UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD HEARING

In the Matter of
U.S. Department of Energy
High Level Waste Repository
Docket No. 63-001-HLW
March 31, 2009

TRANSCRIPT OF PROCEEDINGS
Oral Argument on Admissibility of Contentions
Before the Administrative Judges
CAB-03
Paul S. Ryerson, Chairman
Michael C. Farrar
Mark O. Barnett
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P R O C E E D I N G S

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

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

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

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

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

The proceedings today are being webcast by the NRC, and, in addition, they're being carried internally by the agency's digital data management system, or DDMS. They're being shown in the
headquarters facility in Rockville, Maryland, and in
addition they are being broadcast internally on the
NRC's internal television system, broadband system.

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

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

The Atomic Safety and Licensing Board is
entirely separate and distinct from the staff. We do
not have communications about the merits of our
proceedings with the staff or, for that matter, with
the Commissioners.

The staff, in fact, appears as a party in
our proceedings. And ultimately the Commission has
jurisdiction to hear appeals from our decisions, but
again, we do not communicate with commissioners about
any of the merits of these proceedings while they're
underway.

Our purpose today is an important one, but
it's also in a sense a very narrow and limited one.
The law provides an opportunity for interested stakeholders to identify issues on which they would like to have a hearing. Twelve petitions have been filed in the Yucca Mountain proceeding by various petitioners, and in addition two counties have asked to participate, not as parties, but as interested government units.

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

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

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

First, which petitioners have standing? And that's not a terribly difficult job this time because of the 12 petitioners, the majority have automatic standing under the Commission's regulations. They're units of local government that
are deemed to be considered affected by this proceeding. So standing will not be an issue for most of the petitioners. It will be an issue for some of them.

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

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

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

So again, we're not here over the next few days to decide the merits of these 300 contention. We're here, in effect, to show at this stage or determine at this stage whether there's a genuine dispute whether the pleadings are, in that sense,
adequate.

Now, before I ask the parties to introduce themselves, I'd like to ask Judge Farrar: Do you have any comment?

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

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

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

>>MS. SILVIA: Andrea Silvia.

>>MS. YOUNG: Mitzi Young representing the NRC staff.


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

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

>>JUDGE RYERSON: Welcome, gentlemen.

>>MR. SCHMUTZ: Tom Schmutz representing DOE.
MR. SILVERMAN: Don Silverman representing DOE.

JUDGE RYERSON: Welcome.

MR. MALSC: Marty Malsch, representing the State of Nevada.

MR. FITZPATRICK: Charles Fitzpatrick, State of Nevada.

MR. LAWRENCE: John Lawrence, State of Nevada.

JUDGE RYERSON: Welcome.

MR. MALSC: Judge, also I'd like to introduce people in the audience. One is Mr. Bruce Breslow, who is the director of the Nuclear Project in Nevada, and Marty Abbs (phn), who's the Deputy Attorney General.

JUDGE RYERSON: Welcome.


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

JUDGE RYERSON: Welcome.

MR. SULLIVAN: Tim Sullivan with California Attorney General's Office on behalf of California.
MS. DURBIN: Susan Durbin with the Attorney General's office, State of California.

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

MR. HUSTON: John Huston, Caliente Hot Springs Resort.

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

MR. WHEGART: Baird Whegart representing Lincoln County.

MS. CURRAN: Diane Curran for Eureka County.

JUDGE RYERSON: Welcome.

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

JUDGE RYERSON: Welcome.

MS. RENFRO: Good morning, Hannah Renfro, also representing the Timbisha Shoshone Yucca
Mountain Oversight Program, nonprofit corporation.

>>JUDGE RYERSON: Thank you.

>>MR. JAMES: Good morning. Greg James representing the County of Inyo. And the County of Inyo would like to invite the State of California, Kevin Bell, to join at the counsel table. He will not be addressing the Commission this morning.

>>JUDGE RYERSON: Thank you. We have Nye County?

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

>>MR. ANDERSON: Robert Anderson on behalf of Nye Counsel.

>>JUDGE RYERSON: Welcome.

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

>>JUDGE RYERSON: Welcome.

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

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

>>JUDGE RYERSON: Welcome.

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

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

>>JUDGE RYERSON: Welcome to both of you.

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

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

>>JUDGE RYERSON: Okay. Again, welcome. Obviously, we have a number of participants and parties here, and we on the bench are going to try, as best we can, to address you by name. If we fail to do that, for the benefit of the reporter who probably has the toughest job here today, please do remember to announce your name before you speak.

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

It is our plan to dispense with formal openings. We have read your petitions and answers and replies, all 12,665 pages of them. And so it will not be necessary to simply repeat what is in your papers.

At the end of the day, we will try, as time permits, to give every party or participant an opportunity to sum up and to address anything that they have felt is not adequately covered by our questions during the day.

We'll obviously try, as best we can when we ask a question, and after we get an answer, to cover that same ground, as appropriate, with other interested parties in that -- in that particular issue. But we do hope to have time at the end of the day for all of you to say what you'd like about what's on your mind, and, hopefully, we will avoid undue repetition in that exercise.

A couple of words about logistics. It's our intention to break for lunch, depending on where we are, about noon. Given where this facility is in
Las Vegas and the logistics of everyone getting back through security, we're really forced to give you at least 90 minutes' lunch. So that's what we plan to do. And hopefully we can all get back here in that time frame. We will take at least one or two breaks in the morning and in the afternoon. And we certainly hope to finish by 5 o'clock and get you all out of here then. And, again, we will -- the next board, Board Two will be starting at 9 o'clock tomorrow.

Any comments from Judge Farrar on the procedures?

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

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

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

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

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

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

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

And Board Three would appreciate if all of
the petitioners could be prepared on Thursday to
inform Board Three of which of their petitions they
believe are affected by the recent revisions to
Part 63.
And in the case of the parties, that's the DOE and the NRC staff, Board Three would appreciate it if you would be prepared to address all of the contentions and let Board Three know which you believe are affected by the changes to Part 63.

All right. Any questions about that?

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

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

And I'd like to begin, if I may, with one question -- with one or two questions, Mr. Repka. The Nuclear Energy Institute -- that's NEI -- is seeking representational standing as a right. Is that correct?
MR. REPKA: That is correct, Judge.

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

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

JUDGE RYERSON: Of your members. And you are seeking in the alternative, discretionary intervention?

MR. REPKA: That's correct.

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

MR. REPKA: It does not make a difference.

We do believe that we are entitled to standing of right, and we have requested representational standing as a right for several independent reasons based upon injuries to members under the Atomic Energy Act, under the National Environmental Policy Act, and the Nuclear Waste Policy Act.

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

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

>>MR. REPKA: I think that's a significant basis for standing as a right under the Nuclear Waste Policy Act. I think that the distinction drawn in the pleadings of the other parties, with respect to economic injuries, is one that has no bearing under the Nuclear Waste Policy Act because of the contributions of our members from the Nuclear Waste Fund.

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

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

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

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

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

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

>>JUDGE FARRAR: Except your members got that money from us. They got the money from the rate payers who are substantially the same as the taxpayers.
>>MR. REPKA: But for a very specific purpose, for funding the Nuclear Waste Repository.

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

>>MR. REPKA: Correct. Now, the second basis, again, if you look at the Court of Appeals decision that we referenced, what makes us very different from those cases, is there is clearly direct economic injury to members from continued on-site storage of nuclear waste. And that has a direct economic and radiological safety and environmental impact on the member companies. And I think that that's -- that's a factor that's in addition to reliance on contributions from the Nuclear Waste Fund, which is -- makes the Nuclear Energy Institute very, very different from the generalized rate payer and taxpayer interests.

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

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

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

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

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

>>JUDGE RYERSON: You submitted with your reply, as I recall, some supplemental affidavits concerning -- certainly explaining the union membership in the Institute.

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

>>MR. REPKA: We believe strongly that our
original petition was sufficient. We provided the explanation of the union membership to address a very, very specific question raised by the parties with respect to injuries at the -- to perspective workers at the Yucca Mountain site, but we don't believe that an affidavit was necessary to address that. That's clearly our members and those injuries clearly exist.

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

Would you assert that with organizations like yours that have a continuing existence for purposes other than this proceeding, that there's a presumption of corporate regularity, that if the organization says -- the organization votes to file a lawsuit, that that necessarily means under the organization's bylaws, that every member can automatically or implicitly authorize that lawsuit?

>>MR. REPKA: I think you can assume that there's a governing structure that applies, and we would -- and, yes, we're relying on that, in addition to the fact that the NRC's case law and precedence I
think is fairly clear with respect to representational standing which you need one member to -- preferably by affidavit to show that the member has authorized the entity. And we exceeded the more than -- we provided more than one member.

>>JUDGE FARRAR: Well, but your opposition has an argument that the one member -- the members that you had affidavits from are coming in basing their standing under the Nuclear Waste Policy Act, whereas the union workers would be the ones who have standing, who could make a stronger claim to standing under the Atomic Energy Act.

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

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

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

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

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

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

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

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

>>JUDGE FARRAR: Aren't the utility
companies in a -- maybe I shouldn't use this word --
paternalistic relationship to their employees. In
other words, if the utilities are in, aren't they
there representing not only the utilities' business
interest but one of their great resources, their
employees?

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

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

>>MR. SILVERMAN: Oh, I imagine that's
right, Your Honor. I don't think it's a cognizable
injury under the Atomic Energy Act, however, in this
proceeding.
JUDGE FARRAR: In terms of the same employees, you make an argument that anything outside the Geologic Repository Operations Area, which we're will shorten to GROA in the future, is outside the scope of the proceeding, but we have -- because we cannot, in this proceeding, regulate what goes on at the individual utility sites where the spent fuel now is.

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

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

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

JUDGE FARRAR: Thank you.

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

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

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

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

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

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

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

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

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

>>MR. SILVERMAN: Right.

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

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

>>MR. SILVERMAN: Right. No, I understand the rational that the repository doesn't get licensed in a timely fashion, and that has the effect of requiring additional long-term storage or some of the other contentions relate to the use of TADs at the reactor facilities.

But again, I think it is distinguishable because they are alleging that the injury is coming from the activity -- directly from the Part 50 licensed activity, and that's different than the other cases.

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

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

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

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

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

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

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

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

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

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

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

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

Again, I don't think that that's necessary
in this case. I don't think it's necessary for us or
the Board to rely upon that. I am a little
concerned. I think I'm hearing a new argument from
the Department this morning that we would need to
have affidavits from individual employees. That's
not an argument that's been made in any of the papers
today.

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

>>JUDGE FARRAR: And would you say your
supplemental filing is in the nature of explanation
of your original as opposed to the thing your members
always object to, supplemental filings that open up a
new --
MR. REPKA: Yes. And that's absolutely true, Judge Farrar. That's exactly what it does.

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

MR. SILVERMAN: I'm sorry. Would you repeat.

JUDGE FARRAR: The question was: Is there supplemental filing, just explanatory to their original, or does it, as companies often do, complaining about the normal interveners that introduces brand-new information.

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

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

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

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

>>JUDGE FARRAR: What you mean by -- bystanders could have come in and said we want to be part of this proceeding?

>>MR. SILVERMAN: I have to refer to the rules, but any potential -- some language like any potential party, potential party, can participate in that proceeding as long as they're complying with the LSN obligations. That was -- standing is not a prerequisite for participation in the PAPO proceeding, and I can, with a moment or two, find the regulations that specify that.

So that would have been inappropriate for us to raise that at that point. We're now at the contention admissibility stage, which is an intervene stage, and it is a relevant consideration.

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

>>MR. SILVERMAN: Well, I guess I'd want to
know more about that. I don't believe they've
alleged that as a basis for discretionary
intervention. So I'm not sure what the -- how that
would support a discretionary intervention argument.
It's not an argument they've made, to the best of my
knowledge.

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

>>MR. SILVERMAN: Yes.

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

>>MR. SILVERMAN: Our view on the question
of their ability to contribute to the development of a sound record is that they do allege that they have direct substantive expertise in a very general way. There is no doubt that the utilities are cognizant and very experienced with the spent fuel handling, but their pleadings don't really specifically -- they don't identify specific experts upon which they would rely, which is one of the factors to be considered, at the evidentiary hearing, or their qualifications.

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

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

>>MR. REPKA: That sounds right.
JUDGE RYERSON: And we are faced with 328 or 329 proposed contentions, which means, if my math is correct, that their presence would appear to complicate the proceeding by a factor of 2.8 percent or thereabouts.

I mean, is that something that is a relevant consideration for discretionary intervention? It doesn't sound like, you know, we have most -- we have 12 petitioners here, most of whom have automatic standing. So we're not -- if we were to allow discretionary standing, we don't open up the flood gates potentially, and we don't seem to dramatically complicate what is already a rather complicated proceeding.

Is that something we should consider or is that an improper consideration?

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

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

What we have here is largely a set of
contentions asserting that the Department of Energy's
analyses are overly conservative and that -- and I
want to stress the word in the standard that applies
here, "inappropriately" broaden this proceeding.

What we would be doing, we would be having
the NRC, you the licensing board, adjudicating
whether the Department was too conservative. That's
a very unusual situation, maybe unprecedented, I'm
not sure, clearly unusual. It's, in our view,
inappropriate.

It would result in wholly different
testimony from the Department of Energy and other
parties than we would need to provide in response to
other petitioners. We would now not only have to
show that we were sufficiently safe and we meet the
regulations, but now we have to show that we're not
too conservative in order to rebut these contentions.

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

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

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

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

>>MR. SILVERMAN: That will be fine.

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

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

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

>>MR. SILVERMAN: Spent fuel.

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

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

>>JUDGE FARRAR: Well, just my seat-of-the-pants layman's knowledge, if there's anybody in the world who has access to talk to you all, it's NEI. The fact that they're here petitioning for us -- petitioning to have an adjudication in front of us, can't we draw from that they believe that you've not been responsive? I mean, I can't imagine that all these years, while DOE has been putting this application together, that their members have not been talking to you.

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

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

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

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

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

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

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

But when you look behind the surface, there
were allegations that that company was, in fact, involved in civil litigation because of their deficient -- allegedly deficient performance, and there was some suggestion that rather than trying to just help the NRC solve this problem, they were in there to get a leg up on their civil litigation by establishing what a great -- establishing in front of us what a great job they had done.

And, in fact, that would enhance their reputation, which was in some jeopardy in the business community. That's the premise of my question.

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

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

>>MR. SILVERMAN: I'd have to go back and re-check North Anna, frankly. I accept your description of it with respect to potential other motives of Sun Ship Building.

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

It's based not upon radiological injury. It's not linked to radiological injury as its pled. It's based upon the cost of having to continue to store the fuel.

It's based upon the contributions to the Nuclear Waste Fund, and that is no different, in our view, than the other economic injury cases that we've seen, which have resulted in a determination of a lack of standing under the Atomic Energy Act.

>>JUDGE FARRAR: You ever read District Court and Court of Appeals' opinions that start out, this case comes -- you know, this case arises under the Voting Rights Act or this case arises under the Federal Tort Claims Act, write that first sentence of our opinion for me. This case arises under?

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

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

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

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

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

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

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

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

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

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

And, in fact, as I think you know and we
cited in our briefs, when the Commission modified its
Part Two regulations in 1989 to implement some of the
NWPA provisions, they even said -- they anticipated,
quote, that the industry's interest in the high-level
waste is economic, which led them to conclude that
maybe their best option would be discretionary
intervention.
I do not think it's correct to say -- to consider the NWPA as a monolithic statute, where it affords standing in one form; it does not necessarily afford standing in another form. And the NEI case specifies that a Board or a court should consider the specific provisions of the statute under which the litigation is occurring and not look at the statute as a whole, in making that judgment.

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

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

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

>>MR. REPKA: Okay. A couple of points I wanted to respond to. First, I want to make it very clear that Nuclear Energy Institute's position in this proceeding is licensing of the project. And we support licensing of the project, and I think that puts us in a little different light, in terms of our contentions, but we'll get to that.
Mr. Silverman picks on one aspect of the contention, and that's the assertion that the application is, in some respects, overconservative. Overconservative.

Our contentions do a lot of things, and that's one of the things it does say, but I think -- and Mr. Silverman claims that is unprecedented. And I don't think that really is true. I think that the flip side of over-conservatism is compliance and safety margin.

And one of the things we would seek to establish is that there is sufficient safety margin. It will be help to establish compliance, and I think licensees or applicants make that argument all of the time, and that will be not unduly delay the proceeding. I think that -- as we said in our papers, I think will actually support and, in some respects, expedite the proceeding. So I think that picking on the contentions related to over-conservatism in the context of standing is misplaced.

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

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

Well, again, I think the Nuclear Waste Policy Act has many aspects to it, and I think that, as we've pointed out repeatedly, one of the aspects and purposes of the Nuclear Waste Policy Act is the citing of our repository, the licensing process for a repository, the funding mechanism for a repository. And all of that puts our participation well within that zone of interest. And we're not relying on precisely the same basis that we might -- we might rely for standing in waste litigation in the district
JUDGE FARRAR: If we found you had no standing as of right, but had discretionary standing, what -- we would then -- would we still have to look at your contentions to see which ones come in?

MR. REPKA: I believe that that would be true; that discretionary standing would not eliminate the admissible contention standard. However, again, we are a supporter of the project. And I think that puts our role in a slightly different perspective. I think we have proposed contentions to try to meet the contention standard.

But again, I think we would be looking to participate in a way that would support the project where we have that expertise, and based upon discretionary standing or any other kind of standing.

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

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

    >>MR. REPKA:  I think roving commissioners
is probably too broad a characterization. I mean, I
think we would be looking to where we appropriately
join other contentions, or we would do so, or adopt
contentions of other parties or appropriately seek
leave to participate on other issues where we felt we
could do that. But I think that's probably getting
ahead of ourselves. At this point we don't know what
the contentions are.

    Again, it's a little bit of a unique
position for an entity that would support the project
because, again, we're filing a pleading at a point
where we don't know what all the other contentions
are.

    >>JUDGE FARRAR:  Let me interrupt you
there, Mr. Silverman. We've never had a problem in
our decisions -- I mean, there's nothing wrong with
someone wanting to intervene to support a project.
For example, the tribe came in one segment of the --
the ruling segment of the tribe came in the private
fuel storage proceeding to support the project. So
there's nothing wrong with coming in to support the
project.
>>MR. SILVERMAN: I'm not aware of a general principle of law that says that can't be done.

>>JUDGE RYERSON: I'd like to hear if there's a view of the NRC staff on this issue. Ms. Young, does the staff have a position on these points?

MS. YOUNG: Judge Ryerson, Daniel Fruchter will be addressing questions on NEI standing.

>>JUDGE RYERSON: Okay.

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

>>JUDGE RYERSON: Yeah. I think, just as a practical matter, we'd like to wrap this up in a couple of minutes. And if you have -- if, having heard the arguments, there's some points you'd like to make, please do. If the points have been covered, there's no need to speak.

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

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

With regard to --

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

>>MR. FRUCHTER: That's correct.

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

>>MR. FRUCHTER: I believe that that's what they would say. As the Commission's decision in Palisades filed last year held, though, the representational standing of unions to represent their members should not be assumed. Like anyone else, they have the obligation to come forward and show that they're authorized to represent their members.

With regard to the issue of standing --

>>JUDGE BARNETT: I'm a little confused. So your argument is that only individuals can have radiological injuries or that organizations can, but
that they are not -- they haven't shown that they're representing the proper organization? Which one is it?

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

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

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

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

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

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

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

While it's certainly true that this case
was arising under the NWPA, it's arising under a
particular provision that calls for the NRC to make a
determination as to whether the application is
consistent with public health and safety. And
there's no purpose in that provision to protect the
economic interests of NEI.

So looking at the particular provision of
NWPA under which the proceeding is taking place, the
staff is of the view that that also does not protect
economic interests, which may be unlike some of the
provisions having to do with standard contracts or
ground water standards.
>>JUDGE RYERSON:  Does the staff have a position on NEI's summary of the standard for our considering new affidavits in the reply?

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

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

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

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

>>MR. FRUCHTER: Exactly, Your Honor.

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

>>MR. FRUCHTER: Thank you.

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

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

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

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

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

>>MR. FRUCHTER: If your question is whether the staff can show the kind of radiological injury that would give standing in an NRC proceeding, I think Your Honor is exactly correct. I don't think the staff would be radiologically injured by the outcome of the --

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

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

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

>>MR. FRUCHTER: I would -- the staff is
not of the position that NEI has no interest in the
outcome of the proceeding, but that the interest that
they have is economic, and, therefore, not protected
by the Atomic Energy Act and NEPA. It is not
connected to radiological --

>>JUDGE FARRAR: It is protected by the
Nuclear Waste Policy Act which your brief starts out
by saying it's what this case is about.
MR. FRUCHTER: It is protected, arguably, by certain portions of the Nuclear Waste Policy Act, but not by the -- not by the provision under which this proceeding is taking place.

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

MR. FRUCHTER: That's correct, Your Honor.

JUDGE RYERSON: Why?

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

In favor of discretionary intervention is the extent to which the Petitioner is going to assist in developing a sound record.

The staff is of the view that, while NEI has made a general assertion that it has expertise, and certainly the staff does not disagree with that -- well, NEI has asserted that they have general expertise that will be brought to bear on the proceeding. They have not showed, however, that they would assist in developing a sound record on the issues that are properly under consideration in the proceedings.
JUDGE FARRAR: How could they do that since there are 300 contentions, theoretically an issue, and no one will know until May 11th or thereafter which issues, if any, are coming in. So how could they have told us in their petitions some months ago specifically which experts they'd bring to bear on which issues?

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

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

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

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

>>MR. FRUCHTER: Well, in terms of proffered contentions, again, we don't know what the numerical extent would be in terms of admitted contentions. But, as Your Honor pointed out, there's, you know, over 300 proffered contentions, and it's not clear to what extent they would be participating on those other contentions, if they were admitted.

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

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

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

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

>>JUDGE BARNETT: Well, in effect, that could be the outcome, right, because if they're -- if they were raising -- if they were making the same argument that the design wasn't conservative enough, then it wouldn't be broadening the proceedings, in your view; is that correct? It wouldn't be appreciably broadening the proceedings in your view?

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

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

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

>>JUDGE BARNETT: What would make their contentions then -- what is it about their contentions that make them so that they would inappropriately broaden the proceedings? What is it -- what's the issue, the general issue about that?

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

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

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

As I read that case, that decision, the
postal workers, Supreme Court held, had no cognizable
interest or standing in the overarching issue of how
the postal service is going to be run for the benefit
of the country. And they came -- but they were
trying to raise issues under that overarching
statute, even though their standing came only from
all these much later provisions that said how the
postal service should treat its workers.
Isn't that the flip side of what we have here and therefore, not particularly helpful. What we have here is the overarching statute these people are arguing they have a right under, and maybe not so much their economic interest under the Atomic Energy Act and NEPA. So I'm wondering if the case decision you cite is particularly helpful to us.

>>MR. MAL SCH: Judge Farrar, we think the case is actually quite helpful and is pretty close to analogous to the situation we have here.

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

And in that case, the union was challenging regulations that allowed -- based on standing, exclusively upon the 1970 Reorganization Act, but its actual claims in the case were all based upon the private express statutes.

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

And I think that the Postal Reorganization Act stands in relation to the private express statutes, just like the NWPA stands in relation to the Atomic Energy Act, because what was interesting is that the Reorganization Act actually reenacted a number of provisions of the private express statutes. And yet the court nevertheless said that since there was no effort to change the private express statutes, that you couldn't sweep those up into the zone of interest.

And similarly here, there is no claim by NEI in any of its contentions that there was any violation of a Nuclear Waste Policy Act. And the Nuclear Waste Policy Act does say that you apply the Atomic Energy Act standards. But that doesn't sweep up, within the interest protected, all of the Atomic Energy Act.

And as we pointed out in our papers, we think that NEI's interests are solely economic and beyond the zone protected by NEPA and the Atomic Energy Act, which are the only two statutes upon which they base their contentions. So we think the case is directly on point.

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

>>MR. REPKA: Yes, Judge Farrar. In fact, when we're looking at standing under the Nuclear Waste Policy Act, we're looking at standing under only one statute, the Nuclear Waste Policy Act. So the case -- the Air Courier case is completely in opposite for that argument.

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

>>JUDGE FARRAR: Is this case different from almost anything else, in that here you have, in effect an act of Congress that says we want you to do this project?

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

Does that make this case different and your
standing different because -- because you are not
only within the zone of interests, are your members
the real party in interest under that --

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

Mr. Malsch is focusing on whether or not
there's an alleged violation of the Nuclear Waste
Policy Act, and I don't think that's the correct
question. I don't think whether or not there's a
violation is at all relevant. The point is the
statute calls for a specific citing and funding and
licensing of a specific project which we support.

At the very beginning of this conference,
Judge Ryerson talked about the purpose today was to
identify interested stakeholders. Well, I can't
imagine a more interested stakeholder than the
Nuclear Energy Institute.

Yes, there are many other interested stakeholders, and -- but none more so than the members of NEI. So I think the answer to your question is, yes, the Nuclear Waste Policy Act is a direct mandate from Congress and the Nuclear Energy Institute's interest is well within that zone of interest.

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

(A recess was taken)

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

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

My understanding, we now have audio on the web stream, and we'll have both video -- should have both video and audio this afternoon. For anyone who's interested, it's also my understanding, the proceeding will be on the web stream site for about 90 days or so after the proceeding. So it goes.
Okay. The next general area we want to cover deals with environmental contentions. And as all of the participants are certainly aware, there's kind of a long and complicated history to the treatment of environmental contentions. The National Waste Policy Act contemplated that the Nuclear Regulatory Commission would not take a fresh look at environmental issues, as it would normally do in a situation like this, but that the NRC would adopt, to the extent practicable, the environmental documents prepared in the first instance by the Department of Energy, the applicant. And recognizing that, the Commission adopted rules unique to environmental contentions that specified the circumstances under which it would be appropriate to adopt NEI -- or DOE's environmental documents.

And I won't get too -- into too long a history of what happened after that, but there was -- things didn't develop as originally contemplated. There was a decision in the DC Circuit in which it was represented to the court that there would certainly be some level of opportunity for petitioners to present environmental issues to the Board or to the Commission in this proceeding.

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

Let me begin with 2 CFR 51.109(a)(2).

That's the original regulation concerning environmental contentions, and it says that, after the adoption decision by the staff or by the Commission, any party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement as it may have been supplemented shall file a contention to that effect after publication with the notice of hearing in the federal register, and it proceeds to say, "Such contention must be accompanied by one or more affidavits."

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

>>MR. REPKA: Judge Ryerson?
>>JUDGE RYERSON: Yes.

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

>>JUDGE RYERSON: Certainly, Mr. Repka.

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

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

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

>>JUDGE RYERSON: Okay. Excuse me. Yeah. Again, I should remind everyone to please, please for the benefit of the reporter, announce your name, if I haven't called you by name.
MS. SILVIA: That was Andrea Silvia for the NRC staff.

JUDGE RYERSON: Thank you.

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

JUDGE RYERSON: Nevada have a position on that?

MR. MALSCHE: John Malsch, State of Nevada. We would agree with NEI, that the only exception would be for a legal issue.

JUDGE RYERSON: Okay. All of Nevada's environmental contentions did have an affidavit; didn't they?

MR. MALSCHE: Correct. The only one we filed that was a purely legal issue was NEPA 17.

JUDGE RYERSON: And that does not have an
I'll be checking.

Pardon?

I'll be checking. I'll get you an answer.

Anyone else have a view on whether the regulation has to be read literally or whether there's an exception?

Okay. Nye County.

Your Honor, Robert Anderson for Nye County. Your Honor, we included in an affidavit with our NEPA contention. However, we agree with NEI that it is possible to articulate the NEPA contention based solely on the law and the record, as it stands, to articulate an omission that would be required to be included in the considerations under NEPA.

Okay. And would you agree that that's an exception that the board would have to find that's really inconsistent with the regulation on its face? There's no exception in the regulation, correct?

That's correct.

Judge Ryerson, may I be heard on that question? This is David Repka, NEI.
>>JUDGE RYERSON: Yes, Mr. Repka.

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

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

>>JUDGE RYERSON: Okay. Clark County.

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

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

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

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

>>MR. JAMES: No.

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

There are a couple of criteria, again, staying in 51.109, and I believe that only one is potentially relevant in these circumstances, and that would be that the contention -- or it refers actually to the affidavit, I believe -- present significant and substantial new information or new considerations that would render the environmental impact statement inadequate.

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

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

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

>>MR. REPKA: Dave Repka for NEI.

>>JUDGE RYERSON: Yes.

>>MR. REPKA: Not to spoil the agreement. I would just add the qualifier, as read in accordance with the NEI versus EPA case. I think that case provides significant perspective on what the new information standard means.

>>JUDGE RYERSON: Okay.

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

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

>>MR. SCHMUTZ: Mr. Schmutz. I'm sorry. Actually it doesn't have anything about what new information means. It talks about new considerations. But as I understand Your Honor's
point, we haven't gotten to that point. We're
talking about what the reg provides on its face, and
it is, as you've read it, it requires as an exception
to adoption. And adoption, I would point out, is
essentially presumed unless one of two things occur.
For this proceeding it's new information or
new considerations that are significant or
substantial.

>>JUDGE RYERSON: Okay. Now, we go from
there to the notice of hearing, and the notice of
hearing says under 10 CFR 51.109(c), the presiding
officer should treat as a cognizable new
consideration an attack on the Yucca Mountain
environmental impact statements based on significant
and substantial information that, if true, would
render the statements inadequate.
In other words, I think the Commission has
dropped "new" out of the test. Does anyone disagree
with that? New is gone? If it's significant and
substantial, it is deemed to be new. Is that a
reading that is shared by everyone here?
All right. We do -- we do have agreement.
So when you put -- when you put these provisions
together, isn't it the case that the test comes down
to whether -- well, I should state, there is a
further condition that we apply, to the extent possible. The reopening provisions under the Commission's regulations, and we'll get to that in a moment.

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

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

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

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

>>MR. FRUCHTER: I believe that's correct.
JUDGE RYERSON: But it does require us to interpret all of this in light of the NEI case, specifically?

MR. FRUCHTER: Right.

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

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

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

JUDGE RYERSON: Right. And we actually have broken out the transportation-related environmental contentions as a separate issue that we'll get to after we try to figure out what's required for environmental contentions.
MR. SCHMUTZ: I didn't mean to jump in there.

JUDGE RYERSON: Quite all right.

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

Anybody disagree that we are required to apply the reopening criteria to the extent possible?

Great. Or at least we have agreement again.


JUDGE RYERSON: Mr. Lawrence.

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

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

MR. LAWRENCE: I just wanted to make that clear.

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

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

    The second criteria is the motion must
address a significant safety or environmental issue,
but we're already there because, under 109 and the
Commission's notice of hearing, there already has to
be a significant or substantial environmental issue.
So that seems redundant to me at least, as well.

    Does anybody else see that as not a
redundant requirement?

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

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

Now, the National Environmental Policy Act,
which is the principal statute we're dealing here
with, is entirely a procedural statute. In other
words, it requires disclosure or consideration and
disclosure of environmental consequences of
significant federal action, but it doesn't require
one result or another. In other words, for -- in the
licensing process, provided an agency adequately
considers and discloses environmental considerations,
basically, the agency can do pretty much what it
wants. It can consider other factors that it deems
more important. It may make a decision that national
security interests trump environmental
considerations, can do any number of things, as long
as it doesn't act arbitrarily and capriciously.

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

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

>>MS. SILVIA: This is Andrea Silvia for the NRC staff, and we agree with Your Honor that the materially different result would essentially be that the EIS could not be adopted by the NRC staff and it would require supplementation, and that goes to the same standard that the alleged deficiency or additional information would result in a seriously different picture of the environmental landscape.

>>JUDGE RYERSON: Thank you. NEI?
MR. REPKA: Yeah, this is David Repka.

We agree with your characterization of the issue, Judge Ryerson.

JUDGE RYERSON: Okay. And the Department of Energy?

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

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

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

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

And there is a presumption in this reg, as well as in the NWPA, that adoption is going to be what occurs, absent, excuse me, to exception. So it's the adoption decision we're looking at, and we think, just as the staff said perfectly well, they would have to come up with some sort of environmental contention that it was sufficiently serious to require the EIS not to be adoptable unless supplemented.
JUDGE FARRAR: Or just amended in some fashion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  MS. HOUCK: Yes. I apologize.

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

  >>MR. LIST: Judge Ryerson, thank you very much. Bob List on behalf of the four counties. We would agree, and by way of example, I would simply say that, in our judgment, the EIS documents, NEPA documents, fail to set forth a very significant and substantial area and to demonstrate -- and we believe that a -- had it been done properly, that it would have shown, in our instance, in the case of a couple
of our contentions, impacts on traffic, on highways, on first responder capabilities. And all of those matters should have been a part of the EIS, so that procedurally the public and interested individuals and entities would have had notice of it and an opportunity to participate.

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

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

California, yes, Mr. --

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

And I just want to remind the Board that NRC staff and DOE attack our petition, in very large, part on the idea that each of those factors has to be supported by evidence in an affidavit. So while we completely agree that those -- that those factors would operate the way that you described, we disagree that they are actually a threshold evidentiary pleading requirement.
Also, the staff just articulated a standard that there would be a -- that the NEPA documents are -- can't be adopted unless there's a -- if there's a seriously different picture of the environment. And that's a -- that's a kind of standard that might be appropriate for a -- a court to look at reopening an administrative process. But that's not the situation we find ourselves in here. And I think, under the regulations in the NEI case, all that needs -- that the -- that the materially different outcome is just showing that the DOE's NEPA documents are inadequate under NEPA and, therefore, can't be adopted.

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

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

>>JUDGE RYERSON: Okay. Thank you. We're happy to hear from anyone else. You don't all need to say you agree with us. So if you do, we'll move on to another point.

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

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

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

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

>>>JUDGE RYERSON: Yes, certainly.

>>>MR. SCHMUTZ: 2.326 imposes some additional requirements that we believe must be in the affidavit. We're not suggesting that there needs to be two affidavits. There's one affidavit. But 2.326 also provides that the affidavit must be given
by a competent individual with knowledge of the facts alleged or by experts in disciplines appropriate to this issues raised. And an affidavit providing expert opinion signed by someone who has not demonstrated competency has not submitted an appropriate affidavit.

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

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

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

>>JUDGE FARRAR: Are you making that argument only under this regulation we're talking about now or are you making that as a broader argument as to affidavits generally in support of contentions?

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

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

>>MR. SCHMUTZ: No.

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

>>MR. SCHMUTZ: No, Your Honor. Not all.

But I do think in this case we have a regulation that
makes a pointed statement about competency, and all
we're asking for you to look at the -- you know, as
you review the contentions, you'll look at the
affidavits, you'll look at the statement of
credentials, and you'll say, okay, does this sound
like the kind of person who can give this kind of
opinion testimony. It's a threshold question, but it
is one that has to be addressed.

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

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

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

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

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

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

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

>>MR. SCHMUTZ: Under 2.309.

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

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

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

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

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

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

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

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

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

>>MR. SCHMUTZ: Absolutely. This is all on
the paper. This is just as you review the contention
as you would under -- what I do know about 2.309 is
there's a materiality requirement for all
contentions, and you're going to look at all
contentions and you're going to make judgments as to
whether or not these contentions are of any
consequence or the kind of things that we ought to be
hearing in this proceeding; are they important enough
to merit litigation. We're not saying a whole lot
different with regard to the affidavits that have to
be submitted in support of environmental contentions.
They have to provide -- although we are saying that
there's a slightly higher -- somewhat higher burden
in terms of supporting those with evidence.

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

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

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


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

>>MR. SCHMUTZ: Yes; correct.

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

JUDGE RYERSON: I guess the question I have is: We are now at the contention admissibility phase. We are not making determinations on the merits of any contentions, and since there is an affidavit requirement under 51.109, we will -- we will be looking at affidavits for compliance with 51.109 in the context of not making merit space determinations. And I'm just -- I'm not sure I understand how different your slightly tougher standard would be for affidavits under the companion section that we're talking about, you know, and how, as a practical matter, we would make that
determination for purposes of either admitting or not admitting a particular environmental contention.

>>MR. SCHMUTZ: Well, for example,

Your Honor, as we looked at the environmental contentions in the affidavits that were submitted, we had, in many cases, problems with the competency of the individuals providing those affidavits. We had people -- transportation people talking about radiologic consequences and the like. We didn't think that was appropriate. So certainly with regard to the competency of the individual, which was set out there, I think that is something the Board has to take into account, has to look at the competency in every instance.

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

>>MR. SCHMUTZ: I don't know that that's so. I know it is so under 2.326, though. And the Commission has said -- and we had some problems with some of the submissions of the experts, some of the materials that they were relying on and offering as evidence in support of their contentions. And we think that you have to look at that, at those materials that are being submitted, and determine whether or not those materials are appropriate to
support the contention. There's no -- you know, there were experts that simply threw out large numbers of documents that they didn't author without any demonstration that they were even adopting or had done even any study to adopt the positions taken in those papers. Those would be questionable, of questionable admissibility.

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

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

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

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

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

>>MR. LAWRENCE: State of Nevada, John Lawrence.
>>JUDGE RYERSON: Mr. Lawrence.

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

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

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

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

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

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

But the notion that they purely go to our role seems to me maybe inconsistent with the statement, for example, that, in the affidavits under the reopening vision, it says each of the criteria must be addressed separately with a specific explanation of why it has been met. I mean, that is
a requirement not on us. But if it's applicable, it's clearly a requirement on a petitioner, because it goes to how the affidavit is framed.

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

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

However, I don't believe there's any requirement to do that now at this stage, the admissibility stage. I don't believe there's a requirement to resolve this dispute. You're simply trying to find out whether the contention has been pled properly, comply with the requirements, and contain sufficient information to reach conclusions that, if true, the EIS would have to be modified in
some manner.

>>JUDGE RYERSON: All right. Thank you.

We will turn shortly to transportation-related environmental contentions, but first let me say, Judge Farrar, do you have any questions? Judge Barnett?

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

>>MS. SILVIA: This is Andrea Silvia for the NRC staff. I just would like to add that, in the Commission's notice of hearing, they stated that the 51.109 requirements should be applied consistent with NEI versus EPA. The Commission's denial of Nevada's petition to amend Section 51.109 and OGP's subsequent letter clarifying the Commission's denial, and in that letter clarifying the Commission's denial of Nevada's rule-making petition, it specifically states that the higher threshold for evidence needed to support contentions in 51.109(a)2 remains in effect, which just further supports the position that at the contention admissibility stage, the higher requirement's that this is the appropriate time.

>>JUDGE FARRAR: But didn't the Commission say to apply that consistent with the NEI decision?
>>MS. SILVIA: Correct.

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

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

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

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

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

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

I think -- I think it may have been California's filing that suggested that without transportation of waste to the repository that you would just have a large expensive hole in the ground at Yucca Mountain. But the two do seem somewhat related.

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

>>MR. FRUCHTER: Dan Fruchter for the NRC staff. Yes is the short answer to your question. I think that your question involved whether the NRC must analyze all environmental impacts. I would modify that slightly and say that the NRC has to analyze, and, again, in this very context-specific way, all environmental impacts that are reasonably foreseeable and also that are approximately or legally caused by the NRC's proposed action, which is licensing the repository.

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

>>MR. FRUCHTER: That's correct.

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

>>MR. REPKA: Yes. This is David Repka for NEI. We agree with that formulation that the staff just stated that NRC does have responsibility under NEPA for reasonably foreseeable effects that are proximately related to the licensing action, and that could, in fact, extend to activities and actions and
effects that are in areas unregulated by the NRC. So we agree with that.

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

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

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

We don't believe that, however, the NRC can look behind the EIS prepared by the Department of Energy, and we have some arguments in support of that, which I hope we get to that.

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

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

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

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

>>MR. SCHMUTZ: EIS, yes.

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

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

>>JUDGE FARRAR: Which one?

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

>>JUDGE FARRAR: So if the NRC staff says those are good, you just fold them in, and you would say people can't file contentions at all that would challenge that?

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

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

>>JUDGE RYERSON: Let me come back to you in just a moment on that issue, Mr. Schmutz. I have a feeling that on this side of the room I will not get any disagreement. So let me just see if I do.

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

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

>>MR. SCHMUTZ: Through the DOE procedures.

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

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

I think the NEI decision that we're talking about, if you take a look at it, they actually distinguish between transportation proceedings before the Department of Energy and essentially repository proceedings before the NRC. It's explicitly stated in there. So the DC Circuit team and NEI seem to understand that distinction as well.
>>JUDGE FARRAR: Let me put to you a position that I'm not sure if it's been raised by the parties or not.

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

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

>>JUDGE RYERSON: But why? Because we go back to the notion that -- put aside DOE. If the Nuclear Waste Policy Act didn't require the NRC to adopt DOE's environmental documents to the extent
practicable, then each agency would have an independent responsibility under NEPA to examine the environmental consequences of this action.

And the NRC's responsibility would extend, would it not, to both the repository itself and the related transportation of nuclear waste? So we start with some level of responsibility there that has been cut back by the act and by the implementing regulations but not totally eliminated.

>>MR. SCHMUTZ: I think there's substantial case law that would provide that where the federal agency or two federal agencies are involved -- and I'm going to call it an overall project, and that's not quite accurate, and they each have separate independent jurisdiction over portions of it, and particularly where one of the federal agencies, as is the case with the Department of Energy, has an overall responsibility, has to do environmental impact statement of the whole, and the other federal agency, in this case the NRC, has environmental responsibility and jurisdiction over only a portion of that project, that that lesser agency has no jurisdiction and has no responsibilities under NEPA to consider the environmental impact statements being prepared by another federal agency.
And I would point, for example, there's a case out of the Ninth Circuit called California Trout v. Schaefer, a Ninth Circuit decision. I point it out because I noted that the State of California pointed to a case in another Ninth Circuit decision called Thomas v. Peterson, a case in which the very same agency segmented two portions of an overall project. We all know that that's not appropriate.

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

>>JUDGE FARRAR: Was that a case where the other agency had hearing and adjudicatory powers like we do?

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

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

>>> MR. SCHMUTZ: If you belief that exclusive jurisdiction is in the court, that exclusive means exclusive. And if that situation occurred with regard to transportation -- and I'm going to limit it to transportation. --

>>> JUDGE FARRAR: Right.

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

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

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

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

>>MR. SCHMUTZ: I guess what I'm saying is that -- well, if that -- if that case occurred and if there was a significant change that was going to occur and if it affected the -- your review of cumulative impact, for example, I know the staff takes that, that may be so. But that's the route. It is not to be litigated in this proceeding.

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

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

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

>>MR. MAL SCH: Let me address first -- I'm Martin Malsch from Nevada -- DOE's argument from this morning.

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

Second, putting aside res judicata and collateral estoppel issues, which Mr. Lawrence can address, I just wanted to mention that the Nuclear Waste Policy Act was enacted against a backdrop in which the Commission was very clear, even where another federal agency was an applicant, that the Commission itself would exercise its independent power and do its own environmental impact statement.
For example, in the case of TVA applications for nuclear power plant construction permits, it was the Commission's consistent practice of not deferring to some supposed exclusive jurisdiction under NEPA to the Tennessee Valley Authority but instead of assuming that its role as an independent regulatory agency required it to do its own environmental impact statement.

The principal effect of the Nuclear Waste Policy Act was that Congress understood this was the NRC's practice and modified it only to the extent that, instead of having to write its own statement of an issue, it was allowed under certain circumstances to adopt DOE's.

But that was certainly not in derogation of the requirement under NEPA that the agency's impact statement had to be considered in the agency review process.

And in this case, the agency review process is, in the case of Part 63, the adjudicatory hearing process provided for. So we do get a right to a hearing on NEPA issues, in general, provided we've met appropriate pleading requirements, regardless of other opportunities for judiciary review and regardless of what may have been the practice of the
Bureau of Reclamation in some case in the Ninth Circuit.

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

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

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

>>>JUDGE RYERSON: Including the transportation aspect?
MR. FRUCHTER: The aspects of the transportation analysis that have been adopted.

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

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

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

MR. SCHMUTZ: Yes.

JUDGE RYERSON: -- by reason of that?

MR. SCHMUTZ: Yes. Yes, Your Honor.

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

MR. SCHMUTZ: Correct.

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

>>MR. SCHMUTZ: That follows.

>>JUDGE RYERSON: You follow. Okay.

>>JUDGE FARRAR: Why does that follow?

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

>>JUDGE FARRAR: Right.

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

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

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

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

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

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

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

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

MR. SCHMUTZ: And just to expand one other thing, we are saying that the NEPA responsibilities imposed upon the NRC by NEPA do not extend to transportation. And we've adequately, I think, set it forth in the paper. I'm going to add one other thing. There is an Entergy case, relicensing case, by the Commission which was cited on by California -- I happened to look at it the other night -- in which the Nuclear Regulatory Commission took a position that, where it doesn't have jurisdiction, it can't change the result of a
sister agency's determination, environmental determination, it needn't look at it. It is quite close to this situation. It's an Entergy case involving Wolf Creek. I can give you the citation to it.

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

>>MR. SCHMUTZ: Correct.

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

>>MR. SCHMUTZ: That would be correct.

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

>>MR. SCHMUTZ: I hope what I said was that, at most, the NRC, if it felt it necessary to look at cumulative impacts, would have to accept the DOE's transportation impact statements as they stand, if it felt it necessary to look at cumulative impacts, but not -- I'm not suggesting that I think that legally that's required. I'm just saying I think that's where the staff is coming out. I think
they're looking at it. I'm just saying, if they're
going to do that, you can't look behind those
documents.

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

>>JUDGE RYERSON: Yeah, I mean -- okay.

Let me -- you mentioned Supreme Court, and there is
one case -- I believe you cited it -- the Department
of Transportation versus Public Citizen case. I
suspect this is your area, Mr. Schmutz.

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

>>MR. SCHMUTZ: I'm going to create and say
that that stands for a limited but important
position. The facts of the case, as we all know, are
a bit odd. And so -- but I think --
>>JUDGE RYERSON: We probably all don't know.

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

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

They didn't look at the impact of those trucks entering the United States and, you know, spewing noxious fumes all over the country. They didn't look at the national impact of that. And they didn't do it because they had no jurisdiction over the activity of allowing those trucks into the United States. It was up to the President to do that.
So it's a -- I guess the California trucking case, I suppose I like in kind of saying that's the case we ought to be looking at, because it was two federal agencies, both of whom had environmental responsibilities. But it does stand for the proposition that where one agency doesn't have jurisdiction over an activity and can't change the outcome, NRC -- I mean, in our view, the Nuclear Regulatory Commission can't tell us how to ship -- you know, what kind of shipments we're going to have in New Jersey. We don't believe that that is within their jurisdiction.

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

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

>>JUDGE FARRAR: I thought it said where no federal agency has any jurisdiction, because the President is not subject to NEPA.

>>MR. SCHMUTZ: That's fine.

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

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

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

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

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

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

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

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

>>MR. SCHMUTZ: Probably way too lengthy.

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

>>MR. SCHMUTZ: I think it has the same -- I don't think it stands for any more, Judge Ryerson, than California Trout stands for. I really don't. It's an on-fact situation. But I don't think it stands for any more than that case stands for. And
that case, I think, is on all fours with what we're faced with here.

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

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

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

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

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

>>JUDGE RYERSON: Thank you.

Mr. List.

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

And there are three criteria, as we read
that regulation, which are as follows: That the --
first of all, is the indirect action caused by the
1 direct action? Certainly the repository is the
2 driving factor that would initiate the transportation
3 itself.
4 Secondly, is it further in distance? In
5 other words, is it off-site. Certainly the
6 transportation is.
7 And finally, is it reasonably foreseeable?
8 And certainly the transportation is reasonably
9 foreseeable. It's an integral part of the completion
10 of the fulfillment of the repository.
11 I would point out there are a couple of
12 important cases that directly, I think, support that
13 proposition. The first is Sierra Club versus Marsh,
14 a First Circuit case in 1985 involving the Federal
15 Highway Administration and the Corps of Engineers.
16 And they held in that case, the court did, that the
17 FHA did not meet their NEPA burden because they
18 didn't consider whether agency approved of a --
19 approving of a cargo port and causeway to an island
20 would lead to further industrial development on the
21 island, which was outside their direct jurisdiction.
22 The point of the case was that neither the
23 Corps nor FHA, the Federal Highway Administration,
24 had any ability to regulate or to prevent development
25 on the island that was privately owned and under the
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jurisdiction of the local government. And yet the
court required consideration of that future
environmental impact caused by the action that was
under consideration.

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

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

I'd also point out that, in the Nuclear
Waste Policy Act itself, there were certain EIS
analyses that were excluded from what the Commission
had to take under consideration. For example, they
did not include in those exclusions -- or, rather,
they did include in those exclusions non-geological
alternatives to Yucca Mountain. They could have but
I did not exclude transportation.

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

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

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

And we believe this is a connected action. Actions are connected if under that regulation if they automatically trigger other actions which require or cannot or will not proceed unless the actions are taken previously and simultaneously,
which is our case, and are interdependent parts of a larger action and dependent on the larger action for their justification.

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

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

California, yes.

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

Under the FMSA's statutes, if the trucks met a specified series of criteria, FMSA had no discretion. It had to issue a license. Similarly in the NPDBS case that the counsel just cited, the
Supreme Court said under the Clean Water Act there was a specific set of criteria that, if met, required the issuance of a permit, and that the court could not take Congress' place and add another criterion to that list. There was no discretion in the agency to deny a permit where the criteria were met.

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

As to the exclusive remedy, there is nothing in the Nuclear Waste Policy Act that creates -- that robs the NRC of the ability to look at the environmental documents. Simply because the judicial review is placed in the circuits of appeal, and not in the district court. The intent of Congress is clearly to say that the judicial review will not take place in the district courts. It will take place in the Courts of Appeal. That does
nothing to affect the jurisdiction of the NRC to look
at the decision it is making and the environmental
documents that would support it.

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

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

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

>>JUDGE RYERSON: What you're saying is if
they're wrong on that, if nothing is new and
different, that it should be looked at this point.

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

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

Here that does not fly. The NRC is an
executive -- is part of the executive branch, even if
it is not in the standard administrative organization
under the President. It's part of the executive
branch. It is not part of the judicial branch. It
is a sister agency with equal standing with the DOE,
and is not obligated to give deference to DOE's
determinations.

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

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

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

>>JUDGE FARRAR: Ms. Durbin, I'm under the
view you said about internal state business, in
leaving aside the judiciary, the judiciary always
reviews agencies and says NEPA's just a procedural
statute.
Did I hear, if ever so subtly in what you said, that as far as internal state business is concerned, NEPA, or the state equivalent of NEPA, is not just a procedural statute; that it's a mandate to the executive branch to get it right?

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

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

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

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

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

>>MR. SCHMUTZ: I'm sorry. This is Tom Schmutz. What I am talking about and what DOE is talking about is just the transportation portion of the EISs. We're not talking about what the NRC does or doesn't have to do with the repository SCIS and FDIS, number one.

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

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

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

>>MR. MALSCH: Judge Ryerson, I just would like to make a few brief statements about collateral estoppel and res judicata, since we seem to be the ones primarily on the receiving end of those arguments. And I just want to address them briefly. First of all, for one to even ask the question, there has to be a decision on the merits, and the only conceivable decision on the merits on any NEPA issues involved in this proceeding is the decision of the Court of Appeals and Nevada v. DOE. That's the first point.
The second point is that the standard for review of a reviewing court in that case is arbitrary and capricious. That does not resemble, in any respect, the standard for review that the Commission would apply in adopting the DOE statement. So right away, we have automatically a difficulty in applying any concept of res judicata and collateral estoppel because the ultimate standard of judgment is different before the agency as contrasted with the Court of Appeals.

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

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

>>JUDGE RYERSON: And if there were, is that something that would be more appropriately raised on the merits in the context of an adjudicatory hearing as opposed to a contention
admissibility. It's kind of moot, I guess, could you
say, but none of them are governed by res judicata.

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

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

>>JUDGE RYERSON: All right. Thank you
Mr. Malsch.

>>JUDGE FARRAR: Not to ruin your lunch
hour that's about to come up, but I want -- it's an
item not on the agenda that I want you to address
after lunch. I think we can do it very quickly.
Mr. Malsch or the state said in its safety contention 146, I think it was, that this was essentially a one-step licensing process.

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

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

>>JUDGE RYERSON: Thank you, Judge Farrar. In addition to the issue that Judge Farrar has raised, a principal subject for this afternoon, before we get into the closings that we hope we have time for, will be issues that pertain to the model-based contentions dealing with the total system performance assessment.
I have exactly 12:15. So if we give you the 90 minutes we promised, and as I said this morning, I think you do need that, trying to get lunch in this area and get back through security.

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

>> JUDGE RYERSON: Of course, Judge Farrar.

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

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

(A recess was taken.)

>> JUDGE RYERSON: Please be seated. Okay.

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

>> JUDGE FARRAR: Okay. This is on the general question of pre -- where the contentions have been filed prematurely. I promised Judge Ryerson I'd get it done in two minutes, so please keep your answers short, if you can.

The State of Nevada said in Contention 146 that this was essentially a one-stage licensing process. The key other parties did not challenge that. They may have their own reasons for wishing it was a one-stage licensing process.

The Department of Energy, based on those two sections of Part 2 that I cited to you, do you agree that we're looking at a two-stage license process right now, a construction authorization; and second, the equivalent of an operating license called a use and possession license?

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

>> JUDGE FARRAR: 2.102-1 which says there will be a first pre-hearing conference and a construction authorization phase; and then we could have a first pre-hearing conference at the receive
and possess phase.

So that tells -- and then the second
provision about the next section, 10.22 talks about
the second pre-hearing conference and again mentions
it at two phases. It mentions two, yes, two phases
for a second pre-hearing conference.

>>MR. SILVERMAN: There is -- the
regulations do provide that the Department has to
update the license application, the Construction
Authorization Application to support a license to
posses and use and it's in Part 63.

The precise procedures to follow and
whether there is a right to a hearing, an opportunity
for a hearing and all that, I'm really not prepared
to answer that at this point.

I would say -- because I think that the
regulations aren't entirely clear in that regard.
What I would say is just a couple of things. One is
that I don't believe -- at least the Department has
argued -- and I could be wrong, but I don't recall, a
contention where we've alleged it was filed
prematurely and it's appropriate for a later phase in
the proceedings.

>> JUDGE FARRAR: You haven't said that,
but it's subliminal in some of them that I could see,
gee, maybe this one doesn't get admitted because it's not timely to hear it now, so we'll say to the state or the other parties, nice contention, you've reserved your rights, come back in seven years.

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

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

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

>> JUDGE FARRAR: Are you saying you don't know or you don't want to tell me?

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

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

>> MR. FRUCHTER: I think the -- any
opportunity for a hearing in the subsequent phase would be restricted to consideration of whether the actual construction of the repository was done consistent with the -- any construction authorization that was issued by the NRC.

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

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

>> JUDGE FARRAR: So I take it you are in agreement with the NRC fact sheet that appears on the web under the aegis of the Office of Public Affairs at Page 5 on the light and fact sheet for licensing Yucca Mountain, it says "if construction would be authorized before beginning to operate the facility,
DOE would have to update the application," blah, blah, blah. "This application would also be subject to staff technical review and hearing processes."

>> MR. FRUCHTER: I don't have that fact sheet in front of me, but that sounds right.

>> JUDGE FARRAR: You have no disagreement to that that you want to state today?

>> MR. FRUCHTER: I do not.

>> JUDGE FARRAR: NEI, what do you think?

Another?

>> MR. SILBERG: Judge Farrar, I'm Jay Silberg for NEI. I think it's quite clear that this is a multi-stage process. As the Commission of the Federal Register noticed back in 1999, the report refers to four major decisions: The constructional authorization, license to receive and replace waste, license amendment for permanent closure, and termination of the license.

And Part 63 is pretty clear when it says it distinguishes between the construction authorization in Sections 63.32 among others, and the license and its conditions at 63.42. And then 63.46, where it refers to the license amendment required to make in place high-level wastes retrievable and other factors. And there are clearly differences in these
It's clear that the performance confirmation program that's called for in Part 63 contemplates that there will be a lot of additional information that is developed during construction and, indeed, during operation.

That additional information has to be input into the license. The license has to be amended. At the time of license amendment, as with any other NRC license amendment, there is an opportunity for a hearing. Those details have not yet been worked out.

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

>> MR. SILBERG: Yes. And I think the other important consequence of that is that the showing that one needs to make at the different stages is dependent upon the information. For instance, it is assumed that we will have more information after construction.

So one need not prove everything at the construction authorization phase because there will be further information coming forward during that process.

>> JUDGE FARRAR: Thank you, Mr. Silberg. I appreciate that.
In light of this, Mr. Malsch, is the state claiming to its express view this is essentially -- I know you used the word "essentially" -- essentially a one-step licensing process?

>> MR. MALSCH: Yes, we -- we adhere to that position and let me explain why. The essence of Nevada Safety 146 is that under Part 63 this is essentially a one-step process in -- that is analogous to the combined licensing process under Part 52, which has also been characterized as essentially a one-step process; although it does provide for a further step that takes place and requires approvals before operations.

So there is no doubt under Part 63, that there is a construction authorization stage, which is filed at some point by a stage which involves a proceeding and an opportunity for a hearing on a license to receive and possess.

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

>> MR. MALSCH: We would but the difficult question which the question which Section 146 poses is, is not so much how much -- how many stages there are, but what kind of information Part 63 requires for the first stage. And what we say is that if you
look at 63 and its history, it is quite clear that there cannot be any issuance of a construction authorization without provision in the application at the time of the construction authorization stage of final design information. And then we point out that various reasons for that.

>> JUDGE FARRAR: I don't want to get into the details of the contention. I just want to have this concept in mind, because I think it may have broader applications, this 146 and I wanted to get your views on this.

>> MR. MALSCH: It might -- I just want to make a point, though. It's important on this contention, and maybe a few others also, when the Commission promulgated Part 63, it noted that -- I'm sorry, the contention requirements in Part 2, it noted that there would be such a thing as legal contentions. Nevada Safety 146 is expressly designated as a legal contention and the preamble to the contention rule in 89 provides specifically that legal contentions would be admitted and then decided on the basis -- decided later on the basis of briefing an argument; and this is one example where we would anticipate being given the opportunity after the contention is admitted to fully brief and argue
the point.

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

Okay. Thank you. Thank you, Mr. Chairman.

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

>> MR. SILVERMAN: Your Honor, I apologize.

Did Judge Farrar want us to address the three snappy
answers --

>> JUDGE FARRAR: That's another thing that
we're going to move toward -- what Judge Ryerson is
about to tell you -- and then we'll do that after
that.

>> MR. SILVERMAN: Fine, thank you, I'm
sorry to interrupt.

>> JUDGE RYERSON: No problem. So we'll
deal with the model now -- the model base
contentions, and then address Judge Farrar's other
points.

Mr. Silverman, Part 63 requires a
performance assessment. And I guess my question is, does it -- does it not require a performance assessment that demonstrates more than simply compliance with dose standards?

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

Is that question clear?

>> MR. SILVERMAN: I think it is clear. And I think that you could be referring to the pre-closure or the postclosure requirement where there is a dose standard in each case. And the answer is, yes, it does require more.

I consider those regulations, I think the ones that you are referring to, I like to call them the process regulations, how you do it, how you get to the conclusion.

So, yes, they do require more. There are -- there is language in the rule that tells you how to do the total system performance assessment for postclosure and the pre-closure analysis.

>> JUDGE BARNETT: Can I follow up to that?

Can I follow up that?
So, for the -- we're talking about the post
performance -- total performance assessment, we're
talking about the total system performance
assessment, the postclosure assessment?

>> MR. SILVERMAN: Yes.

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

>> MR. SILVERMAN: Our view is that Nevada
does need to demonstrate that the allegations of
errors and efficiencies in the TSPA area do
necessitate a demonstration of an exceedence of the
mean dose limits and that is derived from the
materiality requirement which specifies that the
issue must make a difference in the outcome of the
proceeding.

And what I would say about those process
regulations is they are very general with intent and
there is a reason for those. And the reasons
expressed in the regulations which is the difficulty
of predicting performance out many, many thousands of
years, and they do provide a considerable amount of
flexibility to the applicant in determining -- not
complete flexibility as Nevada has alleged, we argue, that is not the case but they do provide a substantial amount of flexibility for engineering judgment, scientific judgment, to determine -- to flush out the analysis.

So, simply alleging that there is some uncertainty that we didn't consider, simply alleging that there is an error of some sort or an omission or a use of older data or something is not -- does not demonstrate materiality. It doesn't even demonstrate that the process regulation has been violated because to me, you have to show at a minimum that the integrity of the analysis is violated in some way.

But our position on TSPA is, yes, on materiality purposes where they are alleging this could impact the results of the TSPA, that they do need to show -- to make some showing that it could affect the mean dose. And I'm prepared at the appropriate time to discuss the notion of how difficult that would be for them, whether that's within the means of the State of Nevada or others.

I don't think you asked me that yet.

>> JUDGE RYERSON: I think that's correct.

Well, we can perhaps get to that later.

>> JUDGE BARNETT: Can I follow up?
>> JUDGE RYERSON: Sure.

>> JUDGE BARNETT: So would you argue then that DOE does not have a duty to have a defensible and reasonable set of parameters or that Nevada couldn't attack the reasonableness of DOE's parameters using the TSPA model without re-running the model by using a different set of parameters? Would that be particularly off-base for Nevada to contend?

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

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

Would that be a reasonable contention without having to run the model again with a different set of parameters that they felt was more reasonable?

>> MR. SILVERMAN: It would not. We don't think they'd meet their burden merely by alleging that there is some other data that should be used or some uncertainty we didn't consider. But we don't believe they need to re-run the model entirely.

We agree with the State of Nevada that it would not be practical for them to do the multiple
thousands of runs of different elements of code --
computer code that the state - that the Department of
Energy did. But we think that they had a significant
opportunity to do more than they did. They were
required to do more. They acknowledge they could
have done more, but they failed to do that.
>> JUDGE BARNETT: Okay.

But -- so -- you don't think they would
need to do that on every single contention; is that
correct?
>> MR. SILVERMAN: Our view is to support a
contention -- let's take TSPA, for example, which
alleges any typical sort of -- any error or
deficiency in that analysis; that they would need to
provide some basis for concluding it would affect the
outcome and it would affect the ultimate result.
They do not need to do that by re-running or
replicating in its entirety, the TSPA.

They've acknowledged, first of all, the
Department has given them the tools to run the TSPA,
has done training on how to run the TSPA, has worked
with them to make sure it was operational in their
systems.

Their expert, Dr. Thorne has stated he had
the ability to run selected runs at a minimum.
And we're not suggesting a full run. What we're saying is when you have a contention and you are providing -- proposing a contention to the Licensing Board, it's incumbent upon the State of Nevada with those tools that they had, to do some selective analysis, to do -- run a limited set, focusing on the issue they think is material, whether it's a corrosion analysis or an infiltration analysis.

Do some analysis using the model that's been provided to you with the experts who purportedly are qualified to run that, or alternatively, provide a qualitative analysis based upon expert opinion that would demonstrate a prima facie case.

They don't have to provide proof of their contention. We do that. A prima facie case is some indication, some reasonable basis, expert basis for concluding that the result would be different and we would not exceed -- that we would exceed our dose standards.

That could be an expert describing scientific studies that are relevant or that are based upon their own experience; but in most or all of the cases that we looked at in TSPA spaces, in particular, we felt all we got was essentially a bare
allegation that we didn't do something or we didn't
do something adequately. But the dots weren't
connected to show that the process regulation, the
boundaries have been exceeded.

>> JUDGE RYERSON: I suppose,

Mr. Silverman, one of the issues that the Board has
to consider is again, we're going back to a test
which is the adequacy of a pleading and what is
required in a pleading. And we are in agreement, I
don't think anyone is suggesting -- you are certainly
not suggesting we have to get into the merits of the
allegation.

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

Why isn't that enough?

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

>> MR. SILVERMAN: I think it does depend on the nature of the contention and I think it is different when it comes to these process regulations. Let me give you an example.

I think that if we were required at this stage to submit an emergency plan -- let's be a little more specific, one that deals with protecting the public from offsite public, and we submitted an emergency plan that only covered the on-site workers; if someone alleged that that regulation was violated with sufficient basis, that we didn't provide what is required by the rule, that's not processed regulation and that could be an admissible contention if it's supported by adequate support and adequate demonstration that appears that the regulations violated it.

It's different, we believe, in the context of these process regulations. And we think that the case law is supportive of us. The Board has specifically asked us about cases we cited on pages 53 to 57 of our Answer. And I think this is the right time to talk about those cases because I think the question you posed -- the questions posed was on the NRC cases on which DOE relies on Pages 53 through
57, did the petitioners allege violations of specific regulatory requirements?

What I read into that is you were asking, gee, maybe those particular contentions that were dismissed in those cases, were dismissed because they didn't cite a regulatory violation. I'm presuming that was what you were wondering about that.

The answer to your question is: Did petitioners allege violations of specific regulatory environmental requirements?

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

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

>> MR. SILVERMAN: In some cases, you can see it in the decisions, but I went back to the petitions, themselves, and read the contentions. And I will be brief -- but the point we were trying to make in these cases is even though a regulatory violation was alleged, clearly -- and I will hit these very briefly for you -- the decisions by the Boards and by the Commission -- and I will
read the brief snippets of language -- indicate that
the decision to not admit the contention was based
upon really the failure to really demonstrate the
result or the impact of the -- of the alleged
violation. And it's interesting to note that in, I
think all the cases, certainly the first two, it was
a process regulation.

In the Duke Energy case, which is LBP0317,
the contention specifically alleged violations of
Part 51 and Part 54, having to do with severe
accident mitigation alternative analyses, and they
also cited a violation of the regulations dealing
with requirements for the Aging Management Program
for licensing renewal proceedings. They specifically
cited those regulations.

The contention - when the Board in the Duke
case rejected the -- excuse me, the contention, it
did so for failure to explain the implications of the
alleged deficiencies. And that's really very
analogous to the Nevada contentions and the positions
we've taken in this case. In the Entergy case, which
is Indian Point --

>> JUDGE RYERSON: Who was that Board,
Mr. Silverman?

>> MR. SILVERMAN: I don't -- I could find
that for you here, but I don't know off the top of my head.

>> JUDGE RYERSON: That's okay. I'll find it on my own.

>> MR. SILVERMAN: I have only two more cases. I'll be very brief with them both. In Entergy -- this is another case we cite in that section of the brief. It's LBP0813. Again, the contention was based upon a SAMA, Severe Accident Mitigation Analysis issue. The contention explicitly cited alleged violations of NEPA and of Part 54, particularly Appendix B of Part 54.

The Board, nevertheless, rejected the contention as inadmissible.

And the last case I want to cite is Dominion where we have some language from the Commission. This is the Millstone case. It's LBP03-12. And it was affirmed by the Commission in CLI-03-14. Here in the contention, the Petitioner allege a violation of the significant hazards consideration requirements set forth in Part 50 -- Section 50.92-C, specifically. And we did not meet the requirements under NEPA for a categorical exclusion; and it cited the regulation again.

The Board did not admit the contention; and
the Commission in upholding the Board, stated the Petitioner, quote," never provides any accident or dose analysis of its own and therefore, never indicates how a significant radiological release may occur as a result of the proposed changes." These were proposed changes to text specs.

So these are three cases we cited where a petitioner specifically alleged the regulatory violation, really related primarily to process regulations, and the Boards and the Commission required more.

>> JUDGE RYERSON: Were the contentions -- in your view, what's your best case on the facts in terms of being similar to the contentions that are -- that are proffered in this case?

>> MR. SILVERMAN: I'm not sure what you mean by that, Your Honor.

>> JUDGE RYERSON: In other words, it seems to me you can look at this from two directions. The contentions that are set forth in this case, while you properly say they don't allege an impact on dose, or demonstrate an impact on dose, nonetheless, at least in my experience, are considerably more detailed than many of the contentions that have been rejected in other cases.
There may have been an allegation of a violation of a -- what you characterize as a process regulation, but I question whether the contentions looked like the contentions that we have here. Did they have the degree of specificity?

Is there any particular case that comes to mind that you would urge us to read carefully?

>> MR. SILVERMAN: I'd be happy to provide that information to you. I'm confident that we will find contentions that are not as well written as those of Nevada and some that are far better written, in our view. And in fact, were probably admitted in some cases.

Off the top of my head, on these particular cases, I think the contentions were fairly clear and there was some detail there, but it's hard for me to characterize that.

>> JUDGE RYERSON: Approaching it from the other direction, you characterize, I guess, Part 63 or parts of Part 63 as process regulations. And I'm not -- it's not clear to me that there are some regulations that the Applicant is bound to follow and other regulations that seem to have a lesser standard. I mean isn't -- why is compliance with a regulation not mandatory?
MR. SILVERMAN: Compliance with a regulation is mandatory. In the case of these particular regulations, particularly with TSPA, as I said, there is a very considerable amount of flexibility and space for engineering and scientific expert judgment in deciding how to implement those regulations.

You may or may not agree with us on the issue of mean dose, but if -- even if you did not, what I believe is the difficult job of the Boards to do is to examine these contentions beyond these sort of overarching issues like this one that we're discussing right now.

I'm not suggesting that you engage in an analysis of the merits, but in each of these cases or almost all of these cases, the Applicant, the Department of Energy has -- let me back up. Nevada has alleged certain facts, the Department has responded.

It's incumbent in deciding whether that regulation is -- has been violated for you to look at those facts to some degree at some level. An obvious example is, if a contention says something was omitted from the SAR and we cite the pages of the SAR where that analysis was not admitted, you need to
look at those facts and make that judgment.

At the end of the day, it comes down to the importance of the issue in the overall analysis that's required by the regulations. And many of the contentions -- most of the contentions in our view, allege an error, a problem, use of improper data, but don't show how that exceeds the boundaries of the process regulation that's before us.

>> JUDGE RYERSON: Let me -- if I may, let me turn that argument around a little bit and see, and characterize and a lot may reject my characterization of their argument, but to some extent, it seems to me that these regulations remind me of high school Algebra class.

You seem to be saying, look, as long as we get the answer right, that's all we need to do. As long as we are comfortable, DOE is comfortable that we're going to meet the dose standards and we have a model that in our view, DOE's view says that, we're okay.

But it seems to me that the regulations as Nevada is pointing out -- at least that's what I think they're saying -- is we got to show the work. It's not enough to have the right answer, you have to show the work. You have to, in other
In other words, it's not good enough to prove dose compliance by any means you choose. You've got to prove dose compliance according to the regulations in a certain way. You got to show the work by analogy. And, you know, is that a mischaracterization of what the regulations require?

>> MR. SILVERMAN: No, I don't think so. I think that you do have to show the work. I think that this is a unique regulation that provides a very large swath for reasoned expert judgment in deciding what work is satisfactory to produce the correct result.

>> JUDGE BARNETT: But it doesn't provide an infinite swath?

>> MR. SILVERMAN: Absolutely not. We have been accused of that and we are not alleging that.

>> JUDGE BARNETT: So let me just give you a hypothetical -- and I'm not trying to pin you down here, I just want to make sure I understand your answer. If Nevada were to contend that in one of the TSPA analysis that DOE should have used ten inches of rain a year, and they used a thousand inches of rain
a year; would that be an admissible contention without Nevada then running the TSPA code to see what the actual implications of using a thousand versus ten were?

>> MR. SILVERMAN: No. No, because it sounds like a large difference, but it -- this is a complex analysis. It's not -- and I'm hardly the expert on this. I'll get over my head very quickly. But as I understand it, it's a nonlinear analysis in the sense that there are multiple models being run feeding into each other.

And the simple allegation that we underestimated the amount of precipitation, all that tells you is we underestimated the amount of precipitation. It does not tell you that we exceeded the bounds of uncertainties. It doesn't tell you --

>>JUDGE BARNETT: Well, assuming they had appropriate citations that it was well beyond the, you know, assuming they had appropriate references that it was 10 inches a year and a thousand was way outside the bounds, yeah, assuming they had some basis for it. But if they had an adequate scientific basis for saying they should have used 10, and they used a thousand; would that then be an admissible
contention without running the TSPA model?

>> MR. SILVERMAN: I think the contention, they would not necessarily have to run the TSPA model, but they would have to provide an adequate basis, if not in running portions, in selectively running the model and expert judgment with an adequately reasoned basis.

>> JUDGE RYERSON: Let me change Judge Barnett's hypothetical just a little. Assume the regulation said you shall use for the annual rainfall, the mean of the last 50 years and you decided to use something else; does that on its own, constitute a violation of the regulation which is ipso facto admissible?

>> MR. SILVERMAN: I think if we had that kind of regulation, the answer would be yes, but we don't generally have that kind of regulation in TSPA and pre-closure space.

>> JUDGE BARNETT: Some you do and some you don't. That was just a hypothetical made up. Let me -- you said there's a lot of flexibility in meeting these regulations, but some of them don't seem -- at least to my reading -- to give you any flexibility. They say, let's do this.

>> MR. SILVERMAN: Oh, there are some parts
of 63 that are like that, yes, I don't think they are --

>> JUDGE BARNETT: But I think you are saying that even for those parts of violations -- there are violations and there are violations; and until your opponent points out that that's a violation that has consequences for the outcome, that that's not an admissible contention?

>> MR. SILVERMAN: No. Again, I go back to my emergency plan. That's kind of like you are using the mean precipitation rate over the last 50 years' example. It's very prescriptive. It's very precise. It says thou shall submit a plan. You don't submit a plan. It's deterministic if you will --

>> JUDGE BARNETT: Okay, so a violation of a prescriptive-- a contention alleging with the right basis, and so forth, a violation of a prescriptive regulation is admissible on its face?

>> MR. SILVERMAN: Well, I hate to use the words like "on its face." It can be admissible. I would say yes. And I think that this argument that we've made is largely confined to the TSPA contentions.

>> JUDGE BARNETT: Okay. You said earlier that you could come up with some cases where there
were better drafted contentions than Nevada has submitted here that were admitted. Can you tell me of a single instance in which the Department of Energy is not opposed a single contention that has ever been filed in front of us?

>> MR. SILVERMAN: Well, the only proceeding I know about is this one.

>> JUDGE BARNETT: No, we have the Mox proceeding that you and I are in.

>> MR. SILVERMAN: In the Mox proceeding, we challenged all the contentions. May I speak -- may I respond to that?

I'm not sure exactly what your point is, but let me say this about what we did--

>> JUDGE BARNETT: Well, your point was floating around out here are a lot of far better drafted contentions than Nevada filed.

I was here seven years, a long time ago on on the Amended Appeal Board, and I have been here seven years now; and I'm trying to find those. There were some good ones by the State of Utah and we'll come to those later in a PFS case, but --

>> MR. SILVERMAN: Your Honor, I was making a general statement. I just think it stands to reason and based upon my general recollection and
experience, that there are some that, as I said, that are far more poorly drafted than in the State of Nevada and others that were likely better drafted. I would like to respond --

>> JUDGE BARNETT: Would you like the opportunity in the next ten days or so to submit to us some contentions from some other cases you think are far better drafted?

>> MR. SILVERMAN: We can certainly look for those. If you like that, we would try to provide that.

>> JUDGE BARNETT: Okay.

>> MR. SILVERMAN: Was that a yes, Your Honor?

>> JUDGE BARNETT: Yes.

>> MR. SILVERMAN: May I add one comment with respect to your remark about the -- having not -- having challenged every contention in this proceeding and in the Moxs proceeding?

Thank you. I'll be brief on this. I just want to make it clear to this Board and all the Boards, we -- in preparing for this proceeding and for what we anticipated to be an unprecedented number of contentions, thought a lot about the process, put a team together of people to work on it, we were
given directions to calls balls and strikes as we see them, and assumed before we ever got any contentions that there would be some that we would conclude and acknowledge up front were admissible. That was our going-in assumption and our client's going-in assumption.

Once we got into contentions, in good faith, we evaluated them as the representative of the Department of Energy and reached the conclusion that in our view, they were not admissible. You may or may not agree with us.

I suspect you will not agree with us in all cases, but it was a good faith judgment based upon our interpretation of the law and it was not a pre-ordained conclusion. And I wanted that to be made very clear.

>> JUDGE BARNETT: The question, let's get back to the very basics, a violation of a prescriptive regulation -- a violation of a prescriptive regulation, assuming that it meets all the other criteria that's admissible. You don't need to show what the consequences of that violation are. Is that correct?

>> MR. SILVERMAN: Well, as in the example of the emergency plan, yes.
Because we've always held the rank and file intervenors, the citizens groups, whenever they say that an application is not any good and the applicant comes back and says it meets the regulation and the intervenors say so what, we say to them, You can't challenge the regulation? That's up to the folklore of the beginning of the agency. That got converted so that the staff and the applicant are also bound by the regulations. They don't see the way the regulations are binding on them.

I think that's been our precedence for any number of years. So I'm trying to ask the question here, are you asking us to depart from those precedents in this case that if it's something particular about this case so that a -- an allegation of a prescriptive regulation is not necessarily admissible, meaning your client, alone, of the people who appear in front of here, gets to challenge regulations without seeking a waiver from the --

No, we don't. We don't have that right or authority.

Thank you.

May I have one moment?
MR. SILVERMAN: Thank you, Your Honor, one more point -- two more points, briefly. I agree with you on the prescriptive regulation argument. As I said before, we don't believe that's what the TSPA process regulations are. The one thing I'd like to point out is this: It seems to me what's good for the goose is good for the gander.

If in fact, a contention is admitted on the basis of an allegation that the regulation is violated without -- and that's the material issue, the Board decides that's the material issue, and if you don't have to look at the effect of that on the final outcome of the analysis, then it seems to me that when we go to evidentiary hearing, the burden shifts, of course, as you know to the applicant.

I don't understand why if we follow that logic, the applicant wouldn't meet its burden merely by showing it met the regulations regardless of the impact on dose or the ultimate outcome.

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I don't understand why if we follow that logic, the applicant wouldn't meet its burden merely by showing it met the regulations regardless of the impact on dose or the ultimate outcome.
>> JUDGE RYERSON: I do have a question for you, Mr. Silverman, but I don't know if you are prepared to address or not; but the case that you cite 427 times, I believe, the Duke energy case, CLI9911, for the proposition that a dispute is material, if its resolution would make a difference in the outcome of the licensing proceeding. I mean, do the -- that language is in the Decision because it's a quote from the Federal Register Final Rule Notice, I believe.

But I don't see how the facts of that case, myself, really support that at all. I don't know if you are prepared to address that or one of your colleagues is.

>> MR. SILVERMAN: I'm not sure any of us are prepared to address the specific facts of that case.

>> JUDGE RYERSON: Okay. I note that the case also says that our contention rule should not be turned into a fortress to deny intervention.

>> MR. SILVERMAN: Understood.

>> JUDGE RYERSON: It's an interesting case. I commend it to you. Let me ask this; there may be some dispute as to what Nevada would be required to -- to show in order to have an admissible
You acknowledge they don't need to re-run the entire model, but you do ask for some sort of imperical demonstration of an effect. Is there a factual dispute on the record in front of us as to what Nevada can do and if there is a factual dispute of that nature, does that preclude our ruling against Nevada at this stage, on a factual question?

>> MR. SILVERMAN: Right. No, the answer to your first question, there is no factual dispute, and if there were, I do not think it would require you to rule in their favor; and let me explain. This goes to your question, I think, the first part, is there a factual dispute concerning the Petitioner's ability to replicate the TSPA?

First of all, by replicate, we interpret that to mean to essentially completely reproduce. There isn't a factual dispute. We do not believe Nevada could do that.

But we don't think, as I said before, that that ability was a prerequisite for Nevada or any of the Petitioners to meet their burden. As I talked about in terms of providing selective analysis, limited -- limited runs at the TSPA, qualitative expert based analysis for the reasoned basis.
If you read replicate to mean something less than you fully replicate, there also, I believe, is no factual dispute because in Nevada's reply -- I have it highlighted, I need to find the phrase -- and there is an acknowledgment that they could have run limited runs of the TSPA to produce some results.

And there are multiple statements by their expert that they had the tools and the ability to modify the parameters of the analysis and produce their own results and reach a conclusion.

Now, even if there is a factual dispute on either of those issues, it is not the sort of dispute that the burden -- that the presumption goes to the Petitioner. The issue of whether Nevada can replicate the TSPA, regardless of how you define that, to me that's an ancillary issue.

It's not the kind of material issue that goes -- it wouldn't be subject of a contention. If Nevada filed a contention that said we can't replicate the TSPA, I don't think you'd admit that.

It's an ancillary issue. It's a procedural issue. It doesn't -- the resolution of it would not lead to a finding that we meet the requirements or we don't meet the requirements. So I do not think in any way, shape or form there was a presumption in
favor of the Petitioners in that regard.

>> JUDGE RYERSON: Okay. Mr. Malsch, you
have been kind of quiet on this side of the aisle for
the moment. Did you want to address these points at
this time?

>> MR. MALSch: Let me address two points;
the first is that -- what is true in this proceeding
is, as has been true in a quarter century of NRC
practice, an allegation that a regulation, an
allegation that an applicable regulation has been
violated raises a material issue, period.

And I would point out to you that we have
140 -- about approximately 140 contentions addressing
the total system performance assessment. Each of
those contentions specifically alleges that a
violation of several -- one or more particular
provisions in Part 63 which address how the
performance assessment shall be conducted.

We cited to 63.102-A that there had to be
included a full range of reasonable defensible
parameters; 63.102-H, that all models and parameters
had to be credible and include uncertainty; 63.114-B
that the model had to include uncertainty and
variability parameters and provide the technical
basis for parameters and probabilities; 63.114-G,
which requires that the models provide -- have been supported by an adequate technical basis.

We have 140 or so contentions which specifically allege a violation of one or more of these divisions. We have an additional dozen or so contentions that also allege specific violations of 63.114-C, which requires consideration of all conceptual models; 63.114-B, which requires a full accounting and explanation of uncertainties; and 63.102-J -- 63.102-J which requires consideration of futures, processes and events.

Now, what's interesting about these regulations is the Commission went out of its way to promulgate in Parts 63 to explain how each of these requirements had its own independent significance and enforceability. And to understand that, you need to go back a little bit into the history of Part 63.

Part 63 was originally spun off of Part 60, which was a generic regulation applicable to repositories in general. Part 63, in addition -- and we're talking about postclosure safety. In addition to requiring for postclosure safety purposes, compliance with an ultimate dose standard using a performance assessment, also had a requirement for individual barriers to meet particular subsystem
performance requirements. For example, ground water
tavel time was specified.

When the Commission developed Part 63, it
did not include any of these substance and
performance requirements, leading commenters to
accuse the Commission that it was doing something it
had never done before, namely, the whole safety case
depend solely upon the results of the equivalent of a
probabilistic risk assessment and nothing else.

In responding to those comments, the
Commission was very clear that that was not what it
was doing, that the postclosure safety did not depend
solely upon meeting a simple dose standard at the end
of a total system performance assessment, that
instead, postclosure safety depended upon a
comprehensive collection of requirements, including
the ones that I mention here.

So, we say that a contention which alleges,
for example, a violation of a requirement that a
model be adequately supported is material per se,
nothing else need be shown, just as would be the case
in a reactor case, an allegation that the general
design criteria were not complied with or emergency
planning requirements were not complied with would
also be material per se without some further showing
of a lack of reasonable assurance or without some
further showing that some design basis, those
calculations had been violated.

>> JUDGE FARRAR: Mr. Malsch, can I
interrupt you there? Are you saying that applies to
these process kind of regulations, that you shall do
it this way, as much as it does to a regulation that
says, the tie rod should be made out of titanium?
Are you saying they're both the same?

>> MR. MALSCH: That is exactly correct.

There is nothing whatsoever in the history of Part 63
that would suggest a distinction between process
regulations or, on the one hand, the other kinds of
regulation or process regulation versus some other
kinds of regulation. They're all independently
enforceable, all -- and they all have independent
significance.

The Commission does not suggest any place
these are of lesser significance. In fact, as I
said, they were very clear that postclosure safety
depended upon a comprehensive collection of
requirements, including all of these process
requirements. Just to borrow a little bit from what
Judge Ryerson said, they were as much concerned about
how you got the result as they were with the result
And that is why we think that all of our TSPA contentions raise material issues. Now, second, let me address the other question dealing with our capabilities. First of all, I don't think you need to reach this question because, as I just said, I think our TSPA contentions all raise material issues. But if there were to be some further additional showing to be required and, frankly, I did not understand from DVR argument what exactly that is -- but let's suppose in some cases there is required some sort of further demonstration.

We asked ourselves that question because we anticipated that DOE would make the precise argument that it made in its Answer. So we asked ourselves, is it possible for us to actually do a dose calculation that would gauge an estimate in some quantitative way the precise impact of our contention, if true?

Well, it turns out that for about maybe 50 -- except for about 100 of our contentions, our contentions are so utterly destructive of the TSPA model, so that if you assume they are true, which is what you should do if you address a materiality question, if you assume they are true, there is literally no model left to run, no calculation can be
made.

There are about 100 or so -- I think it's 101 -- contentions which actually, if true, would not be so completely destructive of the TSPA model. It wouldn't be something of a structure in place that we could conceivably modify. Now, so we asked ourselves, well, what would be involved in doing that?

Well, first of all, we thought to give DOE the benefit of the doubt, let's assume instead of having 100 contentions, we really have 19 contentions, because it turns out our 100 contentions here break down into 19 separate categories.

So let's talk about to give DOE the benefit of the doubt. Let's say we only have 19 groups of contentions. What would be required actually to demonstrate quantitatively their effects on dose?

Well, first of all, let's just take one, one of the 19, what would we have to do?

Well, first of all, we'd have to develop a QA program for modifying the TSPA because otherwise unless our own calculation and model changes were fully subject to and implemented under a Quality Assurance program, our results would have no credibility. So we first have to develop our own QA
program.

Secondly, we would have to actually model the TSPA code, not just in one case, but in five separate modeling cases. The DOE TSPA actually is comprised of about five separate modeling cases. There is the igneous intrusive case -- the igneous extrusive case, the early waste package failure case.

And then there are two separate cases in the so-called nominal scenarios. Each one of the those cases involves a variance in the TSPA model.

So to include any one of our contentions to accommodate it, to change the model to include it, we would have to actually make as many as five changes in -- as many as five separate TSPA models.

That would take literally in the case of some contentions, months of work. But that's not -- but that's just the beginning. There are -- there is no requirement for us to show that any one contention by itself would influence the dose.

It would be perfectly permissible for us to argue the combinations of contentions would have an effect on the dose that would be significant. There are --

>>JUDGE BARNETT: Let me follow up on that.

So you do think that you need to consider these
contentions in combination; is that right, not one at a time -- consider the technical questions about the contentions on the TSPA model, you have to consider those in combination, is that not one at a time?

>>MR. MALSCH: I don't think you have to consider them in combination but I think as long as we are talking about demonstrating significance, to rule out any one contention on the basis of a lack of demonstration, quantitative effect on dose, it wouldn't be sufficient just to show that that one contention had no effect. You'd have to show that one contention in combination with all other contentions had no effect on dose.

And I can tell you that just taking 19 contentions, not 101, the number of possible combinations is in the quad drillions.

>>JUDGE BARNETT: That's exactly right. Doesn't that actually go -- extend beyond DOE's capability of testing all --

>> MR. MALSCH: That would actually even extend beyond DOE's capability. Mr. Silverman's argument here today is a little bit misleading. There is no doubt he can run the TSPA code on our computers. We can run it. The question is not whether we can run it. The question is whether for
the thousands of different combinations we can -- we
would possibly have the time and resources to make
the necessary number of model changes to show the
dose effects of any one contention or any combination
of contentions. What DOE is effectively asking us to
do is the impossible, and the impossible actually
denies us due process of law.

>> JUDGE BARNETT: But would you be asking
DOE to do the impossible?

>> MR. MALSCH: We would not be asking DOE
to do the impossible. I mean, that would be their
option. If you look at the way we structure our
contentions -- let's say we have a contention -- we
have a group of contentions with the tax their
massive infiltration model. We believe the effect of
our contentions is to utterly destroy the model.

DOE could respond to our contentions by
correcting the model, without doing any dose
calculations. They could just say, we corrected the
model. Or they can explain why our concerns about why
the model is incorrect were not well-founded.

So they are -- it is within their
discretion in defending -- in making their case, to
address each of our contentions on a model-by-model
basis and on a 114-A basis, 114-G basis and just
defend their models one by one. That's the perfectly permissible way for them to go about making their case.

>> JUDGE BARNETT: But you couldn't test the implications of your contentions one by one?

>> MR. MALSCH: Pardon?

>> JUDGE BARNETT: You couldn't also then test the implications of your contentions one by one?

So, as I understand your argument, there were two many combinations of your contentions for you to test, but -- and by extension, there would be too many for DOE to contest, so they can analyze the effects one by one but you couldn't do the same thing?

>> MR. MALSCH: No, and when I say analyze the effects, they can defend purely on the basis of compliance with the individual requirements in Part 63. I'll give you an example. Let's take the massive infiltration contentions.

We say their model is in a number of respects, not scientifically supported. How would DOE -- that contention gets admitted, how would DOE make its case?

We presumably -- make the case by either we're wrong and its model is correct just on the
basis of the merits of the model, without getting into any dose calculations, or it could defend its case by producing a corrected model and say, ah, we're taking care of your problems. Again, there would be no need to be a separate dose calculation by DOE. They would simply defend their models on a scientific basis, scientific discipline, by scientific discipline.

That would be sufficient without going to dose calculations. Now, let me just mention one last thing; and that is, I do believe that Dr. Thorne's Affidavit is essentially un-rebutted. There was no other Affidavit which rebuts what effectively what Dr. Thorne said. Most of the DOE's applicants said we could have run some contentions. He does not say which contentions or he doesn't say how much time does it take, and he doesn't address the combination problem.

Under NRC case law, petitioners are to be given the benefit of the doubt in really contention admissibility. And I think that means that the Board, in ruling on our contention admissibility in the TSPA field should take what Dr. Thorne said as a given.

But I want to emphasize, you don't even
have to even reach that question because I think each of our TSPA contentions are separately admissible. They separately raise a material question just because each of them involves a separate violation of the requirement of Part 63.

>> JUDGE BARNETT: Well, for example, if you were -- if you were -- if the contention was they had estimated the probability of volcanic eruption as half of what the actual probability was, there is no specific requirement or regulation that it has to be some given number.

They can allege their number is wrong. So that's not a regulation -- that's not a regulation violation per se.

>> MR. MALSCH: It is. I mean, in each -- let's take that as an example. We have alleged that their models for igneous events are wrong in several respects because they don't include certain kinds of phenomenon. They don't include certain categories of data.

>> JUDGE BARNETT: Let's restrict it to where a parameter is wrong. That's a separate case. Their frequency that they use, estimated frequency of volcanic eruption was half of the value that it should have been. There are contentions like that.
That's not a violation of the specific regulation; right?

>> MR. MALSCH: No, I think it is.

I mean, under 62 -- 63.101-A, there is a separate and enforceable requirement that the TSPA include the full range of defensible and reasonable parameters.

So a contention which says they have not included the full range of defensible and reasonable parameters, is material per se, regardless of whether that would have an effect of dose. And that's because of the way the NRC carefully structured Part 63. They took great pains to explain that it wasn't just the ultimate dose calculation.

It was also such things as including the full range of defensible and reasonable parameters.

>> JUDGE BARNETT: Okay. So would Nevada ever need to show any implication of the contention at all of the TSPA model or is it sufficient to say this parameter is not right, this model left this out; any implication?

>> MR. MALSCH: I think that's all we have to show. I think we have to show that they violated these requirements, that either their models are not supported scientifically, that they don't include the
full range of defensible reasonable usable parameters. They don't include certain essential factors.

They omit a FEP, for example. I think that's enough to get our contentions admitted. And this is no departure from standard NRC practice. It has always been the case that a contention which alleges a violation of a regulation is -- raises a material issue. And it was NRC's decision to separately promulgate this collection of requirements.

And that was their decision, they're separately enforceable. The Commission took great pains to emphasize that its ultimate decision on postclosure safety depend upon not just the dose calculation by compliance with these separate requirements.

And so we think a violation of these separate requirements raises a material issue.

Now, I would grant you that these requirements are standard in non-prescriptive fashion, but that doesn't make a violation of them any less material than it would, for example, a violation of the general design criteria, which are also expressed in general principles; the immaterial
just because the regulation is non-prescriptive.

There is no distinction in terms of
materiality between prescriptive requirements and
non-prescriptive requirements, between substantive
requirements and positive requirements. They are all
independently significant and separately enforceable.

>> JUDGE RYERSON: I think Mr. Silverman is
straining to say something at this point; and then I
have a question for you, Mr. Silverman. Why don't
you --

>> MR. SILVERMAN: Thank you. A few points:
Mr. Malsch continues to refer to in response to Judge
Barnett's questions which I think were good
questions, that a mere allegation of an error or
deficiency in omission is material per se.

Well, materiality is one part of the test
for admitting the contention.

We also have to have a genuine dispute
about that material issue. And to find a genuine
dispute, you must do more than look at the allegation
of the Petitioner. You must also look at the
response of the Applicant.

And it is beyond the legal overarching
issues that you must look.

As I said, not a full merits analysis,
we're not asking for an evidentiary judgment here;
but there are and I believe it's consistent with
Board practice in the past that you look at the
facts. We've cited sections of the SAR that are
responsive to the Nevada contentions. It may be that
they allege an omission. We show where it's
addressed. They may say, there is an uncertainty, we
describe why it clearly is bounded by what we've done
or not relevant to the ultimate determination. Or
why it doesn't violate Section 63.114, the
postclosure analysis, which has such broad methods,
if you will, for going through the process of doing
the postclosure analysis and talks very generally
about including certain data, accounting for
uncertainties, considering alternatives, et cetera.

So it's not enough to be just material.
You must look at the facts at some level -- at some
level in deciding whether to admit these contentions.

There are a couple of other things I'd like
to mention and I'd be happy to take your question,
Judge, is there no requirement for them to have done
a Quality Assurance Program. That's not a
requirement of the Petitioner or we wouldn't have
asked that. And we would have be laughed out of the
boardroom if you challenge them on the basis of not
having a qualified QA program for their contentions. Finally, there has been some suggestion about cumulative impact of these contentions. When we had the Advisory PAPO Board pre-hearing conference in March -- May of last year, this very subject came up. I think it was Judge Moore. I could be wrong. It might have been you, Judge Ryerson; but the issue said, it was very clear that if the Petitioner felt that they wanted to argue that an individual contention combined with other individual contentions cumulatively demonstrated a material issue and a genuine dispute, that they should do that, either by way of summing them up and saying that or having an extra contention that specified that.

We honestly do need read the Nevada Petition to have done that, to have accumulated and have argued that the cumulative impact needs to be considered.

>> JUDGE RYERSON: I think you've answered one of my questions, is whether you disagreed at all with Mr. Malsch's description of what would be required. But let me ask the second question and you sort of lead into this. You say that there's got to be at least some level of demonstration.

>> MR. SILVERMAN: Yes.
JUDGE RYERSON: And the question I guess for us again dealing with the adequacy of a pleading is what that level is. And I hate to keep returning to this case that you cite 427 times to us; but that case says that there must be at least some minimal factual and legal foundation in support of the contention, some minimal factual and legal foundation. Is that the wrong test?

Because --

MR. SILVERMAN: No --

JUDGE RYERSON: Because this sounds like a minimal factor.

MR. SILVERMAN: That's good law. That's good law; but you can't judge whether there is a minimal showing by reading the factual allegations in one pleading. You've got to look at the other side.

I acknowledge that you may look at a contention and you may look at an answer of the Department and you may say, you know, they've raised the legitimate issue. This may be your judgment; and it is not clear to us on its face that, that it's not an issue -- that it's not an a genuine issue.

Some of Nevada's arguments leave the word "genuine" out of this criteria; but there are others you will read, where I think you can conclude merely
by reading the pleadings and perhaps looking -- not perhaps, really, it's a difficult job, but looking at the things we cite in the SAR often and in most of our responses and conclude there is no genuine issue there. And you don't go beyond the pleadings and the references, and that is your call to make. It's not necessarily an easy one; but it is -- it does require you to look at both sides and to delve down to some level of review of both sides of the allegations.

>> JUDGE RYERSON: I would very much like to hear the NRC staff's position on whether an allegation of a violation of any Commission regulation is a material -- raises a material issue for an option. Could one of you please speak to that?

>> MS. YOUNG: Mitzi Young for the NRC staff. The staff's position is that depending on the contention and the regulation that's alleged to be violated, it could be a material issue.

The staff did not do a wholesale objection to the contentions based on materiality. There are contentions where Intervenor suggests that radionuclides and radiological exposures would be increased.

And those contentions specifically, the
staff would expect demonstration provided by Nevada
would address what those impacts would be.

However, there are contentions that allege
certain particular processes were not followed. The
staff does not object to those contentions as being
immaterial.

>> JUDGE FARRAR: You said at the
beginning, Ms. Young, staff's position is that a
violation -- an allegation of a regulation could be
material.

>> MS. YOUNG: It could be.

>> JUDGE FARRAR: I think Judge Ryerson's
question -- it's not his, mine is -- is a violation
of a regulation always material on its face?

>> MS. YOUNG: Well, materiality has
different meanings, obviously. There is materiality
that can affect the outcome of the proceeding. But
there's also materiality with what can bear on the
staff evaluation of a particular standard.

>> JUDGE FARRAR: Our precedence have
always said that applicants just like the
intervenors is bound by the regulations unless they
ask the Commission for a waiver or an exemption.

>> MS. YOUNG: Or an exemption --

>> JUDGE FARRAR: Or an exemption, fine,
whatever they ask. But if they don't ask for that, what is the force behind that precedent or that principle that I just stated, if we say, yes, you violated the regulation, you didn't get a waiver and exemption, but we're not going to hear the contention? That makes that principle a dead letter.

So I need to know what the -- if the staff's position is, a allegation or violation of a regulation is always per se, material?

>> MS. YOUNG: It depends on what that contention is alleging, was or was not fulfilled a regulatory requirement.

>> JUDGE FARRAR: The answer is no?

>> MS. YOUNG: Again --

>> JUDGE FARRAR: You are saying the answer is no, that it's not always material?

>> MS. YOUNG: An Intervenor can provide a contention that says the regulation is violated because the walls of the repository will be blue. Is that material to fulfilling some requirement --

>> JUDGE FARRAR: The Commission regulations says the walls of the repository should be pink and they say they are going to be blue. That's my question; is that per se, an admissible contention?
MS. YOUNG: That could be but again, you have to look at the particular regulation that's at issue with respect to the challenges raised by the petitioner.

JUDGE RYERSON: Do either of the Judges have something?

MR. ANDERSEN: Your Honor, Rob Anderson on behalf of Nye County. One of the problems that I had with DOE's approach with review of this particular issue is it didn't make a distinction between what it has perhaps called a process regulation and one that is quote/unquote: "Prescriptive" as Judge Farrar has pointed out. I can tell you that they made the same materiality challenge to every one of our contentions, and I'd like to make a point that hasn't been stressed enough, although alluded to by the Board, and that is the following -- every single one of the emergency response planning regulations, performance confirmation, quality assurance regulations are bottomed on a record that demonstrates why it is significant to safety. And it's presumed that if you violated that, you violated a principle that the Board has established or the Commission has established as a
safety significant matter. Now, that isn't every
single regulation.

I think I understand why my colleagues from
NRC staff are shuffling a little bit, because there
certainly could be a regulation that isn't
significant enough to justify.

>> JUDGE FARRAR: If there were, why would
the Commission bother to expend the effort to adopt
it?

>> MR. ANDERSON: Again, I would go back to
what the record is that establishes the regulation.
What is the bottom line support for establishing the
regulation in the first place.

And then cited in our materials and others
is the Massachusetts case out of the Federal Circuit,
where, indeed, NRC wouldn't allow evidence on impact
to dose because they said underline emergency
response regulations is the commitment by the
Commission to the principle, that if you violated
that regulation, you were violating a safety
principle.

So there was no demonstration allowed, even
though the Petitioner wanted to do it, of showing
those implications. I would say to the Board, in
conclusion, that we urge you to carefully look at DOE
s arguments in this regard to make sure this
so-called process argument on materiality doesn't
wash over into areas where it clearly has to do with
a specific alleged violation of a safety significant
regulation that NRC has promulgated. They were --

>> JUDGE RYERSON: Thank you Mr. Anderson.

This may be a good time for a break. I don't see any
other hands up. So I'm going to say it's a good time
for a break. Why don't we try to do this, in
literally nine minutes and begin again promptly at
3:15.

(A recess was taken)

>> JUDGE RYERSON: Please be seated.

Okay. I think Judge Barnett has a couple of further
questions on the model, then we will turn to some of
the subjects that Judge Farrar wanted to cover.

>> MS. YOUNG: Judge Ryerson?

>> JUDGE RYERSON: Yes.

>> MS. YOUNG: Mitscy Young from the NRC
staff. I just wanted to clarify one thing in terms
of my answers to Judge Farrar. When the staff was
talking about it would depend on the nature of a
regulatory requirement, one example could be 63.114-E
and F which talks about DOE having to provide the
technical basis for inclusion or exclusion of FEPS.
And that a specific FEP must be evaluated in detail if the magnitude and time of resulting radiological exposures to the reasonably maximally exposed individual or the radionuclide releases to the successful environment would be significantly changed by the omission.

If Nevada, for example, were to raise a contention that allege that a particular FEP was not properly excluded, there has to be in that situation, a showing of what the significance would be in terms of results. So again, it depends on what the regulatory requirement is that's being alleged that DOE has failed to satisfy.

>> JUDGE RYERSON: Thank you.

Judge Barnett?

>> JUDGE BARNETT: I have a question for Mr. Malsch or Mr. Lawrence.

For the TSPA contentions, if DOE's answer is that this is a non-safety item or not important to safety item or not important to waste test isolation, and Nevada's reply doesn't address that or doesn't say this is important to safety use, is that an admissible contention?

Should we have contentions on things that aren't important to safety, that nobody has argued is
important to safety?

>> MR. MALSCH: I think you are referring to the contention we had with respect to retrieval plans.

>> JUDGE BARNETT: I can't remember specifically.

>> MR. MALSCH: I believe it's retrieval plans. And here was the difficulty. Our basic goal was to assure that retrieval plans are subject to quality assurance requirements.

And more specifically, I guess, structured system equipment necessary to implement retrieval plans are subject to full quality assurance requirements.

Under DOE's QARD, a structured system or component is not subject to the QARD unless it is either important to safety or important to waste isolation.

We agree it doesn't make any difference under which category something falls. If it falls under either one, it's subject to quality assurance and that's sufficient.

The problem is from our standpoint was that the criteria for deciding whether a piece of equipment was important to safety is so different
than the criteria that applied in deciding whether a piece of equipment was important to waste isolation, that if you applied the wrong set of criteria, the result would be that a structured system or component important to retrieval would be ruled not important to safety because that criterion focuses solely on safety of workers, not postclosure safety.

The result would be that it would not be subject to quality assurance by reason of it being important to safety, and they never asked the question whether it should be important -- it should be subject to quality assurance, because it is important to waste isolation, the result as a whole.

>> JUDGE BARNETT: Okay. I can't remember the specifics but let me just give you a hypothetical. If Nevada's contention was based on component A and DOE's answer was Component A is not important to safety and they show the table where it says it's not important to safety, it's not important to waste isolation and show the table that says that. And then Nevada's reply does not address that or offer a contention that, well, it should be important to safety, it should be important to waste isolation, then would that be an admissible contention, where there is no such disagreement
about -- no explicit disagreement about whether it is
or isn't an important to safety?

If DOE has classified it is not important
to safety, Nevada doesn't make the argument that it
is important to safety, is it an admissible
contention?

>>MR. MALSC: Let me put it this way, I
think we have to -- we have disagree with either the
classification or the application of the wrong -- the
application of the classification criteria.

If hypothetically one were to conceive
that retrieval is not important to waste isolation,
then our contention goes away.

But we've argued specifically that it is
important to waste isolation considered in the
broader sense, and therefore, it should be subject to
quality assurance as important to waste isolation,
and DOE never even considered that issue.

>> JUDGE BARNETT: I'm not trying to pin
you down so much. I just want to understand. Let's
leave the specific contention out because I don't
remember. Say it's Component A and Nevada's
contention is based on Component A. DOE's response
is, it's not important to safety, here's the table
where it says it's not important to safety; it's not
important to waste isolation. Here is the table where it says it at.

And then Nevada can not come back and argue that it is important to safety, it is important to waste isolation and here is where it says that.

Is that an admissible contention?

>> MR. MALSCCH: I think we would have to counter the table or argument that it is neither.

DOE has -- points to something in the application which properly -- which classifies it as one or the other. And I think we've got a problem with our contention. I think though in the particular case I'm thinking of, they utterly failed to consider whether structured systems of components important to retrieve were important to waste isolation, and therefore, the gap.

>> JUDGE BARNETT: I want to thank you.

Along similar lines, if the contention said that DOE assumes X, and DOE's answer was well, we don't assume X, it's not referenced anywhere in the license applications at least, and then, Nevada is required to come back and say, here is where you assumed X, in Nevada's reply; would that be an admissible contention?

>> MR. MALSCCH: I think if we pointed to a
alleged defect in the application or one of the
supporting references, and that defect in fact, did
not exist, I think that's not an admissible
contention. I don't think we have any contentions
in that category. But when we allege an omission, I
think the omission has to be there.

>> JUDGE BARNETT: Thank you.

>> JUDGE RYERSON: Judge Farrar, do you have
any questions?

>> JUDGE FARRAR: Yes, let's turn to what
we mentioned before lunch, the State of Nevada reply
brief to DOE, pages one to two and four bullets and
we'll add that up. The first bullet, I think is
fairly covered by point 4-A of the proceedings
tomorrow, so we won't do that.

The fourth bullet about the regulation,
where we talked about it at some length, I have a
couple follow-up questions.

Mr. Silverman, several times there was a
regulation that DOE -- I'm sorry -- that Nevada said
you're not in compliance with the regulation and the
regulation was non-prescriptive giving you the
flexibility that you said you had.

But your Answer said, it's a challenge to
the regulation. So it was as though you said, since
the regulation gives us flexibility, saying we don't comply with it is a challenge to the regulation, whereas another reading would be it's not a challenge to the regulation, it's a challenge to whether you have used that flexibility wisely and have come up with a solution that fits within the meaning of the regulation.

Do you want to address anything, do you want to say anything in response to that?

>> MR. SILVERMAN: Yes. Does that refer to one of these particular bullets?

>> JUDGE FARRAR: Well, it's -- no, it's kind of a variation of this question -- it's the flip side of here's a prescriptive regulation and you don't comply with it. Here's one where you say, well, the regulation isn't prescriptive, so the challenge in the regulation, when they challenge us, because we have infinite flexibility.

>> MR. SILVERMAN: No, we did not mean to suggest infinite flexibility. What we meant when we said challenge to the regulations, you have a regulation like 63-114 which is your how to on your TSPA postclosure analysis.

And it requires adequate and accurate generally analyses and considerations of uncertainty,
considerations of alternative models, inclusion of
data in broad ranges of areas like geology,
hydrology, et cetera.

And when -- what we were just trying to say
is all Nevada is saying there is another uncertainty
here, or there is a piece of data that's being used.
Without showing that we have violated this regulation
which gives us fairly broad relay based upon expert
scientific judgment that what we are trying to say is
that is, that is in essence, a challenge to
regulation.

It's a regulation, not just this reg, but
the preamble regulation 63.101 I think and 102, they
talk about the conceptual framework, go on and on and
on about the complexity, the difficulty into the
future, the need for flexibility for the applicant to
do these analyses. So that's the point we were
trying to make, maybe not as artfully as we should
have.

>> JUDGE FARRAR: What contention, do you
refer to a specific contention there? Okay, fine.

>>MR. SILVERMAN: Thank you.

>>JUDGE FARRAR: Thank you Mr. Silverman.

Mr. Malsch, let me ask you a different question on
this same subject.
There are times when DOE says that your contention should be rejected because you're -- you're asking them to consider something they don't have to.

For example, if the regulation says your tires have to withstand certain conditions and they say, we have synthetic rubber number 93 that does this. If you say well, you didn't consider synthetic rubber number 95, and they say, look, if 93 does the job, we don't have to consider all the others that might do the job better because we just don't have to do that.

We've come up with a proposal that meets what the regulations are looking for. So they oppose a number of your contentions on the ground that you are asking them to look at one or an infinite number of other things that would also do the job. And all they have to do is say they've done the job.

How do you respond to that?

>> MR. MALSCH: Well, I think there could be two categories of contentions to which that question would apply. We have a whole category of contentions which alleges that DOE's -- one or more of the TSPA models is not considered the full range of defensible and reasonable parameters.
It would be possible for us to argue that it is non-compliant with that provision because a contention did not include a particular range of parameters or -- and that would make the contention admissible assuming --

>> JUDGE FARRAR: That's not the kind that was self supporting. That's not what I was talking about.

>> MR. MALSCH: The second category would be where we -- I guess in retrospect, there are three categories. The second category would be where we have tapped a DOE's model that is either wrong or unsupported, because it did not include consideration of a necessary phenomena.

For example, if a necessary element in estimating corrosion was ignored in DOE's model, we have attacked the validity of that model.

The third category and that's I think fairly standard stuff -- the third category is actually unique to Part 63 and performance assessments. And that is the requirement would consider alternative assessment of models of things consistent with data and scientific understanding.

We do have a number of contentions --

JUDGE FARRAR: I thought there were some
alternative materials that you just said they should have used, and --

>> MR. MALSch: Oh, there are a few contentions where we say that.

>> JUDGE FARRAR: And I think they say, look, the material we selected does the job. You can challenge us, the material we selected is inadequate, but you can't say we need to consider all these others that are also adequate or maybe more than adequate, because we don't need to use those. That's the one I'm talking about.

>> MR. MALSch: Okay.

I think a contention which simply says that they could have used these materials which are better. The ones they've chosen would not by itself be an admissible contention.

I think though in the contentions we're thinking of, we went on to explain that there were problems with the materials that they were using that might -- and we went ahead and suggested how those might be cured.

I agree with your hypothetical, a contention that says what they did was fine, but this would have been better, is not admissible per se.

>> JUDGE FARRAR: All right. I think that
takes care of that bullet. Let's look at the second bullet. Mr. Silverman, this is the one about your application having to be as complete as possible and many of the petitioners challenge various aspects of the application and sometimes you give the answer, well, that was all we had at the time.

What do we do; is Mr. Malsch right in this point and what do we do with that?

One thing we can do is, fine, we'll admit the contention and we'll go to hearing. And by then you will have more information and we'll test it. I take it you would not like us to do that?

>> MR. SILVERMAN: I think that this bullet and it is then later reflected in a little bit more detail in the generic section of Nevada's pleading, is a mischaracterization of our position.

We do on a number of occasions indicate that 63.21-A provides that those applications should be as complete as possible and available information.

But we do not say and I do not think we intimate at all that that gives us carte blanche to exclude any information required or to provide as I think they say here, it would be acceptable to submit a one-sentence application.

We didn't assert 63.21-A eliminates the
need to comply with the rest of 63.21, which does
have specific requirements in it.

When Nevada makes this allegation, they in
the front of their response, they point to two pages. And I'd just like to make it clear that we are
providing the indication to you and the references so
you can see that is not what we did. They point to
page 1351 and page 1500 of DOE's answer.

If you look at pages 1349 to 1358 of DOE's
answer which bounds page 1351, you will see -- the
issue is whether we provide a final design
information in the LA. We referenced 6321-A.

But we went on for several pages to
recognize that we have to provide sufficient
information under the balance of 63.21.

We explain that the regulation doesn't
provide final design information, so we address
content and substance. We specifically identified
the information in the license application that
satisfies 63.21-B, the rest of that regulation.

So we took on the substance. We didn't
just say whatever we say is good enough. We said
look in the LA and you will see that these locations,
information we believe is sufficient to meet the
regulations.
And in this case, it dealt with the specific allegations regarding the transport and replacement vehicle, the multi-tax and transportation and disposal containers. So we have not taken the position that there is no minimum amount of information. And that's an example that -- that if you look at those pages, you will see that we do not do what Nevada alleges in this bullet, which is argue with that 63.21 gives us carte blanche.

Very briefly, the other reference that Nevada cites for that proposition is page 1500 of our answer. If you look on pages 1491 to 1500, which deals with waste retrieval, whether there's an adequate plan for waste retrieval, if we're not able to put the drip shields in.

We reference 63.21 again but we also explain how we meet Section 63.21C-7, that it doesn't require a formal retrieval plan. It goes to the substance of the regulation.

We state, quote " the only issue for consideration is whether the description of the retrieval plan is sufficient" and we identify again the specific information in the LA that satisfies that regulation.
We're not saying we have carte blanche to put in as little as we want and in these cases that were cited by Nevada, if you look at them, you will see that we refer you specifically to the LA where we think we have given you sufficient information.

>> JUDGE RYERSON: All right, Mr. Silverman, if I could follow up on that.

It seems that everyone has to agree that when we are talking about compliance years out, potentially a million years out in some aspects, that there is going to be a level of uncertainty.

Nevada's point, as I understand it, is that there is a level of uncertainty that is unacceptable. Your point, if I understand it, is that you have come forward with -- given the state of knowledge right now, an acceptable level of uncertainty.

But doesn't -- for purposes again of the adequacy of a pleading, doesn't that bring us into a factual dispute on the merits that requires further proceedings to make factual determinations on who's right?

>> MR. SILVERMAN: Your Honor, it may in some cases and it may not in others. It really depends on looking at the pleadings and again the reputation in the Applicant's response because as I
said, in cases, you will find, I am confident that we adequately refute and you will conclude there is no genuine dispute because it will be obvious on its face.

It will be clear and -- and that will be sufficient. So I think there could be both cases in any given situation.

>> JUDGE RYERSON: Thank you.

>> JUDGE FARRAR: In reading your response, Mr. Silverman, to Nevada's Contention 147, I asked myself the question, DOE -- and following up with what Judge Ryerson just said, DOE making the argument that this case is so complex that we can not be expected to get it right and so minor errors don't matter, or in the vernacular, it's close enough for government work.

That flavor seems to run through this, while this is a tough case, don't worry about it.

>> MR. SILVERMAN: No, and I don't remember what's in 147, but I can assure you, that's not what we're arguing. If that's not TSPA's contention, what we're arguing, we said before is if you look at 63.114, there are small errors and there are large errors.

And a small error even if it's true would
not necessarily violate one of these regulations in this particular section of the code.

>> JUDGE FARRAR: And, of course you didn't say that exactly 147. That was my rough paraphrase. I think that we covered indirectly the third to the last bullet of the State's points. So Mr. Chairman, I'm finished with that, unless someone had a -- I only asked those two parties, because that was Mr. Malsch's State of Nevada's challenge to DOE, particularly which is why I involved him in that questioning. Go ahead Mr. Malsch.

>> MR. MALSCH: I want to indicate if the board is interested, I can explain why the cases you cited in support of their position are utterly did not stand for that proposition, but this is the Duke case and some other cases.

>> JUDGE FARRAR: I heard those already.

>> MR. MALSCH: I'd be willing to discuss them, if the Board is interested.

>> JUDGE FARRAR: We have a lot of business yet to conduct.

>> MR. ROBBINS: Your Honor, Alan Robbins. Procedurally Your Honor, I'm not the designated counsel to speak today but may I have permission to speak briefly?
>> JUDGE RYERSON: Yes, you may.

>> MR. ROBBINS: Thank you. I want to use Clark County's contentions regarding forecasted volcanism as examples of the discussion that has been going on for quite some time here. Frankly, one that we think is very simple. We have an allegation, supported by the Affidavit, recognized expert, geologist, not an expert candy cone maker or something, a geologist. He's been in the field, I mean out in the field doing studies, not just in the field of geology, who is alleging with explanation that DOE's assumptions regarding forecasted volcanic activity are incorrect.

Counsel for DOE is just saying there are big errors and small errors. We have expert supported allegations about significant understatement of forecast of future volcanic activity. And needless to say, that's among the contentions that DOE finds inadmissible because it is a proposed contention in this case and they of course find them in all inadmissible.

Well, if that is too small and minor to be admissible, you might be interested although probably rhetorical to know, how big does a contention have to get before it matters, to warrant at least being the
subject matter of a hearing in this proceeding? It boggles the mind.

I'd also like to go back to Your Honor's example that well, what if the -- I'm still on volcanism -- what if the regulations say use this kind of material, a material that meets this specification. They say, we'll use the model A and somebody allege I'll use type B. That is not the nature of our volcanic activity contention.

But DOE's response suggests that that is. They respond as if that's the kind of contention we're raising. It's not. It's as if we've said, well, you're using a backup access of the forecast for volcanic activity and let's do it on the shelf as a different forecast of why, why did you choose Y instead of X?

And they're saying a variety of different things, none of which are fair issue for hearing. But plainly, that is not the nature of our contention.

And it is not the kind of contention that is conducive to saying they specifically violated a designated standard or a prescription because the forced regulations don't specify the forecasted level of expected volcanic activity that is to be modeled,
but instead, there are other regulations that among other things require them to support the models that they use and the assumptions and data that go into it.

And that is the nature of the regulations that we allege they have violated by ignoring wholesale, information known to them that significantly affects the forecasted level of volcanic activity.

So, at times, it's been clear which kinds of contentions which would underline this discussion. At other times, it's a little more robust.

But I want to put a point on it because these are among the very important contentions that we are raising.

>> JUDGE RYERSON: Mr. Silverman, if I understand your point, is that you are urging us to look at contentions, you are asking the Board to look at contentions and decide on the pleadings whether the allegation is conceivably substantial enough to constitute a violation of the regulations. Am I correctly stating your view?

>> MR. SILVERMAN: Well, the burden is to demonstrate a genuine issue of material fact or law.
>> JUDGE RYERSON: A genuine issue of material fact. And I guess, my question is this; you've said earlier, that although your going in proposition was that you expected to find some admissible contentions, you ultimately did not.

If we took out your argument as to the adequacy of the form of affidavits and I don't want to get into discussing that.

I think another Board is going to deal with that tomorrow or Friday, or Thursday. But let's assume that all of the affidavits in this case, were in proper form.

>> MR. SILVERMAN: I'm sorry, were what?

>> JUDGE RYERSON: Were in proper form.

>> MR. SILVERMAN: In proper form.

>> JUDGE RYERSON: In correct form. And included within the body of the Affidavit, everything that is adopted from paragraph five or paragraph six or both, in particular contentions; are there any contentions on that basis that you believe would be admissible?

>> MR. SILVERMAN: Well, that would be -- there would be some if that were the only argument that we made in response to that contention. In other words --
JUDGE FARRAR: There are no contentions where that's the only argument that you made?

MR. SILVERMAN: That's my point.

Logically, you are saying we presume --

JUDGE FARRAR: Although some of them may have been influenced, since you don't like the affidavits, then maybe it doesn't amount to a genuine issue.

MR. SILVERMAN: Bear with me. I think I'm trying to answer your question just very straight forwardly. If we have a situation where we all presume the affidavits are adequate for purposes of the 2.309 criterion that requires a supporting fact, an expert opinion and if that were the only argument that we make in response to that contention, argument was inadmissible, then it would be inadmissible.

I don't know whether there are any of those or not. I suspect in most cases we made several arguments. Now, we may be wrong on the others you may find. But there are other arguments.

CHAIRMAN RYERSON: Okay. I guess -- you were suggesting earlier, we should be taking a hard look at individual contentions from the standpoint of whether they in fact, present a genuine dispute.

And I guess I was asking, if you were
looking fresh at the contentions yourself and
assuming, again, we may not assume this form is
correct, but assuming that the form on the Affidavit
were correct, I take it your position is, since you
have made other arguments in every instance, it
remains your view that there are no genuine disputes?

>> MR. SILVERMAN: That's based on our
pleadings. And really, the critical point I've been
trying to make and probably being redundant at this
point, but I also feel like maybe I haven't been as
clear, is over these few days, we're talking about
what the Board's described as overarching legal
issues.

And all I'm saying is that the Board has a
difficult job and when you see the responses, you
need to view them in their totality, both the
petition and the answer and the reply. If you
disagree with us on one of these legal principles,
you still have to look at the factual response.

You have to look at our references to the
SAR, to other portions of the license application or
to a citation to a regulation which we provide or to
a citation to a background supporting document, which
we reference.

There is a threshold for you to decide
where it becomes a merits determination. And you may, contrary to our position, conclude it's admissible or it's a genuine dispute, but there is a threshold that has to be crossed. And that's what we're requesting.

>> JUDGE FARRAR: Mr. Silverman, suppose we find an issue or two or ten that we think have -- at bottom, they are legal issues.

Do you have any objection to us admitting those contentions and calling for briefing of the legal issues, kind of like you would file a motion to dismiss that contention because the law is on your side rather than theirs?

>> MR. SILVERMAN: You'd have to first find it's a genuine legal dispute. If you did, then you'd admit the contention and if you wanted it resolved, then, yes, motions -- a brief would be a good way to resolve that issue.

>> JUDGE FARRAR: Okay. let me -- do you want to go ahead?

>> JUDGE RYERSON: Yeah, you know I said at the outset, we hoped to reserve some time for kind of a final cleanup of anything anyone feels has not been adequately addressed. I would urge you when we do that not to feel constrained to say something if you
really have nothing to say at this point. We've heard a lot.

But I know Judge Farrar has some questions that he'd like to address, I think on some specific contentions and would like to try to reserve enough time to at least give everyone an opportunity to say whatever they'd like.

>> JUDGE FARRAR: In order to honor what the Chairman wants to do on the short snappy answers to the -- don't feel compelled to give a non-snappy answer.

Let me first ask the staff, in the State of Nevada's reply brief to you, at pages one to two, they say you have insisted on a depth of support for these contentions that's not necessary and, in fact, it's preposterous.

Let me put that a different way. A long time ago, we had no -- almost no bar to Intervenors coming in. And through the years, the Commission has raised the bar and many Intervenors and experts in most cases, we deny most of the contentions because the Intervenors haven't met that bar.

But you can't read this case without coming to a sense that the bar was here and the State of Nevada and some of the other petitioners far surpass
that bar, so the bar got raised so they didn't quite reach it.

I have that feeling when I read some of the Staff's answers. Am I wrong to think that the bar has been raised? In other words, that yeah, the bar has been raised -- because I have to tell you, comparing these contentions to others that I have seen, they seem at least superficially to be a lot better.

We're going to talk about the aircraft issues in PFS. I think that came in, Mr. Silberg, correct me if I'm wrong, I wasn't there at the time, but that came in on a five-line contention?

Am I right?

>>MR. SILBERG: Close to that, yes.

>>JUDGE FARRAR: Go ahead Ms. Young.

>> MS. YOUNG: Mitzi Young for NRC staff.

I don't believe the bar has been raised. I believe when you are evaluating the contention with respect to the proposed action, you need to evaluate it in the context of the issues that are challenged. Part 63 is a risk-informed performance-based regulation.

Many times the contentions used very broad-brush in terms of identifying multiple sections of Part 63 that they believe had been -- DOE has been
sufficient in satisfying.

But when you looked at that list of issues or sections that they identified, it seemed like their concern was not with respect to all of the sections, although, they did a pretty good job showing the relationships between various regulations. But they had a concern about a specific, more narrow regulatory requirement.

To that extent, in looking at contentions for this proceeding, the staff under the time constraints it had, given the brevity of reply time, tried to reasonably construe each contention in the context of the matters raised.

We did not arbitrarily raise the bar. Now, we recognize as you did, Judge Farrar, that in many years passed, contentions in both the reactor proceedings and the issues and the informal proceedings, until the contention requirement was imposed, people got in with very little explanations for supporting an issue, but in each instance, we were reading Nevada's pleadings and trying to understand what was the real concern being raised, was there a genuine issue of dispute as to the material issue of law of fact; what was the supporting information and given the technical issues
involved, it was important.

In each instance, the staff reasonably construed the petition and tried to understand what was in that and our objection, which pertained mostly to the adequacy of support and whether a genuine dispute had been raised, were done using the standards that the Commission has elucidated for admission of contentions.

So it's hard to compare repository contentions to reactor contentions because obviously, reactor -- well on the principles of allegation has been well trodden, there are a lot of different issues.

Obviously, there are fluctuations between the individual boards. You asked a question about who served on the Board with respect to a question -- answer by Don Silverman. Anne Young was the Chairman of one of those boards. You have different readings in the context of the matters raised.

>> JUDGE FARRAR: Let me interrupt. The key thing you are saying though is you want me to put aside what I think I know from the past because Part 63 is really a different animal?

>> MS. YOUNG: It is and obviously, this is a case of first impression, and Nevada and the other
parties have, you know, labored hard to try to raise
issues, but this staff and those who are responding
to petitions there also labored equally hard, if not
longer, although in a shorter period of time to try
to understand the issues raised and whether they were
adequately contained in the context of the regulatory
requirements contentions.

>> JUDGE FARRAR: That's a fair answer.

Thank you. I don't need a reply. We need to get
through this or we won't get through this. I'll give
you ten seconds.

>> MR. MALSCH: Just to make a quick
observation. When the Commission entertained
contentions in the first license renewal proceedings,
it didn't cast the past aside. When it entertained
contentions in the first storage proceeding, it
didn't cast the past aside. When it entertained
contentions in the first enrichment progressive
conservative, it didn't cast the past aside.

I would call the attention to the
Commission contentions of the LES case and they
invited the Board to compare that contention with any
of ours and conclude, that we believe would be the
case, that our contention is, if anything, better
than theirs and that was admitted by the Commission,
and not a licensing board.

>> JUDGE FARRAR: Thank you, Mr. Malsch.

Mr. Silverman, let's talk about on a general basis, your contentions.

>> MS. YOUNG: Judge Farrar, if I could respond briefly to one issue.

>> JUDGE FARRAR: I really got to get through this. Go ahead.

>> MS. YOUNG: Mr. Malsch suggested in the first license renewal proceeding the Commission didn't pass -- use a different standard. There were no contentions admitted in the first license renewal proceedings.

>> JUDGE FARRAR: Thank you.

Mr. Silverman, let's talk about your contentions 174 to 183 which are the air crash contentions and just talk about them generally. A few years ago, we had a proceeding at PFS where we ended up with two phases, a total of 60 days of hearing.

The company lost on the first go-around, one on the second go-around on contentions. And the original contention which as Mr. Silver recalls, was very simple, had very little in it and behind it.

We ended up having a hearing on issues that looked very much like these issues, 174 to 183. We
had the very same witnesses that the State of Nevada brings forward.

I'm having trouble saying that what they've put forward isn't as much as the State of Utah put forward and State of Utah won the first phase of that case and for a time, had the project blocked.

I'm having trouble finding any way that I could reject these contentions. Can you help me with that?

>> MR. SILVERMAN: As much as I'd like to, Your Honor, without going back and reviewing them, I apologize Your Honor, without trying to compare and contrast, I apologize.

>> JUDGE FARRAR: But this generally, this is the PFA-- PFS case all over again --

>> MR. SILVERMAN: I sat on the PFS Board. I really can't do it.

>> JUDGE FARRAR: Mr. Silberg, in case you get admitted here, should these contentions be admitted?

>> MR. SILBERG: I've not read them, Your Honor.

>> JUDGE FARRAR: Moving right along. Is there some contentions and when I speak of specific contentions now, I'm not so much interested in the
contention, itself as in the principle behind it, which might affect a number of other contentions.

Contention 139 states the issue is whether the DOE has to file a description of something now or details. And DOE says we don't need details now, we only need descriptions. When do we get the details, Mr. Silverman?

And I don't mean just on this one, but generally, if your application only needs a description, when do we get the details? Is that at phase 2 of Mr. Silberg's multi-phase?

>> MR. SILVERMAN: Did you say 139?
I'm not familiar with the numbers. There were contentions made with material plans, a county plan as I recall --

>> JUDGE FARRAR: I'll tell you in just a second; 139 was emergency, yeah, dealing with plans for radiological emergencies.

>> MR. SILVERMAN: I had a different number for that. The regulation and I -- it would take me a moment to find it, the regulations specifies when that's to be required to be submitted.

>> JUDGE FARRAR: The description now, if I read the rate carefully enough, I'll find out -- when the details have to be supplied.
MR. SILVERMAN: Yes, sir.

>> JUDGE FARRAR: Now, if thigh challenged. If they look for details now and we say, sorry, it's a bad contention, you can't get the details now. Do they get to come back with a contention at a later stage and say, now, we gave us the details and we don't owe -- is that the time contention?

>> MR. SILVERMAN: If their contention when we submit an emergency plan is that the emergency plan is inadequate, and they file that contention within a reasonable amount of time after the emergency plan is made available, that -- that's timely.

>> JUDGE FARRAR: That's timely. Still they have to meet the other stuff. But they're not out of time because they've raised it now?

You are saying, in fact, it's too early to give you that now, go away?

>> MR. SILVERMAN: I can't challenge the emergency plan that doesn't exist and is required to be submitted. And I believe there is a rulemaking on the security issues, and MCA issues that specifies -- I think it hasn't gone final yet, the exact dates when the fiscal security TSPA plans have to be submitted. It's not now. It's later
MS. ROBY: Your Honor, Debra Roby for Clark County: A follow-up to that.

I believe there is case law that states if an emergency plan is to be prepared at a later stage, if that contention should still be admitted at this stage and to prevent that from being admitted at this stage may deny it down the road. You may be faced with an untimely --

JUDGE FARRAR: So under your theory, you would admit it and just hold it in abeyance until it became ripe?

MS. ROBY: I would admit it at this stage, yes.

JUDGE FARRAR: It would eventually do the emergency plan?

MS. ROBY: Correct.

JUDGE FARRAR: And then they'd have to file in effect --

MS. ROBY: At that point, there may be an amended contention based upon the filing of the information at that point. But the contention would already be in. And then it would be an amended contention at that point.

JUDGE FARRAR: Let me say, Mr. Silverman, you don't agree?
MR. SILVERMAN: Ten seconds or less; the regulation in 63.21, it's a sub element of 21 which says the description of the plan for responding or covering a description of the plan for emergencies. We laid out in our Answer why there was a history of that, I believe, why that only requires a description at this time and a full emergency plan is not required.

So I wouldn't agree these should be admitted now and held in abeyance.

JUDGE RYERSON: But again, you would agree that once the plan exists, a proper contention could be filed at that time?

MR. SILVERMAN: Absolutely.

JUDGE FARRAR: Contentions -- Contention 148, there is a mention of human factors. And I think that's the one where you accuse the State of Nevada of not coming up with enough information to show that human factors was an issue. I seem to recall we wrote in PFS where the company tried to win the case on the theory that don't worry about what the mathematical formula said, we could count on the human factors of the pilots' action to take care of things.

And we said, no, no, in things nuclear,
human factors are bad things. We try to make sure we
don't rely on infallible human behavior, because
that's not how things go.

Why is this not like, not like that where
we're -- where when you challenge human factors, you
have a very, very low threshold of acceptance to get
in.

You don't have to show much to say, don't
let them rely on, you know, the human factors are
going to save the day.

>> MR. SILVERMAN: Well, two responses:

One, human factors can be interpreted in two
different ways.

One that I recognize, the principle in the
nuclear industry that the best protection is a
passive barrier and/or an engineered barrier. It's
active and then human action is sort of the lowest
level -- I appreciate that.

On the other hand, there's the other side
of the human factors which is an analysis of building
it into the design and operation of a facility; it's
a positive thing.

It's something that's done in most
facilities I know, that I'm -- I'm afraid I'm going
to disappoint you. Again, I'm not familiar with
PFS in detail. I would have to go back and look at this contention and compare the two. I apologize. It's hard for me to give you an answer on that.

>> JUDGE FARRAR: Mr. Malsch, do you want to address that quickly?

>> MR. MALSCH: With the definition of features, process and events in this case, most people would say a very low threshold, this would be the least case in which one would ignore human factors considerations might have an effect on the ultimate result.

We have had at least this one contention, that is Safety 148 and perhaps some others in which we specifically challenge DOE's basis and assumptions regarding human factors.

I think there are a number of factors in which we thought was a ridiculous argument, the contention should be dismissed because we presume that the construction authorization that their quality assurance program function perfectly. There would be no deviations and so far as human factors are concerned, we should assume at this stage that everyone performs perfectly. We see absolutely no basis for that in this case at all.

>> JUDGE FARRAR: A contention, Nevada 149
raised to me, the question which others did, Mr. Silverman, sometimes the contention seems self-evident. You are saying they didn't supply this and they didn't supply that.

But some contentions just seem self-evidently to be raising a legitimate issue. But your response never seems to recognize that. You always say they fell short in terms of affidavits or expertise or references or so forth.

You gave a general -- I'm sorry I can't ask you a more specific question.

I'm trying to let you understand at least one board member's thinking in reviewing those, so you have a chance to respond.

>> MR. SILVERMAN: Well, my response is two-fold and I'm being repetitive.

The first is the contention may seem self evident. If you conclude it is self-evident after reviewing our answer, you have a judgment to make and you may conclude it is admissible.

To answer these questions on the individual contentions, I need to go back --

>> JUDGE FARRAR: These ideas, we've done a lot of work already but after this argument, we have a lot more to do. Let me go back and review it. I'm
trying to get some principles to apply to that next round.

>> MR. SILVERMAN: When you see one side of the story, it may also be self evident and then you find out later it's not.

>> JUDGE FARRAR: Fair comment. In Contention 157 on volcanism, DOE raised the Bolotte Defense, and, in effect, said maybe it was the staff. I think it was DOE, hold on. No, DOE raised the Bolotte Defense which was the name of a case in the enforcement arena where a court of appeals says you can't get standing to say that NRC Enforcement Act, proposed NRC enforcement action didn't go far enough. And you use that as a defense to say, in -- that where the state wants more completeness and accuracy, that Bolotte is barred from asking for that, that only the staff can ask for that in an enforcement proceeding and I didn't follow that.

>> MR. SILVERMAN: Give us just one moment. I will be brief. I haven't read the contention again, in the response. But on completeness and accuracy, if the applicant has not provided completed and accurate information in 63.7(10), that's an enforcement matter. That's clearly an enforcement matter.
It may be an enforcement matter. In other words, if you file an incomplete and inaccurate application, the NRC may get after you and maybe some other agencies of government. But we have a hearing here, the fact that they have that authority to go after you in enforcement action, doesn't mean that the state or other petitioners can't also say that that part of your application is seriously deficient and therefore, your application should not be granted.

Now, Bolotte doesn't take away our authority in a non-enforcement case. Bolotte takes away our authority in an enforcement case. I'm asking if it takes it away in a non-enforcement case.

Well, in skimming our answer, I think the arguments we make are that when staff reviews an application, they review it first to see if its docketable. They have done that. They then review the legal requirements to see if it meets the legal requirements. That's the licensed application for review.

I think what you were saying here is that's different from an allegation that we have failed to provide -- failure to provide complete and accurate information is different than an allegation that we
omitted information that should have been included generally.

>> JUDGE FARRAR: One is not exclusive of the other. If the staff thinks you committed -- some call it fraud -- they'll go after enforcement. But the State and the other petitioners can also say, that application is unworthy of being granted, because it's missing some stuff. That was mentioned --

>> MR. SILVERMAN: Just in my mind, that is typically not a complete and accuracy issue under 63.10. That's a violation of a specific regulation in 63 that says "thou shall provide this information" and we didn't provide it.

>> JUDGE FARRAR: When are you going to -- Contention 162, when are you going to submit a retrieval plan?

>> MR. SILVERMAN: This is not intended to be a flip answer, Your Honor but it's when the regulations requires it. I have to pinpoint the regulation, but I strongly suspect in my answer we identify --

>> JUDGE FARRAR: Seven years or 100 years?

>> MR. SILVERMAN: I can get back to with you that information. It's probably specific in the
regulation.

>> JUDGE FARRAR: Well, if it is, we'll find it. This came up mostly to my attention in connection with Nevada 163. Sometimes your paragraph six goes on for vast numbers of pages convincing us that there is no genuine dispute as to a material fact.

And after I read Nevada's six pages on that subject and your six pages on that subject, my conclusion is, it sounds like a dispute to me. I mean, if you can't be dismissive of them in a fairly short time, isn't that a clue that there is something, there is a real controversy here that we need to get to the bottom of, not through a pleading ruling?

>> MR. SILVERMAN: Is that an indicator of a genuine material dispute because the two parties have gone on at length about the issue? It may or may not be, Your Honor. It depends.

>> JUDGE FARRAR: It may be a subtle way to encourage shorter filings, I suppose.

>> MR. SILVERMAN: Yes. It may be that it took that long to explain the issue, but, nevertheless, at the end of the day, it's apparent, would be apparent on its face that the matter did not
raise a genuine dispute. These are complex issues, particularly in TSPA space.

>> JUDGE FARRAR: Moving back -- I forgot something on 149. I think that's one of the ones where the State said, you don't have any reasons that you've put forward on this particular facet of the case. And you snap back at them, well, you didn't give any reason saying why we didn't give any reasons?

If you have no reasons, isn't that a valid contention? You have fallen down on the job by not supporting what you've done. How can they say more than that?

How can they have reasons to counter your lack of reasons?

>> MR. SILVERMAN: They would have to explain, among other things, where in the regulations it requires to provide -- when we say "reasons make its technical basis", maybe, in other words, that there was a requirement to provide the technical basis for some piece of information, their burden initially.

>> JUDGE FARRAR: Mr. Malsch, I have one question for you.

You have a number of contentions starting
at 184 that deal with land use. And I kind of split
them into two parts, one of which, one batch of them
says they don't have the necessary approvals yet to
build this thing. They have to get all these
different approvals.

Why is that not like our old cases where we
say, we're going to award the license for the reactor
even if they don't have this state permit and that
state permit because either they'll get there, that's
not our business, either they'll get those, or they
won't get them and they can't proceed.

What is different about that first half of
your land use issues where we can't just say, let's
wait and see if they get those. We don't care if
they get those permits, that's somebody else's
business.

>> MR. MALSCH: I think the distinction is
that in this case as our contention provides and our
Reply provides, Part 63 requires that the rights or
approvals be obtained.

>> JUDGE FARRAR: So it's our regulation
rather than the State of Connecticut's regulation?

>> MR. MALSCH: That's correct. We're not
arguing as a general proposition that everything
should be held up because of some other permit
requirement. We're simply arguing the matter applying to Part 63.

>> JUDGE FARRAR: Mr. Silverman, on the second batch of those lands use things -- oh and on the one or two of the aircraft ones, particularly the ones about the fly-overs and so forth, you say, don't worry about it, we don't have the permission yet, but we'll get the permission.

And I think the second batch of the land use said, you don't have the authority to keep our people off the land. These are people who would get an excessive dose, presumably would get some kind of an excessive dose.

Now, the aircraft ones, you say, we'll just go to the Chief of Staff of the Air Force and we'll get those permits and the people won't fly over. What we learned in the PFS case is the Chief of Staff of the Air Force doesn't like getting all these requests because it severely limits the Air Force's ability to train their people.

So why are -- any contention that says you don't have the control you need to have, why are those not valid contentions and we'll just leave them lingering around and when you get those permissions, then the contention goes away.
But I -- after what I learned in PFS, I'm reluctant to say, don't worry about it, you'll get those permits.

In fact, the PFS project is not going forward today because after finally winning the case with us, the company was unable to get a couple of permits that seemed -- from other agencies -- that seemed they ought to have been very routine.

>> MR. SILVERMAN: One moment, Your Honor.

>> MR. SILBERG: While DOE counsel is conferring; it seems to me -- this is Mr. Silberg for NEI -- that the easy way to deal with this is by license condition. It is a clear requirement, they can't go forward without it. Put it in as a license condition; we move on.

>> JUDGE FARRAR: So, does that mean, Mr. Silber, you admit the contention and tell the parties to work out the condition or you don't admit it and trust the staff to put in the condition. Good suggestion but give me the mechanics of how you do it?

>> MR. SILBERG: I think you can do it either way.

>> JUDGE FARRAR: Okay, thank you.

>> MR. SILVERMAN: I understand unlicensed
conditions may be appropriate as a result of a
evidentiary proceeding on the admitted contentions,
and again, not being completely familiar with the
details of those specific contentions, the issue
depends upon whether we are required to have those
permits now or not, as a condition -- I'm sorry, as a
prerequisite of the issuance of the construction
authorization. That's without regard to precisely
what we have said in the answers, which I'd have to
go back and look at.

>> JUDGE FARRAR: Why would we want to
authorize you to build a multi-billion dollar
facility and then at the phase 2 of this multi-phase
proceeding, say, oh, that farmer can still come on
the grounds because he has an easement, so sorry, you
can't get a use and possession permit. Why would you
want to government to function that way?

>> MR. SILVERMAN: Well, the first response
to that thing is you would not have that contention
if there was not in fact a requirement to have that
permit as a condition of getting the construction
authorization, number one.

And number two, in regard to your question
what you were referring to, where you have any number
of environmental permits that may come later, which
the NRC doesn't hold the licensing up for. Same
ting goes forward. I understand Mr. Malsch's
point regarding the legislation required, certainly
it's a requirement. But to your point, it's no
different.

>> JUDGE FARRAR: Thank you all for the
quick answers too. I know you weren't particularly
prepared for those questions, but I thought it was
important to at least get your views. It will help
us as we go back through the contentions.

>> JUDGE RYERSON: Thank you Mr. Farrar.

Why don't we take one last break for ten minutes or
eight minutes, come back at 4:30.

What I'd like you to give some thought to
during this short break, we will give some thought to
whether we have final questions. And we'd like to
give as we said at the beginning, we'd like to give
you an opportunity to address anything on today's
topics. You'll have two more days. There is no need
for a grand summation of your position.

And honestly, if you don't feel you need to
say anything on any of the issues at this point; it's
been a long day, and we don't need to hear anything
that you don't want to give us. But we'll give you
eight minutes and we'll be back at 4:30. We'll see
if we have further questions and we'll hear from
whoever would like to speak at that time.

(Whereupon a short break taken)

>> JUDGE RYERSON: Please be seated. All
right. You will be either pleased or displeased to
know that the Board has at this time no further
questions.

Now, we will be either pleased or
displeased as the case may be to see whether there is
further enlightenment you wish to share with us.

Again, I emphasize there will be two more
days before the two other boards, so we're really not
looking for a grand summation of any kind. We're
looking to give you an opportunity to crisply address
any of today's issues, where there just wasn't an
opportunity or you really thought of an important
point later.

So in that spirit, why don't we just go
around the room and ask the NRC, staff anything to
add?

>> MS. YOUNG: Mitzi Young for the NRC
staff. The staff has no further comments.

>> JUDGE RYERSON: Thank you Ms. Young. NEI?

>> MR. SILBERG: Jay Silberg for NEI. Three
short points, Your Honor. First, thank you for giving
us an opportunity to hear our case on standing.

Second, with respect to materiality, we
believe that the contention can be material even if
there is no violation of the regulation as alleged.

Second with materiality, the contention
that argues for over conservative can be just as
material as one that argues for under-conservatism.
And finally with regard to contentions, I have been
litigating contentions for 40 years. I can't speak
for the other party's contentions, but I know ours
are more specific with more basis and more care as to
their legal underpinning than any contentions that I
have ever seen in a law practicing before this
agency.

>>JUDGE RYERSON: Thank you, Mr. Silberg.

Mr. Silverman?

>> MR. SILVERMAN: We appreciate the time
as well, excellent discussion today Your Honor and
excellent exchange. And we have nothing further.

>>JUDGE RYERSON: Thank you. Mr. Malsch,

for Nevada.

>> MR. MALSch: Just one ten-second
comment. First of all, we appreciate the time the
Board spent today on the issues involved. Secondly,
I just wanted to briefly pick up on an interesting observation or hypothetical offered by Judge Farrar, which is when you are looking at whether there is sufficient support and facts and opinion for a contention, and you look at our contention and you look at DOE's and the staff's answer and reply and say, who can figure this out?

I think the case law would rather clearly indicate that the contention under those circumstances should get admitted and I just refer the Board to LaMont Yankee case LBP-o6-20 and the Commission's Paliverde decision in CLI.91-12, both of which stand for the general proposition that newly contentions at the admissibility stage, the boards or Commission should draw inferences in favor of admission.

CHAIRMAN RYERSON: Thank you, Mr. Malsch. Mr. List, anything for the four counties?

>> MR. LIST: If I may, Your Honor, at the risk of violating a pattern that seemed to have started here, I would like to take a few moments to discuss what we believe is for the future of our counties, from a public policy standpoint, is extraordinarily important.

This is our one chance to address this
Board and to talk to Your Honors about what we think are critical issues for our people.

You mentioned at the outset of today's proceedings that, that we don't have to win the case here today, and that, that what we do have to show is a genuine issue, a genuine dispute. I think you also said that we don't have to decide it on the merits today, and we recognize that.

And I think that some of the legal principles which were collected in the Crowe-Beaut case are worth thinking about as we conclude these discussions about the NEPA contentions in particular. The petitioner in that case reminded us is not required to prove its case if the contention stays. We must only make a minimal showing that material facts are in dispute.

And we believe that we've done that. And we've met the depth required in the documentation that we have submitted. And I would just suggest that, that it might be worthwhile for the Board or your staff to look back at the original FEIS, the Final Environmental Impact Statement and contact that with the supplemental final supplemental impact statement.

The Supplemental Environmental Impact
Statement changed the size and the weight of the trucks and did not do the kind of analysis that they did previously for the other trucks that had originally been proposed. They went from, from legal weight trucks to overweight trucks; substantial difference.

They went from trucks less than 80,000 pounds to trucks averaging around 115,000 pounds; a significant difference, difference in length as well. They also increased between those two environmental impact statements, the number of shipments from 1100 to 2700.

So they nearly doubled the weight on the trucks and they more than doubled about 150 percent increase of the number of truck shipments. So 2700 truck shipments, they've given an awful lot of concern in the environmental supplemental Environmental Impact Statement to 2800 train shipments, but very, very sparse consideration to 2700 truck shipments.

We believe that our affidavits that support our position on NEPA Contention Number One are very, very clear, both the Affidavit and the original petition is number three. And the Affidavit or attachment Number One to the reply, laid out in depth
the enormous impact that these truck shipments will have.

The -- I think it's totally unrealistic, also, if you look at the Supplemental Environmental Impact Statement, to see that they have considered no routes in Nevada off of the interstate freeways, that is, there are two across Interstate-15 and Interstate-80. The only route they've considered to the repository, itself, is from Las Vegas off of Interstate-15.

It's the only one that's shown on any of the exhibits or any of -- or discussed in any of their documentation.

The fact is that DOE policy presently prohibits even low-level waste through Las Vegas. Secondly, by DOE's own admission, the State, under DOT regulations designates the off interstate routes and it's unimaginable that the State of Nevada would ever designate Highway 95 from Las Vegas out to the site bringing in traffic to this community.

And, thirdly, the level of service in Las Vegas is by DOE's own admission, congested.

And so, we -- what we're suggesting is that the omission of the realistic fact that these shipments are going to take place -- not from Las
Vegas but through our four counties, has not been recognized. It was talked about in the original final impact -- final Environmental Impact Statement, but not in the supplemental.

I think we've shown that clearly through the Massie Affidavit and through the two patent affidavits.

I should also mention that they very briefly touched on traffic in the state of Nevada off of the interstate freeways. They picked five locations, all of them right near Gate 510; three of them on 95 South where there is unlikely to ever be a single shipment seen.

One of them on the road over to Death Valley, which would be a very unusual place to have shipments, although there may be some, and one right at the gate, but none up in the four counties where in all likelihood we are going to see significant shipments as we demonstrated in our affidavits.

Each of the locations they've chosen was in the middle of nowhere, away from the communities, away from the towns, when in reality, these shipments are going to go on two-lane highways right through these communities. These are inextricably connected to this repository project.
There is no doubt if one considers what makes this plan -- this whole plan go, they have to consider it. The -- I think similarly, and they've attempted to do some calculation on radiation doses for maximum exposed workers and members of the public caused by Nevada transportation. The only location chosen for that was in Indian Springs which again was on 95 South of the repository where it's unlikely there will ever be a single shipment.

The SEIS also estimates the total number of shipments by train, as I mentioned. They go through extensive analysis of the details and the procedures and processes necessary to deal with the train, not only in this EIS but also, of course, in the county rail analysis study and the Environmental Impact Statement there.

We think that our affidavits clearly show new information within the meaning of 51.109 and we note that the EIS does address environmental impacts of transportation by truck on a national scale, but they don't do it in Nevada.

And the defect in that approach to it is that they simply don't address the environmental impacts which will result in the confluence of trucks coming off of the Interstate and proceeding to the
Yucca Mountain project.

Every single truck has to come down that two-lane highway. And so what you have is a convergence, sort of a funneling effect of thousands of trucks, overweight trucks after they leave the interstate system traveling through several hundred miles through small towns adjacent to the counties, adjacent to Nye County.

And to ignore that is a violation, we believe, of the case law and of the regulation. The -- there is zero recognition nor discussion of the resulting environmental impacts on the traffic congestion and safety, and the impact and damage on the roads, themselves. The burden of the consequential impact on the first responders which are enormously significant.

The absence of communication inner-operability among first responders and law enforcement on these counties and communities that are adjacent to the site.

The affidavits demonstrate that there are a tremendous absence of staff and individuals are dependent largely on volunteers. They don't have the equipment. DOE attempts to gloss over that by saying well, we're going to give them the training and
planning required under Section 180-C of the Nuclear Waste Policy Act.

But planning and training certainly does not equip or staff these people to deal with the emergencies that clearly are going to arise.

So we suggest to you that the NEPA document is absolutely inadequate. They have not taken a hard look at the consequences of this project and of the important aspect of it. They have not come up with a mitigation plan at all insofar as the matters that I just touched upon which, of course, they are required to do.

Even if they haven't mentioned some of the mitigation measures, that's insufficient. They have to have a reason discussion.

So for all these reasons, they fall short of what the law requires and these are critically important matters to the residents of these communities. We're not out to kill this project. Let me make that clear. The people in these communities have taken a constructive approach. They're the ones that live closest to the project.

And they have every right to insist that the documentation done in this matter be done in accordance with law, that they have an opportunity to
come in and be heard. And I think it's also worth mentioning that the DOE, itself, in a previous -- in the final Environmental Impact Statement, actually said they were responsible for developing a response policy. And yet, they didn't do it. They don't talk about it in the supplemental EIS. How big are the impacts?

We've made an effort on our own to quantify it. There is a reason these units of government are called defective units of government. Congress calls them that.

That's because they are defective. Our analysis shows that about $185 million dollars in highway improvements are needed in just these four counties, another $18 million annually to maintain them; about $16 million in capital costs to equip our first responders, an annual operating cost there of another $15 million. And $7 million to establish the ability to communicate.

Currently a sheriff in one county can't talk to a sheriff in another county or to the highway patrol or to the ambulance company, or to the volunteers that run them, or to the hospital. None of them are able to do that.

That's another $7 million. These are poor
counties as the affidavits show that don't have the
money to deal with that.

So they -- people need to be put on notice
these things need to be quantified and discussed in
such a way that they can be addressed.

>> JUDGE RYERSON:  Now, Mr. List, I want to
assure you that this Board and the other boards will
be carefully reading each of the 328 or 29
contentions that we have. And I appreciate you
highlighting them. If you can wrap up in the next
minute or so, I'd appreciate it.

>> MR. LIST:  I will. I'm almost to the
end. I appreciate your indulgence, Your Honor. So
in our limited way, we've taken a bit of a hard look
to look at these things and do what DOE should have
done.

We've demonstrated those in our Affidavits.

I also want to in closing mention that this is the
time that this contention needs to be taken up. It
should not be deferred. It takes years to design and
to put together the kind of improvements we're
talking about and then to construct hundreds of miles
of highway, to put together the funding that's
necessary and these things don't all get built at
once. And it should not be put off until the time
when the actual time comes, the day comes when
they're ready to complete the construction and
they're ready to put the material in.

So in essence, I appreciate your indulgence
and I want to simply say that we feel very
passionately about this and trust this Board and the
other boards to read carefully and to take into
account the matters that we've put forth.

>>JUDGE RYERSON: Thank you Mr. List.

Mr. Sullivan for California.

>>MR. SULLIVAN: Thank you, Your Honor. We
appreciate the opportunity to participate in this
procedure and we also greatly appreciate the extreme
amount of preparation and thought that the panel has
obviously given to all of these issues and I think
all the attorneys in the room can appreciate that.

The NRC has an obligation to, under NEPA to
consider the environmental impacts of not just the
construction of the repository, but also connected
actions even if they're not under NRC's direct
regulatory control. Transportation and construction
are inextricably linked.

It's irrational to just do just one or the
other. They have to go together. The NEI case,
allow parties to litigate substantive NEPA issues in this proceeding.

I want to talk a little bit about what has not come before us, specifically, in the Nevada vs. DOE case. California is not a party there so res judicata, collateral estoppel don't apply to us.

There were very few issues that were actually decided on the merits in that case. The court in Nevada vs. DOE looked at the 2002 repository EIS. No court has ever considered the other documents since that 2000 EIS.

In 2008, the Department of Energy issued a record decision that said that although we analyzed the Minor route and the Caliente route and the Minor Route is environmentally preferably. But we're not going to choose that one. No court has ever looked at the difference between the Minor and the Caliente Route and whether or not DOE adequately analyzed that.

No court has ever ruled on transportation impacts outside of Nevada, whether those have been properly analyzed by DOE. So we think that all these issues as outlined in our contentions are proper for this proceeding. Thank you.

>> JUDGE RYERSON: Thank you, Mr. Sullivan.
Mr. Huston?

>> MR. HUSTON: Your Honors, thank you. We are I'm certain the only private party at this proceeding, that small land owner in Lincoln County. At the outset of the hearing today, Mr. Sullivan was asked whether there had been any change in DOE's position.

It was unclear to me whether the question was directed toward the DOE's commitment or lack thereof to the license application and this process. Toward the end of the questioning, Judge Farrar asked why contention could not be maintained, to the effect that DOE did not control the site and what it needed to complete the project. And possibly that farmer that maintained the right to walk around the site.

This Board and CHS, Caliente Hot Springs Resort, it seems that the Commission are well aware that the project subject to the LAN is in the President's words, quote, unquote "dead."

Further, the Secretary of Energy confirmed that the administration determined that Yucca Mountain would never be built in testimony before a Senate on natural resources on March 17th of this year. When asked by Senator McCain, what is wrong with Yucca Mountain, his secretary testified, I think
we can do better.

All of the parties here who have filed contentions agreed in some part or portion or spirit with the Secretary of Energy.

My concern is that DOE is wasting my time and Treasury and those of Nevada and California and that the counties represented here, and the other parties and the U.S. treasury, itself, and this proceeding presently lacks foundation and DOE candor at its very core.

If so, DOE should withdraw the LAN at its earlier opportunity as topics discussed today may, in fact, have no relevance or value to the parties or to the public. Only if DOE intends to proceed to construction are all our efforts and expenditures and time here today and in the future justified and have any value.

We're all -- the administration is determined not to proceed. All we lack is withdrawal of the LA --

>> JUDGE RYERSON: Mr. Huston, thank you.

I, at this point, we are dealing with an application that is in front of the NRC and it's not -- it is really not an issue that is relevant to this Board as to whether DOE should or should not be withdrawing
the application. If you have comments beyond that of
a brief nature, please, please continue.

>> MR. HUSTON: Well, with all due respect,
these proceedings are probably costing about $2
million dollars but with regard to the topics
discussed here today, Caliente Hot Springs finds
itself in agreement with Nevada, California, the Four
Counties, and the tribes on the issues. Thank you.

>> JUDGE RYERSON: Thank you, Mr. Huston.

Ms. Curran, your participation as a
non-party is not opposed so I'll pass you by. We'll
move on to Mr. Poland, is that it?

>> MR. POLAND: Thank you, Your Honor, yes.

On behalf of the Timbisha Oversight Program, we
understand there will be some native American issues
that will be discussed tomorrow. However, because
our sole contention is that NEPA contention, those
are the issues before this Board today, I wanted to
very briefly address those.

As I mentioned, the Timbisha Oversight
Program proffers just one contention, that's a NEPA
contention contained in our amended petition. That
contention notes DOE's concession in the EIS and the
SEIS that contaminants from the geologic repository
might contribute to and discharge into the Death
Valley Springs.

That contention also is supported by affidavits of members of the Timbisha Shoshone Tribe who live in the Death Valley area as well as an expert anthropologist that tribal cultural religious and other interests, which are based on the purity of the water, including Spring's Death Valley, would be greatly harmed by the contamination of those springs.

It's notable that the NRC staff does not oppose the admissibility of this single NEPA contention that the Timbisha Oversight Program is proper. The DOE, however, does oppose this contention and I would like to address two points of difference. First, DOE argues that this contention does not raise a significant issue and is not material.

Now, some people might view Native American religion and culture as history.

Although, it is true that the Timbisha Shoshone has maintained their culture and practiced their religion for thousands of years. Their culture and religious practices which revolve around the purity springs and water are very much alive. They are practiced now as they were a thousand years ago.

The notion that the devastation of an
entire people's cultural and religious practices stretching back thousands of years is not significant or material, is culturally myopic. It is offensive and it is just plain wrong under CEQ regulations, NRC regulations and NRC guidance.

I suspect that for many of us in this room, our cultural heritage and our religious practices are not just significant to us, they are central parts of our lives. It is no less so for the Timbisha Shoshone.

Second point of difference. DOE claims that it took the hard look at cultural impacts that the regulations required it to take and that that hard look is reflected in the EIS. What DOE sites for this proposition is a single page in the FDIS and a single page in the SDIS. Both pages say essentially, the same thing. The passage from SDIS reads as follows:

"The American Indian people believe cultural resources are not limited to the remains of native ancestors, but include all natural resources and geologic formations in the region, such as plants and animals and natural land forms. Equally important are water resources and minerals."

Now, this is supposedly the hard look that
DOE took at the impact on Timbisha Shoshone cultural interests. This is patently deficient in at least two ways. It lumps together the cultural interests of all American Indian tribes as though they are identical and there are no differences.

Second, it says only that water resources and minerals are important. It mentions nothing about the devastating impact on Timbisha culture and religious practices that contamination of the Death Valley Springs would have.

In sum, if the purpose of NEPA and the implementing regulations of the CEQ and NRC is to ensure that the decision-makers in this proceeding have before them analyses of all the important effects and consequences that might result from the proposed geological repository, then it is clear that the contentions the Timbisha Oversight Program has raised are significant, they are material, they will help develop a sound record. They should be admitted. Thank you.

>> JUDGE RYERSON: Thank you Mr. Poland.

Mr. James for Inyo County?

>> MR. JAMES: Yes, good afternoon. I simply want to commend your Board for the excellent preparation for this hearing and for conducting an
excellent hearing this afternoon and this morning.

Thank you.

>> JUDGE RYERSON: Thank you. Nye County.

Mr. Anderson?

>> MR. ANDERSON: Yes, Your Honor. On behalf of Nye County, first of all, we want to express our appreciation also as the host county for the repository, for this opportunity to discuss with you contentions which are important to the residents of Nye County and to their safety.

And second, Judge Ryerson, you did a far more cogent job of explaining the disparate and seemingly inconsistent statutory, regulatory and notice requirements that apply to the admissibility of NEPA than I ever could have. So we came here with some trepidation that it might come out with a principle that Nye County could not live.

But we are now convinced that the Board recognizes that determining the admissibility of NEPA contentions is not tied to the ultimate outcome on of the decision on whether or not to construct the project but, rather, whether or not an omission of a considerate was significantly and environmentally under consideration from the Environmental Impact Statement should be supplemented. That's the outcome
Finally, we support the standing of NEI as a party in this proceeding and have joined in adopting two of their contentions and they've adopted some of our contentions.

We do that for a number of reasons, but we believe they meet all the Supreme Court and NRC standards for standing as a party. We're somewhat surprised at the opposition that's been received after their full participation to this point and perhaps most importantly we support it because we believe NEI members have handled fuel for many years, storage and otherwise and have decades of technical expertise in those issues and are essential to NRC's resolution, informed resolution of these issues.

Thank you, Your Honor.

>> JUDGE RYERSON: Thank you, Mr. Anderson. Ms. Houck?

>> MS. HOUCK: Thank you, Your Honor. The tribe would like to thank the Board for taking the time today. The Timbisha Shoshone Tribe concurs with the comments of Nevada, the Four Counties and the State of California and the other parties concerning the issues regarding the environmental contentions.

We also concur with the statements made by
Mr. Poland and I'm not going to repeat those. But I will note that by virtue of the language in the Nuclear Waste Policy Act and the regulations by being certified as an affected native tribe, the Timbisha Shoshone Tribe may suffer substantial and adverse impacts to its lands.

And that is what the language in both the Nuclear Waste Policy Act and the regulations state and that is the Timbisha Shoshone Tribe, not a generic one paragraph or two paragraph reference to potential impacts to native Americans.

There is nothing in the environmental document that addresses the specific substantial and adverse impacts that the tribe may suffer as a result of this project being located in the proposed area.

Therefore, based on the discussions today regarding what is significant and material, this document is lacking significant and material information that is required and, therefore, the document would be fatally flawed as decision-makers don't have the information as to the direct impact that the tribe is going to suffer.

So we would ask the Board to take that into consideration when examining the contentions proffered by the tribe.
>> JUDGE RYERSON: Thank you. For Clark County, Ms. Roby.

>> MS. ROBY: Thank you very much. On behalf of Clark County, we, too, would like to thank the Board for what was a very good discussion today and what is obviously a lot of thought and preparation performed by the Board for today.

Very briefly, we do agree with the comments, closing remarks by the State of Nevada, State of California and the Four Counties with respect to environmental impacts. There is no question that in the event of an emergency, Clark County will be among the first responders and evaluation of impacts related to the transportation, related to the licensing of this repository are absolutely important to Clark County.

And finally, we agree with the State of California with respect to the admissibility of contentions and where there is substantial discussion in the pleadings, it ought to fall in favor of admission. That type of discussion indicates that there is a genuine issue of material fact proper for a full and robust record. Thank you.

CHAIRMAN RYERSON: Thank you. And for White Pine County, Mr. Sears.
MR. SEARS: I'm sure you are tired of being thanked and would like to get out of here.

JUDGE RYERSON: Enough times, already, thank you.

MR. SEARS: Turning for your attention however, I would like to say something on behalf of the voters that sent me here.

White Pine County is north of this project and the tendency may be to think because we are north of this project that we are upwind of this project. We are not. And that of course is if you read our pleading, which I'm sure you have.

Our concern, our position is that the DOE posite is something like a chemical company kicking mercury into a river, and then looking upstream and saying, no problem. We are downstream from that mercury spill. I'd ask you to take a careful look at our expert affidavits that show that. Thank you.

JUDGE RYERSON: Thank you.

JUDGE RYERSON: Thank you. And Mr. Williams.

MR. WILLIAMS: We are at the end of the line here today. Your Honor, I think the wise choice would be to withhold our comments until tomorrow, so we will. Thank you very much.
>>JUDGE RYERSON: Thank you. All right.

And thank you all. That concludes what we intended to cover today. One thing I want to mention before a couple other words, is we've run just slightly over 5:00, so the guards will be trying to shoo you out of the facility so they can go home, but there will be a few minutes for you to talk to each other but they will be hoping that you leave the facility fairly promptly.

We have gone a little bit over our 5:00 time. You know, as our March 18 order indicates, Construction Authorization Board 2 will be here at 9:00 tomorrow to continue primarily on the issues identified in Appendix B. And perhaps most importantly, on behalf of our Board, I really would like to thank all of you for your comments.

We talked about them during the break and at lunch and we found them very helpful. We found the quality of argument very high and several people commented on that. We also appreciate that you are required by the rigorous briefing schedule that has been imposed in this matter, to brief an enormous number of issues in a short period of time and we are very appreciative of that.

We know you have done a lot of work in a
limited time period and we expect to and hope to mirror that as we move into a decision phase and have a prompt decision and a timely decision for you. Any comments Judge Farrar?

>> JUDGE FARRAR: No.

>> JUDGE RYERSON: Judge Barnett?

Again, thank you very much. We stand adjourned until tomorrow morning at 9:00.

(Whereupon, proceedings were concluded)
CERTIFICATE OF REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of U.S. Department of Energy [High-Level Waste Repository] No. 63-001-HLW were held as herein appears, and that this is the Original Transcript thereof for the file of the United States Nuclear Regulatory Commission taken and transcribed by Caption Reporters, Inc. on March 31, 2009 and that the transcript is a true and accurate record of the foregoing proceedings.

Lorraine Carter, RPR
Official Court Reporter
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