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P R O C E E D I N G S

1  
2 JUDGE FARRAR: Good morning. This Atomic  
3 Safety and Licensing Board is convened here this morning  
4 to hear oral argument in a case entitled Shaw AREVA MOX  
5 Services, which involves a Department of Energy contractor  
6 and a project to recycle plutonium from nuclear warheads,  
7 make into new fuel for nuclear power reactors.

8 I say we're here. Here happens to be the  
9 Federal Courthouse in August, Georgia. I'd like to start  
10 by thanking the people in the judges' office, the  
11 marshals' office, and the clerk's office, particularly Mr.  
12 Buford Rowe, for making this lovely space available.

13 Forty years ago about this time I was leaving a  
14 federal court clerkship in New Orleans in the beautiful  
15 building at 400 Royal Street; it brings back a lot of  
16 memories to be in a lovely setting like this.

17 I'm Mike Farrar, the chairman of this board.  
18 With me is Nick Trikouros and Larry McDade. Judge McDade  
19 and I are trained as lawyers; Judge Trikouros as a  
20 technical person. All three of us have an equal vote in  
21 the proceeding.

22 Could I have the representatives of the parties  
23 introduce themselves. First, for the Applicant.

24 MR. SILVERMAN: Thank you, Your Honor. My name  
25 is Don Silverman. I'm with the law firm of Morgan, Lewis,

1 and Bockius in Washington, DC, and we are counsel for the  
2 Applicant.

3 MR. ZABIELSKI: My name is Vince Zabielski, and  
4 I'm also with Morgan, Lewis, and Bockius.

5 JUDGE FARRAR: Mr. Silverman, is your chief  
6 client here? -- anyone you'd like to introduce from the  
7 audience?

8 MR. SILVERMAN: We have a number of members  
9 from the client that are here today.

10 JUDGE FARRAR: Okay. For the Petitioners.

11 MR. ZELLER: Yes, Your Honor. My name is Louis  
12 Zeller, and I'm on the staff of the Blue Ridge  
13 Environmental Defense League.

14 MS. CARROLL: My name is Glenn Carroll. I'm  
15 with Nuclear Watch South, formerly GANE, Georgians Against  
16 Nuclear Energy.

17 JUDGE FARRAR: All right. Ms. Olson is not  
18 going to be here?

19 MS. CARROLL: Not here.

20 JUDGE FARRAR: All right. And for the NRC  
21 Staff.

22 MS. BUPP: My name is Margaret Bupp; I'm  
23 counsel for the NRC Staff.

24 MR. MARTIN: My name is Jody Martin; I'm also  
25 counsel for the NRC Staff, and with us today we also have

1 Dave Kapinsky. He's the project manager for MOX.

2 JUDGE FARRAR: Okay. And your colleague?

3 MS. JONES: Andrea Jones.

4 JUDGE FARRAR: All right. For those of you  
5 who've never attended an oral argument before, we have put  
6 out an order of the proceedings if you want to get a  
7 handout that would help you follow things.

8 But the more important thing to remember is  
9 this is not a time for the lawyers to make speeches.  
10 They've all filed one or more sets of written briefs;  
11 we've studied those; we've read them. We could decide the  
12 case on the basis of the written briefs only, but we  
13 decided to have oral arguments. It's more for our benefit  
14 to probe the intricacies or possible inconsistencies in  
15 their position, so you will find us very vigorous in our  
16 questioning. Don't think that's rude; they expect it.

17 And so it may be a rapid-fire event like that;  
18 it's not their time to get up and make speeches.

19 For the representatives of the Petitioners, I'd  
20 like -- you're laymen; I'd like to compliment you on the  
21 quality of the written filings you made. In my 40 years  
22 I've seen lawyers not do as good a job. So we compliment  
23 you on that.

24 And if your oral presentations are as good --  
25 you know, just listen to our questions; make sure you



1 answer them, and you'll do just fine.

2 If there are any reporters here, Dave McIntire  
3 is in the back corner of the room; he's from our office of  
4 public affairs in Washington. So if there are any people  
5 from the news media who'd like to speak to him, you're  
6 welcome to.

7 With that, let's begin. We have two areas of  
8 inquiry. One is the legal standing of the Petitioners to  
9 participate in this proceeding. We've allocated 40  
10 minutes to those arguments.

11 The second is the admissibility of the various  
12 contentions or issues that they have attempted to raise,  
13 and we've got an hour and 50 minutes of those split  
14 variably among five different contentions.

15 For the standing argument we're going to have  
16 the Applicant and Staff go first.

17 Mr. Silverman, how were you all going to divide  
18 that time?

19 MR. SILVERMAN: We'll be dividing our time on  
20 all the issues equally, Your Honor.

21 JUDGE FARRAR: Equally.

22 MR. SILVERMAN: Between the Staff and the  
23 Applicant, yes.

24 JUDGE FARRAR: All right. Who's going first?

25 MR. SILVERMAN: The Applicant will.

1 JUDGE FARRAR: Okay.

2 MR. SILVERMAN: Good morning, members of the  
3 Board. I'm Donald Silverman, from Morgan Lewis, and I  
4 represent the Applicant. I'm here to discuss the issue of  
5 whether the petitioning organizations have demonstrated  
6 standing in this proceeding.

7 Petitioners have two options for demonstrating  
8 standing.

9 JUDGE FARRAR: Could I interrupt you. In your  
10 initial set of papers -- and you didn't get to file a  
11 surrebuttal -- there were kind of three questions. The  
12 first is do the individual petitioners have standing and  
13 that's what, I take it, you were about to argue.

14 There were also questions that may or may not  
15 have been cured about whether the individuals had  
16 authorized the organization to represent them and then, in  
17 turn, whether the organization had properly delegated  
18 these people who are here today to speak for them.

19 Are those latter two cured?

20 MR. SILVERMAN: They are cured. We're here to  
21 discuss Petitioners' standing --

22 JUDGE FARRAR: Okay. So we're just talking  
23 about the standing --

24 MR. SILVERMAN: Yes.

25 JUDGE FARRAR: -- of the individual petitioners

1 who have let these organizations represent them.

2 MR. SILVERMAN: Yes. The traditional concept  
3 of standing --

4 THE REPORTER: Excuse me, Your Honor. May I  
5 move his mike from the table to the podium? I'm not  
6 picking him up very well.

7 (Pause.)

8 MR. SILVERMAN: As I was saying, the  
9 Petitioners in this case have two options available to  
10 them to demonstrate standing. One is to satisfy the  
11 traditional elements of standing: injury in fact,  
12 causation, redressability, et cetera. They have not done  
13 that. They have relied exclusively, in our view, on the  
14 concept of presumptive standing based upon geographic  
15 proximity, which is an appropriate standard in the NRC  
16 case law.

17 With respect to the geographic proximity  
18 standard and whether they have presumptive standing on  
19 that basis, the Board's asked some questions, and I will  
20 answer those in the course of my brief remarks on this  
21 particular issue.

22 First, there is no 50-mile presumption --  
23 proximity presumption of standing in a non-reactor  
24 proceeding; we think that's crystal clear in the case law.  
25 And so to the extent that the Petitioners have alleged

1 that they live within 50 miles of the facility, that is  
2 not an adequate basis to demonstrate standing.

3 There is, however --

4 JUDGE FARRAR: This 50-mile reactor proximity  
5 obviously has been applied only to reactors, but this is a  
6 novel and unique proceeding. Why should we assume that  
7 the Commission would not want the 50 miles to be applied  
8 to a facility of this nature?

9 MR. SILVERMAN: Well, all the cases that I'm  
10 aware have strictly applied it to reactors and,  
11 furthermore, there are quite a number of other proceedings  
12 that the NRC has passed judgment on, and fuel cycle  
13 facilities, enrichment plants, fuel fabrication  
14 facilities, where that presumption has not been applied:  
15 waste processing facilities, test reactors at  
16 universities.

17 This presumption simply has not been applied to  
18 anything but power reactors where there's a very high  
19 source term and a higher risk of outside exposures if  
20 there's an accident, and we think the case law is crystal  
21 clear on that.

22 JUDGE McDADE: In this particular instance, the  
23 affidavits indicate that the members live between 20 and  
24 32 miles from the facility.

25 MR. SILVERMAN: Yes.

1 JUDGE McDADE: Assuming that we accept your  
2 premise that there is no automatic presumption based on  
3 geographic proximity, we use the rationale used in the  
4 Georgia Tech case, which talks about deciding this on a  
5 case-by-case basis.

6 Differentiating this case from Georgia Tech,  
7 there there was very little fissionable material  
8 available; it was basically a research facility; here  
9 there's a considerable amount of fissionable material  
10 available.

11 Why, on a case-by-case basis, would you argue  
12 that there is not the possibility -- not a probability,  
13 but a possibility -- of offsite consequences in the 20- to  
14 32-mile range?

15 MR. SILVERMAN: Well, Your Honor, first of all,  
16 the standard is is there an obvious potential for offsite  
17 consequences associated with the facility, and the  
18 critical issue, in our view, is that the legal standards  
19 requires the Petitioners to demonstrate that that is the  
20 case; that they have the burden to demonstrate that there  
21 is an obvious potential for offsite consequences.

22 JUDGE McDADE: Isn't their representation that  
23 there would be as many tons of plutonium available here  
24 that would be processed sufficient to make that claim?

25 MR. SILVERMAN: I don't believe so, Your Honor.

1 It's one thing to have some discussion of the facility  
2 itself, and it's quite another to be able to draw some  
3 connection and some linkage between -- and some  
4 demonstration of how that could result in an offsite  
5 consequence.

6           When we look at the declarations of the  
7 individual members of the petitioner organizations,  
8 they're very, very vague. They're about as sparse,  
9 frankly, as I have seen.

10           They say, This facility could jeopardize our  
11 health and safety. We're concerned about the facility --  
12 some of the declarations say, We're concerned about the  
13 transportation of material.

14           But there's no allegation -- one, whether it is  
15 true or not, there is no allegation that this facility  
16 does create -- is a significant source of radioactivity.  
17 And, second and more importantly, there is no discussion  
18 of how there could be obvious potential for an offsite  
19 consequence, so the key for us is that the Petitioners  
20 bear that burden, and they have not met that burden.

21           JUDGE FARRAR: Except for this fact: Congress  
22 established this kind of tribunal because of the  
23 complexity of these cases, and they wanted to bring some  
24 technical expertise to bear on it. Why, in the face of  
25 their pleadings, are we not entitled to take the

1 equivalent of what would be judicial notice and draw upon  
2 the documents you have filed -- your client has filed and  
3 the Staff has filed and draw our own conclusions of the --  
4 based upon the science and the process of what this  
5 facility is capable of doing if there were some sort of  
6 incident?

7           Why is that something that they have to tell  
8 us? When you know it, the Staff knows it, and we know it,  
9 why is their pleading, considering that they're lay  
10 people -- why are their pleadings not sufficient to cause  
11 us to look at the documents and say, Yes, they didn't  
12 spell it out, but we know what they mean?

13           MR. SILVERMAN: Well, Your Honor, I guess I  
14 question the assumption that you know it, we know it, and  
15 others know it. The -- again, I think they have the  
16 burden to come forward, and they haven't done that, but  
17 aside from that, in direct response to your question,  
18 certainly under normal operations this facility, according  
19 to the information in the ER and the EIS, the dose  
20 projections in this facility are in the range of 3.3  
21 thousandths --

22           JUDGE FARRAR: Let's leave out normal  
23 operations. In other words, as I understand standing,  
24 it's because here's the facility; if something goes wrong,  
25 people within a certain area could be in jeopardy. So

1 that's what I'm talking about, not normal operations.

2 MR. SILVERMAN: Right. With respect to  
3 accidents, the application and the ISA demonstrate that  
4 any high-consequence event would be very, very unlikely.

5 JUDGE FARRAR: Okay. But for standing, it's  
6 not high likelihood or major consequences. As I  
7 understand the judicial and the Commission's standing  
8 precedents, any consequences are sufficient for standing;  
9 they may not be sufficient to win a contention or to put a  
10 condition on your facility, but any consequences get you  
11 into Court. Once into Court, you may not win, but I  
12 thought that all we're talking about is -- are these  
13 people sufficiently enough affected even in a minor way to  
14 give them standing. Isn't that what this case comes down  
15 to?

16 MR. SILVERMAN: Yes. It is, Your Honor. And  
17 the case law does indicate that it does not have to be a  
18 very significant dose to warrant standing. The  
19 Applicant's position fundamentally on standing in this  
20 case, however, is that the Petitioners do have the burden  
21 to allege those facts.

22 And these are experienced Petitioners; they've  
23 been involved in both this proceeding and other  
24 proceedings, including the Georgia Tech proceeding. And I  
25 believe they know that law, and we don't believe they've



1 met that burden.

2 JUDGE FARRAR: Okay. One thing they pointed to  
3 was a staff document that calculated doses out to 50  
4 miles.

5 MR. SILVERMAN: Yes.

6 JUDGE FARRAR: Even if license staff was  
7 deliberating wasting taxpayer money, I would assume that  
8 them looking at 50 miles meant that they thought there was  
9 at least, you know, some possibility that people within 50  
10 miles might be affected. So why isn't the Petitioners'  
11 pointing to the staff document sufficient?

12 MR. SILVERMAN: The -- I know the Staff is  
13 going to be directly to that question. And I would be  
14 happy on rebuttal to respond to any further questions, but  
15 I would defer that to them, because there is an  
16 explanation for that decision.

17 JUDGE FARRAR: Okay. All right.

18 MR. SILVERMAN: So to just sum up, in addition  
19 to citing to that particular portion of the EIS, when the  
20 Applicant indicated that we did not believe they had  
21 standing in our answer, the response that came back, again  
22 from Petitioners that do have some experience, cited that  
23 particular provision of the EIS. They cited alleged  
24 tritium releases from the PDCF facility, which is not the  
25 facility that's being licensed here.

1           They cited the standard review plan that says  
2 an Applicant is to prevent criticality. That does not --

3           JUDGE FARRAR: Let me get back to that other  
4 facility, which is not subject to NRC licensing. But  
5 isn't it a necessary part of the project? And, therefore,  
6 why would it be wrong to consider the impact -- granted,  
7 the NRC is only being asked to license the one facility,  
8 but if here's a necessary adjunct, why isn't it sufficient  
9 for standing to say that, That necessary adjunct might  
10 affect us?

11           MR. SILVERMAN: Yes. I believe it is not  
12 appropriate at all to do that in the context of standing.

13           It is one thing to challenge an environmental  
14 report or an environmental impact statement by arguing  
15 that the cumulative impacts of connected actions, such as  
16 the PDCF facility, weren't adequately considered. That's  
17 appropriate. That's part of the NEPA judgment. But the  
18 legal standard here is, Does this facility that's being  
19 licensed create an obvious potential for offsite  
20 consequences, and have the Petitioners demonstrated that.

21           JUDGE FARRAR: Okay. Thank you, Mr. Silverman.

22           MR. SILVERMAN: Thank you.

23           JUDGE FARRAR: Ms. Bupp?

24           MS. BUPP: Thank you, Your Honors. My name is  
25 Margaret Bupp; I represent the NRC Staff.

1                   With regard to the standing question that is  
2 specifically asked in your scheduling order, in the first  
3 place, the Staff also agrees that there's no 50-mile  
4 presumption for standing here in the present case and, in  
5 fact, there is no presumption for any distance; rather,  
6 what we must determine is whether there is a proximity at  
7 which there's an obvious potential for offsite  
8 consequences.

9                   JUDGE FARRAR: Okay. But there has never been  
10 a case like this. And so while it was perhaps easy for  
11 the Commission to say, We have a lot of reactor cases;  
12 let's simplify this and make it 50 miles per reactor, why  
13 is this not a case where we can say, Let's make it X miles  
14 for a facility? You know, in other words, if 50 miles is  
15 right for a reactor, why isn't it permissible to say X  
16 miles, whatever X is, is proper for a facility of this  
17 nature?

18                   It's not that the Commission said you can't  
19 apply 50 to this facility. They only had reactors in  
20 front of them at the time.

21                   MS. BUPP: Well, Your Honor, you're correct  
22 that there has never been a case like this before,  
23 although there was an earlier proceeding on the  
24 construction authorization phase of this project. But  
25 there have been, as counsel for the Applicant pointed out,

1 many, many other materials licensing cases where the Board  
2 very -- where the Commission very strictly upheld the idea  
3 that in materials licensing cases and in research and test  
4 reactor cases, you must have a proximity-plus standing,  
5 rather than simple proximity standing.

6 And as the Commission has not thus far stated  
7 that there is any proximity presumption for this type of  
8 facility, it seems more in keeping with prior Commission  
9 case law to apply the proximity-plus standard.

10 JUDGE TRIKOUROS: So as I understand it, we're  
11 to look at this on a case-by-case basis?

12 MS. BUPP: Uh-huh.

13 JUDGE TRIKOUROS: The -- if I look at the  
14 probability of an offsite dose associated with, say, the  
15 new, advanced reactors that we're soon to be licensing,  
16 it's exceedingly low, and, yet, the 50-mile proximity  
17 assumption applies to those. There have been  
18 criticalities at fuel cycle facilities around the world.  
19 At least -- I know there has been at least one in Japan,  
20 and there've been others.

21 So the probability, one might argue, is not  
22 even as low as the new reactors for an impact within the  
23 50-mile zone; certainly within a 20- or a 30-mile zone.  
24 How would you respond to that?

25 MS. BUPP: Well, the Staff's position is not

1 that there is no distance at which there would be an  
2 obvious potential for offsite consequences. The Staff's  
3 position is simply that the Petitioners have not shown  
4 that there is any distance at which there would be offsite  
5 consequences. They do have a burden -- although it is a  
6 low burden, they have some burden to show that there is an  
7 obvious potential for offsite consequences at the distance  
8 they espouse, whether it's one mile or ten miles or, in  
9 this case, 20 to 30 miles. And they have not made that  
10 showing.

11 JUDGE FARRAR: And is the showing -- if I  
12 remember their papers correctly, the showing they  
13 attempted to make was why the Staff thinks there's an  
14 impact of 50 miles, because they did documents that --  
15 they did studies that looked up to 50 miles. Why isn't  
16 that called an admission against interest, or whatever you  
17 want to -- you know, why doesn't that carry the day?

18 MS. BUPP: The Staff did do its calculations  
19 out to 50 miles. However, this was not entirely an NRC  
20 Staff decision to do the analysis out to 50 miles. The  
21 Department of Energy -- as a policy for all of their  
22 nuclear facilities, they do all of their EISs out to 50  
23 miles no matter what the facility. They don't make a  
24 judgment on the facility.

25 Because this is a facility that is being

1 operated by a contractor for DOE and because there were  
2 connected actions that are DOE-run facilities where the  
3 EISs were completed by DOE for doses out to 50 miles, for  
4 consistency's sake, the Staff did the analysis in our EIS  
5 out to 50 miles to make sure that it encompassed the DOE's  
6 analysis.

7 JUDGE FARRAR: Well, then I would --

8 MS. BUPP: But it was not a judgment on this  
9 facility at all.

10 JUDGE FARRAR: Then I would raise my question  
11 why -- using the colloquial, Admission against the Staff's  
12 interest. Why isn't that an admission against DOE's  
13 interest, DOE being the real party in interest in this  
14 case? It's their project.

15 MS. BUPP: You might need to ask DOE. I do not  
16 represent DOE. But it is my understanding and the Staff's  
17 understanding that DOE applies a 50-mile radius regardless  
18 of the facility. It could be a waste storage facility, it  
19 could be a fuel facility, it could be really any type of  
20 DOE nuclear facility; they do their EIS out to 50 miles.

21 JUDGE FARRAR: Right. But then you -- when the  
22 Staff did it, you used the same 50 miles. Your FEIS  
23 didn't say, DOE did 50, but we're discarding the outer 25  
24 of that because, as far as we're concerned, we needn't  
25 look more than 25 miles; so DOE may have done this work

1 for consistency, but we're focusing on licensing this, and  
2 we only need to look out to 25. You all didn't say that.

3 MS. BUPP: I mean I suppose we could have. But  
4 we were also trying to look at the cumulative impacts that  
5 included many DOE facilities. And although we did our own  
6 analyses in the EIS, we also looked at the DOE analyses,  
7 and those were not broken down into 20-mile radiuses or  
8 30-mile radiuses; they were out to 50 miles.

9 JUDGE FARRAR: Okay. So if I'm a prospective  
10 Petitioner and I want to get into this case, why don't I  
11 read these documents and say, I don't have to make a  
12 showing here, because the two Government Agencies have  
13 made the showing, and I'm willing to rely on the way they  
14 did their work? And so why would the Petitioners be  
15 expected to do any more than they did?

16 MS. BUPP: Well, all that they did simply is  
17 read the documents and say, It's out to 50 miles;  
18 therefore, there is an obvious potential for offsite  
19 consequences. They didn't look at what was actually  
20 included in the EIS and explain how what was included in  
21 the EIS shows that there's a potential for offsite  
22 consequences.

23 JUDGE FARRAR: Maybe I'm not making myself  
24 clear. Why wouldn't they just point to that and say, If  
25 this is what the Government thinks, we're going along with

1 it? In other words, why did they -- your brief says, you  
2 know, they haven't drawn the connection. The connection  
3 jumped off the page to me. Why is -- why was it not  
4 sufficient just to say, Here's what the Government does;  
5 we'll go along with them?

6 MS. BUPP: Well, they need to show some  
7 connection, that there is actually going to be a potential  
8 for offsite doses. That just saying that they did an  
9 analysis out to 50 miles -- if we had found that there was  
10 going to be zero dose out to 50 miles or a negative does  
11 out to 50 miles, that wouldn't be enough. They still  
12 haven't shown that there is an obvious potential for  
13 offsite consequences. Just by saying that we analyzed it  
14 out to 50 miles doesn't actually mean anything.

15 JUDGE McDADE: Okay. You could analyze it out  
16 to 50 miles and find out that there's no dose beyond 50  
17 feet. Correct?

18 MS. BUPP: Yes, exactly. We could analyze it  
19 out to a hundred miles. Sometimes we do EISs not because  
20 we think that there might actually be a dose out to a  
21 certain radius, but because the facilities are located in  
22 such remote areas that you have to go out a great distance  
23 to even reach a human being who might receive a dose. And  
24 then we'll find that out of that distance where human  
25 beings reside, there is no dose.



1           And so in those cases, it's not a function of  
2 the facility; it's a function of the location of the  
3 facility.

4           JUDGE FARRAR: Okay. But this is --

5           MS. BUPP: So there are many reasons why we  
6 might pick --

7           JUDGE McDADE: But here there are individuals  
8 within several miles of the facility.

9           MS. BUPP: Yes.

10          JUDGE McDADE: As I understand the position of  
11 the Petitioners here -- and they can correct me if I'm  
12 wrong -- it's basically a res ipsa kind of argument. They  
13 say that they are within 20 miles of the facility, the  
14 facility will have up to 78 tons of plutonium; ergo, there  
15 is a potential for offsite consequences.

16          That's their argument. It's basically, It's  
17 there; we're here; there's a potential. Your argument is  
18 that they have to explain how one leads to the other; they  
19 have a basic obligation to at least make out a plausible  
20 argument, a theory, of how those offsite consequences  
21 would occur. Is that correct?

22          MS. BUPP: Yes. There's an intermediate step.  
23 The material's there; X event could happen, and,  
24 therefore, we could receive a dose.

25          JUDGE McDADE: Okay. And going back to the

1 questions that Judge Farrar asked of Mr. Silverman, is  
2 looking at all of the documentation -- the license  
3 application, the environmental impact statement, all of  
4 the documentation -- that is in front of us right now, do  
5 we have an ability as a panel to look at that information  
6 and make our own conclusions as to whether or not --  
7 again, not a probability, but whether or not there is a  
8 potential within the period of, say, 20 miles for offsite  
9 consequences?

10 MS. BUPP: No. Although the burden is quite  
11 low for interveners to establish standing, they do have  
12 the burden to make a standing showing. It is not the  
13 Board's burden to establish standing for interveners.

14 JUDGE McDADE: Well, put aside the Board's  
15 burden. Does the Board have the authority to make that  
16 jump?

17 MS. BUPP: I don't believe so, no. The  
18 Commission has been quite clear that it is the  
19 Petitioners' burden.

20 JUDGE McDADE: And how do you answer the fact  
21 of just the res ipsa type of argument, 78 tons; 20 miles'  
22 potential exists?

23 MS. BUPP: I believe that there needs to be an  
24 intermediate step, that there needs to be some explanation  
25 as to how that 78 tons will have an effect at 20 miles.

1 JUDGE McDADE: And that's an affirmative  
2 obligation on the Petitioner in order to gain standing and  
3 to litigate in this proceeding?

4 MS. BUPP: That is correct, Your Honor.

5 JUDGE McDADE: That's your position?

6 MS. BUPP: Yes, it is.

7 JUDGE McDADE: Okay.

8 JUDGE TRIKOUROS: Even though we're entitled to  
9 use -- to read laymen's pleadings a little more liberally  
10 than we would read lawyers'?

11 MS. BUPP: Yes. And, you know, it is also  
12 well-established that you construe standing arguments in  
13 favor of the Petitioner, but there must be an argument  
14 there to construe.

15 JUDGE FARRAR: Would you consider this an  
16 unusual site? The -- we've got releases from SRS. We've  
17 got releases from Vogtle 1 and 2. We've got new releases  
18 occurring from the MOX facility. We've got early site  
19 permit applications in our hands right now for Vogtle 3  
20 and 4. So this site is a -- I would call it an atypical  
21 site with respect to offsite doses even for normal  
22 operations of all these facilities, but would you agree  
23 with that? Is it?

24 MS. BUPP: It was a challenge to create the EIS  
25 to include all of the cumulative doses. And that was a

1 concern. And so this is in some respects unusual, but  
2 there are other facilities where there -- other DOE  
3 facilities where there would also be similar materials.

4 JUDGE FARRAR: When you explained why you did  
5 the 50-mile calculation -- correct me if I'm wrong, but I  
6 believe when you finished that calculation, you did not  
7 put down, Although, because DOE for consistency looks to  
8 50 miles, we looked at 50 miles, and our conclusion is we  
9 really didn't have to look past 15 miles, because  
10 nothing's possibly happening after 15 miles. You didn't  
11 say that in the FEIS, or, X miles. You didn't say that in  
12 the --

13 MS. BUPP: No. We didn't make a determination  
14 as to where the offsite consequences would end. In fact,  
15 our finding in the FEIS was that all impacts would be  
16 small. And that was the finding that we made based on --

17 JUDGE FARRAR: But it didn't say, It didn't do  
18 concentric rings, and said, They're infinitesimal between  
19 40 and 50 or 30 and 40.

20 MS. BUPP: Honestly, I don't believe so, but I  
21 would have to look at the EIS again to be certain.

22 JUDGE FARRAR: Okay. Then why should we hold  
23 the interveners to a higher standard for creating their  
24 documents than you're asking us to hold the Staff for  
25 creating its documents?

1 MS. BUPP: I don't believe that we're holding  
2 them to a higher standard. It's actually a very low  
3 standard they have to meet to argue that there is some  
4 impact. I mean, our documents do include doses, both at  
5 the site barrier and then out to the public.

6 You know, we do have -- we do include a lot of  
7 information in our document. And we're not asking them to  
8 include as much information as the Staff would include in  
9 an EIS; we're asking them to make a very simple, logical  
10 connection between their proximity to the facility and the  
11 potential dose. It's not a high burden. Unfortunately,  
12 they haven't met the burden.

13 JUDGE McDADE: They have some obligation to  
14 explain how --

15 MS. BUPP: Yes.

16 JUDGE McDADE: -- that offsite impact could  
17 occur?

18 MS. BUPP: Yes.

19 JUDGE McDADE: Okay. At this point, we've used  
20 25 minutes of the 15 minutes allocated.

21 MS. BUPP: Okay.

22 JUDGE McDADE: Do you have anything further on  
23 this particular point on standing?

24 MS. BUPP: No, unless the Board has further  
25 questions.

1 JUDGE McDADE: Okay.

2 JUDGE FARRAR: Thank you.

3 Let's go out of order momentarily.

4 Mr. Silverman, rather than you hold this for  
5 rebuttal -- and the Petitioners won't have a chance -- do  
6 you want to speak for 30 seconds to the DOE 50-mile policy  
7 so that they'll have a chance to respond to that when it's  
8 their -- as their turn comes up?

9 MR. SILVERMAN: Yes, Your Honor, I -- the 30  
10 seconds or less on that particular issue.

11 As I understand what the Staff has done, they  
12 selected the 50 miles as an input to their analysis, as an  
13 input to determining where doses may -- what doses may be  
14 and where they may be. It is not an output. And it's my  
15 understanding based upon their approach here that they  
16 selected that location and the selection of that location  
17 has really nothing to do with what the actual doses are  
18 that are associated with this facility.

19 JUDGE FARRAR: But as an output, they didn't  
20 tell us the actual doses in concentric rings.

21 MR. SILVERMAN: I believe that information in  
22 some form is in the EIS. But the selection of -- the  
23 decision to select 50 miles is an input, and not an  
24 output, and doesn't say anything in and of itself about  
25 the offsite exposures.

1 JUDGE FARRAR: All right. Thank you.

2 Who's going to argue for the Petitioners?

3 MR. ZELLER: I am, Your Honor.

4 JUDGE FARRAR: Okay. Go ahead, Mr. Zeller.

5 And you heard the concession about the -- you being  
6 authorized representatives and the Petitioners authorizing  
7 the organization. So all you need to do is speak to the  
8 individual standing.

9 MR. ZELLER: Yes, sir. I understand.

10 JUDGE FARRAR: Go ahead.

11 MR. ZELLER: All right. Thank you very much.

12 My name is Lou Zeller, and I'm with the Blue Ridge  
13 Environmental Defense League, and I'm speaking on behalf  
14 of my organization and Nuclear Watch South and the Nuclear  
15 Information and Resource Service on the issues of  
16 standing.

17 To begin with, the maximum legal exposure is 10  
18 millirems per year for airborne emissions through any  
19 environmental pathway, according to 40 C.F.R. 6192. This  
20 translates into a risk of 5.6 excess fatal cancers per  
21 10,000 people, according to BEIR V estimates. The  
22 Petitioners submit that this alone should provide the  
23 legal basis for standing in this matter in terms of  
24 offsite consequences. Further, our presumption of  
25 proximity rests upon the population dose calculated --

1 JUDGE McDADE: What is the evidence we have in  
2 front of us of millirem exposure at the 20-mile range from  
3 the facility?

4 MR. ZELLER: Pardon?

5 JUDGE McDADE: What is the evidence we have in  
6 front of us of millirem exposure at the 20-mile range from  
7 the facility?

8 MR. ZELLER: You --

9 JUDGE McDADE: Do we have any?

10 MR. ZELLER: You have no -- you have risk  
11 assessments and computer projections of dose estimates.  
12 For example, the population dose, 50 miles, according to  
13 DCS is at -- documents filed were .12 person rems per year  
14 from transportation. Other doses are calculated again out  
15 to 50 miles, I believe, at .12 person rems per year  
16 population dose from -- that's from normal plutonium fuel  
17 factory operations. And --

18 JUDGE McDADE: Okay. It is the position of the  
19 Applicant that in order for you to demonstrate standing  
20 you have to make an argument, present to us specific  
21 information, indicating offsite consequences. And what  
22 I'm asking you to do is just succinctly state the evidence  
23 that's currently before us in your mind that indicates  
24 that there will be offsite consequences of the proposed  
25 action at the distance of 20 miles, which is the nearest



1 of any of your members.

2 MR. ZELLER: Well, I think -- I listened very  
3 carefully to the Applicants and to the Staff counsel's  
4 earlier arguments, of course. And I understand that for  
5 consistency's sake, 50 miles is used for reactors.  
6 However, this is -- as you have pointed out, this is an  
7 atypical situation and a single facility.

8 It might be fair to compare it to another  
9 facility operated by AREVA or -- COGEMA at La Hougue,  
10 where, at a 35-kilometer radius from La Hougue in  
11 Normandy, France, that -- in The British Medical Journal,  
12 a study found that leukemia was increased by relative risk  
13 of 2.87 and 4.49 when categories were aggregated, and  
14 levels of more-than-once-a-month consumption of local fish  
15 and shellfish showed an increased relative risk of 2.66.

16 This is a study presented -- case control study  
17 of leukemia among young people near La Hougue Nuclear  
18 Reprocessing Plant. And it talks about the environmental  
19 hypothesis revisited. So the --

20 JUDGE FARRAR: Was that a case control study,  
21 or just one of those that says, Here's at least a  
22 coincidence we need to study more and see what the  
23 causation may or may not be?

24 MR. ZELLER: This is, Your Honor, a case  
25 control study published in The British Medical Journal.

1 This was in 1997, 11 January. In terms of the --

2 JUDGE FARRAR: And what are the similarities or  
3 dissimilarities between the facility at the Savannah River  
4 site and La Hougue?

5 MR. ZELLER: Well, the La Hougue facility is  
6 operated by the same contractor for the Savannah River  
7 site. It is -- has often times been pointed to as an  
8 example of the technology and the safety and the efficacy  
9 and the efficiency and the utility and the history of this  
10 type of process. In fact, it's also called a MOX  
11 facility. It's the nearest plant that I could find  
12 anywhere.

13 JUDGE FARRAR: Was this study referenced in  
14 your petition or your reply?

15 MR. ZELLER: We did not make specific reference  
16 to it.

17 JUDGE FARRAR: Okay. Go ahead.

18 MR. ZELLER: I would add that I understand that  
19 proximity standing differs from traditional standing, but  
20 I would say in response to that first that the plutonium  
21 fuel plant is plainly a significant source of  
22 radioactivity. The environmental report itself points to  
23 a design capacity of 35 metric tons of plutonium and 660  
24 metric tons of uranium. Projected impacts are based on  
25 preliminary design and assumed to be bounding. Impacts of

1 proposed action are expected to occur for a ten-year  
2 period, adding up to these totals.

3           So this is radioactive material with a  
4 potential radiation release second -- either under  
5 accident scenarios or under normal operations, as I  
6 outlined before.

7           JUDGE FARRAR: How many warheads does it take  
8 to leave us with that amount of plutonium, or is that  
9 perhaps an irrelevant question?

10           MR. ZELLER: How many warheads? That's very  
11 good. I believe it's somewhere on the order of ten  
12 kilograms -- but don't hold me to that -- per warhead.

13           Furthermore, the plutonium fuel factory  
14 environmental report specifies three receptors, or  
15 categories of humans, who may be exposed to radiation from  
16 the plant. These are: SRS site workers, of course, a  
17 person at the fence line, the so-called maximally exposed  
18 individual, and; the public, and; as has been pointed out  
19 before and you've read, I'm sure, the third receptor, the  
20 offsite population, is all members of the public within a  
21 50-mile radius, or 80 kilometers.

22           In the Appendix D of the plutonium fuel factory  
23 environmental report, it talks about the risk from  
24 ionizing radiation. Potential offsite doses to the public  
25 were determined for the NEI and the general population

1 residing within an assessment area, defined by 50-  
2 miles/80-kilometers radius around the facility. The  
3 entire population within the assessment area was assumed  
4 to consist of adults.

5 I raise this because this would indicate to me  
6 that the impacts from this radiation dose have been  
7 underestimated. And this is among the concerns of people  
8 that we are in communication with on a regular basis in  
9 the Augusta and Aiken area, and that is that radiation  
10 dose estimates underestimate the impacts on people,  
11 particularly gestating females, unborn children and the  
12 elderly, and very young children.

13 The use of the population or the person rem  
14 itself -- the environmental report expresses population  
15 dose in person rems. People dose is a collective  
16 measurement which is based on population, of course,  
17 within a given area.

18 According to Sanden [phonetic] Corporation,  
19 it's an average individual dose multiplied by the number  
20 of people exposed. Comparisons with background radiation  
21 and regulatory standards notwithstanding, the population  
22 dose is an additional radiation exposure above and beyond  
23 that level to which people would be otherwise exposed.  
24 Impacts of this additional exposure are measurable and  
25 real.

1            Calculation of the offsite dose requires a  
2 detailed assessment of the projected population based on  
3 census data population projections through the proposed  
4 operating period. The annual dose to a person living  
5 within 50 miles was calculated by the annual offsite  
6 population dose divided by the total population projected  
7 to live within a 50-mile radius in the year 2030.

8            The negative health impacts on residents living  
9 near the plutonium fuel or MOX plant in La Hougue are  
10 instructive. The plant's operated by COGEMA, since 1976.  
11 It has had numerous radioactive releases to the air, water  
12 and to agricultural produce. Streams are purported to be  
13 contaminated near La Hougue. One stream from which cattle  
14 drank reported 3,800 Picocuries per liter in water.

15            A fire caused breakdown in the cooling system  
16 at the waste dump/reprocessing plant and caused massive  
17 contamination. A pipeline which carries radioactive water  
18 from the nuclear treatment plant was breached scores of  
19 times. A British scientist discovered radionuclides  
20 concentrated 100 to 10,000 times in seaweed outside of the  
21 plant eight kilometers from La Hougue.

22            A 1997 study that I mentioned before discovered  
23 significant increases in leukemia incidence in young  
24 people within 22 miles of the La Hougue plant. That's the  
25 case control study I had mentioned earlier.

1 JUDGE McDADE: Okay. But at this point in the  
2 proceeding, we're talking about standing. In order for  
3 standing for your membership, you have to demonstrate that  
4 there is some potential for offsite consequence. You  
5 don't have to demonstrate that that consequence is  
6 particularly high. For example, in the earlier proceeding  
7 here on transportation, it was a very low dose that  
8 members would be exposed to in order to establish  
9 standing.

10 So we're not at this point yet talking about  
11 the consequences of that dose; we're just talking about  
12 what is before us right now that demonstrates that your  
13 members within 20 miles to 32 miles of the facility will  
14 have an increased dose, increased exposure, to  
15 radionuclides. Can you focus on that for a moment and,  
16 again, what's before us in the record, just to explain  
17 that?

18 MR. ZELLER: Okay. All right.

19 (Pause.)

20 MR. ZELLER: Thank you, Glenn.

21 In our June 27 reply of the petitioning  
22 organizations to the answers filed June 11 and 13 by NRC  
23 Staff and the license Applicant to our petition of May 14,  
24 on page 2, we say that, Individuals who work and live  
25 outside the SRS within 50 miles of the proposed

1 facilities.

2 Second, NRC finds that tritium released  
3 accident at the proposed pit disassembly conversion  
4 facility would administer a sizable dose to members of the  
5 public out to 50 miles. It's clear that the proposed  
6 plutonium fuel receive would affect Petitioners' members.

7 JUDGE FARRAR: But Mr. Silverman would say  
8 we're not entitled to look at that, because that's a  
9 collateral facility that is not subject to our licensing  
10 authority.

11 MR. ZELLER: Well, it is a part of the process  
12 here, and it is a facility which, I understand, would not  
13 be constructed at all if -- unless there was a fuel  
14 factory alongside of it. And the consequences there are  
15 spelled out. I'm sorry. Do you have just --

16 JUDGE FARRAR: Suppose -- isn't it possible --  
17 was there even a suggestion that that facility could be  
18 built elsewhere in the country in which it would be  
19 built -- let's take your argument to its logical extreme.

20 If that facility could be elsewhere, then we  
21 could have people who lived within two miles of wherever  
22 elsewhere is come in to this facility saying, We don't  
23 like this MOX facility at the Savannah River Site because  
24 we live two miles from where this adjunct facility is  
25 going to be in Texas, and so we want to come in here.

1                   Wouldn't that be too attenuated a connection?  
2                   And if that's attenuated, how is that -- if that's too  
3                   attenuated, how is that different from your people saying,  
4                   Well, the facility itself won't bother us, but this  
5                   collateral facility would? Is that question kind of  
6                   clear?

7                   MR. ZELLER: I think so.

8                   JUDGE FARRAR: It's long and complex. But --

9                   MR. ZELLER: Right. I know that's a  
10                  complicated question. And as my friend John Jacobs used  
11                  to say, If Zeide was a bubbe.

12                  What we are talking about, of course, is these  
13                  facilities located -- and the reason I bring this up is  
14                  because here is an example of an offsite consequence with  
15                  a sizable dose to members of the public. It is to be  
16                  located here. It is one example of the emissions from the  
17                  facility having an impact. Some of the others which I  
18                  have already mentioned to you have to do with both the  
19                  predictions provided by the Applicant, that is: The .12  
20                  person rem figure, and the transport figures.

21                  JUDGE FARRAR: From the operation of the --

22                  MR. ZELLER: From the normal operations, .12.

23                  JUDGE FARRAR: From the MOX facility itself?

24                  MR. ZELLER: Correct. That is --

25                  JUDGE FARRAR: Not these collateral buildings?



1 MR. ZELLER: That's right. That is from the  
2 plutonium fuel factory itself, and then the transport was  
3 in addition to that, to and from the plutonium fuel plant.  
4 So even those small doses arguably have measurable  
5 consequences in a population.

6 And, as I began talking about, these  
7 predictions are very difficult to rely upon because of  
8 some of the assumptions that go into them. Therefore,  
9 that's why I began with the standard, the 10 millirem  
10 standard, to doses of the public in terms of standing at  
11 least, in that the only benchmark that we have that we can  
12 hang our hats on legally is the 10 millirem standard,  
13 which is written down in the Code of Federal Regulations.

14 If the .12 millirems person rems in population  
15 dose turns out to be .14 or .16 or .66, it wouldn't matter  
16 in terms of their ability to get a license, because it  
17 would still be under the regulatory limit.

18 So whatever the prediction says, and if it  
19 turns out that it's not accurate or that it hasn't  
20 accounted for something or there has been some error or  
21 some assumption which BEIR V or BEIR VII or BEIR XXVIII  
22 down the road finds out is not adequate, we can rely upon  
23 the one figure which is written in the Code of Federal  
24 Regulations, which says that you can excess 5.6 excess  
25 fatal cancers per 10,000 people.

1           That is cause for concern in the public. That  
2 is a dose that is a measure of the impact upon the  
3 population here. That is the concern of the people that  
4 have signed affidavits in support of our standing.

5           JUDGE FARRAR: Are you conceding that if the  
6 doses were all less than the maximum legal, you would  
7 not -- people would not have standing? Or could they say,  
8 Well, it's within the legal limits, but every little bit  
9 counts, and, you know, there's no -- we are affected? You  
10 may not have a contention that you'll win on, but you're  
11 affected for standing purposes by a dose that approaches  
12 the maximum legal limit? What's your position on that?

13           MS. SMITH: No, sir, I'm not saying that it  
14 would be okay. But we have two different things here. We  
15 have computer estimates and predictions based on a series  
16 of assumptions, and we have the legal limit, which is  
17 written down in black and white. Those are two separate  
18 things.

19           JUDGE FARRAR: Do you have anything else?  
20 Or --

21           MR. ZELLER: Just one moment.

22           (Pause.)

23           MR. ZELLER: I did look back into the history  
24 again, to compare apples to apples, of the La Hougue  
25 plant. It has had a series of accidents. And I didn't

1 bring that document with me today; I'd be happy to provide  
2 some of the operating history at that plant. And my  
3 associate here is bringing me something.

4 (Pause.)

5 MR. ZELLER: This is from the environmental  
6 impact statement on the construction and operation of the  
7 proposed mixed oxide fuel fabrication facility at the  
8 Savannah River Site. This is the final report, NUREG-  
9 1767, Volume 1, on page 4-48. Again, this talks about the  
10 pit disassembly conversion facility and the estimates on  
11 offsite of about 14 millirems.

12 JUDGE FARRAR: Okay. Thank you.

13 MR. ZELLER: Thank you.

14 JUDGE FARRAR: Our questioning took up far more  
15 of the Applicant's and Staff's time than our questioning  
16 of you did. So don't consider that you got unequal  
17 treatment.

18 Mr. Silverman, Ms. Bupp, do you want to do a  
19 very quick rebuttal, please?

20 MR. SILVERMAN: Just a few points, Your Honor.

21 The Board inquired of the Petitioners what  
22 their basis was and what the evidence was for identifying  
23 a proximity presumption and demonstrating standing and an  
24 offsite obvious -- a potential for offsite dose in this  
25 case, and I think it's very telling what the response is.

1           The response goes to, One, the La Hougue  
2 facility in France, which, of course, this facility is  
3 modeled after in part, but which is not the facility that  
4 is being licensed here and which is not the facility that  
5 is the subject of the environmental report, the EIS and  
6 the other safety documents, and, Two, the PDCF facility,  
7 which again is appropriate for discussion and the  
8 environmental report, but doesn't -- is not an appropriate  
9 basis for determining whether the Petitioners have  
10 standing in this case. Those --

11           JUDGE FARRAR: You're -- I understand the  
12 argument about the second one. We've discussed that. But  
13 about La Hougue, if this facility is modeled on it, why  
14 can't we reason by analogy to what has been experienced  
15 there?

16           MR. SILVERMAN: Well, Your Honor, that would be  
17 overly simplistic to do it. I'm not an expert in what the  
18 similarities and differences are in those two facilities.  
19 It was -- it's a facility that is in another country, that  
20 has a different operating experience.

21           None of us have -- at least the Applicant  
22 certainly has not prepared today a discussion of what the  
23 actual impacts are to test what the Petitioners have even  
24 said about La Hougue. I'm not even sure that information  
25 is available. So they're focusing on the PDCF and the La

1 Hougue facility, and I think that says something about  
2 their case.

3           And then I'd just like to close by saying with  
4 respect to the Georgia Tech case that you referred to, if  
5 our recollection is correct, the Petitioners were in the  
6 range of about a half-a-mile from that facility. Here we  
7 are talking about the closest -- the site boundary. The  
8 closest point of the site boundary from this facility to  
9 the Savannah River Site boundary is over eight kilometers.  
10 When you add to that the 20 to 32 miles that the  
11 Petitioners have indicated where they live, we're talking  
12 about a very substantially different difference.

13           And finally, Your Honors, if you were to  
14 establish a 50-mile proximity presumption in this case, I  
15 think you would be setting, establishing, new law. Thank  
16 you.

17           JUDGE McDADE: Okay. Before you move on, as I  
18 understand the argument -- and I'm not saying this is a  
19 good argument or bad argument; I'm just asking you to  
20 address  
21 it -- it is -- the Petitioners are saying that the pit  
22 disassembly conversion facility would not exist if we do  
23 not license this facility, and that there is a potential,  
24 a demonstrated potential, for offsite impact as a result  
25 of that. Should that alone grant them standing? If not,

1 why not?

2 MR. SILVERMAN: It cannot, Your Honor. It, the  
3 law, and the standard is, Is the facility that is being  
4 licensed by the NRC a facility that is a potential source  
5 of a significant offsite consequence. It is not the PDCF.  
6 You may not consider that for purposes of standing.

7 JUDGE McDADE: Well, for example --

8 JUDGE TRIKOUROS: Well, the requirements for  
9 cumulative effects also, as I understand them, do include  
10 ancillary buildings licensed by others. Isn't that  
11 correct?

12 MR. SILVERMAN: That is absolutely correct with  
13 respect to whether the environmental report and  
14 environmental impact statement are appropriately scoped  
15 and cover all the necessary impacts.

16 It is not -- it is a very different matter to  
17 take another facility which is not the one that is being  
18 licensed and determine whether as a result of a dose from  
19 that facility that demonstrates that there is a  
20 significant potential for an offsite consequence from our  
21 facility. That's -- the standard for standing is the  
22 facility being licensed: Does it create an obvious  
23 potential for offsite impacts.

24 JUDGE McDADE: Well, is it from the facility  
25 being licensed, or is it from the Agency action? The

1 Agency action is the licensing of the facility. The  
2 licensing of the facility, they argue, will result in the  
3 pit conversion facility being built and an offsite dose  
4 occurring. That's their argument. Now my question is, Is  
5 it the Agency action that we're looking at, which is the  
6 licensing of the MOX facility, and what flows from that?

7 For example, transportation of plutonium to the  
8 facility is a necessary part of it. That was taken care  
9 of in the earlier proceeding here. Standing was  
10 determined based on the potential for offsite consequences  
11 moving plutonium to the facility and moving fuel from the  
12 facility. Is the analogy that they make here not apt, as  
13 well?

14 MR. SILVERMAN: It is not, Your Honor. I think  
15 that the facility and the action are the same. I do agree  
16 the action does include the transportation of material  
17 from the facility, but it does not include the impacts  
18 from a completely separate facility, albeit somewhat  
19 related. I do not believe that's what the NRC case law  
20 holds in this context.

21 JUDGE McDADE: Okay.

22 JUDGE FARRAR: Okay, Ms. Bupp.

23 MS. BUPP: I just have a few points, Your  
24 Honors.

25 First with response -- in response to the

1 statements made about the La Hougue facility in France,  
2 although the Staff, of course, has not had a chance to  
3 review the studies relied upon by the Petitioners, we  
4 would like to point out a few factual issues about the La  
5 Hougue plant.

6 The La Hougue plant is a very, very large  
7 facility that does include a MOX processing plant but also  
8 includes several other nuclear facilities, including a  
9 spent fuel reprocessing plant. And without having the  
10 opportunity to study the studies relied upon by the  
11 Petitioners, it's not entirely clear where these offsite  
12 doses are coming from. And you should keep in mind the  
13 actual character of the La Hougue plant. Also, with  
14 respect to the PDCF --

15 JUDGE FARRAR: Would it have been legitimate  
16 for them -- suppose in their opening petition they had  
17 said, We read about La Hougue; that makes us nervous about  
18 this place; we think it's going to be the same? Then you  
19 could have responded and said, No, that's a totally  
20 different facility. Is this a matter of proper pleading,  
21 or, as Mr. Silverman said or as I think I understood him  
22 to say, is it that that facility is another facility, and  
23 so just don't look at it?

24 MS. BUPP: Okay. I think it's both. I mean,  
25 first of all, there's the issue of proper pleading, that



1 we haven't had our chance to respond to any of this. But  
2 also, it is a different facility that -- even the MOX  
3 facility at La Hougue is run differently than this  
4 facility will be run. But, also, that facility includes  
5 many other plants and processes, and so it is an entirely  
6 separate character as a facility.

7           And then, also with respect to the PDCF, I  
8 think all the parties have spoken on that issue, but the  
9 Staff does agree with the Applicant that the PDCF -- at  
10 least at this stage of this proceeding, impacts from that  
11 facility are not a proper basis for standing.

12           JUDGE FARRAR: All right.

13           MS. BUPP: Okay. If you have any --

14           JUDGE McDADE: At this stage of the proceeding.  
15 Would it be at any other stage?

16           MS. BUPP: In the earlier construction  
17 authorization stage, where the ER and EIS were at issue  
18 and both the ER and the EIS addressed impacts from that  
19 facility, it could be a proper basis for standing. But  
20 here, where the only thing at issue is issuance of the  
21 license that would lead to operation of the MOX facility,  
22 that is not a proper basis for standing.

23           JUDGE McDADE: Okay. So as I understand the  
24 argument that you've just made -- in the earlier  
25 proceeding, the environmental impact statement was part of

1 what was being taken into consideration -- that any  
2 argument made based on the pit disassembly facility  
3 would -- if it would have been appropriate, it would have  
4 been appropriate then, even if it was appropriate then, it  
5 would not be appropriate now; it's outside the scope of  
6 this proceeding since it could have been raised at the  
7 earlier proceeding and wasn't?

8 MS. BUPP: Yes, Your Honor.

9 JUDGE McDADE: Okay.

10 JUDGE FARRAR: Okay. Thank you, Ms. Bupp.

11 JUDGE McDADE: Mr. Silverman, do you agree with  
12 that?

13 MR. SILVERMAN: Not entirely, Your Honor. I --  
14 we continue to adhere to the belief that, whether it was  
15 the prior proceeding or this proceeding, when it comes to  
16 standing, the issue is whether the facility that is being  
17 licensed creates the obvious potential for offsite  
18 impacts, and that in the earlier proceeding, raising an  
19 issue about what the PDCF would create would not go to  
20 standing.

21 JUDGE McDADE: No. I understand your position  
22 there. The question that Ms. Bupp answered, which is what  
23 I intended the question to be, is, For the sake of  
24 argument, assume that would be a legitimate concern, it  
25 would be a legitimate basis for standing, that,

1 nevertheless, since the environmental impact statement was  
2 a part of the earlier proceeding, if it were to be raised,  
3 it would have had to have been raised at the earlier  
4 proceeding or would be waived.

5 MR. SILVERMAN: Yes. With that assumption, I  
6 agree with that 100 percent.

7 JUDGE McDADE: Without conceding -- this is  
8 just for the sake of argument. Without conceding that it  
9 would be a basis, if it were, it's too late?

10 MR. SILVERMAN: Absolutely.

11 JUDGE McDADE: Okay.

12 JUDGE FARRAR: All right. Thank you.

13 We've used an hour of the 40 minutes we  
14 allocated to that issue. People may have airplanes to  
15 catch, so we'll try to perhaps cut some of the times back  
16 a little as we move forward.

17 I was remiss in my introductions. I forgot  
18 to -- I mentioned all the people here in Augusta who  
19 helped, but I forgot our own people who helped. Trish  
20 Harich, sitting up here with us, has worked with all the  
21 good people here to help pull this event off. We also  
22 have with us our law clerk, sitting in front, Marcia  
23 Carpentier, who has been with us a couple of years, and  
24 Zach Kahn, who just started recently.

25 And, Mr. Zeller and Ms. Carroll, I notice you

1 have someone who I think is familiar to us from last night  
2 sitting with you at the counsel table. If you want to,  
3 introduce her.

4 MS. CARROLL: Oh. This is Jeannine Honicker,  
5 and she's a member of Nuclear Watch South, and she stayed  
6 over. And we had an extra seat at the table, and I hope  
7 it's okay if she sits with us.

8 JUDGE FARRAR: We're glad to have her. We --  
9 she was one of the people who made a limited appearance  
10 statement last night.

11 And we're glad to have you here, ma'am.

12 MS. CARROLL: She has also been an intervener  
13 in the past.

14 JUDGE FARRAR: Okay.

15 Well, let's move ahead and discuss Contention  
16 1. Let's try to cut the time periods down a bit. And  
17 then we'll take a break after that, after we deal with  
18 that contention.

19 On this one, the Petitioners are to go forward.  
20 Who's going to do that argument?

21 MR. ZELLER: Oh. I'm sorry, Your Honor?

22 JUDGE FARRAR: On the contention of  
23 admissibility, we'll start with Contention 1 and try to  
24 cut the times back a little. And on that one, you all go  
25 first. Which of you is going to make that argument?

1 MR. ZELLER: Yes, sir. I will.

2 JUDGE FARRAR: Okay. Thank you.

3 (Pause.)

4 JUDGE McDADE: Okay. If I could start off with  
5 a question on this? As I understand, part of your  
6 argument is that the Nuclear Regulatory Commission should  
7 have done a supplemental environmental impact statement;  
8 under 51.92(a), they would have to do a supplement if  
9 there were seriously different circumstances than  
10 previously envisioned.

11 Can you focus us on what circumstances, what  
12 information is available now, that was significantly  
13 different from the circumstances existed at the time the  
14 original environmental impact statement was issued, I  
15 believe, back in '05, and during the previous proceeding  
16 here?

17 MR. ZELLER: All right. Yes, I can do that.

18 The issuing of an operating license for the  
19 proposed plutonium fuel factory would allow the Applicant  
20 to proceed with operations as permitted. Operating  
21 permits are legally enforceable documents. Issuing of  
22 this operating license would permit the Applicant to emit  
23 air pollution from the plutonium fuel factory and the  
24 supporting structures. Although --

25 JUDGE FARRAR: But you knew Judge -- the point

1 of Judge McDade's question is you knew that four years  
2 ago, or whenever it was you first heard of the case. You  
3 knew that, the Staff knew that, and it was addressed in  
4 the EIS and was subject to being addressed in the hearing  
5 at the first proceeding.

6 So the question is, What's new about that that  
7 either lets you come in now and say, "Aha, there's new  
8 evidence on this point," or should have triggered the  
9 Staff to do a supplemental draft EIS which would have gone  
10 out for comment? What's new since four or five years ago?  
11 What would you tell us today that you would not have said  
12 from the same podium in the first proceeding?

13 MR. ZELLER: Well, it's -- that's a difficult  
14 question to answer because, you know, four or five years  
15 ago, we did not have, of course, the license application,  
16 which was filed late last year. So that, of course,  
17 provided new insights into how the plant would be operated  
18 and how and what type of emissions, air-pollutants, we  
19 might expect from that under --

20 JUDGE FARRAR: Well, wasn't that all in the  
21 Applicant's and Staff -- perhaps not in the same detail as  
22 in the current documents, but wasn't all that covered  
23 to -- I was going to say, "To a greater or lesser extent,"  
24 but, actually, to a greater extent at that point?

25 MR. ZELLER: It was -- some of the same issues

1 were certainly covered. I agree with that. However --

2 JUDGE FARRAR: And then -- and you -- well, go  
3 ahead.

4 MR. ZELLER: Yes. But there are -- there is  
5 further development of it in the license application. Of  
6 course, because in -- under the regulations for the  
7 operating license, additional information is provided,  
8 perhaps not enough information to satisfy us, because  
9 that's what  
10 we're -- some of the points that we are arguing here, in  
11 that the pollution limits will not be controlled  
12 adequately by what they have spelled out in the license  
13 application --

14 JUDGE McDADE: Okay. In --

15 MR. ZELLER: -- under the Clean Air Act, which  
16 comes back to the environmental impact.

17 JUDGE McDADE: In your petition, though, you  
18 point to a revision of the license application was filed  
19 in November '06. But the Applicant and the Staff indicate  
20 that the data that you use from that revision don't  
21 measure the same things, that there's no inconsistency  
22 there, that you're -- basically, I believe the Staff's  
23 language were that you're comparing apples and oranges and  
24 saying they're not the same. And they're saying it's not  
25 surprising that apples and oranges aren't the same.

1           You -- can you explain how that table that, I  
2 believe, was on page 8 of the application or -- of your  
3 petition, you know, is relevant here if they're measuring  
4 different things? What's the inconsistency?

5           MR. ZELLER: Page 8? (Perusing document.)

6           Yes. On page 8, we did compare the EIS to the  
7 application. So -- and we point to the inconsistencies  
8 within that between those two documents. So there is new  
9 information in the license application which we did not  
10 have during the environmental impact statement, which was  
11 filed on whatever date it was filed on.

12           JUDGE McDADE: But the Staff and the Applicant  
13 say that the fact that those two tables are inconsistent  
14 is not relevant, that one is measuring emissions from the  
15 Savannah River facility in 2000 and the other is measuring  
16 emissions from the prospective MOX facility, that you  
17 wouldn't expect them to be the same; there's nothing  
18 inconsistent there. Have -- is --

19           MR. ZELLER: Right.

20           JUDGE McDADE: Do you agree with that argument  
21 by the Staff and the Applicant? Or -- if not, why not?

22           MR. ZELLER: What we attempted to show in our  
23 petition, whether we did it well enough or not, is to show  
24 that the plutonium fuel factory, the license  
25 application -- emissions are quite high even compared with



1 the total facility emissions. And that's -- under the  
2 Clean Air Act, what we are looking at here is the Nuclear  
3 Regulatory Commission proceeding with an operating permit  
4 for an air-pollution facility.

5 And I agree this is perhaps a novel argument,  
6 which someone else said. That's not my term. But  
7 under -- as a major emissions source, the Savannah River  
8 Site has one single permit for the entire facility,  
9 excluding a couple of the coal-fired units which many  
10 people don't even know exist on a nuclear facility such as  
11 this providing electric power. But for the most part, all  
12 of the facilities are under one single Title V permit.  
13 The plutonium --

14 JUDGE FARRAR: Is that an EPA permit, or state  
15 permit?

16 MR. ZELLER: It's a Part 70 permit under the  
17 Clean Air Act. And the permit is issued under Part 70 by  
18 the State of South Carolina as an agreement state. That  
19 goes to the point exactly in that --

20 JUDGE FARRAR: But if -- okay. Are you saying  
21 that the new information you read suggests that they'll  
22 violate that permit? And if so, isn't the answer to that  
23 South Carolina superintendent via EPA will get after them  
24 and the problem will be solved?

25 MR. ZELLER: Exactly the point. You anticipate

1 my argument. The issuance of this license application is  
2 a -- should come under new source performance standards or  
3 a major modification.

4 JUDGE FARRAR: But that's -- isn't that an  
5 issue for the Clean Air people?

6 MR. ZELLER: However, under Title V -- a Title  
7 V permit under the Clean Air Act is issued for operating  
8 for facilities after they've begun operation. For  
9 example, at the present time, Title V permits are issued  
10 for a large percentage, but not all operating, major  
11 sources in the United States, no matter where they're  
12 located.

13 This operating license if issued by the Nuclear  
14 Regulatory Commission would allow the facility to begin  
15 operating. This is the chance -- this is perhaps the only  
16 chance that we have for the application of NESHAPs,  
17 radionuclide emissions, maximum achievable control  
18 technology before the --

19 JUDGE FARRAR: Well, yes. But shouldn't you be  
20 at the South Carolina -- I don't know if it's the DEP or  
21 DEQ in that state.

22 MR. ZELLER: It will be too late, because the  
23 plant would have been in operation already. And the  
24 permit would come back and license what is already there.

25 JUDGE FARRAR: Okay. All right. Do -- without

1 going -- do you have anything else to point us to on this  
2 question of what's new in the last several years?

3 And remember, this is a special proceeding. I  
4 haven't seen any like it before where the Commission's  
5 notice at the beginning said, We're going to do this and  
6 this and environment at the first stage, and then we're  
7 not going to do environment at the next stage; you're  
8 going to have to do all of it at the first stage.

9 So we're in an unusual position. So do you  
10 have anything else to show us what has happened lately,  
11 meaning in the last several years, that should allow us to  
12 say, Well, the Commission would want us to re-open  
13 environment because of these new matters?

14 MR. ZELLER: I don't think of anything to add  
15 in terms of modifying the environmental impact statement.

16 JUDGE FARRAR: Okay. Well, we have your  
17 pleadings on the specifics of the other. And in light of  
18 the time constraints, if you have nothing else, we'll hear  
19 from your opponents.

20 MR. ZELLER: Just -- thank you, Your Honor.

21 Just to be clear, the Clean Air Act under  
22 Section 165(a) states that no major emitting facility may  
23 be constructed unless a permit has been issued for such  
24 proposed facility which sets forth emission limitations  
25 and a proposed permit has been subject to review in

1 accordance with the regulations of the Clean Air Act. So  
2 what I'm saying is here we may be putting the cart before  
3 the horse.

4 JUDGE FARRAR: But shouldn't you be down at the  
5 DEP or DEQ saying, Watch out for these people; there's an  
6 enforcement action working here?

7 MR. ZELLER: If the DEQ's not in the room, I  
8 would be --

9 JUDGE FARRAR: But they have a role.

10 MR. ZELLER: They would have a role, but --

11 JUDGE FARRAR: No. I mean -- yes, they have a  
12 room somewhere that you could make that argument to.

13 MR. ZELLER: Yes, exactly.

14 JUDGE FARRAR: Okay. Thank you, sir.

15 Mr. Silverman?

16 MR. SILVERMAN: Thank you, Your Honor. In the  
17 interest of time -- we have Contention 1; it has got five  
18 subparts to it. What I'd like to do, hopefully, is -- I  
19 want to make three points that are generic to the entire  
20 contention. And then, certainly, if you have specific  
21 issues or questions about subcontentions, I'd be happy to  
22 answer them.

23 JUDGE FARRAR: Go ahead.

24 MR. SILVERMAN: We have three reasons for why  
25 we believe the contention as a whole, in its entirety,

1 ought to be dismissed. The first one is that, as you've  
2 pointed out, we've had two different proceedings here.

3 We had a construction authorization proceeding,  
4 and there were Commission notices on that subject. And in  
5 our view, those Commission notices made it very clear that  
6 environmental issues associate with the MOX facility were  
7 to be litigated in that proceeding and addressed  
8 completely in that proceeding.

9 The environmental report that the Applicant  
10 filed covered construction and operating impacts. The EIS  
11 that was prepared covered construction and operating  
12 impacts.

13 The interveners were directed to file  
14 contentions if they had contentions on the basis of the  
15 environmental report, and they did so. They had a full  
16 opportunity to raise environmental contentions in the CAR  
17 proceeding. And in fact, by my count, there were roughly  
18 20 contentions that were environmental-based contentions  
19 and related to operation of the facility, not just  
20 construction. Some of those were even dismissed as  
21 untimely in the prior proceeding several years ago.

22 In this particular proceeding, there is no  
23 environmental finding that the Staff has to make to issue  
24 this license. And I do not understand how we can have  
25 contentions on a matter that is not even the subject of a

1 finding that must be made by the Staff. So the first, our  
2 first, point here is that we just don't think  
3 environmental issues are appropriate at all under any  
4 circumstance in this proceeding.

5 Now, I recognize there is some language -- and  
6 this is my second point -- in a Commission order in this  
7 proceeding and the Commission does say and I'll quote, "If  
8 genuinely new environmental information emerges during  
9 subsequent phases of the proceeding, there may be a  
10 supplement to the EIS and late-filed contentions."

11 I'm having -- I've had a little trouble  
12 explaining that language based upon my first argument,  
13 because I believe there's no basis in this proceeding for  
14 environmental contentions at all, but I've tried to take  
15 that language and explain it. I think it is clear on its  
16 face, and that is that in order for there to be an  
17 environmental contention, there needs to be information,  
18 new information that is significant enough that it  
19 warrants a supplement to the EIS: There has been a  
20 change; the Staff has said, Gee, we need to look at that  
21 harder; it's not bounded by the environmental impact  
22 statement that we prepared before. And that would  
23 potentially open up the door if you read this language  
24 literally from the Commission to environmental  
25 contentions.

1           There is no such information. There has been  
2 no such information identified by the Petitioners.  
3 Certainly, the Staff has not indicated that there is any  
4 need for a supplement. So we believe that is a second  
5 independent basis for not allowing environmental  
6 contentions. And this would, again, cover all of  
7 Contention 1 and all its subparts.

8           And finally, as a generic point, even if there  
9 were significant new information, the Commission has  
10 spoken very clearly. They've said if there is such  
11 significant information and there is a supplement to the  
12 EIS, there may be late-filed contentions; these  
13 contentions would be late-filed. It -- that requires that  
14 the interveners address the late-filed standards at 10  
15 C.F.R. 2.309 of the Commission's regulations, which  
16 include the good cause standard and a number of other  
17 standards. They did not do so in their petition.

18           We raised the issue in our answer. They did  
19 not do so in their reply. They've completely failed to  
20 address that issue, in our view. So on those generic --

21           JUDGE FARRAR: Wouldn't -- if the facts were  
22 genuinely new and late-breaking and significant, wouldn't  
23 good cause be a foregone conclusion? What you're saying  
24 is it's not that --

25           MR. SILVERMAN: Yes, if there's --

1 JUDGE FARRAR: Your argument is more, Nothing  
2 has happened. Although it's also, if something has  
3 happened, they didn't talk of it, they didn't address it,  
4 and you gave them a chance to by raising it in your reply.

5 MR. SILVERMAN: One, nothing has happened.  
6 And, Two, if something had happened, they do have the  
7 obligation to at least describe it and at least make the  
8 argument that that provides good cause.

9 JUDGE FARRAR: Yes.

10 MR. SILVERMAN: And they haven't done that.

11 JUDGE FARRAR: On the business about the Clean  
12 Air Act permit. If what they say is true about potential  
13 violations, is there a remedy here?

14 MR. SILVERMAN: No, there is not. This is the  
15 wrong forum, Your Honor.

16 JUDGE FARRAR: What is the forum?

17 MR. SILVERMAN: I'm not an expert in EPA  
18 standards. I don't think they have adjudicatory boards.  
19 I think there are ways to challenge permits that are  
20 issued by the Agency. And in fact, I believe there were  
21 even some documents that were attached to some of the  
22 Petitioners' pleadings that appeared to be some sort of a  
23 challenge to the air permit at the Savannah River Site;  
24 I'm not sure those were ever filed.

25 JUDGE FARRAR: Okay.



1 MR. SILVERMAN: And I would be happy to talk  
2 briefly about the other portions of the contention if  
3 you'd like.

4 JUDGE FARRAR: No. I think that in light of  
5 the time, we'll rest with that.

6 MR. SILVERMAN: Thank you.

7 JUDGE FARRAR: Ms. Bupp, do you all have  
8 anything to add to what Mr. Silverman just said?

9 MS. BUPP: Actually, Mr. Martin will be  
10 responding to this contention.

11 JUDGE FARRAR: Okay. Does he know that saying  
12 relatively little at this time will win our favor?

13 MR. MARTIN: I'll take that under  
14 consideration, Your Honor.

15 My first point is that we don't have much to  
16 add. We just want to kind of reiterate our original  
17 statements and -- unless you have any questions.

18 Once again, the Staff does not believe that any  
19 new or significant information has been brought forward  
20 here that would make us revisit the EIS. As both parties  
21 have talked about, 5192 is the standard for supplementing  
22 the EIS. And only if the standards set out in 5192(a) are  
23 met would we revisit the EIS. And at that point, we  
24 could.

25 JUDGE FARRAR: Now, under that regulation,

1 that's an obligation you all have yourselves.

2 MR. MARTIN: Correct.

3 JUDGE FARRAR: In other words, now suppose I'm  
4 an intervener and said, Gee, you guys are asleep at the  
5 switch; you didn't notice this new thing happened. Would  
6 they come to -- should they go to you asking for a  
7 supplement before they come to us, or are they parallel  
8 remedies? Or --

9 MR. MARTIN: I believe they would first bring  
10 it to our attention. However, if they -- in a situation  
11 such as this, they could bring it to your attention, as  
12 well. I think --

13 JUDGE FARRAR: But they did not bring anything  
14 to your attention?

15 MR. MARTIN: Not that we're aware of, no.  
16 Nothing has been brought to our attention as of yet. And  
17 therefore, we still do not feel that there's any. It's  
18 not necessary to revisit the EIS, and, therefore, it's not  
19 within the scope of this proceeding.

20 JUDGE FARRAR: Okay.

21 JUDGE McDADE: But they could argue that the  
22 environmental impact statement was inadequate because  
23 there was not a supplement under 51.92, but in order to do  
24 that, they would have to demonstrate that there was new  
25 information that created a significantly different picture

1 of the environmental impact than that was available at the  
2 time the original environmental impact statement was  
3 issued. Correct?

4 MR. MARTIN: That is correct, Your Honor.

5 JUDGE McDADE: Okay. And it's your position  
6 that they have not demonstrated this significant new  
7 information that would require a supplement or an  
8 amendment under 51.92(c)?

9 MR. MARTIN: That is correct. It's our  
10 position that they haven't even really addressed that  
11 standard at all, let alone at this point.

12 JUDGE McDADE: Okay.

13 MR. MARTIN: If Your Honors don't have any more  
14 questions, thank you.

15 JUDGE FARRAR: Thank you, Mr. Martin.

16 It's 10:27 by the clock in the back there.  
17 Let's take a break and be back here promptly at 10:35, and  
18 we'll move right into Contention 2. Thank you.

19 (Whereupon, a short recess was taken.)

20 JUDGE FARRAR: All right. We'll go back on the  
21 record and take up Contention 2, where the Petitioners go  
22 first.

23 MR. ZELLER: Okay. Contention 2. Our  
24 contention states, Whether MOX Services' license  
25 application meets the relevant requirements of the Atomic

1 Energy Act because of its failure to prepare and submit an  
2 emergency plan to the Nuclear Regulatory Commission for  
3 potential radioactive releases to the public. And I  
4 understand that you're interested in genuine disputes and  
5 expert opinion in this area.

6 In our petition, we made reference to the  
7 Federal Radiological Monitoring Assessment Center, which,  
8 of course, I'm sure you know is under the US Department of  
9 Energy and the National Nuclear Security Administration.  
10 And this is the information which we relied upon in terms  
11 of the dose conversion factors to translate 232 millirems  
12 inhalation dose to 5,430 millirems thyroid dose, or 5.43  
13 rems.

14 We believe this is -- a more accurate  
15 assessment indicates that the 10 C.F.R. 70 threshold of  
16 one rem required for the development and submission of an  
17 emergency plan has been exceeded by a factor of five.

18 JUDGE TRIKOUROS: Can you -- can I ask you,  
19 please, to explain to me? Are you saying that the  
20 calculation that was done by the Applicant was incorrect,  
21 or are you saying that they did it correctly with respect  
22 to the regulations but that if they had done it another  
23 way, it would have provided what you would call the  
24 correct dose? Just where are you coming from on this?

25 MR. ZELLER: I believe that -- the Petitioners

1 assert that the work done by the Applicant has been done  
2 incorrectly. For example, they relied, as we stated in  
3 our petition, on outdated guidance, in fact, which has  
4 been withdrawn from use by the Nuclear Regulatory  
5 Commission.

6 JUDGE FARRAR: Was that withdrawn because it  
7 was incorrect, or superseded by something better? I mean,  
8 was it disavowed?

9 MR. ZELLER: Well, part of the problem with the  
10 ARCON model, as we stated before, is that it is a limited  
11 model. Gaussian dispersion models are used in a variety  
12 of assumptions, and they're relatively simple mathematical  
13 formulas of algorithms in predicting impacts at a certain  
14 distance from an emission source: smokestack here, a  
15 person a mile or two miles or 500 feet away.

16 The ARCON model does not extend much beyond the  
17 perimeter of the Savannah River site from the smokestack,  
18 or the emission points of the proposed plutonium fuel  
19 factory. So, again, as we stated before, the ARCON model  
20 is inaccurate and also withdrawn.

21 JUDGE TRIKOUROS: Well, the argument that was  
22 presented was that, in fact, the calculation that was done  
23 was within the distance limits of the ARCON 96 computer  
24 code. Your argument seems to be more along the lines of  
25 it is possible that if they had done the calculation for a

1 greater distance, it would have resulted in a higher dose.  
2 And I never saw any substantiation of that.

3 Typically that's not the case, unless there was  
4 some extenuating reason for that to be the case; for  
5 example, some hillside that occurs down -- further down,  
6 some reason for the deposition to take place at a greater  
7 rate in the plume further down.

8 But I heard nothing or saw nothing from you  
9 regarding specifics in that regard. You know, you  
10 mentioned general effects like cavitation effects and that  
11 sort of thing. But you never make any statement about  
12 specific situations here that would make that happen, and  
13 that's what I was looking for from this proceeding from  
14 you.

15 You know, do we have any specific conditions  
16 here that would lead one to believe that the dose at a  
17 greater distance than the IOC point would be higher?

18 MR. ZELLER: The dose burden factors here are a  
19 critical factor in predicting the impact of a given amount  
20 of radionuclide emissions. And where we did state it  
21 briefly in our petition was that there are better and more  
22 recently developed estimates of that.

23 And these have been, for example, provided by  
24 what I believe is a reliable source, the Federal  
25 Radiological Monitoring Assessment Center, and which

1 provides data for major radiological emergencies in  
2 support of state and local governments. The Nuclear  
3 Regulatory Commission is participating in that and in fact  
4 is the lead agency under the Department of Homeland  
5 Security for this program.

6           There was a National Atmospheric Release  
7 Advisory Center modeling decision support system for  
8 radiological and nuclear emergency preparedness which  
9 addresses the -- some of the basic questions about  
10 Gaussian plume and puff models and their limitations.  
11 This would -- this goes to the same point that we raised  
12 earlier about the limits of the ARCON model.

13           And also the atmospheric and dispersion models  
14 predict quantity such as time-integrated or time-averaged  
15 air concentrations, peak concentrations at any time  
16 interval during total exposure time, and accumulated  
17 surface deposition. These quantities are converted into  
18 products that are useful to a wide range of users.

19           This, again, comes from the Lawrence Livermore  
20 National Laboratory publication of April 25, 2005, which  
21 is the National Atmospheric Release and Advisory Center.

22           Within this document are some of --  
23 explanations of some of the software systems, and, again,  
24 the more accurate estimates of dose conversions factors so  
25 that you may be able to more accurately assess what the

1 impact will be outside of -- on the general public.

2 And what I believe Shaw AREVA has attempted to  
3 do here is to simply get by doing what they should do, and  
4 I think they've done it incorrectly. They should simply  
5 do that assessment, do the full assessment and not rely  
6 upon -- or I believe the Commission should not rely upon  
7 the document which was submitted which allows them to not  
8 do that assessment.

9 JUDGE TRIKOUROS: I need to understand, though,  
10 specifically has the Applicant met the regulations? Or  
11 are you saying that the Applicant has not met the  
12 regulations?

13 MR. ZELLER: Have not met the regulations.

14 JUDGE TRIKOUROS: It's important for us to  
15 understand if you're simply saying that the Applicant met  
16 the regulations, but I don't think the regulations are  
17 correct in the way that they're applied, that their  
18 requirements are incorrect. What exactly are you saying?

19 For example, certainly there are many effects  
20 that you could point out that might have an impact, but I  
21 need -- it's not clear that those effects would make  
22 things worse or make things better. You haven't nailed it  
23 down, so to speak, with respect to this application, and  
24 we need to be able to do that.

25 JUDGE McDADE: And if I could interject



1 something here as well, as I understand the Staff's  
2 position -- they say put the regulatory guidance aside --  
3 at issue is whether or not 10 C.F.R. 70.22(i) has been  
4 complied with.

5 The Staff represents that I has been complied  
6 with, and the question to you is, specifically how do you  
7 allege that that regulation has been violated here; how  
8 have they not complied with 70.22(i)?

9 MR. ZELLER: Right. We do -- thank you. We do  
10 state that they have not met the 10 C.F.R. 70.22.

11 JUDGE McDADE: How? I mean, not saying that --

12 MR. ZELLER: That by its --

13 JUDGE McDADE: -- the regulation is inadequate,  
14 but how did --

15 MR. ZELLER: Right.

16 JUDGE McDADE: -- they fail to meet the  
17 regulation?

18 MR. ZELLER: Of course. They have not shown --  
19 they have relied on incorrect information to get an  
20 estimate --

21 JUDGE TRIKOUROS: Well, incorrect --

22 MR. ZELLER: -- which --

23 JUDGE TRIKOUROS: It's a very important point:  
24 incorrect relative to the requirements of the regulations,  
25 or incorrect in the application of the regulations? So in

1 other words, was the calculations performed by the  
2 Applicant incorrect in that it made some mistake or made  
3 some -- have made some assumption that was not valid with  
4 respect to the regulatory requirements?

5 Is that what you're saying? Or are you saying  
6 that there are other methods out there that, if they were  
7 used, would give a different answer?

8 MR. ZELLER: Well, both.

9 JUDGE TRIKOUROS: Well, let's concentrate on  
10 the former right now.

11 MR. ZELLER: The former, as we stated before,  
12 is the guidance has been withdrawn, which they used in  
13 their estimates. Now, I don't know what the internal  
14 Nuclear Regulatory Commission decision-making process is  
15 on what guidance to post on their website and which  
16 guidance to withdraw from their website.

17 And I'm assuming there are good reasons to do  
18 that, and I'm certain there are, when guidance is  
19 withdrawn from use, I would assume that someone would use  
20 something different and not guidance which has been  
21 withdrawn, for whatever reason.

22 JUDGE McDADE: Okay. But the guidance is  
23 simply guidance. What we're focusing on is the regulation  
24 itself, 70.22(i). The guidance has been withdrawn. The  
25 Applicant followed that guidance, but whether they

1 followed the guidance or not, they still had an obligation  
2 to comply with 70.22(i).

3 And what the Applicant has said is, first of  
4 all, with regard to the guidance itself, it was withdrawn  
5 back in 1998, so therefore if there was an issue simply  
6 based on the withdrawal of that guidance, you should have  
7 raised it at the earlier proceeding; if not, you've waived  
8 it.

9 So the only issue here is whether or not they  
10 complied with 70.22(i). And, again, what we're asking you  
11 is specifically to explain to us what they did or failed  
12 to do that puts them in violation of 70.22(i).

13 MR. ZELLER: If I understand your question  
14 correctly, in that if we had objected or pointed this out  
15 in 1998 --

16 JUDGE McDADE: Well, they're saying that there  
17 was an earlier proceeding.

18 MR. ZELLER: Yes.

19 JUDGE McDADE: Prior to the earlier proceeding  
20 that guidance had already been withdrawn; it had been  
21 withdrawn in 1998, so therefore, if there was an issue  
22 based solely on the withdrawal of that guidance -- and  
23 they claim that there isn't, but even if there were, it  
24 would have been waived by not raising it.

25 But the Staff is saying -- and what we're

1 asking you to focus on right now -- is put aside the  
2 guidance. What we're looking -- because that -- all that  
3 is is just a methodology: It suggests to Applicants  
4 things they can do that, in the Agency's view, would bring  
5 them into compliance with the regulation. It gives them  
6 sort of an assistance on bringing themselves into  
7 compliance.

8           What we're asking you to focus on is how  
9 specifically are they not in compliance. What does  
10 70.22(i) require that hasn't been met?

11           MR. ZELLER: Right. I understand that. The  
12 threshold, of course, in there is the one rem, whether one  
13 rem is exceeded in order to move forward, in order to not  
14 perform -- put the emergency plan in -- to do the full  
15 work that's required.

16           Therefore the dose factors which we brought,  
17 which we provided as an example of a more reliable one,  
18 shows that when that 230-millirem inhalation dose exceeds  
19 that one-rem standard, that this information was available  
20 to the Applicant; it was available to the Nuclear  
21 Regulatory Commission itself, and it should have -- it  
22 should provide pause to the Commission at this point.

23           JUDGE FARRAR: When you did your analysis of  
24 the thyroid dose, did you apply the proper conversion  
25 factors to tie it back into a regulation?

1 MR. ZELLER: Yes. Yes, we did some of the  
2 number crunching, and we had some help from some experts  
3 in that area.

4 JUDGE TRIKOUROS: The Staff in their review  
5 understood that the Applicant had used the regulatory  
6 guide that had been withdrawn. As I understand it, the  
7 regulatory guide was replaced by a NUREG document. The  
8 Staff looked at the source terms that were generated and  
9 made the determination that they were correct with respect  
10 to the latest guidance.

11 The Applicant appears to have applied the total  
12 effective dose-equivalent methodology that was required,  
13 that's acceptable in the -- under the regulations. They  
14 used the weighting factors associated with the individual  
15 organs, including the thyroid.

16 So it looks, from our perspective, okay. I  
17 can't comment on the document that you used and its  
18 acceptability with respect to the regulations, because  
19 that -- because as far as I know, it is not typically used  
20 for these types of calculations.

21 I'd like to understand from you if you believe  
22 that the regulations were complied with as they're  
23 specified in the EIS.

24 MR. ZELLER: I don't know how to state this any  
25 more plainly, in that guidance which was relied upon by

1 the Applicant has been withdrawn, and that other expert  
2 guidance would provide a different impact which falls  
3 outside of the one rem required for the development and  
4 submission of an emergency plan under 10 C.F.R. 70.22.

5 If there's another assessment here, it's not in  
6 the license application that I've seen, and if it's in the  
7 document somewhere, then I would like see that. It  
8 certainly -- I would recommend that the Commission do that  
9 work, and make it available, because I have not seen it.

10 JUDGE FARRAR: Mr. Zeller, we're way over our  
11 time. We got enough -- that concludes -- is that a good  
12 point to conclude?

13 MR. ZELLER: Thank you. Yes, it is.

14 JUDGE FARRAR: Thank you.

15 We'll hear then the Applicant and Staff  
16 response.

17 And, Mr. Silverman, let me preface your  
18 response. Ordinarily in these cases we get applicants who  
19 don't follow a regulatory guide, and citizens groups come  
20 in and say, Aha, you didn't follow a regulatory guide, and  
21 the Applicant's and Staff's standard answer is, Yes, we  
22 didn't follow it, but we adopted our own method, which  
23 passes muster for the following reasons.

24 We now here have the flip side, where you're  
25 clinging to a regulatory guide that's been withdrawn. So

1 I think that's the central focus. If you can address that  
2 directly it would be helpful.

3 MR. SILVERMAN: I believe I can, Your Honor.

4 Our position on this is there's no genuine  
5 dispute of material fact on that subject. The reg guides  
6 are guidance, if -- they are not binding requirements, as  
7 you well know, and there's no alleged non-compliance here  
8 with NRC regulations.

9 We did use reg guide 3.35, which was withdrawn  
10 in 1998.

11 JUDGE FARRAR: You used it after it was  
12 withdrawn?

13 MR. SILVERMAN: Yes, Your Honor, that's --

14 JUDGE FARRAR: Okay.

15 MR. SILVERMAN: -- my understanding.

16 JUDGE FARRAR: So your people much have said,  
17 It's withdrawn, but the reason it was withdrawn makes it  
18 still useful for some purpose. What was that --

19 MR. SILVERMAN: Yes.

20 JUDGE FARRAR: -- that was their chain of  
21 reasoning?

22 MR. SILVERMAN: I'm not sure --

23 JUDGE FARRAR: Help me with it.

24 MR. SILVERMAN: Sure. I think the simple  
25 answer to this, Your Honor, is that it doesn't matter what

1 their motivation was because the inputs that were used  
2 from reg guide 3.35 to do this calculation are also  
3 contained in the most current guidance, which is the NRC  
4 accident analysis handbook, which is NUREG CR 64.10.

5 The same information is in both documents. And  
6 so whether you use the old withdrawn -- the same  
7 information as relevant to the calculation that was  
8 applied by the Applicant -- so whether you use the older  
9 or you use the new, they have the same inputs. It does  
10 not matter.

11 And it does not state a claim in any event that  
12 we used a guideline that was withdrawn unless they  
13 demonstrate somehow that we failed to comply with the  
14 regulation.

15 JUDGE FARRAR: So is that an argument: It  
16 might have been better practice and made everybody  
17 understand things better if you had cited the new guide  
18 rather than the old one, but it's just a matter of  
19 superficial labels as opposed to substance. Is that --

20 MR. SILVERMAN: That is my understanding, Your  
21 Honor.

22 JUDGE FARRAR: -- is that your argument?

23 MR. SILVERMAN: Yes. It might have been a  
24 little clearer. And, of course, the Staff independently  
25 evaluated our calculation in the SER and was satisfied



1 with it.

2 JUDGE FARRAR: Maybe it would be good to hear  
3 from the Staff on why they let you do that, unless you --  
4 again, I'm trying to --

5 MR. SILVERMAN: The only --

6 JUDGE FARRAR: -- save some time.

7 MR. SILVERMAN: Right. I have nothing else on  
8 the issue of the outdated reg guide, that's contention  
9 2.1. I would want to speak to contention 2.2 on the --

10 JUDGE FARRAR: Go ahead then.

11 MR. SILVERMAN: -- emergency plan. You want me  
12 to do that now?

13 JUDGE FARRAR: You can do that now.

14 MR. SILVERMAN: Sure. I think the Board's  
15 covered a lot, so I will try to be -- what I would  
16 otherwise say, but I will try to be brief.

17 The -- one of the assertions here is that we  
18 used this ARCON 96 code, which is a code that's used for,  
19 as I understand it, near-field, close-by atmospheric  
20 transport. But that was an extremely conservative  
21 approach.

22 What we did was we calculated a maximum dose to  
23 the individual outside the controlled area, which is 160  
24 meters from the stack. We used that code for its  
25 appropriate purpose, for a close-in, near-field

1 assessment. We came up with a dose that was less than one  
2 millirem -- I'm sorry -- less than one rem. I apologize.

3 And we then therefore concluded that the public  
4 at the Savannah River site boundary, which is over eight  
5 kilometers away, would receive a dose considerably less  
6 than that.

7 So we did not misuse that code in any way,  
8 shape, or form. It was actually a very conservative  
9 application of the calculation.

10 JUDGE FARRAR: So you did a conservative  
11 application, and then made a logical leap. But Judge  
12 Trikouros would say the logical leap is okay unless you  
13 have some peculiar topography that would mean that the  
14 farther out you went --

15 MR. SILVERMAN: Yes.

16 JUDGE FARRAR: -- perhaps there would be an --

17 MR. SILVERMAN: But we did --

18 JUDGE FARRAR: -- unusual --

19 MR. SILVERMAN: -- yes, but we did more than a  
20 logical leap, because my understanding is the Applicant  
21 has also looked at using the appropriate code for farther  
22 distances out, the CAP-88 code, whether, in fact, it is  
23 true that the doses would drop off with distance, and the  
24 answer to that question is that they would.

25 JUDGE TRIKOUROS: Which code was that?

1 MR. SILVERMAN: CAP-88.

2 VOICE: It's EPA.

3 MR. SILVERMAN: EPA?

4 VOICE: Yes.

5 MR. SILVERMAN: Base code. And, you know,  
6 there's a lot of discussion here about the Federal  
7 Radiological Monitoring Assessment Center guidance. We  
8 did not use that guidance. We used federal guidance  
9 report 11. My understanding is that both documents have  
10 the same dose conversion factors.

11 And the regulation here finally calls for an  
12 analysis of total effective dose equivalent, not  
13 individual organ dose. We took the thyroid individual  
14 organ dose. We applied the appropriate weighting factor  
15 that is set forth in the NRC regulations, and we correctly  
16 came up with a dose that was below the one rem standard,  
17 so there is no genuine dispute on this issue, in our  
18 opinion.

19 JUDGE FARRAR: Okay. Thank you.

20 Staff, please.

21 MS. BUPP: The Board would like me to start  
22 with the question that you just addressed to Mr. Silverman  
23 about why the Staff allowed the Applicant to use the  
24 outdated guidance.

25 JUDGE FARRAR: Right. In the intervenor's

1 mind, the Petitioner's mind, they came in with this, and  
2 you should have, I suppose, sent it back saying, Hey, you  
3 used something that's no longer operative, redo -- you  
4 know, do your homework over again. Why did that not  
5 happen?

6 MS. BUYP: The question in the Staff's mind  
7 always when looking at a license application is whether  
8 that application complies with the regulations. The  
9 Applicant could have come in using no guidance at all or  
10 using the completely updated guidance or, in the present  
11 case, using slightly outdated guidance. The Staff's  
12 process is the same: We look at their calculations no  
13 matter what guidance they used. If any guidance was used,  
14 check their calculations, make sure they're correct, and  
15 then, if those calculations comply with the licensing  
16 requirements in the regulations, do we make a positive  
17 finding.

18 The fact that they would have -- if they had  
19 used the up-to-date guidance, we wouldn't have given them  
20 a free pass. We still would have gone through and  
21 analyzed their calculations, looked at their calculations,  
22 checked them. So our process is the same no matter how  
23 they label the input.

24 JUDGE FARRAR: Well, you can say it's the same,  
25 but if somebody comes in and uses outdated guidance,

1 doesn't -- why doesn't that prompt a letter back saying,  
2 We withdrew that guidance for the following -- now those  
3 reasons may be it was too strict; it may have been it was  
4 not -- in other words, for some reason it was withdrawn,  
5 and we haven't heard anyone explain to us yet why it was  
6 withdrawn and explain why it was withdrawn in a manner  
7 that meant relying on the outdated guidance is not fatal  
8 to your case.

9 MS. BUPP: Well, but --

10 JUDGE FARRAR: But you withdrew it for some  
11 reason.

12 MS. BUPP: Well, we withdrew it for different  
13 reasons, but for the specific inputs that were used in  
14 this case, they were superseded by more recent guidance.  
15 And so the relevant portions of the withdrawn guidance are  
16 still up to date, because they're in the more recent  
17 guidance.

18 JUDGE FARRAR: Okay.

19 MS. BUPP: So --

20 JUDGE FARRAR: Unless you have something extra,  
21 I mean, that was the central point we thought --

22 MS. BUPP: For contention 2.1, yes.

23 JUDGE FARRAR: -- for this, so.

24 MS. BUPP: For contention 2.2, I don't have a  
25 great deal to add; simply to point out that the Staff's

1 main argument is that there has not been any evidence that  
2 the calculations would not be applicable at a further  
3 distance, either from the Applicant, from the Staff's  
4 analyses, or, most importantly, put forth by the  
5 Petitioners.

6 Unless the Board has further questions?

7 JUDGE FARRAR: So to Judge Trikouros's  
8 question, it's a legitimate question, but you're saying  
9 you and this Applicant were satisfied that those, say,  
10 topographical conditions did not exist that would bring  
11 his question into play?

12 MS. BUPP: Yes, we've been satisfied. And the  
13 Petitioners haven't raised anything new.

14 JUDGE FARRAR: Okay.

15 JUDGE TRIKOUROS: Have you seen the Applicant's  
16 calculation using the additional code, the other code that  
17 he mentioned, an AP-88 [sic], was it?

18 MS. BUPP: No, I -- no, we have not.

19 JUDGE TRIKOUROS: Okay. And did you say that  
20 was an EPA code, by the way? Is that -- was that -- I'm  
21 not familiar with it in the nuclear industry at all.

22 MR. SILVERMAN: CAP-88 is an EPA code used for  
23 air emission calculations.

24 MS. BUPP: Are there any further questions from  
25 the Board?

1 JUDGE FARRAR: No. Thank you, Ms. Bupp.

2 MS. BUPP: Thank you.

3 JUDGE FARRAR: We will now do contentions -- as  
4 it says in the handout, we'll do contentions 3 and 4  
5 together. These deal with the likelihood or not of  
6 building a waste solidification building, that raise  
7 larger procedural issues. Applicant and Staff are first.

8 MR. SILVERMAN: Your Honor, if you'd like me to  
9 proceed differently, I will, but what I'll do is I'll  
10 start with contention 3; I think run through that quickly  
11 and address your questions.

12 JUDGE FARRAR: Well, I'd rather we talk about  
13 the notion of these things being speculative because they  
14 haven't happened yet. And some people in the room are old  
15 enough to remember the Lone Ranger and the thrilling days  
16 of yesteryear. I'll take you back to the 1970s when we  
17 had construction-permit and operating-license hearings on  
18 reactors.

19 And at the operator license stage, Petitioners  
20 came in with a lot of issues about bad things that had  
21 happened during construction, and so we had hearings or  
22 didn't have hearings on those issues.

23 Here they can't come in with bad things that  
24 happened during construction because construction just  
25 started, as I think you informed us, on August 1.

1                   So why isn't any safety -- and forget  
2 environmental contentions. Why is it not impossible for  
3 them to come in with any safety contention they came in  
4 with, whether it's the waste solidification building on  
5 which you have certain arguments about it -- why wouldn't  
6 any safety contention they raise now be speculative, and  
7 if that's true, what do we do about it?

8                   MR. SILVERMAN: Yes. Your Honor, in the old  
9 NRC CPOL cases Petitioners often raised construction-  
10 related issues like quality of construction in an  
11 operating-license proceeding. There were opportunities in  
12 a number of those cases to raise those issues, and some of  
13 those contentions were determined not to be speculative.

14                   The fact that we've got a notice here of  
15 hearing that precedes some of the construction work --  
16 most of the construction work, doesn't give the  
17 Petitioners a right to raise a speculative contention  
18 here.

19                   More directly to your question, the intervenors  
20 have opportunities available by the way of the regulations  
21 to raise these issues at a later date if and when they are  
22 not speculative. They have a right to file late-filed  
23 contentions --

24                   JUDGE FARRAR: Okay. Hold on, let me interrupt  
25 you right there, and I'll -- let's walk through that



1 together.

2 MR. SILVERMAN: Sure.

3 JUDGE FARRAR: Suppose we found in this case  
4 that they had standing, but that for one reason or another  
5 the other contentions were not valid and that this one was  
6 speculative because we don't know right now what's going  
7 to happen with the waste solidification.

8 Would we then -- would you urge us to terminate  
9 the proceeding? Would you urge us to say, okay, you're  
10 in, you have standing; let's all take a rest and, you  
11 know, come back in a year and let us know if you've  
12 discovered anything that's not speculative because  
13 something's gone wrong out at that site?

14 What is the -- how would we proceed in that  
15 situation where, if we were to find you had standing, but  
16 were to find that none of these -- I take it if we found  
17 one contention came in right now, the proceeding would be  
18 live and they could come back for the life of that  
19 proceeding with new contentions as long -- and they'd have  
20 to show good cause -- I don't use the term late filed; I  
21 use recently filed because late filed can be pejorative.

22 If something just happens, they learn about it  
23 on Monday and come in on Tuesday, to me that's good cause;  
24 we just learned about it, yes, it wasn't filed at the  
25 beginning, but here we are, the thing just happened.

1           So if we let one contention in, the proceeding  
2 would be live and they'd have the rest of the  
3 construction, which I think is scheduled to go to 2014, to  
4 come back in. But if we throw out all the contentions,  
5 are you going to tell me the proceeding's over?

6           MR. SILVERMAN: I am going to tell you the  
7 proceeding's over, Your Honor. They have a -- to the best  
8 of my knowledge, I'm not aware of another proceeding,  
9 there may be one out there where in a situation where the  
10 Board has decided that there is a reason outstanding but  
11 there is no valid contention that they have not dismissed  
12 the proceeding.

13           That does not mean the intervenors. There is  
14 still one more remedy available to them at least, which is  
15 a request to reopen the record of the proceeding, and  
16 intervenors have done that in the past.

17           JUDGE FARRAR: Who do they make that to?

18           MR. SILVERMAN: They would make that probably  
19 to the Secretary of the Commission, since the Licensing  
20 Board would no longer empaneled, and that opportunity  
21 presents itself.

22           JUDGE FARRAR: Then the Commission, or the  
23 Secretary, on orders from the Commission, would either  
24 refer that motion to the Commission itself, or tell the --  
25 or the -- tell the Chief Judge of the Licensing Board

1 panel to resurrect the old Board or appoint some new Board  
2 to deal with that.

3 MR. SILVERMAN: Absolutely. But I don't think  
4 it's within this Board's authority to extend for this -- a  
5 proceeding where there's no basis to keep it open; there's  
6 no live contention under your assumption that all the  
7 contentions are dismissed, on the possibility that the  
8 intervenors might find some new information that's  
9 significant at some later point in time related to the  
10 construction, and then file contentions on that basis.

11 JUDGE FARRAR: But as you just described it,  
12 it's a fairly easy step for them to take to say, Aha, a  
13 year from now, here's something new we just heard about --  
14 bad quality assurance, uncertified welders, whatever --  
15 and file that contention. They don't have to overcome  
16 enormous hurdles to take that step. Is that your  
17 position?

18 MR. SILVERMAN: Well, my position is that if  
19 there's an open proceeding, they have to meet what I refer  
20 to and I think the rules refer to as the late-filed  
21 standards. And if there's not, then they have to meet the  
22 reopening standards, and they are what they are.

23 JUDGE FARRAR: But the reopening standards are  
24 basically we just discovered -- in other words, if you  
25 come in and say, We just discovered this genuine safety

1 issue, and so, you know, we were found to have standing in  
2 the proceeding that's been closed, we would like to reopen  
3 that proceeding.

4 Now, you would argue with them about whether  
5 that's new information --

6 MR. SILVERMAN: Yes, sir.

7 JUDGE FARRAR: -- about whether it's  
8 substantial information, but you're telling me here and  
9 now, you wouldn't stand up and say, You can't do that;  
10 that's not a permissible approach? You'd argue with the  
11 merits but you wouldn't say, That's not the right avenue  
12 to go down?

13 MR. SILVERMAN: If you're asking me whether --  
14 we're speculating a little bit about the future here, but  
15 if you're asking me if at this -- today, standing here, I  
16 would say, No, they have no right to seek a reopening of  
17 the record -- I would say they have a right to seek a  
18 reopening of the record in accordance with the  
19 Commission's standards.

20 JUDGE TRIKOUROS: Maybe you can help me  
21 understand this a little better. If this were a nuclear  
22 reactor there would be something called ITECs, which I'm  
23 sure you're very familiar with.

24 These ITECs would be promises on the part of  
25 you, the Applicant, to build the reactor in accordance

1 with everything you said you would do. If you didn't meet  
2 those ITECs, then people would be able to question you,  
3 and we would have a hearing, and there would be some  
4 difficulties for you.

5 The waste solidification building is in the  
6 application; it's a promise to build that building. As a  
7 result there won't be the storage of large amounts of  
8 liquid alpha waste; therefore, your safety analysis didn't  
9 worry about that waste being -- in some manner getting out  
10 into the environment. And the Applicant is saying, Well,  
11 we don't think you're going to build that building. And  
12 clearly that's speculative on their part.

13 What responsibility do you have? -- because  
14 there doesn't appear to be anything in the system that  
15 would call you out and say, You didn't do it in accordance  
16 with the way that you promised, which was to build a waste  
17 solidification building.

18 So you're saying if you don't build the waste  
19 solidification building and if the Applicant doesn't pick  
20 that up, then that's it?

21 MR. SILVERMAN: No, first of all, the waste --  
22 we're not building a waste solidification building, and  
23 it's not subject to this licensing proceeding, so perhaps  
24 that's not exactly the right example. We're building the  
25 MOX facility.

1 JUDGE TRIKOUROS: Well --

2 JUDGE FARRAR: No, no, no. That -- your papers  
3 represent that you need -- that if you -- that you need to  
4 build that, because that will deal with what would  
5 otherwise be an onsite problem.

6 So we may not have licensing authority over  
7 that, but if you decide not to build it, Judge Trikouros's  
8 question, if I can paraphrase it, is, Okay, now you got  
9 some stuff on site that you told us wouldn't be on site,  
10 now it's there, what are you doing about it?

11 So now, even though the waste solidification  
12 building is not our jurisdiction, or our problem --

13 MR. SILVERMAN: Right.

14 JUDGE FARRAR: -- what's onsite is our problem.

15 MR. SILVERMAN: Right. Right. And to the  
16 extent that that is new and significant information that  
17 either meets the standard for late-filed contentions or  
18 reopening of the record, there are opportunities there for  
19 the intervenors to raise that issue if and when that were  
20 to happen.

21 JUDGE FARRAR: Let me ask you this, and let me  
22 follow and let me see how -- let's push what you said. We  
23 just talked about new -- a minute ago we talked about new  
24 contentions generally, and they could come in under the  
25 reopening.

1           With this one, since they have a contention in  
2 front of us that you say is speculative, is this one where  
3 you decide, or Congress decides, or whoever decides,  
4 there's not going to be a waste solidification building,  
5 would this be an automatic reopener?

6           MR. SILVERMAN: It would not be an automatic  
7 reopener. I think --

8           JUDGE FARRAR: Tell me why.

9           MR. SILVERMAN: Well, I don't think there is  
10 such thing as an automatic reopener, first of all.

11          JUDGE FARRAR: Well, if you say you're going to  
12 have a waste solidification building because you need it  
13 to deal with a problem onsite, and they say, aha, you  
14 might not build it. You say that's speculative so we  
15 throw them out. Then you say the next week, oh, we're not  
16 going to build it. Why is that not an automatic reopener,  
17 and think hard about your answer before you say it.

18          MR. SILVERMAN: Well, Your Honor, I have a  
19 couple of responses to that. The first one, I just will  
20 repeat, is there is a legal standard for reopening the  
21 record. It may very well meet the standard, it may not, I  
22 don't have the standard on my fingertips, but I believe it  
23 does require some significant level of new information.  
24 That may or may not be, and that's not before us today.

25          But let me add --

1 JUDGE FARRAR: Where -- how we write a decision  
2 is before us today --

3 MR. SILVERMAN: Understood.

4 JUDGE FARRAR: -- and you're asking us to throw  
5 these people out and say, you know, leave us on something  
6 that's speculative, and I guess I'm asking you, do you  
7 concede that if at some later point you don't build the  
8 waste solidification building, that you would join  
9 that -- and they'd come in with a request for reopener,  
10 that you would support that request for reopener?

11 MR. SILVERMAN: No, I would not say that. And,  
12 no, I think we have to distinguish here between  
13 environmental contentions and safety contentions.

14 JUDGE FARRAR: This is a safety contention.

15 MR. SILVERMAN: On the safety side, let me  
16 quote to you, and it came from -- you also quoted it in  
17 your scheduling order, or one of your orders, I believe.  
18 The construction related finding that needs to be made in  
19 this possession and use license proceeding -- it's in 10  
20 C.F.R. 70.23(a)(8), and it is, as far as I know, the only  
21 construction related finding that has to be made, and it  
22 says that the NRC must determine the license will be  
23 approved if "construction of the principal structures,  
24 systems, and components approved in the construction  
25 authorization have been completed in accordance with the



1 application." That's the standard.

2 If there was new information related to some  
3 change in the circumstances with the WSB that caused us to  
4 not construct our facility the way we said we would  
5 construct it, there's a significant question there, and  
6 there may very well be some basis for reopening. In the  
7 absence of that, I would think that there would not be  
8 under that scenario.

9 JUDGE FARRAR: But if you don't concede now --  
10 I'm not asking you to concede that not building the waste  
11 solidification building would be a winning issue for them  
12 on the merits, all I'm saying is, you know, would it be an  
13 issue that comes in and then maybe you move from summary  
14 disposition and say, Wait a minute, we didn't build this  
15 building but here's what we're doing onsite to deal with  
16 the problem, no need for a hearing on that.

17 MR. SILVERMAN: Well, I could come in in an  
18 environmental context if, for example, there is -- it  
19 creates significant new information and there's some need  
20 to supplement the EIS on the basis of that, which is not  
21 where we are today. And on the safety side, with respect  
22 to this proceeding, once again, the issue is did we build  
23 this plant in accordance with the PSSCs that were  
24 established at the GAR [phonetic] stage.

25 If we did not, there's a basis to have that new

1 contention brought in. If we did, I have a real question  
2 about whether there's a basis for that contention to be  
3 admitted.

4 JUDGE FARRAR: Okay. But the more you say  
5 that, the more you're forcing us toward the position that  
6 we don't dismiss this contention as speculative, we leave  
7 it pending because there's a little -- however speculative  
8 you may describe it as, there's a little something behind  
9 that speculation from the -- that has nothing to do with  
10 NRC processes, but there's --

11 MR. SILVERMAN: Well --

12 JUDGE FARRAR: -- a little behind the  
13 speculation so why is -- if you won't make that automatic  
14 reopener concession, not on the merits, just as a matter  
15 of procedure, then why wouldn't we leave this contention  
16 open to see if, in fact, it is speculative.

17 MR. SILVERMAN: Because, Your Honor, it -- I  
18 don't believe there is anything behind the contention.  
19 Let's back up to the language of the contention. The  
20 contention says there are no concrete plans to build the  
21 WSB. They have provided no basis for that whatsoever.  
22 That's the contention before us, no concrete plans -- this  
23 is contention 3 -- to build that facility.

24 It's in the president's budget; the project's  
25 been approved by the Department of Energy; the conceptual

1 design is completed of this facility, the preliminary  
2 design is completed of this facility; the final design is  
3 about halfway done; the intervenor --

4 JUDGE FARRAR: Then why isn't it easy for you  
5 to say it's so non-speculative, I'm happy to give you the  
6 automatic reopener, because it really ain't going to  
7 happen?

8 MR. SILVERMAN: I can't predict the future,  
9 Your Honor.

10 JUDGE FARRAR: Well, neither can we, and these  
11 people have come --

12 JUDGE TRIKOUROS: But I don't even think that  
13 is the question. There's the -- I understand the issue  
14 that was raised by the Petitioners, but they -- whether  
15 they know it or not, there's a broader issue, and that is  
16 that if you have a design -- if this were a nuclear  
17 reactor and we decided not to build the WSB, we would do a  
18 design evaluation -- not having built the WSB, we would  
19 have to do a safety evaluation of not having built the  
20 WSB, we would have to take all of that into consideration,  
21 do all the analyses associated with that over again.

22 If they were important results, we would have  
23 to submit it to the Nuclear Regulatory Commission and they  
24 would have to approve it. That would be my responsibility  
25 as the person building --

1 MR. SILVERMAN: Yes.

2 JUDGE TRIKOUROS: -- this facility. Do you  
3 have that responsibility?

4 MR. SILVERMAN: We have --

5 JUDGE TRIKOUROS: And if not, does the NRC have  
6 that responsibility to overlook -- to look over your  
7 shoulder?

8 MR. SILVERMAN: We have a very similar  
9 responsibility, yes, under the Part 70 regulations.  
10 There's -- I think you're referring to the 50.59 type  
11 process.

12 JUDGE TRIKOUROS: Right.

13 MR. SILVERMAN: And in Part 70 there is a  
14 comparable process.

15 JUDGE TRIKOUROS: Right. That's what I want to  
16 hear you say, that, in fact, if the waste solidification  
17 building is not built within the regulations that are  
18 requirements, that you have to do a re-evaluation of your  
19 application, submit that to the Nuclear Regulatory  
20 Commission, where they would approve it, which would then  
21 flag the Applicant's the opportunity to see that and  
22 possibly file a contention.

23 But is that not the way it works?

24 MR. SILVERMAN: Well, you're -- I'd like to be  
25 able to completely agree with you that we would have to do

1 the evaluation and submit the evaluation to the NRC. The  
2 70.76 --

3 VOICE: Seventy-two.

4 MR. SILVERMAN: 70.72?

5 VOICE: Yes.

6 MR. SILVERMAN: I'm sorry -- 70.72 change  
7 process. I'm not an expert in it, but what I do  
8 understand is that they're sort of a screening level at  
9 first. And any potential change has to be evaluated to  
10 see if it even -- if it has to be evaluated at all, if it  
11 does have to be evaluated, there are some changes that can  
12 be made without prior approval, and they are made  
13 available for the NRC -- all of those that were available  
14 for the NRC Staff to inspect at any time.

15 They come in, and if they disagree, for  
16 example, that we did that evaluation and that we should  
17 have come to them about it and we should have gotten prior  
18 approval, then there's an issue and there's potential  
19 enforcement action.

20 JUDGE TRIKOUROS: Right.

21 MR. SILVERMAN: In some circumstances the  
22 change is such that we would have to go, but there is a  
23 process for doing that that's very comparable to the 50.59  
24 change process.

25 JUDGE TRIKOUROS: Very important to have this

1 on the record, that this is not a you decide to build it a  
2 different way and that's the end of it.

3 MR. SILVERMAN: Absolutely not.

4 JUDGE TRIKOUROS: It doesn't end there, and the  
5 regulations -- Part 70 requires you to do certain things  
6 which may or may not require the NRC to do certain things.  
7 And the whole thing is open and above board, and people  
8 can see these documents, and the NRC can see any documents  
9 that you generate, even if you conclude that it doesn't  
10 require NRC approval. In fact, I believe they do look at  
11 that, their inspectors would look at that.

12 MR. SILVERMAN: That's absolutely correct.

13 JUDGE McDADE: If I could interrupt here and  
14 just -- if I can get you to sort of correct my thinking  
15 here. And I want to sort of get on this horse from the  
16 other side and see if this follows through.

17 As I understand it, under NEPA, under 40 C.F.R.  
18 1508.25, the disposition of the waste has to be  
19 considered, that in the environmental impact statement the  
20 NRC Staff did consider the disposition of the waste. The  
21 way they considered the disposition of the waste is to say  
22 that this facility, the WDB, would be built, and it would  
23 take care of that.

24 Now, one of the concerns that I have, if we go  
25 ahead and the license is issued, the NRC has no control

1 over whether or not that facility will be built. The  
2 Applicant has no control over whether that facility will  
3 be built or not.

4 Is the fact that the NRC did not consider in  
5 its environmental impact statement that alternative, which  
6 is something over which neither the NRC or the Applicant  
7 has control over, could occur -- what happens to the waste  
8 from an environmental impact statement, from a NEPA  
9 standpoint, if the building is not built, if it is not  
10 adequate? Does that not render the environmental impact  
11 statement, not discussing this possibility, inadequate,  
12 and if not, why not?

13 MR. SILVERMAN: Well, first I'd like to say,  
14 Your Honor, that, once again, I think questions about the  
15 adequacy of the environmental impact statement were  
16 appropriate for the prior proceeding, not this proceeding.  
17 But --

18 JUDGE McDADE: Well, that's the next step. The  
19 question is whether or not the environmental impact  
20 statement, first of all, when written, was inadequate,  
21 secondly, whether or not a supplement would be necessary,  
22 and then depending on the timing of that, whether or not  
23 any challenge to that would have been waived by not  
24 bringing it up in the earlier proceeding.

25 MR. SILVERMAN: I should defer to the Staff --

1 JUDGE McDADE: Let's do it one at a time.

2 MR. SILVERMAN: I should defer to the Staff on  
3 whether -- what's the impact of this on the EIS, but my  
4 own assessment is that they would have to evaluate the new  
5 information to determine if a supplement was necessary,  
6 and if a supplement was necessary, they would prepare one.

7 JUDGE McDADE: But at what point? For example,  
8 once the license is issued -- the NRC issued the license,  
9 they tell you, go ahead. Now we're now in 2016, you're  
10 all set to go ahead, construction is complete, you have a  
11 license to receive this material and process the material,  
12 and there is no WSB.

13 Now what happens then from the standpoint of  
14 the NRC, from the standpoint of the Applicant, from the  
15 standpoint of NEPA, you know, it hasn't been considered at  
16 this point in time. You know, does the NRC, at that time,  
17 have an obligation to do a supplement environmental impact  
18 statement? But in what context because they've already  
19 issued the license.

20 MR. SILVERMAN: Understood.

21 JUDGE McDADE: What further authority do they  
22 have?

23 MR. SILVERMAN: Understood. And I will defer  
24 that very specific question, if I may, to the Staff. I  
25 would say, if the issue is, again, technical and safety



1 . contention, we have the 70.72 change process, the -- and  
2 the opportunity to reopen a record as I've spoken about  
3 before. On the environmental side --

4 JUDGE FARRAR: Now, let me interrupt there. We  
5 were speaking about that opportunity in a different  
6 context. In this case, where you file what's called a --  
7 let's assume this would be a significant change in the  
8 license, we need a license application amendment.

9 If the Staff looks at it and approves it, would  
10 this type of change be significant enough that they'd have  
11 to re-notice the opportunity for hearing because of the  
12 significance of the license amendment?

13 MR. SILVERMAN: I think I would defer to the  
14 Staff on that one as well. I would just like to say, on  
15 the environmental side, if the WSB does not get built,  
16 there's something that -- as far as I'm concerned, we're  
17 in very, very speculative territory with no basis right  
18 now to even speculate about this, but nevertheless,  
19 assuming that, we also have -- this is a Department of  
20 Energy facility.

21 They have their own NEPA procedures, and they  
22 would have to evaluate what would need to be done in that  
23 context. If they were changing the plan that they have in  
24 place right now to build that facility, and there is  
25 public process associated with that.

1           They do not have adjudicatory hearings, but  
2 they have a NEPA process, they have public meetings, they  
3 have scoping meetings, if necessary, if they're going to  
4 redo an EIS, and they can be challenged in court like any  
5 other federal agency if they -- if someone believes their  
6 NEPA process has been violated.

7           JUDGE FARRAR: So people could respond with a  
8 draft -- supplement to the draft change in the EIS. If  
9 their change is rejected, then they go right to court  
10 under the DOE system.

11           MR. SILVERMAN: I believe that's the case.

12           JUDGE McDADE: Okay. And, again, this  
13 question -- you're standing up there -- but Ms. Bupp or  
14 Mr. Martin, you have to also answer this -- at least as I  
15 understand the methodology as explained, and through the  
16 documents, through the regulations, that if, for some  
17 reason, the waste treatment facility were not available,  
18 we're now in 2016 or approaching that, you're at the point  
19 where you're ready to actually start processing the  
20 plutonium, you don't have anything available for the  
21 waste.

22           At that point in time, procedurally, the  
23 Applicant, who has no ability to just go out and build  
24 this facility, is currently existing, you would do -- or  
25 could do a 70.72 change, which would indicate a new

1 estimate of what you're going to do with the waste.

2           When that came in, the NRC Staff would then  
3 have the ability at that point to do a supplement to the  
4 environmental impact statement to view what is going to be  
5 done with this waste, what is going to be the  
6 environmental impact, could it meet their NEPA  
7 requirements at that point in time, and at that point in  
8 time could go ahead and either allow you to take new  
9 action with regard to what to do with the waste, or not.

10           But that until you had something to do with  
11 that waste, and there was a method that had been sent  
12 through the NRC, had been approved by the NRC, you would  
13 not be able -- even though the license had been approved,  
14 you would not be able to start processing this material.  
15 Is that a correct scenario?

16           MR. SILVERMAN: It's very close to accurate,  
17 and it's a good segue to a point I wanted to make sure I  
18 got here -- in here, and I have consulted with the  
19 Applicant's technical folks on this issue.

20           If the WSB were not built or were not available  
21 for any period of time, once the storage capacity of the  
22 MOX facility, for the waste that we're talking about, was  
23 filled up, they would have to shut the plant down -- that  
24 is my understanding -- until that matter was resolved.

25           JUDGE McDADE: And the way --

1 MR. SILVERMAN: They would not take any more  
2 waste.

3 JUDGE McDADE: Okay. And the way it could  
4 be --

5 MR. SILVERMAN: Or they --

6 JUDGE McDADE: -- resolved is --

7 MR. SILVERMAN: -- would not generate any more  
8 waste. Excuse me.

9 JUDGE McDADE: Right. Right. And the way it  
10 could be resolved either is, for example, if the WSB were  
11 delayed, or if the WSB's capacity was less than what was  
12 anticipated, that you would then have the ability to come  
13 forward with a proposal to the NRC on what to do with this  
14 waste, that that would be in the context of a 70.72  
15 change.

16 At that point, the NRC, to meet its NEPA  
17 requirements, would have the opportunity to do a  
18 supplemental environmental impact statement, review what  
19 you proposed, make a determination as to whether or not  
20 that satisfied the NEPA requirements, satisfied the NRC  
21 regulations, and then either authorize you to make the  
22 change, in other words, to handle the waste in a different  
23 way, to not, and at that point in time there would be a  
24 notice of an opportunity for hearing where at that point  
25 someone could challenge the supplemental environmental

1 impact statement.

2 MR. SILVERMAN: Almost. If there was a change  
3 in the facility that required a license amendment, okay,  
4 so the storage capacity, for example, is inadequate and  
5 they decide, We need to build five years of storage  
6 capacity. If a license amendment were required to do  
7 that, that would be an opportunity for hearing on that  
8 license amendment -- opportunity to request a hearing on  
9 that license amendment.

10 JUDGE McDADE: Okay.

11 JUDGE TRIKOUROS: Do these facilities have  
12 technical specifications analogous to operating reactors?  
13 These facilities are sort of halfway between chemical  
14 processing plants and nuclear power reactors, so they're  
15 an odd kind of combination.

16 MR. SILVERMAN: Yes.

17 JUDGE TRIKOUROS: Do they have technical  
18 specifications with limiting conditions for operation?

19 MR. SILVERMAN: I believe, but bear with me  
20 just one quick second.

21 (Pause.)

22 MR. SILVERMAN: Your Honor, there are no tech  
23 specs per se, but we have to live within the bounds of the  
24 safety limits established in the license application, and  
25 there are safety limits established in the license

1 application, and I believe some of them are quantitative  
2 and some are not.

3 JUDGE TRIKOUROS: So when you -- when the  
4 license is issued, it will have in it certain requirements  
5 that you have to live with, and --

6 MR. SILVERMAN: There will be potentially  
7 license conditions established by the Staff, there will be  
8 an obligation that we operate the plant in accordance with  
9 the application. You go to the application; the  
10 application has safety limits and parameters that have to  
11 be met. You don't meet those safety limits and  
12 parameters, you're subject to enforcement action.

13 JUDGE TRIKOUROS: So that if the WSB were not  
14 built, if the WSB were unavailable, if the WSB were  
15 operating differently than designed, any number of those  
16 occurred, that would be picked up by the process and  
17 corrected?

18 MR. SILVERMAN: Absolutely.

19 JUDGE TRIKOUROS: Or the plant would be shut  
20 down?

21 MR. SILVERMAN: Yes.

22 JUDGE TRIKOUROS: And if there were a violation  
23 of that, then the Applicant would be subject to  
24 enforcement proceedings by the Office of Investigations,  
25 and then we would be here with our Perry Mason hat on as

1       opposed to --

2                   MR. SILVERMAN: We have a safety process; we  
3       have an environmental process, and we have enforcement  
4       process, yes.

5                   JUDGE TRIKOUROS: All right.

6                   JUDGE FARRAR: Let me ask you a wrap-up  
7       question. At one point in their papers the Petitioners  
8       refer to this as an operating-license proceeding, and you  
9       took -- let me call it great offense -- let me tell -- let  
10      me ask you why that label matters, because a lot of other  
11      people seem to have called it an operating-license  
12      proceeding also.

13                   Is that significant, or did you really not take  
14      offense; you were just trying to clarify that that's not  
15      exactly the name of the --

16                   MR. SILVERMAN: It's essentially the latter.  
17      This is a materials license process. There was a  
18      construction authorization, and now this is a license to  
19      possess and use radioactive material, and we do want to  
20      distinguish it from an operating license for a reactor.

21                   JUDGE FARRAR: Right.

22                   MR. SILVERMAN: And that is different, just in  
23      term of the way the structure of the regulations function.  
24      That's the principal reason.

25                   The other reason that is probably worth

1 mentioning is because there are some places in the  
2 petition there's pleadings where they refer to a  
3 regulation that says you must do a supplement to an EIS  
4 when you have an operating license for a production and  
5 utilization facility, and this is neither of those things.

6 JUDGE FARRAR: But the Staff -- well, the  
7 Staff, in its *Federal Register* notice and in its FEIS  
8 called it an operating-license proceeding. The  
9 Commission, in one of the decisions on the previous go-  
10 round called this an operating-license proceeding. So as  
11 long as we're careful not -- I mean, it's -- I mean,  
12 you're not going to get a license to possess if you're not  
13 prepared to operate properly. I mean, can we understand  
14 it in that context?

15 MR. SILVERMAN: Yes.

16 JUDGE FARRAR: Yes. Okay. We're way over our  
17 time on this. Thank you for answering our questions. You  
18 can tell our degree of interest in this subject.

19 Ms. Bupp, do you -- let's get right to the  
20 process kind of questions that you've heard us asking and  
21 Mr. Silverman defer to you to some extent.

22 MS. BUPP: For the most part, I agree with what  
23 Counsel for the Applicant has stated. I would just like  
24 to maybe take an opportunity to briefly outline what I  
25 would see the process being, if there were to be changes



1 in the facility.

2 The main change at issue is the failure to  
3 construct the WSB, or constructing the WSB in a different  
4 location, or some difference in the construction. And I  
5 think that would trigger two parallel sort of processes.

6 The first would be, if the license has not yet  
7 been issued, the Staff would simply look at what this  
8 change was and determine whether or not it was significant  
9 in terms of the EIS, and if so, we'd supplement the EIS,  
10 and there would be an opportunity to come in with new  
11 contentions on that supplement to the EIS --

12 JUDGE FARRAR: There -- you said --

13 MS. BUPP: -- or Staff's failure to supplement  
14 the EIS.

15 JUDGE FARRAR: Why do you say there would be?

16 MS. BUPP: Excuse me?

17 JUDGE FARRAR: You said there would be an  
18 opportunity to come in --

19 MS. BUPP: Yes.

20 JUDGE FARRAR: -- would that be because you  
21 would issue an new notice of opportunity, or would the  
22 Petitioners do what Mr. Silverman suggested and they would  
23 come back to the Secretary of the Commission and say, This  
24 is new information and there should be a reopener?

25 MS. BUPP: I think they could either. They

1 could come to the Secretary of the Commission and say it  
2 should be reopened. If the Staff were to actually  
3 supplement the EIS, we would issue another notice of  
4 opportunity, at least to comment publicly on the EIS --

5 JUDGE FARRAR: You know -- yes --

6 MS. BUPP: -- and then could come in --

7 JUDGE FARRAR: Right.

8 MS. BUPP: -- at that time.

9 JUDGE FARRAR: And then their comments get  
10 rejected, do you then issue a notice of opportunity for  
11 hearing?

12 MS. BUPP: No, but they could go to the  
13 Commission and ask to reopen it. The notice of  
14 opportunity for a hearing comes with the license  
15 application, not with the EIS.

16 JUDGE FARRAR: Would you support that motion to  
17 reopen?

18 MS. BUPP: It depends on what their contention  
19 is, but, you know --

20 JUDGE FARRAR: Forget the merits of the  
21 contention. Would you support that as the right --

22 MS. BUPP: We wouldn't throw it out for  
23 procedural reasons.

24 JUDGE FARRAR: Right. And you say this is the  
25 right avenue, but unfortunately their contention, you

1 know, doesn't say anything, or whatever.

2 MS. BUPP: Yes. Precisely. Yes.

3 JUDGE FARRAR: But you would support them, that  
4 that's the right avenue to follow?

5 MS. BUPP: Yes, if the license has not yet been  
6 issued. If the license had been issued already, the  
7 Applicant, and then the licensee, MOX Services, would have  
8 to go through the 70.72 change process for whatever action  
9 they would need to take in order to respond to the issues  
10 of the WSB.

11 If their 70.72 change process resulted in them  
12 applying for an amendment to the license, we would, again,  
13 issue a notice of opportunity for a hearing for that  
14 license amendment, and it would --

15 JUDGE FARRAR: Is that for --

16 MS. BUPP: -- carry with --

17 JUDGE FARRAR: -- all license --

18 MS. BUPP: -- us NEPA --

19 JUDGE FARRAR: -- amendments, or only things  
20 you deem --

21 MS. BUPP: It would be for significant  
22 license --

23 JUDGE FARRAR: Okay.

24 MS. BUPP: -- amendments. So assuming it's a  
25 significant license amendment, we would issue another

1 notice of opportunity for a hearing and --

2 JUDGE FARRAR: Can you --

3 MS. BUPP: -- it does --

4 JUDGE FARRAR: -- reassure me here today that  
5 you would view that as a significant license amendment?

6 MS. BUPP: It honestly does depend on what the  
7 change is. If the change is that they're going to build  
8 the WSB on another portion of the Savannah River site and  
9 they would have to ship it one mile within the Savannah  
10 River site rather than 50 yards, probably not significant.

11 If the change is that they're going to store  
12 large quantities of material, without making any promises,  
13 but that probably would be a significant enough license  
14 amendment for a notice of opportunity for a hearing.

15 And any license amendment would, again, trigger  
16 the Staff's NEPA obligations, and we would prepare either  
17 an environmental assessment or an environmental impact  
18 statement, and then there could be contentions on that.

19 JUDGE FARRAR: What do you think of the -- what  
20 would you say if we said there was, yes, there's some  
21 speculation, but there's something behind this contention,  
22 and since there's -- neither of you will concede there's  
23 an automatic reopener, we're just going to leave this  
24 contention pending for a while?

25 MS. BUPP: I would disagree with that, because

1 I would disagree that there is anything behind the  
2 contention at this point in time. As counsel for the  
3 Applicant pointed out, there is -- there are plans, there  
4 is already budgeting for the WSB; it's being designed.  
5 And until the Department of Energy comes in with an  
6 amended record of decision, there is -- everything is very  
7 speculative.

8 JUDGE FARRAR: Didn't I read somewhere that the  
9 United States Congress -- there are people in the United  
10 States Congress who don't think this is -- who are trying  
11 to eliminate the funding?

12 MS. BUPP: There are people in the United  
13 States Congress who are trying to eliminate it, but until  
14 there's 51 percent of the United States Congress who are  
15 trying to eliminate the funding, it's speculative.

16 JUDGE FARRAR: So there are a lot of people in  
17 the United States Congress thinking of a lot of things --

18 MS. BUPP: Yes.

19 JUDGE FARRAR: -- doesn't mean it's going to  
20 happen. Okay.

21 JUDGE TRIKOUROS: Let me ask you, the process  
22 that you go through -- when will you be issuing -- if you  
23 were issue this license, when would you issue it, would it  
24 be soon following these proceedings, would it be when  
25 the -- after the construction is over, would it be

1 somewhere in between? How does that work?

2 MS. BUPP: The Staff has currently budgeted  
3 three years to review the license application. Once that  
4 license application review is complete, assuming that we  
5 that it does meet all the safety requirements, at that  
6 point in time we would issue the license. So if the  
7 license application is acceptable, it will be in about  
8 three years.

9 JUDGE FARRAR: But how can you do that  
10 before -- it's four years before construction is  
11 completed?

12 MS. BUPP: Honestly it's not that different  
13 from any other materials licensee.

14 JUDGE FARRAR: Yes. No, I've heard that in  
15 a --

16 MS. BUPP: Yes.

17 JUDGE FARRAR: -- irradiator case, that you  
18 have 7,000 materials license --

19 MS. BUPP: Yes.

20 JUDGE FARRAR: -- and they're all the same.  
21 The irradiator wasn't the same, and this sure ain't the  
22 same.

23 MS. BUPP: Actually -- let me rephrase. It's  
24 the process. For example, the NRC recently licensed two  
25 uranium enrichment facilities. We gave them both

1 authority to start construction and to begin operations  
2 before they even overturned a single spade of dirt. In  
3 the LES proceeding for USEC they had buildings there, but  
4 they had not really begun to refit the buildings, and they  
5 couldn't begin to do that until they had issued a license.

6           So for this facility -- for those facilities,  
7 if they make changes during the construction process, they  
8 will have to go through the 70.72 change process. That  
9 process -- even if they don't come in with a license  
10 amendment application, their books are open to us, we go  
11 in, we look at their documentation of the 70.72 change  
12 process. If they're not following it correctly, we'll  
13 take enforcement action.

14           If they do find that any changes are  
15 significant enough to trigger a license amendment, we'll  
16 then review that license amendment application.

17           JUDGE FARRAR: How do intervenors -- potential  
18 intervenors in the case where you described, where you  
19 issue the operating license well before construction is  
20 completed, and say the company comes in, keeps you posted,  
21 and you say, yes, that change is all right, not  
22 significant, how do potential intervenors keep track of  
23 that so that they can exercise -- so they have the  
24 opportunity to come in and challenge things, that if they  
25 knew about them, they would say, Hey, that's not what was

1 warranted at the beginning, we'd like to reopen  
2 everything, or we'd like to come in now. How do they  
3 track that kind of process which is not done out in the  
4 open?

5 MS. BUPP: Well, it's not -- not everything  
6 will be -- not every piece of paper will be completely  
7 open, but there is a paper trail of our inspection  
8 reports, when we go out and visit them, what kind of  
9 information is available, what sorts of changes they're  
10 making.

11 JUDGE FARRAR: Are those on the web?

12 MS. BUPP: Some of them are; some of them are  
13 redacted or certain appendixes are not there because it's  
14 not publicly available information. Some of the design  
15 information is sensitive.

16 JUDGE FARRAR: Then how do the citizenry who  
17 are supposed to have an opportunity for hearing -- how do  
18 they exercise that opportunity for hearing?

19 MS. BUPP: Well, they're exercising it now at  
20 this point in time. Once the license is issued --

21 JUDGE FARRAR: you know, now is fine --

22 MS. BUPP: Yes.

23 JUDGE FARRAR: -- but what you all are saying  
24 is give them the bum's rush, throw them out, proceeding  
25 over. We got seven years to go and now you're telling me



1 during that seven years all these things will be  
2 happening. How do they find out about it so that they can  
3 be no worse off than they were when this notice came out?

4 MS. BUPP: Once the license is issued, whether  
5 it's the license for the MOX facility, whether it's the  
6 license for a uranium enrichment facility, whether it's a  
7 combined construction and operating license for a new  
8 reactor, once that license is issued, the opportunity for  
9 a hearing is closed.

10 But concerned citizens can keep abreast of the  
11 docket and can keep abreast of what's going on, and if  
12 they feel that the facility is not being constructed or  
13 run properly, they can come in and petition for an  
14 enforcement action under 10 C.F.R. 2.206.

15 JUDGE FARRAR: But the documents are redacted.

16 MS. BUPP: Not all of them are. Some of them  
17 are because they're sensitive. We do not put every  
18 document publicly available on the web. But the fact that  
19 these documents exist -- you know, there are cover  
20 letters; there are sheets that say that we went out for an  
21 inspection report. Someone could come in, submit FOIA  
22 requests, ask for the documents, if they have a right to  
23 view them under FOIA.

24 So the information is out there, and they --  
25 we're not asking for any separate treatment for this

1 facility than we would ask for uranium enrichment  
2 facilities, or combined --

3 JUDGE FARRAR: Will you work as --

4 MS. BUPP: -- operating licenses for new  
5 reactors.

6 JUDGE FARRAR: Will you work as hard under a  
7 FOIA request as you do on applications from potential  
8 licensees?

9 MS. BUPP: To gather the documents and get them  
10 to them?

11 JUDGE FARRAR: Yes.

12 MS. BUPP: It's not as time consuming, but,  
13 yes, we will work as hard on those.

14 JUDGE McDADE: But certainly, given the  
15 contention here, if the WSB were not constructed, if there  
16 were no shovel of dirt turned on the WSB between now and  
17 2016, that would be something that a putative intervenor  
18 would have no difficulty in securing that information?

19 MS. BUPP: No, they certainly would not. They  
20 also -- I mean, as the Counsel for the Applicant has  
21 said -- has stated, that there would be steps that the  
22 Applicant, and then licensee, would have to go through.  
23 At the same time, DOE, if they change their plans for the  
24 WSB, even if we've already issued the license and even if  
25 our NEPA obligations have been satisfied, at least for the

1 time, they will have to issue an amended record of  
2 decision.

3 That triggers new NEPA obligations. They have  
4 the same public participation obligations under NEPA that  
5 the NRC has, and their NEPA analyses could be challenged  
6 in federal court. So the DOE side of it certainly does  
7 not end just because the NRC side of it has ended.

8 JUDGE FARRAR: Okay. But judgment -- they had  
9 indicated, you know, they could keep track if the WSB  
10 wasn't built. I'm not sure they can because they can't  
11 necessarily get on the site. Are you willing to offer to  
12 send them any key documents that you get from now to 2014  
13 that deal with the construction or not of the WSB?

14 MS. BUPP: We normally have a docket for  
15 various --

16 JUDGE FARRAR: People have lives and they don't  
17 know when you -- you know, you put something on the docket  
18 and they have a family wedding they're doing. And a month  
19 later they see the docket and you say, oh, you should --  
20 it's been a month; you should have known that a month ago.

21 MS. BUPP: Well, if they --

22 JUDGE FARRAR: You should have --

23 MS. BUPP: -- didn't know it, they could come  
24 in and argue why they had good cause for not knowing it.

25 JUDGE FARRAR: Now, why -- if all that you and

1 Mr. Silverman is saying is true, why can't you make a  
2 representation here that documents that come in affecting  
3 the WSB will be sent to them?

4 MS. BUPP: We have a mailing list during our  
5 review, and major documents -- or just the license or a  
6 license applications are shared with the mailing list for  
7 the docket, which includes -- when I say the docket, I  
8 mean, the MOX Services facility has its own docket, it has  
9 a mailing list. So they're already on the mailing list,  
10 so they will get major documents. They won't get every  
11 single piece of paper.

12 JUDGE FARRAR: I'm not talking every single  
13 piece of paper, I'm --

14 MS. BUPP: But they will get major documents.

15 JUDGE FARRAR: I'm saying something that says  
16 to them, aha, you -- you know, here's something that bears  
17 directly on that contention that hypothetically got thrown  
18 out in September 2007.

19 MS. BUPP: Yes.

20 JUDGE FARRAR: Mr. Silverman wanted to say  
21 something. He's got --

22 MR. SILVERMAN: If you don't mind, I'd just  
23 like to add, if the WSB were not to be built, if the DOE  
24 ever made a decision not to do that, that would be a very  
25 public process in the DOE world. They have NEPA

1 obligations; it's a major part of their overall plutonium  
2 disposition program. Congress is interested in it;  
3 everybody would know about it. The local press would know  
4 about it; it would be a big deal.

5 JUDGE FARRAR: Why is this so hard? These  
6 people have a contention today that you say is  
7 speculative, and I can't get anyone to say, We'll send  
8 them the paperwork. And you want the contention  
9 dismissed.

10 JUDGE McDADE: Ms. Bupp has already indicated  
11 that they're on the mailing list for any significant  
12 documents that would be generated here, that they would  
13 get them automatically.

14 MS. BUPP: They're -- I mean --

15 JUDGE McDADE: Mr. Silverman has indicated that  
16 in addition to that, there are other sources of  
17 information that would be available in the event that --  
18 as a fail-safe, in the event that for some reason they  
19 were not informed of that. Am I correct in what the  
20 representations are of the Applicant and the Staff?

21 MS. BUPP: Yes, that's correct.

22 MR. MARTIN: You are, Your Honor.

23 JUDGE TRIKOUROS: I have another variation of  
24 the question. When -- before the plant actually starts  
25 production activities, does the NRC actually go in, or

1 does Staff actually go in and do -- or throughout the  
2 process are they doing onsite inspections, are they  
3 ensuring that it will be built in accordance with design  
4 requirements, approved design requirements. Has all of  
5 that happened?

6 MS. BUPP: We do -- I'm sorry, Your Honor.

7 JUDGE TRIKOUROS: Yes, I just want to make  
8 sure. As I said, in the reactor world there would be  
9 ITECs and it'd be a totally different story. But here I  
10 assume it's more of an informal process. But you --

11 MS. BUPP: We do inspections continuously  
12 throughout the process. We do the operational readiness  
13 review, which is the main inspection, just before they  
14 begin operation. But we have inspections concurrently  
15 throughout the construction phase.

16 In fact, at the same time as we've been down  
17 here for these hearings, there have been meetings between  
18 the NRC Staff and the Applicant going on at the same time.  
19 And I believe -- correct me if I'm wrong, but there's  
20 already an onsite inspector who's there at the MOX  
21 facility full-time. And in addition we send down more  
22 inspectors from time to time to inspect the facility.

23 JUDGE TRIKOUROS: Right. I think that's  
24 important for the record. There is an onsite inspector,  
25 just as there is a reactor, there's an office of -- the

1 NRC has an office --

2 MS. BUPP: Yes.

3 JUDGE TRIKOUROS: -- there, constant inspection  
4 is going on. Right?

5 MS. BUPP: Yes.

6 JUDGE FARRAR: Ms. Bupp, our questioning has  
7 taken 40 minutes of -- 15 minutes you have, Mr.  
8 Silverman -- and is there something you want to add,  
9 particularly on this process question that would help us  
10 render a decision?

11 MS. BUPP: I have nothing to add except to sum  
12 up that the process is there for them to -- for the  
13 Petitioners to either reopen the case, or to have their  
14 concerns heard throughout the life of this license, let  
15 alone throughout the licensing process.

16 JUDGE FARRAR: Okay. Thank you.

17 For the Petitioners, we allotted 20 minutes.  
18 If you've noticed, many of the Board's questions were from  
19 the perspective of what does it take to protect your  
20 interest. So if you use less than 20 minutes you would  
21 not be shortchanged.

22 So, Ms. Carroll, would you go ahead, please?

23 MS. CARROLL: Well, I can't thank you enough,  
24 and it's heartening that you did ask all these questions,  
25 and it answered a lot of questions that were coming to my

1 mind, and also really confused what I had to say at this  
2 point, because --

3 JUDGE FARRAR: Well, one thought might be,  
4 given the questions we've asked and the responses we've  
5 given, why don't you start with what steps would -- having  
6 heard all this, what steps do you think we should take  
7 with this contention --

8 MS. CARROLL: I have some notes on that, but I  
9 have just a couple of thoughts that I was prepared to  
10 say and --

11 JUDGE FARRAR: Go ahead.

12 MS. CARROLL: -- not knowing that all of this  
13 wonderful discussion would take place.

14 I want to say this is an unprecedented  
15 proceedings. It's appreciated that you have noted that  
16 this is a unique facility. And what is also unique is the  
17 NRC oversight OF a DOE project. And we've been talking  
18 about doing this in a couple of places, but this is -- and  
19 this is the first time. And it's appreciated to see a  
20 very engaged Board, and we just want to encourage you to  
21 set a strong precedent.

22 That we're operating without an MOU here  
23 between NRC and DOE, that may not be legally required;  
24 it's very uncomfortable, and it comes to both the security  
25 issues and this waste issue. But we do have an MOU on



1 GNEP, on the Global Nuclear Energy Partnership, and the  
2 substance of that MOU is to limit the authority of the  
3 NRC. So maybe it's a good thing we don't have that MOU.

4 I want to comment on the EIS. May be legal,  
5 but it's shameful to us that we have two and a half pages  
6 on a waste plan that doesn't exist. And the EIS should be  
7 responding to a real plan.

8 And so let me just glance -- because I'm  
9 telling you so much came up and I know we need to be  
10 really quick here. We feel confident in the arguments  
11 we've made already about this. We also feel confident in  
12 our argument that these are not late-filed contentions,  
13 and so I won't speak to that.

14 JUDGE FARRAR: Well, the argument here is the  
15 reverse of late filed.

16 MS. CARROLL: I understand.

17 JUDGE FARRAR: They're saying --

18 MS. CARROLL: But I did want to get that out.

19 JUDGE FARRAR: -- your -- and the contention's  
20 timely filed, but you're -- the opposition is saying it's  
21 too early because you're talking about something that  
22 hasn't happened and, in their mind, is too speculative to  
23 assume will happen.

24 So assume this as you address where we are --  
25 assume we agreed with the Applicant and the NRC Staff that

1 there's a large degree of speculation involved in this.  
2 Assume you have standing, but there's a large degree of  
3 speculation concern with this contention.

4 Our point is what do we do that treats all the  
5 parties fairly and protects against various future  
6 scenarios?

7 MS. CARROLL: Well, I have some very specific  
8 notes on ideas on how we would like this to proceed.

9 JUDGE FARRAR: Tell us.

10 MS. CARROLL: But I want to make --

11 JUDGE FARRAR: This is your chance --

12 MS. CARROLL: This may sound broader than what  
13 you're saying. We've been watching this for seven years,  
14 and there has not been a waste plan for seven years. The  
15 waste solidification building has been canceled once. I  
16 think -- this isn't evidentiary, but I'm talking to a guy  
17 at a Savannah River site CAB meeting about them not having  
18 a waste plan, and suddenly it appears in the budget for  
19 2008.

20 So we've got to get through the rest of 2007  
21 and 2008. It's speculative all the way around whether  
22 there'll be a waste solidification building, and has been  
23 repeatedly.

24 Now, I just -- please let me -- because my  
25 notes are very confused at this point.

1 JUDGE FARRAR: But --

2 MS. CARROLL: So we do not think the EIS is  
3 addressing anything --

4 JUDGE FARRAR: Yes, but --

5 MS. CARROLL: -- it's speculative.

6 JUDGE FARRAR: -- let me urge you, forget about  
7 your notes --

8 MS. CARROLL: Okay.

9 JUDGE FARRAR: -- and address the question in  
10 front of us because we have to decide -- assuming we agree  
11 that to some extent, you know, this is speculative, this  
12 is not that you have information that they hired an  
13 uncertified welder in the past, this is something that may  
14 or may not happen in the future -- how do we write a  
15 decision, what do we do in our decision that deals  
16 properly with this so that if the WSB is not built,  
17 there's an avenue for you to challenge that, and if it is  
18 built, everybody's happy?

19 MS. CARROLL: Well --

20 JUDGE FARRAR: So don't worry about your notes,  
21 about what you were going to say, address that question  
22 for us, what should we do at this point?

23 MS. CARROLL: Okay. We think that the case  
24 should be put on hold. I have a note, but you instructed  
25 me to abandon it. We want you to put it on pause but keep

1 it in place. We put this in a place holder because this  
2 has just been an ongoing, undealt-with issue.

3 So we do not want you to give us standing and  
4 close the case because, first of all, there's never been a  
5 2.206 petition accepted for a hearing. Second, we think  
6 if the case --

7 JUDGE FARRAR: Okay. I wrote that in a  
8 decision once, and the Commission disagreed with me, in  
9 *Millstone*, but I don't think the Staff was -- or the  
10 Applicant was saying you're relegated to 2.206.

11 Were you, Ms. Bupp?

12 MS. CARROLL: She did.

13 JUDGE FARRAR: You weren't --

14 MS. CARROLL: She did.

15 JUDGE FARRAR: You weren't talking about  
16 2.206 --

17 MS. CARROLL: She did.

18 MS. BUPP: No, only --

19 JUDGE FARRAR: -- with that petition for the  
20 Secretary.

21 MS. CARROLL: She did.

22 MS. BUPP: No, only if the license has already  
23 been issued and there was some other change, or they were  
24 saying that -- I just mentioned 2.206 as an avenue for any  
25 change in the facility, or if there was any belief that

1 the facility was not operating properly, that it's another  
2 avenue for the public to come into the NRC's process --

3 JUDGE FARRAR: But it's not the only --

4 MS. BUPP: -- after the license is issued.

5 JUDGE FARRAR: -- it's not the only avenue?

6 MS. BUPP: No.

7 JUDGE FARRAR: Mr. Silverman?

8 MR. SILVERMAN: I agree with that.

9 JUDGE FARRAR: Okay.

10 MS. CARROLL: Well, we think this is the  
11 avenue, and it's the best avenue, it's the easiest one for  
12 the public to use, and we've done due diligence, and we  
13 filed timely, and we think we should continue on with  
14 this. However you handle the lack of anything to discuss  
15 for the next year and a half that it should be kept --

16 JUDGE FARRAR: Are you --

17 MS. CARROLL: -- on the shelf and ready to  
18 reactivate when such time comes.

19 JUDGE FARRAR: Are you in fact on a mailing  
20 list?

21 MS. CARROLL: I do get mail. What I'm  
22 wondering is, if you close this thing, how that would  
23 be -- how that would affect --

24 JUDGE FARRAR: Is the mail you get sufficient  
25 for you to keep tabs on what's going on without going into

1 atoms and the other --

2 MS. CARROLL: Well, you know, I only got this  
3 thing by intervening for five years before, and so it's  
4 very difficult to get a beast like this on the internet.  
5 So, no --

6 JUDGE FARRAR: That is --

7 MS. CARROLL: -- I don't think -- we did not  
8 get a license application, for instance. We had to be  
9 aware of it and go out on the internet, so --

10 JUDGE FARRAR: But, Ms. Carroll --

11 MS. CARROLL: -- no, we don't get --

12 JUDGE FARRAR: -- you --

13 MS. CARROLL: -- mailed the most significant  
14 documents.

15 JUDGE FARRAR: -- do understand that you could  
16 call the public document room and get any of these things.  
17 Right?

18 MS. CARROLL: Well, they charge us for these  
19 big documents, up towards \$100.

20 JUDGE FARRAR: I'm talking about things where  
21 you have to take no initiative whatsoever, that in other  
22 words either the Staff or the Applicant, they take the  
23 initiative to keep you informed.

24 MS. CARROLL: With -- yes.

25 JUDGE FARRAR: You are on a mailing list

1 from --

2 MS. CARROLL: Yes.

3 JUDGE FARRAR: -- the Staff.

4 MS. CARROLL: But I do not think that I  
5 received a notice of operating license from them. I think  
6 I had to be out there swimming in these waters to be aware  
7 of that, checking the *Federal Register* and all of that.  
8 It's --

9 JUDGE FARRAR: Is this something --

10 MS. CARROLL: -- you know, I don't know that --  
11 we're trusting their selective process on what they send  
12 us as Ms. Bupp said.

13 JUDGE FARRAR: Is this something you and Ms.  
14 Bupp could work out over the next -- what's today,  
15 Wednesday -- by next Wednesday send us a letter on exactly  
16 what the mailing list -- what she's going to get on the  
17 mailing -- she and the other potential intervenors are  
18 going to get on the mailing list?

19 MS. CARROLL: I --

20 JUDGE FARRAR: That's to Ms. Bupp.

21 MS. BUPP: We can even tell you what they've  
22 already received. They received the acknowledgment that  
23 we got, the license application, they received the  
24 *Federal* -- all the *Federal Register* notices, they received  
25 those in advance of them actually being published in the

1 Federal Register. They received notices of public  
2 meetings --

3 JUDGE FARRAR: No, no, no, no --

4 MS. BUPP: -- they --

5 JUDGE FARRAR: -- no, no, no, no, no. I'm  
6 talking about documents from the Applicant that say,  
7 Here's what's going on on the site.

8 MS. BUPP: I haven't gotten to what they will  
9 receive in the future.

10 JUDGE FARRAR: Okay.

11 MS. BUPP: They will receive --

12 JUDGE FARRAR: Why don't you do this, by next  
13 Wednesday, get in our hands a letter that says what they  
14 will receive in the future, without them asking for it,  
15 without them lifting their finger, they're going to get  
16 and what kind of information are they going to get.

17 MS. BUPP: I mean they'll -- I will outline --

18 JUDGE FARRAR: Mr. Silverman --

19 MS. BUPP: -- it but they get everything that  
20 all interested stakeholders receive.

21 JUDGE FARRAR: No, no, they're not an  
22 interested stakeholder, they're a person -- they're people  
23 who, at this moment, have a live petition for intervention  
24 pending with us, and you've heard our concerns up here.  
25 I'm not -- they're not --



1 MS. BUPP: We'll send a letter by next  
2 Wednesday.

3 JUDGE FARRAR: -- they're not a stakeholder,  
4 they are somebody with a live petition who have a serious  
5 matter in front of us, and I want to know what they're  
6 going to get.

7 MS. BUPP: We will send a detailed letter by  
8 next Wednesday.

9 JUDGE FARRAR: Okay.-

10 MS. CARROLL: I'm kind of uncomfortable with  
11 that line of inquiry because another main point we have is  
12 that the EIS already needs to be reopened, and they may  
13 not be able to reopen it for a year and a half until they  
14 have a plan they can review.

15 JUDGE FARRAR: No, no, what we're doing is  
16 we're talking about if this contention were to be  
17 dismissed, what would you have in your hands so that at  
18 the appropriate moment you could readily come back, you  
19 wouldn't learn about things six months too late, and  
20 people would say, Sorry, you should have learned about  
21 that six months ago, because they have a way to learn  
22 about it but you don't.

23 We're just trying to find out if there's -- I'm  
24 not saying what way the decision's going, but we want to  
25 know what the process is for the future. That was

1 directly the question that we asked in our order, we  
2 said, what steps are in place to provide fair opportunity  
3 for hearing as construction continues, and thus to support  
4 the dismissal of contentions as speculative.

5 That was exactly the question we framed, and we  
6 want to know what processes are in place. We've discussed  
7 some of the processes here, they may or may to be  
8 sufficient of themselves.

9 Ms. Bupp, you can send us a letter saying that  
10 you're going to have -- you're taking them off the mailing  
11 list. That's your -- you know, that's your option, but  
12 that would be one of the part of the -- one piece of the  
13 package of processes that are in place. That's all we  
14 want to know, what -- you've talked to the legal  
15 processes. At least I want to know about the informal  
16 processes.

17 And before your superiors or anybody else runs  
18 to the Commission and say we're trying to superintend the  
19 Staff's work, we're not. We're asking you what you will  
20 do. You can -- we're not telling you what to do, we  
21 want -- we just want to know what you're going to do.

22 MS. BUPP: Yes, and we do have a process in  
23 place, and we'll have a more detailed explanation in the  
24 letter by next Wednesday.

25 JUDGE FARRAR: Okay. Ms. Carroll, I'm getting

1 nervous about airplanes that people may be getting.  
2 You've had relatively little time, but in the next few  
3 minutes can you focus on anything you'd -- that we need to  
4 know about this contention, and what would happen -- you  
5 know, what steps we should take?

6 MS. CARROLL: Well, I believe I already said  
7 that you should find a way to keep it on the shelf until  
8 they give us a waste plan that we can actually evaluate.  
9 And I'll close by saying we have been living with DOE's  
10 practice of building major facilities without a waste plan  
11 for 50 years.

12 And we have the NRC -- the first time ever  
13 we've had the NRC to help us put DOE's feet to the fire  
14 and make them make a plan before they waste more of the  
15 taxpayers' money and bring up to 78 tons plutonium here  
16 and ruin the place further.

17 And thank you so much for your very clear  
18 evidence that you get it, and I hope the process works out  
19 in a way that helps us stay engaged.

20 I'll say this one thing, if we have to go to  
21 the DOE, it's just not good; you know, we'll wind up in  
22 federal court and it's just not really possible for a pro  
23 se intervenors to take on the DOE. The adjudicatory  
24 process here, we have a little experience, and we think  
25 you should keep it open and available to us.

1 Do you have any more questions?

2 JUDGE FARRAR: No. Thank you. Thank you for  
3 that closing. I mentioned at the beginning of the  
4 argument, leaving the clerkship in New Orleans 40 years  
5 ago, and I've carried with me one thing since that day,  
6 the Judge taught me people can stand to lose, but they  
7 can't stand not to be treated fairly. And at least from  
8 my part, some of the questions came from that motivation.

9 We have one issue left to do, which is  
10 terrorism. We're way past our time. As people in the  
11 audience may know, the Commission long ago said, for a  
12 number of reasons, that terrorism contentions were not a  
13 fit subject for consideration in these adjudicatory  
14 proceedings. They rethought that after September 11,  
15 stuck with the same conclusion. Their conclusion has been  
16 rejected by the 9th Circuit Court of Appeals, which sits  
17 out on the West Coast.

18 But the Commission has decided that even though  
19 the government did not seek cert from the Supreme Court in  
20 that case, that the Commission views that decision as  
21 binding only in the 9th Circuit and they will await  
22 another case and see what happens. They're applying that  
23 same -- so they're sticking to their original holding  
24 everywhere but in the 9th Circuit. We're not in the 9th  
25 Circuit.

1           Is there anything that anyone -- and as I read  
2 the Petitioner's papers, they largely recognize that and  
3 really were using this as a placeholder that they've  
4 preserved their rights if some other court does say to the  
5 Commission, You have to consider terrorism, their  
6 contention would have been on the books.

7           But is there anything in light of that  
8 background that you'd like to say about that?

9           MS. CARROLL: Well, please forgive me, but we  
10 want our three minutes on this, because it's --

11          JUDGE FARRAR: Go ahead.

12          MS. CARROLL: -- terribly important to us. We  
13 filed on August 13, 2001 the contention, which we refiled  
14 with you. We had a prehearing conference on September 21,  
15 ten days after 9/11. Our Board accepted the contention,  
16 and they made this decision, and please indulge me,  
17 because this should be read. It's so clear.

18          Regardless of how foreseeable terrorist attacks  
19 that could cause a beyond-design-basis accident were prior  
20 to the terrorist attacks of September 11, 2001, involving  
21 the deliberate crash of hijacked jumbo jets into the Twin  
22 Towers of the World Trade Center in New York City and the  
23 Pentagon in the nation's capital, killing thousands of  
24 people, it can no longer be argued that terrorist attacks  
25 of heretofore unimagined scope and sophistication against

1 previously unimaginable targets are not reasonably  
2 foreseeable.

3           Indeed, the very fact that these terrorist  
4 attacks occurred demonstrates that massive and destructive  
5 terrorist acts can and do occur and closes the door, at  
6 least for the immediate future, on qualitative arguments  
7 that such terrorist attacks are always remote and  
8 speculative, and not reasonably foreseeable.

9           These words of the Atomic Safety and Licensing  
10 Board, which were overturned by the Commission, formed the  
11 cornerstone of the 9th Circuit decision. This facility is  
12 significantly more vulnerable and more of a security risk  
13 than the Diablo nuclear power plant.

14           You want to know how we think you can address  
15 the Commission's prohibition on this issue, and we beg you  
16 to help lead the NRC in the direction it must go, that the  
17 9th Circuit decision starts. It's time for the regulatory  
18 agency to mature into its role. All we want is an  
19 emergency plan.

20           This is different. NEPA is different than the  
21 security regulations which look at fences and prevention.  
22 This lets us know how to prepare an emergency plan if the  
23 worse happens. Thank you.

24           JUDGE FARRAR: Thank you, Ms. Carroll.

25           Mr. Silverman, take it -- well, let me ask you

1 a question. I think it was in Oyster Creek that the  
2 Commission said they were not going to apply the 9th  
3 Circuit ruling to facilities outside the 9th Circuit.

4 But they pointed out -- I think it was in a  
5 footnote in Oyster Creek -- that was only a license  
6 renewal hearing, and so in terms of what was being done,  
7 it was not really a dramatic federal action, should Oyster  
8 Creek be limited to reactor renewal cases and therefore we  
9 would have a clean slate to decide what to do with  
10 terrorism, or are there other things in the Commission  
11 opinion that say this is resolved.

12 MR. SILVERMAN: Your Honor, that was a license  
13 renewal proceeding, and as I recollect, part of that was  
14 the fact that a license-renewal proceeding has sort of  
15 limited scope. But nevertheless, I believe there are  
16 other Commission precedent statements where they have  
17 said, This is a precedent that applies in the 9th Circuit  
18 and only in the 9th Circuit with respect to this facility,  
19 and that that's the Commission's policy, and that the  
20 Licensing Board need to adhere to that as bind precedent.

21 The only other thing I would add, with all due  
22 respect to Ms. Carroll's position, and appeals on the  
23 subject, this is a contention, an identical contention  
24 that was raised before and dismissed --

25 JUDGE FARRAR: Thank you, Mr. --

1 MR. SILVERMAN: -- in this proceeding. Thank  
2 you.

3 JUDGE FARRAR: Ms. Bupp, Mr. Martin?

4 MS. BUPP: I believe it's the staff's position  
5 and interpretation of the recent Commission decision is  
6 fully outlined in our brief. So unless the Board has any  
7 specific questions, we would rest on our reply.

8 JUDGE FARRAR: So you wouldn't think Oyster  
9 Creek is limited to license renewal as Mr. Silverman  
10 called it, we should read it as a broad policy, just  
11 Commission policy decision that applies across the board  
12 outside of the 9th Circuit. That applies to any kind of  
13 proceeding outside of the 9th Circuit.

14 MS. BUPP: I would agree with Mr. Silverman  
15 both at Oyster Creek could be read to other proceedings,  
16 but I would also point out that on the same date Oyster  
17 Creek was issued, the Commission issued two other  
18 proceedings, the Palisades proceedings and also the Grand  
19 Gulf decision which applied to an early site permit for a  
20 new nuclear reactor.

21 And so if you look at the totality of all that  
22 the Commission has said, I think you could see that their  
23 decision not to apply the 9th Circuit decision outside the  
24 9th Circuit would apply to all types of facilities.

25 JUDGE FARRAR: Okay.



1 JUDGE TRIKOUROS: The Commission is doing a  
2 terror evaluation on the Diablo Canyon ISFSI facility.  
3 Right?

4 MS. BUPP: Yes. And also on another license  
5 application that's in the 9th Circuit as well.

6 JUDGE TRIKOUROS: When is that going to be  
7 issued, do you know?

8 MS. BUPP: I actually think -- I'm sorry -- I  
9 know that the final environmental assessment for the other  
10 9th Circuit license application has been issued. I think  
11 the Diablo Canyon should be soon, but I only know -- the  
12 other one is actually my case, but the Diablo Canyon one  
13 is not my case, but I believe it should be soon.

14 JUDGE FARRAR: All right. Ms. Carroll, did you  
15 want to say something?

16 MS. CARROLL: Can you tell? Just I was short  
17 because -- it's proper to be short right now, and Don  
18 Silverman was not correct. We have raised a new and  
19 significant addition to our original contention, which is  
20 that broad powers were given to all federal agencies by  
21 the Homeland Security Act, and we encourage you to help  
22 lead the NRC in taking the authority here. And you can  
23 read, and so I'll be quiet.

24 JUDGE FARRAR: We will look at it carefully.

25 It's now 12:15, we're not too bad in terms of

1 our time. We will take the case under submission. We  
2 talked earlier about a mid-September date given the 45 day  
3 rule that elapsed some time ago, but we were past that  
4 because of scheduling difficulties. So we will continue  
5 to target mid-September as the parties agreed for a  
6 decision in this matter.

7 I want to thank all the parties for their  
8 participation. You can see that we take our jobs, but not  
9 ourselves, seriously. The questions, as I predicted,  
10 would be fast and furious, but that's the way to get to  
11 the bottom of things and make sure we have a full  
12 understanding of our -- of your positions.

13 And to do that we have to press you kind of  
14 hard, and counsel responded admirably. But more than  
15 that, the representatives of the Petitioners who, perhaps  
16 because they didn't have the benefit of law school, did a  
17 fine job in trying to -- in addressing the issues and our  
18 questions. And you've done a remarkable -- made a  
19 remarkable effort on behalf of your clients, and I think  
20 that should be noted.

21 What also should be noted is, as we struggled  
22 with scheduling and other difficulties, procedural  
23 difficulties in the case, how counsel and the  
24 representatives of the Petitioners all worked together to  
25 solve things better than we could have directed them. So

1 for that we thank you.

2 And we stand adjourned. Thank you.

3 (Whereupon, at 12:20 p.m., the hearing was  
4 concluded.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Shaw AREVA MOX Services LLC

Oral Argument

Docket Number: 70-3098-MLA

07-856-02-MLA-B001

Location: Augusta, Georgia

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



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