant with that provision because a  
11 contention did not include a particular range of  
12 parameters and that would make the contention  
13 admissible --

14 >> JUDGE FARRAR: That's not what I was  
15 talking about.

16 >> MR. MALSCH: The second category would be  
17 where we -- I guess in retrospect, there are three  
18 categories. DOE's model is wrong or unsupported,  
19 because it did not include unnecessary or phenomena.  
20 For example, if a necessary element in estimating  
21 corrosion was ignored in DOE's model, we have  
22 attacked the validity of that model.

23 The third category and that's I think  
24 fairly standard stuff -- the third category is  
25 actually unique to Part 63 and performance

1 assessments. And that is the requirement would  
2 consider alternative assesment of models, specific  
3 with data and scientific understanding. We do have a  
4 number of contentions --

5 JUDGE FARRAR: I thought there were some  
6 alternative material that you just said they should  
7 have used, and --

8 >> MR. MALSCH: Oh, there are a few  
9 contentions where we say that. And I think they say,  
10 look, the material we selected does the job.

11 >> JUDGE FARRAR: The material we selected  
12 does the job, you can challenge us, the material we  
13 selected is inadequate, but you can't say we need to  
14 consider all these others that are also adequate or  
15 maybe more than adequate, because we don't need to  
16 use those. That's the one I'm talking about.

17 >> MR. MALSCH: Okay.

18 I think a contention which simply says that  
19 they could have used these materials which are  
20 better. The ones they've chosen would not by  
21 themselves be an admissible contention.

22 I think the contentions we're thinking of,  
23 we went on to explain that there were problems with  
24 the materials that they were using. We went ahead  
25 and suggested how those might be cured.

1           I agree with your hypothetical, a  
2           contention that says what they did was fine, but this  
3           would have been better, is not admissible per se.

4           >> JUDGE FARRAR: All right. I think that  
5           takes care of that bullet. Let's look at the second  
6           bullet. Mr. Silverman, this is the one about your  
7           application having to be as complete as possible and  
8           many of the petitioners challenge various aspects of  
9           the application and sometimes you give the answer,  
10          well, that was all we had at the time.

11          What do we do; is Mr. Malsch right in this  
12          point and what do we do with that?

13          One thing we can do is fine, we admit the  
14          contention and we'll go to hearing. By then you will  
15          have more information and we'll test it. I take it  
16          you would not like us to do that?

17          >> MR. SILVERMAN: I think that this bullet  
18          and it is then later reflected in a little bit more  
19          detail in the generic section of Nevada's pleading is  
20          a mischaracterization of our position.

21          We do on a number of occasions indicate  
22          that 63.21-A provides that those applications should  
23          be as complete as possible and available information.

24          But we do not say and I do not think we  
25          intimate at all that that gives us carte blanche to

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1     exclude any information required or as to provide as  
2     they say here, it would be acceptable to submit a  
3     one-sentence application.

4             We didn't assert 63.21- A eliminates the  
5     need to comply with the rest of 63.21, which does  
6     have specific requirements in it.

7             When Nevada makes this allegation, they in  
8     the front of their response, they point to two pages.  
9     And I'd just like to make it clear that we are  
10    providing the indication to you and the references so  
11    you can see that is not what we did. They point to  
12    page 1351 and page 1500 of DOE's answer.

13            If you look at pages 1349 to 1358 of DOE's  
14    answer which bounds page 1351, you will see -- the  
15    issue is whether we provide a final design  
16    information in the LA. We referenced 6321-A.

17            We went on for several pages to recognize  
18    that we have to provide sufficient information under  
19    the balance of 63.21. We explain the regulation  
20    doesn't provide final design information. So we  
21    address content and substance. We specifically  
22    identified the information in the license application  
23    that satisfies 63.21-B, the rest of that regulation.

24            So we took on the substance. We didn't say  
25    whatever we say is good enough. We say look in the

1 LA and you will see that these locations, information  
2 we believe is sufficient to meet the regulation.

3 And in this case, it dealt with the  
4 specific allegations regarding the transport and  
5 replacement vehicle, the multi-tax and transportation  
6 and disposal containers.

7 So we have not taken the position that  
8 there is no minimum amount of information. And  
9 that's an example that -- that if you look at those  
10 pages, you will see that we do not do what Nevada  
11 alleges in this bullet, which is argues with that  
12 63.21 gives us carte Blanche.

13 Very briefly, the other reference cites  
14 page 1500 of our answer. If you look on pages 1491  
15 to 1541, which deals with waste retrieval, adequate  
16 plan if we're not able to put the drip shields in. We  
17 reference 63.21 again but we also explain how we meet  
18 section 63.21C-7, that it doesn't require a formal  
19 retrieval plan. It goes to the substance of the  
20 regulation.

21 We state, quote " the only issue for  
22 consideration is whether the description of the  
23 retrieval plan is sufficient "and we identify again  
24 the specific information in the LA that satisfies  
25 that regulation.

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1           We're not saying that we have carte Blanche  
2 to put in as little as we want and in these cases  
3 that were cited by Nevada, if you look at them, you  
4 will see we refer you specifically to the LA where  
5 we have given you sufficient information.

6           >> JUDGE RYERSON: All right,  
7 Mr. Silverman, if I can follow up on that.

8           It seems that everyone has to agree that  
9 when we are talking about compliance years out,  
10 potentially a million years out in some aspects, that  
11 there is going to be a level of uncertainty.

12           Nevada's point, as I understand it, is that  
13 there is a level of uncertainty that is unacceptable.  
14 Your point, if I understand it, is that you have come  
15 forward with -- given the state of knowledge right  
16 now, an acceptable level of uncertainty.

17           But for purposes again of the adequacy of a  
18 pleading, doesn't that bring us into acceptance  
19 dispute on the merits that requires program  
20 proceedings to make factual determinations on who is  
21 right.

22           >> MR. SILVERMAN: Because as I said, in  
23 cases, you will find, I am confident that we  
24 adequately refute and you will conclude there is no  
25 genuine dispute. It will be obvious on its face.

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1           It will be clear and -- and that will be  
2 sufficient. So I think there could be in both cases  
3 in any given situation.

4           >> JUDGE RYERSON: Thank you.

5           >> JUDGE FARRAR: In reading your response,  
6 Mr. Silverman, as to Nevada's Contention 147, I ask  
7 myself the question DOE has followed up, DOE making  
8 the argument that this case is so complex that we can  
9 not be expected to get it right and so minor errors  
10 don't matter or in the vernacular, it's close enough  
11 for government work. That flavor seems to run  
12 through this, while this is a tough case, don't worry  
13 about it.

14           >> MR. SILVERMAN: No, and I don't remember  
15 what's in 147, but I can assure you, that's not what  
16 we're arguing. If that's TSPA's contention, if you  
17 look at 143, there are small errors and large errors.  
18 A small error if it's true would not necessarily  
19 violate a regulation in this particular section of  
20 the code.

21           >> JUDGE FARRAR: And, of course you didn't  
22 say that 147. That was my rough paraphrase. I  
23 think that we covered indirectly the third to the  
24 last bullet of the State's points. So Mr. Chairman,  
25 I'm finished with that, unless someone had a - I

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1       only asked those two parties, because Mr. Malsch's  
2       State of Nevada's challenge to DOE, particularly  
3       which is why I involved him in that questioning. Go  
4       ahead.

5               >> MR. MALSCH: I want to indicate if the  
6       board is interested, I can explain why the cases you  
7       cited in support of their position are utterly did  
8       not stand for that proposition, but this is the Duke  
9       case.

10              YouI heard those already. I'd be willing  
11      to discuss them, if the Board is interested.

12              >> JUDGE FARRAR: We have a lot of business  
13      yet to conduct.

14              >> MR. ROBBINS: Your Honor, Alan Robbins.  
15      I'm not the designated counsel to speak today but may  
16      I have permission to speak?

17              >> JUDGE RYERSON: Yes, you may.

18              >> MR. ROBBINS: I want to use Clark  
19      County's contentions regarding forecasted volcanism  
20      as examples of the discussions that have gone on for  
21      quite some time here. Frankly, one that we think is  
22      very simple, we have an allegation, supported by the  
23      Affidavit, recognized expert, geologist, not an  
24      expert, candy cone maker, something; a geologist.  
25      He's been in the field, I mean out in the field doing

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1 studies, not just in the field of geology, who is  
2 alleging with explanation that DOE's assumptions  
3 regarding forecast involving volcanic activity are  
4 incorrect.

5 Council for DOE is just saying there are  
6 big errors and small errors. We have forecast of  
7 future volcanic activity. Needless to say, that's  
8 among the contentions that DOE find inadmissible in  
9 this case and they of course find them in whole,  
10 invisible. Well, if that is too small and minor to  
11 be admissible, you might be interested althoug  
12 probably rhetorical to know, how big does a  
13 contention have to get before it matters, the subject  
14 matter of a hearing in this proceeding? It boggles  
15 the mind.

16 I'd also like to go back to Your Honor's  
17 example that well, what if the -- I'm still on  
18 volcanism. What if the regulations say use this kind  
19 of material, a material that needs specification.  
20 They say, we'll use the model A and somebody allege  
21 I'll use type B. That is not the nature of our  
22 volcanic activity contention.

23 But DOE's response suggests that that is,  
24 they respond as if that's the kind of contention  
25 we're raising. It's not. It's as if we've said,

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1 well, you're using a backup access of the forecast  
2 for volcanic activity and let's do it on the shelf as  
3 a different forecast of why, why did you choose Y  
4 instead of X?

5 And they're saying a variety of different  
6 things, none of which are fair issues for the  
7 hearing. But plainly, that is not the nature of our  
8 contention.

9 And it is not the kind of contention that  
10 is conducive to saying they specifically violated a  
11 designated standard or a prescription because the  
12 forced regulations don't specify the forecasted level  
13 of expected volcanic activity that is to be modeled,  
14 but instead, there are other regulations that among  
15 other things require them to support the models that  
16 they use and the assumptions and data that go into  
17 it.

18 And that is the nature of the regulations  
19 that we allege they have violated by ignoring  
20 wholesale, information known to them that  
21 significantly affects the forecasted level of  
22 volcanic activity.

23 So, at times, it's been clear which kinds  
24 of contentions which would underline this discussion.  
25 At other times, it's a little more robust.

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1           But I want to put a point on it because  
2 these are among the very important contentions we are  
3 raising.

4           >> JUDGE RYERSON: Mr. Silverman, if I  
5 understand your point, is you are urging us to look  
6 at contentions, you are asking the Board to look at  
7 contentions and decide on the pleadings whether the  
8 allegation is conceivably substantial enough to  
9 constitute a violation of the regulations. Am I  
10 correctly stating your view?

11           >> MR. SILVERMAN: Well, the burden is  
12 to demonstrate a genuine issue of material fact or  
13 law.

14           >> JUDGE RYERSON: A genuine issue of  
15 material fact. Okay. And I guess, my question is  
16 this; you've said earlier, that although you're going  
17 in proposition was that you expected to find some  
18 admissible contentions, you ultimately did not.

19           If we took out your argument as to the  
20 adequacy of the form of affidavits and I don't want  
21 to get into discussing that.

22           I think another Board is going to deal  
23 with that tomorrow or Friday, or Thursday. But let's  
24 assume that all of the affidavits in this case, were  
25 in proper form.

1 >> MR. SILVERMAN: I'm sorry, were what?

2 >> JUDGE RYERSON: In proper form.

3 >> MR. SILVERMAN: Correct form.

4 >> JUDGE RYERSON: And included within the  
5 body of the Affidavit, everything that is adopted  
6 from paragraph five or paragraph six or both, in  
7 particular contention, are there any contentions on  
8 that basis that you believe would be admissible?

9 >> MR. SILVERMAN: Well, that would be --  
10 here would be some if that were the only argument  
11 that we made on that contention. In other words --

12 >> JUDGE FARRAR: There are no contentions  
13 where that is the only argument that you made, then  
14 it doesn't amount to a genuine issue?

15 >> MR. SILVERMAN: That's my point.  
16 Logically, you are saying we presume --

17 >> JUDGE FARRAR: Although some of them may  
18 have been influenced, since you don't like the  
19 affidavits, then maybe it doesn't amount to a --

20 >> MR. SILVERMAN: I think I'm trying to  
21 answer your question very straight forwardly. If we  
22 have a situation where we all presume the affidavits  
23 are adequate for purposes of the non-criterion that  
24 requires a support -- in fact, an expert opinion and  
25 if that were the only argument that we make in

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1 response to that contention, argument was  
2 inadmissible, then it would be inadmissible.

3 I don't know whether there are any of those  
4 or not. I suspect mostly -- we may be wrong on the  
5 others, you may find. But there are other arguments.

6 >>CHAIRMAN RYERSON: I guess you were  
7 suggesting earlier, we should be taking a hard look  
8 at individual contentions from the standpoint of  
9 whether they, in fact, present a genuine dispute. I  
10 guess I was asking, if you were looking fresh at the  
11 contentions yourself and assuming, again, we may not  
12 assume this form is correct, assuming the form on the  
13 Affidavit were correct, I take it your position is,  
14 since you have made other arguments in other  
15 instances, it remains your view that there are no  
16 disputes?

17 >> MR. SILVERMAN: That's not our  
18 pleadings. What we really triple plan in trying to  
19 make in probably being redundant at this point, but I  
20 also feel like maybe I haven't been as clear over  
21 these few days. We're talking about what the Board  
22 described as overarching legal issues and all I'm  
23 saying is that the board has a difficult job and when  
24 you see them respond, you see them in their totality,  
25 both the petition and the answer and the reply, if

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1 you disagree on one of these legal principles, you  
2 still have to look at the factual response.

3 You have have to look at our references to  
4 the SAR, other portions of the license application  
5 or to a citation for regulation, which we apply a  
6 citation to do a background supporting document,  
7 which we reference, there is a threshold for you to  
8 decide where it becomes a merits determination.

9 And you may, contrary to our position,  
10 including admissible or a genuine dispute, but there  
11 is a threshold that has to be crossed. And that's  
12 what we're questioning.

13 >> JUDGE FARRAR: Mr. Silverman, suppose we  
14 find an issue or two or ten that we think have at  
15 bottom, they are legal issues.

16 Do you have any objection to us admitting  
17 those contentions and calling for briefing to the  
18 legal issues? You would file a motion to dismiss  
19 that contention because the law is on your side  
20 rather than theirs?

21 >> MR. SILVERMAN: You'd first have to  
22 find -- admit the contention. If you wanted it  
23 resolved, then, yes, the motion, a brief would be a  
24 good way to resolve that issue.

25 >> JUDGE FARRAR: Okay. let me -- do you

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1 want to go ahead?

2 >> JUDGE RYERSON: Yeah, I said at the  
3 outset, we hoped to reserve some time for kind of a  
4 final cleanup anyone feels has not been adequately  
5 addressed. I would urge you when you do that not to  
6 feel constrained to say something if you have nothing  
7 to say at this point. We've heard a lot. But I know  
8 Judge Farrar has some questions that he'd like to  
9 address, I think on some specific contentions and  
10 would like to try to reserve enough time to at least  
11 give everyone an opportunity to say whatever they'd  
12 like.

13 >> JUDGE FARRAR: In order to honor what  
14 the Chairman wants to do on the short snappy answers  
15 to the -- don't feel compelled to give a non-snappy  
16 answer. Let me first ask the staff, in the State of  
17 Nevada's reply brief to you, at pages one to two,  
18 they say you have insisted on a depth of support for  
19 these contentions. That's not necessary and, in  
20 fact, it's preposterous.

21 Let me put that a different way. A long  
22 time ago, we had no -- almost no bar to intervenors  
23 coming in. And through the years, the Commission has  
24 raised the bar and many intervenors and experts in  
25 most cases, we deny most of the contentions because

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1 the intervenors haven't met that bar.

2 But you can't read this case without coming  
3 to a sense that the bar was here and the State of  
4 Nevada and some of the other petitioners far  
5 surpassed that bar, so the bar got raised so they  
6 didn't quite reach it.

7 I have that feeling when I read some of the  
8 Staff's answers. Am I wrong to think that the bar  
9 has been raised? In other words, that yeah, the bar  
10 has been raised -- because I have to tell you,  
11 comparing these contentions to others that I have  
12 seen, they seem at least superficially to be a lot  
13 better.

14 We're going to talk about the aircraft  
15 issues in PFS. I think that came in, Mr. Silverman,  
16 correct me if I'm wrong, I wasn't there at the time,  
17 that came in on a five-line contention?

18 Am I right?

19 >>MR. SILVERMAN: Close to that, sir.

20 >>JUDGE FARRAR: Go ahead Ms. Young.

21 >> MS. YOUNG: Mitczy Young for NRC staff .

22 I don't believe the bar has been raised. I believe  
23 when you are evaluating the contention, with respect  
24 to the proposed action, you need to evaluate it in  
25 the context of the issues are challenged. Part 63 is

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1 a risk-informed performance-based regulation.

2 Many times the contentions use very  
3 broad-brush in terms of identifying our multiple  
4 sections of Part 63 that they believe had been --  
5 DOE has been sufficient in satisfying.

6 But when you looked at that list of issues  
7 or sections that they identified, it seemed like  
8 their concern was not with respect to all of the  
9 sections, although, they did a pretty good job  
10 showing the relationships between various  
11 regulations. They had a concern about a specific,  
12 more narrow regulatory requirement.

13 To that extent, in looking at contentions  
14 for this proceeding, the staff under the time  
15 constraints it had, given the brevity of reply time,  
16 tried to reasonably construe each contention in the  
17 context of the matters raised.

18 We did not arbitrarily raise the bar. Now,  
19 we recognize as you did, Judge Farrar, that in many  
20 years passed, contentions in both the reactor  
21 proceedings and the issues and the informal  
22 proceedings, until the contention requirement was  
23 imposed, people got in with very little explanations  
24 for supporting an issue, but in each instance, we  
25 were reading Nevada's pleadings and trying to

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1 understand what was the real concern raised, was  
2 there a genuine issue of dispute of to the material  
3 issue of the fact, what was the supporting  
4 information and given the technical issues involved,  
5 it was important in each instance.

6 In each instance, the staff reasonably  
7 construed the petition and tried to understand what  
8 was in that and our objection, which pertained mostly  
9 to the adequacy of support and whether a genuine  
10 dispute had been raised, were done using the  
11 standards that the Commission has elucidated for  
12 admission of contentions.

13 So it's hard to compare repository  
14 contentions to reactor contentions because obviously,  
15 we acted well on the principles of allegation has  
16 been well trodden, there are a lot of different  
17 issues.

18 Obviously, there are -- fluctuations  
19 between the individual boards. You asked a question  
20 about who served on the Board with respect to a  
21 question -- answer by Don Silverman. Anne Young was  
22 the Chairman of one of those boards. You have  
23 different readings in the context of the matters  
24 raised.

25 >> JUDGE FARRAR: Let me interrupt. The

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1 key thing you are saying though is you want me to put  
2 aside what I think I know from the past because Part  
3 63 is really a different animal?

4 >> MS. YOUNG: It is and obviously, this is  
5 a case of first impression, and Nevada and the other  
6 parties have, you know, labored hard to try to raise  
7 issues, but this staff and those who are there also  
8 labored equally hard, if not longer, although in a  
9 shorter period of time to try to understand the  
10 issues raised and whether they were adequately  
11 contained in the context of the regulatory  
12 requirements contentions.

13 >> JUDGE FARRAR: That's a fair answer.  
14 Thank you. I don't need a reply. We need to get  
15 through this or we won't get through this. I'll give  
16 you ten seconds.

17 >> MR. MALSCH: Just to make a quick  
18 observation. When the Commission entertained  
19 contentions in the first license renewal proceedings,  
20 it didn't cast the past aside, when it entertained  
21 contentions in the first storage proceeding, it  
22 didn't cast the past aside, in contentions in the  
23 first enrichment progressive conservative, it didn't  
24 cast the past aside.

25 I would call the attention to the

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1 Commission contentions of the LES case and they  
2 invited the Board to compare that contention with any  
3 of ours and conclude, that we believe would be the  
4 case, that our contention is, if anything, better  
5 than theirs and that was admitted by the Commission,  
6 not a licensing board.

7 >> JUDGE FARRAR: Thank you, Mr. Malsch.  
8 Mr. Silverman, let's talk about on a general basis,  
9 your contentions.

10 >> MS. YOUNG: Judge Farrar, if I could  
11 respond briefly to one issue.

12 >> JUDGE FARRAR: I really got to get  
13 through this. Go ahead.

14 >> MS. YOUNG: Mr. Malsch suggested in the  
15 first license renewal proceeding the Commission  
16 didn't pass -- use a different standard; there were  
17 no contentions admitted in the first license renewal  
18 proceedings.

19 >> JUDGE FARRAR: Thank you.  
20 Mr. Silverman, let's talk about your contentions 174  
21 to 183 which are the air crash contentions. And just  
22 talk about them generally. A few years ago, we had a  
23 proceeding at PFS where we ended up with two phases,  
24 a total of 60 days of hearing.

25 The company lost on the first go-around,

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1 one on the second go-around on contentions and -- the  
2 original contention which as Mr. Silver recalls, was  
3 very simple, had very little in it and behind it.

4 We ended up having a hearing on issues that  
5 looked very much like these issues, 174 to 183. We  
6 had the very same witnesses that the State of Nevada  
7 brings forward.

8 I'm having trouble saying that what they've  
9 put forward isn't as much as the State of Utah put  
10 forward and State of Utah won the first phase of that  
11 case and for a time, had the project blocked.

12 I'm having trouble finding any way that I  
13 can reject these contentions. Can you help me with  
14 that?

15 >> MR. SILVERMAN: As much as I'd like to,  
16 Your Honor, without going back and reviewing them,  
17 Your Honor, without trying to compare and contrast, I  
18 apologize.

19 >> JUDGE FARRAR: But this generally, this  
20 is the PFA-- PFS case all over again -- .

21 >> MR. SILVERMAN: I sat on the PFS Board.  
22 I really can't do it.

23 >> JUDGE FARRAR: Mr. Silbur, in case you  
24 get admitted here, should these contentions be  
25 admitted?

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1 >> MR. SILBUR: Ive not read them, Your  
2 Honor.

3 >> JUDGE FARRAR: Moving right along. Is  
4 there some contentions and when I speak of specific  
5 contentions now, I'm not so much interested in the  
6 contention, itself as in the principle behind it,  
7 which might affect a number of other contentions.

8 Contention 139 states the issue is whether  
9 the DOE has to file a description of something now or  
10 details. And DOE says we don't need details now, we  
11 only need descriptions. When do we get the details,  
12 Mr. Silverman?

13 And I don't mean just on this one, but  
14 generally, if your application only needs a  
15 description, when do we get the details? Is that at  
16 phase 2 of Mr. Silbur's multi-phase?

17 >> MR. SILVERMAN: Did you say 139?

18 I'm not familiar with the numbers. There  
19 were contentions made with material plans, a county  
20 plan as I recall --

21 >> JUDGE FARRAR: I'll tell you in just a  
22 second; 139 was emergency, yeah, dealing with  
23 radiological emergencies.

24 >> MR. SILVERMAN: I had a different number  
25 for that. The regulation and I -- it would take me a

1 moment to find it, the regulations specifies when  
2 and it's required to be submitted.

3 >> JUDGE FARRAR: The description now, if I  
4 read the rate carefully enough, I'll find out -- when  
5 the details have to be supplied.

6 >> MR. SILVERMAN: Yes, sir.

7 >> JUDGE FARRAR: Now, if thigh challenged.  
8 If they look for details now and we say sorry, it's a  
9 bad contention, you can't get the details now.

10 Do they get to come back with a contention  
11 at a later stage and say, now, we gave us the details  
12 and we don't owe is that the time contention?

13 >> MR. SILVERMAN: If their contention when  
14 we submit an emergency plan is that emergency plan is  
15 inadequate, and they file that contention within a  
16 reasonable amount of time after the emergency plan is  
17 made available, that -- that's timely.

18 >> JUDGE FARRAR: That's timely. Still  
19 they have to meet the other stuff. But they're not  
20 out of time. They've raised it now?

21 You are saying, in fact, it's too early to  
22 give you that now, go away?

23 >> MR. SILVERMAN: I can't challenge the  
24 emergency plan that doesn't exist and is required to  
25 be submitted. And I believe there is a rulemaking on

1 the security issues, some issue that specifies -- I  
2 think it hasn't gone final yet, the exact dates when  
3 the fiscal security TSPA plans have to be committed.  
4 It's not now. It' s later

5 >> MS. ROBY: Your Honor, Deborah Roby for  
6 Clark County:. A follow-up to that.

7 I believe there is case law that states if  
8 an emergency plan is to be prepared at a later stage,  
9 if that contention should still be admitted at this  
10 stage and to prevent that from being admitted at this  
11 stage may deny it down the road, you may be faced  
12 with an untimely --

13 >> JUDGE FARRAR: So under your theory, you  
14 would admit it and hold it in abeyance until it  
15 became ripe?

16 >> MS. ROBY: Yes, I would admit it at this  
17 stage.

18 >> JUDGE FARRAR: It would eventually do  
19 the emergency plan?

20 >> MS. ROBY: Correct.

21 >> JUDGE FARRAR: And then they'd have to  
22 file in effect --

23 >> MS. ROBY: At that point, there may be  
24 an amended contention based upon the filing of the  
25 information at that point. But the contention would

1 already be in. Then it would be an amended  
2 contention then.

3 >> JUDGE FARRAR: Let me say,  
4 Mr. Silverman, you don't agree?

5 >> MR. SILVERMAN: Ten seconds or less, the  
6 regulation in 63.21, it's a sub element 21 which says  
7 the description of the plan for responding or  
8 covering a description of the plan for emergencies,  
9 we laid out in our Answer why there was a history of  
10 that, I believe, why that only requires a description  
11 at this time of a full emergency plan is not  
12 required.

13 So I wouldn't agree these should be  
14 admitted now and held in abeyence.

15 >> JUDGE RYERSON: But again, you would  
16 agree, once the plan exists, a proper consensus could  
17 be filed at that time?

18 >> MR. SILVERMAN: Absolutely.

19 >> JUDGE FARRAR: Contentions -- contention  
20 148, there is a mention of human factors. And I  
21 think that's the one where you accuse the State of  
22 Nevada of not coming up with enough information to  
23 show the human factors was an issue. I seem to  
24 recall we wrote in PFS where the company tried to win  
25 the case on the theory that don't worry about the

1 mathematical formula said, we could count on the  
2 human factors of the pilots' action to take care of  
3 things.

4           And we said, no, no, in things nuclear,  
5 human factors are bad things. We try to make sure we  
6 don't rely on infallible human behavior, because  
7 that's not how things go. Why is this not like, not  
8 like that where we're -- where when you challenge  
9 human factors, you have a very, very low threshold of  
10 acceptance to get in.

11           You seem to show much to say, don't let  
12 them rely on, you know, the human factors are going  
13 to save the day.

14           >> MR. SILVERMAN: Well, two responses,  
15 one, human factors can be interpreted in two  
16 different ways.

17           One that I recognize, the principle in the  
18 nuclear industry that the best protection is a  
19 passive barrier and/or an engineered barrier. It's  
20 active and then human action is sort of the lowest  
21 level -- I appreciate that.

22           On the other hand, there's the other side  
23 of the human factors is an analysis of building it  
24 into the design and operation of a facility; it's a  
25 positive thing.

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1           It's something that's done in most  
2 facilities I know, that I'm -- I'm afraid I'm going  
3 to disappoint you. Again, I'm not familiar with  
4 PFS in detail. I would have to go back and compare  
5 the two. I apologize. It's hard for me to give you  
6 an answer on that.

7           >> JUDGE FARRAR: Mr. Malsch, do you want  
8 want to address that quickly?

9           >>MR. MALSCH: With the definitions of  
10 local threshold, this would be the least case in  
11 which one would ignore human factors considerations  
12 might have an effect on the ultimate result. We have  
13 had at least this one contention, that is a safety  
14 148 and perhaps some others in which we specifically  
15 challenge DOE's basis and assumptions reporting human  
16 factors.

17           I think there are a number of factors in  
18 which we thought was a ridiculous argument, the  
19 contention should be dismissed because we presume  
20 their quality assurance program function perfectly.  
21 There would be no deviations and as far as human  
22 factors are concerned, everyone performs perfectly,  
23 we have absolutely no basis for that in this case at  
24 all.

25           >> JUDGE FARRAR: A contention that Nevada

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1 of 149 raised to me the question which others did,  
2 Mr. Silverman, sometimes the contention seems  
3 self-evident. You are saying they didn't supply this  
4 and they didn't supply that.

5 But some contentions just seem  
6 self-evidently to be raising a legitimate issue, but  
7 your response never seems to recognize that.

8 You always say they fell short in terms of  
9 affidavits or expertise or references or so forth.

10 Do have you a general -- I'm sorry I can't  
11 ask you a more specific question.

12 I'm trying to let you understand at least  
13 one board member's thinking in reviewing those, so  
14 you have a chance to respond.

15 >> MR. SILVERMAN: Well, my response is  
16 two-fold and being repetative.

17 The first is the contention may seem self  
18 evident, if you conclude it is self-evident after  
19 reviewing my answer, you have a judgment to make, you  
20 may conclude it is admissible.

21 >> MR. SILVERMAN: I'm saying when you see  
22 one side of the story, it may appear to be  
23 self-evident. It may not.

24 >> JUDGE FARRAR: Fair comment. In  
25 Contention 157 on volcanism, DOE raised the Bolotte

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1 Defense, and, in effect, said- maybe it was the  
2 staff. I think it was DOE, hold on. No, DOE raised  
3 the Bolotte Defense, which was the name of a case in  
4 the enforcement arena that, where a court of appeals  
5 says you can't get standing to say NRC Enforcement  
6 Act, proposed NRC enforcement action didn't go far  
7 enough.

8 And you use that as a defense to say, in  
9 that where the state wants more completeness and  
10 accuracy, that Blotte is asking for that, then staff  
11 can ask for that in an enforcement progressive  
12 conservative. I didn't follow that.

13 >> MR. SILVERMAN: Give us just one moment  
14 I will be brief. I haven't read the contention  
15 again, in response, on the complete inaccuracy, if if  
16 the applicant has not completed information in 63.7  
17 and that's an enforcement matter. That's completely  
18 an enforcement matter.

19 >> JUDGE FARRAR: It may be an enforcement  
20 matter. In other words, if you file an incomplete  
21 and inaccurate application, the NRC may get after you  
22 and maybe some other agencies of government. But we  
23 have a hearing here, the fact that they have that  
24 authority to go after you in enforcement actions,  
25 doesn't mean that the state or other petitioners

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1 can't also say that that part of your application is  
2 seriously deficient and therefore, your application  
3 should not be granted.

4 Now, Boltte doesn't take away our authority  
5 in a non-enforcement case. Bolotte takes away our  
6 authority in an enforcement case. I'm asking if it  
7 takes it away in a non-enforcement case.

8 >> MR. SILVERMAN: Well, in skimming our  
9 answer, I think the argument that we make are that  
10 when staff reviews an application, they review it  
11 first to see if its docketable. They then review the  
12 legal requirements to see if it meets the legal  
13 requirements. That's the licensed application for  
14 review. I think what you were saying here is that's  
15 different from an allegation that we have failed to  
16 provide complete and accurate information is  
17 different than an allegation that we omitted  
18 information that should have been included generally.

19 >> JUDGE FARRAR: One is not exclusive of  
20 the other. If the staff thinks you committed -- some  
21 call it fraud, they'll go after the enforcement. But  
22 the State and the other petitioners can also say that  
23 application is unworthy of being granted, because  
24 it's missing some stuff. That was mentioned -- .

25 >> MR. SILVERMAN: This is typically not a

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1 complete and accuracy issue under 63.10, that's a  
2 violation of a specific regulation in 63 that says  
3 thou shall provide this information and we provided  
4 it.

5 >> JUDGE FARRAR: When are you going to  
6 Contension 162, when are you going to submit a  
7 retrieval plan?

8 >> MR. SILVERMAN: It is not my intention  
9 to have a flipant answer, I have to pin.touch-tone  
10 regulation, I strongly suggest many in my answer.

11 >> JUDGE FARRAR: Seven years or 100 years?

12 >> MR. SILVERMAN: Ive I can get back to  
13 with you that information.

14 Probably specific in the regulation.

15 >> JUDGE FARRAR: Well, if it is, we'll  
16 find it. This came up mostly to my attention in  
17 connection with Nevada 163. Sometimes your paragraph  
18 six goes on for vast numbers of pages convincing us  
19 that there is no genuine dispute as to a material  
20 fact.

21 And after I read Nevada's six pages on that  
22 subject and your six pages on that subject, my  
23 conclusion is, it sounds like a dispute to me. And  
24 if you can't be dismissive of them in a fairly short  
25 time, isn't that a clue that there is something,

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1       there is a real controversy here that we need to get  
2       to the bottom of, not to a pleading ruling?

3               >> MR. SILVERMAN:  Is that an indicator of  
4       a genuine dispute because the two parties have gone  
5       on at length about the issue?  It may or may not be,  
6       Your Honor.

7               >> JUDGE FARRAR:  It may be a way to  
8       encourage shorter filings, I suppose.

9               >> MR. SILVERMAN:  It may be that it took  
10      that long to explain the issue, but, nevertheless, at  
11      the end of the day, with the -- it's apparent on its  
12      face the matter did not come into dispute, these are  
13      complex issues, particularly in the -- .

14              >> JUDGE FARRAR:  Looking back on 149, I  
15      think that's one of the ones where the state said,  
16      you don't have any reasons that you've put forward  
17      on this particular facet of the case.  And you snap  
18      back at them, well, you didn't give any reason saying  
19      why didn't we give any reasons?

20              If you have no reason, isn't that a valid  
21      contention?

22              You have fallen down on the job by not  
23      supporting what you have done, how can they say more  
24      than that?

25              How can they have reasons to counter your

1 lack of reasons?

2 >> MR. SILVERMAN: They would have to  
3 explain, among other things, where in the regulations  
4 it requires to provide, when we say reasons, on a  
5 technical basis, maybe, in other words, that there  
6 was a requirement to provide the technical basis on  
7 that information, their burden initially.

8 >> JUDGE FARRAR: Mr. Malsch, I have one  
9 question for you .

10 You have a number of contentions starting  
11 at 184 that deal with land use. And I kind of split  
12 them into two parts, one of which, one batch of them  
13 says they don't have the necessary approvals yet to  
14 build this thing. They have to get all these  
15 different approvals.

16 Why is that not like our old cases where we  
17 say, we're going to award the license for the reactor  
18 even if they don't have this state permit and that  
19 state permit because either they'll get there, that's  
20 not our business, either they'll get those, or they  
21 won't get them and they can't proceed.

22 What is different about that first half of  
23 your land use issues where we can't just say, let's  
24 wait and see if they get those. We don't care if  
25 they get those permits, that's somebody else's

1 business.

2 >> MR. MALSCH: I think the distinction is  
3 as in this case as our contention provides and our  
4 Reply provides, Part 63 requires that the rights or  
5 approvals be obtained.

6 >> JUDGE FARRAR: So it's our regulation  
7 rather than the state of Connecticut's regulation?

8 >> MR. MALSCH: That's correct. We're not  
9 arguing as a general proposition that everything  
10 should be held up because of some other permit  
11 requirement. We're arguing Part 63.

12 >> JUDGE FARRAR: Mr. Silverman, on the  
13 second batch of those lands use things -- oh and on  
14 the one or two of the aircraft ones, particular the  
15 ones about the fly overs and so forth, you say, don't  
16 worry about it, we don't have the permission yet, but  
17 we'll get the permission.

18 And I think the second batch of the land  
19 use said, you don't have the authority to keep our  
20 people off the land. These are people who would get  
21 an excessive dose, presumably would get some kind of  
22 an excessive dose.

23 Now, the aircraft when you say, we'll just  
24 go to the Chief of Staff of the Air Force and we'll  
25 get those permits and the people won't fly over.

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1 What we learned in the PFS case is the Chief of Staff  
2 of the Air Force doesn't like getting all these  
3 requests because it severely limits the Air Force's  
4 ability to train their people.

5 So why are -- any contention that says you  
6 don't have the control you need to have, why are  
7 those not valid contentions. And when you leave them  
8 lingering around and when you get those permissions,  
9 then the contention goes away.

10 But I, after what I learned in PFS, I'm  
11 reluctant to say, don't worry about it, you will get  
12 those permits.

13 In fact, the PFS project is not going  
14 forward today, because after finally winning the case  
15 with us, the company was unable to get a couple  
16 permits from other agencies that it seemed they ought  
17 to have been very routine.

18 >> MR. SILVERMAN: DOE counsel is  
19 conferring. One moment, Your Honor.

20 It seems to me the way to deal with this,  
21 if it isn't a licensed commission, they move on.

22 >> JUDGE FARRAR: So, does that mean,  
23 Mr. Silber, you admit the contention and work out the  
24 condition or you don't admit it and trust the staff  
25 to put it in the contention and give me the good

1 suggestion but give me the mechanics of how you do  
2 it?

3 >>MR. SILBER: I think you can do it either  
4 way.

5 >> JUDGE FARRAR: Okay, thank you.

6 >>MR. SILVERMAN: I understand unlicensed  
7 conditions may be appropriate as a result of a  
8 proceeding on the admitted contentions, and again,  
9 not being completely familiar with the details of  
10 those specific contentions, the issue depends on  
11 whether we are required to have those permits now or  
12 not as a condition or a prerequisite of the condition  
13 without regard to precisely what we have said in the  
14 answers, which I have to go back and look at.

15 >> JUDGE FARRAR: Why would you want to  
16 authorize you to build a multi--billion dollar  
17 facility and then at the phase 2 of this multi-phase  
18 proceeding say, oh, that farmer can still come on the  
19 ground, because he has an easement, sorry, you can't  
20 get a use of possession permit, why would we want to  
21 government to function that way?

22 >> MR. SILVERMAN: Well, the first response  
23 to that thing is you would not have that contention  
24 if there was not in fact a requirement to have that  
25 permit as a condition of getting the construction

1 permit. Number 1. Number 2, in that regard, in  
2 regard to your question what you were referring to,  
3 where you have any number of environmental permits  
4 that may come later, which the NRC doesn't hold the  
5 licensing up for. Same thing, mainly, get those  
6 permits Yet, the licensing goes forward. I  
7 understand Mr. Malsch's point regarding the  
8 legislation required, certainly it's a requirement.  
9 But your point, it's no different.

10 >> JUDGE FARRAR: Thank you all for the  
11 quick answers to I know you weren't particularly  
12 prepared for those questions, but so I look forward  
13 to at least get your views that will help us as we go  
14 back through the action. Chairman chairman thank  
15 you, Mr. Farrar .

16 >> JUDGE RYERSON: Why don't we take one  
17 last break for ten minutes or eight minutes, come  
18 back at 4:30. What I'd like you to give some thought  
19 to. During the short break, we will give thought to  
20 whether we have final questions.

21 We'd like to give as we said at the  
22 beginning, we'd like to give you an opportunity to  
23 address anything on today's topics. You'll have two  
24 more days. There is no need for a grand summation of  
25 your position. And honestly -- grand summation of

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1 your position. Honestly, use it at this point.

2 It's been a long day, we don't need to hear  
3 anything that you don't want to give us. But we'll  
4 give you eight minutes and we'll be back at 4:30.  
5 We'll see if we have further questions and we'll hear  
6 from whoever would like to speak at that time.

7 >> JUDGE RYERSON: Please be seated. All  
8 right. You will be either pleased or displeased to  
9 know that the Board has at this time no further  
10 questions.

11 Now, we will be either pleased or  
12 displeased as the case may be to see further  
13 enlightenment you wish to share with us. Again, I  
14 emphasize there will be two more days before the two  
15 other boards, so we're really not looking for a grand  
16 summation of any kind. We're looking to give you an  
17 opportunity to crisply address any of today's issues,  
18 where there just wasn't an opportunity or you really  
19 thought of an important point leader. So in that  
20 spirit, why don't go around the room and ask the NRC,  
21 staff anything to add?

22 >>MS. YOUNG: Mitscy Young for the staff,  
23 no further comments.

24 >> MR. SILBERG: Three very short points,  
25 first, thank you for giving us the opportunity. The

1 second, with respect to materiality, we believe the  
2 contention can be material even if there is no  
3 violation of regulation alleged. Second with  
4 materiality, the contention that argues for over  
5 conservative can be just as material as the one that  
6 argues for under-conservatism. Finally I have been  
7 litigating contentions s for 40 years. I  
8 can't speak for the other party's contentions, but I  
9 know ours are more specific with more basis and more  
10 care to their legal underpinning than any contentions  
11 I have ever seen in a law practice before this.

12 Chairman: Thank you, Mr. Silberg.  
13 Mr. Silverman?

14 >> MR. SILVERMAN: We appreciate it as  
15 well, excellent discussion and exchange, we have  
16 nothing further. Chairman Mr. Malsch, for Nevada.

17 >> MR. MALSCH: One ten-second comment,  
18 first of all, we appreciate the time the board spent  
19 today on the issues involved, secondly, I want to  
20 pick up on an interesting observation or hypothetical  
21 observation by judge Farrar, which is when you are  
22 looking at specific facts and contention, you look at  
23 our contention and DOE's reply and say, who can  
24 figure this out?

25 I think the case law clearly indicates the

1 contention under those circumstances should get  
2 admitted and I refer the board to LBP-06-when the  
3 Plaver Decision 112, which stands for the newly  
4 contentions at the admissibility stage the boards or  
5 commission should draw inferences in favor of  
6 admission.

7 CHAIRMAN RYERSON: Thank you Mr. Malsch,  
8 Mr. List, anything for the four counties?

9 >> MR. LIST: If I may, Your Honor, at the  
10 risk of violating a pattern that seemed to have  
11 started here, I would like to take a few moments to  
12 discuss what we believe is for the future of our  
13 counties, from the public standpoint is  
14 extraordinarily important. This is our one chance to  
15 address this board and to talk to Your Honors about  
16 what we think are critical issues for our people.

17 You mentioned at the outset of today's  
18 proceedings that, that we don't have to win the case  
19 here today, and that, that what we do have to show is  
20 a genuine issue, a genuine dispute. I think you also  
21 said that we don't have to decide it on the merits  
22 today, and we recognize that.

23 And I think that some of the legal  
24 principles which were collected in the Crowe-Beaut  
25 case are worth thinking about as we conclude these

1 discussions about the NEPA contentions in particular.  
2 The petitioner in that case reminded us is not  
3 required to prove its case if the contention stays.  
4 We must only make a minimal showing that material  
5 facts are in dispute.

6 And we believe that we have done that. And  
7 we've met the depth required in the documentation  
8 that we have submitted. And I would just suggest  
9 that, that it might be worthwhile for the board or  
10 your staff to look back at the original FIS, the  
11 final impact statement and contact that with the  
12 supplemental final supplemental impact statement.

13 The supplemental environmental impact  
14 statement changed the size and the weight of the  
15 trucks and did not do the kind of analysis that they  
16 did previously for the other trucks that had  
17 originally been proposed. They went from, from legal  
18 weight trucks to overweight trucks. Substantial  
19 difference. They went from trucks less than 80,000  
20 pounds to trucks averaging around 115,000 pounds; a  
21 significant difference. Difference in length as  
22 well. They also increased between those two  
23 environmental impact statements, the number of  
24 shipments from 1100 to 2700.

25 So they nearly doubled the weight on the

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1 trucks and they more than doubled about 150% increase  
2 of the number of truck shipments. So 2700 truck  
3 shipments, they've given an awful lot of concern in  
4 the environmental supplemental Environmental Impact  
5 Statement to 2800 train shipments, but very, very  
6 sparse consideration to 2700 truck shipments.

7 We believe that our affidavits that support  
8 our position on NEPA Contention Number one are very,  
9 very clear, both the Affidavit and the original  
10 petition, Number three, and the Affidavit or  
11 attachment Number one to the reply laid out in depth  
12 the enormous impact that these truck shipments will  
13 have.

14 The -- I think it's totally unrealistic,  
15 also, if you look at the supplemental Environmental  
16 Impact Statement, to see that they have considered no  
17 routes in Nevada off of the interstate freeways, that  
18 is, there are two across Interstate-15 and  
19 Interstate-80. The only route they've considered to  
20 the repository, itself, is from Las Vegas off of  
21 Interstate-15.

22 It's the only one that's shown on any of  
23 the exhibits or any of -- or discussed in any of  
24 their documentation.

25 The fact is that DOE policy presently

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1 prohibits even low-level waste from coming to Las  
2 Vegas. Secondly, by DOE's own admission, the state,  
3 under DOT regulations designates the off interstate  
4 routes and it's unimaginable the State of Nevada  
5 would ever designate highway 95 from Las Vegas out to  
6 the site, bringing in traffic to this community.

7 And, thirdly, the level of service in Las  
8 Vegas is by DOE's own admission, congested.

9 And so, we -- what we're suggesting is that  
10 the omission of the realistic fact that these  
11 shipments are gonna take place -- going to take place  
12 not from Las Vegas but through our four counties. It  
13 was talked about in the original final impact --  
14 Environmental Impact Statement, that none of the  
15 supplemental.

16 I think we've shown that clearly through  
17 the Massie Affidavit and through the two patent  
18 affidavits. I should also mention that they very  
19 briefly touched -- briefly touched on task in Nevada  
20 off the interstate freeways. They picked five  
21 locations, all of them near get a 510. Three of them  
22 on 95 South, where there is unlikely to ever be a  
23 single shipment seen.

24 One of them on the road over to Death  
25 Valley, which would be a very unusual place to have

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1 shipments, although, there may be some, and one right  
2 at the gate but none in the 40 counties.

3 Each of the locations they've chosen is in  
4 the middle of nowhere, away from the community, away  
5 from the town, when in reality, these shipments will  
6 go on two-lane highways, right through these  
7 communities. These are inextricably connected to  
8 this repository project.

9 There is no doubt if one considers what  
10 makes this plan, this whole plan go. They have to,  
11 they have to consider it. The -- I think similarly,  
12 and they've attempted to do some calculation on  
13 radiation doses for the maximum exposed workers and  
14 members of the public in the spring, on 95 South of  
15 the repository where it's unlikely there will ever be  
16 a single shipment.

17 The SEIS also estimates the total number of  
18 shipments by train, as I mentioned, they go through  
19 extensive analysis of the details and the procedures  
20 and processes necessary to deal with the train. Not  
21 only in this EIS but also, of course, in the county  
22 rail analysis and the Environmental Impact Statement  
23 there.

24 We think that our affidavits clearly show  
25 new information, within the meaning of 51.109 and we

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1 note that the EIS does address environmental impacts  
2 of transportation by truck on a national scale, but  
3 they don't do it in Nevada and the defect in that  
4 approach to it, is that they simply don't address the  
5 environmental impacts which will result in the  
6 confluence of trucks coming off of the Interstate and  
7 proceeding to the Yucca Mountain projects. Every  
8 single truck has to come down that two-lane highway.

9           And so what you is a convergence, sort of a  
10 funneling of thousands of traveling through several  
11 hundred miles through small towns adjacent to the  
12 counties, adjacent to my county. And to ignore that  
13 is a violation, we believe, of the case law and of  
14 the regulation. There is zero recognition resulting  
15 in the environmental impacting damage on the roads,  
16 themselves. The burden of the sequential impact on  
17 the first responders which are enormously  
18 significant.

19           The absence of communication interrupt our  
20 operability among first responders and law  
21 enforcement on these counties an communities that  
22 adjacent to the site.

23           The affidavits demonstrate that there are a  
24 tremendous absence of staff and individuals dependent  
25 largely on volunteers. They don't have the

1 equipment. DOE attempts to gloss over that by  
2 saying well, we are going saying well to give them the  
3 training and planning required under section 180-C of  
4 the Nuclear Waste Policy Act.

5 But planning and training certainly does  
6 not equip or staff these people to deal with the  
7 emergencies that clearly are gonna rise.

8 So we suggest to you that the NEPA document  
9 is absolutely inadequate. They have not taken a hard  
10 look at the consequences of this project and of the  
11 important aspect of it. They have not come up with a  
12 mitigation plan at all. In so far as the matters  
13 that I just touched upon and by which, of course,  
14 they are required to do.

15 Even if they haven't mentioned some of the  
16 mitigation measures, that's insufficient. They have  
17 to have a reason discussion.

18 So for all these reasons, they fall short  
19 of what the law requires and these are critically  
20 important matters to the residents of this community.  
21 We're not out to kill this project. Let me make that  
22 clear. The people in these communities have taken a  
23 constructive approach. They're the ones that live  
24 closest to the project.

25 And they have every right to insist that

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1 the documentation done in this matter be done in  
2 accordance with law and that they have an opportunity  
3 to come in and be heard and, and I think it's also  
4 worth mentioning that the DOE, itself, in a previous,  
5 in the final Environmental Impact Statement, actually  
6 said they were responsible for developing a response  
7 policy. And yet, they didn't do it. They don't talk  
8 about it in the supplemental EIS. How big are the  
9 impacts?

10 We've made an effort on our own to quantify  
11 it. There is a reason these units of government are  
12 called defective units.

13 Congress calls them that.

14 That's because they are defected. Our  
15 analysis shows that about one million dollars in  
16 highway improvements are needed -- \$185 million are  
17 needed in highway improvements. 16 million in  
18 capital costs to equipment or first responders, an  
19 annual cost of another \$15 million and 7 million to  
20 establish the ability to communicate.

21 Currently a sheriff in one county can't  
22 talk to a sheriff in another county or to the highway  
23 patrol or to the ambulance company or to the  
24 volunteers that run them to the hospital, the ward  
25 of the hospital. None of them are able to do that.

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1           That's another \$7 million. These are poor  
2 counties as the affidavits show that don't have the  
3 money to deal with that.

4           So they -- people need to be put on notice.  
5 These things need to be quantified and discussed in  
6 such a way that it can be addressed.

7           >> JUDGE RYERSON: Mr. List, I want to  
8 assure you this board and this other board will be  
9 reading each of the 328 or 329 contentions we  
10 appreciate you filing. If you can wrap up in the  
11 next minute or so, I appreciate it.

12           >> MR. LIST: I'm almost to the end. I  
13 appreciate your indulgence, Your Honor. In our way,  
14 we've taken a bit of a hard look to look at these  
15 things and do what the DOE should have done.

16           We've demonstrated that in our Affidavits.  
17 I also want to mention in closing that this is the  
18 time that this contention needs to be taken up. It  
19 should not be deferred. It takes years to design and  
20 to put together the kind of improvements we're  
21 talking about and then to construct hundreds of miles  
22 of highway, to put together the funding that's  
23 necessary and these things don't all get built at  
24 once.

25           It should not be put off until the time

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1 when the, when the actual time comes, the day comes  
2 when they're ready to complete the, have completed  
3 the construction. And they're ready to put the  
4 material in.

5           So in essence, I appreciate your indulgence  
6 and I want to simply say that we feel very  
7 passionately about this and trust this Board and the  
8 other boards to read carefully and to take into  
9 account matters we put forth. Chairman thank you.  
10 Mr. List, Mr. Sullivan for California.

11           The NRC has an obligation to, under NEPA to  
12 consider the environmental impacts of not just the  
13 construction, but of the repository, but also  
14 connected aces, even if they're not owe actions even  
15 if they're not under regulatory control.  
16 Transportation and construction are inextricably  
17 linked. It's irrational to do just one or the other.  
18 They have to go together. The NEI case, NRC's own  
19 regulations and the hearing notice all allow parties  
20 to litigate substantive NEPA issues in this  
21 proceeding. I want to talk a little bit about what  
22 has not come before us. Specifically, in the  
23 Nebraska versus DOE case. California -- Nevada  
24 versus DOE case. So res judicata, collateral  
25 estoppel don't apply to us. There were few issues

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1 decide on the merits in that case. Is court looked  
2 at the 2002 repository EIS. No court has ever  
3 considered the other documents since that 2000 EIS.

4 In 2008, the Department of Energy issued a  
5 record decision that said that before we analyze the  
6 route and the minor route is environmentally  
7 preferably. Over preferable. But we're not going to  
8 choose that one. No court has ever looked at the  
9 difference between the minor and the Kelley route and  
10 whether or not DOE adequately analyzed that.

11 No court has ever ruled on transportation  
12 impact outside of Nevada, whether those have been  
13 properly analyzed by DOE. So we make it all these  
14 issues as outlined in our contentions are proper for  
15 this proceeding.

16 >> JUDGE RYERSON: Thank you, Mr. Sullivan.  
17 Mr. Huston. His second -- Yucca Mountain -- his  
18 secretary testified, I think we can do better. All  
19 of the parties here have filed contentions, agree in  
20 some part or parcel or portions or spirit with the  
21 Secretary of Energy. My concern is that DOE is  
22 wasting our time and treasury and those in Nevada and  
23 California and that the counties as represented here,  
24 and the other parties and the U.S. treasury, itself,  
25 and this proceeding presently lacks foundation and

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1 DOE candor at its very corridors.

2 If so, DOE should withdraw at its earlier  
3 opportunity as topics discussed today may, in fact,  
4 have no relevance or values or to the public. Only  
5 if DOE intends to proceed to construction are all our  
6 efforts in the expenditures and time here today and  
7 in the future justified and have any value. We're  
8 all -- the administration is determined not to  
9 proceed. All we lack is withdrawal of the LA.

10 >> JUDGE RYERSON: Mr. Huston, thank you.  
11 I, at this point, we are dealing with analyzed  
12 application that is in front of the NRC and it's  
13 not -- it is really not analyzed issue that is  
14 relevant to this Board as to whether DOE should or  
15 should not be withdrawing the application. If you  
16 have comments beyond that, of a brief nature, please,  
17 please continue.

18 >>MR. POLAND: Thank you, Your Honor, yes.  
19 On behalf of the Timbisha overcytokines, program, we  
20 understand there will be native American issues  
21 discussed tomorrow. However, because our sole  
22 contention is that NEPA contention, those are the  
23 issues put forth before the Board today, I wanted to  
24 very briefly address those. As I mentioned, the  
25 Timbisha oversights program proffers just with you

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1 one contention that notes DOE's conception in the  
2 EIS and the SEIS that contaminants from the  
3 repository might contribute to and discharge into the  
4 Death Valley Springs.

5 That contention is supported by affidavits  
6 of members of the Timbisha Shoshone Tribe that live  
7 in the Death Valley area as well as analyzed expert  
8 anthropologist that tribal cultural religious and  
9 other interests, which are based on the purity of the  
10 water, including Death Valley, would be greatly  
11 harmed by the contamination of those springs.

12 It's notable that NRC staff does not impose  
13 the admissibility of this single NEPA concept that  
14 the Timbisha oversight program is proper. The DOE,  
15 however, does oppose this contention and I would like  
16 to address two points of difference. First,  
17 DOE argues that this contention does not raise a  
18 significant issue and is not material. Now, some  
19 people might feel Native American religion and  
20 culture as history.

21 Although, it is true, the Timbisha and  
22 Shoshone practice their religion for thousands of  
23 years. Their culture and religious practices which  
24 revolve around procuring springs and water are very  
25 much alive. They are practiced now as they were a

1 thousand years ago.

2 The notion that the devastation of analyzed  
3 entire people's cultural and religious practices  
4 stretching back thousands of years is not significant  
5 or material. It is culturally myopic. It is  
6 offensive and it is just plain wrong and CE-2  
7 regulations and NRC regulations and NRC guidance.

8 I suspect that for many of us in this room,  
9 our cultural heritage and our religious practices  
10 are not just significant to us, they are central  
11 parts of our lives. It is no less so for the  
12 Timbisha Shoshone. Second point of difference.  
13 DOE claims that it took a hard look at cultural  
14 impacts that the regulations required of them to take  
15 and that that hard look is reflected in the EIS.  
16 What the DOE sites for this proposition is a single  
17 page in the FDIS and a single page in the SDIS.  
18 Both pages essentially, the same thing. The passage  
19 from SDIS reads as follows:

20 "The American Indian people believe  
21 cultural resources are not limited to the remains of  
22 native ancestors, but include all natural resources  
23 and geologic formations in the region, such as plants  
24 and animals and natural land forms. Equally  
25 important are water resources and minerals. "

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1           Now, this is supposedly the hard look at  
2 DOE took at the impact on  
3 Timbisha-Shoshone interests. This is patently  
4 deficient in two ways. It lumps together the  
5 cultural interests of all American Indian tribes as  
6 though they are identical and there are no  
7 differences.

8           Second, it says only that water resources  
9 and minerals are important. It mentions nothing  
10 about the devastating impact on Timbisha culture and  
11 religious practices that contamination of the Death  
12 Valley Springs would have. In sum, if the purpose of  
13 NEPA and the implementing regulations of the CEX and  
14 NRC is to ensure that the decision-makers in this  
15 proceeding have before them analyses of all the  
16 important effects and results from the repository, it  
17 is clear that the contentions, the Timbisha Oversight  
18 Program has raised are significant, they are Steeler,  
19 they will help develop a sound record. They should  
20 be admitted. Thank you.

21           >> JUDGE RYERSON: Thank you. Nye County.  
22 Mr. Andersen.

23           >. MR. ANDERSEN: Yes, Your Honor. On  
24 behalf of Nye County, first of all, I want to express  
25 our appreciation also as the host county for the

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1 repository for this opportunity to discuss with you  
2 contentions which report that the residents in my  
3 county and to their safety and, second, Judge  
4 Ryerson, you did a far more cogent job of explaining  
5 the inconsistent statutory, regulatory and notice  
6 requirement apply to the as missability of NEPA than  
7 I ever could have. So we came with some trepidation  
8 that might come out with a principle that my county  
9 could not live.

10 We are on the fence that the Board  
11 recognizes in determining the NEPA contention is not  
12 tied to the old outcome on the decision on whether  
13 or not to construct the project but, rather, whether  
14 or not analyzed omission was significantly and  
15 environmentally under consideration from the  
16 Environmental Impact Statement should be  
17 supplemented. That's the outcome of the concern.

18 Finally, we support the standing of NEI of  
19 a party in this proceeding and have joined in  
20 adopting to their contentions and they've adopted to  
21 some of our contentions. We do that for a number of  
22 reasons, but we believe that meet all the Supreme  
23 Court and NRC standards for standing as a party after  
24 their full participation at this point and perhaps  
25 most importantly because we believe NEI members have

1 hasn't handled fuel for many years and historic and  
2 expertise in those issues and are essentially to  
3 NRC's resolution, informed resolution. Thank you,  
4 Your Honor.

5 >> JUDGE RYERSON: Thank you, Mr. Andersen.  
6 Mr. Miss Houck.

7 >> MS. HOUCK: Thank you, Your Honor, the  
8 tribe would like to thank the Board. The  
9 Timbisha-Shoshone, works with the State of California  
10 and other parties regarding the environmental  
11 contention. We also concur with the statements made  
12 by Mr. Poll and I'm not going to repeat those. But I  
13 will note by virtue of the language and the  
14 regulations by being certified as analyzed effective  
15 native tribe the Timbisha-Shoshone Tribe may suffer  
16 adverse impacts to its land. That would put the  
17 nuclear waste policy act and the state the  
18 Timbisha-Shah shownee tribe a generic or two  
19 paragraph reference to potential impossibility to  
20 native Americans.

21 There is nothing in the environmental  
22 document that addresses the specific substantial and  
23 adverse impacts that the tribe suffers as a result of  
24 this project back located in the proposed area.  
25 Therefore, based on the discussions today regarding

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1 what is significant and material, this document is  
2 lacking significant and material information that is  
3 required and, therefore, the document would be  
4 fatally flawed if decision-makers don't count  
5 information as to the direct impact that the tribe is  
6 going to suffer. So we would ask the board to take  
7 that into consideration when the contention is  
8 proffered by the tribe.

9 >> JUDGE RYERSON: Thank you. For Clark  
10 county, Ms. Roby.

11 >> MS. ROBY: Thank you very much, on  
12 behalf of caloric county, we, too, would like to.  
13 Thank the board, for the thought and preparation  
14 performed today. Very briefly, we do agree with the  
15 comments, closing remarks by the state of Nevada,  
16 state of California and the four counties with  
17 respect to environmental impacts. There is no  
18 question that in the event of analyzed emergency,  
19 Clark County will be among the first responders and  
20 evaluation of impacts related to transportation,  
21 related to the licensing of this repository are  
22 absolutely important to Clark County. And finally,  
23 we agree with the State of California with respect to  
24 the admissibility of contentions and where there is  
25 substantial discussion, in the pleadings, it ought to

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1 fall in favor of admission. That type of discussion  
2 indicates that there is a genuine issue of material  
3 fact proper for a full and robust record. Thank  
4 you.

5 CHAIRMAN RYERSON: Thank you. For White  
6 County, Mr. Sears.

7 >> MR. SEARS: I am sure you are tired of  
8 being thanked. Turning for your attention however I  
9 would like to say something on behalf of the voters  
10 that sent me here.

11 White Pine County is north of this project  
12 and the tendency may be to think that we are north of  
13 this project that we are upwind of this project and  
14 we are -- that, okay, if you read our pleading, which  
15 I'm sure you have, our concern, our position is that  
16 the DOE repository situation is something like a  
17 chemical company kicking mercury into a river.

18 And then looking upstream and saying, no  
19 problem. We are downstream from that mercury spill.  
20 I'd ask you to take a careful look at our expert  
21 affidavits that show that. Thank you Chairman.  
22 Thank you. And Mr. Williams.

23 >>MR. WILLIAMS: We are at the end of the  
24 line, I think our wise choice would be to hold our  
25 comments until tomorrow. Thank you very much.

1 >> CHAIRMAN RYERSON: All right. Thank  
2 you all. That concludes what we intended to cover  
3 today. One thing I want to mention before a couple  
4 other words, is we've run just slightly over 5:00.  
5 They will be hoping that you leave the facility  
6 fairly promptly. We have gone a little over our 5:00  
7 time. You know, as our March 18 Order indicates,  
8 Construction Authorization Board 2 will be here at  
9 9:00 tomorrow to continue primarily on the issues  
10 that are identified in Appendix B and perhaps most  
11 importantly, on behalf of our Board, I really would  
12 like to thank all of you for your comments.

13 We also appreciate that you are required by  
14 the rigorous briefing schedule that has been imposed  
15 in this matter, to briefly analyze enormous number of  
16 issues in a short period of time and we are very  
17 appreciative of that.

18 We know you have done a lot of work in a  
19 limited time period and we expect to and hope to  
20 mirror that as we move into a decision phase and have  
21 a prompt decision and a timely decision for you. Any  
22 comments to Judge Farrar?

23 Again, thank you very much. We stand  
24 adjourned until tomorrow morning at 9:00.

25 (Whereupon, proceedings were concluded.)

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