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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the Matter of :
 : Docket No. PAPO-00
U.S. DEPARTMENT OF ENERGY :
 : ASLBP No.08-861-01-PAPO-BD01
(High Level Waste Repository: :
Pre-Application Matters) : May 14, 2008
 :

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Pacific Enterprise Plaza
Building 1 of 3250 Pepper Lane
Las Vegas, NV 89120

BEFORE:

THOMAS S. MOORE, Chairman
G. PAUL BOLLWERK III, Administrative Judge
PAUL S. RYERSON, Administrative Judge

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

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>> CHAIRMAN MOORE: Please be seated.

Good morning. I'm Judge Thomas Moore. On my right is Judge Paul Bollwerk; on my left is Judge Paul Ryerson.

The Board was saddened to learn of the death of Joseph Egan, and we would like to express our condolences to Mr. Malsch and Mr. Fitzpatrick over the loss of their partner. And we greatly appreciate you being here today.

>> MR. FITZPATRICK: Thank you very much.

>> CHAIRMAN MOORE: At this time I ask that all participants identify themselves for the record, beginning with the NRC staff and proceeding around the well, and then at the end those participating by video conference from Rockville, if they would identify themselves, please.

>> MR. LENEHAN: Your Honor, I'm Daniel Lenehan with OGC staff, accompanied by Margaret Bupp and King Stablein, staff director of project management branch.

1 >> MR. BINZER: Chris Binzer with the
2 Nuclear Energy Institute.

3 >> MR. BAUSER: Mike Bauser, Nuclear Energy
4 Institute.

5 >> CHAIRMAN MOORE: Probably better if you
6 don't stand up -- excuse me. Excuse me. These
7 microphones need to be activated by pressing the
8 button on the base of the microphone. Please speak
9 directly into the microphone, and then when you're
10 through speaking, if you would turn it off so it
11 doesn't stay live.

12 Please continue.

13 >> MR. SILVERMAN: I'm Don Silverman
14 representing the Department of Energy.

15 >> MR. SHEBELSKIE: Michael Shebelskie with
16 Hunton & Williams, also representing the Department of
17 Energy.

18 >> MR. MALSCH: Martin Malsch representing
19 the State of Nevada. With me is Charlie Fitzpatrick.

20 >> MR. BELL: Kevin Bell with the California
21 Energy Commission.

22 >> MR. SULLIVAN: Tim Sullivan, California

1 Attorney General's Office.

2 >> MR. LIST: Robert List on behalf of
3 Esmeralda, Churchill, Lander and Esmeralda Counties.
4 Did I say them all? The four counties. And I have
5 with me Mr. Ed Mueller from Esmeralda County.

6 >> MS. VIBERT: Elizabeth Vibert with Clark
7 County and I'm with Irene Narvis.

8 >> MR. MURPHY: Malachy Murphy from Nye
9 County, and also Jeffrey VanNiel representing Nye
10 County.

11 >> CHAIRMAN MOORE: Thank you. The Advisory
12 Pre-License Application Presiding Officer Board has
13 convened this conference this morning to address,
14 among other things -- I'm sorry.

15 Would those participating from Rockville
16 please identify yourself.

17 >> MS. CURRAN: This is Diane Curran
18 representing Lincoln County.

19 >> MR. NEUMAN: And this is Barry Neuman on
20 behalf of Lincoln County.

21 >> CHAIRMAN MOORE: Thank you. We've
22 convened this conference this morning to, among other

1 things, address the issues that were identified in our
2 May 2nd order and those in our earlier order of
3 April 4th.

4 From what we've learned today and in light
5 of your written comments that you've already provided
6 us, we hope to fashion remedies or recommendations to
7 the Commission that will help both potential parties
8 and the licensing boards address effectively and
9 efficiently within the rigorous schedule of Appendix D
10 of Part 2, the admissibility of contentions and the
11 adjudication regarding DOE's application to construct
12 a high-level waste repository at Yucca Mountain.

13 We've placed on all the counsels' tables, in
14 case you don't have them, copies of our May 2nd
15 memorandum containing the questions we wish to address
16 today. We understand that you have conferenced and we
17 will give you in a moment an opportunity to tell us
18 what you have come to agreement on.

19 We had planned to proceed by working through
20 the questions in our May 2nd order, and then as we
21 worked through those address questions we have
22 concerning your earlier filings. In that way we

1 thought we would be able to cover the areas that we
2 still have questions and need to reach resolution on.
3 But we are perfectly willing to adjust on the fly,
4 depending on what you have all agreed on, to make it
5 more efficient.

6 But if we do proceed through those
7 questions, just so you'll be prepared, all of those
8 questions that we would like to hear from all of you
9 on, those that are marked "all," we will always use
10 the same order in calling on you. And we will proceed
11 each time with DOE, followed by the State of Nevada,
12 the NRC staff, NEI, Nye County, Clark County,
13 Churchill and the other three counties represented by
14 Mr. List, the California Department of Justice, and
15 then in Rockville, Eureka County and Lincoln County.

16 We had planned to take a brief mid-morning
17 break. Because of the logistics and the location of
18 this facility, we will give you 90 minutes for lunch,
19 because otherwise you will not get lunch. And then we
20 will take a brief afternoon break and hope to conclude
21 somewhere between 5:00 and 6:00. We will push very
22 hard to get this completed by then, hopefully the

1 earlier time.

2 Again, I would remind you, please, to speak
3 into the microphones, first activating it at the base,
4 and then turn it off so that it doesn't remain live so
5 that we don't hear what we're not supposed to hear.

6 And is there a spokesman from the conference
7 that you had that would like to tell us what you might
8 have agreed on or what areas we might want to
9 emphasize today.

10 >> MR. LIST: Thank you, Mr. Chairman,
11 Judge. Robert List on behalf of the four counties, as
12 mentioned earlier.

13 We did have a conference, telephone
14 conference of about two and a half hours on Monday
15 afternoon. And it was participated in by virtually
16 everyone that's represented here, I think with the
17 exception of Eureka County.

18 We had Lincoln, we had the NRC staff, Nye
19 County, DOE, the State, NEI, and Clark County all on
20 the call.

21 And the matters that we addressed were those
22 which were directed to all of the participants. We

1 did not address, for example, in your memorandum, the
2 items under Paragraph A. We started, in fact, with
3 B6, which was the first one that was addressed to
4 everyone.

5 On many of them we reached general
6 concurrence; on some, rather specific concurrence.
7 There are a number of the parties that are --
8 potential parties who will have comments and
9 qualifications concerning their concurrence. But I
10 think that we, at least from a 50,000-foot elevation,
11 reached a meeting of the minds in several respects.
12 And it was a -- I would report it was a very cordial
13 and, we think, productive meeting. And we'll present
14 our views as you wish here today.

15 >> CHAIRMAN MOORE: From what you said, do
16 you think it would be most efficient for us to work
17 our way through the questions that we've posed in the
18 May 2nd order and then one of you can address what the
19 consensus was and we don't then need to call on
20 everyone?

21 >> MR. LIST: That would be fine. That is
22 how we -- I'll be prepared to give a general comment

1 as to our observations or -- or agreement on each of
2 the items, and then others, of course, will give their
3 specific views or dissent, if it were, but -- if
4 that's the case.

5 >> CHAIRMAN MOORE: All right. Then let's
6 begin this morning starting with our questions for DOE
7 from the May 2nd order. We'll take them in order.

8 Question A1: What is DOE's current best
9 good faith estimate on the date on which DOE expects
10 to file its license application?

11 >> MR. SILVERMAN: Good morning, Your Honor.
12 Don Silverman again.

13 Our best estimate for the submittal of the
14 license application is early June. It could be as
15 early as the first week in June. That does depend
16 upon certain logistical issues. We do not have a firm
17 date, but we anticipate within the first half of June.
18 And that would include the license application as well
19 as the 2002 Final EIS.

20 >> JUDGE BOLLWERK: I take it the
21 expectation is -- there's a meeting set for June 19th
22 in Rockville -- that you're going to make a

1 presentation to the NRC staff? Is that -- so, in
2 theory, the application will be out before then,
3 correct?

4 >> MR. SILVERMAN: I'm not aware of the
5 specifics of that particular meeting. But I do know
6 that there is no firm date at this point for the day
7 the application will be submitted to the NRC.
8 However, the expectation is within the first couple of
9 weeks of June we hope and expect.

10 >> JUDGE BOLLWERK: And, of course, that
11 would be consistent if it's issued the first couple
12 weeks, the 19th of June, as well, after that, of
13 course.

14 >> MR. SILVERMAN: Yeah.

15 >> JUDGE BOLLWERK: Okay, thank you.

16 >> CHAIRMAN MOORE: In what form -- for
17 example, three-ring notebooks -- will DOE file paper
18 copies of the application?

19 >> MR. SILVERMAN: Three-ring binders, Your
20 Honor.

21 >> CHAIRMAN MOORE: So they will be able to
22 be supplemented? Is that the -- the goal with this?

1 >> MR. SILVERMAN: I believe that that's
2 poss- -- should be possible, yes.

3 >> CHAIRMAN MOORE: What kind of optical
4 storage media will DOE use for filing the application,
5 including any nonpublic portions of the application?

6 >> MR. SILVERMAN: We will be submitting it
7 in DVD format. It's a searchable, fully text
8 searchable format.

9 And that will include both the public and
10 nonpublic versions. Of course, the nonpublic version
11 will have the OUO information, appendix, and the
12 public version will have that excluded.

13 But DVD will be the format.

14 >> CHAIRMAN MOORE: Now, the Pre-License
15 Application Presiding Officer Board, not this Advisory
16 Board, several weeks ago issued an order reminding DOE
17 that the Commission had already indicated that that
18 was a other licensing document that had to be on the
19 LSN and that it needed to be on the LSN, made
20 available to the public on the LSN at the time it was
21 filed, and that would include a redacted version of
22 those OUO matters.

1 And that will all be done, I assume?

2 >> MR. SILVERMAN: It is our intention to
3 have the LA on the LSN at the same time we submit to
4 the NRC.

5 >> CHAIRMAN MOORE: So the public version
6 will include redacted copies, versions, of the OUO
7 material?

8 >> MR. SILVERMAN: That's my understanding.
9 Or it will be eliminated, because there is, as I
10 understand it, an OUO appendix where all the OUO
11 information resides.

12 >> CHAIRMAN MOORE: Question A4: Will DOE
13 include reference materials as part of the license
14 application, provide citations to those materials, or
15 some combination of attachments and citations?

16 >> MR. SILVERMAN: The Department will be
17 providing about 200 LA references in DVD format. And
18 that will be provided to the NRC in that format, so
19 they won't -- there won't be a need in the case for
20 citations to those. And those include --

21 >> CHAIRMAN MOORE: Now, will there be a
22 single DVD or will there be multiple DVDs?

1 >> MR. SILVERMAN: One DVD.

2 >> CHAIRMAN MOORE: A5: Will DOE's optical
3 storage media contain hyperlinks to such application
4 reference material, and, if so, how will they
5 function.

6 >> MR. SILVERMAN: No, there will no -- not
7 be hyperlinks. But, again, you'll have those
8 references, all the parties will have those references
9 on DVD.

10 >> CHAIRMAN MOORE: As I understand it, the
11 application is going to be thousands of pages long, if
12 it were printed.

13 >> MR. SILVERMAN: Yes.

14 >> CHAIRMAN MOORE: And there will be some
15 thousands of pages, I assume, of reference material.

16 >> MR. SILVERMAN: Yes.

17 >> CHAIRMAN MOORE: How will one navigate
18 that on a DVD? Or does one spend hours searching?

19 >> MR. SILVERMAN: No. My understanding,
20 and I -- is that the DVD is pretty user-friendly; that
21 there are categories -- and I will maybe have to
22 verify this with one of our technical experts, who is

1 behind me here. But it is fully word searchable,
2 that -- let me just verify that I think that each of
3 the documents will be independent -- each of these
4 references will be independently identified in the
5 DVD. Bear with me one second.

6 In addition to that, we've expressed a
7 willingness, even though the references are on the LSN
8 now, among all the other LSN references -- we've
9 expressed a willingness to provide a separate list to
10 the prospective parties of the approximately 200
11 references with the accession number for each one, so
12 they'll know exactly which documents are those
13 references that we'll be submitting.

14 >> CHAIRMAN MOORE: There will be a table of
15 contents?

16 >> MR. SILVERMAN: For the DVD that has the
17 reference material on it? Yes, sir.

18 >> CHAIRMAN MOORE: But you will not be able
19 to go from that table of contents to the item without
20 having to navigate through lots of material to get
21 there, I take it.

22 >> MR. SILVERMAN: Let me check on that.

1 May I take a moment?

2 >> CHAIRMAN MOORE: Okay.

3 >> MR. SILVERMAN: Thank you.

4 >> CHAIRMAN MOORE: Mr. Silverman, I think
5 your explanation may be longer than I want to hear.

6 (Laughter.)

7 >> MR. SILVERMAN: I couldn't begin to
8 repeat it all, anyway, Your Honor.

9 But my understanding is that you could --
10 first of all, the documents will be on the DVD in the
11 order that they're presented in the LA. They'll be
12 numbered. And it should only take a few moments to
13 get to any particular document that you want to get
14 to. That's what our technical experts tell us.

15 >> CHAIRMAN MOORE: But it was your
16 understanding that you'll have to scroll to get there?

17 >> MR. SILVERMAN: Yes.

18 >> CHAIRMAN MOORE: Okay.

19 A6: In addition to the paper and optical
20 storage media copies filed in accordance with 10 CFR
21 Section 63.22, does DOE intend to provide the NRC
22 staff with the application and/or reference materials

1 or any portion thereof in any other format.

2 >> MR. SILVERMAN: We do not.

3 >> CHAIRMAN MOORE: Do you intend to
4 generate the application or reference materials in
5 another format for your own use?

6 >> MR. SILVERMAN: Yes. We have -- for our
7 own internal use, there will be some other format in
8 which the application exists.

9 >> CHAIRMAN MOORE: Will those be more
10 user-friendly than what is being made public?

11 >> MR. SILVERMAN: I believe they will be
12 probably less user-friendly. They're things like a
13 FrameMaker file, which is like a Word file, a word
14 processing system. And a TIF format. These are just
15 for internal purposes; for example, to accommodate the
16 requirements of DOE's internal record-keeping systems
17 and that sort of thing.

18 >> CHAIRMAN MOORE: And you have no -- it
19 doesn't sound like there would be any purpose for you
20 to make those available to anyone that might want
21 them.

22 >> MR. SILVERMAN: It is my understanding

1 that the formats we're providing it in, the DVD in
2 particular, is probably the best and easiest format
3 for the prospective parties.

4 >> CHAIRMAN MOORE: Thank you. Let's turn
5 now to the questions for the staff.

6 Question B1: Does the staff intend to place
7 the DOE application in ADAMS?

8 >> MR. LENEHAN: Yes, Your Honor.

9 >> CHAIRMAN MOORE: And Question B2: If so,
10 how long after the initial filing will the NRC staff
11 make the license application available in ADAMS?

12 >> MR. LENEHAN: Approximately one week,
13 Your Honor.

14 >> CHAIRMAN MOORE: What is the staff's
15 current best good faith estimate of how long it will
16 take the staff to comply with the docketing
17 requirements of 10 CFR Section 2.101(e)?

18 >> MR. LENEHAN: Approximately 90 days.

19 >> CHAIRMAN MOORE: Now, (e) contains a
20 great number -- I think seven or eight steps, and I
21 know that one of those steps obviously is the
22 application has to be reviewed for completeness, and

1 whether you think that there's enough there to begin
2 your technical review. But 101(e) deals with a lot of
3 other steps. And that -- and you'll do all of those
4 steps within 90 days?

5 >> MR. LENEHAN: That's our best estimate at
6 this point, Your Honor.

7 >> CHAIRMAN MOORE: What is the staff's
8 current best good faith estimate of the time likely to
9 lapse between the formal docketing of the DOE license
10 application pursuant to 10 CFR Section 2.101(e)(6) and
11 the publication of a notice of hearing pursuant to 10
12 CFR Section 2.101(e)(8)?

13 >> MR. LENEHAN: Your Honor, this is a very
14 difficult one. We really cannot give a definitive
15 answer at this point. In other areas, this is taken
16 in the range of 30 to 45 days. The staff will do
17 everything possible to coordinate with the other
18 offices, the secretary's office of the Commission, to
19 have it done as quickly as possible, and we will make
20 our very best effort to do it.

21 Again, the only thing we can really rely on
22 is how long it has taken in other areas of

1 publication, and that's been the 30- to 45-day range.

2 >> JUDGE RYERSON: So if I understand, the
3 total time period between the physical filing and the
4 notice of hearing would be more like 120, 135 days?

5 >> MR. LENEHAN: Yes, Your Honor. Yes.

6 >> JUDGE BOLLWERK: And, of course, the
7 Appendix D schedule doesn't kick off until the notice
8 of hearing is issued.

9 >> MR. LENEHAN: Is published.

10 >> JUDGE BOLLWERK: Under Part 2. The
11 Appendix D schedule does not start until the notice of
12 hearing goes out, not when the application is
13 docketed.

14 >> CHAIRMAN MOORE: Question B5: In light
15 of the reported current budgetary constraints and the
16 projected budgetary constraints through fiscal 2010,
17 what is the NRC staff's current best good faith
18 estimate of the time required to complete a Safety
19 Evaluation Report and the final environmental
20 documents concerning the DOE license application?

21 >> MR. LENEHAN: Your Honor, this is a
22 two-part answer. Staff's position on the adoption of

1 the EIS will be known at the time of docketing. So
2 it's not going to have any impact in that area.

3 Beyond that, we cannot give any real
4 estimate because the FY 2010 budget is not finalized.
5 Once we know the final budget numbers and the impact
6 of those numbers on the staff's review schedule, we
7 will then be in a position to make the public aware
8 those impacts would have on the schedule. This may
9 occur at some point after the docketing of the
10 application.

11 >> JUDGE BOLLWERK: What impact does the
12 2009 budget have?

13 >> MR. LENEHAN: At this point, Your Honor,
14 we cannot project -- we cannot calculate that, offer a
15 comment on that.

16 >> CHAIRMAN MOORE: But you think that at
17 least by the time the application is docketed, you
18 will be able to inform the Board and the potential
19 parties of what those schedules might look like?

20 >> MR. LENEHAN: I'm not sure I could
21 represent that, Your Honor. At this point, our goal
22 is to maintain the schedule as it's set out in

1 Schedule D. That's our goal.

2 >> CHAIRMAN MOORE: Question B6: If DOE
3 supplements the license application as described in 10
4 CFR Section 2.101, what impact will this have on the
5 filing of contentions?

6 And that is a question that we'd like to
7 hear all of your answers on.

8 Mr. List, do you have a consensus view?

9 >> MR. LIST: Generally there's agreement
10 that there would be little effect. However, there are
11 some qualifications on that that were expressed by the
12 State, by Nye County, by Clark County and Lincoln
13 County. So I think it would be appropriate for each
14 of them to give their concerns on that matter.

15 >> CHAIRMAN MOORE: DOE, do you think this
16 is going to impact what happens downstream?

17 >> MR. SILVERMAN: Your Honor, we don't
18 think there should be or is any impact associated with
19 any such amendment or supplement in terms of the
20 filing of the contentions.

21 >> CHAIRMAN MOORE: One of your filings
22 indicated that your present intention was not to have

1 any supplements filed in the period from filing to
2 docketing. Is that still your present intention?

3 >> MR. SILVERMAN: Absolutely.

4 >> CHAIRMAN MOORE: But if you were to file
5 supplements -- and it's frankly because we're all
6 human and someone will discover that something was in
7 there that shouldn't have been or something that
8 should have been wasn't included and you have to make
9 a supplement, what impact is that going to have or
10 will this fall into the realm of nontimely contentions
11 at that point?

12 >> MR. SILVERMAN: We don't think it should
13 have any or will have any impact on the time for the
14 filing of contentions since it is triggered by the
15 notice of hearing, which comes after the docketing.

16 And let me briefly explain. We have no
17 present intention of amending or supplementing, as
18 I've indicated. If as a result of the review of the
19 application for completeness the NRC staff identifies
20 a problem that does require some sort of an amendment
21 or supplementation before it's docketed, DOE would
22 have to go through the process of providing that

1 additional information.

2 That would probably take some time. That
3 will likely -- very likely extend the time that the
4 staff will have before they make the final decision on
5 docketing.

6 And so we still think that it should not
7 have any impact on the time for filing the petitions.

8 >> CHAIRMAN MOORE: State of Nevada, do you
9 concur that won't have any substantial impact?

10 >> MR. MALSCH: Technically, under the
11 rules, the time for filing contentions is triggered by
12 the notice of hearing. And it's set in the rules.

13 As you know, there's a motion pending before
14 the Commission that we filed to set a more reasonable
15 time scale for the filing of contentions, and there
16 have been various responses to that, including one in
17 which the time for filing contentions might depend
18 upon the nature of amendments made to the application
19 during the docket review.

20 So it's a little hard to tell. DOE is
21 correct. It would be normal practice for the staff to
22 ask questions pointing out possible inadequacies in a

1 tendered application. And that would result in
2 amendments to the tendered application, which could be
3 quite substantial. But it's difficult to predict now
4 what those might be.

5 >> CHAIRMAN MOORE: NRC staff?

6 >> MR. LENEHAN: We don't see -- for the
7 same reasons on the docketing, we agree with the
8 position of the State so far. It should not have any
9 major effect.

10 >> CHAIRMAN MOORE: All right. NEI?

11 >> MR. BAUSER: We have nothing to add.

12 >> CHAIRMAN MOORE: Nye County?

13 >> MR. MURPHY: We agree that it's unlikely
14 to have any substantial impact on filing contentions,
15 Your Honor. But we need to preserve our -- what we
16 want is for any significant, substantive amendment or
17 supplementation of the LA by DOE, that Nye County and
18 the rest of the parties would not lose any of the time
19 allotted to us under the rules for filing contentions.

20 For example -- and this may be an extreme
21 hypothetical, but what would happen if, pursuant to a
22 request for additional information from the staff, DOE

1 files a supplementation to the LA that would -- that
2 to us would appear to be significant on the 85th day?

3 And the NRC staff accepts it and docket it.
4 We then have 35 days to respond to that rather than
5 the 90 days or 120 days we would have had since the
6 filing of the LA.

7 We just want to make sure that we're not
8 constrained too much in our ability to respond to a
9 significant supplementation. And we understand and we
10 appreciate that DOE doesn't expect to do that. But
11 everybody in the room knows that the staff is going to
12 ask for additional information during that review
13 period. And that could result in substantive,
14 significant changes to the LA.

15 >> CHAIRMAN MOORE: I would think that any
16 request for additional information will come during
17 substantive review, not during docketing review. And
18 so the problem's going to be with -- if the staff were
19 to perceive the application in some way inadequate, to
20 allow them to initiate technical review.

21 So I think those are probably apples and
22 oranges.

1 Clark County, do you have anything to add?

2 >> MS. VIBERT: I have nothing to add, Your
3 Honor.

4 >> CHAIRMAN MOORE: Mr. List?

5 >> MR. LIST: Nothing further to add.

6 Nothing further to add from our perspective.

7 >> CHAIRMAN MOORE: California Department of
8 Justice, anything to add on this?

9 >> MR. SULLIVAN: Nothing else.

10 >> CHAIRMAN MOORE: Back in Rockville,
11 Eureka County?

12 >> MS. CURRAN: We would just hope for an
13 opportunity to submit late -- not necessarily late,
14 but contentions within a reasonable time of new
15 information being submitted.

16 >> CHAIRMAN MOORE: And Lincoln County?

17 >> MR. NEUMAN: We agree with Eureka County
18 on this position; that is, our main concern is to
19 ensure we have sufficient time to address additional
20 information.

21 >> CHAIRMAN MOORE: All right. Let's move
22 on, then, to more substantive matters where we're

1 really going to get into why we're here today.

2 Let's start with Question C1: Is there any
3 reason not to allocate contentions to multiple
4 licensing boards for adjudication?

5 DOE.

6 >> MR. SILVERMAN: No, we think that's
7 essential, Your Honor. I don't want to preempt
8 Mr. List, but I think there was a general agreement on
9 that among the parties.

10 >> MR. LIST: If I may.

11 >> CHAIRMAN MOORE: Mr. List.

12 >> MR. LIST: I think there was general
13 agreement. And if I might lay a bit of groundwork for
14 some of the questions that follow.

15 Of course, this came as no surprise that
16 there might be multiple licensing boards. There was
17 concern expressed throughout our conversations on this
18 question and the ones that follow about the fact that
19 it's extremely important that the multiple boards not
20 have overlapping issues; that, otherwise, there could
21 be conflicting decisions if there were similar subject
22 matter before two or more boards.

1 And we ultimately felt that one approach
2 might be to have three adjudicatory boards and one
3 sort of umbrella coordinating Board that might be
4 responsible for multiple matters of administrative
5 proceedings. For example, compliance with the LSN or
6 standing or the allocation of the contentions
7 themselves among those boards.

8 >> CHAIRMAN MOORE: I think we will clearly
9 be touching upon this same subject periodically today
10 when we get to questions later on DOE's suggestion on
11 subject matter for allocation and labeling of
12 contentions. All of this is part and parcel of this
13 problem of overlapping -- well, three boards -- and
14 trying to keep them from stepping on one another.

15 >> MR. LIST: Exactly.

16 >> CHAIRMAN MOORE: Does anyone else have
17 anything they would like to add to what Mr. List has
18 said?

19 Nevada.

20 >> MR. MALSCH: Just one comment, and that
21 is that we have assumed all along that there would be
22 as many as three licensing boards hearing sets of

1 contentions.

2 We just offer the qualification that if
3 there were more than three, I think the burden would
4 really be unbearable on the parties, including Nevada.
5 And so we did express a qualification that really
6 there should be no more than three.

7 We did agree in principle with the concept
8 of a coordinating Board that could serve the function
9 of, among other things, dividing up the contentions
10 among the other boards. And we would not object in
11 that respect to consultation among the various boards
12 or Board members to sort of work things out so there
13 was no or limited potential for overlap.

14 >> CHAIRMAN MOORE: No tablets have been
15 cast and the carving on the stone is not done,
16 obviously. But it is -- I think I can speak for the
17 panel at this point to say that it is our current
18 intention and thinking that, unless ordered by the
19 Commission, there would not be, certainly in the
20 normal course, any simultaneous hearings. They would
21 always be running consecutively, as if it were one
22 Board. Which should, in large measure, alleviate

1 Nevada's concern.

2 Because we also recognize that you can't be
3 in more than one place at one time. There may be
4 instances where there have to be parallel matters
5 going on. But I believe it's everyone's thinking that
6 they will be kept to the barest of minimum, if
7 possible. Unless, of course, the Commission were to
8 order otherwise.

9 >> MR. MALSCH: Thank you very much. That's
10 obviously what would present a real problem for us and
11 any of the other parties.

12 I just wanted the Board to recognize, in
13 addition to bare presence in the hearings, there's
14 also a substantial burden of case preparation and the
15 witnesses and the like. So the mere fact that there
16 are not overlapping actual evidentiary hearings
17 doesn't mean on our side that you can have four, five,
18 six, ten presiding licensing boards. I think we were
19 planning on three and no more, really.

20 >> CHAIRMAN MOORE: Does anyone else want to
21 be heard on this subject? And then let's move on.

22 >> MR. SILVERMAN: Your Honor, DOE. Just

1 very briefly, and I know we'll get into it later as we
2 talk about exactly how you would divide up the
3 jurisdiction of the boards as a recommendation of the
4 Commission.

5 Our view is it's probably a minimum of
6 three. We think there may be ways to do this where it
7 would be most efficient to have more, but I think
8 we'll be coming to that.

9 >> CHAIRMAN MOORE: I think we could all
10 speak to that, Mr. Silverman. To quote the former
11 Secretary of Defense: You gotta go to war with the
12 Army you got. And we ain't got much of an Army.

13 >> MR. SILVERMAN: Understood.

14 >> CHAIRMAN MOORE: Three boards would
15 stretch the panel to the breaking point.

16 Let's look at C2: If contentions are
17 allocated among multiple boards, how would it be most
18 efficient to do so? And, specifically, would it be
19 possible to identify scientific phenomena or modeling
20 techniques that are common to contentions addressing
21 various portions of those applications so that the
22 same Board would hear all of the challenges that

1 involve that scientific phenomena or modeling
2 technique?

3 DOE.

4 >> MR. SILVERMAN: Your Honor, we think that
5 that is not a workable solution to try to allocate the
6 authority of the boards along scientific modeling
7 techniques of the like. We think, and I think there
8 was general consensus again with the parties, that --
9 as we have indicated in our pleadings, that the best
10 way to organize this is essentially along the lines of
11 the major topic areas of the license application.

12 That's not necessarily inconsistent with the
13 concept of some modeling techniques and scientific
14 issues being addressed independently. There are,
15 obviously, some areas of overlap, but the pre-closure
16 issues are somewhat distinct from the post-closure
17 issues.

18 So we would recommend, and we think there
19 was a consensus, that the best way to structure this
20 is to focus on the LA organization and go from there.

21 >> CHAIRMAN MOORE: Mr. List, I'm sorry, I
22 should have started with you and probably saved us all

1 a few moments.

2 >> MR. LIST: I'm not certain about that,
3 Your Honor. But essentially I think that does reflect
4 what the concurrence was.

5 Without -- with apology, if I may, let me
6 touch on 3B below, which is on this very topic, which
7 is how the matters might be allocated. And there was
8 general consensus that the -- that the three boards
9 might be established just as suggested by DOE; that
10 is, pre-closure issues, post-closure issues, and then
11 a -- another Board that would cover the NEPA
12 activities, the programmatic, quality assurance, and
13 such matters as worker safety and other operational
14 concerns that are not specifically within the
15 scientific aspects.

16 And I might also mention that according to
17 the Draft table of contents it appears that with the
18 LA being organized in such a manner as it is, that
19 that in fact would coincide with this recommendation.

20 >> CHAIRMAN MOORE: Does anyone else wish to
21 be heard on this?

22 Mr. Malsch.

1 >> MR. MALSCH: Judge Moore, we generally
2 agreed with the outline, but we did have some
3 qualifications. It seems to us that there is usually
4 a pretty clear distinction between -- or will be in
5 this case between pre-closure safety issues and
6 post-closure safety issues.

7 We were concerned that really the best way
8 to segregate out NEPA questions would be to confine
9 ourselves to NEPA non-radiological impact questions.

10 There's a curious aspect of this proceeding,
11 because a major part of the DOE Environmental Impact
12 Statement consists of a total system performance
13 assessment, which resembles, at least in some
14 respects, the total system performance assessment and
15 the license application.

16 So there is a potential for an overlap if
17 one were to litigate before separate boards two
18 related and somewhat similar TSPAs with the potential
19 for conflicting Board rulings.

20 So we were thinking at least at the outset
21 that the cleaner distinction was pre-closure,
22 post-closure, and then non-radiological NEPA issues.

1 Obviously that would depend upon the nature of the
2 contentions.

3 On QA, our initial impression would be that
4 should be allocated to the pre-closure or post-closure
5 boards, as necessary, not treated as a separate issue.
6 But maybe that should depend upon the nature of the
7 contentions.

8 >> CHAIRMAN MOORE: Mr. Malsch, it is likely
9 that Nevada will have the lion's share of the
10 contentions filed, from what you've previously
11 indicated. My guess -- strictly a guess, total
12 speculation -- is that as a matter of sheer numbers,
13 because of the total system performance assessment,
14 Nevada will likely have many more contentions aimed at
15 post-closure than any other portion.

16 Is that accurate? Or a reasonable guess?

17 >> MR. MALSCH: I think that's a reasonable
18 guess.

19 >> CHAIRMAN MOORE: If that is the case, if
20 you allocate to three boards using the scheme such as
21 DOE has suggested with pre-closure, post-closure and
22 all others, it is, I would guess, highly likely that

1 there will be a very large misallocation of workload
2 among those three boards.

3 Is that likely to happen with that kind of a
4 breakdown? Breakdown among issues, not the boards.

5 >> JUDGE BOLLWERK: And maybe is there a way
6 that you can rebalance that in some way? I guess that
7 would be the other question.

8 >> MR. MALSCH: I thought about that. And I
9 think you're right. The difficulty is, if you look at
10 the post-closure requirements in Part 63, they are
11 very diffuse and spread throughout the regulation.

12 And from what I know about the total system
13 performance assessment, it's one of these things in
14 which you change one thing and it changes almost
15 everything else.

16 So, frankly, I don't know how, in theory,
17 without actually seeing the contentions, one might
18 make up a further division of authority to divide --
19 for example, to assign different boards various
20 aspects of the post-closure safety analysis.

21 I agree that could be a problem. I guess my
22 only suggestion would be that we'll just have to wait

1 and see what the contentions are that are filed and
2 admitted and make some sensible judgments at that
3 time. But I agree it could be a problem.

4 >> CHAIRMAN MOORE: DOE?

5 >> MR. SILVERMAN: Thank you, Your Honor.

6 We have one suggestion that might help alleviate the
7 problem.

8 When you think about the post-closure issues
9 in the TSPA, it seems to us it may be possible to
10 differentiate between issues related to the subsurface
11 facility design and the waste package. Essentially
12 issues regarding, you know, corrosion, fabrication,
13 procurement of the metallic components, the waste
14 package, et cetera, versus what I'll loosely refer to
15 as the "ologies" -- the hydrology, the geology, et
16 cetera -- of the overall repository, natural barriers,
17 et cetera.

18 So we thought it might be possible to do
19 that sort of a split. You'll have, I think, different
20 experts dealing with issues, like corrosion versus
21 hydrology, et cetera.

22 So it's one thought we had.

1 >> CHAIRMAN MOORE: Mr. Malsch?

2 >> MR. MALSCH: Judge Moore, that's an
3 interesting idea, but, again, this is a total system
4 performance assessment, and slight changes in nuances
5 in the conclusions regarding the engineered barriers,
6 for example, could have a dramatic effect on the total
7 assessment.

8 And I'm just not sure that that would work.
9 Perhaps it would work. I'm just not positive. I have
10 my doubts.

11 >> CHAIRMAN MOORE: Okay. I think we will
12 probably all have a lot of questions in this area as
13 we go along. But it may be prudent to get more of
14 this under our belts and continuously come back to it
15 with other questions and ideas.

16 Just one thing that comes to mind
17 immediately is, if there are three boards, one concept
18 that we have been working with -- because, as you're
19 all aware, the panel has accumulated a lengthy and
20 diverse list of expertise, part-time expertise, in
21 areas that are likely to arise in the proceeding,
22 especially the total system performance assessment:

1 volcanology, seismology, hydrology, geohydrology,
2 hydrogeology, geochemistry, geophysics, and the list
3 goes on and on, some that are expert in modeling.

4 And we had thought instead of using three
5 permanent boards -- simply because of the length of
6 time of the proceeding, one and two, the issues that
7 will have to be wrestled with -- that it may make some
8 sense to have two of the three members of those boards
9 permanent, if you will, and one member of that Board
10 changing. Which technically would mean there would be
11 many more than three boards, but the reality is there
12 would be three with one member who would bring
13 expertise to bear on those particular subject matters.

14 For example, when you're hearing
15 seismological issues, having the seismologist on the
16 Board has a great deal of appeal to those of us who
17 have to wrestle with those issues; whereas having that
18 seismologist on the Board when you're dealing with
19 something totally and completely out of the field of
20 seismology, it has no advantage.

21 Using that construct, then, does this
22 breakdown between pre-closure and post-closure and

1 other issues become as important?

2 Nevada?

3 >> MR. MALSCH: I think that it would still
4 be important, because the concern we have looking down
5 the road would be the possibility of inconsistent
6 decisions because of some overlap in the jurisdiction.

7 And I suppose that would be minimized if
8 there was some overlap among the Board members, but I
9 don't think it would be eliminated altogether.

10 Although, I can appreciate that I think all
11 parties would benefit by having presiding boards with
12 one or more members with really applicable expertise.

13 >> CHAIRMAN MOORE: DOE?

14 >> MR. SILVERMAN: It's certainly an idea we
15 had not thought of, and I think it's an idea that is
16 worth serious consideration.

17 >> CHAIRMAN MOORE: NRC staff?

18 >> MR. LENEHAN: Your Honor, we'd agree it's
19 definitely worth consideration.

20 Another approach the Board may want to take
21 is, if there is a Board established to allocate
22 contentions -- if the Board is established to allocate

1 contentions, before that, you establish the boards the
2 way has just been suggested, but after the allocation
3 Board is established, the contentions are in, the
4 Board has an opportunity to look at what's actually
5 filed. At that point there may be some benefit to
6 revisiting the issue and deciding exactly how these
7 subboards would be constituted.

8 >> CHAIRMAN MOORE: That's a very practical
9 point. I'd like you all to think about this. Does it
10 really matter? Is it critical that the boards that
11 are established for the admission of contentions would
12 be the same, identical boards that would then be the
13 presiding boards to hear the evidence some many, many,
14 many months later on those admitted contentions?

15 Now, there will be -- as you all know, there
16 will be discovery. There will be very active motion
17 practice, we assume. There will be enormous numbers
18 of motions for summary disposition and all of those
19 will have to be wrestled with, hopefully by boards
20 that can bring the requisite expertise to bear.

21 But for the initial admission of
22 contentions, is it really a critical factor that those

1 same boards be the boards that are going to hear this
2 substantively downstream?

3 DOE?

4 >> MR. SILVERMAN: DOE? We don't think, so,
5 Your Honor. We thought about proposing that very
6 thing; that it is not necessarily the case that you
7 need to have the same number of boards or the same
8 boards for the admissibility determinations as for the
9 evidentiary proceeding.

10 You may have a different number, even if
11 it's -- if you can't have more than three, that's one
12 thing. But you may find in -- in evidentiary space
13 you need more and you need less when it comes to the
14 admissibility determinations.

15 >> CHAIRMAN MOORE: Mr. Murphy?

16 >> MR. MURPHY: I think that's an ideal
17 assignment for a coordinating Board. There's no
18 reason to parcel the contentions out among the various
19 panels.

20 Are we through with the earlier question,
21 Your Honor, on the --

22 >> CHAIRMAN MOORE: No. Please.

1 >> MR. MURPHY: Because I not only agree
2 that it is a -- that it's advisable to consider the --
3 the use -- the use of expert -- expertise, technical
4 expertise on the panels, I have always assumed that
5 that would be the case, naturally.

6 And if that, through some hypertechnical
7 definition means that because one person or geologist
8 or whoever would serve on more -- we -- we -- you
9 know, to me it wouldn't mean there would be -- there
10 wouldn't be more than three panels.

11 But, I mean, it's so desirable it seems to
12 me to have that technical expertise.

13 >> CHAIRMAN MOORE: I think practically we
14 should look at it as that --

15 >> MR. MURPHY: Sure.

16 >> CHAIRMAN MOORE: -- this was done as
17 three panels. But the reality is each time the Board
18 would be reconstituted with two of the same members
19 and there were a third one, when that one moved -- the
20 third member moved off, it would be reconstituted,
21 putting back on.

22 >> MR. MURPHY: Sure.

1 >> CHAIRMAN MOORE: Technically,
2 unfortunately, under the way --

3 >> JUDGE BOLLWERK: Or call A1, A2, A3 --

4 >> MR. MURPHY: Yeah. I mean, the
5 desirability of having that technical expertise, seems
6 to me, greatly over- -- outweighs all of the
7 administrative stuff.

8 As a matter of fact, I think what you ought
9 to work on, Judge Moore, is a way to get geologists
10 and seismologists to serve on panels of the Circuit
11 Courts of Appeal.

12 (Laughter.)

13 >> CHAIRMAN MOORE: Be careful what you wish
14 for.

15 (Laughter.)

16 >> CHAIRMAN MOORE: In Rockville, Eureka
17 County or Lincoln County, do you have anything that
18 you would like to speak to on this issue?

19 >> MR. NEUMAN: No, Your Honor. I think we
20 both agree that it would not be critical for the Board
21 that reviews contentions to be the one that hears the
22 evidence subsequently.

1 >> CHAIRMAN MOORE: Then let's move on
2 quickly to the other parts of C -- or 2B. From the
3 discussion I assume there won't be much on this.

4 Should contentions be allocated on the basis
5 of legal requirement that allegedly has not been
6 satisfied, assigned, all of such contentions assigned
7 to one Board?

8 Mr. List?

9 >> MR. LIST: The only concern that I think
10 was expressed on this matter was a concern,
11 especially, I think, from Mr. Malsch, to the effect
12 that any challenge or any contention ought not to have
13 to refer to every single legal requirement or every
14 single portion of the LA, because it would be
15 extremely burdensome to have to do so.

16 Otherwise, I think our consensus was that so
17 long as it isn't overly burdensome that it should, of
18 course, refer to the principal legal requirement.

19 >> CHAIRMAN MOORE: Does anyone else wish to
20 be heard on this?

21 And moving on to Question 2 -- I'm sorry,
22 3A: Relative to the DOE suggestion of issues be

1 allocated based on pre-closure, post-closure and NEPA
2 programmatic groupings, why did DOE structure
3 groupings in this manner?

4 And I haven't -- we're curious as to how you
5 came up with this division. And, frankly, the first
6 thing that came to my mind was the misallocation of
7 numbers of issues that the Board would be hearing.
8 And, because of that, I didn't understand probably why
9 you made that division, and I'm very curious as to
10 what led to that.

11 >> MR. SILVERMAN: Understand your concern,
12 Your Honor, about the potential that there would be a
13 large number of contentions on TSPA-type issues. But
14 it was really quite fairly simple calculus for us, and
15 we are flexible on this.

16 We presumed there would be multiple boards,
17 we presumed that there would be a limited number of
18 multiple boards, and we felt we did not want the
19 jurisdictional issues to be cut too finely; in other
20 words, such narrow jurisdiction for each Board that
21 you would need a very large number. We really were
22 basically tracking the major components of the license

1 application organization.

2 But I would say that the bottom line for us
3 is that we would support whatever structure and
4 jurisdictional organization would -- would just best
5 achieve the goal of meeting the Appendix D in the NWPA
6 schedules. And there may be better alternatives.

7 >> CHAIRMAN MOORE: Speaking only for
8 myself, I don't see a real jurisdictional problem
9 among boards. I don't see it in terms of jurisdiction
10 of who hears what contention.

11 It strikes me, though, that if what you have
12 suggested is some sort of a coordinating Board, or
13 whether it not be technically a Board, be an informal
14 committee on the panel that has a representative from
15 each of the boards with others on the panel that
16 serves in the capacity of, one, a traffic cop, keeping
17 track of all the evidence and exhibits -- obviously,
18 an overwhelming job -- but what's going on in front of
19 each of the boards, and that they then, regardless of
20 what tentative initial assignments of contentions to
21 boards was, as things develop -- they move the pieces
22 around on the chessboard so that boards that have

1 heard issue X and decided issue X, other issues
2 that -- matters they got into that had been thought to
3 go to another Board, that they really belong to that
4 Board, and the dynamic of -- fluid way, as this goes
5 along, be moved over to be heard by that Board, it
6 wouldn't change anyone's preparation, other than the
7 board's preparation. But as far as the parties are
8 concerned, who would hear it, to me, wouldn't be
9 impacted.

10 Would that kind of a thing help alleviate
11 any of your concerns about what boards hear what
12 issues? If there's someone that's trying to make a
13 very logical assessment of what all the boards are
14 doing and moving contentions in that way in front of
15 boards that have heard similar or overlapping issues
16 already so that the same Board would be hearing all of
17 them?

18 >> JUDGE BOLLWERK: Let me just add one
19 other thing. Or, at a minimum, that boards that may
20 have conflicts would be aware of those conflicts so
21 they did not walk into them unknowing. If they're
22 going to make different decisions, they should know

1 that one Board or another has them. And arguably, as
2 well, perhaps a -- a clearinghouse worth looking at
3 things that should be referred to the Commission to
4 resolve these sorts of questions.

5 >> MR. SILVERMAN: Yeah. I hope I
6 understood your question and I'm answering it; if I'm
7 not, you'll let me know.

8 We agree with the coordinating Board
9 concept. We agree -- I think it's a very reasonable
10 approach that you have just laid out in terms of the
11 traffic cop function.

12 I think it would allow us, perhaps, to stay
13 with the three-Board concept, with the understanding
14 that perhaps one Board member shifts.

15 We're not concerned about jurisdiction
16 either. What we were simply trying to do was group
17 the right number of issues before any particular
18 Board.

19 >> CHAIRMAN MOORE: Now, if the coordinating
20 committee or Board -- in keeping track of all of this,
21 they will still never have the same grasp of the
22 information as those that are most intimately

1 involved.

2 Is there a workable and reasonable way in
3 which the parties can always find a way to inform the
4 boards of similar issues in their view of overlap
5 and -- let me back up and break it down.

6 If there are a myriad number of contentions
7 and some of the same evidence is going to be used by
8 the parties on each of those contentions, it may be
9 identical evidence, a host of problems come up.

10 It may be admissible in front of one Board.
11 It may very reasonably not be admissible in front of
12 another. However, both boards should be aware that
13 the identical evidence is being presented to them.
14 And that should go into the calculus of admissibility
15 so that they may want to rethink their position if the
16 evidence is already in before another Board on another
17 contention.

18 Just keeping track of those things is
19 mind-boggling. Issues that are involved in
20 contentions that are similar may not appear to those
21 of us who are viewing it from one perspective would
22 have as those of you who are more intimately involved

1 with the evidence that's going to be presented on
2 those issues.

3 And there has to be some way in which
4 there's communication by the boards -- sorry -- by the
5 participants and the parties to the boards about those
6 things so that a traffic cop knows where the traffic
7 tie-ups are.

8 How can that function work?

9 >> MR. SILVERMAN: Well, I would say, if our
10 conference call that we had on Monday is any
11 indication, that I think the prospective -- the
12 parties, once we have admitted contentions, can get
13 together on an informal basis and do very much like we
14 did fairly successfully, I think, on Monday, which is
15 try to reach agreements among ourselves to inform and
16 recommend to the coordinating Board or the substantive
17 boards which issues ought to be heard by which panels
18 and provide that input.

19 >> CHAIRMAN MOORE: Do any of you see any
20 legal problems, legal objections, to proceeding in the
21 way that has been discussed this morning?

22 Staff?

1 >> MR. LENEHAN: Your Honor, we don't see
2 any legal objections, but the procedure you're
3 suggesting here, it sounds extremely -- very useful,
4 very productive for this situation.

5 We'd like an opportunity to take a good,
6 hard look at it. Off the top of our heads, it appears
7 fine.

8 >> CHAIRMAN MOORE: Sure.

9 >> MR. LENEHAN: One question that does seem
10 implied in what is being suggested -- and I'd just
11 like to clarify, if I may -- is that there would be no
12 penalties imposed if a party files a contention with
13 the wrong Board; that contentions would be filed and
14 the allocation process among the boards you're
15 envisioning, am I correct, that would come after?

16 >> CHAIRMAN MOORE: Right. Nothing would
17 ever be -- oh, I take that back.

18 >> JUDGE BOLLWERK: Maybe I'm not -- I don't
19 think we -- when a contention is filed, a petition
20 comes in, it comes in as a whole; it isn't filed
21 before a particular Board.

22 And I think what the scheme or the process

1 we're talking about here envisions that division would
2 come afterward; not necessarily file your contention
3 before this Board, but file your contention into the
4 proceeding and then it would be allocated to the
5 proper place.

6 >> CHAIRMAN MOORE: And non-timely, new,
7 amended contentions --

8 >> JUDGE BOLLWERK: In fact, that raises a
9 different issue. But you're right. It would have to
10 be --

11 >> CHAIRMAN MOORE: The hitch in the
12 giddy-up may occur at that point, but --

13 >> JUDGE BOLLWERK: Something to think
14 about.

15 >> CHAIRMAN MOORE: -- it would strike me as
16 not an insurmountable hurdle that either the
17 coordinating Board or committee do the assignment if
18 necessary or it would be so patently obvious, since
19 it's dealing with an area that Board A or Board B or
20 Board C have been dealing with; that the contention is
21 filed and it would automatically go to them.

22 But filings wouldn't be with individual

1 boards. They would still be through the EIE and there
2 would be that allocation process in every instance, as
3 if it were one Board. So I don't think it's a
4 problem.

5 >> JUDGE BOLLWERK: I would think once the
6 allocation is made, obviously then the contentions,
7 the filings are going to go to the particular boards.

8 But before that happens -- and it strikes me
9 that the point could be to get it before the proper
10 Board, not necessarily to worry about if it's filed in
11 the wrong place -- create some process so -- the point
12 is to get it to the right place, not to throw it out
13 because you put it in the wrong bin.

14 >> CHAIRMAN MOORE: Just knowing the size
15 and magnitude of the problem before us, I am quite
16 sure that there will be mistakes made probably fairly
17 regularly.

18 But if we're all reasonable and they're
19 pointed out to us, and we have no juries, even when
20 you're in trial, any mistakes we made, they can all be
21 corrected if we catch them in a timely fashion.

22 So -- and certainly putting the wrong three

1 names of the Board on the filing does not disqualify
2 the filing. If it did, an awful lot of filings would
3 have been tossed out in the past.

4 >> JUDGE BOLLWERK: From time to time now,
5 things get filed before the Commission that should be
6 for a Board or before a Board that should be for the
7 Commission and we just refer them to where they should
8 go. So it's -- you know, I think it's not
9 insurmountable.

10 >> CHAIRMAN MOORE: Let's move on.

11 Judge Ryerson is now going to tackle things
12 that are dealing with contentions. And we'll
13 interject as we go along, our other questions in that
14 regard.

15 >> JUDGE RYERSON: Before we go through the
16 specific questions under D dealing with contentions,
17 I'd like to raise one issue that we didn't put in our
18 May 2nd memorandum that I'd like to give you some time
19 to think about.

20 And that is the overriding issue of single
21 issue contentions. I think it was certainly our
22 impression from the parties' filings, the potential

1 parties' filings, that there was a consensus or near
2 consensus that single issue contentions made a lot of
3 sense, subject to one important reservation. And that
4 is, what do we mean by "single issue contentions"? A
5 fair point.

6 And I think we've talked about this among
7 ourselves on the Advisory Board. And I think we're
8 confident or reasonably confident we know it when we
9 see it. But it would probably be helpful to have a
10 more precise way, if we can, of framing what single
11 issue contentions are.

12 So I'd like to come back at the end of the
13 series of questions dealing with contentions to see if
14 there are views from any of the parties about how we
15 might try to express that.

16 >> MR. LIST: Judge Ryerson, we struggled
17 with that very topic yesterday among ourselves, and I
18 think there are a number of observations that you'll
19 find made by the parties.

20 >> JUDGE RYERSON: Should we save that for
21 the end?

22 >> MR. LIST: I think that would be

1 appropriate, yes, sir.

2 >> JUDGE RYERSON: Okay.

3 D1: Should all contentions and not only
4 contentions of omission clearly identify the legal
5 requirement that allegedly has not been satisfied?

6 Mr. List?

7 >> MR. LIST: The consensus, I think, was
8 generally yes. However, once again, there was the
9 concern that it would be burdensome to require a
10 contention to refer to every related provision in the
11 application or in the regulations.

12 >> CHAIRMAN MOORE: If I may, simply because
13 I've been around too long and I guess know or can make
14 too good a guess of how a staff and often how an
15 applicant are going to respond in just about every
16 instance.

17 If there is a contention, if we recommend to
18 the Commission that contentions should always clearly
19 identify the legal requirement that has not been met,
20 obviously there's always one overriding legal
21 requirement in the -- and, I'm sorry, I don't have a
22 cite at hand -- but there's one that they didn't meet

1 the overall standard of -- whatever the language of
2 the health and safety requirement is for Yucca
3 Mountain.

4 That one is -- is -- every single contention
5 would deal with that. And from that point there are
6 other legal requirements. It doesn't do a lot of good
7 if you just put the general ones in and not the
8 specific ones.

9 But, by the same token, as sure as I'm
10 sitting here, the staff would object and say that the
11 contention or the applicant would object and say the
12 contention is no good because they didn't have the
13 specific statement, they just had the general legal
14 requirement.

15 How do we deal with that in an equitable
16 way? Because the regulations don't specify any of
17 this.

18 >> MR. SILVERMAN: Well, Your Honor --

19 >> CHAIRMAN MOORE: As the chief objector,
20 go ahead.

21 >> MR. SILVERMAN: Thank you. The objector
22 in chief. Thank you.

1 If the parties are going to respond to a
2 contention in an answer, if the Department of Energy
3 and presumably the NRC staff is going to respond, we
4 need to have a clear reference to the specific
5 regulation which the petitioner believes is being
6 violated.

7 And so we think that's essentially mandated
8 by 2.309 to the extent you have to identify issues
9 that are material to the findings that have to be
10 made.

11 The rules specify that the findings that the
12 NRC staff has to make in order to grant the
13 construction authorization. And there ought to be a
14 clear reference to the particular regulation or
15 regulations that are allegedly not being met.

16 And that doesn't sound to me to be terribly
17 burdensome. It's a different issue than I think was
18 perhaps mentioned before, which was do you have to
19 find -- do the petitioners have to find every single
20 section of the LA that may touch upon a particular
21 issue. We are not suggesting or advocating that that
22 is necessary.

1 We need --

2 >> CHAIRMAN MOORE: On that point, if a
3 contention is admitted that identifies a portion of
4 the application that is in some way erroneous, in that
5 same alleged error would apply to 15 other parts of
6 the application, would a contention that merely
7 said -- highly specific contention, now -- that
8 pointed out this part of the application was in error,
9 for whatever reason, and among -- and that there were
10 similar mistakes throughout the application, would
11 that fairly bring in that same mistake that appeared
12 14 other places for a total of 15, or do all 15 have
13 to be ferreted out?

14 >> JUDGE BOLLWERK: Can you use examples or
15 do you have to give them all?

16 >> CHAIRMAN MOORE: Would a "for example"
17 work?

18 >> MR. SILVERMAN: Go ahead.

19 What my co-counsel suggested to me, I think
20 it makes some sense, that perhaps for admissibility
21 purposes it would be sufficient to identify the
22 representative, the most important, the primary

1 reference.

2 But if, in fact, the evidentiary case that
3 the party's going to put on in that contention is
4 going to provide evidence of experts that we fail to
5 comply with -- or there are multiple portions of our
6 license application --

7 >> CHAIRMAN MOORE: You'd find it all out in
8 discovery, in theory.

9 >> JUDGE BOLLWERK: Sure. An interrogatory
10 of something directed to them would solve that
11 problem, you would think.

12 >> CHAIRMAN MOORE: Is the staff listening
13 over there and conjuring how you would be objecting to
14 such a thing? Because I can't fathom that many of the
15 contentions aimed at the license application that that
16 same objection will likely apply to many other
17 sections of the application.

18 And do they have to, in an 8,000-page
19 document, which is not going to be easily looked at in
20 a computer-searchable manner, I guess, have to
21 identify all of them? Or is a -- for example, in one
22 or two given with the recognition that the contention

1 covers all of those in the applications that fall
2 within this umbrella?

3 >> MR. LENEHAN: Your Honor, the staff's
4 position all the way through this is that we want to
5 focus the issues -- focus the boards' times on the
6 substantive issues. I think what's implied in the
7 situation we've got here is some kind of a rule of
8 reason and a rule of good faith.

9 If a contention lists 10 sections and misses
10 the 11th section inadvertently, that's something that
11 should be able to be addressed and corrected.

12 >> CHAIRMAN MOORE: That's an easy example.
13 But how about if you give one and there are 10 more?

14 >> MR. LENEHAN: That gets into the good
15 faith. Like the concept of good faith, that they have
16 to do their best effort to identify all the sections
17 that apply as best that can be done.

18 >> CHAIRMAN MOORE: DOE?

19 >> MR. SILVERMAN: Your Honor, I was going
20 to say, I don't believe that the Department of Energy
21 would object to the admissibility of a contention
22 because it cited one or two sections and failed to

1 cite others.

2 What I do think is that there may be
3 information in those other sections that may go to the
4 admissibility of the contention, that we would be able
5 to -- we could bring out and would be material to the
6 determination as to whether it's admissible or not.

7 The simplest example, of course, is that the
8 contention says the license application section blank
9 fails to address. Contention of omission, a subject.
10 And, in fact, it is addressed in another appropriate
11 section of the application. The failure to cite that
12 other section isn't why we would be arguing it's
13 inadmissible.

14 >> MR. LENEHAN: Your Honor, I think I quote
15 our concern is that the legal argument that is being
16 cited is cited. If every section of the application,
17 the example that was just used, is not cited, that
18 does not seem to be the major sticking point. We do
19 want the legal citation, what provision of law or
20 regulation is not being complied with.

21 >> JUDGE RYERSON: Mr. Malsch?

22 >> MR. MALSCH: I don't disagree with most

1 of what's said. Let me just point out two problems we
2 anticipated.

3 One was in citing to the regulations. And
4 we have no difficulty with the concept that our
5 contention, each contention should cite to the
6 provision of the regulation which we think is violated
7 or not satisfied.

8 Our only comment was that Part 63 is kind of
9 peculiar. And, for example, the need to comply with
10 the individual protection standard as a result of a
11 performance assessment appears three or four different
12 places using slightly different wording.

13 And we just wanted to be clear that as long
14 as we were reasonable and that the parties were on
15 reasonable notice as to what provision was at issue
16 here, that no one should be penalized for failing to
17 mention some particular subsection or sentence in some
18 other regulation. That was our first point.

19 The second point about reference to the
20 license application I think is illustrated by -- by
21 some information that -- let me give you. We've not
22 seen the license application, so we can't tell you

1 what it looks like.

2 We have taken a quick look, kind of a survey
3 look, at the license application, total system
4 performance assessment addendum, which we received
5 maybe a month or so ago. And just to illustrate the
6 difficulty, let us suppose we were to attempt to craft
7 a contention addressed to the drip shield, which is
8 one of the engineered barriers which DOE was planning
9 on relying on.

10 The term "drip shield" appears and is
11 discussed at least to some extent in that particular
12 addendum at the second and third level of granularity
13 19 times, at the fourth level of granularity 44 times,
14 at the fifth level of granularity, 16 times. Now,
15 clearly it would be unreasonable to ask for there to
16 be 60 or so separate contentions each addressed to
17 every single time the term "drip shield" was
18 mentioned.

19 I think all we're asking for here is a rule
20 of reason, so that if it is reasonably clear what it
21 is about the license application we don't like and is
22 put into controversy, then we shouldn't be penalized

1 for failing to mention, say, hypothetically, 15 -- or
2 half of the 16 references in the fifth layer of
3 granularity or whatever.

4 I think I agree with the sentiments
5 expressed that there ought to be a rule of reason
6 here, because otherwise we'll end up with numerous
7 multiple contentions, and the parties might be
8 penalized for a really innocent, inadvertent mistake
9 that really didn't mislead anyone.

10 >> JUDGE BOLLWERK: How would you interpret
11 the staff's idea of good faith effort? In other
12 words, you have to make -- what do you see as good
13 faith on your part? The contention drafter.

14 >> MR. MALSCH: I have a problem with that
15 because I don't know what it means. Does it mean that
16 Nevada because it has expertise necessarily has to
17 identify as a part of the good faith effort every
18 single one in my example with 50 or 60 or so
19 references? I would say no.

20 Good faith is kind of subjective. I think a
21 rule of reason is a more -- granted, that's a bit
22 slightly subjective, but it's a lot less subjective

1 than good faith. I think a rule of reason would be a
2 better way to formulate the standard.

3 >> JUDGE RYERSON: Any additional comments
4 on this question?

5 Rockville?

6 >> MR. NEUMAN: Barry Neuman on behalf of
7 Lincoln County.

8 I subscribe to the comments of Mr. Malsch,
9 but I think the crux of this issue here is not good
10 faith, which I agree is subjective, but rather whether
11 the contention puts the applicant and staff on notice,
12 sufficiently on notice of the issue that is intended
13 to be litigated. I think that's a bit more objective
14 and is really what the point of the contention is.

15 >> JUDGE RYERSON: Moving along --

16 >> MS. CURRAN: This is Diane Curran. I
17 would agree with that.

18 >> JUDGE RYERSON: Moving on to D2: Should
19 answers to contentions track the format for
20 contentions?

21 Mr. List?

22 >> MR. LIST: Yes, I think there was

1 consensus that generally that they should.

2 >> JUDGE RYERSON: Any other comments on
3 that?

4 D3.

5 >> MR. LIST: Here, again, there was general
6 agreement. I think, however, the NRC staff wishes to
7 comment further on the D3 question.

8 >> JUDGE RYERSON: And the question for
9 those in the audience: Should answers to contentions
10 be limited to addressing only those specific
11 requirements with which the proponent allegedly has
12 not complied?

13 Mr. Lenehan?

14 >> MR. LENEHAN: Your Honor, the staff would
15 like to see -- to see the answer just spelled -- spell
16 the whole thing out. It is just the legal
17 requirements are there. It just seems that we're not
18 asking for any kind of a imposition on the parties.

19 Your Honor, may we have just one moment,
20 please?

21 >> JUDGE RYERSON: Pardon? Yes.

22 >> MR. LENEHAN: Your Honor, the question is

1 whether we have to address each of the 301
2 requirements, 2.301 requirements. As far as --

3 >> JUDGE RYERSON: This would be in the --
4 in the answer to the -- to the contention. In other
5 words, the contention presumably addresses all six
6 because that's what the regulation requires. But if
7 the challenge is only to two parts -- let's say one
8 part, say scope of the proceeding, is there any reason
9 why the answer to the contention should deal with more
10 than the challenge to scope of the proceeding?

11 >> MR. LENEHAN: No, Your Honor, there
12 isn't.

13 >> JUDGE RYERSON: D4: Should replies in
14 support of contentions be limited to responding only
15 to those issues that were raised in the answer?

16 Mr. List?

17 >> MR. LIST: And the consensus was yes.

18 >> JUDGE RYERSON: Anyone else want to be
19 heard on that question?

20 D5: Is it possible to proffer admissible
21 contentions supporting the application?

22 Mr. List?

1 >> MR. LIST: On this one, we would
2 appreciate some clarification of the question. There
3 was some confusion on this matter. And I think that
4 Nye County had some speculation about what the purpose
5 for the underlying assumption of the question might
6 be, but we'd appreciate clarification from the Board
7 and then we'll be prepared to comment.

8 >> JUDGE BOLLWERK: Let me try. It has
9 happened in the past, and there's case law -- at least
10 case law that goes before the change of the regulation
11 back to 1989, where -- I don't know if it was
12 individuals or groups came in and said we really like
13 this application; we support it and that's our
14 contention. And those were admitted, in fact.

15 And it happened as well, and maybe
16 improperly, come to think of it -- I'm not sure -- in
17 private fuel storage where the Native American Tribe
18 wanted to put a contention in based that way and we
19 admitted it. I'm not sure if it's appropriate or not.
20 Haven't given it additional thought at this point.

21 Although, that's water way over the dam and
22 I guess the question is, and maybe I should direct

1 this to someone that might be supporting the
2 application, at least it would look that way, like
3 NEI, what is your intention here in terms of
4 contentions and your participation, and put it on the
5 table and see where we go.

6 >> MR. BAUSER: Your Honor, there may be two
7 concepts conflated within the context of this
8 particular question: one of standing and one of
9 contentions. They are different. Contentions are not
10 necessarily tied to one's demonstration of injury and
11 so on with respect to demonstration of standing.

12 As the question points out, one of the
13 requirements for the contention is that there be a
14 statement of issue of law or fact. And, to me, issue
15 means a point of dispute. If there's no point of
16 dispute, in my mind, there's no issue.

17 >> CHAIRMAN MOORE: So is that if you are
18 seeking to support DOE's application, you can't file
19 an admissible -- there can't be an admissible
20 contention?

21 >> MR. BAUSER: Again, not necessarily,
22 because I think questions of harm are within the

1 context of standing.

2 >> CHAIRMAN MOORE: Put standing aside.

3 We're dealing with here 309(f)(1), which is contention
4 admissibility.

5 >> JUDGE BOLLWERK: You have to have
6 standing and an admissible contention. At least
7 that's the general --

8 >> CHAIRMAN MOORE: And in addition to
9 (f)(1)(i)'s requirement, you have (f)(1)(vi)
10 requirement of a dispute, which is the point you just
11 made.

12 So how do you file an admissible contention
13 in support of DOE's application?

14 >> MR. BAUSER: I think it's certainly
15 conceivable one could. Let me come up with a
16 hypothetical, and this is not to say this would be a
17 contention, because, again, we haven't seen the
18 application.

19 But I suppose a party could contend that the
20 safety evaluation report is inadequate to the extent
21 it underpredicts repository performance and therefore
22 is not an accurate representation of -- in this case I

1 guess it would be fact.

2 >> JUDGE BOLLWERK: So essentially you're
3 saying you would try to bolster the basis for the
4 application as opposed to say there's something
5 inadequate?

6 >> MR. BAUSER: I guess that's a fair
7 characterization. I'm not sure if that was what was
8 in the board's mind when they talked to a supporting
9 contention. That's, I guess, the difficulty I'm
10 having. But again --

11 >> JUDGE BOLLWERK: It's not supporting the
12 application, I don't think.

13 >> CHAIRMAN MOORE: I have trouble when you
14 get to dispute when DOE says, You're absolutely right.

15 >> MR. BAUSER: Well, they might not.

16 >> JUDGE RYERSON: Mr. Malsch?

17 >> MR. MALSCH: I think that the principal
18 difficulty which organizations supporting the
19 application would encounter is actually the
20 requirement for contentions in 2.309 (d)(2) -- I think
21 it's -- it's -- I'm sorry -- (f)(1)(vii), which says
22 that each contention in the detailed basis part has to

1 refer to specific portions of the application that the
2 petitioner disputes and the supporting reasons for
3 each dispute.

4 Now, I suppose in theory one might dispute a
5 part of the application as being too safe or too
6 conservative. But then that would implicate another
7 provision of the contention which would says you have
8 to cite to a requirement in the regulations which the
9 application violates.

10 And I'm not aware of any provision of the
11 NRC's regulations, nor do I think there could be one,
12 that would prohibit excess safety or too much
13 conservatism. So I think on both scores I see great
14 difficulty in admitting a contention that would
15 support the application.

16 >> MR. BAUSER: If I might respond. We're
17 now building hypotheticals on hypotheticals, but
18 difficulty in terms of, quote, overdesign, unquote,
19 is, I guess, how I would characterize the issue that
20 I've suggested could have unintended circumstances in
21 other areas.

22 But I'm not really prepared to debate

1 specific contentions and argue legally on those today.

2 >> JUDGE RYERSON: It sounds to me like D6
3 may be moot, unless someone is arguing in favor of the
4 admissibility of contention supporting the
5 application.

6 Let's move to D7: If contentions in support
7 of the application are not permitted, should a
8 participant that wants to support the application be
9 permitted to participate in a proceeding, and, if so,
10 how?

11 Mr. List?

12 >> MR. LIST: We did not address this -- we
13 did not address this in detail, Your Honor. It sort
14 of fell into the same heading, I think, as the two
15 preceding questions.

16 So I suppose we did not reach a specific
17 consensus.

18 >> JUDGE RYERSON: Is there anyone else who
19 wants to address that issue now?

20 >> MR. MALSCH: Thank you, Judge Ryerson.

21 I would suggest there are other means
22 whereby parties can participate. For example,

1 especially important questions could invite NEI to
2 participate or other supporters of the application to
3 participate in an amicus capacity. So just because a
4 person is not a party does not mean that one is
5 completely frozen out of the proceeding.

6 Participation in an amicus capacity, I
7 think, would be a very viable option for those
8 petitioners.

9 >> JUDGE RYERSON: Mr. Murphy, did you have
10 a comment.

11 >> MR. MURPHY: Yes. That falls short in
12 one significant respect, seems to me, Your Honor. And
13 that is that except for the defense waste it's
14 Mr. Bauser's client's money that we're spending here
15 today. And amicus does not give them a right to
16 appeal if they disagree with the decision of the Board
17 or the staff or the Commission. Seems to me
18 fundamental fairness.

19 And I don't know technically how we -- I
20 think I have the same sort of problem that Judge
21 Bollwerk has, that it seems to me they worked it out
22 in the PFS proceeding and gotta be able to work it out

1 here.

2 Seems to me fundamental fairness dictates
3 that the nuclear utilities and others -- Nye County
4 may find portions of the DOE application we want to
5 support.

6 But it seems to me fundamentally it's just
7 inconceivably unfair to tell NEI they can participate
8 only as an observer and not have appellate rights when
9 we're spending billions and billions of dollars of
10 nuclear utility rate payers' money.

11 >> MR. BAUSER: Mr. Chairman, I appreciate
12 Mr. Murphy's observation. But just for the sake of
13 the record, there are, of course, other methods such
14 as discretionary intervention and so on and so forth.
15 Not to exceed anyone's suggestion that we could not
16 participate as a matter of right.

17 >> MR. MURPHY: I agree with that. I just
18 think NEI shouldn't have to beg to participate in this
19 process. I think they should be able to participate.
20 The rate payers of the utilities in the United States
21 should be able to participate as a matter of absolute
22 right and there ought to be a way for us to figure out

1 how to do that, seems to me.

2 >> MR. LIST: We would join in that same
3 sentiment.

4 >> JUDGE BOLLWERK: There is an option,
5 obviously, for governmental entities, which can be
6 interest of governmental entities not taking any
7 position on any issue, simply there to participate in
8 whatever capacity they want to.

9 But obviously NEI does not -- I don't -- at
10 least I'm not trying to make a ruling here, but they
11 don't seem to fall into that category, at least on its
12 face.

13 So -- and I think with respect to
14 discretionary intervention, again, there's that tie
15 between the intervention and the contention. So I
16 don't know. But this is something I guess for --
17 grist for the litigation mill at some point, perhaps.

18 >> CHAIRMAN MOORE: I think it's appropriate
19 to take a 15-minute break now. It is now 10:30. We
20 will reconvene at 10:45, and we will start with the
21 issue that Judge Ryerson raised previously on single
22 issue contentions.

1 (Recess taken at 10:31 a.m.)

2 >> CHAIRMAN MOORE: Please be seated.

3 Please come to order.

4 >> JUDGE BOLLWERK: If we could go back on
5 the record, please.

6 We'd like to revisit, before we move on to
7 question of specifics and contentions, we wanted to
8 revisit one issue a little bit that was raised, the
9 question about, I guess, citation of statutory
10 provisions or regulatory provisions in support of a
11 contention and how specific you need to be about that
12 particular citation.

13 And let me just preface this by saying it's
14 been my observation over the years, whether it's
15 judges or lawyers, that everybody likes to keep their
16 options open. And to keep their options open, they
17 will be more general rather than more specific.

18 And while it's useful to the lawyers
19 sometimes and the judges to be more general, often to
20 the other -- opposing party or the judge that has to
21 deal with that information, what they really want is
22 the more specific.

1 And I guess the question is talking about
2 rules of reason or good faith, where does that come
3 out? And this is a really -- it's a problem. It's a
4 continuing problem when we're talking about
5 contentions here and other -- other -- other contexts.

6 Does anybody want to address that again?
7 Because, to some degree, from the judges' perspective,
8 we would like to see the more specific. That's what
9 tells us what the nub of the contention is. And I'll
10 open that up.

11 Is that the right --

12 >> CHAIRMAN MOORE: And I would add just
13 good lawyering, would seem to me, would indicate that
14 you would always use the broadest statutory provision,
15 and -- but it's most helpful because, obviously, the
16 more specific is already encompassed within the
17 broader one.

18 But it -- the more specific in addition to
19 the broad regulatory or statutory requirement that you
20 claim is -- is being violated, the more specif- --
21 you've -- you've covered yourself by doing that.

22 And then getting down as far into the weeds

1 each time with the specific regulatory provisions is
2 something -- certainly a goal that I think all
3 contentions in being drafted should -- should strive
4 for.

5 That's our take on the discussion we had
6 this morning. Is there anyone who disagrees with that
7 or feels that some other approach should be taken?

8 >> JUDGE RYERSON: Well, let's get back,
9 then, to the question of what's a single issue
10 contention.

11 Mr. List, are you prepared to address that?

12 ROBERT LIST: We didn't reach a consensus on
13 it. We struggled with it. We realized that it's a
14 matter of great import but, frankly, did not come up
15 with our own definition.

16 >> JUDGE RYERSON: Is there anyone else who
17 is prepared to address that today? DOE?
18 Mr. Silverman?

19 >> >> MR. SILVERMAN: I would, but does the
20 staff want to go first on this, since you had some
21 recommendation during the telecon? Or I'd be happy to
22 step in.

1 >> >> MR. LENEHAN: If we could go first.

2 We'd like to address part of it to the
3 extent that we feel very, very strongly that each
4 contention should cite a single legal basis.

5 Now, that gets to the point of whether there
6 are multiple sections of the LA that supposedly
7 violate that single legal basis.

8 Each section of the LA that they claim
9 violates that particular law of that particular
10 provision should be as a separate contention.

11 The issue that arises is how detailed a
12 degree of granularity you get in the LA as far as that
13 assertion is concerned.

14 And that is the point where I think the rule
15 of reason has to come in and we're not prepared to say
16 it should specifically go to this or some other degree
17 of granularity.

18 >> JUDGE RYERSON: You know, one -- one
19 possibility, unless there are others who would like to
20 speak to this today, and I'd hope that -- to get a
21 discussion, their views, but one possibility would be
22 to take a -- take a week or so and if -- if any of the

1 potential parties want to submit individually or in
2 consultation with others some suggestions as to a way
3 to define what -- what a single issue contention
4 should be, I think that might make sense.

5 Yes?

6 >> MR. MALSCH: I think that might make
7 sense. Let me just go through at least preliminarily
8 the list of possibilities, some of which we would
9 object to.

10 For example, one possibility would be that
11 every section of the application, even to the finest
12 level of granularity, has to be the subject of a
13 separate attack and a separate contention.

14 And the reason for that on our part is
15 that -- just taking up my example of the earlier drip
16 shield, if the license application looks like the
17 analysis model report, we're going to have 60
18 contentions that basically say the same thing.

19 So I think that's a problem. In concept, I
20 don't disagree with the idea that each contention
21 ought to be focused on a single regulatory violation.
22 I think that makes sense. My only small qualification

1 was that, as I pointed out before, Part 63 is somewhat
2 diffuse, and I would hope that if a party cites what
3 it believes is the key section, the fact that it
4 didn't cite virtually identical to other sections
5 wouldn't be fatal to the admission of the contention.

6 Another possibility is that --

7 >> >> CHAIRMAN MOORE: Mr. Malsch, would you
8 agree, however, that the contention needs to include
9 language that indicates that -- that there are others?
10 If the contention is specific to one portion of the
11 application, even though that same issue, because of
12 an identical other provisions of the application -- it
13 would be applicable to, if the contention does not
14 include language -- for example, that kind of
15 language, or including X, Y and Z -- that it should be
16 interpreted as a single challenge to a single portion
17 of the application?

18 >> >> MR. MALSCH: I think the difficulty
19 there would be the temptation on the part of
20 contention drafters to always say in all other related
21 parts of the application just to protect themselves.

22 >> >> JUDGE BOLLWERK: To keep their options

1 open.

2 >> >> MR. MALSCH: It's hard -- this is a
3 difficult discussion in the abstract, I think. I
4 think, as has been suggested, we're talking about a
5 rule of reason and fair notice here.

6 I mean, it would be our intention to -- in
7 drafting contentions to cite to precisely to the
8 regulation which we think is placed at issue and to
9 cite precisely to what we believe and our experts
10 believe is the most pertinent part of the application
11 where the matter is discussed.

12 And I think if all the parties do that, I
13 think this discussion may be almost entirely academic.
14 But it's a hard discussion to have in the abstract.

15 And I don't think just the reference to all
16 other parts is going to be terribly helpful.

17 >> >> JUDGE RYERSON: One or more parties
18 raised the issue about losing the interrelatedness
19 among contentions by reducing them to too small, too
20 tiny a level. I think Lincoln County may have been
21 one of those. Is this a problem? Or is there a way
22 to deal with it? In fact, Lincoln County gave some

1 examples, so maybe we can look at those as well. That
2 might be something useful.

3 >> CHAIRMAN MOORE: Mr. Neuman, do you have
4 comments on that?

5 >> >> MS. CURRAN: This is Diane Curran. I
6 was actually the one who commented on that.

7 It was in the context of NEPA, which is
8 probably the context that my clients will be raising
9 contentions. And, for instance, in a NEPA contention,
10 if one were concerned about the choice of
11 alternatives, whether there had been an adequate
12 discussion of alternatives, it's not clear to me
13 whether the Board would require a separate contention
14 for each separate alternative. And, of course,
15 consideration of alternatives is related to the
16 cost-benefit analysis.

17 It seems to me that it's hard in the NEPA
18 contention to break it down into the little parts
19 without losing the relatedness for all the parts.

20 >> >> MR. NEUMAN: This is Barry Neuman on
21 behalf of Lincoln County. The Board is correct. We
22 also raised this issue and have the -- have the same

1 concern and did give several examples.

2 Our primary concern would be to not have to
3 break this down to such a level of detail that we
4 would be repeating over and over certain essential
5 points.

6 So, for example, if there were contention
7 that the EIS failed to adequately consider
8 alternatives, that seems to us should be one
9 contention, with an identification of the alternatives
10 that we believe were not sufficiently considered.

11 Similarly, if there's a contention that
12 certain mitigation measures were not adequately
13 identified, that could serve as one contention as a
14 discrete requirement of NEPA and then all of the
15 instances in which mitigation was not adequately
16 considered would fall under -- ought to fall under
17 that as part of the generic contention.

18 But, again, geared to discrete, understood
19 requirements of NEPA.

20 >> CHAIRMAN MOORE: Isn't the approach,
21 though, that having single issue contentions, and
22 using, Mr. Neuman, the ones you're just positing as an

1 example, it might be slightly more burdensome for you
2 to break them out as individual contentions, but,
3 frankly, since everyone here is working off of a
4 computer that has a copy-and-paste feature on it, how
5 burdensome, is it, really?

6 Now, it makes the filing longer, but the
7 reality is that, subsequently, after the admission of
8 contentions, the boards can then combine contentions,
9 and isn't that the point at which it should be done as
10 opposed to putting them all in much larger contentions
11 up front?

12 And it seems to me that it might ultimately
13 be a better approach to have the boards' combining
14 contentions after admission than to have parties
15 having multiple-part contentions.

16 For example, the DOE EIS is inadequate
17 because it doesn't include the alternatives of A, B,
18 C, D. Instead of having one contention, it's
19 inadequate because it doesn't include the alternative
20 of A and the second contention of Alternative B. Yes,
21 you will have to repeat some of that material, but if
22 it is the same, it's really not burdensome with modern

1 computers to do that.

2 >> JUDGE BOLLWERK: Particularly if those
3 alternatives are discussed in very different parts of
4 the application or the NEPA statement where they're
5 brought from one part and another part and another
6 part.

7 Again, that's looking at -- again, if you're
8 looking at the subdivisions or the portions of the
9 application of the NEPA documents that evolve, that
10 goes back to a question we raised about labeling and
11 other things, how specific are we going to be.

12 >> >> MR. NEUMAN: I would agree that the
13 incremental burden on the party filing the contention
14 may not be that great in light of technology that's
15 currently available.

16 Frankly, our thought had more to do with the
17 burdens that would be imposed just by virtue of the
18 paper, burdens imposed on the Board and others in
19 reviewing it. We thought it made more sense to
20 streamline in one consolidated contention.

21 But if that's not the board's view, I
22 certainly would defer to that in terms of I would use

1 what's most convenient for itself.

2 >> CHAIRMAN MOORE: This ties in,
3 Mr. Malsch, with a point you raised about the possible
4 overlap between NEPA contentions and the same type of
5 thing being a safety contention. If they're broken
6 out very specifically as NEPA contentions, does that
7 not make it easier to keep a brighter line, if you
8 will, between safety and environment? And then if you
9 are litigating the NEPA contentions before Board A,
10 because the standard to which -- the legal standard
11 that is being applied is different than the safety
12 standard, don't you -- you certainly, I would think,
13 eliminate the res judicata problem. And to some
14 extent, if not entirely, you eliminate the collateral
15 estoppel problem.

16 >> MR. MALSCH: I think --

17 >> CHAIRMAN MOORE: Between safety and
18 environment.

19 >> MR. MALSCH: I understand that. There
20 are -- clearly there are some distinctions between the
21 kind of evaluation that you would see under NEPA, for
22 example, and the kind of evaluation you would see

1 under the Atomic Energy Act, even assuming if we're
2 talking about radiological safety, for example.

3 Let's say hypothetically a contention by
4 Nevada addressed to the quality assurance compliance
5 of some aspect of the performance assessment, would
6 certainly be within the scope of a challenge on the
7 Atomic Energy Act, but would not terribly relevant --
8 or maybe not be, but not obviously relevant under
9 NEPA.

10 My concern is that the distinction could end
11 up being, at least for some kinds of contentions, very
12 artificial. For example, what would happen if we
13 had -- even with or without, let's say -- let's say we
14 had a contention on the drip shield addressed to both
15 the NEPA performance assessment and the Atomic Energy
16 Act performance assessment.

17 And the results were that for reasons that
18 were well established it was decided that the safety
19 assessment could not take any credit for the drip
20 shields.

21 It seems to me that has an obvious
22 spill-over into the total system performance

1 assessment done under NEPA, because then logically it
2 shouldn't take credit for drip shields either.

3 So while I think there are some aspects of
4 the NEPA versus atomic energy act distinction that are
5 pretty clear, where you can draw a line and where
6 saying NEPA contention, Atomic Energy Act contention
7 makes sense and is understood, I'm concerned that in
8 some other aspects that distinction is going to turn
9 out to be rather artificial.

10 >> CHAIRMAN MOORE: The concern that I have
11 always seen in this problem in Yucca Mountain is the
12 collateral estoppel-res judicata problem, because
13 they're going to be in all probability litigated at
14 different points in time; that is, the NEPA
15 contentions are more likely than not to precede the
16 litigation of the so-called safety contentions.

17 How do you wrestle with that problem, or is
18 the only way to avoid the collateral estoppel-res
19 judicata problem by ensuring that the same Board at
20 essentially the same time is hearing the safety and
21 environmental issue that would be the left and right
22 foot of the issue as you put it?

1 >> >> MR. MALSCH: Frankly, that's what I
2 thought would be the most efficient way to do it.
3 There may be others. I mean, one could adopt sort of
4 a rule that said that there's no collateral estoppel
5 overlap between Atomic Energy Act and NEPA
6 contentions, and maybe that would work.

7 But I had the sense that that could result
8 in some fair amount of duplication and overlap. I
9 don't think I have an easy solution to this. It's
10 just that I think in this proceeding, unlike others,
11 the overlap may be very substantial. And, frankly, we
12 were concerned that with the burden of filing
13 contentions addressed to two different total system
14 performance assessments, one used for NEPA, one used
15 for the Atomic Energy Act.

16 >> CHAIRMAN MOORE: DOE, and let's hear from
17 the staff.

18 >> >> MR. LENEHAN: Your Honor, it strikes
19 me what we're looking at here is a situation where
20 most of the parties seem to agree in concept on the
21 idea of single issue contentions, in concept.

22 We're trying to discuss now very fairly

1 complicated issues, collateral estoppel, particularly.
2 We're trying to discuss how fine the contentions
3 should be drawn.

4 I would suggest that we take the Board up on
5 its recommendation that we take a little while and
6 take a while to put this together and see if we can
7 coordinate among ourselves, present something to the
8 Board that reflects a well-thought-out position as
9 opposed to what we're trying to do here specifically
10 this morning.

11 With the one exception, could I suggest it
12 be more than a week, though, Your Honor?

13 >> CHAIRMAN MOORE: Well, why don't we get
14 to timing later.

15 DOE, you wanted to speak to this NEPA safety
16 dichotomy problem that's on the floor.

17 >> >> MR. SILVERMAN: Just briefly, Your
18 Honor.

19 I agree, this is a complicated issue. I
20 wanted to underscore something I think you said, which
21 we wholeheartedly agree. I think we should be
22 breaking out NEPA-based contentions from safety-based

1 contentions, because the legal standard for certainly
2 admissibility and I think for the ultimate
3 determination is different.

4 And so we wholeheartedly endorse that. It
5 is conceivable you could have a contention, very
6 similar factual basis that's not admissible in NEPA
7 space that is admissible in safety space.

8 >> CHAIRMAN MOORE: But by the same token,
9 you could have them admissible in both columns.

10 >> >> MR. SILVERMAN: Absolutely true.

11 >> JUDGE BOLLWERK: Is there a concern about
12 allocation, which Board it goes to? Could one Board
13 try both of those? Is this something that the overall
14 committee ought to be looking at? Is there a
15 difference between drafting two contentions and how
16 you put them back or do you put them back together?

17 >> >> MR. SILVERMAN: Yeah, I don't think we
18 have an objection to one Board ruling on that, on the
19 NEPA contentions and some subset of safety
20 contentions. I just think that all the NEPA
21 contentions ought to be ruled on by the same Board.

22 >> CHAIRMAN MOORE: As opposed to safety --

1 if it was the situation, essentially an identical
2 contention but for the legal standard that's
3 applied -- one under NEPA, one under the Atomic Energy
4 Act -- would that change your view that it should be
5 two different rulings from two different boards, or
6 the same boards?

7 >> >> MR. SILVERMAN: I don't think I said
8 that. I think it would be fine if it was the same
9 Board. It's just critical that --

10 >> CHAIRMAN MOORE: Is there a reasonable
11 way in which the parties could identify, after
12 contentions are filed, their view of those issues?

13 >> >> MR. SILVERMAN: Sure, absolutely. And
14 we could confer as we have this past week and then
15 recommendations or opinions could be provided on the
16 record to the panel.

17 >> CHAIRMAN MOORE: Because then we could
18 have essentially -- I hate to use the word "safety" in
19 these contexts, but safety contentions with a dovetail
20 NEPA contention or a NEPA contention with a dovetail
21 safety contention that would more or less do the
22 process go together. That would be one way that we

1 could consider doing this.

2 Does that make sense?

3 >> JUDGE BOLLWERK: Would you still have the
4 contentions filed as separate contentions and then
5 they're put back together? Or would you have them
6 identified as a joint contention, potentially?

7 >> CHAIRMAN MOORE: It's just a thought, but
8 it would seem to me that it may be most efficient if
9 it's essentially the same issue with different
10 standards, because the same facts are going to have to
11 be examined, that the same Board is examining the
12 facts only once, not twice.

13 >> >> MR. SILVERMAN: I think we feel that
14 if there is a set of facts that supports a NEPA-based
15 contention or a concern under NEPA and the same set of
16 facts that supports a safety concern, we would like to
17 see those as separate contentions. We're going to
18 need to --

19 >> CHAIRMAN MOORE: I'm not disagreeing with
20 you that it's separate contentions, but it would be
21 contention one has a dovetail contention, which is
22 either safety or environment.

1 I was thinking that that might be one
2 approach we could try to use, which it would seem to
3 me also makes sense on why we want contentions as
4 narrowly drawn in more of them than broadly drawn with
5 less contentions, because it will make, I would think,
6 it easier administratively to deal with them. Just
7 thinking out loud on that.

8 >> JUDGE BOLLWERK: To some degree I think
9 the same idea would apply. We've talked before about
10 the concern about a contention that has many parts in
11 that its whole also raises an issue. In theory you
12 can file the separate contentions, and then you can
13 file another contention that creates an "oh, by the
14 way, for this reason, this reason, this reason,
15 there's a generic problem here."

16 I don't know. I mean, that's a different
17 way to approach it.

18 >> CHAIRMAN MOORE: How do we deal with
19 contentions that challenge models? For example, I'm
20 assuming that the total systems performance assessment
21 in last analysis is a model that has many, many
22 subparts which, in fact, are submodels. And all

1 models are somewhat akin to an onion: You just keep
2 peeling the layers and you get to the submodels.

3 If you have contentions challenging the same
4 aspect of models and submodels, what's the granularity
5 for the specificity of the contention? Do you
6 challenge the overall model which subsumes the
7 submodels that are in it, or do you break it down and
8 challenge the submodels, recognizing that at any
9 submodel level there could be, for example, three
10 problems with the submodel?

11 Would each of those be a contention or is it
12 the challenge to the submodel one contention?

13 >> MR. MALSCH: Speaking on Nevada's part, I
14 think there are two related issues. I think our
15 intention would be that where we have a difficulty
16 with a model, we would be as specific as possible,
17 which would, assuming it were appropriate and not a
18 generic attack on some aspect of the overall model --
19 that we would actually go down to the submodel level.

20 >> CHAIRMAN MOORE: The problem is, if I'm
21 remembering the filings correctly, DOE indicated that
22 they felt or it felt that the contention needed to

1 address whether this would invalidate the grant of the
2 license. Whereas, no one of those errors or alleged
3 errors in the submodel would do that, but in
4 combination it may. And you would not necessarily
5 know that until, one, the issue was decided, and, two,
6 sensitivity analysis is then run, which is a secondary
7 component of every model challenge.

8 And then the sensitivity analysis in
9 relation to the entire model and all the other
10 problems that have been highlighted or litigated and
11 at what point then can you resolve these issues?

12 >> MR. MALSCH: That was the second aspect
13 of my answer. I think what you've suggested is the
14 only way to deal with that. If we are going to have
15 very specific contentions addressed to the submodel
16 aspects, then we can't be in a situation in which just
17 because we, as a matter to be helpful and to have
18 specific contentions, draft contentions at the trees
19 level; we're then accused of forgetting the forest.

20 I think our view would be if we are drafting
21 very specific single issue contentions, let's say at
22 the submodel level, then those would be admissible,

1 assuming they satisfy other requirements of 2.309.

2 But that if we prevailed on those, or any
3 one aspect, let's say any one submodel, then at that
4 point it would be up to DOE to present an alternative
5 performance assessment that would take account of the
6 model changes or, at its option as a matter of
7 litigation strategy, present an alternative assessment
8 simply for purposes of argument, assume we were
9 correct in our challenge to the submodel.

10 But I think it's too much to ask any party
11 to be able to assess, in connection with the filing of
12 contentions, the overall effect of all of its
13 contentions or any small collection of them. Because
14 that would mean that every party has to do its own
15 total system performance assessments multiple times,
16 making multiple assumptions about which contentions
17 get adopted or proven or not.

18 >> CHAIRMAN MOORE: DOE, this is a problem
19 that I have seen with challenges to models. How do
20 you respond to Mr. Malsch?

21 >> >> MR. SILVERMAN: If I understand
22 Mr. Malsch correctly, he is saying that the State

1 would endeavor to identify specifically as reasonable
2 possible errors, alleged errors in models or submodels
3 as individual contentions. We agree with that.

4 He is saying that they would not necessarily
5 need to identify the implications of -- cumulative
6 implications, perhaps, of all of those various errors.
7 I believe he's saying that. And if that's true I
8 think that's right.

9 I think that does give us, however, the
10 Department, the opportunity to respond to indicate
11 that either individually or collectively there's no
12 significant impact.

13 In other words, an individual error, even if
14 true, may not jeopardize the board's satisfying it.

15 >> CHAIRMAN MOORE: Stop there. Now, the
16 hypothetical was that it was a submodel and there were
17 three alleged errors.

18 >> >> MR. SILVERMAN: Yes.

19 >> CHAIRMAN MOORE: And you would be, then,
20 saying that, as a defense, that it doesn't impact the
21 outcome?

22 >> JUDGE BOLLWERK: We're at the contention

1 admission stage right here or are we moving -- that's
2 the other thing I'm hearing back and forth.

3 >> >> MR. SILVERMAN: Let me answer that. I
4 think if there were three individual --

5 >> CHAIRMAN MOORE: That's the materiality.

6 >> JUDGE BOLLWERK: Materiality is clearly
7 the standard in play here.

8 >> >> MR. SILVERMAN: My view is if there's
9 three independent errors in the model, that's three
10 contentions.

11 >> CHAIRMAN MOORE: Do you always have a
12 fourth contention that says any combination of those
13 also would lead to not meeting the standard?

14 >> JUDGE BOLLWERK: To keep your options
15 open, as it were, once again.

16 >> >> MR. SILVERMAN: This is difficult, but
17 I think that to some degree the petitioner has to
18 identify that the issues that they raise a genuine,
19 material issue. And if that requires them to identify
20 why these individual issues cumulatively are material
21 to the findings that the agency has to make, then they
22 should do that.

1 >> JUDGE RYERSON: It seems almost like a
2 very mechanical pleading requirement. Presumably, if
3 the contention -- if three contentions each say this
4 alleged defect is material, presumably some
5 combination of them would also be material. I mean,
6 it would have to be the case.

7 I guess the question is, do you lose that?
8 Do you lose that fourth contention somehow by
9 splitting it up? Obviously you shouldn't.

10 >> MR. MALSCH: Let me respond just a little
11 bit. There's a requirement that you show that the
12 issue raised is material. I think that means, under
13 analysis, that you've got to identify a regulation
14 which is not satisfied or is violated.

15 It seems to me that if you have a contention
16 that's drafted sufficiently to show with the requisite
17 minimal factual showing that a particular NRC
18 regulation is not satisfied, that means the contention
19 is admissible and nothing further is required.

20 A further argument that says that, oh, but
21 if one did some further evaluation and did some
22 different assessment than the one in the application,

1 we would show that we still comply, it seems to me
2 that goes to the merits of the contention and we're in
3 possibly some sort of rebuttal case.

4 But even from the standpoint of contention
5 drafting, that imposes a nearly impossible burden on
6 parties to show that. It seems to me, as I said
7 before, a contention which says that the application
8 doesn't satisfy a particular part of the application
9 raises a material issue.

10 And the remedy could be the application is
11 denied. The remedy could be that the application is
12 conditioned or the remedy could be DOE has to go back
13 and redo the performance assessment to comply with the
14 regulations. At which point it would be up to DOE to
15 prove that it still complies.

16 But there's no way that any party could
17 reasonably be expected to have -- to be able to run
18 its own total system performance assessment to show
19 the ultimate result on DOS of each and every one of
20 its contentions considered a low-order combination.
21 That's just asking for too much.

22 >> JUDGE RYERSON: Let me phrase my issue a

1 little differently. Suppose you have ten related
2 contentions and at the contention admissibility stage
3 it is your position, and say a Board agrees, that each
4 of those ten is an admissible contention.

5 But then you get to the next phase. You get
6 to hearing. And you prevail on three of the ten in
7 terms of being wrong, in terms of there being some
8 sort of error, but the question of materiality only
9 arises when you look at all three together, but you
10 don't have at that point technically a contention that
11 deals with all three.

12 You know, is that a problem at the hearing
13 stage if you don't have a contention that aggregates
14 those ten related problems in some way?

15 >> MR. MALSCH: I don't think it's a problem
16 for the hearing. As I see it, a contention alleging
17 that the app- -- let's say a submodel of the
18 application is not in compliance with some particular
19 provision in Part 63, and let's say we offer the
20 necessary factual support, that is admissible. Seems
21 to me we go to hearing on that particular question.

22 If we prevail and the submodel is

1 invalidated as lacking sufficient support or being in
2 violation of some requirement, then the ball passes to
3 DOE.

4 Now they have a choice. And I suppose this
5 is maybe their rebuttal case. That their choice is to
6 abandon the application because there's no plausible
7 way they can do the model in a compliant way, or to
8 present a new analysis which corrects the model
9 defect.

10 But I think that's down the road. I think
11 in the initial round of litigation, all that should be
12 done is to look at the individual contentions and to
13 litigate them one by one, granted that they ought to
14 be organized and aggregated before boards so that
15 there's some sense of how they're related to each
16 other.

17 >> CHAIRMAN MOORE: DOE, do you agree with
18 Mr. Malsch that at the contention pleading and
19 admissibility stage that the contention does not need
20 to do more than allege that this error is material and
21 will preclude the model and, hence, the application
22 from meeting the health and safety standards that it

1 has to meet?

2 >> >> MR. SILVERMAN: No, I don't think it's
3 just merely an allegation. Obviously the 2.309 does.

4 >> CHAIRMAN MOORE: So is it DOE's position
5 that a pleader at the contention stage has to do for
6 every challenge to a model or a submodel -- run a
7 complete -- before they can so plead, a total systems
8 performance assessment so that they know -- and then
9 the sensitivity analysis -- so that they know what the
10 outcome of that is?

11 >> >> MR. SILVERMAN: I'm not suggesting
12 they have to rerun the TSPA in its entirety, but they
13 do have a burden as a petitioner to identify a genuine
14 issue of material fact.

15 They can't just allege that some error -- it
16 may be a very, very small error, maybe a
17 inconsequential error -- invalidates the TSPA, and by
18 simply alleging that, having the contention admitted.

19 I think there's something more that has to
20 be shown, albeit it's not a full evidentiary
21 proceeding, but some reasonable basis in fact or
22 expert opinion for a Board to conclude that there's a

1 reasonable issue to be litigated there that it does
2 affect adversely and potentially invalidate the TSPA.

3 >> JUDGE BOLLWERK: So what you're saying is
4 that they have an affidavit from an expert that says
5 "this is material," that would suffice?

6 >> >> MR. SILVERMAN: With a reasonable
7 explanation that -- which would -- for what would be
8 appropriate at this stage of the proceeding, yes.

9 >> JUDGE RYERSON: And, conceivably, as to
10 some alleged defects, it might not be possible for an
11 expert to opine that it's material, but there might be
12 situations where an expert would opine that five
13 issues collectively are material; is that correct?

14 >> >> MR. SILVERMAN: I think that's
15 probably right.

16 >> CHAIRMAN MOORE: If that's the case,
17 then, each one of those would have to be part of the
18 admissibility -- would have to be admitted or you'd
19 never get to the collective question. It's chicken
20 and egg, but I'm concerned with models on how we're
21 supposed to -- on single issue contentions, how you're
22 supposed to deal with it.

1 Mr. Malsch, I would suggest -- I would like
2 to hear what the staff has to say. Although, the
3 staff may not want to say a thing.

4 >> >> MR. LENEHAN: I think at this point we
5 would prefer not to say anything, Your Honor.

6 >> JUDGE BOLLWERK: Keeping their options
7 open.

8 >> MR. MALSCH: To make the debate more
9 interesting, let's suppose we have a contention which
10 challenges a submodel as lacking sufficient support,
11 and let us suppose our expert tells us -- expert tells
12 us that in drafting the contention that in his or her
13 view there is insufficient scientific basis to develop
14 any model, how can we possibly be required to analyze
15 the overall effects on the performance assessment in a
16 situation in which we think no scientifically valid
17 performance assessment can be done?

18 >> >> MR. SILVERMAN: I think that
19 contention is potentially admissible if that expert
20 provides a reasonable basis for his position that
21 no -- what was it -- that it's not possible to run
22 that model adequately. If I'm paraphrasing you

1 correctly.

2 >> CHAIRMAN MOORE: Let me step out of
3 contention admissibility just a moment for purposes of
4 my own analysis and thinking downstream.

5 Mr. Malsch has said that the way in which
6 the contention's now admitted, challenging a model,
7 is -- can be addressed is -- after trial and it's
8 found to be a valid challenge, DOE can obviously
9 appeal and try to get that overturned.

10 But assuming that that doesn't happen, they
11 can amend the application to bring in a new model
12 plugged into the total systems submodel plugged into
13 the total systems performance assessment. They can --
14 or it can be conditioned that certain steps would have
15 to be taken. Is that correct, Mr. Malsch?

16 >> MR. MALSCH: That's correct.

17 >> CHAIRMAN MOORE: Now, if it were so
18 conditioned, would one of those conditions always have
19 to be that when all was said and done, after all the
20 litigation is over, that there is a sensitivity
21 analysis run that shows that this error that's now
22 been demonstrated in combination with all the other

1 errors that were demonstrated, assuming there were
2 any, you come out with a new result and that new
3 result is fine and there would then be an opportunity
4 to challenge that anew? Is that the way this would
5 all work?

6 >> MR. SILVERMAN: With all due respect,
7 Your Honor, that's well beyond my expertise to comment
8 on whether a sensitivity analysis would be required.

9 >> CHAIRMAN MOORE: And probably all our
10 lives' expectancies, I might add.

11 Mr. Malsch, though, is that your view of how
12 that would work?

13 >> MR. MALSCH: That's one way it could
14 work. I guess my difficulty is I think we're using
15 the term "materiality" kind of loosely. In our view,
16 if a contention with adequate support alleges that a
17 regulation is not satisfied, then that makes the
18 contention admissible.

19 There is no further requirement that we show
20 that that violation has some independent safety
21 significance.

22 >> CHAIRMAN MOORE: I understand your

1 position. But take it to the point that now you've
2 had your hearing and you prevail on that challenge to
3 the submodel. You condition -- either the applicant
4 has to fix it with a new analysis or a licensed
5 condition that it has to be fixed. I mean, the
6 applicant either agrees to do it or he has a condition
7 that he has to do it before he can get a license.

8 Is part of any license condition in this
9 proceeding challenging models necessarily going to
10 have to include something that deals with when all is
11 said and done a sensitivity analysis showing that it
12 doesn't make any difference?

13 All these mistakes have been corrected under
14 the new sensitivity analysis.

15 >> MR. MALSCH: It seems to me that that's
16 really DOE's option. I mean, in our hypothetical, a
17 submodel has been found to be in noncompliance with
18 Part 63. It seems to me at that point it's DOE's
19 call.

20 >> CHAIRMAN MOORE: Okay.

21 >> MR. MALSCH: If they want to try again
22 with a compliance model, that's fine. They could

1 maybe try to get an exemption from that particular
2 part of the regulations and proceed on that basis.

3 That's a possibility, I suppose. This is
4 really all their call. But it seems to me that's hard
5 to plan for at this point.

6 >> CHAIRMAN MOORE: So license conditions
7 won't play a part of this, then?

8 >> MR. MALSCH: I wouldn't think so. We're
9 talking about matters that are inherently
10 discretionary involving large amounts of judgment and
11 expertise, not something that's fairly mechanical. So
12 I rather doubt a license condition would do it.

13 >> CHAIRMAN MOORE: On single issue
14 contentions, I have a couple of questions and
15 comments. These are basically aimed at language in
16 the filings from the staff and DOE.

17 And that language predates the very
18 substantial contention admissibility requirements
19 prior to 1989. And when you talk about "basis" and
20 "basis statement," that is no longer really a part of
21 the lexicon of 309(f)(1). The word "basis" only
22 appears in 309(f)(1)(ii). And that -- the gist of

1 that provision is a brief explanation of the basis of
2 the contention.

3 Which I believe we probably can have general
4 consensus means very briefly describe what's this
5 contention all about. Is this about baseball or is it
6 about football? Brief explanation: one, two, three
7 sentences.

8 Then when you get over to 309(f)(1)(v) and
9 (vi), you're into setting forth the sources and
10 evidence supporting your position and what portions of
11 the application you're challenging and detailing the
12 matters that support the contention.

13 But I see tossed around in the filings
14 "basis statement," "inadequate basis." It wouldn't be
15 an adequate basis. The contention should only have
16 one basis.

17 Well, staff and DOE, correct me where I'm
18 wrong now under 309, what part does that kind of
19 language play in the admissibility of a contention?
20 And if I'm correct, then I think we all need to
21 jettison that pre-1989 language which was applicable
22 when the contention we were under noticed pleading

1 standards which only required to set forth the
2 reasonable basis for the contention, and there's
3 legions of case law and what was the reasonable basis
4 for a contention.

5 All that changed in 1989, and it was largely
6 incorporated without change in 2004, particularizing
7 the scope provision that was in the case law and the
8 materiality provision that was always in the case law.

9 Staff, you're one of the ones who likes to
10 toss out "inadequate basis." Where is that to be
11 found in the 309(f)(1) other than in (f)(1)(ii)?

12 MS. BUPP: I think the basis requirement is
13 in (f)(1)(ii). It does require you to have a brief
14 statement of what your contention is all about.

15 I think when we say that we want a single
16 issue contention to have a single basis, give your
17 brief explanation of what your contention is about.

18 >> CHAIRMAN MOORE: So that -- would you --

19 MS. BUPP: If it's something other than
20 brief --

21 >> CHAIRMAN MOORE: Would you agree --

22 MS. BUPP: -- then it's probably --

1 >> CHAIRMAN MOORE: -- with me that the
2 support for that contention, the things that are
3 required by 309(f)(1)(v) and (vi) are not what you're
4 talking about when you're saying "basis statement"?

5 MS. BUPP: When we're saying "basis
6 statement" in our pleadings that we filed before the
7 Advisory PAPO Board or in past meetings?

8 >> CHAIRMAN MOORE: The things you've filed
9 with us. You talk about a basis statement.

10 MS. BUPP: No. I think that the factual and
11 accurate opinion support for the contention is
12 different than what we meant by "basis statement." By
13 "basis statement" we meant what is said in (ii): You
14 need to have a brief explanation.

15 >> CHAIRMAN MOORE: Well, explain further to
16 me if you've specified what the issue is, isn't it
17 pretty difficult if you have any kind of a brief
18 explanation of what the basis of the contention is --
19 i.e., what it's all about -- how can the brief
20 explanation, unless it's so brief as to be
21 nonexistent, be an inadequate basis?

22 MS. BUPP: Well, I don't think --

1 we certainly haven't said -- there are no contentions
2 before the Board right now where we would say that
3 something had an inadequate basis.

4 If we were to argue that something had
5 inadequate factual or expert opinion support for it to
6 be admissible --

7 >> CHAIRMAN MOORE: Okay. That is the point
8 I guess I'm trying to get at the long way around.

9 It would seem to me that if the requirements
10 for admissibility of a contention are set forth in
11 309(f)(1), subparts (i) through subpart (vi), that an
12 objection to a contention on the basis that it has an
13 inadequate basis is not a proper objection and should
14 never appear in an answer opposing a contention.

15 MS. BUPP: I don't think that it would never
16 be an improper objection. I think the basis statement
17 is related to having a sufficient statement of what
18 your contention is. If your contention is so
19 confusing that you cannot clearly identify from
20 reading the contention what exactly is at issue, then
21 in that case the basis statement might be
22 insufficient. I don't want to say that it would never

1 be something that we would object to. But the main
2 objection --

3 >> CHAIRMAN MOORE: Is the staff of the
4 opinion that if we were to recommend to the Commission
5 that the six contention admissibility requirements set
6 forth in 309(f)(1), and the second requirement, a
7 brief explanation of the basis, if it's one, two, or
8 three sentences that make sense, that -- and a proper
9 objection is not an inadequate basis for that
10 contention, and you've got to be -- if you're
11 challenging the support, it's got to be something that
12 you're complaining about in 309(f)(1)(v) or (vi)?

13 MS. BUPP: I would say that in most cases
14 that that would be correct. As a lawyer I want to
15 keep my options open. But in most cases that would be
16 correct.

17 >> JUDGE RYERSON: I think Nevada in its
18 filing suggested that normally (i) would be a
19 one-sentence response, (ii) would be a one-sentence
20 response. And I take it, staff, you don't disagree
21 with that; you disagree with their notion that you
22 really can compress 3 and 4 and 5 and 6, but as to

1 their description of (i) and (ii), that would be the
2 same. Normally one sentence or so.

3 MS. BUPP: One sentence, up to three or four
4 sentences if you want to get fancy.

5 But we would expect it to be a brief
6 statement that clearly identifies what is at issue.

7 >> CHAIRMAN MOORE: And you would agree that
8 in that brief explanation you don't have to set forth
9 the support.

10 >> MS. BUPP: As long as it's elsewhere in
11 the contention, no.

12 >> CHAIRMAN MOORE: You're all looking at me
13 like I'm either an outcast or I've been around too
14 long. But the pre-1989 case law unfortunately has
15 worked its way into the lexicon, and it has no place
16 today. And it is misused by the Commission, by the
17 boards and by the parties all the time. And this is
18 the proceeding where we don't have time to sort it
19 out.

20 So I would hope that if you agree that that
21 is what 309(f)(1) means, that we approach it that way
22 in our answers and our replies, and it will make life

1 easier. And I would agree with what the staff has
2 said, that it would be a rare occasion that you would
3 have an inadequate brief explanation of what the
4 contention's all about. Certainly possible. But --
5 so that we shouldn't be seen as an objection to a
6 contention language that says it's -- and it's an
7 inadequate basis.

8 And this is the point when we say should the
9 answers that is raising the objections to a contention
10 track this -- the requirements of 309(f)(1), if you
11 have a specific objection, for example, through the
12 scope, which is 309(f)(1)(iii), that it's probably
13 this is not the proceeding to then as a throw-away
14 line end up at inadequate basis.

15 Because that should not be even -- a moment
16 should be spent by a Board in determining then or in
17 anybody filing a reply why that's inadequate.

18 Yes. Staff.

19 >> >> MR. LENEHAN: Your Honor, in drafting
20 the written submissions we submitted to this Board,
21 there was no intention to drag in the pre-1989
22 lexicon.

1 >> CHAIRMAN MOORE: Well, it's there.

2 >> JUDGE BOLLWERK: In many instances this
3 doesn't become an issue necessarily, because we
4 don't -- we're not -- we're not talking about actually
5 having perhaps a label for each contention for each
6 one of these subparts, and it's going to be very clear
7 what part falls under what subpart if we go that
8 direction.

9 This is going to become something that many
10 times is covered over because it's not clear exactly
11 what someone thinks their basis is.

12 >> CHAIRMAN MOORE: You had indicated in
13 your filing that you felt breaking the contention down
14 into those six requirements was burdensome.

15 We cannot hear you, Ms. Curran. Can you
16 hear us?

17 >> >> MS. CURRAN: I'm sorry. I couldn't
18 hear who you were addressing.

19 It seems to me there was overlap and it
20 was -- if you look at the different positions that are
21 related, addressing them separately, in my experience,
22 you wind up repeating yourself. But honest to

1 goodness, I had never really thought about what you
2 just said.

3 I think I'm one of the guilty parties of
4 carrying over the concepts of pre-1989. So maybe this
5 is the time to jettison that. I just assumed the word
6 "basis" was in summary what is the support for your
7 contention, including what's your documentary basis,
8 and the word "base" is used in Section -- Subsection
9 (f)(2), what is the dispute.

10 I had just included that as, in my own
11 thinking, part of the basis that it was an expansion
12 on the concept of a basis requiring you to make sure
13 that you address all these different concepts in
14 seeking admission of the contention.

15 Sometimes I find that doing it separately
16 gets really duplicative.

17 >> JUDGE BOLLWERK: The concern here,
18 though, is when you have potentially in multiple
19 hundreds of contentions, when those things aren't
20 fairly clearly laid out, the boards and, frankly, the
21 other parties are going to spend a lot of time hunting
22 for the what label or what you're trying to address,

1 basically. That's the idea here, the basic concept.

2 >> CHAIRMAN MOORE: This brings up the
3 staff's comments that there should be one contention
4 and one basis. Well, if 309(f)(1)(ii) is a brief
5 explanation of the contention, obviously every
6 contention has to have a basis, because it's got to
7 have one brief explanation of it.

8 But I suspect what you really mean is the
9 support for that contention and which is the pre-1989
10 concept of a reasonable basis for the contention and
11 all that case law that has subsequently been refined
12 in 309(f)(1)(v) and (vi), and I don't see that the
13 single -- what I believe you mean by single basis has
14 any part to play in this.

15 >> >> MS. CURRAN: Well, I think you said a
16 little earlier that some of these things could be
17 compressed. And, for instance, when I looked down
18 through the various requirements, demonstrate that the
19 issue raised in the contention is within the scope of
20 the proceeding.

21 Well, if you've raised a question of
22 compliance within NRC safety requirement, then do you

1 really need a separate statement that this is within
2 the scope of the proceeding?

3 >> CHAIRMAN MOORE: The answer is, what's
4 the harm?

5 >> MS. CURRAN: I guess I just -- I, A, hate
6 to generate great volumes of paper.

7 >> CHAIRMAN MOORE: Staff?

8 >> MR. LENEHAN: Your Honor, it may well be
9 duplicative, the staff's position is that you have to
10 address all the six subparts, among other things.

11 Yes, it may be duplicative, but if you're
12 allocating contentions among different boards,
13 different attorneys and so on, it's just a price that
14 we have to pay. We'll try to minimize as much as
15 possible, but at some points if a Board wants to look
16 at contentions, it's much easier to have them
17 separately laid out all to different bases.

18 >> >> MR. SILVERMAN: Your Honor --

19 >> >> MS. CURRAN: For instance, 5 and 6,
20 how do you divide those? In 5 you're going to provide
21 a concise statement of the alleged facts or expert
22 opinion that you rely on.

1 And, then, in 6, that you have to provide
2 sufficient information to show a genuine dispute
3 exists. Well, didn't you just do that when you laid
4 out what your expert has to say?

5 I guess I have a question in my mind, is how
6 much do you have to go into it again?

7 >> CHAIRMAN MOORE: DOE?

8 >> >> MR. SILVERMAN: It's DOE's strongly
9 held position that the commission has established
10 these regulations, they've identified six separate
11 criteria, they believe they're six separate criteria.
12 We shouldn't be rewriting them in this proceeding.

13 If we try to start now to try to combine
14 them in some artificial fashion, we're going to have
15 motions and disagreements about what these criteria
16 mean and where the lines are drawn.

17 There is much more opportunity for mischief
18 and delay in our view if we start trying to rewrite
19 the rule effectively as if we simply say to each
20 party, as has been done in many cases with many
21 parties before, that there are six criteria and we
22 should address each one independently.

1 >> CHAIRMAN MOORE: Would you agree, DOE,
2 that, almost of necessity, the six criteria, though,
3 demand some repetition?

4 >> >> MR. SILVERMAN: I think some
5 repetition is very likely.

6 >> CHAIRMAN MOORE: Just the nature of the
7 beast?

8 >> JUDGE RYERSON: Mr. Malsch?

9 >> CHAIRMAN MOORE: Now is probably, then, a
10 good time to break for lunch.

11 When we return, in addition to the matters
12 of joint -- starting with the matters of joint
13 contention and contention adoption, we'd like to
14 briefly address the, for lack of a better word,
15 quagmire that's been created thus far with the
16 litigation and the regulations over challenges to the
17 DOE environmental documents and the staff's suggestion
18 in its filings that clarification as to which of the
19 reopening criteria are applicable.

20 We would like very much to get all your
21 views on how that matter plays out and see if there's
22 a general consensus of to what it means and which of

1 those standards are applicable.

2 So while you're having lunch, you can
3 contemplate that. If you have any questions for us
4 about that issue now as to what we're -- what the
5 problem is, you all --

6 >> JUDGE BOLLWERK: I think also after lunch
7 we may deal briefly, after we deal with that subject,
8 before we get into E, F, G, and moving along, the
9 question of labeling, which I think we've discussed
10 somewhat. But we may need to at least visit that
11 briefly.

12 >> >> MR. SILVERMAN: Your Honor, if I may
13 ask when you referred to litigation that helped create
14 this quagmire, what are you referring to?

15 >> CHAIRMAN MOORE: The 2004 challenge to
16 the DOE EIS by, among others, the State of Nevada in
17 which the Court found that they would not address the
18 merits of the Nevada challenge and that the
19 substantive challenges would be -- upon representation
20 of both DOE and NRC counsel would be able to be raised
21 in the administrative adjudication.

22 And the Commission's more recent denial of

1 Nevada's rule-making petition in which they reiterated
2 that those substantive challenges would be able to be
3 raised in the administrative litigation but denying
4 the rule-making, leaving the question of the
5 regulations in 10 CFR 51.109, which state that --
6 among other things, that in challenging, in raising
7 challenges to the staff's supplementation decision of
8 the EIS, the boards are to apply the standards for a
9 reopening motion to the extent possible.

10 So it's now 11:50. We will reconvene in 90
11 minutes. Let's just make it 1:30. Thank you.

12 (Recess taken at 11:50 a.m.)

13 >> CHAIRMAN MOORE: Please be seated.

14 Let's start with the staff on the issue that
15 we left, we said we'd pick up with. If the staff
16 would be so kind as to turn to page 6 of its May 6th
17 filing.

18 You state, in starting with your second
19 sentence: While petitioners may raise substantive
20 challenges against the DOE EIS, they must still raise
21 such challenges within the context of 10 CFR Section
22 51.109, which frames the challenge in terms of the

1 practicability of adopting the DOE EIS.

2 By that statement, do you mean that all
3 contentions in the staff's view challenging the DOE
4 EIS, or EISEs, must be framed in the context of the
5 staff's supplementation decision to be admissible?

6 >> MS. BUPP: Do you mean the staff's
7 adoption? Yes, that's correct.

8 >> CHAIRMAN MOORE: Then you go on to state:
9 However, the staff also believes that the NRC staff
10 position -- I'm sorry.

11 For these types of contentions, the staff
12 believes it would be more useful to label the
13 contention with the EIS section being challenged.

14 I assume the word "label" is the whole key
15 to what that means.

16 >> MS. BUPP: Yes. Just the label.
17 Otherwise we could have 20, 30 contentions that all
18 were labeled, you know, Nevada Environmental
19 Contention 1 through 20, Staff Adoption Decision. And
20 it wouldn't really tell you much about what exactly
21 the contention was about.

22 >> CHAIRMAN MOORE: Now, moving on to the

1 last sentence on that page that runs over to the next
2 page, you say: To the extent that DOE's suggestion
3 invites the Board to recommend which of the motions to
4 reopen criteria and the procedures listed in 10 CFR
5 Section 2.326 are applicable in the proceedings as
6 staff's beliefs such articulation would be beneficial.

7 I would commend you on the dodge, but would
8 you please tell us what the staff's view is as to
9 which of the reopening criteria in 2.326 are
10 applicable in the circumstances at hand.

11 >> MS. BUPP: In the circumstances at hand,
12 both the regulations and the Commission's most recent
13 decision denying Nevada's petition for rule-making
14 related to 51.109 stated that the motion to reopen
15 criteria in 2.326 should be considered to the extent
16 possible, I think, is the exact wording.

17 Without any elaboration on what "to the
18 extent possible" means, it appears based on a reading
19 of the regulations that all three of those criteria
20 should be used.

21 >> CHAIRMAN MOORE: If that is true, turn to
22 the third criteria in Section 2.326(a)(3), please.

1 >> MS. BUPP: Yes.

2 >> CHAIRMAN MOORE: And tell me what
3 materially different result is the subject.

4 >> MS. BUPP: I would say that the newly --
5 the materially different result would have been the
6 staff's adoption decision; that with this new
7 information on the EIS, the staff would have either
8 decided not to adopt or would have decided to; that a
9 supplement was needed for the EIS.

10 >> CHAIRMAN MOORE: But you can't get to
11 that decision without the challenge to the underlying
12 EIS document which both in the court case and in the
13 Commission's denial of Nevada's petition for
14 rule-making said that Nevada, among others, had a
15 right to raise those substantive challenges to the
16 EIS.

17 >> MS. BUPP: Yes.

18 >> CHAIRMAN MOORE: Well, how can you raise
19 it if the materially different result is only the
20 staff's adoption decision?

21 >> MS. BUPP: You would say that because
22 something in the EIS was wrong or inadequate or not

1 substantially complete, that therefore the staff
2 should have come to a different decision on its
3 adoption review. So you would challenge the
4 underlying EIS on which the staff bases adoption
5 review, but the reason why it is material is that it
6 goes to whether or not the staff was correct in
7 adopting it.

8 >> CHAIRMAN MOORE: Except I guess what
9 troubles me is that NEPA is, in the last analysis, a
10 procedural statute. And challenges to the adequacy or
11 inadequacy of the document in and of themselves are
12 material, because two of the purposes, statutory
13 purposes, of NEPA are that the decision-maker has a
14 full, accurate record of the facts upon which the
15 decision is made and that the public also has that
16 record. And that record is made public.

17 If those are two of the purposes of NEPA,
18 how can you ever say that would or -- would be or
19 would not have likely had the newly proffered evidence
20 been considered initially when the accuracy of the
21 information that appears in NEPA are two of the
22 purposes that are served by NEPA? And if the

1 information is not accurate, those two purposes of
2 NEPA, of which there are others, can never be met.

3 >> MS. BUPP: I don't know that I would
4 disagree with you. I don't know that we really have a
5 disagreement on that. But if -- the EIS is not
6 adequate if it does not have adequate information for
7 a decision-maker to make a decision, and if it does
8 not have adequate information for the public to be
9 well informed, then one could argue that it would not
10 be practicable for the staff to adopt it.

11 But the issue really is, what is the NRC's
12 role with regard to this EIS, and our role is the
13 adoption decision.

14 We can't make a decision that it is
15 practicable to adopt if the EIS isn't adequate. But
16 that's the final decision.

17 >> CHAIRMAN MOORE: The reality is the
18 staff's position, just to cut to the chase here, it's
19 really a semantic game of how it's worded.

20 >> MS. BUPP: It's really just -- we're not
21 saying you can't challenge the EIS. We're saying that
22 you have to as -- as a nicety of pleading you have to

1 tie it back into the staff's adoption decision. The
2 entire point of the EIS is the staff's adoption
3 decision.

4 >> JUDGE BOLLWERK: So the staff is wrong
5 equals materiality, essentially. The magic words: If
6 the staff is wrong equals materiality.

7 >> CHAIRMAN MOORE: Anyone else wish to
8 comment?

9 >> MR. SILVERMAN: We don't agree with that
10 prescription, that any alleged error in the staff's
11 conclusions is material.

12 If I can back up. If I'm not answering your
13 questions again, please redirect me.

14 I think the fundamental intention here of
15 51.109 and reference to the reopening standard is not
16 to revisit -- the Commission believes it's not
17 appropriate to revisit de novo decisions that have
18 been made by the Department of Energy.

19 That does not mean that some of those
20 decisions are not appropriate for litigation in this
21 proceeding by virtue of a judgment as to whether it
22 was practicable or not to adopt the EISes.

1 In that regard, the agency is acting almost
2 like an appellate court. The Court in the earlier
3 decision held that any issues -- issues that Nevada or
4 others may raise with respect to the repository
5 Environmental Impact Statements that were not
6 raised -- that were not ripe at that time and can be
7 raised as new considerations in this proceeding.

8 That's as far as they went in our view.

9 You then have to go to the regulation to
10 understand what the standard is for litigating those
11 in this administrative proceeding.

12 And under 51.109 the determination is was it
13 practical to adopt. How do you decide that? You look
14 to the further standards of 51.109 which says you have
15 to have, first, significant substantial new
16 information or new considerations. That's satisfied
17 by virtue of the Court's earlier decision. That
18 rendered the Environmental Impact Statement
19 inadequate. That doesn't mean any small mistake,
20 error, omission; renders it inadequate.

21 How do you interpret inadequate? I believe
22 you go to the reopening standards, which are

1 referenced in 51.109, which say that it must -- this
2 information that's raised in this contention must
3 essentially demonstrate that a materially different
4 result would obtain as a result of that information.
5 Either the error or the omission.

6 That does not mean the mere absence of some
7 small piece of information or incorrect analysis in
8 the NEPA documentation. The idea was not to duplicate
9 the review and analysis that the department has done.

10 >> JUDGE BOLLWERK: I'd like to hear what
11 the staff has to say about that. Maybe we want to
12 hear from Mr. Malsch first.

13 >> CHAIRMAN MOORE: Does Nevada wish to
14 comment on this?

15 >> MR. MALSCH: Yeah, we have a view on both
16 what the staff said and what DOE said. I think the
17 staff is engaging in the kind of silly formalism. If
18 we may challenge a staff's adoption decision on the
19 basis that the DOE statement is wrong or inadequate,
20 then basically a challenge to DOE statement by itself
21 is equal to a challenge in the staff's adoption
22 decision.

1 I don't see how there's any difference. And
2 the fact that a contention may be labeled one way or
3 the other seems to me is elevating form over
4 substance.

5 That's why we suggest that we should simply
6 file contentions directed against the DOE NEPA
7 documents and it would be understood that by doing so
8 we were necessarily then challenging the staff's
9 adoption decision, because I think that's the way it
10 comes out.

11 On DOE's formulation, I think they are
12 overlooking the actual impact of the Court's decision
13 in NEI NEPA.

14 The reason why the Commission agreed or
15 adopted this reopening standard in the first place was
16 that the assumption was that by the time the license
17 application was filed, there would be a body of
18 environmental documents, Environmental Impact
19 Statements, that would be essentially off limits
20 because there would have been a full opportunity to
21 challenge them on their merits on judicial review.

22 So that's why it made sense to limit the

1 challenge to situations where the proposed action had
2 changed in some significant way or to new information.
3 Because in either of those circumstances you couldn't
4 apply principles of res judicata or collateral
5 estoppel.

6 But because we're now in a situation in
7 which we didn't get a chance to challenge the DOE NEPA
8 statement, then it has no special status. And it
9 seems to me having no special status we are entitled
10 to challenge it de novo, just as if it were anybody
11 else's Environmental Impact Statement.

12 >> CHAIRMAN MOORE: Doesn't that overlook
13 the Commission's denial of your rule-making petition
14 and what they said there?

15 >> MR. MALSCH: No. They -- I think the
16 Commission said in denying our petition that we would
17 be given the opportunity to challenge all aspects of
18 the Environmental Impact Statement.

19 >> CHAIRMAN MOORE: Correct. But they then
20 said that they didn't have to use the same procedure
21 for those challenges as other NEPA challenges which
22 would be just the 3.109 NEPA contention approach.

1 >> MR. MALSCH: They said that. But the
2 regulation says apply those procedures to the extent
3 possible.

4 >> CHAIRMAN MOORE: But it doesn't say
5 practicable. The same paragraph says practicable,
6 then possible, and then the next paragraph says
7 practical.

8 >> MR. MALSCH: Right. It says possible.
9 But I submit to you that that standard was based upon
10 the idea that reopening -- you actually would be in a
11 reopening mode. It would be reopening a decision, a
12 record of NEPA stuff, that had already been litigated.
13 And that's not the case here.

14 But even assuming, though, you attempt to
15 apply the three criteria, their timeliness. That's
16 answered by whatever the contention filing
17 requirements are.

18 Significant environmental issue. I'm not
19 sure what that means as opposed to the third criteria,
20 which is a materially different result might have been
21 achieved. And I think on that one the staff was
22 correct, that if we challenge some aspect of the NEPA

1 document as being insufficient or inadequate under
2 NEPA law, then by definition we will be submitting a
3 contention that if true would have a different result.

4 >> CHAIRMAN MOORE: In your view, DOE's
5 position is essentially that the Commission did not
6 intend by its representations to the Court previously
7 to be in any way suggesting that what they would be
8 giving with the right hand, they would be taking away
9 with the left through procedure?

10 >> MR. MALSCH: That's correct.

11 >> CHAIRMAN MOORE: And under DOE's view and
12 Nevada's view, that's precisely what would be
13 happening.

14 >> MR. MALSCH: I think that's right. I
15 think under the court case, NEPA contentions should be
16 treated essentially the same as any other
17 environmental contentions, any other safety
18 contentions.

19 >> CHAIRMAN MOORE: So then we do not have
20 agreement that the third criteria, to the extent
21 possible, that's not possible to apply it so the
22 future boards will have to wrestle with this, I take

1 it.

2 >> JUDGE BOLLWERK: Can we see if staff has
3 any further statement and then move on.

4 >> MS. BUPP: I would briefly like to
5 dispute Mr. Malsch's assertion that NEPA contentions
6 should be treated like any other contentions as the
7 Board just noted the Commission did deny Nevada's
8 petition for rule-making and in the denial for that
9 petition for rule-making the Commission reasserted its
10 plan to use this very particular NEPA contention
11 procedures in 51.109(a)(2), wherein contentions filed
12 regarding the EIS would have to be related to the
13 criteria in 51.109(c).

14 >> CHAIRMAN MOORE: But it also unreservedly
15 said that Nevada would have the right to raise
16 substantive challenges to the DOE EIS.

17 >> MS. BUPP: Yes, within that framework of
18 the 51.109(a)(2).

19 >> CHAIRMAN MOORE: But if the materially
20 different results standard makes it in practicably
21 impossible to raise it, where does that leave you?
22 We'll leave it as a rhetorical question.

1 >> JUDGE RYERSON: Mr. Silverman, a question
2 for you, and I think you wanted to say something.

3 Just so I'm clear, does DOE agree with the
4 staff's position that in 2.326(a)(3), materiality
5 refers to being material to the staff's decision to
6 adopt as opposed to being material to the ultimate
7 licensing decision?

8 >> MR. SILVERMAN: That is a difficult
9 question, and I'm not sure whether I know there's a
10 difference or not.

11 In our view a materially different result
12 means that based upon that new information,
13 essentially the ultimate conclusion of the NEPA
14 documentation would change.

15 And, therefore, if that were the case, then
16 I think if the staff had adopted that NEPA
17 documentation, without any supplementation, it would
18 be a challenge to the staff's practicability
19 determination.

20 I think I'm answering your question, but I
21 might not be.

22 >> CHAIRMAN MOORE: The problem I have with

1 your configuration of that is that because NEPA's a
2 procedural statute. And there's a couple of cases
3 that essentially say that you just have to follow the
4 procedures and lay out all the information.

5 NEPA was never designed to keep the
6 decision-maker from making a stupid decision. And
7 that sums it up in the sense that as long as you stay
8 out of the realm of arbitrary and capricious of your
9 decision under the APA, you can make what many people
10 would consider a wrong-headed decision or it can be a
11 very right decision based on a lot of other factors
12 than just the environmental issues.

13 So the materially different result seems to
14 lose meaning to me in the context of NEPA, which
15 doesn't decree any kind of a result.

16 >> MR. SILVERMAN: You're absolutely right
17 as to it being a procedural statute, but at the end of
18 the day it is the basis for an agency to determine
19 whether to take a particular proposed action or not to
20 take that proposed action or to modify it in some
21 respect.

22 Department of Energy has made those

1 decisions and we think that --

2 >> CHAIRMAN MOORE: But really those
3 decisions are in the record of decision, not in the
4 EIS document, technically, are they not?

5 >> MR. SILVERMAN: Correct. They're
6 ultimately documented --

7 >> CHAIRMAN MOORE: That materially
8 different decision doesn't talk about the record of
9 decision, it's talking about the NEPA documents.

10 >> MR. SILVERMAN: It's a difficult issue.
11 I think I endorse the notion that this is an issue
12 that may need to be addressed by either this Board
13 through additional briefs or other boards but I think
14 there are two points I wanted to make.

15 One is there's distinction to be made
16 between what the Court said, which is you have a right
17 to raise these issues in the administrative
18 litigation. And, two, what the legal standard is,
19 which we think is laid out in the regulations for how
20 those issues are litigated. That's one point.

21 Then just I think a minor procedural -- that
22 distinction needs to be kept in mind. The Court

1 didn't speak to what the legal standards should be.

2 The second point is with respect to the
3 staff's statement -- I think this is a minor item,
4 maybe we could clear it up -- I hope I'm not
5 misrepresenting what staff is saying -- this notion of
6 do you label according to the EIS or label according
7 to the practicability determination by the staff, I
8 don't know what the practicability determination is
9 going to look like, whether it's going to be a short
10 document with a lengthy analysis or not.

11 But what I do know is that the Environmental
12 Impact Statements will have form and substance to them
13 and they will have sections and so it's not
14 inconsistent for me to say that Nevada and other
15 parties may challenge the practicability decision, but
16 that they should label their challenges in accordance
17 with the Environmental Impact Statement issue that
18 they're raising, because there's something you can
19 cite to it to the alternatives analysis or the
20 cost-benefit analysis or the description of the
21 environment or whatever.

22 It's a labeling issue.

1 >> JUDGE BOLLWERK: We'll go to Mr. Malsch,
2 then I may have a question.

3 >> MR. MALSCH: I had two quick comments.
4 One is that it seems to me the essence of the Court's
5 decision was that our -- was that the challenge wasn't
6 ripe and because, among other things, we would not be
7 prejudiced in any way by being asked to challenge it
8 later.

9 What I'm hearing now is in fact, if DOE is
10 correct, we could be challenged by the fact that we
11 are now challenging later.

12 Secondly, if DOE's formulation of the
13 standard is correct, then I would submit that no NEPA
14 contention is ever admissible in any NRC proceeding.

15 Because in no NRC proceeding could you show
16 under NEPA law that the result of the NEPA contention
17 would be denial of a license.

18 >> JUDGE BOLLWERK: You said this Board or
19 some other mechanism should be used to raise this
20 issue. Given we're an advisory Board, is there any
21 reason for us to do it and does that change any if the
22 Commission, as we've requested, gives us authority to

1 issue orders in some way? Is there something this
2 advisory Board can do on this issue?

3 I think we're a little -- we can get briefs.
4 We can take them. We can make a recommendation, I
5 guess, but we really can't decide anything.

6 >> MR. SILVERMAN: Well, I think the
7 Commission has spoken in the denial of the rule-making
8 petition. So there may no need for briefing, but I
9 think one thing the Board could do if they felt
10 sufficient ambiguity would be to recommend to the
11 Commission that this is an issue that could be
12 resolved early in the proceeding and that briefs be
13 filed with the Commission.

14 >> CHAIRMAN MOORE: Also, would it make
15 sense to recommend that Mr. Malsch's objection appears
16 to be one of that the staff's view is one of form over
17 substance. If you're really labeling -- and DOE says
18 the same thing, really if -- you need to label what
19 the part of the EIS is that you're challenging, but
20 you have to do it in the context of the staff's
21 adoption decision, he says that's form over substance,
22 you're really going right to the EIS, why do you need

1 the interim step.

2 But if it is only -- if it will avoid fights
3 as to the contention admissibility stage, does it make
4 sense to just recommend that you do it the way the
5 staff is recommending and, yes, it may be form over
6 substance, but this would certainly not be the first
7 time in the history of the Commission that form over
8 substance played a role.

9 And just be done with it in that context for
10 contention admissibility.

11 >> MR. MALSCH: You know, if it's just a
12 matter of adding an extra label, I guess it's hard to
13 see how we could object. I guess my concern is that I
14 don't know what the staff's adoption decision is going
15 to look like.

16 And if, say, hypothetically the staff's
17 adoption decision were a 150-page document, what is
18 the purpose of having us scour through the 150-page
19 document when really the focus of contentions is on
20 the DOE document? Perhaps that would depend on what
21 the nature of the adoption decision actually is.

22 >> CHAIRMAN MOORE: Or the other side of

1 that coin is that if it's a two-page document, which
2 just emphasizes why you really need to be pointing to
3 the EIS and may be form over substance but not to the
4 staff's adoption decision, at least as far as the
5 pleading requirements of the contention is taken care
6 of.

7 >> MR. MALSCH: I guess we couldn't object
8 to that.

9 >> CHAIRMAN MOORE: All right.

10 >> JUDGE BOLLWERK: Okay. Anything else we
11 need to do with that? I think we've pretty much
12 exhausted that.

13 I did mention that we'd like to talk for a
14 second about labeling. And this is a good segue into
15 that subject. The one thing I think we've heard is
16 when you looked at the original ground of responses
17 that we got on labeling, there seems to be sort of a
18 split between those interested in having a label
19 somehow reflect to some degree of granularity at least
20 the license application, or potentially we've heard
21 the NEPA document that's involved, and those that
22 simply thought that it would be better to use a more

1 generic label, safety perhaps and NEPA environment or
2 miscellaneous, and number them in some way
3 sequentially, and then have potentially, within the
4 contention itself, the basis. Who knows where you
5 would put it exactly. Some reference to the
6 application rather than having it in the title or the
7 label of the contention.

8 And particularly with respect to talking
9 about single issue contentions and what we've heard
10 today, obviously there may be some difficulty
11 depending on how the contention is framed and what
12 level of granularity you go into, how exactly you
13 label it.

14 Is there any additional thoughts based on
15 what you've talked about in terms of single issue
16 contentions and your thoughts about labeling in terms
17 of labeling the contention using something that
18 specifically directs you to the license application or
19 the NEPA documents as opposed to a generic label of
20 some kind? And maybe we'll just go through the list
21 like we've done in the past and see if there's any --

22 >> MR. LIST: There was a brief conversation

1 on that on Monday. And as I recall, if I can sum it
2 up, I think there was a consensus that the reference
3 to the table of contents and the application or the
4 EIS section of specificity would be preferable to the
5 generic.

6 >> JUDGE BOLLWERK: Anyone else, given what
7 we've talked about today, have anything further they
8 want to say on that subject?

9 Mr. Malsch?

10 >> MR. MALSCH: We had suggested in our
11 pleading that the third level would be sufficient.
12 And I guess it would depend on what the license
13 application looks like. But I actually do believe
14 that going to the third level would turn out to be
15 more than sufficient for purposes of organizing the
16 contentions.

17 Although, as I said, when it gets to
18 actually drafting the contentions, we will probably be
19 going more specific than that. But at least for
20 purposes of organization, I suspect it will turn out
21 to be a lot easier to go no further than the third
22 level.

1 >> JUDGE BOLLWERK: All right. I think the
2 DOE recommendation is in the fourth level, if I
3 remember correctly.

4 If you saw something going to the fourth or
5 fifth level, would you still label it the third level
6 even though you could be very specific in terms of the
7 labeling?

8 >> MR. MALSCH: I think the difficulty is
9 that if some of the model report documents are any
10 guide, each level will have its own discussion, at
11 least third level and going down. And so it will not
12 be a matter of saying the fourth level is sort of
13 self-contained. It may be that the fourth level is
14 actually not self-contained and the fourth level can't
15 be understood unless you also include stuff from the
16 third level.

17 >> CHAIRMAN MOORE: A number of the filings
18 suggested that the page number or numbers always be
19 included along with the granularity level.

20 How does that play into this?

21 >> MR. MALSCH: We thought we might have a
22 problem with that, because we weren't sure whether

1 different formats in the document have different page
2 numbers.

3 >> JUDGE BOLLWERK: Does DOE want to speak
4 to that?

5 >> MR. SILVERMAN: It is my understanding
6 that that should not be a problem; that each of these
7 documents is in PDF form or DVD form. You'll have,
8 for example, Section 1.2 of the LA, and you'll have
9 page 1.2-1, 1.2-2. In any format, it will be numbered
10 the same way. So you're not going to have
11 inconsistencies.

12 >> CHAIRMAN MOORE: In the PDF document all
13 the page numbers as it appears in Adam, as it appears
14 in your DVD, as it appears in the LSN, will all be the
15 same page?

16 >> MR. SILVERMAN: Yes. Image of the page
17 will be the same. You'll see that page number at the
18 bottom. It's consistent.

19 >> JUDGE BOLLWERK: One of the things that
20 may address or assuage a concern about what level of
21 granularity to go to, is if there's a citation to
22 pages, even within a lower level, that may suggest

1 how -- some specific -- add some specificity to the
2 contention at that point, even though it's labeled up
3 here you're looking at this very specific, these
4 pages.

5 >> CHAIRMAN MOORE: By the same token it can
6 work the other way.

7 >> JUDGE BOLLWERK: That's true.

8 >> CHAIRMAN MOORE: If somebody puts a broad
9 band of pages in and that puts us right back to the
10 problem on what on earth is being cited to.

11 >> JUDGE BOLLWERK: That's exactly right.
12 That's true.

13 Anybody in Rockville have anything they
14 wanted to say about this? Because I know some of the
15 counties were concerned about this at one point,
16 anyway.

17 >> MR. NEUMAN: Lincoln County endorses the
18 view of the State that third level of granularity
19 ought to suffice for purposes of labeling. To go any
20 deeper than that, so to speak, could lead to losing
21 relevant and appropriate information in the labeling.

22 >> JUDGE BOLLWERK: All right. Anybody else

1 want to say anything further about labeling, then?

2 All right. I think at this point, then,
3 we'll go -- sort of go back into our May 2nd
4 memorandum. I think we were on Subsection E. I'll
5 take us through the balance of the subdivisions, I
6 think.

7 The E deals with joint contentions and
8 contention adoption, which is 10 Code of Federal
9 Regulations Section 2.309(f)(3).

10 And just by perhaps a little background
11 explanation. I'd invite the other Board members if I
12 say something they don't agree to certainly interject
13 and clarify or give their own views.

14 But contention, joint contentions,
15 contention adoption are maybe a little bit -- what's
16 the word I'm looking for -- not the clearest thing. I
17 guess the rules have made them clearer, but this is
18 something that's been going on for a number of years.

19 The idea with joint contentions parties
20 would get together before the contentions are filed
21 generally -- in fact, that's the idea of a joint
22 contention -- have some discussion, decide who the

1 representative is going to be. And when the
2 contention comes in, it's a joint contention, but
3 there's always one party under the rules that is
4 responsible for the contention to the degree that the
5 Board would go to them and direct any questions they
6 had.

7 In theory, the other parties in dealing with
8 that contention, if it were admitted, they would then
9 know the representative who they have to deal with,
10 with discovery or any other questions about that
11 contention.

12 And so joint contentions subsumes a level of
13 interaction by the parties before the petition is
14 filed and a willingness to agree on a representative.

15 Adoption is a little bit different.
16 Although it has, to some degree, an impact in that you
17 have two parties that somehow are interested in
18 supporting a contention, the adoption process comes
19 generally after the petition is filed.

20 Other parties see -- having chosen for
21 whatever reason not to talk with one another about
22 contentions, see the contention of a particular party

1 that they like. There's generally a period the Board
2 provides for adoption of contentions. If they feel
3 they want to adopt a contention they would then file
4 something with the Board indicating they've adopted X
5 party's contention.

6 They would have to indicate in that, under
7 the rules, that they agree the party that originally
8 sponsored the contention would be the representative,
9 or they have to indicate that there was some
10 discussion and there was an agreement about who the
11 representative would be.

12 My assumption would be generally if they
13 decided the party that adopted the contention was
14 going to be the representative, that would have to be
15 reflected in that filing with the Board. So that's
16 the basic idea.

17 And the contentions that are joint or that
18 are adopted, in theory, if one of the parties drops
19 out, in theory, the party may be there then to
20 continue the fight, as it were, with respect to that
21 contention.

22 And that can have implications down the road

1 and parties do from time to time decide for whatever
2 reason that their concerns have been addressed or for
3 lack of resources they can no longer participate.
4 People do drop out in contentions. If they haven't
5 been adopted, they go by the wayside or they're
6 subject to timeliness concerns in terms of late
7 adoption, for instance.

8 So that's the basic background on joint
9 contentions and adoptions.

10 Any questions about that or comments?

11 DOE.

12 >> MR. SILVERMAN: A question, Your Honor.

13 When you indicated that adoption is a
14 process that comes after contentions have been
15 admitted --

16 >> JUDGE BOLLWERK: After they've been
17 filed. Not after -- if I said admitted, that was a
18 mistake. After they've been filed.

19 >> MR. SILVERMAN: It may have been my
20 error. Thank you.

21 >> JUDGE BOLLWERK: At least the general
22 process is when the petition comes in, then the Board,

1 under the rules, would issue some kind of an order
2 saying -- again, it has to be a proceeding where you
3 have multiple parties, you don't have to be concerned
4 about that. But there obviously will be multiple
5 parties in this case.

6 Let's go through the questions, then. These
7 were all -- so, Mr. List, I guess I'll be looking to
8 you first.

9 E1: Should the potential parties confer
10 prior to filing contentions with the goal of
11 submitting, where practicable, joint contentions
12 rather than duplicative contentions, and, if so, what
13 procedural structure, if any, should be established to
14 enable the consultation process?

15 Anything you'd like to say about that one,
16 sir?

17 >> MR. LIST: First, I guess I should say
18 that informal consultation among the local governments
19 on potentially joining together with joint contentions
20 has actually begun.

21 It's been going on for some time,
22 particularly at least among the -- some of the AULG

1 members.

2 And obviously they share common interests.
3 They also have some cost constraints. And so the
4 ability to join together in contentions is one that we
5 appreciate having.

6 That's particularly been the case with the
7 four counties that I represent who have considered
8 very carefully the potential for conflicts among
9 ourselves and all that's been resolved and it may be
10 that we'll join with others.

11 We, in fact, as recently as over lunch today
12 talked with a couple other counties about how we might
13 come together.

14 As far as a procedural structure, we didn't
15 talk much about that. Certainly there's been no
16 formal structure that we have recommended or agreed
17 upon. I think it would be difficult to mandate
18 advanced consultation among parties, among all the
19 parties. Because obviously there could be serious
20 objections or conflicts among the parties over what
21 positions they intend to take.

22 I don't think that that would be

1 appropriate. But certainly the opportunity to confer
2 on an informal basis is one that might be recognized
3 in some fashion.

4 >> JUDGE BOLLWERK: Is there anything a
5 Board like this one or any other -- a body that you're
6 aware of the Commission currently has with the PAPO
7 Board, someone else that could help the parties in
8 terms of that consultation process?

9 I mean, obviously we can't hold settlement
10 conferences when we don't have anything to settle at
11 this point. But just basically leave it up to you, I
12 think, is what I'm hearing.

13 >> MR. LIST: I think so. One matter that
14 you touched upon a few moments ago was the issue of
15 what happens after the contention has been accepted
16 and the matter of who is going to be the lead party on
17 it. And one of the questions that we have thought
18 about is, in that circumstance, suppose there's a
19 negotiation that takes place, do all the other joint
20 sponsors of that, of that contention or even in the
21 context of an adopted contention -- do those who have
22 adopted it have an opportunity to participate and

1 perhaps be a part of the decision on how it's
2 resolved?

3 There's been some concern about that. And I
4 think that perhaps is something that has to be worked
5 out among the joint sponsors as well.

6 >> JUDGE BOLLWERK: The only thing I could
7 say about that is, let me see -- in private fuel
8 storage, we had a similar situation. And I think it
9 was pretty clear from the orders that we issued the
10 Board looked to the representative, whoever it was
11 that had been represented as the lead party, to
12 basically be the representative for the other parties.

13 But the Board also created a process whereby
14 if someone had a real problem with what the lead party
15 was doing or for whatever reason there wasn't an
16 opportunity to come to the Board and express those
17 concerns, we made it clear we thought that should be
18 the exception rather than the rule, because by
19 agreeing to adopt or file a joint contention, there's
20 some expectation that the parties are going to work
21 together.

22 But having said that, there was a safety

1 valve, if it were. That was one instance. I don't
2 know that necessarily is the process here, but that
3 was certainly used in the past.

4 >> MR. LIST: I think that would be a good
5 precedent.

6 On the issue of one individual or one party
7 being designated as the lead, in the case of our four
8 counties, we haven't reached any such arrangement.
9 They've all basically delegated to one counsel, myself
10 being that person, the lead role for each person on an
11 equal basis.

12 >> JUDGE BOLLWERK: Department of Energy.

13 >> MR. SILVERMAN: Thank you, Your Honor.

14 Just one point. DOE's position is we
15 ought -- the Board ought to maximize the degree to
16 which the parties get together in advance before the
17 filing of contentions to jointly sponsor contentions
18 in accordance with the procedure that you laid out.

19 The critical point there is that will avoid
20 a certain number of duplicative contentions that we
21 will have to respond to that the staff will have to
22 respond to.

1 We think there is time for that to occur,
2 and we would encourage that that process be used to
3 the maximum extent possible. And just one of the
4 things that the Board asked is what's the procedural
5 approach for doing that. And you've got the State of
6 Nevada that's indicated they may have 600 or more
7 contentions.

8 One way to do that -- and most of the other
9 prospective parties have said they have somewhere in
10 the range of 10, 20, 30 contentions.

11 At an appropriate time, as it gets close to
12 filing time for those contentions, it doesn't seem to
13 us to be a huge burden to ask the prospective parties
14 to share the counties or other parties their smaller
15 numbers of contentions with the State to see where
16 there's overlap and duplication.

17 The State can look at those, because there's
18 not a huge -- not expected to be a huge number of
19 those. And it would be a fairly short process, I
20 would think, for the parties to get together and say,
21 you know, we're saying the same thing here. Why can't
22 we consolidate and jointly sponsor one contention

1 instead of filing two, three, or four.

2 So we think it's a doable process.

3 >> CHAIRMAN MOORE: In light of the
4 tightness of the schedule for the contention filers, I
5 recognize you have the same kind of tight problem in
6 filing answers. But isn't that something that in the
7 scheme of things is best left to after contention
8 admissibility? In more fullness of time, we have the
9 opportunity to take a sober look at all of them and
10 combine them and join them and do those things, as
11 opposed to this very compact -- where people are going
12 to be very pressed for time?

13 I recognize it would lessen your burden, but
14 it would increase theirs.

15 >> MR. SILVERMAN: Understood. Our view is
16 there's ample time with the minimum expected 90 days
17 of staff docketing review, the 30 days right now, for
18 the contention preparation in addition to the 90, plus
19 the time that the number the parties have been
20 preparing to date.

21 And of course that's not mutually exclusive,
22 with the Board getting together or the parties getting

1 together afterwards and trying to consolidate
2 contentions.

3 >> MR. NEUMAN: Chairman Bollwerk?

4 >> JUDGE BOLLWERK: Yes?

5 >> MR. NEUMAN: If I may, Your Honor made
6 the point that I was about to make in response to DOE.

7 I think that it's a bit cavalier for the DOE
8 to assume that the burden on the AULG to draft
9 contentions in the short time we will have. It is
10 short. And then to confer among ourselves, including
11 the State of Nevada, to work out agreements on joint
12 contentions.

13 It puts a burden on the counties that is far
14 greater, far greater than the burden that would be
15 placed on DOE, that its resources that are orders of
16 magnitude greater in DOE's in to review potentially
17 duplicative contentions at a later date.

18 I can say with respect to Lincoln County,
19 based upon what we've heard earlier in terms of how
20 single issue contentions will be defined, although our
21 filing some time ago indicated perhaps 25 to 50
22 contentions, based on what we've heard today, that

1 number will substantially increase.

2 The State itself, we know, will have many,
3 many contentions. And I think that it is a relatively
4 small burden to place on DOE given its enormous
5 resources relative to the great burden that we've
6 placed on the AULGs to sit down in advance, try to
7 work out agreement on contentions, which isn't just a
8 matter of saying, "oh, yes, we like your contention,
9 we'll adopt it"; it may take negotiation on wording
10 and the like.

11 To impose that burden on AULGs while they're
12 also trying to draft contentions I think is unfair and
13 inappropriate and the burden ought to be placed on
14 DOE.

15 >> JUDGE BOLLWERK: Mr. Murphy.

16 >> MR. MURPHY: I generally agree with that
17 statement. I think that's a burden on the smaller
18 counties particularly that is unnecessary.

19 But there is another -- I would suggest to
20 the panel that there are principles of comity involved
21 here. This does not apply to NEI or environmental
22 organizations or some other potential interveners, but

1 the AULGs are sister counties of the Sovereign State
2 of Nevada. And our clients have been used to
3 conferring on a number of matters since statehood.

4 And I just think it's not -- it's
5 inappropriate at this early stage of the proceedings
6 for the panel to try to impose on the counties in
7 Nevada a system, a methodology or system or
8 requirements or deadlines, and for anyone we confer
9 all the time about a whole number of things totally
10 unrelated to Yucca Mountain.

11 And there are considerations which the
12 counties take and have and the State of Nevada has
13 that have absolutely nothing whatsoever to do with
14 Yucca Mountain or legal or tactical things that
15 sometimes prompt cooperation among local governments
16 and sometimes require decisions in another way.

17 There are other considerations which these
18 small local governments in Nevada have to take into
19 account.

20 And I just don't think it's appropriate for
21 the panel to try to figure that out at this early
22 stage in the process. We're going to confer. We

1 have. We're going to continue to. As Bob List
2 indicated, that will happen and it will happen in our
3 own way.

4 >> JUDGE BOLLWERK: Mr. Malsch.

5 >> MR. MALSCH: I wanted to say I agree with
6 the comments by Mr. Neuman and Mr. Murphy and also the
7 concerns expressed by Judge Moore.

8 It seems to me it's asking too much to
9 insist on this and the benefits can be achieved just
10 as well and a lot more easily, with less burden, later
11 on after the contentions are admitted.

12 >> JUDGE BOLLWERK: All right. Anyone else
13 want to say anything about the question of
14 consultation?

15 >> MS. VIBERT: I'd like to add for a number
16 of the counties there appear to be issues of the
17 delegated authority given and whether some of the
18 counties will have authority to do that without
19 returning to their Board for authorization to join.

20 So all of these time frame issues also play
21 out in the context of we're representing public bodies
22 as well.

1 >> JUDGE BOLLWERK: Okay. All right.

2 Let me move on to the next question, then.

3 This was E2. This is sort of a procedural question.

4 If a joint contention is proposed -- I'm not
5 sure given what we just heard whether there will be
6 any, but nonetheless let's assume for argument
7 purposes there are.

8 If a joint contention is proposed, what
9 additional information should be included in the
10 hearing petitions of one or more of the joint
11 contention sponsors to designate or label or support
12 that contention?

13 For instance, statements indicating the
14 contention is jointly sponsored, a list of all the
15 participants that are sponsoring the contention,
16 designation of the specific participant who has
17 authority to act with respect to the contention.

18 The basic idea here is how would you label a
19 contention that's jointly filed to make it clear to
20 the Board, to the other parties, this is a joint
21 contention and it meets the general requirements that
22 are in the rules in terms of joint contention.

1 Mr. List.

2 >> MR. LIST: I think we felt that each of
3 those suggested examples are valid and good and
4 reasonable. We did not have any additions to those,
5 but I doubt there will be much difficult in satisfying
6 requirements along those lines.

7 >> JUDGE BOLLWERK: All right. Anyone have
8 any other comments on that? Okay.

9 Any comments from Rockville? All right.

10 Then let's move on to E3: Should there be a
11 fixed time period in which to adopt the contentions of
12 other parties?

13 Turning now from joint contention to
14 contention adoption. We can do four at the same time.
15 If there should be a fixed time for adoption
16 contention, what should the time period be?

17 Mr. List, I'll ask you to respond first,
18 please.

19 >> MR. LIST: Thank you, Your Honor.

20 I think we all agree that there should be a
21 specific time frame. We did not come up with a number
22 of days. However, if I may, on behalf of at least one

1 of the participants, the concern was that in at least
2 one county the commissioners only meet once a month.
3 And they have to approve any contentions that might be
4 filed. And so any time frame that's adopted should
5 take into account the schedule of the county
6 commissioners to include as much as a 30-day lapse
7 between meetings.

8 >> JUDGE BOLLWERK: We're talking 30 days
9 plus --

10 >> CHAIRMAN MOORE: 45 days would always
11 capture it.

12 >> MR. LIST: That should do it, Yes, Your
13 Honor.

14 >> CHAIRMAN MOORE: Are there any periods
15 where they don't meet?

16 >> MR. LIST: Pardon me?

17 >> CHAIRMAN MOORE: Are there any months
18 where they don't meet?

19 >> MR. LIST: No, there are not.

20 >> JUDGE BOLLWERK: From Rockville.

21 >> MR. NEUMAN: Barry Neuman on behalf of
22 Lincoln County. I was the party that raised this

1 concern. I would think that 45 days would be
2 sufficient. Just to be clear, it's not just a matter
3 of when the Commission meets but also the need to
4 deliberate on the contentions and get these on the
5 agenda sufficiently in advance of meetings. But I
6 would think 45 days ought to do it.

7 >> MR. SILVERMAN: I think we have a comment
8 on the timing, but just one clarification as I'm
9 thinking ahead a little bit about avoiding problems.

10 To the extent there is a decision to jointly
11 sponsor contentions -- or this may be more appropriate
12 for adopting a contention -- I think it's very
13 important that it be clear that if that's going to --
14 that that adoption decision is -- it's a notice. It's
15 we're adopting this contention; for example, the State
16 of Nevada. It's not an opportunity to add new
17 information to that contention in some way that would
18 create the potential for DOE to now ask for an
19 opportunity to respond, et cetera.

20 So we just ask that all the parties keep
21 that in mind when it comes time to make that adoption
22 decision and deliver it to the parties.

1 >> JUDGE BOLLWERK: Well, again, generally,
2 the past practice, it's as simple as filing a list of
3 the contentions you adopted. I mean, that's generally
4 the way it's done.

5 All right. Number E5. Let me stop. Any
6 other points on timing from anyone?

7 E5, this is a procedural question: If
8 contention adoption is proposed, what information
9 should be included in the pleading regarding adoption?

10 For example, an adopter statement declaring
11 whether or not it has contacted the originator of the
12 contention regarding the adoption and whether there's
13 an agreement on which participant will have authority
14 to act regarding the contention.

15 Again, this is a procedural matter to make
16 it clear that the -- when you're putting in your
17 contention adoption information, what do you need to
18 say to make it clear that you follow the procedural
19 requirements that are in the rules.

20 Mr. List?

21 >> MR. LIST: I think the consensus was that
22 there should be consultation among the parties in

1 advance of the adoption and concurrence reached if
2 possible on what the adopter includes in that adoption
3 document.

4 The examples that are set forth in your
5 question, I think, again, seemed reasonable and fair.

6 >> JUDGE BOLLWERK: All right. Any comments
7 anyone has on that proposal? All right.

8 >> CHAIRMAN MOORE: If we make any
9 recommendations concerning adoption, one thing I'd
10 want to point out is if there's a period post
11 contention admission for adoption, there's no
12 preclusion or there shouldn't be preclusion from
13 adopting early because that then would -- arguably
14 would give someone appeal rights. If they adopted
15 contention that wasn't admitted, they then arguably
16 would have appeal rights on that contention that
17 wasn't admitted, whereas they would be forfeiting any
18 such rights if they waited post adoption or post
19 admission. Especially in a 45-day period.

20 So you should all be aware that it carries
21 for adoption and joint contentions as well appeal
22 rights on nonadmissibility of the contention.

1 >> JUDGE BOLLWERK: I think that's a point
2 well made.

3 All right. Anything else on that point?
4 Anything else on joint contention or adoption
5 contentions that anybody wants to bring to the
6 Advisory Board's attention or discussion? No?

7 All right. Then let's move on to letter F,
8 non-timely, new, or amended contentions.

9 And this really goes to the question of some
10 reaction when the initial petition is filed and other
11 matters arise, what's the ability of the parties or
12 what are the procedural avenues for getting in other
13 contentions and what those contentions would need to
14 specify in terms of any requirement -- not
15 requirements, but itemization of the requirements for
16 admission of contentions.

17 F1: Should any proffered contentions filed
18 subsequent to the submission of the initial hearing
19 petitions, whether they were nontimely, new, or
20 amended contentions, be subject to the same kind of
21 formatting requirements as initial contentions?

22 Again, looking to 10 CFR Section 2.309(c) as

1 well as Section (f)(2).

2 Mr. List.

3 >> MR. LIST: I think the feeling was that
4 the logic here is that such contentions ought to meet
5 the same standards in terms of format. I think NRC
6 staff also noted during this discussion that there is,
7 that there are time frames allowing for extension of
8 time. But otherwise the form of the contentions
9 themselves and their content ought to track the
10 submission of the initial contentions that would be
11 timely filed.

12 >> JUDGE BOLLWERK: Although with each of
13 these, whether it's nontimely, new, or amended, there
14 are additional procedural requirements, hurdles, or
15 hoops that have to be jumped through. And I take it
16 there was no problem, if there was a -- that those
17 would be specified or they would be a requirement they
18 be set out specifically as well.

19 >> MR. LIST: At least if there were any
20 concerns about that, they were not addressed on
21 Monday.

22 >> JUDGE BOLLWERK: Anybody want to say

1 anything about that?

2 >> MS. CURRAN: Judge Bollwerk, I don't
3 believe there's anything in the regulation that says
4 what is considered timely with respect to filing a new
5 contention after the original deadline, and I'd just
6 like to request that advisory PAPO Board give us some
7 guidance as to whether it say 30 days, whether that
8 would be a reasonable period.

9 >> JUDGE BOLLWERK: Ms. Curran has stated
10 correctly that generally -- the rules don't say
11 anything about it specifically, but the Board's -- the
12 practice has been I think generally 30 days for a new
13 or amended contention when the information that would
14 trigger that contention would be filed.

15 Anybody want to say anything about that?
16 Staff, please.

17 >> MR. LENEHAN: Yes, Your Honor. We
18 believe 30 days is the correct time. As you say,
19 that's what's been used before and it seems like it's
20 the time it should be done.

21 >> CHAIRMAN MOORE: I would comment that
22 that's something that's been a rule of thumb, but

1 there's never been a case quite like this. And,
2 therefore, I think we may be dealing with a different
3 thumb.

4 And at least my take on this is it would be
5 highly dependent on the circumstances. And I can
6 envision situations in which 30 days would be
7 completely inadequate to analyze and digest the
8 material, especially when you're dealing with complex
9 models and things like that. And a rule of thumb may
10 be totally inappropriate.

11 And my take on it would be that in each
12 instance the timeliness is something that the person
13 filing needs to have built a record and lay forth all
14 its reasons why the time period in which they're now
15 filing is adequate and those opposing it can point out
16 why it's inadequate.

17 But what I see happening, because we used a
18 30-day rule of thumb in just run of the mill cases or
19 compared to this case run of the mill proceedings. It
20 could be work quite an injustice if it were just
21 rotely applied here.

22 And so just speaking for myself, I see no

1 problem in making people justify whatever period of
2 time it is and having built a record for that time.
3 Historically what's going to happen, the responses are
4 going to be that in that 36 million pages of material
5 in the LSN that there's scrolled away somewhere in
6 there a paragraph and so they've had two and a half
7 years' notice to this if they could have connected the
8 dots, and so, therefore, it's not good cause.

9 As sure as I live and breathe, I expect to
10 see those arguments.

11 And that's why I think a party needs to make
12 the case as to what's reasonable in the circumstances,
13 depending on the complexity of the issue and what
14 material they were aware of and let the opponent point
15 out that there was squirreled away in this 36 million
16 pages some hint that should have keyed them to this.

17 So I would be loathe to recommend anything
18 suggesting an automatic 30-day period. It's
19 convenient, it's nice and it has historical
20 precedence, but where I'm coming from in this case I
21 don't see it applicable here.

22 >> MS. CURRAN: Judge Moore --

1 >> CHAIRMAN MOORE: Ms. Curran, I suspect
2 for once you're going to agree with me. Ms. Curran?

3 >> MS. CURRAN: I think your point is very
4 well taken. And I would just like to request, if it
5 was possible, to sort of set a threshold. It does
6 help the parties to know, for instance, if I come in
7 30 days, is somebody going to argue, well, really
8 after 15 days you're late, in general.

9 I think it would be helpful to -- I think
10 it's a really good idea to allow case-by-case
11 determinations, but it would be helpful to have a
12 threshold.

13 >> JUDGE BOLLWERK: Let's start with the
14 staff, then we'll work our way around the room.

15 Anything else, Ms. Curran?

16 >> MS. CURRAN: No.

17 >> JUDGE BOLLWERK: Staff has a comment?

18 >> MR. LENEHAN: Yes, Your Honor. We do not
19 disagree with Judge Moore's comments. But in order to
20 have a certain degree of closure to this, though, what
21 we'd suggest maybe is within 30 days, if a party feels
22 they may have a contention and they don't have enough

1 time, at that point for them to notify the Board, go
2 through whatever procedures the Board chooses to get
3 an extension of that or to get a -- not so much an
4 extension but to get a time certain for when they must
5 file the contentions, but that they make the request
6 within the 30 days.

7 >> CHAIRMAN MOORE: That kind of procedure
8 would also allow it to be essentially thrashed out at
9 that point as to the time frame and everyone could be
10 essentially heard and perhaps agreement as to what
11 would be a reasonable time frame.

12 >> MR. LENEHAN: Yes, Your Honor.

13 >> JUDGE BOLLWERK: What I'm hearing
14 proposal 30 days at a minimum but anything --

15 >> CHAIRMAN MOORE: We have to be careful
16 here we all may be getting reasonable.

17 (Laughter.)

18 >> JUDGE BOLLWERK: But anybody saw
19 something that needed to go beyond 30 days they could
20 come in ask for a extension or definitive ruling by
21 the Board as to how much time they should have without
22 having to face lateness requirements.

1 >> MR. BAUSER: Yes, I agree this is a
2 proceeding like no other, but that might actually cut
3 two ways. It's a proceeding like no other in the
4 situation that it is on a very tight time schedule,
5 too.

6 And it seems to me an appropriate time to
7 raise a new contention, if you will, based on new
8 information, maybe a week. It may come up during
9 hearing, very clearly, so on, so forth.

10 So I just throw that factor into the mix.

11 >> JUDGE BOLLWERK: All right. Department
12 of Energy.

13 >> MR. SILVERMAN: I was going to say I also
14 understand Judge Moore's points. One option would be
15 to say that 30 days is the standard. But if a party
16 believes they need more time, then within the 30-day
17 period they can request an extension to file the new
18 event petition or intention.

19 >> CHAIRMAN MOORE: Is presumptively good
20 cause within 30 days?

21 >> MR. SILVERMAN: Yes.

22 >> MS. CURRAN: But this is Diane Curran. I

1 think Judge Moore raised the hypothetical that an
2 avalanche of new material comes in and that one
3 doesn't discover the new issue until after 30 days.
4 And I think that has to be taken into account, too.

5 >> JUDGE BOLLWERK: Although, in theory that
6 may have come into the mix, if you really didn't
7 discover it, then the question is what was the trigger
8 for you to file the contention if you didn't know
9 about it. But we'll get into questions about what the
10 triggering mechanism is for the contention. But yes.

11 Anyone else? State of Nevada?

12 >> MR. MALSCH: I think the suggestion is a
13 good one, that, as I understand it, if a contention is
14 filed within the 30 days, it is considered per force
15 to be timely because it's within 30 days. But if the
16 party thinks they need more than 30 days they should,
17 within the 30-day period, ask for more time.

18 The only slight glitch is there would need
19 to be an understanding that if that request were
20 denied, that they were afforded some small opportunity
21 to catch up and file in a timely basis.

22 >> JUDGE BOLLWERK: All right. Or there

1 needs to be a requirement they file, say, a week or
2 ten days beforehand so they have that if there's a
3 timely denial.

4 >> MR. MALSCH: Something like that.

5 >> JUDGE BOLLWERK: Right. All right.

6 Anyone else want to make a comment on this particular
7 process?

8 Let's, then, move to G, which talked about
9 additional submission format matters. Couple of items
10 that we thought we would bring to the potential
11 parties' attention and get your comments on.

12 G1: Can the parties agree on three-letter
13 designations for identifying themselves and their
14 filings in the evidentiary exhibits?

15 I'm told we have a technical difficulty and
16 we need to take a brief break.

17 >> CHAIRMAN MOORE: The closed captioning,
18 as we're still working out the bugs on the DDMS
19 system, is now down. And since we're also on the
20 learning curve, I'm trying to get the DDMS system
21 debugged.

22 Although I'd planned to take a brief

1 15-minute break at 3:00, we'll now take it and we'll
2 come back into session at 2:50, 15 minutes from now.
3 Thank you.

4 (Recess taken at 2:36 p.m.)

5 >> CHAIRMAN MOORE: We apologize for the
6 technical glitch. We're now proceeding.

7 >> JUDGE BOLLWERK: I have a technical
8 glitch. I have to find the paper I was reading from.

9 I think what we were about to do is to get
10 into letter G, additional formatting matters, G1: Can
11 the parties agree on three-letter designations
12 identifying themselves in their filings and any
13 evidentiary exhibits?

14 Mr. List?

15 >> MR. LIST: Yes. There was no question
16 about that. I would note that NRC staff noted that
17 they would identify a three-letter designation other
18 than NRC in order to distinguish themselves from the
19 Commission.

20 >> JUDGE BOLLWERK: All right. So that
21 would be something we would -- if someone set a
22 deadline, say, at some point, that you all would be

1 able to generate a list, or would we ask you to --
2 something we should have you do on an individual
3 basis? How is that?

4 >> CHAIRMAN MOORE: By way of background,
5 this is driven by the DDMS. That in turn was driven
6 by DOE's record-keeping system for the LSN. So too
7 much water has passed over the dam and under the
8 bridge to be able to do anything. It has to be a
9 three-letter designation.

10 >> JUDGE BOLLWERK: And one thing we talked
11 about -- actually, we touched on this, and maybe we
12 should -- the parties should anticipate with respect
13 to exhibits that their exhibits will have individual
14 exhibit numbers that will have the designation for the
15 party who sponsors the exhibit.

16 Now, that raises a number of interesting
17 questions that we've been thinking about, and you
18 should think about as well, how do we designate those
19 if they're, for instance, before different boards? We
20 talked a little bit this morning about potential
21 admission of an issue -- or, I'm sorry, an exhibit for
22 one Board and not another.

1 We also, frankly, would prefer to have
2 exhibits only designated once to some degree. So
3 there may be a need to keep a master list of exhibits
4 among the parties. So that's one of the things
5 procedurally you all should be thinking about, as we
6 are already.

7 >> CHAIRMAN MOORE: In that regard, I would
8 speak to Nevada and DOE and to the staff. If you
9 would be contemplating the method in which you could
10 always notify boards if an exhibit had been previously
11 admitted or offered and admitted or not admitted
12 before another Board.

13 This is a housekeeping matter that probably
14 will be important as the case is tried so that boards
15 will be aware of what other boards have done with the
16 same evidence.

17 >> JUDGE BOLLWERK: I think I may have
18 misspoke. We would be interested in having an exhibit
19 only identified once. Generally you would identify
20 it. It may well be admitted before some boards and
21 not others, but it would be identified once. It would
22 have a unique number.

1 That also raises questions, again, thinking
2 sometimes parts of an application are put in and we
3 need to pay attention to that. Somebody may put in
4 three pages there, four pages there.

5 There may be overlaps all those sorts of
6 things we need to be thinking about. These are all
7 sort of procedural matters, but they'll become
8 important in the context of a case this large with
9 this number of parties and the number of exhibits
10 we're looking at.

11 So that's something that the boards will be
12 dealing with and hopefully with the parties. But
13 start thinking about that as well.

14 I suspect at some point, then, we'll be
15 looking for a three-letter designation from each of
16 the parties something they can live with.

17 On G2: Can the parties consistently label
18 supporting materials as attachments so as to
19 distinguish them from evidentiary exhibits for the
20 purposes of electronic filings?

21 This needs a little background probably, and
22 then I'll turn to Mr. List.

1 The background, I think if you read the PAPO
2 Board's fourth order, fourth case management order, I
3 think that was the one where you actually laid this
4 out for the first time that there was a concern that
5 an exhibit, an evidentiary exhibit hearing, one where
6 you're at an evidentiary hearing with witnesses and
7 exhibits are being identified, for the purposes of
8 electronic hearing docket and for the DDMS system,
9 those need to be put into the Electronic Information
10 Exchange System as individual dockets so that they can
11 be electronically marked as individual documents.

12 If, on the other hand, you're simply using
13 something as an attachment -- and when you put a
14 document included with a pleading -- it could be
15 called an attachment, enclosure, exhibit, pick a
16 name -- those really do need to be not put in actually
17 as separate documents. It's not necessary and it
18 simply causes problems for the system.

19 So this is the basic idea that we're trying
20 to achieve, and it's actually reflected now on the
21 NRC's rules that deal with the EIE submission of
22 documents for non high-level waste proceedings. It's

1 actually in the rules. Although the fourth case
2 management Board that Judge Moore's PAPO's Board put
3 together also indicates it should be followed there.

4 Mr. List, I've said too much. I'll turn to
5 you.

6 >> CHAIRMAN MOORE: The reason this happens,
7 as Judge Bollwerk mentioned, evidentiary exhibits need
8 to be individually manipulated in the electronic
9 system, the DDMS.

10 Attachments to motions and things like that
11 are filed as a single document, and then if they're
12 going to be used in the system, you need to be aware
13 that the only way you can bring up -- if there are ten
14 attachments in this filing, you need to be aware that
15 you can only bring it up by knowing the page on which
16 each one of those exhibits comes up and the page is
17 always part of what's available to you on the
18 electronic screen and so you can get to it very
19 quickly that way.

20 And that's the distinction between
21 attachments or --

22 >> JUDGE BOLLWERK: Exhibits.

1 >> CHAIRMAN MOORE: -- and exhibits or -- we
2 would like some consistent labeling so that you know
3 it's going to be one document or anything that's
4 labeled exhibits is going to be separate document in
5 the Electronic Information Exchange filing system of
6 the agency.

7 >> JUDGE BOLLWERK: All right. And, Mr.
8 List, we've --

9 >> MR. LIST: There were no -- no concerns
10 expressed about that at all.

11 >> JUDGE BOLLWERK: All right. Again, it's
12 a procedural matter, but it is important. And one of
13 the real time savings or efficiencies in the process,
14 hopefully, the ability of the Digital Data Management
15 System to mark exhibits electronically. Those who
16 have been part of the DOE process, we get a lot of
17 paper and stamping. A lot can be done by the clerk
18 simply marking the electronic exhibit, and that's all
19 that needs to be done. So that will save us a
20 tremendous amount of time and, frankly, paper as well.
21 So that's the idea.

22 Let's go to H1, then, if there's nothing

1 else on G that anyone has.

2 I'm sorry. Before I do that, I've got a
3 note here. We did have a discussion in our earlier
4 order about the use of documents and how they should
5 be referenced. And we wanted to go over that briefly
6 again.

7 The distinction between using a Universal
8 Resource Locator, or URL, to reference a document,
9 attaching the document specifically to an electronic
10 filing, or using the LSN number for the document.

11 And I think there was some consensus, at
12 least -- and I don't know if you all talked about this
13 at all, Mr. List, anything you want to say about it --
14 about using URLs. That seemed to be, most people's
15 estimation, a bad idea.

16 But let me see if you have anything to say.

17 >> MR. LIST: Yes, Your Honor. As a matter
18 of fact, after we finished going through the May memo
19 from the Board, we turned our attention to the
20 April 4th memo that specifically did address that, and
21 we hit on three or four significant matters where we
22 thought you might want to hear back from us, and this

1 was one of them.

2 And the consensus was that the URLs are
3 generally unreliable, they're often changed or removed
4 or modified, and, therefore, that that particular
5 reference ought not to be allowed.

6 >> JUDGE BOLLWERK: All right. So URLs are
7 not a good idea in the parties' estimation.

8 I take it -- I know the Department of Energy
9 has been suggesting fairly vigorously that they wanted
10 to see all documents attached to a pleading. Others I
11 think did have the feeling that they could live with
12 an LSN number and perhaps a document title and date so
13 that if there was any problems with the number they at
14 least could try to reference a document or identify it
15 in that way.

16 Anyone want to say anything on anything
17 differently than what you said or any other additional
18 thoughts on attachment of documents versus using the
19 LSN number?

20 Yes, Mr. Malsch.

21 >> MR. MALSCH: I wanted to add a small
22 point. It would seem to me to be efficient to either

1 cite to the LSN accession number or an ADAMS accession
2 number. In either case it's pretty clear what it is
3 you're referring to, and ADAMS is the official
4 document. So it struck us that that should be
5 sufficient as well.

6 >> CHAIRMAN MOORE: If they're in the LSN,
7 you would recommend that still would be acceptable to
8 have an ADAMS number as opposed to LSN?

9 >> MR. MALSCH: I hadn't thought about one
10 as opposed to another. I was thinking either one
11 would be sufficient.

12 >> JUDGE BOLLWERK: Let me interpose
13 something else, then I'll get to Mr. Murphy.

14 There's been a contemplation, or has been
15 for some time, particularly when we get to evidentiary
16 exhibits and those are filed in the Electronic
17 Information Exchange process, there will be a box
18 there to put in the LSN number for each exhibit and
19 that would be -- obviously there's been a lot of work
20 that's been put into this. Everyone should have
21 identified all these documents.

22 If it doesn't have an LSN number, I think

1 the Board's going to want to know about that and the
2 other parties. So that will be part of the process as
3 well.

4 Nothing pejorative about the lack of an LSN
5 number, but if it's not there, I think there's going
6 to be some questions raised.

7 So let me go to Mr. Murphy, and then I'll go
8 back to Mr. Malsch.

9 >> MR. MURPHY: You took the comments out of
10 my mouth. We've been talking about it for years, as
11 you remember.

12 Particularly the smaller counties and
13 potential participants who aren't even in the room yet
14 have familiarized themselves with LSN and they don't
15 know what ADAMS is about and haven't been required to
16 figure out ADAMS.

17 ADAMS years ago used to be very
18 user-unfriendly. So it would be our position clearly
19 that the LSN -- that's what we negotiated the LSN for,
20 that's what the LSN is for is to provide that kind of
21 capability to the hearing.

22 And our position is LSN number rather than

1 ADAMS number. If the document is not in the LSN and
2 you don't want to attach it to your contention or to
3 whatever else, then put it in the LSN. I mean, it
4 takes a matter of -- overnight is the longest period
5 of time.

6 So we're LSN fans here in Nye County. Let's
7 do everything through the LSN.

8 >> JUDGE BOLLWERK: All right. Let's go to
9 Mr. Malsch, and DOE has something to say.

10 >> MR. MALSCH: I wanted to point out, as we
11 said in one of our submissions, it's sometimes very
12 difficult to find documents on the LSN. And the other
13 problem is that there's no way just using LSN to be
14 sure when you find a document that it's not been
15 superseded.

16 So we had suggested if we're going to be
17 using LSN numbers as a means for reference, there
18 ought to be a way in which one can clearly find out
19 whether what you're citing is the latest draft, a
20 second draft or whatever it is. And there may be
21 various ways to do that.

22 One way would be to have, let's say, DOE,

1 which I think would have the most documents at issue
2 here, put together some kind of a program or
3 spreadsheet that would enable it to tell you on a
4 fairly timely basis when particular LSN documents have
5 been superseded.

6 But that is a problem, finding documents on
7 the LSN, and then when you find them, being sure
8 you've got the one that's the latest.

9 >> JUDGE BOLLWERK: All right.

10 >> CHAIRMAN MOORE: I believe the
11 contemplation of the LSNA is that there will be that
12 information available. I believe also it entails
13 cooperation with DOE and the LSNA is in contact and
14 discussions with DOE as I understand it to largely
15 resolve that problem. The problem will never go away
16 completely, but it should be ameliorated considerably.

17 On the LSN numbers, citing those in your
18 contentions, that's I believe a 12-space alphanumeric
19 compilation. There's a lot of room for transposition
20 of numbers and letters.

21 Was there consensus on having something more
22 than just the LSN number, the date and title of the

1 document, so that when those transpositions of numbers
2 happens -- and it will, it will happen to all of you,
3 and it will certainly happen to us in our orders --
4 there's a way that the document can still be found
5 without too much hair pulling?

6 >> MR. LIST: I think you're way ahead of us
7 on that one, Your Honor. That's one we didn't get to.

8 >> CHAIRMAN MOORE: Is there general
9 consensus that should not be a problem, the date and
10 title of the document as well as its LSN number?

11 >> MR. SILVERMAN: DOE recommends that, LSN
12 number and title.

13 >> CHAIRMAN MOORE: I know NEI recommended
14 that.

15 >> MR. SILVERMAN: Yes.

16 >> JUDGE BOLLWERK: Maybe a page number,
17 too. Get the terms and citations. It goes to the
18 same point. The more specific you are any time you
19 give us a citation, the better we are.

20 >> MR. SILVERMAN: Might help to have the
21 document type such as e-mail, report, et cetera.

22 >> JUDGE BOLLWERK: Let me make a slight

1 divergence. We were going to wait to talk about this,
2 but since we talked about LSN and electronic filing,
3 this might be a good time to do this.

4 I may be talking to the converted here, but
5 we wanted to give you a little sense of what we are
6 about with respect to electronic filing and electronic
7 docket, and Digital Data Management System put in a
8 little pitch for getting with the program. I think a
9 number of people are in terms of training.

10 If you could turn on the overhead, please.

11 All right. This is a schematic, very
12 general one, that illustrates the -- what's called the
13 Meta-System, the electronic hearing environment that's
14 been created. It was actually created for the
15 high-level waste proceedings. It's being used for all
16 NRC proceedings, including the new combined operating
17 proceeding. It's the standard operating practice for
18 NRC now.

19 You can see the LSN which is the source of
20 discovery material for the high-level waste
21 proceeding. That is a source of information to be put
22 into the parties' pleadings as well as potentially

1 issuances from the boards. Those then go into the
2 Electronic Information Exchange. I think most folks
3 here are already using it.

4 There's e-mail service from that that goes
5 to all the parties that are on the e-mail list for the
6 particular proceeding. And if we do begin to
7 establish multiple boards, in theory, each of those
8 boards would have a separate service list and folks
9 will be served in terms of the pleadings that go to
10 that particular Board.

11 From the Electronic Information Exchange,
12 the documents go into our ADAMS system which we've
13 been talking about. If you wonder what Adam stands
14 for, there's what the acronym means.

15 Then it's electronic hearing document, which
16 is available at the NRC's public website. From the
17 electronic hearing docket, we then duplicate what's in
18 the electronic hearing document and put it into the
19 Digital Data Management System.

20 The DDMS actually has two aspects to it.
21 One is the audiovisual system that you see here and in
22 Rockville. Our ability to display documents as well

1 as to do videoconferencing and teleconferencing, as
2 well as what we're seeing in terms of the closed
3 captioning that we're using.

4 Also, we have -- there's a database that
5 stands behind the DDMS that includes all the documents
6 that are in the electronic hearing docket. They're
7 accessible to you all. If you have taken DDMS
8 training on the road, web accessible, as well as
9 accessible in this hearing room.

10 As we go forward with the high-level waste
11 proceeding, hopefully you'll be able to sit at the
12 monitors you have in front of you and call up the
13 documents that you need to use to display them in this
14 room, with respect to the evidentiary hearings that we
15 hold, those documents will also be scheduled on a
16 regular basis and those will be the way that we are
17 able to admit the documentary material into evidence
18 using the digital data management system.

19 So that's all part of it. You can see also
20 the clerk of the court, he or she can mark the
21 exhibits that are there. There's also the possibility
22 although we don't encourage it, to take ad hoc

1 exhibits, things that you might bring into this room
2 for the first time in electronic format. We can put
3 those into the system as well. Using the document
4 camera over there we can capture digital pictures of
5 physical exhibits.

6 We can also take things that can be shown on
7 a computer, like these slides or a computer program,
8 that can be run and displayed in this room and
9 captured digitally. All that will be available to us
10 through the use of the DDMS.

11 I just want to go through briefly you know
12 the LSN that's the home page. Hopefully everyone here
13 has had LSN training that needs to have it. We would
14 encourage you we'll talk about that at the end to take
15 that LSN training now. We are coming to the point
16 where, you heard the Department of Energy say, they're
17 going to be filing this application potentially within
18 the next month. And things are going to proceed from
19 there.

20 If you haven't had LSN training, if you know
21 someone that hasn't had LSN training up to this point,
22 now is the time to get it and we'll be glad to help

1 you with that. So I would encourage you to do so.

2 This is the e-filing submission form. I
3 think most of the folks here have actually seen this
4 and used it. This is the way in which you would put a
5 document into the electronic hearing docket into our
6 electronic system. It is also the way that you would
7 take the documents out. It has a little box there
8 that says "view" and that's how when you get an e-mail
9 it says there's a document available, push the view
10 box. And then you're able to see it or you can also
11 download it.

12 I should mention that this form will be
13 superseded probably by the fall by an updated form.

14 One of the things that doesn't work on this
15 form is the bundling process. We talked about 50 MG
16 or higher filings; right now that really doesn't work
17 very well. Hopefully by the fall that will be the
18 changed and will be working better.

19 Also with the new system we hope to put in
20 place right now you have to download a viewer. You no
21 longer will have to do it make it simpler to use. So
22 there are some improvements coming in EIE hopefully by

1 the fall.

2 And one of the things you do need to have to
3 use the EIE system is a digital certificate, and there
4 are ways to get that if you don't have one. But it's
5 important to become part of that system.

6 This is the e-mail you would receive for an
7 E-filing service. You click on the link, that it will
8 take you right to that form, and then the form will
9 give you access to the document. But, again, you need
10 a digital certificate to be able to do that.

11 And there are ways to do that and we can
12 help you with that as well.

13 This is the electronic hearing docket, which
14 is the public face of the high-level -- for the
15 high-level waste docket. That's available through the
16 NRC's website. And it can be accessed 24 hours a day.
17 It's there. It has all the documents on it for both
18 this Board. Right now the Advisory PAPO Board as well
19 as the PAPO Board.

20 This is something you may not have seen
21 before. There's actually a page also for the
22 protective order file. Again, this would be the

1 sensitive documents proprietary, something less than
2 safeguards that might be filed in the proceeding that
3 only certain individuals under a protective order
4 would have access to. You would need a digital
5 certificate to be able to access these documents
6 through the electronic hearing docket or through the
7 DDMS, either way.

8 And they are -- the security on those is
9 actually controlled at the docket level. So you have
10 to be covered by the protective order and have put in
11 an affidavit indicating that you're going to follow
12 that protective order in order to be -- to have those
13 documents made available to you there through the
14 protective order file or to see them on the DDMSF.

15 This is a digital data management system.
16 This is sort of the front page a lot of different
17 capabilities I already mentioned and you do need to be
18 trained on it and have a password and a user name in
19 order to be able to have access to the system, which
20 brings me to the final slide.

21 We are more than willing to arrange LSN or
22 DDMS training for anyone that needs it, whether it's

1 the representatives themselves or their support
2 staffs. The contact is LSNwebmaster@NRC.gov.

3 I mentioned before the June 19th meeting
4 that's going to be held between the Department of
5 Energy and NRC staff. It's going to be held at
6 Rockville. We will have this room open, I believe, as
7 a web-conferencing site. Folks can come and watch it.
8 And in conjunction with that meeting, we'd be more
9 than glad to train anybody on the LSN or DDMS that
10 would like to have it. All you need to do is let us
11 know.

12 We'll make our IT folks who are very good
13 available to you to train you on both the DDMS and LSN
14 if you just let us know. So, please, if you haven't
15 had the training, now is the time.

16 I know Judge Moore and I have been living
17 with this proceeding for a number of years. But it is
18 coming to fruition in one way or another, at least
19 with the filing of the application. And it's time to
20 start now if you haven't at this point to participate
21 with both the LSN and DDMST.

22 So I would urge you to get the training

1 because it's necessary to why you the system, both the
2 systems to their maximum usability of the
3 functionality that it will give you.

4 That's just a short explanation. Now is the
5 time if you haven't done it already.

6 >> CHAIRMAN MOORE: On the subject of
7 protective orders, if the staff and DOE both suggested
8 in their filings that protective orders need to be
9 issued to cover the OUO information in the license
10 application in light of the PAPO Board's April 29th,
11 2008, order, the staff and DOE satisfied that those
12 protective orders are fully applicable and will cover
13 the situation?

14 >> MR. SILVERMAN: We have reviewed the --
15 you're referring to the third case management order, I
16 believe?

17 >> CHAIRMAN MOORE: I'm sorry?

18 >> MR. SILVERMAN: Are you referring to the
19 third case management order?

20 >> CHAIRMAN MOORE: Yes. Maybe it's the
21 fourth.

22 >> MR. SILVERMAN: I believe it's the third.

1 >> CHAIRMAN MOORE: Whatever. One or the
2 other.

3 >> MR. SILVERMAN: Our view of that, that's
4 a good starting point for a protective order for this
5 proceeding. But as you look at it, it seems to apply
6 to the predocketing phase. It refers to the PAPO
7 Board and there may be -- there's probably a need for
8 some modifications, probably not terribly substantial.

9 >> CHAIRMAN MOORE: But those orders were
10 written looking to the long-term, and require, and
11 then stay in effect. Of course, that board's
12 jurisdiction doesn't cease until after docketing or at
13 docketing, around that time.

14 And those protective orders were all written
15 at the suggestion of the parties that they stay in
16 effect until replaced by another presiding officer or
17 the Commission.

18 So I believe that that would take care of
19 the problem since it is LSN predocketing information
20 that we're now talking about. The license application
21 is the license --

22 >> MR. SILVERMAN: Yeah, it would remain --

1 >> CHAIRMAN MOORE: With the LSN, fell
2 within the jurisdiction of the PAPO Board and those
3 protective orders that are in effect now should
4 clearly cover --

5 >> MR. SILVERMAN: They are fine up through
6 the docketing and through the period of time when the
7 jurisdiction --

8 >> CHAIRMAN MOORE: You or the staff or
9 Nevada or any other party feels those are not
10 adequate, I would urge you to file something with the
11 PAPO Board suggesting those modifications, because
12 that's the only Board in existence at this point that
13 can act on anything.

14 >> MR. SILVERMAN: If I may, an alternative
15 may be to recommend changes to this advisory Board for
16 the post docketing period for recommendation to the
17 Commission.

18 Again, I don't think we think that major
19 changes are required.

20 >> CHAIRMAN MOORE: From your lips to the
21 Commission's ears is, I think, the way that goes.

22 >> MR. SILVERMAN: May I add something on

1 LSN before we move off of that? I just wanted to
2 reiterate an offer that the Department's made and then
3 couple it with a request.

4 The offer was that the department would be
5 willing to provide to the prospective parties, Nevada
6 and the other counties, et cetera, the reference that
7 LSN accession numbers in identification information
8 for those references that we spoke of earlier for the
9 LA, by the same token -- and they'll have months to
10 look at those documents, and later on LSN now, unless
11 they're excluded.

12 We would ask that the Board consider that at
13 some time shortly before the submission of petitions
14 with the contentions that we be provided with the LSN
15 accession number information for the attachments;
16 i.e., references in support of those contentions.

17 That doesn't mean there can't be changes to
18 those and the parties can't make final changes, but in
19 the 25-day period we have to respond it would
20 certainly help us a great deal if we had at least
21 those document numbers and identification information
22 perhaps 10 days before the filing of the petitions.

1 >> CHAIRMAN MOORE: Mr. Neuman, you raised
2 an objection previously to a similar suggestion. Do
3 you wish to comment on this?

4 >> MS. CURRAN: This is Diane Curran. I
5 think I'll jump in here and say that Eureka County, at
6 least, would be concerned that given all our
7 responsibilities in such a short time frame we're not
8 going to be able to provide a list of the attachments
9 until we submit the contentions. And they're
10 documents that are going to be known to the applicant
11 anyway. It's not like we're coming up with something
12 they've never seen before.

13 >> CHAIRMAN MOORE: Ms. Curran, I think this
14 is a housekeeping matter from the DOE's standpoint.
15 They believe, I think, that they will have need to be
16 able to reproduce those materials and have them ready
17 to their various teams so that they can file answers
18 within 25 days. And this is a corollary to the
19 attaching the documents question that was raised
20 previously.

21 It's in that context that they are looking
22 for the ability to have a couple of days' advance

1 notice so they can physically reproduce the materials
2 and have them ready to go so that after the
3 contentions are filed, they don't have to spend
4 several days trying to do that.

5 Does anyone else -- yes, Ms. Curran.

6 >> MS. CURRAN: Well, we could make an
7 effort to do that. I guess we'll probably err on the
8 side of identifying so many and then ask not to be
9 penalized if we couldn't identify one.

10 >> CHAIRMAN MOORE: I don't believe there's
11 any question about penalties or being bound by it.
12 This is essentially cooperation among counsel
13 recognizing the tightness of the time frames that
14 everyone is working with.

15 What's the general -- is there a consensus
16 view whether this would be possible in -- some days in
17 advance of the contention filing deadline that parties
18 be able to produce as many as reasonably possible of
19 the LSN document numbers, that they're going to be
20 using so that others will have an opportunity to
21 reproduce those in advance?

22 Mr. Malsch.

1 >> MR. MALSCH: You know, it sounds
2 reasonable, but it depends on the time we have for
3 drafting contentions.

4 If we're facing a 30-day deadline, after the
5 notice of hearing, it's just one additional thing
6 we're going to be having to do.

7 So as the regulations stand now, I would say
8 we couldn't agree to do that.

9 I think if DOE has a problem, then they can
10 ask for more time to file their answer.

11 >> CHAIRMAN MOORE: That might be the
12 obvious solution, but I suspect they're in a -- well,
13 let's leave the characterization out. They're going
14 to meet this deadline come hell or high water.

15 >> MR. MALSCH: Seems to me if they can
16 answer a thousand contentions in 25 days they have
17 immense resources and the mere fact that they don't
18 actually have the LSN numbers a few days in advance
19 will have no effect one way or the other.

20 >> CHAIRMAN MOORE: Mr. List, was this
21 something that your group tackled?

22 >> MR. LIST: It's not something that the

1 group tackled. I would just say for the parties that
2 I represent that we would be -- we'd be willing to
3 reach out and make that effort.

4 >> CHAIRMAN MOORE: This sounds like
5 something as time progresses over the next 30, 60, 90
6 days will be better able to be addressed and when we
7 see how all of this is more likely to shake out.

8 Voluntarily I would urge -- I think we could
9 all agree if you're willing to do that to provide this
10 to DOE. It appears DOE would be appreciative of your
11 efforts. And we could address this at a later time
12 depending on what schedules look like, and at that
13 point we can see if we can have more complete
14 voluntary cooperation.

15 The Board is facing much the same problem.
16 And we will have to figure out how to deal with it one
17 way or another.

18 >> MR. SILVERMAN: Of course it would be the
19 same benefit to the Board.

20 >> JUDGE BOLLWERK: Let me just also --
21 occurred to me to mention, one thing about the DDMS
22 that may give some folks an incentive to do the

1 training, I've been watching this proceeding. It's a
2 little delayed, but there's actually a way you can
3 see. There's a live video within the DDMS that's
4 available to you if you sign up and take the training,
5 and you can watch it right from your office.

6 So, Ms. Curran, you've expressed concerns
7 about web streaming. We would really like the web
8 streaming. We probably will start that sometime in
9 the near future. Hopefully. But right now DDMS does
10 have that capability to some degree. Obviously within
11 your office where you have web access, but it's
12 something, again, you take the training, you'll be
13 able to see these proceedings if you can't show up.

14 So, again, that's another reason to do it.

15 Enough DDMS stuff here.

16 In terms of the number H, let's move on to
17 that one. That was dealing with standing interested
18 governmental entity status. This may be one where
19 maybe we characterize it as fools walk in where angels
20 fear to tread. I'm not sure. But we're going to talk
21 a little bit about this.

22 Should a petition that establishes -- this

1 is H1: Should a petition that establishes -- that
2 seeks to establish, excuse me, standing as of right
3 for individuals or nongovernmental organizations
4 contain specific labeled sections addressing the
5 required elements?

6 And, again, those elements -- for instance,
7 injury in fact, zone of interest -- are fairly well
8 established in NRC regulations. This is sort of the
9 standing analog to what we've been talking about with
10 contentions, which is if there are certain general
11 requirements that need to be set out to establish your
12 standing there, you simply have a label and discuss it
13 under that.

14 Mr. List.

15 >> MR. LIST: We started talking about this,
16 and it became apparent very quickly that some of the
17 persons on the call were in disagreement about who had
18 automatic standing as parties.

19 And we kind of digressed into that. I do
20 want to make the Board aware of that discussion,
21 because we believe it's something that ought to be
22 sorted out and acted and ruled upon as quickly as

1 possible.

2 Specifically, I think it was generally
3 agreed that the State of Nevada and Nye County are
4 automatically included as parties.

5 But whether the other AULG members, and
6 there are nine of them, have automatic standing or not
7 became a matter of contention.

8 The DOE's initial position was that these
9 AULGs do not have statutory or regulatory standing.
10 NRC staff took the position to the contrary that we do
11 have such standing, and DOE, at the conclusion of this
12 discussion, agreed to review its position.

13 I should state that the AULGs feel very
14 strongly, passionately about that issue and that it
15 was generally agreed there that an early determination
16 is really essential. And that the matter should
17 probably be briefed and decided promptly, because it
18 will affect our whole preparation of contentions and
19 the role which we find ourselves.

20 There was concern expressed by Mr. Neuman,
21 which I'm sure he can elaborate upon here, about the
22 time and the costs that might be incurred in

1 addressing that, where we ought to be also dealing
2 with contentions.

3 So I'll let him step forward on that point.
4 But clearly this is something that's of great interest
5 and great concern to each of us.

6 >> CHAIRMAN MOORE: Before hearing from
7 Mr. -- who is going to speak to this?

8 >> MR. LIST: Mr. Neuman.

9 >> CHAIRMAN MOORE: Before Mr. Neuman
10 speaks, DOE, what is the basis for your contention
11 that -- bad choice of words, for your argument that
12 effective units of local government as set forth in
13 Section 2 of the Waste Policy Act and as defined in
14 Section 10 CFR 2.101, definition of party, do not have
15 automatic standing? What's your argument?

16 >> MR. SILVERMAN: Your Honor, I'll be happy
17 to respond to that. Let me back up one step to
18 clarify one thing. I think there was general
19 agreement -- first, the basic point that the Board
20 asked was, should a petitioner seek standing for
21 rights of individuals for nongovernmental entities
22 contain specific labeled sections regarding the

1 standing requirements.

2 I think there's general consensus on that
3 that is --

4 >> MR. LIST: That's correct.

5 >> CHAIRMAN MOORE: Thank you.

6 >> MR. SILVERMAN: Having said that, with
7 respect to the AULGs, before briefly explaining our
8 legal position, I want to underscore it's the
9 Department's interest simply that all the parties and
10 prospective parties follow the requirements and the
11 regulations. We are not looking to overly stringently
12 restrict the participation of any entity, including
13 the AULGs, and we are mindful of some language in the
14 relevant statements of consideration, which I'll
15 mention to you in a moment, that does anticipate a
16 very likely standing of the AULGs.

17 Having said that, our view is in fact
18 automatic standing really only has been conferred upon
19 the State of Nevada and Nye County.

20 The Nuclear Waste Policy Act defines AULGs,
21 the statutory provisions relate primarily exclusively,
22 actually exclusively to coordination and cooperation

1 with those entities and financial grants. It does not
2 confer automatic standing on those entities.

3 The 2.309 standards with respect to standing
4 only confer standing again on the local governments
5 and affected Indian tribes and states that have the
6 repository within their borders.

7 You are correct that Subpart J, and I
8 believe it's 2.1000, does define a party to include
9 AULGs.

10 But the standards in Subpart J, if you look
11 at the very beginning of that -- and I believe it's
12 2.1000 -- I can find a precise reference for you --
13 indicates that Subpart J is superseded by certain
14 other provisions, including 2.309 and 2.315, which is
15 the standing contention and interested state
16 requirements. So we think that those take priority
17 over the definitional language in Subpart J.

18 And, finally, in 2004 NRC rule-making,
19 changing Part 2, and if I may refer you to 69 Federal
20 Register, page 2221, and the right-hand column, and if
21 I may briefly read an excerpt. It says: There's been
22 a significant change relative to the former

1 requirement that Section 2.714 -- in 2.7104 that a
2 state and local governmental body or affected
3 federally recognized Indian tribe who wishes to be a
4 party in a proceeding for a facility which is located
5 within its boundary are explicitly relieved of the
6 obligation to demonstrate standing in order to be
7 admitted as a party.

8 Again, entities with facilities within their
9 borders.

10 A state, local governmental body or
11 federally recognized Indian tribe who wishes to be a
12 party in a proceeding for a facility which is not
13 located within its boundary must address standing.

14 However, and this is the language we are
15 mindful of, a state, local governmental body, or
16 federally recognized Indian tribe which is adjacent to
17 a facility or, for example, has responsibilities as an
18 off-site government for purposes of emergency
19 preparedness and presents such information in its
20 request petition would ordinarily be accorded
21 standing.

22 So we're simply making the point that there

1 is a showing there that needs to be made, and we're
2 not trying to overly restrict access to this
3 proceeding by these entities. But we do not believe
4 it is an automatic standing.

5 >> JUDGE BOLLWERK: Let me ask one
6 clarifying question, recognizing the Timbisha
7 Shoshones are not represented here, because they fall
8 within the category with AULGs. I don't know what
9 their status is in terms of the borders of their
10 tribal lands. They're the only affected Indian tribe
11 out there, if I'm correct in that.

12 >> MR. SILVERMAN: My understanding is they
13 are the one tribe that has been identified by the
14 Department of Interior as an affected Indian tribe.

15 And I'm not positive about this, but I don't
16 think the repository is within the borders of the
17 tribal lands, which would put them in the category of
18 what we think the AULGs ought to do, which is they
19 need to make that demonstration.

20 >> JUDGE BOLLWERK: All right.

21 Does the staff want to say anything at this
22 point?

1 >> MS. BUPP: The staff, obviously, takes a
2 different view than DOE. And our view is based both
3 on the definition of party in 2.1001, and also in the
4 rule-making, in November 2001, which was prior to the
5 2004 Part 2 rule-making.

6 But at this point in time the Commission did
7 specifically speak to AULGs as opposed to adjacent
8 government organizations which we think is an
9 important distinction and, therefore, the 2001
10 rule-making is more specific.

11 In the 2001 rule-making, the Commission
12 stated that the regulations relieve the state, tribes
13 and affected units of -- excuse me, the state affected
14 Indian tribes and affected units of local government
15 for the need to meet standing requirements in order to
16 be admitted to the proceeding.

17 The rule-making went on to state that the
18 state affected units of local government and affected
19 Indian tribes must still meet the contention of
20 admissibility requirements.

21 But I think it's clear that this supports
22 the staff's position that the AULGs do not need to

1 demonstrate standing in order to intervene. They need
2 only submit at least one admissible contention.

3 >> JUDGE BOLLWERK: All right. If he wants
4 to say something, I have no problem with that.

5 >> CHAIRMAN MOORE: Mr. Neuman, do you wish
6 to address this?

7 >> MR. NEUMAN: Your Honor, Mr. List has
8 done a terrific job of collating the parties'
9 position. In this instance I think there was a
10 misunderstanding. I have no caveat or concern with
11 respect to this matter. We do believe that AULGs do
12 have standing under the regs, but whatever briefing or
13 other approach the Board may want to take to resolve
14 this is fine with Lincoln.

15 >> JUDGE BOLLWERK: Anything else anyone
16 else wants to say on this subject, then? I think
17 we've actually taken care of H6 in the context of this
18 one.

19 So let me move on, then, to H2: What
20 identifying supporting information should be included
21 in petitions and supporting affidavits relative to
22 attempts to establish standing for individuals,

1 organizations and organizations seeking to establish
2 representative standing?

3 And recognizing that probably these groups
4 and individuals are not represented here, I don't know
5 if there's anything you all wanted to say about that,
6 Mr. List.

7 >> MR. LIST: Not really. I would just
8 simply note that the examples cited in your question
9 under H1 would certainly be appropriate.

10 >> JUDGE BOLLWERK: All right. I mean,
11 there is a general, certainly, practice -- I don't
12 know the best way to describe it -- that the
13 individuals, particularly individuals that are
14 supporting an organization in terms of representing
15 them in a proceeding, do need to provide certain
16 information in some form to the Board so that we will
17 know what their address is, who they are, whether they
18 have the authority -- the organization has authority
19 to represent them.

20 But obviously those are things that wouldn't
21 affect anyone here, necessarily.

22 Anything that the staff wants to say on this

1 subject?

2 >> MR. LENEHAN: No, Your Honor, you've
3 covered it all.

4 >> JUDGE BOLLWERK: All right. I'm not sure
5 how relevant this is going to become for anyone here,
6 but let me ask. We'll go to the question anyway.

7 H3: If distance is relevant in establishing
8 standing, should tools such as Google or Google Earth
9 or Map Quest be used to provide an "as the crow flies"
10 estimate?

11 And this is a particular tool that may give
12 you some fairly certain sense, at least in terms of
13 the program, of exactly where an individual or party
14 is located, vis-a-vis the mountain, and any questions
15 about distance that might apply to standing.

16 Anything, Mr. List, you want to say?

17 >> MR. LIST: We in our discussion recognize
18 that that could be a criteria, distance could be one
19 of the criteria. We did note, however, that the
20 criteria in terms of the length of the distance ought
21 to be very narrowly established in order to avoid a
22 massive logjam of possible participants.

1 >> JUDGE BOLLWERK: What did you mean by
2 "narrowly"?

3 >> MR. LIST: In terms of miles. I think
4 that the greater length -- we did not agree on a
5 number. But, clearly, if you went out several hundred
6 miles, you would enable potentially millions of people
7 to come forward and seek to become participants.

8 >> JUDGE BOLLWERK: Did staff want to say
9 something? Mr. List, anything further?

10 >> MR. LIST: Nothing further.

11 >> MR. LENEHAN: Staff does not want to
12 concede that geographic distance is a criteria. To
13 say that somebody automatically within a certain
14 geographic area is included or outside of a certain
15 geographic distance is excluded, the staff does not
16 want to take that position at all. We feel there are
17 other considerations to be involved. Distance, per
18 se, is not one of them.

19 >> JUDGE BOLLWERK: So you would not see a
20 Board or the Commission applying what has been done in
21 reactive cases for a number of years at least for
22 operating reactor, for instance, the 50-mile rule?

1 >> MR. LENEHAN: No, Your Honor. Not an
2 automatic 50-mile or any other mileage rule, no, not
3 automatically. There's too many other considerations,
4 the groundwater flows, things like that may have a
5 longer distance in one direction and a shorter
6 distance in another.

7 >> CHAIRMAN MOORE: What do you deal with,
8 remote and speculative, in all of this? Staff?

9 Just traditional standing, injury in fact,
10 causation, redressability, are the three fundamental
11 steps in establishing standing that have to be shown.

12 We're talking periods of time of 10,000
13 years or longer for impacts. No people currently
14 alive, I would suggest, are impacted. So how would
15 anyone -- how would an individual establish standing?
16 No matter where they live.

17 >> MR. LENEHAN: The staff would suggest
18 that that's a difficult question, but our position
19 here is that mileage alone, per se, in and of itself,
20 is not a criteria.

21 >> CHAIRMAN MOORE: Mr. Murphy?

22 >> MR. MURPHY: Generally I think you're

1 correct, Judge Moore, but that ignores the potential
2 socioeconomic impacts that are may immediately fall on
3 particularly on residents close -- in close
4 proximity -- that is, Nye County residents -- to Yucca
5 Mountain.

6 Whether or not true is immaterial to some
7 people out there, there is a perceived disadvantage to
8 being located that close to a repository. And that is
9 an impact to some people. I'm not suggesting that
10 that gives them standing, but it's not quite accurate
11 to say that no one alive is going to be impacted.

12 You need to talk to the owner of the
13 Ponderosa.

14 >> CHAIRMAN MOORE: Like living next to an
15 attractive nuisance or a distance from attractive
16 nuisance.

17 >> MR. MURPHY: If you're a dairy farmer in
18 Amargosa Valley and you sell your milk to Los Angeles,
19 and the people in Los Angeles think there might be
20 some potential for contamination and they quit buying
21 your milk, you're impacted. Correct? Rightly or
22 wrongly, you're impacted.

1 >> CHAIRMAN MOORE: Did your group discuss
2 at all recommending that the Commission may just want
3 to draw some arbitrary lines and not rely on judicial
4 concepts of standing because they certainly have the
5 right under the Atomic Energy Act to determine who is
6 adversely affected and hence has an interest.

7 Did your group discuss that at all? As a
8 way to deal with this.

9 >> MR. MURPHY: I was in the airplane during
10 that conference call. Mr. VanNiel represented Nye
11 County. But I think we would agree with the NRC staff
12 on that, that each -- the folks in this room all have
13 standing, and I include specifically my friends from
14 the Nuclear Energy Institute in that regard.

15 But anybody else is going to have to
16 demonstrate that they have standing. But to
17 arbitrarily pick a number, I think, is -- I don't know
18 how you would do that at this point.

19 Like the staff says, if you're down
20 gradient, the further -- if you're one side or the
21 other of the mountain, closest, far away.

22 That's a can of worms that you're going to

1 have to open some day because you won't be able to
2 avoid it. But I wouldn't do it yet.

3 >> CHAIRMAN MOORE: Mr. Malsch.

4 >> MR. MALSCH: It seems to me that this is
5 going to be a can of worms you'll have to open, but
6 there might be some benefit in making the can of worms
7 at least a bit smaller, if one, as a convenience,
8 established a distance within which someone had
9 standing. Making it clear that outside that distance
10 you'd have to make the full demonstration.

11 But as to what that would be, I think that
12 would take some more thought than the group here was
13 able to give to it.

14 >> CHAIRMAN MOORE: Mr. List, you had
15 noted --

16 >> MR. LIST: I simply wanted to suggest
17 that it could be a subject of consideration for
18 standing. That is, someone who lives 5 miles away and
19 runs a dairy might be able to make a stronger case
20 than someone who lives, runs a dairy 200 miles away.

21 And it seems to me that distance could be a
22 factor. There shouldn't be an automatic line drawn.

1 >> CHAIRMAN MOORE: The other thing that
2 always comes to mind when you're looking at standing
3 is that anyone that lives, crosses or will be next to
4 the transportation routes when fuel is en route to
5 Yucca Mountain arguably will receive a dose, even
6 though it may be a small dose, and even a small dose
7 can establish an injury and be the basis for standing.

8 But traditionally in NRC adjudication, as
9 NEI mentioned earlier, there was never the requirement
10 in most instances of a direct connection as in federal
11 court for every cause of action you had to have
12 standing for that cause of action.

13 And NRC proceedings, if you have standing
14 and admissible contention and all your other
15 contentions, you don't have to establish your standing
16 for that particular contention.

17 In large measure, though, the person
18 withstanding was in reasonable proximity to the
19 facility and that may have been part of how it
20 developed that way.

21 But to someone living in Missouri next to
22 the railroad tracks at a railroad hub, for example,

1 would clearly have standing from the transportation of
2 fuel because they would be receiving a dose, have
3 standing to raise a problem with something substantive
4 about Yucca Mountain.

5 I mean, it is a can of worms that portends
6 an awful lot of litigation downstream then it may make
7 sense to try to find a way to cut that off perhaps
8 with the recommendation to the Commission that they
9 take this out of the traditional standing realm and
10 define interest under the Atomic Energy Act in some
11 other way for this proceeding, however they wish to
12 draw the line.

13 Does that make sense?

14 >> MR. SILVERMAN: Your Honor, I think it
15 would make sense for the Commission to consider a
16 distance beyond which one could not show standing.

17 But within that distance would provide the
18 opportunity for a party to demonstrate standing
19 without that distance per se demonstrating standing,
20 and I'd like to just indicate that we're not sure we
21 entirely agree with your expression of the fact that
22 an individual that may be living near a rail line

1 would automatically have standing.

2 >> CHAIRMAN MOORE: I didn't suggest
3 automatically. They would have an injury that from a
4 dose. Now, they would still have to show causation
5 and redressability. Presumably they could probably do
6 that. We have cases that have been decided that way
7 on the standing issue.

8 I believe the Mox case was one of them.

9 >> MR. SILVERMAN: I believe. And I believe
10 there's other cases to the contrary, if I remember
11 correctly.

12 >> CHAIRMAN MOORE: I'm sorry.

13 >> MR. SILVERMAN: I believe there's cases
14 to the contrary as well, although I cannot cite them
15 for you today.

16 >> CHAIRMAN MOORE: I don't recall those to
17 the contrary. I think all the ones you cited were
18 rather significantly distinguished.

19 Be that as it may, this is a morass. What I
20 see as the problem if you have multiple boards
21 deciding contentions, deciding standing, this is an
22 area where it would seem to me is ripe for significant

1 disagreements among boards on standing. And that only
2 delays things, if it's appealed, ultimately resolves,
3 comes back with or without standing, and that's
4 something that presents a picture that I think should
5 be avoided.

6 That's why I tossed out the notion of is
7 there another way to deal withstanding on a case like
8 this.

9 >> JUDGE BOLLWERK: Is there anything that
10 speaks to having a standing Board as opposed to a --
11 that's something that --

12 >> MR. SILVERMAN: I was going to say I
13 think we're very amenable to at least a couple of
14 ideas. One of which you threw out which was to ask
15 the Commission to perhaps look at this question and
16 rule on it in advance of contentions having to be
17 submitted. And the other alternative would be that
18 the coordinating Board that a lot of us talked about,
19 and we mentioned earlier, might very well, not only
20 just apportion contentions but might rule on the
21 standing of all the parties as well as the related
22 issue of have people substantially complied with their

1 LSN obligations to enable them to be parties.

2 So one Board could handle all those issues.

3 >> CHAIRMAN MOORE: But if you separate
4 standing from contentions, since it's a two-part
5 process to become a party, a minimum of two-part
6 process, you have to have standing and at least one
7 admissible contention.

8 If a party doesn't have admissible
9 contentions and someone spent a lot of time
10 determining whether they had standing, that would be a
11 rather wasteful effort. When you separate contentions
12 from standing that could happen.

13 >> MR. SILVERMAN: Well, they do have to be
14 decided independently, regardless of whether it's one
15 Board or two.

16 >> CHAIRMAN MOORE: I'm sorry?

17 >> MR. SILVERMAN: They have to be decided
18 independently, regardless of whether it's one Board
19 determining --

20 >> CHAIRMAN MOORE: If a party doesn't have
21 a admissible contention, nobody is going to waste
22 their time deciding whether they have standing. Not

1 in a case like this. When there's more important
2 things to do.

3 Well, we'll have to wrestle with this.

4 >> JUDGE BOLLWERK: I should make one point.
5 Mr. Murphy pointed out I said there was really no one
6 affected in the room by this, but actually NEI is.
7 They're an organization, not a governmental entity.
8 So, in theory, they will have to some compliance with
9 standing requirements in some way. So there is
10 someone here that is affected.

11 Number 4, this is H4: Should a petition
12 that seeks discretionary standing for individuals or
13 nongovernmental organizations contain specific labeled
14 sections addressing the elements that must be waived
15 such as the developing sound record, interest in the
16 proceeding, affect on those interests, availability of
17 other meetings, representation by existing parties,
18 broaden issues or delay the proceeding which are
19 standards that are set forth in Section 2.109(e) of
20 the regulation?

21 Mr. List.

22 >> MR. LIST: Our thinking on this was

1 petitioners seeking discretionary standing should have
2 to follow an established format and meet advanced
3 announced criteria.

4 >> JUDGE BOLLWERK: All right. Anyone want
5 to comment on this?

6 >> CHAIRMAN MOORE: Is discretionary
7 standing as a practical matter a way parties will
8 avoid, if they have a difficult time establishing a
9 standing they'll seek discretionary standing? If
10 that's the case, I would ask the staff and DOE under
11 the criteria that are applied, normally the staff and
12 applicant will argue that the addition of these
13 contentions would broaden the proceeding and lengthen
14 or delay the proceeding.

15 In this proceeding, how could that argument
16 be, when there's hundreds and hundreds of contentions,
17 you're talking about a match in a forest fire. I
18 don't think those are arguments could be made with a
19 straight face.

20 So what's the meaning of discretionary
21 standing for this case?

22 DOE?

1 >> MR. SILVERMAN: Your Honor, with all due
2 respect, the notion that whether a party could
3 contribute to developing a sound record, depending on
4 who the party is, they may have expertise, they may
5 not have expertise. May be a single individual. That
6 may very well weigh against this discretionary
7 standing of that individual.

8 The interests -- it's not just a matter of
9 whether it broadens or delays the proceeding. That's
10 one factor to be taken into account but it's not the
11 only one.

12 >> CHAIRMAN MOORE: But you could never
13 decide in advance representation by an existing party
14 because you won't know that at the time you're dealing
15 with the discretionary standing.

16 >> MR. SILVERMAN: I apologize. Say again?

17 >> CHAIRMAN MOORE: Representation by an
18 existing party. That looks to is there somebody else
19 that's already taking care of this concern, you won't
20 know that in a case such as this unless you hold off
21 ruling on discretionary standing until all parties are
22 identified and contentions are admitted and then deal

1 with discretionary standing.

2 >> MR. SILVERMAN: That's probably right.

3 >> CHAIRMAN MOORE: Is it permissible to do
4 it under the rules? Historically we've always had to
5 deal with that right up front.

6 >> MR. SILVERMAN: If I remember correctly,
7 the way it would typically occur in a particular
8 proceeding, it would be that a party, prospective
9 party would argue that they have standing as a right.

10 >> CHAIRMAN MOORE: They plead in the
11 alternative if they don't they seek discretionary --

12 >> MR. SILVERMAN: Exactly. So it's dealt
13 with at that time.

14 >> CHAIRMAN MOORE: My question was simply
15 how do you know whether there's an existing party that
16 takes care of the, represents their interest.

17 >> MR. SILVERMAN: They've all filed their
18 contentions and petitions at the same time. So we'll
19 have all that information available to them. Albeit,
20 there's a lot of information in petitions. But we
21 have the same -- it's the same process as any other
22 proceeding as I see it but there's a lot more

1 information and parties to sort through.

2 >> JUDGE BOLLWERK: All right. Anything
3 else anybody wants to say on discretionary standing
4 format, then?

5 Let me then move on to H5: What identifying
6 supporting information should a petition provide
7 relative to an assertion that a federal, state or
8 local governmental entity or Native American Tribe has
9 standing as of right.

10 And this again would look to Section
11 2.309(b)(2) in the requirements that are there.

12 Mr. List?

13 >> MR. LIST: I think the feeling was as
14 simply a matter of turning to the statutes and the
15 regulations and their interpretation. And obviously
16 there can be different readings of those same
17 provisions and their effectiveness as illustrated in
18 our discussion earlier this afternoon.

19 But clearly that's where it must turn is on
20 the provisions of those statutes and regulations.

21 >> JUDGE BOLLWERK: Anybody else wants to
22 stay on this question about the showing -- necessity

1 to show a governmental entity has standing as a right?

2 All right. I think H6, as you made
3 reference to, we've already dealt with, in terms of
4 the affected units, local governments, affected Indian
5 tribes, and their potential standing.

6 For H7: Relative to obtaining interested
7 governmental entity status -- we've moved to a
8 slightly different concept -- what identifying
9 supporting information should be provided in a hearing
10 petition?

11 Mr. List?

12 >> MR. LIST: Again, I think the regulations
13 and the statutes set forth the qualifications for
14 parties seeking such status.

15 >> JUDGE BOLLWERK: They'd have to comply
16 with those requirements.

17 Again, interested governmental status. It's
18 different than standing of right to the degree that
19 the interests of a governmental entity does not have
20 contentions in the case. They do not have issues but
21 they do have the right to participate, to introduce
22 evidence, to examine witnesses and actually can take

1 an appeal as well from the initial decision.

2 So an interested governmental entity does
3 have a different status than a party having standing
4 as a right or discretionary standing.

5 Anyone else on interested governmental
6 entity status in terms of the showing?

7 Let's move on to H7 relative to obtaining
8 interested governmental -- I'm sorry. H8: For each
9 potential party and interested governmental entity
10 which information should be provided in a petition in
11 connection with 10 CFR Section 2.1003 regarding the
12 availability of LSN material -- for instance, the date
13 of filing of certification and the status of any
14 challenges to that certification or a declaration that
15 no LSN certification was submitted and an explanation
16 as to why no certification -- an explanation as to why
17 no certification was needed.

18 Again, this relates to a provision in the
19 rule that parties need to give the status of their LSN
20 certification or potential parties when they file
21 their petition.

22 Mr. List?

1 >> MR. LIST: General understanding here was
2 interested party and governmental entity should
3 demonstrate compliance with the provisions of that
4 certification of 10 CFR, and the examples that he
5 cited in the question, are apt.

6 >> JUDGE BOLLWERK: Staff have a comment?

7 >> MR. LENEHAN: Yes, Your Honor. In the
8 situation -- hypothetical situation where a party has
9 not made -- a petitioner has not made a material
10 available on the LSN and they believe the reason they
11 have not made it available is because they don't have
12 any information, staff believes they should file
13 certifications to the effect that they didn't have any
14 as opposed to just ignoring it.

15 >> JUDGE BOLLWERK: Anyone have any
16 additional comments? The Department of Energy?

17 >> MR. SILVERMAN: Your Honor, I'm going to
18 start this, but if the questions get too deep, I'll
19 ask you to indulge me and let Mr. Shebelskie fill in
20 because of his experience with the LSN.

21 We think it's important that potential party
22 identify at a minimum the date of their LSN

1 certification that it complies with the regulations
2 that it was certified within 90 days of the
3 Department's certification; that they've continued to
4 supplement their document production with documentary
5 material in accordance with the regulations; that
6 they're in substantial and timely compliance with the
7 PAPO Board orders pursuant to the regulations; and
8 they really ought to identify that they have
9 procedures in place to search for and produce
10 documentary material in accordance with the
11 requirements.

12 The critical issue is essentially they need
13 to demonstrate that they've met the obligation that is
14 a prerequisite to becoming a participating party in
15 the proceeding.

16 >> JUDGE BOLLWERK: Any comments on that?
17 Mr. Neuman.

18 >> MR. NEUMAN: Thinking about this issue, I
19 have a question as to what demonstration in this
20 context means. I understand the appropriateness of
21 certifying that these requirements permit, but I guess
22 it's not clear to me what showing is contemplated in

1 terms of a demonstration, and one extreme -- for
2 example, we would have to attach copies of every
3 certification and supplemental certification we filed
4 since day one. I'm not sure that that makes sense.

5 Certainly unnecessarily burdensome. So
6 beyond certifying compliance, with specific reference
7 to the requirements, I'm not clear as to what a
8 demonstration of compliance means.

9 >> JUDGE BOLLWERK: All right. Mr. Malsch.

10 >> MR. MALSCH: Just two comments. One is,
11 generally speaking, I agree with what Mr. Neuman said.
12 It isn't clear exactly what a party is supposed to say
13 in this respect.

14 Assuming some sort of demonstration is
15 required, and I'll get to that in a minute for Nevada,
16 it struck me that maybe the best way to deal with this
17 would be to treat it as a matter that comes up as a
18 kind of affirmative defense by DOE. So that if they
19 thought there was a problem with LSN compliance or LSN
20 participation, they would raise that specifically in
21 their answer, and then the responding petitioner could
22 then answer.

1 That way there would be no need to certify
2 vaguely or to anticipate what challenges DOE might
3 make. It will be dealing with a concrete controversy.

4 I do want to say, though, that it is our
5 view that at least for Nevada and the other states
6 referenced in 309, that we are a mandatory party
7 regardless of the status of our LSN compliance. I
8 mean, we have every intention to fully comply. I just
9 wanted to point out the way we read the regulations,
10 the provision in 2.1012 does not apply to mandatory
11 parties like the State of Nevada.

12 And we can discuss that in some detail if
13 you wish, but I just want to make it clear that's our
14 position.

15 >> JUDGE BOLLWERK: All right. Mr. Murphy,
16 then we'll go to the Department of Energy.

17 >> MR. MURPHY: I generally agree with
18 Mr. Malsch on that, but I think that overlooks one
19 thing that goes all the way back to the beginning of
20 this process, and that is that before the Department
21 of Energy even has an obligation to respond -- this is
22 what the original negotiated rule-making envisioned,

1 that before the Department of Energy even had the
2 obligation to respond to a petition in intervening and
3 contentions, the party had to make some sort of
4 showing.

5 And I don't think I would necessarily have
6 chosen the word "demonstrate," but the party had to at
7 least say we have complied with the licensing support
8 system or not a licensing support network
9 requirements, because if they didn't, it was the
10 intention of the negotiated rule-making, if they were
11 unwilling to comply with the documentary requirements,
12 the NRC, they weren't going to get through the door.

13 Their petition was not even going to be
14 accepted. It wasn't even going to have a file stamp
15 put on it. No obligation on the part of DOE or the
16 State of Nevada or NEI or anybody else would arise
17 unless you showed, number one, we have no documents
18 whatsoever or we have documents and we have put them
19 on the LSN. If you don't make that showing, there is
20 no obligation on the part of DOE to even respond to
21 your petition.

22 That's the intent, the original intent of

1 the negotiated rule-making, is I think you might
2 recall.

3 But that said, to me "demonstrate" means
4 write it down. Saying we have complied with, we
5 certify on such and such a date we did such and so and
6 so and as Mr. Malsch says DOE doesn't agree with that,
7 in the nature of an affirmative defense they can
8 dispute it.

9 >> JUDGE BOLLWERK: All right, sir.

10 Department of Energy.

11 (check portion)

12 >> I think we strongly object to the notion
13 that the State of Nevada does not have to
14 provide with the LSN obligation and may
15 still participate. The regulations are
16 clear that all the respected parties have a
17 prerequisite to participate, must have met
18 those obligations and referring to section
19 21003.1 among others, one of the fundamental
20 purposes as I understand it.

21 >> JUDGE BOLLWERK: All right.

22 >> Mr. Malsch, anything further?

1 >> Mr. Malsch: I could respond, briefly to
2 indicate the basis for our position. This
3 is actually two regulations to address this
4 precise issue 2.1 o 1.2 says that a party
5 will be granted party status under 2.3 o 9
6 unless they can demonstrate compliance.
7 There is another provision that mirrors that
8 is in 2.309A which says similar effect that
9 the addition to the other considerations
10 favoring intervention, the commission will
11 consider the party's participation under
12 subpart J and that's 2.39A. The difficulty
13 is that in 2.3 also says that the state the
14 commission shall permit intervention by
15 mistake in certain other entities and says
16 that all other petitions must be judged
17 under the revisions of subsection A through
18 F indicating clearly to us subsections --
19 that these do not apply to the state of
20 Nevada. So we have a conflict between 2.3 o
21 9 and 2.1 o .2 but then as Mr. Silverman
22 pointed out correctly, there is a rule about

1 how to resolve those conflicts in the
2 opening section of subpart J in 2-point I
3 guess 1 o o o which say that is the
4 provision of subpart judge take present over
5 other provisions with the following
6 exceptions and 2.3 o 9 is one of those
7 exceptions.

8 >> All right.

9 >> I would add there is legislative history
10 on the precise issue was discussed within
11 the one of the LSN or advisory meetings and
12 resolution was just as I suggested in with
13 the Nevada position and I can give you Adams
14 number, MPO L012 0 50076 at page 15.

15 >> JUDGE Bollwerk: All right. Anything
16 further? Doe, staff?

17 >> Mr. Shebelskie: Yes, Your Honor. As
18 someone involved in the last four years in
19 the pre-license board concentrated and that
20 was of course, four year history, Nevada
21 never suggested that they were required to
22 comply with the LSN production obligation

1 and certification obligations. And the
2 provisions they are discussing now on this
3 standing intervention positions
4 requirements, in LSN production, every party
5 to the proceeding whether statutory right or
6 those that have established standing will
7 have to comply with all the manner of
8 procedural requirements in this proceeding
9 deadlines for submitting contention, for
10 filing exhibits, all the Nevada is not get a
11 pass with meeting all the obligations
12 requirements that the commission has
13 established and that the licensing board
14 will establish to regulate the proceeding.
15 Simply those requirements is simply say
16 statutory party can be excluded because of
17 the procedural faults.

18 >> All right, Mr. Malsch.

19 >> Mr. Fitzpatrick: Since I'm the person
20 that dealt with him on many of those, it
21 sounds suspiciously to me like DOE wants two
22 bites of the apple at getting information.

1 There was a deadline in January, 17 outside
2 parties wishing to become participants in
3 this proceeding to file certification and
4 many did so. Some were challenged. And
5 what was a ten day requirement in which to
6 challenge them and DOE is now suggesting
7 that the fact that at the time of filing
8 petitions among the laundry list of check
9 marks is LSN compliance, that gives name
10 whole new opportunity if you check that
11 check mark to say, we disagree with LSN
12 compliance as if they had not had the
13 opportunity to fully test that before. So
14 it is a second bite of the apple and worse
15 than that, given the amount of the time that
16 the respective boards take to schedule a
17 hearing and then, the Commission to decide
18 appeals on those issues, a party could be
19 deprived of an opportunity to file
20 contentions in a long time, anybody, any one
21 who was supposed to file a certification
22 January 17 could be effectively, be

1 challenged second time, months after the ten
2 day deadline.

3 >> JUDGE BOLLWERK: Mr. Murphy?

4 >> That's -- I think this whole discussion
5 does not apply to Nevada or anything else
6 and you might recall back in the 80's s when
7 we were trying to construct this process,
8 there were lengthy discussions about how to
9 handle what we refer to as the unknown
10 intervener. The person who comes in on to
11 deadline the tent, from Atlanta that comes
12 in on the 30th day and files a petition to intervene and
13 how do you handle that entity or that individuals compliance or
14 non-compliance with the LSN requirement, the state of Nevada has
15 done what the LSN rule requires it to do and that is to certify
16 that it is complying with the rule. Whether that certification is
17 adequate, correct or whatever it is, it is currently in the
18 process of being challenged but that's not what we are talking
19 about here. What we are talking about is whether the unknown
20 intervener how does the unknown intervener indicate and use the
21 word that they have complied with the LSN requirement. Mr.
22 Malsch?

1 >> MR. MALSCH: My problem is simple. I just say it, certify LS N
2 January 17. That's true, it was unchallenged. Mr. Malsch just
3 has to say the still of Nevada certify LS N January 17. That's
4 true, can't be challenged. What was challenged is whether or not
5 that certification was complete but whether or not he certify it
6 the LS N is indisputable. So what the problem we are dealing with
7 him what do we do with people that none of us even know about?

8 >> CHAIRMAN MOORE: They will not be occupying these other tables
9 for or wanting to any way.

10 >> The state of the California has no problem. They are an
11 interested governmental party. I'm talking about the -- Mr.
12 Bollwerk, the empty tables.

13 >> Yes.

14 >> Doe?

15 >> MR. SHEBELSKIE: Your Honor, my County is correct that persons
16 or entities who did not certify 90 days will have procedural
17 problems because of that failure. But I don't believe that is
18 the only obstacle parties would face because the phrases we
19 understand is substantial and timely compliance in part more than
20 just procedural can be certified to be in substantial timely
21 compliance requires the completion of the good faith production of
22 the party's documentation material. This is particularly pressing

1 because of the ruling we got on DOE's motion to strike the
2 certification where the Papo Board ruled that Nevada as a matter
3 of law didn't presume other entities don't have to make a
4 production of their supporting or non-supporting information of
5 the pre-license period and can wait until they finalize the
6 contention and so, we in Nevada and any other intervener files a
7 petition, DOE will be expecting they made at that point at latest,
8 Papo Board ruling gets upheld, a substantial good faith
9 production, all their supporting and non-supporting the material.
10 This is not a second bite at the apple but rather the continued
11 fulfillment of the ongoing to make their documentary material as
12 their conditions become solidified.

13 >> Is it DOE's position in response to specifically to this
14 question, that there is some affirmative showing that should be
15 included in hearing petitions for potential parties that they
16 have complied? Is that DOE's position.

17 >> Yes, sir.

18 >> Judge Moore: Why I ask is because the language of 3 o 9 says
19 the licensing board shall also consider any failure of the
20 petitioner to participate as a potential party based on subpart
21 J. Now, that suggests as Mr. Malsch suggested that that is
22 something that DOE would bring up in opposing party status that

1 they don't have to make affirmative demonstration that they
2 complied with anything but that you need bring up their failure to
3 comply and then, they can respond. Where am I misreading the
4 regulation this?

5 >> I that state with 3 o 9A, I would not view that statement in 3
6 o 9 - A as addressing one way or the other the procedural
7 obligation of whether the intervener has to make an affirmative
8 demonstration, rather, substantive requirement that a board make
9 in this decision will consider that factor. I think to get to the
10 procedural question of what must be shown and who must make the
11 showing you look at subpart J. There the procedures require the
12 intervener to be able to demonstrate substantial and timely
13 compliance. And for example, if you have an intervener who had
14 made no certification on January 17, and their petition for
15 intervention was silent, as to why they made no certification
16 then, otherwise address the fact that procedures cetra, that would
17 be a deficiency they had not made a showing in substantial on its
18 face.

19 >> Judge Moore: What regulatory language are you going to in
20 subpart judge that requires such an affirmative showing?

21 >> MR. SHEBELSKIE: Well, I think it follows from 1012B1 and it
22 requires provide a person -- access not be granted party status if

1 it cannot demonstrate substantial and timely compliance with
2 requirement of 2.1 o o 3 at the time it request participation when
3 it files it petition.

4 >> Judge Bollwerk: Mr. Malsch?

5 >> Mr. MALSCH: Just to make clear our position, it is not our
6 position that we do not comply with subpart J. We are only
7 addressing the possible sanction or consequences should someone
8 find us in non-compliance. All we are suggesting is that a number
9 of remedies might be available under the circumstances but one
10 remedy not available is to disallow our status as a party.

11 >> Mr. Murphy?

12 >> I agree and I think I need to say that my County does not
13 agree with the rationale of the majority of the Papo Board with
14 respect to the DOE challenge or motion to strike DOE. State of
15 Nevada LS N and more on this that later un-circumstances but, be
16 that as it may, Mr. Malsch very accurately points out the
17 appropriate sanction and we take no position on whether or not the
18 state of Nevada has documents that they should have put up or
19 didn't. Our problem is simply the rationale. But be that as it
20 may, it is very clear to me in my mind at least, that disallowance
21 of party status is not an appropriate sanction. There are
22 other -- plenty of other sanctions available to the Board. I want

1 to make this clear at this point in time.

2 >> MR. SHEBELSKIE: And Your Honor, from DOE's perspective, we do
3 view that disallowance as party status verses suspension.
4 Participation is appropriate remedy and to be contemplated on
5 subpart J 1012B2 that we read that as allowing proceedings of the
6 Board to suspend participation until there has been such a showing
7 of substantive compliance and at that point, the person can come
8 back in as a party to take the proceedings as they find at the
9 time.

10 >> JUDGE BOLLWERK: All right, let me see if there are any other
11 comments about questions certification or showing that need to be
12 made?

13 >> In Rockville, Mr. Neuman.

14 >> MR. NEUMAN: I think 1012B, the language to the DOE would
15 actually suggest that LSN compliant is affirmative because
16 language says it is phrased in terms of whether or not the
17 party -- potential party can or cannot demonstrate substantial
18 compliance which suggest to me the language does not say in the
19 party fails to tender evidence at the time of its application, it
20 sees if it cannot demonstrate which suggests to me the burden is
21 on DOE to argue that demonstration have and may. I don't think
22 that language supports the notion that the burden is on the

1 potential party to make a demonstration at the time of the
2 application. To the contrary, I think it supports the opposite.

3 >> JUDGE Bollwerk: Staff?

4 >> Mr. LENEHAN: Yes, Your Honor, it does require certification
5 does not require but just certify that they have complied.

6 >> Judge Bollwerk: So certification in your estimation?

7 >> Yes, Your Honor.

8 >> Judge Bollwerk: Anything else from Rockville or Las Vegas?

9 >> I appreciate the effort you put in to thinking this through and
10 give us your views on it.

11 >> Let's turn to the last question. That we send up to the
12 Commission if they don't deal with this in a timely fashion so
13 that we can have some semblance of order in all of this?

14 >> That may be wishful thinking but there is every possibility
15 that the Commission will not act in a way in which it will do you
16 a lot of good. For your long term planning --

17 CHAIRMAN MOORE: This does not give this
18 Advisory PAPO Board the authority to order
19 uniform format for contentions, answers and
20 replies. Are you all willing to be prepared
21 to act voluntarily with what we hope will
22 be -- all of you will conclude will be

1 reasonable recommendations that we send up
2 to the Commission if they don't deal with
3 this in a timely fashion so that we can have
4 some semblance of order in all of this?

5 That may be wishful thinking, but there's
6 every possibility that the Commission will not act in
7 a way in which it will do you a lot of good for your
8 long-term planning. That's just a fact of life.

9 And so it seems that there's a great number
10 of things that there's consensus on today. We will be
11 taking that consensus in large measure and translating
12 it into recommendations to the Commission. Obviously
13 there will be some things in which there was not
14 complete uniform agreement. But I don't think it will
15 be anything that you would be violently opposed to.
16 We have not heard such opposition today on the kinds
17 of things that we'll be recommending.

18 And is there general agreement that -- and
19 you will in all probability be given an opportunity, I
20 would guess, to comment on our recommendations,
21 whether we give you that opportunity or whether it
22 would come later from the Commission, I don't know.

1 But assume that none of you have violent
2 objections, is there likelihood that you would
3 voluntarily comply? For example, you'll get together
4 and provide us hopefully a definition of single issue
5 contentions. Now, we recognize there's an aspect
6 of -- we all know when we see it, but it will be
7 difficult to define, that a definition that would be
8 applicable 100 percent of the time.

9 And I don't think any of us would expect
10 that kind of result, but if there's general agreement
11 as to what single issue contention is and everyone
12 seeks to comply with that goal, it will go a long way
13 toward making this a much more efficient and
14 productive process for meeting the scheduled
15 deadlines.

16 >> MR. LIST: Mr. Chairman, we did discuss
17 this at some length. There was, I think, some
18 reluctance to agree to standards not presently known.
19 I guess the key is the word, the definition of the
20 word "reasonable." I think you've given a little more
21 context to it in your prefaced remarks here.

22 I would note that all of us felt, uniformly,

1 that we wanted to see the Commission act swiftly and
2 promptly insofar as possible to give authority to the
3 Board to adopt a uniform format for the contentions
4 and answers and replies and also to act quickly
5 regarding the board's recommendation.

6 I must say that in light of what you
7 anticipate may be a delay in that, I would hope that
8 speaking for ourselves at least that we can reach a
9 concurrence on acceptability of reasonable standards.

10 >> CHAIRMAN MOORE: Let's address how long
11 you think you'll need to come up with a consensus
12 definition of a single issue contention.

13 I don't know if definition is the right
14 word. I really do think that this is going to be a
15 Potter Stewart exercise of the definition of
16 pornography. I know it when I see it. Other than
17 that, I'm at a loss to know how to define it.

18 >> MR. MALSCH: Judge Moore, I just want to
19 get back briefly to the prior discussion, and that is
20 that in our conversation we expressed real reluctance
21 to agreeing to procedural requirements prior to
22 Commission action. And there are really two reasons

1 for that.

2 One was that we would love to be able to do
3 that. But the Commission is in no way bound to accept
4 your recommendations or even accept the parties'
5 agreements. And we were really reluctant to commit to
6 go forward and expend the resources and drafting
7 contentions following one format the Commission is
8 going to end up with a different format.

9 Then, secondly, frankly, we're concerned
10 that if the Commission gets your recommendations and
11 there are circumstances in which you indicate the
12 parties are going for it anyway, the heat will be off
13 the Commission.

14 I really think the Commission ought to be on
15 the critical path on this one. If they're as
16 interested as they say they are in an expeditious
17 proceeding, then, by gosh, they ought to be willing to
18 act expeditiously on your recommendations.

19 I think that's the way it ought to stand. I
20 think the Commission should be aware until they act
21 not much is going to happen.

22 >> CHAIRMAN MOORE: Is that the consensus

1 view?

2 >> MR. SILVERMAN: DOE is anxious for the
3 Commission to act as quickly as possible as well.
4 However, I think we feel we're going to proceed to
5 plan our work effort and our case based upon our best
6 judgments as to what your recommendations will be. We
7 feel that's necessary for us to be able to meet our
8 obligations and the time deadlines that we all have.

9 >> CHAIRMAN MOORE: Let's get back to how
10 long do you think you need to get together and see if
11 you can't craft a work able construct for what we mean
12 by single issue contention. Something that you can
13 all live with and shoot for when you're drafting
14 contentions and responding to contentions.

15 We had started with a week and the staff had
16 suggested that wasn't long enough.

17 >> MR. LENEHAN: Your Honor, at this point
18 I'm not really sure -- I will still agree that a week
19 is not long enough if for no other reason but the
20 review process within the Commission.

21 I think this probably could be addressed
22 much better in a letter to the Board probably tomorrow

1 after a couple of the attorneys specifically,
2 particularly DOE, the staff, Nevada and anybody else
3 that wishes to participate were all here, can talk for
4 a little while and then respond to the Board at that
5 time.

6 I think that might be a more productive way
7 to handle this, if that would be useful for you.

8 >> JUDGE RYERSON: One further issue that
9 this filing might address is the question that several
10 parties have raised about the interrelatedness of
11 contentions.

12 And I'm still not sure, Mr. Malsch, I fully
13 understood your answer on that point this morning.
14 But to re-ask the question, to give a hypothetical,
15 suppose you file a contention on the -- eight
16 contentions on the EIS and you say it's deficient in
17 eight -- in not considering eight separate matters and
18 in your contention you say each of those matters is
19 material, whatever that means within the regulations,
20 and your position is that that's good enough to be
21 admitted and say you're right on that, eight
22 contentions are admitted on NEPA issues.

1 But then those contentions go to hearing and
2 four of them are knocked out completely for whatever
3 reason. So the Board that handles it says, no, that
4 didn't have to be considered. Four are found to have
5 been, they should have been considered, but in each of
6 those four instances the Board says, well, should have
7 been considered but not material.

8 Don't you need -- don't you want another
9 contention that says something like individually or in
10 some combination these deficiencies that you're
11 alleging are material? You didn't seem to think that
12 was a problem this morning. And I'm not quite sure
13 why.

14 >> MR. MALSCH: I think that there are two
15 aspects of materiality. I think at the contention
16 stage, if you allege with sufficient support that some
17 regulation has not been satisfied, it follows the
18 contention is admitted because the finding cannot be
19 made that the application complies with the NRC's
20 requirements. And the finding cannot be made as a
21 prerequisite issue in the construction authorization
22 that the requirements have been met. So that's enough

1 for admission of a contention.

2 I think if those contentions are proven, it
3 also follows that the applications simply cannot be
4 granted. I don't think there's any additional
5 requirement that we have to make over and above that.

6 Now, I grant you NEPA might be a little
7 different in the sense that there's not such an
8 elaborate collection of specific requirements that
9 apply to a NEPA statement.

10 But even there, for example, if we were to
11 say that the NEPA statement is inadequate because it
12 fails to consider reasonable alternative A, and it's
13 turned out that in fact, yes, it did not consider
14 alternative A and we prevail in proving that it was
15 reasonable, I think at that point the NEPA statement
16 is simply inadequate and there's no further showing
17 that we have to make.

18 >> JUDGE RYERSON: Well, that would be your
19 position, I understand that. But isn't it possible
20 that a Board would find, well, it should have been
21 considered but each one of them individually is not
22 material but collectively they might be? Isn't that a

1 realistic possibility you would want to protect
2 against in terms of framing the single issue
3 contentions in some fashion?

4 >> MR. MALSCH: Yeah, I think as a matter of
5 contention drafting, I think from our standpoint that
6 would be a really nice thing to do. My difficulty is
7 I just am having concerns figuring out that we would
8 actually be able to do it. Especially in the context
9 of the total system performance assessment.

10 Let me just also point out that if we were
11 to prevail in showing that, let's say one particular
12 piece of DOE's performance assessment didn't comply
13 with one particular regulation, as I said, I think
14 that prevents the license application from being
15 granted.

16 If one were to impose some additional
17 requirement in establishing the significance of that
18 violation, that's really in effect sua sponte giving
19 DOE an exemption from that regulation. I mean, there
20 is a provision in the Commission's rules that say that
21 you can be exempted from the regulation if certain
22 findings can be made but we shouldn't presume that

1 such exemptions will be applied for or will be
2 granted.

3 But if there is a problem, if the argument
4 is going to be that, okay, Nevada, you proved a
5 violation but it's such a small violation really
6 shouldn't make any difference, I really think at that
7 point the burden is on DOE, either to show compliance
8 or to file for an exemption from that regulation and
9 then we can carry forward things from there.

10 >> JUDGE RYERSON: Okay. Are you saying
11 that materiality is not really -- that every omission
12 or violation is material? That materiality is not a
13 concern as to --

14 >> MR. MALSCH: I'm saying that every
15 supported violation of an NRC retro requirement is per
16 se material that prevents the granting of the license
17 application, absent some further steps along the lines
18 of what I just suggested.

19 >> JUDGE RYERSON: Other potential parties
20 likely to file contentions that disagree with that
21 view? Anyone want to speak to that?

22 >> MR. MURPHY: Nye County disagrees with

1 that view. We can envision technical contentions
2 which we could demonstrate that the Department of
3 Energy's approach in a certain scientific area is
4 incorrect, but that it doesn't change the outcome with
5 respect to compliance with the -- with the DOE's
6 requirements in 10 CFR 63 or what we anticipate would
7 expect to come from EPA sometime in this century.

8 So, no, I think we have to -- we think
9 materiality means that it has to affect the outcome.
10 But the outcome has to be measured by the compliance
11 requirements, not just every single little Nuclear
12 Regulatory Commission regulation, if the repository
13 meets the safety standards imposed by 10 CFR 63 and by
14 the EPA standards, and we show that it meets the
15 safety standards by a factor or somebody shows that it
16 meets the safety standards factor by only eight rather
17 than ten. We don't think that's material. So we have
18 a different approach on materiality.

19 >> CHAIRMAN MOORE: In closing, are there
20 any matters that you wish to bring to our attention at
21 this point?

22 >> MR. SILVERMAN: Yes, Your Honor. Just a

1 recommendation for consideration by the Board and all
2 the parties. Given the fairly urgent time frames that
3 we all have, it's DOE's view that there are probably
4 some issues, substantive legal issues, some of which
5 have come up today, some of which have not -- that
6 would benefit from an early resolution by the
7 Commission such that when the Commission issues a
8 hearing order they may rule on those issues at that
9 time no later than that time and not wait for some of
10 these significant generic issues to be addressed via
11 the contention process. Some of them have to do with
12 some of the NEPA-type scope issues that we've talked
13 about today, perhaps the 51.109 issue.

14 In the pleadings there is some disagreement
15 over the extent to which and whether, for example, the
16 EIS and supplemental EIS for the rail corridor, rail
17 alignment, whether the adequacy of those documents are
18 within the scope of the proceeding, we would just like
19 to suggest that the possibility that this Board would
20 entertain some suggestions from the parties in the
21 very near term, perhaps by a week from Friday, as to
22 those issues that they think, without necessarily

1 expressing a view on them, but those issues that we
2 think would benefit from an early Commission
3 resolution.

4 And you could then decide which of those you
5 would want to recommend to the Commission that they
6 address in a Commission order. And there is some
7 precedent for that in the enrichment facility notices
8 of hearing.

9 >> MR. LIST: Your Honor, we would, if I
10 may, we would join in that suggestion.

11 The two areas of specificity that were
12 discussed yesterday have now been touched upon. One
13 was a standing, automatic standing of the AULGs. The
14 other is this rail line issue, both of which we think
15 need early rulings.

16 The rail line issue, again there's strong
17 difference of opinion on it and it's very, very
18 critical to the development of contentions with
19 respect to the AULG's planning and development of
20 their contentions. So those are two at least.

21 >> CHAIRMAN MOORE: How -- DOE, are you
22 suggesting that the issues would then be fully briefed

1 before the Commission and you would hope that they
2 would get these issues decided?

3 >> MR. SILVERMAN: Yes, Your Honor.

4 >> CHAIRMAN MOORE: Ab initio?

5 >> MR. SILVERMAN: Yes. I think there's a
6 limited number of them. But I think they, at least
7 the ones we generally have in mind, will, if you'll
8 pardon the expression, cover a multitude of sins,
9 cover a lot of ground on the contention issues.

10 >> CHAIRMAN MOORE: Putting standing aside,
11 which we covered somewhat today, and take, for
12 instance, DOE's position on the rail issue, aren't
13 those issues, though, classic issues that could be
14 dealt with probably most efficiently in contention
15 space? Contentions are filed on those issues and
16 objected to if there's purely legal issues, then
17 they're set aside for briefing and decided in early
18 resolution in essentially contention space?

19 Or you admit the contention as a legal issue
20 and decide it and then there's going to be automatic
21 appeal to the Commission as opposed to trying to do
22 it -- in a perfect world, I would agree with you, it

1 would be very nice if we could have all of this slated
2 and taken off the table.

3 But since we're all aware it's not a perfect
4 world, under the existing demands that are on the
5 potential participants' time at this particular time,
6 taking time out to brief these issues now, is that
7 something that the parties want to do at this time?

8 I raise it because I think we probably could
9 come to agreement on six, eight or ten issues that
10 need such resolution, and many of them, though, could
11 be dealt with and have been dealt with in the past in
12 contention space and then wouldn't distract parties
13 from the issues at hand and getting a grasp on this
14 information getting contentions filed.

15 >> MR. SILVERMAN: Yeah, I think we're
16 not -- certainly we're not angling to distract the
17 parties, and I would say that the issue group ought to
18 be as limited as appropriate, and perhaps ten would be
19 too high. But I think if not now -- I mean, I think
20 this is as good a time as any. It will only get more
21 difficult for everyone.

22 >> CHAIRMAN MOORE: Post contention

1 admission, you'll all be consumed with discovery.

2 >> MR. SILVERMAN: Yes.

3 >> CHAIRMAN MOORE: And there will be an
4 enormous number of administrative matters and case
5 conferences that have to be dealt with starting to
6 schedule, not only discovery but ultimate hearing; but
7 there is, under the staff's view that they're going to
8 meet Schedule D, at least that's what they're
9 propounding -- there's some 700 days before the --
10 which is almost two years before the SCR is issued.
11 If budgetary constraints come into play, it's going to
12 be a lot longer than that.

13 And it strikes me that there's more likely
14 to be time to address those issues fully without
15 distracting parties at this point who have limited
16 resources from mastering your license application and
17 trying to file contentions.

18 Because I would suggest it's easier to file
19 contentions raising these issues as a legal question
20 that needs to be addressed and then it can be
21 addressed with full appeal to the Commission. That
22 just strikes me as a more efficient way to deal with

1 these than hoping we can get these matters fully
2 briefed and decided out at Commission in the next
3 ensuing months.

4 >> MR. SILVERMAN: I think in one sense
5 that's true. In another sense, obviously to the
6 extent the Commission does rule, it will either
7 obviate a number of contentions or obviate a number of
8 answers that we would file in opposition to the
9 contentions.

10 >> JUDGE BOLLWERK: Is there any reason to
11 look towards this approach if --

12 >> CHAIRMAN MOORE: Mr. List.

13 >> MR. LIST: Mr. Chairman, I would suggest
14 that if we went the route that you're suggesting, that
15 it would put many of the AULGs affected by the rail
16 line in a very untenable position of spending tens or
17 hundreds of thousands of dollars to develop
18 contentions, for example, relating to the rail EIS and
19 putting our eggs in that basket, if you will, using
20 our resources and our focus in that direction, filing
21 our contentions on that and then finding out in the
22 end that it's determined not to be within the scope of

1 the Commission's jurisdiction, we're kind of left out
2 in the cold.

3 So it would seem to us very critical, since
4 that is in several instances the closest-to-home
5 matter that would get our first and obvious attention
6 and focus, that's where we'd want to put our attention
7 to some extent on this rail line, put us in a
8 difficult position.

9 On the other hand, if we knew up front that
10 we were not, that we could not put our efforts into
11 that area and that our contentions on that matter
12 would not be accepted, we need the time to work on the
13 other matters.

14 >> MR. NEUMAN: Mr. Chairman, Barry Neuman
15 on behalf of Lincoln County.

16 >> CHAIRMAN MOORE: Yes, Mr. Neuman.

17 >> MR. NEUMAN: As a preliminary matter,
18 Lincoln County, perhaps more than any AULG, is
19 directly and substantially affected by this issue as
20 the DOE's designated preferred rail corridor and rail
21 alignment would be built and run through a portion of
22 the county. So we're particularly interested in this

1 issue.

2 I would agree with Mr. List that there would
3 be utility having this issue briefed and decided at
4 the outset if it were clear that the issue were
5 briefed and decided sufficiently expeditiously to
6 obviate the need on the part of the AULGs to prepare
7 contention, draft contentions and get their experts in
8 order.

9 I guess I have some question that, as a
10 practical matter, that issue will be briefed and
11 decided in a manner that obviates the need for AULGs
12 to proceed down this road and prepare contentions in
13 any event.

14 At the same time, I think that there may be
15 some benefit -- I'm actually of two minds on this
16 issue, not that that particularly helps the
17 Commission. But there may be some benefit to
18 deferring resolution of this issue until contentions
19 are filed. And I say that for this reason:

20 We have a site repository EIS that devotes
21 6- or 700 pages to examining transportation-related
22 environmental impacts. And I understand the DOE's

1 position to be that those issues, as part of the site
2 repository EIS, even though they deal with
3 transportation, are properly part of this proceeding.

4 Then we have, on the other hand, a more
5 site-specific, if you will, EIS that's addressed to
6 rail alignment and the rail corridor where the actual
7 specific impacts of the DOE's preferred choices are
8 examining in some detail.

9 And so if it is the DOE's position that, as
10 I understand it to be, that the rail alignment EIS and
11 the rail corridor EIS somehow are not proper probably
12 before the Commission, but the SEIS, EIS on the site
13 is -- it could raise questions as to where the line is
14 to be drawn assuming that the Commission agrees with
15 the DOE position, would raise questions as to where
16 the line is to be drawn on permissible scope of
17 transportation-related commissions. Something which
18 may better be dealt with when the Commission has in
19 front of it the specific transportation-related
20 contentions that are being proffered by the parties.

21 Just as a final observation, this issue is
22 additionally complicated by the DOE's own choice

1 having decided to prepare separate rail alignment EIS
2 and supplemental rail corridor EIS which it says were
3 not properly part of this proceeding, it is then
4 decided to incorporate by reference those EISs back
5 into the site repository EIS.

6 So it's not clear to me that, number one,
7 this issue can and will be decided by the Commission
8 sufficiently quickly to really have the desired effect
9 of alleviating the AULG's burden of preparing the
10 contentions, and it's not clear to me, number two,
11 that these issues are best decided in the abstract as
12 opposed to having contentions before the Commission
13 within which to consider the legal issue.

14 >> CHAIRMAN MOORE: In that regard,
15 Mr. List, what time frame are you suggesting the
16 affected units of local government would need an
17 answer?

18 >> MR. LIST: I would think, recognizing
19 that we learned this morning, that we will get an
20 additional, basically, 45 days from the time the
21 docketing takes place until it's published in the
22 Federal Register, which is some kind of a bonus for

1 us. We hadn't realized that we had.

2 >> CHAIRMAN MOORE: You may get an
3 additional 30 days.

4 >> MR. LIST: I understand. 30 to 45 days.
5 We could get.

6 Recognizing that, I would think that if we
7 could have an expedited schedule, brief this issue and
8 get a ruling within, say, maybe this is unrealistic,
9 within 45 to 60 days after the filing of the LA, that
10 we could -- that's something we could work with, a
11 schedule we could work with.

12 >> JUDGE BOLLWERK: It strikes me -- again,
13 I've heard concerns about resources back and forth,
14 which I think is very, very relevant. If you really
15 have some issues that you feel you need to go to the
16 Commission with and there's agreement among all the
17 parties that these issues do need to be decided, then
18 maybe the response should be given the current status
19 of this Board, go to the Commission and ask them to
20 decide.

21 They're there. You know where they live.
22 File a pleading with them. It's not like you can't --

1 I don't know if that's -- that way you're there before
2 them directly and you don't have to pass it through
3 us.

4 I'm not trying to be -- not trying to shift
5 the burden here. But especially under that time
6 frame, you're probably looking at actually dealing
7 with the Commission directly.

8 >> CHAIRMAN MOORE: Without in any way
9 casting aspersions on schedules and ability to meet
10 schedules, I just think the reality is that it's
11 highly unlikely because of the structure that that
12 kind of schedule could likely be met.

13 And if you get it, 90, 120, or 150 days,
14 that may put you in a worst position than not getting
15 it at all.

16 >> MR. LIST: That's probably correct.
17 We're going to have to make some assumptions, and we
18 may very well have to take the avenue that was
19 suggested by Mr. Neuman in order to address the
20 transportation issues, coming in through the SEIS,
21 repository SEIS to address these matters.

22 >> CHAIRMAN MOORE: I would also suggest

1 that I have no idea what pending, what the Commission
2 will be doing with pending matters before them, but
3 those could impact both on a schedule as to what
4 should be done. And that, I suspect, will be
5 clarified in the not too distant future. We think a
6 matter of several weeks.

7 And if it becomes clear, then taking things
8 to the Commission may make, be cast in a different
9 light.

10 Are there any other matters that anyone
11 wishes to bring before us? Mr. Malsch?

12 >> MR. MALSCH: Yeah, Judge Moore, I just
13 wanted to bring up a matter that was discussed this
14 morning. And that is the staff's indication that
15 there will be a 30- to 45-day gap between the
16 docketing of the application, the issuance of the
17 notice of hearing.

18 I was concerned that, since under case law
19 within the Commission the notice of hearing has a
20 substantial bearing on the admission of contentions,
21 the notice of hearing serves as basically a kind of
22 adjudicatory matter or decision, and I would hope that

1 during that period there are not off-the-record
2 communications between the staff and the Commission
3 about the contents of the notice of hearing.

4 I should think that the notice of hearing
5 is, A, basically a Commission decision to make,
6 because it is the Commission that controls the scope
7 of proceedings.

8 But so, therefore, I don't know exactly what
9 the basis would be for the staff's decision that there
10 would be this 30- to 45-day gap. I don't know exactly
11 what the staff would be doing between docketing and
12 issues of the notice of hearing. And perhaps we could
13 hear from the staff what activities they thought would
14 be underway during that period.

15 >> CHAIRMAN MOORE: Does staff wish to
16 respond to that?

17 >> MR. LENEHAN: Yes, Your Honor. The staff
18 is going to do, is going to take the steps it's
19 supposed to take making the docketing decision.

20 The Commission itself is used to notice of
21 hearing. There is a clear separation between staff
22 and Commission functions. The staff is well aware of

1 it. The staff will not be communicating with the
2 Commission in any inappropriate way.

3 The 30 to 45 days was, more than anything,
4 an estimate based on how long it has taken the
5 Commission to issue notices of hearing in other areas.
6 It is just our estimate of how long the Commission may
7 take.

8 And we made it very clear, I believe, that
9 that was strictly an estimate. I think we
10 specifically said we could not give a realistic
11 estimate at this point.

12 >> CHAIRMAN MOORE: In many instances, the
13 notice of hearing or notice of opportunity of hearing
14 is issued by the director of the division that's
15 involved for the Commission. And I have no
16 independent knowledge -- I did not know what
17 Mr. Malsch just recited. I had always been under the
18 impression that they were issued by staff in the name
19 of the Commission; that they were not in fact issued
20 by the Commission.

21 >> MR. LENEHAN: May I have a moment, Your
22 Honor?

1 Your Honor, the situation you're describing
2 is the case in most, for many proceedings. In this
3 particular one it's specifically provided that the
4 notice of hearing will be issued by the Secretary of
5 the Commission.

6 >> CHAIRMAN MOORE: This morning I mentioned
7 that it was the current contemplation in planning for
8 this proceeding that we would strive to avoid
9 simultaneous hearings. And that is, I believe,
10 accurate.

11 And I qualify that by saying there may be
12 some instances when there may be some activities that
13 we would try to minimize occurring in simultaneous
14 venues.

15 I don't want to leave you with the
16 impression that some things like oral arguments or
17 some case management conference with the Board and the
18 parties might not have to happen simultaneously. That
19 will be something that will be attempted to be
20 studiously avoided. But there may be instances when
21 it doesn't.

22 We will always have uppermost in mind the

1 fact that it's very difficult for parties, especially
2 parties with limited resources and limited counsel, or
3 counsel few in number, to be in more than one place at
4 one time.

5 So we are well aware of that. But I did not
6 want to leave -- if I left an impression this morning
7 that it could never happen, it's that we're aware of
8 the difficulties it presents and it will be our goal
9 to try to avoid and minimize those.

10 Finally --

11 >> JUDGE BOLLWERK: This goes back to the
12 same thing --

13 >> CHAIRMAN MOORE: -- Mr. Bollwerk has a
14 few housekeeping matters in terms of an admonition
15 that the train is going to be leaving the station
16 shortly and what that means.

17 >> JUDGE BOLLWERK: Right. And this is in
18 the realm of maybe not wanting to create false
19 expectations as well.

20 Given the nature of this conference, which
21 was really intended to collect information from as
22 many of the potential high-level waste proceeding

1 parties as wish to participate, the PAPO Board, the
2 Advisory PAPO Board really went out of its way to have
3 licensing Board panel contact -- licensing Board panel
4 staff contact and remind the parties about the various
5 administrative matters that were associated with
6 participation here today at the Las Vegas facility as
7 well as our facility in Rockville, including such
8 things as how tables, getting tables of assignments
9 and hearing room taken care of in the well area, as
10 well as conference room space and the availability of
11 reserved parking in front of the building.

12 We want to make it so there's no false
13 expectations. They shouldn't necessarily anticipate
14 that this is going to continue if the proceeding moves
15 forward. The licensing boards that are convened to
16 conduct the various prehearing conferences and
17 evidentiary sessions will certainly provide the
18 potential parties for each session with contact
19 information that will allow them to make arrangements
20 for seating in the well, for conference space and for
21 parking.

22 We created this facility to try to meet as

1 many of the needs of the parties we could in terms of
2 litigation support that we felt were reasonable and
3 part of what we do in our Rockville facility as well.

4 You should be aware, however, if you fail to
5 respond timely when we send out these notices, that
6 you shouldn't anticipate finding yourselves with
7 access to these items at the facility. Basically, the
8 message here is we really did try to remind people
9 several times about these things. Please don't expect
10 you would hear that from us in the future.

11 You probably will receive one notice and
12 that would be the one you would need to respond to.

13 You all are very busy people. We understand
14 that. But this is the sort of thing, maybe on a
15 regular basis, as we begin to use the facility more,
16 if there's someone on your administrative staff that
17 needs to deal with these matters, please give them the
18 e-mail we send you or notice we send you all and have
19 them respond to us, let us know what you need.

20 We don't want to have someone show up here,
21 not have a parking space if they really need one. On
22 the other hand, if we don't hear anything from you in

1 the future, we're not going to be pulsing you to find
2 out where you're at. That's the bottom line, I think.
3 We do want you to use it.

4 >> CHAIRMAN MOORE: Finally, we do need to
5 know how much time you need to get back to, with
6 something in writing that hopefully a consensus view.
7 And, staff, you are being out front on this. So how
8 much time do you need?

9 >> MR. LENEHAN: Two weeks, Your Honor.

10 >> CHAIRMAN MOORE: Two weeks?

11 >> MR. LENEHAN: Two weeks.

12 >> JUDGE BOLLWERK: If that's what it is,
13 that's what it is.

14 >> CHAIRMAN MOORE: Then we would greatly
15 appreciate it if you could all get together and see if
16 you can hammer out a consensus view that you can all
17 live with and set as the admirable goal for filing
18 contentions, if you could file it with us within two
19 weeks from today, we'd appreciate it.

20 >> JUDGE BOLLWERK: I have one caveat to
21 that. If we hear from the Commission that they want
22 something from us earlier, we may have to come back to

1 you. And I hope not.

2 >> CHAIRMAN MOORE: If we hear from the
3 Commission.

4 >> JUDGE BOLLWERK: Well --

5 >> CHAIRMAN MOORE: That said, I would like
6 to thank all of you for your participation. Your
7 comments on these matters which, as you can see, are
8 going to play a part in how efficiently we can deal
9 with the case in the initial stages.

10 And we will await your filing on
11 contentions, single issue contention, and we will
12 attempt to get recommendations pulled together from
13 all of your filings and what's gone on here today for
14 forwarding to the Commission in the very, very near
15 future.

16 Mr. List?

17 >> MR. LIST: Mr. Chairman, let me just take
18 the liberty, if I may, on behalf of all of us express
19 our appreciation to this Board for this procedure and
20 this process of inviting our participation and
21 allowing us to take part in this important process of
22 developing the format and the procedures that we're

1 all going to be living with.

2 It's unusual and unique, and we're very
3 grateful for this opportunity.

4 >> CHAIRMAN MOORE: Mr. List, I speak for
5 all of us when I say that it is an unusual proceeding.
6 Needless to say, unique in many respects, and I only
7 hope that the cooperation and comity you've all shown
8 one another will continue throughout. Because if it
9 does, it will make it much easier for all of us to
10 deal with this matter.

11 And looking downstream, there will be -- if
12 there are contentions on the order that have been
13 suggested, and we suspect that this proceeding will be
14 different from most in that a very, very high
15 percentage of the contentions will probably be
16 admissible, unlike in many proceedings, if that turns
17 out to be the case, then there are going to be
18 enormous amounts of work and there will be many, many
19 scheduling conferences where your cooperation will be
20 absolutely vital so that things can be scheduled
21 precisely for very long periods in advance and
22 requiring things that you file, pre-file direct

1 testimony, for example, instead of the typical 30 or
2 45 days before you go to hearing, something on the
3 order of probably 90 or 120 days or even longer in
4 advance, so that once a trial schedule from start to
5 finish is set, it can be met.

6 And your cooperation is vital in
7 accomplishing those kinds of things. So, again, we
8 thank all of you and look forward to getting your
9 filing in two weeks from today.

10 If there's nothing else, we'll stand
11 adjourned. Thank you.

12 (Proceedings adjourned at 5:02 p.m.)