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U.S. NUCLEAR REGULATORY COMMISSION

PUBLIC PARTICIPATION IN NRC REGULATORY
DECISION-MAKING

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TRANSCRIPT OF PROCEEDINGS

Public Meeting

Before the U.S. Nuclear Regulatory Commission:

Allison M. Macfarlane, Chairman

Kristine L. Svinicki, Commissioner

George Apostolakis, Commissioner

William D. Magwood, IV, Commissioner

William C. Ostendorff, Commissioner

APPEARANCES

NRC Staff:

Bill Borchardt
Executive Director for Operations

Darren Ash
Deputy Executive Director for Corporate Management,
Office of the Executive Director for Operations

David Lew
Deputy Regional Administrator, Region I

Brad Jones
Assistant General Counsel for Reactors and Materials
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External Panel:

Jay Silberg
Partner, Pillsbury

Ellen Ginsberg
Vice President, General Counsel and Secretary, Nuclear
Energy Institute

Christopher Paine
Nuclear Program Director, Natural Resources Defense
Council

Mark Edward Leyse
Consultant, New England Coalition

Joseph Klinger
Assistant Director, Illinois Emergency Management Agency

Phil Mahowald
General Counsel, Prairie Island Indian Community

1 PROCEEDINGS

2 CHAIRMAN MACFARLANE: Okay, now we will move on to the
3 main part of the morning, which is our session on public participation in NRC
4 regulatory decision-making. We're going to be hearing from a variety of
5 viewpoints today about this important topic. First we will be hearing from our staff
6 here at the NRC. And then we'll have a second panel which will include a variety
7 of external experts from the nuclear industry, from environmental and intervenor
8 groups, and from state and Tribal officials. So I'm looking forward to this first step
9 towards better understanding all views on this issue and determining where
10 effective changes can be made in public participation. So we're going to start off,
11 as I said, with the staff views. And let me introduce Bill Borchardt, the executive
12 director of operations at the NRC.

13 BILL BORCHARDT: Good morning, thank you. First Slide 3,
14 please. This provides the agenda for today's briefing. What we're going to do is
15 just spend a few minutes giving a quick broad overview and then transition to
16 some specific adjudicatory issues that are in a fair amount of detail compared to
17 the rest of the presentation. Slide 4 is an illustration which attempts to show the
18 many ways that we engage the stakeholders through a wide variety of activities.
19 They range in different degrees of formality. These different methods have
20 different processes involved. They did have maybe some different specific
21 objectives. But the common theme is that we strive to be an open agency, that
22 we value the input, the interaction, and the participation of all members of the
23 public in our regulatory processes. And that each of these has evolved over time
24 in response to feedback that we've gotten from a variety of stakeholders. And
25 we're continuing to revise them to take advantage of technology and, again, from

1 the most recent feedback that we get through those interactions. We recognize
2 there's always room for improvement and we strive to do that on an ongoing
3 basis. I'm going to turn the presentation over to Darren, who will get into an
4 overview of some of our petitions for rulemaking and other enforcement actions.

5 DARREN ASH: Bill, thank you. Chairman, Commissioners, good
6 morning. I'm on Slide 6. Every public meeting presents a unique opportunity for
7 continuous improvement; that's why we distribute feedback forms at each public
8 meeting as well as online via the NRC's website satisfaction survey. I
9 acknowledge that it is challenging to truly measure how well we perform in our
10 interactions with the public. This is because our interactions are broad and
11 feedback, frankly, can be objective and anecdotal. We do review all the feedback
12 forms and, as appropriate, take action. The NRC public meeting feedback form
13 also allows the public to request additional follow-up information from the staff.
14 While the preferred communication approach is face-to-face, and in some
15 circumstances necessary, we do continue to look for and expand alternative
16 ways for outreach. This is being done via web streaming as well as other
17 technologies. Anecdotal evidence and feedback from participants is that these
18 mechanisms are helping the public to contribute to our meetings. Next slide
19 please. The 2.206 process is unique to the NRC. Anyone may request that the
20 NRC take enforcement-related action against an NRC licensee or certificate
21 holder. Most other federal agencies do not provide an opportunity for the public
22 to participate in this open a manner with senior management, and technical leads
23 to discuss enforcement actions or safety concerns. Some feedback we received
24 indicates that individuals participating in the 2.206 process are frustrated due to
25 the perceived low number of substantive actions that result from such petitions

1 and that the process places the quote-on-quote, "Burden of Proof" on the
2 petitioner for substantiating safety concerns. However, a good percentage of
3 petitions are, indeed, acted on at least in part. I would note that the management
4 directives on -- management directive on the review process for 10 CFR 2.206
5 petitions is currently under review. The revision will clarify NRC's staff rules and
6 responsibilities as well as streamline the criteria used for accepting the petition
7 for review. I believe that we are a better regulator as a result of the public's
8 participation in the 2.206 process. Next slide please.

9 In another opportunity for participation, anyone may submit a 2.802
10 petition to the NRC to develop, change, or rescind any one of its regulations.
11 The NRC is not required to invite comments on a petition and may not do so if it
12 has sufficient information to fully evaluate the request within the petition. Over
13 the past five years, the NRC has either fully or partially considered 45 percent of
14 the petitions received in the rulemaking process. A proposed rule currently
15 before the Commission would streamline NRC's process for addressing petitions
16 for rulemaking and provide greater transparency in the process. With that, I'd like
17 to turn it over to David Lew from Region I.

18 DAVID LEW: Next slide. Chairman, Commissioners, good
19 morning. Public outreach and engagement is an important priority for us. One of
20 the many opportunities Region I has for public engagement on meetings about
21 licensee performance are held at least annually and conducted in the vicinity of
22 each nuclear power plant. For some, including contentious meetings attracting
23 hundreds of attendees we have gone above and beyond the norm by providing
24 additional open houses with information booths on a wide range of topics offering
25 various groups the opportunity to set up their own booths to share their views

1 and perspectives and briefing reporters and conducting outreach to state, local,
2 and non-governmental organizations ahead of these meetings to provide
3 information and respond to questions and concerns. In addition to these annual
4 meetings, we also conduct public meetings on specific topics of interest. There
5 are other opportunities for engagement by public affairs officers, state liaison
6 officers, and State Agreement officers, as well as media, as well as managers,
7 and inspectors who interact directly with the public, the media, state and local
8 governments, and non-governmental organizations. A good deal of our
9 interactions involve our resident inspectors, who are assigned to each nuclear
10 power plant and live in the nearby communities. They often receive calls from
11 and interact with the public and they get tremendous amounts of support from the
12 Regions in responding to questions and ensuring that issues and concerns,
13 including allegations, are processed and addressed in a timely fashion.
14 Technology has also helped us stay connected with the public. During Super
15 Storm Sandy, tools like blogs and tweets came into play to help in keeping the
16 public better informed about the condition of plants in the Northeast. We have
17 also established a listserv system in which people can sign up and receive
18 inspection reports and correspondence electronically as soon as they are issued.
19 This has greatly enhanced the timeliness and increased public access to many of
20 our key documents. And we have also set up web pages on specific topics of
21 interest such as concrete degradation at Seabrook. These are just some of the
22 examples of public outreach activities which reflect the importance that we place
23 in this area. That concludes my remarks, so I'll turn it back to Darren.

24 DARREN ASH: David, thank you. The last topic today is NRC's
25 interactions with states and Native American Tribes. On Slide 12 please. The

1 office of Federal and State Materials and Environmental Management Programs,
2 or FSME, manages NRC's federal, state, and Tribal liaison program. FSME
3 maintains regular and successful relations and communications with these
4 important partners. These relationships promote greater awareness and mutual
5 understanding of the policies, activities, and concerns of all parties involved as
6 they relate to radiation safety and NRC licensed facilities. All states, including
7 the 37 Agreement States, work with the NRC on various issues. One example of
8 our Tribal interactions is that Region III maintains communications with the
9 Prairie Island Indian Community, given its location within the 10-mile emergency
10 planning zone of the Prairie Island Nuclear Generating Plant. The NRC is
11 currently seeking comments on draft agency procedures for consulting with
12 Native American Tribes. The comment period closes on April 1st of this year. I'll
13 now turn it over to Brad Jones, Office of General Council.

14 BRAD JONES: Thank you. My first slide is an outline of my
15 presentation which includes some specific topics we were requested to address.
16 Before I discuss those specific topics, a few general observations on hearing
17 may help put this discussion in context. First is maybe evident from the previous
18 speakers; adjudicatory hearings supplement a robust set of tools for public
19 interaction. Although important to the overall process of public interaction,
20 hearings are not the sole or even the primary source for agency interaction with
21 the public. On many matters such as rulemaking or policy determinations, we do
22 not use the adjudicatory process at all. Second, even though not required, the
23 NRC has used the adjudicatory process as an additional opportunity for public
24 involvement even when alternative methods of interaction are also used. As an
25 example, although NRC uses public notice and comment process in developing

1 final environmental impact statements, we also allow our licensing hearings to
2 include contentions addressing environmental matters. Earlier this month, the
3 First Circuit Court of Appeals recognized that our adjudicatory hearings on
4 environmental matters were a function of NRC's own regulations and did not
5 arise from NEPA itself. To my knowledge we're the only federal agency that
6 provides for an adjudicatory-type hearing opportunity on environmental issues.

7 With that background, let me discuss the specific issues related to
8 hearings we've been asked to address. Next slide please. It is a long-
9 established principle that a better record is established when persons have a
10 direct stake in the outcome of a hearing rather than a generalized interest in the
11 subject matter of the hearing. The mechanism for putting this principle into effect
12 is referred to as establishing standing. With respect to standing in NRC hearings,
13 the Commission has historically maintained that the agency will use generally
14 accepted judicial concepts of standing for our hearings. This requires that a
15 petitioner state the nature of the interest in the proceeding and the possible effect
16 of any decision in the proceeding on that interest. The Commission has
17 established a presumption that standing exists for persons living within 50 miles
18 of a proposed reactor for hearings on that facility. The Commission also allows
19 discretionary intervention where traditional standing is not present after balancing
20 certain factors. While there have been a few cases where petitioners have been
21 unsuccessful in seeking a hearing based on issues related to standing, our
22 contention standards have been more significant in determining whether a
23 hearing will be held and what topics will be explored through the hearing process.
24 Demonstrating standing alone does not entitle a petitioner to a hearing under
25 NRC regulations. In addition to showing standing, each petitioner must

1 demonstrate that they have at least one admissible contention that would be
2 adjudicated in the hearing. Originally reflecting the statutory language that
3 hearings be granted to persons whose interest would be affected, NRC only
4 required that a petitioner set forth the basis for each contention with reasonable
5 specificity in order to be admitted. The board of presiding officer could not
6 inquire into the basis for the contentions in deciding whether a contention was
7 admissible. This resulted in the admission of some poorly-defined or poorly-
8 supported contentions. This was sometimes referred to as a mere notice
9 pleading standard since admission could depend more on the skill of the person
10 drafting the petition to intervene than on the actual existence of issues
11 appropriate for hearings. One outcome of this process was that petitioners
12 could almost guarantee a hearing by cutting and pasting contention language
13 that had been found to contain reasonable specificity in prior NRC hearings. It
14 would then be left to the process of discovery and summary disposition to whittle
15 the contentions down to the few for which there was an actual dispute that could
16 benefit from the filing of testimony and the exploration of that testimony in an
17 adjudicatory setting. Significant time and resources were spent simply
18 determining which issues were deserving of a full hearing process. As a result,
19 members of Congress and other stakeholders in the early 1980s began to raise
20 concerns about the efficiency of the NRC's hearing process. The Commission
21 responded by making efforts to critically examine its contention admissibility
22 requirements and ultimately modified the contention admissibility requirements in
23 1989. Next slide.

24 This slide summarizes the requirements as they now appear in 10
25 CFR 2.309(f). The most significant part of the 1989 revision was the new

1 requirement that petitioners provide a basis for their proposed contention
2 reflected in the next-to-last bullet on this slide. That revision also required that
3 the petitioner specify the specific part of the application for which there was a
4 dispute. This provides contention admissibility standard has governed our
5 reactor licensing actions for over two decades. The First Circuit recently noted
6 the history of the development of our contention admissibility standard and found
7 it a valid exercise of Commission discretion. Despite comments on the 1989 final
8 rule that the revised contention standard would make it virtually impossible for
9 persons seeking to participate in a NRC adjudicatory proceeding to succeed in
10 having their contentions admitted, petitioners have, in fact, been successful in
11 having contentions admitted and using the NRC hearing process in the
12 intervening years since the contention standard was revised. Next slide.

13 We've also been asked to address the timing of the opportunities for
14 hearings. This issue concerns whether NRC should time the publication of the
15 opportunity to request hearings based on the receipt of the application, or
16 alternatively, later in the licensing process based on the completion of staff
17 documents evaluating the application. After the staff has accepted an application
18 for review, a notice of opportunity to request a hearing is published. Generally,
19 these notices provide a 60-day period in which to request a hearing from the date
20 of publication of the notice. In reality, the NRC typically makes reactor
21 applications available in our ADAMS system shortly after receipt while the staff
22 conducts a review to determine whether to accept and docket the application.
23 Thus the application would be available for public review for much more than just
24 the 60 days following publication of notice of opportunity to request a hearing.
25 Since it is the adequacy of the application in meeting NRC requirements that

1 determines whether a license should be issued, this has been deemed an
2 appropriate time to publish the notice of opportunity to request a hearing on the
3 application. With respect to environmental issues under NEPA the adequacy of
4 the staff review is the ultimate issue, NRC satisfies public participation
5 requirements of NEPA by publishing a draft EIS for comment and including an
6 evaluation of public comments as part of its development of a final EIS. While we
7 also allow contentions in our adjudicatory process on environmental issues, the
8 regulations require that petitioners file contentions based on the applicant's
9 environmental report submitted at the time of the application. There are
10 provisions for filing modified or new contentions later in the hearing process
11 when the draft or final EIS has been published. Under the regulations there can
12 even be a late filed request for a hearing based on new information. These
13 timing requirements allow for an early identification of issues of concern to the
14 public on both safety and environmental matters associated with the application.
15 Our regulations require both that this SER and the EIS be made publicly
16 available, assuring the public will have the opportunity to evaluate those
17 documents for information that could potentially be used to support a new
18 contention or hearing request. Next slide.

19 The final area we've been asked to address is that of the current
20 process for interlocutory appeals of decisions on contention admission. By
21 interlocutory appeals, we're referring to appeals to the Commission concerning
22 admission -- contention admission that are filed before the boards have
23 completed their hearings on the admitted contentions. The current criteria for
24 interlocutory reviews has been in place for over 40 years. As provided in 10 CFR
25 2.311, the focus of interlocutory review process is on the granting or denying of

1 the request for a hearing. Thus, the provision provides that a party denied a
2 hearing may immediately appeal the denial, while a party against whom a
3 hearing has been granted may immediately appeal the granting of the hearing.
4 The effect of this provision is that if at least one contention has been admitted,
5 the petitioners cannot appeal the dismissal of the additional contentions until the
6 end of the hearing process. On the other hand, those opposing the hearing may
7 immediately appeal the granting of the hearing. While such an appeal could be
8 based on an argument that the petitioners lack standing, frequently appeals
9 argue that no hearing should be held because none of the -- none of the
10 contentions admitted by the board should have been admitted to the proceeding.
11 The NRC will be publishing an advance notice of proposed rulemaking that will
12 solicit further public comment on whether NRC should retain its framework or
13 should consider alternatives that will result in changes for the timing for appeals,
14 such as allowing more appeals related to contention admission at the onset of
15 the hearing or requiring all parties wait until the close of board hearings to file
16 appeals. That advance notice of proposed rulemaking is under development and
17 should be published in the near future. That completes my presentation. I'd be
18 happy to answer any questions.

19 CHAIRMAN MACFARLANE: All right, before we turn to questions,
20 let me step back a second, and I omitted the opportunity for folks to make
21 opening comments. So let me first turn to my colleagues and see if anybody had
22 any opening comments? No? Okay. Apologies for that. Then we will turn to
23 questions. And I think I'm up first. So, first of all, let me say I'm glad to hear the -
24 - and thank you very much for your presentations. I'm glad to hear that you find
25 public input valuable, as you said, Darren. I think you'll find that the literature

1 supports that view. But I want to understand a little bit more about the impact of
2 the public input that you receive and so I'm interested in all of your views here.
3 And in particular, I note on Slide 7, you say that the NRC takes substantive action
4 on the petition nearly 40 percent of the time. And so I want to understand what
5 that substantive action is and how you understand substantive action so maybe
6 you, you know, I can get a number of your views here, and then I have a number
7 of other questions.

8 DARREN ASH: So, do you want to -- you probably have the data
9 behind the substantive actions. Oh, I'm sorry.

10 BILL BORCHARDT: Well, I can start. So these petitions for
11 enforcement action, frequently they are requests or demands for us to consider
12 taking a regulatory action against a licensee. Many times they're activities that
13 we already have underway, so there is some duplication. In addition, and I think
14 in my understanding, less frequently, there are new topics that are being raised
15 that cause us to evaluate the issue being raised. And on occasion we have in
16 fact taken -- gone down a path for regulatory actions. You want to --

17 DAVID PELTON: Thanks, Bill. Commission, I'm Dave Pelton. I am
18 process owner for the 2.206 process. The statistic that you mentioned,
19 Chairman, really points to how the process works in parallel with other agency
20 actions. So when issues are raised, a lot of times they are raised in parallel with
21 other, perhaps, inspection activities or other processes that are ongoing. So the
22 statistic reflects the fact that for the issues that would be significant, they may
23 already be tracked and being taken care of through direct inspection, the
24 allegation process, or some other parallel process.

25 CHAIRMAN MACFARLANE: So the public part -- input here is

1 superfluous?

2 DAVE PELTON: Well, I don't know if I'd say superfluous, but my
3 understanding that most of the time the information available to the public is
4 either through us or through the media. The NRC most often is already taken
5 action and recognized the significance of the issues. It is already taking action in
6 a proactive matter, so I think it's the proactive nature of our inspection and
7 reaction that the Regions provide rather than a superfluous or, you know, that
8 we're just trying to hide through statistics.

9 CHAIRMAN MACFARLANE: Okay. Well, let me pursue this a little
10 bit more. So what do you think works well in NRC's public interactions?

11 BILL BORCHARDT: I think, well, I mean --

12 CHAIRMAN MACFARLANE: -- especially the adjudicatory end of
13 it.

14 BILL BORCHARDT: Well, I'll let Brad talk about the adjudicatory --
15 talking from the licensing perspective, and the inspection perspective, having a
16 wide range of meetings and opportunities for engagement of various
17 stakeholders, like David referred to, provides an opportunity to go beyond just the
18 written word that's in an inspection procedure or an SER or in the documented
19 inspection report, and actually have a face-to-face conversation with people that
20 are sincerely interested about what's going on in that facility and have that
21 reaction so that we can receive what they're concerned about, explain what the
22 NRC inspection program is about, the findings, it helps, I think, establish our goal,
23 anyways, to establish a sense of trust with those individuals and organizations so
24 that they are aware of what we do, how we carry out our regulatory
25 responsibilities, and that they know they have someone they can contact if they

1 have a concern that they believe needs to be addressed.

2 BRAD JONES: Yeah, I think with respect to the hearings that what
3 I find most effective based on my own experience is that the contention process
4 itself and the timing of the contention process, has an effect way beyond just the
5 results of the hearing. It's human nature. But when we have a set of contentions
6 that are proposed and the staff helps prepare responses to those initially and
7 then some are admitted and they have to prepare testimony, they inevitably take
8 a good, hard look at those issues. They spend more time on those issues. I
9 think it results in a draft environmental impact statement that clearly is going to
10 have a better discussion of the issues that have been put into contention than
11 would otherwise be there. And then that's available for public comment again at
12 that point. So in addition to the value that's put in by having the real issues in
13 contention go through the hearing process and have the testimony and find those
14 places where we really have a fundamental disagreement, I think just the
15 process of having a more formalized way of raising issues early in the staff's
16 beginning of the process of reviewing an application has maybe something that's
17 not so quantifiable but it's definitely there that we get a benefit out of getting that
18 information early.

19 CHAIRMAN MACFARLANE: Okay, so what doesn't work? What's
20 broken? And then how do you fix what's broken? But first you have to identify
21 what -- if you think that anything is broken.

22 DARREN ASH: Part may be the perception of whether the
23 communications are one-way or two-way. I think that as an agency, historically,
24 we've done very well in communicating out, sharing a great deal of information
25 through the principle of openness, through ADAMS and our website and all the

1 other things that we do. And obviously the vast majority, the vast numbers of
2 public meetings that we do hold, either through technology or in person. I think
3 the things that I'm hearing, and obviously I talked a little about this, is how much
4 is it perceived as -- is this just one-way or is it meant to be two-way? I think there
5 are opportunities to improve the participation side.

6 CHAIRMAN MACFARLANE: And is it meant to be two-way?

7 DARREN ASH: I think there's opportunities in different instances to
8 be two-way.

9 CHAIRMAN MACFARLANE: Anybody else have any comments on
10 what's broken?

11 BRAD JONES: Well, I would echo that the question of perception
12 has always been a problem, and with the hearings you have the same sort of
13 situation. I don't know the licensee that is willing to go to the hearing with the
14 NRC staff opposing their application. It's not a very fruitful exercise. Over the
15 years we've tried to address that as the open meeting policy was developed and
16 we tried to find more ways to make this available, we tried to make more
17 transparent to the public the process by which the applicant and the staff end up
18 in agreement, you know, by the time the hearing actually takes place, that this
19 looks like an application that should be granted. I think we succeeded
20 somewhat, but for those that are just casual observers that don't participate or
21 see those public meeting interactions and, you know, the development as we get
22 RAIs and changes in applications to address concerns, I think you're always
23 going to have that as a challenge that the perception -- the reality is applicants
24 don't want to go to a hearing with NRC opposing the application, so we're likely
25 to work at it until we get on the same page before that happens.

1 CHAIRMAN MACFARLANE: Okay. Commissioner Svinicki.

2 COMMISSIONER SVINICKI: In the interest of our large external
3 panel, we only have five-minute round here, so I'll try to be as concise as I can.
4 Darren, on the 2.206 petition area, I found particularly illuminating, I hadn't been
5 aware of this until we began to prepare for this meeting that the agency staff
6 undertook an evaluation and analysis of the 2.206 process, and the Commission
7 conducted a public meeting back in, I think it was 2000, and I thought -- I was
8 struck as I studied some of that history with, I think, that we encounter some of
9 the same concerns about that process today. But it was a very systematic
10 evaluation, at least in my view, on the NRC staff's part of the various pros and
11 cons of that process. So one thing that we haven't really discussed here and you
12 didn't cover was the, you know, illuminating this record with some of that history,
13 which I think a lot of the issues were still -- I would characterize them the same
14 way today. So I don't know if you, you know, generally could talk to some of what
15 was considered at that time and some of the changes that were made in the
16 2.206 process. If not, I don't know if there's anyone else on the staff who could
17 just, again, draw a little bit of an overview of some of that very extensive
18 consideration that was done in the year 2000. Or at the very least I guess I
19 recommend to all those in the audience and listening that those documents there
20 was a very good, I thought, staff paper written. There's the transcript from the
21 Commission's meeting. So I commend that history to those who were involved in
22 our thinking on that. I don't know if you wanted to add anything.

23 DARREN ASH: That predated me, but I would turn to Dave Pelton
24 on that.

25 COMMISSIONER SVINICKI: Okay, Dave. Well, I think Dave's got

1 another -- Well, I think the microphones are still working, so please go ahead.

2 TANYA MENSAH: Good morning. My name's Tanya Mensah. I've
3 been the 2.206 coordinator in NRR for the past seven years. I wasn't involved in
4 that effort, but what's part of my background and experience with it, it's my
5 understanding that some of the concerns that came out of those meetings and
6 interactions with the stakeholders at that time or that the process was that people
7 would submit their petitions and they just didn't know what was happening; they
8 would have no communication back from the staff about was it being accepted
9 for review, what the staff's activities were in terms of making a decision about
10 their petition. So there were numerous opportunities included in the process that
11 you currently see it, such as to have, like, opportunities for petitioners to address
12 the petition review board. Currently, they have two opportunities where they can
13 come and address us before we make what's called an initial recommendation.
14 And then after their informed of that initial recommendation, they can come back
15 and also request another meeting or a teleconference if they choose to do so by
16 phone.

17 COMMISSIONER SVINICKI: And I think we added even some
18 simple things like a publicly available monthly status report and things like that.

19 FEMALE SPEAKER: Exactly, and that's posted on the public
20 website; so every month we produce a status report that says, here's a summary
21 of all the petitions that were closed, what's under consideration, what's been
22 accepted for review, and all the petition managers provide input to that report. It
23 goes through Dave Pelton.

24 COMMISSIONER SVINICKI: So again, and thank you for that.
25 Those were some of the key highpoints of the modifications that the agency and

1 the Commission made to that process at that time. The other comment that I just
2 wanted to get on the record is I really wanted to commend the work product that
3 was done by OGC in preparation for this meeting. And my understanding is we
4 have this publicly available in our document system, but it's a memo to the
5 Commission from Margie Doane, the general counsel, that was done January 8,
6 2013. And since we're always very interested in lessons learned, I want to share
7 this very direct lessons learned. It's this memo is a background on the evolution
8 of both standing -- notions of standing for the agency and contention
9 admissibility.

10 And I think that even though the Secretary of the Commission
11 keeps a very careful -- is very thoughtful about when new Commissioners come
12 in, what are kind of primers and documents that would be very useful to them.
13 As someone who basically had to learn this history piecemeal through, actually
14 exercising my adjudicatory role that was a much more arduous way to learn this
15 history. This document I would really recommend as something that the
16 Secretary of the Commission provide to new Commissioners. I thought it was an
17 extremely well done and yet concise, which is always important when we're
18 having a legal history of something, was a concisely written history of how those
19 standards has evolved over time. And when you're a new Commissioner
20 exercising this adjudicatory role, which if anyone else is like me, you frankly
21 didn't give that much thought to when you became an NRC Commissioner. You
22 were thinking more about the policy and technical aspects of the job, but it's a
23 very, very significant adjudicatory roll that Commissioners have. And
24 understanding this precedent in history, I think, is very important.

1 So I'm going to -- I thought the document, although I knew a lot of
2 the history, was a wonderful compilation of that. So I really wanted to commend
3 that as a useful document going forward and in the interest of moving forward, I
4 will end there, thank you.

5 CHAIRMAN MACFARLANE: Great, Commissioner Apostolakis.

6 COMMISSIONER APOSTOLAKIS: Thank you, Chairman. I would
7 come back to the issue of impact of external stakeholders that the Chairman
8 raised. I -- let me give you some thought first. I believe that the major impact is
9 their existence, namely the staff when they've taken action they know that
10 stakeholders will review that action and maybe criticize it so the quality goes up.
11 But in terms of specifics, do any examples come to mind where, you know,
12 earlier we heard that most of the time we have already thought about the issue
13 and we are about to take action. But are there any examples where we hadn't
14 thought about something and we benefited from stakeholder input either on a
15 technical or a procedural issue?

16 BILL BORCHARDT: Well, I'm confident the answer is, yes. Can I
17 give you an example off the top of my head? No. But I will say that we have
18 over time created some FACA panels, that have members of the public
19 participate. And in fact the creation -- the development of the reactor oversight
20 program utilized such a process in which members of the public were active and
21 equal participants in providing ideas and the ground rules for how we wanted to
22 start up this new process that would communicate effectively with the public. So,
23 I mean, I think that's a clear example where all the stakeholders were on an
24 equal footing in helping us come up with the most effective program possible.

1 DAVID LEW: I will also add that we get a lot of public input from
2 various venues beyond 2.206s, whether it's from letters, emails, correspondence,
3 or allegations. And we have received information that we're not aware of in the
4 past, put in direct processing and it has caused us to take significant action. For
5 example, people were aware of the Peach Bottom sleeping security guards a
6 number of years ago. Those are the types of things that we will look, put into the
7 process and make sure that if we don't know about it, we will take the appropriate
8 action to ensure safety and security.

9 BILL BORCHARDT: And probably one that should have come to
10 my mind immediately is the allegation process, which is a direct conduit of
11 potential safety issues into the staff that are all individually assessed and put into
12 our rigorous process. Most of those issues handled through the Regions, but not
13 all.

14 BRAD JONES: Yeah, I can give one example, concrete example of
15 only, and I remember it only because I was the attorney on the case early in my
16 career. But in the case of the Midland Power Plant, it was actually an intervener.
17 It was not an intervener group; it was a local school teacher who identified an
18 issue in the documentation about settlement of the soil at the site exceeding what
19 was expected to be the graded settlement for the entire life of the plant. I at the
20 time asked the project manager if we would have found the issue and he said we
21 probably would have, but we would not have found it as soon as we did with this
22 intervener raising this issue. And she just looked through documents and noticed
23 this discrepancy and filed it as a contention. Eventually, that was part of the
24 reason the plant was not built. But that's one concrete example that I'm aware of
25 where interveners were at least the first to bring an issue to our attention.

1 COMMISSIONER APOSTOLAKIS: Thank you.

2 JENNIFER UHLE: I can give you another quick example regarding
3 the rule making pertaining to the ECCS acceptance criteria.

4 COMMISSIONER APOSTOLAKIS: Who are you?

5 [laughter]

6 JENNIFER UHLE: Good point.

7 CHAIRMAN MACFARLANE: And what's ECCS?

8 JENNIFER UHLE: Yeah, okay, good point too. I'm Jennifer Uhle;
9 I'm the deputy director of NRR. ECCS Rule 50.46 is an emergency core coolant
10 system acceptance criteria. We have rulemaking underway pertaining to the
11 acceptance criteria. How hot the fuel is permitted to get, the levels of oxidation,
12 and the modeling required by the licensees to justify that the plant is in fact able
13 to maintain the cooling necessary for the core.

14 And in fact Mr. Leyse is here today and he has provided a number
15 of petitions for rulemaking. And one of his contentions has of course been
16 accepted and we are looking at that in our rulemaking process. I'm not sure if
17 you will be talking about that, but that's another example, concrete one.

18 COMMISSIONER APOSTOLAKIS: Thank you. I've got one more.
19 Very often I hear during a rulemaking process, interveners complaining that the
20 available time for public comment is too short. One of the counter arguments the
21 staff gives is that the public knows before the staff docket an application that
22 this is coming, so there is extra time there. Is there any evidence that this time
23 useful to the interveners? I mean does -- is this working or should we think in
24 terms of extending the period of public comment? Do people take advantage of
25 it? If you don't know, you don't know.

1 CINDY BLADEY: I'm Cindy Bladey; I'm the branch chief for the
2 Rules Announcements Directives Branch in the Office of Administration and I'm
3 the chair of the RCC, the rulemaking coordinating committee for the agency. We
4 established a 75-day comment period for all technical rules. That's a standard
5 that we've put in place since the NAFTA rulings. So we do, on occasion, when
6 we are requested to extend those comment periods we do, especially when we
7 know that we have a very long rule, we'll offer a longer comment period.

8 COMMISSIONER APOSTOLAKIS: But the question is, is the
9 period before docketing the application useful to anybody?

10 CINDY BLADEY: For rulemakings?

11 COMMISSIONER APOSTOLAKIS: Yeah.

12 MICHAEL WEBER: No, he's talking about licensing.

13 CINDY BLADEY: That's licensing.

14 COMMISSIONER APOSTOLAKIS: Oh, whatever it is, I mean, we
15 have an application for license, and the staff says no, the application was
16 available even before we docketed it.

17 CINDY BLADEY: I guess that that would -- it's outside my area.

18 COMMISSIONER APOSTOLAKIS: I'm sorry, what?

19 CINDY BLADEY: That's outside my area. I would assume that
20 someone had to be familiar with the ADAMS System to be able to see that that
21 document's available or if there's been a public release on that application, you
22 know, public use, press release.

23 JENNIFER UHLE: Well, I think -- Jennifer Uhle, I'm Deputy
24 Director of NRR. The agency has as one of our goals is to be as open as
25 possible. And typically when we're talking about a technically complex issue, we

1 have several public meetings and I think we're very vocal and very public about
2 the upcoming meetings giving plenty of notice and take the input from the public
3 very seriously. So I can't say, since I'm part of the NRC staff, I think maybe best
4 answered by hearing from our external panel. But when we find that we have
5 documents this thick, very thick, to take action on, then we provide a longer
6 comment period. And oftentimes, when requested for an additional time period
7 for comment, we offer that.

8 COMMISSIONER APOSTOLAKIS: Thank you.

9 CHAIRMAN MACFARLANE: Okay, Commissioner Magwood.

10 COMMISSIONER MAGWOOD: Thank you, Chairman. I
11 appreciate having today's discussions; already been educational. I think I'll get
12 more education as we go to the next panel as I'm sure we'll hear a lot of thoughts
13 about these issues. But, you know, I think it's important to -- I think it's important
14 for a very simple reason. Obviously, as a regulatory organization we are very
15 steeped in the details of the technology, and the procedures. But at the end of
16 the day it's the public that we serve and I think everyone that works in the agency
17 is fully aware of that and is very conscious of that on a constant basis.

18 So in thinking about that, we have -- we've created processes to
19 help us engage the public that we serve that over the course of time, and I think
20 Commissioner Svinicki referenced the OGC memo on this on the background.
21 Over the course of time it's become very complicated. And I'm sure there are
22 people who are listening to this conversation, they're hearing about, you know,
23 2.206, Part 2 wondering what in the world are those people talking about. And I
24 think even, you know, and I've been with the agency now for almost three years
25 and I find it being somewhat byzantine and I'm often talking with one lawyer or

1 another; right Bernice? About what the heck this means, and why did this
2 happen, and why do we do it this way versus that way? So it's a very
3 complicated process, but the point of the process is to achieve a balance. And
4 the balance is to be fully open to public input and public participation while still
5 moving forward with decisions. That's basically what this is all supposed to do
6 and the point of this discussion for me is reassessing, as I think we should do on
7 a constant basis, whether the balance is in the right place or not. And I think that
8 as the memo points out, the balance has moved a little bit this way versus that
9 way over the course of time and I think, you know, given the length of time since
10 the last major revision, this is a reasonable time period to take a look. Is the
11 balance right? Do we have it correct?

12 You know on the next panel, we'll hear from Mr. Paine. I just, you
13 know, I noticed he had a relatively long note that he wrote that I think most of you
14 have seen. And I just wanted to read part of what he had written referring to our
15 -- to what petitioners go through. He mentions, "Assuming for a moment that
16 petitioner surmounts all the hurdles and convinces the licensing board to grant
17 standing, at least when initial contention a fairly rare event, statistically speaking,
18 what happens then? Under current rules the applicant is entitled to an immediate
19 interlocutory appeal of the board's ruling of the Commission under question of
20 whether the petition should have been wholly denied, but the intervener has no
21 right to appeal unless the entire petition was denied. Essentially, they're being
22 rejected contentious for review only after the entire hearing process has been
23 completed." That's true; that's an accurate statement. And I've heard people
24 complain about that over time. And I just, you know, wanted -- and I know we
25 have an advance notice of rulemaking which might address some of this, but I

1 wanted to give you a chance to talk about that. I mean how do you view that as
2 a public servant? Do you think that balance is in the right place right now or do
3 you think that there is room for some modification at this point?

4 BRAD JONES: Well, I do think that it's an issue that's worth
5 examining for what other ways to handle the appeals and decisions on
6 contentions will give a different appearance to the process because while on its
7 face it seems very fair. If you're granted a hearing, the party against whom the
8 hearing has been granted, can appeal that decision? And if you're not granted a
9 hearing, you can immediately appeal and say, "I should have been given a
10 hearing." It's in the application with our contention process that you actually get
11 this dichotomy that if you get one contention in and you had 100, you don't get to
12 argue about the 99 until the end.

13 I think you can strike a balance at a different place. It's hard to
14 predict what the impact will be. You know in one sense the simplest thing is to
15 not to let anyone appeal the contentions and we'll consider them all at the end of
16 the process, if there's something that wants to be pursued. The applicants can
17 certainly argue, "Well, by that time if we've gone through the process and the
18 board has ruled in our favor, we're not going to say we never should have argued
19 this," so we're essentially never going to get to appeal.

20 So, I mean that's the counter argument. I think either way can
21 work. I mean it's -- you're going to get an argument that it's unfair to somebody
22 wherever you slice this. And it is a matter of trying to, you know, in theory the
23 idea was don't go through a whole hearing process and use all those resources if
24 there's a mistake and we shouldn't have had it in the first place. And don't go

1 through the whole process and find out at the end we should have had a hearing
2 and we didn't have any hearing.

3 And all those are valid points. And this isn't a perfect system. And
4 that's why I think it's important we provide a whole host of ways for public input to
5 be made into our processes because there are people that don't want to go
6 through this formality because it is a difficult process. And it's designed to be a
7 difficult process. Adjudicatory proceeding is a much more formal way of getting
8 public comment. It's certainly not the most efficient way to get public comment
9 on something and it's why it's not the only way we get public comment on our
10 activities.

11 And so I think with respect to the interlocutory review, it's not so
12 much that we don't hear the inequities, it's we scratch our heads and nobody's
13 actually come up with a better design. And so we've had the same thing for 40
14 years. But I think all of the proposals that we've heard, they could be
15 implemented and they could be made to work, but somebody else will then
16 complain that they're being given an unfair treatment and that's kind of the
17 conundrum.

18 COMMISSIONER MAGWOOD: I appreciate that answer. I'm
19 already over my time, but I just wanted to comment. And I have about 15 other
20 questions to ask, but I guess I won't get a chance to ask them all. But I think one
21 thing you said was very important and that is you don't know what the impact will
22 be. And the Commission had explored one issue, the idea of a pilot project, but
23 eventually concluded it wasn't practical to pursue that.

24 I'd like to -- I would like to invite anyone who has thoughts. Howie
25 might be able to experiment in some practical fashion to see if there's

1 adjustments we could make because it's very difficult to have these
2 conversations and make these judgments in a complete vacuum without some
3 factual basis. So if there's a way of actually demonstrating or testing different
4 ideas, I'd really like to hear some thoughts on how we do that. Thank you,
5 Chairman.

6 CHAIRMAN MACFARLANE: Okay, Commissioner Ostendorff.

7 COMMISSIONER OSTENDORFF: Thank you, Chairman. Thank
8 you all for your presentations. I want to make a couple comments to start out
9 with. I want to echo Commissioner Svinicki's comments on the OGC memo, I
10 found that very helpful. In the fitness center yesterday on the exercise bikes
11 side-by-side, Brad and I talked about this, but I completely agree with you that
12 that'd be a very helpful document for a new Commissioner. I found it
13 extraordinarily useful and very well done and I agree completely with my
14 colleague here, thank you Commissioner Svinicki for raising that.

15 I want to make another comment on the level of openness. I had
16 32 years of experience in the Department of Defense, most of it in uniform, then
17 the Hill, and DOE before coming to the Commission in 2010. And I would just
18 say as far as how we do business and what we do, the level of openness and
19 transparency from my experience just on those other data points is just
20 unparalleled.

21 And there's probably some valid criticisms on certain things as to
22 how we do business and how we communicate and there's always areas to
23 improve. But as far as the level of openness and transparency this agency
24 exhibits it in its daily business, I think is just remarkable. Now, that's a good
25 thing.

1 Let me shift to a question or two and I'm going to be respectful to
2 the time limits here. I'll throw this to David. I visited Prairie Island Indian
3 Community, I know we have a panelist next session, but I was struck in
4 November and I was visiting the nuclear power plant and the community, which
5 is right on that border. The proximity is extraordinarily close. And I was
6 impressed that the resident inspectors at Prairie Island, as part of the baseline
7 inspection program would extend an invitation to Ron Johnson, who is a member
8 of the community, to participate in the company, the inspectors on certain
9 baseline inspections. I was very impressed with that. I was curious as to how
10 widespread that practice is or has that practice been shared with other sites and
11 Regions? I didn't know if Region I did anything like that.

12 DAVID LEW: Yeah, I'm not aware of any outreach to the -- is this
13 person a citizen or --

14 COMMISSIONER OSTENDORFF: He's a citizen, he's an official,
15 he's the Secretary of the Prairie Island Indian Community.

16 DAVID LEW: Okay.

17 COMMISSIONER OSTENDORFF: And that's his capacity for
18 being invited. Now, that particular community the border's right next to the plant.
19 I thought given their special equities, given the proximity, that it was a very
20 effective insight as to how the NRC residents are doing their job and what Region
21 III is doing there.

22 DAVID LEW: We actually have the equivalent in terms of how we
23 deal with the states --

24 COMMISSIONER OSTENDORFF: Okay.

1 DAVID LEW: -- and the locals. We have a memorandum of
2 understandings or letters with all the states and frequent interaction with many
3 states have state engineers or the state liaison officers they have. And they
4 often are aware of the inspections that we conduct. We actually share with them
5 our inspection schedule. So there is that interaction and offering of openness in
6 how we do business.

7 COMMISSIONER OSTENDORFF: I'm just impressed with that. I
8 commend that to the staff's consideration. I think it is working very well there and
9 there may be other areas where that might be considered. I'm going to go to
10 public meetings. I want to respond to a comment when asked a question.
11 Darren, in response to the Chairman's comment about the one way versus two-
12 way piece, I think you hit on a very, very important part here. Again,
13 Commissioner Magwood and I, I guess in the fall of 2011 went out there and met
14 with Mothers for Peace around Diablo Canyon and as other Commissioners do,
15 we read all the Commissioner emails that come in on various comments with
16 respect to public meetings. And on the public meetings side, it seems like that
17 we go to great lengths to provide opportunities for comment by the public, and
18 we do our very best, we always improve in communicating to the public what
19 we're doing and why and so forth.

20 I'm struck with, and this is my personal impression, is that
21 sometimes there perhaps is not a clear understanding or expectation of the
22 public going into that meeting as to what that meeting is going to achieve. I'm
23 curious if you could comment on that upfront expectation the public has going to
24 a meeting.

1 DARREN ASH: Commissioner, thank you for the question. I know
2 we do a good job in terms of communicating what type of meeting it is, what
3 category of meeting, obviously open, closed, et cetera. But also within those
4 categories what type of participation? What is the public -- what should they
5 expect? Is it a one way? Is it an opportunity for them to comment? Is it limited?
6 And of course you work your way into the adjudicatory space. It goes back to, I
7 think, a common thing I talked about earlier. I think there's always an opportunity
8 for us to improve and clarify in terms of how we communicate out to the public
9 what is expected; manage their expectations, but also -- and really its managing
10 expectations and doing a better job communicating really what to expect.

11 COMMISSIONER OSTENDORFF: I just think that's worth it and
12 again, my time is up, but I think that's an area that try to try to integrate across,
13 synthesize across, all the comments I've seen, whether it be in a San Onofre
14 context, or Seabrook, or Indian Point, or the various issues that the staff deals
15 with on a daily basis. I think trying to give some thought as to how to upfront
16 shape and perhaps maybe adjust our approach as to what those expectations
17 should be, that's a worthwhile endeavor. Thank you, Chairman.

18 CHAIRMAN MACFARLANE: Okay, any further questions from any
19 of my colleagues? I'm beginning to be able to rely on you. [laughs]

20 COMMISSIONER MAGWOOD: I have 15 other ones.

21 CHAIRMAN MACFARLANE: I know.

22 COMMISSIONER MAGWOOD: I -- hopefully, this won't be long,
23 but I just, one observation when Commissioner Ostendorff mentioned our
24 discussions of Mothers for Peace, one interesting thing that happened during that
25 discussion was that they indicated that there was an issue they had identified

1 and wanted to raise it as a contention, but it never actually got through the
2 process. It was never accepted, but, you know, people knew that it was out
3 there.

4 And upon hearing about this issue, the residence inspectors took a
5 look and investigated and found well, there was an issue there and they dealt
6 with it. But there was never any feedback to the public that this issue had been
7 dealt with in any fashion. Is that something that -- and I suspect that happens
8 quite often, but I don't think we have a process of any type to capture ideas that
9 show up in those sorts of venues and deal with them. I just wanted to get your
10 reaction. Is that something we should have a process or should we just --

11 BRAD JONES: Well, yeah, I think we go to great lengths and we
12 try and have processes and some of them are specifically designed to make sure
13 we get back to folks in writing and tell them exactly what happened. I think as an
14 agency if we can encourage all the employees to be sensitive to when they have
15 a situation like that that maybe doesn't fit any of our pattern things, you know,
16 this would be something this person would be interested in knowing happened
17 with the information they've provided.

18 We don't have to have a process to contact somebody and let them
19 know something happened; we just have to have a mindset to do that. And I
20 think we can do ourselves some favors if when we do something we know folks
21 would find as being responsive, just because there's not a system in place that
22 says we have to get back to them, we can still take the time to do that.

23 COMMISSIONER MAGWOOD: Bill, did you want to --

24 BILL BORCHARDT: Yeah, I just want to be clear that there are a
25 number of different processes where we ensure that we get back to the

1 individual. If there's an allegation that's written, there's frequent contact, periodic
2 contact back to the individual and then with the eventual closeout with how the
3 issue is dispositioned. Of course every inspection report that we issue is public,
4 whether the individual -- if the individual made the comment anonymously and
5 then it's in an inspection report, we can't make that linkage. But if they write us a
6 letter, this agency is very rigorous about responding to letters as well. I mean
7 there's a lot of communication.

8 COMMISSIONER MAGWOOD: I would offer that more, even more
9 important perhaps than whether we get back to the individual that originated the
10 issue, I think the real question is whether we consistently are looking at things
11 like contentions that are rejected for one reason or another to see if there's any
12 there that perhaps doesn't meet, you know, contention criteria, but perhaps it's
13 something that should be investigated by inspectors. We don't -- I know we don't
14 have a process to do that, but it just happened that our residents did look in that
15 case. And just, you know, from your perspective, how do you look at that?

16 BILL BORCHARDT: Well, I think even I might disagree with you
17 because we have review boards that evaluate 2.206 even if it doesn't meet the
18 threshold for being brought into the process. These are technical staffs that are
19 reviewing it. So if there's a nugget in there, they'll take that and work that
20 through the normal staff interactions and contacts. We might not have a rigorous
21 process that puts it into a tracking system; I think you're right about that.

22 COMMISSIONER MAGWOOD: Okay, thank you, Chairman.

23 CHAIRMAN MACFARLANE: Anybody else? No? Okay, what
24 we're going to do right now is take a five-minute break and then we'll switch out
25 panels and we'll hear from the external panel.

1 [break]

2 CHAIRMAN MACFARLANE: Everybody can take their seats.

3 Great. All right, let me just address a little bit of housekeeping. It appears that
4 we -- there was a power loss somewhere on the Internet, and so the live web
5 streaming of this meeting, of all meetings --

6 [laughter]

7 -- is not operating right now. Nonetheless, we are taping this, and
8 this will be available on our archive within some relatively short period of time,
9 units unknown --

10 ANNETTE VIETTI-COOK: And the transcript --

11 CHAIRMAN MACFARLANE: -- and the transcript will be available
12 as well, but so you know, for those folks in California, they don't care because
13 they're still asleep. But for the rest of everybody else, it's unfortunate that some
14 transformer or something in the Midwest blew. I don't know. So, that's just one
15 piece of housekeeping. And the other piece of housekeeping is that Diane
16 Curran was supposed to be on this panel. Unfortunately, she has the flu and she
17 couldn't be with us today, but she will be submitting remarks, and we look
18 forward to seeing those as well. So nonetheless, we still have quite a full panel
19 here. We have six folks who are going to speak, and I'll introduce each as they
20 speak. So, starting off on my left with Jay Silberg, who is a partner at Pillsbury.

21 JAY SILBERG: Thank you, Madam Chairman. First, I thought I'd
22 try to give a little bit of historical perspective. I've been in this business for a very
23 long time, and I think that these issues are not ones that are new to the
24 Commission, they're not ones that are new to the intervener community. They're
25 certainly not new to the licensees. First slide. I think balancing of interests, we

1 fully agree that this is a balancing process. It's not one time. I think we need to
2 currently look at where the balance is, that it's working, and it is a balance
3 between public participation, and the licensees need to resolve matters in a
4 timely efficient way, and also the staff's obligation to carry out its statutory
5 function.

6 The staff's document that you were referring to before is a very
7 interesting and thorough job. It's not comprehensive because it seems to start at
8 Three Mile Island. This is an issue that goes back to the beginning of time. It
9 postdates TMI. It will predate TMI. It will predate us today, and we have to
10 continue to look at where the balance is, is it working right, is it not working right.
11 And we think that the Commission has full authority to strike that balance, and to
12 adjust that balance as necessary. Slide 2.

13 The Atomic Energy Act is a very broad grant of responsibility when
14 it comes to the hearing process. It adopted procedures that were patterned after
15 other agencies that were operating at the time, Federal Power Commission, ICC,
16 FCC, but it was not thought that that was -- that the words in the statute were
17 going to tell you very much, and a book that goes back in ancient history, 1955
18 said, "You can't really get a lot just out of the words," and or -- the authors of that
19 book was the founding partner in our practice. The original concepts for public
20 participation on Slide 3 really looked more at non-adjudicatory processes, and I
21 think if you go back in history, you'll see in early license applications where we
22 had uncontested hearings the staff and the applicant would come out to the area
23 where the plant was going to be built, we'd have the high school auditorium, we'd
24 put on a story for a day of what a nuclear power plant was, what are the issues,
25 the staff would explain its process, and then we'd have a very long list of public

1 statements, raising questions, making comments. Then we'd come back in real
2 time and give answers to those. We'd put our witnesses on, not sworn
3 testimony, not a trial type hearing, but we'd try to convey information: what are
4 the things that you're worried about, why shouldn't you be worried about them, or
5 what are we doing to look at them. And so in real time, we tried to educate the
6 public. Over time, we became more and more trial and lawyer oriented. I don't
7 think that necessarily has been helpful for the process, but it did carry out one of
8 the statutory obligations. The regulations as they were created initially were fairly
9 simple. Tell us how you're interested and tell us what your contentions are.
10 Standing, and I think there was a bit of discussion before, has not really been the
11 issue. Most interveners standing is not questioned. There are a few where
12 people have been excluded from hearings. I remember in Wolf Creek licensing,
13 someone who is living up in Alaska wanted to come in and be a party, and he
14 was not admitted. On the other hand in Private Fuel Storage, another Indian
15 Tribe that was about 100 miles away was granted standing because some of
16 their members had cousins who lived on the reservation where our facility was
17 going to be, and they visited on occasion. And that was thought to be enough for
18 standing, but standing generally isn't the interest, isn't the issue. Nor is timing of
19 the intervention. I don't think that's been particularly a problem. Over time,
20 we've seen interveners argue that they were being forced to come in too soon.
21 We've also heard them argue that they were being forced to come in too late.
22 There is plenty of information out in the real world where they can make their --
23 they could educate themselves as to what the facility is going to be, what the
24 issues are; and for them to come in at the end of the process I think turned out to
25 be I think the wrong way to get their views heard.

1 Slide 5. Delays in licensing are nothing new. I found a case
2 back in 1974, where Judge Friendly, one of the best, most famous jurists in
3 history, noted the giant delays that were occurring at that time, and prior to then,
4 the NRC started to look at the intervention process and decided that more
5 specificity was needed. There are some quotes from that rulemaking on Slide 6.
6 I won't go through them, but generally the thought was that people ought to be
7 able to come in, not just say, "I have an issue," but come in with some support for
8 that issue. And the revision to the intervention rule 2.714, at Slide 7 required that
9 there be a supporting affidavit, that the contention be addressed with some
10 particularity, and some basis, and some specificity, and that worked out
11 reasonably well. The Commission has tinkered with that over the years, but that
12 was challenged early on, Slide 8 in the BPI case, which is I think a seminal
13 decision on the ability of the Commission to control who gets into the hearings
14 and what do they have to show. That I think was one of the things, when I didn't
15 see that case highlighted in the memo, I thought we needed to put some history
16 in there. So, if there's particularization of the issue, then I think we can move
17 ahead and litigate that issue. Everyone knows what the intervener wants to
18 litigate. The staff knows, so they can address it in their technical review. The
19 applicant knows, so they can address it, and the -- I think you can move forward,
20 but even with that we have constantly looked to see whether that's the correct
21 balance or not. In 1978, we removed some of the requirements. Again, the
22 pendulum swings one way or the other. Query whether we're in the right place
23 now for intervention standards. I generally think we are. That doesn't mean
24 there aren't improvements that we can make, but I think the Commission needs
25 to be constantly looking at where we are in the process.

1 This is not a numbered page. I don't know what happened to it, but
2 I think it's Page 10, Slide 10. I think if you look at where we are, we at the NRC
3 and the licensees are in the governmental context, as I said, the NRC process
4 was really patterned after the older agencies. Some of those agencies have
5 disappeared. Others have changed their way of living. The NRC I think has not
6 caught up with where people have gone. Most other agencies no longer use the
7 trial type hearings, the adjudicatory process trappings that we have grown up
8 with, and some of us love some of them. Some of us don't love. But in many
9 cases -- I was talking to a friend of mine who is one of the leading lawyers for
10 hydro plants, and he said in the 22 years he's practiced, he's had perhaps four
11 hearings. Everything else is done on paper. I think that's common in other
12 agencies. Query whether we need to have as much lawyering as we do in our
13 hearings, where the issues are technical, where we're not trying to get, you
14 know, to cross-examine people who cross those, you know, who hit who at the
15 intersection. We're talking about technical issues. Is this really the best way to
16 proceed? I think we are over-proceduralized, whether that's physically -- whether
17 that's politically possible to change at this stage, I have my doubts, but we clearly
18 haven't kept pace with what other agencies are doing, and I think that's
19 something the Commission ought to look at.

20 Slide 11 on public participation. There are, as you heard, many,
21 many opportunities for the public to participate. It's not the first time, for instance,
22 that we've looked back at the 2.206 process, talked about a review in 2000, and
23 looking back through my files I found that I was on the panel very much like this
24 in 1993, where we talked about 2.206 petitions. Again, it's an ongoing process.
25 The Commission needs to keep an eye on that and not say, "Well, we can look at

1 it now and we never have to look at it again,” or “We looked at it 10 years ago
2 and that’s fine.”

3 Are there areas for improvement? Slide 12. Yes. This is not a
4 static world. I think the NRC needs to be self-critical, the same way as you are
5 just as licensees to be self-critical, but that doesn’t necessarily assume that the
6 system is broken. It just means we need to continue to look at it.

7 And on the last slide, 13, interlocutory appeals, I think that’s one
8 area where there may be some tinkering. I am personally in favor of more
9 Commission participation at that level, not just for the admissibility of contentions,
10 but really throughout the whole process. The licensing boards have a very, very
11 important function. I think by and large they do well, but there’s a lot of
12 inconsistency as to how different licensing boards approach different issues. I
13 think that could use some Commission oversight, not just at the contention
14 admissibility stage, not just at the end of the process, but during the hearings as
15 well. The other point I’d make is more timely action. Third-party rulemaking
16 petitions, some have languished for years, maybe even decades before the
17 Commission. This gets back to the need for transparency and communication. I
18 think the Commission has done a good job in trying to weed through that backup,
19 that backlog, but I think the Commission needs to be more prompt, and not
20 necessarily overnight prompt, but certainly not in a decade prompt, to make sure
21 that things don’t languish where they’re brought to your attention. In terms of
22 whether things are being brought to your attention and does the process work? I
23 think yes. Most issues, the vast majority of issues are caught by the staff; the
24 technical staff does an absolutely spectacular job. That doesn’t mean that we
25 shouldn’t be on the lookout for that nugget. There are clearly issues that get a

1 much harder look when an intervener raises them, whether it's through an
2 adjudicatory hearing, or if there were a comment to the resident, or through a
3 letter, the Commission obviously has to be on its toes all the time to be alert to
4 those. By and large, I think the system works. Should you look at it again?
5 Obviously.

6 CHAIRMAN MACFARLANE: Thank you very much. Okay, now we
7 have Ellen Ginsberg, who is vice president, general counsel, and secretary of the
8 Nuclear Energy Institute.

9 ELLEN GINSBERG: Thank you, Madam Chairman, and good
10 morning to everyone. Thank you for inviting me to participate in this meeting. I
11 want to start by commenting on a question you asked, Madam Chairman, this
12 morning, to the earlier panel, and that is rather than looking at this as a glass half
13 empty, you asked what works well. And I think it's critically important that we
14 look at this broadly, not just with respect to adjudication as the title of the meeting
15 is. It's public participation throughout the agency's various processes, and my
16 experience started as a licensing clerk -- law clerk to the licensing board in the
17 mid '80s. And from that perspective I was able to see a great deal of -- I have
18 seen a great deal of change in the manner in which the agency operates. But
19 most importantly, I observed the manner in which the agency takes seriously
20 input from the public. And my first case, or one of the first cases was a
21 Comanche Peak licensing case in which a woman named Juanita Ellis came in
22 with what really was a shopping cart every day, and had a huge impact on the
23 licensing in that case. So, my experience is broad and varied, and I think it's
24 important to note that exactly what we're doing this morning, crystallizing the
25 issues, identifying where there may be issues that are either sensitive to one

1 constituency or another is extremely valuable. So with that, I'll go to my first
2 slide.

3 Like the speakers before me, I would emphasize that a key
4 message here is the importance of the agency balancing all of the stakeholders'
5 interests. Commissioner Magwood has already mentioned this, and Jay has
6 spoken about the age old question of how much is enough, how much is too
7 much. I think that's really the question before the Commission right now. I
8 would, to go to the punch line very quickly, I would agree with Jay that it's roughly
9 right with respect to adjudications. Are there areas where perhaps you could
10 refine or enhance? Yes, certainly. The same is true with other processes, but in
11 the main, I think the agency does a very good job in being open and transparent
12 with respect to public input. The other thing is, as I mentioned, adjudication is
13 only one of many opportunities that the public has. You've heard about 2.206.
14 I'll talk about that in a little while, but the real point here is that the agency gives a
15 lot of opportunity for the public to provide input.

16 Going to the next slide, balancing the interests, here I would make
17 the point that it's everyone's interest at issue here. And going to the
18 Administrative Procedures Act, it's important to recall that that statute was
19 established for the purpose of providing a framework for public participation in
20 agency activities. And in part it was to protect the rights of entities that are
21 subject to government regulation. So, the government -- the public and the
22 public constituencies that the government serves are many and varied, and I
23 think it's important not to lose sight of that point. On the last point, I would say
24 that with respect to the Commission's adjudicatory framework, it is not
25 necessarily all burden on one side, and often I hear the public interest community

1 sometimes say, “Well, we bear a great deal of the burden.” And while that’s
2 obviously true, it’s also true that in the context of for example mandatory
3 disclosures licensees bear a tremendous burden. Applicants have to process
4 and provide material from many, many people through their organizations, and
5 it’s a constant update for that information. So, I think important not to lose sight
6 of that as well. Next slide.

7 Jay has already mentioned and others have alluded to the fact that
8 the courts have been supportive of the NRC’s changes with respect to
9 heightening the attention to the adjudicatory procedures, and making sure that
10 they’re meaningful. Only the First Circuit could say in this fashion that it
11 approves of changes to the procedures, and I think it’s entertaining to hear that
12 they said, “fully cognizant of the gravity of our task, we’ve studied the complex
13 statutory and regulatory framework, and scrutinized the plenitudinous
14 administrative record. After completing that perscrutation, we find that the new
15 procedures in fact comply with the relevant provisions of the APA, and that the
16 Commission has furnished an adequate explanation for the changes.” Never say
17 in three words what you can say in 33 is apparently the First Circuit’s mantra. In
18 any case, I’ve also cited on this slide the more recent decision by the First Circuit
19 also supportive of the contention admissibility standards.

20 Next slide. With respect to contention admissibility, I think it’s
21 extremely important to look at the data, but also look at the data in context, and
22 to understand that when not all contentions are admitted there are explanations
23 for why that is the case. In some cases the contentions relate to something, for
24 example, like waste confidence, which is not subject to litigation, Table S3,

1 design certification issues. Those sorts of issues are, by their nature, not subject
2 to being admissible.

3 Next slide. Perhaps the more significant question is whether or not
4 there are hearing requests granted, and whether the admissibility of contentions
5 precludes that from occurring. The answer is no, and our statistics show that of
6 the 14 hearing opportunities with respect to COL, there were 13 requests for
7 hearing, and nine of those were granted. Next slide.

8 I won't spend too much time on this because I think this is
9 something that everyone knows, which is that the data on contentions doesn't tell
10 us everything. The licensing process as was discussed by the NRC staff is an
11 iterative and dynamic process, and often applicants and interveners are able to
12 settle contentions without having to litigate them.

13 Next slide. This is consistent with the theory of never overstating
14 the obvious. I've mentioned that there are multiple avenues for the agency to be
15 open and transparent, and here is an example from the agency's most recent
16 Information Digest, on the right hand side with the cartoon. I often, when I'm
17 walking around the halls here, meet others who have very different views, many
18 from the intervener community, or the public interest community who are walking
19 out of the same office as I'm walking into. So, I think it's much more open than
20 one would perceive as sometimes reported. The other thing is there have been
21 55 rulemaking opportunities. Those are all opportunities for public participation.
22 Next slide. I won't spend a lot of time on this slide because it's already -- the
23 statistic has already been covered. We came up with about 35 percent based on
24 what the NRC had compiled, 35 or 40 percent roughly represents the number of
25 2.206 petitions that are in some form substantive relief is granted.

1 Next slide. With respect to rulemaking, I do want to make the point
2 here that the industry believes that rulemaking is an extremely important tool for
3 the agency to use, and as you'll see in my next slide, we think it's extremely
4 important to use it when there are generic issues to be addressed. And I
5 contrast this with orders. Rulemaking is obviously acceptable under the Atomic
6 Energy Act and the APA. I think we skipped a slide, but in any case the -- okay.
7 We're on the slide that's titled "Rulemaking." In any case, the point is that the
8 industry believes that going to the timing of rulemaking, this does not have to be
9 a two-, three-, four-year process, that there can be significant public interaction,
10 stakeholder interaction, and still provide for a timely response by the agency. We
11 think the agency's oversight is critical to this, senior management oversight, and
12 so we encourage further attention to the timeliness of rulemaking. Going to the
13 next slide.

14 The point of this slide is that rulemakings and orders are not -- they
15 may reach the same result, but they are not the same process, and that
16 rulemakings provide much more potential opportunity for the public to participate
17 than do orders. And so, where there are generic requirement, we suggest that
18 the agency look carefully -- or generic issues -- the agency look carefully at
19 issuing a rule rather than issuing an order.

20 Next slide. So, where are we on potential improvements? I think
21 it's important that the NRC -- the Commission look at, as Jay has said, look at its
22 processes, but not necessarily jump with changes. We think that generally the
23 processes makes sense. There is probably room for more Commission
24 supervision on higher priority issues, and occasionally we think that there are too
25 many issues, if you will, included or contained in a single rule, and that there is

1 value in avoiding this omnibus style rule so that the issues can be better
2 understood, and better described. So overall, our industry -- the conclusions of
3 the industry are that we fully support meaningful and efficient stakeholder
4 interaction. We think that can be achieved. The processes balance
5 effectiveness and transparency pretty well, and the Commission, as has been
6 said previously, provides not just a variety, but many, many avenues for public
7 participation. And given the range from a trial type adjudication to submitting a
8 comment, or simply calling someone on the staff, the range allows for various
9 disciplines, whether they're lawyers, or whether they're someone who simply
10 lives by a plant to make their voices heard. Thank you.

11 CHAIRMAN MACFARLANE: Thank you very much, Ms. Ginsberg.
12 Again, Diane Curran is not here. She's ill, so she's not able to join us. So, we
13 will move on to Christopher Paine, who is the nuclear program director at the
14 Natural Resources Defense Counsel. Chris.

15 CHRISTOPHER PAINE: Thank you, Chairman MacFarlane,
16 members of the Commission, for the opportunity to present our views today. I
17 believe you should already have a copy of my prepared statement which
18 provides a lengthy factual and legal basis for our critical views on the
19 Commission's present rules, not just the standing and admissibility rules, but
20 more broadly. The question is how all these rules fit together to either admit or
21 exclude the public's concerns with the safety of nuclear facilities. I'm not going to
22 attempt to summarize everything that's in that statement, but I welcome the
23 opportunity later in the questions to answer any questions you may have
24 regarding it. I'd like to spend these few minutes discussing how some of the
25 inequities and dysfunctional aspects of the current system might be remedied.

1 Regarding the hearing process itself, the hearing request process, I think the
2 current strict by design contention and admissibility requirements place too steep
3 a barrier in front of the affected members of the public seeking access to your
4 hearing processes, to adjudicate their nuclear safety and environmental
5 concerns. Under the standards set forth, and I would add the legislative intent,
6 and I think it's important to go back to that, the standards and legislative intent of
7 the AEA, the Commission is directed to grant a hearing upon the request of any
8 person whose interest may be affected by a licensing or rulemaking proceeding,
9 and admit any such person as a party to such proceeding. And the words that
10 the AEA uses are not "may admit" or "may admit" according to a whole long
11 lengthy list of gates that the petitioner has to pass through. It says, "It shall
12 admit. Shall grant a hearing," and I think it's important to recognize that of
13 course there has to be some interpretation of that with respect to the pleading
14 standards, but you need to consider whether you've gone too far.

15 The current pleading requirements are very difficult to reconcile
16 with this statutory direction. They should be scaled back to reflect the good faith
17 implementation of the standard expressed in the AEA, and of course there are
18 obviously many places between simple notice pleading that will get you into a
19 district court and the current requirements where one could draw the line. And
20 I'm not a lawyer, so I'm not going to attempt to do that today, but I think a good
21 faith effort could be done in a dialogue between interveners and the agency to try
22 to come up with a more rational set of procedures. Because the justification for
23 these procedures has been that they contribute to the efficiency of your
24 deliberations, which I submit is a preposterous hypothesis. They don't contribute
25 to the -- they cause interminable delays. We have been attempting for the last

1 15 months to admit one simple environmental contention, and we are not even to
2 the merits process of considering this. We're still fighting over the admission of
3 one simple contention after 15 months and \$100,000 in fees and staff expenses.
4 Now, I submit that's just dysfunctional, and I know this occurs with other
5 organizations. Most of the expenditure upfront is just to get to the starting line on
6 consideration of the merits of your claims. Of the current requirements, these
7 requirements are excessive, and I'm not going to, you know, go through the
8 pleading standards, but you should really look at them, and examine the burden
9 it places within 60 days upon a public interest organization, or a citizens group to
10 be heard. They essentially have to preview their entire case based on the record
11 that's available to them, not on the 60th day, but considerably before that, and
12 essentially, you know, it's close to demonstrating they could survive a summary
13 judgment motion. It's probably not that, and several of your hearing boards have
14 said, "That's not what the -- Commission is about with these pleading standards,"
15 but it's pretty close to that, and I think that's not what was intended under the
16 AEA.

17 What you have now is an excessively litigious approach to a
18 process that should be geared in the first instance to ascertaining not whether
19 the petitioners have demonstrated a specific material litigable dispute with an
20 application, but whether they have raised a safety or environmental issue worthy
21 of further exploration by the board. It defeats the entire purpose of this process
22 to force petitioners who may be in possession of insights and information
23 important to NRC's safety mission, but who are unschooled in the arcane
24 complexity of NRC's rules into such a narrow, technically litigious framework,
25 before they've had a chance to appear before a licensing board, tasked with

1 exploring the substantive merits of their contentions at a hearing. Not every
2 petition need be resolved by a licensing board with a finding that applicant did or
3 did not violate a particular Commission rule or a license requirement. For
4 example, a board might find the petitioners have raised valid safety issues but
5 that the applicant has not violated any particular rule or requirement, or perhaps
6 because they've been granted an exception by staff that excused its non-
7 compliance. I mean you don't know today how many enforcement discretion
8 exceptions have been granted at your plants in total. That's why you send out a
9 request for information for plants to go through and total up all the exceptions
10 they've been granted, and the rules are so long because you've got so many
11 exceptions to the rules. So, the idea that citizens who are supposed to have this
12 right to come in, appear before a board, and present their concerns, and the
13 board was supposed to probe the substantive merit of those concerns, it seems
14 to me that all that's been lost. Important safety function to be performed by
15 licensing board cannot and should not be reduced to a systematic parsing and
16 reparsing this bewildering array of rules, requirements, exceptions, enforcement
17 discretions, regulatory guidelines, statements of consideration, policy statements,
18 and so forth. Ordinary citizens and even most nuclear experts that I know have
19 little motivation to comprehend all that in order to make substantive contributions
20 to nuclear safety within the context of the licensing process.

21 I would also point out the self-referential character of these strict
22 pleading standards. They focus narrowly on whether petitioners have pinpointed
23 a specific material dispute concerning an applicant's compliance with NRC rules,
24 but totally missing from this framework is the reality that some petitioners may be
25 more concerned with adjudicating issues involving certain actions or

1 requirements of the Commission, whether the Commission itself has met not its
2 own rules but the requirements laid down by the Atomic Energy Act. For
3 example, recently staff claimed in a SILEX licensing proceeding that the non-
4 proliferation issue was unrelated to the NRC's licensing criteria and even more
5 improbably was not even within the NRC's jurisdiction. Had NRDC been
6 apprised of this erroneous view early enough in the process, and it would have
7 had to been at the outset, and had we had the necessary financial resources at
8 our disposal, we most certainly would have wanted to pursue before a licensing
9 board the question of whether the staff's refusal to evaluate the proliferation
10 implications of SILEX in its licensing proceeding constituted a violation of its non-
11 discretionary duties under the AEA and NEPA, and we believe that legally to be
12 true. But the pleading requirements just made it impossible for us to get in and
13 we didn't have the resources to do it. In fact, we didn't find out about the staff's
14 opinion until it was too late.

15 In addition to revising the pleading standards and getting more
16 discretion to licensing boards, I would commend to your attention a number of
17 other modest reforms that would make the licensing process more equitable. A
18 notice of hearing opportunity should be published only after the staff determines
19 that the application is materially complete in all respects, and the number of days
20 allowed to prepare a hearing request should be reasonably related to the scale of
21 the hurdles the petitioners must surmount in order to file admissible contentions.
22 Today's pleading requirements, I think a fair interval would be 180 days, but with
23 some more reasonable pleading requirements, the current 60 days might suffice.
24 But this is something that could be -- it's a matter for negotiation and dialogue,
25 regardless of the pleading standards that are adopted. When the staff is notified

1 of a company's intention to submit a license application, it should establish a
2 single consolidated electronic file, and into that file should henceforth be
3 deposited all the correspondence and the documents that circulate between the
4 applicant and the staff relating to the application as long as these documents do
5 not contain, you know, proprietary business information, trade secrets, and the
6 like.

7 The current system placing the entire burden on petitioners to
8 discover and retrieve all relevant documents, no matter where they are stored
9 within ADAMS that are related to the application. That is burdensome and unfair,
10 when the staff could easily establish a consolidated file open to all parties with an
11 interest in the application as it develops. And also why would you expect
12 potential interveners to start pursuing an application that sometimes takes years
13 to develop? I mean we've been told that, you know, it's not unfair now based on
14 the current notice requirement, because we could have gotten involved much
15 earlier. But, I mean you're talking about citizens groups. You're talking about
16 people who don't have \$400 an hour tax deductible lawyers to pursue all of this
17 over a long period of time. I mean these applications sometimes are in
18 preparation for years. As a matter of elemental fairness, I also commend to you
19 the following simple reform. In matters where the staff agrees with any other
20 party, and it's usually nearly always the applicant, the staff should be compelled
21 to file joint motions and briefs, thus reducing the inequitable burden on the
22 petitioner to respond to multiple slight variations and the same basic arguments
23 for why they should be excluded from the licensing process. This rule already
24 applies to interveners, regardless of whether they are private citizens, sovereign
25 states, local governments, or Indian Tribes, by requiring that they be

1 consolidated for all purposes on any issue in which we take the same position.
2 Eliminate the -- as we've talked about, eliminate the asymmetry and the
3 interlocutory appeal rights, revise your NEPA rules to end the owners' and
4 problematic requirement that all NEPA contentions must be lodged by admitted
5 parties. Let people come in later, especially state representatives. Let them
6 come in later when the draft EIS is available for comment, and file contentions
7 from that point forward, and get rid of all the existing rules now that govern
8 amended contentions based on the draft, and finally EIS. Give citizens who
9 desire to participate in the NEPA process the same rights and obligations they
10 have as participants in proceedings before other agencies. Thanks.

11 CHAIRMAN MACFARLANE: Thank you. Okay, moving on to Mark
12 Edward Leyse from the New England Coalition. Don't worry, it'll start when you
13 start to --

14 MARK LEYSE: Oh, I get it. Okay. Okay, anyway, I'd like to thank
15 the NRC for inviting me to participate in this meeting, and I want to clarify that I'm
16 speaking on my own behalf, not for the New England Coalition. I've been a
17 consultant for different organizations, and they happen to be one of them. My
18 comments on public participation will be integrated into my comments on
19 enforcement action and rulemaking petitions, yet I'd like to say that I appreciate
20 that the NRC provides teleconferencing. I think it's a great feature. First, I'll
21 discuss enforcement action petitions. Richard Webster has submitted comments
22 on such petitions, and I agree with his points. I think it's constructive that
23 petitioners are allowed to have meetings with petition review boards, PRBs,
24 however I think the petitioner should be allowed to ask PRBs questions; having
25 more of a dialog would help facilitate the resolution of potential safety issues.

1 And I believe in cases in which PRBs claim that given safety issues have been
2 resolved, that PRBs should be required to provide documentation demonstrating
3 that the given issues have indeed been resolved. I've had a couple of instances
4 where they said issues were resolved, when in fact they could not provide
5 documentation for that. So, PRB meetings should allow petitioners to clarify the
6 safety issues they are concerned about. Well, they do allow them to clarify that,
7 and having meetings with petitioners saves time. A petition review board can ask
8 questions and learn about issues which were perhaps not clearly stated, or were
9 perhaps confusing. So, this expedites the process, and this is one of the
10 examples of fiscal benefits of -- actually, may I have a cover slide? No, that --
11 the cover -- okay, thank you. Yeah, well that's one of the benefits of public
12 participation, is that it can help clarify issues, so a review board is not just lost in
13 a bunch of technical documents that may be confusing or something. A
14 petitioner can just clearly state what is important, and I think that expedites the
15 process.

16 Let me provide one example of this. NRDC submitted an
17 enforcement action petition on a safety issue regarding passive autocatalytic
18 recombiners, which were intended to eliminate hydrogen in accidents. This type
19 of recombiner can malfunction and have ignitions when exposed to elevated
20 hydrogen concentrations, such as would occur in a severe accident, and an
21 ignition could cause a hydrogen detonation. So, the original decision, the initial
22 decision of the PRB was to not consider the petition, and actually this is a case
23 where they said that the issue had been resolved, when in fact it had not. So,
24 after a second meeting in which we were given the opportunity to clarify, answer
25 questions that they had, and actually contend that the safety issue had not been

1 resolved, the PRB reversed its initial decision, which I think was great. So, this is
2 one example of how having meetings can really help sort things out, clarify
3 things, and I think that's very constructive.

4 Now, I'll discuss petitions for rulemaking, PRMs, and I have
5 reviewed the proposed rule for expanding the authority of the EDO to deny
6 PRMs, and I understand that the NRC has limited resources available for
7 processing PRMs, and that the NRC is concerned that there have been a
8 number of petitions submitted in recent years. Among other things, it is proposed
9 that the EDO be allowed to deny a PRM if it raises issues already stated in an
10 enforcement action petition, and I do not think that's a good idea. Actually, one
11 of the criteria for not accepting an enforcement action petition is if it has issues
12 covered in a rulemaking petition. So, we wouldn't want things cancelling each
13 other out too much. And I saw that 23 PRMs were submitted in 2007, and as it
14 turns out that's the year I submitted a PRM on crud deposits on fuel cladding,
15 and how these crud deposits could increase the maximum cladding temperature
16 in the event of a loss of coolant accident. And that petition was accepted, and
17 became part of the staff's revision of Section 50.46(b), which is now Section
18 50.46(c). I would suggest that the staff review how much it costs to revise
19 Section 50.46(c), and I would wager that the cost of those revisions would have
20 been higher, if the end result were the same, if I had not submitted a PRM on
21 crud deposits. To clarify, I spent hundreds of hours researching the PRM, and
22 that's research that the NRC didn't have to pay for -- I'm not complaining, just
23 making a point that when the public do submit rulemaking petitions, they can -- I
24 think it was covered earlier by your staff members -- it's a way to bring up issues
25 that really weren't on the radar screen ahead of time. I mean crud deposits

1 actually should have been on the radar screen. My father, Robert H. Leyse first
2 wrote about how crud deposits could -- the thermal resistance of crud would
3 increase fuel cladding temperatures. He wrote about that in the late 1950s. So,
4 it's only -- kind of put two and two together, if you have a loss of coolant accident,
5 that's going to increase the maximum cladding temperature.

6 Anyway, I just want to say that I think expanding the authority to
7 deny PRMs would -- if you're going to think about that first, I would suggest
8 investigating the potential fiscal benefits of PRMs. PRMs also play a role in
9 improving nuclear safety. And one of the ideas I have would be that there should
10 be more public participation in the rulemaking process. And there should be
11 meetings between petitioners and technical staff who review PRMs, just like
12 there are meetings between petitioners and PRBs for enforcement action
13 petitions. Diane Curran actually suggested that idea to me. I think that would
14 help expedite the process. Issues that were perhaps confusing or not clearly
15 stated could be clarified. And may I have the next slide, please?

16 Yes, I'd like to -- just to provide an example. Right now, technical
17 staff are reviewing PRM-5093, a petition I submitted in 2009, and the staff have
18 overlooked a number of important points. They've released three interim
19 reviews. In one review they concluded that runaway oxidation or thermal
20 runaway of fuel cladding temperatures has not commenced below 2,200
21 Fahrenheit. However, in a different review they actually reported data from the
22 LOFT LPFP-2 experiment, demonstrating that thermal runaway had commenced
23 below 2,200 Fahrenheit in that experiment. And incidentally, there is a document
24 for an NRC safety course which states that an expostulated station blackout
25 scenario at Grand Gulf runaway zirconium oxidation would commence at 1,832

1 degrees Fahrenheit. In comments on PRM 5093, I submitted information from an
2 OECD Nuclear Energy Agency report, explicitly stating that hydrogen generation
3 rates recorded in LOFT LPFP-2 and other experiments were underpredicted by
4 computer models. Information -- this information was overlooked by the staff.
5 They actually concluded that the LOFT LPFP-2 experiment, the results indicated
6 that this was not the case. So, this information I submitted was ignored. And
7 when the staff do MELCOR calculations for Fukushima, they should keep in mind
8 that hydrogen generation rates will be underpredicted, and this is problematic for
9 designing hydrogen mitigation systems.

10 And finally -- actually if I could see this, get this slide, this is an
11 image of a design basis accident experiment. So, that's what I want to talk about
12 now. The staff have done trace code simulations of this experiment, FLECHT
13 run 9573, yet the section of the test bundle that incurred runaway oxidation
14 pictured was not simulated. And Westinghouse reported that that section that
15 incurred runaway oxidation reached temperatures exceeding 2,500 degrees
16 Fahrenheit, which is more than 80 degrees Fahrenheit higher than the highest
17 temperature predicted by NRC's trace simulation using the Baker-Just
18 correlation, which is supposed to be conservative. Anyway, this is my point. You
19 cannot do legitimate computer simulations of an experiment that incurred
20 runaway oxidation by not actually modeling the section of the test bundle that
21 incurred runaway oxidation. So, the staff's trace code simulations were frankly a
22 waste of money. And I understand that the NRC has limited resources available
23 for processing PRMs. So, I think it would be constructive if I as a petitioner could
24 meet with the staff who are reviewing PRM 5093, discuss this, try to sort things

1 out, expedite things, and that's basically, I think, in general, having such
2 meetings would save time and money with the rulemaking process. Thank you.

3 CHAIRMAN MACFARLANE: Thank you. Okay, moving on to
4 Joseph Klinger, who is the Assistant Director of the Illinois Emergency
5 Management Agency.

6 JOSEPH KLINGER: Thank you, and good morning. Thank you,
7 Chairman and Commissioners. Like Christopher, I'm not an attorney. So, I will
8 avoid addressing some of the specific legal issues, but I am a health physicist
9 with over three decades of experience in an Agreement State program. As most
10 of you know, Illinois is home to 11 operating reactors. We have a unique spent
11 fuel storage facility in Morris, a uranium conversion facility in Metropolis, \$700-
12 plus million rare earth thorium decommissioning project in West Chicago,
13 accelerated decommissioning at Zion. I know Commissioner Magwood has
14 visited that a couple of times. And we've been an Agreement State since 1987
15 for about 740 licensees.

16 With 37 Agreement States regulating 87 percent of the radioactive
17 material licensees in the country, NRC is obviously the key federal partner in two-
18 way communication; joint participation is imperative. I've seen over the last
19 couple of decades great improvements, because we didn't always feel like a
20 partner in the past, but we definitely do now. So, things are pretty bright. As
21 chair elect for the Conference of Radiation Control Program Directors, I'm very
22 familiar with the important contributions to radiation safety from our participation
23 with CRCPD and the organization of Agreement States. NRC's active support
24 and participation with these important state organizations is very much

1 appreciated. I think it's very important. It's a good forum to exchange
2 information, two-way communication, collaboration.

3 Now, interactions with our NRC partner almost daily are very open
4 and productive. I like to kind of list the different examples. I think the NRC
5 website is much improved. There's a daily list server, provides the latest FSME
6 notices, SECY papers, everything that's going on is out there for the public to
7 see; and so I think that's very, very informative, a big improvement from the past.
8 Unique to Illinois, we have a formal resident inspector program at each of the six
9 nuclear power plant stations with daily interactions with the NRC resident
10 inspector. This is outstanding, and I think, Commissioner, you mentioned that
11 that really works well, because we have senior reactor operator level state
12 inspectors with a different perspective, working with the NRC inspectors, making
13 sure that all of the appropriate safety issues are being addressed. And so daily
14 communication is very important. Also, they live in that community. They
15 participate in the NRC and the utility public meetings in the evening. So, they're
16 open. They get to know the people in the community and stuff. So, it's a very,
17 very good program. Agreement State liaison Jim Lynch and Regional
18 government liaisons Allan Barker, and Harrol Logaras, they keep us informed
19 constantly. In fact I got off the plane last night and looked, there was a note from
20 Harrol Logaras, "I need to update you on this issue." Now, we're careful too. It's
21 incumbent upon the state to do the same thing back to those people if there's
22 some issue. No one likes surprises. You don't. We don't. And so that's a very,
23 very good program. The IMPEP, having a state representative on that program,
24 where the state representative participates in reviews of NRC Regional offices
25 and stuff is very, very important. Again, it's that feeling of partnership. It's

1 sharing information all for the good of the public. The OAS and CRCPD monthly
2 telecons, those are very informative. NRC and the other federal partners update
3 -- we've got FDA, NRC, FEMA, DOE, all the federal partners are on these, and
4 so we're just sharing information, updating with each other. The CRCPD board
5 meetings, we actually have -- Brian McDermott attends those from NRC. We
6 have, again, representatives from each of the federal partners on that as well.
7 So, it's all good. CRCPD working groups: Those are very, very good because
8 you've got all of the different states working together, and you've got the federal
9 partner advisors that really contribute a lot to that. So, many of the rules that you
10 actually promulgate through your process came out of these working groups. So
11 again, it's coordination, communication, collaboration, the three Cs is what we
12 refer to them.

13 Now, through -- these are more of the informal, and then the formal
14 rulemaking process, the states continue to be provided extensive participation
15 opportunities. The advance notice of proposed rulemaking, the draft proposed
16 rule for 30-day comments typically, then the comments reviewed, draft proposed
17 rule comes to the Commission, and then the revised proposed rule goes out.
18 Again, we get another opportunity for comment, and we tried our best to do so.

19 So again, this formal process provides more than ample opportunity
20 for state participation. Now, do we always get what we want? No. If we did, I'd
21 be kind of suspicious about it, you know. We have issues. Any kind of a
22 collaborative process you've got technical people, you're going to have some
23 differences. And so we work our way through those.

24 Back in 2005, just as an example, 10 CFR 31, the general license
25 requirements, long-overdue requirements to address general licensed devices,

1 there was an issue with the compatibility. It came out from the Commission as a
2 Compatibility B, which is essentially identical. Our rules had to be identical. And
3 some of us, Illinois included, already had registration programs. We managed
4 those generally licensed devices in a more restrictive fashion we thought, so by
5 making it a Compatibility Category B, we had to weaken our programs, was the
6 way we looked at it.

7 So the state of Florida and the Organization of Agreement States
8 had standing, obviously, because they petitioned the NRC to revise that
9 compatibility category. Now, I thought this was good, too. During the IMPEP
10 reviews until this issue was resolved, they held that determination of adequacy
11 and compatibility of that area pending the results of this petition. It didn't happen
12 overnight. It actually went on for years, but they both were eventually granted
13 the petitions, and so the states were satisfied, and we feel like public health and
14 safety was enhanced through this process.

15 So that's just one example. There are others, but that's the one
16 example I wanted to address. Again, thanks for the opportunity for state
17 participation today in this meeting. With tight budgets at all levels, partnerships
18 are key. As a theme from our CRCPD annual meeting last year, doing more with
19 less is the new norm. Open communication and transparency with our federal
20 partners and the public are key to effective and efficient nuclear safety
21 throughout the country. Thank you.

22 CHAIRMAN MACFARLANE: Thank you very much. Okay, our
23 final speaker this morning is Phil Mahowald, who is general counsel to the Prairie
24 Island Indian Community.

1 PHIL MAHOWALD: Thank you, Madam Chairman and members of
2 the Commission. On behalf of the Prairie Island Indian Community and the
3 Prairie Island Indian Community Tribal Council, I'd like to thank you for the
4 invitation to be here today. The Tribe certainly appreciates the effort and the
5 involvement that the NRC, through its staff, has made to the community, and this
6 is just yet another extension of that.

7 With respect to the slides, I think I can probably go through them a
8 little bit quicker in light of some of the discussion in the earlier session as well as
9 those that were discussed here at the panel. But if I could just briefly go through
10 starting with the second slide. Just a little brief background on the Prairie Island
11 Indian Community, which is in Minnesota, approximately 30 miles southeast of
12 the Twin Cities of Minneapolis and St. Paul. The Prairie Island Indian
13 Community is a Mdewakanton Dakota tribe. They're the Mdewakanton band of
14 eastern Dakota are one of -- part of I guess what would be referred to as the
15 Great Sioux Nation often, and they've lived in Minnesota and along Prairie Island
16 for countless generations. As you can see, and as Commissioner Ostendorff
17 pointed out, the Tribe is immediately adjacent to the facility. You can see the
18 residential area beyond the plumes from the cooling towers and the gaming
19 enterprises just up over the containment domes. Next slide, please.

20 And this is just a view from the other direction, where you can see -
21 - get a closer look to the Tribal residences, and then you can also notice too, in
22 between -- the area between the trees of the residential area and the plant, there
23 are the 345-kilovolt power lines. Interestingly enough, although the Tribe
24 received \$178 for the right of way to access the plant back in 1968, when the
25 plant did come into operations, power was not provided to the tribe, and so that's

1 in the process of being remedied. But as it currently stands, the Tribe receives
2 its power from coal plants in the Dakotas.

3 So, next item just basically shows the NUREG-1350, and if you
4 look there, there's also a list and a map of all of the Tribes across the country
5 that are within a 50-mile radius, but then as you go to the next slide, number five,
6 I want to -- just to kind of, again -- I suppose you can't do much better than those
7 two pictures -- just highlight the Tribal lands that are within the immediate vicinity
8 of the power plant, so in addition to the residential areas, you also have other
9 lands.

10 And then slide number six zooms in a little bit closer still to show
11 that when you look at the maps, we're right within that one-mile radius
12 immediately adjacent to the facility.

13 With respect to some of the standing issues, I think the
14 Commission is actually well aware of most of them and the various litigation
15 proceedings involving not only the Prairie Island Indian Community and the
16 Prairie Island Nuclear Generating Plant, but also the Private Fuels Storage
17 proceedings as well as the Crow Butte resource proceedings, which are still
18 ongoing.

19 And the next slides just highlight some of the issues and concerns,
20 I guess, from a picture point of view, that get addressed oftentimes in the
21 standing issues. For example, on Prairie Island -- and then you can zoom in to
22 the next slide -- you can notice the various dots that are included on the map.
23 Those are all recorded known burial mounds. And this map was prepared back
24 in 1903. Of course, the technology has been improved, and we now have LIDAR
25 mapping of the facility, so the point being that the Tribes' ancestral lands and

1 areas of archaeological or cultural significance clearly extend well beyond the
2 established boundaries of the current reservation.

3 And then again, you can go to the next slide. This is a photograph
4 of the Royce maps, which -- a useful resource to see Tribal land cessions
5 historically where Tribes were recognized, at least when the treaties were
6 enacted or entered into for various land cessions. And with this one, you can --
7 the -- basically the southern half of the state of Minnesota involves treaties to
8 which the Mdewakanton Dakota were parties involving land cessions there.

9 And then if you go to the next slide, one of the points that I want to
10 make too, and it's also one that the Commission and the Atomic Safety and
11 Licensing Board has addressed, is even where you do have some land cessions,
12 there can be use of fracturing rights that remain. So even though the reservation
13 boundaries are contained in a much smaller piece of land, that the Tribe still may
14 have the rights under treaties or other federal agreements to hunt and fish,
15 gather medicines, and conduct sacred ceremonies, and so you can't simply look
16 at the boundaries of a current reservation to understand what the Tribe's
17 interests and concerns might be.

18 The other point that I wanted to make there is that it's not just
19 treaties. It can be other federal actions. For example, back in 1938, Lock & Dam
20 #3 was constructed about a mile downstream from the plant site and the
21 reservation, and as part of that, there were lands that were flooded and lost, and
22 there was actually a transfer of property to the U.S. Army Corps of Engineers.
23 But as part of that arrangement, it was understood that community members
24 could continue to hunt and fish on that land and in those waters, which of course

1 are just upstream from the Prairie Island Nuclear Generating Plant. Next slide,
2 please.

3 One of the things -- I guess before I get into this, I do want to echo
4 some of the comments that Mr. Paine made, and I think they were well put and
5 well said, so I don't want to restate those. But this is a complex process with
6 complex issues that aren't readily understood by members of the public. And so
7 it takes some time and some effort, and certainly I can say with recent
8 experience with the Prairie Island Indian Community, again, commend the staff
9 for that effort. One of the things on the slide on Page 11, what I refer to as "the
10 evolving Tribal standing analysis," you know, the analysis really hasn't changed
11 much, but it's a little bit of the approach, and back in 2008 when the Tribe
12 petitioned to intervene in the license renewal proceeding for the reactor, the staff
13 took a very aggressive approach on standing issues and the ability of the Tribe to
14 have me represent them in the proceedings, and it was -- it was unfortunate,
15 because that, in addition to outright opposition to every single contention that we
16 made, along with the applicant, really set an adversarial tone to the relationship.

17 Obviously, that's part of the adjudicatory process is there will be
18 some adversarial nature, but it was unfortunate, because it really set a tone that I
19 think required an effort to overcome it. And fortunately, the tribe again
20 participated as a cooperating agency for purposes of the environmental review
21 and the preparation of the environmental impact statement, and those efforts
22 overcame those initial sort of confrontations and I think ended up being an open
23 and collaborative and very constructive process.

24 And so as you kind of work through the next slide, I wanted to just
25 shift a little bit from talking about the adjudicatory process but also in the context

1 of public participation in general, how that can actually facilitate the process,
2 because if you look, for example, with the license renewal prop that's currently
3 underway -- and I'm not going to get into any specifics with respect to that. All I'll
4 say though with respect to that is, after the application was filed and then it was
5 accepted by the NRC, staff came out to Prairie Island to do a site inspection, a
6 meeting with the applicant to discuss the application for the spent fuel storage
7 installation. The Tribe was invited to participate in that process. And I want to
8 just say how helpful that was to have the Tribe there before its petition to
9 intervene was due to understand some of the issues, to have an opportunity to
10 communicate with not only the NRC staff but also the applicant to address and
11 discuss some of the Tribe's concerns pre-adjudication.

12 And so you think about the amount of time and effort and energy
13 that goes into a process once the petition to intervene is filed, and you get into
14 the very cumbersome, very detailed procedures involved in those and the
15 timeframe involved, when it seems to me -- not some, but not all of the issues
16 and concerns that the Tribe or any member of the public might have could be
17 addressed beforehand. And I guess I would say that that would be somewhat
18 similar to the process in federal court, for example, where you have mandatory
19 meetings with the magistrate to discuss settlement very soon after a complaint is
20 filed.

21 And I think it's even more important in these types of proceedings
22 simply because, I think as one of the panelists spoke earlier, we're dealing with
23 some very complex issues that aren't, unless you're a health physicist or a
24 nuclear engineer or someone that has spent a career working with these issues,
25 they're tough. They're difficult to understand. And so when you're talking about

1 promoting public safety and public trust, if you can get the public involved earlier
2 in the process, where they can actually explore and understand things better, not
3 only will they be able to make informed decisions and hopefully better, more
4 specific contentions if it goes to adjudication, but I think that also helps to have a
5 considerable amount, a better public trust in the entire process.

6 So I do have some other slides there, but I see that I'm out of time.
7 But I -- but I guess if I -- if you could indulge me for just one -- again, I think,
8 ultimately, the Tribal understanding has been enhanced with the efforts of NRC
9 staff, and I want to particularly mention Allan Barker from Region III, the tribal
10 liaison. If there's an issue at the plant, he's often the first to call, before anybody
11 from the plant.

12 Also, staff has been outstanding in addressing our concerns, and
13 more importantly, kind of following up my other comment, once the -- once the
14 NRC staff understands what the Tribe's issues and concerns are, what the
15 Tribe's questions are, then we oftentimes will get a call, or if it's a public meeting
16 here, they'll say, "Oh, by the way, we're having a public meeting next month on
17 this particular issue." I think it's -- goes to what you were talking about today,
18 and it might help you learn a little bit more and understand the process better.
19 So it's just -- communication, I think, is the key. Thank you.

20 CHAIRMAN MACFARLANE: Okay, on to questions, and I will start
21 off. So I appreciate all of your presentations. They were very helpful and
22 generated a number of questions for me. So let me start off. Let me first note
23 that I think Mr. Leyse demonstrated and has been and is continuing to be in the
24 process of demonstrating that the public actually has a lot of valuable input. The
25 public actually knows things that people at government agencies don't know and

1 may not be aware of, and actually, the social science literature is ripe with this
2 information as well, confirming this is true.

3 Let me go to a point that Mr. Silberg made and sort of echoed by
4 Ms. Ginsberg that -- I thought it was interesting that you pointed out that the NRC
5 hasn't kept pace with other agencies, and most agencies don't use these trial-
6 type hearings. And so I guess my question to Mr. Paine and maybe Mr.
7 Mahowald is, do you agree with that, and is there a better way of participating
8 meaningfully in the process?

9 CHRISTOPHER PAINE: Well, I think the APA, you know, has it --
10 there are two pathways in the APA for agencies to conduct their proceedings:
11 one with adjudicatory procedures and one with not -- more informal-type
12 hearings, and I think, you know, the courts have found that there's no, you know,
13 universal criterion that will, you know, automatically tell you which type of
14 procedures to use. It depends on whether there's been a full and fair exploration
15 of the facts, and that's the -- at the end of the day, that's the APA standard. And
16 your recent rule revisions, you know, make it much harder to invoke adjudicatory
17 proceedings, but -- I mean, using trial-type procedures, but they don't exclude
18 them altogether, and it's really in the application of those procedures whether you
19 will run afoul of the APA standard or not, and I think in some cases, you may
20 have already, and other cases, not.

21 But, I mean, I think the real issue for us is that we're spending -- the
22 agency is spending too much time, the applicants are spending too much time,
23 and we're spending too much time fighting over whether we're entitled to bring
24 these concerns to a licensing board. That's the issue. It defeats the purpose of
25 the licensing boards. You know, they're quasi-judicial bodies. They were

1 designed to do adjudication and fact finding, and if petitioners have an issue, I
2 think that the -- you know, it's not going to be notice pleading. It's not going to
3 be, you know, "I've got a complaint against you. Therefore, you get a hearing."
4 But somewhere between notice pleading and the current standards, there's a
5 reasonable standard that would allow people with serious concerns -- you know,
6 knowledgeable people, not -- you know, citizens groups usually take the time to
7 find local experts or someone who really knows the subject to buttress their
8 concerns and, you know, admit those contentions have an evidentiary hearing.
9 Let the licensing boards do their work. Right now, their work consists -- probably
10 a third or half of their work or more involves adjudicating the contention
11 admissibility standards.

12 CHAIRMAN MACFARLANE: Okay.

13 CHRISTOPHER PAINE: They never get -- they never get to the
14 safety issues.

15 CHAIRMAN MACFARLANE: Okay. Do you have a comment on
16 that question?

17 PHIL MAHOWALD: Sure. No, I agree with Mr. Paine. I think that
18 those are some of the issues. The adjudicatory process can be very, very strict.
19 Obviously there's a high burden, a high bar for contention admissibility at the
20 outset, and I do think that, you know, mindful that you have a process to go
21 through, a timeline, ideally, for review of an application and of processing and
22 approval that, if you can kind of step away sometimes from the litigative process
23 with the procedures and with the attorneys and have a little bit more informal,
24 that I think it can help to address some of the public concerns. And again, I do

1 think that there's an effort or there could be an effort to address some of those
2 concerns, you know, pre-adjudication.

3 CHAIRMAN MACFARLANE: [affirmative]

4 PHIL MAHOWALD: Not always. You know, we're never going to
5 agree on everything, but I think ultimately, it's sometimes -- it's simply about
6 having a concern heard --

7 CHAIRMAN MACFARLANE: Right.

8 PHIL MAHOWALD: -- and addressed and can, so...

9 CHAIRMAN MACFARLANE: I think you've actually hit the nail on
10 the head there, is having a concern heard and addressed and knowing it was
11 addressed, and so sort of been the focus of all of my questions and interest,
12 actually, today, with my question about the staff about impact. And I appreciate
13 that, Ms. Ginsberg, that you put actually some quantitative data in your -- in your
14 presentation about impact, and what I want to do is understand the validity of that
15 -- of that data and whether it rings true for some of you guys.

16 So one thing that you noted was that 35 percent of 2,206 petitions
17 were granted substantial relief -- substantive relief, sorry. And so I want to know
18 whether you agree with that and whether you've -- whether you think that you've
19 actually achieved success, and what success looks like.

20 CHRISTOPHER PAINE: Well, I can't speak to -- I'm not
21 acquainted with the survey or --

22 CHAIRMAN MACFARLANE: Don't worry about the number, yeah.

23 CHRISTOPHER PAINE: In the past, I know when they've done
24 those surveys, that the NRC has taken credit for writing a letter --

25 CHAIRMAN MACFARLANE: [affirmative]

1 CHRISTOPHER PAINE: -- you know, back to the petitioner or --
2 saying, you know, "We received your petition, and we're considering it," or they
3 take credit for, you know, writing a letter back saying, "We've looked at these
4 issues, it's in our enforcement process. Thank you for your interest." I don't
5 think that's really, from the petitioner's perspective, you know, really dealing with
6 the issues that are raised in the petition.

7 CHAIRMAN MACFARLANE: [affirmative]

8 CHRISTOPHER PAINE: So I wouldn't credit those kinds of
9 responses.

10 CHAIRMAN MACFARLANE: So you wouldn't call that "heard and
11 addressed."

12 CHRISTOPHER PAINE: No.

13 CHAIRMAN MACFARLANE: Maybe heard, but not addressed.
14 [laughs]

15 CHRISTOPHER PAINE: No. And so, I mean, I think regardless of
16 what the historical statistics are, I think Mark has really laid it out. We want a
17 process where there is a substantive interaction with the staff. Staff is under, you
18 know, affirmative obligations to really respond to the technical information that's
19 been presented. Part of the problems that we've been encountering is that we
20 get responses that aren't responsive to what we've said. They just ignore the
21 data. You know, they assert that the issue has been dealt with, but they don't --
22 aren't -- they don't feel under obliged to show how the issue was dealt with --

23 CHAIRMAN MACFARLANE: [affirmative]

24 CHRISTOPHER PAINE: -- and why the issue has been resolved
25 and what manner. And where's the documentation that shows it was resolved?

1 We don't get that. It takes four or five iterations. Sometimes we get never get it,
2 but sometimes it takes four or five iterations to get the substantive response, so
3 we think this can be real improvement on that score.

4 CHAIRMAN MACFARLANE: Okay. That's helpful.

5 RICHARD WEBSTER: Chairman, I'm Richard Webster. Can I just
6 answer specifically your point -- this came up in the Pilgrim proceeding earlier
7 this year, and the licensing board did ask the staff for a full accounting of all
8 2.206 petitions and the outcomes, and the board there admonished the staff for
9 quoting this statistic. And so then the fact, depending on the definition of the
10 word "substantive," a very tiny proportion of 2.206 petitions actually produce
11 substantive relief. The staff's view of "substantive" has been extremely
12 expansive, and as correctly said by Mr. Paine, involve merely writing a letter. So
13 in fact, I think that is quite misleading, and I would -- I provide a reference to
14 Judge Rosenthal's order on the subject in my paper that I submitted.

15 CHAIRMAN MACFARLANE: Great. Thank you. That's helpful.

16 MARK LEYSE: I just wanted to say just another example. It's sort
17 of similar to the NRDC petition on passive autocatalytic recombiners. I have a
18 petition right now with the Vogtle plant on the AP1000, and I hope the board will
19 reverse its initial decision, but it was very parallel to the NRDC petition, where
20 they claimed that issues had been resolved within. However, there's no
21 documentation that substantiates that claim. So I think that's definitely an issue
22 where I think that if they're going to -- if staff is going to say, "Such and such
23 issue has been resolved," it's definitely this -- you know, please provide the
24 documents, so I think that's --

1 CHAIRMAN MACFARLANE: Well, coming from academia, you
2 wouldn't get anywhere unless you provided documentation.

3 MARK LEYSE: Exactly.

4 CHAIRMAN MACFARLANE: And references.

5 MARK LEYSE: And just one other thing. Sorry, just -- it's just like
6 with this analysis of PRM 5093, there are so many contradictions, and these are -
7 - I need to qualify, there are interim analyses. There -- it's not a final, but there
8 are things where they've said, "Oh, the petitioner" -- me -- "did not consider such
9 and such." And my petition -- like, actually, in one case, there was a quote that
10 they said that, you know, "You didn't consider this." Because I had quoted one
11 thing. They said I'd left out part of the quote. But actually, I had quoted the very
12 same quote in my petition, which was on two separate experiments. And in the
13 petition, I spoke about those experiments probably over 10 pages, and there
14 was, like, no -- so it's like I was basically, you know, like, "Hey, you didn't cover
15 this." I'm like, "Hey, I have 10 pages on it."

16 It's like -- and then there was another thing with this, like I said, with
17 the fuel bundle. It's like it's not a legit analysis if you're not going to consider the
18 part where there was runaway oxidation. But there was a problem with another
19 part of that, and that's where I'll conclude now, was where you're supposed to --
20 if you are comparing data to a computer simulation, you're supposed to compare
21 the hotspot, the hottest peak cladding temperature, and what they did in one
22 case was, over one elevation, they averaged a lot of the temperatures together.
23 So they averaged cooler temperatures with hotter temperatures, which would in
24 effect lower the hottest temperature, and then they compared that to their

1 computer simulation, and you know, a proper -- you know, it should be the
2 hottest temperature. Anyway...

3 CHAIRMAN MACFARLANE: Thank you.

4 MARK LEYSE: You're welcome.

5 CHAIRMAN MACFARLANE: You -- we'll try -- we were over time,
6 but -- oh, go ahead.

7 PHIL MAHOWALD: Well, you know, in answer to your question
8 about what success looks like, I wanted to -- one of the examples that we had
9 from the license renewal proceeding for the reactors. We had raised a
10 contention related to archaeological and cultural resources and the adequacy of
11 those and the methodology that was used originally, where there was evidence
12 that the archaeologist who did the salvage operation used a bulldozer and a
13 trench digger, and then also went off --

14 CHAIRMAN MACFARLANE: That was an archaeologist?

15 PHIL MAHOWALD: -- away from the actual construction site and
16 desecrated some burial mounds and removed some human remains and other
17 objects. Now, we asserted that contention. It was opposed by both the NRC
18 staff and the applicant. As soon as it was admitted, well, very shortly thereafter,
19 the applicant presents us with a cultural resource protection plan, which was
20 wonderful. It was -- they had heard the concerns and had addressed them in a
21 meaningful way, but we had to go through this very lengthy, time-consuming, and
22 expensive process to get to the point where there was a compromise resolution.
23 We can't undo what was done, but as part of that process, even, you actually --
24 we worked with the applicant, and we even repatriated the remains that were

1 removed back in 1968. But those were open wounds that needed to be healed
2 to the extent you can.

3 CHAIRMAN MACFARLANE: Okay.

4 PHIL MAHOWALD: So that's success.

5 CHAIRMAN MACFARLANE: Okay. Thank you. That's helpful. All
6 right. Commissioner Svinicki.

7 ELLEN GINSBERG: Can I just add something in response? So
8 Chairman, I just wanted to mention that you asked about having a concern
9 heard, and I think it's extremely important to ask yourself and for the Commission
10 to review whether that concern has to be heard necessarily in an adjudicatory
11 proceeding. And so some of the context in which this has been discussed is in
12 the context of an adjudicatory proceeding. I think the suggestion about the
13 mandatory discussion -- and I would not use "mandatory" but perhaps a voluntary
14 discussion between the potential interveners and the applicant and perhaps the
15 staff as well is a perfectly rational idea and perhaps something that ought to be
16 explored further but made voluntary, not mandatory. My experience, actually,
17 with the mandatory version of this in federal court is that it's very rarely
18 successful. But voluntary -- incentivizing this in a voluntary manner may have
19 some better result. So I just think it's important to think about the context in
20 which the hearings are heard -- the issues are heard.

21 CHAIRMAN MACFARLANE: Thanks. I think we're going to have
22 to cut it off.

23 JAY SILBERG: I just want to endorse her idea.

24 CHAIRMAN MACFARLANE: Okay. Great.

25 [laughter]

1 That's rare agreement.

2 CHAIRMAN MACFARLANE: There you go.

3 COMMISSIONER SVINICKI: Well, I want to begin by thanking all
4 of you for your presentations. You know, if one were a cynic, they could look at
5 the meeting notice for this and say most of the participants have had outcomes
6 from NRC that I'm sure they don't agree with. And I want to compliment all of
7 you because your presentations focused on the process, which is what we're
8 here to talk about: what can be changed and improved, or where, you know, the
9 process, you know, has resulted in something that you find to be inefficient or
10 ineffective. And I thank you.

11 And some of you have been very explicit about outcomes that you
12 didn't agree with. But I think that, again, it's to the credit of all of you that it's
13 been very much a conversation this morning, focused on NRC's processes. And
14 I appreciate the last comments to the chairman's questions, which are that on its
15 face we should also be looking, though, at having the different mechanisms. And
16 you want to raise issues in the venue where they're going to be susceptible to
17 resolution that is going to remedy whatever it is that's put forward and address it.
18 And that's not always in adjudicatory proceedings.

19 So I remember when I got here and I was first reviewing draft
20 orders, they kept talking about collateral attacks on regulations. And I thought
21 that was such fiery language but that is an element of contention admissibility to
22 look at whether or not the issue being raised is really about the sufficiency or the
23 adequacy of the regulations themselves. And that is, of course, susceptible so
24 resolution and rulemaking as opposed to adjudication. So there is some logic to
25 it but, as we're talking about today, it's always worth looking at those

1 mechanisms we've put in place to do what we think we're doing. So I think this is
2 a productive conversation to be having.

3 One thing that I didn't hear addressed and I just wanted to provide
4 each of you -- or any of you who have a thought on this to respond -- I found in
5 coming to NRC and looking at proposed rules that a lot -- the rules can be
6 extremely high-level. And I understand why they are prepared that way. But I
7 find that to have a real understanding for commenting on a rule, what I need to
8 have is some of the subsidiary documentation. Specifically, often draft guidance
9 can be very helpful. And guidance is not the requirement but guidance, I think,
10 provides essential insights into what the NRC staff will consider to be the
11 appropriate interpretations of whatever proposed rule language they're putting
12 forward.

13 I know that NRC staff in recent years have -- has been attempting
14 to be perhaps more disciplined about the availability of subsidiary documents
15 such as draft guidance when we are out for public comment on a proposed rule.
16 But I'm not sure, you know, if we're making improvements in that area or if any of
17 you have observations about the availability of other draft documents being
18 available concurrent -- when we're out for public comment on a proposed rule.

19 JAY SILBERG: I think it's hit and miss. I think there are some
20 cases where the process seems to be working very well. Your Part 21 revisions,
21 Part 21 on reporting of defects, is a very complex set of regulations because it's
22 based on a very poor statute that was written in 1974. But there's been an
23 ongoing process that's involved lots of stakeholders figuring out what the
24 problems are. How do we fix it? Writing, at the same time: proposed rules,
25 statements of the problem, statements of how we fix it, development of guidance

1 documents, working with vendors, working with licensees, working with others. I
2 think that's an area where the system is working. There are other cases where
3 the rule shows up and then we spend three years trying to figure out what it
4 means. That's an example where the process is not working as well as it should.

5 COMMISSIONER SVINICKI: Did anyone else want to --

6 ELLEN GINSBERG: I would just add that probably the most oft
7 heard complaint I have with respect to NRC rulemaking is far less what the rule
8 says and far more what the rule doesn't say. And how do we address what the
9 rule doesn't say? What is the agency's position on implementation? And without
10 the guidance documents, everybody is subject to their own interpretation. And
11 then what you end up with is either a need to amend the rule or arguments about
12 enforcement. You get backfit arguments about whether this was intended under
13 the original rule for purposes of compliance. So I think having that material is fair
14 to everyone, whatever your interest is, in terms of implementation and knowing
15 what the rules of the road are long before you have to make a decision about
16 how you're going to implement the rule.

17 COMMISSIONER SVINICKI: Well, and again that's, I think -- why I
18 raised the issue was my own experience of this. And when a draft final rule is
19 laid before the Commission, often I will do my best to review as much of the
20 public comment record as I can. But often in reading public comments I will see
21 comments that when laid side-by-side, about the same provision, they reveal that
22 -- you know, these questions about, "What is the meaning?" because if a
23 comment -- if the provision meant one thing, one comment makes perfect sense.
24 And then you read another comment or a new -- it becomes clear that they
25 interpreted the language in a very different way.

1 That's why I think the guidance doesn't solve -- having draft
2 guidance available doesn't solve all of that. But I do -- I found it, in my own
3 experience, to be helpful. And I know that the agency is making efforts to have
4 that available in more instances or perhaps ultimately all instances. I think it
5 would be useful. Did anyone else want to comment?

6 CHRISTOPHER PAINE: Just on that point, I don't think -- you can't
7 have a rule for every situation. You have a standard in the Atomic Energy Act:
8 adequate protection of public health and safety. And you have an adjudicatory
9 system, licensing boards who are charged with assessing whether the actions of
10 the staff and the applicants meet that standard. And you can't -- I mean, that's
11 part of the problem with the way the NRC is regulating. You don't leave enough
12 room for the merits.

13 You try to define every single situation including specifically how an
14 applicant can apply a rule, but then there's an exception. You know? And so,
15 you -- look at your rule books; they're just expanding, and expanding, and
16 expanding. And I just don't think that's really -- you've got to get back to a
17 system where the -- you get to the merits more quickly, and the boards are
18 entitled to use their technical expertise and their knowledge to make the
19 judgments. And then those judgments are appealable to the Commission and
20 ultimately to the court of appeals.

21 You know, the idea that you can solve everything by rules and
22 thereby never have an intervener who's -- I mean, that seems to be the aspiration
23 around here, is to never have an intervener who's exhausted his administrative
24 remedies and then can go to the court of appeals. But that's effectively saying

1 that you think the NRC should be immune from judicial review. So, you know, I
2 think there's got to be a better balance in how you approach your work.

3 COMMISSIONER SVINICKI: I appreciate that comment. I don't
4 think I implied some of those things, but I need to reclaim --

5 CHRISTOPHER PAINE: I'm not saying that you did imply them.

6 COMMISSIONER SVINICKI: Okay, thank you. I did have a
7 specific question. Mr. Silberg, you indicated that you think there should be more
8 Commission oversight of licensing boards. And you talked about a judicious
9 approach to interlocutory appeals. I think I challenge that; I don't observe the
10 same thing. I think that there is -- at least in my experience, the Commission
11 exercises what I believe to be a reasonable and appropriate level of restraint in
12 terms of weighing in in an interlocutory capacity. I don't -- are you indicating
13 somehow -- is -- are you noticing a trend or something that the Commission is
14 not intervening as much as you would say -- I mean, obviously there -- the
15 Commission, we're -- we keep talking about balance, but the Commission needs
16 to strike the right balance there.

17 JAY SILBERG: And it is --

18 COMMISSIONER SVINICKI: And I guess I just wanted to
19 comment that I don't think I share your observation. But if you want to challenge
20 that, please, go ahead.

21 JAY SILBERG: No, it's obviously a judgment call. It's obviously
22 resource driven. I'm looking at it from a -- I'm in my fifth decade of licensing
23 hearings and I've seen a lot of swings of the pendulum. And what I see now is
24 probably less consistency among licensing boards, not just on contention and

1 admissibility but on all issues. But it's a judgment call. And what I'm urging is
2 that the Commission look carefully at what's coming out of its licensing boards.

3 I think the point I'd like to comment on, Mr. Paine's point --
4 adjudication is not the end-all and be-all of the regulatory system. We're not
5 going to run nuclear plants based on adjudication. We're not going to design
6 nuclear plants based on adjudication. The idea that we can decide what a safe
7 design is based on adjudication and licensing board is really the wrong way to
8 go. There are times when we are thrust into that arena. I'm not sure that we
9 need to be there as much as possible.

10 But we have to look at what works from a staff review process
11 because that's where most of the work gets done: the interactions between the
12 staff and licensees; the ability of those outside the process, the public interest
13 community, the interveners, to know what's going on, wholly apart from
14 adjudication. We need transparency. We need information that's available to
15 everybody. But the idea that the licensing boards are going to decide how to
16 operate and how to design a nuclear power plant is really the wrong -- that's
17 looking at the tail and not the entire dog.

18 COMMISSIONER SVINICKI: I would note for the Chairman, I think
19 I'm encountering the same thing you did. We have a lot of experience and
20 observations on the other side of the table. So I'll have to let my colleagues
21 continue this thread, which is -- I'm sure we could talk about this for long periods
22 of time. I did have a couple of specific questions, though. Prairie Island Indian
23 Community is a cooperating agency on an EIS. Just on the process of gaining
24 that status, do you have any feedback or observations to share? Did that work

1 fairly smoothly in terms of granting the -- being granted the status as a
2 cooperating agency?

3 PHIL MAHOWALD: Yes, it did, back with the first proceeding or the
4 first licensing for the reactors. And it's working well now as we're participating as
5 a cooperating agency for the ISFSI license renewal. And again, it gets back to
6 the point where it is an opportunity outside of adjudication to voice the Tribe's
7 concerns and to discuss them with staff. And often times it's often -- it's helpful
8 for us to get feedback from staff on why something may or may not be an issue
9 for staff, or it gets addressed in some other way.

10 And so, it is definitely -- it's a helpful process. And one of the
11 comments I wanted to make is that I think the Tribe is actually quite fortunate
12 compared to other public entities or perhaps environmental group because with
13 that cooperating agency status we do get that access, that communication, that
14 others may not get. So from Prairie Island's perspective it's been a very positive
15 experience.

16 COMMISSIONER SVINICKI: Well, I will just close by noting
17 obviously, though, the -- with the Tribe it's a government-to-government
18 relationship. So I know you said "other public entities"; I know often Tribes would
19 take exception to any characterization of them. It's a -- as a sovereign entity, it is
20 a government-to-government. And so that's why there is that difference. It's not
21 by accident. So I feel like I've taken on your role, there, by correcting that. So
22 thank you. And I'm over my time; thank you, Chairman.

23 CHAIRMAN MACFARLANE: Thank you. Commissioner
24 Apostolakis?

1 COMMISSIONER APOSTOLAKIS: Thank you. Well, I thank this
2 panel as well as the NRC panel earlier. I learned a lot. In my previous life
3 procedures were nonexistent, so there is a lot to learn here.

4 [laughter]

5 But I did realize today how happy I was then.

6 [laughter]

7 And --

8 [laughter]

9 Now, Mr. Leyse, you went into technical details regarding your
10 petition, recent petition. And Mr. Paine also complained about certain things the
11 NRC staff has done. And the staff is not sitting at the table to respond, so I
12 would like to get a response from the staff at some point. My fellow
13 Commissioners agree to these particular issues that these two gentlemen raised.
14 I think it's only fair for the staff to do that.

15 MARK LEYSE: I agree entirely.

16 COMMISSIONER APOSTOLAKIS: Okay.

17 [laughter]

18 COMMISSIONER APOSTOLAKIS: Ms. Ginsberg, you made an
19 interesting observation -- more than an observation. You said that -- and it's true,
20 I think, that rulemakings provide more opportunities to stakeholders to provide
21 input as opposed to orders. Do you have any advice for us? When we should
22 be issuing orders and when we should be issuing rules?

23 ELLEN GINSBERG: So the general sort of rule of thumb that I
24 understand the agency uses -- and I'm happy to be corrected if there's more to
25 be said here -- is that when the agency feels that there is an immediate need, if

1 it's sort of something that needs to be done in a more timely -- on a more timely
2 basis, an order is used. The concern that I have is orders typically are used for
3 purposes of individual utility or individual recipients. And their purpose is sort of
4 targeted. When you have a generic set of issues, by issuing 104 orders
5 essentially you've just created a rulemaking, in another manner.

6 And the problem with orders is neither the regulated industry nor
7 the public get to comment on those orders. With a rulemaking, if you do it on an
8 expedited basis there are opportunities for significantly more public input. Now,
9 whether or not you take the 75 days or if you need it to be done more quickly,
10 you reduce that time with the understanding that this has greater urgency. The
11 APA allows for a time under -- it's NAFTA, I think, that requires the 75 days, if I'm
12 not mistaken.

13 So I think there's value in thinking very long and hard before orders
14 are issued. And I think there's a political imperative sometimes that drives not
15 just the NRC but agencies generally to act with orders. And I would suggest that
16 you try to resist the temptation to respond to that political imperative.

17 COMMISSIONER APOSTOLAKIS: So should I interpret what you
18 just said that we should be issuing orders when it -- issues of adequate
19 protection are involved only?

20 ELLEN GINSBERG: I'm sorry? When --

21 COMMISSIONER APOSTOLAKIS: When issues of adequate
22 protection are involved.

23 ELLEN GINSBERG: I'm saying there's probably not a hard and
24 fast rule here but that when it's a generic issue, to the extent possible, a
25 rulemaking ought to be very heavily considered, carefully considered.

1 COMMISSIONER APOSTOLAKIS: Anybody else, agrees,
2 disagrees? Well, I'll save you some time, Madame Chairwoman. I'm done.

3 CHAIRMAN MACFARLANE: Excellent, okay. Commissioner
4 Magwood?

5 COMMISSIONER MAGWOOD: I'm not ready.

6 [laughter]

7 You went too fast

8 CHAIRMAN MACFARLANE: We can come back to you.

9 COMMISSIONER MAGWOOD: It's okay. I'm always ready. Well,
10 first let me repeat the thanks: This is an excellent panel. All of you made some
11 very, very good comments and I want to take a couple of minutes to first do some
12 special welcomes. First, welcome to Joe Klinger. As he pointed out, I visited the
13 operation center in Springfield. And for those of my colleagues that have not
14 visited the center, I commend that visit to you. I think it is extremely worthwhile
15 and very educational. As a matter of fact, you'll be happy to know that when I
16 travel overseas I sometimes say, "You should go to Springfield and visit the
17 operation center and see how it's done," because I think -- I highly recommend
18 what you have accomplished there. So welcome, and appreciate your comments
19 today.

20 And Mr. Lacey, you provided some more technical comments today
21 which my colleagues have already indicated we will ask the staff to follow up on.
22 But I just wanted to, you know, thank you personally because I remember when I
23 was going through the package the staff prepared on the 50.46(c) update. And
24 they made reference to your petition and to your father's work. And the first thing
25 I asked my staff was, "Who is this guy?" And so I went and heard the story. So I

1 appreciate the opportunity to meet you in person. And thank you for that
2 contribution. It was very, very valuable to us and we look forward to some of
3 these other issues you've raised, as well.

4 MARK LEYSE: Yes, thank you, I appreciate that. I do want to -- I
5 mean, I've been critical of the staff in this meeting. But I do want to express that I
6 think they did do a very good job in reviewing the petition I sent in on crud
7 deposits. And I, you know, just want to say that it seems that -- where am I --
8 well, I think they did very well with that. So I just think that perhaps with the
9 current issues that I have, perhaps that could be sorted out with more
10 communication. And I have to say, I did submit hundreds of pages to them on
11 this more recent petition. So maybe if they're looking at one area, maybe they
12 would miss the fact that I had spoken about something elsewhere. Anyway --

13 COMMISSIONER MAGWOOD: Okay, I'll make sure I make a point
14 to follow up with some of the senior staff, just ask about how they handled that.
15 And I'm not actually entirely sure how the rules and petitions work or -- let me
16 turn to the General Counsel. Is it convenient to engage directly with petitioners
17 after the petition has been submitted? Can we do that?

18 MARGARET DOANE: Well, I think yes, I mean, we can do it under
19 the current procedures. But it would have to be in an open process.

20 COMMISSIONER MAGWOOD: In an open process.

21 MARGARET DOANE: Yeah, in an open process. And I also think
22 that that has happened on occasion with petitions that have been here, actually
23 quite recently, where there's been discussions with the petitioner. But there are
24 certain things, if it's outside of the open forum -- might be seen as inappropriate.

1 COMMISSIONER MAGWOOD: Okay, so we'll follow up on that a
2 bit and see how the staff intends to follow up on some of these issues. I'll follow
3 up on that myself so -- appreciate those inputs.

4 MARK LEYSE: Okay, thank you.

5 COMMISSIONER MAGWOOD: My final welcome is to Mr. Silberg.
6 And Mr. Silberg and I go back some, what, six -- 700 years now?

7 JAY SILBERG: At least.

8 COMMISSIONER MAGWOOD: Mr. Silberg is actually one of the
9 very first lawyers I met when I first came to Washington 700 years ago. And so
10 it's a pleasure to have you on the panel today. And I appreciate your insights
11 and your comments. And I do have -- I wanted to start with a question with you,
12 although I wanted to first remind you that you cannot charge me for answering
13 these questions.

14 [laughter]

15 And the question I have -- you know, there's often a lot of I guess
16 I'd say some angst from the applicant side about allowing -- broadening the
17 admissibility requirements for contentions. But -- just ask you this question.
18 Would it not be a better use of resources to clearly define the bounds of hearings
19 at the outset, as opposed to, you know, later in the process, ensuring that the
20 hearing schedules are well known at the beginning and that we're able to avoid
21 unnecessary litigation down the road? I mean, isn't that something that would be
22 a benefit to everyone, if we dealt with everything up front?

23 JAY SILBERG: I think as much as you can, to some extent until
24 the staff finishes its review on a particular item you can't wind up the process
25 because the staff isn't able to present its views to a licensing board until it's

1 finished its technical review. That doesn't necessarily need to wait for the
2 completion of the SER on the safety side, or the EIS or EA on the NEPA side.
3 But certainly staff review is a valuable function. We ought to be able to get to the
4 process early on. There's a huge amount of information that's publicly available
5 even before the application is filed, even more so after it's docketed, even more
6 so after RAIs come in and are answered.

7 I was kind of interested in some of the comments by Mr. Paine,
8 where he said that some of the groups have -- their own experts have a huge
9 amount of information yet it's impossible for them to meet the pleading standards.
10 It seems to me you can't have both at the same time. Either the intervenor has a
11 lot of information, in which it ought to be presented to the board, in which case
12 the contention is likely to be admitted; or if they don't have a lot of information
13 then perhaps we shouldn't go down this path. The purpose is not to have an
14 open-notice pleading situation where anybody come in and say, "I want a hearing
15 on this license," without being very specific. And as Ellen said, there are a lot of
16 issues which are really off the table because they've been resolved by rules by
17 other decisions. If you have a well-focused issue and you have an expert to
18 support it, the chances are that issue is coming in; you can litigate it, you can
19 deal with it up front and, you know, you can meet your schedules.

20 COMMISSIONER MAGWOOD: You've sort of opened up the
21 appropriate can of worms, so let me move on to Mr. Paine and ask him first --
22 because I heard a response. It was a grunt of some disdain. But why don't we
23 give you a chance to react to that, first. And let me follow up with a question.

24 CHRISTOPHER PAINE: Well, it's been 15 months. We've spent
25 \$100,000. And we have one simple contention and it's still not -- still unable to

1 get it heard. So I think you'll find that the current admissibility requirements lead
2 to an extended litigious process that isn't about safety. It's not. It's about
3 whether the petitioners have met certain specific, very specific, standards which
4 are then somewhat randomly interpreted by each individual licensing board,
5 because there's no criteria by which they are then to assess whether you have or
6 have not met the standard other than what's stated in the standard. And so --
7 and they're very, you know -- there's a lot of subjectivity involved in those
8 assessments. And so, when someone says, Well, yes, in the COL proceedings,
9 you know, whatever you said about how many proceedings have -- hearings
10 have been established pursuant to petitions, how many contentions have actually
11 been admitted? That's the key statistic.

12 I think -- and I explicitly made the point, I'm not talking about notice
13 pleading. I think that obviously something more is involved here. But isn't the
14 purpose of the system to get to the heart -- it should be -- to get to the heart of
15 the substantive matter that has been raised? And the substantive matter for a
16 petitioner is not whether, you know, they can meet all these particular hurdles or
17 even whether a particular rule has been violated. It's perfectly possible to have a
18 proceeding in which the licensing board says, "Well, no, they didn't violate any
19 rules, but there's a serious safety issue here." Maybe there should be
20 rulemaking. Maybe they -- should be more close supervision by the Commission
21 of the staff to make sure they don't grant so many exemptions to the rules. You
22 know, I mean, there are many possible outcomes of a proceeding.

23 COMMISSIONER MAGWOOD: Well --

24 CHRISTOPHER PAINE: And so I want to get the NRC back to that
25 more accessible concept.

1 COMMISSIONER MAGWOOD: Let me jump in to that a little bit,
2 because I think from what I've heard -- what I heard Mr. Silberg say and what you
3 just said, I think there's a lot of commonality there. I think what Mr. Silberg said --
4 and if you -- I misinterpret, please jump in. But it isn't so much that there's a
5 disagreement that contentions should be presented. It's simply that if they're
6 presented, they ought to have technical quality enough to, you know, meet, you
7 know, certain reasonable criteria. And I guess what I hear you saying isn't that
8 you disagree with that, because you've said you don't want to go back to notice
9 pleading. You're saying that the balance where it exists today, you know, has
10 shifted.

11 CHRISTOPHER PAINE: Right, it's -- I just think it's shifted too far.

12 COMMISSIONER MAGWOOD: Too far.

13 CHRISTOPHER PAINE: And if you're going to have those kinds of
14 really burdensome requirements, I mean, obviously you're imposing a standard
15 that's far above what ordinary citizens are entitled to, for example, in a NEPA
16 proceeding before another agency. They don't have to do all this stuff, you
17 know?

18 COMMISSIONER MAGWOOD: Well, you --

19 CHRISTOPHER PAINE: I mean --

20 COMMISSIONER MAGWOOD: But let me -- this is important
21 because I want to make sure I have this right. But you are saying that this -- I
22 was actually expecting you to take issue with the concept of, "There is a
23 balance." But you're not. You're --

24 CHRISTOPHER PAINE: No. Of course there's a balance.

25 COMMISSIONER MAGWOOD: You think that there is a balance.

1 CHRISTOPHER PAINE: If you read my paper, there's a -- I --

2 COMMISSIONER MAGWOOD: Yeah.

3 CHRISTOPHER PAINE: You know, okay.

4 COMMISSIONER MAGWOOD: And until I read the paper --

5 CHRISTOPHER PAINE: Yeah.

6 COMMISSIONER MAGWOOD: -- I was expecting that. But -- so I
7 hear it's more that it's that judgment that Mr. Silberg actually referenced in the
8 beginning of his presentation, that the Commission should review to see if the
9 balance is in the right place. And you're simply -- you're not making -- you're
10 making the case that the balance ought to be adjusted --

11 CHRISTOPHER PAINE: Yes.

12 COMMISSIONER MAGWOOD: -- at this point.

13 CHRISTOPHER PAINE: Yes.

14 COMMISSIONER MAGWOOD: Well, I -- I'm -- as my colleagues
15 know, I've raised issues about whether we're in the right place in the balance or
16 not. I'd be very happy to sit down with you and talk about this in greater detail.
17 So we'll follow up with that and perhaps have a more lengthy conversation,
18 because I'd like to understand a little bit more about some of the points you
19 raised and some of the suggestions you've made. Some of them I can tell you I
20 won't -- I don't agree with. But there's some I think are certainly worth exploring.
21 So, you know, let's have that dialogue and, you know, certainly invite my
22 colleagues to, you know, participate in a conversation like that. But again,
23 appreciate the fact that you did present, because I think the last time you were
24 here I sort of challenged you on this to present specific suggestions; and this

1 time you did, so I appreciate that you did that. So it gives us something we can
2 work with.

3 CHRISTOPHER PAINE: I mean, I'd like to say on the question of
4 when people can come into the NEPA proceeding, I have a detailed rehearsal of
5 those problems in my paper. And I really think your rules don't make sense. In
6 fact, they -- they're absurd. You know, why would you put a premium on the staff
7 wanting to demonstrate that their draft environmental impact statement conforms
8 to the applicant's environmental report, and that the only way you can pursue a
9 claim at that point is to demonstrate differences? That's grandfathering in
10 whatever errors are in the environmental report that weren't spotted, you know, a
11 year ago, or two years ago, or three years ago when we initially became parties,
12 if we're lucky enough to become parties.

13 Why would state officials who are interested in environmental
14 impacts necessarily want to be involved two years earlier in a proceeding about
15 nuclear safety? I mean, you know, you look at any other agency, people can
16 come in, and if they've commented on the draft and their comments are not
17 somehow dealt with adequately in the final, and the final ignores reasonable
18 alternatives or has errors in it, then they can take their claims to district court.
19 Well, their -- you know, in this case, it's not district court, it's the court of appeals.
20 But I don't see why state officials and other government agencies, other people
21 who have a legitimate interest in the quality of the draft environmental impact
22 statement can't come in at that stage. And so, I just -- you know, I just think the
23 rules that you have now don't make sense. And they actually don't even promote
24 a rational discussion on the environmental issues.

1 COMMISSIONER MAGWOOD: I appreciate that and, you know,
2 look forward to the dialogue.

3 JAY SILBERG: If I could just make one comment, it seems to me if
4 the draft environmental impact statement just merely parrots the environmental
5 report and it's so bad, then the intervener should come in at the beginning when
6 he reads the environmental report, which is so bad, and raise that issue to the
7 licensing board at a time when it can really be resolved, either by working with
8 the petitioner or by doing more work, amending the environmental report. The
9 staff knows what it has to do at the DES. Why wait until the last minute? All
10 you're doing is pushing, kicking the can down the road. Resolve the issues early.

11 COMMISSIONER MAGWOOD: I guess you agree with that.

12 CHRISTOPHER PAINE: I just gave you a detailed response to
13 that. Weren't -- apparently you weren't listening. The reason is that state
14 officials and many interveners don't need to get in two years earlier. We're -- it's
15 not our job to write the applicant's environmental report. It's not our job to rewrite
16 it for the staff. The staff has the affirmative obligation to prepare a draft
17 environmental impact statement. If there's a problem with the schedule and
18 licensing, get the draft out earlier.

19 COMMISSIONER MAGWOOD: I think I'm slightly over my time, so
20 I'll --

21 CHAIRMAN MACFARLANE: A bit.

22 COMMISSIONER MAGWOOD: Thank you, Chairman.

23 CHAIRMAN MACFARLANE: Okay. Commissioner Ostendorff.

24 COMMISSIONER OSTENDORFF: Thank you, Chairman. Thank
25 you all for presentations. I know there's been a lot said this morning and there's

1 a lot to digest from your comments. I found it very helpful and informative across
2 the board. I want to go back to a comment Commissioner Svinicki made that I
3 shared her opinion on. And this, Jay, gets back to the comment you made about
4 -- I think what I took was you were critical of the Commission oversight of the
5 ASLB process.

6 JAY SILBERG: Somewhat.

7 COMMISSIONER OSTENDORFF: Well, that's in a -- my reaction
8 to that comment when you made it during your initial presentation was, similar to
9 Commissioner Svinicki, is I think we spend quite a bit of time looking at that but
10 also recognize that we do give deference to the boards in decision making, a lot
11 of areas pursuant to our history and our precedence. And I guess what I heard --
12 I want to get bore down on this a little bit. What I wrote down was that you're
13 seeing less consistency among licensing boards. Did I capture that correctly?

14 JAY SILBERG: That's -- I said -- so I haven't done, you know, a
15 detailed qualitative -- quantitative analysis. But that's my general sense.

16 COMMISSIONER OSTENDORFF: So is this consistency amongst
17 application of procedural issues or consistency on substantive technical issues?

18 JAY SILBERG: No, not on technical issues; on the process.

19 COMMISSIONER OSTENDORFF: The process. Okay.

20 JAY SILBERG: Standards for admitting contentions, things like
21 that.

22 COMMISSIONER OSTENDORFF: Okay. So let me just time out
23 right there. Chris, I want to see if you have any -- yeah. I think I heard a little bit
24 of the same from you. But I want to give you a chance to --

1 CHRISTOPHER PAINE: I'm not at all informed about what the
2 broad range of opinions on the licensing boards are with respect to admissibility.
3 I think it's a bit of a crapshoot from an intervener's perspective as to what, you
4 know, at the end of the day -- whether you've met these standards or not. You
5 really can't know going in whether you have. And sometimes you get something
6 in, sometimes you don't. And you don't really know why. So -- but my point was
7 that we should have a process that gets more swiftly to the merits.

8 COMMISSIONER OSTENDORFF: You know, that's one -- I
9 understand that.

10 CHRISTOPHER PAINE: And --

11 COMMISSIONER OSTENDORFF: You're clear on that.

12 CHRISTOPHER PAINE: Okay.

13 COMMISSIONER OSTENDORFF: Yeah.

14 CHRISTOPHER PAINE: And you know, I -- if there's a lot of
15 variability among the different licensing boards I wouldn't be surprised.

16 COMMISSIONER OSTENDORFF: Okay, thank you. Ellen, do you
17 want to say something there?

18 ELLEN GINSBERG: No. I was going to comment on my
19 experience in the very early days -- so, in the mid '80s -- of licensing boards and
20 my view sort of usurping the Commission's obligation to be the establisher of
21 Commission policy. And the activism that we saw in the '80s I don't think we see
22 as much now. So, I think that is a difference and that's a difference worth noting.

23 COMMISSIONER OSTENDORFF: Thank you for bringing that up.
24 Okay. Let me go on. Ellen, I'll stay with you for a question. Commission
25 Apostolakis had probed the rulemaking topic with you. And I appreciate his

1 question; it's a very important question and one that outside the confines of this
2 particular public meeting has huge implications for us as we're doing business in
3 the post-Fukushima world. And we wrestle with a lot of these issues on a daily
4 basis with our staff. In your presentation, Ellen, I wrote down that you -- I think
5 your slide said more -- you suggested more Commission supervision on higher-
6 priority rules. Could you expand upon that a bit?

7 ELLEN GINSBERG: I suppose it has two parts to it. So I'll answer
8 the question I thought you might have wanted to ask.

9 COMMISSIONER OSTENDORFFS: No, you -- please go ahead.
10 Yes.

11 ELLEN GINSBERG: The first part is the issue with respect to
12 priority. I think the industry is really struggling, as you know, with the cumulative
13 impact issue from a variety of rulemakings all at once, a variety of schedules that
14 overlap, a variety of requirements that are being imposed all at the same time,
15 with finite resources to do this and, in some cases, tight deadlines. So one of the
16 things I think would be useful is for the Commission to take a very hard look at
17 what rules are highest priority and make sure that the schedule for
18 implementation of those rules' development and implementation associates with
19 that priority so that you don't have relatively low safety-significant rules, which
20 nonetheless may be useful to promulgate, also being promulgated at the same
21 time, on the same schedule, with the same urgency as what I would describe as
22 higher-priority rules. And some of the determination of that priority requires
23 perhaps a public discussion.

24 COMMISSIONER OSTENDORFF: Okay. Thank you.

25 MARK LEYSE: May I add something?

1 COMMISSIONER OSTENDORFF: Sure. Go ahead, Mark.

2 MARK LEYSE: Yes, I agree entirely. I think it would be very
3 important to pay attention to higher-priority rules. And I would -- I think there's a
4 problem now with the post-Fukushima, the fact that I think the hydrogen safety
5 issues are now third tier. I think that should be tier -- you know, first tier. I think
6 that's, you know, how -- what happened in Fukushima? You had hydrogen
7 detonations and that's what led to the release of radiation. And that was -- a final
8 containment barrier was broken by the hydrogen detonation. So I agree entirely;
9 that is a very -- that is a high-priority safety issue that I think needs to be
10 addressed. And one thing -- Three Mile Island, after that accident, you
11 completely revised your 50.44 -- Section 50.44, which regards hydrogen safety
12 issues. And so I think after Fukushima you saw something entirely different than
13 what you had at Three Mile Island. Three Mile Island, you had a meltdown with
14 perhaps maybe 30 percent of the core.

15 COMMISSIONER OSTENDORFF: Mark, I need to preserve the
16 rest of my time here. I understand the difference between the accidents.

17 MARK LEYSE: Yeah. Okay, I'm -- basically -- thank you. Basically
18 after Three Mile Island there was a response to the fact that there was a
19 hydrogen deflagration in the containment. And they revised rules. That's when
20 you made -- had requirements for hydrogen igniters, et cetera. So I think now
21 that Fukushima has happened it's a time to really relook at that rule and to react
22 in a similar fashion.

23 COMMISSIONER OSTENDORFF: I appreciate the example. I'll
24 just say, my personal observation as a Commissioner, I think we're doing that

1 very effectively with our staff's recommendations right now. But that may be a
2 sidebar conversation we could have. But thank you for raising that.

3 MARK LEYSE: Yeah, I just --

4 COMMISSIONER OSTENDORFF: Okay.

5 MARK LEYSE: -- mean, if it's, like, third tier now --

6 COMMISSIONER OSTENDORFF: I understand. Yeah.

7 MARK LEYSE: Yeah.

8 COMMISSIONER OSTENDORFF: Let me get down to our
9 colleagues at the end of the table. Joe, I appreciated your citation of the different
10 examples/interfaces you and the state of Illinois have with the NRC, and your
11 bringing the nexus of OAS and CRCPD; I thought that was very helpful. And I
12 appreciated, Phil, your citing the -- a good example and a bad example of
13 engaging with the NRC throughout your career with the Prairie Island Indian
14 Community. And I was struck by your comment and I want to focus now on the
15 non-adjudicatory piece in the engagement. I know we've had a lot of discussions
16 on the adjudicatory side. But you were talking about earlier engagement prior to
17 there being a formal proceeding or an adjudicatory proceeding between your
18 constituents and the NRC and the licensee, in the context of the license renewal.

19 And I know that Mark has said, you know, suggested the notion of
20 meeting with the PRBs to get a -- have a dialogue in that area to better
21 understand the thinking and so forth. That's something I want to think about
22 more. Outside of the adjudicatory context are there other examples or things you
23 think the staff or Commission should look at for opportunities for enhanced
24 dialogue, two-way communications prior to or separate from an adjudicatory
25 matter?

1 PHIL MAHOWALD: Absolutely. And as Commissioner Svinicki
2 said, you know, the Tribe has the luxury of being in a government-to-government
3 relationship with the NRC. And so we do get consulted when the NRC comes
4 out for a public meeting. And so there -- it ends up being a very helpful session
5 because it's -- the Tribe has that opportunity to express its concerns.

6 And one of the examples I'll give that -- again, it was a good and
7 positive example. You know, the Tribe has had concerns about tritium
8 contamination, going back. And the response to that is, "Well, if you look at the
9 highest levels recorded they're well below the 20,000 picocuries per liter limit."
10 And we would say, "Well, we understand that but there's a fluctuation there."
11 And then you see what happens at -- you know, in Illinois and Vermont Yankee
12 where there are these massive leaks of high quantities of water with high
13 concentrations of tritium. And it's just the worst fear.

14 And it just happened that health physicist -- NRC health physicist
15 Marty Phalen was out for an effluent inspection. And as is the practice now, staff
16 came to meet with the Tribal council. And we once again had the opportunity to
17 express some concerns about tritium. And he said, "You know what?" He said,
18 "The pipes that have been problems at other facilities are actually above grade at
19 Prairie Island. They're not buried pipes. They're above grade, above concrete
20 floors and hallways that are regularly walked by licensee staff." And so the
21 concerns that you have really aren't -- I mean, obviously you're still going to have
22 your concerns. But there are just -- what -- the reality of what's in place at Prairie
23 Island, it makes it very less likely to have a huge tritium leak like you've seen
24 elsewhere. And I thought, my goodness, we've been up and down with the
25 Minnesota Public Utilities Commission. We've expressed this concern in our

1 petition to intervene. We've raised this concern for years. And finally in this
2 process we get an explanation that goes to address and allay the concerns that
3 the Tribe is expressing. It was a long time coming.

4 And so, that's where I'm talking about the non-adjudicatory
5 successes. And again, I think the Tribe benefits because of that government-to-
6 government relationship. But from my perspective it has really enhanced the
7 relationship between the Tribe and the NRC, but also the Tribe and the licensee.
8 I think there's just more clarity.

9 COMMISSIONER OSTENDORFF: Thank you for sharing your
10 experience; I think that's helped all of us to hear the context of that background.
11 Thank you.

12 CHAIRMAN MACFARLANE: Thank you. Other questions?

13 COMMISSIONER MAGWOOD: Not a question, just a comment.
14 In your dialogue with Ellen, there was a suggestion about having voluntary
15 discussions, which I think Mr. Paine sort of seconded. I'd just like to make sure
16 this is captured in the meeting records so we can explore that to understand what
17 the ins and outs of that are and whether we can encourage that further. Thank
18 you.

19 CHAIRMAN MACFARLANE: Great, and I have one -- anybody
20 else? No?

21 COMMISSIONER SVINICKI: Can I just -- I think I missed that back
22 and forth. So are we going to -- we're going to define what it was that just --

23 CHAIRMAN MACFARLANE: Yes --

24 COMMISSIONER SVINICKI: I don't know what a voluntary
25 conversation -- or we're having a lot of involuntary ones, I guess.

1 CHRISTOPHER PAINE: I can tell you what we think would be
2 beneficial. Prior to having to spend, you know, \$75,000 or \$100,000 to vindicate
3 your contentions and get them admitted, it might be useful for both parties to get
4 together and say, "Is it worth litigating this?" I mean, is it worth it to us to try to
5 get the contention admitted? You know, if -- in the case that I'm thinking of, we
6 just want the applicant to do -- analyze some more severe accident-management
7 alternatives. They already spent -- I know they've already spent more money
8 than it would have cost them to do that work.

9 ELLEN GINSBERG: So I would just add that I can't predict the
10 outcome of the suggestion. I made it here in response to what Chris identified.
11 My experience would not suggest that you get a lot of bang for your buck in doing
12 it. But I do think if you get a few items off the table there would be value. That
13 having been said, I have not obviously had the chance to rehearse this with my
14 constituency. And I would need to do that. So I suggest another public meeting,
15 if you're so inclined, to have a conversation about some of these other issues.

16 COMMISSIONER SVINICKI: Well, and I wasn't looking to resolve
17 it. I just didn't understand the definition of what we were talking about. If we're
18 going to work this out I just -- I guess I can say I don't understand it well enough
19 to at this moment to accept any proposal on this.

20 CHAIRMAN MACFARLANE: Okay. Well, let me make a proposal.
21 I think we have heard very many interesting viewpoints today and from the staff
22 earlier. And I look forward to the staff summarizing these -- the key points that
23 have been made by our external presenters. I think, you know, Commissioner
24 Apostolakis recommended this and Commissioner Magwood. And I'd like to see
25 it done a little more broadly than either of those two, as well as the comments

1 and key points made by my colleagues here. In addition, there is actually a rich
2 body of research into effective public engagement with industry and with
3 government that already exists. And I have some examples here to show you
4 and share with you. And so I would encourage you to link this research to some
5 of the findings from today's meetings by providing an assessment of our
6 performance, NRC's performance in relation to what we've learned from our
7 external panelists. So I'd like to push you guys to do a little bit more and to link
8 some of the stuff that's out there because there is a really important, rich body of
9 research. And everybody's made really important points today. And I think we
10 can do some good thinking here.

11 One more piece of housekeeping: The webcast actually did come
12 back during the Q&A period, but I have been assured that the meeting -- the
13 whole, full webcast of the meeting will be on the web by, very latest, at the end of
14 today, in the archives. So unless anybody has anything else to say, I think I will
15 call the meeting adjourned. Thank you very much.

16 [Whereupon, the proceedings were concluded]