

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

In the matter of the
U.S. Department of Energy
High-Level Waste Repository
Docket No. 63-001-HLW

APRIL 1, 2009

TRANSCRIPT OF PROCEEDINGS
Oral Argument On the Admissibility of Contentions
Before the Administrative Judges:

CAB-02

Michael M. Gibson, Chairman

Alan S. Rosenthal

Nicholas G. Trikouros

1 APPEARANCES

2 For the Nuclear Regulatory Commission Staff?

3 Mitzi Young, Esq.
4 Andrea Silvia, Esq.
5 Dan Lenehan, Esq.
6 Daniel H. Fruchter, Esq.

7 For the Nuclear Energy Institute:

8 Jay E. Silberg, Esq.
9 David A. Repka, Esq.

10 For the Department of Energy:

11 Paul Zaffuts, Esq.
12 Don Silverman, Esq.
13 Alex Polansky, Esq.
14 Tom Schmutz, Esq.

15 For the State of Nevada:

16 Martin Malsch, Esq
17 John Lawrence, Esq.
18 Charles Fitzpatrick, Esq.19 For the Nevada Counties of Churchill, Esmeralda,
20 Lander and Mineral:21 Robert List, Esq.
22 Jennifer Gores, Esq.

23 For the State of California:

24 Tim Sullivan, Esq
25 Susan Durbin, Esq

For the Caliente Hot Springs Resort:

John Huston, Esq.

23

24

25

1 APPEARANCES (Continued)

2 For the Native Community Action Council:

3 Rovianne Leigh
4 Scott Williams, Esq.

5 For the Nevada County of White Pine:

6 Dr. Michael Baughman
7 Richard Sears, Esq.

8 For the Nevada County of Clark:

9 Alan Robbins, Esq.
10 Debra Roby, Esq.

11 For the Timbisha Shoshone Tribe:

12 Darcie Houck, Esq.
13 Ed Beanan

14 For the Nevada County of Nye:

15 Rob Anderson, Esq.
16 Jeff VanNiel, Esq.

17 For the California County of Inyo:

18 Gregory James, Esq.

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

23 For the Nevada Counties of Lincoln and Eureka:

24 Diane Curran, Esq.
25 Baird Whewart, Esq.

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

2 JUDGE GIBSON: Thank you. We are back on
3 the record for oral argument before the Atomic Safety
4 and Licensing Board. My name is Michael Gibson. I
5 am Chair of Construction Authorization Board No. 2.
6 With me, on my right, is Judge Alan Rosenthal, who,
7 like me, is a lawyer. On my left is Judge Nicholas
8 Trikouros, who is a technical judge.

9 In the interest of having a clean record --
10 and I know that we've had some counsel switch in and
11 out, I would like for us to have announcements of
12 counsel again like we did yesterday, and let's start
13 here on the left with the NRC staff.

14 >>MR. LENEHAN: Daniel Lenehan, NRC staff.

15 >>MS. SILVIA: Andrea Silvia NRC staff.

16 >>MS. YOUNG: Mitzi Young, NRC staff.

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

19 >>MR. REPKA: David Repka, representing
20 Nuclear Energy Institute.

21 >>MR. ZAFFUTS: Paul Zaffuts, representing
22 the Department of Energy.

23 >>MR. SILVERMAN: Don Silverman,
24 representing the Department of Energy.

25 >>MR. POLANSKY: Alex Polansky,

1 representing the Department of Energy.

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

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

6 >>MR. FITZPATRICK: Charles Fitzpatrick,
7 State of Nevada.

8 >>MR. LIST: Robert List on behalf of the
9 four counties of Churchill, Esmeralda, Lander and
10 Mineral.

11 >>MS. GORES: Jennifer Gores on behalf of
12 the Four Counties.

13 >>MR. SULLIVAN: Tim Sullivan with the
14 California Attorney General's Office on behalf of the
15 State of California.

16 >>MS. DURBIN: Susan Durbin, California
17 Attorney General's Office, State of California.

18 >>MR. HUSTON: John Huston for Caliente Hot
19 Springs Resort.

20 >>MR. WHEGART: Baird Whegart on behalf of
21 Lincoln County.

22 >>MS. CURRAN: Good morning. I'm Diane
23 Curran, representing Eureka County.

24 >>MR. POLAND: Good morning, Your Honor.
25 Doug Poland on behalf of the Timbisha Shoshone Yucca

1 Mountain Oversight Program Non-Profit Corporation.

2 >>MS. RENFRO: Good morning. Hannah Renfro
3 also for the Timbisha Shoshone Yucca Mountain
4 Oversight Program Non-Profit Corporation.

5 >>MR. JAMES: Greg James representing Inyo
6 County, and to my left, we've invited the State of
7 California to share counsel table.

8 >>MR. FELDMAN: Kevin Feldman, State of
9 California.

10 >>MR. VanNIEL: Jeff VanNiel, representing
11 Nye County.

12 >>MR. ANDERSON: Robert Anderson on behalf
13 of Nye County.

14 >>MS. HOUCK: Good morning. Darcie Houck
15 on behalf of the Timbisha Shoshone Tribe, and with me
16 is Ed Beanan, a member of the tribal council.

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

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

21 >>MR. SEARS: Good morning, Sears White,
22 Pine County, Nevada.

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

25 >>MR. WILLIAMS: Scott Williams, Your

1 Honor, on behalf of the Native Community Action
2 Council.

3 >>MS. LEIGH: Good morning, Your Honor.

4 Rovianna Leigh also on behalf of the Native Community
5 Action Council.

6 >>JUDGE GIBSON: Thank you.

7 Our subject today, as it was yesterday,
8 concerns standing and contention admissibility to
9 challenge the Department of Energy's application for
10 a license to construct a high-level waste repository
11 at Yucca Mountain, Nevada.

12 Yesterday, Construction Authorization Board
13 No. 3 devoted the first day of this proceeding to a
14 number of issues, including standing for NEI, as well
15 as the standards by which to evaluate certain groups
16 of contentions and whether they could be admitted as
17 set forth in Appendix A to our March 18 Order.

18 As was done yesterday, we will dispense
19 with opening statements. We have read all 12,500
20 plus pages of your 300 and plus contentions. And we
21 are familiar with the basic arguments that you've
22 made.

23 Instead, what we are seeking today is a
24 refinement of the positions that you all have already
25 enunciated in those papers. And we have a number of

1 areas that we wish to explore with you today.

2 Hopefully, we have set them out with
3 sufficient notice in Appendix B to our March 18
4 Order.

5 Now, if time permits, at the end of the
6 day, we will attempt to afford each of you an
7 opportunity to apprise us of what you believe remains
8 to be said about the topics that we cover today, but
9 I want to add a caveat to that, and that is, we're
10 not looking for closing arguments, summations of the
11 evidence you've already submitted. As I've said,
12 we've already read your paper.

13 What I would encourage you to do instead is
14 not to hold back anything that you want to say till
15 your closing argument, because that's not what it is.
16 I would encourage you to let us know that you wish to
17 participate so that we can have a robust dialogue
18 about the issues that we are trying -- that we are
19 grappling with this Board, and to allow other people
20 to respond to what you say so that we can try to
21 fine-tune those issues.

22 But if there truly is something that we
23 overlook during the course of the day, then I
24 would -- again, we'll try to give everybody, perhaps
25 a minute, to let us know what you think that we

1 didn't cover today that really bears on the issues
2 that are set forth in Appendix B to our March 18
3 Order.

4 We also will make a little bit of a
5 departure, I think, from what was done yesterday.
6 What I would like to do is for us to go 50 minutes.
7 I would like to break at 9:50. I would like to take
8 a 15-minute break. I would like to go another
9 50 minutes, take a 15-minute break, break at noon for
10 an hour and a half. I would like to go from 1:30 to
11 2:30, take a 15-minute break. Go from 2:45 to 3:45,
12 take a 15-minute break, and then go from 4:00 to
13 5:00.

14 So I would -- I promise you, we will try to
15 stick to that schedule as closely as possible.
16 Knowing that, I would ask each of you to try to do
17 what you can to stay in your seats and whatever
18 until -- so that you won't disrupt other people by
19 getting up and leaving the room or moving from one
20 place to another.

21 I would also be remiss if I do not remind
22 you that tomorrow, Construction Authorization Board
23 No. 1 will be sitting here, and that not only will
24 they expect you to address the issues that are set
25 forth in Appendix C to our March 18 Order, but, in

1 addition, as Judge Ryerson noted yesterday, they
2 expect each of you to be able to apprise it of the
3 contentions that you believe are affected by the
4 Nuclear Regulatory Commission's recent revisions to
5 10 CFR Part 63. So please don't forget that's your
6 homework tonight.

7 Before we proceed to oral argument, I
8 believe that Judge Rosenthal wanted to make an
9 observation, and after that we will proceed to oral
10 argument.

11 >>JUDGE ROSENTHAL: Thank you, Judge
12 Gibson. I have a brief prepared statement. It was
13 prepared prior to yesterday's proceeding, but there
14 was a colloquy between Judge Farrar and DOE counsel
15 that I think is -- has a tie to my statement.

16 I wish to stress that this statement, its
17 content is mine alone. I do not presume to speak for
18 my colleagues on this Board or my colleagues on the
19 other two construction authorization boards.

20 For that reason I do not intend to
21 entertain any commentary following my statement. The
22 statement will just stand, as it's presented, and
23 we'll then turn to the issues of the day.

24 This is the statement: As the parties to
25 the proceeding are likely aware, I became a member of

1 this Board very recently. Upon joining it, I
2 discovered to my amazement that the Department of
3 Energy was taking the position that not a single one
4 of the 100 -- of the 229 separate contentions filed
5 by the State of Nevada was admissible.

6 In addition, to my further amazement, I
7 learned that the Nuclear Regulatory Commission staff
8 had told the Boards that, in its view, only a very
9 small number of those 229 contentions met the
10 standards for admission contained in the Commission's
11 rules of practice, more particularly, Section
12 2.309(f)(1).

13 That amazement stemmed from the fact that,
14 on the face of it, it seemed most unlikely that
15 experienced Nevada counsel, which included a former
16 deputy general counsel of this agency were unable to
17 come up with even one acceptable contention relating
18 to this extraordinarily and unique proposed facility.

19 Put another way, I found it difficult
20 offhand to believe that Nevada counsel were so
21 unfamiliar with the requirements of Section
22 2.309(f)(1) that they simple were unable to fashion a
23 single contention that met those requirements.

24 Now, it might turn out that despite this
25 initial reaction, at day's end it will be determined

1 by the members of the three boards, myself included,
2 that, in fact, none of Nevada's contentions is
3 admissible.

4 In that connection, DOE and the NRC staff
5 can be assured that each of their objections to the
6 admissibility of contentions will have received full
7 consideration by the time of our decision.

8 Should, however, upon that full
9 consideration, we conclude that a significant number
10 of the Nevada contentions are clearly admissible,
11 with the consequence that the objection to their
12 admission was wholly insubstantial, for me at least,
13 both DOE and the NRC staff will have lost
14 credibility.

15 Obviously DOE has an interest in fending
16 off at the threshold as much of the opposition to its
17 Yucca Mountain proposal as responsibly can be done.

18 It is not responsible conduct, however, to
19 interpose objections that are devoid of substance on
20 an apparent invocation of the old adage, nothing
21 ventured, nothing gained.

22 Insofar as concerns the NRC staff, unlike
23 DOE, it is the regulator, not the promoter of the
24 proposal. That being the case, it would be even more
25 unseemly for it to interpose to the admission of

1 contentions, objections that are plainly without
2 substance.

3 Indeed, in such circumstances, the staff
4 would, to its detriment, create the impression that
5 it is not a disinterested participant in the
6 licensing process but rather a spear carrier for DOE.

7 Once such impression has been garnered,
8 there would remain little reason to credit anything
9 that the staff might have to offer. That is the end
10 of my statement. I will now turn it back to Judge
11 Gibson, and we can move forward with the
12 consideration of the issues that are before this
13 Board.

14 >>JUDGE GIBSON: Thank you, Judge
15 Rosenthal.

16 Before we get to the items that are set
17 forth in Appendix B to the March 18 Order, I want to
18 be sure and remind each of you that, when you speak,
19 please say your name and who you represent. We have
20 a very good court reporter here, but as you can
21 imagine the job they're trying to do is almost
22 incomprehensible to remember everybody's name and who
23 they represent. So just -- if you could just be sure
24 and say your name and who you represent before you
25 speak.

1 The second thing is, as there was one
2 follow-up question I had to something that came up
3 yesterday. And I believe this would be addressed to
4 counsel for DOE.

5 I believe -- obviously, you all have taken
6 the position that there's a number of petitioners
7 here who have asserted transportation-based
8 contentions. And your argument, as I understand it,
9 is that -- you all went through this yesterday --
10 that it is outside the permissible scope of this
11 proceedings to hear the -- for us to hear that
12 matter, that exclusive jurisdiction rests in the
13 courts of appeal, and that whatever decision has been
14 reached under legal doctrines of res judicata,
15 collateral estoppel, and merger, that they basically
16 are going to prevent us from hearing the case.

17 My question doesn't have anything to do
18 with the substance of that argument. If you need to
19 bring your other counsel forward, I appreciate the
20 fact that you all may not be prepared to address this
21 today. But I don't think that it actually requires
22 any substantive response on his part.

23 The question really is simply this: I'm
24 going to ask you to make some assumptions that I know
25 are going to be incredibly painful for you. But

1 assume with me, if you would, that you were wrong,
2 and, in fact, that we could hear transportation
3 contentions in this proceeding. And assume with me
4 something that I know is equally painful for you, and
5 that is that for those petitioners who have a -- all
6 the petitioners who have asserted a
7 transportation-based contention, at least one of
8 their contentions is going to be admissible.

9 Now, my question is just simply this --
10 assume with me that both those things are true, are
11 there any parties that have transportation-based
12 claims whose standing you would still oppose in the
13 event both of those assumptions turned out to be
14 true?

15 >>DOE: This is Don Silverman, Your Honor.
16 Judge Gibson, give me just one moment. I think I
17 know the answer to the question. I'd like to very
18 briefly confer.

19 >>JUDGE GIBSON: Gladly.

20 >>MR. SCHMUTZ: Your Honor, may I approach
21 the counsel table? I'm Tom Schmutz, representing
22 DOE.

23 >>JUDGE GIBSON: Oh, yes, yes. I know I
24 threw you a curve. It's fine.

25 >>MR. SCHMUTZ: That's all right.

1 >>MR. SILVERMAN: I think I had it right.
2 I'm sorry, Your Honor.

3 I mean, the question is, assume
4 transportation NEPA contentions can be heard, and
5 that for any party that may have alleged one, one
6 is -- at least one is admissible, would there be any
7 other basis for not admitting that party? Yes, the
8 standing issue. And the party that comes to mind
9 would be the State of California, where we've made
10 independent arguments as to the standing of that
11 state.

12 >>JUDGE GIBSON: Okay. And with respect to
13 any others who have raised transportation-based
14 claims, assuming that we can hear transportation
15 contentions, and assume that a contention is
16 admitted, is there -- are there other base -- are
17 there other grounds that you would be opposing
18 standing with respect to those parties, or is
19 California the only one?

20 >>MR. SILVERMAN: My recollection is the
21 parties that -- the only parties that we have
22 contested standing on are the State of California,
23 the Nuclear Energy Institute; we have the two
24 purported representatives of the Timbisha Shoshone,
25 and we have said that whichever one is the AIT,

1 affected Indian tribe, does have standing, but we
2 have argued that beyond that they do not, have not
3 shown that. I believe we made the similar argument
4 with respect to NCAC, that they lack standing. And
5 we probably did it with respect to Caliente Hot
6 Springs Resort as well is my recollection.

7 >>JUDGE GIBSON: Okay. That's helpful.

8 >>MR. SILVERMAN: That's the group, I
9 think, because I think the AULGs that are recognized,
10 we have not contested standing.

11 >>JUDGE GIBSON: Okay. That's helpful.

12 >>MR. SILVERMAN: There is the LSN
13 compliance issue which we think is a gateway also.

14 >>JUDGE GIBSON: Sure, fair enough. Fair
15 enough. Okay. I just wanted to try to get that
16 clarified because it's a little hard to keep all
17 these parts in -- that are moving at the same time in
18 line. Thank you.

19 >>MR. SILVERMAN: Thank you.

20 >>JUDGE GIBSON: While I've got you,
21 Counsel for DOE, I would like to start today talking
22 about the issue of reasonable expectation and
23 reasonable assurance in part -- in 10 CFR Part 63.

24 Now, if I understand correctly, the
25 reasonable assurance concept is associated with

1 preclosure safety issues and the reasonable
2 expectation concept is associated with post-closure
3 activity; is that correct?

4 >> MR. POLANSKY: This is Alex Polansk for
5 the Department. Yes, Your Honor, that appears to the
6 way 63.31(a) and the safety findings are set up.

7 >>JUDGE GIBSON: Thank you. After reading
8 your papers, it appears to me that you're asserting
9 that a goodly number of Nevada's contentions fail the
10 materiality threshold of 309(f)(4), and that
11 specifically my understanding is, you're asserting
12 that, even if those contentions were otherwise
13 admissible, Nevada has failed to establish that such
14 a contention that would impact the ultimate decision
15 of the Nuclear Regulatory Commission, whether to
16 authorize construction at Yucca Mountain.

17 Is that a fair statement?

18 >>MR. POLANSKY: This is Alex Polansky for
19 the Department. Yes, Your Honor, and there was some
20 lengthy discussion on that yesterday as well.

21 >>JUDGE GIBSON: I appreciate that. You
22 know, these things sometimes bleed into each other.
23 And I realize that, as today, sometimes we may have
24 not the designated hitter up to talk about that
25 issue, but hopefully we'll be able to get through all

1 this.

2 Now, one of the reasons that I understand
3 you to be asserting that this fails the materiality
4 threshold is that Nevada's petition, at least in
5 certain cases, fails to demonstrate that the license
6 application of the Department of Energy fails to meet
7 the reasonable assurance standard with respect to
8 preclosure obligations and does not meet the
9 reasonable expectation standards with respect to
10 post-closure obligations.

11 Now, you are asserting, if I understand
12 correctly, that these two terms, reasonable
13 expectation, reasonable assurance mean two different
14 things; is that correct?

15 >>MR. POLANSKY: Under 63.31(a) the
16 Commission's ultimate safety finding is the same.
17 For reasonable assurance, it's that you can receive
18 and possess radioactive materials. Another
19 reasonable expectation is that you can dispose of
20 those materials. But the test is or the finding is,
21 can you do that without unreasonable risk to the
22 health and safety of the public.

23 So the Commission finding is the same. The
24 rules, we think, are very clear, just on their face,
25 that the methodology that the Commission must use to

1 reach those findings is different.

2 >>JUDGE GIBSON: Well, maybe I didn't ask
3 my question right, but I meant to ask: Do those two
4 terms mean two different things?

5 >>MR. POLANSKY: Your Honor, I don't know
6 that I can answer that question in the abstract
7 because the regulations are there and the
8 regulations, for example, in interpreting what
9 reasonable expectation is, set forth a number of very
10 specific considerations that the Commission should,
11 for lack of a better word, consider.

12 In 63.101, in describing the purpose and
13 nature of the findings, it says specifically that for
14 reasonable expectation that proof that the geologic
15 repository will conform with the objectives for
16 post-closure performance is not to be had in the
17 ordinary sense of the word because of the
18 uncertainties inherent in the understanding of the
19 evolution of geologic setting biosphere and engineer
20 barrier systems.

21 Similarly, it acknowledges that
22 demonstrating compliance will involve the use of
23 complex predictive models that are supported by
24 limited data from the field and laboratory tests,
25 analogue studies, et cetera.

1 It then further goes on to have a separate
2 section, which its title is Reasonable Expectation in
3 63.304, which sets forth four items that set -- that
4 identify characteristics of what reasonable
5 expectations includes.

6 And those are that it requires less than
7 absolute proof, because absolute proof is impossible
8 to obtain because of the uncertainty in projecting
9 long-term performance.

10 Two, it accounts for inheriting greater
11 uncertainties in making long-term projections of
12 performance for the Yucca Mountain disposal system.

13 Three, it doesn't exclude important
14 parameters from assessments and analyses simply
15 because they are difficult to precisely quantify to a
16 high degree of confidence.

17 And finally, it focuses performance
18 assessments and analyses on the full range of
19 defensible and reasonable parameter distributions
20 rather than only upon extreme physical situations and
21 parameter values.

22 So in the abstract, to say reasonable
23 assurance and reasonable expectation are the same, we
24 believe the safety finding is the same, but we
25 believe you cannot ignore the plain language of the

1 subsequent regulations which extrapolate on the
2 characteristics of what a reasonable expectation is
3 and what the burden of an applicant is to demonstrate
4 reasonable expectation, and, therefore, what the
5 staff and the Commission's job is to interpret
6 whether they have met that burden.

7 >>JUDGE GIBSON: Okay. Well, maybe we'll
8 come back to this question. Maybe we can -- do we
9 have the -- could you get the DOE Answer to Nevada
10 petition on page 40? I'm going to go over a couple
11 of the points that I think you just made,
12 Mr. Polansky.

13 If I understand correctly, you're saying
14 that it would require a different level and type of
15 proof, reasonable expectation would than reasonable
16 assurance?

17 >>MR. POLANSKY: I don't know that proof is
18 the word I would select, Your Honor. I look at it as
19 a methodology that needs to -- a framework.

20 >>JUDGE GIBSON: Well, certainly the word
21 "proof" appears in the last line of this page;
22 doesn't it? This is from your --

23 >>MR. POLANSKY: Yes. And that's directly
24 from the regulation; that it requires less than
25 absolute proof, because absolute proof is impossible

1 to obtain, yes.

2 >>JUDGE GIBSON: Okay. And I believe --
3 again, I think this is consistent with what you said
4 earlier; it is cautious but reasonable. Is that in
5 the prior paragraph on this page? Yeah. There we
6 go.

7 We've got "conservative means the use of
8 cautious but reasonable assumptions consistent with
9 present knowledge."

10 And, again, this is how we can describe --
11 I won't argue with you what it means, but whether it
12 means something different, the reasonable assurance,
13 but this is sort of how we describe it; is that
14 right? It's from your -- from your pleading.

15 >>MR. POLANSKY: Yes.

16 >>JUDGE GIBSON: Okay.

17 >>MR. POLANSKY: I think our pleading is
18 taken directly from the regulation in that particular
19 instance, Your Honor.

20 >>JUDGE GIBSON: Yeah. And I think your
21 previous answer was as well. If we could go to
22 page 39.

23 I believe we have this language again from
24 your pleading, "To merely assert the existence of
25 such uncertainties without specifying their impact on

1 a finding NRC must make in its issuance of the
2 construction authorization, amounts to an improper
3 challenge to Part 63, which explicitly recognizes
4 that such uncertainties exist and cannot be
5 eliminated."

6 So we have these unavoidable uncertainties
7 that are inherent in making long-term predictions
8 about post-closure performance. And what we're
9 trying to do is to figure out how -- what is this
10 term, if we don't describe what it means, which seems
11 to be a hard thing for you to do. At least we can
12 try to describe what its significance is for the
13 decision-making that NRC needs to make.

14 In doing that, you have invoked EPA and its
15 use of the term "reasonable expectation."

16 Could we get 41 of the DOE answer, please?
17 A little bit further up, if you could, please. Okay.

18 "Given the obligation of the Commission
19 under" -- this is from your pleading on page 41.

20 "Given the obligation of the Commission to
21 modify its technical requirements and criteria to be
22 consistent with the radiological protection standards
23 promulgated by EPA, the proper application of the
24 reasonable expectation standard must take into
25 account the statements by EPA in promulgating the

1 standards required by EPACT."

2 Now, for everybody here who may not be
3 familiar with that, could you please let us know what
4 EPACT is, Mr. Polansky?

5 >>MR. POLANSKY: The Energy Policy Act of
6 1992.

7 >>JUDGE GIBSON: Okay. Now, the basic idea
8 is that reasonable assurance is a standard that the
9 NRC uses in reactor licensing cases, and reasonable
10 expectation is not a term that they use in those
11 reactor licensing cases. And your reading of this is
12 that the reasonable expectation would be something at
13 least less restrictive or less stringent than the
14 reasonable assurance standard that the NRC uses in
15 reactor licensing cases; is that correct?

16 >>MR. POLANSKY: Your Honor, this is
17 Mr. Polansky. I don't know that it is a lesser
18 standard. It is a different methodology. The safety
19 finding, as I said before, is the same. And I think,
20 if I could go to one of the documents, the federal
21 register notices that we cite on the subsequent page,
22 on page 42 at the top.

23 >>JUDGE GIBSON: What fair register that?

24 >>MR. POLANSKY: This is the final rule,
25 it's 66 Fed Reg 32.101. It is the only citation to a

1 Fed Reg in footnote 27, and it goes directly to the
2 sentence that you had brought up before.

3 >>JUDGE GIBSON: Okay.

4 >>MR. POLANSKY: And in looking at what EPA
5 is saying --

6 >>JUDGE GIBSON: Did you say 32.101?

7 >>MR. POLANSKY: 32.101 is where we --

8 >>JUDGE GIBSON: I think we may actually
9 have that. So for the benefit of everyone here,
10 could we call that up? I believe that's maybe the
11 last one.

12 >>MR. WELKE: 74? 75?

13 >>JUDGE GIBSON: This would be 66 Fed Reg
14 32.101. Could you call that up, please, Mr. Welke?

15 >>MR. POLANSKY: The exact page I'll be
16 referencing is the next page 32.102. 32.101 is the
17 page which has the heading which is entitled "What
18 Level of Expectation Will Meet Our Standard."

19 >>JUDGE GIBSON: Do you have 102 or not? I
20 don't think we have that page. Okay. It's okay. Go
21 ahead. I'm sorry. We don't have that page --

22 >>MR. POLANSKY: Okay.

23 >>JUDGE GIBSON: -- available.

24 >>MR. POLANSKY: I don't know if it would
25 help, but the previous footnote, Footnote 26, if it's

1 a hyperlink, the first citation they reference is
2 32.101 to pages 103. So maybe you have it from
3 there. No. Okay.

4 The EPA was asked to clarify its meaning of
5 what reasonable expectation was. And on page 32.102
6 it says, "We'll clarify our meaning here.
7 Performance projections for deep geological disposal
8 require the extrapolation of parameter values (site
9 characteristics related to performance and
10 performance calculations) (projections of
11 radionuclide releases in transport from the
12 repository) over very long time frames that make
13 these projections fundamentally not confirmable."

14 And I would focus on that language,
15 "fundamentally not confirmable." In contrast to the
16 situation of reactor licensing where projections of
17 performance are only made for a period of decades,
18 and confirmation of these projections is possible
19 through continuing observation.

20 "In this sense, a reasonable expectation
21 approach to repository licensing would be necessarily
22 less stringent than an approach to reactor licensing.
23 We, therefore, must agree that these comments that
24 reasonable expectation requires less rigorous proof
25 than NRC's reasonable assurance approach."

1 We don't interpret it as a lesser standard.
2 It is a different standard simply because you cannot
3 physically confirm through observation during the
4 life of the facility that the uncertainties and
5 assumptions that you have made will be verified.

6 >>JUDGE GIBSON: So one is fundamentally
7 not confirmable?

8 >>MR. POLANSKY: Yes.

9 >>JUDGE GIBSON: And one is?

10 >>MR. POLANSKY: That is the major
11 difference. And that's why uncertainties have to be
12 taken into account. And as we said on page 39,
13 therefore -- and this is in our opening, not
14 attacking any particular contention, but a contention
15 that merely asserts that there are uncertainties out
16 there. That's not a legitimate contention because
17 the rule expects uncertainties and directs DOE to
18 take into account uncertainties.

19 >>JUDGE GIBSON: Okay. I think we'll come
20 back to you. I want to check in with NRC staff
21 counsel. Hopefully this won't be quite as abstract
22 as what we've just been talking.

23 You all were -- I want to sort of review
24 with you the history of these terms in terms of
25 rulemaking. And my understanding is that in 1999 the

1 Commission first planned to impose the standard of
2 reasonable assurance on post-closure safety; is that
3 correct?

4 >>JUDGE GIBSON: I don't think your
5 mic's on.

6 >>MS. YOUNG: Mitzi Young for the NRC
7 staff. That's correct.

8 >>JUDGE GIBSON: Thank you. And that was
9 in the rule that you proposed on February 22 of 1999?

10 >>MS. YOUNG: I believe that's correct.

11 >>JUDGE GIBSON: And I -- the cite I have
12 for that is 64 Fed Reg 8640. Does that sound right?

13 >>MS. YOUNG: Correct.

14 >>JUDGE GIBSON: Does that look like what
15 you all said? We've got that displayed.

16 >>MS. YOUNG: That's the proposed
17 regulation, 63.31, findings for construction
18 authorization.

19 >>JUDGE GIBSON: And the idea at that time
20 in 1999 was that you all were going -- were proposing
21 to use the reasonable assurance standard for
22 post-closure; is that correct?

23 >>MS. YOUNG: That's correct.

24 >>JUDGE GIBSON: Okay. Now, let's just
25 keep with the history here. Later the same year in a

1 final rule that was issued in November of 1999, the
2 Commission changed this language to replace the term
3 "reasonable assurance" with the term "reasonable
4 expectation;" is that correct?

5 >>MS. YOUNG: Mitzi Young again. That's
6 correct.

7 >>JUDGE GIBSON: Okay. Now, I have, in
8 some rulemaking that was done, I guess, like two
9 years later -- do we have 66 Fed Reg 55740?

10 Okay. In some rulemaking that was done a
11 couple years later, NRC, as I understand it, was
12 explaining in like, 2000 -- was this 2001?

13 >>MS. YOUNG: November 2nd, 2001.

14 >>JUDGE GIBSON: It was trying to explain
15 what it had done two years prior. And it said that
16 the change from reasonable assurance to reasonable
17 expectation was to avoid any misunderstanding and to
18 achieve consistency with the final EPA standards; is
19 that correct?

20 >>MS. YOUNG: That's correct.

21 >>JUDGE GIBSON: Okay. Okay. Now, once
22 this was done, Nevada then challenged the reasonable
23 expectation standard in the DC Circuit. Is that
24 correct?

25 >>MS. YOUNG: Yes, I believe that was the

1 case, EPA versus NEI or --

2 >>JUDGE GIBSON: Something like that, huh?

3 >>MS. YOUNG: Right. Or NEI vs EPI.

4 >>JUDGE GIBSON: Okay. Now, I also will
5 get back with you shortly, but, Counsel for Nevada,
6 let's see if we can pick up the story from there.

7 When you challenged this reasonable
8 expectation standard in the DC Circuit, was that in
9 the NEI v. EPA case?

10 >>MR. MALSCH: That's correct.

11 >>JUDGE GIBSON: Now, when you challenged
12 that standard, do I understand correctly that you
13 argued that the National Waste Policy Act did not
14 authorize this reasonable expectation standard, but
15 instead required a reasonable assurance standard?

16 >>MR. MALSCH: You know, I don't remember
17 making precisely that argument. I do remember
18 arguing that there was no rational explanation for
19 the departure from prior precedent in which the
20 Commission said, in '99, that it would apply a
21 reasonable assurance standard for post-closure
22 safety.

23 And I do know we raised a concern in our
24 brief that the reasonable expectation standard could
25 be read in a way to authorize issuance of a license

1 based upon less than a preponderance of the evidence.

2 But fortunately, the issue basically went
3 away when the Commission -- Commission -- counsel for
4 the Commission assured the Court that there was no
5 consequential difference between reasonable
6 expectation and reasonable assurance, and that the
7 two standards for post-closure safety were
8 substantively identical.

9 >>JUDGE GIBSON: Okay. You anticipated my
10 next question. But I appreciate that clarification.
11 As we promised, we'll break. It is 10 till 10:00,
12 and we will pick back up at 10:05. We will be in
13 recess until then.

14 (A recess was taken)

15 >>JUDGE GIBSON: Counsel for Nevada, when
16 we recessed -- incidentally I apologize. I was
17 looking at the clock at the back of the room and
18 apparently it's a few minutes fast. So I'm sorry
19 about that. I'll try to -- try to realize that one's
20 fast when we break next time.

21 Counsel for Nevada, I believe when we
22 recessed, we were talking about the NEI v. EPA case
23 and what transpired there.

24 I want to, if I could, look at the June 6,
25 2003 brief that the staff filed in the DC Circuit.

1 Do you have that; I believe pages 47 to 48?

2 Now, if we could -- I believe the header
3 here -- and this is, I believe, the staff's brief
4 that was filed. "As applied to a repository,
5 reasonable expectation and reasonable assurance are
6 virtually indistinguishable." And then they say,
7 "And thus, the reasonable expectation standard is not
8 too vague and does not reduce the applicant's burden
9 of proof."

10 How did you -- how did you respond to
11 this -- I'm just curious -- in the DC Circuit when
12 this header came up? I think there's also a
13 statement later in the next page that says something
14 like, "As applies to Yucca Mountain, there's no
15 consequential difference between the two standards,
16 given the nature of the determinations at issue."

17 Now, you had challenged this. So I'm just
18 curious, what transpired?

19 >>MR. MALSCH: Marty Malsch for Nevada.

20 >>JUDGE GIBSON: Thank you.

21 >>MR. MALSCH: My recollection is that we,
22 in our reply brief, advised the Court of Appeals that
23 in view of the NRC's -- we may have called it
24 concession, that there really wasn't much of an issue
25 here. And I think that is reflected in the Court's

1 decision, because my recollection is that in NEI v.
2 EPA, there was no court decision on the merits of
3 this original controversy.

4 >>JUDGE GIBSON: Yeah. In fact, let's --
5 I've got a -- could we go to the NEI v. EPA excerpt?
6 I actually pulled this off. It was a little hard to
7 read the two column -- not that. There's actually
8 a -- there we go. Here we go.

9 This paragraph right here, the whole
10 thing's not highlighted, but it says -- explaining
11 what NRC explained in the brief we just looked at,
12 then it says, "Moreover, during oral argument,
13 Counsel for NRC confirmed that the two standards are
14 substantively identical."

15 Now, is that your recollection that there
16 was a concession in oral argument that they're
17 substantially identical?

18 >>MR. MALSCH: That is my recollection,
19 Your Honor.

20 >>JUDGE GIBSON: Okay. And by virtue of
21 that, the Court said that you deemed the
22 representation sufficient to satisfy its claim.

23 >>MR. MALSCH: That is correct. We were
24 taking the Commission at its word.

25 >>JUDGE GIBSON: And so back to where you

1 left it when the NEI v. EPA case was concluded that
2 you had basically gotten the concession that you had
3 hoped for?

4 >>MR. MALSCH: That is correct.

5 >>JUDGE GIBSON: Okay. Let's fast forward
6 to 2007. You requested a binding interpretation of
7 the phrase "reasonable expectation" from the
8 Commission; is that correct?

9 >>MR. MALSCH: That's correct.

10 >>JUDGE GIBSON: Now, having gotten this
11 concession in the DC Circuit, were you -- did you
12 look at this as sort of, you know, belt and
13 suspenders that you'd already -- is that how you
14 looked at it, or you were you just being greedy? I
15 mean, why did you seek this?

16 >>MR. MALSCH: We had a good reason for
17 seeking this, Your Honor, and that is because in the
18 time period following the decision by the Court of
19 Appeals and the time in which we filed our request
20 for an opinion, we had been following interactions
21 between DOE and NRC staff in which DOE constantly
22 harped on some perceived significant difference
23 between the two statements of -- statements of the
24 finding to be made.

25 And so we thought that perhaps DOE hadn't

1 gotten the message, and we wanted to secure from the
2 Commission a reassurance that what they had told the
3 Court of Appeals was still true.

4 So it wasn't so much a belt-and-suspenders
5 argument; it was asking for a reaffirmation so as to
6 remind DOE, who seemed to have forgotten the
7 concession, that there was no meaningful distinction,
8 and that in preparing their license application, that
9 they should bear this lack of meaningful distinction
10 in mind.

11 >>JUDGE ROSENTHAL: Well, if I may
12 interrupt a second.

13 >>JUDGE GIBSON: Please. Please.

14 >>JUDGE ROSENTHAL: I don't understand why
15 that would have been necessary. It seems to me --
16 maybe I'm wrong -- that if a federal agency, in this
17 case the NRC, makes a particular statement to a court
18 with respect to the meaning of particular provisions,
19 that it's bound by it. Am I wrong about that?

20 >>MR. MALSCH: No. I think you're correct
21 Judge Rosenthal. In that representation, it may have
22 been unnecessary. But as I say, we certainly would
23 not have filed the petition had DOE not been
24 constantly harping on some perceived significant
25 difference. And they could read the Court of Appeals

1 decision as well as I could, and so we were wondering
2 what on earth DOE was doing, and so we sought the
3 affirmation.

4 >>JUDGE ROSENTHAL: If you could indulge me
5 just one additional moment?

6 >>JUDGE GIBSON: Please.

7 >>JUDGE ROSENTHAL: How did DOE interpret
8 the statement that was made by the staff to the Court
9 and the Court's action on that statement? It seems
10 to me from what I've just been told, that the staff
11 had made a binding representation to the Court that
12 these two standards were substantively identical.
13 And if that's the case, then I don't understand at
14 all, DOE's position as it, again, reiterated this
15 morning, that in operation, there is some
16 distinction.

17 It seems to me, if these two terms are
18 indistinguishable, substantively, that's the end of
19 the game. But maybe I'm missing something.

20 So I'm interested in how DOE interpreted
21 the staff's representation to the court and the
22 court's action on it.

23 >>MR. POLANSKY: This is Mr. Polansky from
24 the Department.

25 If we understand Nevada's position, it is a

1 concern that the preponderance of the evidence
2 standard, the standard of proof would somehow be
3 changed by changing the term from reasonable
4 assurance to reasonable expectation standard.

5 DOE is not saying that the preponderance of
6 the evidence standard is different. And we believe
7 that the NEI decision and how we've interpreted the
8 NRC staff's actions in its briefing during that case
9 is that they agree the preponderance of the evidence
10 standard is the operable standard.

11 The issue is that the methodology for the
12 Commission to reach its finding of reasonable
13 assurance and reasonable expectation is different.
14 And it is, we think, plainly laid out in the
15 regulations themselves. To interpret the methodology
16 to be identical or substantially have no difference,
17 would be to wholesale delete entire regulations out
18 of Part 63, which we don't think --

19 >>JUDGE ROSENTHAL: I don't know. Maybe
20 you have a different interpretation of the term
21 "substantively identical" than I do, but, to me, if
22 something is "substantively identical", that means
23 that even from a standpoint of methodology, there's
24 no difference.

25 >>MR. POLANSKY: Your Honor, we interpreted

1 the dispute over the difference between reasonable
2 assurance and reasonable expectation, as I said, to
3 be one of the standard of proof, the preponderance of
4 the evidence. We believe that standard remains
5 intact. We believe that the methodology that the
6 Commission needs in order to reach its safety
7 findings under 63.31(a) is clearly set forth in the
8 regulations, and we don't think there's any dispute
9 by Nevada or NRC staff that those regulations apply.

10 >>JUDGE GIBSON: Thank you, Judge
11 Rosenthal.

12 Returning to our chronology, which is a lot
13 easier for me to follow than this level of
14 abstraction that Judge Rosenthal and Mr. Polansky got
15 to.

16 I'm curious, what would -- I take it your
17 response from the NRC was a denial of your request
18 for a binding interpretation of the phrase
19 "reasonable expectation"?

20 >>MR. MALSCH: Marty Malsch. Marty Malsch
21 for Nevada.

22 Yes. I mean, we would have been frankly
23 surprised if the general counsel had issued a binding
24 interpretation. NRC general counsels seldom do that.
25 There was no harm in asking. But what we did get was

1 an informal opinion that reaffirmed the earlier
2 position. And we thought that was helpful, at least
3 to remind DOE that the Commission's statement before
4 the Court of Appeals was still operative.

5 >>JUDGE GIBSON: So their response was sort
6 of like, you got the belt; so you don't get the
7 suspenders?

8 >>MR. MALSCH: Perhaps.

9 >>JUDGE GIBSON: Okay.

10 >>MR. MALSCH: But we were satisfied.

11 >>JUDGE GIBSON: Okay. All right. Now,
12 let's go back to the NRC staff for a second. Pick up
13 here.

14 Is that essentially what this letter from
15 Karen Cyr at the NRC to Nevada said, was that
16 essentially you got the belt; so you don't get the
17 suspenders?

18 >>MS. YOUNG: Mitzi Young for the NRC
19 staff. We wouldn't disagree with that
20 interpretation. I think this dispute or
21 misunderstanding mostly lied within EPA's
22 interpretation of what the words "reasonable
23 assurance" meant.

24 And I mean, the Commission never had any
25 other expectation for Part 63 than what's reflected

1 in the final requirements now. And just to avoid any
2 confusion on terminology, not that there was any
3 substantive difference between the two terms, the
4 Commission adopted the EPA terminology.

5 But it always had stated, I believe, even in
6 the proposed rule, that they thought there was
7 sufficient flexibility in the reasonable assurance
8 standard to accommodate licensing of the repository.

9 >>JUDGE GIBSON: Thank you.

10 >>MS. YOUNG: And if I just might add,
11 Karen Cyr's --

12 >>JUDGE GIBSON: Please.

13 >>MS. YOUNG: -- letter was dated May 18,
14 2007 that you were referring to.

15 >>JUDGE GIBSON: Okay. Now, let's go to
16 2009, if we could. My understanding is that the
17 Commission issued a final rule implementing the dose
18 after 10,000 years, and as part of that rulemaking --
19 do we have 74 Fed Reg 10826? There we go.

20 The Commission, once again, indicated, as
21 noted by the state -- I assume that's the State of
22 Nevada -- "NRC and the state have already agreed that
23 the two terms are substantially identical, see NEI v.
24 EPA." Is that correct?

25 >>MS. YOUNG: Mitzi Young. That's correct.

1 >>JUDGE GIBSON: Is there any question in
2 your mind, Counsel for the NRC that these terms are
3 substantially identical?

4 >>MS. YOUNG: No question. But you can say
5 that Part 63, through its regulations, gives a lot of
6 information on what DOE has to do to provide the
7 staff reasonable expectation in the post-closure
8 phase that the regs will be met.

9 So there's no difference in the terms.
10 Either reasonable assurance or reasonable expectation
11 always has to be judged in the context of what's
12 being considered in terms of the proposed action that
13 the NRC is considering. They both refer to a level
14 of confidence with the NRC's decision-making. That's
15 based on fulfillment of the regulatory requirement
16 set out in Part 63.

17 >>JUDGE GIBSON: Well, you know, you just
18 heard Counsel for NRC, and -- I mean Counsel for
19 Nevada and Counsel for DOE, and, you know, it sounds
20 like, you know, they're not -- they don't certainly
21 view these terms as being quite the same.

22 Do you -- are you going to pick a dog in
23 this fight? Do you have a -- or do you agree with
24 DOE's interpretation or do you agree with Nevada's
25 interpretation?

1 >>MS. YOUNG: We do not agree with DOE's
2 interpretation. That's clear.

3 >>JUDGE GIBSON: Okay. Okay. Thank you.
4 So when it comes to actually drafting a license, then
5 you, the NRC, would be -- not be pursuing the
6 methodology that Mr. Polansky has been proposing for
7 reasonable expectation, but would be utilizing the
8 methodology that counsel for Nevada has indicated
9 should be used; is that correct?

10 >>MS. YOUNG: Mitzi Young for the NRC staff
11 again.

12 I don't believe counsel for Nevada proposed
13 a methodology. I do believe that Mr. Polansky for
14 DOE identified the pertinent regulation in terms of
15 the reasonable expectation findings. And the staff
16 does not dispute that that's the regulation that
17 actually elucidates what reasonable expectation is
18 with respect to repository.

19 >>JUDGE GIBSON: Counsel for Nevada, while
20 you have a chance here, do you have a methodology
21 that you could describe so that anyone here could
22 understand it so that counsel for NRC will understand
23 what methodology you're proposing?

24 >>MR. MALSCH: We don't propose a
25 methodology as such. We do propose in our replies an

1 approach to how one applies the reasonable
2 expectation standard, which is consistent with the
3 reasonable assurance standard.

4 And let me just go through each of the
5 supposed differences between -- the supposed
6 methodological differences offered by EPA or NRC that
7 would distinguish the two terms. I mean, we've
8 heard -- and go over them one by one. I think, if we
9 go over them, we can see where there might be a
10 possible difference in methodology between reasonable
11 assurance and reasonable expectation, but then I
12 think we could conclude that certainly at the
13 contention stage, that difference is of no
14 consequence.

15 I mean, if you just go through the
16 differences one by one, you can see that. For
17 example, the statement is made that under reasonable
18 expectation, one uses cautious but reasonable
19 assumptions consistent with present knowledge. We do
20 that with reactor --

21 >>JUDGE GIBSON: I'm sorry. But before you
22 go on, is that set forth somewhere in some document?
23 Are you just reading from some notes? I'm just
24 curious. I just thought if you had it available, it
25 might be worthwhile for us to be able to see it. That's

1 all. I was just curious.

2 >>MR. MALSCH: I don't have that handy. I
3 believe that's from one of the preambles. When I get
4 to -- perhaps I should just go to the definition,
5 63.304, which is where the Commission actually
6 defines reasonable expectation. I think that would
7 be the more definitive place to look.

8 If you look at 63.304, you see that
9 reasonable expectation requires less than absolute
10 proof. While the Commission has been clear for over
11 a quarter century that reasonable assurance does not
12 require absolute proof, so that is not a meaningful
13 or consequential distinction.

14 63.304 next says that reasonable
15 expectation accounts for the greater uncertainties in
16 making projections of long-term performance. And
17 I'll come back to that in a second.

18 Thirdly, it says it does not exclude
19 important parameters because of -- they are difficult
20 to quantify with a high degree of confidence. Well,
21 that doesn't distinguish reactor licensing. Reactor
22 licensing involves lots of parameters which are
23 difficult to quantify. For example, reactor
24 licensing involves efforts to develop precise
25 sequences of core melt accidents. And many of the

1 parameters involved in those sequences are also
2 difficult to quantify with a high degree of
3 confidence. That doesn't distinguish any methodology
4 used in reasonable assurance.

5 And then finally 63.304 says it focuses the
6 performance assessment on the full range of
7 defensible and reasonable parameters. Well, we do
8 that in reactor licensing also.

9 So the one area where there might be a
10 possible methodological distinction is in the part
11 where they say that it accounts for greater
12 uncertainties in projecting long-term performance.

13 Now, that is a theoretical methodological
14 difference, but it is, in this case, certainly at the
15 contention stage, of no practical significance. And
16 that is because, what that seems to be saying is we
17 should be allowing for greater amounts of
18 uncertainty, because of the inherent uncertainties of
19 projecting long-term performance.

20 Unfortunately the Commission, while saying
21 that there, indeed, was such a thing as too much
22 uncertainty, that is to say, an amount of uncertainty
23 which would preclude a finding of reasonable
24 expectation, it declined to define what that level
25 was.

1 So at the same time insisting that it be --
2 it was very important to properly characterize
3 uncertainty.

4 So let's go back with that in mind and look
5 at these objections to any one of our TSPA
6 contentions, where they say we have failed to account
7 for reasonable expectation. What they must mean in
8 the context of a single contention is that we have
9 not shown -- and this is a materiality objection, so
10 they have -- they must be arguing that we have not
11 shown that our contention, if true, if taken as true,
12 would result in some degree of uncertainty which
13 exceeded acceptable bounds.

14 But there are no acceptable bounds. So
15 asking us to do that is like asking the question how
16 high is up? It's an unanswerable question.

17 The Commission was very clear when it
18 declined to define what was an acceptable,
19 unacceptable amount of uncertainty. It was very
20 clear that it reserved that decision to much
21 later further -- much further down the line based
22 upon a full record.

23 So what the Commission is saying is we
24 don't know what an unacceptable degree of uncertainty
25 is now. You can't use that concept in ruling on the

1 admissibility of contentions. But later on, way down
2 the road, we come to a final licensing decision,
3 we'll tell you what it is.

4 Now, I wanted to add one further thought.
5 Remember that DOE made this objection to virtually
6 every single one of our TSPA contentions. So what
7 they mean -- what they are arguing then necessarily
8 is something which we called utterly irresponsible.
9 Since they're arguing materiality, they are saying
10 that every single one of our contentions, if true,
11 would not warrant denial of the license application.

12 They must be saying, looking at our
13 contentions, that uncertainty doesn't matter. You
14 can have an infinite, undefined amount of
15 uncertainty, and we still are entitled to get a
16 construction authorization. And we maintain that is
17 an utterly irresponsible position to take.

18 >>JUDGE GIBSON: I suspect that
19 Mr. Polansky would not agree that that was utterly
20 irresponsible, but I do want to add -- afford him an
21 opportunity to respond to what you just said. I
22 would ask if you could do it in two minutes, perhaps,
23 please.

24 >>MR. POLANSKY: Thank you, Your Honor.
25 This is Mr. Polansky.

1 We started on this discussion and the
2 question about whether there is any difference in
3 methodology, so let me address that first.

4 Reasonable expectation -- we don't agree
5 that they are identical up to reasonable assurance in
6 their methodology implementation. For example, in
7 the reactor world, it is perfectly acceptable under
8 most circumstances, to demonstrate that you have a
9 bounding analysis.

10 And here under 63.304, No. 4, you are not
11 allowed to using all bounding analyses, in essence,
12 to be 100 percent in every single capacity so
13 conservative that you are bounding. The rule asks
14 you to focus performance assessments and analyses on
15 the full range of defensible and reasonable parameter
16 distributions rather than only upon extreme physical
17 situations and parameter values.

18 Now, that's not to say we cannot select any
19 bounding value in certain models or submodels, but if
20 we said every single thing is bounding here and,
21 therefore, we're fine. We don't believe that that
22 meets the probabilistic aspects of the performance
23 assessment that is required under Part 63 to
24 demonstrate reasonable expectation.

25 In addition, as a provision, we haven't

1 discussed, which is the one that comes right before,
2 it, Section 63.303, which discusses the
3 implementation of Subpart L, and how you are to
4 achieve your dose limit on reasonable expectation.
5 And it was modified slightly in the March 13th rule.
6 And it now states --

7 >>JUDGE GIBSON: This is the one the
8 Commission just issued?

9 >>MR. POLANSKY: Yes, Your Honor.

10 >>JUDGE GIBSON: That we were just
11 referring to?

12 >>MR. POLANSKY: Yes.

13 >>JUDGE GIBSON: Okay.

14 >>MR. POLANSKY: And that section now has
15 the arithmetic mean of the estimated doses to be used
16 for determining compliance.

17 Clearly the arithmetic mean or the mean of
18 a value is there because of the great uncertainty
19 that you have, and you are running many iterations
20 and model runs, and you are getting numbers and
21 possibilities above that mean and numbers and
22 possibilities below that mean. In essence, you are
23 running iterations that take into account all of the
24 reasonable uncertainties.

25 And some of those uncertainties result in

1 very high dose, with low probabilities, and others in
2 very low dose with low probabilities, and you get an
3 arithmetic mean.

4 That, in essence, is incorporating
5 63.304.2, which accounts for the inherently greater
6 uncertainties in making long-term projections. You
7 wouldn't use a mean, I don't think, if you didn't
8 have those uncertainties. You would use a single
9 value. You may not get there deterministically, but
10 you would say here's my dose value, you know; I can't
11 go above.

12 >>JUDGE TRIKOUROS: Mr. Polansky, when
13 would it be acceptable to file a contention that
14 claimed that there was uncertainty? Would any such
15 contention be viable?

16 >>MR. POLANSKY: What we said in our answer
17 is generically, upfront, a contention that merely
18 says that there is uncertainty or you have unbounded
19 uncertainty by itself is not an admissible
20 contention. And itself is not material. You have to
21 go further. You have to say more.

22 >>JUDGE TRIKOUROS: And what would you
23 constitute going further? Quantifying the
24 uncertainty? Is there a standard that somebody would
25 apply to that quantification?

1 >>MR. POLANSKY: Judge Trikouros, it is --
2 in the contentions that we saw, the -- we did not
3 think that the petitioners connected the dots. I
4 think Mr. Silverman addressed yesterday that under
5 the TSPA, total system performance assessment, which
6 is what we're discussing for post-closure and
7 reasonable expectation, that there was no attempt at
8 all, an essential abandonment of, you know, it's not
9 possible to do it and we haven't even tried. And so
10 that failure, we believe, doesn't connect the dots to
11 demonstrate whether there would be a qualitative or
12 quantitative outcome.

13 And in performance assessment space, I
14 guess the best example would be to look at 63 -- is
15 it 114(e) and (f), which state that -- you know, (e),
16 you need to provide the technical basis for either
17 inclusion or exclusion of specific features, events,
18 and processes in the performance assessment. That's
19 the TSPA.

20 Specific features, events, and processes
21 must be evaluated in detail if the magnitude and time
22 of the resulting radiological exposures to the REMI,
23 the reasonably maximally exposed individual, or
24 radionuclide releases to the environment, would be
25 significantly changed by their omission.

1 Now, DOE, in identifying it's FEPs,
2 features, events, and processes, did not run the TSPA
3 model for every single one of those in order to
4 determine an inclusion or exclusion of those. It
5 evaluated them.

6 We would have expected, and we did expect,
7 that any contention saying that there had to -- that
8 there was a change, because you didn't look at this
9 issue or this type of corrosion mechanism or whatever
10 it was -- that they would have to demonstrate
11 materiality to this provision; that there would be --
12 it would be significantly changed by their omission;
13 that is the dose to the REMI would be significantly
14 changed by their omission. And we, frankly, did not
15 see that in the contentions.

16 >>JUDGE TRIKOUROS: We're going to get into
17 that quite a bit today, I think, but I'm not sure if
18 this is the appropriate time, because I think we want
19 to finish the arguments with respect to reasonable
20 expectation and reasonable assurance.

21 All right. But let me ask one question in
22 that regard.

23 >>JUDGE GIBSON: Please. Yes.

24 >>JUDGE TRIKOUROS: Would it be correct for
25 me to say that applying the reasonable expectation

1 standard would provide reasonable assurance that the
2 post-closure performance criteria would be met, and,
3 conversely, if we applied the reasonable assurance
4 standard, we would have reasonable expectation that
5 the preclosure performance requirements would be met?
6 Is that a -- are both of those correct and the same?

7 >>MR. POLANSKY: We believe so, because the
8 underlying principle, the standard of proof is
9 preponderance of the evidence.

10 >>JUDGE TRIKOUROS: Does Nevada agree with
11 that?

12 >>MR. MALSCH: Marty Malsch for Nevada. We
13 would agree that this proceeding is governed by the
14 Administrative Procedure Act and the standard
15 definition of level of proof is preponderance of the
16 evidence. I guess the question is the preponderance
17 of the evidence showing what?

18 And in regard to the comment that our
19 contentions didn't connect the dot, I think our
20 response is that, if the contention is the first dot,
21 the Commission hasn't told us what the second dot is,
22 and there's no connection to be made. I would also
23 want to add that there is no single Nevada contention
24 which merely asserts that uncertainty exists, period.

25 >>JUDGE TRIKOUROS: Judge Gibson

1 characterized this as trying to nail jello to a tree.
2 Does the NRC staff agree that those two statements
3 that I made are correct and the same?

4 >>MS. YOUNG: Mitzi Young for the NRC
5 staff. If I heard you correctly, I would agree with
6 your postulation of the two standards.

7 >>JUDGE GIBSON: Okay. Well, since we are
8 not going to be able to nail this jello to a tree,
9 let me ask you this, Ms. Young: I asked you about
10 what methodology you would use in terms of preparing
11 a license for this facility, and I understand that we
12 didn't have a methodology that Nevada can propose.

13 Let me ask you with respect to the specific
14 question of contention admissibility; you have heard
15 the two assertions of these two gentlemen with
16 respect to what should be demanded by this Board with
17 respect to the admission of these contentions.

18 Do you have a preferred view which was
19 between Nevada and DOE on that issue?

20 >>MS. YOUNG: Mitzi Young for the NRC
21 staff. Again, I'm not sure I remember everything
22 that each of the Counsel said, but it is clear that
23 the staff did not, to my recollection, oppose
24 contentions based on this issue.

25 Materiality in terms of uncertainty being a

1 challenge to regulations, we did not oppose that. So
2 I would state that our view is closer to what Nevada
3 is stating; although Nevada talked about contentions
4 being decided at a later date. I'm not sure the
5 staff would agree with that. I mean, we have the
6 regulations, we have the standards, and the
7 petitioner has the obligation to demonstrate that
8 their issues satisfy the requirements of
9 10 CFR 2.309.

10 >>JUDGE GIBSON: Okay. Well, rather than
11 get into more tit for tat, let me just say I believe
12 that what counsel for Nevada was talking about was,
13 he simply said the Commission has given us a dot but
14 they haven't given us the second dot. I think that's
15 what he was referring to when he was talking about
16 how it would be hard for them to describe it with
17 more specificity.

18 Okay. DOE, let's go back to this -- I want
19 to understand how significant, if at all, the EPA
20 rulemaking is for the position that you have taken
21 with respect to what is required by the NRC.

22 And to just give a little context for that
23 for those of you who are not familiar, EPA
24 promulgates regulations that have to do with the
25 standards that must be met, and the NRC is then to

1 develop the technical criteria to implement those
2 regulations.

3 EPA used the term "reasonable expectations"
4 in their regulations, and as Ms. Young indicated, the
5 Commission then picked up that term.

6 Now, I want to understand, is the -- are
7 the EPA regulations an integral part of your position
8 or are they just out there and something that you
9 think that the NRC's going to need to implement?

10 >>MR. POLANSKY: Mr. Polansky, Your Honor.
11 I don't think they have a great amount of weight or
12 consideration in the discussion we have here. The
13 one paragraph that I read to Your Honors earlier
14 today, I tend to find just the logical observation
15 that you cannot confirm those parameters because
16 we're going out 10,000 years as opposed to a 50-year,
17 40-year operating license for a nuclear facility. I
18 think that's the distinction to keep in mind.

19 The NRC has adopted its own regulations in
20 Part 63, and as we've already discussed and I've
21 walked through, those regulations say what they say,
22 and that's what the applicant DOE is trying to meet.
23 And we believe that they're plain on their face and
24 they can't be read out of the regulations.

25 >>JUDGE GIBSON: Okay. If -- could we get

1 the 64 Fed Reg 46997? Would you call that up for me,
2 please?

3 In 1999, EPA in proposing these rules
4 basically -- they were -- they have to do with
5 reasonable expectation and reasonable assurances,
6 said that -- I'm quoting now from the highlighted
7 part -- "While the provisions in this rule establish
8 minimum requirements for implementation of the
9 disposal standards, NRC may establish requirements
10 that are more stringent."

11 Now, I read that to say that if NRC wants
12 to adopt technical criteria that would be based on
13 reasonable expectations, it can do so, and by doing
14 that, it will -- it will meet the EPA standard. But
15 that if the NRC wants to devise technical criteria
16 that are more restrictive or stringent, or I guess
17 have a more rigorous methodology would be the way you
18 would put it, than what EPA has proposed here, then
19 that would be okay, because that would be more
20 stringent than the EPA standards.

21 On the other hand, if NRC were to adopt
22 standards that -- technical criteria that were
23 looser, less restrictive, had a less rigorous
24 methodology than the reasonable expectation
25 standards, then that would not comply with the EPA

1 rules, the EPA standard, with respect to
2 radionuclides.

3 Now, I just want to know, do you agree with
4 the way that I read that statement?

5 >>MR. POLANSKY: This is Mr. Polansky.
6 Yes, I do, Your Honor.

7 >>JUDGE GIBSON: So if this more rigorous
8 methodology that I think is connoted by reasonable
9 assurances were to be adopted as the appropriate
10 standard for post-closure -- and I'm not saying the
11 NRC's done it. Okay. I don't want to go there. I
12 just want to say, if they decided to do that, they
13 would be -- not be inconsistent with the EPA
14 radionuclide standards; is that correct?

15 >>MR. POLANSKY: Yes, Your Honor.

16 >>JUDGE GIBSON: I knew you'd want to say
17 something else. Go ahead. I just wanted to -- at
18 least I got a yes out of you. Thank you.

19 >>MR. POLANSKY: I am cognizant of some
20 inability to tack jello to a tree; so I'm trying to
21 make it a little firmer for you.

22 I think, from the conversation we've had,
23 what DOE could say is that, if NRC had not changed
24 the word "reasonable assurance" to "reasonable
25 expectation" and had, for example, in Section

1 63.304 -- instead of entitling it reasonable
2 assurance or reasonable expectation, the methodology
3 used for post-closure would still be different than
4 the methodology that would be used for preclosure,
5 because it's the methodology that we're saying is
6 different.

7 The standard of proof in Court,
8 preponderance of evidence, that's the same. The
9 ultimate finding of unreasonable risk to the public
10 health and safety, that's the same. It's just that
11 the methodology recognizes, and has to, that you are
12 looking out thousands or tens of thousands of years
13 for your post-closure, and you cannot do that in
14 preclosure.

15 That being said, you know, we did have the
16 exchange with Mr. Malsch that under 63.304, I think
17 there are some slight differences. And I use the
18 example of a bounding scenario that we could not, in
19 every single model and submodel, use bounding
20 parameters. That's not what the concept is under
21 63.304, No. 4. But besides those subtle differences,
22 I hope that's firmed up our position for you.

23 >>JUDGE GIBSON: Okay. Thank you. Counsel
24 for Nevada, I don't want to leave this without you
25 having an opportunity to respond to what Mr. Polansky

1 said. I gave him the chance to respond to you.

2 >>MR. MALSCH: Let me begin by just
3 remarking that we agree with Your Honor's statement.
4 And I would just add that the EPA observation and its
5 rulemaking that you cited is actually consistent with
6 almost identical language in the conference report
7 for the Energy Policy Act of 1992. So this was not
8 just some generous statement by the EPA. It was
9 reflecting the state of the law.

10 Secondly, under the Energy Policy Act, the
11 EPA rule itself has no direct application in this
12 proceeding because, under the statute, the EPA rule
13 only has significance insofar as it leads to a second
14 NRC rule. And if it were even possible to argue
15 theoretically that there was some inconsistency
16 between the NRC implementing rule and the EPA rule,
17 that would actually be an impermissible challenge to
18 an NRC rule, which is not allowed in NRC practice.

19 So for a number of reasons, the controlling
20 regulation in this case is the NRC rule, not anything
21 the EPA might have said or done in its rulemaking.

22 With regard to Mr. Polonsky's statement, I
23 guess I can't disagree that the differences in
24 methodology are, at best, slight. I would say that I
25 don't see any problem with establishing compliance

1 with an EPA dose standard using only bounding
2 estimates.

3 I don't think that's precluded so long as
4 one also -- in connection with making that proof of
5 compliance, also includes a discussion of -- and
6 characterization of the uncertainty involved. But I
7 think that's almost of academic significance.

8 I would also add that, if you look at DOE's
9 objections in their Answers, their objections along
10 the lines of we have not established no reasonable
11 expectation; those objections don't sound in
12 methodology. They sound in risk, acceptable levels
13 of risk, which I addressed earlier.

14 So I don't understand exactly what DOE's
15 objections to our contentions are if they're talking
16 about methodology and not levels of acceptable risk.
17 I've just sort of lost track of what they're trying
18 to say in their Answers.

19 >>JUDGE GIBSON: Counsel for DOE, I think
20 Mr. Malsch's statement raises a question in my mind.
21 I hope I can formulate this.

22 I guess I'm curious how would -- I realize,
23 you know, you don't want to be aiding and abetting
24 the enemy here, but how would you, if you were, you
25 know, going to be a petitioner in this case, how

1 would you draft a contention to challenge DOE's
2 license application with respect to this post-closure
3 standard that you say fails the materiality
4 threshold?

5 How would you -- would it be possible to
6 draft a contention that, under your standard, would
7 be admissible to challenge the post-closure rules --
8 or the post-closure regime that you have proposed in
9 your application?

10 >>MR. POLANSKY: This is Mr. Polansky. It
11 certainly would be possible to craft a contention.
12 This -- you know, we were accused yesterday of
13 creating a fortress to contention admissibility, and
14 that's certainly not the case.

15 >>JUDGE GIBSON: Well, I think someone was
16 just quoting out of a case. I'm not sure they
17 accused you of anything. But that's okay.

18 >>MR. POLANSKY: Fair enough, Your Honor.
19 Under 63.114(e), which is a provision I had read from
20 earlier --

21 >>JUDGE GIBSON: 63.114(e)?

22 >>MR. POLANSKY: (e), yes.

23 >>JUDGE GIBSON: Can we call that up,
24 Mr. Welke?

25 >>MR. POLANSKY: If I were crafting a

1 contention, the requirement for materiality for this
2 provision, for example, is that the omission of this
3 FEP, this feature, event, or process, would be that
4 the radiological exposure to their RMEI would be
5 significantly changed by its omission.

6 So I would have experts and expert opinion
7 that had some evaluation that demonstrated that the
8 exclusion or omission of this -- and I'd have to find
9 a place where it was omitted in the application --
10 would have significantly changed the dose to the
11 RMEI.

12 Now, we had discussion yesterday about, you
13 know, replicating the TSPA to do that. You know,
14 that's not what DOE is asserting, and that's where
15 the impossibility came up yesterday that no one can
16 replicate what DOE has done. And by replicate we
17 meant exactly model what DOE has done.

18 But, you know, we do point out that EPRI
19 has its own model. NRC has its own model. It's not
20 identical, it's not a replication, but they clearly
21 have run some performance assessment-like analyses
22 and have come up with their own opinions about the
23 outcome.

24 And DOE, as I mentioned, in evaluating
25 those FEPs, features, events, and processes,

1 evaluated them and did not run them all through the
2 TSPA. It might have done it on a model or submodel
3 basis in order to make its decision.

4 Clearly a petitioner could do that and have
5 met the materiality requirement. We do not believe
6 that any of the contentions that are proffered in
7 good faith did that.

8 >>JUDGE GIBSON: Okay. I think Judge
9 Trikouros has got a question.

10 >>JUDGE TRIKOUROS: You need -- you need to
11 provide me with more than that of how exactly would
12 this process work?

13 Let me ask the question this way: Do you
14 believe -- do you truly believe that any one
15 parameter discussed in any one contention, if
16 propagated through the TSPA, could result in failure
17 to meet the standard?

18 >>MR. POLANSKY: Mr. Polansky. Judge
19 Trikouros, I am not fully versed on the implications
20 of this nonlinear model, the TSPA. What I can say is
21 I think from some of the figures that are at the
22 back -- and at a break I can provide you with those
23 numbers -- there are clearly some features, events,
24 phenomena which have greater implications on
25 significance of dose than others.

1 >>JUDGE TRIKOUROS: Has the DOE done any
2 sensitivity analyses in all of the years they were
3 working with this model to identify which of those
4 are sensitive and which of those aren't?

5 >>MR. POLANSKY: I believe there's a whole
6 host of sensitivity studies. Whether they were done
7 on the entire TSPA or on a model or submodel basis,
8 I'd have to talk with our experts at a break.

9 >>JUDGE TRIKOUROS: But in the answers --
10 well, let me say it this way. The only viable way
11 that I can see to evaluate the implication of all of
12 these contentions, many of which is still with
13 individual parameter issues, would be to basically
14 rerun the entire model with all of the parameters
15 altered to the -- to be what the intervenors are
16 indicating they should be and possibly reducing
17 conservatism in other parameters that the DOE deems
18 are overly conservative to try and reach something
19 that makes sense.

20 And so what I'm trying to wrestle with is
21 how does Nevada meet your standard? You're very
22 nebulous about it. You make statements like they
23 don't need to run the whole model, they could run
24 parts of the model, but it's still -- from my
25 perspective, is still not very clear how they could

1 have met your materiality concern. Can you enlighten
2 me perhaps some more?

3 >>MR. POLANSKY: This is Mr. Polansky. I'm
4 having trouble articulating a specific for you
5 because I don't want to talk out of school because
6 I'm not a technical expert. I don't know all the
7 details and machinations of how the models or
8 submodels were run, but I could point the Board to
9 how the DOE evaluated inclusion or exclusion of FEPs,
10 the features, events, and processes.

11 I believe it's Section -- SAR Section 2.2
12 which discusses the inclusion or exclusion of FEPs.
13 And there are supporting references which go on for
14 hundreds, if not thousands, of pages for each
15 feature, each event, each process, and how it was
16 that DOE evaluated it for inclusion or exclusion
17 against this criteria of significant effect.

18 And so if there are some people who are
19 expert in the field -- and this is not just a single
20 field. I mean, this covers corrosion. This covers
21 igneous.

22 It covers Martians coming from outer space.
23 If those experts can do that evaluation and say to
24 the NRC that we meet this criteria, then our
25 assumption was that it would be relatively easy for

1 experts in those same fields, if retained by
2 petitioners, to make similar allegations with
3 appropriate support that was a violation of that
4 criteria or that regulation. And, as I said, in good
5 faith, we did not think any of the contentions did
6 that.

7 >>JUDGE TRIKOUROS: All right. Well, I'd
8 like to -- we'll come back to this again. I don't
9 think we've reached a resolution on this.

10 >>JUDGE GIBSON: I appreciate the fact that
11 you can't tell me what these two terms mean,
12 Mr. Polansky, and whether they mean the same thing or
13 not. I understand that. I understand that you're
14 saying that there is a different methodology, one
15 more rigorous, one less rigorous that one would
16 utilize to determine whether, you know, you met this
17 standard.

18 Setting that aside for a minute, have the
19 contentions that Nevada has drafted, recognizing in
20 your estimation they do not comply with the criteria
21 that would be necessary for them to be admissible
22 because of materiality; with respect to reasonable
23 expectation, do they, nevertheless, meet the
24 materiality threshold with respect to reasonable
25 assurance?

1 >>MR. POLANSKY: This is Mr. Polansky.
2 Judge Gibson, are you referring then to those few
3 contentions that are challenging DOE's preclosure?

4 >>JUDGE GIBSON: No, I'm not. No, I'm not.
5 I'm not talking about that at all. I'm talking about
6 the post-closure contentions. And I realize that you
7 don't think that's what they need to mean.

8 But I just want to ask you, with respect to
9 contention admissibility, you're saying they flunk
10 the materiality threshold, okay, because reasonable
11 expectation is something that your application meets
12 and their contentions don't get there.

13 I'm just saying: Do you concede that they
14 at least meet the reasonable assurance standard, even
15 though you think that's not what applies?

16 >>MR. POLANSKY: This is Mr. Polansky. My
17 gut reaction is that, no, but I'm not sure I fully
18 still understand the question.

19 >>JUDGE GIBSON: Well, I definitely do not
20 want you to -- as I would tell a deponent in my prior
21 life, I would never want you to answer a question you
22 did not understand. So let's start over.

23 >>MR. POLANSKY: Okay.

24 >>JUDGE GIBSON: Okay. You indicated that
25 these contentions that Nevada has asserted with

1 respect to post-closure flunk the materiality
2 threshold for contention admissibility because
3 reasonable expectation means something different than
4 what they've alleged and they have not met those
5 materiality requirements with respect to reasonable
6 expectation.

7 Now, I know you don't think that reasonable
8 assurance is the standard, that they -- that you need
9 to meet for post-closure. And I'm sorry I have to
10 ask you to assume that that is the case, just for
11 purposes of this question. We're not going to hold
12 you to this, Mr. Polansky.

13 But with respect to reasonable assurance,
14 did Nevada's contentions that you say flunked the
15 materiality threshold at least meet the contention
16 admissibility requirements for that standard?

17 >>MR. POLANSKY: This is Mr. Polansky. No,
18 Your Honor.

19 >>JUDGE GIBSON: And why?

20 >>MR. POLANSKY: I think what you're asking
21 is, if we were to just say that reasonable assurance
22 was the requirement that they needed to meet, as I
23 hope I was clear --

24 >>JUDGE GIBSON: Actually, it would be you
25 meet, but ...

1 >>MR. POLANSKY: Yes. As I said
2 previously, we believe that the ultimate safety
3 finding is the same and the methodology is different.
4 And so whether you call it apples or oranges or
5 reasonable expectation, the methodology is what the
6 methodology is in the rules. And we believe they
7 need to meet that in order to show that there's a
8 material issue, not meet it but raise a material
9 issue within those -- that methodology.

10 >>JUDGE GIBSON: So you're saying that they
11 don't even meet the materiality threshold with
12 respect to reasonable assurance? I know you don't
13 think they need to, Mr. Polansky, and I'm not asking
14 you to concede that they do. I just want to know
15 that question.

16 >>MR. POLANSKY: Yes.

17 >>JUDGE GIBSON: Okay.

18 >>MR. POLANSKY: We believe they wouldn't
19 meet the materiality for that.

20 >>JUDGE GIBSON: Fair enough. I think we
21 are at a point where we agreed we would take a break.
22 We will take a 15-minute break, and we will be back
23 on the record then. Thank you.

24 (A recess was taken)

25 >>MR. MALSCH: Judge Gibson, if I may, I

1 would like to respond briefly to -- a minute's worth
2 to one of the comments that DOE made just before the
3 Board broke.

4 >>JUDGE GIBSON: That will be fine. I hope
5 you won't be surprised if Mr. Polansky may feel, you
6 know, moved to speak to respond to you as well, but
7 go ahead. One of these days you guys will finish.

8 >>MR. MALSCH: That will be fine. And this
9 is Marty Malsch with the State of Nevada.

10 >>JUDGE GIBSON: Go ahead.

11 >>MR. MALSCH: When you asked DOE to frame
12 what they perceived to be an admissible contention,
13 they actually attempted to frame a contention in a
14 very narrow field dealing with inclusion of features,
15 events, and processes. That has a whole separate
16 regime in which one looks at probabilities and
17 consequences.

18 In fact, Nevada has only, I would say, less
19 than a dozen contentions specifically dealing with
20 FEPs. But two things I would say about this.

21 First of all, the account of the definition
22 of FEPs and the standards for their inclusion offered
23 by DOE is incomplete because elsewhere the Commission
24 says quite clearly that we should also include
25 features, events, and processes that might affect the

1 performance of the repository and we should include
2 those expected to materially affect compliance or be
3 potentially adverse to performance.

4 Now, that's important because the
5 calculations which DOE was insisting for -- need --
6 DOE was insisting be included for FEPs contentions is
7 actually something which the Department itself did
8 not or perhaps could not do in its own FEPs
9 screening.

10 And let me call the Board's attention to
11 their safety analysis report at page 2.2-17, in which
12 it appears that the DOE in screening in FEPs, didn't
13 engage always or perhaps never in doing dose
14 calculations, as what Mr. Polansky would suggest
15 needed to be the case for an admissible contention.
16 But instead FEPed in a feature, event, or process if,
17 quote, "it would have an intermediate performance
18 measure that can be linked to radiological exposure
19 or radiological release."

20 So they were looking for implications and
21 links to releases in including in FEPs but were not
22 themselves engaging in doing the kinds of dose
23 calculations which DOE now insists would have been a
24 precondition for admission of one of our contentions.
25 So ultimately DOE's notion of an acceptable FEP

1 contention went beyond what DOE itself purported to
2 do in its license application.

3 >>JUDGE GIBSON: Okay. I suspected you
4 would want to say something, Mr. Polansky. Go ahead.

5 >>MR. POLANSKY: This is Mr. Polansky. In
6 response, DOE can clearly be more conservative than
7 the rules require; so I don't think the issue that
8 Mr. Malsch raised in itself suggests that DOE did
9 anything wrong or changes our position.

10 In order to bring -- and, also, to get back
11 to issues that you were -- we were discussing before
12 the break, in order to take this down from the
13 high-level discussion to something more concrete, we
14 would like to call to your attention Nevada
15 Safety 29, which is a contention that alleges that
16 DOE should have taken into account plant height,
17 differentiating plant height in its infiltration
18 analysis.

19 And the allegation or the materiality is
20 based on a purported violation of 63.114(b), which is
21 account for uncertainties and variabilities in
22 parameter values and provide for the technical basis
23 for parameter ranges, probability distributions, or
24 bounding values used in performance assessment.

25 This is where we come back to our central

1 theme which we think is correct, that you need to
2 show or demonstrate a material change to the outcome
3 of the proceeding. One contention could have said --
4 and it did not. I'm not saying they filed this
5 contention, but a contention could have said, you
6 didn't account for flowers on these plants. Now, why
7 does that raise a material -- a material dispute,
8 something that's material here, that we should have a
9 hearing about.

10 And the same thing on plant height. It is
11 not the requirement of these regulations that the
12 Department of Energy take into account every single
13 kind of perturbation or parameter that happens to
14 exist in real life, that plants are not all the same
15 height. But there has to be a proxy in some of these
16 models that, by itself, saying that there's a change
17 in plant height, that that could affect infiltration,
18 that that somehow creates a material dispute.
19 And our response to Nevada Safety 29 said this
20 doesn't raise a material dispute for that reason.

21 >>JUDGE GIBSON: I hope that this doesn't
22 degenerate into a colloquy on plant height.

23 Mr. Malsch, is there anything you need to
24 say to what Mr. Polansky said?

25 >>MR. MALSCH: Just very briefly in defense

1 of that contention.

2 >>JUDGE GIBSON: Please, briefly.

3 >>MR. MALSCH: There is a separate
4 enforceable requirement in Part 63, and it's in,
5 among other places, 63.101(a)(2) which says that the
6 total system performance assessment must include the
7 full range of defensible and reasonable parameters,
8 otherwise, the TSPA itself is not valid. That is a
9 separate issue. A contention which alleges a
10 violation of that standard is, per se, material
11 because it raises an issue of compliance with an
12 applicable regulation.

13 Now, insofar as flowers are concerned, I
14 think DOE is confusing materiality with the minimal
15 showing required under the contention requirements.
16 I mean, obviously if we had alleged a violation of
17 63.101(a)(2) and had said that the full range of
18 defensible and reasonable parameters had not been
19 included because flowers weren't accounted for, one
20 would expect to see some reasonable explanation by
21 our expert under Paragraph 5 as to why flowers were
22 important. I think here we are confusing the minimal
23 showing required to show there was a genuine dispute
24 under Paragraph 5 with materiality standard
25 elsewhere.

1 >>JUDGE GIBSON: We are talking about
2 materiality, I hope. Fair enough. Okay.

3 We have not heard from the NRC staff in a
4 while. Before we move on to the next area, I just
5 want to see -- ask you, is there anything else that
6 you all wanted to say about reasonable expectation
7 and reasonable assurance?

8 >>MS. YOUNG: Ms. Young for the NRC staff.

9 I believe the Board made reference to a
10 statement in the EPA rulemaking about differences
11 between the EPA standard being either more lenient or
12 more restrictive than the NRC requirements.

13 >>JUDGE GIBSON: That was actually -- I
14 believe I got an agreement from counsel from DOE on
15 that.

16 >>MS. YOUNG: Right. I guess --

17 >>JUDGE GIBSON: To go back over it, it
18 simply was that technical criteria that EPA -- that
19 NRC promulgates must be at least as restrictive,
20 stringent, or meet the standard that the EPA
21 promulgates in its radionuclide standards. I believe
22 that's all we were really talking about.

23 >>MS. YOUNG: Okay. I just wanted to point
24 the Board's attention to the words in the final rule
25 issued November 2nd, 2001, regarding reasonable

1 assurance and a response to a comment that EPA --

2 >>JUDGE GIBSON: Was this an EPA standard?

3 >>MS. YOUNG: No. This is the NRC rule.

4 >>JUDGE GIBSON: The NRC rule in 2001. Do
5 you have a cite to that?

6 >>MS. YOUNG: Absolutely. It's 66 Federal
7 Register. The exact page is 55740.

8 >>JUDGE GIBSON: Could you call that up,
9 please, Mr. Welke. Be sure everybody can see it?
10 Okay. It's not coming up. Thank you. Okay.

11 Is this the language you're referring to,
12 ma'am?

13 >>MS. YOUNG: I believe it's a little
14 further.

15 >>JUDGE GIBSON: Okay.

16 >>MS. YOUNG: It's the next column.

17 >>JUDGE GIBSON: Okay.

18 >>MS. YOUNG: It's Issue 2, which talks
19 about "Does the term reasonable assurance denote a
20 specific statistical parameter related to either
21 probability distribution."

22 >>JUDGE GIBSON: You know what? Could you
23 help Mr. Welke find that, please?

24 >>MS. YOUNG: Yeah, he was there. It's at
25 the bottom of the first column.

1 >>JUDGE GIBSON: Bottom of the first
2 column. I thought you said on the second one. Go
3 down to the bottom.

4 >>MS. YOUNG: Yes.

5 >>JUDGE GIBSON: Issue 2. "Does the term
6 reasonable assurance denote a specific statistical
7 parameter related to either the probability
8 distribution of calculated individual doses or
9 important variables used in that calculation."

10 >>MS. YOUNG: And you'll see at the top of
11 the next column --

12 >>JUDGE GIBSON: Okay.

13 >>MS. YOUNG: -- the EPA's interpretation
14 of reasonable assurance, in their minds, would lead
15 to the extreme approach of selecting worst case
16 values.

17 >>JUDGE GIBSON: Okay. Do you see that,
18 coupled with, according to the EPA, that approach?

19 >>MS. YOUNG: Right.

20 >>JUDGE GIBSON: Yeah. Could you highlight
21 that for her, please?

22 Is that the language you're talking about,
23 Ma'am?

24 >>MS. YOUNG: Yes. And a little further
25 down.

1 >>JUDGE GIBSON: Okay.

2 >>MS. YOUNG: "EPA concludes that the
3 application of reasonable assurance standard could be
4 inconsistent, number one, but also, number two, would
5 result in applying margins of safety beyond the
6 standard for individual protection set by the EPA,
7 which, in effect, alters the standard."

8 And you'll see, in the Commission's
9 response here, again, was to --

10 >>JUDGE GIBSON: And that would be in the
11 next column; is that right?

12 >>MS. YOUNG: Actually starts at the bottom
13 of that column.

14 >>JUDGE GIBSON: Bottom of that column.

15 >>MS. YOUNG: The word "response."

16 >>JUDGE GIBSON: Okay.

17 >>MS. YOUNG: Even though the Commission
18 was adopting EPA's terminology of reasonable
19 expectation, again, there was no view of the
20 Commission that reasonable assurance would involve
21 such extreme values being used for important
22 parameters.

23 So this is just to highlight, again, that
24 EPA's interpretation of reasonable assurance was
25 different than the NRC's interpretation of reasonable

1 assurance. But there is no difference in the NRC's
2 mind between the terminology reasonable assurance and
3 reasonable expectation.

4 Each considers either uncertainties or the
5 particular action that's being authorized or
6 considered for authorization and obviously the time
7 period that that proposed action would be undertaken.

8 >>JUDGE GIBSON: Okay. Thank you very much
9 for that clarification. We are ready to go to the
10 next topic unless somebody has some burning desire to
11 say something about reasonable expectation or
12 reasonable assurance.

13 Oh, I'm sorry. Judge Trikouros has got a
14 question. I'm sorry. Please.

15 >>JUDGE TRIKOUROS: When we agreed earlier
16 that reasonable assurance and reasonable expectation
17 were fundamentally significantly the same, Mr. Malsch
18 indicated in his agreement that, yes, I agree that
19 they are significantly the same in that both referred
20 to a burden of proof of the preponderance of the
21 evidence. And, however, the statement was made that
22 we don't know what the preponderance of evidence is.
23 So it kind of shifted the issue to preponderance of
24 evidence but left it nebulous again.

25 Would 50 percent be the answer to that? In

1 other words, you know, where the -- where we were
2 just looking at 95 percentile, would the truth be in
3 terms of preponderance of evidence, what I would call
4 50 percentile, 50th percentile?

5 >>MR. MALSCH: Marty Malsch for the State
6 of Nevada. I mean, if you look at law school books,
7 the preponderance of the evidence standard is equated
8 to, you know, 51 percent versus 49 percent; although,
9 in fact, in most cases and certainly in this case, it
10 doesn't come down to such, you know, quantitative
11 measures. I would say the difficulty here is that
12 the preponderance of the evidence standard really
13 applies not at the contention stage. I mean, indeed,
14 the Commission's rules are quite clear that one need
15 not make his case at the contention stage.

16 The preponderance of the evidence standard
17 applies when the entire record is completed on any
18 one issue and the -- and the Boards and Commission
19 are deciding and weighing the evidence.

20 I don't think you can easily equate
21 preponderance of the evidence with such things as
22 using the 95 percent distribution or the mean or the
23 median. I think --

24 >>JUDGE TRIKOUROS: I understand that.
25 However, we're trying to get through the contention

1 admissibility phase, and people are using words like
2 "uncertainty" in contentions with no clear definition
3 of how much uncertainty is acceptable and how much
4 uncertainty is unacceptable.

5 There are contentions that you -- your
6 organization has filed that indicate that certain
7 parameters -- because of certain reasons, various
8 parameters have a greater uncertainty than was
9 assumed by the DOE; therefore, you want that admitted
10 as a contention.

11 And DOE comes back and says, you know,
12 that's not sufficient to simply say that. So, you
13 know, we're dealing with a -- what really would
14 satisfy me to be a quantitative aspect of this that
15 we can't get ahold of, really, and, you know, somehow
16 I think we need to come to grips with that, at least
17 to some extent.

18 >>MR. MALSCH: Let me just respond by
19 saying that the issue you're struggling with, I
20 think, is precisely the issue the Commission itself
21 struggled with when it addressed this question in
22 promulgating Part 63. It declined to define for the
23 purposes of the regulation what would be an
24 acceptable or unacceptable level of uncertainty and
25 said, instead, we'll make that decision later on

1 based upon the full record.

2 So I think your struggle is symptomatic of
3 a problem with DOE's objection. It's just not the
4 kind of thing you could properly wrestle with or even
5 possibly decide at the contention stage. This is
6 clearly the kind of thing that is reserved for the
7 merits decision much later down the road.

8 >>JUDGE TRIKOUROS: Correct. Correct. But
9 the problem is the far-reaching nature of this is
10 such that it encompasses a very large number of
11 contentions. If one were to come on one side of
12 this, basically every contention would be admitted.
13 If one were to come on the other side of this,
14 basically every contention would be denied.
15 That's the problem.

16 >>MR. MALSCH: Well -- Marty Malsch for
17 Nevada. Obviously that's not a problem for us. We
18 think we've raised a great number of very legitimate
19 issues, and I think they are all admissible, and the
20 fact that there are a great number of them derives
21 from two facts. One is we have very specific
22 contentions, unlike most intervenors in most
23 proceedings. And, two, the Commission in Part 63
24 purported to adopt a performance-based regulation in
25 which there are not a whole lot of quantitative

1 standards other than the ultimate dose standard.

2 Yet the Commission was very clear that, for
3 post-closure safety, safety would not depend just
4 upon the simple results of a dose calculation at the
5 end of a performance assessment. Instead there had
6 to be compliance with a whole subset of requirements,
7 including, as one of them, a separate and enforceable
8 requirement that the full range of reasonable and
9 defensible parameters be included.

10 Now, I would agree that admits of a great
11 number of specific complaints about whether that has
12 been done, but that's the nature of the regulation.
13 It's the nature of the fact that we chose to file
14 very specific contentions.

15 >>JUDGE GIBSON: Okay. Thank you. Seeing
16 no hands up there, I'm assuming we won't hear any
17 more about reasonable expectation or reasonable
18 assurance the rest of the day, unless Judge Trikouros
19 decides to, you know, get back into this issue later.
20 And I think Judge Rosenthal has some specific
21 questions for you all.

22 >>JUDGE ROSENTHAL: Yes. Another area of
23 overarching disagreement between DOE, joined in this
24 instance by the NRC staff and Nevada, relates to the
25 sufficiency of the affidavits of experts that Nevada

1 has submitted in fulfillment of certain of the
2 requirements of the rules of practice governing
3 contention admissibility.

4 The controversy specifically centers upon
5 Nevada's practice of first placing everything that it
6 is offering in support of each of its contentions in
7 the body of the contention itself. Then in
8 affidavits accompanying the totality of the Nevada
9 contentions, to the extent relevant, its experts
10 adopt as their own opinions, that content.

11 In the view of DOE, again supported by the
12 NRC staff, the pertinent requirements of
13 Section 2.309(f)(1) are not satisfied by the
14 submission of expert affidavits that simply
15 incorporate by reference what is offered in the
16 contention itself by way of support for the challenge
17 to the proposal under consideration. Thus, DOE would
18 have it that virtually all of Nevada's submitted
19 contentions must fail for this reason alone.

20 By way of response, Nevada insists that the
21 course that it followed was entirely consistent with
22 the discharge of the obligations imposed upon it by
23 the applicable rules of practice.

24 Now, in exploring this issue, I'd first
25 like to inquire of Nevada what prompted its decision

1 to place the supporting material in the body of the
2 contention rather than in the affidavit of the expert
3 and then having the expert endorse the content of the
4 contention. And this is -- basically deals with
5 Paragraphs 5 and Paragraph 6 of 2.309(f)(1). So I
6 would like to get its rationale for adopting that
7 procedure.

8 >>MR. MALSCH: This is Marty Malsch for
9 Nevada. It was done, first, for practical reasons.
10 We had hundreds of contentions, and it was a
11 considerable burden on Nevada to review the license
12 application and all the supporting materials within
13 the time frame allotted and file contentions on a
14 timely basis. So we adopted this practice of having
15 affidavits incorporate materials by reference solely
16 to avoid the burden on Nevada of having to file
17 hundreds of individual affidavits.

18 Also, we were aware of no NRC rule or
19 precedent at all that would preclude the practice
20 that we followed.

21 And I wanted to emphasize here that, in
22 fact, the language in paragraph 5 and to some extent
23 Paragraph 6 of our contentions was, with very limited
24 exceptions and those exceptions deal with primarily
25 legal contentions or contentions in which we use the

1 support of government documents. With those rare
2 exceptions, in fact, the statements in Paragraph 5 of
3 our contentions were drafted by our experts, not by
4 counsel.

5 >>JUDGE ROSENTHAL: And you have, if I
6 recall correctly in your reply to the DOE objection,
7 a specific representation that your experts had a
8 major role in the formulation of the supporting
9 material; is that correct?

10 >>MR. MALSCH: Marty Malsch of Nevada.
11 That is not only correct, but you've actually
12 understated their role. Their role was not just a
13 major role. It was they were the -- virtually, the
14 only drafters of those contentions.

15 I mean, we, as lawyers, reviewed them and
16 maybe corrected some grammatical mistakes and such,
17 but, by and large, what you're seeing here are the
18 statements of our experts, not the statements of
19 counsel, not, though, that would have made any
20 difference.

21 We pointed out an NRC case in which said
22 that, actually, it would not have been impermissible
23 to have counsel draft these statements and have the
24 statements drafted by counsel adopted by experts,
25 but, in fact, that is not the practice we followed.

1 These were essentially drafted by the experts.

2 >>JUDGE ROSENTHAL: Okay. Thank you,
3 Mr. Malsch.

4 DOE, can you point to any specific
5 provision in the rules of practice that preclude the
6 course that was pursued by Nevada in this instance or
7 any decision of the Commission or of a licensing
8 board that states that the support that's being
9 offered for a particular contention must be contained
10 in the expert's affidavit?

11 >>MR. POLANSKY: This is Mr. Polansky.

12 Yes, Your Honor. Before I answer, I did
13 note that the topics for discussion included not only
14 what format the affidavits may take but what is
15 needed to satisfy the standards for contention
16 admissibility under 2.309(f)(15). Would you like my
17 answer to encompass both of those?

18 >>JUDGE ROSENTHAL: No. I am dealing
19 with -- I don't know whether what you now have in
20 mind is the question as to whether the expert must
21 provide documentary support for his opinion. Is that
22 what you're addressing? Because if that is what you
23 have in mind, I'm going to get to that subsequently.

24 I'm now focusing on the question as to
25 whether it is permissible to have the support

1 contained in the body of the contention, with then
2 the expert in his or her affidavit endorsing that
3 content as his or her own opinion.

4 And I'm not getting into the question as to
5 whether in a particular instance what's been put in
6 the contention is sufficient to the day. I'm just
7 now addressing the question of whether, as apparently
8 is your claim, joined by the staff, that it is not
9 adequate to have the expert in his or her affidavit
10 simply adopt as his or her opinion what's set forth
11 in the body of the contention.

12 >>MR. POLANSKY: Yes, your Honor. This is
13 Mr. Polansky.

14 I understand the focus of your question,
15 and my answer remains yes. In our Answer, DOE's
16 answer at pages 47 and 48, we did cite to a Vermont
17 Yankee Board decision in which that Board criticized
18 the State of Vermont in a power upgrade proceeding
19 for the wholesale adoption of contentions by its
20 expert, because it, quote, "seriously undermines our
21 ability to differentiate between the legal pleadings
22 and the facts and opinions expressed by the expert."
23 The Board in that decision expressly prohibited the
24 State of Vermont from doing it again in the
25 proceeding in 2004.

1 >>JUDGE ROSENTHAL: And what provision of
2 the Commission's rules of practice did the Board
3 refer to?

4 >>MR. POLANSKY: The Board was not
5 referring to any specific language.

6 >>JUDGE ROSENTHAL: That was just in the
7 Board's personal opinion that it felt that that was
8 not a desirable practice? I mean, I want to know
9 where in the regulations, the rules of practice,
10 there is a proscription against this practice.

11 This Board, apparently, this one licensing
12 board, apparently for reasons of its own, decided
13 that it didn't like the practice. But I'm getting at
14 where it appears that the rules of practice proscribe
15 it. Because I can't -- I couldn't find anything in
16 the rules myself, and I don't think that either you
17 or the staff referred me to any proscription in the
18 rules. So the answer is, there is none; is that
19 right?

20 >>MR. POLANSKY: Correct, Your Honor. In
21 the rule itself, there is none, but the rules
22 themselves are based on the Federal Rules of Civil
23 Procedure where there is an adoption or a principle
24 that, if you are going to use an affidavit to
25 identify specific facts that are setting out a

1 genuine issue of fact for trial, that you do that in
2 an affidavit form. And this -- an advisory PAPO
3 Board also set forth in LBP 08-10 that affidavits
4 shall be individually paginated and contain numbered
5 paragraphs that can be cited with specificity.

6 We read into that requirement an
7 understanding that these affidavits would have that
8 material so that we could challenge individual
9 paragraphs or that the Board could look at those
10 paragraphs and agree or disagree with certain
11 provisions in them. There's no ability to do that
12 here.

13 >>JUDGE ROSENTHAL: You're referring to
14 something of the PAPO Board?

15 >>MR. POLANSKY: Advisory PAPO Board,
16 your Honor.

17 >>JUDGE ROSENTHAL: The advisory one, all
18 right. All right. Well, before -- I'm going to get
19 back to you in a moment, but I'm going to ask the
20 staff: Do you find anything in the rules of practice
21 that specifically proscribe the course of action that
22 the State of Nevada pursued? Yes or No.

23 >>MR. LENEHAN: No.

24 >>JUDGE ROSENTHAL: Staff says no. All
25 right.

1 >>MR. LENEHAN: Required to make a one-word
2 answer to that.

3 >>JUDGE ROSENTHAL: Okay. Now, in the real
4 world, why is not the position that you're taking,
5 DOE, exalting form over substance? I mean, isn't it
6 important for the purposes of fulfilling the
7 objective that the Commission had in proposing this
8 requirement in Paragraph 5 and in Paragraph 6, isn't
9 it enough that you have an expert who is endorsing as
10 his or her opinion, certain conclusions or certain
11 facts?

12 What practical difference does it make
13 whether the body of the supporting material is found
14 in the contention or in the affidavit?

15 I mean, to me, the material is set forth,
16 and there's an expert who's endorsing it. I have
17 difficulty in understanding just what difference it
18 makes, particularly if, as in this case, there is a
19 representation unchallenged by the staff that these
20 supporting statements were not simply lawyer's talk
21 but were formulated by the expert. So why -- why
22 can't -- why shouldn't I conclude that this is
23 entirely a matter of form over substance?

24 >>MR. LENEHAN: Your Honor, Dan Lenehan
25 here, NRC staff. The starting point is the simple

1 fact that the 2.309(f)(1)(v), Roman Numeral v, does
2 not require an affidavit for a non-NEPA contention.
3 The body of the contention or an affidavit has to
4 state the contention -- the substance of the
5 contention.

6 If the question here, as I understand it,
7 is the format of the affidavit as used in this
8 proceeding by Nevada, what, in effect, you've got
9 with these -- these affidavits, the way they are
10 structured, is that, at the time the affidavit is
11 signed, the affiant is attesting to something that at
12 that time is not a presently existing fact. He's
13 attesting to a future event that will occur when the
14 attorney assigns a specific number to them. That
15 does not go to the contention admissibility issue.
16 It goes to the affidavit.

17 >>JUDGE ROSENTHAL: I don't follow you at
18 all. But we're dealing here, I thought, with the
19 question: There is supporting material advanced for
20 a particular contention. Now, I'm not getting into
21 the matter now as to whether what's offered in
22 support is adequate or not.

23 >>MR. LENEHAN: Okay.

24 >>JUDGE ROSENTHAL: What I'm dealing with
25 is simply the manner of where it is set forth.

1 My question, again, is: Here is this
2 material. Instead of putting it in the expert's
3 affidavit, it's put in the contention, and then the
4 expert's -- in this instance, I think they were all
5 men -- affidavit adopts what was in the contention as
6 his own opinion.

7 Now, my question was a very simple one, and
8 that is: What practical difference does it make
9 whether this substantive material is found in the
10 contention, with the expert then endorsing it in its
11 affidavit, or, rather, than on the other hand it all
12 being put in the affidavit. I mean, to me,
13 offhand -- I mean, I may be missing something, but,
14 to me, offhand it makes no real difference whether
15 it's in one place or in the other place.

16 What's important is that an expert has
17 endorsed the -- whatever the statements are. Now, if
18 those statements are inadequate, that's a different
19 matter, but that's not what I'm addressing here. But
20 I'm going to ask DOE, why isn't this form over
21 substance?

22 >>MR. POLANSKY: This is Mr. Polansky.

23 First of all, Your Honor, you stated that
24 it was unrefuted that these paragraphs were written
25 by the individuals who are proposed as experts by

1 Nevada. In fact, Nevada didn't articulate that
2 that's what had happened until it filed its reply.
3 So it would be unrefuted because DOE did not have an
4 opportunity to file a reply.

5 >>JUDGE ROSENTHAL: Well, is DOE -- let's
6 pursue that a minute. Are you challenging the
7 veracity of that statement?

8 >>MR. POLANSKY: Well, the statement is not
9 from the experts who made it, Your Honor. It's from
10 counsel.

11 >>JUDGE ROSENTHAL: Counsel has made a
12 representation -- they're officers of this Board.
13 They have made a representation that their experts
14 were heavily involved in the formulation of these
15 contentions.

16 Now, I'm asking you whether you are raising
17 a question as to the authenticity of a representation
18 of counsel before this Board.

19 >>MR. POLANSKY: No. We have to accept
20 that now, but we did not have an opportunity to
21 refute that. I'd like to draw your attention to the
22 replies that Nevada filed and their Paragraph 5's,
23 and in specific Nevada Safety 84 I think is a good
24 example.

25 In its reply, Nevada provides a photograph

1 of titanium tubing alleged from a heat exchanger
2 which Nevada's lawyers state it was taken from one of
3 its experts -- taken by one of its experts after the
4 tubing failed. And this is a quote from that reply:
5 "In this illustrative example, there was no apparent
6 general corrosion observed on the tube inside surface
7 and none on the outside surface in the short exposed
8 end of the tube."

9 Obviously this is a corrosion contention, a
10 corrosion-related contention. This is not expert
11 opinion. This is statements of counsel. And we
12 believed that this kind of statement -- well, let me
13 back up. We know it's not a statement of an expert,
14 because there are no affidavits attached to Nevada's
15 reply.

16 >>JUDGE ROSENTHAL: Well, we are dealing
17 here with the question as to whether those statements
18 that are contained in contentions which the expert
19 endorses as his own opinion can be accepted as the
20 expert opinion supporting the contention, even
21 though, again, the supporting material is found in
22 the contention rather than in the affidavit. That's
23 the issue I'm addressing.

24 >>MR. POLANSKY: Yes, Your Honor. This is
25 Mr. Polansky.

1 We think it blurs the line between what is
2 the expert opinion and what is the statement of
3 counsel, and I raise the example of the reply to show
4 that just as an example. If you looked at the text
5 of Paragraph 5 in the contention and you looked at
6 the text of the Paragraph 5 in the reply, you would
7 not know which statements were from counsel and which
8 ones are from the experts. And in the reply, in
9 fact, they were all from counsel. We don't know
10 which ones are expert opinion.

11 And the Board in looking at its
12 admissibility needs to look at all of the provisions
13 of 2.309(f)(1), and, if under 5 a statement is
14 purported to have been from an expert, we should know
15 which of those statements are from the expert;
16 otherwise, counsel is not qualified to make those
17 statements. That's the point we were trying to make.

18 >>JUDGE ROSENTHAL: Well, I don't follow it
19 at all. All right.

20 Let's move on to the other issue. Now,
21 Mr. Malsch, the -- let's turn to the provisions of
22 2.309(f)(1)(v), and it says that you must provide a
23 concise statement of the alleged facts or expert
24 opinions which support the requester's/petitioner's
25 position on the issue and on which the petitioner

1 intends to rely at hearing together with references
2 to the specific sources of documents on which the
3 requester/petitioner intends to rely to support his
4 position on the issue.

5 Now, here is this mention of specific
6 sources and documents. Now, I take it, it's your
7 position that it is not necessary in all cases for
8 the expert to buttress the opinion that he or she is
9 expressing with documents or specific resources. Am
10 I correct in that?

11 >>MR. MALSCH: Yes. Marty Malsch from
12 Nevada. Yes, that is correct. In many cases our
13 expert did so, but it seemed to us that under the
14 rules the only requirement is that there be a
15 sufficient accumulation of facts and opinions to make
16 the minimal showing required, and if the explanation
17 is reasonable and understandable, that should satisfy
18 the requirements of this section.

19 >>JUDGE ROSENTHAL: Well, how do you
20 interpret then as together with references to the
21 specific sources and documents?

22 >>MR. MALSCH: I think that is -- that is
23 permissible that they expect that, if we have
24 available specific sources and documents to support
25 our contention, we would be coming forward with them

1 at the time, but I don't think that is -- the fact
2 that a particular Paragraph 5 does not itself
3 reference additional sources and documents, I do not
4 think is fatal to contention admissibility. And I
5 don't think there's any NRC case which stands for
6 that proposition.

7 >>JUDGE ROSENTHAL: DOE, what case
8 authority do you have for the proposition that in all
9 instances, the expert must provide specific sources
10 or documents?

11 In that connection, I might say that we
12 looked at the cases that were cited in your papers,
13 and I'm frank to state that I didn't find those cases
14 to support the proposition that an expert opinion
15 must, in all instances, be accompanied by the -- by
16 specific sources.

17 I mean, what those cases, as I read them,
18 stand for is the proposition, which is quite
19 understandable, that the offered expert opinion must
20 not be limited to bold and conclusory statements such
21 as that the application under consideration is
22 deficient or is inadequate or is wrong.

23 But that, to me, is a far cry from saying
24 that in all instances, the expert opinion must be
25 accompanied by specific sources or documents.

1 Now, do you have any authority that
2 addresses specifically the manner of whether an
3 expert opinion is, per force, insufficient unless it
4 is accompanied by specific sources or documents?

5 >>MR. POLANSKY: This is Mr. Polansky.

6 We believe that the rule is plain in its
7 reading, that it does require this together with
8 references. We also realize you cannot read this
9 particular provision (f)(1)(v) without looking at its
10 accompanying provisions (f)(1)(vi).

11 We think it's difficult for a Board to
12 determine whether there's a genuine dispute of a
13 material fact if the expert merely says, my opinion
14 is this. If they're not attaching the documents, the
15 specific sources and documents on which they intend
16 to rely, there is very little ability for the
17 applicant to respond or the Board to determine
18 whether there's a genuine dispute.

19 For example, you could have a contention
20 that says, you know, corrosion can happen in the
21 following circumstance, and here's a paper I wrote,
22 but you don't give the citation to the paper. If you
23 don't give a citation to the paper, it's impossible
24 for the applicant to determine whether the underlying
25 provision in there, let's say it was corrosion caused

1 by sulfuric acid, whether that is even applicable
2 here. If that Board knew that that paper was about
3 sulfuric acid, they probably would determine there's
4 no genuine dispute because we're not having sulfuric
5 acid infiltrating through the repository.

6 >>JUDGE ROSENTHAL: Well, but, if you
7 have -- well, that may go to relevance, but if you
8 have an expert, qualified expert, who expresses an
9 opinion on a matter that is of plain materiality, why
10 isn't that enough?

11 I'll give you a concrete example from my
12 own prior history. In the Seabrook case, one of the
13 issues -- and I'm going back to the 1970's, which
14 shows how long I've been in this game. There were --
15 there was an issue as to what should be regarded as
16 the safe shutdown earthquake, in other words, what
17 was the largest earthquake that might occur in the
18 region of the Seabrook plant located on the coast of
19 New Hampshire.

20 Now, there were both the intervenor and the
21 applicant had highly qualified seismologists. One of
22 them was associated with the laboratory at Columbia
23 University, the other one with the laboratory at the
24 Massachusetts Institute of Technology. Both of these
25 men had credentials as long as your arm.

1 One of them had a view that intensity 5,
2 let us say, was sufficient. The other one thought it
3 was intensity 9.

4 Now, why, given the fact that these two
5 individuals had qualifications beyond any dispute and
6 that they were addressing a clearly material issue --
7 why wasn't that enough to get it to a hearing without
8 there having to be contention admissibility level go
9 through with their whole documentary basis for the
10 conclusions that they were reaching?

11 It seems to me that what the Commission's
12 requirements here is to make certain that there is at
13 least enough to go forward to an evidentiary hearing.
14 And it seems to me, frankly -- you can persuade me,
15 perhaps, that I'm wrong -- that, if you have a highly
16 qualified expert who is offering an opinion on a
17 matter that is plainly material, that that is enough
18 to satisfy both Paragraph 5, the expert opinion
19 paragraph, and Paragraph 6, the genuine material.

20 I mean, in Seabrook, I mean, I just offered
21 that as an example. I mean, why would there have
22 been any need there and why is there any need here
23 for something, given, again, that the objective of
24 the Commission is just to make certain that it's
25 something that's worth pursuing, and that's why they

1 want an expert to be expressing an opinion on a
2 matter that is material to the outcome of the
3 particular proceeding.

4 >>MR. POLANSKY: This is Mr. Polansky.

5 Your Honor, in the example you've given --
6 I mean, I can't respond to that. What I can tell you
7 here in this proceeding is that, as an applicant,
8 there is a fundamental principle of fairness that the
9 applicant be given an opportunity to file a
10 meaningful answer.

11 And if a petitioner comes forth under its
12 Paragraph 5 with expert opinions that in many cases
13 cite to studies or say that there's, quote, "numerous
14 tests made by laboratories in testing of titanium for
15 corrosion applications and provides no citations,"
16 there is no ability for the applicant or the
17 NRC staff to look at those documents, and no ability
18 for the Boards to look at those documents.

19 >>JUDGE ROSENTHAL: But the merits aren't
20 up at this stage. Where you get that opportunity, if
21 the contention is admitted, at the summary
22 disposition phase, if you found one.

23 This is not merits here. The objective,
24 again, as I see it -- I may be wrong -- of the
25 Commission was just to make certain that this wasn't

1 some flight of fancy that's being advanced that
2 should never get beyond the stage of Commission -- of
3 contention admissibility.

4 And it seems to me, if you've got a highly
5 qualified expert who is -- expresses an opinion that
6 there is substance to this particular contention,
7 that, for the purposes of contention admissibility,
8 that's enough. You people then have the opportunity
9 to fully explore it in the context in the first
10 instance of a motion for summary disposition.

11 >>MR. POLANSKY: This is Mr. Polansky.
12 Your Honor, it's not enough under the plain reading
13 of the rules to identify a dispute.

14 >>JUDGE ROSENTHAL: Don't give me plain
15 meaning of the rules. None of the rules of this
16 Commission are that plain. I mean, they're all open
17 to interpretation.

18 And I would say that this rule could be
19 read the way you read it. I think it can be equally
20 read the way Mr. Malsch reads it. And what you have
21 here is what makes good sense, given what seems to be
22 the ultimate objective of the Commission.

23 >>MR. POLANSKY: This is Mr. Polansky. If
24 I could finish. I was not referring to (f)(1)(v). I
25 was referring to (f)(1)(vi), which says that there

1 has to be a genuine dispute, not merely a dispute.

2 And the way that the Board looks at whether
3 there is a genuine dispute is to look at the
4 documents and supporting statements that are
5 identified by the petitioner and the response from
6 the applicant and anyone else who has filed an
7 answer. And, if I could go through some examples,
8 Nevada Safety 80 --

9 >>JUDGE GIBSON: Before you go through the
10 examples, since it's noon, perhaps you can take the
11 noon hour to limit your examples down. Would that be
12 okay? You can finish your answer.

13 >>MR. POLANSKY: I'd be happy to break as
14 long as we'll be allowed an opportunity to address
15 this.

16 >>JUDGE GIBSON: Oh, yeah. You definitely
17 will. You'll definitely will. You'll be able to
18 finish your answer. And like I said, you may be able
19 to take your lunch hour to reduce the number of
20 examples you want to use. We all look forward to
21 seeing you back at 1:30, and we will take it up
22 promptly at that point. Thank you.

23 (A recess was taken)

24 >> JUDGE ROSENTHAL: I think that when we
25 adjourned, the ball was in Mr. Polansky's corner; was

1 it not?

2 >> JUDGE GIBSON: Yes, he was in the middle
3 of an answer, and I -- since it was noon, I made him
4 stop. So I hope you can start back up in
5 mid-thought.

6 >> MR. POLONSKY: Thank you, Your Honor,
7 I'm Mr. Polansky. I'd just like to bring two
8 examples of where we believe that there is a
9 requirement to identify specific sources and
10 documents and that challenging that is not a
11 challenge to the merits. It is merely allowing --
12 informing the Board of whether a genuine dispute
13 exists under (f(1)(vi)).

14 The section alleges that there are NACE
15 studies, National Association of Corrosion Engineers,
16 involving failure of titanium tubing and petroleum
17 refineries. There are no cites provided to the NACE
18 studies at all. Nevada Safety-85 relies on alleged
19 results of quote "numerous tests made by laboratories
20 engaged in testing of titanium for corrosion
21 applications," end quote. And again, there is no
22 citations for the applicant to identify what these
23 tests are to, for example, to determine if they are
24 even relevant to the proceeding. We believe that the
25 Board needs to look at these documents to determine

1 whether there is a genuine dispute; so that is why we
2 were objecting in many of the contentions to a
3 requirement that there be documents specifically
4 identified.

5 There also is the LSN obligation to have
6 provided your supporting and non-supporting
7 information. And so those documents should be in
8 existence and on the LSN. And we believe the
9 Advisory PAPO Board informed the parties that they
10 needed to either provide the LSN document number for
11 those documents or attach them to their petitions.
12 Thank you, Your Honor.

13 >> JUDGE ROSENTHAL: Would you like to
14 respond, Mr. Malsch?

15 >> MR. MALSCH: Yes. Thank you. It seems
16 to me, looking at the basis for these contentions, we
17 have provided levels of detail and specificity far
18 beyond the norm. And the mere fact that not every
19 single expert conclusion is further supported by
20 specific references to our mind, doesn't detract from
21 the admissibility of the contention. And I'd like
22 just to call the Board's attention to the contention
23 to which we attached to our reply to DOE's answer.
24 We gave there an example a contention that was filed
25 in the LES case. It was admitted by the licensing

1 board and then that admission was specifically
2 affirmed by the Commission in CLI 04-25. And just
3 note that the basis in that contention included only
4 one reference and that was a newspaper article.

5 So, clearly, we have provided levels of
6 detail and specificity in support far beyond
7 contentions, which in other cases, specifically the
8 LES case we mentioned ever provided. I think what we
9 have done here is more than sufficient.

10 >> JUDGE ROSENTHAL: I think, Mr. Polansky,
11 the problem that I have is that it seems to me
12 offhand, that the purpose of the Paragraph 5 and
13 Paragraph 6 requirements was to ensure that time was
14 not being wasted in the litigation of vague
15 contentions put forth by, in my many instances,
16 people who have zero qualifications.

17 The objective was to make certain that the
18 contentions that were in litigation that got beyond
19 the contention stage were ones that had some
20 potential worthiness to them, not necessarily that
21 they would turn out at the end of the day to be
22 winners. Now, it seems to me, offhand, that as long
23 as you have a qualified expert -- now, you always
24 raise the question as to whether the particular
25 expert that's being offered is qualified to speak on

1 the subject that he's addressing or that she's
2 addressing.

3 But as long as that expert is qualified and
4 as long as that expert is addressing an issue that is
5 material, that as a matter of fact, you have got a
6 genuine dispute because you have an expert who is
7 challenging -- a qualified expert who is raising a
8 challenge or supporting a challenge that's material.
9 And now whether or not that expert's opinion down the
10 road is going to carry the day, again, that's
11 not -- it seems to me, an issue on the contention
12 admissibility level.

13 That's an issue that's resolved down the
14 road. But I don't see why your client is entitled to
15 litigate the substance of a qualified expert's
16 opinion at the contention and admissibility stage.
17 It seems to me, that's just not open at that stage.
18 Now, I'll give you an opportunity to tell me why I'm
19 wrong.

20 >>MR. POLANSKY: Your Honor, I don't think
21 we think you are wrong. We don't think we are
22 litigating at this stage. We think that -- and if I
23 hear you correctly, it would seem that once the
24 petitioner raises a prima facie case that they have
25 something to put forward, there's no burden shift at

1 all. It would seem there would be no need for an
2 applicant to even file an answer, because there would
3 be nothing that we could say that would demonstrate
4 that the contention is not admissible. So,
5 clearly --

6 >> JUDGE ROSENTHAL: No you could say that
7 the expert or the alleged expert wasn't qualified.
8 You could say that the alleged expert or the expert,
9 even if qualified, was addressing a matter that was
10 immaterial to the contention. I mean, those defenses
11 would be available.

12 >>MR. POLANSKY: Would it not be
13 appropriate to also say the specific study that the
14 expert is relying on -- I will go back to sulphuric
15 acid example -- relies on sulphuric acid corroding
16 titanium and that simply's not what's -- that's not
17 the environment in the Yucca Mountain Repository.
18 Therefore, that doesn't raise a genuine dispute.

19 >> JUDGE ROSENTHAL: Well, then, you're
20 raising materiality aren't you? In that
21 circumstance, you're saying that, well, that expert
22 may be qualified, what he's talking about, he may
23 have the appropriate expertise, but that happens not
24 to be material to the issue at hand. Materiality, I
25 would think, or relevance is something you can raise,

1 but the expert is up there and he's a qualified
2 astronomer talking about some kind of astronomical
3 phenomenon which has no relevance at all to the
4 proceeding.

5 You are certainly free to raise that, but
6 I'm assuming that the contention or his claim is
7 within the bounds of materiality. If it's not, you
8 can make that claim.

9 >>MR. POLANSKY: I think we felt
10 handicapped, Your Honor, in not knowing these studies
11 that they're citing to. They cite studies but don't
12 provide any citations. Well, they identify studies
13 but don't identify citations. And so -- and that's
14 required under Section (f)(1)(v), so it was
15 impossible for us to make an argument on genuine
16 dispute or materiality on those scientific studies
17 that they didn't tell us what they were.

18 So that's why we attacked it under 5,
19 because that's where we thought the information ought
20 to have been provided. That's all we were trying to
21 express. Thank you.

22 >> JUDGE ROSENTHAL: Staff, if you want to
23 add anything on this subject, I mean, is it the
24 staff's view that there is a in-violate requirement
25 that the expert accompany his opinion with sources of

1 documents?

2 >> MR. LENEHAN: Dan Lenehan for the staff.

3 No, the staff does not make that requirement.

4 However, Your Honor --

5 >> JUDGE TRIKOUROS: What's the staff's

6 view on what Mr. Polansky has just offered?

7 >> MR. LENEHAN: Your Honor, the staff's
8 view is that a contention -- the expert opinion that
9 merely states a conclusion without providing a recent
10 basis for that explanation is inadequate for a couple
11 of reasons. First, it deprives the Board of the
12 ability to make the necessary assessment of the
13 opinion -- that's a UC case. And, secondly, it
14 puts -- it's necessary to provide -- put the other
15 parties on notice of the issues that they're going to
16 have to litigate and decide whether or not they're
17 going to support or, you know, oppose the contention.

18 >> JUDGE ROSENTHAL: All right. But if the
19 expert sets forth the reasons for his conclusion but
20 does not accompany that with reference to specific
21 sources, that, insofar as you are concerned, would
22 not be a fatal defect, if I understand you correctly?

23 >> MR. LENEHAN: It's difficult to respond
24 to this in the abstract. It -- provided that
25 situation that you've hypothesized puts the parties

1 on notice to the claims that it would be adequate.

2 >> JUDGE ROSENTHAL: Let me -- if I might
3 refer to an illustrative example to one of the safety
4 contentions of the -- that this was Nevada's Safety-
5 009. Now, in that case -- and I think, I know that
6 DOE objected, I think, to that contention. But the
7 contention, in essence, or the support for it said
8 that the document on the basis of which DOE had
9 reached certain conclusions was flawed.

10 And they pointed to some other document.
11 Now that -- supposing that they had not pointed to
12 the other document, but they'd said the DOE document
13 is flawed and these are the reasons why we think it's
14 flawed, and they hadn't pointed to some other
15 document which they thought demonstrated the flaw.
16 It just said, in my expert opinion, the document that
17 DOE relied upon for the conclusion that it reached
18 that we're challenging, was flawed. That's my expert
19 opinion.

20 Would that be, in your view, sufficient for
21 contention and admissibility purposes?

22 >> MR. LENEHAN: No, Your Honor, it would
23 not.

24 >> JUDGE ROSENTHAL: What does the expert
25 have to do? He gives his personal reasons why he

1 thinks it's flawed, but he doesn't point to a
2 document in support of those reasons.

3 >> MR. LENEHAN: Your Honor, if he says the
4 document was flawed and stops, it would not be
5 admissible. If he says it's flawed and provides a
6 reasonable basis to support that opinion, under those
7 circumstances in the hypothetical, it would be --

8 >> JUDGE ROSENTHAL: Even though he did
9 not say that my reasons for believing it's flawed is
10 supported by X document? He doesn't have to come up
11 in your view, with a source?

12 >> MR. LENEHAN: We're talking about an
13 established expert that provides reasons to provide a
14 source --

15 >> JUDGE ROSENTHAL: Yes, we're talking all
16 the way through this discussion, I'm making an
17 assumption that the expert is qualified and that what
18 he's talking about is material. And so it's the
19 thing as to whether he has to -- in detailing his
20 reasons, I grant you, he can't simply provide a
21 conclusion. But in providing his reasons, the
22 question is whether he has to take the next step and
23 say, well, my reasons are supported by the X, Y, Z
24 documents. I take it that staff's standpoint, he
25 wouldn't have to do that?

1 >> MR. LENEHAN: That is correct, Your
2 Honor.

3 >> JUDGE ROSENTHAL: As long as he gave
4 his -- he sets forth the basis for the ultimate
5 conclusion that he's reached?

6 >> MR. LENEHAN: Yes, Your Honor.

7 >> JUDGE ROSENTHAL: Well, I think I
8 understand your position, Mr. Polansky. From my
9 standpoint, I think I got -- do you have some
10 questions?

11 >> JUDGE GIBSON: Yes, I believe Judge
12 Trikouros has some questions on this point.

13 >> JUDGE TRIKOUROS: I'll address this to
14 Mr. Malsch. And I've been thinking this through for
15 some time here, everything we have been discussing
16 here. And thinking through how technical people
17 behave when they -- when they document something, and
18 you can see this by looking at any technical paper
19 anywhere in the world, you'll find a substantial list
20 of references. So technical people have a tendency
21 to put forth a plethora of references to support
22 technical papers. And I was struck by the lack of
23 any references in -- in a large number of contentions
24 and I was wondering if there was some reason for
25 that.

1 Was that -- was it a purposeful thing that
2 it was a -- an agreement among all the technical
3 experts to not provide references, because even under
4 the circumstances in which they make statements, such
5 as a result -- well, they make a technical statement.
6 I'll try and keep his general. And then they
7 say -- and this is supported by numerous publications
8 and documents.

9 So, clearly, their knowledge is something
10 they derive from those documents. Not all technical
11 people have done all experiments, themselves. You
12 know, they get knowledge from reading papers, from
13 reading textbooks, from reading other material.
14 That's the source of their knowledge.

15 It's not personal research or anything like
16 that. And yet, they don't provide that source of
17 knowledge, but they refer to it as existing. Was
18 there some logic behind that or was this just the way
19 it was with all these experts?

20 >> MR. MALSCH: The decision on -- first of
21 all, effectively we're talking about Paragraph 5 of
22 our contentions, primarily, and as I mentioned, they
23 were all drafted primary by the experts, themselves.
24 We defer largely to the experts in terms of the level
25 of support that they would offer.

1 And I would say that there was no conscious
2 decision on our part to limit any expert in what he
3 or she wanted to provide. On the other hand, we did
4 not advise the experts in situations where they
5 offered a opinion and reasons but no documents, that
6 the contentions were inadmissible without supporting
7 those documents. And really what it came down to was
8 a matter of time and resources.

9 I mean, we complained to the Commission
10 that we really didn't have sufficient time to draft
11 contentions. We really were strongly driven by
12 powerful time constraints in putting our package of
13 contentions together, and so we did the best we could
14 under the circumstances. And, as a lawyer, I was not
15 in a position based on what I knew about contention
16 practice to tell the expert that in every case they
17 had to go back and document every single conclusion
18 that they offered.

19 Although, I think they fully understand
20 that the matter of supporting your opinions with
21 references and studies is a matter which experts are
22 expected to do, and I think they all fully expect to
23 be held accountable in that respect on discovery and
24 at the hearing, and that's where things stand.

25 I think all of our experts are fully

1 prepared to provide sources and reference in
2 discovery and then ultimately at the hearing.

3 >> JUDGE TRIKOUROS: The -- if I were
4 talking to another technical person and said, you
5 know, there are plenty of experiments that show this
6 position. I would never do that because I know,
7 immediately, the next question is going to be, what
8 experiments are you talking about?

9 So technical people have a natural tendency
10 to not do that because you're going to get caught
11 short and you better know the experiment that you're
12 talking about, otherwise, the whole thing falls
13 apart.

14 So, again, it just struck me as odd. So if
15 you're telling me this is all about time, then, and
16 just resource constraints, then let me ask you this:
17 For those contentions in which statements are made
18 regarding experimentation, available experimentation
19 and numerous publications and that sort of thing
20 where clearly the statement is being made as being
21 derived from those sources, not necessarily from
22 personal knowledge but from those sources, would
23 those still -- would you still consider those
24 admissible contentions as opposed to those
25 contentions that are, in fact, very well reasoned and

1 provide a factual basis that, that don't
2 even -- don't even mention experiments and
3 publications and that sort of thing; and there are
4 numerous contentions that do meet that criterion
5 where they're very well reasoned and provide very
6 logical progression of thought that would lead you to
7 conclude that that makes sense. But for those
8 references that do -- for those contentions that do
9 specifically hang on the statement of these documents
10 that are out there, would you still think those
11 contentions are admissible?

12 >> MR. MALSCH: Again, Marty Malsch for the
13 State of Nevada. I think that they indeed are
14 admissible because the Commission's rules are quite
15 clear that all that is required is a minimal showing.
16 And as long as the expert offers an opinion and
17 supports it with some reason, the contention is -- is
18 admissible.

19 And I think the matter of coming up with
20 detailed sources is a matter for discovery and
21 ultimately the merits. I think I would say that if
22 we had had, you know, the full amount of time which
23 we had asked for, we might have perhaps gone back and
24 with, you know, another round of with the experts
25 that come up with more references, but in the time

1 available, that simply was not possible. But we
2 fully expected that once our contentions were
3 admitted, our experts would be asked those questions
4 and we would then be fully prepared to respond to
5 them.

6 >> JUDGE TRIKOUROS: Sometime later today
7 and I'm not sure of the exact timing, I'm going to be
8 referring to what we've started to call themes that
9 involve numerous contentions. And then we can be
10 specific there about some of these issues that we're
11 talking about, but I'll defer that.

12 >> JUDGE GIBSON: Before we move to Judge
13 Trikouros' themes, I just want to see if there is
14 anybody else that feels moved to speak to the issue
15 of the factual support necessary to support a
16 contention relative to the affidavit discussion that
17 we've had?

18 Yes, Clark County.

19 >> MR. ROBBINS: Thank you, Your Honor,
20 Alan Robbins on behalf of Clark County. I think it's
21 important to keep in mind and there was reference to
22 this earlier, but it is not uncommon on a petitioner
23 to prove its case at this stage. This is not at the
24 merits stage. This is the stage to establish whether
25 there is a genuine issue of material fact.

1 By analogy, if the expert, if the issue
2 was, you know, is some sort of surgery required and
3 the contention is, yes, it is, well, if you have a
4 lawyer's statement with no affidavit that says I
5 represented all kind of patients and I don't think
6 this guy needs surgery; well, that should not fly.

7 But if you are supported by an affidavit of
8 a qualified surgeon or other type of doctor who says,
9 yes, you know -- I've forgotten my own example which
10 side I'm going on on this -- but gives the opinion on
11 surgery, and says it's based on examination or based
12 on a review of, you know, a medical history, that
13 ought to be enough at this stage. And he ought not
14 have to identify or attach every last document that
15 he or she reviewed or test that he or she ran or
16 reviewed or that sort of thing.

17 That can be tested later. But you have on
18 the record a contention supported by an expert who's
19 giving more than a conclusion and may disappoint the
20 DOEs of the world but maybe did not cite or attach
21 every last document. I think that is roughly what
22 we're dealing with here. I would also add, in the
23 case of Clark County contentions, some are highly
24 dependent on experts. First of all, all are
25 supported by affidavits. Those that really turn on

1 expert opinions such as forecasted volcanic activity
2 is one example. That's a number of our contentions.

3 There is considerable explanation of the
4 geology and the basis for the geology on which the
5 expert bases his opinion about DOE's under forecast
6 of probable volcanic activity. He does not simply
7 say, I'm pretty sure it's going to be more than what
8 they say, which would not be a sufficient example.

9 So it is a document and it cites papers, it
10 cites research. So it's important in this discussion
11 that a lot of this general discussion not
12 unwittingly -- I'm not suggesting the Board would do
13 this at all, with too broad a brush on all this,
14 because the contentions do differ.

15 Quickly, as to format, does it really make
16 a difference if the witness says, I adopt the
17 following or following is a summary of my
18 professional expert opinion as set forth below, and
19 then it's in the affidavit. Or, if he said, the
20 summary as attached to Exhibit A, for Exhibit A to
21 this affidavit, rather than set forth below; does
22 that make a difference?

23 It shouldn't. Or, it says, as set forth in
24 Contention Safety 5 or Safety 5 through 8. What
25 difference does it make?

1 The practical difference is that if all of
2 the detailed explanation was set forth in the
3 affidavit, either below or attached, it's our view
4 that our pleading would not be very effective if we
5 said, to save repetition, we're not going to tell you
6 here in the pleading what the contention is or the
7 basis for it. Please see the attached affidavit.

8 You don't want to make it inconvenient for
9 the reader, and you want to be able to have that
10 reader just continue to read, not have to start
11 fumbling looking for attachments.

12 So what we would end up doing is repeating
13 it. And now we would take the whole substance of the
14 affidavit and put it back in the petition and now you
15 have it twice. Well, what does that do other than
16 increase the thickness -- those that are printed
17 out -- of the actual document.

18 So this whole form argument is bothering to
19 me. And for DOE, the irony is the discussion is
20 supposedly about a genuine issue and, yet, we have to
21 have this kind of discussion. Is that a genuine
22 argument over the form of the affidavit? I'd
23 respectfully suggest it is not. They will have their
24 time to deal with the qualifications of the witness,
25 the credibility of the witness, the basis for the

1 witness, at hearing. As -- I forget which one of
2 Your Honors said so earlier this morning, the basic
3 purpose at this stage is to make sure that you are
4 not embarking on a waste of time, that there's some
5 basis for the contention, that it's not just
6 something made up by lawyers sitting in their office.

7 And I think virtually, you know, all or
8 virtually all of the contentions in this case pass
9 that test and we have to not lose sight of what these
10 rules are being taken out of context. And the burden
11 that lies with the Department as the applicant is now
12 being presented by the Department as the burden on
13 the petitioners presenting contentions.

14 And those burdens don't apply to
15 contentions, they apply to the application. Thank
16 you.

17 >> JUDGE GIBSON: Okay. Nick, pardon me,
18 Judge Trikouros, did you need to say something?

19 Go ahead.

20 >> JUDGE TRIKOUROS: If the medical
21 affidavit said that the patient might need surgery;
22 would that be sufficient?

23 >> MR. ROBBINS: Does -- assuming, if
24 that's his opinion and it says, based on, you know,
25 I've reviewed the patient's history or something, I

1 would say, yes, it is.

2 >> JUDGE TRIKOUROS: All right. Thank you.

3 >> JUDGE GIBSON: Okay. Is there anyone
4 else who feels that they've just got to talk about
5 affidavits?

6 Okay. Seeing none, we will move on to
7 Judge Trikouros' themes.

8 >> JUDGE TRIKOUROS: First of all, there
9 were some issues that I think were not -- were sort
10 of left over from some discussions yesterday
11 regarding this TSPA and I wanted to at least discuss
12 a couple of those. The one question that came to my
13 mind was how we would, if we did go to hearing on a
14 number of these TSPA issues, how would we litigate
15 those?

16 I think it would be helpful to me to
17 understand that. So I'll start with Mr. Malsch.

18 >> MR. MALSCH: Okay. I think what I
19 imagined would happen would be that the litigation
20 would proceed subject area by subject area and that
21 in particular what we have attacked a DOE model as
22 being unsupported or wrong or not really representing
23 the full range of parameters, I would expect in the
24 normal circumstance and of course, this is a strategy
25 question for DOE, but I would expect that the

1 simplist way to proceed in a litigation would be for
2 them to say and defend their model, which would be a
3 subject matter area in which they would simply defend
4 their model or say their infiltration model as
5 actually, you know, supported by the data consistent
6 with the scientific understanding of infiltration and
7 the like.

8 There would be no need in that context to
9 go through elaborate dose calculations and computer
10 runs. The question would simply be, as a matter of
11 the science of infiltration, is their model
12 reasonable and credible and is it supported by some
13 combination of site-specific data or analogue data?

14 And I would think that's the way things
15 would proceed, contention by contention or a group of
16 contentions by groups of contentions.

17 It would be, I think, at DOE's option if
18 they thought that our model attack were too difficult
19 to counter, it would be their option to say, oh,
20 well, okay, let's assume it's true and let's see if
21 it makes any difference.

22 That would, though, I think encounter a
23 serious problem, which is that in every case of our
24 TSPA contentions, we have cited a violation of a
25 specific provision in Part 63 that requires, for

1 example, that models be defensible and credible, that
2 the full range of parameters be represented. And as
3 we've explained yesterday, those requirements are
4 independently enforceable. So, if we are correct in
5 our attack on a DOE model, the TSPA fails regardless
6 of the results of the dose calculations.

7 >> JUDGE TRIKOUROS: Well, let's explore
8 that a little bit. Let's start with the premise that
9 experts discuss the parameter variation and let's
10 assume that your experts prevail. Now, the value of
11 the parameter that was used in the license
12 application is agreed to be incorrect and that
13 another value is appropriate. Does that end it?

14 >> MR. MALSCH: Well, again -- this is
15 Marty Malsch again for Nevada. I mean, from our
16 standpoint, that would be a nice end because we would
17 prevail and an essential piece of the TSPA model were
18 destroyed, and DOE could not meet their burden of
19 proof of the EPA dose standard.

20 Now, what I suspect would happen would be
21 either the DOE would introduce -- well, I suppose at
22 that point they'd have to introduce a new model and
23 there would be another round of contentions on that
24 model, but that would be their choice. But I think
25 in a situation in which we prevail, that a part of

1 the TSPA is in noncompliance with 63, that's the end
2 of the case, we win.

3 >> JUDGE TRIKOUROS: So, now, let's assume
4 that we go through two weeks of this and the DOE then
5 does sensitivity studies on the whole range of
6 parameter variations that are within the range that
7 were being discussed in the hearing and conclude that
8 there is an insignificant change in the dose; would
9 that be an end point?

10 >> MR. MALSCH: That could conceivably be
11 an end point. I mean, what they would be doing, in
12 effect, would be volunteering to modify their TSPA to
13 include our concern and then show that their now
14 compliant TSPA was still showing a compliance with
15 the ultimate dose standard.

16 I think if that were to be done, then DOE
17 would prevail, although we would have the opportunity
18 to show that perhaps their model didn't do all it
19 said, but their dose calculation was incorrect. But
20 in your hypothetical, if we attack their model, we
21 win that their model was wrong, they then modify
22 their model to conclude our contention and establish
23 that their TSPA, with that model as so amended was
24 still in compliance, then DOE prevails. Although, we
25 have other contentions also that would have to be

1 addressed as well. But just looking at it on a
2 contention by contention basis, I think that's how it
3 would progress.

4 >> JUDGE TRIKOUROS: And if they ran that
5 model for each contention assuming a contention dealt
6 with one parameter for the sake of argument,
7 individually, would that be satisfactory or would you
8 argue that -- that TSPA would have to be -- would
9 have to accommodate all of the changes of all the
10 parameters at one time?

11 >> MR. MALSCH: Oh, I think, we would -- we
12 would argue very much that it would be very
13 misleading to do dose calculation runs, including
14 only one contention at a time, because that would
15 overlook the cumulative effect of all of our
16 contentions.

17 >> JUDGE TRIKOUROS: All right. Well, DOE,
18 do you have any thoughts on how this might be
19 litigated?

20 >>MR. POLANSKY: Yes, Your Honor. This is
21 Mr. Polansky. If a contention comes in, clearly, we
22 would present experts to defend the model. I think
23 there already are sensitivity studies that have been
24 done on various parameters and we would probably just
25 bring those out and try and demonstrate why on the

1 merits of what we've already done in sensitivity
2 analysis space what addressed the concern that's
3 raised.

4 But as for the last statement that
5 Mr. Malsch made about us having to do this in a
6 cumulative capacity, A, they did not plead that.
7 None of the contentions are pled cumulatively as the
8 Advisory PAPO Board had suggested in its May
9 conference -- May, 2008 conference.

10 And also, I believe Mr. Malsch stated
11 yesterday that it was an impossibility to run the
12 TSPA with all of its changes and their own expert
13 said it could not do it and its experts could not.
14 So they are -- if I'm hearing it correctly --
15 espousing a situation that would be impossible for us
16 to meet.

17 >> JUDGE TRIKOUROS: Do NRC staff have any
18 comments on this or should we move on?

19 >> MS. YOUNG: Mitzi Young for the NRC
20 staff. I don't disagree with what has been stated by
21 Nevada and DOE up to now. Just in terms of the
22 hearing, the staff's role, what we provide after the
23 hearing preparing its safety evaluation, its position
24 with respect to whether DOE's modeling of performance
25 assessment satisfied the requirements of Part 63.

1 >> JUDGE TRIKOUROS: All right. We'll move
2 on. Yesterday, Dr. Barnett began asking a few
3 questions regarding sort of general themes that were
4 observed in various contentions and -- and I will
5 repeat one because I want to confirm your answers.
6 The -- that had to do with the treatment of
7 contentions that referred to a non-ITS and a
8 non-ITWI structure, system, or component.

9 >> JUDGE GIBSON: Judge Trikouros, would
10 you mind making sure everybody knows what those
11 acronyms are, so that we don't have a
12 misunderstanding?

13 >> JUDGE TRIKOUROS: A structure system or
14 component that is not important to safety or not
15 important to waste isolation, which means in effect,
16 that -- that that component cannot result in a change
17 to the conclusion that the post-closure criteria will
18 be met regardless of the nature of the contention
19 attacking it.

20 And I just want to confirm that,
21 Mr. Malsch, that you had agreed that that can -- such
22 a contention would not be admissible, assuming that
23 your -- and that your reply did not take that on
24 successfully?

25 >> MR. MALSCH: If -- let me try to answer

1 that this way: If we had a contention which says
2 that a structure system or component was not properly
3 analyzed as, let's say, important to the waste
4 isolation, and the DOE Answer said, oh, no, you're
5 wrong, we did so analyze whether that structure
6 system or component was important to waste isolation
7 and reached a conclusion that it was not, then you
8 would have to come up with some explanation as to why
9 that evaluation was flawed; otherwise, our contention
10 would be dismissed.

11 >> JUDGE TRIKOUROS: Okay. And if -- if
12 your attack on the structure system or component did
13 not mention anything regarding whether it was
14 important to safety or to waste isolation or not and
15 the DOE Answer came back and said, that's an ITS/ITWI
16 component and your reply did not mention anything
17 about that, would that sequence then be not an
18 admissible contention?

19 >> MR. MALSCH: If -- if DOE replied that
20 it was neither important to safety or important to
21 waste isolation and explained why, and we didn't
22 counter that explanation, I think there'd be a
23 problem with our contention.

24 >> JUDGE TRIKOUROS: And I don't think --
25 and there are specific contentions like this -- I

1 don't think that one would have to say anything more
2 than that, because the components are identified in
3 the license application as ITS or ITWI. And if
4 you're not attacking that in any of your follow-up,
5 then, clearly, that conclusion remains.

6 Does DOE want to say anything about that?

7 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I
8 think I agree with the premise of your question. If
9 the contention doesn't disagree with a
10 classification, non-ITS and non-ITWI, then some
11 allegation regarding that SSC, we don't believe would
12 be able to provide a general dispute of material
13 value.

14 >> JUDGE TRIKOUROS: Let's take a situation
15 in which the contention refers to an omission using
16 terminology such as "fails to consider" or words to
17 that effect, but in the -- in the DOE answer, it's
18 pointed out that, that it was considered, in fact, in
19 the screening process and it was screened out because
20 it didn't meet the established criteria that are
21 indicated there. The contention, itself, doesn't
22 provide any reference to or comment on the screening
23 process at all so that in reading the contention, one
24 would not have any -- there would be no connection to
25 any screening process issues. Would such a

1 contention be admissible?

2 >> MR. MALSCH: This is Marty Malsch for
3 Nevada. Again, if we were to claim that a process
4 had been ignored and, in fact, DOE had not ignored
5 it, then I don't think we'd have an admissible
6 contention.

7 However, I think in the cases in which I
8 can think of where we allege that DOE had ignored
9 some process and DOE came back in their answer and
10 said, oh, no, you're wrong, we did not ignore the
11 process; our replies in such cases I think invariably
12 remain clear that they certainly did not consider it
13 in the sense in which it was considered in Part 63.

14 As for example, in a number of contentions
15 dealing with screening of FEPs, DOE would point to
16 the fact that they had screened out a FEP on legal
17 grounds. And our reply usually was that that is
18 completely unexplained and wrong and is that is not
19 an adequate basis for screening out a contention and
20 the fact that screening out effect and the fact that
21 an effect was screened out on legal grounds does not
22 actually demonstrate that the effect was actually
23 considered for inclusion in any legitimate sense.

24 So, it is usually not always apparent just
25 on the face of what DOE says in its answer that it is

1 true, that, in fact, something we say was ignored
2 was, in fact, ignored.

3 In almost all cases in which I can think
4 of, we have said in our replies that, no, we were
5 right, this consideration was, in fact, ignored and
6 here's why. But in theory, if in the bare case in
7 which we claim something was omitted and DOE says,
8 no, it was not and we have nothing else to say, our
9 contention has a problem.

10 >> JUDGE TRIKOUROS: All right. The -- if
11 the original contention did not question the
12 screening process but the reply questioned the
13 screening process after the DOE Answer indicated that
14 there was a screening process; would you consider
15 that acceptable to discuss at that -- at the reply
16 stage?

17 >> MR. MALSCH: I would consider that to be
18 acceptable. That's just an elaboration or
19 explanation of your original contention on the basis
20 for the contention. It's not raising an entirely new
21 contention.

22 >> JUDGE TRIKOUROS: I'd like to hear DOE's
23 response to that.

24 >> MR. ZAFFUTS: Paul Zaffuts, DOE.

25 Regarding that last point, petitioners have a burden

1 to prepare clear, complete contentions. Although the
2 subject matter that we're dealing with generally, is
3 complex, dealing with complex issues, the issues and
4 the language that Nevada generally uses is straight
5 forward.

6 We're dealing here with words here like
7 "omissions" and "consideration." These are not
8 complex concepts. So when Nevada provides a
9 contention, for example, we didn't consider
10 something -- DOE didn't consider something, we
11 demonstrate and point to the specific parts of the
12 SAR where we did. And then they turn around and they
13 say, well, we didn't really mean "consider" like
14 that.

15 What we really mean is, you didn't do a
16 sufficient job of considering. And then they start
17 beginning to go on and discussing FEPs and other
18 standards. I think that's just, that's unacceptable.
19 I think that's -- that is something that they had a
20 burden to discuss in clarity in their initial
21 petition. And if that was the case, we would have
22 answered it in respect to the particular contention
23 or issue that was involved. I believe that in
24 change -- this would be a change. This is a change
25 of the basis for the contention. That's not

1 acceptable.

2 >> JUDGE TRIKOUROS: Would the staff
3 consider that that discussion in the reply, that
4 there were deficiencies in the screening process
5 where that was not discussed in the original
6 contention, would the staff consider that an
7 acceptable thing to do with respect to a reply?

8 >> MS. YOUNG: Mitzi Young for the NRC
9 staff. Unless it were clear in the initial
10 contention that that was the concern being raised, it
11 would be inappropriate to raise it for the first time
12 in a reply. So any chances depends on what the
13 original contention raised. Sometimes, there are --
14 there are statements that would be akin to that,
15 although not specifically stated, but you have to
16 reasonably construe whether the reply is just a
17 response to the legal and factual arguments raised or
18 whether the reply tries to amend and bootstrap and
19 raise arguments that weren't previously raised in the
20 initial petition.

21 >> JUDGE TRIKOUROS: All right. Thank you.
22 Any other comment on this?

23 Should I move on?

24 Another area that was of interest was
25 contentions that identify a particular item. They

1 might state that it was omitted or that it was
2 incorrectly considered in this case and conclude that
3 the impact that this -- this will have is unknown,
4 that it introduces an unknown characteristic to the
5 analysis.

6 With no further characterization other than
7 to say it's unknown, what would -- Mr. Malsch, what
8 would you say about contentions that have that
9 characteristic?

10 >> MR. MALSCH: I would say that in
11 general, such a contention would be admissible so
12 long as it was, you know, it was reasonably supported
13 and it was dealing with an obligation by DOE a
14 separate and enforceable obligation by DOE to include
15 in its models, the full range of uncertainties and
16 defensible and reasonable parameters.

17 It seems to me those requirements are
18 independently enforceable and independently of
19 significance. And so, for example, if DOE -- a DOE
20 model considered a range of some parameter between
21 five and six and we filed a supported contention and
22 said the range is really between one and ten, that
23 would be a independently significant violation of
24 several requirements in Part 63 to include the full
25 range of defensible and reasonable parameters. I

1 think that in itself is raising a violation of a
2 particular requirement in Part 63 and that's the
3 material contention.

4 >> JUDGE TRIKOUROS: But what if it didn't
5 provide magnitude, if it just simply said
6 that -- with you giving your five to six example, if
7 it said that the license application assumes five to
8 six, but given certain phenomenology that's
9 discussed, they can't know that. And nothing more.
10 No characterization that it's two to ten, just --
11 they can't know that.

12 >> MR. MALSCH: I think that is absolutely
13 admissible. I mean, it is DOE's obligation under
14 Part 63 to present the range, the full and defensible
15 range of parameters. If they fail to do so, it is
16 DOE that is in default and has not complied with Part
17 63.

18 It is not our obligation as an intervenor
19 to do our job for them and supply what is missing,
20 namely, the full range of defensible and reasonable
21 parameters. So a contention that simply says, with
22 adequate support their range is five to six and that
23 is not supported or is wrong, is in itself an
24 admissible contention because of the way Part 63 is
25 drafted.

1 >> JUDGE TRIKOUROS: DOE?

2 >> MR. ZAFFUTS: Paul Zaffuts, DOE. To go
3 back to something Mr. Malsch said -- well, let's talk
4 about uncertainty. I know we talked about that a
5 bit. This idea of a range of uncertainty, it's -- I
6 think we have a fundamental disagreement here. It's
7 something like a range of uncertainty. Okay. It
8 could be 1%. It could be 2%. It could be 90%. It
9 could be .01%. That's -- what a particular range
10 would be and I don't think any of these contentions
11 get to that specificity, I guarantee you, we don't.
12 That's a technical disagreement. Okay. That's --
13 we're not talking about regulatory violations with
14 something like that.

15 This is a technical disagreement that the
16 materiality standards have to apply. It's
17 petitioner's burden in that case to demonstrate why
18 should we have a hearing, a full evidentiary hearing
19 on something that may have absolutely no significance
20 whatsoever. I don't know what the significance would
21 be, that's petitioner's burden. They have to
22 demonstrate with a basis sufficient for your
23 understanding, the Board, to say, yes, this is an
24 issue that's sufficient for a hearing. That's not
25 what's being done in these contentions. They don't

1 do that. They just say -- your example was a good
2 one, sometimes they just say, "we don't know."

3 I just don't understand what type of a
4 contention that is and how you are supposed to or
5 anyone is supposed to determine materiality or
6 importance sufficient to have a hearing on that.

7 So, I think we need to understand it in
8 those realistic and rational terms. So -- so in the
9 case of where there is some inaccuracy or some other
10 allegation, I think we just need to continue to look
11 at it from the terms of a materiality aspect.

12 >> JUDGE TRIKOUROS: So, the statement that
13 something is wrong with a -- with a reasoned basis,
14 is a genuine dispute and might be material. But the
15 statement that something is not right or the
16 statement that something may not be right; do you
17 consider that to be a genuine dispute?

18 >> MR. ZAFFUTS: Well, let me go back to
19 the first thing that was said which is that it was a
20 statement that something is wrong. I mean, they have
21 to support that.

22 It's got to be supported with a basis.

23 >> JUDGE TRIKOUROS: Well, I understand
24 that, with a reasonable justification.

25 >> MR. ZAFFUTS: That in and of itself I

1 don't believe is necessarily material. As you know
2 with a model such as like this, what is right? What
3 is wrong?

4 It's another way of saying you may not know
5 the precise words of uncertainty, because that's what
6 we're dealing with here generally is, you know, you
7 may have a difference in a data point and is that
8 quote, "wrong" or is it "not wrong?"

9 I don't know what the answer is. I don't
10 think anyone knows what the answer to that is.
11 That's sure not a basis of determination of
12 materiality. They have to show an effect. What is
13 the impact of that error or something being wrong?

14 >> JUDGE TRIKOUROS: The problem that we're
15 having here is that in essence, you could be hiding
16 behind that screen as well. The analogy I used was,
17 you provided wax wings to the -- to intervenors with
18 the requirement to prevail, they have to approach the
19 sun at a certain distance.

20 >> MR. ZAFFUTS: Okay. Well, if I could, I
21 think they could probably put a heat lamp on those
22 wings and determine that without having to fly to the
23 sun. So I think there are many ways of assessing
24 issues that they bring up and they did, they had a
25 burden to do that.

1 >> JUDGE TRIKOUROS: But this hiding behind
2 the complexity of the TSPA is a two-edged sword; it's
3 cutting both ways here. We're in a position to have
4 to sort that out. So we're going to ask a lot of
5 questions, maybe repeat things if we have to.

6 >> JUDGE GIBSON: But before we do that,
7 why don't we take a recess here for 15 minutes.
8 We'll be back on the record. Fifteen minutes.

9 (Whereupon, a recess was taken)

10 >> JUDGE GIBSON: Back on the record.
11 Judge Trikouros.

12 >> JUDGE TRIKOUROS: All right. We were
13 discussing what I had referred to as a contention
14 that indicated that an impact would be unknown. We
15 went through some discussion regarding that.

16 Would it be necessary for a contention to
17 state as a minimum that the effect that it's alleging
18 would be in the -- let me say, the non-conservative
19 direction, or I could say the conservative direction,
20 depending on which -- how you're looking at it, but
21 that it would have to state that the effect would be
22 in a direction to prevent or possibly prevent meeting
23 the post-closure criteria. Would it at least have to
24 say that?

25 >> MR. MALSCH: This is Marty Malsch again

1 for Nevada. I think it would depend upon the
2 contention. If the contention asserts that a DOE
3 model is simply wrong or not supported, I think the
4 model disappears, it can't be used in the assessment
5 and that's the end of it. There is no further
6 obligation on our part.

7 If we're dealing with ranges of
8 uncertainties or ranges of parameter distributions,
9 that's a slightly different story, but again, it
10 seems to me that the requirement in the regulations
11 that uncertainty be accurately characterized and
12 described and that the full range of parameters be
13 included is independently enforceable, because the
14 Commission wanted to know whether the ultimate result
15 or the extent to which the ultimate result was
16 neither conservative or non-conservative, because
17 remember that the ultimate decision is based upon the
18 full record of a whole bunch of considerations, not
19 just -- although this is the most important part --
20 but the record includes a whole range of
21 considerations. Unless the Commission knows on a
22 model by model basis exactly what the full range is,
23 regardless of how the effects of an individual model
24 are, when you get to the final decision on the
25 validity of the dose calculation, you need to know

1 all about uncertainties and ranges for all the
2 models.

3 So I don't think we have any obligation in
4 any one contention attacking any one model or
5 submodel to either -- to show that the range or part
6 of the range that we think is missing is on the
7 conservative or non-conservative side because who
8 knows -- if that could be either way, ultimate dose
9 calculations considering all of the other models.

10 >> MR. ZAFFUTS: May I respond?

11 >> JUDGE TRIKOUROS: Yes.

12 >> MR. ZAFFUTS: This is Paul Zaffuts, DOE.
13 Again, I think a couple points. When we're dealing
14 with -- again, the fundamental difference here, if
15 we're dealing with things like ranges of uncertainty,
16 notwithstanding what Mr. Malsch believes, it's our
17 position that does not deal with violations.

18 If they can demonstrate that we have
19 utterly, utterly not taken uncertainty into account,
20 you can look at 113 -- or 114, 63-114, that's the
21 uncertainty regulation that primarily deals with
22 uncertainty in the TSPA. What we're dealing with
23 here in the vast majority of these contentions are
24 technical disagreements related to ranges of
25 uncertainty, data values, what particular type of

1 data or piece of data that may or may not be
2 important.

3 These are very common types of contentions
4 in proceedings. They're technical issues between
5 disagreements with technical experts -- disagreements
6 related to a technical issue, not a violation. And
7 when you are dealing with things like that, there has
8 to be a sense of materiality. You need to, your
9 example is perfect. If the allegation suggests that
10 conservatism will increase, how can -- I just don't
11 -- I do not fathom how that can have a significant
12 effect or a material effect that we are going to
13 have a hearing over.

14 >> JUDGE TRIKOUROS: Okay. Well, let me
15 explore this a little bit. What I think I'm hearing
16 is that a contention could actually say that
17 something will have an uncertainty in a direction
18 that will improve the dose response. But what you're
19 saying is that even a negative -- let's call it a
20 conservative uncertainty, might be material in such a
21 complex model that even though it appears
22 conservative when you run the model, it may go the
23 other way or you know, eddies and currents in this
24 model might drive it some place where no one
25 expected.

1 That's the issue of materiality. But then
2 you're saying that someone else has to determine that
3 materiality?

4 I don't understand where you are coming
5 from on that.

6 >> MR. MALSCH: Again, Marty Malsch for
7 Nevada. That's precisely what we're trying to argue,
8 that you cannot on an individual contention basis
9 when you are talking about contentions along those
10 lines, hope to demonstrate materiality in the sense
11 of its ultimate effect on the dose calculation
12 because who knows what that actually might be in
13 terms of the ultimate calculation, especially
14 considered with your other contentions.

15 >> JUDGE TRIKOUROS: But is it a valid
16 contention to say that you may have made a mistake
17 here and it might be material without demonstrating
18 materiality, or at least having an expert say, I'm
19 confident that if you utilize what I am telling you,
20 it will have a significant effect on the outcome?

21 >> MR. MALSCH: Well, I think though as a
22 matter of fact, for every one or virtually every one
23 of our TSPA contentions, we always have in Paragraph
24 5, an opinion by the expert that he believes his
25 contention, if true, would have an adverse effect in

1 terms of increasing doses of releases.

2 What's missing is a quantitative discussion
3 of what precisely that would be. And as we explained
4 yesterday, that is far beyond any intervenor's
5 ability to do, because of the complexities in the
6 model, the recognition that there are at least five
7 separate modeling cases, and the fact that we'd have
8 to include combinations of contentions.

9 And then also, it wouldn't be sufficient to
10 modify -- let's say we took one contention and let's
11 say we attempted to do a calculation of the effects
12 on doses of releases if they included our different
13 parameter range. If we did that, we would perhaps
14 have to change as many as five different versions of
15 the TSPA because there are at least five different
16 modeling cases.

17 And let's suppose we did that. In some
18 cases as we've explained, that might take a month's
19 worth of work. But let's suppose we did tht and we
20 produced a single dose calculation; what good would
21 that do?

22 No one would know whether that was at the
23 high end or low end or in between. We would have to
24 actually run enough number of realizations to show it
25 affected the mean.

1 So we would have to actually modify as many
2 as five different modeling cases and then run those
3 things, at least perhaps 300 times. That just is not
4 within our ability to do. I think you're asking for,
5 you know, what is actually the impossible.

6 The best you could ask for would be an
7 opinion from the expert that this would have an
8 effect in terms of doses and releases and that's the
9 best we did.

10 >> MR. TRIKOUROS: So if a contention has
11 that statement by the expert, that he believes this
12 would be a significant effect in the direction of --
13 the improper direction, let's say, then, then that
14 contention might be admissible. But if that
15 statement is not there, then would you then agree
16 that contention might not be admissible?

17 >> MR. MALSCH: I wouldn't agree that that
18 would always be the case. It would depend upon the
19 contention. For example, a contention that says the
20 model is simply wrong or unsupported, that's it. No
21 further demonstration required.

22 You can't have a TSPA that uses the wrong
23 model or a model that is unsupported because the
24 regulations have apart from the requirement to do
25 the dose calculation, a separate requirement that

1 each model be defensible scientifically.

2 >> JUDGE TRIKOUROS: But if a statement is
3 made that is wrong, I'm assuming that it's
4 reasonably -- there is a reasonable basis for that
5 statement.

6 >> MR. MALSCH: Of course. Of course.

7 >> MR. ZAFFUTS: Your Honor, may I respond?

8 >>JUDGE TRIKOUROS: Yes.

9 >> MR. ZAFFUTS: Paul Zaffuts, DOE. Just a
10 quick one. You mentioned -- Mr. Malsch mentioned a
11 statement by an expert that says there is some
12 significant effect and that's sufficient. I
13 fundamentally disagree with that.

14 Statements like that need to have support.
15 That's just a conclusory statement without any basis.
16 That's insufficient. I don't care if it comes from
17 an expert; it's not sufficient. That's exactly what
18 they do in a vast majority of the cases. They will
19 have some issue related to -- I'm going to use the
20 example we used this morning, plant height over the
21 mountain.

22 We take plant height into account, but
23 maybe some are taller and some are lower. Ergo,
24 there is potentially a little increase and
25 uncertainty in our estimation. And then they

1 summarize the discussion by saying it could widen the
2 range of infiltration. As you suggest earlier, which
3 direction?

4 I would like an expert to tell me which
5 direction so now I can -- one could determine if it's
6 conservative or non-conservative. And then the next
7 line is in consequence, "seepage would be altered."

8 No basis for that. Just a statement.
9 Significant changes in corrosion, radionuclide
10 release in transport and radionuclide impacts on the
11 REMI. It's one sentence. That's not sufficient.

12 >>MR. REPKA: David Repka, NEI. May I be
13 heard?

14 >> JUDGE TRIKOUROS: Yes.

15 >> MR. REPKA: Certainly before we leave
16 the topic of TSPA, I would be remiss if I didn't make
17 a few points. NEI does have several contentions
18 directed to the TSPA.

19 First, on the issue of the threshold and
20 the materiality, I do agree there is some materiality
21 showing required at the contention stage. And I
22 would point out that NEI's contentions specifically
23 address that and meet that threshold based upon
24 expert affidavits that not only establish their own
25 expertise, the model that they rely on developed by

1 and for EPRI and that they show us specific impact
2 with respect to the TSPA.

3 Those impacts are that the TSPA is
4 conservative and that we would establish further
5 conservatisms. I think that that demonstrates that
6 that kind of threshold showing can be made and has
7 been made in this case.

8 I think with respect to the issue of
9 showing conservatisms, the question came up earlier
10 as to whether or not these issues would need to be
11 heard or addressed together. And I do believe that
12 assuming there are contentions admitted, they do have
13 to be considered together in some way.

14 Obviously, focusing on specific
15 contentions, yes, but in terms of total effect, a
16 holistic effect, it's clearly relevant.

17 Mr. Malsch stated, you know, I think he
18 said something about there's a whole range of
19 considerations, and I certainly agree with that.

20 I think our model would probably show a
21 different outcome than his would. But I think that
22 the point is, there is a materiality showing. NEI's
23 contentions I think meet that showing and I think
24 that are certainly relevant to this issue and the
25 litigation of it.

1 >> JUDGE TRIKOUROS: All right. Well, as
2 I've done before, I'm going to defer additional
3 discussion of these themes for now and try and come
4 back to it later.

5 >> JUDGE GIBSON: Yeah, I -- we will come
6 back to the themes issue. There are some tribal
7 questions that I want to be sure that -- we need to
8 cover now. So I would like to turn to those now.

9 First, I'd like to discuss the issue of
10 standing. As I understand it, there are two entities
11 that claim to represent the Timbisha Shoshone Tribe.
12 The first group calls itself the Timbisha Shoshone
13 Tribe. But for purposes of the questions that I will
14 pose today, I'm not going to refer to that group as
15 the Timbisha Shoshone Tribe, but I will instead refer
16 to them as TIM. You will understand why in a minute.

17 The second group calls itself the Timbisha
18 Shoshone Yucca Mountain Oversight Program Nonprofit
19 Corporation, and not surprisingly, I don't want to
20 have to say that every time either. And so we will
21 simply refer to that group as TOP. So I'm going to
22 be referring to TIM and TOP. Does everybody know
23 who they are?

24 Okay. I think the record is clear that no
25 one who has entered an appearance here disputes that

1 the Timbisha Shoshone Tribe is an affected Indian
2 tribe under the Nuclear Waste Policy Act.

3 Now, as determined by the Secretary of
4 Interior, and as such, the Timbisha Shoshone Tribe is
5 to be accorded automatic standing here.

6 But just to be sure, I want to make sure
7 that there is not anybody in the room here who would
8 dispute that the Timbisha Shoshone tribe, itself, is
9 to be accorded automatic standing? No problem there,
10 right?

11 Okay. Speak now or forever hold your
12 peace. Unfortunately, both TIM and TOP claim to be
13 the sole legitimate representative of the Timbisha
14 Shoshone Tribe. And at least of the last filing we
15 had, which I think was at least last night or this
16 morning, TIM and TOP have been unable to resolve the
17 dispute between themselves as to which entity is
18 authorized to represent the tribe in this proceeding.

19 I need to make it clear, initially, to both
20 of you that this licensing board is in no position to
21 resolve the dispute between TIM and TOP in terms of
22 which group is the sole legitimate representative of
23 Timbisha Shoshone Tribe.

24 Instead, this is something that is going to
25 have to be worked out through the administrative and

1 judicial channels, where I understand a dispute is
2 pending. And again, just so the record is clear
3 here, do I understand correctly that there are two
4 appeals pending within the Bureau of Indian affairs
5 and another case pending in Federal District Court?

6 >> MS. HOUCK: Your Honor, Darcy Houck for
7 TIM.

8 >> JUDGE GIBSON: Yes.

9 >> MS. HOUCK: Currently, there are
10 actually three appeals in Interior. The first appeal
11 was decided at the regional director level on
12 February 17th recognizing the '06 '07 tribal
13 council as the last duly elected council and that
14 council is made up of Joe Kennedy, Ed Beanan,
15 Virginia Beck, Madeleine Estevez and Cleveland Casey.

16 And I will indicate that regardless of what
17 the ultimate outcome is on all of these appeals, four
18 of those five people are in the room today and this
19 is probably the first time since this dispute started
20 in 2007 that that has occurred.

21 So overall, the issues in this proceeding
22 are critically important to the tribe and regardless
23 of the ultimate outcomes, the tribes very much wants
24 to make sure that the impacts to the tribe, itself,
25 are addressed in this proceeding and that they have a

1 seat at the table. But with that said, the first
2 appeal, the regional director made the decision on
3 February 17th.

4 That was then appealed to the Interior
5 Board of Indian Appeals. Under Interior regulations,
6 the Assistant Secretary of Indian Affairs has the
7 ability to take jurisdiction within 20 days of the
8 filing of that appeal. That did occur in this case,
9 so acting Assistant Secretary George Staben has taken
10 jurisdiction over the first appeal to the IBIA.

11 The second appeal, the regional director
12 made a decision on March 24th also recognizing
13 the '06-'07 tribal council consisting of Joe Kennedy,
14 Ed Beanan, Virginia Beck, Madeleine Estovez and
15 Cleveland Casey.

16 There is a 30 day period that can be
17 appealed to the Interior Board of Indian Appeals at
18 which time, it's my understanding from the U.S.
19 Attorney's Office, I can't confirm this, but if an
20 appeal is made, the Assistant Secretary will likely
21 also take jurisdiction over that appeal.

22 There was an election in November, 2008,
23 that was conducted -- it was not approved by that '06
24 '07 council. It was the other faction. And there
25 has been an appeal as to that election, which a

1 decision is still pending at the Superintendent's
2 level.

3 So those are the three administrative
4 appeals that are pending.

5 >> JUDGE GIBSON: Is there also a case in
6 Federal District Court?

7 >> MS. HOUCK: There are actually -- my
8 understanding is there are two cases in Federal
9 Court, one that was filed I believe -- and I believe
10 in December. That one I believe is moot and nothing
11 has happened. I don't know, I would have to check.
12 That was filed on behalf of Mr. Kennedy by I believe
13 Judy Shapiro and George Foreman's law firm, I don't
14 know.

15 I believe the issue was resolved
16 administratively, though, by deciding -- by
17 retracting a December 4th decision.

18 There's a whole litany of decisions I think
19 you've seen from the pleadings between December 14
20 of '07 up through actually March 24th of last
21 week.

22 The second district court case was filed in
23 regards to the appeal that was decided on
24 January 17th. The U.S. Attorney's Office filed a
25 motion to dismiss based on the two recent decisions

1 and the fact that they have consistently since
2 November and indicated in their motion to dismiss
3 that pending resolution of all appeals, the Bureau of
4 Indian Affairs is recognizing for
5 government-to-government purposes, the tribal council
6 made up of Joe Kennedy, Ed Beaman, Virginia Beck,
7 Madeleine Estovez and Cleveland Casey, that the whole
8 matter is moot.

9 That case is likely -- we're in
10 discussions with the U.S. Attorney about withdrawing
11 that lawsuit. And that one may go away based on
12 their representation that that is the council that
13 they're going to be recognizing pending resolution of
14 these appeals.

15 >> JUDGE ROSENTHAL: Can I ask you a
16 question at this point? When the final determination
17 in the BIA is made, is that subject to judicial
18 review or does the BIA determination have finality?

19 What I'm getting at is, as Judge Gibson
20 pointed out, it's beyond our province to become
21 involved at all in this dispute. And I'm sort of
22 curious as to whether there is any basis for
23 concluding at this point that this dispute is going
24 to be ultimately resolved, whether administratively
25 or after a judicial review within this century.

1 >> MS. HOUCK: Once the Acting Assistant
2 Secretary makes his determination which is likely to
3 take roughly five months, probably, it is subject to
4 judicial review as a final agency action under the
5 APA.

6 >> JUDGE GIBSON: Okay. We heard from TIM,
7 with TOP. Just with respect to the factual
8 recitation that she gave, is there anything else that
9 you would like to add or correct?

10 >> MR. POLAND: Judge Gibson, there are two
11 things I would like to say. First of all, as far as
12 the November 28, 2008 election is concerned that is
13 not yet on appeal right now to BIA. There is no
14 appeal pending as to that election. So I do want to
15 make that correction.

16 >> JUDGE GIBSON: Thank you.

17 >> MR. POLAND: Second of all -- I'm sorry.

18 >> JUDGE GIBSON: I said thank you.

19 >> MR. POLAND: Okay. Second of all, Ms.
20 Houck referred to four or five members of the tribal
21 council being in this room. I understand, Your
22 Honor's statement that this particular Board does not
23 have the expertise or is not going to decide these
24 issues.

25 We would like to make clear, TOP would like

1 to make clear that the problem with deferring to what
2 the BIA might determine is that some of these issues
3 are not issues for the BIA to determine. They are
4 issues that are to be resolved by a sovereign tribe.

5 >> JUDGE GIBSON: Okay.

6 >> MR. POLAND: And the U.S. Supreme Court
7 has made clear that these are sovereign tribal issues
8 and that the BIA does not have a say over this.

9 >> JUDGE GIBSON: Okay, fair enough. And
10 we'll get to that in a minute.

11 Let me just go back to TIM now. Judge
12 Rosenthal asked if it would be resolved in this
13 century. I think you said you are hoping to get a
14 decision in five months and then that decision can be
15 appealed. Is that a fair statement?

16 >> MS. HOUCK: Yes, that is a fair
17 statement. I would like to note though that the
18 March 24th regional director's decision indicates
19 that there is a pending determination regarding the
20 November 11th, 2008 general election, and so we
21 are unsure what they're going to do as far as
22 recognizing that.

23 It was my understanding there was an
24 appeal. But there is some decision pending.

25 >> JUDGE GIBSON: Okay. And do you at

1 least agree with her with respect to the five month's
2 Board decision plus that can then be appealed to
3 Federal District Court?

4 >> MR. POLAND: I think that there is some
5 range, Your Honor, but I don't disagree -- it's a
6 matter of months as opposed to years.

7 >> JUDGE GIBSON: Fair enough. Thank you.
8 Okay. Now, I know that, you know, I made DOE answer
9 some questions earlier today that I knew were painful
10 for them. I'm going to do the same thing for you
11 guys.

12 And in the event that the pending dispute
13 in other forms is not resolved in your favor, which
14 would mean that your organization would not be found
15 to be the sole authorized representative of the
16 Timbisha Shoshone Tribe, and I know that that's
17 painful for both of you to make that assumption, but
18 just for purposes of helping us out here, we need to
19 try to make the record, okay.

20 It's my understanding that each of you is
21 nevertheless claiming that your organization meets
22 the requirements for standing as a matter of right in
23 failing that for discretionary intervention. And so
24 if that's correct, I want to make sure that we can
25 unpack that a little bit so that we will have a clear

1 record for purposes of entering an Order in this
2 case.

3 Let's begin with TOP. In your amended
4 petition to intervene, you argue that you've met the
5 requirements representational standing. Assume for a
6 minute that the Board grants your motion for leave to
7 file your amended petition, the NRC staff, as I
8 understand in answer to your amended petition has
9 conceded that you have satisfied the criteria for
10 representational standing. Is that your
11 understanding?

12 >> MR. POLAND: Yes, it is, Your Honor.

13 >> JUDGE GIBSON: Is that correct, staff?

14 >> MS. SILVA: That is correct.

15 >> JUDGE GIBSON: Thank you. But DOE in its
16 answer has not addressed this question as I
17 understand it, have you, with respect to TOP?

18
19 >>MR. ZAFFUTS: Yes, Your Honor, I believe
20 we have stated that they do not have representational
21 standing based on the pleadings they provided.

22 >> JUDGE GIBSON: Okay. And what was the
23 basis for that?

24 >>MR. ZAFFUTS: One moment, Your Honor. It
25 would have been in the pleading that DOE filed on I

1 believe it was Friday of last week in response to the
2 Amended Petition. And for representational standing,
3 as you know, an organization which is not asserting
4 standing on itself, must demonstrate that one of its
5 members who is authorizing the organization to
6 represent it, itself has standing.

7 And we do not believe that the information
8 provided in the pleading demonstrated that the
9 individual members have standing in their own right
10 and, therefore, there was no ability for TOP to have
11 representational standing.

12 I think we may have also mentioned that the
13 Articles of Incorporation and the corporate bylaws
14 state that TOP has no members and we may also have
15 relied on that.

16 >> JUDGE GIBSON: TOP, could you address
17 the two points that DOE just raised?

18 >> MR. POLAND: Certainly, Your Honor.

19 >>JUDGE GIBSON: Thank you.

20 >>MR. POLAND: TOP was formed specifically
21 and incorporated specifically to represent the
22 interests of the Timbisha Shoshone Tribe in these
23 very proceedings. That is its purpose. It stands in
24 place of the Timbisha Shoshone Tribe. It represents
25 the interest of the members of the tribe.

1 And so, Mr. Polansky says, well, TOP,
2 itself, is a corporate entity, and so it doesn't have
3 any members, it just has directors and that precludes
4 it from participating.

5 Your Honor, I would refer the Board to the
6 NEI vs. EPA case.

7 >> JUDGE GIBSON: What? Could you please
8 give us that case?

9 >> MR. POLAND: Sure. NEI vs EPA.

10 >> JUDGE GIBSON: Okay, NEI vs EPA. Okay,
11 I'm sorry, I just I didn't hear what you said.

12 >> MR. POLAND: Yes, YOur Honor. There,
13 the D.C. Circuit addressed the question whether the
14 environmental organizations there had standing. And
15 I don't see a big difference between the decision
16 that the D.C. Circuit made there where they clearly
17 held that the individual members addressed an injury
18 that they would suffer if they had standing.

19 And I don't see representational standing
20 as well as credential standing.

21 And I don't see a difference here. We have
22 submitted the affidavits of several members of the
23 Timbisha Shoshone Tribe who live in the traditional
24 home lands in the Death Valley area. They have set
25 out real concrete injuries that they will suffer

1 based on concessions in DOE's own Environmental
2 Impact Statements. They're members of the tribe.
3 They are current members of the tribe.

4 So we certainly don't see a problem with
5 representational standing.

6 >> JUDGE GIBSON: And are those members of
7 the tribe also members of TOP?

8 >> MR. POLAND: Two of them are on the
9 Board of Directors of TOP.

10 >> JUDGE GIBSON: Okay. Now, I do
11 understand that both DOE and the NRC staff are
12 opposing TOP's request for discretionary intervention
13 in this case?

14 >> MS. SILVIA: This is Andrea Silva from
15 the NRC staff. We did not address the discretionary
16 intervention because we found that they had standing
17 as -- representational standing.

18 >> JUDGE GIBSON: Well, just assume for the
19 sake of argument, that discretionary intervention is
20 on the table; do you have any problem with them being
21 accorded discretionary intervention in this case?

22 >> MS. SILVIA: No, we do not.

23 >> JUDGE GIBSON: DOE?

24 >> MR. POLONSKY: Thank you, Your Honor.

25 Mr. Polansky. I believe that the answer we filed on

1 Friday. Based on the petition provided, we do not
2 believe that TOP had discretionary standing.

3 I think in particular, we were conflicted
4 by the fact that whoever is the affected Indian tribe
5 really represents the interests of that tribe. So
6 whoever that entity is should be the entity that
7 represents them.

8 And to the extent that TOP is not the AIT,
9 then it shouldn't be given discretionary standing
10 because the interests of the tribe will already be
11 represented, for lack of a better word, Your Honor.

12 >> JUDGE GIBSON: Okay. Would you like to
13 respond to that, TOP?

14 >> MR. POLAND: Yes, I would, Your Honor,
15 thank you. I think that if we go through the
16 factors, Mr. Polansky mentioned one, are there other
17 entities that could represent the interests of TOP if
18 they were not granted discretionary intervention.
19 But that's only one of the factors.

20 That's not all the factors. One of the
21 first factors is will the participation assist the
22 Board in developing a sound record?

23 Here, there is no question that it will.
24 These are people, these are Timbisha Shoshone tribal
25 members who live at the Death Valley Springs. They

1 live in the area. They practice traditional tribal
2 customs and religions. They clearly will be injured.

3 And the views that they have, the injuries
4 that they will suffer, those need to be made a part
5 of the record. They must be made a part of the
6 record. And so if they are not participating, those
7 views will not be made a part of the record.

8 So I don't understand how DOE can say that
9 they will not, their participation would not assist
10 the development of a sound record.

11 The second factor that's to be considered
12 under Section 2.309 (e(1)) is the nature and extent of
13 the property financial or other interest in the
14 proceedings.

15 I did mention these yesterday at the end of
16 the day. We have culture, heritage interests that
17 are at stake here, our members do who live in the
18 Death Valley area. Clearly, those are interests that
19 ought to be considered. They are significant
20 interests. They are significant to the tribe and to
21 the members of TOP.

22 Third is the possible effect of any
23 decision or Order that may be issued in the
24 proceeding. And here, if an Order is issued, I think
25 it's a sort of a two-step process.

1 The first question is the NRC's staff
2 review of the EIS. If the EIS is lacking because
3 these cultural issues should be considered, clearly,
4 the NRC staff could choose to reject that EIS and
5 require a supplement.

6 But then as a second step, as well, the
7 Board could reject the application if the information
8 is not contained in the EIS. So none of those
9 factors which are the ones that are to be taken into
10 account weigh against us. They all weigh in our
11 favor. And then there are also several factors that
12 would weigh against granting discretionary
13 intervention.

14 We don't think any of those are present.
15 We don't think that there are other organizations
16 that can represent our interests.

17 Mr. Polansky mentions the other entity,
18 TIM. None of the members of TIM live in the Death
19 Valley area. They live outside the traditional
20 tribal homeland. They don't practice the traditional
21 tribal customs. They cannot represent the interests
22 of the people who live in the homeland. So those
23 interests will not be represented.

24 And then there's a question as well as to
25 whether the participation of TOP will inappropriately

1 broaden the issues or delay the proceeding. And we
2 talked about this yesterday. Mr. Silverman on behalf
3 of the DOE even focused on the word "inappropriately
4 broadened."

5 We certainly would submit that it is not
6 inappropriate to include TOP's concerns at this FE
7 contention stage.

8 >> JUDGE GIBSON: Okay. Thank you. TIM, I
9 understand that -- first of all, I guess I want to
10 know, are you all asserting standing as a matter of
11 right?

12 >> MS. HOUCK: Yes, Your Honor, we're
13 asserting standing as a matter of right.

14 >> JUDGE GIBSON: In the event, that, you
15 know, you don't get where you want to be with BIA?

16 >> MS. HOUCK: In the event that we don't
17 get there, we've also requested discretionary
18 standing and given the decision on the potential
19 appeals and the litigation that could follow could
20 take months or potentially at least more than a year
21 while this proceeding is moving very quickly.

22 And even though there is case law regarding
23 internal governmental affairs issues, there is also
24 case law looking at the Bureau having to recognize
25 some governmental entity for government-to-government

1 purposes when the tribe's dealing directly with a
2 federal agency.

3 For right now, the Bureau of Indian Affairs
4 has identified five people as who they are
5 recognizing as the Tribal Council. And regardless of
6 what happens in those appeals, if one of those
7 entities isn't allowed to participate in this
8 proceeding, they're not going to be able to make up
9 that time or be able to come back and correct
10 whatever errors or information is omitted here in
11 these proceedings to represent their members.

12 And TIM is indicating that as the Tribal
13 Council recognized by the Bureau, that they're
14 representing all of the members of the tribe.

15 So at this point, they do believe that
16 members of TIM are going to be directly impacted and
17 if the BIA is looking to them to make decisions on
18 behalf of the tribe, that would include all members.

19 We are not opposed to discretionary
20 standing for TOP. I, will put that on the record.
21 We think that the more information that this Board
22 has, particularly given the lack of information in
23 DOE's documents, the more informed the Board is going
24 to be as to the actual substantial and adverse
25 impacts that the tribe is likely to suffer in this

1 matter.

2 And those substantial and adverse impacts
3 that may be suffered by the tribe are not just
4 hypothetical or theoretical based on the
5 certification of the affected Indian tribe's data.
6 As the Secretary of Interior has basically certified,
7 that those impacts could occur and they haven't even
8 been analyzed sufficiently.

9 So the tribe does need to be represented in
10 these proceedings, and because of the unique
11 circumstances in this case and these outstanding
12 appeals and the Bureau's current position on this
13 matter, it would seem appropriate that the Board
14 would allow discretionary standing at a minimum to
15 the entities that have a legitimate right to claim
16 representation to the tribe -- of the tribe.

17 >> JUDGE GIBSON: Okay. Let's turn to your
18 claim for representational standing that you've made.

19 Now, I understand from DOE's answer that
20 they are claiming that you failed to address the
21 criteria for representational standing in your
22 Petition To Intervene by failing to identify a member
23 by name and address, by demonstrating that that
24 member has standing in his or her own right, and
25 showing that the member hasn't authorized

1 intervention on his or her behalf.

2 Do you agree with DOE that those are
3 defects in that pleading or do you wish to dispute
4 that?

5 >> MS. HOUCK: Your Honor, we don't believe
6 that there's a defect in the pleading. As we said
7 before, that the Bureau currently is representing
8 this group for government-to-government purposes, so
9 even if there's not a member that's actually -- the
10 members of the tribe as a whole is who they're acting
11 on behalf of and also in protection of the land base,
12 which includes the trust land as well as the use
13 rights of the tribe to the federal land.

14 If the Department of Interior would like a
15 list of each of the members of the tribes and their
16 address, we could provide that to the Board and to
17 DOE.

18 >> JUDGE GIBSON: I think it's -- yeah,
19 it's the Department of Energy, not the Department of
20 Interior.

21 >> MS. HOUCK: Department of Energy.

22 >> JUDGE GIBSON: That's okay. Hopefully
23 DOI already has that. Let's see. So you'd be glad
24 to provide that additional information to them?

25 >> MS. HOUCK: Yes.

1 >> JUDGE GIBSON: Okay. They may still
2 find that defective but I appreciate your offer and
3 thank you.

4 Now, with respect to organizational
5 standings, DOE argues that your alleged injuries are
6 not the distinct and palpable particular and concrete
7 injuries required to establish standing as a
8 non-affected Indian tribe. And I guess, DOE, could
9 you give us what specifically you find inadequate
10 about the injuries that TIM has alleged?

11 >>MR. ZAFFUTS: Your Honor, we took the
12 pleading at its face and the pleading assumed because
13 it appears -- TIM assumed that it was the only entity
14 that would be petitioning here as the AIT. So at the
15 time that TIM submitted it's petition, it assumed it
16 was the AIT and sought to intervene in this
17 proceeding on its automatic standing basis as the
18 AIT.

19 We don't believe that they pled that they
20 had organizational standings, because, as I said,
21 they assumed they were the AIT. We merely responded
22 to that by saying they haven't demonstrated
23 organizational standing. They don't request
24 representational standing and, therefore, they don't
25 meet discretionary standing.

1 Now, it's reasonable to make those
2 arguments because they assumed they were the AIT.

3 >> JUDGE GIBSON: Yeah, I think they
4 definitely made that assumption but that obviously,
5 you know what happens when you make assumptions.

6 NRC staff: Do you all have a position on
7 whether TIM has established standing,
8 representational or organizational standing here?

9 >> MS. SILVIA: We didn't address it
10 because we didn't think they were requesting it.

11 >> JUDGE GIBSON: Recognizing you didn't.

12 >> MS. SILVIA: Andrea Silva for NRC staff.

13 >> JUDGE GIBSON: Any objection? In the
14 event that TOP turns out to be the one that gets the,
15 you know, the golden ring here from BIA?

16 >> MS. SILVA: We would like to see them
17 demonstrate that they have met the requirements,
18 but --

19 >> JUDGE GIBSON: Which it sounds like
20 they can probably do. They just pled because they
21 assumed they were the AIT.

22 >> MS. SILVA It seems reasonable that they
23 would be able to --

24 >> JUDGE GIBSON: Okay, thank you. Now, if
25 they were to provide this information albeit

1 belatedly, DOE, would that be okay with you or are
2 you still going to object?

3 >>MR. ZAFFUTS: I can't answer that
4 question right now, Your Honor. I have to consult
5 with my client.

6 >> JUDGE GIBSON: How about staff, if they
7 do it belatedly?

8 >> MS. SILVIA: The one thing that I would
9 add that I wasn't aware of until this discussion, if
10 it's true, that none of TIM's members actually live
11 in Death Valley, that might complicate the way that
12 we look at TOP's standing, so it might not exactly be
13 the same.

14 >> JUDGE GIBSON: I'm sorry. Death Valley,
15 can you amplify on that point?

16 >> MS. SILVIA: The tribe traditional
17 homeland in Death Valley.

18 >> JUDGE GIBSON: Right, yeah.

19 >> MS. SILVIA: I thought I heard TOP's
20 counsel state that none of TIM's members resided in
21 Death Valley.

22 >> JUDGE GIBSON: I don't believe he said
23 that. I believe he said TOP's members -- a lot of
24 TOP's members do.

25 I'm not sure he said none of TIM's members

1 do. Right?

2 >> MR. POLAND: Your Honor, I believe that
3 I did say -- when we talk about TIM, again, we have
4 to be careful talking about organizations here.
5 Really what we're talking about as Ms. Houck
6 indicated is tribal councils and disputed tribal
7 councils.

8 So what I was referring to was the people
9 who are on the tribal council that Ms. Houck is
10 representing, those people do not live in the
11 traditional tribal homeland in and around Death
12 Valley.

13 >> JUDGE GIBSON: Okay. Do you want to
14 amplify on that point?

15 >> MS. HOUCK: Yes, Your Honor, I would
16 just like to say that TIM did not intervene on behalf
17 of one or two individuals. It was on behalf of the
18 tribal members as a whole, which the council that
19 they're acting under does also include Mr. Kennedy,
20 who is a part of TOP and is the other side of this
21 dispute, but he is also a member of both councils as
22 well.

23 >> JUDGE GIBSON: Okay. Does that help you
24 understand now and knowing with that additional
25 information, can you say if belatedly they supply you

1 with that information, will you be okay with them
2 getting standing in this case?

3 >> MS. SILVIA: Well, if TIM is not the
4 official representative of the government, then I'm
5 not sure their membership would be the same as their
6 tribal council. So I would still have questions
7 about who their members are.

8 >> JUDGE GIBSON: Fair enough. So you just
9 can't give me an answer.

10 >> MS. SILVIA: Right.

11 >> JUDGE GIBSON: That's okay. We have to
12 get accomplished what we can accomplished today.

13 DOE, are you still need to confer with your
14 client?

15 >>MR. ZAFFUTS: Yes, we would. But in the
16 discussion that has ensued since, I think there is a
17 complication that has arisen. And that is, if I hear
18 TIM and TOP's counsel correctly, we would have two
19 separate groups that if granted discretionary
20 standing, would be representative of the exact same
21 people; and that would be an interesting precedent
22 for the Board to set. And perhaps the Board would
23 want one entity representing those people, one entity
24 representing the tribe.

25 >> JUDGE GIBSON: Yeah, well, I appreciate

1 what you're saying, but, you know, that -- that may
2 be something that would be convenient for us. It
3 might be convenient for you, but it might not be
4 agreeable to them. And so, we basically have to try
5 to find out if there is a way for all of these people
6 to participate in this proceeding or not.

7 And that's what we're about this afternoon.
8 Okay. I think it is clear, however, and I think your
9 point is well taken, that there is no way that we
10 could allow both parties, both of these entities to
11 represent the tribe.

12 That in itself cannot happen. And I don't
13 think either one of them is asking us to do that. I
14 think you realize that we couldn't do that either.

15 >>JUDGE ROSENTHAL: Now this is just my
16 ignorance; are these two entities really operating in
17 cross purposes here?

18 They both were purporting to represent a
19 particular tribe, the interest of that tribe which
20 assertedly are being impacted in some way or would be
21 impacted in some way by the construction and/or
22 operation of this facility?

23 Now, I would think -- I understand that
24 there seems to be a jurisdictional dispute here, but
25 really, are these two organizations at loggerheads

1 with respect to precisely what the interests are of
2 their members, how those interests might be impacted
3 so that -- because I would have thought the
4 possibility that if one of these organizations
5 was allegedly admitted as -- on the basis of
6 representational standing, the other entity got in on
7 the discretionary standing, that there might be a
8 Board requirement two groups operate collegially.

9 And I'm just trying to find out whether
10 this is a Hatfield and McCoy situation where that
11 would not be possible.

12 I mean I would have hoped that there would
13 be some agreement as to how the interests of this
14 group that they're both purporting to represent would
15 be impacted by the -- the operation of this facility.

16 So I would like to get a little
17 clarification from both TIM and TOP as to just how
18 they see their relationship with each other.

19 >> JUDGE GIBSON: Before they answer the
20 question, Judge Rosenthal, I think it's interesting
21 that there's actually a third group, the Native
22 Community Action Council that we haven't gotten to
23 yet, so there is actually three.

24 >> JUDGE ROSENTHAL: Maybe we can put
25 three -- I'm just concerned about that, because it

1 didn't -- offhand, I would think that there would be
2 at bottom, even though there is a jurisdictional
3 battle, that when it came to the merits of this, that
4 they would be on the same track. But perhaps that's
5 not the case.

6 >> MR. POLAND: Your Honor, if I may, Doug
7 Poland for TOP. I think one thing that Ms. Houck and
8 I can probably agree on is that certainly we want to
9 both act in the best interests of the tribe itself,
10 the Timbisha Shoshone Tribe, and we would like those
11 interests to be represented.

12 Your Honor referred to -- Judge Gibson
13 referred to the Hatfield-Mccoy type of situation.
14 And it's clear the dispute goes much deeper and
15 beyond this particular proceeding and has
16 implications for other proceedings as well.

17 We have said in our amended petition, we
18 believe that we are the AIT. We represent the AIT
19 and we should have AIT status. We set out the
20 reasons for that.

21 We have said as a secondary position,
22 however, that if we are not selected to be the AIT,
23 we would request respectfully that the Board rule in
24 a way that does not preclude our group, TOP from
25 participating in these proceedings, whether it's

1 through representational standing or otherwise.

2 So we certainly are looking out for the
3 best interests of the tribe as a whole.

4 >> JUDGE ROSENTHAL: You have a different
5 view as to how the interests of the tribe is best
6 served in this proceeding than is possessed by TIM?

7 >> MR. POLAND: Well, we've raised
8 different contentions, Your Honor. They do not
9 overlap.

10 >> JUDGE GIBSON: Well, let's turn to the
11 Native Community Action Council. Now, I understand
12 NCAC is not claiming to be either an effective Indian
13 tribe, nor is it claiming to represent an affected
14 Indian tribe; is that correct?

15 >> MR. WILLIAMS: Scott Williams. Yes,
16 Your Honor, that's correct.

17 >> JUDGE GIBSON: Okay. Who then are the
18 members of NCAC and who does NCAC purport to
19 represent?

20 >> MR. WILLIAMS: NCAC is a nonprofit
21 corporation chartered under state law to represent
22 western Shoshone and southern Paiute people who are
23 in the words of their articles, members of indigenous
24 communities in the Nevada testing ground area, which
25 includes Yucca Mountain.

1 It does not purport to represent tribes.
2 It represents members of tribes. Its Board of
3 Directors is composed of members of five federally
4 recognized tribes in the area of Yucca Mountain.

5 >> JUDGE GIBSON: And you are arguing both
6 for organizational and representational standing, is
7 that correct?

8 >> MR. WILLIAMS: That's correct. We would
9 have argued discretionary standing if it had been
10 mentioned in the petition, but it was not. I feared
11 that I was blocked from raising that issue.

12 >> JUDGE GIBSON: Okay. Well, we can
13 deal with that issue in a minute. As to
14 organizational standing, let's start with that. What
15 are the organizational injuries that NCAC alleges as
16 a basis for standing?

17 >> MR. WILLIAMS: NCAC has as its mission,
18 the protection of the customs and traditions of the
19 Shoshone and Paiute people. Those customs and
20 traditions are explained to some degree in the
21 affidavits submitted by the three board members.

22 Those customs and traditions describe these
23 two people as nomadic people, historically. They
24 rein over this area historically. They use the
25 water, the game, the vegetation of these areas

1 traditionally.

2 Ceremonies were held throughout this area
3 traditionally. All of those practices go on today,
4 obviously to a considerably lesser degree, but they
5 continue to happen. It is the view of NCAC that the
6 construction of the facility at Yucca Mountain is an
7 irremediable injury; it cannot be fixed. It cannot
8 be mitigated.

9 It is as Calvin Meyers, one of the
10 declarants and one of the Board members would say, is
11 taking another chapter out of the equivalent of their
12 Bible.

13 So the answer to your question, Your Honor,
14 is that organizational standing is present here in
15 that the construction operation program maintenance
16 of the facility forever causes a direct and immediate
17 injury to the interests of the organization, itself,
18 which is the preservation of traditional practices
19 which could no longer occur on Yucca Mountain.

20 >> JUDGE GIBSON: Okay. Now, it just
21 occurred to me, you mentioned Shoshone. I take it
22 that your -- the Shoshone and Paiute people that you
23 are representing are not any of the same as these two
24 party, Shoshones that these two are representing?

25 Is that a fair assessment?

1 >> MR. WILLIAMS: I wish the answer were
2 yes.

3 JUDGE GIBSON: Maybe some overlap?

4 >> MR. WILLIAMS: One of the board members
5 of NCAC is a member of the Timbisha Shoshone Tribe,
6 Pauline Estevez. She submitted a declaration.

7 >>JUDGE GIBSON: Okay.

8 MR. WILLIAMS: But we do not purport to
9 represent the tribe, the Timbisha Shoshone Tribe.

10 >> JUDGE GIBSON: Fair enough. Okay. In
11 its answer, DOE argues that your allegations of
12 injury are too broad and un-particularized to provide
13 a basis for standing.

14 Counsel for DOE, could you tell us what you
15 find deficient about these injuries as they have been
16 alleged?

17 >>MR. POLANSKY: Yes, Your Honor. This is
18 Mr. Polansky. I'd note at the time we filed our
19 answer, I don't believe there were the affidavits of
20 Calvin Meyers or Ms. Estevez attached because they
21 were not provided until the reply. At the time we
22 looked at the Petition, it identified, you know, a
23 longstanding interest in radiological harm, et
24 cetera, to native people, but we believe the
25 longstanding precedent that says that's not enough

1 for organizational standing, and that the allegations
2 of injury, we thought, were just too broad.

3 You know, unspecified Native American
4 communities will quote, "experience adverse health
5 consequences," for example.

6 So, organizational standing, we did not
7 think it was met under the Petition that we saw. And
8 I don't believe representational standing,
9 representational standing --

10 >> JUDGE GIBSON: That you also addressed
11 at -- if you look at pages 22 and 23 --

12 >>MR. POLANSKY: Yes, but there were no
13 affidavits asserting that an individual had standing
14 in their own right which would have supported such
15 representational standing.

16 >> JUDGE GIBSON: Okay. I think we'll take
17 a 15-minute break here at this point and then we will
18 go back on and conclude. We probably will run all
19 the way to 5:00 today. Thank you.

20 [Whereupon, a recess was taken]

21

22 >> JUDGE GIBSON: Okay. One thing I need
23 to clear up for the record, with respect to NCAC, NRC
24 staff, do you have a view about their participation
25 or their standing in this case?

1 >> MS. SILVIA: Andrea Silva, NRC staff.
2 We believe in their initial petition, they did not
3 demonstrate standing and that the reply went beyond
4 the permissible scope of a reply by raising new
5 arguments and supplying affidavits for the first
6 time.

7 >> JUDGE GIBSON: Okay. I believe Judge
8 Rosenthal --

9 >> JUDGE ROSENTHAL: It's one thing that
10 seems quite apparent here and that is that the
11 ultimate determination as to which of you two groups,
12 TIM or TOP is the legitimate representative of the
13 tribe in this proceeding, is not going to be
14 determined before this Board acts on the various
15 petitions before it.

16 So the question, it seems to me is this:
17 Does the seat of the tribe which has itself, clearly
18 standing, remain vacant until such time as a dispute
19 between the two groups is resolved, or will those two
20 groups, no matter what their differences may be,
21 reach some agreement as to who will occupy that chair
22 until such time as the matter is finally resolved?

23 I mean, it seems to me, that if these two
24 warring factions cannot get together, at least to
25 come to some understanding as to what is going to

1 transpire in the interim, there will be simply no
2 representation of the tribe.

3 That seat will as the saying goes, will
4 remain empty, because once again, this Board neither
5 can nor will endeavor to resolve that dispute and
6 it's going to be up to the two groups.

7 I didn't -- I don't think I got a full
8 answer to my question as to just what is the
9 relationship between the two groups, but it seems to
10 me that in the interest of this tribe, you two
11 groups, no matter what your differences might be,
12 should be coming to some understanding as to what
13 will be the arrangement in the interim.

14 And if you can't come to some
15 understanding, again there will be an empty chair and
16 the tribe will not be represented.

17 >> MR. POLAND: Your Honor, Doug Poland for
18 TOP, if I may. I don't think that it necessarily has
19 to be the case that the tribe is not represented and
20 that there is an empty chair. I think there are a
21 variety of options that are open to the Board.

22 Certainly as I said before, we believe we
23 are the AIT. The decision by the BIA -- and I can't
24 stress this strongly enough -- does not necessarily
25 determine who is the rightful representative of the

1 tribe. We have taken the position, we will continue
2 to take the position that that is a matter of tribal
3 sovereignty. Controlling United States Supreme Court
4 authority clearly holds that tribal membership rests
5 with the sovereignty of the tribe.

6 >> JUDGE ROSENTHAL: You have that
7 position. The other group has, I gather, a different
8 position and we're not going to resolve it. This is
9 not within our province. We're not going to make a
10 decision as to that so I think it does come down to a
11 matter of some kind of interim arrangement between
12 the two groups or no representation at all.

13 >> MR. POLAND: Judge, again, if I could,
14 Doug Poland for TOP. One option that would be open
15 to the Board would be to give both parties
16 discretionary standing and say, we'll wait and see
17 what happens later on. That might be one way to do
18 it.

19 >> JUDGE GIBSON: Let me just hasten to
20 add, even if the Board were to reach some sort of
21 determination that you all were entitled to either
22 standing as of right, or discretionary standing, the
23 fact remains that, you know, in a proceeding of this
24 complexity, we would be doing everything we could to
25 try to ensure that groups with similar interests

1 would be working together.

2 So I -- you know, it certainly behooves
3 both of you all to try to find some accommodation so
4 that you can make it easy not just for this Board,
5 but for all these parties who are all willing, I
6 think you heard it, they are unanimous in their
7 acquiescence in letting the Timbisha Shoshone Tribe
8 have a seat at the table.

9 But we can't make that decision and so
10 whatever happens, you all are going to have to find
11 some way to work together, okay. Yeah?

12 >> MS. HOUCK: Your Honor, just to respond
13 in -- I know that Judge Rosenthal has made the
14 statement, and we agree that you are not going to
15 make this decision. But just on two points:

16 One, we are -- we would request that the
17 Board grant possibly five days to allow us to confer
18 with TOP and see if there is any way that we can come
19 up with some kind of an arrangement where both
20 entities claiming to be the Tribal Council can work
21 something out to make sure the substantive issues on
22 behalf of the tribe are addressed in a way that is
23 going to represent the tribe's interests and that the
24 governmental entity does have a seat and a say in
25 this proceeding.

1 Again, TIM does believe that the Bureau of
2 Indian Affairs' determination on who they're going to
3 interact with for government-to-government purposes,
4 particularly in regards to proceedings involving
5 other federal agencies and the affected status
6 granted, is important and does have to be considered,
7 particularly since 10 CFR 60.2 indicates that the
8 Secretary of the Interior has to determine that the
9 entity that petitioned was the appropriate
10 governmental entity.

11 So it is the the Department of Interior,
12 the Federal Government's determination as to who the
13 affected tribe is that does have some importance
14 here.

15 We do want the substantive issues
16 addressed, though, despite the ongoing appeals and
17 the tribal dispute. And TIM is more than willing to
18 sit down with TOP and see if there is a way that both
19 entities can assure that there is representation of
20 the tribe and all of its members, because all of the
21 tribe's members are impacted by this proposed
22 project.

23 The land base encompasses much more than
24 the trust lands in Death Valley and the impacts are
25 far reaching, both from the transportation aspect,

1 the water, and all of the issues that have been
2 raised by both tribe entities represented -- claiming
3 representation to the tribe. And TIM is more than
4 willing to make an attempt to talk to TOP and would
5 ask that we be allowed to submit a supplemental brief
6 that either comes up with a solution of how to
7 address representation of the tribe or what the
8 positions of the party are after those discussions
9 occur.

10 >> JUDGE GIBSON: Okay. And you're
11 suggesting five days?

12 TOP? Five days? Ten days?

13 What do you need?

14 >> MR. POLAND: Until the end of next week
15 would be appreciated.

16 >> JUDGE GIBSON: Yeah, okay. Let me just
17 make sure. Anybody here have any objection to such a
18 solution even though that would be a belated filing?

19 Hearing none, okay. End of next week,
20 okay? Hopefully, we will hear from you the first
21 part of the following week.

22 >> MS. HOUCK: Thank you, Your Honor.

23 >> JUDGE GIBSON: I'd like now to turn to
24 the contentions. Specifically, both NCAC and TOP
25 have raised some claims related to land ownership and

1 water rights and unique cultural impacts of this
2 possible repository on the Timbisha Shoshone peoples.
3 And I'd like to start with TOP in that regard.

4 The Board has yet to rule on your motion
5 to file for leave on an amended petition, and we'll
6 get to that in a minute, but for now, I'd like to
7 focus on the contentions that have been raised in
8 both the original petition and the amended petition.

9 Let's start with the original Petition to
10 Intervene. You've raised three contentions, and
11 although you've failed to characterize them as
12 safety, environmental, or miscellaneous, NRC staff
13 was kind enough to characterize them for you, and I
14 think we'll just go with those characterizations for
15 purposes of our discussion here.

16 And I want to refer to your first
17 contention as Miscellaneous Contention 1 and
18 Miscellaneous Contention 2 and your third contention
19 is NEPA Contention 1. Fair enough?

20 >> MR. POLAND: That's fair, Your Honor.

21 >> JUDGE GIBSON: Thank you.

22 >> MR. POLAND: Although I might be able to
23 shortcut this a little because we have withdrawn two
24 of those contentions.

25 >> JUDGE GIBSON: Okay. That was going to

1 be my first question, you have withdrawn the first
2 two contentions?

3 >> MR. POLAND: Well, we have withdrawn the
4 contentions, the safety contention and the
5 miscellaneous contention. The NEPA contention has
6 been modified in our amended petition.

7 >> JUDGE GIBSON: Which we'll get to in a
8 minute. Okay, so all we're dealing with is the NEPA
9 contention from TOP?

10 >> MR. POLAND: That's correct, Your Honor.

11 >> JUDGE GIBSON: Okay. Now, in the
12 original petition, it's alleged that DOE's
13 environmental impact statements are inadequate
14 because they failed to identify postclosure
15 biological impacts specific to members of the tribe
16 who have a different diet and lifestyle than the
17 general population. That was what was in your
18 original petition, correct?

19 >> MR. POLAND: That was in the original
20 petition, Your Honor.

21 >> JUDGE GIBSON: Okay. Now, both DOE and
22 the NRC staff have objected to that, and they've
23 argued that you failed to explicitly address the
24 requirements of 10 CFR 51.109 and 2.326, all which
25 apply to NEPA contentions that are filed in this

1 proceeding.

2 Among the requirements is the requirement
3 to file an affidavit with the Petition to Intervene.
4 Now, although I understand you did not file an
5 affidavit with your initial petition, at that time
6 you were not -- TOP was not represented by counsel;
7 is that correct?

8 >> MR. POLAND: That's correct, Your Honor.

9 >> JUDGE GIBSON: And once represented by
10 counsel, was an affidavit submitted?

11 >> MR. POLAND: In support of our -- yes,
12 with our reply it was, correct.

13 >> JUDGE GIBSON: Right, right, but just
14 not with the original one?

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

16 >> JUDGE GIBSON: Okay. I just want to
17 ask, in light of the fact that they had no counsel at
18 the beginning, I want to know if NRC staff and DOE
19 are willing to cut them slack just with respect to
20 they didn't have an affidavit but they didn't have
21 counsel. Once they got counsel, they submitted an
22 affidavit. NRC staff?

23 >> MS. SILVIA: We didn't object to their
24 amended petition.

25 >> JUDGE GIBSON: So you're okay with it?

1 >>MS. SILVIA: Yes.

2 >>JUDGE GIBSON: DOE?

3 >>MR. POLANSKY: This is Mr. Polansky. On
4 that sole basis, yes.

5 >> JUDGE GIBSON: Just on that sole basis,
6 thank you. Appreciate that.

7 >>MR. POLANSKY: Yes.

8 >> JUDGE GIBSON: Now, in addition, they
9 have also asserted with respect to your initial
10 petition that a study regarding radiation exposure on
11 Native Americans from nuclear weapons testing does
12 not speak to the potential impacts from the Yucca
13 Mountain Repository and so it does not constitute
14 adequate support. Do you disagree with what they
15 have said in that regard?

16 >> MR. POLAND: Your Honor, the contention
17 that we're pressing at this point really doesn't, it
18 doesn't rely on human health effects.

19 >> JUDGE GIBSON: Okay.

20 >> MR. POLAND: It is solely a cultural and
21 other tribal interest -- heritage interest impact
22 contention.

23 >> JUDGE GIBSON: Okay. So is it fair to
24 say, then, that we can just drop in the grace this
25 argument that you originally made about the potential

1 impact, the nuclear weapons testing?

2 >> MR. POLAND: Yes, Your Honor.

3 >> JUDGE GIBSON: Okay, great. Okay.

4 Thank you. Now, with respect to the -- what is
5 it -- what is it that remains that you are asserting?

6 >> MR. POLAND: Your Honor, the nexus
7 between the NEPA contention that was raised in the
8 original petition and the amended petition is the
9 contamination of the springs and waters in the Death
10 Valley area in the tribal homelands.

11 In the original petition, it was framed --
12 the original NEPA contention, it was framed really
13 more as a human health risk issue, and we are not
14 framing it that way now. It's a cultural impact
15 issue is how we frame that contention.

16 >> JUDGE GIBSON: Okay. And is it is
17 essentially a failure to consult or is it a
18 destruction of cultural -- of culture procedurally?

19 >> MR. POLAND: It's the latter, Your
20 Honor. We did have a failure to consult contention
21 that we did put into our amended petition.

22 >> JUDGE GIBSON: Right.

23 >> MR. POLAND: But we did -- we did take a
24 look at what the NRC staff said in their answer.

25 >> JUDGE GIBSON: Right.

1 >> MR. POLAND: And, at that point after
2 reading that, we decided that we would withdraw the
3 failure to consult contention, which was a
4 miscellaneous one.

5 >> JUDGE GIBSON: Okay. So we don't have
6 nuclear weapons testing; we've gotten rid of that.
7 And we don't have failure to consult. But what we
8 have left is what?

9 >> MR. POLAND: We have a single NEPA
10 contention, Your Honor. And the contention is that
11 both the FEIS and the SCIS that DOE have prepared and
12 submitted concede that contaminants from the geologic
13 repository could make their way to the Death Valley
14 and discharge in the springs and to other surrounding
15 waters in the area.

16 Those are -- the purity of those waters is
17 critical to the Timbisha Shoshone culture to
18 religious practices and would have a devastating
19 effect on the culture and their religious practices,
20 and that that is not considered in the EISs.

21 >> JUDGE GIBSON: Okay. NRC staff, do you
22 all have any problem with that as an admissible
23 contention?

24 >> MS. SILVIA: Andrea Silvia, NRC staff.
25 No, we don't.

1 >> JUDGE GIBSON: Okay. DOE?

2 >>MR. POLANSKY: Yes, Your Honor. In the
3 answer we filed on Friday, we did say that it was not
4 admissible.

5 >> JUDGE GIBSON: Okay. As it has been
6 narrowed by TOP?

7 >>MR. POLANSKY: Yes.

8 >> JUDGE GIBSON: You do understand that
9 that's all they're asserting now?

10 >>MR. POLANSKY: Yes.

11 >> JUDGE GIBSON: The effluent reaches the
12 springs in Death Valley, affects the purity of that
13 water, and that, in turn, impairs their ability to
14 practice whatever culture's associated with those
15 waters?

16 >>MR. POLANSKY: It's not a safety
17 contention, Your Honor. It's a NEPA contention
18 attacking the adequacy of whether -- of the
19 discussion of those unique impacts, whether they were
20 covered by the EIS. And our view of the affidavits
21 that were provided and the information provided we
22 don't think supports an admissible contention for the
23 reasons we've stated in that answer filed on Friday.

24 >> JUDGE GIBSON: Okay. Just for purposes
25 of the record, was that issue addressed in any EIS

1 that is DOE prepared; the specific question about the
2 culture related to the purity of the water that might
3 be affected by the effluent from Yucca to the Death
4 Valley Springs?

5 >>MR. POLANSKY: This is Mr. Polansky.
6 I'll take a moment to confirm with my client after I
7 give the answer, just to make sure you are getting
8 the right information.

9 >> JUDGE GIBSON: That's always a dangerous
10 proposition, Mr. Polansky. Having been in private
11 practice for the last 21 years, I don't know if I
12 would say what I think the answer is without
13 consulting with my client, but, you know, it's your
14 neck.

15 >>MR. POLANSKY: We have discussed this
16 issue, and my recollection is that the SCIS
17 references itself and then references back to the
18 final Environmental Impact Statement from 2002 where
19 the impacts of contaminated water on cultural water
20 resources is discussed.

21 I do not believe the SCIS covers the very
22 specific issue of whether water at the Death Valley
23 Springs would have been, but the general discussion
24 of cultural impacts from contaminated water are
25 discussed.

1 >> JUDGE GIBSON: Fair enough. I think
2 that's a fine answer. Okay.

3 >> MR. POLAND: May I respond to that, Your
4 Honor?

5 >> JUDGE GIBSON: Yeah, real briefly.

6 >> MR. POLAND: Very briefly. And I made
7 this point yesterday to CAB 3 which was sitting;
8 there is a single mention, and it's the same in the
9 FEIS, and it was the same six years later in the
10 SCIS. There is no mention of the Timbisha Shoshone
11 specificall in this injury. All the DOE says, and
12 this is what they see as the hard look. They say
13 "equally important are water resources and minerals."
14 Okay. That is not an adequate analysis.

15 >> JUDGE GIBSON: Fair enough. And I think

16 >>MR. POLANSKY: Your Honor, I wasn't given
17 an opportunity to respond yesterday, and, if
18 Mr. Poland is raising it again, I'd just like to
19 respond with three citations.

20 >> JUDGE GIBSON: Go ahead.

21 >>MR. POLANSKY: The repository SCIS does
22 reference back to the FEIS, and in that FEIS there
23 are three separate sections which discuss affected
24 environment, analysis of culture resources, and
25 American Indian perspectives on environmental

1 justice. Those sections are Section 3.1.6.2, Section
2 4.1.5, and Section 4.1.13.4 respectively. We're not
3 relying on a single paragraph.

4 >> JUDGE GIBSON: I appreciate your
5 clarification in the record. Rather than responding
6 to him, I would just ask this: I think we have the
7 information we need to evaluate the admissibility of
8 the contention. That's the purpose we're here.
9 We're not interested in the merits at this point,
10 okay?

11 >> MR. POLAND: Thank you, Your Honor.

12 >> JUDGE GIBSON: All right. All right.
13 Let's move to the Native Community Action Council.
14 Now, as I understand it, at least initially you all
15 have raised three contentions. Do you still have
16 three live contentions?

17 >> MR. WILLIAMS: Yes, sir.

18 >> JUDGE GIBSON: Again, as with TOP, you
19 didn't actually characterize them in terms of safety
20 and environmental miscellaneous, but the staff was
21 kind enough to do that for you, and, for purposes of
22 this discussion, I'd like to stick with the staff's
23 characterization. We'll refer to your first two
24 contentions as miscellaneous contentions 1 and 2 and
25 identify the third contention as NEPA contention 1.

1 Fair enough?

2 >> MR. WILLIAMS: Yes, thank you.

3 >> JUDGE GIBSON: Okay. Let's start with
4 miscellaneous contention 1. In this contention,
5 NCAC has alleged that Yucca Mountain is owned by the
6 Western Shoshone Nation under tribal law and custom
7 and under the 1863 treaty of Ruby Valley. Is that
8 correct?

9 >> MR. WILLIAMS: Yes, sir.

10 >> JUDGE GIBSON: Okay. Now, you're
11 contending that DOE has failed to meet the
12 requirement that the repository be located on lands
13 that acquired under the jurisdiction control of DOE
14 were permanently withdrawn and reserved for use and
15 that the lands have to be free and clear of any
16 encumbrances. And, essentially, you're saying that
17 this is -- at a minimum an encumbrance on that land
18 that would prevent Yucca Mountain from being located
19 there. Is that a fair assessment?

20 >> MR. WILLIAMS: It is.

21 >> JUDGE GIBSON: First, I'd like to turn
22 to the treaty of Ruby Valley. DOE and NRC staff
23 were, I think, highly critical would probably be a
24 pretty accurate assessment of your reliance on this
25 treaty, and they have maintained that federal law

1 precludes the Western Shoshone Nation from asserting
2 a claim of land ownership under the treaty of Ruby
3 Valley. And they have cited the case of United
4 States Vs. Dann which they claim found that this
5 claim of Aboriginal Title to lands in the western
6 United States had been extinguished. And that there
7 were a number of lower federal court decisions in
8 recent years that have upheld that result.

9 And DOE also noted that there was a federal
10 law passed in 2004 affirming that Western Shoshone
11 land claims to lands in the western United States
12 under Aboriginal Title have been originally subsumed.

13 Now, how do you respond to those claims?
14 And I would just ask you to try to be short because
15 we do have to be out of here by 5:00 and I've got a
16 lot more ground to cover.

17 >> MR. WILLIAMS: Two points, Your Honor.
18 Scott Williams for NCAC. First, our focus is on
19 encumbrance. The Western Shoshone people, the
20 traditional Western Shoshone people, do not concede
21 that, irrespective of how many court decisions there
22 are, that this land was rightfully taken by others.
23 We do not need to resolve that.

24 We're not asking you, the Board, to become
25 involved in that.

1 We are asking you to decide whether or not
2 the existence of the dispute constitutes an
3 encumbrance, and there are two ways in which we think
4 it does.

5 First, as I mentioned earlier, the land is
6 used by Indian people today. Irrespective of who
7 holds record title, it is used by Indian people for
8 Indian purposes.

9 Secondly, an international tribunal has
10 determined that the United States violated the human
11 rights of the Western Shoshone people in taking the
12 land and declaring it to be the property of the
13 United States.

14 >> JUDGE GIBSON: Are you referring to the
15 Inter-American Commission on Human Rights?

16 >> MR. WILLIAMS: Yes, sir.

17 >> JUDGE GIBSON: Okay.

18 >> MR. WILLIAMS: This strikes us as the
19 kind of contention that was discussed yesterday in
20 that it is a legal contention. Either those two
21 factors constitute an encumbrance within the meaning
22 of the regulation or they do not. It is a matter
23 which could be resolved within the meaning of the
24 Board's regulations relatively simply.

25 >> JUDGE GIBSON: Okay. Well, you know,

1 starting with Worcester v. Georgia and going on to
2 Lone Wolf v. Hitchcock, I know that there is a long
3 line of cases establishing the plenary power of
4 Congress over tribes. Whether that's, you know, a
5 good thing or not, it is the law of the United
6 States. Congress can abrogate these treaties.

7 You know, what's happened, you know, may be
8 very unfortunate to native people. I'm not here to
9 address that issue, but I think the law is clear,
10 and, as you have seen, our jurisdiction here is very
11 limited. We are not about to go questioning the
12 decisions of the U.S. Supreme Court.

13 Regardless of what the Inter-American
14 Commission on Human Rights may say, that's about as
15 far as we can go. And you may have to go take this
16 contention to another tribunal, but I don't -- I just
17 can tell you, I doubt that you are going to be
18 getting very far with it here.

19 I doubt you're surprised.

20 >> MR. WILLIAMS: No comment, Your Honor.

21 >> JUDGE GIBSON: Okay. Now, I would like
22 to address the -- your Miscellaneous Contention 2,
23 and that is that DOE fails to meet the water rights
24 requirements of 10 CFR 63.121 because the Western
25 Shoshone Nation maintains a reserved property

1 interest in water rights under the Treaty of Ruby
2 Valley.

3 Now, separate and apart from what
4 individual peoples may have who may be affiliated
5 with this tribe or with these claims; is there -- is
6 the basis for the claim the Treaty of Ruby Valley or
7 the Aboriginal use of these peoples with respect to
8 these water rights?

9 Because, if it is, I think the answer to
10 this contention is going to be the same as it was to
11 the first contention. I'm sorry to tell you that,
12 but I think it will be.

13 >> MR. WILLIAMS: I don't think I can
14 answer the question with a yes or no.

15 >> JUDGE GIBSON: Okay.

16 >> MR. WILLIAMS: Can I take a minute to to
17 explain?

18 >> JUDGE GIBSON: You can. Just don't take
19 too long.

20 >> MR. WILLIAMS: Got it. The United
21 States chose to put this facility at Yucca Mountain.
22 Yucca Mountain is in the middle of Indian country.
23 The United States, therefore, has to deal, in my
24 opinion, with the realities of working with the
25 people whose land this was.

1 One of those realities is the treaty.
2 Another of those realities is the United States'
3 interpretation of federal Indian law with respect to
4 those treaties. And one of those principles is that
5 there is a reserved water right which arises from a
6 treaty which acknowledges Aboriginal ways of life as
7 does the Ruby Valley Treaty. So it took me a few
8 sentences, but I think I got to the answer, which is,
9 yes, it does depend on the treaty.

10 And then the second point is that the
11 federal courts have consistently since that time,
12 since Winans, they have consistently said that the
13 destruction of -- by the United States, by Congress,
14 of the tribe's land interest does not destroy
15 reserved hunting, fishing, gathering, water rights.
16 And that's the Adair case that we also cited.

17 So our position, Your Honor, is that these
18 water rights did not disappear simply because
19 Congress acted.

20 >> JUDGE GIBSON: Okay, fair enough. I
21 understand your position. And we will get to water
22 rights, you know, their context, in a minute. But I
23 just -- you know, we will evaluate the contention,
24 but I just want to give you fair warning that I doubt
25 that anything that is based on the Treaty of Ruby

1 Valley by virtue of Worcester v. Georgia and Lone
2 Wolf v. Hitchcock is going to enable us to go
3 anywhere, particularly in light of the U.S. Supreme
4 Court on this specific topic.

5 >> MR. WILLIAMS: Understood. One other
6 point, though, please, Your Honor.

7 >> JUDGE GIBSON: Yes.

8 >> MR. WILLIAMS: And that is, not
9 withstanding the NRC staff objections, there was in
10 the original petition, and we emphasized it in our
11 reply, a statement about the use of the water and the
12 importance of that water. This is not limited to the
13 springs in Death Valley as with the tribe. This is
14 general within the area used by Shoshone and Piute
15 people that part of the contention, in our view, does
16 not depend on the Treaty of Ruby Valley.

17 >> JUDGE GIBSON: I appreciate your
18 clarification and that may well be very more than in
19 the evaluating contention. Thank you.

20 DOE claims that it's been pursuing water
21 applications from the State of Nevada and, although
22 those applications have been denied, it's appealed
23 those decisions, as I understand it, by the State of
24 Nevada to the U.S. District Court for the District of
25 Nevada.

1 I'm curious if you believe that the fact
2 that there is a dispute over these water rights
3 matters before federal district court in anyway
4 affects what we can do here as a Board.

5 Obviously, there is this water rights issue
6 that several people have been asserting. Do you all
7 have a view?

8 >>MR. POLANSKY: This is Mr. Polansky.
9 Your Honor, the water rights issue, and I think there
10 was perhaps some discussion yesterday, the view that
11 DOE views this as any other permit or environmental
12 requirement, the decision maker for whether DOE gets
13 water is a different decision maker than this Board.

14 And so it is not anything that's within the
15 scope of this proceeding. I can't speak to timing or
16 anything else as to when this might be resolved.

17 >> JUDGE GIBSON: Do you think that that
18 affects in any way our ability to consider either
19 water quality issues or water quantity issues with
20 respect to either the tribes or individual land
21 owners in this proceeding?

22 >>MR. POLANSKY: No, Your Honor.

23 >> JUDGE GIBSON: To the extent that they
24 have raised contentions that Yucca Mountain will
25 deplete their water quantity or adversely affect

1 their water quality?

2 >>MR. POLANSKY: No, Your Honor, not the
3 way these contentions are pled. We didn't read.

4 >> JUDGE GIBSON: Okay. Thank you.

5 Now, with respect to your contention, TOP
6 and possibly the NCAC contention to the extent that
7 it is not dependent on the Treaty of Ruby Valley or
8 these aboriginal land claims, I did not see any
9 briefing of the Winters doctrine by either of you.
10 And I'm wondering if you think that that has any
11 bearing on how we should proceed in this matter and
12 what DOE is proposing to do.

13 >> MR. POLAND: Your Honor, if I could,
14 Doug Poland for TOP.

15 >> JUDGE GIBSON: Yes.

16 >> MR. POLAND: We do mention this in our
17 amended petition. We believe that --

18 >> JUDGE GIBSON: I guess I didn't catch
19 that. I'm sorry.

20 >> MR. POLAND: It's in our amended
21 petition. It's at pages 23 to 24. We do cite to the
22 Winters case, but it really relates to our NEPA
23 contention. And it has to do with the contamination.
24 We believe that they're --

25 >> JUDGE GIBSON: Right.

1 >> MR. POLAND: So that's cited in there.
2 I think the argument's set forth.

3 >> MR. WILLIAMS: In my world -- Scott
4 Williams, Your Honor, for NCAC. In my world, there
5 is a fine distinction between Winters rights and
6 Winans rights.

7 >> JUDGE GIBSON: Could you take a minute
8 and explain to us the difference between Winters
9 rights and Winans rights? I thought I understood the
10 Winters doctrine, but I don't know if I -- you're
11 making a distinction that I'm not familiar with in
12 Indian law.

13 >> MR. WILLIAMS: I'm impressed that you
14 asked. The Winters doctrine stands for the principle
15 that, when the United States sets aside a
16 reservation, there is an implied reservation of water
17 sufficient to carry out the purposes of that
18 reservation.

19 The reservation might be an Indian
20 reservation, it might be a military reservation, it
21 might be a national park. If they set aside Yosemite
22 National Park as a national park, there is an implied
23 reservation of sufficient water in the Red River to
24 maintain the park in the state in which Congress
25 desires.

1 The Winan rights, which I talked about
2 earlier, stand for the proposition that, based on a
3 treaty which establishes hunting, fishing, or
4 gathering rights, or reserves to the tribe those
5 rights, that reservation of rights is maintained
6 irrespective of what might happen later with the land
7 itself.

8 >> JUDGE GIBSON: Fair enough. Now, let me
9 just to make sure I understand that. The Winters
10 rights to water are a function of a reservation,
11 correct, and that you essentially have to be able to
12 maintain the tribal customs and practices on your
13 reservation that you did before and so people cannot
14 deprive the tribe of those rights on the reservation?

15 Okay. Now, what you're talking about with
16 respect to Winans rights have to do, if I understand
17 correctly, with some rights that would exist
18 independent of a tribal reservation. And that would
19 be something that would -- individual tribal members
20 or the tribe, itself, probably the tribe, itself,
21 would be entitled to by virtue of the fact that they
22 lived in that area and, you know, were able to
23 continue to carry on their lifestyle. And you
24 mentioned hunting and fishing.

25 Now, if I -- my recollection of that line

1 of cases is that the language of the treaty that
2 creates those rights must be explicit. It -- can you
3 point me to an explicit treaty that accords those
4 rights to the peoples that you are representing here
5 under this Winans doctrine?

6 >> MR. WILLIAMS: Your characterization of
7 the two cases and the differences is accurate, in my
8 view.

9 >> JUDGE GIBSON: Even a broken clock is
10 right twice a day.

11 >> MR. WILLIAMS: I didn't say that, Your
12 Honor. With respect to the specific question, I can
13 point only to language in the Treaty at Ruby Valley
14 which acknowledges that the Shoshone people are
15 nomadic people. I cannot point to language there
16 which specifically reserves to them, fishing,
17 hunting, or gathering rights.

18 >> JUDGE GIBSON: And the treaty of Ruby
19 Valley was abrogated subsequently by Congress,
20 correct, which has plenary power under Worcester v.
21 Georgia and Lone Wolf versus Hitchcock, correct?

22 >> MR. WILLIAMS: There is no question but
23 that Congress has plenary power over Indians.

24 >> JUDGE GIBSON: Fair enough. Well,
25 again, without prejudging anything, I just want to be

1 sure that you to understand that, to the extent
2 you're claiming a contention here based on the Treaty
3 of Ruby Valley may be a hard sell.

4 >> MR. WILLIAMS: Understood. And I would
5 ask in return, Your Honor, that the Board look
6 carefully at the question of essential nature of
7 water to the lifestyle of the native people and how
8 that is included in Miscellaneous Contention No. 2.

9 >> JUDGE GIBSON: Okay. If we could go to
10 your environmental contention.

11 >> MR. WILLIAMS: My request, Your Honor,
12 is that, to use your word, you allow me to ask my
13 designated hitter on NEPA contentions to come in.
14 Rovicianne Leigh can give you more intelligent
15 responses on these issues than I can.

16 >> JUDGE GIBSON: That's fine. Now, if I
17 understand correctly, you are alleging that DOE's
18 environmental impact statements are inadequate
19 because they failed to identify postclosure
20 biological impacts, specific to members of the
21 NCAC who have a different diet and lifestyle than the
22 general population, is that correct?

23 >>MS. LEIGH: That's correct. And if I may
24 expand on that a little bit.

25 >> JUDGE GIBSON: Just a little bit. You

1 don't have much time.

2 >>MS. LEIGH: To our members, the culture
3 impacts are inextricably linked, and so in our reply,
4 and I do know that the original petition was filed
5 without assistance of counsel, we do attempt to
6 clarify that link between the cultural resources and
7 the adverse health impacts alleged in that original
8 petition, so I would just hope that the Board would
9 consider that.

10 >> JUDGE GIBSON: Let me just ask the staff
11 and DOE, recognizing that they had no counsel
12 initially, they did try to clean this up. I'm not
13 asking you to agree to the admission of the
14 contention, but are you all willing to cut them some
15 slack with respect to cleaning this up in their
16 reply? Staff?

17 >> MS. SILVIA: Andrea Silva for NRC staff.
18 Again, we believe that the reply went beyond the
19 scope of the initial contention. Perhaps a little
20 leeway is in order. However, I think it still goes,
21 even if you assume that the health and cultural
22 impacts are integrated, there is still a lot more in
23 the reply. It's not a single issue contention, and I
24 think it's hard to discern the scope of the
25 contention of the reply, even.

1 >> JUDGE GIBSON: Okay. DOE?

2 >>MR. POLANSKY: This is Mr. Polansky. On
3 the sole issue of whether we'll object to the fact
4 that they've attached affidavits to the reply for the
5 first time because they were not represented by
6 counsel, DOE will not object to that.

7 But we do echo NRC staff's concern in that
8 essentially the reply provided a new contention with
9 new bases that we think was impermissible. Thank
10 you.

11 >> JUDGE GIBSON: Okay. Thank you.

12 DOE and the NRC staff allege that your
13 support for this contention is a study regarding
14 radiation exposure on Native Americans from nuclear
15 weapons testing, and that this does not speak to the
16 potential impacts from the Yucca Mountain repository.

17 Do you disagree with what staff and DOE
18 have with their criticism of that study?

19 >> MS. LEIGH: Your Honor, that study goes
20 to the lifestyle differences such as traditional
21 gathering and hunting, traditional diets. People
22 have mentioned, the traditional diet of pinunet
23 (phn)and wild game.

24 Our client does believe that its members
25 would be adversely impacted by potential

1 contamination of those traditional cultural
2 resources, and that NCAC's members are in a unique
3 position because of their traditional cultural
4 practices. So we would disagree with the position
5 that that study does not provide any support for the
6 contention that NCAC's members would suffer
7 disproportionate impacts as a result of their
8 traditional gathering and cultural practices,
9 including ceremonies.

10 >> JUDGE GIBSON: Okay. We have a similar
11 issue here with respect to TOP's question, I think,
12 for you, and that is, you all have alleged a cultural
13 lifestyle -- adverse effect on cultural lifestyle.

14 DOE claims that they studied impacts on
15 different lifestyles. Is your claim essentially
16 that, well, they might have but they didn't address
17 the lifestyles that are involved with -- implicated
18 for the peoples that you all represent?

19 >>MS. LEIGH: I believe the contention of
20 our client is that the Environmental Impact Statement
21 does not take into account the specific and unique
22 cultural lifestyles of NCAC's members and the
23 disproportionate impacts that those members may
24 suffer.

25 >> JUDGE GIBSON: Okay. Fair enough. And

1 I'm sure the DOE thinks they did and that was
2 adequate, but, you know, I jut want to make sure I
3 understand where you're coming from.

4 Okay. I think we've got a couple of
5 pending motions, and, I'm sorry, but I think we need
6 to try to clean this up, because we've got to get
7 this order out by May 11.

8 TOP and TIM both have motions pending
9 before the Board. By my count, there's three of
10 them. TOP has a motion for leave to file an amended
11 petition. TIM has a motion for LSN certification out
12 of time. And TOP has a motion for leave to file an
13 answer to TIM's reply. Now, are there any more of
14 these motions involving the tribes that I've
15 overlooked?

16 >> MR. POLAND: Not from our standpoint,
17 Your Honor.

18 >> JUDGE GIBSON: TIM?

19 >> MS. HOUCK: I don't believe so, Your
20 Honor.

21 >> JUDGE GIBSON: NCAC?

22 >> MR. WILLIAMS: We have filed no motions.

23 >> JUDGE GIBSON: Fantastic. Okay. Let's
24 start with TOP's motion for leave to file an amended
25 petition. NRC staff's filed an answer to this motion

1 stating the Board should entertain the amended
2 petition. I understand Friday, DOE filed an
3 opposition to that; is that correct?

4 >>MR. POLANSKY: This is Mr. Polansky.
5 Yes, that's correct, Your Honor, March 27th.

6 >> JUDGE GIBSON: Thank you. Now, you're
7 asserting that the only way a petitioner can show
8 good cause for an untimely filing is to demonstrate
9 that the new contentions are based on new
10 information, is that correct?

11 >>MR. POLANSKY: This is Mr. Polansky. We
12 do state that one of the criteria that the
13 information be based on new information, not just new
14 documents. And, in this case, we believe, if we read
15 the amended petition correctly, that they are basing
16 their motion on four new declarations from either
17 experts or members; but the information in those
18 declarations we do not believe is new, so that there
19 is no adequate justification or good cause.

20 The information was available for some
21 time, and, therefore, this contention could have been
22 brought some time ago.

23 >> JUDGE GIBSON: Okay. Let me make
24 sure --

25 >>MR. POLANSKY: That's the crux of what

1 our response was.

2 >> JUDGE GIBSON: Fair enough. Were these
3 declarations filed as soon as possible after TOP got
4 counsel?

5 >> MR. POLAND: Absolutely, Your Honor.

6 >> JUDGE GIBSON: But you are not willing
7 to cut them slack insofar as that goes, right?

8 >> MR. POLONSKY: That's correct, Your
9 Honor, because the underlying information has been
10 available for a very long time.

11 >> JUDGE GIBSON: Okay. Now, I understand
12 you guys are okay with TOP's motion for leave?

13 >> MS. SILVIA: This is Andrea Silvia with
14 NRC staff. Yes, we're okay.

15 >> JUDGE GIBSON: Let's go to the next one.
16 I'd like to talk about TIM's motion for LSN
17 certification out of time for good cause. As the
18 parties are aware, any party seeking to file a motion
19 must first make a sincere effort to contact other
20 parties and resolve the issue raised in the motion.

21 DOE is arguing that TIM did not make a
22 sincere attempt and, therefore, the motion to get LSN
23 certification out of time for good cause was not
24 admitted. Is that correct, DOE?

25 >>MR. POLANSKY: This is Mr. Polansky. I'm

1 sorry, Your Honor, if I could have just a moment.

2 >> JUDGE GIBSON: Please.

3 >>MR. POLANSKY: Your Honor, if you could
4 indulge me in just repeating the question.

5 >> JUDGE GIBSON: Sure. My understanding
6 is that you're arguing that TIM did not make a
7 sincere attempt to consult under 10 CFR 2.232(b) and,
8 therefore, their motion to get LSN certification out
9 of time should be denied?

10 >>MR. POLANSKY: That is one of the many
11 arguments we made, yes, Your Honor.

12 >> JUDGE GIBSON: Okay. Now, TIM indicated
13 that it would -- it notified you in December of 2008
14 that it was going to be filing this motion. It sent
15 an e-mail to all the parties on May 10. It didn't
16 receive any objection. And those are the
17 representations they've made.

18 Are you disputing the representations that
19 counsel for TIM made in that regard?

20 >>MR. POLANSKY: I don't believe so, but
21 merely making DOE aware of TIM's intent to file is
22 not an effort to resolve our narrow issues under
23 323(b). DOE and TIM had discussions, but as
24 explained in our opposition, they weren't substantive
25 discussions but were efforts by DOE to get TIM to

1 discuss substance which we believe they would not do
2 with us.

3 And they did provide us with the procedures
4 that they were using or thought to use. But that
5 doesn't really have any meaning since they refused to
6 discuss any questions we had about them.

7 >> JUDGE GIBSON: Okay. I think I
8 understand your position. Can you envision any
9 scenario under which a light LSN certification would
10 not be a complete bar to intervention?

11 >>MR. POLANSKY: I'm sorry, would not be a
12 complete bar to --

13 >> JUDGE GIBSON: Correct.

14 >>MR. POLANSKY: I believe it's DOE's
15 position that, if you -- it's not a complete bar to
16 intervention. It's a bar to intervention I believe
17 at this time. A party can come into compliance at a
18 later time and they find the proceeding as it is, but
19 the criteria that are set out, which are proscriptive
20 and which we believe we have applied to every party
21 equally, we believe cannot be read to allow a party
22 to intervene at this stage if they have not
23 adequately met their obligations under LSN.

24 >> JUDGE GIBSON: I'd like to know from
25 TIM's counsel, as of the day that you filed your

1 Petition To Intervene, how many of your documents
2 were missing from the LSN system, if any?

3 >> MS. HOUCK: None, Your Honor. All of
4 the documents were either on the LSN by other parties
5 or fell within an exception, I believe. Or --

6 >> JUDGE GIBSON: Okay. As of
7 March 11th when you filed your motion for late
8 certification, how many documents, if any, were still
9 missing from the LSN?

10 >> MS. HOUCK: Just to clarify my answer
11 earlier, all of the documents were on our LSN before
12 we filed for intervention. We just had not filed our
13 certification.

14 >> JUDGE GIBSON: Right, I understand. I'm
15 not asking for your certification. I'm asking for
16 the documents. How many of them were on there?

17 Were any missing?

18 >> MS. HOUCK: No.

19 >> JUDGE GIBSON: Were any missing on March
20 11th?

21 >> MS. HOUCK: No, Your Honor.

22 >> JUDGE GIBSON: DOE, can you point to any
23 missing documents that TIM has not mentioned?

24 >>MR. POLANSKY: We acknowledge that TIM
25 posted documents on the LSN for the first time one

1 week before it filed this petition. But the -- I
2 believe our reading of the LSN requirements is that
3 you cannot simply do that.

4 There are all -- a whole host of other
5 requirements that need to be met, including initial
6 certification within 90 days of when DOE made its
7 certification, monthly supplemental productions and
8 certifications, monthly certifications in accordance
9 with the second case management order of the
10 PAPO Board, et cetera.

11 >> JUDGE GIBSON: And what sort of
12 prejudice has DOE sustained as a result of the fact
13 that the LSN certification occurred lately but no
14 documents were missing?

15 Any prejudice?

16 Can you tell us about any prejudice you've
17 sustained?

18 >> MR. POLONSKY: No, Your Honor, we cannot
19 identify any prejudice.

20 >> JUDGE GIBSON: All right.

21 >>MR. POLANSKY: But we believe that the
22 Commission has already spoken to the issue of strict
23 compliance. You know we didn't just fabricate this
24 requirement. The Commission had an opportunity in
25 its September 8th, 2008 decision, CLI 822, and it

1 said, "we remind potential parties that we expect
2 full compliance with our LSN requirements and we
3 expect all participants to make a good faith effort
4 to have made available all documentary materials by
5 the dates specified for initial compliance in Section
6 2.1003(a)."

7 >> JUDGE ROSENTHAL: There is no doubt,
8 Mr. Polansky that that was a directive. But I think
9 the question is whether in circumstances where as you
10 can see, there was no prejudice to DOE. This Board
11 has the latitude to, in this instance, grant the
12 motion, and in fact waive the failure to comply.

13 I mean, it does seem to me that this would
14 not in this instance set such a dreadful precedent
15 that parties would decide that as a result of the
16 granting of a motion that they could now just
17 willy-nilly disregard the LSN requirement. I mean, I
18 think everybody understands there is supposed to be
19 compliance. In this instance, there was not, but no
20 prejudice. And I don't see -- and I don't see,
21 frankly, the basis for your objection.

22 >>MR. POLANSKY: I agree with you, Judge
23 Rosenthal, that under most circumstances, the Board
24 has great discretionary powers. But if there is a
25 Commission decision, we believe that that's binding

1 and there is additional language from that CLI-08-22
2 which says, quote, "We expect the presiding officer
3 to impose appropriate sanctions for any failure to
4 fully comply with our LSN requirements." It did not
5 create an exception. We read the same document you
6 read and that is why we responded the way we did. We
7 assumed the Board would act the same way.

8 >> JUDGE GIBSON: And you did, you did
9 respond that way and we have that in the record. We
10 also might let you know that sometimes, you know, you
11 need to know when to hold 'em and sometimes when to
12 fold 'em.

13 Let me finally end with TOP's Motion for
14 Leave to file an Answer to TIM's reply. I just want
15 to know if either DOE or the NRC staff has a dog in
16 this fight?

17 You all aren't going to object to that; are
18 you?

19 >> MS. SILVIA: Andrea Silvia from NRC
20 staff. I believe -- are you referring to TOP's
21 motion to respond to -- it was just the portions
22 about the leadership dispute, in which case we don't
23 have an objection to that.

24 >> MS. HOUCK: Your Honor.

25 >> JUDGE GIBSON: Yes.

1 >> MS. HOUCK: Based on our earlier
2 discussions and the supplemental filing, that this
3 Board granted leave for parties to file. I would say
4 that TOP's request to file a response to our reply
5 would not be necessary at this point, because the
6 only issues I believe they indicated they wanted to
7 address were related to that inner-governmental
8 dispute. And, hopefully, both TIM and TOP's filing
9 at the end of next week will fully address those
10 issues as to where we stand at this point.

11 >> JUDGE GIBSON: TOP?

12 >> MR. POLAND: I saw you looking in my
13 direction, Your Honor.

14 >> JUDGE GIBSON: I was hoping you were
15 going to say that's great.

16 >> MR. POLAND: Well --

17 >> JUDGE GIBSON: I figured that's what you
18 would say. Go ahead.

19 >> MR. POLAND: Will you give me time to
20 consider whether we will withdraw the motion?

21 It did speak solely to those representation
22 type issues.

23 >> JUDGE GIBSON: We certainly encourage
24 you to work this out. Okay.

25 >> MR. POLAND: We understand that, Your

1 Honor.

2 >> JUDGE GIBSON: Now, I promised you all
3 that you all would have time to tell us what you
4 didn't cover. I have to believe that we have covered
5 everything that we planned to cover today and nobody
6 has anything else to say. But I have to, you know,
7 follow with Judge Ryerson's effort yesterday
8 afternoon. So let me just go around the room. We
9 started with NCR staff yesterday. So let me start
10 with NCAC today. Is there anything NCAC that we have
11 to -- that you need to say that we didn't cover?

12 >> MR. WILLIAMS: Two sentences; Scott
13 Williams.

14 >> JUDGE GIBSON: Yes.

15 >> MR. WILLIAMS: Earlier today DOE
16 asserted that it required -- it wished to benefit
17 from fundamental fairness in this proceeding. That
18 goes both ways. There are a long list of opinions of
19 the Commission requiring fundamental fairness in
20 these proceedings and we ask for the same benefits.
21 Thank you.

22 >> JUDGE GIBSON: Okay, great. Okay.
23 Clark County.

24 >> MR. ROBBINS: Nothing further, thank
25 you.

1 >> JUDGE GIBSON: TIM.

2 >> MS. HOUCK: Yes, Your Honor. I'll try
3 not to take too much time, but I just want to state
4 that these issues are critically important to the
5 entire tribe and that TIM's representation is of the
6 entire tribe and the land base and the resources that
7 are affected as well as I believe TOP is also looking
8 at that. And we are hopeful that we can resolve
9 these issues.

10 But I would ask that the Board -- which
11 you've demonstrated today -- show some flexibility in
12 how you deal with the issues between the tribes as
13 they have -- and I'm talking about the tribe, not TIM
14 or TOP, but the tribe as a whole has faced
15 significant barriers in being able to adequately
16 participate in this proceeding, including having to
17 wait six years for there to be a determination on
18 their petition for affected tribal status; and then
19 after that, another year and a half to resolve issues
20 regarding funding to be able to participate, which
21 was only issued a month after petitions had to be
22 filed in this proceeding.

23 So they have been having to deal with
24 significant disadvantages in regards to the immense
25 complexities in this proceeding. And we thank you

1 for taking the time to address these issues and to
2 grant leave to provide additional information to the
3 Board on how to deal with the sensitive issue. Thank
4 you.

5 >> JUDGE GIBSON: Thank you.

6 >> MR. ANDERSON: Robert Anderson on behalf
7 of Nye County. Nothing further, Your Honor.

8 >> JUDGE GIBSON: Thank you.

9 >>MR. JAMES: Greg James on behalf of Inyo
10 County, nothing further.

11 >>JUDGE GIBSON: TOP, I bet you're gonna
12 say something?

13 >> MR. POLAND: No, Your Honor, I'm not.

14 >> JUDGE GIBSON: Fantastic.

15 >> MR. POLAND: Thank the Board for its
16 time today.

17 >> JUDGE GIBSON: Thank you. Yes. Okay.

18 >>MS. CURRAN: Diane Curran, nothing
19 further.

20 >>JUDGE GIBSON: Calintene, nothing?
21 California?

22 >>MR. SULLIVAN: Tim Sullivan, nothing to
23 add.

24 >>JUDGE GIBSON: Four Counties?

25

1 >>MR. LIST:

2 >> MR. SULLIVAN: Tim Sullivan. Nothing to
3 add.

4 >> JUDGE GIBSON: Four Counties.

5 >> MR. LIST: Robert List. Nothing.

6 >> JUDGE GIBSON: Nevada.

7 >> MR. MALSCH: Marty Malsch for Nevada.
8 Nothing, Your Honor, thank you.

9 >> JUDGE GIBSON: DOE.

10 >> MR. SILVERMAN: Your Honor, Don
11 Silverman. Sorry to disappoint, but I promise I will
12 do this in less -- far less time than the five
13 minutes left in the day. I do need to make a brief
14 comment, if I may.

15 >> JUDGE GIBSON: That's fine.

16 >> MR. SILVERMAN: Thank you. A brief
17 closing comment. I wanted to note that the
18 discussions -- particularly this morning that
19 occurred in the proceeding underscored the complexity
20 of the regulations that the Board is dealing with and
21 the considerable room that there is for differing
22 interpretations of those regulations, as the Board,
23 itself, I think recognized earlier today.

24 I assured the Board yesterday that the
25 Department has proceeded in good faith in evaluating

1 the Petitions to intervene in this case and in making
2 its best judgments with respect to the admissibility
3 of the contentions. As I stated, we did not proceed
4 on the basis of a predetermined decision to challenge
5 all of the contentions, nor did we decide to throw
6 everything against the wall to see what might stick.
7 I want to reassure this Board as well, as to our
8 positions and the manner in which we arrived at them.
9 We take our ethical obligations seriously, as I am
10 sure every attorney in this room does.

11 It's not at all unusual in NRC proceedings
12 for applicants to challenge the admissibility of
13 large numbers of contentions.

14 In my own experience, in the Mox
15 proceeding, all told, there were over 80 contentions
16 that were proper, but only approximately 11 admitted.
17 And as I recall, ultimately, those 11 were either
18 withdrawn or dismissed on the basis of summary
19 disposition. Our positions in that case, on behalf
20 of that Applicant, which was not the Department of
21 Energy -- although, it was a DOE contractor -- were
22 reasonable and proper.

23 More recently, in the Indiana Point
24 licensing renewal proceedings, there were over 150
25 contentions submitted, some by sophisticated

1 petitioners, like the State of New York. All of the
2 contentions were challenged by the Applicant. And
3 while one petitioner was dismissed from the
4 proceeding, I believe for improper conduct, only
5 about roughly in the teens, mid teens, about 15
6 contentions were admitted. In this case before us,
7 it's no less plausible that Nevada's 200-plus
8 contentions are not admissible than it is that
9 they're all admissible as the petition alleges.

10 In closing, however the matters before
11 these Boards, established in this proceeding are
12 decided, I would be remiss if I did not make it
13 absolutely clear that the Department has acted
14 professionally in good faith and with due regard for
15 the integrity for the NRC adjudicatory process. You
16 may disagree with us on individual issues, but our
17 credibility as -- as an honest participant in this
18 proceeding should not be questioned. And thank you
19 for taking the time.

20 >> JUDGE GIBSON: Thank you. NEI.

21 >>MR. REPKA: David Repka for NEI. Mr.
22 Chairman, very briefly: I withheld my comment this
23 morning. There has been much discussion this morning
24 of the preclosure performance assessment and the
25 postclosure assessment. NEI has a number of

1 contentions that go to those issues. The Department
2 of Energy, the NRC staff and Nevada have opposed all
3 of those contentions. We believe, for the reasons
4 stated in our Reply, they are all admissible. There
5 was some discussion yesterday of whether an issue
6 could be material if it did not plead a violation of
7 NRC requirements. We believe that for a party in a
8 contention that would support the application and
9 support compliance, that materiality provision would
10 not apply.

11 It would not have to allege a violation;
12 but even beyond that, our contentions did allege
13 violations and to that point, this morning, I heard
14 the Department of Energy counsel referenced, for
15 example, 10 CFR 63.304, which is the reasonable
16 expectation requirement with respect to the
17 postclosure analysis, to say that DOE cannot use
18 bounding parameters for everything, because that
19 would be too conservative.

20 That's precisely the argument we've made in
21 several of our contentions and we do believe that,
22 for example, our contention -- that we are -- it's
23 perfectly admissible to allege as we have, for
24 example, that the seismic design is based upon an
25 earthquake that is greater than anything that has

1 been experienced in the history of the world or as we
2 have with respect to the total system performance
3 assessment, we've alleged there is a margin of safety
4 that amounts in the igneous or volcanic assessment
5 that accounts for up to 40% of the total postclosure
6 dose. Those are the kinds of contentions that we do
7 believe are admissible based upon a violation of the
8 various standards discussed this morning and for
9 other reasons as well. We have also alleged that
10 those contentions relate to a lot of violations -- I
11 won't get into that here, that's addressed in our
12 pleadings, but I did want the record to reflect those
13 points.

14 >> JUDGE GIBSON: Okay. Okay. NRC staff,
15 anything you need to clean up that we didn't address
16 today?

17 >> MS. YOUNG: Mitzi Young for the NRC
18 staff, just a few statements.

19 >> JUDGE GIBSON: Okay.

20 >> MS. YOUNG: The staff wanted to
21 emphasize that the Part 63 regulatory scheme is
22 risk-informed and performance-based. I believe
23 Nevada has always focused on the performance-based
24 and argued about the independent enforceability of
25 certain provisions in 63.

1 I think when you look at the preamble to
2 the final rule, the Commission makes it clear that
3 the purpose of performance assessment and Part 63 is
4 to focus attention on those activities that are most
5 important. So, therefore, where there were concerns
6 about uncertainty or certain parameters, it is not a
7 theoretical request for a perfect calculation, but it
8 has to do with understanding the performance of the
9 repository and what things are significant
10 contributors to dose.

11 With respect to the Board statement earlier
12 today in terms of the staff's positions on the
13 filings for this proceeding, the staff would like the
14 Board to understand that regardless of whether -- in
15 the staff's view -- a contention meets contention and
16 admissibility requirements, if there is a significant
17 safety issue raised by a contention, even though it
18 does not satisfy the requirements for admissibility
19 under 10 CFR.2.309 F(1), the staff will consider that
20 significant safety issue in its review. Thank you.

21 >> JUDGE GIBSON: Thank you. Let me just
22 say, you all will be -- we will stand in recess until
23 9:00 tomorrow morning at which point, Construction
24 Authorization Board 1 will be here on the bench.
25 They will be addressing the issues that are set forth

1 in Appendix C, but I want to remind each of you about
2 your homework to make sure you apprise them of any
3 contentions that are affected by the new rulemaking.
4 And we stand recessed until then. Thank you.

5 [Whereupon, the hearing was concluded]

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of the U.S. Department of Energy, [High Level Waste Repository] Docket No. 09-HLW-CAB-02 in Las Vegas, Nevada on April 1, 2009, is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken and transcribed by Caption Reporters Inc., and the transcript is a true and accurate record of the foregoing proceedings.

Lorraine Carter, RPR
Official Reporter
Caption Reporters, Inc.