

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Holtec International
(HI-STORE Consolidated Interim
Storage Facility)

Docket Number: 72-1051-ISFSI

ASLBP Number: 18-958-01-ISFSI-BD01

Location: Albuquerque, New Mexico

Date: January 23, 2019

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Pages 1-210

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of:	:	Docket No.
HOLTEC INTERNATIONAL	:	72-1051-ISFSI
	:	ASLBP No.
(HI-STORE Consolidated	:	18-958-01-ISFSI-BD01
Interim Storage Facility)	:	

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Wednesday, January 23, 2019

State Bar of New Mexico
5121 Masthead Street NE
Albuquerque, New Mexico

BEFORE:

PAUL S. RYERSON, Chair

GARY S. ARNOLD, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

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

(9:01 a.m.)

CHAIR RYERSON: All right, good morning again. Welcome, everyone. We're here on the matter of Holtec International's application to construct and operate a Consolidated Interim Storage Facility for nuclear waste in Lea County, New Mexico.

And I should mention that in addition to this room being open to the public, we are making available this proceeding on listen-only telephone lines so that interested members of the public who cannot be here can follow this today, if they so choose.

I'm Judge Ryerson. I'm trained as a lawyer. I chair the particular Atomic Safety and Licensing Board that the NRC has assigned to this case. On my left is Judge Trikouros, who is a nuclear engineer. And on my right is Judge Arnold -- Dr. Arnold is also a nuclear engineer.

Today's proceeding concerns six hearing requests that the NRC has received challenging aspects of the application that have been filed by Holtec. And we'll listen by name when we take the appearances of counsel.

We also have before us five petitions to

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1 participate in this proceeding as interested local
2 governments. And these have not been opposed.

3 Before we take the appearances of Counsel,
4 I'd like to review how we intend to proceed today. I
5 think we pretty much set it forth in the order that we
6 issued on January 10. Again, our principal purpose
7 today is to hear arguments on the hearing petitions to
8 determine whether the hearing petitions meet the NRC's
9 requirements to participate in an evidentiary hearing
10 which, if it's held, will be held at a later stage.

11 Today's arguments are essentially
12 procedural ones. We also have before us a host of
13 related motions. And they may or may not come up
14 today. We're not going to argue them specifically, but
15 they include motions by some of the participants to
16 strike portions of other participants' pleadings.

17 They include motions to adopt parts of
18 other participants' pleadings. They include motions to
19 file new and amended contentions, both of which I
20 think are pretty closely related to -- Beyond
21 Nuclear's contention and also Sierra Club's Contention
22 Number 1.

23 And finally, we have motions addressed to
24 the type of evidentiary hearing we should have if we
25 have a hearing.

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1 Now we have read the pleadings that have
2 been filed by all of the participants here. They
3 total, literally, hundreds of pages. So as we said in
4 our order of January 10, we would like to begin with
5 each individual participant with a brief -- and I do
6 mean brief, no more than ten minutes or so --
7 statement of their position, if they wish to make one.

8 But then we'll begin with questions for
9 each participant, one after the other. And I should
10 urge that nobody should feel that we are neglecting
11 them if we do not have many questions for them. In
12 some cases, the pleadings are quite clear, I think, as
13 to what the issues are and what the positions of the
14 parties are, and we simply may not need to hear
15 further explanation on some of the contentions or even
16 the standing the issues.

17 So don't take anything, I hope, from the
18 fact that we may not have a lot of questions for a
19 particular participant. That simply means that we
20 believe, anyway, that we understand exactly what the
21 issues are.

22 When we ask questions, generally, the
23 Board will be directing questions, in the first
24 instance, at the petitioner or participant who's in
25 front of the podium. We may -- I think we will have --

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1 we have available mics, remote mics. We may ask
2 another participant to comment.

3 Generally, if we want another participant
4 to comment, we will request that. Nonetheless, I think
5 we'll be relatively informal here. If anyone has an
6 uncontrollable urge to comment on somebody else's
7 response, raise your hand. We may recognize you, but
8 if we don't ask, better, in most cases, to simply wait
9 your turn.

10 I don't know if we have here -- we'll
11 check when we have the appearances -- if we have
12 representatives of the local governments, but we will
13 find time to fit in statements by any of the local
14 government petitioners who would like to make them.

15 But their petitions, as I think I said,
16 are not opposed. And so they really don't have to say
17 anything at all unless they want to.

18 Logistics. We will take at least one short
19 break in the morning and the afternoon, perhaps two.
20 We will break for lunch, I think, at the first
21 convenient opportunity after noon. And today we will
22 finish by 4:30. We promised the building that we will
23 have everybody out by 5:00.

24 So we really should try to wrap up, I
25 think, by 4:00 and then people can straggle out and be

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1 out of the building by 5:00. What else? Before we
2 take the appearances, any comments, Judge Arnold?
3 Judge Trikouros?

4 Oh, lunch, I think -- there's no cafeteria
5 in this building, so we're probably going to take a
6 relatively long lunch, an hour and a half, so people
7 can not only easily go someplace to eat but also
8 perhaps have a chance to discuss issues, if that's
9 helpful.

10 Anything else, Judge Trikouros? Judge
11 Arnold? Okay. What I'm going to now is ask the
12 individual Counsel and representatives to come to the
13 podium and identify themselves. If you have questions
14 about what I just talked about, this would be a good
15 time to ask them as well. So let's begin with Beyond
16 Nuclear.

17 MS. REISER: Good morning my name's
18 Caroline Reiser, and I will be appearing on behalf on
19 Beyond Nuclear.

20 CHAIR RYERSON: Good morning. Welcome.

21 MS. CURRAN: I don't know if you want each
22 of us to come by ourselves, but I'm Diane Curran. I'm
23 appearing on behalf of Beyond Nuclear. And also with
24 us today is -- shall I just introduce her or would you
25 like her to come up -- Mindy Goldstein?

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1 CHAIR RYERSON: Mindy? You may introduce
2 them from where -- from your podium is fine.

3 MS. CURRAN: We have with us this morning
4 Mindy Goldstein, director of the Turner Environmental
5 Law Clinic, also appearing on behalf of Beyond
6 Nuclear, and two law students, Alex -- what is your
7 last name, Alex?

8 MS. PEARCE: Pearce.

9 MS. CURRAN: Pearce. And Margarite?

10 MS. MILLS: Margarite Mills.

11 CHAIR RYERSON: Thank you.

12 MS. CURRAN: Thank you.

13 CHAIR RYERSON: Welcome to all of you. And
14 who will be speaking, Ms. Curran? Will both of you be
15 speaking?

16 MS. CURRAN: Ms. Reiser and I will be
17 speaking. She'll be delivering the opening statement,
18 and I'll be answering questions.

19 CHAIR RYERSON: Okay. Okay, thank you. The
20 Sierra Club?

21 MR. TAYLOR: I'm Wallace Taylor on behalf
22 of the Sierra Club.

23 CHAIR RYERSON: Good morning, Mr. Taylor,
24 thank you. Welcome. Alliance for Environmental
25 Strategies -- I think I have it right. It's appeared

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1 two different ways in some of the pleadings. But -- do
2 we have a representative? Yes.

3 Ms. Simmons: I apologize for the
4 confusion. I'm Nancy Simmons. I'm here for the
5 Alliance for Environmental Strategies.

6 CHAIR RYERSON: Thank you. Welcome, Ms.
7 Simmons.

8 All right, I'm going to refer to them
9 after this moment as Joint Petitioners, but we have,
10 I believe one counsel representing -- and tell me if
11 I don't have this right -- Don't Waste Michigan,
12 Citizens for Alternatives to Chemical Contamination,
13 Nuclear Energy Information Service, Public Citizen,
14 San Luis Obispo Mothers for Peace and Nuclear Issues
15 Study Group.

16 I believe that you represent all seven. Is
17 that so?

18 MR. LODGE: Yes, sir. Good morning. My
19 name's Terri Lodge. Yes, I am.

20 CHAIR RYERSON: Mr. Lodge, you appear to
21 be what we used to call, in private practice, a
22 rainmaker, so I congratulate you.

23 MR. LODGE: Well, fair to say, Your Honor,
24 I'm drowning. Thank you.

25 CHAIR RYERSON: Thank you. Welcome to you.

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1 The next is, I think it's pronounced NAC. It's not N-
2 A-C, but Nac. Is that correct? NAC International?

3 MALE 1: N-A-C.

4 CHAIR RYERSON: N-A-C? Okay, Thank you.

5 MR. DESAI: My name is Sachin Desai. I'm
6 appearing as counsel for NAC International. Along with
7 me is Daniel Stender, from Hogan Lovells law firm,
8 also counsel for NAC international, and Robert
9 Helfrich who is general counsel for NAC International.

10 CHAIR RYERSON: Thank you, Mr. Desai.
11 Welcome to you all. Let's see, next -- and you can
12 satisfy some confusion I have here, actually, Fasken
13 Land and Minerals and Permian Basin Land and Royalty
14 Owners.

15 MR. EYE: Yes, good morning, Your Honor.
16 My name is Robert Eye, and I do represent those
17 parties.

18 CHAIR RYERSON: Okay, thank you Mr. Eye.
19 The question I have is, I think I'm correct -- Fasken
20 Land and Minerals is a member of the Permian Basin
21 Group. But are both -- are you representing each of
22 them separately as well?

23 MR. EYE: Yes.

24 CHAIR RYERSON: Yes? Okay.

25 MR. EYE: Yes.

1 CHAIR RYERSON: Thank you.

2 MR. EYE: Thank you.

3 CHAIR RYERSON: Let's see, that's it for
4 the Petitioners. Now Holtec International?

5 MR. SILBERG: Good morning, Judges. I'm
6 Jay Silberg at the law firm of Pillsbury Winthrop Shaw
7 Pittman, representing Holtec International.
8 Here with me, representating Holtec
9 International from Pillsbury are Tim Walsh and Ann
10 Leidich, and we'll all be speaking in response to your
11 questions. I will be delivering the opening statement.

12 CHAIR RYERSON: Okay. Good morning. Thank
13 you, and welcome to our review. The NRC staff, who do
14 we have for this staff?

15 MS. KIRKWOOD: Good morning, Your Honor,
16 Sara Kirkwood, for the NRC Staff. I'm accompanied by
17 my co-counsel, Joe Gillespie and Alana Wase. And we
18 also have with us several of our staff members. We
19 have John McKirgan, who is the branch chief for the
20 Spent Fuel Licensing branch; Jose Cuadrado, who's the
21 Safety Project Manager for this project, and Jill
22 Caverly, the environmental project manager.

23 CHAIR RYERSON: Thank you, Ms. Kirkwood.
24 Welcome to all of you. Next, and I'm not sure if we
25 have them all here or not, but we have, as I said,

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1 five Petitioners to participate in any evidentiary
2 hearing, if we have one, as local governments who have
3 a special role in our hearings under the rules.

4 The first I'll mention is -- and I may be
5 mispronouncing the counties. Is it Eddy or Eddi? The
6 Eddy-Lea Energy Alliance? Do we have anyone? Yes.

7 John Heaton: Mr. Chairman my name's John
8 Heaton, and I am the Vice Chairman of the Eddy-Lea
9 Energy Alliance.

10 CHAIR RYERSON: Thank you, Mr. Heaton. I
11 have a question for you.

12 MR. HEATON: Yes, sir.

13 CHAIR RYERSON: First, do you intend to
14 speak for a few minutes today? You're certainly
15 entitled to.

16 MR. HEATON: Well, we'd like to. We have
17 three members here that would like to speak. And two
18 of the county commissions would like to like to speak.
19 And two of the county commissions would like members
20 to speak. And then one of the members representing the
21 City of Carlsbad could not be here today because of
22 commitments tonight, but is going to come tomorrow if
23 the hearing goes on. And he would like to speak then.

24 CHAIR RYERSON: Okay, the second question
25 I had for you was do you plan to stay -- if we go two

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1 days, do you plan -- I know you've come some distance,
2 and we could take you today if that matters to you.
3 Otherwise, we'll fit you in as it makes sense to do.

4 MR. HEATON: Mr. Chairman, I think all of
5 us plan to be here for the whole --

6 CHAIR RYERSON: Okay.

7 MR. HEATON: We three and the --

8 CHAIR RYERSON: We'll find a convenient
9 time, then, to hear from you.

10 MR. HEATON: Yes, thank you.

11 CHAIR RYERSON: Thank you. So the City of
12 Carlsbad, is that -- are you separately represented?
13 Or who -- in other words, are you coordinating all of
14 the counties and the cities that are involved?

15 MR. HEATON: Yes, the City of Carlsbad's
16 representative will be here -- he's in --

17 CHAIR RYERSON: He's here tomorrow.

18 MR. HEATON: He'll come tomorrow. There's
19 nobody from the City of Hobbs.

20 CHAIR RYERSON: No one from Hobbs? Okay.

21 MR. HEATON: Yes.

22 CHAIR RYERSON: And so, Lea County, is
23 anyone here separately from Lea?

24 MR. SENA: Yes, Mr. Jonathan Sena, did you
25 -- I'm sorry, you're Mr. Sena? Okay, and you are

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1 speaking or no?

2 MR. SENA: Yes, sir.

3 CHAIR RYERSON: You are speaking? Okay.
4 And Eddy or Eddie? Is it Eddy or Eddie?

5 MR. HEATON: Eddy.

6 CHAIR RYERSON: Eddy? Eddy County, then we
7 -- I think the appearance was entered by Mr. -- and
8 I'm going to really apologize in advance for his name,
9 Rudometkin?

10 MR. RUDOMETKIN: That's good, sir, thank
11 you.

12 CHAIR RYERSON: I'm going to get it right.
13 Thank you, sir. And are you speaking independently or
14 --

15 MR. RUDOMETKIN: Yes.

16 CHAIR RYERSON: Okay.

17 MR. RUDOMETKIN: Yes, thank you.

18 CHAIR RYERSON: Okay, very good. Judge
19 Arnold, anything -- oh, I'm sorry.

20 PARTICIPANT: I belong to a -- action
21 team. And I don't see Janet Greenwald here. She's
22 been very active in this and the leader of our group,
23 so if she doesn't come, may I speak for my group?

24 CHAIR RYERSON: Have you entered an
25 appearance? Have you filed anything?

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1 PARTICIPANT: No.

2 CHAIR RYERSON: Oh, okay, no, this
3 proceeding today is limited to participants,
4 petitioners, the applicant, the staff, and the
5 government entities who have actually filed and asked
6 for an opportunity to speak.

7 PARTICIPANT: But not the people?

8 CHAIR RYERSON: This is a government of
9 the people, by the people, for the people. But you had
10 an opportunity to enter an appearance, and you
11 haven't, so some other time, perhaps, but not today.

12 PARTICIPANT: How come we had to enter an
13 appearance?

14 CHAIR RYERSON: Because there was a
15 Federal Register Notice providing an opportunity to
16 participate which all of these groups responded to,
17 which five different local governments responded to.

18 PARTICIPANT: Lynn McCoy (phonetic) from
19 Citizens' Action, you have the part -- you have an --

20 CHAIR RYERSON: I'm sorry?

21 PARTICIPANT: I'm asking someone from an
22 organization that we want to be very active and we
23 really want to be -- really supportive of, I'm just
24 asking him --

25 CHAIR RYERSON: Okay. Two things. One,

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1 today, we are limited to the parties -- participants
2 at this point, who have filed pleadings in front of
3 us. That's all we are considering.

4 And Judge Trikouros reminds me, I perhaps
5 should have asked people to turn off their cell phones
6 or silence their telephone for the rest of the
7 proceeding. But thank you. I'm sorry we cannot hear
8 you or anyone else who has not yet filed something
9 today.

10 Judge Arnold, before we start questions?

11 JOHN ARNOLD: Nothing.

12 CHAIR RYERSON: Nothing? Judge Trikouros?
13 Okay. All right, well we will begin, as our order
14 said, with Beyond Nuclear. And so I'm not sure I
15 caught your name. Is it Reiser?

16 MS. REISER: Yes, Reiser.

17 CHAIR RYERSON: Reiser? Okay. And your
18 opening statement.

19 MS. REISER: Thank you.

20 CHAIR RYERSON: Thank you.

21 MS. REISER: May it please the Board, my
22 name is Caroline Reiser, and I'm a fellow with Emory
23 Law School's Turner Environment Law Clinic. I'm
24 appearing on behalf of petitioner Beyond Nuclear.

25 This proceeding that we all participate in

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1 today is illegal. This adjudicatory body does not have
2 the authority to review a license application that is
3 based on an illegal premise.

4 Although Holtec presents it as an
5 alternative, the mere inclusion of the Department of
6 Energy as an option to be responsible for the spent
7 nuclear fuel transported to and stored at the proposed
8 facility is illegal.

9 The law is clear. The Nuclear Waste Policy
10 Act states affirmatively that the U.S. government
11 cannot take title to privately produced spent nuclear
12 fuel until a final repository is operational.

13 There is no dispute that no final
14 repository is operational let alone even licensed,
15 thus Holtec's application is based on an illegal
16 presumption and application should be dismissed.

17 By conducting these proceedings, the
18 Nuclear Regulatory Commission has impermissibly
19 allowed Holtec to undermine longstanding United States
20 law established in the Nuclear Waste Policy Act.

21 However, regardless of established law,
22 the Commission has directed that this proceeding, for
23 the moment, will continue. In accordance with that
24 wish, Beyond Nuclear has shown and will continue to
25 show today, that it both has standing to pursue this

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1 claim and that the Holtec application violates the
2 Nuclear Waste Policy Act.

3 First, as NRC staff agree, we establish
4 that Beyond Nuclear has standing. Our members live,
5 work, recreate and frequent the fence line of the
6 proposed Holtec facility. They are mineral owners
7 whose financial interests are threatened by the
8 presence of nuclear waste, limiting their ability to
9 extract their resources.

10 They are ranchers who currently ride
11 horses over the very land that Holtec proposes to use
12 to store hundreds of thousands of tons of nuclear
13 waste. They are families whose children pass across
14 the Holtec land every weekday just to get to school.

15 Suddenly the land is no longer pastoral
16 ranch land, as it has been for a hundred years. But
17 instead, it will be overshadowed by the largest
18 nuclear waste dump in the world, lest we provide the
19 land for any other purpose.

20 Suddenly just driving on what is their
21 main street, Highway 62-180, women consistently
22 exposing themselves and their families to doses of
23 radiation as they drive along this highway on their
24 way to work, to school or just to see a movie in town.

25 They will be exposed to radiation from

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1 shipments of nuclear waste paralleling the highway on
2 the way to the Holtec facility. Beyond Nuclear members
3 will not be to escape being next to the 173,000 metric
4 tons of spent nuclear fuel that Holtec plans to store
5 in their backyards and ship along their main street.

6 The amount of nuclear waste is more than
7 twice the amount that the U.S. currently has and more
8 than twice the amount that was proposed to be stored
9 at the Yucca Mountain permanent repository. No one
10 will be more harmed than these individuals by the
11 licensing of this facility.

12 If you do not grant them standing, you
13 will be declaring this neighborhood a national
14 sacrificed zone without giving it an opportunity to be
15 heard.

16 Next, Beyond Nuclear has shown and will
17 show further today that the Holtec application's
18 central premise, that the Department of Energy must
19 take title to the nuclear waste at the interim storage
20 site, violated the Nuclear Waste Policy Act.

21 And by entertaining this application, the
22 Nuclear Regulatory Commission violates the Nuclear
23 Waste Policy Act and Administrative Procedure Act. The
24 Nuclear Waste Policy Act is Congress' comprehensive
25 scheme for the interim storage and permanent disposal

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1 of high-level radioactive waste generated by civilian
2 nuclear power plants.

3 It is the result of brilliant and wise
4 balancing on the part of Congress that establishes
5 distinct responsibilities for the federal government
6 and private generators regarding spent fuel with the
7 ultimate goal that nuclear waste will end up
8 underground in a permanent repository.

9 By seeking a license that would allow the
10 federal government to take title to the spent fuel at
11 an interim above-ground storage site, Holtec flaunts
12 the Nuclear Waste Policy Act and its important
13 balancing.

14 Holtec attempts to skirt the question of
15 who may legally own the nuclear waste it proposes to
16 store by saying that either the department of Energy
17 or private owners will be responsible for the spent
18 fuel. But by including an illegal option, the entire
19 application is rendered unlawful.

20 Consider a contract that offers for the
21 purchase of an item either cash or committing a
22 felony. This contract is clearly unenforceable simply
23 because it includes an illegal option. The legal
24 option does not save it.

25 And even though just offering an illegal

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1 option is a fatal flaw, we know that the only real
2 option is the unlawful one. To its shareholders at
3 press interviews and in industry presentations, Holtec
4 has always said and continues to say that to complete
5 this facility it is counting on the Department of
6 Energy being responsible for the waste.

7 Just this month, Holtec reiterated that
8 the facility will ultimately depend on the department
9 of Energy and Congress. We challenge the application's
10 compliance with the Nuclear Waste Policy Act. But the
11 purpose of this proceeding is to consider contentions
12 brought under the Atomic Energy Act and National
13 Environmental Policy Act.

14 Thus, we think that this board has no
15 choice but to dismiss our contention. To protect the
16 integrity of this licensing board and this licensing
17 proceeding, we ask that the Board take note of the
18 violations of the Nuclear Waste Policy Act and the
19 Administrative Procedure Act. Thank you.

20 CHAIR RYERSON: Thank you. Ms. Curran?

21 MS. CURRAN: Oh.

22 CHAIR RYERSON: Are you going to answer
23 questions? Yes, we're going to ask questions after
24 each opening, I think.

25 BOARD QUESTIONS TO PETITIONER BEYOND NUCLEAR

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1 All right, Ms. Curran, I know -- I
2 understand your -- Beyond Nuclear's position to be
3 that we shouldn't be considering this issue. You
4 wanted to the Commission to consider the lawfulness
5 under the Nuclear Waste Policy Act of this
6 application.

7 And through the Secretary, the NRC
8 declined to do that. I think you have appealed that.
9 Correct? If I'm correct --

10 MS. CURRAN: That's correct.

11 CHAIR RYERSON: -- at the DC Circuit, and
12 that is, I assume, probably stayed, pending our
13 decision?

14 MS. CURRAN: We've made

15 MS. CURRAN: We've made a motion to hold
16 the proceeding in abeyance pending further proceedings
17 here. The NRC has posed our motion and has said it's
18 going to move to dismiss our lawsuit, but none of that
19 has been decided yet.

20 CHAIR RYERSON: Right. Okay, thank you.
21 Well, let's -- I know that in addition to thinking we
22 shouldn't have this issue, you have raised some
23 questions about whether Holtec really has two options
24 on the table.

25 But for the next couple of questions let's

1 assume Holtec's position is, as I believe Mr. Silberg
2 has stated it to be, that Holtec wants to either
3 proceed under an arrangement by which DOE would take
4 title to the nuclear waste or proceed under an
5 arrangement by which the nuclear power companies would
6 retain title to the nuclear waste.

7 The DOE option, we'll call Option 1. The
8 power company title, we'll Option 2. Now, your
9 position, I take it, is clearly that Option 1 raises
10 at least a legal issue contention? Assuming that
11 there's a contention here, that we should be deciding
12 it at all, isn't that a legal issue contention, in
13 your view?

14 MS. CURRAN: Yes.

15 CHAIR RYERSON: Yes? Okay. Now suppose
16 Holtec changed it's mind. And you needn't leap to your
17 feet, Mr. Silberg. I'm not suggesting this is the
18 case. But suppose Holtec changed its mind and said
19 that, well, we'll really going to go only with Option
20 2. Would that solve your problem?

21 MS. CURRAN: Well, it would certainly
22 address the Nuclear Waste Policy Act issue if DOE were
23 not named at all.

24 CHAIR RYERSON: Correct.

25 MS. CURRAN: And it was similar to say the

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1 the Private Fuel Storage case where everything was
2 done by private licensees.

3 CHAIR RYERSON: Okay.

4 MS. CURRAN: Yes, that would -- I mean,
5 that would solve that problem, and we may come back
6 with other problems, but, yes, that one would be
7 solved.

8 CHAIR RYERSON: Okay, thank you. And I
9 recall that in Holtec's pleadings -- and I really
10 haven't often see this -- there was a suggestion --
11 neither Holtec nor the NRC staff in their pleadings,
12 I believe, directly addressed the lawfulness of what
13 we'll call Option 1, the DOE type position.

14 But Holtec did note that there is the
15 possibility of pending legislation in the Congress
16 that would amend the Nuclear Waste Policy Act. Suppose
17 Holtec -- and again, Mr. Silberg, I'm not suggesting
18 you're posing this, but suppose Holtec said, okay,
19 we'll take -- we will modify our application to say
20 that Option 1 is conditioned on congressional
21 legislation that, we'll say, amends to clarify that
22 the Nuclear Waste Policy Act permits DOE to take title
23 in these circumstances. Would that solve your problem?

24 MS. CURRAN: No.

25 CHAIR RYERSON: No? Why?

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1 MS. CURRAN: The reason being that the
2 reason being that the current state of the law is that
3 the DOE may not take title to spent fuel unless and
4 until a repository is up and running.

5 And for the NRC to entertain on kind of a
6 hypothetical basis an application that might turn out
7 to be valid in the future would be, we think, a gross
8 of the Administrative Procedure Act which does not
9 allow the agency to do more than Congress has
10 authorized.

11 And there's a recent case I would refer
12 you to, and I'm sorry I don't have the number at the
13 top of my head. It's State of New York versus -- oh,
14 my -- the Commerce Department, I think, and the U.S.
15 Department of Commerce. It has to do with the census
16 and the Secretary of Commerce's addition of a
17 citizenship question to the census which Congress had
18 precluded.

19 And the judge in that case was in the
20 Southern District of New York, issued maybe a week
21 ago, said the Administrative Procedure Act, it may
22 seem like kind of it's a basic and boring thing, but
23 it's a statute that kind of maintains the integrity of
24 our government.

25 And if the government, if an

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1 administrative agency like the NRC goes about
2 entertaining hypothetical license applications that
3 are clearly inconsistent with governing law, then
4 that, we would submit, is a gross violation of the
5 APA.

6 CHAIR RYERSON: Yes, all right, I think
7 I can anticipate your answer to my next question then.
8 Another purely hypothetical, if Holtec said that it
9 would exercise Option 1 only if it went to a court of
10 competent jurisdiction and obtained a declaratory
11 judgment that, under the Nuclear Waste Policy Act,
12 having DOE take title and possession would be
13 permissible, that would not solve your problem -- I
14 take it?

15 MS. CURRAN: We would say go to the court
16 first.

17 CHAIR RYERSON: Right.

18 MS. CURRAN: And then come to the NRC. And
19 just bear in mind that Beyond Nuclear's members -- and
20 these are the people who contribute to the
21 organization and make its work possible, are people
22 who live -- include people who live near this
23 facility, who do not have endless resources to protest
24 a hypothetical license application.

25 They're spending their treasure to argue

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1 about something that may never happen and should never
2 happen unless the law has changed? The government --
3 I mean, that's part of the APA, is to be responsible
4 to the citizens of the country who are going to
5 litigation because there's a real dispute over laws
6 that are currently in effect, not because there's a
7 hypothetical dispute.

8 This is quite an undertaking for these
9 organizations to do this work. And if we were to -- I
10 mean, we had the choice of fighting this application
11 because our members are very concerned about this, on
12 the many technical grounds that there are to do it.

13 But we chose, instead, to say just -- our
14 group, Beyond Nuclear, is saying, no, this is not
15 appropriate to even conduct this proceeding at this
16 time. If Holtec were to get a judgment from a court
17 saying this is legitimate under the APA and the
18 Nuclear Waste Policy Act, then we would have to
19 participate because, well, we had that judicial
20 interpretation. I doubt they would get such an
21 interpretation.

22 CHAIR RYERSON: Okay. I have just one --
23 well, for you, it may be almost a moot question. The
24 NRC staff is not opposing the standing of Beyond
25 Nuclear. I believe you have a member who lives about

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1 a mile from the proposed facility. And that is the
2 basis on which the NRC staff would agree that you have
3 standing or would not oppose standing.

4 MS. CURRAN: Yes. I would just add we have
5 members that are even closer than that. And that, as
6 Ms. Reiser was saying, they cross the property. They
7 have cattle on the property. They would be going, you
8 know, using the fence line area of the property, so
9 even closer than a mile.

10 CHAIR RYERSON: Yes, so for you this
11 question is not maybe terribly relevant, but we always
12 appreciate your views, Ms. Curran. And you also have
13 members who are relying upon proximity to
14 transportation routes. Is that -- you're relying on
15 them as well for standing.

16 MS. CURRAN: I would just want to clarify
17 that we are not relying on proximity standing with
18 respect to transportation.

19 CHAIR RYERSON: Okay.

20 MS. CURRAN: We are relying -- our basis
21 for standing is virtually identical to the basis for
22 standing that was found by the Licensing Board in the
23 Duke Cogema Stone & Webster case that's cited in our
24 brief.

25 And, as a matter of fact, there seems to

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1 be some standard determination that if you are within
2 two meters of a transportation cask, you are going to
3 get a certain dose of radiation. I can't remember how
4 many milli-rams it is, but it's exactly the same
5 number in the Duke Cogema Stone & Webster case as it
6 is in our case.

7 And we are saying that this isn't a case
8 where we're saying railroad cars may go by these
9 folks. We're saying, there's going to be 500 shipments
10 a year for 20 years of highly radioactive material
11 that are going to go on a railroad line or a road,
12 from the main railroad trunk to the facility.

13 And people drive along the road, right next
14 to that railroad track and people go into the railroad
15 yard where these cars will sit. And they will be
16 within the distance where they will get a radiation
17 dose. It may be small, but they would prefer to avoid
18 it.

19 It's different from a case where -- first
20 of all, we're not saying that's a proximity thing.
21 We're saying that is we're using in the numbers in the
22 environmental report to show that there is an injury
23 to our members. And it's -- I think Holtec tried to
24 say, well, the Duke case isn't really good law
25 anymore.

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1 But I think if you look at those cases,
2 they're quite different. For instance, in the Pacific
3 Gas and Electric case, the petitioners that
4 represented said, we cited the Yucca Mountain, EIS,
5 that said if there was an accident involving a cask,
6 people might be affecting 50 miles.

7 And the Board said, well, the dose is,
8 it'd be minuscule, like you can't rely on that. But
9 this is really quite different. This is every single
10 day of every single year for 20 years, railroad cars
11 passing through this area are going to be emitting
12 some level of radiation to the public and onto road
13 nearby, to people who may be nearby.

14 CHAIR RYERSON: Yes, all right, well I
15 thank you for that. I think Mr. Lodge's clients may be
16 -- some of them have a slightly different on that
17 issue. And we'll talk to him about that.

18 MS. CURRAN: Yes.

19 CHAIR RYERSON: Judge Arnold, did you have
20 further questions?

21 JUDGE ARNOLD: Sure do. In your petition
22 you state that this contention is neither within the
23 scope nor material to the finding the NRC has to make.
24 Is that still your opinion?

25 MS. CURRAN: That's a good question and

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1 let me -- I would, before the Oct 29th Order from the
2 Commission, I would have said unequivocally,
3 absolutely because the hearing notice that went out
4 about this facility said that this board was going to
5 look at the Atomic Energy Act and NEPA, and there's
6 nothing in it about the Nuclear Waste Policy Act.

7 The Commission's order now adds to the
8 licensing board the responsibility to look at our
9 claims. I think there's -- so it's gotten a little
10 more complicated, but I think the issue is still the
11 same because it's the hearing notice that still
12 governs.

13 Unless a new hearing notice goes out that
14 says, "And we will now entertain questions about
15 compliance of this application with the Nuclear Waste
16 Policy Act" I think you're still limited by the scope
17 of your hearing notice.

18 And the Commission did direct you to
19 evaluate our claims in the context of Section 2.309
20 which raises the question, is this material? Is this
21 issue in the scope?

22 CHAIR RYERSON: And you did file a
23 contention as a precautionary matter, as I recall.

24 MS. CURRAN: Yes, we did. Yes, it was a
25 precautionary measure. And we think that the

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1 appropriate response for Licensing Board is to dismiss
2 the contention for lack of scope, you know, compliance
3 with the scope and materiality requirements.

4 And we would hope you would raise some
5 concern about the APA problems that are raised by the
6 case. We'd love to have your input on that. But we
7 think that you really have no other choice under the
8 framework that you are given.

9 JUDGE ARNOLD: That was my next question.
10 Under the requirements in 10 CFR 2.309(f), contention
11 admissibility standards, would you say that your
12 contention does not meet all of those because you say
13 it's out of scope and not material?

14 MS. CURRAN: That's right. We had to, you
15 know, we had to say that because that's what's true.

16 JUDGE ARNOLD: So, in your opinion, does
17 the Board have the authority to admit a contention
18 where the petitioners say it's out of scope and it's
19 not material?

20 MS. CURRAN: Well, I think you'd have
21 authority to admit a contention if you thought we were
22 wrong. But I don't see how you could disagree with us.
23 I mean, I don't want to be disrespectful, but I just
24 don't see how anyone could say that the Nuclear Waste
25 Policy Act has any bearing on a typical licensing case

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1 because this really has to do with a whole separate
2 statutory framework.

3 JUDGE ARNOLD: Okay, one last question on
4 this particular topic. Supposing this board just
5 didn't you and admitted the contention. Would you have
6 the authority or the ability under the rules to appeal
7 our decision stating that your petition should have
8 been denied? I mean, it's kind of reverse of anything
9 we've ever done before.

10 CHAIR RYERSON: I don't believe as an
11 interlocutory matter. If we admitted your contention
12 and found you had standing, hypothetically, I don't
13 think you would have grounds for an interlocutory
14 appeal, would you?

15 Your hearing petition has been granted in
16 that hypothetical circumstance.

17 MS. CURRAN: Yes, we might try to make an
18 item. But I think if you admitted the contention we
19 would think of some way to go back to the Commission.
20 I'm not sure what it would be, but we I think that we
21 would consider that a problem that we would address.

22 JUDGE ARNOLD: Okay, then onto a different
23 topic. To your knowledge, does the Department of
24 Energy currently own any spent fuel or greater than
25 Class C waste?

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1 MS. CURRAN: I would think so, but, you
2 know, the Department of Energy has facilities all
3 over the country with all kinds of material in them.

4 JUDGE ARNOLD: Okay, and in that case if
5 this license were granted, would the Department of
6 Energy be permitted to store that spent fuel and waste
7 at this consolidated facility?

8 MS. CURRAN: Well, boy that's a good
9 question. I would be really surprised, but I suppose
10 that's a possibility and another reason why not to
11 entertain this application. It's kind of opening a can
12 of worms.

13 JUDGE ARNOLD: Okay, that's my questions.

14 CHAIR RYERSON: Okay, Judge Trikouros?

15 JUDGE TRIKOUROS: Yes, would there be any
16 reason why the DOE could not provide funding for the
17 utility ownership or for utilities transporting and
18 storing this material but not -- the DOE not take
19 ownership of the spent nuclear fuel?

20 MS. CURRAN: I suppose depending on what's
21 authorized by the Atomic Energy Act for the DOE to do,
22 if that's within their power under the Atomic Energy
23 Act, yes. But I think don't think that that would
24 solve the problem that Holtec is seeking here.

25 It's that the issue of ownership is

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1 basically involved a transfer of liability which is
2 really a huge issue for private licensees.

3 This is a long-term problem. We know it's
4 taking a long time to license a repository, and it
5 would help private utilities to be able to shift
6 liability for spent fuel from the private licensees to
7 the Department of Energy.

8 And by giving grants to private licensees,
9 that might help them along somewhat. And I have no
10 idea whether that would be legal, but I don't think it
11 would address the fundamental issue here, and that is
12 a transfer of liability.

13 And this was -- I would just recommend you
14 look at COI-02-29. It was a decision by the
15 commissioners about the private fuel storage
16 application where the State of Utah said, that scheme
17 violated the Nuclear Waste Policy Act.

18 And the Commission quotes a colloquy about
19 why the Congress wanted to set up the legal scheme
20 this way. Congress was worried that if the Department
21 of Energy took title to spent fuel before the
22 repository opened, that this would dilute the
23 incentive for private licensees to get behind a
24 repository and that storage would become the de facto
25 solution, which is major worry for Beyond Nuclear

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1 that, if the Department of Energy becomes involved
2 here through taking ownership, that takes away a lot
3 of incentive to find a permanent repository for this
4 waste -- political incentive, I'm talking about.

5 We all agree that there's a tremendous
6 technical need for a repository, but political
7 incentive is very important. And that once New Mexico
8 had accepted, basically, the entire inventory of spent
9 fuel for the United States in an above-ground
10 facility, a lot of motivation to find a repository
11 would be gone.

12 JUDGE TRIKOUROS: But, as you mentioned
13 earlier, PFS was to be funded entirely by the private
14 sector and did not include DOE at all.

15 MS. CURRAN: That's correct. But the
16 Commission just explained why the private project that
17 PFS had didn't fit within the Nuclear Waste Policy Act
18 scheme.

19 JUDGE TRIKOUROS: That's all.

20 CHAIR RYERSON: Thank you, Ms. Curran.

21 MS. CURRAN: Okay, thank you.

22 CHAIR RYERSON: Let's see. All right,
23 let's -- we'll take a break either during the middle
24 or after Mr. Taylor's presentation. So we'll go next
25 to the Sierra Club.

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1 MR. TAYLOR: Thank you, and good morning.

2 CHAIR RYERSON: Good morning.

3 MR. TAYLOR: The Sierra Club is the oldest
4 and largest environmental organization in the country.
5 We have over 700,000 members nationwide and about
6 10,000 members in New Mexico.

7 We are concerned about the environmental
8 consequences of nuclear power, in general, and more
9 specifically, the problem of highly radioactive
10 nuclear waste. That's why we're intervening in this
11 proceeding.

12 This project that Holtec proposes is
13 without precedent -- 173,000-plus tons of radioactive
14 waste brought in one spot in New Mexico. Although the
15 environmental report, even the third revision, still
16 says 100,000 tons, Holtec's pleadings have said
17 173,000 so I'll go with that.

18 It will come from all over the country,
19 mostly by rail, sometime through cities and urban
20 areas. Sometimes through farm areas. I'm from Iowa so
21 I understand that. And we have to look at the
22 consequences of forcing that transportation issue. And
23 also the shear scope of this project, as I said, it's
24 unprecedented.

25 The PFS project that you mentioned was

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1 only -- only 40,000 tons. The Yucca Mountain Geologic
2 Repository was 70,000 -- it was going to 70,000 tons.
3 This project, if we take the 173,000 tons, is much,
4 much larger than either of those and without the
5 protections and safeguards of a geologic repository.

6 That's our real concern and why we believe
7 that the environment report and the safety analysis
8 report are deficient. They really don't address the
9 scope and consequences of this project. So we would
10 ask the Board to give this case the consideration that
11 the scope and nature of this project demands.

12 Several of our contentions relate either
13 directly or indirectly to the integrity of the
14 containers in which the radioactive waste would be
15 stored at the Holtec CIS facility.

16 For example, Contentions 14 and 23-24
17 raise concerns about the safety and integrity and
18 monitoring of the containers. Contentions 15 through
19 19 raise concerns about the impact to ground water
20 from leaking containers caused by corrosion from salts
21 in ground and other causes.

22 We initially responses to requests for
23 additional information or RAIs submitted by Holtec.
24 Holtec has said it will revise the SAR to address NRC
25 staff's concerns about testing for and addressing

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1 leaking containers.

2 In response to another RAI 17-14, Holtec
3 has said the potential for cavity enclosure
4 containers, or CEC's wall thinning will be assessed by
5 visual inspection for any corrosion and/or pitting on
6 the interior surfaces of the CEC.

7 Because the CEC is a bare structure,
8 degradation of the coating due to abrasion or other
9 external contact during the life of the CEC is not
10 feasible. Thus, inspection of the CEC internal surface
11 serves as a viable method for determining the
12 potential for any wall thinning due to localized CEC
13 corrosion. So they're admitting there could be
14 corrosion.

15 In another RAI 17-12, the NRC staff
16 recognized in the presence of salts that could cause
17 corrosion of the containers, a circumstance Holtec
18 blithely dismissed.

19 These RAI responses were just placed on
20 Adams, Exception Number is ML-19016(a)481 on January
21 16th. They will change our contentions or form a new
22 basis for contentions. Obviously, we've not had a
23 chance or a time to make an evaluation.

24 10 CFR Section 2.309 allows late-filed
25 contentions. One of the conditions for late-filed

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1 contentions to be recognized is that they be timely
2 filed. Timeliness has been determined to be within 30
3 days after the new information on which the contention
4 is based becomes available.

5 Sierra Club therefore requests that the
6 record be left open for 30 days from the date the RAI
7 response was entered on Adams to allow us to file new
8 or amended contentions based on the RAI responses.

9 If the Board would prefer a written
10 motion, we would ask for seven days to file that
11 motion.

12 CHAIR RYERSON: Let me just interrupt you
13 there. You're correct, although it's not in the
14 regulations, 30 days has generally been ruled to be an
15 adequate period of time to respond to new information.

16 So if you file within 30 days a motion or
17 a new or amended contention, that's sufficient. You
18 don't need another motion seven days from now. Thank
19 you.

20 MR. TAYLOR: Okay, thank you. As I said,
21 the issue here really is the danger from the
22 radioactive waste being stored. The U.S. Court of
23 Appeals for the District of Columbia Circuit said in
24 the 1st New York versus NRC case regarding the waste
25 decision that even though it was no longer useful for

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1 nuclear power, spent nuclear fuel poses a dangerous
2 long-term health and environment risk.

3 It will remain dangerous for time spans
4 seemingly beyond human comprehension. I think that
5 should give us all pause and encourage all the parties
6 on the Board to give this case very serious
7 consideration, and I know you will. Thank you.

8 BOARD QUESTIONS TO SIERRA CLUB

9 CHAIR RYERSON: Thank you, Mr. Taylor. Let
10 me ask you a few questions first about Sierra Club's
11 contention #1. The first part of that, I believe, is
12 essentially identical to the Beyond Nuclear
13 contention. Am I correct?

14 In other words, it's challenging the
15 lawfulness under the Nuclear Waste Policy Act of what
16 we called earlier Option 1, the possibility that is in
17 the application, that DOE would take title to the
18 nuclear waste. Am I correct in that?

19 MR. TAYLOR: Yes.

20 CHAIR RYERSON: The first part of your
21 contention?

22 MR. TAYLOR: Yes.

23 CHAIR RYERSON: But there's a second part
24 to Contention 1, as I recall. And that seems, if I'm
25 reading it correctly, to more broadly challenge the

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1 idea of any way from reactor interim storage facility
2 for nuclear waste.

3 And are you still pursuing the second part
4 of that in light of the responses you received or have
5 you re-thought that one?

6 MR. TAYLOR: In our reply we suggested
7 that the Atomic Energy Act allows the NRC to not allow
8 an away from Class FSI. And, of course, Holtec,
9 through the Bullcreek case at us and the PFS ruling.

10 But it seemed to me that the Bullcreek
11 case which upheld the PFS decision, basically, was not
12 only focused on the argument that the State of Utah
13 was making, that that one of the Nuclear Waste Policy
14 Act didn't preclude the challenge to the AEA authority
15 for the NRC to not approve an away site.

16 So I think if you look at the AEA as we
17 did in terms of what the AEA allows, that it allows
18 approval only for the production or -- I forget the
19 other term -- production or utilization facility. So
20 that's our position at this point.

21 CHAIR RYERSON: Okay. But the NRC
22 regulations now provide -- I mean, as the NRC has
23 interpreted the Nuclear Waste Policy Act, there are
24 regulations that provide for licensing in an away from
25 reactor interim storage facility.

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1 And you have not challenged those
2 regulations in the way that a petitioner is required
3 to, have you?

4 MR. TAYLOR: No, we're not challenging the
5 regulations. As I see it, we're challenging the NRC's
6 jurisdiction, and, as I understand it, that's a
7 different thing that -- in challenging jurisdiction,
8 you're not challenging the regulations themselves.

9 CHAIR RYERSON: Okay. Let me ask you a
10 couple questions about Sierra Club Contention 4 which,
11 I think on its face, well, clearly your position, as
12 I understand, reading the whole contention and its
13 support, is that the evaluation of transportation
14 risks was inadequate.

15 And there's one particular aspect of that.
16 You cite the Lamb and, I believe it's Resnikoff Study,
17 which is a study that was based on a buyer that took
18 place in the Baltimore tunnel in 2001 and analyzed
19 that, from the standpoint if that had been a nuclear
20 issue.

21 And Holtec's argument is that in their
22 environmental report, they cite, I believe it was a
23 2008 plain old supplemental environmental impact
24 statement of the Department of Energy in the Yucca
25 Mountain case.

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1 And they point out that that is very
2 critical, frankly, of the Lamb and Resnikoff Study,
3 which they basically say, A, at a minimum, shows that
4 it's a worst-case analysis. And, B, they would say
5 it's flatly wrong.

6 And they say that you don't grapple with
7 that at all in your petition. I think I'm
8 characterizing their position. What is your response
9 to that?

10 MR. TAYLOR: Well first of all, Dr.
11 Resnikoff, who was our expert for this contingent and
12 was also the author of the report that's being
13 criticized, he clearly states that he stands by his
14 analysis and, in fact, updated it somewhat for the
15 contingent and --

16 CHAIR RYERSON: I'm not sure I saw it
17 updated. Where is it updated?

18 MR. TAYLOR: On Page 25 of our
19 contentions.

20 CHAIR RYERSON: Okay, thank you.

21 MR. TAYLOR: And, secondly, I think that,
22 quite frankly, Holtec is arguing facts which are not
23 appropriate for this stage of the proceedings.

24 CHAIR RYERSON: Well, that, I mean,
25 that's, as you know, the NRC does not make merits

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1 determinations on contention admissibility. At the
2 same time, the rules are what the Commission has
3 described as intentionally stripped.

4 And the Commission has expressed the view
5 that a party must, for want of a better term, come to
6 grips with the things in the application. And what I'm
7 asking you is, you know, if, as Holtec represents,
8 there are criticism of Lamb and Resnikoff and you're
9 relying on it, but you don't address those criticisms
10 specifically, then do you still have an issue that
11 merits an evidentiary hearing?

12 That's a two-part question. The first part
13 is, do you grapple with the criticism, and if not, why
14 not?

15 MR. TAYLOR: Well, I guess I grapple with
16 it, just, the same response that I just gave you, that
17 I think Holtec is arguing facts. And Dr. Resnikoff
18 stands by his prior analysis.

19 Secondly, it's impossible to, I mean, to
20 have anticipate every challenge you're going to get
21 from the applicant.

22 Well, you should have seen this or you
23 should have talked about that. And there may be things
24 that are not that easy to find that the applicant may
25 know about, but how are we supposed to, at the

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1 contention stage, you know, when it's very early, to,
2 as I say, at least in the proceedings, and with the
3 time limit we have to form contentions, to just survey
4 the universe for anything that might be at odds for
5 what we're contending.

6 CHAIR RYERSON: All right. Thank you. Let
7 me about Sierra Club Contention 8, which is addressed
8 to the decommissioning plan in the application. And I
9 -- did your original petition essentially ignore the
10 fact that Holtec is relying upon a reasonable rate of
11 return on the money that it puts aside for
12 decommissioning?

13 I mean, I think your original contention
14 just missed that. Is that right?

15 MR. TAYLOR: We didn't specifically
16 discuss that, no. We did in our reply, obviously,
17 which I think was appropriate for a reply.

18 CHAIR RYERSON: Right.

19 MR. TAYLOR: And, but it wasn't obvious to
20 me, at least, when I read their funding document that
21 they were relying to that extent on the interest that
22 would be generated from the fund. And they said up to
23 3 percent, so how were we supposed to know exactly
24 what percent they're relying on?

25 CHAIR RYERSON: So the application says 3

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1 percent real rate of return, I believe. And I can
2 actually, I can ask Mr. Silberg? A real rate of
3 return, I don't know if you need a mic.

4 My question is when Holtec says a real
5 rate of 3 percent, is that 3 percent above inflation?
6 Is that what a real rate of return is?

7 MR. SILBERG: Yes.

8 CHAIR RYERSON: Okay, thank you. Well in
9 your reply -- I know Holtec, I believe, says you
10 shouldn't be allowed to make this argument, but you
11 make an argument in your reply that 3 percent real
12 rate of return is not necessarily realistic.

13 Do you have any -- other than your own
14 view, do you have any support for that position,
15 assuming you're allowed to make that argument? Other
16 than your own view, do you introduce any evidence that
17 3 percent is not a realistic rate of return?

18 MR. TAYLOR: We just use their own
19 figures. I think in their answer, they said up to 3
20 percent. That's where I got that. When you only have
21 seven days to file a reply, you can't go find an
22 economist who can do that kind of analysis in that
23 length of time.

24 CHAIR RYERSON: It perhaps could have been
25 in the original petition, but it was not. Let me ask

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1 you about Contentions 15 to 19, which -- various
2 challenges based essentially on geology. The
3 environment report states -- and I think I'm quoting
4 it accurately, at Pages 1-7 and maybe 7-2, as well --
5 there is no potential for a liquid pathway because the
6 spent nuclear fuel contains no liquid component, and
7 the casks are sealed to prevent any liquids from
8 contacting the spent nuclear fuel assemblies. The
9 environmental report further concludes, at 4-47, that
10 there is no viable mechanism for offsite migration.
11 Where do you address that, those arguments in your
12 petition, or where does your expert address those
13 specific arguments?

14 MR. TAYLOR: Of course, the expert we had
15 for the hydrology is not an expert on radioactivity,
16 but if you look at our Contentions, I think that's 14,
17 and then 20 through 24, we do discuss the possible
18 causes of leaks and breaches in the containers. Even
19 if you look at the SAR that Holtec submitted in their
20 aging management chapter, Chapter 18, they list six or
21 eight causes of container breach.

22 So they are admitting there that there are
23 possibilities of container breach. As I said, even
24 these new responses to the RAIs that I mentioned in my
25 opening statement, I think, go to the issue of the

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1 possibility that the ground water and the
2 radioactivity can come together and cause pollution of
3 the ground water.

4 CHAIR RYERSON: The quotes I just
5 mentioned from those pages, do you -- either in your
6 petition or your expert statement, do you cite those
7 specifically? Do you address those specifically?

8 MR. TAYLOR: Not specifically.

9 CHAIR RYERSON: Thank you. Judge
10 Trikouros.

11 JUDGE TRIKOUROS: In your Contention 2,
12 the staff answer, actually, to your Contention 2 talks
13 about the fact that -- the contention deals with the
14 need --

15 (Simultaneous speaking.)

16 JUDGE TRIKOUROS: In the staff answer --
17 in your contention, you're focusing on the relative
18 safety of this offsite ISFSI in comparison to an
19 onsite ISFSI, which exists now in almost every plant
20 that we have.

21 Would you say that the purpose and need
22 for the project can be supported by everything other
23 than the relative safety argument? The staff points
24 out five or six very -- what I would view as very
25 important reasons for the project, but you were

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1 focusing on just relative safety issues. Is that a
2 major part of your argument, or does -- would you need
3 that for that contention or be satisfied with the
4 staff answer?

5 MR. TAYLOR: I'm never satisfied with the
6 staff answer. Well, sometimes I am. There are a few
7 staff answers I was satisfied with. The point of
8 purpose and use statement is to determine the range of
9 alternatives that are to be considered. If, as in
10 this case, Holtec is making the claim that the CIS is
11 safer and more secure than onsite storage, and they're
12 dismissing onsite storage, basically -- and that's a
13 major factor in why they're doing that -- that limits
14 the choice of alternatives.

15 They're trying to use the safety factor as
16 a, I believe, key factor in dismissing the onsite
17 storage as a viable alternative, even though they say,
18 in the ER -- I think it's Section 1.1 or 1.2 -- that
19 the onsite storage is a reasonable alternative and, in
20 fact, in Section 4.14 of the ER, they discuss the
21 impacts of onsite storage and find that it's perfectly
22 safe.

23 Maybe I'm exaggerating a bit, but they
24 find that it's a safe alternative. It seems to me
25 that by neglecting the finding of the -- your new

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1 storage rule that onsite storage is safe indefinitely,
2 the blue ribbon commission report that says onsite
3 storage is safe, that they are improperly limiting the
4 choice of alternatives.

5 JUDGE TRIKOUROS: In the NRC staff, I
6 should say, response -- let's take it as a given that
7 whether it's at an offsite facility or an onsite
8 facility, those are both options from a safety point
9 of view, which, in fact, may be true, but let's take
10 that as a given. There are many other reasons for a
11 utility wanting to remove the fuel from their site,
12 and a number of them are discussed in the application.
13 I can't point to specific places, but the staff answer
14 lists those; one, for example, being to get the fuel
15 off the site so they could return the site to a useful
16 -- for useful purposes. Wouldn't the purpose and need
17 be satisfied, then, by those other reasons, as opposed
18 to whether it's safer to have it onsite or offsite?

19 MR. TAYLOR: When Holtec uses the safety
20 argument in its purpose and need statement, it has to
21 be backed up. It has to be supported. Because they
22 have other possible purposes and needs doesn't take
23 away from the fact that they are using the safety
24 argument as a major factor in their purpose and need
25 statement. They are thereby limiting the choice of

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1 alternatives.

2 JUDGE TRIKOUROS: You have a series of
3 contentions -- basically, I think, 15, 16, 17, sort of
4 a group of contentions.

5 MR. TAYLOR: About the ground water, yes.

6 JUDGE TRIKOUROS: About the ground water
7 and the chemistry of the ground water. The staff, in
8 response, of course, provided the argument that you
9 can't identify a mechanism whereby you'd have a leak
10 and that leak would lead to all these problems. Isn't
11 it true, however, that in a standalone fashion, you're
12 questioning the adequacy of the environmental report
13 and, perhaps, even the safety evaluation report or the
14 safety analysis report?

15 In your contention, you sort of focused on
16 what could happen if there's near-surface ground water
17 and brine present. Wouldn't it be true, however, that
18 if you eliminate all that and just argue -- make the
19 argument that you've shown that there's inadequacies
20 in the environmental report, period? Would that be
21 correct?

22 MR. TAYLOR: If I understand your question
23 correctly, you're saying that I could just argue that
24 the environmental report is insufficient, whether or
25 not there's any pathway for contamination. Is that

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1 it?

2 JUDGE TRIKOUROS: Yes.

3 MR. TAYLOR: I think that's true.
4 Certainly, when the environmental report addresses the
5 issue of ground water and sub-surface conditions, they
6 have to do a thorough, complete, and accurate job. We
7 have shown, through our expert's opinion, that they
8 have not. I think it was basically the staff in
9 Holtec that raised the issue of whether or not there
10 was a pathway for contamination. We do believe that
11 our contentions regarding the possible leakage from
12 the containers does provide that. I think you're
13 right that just the inadequacy of the discussion of
14 the underground water and sub-surface conditions
15 wouldn't be enough for a contention, which is
16 basically what we were arguing.

17 JUDGE TRIKOUROS: Okay, thank you. In
18 your Contentions 20 through 23, those contentions are
19 dealing with the question of high burn up fuel. The
20 manner in which high burn up fuel is being dealt with
21 in this facility, is that satisfactory to you?

22 MR. TAYLOR: In looking at all the
23 documentation, particularly the SAR, which relies, to
24 a great extent, on the UMAX FSAR, it looked to me like
25 -- and I admit, I'm not an expert. I'm just a dumb

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1 lawyer. It looked to me like -- and our expert has
2 indicated this -- that the Holtec documentation
3 doesn't really address the concerns about high burn up
4 fuel that Dr. Resnikoff addressed.

5 It appears that they're just assuming,
6 somehow or other, magically, that the fuel will be
7 less than a certain temperature in the container, and
8 that's it. I didn't really see any justification or
9 credible support for that in the documentation.

10 JUDGE TRIKOUROS: We have questions on
11 this for the other parties. This is just starting
12 this issue. Are you saying, then, that the Interim
13 Staff Guidance, I believe it's 11, Rev. 3 --

14 MR. TAYLOR: Yes.

15 JUDGE TRIKOUROS: -- talks about
16 temperature limitations that if you meet those
17 temperature limitations, you will mitigate any
18 potential cladding failure effects on the fuel. It
19 does have separate numbers for the high burn up fuel
20 versus the low and moderate burn up fuel. Are you
21 saying that's sufficient, or do you feel that's
22 insufficient?

23 MR. TAYLOR: You mean the staff guidance
24 is sufficient for Holtec to rely upon?

25 JUDGE TRIKOUROS: Yes.

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1 MR. TAYLOR: The problem is two-fold. One
2 is that Dr. Resnikoff pointed out that the Staff
3 Guidance 11, Version 3 says that each site must be
4 taken on its own facts, a case-by-case determination.
5 That wasn't done here. Secondly, as I said, Holtec,
6 it appears to me, has not adequately justified the
7 statement that the temperature will be below the
8 regulated -- the guidance standard.

9 JUDGE TRIKOUROS: Have you seen the aging
10 management program? I think it was --

11 MR. TAYLOR: It's Chapter 18 in the SAR?

12 JUDGE TRIKOUROS: It's Chapter 18 in the
13 SAR, but there's also a separate submittal of it. I
14 forget which attachment it was to the license
15 application. Do you feel that's adequate with respect
16 to such things as the CEC, as you mentioned earlier?
17 Do you think the aging management program is adequate
18 to accommodate these various effects?

19 It also includes, by the way, ground water
20 monitoring, including, I believe, for brine. One of
21 the questions that we'll follow up with is if they're
22 only monitoring the ground water that the ER says is
23 there, then your Contention 15, I think, it says that
24 there's probably ground water that is there that you
25 haven't found. It would be relevant. Do you have any

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1 comments at all about the adequacy of the aging
2 management program?

3 MR. TAYLOR: My concern about the aging
4 management program is that first of all, it would, as
5 we said in some of our contentions, the COC for the
6 UMAX system is based on a design life of 60 years and
7 a service life of 100 years, I believe. The license
8 for the facility, according to Holtec, would be 20
9 years, and then they hope to get a 40-year extension.
10 That's only 60 years. What happens after that? The
11 aging management plan, it looks like to me, is
12 strictly a voluntary proposal by Holtec, based on what
13 the conditions might or might not be 100 or 200 years
14 from now, depending on how long this site has to be
15 used. There's no NRC oversight, as far as I can tell.

16 It looks like it's totally voluntary, with
17 no NRC oversight after the licensing period. That's
18 our concern, that there's -- we're relying on Holtec's
19 guess as to what they might need later on, if it's
20 totally voluntary. We just don't have the assurance
21 that it's really going to catch problems or to do
22 anything about them sufficiently if they do find
23 problems.

24 CHAIR RYERSON: Mr. Taylor, we're not
25 quite done with you. Judge Arnold has advised that he

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1 has a number of questions. I believe Judge Trikouros
2 has a few more. We've gone almost 90 minutes now, so
3 we'll take a break until, let's say, promptly 10:40,
4 20 of 11:00, and we will resume at that time.

5 (Whereupon, the above-entitled matter went
6 off the record at 10:27 a.m. and resumed at 10:44
7 a.m.)

8 CHAIR RYERSON: We're beginning with
9 questions, again, for Mr. Taylor, if we could have
10 some quiet, so Mr. Taylor can be heard. We have one
11 last logistical issue I probably should have mentioned
12 at the outset. For the benefit of our speakers who
13 have to stand for quite a while here -- I'm not sure,
14 if we'd been able to use the federal court, whether
15 the space would have been that much better, but we're
16 making due as best we can.

17 In any event, we have put water out. If
18 any of the speakers, as they come to the podium, would
19 like to pour themselves some water, they are more than
20 welcome to do that. We're continuing with questions
21 for Mr. Taylor, who represents the Sierra Club. We're
22 going to start -- at this point, I think we'll come
23 back to Judge Trikouros, but we have, from Judge
24 Arnold, some questions.

25 JUDGE ARNOLD: On Page 8 of your petition,

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1 you list the 10 CFR 2.309(f) criteria for an
2 admissible contention. That included Item 3, that the
3 contention be within scope, and Item 4, that the issue
4 be material to the findings the NRC must make. As I
5 looked through, I think there was only one of your
6 contentions that actually addressed that it was within
7 scope and material. What are we to assume about the
8 other contentions that you did not address scope and
9 materiality?

10 MR. TAYLOR: I guess I wasn't under the
11 impression that you had to specifically say that, as
12 long as the contentions were, in fact, within scope
13 and were material.

14 JUDGE ARNOLD: But your position is they
15 all are within scope and all are material?

16 MR. TAYLOR: Yes.

17 JUDGE ARNOLD: Throughout the petition,
18 you make numerous references to the Nuclear Waste
19 Policy Act. Do you consider that an NRC licensing
20 board is the proper platform to challenge whether
21 something violates the Nuclear Waste Policy Act?

22 MR. TAYLOR: As Ms. Curran said, that's a
23 good question. Frankly, it isn't clear to me. I
24 certainly would defer to Ms. Curran in an argument
25 that this Board may have no jurisdiction to decide the

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1 issue of whether the Nuclear Waste Policy Act
2 precludes the licensing of this facility.

3 On the other hand, the Commission, through
4 the secretary, clearly said that this Board is the
5 proper venue, so I guess we're between a rock and a
6 hard place. I chose to bring the contention to the
7 Board within the 309 proceeding. Again, of course,
8 we'll have to straighten that out. I don't know.

9 JUDGE ARNOLD: On your Contention 1, the
10 challenge to the authority to license the Holtec CIS
11 facility, as I see it, you say that the NRC does not
12 have the authority to license the CIS facility under
13 the Atomic Energy Act, and when you discuss the basis,
14 that's focused on who would hold title to the spent
15 fuel.

16 On Page 13 of the petition, you cite
17 Holtec, stating it will build the storage facility,
18 quote, upon successful completion of an agreement with
19 the Department of Energy and/or one or more utility
20 companies to store spent fuel. Immediately
21 thereafter, you say all of the foregoing statements by
22 Holtec and its representatives clearly show that
23 Holtec intends for DOE to take title to the waste. As
24 concise as you can, why is not Option B viable?

25 MR. TAYLOR: The documentation,

1 particularly the ER, does not provide any indication,
2 at all, that the nuclear plant owners would agree to
3 retain title. If Holtec is using that option as a
4 possibility, they need to tell us, tell the Board,
5 tell the Commission what basis they have to say that
6 the nuclear plant owners would want to retain
7 ownership of the waste. They've not done that.

8 JUDGE ARNOLD: Let me ask you this. I
9 asked Ms. Curran earlier. To your knowledge, does the
10 DOE currently hold title to spent fuel or greater than
11 Class C waste?

12 MR. TAYLOR: I don't know off the top of
13 my head. I don't know.

14 JUDGE ARNOLD: Beyond Nuclear has
15 submitted a petition that has a very similar
16 contention. I'm just going to state what I see as the
17 difference between your contention and the Beyond
18 Nuclear contention.

19 From what Ms. Curran said earlier, her
20 belief is when a contract has two options for
21 fulfilling some requirement, and one of those options
22 is just plain old illegal, that contract is not valid.
23 Whereas, your argument seems to be that there are two
24 options. One is illegal, and the other one is just
25 unsupported by the petitioner. Is that how you see

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1 it?

2 MR. TAYLOR: I guess I hadn't considered
3 that my contention and Ms. Curran's were different in
4 that respect, but certainly, our main contention is
5 that all the way along, based on what Holtec personnel
6 had said before the application was filed, what they
7 said in the ER, that DOE would take title, and now,
8 what they have, in fact, said in a recent statement to
9 the public, in a newsletter that went out, that
10 they're depending on DOE, we believe that the Option
11 B, as you call it, that the plant owners would retain
12 title, is not something that Holtec has substantiated
13 would even be a possibility. They have not really
14 convinced anybody, to my mind, that that is a distinct
15 possibility.

16 JUDGE ARNOLD: Ms. Curran also stated that
17 her contention is not within scope and is not
18 material. Considering the similarity of two
19 contentions, why is yours within scope and material?

20 MR. TAYLOR: My understanding is that in
21 a 2.309 proceeding, you can always challenge a legal
22 issue. I believe that's what we're doing here,
23 whether the Board, and thus the Commission, can
24 legally grant a license in this proceeding. As we see
25 it, it's a legal contention that is appropriate for

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1 this Board to consider.

2 JUDGE ARNOLD: Contention 2, you
3 challenged the application statement that the CIS is
4 safer and more secure than storing waste at reactor
5 sites. If the ER had simply said that it is safe and
6 secure, rather than safer and more secure, would this
7 contention go away, or would it still be there?

8 MR. TAYLOR: The inference clearly is, in
9 the ER, that they're dismissing the onsite storage
10 alternative by saying that the CIS is safer and more
11 secure. I think that's very clear in the ER.

12 JUDGE ARNOLD: On Page 18 of your
13 petition, you state the purpose and need statement,
14 under National Environmental Policy Act, is important
15 because the purpose and need statement necessarily
16 dictates the range of reasonable alternatives.
17 Specifically, what alternatives are you concerned
18 with?

19 MR. TAYLOR: Onsite storage.

20 JUDGE ARNOLD: To your knowledge -- you
21 were talking about HOSS, which is the -- what does
22 HOSS stand for?

23 MR. TAYLOR: Hardened onsite storage.

24 JUDGE ARNOLD: Has that been implemented
25 at any ISFSI currently?

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1 MR. TAYLOR: It certainly is a technology
2 that has been studied and recommended. In fact, we
3 cited up to Gordon Thompson's paper on that. I don't
4 know offhand whether it's been implemented anywhere or
5 not.

6 JUDGE ARNOLD: Contention 3 also is
7 concerned with the statement that the CIS is safer and
8 more secure. On this contention, on Page 22, you
9 state Holtec, contrary to NEPA, has not established a
10 purpose and need for this CIS project. But when I
11 look at ER Section 1.2, specifically purpose and need
12 for the proposed action, I see, quote, many policy
13 makers and stakeholders in the communities that host
14 shut-down reactors want to have the spent nuclear fuel
15 removed to complete decommissioning of the site and to
16 allow for more beneficial uses of the land.

17 That seems to be a purpose and need that
18 is totally independent of that safer and more secure
19 issue. How is that not a valid purpose and need?

20 MR. TAYLOR: As I mentioned to Judge
21 Trikouros, I think it was, when Holtec cites, quite
22 significantly, that the alleged safety and security of
23 the two alternatives, onsite versus the CIS, is made
24 a distinct part of the purpose and needs statement,
25 that unfairly limits the choice of alternatives,

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1 basically the onsite storage.

2 I don't think you can -- Holtec can use
3 that as a major purpose and need, and thereby more or
4 less dismiss onsite storage, and then say there are
5 other things that we've mentioned, too. I think if
6 they use the safety and security aspect, they have to
7 justify it, and they have to live with that.

8 JUDGE ARNOLD: Okay, Contention 4 has to
9 do with transportation from a reactor to the CIS sites
10 carrying substantial risk. You state these risks must
11 be evaluated in the ER, and that ER Section 4.9 does
12 not adequately address these. On Page 25 of your
13 petition, you provide your estimate of dose to the
14 population following a major rail accident.

15 This estimate is 1,250 times the estimate
16 contained in the ER. You state here as shown in Dr.
17 Resnikoff's declaration, the updated estimate of
18 approximately 20 million person rem due to a major
19 rail accident is approximately 1,250 times Holtec's
20 estimate. I looked at Dr. Resnikoff's declaration.

21 It was a one-page declaration that
22 contained no calculations or numbers, only the
23 statement I have performed calculations and analysis
24 sufficient to reach opinions and conclusions regarding
25 safety issues inherent in Holtec's proposals. Did I

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1 miss something? Was there another paper that I --

2 MR. TAYLOR: What Dr. Resnikoff's
3 declaration said was that he had reviewed the
4 contention, which he helped draft, and that he is
5 adopting that contention as his declaration,
6 basically.

7 JUDGE ARNOLD: Basically, we have a
8 conclusion without any numbers behind it. I got it.
9 You fault the environment report for its reliance on
10 the generic environmental impact statement of
11 continued storage of spent nuclear fuel. That is
12 NUREG 2157. You have several reasons for that. One
13 of them is the GEIS assumes a consolidated facility of
14 40,000 metric tons of spent fuel, not for 100,000
15 tons. What I want to know is how does the amount of
16 spent fuel sitting at the destination affect the risk
17 of transportation?

18 MR. TAYLOR: The more fuel you have at the
19 destination, the more transportation trips there are
20 going to be, thus the risk increases.

21 JUDGE ARNOLD: It's simply -- it's a
22 multiplier.

23 MR. TAYLOR: Right, 100,000 versus 40,000,
24 the risk would be 2.5 times greater.

25 JUDGE ARNOLD: I don't know if it works

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1 out quite that way, but yes, it would be much greater,
2 yes. The GEIS assumes a dry transfer system at the
3 destination storage facility. How do the facilities
4 at the end affect the risk during shipping?

5 MR. TAYLOR: I think probably that was not
6 exactly addressed to the transportation. It was more
7 to dealing with the waste once it got there.

8 JUDGE ARNOLD: The GEIS does not account
9 for deterioration of the railroad infrastructure.
10 What evidence is there that this deterioration and the
11 actual railroad infrastructure is in worse condition
12 than assumed in the GEIS transportation risk analysis?

13 MR. TAYLOR: We noted, first of all, in
14 our standing declarations that the rail system, at
15 least in New Mexico, is deteriorated. We noted two
16 recent, at that time, at least, rail accidents that
17 were caused by deteriorated infrastructure. That's
18 the basis.

19 JUDGE ARNOLD: Hasn't there always been
20 rail accidents?

21 MR. TAYLOR: Not necessarily.

22 JUDGE ARNOLD: Does the evidence show that
23 there's recently more accidents than in the past per
24 shipping mile?

25 MR. TAYLOR: Dr. Resnikoff, in the

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1 contention, notes that there have been more rail
2 accidents and more rail fires.

3 JUDGE ARNOLD: Petitioners fault
4 Environmental Report, Section 4.9.4, due to its
5 reliance on the FEIS for the ISFSI in Tooele County,
6 Utah. That would be NUREG 1714. The petition states
7 that this EIS focuses on local transportation and is
8 irrelevant for cross-country transportation. Is there
9 anything wrong with using that EIS for local
10 transportation in the region of the facility?

11 MR. TAYLOR: I think when you try to
12 equate two separate situations, you're taking a risk
13 -- we're talking about risk, I guess -- you're taking
14 a risk that the case specific situation may be
15 different, and you need to be really careful in using
16 another EIS to just determine what should be in this
17 EIS.

18 JUDGE ARNOLD: Contention 6, the
19 discussion of the no action alternative, you claim it
20 does not consider adequately the onsite storage.
21 Would implementing HOSS at current ISFSIs actually be
22 a no action alternative? It seems to me that would
23 require a licensing action in and of itself.

24 MR. TAYLOR: It would be a no action
25 alternative concerning this project because if this

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1 project weren't built, the onsite storage supplemented
2 by HOSS would be a viable alternative. But it would
3 be no action in terms of this licensing procedure.

4 JUDGE ARNOLD: Implementing HOSS at
5 existing ISFSIs, you would admit that it would not
6 achieve the goal of having an ability to return
7 decommissioned sites to a natural state, but then you
8 also say that's not a reasonable need for it because
9 it's limiting the selection of alternatives, right?

10 MR. TAYLOR: The fact that they're
11 dismissing the onsite storage, I think, is a violation
12 of the purpose and needs statement, or at least what
13 it should be.

14 JUDGE ARNOLD: Contention 7 -- actually,
15 I seem to -- the way I read it, it seemed to be two
16 contentions. One was Holtec's ER Sections 1.1 and 2.1
17 mischaracterize both the Blue Ribbon Commission's
18 report's conclusions and the relative risks of CIS
19 versus onsite storage; and two, the EIS must
20 independently and fully address the relative risks and
21 benefits of both storage options.

22 That's what I seem to get out of it.
23 Question. You cite ER Sections 1.1 and 2.1, claiming
24 that in them, Holtec says the, quote, purpose and need
25 is dictated a great extent by the BRC report. That's

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1 what you say.

2 I see ER Section 1.1 providing history and
3 background, and Section 2.1 discusses the no action
4 alternative. It is Section 2.1 that provides the
5 purpose and need. I'm wondering why we should give
6 more weight to inferences derived from Sections 1.1
7 and 2.1, instead of just reading the explicit purpose
8 and need provided in Section 1.2?

9 MR. TAYLOR: I think you have to read them
10 together. I think -- I can't cite the exact sections
11 at the moment, but there are several places in the ER
12 where Holtec refers to the Blue Ribbon Commission
13 report and that this proposed project would be
14 consistent with and support the BRC report.

15 JUDGE ARNOLD: Contention 8, you state the
16 decommissioning plan submitted by Holtec does not
17 contain a funding plan that provides reasonable
18 assurance that funds will be available to decommission
19 the CIS state. I looked in the Code of Federal
20 Regulations for the requirements. It's 10 CFR 72.30.

21 In Paragraph B, it requires a
22 decommissioning funding plan that must contain, and
23 there's a list of things that it must contain. The
24 first one is information on how reasonable assurance
25 will be provided. It makes it sound to me as though

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1 the application doesn't have to supply reasonable
2 assurance, just information on how it's going to be
3 supplied in the future. Do you read that differently
4 than I do?

5 MR. TAYLOR: I do. I think that
6 certainly, if that means anything, it means we need to
7 see, in the documentation, some assurance, right now,
8 that there is a funding plan that will assure adequate
9 funding for decommissioning. Otherwise, I can't see
10 how that really means anything.

11 JUDGE ARNOLD: Item 4 in that list of what
12 it contains is a description of the method of assuring
13 funds for commissioning. That doesn't sound to me
14 like a detailed funding plan, but just kind of the
15 words and we'll use this -- basically, the funding
16 plan that's in there has a lot of contingencies, and
17 it's not one specific plan. Do you object to the way
18 it's worded now with contingencies?

19 MR. TAYLOR: I think that if there are
20 contingencies, they would have to be very specifically
21 stated and still give some assurance that there will
22 be adequate funding for decommissioning.

23 JUDGE ARNOLD: Then there's an Item 6.
24 This one I'm confused on. The decommissioning plan
25 must contain a certification that financial assurance

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1 for decommissioning has been provided. I see your
2 challenge being more a challenge to this, that there's
3 no certification that the financial assurance is
4 there. Would that be a correct interpretation?

5 MR. TAYLOR: That's certainly an important
6 part of it, yes.

7 JUDGE ARNOLD: Contention 9, the ER must
8 examine the environmental impact of the containers
9 being used beyond their approved service life.

10 I look at 10 CFR 51.23(b), which is the
11 continued storage, and in relevant part, it says the
12 environmental reports are not required to discuss the
13 environmental impacts of the spent nuclear fuel
14 storage in an ISFSI for the period following the term
15 of the ISFSI license. I believe that these canisters
16 are certified for longer than the ISFSI license. How
17 can I not consider this contention to be a challenge
18 to this rule?

19 MR. TAYLOR: The continued storage rule is
20 based on several assumptions that we've set out in our
21 contentions and our reply, in terms of the quantity of
22 waste. The rule is based on 40,000 tons. This is
23 over four times that much, I guess. It's based on
24 having a dry transfer system, which there's no
25 indication in this one that there is.

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1 There's no indication in the continued
2 storage rule that it actually considered the problems
3 with high burn up fuel. All of those assumptions that
4 -- upon which the rule was based are not present in
5 this case. As I said in my reply, as well, the
6 continued storage rule still provides for
7 site-specific considerations, which we need to look at
8 here, based on those assumptions that are not present
9 here, but that were used in creating the rule.

10 It's like you buy a can of vegetables at
11 the store that says the expiration date is such and
12 such. After that expiration date, a lot of things go
13 into whether or not you can still eat that can of
14 vegetables or not. It may be okay; it may be not. We
15 need to look at the specific can of vegetables to
16 determine.

17 JUDGE ARNOLD: Are you, therefore, saying
18 that the continued storage rule only applies to ISFSIs
19 that match exactly the ISFSI used for the study which
20 developed the GEIS or continued storage?

21 MR. TAYLOR: Yes, I believe that if you
22 look at the GEIS, it says it's specifically based on
23 those assumptions.

24 JUDGE ARNOLD: In that case, one of the
25 assumptions was the dry transfer facility. I know in

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1 one of your contentions, you mentioned that there are
2 no dry transfer capability at any ISFSIs. So
3 basically, you believe the GEIS and that rule applies
4 to no storage facility current in the United States?

5 MR. TAYLOR: If they had ADTS (phonetic)
6 it might apply, but there's no indication here that
7 Holtec plans to have one.

8 JUDGE ARNOLD: Contention 10, NRC
9 regulations specify that greater than Class C waste
10 must be disposed of in a geologic repository licensed
11 by the NRC. You're saying that greater -- the spent
12 fuel storage facilities are licensed under 10 CFR 72.

13 In 72.3, an ISFSI is defined as a complex
14 designed and constructed for the interim storage of
15 spent nuclear fuel, solid reactor related greater than
16 Class C waste, and other radioactive materials
17 associated with spent fuel and reactor related greater
18 than Class C waste storage. Since the regulations
19 states this greater than Class C waste can be stored,
20 why must Holtec treat this as disposal of greater than
21 Class C?

22 MR. TAYLOR: Because, as I said in other
23 contentions, this may, in fact, end up being a
24 permanent facility if there's no geologic repository
25 ever created. Frankly, I'm speculating here a little

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1 bit, but if this facility is licensed, and also the
2 one over in Texas is licensed, that may take the
3 political pressure off finding a permanent repository,
4 which would further support the idea that this may, in
5 fact, become a de facto permanent repository. As I
6 indicated in my reply, if you look at the definition
7 of a disposal, it would apply to this if it, in fact,
8 is not just interim. That's what we were suggesting
9 there. There's no indication that this will just be
10 an interim storage facility. It may be a disposal
11 facility and, therefore, cannot accept the GTCC waste.

12 JUDGE ARNOLD: Contention 11, both the ER
13 and the SAR are inadequate, in that neither evaluates
14 the potential for and consequences of an earthquake.
15 On Page 44 of your petition, you state, regarding oil
16 and gas drilling, this drilling activity makes the
17 underground area unstable and induces earthquakes. Do
18 you have support for that statement that oil and gas
19 drilling does induce earthquakes? I didn't see any
20 support in your --

21 (Simultaneous speaking.)

22 MR. TAYLOR: Yes, the Stanford study that
23 is attached as an exhibit supports that.

24 JUDGE ARNOLD: That just concluded that it
25 caused more earthquakes, or did it affect the severity

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1 of earthquakes?

2 MR. TAYLOR: They were finding new faults
3 as a result.

4 JUDGE ARNOLD: In SAR -- on Page 47, you
5 state the SAR 2.6 refers only to historic earthquake
6 data. Is there any earthquake data that is not
7 historic, or were you saying they should be looking at
8 analysis, as well as historic data?

9 MR. TAYLOR: Certainly, analysis would
10 help. Their data was certainly more remote than the
11 Stanford study that we provided and the evidence of
12 recent gas and oil fracking.

13 JUDGE ARNOLD: Contention 13, the
14 credibility of those portions of the ER prepared by
15 Tetra Tech is in question. On Page 52 and 53, you
16 discuss a petition to the NRC pursuant to 10 CFR
17 2.206, asking the NRC to revoke Tetra Tech's license.
18 I didn't see any -- did the NRC revoke Tetra Tech's
19 license or put any limits on their license as a
20 result?

21 MR. TAYLOR: The last thing I had at the
22 point that we filed the contention was that the NRC
23 had fined Tetra Tech \$7,000 and found that Tetra Tech
24 engaged in a deliberate falsification of soil sample
25 surveys. At that point, the 2.206 petition had not

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1 been finally decided.

2 JUDGE ARNOLD: Do you know if it has now?

3 MR. TAYLOR: I don't know for sure.

4 JUDGE ARNOLD: Contention 15, the ER fails
5 to adequately determine whether shallow ground water
6 exists at the site of the proposed CIS. I have -- 10
7 CFR 51.45 requires the environmental report for an
8 ISFSI contain a description of the environment
9 affected. How would the site affect the ground water?
10 Is it you're worried about the site affecting the
11 ground water or the ground water affecting the storage
12 facility?

13 MR. TAYLOR: I think the primary focus --
14 although, the questions that you gave us before the
15 hearing attribute another alternative, probably -- is
16 that it may run both ways. But originally, our
17 concern was that the -- that a leak or discharge from
18 the facility would impact the ground water. I suppose
19 brine in the ground water could also impact the
20 facility.

21 JUDGE ARNOLD: Contention 16, the ER does
22 not adequately address basic questions regarding the
23 subsurface movement of brine. This is another similar
24 question. Are you worried about the brine affecting
25 the facility, or the facility affecting the brine?

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1 MR. TAYLOR: The brine affecting the
2 facility. It goes to the RAI that I was mentioning in
3 my opening statement.

4 JUDGE ARNOLD: Contention 19 about the
5 Packer tests to estimate hydraulic conductivity were
6 not conducted properly. That's a way of measuring the
7 hydraulic conductivity. Can you tell me how has the
8 hydraulic conductivity been used in the application?
9 Do they specifically make calculations using the
10 results of the Packer tests?

11 MR. TAYLOR: What the contention says,
12 based on Mr. Reisser's report, is that GEI
13 Consultants, who were hired by Holtec to conduct
14 packer tests at the site to determine the
15 conductivity, GEI claimed to have used the testing
16 method set out in the U.S. Bureau of Reclamation field
17 manual, but as Mr. Reisser notes in his report, GEI
18 does not appear to have followed several
19 recommendations in the manual.

20 JUDGE ARNOLD: What I want to know is have
21 they used the results of the test in any significant
22 way in the application, or is it just a number that
23 they have available?

24 MR. TAYLOR: I can't tell you that
25 specifically. I don't know.

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1 JUDGE ARNOLD: Contention 21, there is no
2 experimental support for the safe transportation and
3 storage of high burn up fuel. Actually, I don't have
4 a question on that.

5 MR. TAYLOR: Good.

6 JUDGE ARNOLD: Quickie on Contention 23.
7 Holtec has not described how degradation that leads to
8 gross rupture of the fuel would be detected. Holtec
9 has not specified how it will address the safety
10 issues inherent in the gross cladding defects due to
11 high burn up fuel. Do you know, is there, somewhere,
12 a requirement that a storage facility be able to
13 detect gross failure of the fuel clad?

14 MR. TAYLOR: We're basing this on Dr.
15 Resnikoff's input, which it is in the contention.
16 Certainly, failure of fuel -- a failure of the
17 cladding would certainly be a safety issue. I don't
18 think we can disagree with that.

19 JUDGE ARNOLD: When we get to Holtec's
20 turn for questioning, we'll ask. Contention 24,
21 neither the Holtec ER or SAR contain sufficient
22 information to assess the risk of shipping the MPC 37
23 canisters. My question is you state, specifically,
24 insufficient information to assess the risk of
25 shipping the canister. I get from that there's an

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1 assertion that the ER or the SAR are required to
2 provide sufficient information for an independent
3 assessment. Is that your statement?

4 MR. TAYLOR: Sure. That's the purpose of
5 the ER, and then, of course, the EIS later on.
6 Certainly, there's an NRC regulation on how the NRC is
7 supposed to prepare the EIS. The first thing they
8 look at is the ER, so they have to start there.
9 Certainly, you want enough information that, first of
10 all, the NRC, in preparing the EIS, can evaluate the
11 situation, and then the whole purpose of NEPA is for
12 the public to be informed.

13 JUDGE ARNOLD: Except that the public is
14 -- these calculations to evaluate the integrity of a
15 canister during a shipping accident, that's a detailed
16 calculation that, I can assure you, most of the public
17 can't make, no matter how many details they have.

18 MR. TAYLOR: Me, either, but if the
19 information is not there, a member of the public
20 cannot have an expert like Dr. Resnikoff or somebody
21 else make that calculation, who's capable of doing it.

22 JUDGE ARNOLD: I'm to the end of my
23 questions for you.

24 MR. TAYLOR: Thank you.

25 CHAIR RYERSON: Thank you, Judge. Judge

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1 Trikouros, do you have some more questions?

2 JUDGE TRIKOUROS: Yes, I think so. With
3 respect to Contention 16, there's a reference to the
4 Reiss declaration, where it talks about the presence
5 of brine, but it doesn't talk about corrosion, is that
6 correct? You're not relying on the Reiss declaration
7 for argument of an expert witness on corrosion, right?

8 MR. TAYLOR: Right. We're relying on the
9 other contentions, where Dr. Resnikoff talked about
10 the danger of leaks from the canisters.

11 JUDGE TRIKOUROS: In Contention 17, you
12 talk about fractured rock, and you say these fractures
13 could allow radioactive leaks from the CIS facility to
14 enter ground water or for the brine described in
15 Contention 16 to corrode the containers contained --
16 I guess you meant containing the radioactive material.

17 That's really all you say about it. It
18 wasn't clear to me if Contention 17 was the
19 environment affecting the canister, or the canister
20 affecting the environment, or both, I suppose, for
21 that matter.

22 MR. TAYLOR: I think it probably goes both
23 ways, but at the time, the emphasis was on leaks from
24 the canisters entering the ground water through the
25 fractured rock.

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1 JUDGE TRIKOUROS: But in all of this,
2 you've never identified a leak scenario, right?

3 MR. TAYLOR: As I say, we have in the
4 contentions regarding the safety of the containers,
5 but Mr. Reiss was not an expert on that, so he was
6 just talking about the underground conditions that
7 would be impacted or would impact if there were a
8 leak.

9 JUDGE TRIKOUROS: Contention 20, is this
10 a contention of omission, in your evaluation, that the
11 ER does not discuss -- specifically discuss high
12 burner fuel?

13 MR. TAYLOR: Yes.

14 JUDGE TRIKOUROS: You consider that a
15 contention of omission?

16 MR. TAYLOR: Yes.

17 JUDGE TRIKOUROS: How would you expect the
18 subject of high burner fuel to be discussed in the ER?

19 MR. TAYLOR: Just the way Dr. Resnikoff
20 did, that the high burn up fuel can cause cladding
21 failure. There has to be information about how it's
22 packaged in the containers and that kind of thing.

23 JUDGE TRIKOUROS: The existence of a high
24 burner fuel aging management program, an aging
25 management program specific to high burner fuel, that

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1 -- which I think is a SAR issue -- is not adequate.
2 You think it should also be discussed in depth in the
3 ER.

4 MR. TAYLOR: I don't know that it needs to
5 be discussed in the ER, although I think it certainly
6 could be.

7 JUDGE TRIKOUROS: We just discussed that
8 it's a contention of omission; therefore the ER -- you
9 meant it that way, right?

10 MR. TAYLOR: Yes.

11 JUDGE TRIKOUROS: Contention 21, it says
12 the staff recognizes that data is not currently
13 available -- this is talking now about high burner
14 fuel -- the staff notes states that until further
15 guidance is developed, the transportation of high burn
16 up commercial spent fuel will be handled on a
17 case-by-case basis.

18 That's quoting from the ISG 11, I guess.
19 Holtec has not met this test. High burn up fuel
20 should not be transported until Holtec can assure it
21 is safe. Then you go on to say the ER must address
22 real-life accident conditions, based on the specific
23 facts of this case. My question is how does the first
24 part of that apply to the Holtec application? What's
25 the difference between hypothetical accident

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1 conditions and real-life accident conditions? This is
2 not the first place that I've seen this. I think
3 you've used it in more than two or three places,
4 actually. Why don't you address the hypothetical
5 versus real life first?

6 MR. TAYLOR: As I understand what Dr.
7 Resnikoff was saying, there could be models, for
8 example, or it may be something taken from some other
9 situation, like we were talking about the PFS EIS
10 being used for this proceeding, versus using data that
11 would more accurately mirror the situation that we
12 have here and the facts that we have in this case.
13 That's my understanding.

14 JUDGE TRIKOUROS: You're saying that what
15 you defined as a hypothetical accident condition is a
16 computer code analysis.

17 MR. TAYLOR: Yes, I think that's what Dr.
18 Resnikoff had in mind.

19 JUDGE TRIKOUROS: That wasn't clear. The
20 other -- what you referred to as a real-life condition
21 is an actual physical test, along the lines of Part 71
22 requirements for transportation cask testing?

23 MR. TAYLOR: I don't know if they need to
24 be quite that elaborate, but that's certainly --
25 something toward that nature, yes.

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1 JUDGE TRIKOUROS: Your position, and I
2 think you said this earlier, this case by case
3 business that's discussed in the Interim Staff
4 Guidance, you're claiming that hasn't been fulfilled
5 by Holtec.

6 MR. TAYLOR: Right.

7 JUDGE TRIKOUROS: Until that does get
8 fulfilled, you're claiming that high burner fuel
9 should not be transported.

10 MR. TAYLOR: Right, or at least Holtec
11 needs to make a better showing of how they're
12 addressing the high burn up fuel.

13 JUDGE TRIKOUROS: When you talked about
14 transportation -- I'm referring, now, to your
15 Contention 22 -- are you talking about the initial
16 transportation to the facility from the reactor site?
17 Are you talking about transportation after a long
18 period of time to the permanent disposal facility or
19 -- also, there's transportation within the facility,
20 itself, which certainly is of concern to people. Are
21 you talking about one or all of these?

22 MR. TAYLOR: To a certain extent, all of
23 them, but I think primarily the transportation from
24 the reactor site to the facility. You're correct.
25 There are certainly issues in all of those. I think

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1 probably the biggest risk, of course, is the longest
2 distance of transportation, which would be from the
3 reactor site to the facility.

4 JUDGE TRIKOUROS: The concern with high
5 burner fuel that we've been discussing is
6 transportation related. Is there also a concern with
7 high burner fuel for lengthy storage?

8 MR. TAYLOR: Yes, as I understand it,
9 there can be cladding failure and other problems that
10 don't manifest themselves initially but, with time,
11 would appear, that would probably be caused by high
12 burn up fuel.

13 JUDGE TRIKOUROS: Overall, with all these
14 things we've been discussing about high burner fuel,
15 there really is no satisfactory discussion in the
16 environmental report, or even the SAR, regarding this
17 subject.

18 MR. TAYLOR: Right.

19 JUDGE TRIKOUROS: You make that assertion
20 in not just one contention, but three or four -- I
21 think, actually, at least four contentions, 20 to 23,
22 in general, is discussing that subject.

23 MR. TAYLOR: High burn up fuel, yes.

24 JUDGE TRIKOUROS: One other item. We have
25 a license life. We have a design life. We have a

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1 service life. I'm sure the staff can give me details
2 about what each of those are relative to each other.
3 Would it not be true that you can't get to the design
4 life, or most certainly not to the service life, which
5 is longer, unless you do license renewals of the
6 initial license?

7 For example, if you have X years of
8 initial license, and you want to renew that for 40
9 years, we have to go through this process again. They
10 have to go through a license renewal process, which I
11 believe would include all of the environmental
12 reviews, safety reviews, etc. This idea of long term
13 is going to be revisited again more than once,
14 correct?

15 MR. TAYLOR: As I read Holtec's
16 documentation, both the environmental report and the
17 SAR, they're talking about the initial 20-year license
18 period and one 40-year extension. They don't talk
19 about anything beyond that. Then they go into the
20 aging management program, which, as I said, expresses
21 a concern to me because there is no regulatory
22 oversight, it appears.

23 JUDGE TRIKOUROS: Perhaps I will ask the
24 NRC this question. It seems to me you can't go beyond
25 the 60-year point without a license renewal. What

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1 I've said regarding revisiting this entire thing would
2 have to occur. Does one of the staff want to comment
3 on that?

4 MR. GILLESPIE: I apologize. Could you
5 clarify your question, or repeat it?

6 JUDGE TRIKOUROS: Each of the stages of
7 licensing requires a detailed environmental and safety
8 analysis review. We're now dealing with the initial
9 license, but if they did apply for the renewal license
10 term, which is 40 years, we would require this process
11 to be repeated at that point, correct?

12 MR. GILLESPIE: Yes, sir.

13 JUDGE TRIKOUROS: That would also be true
14 of a second 40-year license renewal.

15 MR. GILLESPIE: Yes, Your Honor.

16 JUDGE TRIKOUROS: There is no way to get
17 to the service life without at least three -- or two
18 more license reviews, environmental and safety.

19 MR. TAYLOR: Are you addressing that to
20 me?

21 JUDGE TRIKOUROS: Yes.

22 MR. TAYLOR: Okay, thank you. The
23 projected life of this facility is only 120 years, as
24 I read the Holtec documentation. Again, as I said, I
25 don't see any indication that they plan to get a

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1 license after 60 years, which, you're right, that
2 creates a certain contradiction, but I think it's up
3 to them to clarify that.

4 The burden's on them. What happens after
5 120 years if there's still waste there and they
6 haven't got a permanent repository? I think we just
7 have a lot of questions and problems here that haven't
8 been addressed by the Holtec documentation that your
9 questions certainly raise.

10 JUDGE TRIKOUROS: Perhaps we will ask that
11 question of Mr. Silberg when his time comes, rather
12 than do that now. It is a sort of interesting
13 question, but clearly, every renewal will require a
14 detailed environmental review and safety analysis
15 review, and there will be some board, most certainly
16 not us, discussing that at that time. You will have
17 all these same opportunities at that time. Thank you.

18 MR. TAYLOR: Thank you.

19 CHAIR RYERSON: Just one more question --

20 MR. TAYLOR: Promise?

21 CHAIR RYERSON: -- at least from me, just
22 a follow-up question on Contention 4, Sierra Club
23 Contention 4. Judge Arnold made the statement that --
24 speaking, I believe, of Dr. Resnikoff's declaration --
25 that there are no numbers in it.

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1 I want to clarify, my understanding of
2 your position is that Dr. Resnikoff has submitted a,
3 either sworn declaration or a declaration subject to
4 penalty of perjury that asserts that he has read the
5 contention that you have signed and that he, in fact,
6 partly drafted, you say. But in any event, he's read
7 that and, subject to penalty of perjury, he is
8 adopting your language.

9 He is adopting the language of that
10 contention, which contains numbers. We may decide
11 that the analysis in the contention that leads to
12 those numbers is adequate or inadequate, but those
13 numbers are incorporated, if you will, into his sworn
14 declaration. Is that my understanding of your
15 position?

16 MR. TAYLOR: Yes, he and I worked on the
17 contention together. I drafted the contention, sent
18 it to him. He said it was fine, and he signed the
19 declaration adopting that contention.

20 CHAIR RYERSON: If you're not familiar,
21 that was an issue, actually, that came up in the Yucca
22 Mountain contention admissibility phase, in which both
23 Judge Trikouros and I were on two of the three boards.
24 That was -- we adopted the view that as long as there
25 is a sworn declaration, subject to penalty of perjury,

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1 incorporating the language of the contention, that is
2 adequate.

3 That was challenged by the DOE, but we --
4 all three boards went the other way on that, and the
5 Commission affirmed. I think that is a practice that
6 is permissible. You've got to have your analysis
7 either in the sworn declaration or in the contention
8 adopted, or both. It doesn't work if you don't have
9 it either place, but it's okay to have it either
10 place, if that is the situation.

11 It is now about quarter of 12:00, a little
12 after, actually. I think we might as well take an
13 early lunch. As I said, we'll take a fairly long
14 lunch break, so people can get out of this building
15 and find places to have lunch. Let us plan to resume
16 promptly at 1:15 for this afternoon's session. Thank
17 you.

18 (Whereupon, the above-entitled matter went
19 off the record at 11:47 a.m. and resumed at 1:16 p.m.)

20 CHAIR RYERSON: All right. We are back on
21 the record, and we're going to begin this afternoon's
22 session with a brief announcement. I think is Ms.
23 Curran here? Where is Ms. Curran? Oh, here she
24 comes. All right. No rush. We can wait.

25 After the morning session, there was a

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1 brief discussion off the record about some scheduling
2 issues. And there appeared to be an agreement among
3 the parties. Ms. Curran is going to announce what
4 that is so it'll be on the record. If anybody
5 objects, they're here to object. But absent
6 objection, we will set the schedule issue.

7 MS. GOLDSTEIN: I'm going to step in for
8 Diane if that's okay. Mindy Goldstein, good to see
9 you all. So the proposal is that joint petitioners
10 would amend our motion by February 6th. Holtec could
11 respond by February 18th. And then we could reply by
12 February 25th. And obviously the NRC staff could
13 reply as well.

14 CHAIR RYERSON: And I'm sorry. This is
15 which motion you're --

16 MS. GOLDSTEIN: The motion to amend our
17 contention as well as the motion to strike certain
18 issues, the joint consolidated question.

19 CHAIR RYERSON: Okay. Is that clear to
20 everyone? Any objection?

21 MS. GOLDSTEIN: Does everyone have those
22 dates, February 6th, February 18th, and February 25th?

23 CHAIR RYERSON: Hearing no objection, that
24 is so ordered. Thank you.

25 MS. GOLDSTEIN: Thank you.

1 CHAIR RYERSON: All right. Now I have a
2 question. If you can give Mr. Heaton a mic, I have a
3 question for him at this point. This might be a good
4 time, Mr. Heaton, for a little change of pace to hear
5 from the local government petitioners if that makes
6 sense to you. I know the City of Carlsbad plans to
7 talk tomorrow. And I don't know if you're in a
8 position to tell us how much time collectively all of
9 the other local governments would like.

10 MR. HEATON: I would guess each statement
11 is in the four to five-minute range, maybe six.

12 CHAIR RYERSON: Excellent. Well, if it's
13 agreeable to you, I think we might do that now. And
14 then that is done with. So please announce as each of
15 you come up for the record and we'll just go through
16 those. So Mr. Heaton, you represent the alliance?

17 MR. HEATON: I represent the Eddy-Lea --

18 CHAIR RYERSON: Eddy-Lea.

19 MR. HEATON: -- Energy Alliance.

20 CHAIR RYERSON: Thank you.

21 MR. HEATON: So Mr. Chairman and board
22 members, again, my name is John Heaton and I'm
23 presenting the Vice Chairman of the Eddy-Lea Energy
24 Alliance. And I am designated as their representative
25 to the ASLB hearing. So our alliance is a

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1 longstanding consortium of the cities of Carlsbad,
2 Hobbs, and Eddy County and Lea County. And it's been
3 enforced since 2006.

4 The proposed interim storage facility site
5 is located approximately 35 miles from Carlsbad and
6 Hobbs in a very sparsely populated area that is very
7 remote. Our cities and counties in the alliance were
8 strongly supportive in the development of the global
9 nuclear energy partnership if you can remember back
10 that far. And that project was for advanced nuclear
11 fuel and reactors. And we purchased the approximately
12 1,000 acres at that time to supply the application.

13 We had the site characterized, and we were
14 one of the finalists. But the project, as you know,
15 was subsequently stopped. Then when consolidated
16 interim storage was proposed, we realized that we
17 thought we had this is a perfect opportunity to use
18 that land because we believed we had a very superior
19 site.

20 The CISF will have a real impact on our
21 communities. We expect that it will bring with it the
22 following benefits in our member cities and counties.
23 It will create, we believe, 215 high paying jobs for
24 our citizens. This is a real economic development
25 project in that it brings dollars from outside our

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1 area and outside the state into our area.

2 It will diversify our economy of the area
3 which it is highly dependant on the extractive
4 industry. Furthermore, we have discovered the
5 presence of engineers and scientists associated with
6 our nuclear projects improves the expectations in our
7 communities for our student educational attainment,
8 the arts, recreation, culture, higher education, and
9 frankly all aspects of life.

10 We are familiar with living near a site
11 for nuclear and waste disposal as our city members are
12 located approximately 30 miles away from the existing
13 Waste Isolation Pilot Plant or WIPP as it's known, a
14 facility run by the Department of Energy. This
15 facility has brought enormous benefits to the region,
16 some 1,200 jobs, and approximately a
17 400-million-dollar annual budget.

18 URENCO outside of Eunice and Lea County
19 has also been another stabilizing nuclear business
20 with a multimillion-dollar construction budget and
21 they have some 400 permanent employees. We have taken
22 the additional steps as the alliance to become
23 familiar with the nuclear industry by visiting nuclear
24 power plants to see the various dry storage systems,
25 dry storage manufacturers, attending and speaking at

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1 industry conferences in the way of waste management
2 and other conferences that gone on around the country.

3 The Holtec HI-STORE system stands out
4 clearly as being head and shoulders above any of the
5 others from a safety, security, and durability
6 perspective. Our constituents support the Holtec
7 interim storage facility and we are aware of that
8 because of numerous resolutions that have been passed
9 by our city and county elected officials as well as
10 resolutions from our chambers of commerce and from our
11 economic development associations in our area. So
12 there are some -- at a recent scope hearing in
13 Carlsbad, there were some 40 members that lined up to
14 speak from Carlsbad. So some of them didn't get to
15 speak but we were there to speak.

16 We are here today to show our support.
17 The Holtec CIF is a great project. It is desperately
18 needed in the country. The subsurface concrete
19 facility is a virtual fortress. The 1,500-foot thick
20 salt layer under the facility forms an impenetrable
21 barrier to transmission from above it, and it buffers
22 any seismic impacts from drilling or fracking below
23 it. I don't know how it could be made really frankly
24 any more safe. Holtec is a great corporate partner
25 that has lived up to every promise without fail. And

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1 we welcome the project and the other benefits that it
2 will create.

3 Board members, in closing, we live there.
4 We work there. Our children live there. You have
5 certified the system, the high storm system. And we
6 are confident in the geology and our ability to
7 respond to emergencies. After all, we do that with
8 WIPP and URENCO. And we are tired, frankly, of all
9 the what ifs and what if this and what if that with no
10 real technical basis. We have every confidence in
11 your technical determination process and your
12 capabilities to evaluate the safety of the project.
13 And again, it is a great project. Thank you for your
14 time.

15 CHAIR RYERSON: Thank you, Mr. Heaton.
16 Who would like to speak next for the local
17 governments? Yes.

18 MR. RUDOMETKIN: Good afternoon, Judge,
19 ladies and gentlemen.

20 CHAIR RYERSON: You are Mr. -- for the
21 recorder's benefit, you are Mr. Rudometkin?

22 MR. RUDOMETKIN: Rudometkin, yes sir.
23 Okay. Thank you for this opportunity.

24 Hello. My name is Rick Rudometkin, and I
25 am the county manager for Eddy County, New Mexico.

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1 And I have been designated by the county commission to
2 represent Eddy County, New Mexico at this ASLB
3 hearing.

4 Our county has a present population of
5 around seventy to seventy-five thousand people and is
6 a member of the Eddy-Lea Energy Alliance which is a
7 longstanding consortium of the cities of Carlsbad and
8 Hobbs and the counties of Eddy and Lea formed under
9 New Mexico's Local Economic Development Act, LEDA, in
10 2006. Additionally, our county is adjacent to Lea
11 County, and our main city of Carlsbad is located at
12 approximately 35 miles away from the proposed Holtec
13 HI-STORE Consolidated Interim Storage Facility.

14 The CISF is also located very close to the
15 Eddy and Lea county line. It is my firm belief that
16 the proposed Holtec HI-STORE Consolidated Interim
17 Storage Facility will constructed with the upmost care
18 and will deliver many years of trouble-free service as
19 one of the premier facilities in the whole world.

20 Our county has been keenly interested in
21 the development of the Holtec site since the 2013
22 report from the President's Blue Ribbon Commission
23 recommending that a consolidated interim storage
24 facility be established. We are the perfect and have,
25 in my opinion, the perfect location.

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1 With our partnership with WIPP, which is
2 our Waste Isolation Pilot Plant, we have a great
3 understanding of the workings of a holding facility
4 and welcome with open arms this new facility. The
5 CISF will have a real impact on our community as
6 stated before. We expect that it will bring with it
7 the following benefits to our county and the cities
8 within just to name a few.

9 It will create and foster directly and
10 indirectly more jobs for our citizens. It will help
11 raise local wages by providing top-quality jobs and
12 the best candidates for those jobs. It will generate
13 tax revenue dollars for our county and communities
14 thereby improving our schools, infrastructure, and our
15 quality of life. It will raise property values and
16 encourage new construction so our communities can
17 thrive. It will add to the economic development and
18 vitality of our diverse county as it continues to grow
19 and expand.

20 As stated above, we are very familiar with
21 living near a site for nuclear waste storage as our
22 main city of Carlsbad is located approximately, like
23 we said before, 30 to 35 miles away from the existing
24 WIPP facility run by the Department of Energy which
25 has brought many benefits to this region.

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1 We've also taken additional steps to
2 become familiar with the nuclear industry by visiting
3 the WIPP nuclear facility many times, attending
4 meetings at the Nuclear Regulatory Commission, the
5 NRC, and attending local meetings with the NRC for
6 this particular project. We are also familiar with
7 the San Onofre nuclear generating station in
8 California which provided me myself information and
9 familiarity with emergency response procedures.

10 Our constituents support the Holtec CISF.
11 We know that because of past town hall meetings,
12 general belief in our industry's support of the
13 current WIPP site and a general desire to have a
14 climate of economic development vitality and security
15 for our future.

16 We are here today to show our support for
17 this wonderful project. The Holtec CISF is welcome
18 near our communities, and we look forward to the jobs,
19 tax revenue, economic development vitality, and the
20 other benefits that this project will bring and
21 create. And with that, your Honor, I appreciate the
22 opportunity.

23 CHAIR RYERSON: Thank you, Mr. Rudometkin.
24 Mr. Sena?

25 MR. DESAI: Your Honor, some of our

1 colleagues are saying that they can't hear through the
2 telephone line. So we just want to ask if it could be
3 confirmed that the telephone line is working.

4 CHAIR RYERSON: Sometimes if nobody is on
5 the line, they may cut out which may have happened
6 here.

7 PARTICIPANT: Well, there's people on the
8 line. They couldn't hear.

9 CHAIR RYERSON: Oh, they simply couldn't
10 hear. Okay. Perhaps one of the law clerks can check
11 that out while we continue. And Mr. Sena, you
12 represent the Lea County?

13 MR. SENA: Yes sir, that's correct. Thank
14 you for your time.

15 Hello. My name is Jonathan Sena, and I am
16 a Lea County commissioner speaking on behalf of Lea
17 County and District 4. I am the designated
18 representative for Lea County and a member of the
19 Eddy-Lea Energy Alliance Board.

20 Our county has a population of
21 approximately 65,000 people, and our alliance is a
22 longstanding consortium of the cities of Carlsbad and
23 Hobbs and the counties of Eddy and Lea, formed under
24 New Mexico's Local Economic Development Act, LEDA, in
25 2006. Additionally, Lea County is the proposed

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1 jurisdiction for the Holtec HI-STORE Consolidated
2 Interim Storage Facility, the CISF.

3 Lea County has been keenly interested in
4 the development of the Holtec site since the 2013
5 report from the President's Blue Ribbon Commission
6 recommendation that a consolidated interim storage
7 facility be established. The CISF will have a real
8 impact on our community. We expect that it will bring
9 with it the following benefits to southeastern New
10 Mexico.

11 It will create 115 permanent jobs and 100
12 construction jobs for ten years for our citizens. The
13 average salary will be about 70,000 dollars. This new
14 development will be worth 2.4 billion dollars. It
15 will generate significant dollars in tax revenue for
16 schools and communities throughout Lea County. This
17 will have an extraordinary impact on the lives of
18 young people throughout Lea County.

19 We have taken steps to become familiar and
20 even more familiar with the nuclear industry by out
21 building on our current relationship with URENCO, a
22 nuclear enrichment facility in Lea County. We have
23 also worked hard to engage the Nuclear Regulatory
24 Commission through the public meetings in our
25 community.

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1 But we are familiar with living near a
2 site for nuclear waste storage as we are located less
3 than 40 miles away from the existing Waste Isolation
4 Pilot Plan also known as WIPP. It's a facility run by
5 the Department of Energy which has brought benefits to
6 the region. Based on my personal experience as a
7 county commissioner and as a 33-year resident, I see
8 that our constituents and the county commissioners
9 strongly support the Holtec CISF.

10 Another great example of many is of Finn
11 Smith. Finn is the president of Watson Truck & Supply
12 in Hobbs, New Mexico. He's a strong member of our
13 community and a business leader who understands the
14 importance of diversifying our economic with new safe
15 jobs like those provided by Holtec.

16 Another example of support is that of
17 Steve Verrick. He's the director of the Economic
18 Development Corporation of Lea County. He also sees
19 the value of Holtec coming to southeastern New Mexico
20 to provide good high-paying jobs and to augment
21 property taxes to help our schools.

22 Joe Calderon is another example. He's a
23 longtime educator and community leader who has lived
24 in Hobbs for many years. He also sees the great value
25 of Holtec coming to our county and bringing good, safe

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1 jobs. The last example would be Debra Hicks. She's
2 a business owner in Hobbs who also supports Holtec
3 coming to our community.

4 And we're here today to show our support.
5 The Holtec CISF is welcome in our county and we look
6 forward to having Holtec provide jobs and tax revenue
7 as well as other benefits that it will create. We're
8 an energy-based economy, and we support oil and gas
9 and nuclear energy in Lea County and Eddy County.
10 Thank you for your time.

11 CHAIR RYERSON: Thank you, Ms. Sena. I
12 know tomorrow we'll hear from the City of Carlsbad.
13 Did we have someone from the City of Hobbs who wants
14 to speak separately?

15 MR. HEATON: We don't.

16 CHAIR RYERSON: We don't? Okay. So just
17 tomorrow we'll make time for the City of Carlsbad
18 which gets us back to the hearing petitions. And I
19 think the next up in order would be Alliance for
20 Environmental Strategies. Is that Ms. Simmons?

21 MS. SIMMONS: Yes sir. I'll have to get
22 some water.

23 CHAIR RYERSON: Oh, absolutely. Yes, I'll
24 repeat again. If any of the speakers want water,
25 that's why it's out there. We don't have tables for

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1 everybody here, but we're trying to be as
2 accommodating as we can.

3 MS. SIMMONS: Welcome to New Mexico.

4 CHAIR RYERSON: Thank you.

5 MS. SIMMONS: Good afternoon. I have on
6 behalf of the Alliance for Environmental Strategies
7 two points I'd like to make this afternoon. The first
8 is -- I'm having a hard time with the microphone. Is
9 that better? Okay. Thank you. I'll try to look up.

10 I was asked by AFES to address the problem
11 of dumping of nuclear and other waste in Lea and Eddy
12 County many, many months ago because I've done some
13 work in the area of environmental justice. I'm
14 primarily a civil rights attorney.

15 They specifically were interested in the
16 particular effect on the minority population in Lea
17 and Eddy County which is perceived at least as in
18 effect the targeting of the border area of the United
19 States for multiple dump sites for nuclear waste and
20 other types of waste. Sort of the traditional
21 environmental justice point that it turns out so very
22 often that these type of sites end up in low income
23 minority communities in the south and on the border
24 and very much in New Mexico.

25 I looked at the Holtec application as my

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1 preliminary step, and what surprised me was that there
2 really wasn't any study that addressed and any kind of
3 scoping process what the potential discriminatory
4 effects may be. Instead there was a adoption of a
5 prior report done by ELEA I think they called
6 themselves, but nothing else, nothing specific as to
7 this community right now. People were not really
8 invited to participate in any kind of explanation of
9 how this might affect them. And there was no real
10 demographic study other than the adoption of what ELEA
11 had done before.

12 And one, for example, particular point
13 that AFES would want to raise is what's the
14 demographic comparison we want to do. If you compare,
15 for example -- I think this is a helpful example. If
16 people contended that the current administration is
17 biased against South Americans and Mexicans and I'm
18 not saying that's true or false. But let's just say
19 that's the argument that they're biased against the
20 people crossing the border to the south because of a
21 problem with people from those communities, from
22 Mexico.

23 A demographic study that said, well, look,
24 if you compare the people that are crossing to the
25 people living right on that border, in the El Segundo

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1 Barrio in El Paso, we're not discriminating. We treat
2 those two groups just alike. So we don't see any
3 discrimination.

4 But that's really not the point, is it.
5 The point you'd have to do is compare to the Canadian
6 border and say, oh, people on the southern border are
7 treated very differently than people on the northern
8 border. So let's see why that is. And maybe there's
9 an explanation. But that's what I'm saying in terms
10 of demographics.

11 If you compare Lea and Eddy County to the
12 rest of New Mexico, you'll probably find similar
13 numbers of minority population because Albuquerque has
14 a big minority population. Northern New Mexico has a
15 bigger minority population than Anglo in some
16 counties. But that's not the comparative piece of
17 this that needs to be done. What we're saying in our
18 argument and again I know that's for a later date to
19 argue this on the merits. But just in terms of
20 standing, what I would say is that the comparative
21 group is the rest of the country.

22 So what's happening on the border that we
23 think that these communities are targeted for the
24 dumping of waste? We say that the comparative
25 demographic is the rest of the country. Okay. That

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1 gets me back to standing.

2 Who has standing to raise that claim? And
3 my issue is that that was never even addressed as to
4 what the proper demographic was. It was just an
5 adoption. There was no consideration given to whether
6 the minority community in Lea and Eddy county would
7 have more difficulty with a drop in property values
8 because of the perception in New Mexico that these
9 areas are dumping grounds for waste so that people
10 aren't moving in, for example.

11 So the property values do go down. That
12 was a concern of one of the members of AFES. There
13 wasn't consideration to be given to that. I think
14 we're entitled to raise that claim as a matter of law.
15 This application is deficient in terms of the work
16 that was done to look at these issues. And I believe
17 that the standing issue is traditional standing.

18 The NRC is not supposed to have one narrow
19 definition of standing. If anything, it should have
20 a broader definition of standing that is in a judicial
21 forum. And in a judicial forum, if I'm being
22 discriminated against by the dumping of waste in my
23 community, I don't have to say that it came within two
24 miles of me.

25 I can say the effect on this entire

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1 community is that it's lowering the property values,
2 lowering our sense of being a community, lowering our
3 self esteem, affecting our children, that they feel
4 that they're being dumped, that we're a waste plan, a
5 landfill rather than a community. All of that whether
6 you believe me on the merits or not because this isn't
7 the point to determine the merits. All of that,
8 anybody in that community should be allowed to raise
9 that instead of saying that you have to be next to the
10 dump because those are apples and oranges.

11 The issue of radiological exposure goes to
12 whether I'm going to be injured if there's an
13 accident. Well, that's not our claim. Our claim is
14 that there is a deficient application in terms of
15 their environmental justice portion of their
16 application. And if you say otherwise, respectfully,
17 I think you end up with a situation where
18 environmental justice just doesn't count.

19 That's something that has to be addressed.
20 All you have to address is whether this is safe or not
21 and then you're done. If that's the rule, then it
22 should be clear. There should be a holding that it's
23 not a standing issue. It's on the merits.
24 Environmental justice is not an issue that has to be
25 addressed in an environmental impact statement,

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1 period. All we're going to look at is whether the
2 cask might leak or they might not leak, whether this
3 might explode or that might explode. That's obviously
4 critically important.

5 But there are other people that are
6 presenting those arguments on behalf of particular
7 groups today. We are presenting primarily the
8 argument about environmental justice. And so I think
9 we have met the requirements for standing on that.

10 Now we would also like to participate and
11 ask questions obviously the safety of this proposal.
12 I think we need that because of the proximity of --
13 well, because there are members of AFES that travel on
14 the roads that might be exposed to the possibility of
15 leaking casks along the highways and byways in Lea and
16 Eddy County. So that's my second point.

17 That's all I had to present unless there
18 are questions.

19 CHAIR RYERSON: Thank you, Ms. Simmons.
20 I believe Judge Arnold will begin our questions for
21 you.

22 JUDGE ARNOLD: Your contention 1 and
23 contention 2, correct me if I'm wrong, they're
24 basically environmental justice contentions of some
25 sort or another?

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1 MS. SIMMONS: I have two -- I don't have
2 my numbers. But the first one is as a matter of law,
3 and I believe the second one is that we're relying on
4 Dr. Gomez to talk about environmental racism, so yes.

5 JUDGE ARNOLD: Okay. I understand how one
6 could consider the executive order requirement for the
7 NRC to do environmental justice work. The Commission
8 put out a policy statement on environmental justice
9 and say, yes, this is a part of our environmental
10 impact statement. But I'm looking for where is the
11 legal requirement for an applicant to address
12 environmental justice?

13 MS. SIMMONS: Well, I think there are
14 several things. One, there's the Louisiana Services
15 case that talks about that that could be an issue.
16 There is the policy -- President Clinton's policy
17 statement that that has to be considered in anything
18 that is done.

19 JUDGE ARNOLD: A presidential policy
20 statement applies to federal agencies, the NRC. But
21 an applicant is a private entity, so why does that
22 apply to them?

23 MS. SIMMONS: I see your point. Well, if
24 they don't present that in an application, I don't see
25 how the NRC can rule that the NRC is complying with

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1 President Clinton's executive order if there hasn't
2 been any evidence presented or anything in the
3 application to address that.

4 JUDGE ARNOLD: Okay. So it's a matter of
5 logic rather than being able to identify a specific
6 rule, regulation, or law that says it?

7 MS. SIMMONS: That I know of, and I would
8 appreciate the opportunity to supplement because
9 frankly that's a question that I had not considered
10 whether there's specifically a CFR regulation that
11 says that the applicant specifically has to present it
12 in their application. I think because of the natural
13 logic of if the NRC has to consider it, somebody has
14 to present it and it should be a part of the
15 applicant's burden.

16 JUDGE ARNOLD: Okay. That's all I have on
17 those contentions. Your third contention, there's no
18 factual support for Holtec's primary site selection
19 criterion which is community support. Once again, can
20 you point to any rule that says they have to provide
21 specific support for statements of that sort?

22 MS. SIMMONS: No, I can't and I don't
23 think there is in that case. My point in presenting
24 that it may have become moot depending on what Holtec
25 has to say. But my point in presenting that is that

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1 their application in terms of the section that they
2 did on environmental justice in their environmental
3 impact statement was we were invited in by local
4 leaders so there must not be any problem. And they
5 did a study that basically studied their own counties
6 as opposed to any demographic comparative study that
7 I would see is valid and that that was sufficient.

8 So once we're invited in by local
9 community leaders, we're done with any environmental
10 justice analysis. I said that's not sufficient. You
11 need to do more. You need to do your own study, and
12 it needs to be much more specific than what ELEA did.

13 Their response was, well, this is
14 irrelevant. It doesn't matter whether we invited by
15 local communities, so you can't challenge whether we
16 were or we weren't. And then in my reply, I said,
17 okay. If it's irrelevant, then you have nothing in
18 your environmental impact statement about
19 environmental justice because pretty much you hung
20 your entire hat on being invited into the community by
21 local leaders. So that contention may go away.

22 JUDGE ARNOLD: Okay. Do you have any
23 support that their statement of community support is,
24 in fact, incorrect, wrong?

25 MS. SIMMONS: I don't have anything to

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1 suggest that these gentlemen were saying anything
2 other than what they see as absolutely the truth, that
3 their constituents as they perceive them support this
4 project coming into Lea and Eddy County.

5 My issue is in accordance with what Dr.
6 Gomez said in her report which I attached to the
7 petition that when you are dealing with folks that are
8 low income minority community, the idea that local
9 community leaders speak for Rose Gardner, for example,
10 isn't a definitive decision as to whether low income
11 and minority communities are definitely swept up into
12 the view that I'm the local community leader and I
13 speak for everyone.

14 I think even I can't speak for them but I
15 think they would probably concede the point that the
16 less income you have and the more marginalized you
17 feel, the less likely you are to come to a town hall
18 and challenge the larger group and say, you know what?
19 I don't want this because I already feel like I'm
20 being dumped on and I don't want more. It's not going
21 to help me in my community as a subset of what goes on
22 in Lea and Eddy County.

23 So I think local leaders and local
24 businessmen and people that have an economic interest
25 in this fully support this and that's their right.

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1 But they don't speak for the members of AFES or for
2 the rest of the low income minority population without
3 specific evidence. And this gets back to my point of
4 the environmental impact statement. You have to go
5 into those communities.

6 I can't be my own expert, and I get that.
7 But anecdotally, I have worked in communities like
8 this on the border for more than 30 years, and you
9 don't just hold a meeting. When we would hold
10 meetings, we would talk to ourselves. We wouldn't get
11 all of this just by saying, here we come. You come
12 tell us. We had to go to where folks were and ask
13 them, what do you need? What do you want? And that's
14 what didn't happen here.

15 JUDGE ARNOLD: Thank you. I have no more
16 questions.

17 CHAIR RYERSON: Thank you. Just sort of
18 three areas of inquiry, first, the executive order,
19 President Clinton's executive order on environmental
20 justice. It may seem a little strange, but the
21 Nuclear Regulatory Commission does not report to the
22 president of the United States. And the president's
23 executive orders do not apply. We are an independent
24 agency. The president appoints the members but does
25 not supervise them which is a little odd. We're part

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1 of the executive branch, but that is the structure.

2 It turns out doesn't matter because the
3 Commission voluntarily determined that the agency
4 would follow the principles of the executive order.
5 Now as I understand the point that Judge Arnold is
6 raising is that an environmental impact statement is
7 not something that is the responsibility of a private
8 party. It's the responsibility of the government, in
9 this case the NRC.

10 And what applicants must do is not comply
11 with NEPA because they aren't the government. But
12 what applicants must do is comply with the regulations
13 that the NRC has promulgated to facilitate preparing
14 an EIS. In other words, the regulations require
15 applicants to have an environmental report which can
16 become the basis for much of the NRC staff's
17 environmental impact statement.

18 So I have a question for the staff. Do we
19 have a microphone for the staff? And my question is,
20 is Judge Arnold's question well founded? Is there a
21 regulation -- I guess it would be in Part 51 that
22 requires applicants for a consolidated interim storage
23 facility -- to address environmental justice in their
24 environmental report?

25 MS. KIRKWOOD: I'm Sara Kirkwood for the

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1 NRC staff.

2 CHAIR RYERSON: And just for the record,
3 that's Ms. Silkwood.

4 MS. KIRKWOOD: Kirkwood.

5 CHAIR RYERSON: Kirkwood.

6 MS. KIRKWOOD: Sara Kirkwood --

7 CHAIR RYERSON: Sorry, my apologies.

8 MS. KIRKWOOD: -- for the NRC staff. I'm
9 not sure that there would be a specific requirement in
10 Part 51. But the NRC staff guidance which is cited in
11 our answer --

12 (Simultaneous speaking.)

13 MS. KIRKWOOD: It has the citation.
14 NUREG-1748, Appendix C lays out the categories of
15 information that we expect to see in environmental
16 reports, environmental justice. And I would say that
17 anything that is expected to have in an EIS for
18 purpose of contention admissibility should be in the
19 ER.

20 CHAIR RYERSON: But that was a NUREG,
21 correct? That is guidance. That is not a regulation
22 of the NRC.

23 MS. KIRKWOOD: That is true.

24 JUDGE ARNOLD: Could I ask? Let me quote
25 a sentence out of the introduction to that document.

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1 Applicants and licensees are encouraged by not
2 required to use chapter 6 which preparing
3 environmental reports for submissions to the NRC.
4 Does that make it sound like a requirement?

5 MS. KIRKWOOD: Following our guidance is
6 not a requirement. So we would not deny an
7 application for lack of complying with that document.
8 However, for purpose of contention admissibility, if
9 it's something that we think needs to be in the EIS,
10 I would posit that it would be potentially an
11 admissible contention. I don't think that's the
12 scenario here.

13 MS. SIMMONS: Is that admissible or
14 inadmissible?

15 MS. KIRKWOOD: Admissible.

16 MS. SIMMONS: Could I respectfully ask a
17 question? Maybe of Mr. Arnold and Mr. Ryerson as
18 well. If the NRC is then required to consider
19 environmental justice in an environmental impact
20 statement, how does the NRC go about doing that if it
21 doesn't require the applicant to do it?

22 So for example, if I'm denied because, oh,
23 it doesn't have to be in the application. That's the
24 current hypothetical or possible position, whatever.
25 And then you're supposed to decide, respectfully

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1 again, whether this is going to affect the environment
2 in a way that it should be denied. Do you have to do
3 the work to go out there, or do you deny the
4 application because it's not clear what the
5 environmental impact would be?

6 I mean, it seems there's a bit of -- with
7 all due respect and Mr. Ryerson will remember this
8 from law school days -- angels dancing on the head of
9 a pin to my mind. Because if it's required that there
10 be an environmental impact statement that includes
11 environmental justice and the NRC guidance provides
12 that that should address environmental justice, you
13 are correct, Mr. Arnold, that it may as in shall. But
14 I don't see any way around it.

15 CHAIR RYERSON: Mr. Silberg, yes.

16 MR. SILBERG: The ultimate obligations of
17 the NRC staff in this case, if applicants did not
18 include the information -- we did include the
19 information. We did follow the guidance. But if we
20 had not included the information, the ultimate
21 obligation to prepare the environmental impact
22 statement rests with the NRC staff.

23 They would go out and develop the
24 information. They would include that information in
25 the environmental impact statement which is required

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1 by their regulations and the fact that they chose
2 voluntarily to follow the executive order.

3 CHAIR RYERSON: Okay. I think are we --
4 I think we're clear on the point that, in fact -- are
5 you okay, Ms. Simmons?

6 MS. SIMMONS: Yes. I was listening too
7 hard to the --

8 CHAIR RYERSON: Here's where I think we
9 are. There's no question. You may say it's
10 inadequate, but the applicant believes that it did
11 submit environmental justice information as part of
12 its environmental report. The staff says that if they
13 didn't because of the NUREG, not a regulation but
14 because of the staff guidance, they would've agreed
15 that a proper challenge would have been admissible.

16 So the question is I think whether your
17 challenge is to what they've submitted is adequate.
18 And I think Judge Arnold has raised a very interesting
19 point, that there's not a regulation that requires it.
20 But in fact, I think we're past that to where we
21 started which was the adequacy of what they've
22 submitted -- of what the applicant has submitted.

23 Let me move on. I have two other areas.
24 Ms. Simmons, you were absolutely correct that in the
25 federal courts, standing has a constitutional

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1 dimension. There is a case or controversy requirement
2 in the constitution for the federal courts that does
3 not apply to the NRC.

4 Nonetheless, once again, the Commission
5 has declared a policy that it would generally follow
6 current standards of standing that is applied in the
7 federal courts as a matter of the Commission's
8 discretion as an agency. And they've indicated, and
9 this is all in your pleading. I'm saying more than I
10 need to. But they've indicated there's different ways
11 to satisfy that for power reactors. There's kind of
12 an arbitrary judgement that anybody who lives within
13 50 miles has standing.

14 For groups, if they can show that a member
15 has standing independently, either traditionally or
16 through a presumption. And the interests of the group
17 are aligned with what's at stake, there's such a thing
18 as representative standing.

19 So that's what we're really talking about
20 here. And this board tends to be guided somewhat by
21 what the Commission does. The Commission has found,
22 I believe, standing -- the Commission or other boards
23 have found standing in the case of interim storage
24 facilities at a distance of 17 miles, I believe. Your
25 closest member is 37 miles; is that correct?

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1 MS. SIMMONS: That's correct.

2 CHAIR RYERSON: Okay. And I think if you
3 take the District of Columbia Circuit in the NEI case
4 which dealt with Yucca Mountain I think found 18 miles
5 to be sufficient, a tad more distant than the
6 Commission has. But given that these cases are 17 or
7 18 miles and your closest resident is at 37 miles, are
8 there any cases that we are missing that show the
9 Commission accepting or another board accepting a
10 standing based upon a proximity that is closer to your
11 37 miles?

12 MS. SIMMONS: That I know of?

13 CHAIR RYERSON: Yes.

14 MS. SIMMONS: Mr. Ryerson, no. But let me
15 also take exception to the premise that the shorthand
16 -- the handy shorthand, admittedly so, that there's a
17 certain proximity and you get standing, a certain
18 proximity and maybe you don't if your problem is with
19 the radiological exposure is not the point that's
20 being made here.

21 So there are cases that say that if I am
22 denied a procedural right which I would assert that a
23 person who is a minority, member of a minority living
24 in the community that is within -- there's a point at
25 which the rubber band break. If I'm in New Jersey, I

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1 can't complain about the discriminatory impact of what
2 happens in Hobbs.

3 But if I live in the community of Hobbs,
4 if I live in the community of Lea County and the
5 cumulative impact of dumping on the border communities
6 is hurting me and I think that that would come out in
7 an environmental impact statement that is well done
8 with an environmental justice aspect. We've gone
9 through whether that's the applicant's responsibility
10 de facto or whether it's not. But I think I have
11 standing to challenge that issue as not being
12 sufficiently address in the application, whether I'm
13 close to the radiological exposure or not, because
14 that's apples and oranges. That's not the point I'm
15 trying to make.

16 So to me, it's like saying that if I am --
17 Hatch, New Mexico has sundown laws, used to before
18 legal aid got involved, where if you were a Mexican in
19 downtown Hatch, you were in trouble. They passed a
20 law saying you can't live in a double wide trailer in
21 Hatch. And the city commission said, this will get
22 rid of those rats, meaning the Mexicans.

23 Now, if I don't have a double wide trailer
24 and I won't go downtown in Hatch, I'm not close to
25 either of those. But I'll tell you if I'm a Mexican

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1 American, I can challenge that because I'm not
2 specifically challenging the fact that I can't have a
3 double wide. I'm challenging that you can't pass laws
4 targeting me as a Mexican American. And okay, we're
5 off to the races to make my argument on the merits.
6 But I definitely have standing to make that challenge.

7 Now I take your point, Mr. Ryerson, that
8 that's from judicial cases. But there are also NRC
9 cases saying that, for example, a deficient
10 environmental impact statement is a basis for standing
11 by the group that's challenging the insufficiency of
12 the environmental impact statement per se.

13 So I think it's interpreted broader than
14 you are suggesting because of the nature of the claim
15 we're making. Second, and this is more of the
16 traditional approach before the NRC, my clients do
17 travel on these roads and there is an admission in the
18 application that some of these casks may leak and
19 they'll be just sent right back if they're leaking.
20 And that's not enough assurance for my clients. So
21 they have standing on that basis.

22 And let's see. One of my -- I'm going to
23 read this note. One of my AFES clients, Lorraine
24 Viega, drives to work within one-half mile of the site
25 multiple times daily. That's a fact. That's in the

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1 affidavit, so I would add that. But again, I don't
2 think that's the be all, end all. I think we have
3 enough because of proximity. The traditional analysis
4 of NRC applies because the folks travel on these roads
5 and also travel close to the site itself based on the
6 very traditional analysis NRC applies.

7 But I also think that it's way to
8 constricted to say that if you are alleging that you
9 have been discriminated against by the multiple
10 instances of dumping on the border, just very
11 traditional definition of a violation of environmental
12 justice principles. If that's my contention and I
13 live in that community, that's sufficient for
14 standing.

15 CHAIR RYERSON: All right. I think we
16 understand your position on that. I had just, I
17 think, one more question at least at this point.
18 We've talked, I think, mostly about your environmental
19 -- your contentions 1 and 2.

20 Contention 3, if I understand it, seems to
21 require us to find that community support would be a
22 relevant issue under the National Environmental Policy
23 Act. And am I correct that that's what you're saying
24 in effect?

25 MS. SIMMONS: That's what I just responded

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1 to from the question from Judge Arnold which is that
2 the environmental impact statement that Holtec
3 submitted, when it was addressing environmental
4 justice focused on the support of local leaders. And
5 to my mind, that means that raises the question
6 whether there is truly support in the community for
7 this as in if everybody is happy that this is coming,
8 then how is that discriminatory? And that was their
9 position to my mind in their application. That was
10 their environmental justice rallying cry.

11 So my response was, well, but that group
12 that purports to represent the entire community wasn't
13 open to all. Now if they're withdrawing that which in
14 their response they appear to be saying that community
15 support is not a relevant consideration. That's not
16 what we hang our hats on. If that's so, then my
17 response to the environmental impact statement is moot
18 because they're withdrawing even that support and
19 saying, okay, we're just going to rely on the study
20 that ELEA did, not on the fact that ELEA is all for
21 us.

22 I do find it -- I must say respectfully to
23 the gentlemen, respectfully to the NRC, I find it very
24 ironic that they're allowed to stand up and say how
25 great this is going to be when it doesn't sound to me

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1 like they meet the proximity test. And yet their
2 views are interesting.

3 My clients are members of this community
4 that feel excluded from the process because of their
5 position as minority low income folks. And yet maybe
6 they're going to be denied standing. I think they
7 have the same sort of interest as the local community
8 leaders do in speaking to this issue. Because man,
9 we're the folks -- we're the New Mexicans. They're
10 the New Mexicans, so I get why they get to speak. But
11 we're the New Mexicans too.

12 CHAIR RYERSON: Thank you. Judge
13 Trikouros, did you have questions?

14 JUDGE TRIKOUROS: No.

15 MS. SIMMONS: Thank you for your time.

16 CHAIR RYERSON: Okay. Thank you. All
17 right.

18 MS. McCOY: Your Honor, would it be
19 possible to exercise your discretion under 10 CFR
20 2.315 to allow some portion of time for the community
21 to orally at least address some of these issues?

22 CHAIR RYERSON: I don't want to seem curt,
23 but no. We are not permitted to take evidence in
24 those types of statements. Some boards do that
25 usually closer to an evidentiary hearing. I think

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1 it's very rare to ever do that at the time of
2 contention admissibility which is a legal issue
3 concerning the adequacy of these particular pleadings.
4 So we have petitions that have been filed by the local
5 governments. They're unopposed. As a courtesy, we're
6 allowing them an opportunity to speak. But the
7 general public, this is not an opportunity.

8 There conceivably would be another
9 opportunity. I'll tell you personally I'm not a big
10 fan of those because I think they mislead the public
11 because we can't take what people say as evidence if
12 we're close to a hearing. We can't respond to what
13 they say. And frankly, often the issues at that point
14 are very different from what's on the minds of most
15 members of the public. So in any event, at this point
16 unfortunately, we will not be doing that. But thank
17 you for checking with us.

18 I believe Mr. Lodge, yes. And you are
19 representing the joint petitioners, the rainmaker,
20 Rule 7.

21 MR. LODGE: Before I get started, I would
22 like to indicate to the panel it is possible depending
23 on the questions that I'm asked I may be consulting my
24 kitchen cabinet, several of my clients or client
25 affiliates. And I respectfully request the board's

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1 indulgence. I understand the complexities. I
2 understand enough that this is a complex proceeding.

3 CHAIR RYERSON: As long as you are
4 speaking to us and not your clients, that's fine.
5 Thank you.

6 MR. LODGE: That's why they call us mouth
7 pieces. Thank you. May it please the licensing panel
8 and counsel, I'm here on behalf of what I informally
9 consider to be the transportation interveners and
10 public citizens for the precise reason that this is a
11 national policy determination. It's the
12 implementation of a national policy that hasn't
13 actually been fully hammered out or discussed in a
14 meaningful way for quite a long time. But that there
15 are gapping problems with the Holtec application as it
16 has been put to the NRC.

17 In our view, some of the gapping problems
18 that there is literally no addressing within the
19 context of the application of the fact that there may
20 not be a mere 10,000 shipments at 500 per year for 20
21 years. But there may be as many as thirty, fifty
22 thousand, possibly even eighty thousand shipments of
23 smaller uniform canisters from the reactor sites.

24 That particular situations stems from a
25 2008 DOE policy pronouncement relative to the

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1 recommended repository. The policy pronouncement
2 essentially is that wherever the repository may be,
3 that ultimately it will be in the interest of the
4 management of the waste and the public health and
5 safety for there to be a uniform standard applied to
6 the canisters that are put forever in the ground for
7 storage. That hasn't been addressed here at all in
8 the application papers that I've read.

9 It implies another aspect that has not
10 been adequately addressed but which is sort of covered
11 in the application papers. That is the presence or
12 non-presence during operating life of the Holtec
13 facility of a dry storage system or something akin to
14 it.

15 And by that, I'm talking about a
16 complicated technological system that protects the
17 workers and minimizes radiation leakage or exposure
18 that allows the unloading of canisters for the
19 purposes, among other things, of either remediating
20 arriving canisters that are damaged, remediating
21 canisters on site that as time passes become damage or
22 show signs of contamination, or transferring spent
23 nuclear fuel delivered to the site from transport
24 canisters that are not of that smaller uniform size
25 contemplated by the DOE policy.

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1 Another problem which we believe is very
2 distinctly related to these transportation issues I've
3 been talking about is we're talking about millions of
4 miles, millions of road miles, millions of water miles
5 and millions of highway miles of travel for the
6 thousands of loads of spent nuclear fuel we're talking
7 about.

8 And I might point out perhaps one of the
9 most striking omissions from the application papers is
10 this complete lack of discussion, lack of specificity
11 about the probable transportation routes. We're
12 getting to it I'm sure with the board's questioning.
13 But essentially, the Holtec position appears to be,
14 oh, that's way off in the future. We haven't made
15 those decisions, and nobody can figure it out yet.
16 It's just not knowable.

17 And one thing that's quite knowable that
18 is quite imputable because we've been here before. In
19 the Yucca Mountain environmental impact statement
20 documents, there's considerable discussion of the
21 national rail system. There's considerable discussion
22 of the barge hauling which is quite significant and
23 almost invisible in any national perspective on this
24 problem and the highway travel that will be
25 necessitated.

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1 So we're talking about an entire huge,
2 what they call in my law school Latin, a sine qua non,
3 without which the project is nothing. Without
4 transportation, there won't be a Holtec. And
5 transportation is a big issue because 218 million
6 people live within approximately 80 kilometers, 50
7 miles of the transportation arteries that we, to a
8 pretty high degree of certainty, are certain will be
9 used.

10 Approximately, according to the
11 application, I'm thinking somewhere in excess of 84 or
12 85 percent of the actual final delivery leg to Holtec
13 will be by rail. Some of the early stages, however,
14 which are kind of remarkable to me will be barge borne
15 canisters of waste. On the Great Lakes, on Delaware
16 Bay, along the Florida-Atlantic coast line, around
17 Cape Cod, Boston Bay, down through the river system in
18 Missouri, Mississippi, Tennessee rivers would all see
19 barge hauling of this material.

20 And as I say, we know this because we have
21 an imperfect but somewhat analytical analog I should
22 say already in existence, that being the work that was
23 done much of it to the state of Nevada and by the
24 state of Nevada on the transportation implications for
25 Yucca Mountain.

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1 One of the things that is a grave
2 distinction however is that Yucca Mountain, were it to
3 become the repository, would only store or probably
4 dispose of 70,000 tons, less than half of the
5 contemplated storage in surface burial in the desert
6 of southeastern New Mexico.

7 So this is a major national issue. The
8 grassroots organizations and public citizen are here
9 in effect as symbolic plaintiffs, if you will. They
10 are interveners on behalf of the huge amount of the
11 country's population that is potentially affected.

12 The last point that we can certainly turn
13 to toward the issue is that, if I can find it, the
14 2002 -- where is it? Pardon me, one moment while I
15 try to decipher my left handed scroll. The 2002 full
16 environmental impact statement for Yucca Mountain
17 basically set forth a region of influence, and I
18 mentioned this in our pleadings, a region of influence
19 out to the 80 kilometer, 50 mile radius also stating
20 that the area of immediate environmental effect could
21 be 800 meters on either side of a right of way,
22 whether it'd be rail or traffic -- pardon me, road
23 highway. And this was for purposes of assessing the
24 transportation impacts in the Yucca EIS side of the
25 proceeding.

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1 We believe that that's logical. It makes
2 sense. And in fact, the Department of Energy, the
3 name of which keeps recurring in these proceedings
4 might, if asked, strongly advise that the NRC consider
5 it as a region of effect. With that, I'm ready to
6 take your questions. Thank you.

7 CHAIR RYERSON: Thank you. Judge
8 Trikouros, did you want to begin?

9 JUDGE TRIKOUROS: Yes. Since we started
10 in transportation, let me ask a transportation
11 question. Contention 11 -- your contention 11 --

12 MR. LODGE: Yes.

13 JUDGE TRIKOUROS: -- you say that you're
14 referring to the shipments that you're now talking
15 about, that they'll be subject to, if not vulnerable,
16 to human induced event risks over the lifespan of the
17 transport campaign.

18 MR. LODGE: Correct.

19 JUDGE TRIKOUROS: And you say it is
20 necessary to define, understand, and communicate
21 design basis events so that communities along the
22 transportation routes and at the initiation and
23 destination points are risk informed. Now these
24 design basis events that you're talking about, let's
25 see, how do you relate those to the requirements of

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1 Part 71 and I think Subpart F of Part 71. But how do
2 you relate? So what design basis events are you
3 talking about? Are these something that has yet to be
4 created and you're seeking that they be created? It's
5 not clear.

6 MR. LODGE: Well, it's a little difficult
7 to predict design basis events until you have designed
8 transport casks -- pardon me, canisters. The probably
9 presently is that it's our understanding that none of
10 the existing storage, casks and canisters on site at
11 reactors, will be ultimately the transport units used
12 to haul the material to New Mexico. So first of all,
13 there's that problem which is a rather serious one.

14 How does the possibility of sabotage or
15 terrorist events relate to this project? I'm not sure
16 I understood your question, sir.

17 JUDGE TRIKOUROS: You're saying that there
18 should be a set of design basis events defined that
19 would risk inform the public along transportation
20 routes of vulnerabilities associated with potentially
21 terrorist events.

22 MR. LODGE: Right.

23 JUDGE TRIKOUROS: And what I'm asking is
24 what is the nature of these design basis events and
25 how are they different from the Part 71 requirements

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1 for canisters and transportation casks?

2 MR. LODGE: Well, the nature of design
3 basis events is if there is a successful use,
4 deployment of a TOW missile at an in transit cask,
5 there could be a major environmental and public health
6 event. And you thus have apparently not been able to
7 successfully make a delivery that conforms with Part
8 71. I still am not certain I understand what you're
9 asking for here.

10 JUDGE TRIKOUROS: Are you suggesting that
11 Part 71 requirements are inadequate?

12 MR. LODGE: I'm suggesting that compliance
13 with the Part 71 requirements encompasses a lot more
14 than the applicant is suggesting. In fact, one of the
15 problems that we have identified is that certainly one
16 talks about ISFSI facilities. And I think the
17 conventional understanding of ISFSI is not the Holtec
18 waste facility.

19 A standard ISFSI is maybe a few hundred or
20 a few thousand tons stored at a reactor site or maybe
21 a combined storage event at a reactor site. It is not
22 173,000 metric tons having traveled millions of miles
23 to be congregated. And I think that a realistic
24 reading of Part 71 and applying it to this project is
25 going to definitely imply a much more expansive sweep

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1 of the implications and the necessary steps.

2 One of the problems here and it certainly
3 has been discussed well beyond a threshold is the
4 legal problem of whether the facility is even lawful.
5 And along with that there's a paucity because of the
6 way the NWPA is written there are not adequate
7 regulations that envision this type of facility.

8 There is discussion in the NWPA of a CISF,
9 consolidated interim storage facility, but it's tiny
10 in comparison to this. It's minuscule. And of
11 course, it's not even within legal reach at this
12 point. So the point is, yes, Part 71 is there. And
13 yes, it must be obeyed. And no, I'm not suggesting
14 that we challenge the rule. But I think that the rule
15 must be read in the most expansive possible way.

16 JUDGE ARNOLD: A quick question on the
17 Part 71 transportation. Does that have an automatic
18 opportunity for a hearing in it?

19 MR. LODGE: For what?

20 JUDGE ARNOLD: For a hearing like this?

21 MR. LODGE: Well, this is -- I would say
22 probably not.

23 JUDGE ARNOLD: So as far as you know, it's
24 either you're heard now on transportation or you're
25 not heard at all?

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1 MR. LODGE: I'm not sure I agree with that
2 notion. This is not a substantive hearing. It's
3 merely a procedural one.

4 JUDGE ARNOLD: Right.

5 MR. LODGE: And I don't recall -- to
6 answer your question and I want to correct myself.
7 Part 72 is what governs dry cask storage regulations.
8 Part 71 is the transportation regs, of course. But I
9 think that transportation is the essential element
10 without which the project is a nonstarter. It's an
11 impossibility, even if you assume that the legal
12 hurdles have been successfully crossed. So we believe
13 that transportation, my unspoken implication has been
14 segmented out of the project scope.

15 JUDGE TRIKOUROS: It sounds to me as if
16 you're saying that there should be a separate analysis
17 that is, so to speak, a risk study on transportation.
18 And that as a result of that, there should be defined
19 series of events which are not currently incorporated
20 into the current regulation Part 71 and that that
21 should form the basis for what? You say risk
22 informing the people along transportation routes. I'm
23 not sure -- I don't know what that means exactly. So
24 to what end would all this be taking us?

25 MR. LODGE: Number one, it wouldn't be

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1 necessarily a separate study. It would be part of the
2 draft environmental impact statement. Number two, of
3 course as the panelists are well aware, part of the
4 purpose behind an EIS is to inform the public but also
5 to signal to the public that the agency itself has
6 both consulted other agencies and taken into account
7 the maximum number of reasonable scenarios, reasonable
8 problems, and environmental impacts that might befall
9 were the project to go forward.

10 So we believe that it's a very reasonable
11 request. And NEPA trumps Part 71 to the extent that
12 NEPA is not in conflict with Part 71. And we believe
13 that the nature of this unprecedented project is
14 something that demands a much fuller transportation
15 analysis than has been done and has largely not been
16 done.

17 I just want to point out the data that
18 we've been relying on to identify probable
19 transportation mainline rail routes, mainline highway
20 and water routes is taken from an entirely different
21 project's EIS. That's how low the level of
22 information is within this document. And it will
23 involve a lot more waste and a lot more travel.

24 And let me tell you why it will involve
25 more travel. It will involve more travel because this

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1 is an interim site. So the material goes to New
2 Mexico and then supposedly would go ultimately to a
3 repository in another location.

4 And the way Holtec has proposed to manage
5 its waste, they actually reserve the right that a
6 nonconforming shipment delivered to the site can be
7 returned to the originating reactor site. Or now in
8 the last week and a half we've learned that they are
9 proposing it might also be diverted back to a site
10 that can remediate a damaged or leaking or
11 contaminated canister.

12 JUDGE TRIKOUROS: Okay. Thank you.

13 MR. LODGE: Thank you.

14 JUDGE TRIKOUROS: Let me move on to
15 contentions and 5 and 12. And my concern here --
16 well, let me just say I can read contention 5 to be
17 human activity that may cause some geologic effect on
18 the plant, on the facility.

19 MR. LODGE: Yes.

20 JUDGE TRIKOUROS: I can read that the
21 other contention 12 to be a naturally occurring
22 geologic conditions.

23 MR. LODGE: Right.

24 JUDGE TRIKOUROS: Okay. So I'm reading
25 those correctly?

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1 MR. LODGE: Yes.

2 JUDGE TRIKOUROS: And so I'd first ask the
3 question, is subsidence of the land something that you
4 believe would damage this facility?

5 MR. LODGE: Yes. I'm not a geologist, but
6 I suspect that in the Permian Basin, there has been a
7 juried study within the last year and a half or so
8 that has pronounced that in the last three decades,
9 more or less, there's been in some places as much as
10 a 40-inch change in elevation. And yes, subsidence,
11 that's enormous. You don't have to be a geologist to
12 know that that's incredible. So yes.

13 And the Permian Basin is either at or fast
14 approaching the status of the most prolific productive
15 oil and gas patch certainly in the western hemisphere
16 if not the globe. And it's not showing any signs of
17 slowing down in the coming decades. So there are
18 going to be new geological problems including seismic
19 events that we believe have to be taken into account.

20 JUDGE TRIKOUROS: It's your position then
21 that the environmental report and perhaps the SAR did
22 not adequately account for these geologic conditions
23 that you're worried about?

24 MR. LODGE: That is correct. And I might
25 add that from what I understand the Holtec location is

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1 within this -- I'm thinking it's about 20,000 square
2 mile Permian Basin area. The Holtec location is near
3 the most productive zones. And there is presently
4 fracking going on, on two or three sides and a major
5 potash mining facility. I don't know if it's
6 presently operating but certainly has been geological
7 disturbance from a potash mining facility by the site.

8 JUDGE TRIKOUROS: In your contention 12
9 pleading, you reference a report from your consultant.
10 And that report provides a sort of different geologic
11 picture than the environment report in some respects.

12 MR. LODGE: Yes.

13 JUDGE TRIKOUROS: Just a cursory look at
14 differences between them. I could see that section 2
15 of your report talks about the nature of the valley
16 there. And it ends by saying, the Holtec site appears
17 to be sided on top of a karst valley, an extension of
18 a well study nearby karst valley that has undergone
19 subsidence. Section 3.3 of the environmental report
20 says, comparison of conditions at the site with those
21 conditions favorable to karst development indicates
22 that conditions at the site are not conducive to karst
23 development.

24 Now you couldn't be any different than
25 that. One says very much karst valley. They other

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1 says no. But yet in your pleading, you didn't point
2 to the application. You didn't connect your
3 consultant's report to the application. It isn't my
4 job to find such discrepancies. It is your job to
5 find such discrepancies and report them as in the
6 contention. How would you answer that?

7 MR. LODGE: I think you've summed it up
8 correctly. I believe, however, that the distinction
9 that your Honor just noticed reflects an issue of
10 fact. And we're already required and compelled to
11 meet a prima facie standard of evidence and proof for
12 purposes of admitting a contention. I think it is a
13 distinction, the difference in factual position is
14 sufficient to warrant admissibility of the contention
15 and further investigation.

16 JUDGE TRIKOUROS: So you're telling me
17 that you don't think you really need to tell us what's
18 wrong with the application? That just the fact that
19 that information is out there to be found is
20 sufficient, is that what I'm hearing you say?

21 MR. LODGE: No sir, I'm not making that
22 brazen of an assertion. I am saying that the
23 obviousness of the factual controversy is such that
24 there should be a contention.

25 JUDGE TRIKOUROS: Your contention 5 is

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1 rather simply worded horizontal hydraulic fracturing,
2 parenthesis, fracking, is certain to occur underneath
3 the site. From what I can see, that's not in dispute.
4 What is in dispute is that the fracking will occur in
5 depths in excess of 5,000 feet.

6 MR. LODGE: Yes.

7 JUDGE TRIKOUROS: And statements are made
8 that at that depth there's absolute assurance in
9 essence that there won't be any effect on the
10 facility.

11 MR. LODGE: If you're referring to
12 statements that were made in our petition, that's not
13 inaccurate.

14 JUDGE TRIKOUROS: No.

15 MR. LODGE: Okay.

16 JUDGE TRIKOUROS: These are -- when I look
17 at your petition, I also look at the answers from --

18 MR. LODGE: Okay.

19 JUDGE TRIKOUROS: -- Holtec and the NRC
20 staff.

21 MR. LODGE: I just wanted to clarify that
22 point.

23 JUDGE TRIKOUROS: Yes, yes. Clearly that
24 wasn't something you said.

25 MR. LODGE: And as we were just assessing

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1 a few minutes ago, there is scientifically documented
2 subsidence going on. So yes, there is certainly some
3 distinct likelihood that there will be geological
4 effects noticeable at or near the surface. But the
5 problem here is this facility has to be run perfectly.

6 It effectively -- the radioactive waste
7 and the radiation must be contained as perfectly as
8 possible for a very long time. And the stability of
9 these canisters for 100 or 120 years is going to be an
10 ongoing experiment. We've done this before. So we
11 believe that the balance of equities certainly calls
12 for there to be more, not less, investigation via
13 contentions.

14 JUDGE TRIKOUROS: Okay. To your
15 knowledge, is there any level of subsidence that could
16 be tolerated by this facility?

17 MR. LODGE: I'm not a geologist, and I
18 don't consider myself qualified to say. But I would
19 suggest that we're talking about subterranean
20 platforms of human installed and dense material that
21 are going to be rigid and not very flexible and may be
22 cracked or otherwise fissured, both by the unforeseen
23 problems with the weight from above as well as from
24 shifts from below.

25 It just seems to me from a lawyer with a

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1 poly sci degree that what we're looking at is geology
2 that has not been tested nor fully explored nor
3 explained in the context of not just active oil
4 drilling but the most intrusive form of extracting gas
5 and oil which includes underground explosions to
6 create caverns into which to inject under high
7 pressure industrial chemicals to draw out the oil and
8 gas.

9 We don't know what that's going to mean
10 over the next 30, 50, 100 years. We don't know what
11 geological changes will be induced. Very little of
12 our geological understanding of the earth's crust is
13 gleaned apart from oil and gas development.

14 JUDGE TRIKOUROS: The statements are made
15 in your contention that the activities that are taking
16 place in the surrounding area of the Holtec site are
17 similar to what types of activities would take place
18 at the Holtec site including fracking below 5,000
19 feet.

20 MR. LODGE: Correct.

21 JUDGE TRIKOUROS: And you also state that
22 the surrounding area has exhibited signs of
23 subsidence.

24 MR. LODGE: Correct. Not necessarily the
25 immediately surrounding area. I don't believe the

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1 analysis that was published a year or so ago was that
2 close to Holtec. But it's in the Permian Basin.

3 JUDGE TRIKOUROS: Also the environmental
4 report, I think it's page 344 of 482 on a PDF relative
5 basis.

6 MR. LODGE: Right.

7 JUDGE TRIKOUROS: It says, the SAR -- at
8 I think it's page 2-54 -- indicates that there are no
9 surface drill hole or mining indications that
10 subsidence and collapsed chimneys occur at the site.
11 Basically it's saying subsidence is not a safety
12 concern.

13 MR. LODGE: No, and the facility may not
14 even be operable for some years to come during which
15 time there will be incrementally more hydrofracturing
16 activity in and around the site and maybe even
17 underneath it. As I was writing that contention, I
18 was thinking to myself, what would it have sounded it
19 like in the Yucca proceeding a few years ago if oil
20 and gas companies were clearly and rather negatively
21 announcing, sure, we frack right around Yucca
22 Mountain. What's the problem? I think it would have
23 been an enormous problem, not just scientifically but
24 from an image optical standpoint.

25 JUDGE TRIKOUROS: So your consultant

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1 believes that subsidence is a concern at the Holtec
2 site?

3 MR. LODGE: Absolutely, yes sir. And
4 seismicity I think is a concern that is increasingly
5 becoming attached to the presence in the area of
6 fracking.

7 JUDGE TRIKOUROS: Thank you.

8 MR. LODGE: Thank you.

9 CHAIR RYERSON: I think we'll take a break
10 shortly. Just one or two questions that I had at this
11 point. Following up on Judge Trikouros' comments
12 about grappling with the application if you will. I
13 mean, the Commission has said -- and I think I have
14 this as almost a quote. The staff will correct if I
15 don't. The Commission has said that petitioners have
16 an iron clad obligation to read the application and to
17 identify genuine disputes with the application. And
18 I mean, do you disagree? We should follow with the
19 Commission says on that. Don't you agree?

20 MR. LODGE: I'm aware certainly of the
21 Commissions pronouncements. I think, however -- and
22 this is not necessarily to differ with them. I think
23 the obligation has been met with the evidentiary
24 presentation we've made. I think that there is a
25 tendency to overinterpret what the Commission actually

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1 seeks. Because as I say, a prima facie standard isn't
2 even applicable to the evidence here.

3 We are demonstrating some controversy in
4 fact, and that should be legally sufficient to go
5 forward with contentions being admitted. And I've
6 been litigating NRC cases for a long time and have
7 certainly learned a lot about draftsmanship. But I do
8 believe that we've met the standard to present
9 information that a reasonable examiner of the
10 pleadings would find that there is sufficient evidence
11 of a controversy to go beyond this stage.

12 CHAIR RYERSON: Thank you. I have just
13 one more observation, really not a question but more
14 of an observation. And I think I understand that
15 there are contentions that challenge how long these,
16 quote, interim facilities might be in operation. But
17 we should not forget and I urge all petitioners as you
18 make your arguments to remember this that the Yucca
19 Mountain facility was subject -- remains subject if it
20 comes back ever -- to a set of regulations that
21 contemplate standards that will be met for the period
22 of geologic stability.

23 The period of geologic stability in the
24 Yucca Mountain regulations is defined as one billion
25 years. That is longer than 40 years. It's longer

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1 than 100 years. It's longer than 120 years. And so
2 I think as you make your arguments, be a little
3 careful about drawing too direct analogies to Yucca
4 Mountain. They are very different proceedings I think
5 in the board's view. But let's move on.

6 I think if we take a break now until, say,
7 3:00 o'clock, we need to finish at 4:30. So we can
8 take one break till 3:00 and we will then go till 4:30
9 today. Thank you.

10 (Whereupon, the above-entitled matter went
11 off the record at 2:46 p.m. and resumed at 3:02 p.m.)

12 CHAIR RYERSON: Mr. Lodge, one moment. I
13 have an announcement or two to make and then we'll get
14 back to you. Just two announcements. The NRC has
15 reserved and paid for this space for two days. So
16 apparently if you have heavy binders or anything and
17 you want to leave them, there will not be a cleaning
18 crew coming in. You may do that. I wouldn't do it
19 myself frankly, but that's an option just so you know.

20 And there were some questions about
21 timing. I think we said we will start tomorrow at
22 9:00. And we were asked when we would finish, and
23 that kind of depends on how long the questions go
24 tomorrow. So my best guess is that we will finish
25 well -- well, that we will finish before 4:30

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1 tomorrow. Whether we just have a morning session or
2 not, I just don't know.

3 PARTICIPANT: A more intrusive question,
4 Your Honors, is what time are your plane tickets.

5 CHAIR RYERSON: Plane tickets? Oh, the
6 number of people who was on the flight that -- at
7 least who was on it? We were on it. That's right.
8 We should take a break tomorrow at 10:00 o'clock so
9 that people can sign into their Southwest reservation.

10 (Laughter.)

11 CHAIR RYERSON: We might do that actually.

12 (Laughter.)

13 MR. LODGE: Maybe if you could just have
14 a scanner installed in the lobby from the airport.

15 CHAIR RYERSON: All right. We are back to
16 examining Mr. Lodge.

17 MR. LODGE: Your Honor, before we proceed
18 with further questions, I have a couple of things I
19 would like to respond to. One of them is to
20 supplement my response to Judge Trikouros. In March
21 2018, the NRC staff sent their first request for
22 additional information, RAIs, to Holtec.

23 And RAI 2-2 specifically I haven't seen
24 the responses, but the staff requested assessments
25 using site measured geotechnical properties to

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1 demonstrate that the soils at the subgrade and
2 undergrade of the storage pads and the canister
3 transfer facility would be able to withstand the
4 loading assumed in the certification of the HI-STORM
5 UMAX storage system.

6 It goes on to describe expressly what data
7 they're looking for. But clearly the staff is
8 concerned that the analyses should, quote,
9 "demonstrate that the subgrade and undergrade soil
10 properties at the HI-STORE CIS site are uniformly
11 better than those assuming for the general
12 certification of the HI-STORM UMAX system" So the
13 staff is indeed also concerned that there not be human
14 induced geological change just from the fact of the
15 great weight that will be brought into the area of
16 having this facility.

17 And Judge Ryerson, in response to the
18 comments you made just before the break, I believe
19 that your Honor was referring to the post-closure
20 requirements at Yucca which indeed do require imposed
21 certain standards out to one million years. But there
22 is some analogous pre-closure application information
23 that had been submitted by DOE governing the
24 approximate 50-year period of actual operations of the
25 Yucca facility. And those particular requirements

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1 have been conformed to Part 50 which is fairly
2 analogous to Part 72 requirements.

3 So the Yucca operations, which
4 incidentally have -- as things were left at the last
5 cliff hanging episode a few years ago, the Yucca
6 requirements are that there will not be any loading,
7 unloading of canisters at the Yucca site. All of that
8 has been moved upstream if you will into CISFs and/or
9 reactor sites. Thank you.

10 CHAIR RYERSON: Thank you. I think now
11 Judge Arnold has a number of questions for you, Mr.
12 Lodge.

13 JUDGE ARNOLD: Your petition -- this
14 question will be familiar -- lists the 10 CFR 2.309(f)
15 criterial burden, admissible contention, including
16 Item 3, that it be within the scope, and Item 4, that
17 it'd be material to the findings the NRC must make.
18 Most of your contentions did not address either of
19 those. So would you tell me do you think your
20 contentions are in scope and material?

21 MR. LODGE: Yes, we do believe that.

22 JUDGE ARNOLD: Also you make numerous
23 references to the Nuclear Waste Policy Act. What
24 evidence do you have that that this relevant to this
25 licensing procedure?

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1 MR. LODGE: The -- it's a good question.
2 It certainly should be. And we believe it is being
3 violated in not being observed properly by the
4 license, no pun intended, the poetic license that's
5 been granted to Holtec to pretend that there actually
6 would be two financing streams instead of utter
7 dependence on DOE for cash and liability protection.

8 JUDGE ARNOLD: Okay. Concerning
9 contention 1, as I understand it, you're not objecting
10 to the fact that you don't have access to the redacted
11 pages. But rather you are claiming that the redaction
12 itself is a violation of the National Historic
13 Preservation Act; is that correct?

14 MR. LODGE: Insofar -- yes, it's correct.
15 But it is also violative of NEPA because it is another
16 review that has to be addressed or mentioned and
17 disclosed in some respect to NEPA, so yes.

18 JUDGE ARNOLD: In their answer to your
19 petition, staff cited to Section 304 of the National
20 Historic Preservation Act as their authority to redact
21 the information. And in your reply, you seem to go
22 further into depth as to the process of obtaining
23 access to something being unreasonable. Are you
24 changing the focus of your contention, or do you think
25 this is still under the same contention as originally

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1 --

2 MR. LODGE: That was simply a rebuttal
3 argument that we were making. And in fact, I was
4 looking in the last few days at the latest revision of
5 the environmental report which still contains enormous
6 redactions. The thing that jumps out is that
7 literally one quarter of the pages of the ER have been
8 redacted for this apparent cultural property's
9 purpose.

10 And if we're talking about this being the
11 foundational document from which the DIS ultimately
12 may be formed, you're talking about depriving the
13 public of access to what cultural resources are
14 threatened or actually going to, if the project goes
15 forward, be destroyed. And the public has -- under
16 the NHPA and thus indirectly under NEPA, has a
17 mitigation comment and input opportunity which is
18 being denied. And at a minimum, we have a contention
19 of omission.

20 I might add there have been -- I think
21 I've seen an RAI or other correspondence between NRC
22 staff and possibly the State Historic Preservation
23 Office of New Mexico only dated in September. So that
24 there's finally some movement on the NHPA aspects of
25 this. But again, that letter, as I recall, even

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1 continues in effect the redaction and confidentiality.

2 JUDGE ARNOLD: Concerning contention 2
3 having to do with reasonable assurance that it can
4 obtain the necessary funds. In your consolidated
5 reply to Holtec and NRC staff on page 25, you state
6 Holtec has presented essentially two applications to
7 the NRC. One postulates a legal pathway to financing
8 and commissioning but is economically improbable. And
9 the other one lays out a legally impossible pathway.

10 Let's say that you're correct and that one
11 pathway is illegal. If the license is granted and the
12 DOE can't get title to the license, then what happens
13 then? Would they be able to run a consolidated
14 facility just for the utilities? Or are you saying
15 somehow that license still wouldn't be valid?

16 MR. LODGE: Well, license validity with
17 respect is not so much the issue as financial reality.
18 And it's my understanding the Price-Anderson Act will
19 not attach to a private facility. And that means that
20 ten, thirty, fifty, eighty thousand shipments of spent
21 nuclear fuel done as a supposed private enterprise
22 project will all be uncovered unless, of course, there
23 is some brave underwriter out there in the global
24 economy willing to cover the possibilities of a
25 serious nuclear waste accident.

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1 The problem here is that it's not just
2 improbable. We think that in practical terms the
3 private sector stream of financing is impossible. And
4 that it is only used as a means of camouflaging the
5 DOE thing.

6 I'm troubled by the fact that one of my
7 law school -- the things drummed into my head was that
8 courts do not exist to give advisory opinions on
9 theoretical questions. And administrative agencies,
10 you are the trial court. You are the quasi-judicial
11 body. You're the trial judges as you well know. And
12 effectively, this is a request for a theoretical what
13 if opinion. And we believe that just following that
14 simple principle of this board and the Commission
15 itself cannot possibly entertain this application.
16 Thank you.

17 JUDGE ARNOLD: Contention 3, the
18 environmental report is incorrect in that it contains
19 a gross underestimation of a volume of low level
20 radioactive waste that will be generated by the use of
21 concrete and other materials for bunkering the spent
22 nuclear fuel canisters.

23 Now I looked through the ER and I could
24 not find any estimate of the volume of low level
25 waste. Could you cite to where that is? All I could

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1 find was small.

2 MR. LODGE: I believe it's in the GEIS.
3 I think that's what the applicant is assuming would be
4 generated.

5 JUDGE ARNOLD: Okay. And you don't know
6 what the value was of that?

7 MR. LODGE: It's in the Holtec answer.
8 It's a tiny fraction of eight million tons, I can tell
9 you that. I think it's something in the order
10 possibly of less than -- fewer than 200,000 tons. And
11 incidentally, your Honor, again, this raises the
12 specter of that 800-pound gorilla which is that
13 depending on where the loading of the TAD, the
14 transport and disposal canisters occurs, whether it
15 happens at the reactor sites or if it happens at
16 Holtec, there could be a very significant change in
17 the volume of low level radioactive waste generated as
18 a result of the Holtec project.

19 JUDGE ARNOLD: Do you have any factual
20 support for your assertion that concrete would become
21 radioactive?

22 MR. LODGE: Other than common sense and
23 the fact that even in its answer, Holtec basically
24 quibbles with our number but not with the phenomenon
25 that irradiation can and will occur in the immediate

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1 vicinity. If these canisters are emitting seriously
2 public health threatening measurable radiation at six
3 feet when they're being transported, they certainly
4 are going to continue to emit neutron and other
5 radiation for a long time in place, in situ.

6 JUDGE ARNOLD: Now I inferred from what
7 you said that you also believe that if it does become
8 radioactive that it can't be decontaminated. Do you
9 have any support for that?

10 MR. LODGE: No. And we weren't making the
11 argument that it is impossible to decontaminate it.
12 We were making the argument that the initial
13 quantification is tremendously off base.

14 JUDGE ARNOLD: On page 41 to 43 of your
15 petition, you discuss the cost of repackaging spent
16 fuel for disposal citing the Alvarez report as
17 support. How would the overall cost in waste disposal
18 differ between having this central facility and having
19 it at individual ISFSIs. I mean, wouldn't the same
20 repackaging be needed?

21 MR. LODGE: The answer to that question is
22 yes. And the assumptions, of course, in the Alvarez
23 report were that I think that was the Columbia
24 station. But that if it were done there, here's what
25 we estimate.

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1 And Alvarez's point is that I think the
2 ultimate -- if we're talking about DOE taking title,
3 the taxpayers are not being fairly -- having it fairly
4 explained and disclosed to them what the real costs of
5 just having this interim storage way station for 100
6 years. Where will it be? That act is going to have
7 to happen somewhere, the recombination, if you will,
8 of the waste into different canisters.

9 And as presently explained to us, the
10 Holtec proposal is they will take all canisters,
11 they'll take all-comers regardless of brand which I
12 think NAC is here to dispute. But that one of those
13 will be appropriate for use in a geological
14 repository. So there's going to be enormous expense
15 point that is not disclosed, not quantified, not
16 discussed.

17 JUDGE ARNOLD: And since Yucca Mountain or
18 anything other repository doesn't seem to be right on
19 horizon right now, I would not expect this repackaging
20 for disposal to occur within the current licensing
21 period. That being the case, why should it be
22 discussed in this application?

23 MR. LODGE: With respect, you're assuming
24 that it may not happen in this licensing period. The
25 fact is it's going to have to happen. And the

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1 additional fact is that you do raise the interesting
2 problem that Holtec itself has said that an
3 appropriate robust CISF needs to be able to operate
4 effectively for 300 years, not 100 years.

5 This is an important compact with the
6 state of New Mexico that the material will move after
7 a certain specified period of time. And we think that
8 probably serious gestures technologically preparing
9 the waste to be moved to an ultimate repository is
10 going to be a necessary matter.

11 And regardless of the time frame that your
12 Honor suggests, the scope of this project is 120
13 years. And it is incumbent upon the NRC to consider
14 the environmental impacts which includes economic
15 effects out to at least that period of time.

16 And just as we're told that we need to
17 change our expectations of the CISF, one of those
18 expectations is it will be time limited and it will
19 only be a way station which prepares or at least
20 ensures uniformity of the waste to be moved to its
21 ultimate destination.

22 JUDGE ARNOLD: Okay. Onto contention 4,
23 severe accident mitigation during transportation to
24 and from the Holtec CISF and at the CISF, and spent
25 nuclear fuel and greater than Class C storage and

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1 management operations at the site may not be treated
2 as generic issues and excused from consideration
3 within EIS.

4 Now on page 47 of your petition, you argue
5 that the Holtec waste storage facility cannot be
6 covered by the continued storage GEIS because the GEIS
7 assumes that the facility will have a dry transfer
8 system. But you go on to state, continued storage
9 GEIS finds there is no dry transfer system capability
10 anywhere within the United States. And that suggests
11 that the logic says the GEIS applies to no current
12 ISFSI. Would you agree with that?

13 MR. LODGE: Yes.

14 JUDGE ARNOLD: Okay. On page 48 of your
15 petition, you argue that the generic EIS is not
16 applicable because the Holtec facility is much larger
17 than the hypothetical storage facility or the one used
18 in GEIS. Would this particular objection go away if
19 the Holtec facility was for 40,000 metric tons, the
20 same as assumed in the GEIS?

21 MR. LODGE: Well, first of all, it isn't.
22 We're talking about something that's nearly four and
23 a half times the size. But secondly, the problem is
24 even with a 40,000 ton facility, you would be looking
25 at some commitment at some point within that first

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1 century to having a DTS present.

2 Our logic, if that's the right word,
3 behind this is when you have such an enormously larger
4 volume, a larger number of arriving cargos, the odds
5 increase that there will be a need for a DTS. And
6 incredibly enough in the last week and a half, some of
7 RAI responses that have appeared in Adams indicate
8 that Holtec itself now believes that their return to
9 sender system has to contemplate having the presence
10 somewhere, not on a Holtec site of a DTS system.

11 In an RAI response, they actually say that
12 if they find nonconforming casks that are leaking or
13 are contaminated externally, what have you, that they
14 will be held on a site and ultimately returned to the
15 originating reactor site or diverted to a site with
16 loading capability. So now Holtec is sort of starting
17 to faintly mimic the theme that, gee, somebody is
18 going to have to be able to fix these.

19 JUDGE ARNOLD: Now the current license
20 application is for a facility holding only 5,000
21 metric tons, not the whole 100,000 metric tons. So
22 does this specific objection that it doesn't match the
23 size assumed for the GEIS still hold for this
24 licensing action where they're only looking for 5,000
25 metric tons?

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1 MR. LODGE: Yes, yes, it does. And we
2 believe that the 20 different licenses of 5,000 each
3 is probably calculated to get around some type of
4 statutory difficulty. Again, the entire project is
5 what must be considered at this early phase of the
6 planning and licensing. And that's what NEPA is there
7 for. If I may, I would just like to have one moment.

8 JUDGE ARNOLD: Sure.

9 MR. LODGE: All right. Thank you. Let's
10 proceed.

11 JUDGE ARNOLD: Okay. Next question. On
12 page 49 of the petition, you state, quote, "the Holtec
13 CISF does not qualify under NRC regulations as an
14 ISFSI."

15 Now I took a look at 10 CFR 72.3 where it
16 provides definitions for that section. And it defines
17 an ISFSI as an independent spent fuel storage
18 installation or ISFSI means a complex designed and
19 constructed for the interim storage of spent nuclear
20 fuel solid reactor related greater than Class C waste
21 and other radioactive materials associated with spent
22 fuel and reactor related greater than Class C waste
23 storage. What part of this definition is not met by
24 the Holtec CISF?

25 MR. LODGE: Broadly, Holtec falls within

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1 that definition. But this has also been called a
2 monitored retrieval storage facility. The problem is,
3 is it's far different from what I think the drafters
4 of the ISFSI definition contemplated when they wrote
5 that regulation. I return to my earlier point that we
6 believe that a much higher standard of scrutiny and
7 data inventory and investigation and disclosure has to
8 happen.

9 CHAIR RYERSON: Just one point on that,
10 Mr. Lodge. I mean, there is a procedure in the rules
11 for challenging rules and special circumstances which
12 sounds to me like that's sort of what you're saying
13 that you have here a situation. We have a situation
14 that you say was not contemplated when the rule was
15 enacted. Therefore, there are special circumstances.

16 But you haven't followed that option.
17 That option requires certain requirements in your
18 filings and very importantly if we agree it requires
19 I believe immediate referral to the Commission. So
20 why have you not followed that route if you feel there
21 are special circumstances that make the rule no longer
22 serving the purpose for which it was promulgated?

23 MR. LODGE: Well, your Honor, the problem
24 is, number one, that that is a very complex process.
25 Number two, while we're continuing to look at the

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1 possibility of a petition for rulemaking, as I've
2 said, I grudgingly admit that, yes, this is an ISFSI
3 viewed through one prism. But it's not an ISFSI that
4 anyone has ever seen before. And it's much, much
5 larger. It involves a lot of management that is only
6 contemplated and being conceptualized now.

7 So it's difficult to simply say, point
8 blank, that it violates the rules and get us into the
9 challenging a regulation territory. I'm not quite
10 sure that that's really the appropriate approach.
11 That's the best answer I can give you.

12 CHAIR RYERSON: Okay. Thank you.
13 Contention 5 has to do with minerals interests below
14 the site.

15 MR. LODGE: Right.

16 CHAIR RYERSON: But on page 52 of that,
17 you make reference to chemically aggressive wind blown
18 dust. What exactly about the dust is chemically
19 active?

20 MR. LODGE: The nearby, I think, lakes
21 that periodically sometimes go dry have been dumping
22 grounds for decades, at least back to the late 1960s
23 for oil and gas and drilling waste which could contain
24 a lot of acidity, a lot of corrosive material, heavy
25 metals, even radium. And that material is possibly

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1 likely being incorporated into dust. And there are
2 very serious dust events in that part of the state.

3 CHAIR RYERSON: Okay.

4 MR. LODGE: Incidentally, I think if I'm
5 recalling correctly that the volume of waste that was
6 being dumped was in the millions of gallons per year
7 over the decades. So there's possibly a great deal of
8 contamination present.

9 CHAIR RYERSON: Contention 9, potential
10 transportation routes are not all provided. 10 CFR
11 72.108 states the proposed ISFSI or MRS must be
12 evaluated with respect to the potential impact on the
13 environment of the transportation of the spent fuel
14 high level radioactive waste or reactor related
15 greater than Class C waste within the region. And it
16 makes no mention of transportation outside the region
17 of the ISFSI. So can you point to anything that
18 requires them to look at transportation throughout the
19 United States?

20 MR. LODGE: Well, that is one of the
21 poorest drafted regulations I could imagine because
22 there's an extensive argument I think in either the
23 staff or the Holtec answer saying here's how we'll
24 have to define a region since it's not defined within
25 the regulation or within any companion regulations.

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1 And my counter to that is region could be in the 50
2 mile radius region of influence. It could be the
3 southwestern geographic region of the United States.

4 Unfortunately, it's a regulation nobody
5 thought to adequately define what region means. And
6 so I think that it is valid to -- I think this also.
7 That it may not have been drafted in contemplation of
8 a 20-year or longer massive campaign of thousands of
9 cargos of spent nuclear fuel. And I believe if that's
10 going to be reg that it must be interpreted as
11 liberally as possible up to and including the 40
12 percent -- pardon me, 40 states or so through which
13 nuclear waste will travel to go to Holtec.

14 CHAIR RYERSON: Thank you. Contention 10,
15 NEPA evaluation should be performed for operation
16 exceeding 100 years. Now the continued storage rule
17 kind of says that you don't have to evaluate
18 environmental effects beyond the license period for
19 the current license. So how can we look at that and
20 not consider it a challenge to the continued storage
21 rule?

22 MR. LODGE: First of all, we provide some
23 evidence that suggests even from Holtec that there may
24 be actually contemplated a 300-year period of
25 operation. It may be a challenge to the GEIS, but if

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1 you link it to our objections as to the validity of
2 applying the GEIS to this situation, this is not
3 comparable to the prototype of the PFS facility that
4 was actually the prototype in the generic
5 environmental impact statement.

6 This is not -- it won't have a DTS. It'll
7 be four times the size. There are some other
8 technical differences that are pretty serious
9 distinctions. And we believe that the GEIS may not
10 apply, just period, in any type of objective
11 assessment of things. And further, there is, as I
12 say, the additional -- what I consider to be the
13 contract with New Mexico.

14 The original contract between DOE and New
15 Mexico was if you'll take WIPP, we won't do this to
16 you again. And now we see what detrimental reliance
17 will mean when assessing having another possibly DOE
18 funded facility in New Mexico. So the problem is,
19 your Honor, I'm not sure that the GEIS validly can be
20 construed to have effect here. And if it does, that's
21 a most unfortunate thing for purposes of full and
22 genuine public disclosure.

23 CHAIR RYERSON: Okay. On to contention
24 11. Regulators should consider the risks, impacts,
25 and safety security for the Holtec CISF radiological

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1 waste transportation effort. Now on page 77 of your
2 petition, you discuss the Ninth Circuit Court decision
3 in the San Luis Obispo Mothers for Peace case.

4 MR. LODGE: Yes.

5 CHAIR RYERSON: But on page 4-91 of the
6 GEIS for continued storage, it states, quote, "In
7 2009, the court of appeals for the Third Circuit
8 upheld the NRC's position that terrorist attacks are
9 too far removed from the natural or expected
10 consequences of agency action to require environmental
11 analysis."

12 Now this Third Circuit Court seems to be
13 more in line with NRC regulations. So why should we
14 be more influenced by the Ninth Circuit Court than by
15 the Third Circuit Court and NRC policy?

16 MR. LODGE: Well, I believe the NRC
17 regulation actually has largely followed. They come
18 after the Third Circuit decision. It's sort of
19 interesting. The NRC apparently decided to be the
20 Supreme Court and decide which circuit they were going
21 to approve and follow and which they would not. Yet
22 the Ninth Circuit decision is still good and valid and
23 binding in the five or six states that comprise the
24 Ninth Circuit.

25 It's a terrible conundrum. I think it's

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1 unfortunate that there is not some type of uniform
2 policy. And I'm troubled by the fact that the NRC did
3 not at least allow the Supreme Court to make a
4 pronouncement instead.

5 CHAIR RYERSON: New Mexico is not for the
6 benefit of people who are not lawyers. New Mexico is
7 not in the Ninth Circuit, correct?

8 MR. LODGE: No, you're correct, your
9 Honor. But hundreds of shipments will come through
10 the Ninth Circuit en route to New Mexico.

11 JUDGE ARNOLD: I haven't really formulated
12 a question here. I will have a question for Holtec
13 later about transportation of spent fuel from the
14 jurisdiction of the Ninth Circuit Court. Do you have
15 any comment on that?

16 MR. LODGE: I think that the Ninth Circuit
17 law must be respected and abided by within the
18 geographic territory of the Ninth Circuit.

19 JUDGE ARNOLD: So if Holtec ever wants to
20 take Southern California Edison spent fuel or Diablo
21 Canyon, they've got more work to do?

22 MR. LODGE: Correct.

23 JUDGE ARNOLD: That's the end of my
24 questions.

25 CHAIR RYERSON: Judge Trikouros?

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1 JUDGE TRIKOUROS: Yes, just some follow
2 up. You mentioned an RAI that the staff issued fairly
3 recently. What was the date again of that RAI?

4 MR. LODGE: About respecting what?

5 JUDGE TRIKOUROS: This was with respect to
6 the contention 12 and contention 5 discussion on
7 subsidence.

8 MR. LODGE: I don't know. I haven't seen
9 the response. But the RAI itself was put by the staff
10 to Holtec by letter March 28th -- yes, March 28th,
11 2018.

12 JUDGE TRIKOUROS: Okay. And is there a
13 response or is that pending?

14 MR. LODGE: I'm not sure. We think that
15 the company has approval to respond by the end of
16 February of this year.

17 JUDGE TRIKOUROS: Okay. And just one
18 other point. With respect to possible effects of
19 fracking below 5,000 feet --

20 MR. LODGE: Yes.

21 JUDGE TRIKOUROS: -- was it your position
22 that that would have an effect on subsidence at the
23 site?

24 MR. LODGE: I'm not a geologist.

25 JUDGE TRIKOUROS: I understand.

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1 MR. LODGE: Our concern is that --

2 JUDGE TRIKOUROS: Your contention was sort
3 of nebulous.

4 MR. LODGE: Our position is that I can't
5 definitively say that it will have an effect on
6 subsidence. But there is some very disturbing
7 evidence in the, you should pardon the expression,
8 region that suggests that it must be examined much
9 more fully.

10 The Permian Basin, they can't get enough
11 workers. They're importing workers from all over the
12 United States and Canada and Mexico because this is
13 such an oil and gas boom. And it's going to continue
14 into the indefinite future. They can't get enough
15 equipment. They're desperate to construct pipelines
16 to move the product out of the area. This is a huge
17 booming thing. It's not just a passing trend. Thank
18 you. Anything else?

19 CHAIR RYERSON: I have. Do you have
20 another questions?

21 JUDGE TRIKOUROS: I just wanted to finish
22 by saying so the way you left it was that there are
23 regions in the vicinity of the site that are doing
24 hydraulic fracturing below 5,000 feet and are
25 experiencing subsidence. But there's no scientific

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1 correlation of the connection between those two.

2 MR. LODGE: I think that there's
3 definitely some scientific correlation. I think it's
4 an SMU study that came out approximately I'm thinking
5 a year and a little more than a year and a half ago.
6 It certainly does suggest there's a relationship.
7 Frankly, the geological effects of fracking are on a
8 large scale type of basis are finally being
9 scientifically understood. And the Permian Basin is
10 providing a lot of experimental data.

11 JUDGE TRIKOUROS: All right. Thank you.

12 CHAIR RYERSON: Just one final follow up,
13 Mr. Lodge, on your standing arguments. For your seven
14 petitioners, am I correct? Do they all base standing
15 on a proximity to transportation routes? None of them
16 is within 50 miles of the proposed facility, for
17 example; is that correct?

18 MR. LODGE: I believe it is correct that
19 none of them are within 50 miles. It is not
20 completely accurate to characterize our standing
21 arguments as being solely based on proximity, however.
22 We are also relying to some extent on the actual
23 injury enunciated in the Cogema Stone Webster
24 decision.

25 And there's additionally another NRC site

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1 that I cited in our filings. Just give me one moment,
2 please. Yes, it's a milestone case. It's a Dominion
3 Nuclear case that says that the mere threat of actual
4 injury is sufficient to confer standing.

5 But we believe that we've established in
6 many instances with various declarations from the
7 different interviews that they live in many cases
8 within a mile or two or three of a highway or railroad
9 track that they believe to be a mainline. And again,
10 that gets us into the dispute over how could we
11 possibly know or suspect with the main transport
12 arteries will be.

13 But there is proximity and there is also
14 the possibility because they live, work, and recreate
15 within a small radius. There is a possibility of direct
16 injury.

17 CHAIR RYERSON: What I was going to ask
18 you and I think you've just given me the answer. As
19 you know, we tend to follow Commission decisions. We
20 sometimes find other board decisions persuasive. And
21 I was just really going to ask you for your best NRC
22 cases. I think you have given them to me, correct?

23 MR. LODGE: Yes, they appear in our
24 written arguments too.

25 CHAIR RYERSON: Anybody else? I think for

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1 the moment anyway we are done. Thank you, Mr. Lodge.

2 MR. LODGE: You're welcome.

3 CHAIR RYERSON: So we have 45 minutes or
4 so today. Plenty of time for at least one more
5 petitioner, Mr. Desai for NAC International.

6 MR. DESAI: Thank you, guys, very much for
7 having us. May it please the board, I guess I'll just
8 jump into it given the time constraints. If it may
9 please the board, I'm Sachin Desai, counsel for NAC
10 International. I'll start with a general opening
11 statement explaining why we are here and the critical
12 issues with Holtec's universal CISF approach. Robert
13 -- Bob is available to help us with questions as they
14 come up.

15 NAC International is an international
16 supplier of casks, canister, and spent fuel management
17 services to the nuclear industry across the world. We
18 know this industry inside and out and our involvement
19 in Interim Storage Partners' consolidated interim
20 storage facility project down the road.

21 We're not opposed to Holtec getting a
22 license to a CISF generally speaking. We think that
23 Holtec CISF that used Holtec canisters and casks the
24 old fashioned way would help address the nation's
25 complex challenges with managing spent nuclear fuel.

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1 But there is one fundamental issue with
2 Holtec's approach, though, that brings us here today.
3 Holtec's desire to use a universal cask system as the
4 basis for the CISF. They want to take non-Holtec
5 canisters containing spent nuclear fuel and place them
6 in their own Holtec's UMAX canisters at this CISF
7 without the original equipment manufacturer's consent
8 or assistance. This has never been done before for
9 good reason and creates two distinct safety and
10 environmental concerns joined by a single core issue.

11 We're getting to the scope of the license
12 application and the detailed legal issues during the
13 argument itself. But not to mince words here.
14 Holtec's stated goal for the project is to store
15 non-Holtec canisters, essentially taking ownership of
16 this product.

17 As we stated in our petition in page 8,
18 footnote 8, the Holtec website made the bold assertion
19 as the petition and still maintains that statement
20 when we last looked that the HI-STORE CIS will accept
21 a loaded canister of any providence, whether they're
22 horizontally stored canisters in AREVA's new home
23 system or vertical canisters in NAC's system. This is
24 what they're marketing.

25 The first page of the transmittal letter

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1 to the Holtec's application from March 30th, 2017
2 states that the HI-STORM UMAX canister system has been
3 engineered to store entire complement of canisters
4 currently deployed at ISFSIs across the country, a
5 technical assertion.

6 And the ER, of course, reiterates this
7 universal concept a couple times, particularly relying
8 on the universal cask system in the alternativeness
9 analysis in Section 2.4.1, an assertion the staff
10 agreed was incorrect in its answer to our contentions.
11 And there's more in the reply.

12 Now with regards to the ER, there's
13 something worth explaining here as it gets to the
14 board's questions and to Holtec's answer. Note that
15 Holtec's language in the ER which is still maintained
16 despite Holtec's admission, its answer doesn't have an
17 actual universal system still is there in the ER for
18 2.4.1. This is because the ER looks farther out than
19 the specific license application. It has a broad
20 purpose and need statement to store SNF from all
21 plants across the country operating or not.

22 The license requested by Holtec covers
23 just phase one of the CISF, like 8,700 MTUs. But as
24 described in Section 1.3 of the ER, the ER aims to
25 cover all impacts during the full 20 phases of the

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1 project, 100,000 MTUs and 10,000 canisters. This
2 forces Holtec to have to value it now how it will deal
3 with non-Holtec canisters such as NAC's as part of
4 this environmental report. And because it's being
5 addressed now, NAC won't get a chance to deal with it
6 later.

7 Now to make this goal happen, Holtec is
8 relying on this universal cask approach, the
9 centerpiece of its proposed CISF and the ER design
10 alternatives analysis. This approach is a significant
11 departure from the standard reasonable alternative to
12 designing the CISF and its one vendor, like NAC or
13 Holtec, inserts its own canister into its own casks.
14 This is the approach that is used pretty much or at
15 every ISFSI across the country. Even if there's
16 multiple vendors, one will put its own canisters and
17 its casks.

18 Now we adopted an alternative. This was
19 the alternative that was in ER 2.4.1 which is the
20 approach at Interim Storage Partners facility down the
21 road. We call it an open vendor approach in which
22 different vendors can work together to share one ISFSI
23 space or CISF space but not mixing casks and
24 canisters. This is the reasonable alternative Holtec
25 was alluding to and then declined to evaluate in

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1 Section 2.4.1 of the ER. And we cite to the ISP
2 project petition and amplify this point directly on
3 pages 11 and 12 of the reply.

4 Now to note, though, we can discuss
5 alternatives in more detail in response to board's
6 questions or Holtec's answer. But we don't need it
7 for our contention to get in. Simply having incorrect
8 basis to decline to do an alternatives analysis is
9 sufficient under NEPA regulations, NRC regulations,
10 NRC guidance. The NEPA regs and requirements for the
11 ER tie back to the NRC regulations because 51.45
12 requires the alternatives analysis which then goes to
13 NRC guidance.

14 In addition, there was a point that was
15 asked about whether you need proprietary information
16 to do any such alternatives analysis. You don't.
17 There's a whole NEPA consultant industry that's
18 designed to do alternatives analysis and look at
19 things like that. Nuclear power plants have to do
20 alternative analysis comparing to natural gas plants.
21 Actually, PFS had to do alternatives analysis. We
22 cite to PFS.

23 So we mentioned there are reasonable
24 alternatives, but we don't need that for our
25 contention to get in. Now turning back to the

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1 statement.

2 The reasons Holtec's approach to designing
3 a CISF is not standard. Properly storing spent
4 nuclear fuel requires complex analyses of the cask,
5 canister, and direction to deal with normal,
6 off-normal, and accident events such as earthquakes,
7 fires, and droughts which requires access to
8 proprietary information held by the canister vendor.
9 We describe this throughout our petition and through
10 the George Carver affidavit which has gone unrefuted.

11 And to further drive this point home, we
12 cite to PFS which had a lengthy second hearing which
13 was all about whether a canister would rupture in
14 regards to a design basis event.

15 Now challenging an application for a
16 licensing board is an extreme action and one we would
17 only do if the circumstances warranted it. We tried
18 to make our voices heard before in multiple ways.
19 We've discussed with the NRC staff and both us and
20 AREVA have written letters to the NRC to draw those to
21 your attention in footnote 27 of the petition.

22 In particular, we wrote to the NRC staff
23 directly challenging Holtec's statements in 2.4.1 of
24 the ER, contention 3, back in August 10th, 2017. We
25 wrote to them at the time that this was misleading.

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1 And to this end, we believe the staff has recognized
2 the concerns raised with Holtec's universal CS
3 approach.

4 Turn to footnote 26 of our petition,
5 they've sent the request for information questioning
6 how they can justify adding Orano casks, for example,
7 to the UMAX system -- a canister, Orano canister. But
8 we haven't seen progress until now, until we've
9 actually gone and done this activity, this filing of
10 contentions to deal with the marketing.

11 In fact, it's actually Hotec's inability
12 to close the UMAX Amendment 3 process combined with
13 still marketing the universal CISF and universal UMAX
14 cask that leads to confusion about the scope of this
15 application. And it was only until we made our stand
16 here that Holtec now admits in its answer that the
17 CISF license, if granted, would not allow storage of
18 NAC canisters at the CISF.

19 And after deferring in our August 10th
20 letter, the NRC staff agrees that our contention about
21 relying on the universal canister is incorrect. So as
22 a result, we've actually made great progress through
23 this proceeding. But until Holtec actually stands
24 down on its claim of a universal CISF system and
25 analyzes an alternative of a non-universal approach

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1 which is the standard for any CISF or ISFSI, we need
2 to remain involved.

3 Unless Holtec does these two things, the
4 risk exists that an inadequately analyzed Holtec CISF
5 can store NAC canisters and Holtec's casks at some
6 point in time and it would be subject to harm from
7 radiological incident or NRC regulations or the
8 variety of things we've talked about in our petition,
9 again, which were not really responded to in the
10 answers. And to remind the board specifically
11 regarding our environmental contention, Holtec's and
12 the NRC staff's answers that the license application
13 does not consider a universal cask or CISF does not
14 apply to the ER.

15 The ER covers impacts across all phases of
16 the project explained in Section 1.2 and 1.3. If we
17 don't get our voice in now, a key part of Holtec's
18 path to getting an actual universal CISF and actually
19 getting NAC canisters into Holtec casks at the CISF,
20 the NEPA review and alternatives analysis will have
21 passed without our ability to be involved.

22 On that point, I'll stop my opening
23 statement and we can proceed to questions.

24 CHAIR RYERSON: Thank you, Mr. Desai. I
25 have a couple of questions about your position. As I

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1 recall -- well, I know Holtec opposed because Holtec
2 opposed the standing of very petitioner. So Holtec
3 opposed your standing as did the NRC staff. The NRC
4 staff did not oppose the admissibility of contention
5 4, I believe.

6 MR. DESAI: Three.

7 CHAIR RYERSON: Three.

8 MR. DESAI: Environmental, basically the
9 two safety ones and one environmental.

10 CHAIR RYERSON: Three is the one about
11 alternative design?

12 MR. DESAI: Yes.

13 CHAIR RYERSON: Okay. And so one of them,
14 both of them perhaps made the point that the UMAX cask
15 system is currently not approved for the NAC
16 canisters. And Holtec is not requesting approval for
17 that in this licensing proceeding. So explain to me
18 again why NAC can't wait until Holtec does that.

19 MR. DESAI: All right.

20 CHAIR RYERSON: Assuming it does sometime.

21 MR. DESAI: Right, assuming it does at
22 some time. But we don't have to do that because --
23 and then both of the standing ground, both Holtech's
24 and the NRC's responses are pretty much focused on
25 this issue of we're too early. We have to wait.

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1 That's an argument we can get to over the safety
2 contentions. We can get them in more detail.

3 But with the environmental contention
4 which is the one that the staff is not opposed, does
5 a favor there, the ER purpose and needs statement says
6 that we want to take spent nuclear fuel from plants
7 all over the country. To do that, they have to take
8 NAC canisters because NAC is storing spent fuel at
9 power plants that are shut down and in operating
10 facilities all over the country. That is not an
11 opposed to point.

12 Section 1.3 of the ER talks about how
13 they're going to fit 10,000 canisters in the CISF.
14 And they're evaluating impacts for 10,000 canisters.
15 They can't get there with Holtec. They have to use
16 NAC. And we can ask them about how they plan on doing
17 that.

18 So in order to do that, they have to
19 provide an alternative -- a design alternative that
20 will accomplish that. So the proposed -- they run
21 into this problem actually right now because the
22 proposed alternative is going to be using this Holtec
23 system. They can only use Holtec system. By saying
24 the Holtec system is not universal, they have no
25 actual path to meeting a purpose and needs statement

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1 this point in time.

2 But because of the purpose and needs
3 statement means they want to use NAC canisters,
4 they're envisioning a universal system and therefore
5 our canisters will be involved. We can only
6 participate on the NEPA grounds at this point in time.

7 Let's say this proceeding ends. They move
8 to phase two. They're not going to evaluate the NEPA
9 impacts to phase two or later on because they've
10 evaluated it here. They've already evaluated the
11 impacts of the system and they're already said that we
12 have a universal cask system that can take any
13 canister.

14 CHAIR RYERSON: Now Holtec says, I believe
15 -- I hope I'm not misquoting them. But I mean, the
16 staff who filed simultaneously, of course, with Holtec
17 took the position that, yes, there was an inadequate
18 analysis of design alternatives in the ER. Holtec's
19 position is that you haven't made any showing that
20 there are environmental consequences to design
21 alternatives.

22 MR. DESAI: That's the materiality.

23 CHAIR RYERSON: Pardon?

24 MR. DESAI: The materiality, right? The
25 consequences.

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1 CHAIR RYERSON: The materiality, yes. And
2 speak to that.

3 MR. DESAI: Okay, sure. So before the
4 NEPA look at us, right? The rule of reason, it's not
5 a research document. There's only two alternatives.
6 But first, let's look at the legal standard, 72.34 is
7 on the environmental report. It ties back to 51.45.
8 It says it's an alternative analysis.

9 NEPA regs on alternative analysis say that
10 you have to have a reasonable basis or a description
11 for why you declined to do an alternatives analysis.
12 The NUREG 1748 I believe, Section 5.2.5 says the same
13 thing. There's also a Section 5.2.4 that says to
14 evaluate any and all reasonable alternatives. But
15 particularly, if you're going to decline to do an
16 alternative analysis, you have to provide a reason
17 why.

18 Their reason, they disavowed. They said
19 it's not a UMAX system. So for a contention of
20 admission, we provided the basis for that. And that's
21 -- so by having an incorrect basis to reject doing an
22 alternatives analysis, you're not complying with NRC
23 regulations because you haven't done the alternatives
24 analysis. You're not complying with NUREG-1748 which
25 staff guidance gets due weight. You're not complying

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1 with NEPA regs.

2 So you're having a material failure in
3 compliance with NEPA. And you can't get NEPA review
4 certified. You can't get your license unless you've
5 met all the requirements of NEPA. And actually it's
6 led to a decision Florida Power & Light, 75 NRC 615.

7 CHAIR RYERSON: Is that in your petition?

8 MR. DESAI: No, I don't know if it's in
9 our petition or not. But 75 NRC 615 which basically
10 points out around page 625 that if you find a flaw
11 that gets to being able to complete a part of your
12 NEPA analysis, you have an admissible contention
13 because you've raised a material issue with the
14 adequacy of a NEPA document.

15 CHAIR RYERSON: Okay. Let me ask a
16 question for the staff if we could have a microphone
17 over there. The staff's position was that NAC has no
18 standing, has not established standing. But
19 nonetheless, the staff agreed that -- I may have the
20 wrong number here -- agreed that contention 3 would be
21 admissible if they had standing.

22 Now have you had a chance to look at
23 Holtec's response which finds neither standing nor an
24 admissible contention? And does that change the
25 staff's view at all?

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1 MS. KIRKWOOD: Sara Kirkwood for the NRC
2 staff. Yes, we have reviewed the applicant's
3 pleading. And no, at this point, we are not revising
4 our position on contention admissibility.

5 CHAIR RYERSON: Okay. So if, in a
6 hypothetical world, you agreed they had standing, you
7 would still say contention 3 is admissible?

8 MS. KIRKWOOD: Yes.

9 CHAIR RYERSON: Okay. Thank you.

10 MR. DESAI: And if you want to head down
11 this route, part of Holtec's answer gets to that
12 there's no alternative that we should've analyzed. I
13 would like to respond to that and say that we did talk
14 about an alternative. The alternative is what they
15 wrote using other cask vendors and canisters all in
16 the same ISFSI.

17 Now remember, we're talking about design
18 alternatives. We're not talking about designs for
19 canisters or casks. We're talking about designs for
20 an ISFSI. There is a project being built down the
21 road that lets multiple parties come in to work
22 together to put their canisters and their casks on a
23 broad ISFSI. Every pad will be designed to allow for
24 that to happen.

25 Holtec was the cask and canister vender of

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1 PFS. We cite to PFS in footnote 1. You can look at
2 the EIS for that. They had to evaluate design
3 alternatives. And also you look at the SER, they only
4 used their own casks and canisters. So that is --
5 they're saying you don't have an alternative. They
6 are the new alternative. They're coming up with this
7 new approach to using a universal cask system. But
8 they decline to analyze the standard approach based on
9 the idea of just having universal cask system alone
10 which now they've admitted it doesn't actually exist
11 yet.

12 CHAIR RYERSON: Judge Arnold, do you have
13 any questions at this point?

14 JUDGE ARNOLD: Yes, no question on
15 contentions, but I'm still stuck on standing. I look
16 at Holtec's 4.1.1 spent fuel canisters. And it says
17 the spent nuclear fuel bearing canisters that will be
18 stored in the HI-STORE CIS facility are limited to
19 those included in the HI-STORM UMAX FSAR. No canister
20 that is not included in the HI-STORM UMAX FSAR can be
21 stored in the HI-STORE CIS facility.

22 Given that this seems to say explicitly
23 that your canisters would not be used, how do you have
24 standing?

25 MR. DESAI: There's two points on

1 standing. I'm going to deal with the environmental
2 one which I've been hitting on a little bit.

3 JUDGE ARNOLD: I don't believe our
4 regulations differentiate between environmental
5 standing and safety standing. It's just standing.

6 MR. DESAI: On the contention. So the
7 contention is based on if there's a standing. Or at
8 least let's go to the environmental report. So they
9 make this claim that they're not considering NAC
10 canisters at all. How do they get to evaluate the
11 impacts then for storing spent nuclear fuel from all
12 plants across the country?

13 Their ER's purpose and needs statement has
14 to involve taking non-Holtec canisters. And that's
15 what they get to in their design alternatives
16 analysis. How are we going to get here? How are we
17 going to design the CISF that can do that?

18 One way is to actually take everyone's
19 canisters and casks and put them on our CISF. The
20 other way is to do a universal UMAX. They use the
21 word universal there. So whenever they use the word
22 universal in their application, they have to be
23 relying on that idea of taking NAC canisters.

24 JUDGE ARNOLD: Well, wait. You infer that
25 the word universal means more than, hey, they would

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1 fit in it?

2 MR. DESAI: The word universal means they
3 will take canisters of any -- that's what the website
4 says. They'll take canisters of any providence,
5 whether they be AREVA's canisters or NAC's canisters.
6 That's what the website says.

7 JUDGE ARNOLD: Well, I'm interested in the
8 application. Websites are notoriously wrong.

9 MR. DESAI: If you want to claim Holtec's
10 website is wrong, that's totally fine. But that gets
11 to the definition. We're looking for guidance as to
12 what universal means. And so if we have to figure out
13 what the application says about universal, including
14 the environmental report which is part of the
15 application, they're relying on a system that has to
16 take NAC canisters.

17 So I'm actually challenging Holtec's
18 answer when they say that their application is not
19 considering, Holtec, NAC canisters because they're
20 focused just on the licensing report part of it. They
21 say that our application is only for phase one. But
22 they get to evaluate the impacts for all 20 phases at
23 one time right now during this application.

24 So if they're going to evaluate all the
25 impacts right now, they have to evaluate the impacts

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1 for storing canisters from every type of company
2 because that's what they're trying to do. And yes,
3 that's their purpose and needs statement, store spent
4 nuclear fuel from all plants across the country.

5 JUDGE ARNOLD: So are you suggesting if
6 this license is approved for only those canisters in
7 the HI-STORM UMAX FSAR that some time down the road
8 without a license amendment, they'll start putting NAC
9 canisters in?

10 MR. DESAI: So according to the safety --
11 the intent of the safety report, they'll possibly get
12 a license amendment. They may not. We'll talk about
13 that in a second. But one thing they will not do
14 during that process is evaluate environmental impacts
15 because those impacts have all been evaluated in this
16 ER because this ER says that we are evaluating all
17 impacts during the 20 phases of the project including
18 the design of the CISF.

19 They're finalizing the design for the CISF
20 now in terms of a NEPA review because they're
21 analyzing all 20 phases of the project at once. So if
22 they amend later down the road so they can add phase
23 two, add phase three and get the approval to store
24 radiologically that much material, they're not
25 changing the design of a CISF. And they don't relook

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1 at the design of a CISF. They're only doing it once
2 because they don't want to do 20 NEPA reviews.

3 JUDGE ARNOLD: I heard you suggest --

4 MR. DESAI: And you can't analyze the
5 design of the CISF later on. Sorry.

6 JUDGE ARNOLD: You suggested that a
7 license amendment can happen without an environmental
8 assessment?

9 MR. DESAI: A license amendment can happen
10 without an environmental assessment if they've already
11 done the environmental assessment. So for example,
12 with a nuclear power plant, you do a license renewal.
13 There's a lot of environmental work that's already
14 been done. GEIS for license renewals, a lot of that
15 is already incorporated in the regs. They don't have
16 to analyze that again.

17 So if they've done the environmental
18 review for the design of the facility all at once now,
19 they will just cite to that. They do not have to do
20 -- they're going to take the position they don't have
21 to do an environmental review later. And I don't see
22 any response to that argument. I'll get a chance
23 tomorrow, I guess.

24 And to the safety contentions in the
25 licensing report, so our biggest -- there's three

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1 concerns. And you asked, like, one of the questions
2 was why is a license amendment process worse than a
3 license process? And we've dealt with that in the
4 environmental report issue.

5 There's three issues with waiting on the
6 safety analysis part. One is 72.46 allows the NRC
7 staff to grant a license amendment before allowing for
8 a hearing. Now I looked at PFS, the other time we've
9 licensed one of these things. That was a massive
10 hearing to discuss casks, canister, and directions.
11 That would all happen ten years have passed. A very
12 long period of time had passed.

13 All that time, if the amendment is granted
14 first, then Holtec can put NAC canisters in Holtec's
15 casks. And we take all those risks that we were
16 talking about, that we talked about in our contention.
17 And then after that, the thing with spent fuel
18 storage, it's hard to take out canisters from casks.
19 You don't want an unnecessary dose. There will be
20 issues with actually enforcing that process. So
21 that's one thing. We're very concerned about the
22 issue of a pre-hearing amendment.

23 Step two, the second issue is the
24 language. And put in our reply and we can deal with
25 the motion to strike issue if you want to right now.

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1 But they have all these technical statements that talk
2 about how they're having a universal capability, how
3 their casks have been engineered to store materials,
4 store any canister. So those will stay in this. That
5 will become part of the licensing basis for the
6 facility. We will not have had a chance to object to
7 those statements.

8 What we don't want to see happen is down
9 the road try to incorporate this license amendment.
10 And they say, well, we've already discussed this in
11 this ER. Licensing basis says it supports statements
12 that our cask is big enough or technically sound
13 enough to store any canister within its cask.

14 So how do we deal with those statements?
15 This is a unique situation where we have an
16 application that says different things. We have an
17 application that says at one point we have a license
18 condition to only take Holtec canisters right now.
19 And then a part of the ER that says we're evaluating
20 we have a universal cask system and then all these
21 other statements.

22 So how do we get a chance to object to
23 those? Actually, we talk about this in our reply.
24 But we think there would be three things we would need
25 in order to preserve all our rights. Some sort of --

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1 let me get to this here. Actually, let me just quote
2 it.

3 Statements in this application cannot be
4 relied upon as a technical basis for approving
5 insertion of a non-Holtec canister into a Holtec cask.
6 We have to make sure we have pre-amendment hearing
7 rights and to make sure it's noticed in the Federal
8 Register.

9 The third point is there are things like
10 administrative license amendments, 72.16. The regs do
11 say that they're supposed to notice any amendment.
12 But every day licenses change RSOs, change phone
13 numbers. This is a low risk thing, but we are
14 concerned that it could be determined that this is an
15 administrative license amendment because the COC has
16 been amendment and we don't get a right to a hearing.

17 I'd note that the only reason we mention
18 this because there's no answer. There's no statement
19 actually by Holtec I believe, and correct me if I'm
20 wrong, that they get hearing rights. They say, we get
21 to participate at that point in time. We get to
22 participate through a variety of ways and maybe have
23 no legal bearing. So unless we're willing to say all
24 those things are true, then we don't get the same
25 rights in a license amendment as we get in a licensing

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1 hearing.

2 JUDGE ARNOLD: I have no further
3 questions.

4 CHAIR RYERSON: Judge Trikouros?

5 JUDGE TRIKOUROS: This NEPA analysis which
6 you're claiming basically covers every other canister.
7 What's the basis for your saying that that's what will
8 happen if a license amendment is filed in the future
9 with respect to incorporating NAC canisters into this
10 license?

11 MR. DESAI: We're talking about the actual
12 statement of the design alternative analysis that are
13 relying on the universal canister. Section 1.3 of the
14 ER states that we're analyzing all 20 phases of the
15 project. Section 2.2 I think also gets into this as
16 well. They're saying that this ER -- there's other
17 parts of this ER that say this ER is for the final
18 design of the facility. So when they make that final
19 design, they're designing to incorporate only UMAX
20 casks and canisters that meet the purpose and needs
21 statement.

22 JUDGE TRIKOUROS: But your contention 2 is
23 really saying that's inadequate. You need more
24 information that you don't have to be able to claim
25 universality.

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1 MR. DESAI: Our contention 2 is the safety
2 contention, right? We're talking about the omission
3 or are you talking about the NEPA contention?

4 JUDGE TRIKOUROS: We'll I'm asking. Your
5 contention 2 indicates there's technical information
6 missing. Would that also apply to the environmental
7 report, the NEPA analysis?

8 MR. DESAI: So --

9 JUDGE TRIKOUROS: Could they say we have
10 universality and whatever information they have is
11 adequate? Is that what you're saying? Or are you
12 saying you can't make that universality claim because
13 you don't have certain technical information from us?

14 MR. DESAI: So on this safety contention
15 --

16 JUDGE TRIKOUROS: On the environmental
17 side now. On the safety side, there's no question in
18 my mind that any license amendment would have to
19 reevaluate the safety side. Is that not correct?

20 MR. DESAI: On the safety side, yes, we
21 would want to believe our license amendment would open
22 the door to reevaluate the safety issues. And if they
23 don't, if they say that they don't and they're going
24 to rely on any part of this application for a later
25 license amendment, then they're not. Then they're

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1 actually doing the opposite. Then they're saying
2 they're not reevaluating safety issues in a license
3 amendment proceeding.

4 And that's the concern we have that we
5 just talked about with relying, for example, on some
6 of those assertions or statements made in the
7 licensing report later on to avoid doing additional
8 safety analysis. But the environmental review --
9 sorry, what were you going to say?

10 JUDGE TRIKOUROS: No, go ahead, go ahead.

11 MR. DESAI: With the environmental review,
12 I think this is getting to the question, and correct
13 if I'm wrong, about proprietary information. One of
14 the questions in the list was, do we need proprietary
15 information to do an alternatives analysis? The
16 proprietary information is needed for their
17 alternative, for the proposed alternative. It's
18 needed for them to be able to fit non-Holtec canisters
19 into a Holtec cask.

20 To evaluate alternatives, you don't need
21 any proprietary information at all. And it's a
22 business. I made light of this, but it is a business
23 that you can hire people to do analyses for NEPA.
24 That's the whole industry.

25 And when you look at, for example -- you

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1 know, they cited for Vogtle ESP so I just picked this
2 one up in page 19 or 20. If you look at the EIS for
3 Vogtle, they had to compare the NEPA power plant for
4 the expansion against natural gas plants, against coal
5 plants. They didn't have to call up Massey Coal and
6 ask for proprietary information to do that analysis.

7 Now they can go as far as is reasonable.
8 Instead of relying on this universal cask that they've
9 now said doesn't exist, instead what if they had said
10 the alternatives analysis we looked at this far and
11 this is what we can come up with based on our
12 analysis. That might be going as far as is necessary.

13 But they haven't done that, and they can't
14 just assert in the end of their answer that
15 proprietary information might be needed to evaluate
16 alternatives. They have to do that as part of the
17 NEPA process. Otherwise, they get a chance to
18 rehabilitate their ER through the answer which doesn't
19 satisfy the requirements of NEPA.

20 JUDGE TRIKOUROS: And if a license
21 amendment is requested in the future, this contention
22 you're filing now would not be valid?

23 MR. DESAI: The environmental contention
24 would not be valid because an environmental -- if they
25 filed the license amendment request in the future and

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1 we said, you should evaluate an alternative design to
2 the CISF, they would say, wait, we evaluated the
3 design of CISF right now, all three phases in this ER
4 which then becomes an EIS. And so we've already
5 evaluated it. You're out of time. This is the bind
6 we're into with -- we have to be present at every
7 phase to avoid that from happening. And the ER, it's
8 a very present risk because they've already said
9 they're evaluating all 20 phases of this project now.

10 JUDGE TRIKOUROS: And what you're looking
11 for is for Holtec to work with you in the same manner
12 as the Interim Storage Partners?

13 MR. DESAI: We're just looking for a
14 contention admissibility. We're looking to make -- I
15 mean, a broader scope and we can to --

16 JUDGE TRIKOUROS: What's the end -- when
17 you have a contention admitted, you're looking for
18 some judgment. I don't understand what it is that
19 you're looking for.

20 MR. DESAI: We'd like a contention
21 admitted pointing out a material flaw in the NEPA
22 analysis. We have a hearing to determine the scope of
23 that material flaw, the correction to the material
24 flaw, and to make sure we get our voice heard as to
25 the extent they're going to rely on the universal cask

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1 system.

2 So they're saying they're going to rely on
3 the universal cask system. That's kind of the
4 foundation of what we're opposed to because a
5 universal cask system, they use NAC canisters. If
6 they're going to rely on that universal cask system,
7 we should get a contention in that allows us to go to
8 a hearing and reevaluate whether that universal cask
9 system can be relied upon for the ER. This is the
10 only chance where we're going to get to do that.

11 And part of that might involve evaluating
12 alternative analyses and that's for the hearing. And
13 to get the contention in, we just have to show a
14 material flaw with meeting the requirements of NEPA
15 and failing to meet 40 CFR 1502.14(a) which is the
16 requirement that you provide a basis for rejecting to
17 do design alternatives. It's a material flaw with
18 NEPA.

19 JUDGE TRIKOUROS: Does the staff agree
20 with your reading of all this?

21 MR. DESAI: Well, staff did not object to
22 our contention, the admissibility. They agreed that
23 we pointed something that was incorrect in the ER.
24 They agreed that you can get a contention on that so
25 we would get the hearing to evaluate that statement.

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1 JUDGE TRIKOUROS: With respect to loss of
2 nuclear rights?

3 MR. DESAI: With respect to, yes, the NEPA
4 issue.

5 JUDGE TRIKOUROS: Staff agrees with your
6 reading that NEPA rights will be lost in the future?

7 MR. DESAI: The staff does not agree to
8 standing. And one of the arguments they make is that
9 the CISF or this is the same argument Holtec has made
10 which is that we're not contemplating a universal CISF
11 at this point. To which our response is they are for
12 the ER part of this at the very least. And for the
13 safety, we have this argument about all the statements
14 they make of their application. Particularly the ER,
15 it's a much simpler point. They are contemplating a
16 universal CISF because they have to because they're
17 designed their ERs for the final design of the
18 facility.

19 JUDGE TRIKOUROS: The key of me is why
20 there would not necessarily be an ER amendment if a
21 license amendment is filed.

22 MR. DESAI: So the license amendment,
23 let's see what that would cover. The license
24 amendment would say that the license amendment is to
25 incorporate a COC. The COC would say or the amendment

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1 to the COC would say we can fit a canister of AREVA,
2 NAC into a UMAX cask. That is the basis of this
3 amendment.

4 And so we'd be able to challenge whether
5 that's accurate on a safety grounds, whether that
6 might result in some other impact. But the
7 alternative design of the facility will have already
8 been set because this ER is 20 phases long. It's the
9 setting the design for the facility. So later if you
10 have an amendment proceeding to deal with this COC
11 amendment, we'll get to talk about the NEPA issues
12 related to that COC amendment.

13 But we won't get to talk about the
14 alternative designs of the facility. They'll tell us.
15 You'll tell us too that we should've done that when
16 the design of the facility was actually up for bat
17 which is at this point in time.

18 CHAIR RYERSON: It seems to me that what
19 I'm hearing you say in part is that you're here today
20 because if you're not here today you won't be heard
21 tomorrow. And on that issue, plus generally this
22 contention or this petition, I'd be very much
23 interested in Holtec's response which Mr. Silberg at
24 your option you could address now or tomorrow when we
25 get to you. Which do you prefer?

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1 MR. SILBERG: If you could restate the
2 question.

3 CHAIR RYERSON: What I'm sharing a lot
4 here is that NAC is in this proceeding today because
5 they're concerned about events that may or may be
6 likely to happen in the future and that they will be
7 prejudiced in their ability to deal with those events
8 in the future if they aren't here today filing this
9 contention. Mr. Desai, is that a somewhat accurate --

10 MR. DESAI: Yes.

11 CHAIR RYERSON: -- statement.

12 MR. DESAI: On the environmental side.

13 CHAIR RYERSON: On the environmental side.

14 MR. DESAI: And I would add to that, that
15 we are responding to, in essence, their counter.
16 We've said in our petition they're licensing and
17 dealing with the environmental impacts for universal
18 CISF now. They're responding and saying, no, it's not
19 a universal CISF right now to which our response is
20 they're dealing with these universal CISF issues now.

21 CHAIR RYERSON: And Mr. Silberg, do you
22 want to respond to that now or tomorrow?

23 MR. SILBERG: Tomorrow. I think the
24 answer is we think that's incorrect. But we'll have
25 a fulsome answer.

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1 CHAIR RYERSON: Okay. We'll make a point
2 of asking you that tomorrow. Shall we continue or
3 take a break for several minutes? Or we just stop
4 today? Yes, I think rather than begin with Fasken
5 with only less than ten minutes left, we will call it
6 a day today.

7 We'll begin at 9:00 a.m. tomorrow -- thank
8 you, Mr. Desai. We'll begin at 9:00 a.m. tomorrow
9 with either, briefly, the representative from the City
10 of Carlsbad or Fasken, Mr. Eye. And then we will get
11 to Holtec and the staff, and I think there's a good
12 chance we will finish by lunchtime. We will see how
13 many questions we have for you. So that is it for
14 today. We will see you all tomorrow. Thank you.

15 (Whereupon, the above-entitled matter went
16 off the record at 4:22 p.m.)

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