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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket Number: 50-271-OLA; ASLBP No.: 04-832-02-OLA

Location: (telephone conference)

Date: Friday, January 21, 2005

Work Order No.: NRC-192

Pages 559-676

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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PREHEARING CONFERENCE

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IN THE MATTER OF :

ENTERGY NUCLEAR VERMONT :

YANKEE L.L.C. AND ENTERGY :Docket No. 50-271-OLA

NUCLEAR OPERATIONS, INC. :ASLBP No.

Vermont Yankee Nuclear :02-OLA

Power Station :

(Operating License Amendment) :

_____ x

Friday, January 21, 2005

Telephone Conference Call

The above-entitled matter came on for prehearing conference, pursuant to notice, at 2:00 p.m.

BEFORE:

ALEX S. KARLIN Chair

ANTHONY J. BARATTA Admin. Judge

LESTER S. RUBENSTEIN Admin. Judge

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24 ALSO PRESENT:

25 CRAIG NICHOLS Vermont Yankee

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

2:09 p.m.

1
2
3 CHAIRMAN KARLIN: This is a prehearing
4 conference call in the matter of Entergy Nuclear
5 Vermont Yankee L.L.C. and Entergy Nuclear Operations,
6 Inc. It's Docket No. 50-271, ASLBP No. 04-832-02-OLA.
7 Today's date is January 21, 2005 and this hearing,
8 prehearing conference call is being held pursuant to
9 an order issued on January 6th of '05. Here with me
10 in NRC Headquarters in Rockville, Maryland is Judge
11 Baratta and Jonathan Rund, our law clerk. Judge
12 Rubenstein is participating on the call from Tucson,
13 Arizona, sunny Tucson.

14 Could everyone on the call, please, for
15 the record now introduce themselves?

16 MR. SILBERG: The applicant, this is Jay
17 Silberg, partner of Washington Law Firm of Shaw
18 Pittman, here with me and our offices are Matias
19 Travieso-Diaz and Douglas Rosinski. In Entergy's
20 White Plains Office is Mr. Travis McCullough, a lawyer
21 with Entergy, and at the Vermont Yankee site, Craig
22 Nichols, who is the project manager for the EPU
23 Project.

24 CHAIRMAN KARLIN: Thank you, Mr. Silberg.
25 The State, please?

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1 MR. ROISMAN: This is Anthony Roisman and
2 with me is Sarah Hofmann of the Department of Public
3 Service.

4 CHAIRMAN KARLIN: All right. Thank you.
5 NEC?

6 MR. BLOCK: Yes, this is Attorney John or
7 Jonathan Block, B-L-O-C-K. With me on the line is my
8 law clerk, Phoebe Mills, M-I-L-L-S, and on a separate
9 line from Maine is the New England Coalition Staff
10 Technical Advisor, Raymond Shadis, S-H-A-D-I-S.

11 CHAIRMAN KARLIN: All right. Thank you.
12 And NRC Staff?

13 MS. POOLE: Hello, this is Brooke Poole.
14 With me at Headquarters are from the Office of the
15 General Counsel, Catherine Winsberg, Robert Weisman
16 and Marisa Higgins, from the Office of Nuclear Reactor
17 Regulation, Section Chief Darryl Roberts, Project
18 Managers John Boska and Richard Ennis, as well as
19 Richard Lobel. And calling in from Region 1, Neil
20 Sheehan from the Office of Public Affairs.

21 CHAIRMAN KARLIN: Thank you. Now, those
22 are the participants in this call, the parties to this
23 litigation. We also, as I understand, have a
24 representative from the press, Ms. Susan Smallheer, on
25 the line. Is that correct?

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1 MS. SMALLHEER: Yes, yes.

2 CHAIRMAN KARLIN: All right. Fine. And
3 anyone else? Okay. As far as the press and the
4 public, they are welcome to listen in on this
5 conference call just as if we were having a meeting in
6 a courtroom or an auditorium, but participation will
7 be limited to the parties themselves, so we can
8 proceed on that basis, if we could. And as we do
9 proceed, I would appreciate it if each person would
10 identify themselves in speaking, so that the Court
11 Reporter and the rest can know who we're listening to.

12 The purpose of this call is to really
13 power up the scheduling of this matter in this
14 proceeding, particularly try to think through the
15 timing of the evidentiary hearing that we will have
16 under Subpart L, as currently scheduled. So that is
17 the main purpose of the call to set forth an order.
18 I would propose an agenda as follows and then I will
19 ask the parties if there are any other items that may
20 be useful to discuss on this call today.

21 First, I would like to hear from the Staff
22 as to when XX issues, the Safety Evaluation Report and
23 any environmental reports, draft and final. The
24 second item, I would like to discuss the timing of the
25 evidentiary hearing, vis-a-vis, and as related to the

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1 SER, EIS, EA, whatever. Third, I would like to
2 discuss establishing the deadline for motions for
3 summary decision.

4 Fourth, deadline for motions for Subpart
5 G proceeding. Fifth, we, I think, can get into the
6 executive order and the status of the initial
7 disclosures that the parties have been making this
8 week. And sixth is I'm open up to the group. Is
9 there anything else we could possibly discuss or
10 should discuss today?

11 MR. BLOCK: Judge, this is Attorney John
12 Block. I wasn't sure whether we were going to get to
13 this or maybe I misunderstood you, the issue of the
14 RAIs that are outstanding and the Reactor Safety
15 Committee's report/recommendation. Would that also be
16 relevant to this?

17 CHAIRMAN KARLIN: Not particularly, no.
18 I mean, hold on a second, please. Back on the line
19 here, I don't think that the status of RAIs is going
20 to be relevant to us. Although, the ACRS, we would
21 like to hear from Staff as to what the expectations
22 are regarding ACRS letter in review.

23 MR. BLOCK: Judge?

24 CHAIRMAN KARLIN: Yes?

25 MR. BLOCK: We do have a problem with

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1 that. It's a bit problematic. And I'm sure there is
2 a way to resolve this, but the Staff has done an RAI
3 that is directly in line with the subject matter of
4 one of our contentions. And no doubt when they
5 answer, there will be material that is relevant to our
6 contention and the answers that are provided. And we
7 have the general issue of the time lag of when those
8 responses are provided and when they get made
9 available to us via Adams. And it would be good to be
10 able to have any responses that are made treated as
11 part of the ongoing discovery process and provided to
12 us immediately as well. So we feel that that's an
13 issue. And just to back that up a little, when the
14 Staff came down to --

15 CHAIRMAN KARLIN: Well, let's not get into
16 the merits, at this point, you know. I'm trying to
17 distinguish --

18 MR. BLOCK: Oh, I wasn't going to. I'm
19 sorry. I wasn't going to deal with merits. I mean,
20 this is an issue that's just factual information that
21 you wouldn't be aware of. That is that when the Staff
22 came down to Brattleboro when the engineering
23 inspection report was presented to the public, they
24 advised the members of the NRC Staff who were there
25 not to discuss anything that might be relevant to this

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1 proceeding.

2 And so it appears to us that they are in
3 some kind of an adversarial role, although that's
4 ambiguous to us, and therefore that reflects back on
5 this issue of them seeking information on something
6 that's directly relevant to the subject matter of our
7 contention, but us not having direct access to the
8 information in a timely way.

9 CHAIRMAN KARLIN: Okay.

10 MR. BLOCK: I guess that's the best way I
11 can put it without really reaching the merits of it.

12 CHAIRMAN KARLIN: All right. Well, here's
13 what we'll do, Mr. Block. We'll put that on the
14 agenda as No. 6, I guess, after protective order and
15 status of initial disclosures and we can discuss it at
16 that point. Okay?

17 MR. BLOCK: Thank you, Judge.

18 MR. SILBERG: This is Mr. Silberg, I have
19 one other item and it relates to discovery
20 disclosures, but in the context of the newly admitted
21 DPS contention and together with that, a discussion of
22 summary disposition of that contention.

23 CHAIRMAN KARLIN: Okay. Let's put that as
24 Item No. 7 then. Is that 8 or 7?

25 UNIDENTIFIED SPEAKER: 7.

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1 CHAIRMAN KARLIN: All right. So 6 is the
2 RAI issues that Mr. Block has raised and 7, Mr.
3 Silberg, is discovery disclosures for Contention No.
4 6 as it were?

5 MR. SILBERG: Yes, and a related summary
6 disposition motion to be filed.

7 CHAIRMAN KARLIN: Okay. All right.
8 Anything else that ought to be on the agenda? Hearing
9 none, let's proceed, if we can, to the first item,
10 which is the Staff. Ms. Poole, perhaps you could give
11 us a report on the estimated time for the SER, the
12 environmental and the ACRS reviews and activities.

13 MS. POOLE: The short answer to the
14 question is that we don't currently have specific
15 estimates on the schedule and I'll explain why that
16 is. The last docketed communication on the subjective
17 schedule is the October 15, 2004 letter that was
18 included in the hearing file and I believe we
19 discussed it also at the prehearing conference.

20 In that letter, the Staff indicated that
21 the extended power uprate review schedule was being
22 impacted primarily due to steam dryer issues. As it
23 happens, the Staff is currently awaiting two
24 submittals that are due on or about February 15th
25 pertaining to the steam dryer. Also, we're awaiting

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1 the answers to our most recent set of requests for
2 additional information. I believe that's the request
3 that Mr. Block was referencing a moment ago.

4 Those answers are currently scheduled to
5 be filed about February 6th. And also, there is an
6 additional submittal pending pertaining to a station
7 blackout issue, which the Staff currently has been
8 advised will be submitted around March 1st. The Staff
9 expects that once we receive and are able to review
10 those submittals, we will be able to reassess the
11 schedule, probably about two weeks after the final of
12 those submittals. And we would be happy to come back
13 with something to the licensing and the parties at
14 that time.

15 CHAIRMAN KARLIN: All right. So you have
16 nothing new other than what was submitted in October
17 of '04, but you recognize that there are some delays
18 that may occur because of submittals that are due to
19 you. Is that what you're saying?

20 MS. POOLE: That's correct.

21 CHAIRMAN KARLIN: That's essentially what
22 you were saying in your letter of October, if I
23 remember it.

24 MS. POOLE: That's correct.

25 JUDGE RUBENSTEIN: Judge, this is Judge

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1 Rubenstein.

2 CHAIRMAN KARLIN: Yes?

3 JUDGE RUBENSTEIN: Is the draft pretty
4 well included, except for the inclusion of these two
5 items?

6 MS. POOLE: No, no, sir, it's still in
7 process and I don't believe it's close to being
8 finished.

9 JUDGE RUBENSTEIN: Thank you.

10 CHAIRMAN KARLIN: Okay. Yes, we would ask
11 and direct the Staff to inform us. What would be a
12 reasonable date, March 15th? If you could submit to
13 us by March 15th an updated schedule of when the
14 expectation is, vis-a-vis the SER, ACRS,
15 environmental?

16 MS. POOLE: Be happy to do that.

17 CHAIRMAN KARLIN: Environmental, am I
18 correct you are doing, proposing to do an
19 Environmental Assessment or you've already done one or
20 are you doing an EA?

21 MS. POOLE: I believe an Environmental
22 Assessment is in progress.

23 CHAIRMAN KARLIN: Do you have thoughts in
24 terms of when that's expected to be issued?

25 MS. POOLE: Unfortunately, no. It's all

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1 related to the submittals that are still incoming, so
2 we don't have a schedule for the EA yet.

3 CHAIRMAN KARLIN: Well, please, address
4 that as well on your March 15th submission to us,
5 please.

6 MS. POOLE: We'll do that, Your Honor.

7 CHAIRMAN KARLIN: But it does sound to me
8 that it will be a bit of time, a few months at least,
9 before we are likely to see the SER.

10 MS. POOLE: That's correct.

11 CHAIRMAN KARLIN: Okay. Item No. 2,
12 timing of the evidentiary hearing, vis-a-vis, the SER
13 and environmental and ACRS documentation and reports.
14 What are these parties preference and concerns in
15 terms of having the evidentiary hearing after --
16 having it after the SER is issued? Perhaps we could
17 go to State, NEC, applicant?

18 MR. ROISMAN: All right. This is Mr.
19 Roisman. The State's position is that the hearing
20 itself should be after the SER, the ACRS reports are
21 done. That the pre-filed direct testimony should come
22 first for the applicant. Then we would file our pre-
23 filed direct testimony in response thereto 60 days
24 after we get their's. Then they file their rebuttal
25 testimony to the pre-filed testimony. Then we file

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1 and other parties file as soon thereafter as they wish
2 to file it. It certainly shouldn't require more than
3 another 60 days.

4 And if they want to do it in less, that's
5 fine with us. And that the Staff's schedule vis-a-vis
6 all of that should be that the Staff follows whichever
7 party they agree with on whatever position that party
8 is taking. So if they support the State on any part
9 of any of its contentions, they file with regard to
10 that position at the same time as we do. If they
11 support the applicant with regard to any of those
12 issues, they would file at the time the applicant
13 would file and would have whatever rights the
14 applicant has as a rebuttal of filing.

15 And my understanding is that we would not
16 have a rebuttal filing. And that the hearing would --
17 well, that following those filings, after the last of
18 all of those filings, two weeks after that the parties
19 would submit their proposed areas of cross examination
20 to the Board and the Board would hold a hearing at
21 whatever time after that the Board felt it wanted to
22 have the hearing. We would be ready to go to that
23 hearing.

24 CHAIRMAN KARLIN: Okay. Well, you've gone
25 a little bit beyond my question and our concern was

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1 just how soon after the SER would you -- we should
2 shoot for submission of the written statements,
3 initial written statements of position.

4 MR. ROISMAN: Are you talking now about
5 pre-filed direct testimony?

6 CHAIRMAN KARLIN: Well, I guess my
7 original question was your position is the evidentiary
8 hearing should be subsequent to the SER and the ACRS
9 reports?

10 MR. ROISMAN: Correct.

11 CHAIRMAN KARLIN: Okay. All right. Maybe
12 we could then ask the NEC's position.

13 MR. BLOCK: Our position would be,
14 essentially, the same. I guess I'm in pretty much of
15 agreement with the schedule that Mr. Roisman outlined.
16 But to answer the simple question, we think that this
17 should wait until after the EA, SER and ACRS are in.
18 And, frankly, also, there are outstanding RAIs that
19 are germane to the contentions after all of those are
20 answered. I'm assuming that the Staff wouldn't want
21 to go forward if they didn't have all their RAIs
22 answered. But I don't know.

23 CHAIRMAN KARLIN: Okay. Mr. Silberg?

24 MR. SILBERG: Yes, first, I would note
25 that 10 CFR 2.1208 talks about some of these issues in

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1 terms of the submittal of testimony and the like and
2 that may well be getting ahead of your story, Mr.
3 Chairman, but we believe that as soon as the Staff has
4 completed it, whether it's the entire SER or certainly
5 those portions which relate to the contentions and
6 that those issues have been presented, the ACRS, and
7 whatever modifications to the SER sections or
8 equivalent have been made, that we ought to be ready
9 to go to hearing.

10 We don't need, I believe, a complete SER
11 if the SER completion is being held open for reasons
12 unrelated to the admitted contentions. Because what
13 we are litigating are the contentions and the fact
14 that the SER contains a description of Staff's
15 analysis of many other issues should not be reason to
16 hold up the hearing. So our basic position is
17 whenever the Staff's review of the areas covered by
18 the contentions is complete, at that point we are
19 ready to go to trial.

20 CHAIRMAN KARLIN: Okay. And Ms. Poole?

21 MS. POOLE: Mr. Silberg is correct that
22 the Staff it is allowed under the rules for the Staff
23 to go forward before a Safety Evaluation is completed.
24 We could certainly provide statements of position once
25 the draft Safety Evaluation Report has been completed.

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1 That would, of course, be what would be transmitted to
2 the ACRS for its review. And at that time, issues
3 raised and requests for additional information would
4 have been resolved and the Staff would be able to
5 state a position as to the issues.

6 CHAIRMAN KARLIN: And so you're saying
7 after the SER and after the ACRS review?

8 CHAIRMAN KARLIN: I don't know that we
9 necessarily have to wait until after the ACRS review.
10 But certainly after the draft Safety Evaluation has
11 been completed, that will be what is transmitted to
12 ACRS and we'll be able to formulate our position at
13 that time.

14 CHAIRMAN KARLIN: So you're saying after
15 the draft SER?

16 MS. POOLE: Yes.

17 CHAIRMAN KARLIN: That you would be ready
18 to go. All right. Okay. We'll take that under
19 advisement. I think we are inclined to wait until the
20 SER is completed before we would proceed and the ACRS,
21 but we will certainly take those positions into
22 consideration as we develop, you know, after this
23 call, a scheduling order that will be issued later.

24 MR. SILBERG: Do you want to get into the
25 question about testimony submissions, at this time?

1 Because I would take a different view than that
2 expressed by Mr. Roisman.

3 CHAIRMAN KARLIN: Yes, we'll talk about
4 that and with reference to the next question actually
5 it's useful. Certainly looking at 2.1207, which is
6 the process and scheduled for submission, what they
7 call for is simultaneous submissions of written
8 statements of position, simultaneous submissions of
9 rebuttal testimony 20 days thereafter and simultaneous
10 submission of questions, proposed questions for the
11 presiding officer to consider, and then there's a
12 separate rule 2.1208, which has the opportunity to
13 suggest cross examination by the parties.

14 All of that said, what I want to do is
15 turn to the next point for the agenda, which is
16 establishing or discussing a deadline for motions for
17 summary disposition. I want to point out to the
18 parties, we are planning to manage this process in a
19 way to avoid a problem. I believe under 2.1205, for
20 summary disposition, unless otherwise prescribed by
21 the presiding officer, it may be filed as late as the
22 45th day before the hearing.

23 It creates a problem because what it does
24 is it explains motions for summary disposition
25 finalized 25 days before the evidentiary hearing

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1 begins and requires the Board to issue its ruling in
2 a 10 day window, no later than 15 days before the
3 evidentiary hearing begins. This Board does not want
4 to be in that position, at the same time having to
5 read all of the written testimony that these parties
6 are going to submit and prepare for a Subpart L
7 proceeding, which involves a lot of work by the Board,
8 and at the same time have to rule on motions for
9 summary disposition.

10 Therefore, we want to move the deadline
11 for motions for summary dispositions up significantly
12 earlier in the process. The question then is when
13 should that be? The first question then is whether
14 the parties think and, in particular, do we have to
15 wait until after the SERs are issued to set a deadline
16 for motions for summary disposition? If we could hear
17 from the State, NEC, applicant and Staff?

18 MR. ROISMAN: Yes, Mr. Chairman, this is
19 Mr. Roisman again. I think that the issue is, the
20 issue to us anyway, of less concern about when the
21 motions can be filed and of more concern when the
22 responses have to be filed. And let me explain what
23 I mean by that. Certainly the summary judgment
24 motions in theory could be filed as soon as all the
25 discovery was closed, that's the normal rule and

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1 that's how federal courts normally operate and I think
2 it would make sense here.

3 CHAIRMAN KARLIN: But the problem with
4 that is that there is no discovery in this proceeding
5 except for the initial mandatory disclosures and
6 therefore do we have deadlines for motion for summary
7 disposition 30 days after today?

8 MR. ROISMAN: Well, first of all, as you
9 will hear as we go through this, there is some
10 disagreement as to whether the initial disclosures are
11 complete. But I would say that setting a deadline
12 based upon when the final resolution of the issue or
13 whether all the 336 disclosures have been made would
14 be all right if it were not for the fact that the
15 Staff review and what the Staff uncovers and
16 information that the Staff gets in response to its
17 questions to Entergy as they relate to the contention
18 is really important supplemental discovery, which
19 would be relevant to the question of responding to a
20 motion for summary judgment and arguably framing a
21 motion for summary judgment.

22 I agree completely that the dates that are
23 proposed in the rule in 2.1205 are not realistic in
24 the sense that they make the summary judgment motion
25 process virtually unmanageable. And I would support

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1 pushing the date as far back as it makes sense in the
2 context of the parties having available to them the
3 information necessary either to file the request for
4 summary judgment on the one hand or to oppose the
5 request for summary judgment on the other.

6 What I can't tell, because we don't know
7 the answer to your first question, which is what's the
8 dates on which the staff will have completed the work
9 on these contentions and the ACRS will complete its
10 work, I can't give you a date. But I would say that
11 very shortly after they had completed their work that
12 that would be an appropriate time by which summary
13 judgment motions could be filed. And, of course, they
14 could be filed earlier than that if a party thought
15 they had a basis for it.

16 CHAIRMAN KARLIN: All right. All right.
17 Thank you. Mr. Block?

18 MR. BLOCK: Well, once again, I find
19 myself, essentially, in agreement with Mr. Roisman.
20 I guess what I would add here is that it seems to me
21 that since we have the Environmental Assessment and
22 the Safety Evaluation and the Reactor Safety Committee
23 Report all outstanding along with sets of RAIs that
24 are relevant to the proceeding, that it might be more
25 helpful to try to calculate this time when we get the

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1 report on the 15th, the whether report on the 15th of
2 March about when we are going to get this information
3 that, you know, unless what we're looking for here is
4 a number like 30 days from whenever it comes in.

5 And if that's it, I guess I would concur
6 with Mr. Roisman, but I also think that it's very
7 important to try to balance in the interest of
8 fairness here both that, you know, for the applicant
9 that they are finished with the Staff process that's
10 going on and for the rest of us that we have all the
11 information that we're going to get through this
12 process that would be useful to oppose any motion for
13 summary disposition.

14 CHAIRMAN KARLIN: Okay. And we are
15 looking for a number rather than a date. Certainly 30
16 days after X or rather than July 1, 2005.

17 MR. BLOCK: Right. So I guess I would
18 concur with Mr. Roisman. I think something like 30 to
19 40 days after the material is in seems reasonable to
20 me. But we would really need to know for sure that
21 that's the end of the flow of material, otherwise
22 questions of fairness are going to arise.

23 MR. ROISMAN: Mr. Chairman, this is Mr.
24 Roisman again. I just want to be clear about the
25 position of the State. Candidly, the State doesn't

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1 anticipate that it would be filing motions for summary
2 disposition and that these would be coming either from
3 the Staff or from the applicant. Therefore, whatever
4 time either Ms. Poole or Mr. Silberg indicate that
5 they would like after these documents that we've been
6 talking about, the SER, the ACRS Report, the RAI
7 responses relevant to the contention have been served
8 and available, that they want after that, if it's one
9 day, that's fine with me. If it's one week, that's
10 fine with me. And if they said they wanted six
11 months, although I think that would be unreasonable,
12 I wouldn't oppose.

13 CHAIRMAN KARLIN: Okay. And under 2.1205,
14 whoever filed the motion for summary disposition, the
15 other parties have 20 days, and I see no reason to
16 vary from that, to file their answer. So your answer
17 would be triggered in 20 days.

18 MR. ROISMAN: That's correct. But given
19 that they are incorporating the Subpart G portions of
20 summary disposition approach, we would take the
21 position anticipating, as you will hear from --
22 because Mr. Silberg was kind enough to call me earlier
23 today and talk to me about this Contention 6, summary
24 judgments, that we would take the position that that
25 time period would run from the 20 days after any of

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1 the disclosures required under the rules or relevant
2 documents that need or have to be disclosed have been
3 disclosed.

4 So a prematurely filed summary judgment
5 motion wouldn't force us, our position would be it
6 wouldn't force us to file an incomplete answer in 20
7 days, but would allow us to file an answer pretty much
8 following Rule 56(f) of the Federal Rules of Civil
9 Procedure that says we're not in a position to file an
10 answer at this point. But with that caveat, I don't
11 have a problem with doing it 20 days, assuming that
12 we've got the information in hand.

13 MR. BLOCK: Judge, Judge Karlin? This is
14 Attorney Block. Given that Mr. Roisman has just
15 modified his position, I guess I want to make a
16 distinction from what he is saying in that if it's not
17 clear from what I said earlier, and I may not have
18 been very clear, what I'm trying to say is that we
19 need a period of time from the period when that
20 material is in and I would say at least 30 days to
21 look through it. There may well be in the last batch
22 of that material that comes out things that are the
23 proper subject of late filed contentions.

24 And so it isn't simply a question of again
25 what we have to do to keep this on track, but what we

1 have to do to be fair. Because it certainly would be
2 not either in the interest of fairness to us nor in
3 the interest of upholding the Atomic Energy Act to go
4 ahead if it appears from some of that material that
5 there are legitimate new late filed contentions to be
6 filed to say that well, because, for the sake of the
7 rules, we have to hurry up and get on to summary
8 disposition, giddy-up, let's go.

9 I think we have got to, you know, allow
10 for a period for people to digest this. We have
11 experts who have to get the material and look at it
12 and advise us. And so I think it would be prudent to
13 build some kind of a period of 20 to 30 days after
14 that material is final to allow us the opportunity to
15 look through it and to see whether we are set. And at
16 the end of that period, I guess, that would be the
17 time for the summary disposition motions to be
18 properly filed.

19 CHAIRMAN KARLIN: All right. I
20 understand. And certainly we have to achieve fairness
21 first and foremost. Efficiency is an important, but
22 subsidiary rule to that, and that's what we're trying
23 to do and manage this properly.

24 I hear you saying, and I'm not going to
25 engage in a debate here, that a certain amount of time

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1 after the issuance of that material, that material,
2 that material, we need to know and we need to rule
3 what that material is. And right now, the material in
4 question we're thinking of is the SER, the final SER,
5 the final environmental documents, whatever they may
6 be, and the ACRS documents.

7 We understand that there is an initial
8 duty to disclose documents under these regs, 2.336,
9 and a continuing duty to supplement those regs, but
10 somewhere along the line those have to come to an end.
11 The SER, the EIS, EA and the ACRS report have to be
12 filed and we need to move forward. We will move
13 forward. Okay.

14 Now, I will hear from the applicant on the
15 issue of the deadline for motions for summary
16 dispositions.

17 MR. SILBERG: Yes. This is Mr. Silberg.
18 First, let me address Mr. Block's point about the need
19 for some period of time after the final documents are
20 in, because those documents might lead to new
21 contentions.

22 CHAIRMAN KARLIN: Well, let me stop you
23 there. Certainly, if there are new contentions, we're
24 not dealing with new contentions at this moment.

25 MR. SILBERG: I understand, but Mr. Block

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1 was making the point that the schedule has to be
2 governed by the fact that some document might lead to
3 new contentions. And my point is that's irrelevant.
4 The summary disposition schedule has nothing to do
5 with the possibility that a party might be filing new
6 contentions.

7 CHAIRMAN KARLIN: I agree. We're not, at
8 this point, trying to constrain the times for filing
9 a new contention if something new comes up.

10 MR. SILBERG: Right. Okay.

11 CHAIRMAN KARLIN: Okay.

12 MR. SILBERG: That being said, the comment
13 I have with regard to Mr. Roisman's schedule is that
14 it, basically, reads out of the rule summary
15 disposition, because once all these documents are in
16 and everything is done, you're ready to go to hearing.
17 And, particularly, in the Subpart L hearing where
18 there should be, if it's done correctly, certainly, a
19 shorter hearing than if there is unlimited cross
20 examination or, indeed, any cross examination. To say
21 that responses to summary dispositions could wait
22 until every document is in would make summary
23 disposition a totally useless exercise and would read
24 that provision out of the rule.

25 It seems to me that what is appropriate is

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1 when "whichever," whomever is the moving party feels
2 that it has its act together and feels that it could
3 put together a case to meet the standards for summary
4 disposition, it ought to be able to put together an
5 appropriate filing and submit it. Any party that
6 wishes to answer that has the right to seek to delay
7 that on the grounds that perhaps there is something
8 out there, that discovery isn't finished, and
9 therefore they are entitled to more time.

10 However, to say that that automatically is
11 the case, I think, has no foundation in NRC practice
12 or judicial practice. And, indeed, the fact that some
13 information might turn up in the future is always the
14 case, and if we were to wait until that process is
15 done when there is no longer the possibility that some
16 information might turn up, we would never get to the
17 end of the process.

18 And I believe that's true even with regard
19 to the final, there being a "final SER or EA or ACRS,"
20 I don't believe that there's any requirement or
21 necessity that if, for instance, we are the moving
22 party, that Staff cannot respond based on its position
23 at the time, whether that's framed in a final SER or
24 a draft SER or a statement of position that has not
25 yet been incorporated in either of those documents.

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1 And if an opposing party wishes -- and
2 that's true whether we are the moving party or Staff
3 is the moving party. And if an opposing party wishes
4 to argue that it's entitled to wait for something to
5 happen in the future, they can make that showing.
6 However, in this case where we are dealing with an
7 initial document disclosure, recognizing that there
8 may be updates to that, to say we have to wait until
9 the end of the process, essentially, writes out
10 summary disposition as an available procedure.

11 CHAIRMAN KARLIN: Well, Mr. Silberg, let
12 me stop you there. We are not asking whether or not
13 this should be. It clearly is what is the deadline
14 for the last -- what is the earliest deadline
15 proposed?

16 MR. SILBERG: You mean, how late in the
17 process can one file?

18 CHAIRMAN KARLIN: We are not addressing
19 how early. I mean, if someone wants to file a motion
20 for summary dispositions tomorrow, we would be obliged
21 to review it and to respond to deal with it. What
22 we're talking about is what is the latest deadline,
23 what is the earliest deadline. We are not going to
24 use the one that's in the rule, which is 45 days
25 before the hearing.

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1 MR. SILBERG: Well, I'm willing to go with
2 what the Board thinks it needs in order to prepare for
3 the hearing, rather than propose a date, because I
4 think the Board is best able make that determination,
5 but I am concerned that the discussion before me is
6 focusing on when an opposing party, how late an
7 opposing party could wait to file an answer in
8 opposition to a summary disposition motion.

9 CHAIRMAN KARLIN: I understand, and I
10 think their issue is a bit different than what we see
11 in district court litigation where one usually has a
12 discovery period, which then closes and there is a
13 deadline for discovery and once that is closed, then
14 a time frame for filing a motion for summary judgment
15 and after that, of course, the trial is scheduled.

16 Therefore, in that sequence in the normal
17 litigation, you see the discovery entirely closed
18 before motions for summary disposition are cut off,
19 and usually you receive those afterwards. Here, we
20 will have the initial disclosures and then we have a
21 continuing duty to supplement, but really that's it,
22 to supplement.

23 Okay. I understand your position. I
24 think that's helpful, Mr. Silberg. Now, Ms. Poole,
25 your thoughts?

1 MS. POOLE: Yes. I think that the Staff's
2 thought is the very earliest deadline you could really
3 have for summary dispositions would be a reasonable
4 period after issuance of the draft SER, and that would
5 be assuming that the issue on which summary
6 disposition is sought would not be subject to open
7 items in the Safety Evaluation.

8 Other than that, our only thought would be
9 any time the Licensing Board thinks is appropriate,
10 provided it's consistent with the schedule for filing
11 testimony, we don't get a sticky situation there.

12 JUDGE BARATTA: Ms. Poole, this is Judge
13 Baratta. I assume then that if your draft SER has
14 some open questions, then what would have to be the
15 case would be we would have to then wait for the
16 issuance of a final SER. Is that what you would
17 propose?

18 MS. POOLE: One moment, please, Judge
19 Baratta. It's possible that we could go forward if
20 the applicant were to submit something on the docket
21 that potentially resolved the open items.

22 CHAIRMAN KARLIN: Okay. All right. I
23 think that's helpful to hear from all of you on this
24 issue. Our objective is to avoid a crunch, I guess
25 you would call it, of having the motion for summary

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1 disposition come in at the last minute just before the
2 actual evidentiary hearing is being conducted. We
3 want to move that up earlier into the process and make
4 it at a fair juncture when the information is out
5 there, but we do need to set an earlier deadline for
6 that and this is helpful in our thinking.

7 The next issue I would like to have you
8 all help us with and address is the deadline for
9 filing a motion for Subpart G proceedings. As you may
10 remember from our December 16th ruling on the
11 selection of hearings at page 18, we recognize that
12 the entitlement to a Subpart G proceeding was
13 dependent upon an intervenor or whoever raising a
14 point that the credibility of an eyewitness as to a
15 past factual event may be an issue, and we noted that
16 since no one has revealed the names of their witnesses
17 yet, this may be difficult for any party to carry that
18 burden.

19 Therefore, once the names of the witnesses
20 are available, it might be possible for a party to
21 file a motion under 2.309, I think it's (g), and
22 310(e) for a Subpart G hearing.

23 That said, I will note that in the initial
24 discovery, all parties have been required, are
25 supposed to have filed, a list of, essentially,

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1 witnesses they expect to use at the hearing. No one
2 has said these are the only witnesses. You have all
3 properly caveated your list of people, but there is a
4 list out there now. But we don't want to wait until
5 the day the written testimony is filed shortly before
6 the hearing to respond to the issue of whether or not
7 this should be a G or an L proceeding either.

8 So they are thinking of establishing a
9 deadline where parties must tell us who their
10 witnesses are going to be, and then establishing a
11 time frame soon thereafter, which is the final time
12 frame when anyone can make any motion for a Subpart G
13 hearing. Do you follow me on that? So, please, if we
14 could hear from you or perhaps we can start with the
15 applicant, the State, NEC and the Staff on this issue.

16 When is the deadline we should set for
17 when the last person can ask for Subpart G
18 proceedings?

19 MR. SILBERG: I had always thought that
20 under 309(g), that that was a decision that was made
21 up front, because that is something which is supposed
22 to set forth in the request for hearing or petitions
23 taking into account the provisions of 310. And so
24 since the issues are reasonably well-set, it seems to
25 me that that determination really, you know, has been

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1 made and is based on the issues and that is pretty
2 much it, unless someone comes in with a witness, and
3 I don't know that there is any indication of such a
4 witness at this point, that is going to meet those
5 narrow tests for a need for cross examination,
6 credibility, motive or intent, those types of issues.

7 If someone should submit, identify a
8 witness who would be testifying along those lines, I
9 would suspect someone could file, at that point, a
10 request for -- and it's not Subpart G in particular.
11 We're talking about one aspect of it, I believe, which
12 is the cross examination. At that point, when a
13 witness is identified and his testimony is going to be
14 uniquely motive and intent focused, the party could
15 indicate that, at that point, he is entitled to that
16 aspect of Subpart G hearings.

17 I think under no circumstances would other
18 portions of Subpart G somehow come into play, at that
19 point, where we have to go back and start all new
20 Subpart G type discovery. If that's the case, then
21 we're really talking about a Subpart L hearing that
22 becomes not a more efficient hearing process than
23 Subpart G, but one which, in fact, will be worse and
24 I don't think that's what the Commission had in mind
25 when they adopted the new rules.

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1 CHAIRMAN KARLIN: All right. Well, I
2 think that we are getting at the point. First of all,
3 I suggest you take a look at the December 16th ruling
4 at page 18 on this issue, because what we did say was
5 that for the moment, we are ruling that this is a
6 Subpart L proceeding, but once the identity of the
7 witnesses becomes known, then the other side may have
8 another opportunity to request a G hearing for that
9 contention. And we're trying to set an early, but
10 fair deadline for any such motion.

11 MR. SILBERG: Well, I think once the
12 witnesses are identified, you know, if that is the
13 Board's intent, there is no reason why such a motion
14 shouldn't be filed within the week.

15 CHAIRMAN KARLIN: Right. Entergy, for
16 example, has filed its initial disclosures, which
17 includes a list of people who you may or may not call
18 as witnesses.

19 MR. SILBERG: And that is true of NEC and
20 DPS as well.

21 CHAIRMAN KARLIN: Right. Every party has
22 been required to do that and they have filed an
23 initial list. Let's say there are 10 people on your
24 list, Entergy's list, and then six months from now you
25 amend that list and add two more people and there's

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1 12. "And suddenly, the State or NEC says ah, that 11th
2 person you just added, challenge that person, you
3 know, their credibility is a problem, it has been a
4 problem, blah, blah, blah. And if you add a person to
5 that list, you know, then the question is do they have
6 an opportunity to challenge and request a G hearing
7 based upon that newly added witness?

8 As to the ones that have already been put
9 forth, if there is a problem with regard to the
10 credibility of any of those witnesses, I think you
11 all, you know, the parties, are going to have to file
12 pretty quickly if you have got a problem with any of
13 those witnesses.

14 MR. SILBERG: And I would agree with that.
15 And there is no reason why it should take, you know,
16 a lot of time.

17 CHAIRMAN KARLIN: Okay.

18 MR. SILBERG: And I want to again make
19 sure that I understand that what we're talking about
20 here is the cross examination of witnesses, if that
21 would be necessary.

22 CHAIRMAN KARLIN: Well, we're talking
23 about converting it to a G proceeding.

24 MR. SILBERG: Well, a G proceeding is, you
25 know, a whole different ballgame. A G proceeding,

1 then you go back to the beginning and you file
2 interrogatories and requests for production of
3 documents and depositions and everything else. So it
4 can't mean that, because otherwise we will have
5 wasted, you know, the better part of a year when we
6 could have been going through Subpart G procedures.

7 If that is the case, if that is the way
8 licensing boards are going to implement Subpart L,
9 then you might as well never have it, because, you
10 know, we should have started with Subpart G in
11 September and, you know, we would be beyond that stage
12 at this point. So if we're talking about which
13 witnesses are subject to cross examination, I believe
14 that's one thing. If we're talking about converting
15 the entire hearing to a Subpart G hearing, then I
16 think we have thrown out not only the baby, but the
17 bath water and the bathroom.

18 CHAIRMAN KARLIN: Okay. Well, that's what
19 we are talking about, and I suggest you read the
20 December 16th ruling.

21 MR. SILBERG: Well, I have.

22 CHAIRMAN KARLIN: It clearly states it
23 right there. Okay. Mr. Roisman, I think you're next.

24 MR. ROISMAN: Yes, thank you. First of
25 all, I just want to reemphasize. I think what the

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1 Board has just articulated is A, how we read page 18
2 of the decision. Law of the case applies, number one.
3 Time for filing either an appeal from that opinion or
4 a motion for reconsideration of that opinion has
5 passed, so I think that is the law.

6 And we certainly agree with your
7 interpretation of what you said, Mr. Chairman, which
8 is that that does raise the opportunity to
9 subsequently, when the witnesses are properly
10 identified, to resubmit a request for a Subpart G
11 hearing.

12 That said, it seems to me that the only
13 reasonable deadline for the filing of those is not
14 only when the witnesses are identified, but when as I
15 believe the spirit if not the letter of 336(a)(1), is
16 it (a)(1), yes, (a)(1) in 10, and that is that the
17 subject matter on which that witness is going to offer
18 testimony is identified.

19 And it could be that somebody on the
20 witness list was a witness to some event, and the
21 credibility of their perception of that event either
22 might not be an issue, but you don't really know that
23 until you know whether or not that witness is going to
24 testify about anything that has to do with that event.
25 Otherwise, you could have disputes over a witness'

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1 credibility on an issue that witness isn't going to
2 get offered on.

3 So far, the disclosures have been only to
4 the contentions in general, not to any specific issue
5 on which the witness would be offered. My
6 understanding of what is ultimately required under
7 (a) (1) is that a party must identify the witness and,
8 essentially, what it is that the witness' opinion is
9 going to be. I don't mean what their pre-filed
10 testimony is, but I mean what they are going to be
11 addressing.

12 That seems evident if you look at
13 336(a) (1) at the end, which says a copy of the
14 analysis or other authority on which that person bases
15 his or her opinion, the premise is that they have a
16 discreet opinion that they are being identified with
17 reference to.

18 So I would say that, and I don't disagree
19 with Mr. Silberg on this, it's relatively shortly
20 after the disclosure is made and the party said this
21 is the guy who is going to testify and this is a
22 description of what he is going to testify to, almost
23 like you would do in a disclosure of an expert witness
24 under the old Rules of Federal Civil Procedure before
25 they put in the obligation that the expert had to

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1 actually file a full report, that say within 10 days,
2 10 business days, after that any party that believed
3 that that raised a credibility issue could be expected
4 to then file their request for a Subpart G hearing.

5 And a party can stop that clock running at
6 least as to their witnesses by making a declaration
7 that this is it. These are our witnesses. These are
8 their issues. And then they, of course, would be
9 bound by that and wouldn't be able to change absent
10 some rather extraordinary showing and if they made
11 that change, they would reopen the Subpart G
12 opportunity again.

13 CHAIRMAN KARLIN: So your position is that
14 not only do you need to await the identity of the
15 witness, but also wait until it is disclosed what the
16 subject matter of their testimony will be?

17 MR. ROISMAN: Right. Basically, we have
18 to wait until all of the requirements of 336(a)(1)
19 have been met with regard to that witness.

20 CHAIRMAN KARLIN: I think that is going to
21 be much too late in the process, quite frankly, and
22 I'm not sure I see the reason why. But when do you
23 expect that would be? That would be very late.

24 JUDGE BARATTA: This is Judge Baratta
25 again. If you're looking at it from the standpoint of

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1 credibility issue and not from his or her ability to
2 testify in a particular area, I don't understand why
3 that area that they are going to testify for is
4 germane. Could you explain that?

5 MR. ROISMAN: Yes. I mean, otherwise, let
6 me see if I can give a specific example. Let's assume
7 we now have, as you know, Contention 6 that deals with
8 the question of whether or not the applicant has gone
9 through the process of properly verifying the response
10 time in the event of an R type fire event. And we
11 have somebody who we believe was present at the time
12 that the verification process was going on and
13 observed that. And we have suspicions as to whether
14 or not that person might tell the truth or not tell
15 the truth about what that person actually observed.

16 And the applicant lists that person as a
17 witness who is going to be a witness that they are
18 going to be using at the hearing, but they are not
19 using him with regard to the verification process.
20 They are using him with regard to an entirely
21 different issue. I don't think we would be entitled
22 to get a Subpart G hearing even if we had very strong
23 evidence that this guy, if he were offered as a
24 witness on the Part R fire, would tell the truth. He
25 is not being offered for that purpose and whether or

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1 not he would tell the truth about it would be
2 irrelevant.

3 Conversely, how could we know what it is
4 that the guy is going to talk about and know whether
5 or not there is a past event, the credibility of which
6 is relevant to that guy if we don't know what he is
7 going to speak about.

8 Now, I don't see why that has to be very
9 late in the process. It is not at all unusual in
10 normal litigation that very early after one retains an
11 expert, the expert is retained to speak to a
12 particular issue. You know, you're the party. He's
13 your expert, so you identify that expert is going to
14 talk about this subject and, in general, this is what
15 his opinion is going to be. That is very different
16 than having him write out his full report or present.

17 Of course, in court you're not filing pre-
18 filed testimony, but the equivalent of filing pre-
19 filed testimony could be months away. So I see no
20 reason why. Certainly, if it were the case of the
21 State, we would not have any problem with our witness,
22 with identifying what the topics are that he is going
23 to testify about, so that if somebody thought there
24 was some reliability question or credibility question
25 on his testimony related to that fact question, they

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1 would be able to make their Subpart G application.

2 So I am not suggesting that it be even
3 close to the date on which pre-filed testimony is
4 done, and it will encourage the parties to tell you as
5 early as possible and not to be late when they know
6 what their witnesses are going to testify about.

7 CHAIRMAN KARLIN: Okay.

8 MR. SILBERG: Mr. Chairman, if I might.
9 This is Mr. Silberg.

10 CHAIRMAN KARLIN: Well, let me respond and
11 then let's move on. I don't want to get into
12 argument. First, we're not going to get into
13 characterizing what the new contention is.

14 MR. SILBERG: No, no, no, this is a wholly
15 different aspect of the issue.

16 CHAIRMAN KARLIN: Well, second, I think we
17 have heard this. We are concerned about keeping this
18 early. Experts are very unlikely to be the subject of
19 any such motion, because it is very rare that they are
20 going to be, if at all, an eyewitness. We're not
21 talking about eyewitnesses. So I think these motions
22 are going to be rare and we are, essentially, not
23 inclined to get into the subject matter of the
24 witnesses.

25 If there is a witness listed by Entergy or

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1 anyone else, I think it could be the responsibility of
2 the person who wants to file this motion to contact
3 the other party, because there is an obligation to do
4 so and to find out, if they can, what they are going
5 to be testifying to. If you have got any doubt about
6 somebody who is an eyewitness, we probably ought to
7 just hear it right up front rather than to wait until
8 we talk about what their subject matter of the
9 discussion is.

10 MR. SILBERG: Okay. The one point I
11 wanted to make though is that in the real world when
12 one is putting together your case, it is frequently
13 not until the testimony is drafted that you really
14 know who is going to address which issues.

15 CHAIRMAN KARLIN: Yes, I understand.

16 MR. SILBERG: And particularly, in a
17 larger organization when there are a lot of people who
18 have some knowledge and some people who have a lot of
19 knowledge, how you put that story together is not
20 something that is necessarily done long in advance.

21 CHAIRMAN KARLIN: Good. All right. Mr.
22 Block, do you have anything to add to this discussion
23 here?

24 MR. BLOCK: Well, once again, I find my
25 position here is not too much different from the

1 State's. I think that one of the problems here is
2 there's a difference. There is certainly a difference
3 between disclosing the people that you may call as
4 witnesses and disclosing the people you will call as
5 witnesses and the subject matter they wish to testify
6 upon. And I don't see how we can reasonably be asked
7 to make a judgment as to whether to request a higher
8 level of examination opportunity without knowing both
9 the subject matter and the particular person.

10 And I think it would be helpful for the
11 Board to simply set a date, you know, a date beyond
12 which, you know, saying this is the date you have to
13 make a disclosure of your witnesses and their subject
14 matter. And at that time, 10 days from that day,
15 within that period, if anybody believes that they have
16 a reason for making the Subpart G application, it
17 would be made in that period of time and then
18 responded to in a timely way.

19 CHAIRMAN KARLIN: Okay. Thank you.
20 Staff, Ms. Poole?

21 MS. POOLE: I think our view is somewhat
22 similar to that of Mr. Block and Mr. Roisman in that
23 perhaps an easy way to do it would be, understanding
24 Mr. Silberg's point about not knowing for certain
25 early on which witness is going to provide testimony,

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1 there could be, at some point, perhaps around the time
2 for the deadline for filing summary dispositions at
3 some point down the road, a time at which each party
4 files a final list of witnesses. And after that,
5 there are 10 days in which any other party could
6 object to that and file a motion requesting Subpart G.
7 And that way, you would have a single point in time in
8 which to object.

9 JUDGE BARATTA: How detailed of a
10 discussion? This is Judge Baratta again, I'm sorry.
11 How detailed of a discussion of what the witnesses are
12 going to testify to, in what areas the witness is
13 going to testify, would you propose to have, Ms.
14 Poole?

15 MS. POOLE: Probably not much more than
16 identifying which contention on which the witness is
17 going to provide testimony. I don't think it will
18 need to be very detailed.

19 JUDGE BARATTA: Okay.

20 CHAIRMAN KARLIN: All right. Thank you.
21 That was a helpful discussion. I might suggest that
22 one thing we are thinking, and I think we have thought
23 through here, is that already each party has
24 identified a list of potential witnesses in their
25 initial disclosures. Now, presumably, those may be

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1 updated from time to time, names added, names deleted,
2 but with reference to the names that are on there now,
3 I think our inclination is to think that if you have
4 some credibility issue with any of those individuals,
5 the clock may already be running for filing something
6 timely for Subpart G on those. We will address that
7 ultimately in our --

8 MR. SILBERG: Judge, could you just
9 explain what you mean by Subpart G? I mean, is that
10 as to that witness? Is it that whole contention? Is
11 it the whole hearing? I'm, frankly, confused and I
12 have read page 18 several times, and I simply don't
13 see. It looks to me a witness by witness question,
14 and if it's witness by witness, then it certainly goes
15 to, you know, the cross examination perhaps of that
16 witness, but not the entire panoply of a Subpart G
17 hearing.

18 CHAIRMAN KARLIN: It is the contention by
19 contention. As we know, in 2.310(b), you know, a
20 person, a party, is entitled or can claim entitlement
21 to a G hearing if they can show, you know, that the
22 presiding officer finds that the resolution of the
23 contention or contested matter necessitates resolution
24 of issues of a material fact raised or current to a
25 past activity where the credibility of an eyewitness

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1 may reasonably be expected to be an issue.

2 So if there is a Contention X and there
3 are three witnesses to Contention X, A, B and C and
4 Witness B may be an eyewitness who may reasonably be
5 expected, his credibility may reasonably be expected
6 to be at issue, then that is sufficient, as I would
7 understand it under 2.310(d), to perhaps entitle the
8 person to a G proceeding on that contention.

9 And so there is that opportunity. Of
10 course, if that doesn't work, then there is also the
11 opportunity to request cross examination, etcetera,
12 under the L proceedings.

13 MR. SILBERG: I would note that 2.310(d)
14 refers to or contested matter, so that if you have an
15 eyewitness, his issues, that which he is putting
16 forth, would be the contested matter and I see no
17 basis for then making all of the expert witnesses who
18 also may be a part of that contention, subject to
19 Subpart G. And, you know, of course, then you get
20 into interrogatories, requests for productions,
21 admissions and the other parts of Subpart G that are
22 not part of Subpart L.

23 This may all be an academic exercise, but
24 I really think that if the Board is thinking that one
25 can convert a prior contention into a Subpart G

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1 hearing on that contention with all that that entails,
2 because there may be an eyewitness who may be subject
3 to motive, intent or credibility issues, I really
4 think that's not what the Commission had in mind when
5 it created the Subpart L procedure.

6 CHAIRMAN KARLIN: Okay. Thank you. Well,
7 let's move on to the next.

8 MR. ROISMAN: Mr. Chairman, I'm sorry,
9 this is Mr. Roisman.

10 CHAIRMAN KARLIN: I don't think we need to
11 address this anymore.

12 MR. ROISMAN: Oh, I don't --

13 CHAIRMAN KARLIN: We issued our ruling in
14 December. I think it is quite clear and we have asked
15 some questions here and we have gotten the information
16 we need.

17 MR. ROISMAN: Mr. Chairman, with all due
18 respect, it's a slightly different point. It doesn't
19 go to what the Board ruled on the 18th. It goes to
20 what it sounds like the Board is going to rule now.
21 If the Board rules that there is a time limit after
22 which the names of the witnesses are disclosed by
23 which there must be a Subpart G, I would merely
24 request that the Board frame that by saying after the
25 witnesses have been disclosed in compliance with

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1 336(a)(1), because we believe that there are
2 deficiencies in the disclosures that have been made
3 and would like an opportunity to address that and not
4 have the Board have already had our time limit for
5 requesting the Subpart G hearing pass before we have
6 determined whether or not the disclosures have
7 complied with Subpart 336(a)(1).

8 CHAIRMAN KARLIN: All right. Thank you.

9 MR. BLOCK: That would be our position,
10 NEC's position, as well, Judge. Thank you.

11 CHAIRMAN KARLIN: Very good. I do note
12 that everyone has made their disclosures, except the
13 State, Mr. Roisman. Where is your disclosure under
14 that rule?

15 MR. ROISMAN: We disclosed Mr. Sherman.

16 CHAIRMAN KARLIN: Has he filed something
17 here? I don't know that we have received anything you
18 filed in terms of disclosures under the 2.336.

19 MR. ROISMAN: It's contained in our cover
20 letter.

21 CHAIRMAN KARLIN: In your cover letter?
22 Okay. Well, I missed that entirely then.

23 MR. ROISMAN: And I apologize for us not
24 making it in a separate filing along with our document
25 disclosures.

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1 CHAIRMAN KARLIN: All right. I don't know
2 of anything you filed so far, sir, so, you know, maybe
3 we just missed it, but we'll get to that later.

4 MR. ROISMAN: I'm sorry, are you saying
5 that you haven't received our 336 filing?

6 CHAIRMAN KARLIN: Correct, nothing that I
7 recognize.

8 JUDGE RUBENSTEIN: This is Judge
9 Rubenstein. Is that your January 14th letter?

10 MR. ROISMAN: I'm sorry, Mr. Chairman. We
11 read the rule to say, and maybe we were mistaken in
12 this assumption, that we were not supposed to make all
13 these disclosures to the Board. We made our
14 disclosures to the parties and notified the Board that
15 we had made the required disclosures. We have no
16 problem with making it to the Board. We just didn't
17 know whether or not you wanted all that paperwork.

18 JUDGE RUBENSTEIN: Actually --

19 CHAIRMAN KARLIN: We don't.

20 JUDGE RUBENSTEIN: This is Judge
21 Rubenstein.

22 CHAIRMAN KARLIN: Go ahead, go ahead.

23 JUDGE RUBENSTEIN: Actually, on the first
24 page of your -- the middle of January 14th you say
25 pursuant to 336(a)(1), at this time, the person on

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1 whose opinion the party bases claims and contentions
2 and may rely upon as a witness in the case.

3 CHAIRMAN KARLIN: And that was it?

4 JUDGE RUBENSTEIN: That was it.

5 CHAIRMAN KARLIN: Okay. Yes. We
6 certainly don't expect you to provide us with all
7 those documents. No, we don't want that, but I was
8 looking for, for example, if you have a privilege log,
9 that is required.

10 MR. ROISMAN: We did not have one.

11 CHAIRMAN KARLIN: Well, you didn't say
12 that, I don't think. Okay.

13 MR. ROISMAN: It's also in the cover
14 letter, Mr. Chairman.

15 CHAIRMAN KARLIN: All right. I will look
16 at that. Perhaps I missed it. I was looking for
17 something that looked like a pleading.

18 JUDGE RUBENSTEIN: Let me understand.
19 What they are saying is in the cover letter was that
20 you had agreed with the other parties that you did not
21 have to make a privilege log, and because all they
22 were were some internal emails. Is that what you're
23 referring to?

24 MR. ROISMAN: Yes, yes, Judge Rubenstein,
25 that's right. The only items that fell within the

1 scope of the privilege log, that is literally
2 privilege, as opposed to proprietary, was of course
3 communications between counsel or communications
4 between counsel and their client and, by agreement
5 with the parties, it was determined that none of us
6 thought that any of us were entitled to such stuff and
7 we wouldn't require any party to have to make a
8 privilege log if that was what the privilege was.

9 JUDGE RUBENSTEIN: That's the way I read
10 it.

11 CHAIRMAN KARLIN: Okay. Well, I'll have
12 to --

13 MR. ROISMAN: That's why there is not a
14 formal privilege log. Now, to the extent that
15 proprietary documents are considered to be privileged,
16 we did identify in our documents list that we produced
17 that there were proprietary materials, which we were
18 not at liberty to turn over, not because we made them
19 proprietary, but because we received them from Entergy
20 and they were identified as proprietary and there were
21 two CD disks that contained both proprietary and non-
22 proprietary material.

23 We offered NEC access to any of the non-
24 proprietary material by them looking at the index of
25 the disk and telling us which ones they wanted. And

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1 of course, when this proprietary order issue is
2 resolved, we will be able to provide the rest of it.
3 And then we provided a long list of documents
4 consistent with the alternative form of disclosure and
5 offered the parties the opportunity to have us make a
6 copy of any of those documents that they wanted that
7 were not proprietary, and that we would provide it to
8 them or, alternatively, that they could come to our
9 offices and see the documents in the manner in which
10 we have kept them in our files and select from that
11 which ones they wanted to have copies of.

12 CHAIRMAN KARLIN: Okay. Well, all right.
13 While we're on that subject then, let me ask this
14 question. The Rule 2.336 requires -- well, let me
15 just back it up. The only discovery the parties are
16 going to get under this proceeding is, you know,
17 initial discoveries and supplemental disclosures that
18 are required under 336, essentially. 336 also
19 requires the production of a privilege log. The
20 privilege log could cover any category of document
21 that is claimed to be protected or privileged. It
22 could be proprietary. It could be attorney/client,
23 work product, etcetera.

24 I understand that you all have focused on
25 the proprietary and confidential and trade secrets

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1 area for your protective order, proposed protective
2 order, but with regard to all the other documents that
3 you may have that you are not disclosing under the
4 claim of attorney/client or attorney work product
5 privilege, as I understand it, you are waiving.

6 I'm going to go around the table here.
7 Are you waiving any claim or right, separate from the
8 protective order, to a privilege log on
9 attorney/client, attorney work product or any other
10 privilege, other than proprietary?'

11 MR. SILBERG: This is Mr. Silberg. First,
12 let me make a statement. Mr. Roisman and Ms. Hofmann
13 and I agreed as to the State, as to DPS, that we would
14 not insist upon them preparing a log of all the emails
15 that went back and forth between Mr. Roisman and Ms.
16 Hofmann and Mr. Sherman, and I think it was on that
17 basis, as reflected in their letter, that they did not
18 prepare a privilege log.

19 We did prepare a privilege log. We also
20 prepared an index of proprietary information and then
21 we have been seeking to get a protective order to
22 handle the proprietary information issue. I don't
23 think anyone is waiving any of the privileges,
24 attorney/client, attorney work product, as opposed to
25 the confidentiality business trade secrets, etcetera.

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1 With respect to NEC, they also filed with
2 their submission yesterday a statement that they were
3 also not going to file a privilege log because of
4 agreements that had been reached between ourselves and
5 the State and the Staff, but NEC never asked for that
6 permission and, as far as we were concerned, I assumed
7 that they were going to present a privilege log.

8 You know, privilege logs are routinely
9 prepared in litigation and, in some cases, people may
10 seek to obtain those documents notwithstanding
11 privilege or they may claim the privilege doesn't
12 apply, and I was, frankly, surprised when I saw the
13 submission from NEC that we did not have a privilege
14 log from them, you know.

15 CHAIRMAN KARLIN: Okay. Well, let me
16 just --

17 MR. SILBERG: I don't want to, you know,
18 push that.

19 MR. BLOCK: May I respond to that, Judge
20 Karlin?

21 CHAIRMAN KARLIN: No, no, no, not at the
22 moment. You will certainly have an opportunity to
23 respond, Mr. Block, but let me just understand what
24 Mr. Silberg has said. As I understand what you said,
25 Mr. Silberg, is that with regard to the State, you are

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1 waiving, Entergy is waiving any claim or right or
2 desire for a privilege log.

3 MR. SILBERG: Correct.

4 CHAIRMAN KARLIN: With regard to NEC, you,
5 at this point, have not waived any such claim or right
6 to a privilege log?

7 MR. SILBERG: No, I was never asked to.

8 CHAIRMAN KARLIN: Okay. And with regard
9 to yourself, if I understood what you just said, you
10 have prepared a privilege log?

11 MR. SILBERG: That is correct, and we
12 supplied it to the parties.

13 CHAIRMAN KARLIN: But it has not been
14 filed?

15 MR. SILBERG: Yes, it has.

16 CHAIRMAN KARLIN: Has it been filed with
17 us?

18 MR. SILBERG: Yes.

19 CHAIRMAN KARLIN: Where is that? Gee, I
20 just didn't see that. I have got your filings. When
21 did you file a privilege log?

22 MR. SILBERG: Well, I'll have to check.
23 I know it was provided to the parties. I will have to
24 see if that was not supplied to the Board. Did we
25 send the Board our --

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1 CHAIRMAN KARLIN: Well, what you said, I'm
2 looking at January 18th, Entergy's initial discovery
3 disclosures. Let me just see here. You have got
4 identify of persons that might be relied upon,
5 contention by contention.

6 MR. SILBERG: Well, if we didn't, we will
7 be happy to provide that to the Board immediately.

8 CHAIRMAN KARLIN: You have got documents
9 and data compilations, and then you have under A3, you
10 know, privileged and protected. I just didn't find,
11 and maybe I missed it, that you filed a privilege log.

12 MR. SILBERG: Okay. Well, I think it was
13 supplied to the parties, but not to the Board. We
14 will be happy to make a copy available to the Board.

15 CHAIRMAN KARLIN: Thank you. Yes, we
16 would like that filed within in the next, let's say,
17 five days, please.

18 MR. SILBERG: Not a problem.

19 CHAIRMAN KARLIN: All right. So now, I
20 have heard from Mr. Silberg. And with regard to the
21 Staff, the NRC Staff, who has claimed party status, do
22 you waive any request? They have already filed
23 privilege logs in two ways. One, proprietary
24 information and two, what is it, limited privilege.
25 Did someone just join the call? I heard a beep.

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1 Okay.

2 MR. NICHOLS: Yes, this is Craig Nichols
3 joining back in. I apologize, I was cut off.

4 CHAIRMAN KARLIN: Okay. Do you waive with
5 regard to the Staff anything privileged such as
6 attorney/client or any work product?

7 MS. POOLE: It was our understanding that
8 we were waiving the attorney/client privilege as to
9 the State and that is fine. We're happy to do that.

10 CHAIRMAN KARLIN: No, no, I'm asking
11 Entergy.

12 MS. POOLE: Oh, I'm sorry.

13 CHAIRMAN KARLIN: Are they waiving the
14 Staff's attorney/client, attorney work product?

15 MS. POOLE: Sorry about that.

16 MR. SILBERG: Yes.

17 CHAIRMAN KARLIN: Yes? Okay. Yes. All
18 right. Mr. Roisman, what is your status, vis-a-vis,
19 privilege log waiver?

20 MR. ROISMAN: Well, first of all, I feel
21 like I have egg on my face. We read these regulations
22 as not requiring these documents to be filed with the
23 Board, that they were documents to be exchanged
24 between the parties and the Board should be alerted to
25 the fact that they had been done, and we apologize for

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1 that.

2 And because our filings seem to have
3 created a confusion and, if the Board wishes, they can
4 destroy it when they get it. We are going to send you
5 a copy of what we sent to the other parties, because
6 it does include listing of documents within it that
7 are listed as privileged, in the sense that they are
8 proprietary, protected documents. That's number one.

9 Number two, with regard to the issue, I
10 think the agreement that we had with Mr. Silberg and
11 with the Staff was, essentially, that if lawyers were
12 communicating with their clients or with each other,
13 nobody could possibly come up with a legitimate
14 justification for how you could get your hands on
15 those, so why go through the trouble of listing them
16 all and, of course, we didn't. They agreed not to.
17 We didn't think they had to list them and to the
18 extent that they did list them, that's all right. We
19 still don't think we would fight about that.

20 That said, I'm not quite sure which
21 category, given the terms you have used, the Staff's
22 listing of documents as deliberative privilege fits
23 into, but we certainly, A, do not waive their
24 obligation to make a list, which they have done and,
25 B, nor do we waive our right to contest that list,

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1 "which we may do."

2 CHAIRMAN KARLIN: So the State has waived
3 the attorney work product, attorney/client privileged
4 log from the Staff and from Entergy?

5 MR. ROISMAN: Yes, as long as what we call
6 these protected -- as long as what we're listing in
7 that doesn't include the deliberative privilege that
8 the Staff has claimed, and they have made a log, so it
9 doesn't matter if we waived it or not.

10 CHAIRMAN KARLIN: And are you willing to
11 have NEC go without filing a privilege log? See,
12 here's where I'm trying to get. I'm trying to get to
13 whether we need a privilege log or not and I want to
14 hear from each of you affirmatively that you are
15 waiving the requirement that all other parties submit
16 a privilege log for attorney work product and
17 attorney/client documents. If I hear that, then we'll
18 waive it. If somebody is still demanding it, then we
19 have got a problem.

20 MR. ROISMAN: Okay. All right. With
21 regard to NEC, we waive any right we might have,
22 assuming we had any right, to have a privilege log
23 from them and the same with regard to Entergy and the
24 same with regard to the Staff, all to the extent the
25 privilege claim that we're waiving it to is the

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1 privilege of either attorney work product or
2 attorney/client privilege.

3 CHAIRMAN KARLIN: Right.

4 MR. ROISMAN: And just in case there is
5 some case out there that I don't know about, if either
6 of those terms has ever been interpreted to include
7 the deliberative process privilege, we're not waiving
8 it as to that.

9 CHAIRMAN KARLIN: All right. Okay. Well,
10 all right. We have heard from -- Mr. Block, now,
11 perhaps you could address these issues.

12 MR. BLOCK: Thank you, Judge. We have
13 looked at the letter, which I guess we got and you
14 didn't, the State's letter in which they set forth how
15 an agreement had been reached, and we read it as an
16 agreement had been reached between them and Entergy
17 and the NRC Staff on this. And since nobody had
18 invited us to those discussions, we just said we
19 concur. And I would say that we're certainly willing
20 to waive it in regard to the other parties to the same
21 extent that Mr. Roisman described their willingness to
22 waive it. We wouldn't want it to go as far as the
23 deliberative process, but certainly not to all the
24 email messages that fly back and forth.

25 I guess, you know, if Mr. Silberg and his

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1 clients are really interested and the Staff is really
2 interested in seeing a list of, you know, all of the
3 email that Mr. Shadis and myself and anybody else that
4 we're dealing with have had with one another, we'll
5 make it for them if that's what we have to do, but I
6 think it's an utter waste of time and unduly
7 burdensome and will not produce anything to which they
8 would be entitled to under any claim that I can
9 imagine.

10 CHAIRMAN KARLIN: Okay. So you are
11 amendable to neither -- none of the other parties are
12 required, as far as you're concerned, to file a
13 privilege log with regard to attorney/client or
14 attorney work product?

15 MR. BLOCK: Right, and only the
16 deliberative acts would be required.

17 CHAIRMAN KARLIN: All right.

18 MR. BLOCK: We don't see it.

19 CHAIRMAN KARLIN: All right.

20 MR. BLOCK: You know, we wouldn't ask for
21 it just as Mr. Roisman wouldn't.

22 CHAIRMAN KARLIN: Okay. So if I count up
23 the heads on this one, the only person who still has
24 not come on board is Mr. Silberg. Are you amenable to
25 NEC not having to file a privilege log for

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1 attorney/client, attorney work product?

2 MR. SILBERG: If it is truly
3 attorney/client or attorney work product, I would be
4 willing to waive it. My only concern is that before
5 Mr. Block was retained, Mr. Shadis was the
6 representative and I would not want to waive a
7 production of communications between Mr. Shadis and
8 Mr. Gundersen and Mr. Blanch, because I don't think
9 any of the privileges apply to those.

10 CHAIRMAN KARLIN: Yes.

11 MR. SILBERG: But communications to and
12 from Mr. Block, I don't have a problem with waiving
13 that.

14 CHAIRMAN KARLIN: Okay. Well, that's
15 helpful. What we have then is under the 2.336, each
16 party is obliged to provide to the others either the
17 documents or make available the documents that are
18 relevant to the contentions, as well as the identity
19 of persons who might be relied upon as witnesses. And
20 they are also obliged to provide a privilege log,
21 essentially under (a) (3), to the other parties.

22 Right now, each party is providing certain
23 documents to the others and the parties are not
24 providing a privilege log. Therefore, you will not
25 know, I suspect, Mr. Roisman, nor will anyone else

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1 know, Mr. Silberg, what is missing, but that is kind
2 of the way it works.

3 MR. SILBERG: Well, Mr. Chairman, we have
4 produced to Mr. Block a log of privileged, in the
5 sense of proprietary information, and we are preparing
6 a similar log for Mr. Roisman. We explained to him if
7 he agreed that even though we were not able to get
8 that to him by the 18th, that that was -- you know, a
9 few days delay on that was acceptable to him.

10 So we have provided a privileged, in the
11 sense of confidential business trade secret
12 information, log to both parties and we have given and
13 will give the further production of those logs to the
14 Staff as well. And if the Board would like them, we
15 would be happy to make them available to the Board.

16 CHAIRMAN KARLIN: Yes. What I would like
17 is to follow the model of the Staff in this regard to
18 see the privilege logs that are being submitted. We
19 don't want to have the documents themselves, either
20 the ones that are being provided, certainly, nor the
21 ones that are claimed to be privileged. We don't want
22 those, the documents, but we do want the privilege
23 logs.

24 MR. SILBERG: Okay. We will be happy to
25 make those available.

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1 CHAIRMAN KARLIN: Thank you. And we
2 recognize that everyone has now agreed that they don't
3 need to do a privilege log for attorney/client,
4 attorney work product.

5 MS. POOLE: Judge Karlin, this is Brooke
6 Poole. May I just say one quick thing?

7 CHAIRMAN KARLIN: Sure.

8 MS. POOLE: I just want to clarify for Mr.
9 Block that the Staff, we prepare our privilege logs by
10 privilege, as you saw. We had one for proprietary,
11 one for deliberative process. We do not consider
12 attorney work product and attorney/client information
13 to be classed with deliberative process. Therefore,
14 we would do those separately. There was no
15 attorney/client privileged information identified in
16 the deliberative process log and we will, of course,
17 continue to provide the deliberative process. And I
18 just wanted to make that point, that we consider them
19 differently, so we understand that deliberative
20 process is still going to be produced in the logs.

21 CHAIRMAN KARLIN: Okay. That's very good.

22 MR. BLOCK: Judge Karlin, I don't think we
23 have resolved an issue that Mr. Silberg raised as to
24 the other parties and to himself where he seems to be
25 indicating that he would like a log of all the

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1 communications that Mr. Shadis made with his experts
2 prior to retaining counsel. And I guess I would like
3 to see the Board make a specific ruling on that
4 request, because I think that given that he was
5 uncounseled and unaware of where this might lead, that
6 it's going to entail motion practice unless there is
7 some kind of exclusion.

8 It may well be that Mr. Shadis has
9 cleverly deleted everything that, you know, he had on
10 his hard drive and so, you know, it won't be relevant,
11 but I think that we're going down, you know, an alley
12 here where we'll be making, again, unnecessary work
13 leading to the conclusion that Entergy is asking for
14 the production of things that, if not questionably, an
15 entitlement at all, certainly something that would not
16 be really relevant or useful to them in any way.

17 MR. SILBERG: Well, if they are not
18 relevant related to the contentions, then we don't
19 want them. But it seems to me and I guess we don't
20 even need the log, because what we're really entitled
21 to are copies of those communications. And I would
22 certainly hope at least, if they still exist as of
23 this minute, that they will not be deleted, because
24 they ought to be produced as part of the initial
25 document disclosure and they shouldn't have been

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1 deleted.

2 MR. BLOCK: Well, I do know that, just for
3 your information, Mr. Silberg, just prior, within a
4 matter of days of my coming on board, I know that Mr.
5 Shadis was complaining bitterly to me that he had just
6 lost his computer and that everything was gone and he
7 had to get a new computer. So I really don't know how
8 much information there would be. And he spent a lot
9 of the time when I first started working with him
10 collecting back from me pieces of information that I
11 had picked up from other sources that have nothing to
12 do with, you know, the kind of communications that
13 you're talking about just so that he could, you know,
14 get moving again.

15 MR. SILBERG: Whatever exists, exists,
16 whether it's Mr. Shadis' computer or Mr. Blanch's or
17 Mr. Gundersen's, but it seems to me if those weren't
18 produced, they should have been.

19 CHAIRMAN KARLIN: Yes. All right. Let's
20 just move on from this and I will tell you what I'm
21 thinking, as to what my thinking is. Mr. Block has an
22 obligation under this 2.336 to provide to the other
23 parties the documents that are relevant to the
24 contentions. You have an obligation to provide a
25 privilege log. However, we have all agreed now you

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1 don't have to do one for attorney/client or attorney
2 work product.

3 MR. BLOCK: Correct.

4 CHAIRMAN KARLIN: Including deliberative
5 privilege, most of which actually doesn't apply to a
6 private party to begin with. In any event, if there
7 are documents -- so you're going to do that. You're
8 going to provide relevant documents to Mr. Silberg and
9 everyone else and you're going to --

10 MR. BLOCK: Well, what I'm going to have
11 to do now, I guess, is I'm going to have to get in
12 touch with these people and ask them to provide me
13 with whatever it is that they have left from the
14 period of time prior to my becoming counsel with them,
15 and then review all of it and as quickly as I can, if
16 there is anything in there that I don't see a
17 reasonable objection to, to provide it and the things
18 that I think that are reasonably objected to, whether
19 it's on relevance or other grounds, I would so state
20 and offer a log of those things. And I guess if they
21 want to be contested, they will have to be contested.

22 CHAIRMAN KARLIN: That's right. And you
23 know, certainly, your obligation to produce the
24 documents under 2.336 doesn't begin with the date that
25 you started on this thing. You're supposed to go

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1 through whatever you and your client have and produce
2 the relevant documents.

3 If you fail to produce the relevant
4 documents and if Mr. Roisman or someone, I'm sorry,
5 Mr. Silberg or someone else sees a gap in there, they
6 can make a motion for production. They can make a
7 motion objecting to the adequacy of what you have
8 disclosed here and say where are all the Ray Shadis
9 documents of such and such a vintage, and we can have
10 a fight about that later. So you know, but you do
11 have an obligation to produce them.

12 MR. BLOCK: Well, I will try, as best as
13 I can, to put that word out to the parties who were
14 communicating, and I don't know if Mr. Shadis is still
15 on the line and hears this. If he is, we will have to
16 confer later and then, at that point, Mr. Silberg, I
17 give you my personal assurance that by early next week
18 we should be able to have something in hand for you to
19 deal with this if that is acceptable.

20 MR. SILBERG: Yes. I mean, I'm not asking
21 anybody to kill themselves 24 hours a day, but yes, we
22 would like to see those.

23 MR. BLOCK: Well, I guess, anything that
24 we're not objecting to your seeing, we'll try to make
25 available and what we do object, we'll in a timely way

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1 give you a log of those things and we'll be able to do
2 the dance after that if that's what's necessary.

3 MR. SILBERG: Okay. That will be great.

4 CHAIRMAN KARLIN: Okay. And we want to
5 see the privilege logs that are filed.

6 MR. BLOCK: Correct.

7 CHAIRMAN KARLIN: Okay. We have got 15
8 minutes to complete this call. We had a two hour time
9 frame. So I want to move on to -- well, we have the
10 discussion on the RAIs and the discovery on the Item
11 No. 7. I would prefer, at this point, to go on to the
12 motion for the protective order, because I think we
13 need to address that.

14 Yes, well, Jonathan, why don't you see if
15 we can extend this call. Jonathan Rund, our law
16 clerk, will see if we can extend this call. Let's
17 move on to the motion for protective order. I would
18 like to hear from Mr. Silberg as to the status of the
19 motion for protective order and then from the Staff
20 and then from anyone else who wants to speak.

21 MR. SILBERG: Well, the status is that we
22 filed it. I believe that it reflects the agreement of
23 both the State and NEC. I believe that the Staff did
24 not object to it as it applies to the State and NEC.
25 The Staff can speak for itself, but they believe it

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1 should not be made to apply to them because of their
2 independent FOIA responsibilities.

3 Now, I can address some of those issues,
4 as well, because I think there are, you know, cases
5 out there in which the Appeal Board did make
6 protective orders binding on the Staff notwithstanding
7 FOIA, and I would call the Board's attention to
8 Virginia Electric ALAB 555, a 1979 decision. And then
9 also in a recent --

10 CHAIRMAN KARLIN: Would you give me that
11 cite again?

12 MR. SILBERG: Yes, ALAB 555, it's 10 NRC
13 23 and if you will look towards the end of that
14 decision, I think on page 29 they ordered documents
15 turned over by Westinghouse and barred the NRC from
16 disclosing it to anybody outside the Commission.

17 And then the decision in Sequoia Fuels,
18 LDP 95-05, 41 NRC 253, an April 1995 decision, as I
19 read it, tells the Staff that they shall -- that the
20 Board will determine if any FOIA issues that arise --
21 I'm sorry, that the Board will make a determination of
22 any FOIA issues that will arise and, therefore, you
23 know, it becomes a Board issue rather than a Staff
24 issue. And that would be 41 NRC at page 266.

25 CHAIRMAN KARLIN: Page 6?

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1 MR. SILBERG: 266.

2 CHAIRMAN KARLIN: 266? Okay. Well, let
3 me ask this, Mr. Silberg.

4 MR. SILBERG: Also, I do want to point
5 out, and I'm not sure I quite understand this, but
6 there is language at page 260 that says the Staff is
7 not obligated to enter into such a prearranged
8 protective order, but its participation is a
9 recognition that its execution will be in the Agency's
10 best interest.

11 CHAIRMAN KARLIN: Okay.

12 MR. SILBERG: I'm not exactly sure what
13 that means, but it does seem to say that the Board can
14 have some control over the Staff's FOIA obligations.

15 CHAIRMAN KARLIN: All right.

16 MR. SILBERG: The other point I would like
17 to make, the Staff has proposed a resolution to handle
18 what they see as their problem, which is acceptable to
19 us, which is that they will come and look at
20 proprietary information at our offices. If they
21 believe that they want copies of any, then we can, if
22 it's not a voluminous number, we will prepare
23 individualized affidavits for that.

24 CHAIRMAN KARLIN: I have got a couple of
25 questions about the protective order. First, it seems

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1 to me that you probably want to have an obligative
2 requirement for the materials to be marked, so that
3 everyone who is looking at these pieces of paper can
4 know from a glance that it is covered by the privilege
5 or this claim.

6 MR. SILBERG: Yes. All of our protective
7 information is marked already.

8 CHAIRMAN KARLIN: That does not seem to
9 appear from the protective order draft that you have
10 submitted. There is apparently no requirement to mark
11 it. I would suggest that this is a valuable thing.

12 MR. SILBERG: Okay. I have certainly no
13 objection to that.

14 CHAIRMAN KARLIN: And then on paragraph 1,
15 I guess, on page 4, you have this 45 day period, which
16 you have added in the new version of the protective
17 order. That is problematic. My inclination is that
18 is problematic, because, once again, that puts us at
19 a crunch time at the very end of the process to try to
20 rule on motions dealing with proprietary status and I
21 would move anything like that up further in the
22 process.

23 MR. SILBERG: Well, actually, I think that
24 that really is going to come much earlier, except for
25 late filed documents and we have provided that those

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1 would be within seven days after the documents are
2 received. You know, most of these are going to be in
3 the initial document disclosure and it's kind of a
4 running -- and it's updated, it will be updated.

5 CHAIRMAN KARLIN: All right. I think that
6 the --

7 MR. SILBERG: I think the 45 days is going
8 to be an early, I guess --

9 CHAIRMAN KARLIN: I don't want it to be 45
10 days before the hearing. I want it to be X days after
11 the document has been received, so that it comes out
12 earlier. And finally, a question here.

13 MR. SILBERG: That was as originally
14 written and we have made that change at the request of
15 the State, of DPS and NEC.

16 CHAIRMAN KARLIN: I understand that that
17 was a change that was brought in the second draft.

18 MR. SILBERG: Right.

19 CHAIRMAN KARLIN: The second point, let me
20 just add here we have learned, perhaps happily,
21 perhaps not, that we have another hour on this call at
22 least available. That doesn't mean we have to take
23 it, but we have got some extra time.

24 MR. SILBERG: Okay.

25 CHAIRMAN KARLIN: All right. Finally, is

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1 there a need for a protective order at all under
2 federal rules and under the Subpart G, which are not
3 applicable here? Protective orders are, you know,
4 usually often for a situation where the parties are
5 unable to reach agreement. Here you have reached an
6 agreement amongst yourselves, and I am tending to
7 think that that is the decision and you need no
8 protective order from us at all, just have a written
9 agreement amongst yourselves.

10 MR. SILBERG: Well, that then leaves the
11 issue of the Staff hanging.

12 CHAIRMAN KARLIN: Well, the Staff has
13 already said it won't participate and I think there is
14 an issue here that is equally applicable to the Board,
15 which is the Staff's position may apply to the Board,
16 as well, which is we are maybe -- have a blanket of
17 protective order over documents where there has been
18 no agreement by the parties that it is, in fact,
19 proprietary. Why should we even throw that blanket
20 over the document?

21 MR. SILBERG: Well, because there is a
22 process here to resolve that. You will have the same
23 problem with a protective agreement, except we may
24 wind up having to litigate every document in advance.
25 The other major logistical problem is if we have

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1 protective agreements, we're going need a multiplicity
2 of those agreements, because we have not only Entergy
3 documents, but GE documents, Stone and Webster
4 documents, Framatome documents, Erin Engineering
5 documents and each of those -- and we had provided
6 drafts of those to both DPS and NEC, and that means we
7 would have to get them signed by each of the
8 companies. So it's a much more logistically, you
9 know, burdensome process.

10 CHAIRMAN KARLIN: I see no need to have
11 Stone and Webster or Westinghouse or anybody else sign
12 the documents. You're the party here. You sign the
13 confidentiality agreement and the other parties sign
14 the confidentiality agreement.

15 MR. SILBERG: That would be fine, Your
16 Honor, if they were our documents. But if those
17 companies insist on that protection, we can't make
18 those documents available. We don't have that
19 contractual right if that is what those parties
20 desire. It is typical.

21 JUDGE BARATTA: I disagree with you there.
22 I believe if you go back and you look at those
23 agreements, they do allow you to extend those
24 documents to other parties based on certain
25 considerations, including contractual relationships.

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1 You clearly have a contractual relationship with the
2 other parties.

3 MR. SILBERG: I'm sorry, which document
4 are you referring to that gives us that right?

5 JUDGE BARATTA: A proprietary agreement
6 that you have, say, with Westinghouse or Stone and
7 Webster or GE.

8 MR. SILBERG: Well, that has not been the
9 way it has been applied in this case, in a State
10 proceeding. There were separate agreements with those
11 parties. You know, at that point, we would have to go
12 back and explore that with each of those companies.
13 The proprietary order from the Board seemed to be a
14 much simpler, more straightforward approach that would
15 solve a lot of problems.

16 And if we have to go back and now reopen
17 that discussion, first of all, as between Entergy and
18 the companies, our contractors, and then between
19 Entergy and those companies and DPS and NEC, it's just
20 going to take a lot longer before we can get the
21 proprietary documents into the hands of the other
22 parties.

23 CHAIRMAN KARLIN: Well, we'll think about
24 how we can grapple with that, but as I see it, you
25 know, the parties at this table right now are the ones

1 we're concerned with and if you or any one of you
2 possess certain documents and they are relevant to
3 this proceeding, you must either produce them or you
4 must produce a privilege log saying why you're not
5 going to produce them or there must be a protective
6 order covering them.

7 What agreements you may have or do not
8 have with third parties outside of this room, outside
9 of this proceeding, is not really our problem and if
10 we find that something needs to be produced, we will
11 order it to be produced regardless of what that
12 agreement says, and you can appeal it or not.
13 Usually, those agreements, if I am not mistaken, say
14 that documents will be protected, but if a court of
15 competent jurisdiction orders that they be provided,
16 you can notify whoever it is if you think they have
17 got a right and let them complain about it, but you
18 know.

19 MR. SILBERG: Well, I agree and, in fact,
20 you are the court of competent jurisdiction and that
21 is why we were relying on a protective order from you
22 that would allow us to turn the documents over. If
23 you require us to negotiate separate agreements, then
24 there is no order of a competent court that affords
25 that protection.

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1 CHAIRMAN KARLIN: Okay. I see that logic.
2 I understand that. That is useful and helpful. Okay.
3 Staff, perhaps you could address this issue and, in
4 particular, I would like you to sort of distinguish.
5 In a sense, you're a part of NRC, subject to FOIA. We
6 are part of NRC, subject to FOIA, too, in a way. And
7 why is it that you can sort of wash your hands of this
8 protective order, but leave it to us to issue it?

9 MS. POOLE: Well, I wouldn't say we're
10 washing our hands of it entirely. We just feel we're
11 on a different footing from the private parties in
12 this proceeding and that we have no interest in
13 disclosing to the public anybody's proprietary
14 information.

15 However, as it's drafted, the protective
16 order says that documents identified by Entergy as
17 proprietary shall be deemed to contain proprietary
18 trade secrets and commercial and financial
19 information. And our concern is such a broad blanket
20 determination will be insufficient for us to withhold
21 the documents from FOIA requests since the procedures
22 under Section 2.390 were not followed.

23 Now, we do think that the Licensing Board
24 certainly has the authority to issue a protective
25 order on proprietary information, and we're familiar

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1 with the case law that Mr. Silberg mentioned; the
2 North Anna case and old Wolf Creek case that's ALAB
3 327, 3 NRC 408. And what the Hearing Board in that
4 case concluded, and I believe this is still good case
5 law, the Licensing Board makes a finding, you know,
6 that the information is of a type customarily held in
7 confidence. There is a rational basis for having held
8 it in confidence. It has been, in fact, kept in
9 confidence and it is not found in public sources.

10 In essence, the Board is making a
11 proprietary determination as to each document and that
12 is fine, but that is not what is being proposed here
13 and we're concerned that we won't be able to withhold
14 documents that we receive under this order if we were
15 to receive a FOIA request.

16 CHAIRMAN KARLIN: Well, okay. The Board
17 makes a finding of the elements relating to, you know,
18 the validity of the proprietary claim. At this point,
19 what we're being asked to do is sign a protective
20 order before we have made any such finding. Don't you
21 find that is just as problematic as your situation?

22 MS. POOLE: It is problematic, yes, but I
23 guess our thought was the Licensing Board wouldn't
24 receive the documents.

25 CHAIRMAN KARLIN: We will not have

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1 physical.

2 MS. POOLE: You won't have physical so,
3 therefore, if a FOIA request came to the Agency, you
4 wouldn't be put in the same situation that the Staff
5 would be if we had them.

6 CHAIRMAN KARLIN: I --

7 JUDGE BARATTA: What would happen though
8 if those documents were, at some point, produced?

9 MS. POOLE: Well, we would seek that they
10 be submitted. You know, if we would receive them, if
11 they were used, we would receive them and they would,
12 therefore, come to us under 2.390 as we discussed, Mr.
13 Silberg and I discussed that, and that seemed to be a
14 satisfactory arrangement.

15 In that case, once a proprietary
16 determination was made, we could hold the documents in
17 confidence. If we did not find that a determination
18 could be made under 2.390, we would have to go through
19 the process in that regulation and find a way either
20 to further narrow the scope of what needed to be
21 redacted and, you know, work it out in that way.

22 CHAIRMAN KARLIN: I think that is probably
23 the right approach and I hope, Mr. Silberg, you're
24 listening, because we may end up with an instruction
25 for a revised protective order to accommodate that,

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1 the issue being, you know, you all can exchange
2 documents under a protective order, but once it comes
3 into pleadings, into this proceeding, we are loathed
4 to label it privileged or proprietary simply upon the
5 say-so of the private parties. We have to make a
6 determination whether to permit it or not.

7 MR. SILBERG: Well, that has not been the
8 course in other hearings. Certainly the lengthy
9 hearings we had on financial matters and private fuel
10 storage, the Board did accept that information. In
11 fact, the Commission has just issued an order on how
12 to treat that. There was no individualized finding in
13 that case.

14 I would note that in the North Anna case
15 that I cited before, the Board explicitly declined to
16 find that Westinghouse, whose documents they were, had
17 met its burden of showing that the information in
18 question is proprietary. Yet, they still issued the
19 proprietary order. And if you look, that's on page
20 28. The paragraph begins "Because no party has
21 opposed an objection."

22 CHAIRMAN KARLIN: Page 28?

23 MR. SILBERG: Yes, 28 of 10 NRC.

24 CHAIRMAN KARLIN: Oh, okay.

25 MR. SILBERG: "In doing so, however, we

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1 explicitly declined to find that Westinghouse had met
2 its burden of showing that the information in question
3 is proprietary in character and entitled to protection
4 from public disclosure under the standards set forth
5 in Wolf Creek ALAB 327."

6 CHAIRMAN KARLIN: Let's see. I don't know
7 who we haven't heard from at this point. I think Mr.
8 Roisman, have you addressed this yet?

9 MR. ROISMAN: No, I haven't, Mr. Chairman.

10 CHAIRMAN KARLIN: Have not filed. The
11 motion for a protective order was filed, was amended,
12 and you all did not file any response, so let's hear
13 what you have to say here, I guess.

14 MR. ROISMAN: Yes. We didn't file a
15 response because, as you can see in the body of it, we
16 had authorized Mr. Silberg to indicate that --

17 CHAIRMAN KARLIN: Hello?

18 (Conference call terminated.)

19 (Whereupon, at 4:00 p.m. a recess until
20 4:04 p.m.)

21 CHAIRMAN KARLIN: All right. Let's go back
22 on the record.

23 I think all parties are present with this
24 counsel. Let's see, where were we?

25 Is the representative from the Rutland

1 Herald on the line? No. Well --

2 MR. BLOCK: Is Mr. Shadis back on the line
3 here?

4 MR. SHADIS: Yes, he is.

5 CHAIRMAN KARLIN: Yes. Mr. Shadis is here.

6 So, I mean, I'm not going to be calling up
7 members of the public and ask them to joint. If any of
8 you want some of your associates to call Ms. -- what's
9 her name? Smallheer up and she can joint us, that's
10 fine. But I think we need to proceed.

11 I'm sorry it's been taking this long.
12 Let's see if we can move it along.

13 MR. BLOCK: Judge?

14 CHAIRMAN KARLIN: Yes.

15 MR. BLOCK: I hate to interfere with the
16 agenda when we're late, but Mr. Shadis was
17 communicating with me during the time that we were off
18 the line and is very concerned and would like an
19 opportunity to have me address very briefly the matter
20 of his need to file any kind of a response from Mr.
21 Silberg. And he had a couple of points that he'd like
22 me to make. If you we could give me, maybe, one
23 minute or so at some point, that would be useful.

24 CHAIRMAN KARLIN: Mmm. Well, I'm not --
25 all right. Why don't you go ahead and address that

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1 right now. But I think the point is you're
2 representing NEC, you're not representing Mr. Shadis.
3 But Mr. Shadis is a, as I understand it, an agent of
4 NEC. Well, if you've got something to file that NEC
5 has got to file that's from Shadis, file it. Okay?

6 One minute.

7 MR. BLOCK: He wanted me to assert that,
8 first, he believes that the same protections of
9 attorney/client privilege should apply to his
10 communications when he was representing the
11 organization in a pro se capacity. He's certainly
12 willing to swap logs with Mr. Silberg for the period
13 of time prior to the time that they retained me, but
14 would it have to be on a straight swap with him. And
15 that's really, you know, how would it have to be. And
16 he feels that his communications have the same
17 protected character as those that would have taken
18 place had NEC had a hired attorney at that point.

19 CHAIRMAN KARLIN: Okay. Well, I
20 understand that argument. I don't necessarily buy it.
21 If in fact it comes to an issue, you all can brief
22 that issue and we'll have to decide, whether or not a
23 pro se representatives enjoys that or not. I believe
24 there's some case law on union representatives on that
25 going both ways, and we'll get into it if we have to.

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1 MR. BLOCK: Thank you, Your Honor.

2 CHAIRMAN KARLIN: Okay. All right. Where
3 are we? Protective order, I believe Mr. Roisman was
4 addressing the state's position on that, which is
5 essentially consenting to it, if I understand it?

6 MR. ROISMAN: Yes,, but I had wanted to
7 defend against your questioning of Mr. Silberg of 45
8 day provision, and I was in the process of explaining
9 that in the original version we were to respond, any
10 party was to respond within 7 seven days after getting
11 the privilege document if they thought that the
12 privilege didn't apply. And what I had suggested to
13 Mr. Silberg was that that time was so short that it
14 almost meant that if we thought that was ever going to
15 be an issue, that any party would feel compelled to
16 file an objection as to every privilege document
17 because they wouldn't be able to ascertain in that
18 period of time which privileged documents they really
19 cared about.

20 So I proposed to him, and we negotiated
21 about the time limit, that there was a later time in
22 the process when the parties would have reason to
23 believe that there were certain documents that they
24 cared about and certain ones that they didn't care
25 about with regard to whether the privilege applied.

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1 And that that was the time that they would be filing
2 their testimony and intending to rely on the document,
3 or making a pleading and intending to attach or rely
4 on the document, and that we should therefore back up
5 from that period a certain amount of time. I
6 originally proposed 30 days. Mr. Silberg thought 60
7 days. As you would expect, we compromised on 45 days.
8 And I think that that there is a substantial reason if
9 the Board is concerned that this issue not become a
10 tail that wags the dog, that we try to narrow down the
11 number of documents that are going to be in dispute
12 with regard to whether they are titled to privilege
13 status to the smallest number. We can't make that
14 determination this early in the process.

15 We thought that 45 days before the
16 pleading was filed, which might be either prefiled
17 testimony or it might be some motion or something like
18 that, to keep it from becoming a critical path item.

19 If the Court thinks that there needs to be
20 more time than that to keep it from being critical
21 path, we're willing to listen to some other reasonable
22 time. But we think that the key is to date it from
23 when the document intends to be used, rather than the
24 date of the document being produced.

25 MR. SILBERG: I would note, Mr. Chairman,

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1 that probably a 1,000 documents so far that are
2 proprietary that we are prepared to turn over to the
3 parties once the appropriate protective order is put
4 in place. I mean, it's a nontrivial number of
5 documents.

6 MR. BLOCK: Judge Karlin?

7 CHAIRMAN KARLIN: Yes.

8 MR. BLOCK: This is John Block for NEC.
9 Might I make a comment at this point?

10 CHAIRMAN KARLIN: May I ask, does somebody
11 have something beeping on this line?

12 MR. ROISMAN: I can hear it, but it's not
13 from my end.

14 MR. BLOCK: Same here.

15 CHAIRMAN KARLIN: All right. Well, go
16 ahead, Mr. Block.

17 MR. BLOCK: Briefly. We tend to agree,
18 again, with the decision of the state on this. And it
19 is true that that was a compromise number. I'd had
20 some discussions with DPS and with Entergy trying to
21 solve this. And, you know, we were trying to take it
22 from -- and I agree from Mr. Roisman. Take it from
23 the position of if you're going to try to use the
24 document. But he mentioned, you know, an attempt to
25 narrow and I had raised this with Mr. Silberg and it

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1 was shaken off. And I also think that was in his
2 original motion. That, you know, if this has been
3 another type of situation and this was about
4 compliance with, you know, the reg, which is 390, then
5 they would have had to provide some kind of a log that
6 identified everything. And our suggestion had been
7 originally show show that to us, we'll tell you what
8 it is that we want and sign agreements to get those
9 things. And I think that kind of narrowing could
10 actually end up helping, even if it meant that he had,
11 you know, an extra period of time of a couple of weeks
12 to put it together, that then we'd be able to narrow
13 down, you know, how much was being covered. It would
14 also provide the staff with what they need. And in
15 that way, there would be the least problem.

16 Also in dealing with what the staff was
17 staffing about FOIA, I think there's still a problem
18 here in the sense that if I want to make a continuing
19 FOIA request for any documents that are produced
20 between the staff and Entergy that are written
21 documents showing what they've looked at, you know,
22 without disclosing it's contents, again, the same type
23 of information; author, title, some description of it,
24 number of pages, that kind of thing, who is claiming
25 privilege that I should be entitled to do that under

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1 FOIA.

2 So I don't think the staff can skirt the
3 problem of the conflict between the rule and the
4 statute and where compliance has to be had. And
5 there's why I think the best way is to just begin by
6 saying there should be a list provided to the parties
7 of all these documents that are relevant to their
8 contentions so that they can say back to Entergy, look
9 we're going to need to sign agreements with you to get
10 X, Y and Z. That would be my suggestion.

11 MR. SILBERG: We have provided that log to
12 you, Mr. Block.

13 MR. BLOCK: Okay.

14 CHAIRMAN KARLIN: All right. That's one of
15 the things that I was not -- you are going to share
16 with us within a week, and that is what we would call
17 the privileged log for proprietary documents that's
18 already provided. This is the 1,000 or so documents
19 that you or Mr. Silberg, I think --

20 JUDGE BARATTA: No. They said that they
21 haven't provided those yet.

22 CHAIRMAN KARLIN: Well, they haven't
23 provided the documents, but they've provided the --

24 JUDGE BARATTA: They've identified them.

25 CHAIRMAN KARLIN: They identified them on

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1 your log and you are going to provide them under the
2 protective order.

3 MR. SILBERG: Yes, we will.

4 MR. BLOCK: Judge, I wasn't quite finished
5 there. The other problem that we have at this point
6 with these kinds of communications and the decisions
7 that need to be made is that so far only I have this
8 material as it came the other day from Mr. Silberg.
9 I would now have to reproduce the disks that he sent
10 me, transmit them to Mr. Shadis, to our experts,
11 they'd have to review those lists. If they're in
12 paper, similar constraints apply and they would have
13 to get back to me as to what they felt, you know, we
14 needed to take a look at.

15 And so it would seem to me that the Board
16 also needs to take in to consideration if it wants to
17 go the route I'm recommending, that we set forth a
18 reasonable period of time in which people could comply
19 with making, you know, a request for documents and
20 then executing the agreements necessary to get them.

21 CHAIRMAN KARLIN: Well, okay. I'm not
22 sure where you're going with that, Mr. Block.

23 What I suggest is that the parties go back
24 and huddle and come up with a revised protective order
25 that attempts to accommodate the concerns we've raised

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1 here:

2 The marking of the documents. We need
3 something that keeps the disputes about validity of
4 any privilege claim off of the critical path of the
5 hearing. I suggest that the time frame be X days
6 after the document is made available, whether that be
7 60 days, 20 days. If there's 1,000 documents, then
8 maybe it needs to be more than 45 days. But some
9 reasonable time early in the game where if you've got
10 a concern about the validity of any privilege claim
11 for a document you think it is important, you need to
12 raise it with us or forever hold your piece.

13 If other documents come up later in the
14 process, of course, that would be a different story.

15 MR. BLOCK: Isn't there a way to come up
16 with a date that's far enough before the hearing that
17 it satisfies the Board's concerns?

18 CHAIRMAN KARLIN: Right.

19 MR. BLOCK: As opposed to --

20 CHAIRMAN KARLIN: Three months from now.

21 MR. BLOCK: I'm sorry?

22 CHAIRMAN KARLIN: Three months from now,
23 four months from now.

24 MR. BLOCK: No, no, no. I'm talking about
25 X months before the scheduled start of the hearing as

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1 opposed to six months after production.

2 CHAIRMAN KARLIN: Well, since we won't
3 know what the scheduled start of the hearing is --

4 MR. BLOCK: For a while.

5 CHAIRMAN KARLIN: -- we can't do it that
6 way. Right.

7 MR. BLOCK: But we will, and we will know
8 far enough in advance to meet all the various
9 obligations. We're not going to set a date --

10 CHAIRMAN KARLIN: Right.

11 MR. BLOCK: -- for a hearing the first
12 time 30 days before the hearing.

13 CHAIRMAN KARLIN: You're suggesting we not
14 set a date for that at all right now?

15 MR. BLOCK: No. I think you can set a date
16 that, you know, if 45 days is too short, make it 60
17 days, make it 75 days, make it 90 days. I think there
18 will still be enough time to accomplish that and yet
19 to meet the state's and NEC's concern.

20 JUDGE BARATTA: This is Judge Baratta.

21 Having just dealt with that issue,
22 although with safeguards material and not proprietary
23 information, 45 days, 60 days, 90 days is not enough.
24 You really need to be talking months, like six months.

25 CHAIRMAN KARLIN: Yes. I would say this,

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1 "there is an initial disclosure that's occurring, that
2 has occurred this week; a 1,000 documents have been
3 exchanged or more. The parties should have X amount of
4 time from that date to raise any confidentiality
5 challenges that you have as to the validity of any
6 proprietary four months from Monday to raise that. And
7 after that, we probably don't want to hear it very
8 much unless an additional document is added, and then
9 we'll deal with that later.

10 MR. BLOCK: That sounds reasonable to me,
11 Judge.

12 CHAIRMAN KARLIN: Yes. I see no reason
13 why we have to wait until X days before the hearing to
14 confront that issue. Let's get it out early on the
15 table and resolve it if there's a problem there.

16 JUDGE BARATTA: Because otherwise it will
17 definitely --

18 CHAIRMAN KARLIN: Because people won't get
19 around to it. And if you have problems with the
20 proprietary needs, let's get it sorted out at an
21 earlier stage and maybe there'll be a couple of
22 examples that can come forward that raise issues that
23 illustrative of a bunch of others and we can resolve
24 it one way or the other, if there are problems at all.
25 But I would ask that you revise the protective order

1 to confront that and try to reach agreement on that
2 because as it stands, we're not in a position to sign
3 this protective order, this proposed protective order.

4 And I also think you need to confront a
5 little more carefully, if you would parties, what we
6 do with regard to pleadings. Because once you present
7 a document to us in the written testimony, how will
8 you go about getting that and will we need to honor
9 privilege claims?

10 Let's say no one raises a proprietary
11 claim about a document, you all miss the issue or
12 simply you don't even get to it and you submit it to
13 us as a proprietary document, are we simply blithely
14 to accept that or do we have to make an affirmative
15 ruling before we put that into record and throw a veil
16 of secrecy over that document?

17 JUDGE BARATTA: And I would also ask with
18 respect to the transcript that --

19 CHAIRMAN KARLIN: Yes, transcript.

20 JUDGE BARATTA: -- the exhibits, that we
21 are to deal with that on a very careful basis.

22 MR. SILBERG: Well, we've just gone
23 through this in the Private Fuel Storage proceedings,
24 including a decision from the Commissioners last week.

25 CHAIRMAN KARLIN: Okay. Well, perhaps if

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1 you could talk with your peers and work something out
2 and we'd suggest you'd submit it, say, in ten days,
3 I'd appreciate it.

4 MR. SILBERG: I think the general practice
5 was that, you know, when we're talking about financial
6 information or business plan information, that
7 material was just submitted and it was proprietary and
8 it was treated as proprietary, and the hearings were
9 closed to the public. And then there were briefing at
10 the end of the process as to whether some of those
11 things should have been proprietary or out. And the
12 Board ruled and it was appealed to the Commission by
13 both parties. And the Commission ruled. And, you
14 know, now we've been ordered to go back and prepare
15 redacted decisions, redacted testimony, redacted
16 exhibits that carries out the Commission's ruling.

17 JUDGE BARATTA: Judge Baratta again. Again
18 from my opinion if you want to work out an agreement
19 with the other parties that that would be the process-
20 -

21 CHAIRMAN KARLIN: Yes. Submit something to
22 us on that.

23 JUDGE BARATTA: Because, remember, most of
24 these issues that we're dealing with are not going to
25 be of a financial nature. In fact, I think that that

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1 would be highly unusual to see that information being
2 of concern here.

3 MR. SILBERG: Well, here it's going to be
4 technical. Now that's which of, you know, of
5 technical value. But the same process.

6 CHAIRMAN KARLIN: Okay.

7 JUDGE BARATTA: In fact, I can tell you,
8 that's the process you're proposing and I suggest you
9 discuss that with the parties.

10 MR. SILBERG: Okay.

11 CHAIRMAN KARLIN: Yes. So let's say, I
12 guess, 15 days from today we'll direct to -- we're not
13 going to sign the protective order. We do need to deal
14 with this issue because otherwise you need any
15 privilege logs or we need those documents produced.
16 And so please submit something in 15 days with the
17 consent of all the parties or, you know if you can
18 achieve consent, whatever agreement you can get and
19 other parties can raise their objections or concerns
20 at that time.

21 MR. SILBERG: We'll do that.

22 CHAIRMAN KARLIN: Thank you.

23 All right. Essentially except for the two
24 issues that were raised at the outset, the RAI issue?

25 MR. BLOCK: Yes.

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1 CHAIRMAN KARLIN: Mr. Block, what should
2 we cover, what do you want to talk about there?

3 MR. BLOCK: Well, what I'm contending, and
4 I was contending before, it's similar to waiting for
5 the Advisory Committee on Reactor Safety's report, the
6 SERs, the EAs, that where there is clearly information
7 in RAIs that applies to contentions, it would seem to
8 me that given the fact that the staff made it clear at
9 a public meeting that they're in some kind of
10 adversarial position regarding disclosure of this
11 information, that we need to be able to have an
12 opportunity to see that information before we can
13 forward --

14 MR. SILBERG: And you will.

15 MR. BLOCK: -- to see what kind of answers
16 they get to those questions when they're asking
17 questions that relate to the subject matter of our
18 contentions.

19 MR. SILBERG: And you will see that
20 information.

21 MS. POOLED: This is Brooked Pool. I
22 would just note that 10 CFR Section 2.336(d) states
23 that the duty of disclosure is continuing and
24 documents that are developed or obtained must be
25 disclosed within 14 days. The past practice has been

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1 and will continue to be that we file weekly hearing
2 file updates and under the rules as we read them, any
3 RAI responses we receive have to be put in the hearing
4 file within 14 days, and we'll intend to do that.

5 CHAIRMAN KARLIN: All right. Then that
6 continuing disclosure obligation applies to all the
7 parties. And that is how you generally proceed.

8 Is that responsive, Mr. Block?

9 MR. BLOCK: It is. I guess I'd also like
10 to just hear from Ms. Pooled about just what the
11 relationship is that the staff has at this proceeding
12 that they warned the people from their own staff at
13 that meeting from discussing anything that might be
14 deemed relevant to this proceeding.

15 CHAIRMAN KARLIN: Well, we're not going to
16 get into that here as to the merits or the substance
17 of what somebody said at some other meeting, you know,
18 unless there's a motion or something here that's
19 meaningful to this proceeding. All we're trying to do
20 is come up with a schedule here.

21 And, you know, I think the answer is that
22 the responses to the RAIs will, if they are relevant,
23 the staff will be obliged to -- you know, and provide
24 that information in its duty of continuing to
25 supplement its initial disclosures.

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1 MR. BLOCK: Well, Judge, without
2 belaboring this, I mean we were at a meeting. They
3 warned the people there to not discuss things that
4 might be related to this proceeding. They did an
5 engineering inspection of the facility. If
6 information is being withheld from public discussion,
7 but also from us having it for this proceeding through
8 such an avenue as I've described to you, I think that
9 that's improper. And I think that it's not just the
10 setting forth of adversarial position of the staff to
11 the public in this case and to us specifically as a
12 party, but it means that we don't know what wasn't
13 disclosed at that meeting that might be germane to
14 this proceeding. And I think we should have access to
15 whatever it was.

16 JUDGE RUBENSTEIN: Judge Rubenstein.

17 The staff's continuing the obligation to
18 disclose relevant information would include that.

19 MR. BLOCK: Thank you, Judge.

20 CHAIRMAN KARLIN: All right. I agree. I
21 concur. And so if they've got an obligation, they'll
22 provide it. We're not going to discuss it here.

23 Okay. The next is number seven. Refresh
24 my memory. The new --

25 MR. SILBERG: Yes. Before we get that,

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1 one point arises out of the discussion you just had on
2 the continuing disclosures, and I apologize because I
3 didn't raise this with the other parties in advance.
4 But because of the logistics of generating these
5 updates, I don't know if people would object if
6 instead of 14 day ruling updates, we moved at least
7 until we got closer to the hearing, to a 30 day
8 update. Just so we don't have to produce many
9 documents and go through the process as many times.

10 CHAIRMAN KARLIN: We're willing to
11 entertain something like that if all the parties
12 agree, to change the duty to update from 14 days to 30
13 days.

14 MR. SILBERG: At least until, you know, we
15 get--

16 CHAIRMAN KARLIN: For the early part of
17 the proceedings.

18 MR. BLOCK: I guess the only problem that
19 New England Coalition has with that is that we already
20 seem to be behind the curve in acquiring information,
21 particularly acquiring it from Adams. Even though I
22 have a high speed Internet connection, I've spent
23 literally tens of hours sitting here trying to get
24 information off of Adams and having the thing freeze
25 up and not be able to provide me with documents.

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1 And I think if you extend this to 30 days;
2 you know, we're going to be asking and I think with
3 real cause, extensions of time because we're not going
4 to be getting information we need timely.

5 I don't object to it if there is no
6 information. But if there is information, I think it
7 should be provided within the 14 days period. That's
8 when they should disclose it.

9 MR. SILBERG: What goes on Adams is not
10 what we're talking about. We're talking about our own
11 independent obligation to update.

12 MR. BLOCK: Okay.

13 MR. SILBERG: If that's unacceptable to
14 the parties, then so be it.

15 MR. BLOCK: No. If that's what you're
16 talking about, Jay, then that's different

17 MR. SILBERG: No, I'm not talking about--

18 MR. BLOCK: And I don't want to make your
19 life unnecessarily difficult.

20 MR. SILBERG: Yes, I'm not talking about
21 the hearing file. I'm talking about our obligation,
22 and yours as well.

23 MR. BLOCK: Correct. Correct.

24 MR. SILBERG: I mean, it applies to the
25 three of us.

1 MR. BLOCK: Yes. Well, if that's
2 something that you think would serve the purpose at
3 this point, I'm certainly willing to agree to it.

4 How about you, Tony?

5 MR. ROISMAN: Well, I'd like to propose a
6 quid and a pro quo.

7 I would say 30 days for those automatic
8 disclosures up until the deadline for the filing of
9 the motions for summary judgment, whatever the Board
10 decides on. And then seven days.

11 MR. SILBERG: That's fine. Well, seven
12 may be too -- because the production of disks, it just
13 may not be able to do seven. But I certainly don't
14 mind using that cut off date to go back to a 14 days
15 schedule. I think there'll be relatively less stuff
16 back then anyway.

17 MR. ROISMAN: Admittedly, I don't do this.
18 But I've seen it done. I don't know why it takes any
19 time to make a copy of a disk.

20 MR. SILBERG: Oh, no, it's not making the
21 copy -- well, you know, we can do this off line.

22 CHAIRMAN KARLIN: I suggest you take this
23 off line. And if you've got some agreement, we'd be
24 willing to consider it. I quite frankly don't see the
25 great burden in supplementing the documents. It seems

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1 to me that it's a question of how many new documents
2 are being created or, perhaps, if you missed some in
3 your first disclosure then you'd pick up those that
4 you inadvertently missed. But once you've done this
5 a couple of times, I'm not sure how many additional
6 documents you'll be filing every 14 days.

7 But talk about it. And if you've got
8 something to suggest, we might consider it, that's
9 reasonable.

10 Now, Mr. Silberg, did you have another
11 point that you wanted to make?

12 MR. SILBERG: Yes. Well, one very short
13 one. I'm assuming that we don't have to submit back
14 to each other the stuff that we're sending each other?
15 Technically under the rule the way, we now have in our
16 possession lots of new documents we didn't have
17 yesterday, as does NEC and the state. And I assume
18 that this process was never intended to make us resend
19 stuff back and forth. That would be stupid.

20 CHAIRMAN KARLIN: Infinite circularity; I
21 think you're right. I agree with that.

22 MR. SILBERG: Okay. Now the major point
23 I have is what we would like to propose, and we will
24 file a motion, to suspend the discovery, the initial
25 discovery obligations for DPS 6. Now the reason we're

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1 doing that is because we also intend to file a motion
2 for summary disposition of that contention probably
3 next week.

4 The issue that the Board admitted, as it
5 said on page 7 -- I think it's page 7 -- is a narrow
6 one. It says the contention is narrow. "Dispute
7 concerns," and I'm again reading from page 7 of the
8 Board's January 11 order, "whether the application can
9 or should be granted absent the completion of the
10 promised verification if and when Entergy performs the
11 verification showing compliance and duly submits them
12 to NRC, this contention will be moot."

13 The Board then went on to reject the
14 state's attempt to expand the contention to include
15 the adequacy of the verification process. "The
16 contention challenges the absence of the verification,
17 not its quality."

18 On December 8th we filed with the NRC
19 staff a letter setting forth the completion of the
20 verification and providing the times of each of the
21 operating crews that they demonstrated. That letter
22 was provided, as all of our letters are, in normal
23 course to DPS. So we believe that that letter which
24 came out following the briefing on this question, that
25 that letter demonstrates that this contention has now

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1 -- you know, we have done what the contention asks and
2 either the contention is now moot or we should have
3 the contention dismissed on predisposition. And we
4 intend to file that.

5 It seems to us that we don't need
6 discovery to reach that question because any discovery
7 would go to the adequacy of the verification process,
8 and the Board specifically and explicitly ruled that
9 that is beyond the scope of this contention.

10 So I just wanted to raise that. I did
11 talk to both the staff and to Mr. Roisman this morning
12 to give them a heads up as to what I was going to talk
13 about to the Board today. But that is what we intend
14 to do.

15 CHAIRMAN KARLIN: All right. Can we hear
16 from Mr. Roisman and the staff on that?

17 MR. ROISMAN: Yes. Mr. Chairman, very
18 briefly.

19 CHAIRMAN KARLIN: I mean, obviously, if a
20 motion is filed you will have the opportunity to
21 respond and answer. But beyond that if there's
22 anything preliminary you want to say.

23 MR. ROISMAN: Well, preliminary and
24 perhaps also something that might help, at least
25 resolve the preliminary issue, which is whether or not

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1 the 336 disclosure has to be made.

2 The Board's order says if and when Entergy
3 performed the verification showing compliance and duly
4 submits them to the NRC. All we want under 336 is the
5 verification. Not a letter with a summary of the
6 verifications. All we have so far is a letter with a
7 summary of the verifications.

8 Now, I don't know whether or not the staff
9 is insisting upon or will insist upon actually seeing
10 the verification, the actual what was done, how it was
11 done, what the results showed and all of that. But
12 that's the only way to know our belief is to know
13 whether the verification was done. That's different
14 than whether or not we agree with the verification.
15 What we have now is a summary.

16 So if Entergy will give us all the
17 verification, we will agree without them having to
18 file a motion that any other 336 disclosure they might
19 have to make with regard to the issue can await a
20 resolution by the Board of summary judgment.

21 CHAIRMAN KARLIN: Okay. Let me just ask
22 quickly, the answer, Mr. Silberg, do you agree to
23 that?

24 MR. SILBERG: Well, first of all, they
25 have that right. They've had that right forever

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1 because they have a memorandum of understanding with
2 Vermont Yankee that entitles them to see any document
3 in the plant. And so they could have seen that
4 yesterday, they could have seen it last week, they
5 could have seen it December 8th. For all I know, they
6 may have accompanied these crews during the training.
7 So, you know, I really think to call for more
8 disclosure is going beyond what the Board did when it
9 admitted this contention.

10 CHAIRMAN KARLIN: So, I understand. You
11 can file a motion to dismiss this contention, as I
12 understand it, a motion for summary disposition on
13 this contention. You've also, I guess as I understand
14 it, going to file a motion to avoid the need to do the
15 mandatory disclosures, an on that latter point at the
16 moment. And rather than having to move or argue about
17 it, if you just stipulate here that Entergy will
18 provide Mr. Roisman in X days with the verification
19 documents, you can dispense with arguing about the
20 secondary issue.

21 MR. SILBERG: Well, as I'm saying, he has
22 the right to go get them.

23 CHAIRMAN KARLIN: Okay.

24 MR. SILBERG: And he's always had the
25 right to go get them.

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1 MR. ROISMAN: It happens that Mr. Sherman
2 has the right to go get them, Your Honor. And he is
3 and will remain unavailable to do that for at least
4 two more weeks.

5 I candidly don't understand, and I'm a
6 little upset, that Entergy can't manage to put it
7 together to make a copy of the documents and send them
8 to us rather than telling us we have to drive down to
9 the Entergy plant to see the documents. And if they
10 insist, we will insist on the 336 disclosure. And I
11 think they have no basis to ask for that to be
12 suspended. That's a much bigger disclosure.

13 MR. SILBERG: Well, the basis is that
14 we've done what the contention called for.

15 CHAIRMAN KARLIN: Okay. Well, we're not
16 going to argue it here. We'll take it under
17 advisement. And it's of interest, I guess, that --
18 actually this is a state contention. And so I'm not
19 sure whether the state has the right, maybe they do,
20 to obtain the document you're referring to.

21 Mr. Sherman, I guess, is with the state.

22 Okay. We'll take that under advisement,
23 unless -- well, I guess we've heard everyone. The
24 staff, do you have anything to say on this issue?

25 MS. POOLED: No. I'll say that we spoke

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1 with Mr. Silberg this morning and didn't object to the
2 motion.

3 CHAIRMAN KARLIN: Okay.

4 MS. POOLED: And we would respond to any
5 summary disposition motion in due time.

6 CHAIRMAN KARLIN: Right. As I calculate
7 it, the normal time for filing the affirmative
8 disclosures, the initial disclosures for contention
9 number 6 of the staff, would be 30 days essentially
10 after the ruling admitting that contention, which is
11 the 11th of January, I guess. That's how we'll
12 calculate the times for that one.

13 MR. SILBERG: Well, we do need to know
14 because if we are to meet the 30 day deadline, that
15 process has to get underway almost immediately.
16 That's one of the reasons we were trying to give
17 everyone advance notice of the process.

18 CHAIRMAN KARLIN: Well, you can file a
19 motion.

20 I'd suggest one quick and easy way to do
21 this is just simply agree without a lot ado to give
22 them the verification rather than dealing with Mr.
23 Sherman or whether he's sick or whether he can make it
24 down to the plant in next two weeks. If it's really
25 a big problem, just send it to them.

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1 MR. SILBERG: Well, I'll see what that
2 documentation entails. I don't think there is
3 something called "a verification." I think it's a
4 large collection of records, but I don't know.

5 CHAIRMAN KARLIN: Okay. All right. Well,
6 I think we're done.

7 I appreciate everyone's patience.

8 As I see it, let's see -- within 15 days
9 you will submit to us as you wish or you will submit
10 to us a revised proposed protective order.

11 On March 15th the staff will submit to us
12 information about the SER.

13 Within a week of seven days, I believe,
14 Entergy will submit to us the privilege that it used
15 here. We don't want the documents themselves that you
16 exchanged. We just want the privilege log itself.

17 I think that's all.

18 MR. BLOCK: Judge?

19 CHAIRMAN KARLIN: Yes.

20 MR. BLOCK: This is Jon Block, New England
21 Coalition.

22 We do have somewhat of an issue about
23 receiving discovery. We did receive from the DPS as a
24 courtesy the discovery they provided. Entergy has not
25 done the same, and it certainly would be helpful to

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1 have the discovery that they provided to other parties
2 on the DPS contentions, since we're all in the same
3 proceeding.

4 MR. SILBERG: Well, we believe it's quite
5 clear that the requirement is that the party gets
6 discovery on its contentions. And we have done that.

7 CHAIRMAN KARLIN: I'm going to direct that
8 everyone give copies to everyone in this proceeding.
9 NEC has already indicated that it seeks to join the
10 state in its contentions, and I believe vice versa.

11 MR. SILBERG: I don't --

12 CHAIRMAN KARLIN: We haven't ruled on that
13 yet. But for the moment, just make an extra set and
14 send it to them, Mr. Silberg.

15 MR. SILBERG: I don't believe that that
16 was ever moved.

17 MS. POOLED: Yes. The staff's not received
18 anything of that nature.

19 MR. SILBERG: That's a new request which
20 I've never heard from the parties.

21 CHAIRMAN KARLIN: Well, if I go way back
22 to some of the initial pleadings, I believe that the
23 NEC -- perhaps correct me if I'm wrong, Mr. Block,
24 help me here. I thought that you had moved that you
25 were going to adopt and join the state's contentions?

1 MR. BLOCK: I believe that's true. That
2 was the initial contentions that Mr. Shadis filed. I
3 think that's correct.

4 CHAIRMAN KARLIN: Yes.

5 MR. SILBERG: I don't remember that. It
6 wasn't ruled upon, if it was.

7 CHAIRMAN KARLIN: You're right, it was not
8 ruled upon. But I didn't think it would be a problem.

9 MR. SILBERG: Well, I think it is. And
10 there is specific procedures for adopting others
11 contentions, and those have not been met. I have to
12 go back and look at that pleading. I don't think there
13 was ever any response. It was never argued.

14 CHAIRMAN KARLIN: It may have come up in
15 the oral argument up in --

16 MR. SILBERG: If they wish to file a
17 motion at this point, we'll certainly address that.
18 But I don't think there's anything on the record that
19 -- I may be wrong. If they wanted to adopt the
20 contentions and met the requirements for doing that.

21 MR. BLOCK: Well, Mr. Shadis may still be
22 on the line. I don't know. And he may know this for
23 sure. But I believe that was in the contention filings
24 that he would made.

25 CHAIRMAN KARLIN: Well, I would suggest

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1 this: Mr. Block, why don't you file something with us
2 to that effect, if I'm incorrect, if we're incorrect,
3 if you haven't already made that motion. If you're
4 going to make it, make it now. But I thought you
5 already had.

6 MR. BLOCK: Okay.

7 CHAIRMAN KARLIN: Let's hear about that
8 and hear from the intervenors as to whether they want
9 to join and if there's any objections to that. Okay.

10 MR. BLOCK: Okay. Thank you.

11 CHAIRMAN KARLIN: All right. Thank you
12 for your patience.

13 We'll look forward to your filings and
14 then we'll probably issue a scheduling order sometime
15 after that.

16 MR. SILBERG: Just to clarify, Your Honor.
17 Are we to wait the outcome of this filing from NEC on
18 the contentions before we submit the material?
19 Because I really think, having looked at the law, the
20 obligation is that the parties get discovery on their
21 contentions and not others.

22 CHAIRMAN KARLIN: Yes. You can wait until
23 NEC files something vis-à-vis adoption of the other
24 contentions before you send NEC the documents you sent
25 to the state.

1 MR. SILBERG: Okay. Thank you.

2 CHAIRMAN KARLIN: But with regard to the
3 earlier point you're raising about the motion for
4 summary disposition of state contention number 6, we
5 will not be holding in abeyance your duty to produce
6 the documents within 30 days. So we may be able to
7 rule quickly on that, but don't count on it.

8 MR. SILBERG: Thank you.

9 CHAIRMAN KARLIN: Thank you.

10 All right. Thank you, everyone for the
11 call.

12 (Whereupon, the proceeding was concluded
13 at 4:45 p.m.)

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Name of Proceeding: Entergy Nuclear Vermont
Yankee, LLC and Entergy
Nuclear Operations, Inc.
Pre-hearing Conference

Docket Number: 50-271-OLA and
ASLBP No.04-832-02-OLA

Location: teleconference

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