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Title: Exelon Nuclear Texas Holdings
Victoria County Station Site
Oral Arguments

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ASLBP Number: 11-908-01-ESP-BD01

Location: Victoria, Texas

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY AND LICENSING BOARD PANEL
4 ORAL ARGUMENTS
5

6 IN THE MATTER OF Docket No.
7 EXELON NUCLEAR TEXAS 52-042
8 HOLDINGS, LLC
9 (Victoria County Station ASLBP No.
10 Site) 11-908-01-ESP-BD01
11

12 Wednesday, March 16, 2011

13 Theatre Victoria
14 Leo J. Welder Center
15 214 N. Main Street
16 Victoria, Texas
17

18
19 The above-entitled matter came on for oral
20 argument at 9:00 a.m.
21

22 BEFORE THE LICENSING BOARD:

23 MICHAEL M. GIBSON, Chair

24 DR. MARK BARNETT, Administrative Judge

25 DR. ANTHONY J. BARATTA, Administrative Judge

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1 APPEARANCES:

2 On behalf of the NRC:

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19 On behalf of Texas for Sound Energy Policy:

20 JIM BLACKBURN, ESQ.

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P R O C E E D I N G S

(9:00 a.m.)

JUDGE GIBSON: Good morning.

MALE VOICE: Good morning.

JUDGE GIBSON: We are here today to conduct oral argument on the Early Site Permit proceeding for the Victoria County Station Site. We are convening this oral argument because Exelon Nuclear Texas Holdings filed an application seeking to have a location in Victoria County, Texas approved as the site for a nuclear power plant.

Now, Texans for a Sound Energy Policy challenged this application for an Early Site Permit, and it submitted its petition challenging this application on January 24 of this year in response to a November 23, 2010 *Federal Register* notice. For those of you interested, it's posted at 75 *Federal Register* 71467.

In this petition Texans for a Sound Energy Policy requests an adjudicatory hearing on Exelon's application. On February 2 of this year, the Chief Administrative Judge issued a notice designating this three-member Licensing Board to conduct this proceeding.

Now, by way of background, Early Site

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1 Permit applications are governed by Part 52 of 10 Code
2 of Federal Regulations, which are the NRC's
3 regulations. If this Early Site Permit is issued, it
4 will authorize a specific location on which to site a
5 nuclear power plant in accordance with the agency's
6 regulations.

7 Prior to the issuance of an Early Site
8 Permit, the Nuclear Regulatory Commission's staff,
9 which is one of the participants here, has the
10 important responsibility of completing safety and
11 environmental reviews of the Early Site Permit
12 application in accordance with several statutes,
13 including the Atomic Energy Act, the National
14 Environmental Policy Act, and the regulations of the
15 Nuclear Regulatory Commission.

16 Those regulations and the Atomic Energy
17 Act provide an opportunity for interested persons,
18 public interest groups, and other organizations and
19 state and local governments to seek a hearing on
20 health, safety, environmental, common defense, and
21 security matters concerning the application that
22 Exelon has filed, and on the Nuclear Regulatory
23 Commission staff's environmental review of that
24 application.

25 With respect to the conduct of the

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1 adjudicatory process, the panel's administrative
2 judge's are independent of and do not work for or with
3 the Nuclear Regulatory Commission staff on this
4 application.

5 Rather, this Board is charged with
6 deciding whether the contentions that have been
7 proffered by the petitioner, Texans for a Sound Energy
8 Policy, are admissible, and if they are admissible, we
9 are to determine, after an administrative trial,
10 whether those contentions will effect the granting,
11 conditioning or denying of the Early Site Permit.

12 Our decisions on hearing matters are
13 subject to review by the Nuclear Regulatory
14 Commissioners sitting as the Commission, which serves
15 as the agency's supreme tribunal, and then by federal
16 courts of their decision.

17 Relative to the specific matters that are
18 before us today in this initial prehearing conference,
19 neither Exelon nor the Nuclear Regulatory Commission
20 staff has raised a challenge to the standing, or legal
21 interest of Texans for a Sound Energy Policy.

22 By standing, we mean that the petitioner,
23 Texans for a Sound Energy Policy, must show that the
24 grant of an Early Site Permit threatens them in
25 some -- with some concrete injury. Although the Board

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1 has an independent responsibility to assess and rule
2 upon these participants -- whether these participants
3 have standing, under the circumstances we see no
4 reason to entertain arguments today regarding
5 standing.

6 Rather, the participants today will have
7 an opportunity to make oral presentations on whether
8 the proffered contentions from Texans for a Sound
9 Energy Policy are legally sufficient to be admitted as
10 issues to be adjudicated in this proceeding.

11 Those contentions, and there are 23 of
12 them, raise various challenges to certain aspects of
13 Exelon's Early Site Permit application, including its
14 environmental report and its site safety analysis
15 report.

16 Before we begin, I would like to introduce
17 the Board members. To my right is Judge Anthony
18 Baratta. Judge Baratta is a nuclear engineer and a
19 full-time member of the Atomic Safety and Licensing
20 Board Panel. He also serves as chief administrative
21 judge among the technical panel members.

22 To my left is Judge Mark Barnett, who is
23 an environmental engineer, and is a part-time member
24 of the panel.

25 I am Michael Gibson. I'm an attorney and

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1 I am the chairman of this Licensing Board.

2 For those of you in the audience, a few
3 notes. Please do not bring any food or drink. This
4 is a beautiful facility and we want to take very good
5 care of it.

6 And I hope none of you expected to come to
7 speak today. If so, I apologize for any
8 misunderstanding you may have received, but this is
9 not an open mike situation. This is part of a
10 proceeding that could lead to trial, and the people
11 who will be speaking today will be attorneys who
12 represent these three parties.

13 At this point I would like to have counsel
14 for the various participants identify themselves for
15 the record. Let's start with Texans for a Sound
16 Energy Policy.

17 MR. BLACKBURN: I'm Jim Blackburn of the
18 Blackburn and Carter law firm in Houston representing
19 Texans for a Sound Energy Policy. With me is Charles
20 Irvine and Mary Conner from my office as well.

21 JUDGE GIBSON: Thank you.

22 MS. PRICE: Good morning, Your Honors.
23 Sarah Price representing the NRC staff. With me at
24 counsel table are my co-counsel, Laura Goldin and
25 Kevin Roach.

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1 JUDGE GIBSON: Okay. Thank you.

2 MR. FRANTZ: My name is Steve Frantz from
3 the law firm of Morgan, Lewis & Bockius in Washington,
4 DC. We represent the applicant. With me on my left
5 is John Rund, and on my right is Steven Burdick.

6 MR. GIBSON: Thank you.

7 Having completed our introductions, now I
8 would like to make a few additional comments about
9 what we hope to accomplish over the next two days, and
10 then we will proceed to argument.

11 As we address the issue of contention
12 admissibility, we are going to proceed a little
13 differently from the approach that you may be familiar
14 with that's been followed by other boards. This Board
15 has a number of questions and a great deal of ground
16 to cover over these two days, and it intends to ask
17 counsel for all sides about those.

18 Rather than allotting you a specific
19 amount of time for a reply and rebuttal, we just want
20 you to answer our questions. And I suspect that by
21 the time we finish tomorrow, Texans for a Sound Energy
22 Policy, the applicant and the staff will all feel that
23 they've had an adequate opportunity to address all of
24 the issues.

25 If there is any time at the end, we will

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1 try to allow you a short closing. But my suspicion is
2 you won't feel that you need that.

3 Before we begin with those -- with our
4 opening statements not to exceed 10 minutes, Judge
5 Baratta has a few logistical items that he would like
6 to cover with you.

7 JUDGE BARATTA: Yes, just quickly. I
8 think I've spoken with the petitioners and the NRC
9 staff about the facilities that are available to
10 should you need a break out. So if there are any
11 questions about that, if not, that's all I have to
12 say.

13 (No response.)

14 JUDGE BARATTA: Okay.

15 MR. GIBSON: Okay. One other thing, if
16 you can't hear us, please hold your hand up and we'll
17 speak. People usually never have any trouble hearing
18 me for some reason, but.

19 Okay. Let's start with Texans for a Sound
20 Energy Policy.

21 Oh, one other thing, Ms. Hove, who is our
22 clerk here, will be keeping time, and when you're at
23 five minutes and two and one, she'll let you know. We
24 want to be sure we don't go over 10 minutes. Thank
25 you.

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1 OPENING BY TEXANS FOR A SOUND ENERGY POLICY

2 MR. BLACKBURN: Thank you, Your Honor,
3 members of the panel. I am Jim Blackburn, and I am
4 here representing Texans for a Sound Energy Policy or
5 TSEP. I want to thank you for coming down to the
6 Texas Gulf Coast and holding this hearing.

7 We gather today to consider whether
8 proposed contentions submitted by TSEP should be
9 accepted by the Atomic Safety and Licensing Board.
10 TSEP appears today conscious of the serious and
11 unfortunate events in Japan, events which cannot and
12 should not go unnoticed by the Board.

13 These events inform us of the seriousness
14 of the issues before the board and the Victoria
15 Community. Nuclear power is high-risk, it's a high-
16 stakes business. Everyone here should be sobered by
17 the events in Japan and by the seriousness of the
18 matters at hand.

19 TSEP is here today in opposition to the
20 Early Site Permit submitted by Exelon for the Victoria
21 County Station (VCS) proposed facility. As TSEP
22 understands this process, the goal is to determine if
23 this site is suitable for the construction of one or
24 more nuclear power reactors. Site suitability
25 includes both safety and environmental impact

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1 concerns.

2 TSEP believes and will argue that this
3 site is neither safe nor environmentally acceptable.
4 The key to preventing nuclear and environmental
5 disasters is to address site selection honestly,
6 openly and comprehensively. That's why we're here
7 today.

8 First, TSEP would note that the VCS
9 proposed site is a greenfield site. It has not been
10 previously vetted. There is no operating experience
11 at this site.

12 From a safety perspective, TSEP has raised
13 four safety contentions. And from the outset, TSEP
14 would note our concern about the cavalier attitude of
15 Exelon towards safety, as well as concern with the
16 process that appears designed to deliberately obscure
17 key safety issues regarding the site.

18 As we understand the position of Exelon,
19 it does not matter if there is faulting, hundreds of
20 oil and gas wells, toxic gas and methane, and
21 inadequate water supply as long as the power block
22 itself is not directly affected.

23 Additionally, Exelon demonstrates disdain
24 for the instability and uncertainty of the geologic
25 platform for this facility. Essentially, we have a

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1 geologic platform of silt and clay that is riddled by
2 fractures and oil and gas penetrations.

3 The subsurface here is active. It has
4 cracks. It is pressured. It has interconnections.
5 It has active oil and gas extraction. It can and will
6 change over time. It has toxic gas and it has
7 explosive gas.

8 It poses potential dangers to the safe
9 operation of a nuclear facility, and we have an
10 engineering report that supports this position, yet we
11 are told in submissions that none of this matters.

12 TSEP believes that good engineering can
13 address many potential safety issues; however, you
14 cannot engineer around issues that are not recognized,
15 not studied and not evaluated.

16 And consider water. Exelon's proposed
17 plan includes a cooling pond that is clearly crossed
18 by two, and potentially four, subsurface faults.
19 These faults clearly threaten the stability of the
20 cooling pond.

21 Exelon does not deny this but instead
22 argues that it does not matter if the cooling pond
23 fails because it is not a safety feature. It seems
24 that the Japanese situation suggests that a reserve
25 supply of water may, in fact, be a major safety issue.

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1 Without the salt water to pour on the core
2 as a last resort, the situation in Japan would have
3 already been worse. There is no such fallback here.
4 The cooling pond could function as a last resort
5 facility, but it may, in fact, be breached and
6 drained, assuming sufficient water to fill the pond at
7 all.

8 Which brings us to water availability.
9 TSEP avers that Exelon cannot guarantee water at all
10 times, and Exelon may even agree with this assessment.
11 Exelon clearly states that it will simply shut the
12 plant down when the cooling pond levels are too low.

13 Honestly we could not believe that
14 response. We were both surprised and concerned. Why
15 would someone locate a nuclear power plant at a site
16 without adequate water supply and why would the NRC
17 allow them to do this?

18 According to our expert report by Dr. Ron
19 Sass, the potential climate change in this part of the
20 United States will further worsen water supply issues.
21 Simply stated, this part of the Texas coast is dry and
22 getting dryer. We are water challenged.

23 Why would anyone locate a water intensive
24 use such as a nuclear power plant in an area that
25 lacks sufficient water? Where does common sense enter

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1 into these siting decisions? I shudder when I hear an
2 applicant state that they will simply shut down the
3 facility when the water is short. That is simply
4 contrary to the notion of adequate site selection.

5 And then there is the issue of the impact
6 of water usage on San Antonio Bay, Espiritu Santo Bay,
7 Carlos, Mesquite and Aransas Bays, and the endangered
8 whooping crane.

9 Make no mistake about it: If Exelon is
10 permitted by NRC, and uses the GBRA/UCC-Dow water
11 right, it will be taking the last water out of the
12 Guadalupe River at the Salt Water Barrier during the
13 times of drought. It will prolong the drought of
14 record from 22 months to 40 months relative to the
15 bay. It will cause long-term damage to the estuary.
16 It will kill whooping cranes.

17 All of this will be to the detriment of
18 the environment, the economy and the people of the
19 Texas coast. Livelihoods depend upon our bays. There
20 is dollar value in the shellfish harvest, in
21 recreational and commercial fishing, and in home sales
22 to those who wish to enjoy the coast.

23 Frankly, we believe that once the full
24 impact of this facility is understood, the impacts
25 upon the bay and the whooping crane, particularly in

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1 light of climate change, will be extreme. It will
2 cause impacts of such a magnitude that the cost of
3 mitigation and implications of mitigation will
4 eliminate the site from an economic standpoint if not
5 for violation of the Endangered Species Act.

6 As we move forward with the discussion of
7 these issues, the question that should be most
8 prominent is why this site? Why not another? Why not
9 one without faulting, one without oil and gas
10 activity, one without a water shortage, one that does
11 not lead to whooping crane mortality?

12 TSEP reviewed all existing NRC-licensed
13 power plant sites and none had the type of problems
14 that we're raising in this proceeding. The National
15 Environmental Policy Act certainly requires a thorough
16 analysis of alternatives. At this time, Exelon and
17 the NRC staff have argued that certain of these issues
18 do not raise safety concerns.

19 We disagree with that, but at the least,
20 these issues certainly raise alternative site
21 suitability issues. NEPA requires nothing less than
22 a full examination of the alternative sites with
23 disclosure of key issues and their associated
24 costs. In its submissions, TSEP has met
25 its burden on a solid majority of the submitted

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1 contentions. And it should be remembered that TSEP
2 does not have to prove, at the contention stage, its
3 case, but rather must make a showing of a true factual
4 or legal controversy germane to this proceeding.

5 We have submitted a hundred-plus page
6 engineering report on the safety issues. We have
7 submitted a statement from a computer modeler
8 regarding bay impacts, and we have submitted
9 affidavits from an excellent professor on whooping
10 crane impacts and on climate change impacts.

11 We are not making wild accusations without
12 basis or reason. We know the Texas coast, and we know
13 the problems at this site. We simply ask that we be
14 given the chance to bring this knowledge and
15 information before the Licensing Board.

16 Along these lines, TSEP would note that
17 certain of its proposed contentions have been accepted
18 by Exelon, and even more have been accepted by the NRC
19 staff. We thank both Exelon and the NRC staff for not
20 opposing issues that they believe are germane and
21 properly presented. We ask that the Board duly note
22 these positions and at the least accept these
23 uncontested contentions.

24 In closing, I want to revisit the Japanese
25 situation. One can only imagine the re-evaluation

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1 that is currently occurring, wishing for a chance to
2 revisit certain decisions and possibly certain
3 omissions.

4 Thankfully, with regard to the Victoria
5 County Station nuclear plant, we are at the beginning
6 of a process to select a site. The errors and
7 omissions have not yet occurred. That's the good
8 news.

9 All of us involved in this process have an
10 obligation to search for the truth and to ensure that
11 important safety or environmental issues are not
12 overlooked.

13 If this site is not a good one, it's the
14 job of the Licensing Board to so find. This site has
15 different problems and different issues than ever
16 considered before by the NRC or the Atomic Safety
17 Licensing Board.

18 We urge that you grant us party status,
19 admit our contentions and allow us to develop and
20 present what we consider to be bona fide issues.
21 Thank you very much.

22 MR. GIBSON: Thank you. Just before we
23 proceed to the next one, I have a small request.
24 Would it be possible to move the microphone in some
25 way. I have absolutely no eye contact with you, Mr.

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1 Blackburn.

2 MR. BLACKBURN: Well, yes, I quite agree
3 with you. I've never quite had one like this in my
4 face before.

5 MR. GIBSON: It's fine, it's just -- it
6 was more distracting to me. It's probably my own --
7 okay. Thank you.

8 Mr. Frantz.

9 MR. FRANTZ: Thank you, Judge Gibson.

10 OPENING ON BEHALF OF THE APPLICANT

11 MR. FRANTZ: I couldn't disagree with
12 disagree with Mr. Blackburn more. He says that Exelon
13 has a cavalier attitude towards safety. That simply
14 is not correct.

15 Exelon is the largest operator of nuclear
16 power plants in the United States. It's history --
17 safety history is superb, second to none. We have an
18 excellent operating history.

19 We've shown our commitment to safety here
20 in our investigations of this site. If you look at
21 just one small chapter, chapter 2 of our site safety
22 analysis report, that alone approaches almost 2,000
23 pages of evaluation.

24 If you look at the entire application,
25 both from the environmental side and from the safety

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1 side, it's thousands of pages long. We have not taken
2 this lightly at all.

3 Not only have we done extensive reviews of
4 literature, we have actually walked down the site, we
5 have done site investigations, including borings and
6 other evaluations of the geology. We have thoroughly
7 evaluated this site, and we are not showing, contrary
8 to his allegations, any disdain for the geology of the
9 site.

10 He claims that there is toxic and
11 explosive gas on the site. That is pure speculation.
12 He has not cited any information to show that there's
13 any release of toxic or explosive gases onsite.

14 He refers to the growth faults. The
15 growth faults, unlike those in Japan, are not tectonic
16 in nature; they pose no seismic threat. The only
17 threat is a possibility of surface deformation if the
18 growth faults were to move.

19 Even if they were to move here at the
20 Victoria site, they would pose no threat to any
21 safety-related structure on site. All safety-related
22 structures are located away from the growth faults.

23 As Mr. Blackburn indicated there is one
24 growth fault located underneath our cooling basin. He
25 says we don't care whether the cooling basin fails.

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1 That obviously ridiculous. It's a significant
2 economic issue, if nothing else, for us.

3 But to the extent that it pertains to
4 safety, it doesn't have any effect on safety. We have
5 safety-related cooling systems that will ensure the
6 safety of the plant. The cooling pond is not needed
7 for any safety purpose.

8 To the extent he's saying that there's no
9 assurance of water at all times, that's correct, and
10 our application says that. There will be times of low
11 river flow, and that's why we have a cooling basin, a
12 several thousand acre cooling basin.

13 That cooling basin is designed to maintain
14 the normal operation of the plant during periods of
15 low flow. So we will be able to operate during
16 conditions of low flow without withdrawing water from
17 the plant -- from the river. And, in fact, we have
18 analyzed the drought record and have shown that we can
19 continue to operate during the drought record.

20 Our statement to the effect that, if
21 forced to, we could shut down if there's insufficient
22 water, that's just a simple statement of fact. It
23 doesn't mean we expect that to occur. We're just
24 saying from a safety perspective it poses no safety
25 threat. And we need to keep that issue separate from

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1 the issues on the operation of the plant.

2 He says that there won't be sufficient
3 water over the long term to continue to operate the
4 plant. That just is simply inconsistent with the
5 state's regional water plan.

6 The Region L water plan shows out through
7 the year 2060 that there's going to be sufficient
8 water, not only for this plant, but for other demands
9 on the resources. And we do no -- will not be using
10 the last available water, as he contends.

11 He says that the plant will kill whooping
12 cranes. We strongly disagree. We believe that the
13 water use from the plant will be relatively
14 insignificant compared to the water flows into the
15 bay.

16 But we do acknowledge that there is a
17 genuine dispute of material fact here. And therefore
18 we agree that this contention should be admitted
19 further litigation, and during litigation we will
20 prove that there will be impacts -- no significant
21 adverse impacts on whooping cranes from operation of
22 the plant.

23 In short, we have done full evaluations.
24 We believe the plant is safe, we believe the plant is
25 environmentally sound, and that this site is suitable

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1 for an early site permit. Thank you.

2 JUDGE GIBSON: Thank you, Mr. Frantz.

3 Staff?

4 OPENING ON BEHALF OF NRC STAFF

5 MS. PRICE: Good morning, Your Honors.

6 The staff appreciate the opportunity to be here today.

7 JUDGE GIBSON: I was just going to say you
8 may need to get your mike a little closer. You have
9 a very --

10 MS. PRICE: I have a --

11 JUDGE GIBSON: -- soft voice.

12 MS. PRICE: -- soft voice, yes.

13 JUDGE GIBSON: Thank you.

14 MS. PRICE: That's like yelling to me.

15 In the staff's answer to TSEP's petition,
16 the staff indicated that it did not oppose the
17 admissibility of several of the contentions proposed
18 by TSEP, and also did not oppose portions of other
19 contentions.

20 However, it's important to note that the
21 staff did not take such position because it
22 necessarily agrees with the substance of the
23 contention. At this time the staff's review of the
24 Victoria ESP application is ongoing, no final
25 decisions have been made about the substance of that

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1 application.

2 Rather, the intent of the staff's answer,
3 and the purpose of the hearing today, is to address
4 whether or not TSEP's petition met the contention
5 admissibility criteria of 10 CFR 2.09(f)(1).

6 It's the staff's position that with
7 respect to several contentions, or parts of
8 contentions, TSEP met those leading criteria. As
9 noted in our answer, on all other contentions or parts
10 of contentions, it's the staff's position that they
11 are inadmissible for failure to meet those same
12 leading criteria.

13 So staff rests on the answers that they
14 filed and welcome any questions that the Board may
15 have today to clarify the staff's position. Thank
16 you.

17 JUDGE GIBSON: Thank you.

18 Well, I think we ought to proceed directly
19 to the contentions, and we'll start with Safety 1.

20 Mr. Blackburn, on page 10 of your petition
21 you raise a safety challenge claiming that the
22 applicant's identification of the growth faults is
23 inadequate. Is that correct?

24 MR. BLACKBURN: That is correct.

25 JUDGE GIBSON: And do I understand that

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1 it's your position that the -- there's a dispute about
2 whether the cooling reservoir is a safety feature?

3 MR. BLACKBURN: I believe there is a
4 dispute about whether it is a safety feature.

5 JUDGE GIBSON: And it's your position that
6 it is a safety feature.

7 MR. BLACKBURN: We believe it is, yes.

8 JUDGE GIBSON: Okay. Counsel for the NRC
9 staff, do you have a position on whether this is a
10 safety feature or not?

11 MS. PRICE: At this time the application
12 does base the cooling pond as not being a safety
13 feature for this plant. So for the basis of the
14 staff's review at this time, the cooling pond is not
15 a safety feature.

16 So a contention that alleges a safety
17 impact from a failure of the cooling pond would not be
18 a safety impact for contention admissibility. Should
19 that change in the application, then of course that
20 would be a new issue to revisit. But at this time the
21 application itself does base it as a non-safety
22 feature.

23 JUDGE BARNETT: So you're going by what
24 the application itself says, rather than any kind of
25 independent analysis that the staff has done?

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1 MS. PRICE: The staff certainly looks at
2 that, but there's no problem with the application
3 designating a cooling pond as being a non-safety
4 feature. They have plenty of safety features that the
5 staff looks at for safety impact.

6 The way that they have designated their
7 design for their PPE, the cooling pond itself is not
8 a safety-related feature. So it's not that the staff
9 doesn't review it, it's that based on the design that
10 they put forward, it's not a safety feature at this
11 time.

12 JUDGE BARATTA: Is that based upon the
13 definition that appears in Part 50 of safety-related
14 structure, system and components?

15 MS. PRICE: Yes. Yes, Your Honor, it is.

16 JUDGE GIBSON: Well, Mr. Frantz, it's
17 clear that your position is that it's not safety
18 feature. So perhaps you could explain to us why, in
19 your estimation, it is not a safety feature.

20 MR. FRANTZ: The plant will have an
21 ultimate heat sink, and the ultimate heat sink is what
22 provides the safety-related cooling during normal
23 shutdown, anticipated operational occurrences, and
24 accidents.

25 The nature of that ultimate heat sink will

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1 vary depending upon the reactor technology that we
2 eventual choose. If we choose a passive reactor
3 technology, we will not need an external source of
4 water. The ultimate heat sink ultimately is the
5 atmosphere and environment.

6 If we choose a non-passive reactor
7 technology, we will have cooling towers as our
8 ultimate heat sink. Those cooling towers will be
9 separate from the cooling basin itself. There will be
10 make up that will provided from the cooling basin to
11 the cooling towers as necessary. But the cooling
12 towers can operate with out make-up water for 30 days,
13 and that will be sufficient to ensure the safety of
14 the plant.

15 And so there are separate cooling sources
16 beyond the cooling basin that will ensure that the
17 plant could be operated and shutdown safety, and that
18 they can mitigate any accidents that may occur.

19 JUDGE GIBSON: Okay. So you're taking the
20 position -- however contrary to that, what is your --
21 why is -- what is the basis for your position that it
22 is not -- that it is a safety feature?

23 MR. BLACKBURN: Well, I think that we have
24 at least two different positions on that that I'd like
25 to articulate.

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1 JUDGE GIBSON: Okay.

2 MR. BLACKBURN: One is that it just -- it
3 seems, perhaps as a matter of common sense, and I'm
4 not sure -- I understand that we're working with a set
5 of regulations and we're working with concepts and
6 sometimes common sense may or may not fit into this
7 process.

8 But it seems if you're siting a facility
9 that has a cooling pond as part of it, that from a
10 safety standpoint you would want to make sure that all
11 aspects of the site are, in fact, functional at all
12 times. Just common sense.

13 I think to get more technical about it, as
14 I understand it, all of the assessment has been on a
15 design-basis accident. And I think the safety
16 analysis that's being put forward by Exelon is on a
17 design-basis accident.

18 What happened to Japan was a beyond
19 design-basis accident. It happened. The question is,
20 to what extent does a beyond design-basis situation
21 come into play? In that situation, bringing in
22 cooling water from the sea, as I understand it, would
23 not have been a baseline condition. It would have
24 been a beyond design-basis accident -- situation and
25 response. But it happened.

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1 Our position is that cooling pond is
2 essential to the safe operation of this facility,
3 because there is not an alternative source of water.
4 They may have 30 days, or they may not. We don't have
5 a reactor design yet.

6 It seems that if they have identified a
7 site with a cooling pond as part of the site plan,
8 that it absolutely ought to be required that that
9 cooling pond be a protected as any other feature of
10 the site. Those are our arguments.

11 JUDGE GIBSON: Okay.

12 JUDGE BARATTA: I'd like to ask this first
13 of the staff. Could you explain what is meant by the
14 statement that appears in Appendix S of Part 50 that
15 states, "The design provisions for surface deformation
16 be based on postulated occurrence in any direction at
17 azimuth and under any part of the nuclear power
18 plant", with the emphasis on "any part of the nuclear
19 power plant".

20 MS. PRICE: I'm trying to find it. Hold
21 just one minute.

22 JUDGE BARATTA: Sorry I don't have the
23 page number.

24 MS. PRICE: No, I have it. I think at
25 this point of the contention admissibility phase,

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1 what's important is what the petitioner has actually
2 put in their application. They designated this as a
3 safety concern. Whether or not -- the design for any
4 part of the plan has to address it, it isn't
5 necessarily a safety contention.

6 JUDGE BARATTA: Okay. So you're saying --
7 I guess I'm confused because this part of the
8 regulations appears to include any part of a nuclear
9 power plant that has to be examined --

10 MS. PRICE: Yes, Your Honor.

11 JUDGE BARATTA: -- it doesn't speak to the
12 safety aspect, but it says --

13 MS. PRICE: I don't think there's any
14 dispute the design of the plant needs to be such that
15 it addresses whether or not there's a possibility for
16 surface deformation. Is that your question? I
17 believe that's what this appendix says.

18 JUDGE BARATTA: Okay.

19 MS. PRICE: Am I understanding you? I
20 don't know that there's any dispute that the cooling
21 pond would need to be designed in a way that addresses
22 whether or not there's a possibility for surface
23 deformation. But to call that a safety contention and
24 to claim that the cooling pond is a safety feature is
25 not correct.

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1 JUDGE BARATTA: My impression was Part 50
2 dealt with safety as opposed to the other --

3 MS. PRICE: It does. But it doesn't --
4 I'm not clarifying this apparently. The cooling pond
5 still is not a safety significant feature under the
6 definitions of 50.2.

7 JUDGE BARNETT: So it's not your position
8 that the contention is just labeled incorrectly, is
9 it? I mean if it was called something beside a safety
10 contention, would it be admissible in that case?

11 MS. PRICE: That's certainly part of the
12 position, yes. They assert some safety significance
13 that isn't correct.

14 And I guess now would be the point to
15 point out that in the petition as pled the petitioners
16 didn't address the SSARs discussion of the safety
17 significance. They didn't address whether or not the
18 cooling pond was a feature, other than to assert that
19 it was. So at the petition stage they didn't make the
20 assertions that they're making now.

21 JUDGE GIBSON: Well, Mr. Blackburn, I
22 think there's been some suggestion that maybe you
23 didn't plead something right. Do you want to respond
24 to that?

25 MR. BLACKBURN: Well, pleading is always

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1 tricky. And I have been tripped up on pleadings more
2 than once in my career. But I don't think this is a
3 pleading issue. I think it is a straight
4 interpretative issue as to what is the scope of safety
5 concern.

6 Now, I think at this point we're just
7 simply talking about whether the cooling pond is a
8 safety feature as opposed to the correctness of the
9 delineation of the faulting itself, which is also a
10 part of this contention. And perhaps, again, we made
11 a mistake of thinking from a common sensical
12 standpoint.

13 We did in our reply note the position that
14 Judge Baratta quoted, that the safety rules do include
15 the entire site in the cited section. And from that
16 standpoint it seems like that if it is within the
17 scope of the safety rules that the entire site be
18 evaluated, it seems like that that stands and that the
19 cooling pond, as a safety feature, is part of the
20 site.

21 I mean it just seems -- again, if you've
22 got a regulation that talks about an entire site, it
23 seems to be parsing, frankly, words over content. I
24 mean pleadings have that aspect to them, and I
25 understand that's one of the challenges of our

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1 profession to some extent.

2 But it also strikes me that it is form
3 over function. I mean this is about whether, in fact,
4 this site is good and whether, in fact, there is a
5 safety issue about these faults and their impact on
6 the built plant facility.

7 We have no doubt there will be significant
8 impacts from faulting. We have points I would like to
9 discuss with you a bit more about the faults that have
10 delineated. But the cooling --

11 JUDGE GIBSON: And we'll get to those.

12 MR. BLACKBURN: I figured --

13 JUDGE GIBSON: But I want to be sure we
14 have a clear idea about the cooling basin question.

15 MR. BLACKBURN: Right. But I think we do
16 have, I think we have a clear -- okay. Sir, to the
17 extent we need a disagreement, I think we certainly
18 disagree about this. I've certainly seen that. But
19 I don't have more of a response really than I gave you
20 to begin with.

21 JUDGE GIBSON: Okay. That's fine.

22 Mr. Frantz, you haven't had an opportunity
23 to address this possible pleading defect, or to
24 respond to what Mr. Blackburn said, so please.

25 MR. FRANTZ: Okay. Thank you. First of

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1 all, I'd like to go back to Judge Baratta's
2 question --

3 JUDGE GIBSON: Yes..

4 MR. FRANTZ: -- on what is meant by the
5 term "nuclear plant". And Section 3 of Appendix S to
6 Part 50 very clearly defines what structures, systems
7 and components must be designed to withstand surface
8 deformation. And it's those "structures, systems and
9 components that are necessary to assure the integrity
10 of the reactor core and pressure boundary, the
11 capability to shut down the reactor and maintain it in
12 a safe shutdown condition, or the capability to
13 prevent or mitigate the consequences of accidents that
14 could result in potential off-site exposures
15 comparable to the guideline exposures of Section
16 50.34(a) of the regulations."

17 And so there is no doubt of what is
18 covered by Appendix S. It's basically those
19 structures, systems and components that I just
20 referred to, they're also basically termed "safety
21 related," that same definition appears basically in
22 50.2 of the regulations.

23 And so only safety-related structures,
24 systems and components need to be designed to
25 withstand a safe shutdown earthquake and surface

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1 deformation under Appendix S.

2 JUDGE GIBSON: Irrespective of the precise
3 letter of the regulation, do you have a view about
4 what the policy was behind this definition in terms of
5 removing certain things as not being safety features?

6 MR. FRANTZ: Essentially what the
7 regulations require is identification of those
8 structure, systems and components that are necessary
9 to maintain safety. Absolutely. And to maintain
10 safety during certain design-basis events.

11 Those structures, systems and components
12 must be designed to quality assurance standards, they
13 must be designed to seismic standards, and they must
14 be designed, if they're electrical components, to have
15 electrical qualification, and there are other
16 requirements that apply to these types of safety-
17 related systems.

18 For others, that may be useful in safety.
19 They are not -- there's no requirements in the
20 regulations to have those designed to the same
21 rigorous standards. Because the regulations require,
22 as a foremost principle, that safety can be preserved
23 using only the safety-related structures, systems and
24 components.

25 JUDGE GIBSON: Staff, do you have anything

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1 to add to what Mr. Frantz says, or do you have a
2 disagreement with what Mr. Frantz said?

3 MS. PRICE: No, Your Honor.

4 JUDGE GIBSON: Okay.

5 MR. FRANTZ: And then to get to your other
6 question regarding the pleading issue --

7 JUDGE GIBSON: Yes.

8 MR. FRANTZ: -- I might note that there's
9 no expert report on the safety question. They have
10 no -- they don't cite to any other technical reports.
11 There's just nothing that would support their
12 statements that there's some kind of safety impact
13 from these cooling basins. And so it's merely
14 argument by counsel.

15 There is one statement in the report by
16 their geologist that there might be some operational
17 difficulties. But beyond that there's nothing, and
18 certainly the geologists don't have any expertise in
19 nuclear safety issues.

20 JUDGE GIBSON: Okay. I promise we'll get
21 to this question of the other aspects of this
22 contention, but I just want to give you an opportunity
23 to reply to what Mr. Frantz says, if you have anything
24 else to add.

25 MR. BLACKBURN: I would just simply add

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1 that we're trying to understand the process that you
2 have. Our understanding is that we have raised a
3 sufficient issue that if, in fact, you accept that the
4 cooling pond is, in fact, safety related, we think we
5 have more than enough science that basically raises an
6 issue about the security of that cooling pond.

7 I think that we would be, if we understand
8 the process, given an opportunity to provide
9 additional engineering detail if we move to the next
10 stage in the proceeding. And so it's our position
11 that we have put enough forward at this point to at
12 least put the issue into contest.

13 The other thing I would add is, if it is
14 simply a pleading problem, that we be given an
15 opportunity to re-plead if it is considered to be a
16 pleading issue.

17 JUDGE GIBSON: Okay. Let me -- before we
18 get to the delineation questions you've talked about,
19 I just want to see if Judge Baratta or Judge Barnett
20 have anything else they wanted to ask about this
21 cooling basin or pleading question.

22 JUDGE BARATTA: In a minute.

23 JUDGE GIBSON: Okay. Okay. Great.

24 JUDGE BARATTA: I'm looking up
25 something --

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1 JUDGE GIBSON: Okay. Okay. We'll get
2 back to you then, Judge Baratta.

3 Mr. Frantz, the petitioners claim that
4 your application contains no map that delineates the
5 location of these growth faults. Do you agree?

6 MR. FRANTZ: No, we have a number of
7 figures in section 2.51 of our site safety analysis
8 report that shows the growth faults.

9 And I'd like to call the Board's attention
10 to one particular figure. It's Figure 2.5.1-43, which
11 shows Growth Fault D, which is the closest growth
12 fault, active growth -- or potentially active growth
13 fault near the plant -- or near the power block, to be
14 more precise. The power block, by the way, houses all
15 of the safety-related structures, systems and
16 components on the site.

17 And as shown on that figure, the nearest
18 approach of Growth Fault D is 155 meters, which is
19 equivalent to 509 feet. And so we describe that in
20 the text, we have this Figure 2.5.1-43 which actually
21 shows the growth fault. So I think that allegation is
22 a mischaracterization of our application.

23 JUDGE GIBSON: Okay.

24 JUDGE BARNETT: There's been some sort of
25 analysis that movement along this growth fault would

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1 affect the safety feature of the plant, or is it just
2 that it's a long way -- that 590 feet sounds like a
3 long way?

4 MR. FRANTZ: Growth faults only pose a
5 threat if the structure is located on top of the
6 growth faults, because essentially there's no seismic
7 activity associated with the movement of a growth
8 fault. It's all surface deformation. And so unless
9 the structure is located right on top, the movement of
10 the growth fault would not pose a threat to that
11 structure.

12 JUDGE GIBSON: While we're at it, do you
13 have a working definition of surface deformation?

14 MR. FRANTZ: It could be a slight incline,
15 for example some of these growth faults, I think
16 particularly Growth Fault D and Growth Fault E might
17 drop several feet, four or five feet perhaps over an
18 extent 1,000 feet horizontal difference, surface of
19 the land.

20 The petitioners claim that there's been
21 some recent deformation that has dropped maybe one
22 foot and they actually have a figure that shows --
23 and, again, we don't necessarily agree this is from a
24 growth fault, but even taking their own information,
25 it shows just a slight dip in a local road.

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1 So you're talking on a nature of say a
2 foot over a very short surface distance, or if you're
3 looking at maybe 1,000 feet of the surface, there
4 might be a dip of say, four feet.

5 JUDGE BARNETT: Well, you use the figure
6 1,000 feet, and then you said the power block was 590
7 feet away?

8 MR. FRANTZ: Yes, and if you look at this
9 figure I referenced, it has a envelope of where that
10 growth fault is, and it's not a line, it's an area.
11 And this shows that the closet approach, given that
12 bounds, is 155 meters. And so that's a conservative
13 distance, not distance to the center of the growth
14 fault, it's the distance to the closest edge of the
15 growth fault.

16 JUDGE GIBSON: Okay. Mr. Blackburn, Mr.
17 Frantz says he did -- they did delineate all this
18 information, and do you agree with him or do you still
19 think that he didn't -- they didn't do a good enough
20 job?

21 MR. BLACKBURN: Oh, I certainly think he
22 did not.

23 JUDGE GIBSON: Okay.

24 MR. BLACKBURN: Or they did not.

25 JUDGE GIBSON: Would you please explain to

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1 us why you think Mr. Frantz is wrong?

2 MR. BLACKBURN: In a couple of respects.

3 JUDGE GIBSON: Thank you.

4 MR. BLACKBURN: First, I think it's really
5 a question of how many faults there are, which is --
6 there's really only sentence in the engineering report
7 that identifies that we used 3-D seismic for the basis
8 of ours rather than 2-D seismic.

9 And we did not put a lot of the 3-D
10 seismic forward because it is confidential information
11 and because we felt like we would get into that in the
12 next round of this issue, if we got there. But we
13 have identified four faults as opposed to two faults
14 within the area of the cooling pond.

15 Now, with regard to the delineation and
16 the diagram that was put forward by the applicant, in
17 virtually every illustration in the application the
18 entire site is put forward for most all of the
19 diagrammatic purposes. But when the faulting is put
20 forward, the cooling pond is not shown. The power
21 block is, but the cooling pond's not.

22 It really is kind of striking that this is
23 one of the rare occasions that the entire site was not
24 presented. We think with very good reason why they
25 didn't present it.

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1 And I think that goes to the heart of this
2 issue, which is we need to talk about this issue.
3 This is a full disclosure, this is I think a serious
4 safety issue, but it's also something that I think --
5 I won't say it was true slight of hand, but just, you
6 know, only a little bit of the truth was put forward
7 as opposed to the full picture.

8 Now I'd also like to speak a little bit
9 about 500, 600 feet from the power block with regard
10 to the fault itself.

11 JUDGE GIBSON: Okay.

12 MR. BLACKBURN: And two pieces of that,
13 two aspects of that.

14 (Interruption.)

15 JUDGE GIBSON: Go ahead.

16 MR. BLACKBURN: I was hoping that wasn't
17 me.

18 (General laughter.)

19 MR. BLACKBURN: The first thing I would
20 say is that the fault, at least as we have overlaid
21 the fault, it would appear that the fault would cut
22 the cooling pond levy right at sort of the center
23 point of the circle, if you will of the top of the
24 cooling pond, and that that would be at a point much
25 closer to the power block than anything that was

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1 modeled by the applicant.

2 So in terms of dam failure and the fact
3 that just the pond could empty and because of the
4 fault rupturing the levy, there is a real issue about
5 the proximity of that fault, that levy and the power
6 block, and that was not analyzed at any point we saw
7 in the application.

8 JUDGE GIBSON: Hold on a second. I think
9 Judge Baratta's got a question.

10 JUDGE BARATTA: Yes, I had a question with
11 regards to that. Are you referring to -- you have a
12 figure, I think it's on page 11 of our reply brief --

13 MR. BLACKBURN: That's correct.

14 JUDGE BARATTA: -- and that shows a color
15 picture of the site, and there's what is -- it's a
16 growth fault as opposed to --

17 MR. BLACKBURN: Right. This would be
18 Fault -- I believe it's called Fault D.

19 JUDGE BARATTA: Okay.

20 MR. BLACKBURN: And that is the
21 delineation of the applicant and we have overlaid it
22 as best we could with the cooling pond, and it appears
23 to us that the point where we would be considered
24 concerned about a breach in the levy is immediately
25 adjacent to the power block, as opposed to the two

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1 locations they analyzed for a levy breach, which were
2 at either end of the fault.

3 So I don't think they analyzed the
4 situation that is most likely to be of concern with
5 regard to faulting.

6 JUDGE BARATTA: Thank you.

7 MR. BLACKBURN: Secondly --

8 JUDGE GIBSON: Okay.

9 MR. BLACKBURN: -- there's a real question
10 about these types of faults. The applicant talks
11 about these faults as if we know what they do. It's
12 a fault, you know, at this location and we're 590 feet
13 away from it and no problem. Faults splinter. There
14 are a lot of issues to be developed about this
15 subsurface geometry and 3-D seismic as opposed to 2-D
16 seismic is going to be a much better way of doing
17 that.

18 I don't think that you can, for any amount
19 of time, be comfortable that simply identifying where
20 a fault is at this point in time today is where it's
21 going to be necessarily at a later point.

22 Now, I'm to speculating at this point,
23 what I'm saying is there is a fault within 590 feet of
24 the power block. What I'm suggesting is there are
25 major issues to be examined about that fault and about

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1 faulting and what that means in terms of a power block
2 being located frankly right adjacent to it.

3 JUDGE GIBSON: Okay.

4 JUDGE BARNETT: Could I --

5 JUDGE GIBSON: Yes, please.

6 JUDGE BARNETT: Back to this 590 feet
7 again. So what is your -- is there some criteria
8 about how far away it could be, does it have -- to be
9 from the power block, would it have to be actually the
10 zone under the power block, or is there some distance?
11 I don't know whether 590 feet is a long way or not.

12 MR. FRANTZ: Yes, I'm not -- it's 509
13 feet -- I'm not aware of any guidance that has a stand
14 off distance. But, again, because we have shown the
15 closest approach of that growth fault and we do have
16 a clear 500 feet stand off from it, we believe that's
17 more than sufficient to satisfy our needs.

18 JUDGE BARNETT: Could you give me that
19 figure number again?

20 MR. FRANTZ: 5.1 -- I'm sorry, 2.5.1-43.

21 JUDGE BARNETT: Okay. 2.5.1-43?

22 MR. FRANTZ: Yes.

23 JUDGE BARNETT: Thank you.

24 MR. FRANTZ: And if I could address some
25 of the issues raised by Mr. Blackburn. First of all,

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1 he says that there are four faults. Actually, I think
2 to quote his own pleading, he says, "two and possibly
3 four". Other than Growth Fault E and Growth Fault D,
4 they do not identify any other growth faults.

5 He has said today that these other two
6 potential growth faults might underlie the cooling
7 basin. If that's the case, then again, they don't
8 pose any threat to any safety-related structure.

9 He has alleged that we have not analyzed
10 the most susceptible area of the cooling basin, namely
11 that that's directly opposite of the power block. And
12 he's correct that there's no genuine disputed material
13 fact.

14 And there's a reason why we did analyze a
15 breach directly opposite the cooling -- the power
16 block. The power block itself is at elevation 95
17 feet, the maximum operating level of the cooling basin
18 is 91-1/2 feet. And we assumed for our breach
19 analysis that the water level was 93.9 feet.

20 Well, all this area -- and if you turn to
21 his figure on page 11, it will illustrate this
22 point -- all the land between the power block and the
23 cooling basin, directly between those two structures,
24 is also going to be graded at elevation 93.9 feet. So
25 there's no potential for a breach at that location.

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1 Outside of that area, the surface grade
2 will be lower, it will be lower than the 93.9 feet.
3 So there is some potential for breaching of the
4 cooling basin in those other areas. And what we have
5 done is taken the two closest areas where a breach is
6 possible and analyzed the effect of that and shown
7 that the flood level would be far below the level of
8 the grade of the power block.

9 JUDGE BARATTA: So your position then is
10 that the power block is located above the maximum
11 level of the cooling pond.

12 MR. FRANTZ: That's correct.

13 JUDGE BARNETT: I keep trying to pull this
14 figure up. Do you have a page number for the figure?

15 MR. FRANTZ: Yes, the page number is
16 2.5.1-174.

17 JUDGE BARNETT: Page 174.

18 MS. PRICE: I actually have a copy of it
19 if you want to look at it.

20 JUDGE GIBSON: Ann, could you get that us,
21 please?

22 (Pause.)

23 MR. FRANTZ: And, Judge Barnett, the
24 reason you may not be able to find it is I believe the
25 figures are in a separate file from the narrative

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1 portion of that section.

2 JUDGE BARNETT: Okay.

3 JUDGE GIBSON: Okay. I want to make sure
4 what the -- if the staff is taking a position, or if
5 you're just sort of sitting on the fence here about
6 whether or not Mr. Blackburn has raised a legitimate
7 question about the delineation, or whether you side
8 with the applicant that the delineation's fine and
9 there's no issue there.

10 MS. PRICE: Again, and this is going to
11 become rather repetitive, but the staff has not
12 completed it's review, it's an ongoing review. So the
13 staff isn't taking a position about the correctness --

14 JUDGE GIBSON: On pleading, just on the
15 pleading issue. That's all we're talking about here.

16 MS. PRICE: On pleading, what's important
17 is that the petitioners did make some allegations and
18 they've provided some information which the staff felt
19 was enough to make the contention admissible, at least
20 with respect to the limited part that we parsed out.

21 They did mention that there were up to
22 four faults on site. Mr. Frantz is correct, there's
23 not a lot in their pleading to support that theory,
24 but they did make that assertion.

25 JUDGE GIBSON: Right.

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1 MS. PRICE: There also seems to be a
2 discrepancy or a dispute about the rate of those
3 faults, potentially the age of those faults. So the
4 staff, again, hasn't completed their review, we don't
5 have a standpoint on --

6 JUDGE GIBSON: Right.

7 MS. PRICE: -- the accuracy. But at this
8 time it looks like there was enough of a dispute about
9 the facts.

10 JUDGE GIBSON: And you raise a good point,
11 which is we're not trying -- we're not talking about
12 the merits here. What we are trying to figure out is,
13 is there a genuine dispute here, or are we just
14 talking past each other and there's really not
15 anything involved here, provided the other criteria
16 are met for admissibility.

17 And I think that's primarily what we can
18 accomplish at oral argument, and I just want to make
19 sure that -- but in order for us to understand where
20 there's a genuine dispute, we need to ask some of
21 these questions.

22 But I should make sure you understand, we
23 are not talking -- we are not trying to get to the
24 merits, we're just trying to understand what you're
25 saying, and sometimes that's not all that clear.

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1 MS. PRICE: And again, I would point out
2 regarding the flooding analysis, I don't know if Mr.
3 Frantz is correct on the elevations of the surface; I
4 haven't looked at that information.

5 But what's important is that the
6 petitioners didn't attack the flooding analysis in
7 their original petition. That's something new that
8 they filed in their reply. So to the extent that it's
9 new information, it really shouldn't be considered in
10 support of application.

11 JUDGE GIBSON: Mr. Blackburn, is that new
12 information in your reply?

13 MR. BLACKBURN: It may be new --

14 JUDGE GIBSON: About the flooding?

15 MR. BLACKBURN: In one sense yes, in
16 another sense no. I think we were using it clarify
17 the need to find out where the faults actually were,
18 the extent of the faulting, and we think that
19 basically it was all -- at least as I saw it,
20 encompassed in the same issue.

21 JUDGE GIBSON: So you see this as being
22 part of the delineation, the inadequate delineation of
23 the faults?

24 MR. BLACKBURN: Absolutely.

25 JUDGE GIBSON: Is that what you're saying?

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1 MR. BLACKBURN: That's correct.

2 JUDGE GIBSON: Okay. Okay. And you take
3 the position that that's not an issue of adequate
4 delineation of the faults, it's a separate question.
5 Is that right? The flooding?

6 MS. PRICE: I think that to the extent
7 that they are attacking, for lack of a better word,
8 the flooding analysis that was done in the
9 application, that that's a separate issue, and if that
10 was a part of the SSAR, then they shouldn't have
11 addressed it late.

12 JUDGE GIBSON: Okay. You need to say
13 something else, Mr. Frantz?

14 MR. FRANTZ: Yes, very quickly.

15 JUDGE GIBSON: I can tell you do.

16 MR. FRANTZ: To your point on whether this
17 is a dispute of material fact, we don't believe that
18 there is. We don't --

19 JUDGE GIBSON: Right.

20 MR. FRANTZ: -- dispute that the Growth
21 Fault D underlies the cooling basin. So that's not in
22 dispute. We would tell the Board, assume that they're
23 right on the rate of movement to that growth fault,
24 assume that they're right in terms of the age, and
25 even then it doesn't pose any safety threat.

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1 JUDGE GIBSON: Okay.

2 JUDGE BARNETT: But you did dispute that
3 there's four faults versus two faults. Right?

4 MR. FRANTZ: We believe there's two
5 faults. They have not shown the other faults, and we
6 don't even know what they're talking about. But
7 apparently from what they've said, those other two
8 faults also underlie the cooling basin. So again, it
9 doesn't matter from the safety perspective.

10 JUDGE GIBSON: Because they don't underlie
11 the power block.

12 MR. FRANTZ: That's correct.

13 JUDGE GIBSON: Is that correct? Okay.

14 MR. BLACKBURN: Right. And we're not
15 alleging that they do underlie the power block.

16 JUDGE BARATTA: I'm still confused about
17 your interpretation of that paragraph I quoted
18 earlier, because that -- Mr. Frantz -- because that
19 paragraph really has two parts to it. The first part
20 talks about, as you mentioned, the certain structures,
21 systems and components that have to remain functional.
22 And that's referring of course to the safety
23 definition that appears in Part 50.

24 But it still continues and talks about the
25 design provisions for surface deformation must be

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1 analyzed under any part of the nuclear power plant.
2 So clearly there's two parts to that paragraph, and
3 you spoke to the one, but not the other.

4 MR. FRANTZ: I believe that the way to
5 interpret the term "power plant" or "nuclear plant" is
6 in terms of the definition that is given in Section 3
7 of Appendix S. Otherwise, I might add, it almost
8 becomes absurd. There are many structures on nuclear
9 power plants, like there are office buildings, there
10 are sanitary and water systems, there are parking
11 lots.

12 And to say that we need to be -- have all
13 those structures designed for the safe shutdown
14 earthquake and surface deformation would be to absurd
15 results. And it's obviously not consistent with how
16 that's been treated in any other nuclear power plant
17 in the country.

18 For every other nuclear power plant in the
19 country, the only structures that need to be designed
20 for the safe shutdown earthquake and surface
21 deformation are the safety-related structures under
22 Appendix S. And under Appendix --

23 JUDGE BARATTA: Then why the additional
24 wording in there? I mean we're bound by the wording
25 of the regulations, and it seems as though there are

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1 two parts to that.

2 And I agree, you know, an office building
3 might not be appropriate, but there also is a caveat
4 on there which says unless evidence indicates an
5 assumption's not appropriate. So I assume there's
6 some out, but you have to go through the process of
7 showing that, it would seem.

8 MR. FRANTZ: There are also regulatory
9 guidance documents that define what structures,
10 systems and components must be designed to withstand
11 earthquakes and deformation. That's in the guide --
12 Regulatory Guide, I believe, 1.29. The cooling,
13 normal cooling is not part of a list of structures,
14 systems and components that must be designed to
15 withstand safe shutdown earthquakes under the
16 regulatory guidance.

17 To take that one phrase in isolation and
18 take it out of context of Appendix S, to take it out
19 of context of regulatory guidance and 50 years of
20 interpretation and application of the regulations I
21 don't think is appropriate. I think you need to look
22 at all of this in the context of the language in
23 Appendix S and the regulatory guidance and the
24 regulatory history.

25 JUDGE BARNETT: Do you have a reference to

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1 that regulatory history? Have you gone through all
2 the license applications for all the plants?

3 MR. FRANTZ: I have been probably
4 personally involved with more than half the nuclear
5 power plants in this country, so that's my own
6 personal experience.

7 But again, you can look at the regulatory
8 guidance, look at Regulatory Guide 1.29. It provides
9 the identification of what needs to be designed to
10 withstand earthquakes and surface deformation so that
11 you don't have to take my word and my personal
12 experience for it, but you can look at the regulatory
13 guidance also.

14 JUDGE BARATTA: Would the staff care to
15 comment on that?

16 MS. PRICE: I don't have a copy of Reg
17 Guide 1.29 in front of me, Your Honor. I would not
18 disagree with Mr. Frantz that reading the Appendix at
19 4(b) in context with the definitions as provided and
20 also looking at this would not inappropriate, to the
21 extent that those systems, structures and components
22 are safety related and non-safety.

23 JUDGE GIBSON: Okay. Mr. Blackburn, I can
24 tell you wanted to say something else.

25 MR. BLACKBURN: I do. Thank you, Judge.

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1 JUDGE GIBSON: Yes.

2 MR. BLACKBURN: We looked through -- or we
3 had our engineering firm look through all for the
4 active nuclear power plants and the applications, and
5 we could not find a growth fault situation similar to
6 this site at any of those facilities.

7 And I think that's also worth noting here,
8 that, you know, the issue of growth faulting is in a
9 general category, it's one I don't think that has been
10 fully considered nor adequately considered in the
11 past, and I think that's worth noting.

12 JUDGE GIBSON: Let me just make sure.

13 Mr. Frantz, do you know of a specific
14 instance where this has shown up, this fact pattern
15 that we're facing today? I understand --

16 MR. FRANTZ: Yes --

17 JUDGE GIBSON: -- that we're trying to
18 interpret the rules and you've explained the policy
19 that you're standing behind.

20 MR. FRANTZ: Yes.

21 JUDGE GIBSON: I'm just questioning Mr.
22 Blackburn's raised a point though, we don't -- we've
23 never really confronted these facts in any other
24 cases. Do you -- could you cite us to any?

25 MR. FRANTZ: Well, let me give you one

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1 example, Judge, because -- and I know that you're
2 familiar with, and that's the South Texas Project
3 where they also have a main cooling reservoir. As the
4 application for the South Texas Unit 3 and 4 COL
5 shows, that cooling basin is not safety related.

6 Much like Victoria Station, South Texas
7 would have a safety-related ultimate heat sink
8 consisting of cooling towers. That's just one example
9 among many, but that's probably the closest example
10 I'm aware of where a plant has a large cooling basin
11 similar to this, and again, has classified that as
12 non-safety related and it's not designed to withstand
13 the safe shutdown earthquake.

14 JUDGE GIBSON: Okay.

15 MR. BLACKBURN: And in the case of South
16 Texas, Your Honor, that was three miles away and not
17 on the site, the growth fault itself.

18 JUDGE GIBSON: So you're saying the growth
19 faults in that case were so far away as to be -- it
20 would have been remote and speculative to even
21 consider.

22 MR. BLACKBURN: Right.

23 JUDGE GIBSON: Is that what you're saying?

24 MR. BLACKBURN: That's what I'm saying.
25 I'm saying that these growth faults, I mean certainly

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1 D and arguably E, you know, they're affecting plant
2 site facilities. One's within 500 feet of the power
3 block.

4 But, you know, you've got those two, at
5 least one more of the faults that we would like to
6 talk about further, is certainly within the cooling
7 pond as well, the other is right adjacent to it. No
8 site in the United States has that type of faulting
9 activity, growth fault activity associated with it.

10 JUDGE GIBSON: Okay. Okay. Fair enough.
11 Before we leave Safety 1, I have one other question I
12 want to ask you. Make sure -- actually I want to ask
13 this of Mr. Frantz, so you'll have an opportunity to
14 comment. I'm sure you will.

15 On page 21 and 22 of your answer, you cite
16 to the TVA Bellefonte 2008 decision.

17 MR. FRANTZ: Yes.

18 JUDGE GIBSON: Okay. And your argument is
19 that that decision precludes admission of this
20 contention. Now, on page 17 of the reply from Texans
21 for a Sound Energy Policy, they say that Bellefonte
22 petitioners had no expert and that their claims of
23 caves and sinkholes were only possible and undetected.

24 Now, how do you respond to their claim of
25 attempting to distinguish Bellefonte from this case?

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1 MR. FRANTZ: Yes, I might begin by saying
2 that I was counsel for TVA in that particular case,
3 and so I'm directly familiar with the case.

4 Mr. Blackburn is correct that they did not
5 have an expert affidavit attached to the petition to
6 intervene. But the petition to intervene did cite
7 numerous technical reports, I think three or four
8 technical reports if I recall correctly, actually
9 showing locations of caves and sinkholes and so forth,
10 including some near or within the site boundary.

11 And what we did in response to that
12 proposed contention is show that, in fact, the safety
13 analysis report recognized the fact that there were
14 caves and sinkholes on that site, and that there were
15 appropriate measures to deal with that from a safety
16 perspective. There was an analysis shown that those
17 caves and sinkholes would not affect safety.

18 And we have the same situation here. We
19 have an allegation that there are growth faults. We
20 agree that there are growth faults. We then evaluated
21 the safety implications of those growth faults and
22 shown that they would not threaten the safety of the
23 plant. And so therefore we think it's directly
24 analogous to the Bellefonte COL case.

25 JUDGE GIBSON: Okay. Mr. Blackburn.

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1 MR. BLACKBURN: Well, I think as he
2 explained it, it was not analogous. I mean there is,
3 in fact, an expert engineering report that we have
4 that set forth basically our position that, as opposed
5 to lawyers craftily, artfully making words up out of
6 the air, there is at least a basis for what we are
7 saying.

8 And we thought that this was sufficient
9 basis to bring into the conflict both our issue with
10 the applicant that there are -- that they have
11 correctly identified the faults, which we don't think
12 they have, and secondly, that there are safety issues.

13 JUDGE GIBSON: Okay.

14 JUDGE BARATTA: And in light of full
15 disclosure, who were the judges on *Bellefonte*?

16 MR. FRANTZ: Let me -- I can find it out
17 quickly. Judge Bollwerk, Judge Baratta, and Judge
18 Sager.

19 JUDGE BARATTA: Okay. Just wanted to make
20 sure everybody knew that. That's all. Thank you.

21 (General laughter.)

22 JUDGE GIBSON: Judge Barnett, Judge
23 Baratta, do you all have anything else about
24 Contention 1, Safety 1?

25 JUDGE BARATTA: I've got a question

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1 relating to Safety 1 and 2, should I put that --

2 JUDGE GIBSON: Please.

3 JUDGE BARATTA: -- no the table now?

4 JUDGE GIBSON: Yes. Please.

5 JUDGE BARATTA: Mr. Blackburn, I was a
6 little confused about some statements that appeared in
7 your reply brief. And you make this statement with
8 regards to a couple of the contentions. I have it as
9 a note on 1 and 2.

10 But it appears as though in some places
11 you're saying that -- well, the quote I have on page
12 14 of your reply, it says, "Once the parties have
13 litigated and agreed on the location of the growth
14 faults, Exelon or the NRC staff may decide, based on
15 new information, that additional dam breach analysis
16 is required, or TSEP will file a new contention."

17 And what confuses me is, does that mean
18 you're -- the safety aspect of your contention isn't
19 right as opposed to a disagreement over the location
20 and number of faults? What is the issue I'm trying to
21 get at here?

22 MR. BLACKBURN: Well, if I understand, we
23 were trying, out of an abundance of caution, to
24 frankly understand and perhaps anticipate certain of
25 the issues and arguments. There seems to be a

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1 question of whether we could, in fact, make certain
2 arguments if it was unclear what the delineation was,
3 for example of the full scope of the subsurface
4 faulting.

5 Now, I think if the cooling pond is, in
6 fact, considered to be a safety issue, that's
7 absolutely ripe right now. With regard to the
8 potential for the power block to be affected by a
9 fault within 500 feet, that I think would be an issue
10 that would become ripe as more information would be
11 revealed by subsurface investigation and further
12 delineation of faulting.

13 We have not made the allegation in our
14 pleading at this current time that we think there is
15 a direct threat to the power block from the fault 500
16 feet away. All of our safety contentions so far has
17 been based on the cooling pond. If you reject the
18 cooling pond, then I would say other safety aspects
19 would not be ripe until further information was
20 delineated.

21 That's why we believe that certainly full
22 delineation is absolutely essential. We believe that
23 certainly you can identify a lot more from 3-D seismic
24 than you can from the 2-D seismic used by the
25 applicant.

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1 And if you reject cooling pond as a safety
2 issue, if I remember why we did what we did at the
3 time, it was to basically try to preserve the
4 opportunity to raise additional issues as more
5 information came up.

6 JUDGE BARATTA: Thank you.

7 JUDGE GIBSON: Okay. Well, I think this
8 might be -- well, we've got -- we may be able to get
9 through Two. Let's try to do that.

10 Mr. Blackburn, on page 14 of your petition
11 your claim is that the applicant has not properly
12 characterized the rate of recent surface movement at
13 the growth faults. Is that correct?

14 MR. BLACKBURN: That is correct.

15 JUDGE GIBSON: Now, if I understand
16 correctly from reading the applicant's answer, they
17 claim that this recent surface movement is pertinent
18 only to the growth fault that lies more than two miles
19 from the power block area. Are we talking about the
20 same fault?

21 MR. BLACKBURN: Well, I think we're using
22 that as an example that there is an issue about
23 whether there is sort of active recent movement or
24 not. We found one example that we had access to. We
25 didn't have access to the site. We went to locations

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1 where we had access to try to make a determination if
2 this was a historical faulting, you know, geologic
3 time frame faulting, or if this was recent activity.

4 What Halepaska & Associates did was went
5 out and tested -- they pulled records, we looked at
6 what the survey records were from the '70s when a road
7 was built, and went out and surveyed recently, found
8 a significant difference there, and then did Cesium-
9 137 investigations to basically identify movement of
10 about eight inches in the last 40 years.

11 Which is significantly different, orders
12 of magnitude different from the rate of movement
13 identified by the applicant, which basically used
14 geologic time frame as opposed to more recent time
15 frame to make the movement seem, you know,
16 insignificant by most anybody's measure.

17 We challenge that. We think they're
18 wrong, we think that we have good information. We
19 went out and got the best we could. Clearly if we got
20 access to the site we would like to do the same thing
21 on Fault D and our other two faults, if we can get
22 those issues admitted as well.

23 JUDGE GIBSON: So essentially you're
24 saying that the geologic characteristics of this area
25 you can measure from this one fault, and you can draw

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1 from that the inference that there may be a problem
2 with the faults at the site, that they have not -- and
3 that the way that your geologists characterize that
4 would be different than the one the applicant did.
5 Correct?

6 MR. BLACKBURN: Absolutely.

7 JUDGE GIBSON: Sorry.

8 MR. BLACKBURN: I mean, again, in this
9 parlance of when we have a true dispute or not, I mean
10 absolutely we have a dispute about this.

11 JUDGE GIBSON: Right. And we don't know
12 whether the way they characterized it was correct or
13 not. You're just trying to -- this is the way you're
14 raising your contention is by the --

15 MR. BLACKBURN: Right.

16 JUDGE GIBSON: -- characterization of the
17 geology in this area.

18 MR. BLACKBURN: Right. And I think that
19 this raises the larger issue of the active geological
20 processes on site, and when I said in the opening
21 statement an unstable geologic platform, this is where
22 I'm going with that. I think this and the issue one
23 combined together are sort of the key elements of an
24 unstable geologic platform.

25 JUDGE GIBSON: Okay. And staff, do I

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1 understand correctly that you're not opposing this
2 contention?

3 MS. PRICE: That's correct, Your Honor.

4 JUDGE GIBSON: Okay. Now, Mr. Frantz, it
5 appeared to me that your critique of this contention
6 is based on observations in changes in the surface of
7 a road and railroad bridge and that isn't that sort of
8 like merits? I mean like that doesn't really --
9 that's not enough, and they're saying it is enough.
10 I mean how do we not admit this contention?

11 MR. FRANTZ: First of all, that was not
12 the heart of our critique. We did mention that merely
13 to point out that they were engaging in speculation,
14 that the subsidence was caused by growth faults or
15 from some other cause. They don't have any evidence
16 that it was actually caused by growth faults.

17 But let's assume that they're right.
18 First of all, it only applies to Growth Fault E. They
19 haven't provided any substantiation that the same rate
20 of growth would also affect Growth Fault D, which is
21 near the power block.

22 But let's assume that it does. Let's take
23 all the most favorable assumptions for the
24 petitioners, that their information does indicate a
25 movement of the growth fault, that it indicates recent

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1 movement, and that it applies to Growth Fault D as
2 well as Growth Fault E.

3 Even taking all their assumptions, we're
4 still saying it does not affect safety, and therefore
5 it's not a material issue, does not demonstrate a
6 genuine dispute of material fact here.

7 JUDGE GIBSON: Okay. Judge Baratta?

8 JUDGE BARATTA: I have nothing.

9 JUDGE GIBSON: Judge Barnett?

10 JUDGE BARNETT: (No verbal response.)

11 JUDGE GIBSON: Okay. All right. I think
12 this would be a good time to take our morning break
13 for about 10 minutes. And we'll reconvene in 10
14 minutes. Thank you.

15 (Whereupon, a short recess was taken.)

16 JUDGE GIBSON: All right. If we could I'd
17 like to go to Contention 15 through 18 and start with
18 the Contention 15, the socioeconomic impacts for
19 plugging wells and of the impacts on mineral right
20 holders.

21 All right. Mr. Blackburn, on page 92 of
22 your petition you raise an environmental challenge
23 claiming that the applicant has not properly
24 characterized the socioeconomic impacts of plugging
25 wells and of the impacts on mineral right holders. Is

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1 that correct?

2 MR. BLACKBURN: That's correct.

3 JUDGE GIBSON: Now, from reading your
4 reply, it appears that you are conceding that economic
5 activities -- economic impacts that are associated
6 with a facility, here the impacts of plugging the
7 wells, may not be admissible at this stage under 10
8 CFR 51.50. Is that correct?

9 MR. BLACKBURN: I believe that is correct.

10 JUDGE GIBSON: Okay. Now, I just want to
11 make sure that Mr. Blackburn doesn't feel like he's
12 being whipsawed, Mr. Frantz, so I want to make clear
13 that you can assure him that these issues will be
14 addressed in your environmental report at the COL
15 stage and that he can challenge them at that time.

16 MR. FRANTZ: Yes, Mr. Rund will be
17 handling this for us.

18 JUDGE GIBSON: Okay. Sorry.

19 MR. RUND: Jon Rund for the application,
20 Your Honor. That's right. The environmental report
21 for the COL stage is required to address the issues
22 related to economic costs.

23 JUDGE GIBSON: So you may not agree with
24 him that it's admissible, but at least that -- you
25 would agree that that is the appropriate point for him

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1 to raise that contention, and that he's not going to
2 be somehow barred by virtue of this stage of the
3 proceeding. Is that correct?

4 MR. RUND: Well, it may be that cost
5 issues may not be material at that stage, but he
6 certainly --

7 JUDGE GIBSON: Right.

8 MR. RUND: -- will have an opportunity to
9 submit and propose a contention at that stage. It'd
10 obviously have to meet all the contention
11 admissibility requirements.

12 JUDGE GIBSON: Surely. Surely.

13 Okay. Staff, would you agree with this
14 characterization of when and how Mr. Blackburn can
15 challenge the economic impacts?

16 MS. PRICE: I'm sorry, which
17 characterization were you referring to?

18 JUDGE GIBSON: Well, that --

19 MS. PRICE: That he would have the
20 opportunity --

21 JUDGE GIBSON: Yes, he'll have an
22 opportunity at the COL stage and that this is not the
23 appropriate point.

24 MS. PRICE: Yes, certainly.

25 JUDGE GIBSON: It's essentially not ripe.

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1 MS. PRICE: Certainly. At this time it's
2 immaterial based on 10 CFR 51.50, and it will be
3 required in the COL.

4 JUDGE GIBSON: Okay. Is that acceptable,
5 Mr. Blackburn?

6 MR. BLACKBURN: Yes, that is, with the
7 proviso, that I think we also have raised this under
8 the alternatives analysis, and we do think it's
9 appropriate to be discussed in that context, at this
10 point in time.

11 JUDGE GIBSON: I'm sorry, I didn't hear
12 what you just -- the last thing you just said. When
13 is it appropriate?

14 MR. BLACKBURN: I think that we have also
15 raised this under our contention regarding the
16 alternatives analysis NEPA, which is the one we will
17 take up next.

18 JUDGE GIBSON: Right.

19 MR. BLACKBURN: And I do think it is ripe
20 at this time to talk about the issue of socioeconomic
21 alternative -- aspects in the context of alternative
22 site evaluation.

23 JUDGE GIBSON: Fair enough. Fair enough.

24 MR. BLACKBURN: Okay.

25 JUDGE GIBSON: You have a contention

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1 involving alternatives, and that this may be an
2 appropriate issue involving alternatives, but you
3 agree that the economic impacts -- socioeconomic
4 impacts, per se, is not appropriate at this time.

5 MR. BLACKBURN: I agree.

6 JUDGE GIBSON: Okay. Okay. I think we're
7 all on the same page of the same hymnal.

8 If we could go to Number 16 -- let me ask
9 first, Judge Baratta or Judge Barnett, do you have
10 anything on that point?

11 JUDGE BARATTA: No, I do not.

12 JUDGE GIBSON: Okay.

13 JUDGE BARNETT: (No verbal response.)

14 JUDGE GIBSON: Okay.

15 JUDGE BARATTA: Thank you, .

16 JUDGE GIBSON: On page 92 of your petition
17 you raise an environmental challenge claiming that the
18 applicant has not properly characterized an obviously
19 superior alternative site in Matagorda County. Is
20 that correct?

21 MR. BLACKBURN: I think it's page 95.

22 JUDGE GIBSON: Ninety what?

23 MR. BLACKBURN: Page 95.

24 JUDGE GIBSON: Ninety-five. I'm sorry.

25 It is. I'm sorry.

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1 Now, I want to make sure from the staff,
2 do I understand that you do not opposed the admission
3 of this contention with respect to the downstream
4 ecological impacts and the impacts on the whooping
5 cranes and other migratory birds?

6 MR. ROACH: Kevin Roach for the staff,
7 Your Honor. That is correct. To the question that we
8 don't oppose that, we believe there is a genuine
9 dispute regarding as whether the downstream ecological
10 impacts and the transmission line impacts and whooping
11 cranes and migratory birds sort of tipped the
12 environmental balance in favor of the Matagorda County
13 site, with the limitation that the appropriate
14 question at the threshold is environmental
15 preferability before moving on to obvious superiority.

16 JUDGE GIBSON: Okay. Well, obviously
17 there's a lot of issues here, a lot of layers. We're
18 talking about whether a contention is admissible about
19 preferable alternatives as opposed to superiority. Is
20 that right? That's another -- is that another layer?

21 MR. ROACH: Yes, when considering whether
22 there is an obviously superior alternative, that's the
23 ultimate question, I suppose --

24 JUDGE GIBSON: Right.

25 MR. ROACH: -- but at the threshold stage

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1 the NRC process is whether there is an environmentally
2 preferable site, and that's laid out in the
3 Environmental Standard Review Plan, the SRPE Reg 1555.

4 JUDGE GIBSON: So in that respect you have
5 no opposition to the admission of this contention. Is
6 that correct?

7 MR. ROACH: With respect to the two bases
8 that you mentioned, correct.

9 JUDGE GIBSON: Okay. Now, petitioners
10 claim that you're being inconsistent in opposing the
11 remainder of this contention because you did not
12 oppose the admission of a number of other contentions,
13 some of which we'll get to later, that concern these
14 very matters.

15 Do you think that you're being
16 inconsistent?

17 MR. ROACH: We do not believe we are being
18 inconsistent. The --

19 JUDGE GIBSON: Why?

20 MR. ROACH: As I recall, they say that we
21 are being inconsistent by conceding the admission of
22 safety contentions, but disputing the admission of
23 these environmental bases.

24 And I guess it's important to sort of go
25 through how the site selection process works. So

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1 safety criteria are used in delineating feasible
2 sites, in other words, Part 110 site selection
3 criteria are used to decide if a site is going to be
4 feasible and whether it's going to enter the possible
5 universe of candidate sites and ultimately alternative
6 sites.

7 But to say that an issue that is a safety
8 issue that might be used to define alternative sites
9 that will be considered, that doesn't automatically
10 make the issue an environmental one for analysis under
11 NEPA.

12 JUDGE GIBSON: Okay. Okay. Now, Mr.
13 Frantz, in your answer you indicate you evaluated the
14 candidate sites using a ratings process that
15 considered factors such as environmental,
16 socioeconomic and engineering criteria. Is that
17 correct?

18 MR. FRANTZ: That's correct.

19 JUDGE GIBSON: Yet you criticize
20 petitioners for raising these matters as being outside
21 the permissible scope, and that only environmental
22 impacts are apropos. Petitioners are saying, on page
23 71 of their reply, essentially that you want to have
24 your cake and eat it too.

25 What is wrong with the petitioner's

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1 argument?

2 MR. FRANTZ: I'm not sure you properly
3 characterized our position. I don't think we've ever
4 said that issues regarding costs and engineering and
5 safety issues are outside the scope of the alternative
6 site analysis. We definitely look at those factors in
7 judging alternative sites.

8 What we had found though as a result of
9 our analysis is that when you take a subset of those
10 and look purely at environmental issues, at that point
11 we found no environmentally preferable site. As a
12 result we don't need to need further under NEPA.

13 Even though we have, as part of how we
14 characterized our initial site selection process, we
15 selected five sites, we looked at the environmental,
16 socioeconomic issues there, but after you cull out all
17 the results and look solely at the environmental side,
18 at that point we found no environmentally preferable
19 site, so that, from a NEPA perspective, is the end for
20 the analysis.

21 But even if you go further and look at
22 these other issues, engineering, costs, flooding
23 issues, we found that there were defects at the
24 Matagorda site. In fact, initially, Judge Gibson, as
25 a result of our first pass through this process, we

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1 picked the Matagorda site. We thought that was the
2 best site.

3 When we started going into more of the
4 details, did more thorough evaluation of that site, we
5 found problems with flooding, which is obviously
6 relevant given what's happening now in Japan. We also
7 found problems with the bearing capacity, the
8 geotechnical issues of that sites. And as a result of
9 those types of factors, we decided to move our
10 preferred site to the Victoria County site.

11 JUDGE GIBSON: Okay. Mr. Blackburn?

12 MR. BLACKBURN: I get somewhat confused
13 with the commingling of the Atomic Energy Act process
14 with the NEPA process. I am much more of NEPA
15 practitioner than I am an Atomic Energy Act
16 practitioner. But as I understand NEPA it requires a
17 full vetting of all of the alternatives in a
18 comparative framework.

19 Now, there may well be legitimate reasons
20 why the Matagorda site was first selected and then
21 moved down the list. But if the right factors weren't
22 considered in evaluating the Victoria County site,
23 then it was a false presentation and a false analysis
24 and it would lead to a bad result.

25 So our position is our position is there

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1 should be a full presentation of the -- both the
2 environmental and safety issues comparable on a site-
3 to-site basis.

4 We have found case law that indicates that
5 there is absolute capability between basically safety
6 and environmental concerns being considered in the
7 NEPA document. The 3rd Circuit held that the NRC
8 cannot look to sufficiency under the AEA to avoid its
9 NEPA obligations to consider reactor design
10 alternatives. That's the *Limerick Ecology Action v*
11 *NRC*.

12 While the reactor part of -- the reactor
13 design part of that's not germane to this proceeding,
14 the point of mixing, if you will, safety and
15 environmental issues is what's germane. And we're
16 arguing in the faulting that we've talked about and
17 the oil and gas that we are to talk about, there are
18 major issues that are associated with the suitability
19 of this site from a safety standpoint.

20 Now, you may determine that it's not truly
21 a safety issue, but it's certainly an issue that will
22 affect cost and development associated with the site.
23 It's certainly going to be true of the faulting
24 issues. It absolutely is true with the oil and gas
25 issues.

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1 So from that standpoint we certainly think
2 that those should be considered in an evaluation of
3 the alternatives under NEPA and that we've raised
4 legitimate contentions. Similarly, water
5 availability, which we'll talk about at a later
6 time --

7 JUDGE GIBSON: Right.

8 MR. BLACKBURN: -- is also in that
9 category.

10 JUDGE GIBSON: Right. Yes, we postponed
11 water because it's obviously going to be a significant
12 part of our discussion.

13 So putting this in my own words,
14 essentially what you're saying then is that they may
15 well have considered alternatives, they may well have
16 been correct in that, but it's not spelled out in the
17 environmental report, and because of that the
18 environmental report is defective and it needs to have
19 a more robust discussion of this alternatives
20 analysis. Is that a fair characterization of what
21 you're saying here.

22 MR. BLACKBURN: Well, that is absolutely
23 fair.

24 JUDGE GIBSON: Okay. Okay. Now, he
25 doesn't think you put enough in there, Mr. Frantz.

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1 You think you put enough in there. How do we not
2 admit this contention?

3 MR. FRANTZ: Well, first of all, this
4 site's not going to get licensed unless we assure the
5 safety of the plant, so that's a baseline. And he's
6 raised allegations, contentions on safety and the
7 Board will consider those.

8 But the bottom line is, even if those
9 contentions are admitted and we go ahead and litigate
10 them, the Board's not going to approve issuance of the
11 ESP unless the site is safe.

12 From the NEPA perspective and the
13 environmental perspective, it's a two-pronged
14 approach. You look first at the environmental side
15 and if there's no environmentally preferable site,
16 that's the end.

17 If there is, for example let's assume
18 Matagorda is environmentally preferable, then these
19 other environmental -- these other engineering
20 factors, the cost factors that Mr. Blackburn raises
21 would be within the scope of our alternative site
22 analysis and would be properly considered both by the
23 Board and by the NRC staff.

24 You know, again, our view is that you
25 don't have to quite that far because there is no

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1 environmentally preferable site. And even if the
2 Board would disagree and you get to stage two, we
3 believe these other engineering factors would weigh
4 the favor of the Victoria site.

5 So either from an environmental
6 perspective, or when you look at the broader
7 perspective of all the issues, including the
8 engineering and cost issues, we believe, again,
9 Victoria is preferable.

10 JUDGE GIBSON: Well, and that may well be
11 the case, and even Mr. Blackburn's conceded, and you
12 may -- you're analysis may be, you know, floss. But
13 I think, if I understand correctly, what the issue
14 here is, he's saying there's just not enough there to
15 tell that, that you did flesh this out, there's not
16 this sort of robust discussion of alternatives, of
17 these factors involving alternatives.

18 And that's -- and so what I'm trying to
19 figure out is, so how do we not admit this contention
20 if you say there's enough there and he's says there's
21 not enough there. And I'm -- am I missing something
22 in what you said?

23 MR. FRANTZ: Yes, I think you are.

24 JUDGE GIBSON: Okay.

25 MR. FRANTZ: And looking at the first

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1 stage alone, the environmental side, there's other
2 issues on oil and gas wells and the growth faults.
3 They're simply not relevant to the environmental
4 issues. And so they need not be considered in stage
5 one of the alternative site analysis.

6 And even if you assume we have to get to
7 stage two, I don't know what we would litigate on
8 alternative -- or Contention 16. The Board's going
9 to -- if it admits the first contentions on oil and
10 gas wells and growth faults for example, the Board's
11 going to reach its determination, and whatever that
12 is -- and what it is it's going to be whatever it is.

13 But it should not affect the ultimate
14 results of the alternative site analysis because we
15 have to show that the plant is safe. And if that's
16 the assumption of the alternative site analysis, and
17 I don't think the environmental report needs to go
18 through in that kind of gory detail to analyze
19 something that is not going to ultimately affect the
20 alternative site analysis.

21 JUDGE GIBSON: Okay.

22 MR. FRANTZ: There are a lot of factors
23 out there that affect safety, and we don't have to
24 discuss each one in the environmental report.
25 Basically then we just duplicate the safety analysis

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1 report.

2 JUDGE GIBSON: Okay. Did have anything
3 you needed to add or are we clear on what our
4 positions are?

5 MR. BLACKBURN: Well, I think that we were
6 clear. I would just I guess remind -- but perhaps I
7 shouldn't speak directly to counsel, but it seemed
8 like he's talking the same thing that was over turning
9 Calvert Cliffs about 40 years ago, that why do a NEPA
10 analysis in this process.

11 I seem to -- believe me, I come from a
12 very strong NEPA perspective, and NEPA brings
13 something to this analysis and to this issue. And I
14 strongly would argue that NEPA has a strong
15 preference, and bias even, for full disclosure and for
16 really vetting these alternatives, and I don't think
17 it's -- that the ER comes close to meeting a NEPA
18 standard.

19 JUDGE GIBSON: Okay. I think we're pretty
20 clear.

21 Judge Baratta, is there anything else you
22 had on this?

23 JUDGE BARATTA: I had a question for the
24 staff --

25 JUDGE GIBSON: Yes.

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1 JUDGE BARATTA: -- in that you did not
2 oppose admitting of the contention to the extent that
3 the petitioners challenge the adequacy of the
4 alternatives analysis with regards to the downstream
5 impacts or the ecological impacts, but you did oppose
6 the remaining bases of this contention as set out in
7 your answer.

8 I'm a little troubled by that statement.
9 Do we admit bases?

10 MR. ROACH: When attempting to define the
11 scope of the contention, it is appropriate to do so by
12 its bases.

13 JUDGE BARATTA: Okay.

14 JUDGE GIBSON: Okay. Judge Barnett?

15 JUDGE BARNETT: (No verbal response.)

16 JUDGE GIBSON: Okay. I think we can move
17 on to Contention 17. On page 105 of your petition,
18 Mr. Blackburn, you raised an environmental challenge
19 claiming that the environmental report fails to
20 provide a basis -- there's that word again, I don't
21 think you quite meant it the same way -- for its
22 reliance on the waste confidence rule.

23 And the on -- with respect to Contention
24 18, you raise an environmental challenge on page 108
25 claiming that the environmental report fails to

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1 provide a basis for its reliance on Table S-3.

2 Now, counsel for the NRC staff, has there
3 been any new rule making on the waste confidence rule
4 since the Commission promulgated its final rule on
5 December 23 of last year?

6 MS. PRICE: The update, as far as I know,
7 is the most recent.

8 JUDGE GIBSON: Okay. And has there been
9 any new rule making on Table S-3 related to the
10 uranium fuel cycle since the TVA *Bellefonte* decision
11 in 2009?

12 MS. PRICE: I'm sorry, can you repeat the
13 question?

14 JUDGE GIBSON: Yes, has there been any new
15 rule making since the *Bellefonte* decision in 2009?

16 MS. PRICE: Not any new rule making that
17 I'm aware of, no.

18 JUDGE GIBSON: In the absence of this rule
19 making, Mr. Blackburn, your reply indicates that you
20 recognize that we cannot admit this contention in
21 light of 10 CFR 2.335(a) which prohibits a collateral
22 attack on the Commission's regulation in the
23 adjudicatory process. Is that a fair
24 characterization?

25 MR. BLACKBURN: That is a fair

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1 characterization, and basically we filed this
2 contention to preserve a point of error, if you will,
3 if the waste -- I think the rule is under litigation
4 that the DC Circuit, if I'm not mistaken at the --

5 JUDGE GIBSON: Okay.

6 MR. BLACKBURN: -- current time, if, for
7 example, the rule is overturned, we have raised these
8 contentions just simply to have them on file and that
9 it won't be argued at a later time that we didn't
10 raise them at an earlier time.

11 JUDGE GIBSON: Okay. Fair enough. Thank
12 you.

13 JUDGE BARNETT: So what should we do with
14 the contention at this point?

15 MR. BLACKBURN: I would say at this point
16 consider it to be a moot or withdrawn -- not a
17 withdrawn contention, but just basically we filed it
18 just for purposes of having it filed. You can
19 certainly -- I would urge you to rule against the
20 admission of the contention, and that way we can carry
21 it forward as something on record, that we filed it,
22 it that ever comes up in the future.

23 JUDGE GIBSON: Right. So you're
24 essentially saying you know we can't admit it, but you
25 want us to go ahead and deny it so that we can enable

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1 you to preserve error, is that a fair statement?

2 MR. BLACKBURN: That's exactly.

3 JUDGE GIBSON: Okay.

4 MR. BLACKBURN: And not only -- not really
5 so much to preserve error, because I don't think it's
6 wrong to deny it, it's to preserve the argument that
7 we tried to raise it when we had the first opportunity
8 to raise it.

9 JUDGE GIBSON: Okay. Fair enough. Okay.

10 All right. Then I think we can go to
11 Miscellaneous Contention 1 involving the Coastal Zone
12 Management Act consistency determination.

13 Now, on page 110 of your petition, Mr.
14 Blackburn, you raise a miscellaneous contention
15 claiming that the application failed to include the
16 certification of compliance with the Coastal Zone
17 Management Act. Correct?

18 MR. BLACKBURN: That is correct.

19 JUDGE GIBSON: And in your reply you
20 acknowledge that this omission has now been cured and
21 so this contention is now moot. Is that correct?

22 MR. BLACKBURN: That is correct.

23 JUDGE GIBSON: Okay. So we've taken care
24 of three contentions.

25 MR. BLACKBURN: We've taken care of that

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1 to a point. What I would say is that -- and I guess
2 we're really looking for guidance from the panel on
3 this regard -- there has been a new filing. When we
4 filed this contention, the applicant made a
5 substantial filing in response to basically correct
6 what one might call an oversight or whatever.

7 We have not had time to carefully review
8 that new information that has been filed. And one
9 question we have of the panel, we do not know if we
10 want to file a contention based on that new material
11 or not, but if we were interested in doing so, would
12 we be offered the opportunity, and is there a time
13 limit for doing so?

14 JUDGE GIBSON: There certainly is a time
15 limit, and it's very, very tight.

16 MR. BLACKBURN: That's what I was
17 concerned about.

18 JUDGE GIBSON: So essentially what you
19 need to do is, you need to try to make the time
20 deadline. If you don't, then you're going to have to
21 move for leave to file it out of time, and I suspect
22 you're probably out of time right now.

23 MR. BLACKBURN: I think I'm out of time by
24 that calculation, or by that calculus, and --

25 JUDGE GIBSON: Okay.

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1 MR. BLACKBURN: -- I was basically wanting
2 to ask what the process may be.

3 JUDGE GIBSON: Right. Let me --

4 MR. BLACKBURN: Frankly we don't think
5 that we will be raising any new issues about that
6 contention, but I just wanted to raise that
7 possibility.

8 JUDGE GIBSON: Well, essentially what
9 you're going to need to do if you're out of time is
10 file a motion for leave. You need a certificate of
11 conference, and have you conferred with the other
12 parties to let them know you want to do this. They
13 can indicate whether they oppose or don't oppose your
14 motion for leave. And you can file that and then you
15 can file your new contention along with it, and then
16 we can evaluate it.

17 We've not had an initial scheduling order
18 in this case. Normally that would be spelled out in
19 the initial scheduling order, but that normally occurs
20 after the issuance of the order in conjunction --
21 after our initial contention admissibility --

22 MR. BLACKBURN: Right.

23 JUDGE GIBSON: -- proceeding.

24 MR. BLACKBURN: Well, frankly all of this
25 happened during the time that we were writing replies,

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1 among other things, so --

2 JUDGE GIBSON: Okay.

3 MR. BLACKBURN: -- on the list or
4 priorities it was not the highest.

5 JUDGE GIBSON: Right.

6 MR. BLACKBURN: And frankly I don't
7 anticipate that we will file such a motion, but I did
8 want to inquire.

9 JUDGE GIBSON: Well, for future reference
10 though, if you do plan on filing a new or amended
11 contention, you do have a -- it's a very short time
12 window after the new information becomes available.
13 It's set out in the regulations, but it's very short
14 and you need to follow that procedure.

15 MR. BLACKBURN: Thank you.

16 JUDGE GIBSON: Okay. All right. I think
17 we can turn to Safety 4. On page 26 of your petition,
18 Mr. Blackburn, you raise a fourth safety challenge
19 claiming that the applicant has failed to assure a
20 dependable water supply. Is that correct?

21 MR. BLACKBURN: That is correct.

22 JUDGE GIBSON: And in this challenge you
23 assert that there will not be sufficient storage water
24 available from the Guadalupe River. Is that right?

25 MR. BLACKBURN: Correct.

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1 JUDGE GIBSON: Now, Contention Safety 4
2 and Contention Safety Environmental 1 are practically
3 identical in their wording. Is that right?

4 MR. BLACKBURN: Yes.

5 JUDGE GIBSON: Okay. Mr. Frantz, in your
6 answer you have set out three separate reasons why you
7 believe this contention is defective.

8 MR. FRANTZ: Yes, Mr. Rund will be
9 handling the argument for us on this.

10 JUDGE GIBSON: Great. I'm sorry. Well,
11 I should never presume that Mr. Frantz is going to do
12 all the talking.

13 But first you claim that this contention
14 concerns the cooling basin, which you maintain is not
15 a safety structure. Correct?

16 MR. RUND: That's correct.

17 JUDGE GIBSON: Okay. Second, you claim
18 that this contention ignores the site safety analysis
19 report section 2.4.11, which you claim evaluates the
20 safety implications of low water consideration. Is
21 that correct?

22 MR. RUND: That's right.

23 JUDGE GIBSON: And third you claim that
24 this contention makes an incorrect assumption that
25 surface water is only used as make up water for the

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1 cooling basin and is not used for the safety
2 components whose ultimate heat sink is going to be
3 somewhere else, cooling towers or some sort of passive
4 device. Is that right?

5 MR. RUND: If I could just clarify that
6 one.

7 JUDGE GIBSON: Please.

8 MR. RUND: For a passive -- for a non-
9 passive design the ultimate heat sink would be
10 mechanical draft cooling towers, which are safety
11 related as ultimate emergency heat sink.

12 Now, the make up function for those
13 cooling towers is not a safety-related function
14 because those mechanical draft cooling towers would be
15 designed and sized in a manner to ensure that they
16 would store enough water to operate for 30 days.

17 JUDGE GIBSON: Okay. Thank you for that
18 clarification. I think that's helpful.

19 JUDGE BARNETT: So the way these towers
20 operate is they're losing water over time. Right?
21 Where does that make up water come from?

22 MR. RUND: To replace the water that
23 would --

24 JUDGE BARNETT: Right. That you lose from
25 operating the tower to begin with.

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1 MR. RUND: Presumably the cooling basin,
2 although there are alternative options available, you
3 know, you can pull from ground water, but they would
4 be sized to store enough water to operate without any
5 make up water for the first 30 days following a
6 presumed accident.

7 JUDGE BARNETT: But because they're losing
8 water continuously, you need them -- if you're going
9 to have a 30-day capacity, you need to be making up
10 water continuously.

11 MR. RUND: No, they'd be sized, they'd
12 have -- the cooling towers themselves would have their
13 own basins that would allow them to operate without
14 the need for any make up water for the first 30 days
15 following an accident. That's separate from the
16 cooling basin itself.

17 JUDGE GIBSON: Okay. And so if you did --
18 if you do go to a design that involves these
19 mechanical draft cooling towers, you would need make
20 up -- you would need water for them, but by virtue of
21 the fact that you have these basins that provide a
22 supply of water for at least 30 days so that you could
23 shut down the plant, therefore, the cooling basin
24 itself should never be considered a safety structure.
25 Is that a fair statement?

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1 MR. RUND: That's fair.

2 JUDGE GIBSON: Okay. Thank you. Now, you
3 cite the *Palo Verde* case, a 1983 Appeal Board ruling.

4 JUDGE BARNETT: Judge Gibson, before we --

5 JUDGE GIBSON: Yes, that's fine.

6 JUDGE BARNETT: -- move on, is that okay?
7 Again, I'm trying to understand how these towers work
8 exactly. Where is the 30-day supply physically
9 located?

10 MR. RUND: There are basins that are a
11 part of the mechanical draft cooling tower that's
12 separate from the cooling -- you know, the larger
13 cooling basin which is used for normal operations. So
14 the mechanical draft cooling towers and the basins
15 that provide the 30-day supply wouldn't be on the --
16 part of the power block.

17 JUDGE GIBSON: So those basins are located
18 on the -- in the power block.

19 MR. RUND: That's correct.

20 JUDGE GIBSON: In it or on it or under it,
21 I don't know what the right term is, but it's part of
22 it. Okay.

23 JUDGE BARNETT: Is that right, it's
24 located on the power block?

25 JUDGE GIBSON: The cooling basins for the

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1 mechanical draft cooling towers?

2 MR. RUND: Yes, the -- right. The
3 mechanical draft cooling towers for non-passive
4 designs would be safety related. So the components
5 associated with it that are required to provide the
6 30-day supply would be located on the power block.

7 JUDGE GIBSON: Okay. Now you cite the
8 1983 Appeal Board ruling in *Palo Verde*. I believe
9 there's this quote, "The condenser cooling system is
10 not required to meet the standards established for
11 facility components that are deemed to be safety
12 related."

13 Now, on -- let me -- is that right?
14 That's the *Palo Verde* decision you cited, the 1983
15 Appeal Board decision?

16 MR. RUND: That's correct.

17 JUDGE GIBSON: Okay. Counsel for
18 petitioners, on page 29 of your reply you attempt to
19 distinguish the *Palo Verde* case by arguing that the
20 water concerns there were remote and speculative. Is
21 that correct?

22 MR. BLACKBURN: That's correct.

23 JUDGE GIBSON: And here you complain
24 they're not remote and speculative.

25 MR. BLACKBURN: Absolutely.

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1 JUDGE GIBSON: Okay. And my recollection
2 of *Palo Verde* is that the source of the cooling water
3 is the city of Phoenix's discharge of treated
4 municipal sewage, isn't it?

5 MR. RUND: That's correct.

6 JUDGE GIBSON: Okay. Does it seem that
7 they would -- that seems to be a pretty reliable
8 source, it doesn't seem like they would have a problem
9 with that being a source of cooling water. As long as
10 people were flushing their toilets, I guess.

11 MR. RUND: If I recall, in that issue at
12 the time of that decision --

13 JUDGE GIBSON: In '83?

14 MR. RUND: -- in '83, there was
15 uncertainty as to whether they would be able to
16 ultimately procure the ability to use that water. So
17 there was some questions, if I recall, as to whether
18 or not they would be able to rely on that.

19 JUDGE GIBSON: So that was not -- that
20 that would be the source of their cooling water you're
21 saying was not an established fact at the time of that
22 Appeal Board ruling in 1983. Is that a fair
23 statement?

24 MR. RUND: I believe that's correct.

25 JUDGE GIBSON: Well, was there another

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1 dedicated source of water? If they were not going to
2 be getting it from the treated municipal sewage, where
3 were they going to be getting cooling water for the
4 Palo Verde plant in '83?

5 MR. RUND: For normal operations?

6 JUDGE GIBSON: Yes, for -- well, if I
7 understand correctly, you're saying that, in Palo
8 Verde, the condenser cooling system is not required to
9 meet the standards established for facility components
10 that are deemed to be safety related and that there
11 would have been -- there would be plenty of water. We
12 don't have to worry about it essentially, we've got
13 this 30-day supply.

14 And I'm just trying to understand whether
15 or not -- we're trying to understand as a Board, okay,
16 is Palo Verde inapposite, is it right on point, is it
17 distinguishable because in that case the source was
18 not remote and speculative, or it was remote and
19 speculative.

20 We're trying to understand this because,
21 you understand Mr. Blackburn's position, he's saying
22 in Palo Verde they had a dedicated source of water and
23 here you don't. I'm trying to understand what is the
24 significance for us in your mind of the Palo Verde
25 decision.

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1 MR. RUND: Well, I mean here we have --
2 for safety purposes we do have a dedicated source to
3 the extent that that was the case in *Palo Verde*, I
4 think it's right on point --

5 JUDGE GIBSON: Okay.

6 MR. RUND: -- given the 30-day supply we
7 just talked about.

8 JUDGE GIBSON: Okay. Okay. Fair enough.
9 Mr. Blackburn?

10 MR. BLACKBURN: Well, I mean I guess first
11 of all the terms "remote and speculative" come from
12 the *Palo Verde* decision. And I think we were taking
13 them somewhat literally in that we believe that
14 certainly in a broad general sense the water
15 availability for this site, there certainly were
16 issues.

17 I mean when you've got the applicant
18 talking about in response that they would shut down
19 the facility as an alternative to how to deal with the
20 water issue, to my mind that certainly suggests that
21 the -- certainly to raise an issue about water
22 availability is not being any means remote or
23 speculative.

24 So I think that though, to my mind, it
25 comes down to a couple of kind of key distinctions.

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1 The 30-day supply, I think the argument is being made
2 is, you know, that the availability of water for that
3 is not remote or speculative.

4 JUDGE GIBSON: I think that's a fair
5 characterization of what they said.

6 MR. BLACKBURN: And I think that what I
7 hear the applicant trying to do is again parse the
8 safety issue very narrowly. And I think that our
9 concern is in a broader sense. We don't necessarily
10 take issue with that 30-day reserve. At this point we
11 certainly haven't raised any challenge before you in
12 any filings or anything like that.

13 Our concern here was a broader one, and it
14 was one that the applicant on the one hand -- and we
15 talk about this is later contentions -- never
16 identified one alternative or another for where they
17 were going to get their water with any degree of
18 certainty. They sort of are keeping all of their
19 options open.

20 Secondly, they have made these admissions
21 about we'll shut the plant down, you know, that's how
22 we'll deal with this. It's not a safety issue, it's
23 an economic issue. I have great difficulty with that
24 distinction, and I think that it just argues against
25 common sense.

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1 Someone's going to keep a plant running as
2 hard and as long as they can, because that's just
3 human nature. Once you have an investment, once
4 you've got that type of money in the ground, and every
5 day you generate electricity is money coming in, those
6 are hard decisions to make. And we have an admission
7 here that shutting down the plant is where we're going
8 to go.

9 Now, to my mind, and particularly combined
10 with the earlier discussion of whether the cooling
11 pond is a safety -- if the cooling pond is safety
12 issue, then clearly I think this is a safety
13 consideration. I don't think there's any question
14 about that.

15 We're making the argument that even if
16 it's not, even if the cooling pond is not a safety
17 feature, the admission by the applicant that their way
18 of dealing with water availability is to shut down the
19 plant, that's a safety issue in and of itself. That
20 if that's the type of mind set we're dealing with here
21 with regard to water, you know, do I have enough
22 water, or do I shut the plant down, that's a safety
23 issue.

24 JUDGE GIBSON: Okay. I think Judge
25 Baratta has a question.

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1 JUDGE BARATTA: Well, in *Palo Verde*
2 though, that Board also addressed that issue and that
3 they said that it didn't matter whether or not there
4 was enough water to operate the plant.

5 They said something to the effect that
6 really there was no basis, legal basis for them
7 refusing a license including an inability to operate
8 the plant at 100 percent of the time due to temporary
9 water shortages. So because that's an Appeal Board
10 ruling, we're bound by that. So I guess I have a
11 problem with what you're saying from that aspect.
12 Okay?

13 MR. BLACKBURN: I understand. And I mean
14 I think that's the challenge that appeal boards have,
15 and judicial processes have in that it was a 1983
16 decision, situations change. I think that certainly
17 one would argue in light of the events of the last
18 week that one might reconsider a decision that was
19 made in 1983 if, in fact, there is sort of
20 overwhelming issues and concerns.

21 I'm not suggesting that all precedent be
22 thrown out the door by any means. But certainly to
23 the extent that you read, you know, *Palo Verde* to say
24 legally there is no basis, I'm not sure that I read
25 the law in that regard. I think that if the Board

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1 doesn't have some discretion to find -- wait, let me
2 back up.

3 If you were to agree with me, and that's
4 a large assumption, but I'm just making that
5 assumption, if you were to agree with me that you felt
6 it was safety issue, to be denied the opportunity to
7 express that opinion and to have that issue vetted
8 because of what was done in 1983, I think is -- it
9 would be a tragedy on one level, but I don't think you
10 have to -- it has to be that way.

11 I think that you can certainly identify
12 new information, new situations. And again, I would
13 argue that even without what happened in Japan, that
14 certainly water availability is an issue.

15 But when you just -- to my mind, if you're
16 denied as judges the opportunity to look at a
17 situation from a common sense standpoint and say,
18 Something here raises alarm bells, and you're unable
19 to address that, I think there's something wrong with
20 the system, and I don't think you're so restricted.

21 I do think that respect for precedence is
22 important, but I think on an issue like this, to be --
23 on the one hand to basically go forward with a site
24 suitability assessment. Now, that doesn't mean -- now
25 right now we're talking safety. I mean there's also

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1 the environmental and alternative site analysis side
2 of that, which I don't think you're so restricted
3 upon, but you're basically making -- I think your
4 question is strictly related to safety.

5 I think these are the hard decisions,
6 frankly, that the Licensing Board has to deal with.
7 You know, I would urge you that if you feel that it is
8 a direct conflict, go against it.

9 JUDGE GIBSON: Let me ask -- I know this
10 is an Appeal Board decision, do you all have any
11 Commission cases that basically say you don't consider
12 this issue, it's sort of off the table?

13 MR. RUND: I'm not aware of any, but --

14 JUDGE GIBSON: Okay.

15 MR. RUND: -- as Your Honor is probably
16 aware, Appeal Board decisions are binding.

17 JUDGE BARATTA: Binding.

18 MR. RUND: I'd also just --

19 JUDGE GIBSON: Yes.

20 MR. RUND: -- want to address a couple of
21 things if I may.

22 JUDGE GIBSON: Right.

23 MR. RUND: First, the fact that the SSAR
24 establishes a low water level under which the plant
25 would be required to shut down, I mean I think that's

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1 a very conservative and cautious approach that we take
2 for safety purposes.

3 But I'd also point out that, while it's
4 not a safety issue, in the SSAR we also did an
5 evaluation that looked at, okay, based on the size of
6 the cooling basin what would happen if we experienced
7 a drought of record again. And again, this is not a
8 safety issue, but we determined, based on that
9 analysis that the plant would be able to operate
10 through the drought of record based on that analysis.

11 And they have not challenged that portion
12 of the SSAR, so I mean I think even if -- and again,
13 I'm not suggesting that the Board needs to revisit the
14 Palo Verde decision, I think it's binding, I think
15 it's well reasoned, but even if the Board had some
16 concern, I think there's still no need to admit this
17 contention here because there's no genuine dispute
18 about the plant's ability to operate based on having
19 the cooling basin, which would, in a sense, shore up
20 any fluctuations in flows in the river.

21 And that's why we're going through and
22 proposing to build the cooling basin, to have that
23 operational flexibility and be able to operate when --
24 even when there are -- you know, the flow may be lower
25 due to droughts or other --

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1 JUDGE GIBSON: Okay. You anticipated my
2 next question for Mr. Blackburn.

3 How do you respond to the applicant's
4 claim that you've ignored SSAR section 2.4.11 which
5 the applicant claims evaluates the safety implications
6 of well water considerations?

7 MR. BLACKBURN: May I take a minute?

8 JUDGE GIBSON: Yes, you may.

9 (Pause.)

10 MR. BLACKBURN: Would you give me that
11 section again, please?

12 JUDGE GIBSON: Yes, it's 2.4.11 of the
13 SSAR.

14 (Pause.)

15 MR. BLACKBURN: We did not focus on the
16 SSAR so much as we did the ER. Just in quick review
17 it seems that it's very similar. And again, I think
18 it anticipates that there is inadequate water. And so
19 to the extent on the -- I guess on the one hand, we're
20 trying to figure out if we have a true disagreement as
21 to fact.

22 I think the disagreement is the
23 implication of the information, and perhaps I'm not as
24 skilled as I need to be in how to put these issues
25 together, but I mean, again, I think that basically

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1 the applicant's position seems to be, Yes, we have a
2 water availability problem, Yes, there are going to be
3 low flow situations, Yes, all of these things, and
4 Yes, we're going to right ahead, and, Yes, please
5 issue this permit.

6 And at some point we have a disagreement.
7 Now, the disagreement may not be on the factual
8 presentation, per se, the disagreement is over the
9 implication of the information. And how that actually
10 gets structured as a contention is perhaps where my
11 experience before this Board may be lacking.

12 But it seems to me what we're disagreeing
13 about is that, one, safety issues are not raised by
14 that. Now, I recognize the *Palo Verde* situation, I
15 understand that. We've also got the basic assumptions
16 that are made by the NRC and the Board with regard to
17 normal operating procedures, and sort of the design
18 accident, if you will, and the design situation that
19 we're concerned about.

20 What we're raising here is a challenge to
21 the logic that an inadequate supply of water does not,
22 in a broad general sense, and if you will an
23 undisputed agreement that there's not -- that there
24 may well be not enough water during certainly drought
25 conditions, that that in and of itself does not raise

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1 a safety issue.

2 That is the issue. That's what we're
3 concerned about. Frankly, I mean I don't want to
4 argue about whether we're five-acre feet or 50-acre
5 feet or 500-acre feet short. I'll accept their
6 admission, We're short, there is not enough water
7 during drought conditions.

8 JUDGE GIBSON: Okay. Okay.

9 MR. BLACKBURN: As I see it, that's where
10 we are.

11 JUDGE GIBSON: Okay. And I just want to
12 make sure, staff, you all are opposed to the admission
13 of this contention. Is that correct?

14 MS. GOLDIN: Your Honor, Laura Goldin with
15 the NRC staff. Yes, we're opposed.

16 JUDGE GIBSON: Okay.

17 JUDGE BARATTA: I'd like -- could the
18 applicant --

19 JUDGE GIBSON: Please.

20 JUDGE BARATTA: -- care to respond to
21 that?

22 MR. RUND: Yes. I mean I think I heard
23 Mr. Blackburn suggest that we concede that there is
24 not enough water. I think the SSAR is clear that even
25 during a repeat of the drought of record, the plant

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1 would continue to operate.

2 And from a safety perspective, there also
3 is no issue. I mean we've got the ultimate heat sink
4 which would be safety related, which doesn't rely on
5 the cooling basin, it doesn't rely on river flows in
6 order to perform a safety function.

7 JUDGE BARNETT: So the plant would operate
8 during the drought of record?

9 MR. RUND: The cooling basin would be
10 sized in such a manner that there would be enough
11 water where the plant could operate through the
12 drought of record.

13 JUDGE BARNETT: I thought one of the
14 issues that you raised is that you would have to shut
15 down the plant at some point, or lower the power in
16 the plant. Is that -- am I mistaken there?

17 MR. RUND: No, I think -- I refer the
18 Board to the SSAR at 2.4.11-5 and there is shows that
19 the plant would be able to operate through the drought
20 of record.

21 JUDGE GIBSON: I think the question
22 about -- I believe the question about shutdown came up
23 in the context of they would have at least 30 days to
24 do that because they had adequate water in those
25 basins under the power block. Is that correct? That

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1 you be using --

2 MR. RUND: Yes, and if I could just
3 clarify.

4 JUDGE GIBSON: -- whatever you're using
5 for your ultimate --

6 MR. RUND: Right.

7 JUDGE GIBSON: -- heat sink. Right?

8 MR. RUND: For purposes of specifying
9 what's safety related and what's not, we're
10 conservative and we essentially assume that the
11 cooling basin isn't there and we don't need it.

12 I mean obviously it is there and, you
13 know, if we're past 30 days and, you know, we've got
14 water there, it's a logical place we'd draw from. But
15 to meet NRC safety requirements we're conservative and
16 we assume -- we don't rely on the cooling basin.

17 JUDGE BARNETT: Wasn't there something in
18 your answer talking about lowering the power in the
19 plant or shutting the plant down? I'm confused on --

20 MR. RUND: If I recall, I think there's
21 some quoted language from the *Palo Verde* decision that
22 essentially says, you know, that could theoretically
23 be an option if there is a lack of water for whatever
24 reason. And we may have similar language where we
25 just, from a theoretical standpoint, if for whatever

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1 reason, even if it's, you know, remote and
2 speculative, that's always an option.

3 JUDGE BARNETT: But you don't anticipate
4 that?

5 MR. RUND: No, we do not.

6 JUDGE GIBSON: Judge Baratta?

7 JUDGE BARATTA: I have nothing more.
8 Thanks.

9 JUDGE GIBSON: I think what we would like
10 to do, if you all are agreeable, is take maybe a quick
11 break here for five minutes, and then plow on through
12 till, you know, 12:30 or so, we've got a long
13 afternoon ahead of us, and maybe we can take our lunch
14 break a little later, maybe beat some of the crowd out
15 there. Would that be acceptable?

16 MR. BLACKBURN: It's acceptable.

17 JUDGE GIBSON: Okay. Let's take a quick
18 five minute break and come back and we'll plow on.
19 Thank you.

20 (Whereupon, a short recess was taken.)

21 JUDGE GIBSON: Okay. If we could turn to
22 Environmental 1, the impacts from enhanced cooling
23 basin seepage.

24 Mr. Blackburn, on page 34 of your petition
25 you raise an environmental challenge claiming that the

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1 applicant has not properly characterized the impacts
2 from enhanced cooling basin seepage. Is that correct?

3 MR. BLACKBURN: That's correct. Can you
4 hear me with -- my microphone has decided to die here.

5 JUDGE GIBSON: I can hear you fine.

6 The most important thing is, is the court
7 reporter getting everything? You've got your own mike
8 there, so.

9 MR. BLACKBURN: We'll try that.

10 JUDGE GIBSON: I'm sure that everyone here
11 would benefit greatly from hearing you through the
12 microphone, but we'll do what we can. Perhaps we can
13 get that attended to at lunch.

14 Now, specifically your contention concerns
15 the possibility that seepage from the cooling basin
16 will impact oil and gas wells and borings beneath the
17 site. Is that correct?

18 MR. BLACKBURN: That's correct.

19 JUDGE GIBSON: The applicant claims that
20 you have failed to account for section 4.2.3.2 of the
21 environmental report, and that had you accounted for
22 it, you could not have proffered this contention.

23 Now, as I read that section, the applicant
24 is saying that it will plug or cap any wells that
25 might serve as conduits from the cooling basin to

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1 underground aquifers.

2 How do you respond to the applicant's
3 claim that this section, 4.2.3.2 of the environmental
4 report has already made provision for the issues that
5 you have raised with this contention?

6 MR. BLACKBURN: I believe that this goes
7 to both the general presentation and general argument,
8 if you will, about the oil and gas issue in a broad
9 general sense. We think that the problem is much more
10 comprehensive and much more serious than has been
11 presented by the applicant in its documentation
12 generally.

13 And, you know, to promise to plug that
14 which you have not identified and that which you have
15 not found and have at least no plan that I see to find
16 those things, was really I think the point we were
17 making here.

18 I would say that at least there's just a
19 series of concerns about the cooling pond. You know,
20 this is one aspect of it. You know, there are many
21 penetrations into the subsurface here. As we talk
22 about in the oil and gas section, many of those are
23 not recorded at the Texas Railroad Commission, many of
24 these predate record keeping. There are some
25 significant issues associated with that.

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1 And I just think the mere promise that
2 they're going to find and plug things is virtually
3 meaningless. And so I would say that we would stand
4 on the concern that these are unidentified and
5 basically unrepresented hazards, if you will.

6 And once those are identified, perhaps the
7 applicant can convince both -- perhaps me, but
8 probably more importantly the panel that they can, in
9 fact, plug and correctly close off these wells. But
10 nothing in the application assures me of that at this
11 time.

12 JUDGE GIBSON: Okay. I guess I have -- I
13 see two separate issues coming out of what you just
14 said, Mr. Blackburn. The first is, are you suggesting
15 that your contention encompasses seepage from the
16 cooling tower basin that might be transmitted to an
17 underground aquifer through some mechanism other than
18 an underground oil or gas well that hasn't been
19 plugged?

20 MR. BLACKBURN: Well, a fault.

21 JUDGE GIBSON: Through a fault.

22 MR. BLACKBURN: I think faulting is
23 clearly within the --

24 JUDGE GIBSON: Okay.

25 MR. BLACKBURN: -- scope of this concern.

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1 JUDGE GIBSON: Okay. Okay. Fair enough.
2 Thank you. I wanted to be sure I understood that.

3 Secondly, are you saying that, like this
4 other contention we talked about earlier on
5 alternatives, yes, maybe the applicant has done a bang
6 up job, maybe they've got this all delineated, but
7 it's certainly not clear from the environmental
8 report, and the environmental report needs to be much
9 more specific and needs to have a specific
10 characterization of all the oil and gas wells out
11 there at the site, and it's not in there.

12 MR. BLACKBURN: That's absolutely true.

13 JUDGE GIBSON: Okay. Okay.

14 JUDGE BARATTA: One of these that wasn't
15 clear to me, and I apologize I did not indicate on my
16 notes here where this was said, but I believe the
17 applicant said something to the effect that during
18 excavation for both the power block as well as for the
19 cooling pond, if they should find any additional
20 wells, that they would then be capped.

21 I mean that seems to be, at least on the
22 face of it, a pretty concise statement that, We are
23 going to look for more wells, we are going to -- if we
24 do find them, we're going to deal with them. And
25 what, you know, what more would you want?

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1 MR. BLACKBURN: Well, I have a quite a bit
2 more in mind. I would think that one might try to
3 find these -- indications of where these wells are by
4 all means possible before you get out there with a
5 bulldozer and start moving dirt.

6 You know, I mean I understand, I mean it's
7 a last resort. Certainly if you're moving dirt out
8 there and you find something you didn't expect to
9 find, I would expect you certainly to plug it and
10 finish it off in a safe way. But to use that as your
11 primary mechanism I think is -- I mean I would
12 consider it unacceptable.

13 I would think that we could use remote
14 sensing devices, there are ways to come up with, oh,
15 for example, geophysical tools, things like that that
16 could identify where is the metal in the subsurface,
17 you know, where the casing's been left.

18 I think there's any number of ways to be
19 a little more scientific about it than finding it with
20 a bulldozer. I think that -- I wouldn't diminish that
21 as a last resort, but it's not what I would consider
22 the first resort.

23 JUDGE BARATTA: So then your issue is with
24 the site characterization that they have done and that
25 they propose to continue doing should they go to the

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1 next phase.

2 MR. BLACKBURN: Well, that certainly is a
3 piece of it, but I think what we're raising is there
4 a specific issue associated when the cooling pond is
5 not the type of -- I mean what is in the cooling pond
6 is not necessarily what you want in the subsurface.
7 And so there's a specific particularized issue of
8 seepage and leakage from the pond into the subsurface.

9 The subsurface conduits that we've
10 identified are the oil and gas mechanisms, but there's
11 a bigger question of the leakage from the pond itself,
12 and we don't think that has been adequately evaluated
13 or characterized.

14 JUDGE BARATTA: I understand that. I was
15 trying to get this one aspect of it though tied down
16 because I do have a question about that too, which
17 I'll ask the applicant in a few minutes.

18
19 Okay. Are you done with this one from
20 your aspect, because I'm not done.

21 JUDGE GIBSON: No, no.

22 JUDGE BARATTA: I did want to --

23 JUDGE GIBSON: No, I wasn't done.

24 JUDGE BARATTA: Okay.

25 JUDGE GIBSON: But I wanted to be sure

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1 that we covered a few other things. We will -- I know
2 you all have some things you want to say, and you'll
3 have our opportunity, but we need to clarify a few
4 things from Mr. Blackburn first about what he's
5 saying.

6 With respect to the possibility that
7 Tritium might seep out of the cooling basin, the
8 environmental report at 3.5.2 and at 5.4.11 states
9 that, "No radioactive pollutants will be discharged to
10 the cooling basin, but instead will be discharged to
11 the Guadalupe River."

12 Do you dispute that the discharge system
13 as such that no radioactive pollutants will be
14 discharged to the cooling basin?

15 MR. BLACKBURN: We have not disputed that
16 directly in the contentions that we have filed.

17 JUDGE GIBSON: Okay. Well -- okay. Well,
18 I just want to make sure that I understand what the
19 scope of this is because you did mention Tritium --

20 MR. BLACKBURN: We did.

21 JUDGE GIBSON: -- and what they're
22 essentially saying is there's no way Tritium's getting
23 in there because we're discharging a different way.

24 MR. BLACKBURN: And their characterization
25 is correct, according to what they have filed and, you

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1 know, we raised the mention of Tritium because there
2 certainly is evidence in other facilities that there
3 has been --

4 JUDGE GIBSON: Sure.

5 MR. BLACKBURN: -- Tritium and Tritium --

6 JUDGE GIBSON: Sure.

7 MR. BLACKBURN: -- release and it has
8 ended up I think unfortunately in the ground water on
9 occasion.

10 JUDGE GIBSON: Sure.

11 MR. BLACKBURN: We do recognize the way
12 that the applicant says that this particular situation
13 will be addressed. I think our inquiry though is
14 broader than Tritium. There are other pollutants and
15 other concerns associated with the cooling pond, but
16 specifically with regard to Tritium.

17 JUDGE GIBSON: Okay.

18 MR. BLACKBURN: We have not specifically
19 disputed their contention. I've got to say, after the
20 last weekend, you know, I kind of wish I could have
21 rewritten a couple of these, but as I wrote them I did
22 not -- we did not contend that.

23 JUDGE BARNETT: What are the other
24 pollutants that you were talking about besides
25 Tritium?

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1 MR. BLACKBURN: There are a lot of
2 surfactants, there's a lot of, I think, chemicals that
3 are added to the cooling pond for various purposes,
4 any algal materials, things like that that'll be
5 present in the pond and that could be an issue.

6 JUDGE GIBSON: And these are things that
7 are, I believe, covered in other contentions.
8 Correct? The other pollutants? Or are they
9 encompassed within 1?

10 MR. BLACKBURN: I think they're
11 encompassed in this contention.

12 JUDGE BARATTA: Yes, I think --

13 JUDGE GIBSON: In Number 1?

14 MR. BLACKBURN: Number 1, yes, sir.

15 JUDGE GIBSON: Okay.

16 JUDGE BARATTA: Because this -- you had a
17 statement that -- or the applicant has made a
18 statement, I should say, that although the ER does not
19 specifically discuss the impacts of chemical
20 discharges, that discharges would be small because the
21 water in the cooling basin must satisfy the TPDES
22 permit upon discharge to the river.

23 Would you care to comment on that
24 statement? That was in, I believe, their answer to
25 your petition.

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1 MR. BLACKBURN: I understand they have --
2 you know, the requirement for TPDES permit. The river
3 discharge is not going to be a drinking water source.
4 The groundwater that is immediately adjacent might be,
5 depending on the usage in nearby -- not extensive
6 usage, but there is some nearby usage. So I would say
7 that nobody is proposing to drink the water coming
8 through the TPDES permitted outfall.

9 Now, there is the potential that water
10 will be withdrawn downstream of the outfall, but it
11 would go through a treatment process, whereas none of
12 the groundwater wells have a treatment process
13 associated with it. So that would be the distinction.

14 JUDGE BARATTA: Okay.

15 JUDGE GIBSON: You got it?

16 JUDGE BARATTA: Yes.

17 JUDGE GIBSON: Okay. Okay. I just -- I
18 want to make sure before we leave this subject of
19 radioactive pollutants, are you suggesting -- well,
20 let me say, applicant is claiming that with respect to
21 possible seepage out of the liquid radioactive waste
22 management system between the point of generation and
23 the point of plant discharge in the Guadalupe that it
24 has accounted for all of that in its environmental
25 report in section 7.2.3.3.

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1 Are you okay with what they said, or are
2 you disputing that?

3 MR. BLACKBURN: Okay with what they said
4 is a --

5 (General laughter.)

6 MR. BLACKBURN: Do I have a specific basis
7 for disagreeing apart from, one, generally being
8 doubtful about that they can deliver what they say,
9 which is a -- you know, that's the concern about
10 Tritium, in my opinion.

11 It's not that they haven't -- they have
12 discussed and described a system that, if it performed
13 as described, would probably take care of the concern.
14 I am not convinced that it would occur that way.
15 Whether that rises to the level that is required to
16 get Tritium into this specific contention, I can't
17 say.

18 Just one second.

19 (Pause.)

20 MR. BLACKBURN: I think the important
21 point about Tritium is that it is an issue of concern.
22 If we had a specific critique of what the applicant
23 has said, we would have brought it forward. We do not
24 have that type of documentation at this time.

25 That would be something that one would

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1 think, if we were allowed to go forward with Tritium
2 left in, that we could have a chance to look and
3 examine. We have not had that type of detailed
4 engineering examination of what they have offered.

5 JUDGE GIBSON: Okay. Okay. Now, let me
6 ask, first of all, with respect to seepage of
7 pollutants from the cooling basin into the ground
8 water, I want to talk about footnote 171 and the --
9 that the environmental report does not discuss the
10 impacts of chemical discharges from the cooling basin
11 to the ground water.

12 Now, why is that not a legitimate
13 contention of omission?

14 MR. BURDICK: Thank you, Your Honor. This
15 is Steven Burdick, counsel for the applicant.

16 JUDGE GIBSON: Thank you, Mr. Burdick.

17 MR. BURDICK: We believe there's no
18 requirement to specifically evaluate the discharge of
19 those chemicals through the seepage. It's a
20 relatively low amount. We evaluate what the water
21 quality will be in the cooling basin and we show that
22 that will be high quality water.

23 In fact, contrary to what was in the
24 petition, the environmental report, table 3.6-1
25 identifies the specific constituents that are believed

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1 to be -- that will be in the cooling basin. And so it
2 identifies these, and the cooling basin is relatively
3 high quality.

4 It was mentioned in that footnote we do
5 evaluate the water quality due to discharges from the
6 blow down of the cooling basin. We believe that
7 evaluation would also encompass any impacts from
8 chemical discharges through seepage.

9 I would point out though, that I don't
10 believe the Board even needs to reach this contention,
11 or this question to reject the contention. And I
12 think it's important here to step back and look at
13 what was proffered in the contention initially, and
14 that was a contention of omission on seepage from oil
15 and gas wells.

16 Judge Gibson, as you quoted in section --
17 the environmental report section 4.2.3.2, the
18 applicant does identify this potential seepage and
19 provides a response, and that would be to properly cap
20 or plug whatever oil and gas wells are there. And
21 therefore we don't believe this incremental amount of
22 seepage through oil and gas wells would really exist.

23 And that's another important piece, is the
24 scope of this contention isn't related to seepage
25 generally, but as pled it's related to any incremental

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1 amount of seepage that would come through the oil and
2 gas wells. They have not challenged what seepage we
3 estimate just to come from the cooling basin itself.
4 And so I think that's an important factor to put in
5 here.

6 And additionally there was some discussion
7 of growth faults with respect to this contention.
8 This contention does not discuss growth faults
9 whatsoever, and so it's definitely limited just to the
10 alleged seepage from oil and gas wells.

11 And so I think the Board can look at the
12 initial scope of the contention, that it was a
13 contention of omission, we provided the information
14 they claim was not there, and pursuant to 10 CFR
15 Section 2.309(f)(1)(vi) and Commission case law,
16 that's enough to reject this contention, because they
17 haven't disputed what's actually in the environmental
18 report itself. But even moving beyond that, Exelon's
19 committed to properly plug these oil and gas wells.

20 But going back full circle here to our
21 original question, the petitioner has not identified
22 any harm from this incremental amount of alleged
23 seepage due to either Tritium or chemicals. As we've
24 discussed about Tritium, there's no pathway for that
25 Tritium to reach the cooling basin.

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1 With respect to chemicals, there too they
2 haven't provided adequate support for this contention
3 because they haven't identified any harm that would
4 come from that.

5 JUDGE BARNETT: But what they were -- the
6 point he was making, if you were drinking this water
7 from the cooling basin?

8 MR. BURDICK: I think the way we evaluate
9 it in the environmental report is the cooling basin
10 would be high enough quality, and so I don't think
11 there would be an issue with the drinking water here.

12 JUDGE BARATTA: So you claim then that the
13 water in the cooling basin would meet EPA drinking
14 water standards?

15 MR. BURDICK: The environmental report
16 doesn't perform that evaluation, but we do perform the
17 evaluation of discharging the same cooling water to
18 the river, and I think that would support drinking
19 water. And so I think by extending that evaluation --

20 JUDGE BARATTA: So meeting the TPDES
21 would, in fact -- does that meet the EPA drinking
22 water standard?

23 MR. BURDICK: One second, Your Honor.

24 (Pause.)

25 MR. BURDICK: Your Honor, I think that'll

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1 be a future permitting process, and so we don't know
2 exactly what the restrictions will be on that. But
3 what we evaluate in the environmental report, that the
4 impacts will be small, and we believe that's adequate
5 there.

6 JUDGE BARNETT: So he could make a future
7 contention on that evaluation that -- if he disagreed
8 with the evaluation that you made in the future, he
9 could file another contention on that?

10 MR. BURDICK: Well, Your Honor, I think it
11 would depend on the timing of that. We believe, just
12 to be clear, that the environmental report is
13 sufficient, you know, provides adequate information to
14 fully address this issue.

15 We don't believe a specific evaluation of
16 the seepage on -- of chemicals due to the incremental
17 amount of like seepage from oil and gas wells is
18 required in the environmental report. We believe the
19 environmental report is complete.

20 If there was -- if it occurs and when the
21 TPDES permitting process occurs, then the petitioner
22 would be required to evaluate whether that would
23 support an admissible contention. But we think
24 there's enough here to provide finality on this issue.

25 JUDGE GIBSON: Judge Baratta, do you have

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1 any --

2 JUDGE BARATTA: I have nothing more.

3 JUDGE GIBSON: I just want to make sure I
4 understand, and I'm -- the way that you are
5 envisioning, separate and apart from the seepage --
6 since this has come up I want to ask the question
7 now -- the way that you're envisioning this is you
8 would have -- you have a liquid waste management
9 system that would -- that all of your -- any
10 radioactive constituents would run through to be
11 treated, run through that system and then discharged.
12 Correct?

13 MR. BURDICK: That's correct.

14 JUDGE GIBSON: And that would be regulated
15 by the NRC.

16 MR. BURDICK: That is correct.

17 JUDGE GIBSON: You would also have some
18 discharges of other constituents, perhaps sewage or
19 perhaps cooling tower blow down or something like
20 that, that would be -- also occur, and you would need
21 a TPDES permit for that.

22 MR. BURDICK: That's correct.

23 JUDGE GIBSON: And then you would have
24 cooling -- you would have blow down from the reservoir
25 on occasion, I think in South Texas my recollection is

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1 it was, what, once every seven years or something you
2 actually discharge from that reservoir?

3 MR. BURDICK: I think there it's only
4 happened once.

5 JUDGE GIBSON: Okay. So a rare event you
6 would actually have a discharge, but you would have a
7 limit on what your discharges of the constituents
8 would be from the cooling basin. Okay. And all of
9 those things would be regulated under the TPDES
10 system, except for the liquid waste management system,
11 which --

12 MR. BURDICK: Yes.

13 JUDGE GIBSON: -- would be regulated by
14 the NRC. And then to the extent you had seepage, that
15 would be another matter entirely not regulated by
16 TPDES permit presumably, unless you were pumping
17 groundwater and treating it then discharging it or
18 something. Right?

19 MR. BURDICK: That's correct.

20 JUDGE GIBSON: Okay.

21 MR. BURDICK: I'd just like a point of
22 clarification though. I think there, given the size
23 of the cooling basin and the design of the plant, it
24 is anticipated there will be more blow downs from the
25 cooling basin. And so it will occur more frequently,

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1 we anticipate, than South Texas.

2 JUDGE GIBSON: Well, occurring more
3 frequently than South Texas is not saying a lot, Mr.
4 Burdick.

5 MR. BURDICK: Yes.

6 JUDGE GIBSON: Are we -- you talking about
7 daily, or weekly, monthly, yearly, what are we --

8 MR. BURDICK: I think it would be as
9 needed, but we anticipate -- you know, well, I don't
10 think there's a --

11 JUDGE GIBSON: Surely you can give me a
12 range though.

13 MR. BURDICK: I think, you know, within --
14 you know, I don't want to give a specific range
15 because it's dependent --

16 JUDGE GIBSON: That's okay.

17 MR. BURDICK: -- on operation
18 characteristics but it's going to be more than yearly
19 or -- and I think even longer --

20 JUDGE GIBSON: Perhaps. Okay.

21 MR. BURDICK: -- is my understanding, yes.

22 JUDGE GIBSON: Something in that range.

23 MR. BURDICK: Yes.

24 JUDGE GIBSON: Okay. We're not -- not
25 daily?

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1 MR. BURDICK: I just didn't want to leave
2 the impression that --

3 JUDGE GIBSON: No, that's okay.

4 MR. BURDICK: -- it was just once in 20
5 years.

6 JUDGE GIBSON: We just want to get a rough
7 idea of what we're talking about here. Now, any other
8 discharges?

9 MR. BURDICK: You know, I believe there
10 are some plant operational discharges that go to the
11 cooling basin itself, and so I think the discharge
12 from the cooling basin then would encompass those
13 other discharges.

14 JUDGE GIBSON: Okay. And what things
15 would be discharged to the cooling basin?

16 MR. BURDICK: I think it'd be --

17 JUDGE GIBSON: I'm not going to hold you
18 to this, we're just talking generally. What are we
19 talking about here? Not radioactive materials?

20 MR. BURDICK: That's right. Non-
21 radioactive materials. You know, maybe from the waste
22 water treatments, those types of some non-radioactive,
23 just operating plant effluence. You know, maybe from
24 some drains or those sort of things.

25 JUDGE GIBSON: Storm water --

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1 MR. BURDICK: Yes.

2 JUDGE GIBSON: -- that sort of thing?

3 MR. BURDICK: Some of that will go to the
4 cooling basin, and then -- and there will be part of
5 the process of blowing down the cooling component --

6 JUDGE GIBSON: Okay.

7 MR. BURDICK: -- and withdrawn from the
8 Guadalupe to maintain water quality.

9 JUDGE GIBSON: And the specific concern
10 that I understand that you're raising separate and
11 apart from the radioactive constituents, which I think
12 we can say probably aren't going to be going to the
13 cooling basin as this is designed, are biocides and
14 water treatment chemicals that might be put in the
15 water in the cooling basin before it could be used at
16 the plant. Is that right?

17 MR. BLACKBURN: That is correct.

18 JUDGE GIBSON: Okay. And what is -- and
19 your answer is 3.6.1 addresses that issue and
20 therefore it's not a contention for omission and
21 therefore this contention should not be admitted. Is
22 that a fair summary?

23 MR. BURDICK: That's right. The
24 environmental report does identify the types of
25 chemicals, like biocides, and the environmental report

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1 commits to only using chemicals that are approved by
2 the Environmental Protection Agency, but then table
3 3.6-1 provides the expected constituents in the
4 cooling reservoir itself.

5 And so we believe that that cures the
6 omission and that the petitioner has not provided
7 anything that -- provided a further challenge here.
8 And so to the extent this is more than potential
9 omission, it's not properly supported.

10 JUDGE GIBSON: Okay. So how do you
11 address the issue that this is -- if this is addressed
12 in 3.6.1, is your contention that they didn't really
13 address it there, or is your contention they didn't
14 address it right? I mean what is --

15 MR. BLACKBURN: Well, I think it's both of
16 those things. I would tell you that -- well, I mean
17 first of all, we did interject the oil and gas aspect
18 into it.

19 JUDGE GIBSON: Right.

20 MR. BLACKBURN: And so you know, we put
21 that as a specific conduit that would basically take
22 the seepage and whatever came out of the pond down
23 into the deeper subsurface into deeper horizons and
24 deeper sands. So that would be, I think, one for the
25 distinctions.

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1 Now, again, they say they will take care
2 of that by plugging -- finding and plugging, and so --

3 JUDGE GIBSON: Right.

4 MR. BLACKBURN: -- we have that as a --
5 you know, that's out there. But that would
6 certainly -- well, what I would say would be a
7 disagreement, that, in fact, they had covered the
8 contention as we have written it. That's really the
9 primary, I think, issue that I would put back before
10 you.

11 JUDGE GIBSON: Okay. Fair enough.

12 Okay. Judge Baratta?

13 JUDGE BARATTA: I have nothing more.

14 JUDGE GIBSON: Nothing else?

15 JUDGE BARNETT: (No verbal response.)

16 JUDGE GIBSON: Okay. If we could go
17 Contention -- Environmental Contention 2, impacts on
18 limited water availability.

19 Mr. Blackburn, on page 36 of your petition
20 you raise an environmental challenge claiming that the
21 applicant has not properly characterized the impacts
22 of limited water availability. Correct?

23 MR. BLACKBURN: That is correct.

24 JUDGE GIBSON: With respect to your claim
25 that in the event of a drought like we had in 1950 to

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1 1957 --

2 MR. BLACKBURN: Correct.

3 JUDGE GIBSON: -- the section 3.4.2.3 of
4 the environmental report states, "The results of the
5 water budget model indicate that there is sufficient
6 inventory in the cooling basin to support plant
7 cooling water needs during the repeat of the
8 historically regional drought of record when there
9 would be reduced and infrequent withdrawals of make up
10 water."

11 Now, I'm sure you read that.

12 MR. BLACKBURN: I did.

13 JUDGE GIBSON: How do you respond to it?

14 MR. BLACKBURN: Well, I think that -- I
15 would start by saying that, as we view this
16 contention, Contentions 2, 3 and 4 are related. So
17 Contention 2 challenges the availability of water
18 generally. Contentions 3 and 4 raise impact issues
19 associated with the water usage by the facility.

20 So I would simply start by saying the
21 response to what you quoted depends on what water
22 source the facility chooses. If the Union Carbide --
23 GBRA/Union Carbide-Dow water right is used, that is a
24 permitted water right, that water has a priority, and
25 that water which has not been previously -- that water

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1 right has never been fully utilized, it's been sort of
2 held in reserve and it is a very important and very
3 attractive water right -- that water right, I would
4 tell you will be generally available.

5 If Exelon would commit that they are using
6 the GBRA/UCC-Dow water right, we would withdraw
7 Contention 2. However, they have stated in the
8 application that they've got two -- or at least two
9 alternative sources, one of which is that water right,
10 but another will be an alternative facility to be
11 constructed by Exelon or by others that would have a
12 junior water right, and that would basically more
13 recent and later in time. In fact, they're talking
14 about two projects that have not been permitted yet.

15 In that circumstance, I certainly
16 challenge, if that's the water right they're using,
17 challenge the statement. So it's sort of like
18 they've thrown out these alternatives and the
19 statement is probably true with regard to one of the
20 water right alternatives, or water supply
21 alternatives, but I think it is certainly not true
22 with regard to the other.

23 So we've got a little bit of a problem in
24 that they've sort of given us these alternative things
25 to look at, and I'm trying to word these contentions

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1 in a way that take alternatives into account. So I
2 hope that responded to --

3 JUDGE GIBSON: Yes.

4 MR. BLACKBURN: -- your question, but
5 that's certainly the way we see how these contentions
6 inter-relate.

7 JUDGE GIBSON: Well --

8 JUDGE BARATTA: So your issue then is the
9 lack of firmness, or commitment?

10 MR. BLACKBURN: Well, that's one issue,
11 yes, Your Honor. And I think depending on how they
12 commit then either issues 2, 3 and 4 or just 3 and 4
13 would be in play from our perspective.

14 JUDGE GIBSON: Now, on pages 30 to 31 of
15 your reply brief, you seem to put significant stock in
16 the notion that the Region L process has nothing to do
17 with certifying that water will be available. Is
18 that --

19 MR. BLACKBURN: That is --

20 JUDGE GIBSON: -- correct?

21 MR. BLACKBURN: -- absolutely our
22 position.

23 JUDGE GIBSON: Okay. Mr. Burdick, I want
24 you to respond to that, but first I want to ask you
25 one other question, and that is Mr. Blackburn has

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1 given you an out and said he'll -- this contention
2 will go away if you guys will commit to that. Can
3 we -- are you going to commit to that so we can make
4 this contention go away?

5 MR. BURDICK: Well, I wish that were
6 possible.

7 JUDGE GIBSON: Okay. All right.

8 MR. BURDICK: I think Mr. Blackburn's
9 concession here is illustrative, in the context of
10 this contention, is we don't commit to one specific
11 source at this stage and that's because it's
12 undecided. And we're not required to commit to a
13 specific source at this point.

14 But the environmental report does provide
15 an evaluation of the GBRA existing permits, but it
16 adds, just for more support and conservatism in the
17 environmental report that there are other water source
18 options available as well. And so we discuss the --
19 so the Guadalupe and Blanco River Authority, or GBRA,
20 existing rights. They hold about 175,000 acre feet of
21 rights currently.

22 And we demonstrate in the environmental
23 report that in the year 2060 -- up through the year
24 2060 at least 115,000 acre feet per year will be
25 available of unused rights from GBRA. But we don't

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1 leave it there because things could change as far as,
2 you know, contracting or -- you know, we haven't made
3 a decision yet. So we provide a couple of options.

4 The environmental report section 5.2
5 discusses the possibility of obtaining some permits
6 from other currently existing permits up to 39,000
7 acre feet per year. We realize that wouldn't satisfy
8 the whole 75,000 acre feet per year that would be
9 needed, but it could be part of it, and then part
10 could come from GBRA. Or we provide another option
11 would be to obtain a new water right.

12 And we don't dispute with the petitioner
13 that that would be challenging for Exelon to obtain a
14 new water right that would allow significant
15 withdrawals of water under drought conditions, for
16 example, but there are new water rights that are being
17 permitted right now, and we discuss that in our
18 answer.

19 For example, GBRA is currently permitting
20 over 189,000 acre feet per year, and so that's just
21 providing more water that would be available for
22 contracting. And we recognize that that would have a
23 lower priority, but we give those as additional
24 options, not necessarily to say that we won't use the
25 GBRA existing permits that provide different options.

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1 Or we also discuss in the environmental
2 report that a combination of those options would also
3 be possible to provide from existing or new rights as
4 well. And so we don't withdraw that we have those
5 other options available, because they do exist, but we
6 do evaluate the very permit that the petitioner say
7 would be adequate for providing water for the plant.

8 JUDGE GIBSON: Okay. Now, I take it you
9 don't agree with Mr. Blackburn's characterization of
10 the Region L process as being one that doesn't really
11 provide sufficient definition and clarity that
12 would -- that it's, you know, sort of like trying to
13 nail Jell-O to a tree, you know, that that's all this
14 is.

15 And he's frustrated because he doesn't
16 think this process is anything more than just an
17 overall planning process, there's no certification.
18 How do you address that, Mr. Burdick?

19 MR. BURDICK: We don't disagree that it's
20 not a planning process. However, and I think maybe
21 petitioner wouldn't disagree that it's still a robust
22 process that provides a lot of information on the very
23 topic that we use it for for water availability.

24 And I think had we not looked to the
25 Region L plan, then we would be criticized for not

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1 doing that.

2 JUDGE GIBSON: Sure.

3 MR. FRANTZ: It's the available public
4 robust source of information. And although the Region
5 L planning process doesn't determine who gets permits
6 or what plants -- what projects are going to go
7 forward, it does evaluate whether there's sufficient
8 water going forward considering the demands and supply
9 projects, and that's an important factor into the
10 evaluation here of water availability.

11 So I don't know if there's really a
12 dispute there because we don't rely on the Region L
13 water planning process to say that we will have water
14 available. We're relying as an informational source
15 of what water will be available.

16 JUDGE GIBSON: Okay. I just want to make
17 sure of staff's view of this contingent.

18 MS. GOLDIN: Your Honor, the staff opposes
19 admission of this contention because we don't think it
20 demonstrates a genuine dispute with the application.

21 JUDGE GIBSON: Okay. Okay. I'll let you
22 respond to Mr. Burdick.

23 MR. BLACKBURN: Just briefly. Again,
24 there is not an analysis that I can find in the
25 environmental report of the use of the alternative

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1 water strategies. Now, it was mentioned, for example,
2 that there was -- I was trying to figure -- there's
3 189,000 acre foot -- I think the way it was said is
4 GBRA is currently permitting 189,000 acre feet.

5 Well, that is -- that's a huge amount
6 assumed in that statement. As in no permit has been
7 issued, it hasn't even gotten to the contested case
8 stage, and even if it were granted, there's only
9 12,000 acre feet of firm water coming out of a 189,000
10 acre foot application. That's not very much water.
11 This is a water short basin.

12 If, in fact, they use the firm water right
13 of GBRA/Union Carbide-Dow, then we agree that water is
14 in the river. It's the alternative that they keep
15 throwing out that we're contesting in this Number 2.
16 And that's what has not been addressed, and we really
17 doubt that there is sufficient water available if
18 they're forced to go to alternative strategies under
19 what is permitted now.

20 And Region L is nothing but a wish list.
21 It's a list of projects that are -- basically been
22 flagged to be able to go to the next stage in a long
23 process. That's it. It's an enablement. It is
24 nothing more.

25 JUDGE GIBSON: Okay. Fair enough.

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1 JUDGE BARNETT: So tell me again the
2 staff's position on this contention.

3 MS. GOLDIN: We oppose admission of this
4 contention.

5 JUDGE BARNETT: Yes. And what's the
6 reason for that?

7 MS. GOLDIN: It does not demonstrate a
8 genuine dispute with the application, and we also did
9 not think that they demonstrated expert support for
10 their position.

11 JUDGE BARNETT: Okay. As the part of not
12 identifying a specific part of the application that
13 they dispute, what about this business of the Region
14 L water plan? That is in the application. Right?

15 MS. GOLDIN: Right. We agree that the
16 Region L plan is not a permitting process. We agree
17 with the petitioners it's an enablement process.

18 However, the petitioners seem to rely on
19 the Region L plan -- to have it both ways in the sense
20 that they say, Well, it doesn't guarantee there'll be
21 a firm water right for Exelon to use in the future;
22 however, then they mention it regarding all the other
23 competing projects that will be -- possibly take
24 priority or be competing with Exelon if it applies for
25 a new permit, or if it seeks to use part of the GBRA's

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1 current existing permit, or if GBRA applies the two
2 pending permits before the TCEQ. So they seem to rely
3 on it for both sides, for and against adequacy of
4 water.

5 JUDGE BARNETT: But they are -- in doing
6 that, they're disputing the applicant's use of the
7 Region L water plan. Right?

8 MS. GOLDIN: They're disputing the use,
9 but our position is that we never took the -- the
10 application does not take the position that it's a
11 permitting process. But it does identify projects
12 that are on the table in the future, and that also has
13 value in determining what resources will be available.
14 That plays into all of that.

15 JUDGE BARNETT: Okay. So for the
16 applicant it sounds -- back to the cake and eating it
17 too, it sounds like you're saying that you're
18 depending on this Region L, but you're not committing
19 to not use the Region L water supply. Right?

20 MR. BURDICK: That's --

21 JUDGE BARNETT: So if you're saying we're
22 preserving the option to use the Region L water, and
23 he's contesting, that's exactly what he's contesting.

24 MR. BURDICK: Your Honor, so the Region L
25 planning process is that, it's a planning process and

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1 it identifies various needs, and then so demands, but
2 also supply projects.

3 So we're not stating that because the
4 Exelon project is in that planning process, or other
5 permitting -- other permits are in that process that
6 that means they're going to be issued and they'll be
7 available for Exelon. We're not doing that. But we
8 are using the Region L as a source of information.

9 And I think what the staff's saying here
10 is that the petitioners also use the Region L plan for
11 potential projects and they acknowledge and we agree
12 that that doesn't mean those other projects are going
13 forward. But they use the plan to identify possible
14 other projects and claim that we haven't properly
15 evaluated those other possible projects. So I think
16 that's the point -- is where their turning on both
17 sides.

18 We believe, and I'm sure we'll talk about
19 this with respect to Contentions 3 and 4, that we've
20 accounted for all those projects. So we're just using
21 the Region L as a source of information that factors
22 into our own analysis of water availability.

23 JUDGE GIBSON: You okay?

24 JUDGE BARNETT: (No verbal response.)

25 JUDGE GIBSON: Judge Baratta?

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1 JUDGE BARATTA: Yes.

2 JUDGE GIBSON: Okay. Okay. Let's move to
3 Contention 3, impacts on regional water availability.

4 On page 42 of your petition, you claim the
5 applicant has not properly characterized the impacts
6 on regional water availability. Is that correct, Mr.
7 Blackburn?

8 MR. BLACKBURN: That is correct.

9 JUDGE GIBSON: And by this contention you
10 claim that in order to provide water to the applicant,
11 it's going to be necessary for Exelon -- Guadalupe
12 Blanco River Authority -- it's going to be necessary
13 to short change other regional water supply projects.
14 Is that right?

15 MR. BLACKBURN: That is correct.

16 JUDGE GIBSON: Sort of a rob Peter to Paul
17 pay -- to pay Paul argument. Right?

18 MR. BLACKBURN: Something along those
19 lines.

20 JUDGE GIBSON: Okay. It's a zero sum
21 gain.

22 MR. BLACKBURN: That's our view.

23 JUDGE GIBSON: Okay. Now, the applicant
24 maintains that you can't show under NEPA that these
25 other projects are indirect effects of the water needs

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1 of Victoria Station. How do you respond to that
2 argument?

3 MR. BLACKBURN: Well, I argue that as a
4 cause and effect that is directly related, in part to
5 what water right is, in fact, taken by this plant.
6 If, in fact, this plant goes, if you will, to the head
7 of the line, and which they have a right to do, I mean
8 they can make an arrangement with the Guadalupe Blanco
9 River Authority for the Union Carbide-Dow water.

10 I think 75,000 acre feet is what they have
11 discussed. And I think that the pump, by the way, is
12 sized for about 105,000 acre feet for withdrawal at
13 the river itself.

14 That water right is in existence, it's a
15 senior water right, and if Exelon takes that water,
16 then it removes that much water from the inventory,
17 which is a very small inventory, of what water is
18 actually remaining available that is permitted and
19 that is sort of firm.

20 Now, there are definitely needs. Now,
21 I've been accused here of double-dipping on Region L
22 like I've been accusing the others of double-dipping,
23 and in defense I will say that the planning process
24 serves, I think, some very legitimate purposes. It
25 anticipates that there will be future needs. It

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1 identifies a number of ways to try to meet those
2 needs.

3 It's just you can't depend on any of those
4 ways to meet the need because the Region L process
5 does not say, We're going to build X, Y and Z. It
6 says, We've looked and here is a list of candidates,
7 and if any of these candidates can emerge and actually
8 come into existence, we kind of put our seal of
9 approval for them to get to started on that process.
10 We don't know what's going to emerge, if any, of those
11 alternatives.

12 So I think in response I would say Region
13 L certainly demonstrates there's going to be a need
14 for water. I think that we know, if Union
15 Carbide/GBRA-Dow water right is used, that water will
16 be taken out of what is available. You know, you
17 can't take that water out without having impacts and
18 implications.

19 We're simply saying that has to be -- and
20 NEPA requires it as an indirect effect, as a secondary
21 effect, if you will of this particular withdrawal,
22 this particular dedication. There are ripple effects
23 that go from that and NEPA requires those to be
24 analyzed.

25 JUDGE BARATTA: Well, you've hit on

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1 something that's troubled me about your whole argument
2 relative to these water needs, and that under NEPA,
3 you know, we -- case law is such that if it's
4 speculative, it doesn't have to be dealt with. And,
5 you know, what I'm hearing is that these other needs,
6 well, are speculative, in fact, in your own words that
7 doesn't mean they're going to happen, and therefore
8 they really do not need to be addressed in this EIS or
9 ER.

10 MR. BLACKBURN: Well, let me respond to
11 that in a couple of ways, if I may. First of all, the
12 needs are not speculative so much as the projects to
13 meet those needs are speculative. I mean the needs
14 are a population projection, I mean is there
15 speculation? Sure.

16 But the actual projects, I mean there's no
17 indication that any of those can be permitted.
18 There's nothing in this information that the applicant
19 has put forward, and certainly nothing in Region L
20 that indicates the permitability of these water supply
21 alternatives.

22 I think that under NEPA you have to
23 analyze reasonably foreseeable future actions. I
24 actually went to the 5th Circuit on a NEPA reasonably
25 foreseeable action case, and I lost because they said

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1 until -- with regard to a future ship channel project,
2 that until they -- actually the Congress authorized
3 that particular channel project, you couldn't say for
4 sure it was going to happen.

5 I think that applies directly to these
6 water supply projects. They were really truly
7 speculative until there's something firm there. But
8 in terms of the need for water in this part of the
9 world, you know, projections equate to reasonably
10 foreseeable as opposed to speculation.

11 JUDGE BARATTA: Well, and see they have
12 though elsewhere pointed out that they did look at the
13 population growth and the impact this would have. So
14 I come back to, you know, you're speculating about
15 these projects and the need that they would have for
16 this water, and therefore it is not part of our
17 analysis that needs to be done. I'm really troubled
18 by that.

19 MR. BLACKBURN: Well, I mean I guess I'm
20 confused by your trouble to some extent because it
21 seems to me that -- let me try to phrase it a
22 different way, we have a basin, that if you go to the
23 Region L plan before Exelon proposed to come in, the
24 basin was challenged for water before Exelon announced
25 its intention to locate here.

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1 The basin has not gotten any better,
2 except that GBRA -- I mean, I'm sorry, Exelon has now
3 inserted itself. And to the extent that it utilizes
4 the Union Carbide and GBRA water right, it will
5 basically take the last remaining unappropriated water
6 out of the river system.

7 Another way of looking at it is, if -- and
8 this is not speculative -- if Exelon gets that water,
9 no future growth will occur in the region that
10 requires existing water. The only way additional
11 growth can be accommodated will be through creation of
12 projects that are, in fact, speculative.

13 So the NEPA analysis at that stage is, no
14 future growth because of water supply limitations in
15 the Guadalupe River system. I didn't frame the
16 objection in that way, but I think in its coarsest form
17 that is the objection. Exelon moved to the front of
18 the line, they took all the rest of the water in the
19 river.

20 Nobody else has water. That's the
21 objection. That's not speculative. The only proven
22 water is what the Union Carbide/GBRA water right is.
23 That's why we agreed to drop 2, if they would go ahead
24 and specify.

25 There is no doubt that there is no other

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1 firm water. Period. That's impact. That's a NEPA
2 impact. That's full disclosure. That's what the
3 people of Texas ought to be told if, in fact, the NRC
4 issues this permit. There is no more water. Period.
5 That's an impact, that's an issue, that's NEPA.
6 That's full disclosure. That's being honest.

7 JUDGE GIBSON: Are you suggesting then
8 that the demand, the consumptive needs are not
9 speculative, but the possible source of additional
10 water is speculative?

11 MR. BLACKBURN: And the potential that
12 there will even be future water is speculative. You
13 bet.

14 JUDGE GIBSON: Okay. Fair enough. And
15 the potential that you could -- somehow those two
16 could meet is speculative.

17 MR. BLACKBURN: Right. And if someone
18 challenges that, in fact, that future need is
19 speculative, fine. What I can say absolutely is that
20 if the remaining 75,000 acre feet is committed,
21 there's 35,000 left. Period.

22 JUDGE BARNETT: Well, Union Carbide,
23 aren't they just exercising an option that they have
24 they could use for any other project?

25 MR. BLACKBURN: Sure. But then somebody

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1 else could have that water, somebody else -- you know,
2 most any other speculative need could come in and put
3 money down and could buy that water right just like
4 Exelon has. It's just whoever gets it, that's the
5 last of the water in the river. There's no more right
6 now.

7 JUDGE BARATTA: See, that's why it's
8 confusing me, is that that has already been
9 appropriated.

10 MR. BLACKBURN: It has been.

11 JUDGE BARATTA: It's gone.

12 MR. BLACKBURN: It's not -- it has never
13 been used.

14 JUDGE BARATTA: It's gone though for all
15 intents and purposes for future development.

16 MR. BLACKBURN: Right. But it's --

17 JUDGE BARATTA: So then I can't understand
18 why that has to be addressed here, because it's
19 already off the table.

20 MR. BLACKBURN: It's not off the table in
21 the sense if it's availability. It has been
22 appropriated but it has never been, if you will,
23 claimed. It is not possessed by any one user. Right
24 now it has been sold on a spot sale basis here and
25 there up and down the river.

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1 That water right has not been dedicated,
2 that's probably the correct term, to a particular end
3 user. Exelon is going to tie that water up for a long
4 time. It will be off the table. It is currently
5 available if someone wishes to pay for it. Exelon
6 takes it off of the table, there is no other remaining
7 available water.

8 I mean to me that seems pretty clear, but
9 obviously we're missing each other on it.

10 JUDGE BARATTA: Yes, I think we are.
11 Sorry.

12 JUDGE GIBSON: Judge Barnett?

13 JUDGE BARNETT: No.

14 JUDGE GIBSON: Okay. I told you we'd go
15 till 12:30. Why don't we go ahead and, if you all
16 don't mind, we'll finish up Number 3 and then we'll
17 take a break. Is that okay?

18 MR. BLACKBURN: May I --

19 JUDGE GIBSON: Yes.

20 MR. BLACKBURN: -- may I try one last
21 thing? There is in the record a reservation agreement
22 that was signed between Exelon and GBRA. And that is
23 the mechanism by which this water was literally taken
24 off the table and reserved.

25 And I would just point to that as sort of

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1 perhaps maybe the type of document that might be of
2 interest in this discussion that we're having, and we
3 could possibly after the lunch break talk a bit more
4 about that reservation agreement, if that's something
5 you'd like to hear more about.

6 But, yes, I think to me it's proof of the
7 transactional nature of this water acquisition by
8 Exelon as opposed to the fact that it had been
9 permanently set aside at an earlier time. Certainly
10 it had been, that's why it's a firm water right.

11 But the reservation agreement allowed it
12 to be reserved for Exelon, and basically allows them
13 to put the straw out in the river at that particular
14 location for that particular use.

15 JUDGE GIBSON: Okay. I'm sure Mr. Burdick
16 wants to respond. You want to find a document. What
17 I would suggest is let's just go ahead and recess for
18 lunch, we'll come back, you can finish your answer
19 that involves this other document.

20 And we'll come back at what time?

21 MS. HOVE: It's 12:32 right now.

22 JUDGE GIBSON: What is it?

23 MS. HOVE: It's 12:32.

24 JUDGE GIBSON: Okay. Is 1:45 okay? Does
25 that give us all enough time? Does that work? 1:45.

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1 Okay. Let's go with 1:45.

2 (Whereupon, the proceedings were
3 adjourned, to reconvene later this same day,
4 Wednesday, March 16, 2011.)

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A F T E R N O O N S E S S I O N

(Time Noted: 1:55 p.m.)

JUDGE GIBSON: -- recessed for lunch, Mr.

Blackburn, you were in the middle of an answer and you wanted to find a document that you thought might help you explain some things to Judge Baratta.

MR. BLACKBURN: There was a document, we have a copy of it, it was -- I think we mentioned it in the response -- or I think in the reply, if I'm not mistaken, but it is not in the record officially -- which is a reservation agreement that was signed between the Guadalupe Blanco River Authority and Exelon Generating Company. That document dates back to 2007.

If one looks at the Region L plan before and after this reservation agreement was executed, you will find five additional projects that were added to the Regional water list subsequent to the execution of this reservation agreement.

We think that is indicative of the type of impact that we're speaking of, that by the fact that this water became permanently dedicated, it was a pre-existing right, but the act of the dedication, an in this case the act of the Nuclear Regulatory Commission in issuing a permit that would allow a use to come in

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1 and take this amount of water out of the Guadalupe
2 River, that that caused ripple effects with regard to
3 water needs and water supply throughout the basin.

4 So if one compared the Region L plan
5 before 2007 when the reservation agreement was
6 executed, and after 2007, there would be significant
7 differences. We believe that that is certainly
8 indicative of the point we're trying to make.

9 I think -- on a more general sense I think
10 that the applicant recognized that there are
11 implications to the use of water by the facility when,
12 if I remember this correctly, they withdrew the
13 biostatistical analysis, that we complained about in
14 a subsequent contention, on the basis that they had
15 used both a baseline and a with project in-flow
16 assumption that was the same.

17 They withdrew it because they needed to
18 vary those assumptions, as we understand the basis for
19 the withdrawal. And that would indicate the impact of
20 the use of the water from the facility.

21 I don't know if that clarified anything or
22 not. I have done my best.

23 JUDGE BARATTA: Thank you.

24 JUDGE GIBSON: Okay. Thank you.

25 Mr. Burdick, did you want to respond to

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1 the answer that Mr. Blackburn has given to this last
2 question?

3 MR. BURDICK: Sure. I just want to make
4 a couple of points based on what we've heard now, and
5 what we heard before the lunch break.

6 I think it's been instructive today to
7 hear the petitioners talk about the GBRA existing
8 water rights. And it sounds like they agree that
9 those rights could be available for Exelon, and
10 they've raised this reservation agreement. And we
11 agree with that as well, and therefore it's in the
12 environmental report. So we don't think there's any
13 dispute there.

14 But I think it's important to point out
15 that the evaluation in the environmental report of the
16 environmental impacts from additional water use do
17 rely on, or do assume use of that water right.

18 And that's a very conservative assumption.
19 I think the petitioners agree with this because it
20 assumes a more senior right. And so I just want to
21 point that out because I think the -- it's important
22 to note that the environmental report is conservative
23 in that respect.

24 I think we've heard some discussion as
25 well it's important to look at what was actually

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1 submitted in this contention, so Contention
2 Environmental 3. The petitioners had identified a few
3 projects from the Region L plan that they claim were
4 not considered in Exelon's environmental report.

5 And as we discussed in our reply, that's
6 simply incorrect. You know, first we explained that
7 those are not direct or indirect effects, because
8 they're not caused by the Exelon project, they're
9 independent projects, they have their own water needs
10 and it will be used to supply those needs.

11 I think maybe it's a question of just
12 semantics and what kind of impacts we're calling it,
13 because we would call those cumulative impacts. And
14 as we point out in our answer, the environmental
15 report provides a discussion and evaluation of the
16 cumulative impacts of the project. And that's found
17 in section 5.11, and for water use it's specifically
18 found in the environmental report section 5.11.2.

19 And I think here, with respect to
20 contention admissibility, it's important to note that
21 petitioners haven't identified that section at all.
22 And for that reason, because they failed to controvert
23 or even identify the information on their topic, this
24 contention is not admissible.

25 JUDGE BARATTA: Thank you.

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1 JUDGE GIBSON: Okay. Thank you.

2 Okay. We're okay. All right. There was
3 one thing that I wanted to be sure we had a clear --
4 and that has to do with the applicant claims that it
5 was incumbent upon you to show that the five or so new
6 projects that you've identified would not proceed
7 absent the issuance of this Early Site Permit. How do
8 you respond to that?

9 MR. BLACKBURN: The answer that I -- or
10 the supplement that I gave right after the break, I
11 think is actually the answer to that in that the
12 reservation agreement being signed in 2007 signaled
13 that that Union Carbide/GBRA-Dow right was being
14 claimed.

15 And if you look at the Region L plan
16 before and after that reservation agreement, the
17 projects that we're complaining about were added to
18 that Region L plan subsequent to the reservation
19 agreement.

20 JUDGE GIBSON: Okay. Fair enough. Thank
21 you. Thank you for that clarification.

22 Okay. With respect to cumulative impacts
23 being addressed in 5.11.2, I believe, how do you
24 respond to that? That they've addressed these
25 cumulative impacts and you didn't controvert them in

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1 some way in your -- or addressed them, I should say,
2 in some way in your contention?

3 MR. BLACKBURN: I really actually think
4 that semantics are important here.

5 JUDGE GIBSON: Okay.

6 MR. BLACKBURN: And I think that, while I
7 think cumulative impacts would be broad enough to
8 certainly include these, we're claiming a direct
9 causal relationship. And that puts them in the
10 classification of secondary or induced effects that
11 are subsequent to this action being permitted.

12 And as such, they were not analyzed in
13 that light. And I think it's of importance because
14 while cumulative impacts I think are of importance in
15 understanding the totality of an impact to be
16 expected, oh, for example to a wetland base or even to
17 flows in a river for example, or something like that,
18 this is something that is owned as an impact.

19 A secondary or indirect impact is owned by
20 the agency making the decision. And so as such I
21 think it is important because basically that is an
22 impact that should carry with this plant all the way
23 through.

24 Just the mere fact that it was sort of
25 addressed in a summary cumulative fashion, that's not

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1 really the challenge. The challenge is this is a
2 direct impact and that this plant needs to fully
3 disclose and identify, and the NRC needs to fully
4 disclose and identify and own the impacts of this
5 decision, which have a lot to do with future water in
6 this basin.

7 JUDGE GIBSON: Do you all have a view
8 about whether this is a direct effect, or whether this
9 is a cumulative impact?

10 MS. GOLDIN: Your Honors, our position is
11 that -- my understanding is that to be a direct impact
12 it would have to be reasonably foreseeable. And I
13 think we took the position that cumulative facts is
14 the accurate way to describe this.

15 JUDGE GIBSON: Okay. So you would take
16 the position that this is not reasonably foreseeable
17 then. Is that correct?

18 MS. GOLDIN: Not in the way petitioners
19 have framed their petition -- or contention.

20 JUDGE GIBSON: Okay. How would they need
21 to plead it in order to meet the test that you're
22 setting out?

23 MS. GOLDIN: They would have take issue
24 with what the application alleges, or the application
25 states regarding the future water availability in

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1 light of the other projects that specifically the
2 Region L plan describes and what are described in
3 section 5.11 of the ER.

4 And because they don't even address those
5 cumulative impacts and they don't take issue with that
6 or any other exception, it's difficult to see how
7 their claims about future water availability will be
8 reasonably foreseeable.

9 JUDGE GIBSON: Okay. Do you have
10 anything, Judge Baratta, did you have anything
11 further?

12 JUDGE BARATTA: No, not at this time.
13 Thank you.

14 JUDGE GIBSON: Okay. All right. I think
15 we can turn to Environmental 4, impacts on long-term
16 water availability.

17 And we'll turn now to page 47 of your
18 petition, Mr. Blackburn, where you raise an
19 environmental challenge claiming that the applicant
20 has not properly characterized the impacts of long-
21 term water availability. Is that correct?

22 MR. BLACKBURN: That is correct.

23 JUDGE GIBSON: Now, Contention 4 looks to
24 be quite similar to Contention 3, except that 3 is
25 concerned with long-term availability and -- 4 is

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1 concerned with long-term availability and 3 is
2 concerned with regional water availability. Is that
3 right?

4 MR. BLACKBURN: That is correct.

5 JUDGE GIBSON: Okay. Looking at the
6 answer, the applicant claims that 5.2.2.1 of the
7 environmental report demonstrates that there will be
8 more than sufficient water available for Victoria
9 Station through 2060. I take it you dispute that
10 characterization.

11 MR. BLACKBURN: Oh, I certainly do.

12 JUDGE GIBSON: Okay. So what are you
13 seeking the applicant to address in the environmental
14 report with respect to long-term water availability?

15 MR. BLACKBURN: Well, you know, one of the
16 things about these proceedings is it does cause one to
17 spend perhaps a little more time focused on exactly
18 what are the differences in some of these. And I
19 appreciate the question.

20 And what we were trying to get to in this
21 question was something that was unique about the early
22 site permit process. I think that the TSEP
23 Environmental 3 makes the assumption that the water is
24 used immediately, that there are dislocations from a
25 regional standpoint, and we've talked about those and

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1 how we see that happening and the disagreements that
2 may exist around all of the tables about that.

3 This one was attempting to flag that it
4 could be 20 years before this water right is
5 exercised, or some number of years. I mean as I
6 understand the early site permitting process, it sort
7 of puts a marker down on a site and then that can be
8 revisited over a long period of time before some
9 commitment to actually build a facility would be made.

10 And I think we were trying to raise the
11 issue, well, how does time fit into this question of
12 water availability, and we don't think the applicant
13 addressed that at all.

14 I'm not quite sure exactly how one would
15 address it. I would say that in conjunction with TSEP
16 Environmental 6 would be my suggestion. And if I were
17 to -- you know, I would sort of have the option to
18 ask, it may be to combine 4 and 6 together, because
19 that deals with climate change.

20 And I think that that is a legitimate
21 issue and we'll talk about that in a moment. But it's
22 looking at a longer term. It's looking at what the
23 changes may be in the -- and I'm sure we'll have a lot
24 of difficulty with the term "reasonably foreseeable"
25 in this context, but in some future context what may

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1 be the issue.

2 And I think we were trying to get to a
3 similar question here, except perhaps with a more
4 limited future time frame of the 20-year time period
5 that -- and I use 20 years, I may not be exactly
6 accurate about that -- but whatever the length of
7 reservation time is for the site permitting process.

8 That that was the intent of this
9 contention. And like I say, I think that perhaps what
10 may be better would be to combine 4 and 6 together.

11 JUDGE GIBSON: Okay. I'll just ask the
12 staff, I asked you how they should have pled this,
13 that last contention, Contention 3, in order to make
14 it admissible now. How would you suggest that they
15 plead Contention 4 in order to make it admissible?
16 Anything -- would you have anything different to say
17 than you did about 3?

18 MS. GOLDIN: Well, I agree that they
19 are -- 3 and 4 are very similar. It was hard to see
20 the distinction between them. So I don't think my
21 answer would be substantially different from what I
22 said previously.

23 JUDGE GIBSON: Okay. And do you see --
24 from your standpoint, do you see a connection between
25 4 and 6? Do you see them as being different

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1 contentions?

2 MS. GOLDIN: I just see them as being
3 different, I think because as pled this 4 discusses
4 long-term water availability and as issues that 4
5 encompasses deals with other future projects in the
6 area, whereas 6 deals with future impacts on future
7 water availability in light of the reasonably
8 foreseeable effects of climate change.

9 So I think those are dealing with two
10 separate, very separate issues, although they both do
11 depend -- they both have future water availability,
12 you know, inserted into the subject, I think they deal
13 with different issues and they should be treated
14 distinctly.

15 JUDGE GIBSON: Okay. Do you have
16 anything?

17 JUDGE BARNETT: (No verbal response.)

18 JUDGE GIBSON: Judge Baratta, do you have
19 anything about 4?

20 JUDGE BARATTA: No, not at this time.

21 JUDGE GIBSON: Okay.

22 MR. BURDICK: Judge Gibson?

23 JUDGE GIBSON: Yes.

24 MR. BURDICK: Can we respond?

25 JUDGE GIBSON: Yes. Yes, surely.

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1 MR. BURDICK: So when I stated hearing the
2 petitioner request to combine contentions, you know,
3 that kind of raises flags that, you know, the
4 original contentions aren't admissible as pled, and we
5 agree with that, and the petitioner is limited to how
6 they originally pled the contention, and so there's no
7 discussion of global warming in Contention 4, and it
8 shouldn't be broadened beyond that.

9 And I think I heard both the staff and the
10 petitioner claim that there -- we need to look at
11 reasonably foreseeable actions. Well, that's exactly
12 what's looked at in section 5.11. We provide a
13 definition of cumulative impacts from the CEQ
14 regulations and that's an analysis of past, present
15 and reasonably foreseeable future actions regardless
16 of the agency.

17 We provide that evaluation. I think we
18 provided what the petitioner is requesting here.
19 They've identified certain projects from the Region L
20 water plans and claim that we did not evaluate those.
21 That's just simply incorrect.

22 We've identified specific projects that
23 they've raised that deal with surface water and lower
24 basin, and then our cumulative impacts discussion
25 incorporates a discussion of cumulative effects from

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1 the Region L water plan that encompasses all of these
2 identified projects.

3 We believe we've done everything that's
4 necessary there, and so this contention should be
5 rejected.

6 JUDGE GIBSON: We'll get to 6 in a minute,
7 but I will say, just when I read them, it appeared to
8 me that 4 was sort of focused on the basin and what
9 was going on in the basin independent of climate
10 change.

11 MR. BLACKBURN: It was written that way.

12 JUDGE GIBSON: And then 6 was really
13 focused on the impact that climate change would have
14 on water availability in the basin. I don't know if
15 that was how you intended to plead it, but when I read
16 them, that was the impression that I got what you were
17 getting at.

18 JUDGE BARATTA: Yes, I would agree with
19 that. That's the impression that I got, that they
20 were two separate --

21 MR. BLACKBURN: Right. I mean -- and I
22 don't contest that, I mean we pled them separately.
23 I guess I gathered from some of the other comments
24 that had been made in that for example the applicant
25 sort of agreed with us on a number of whooping crane

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1 issues, but talked about reformulating and sort of
2 making the contentions a little different.

3 I somehow got the impression we had some
4 flexibility about how one would cast and recast those.
5 I have no problem with using climate change as a stand
6 alone issue. I was just thinking it sort of made
7 sense, but.

8 JUDGE GIBSON: Well, it certainly sounds
9 like you're going to get a lot of push back if you
10 tried doing anything else, Mr. Blackburn.

11 MR. BLACKBURN: It does seem that way.

12 (General laughter.)

13 JUDGE GIBSON: So you may want to leave
14 well enough alone right now.

15 MR. BLACKBURN: I think I will.

16 JUDGE GIBSON: Okay. All right. Let's go
17 to 5.

18 We're talking now about the federal
19 reserve water right for the Aransas National Wildlife
20 Refuge, and you claim, on page 49 of your petition,
21 that the applicant has not properly characterized the
22 impacts on potential federal reserved water rights for
23 the Aransas National Wildlife Refuge. Is that right?

24 MR. BLACKBURN: That's correct.

25 JUDGE GIBSON: Your legal support for this

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1 claim is the Winters Doctrine. Is that right?

2 MR. BLACKBURN: That's correct.

3 JUDGE GIBSON: Okay. And basically I
4 believe that is when the federal government reserves
5 land by implication it reserves water rights
6 sufficient to accomplish the purposes of that
7 reservation. Is that right?

8 MR. BLACKBURN: That is correct.

9 JUDGE GIBSON: Okay. Now, would it be
10 fair to say that you've urged the water -- the Winters
11 doctrine here, because were the federal government to
12 assert a federal reserve water right for the Aransas
13 National Wildlife Refuge to protect the whooping
14 crane, such a reservation would in turn reduce the
15 amount of water that would be available for users of
16 that basin?

17 MR. BLACKBURN: That is correct.

18 JUDGE GIBSON: Okay. Now, looking at the
19 applicant's answer, they refer us to *United States v*
20 *New Mexico* and say that the Winters Doctrine only
21 applies where the federal government has made an
22 express or implied reservation of water for the
23 subject property, which here would be the Aransas
24 National Wildlife Refuge. You don't dispute that, do
25 you?

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1 MR. BLACKBURN: No, I do not --

2 JUDGE GIBSON: Okay.

3 MR. BLACKBURN: -- dispute that.

4 JUDGE GIBSON: And I take it you would
5 agree that there's been no express reservation of this
6 water.

7 MR. BLACKBURN: I have not found one, and
8 I have looked.

9 JUDGE GIBSON: I suspect if there had
10 been, you would have let us know.

11 MR. BLACKBURN: Yes, sir.

12 JUDGE GIBSON: With respect to implied,
13 the applicant suggests that *United States v New Mexico*
14 holds that for there to be an implied federal reserve
15 water right, the underlying purposes of the
16 reservation of land must be entirely defeated absent
17 the reservation of such a water right. How do you
18 respond to that argument?

19 MR. BLACKBURN: I'm not sure that I will
20 respond exactly as I would like to, because I mean I'm
21 working off of basically a legal theory that has not
22 been asserted in this context, that I am aware of.

23 What we wanted to do was to bring this to
24 the panel's attention. We don't think it has been
25 addressed. We think it is -- it has not been asserted

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1 by the Fish and Wildlife Service at this point in
2 time. So I mean there's a number of different issues
3 about -- we think that, at least in theory, that there
4 is a claim that can be made and has not yet been made.
5 And we wanted to flag it.

6 Now, we think that the reservation goes to
7 the purpose for which the land was set aside. And
8 this land was set aside specifically for water fowl
9 and for wintering water fowl. It was not specific to
10 the whooping crane in the reservation. At that point
11 that was not the purpose for the creation of Aransas.

12 But nonetheless, there is an implied --
13 there is certainly an argument of an implied right for
14 there to be sufficient for the Aransas Refuge to be a
15 refuge for wintering water fowl. That is what this
16 argument sets forth.

17 I wish I had more to bring before you for
18 this. I don't. You know, whether, in fact, at some
19 point Fish and Wildlife would flag it, or things like
20 that.

21 I mean this may be another situation where
22 we have flagged an issue that we think perhaps we
23 don't have enough basis to make this stick at the
24 current time, we've raised it, we wanted it to be
25 brought to the panel's attention that we think that

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1 this whole water system is just rife with issues.

2 Should Fish and Wildlife raise this?
3 Should -- if you get into a Section 7 consultation
4 position and all of a sudden Fish and Wildlife Service
5 asserts that, we will have made this contention at
6 this point in time.

7 I would be frankly -- I guess I wouldn't
8 encourage you, but I could understand your denying the
9 contention --

10 JUDGE GIBSON: Right.

11 MR. BLACKBURN: -- with the understanding
12 that we had made it at this time, we have raised it,
13 we have preserved it.

14 JUDGE GIBSON: Okay. Fair enough. Fair
15 enough. I appreciate our candor.

16 Do you have anything else about that,
17 Judge Baratta?

18 JUDGE BARATTA: No.

19 JUDGE GIBSON: Okay. I assume there's
20 nothing else needs to be said on your part?

21 MR. BURDICK: That's correct, Your Honor.

22 JUDGE GIBSON: Okay.

23 MS. GOLDIN: Yes, staff has nothing to
24 add.

25 JUDGE GIBSON: Okay. Let's turn to

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1 Environmental 6, please.

2 Page 53 of your petition you've raised an
3 environmental challenge claiming that the applicant
4 has not properly characterized the impacts on water
5 availability and aquatic resources in light of
6 reasonably foreseeable climate changes. Is that
7 correct?

8 MR. BLACKBURN: That is correct.

9 JUDGE GIBSON: Now, Mr. Blackburn, do I
10 understand that the concern that underlies this
11 contention is that climate change will exacerbate
12 water availability and salinity in nearby water
13 courses?

14 MR. BLACKBURN: Right. It will reduce
15 water availability, droughts will worsen from what
16 they currently are being experiences, and the impacts
17 of, you know, salinity will definitely be affected in
18 the bay as well.

19 JUDGE GIBSON: They will become more
20 saline, I take it?

21 MR. BLACKBURN: They would become more
22 saline, that's correct, for longer periods of time.

23 JUDGE GIBSON: Okay. You get to do this
24 one. Okay. Good. The reply cites to a new Council
25 on Environmental Quality draft guidance document

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1 regarding climate change.

2 I call particular attention to this
3 statement on page 7, I'm just going to read this, "If
4 a proposed project requires the use of significant
5 quantities of water, changes in water availability
6 associated with climate change may need to be
7 discussed in greater than other consequences of
8 climate change."

9 Recognizing this is a draft guidance
10 documents, it's not, you know, a mandatory document at
11 this point, how do you respond to this particular
12 concern that the petitioners have raised and that the
13 CEQ has raised?

14 MR. RUND: Aside from the fact that it is
15 draft and CEQ guidance isn't binding, I look at the --
16 refer the Board to the next paragraph --

17 JUDGE GIBSON: Okay.

18 MR. RUND: -- which talks about their, you
19 know, the identification of reasonably foreseeable
20 future changes and cautioning agencies about
21 significant uncertainties involved in predicting long-
22 term climate changes.

23 And I'd say that the guidance, in fact, is
24 pretty consistent with what Exelon did here. A couple
25 of things. First, they looked at a 70-year period to

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1 see what the trends were. There was actually an
2 increase in precipitation, slight increase over that
3 period. And they --

4 JUDGE BARNETT: Hold on. Before you said
5 they looked at. What did you mean by --

6 MR. RUND: I'm sorry. The environmental
7 report.

8 JUDGE BARNETT: Okay.

9 MR. RUND: Yes. Sorry, not the CEQ.

10 JUDGE BARNETT: Okay.

11 MR. RUND: I'm sorry, the SSAR did, not
12 the --

13 JUDGE BARNETT: Okay.

14 MR. RUND: -- environment report.

15 JUDGE GIBSON: The SSAR?

16 MR. RUND: That's correct.

17 JUDGE GIBSON: Okay. Was it also in the
18 ER, or just in the SSAR, the seven years
19 of precipitation you're talking about?

20 MR. RUND: I think it's a similar time
21 period, but in terms of the specifically discussing
22 climate change it's in the SSAR in that context.

23 JUDGE GIBSON: Okay.

24 MR. RUND: It went on to note that
25 obviously there are a variety of models out there that

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1 try to project far into future what might -- what one
2 might anticipate in terms of climate change, and found
3 that there's considerable variability from model to
4 model. They're essentially all over the place.

5 And given the difficulty, when you're
6 talking about long-term predictions, it acknowledged
7 that that would make it speculative to try to say what
8 the future changes are likely to be in 2100, the year
9 that TSEP has predicted.

10 And so under NEPA I think it's consistent
11 with the CEQ guidance not to step out -- when you're
12 making -- you're talking about time frames that far
13 down the road, to try to make those types of
14 predications.

15 JUDGE GIBSON: Okay.

16 JUDGE BARNETT: You say it's not
17 foreseeable? I misunderstood the last sentence or two
18 that you said.

19 MR. RUND: I'm not saying that climate
20 change itself is not anticipated, but what I'm saying
21 is, just trying to predict what the specific changes
22 to the environment on a site-specific level, at a
23 local level, and even a regional level is -- to try to
24 nail that down as to be, you know, this particular
25 given increase in temperature or precipitation winds

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1 up being an exercise that really isn't all that
2 useful, given the wide range.

3 JUDGE BARNETT: So why was it in the SSAR
4 then?

5 MR. RUND: To point that out essentially
6 for purposes of -- to the staff essentially that
7 there's uncertainty on this issue, and so it's
8 something obviously we're paying attention to, and
9 it's not something we've omitted or overlooked, it's
10 just on the record essentially that we did take a look
11 at it and there's nothing useful that we could do at
12 this time. Was that the --

13 JUDGE BARNETT: Was that -- your
14 conclusion was that there was nothing useful you could
15 do, or that your models showed there's be more
16 precipitation and so therefore you were covered?

17 MR. RUND: Well, we didn't develop our own
18 model. We looked at --

19 JUDGE BARNETT: Right. Right. The models
20 you used.

21 MR. RUND: -- you know, there's a number
22 of models out there --

23 JUDGE BARNETT: Right.

24 MR. RUND: -- and some point this way and
25 some point that way, they're kind of all over the

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1 place. And to try to -- to pick one them it didn't
2 make sense, and given that -- in light of the fact
3 that there was a slight trend of increase, it didn't
4 seem -- it doesn't seem necessary, based on what we've
5 set forth in the application to go ahead and go a step
6 farther.

7 And just to clarify about the trend we're
8 talking about, we looked 70 years into the past and
9 looked at what's been happening over time, and to use
10 that to try project forward we thought was a
11 reasonable approach. It's not that we looked 70 years
12 into the -- we didn't project 70 years into the
13 future. The 70 years was based on historical data --

14 JUDGE BARNETT: Okay. I see.

15 MR. RUND: -- just to clarify that.

16 JUDGE BARNETT: So you're analysis was
17 that you have more precipitation now than you did 70
18 years ago. Is that the --

19 MR. RUND: Well, there was a --

20 JUDGE BARNETT: The trend, yes, that
21 was --

22 MR. RUND: -- a slight trend of --

23 JUDGE BARNETT: Okay.

24 MR. RUND: -- actually increasing --

25 JUDGE BARNETT: Okay.

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1 MR. RUND: -- rainfall.

2 JUDGE BARNETT: So did you try to use
3 models that -- because to be honest, I didn't look at
4 the SSAR on this topic -- did you try to use models to
5 project into the future?

6 MR. RUND: We reviewed the literature, and
7 I believe there is actually references, and this is
8 all cited in our brief obviously, but, you know, based
9 on the models we looked at, we -- it wasn't practical
10 to go ahead, you know, and develop our own model, or
11 apply those models here to the environmental report.

12 JUDGE BARATTA: What you're referring to
13 is, what section 2.3 which discussed climate change
14 during the period of the SSAR?

15 MR. RUND: That's correct.

16 JUDGE BARATTA: And I think in that you
17 said something to the effect that the current global
18 climate models don't have sufficient resolution to be
19 able to determine with certainty what'll happen in
20 this region? That's kind of a paraphrase I think of
21 what's in there.

22 MR. RUND: I think that's a fair
23 statement.

24 JUDGE BARATTA: Okay.

25 JUDGE GIBSON: Judge Barnett?

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1 JUDGE BARNETT: So given that, so no
2 federal action would have to look at climate change
3 anywhere because of -- that's your position, because
4 the models are so uncertain and they're all over the
5 place that there's no point in looking at it?

6 MR. RUND: I think it depends on the
7 project and the time frame and the scope obviously of
8 the project. If it's potentially project that could
9 have wide ranging impacts that cross regions, it may
10 be that the models can get down to that resolution
11 with some reasonable degree of certainty.

12 But when you're talking about on the
13 region level and the local level, the models just
14 aren't there today. Right. So there are obviously
15 developments being made so, you know, as the models
16 improve over time, that obligation I think would
17 change as well.

18 JUDGE BARNETT: Thank you.

19 JUDGE GIBSON: Judge Baratta, did you have
20 anything else?

21 JUDGE BARATTA: I'd like to hear the
22 response.

23 MR. BLACKBURN: Well, I would start by
24 saying we looked as hard as we could to try to find
25 mention of climate change, and we scoured the

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1 environmental document from top to bottom and didn't
2 find it.

3 I think sometimes we have been critiqued
4 for not going to the SSAR for things that legitimately
5 are supposed to be in there. I'm not quite sure why
6 climate change was even in the SSAR, but I mean I
7 think you'll tell me it's not really a safety issue.

8 But what I would say first of all it is --
9 was not covered. Second, to the extent they're saying
10 that rainfall is increasing with climate over time, we
11 contest that absolutely.

12 We believe that Dr. Sass, in his
13 documentation that he has put forward as expert
14 reports -- Dr. Sass, before he retired, was the chair
15 of the Ecology Department at Rice University, and was
16 on the inter-governmental panel on climate change.

17 So he has IPCC experience, he knows
18 basically the shortcomings and strengths of the
19 documentation, he evaluated published literature in
20 very reputable magazines like *Science* magazine, as
21 well as looked at the models, and has come to the
22 conclusion that there are certainly implications of
23 climate change on reducing the amount of water during
24 drought conditions, that rainfall would decline by as
25 much as 15 percent across the Guadalupe River and San

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1 Antonio River watersheds, and I think he identified
2 several hundred thousand acre feet of change in terms
3 of overall flow patterns.

4 This is not something that happens
5 precipitously at the end of 100 years, but rather is
6 a gradual change. We made that as a clarification
7 after a response that was made by the applicant that
8 we were talking 100 years out. This is a gradual
9 change and there will gradually be less and less water
10 available.

11 I think the CEQ guidance is extremely
12 instructive in that this is now going to be a concern
13 for every major federal project in the United States.

14 JUDGE BARATTA: Well, what about the part
15 though that deals with the uncertainty?

16 MR. BLACKBURN: I understand. And
17 uncertainty is tricky. But I would also challenge
18 that there's any certainty about any prediction of
19 environmental impacts generally. It's not held as a
20 contract, we do the best we can with the science that
21 we have available.

22 There has been 20 years virtually of study
23 of climate change starting with the convention on
24 climate change out of the Rio Conference in 1992. So
25 it's not like this is a brand new science that we

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1 don't know anything about.

2 I think it's like a lot of things, I'm not
3 sure what type of precision will come out of the
4 inquiry, but I think we have the obligation to look,
5 to understand as best as we can, and see what the best
6 science can tell us.

7 I'm not going to sit here and tell you
8 that there'll be absolute certainty about any of this
9 climate change, but I'm not sure I can tell you
10 there's absolute certainty about a lot of these
11 analyses that we do.

12 I think as we move away from engineering
13 and more into the scientific and into the ecological
14 realms, certainty disappears. Certainly meteorology
15 and climate would be among the more uncertain.

16 JUDGE BARATTA: What I'm troubled by is
17 given that there's this uncertainty, at least based
18 upon what was said in the SSAR, what do we litigate?
19 Because if there's this uncertainty and six say this
20 and six say that and there's a bunch in between, all
21 we can do is include a discussion about that in the ER
22 and that's about it.

23 MR. BLACKBURN: Well, at this point I'm
24 not sure if we know if it's six and six. I think
25 that's the first issue. And as I understand, we do

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1 this proceeding in stages and I think the next stage
2 is, is it six and six. You know, what is actually the
3 prevalent sentiment of the models? What do all of
4 these different models say?

5 I mean I heard the applicant describe what
6 the applicant did. And I think the applicant's done
7 a nice job of analyzing current conditions. There
8 probably is a different way -- if you don't go back 70
9 years, if you start 30 years back, I promise you that
10 slope -- the curve may look different.

11 I think that you also have a number of
12 modeling exercises that have been done that have been
13 frankly vetting and have a higher degree of certainty
14 than others. I think that's the type of information
15 that were I in your shoes I would want to see, and
16 then I think you can make a more reasonable
17 determination as to how much certainty is out there or
18 not.

19 I don't think on the basis of what's been
20 submitted so far anything has happened other than us
21 calling into question what we thought was first an
22 omission, but now I think there's a clear difference
23 of opinion between what the applicant has stated with
24 regard to climate change, and what we have. I think
25 that that is worthy of further delineation. It may go

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1 no further than just the next round. I don't know
2 what it's going to reveal.

3 But I have been assured by those that I
4 respect that there is a lot of science out there that
5 supports that there is going to be increasing drought
6 conditions in this basin. That's what Dr. Sass put
7 forward and I think on that basis you have both a
8 conflict with the SSAR and a total omission in the
9 environmental report.

10 JUDGE BARNETT: Yes, so I would say to the
11 applicant, just as he -- to summarize just what he
12 said in a sentence or two, isn't that a matter of
13 legitimate dispute, what his model says versus what
14 your exercise said?

15 MR. RUND: Dr. Sass, in his original
16 declaration, or I think it was in the report actually,
17 focused on the year 2100, which is obviously well
18 beyond a 20-year ESP, and even well beyond any COL
19 that would be issued -- referenced in that ESP. So I
20 don't think there's adequate support to say -- to just
21 overlay the challenges that were presented in the
22 petition to support such a contention.

23 Now, I do understand that in the reply
24 they included a declaration that says the impacts from
25 climate change are going to be gradual. Also, earlier

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1 today Mr. Blackburn seemed to acknowledge that maybe
2 a 20-year period is more appropriate, which I think
3 undercuts the Sass report to the extent it suggests
4 that there are going to be these drastic changes well
5 off into the future.

6 And by simply, in that declaration, saying
7 the impacts are going to be gradual, I'd also point
8 out that they don't say what they're going to be in
9 the relevant time frame that we're concerned about.
10 So to the extent the Board did consider that
11 declaration, I don't think it really cures the point
12 that we made in our answer, that focusing on 90 years
13 down the road is outside the scope of this proceeding.

14 I'd also point out that it's pretty well
15 settled, NRC practice, that it's inappropriate to
16 include such declarations in a reply, and under
17 Commission case law the Board should not -- is
18 under -- it's certainly under no obligation and should
19 not consider Dr. Sass's late, late declaration that
20 was included in the reply brief.

21 JUDGE GIBSON: Judge Baratta?

22 JUDGE BARATTA: No.

23 JUDGE GIBSON: I would be interested in
24 knowing the staff's view about whether this is -- what
25 level of certainty is necessary in order for something

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1 to be considered, and at what point does it become
2 sufficiently uncertain that -- or become sufficiently
3 certain that we can say that it does need to be
4 addressed?

5 MS. GOLDIN: Your Honor, I think first of
6 all just state that the Commission does require the
7 staff to include effects of climate change in it EISs
8 for major federal actions. So we do consider that.
9 And the staff will consider climate change in drafting
10 it's EIS in the future.

11 In terms of certainty versus uncertainty,
12 I think what is reasonably foreseeable is -- can be a
13 liquid term depending on the context and the facts
14 involved.

15 For instance, here we're licensing a
16 facility for 10 to 20 years, and it's subject to
17 renewal for an additional 10 to 20 years, and then
18 eventually granting a COL which could be for up to
19 four years plus a potential renewal period, then
20 depending on how long -- I think analyzing the effects
21 of that -- those -- of the operation and everything,
22 that could extend beyond the life of the plant.

23 So we could look even further into the
24 future about the effects of that. So I think what is
25 reasonably foreseeable change is depending on what the

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1 context is.

2 JUDGE GIBSON: Okay. Yes.

3 JUDGE BARNETT: What's your position on
4 including Dr. Sass's declaration in the reply? Is
5 that something we should consider?

6 MS. GOLDIN: Well, I don't think we have
7 any opposition to that at this time.

8 JUDGE GIBSON: Okay. I'm curious how
9 useful the information that the -- Exelon submitted in
10 its environmental report is going to be to the NRC in
11 making that climate change evaluation in the
12 Environmental Impact Statement, and if not, are you
13 going to request additional information from them, or
14 are you all going to do this independently, do you not
15 need it? I'm just curious what the nexus is here
16 between one and the other.

17 MS. GOLDIN: Yes, Your Honor. I want to
18 first clarify my earlier statement. The Dr. Sass
19 declaration, it is new information, which we don't
20 usually permit during a reply period --

21 JUDGE GIBSON: Okay.

22 MS. GOLDIN: -- so -- under --

23 JUDGE BARNETT: You say it is additional
24 information that you don't --

25 MS. GOLDIN: It's new information.

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1 JUDGE BARNETT: New information. Okay.

2 JUDGE BARATTA: Well, okay, if we divide
3 this up as we've heard, that first off it's a
4 contention of omission, and I guess from what I just
5 heard it's not in the ER and there's a requirement
6 that the ER provide information sufficient for the
7 staff in preparation of their EIS -- and that's not a
8 direct quote; I'm paraphrasing.

9 So at this point, since it's not in the
10 ER, and you're required to include a discussion of
11 greenhouse gas emission and their impact on climate
12 and such, how can you do that without that information
13 being in there?

14 MS. GOLDIN: I think to answer -- this
15 contention, we looked at it as a mixed contention of
16 mixed omission and inadequacy. To the extent that the
17 ER does not contain information on climate change,
18 that would be a legitimate omission.

19 But the remainder for the contention we
20 still view as being inadequate because they don't
21 establish a linkage between the impacts of climate
22 change and the impacts of the Victoria County site,
23 the additional impacts of that on -- the operation of
24 that on climate change -- exacerbating climate
25 change.

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1 JUDGE BARNETT: What about Dr. Sass's
2 report? The initial report that he did his projection
3 to 2100?

4 MS. GOLDIN: Dr. Sass's -- as I read Dr.
5 Sass's report, it didn't establish this direct
6 linkage, it didn't -- it talked about climate change
7 in terms of the region and other effects that he
8 predicted based upon his expertise, but it didn't
9 specifically say how issuance of the Victoria County
10 ESP is going to exacerbate the effects of climate
11 change in this area. I didn't see that linkage.

12 JUDGE BARATTA: Well, looking at the
13 original contention, without going into the, you know,
14 discussion that was in either the petition, the answer
15 or the reply, the -- it says, The ER fails to describe
16 or analyze the future changes in water availability in
17 light of reasonably foreseeable impacts of changing
18 climate on the basin, the river basins.

19 And I guess, from what I've heard, that's
20 a true statement. And from what you just said, are
21 you then saying that your original statement relative
22 to the admissibility really should be tempered and
23 that maybe that the omission part is admissible?

24 MS. GOLDIN: I mean we're not -- certainly
25 not going to argue for admission of this contention in

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1 its entirety as pled. We wouldn't oppose admission of
2 this contention to the extent that the ER does not
3 information on climate change.

4 JUDGE BARATTA: You would not oppose that,
5 is that what --

6 MS. GOLDIN: To that limiting extent.

7 JUDGE BARATTA: That to limit. I see.

8 MS. GOLDIN: That's it. But to the
9 extent -- to get back to Judge Gibson's question
10 regarding what the staff looks at in determining --
11 evaluating climate change and what goes into the EIS,
12 certainly the staff is going to look to what's in --
13 the information in the ER and conduct its own
14 independent analysis to gather information for climate
15 change to put in the EIS. So it's not just what's
16 based in the ER.

17 JUDGE GIBSON: Of course not. Of course
18 not. And I also realize you don't have a crystal ball
19 and you don't know exactly what the staff is -- that,
20 you know, that not the lawyer but the actual staff is
21 going to be doing. But I'm just curious.

22 At this point I take you all haven't
23 formulated a view about whether or not what is here is
24 sufficient or whether there's going to have to be
25 additional information provided?

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1 MS. GOLDIN: I think at this point it's
2 too early to really tell.

3 JUDGE GIBSON: Okay. Fair enough. Fair
4 enough. That's fine.

5 Okay. Mr. Blackburn.

6 MR. BLACKBURN: A couple of comments. We
7 understood, when we made the amendment, or the
8 addition to Dr. Sass's declaration, we knew that we
9 couldn't add new science. We did not intend to add
10 new science, we didn't change the subject matter, we
11 didn't get into -- we basically offered a
12 clarification.

13 And I think clarifications should be
14 allowed to the extent that the term -- the use of the
15 term "2100" was basically the primary basis for the
16 objection with the applicant saying it goes beyond the
17 life time of the facility. Although the staff has
18 just said perhaps not.

19 But nonetheless, we did make the amendment
20 to clarify that climate change is going to be gradual
21 over time and that it is not you go out 100 years and
22 then all of a sudden there's a precipitous change. It
23 is something that happens over time. That was the
24 whole reason for the additional declaration, it was
25 just to clarify that point.

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1 I think beyond that I think we -- I think
2 the differences I think are very clearly understood
3 here. I think certainly at the least I think it is a
4 contention of omission. It was not in the
5 environmental report.

6 I would urge that we have identified a
7 true dispute to the extent that you looked to the SSAR
8 and used their analysis. I think there's, on the
9 basis of Dr. Sass's original report, there is an
10 absolute factual dispute of what is going to occur.

11 And it's not the plant effecting the
12 climate, instead it is basically what's the baseline
13 climate situation going to be and that is -- always
14 has been -- certainly if you were describing current
15 conditions that's clearly within the scope of what the
16 current environments is.

17 It's just taking that to the future and
18 seeing how does that climate change affect future
19 operations of the plant. We've already talked about
20 water and water availability, and this is, if we're
21 correct, only going to worsen that situation. We
22 think it's a legitimate contention all the way around.

23 JUDGE GIBSON: Okay. Did you want -- did
24 you have anything else you needed to say?

25 MR. RUND: Two points, Your Honor.

1 JUDGE GIBSON: Okay. Fine.

2 MR. RUND: To the extent that the
3 information that addresses this issue is dealt with in
4 the SSAR, I believe that establishes essentially the
5 rationale for why it needn't be in the environmental
6 report, including the fact that trying to pin down
7 what these impacts are, are speculative.

8 To the extent that they're claiming
9 there's a contention of omission, it's their
10 obligation to, if not address that particular
11 rationale, at least address the legal requirement in
12 2.309(f)(1)(vi) to establish that the information is
13 legally required. And under NEPA that obligation
14 could be met by showing that these are reasonably
15 foreseeable impacts and aren't speculative.

16 While we do have an estimate by Dr. Sass
17 about what the changes are going to be, there is no
18 explanation of the uncertainty involved in that
19 discussion. And there's no discussion about the
20 variability or any of the number of issues that we
21 raised in the SSAR.

22 And to the extent that that's lacking,
23 there isn't a foundation to demonstrate that there is
24 an omission of something that's legally required to be
25 in the environmental report.

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1 And one other point, as the staff
2 mentioned, before any plant would be built, there
3 would be a separate licensing action for a COL. To
4 the extent we're worried about the year 2100, there
5 would also be at least a renewal of the Early Site
6 Permit, and if I'm doing my math right, also a renewal
7 of the COL to get out that far.

8 All those separate licensing actions
9 require environmental reviews where if we're at a
10 place in the future where there is more precision in
11 these models, these issues could be revisited again.

12 JUDGE BARATTA: With respect to the legal
13 requirement though, we've already heard that the
14 Commission's directed the staff to deal with the
15 effects of greenhouse gas, so that would seem to
16 establish a legal requirement that that be in the EIS,
17 and there already was an existing requirement for the
18 ER to provide sufficient information for the staff to
19 do their preparation of the EIS.

20 So how can you say there's not a legal
21 requirement?

22 MR. RUND: The decision that the staff is
23 referring to directed the staff to include discussions
24 of greenhouse gas emissions from plants. And in the
25 ER we do address that issue in 5.8.1.2 where we

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1 discuss greenhouse emissions from the plant. The
2 direction didn't go to the level of detail that we're
3 talking about now.

4 JUDGE BARATTA: Okay.

5 MR. RUND: It's what are the impacts of
6 climate change going to be on the environment. The
7 staff -- I'm sorry, the Commission's order dealt with
8 what are the impacts from the plant going to be on the
9 environment in terms of greenhouse gas emissions. And
10 both issues are, you know, are distinct obviously.

11 JUDGE GIBSON: You know, it seems to me
12 that your point is well taken about the fact that
13 there would be many more opportunities, once the
14 science gets better, to raise these issues.

15 But it seems to me that the claim -- or
16 the concern that Mr. Blackburn is raising is that,
17 with this and other contentions, is that, you know,
18 this site shouldn't be chosen, there's not enough
19 water available and all these things, and that were we
20 to wait until the science gets more definitive and
21 more precise at a later date, that by that time the
22 facility will have already gone forward and you -- you
23 know, it's pretty hard to unscramble an egg.

24 And so I'm just curious if -- well, I
25 don't guess I don't really need to ask a question. It

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1 was just I guess a concern about waiting until the
2 science gets better. Not that there's anything we can
3 do, or anybody can, but I would think that would be,
4 you know, the problem I guess with waiting until the
5 science is more precise and more definitive.

6 At what point does it need to be -- is it
7 sufficiently precise and definitive that we need to
8 actually tee this up and try to address it.

9 JUDGE BARNETT: Yes, I guess at what point
10 would it be appropriate for the petitioner to file a
11 contention based on the analysis that Exelon may do
12 about the models.

13 So let's say at some point in the future
14 that Exelon decides that science is good enough that
15 they can do this projection for climate change, then
16 at that point would the petitioner have the ability to
17 file a new contention?

18 MR. RUND: I think, in fact -- I mean I'm
19 not foreclosing the possibility that somebody could do
20 it now if they made that argument and went through
21 those steps. But they didn't. In Dr. Sass's report
22 those issues aren't dealt with.

23 And given, you know, the very guidance
24 document, the draft CEQ guidance documents that TSEP
25 is saying support their contention, acknowledge the

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1 considerable uncertainty. And they largely ignore
2 that issue. They haven't met that burden now.

3 So I'm not going to say that it's going
4 to, you know, X number of years in the future. Just
5 given the present state of the signs, as acknowledged
6 by their own documents, they cited the draft CEO
7 guidance in their reply, the Board's entitled to look
8 at that for argument that support their contention, as
9 well as for argument those don't.

10 And given that, I mean I acknowledge it
11 was the SSAR that similar concerns were expressed in
12 our ESP application. We think that's a fundamental
13 link for them to make that argument if they want to
14 make it now.

15 JUDGE GIBSON: Thank you.

16 Okay. Mr. Blackburn, you have something
17 else to say?

18 MR. BLACKBURN: We believe that if this
19 issue and the water supply, water availability, water
20 related issues are not considered at this Early Site
21 Permit stage, basically we're not going to be able to
22 effectively raise them at any other stage in the
23 proceeding because the site will have already been
24 adjudicated to be acceptable.

25 And to my way of thinking, that

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1 includes -- I mean that is the water issue. If you've
2 got an acceptable site, it's going to be very hard to
3 argue about there's not enough water at some later
4 point if basically all of the resources are already
5 committed to this site. So I think now is the time or
6 not, but I mean I think realistically this is our
7 chance.

8 JUDGE BARATTA: Let me ask the staff this
9 question related to that point.

10 The Part 52 licensing process for
11 environmental issues to be addressed during the COL,
12 given that you have an Early Site Permit, is there any
13 limitation as to what goes into that environmental
14 report versus the environmental report that would have
15 been submitted during an ESP or was inserted in COL
16 that references an ESP?

17 MS. GOLDIN: So, Your Honor, you're asking
18 about the distinction between the ER that's for an ESP
19 application versus an ER for a COL application?

20 JUDGE BARATTA: Yes.

21 MS. GOLDIN: Can I take a moment to
22 consult with the staff?

23 JUDGE BARATTA: Sure.

24 MS. GOLDIN: Thank you.

25 (Pause.)

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1 MS. GOLDIN: Thank you, Your Honor.

2 JUDGE GIBSON: Sure.

3 MS. GOLDIN: If an issue is new and
4 significant at the COL stage, then that could be
5 revisited. But if something has been decided at the
6 ESP stage, and if it's not -- there's not any new
7 significant information on that at the COL stage, then
8 it would not be revisited.

9 JUDGE BARATTA: So based on that, if we
10 don't litigate this now, then at the COL stage what
11 he's saying is coming true, then that wouldn't be new
12 and significant. Is that what that --

13 MS. GOLDIN: It would depend on the
14 specific issues that were made final at the ESP stage.
15 For instance need for power is something that --

16 JUDGE BARATTA: Right.

17 MS. GOLDIN: -- is not adjudicated right
18 now, but will come up at the COL stage.

19 MR. BLACKBURN: We have identified 10 CFR
20 52.39(a), which is Commission finality, and it's I
21 think very similar to what was repeated, but the term
22 that is used here is, "The Commission shall treat as
23 resolved those matters resolved in the proceeding."

24 And since many of these we're talking
25 about have been raised in this proceeding, I have no

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1 doubt that I would hear resolved, resolved and
2 resolved if I tried to raise this at any future time.
3 So I think now is, in fact, the time if it's going to
4 be taken up.

5 MS. GOLDIN: Your Honors, can I just
6 include one last point --

7 JUDGE GIBSON: Sure.

8 MS. GOLDIN: -- on that?

9 JUDGE GIBSON: Sure.

10 MS. GOLDIN: So throughout the ESP review
11 process, if new information arises, certainly the
12 petitioners could submit a new or amended contention
13 based upon that information. So just because
14 something's not discussed today doesn't mean that
15 during the ESP review they couldn't later bring it up
16 if it was -- if it was not -- if it was new and
17 significant.

18 JUDGE GIBSON: Sure.

19 JUDGE BARNETT: You mean new and
20 significant beyond the report that Dr. Sass has
21 already submitted?

22 MS. GOLDIN: Or anything, any information
23 that was new beyond the scope of the current
24 application.

25 JUDGE GIBSON: Judge Baratta?

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1 JUDGE BARATTA: How would -- let's say we
2 admitted this issue.

3 MR. BLACKBURN: Okay.

4 JUDGE BARATTA: I mean back to my question
5 about the uncertainty associated with this, how would
6 we address Daubert?

7 MR. BLACKBURN: How would we address --

8 JUDGE BARATTA: Address Daubert relative
9 to your expert.

10 MR. BLACKBURN: I'm sorry, I still haven't
11 heard --

12 JUDGE GIBSON: Daubert.

13 JUDGE BARATTA: Daubert.

14 JUDGE GIBSON: The Daubert --

15 MR. BLACKBURN: Daubert.

16 JUDGE BARATTA: How would we deal with
17 Daubert?

18 MR. BLACKBURN: Oh, excellent. Daubert.
19 I think a couple of ways. I think Daubert, first of
20 all, I think absolutely supports the entry of climate
21 change, you know, as an issue just across the Board.
22 The National Academy of Sciences, the -- I mean
23 virtually every major institution in the United States
24 has accepted certainly that the climate is changing,
25 and so I think -- so certainly that is well

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1 established.

2 I think from a Daubert standpoint all
3 other factors weigh toward admissibility of climate
4 change as an issue, I think it weighs on the fact that
5 there is certainly sufficient scientific certainty
6 that you could at least get competing theories in
7 front of the panel.

8 Now, I think the hard work goes back to
9 the panel. I think that it's the evaluation of those
10 documents --

11 JUDGE BARATTA: Yes, that's really what
12 I'm referring to.

13 MR. BLACKBURN: Right. And I don't think
14 it's -- but I don't think it's a Daubert issue. I
15 don't think it's a question of admissibility. I think
16 that the science is well enough established and it's
17 been peer reviewed, it's been accepted in the general
18 literature. I think most of those tests will be met
19 just fine.

20 I think the real question is, what do you
21 believe. And I don't think that we have sufficient
22 information here to really even argue that well. I
23 think, as I understood the process, we were trying to
24 raise enough of an issue to get to the next stage
25 where we would develop the issue in much greater

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1 detail.

2 I would say at that point -- I mean at
3 some point I think you will have a very difficult
4 decision about how much certainty you require as
5 judges to make a decision that you feel comfortable
6 with. I think that that would go into an
7 understanding of who developed the models, where did
8 the models come from, what type of vetting did the
9 models have, what processes were done, and what are
10 the contrary theories.

11 I mean frankly so far we've got 70 years
12 of historical record and a consultant's opinion that
13 it's raining more here versus basically peer-reviewed,
14 science-published information put forward by a pretty
15 distinguished professional. Is there a dispute? Yes,
16 there's a dispute.

17 Should you believe one or the other at
18 this point in time? Absolutely not. But I think that
19 it is incumbent on us as the attorneys to try to bring
20 to you information that would help you make those
21 decisions.

22 I don't think for one second that it is an
23 easy decision that we're asking you to embark upon.
24 But I do think that there are ways to approach it in
25 a very orderly way that frankly that we work through

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1 with science generally. But I think it is a fairly
2 high level scientific discussion that should occur,
3 and I think frankly just what I expected to occur
4 before this panel.

5 JUDGE BARATTA: Thank you.

6 JUDGE GIBSON: Okay. Did you want to
7 respond to Mr. Blackburn's --

8 MR. RUND: Yes, if I may.

9 JUDGE GIBSON: -- comment?

10 MR. RUND: This is the Nuclear Regulatory
11 Commission. We deal with technical issues all the
12 time; they're hard, and licensing boards will render
13 decisions. But if you're talking about applying
14 Daubert to the type of science that we're dealing with
15 now, I mean my understanding is that the only
16 generally agreed upon principles across the different
17 models is that they're all over the place.

18 So I'm not sure what the Board would wind
19 up ultimately having to decide between if we were to
20 apply that type of standard to the various models.
21 And given that type of standard, I think the Board
22 might find itself at the end of the day just saying,
23 Well, they're all over the place, so what are we --
24 we're kind of left to do what Exelon did in its
25 application, was look at historical data, look at

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1 historical extremes.

2 I mean, you know, we're getting real far
3 down the road from what's at issue here, which is what
4 are the impacts from VCS going to be on the
5 environment. I mean obviously it is important to
6 establish the baseline, but it's also important for
7 the Board to keep in mind that when we evaluate
8 environmental impacts in the environmental report, we
9 look at a wide range of conditions historically, for
10 example, the historical drought of record.

11 And, you know, I think that just helps put
12 in context that we're not taking this matter lightly
13 and we are, in fact, looking at a whole host of
14 potential future scenarios down the road.

15 And given, you know, the fact that -- you
16 know, I keep back to the uncertainty issue and the
17 fact that we're only at the contention admissibility
18 stage now, but they do have to establish a genuine
19 dispute of material fact and establish that any
20 omitted information is legally required to be there.

21 And to do that they needed to establish
22 that there's some reliability, and there's not enough
23 uncertainty so it would be remote and speculative to
24 predict what the impacts would be during the relevant
25 period of the licensing action.

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1 JUDGE BARATTA: Nothing more.

2 JUDGE GIBSON: Okay. I think at this
3 point we'll take a recess for 10 minutes, and see you
4 then.

5 (Whereupon, a short recess was taken.)

6 JUDGE GIBSON: Let's turn to Environmental
7 7.

8 Mr. Blackburn, on page 55 of your petition
9 you raise an environmental challenge and claim that
10 the applicant has not properly characterized the
11 impacts to the endangered whooping crane. Is that
12 correct?

13 MR. BLACKBURN: That is correct.

14 JUDGE GIBSON: Counsel for the NRC staff,
15 do I understand correctly that you do not oppose this
16 admission of this contention, as well as contentions
17 8 through 14?

18 MR. ROACH: That's correct, Your Honor.

19 JUDGE GIBSON: Now, Mr. Frantz, you've
20 suggested that this contention is not admissible, but
21 that if 10 to 11 were rewritten, they would be
22 admissible. Is that correct?

23 MR. FRANTZ: 11 and 12.

24 JUDGE GIBSON: Or 11 and 12, I'm sorry.
25 Thank you.

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1 Okay. Mr. Blackburn, you allege that
2 there is a genuine dispute here and suggest that the
3 question is whether the impacts would be small, as the
4 applicant argues, or potentially catastrophic, in your
5 estimation. Is that correct?

6 MR. BLACKBURN: That is correct.

7 JUDGE GIBSON: How do you respond to this
8 difference of opinion and say there's no dispute? I
9 can understand you could say, Yes, you all are in
10 disagreement, but --

11 MR. FRANTZ: Again, we are willing to
12 agree to the admission of a contention that deals with
13 the impacts of plant water use on whooping cranes, but
14 we believe that many of these contentions including
15 Contention 7, really don't address that issue.

16 Instead they address generic issues
17 regarding whooping cranes, and the whooping crane
18 health, the food sources for the whooping cranes such
19 as the blue crabs and wolfberries, and other issues
20 that don't really deal with the plant itself. And
21 it's -- general issues regarding whooping cranes are
22 not admissible. This Board is not established to make
23 rulings on whooping cranes in isolation from the
24 plant.

25 And to the extent they're trying to

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1 litigate general issues with no tie to the impacts on
2 the plant, we don't believe that's separately a
3 contention that should be admitted by the Board. It
4 doesn't fit within the ambit of section
5 2.309(f)(1)(iv) of the regulations.

6 JUDGE GIBSON: Okay. Mr. Blackburn?

7 MR. BLACKBURN: As best as -- to the best
8 of our ability we tried to link water usage to changes
9 in the bay and estuary system that -- and the allusion
10 was made to food supply.

11 Well, that is the mechanism by which the
12 impact of the plant translates into harm to the
13 whooping cranes. Food supply is -- if you don't have
14 enough food you will perish. We have -- we've done a
15 lot of work with whooping cranes.

16 My point is simply we have causal
17 relationship between water usage, impacts to the bay
18 in a broad general sense, which I think is one clear
19 direction that doesn't involve whooping cranes, and
20 then specific to whooping cranes there's a line of
21 reasoning that follows the impacts through to
22 basically starvation of whooping cranes.

23 JUDGE GIBSON: Okay. Do you disagree with
24 that? Not that that's what he -- his position is, but
25 do you disagree -- would you disagree with a

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1 contention along those lines?

2 MR. FRANTZ: No, we don't. And, in fact,
3 I think our rewritten contention is very much similar
4 to that.

5 Our problem is not with that kind of
6 logic, and maybe we really aren't that far apart here,
7 and we believe that the issues he's raised, he can try
8 to raise those when we litigate the contention that
9 we've agreed to admit. But to the extent he wants to
10 litigate issues in isolation from the impacts of the
11 plant, that's where we disagree.

12 We don't believe, for example, that the
13 Board needs to make a finding on the number of deaths
14 of whooping cranes in 2008 and 2009. We don't believe
15 the Board needs to make a finding regarding the SAGES
16 report. We don't need -- the Board does not need to
17 make a finding whether wolfberries are the primary
18 food source, for example, of the whooping cranes and
19 whether there's other food sources.

20 Those issues can be litigated in the
21 context of the impacts of the plant, but not in
22 isolation from the impacts of the plant.

23 And just as a theoretical exercise for
24 example, if the only contention that comes in is
25 Contention 7 and not the other contentions that

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1 they've alleged, I would say that you could rule
2 either way on that particular contention and it
3 wouldn't affect at all the impacts from the plant,
4 because the contention itself, other than the lead-in
5 sentence, ignores the plant.

6 There's no mention at all of Victoria on
7 pages 57 through 60 other than a passing reference to
8 the plant on page 58. He's trying to litigate generic
9 issues on whooping cranes, and that's not why the
10 Board's been established.

11 JUDGE GIBSON: Are you trying to litigate
12 generic issues on whooping cranes, Mr. Blackburn?

13 MR. BLACKBURN: No, Your Honor.

14 JUDGE GIBSON: Okay. Well, you know, it
15 sounds like you guys are just not -- are talking past
16 each other.

17 MR. BLACKBURN: Well, it does sound that
18 way a bit, and I would certainly say that we would be
19 willing to work with both staff and the applicant to
20 try to forge a set of contentions that perhaps would
21 be suitable for litigation. I do think, for example,
22 we put the 2008-2009 mortality as an issue, we put the
23 SAGES report as an issue to make specific points.

24 I mean I think those are logically subsets
25 under a larger contention. But our point is, we

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1 didn't know how to raise some of these issues. We
2 think that SAGES is subject to a Daubert challenge.

3 And, Judge Baratta, I mean I have to tell
4 you, we're used to hearing Daubert with a little bit
5 more of a twang to it, so when you said that, I didn't
6 quite catch it the first time.

7 But I think we want to make a Daubert
8 challenge to the SAGES report. We generally --
9 genuinely think it is junk science, and we think we
10 can prove that. Now, I'm not sure how we do that in
11 the context of this proceeding, so we raised it as a
12 contention. That may not be the proper way to go
13 about that, and if we can do it as a subset issue in
14 the --

15 JUDGE GIBSON: Okay.

16 MR. BLACKBURN: -- larger issue and in the
17 larger context of impacts. We are only interested in
18 talking about impacts associated with this plant.

19 JUDGE GIBSON: Okay. I tell you what.
20 Why don't you all give us five minutes, let the Board
21 go back and talk for a minute. Okay. We'll be right
22 back.

23 (Whereupon, a short recess was taken.)

24 JUDGE GIBSON: The Board would be
25 interested in your views about whether it might be

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1 appropriate to take a recess, give you all the rest of
2 the day to come up with an agreement on Contentions 7
3 through 14, and on exactly what those contentions
4 would say. And we'll -- present it to us tomorrow on
5 the record at nine o'clock and we can go forward.

6 If not, we can go through these
7 contentions individually, but it sounds to me like you
8 guys have certainly given some thought to this, and if
9 you just have a chance to talk to each other instead
10 of past each other, you might have a chance to resolve
11 it.

12 Do you have a view about that, Mr. Frantz?

13 MR. FRANTZ: That sounds reasonable to us.

14 JUDGE GIBSON: Staff?

15 MR. ROACH: No objection here.

16 JUDGE GIBSON: The pressure's on you, Mr.
17 Blackburn.

18 MR. BLACKBURN: I'm absolutely acceptable
19 to that.

20 JUDGE GIBSON: Okay. Okay. Well, would
21 you all like to recess then, you all try to reach an
22 agreement on this. I'm sure, you know, we can --
23 there's some place -- you all can probably meet here
24 and visit about it, and we'll start, well, nine
25 o'clock tomorrow morning.

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1 Hopefully we'll have a record to recite on
2 the record, and then we can finish up the contentions
3 we have left at that time, and we'll have this done.
4 Does that sound fair?

5 MR. FRANTZ: Yes.

6 JUDGE GIBSON: Are you all agreeable to
7 that procedure?

8 MR. BLACKBURN: Absolutely.

9 MR. FRANTZ: Yes.

10 JUDGE GIBSON: Okay. Okay. Well, rather
11 than us wasting our time asking you questions about
12 things you can resolve, we'll let you all try to
13 resolve it.

14 We'll stand in recess until nine o'clock
15 in the morning. Thank you.

16 (Whereupon, at 3:35 p.m., the proceeding
17 adjourned, to reconvene at 9:00 a.m. tomorrow,
18 Thursday, March 17, 2011.)

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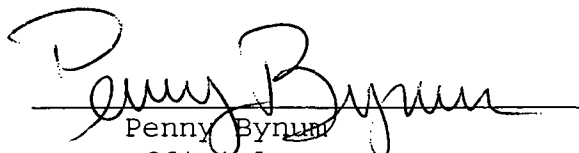
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