UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository) March 25, 2009

MARCH 31, 2009
TRANSCRIPT OF PROCEEDINGS --

Before the Administrative Judges:

ASLBP BOARD
09-878-HLW-CAB03
Paul S. Ryerson, Chairman
Michael C. Farrar
Mark O. Barnett

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APPEARANCES

For the Nuclear Regulatory Commission Staff:
Mitzi Young
Andrea Silvia
Daniel Fruchter

For the Nuclear Energy Institute:
Jay Silberg
David Repka

For the Department of Energy:
Tom Schmutz
Don Silverman

For the State of Nevada:
Martin Malsch
John Lawrence
Charles Fitzpatrick

For the Nevada Counties of Churchill, Esmeralda, Lander and Mineral:
Robert List
Jennifer Gores

For the State of California:
Tim Sullivan
Susan Durbin

For the Caliente Hot Springs Resort:
John Huston

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APPEARANCES (Continued)

For the Native Community Action Council:

Rovianne Leigh
Scott Williams

For the Nevada County of White Pine:

Michael Baughman
Richard Sears

For the Nevada County of Clark:

Alan Robbins
Debra Roby

For the Timbisha Shoshone Tribe:

Darcie Houck
Ed Beanan

For the Nevada County of Nye:

Rob Anderson
Jeff VanNiel

For the Nevada County of Inyo:

Greg James

For the Timbisha Shoshone Yucca Mountain Oversight Program:

Doug Poland
Hannah Renfro

For the Nevada Counties of Lincoln and Eureka:

Diane Curran
Baird Whegart

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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

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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

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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
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 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 state 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 three under 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: Mitzie 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. MALSCH: 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. MALSCH: 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.

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>>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 mikes are always on here on the bench, I think you have to hit a button to put your mike 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.

>>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, always representing that 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.

>>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 august 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 round, 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 5:00 o'clock and get you all out of here then. And, again, we will -- the next board, Board Two will be starting at 9:00 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, DEO'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 the NEI v. Nevada case that we cited in our briefs is the operative precedent that we're relying
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

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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: If 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

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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 kind of automatically or implicitly authorizes 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 to 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 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 and 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

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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

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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 the 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'll 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. 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 DPCs and 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 and 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, 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 proceedings, 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 proceedings, 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 petitioner, 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 broaden 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 prompt 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, 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 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.

>>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.

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>>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 recheck 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 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 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

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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 help 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 in 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. Mulsch and Mr. Repka, if I understand your position which we've not yet ruled on, that Mr. Mulsch has no right to be heard on this. But indulge me anyhow, subject to your objection.

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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 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 license 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, 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,
might be a basis for standing in litigation
surrounding damages under the standard contract. But
somehow that that wouldn't provide standing in this

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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 as 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 relay for standing in waste litigation in the district court.

>>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

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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 commissioner's 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. 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

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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 filled 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 Honor's 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. It think that it does not raise the issue of an injury to employees who maybe 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 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?

>>NRC STAFF: 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 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
hearing. 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 the 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. 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 you 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 they'd 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. Specifically 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?

>>NRC STAFF: 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 broaching the issues in the same precise way, but it would really depend on the specific contentions that were proffered as to, you know, what extent they were broadening the proceeding.

>>JUDGE BARNETT: So I mean, 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 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. Mulsch, 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.

>>NEVADA: 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 a 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 and 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 you -- are
your members the real party in interest under that --

>>MR. REPKA: Yes is the answer to your
question. As I said, before I characterize 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. Mulsch 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

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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

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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.

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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. MALSCH: 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;

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didn't they?

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

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

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

>>JUDGE RYERSON: Pardon?

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

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

Okay. Nye County.

>>MR. ANDERSON: 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.

>>JUDGE RYERSON: 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

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regulation, correct?

>>MR. ANDERSON: That's correct.

>>MR. REPKA: 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
>>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
significant -- 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

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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

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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 anything?

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

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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

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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

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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

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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 actions. 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

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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 believe 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

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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. MALSCH: Let me address first -- I'm Martin Mulsch 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

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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 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

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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

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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 counter-mandate 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

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evaluation on the merits of the EIS, not simply
cconducting 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.

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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 direct action? Certainly the repository is the driving factor that would initiate the transportation itself.

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

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

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

The point of the case was that neither the

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Corps nor FHA, the Federal Highway Administration, had any ability to regulate or to prevent development on the island that was privately owned and under the 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 caused 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 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, FMCSA 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 barging 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

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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

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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. MALSCHE: 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 INTERIM DRAFT COPY
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 -- 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 said in 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 the use and possession license?

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

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

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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.

>> JUDGE FARRAR: There is -- the
regulations do provide that the department has to
update the license applications, the construction
authorization application to support a license to
posses and use and it's in Part 63, the precise
procedures to follow the site procedures, on 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
don't recall, we have read 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,

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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 say to the department that we think there is another opportunity for hearing at the possession and use licensing 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 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 wanna 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

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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 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 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 a considerable 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,
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. That sounds right.

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

>> MR. SILBERG: Judge Farrar, I'm Jay Silberg for NEI. I am quite clear that this is a multi-stage process. The position of the Federal Register notice back in 1999, the report refers to four major decisions: The constructional authorization, the license to receive and replace waste, the 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 irretrievable and other factors. And there are clearly differences in these steps. It's clear that the performance confirmation program that's called for in Part 63 contemplates there will be a lot of additional information that is developed during...
construction and, in deed, 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 con -- 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 one needs the 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 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 views this is essentially -- I know you used the word "essentially" -- to essentially a one-step licensing process?

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

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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 the file new contentions?

>> MR. MALTSCH: We would, but the difficult 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 provision in the application at the time of the construction authorization stage of final design information and when we point out that --

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

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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 requirement, it noted that
there would be such a thing as legal contentions
Nebraska Safety 146 is expressly designated as a
legal contention and the preamble to the contention
rule in 89 provided 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 an opportunity after the
contention is admitted to fully brief and argue the
point.

>> JUDGE FARRAR: Okay. We will come back
to that point later. 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.

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Thank you, Mr. Chairman.

>> JUDGE RYERSON: All right. Let's turn now to the, 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: Is what Judge Ryerson is about to tell you -- and we'll do that after that.

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

>> JUDGE RYERSON: Fine. 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 those standards?

In other words, aren't there specific requirements in the regulations that the total system performance assessment must comply with, in addition to, demonstrating compliance with those 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 post-standard requirements; 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 in the process regulations, how you do it, 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 post-closure and pre-closure analysis.

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

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

MR. SILVERMAN: Yes.

JUDGE BARNETT: So then in that case, if there are requirements in addition to demonstrating a dose effect, 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 those 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 Nebraska 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 demonstrate that the process regulation has been violated because to me, you'd 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

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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 with 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 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 or using the TSPA 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 thought was
more reasonable?

>> MR. SILVERMAN: It would not -- we don't
think they'd meet their burden merely by alleging
that there is data that wasn't used; but we don't
believe they need to run the model entirely. We
agree with the State of Nevada that it could not be
practical for them to do the multiple thousands of
runs of different elements of code -- computer code
that the Department of Energy did; but we think 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 not that -- you don't think they
would do that on every single contention; is that
correct?

>> MR. SILVERMAN: Uh, our view is to
support a contention -- let's take TSPA, for
example, which alleges any typical sort of 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 rerunning or
replicating in its entirety TSPA.

They acknowledge, first of all, the department has given them the tools to run into 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 stated he had the ability to run selected runs at a minimum.

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. A prima facie case is some indication, some reasonable basis, expert basis for concluding the result would be different and we would not exceed -- that we would exceed our dose standards -- and that could be an expert describing

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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 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 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 or reason of Affidavit support that says, this, in effect, this
would be a violation of 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 covered 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 in 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 question poses was on the NRC cases on which DOE relies on Pages 53 to 57, did the petitioner allege violation of specific regulatory requirements?

The answer in three of those cases, the three we cite, 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; and 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 an apparent decision or did you have to go back to the underlying record?

>> MR. SILVERMAN: In some cases, you can see the 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 not really -- the contention was based on 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 LBT0317, 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. 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 --

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>> 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 section 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 Part 54, particularly Appendix B of Part 54. The Board, nevertheless, rejected the contention as inadmissible. 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 alleged a violation of the significant hazards consideration requirements set forth in Part 50 -- Section 59.2-C, specifically. We did not meet the requirements under NEPA for a categorical exclusion;
and 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 were the three cases we cited where a Petitioner alleged the regulatory violation process really related primarily to process regulations; and the Board's information required more.

>> JUDGE RYERSON: Chairman were the contentions -- in your view, what's the best contention of 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, if you look at this in two directions. The contentions that are set forth in this case, while you properly say they don't allege 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
classify 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 were
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 do is to examine these contentions beyond these sort of overarching issues like this one that we're discussing right now. I am 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 places where that analysis was not admitted in the SAR. You need to look at those facts and make a judgment. At the end of the day, it comes down to the importance of the issue in the -- importance of
the issue in the overall regulation. 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 the 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 answers
you have to show the work. You have to, in other
words, comply explicitly with a variety of specific
conditions in the regulations that exist above and
beyond getting the right answer. 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 provide 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 and 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. 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 -- that are --

MR. SILVERMAN: Well, assuming they had appropriate citations that it was well beyond the, you know, assuming they had appropriate inferences that it was 10 inches per year, it was way outside the bounds, they may have had some basis for it. If they had an adequate scientific basis for saying they should have used 10, would that then be an admissible contention of running the TSPA model?

MR. SILVERMAN: I think the contention, it would not necessarily be in the TSPA model, but they would have to on that basis, if not in running selectively 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 a regulation the answer would be yes, but we don't have that kind of regulation for closure space.

>> JUDGE BARNETT: Some you do and some you don't. You said that was just a hypothetical you made up. 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 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 don't think you are saying 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 violation?
MR. SILVERMAN: No, as I pointed out, 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 determine --

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

MR. SILVERMAN: I hate to use the words on its face. It can be admissible. I would say yes. I think this argument that we made is largely contrived 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 to a single contention that were filed in front of us?

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

JUDGE BARNETT: No, we have the Mock's proceeding that you and I are in.
MR. SILVERMAN: In the Mock's proceeding we challenged all 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: Your point was floating around out here are a lot of far better drafted contentions than Nevada filed.

JUDGE BARNETT: I was here seven years, a long time ago on the 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 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 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: Is 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 Mock's 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, fought 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 intentions, in good faith, we evaluated them as the representative of the Department of Energy and reached the conclusion that

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in our view, they were not ad missable. 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 on our interpretation of the law and it was not a pre-ordained conclusion. And I wanted that to be made very clear.

>> JUDGE BARNETT: Now the question, let's get back to the very basic a violation of an allegation of a violation of a prescriptive regulation, assume that it meets all the other criteria that's admiss- -- you don't need to show what the alleged violations are. Is that correct?

>> MR. SILVERMAN: Well, as in the example of the emergency plan, yes.

>> JUDGE BARNETT: Because we've always held the rank and file intervenors, the citizens groups and 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 -- been the folk lore 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 contest in our precedence for any number of years. So I'm trying to ask the question here...are you asking as to departure from those precedence, and if it's something in 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 --

>> MR. SILVERMAN: No, we don't. We don't have that right or authority.

>> JUDGE RYERSON: Thank you.

>> MR. SILVERMAN: May I have one moment?

>> JUDGE RYERSON: Sure.

>> MR. SILVERMAN: Your Honor, one more point -- two more points. I agree with you on the prescriptive argument for we don't believe that's what the TSPA says regulations are. The one thing I'd like to point out is this...it seems what's good for the goose is good for the gander. If a contention is admitted on the basis of an allegation is admitted and that's the material issue, the Board
decides that's the material issue, 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 I don't understand why if we follow that law the applicant wouldn't meet its burden merely by showing it met the regulations of the impact on dose or outcome.

>> JUDGE FARRAR: Right. It seems to me that that's the flipside of what we disagree on. Mr. Chairman, I'm sorry we got distracted from the talk about the model but it seemed that these questions fit in on that point.

>> 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, 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

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that or one of your colleagues is.

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

>> JUDGE RYERSON: Okay. It 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 -- there may be some dispute as to what Nevada would be required to -- to show in order to have an admissible contention.

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 right on a factual question?

>> MR. SILVERMAN: Right. No, the answer to your first question I think is 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

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first part is there a factual dispute to replicate with the TSPA? First of all, by replicate, we interpret that to mean that 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 have talked about in terms of providing selective analysis, limited -- limited runs at the TSPA, qualitative expert based analysis for the reasoned basis. If you re-replicate means 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 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, that's an ancillary issue. It's not the kind of material issue that goes -- it wouldn't be subject of contention. If Nevada filed a contention that said we can't replicate the NTSPA, 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. 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 a violation of several -- one or more particular provisions in Part

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which address how the performance assessment shall be conducted. It's cited to 63.102.5 -- A that there had to be included a full range of reasonable parameters, 63102-H,1, all models and parameters had to be incredible and include uncertainty. 63, 24.114-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 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 64.114-C, of all conceptual models. 63.114-B, which requires a full accounting and explanation of uncertainties; and 63.1012-J -- 63.102-J which requires consideration of futures processes and events. Now, what's interesting about these regulations is the system went out of its way 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 P.a.rt 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 post-closure safety. In addition to requireing for post-closure 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 travel time was specified.

When the Commission developed Part 63, it did not include any of these substance and performance requirements, leading commoners to accuse the commission that it was doing something it had never done before, namely, the whole safety case depends 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. The post-closure safety did not depend solely upon meeting a simple dose standard at a total performance assessment, that instead, post-closure safety depended upon a comprehensive collection of requirements, including the ones that I mentioned 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 the case of an
allegation that the design were not required with or
emergency planning were not complied with would also
be materials per se without some further showing of
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 rods
should be made out of titanium?

Are you saying they're both the same?

>> MR. MALSch: That is exactly correct.

There is nothing that suggests in the history of Part
63 that would suggest a distinction between process
regulations or, on the one hand, the different -- the
other kind of regulation or process regulation versus
some other kind of regulation, they're all
independently enforceable, all -- they all have
independent significance. The Commission does not
suggest any are of lesser significance. In fact, as
I said, they were very clear that post-closure safety
was dependent upon a comprehensive collection of

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requirements, including all of these 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 itself. 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 said, I think our TSPA contentions all are raising material issues; but if there were to be some further additional showing to be required and, frankly, I did not understand from DVR 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 the precise argument. 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 is maybe 50 -- except for about 100 of our contentions, our contentions are so utterly destructive of the TSPA models, 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. There wouldn't be something of a structure in place that we could conceivably modify. Now, so we asked ourselves, what would be involved in doing that?

Well, first of all, we thought to give the DOE the benefit of the doubt. So let's assume instead of having 100 contentions, we really have 19 contentions, because it turns out there are 100 contentions here breaks 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 key weigh program for modifying TSPA unless our own model changes, we are fully subject to an implemented under a coop insurance program, our results would be no credibility. Secondly, we would have to model the
TSPA code, not just in one case, but in five separate modeling cases. The DOE TSPA is comprised of five separate models. There is the igneous intrusive case, the igneous and extrusive case, the early waste package failure case.

And then there are two scenarios -- each one of the those cases involves a variance in the TSPA model. So, to conclude, any one of our contentions to accommodate it to change the model to include it, we would have to 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 that would influence the dose. It would be perfectly permissible for us to argue that it would have an affect on the dose that would be significant. There are some -- let me follow up on that.

>> JUDGE FARRAR: So you do you think you need to consider these in combination; is that right?

To consider the technical questions about the TSPA, you have to consider those in combination, not one at a time?

>> JUDGE BARNETT: That's exactly right.

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Doesn't that extend beyond the capability of testing?

>> MR. MALSCH: That would extend beyond DOE's capability. Mr. Silverman's argument today is a little 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: Would you be asking DOE to do the impossible?

>> MR. MALSCH: Not 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 contention -- a group of contentions with the tax infiltration model. We believe the effect of our contentions is to utterly destroy the model. DOE could respond to our contentions by correctly correcting the model, without doing any calculations. They could just say,
"We corrected the model." Or they could explain why
our concerns about why the model is incorrect, were
not well-founded. So they are -- it is within their
discretion to making their case, to address each of
our contentions on a model-by-model basis and on a
114-A basis, 114-D basis, and just defend their
models one by one. That's a perfectly permissible
way for them to go about making their case.

  >> JUDGE BARNETT: But you couldn't test the implications them one by one?
  >> MR. MALSch: Pardon?
  >> JUDGE BARNETT: You couldn't test the implications 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, is they can analyze one
by one but you couldn't do the same thing?

  >> MR. MALSch: No, and I say analyze the effects, they can defend purely on the basis of
compliance with the individual requirements of 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 -- 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 unrebutted. There was no other Affidavit with 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 unconvention 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

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emphasize, you don't 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 -- the estimated, if the
contention was they had estimated the probability of
volcanic eruption as half of what the eruption was,
there is no specific regulation that it has to be
some given numbers.

They can allege their number is wrong. So
that's not a regulation -- that's not regulation
violation per se?

>> MR. MALSCHE: 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. Their frequency that
they use, estimated frequency of volcanic eruption is
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 re-enforceable climate 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, use material per se, regardless -- material per se, regardless of whether that would have an effect of dose. That's because of the way 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 contention at all of the model or is it sufficient to say this parameter is not right, this model --

>> MR. MALSCH: I think that's all we have to show. I think we have to show they violated these requirements, that either their models are not supportive, scientifically, that they don't include the full range of reasonable usable parameters. They
don't include certain factors. They omit a theft, for example. I think that's enough to get our contentions submitted; 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 that you depend upon not just the dose calculation but 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 stated 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 immaterials, just because the regulation is non-prescriptive. There is no distinction in terms of materiality between prescriptive requirements and non-prescriptive requirements, between some of the requirements and
process requirements. They are all independently significant and separately enforceable.

>> JUDGE RYERSON: I think Mr. Silverman is straining to say something at this point; and I have a question for you, Mr. Silverman. Why don't you -- Thank you.

>> MR. SILVERMAN: A few points. Mr. Malsch continues to refer to Judge Barnett's question in response to Judge Barnett's questions, that an error or omission is material, which I think are good questions, that -- and their allegation of an 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, and 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. You look at the facts. We cited a section of the SAR, maybe

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they allege an omission. 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 post-closure analysis, which has such broad methods, if you will, for going through the process of doing the post-closure analysis and talks very generally about including certain data, accounting for uncertainties, considering alternatives, et cetera. So it's not just the material, you must look at the facts at some level -- at some level in deciding to admit these contentions. There are some other things I'd like to mention and I'd be happy to take your question, Judge, is there no requirement for then 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 be laughed out of the board room if you challenge them on the basis of not having a qualified Q-A program for their contentions.

Finally, there has been some suggestion of 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 called 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 to -- 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's specified that. We honestly did 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 from us in dealing with the adequacy of a Pleading is what that level is. And I hate to keep our 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 in support of the contention.
foundation. Is that the wrong test?

Because --

>> MR. SILVERMAN: No.

>> JUDGE RYERSON: 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 in this 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
Pleading 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's 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 position is that -- it could be a
material issue. The staff did not do a wholesale
objection to the contention of materiality. The
contentions where Intervenor suggests that we do
nucleides and radiologic exposures would be
increased and specifically the staff would be
provided by the State of Nevada would suggest what
those would be; however, there are contentions that
certain particular processes were not followed. The
staff does not object to those contentions being
material.

>> JUDGE FARRAR: You said at the
beginning, Miss Young, that the staff's allegation of
a violation of a regulation could be material.

>> MS. YOUNG: It could be.

>> JUDGE FARRAR: I think Judge Ryerson's

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question -- it's not his, mind is -- is a violation of a regulation always material in on its face?

  > MS. YOUNG: Well, materiality has different meanings, obviously. There is materiality that can affect the outcome of the proceeding. There is materiality with what can bear on the staff evaluation of a particular standard.

  > JUDGE FARRAR: Our precedence have always said an Applicants just like Intervenors are bound unless they ask the Commission for a waiver or an exemption.

  > MS. YOUNG: Or an exemption or a waiver.

  > JUDGE FARRAR: Fine, whatever they ask; but if they don't ask for that, what is the force behind that precedent or that principal that I just stated, if we say, yes, you violated the regulation, you didn't get a waiver or an 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 -- what the staff's position is, that an allegation of a violation of an allegation of a violation or a regulation is always per se material?

  > MS. YOUNG: It depends on what that contention was alleging or not, a regulatory

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requirement.

>> JUDGE FARRAR: The answer is no?

>> MS. YOUNG: Again.

>> JUDGE FARRAR: You are saying it is not always material?

>> MS. YOUNG: 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 is going to be pink. They they're going to be blue, that's my question, is that a per se admissible contention?

>> MS. YOUNG: Again, you have to look at the particular regulation that's at issue with respect to the challenges raced by this issue.

>> JUDGE RYERSON: Do either of the Judges have something?

>. MR. ANDERSEN: Rob Andersen on behalf of Nye County. One of the problems I have 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 they made the same materialiality 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
conciliation, 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 extend an effort to change
it?

>> Again, I would go back to the record
which establishes the regulation. What is the bottom
line support, for establishing the regulation in the
first place. Cited in our materials and others is
the Massachusetts case out of the Federal Circuit,
where, in deed, NRC wouldn't allow evidence on impact
to dose because they said underline emergency
response regulations is the commitment to apply the
principles. Thar -- 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 that
regard to make sure this so-called process of
materialality doesn't wash over into years where it
clearly has to do with a specific alleged violation
of a safety-specific regulation that NRC has
promulgated. They were --

>> JUDGE RYERSON: This may be a good
time for a break. I don't see any other hands up.
Why don't we try to do this, in literally nine
minutes -- and we 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, 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 thefts.

And that a specific theft must be evaluated
in detail if the magnitude and time of resulting
radiological exposures to the reasonably maximally
exposed individual or the radionuclide release 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 theft 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

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not important to waste isolation, and Nevada's reply
doesn't address that or doesn't say this is
important to safety issue, 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. 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. 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 post closure 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's important to waste isolation the result as a whole.

>> JUDGE BARNETT: Okay. I can't remember the specifics but let me 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 Nevada's reply does not address that or offer a contention that it should be an important to waste
isolation, is that a admissible contention, whether there is no such disapproversment or disagreement about whether it is or it isn't an important safety?

If DOE is classified, it is not important to safety, if they make an argument it is important to safety?

>. MR. ANDERSEN: Let me put it this way, I think we have to disagree with either the classification --

>> MR. MALSCH: The classification or the application of the wrong classification criteria. If hypothetically one would conceive that -- if hypothetically, it is considered in the broader sense, therefore, it should be subject to quality assurance as more than to the waste isolation and DOE should consider that issue.

>> JUDGE BARNETT: I'm not trying to pinpoint. I want to understand, let's leave the specific contention out. Say it's component and Nevada's contention is based on component A, DOE's response is, it's not more than to the safety, here's a table where it says it's not more than to the safety, it's not fortunate waste isolation. Here is a -- they believe that it says that.
Nevada will not come back and argue it is important for safety, it is important to wayside; is that a contention?

>> MR. MALSCH: I think we would have to counter the table or argument that it is not. DOE has -- points to something in the application which properly classes it as one or the other. I think though in the particular case I'm thinking of, they utterly failed to consider whether structure exoarants more than to the retrieve the waste isolation. There are the gap.

>> JUDGE BARNETT: I want to thank you. Along similar lines, if the contention says DOE assumes X, and it's not in the life applications, and then, Nevada is required to come back and say here is why, is the syntax and a plot of the reply, is that a contention?

>> MR. MALSCH: I think if we pointed to a alleged defect in the references, and that defect in fact, did not exist, I think that's not an admissible contention. I don't think we have any alleged omission, I think the omission has to be there.

>> JUDGE BARNETT: Thank you. Judge Farrar, do you have any questions?

>> JUDGE FARRAR: Yes, let's turn to --

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before lunch, the State of Nevada requires a brief, DOE, pages one to two and four bullets and we'll add that up. The first bullet, I think is fairly covered by point 4A 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 are 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

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one of these particular bullets?

>> JUDGE FARRAR: No, it's kind of a variation of 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, the regulation isn't prescriptive, so the challenge in the regulation, when they challenge us, we have infinite flexibility.

>> MR. SILVERMAN: No, we did not mean to suggest infinite flexibility. What we meant, you have a challenge, 63-114 which is your how to on your post-closure 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, theology, et cetera. And -- what we were just trying to say is Nevada is saying there is another uncertainty here, or there is a piece of data being used, without showing that we have violated this regulation which gives us fairly broad relay based upon expert scientific judgment that what we tested, that is, in essence, a challenge to regulation.

It's a regulation, not just this, but a preamble regulation 63.101 and 102. They talk about
the conceptual framework, go on and on about the flexibility. The difficulty for the future, the need for flexibility for the applicant to do these analyses. So that's what 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. MALSCH: Thank you.

>> JUDGE FARRAR: Mr. Silverman, 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 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. 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 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 could apply. We have a whole category of contentions which alleges that DOE's -- one or more of the TSPA models does not consider 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 and that would make the contention admissible --

>> JUDGE FARRAR: 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. DOE's model is wrong or unsupported, because it did not include unnecessary or 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, specific with data and scientific understanding. We do have a number of contentions --

JUDGE FARRAR: I thought there were some alternative material that you just said they should have used, and --

>> MR. MALSCH: Oh, there are a few contentions where we say that. And I think they say, look, the material we selected does the job.

>> JUDGE FARRAR: 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 themselves be an admissible contention.

I think the contentions we're thinking of, we went on to explain that there were problems with the materials that they were using. 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 admit the contention and we'll go to hearing. 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 as to provide as
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.

We went on for several pages to recognize
that we have to provide sufficient information under
the balance of 63.21. We explain 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 say
whatever we say is good enough. We say look in the

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LA and you will see that these locations, information we believe is sufficient to meet the regulation.

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 argues with that 63.21 gives us carte Blanche.

Very briefly, the other reference cites page 1500 of our answer. If you look on pages 1491 to 1541, which deals with waste retrieval, adequate plan 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 that 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 we refer you specifically to the LA where
we have given you sufficient information.

>> JUDGE RYERSON: All right,
Mr. Silverman, if I can 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 for purposes again of the adequacy of a
pleading, doesn't that bring us into acceptance
dispute on the merits that requires program
proceedings to make factual determinations on who is
right.

>> MR. SILVERMAN: 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. It will be obvious on its face.
It will be clear and -- and that will be sufficient. So I think there could be in both cases in any given situation.

>> JUDGE RYERSON: Thank you.

>> JUDGE FARRAR: In reading your response, Mr. Silverman, as to Nevada's Contention 147, I ask myself the question DOE has followed up, 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 TSPA's contention, if you look at 143, there are small errors and large errors. A small error if it's true would not necessarily violate a regulation in this particular section of the code.

>> JUDGE FARRAR: And, of course you didn't say that 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 Mr. Malsch's State of Nevada's challenge to DOE, particularly which is why I involved him in that questioning. Go ahead.

>> 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.

YouI heard those already. 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. I'm not the designated counsel to speak today but may I have permission to speak?

>> JUDGE RYERSON: Yes, you may.

>> MR. ROBBINS: I want to use Clark County's contentions regarding forecasted volcanism as examples of the discussions that have gone 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, 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 forecast involving volcanic activity are
incorrect.

Council for DOE is just saying there are
big errors and small errors. We have forecast of
future volcanic activity. Needless to say, that's
among the contentions that DOE find inadmissible in
this case and they of course find them in whole,
invisible. 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, 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 needs 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 issues for the
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 we are raising.

>> JUDGE RYERSON: Mr. Silverman, if I understand your point, is 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. Okay. And I guess, my question is this; you've said earlier, that although you're 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.

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MR. SILVERMAN: I'm sorry, were what?

JUDGE RYERSON: In proper form.

MR. SILVERMAN: Correct form.

JUDGE RYERSON: And included within the body of the Affidavit, everything that is adopted from paragraph five or paragraph six or both, in particular contention, are there any contentions on that basis that you believe would be admissible?

MR. SILVERMAN: Well, that would be -- here would be some if that were the only argument that we made on that contention. In other words --

JUDGE FARRAR: There are no contentions where that is the only argument that you made, then it doesn't amount to a genuine issue?

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 --

MR. SILVERMAN: I think I'm trying to answer your question very straightforwardly. If we have a situation where we all presume the affidavits are adequate for purposes of the non-criterion that requires a support -- in 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 mostly -- we may be wrong on the others, you may find. But there are other arguments.

>>CHAIRMAN RYERSON: 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. 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, assuming the form on the Affidavit were correct, I take it your position is, since you have made other arguments in other instances, it remains your view that there are no disputes?

>> MR. SILVERMAN: That's not our pleadings. What we really triple plan in trying to make in probably being redundant at this point, but I also feel like maybe I haven't been as clear over these few days. We're talking about what the Board described as overarching legal issues and all I'm saying is that the board has a difficult job and when you see them respond, you see them in their totality, both the petition and the answer and the reply, if
you disagree on one of these legal principles, you still have to look at the factual response. You have have to look at our references to the SAR, other portions of the license application or to a citation for regulation, which we apply a citation to do 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, including admissible or a genuine dispute, but there is a threshold that has to be crossed. And that's what we're questioning.

>> 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 to the legal issues? You would file a motion to dismiss that contention because the law is on your side rather than theirs?

>> MR. SILVERMAN: You'd first have to find -- admit the contention. If you wanted it resolved, then, yes, the motion, 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, I said at the outset, we hoped to reserve some time for kind of a final cleanup anyone feels has not been adequately addressed. I would urge you when you do that not to feel constrained to say something if you 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 surpassed 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. Silverman, correct me if I'm wrong, I wasn't there at the time, that came in on a five-line contention?

Am I right?

>>MR. SILVERMAN: Close to that, sir.

>>JUDGE FARRAR: Go ahead Ms. Young.

>> MS. YOUNG: Mitczy 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 are challenged. Part 63 is
a risk-informed performance-based regulation.

Many times the contentions use very broad-brush in terms of identifying our 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. 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 raised, was
there a genuine issue of dispute of to the material
issue of the fact, what was the supporting
information and given the technical issues involved,
it was important in each instance.

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,
we acted 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 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, in contentions in the first enrichment progressive conservative, it didn't cast the past aside.

I would call the attention to the

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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, 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
can 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,
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. Silbur, in case you
get admitted here, should these contentions be
admitted?

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MR. SILBUR: 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. Silbur'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 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
and it's 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 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. 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, some issue that specifies -- I think it hasn't gone final yet, the exact dates when the fiscal security TSPA plans have to be committed. It's not now. It's later

>> MS. ROBY: Your Honor, Deborah 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 hold it in abeyance until it became ripe?

>> MS. ROBY: Yes, I would admit it at this stage.

>> 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. Then it would be an amended
contention then.

>> 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 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 of 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, once the plan exists, a proper consensus 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 the 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 the

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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 infallable 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 seem 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 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 compare the two. I apologize. It's hard for me to give you an answer on that.

>> JUDGE FARRAR: Mr. Malsch, do you want want to address that quickly?

>>MR. MALSch: With the definitions of local 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 a safety 148 and perhaps some others in which we specifically challenge DOE's basis and assumptions reporting 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 their quality assurance program function perfectly. There would be no deviations and as far as human factors are concerned, everyone performs perfectly, we have absolutely no basis for that in this case at all.

>> JUDGE FARRAR: A contention that Nevada
of 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.

Do have you 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 being repetative.

The first is the contention may seem self evident, if you conclude it is self-evident after reviewing my answer, you have a judgment to make, you may conclude it is admissible.

>> MR. SILVERMAN: I'm saying when you see one side of the story, it may appear to be self-evident. It may 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 that, where a court of appeals says you can't get standing to say 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 Blotte is asking for that, then staff can ask for that in an enforcement progressive conservative. I didn't follow that.

>> MR. SILVERMAN: Give us just one moment I will be brief. I haven't read the contention again, in response, on the complete inaccuracy, if if the applicant has not completed information in 63.7 and that's an enforcement matter. That's completely an enforcement matter.

>> JUDGE FARRAR: 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 actions, 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, Boltte 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.

>> MR. SILVERMAN: Well, in skimming our answer, I think the argument that we make are that when staff reviews an application, they review it first to see if its docketable. 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 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 the 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: This is typically not a

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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 provided it.

>> JUDGE FARRAR: When are you going to Contension 162, when are you going to submit a retrieval plan?

>> MR. SILVERMAN: It is not my intention to have a flipant answer, I have to pin.touch-tone regulation, I strongly suggest many in my answer.

>> JUDGE FARRAR: Seven years or 100 years?

>> MR. SILVERMAN: I've I can get back to with you that information. 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. And 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 to a pleading ruling?

>> MR. SILVERMAN: Is that an indicator of
a genuine dispute because the two parties have gone
on at length about the issue? It may or may not be,
Your Honor.

>> JUDGE FARRAR: It may be a way to
encourage shorter filings, I suppose.

>> MR. SILVERMAN: It may be that it took
that long to explain the issue, but, nevertheless, at
the end of the day, with the -- it's apparent on its
face the matter did not come into dispute, these are
complex issues, particularly in the -- .

>> JUDGE FARRAR: Looking back 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 didn't we give any reasons?

If you have no reason, isn't that a valid
contention?

You have fallen down on the job by not
supporting what you have 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, on a technical basis, maybe, in other words, that there was a requirement to provide the technical basis on that 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 as 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 arguing 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, particular 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 when 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 when you 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 will 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 permits from other agencies that it seemed they ought to have been very routine.

>> MR. SILVERMAN: DOE counsel is conferring. One moment, Your Honor.

It seems to me the way to deal with this, if it isn't a licensed commission, they move on.

>> JUDGE FARRAR: So, does that mean, Mr. Silber, you admit the contention and work out the condition or you don't admit it and trust the staff to put it in the contention and give me the good
suggestion but give me the mechanics of how you do it?

>> MR. SILBER: 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 proceeding on the admitted contentions, and again, not being completely familiar with the details of those specific contentions, the issue depends on whether we are required to have those permits now or not as a condition or a prerequisite of the condition without regard to precisely what we have said in the answers, which I have to go back and look at.

>> JUDGE FARRAR: Why would you 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 ground, because he has an easement, sorry, you can't get a use of possession permit, why would we 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
permit. Number 1. Number 2, in that regard, 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 thing, mainly, get those
permits. Yet, the licensing goes forward. I
understand Mr. Malsch's point regarding the
legislation required, certainly it's a requirement.
But your point, it's no different.

>> JUDGE FARRAR: Thank you all for the
quick answers to I know you weren't particularly
prepared for those questions, but so I look forward
to at least get your views that will help us as we go
back through the action. Chairman chairman thank
you, Mr. Farrar .

>> JUDGE RYERSON: 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 the short break, we will give thought to
whether we have final questions.

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 -- grand summation of

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your position. Honestly, use it at this point.

It's been a long day, 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.

>> 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 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 leader. So in that spirit, why don't go around the room and ask the NRC, staff anything to add?

>> MS. YOUNG: Mitscy Young for the staff, no further comments.

>> MR. SILBERG: Three very short points, first, thank you for giving us the opportunity. The
second, with respect to materiality, we believe the contention can be material even if there is no violation of regulation alleged. Second with materiality, the contention that argues for over conservative can be just as material as the one that argues for under-conservatism. Finally 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 to their legal underpinning than any contentions I have ever seen in a law practice before this.

Chairman: Thank you, Mr. Silberg.

Mr. Silverman?

>> MR. SILVERMAN: We appreciate it as well, excellent discussion and exchange, we have nothing further. Chairman Mr. Malsch, for Nevada.

>> MR. MALSCH: One ten-second comment, first of all, we appreciate the time the board spent today on the issues involved, secondly, I want to pick up on an interesting observation or hypothetical observation by judge Farrar, which is when you are looking at specific facts and contention, you look at our contention and DOE's reply and say, who can figure this out?

I think the case law clearly indicates the
contention under those circumstances should get admitted and I refer the board to LBP-o6-when the Plaver Decision 112, which stands for the 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 the public 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 have 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 FIS, the final 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

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trucks and they more than doubled about 150% 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, 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 from coming to Las Vegas. Secondly, by DOE's own admission, the state, under DOT regulations designates the off interstate routes and it's unimaginable 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 gonna take place -- going to take place not from Las Vegas but through our four counties. It was talked about in the original final impact -- Environmental Impact Statement, that none of 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 -- briefly touched on task in Nevada off the interstate freeways. They picked five locations, all of them near get a 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

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shipments, although, there may be some, and one right
at the gate but none in the 40 counties.

Each of the locations they've chosen is in
the middle of nowhere, away from the community, away
from the town, when in reality, these shipments will
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,
they have to consider it. The -- I think similarly,
and they've attempted to do some calculation on
radiation doses for the maximum exposed workers and
members of the public in the spring, 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 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 projects. Every single truck has to come down that two-lane highway. And so what you is a convergence, sort of a funneling of thousands of traveling through several hundred miles through small towns adjacent to the counties, adjacent to my county. And to ignore that is a violation, we believe, of the case law and of the regulation. There is zero recognition resulting in the environmental impacting damage on the roads, themselves. The burden of the sequential impact on the first responders which are enormously significant.

The absence of communication interrupt our operability among first responders and law enforcement on these counties an communities that adjacent to the site.

The affidavits demonstrate that there are a tremendous absence of staff and individuals dependent largely on volunteers. They don't have the
equipment. DOE attempts to gloss over that by saying well, we are 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 gonna rise.

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. In so far as the matters that I just touched upon and by 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 this community. 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 and that they have an opportunity to come in and be heard and, 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.

Congress calls them that.

That's because they are defected. Our analysis shows that about one million dollars in highway improvements are needed -- $185 million are needed in highway improvements. 16 million in capital costs to equipment or first responders, an annual cost 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 to the hospital, the ward of 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 it can be addressed.

>> JUDGE RYERSON: Mr. List, I want to assure you this board and this other board will be reading each of the 328 or 329 contentions we appreciate you filing. If you can wrap up in the next minute or so, I appreciate it.

>> MR. LIST: I'm almost to the end. I appreciate your indulgence, Your Honor. In our way, we've taken a bit of a hard look to look at these things and do what the DOE should have done.

We've demonstrated that in our Affidavits. I also want to mention in closing 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.

It should not be put off until the time
when the, when the actual time comes, the day comes
when they're ready to complete the, have completed
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 matters we put forth. Chairman thank you.
Mr. List, Mr. Sullivan for California.

The NRC has an obligation to, under NEPA to
consider the environmental impacts of not just the
construction, but of the repository, but also
connected aces, even if they're not owe actions even
if they're not under regulatory control.
Transportation and construction are inextricably
linked. It's irrational to do just one or the other.
They have to go together. The NEI case, NRC's own
regulations and the hearing notice all 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
Nebraska versus DOE case. California -- Nevada
versus DOE case. So res judicata, collateral
estoppel don't apply to us. There were few issues
decide on the merits in that case. Is court 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 before we analyze the
route and the minor route is environmentally
preferably. Over preferable. But we're not going to
choose that one. No court has ever looked at the
difference between the minor and the Kelley route and
whether or not DOE adequately analyzed that.

No court has ever ruled on transportation
impact outside of Nevada, whether those have been
properly analyzed by DOE. So we make it all these
issues as outlined in our contentions are proper for
this proceeding.

>> JUDGE RYERSON: Thank you, Mr. Sullivan.
Mr. Huston. His second -- Yucca Mountain -- his
secretary testified, I think we can do better. All
of the parties here have filed contentions, agree in
some part or parcel or portions or spirit with the
Secretary of Energy. My concern is that DOE is
wasting our time and treasury and those in Nevada and
California and that the counties as represented here,
and the other parties and the U.S. treasury, itself,
and this proceeding presently lacks foundation and

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DOE candor at its very corridors.

If so, DOE should withdraw at its earlier opportunity as topics discussed today may, in fact, have no relevance or values or to the public. Only if DOE intends to proceed to construction are all our efforts in the 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 analyzed application that is in front of the NRC and it's not -- it is really not analyzed 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. POLAND: Thank you, Your Honor, yes.

On behalf of the Timbisha overcytokines, program, we understand there will be native American issues discussed tomorrow. However, because our sole contention is that NEPA contention, those are the issues put forth before the Board today, I wanted to very briefly address those. As I mentioned, the Timbisha oversees program proffers just with you

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one contention that notes DOE's conception in the EIS and the SEIS that contaminants from the repository might contribute to and discharge into the Death Valley Springs.

That contention is supported by affidavits of members of the Timbisha Shoshone Tribe that live in the Death Valley area as well as analyzed expert anthropologist that tribal cultural religious and other interests, which are based on the purity of the water, including Death Valley, would be greatly harmed by the contamination of those springs.

It's notable that NRC staff does not impose the admissibility of this single NEPA concept 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 feel Native American religion and culture as history.

Although, it is true, the Timbisha and Shoshone practice their religion for thousands of years. Their culture and religious practices which revolve around procuring springs and water are very much alive. They are practiced now as they were a

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thousand years ago.

The notion that the devastation of analyzed
entire people's cultural and religious practices
stretching back thousands of years is not significant
or material. It is culturally myopic. It is
offensive and it is just plain wrong and CE-2
regulations and 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 a hard look at cultural
impacts that the regulations required of them to take
and that that hard look is reflected in the EIS.
What the DOE sites for this proposition is a single
page in the FDIS and a single page in the SDIS.
Both pages 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."

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Now, this is supposedly the hard look at DOE took at the impact on Timbisha-Shoshone interests. This is patently deficient in 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 CEX and NRC is to ensure that the decision-makers in this proceeding have before them analyses of all the important effects and results from the repository, it is clear that the contentions, the Timbisha Oversite Program has raised are significant, they are Steeler, they will help develop a sound record. They should be admitted. Thank you.

>>> JUDGE RYERSON: Thank you. Nye County.

Mr. Andersen.

>. MR. ANDERSEN: Yes, Your Honor. On behalf of Nye County, first of all, I want to express our appreciation also as the host county for the

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repository for this opportunity to discuss with you
contentions which report that the residents in my county and to their safety and, second, Judge Ryerson, you did a far more cogent job of explaining the inconsistent statutory, regulatory and notice requirement apply to the as missability of NEPA than I ever could have. So we came with some trepidation that might come out with a principle that my county could not live.

We are on the fence that the Board recognizes in determining the NEPA contention is not tied to the old outcome on the decision on whether or not to construct the project but, rather, whether or not analyzed omission was significantly and environmentally under consideration from the Environmental Impact Statement should be supplemented. That's the outcome of the concern.

Finally, we support the standing of NEI of a party in this proceeding and have joined in adopting to their contentions and they've adopted to some of our contentions. We do that for a number of reasons, but we believe that meet all the Supreme Court and NRC standards for standing as a party after their full participation at this point and perhaps most importantly because we believe NEI members have

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hasn't handled fuel for many years and historic and expertise in those issues and are essentially to NRC's resolution, informed resolution. Thank you, Your Honor.

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

Mr. Miss Houck.

>> MS. HOUCK: Thank you, Your Honor, the tribe would like to thank the Board. The Timbisha-Shoshone, works with the State of California and other parties regarding the environmental contention. We also concur with the statements made by Mr. Poll and I'm not going to repeat those. But I will note by virtue of the language and the regulations by being certified as analyzed effective native tribe the Timbisha-Shoshone Tribe may suffer adverse impacts to its land. That would put the nuclear waste policy act and the state the Timbisha-Shah shonene tribe a generic or two paragraph reference to potential impossibility to native Americans.

There is nothing in the environmental document that addresses the specific substantial and adverse impacts that the tribe suffers as a result of this project back located in the proposed area.

Therefore, based on the discussions today regarding

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what is significant and material, this document is lacking significant and material information that is required and, therefore, the document would be fatally flawed if decision-makers don't count 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 the contention is proffered by the tribe.

>> JUDGE RYERSON: Thank you. For Clark county, Ms. Roby.

>> MS. ROBY: Thank you very much, on behalf of caloric county, we, too, would like to. Thank the board, for the thought and preparation performed 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 analyzed emergency, Clark County will be among the first responders and evaluation of impacts related to 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 ad mission. That type of discussion
indicates that there is a genuine issue of material
fact proper for a full and are robust record. Thank
you.

CHAIRMAN RYERSON: Thank you. For White
County, Mr. Sears.

>> MR. SEARS: I am sure you are tired of
being thanked. 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 that we are north of
this project that we are upwind of this project and
we are -- that, okay, if you read our pleading, which
I'm sure you have, our concern, our position is that
the DOE repository situation 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 Chairman.
Thank you. And Mr. Williams.

>>MR. WILLIAMS: We are at the end of the
line, I think our wise choice would be to hold our
comments until tomorrow. Thank you very much.
CHAIRMAN RYERSON: All right. 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. They will be hoping that you leave the facility fairly promptly. We have gone a little 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 that are 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 also appreciate that you are required by the rigorous briefing schedule that has been imposed in this matter, to briefly analyze 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 to Judge Farrar?

Again, thank you very much. We stand adjourned until tomorrow morning at 9:00.

(Whereupon, proceedings were concluded.)

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